BY JEFF SCOTT OLSON

Qualified Immunity:

A Dubious Doctrine and a 21st-Century Wisconsin Solution

Many legal scholars have criticized the doctrine of qualified immunity. Some make the point that it has no textual anchor in the language of 42 U.S.C. section 1983 – it is completely a judicial creation. Others have emphasized the grave injustices that flow from the doctrine's application. The author suggests there is a state-law solution to what he views as a qualified immunity problem, at least in Wisconsin.

In 2019, the U.S. Court of Appeals for the 11th Circuit dismissed a civil-rights-damages case against a police officer who, while hunting a fugitive, ended up at the wrong house and forced six children, two of them under the age of three, to lie on the ground at gunpoint. The officer then tried to shoot the family dog but missed and shot a 10-year-old child who was lying face down, 18 inches away from the officer. The court held that the case had to be dismissed under the doctrine of qualified immunity because there was no prior case in which an officer accidentally shot a child laying on the ground while the officer was aiming at a dog.[1]

That same year the Ninth Circuit Court of Appeals granted qualified immunity from suit for damages to officers sued for stealing hundreds of thousands of dollars in cash and rare coins while executing a search warrant. The court stated, "We recognize that the allegation of any theft by police officers – most certainly the theft of over $225,000 – is deeply disturbing. Whether that conduct violates the Fourth Amendment's prohibition on unreasonable searches and seizures, however, would not be clear to a reasonable officer."[2]

An Immunity Doctrine Run Amok

The doctrine of qualified immunity defeats many otherwise meritorious civil-rights-damages actions, in Wisconsin and across the country. In 2023, the Seventh Circuit Court of Appeals affirmed the dismissal of a Fourth Amendment action brought by "a staunch supporter of the Second Amendment who believes that by openly carrying firearms in public, she brings attention to one's right to bear arms."[3] The plaintiff had been arrested for disorderly conduct for carrying a rifle with a bayonet attached to it in a local park. The court explained that "while a reasonable officer should have known in April, 2020, that simply carrying a firearm or a knife in public does not constitute disorderly conduct, much more is required to show that the legality of [the plaintiff's] conduct was 'beyond debate.'"[4]

Examples like these and increased public interest in civil-rights-damages actions as a means to deter police misconduct have spurred legislative initiatives in many states to enable litigants to get around the defense of qualified immunity. Some of these enactments provide victims with immunity-free state-law paths to damages recoveries, but none of them work to extinguish the defense in cases brought under the U.S. Constitution. This article lays out in broad strokes the nature of the defense and then suggests a Wisconsin solution that would, if enacted, effectively consign it to the dustbin of history.

Scope of the Qualified Immunity Defense

Qualified immunity is the principle "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights."[5] As the Seventh Circuit has explained, "The standard is objective, based on what a reasonable official would or should have known and thought in the same circumstances, given the state of the law at that time."[6] "[W]here the law at the time of the act was not sufficiently developed to put the official on notice that his or her act would violate the plaintiff's statutory or constitutional rights, the official is immune from liability."[7]

SUMMARY

The doctrine of qualified immunity defeats many otherwise meritorious civil-rights-damages actions, in Wisconsin and across the country. The doctrine has been criticized extensively, by federal court judges, U.S. Supreme Court justices, and scholars from the political left and the political right.

Recently, increased public interest in civil-rights-damages actions as a means to deter police misconduct has spurred legislative initiatives in many states to enable litigants to circumvent the defense of qualified immunity. Some of these new enactments provide victims with immunity-free state-law paths to damages recoveries, but none of them really work to extinguish the defense in cases brought under the U.S. Constitution.

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Three principles are key to understanding and applying qualified immunity law.

First, qualified immunity is available only to individual governmental employees facing federal law claims. Qualified immunity is a defense to federal causes of action, based on the U.S. Constitution or federal statutes only. It does not protect state or local governmental employees from claims based upon state law.[8] Municipalities[9] and private parties[10] are not entitled to invoke qualified immunity, even in defending federal-law claims.

Second, qualified immunity is inapplicable to claims for equitable relief. Courts have uniformly held that qualified immunity shields governmental defendants only from liability for damages and does not bar an action for declaratory or prospective injunctive relief.[11]

Third, subjective good faith and malice are irrelevant to the qualified immunity defense. The seminal case of *Harlow v. Fitzgerald*[12] took the element of subjective good faith out of what had previously been called "good faith immunity." The courts have continued to hold that subjective good faith does not aid a defendant asserting qualified immunity[13] and that evidence of malice does not help to defeat a claim of qualified immunity.[14]

Reasonably Competent Public Officials Are Presumed to Know Case Law

One important legal fiction originated by *Harlow,*[15] which is necessary to the U.S. Supreme Court's scheme of keeping state-of-mind evidence out of qualified immunity determinations, is that "a reasonably competent public official should know the law governing his conduct."[16] As the 10th Circuit Court of Appeals put it in *Mellon v. City of Oklahoma City*,[17] "in sum, officials are presumed to know and abide by clearly established law. When their actions are otherwise, their claim of qualified immunity will fail."[18] The Seventh Circuit has said that "all public officials are presumed to know clearly established law, whether or not they have in fact ever cracked a law book."[19]

The Source of Prior Authority: Is Binding Precedent Required?

The Supreme Court recently said that "[t]o be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority."[20]

The Content of Prior Authority: How Analogous Must It Be? The great majority of qualified immunity decisional law is an effort to apply the following language from *Anderson v. Creighton*:

"The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful … but it is to say in light of pre-existing law the unlawfulness must be apparent."[21]

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The Supreme Court has emphasized that the question of whether a right was clearly established need not be determined through rigid analysis of materially identical case law. In *Hope v. Pelzer*,[22] the Supreme Court reminded litigants that while "earlier cases involving fundamentally similar facts can provide strong support for the conclusion that the law is clearly established," "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[23] In 2020, in *Taylor v. Riojas*,[24] the Court held that prison officials responsible for a state inmate's confinement in cells awash in human waste were not entitled to qualified immunity, despite the lack of controlling precedent regarding the precise form of cruel and unusual punishment that the inmate alleged had occurred.

Still, many courts have refused to hold public officials to legal rules in the absence of reported cases applying those rules to nearly identical fact situations. One of the most extreme examples of this sort of decision is *Rich v. City of Mayfield Heights*,[25] in which the plaintiff sued jailers who had found him hanging by the neck from his socks in his jail cell and, instead of taking immediate action to get him down, called the fire department rescue squad. Observing that "no case has been brought to this Court's attention which recognizes a constitutional duty on the part of jail officials to immediately cut down a prisoner found hanging in his or her cell,"[26] the Sixth Circuit reversed the decision of the district court and granted the defendant jailers qualified immunity from damages.

A second lamentable trend is that the growth of the law has been stunted. At one point, the Supreme Court required courts considering cases involving qualified immunity to decide first whether the defendant had violated a constitutional right, and then, only if the decision were that a violation had occurred, to decide whether the law had been clearly established at the time of the defendant's act.[27] In a 2009 decision, *Pearson v. Callahan*, the Court eliminated the requirement that courts decide whether a violation occurred.[28] Because courts no longer must say what the law required in order to dismiss the cases before them, the incremental growth of the law is stunted.

Qualified Immunity Doctrine has been Extensively Criticized

Many legal scholars have criticized the doctrine of qualified immunity. Some make the point that it has no textual anchor in the language of 42 U.S.C. section 1983 — it is completely a judicial creation.[29] Others have emphasized the grave injustices that flow from the doctrine's application, when people who are seriously injured by abhorrent conduct

go uncompensated because there is no prior case on point.[30] In 2020, Reuters published a major study showing that qualified immunity is granted in a much greater proportion of cases in states in the geographic middle of the U.S. than on either coast.[31]

This criticism has come from the political right as well as the political left. The Cato Institute has taken a firm position that qualified immunity ought to be abolished.[32] Judge Lynn Adelman, of the U.S. District Court for the Eastern District of Wisconsin, has written, "It is a little-known and disturbing fact that the Supreme Court is in the process of gutting what may be the most important civil rights statute Congress has ever passed,"[33] referring to the effect of the Court's qualified immunity decisions on the ability of plaintiffs to enforce their rights under 42 U.S.C. section 1983.

Judge James O. Browning has written that the Supreme Court is "crafting its recent qualified immunity jurisprudence to effectively eliminate [42 U.S.C. section] 1983 claims against state actors in their individual capacities by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong."[34] In 2018, Judge Jack B. Weinstein wrote a long critique of the doctrine, saying, "Qualified immunity has recently come under attack as overprotective of police and at odds with the original purpose of [42 U.S.C.] section 1983: 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'"[35] Even U.S. Supreme Court Justice Clarence Thomas has written that "our qualified immunity jurisprudence stands on shaky ground."[36]

A Solution for Wisconsin

Some states are making efforts to evade qualified immunity by creating new state-law causes of action under which the defense is unavailable.[37] These laws do not do anything about the ubiquity of qualified immunity as a defense in 42 U.S.C. section 1983 cases, so they will consign plaintiffs to state-law remedies in state courts, which may come with their own sets of disadvantages. There *is* a state-law solution to the qualified immunity problem, though, at least in Wisconsin.

The one purpose of qualified immunity that makes sense is "to protect government officials, including law enforcement officers, by giving them the ability to predict when their actions will create liability for them."[38] The reason for protecting state actors from personal financial exposure is to avoid deterring qualified individuals from entering public service.[39]

But in Wisconsin, the public employee indemnification statute, Wis. Stat. section 895.46, protects employees of state and local government from any personal exposure if they are sued for something they did in the scope of their

employment. Governmental employees are acting within the scope of their employment if they are motivated to any significant extent by a desire to serve their employer's interests,[40] even if they go about advancing those interests in an improper or even criminal way. The only cases in which governmental employers do not routinely defend civil rights actions against their employees from the outset and pay any settlements or judgments are sexual misconduct cases.[41]

Although it is structured as an indemnification statute, under which it might be supposed that individual public employees pay their own lawyers and pay the settlements or judgments in their cases out of their own pockets and then get indemnified by their governmental employers, in practice the governmental unit or its insurer provides a lawyer for the individual defendant from the outset and pays any settlement or judgment directly.

So, in Wisconsin, the doctrine of qualified immunity is not needed to protect public employees from personal liability for their official actions because the state indemnification statute accomplishes that end. There is no reason for persons who have been injured by violations of federal law to go uncompensated to protect the pocketbooks of public servants, because they are already protected by the indemnification statute.

The obvious solution is for the Wisconsin Legislature to amend the indemnification statute to provide that, if individual defendants accept the defense and indemnification benefits provided by their governmental employers under it, they must, in return, waive the defense of qualified immunity. The fact that qualified immunity is an affirmative defense that can be waived[42] would make such a scheme workable, and, in practice, almost all governmental employees would choose to accept the defense and indemnification benefits of Wis. Stat. section 895.46, even if it meant waiving the defense of qualified immunity. Such an amendment would all but eliminate the defense of qualified immunity in Wisconsin, and plaintiffs injured by serious violations of their rights by state actors would no longer see their cases dismissed because sufficiently similar violations had not been litigated in the past. **WL**

ENDNOTES

[1]*Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019).
[2]*Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019) (internal quotation marks and citations omitted).
[3]*Pierner-Lytge v. Hobbs*, 60 F.4th 1039, 1041-42 (7th Cir. 2023).
[4]*Id.* at 1046 (quoting *District of Columbia v. Wesby*, 583 U.S 48, 63 (2018)).
[5]*Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).
[6]*Pounds v. Griepenstroh,* 970 F.2d 338, 340 (7th Cir. 1992).
[7]*Id.*
[8]*Andreu v. Sapp,* 919 F.2d 637, 640 (11th Cir. 1990).
[9]*Owen v. City of Independence,* 445 U.S. 662 (1980).
[10]*Wyatt v. Cole,* 504 U.S. 158 (1992). In *Richardson v. McKnight,* 521 U.S. 399 (1997), the U.S. Supreme Court held that a correctional officer working for a private contractor engaged by Tennessee to manage its prisons was not entitled to claim qualified immunity. *See also Malinowski v. DeLuca*, 177 F.3d 623 (7th Cir. 1999) (holding that privately employed building inspectors were not entitled to claim qualified immunity under *Richardson*).
[11]*Supreme Video v. Schauz*, 15 F.3d 1345 (7th Cir. 1994); *Fry v. Melaragno*, 939 F.2d 832 (8th Cir. 1991); *American Fire, Theft & Collision Managers Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991); *Cagle v. Gilley*, 957 F.2d 1347 (6th Cir. 1992).
[12]*Harlow, 457* U.S. 800.
[13]*Courson v. McMillian,* 939 F.2d 1479, 1487 (11th Cir. 1991).
[14]*Carlier v. Lussier,* 955 F.2d 841, 846 (2d Cir. 1992); *Winn v. Lynn,* 941 F.2d 236, 239-240 (3d Cir. 1991).
[15]457 U.S. 800 (1982).
[16]*Id.* at 819.
[17]*Mellon v. City of Oklahoma City,* 879 F.2d 706 (10th Cir. 1989).
[18]*Id.* at 731.
[19]*Donald v. Cook Cnty. Sheriff's Dep't*, 95 F.3d 548, 560 (7th Cir. 1996) (quoting *Woods v. Indiana Univ.-Purdue Univ. at Indianapolis*, 996 F.2d 880, 887 (7th Cir. 1993)); *see also Gary v. Sheahan*, No. 96 CV 7294, 1997 WL 201590, at *10 (N.D. Ill. Apr. 18, 1997) (unpublished) ("[I]f the law was clearly established, the immunity defense should fail because a reasonably competent public official is presumed to know the law governing his conduct."); *Winn,* 941 F.2d at 241 ("officials should be aware of the law governing their actions.")
[20]*District of Columbia,* 583 U.S. at 63 (internal quotation marks and citations omitted).
[21]*Anderson v. Creighton,* 483 U.S. 635, 640 (1987).
[22]*Hope v. Peltzer,* 536 U.S. 730 (2002).
[23]*Id.* at 742.
[24]*Taylor v. Riojas,* 141 S. Ct. 52, 53 (2020).
[25]*Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir. 1992).
[26]*Id.* at 1097.
[27]*Saucier v. Katz*, 533 U.S. 194, 201 (2001).
[28]*Pearson v. Callahan,* 555 U.S. 223, 236 (2009).
[29]William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 101.
[30]Clark Neily, *An Unqualified Injustice*, Cato Inst. (Jan. 1, 2018), https://www.cato.org/commentary/unqualified-injustice (reprinted from The Washington Times).
[31]Andrew Chung, Lawrence Hurley, Andrea Januta, Jackie Botts, & Jaimi Dowdell, *Shot by Cops, Thwarted by Judges and Geography*, Reuters Investigates, https://www.reuters.com/investigates/special-report/usa-police-immunity-variations/ (last visited Oct. 12, 2023).
[32]Cato Inst., *End Qualified Immunity*, https://www.cato.org/qualified-immunity (last visited Oct. 12, 2023).
[33]Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, Am. Const. Soc'y (Jan. 12, 2018), https://www.acslaw.org/expertforum/the-supreme-courts-quiet-assault-on-civil-rights/.
[34]*Gutierrez v. Geofreddo*, No. CIV 20-0502 JB/CG, 2021 WL 1215816, at *11, n. 7 (D.N.M. Mar. 31, 2021) (unpublished).
[35]*Thompson v. Clark,* No. 14-CV-7349, 2018 WL 3128975, at *6 (E.D.N.Y. June 26, 2018) (unpublished) (quoting *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)).
[36]*Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., dissenting from denial of certiorari).
[37]*See, e.g.*, Daniele Selby, *New Mexico Is the Second State to Ban Qualified Immunity*, Innocence Project (April 7, 2021) https://innocenceproject.org/new-mexico-bans-qualified-immunity-police-accountability/.
[38]*Koser v. Cnty. of Price*, 834 F. Supp. 305, 310-11 (W.D. Wis. 1993) (quoting *Anderson*, 483 U.S. at 640).
[39]*Delgado v. Jones*, 282 F.3d 511, 516 (7th Cir. 2002).
[40]*Olson v. Connerly,* 151 Wis. 2d 663, 671, 445 N.W.2d 706 (Ct. App. 1989), *aff'd*, 156 Wis. 2d 488, 457 N.W.2d 479 (1990).
[41]*Martin v. Milwaukee Cnty.*, 904 F.3d 544, 555 (7th Cir. 2018).
[42]*Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (citing *Gomez v. Toledo*, 446 U.S. 635 (1980)). **WL**