

ENDING THE QUALIFIED IMMUNITY NIGHTMARE

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“*Wait, what?*”¹

INTRODUCTION

That’s the Fifth Circuit’s Judge Willett—a Trump appointee and stalwart conservative—responding to new scholarship revealing that our whole qualified immunity doctrine stems from a clerical error. Qualified immunity holds that officers are not liable for constitutional violations unless (1) there is an actual constitutional violation and (2) the law clearly establishes that the conduct was unconstitutional.² Upon learning about the doctrine’s dubious foundation, Judge Willett responded appropriately. The mind boggles. The cost of that one error is unfathomable if, as Professor Alexander Reinert argues in *Qualified Immunity’s Flawed Foundation*,³ the Reconstruction-era Congress that passed the Civil Rights Act of 1871 really wanted to make state actors pay for constitutional violations, “any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary”

¹ Rogers v. Jarrett, 63 F.4th 971, 979 (5th Cir. 2023).

² Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In a nutshell, qualified immunity excuses officers from liability—and even from standing trial—in cases where plaintiffs allege violations of 42 U.S.C. § 1983, a portion of the 1871 Civil Rights Act that would otherwise compensate victims for the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” *Id.*

³ Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CALIF. L. REV. 201 (2023).

notwithstanding.⁴ Countless billions of dollars, lost to plaintiffs in qualified immunity cases, lie at that mistake's feet. That's not the worst of it. Think about speech chilled in First Amendment cases where state officers got qualified immunity.⁵ Untold suffering in state jails and prisons that violate the Eighth Amendment.⁶ Life after life lost to police violence—violence perpetrated under color of state law and in violation of victims' Fourth Amendment rights.⁷

But more on that later. “*Wait, what?*” is an equally appropriate response to the fact patterns that qualified immunity cases present.

I. DAVID SOSA

Take *Sosa v. Martin County*, for example, where you can spot the constitutional issues with qualified immunity from miles away.⁸ I should be clear at the outset that I am not a neutral observer. David Sosa is a client; I help represent him through Northwestern's Appellate Advocacy Center. We contend that the facts below alleged by Mr. Sosa should make out a § 1983 claim.⁹ Thus far, though, they have not.

But as “[e]veryone agrees,”¹⁰ David Sosa is an innocent man. He lives in Florida and helps make jet engines at Pratt & Whitney, working in research and development.¹¹ He is certainly not a drug trafficker—he just happens to share a name with one. That other David Sosa (the “wanted Sosa”) was a drug trafficker. A 1992 warrant, issued in Harris County, Texas, informed police that the wanted Sosa had been convicted for selling crack cocaine.¹² It gave his “date of birth, height, weight, tattoo information (he had at least one), and other details.”¹³ That warrant remained open for decades. And for decades, it has troubled the innocent Sosa.

⁴ *Id.* at 207; An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983).

⁵ *See, e.g.*, *Novak v. City of Parma*, 33 F.4th 296 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 773 (2023).

⁶ *See, e.g.*, *McCoy v. Alamu*, 950 F.3d 226 (5th Cir. 2020), *cert. granted and vacated*, 141 S. Ct. 1364 (2021).

⁷ *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021).

⁸ 57 F.4th 1297 (11th Cir. 2023).

⁹ Section 1983 of the Civil Rights Act of 1871 gives people the right to sue state government employees for civil rights violations.

¹⁰ *Sosa*, 57 F.4th at 1309 (Rosenbaum, J., dissenting). Judge Rosenbaum's dissent was not alone on this point. *See id.* at 1304 (Newsom, J., concurring) (“[W]ithout having done anything truly wrong, he was arrested.”) (citing FRANZ KAFKA, *THE TRIAL* 3 (Breon Mitchell, trans., 1998)).

¹¹ *Id.* at 1310.

¹² *Id.* at 1311.

¹³ *Id.*

Those troubles started in November 2014, per the factual record the Eleventh Circuit considered.¹⁴ The innocent Sosa had just moved to Martin County, Florida. During a routine traffic stop there, a sheriff's deputy checked Sosa's name against a database of open warrants. He got a hit. Sosa was wanted for trafficking crack cocaine. The deputy arrested Sosa and took him to jail—despite his protests that the warrant did not describe him. Virtually all relevant identifying information was different. The wanted Sosa's height and weight were different from the innocent Sosa's. Their dates of birth differed. And while the wanted Sosa sported at least one tattoo, the innocent Sosa had none. But the deputies didn't listen. They fingerprinted him and locked him in a cell. Three hours later, they released him when they finally realized his fingerprints didn't match those of the wanted Sosa.

The warrant was 22 years old and originated thousands of miles away. The arrested man did not fit the description on the warrant; he told the police as much. Yet he suffered the indignity of arrest and sat in jail for three hours. That sure *sounds* like an unreasonable seizure under the Fourth Amendment.¹⁵

But then, perhaps, you might say this was constitutional after all. It was three hours. Police can't be expected to investigate every claim of innocence. Better to arrest Sosa now, fingerprint him, and release him than to risk losing a fugitive. Reasonable people can differ. But that's not the issue here, because this whole 2014 incident plays no part in Sosa's claims. He relies on another arrest entirely.

Four years later, all of that happened to Sosa again—the arrest on the Harris County warrant, the protests of innocence, the booking, the jail time—only worse. This time, he wasn't released for three days.

Wait, what?

Really. Judge Newsom, concurring in the judgment, could only describe it as something out of Kafka.¹⁶ But it happened—in real life. Sosa told the deputies that he did not match the characteristics on the warrant; he even told them that he'd been arrested and booked on the same warrant four years earlier. Despite his “continued insistence to deputies and jailers that he was not the wanted man,” Sosa remained in a cell.¹⁷ When his jailers got around to checking his fingerprints, they realized again they had the wrong

¹⁴ *Sosa v. Martin Cnty.*, 13 F.4th 1254, 1260–62 (11th Cir. 2021).

¹⁵ True, “[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.” *Hill v. California*, 401 U.S. 797, 802 (1971). But the mistake here was not likely reasonable—not where Sosa was so clear about the misidentification.

¹⁶ *Sosa*, 57 F.4th at 1304 (Newsom, J., concurring).

¹⁷ *Id.* at 1299.

man and promptly released the innocent Sosa.¹⁸ The repetition here brings the constitutional problems into sharp relief. All the same problems with the warrant recurred. It was old and remote. It described a very different David Sosa in all respects. But the second time around, there were two big differences. First, the Martin County sheriff's office had the benefit of experience. And second, they used that experience to exactly no gain. To the contrary: they detained the innocent Sosa twenty-four times longer than the first time around. In the Fourth Amendment context, where reasonableness is the watchword, it is utterly *unreasonable* to have learned nothing from the original mistake.

We spoke with Mr. Sosa recently, while working up a petition for certiorari. He told us more about his decades-long saga with that decades-old warrant. Mr. Sosa estimated that he had been arrested ten or twelve times on that same warrant in the last thirty years. He shared that he'd tried to take legal action once or twice before, but it had gone nowhere. Last—and most concerning—he revealed another shocking fact about his three-day stay in the Martin County jail. One sheriff's deputy listened to Mr. Sosa's protests of innocence. He allowed Mr. Sosa to use the phone to call his wife. When Mr. Sosa got off the phone, the deputy commiserated with him. As Mr. Sosa's recalled it to us, the deputy said: "Your rights have been violated, man."

II. A FRACTURED ELEVENTH CIRCUIT

The Eleventh Circuit, sitting en banc, didn't agree that Sosa's rights had been violated. They weren't alone. A district court had granted summary judgment to the county and its officials, saying there was no constitutional violation,¹⁹ citing *Baker v. McCollan*.²⁰ That case featured a similar three-day wrongful detention, with a valid warrant but the wrong detainee. There, the Court supposed that "depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused" of due process.²¹ But not in *Baker*; that three-day detention "over a New Year's weekend does not and could not amount to such a deprivation."²²

¹⁸ *Id.*

¹⁹ *Sosa v. Snyder*, No. 19-cv-14455, 2020 WL 6385696 (S.D. Fla. June 25, 2020).

²⁰ 443 U.S. 137 (1979).

²¹ *Id.* at 145.

²² *Id.*

In 2021, an Eleventh Circuit panel reversed the district court, denying summary judgment to the county.²³ The three-judge panel reasoned that qualified immunity did not attach.²⁴ As mentioned above, qualified immunity holds that officers are not liable for constitutional violations unless (1) there is an actual constitutional violation, and (2) the law clearly establishes that the conduct was unconstitutional so that the officer would have notice of the illegality of the violation.²⁵ Here, because the facts were distinguishable from *Baker* and the deputies violated clearly established circuit precedent, Mr. Sosa could proceed to trial.²⁶ Times had changed since *Baker*, the panel held. Confirming identity is faster; it is no longer reasonable to wait three days.

In 1979, when the Supreme Court decided *Baker*, “a fingerprint comparison would have required prints to be copied, physically mailed or otherwise messengered, and compared by a human being.”²⁷ Not in 2018. By then, deputies regularly “compared [detainees’ fingerprints] with a single set of prints almost instantaneously, with the push of a button or two.”²⁸

The stage is set for the en banc opinions, in which the full Eleventh Circuit decided whether the county was entitled to summary judgment. They were numerous and voluminous. To quickly sum up all four:

Chief Judge Pryor’s majority opinion claimed that “*Baker* squarely controls this case,” granting summary judgment.²⁹ Along the way, it adopted a novel interpretation of *Baker* to say Sosa’s repeated arrests are irrelevant. So long as there’s a valid warrant, and the detention lasts no more than three days, the jailers are home free.³⁰

Three Democratic-appointed circuit judges—Judge Jordan, Judge Wilson, and Judge Jill Pryor—concurred in the judgment but did not sign on to the Chief Judge’s analysis. Constrained by precedent, they decided that the officers were not liable under “the legal fiction created by qualified immunity.”³¹ The trio took no pleasure in this conclusion: “the qualified immunity doctrine we have today is regrettable. Hopefully one day soon the Supreme Court will see fit to correct it.”³²

²³ *Sosa v. Martin Cnty.*, 13 F.4th 1254, 1260 (11th Cir. 2021).

²⁴ *Id.* at 1276.

²⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

²⁶ *See Cannon v. Macon Cnty.*, 1 F.3d 1558, 1563 (11th Cir. 1993) (acting as on-point circuit precedent that the mishandling of Sosa was unconstitutional).

²⁷ *Sosa*, 13 F.4th at 1273.

²⁸ *Id.* at 1274.

²⁹ *Sosa v. Martin Cnty.*, 57 F.4th 1297, 1298 (11th Cir. 2023).

³⁰ *Id.* at 1301.

³¹ *Id.* at 1304 (Jordan, J., concurring).

³² *Id.*

Judge Newsom, writing separately, wanted to go further than the majority, claiming that the substantive due process right *Baker* and *Cannon* recognized does not exist.³³ There is only one real limit on mistaken detentions like Mr. Sosa's: the Sixth Amendment's speedy-trial right. At best, that right could bail Mr. Sosa out of jail after a year. Chief Judge Pryor and Judge Lagoa joined this concurrence.

Judge Rosenbaum, dissenting, largely reprised her panel opinion from 2021. Even within the qualified immunity framework, she insisted that "jail deputies violated Sosa's clearly established substantive-due-process right to be free from continued detention when they knew or should have known that he was entitled to release."³⁴ She went further, saying that first-principles Fourth Amendment reasoning established Mr. Sosa's right to freedom from such detention.

Qualified immunity casts a long shadow over the proceedings. Without the doctrine, the law in this area (and many others) could look very different.

And there are good arguments against qualified immunity; Judge Jordan made them in his concurrence. In a nod to his conservative colleagues, he cited conservative sources to make his point that "qualified immunity jurisprudence is far removed from the principles existing in the early 1870s, when Congress enacted what is now 42 U.S.C. § 1983."³⁵ No one would accuse Clarence Thomas, Will Baude, Ilan Wurman, or Akhil Amar of harboring a bleeding heart. Yet there they are in Jordan's concurrence, arguing steadfastly against qualified immunity.³⁶ There may be hope for a cross-ideological reckoning on qualified immunity. Count Judge Willett among the group who could lead the charge toward that new world.

Nevertheless, qualified immunity doctrine remains intact. Judge Jordan's concurrence in *Sosa* blamed its application of the doctrine on recent developments, citing two cases from 2021. "The Supreme Court's recent qualified immunity decisions require that the facts of prior cases be very, very close to the ones at hand to give officers reasonable notice of what is prohibited."³⁷ That wasn't the case when the Eleventh Circuit decided *Cannon*, the decision that Judge Rosenbaum found clearly established law

³³ *Id.* at 1307 (Newsom, J., concurring) ("I'd be game for ditching substantive due process altogether.").

³⁴ *Id.* at 1334 (Rosenbaum, J., dissenting).

³⁵ *Id.* at 1304 (Jordan, J., concurring).

³⁶ *Id.* (citing *Ziglar v. Abbasi*, 582 U.S. 120, 156–60 (2017) (Thomas, J., concurring in part and concurring in the judgment); William Baude, *Is Qualified Immunity Unlawful*, 106 CALIF. L. REV. 45, 55–61 (2018); Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 961–72 (2014); Akhil Reed Amar, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 40–42 (1997)).

³⁷ *Sosa*, 57 F.4th at 1303 (citing *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7–9 (2021); *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11–12 (2021)).

on this issue. Remaining “mindful of the admonition against reliance on broad legal generalities,” *Cannon* nonetheless resisted the urge to “add an unwarranted degree of rigidity to the law of qualified immunity.”³⁸ When *Cannon* was decided, there was no need for a “prior court” to have “expressly” found a violation “on ‘materially similar’ facts.”³⁹

Things are different today. In one recent case that Judge Jordan cited, the Court held just the opposite: the plaintiff “must identify a case that put [the defendant] on notice that his *specific* conduct was unlawful.”⁴⁰

The problem is obvious. Plaintiffs need a case on point to surmount the qualified immunity hurdle. But without cases reaching the merits—and most qualified immunity cases need never reach the merits⁴¹—the next plaintiff can’t “identify a case” that addresses the “specific conduct” at issue.⁴² In the old days, judges could craft rules at higher levels of generality to hold officials accountable for unlawful conduct.⁴³ In other words, the law could develop under the old approach to qualified immunity. Not anymore. Qualified immunity bars courts from fleshing out citizens’ rights.

III. THE QUALIFIED IMMUNITY DEBATE

Sosa fits neatly among a profusion of circuit court cases raising core qualified immunity questions. Just last year, Judge Calabresi exhaustively catalogued dissatisfaction with qualified immunity, prodigiously string citing twenty authorities, including *fifteen* from lower-court judges.⁴⁴ Add Judge Willett’s *Rogers* concurrence to the pile as the most recent example.

³⁸ *Cannon v. Macon Cnty.*, 1 F.3d 1558, 1564–65 (11th Cir. 1993).

³⁹ *Id.* at 1565.

⁴⁰ *Rivas-Villegas*, 142 S. Ct. at 8 (emphasis added).

⁴¹ Qualified immunity analysis has two steps. Courts must determine (1) whether there was a constitutional violation, and (2) whether the law was clearly established. See *Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (“[T]he judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.”). Under cover of *Pearson*, courts today can (and often do) determine (2) before (1). So by first deciding that the law was not clearly established, courts can dismiss claims on qualified immunity grounds without making any pronouncement about the legality of the underlying conduct. See Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 34 fig.1 (2015) (empirically showing that many courts decline to reach constitutional questions).

⁴² *Rivas-Villegas*, 142 S. Ct. at 8.

⁴³ See *Cannon*, 1 F.3d at 1564–65.

⁴⁴ See *McKinney v. City of Middletown*, 49 F.4th 730, 756–57 (2d Cir. 2022) (Calabresi, J., dissenting). For those curious enough to look at this footnote, the full string cite:

See, e.g., *Baxter v. Bracey*, — U.S. —, 140 S. Ct. 1862, 1862–64, 207 L.Ed.2d 1069 (2020) (Thomas, J., dissenting from the denial of certiorari); *Ziglar v. Abbasi*, — U.S. —, 137 S. Ct. 1843, 1869–72, 198 L.Ed.2d 290 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Wyatt v. Cole*, 504 U.S. 158, 170–74, 112 S. Ct. 1827, 118 L.Ed.2d 504 (1992)

Time and again, lower-court judges rant about the doctrine’s flaws. Then they run into a brick wall: binding Supreme Court precedent.

Judge Willett’s *Rogers* opinions—yes, he wrote two—show how comprehensively judges must set aside their own deeply held convictions in the qualified immunity world. In the panel’s unanimous opinion, Judge Don R. Willett upheld the lower court’s grant of qualified immunity.⁴⁵ The plaintiff, Rogers, had suffered a traumatic brain injury at a prison while working in a barn. Its ceiling collapsed on his head.⁴⁶ He demanded to go to the infirmary, but prison staff didn’t let him.⁴⁷ His condition quickly worsened, though he ultimately survived. This exact situation had not happened before, so Rogers could not show that “the violative nature of particular conduct [was] clearly established.”⁴⁸ Qualified immunity meant no liability.

Yet in the concurrence, Judge Don R. Willett (writing solo now) delved deep into § 1983’s history. Citing scholarship from Professor Alexander Reinert, he reached an audacious conclusion. “[T]he Supreme Court’s original justification for qualified immunity—that Congress wouldn’t have abrogated common law immunities absent explicit language—is faulty

(Kennedy, J., joined by Scalia, J., concurring); *Wearry v. Foster*, 33 F.4th 260, 278–79 (5th Cir. 2022) (Ho, J., dubitante); *Jefferson v. Lias*, 21 F.4th 74, 87, 93–94 (3d Cir. 2021) (McKee, J., joined by Restrepo & Fuentes, JJ., concurring); *Goffin v. Ashcraft*, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, C.J., concurring); *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part); *Cox v. Wilson*, 971 F.3d 1159, 1165 (10th Cir. 2020) (Lucero, J., joined by Phillips, J., dissenting from the denial of rehearing en banc); *McCoy v. Alamu*, 950 F.3d 226, 237 (5th Cir. 2020) (Costa, J., dissenting in part); *Reich v. City of Elizabethtown*, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Nelson Moore, J., dissenting); *Zadeh v. Robinson*, 928 F.3d 457, 478–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part); *Dew v. City of Seaside*, No. 19-6009, 2021 WL 1749898, at *7 (N.D. Cal. May 4, 2021) (Gilliam, J.); *Briscoe v. City of Seattle*, 483 F. Supp. 3d 999, 1008 (W.D. Wash. 2020) (Zilly, J.); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 403–09 (S.D. Miss. 2020) (Reeves, J.); *Lee v. Univ. of N.M.*, 449 F. Supp. 3d 1071, 1114–19 & nn.13–15 (D.N.M. 2020) (Browning, J.); *Fijalkowski v. Wheeler*, 361 F. Supp. 3d 577, 584–86 & nn.5–6 (E.D. Va. 2019) (Ellis, J.); *Thompson v. Clark*, No. 14-7349, 2018 WL 3128975, at *6–13 (E.D.N.Y. June 26, 2018) (Weinstein, J.); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55–61 (2018); Joanna C. *757 Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799–1814 (2018); *Examining Civil Rights Litigation Reform, Part I: Qualified Immunity: Hearing Before the Subcomm. on Const., Civ. Rts., and Civ. Liberties of the H. Comm. On the Judiciary*, 117th Cong. (2022) (statement of Hon. Jon O. Newman, Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit), <https://docs.house.gov/meetings/JU/JU10/20220331/114567/HHRG-117-JU10-Wstate-NewmanJ-20220331.pdf>. [<https://perma.cc/7RTG-HEPY>].

Id.

⁴⁵ *Id.* at 974.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 977.

because the 1871 Civil Rights Act *expressly included such language*.⁴⁹ He sticks with the bold framing, inveighing that “the doctrine does not merely complement the text—it brazenly contradicts it.”⁵⁰ But in the end, Willett consigns himself to his fate as a “middle-management circuit judge.”⁵¹ All he can do is ask the Court to “definitively grapple with § 1983’s enacted text and decide whether it means what it says.”⁵²

At least one petition for certiorari has put Reinert’s work before the Supreme Court—albeit in the context of *absolute* immunity.⁵³ But the scholarship questioning qualified immunity predates Reinert’s 2023 piece. Five years ago, Will Baude likewise argued that qualified immunity was atextual.⁵⁴ That got some traction—Justice Thomas cited Baude’s work in a (solo) dissent from denial of certiorari.⁵⁵ But to date, no one has drawn the full Court’s attention. Qualified immunity itself is immune from the barbs that the academy and lower courts send its way.

CONCLUSION

The academics and judges have this much in common with David Sosa: for decades, they’ve run up against the same problem. Qualified immunity confines lower-court judges almost as surely as the Martin County jail confined Mr. Sosa. Both grow weary of their skirmishes with the law—repeating almost exactly, blow for blow and time after time. Judge Newsom had it right with the Kafka reference, if nothing else. But Mr. Sosa is still fighting.

⁴⁹ *Id.* at 980 (Willett, J., concurring).

⁵⁰ *Id.* at 981.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Petition for Writ of Certiorari, *Anilao v. Spota*, 143 S. Ct. 1781 (2023) (mem.) (denying certiorari) (No. 22-539).

⁵⁴ William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47 (2018) (“This Article takes [the prevailing] legal rationales seriously to see if they hold up and concludes that for the most part, they do not.”).

⁵⁵ *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari).