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Qualified Immunity

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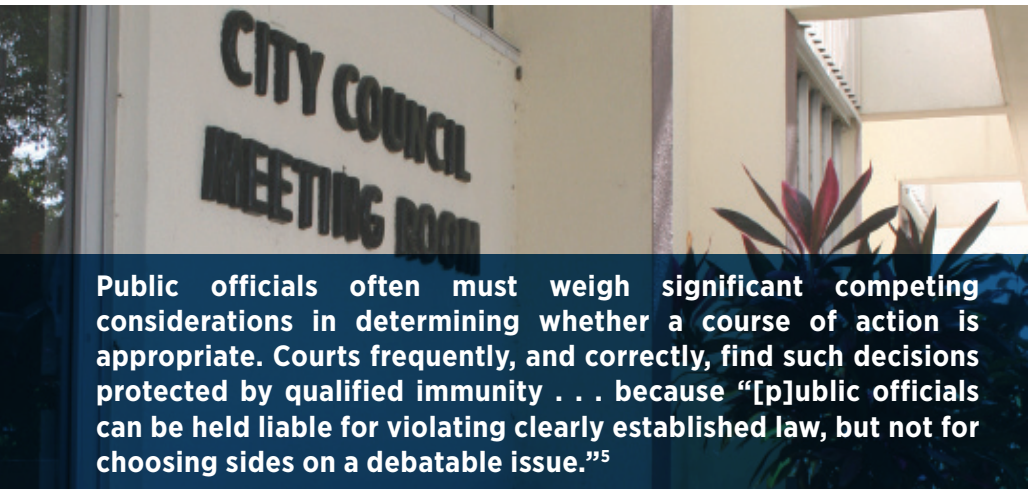
Particularly in the wake of recent instances of police misconduct, many thoughtful persons have called for the elimination or curtailment of qualified immunity,[1] a federal "doctrine ... [that] ... protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[2] While other reform measures may be appropriate, eliminating or limiting qualified immunity would be misguided.

First, qualified immunity is a potential defense for any state or local official sued for allegedly violating a federal right, not just law enforcement officers.[3] Eliminating qualified immunity will deprive all state and local officials, not just police officers, of this important defense. Stripping only law enforcement of qualified immunity, as recent legislation passed by the U.S. House of Representatives purports to do,[4] will not preserve such immunity for other officials. If police, who have perhaps the best case for citing qualified immunity because they often must make split-second decisions, are deprived of qualified immunity because of purported flaws in the doctrine, courts very likely will stop affording such immunity to other public officials. The consequences could be severe. Public officials often must weigh significant competing considerations in determining whether a course of action is appropriate. Courts frequently, and correctly, find such decisions protected by qualified immunity because "[p]ublic officials can be held liable for violating clearly established law, but not for choosing sides on a debatable issue."[5] Eliminating qualified immunity thus will deprive all state and local officials of an important defense.

Second, eliminating or limiting qualified immunity would be unjust. A basic premise of qualified immunity is that public officials should not be subjected to liability in the absence of fair notice that their actions could violate law. "If the law at that time did not clearly establish that the [public official's] conduct would violate the Constitution, the [public official] should not be subject to liability or, indeed, even the burdens of litigation."[6] This "principle of fair notice pervades the doctrine."[7] Discarding this common-sense rule will lead to unfair and harmful outcomes.



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A few examples: officers who had probable cause to suspect intoxicated driving were granted qualified immunity from claims that they had violated the Fourth Amendment by administering a breathalyzer or ordering a blood draw without first obtaining a warrant.[8] At the time, local appellate courts had approved such practices and neither the Supreme Court nor the Seventh Circuit had held such practices unlawful.[9] It would have been profoundly unfair to subject the officers to potential liability because the Supreme Court only later sided with other courts that held such tests might require a warrant.[10] A prison inmate sued a guard for refusing the inmate's request that the guard move because standing behind him exacerbated his PTSD — when the inmate had not yet been diagnosed with PTSD and the guard had received no direction from medical staff to accommodate him.[11] Plaintiff's claim "implie[d] that prison staff have a constitutional obligation to modify the way they do their jobs based solely on an inmate's assertion that their actions elicit extreme psychological responses," a rule of law that would present "a real danger of inmates manipulating correctional officers . . ."[12] Not surprisingly, "it was not clearly established that [the guard] was constitutionally required to avoid standing behind" plaintiff and qualified immunity correctly barred the claim.[13] Qualified immunity protects police officers from false arrest claims where there was "arguable" probable cause — i.e., "a reasonable officer could have mistakenly believed that probable cause existed" even though a court later found probable cause lacking.[14] It would be unjust to impose liability for false arrest under such circumstances.

Third, as the foregoing illustrates, ending qualified immunity will severely damage the operation of local government: the cost and disruption caused by lawsuits will greatly increase because far more cases will proceed to trial, fewer persons will serve in government and those who do are likely to be excessively cautious in the performance of their duties, to the detriment of the public they serve.

Fourth, and critically, qualified immunity does not shield misconduct. A recent column in *USA Today* asserted that qualified immunity is "nearly impossible to overcome" because the plaintiff must "identify an earlier decision . . . holding that precisely the same conduct under the same circumstances is illegal or unconstitutional."[15] This is incorrect. Courts do "not require a case directly on point for a right to be clearly established."[16] Instead, "existing precedent must have placed the statutory or constitutional question beyond debate."[17] Thus, qualified immunity may be denied "even where there are notable factual distinctions between the precedents relied on and the case before the court . . . if the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights . . ."[18] And "in some rare cases . . . where the constitutional violation is patently obvious, the plaintiffs may not need to cite closely analogous cases . . ."[19] Qualified immunity therefore affords no protection to "the plainly incompetent or those who knowingly violate the law"[20] and, far from being "nearly impossible to overcome," is often rejected by the courts.[21] The absence of a prior decision on point will not result in qualified immunity where existing

law nonetheless gave "reasonable warning," or it was "patently obvious," that conduct would violate a right.[22]

It is certainly true that there will be close, or at times even incorrectly decided, cases involving qualified immunity — in both directions. But this is true of any legal rule and does not justify eliminating or weakening the well-established doctrine of qualified immunity, which, judged as a whole, is fair and necessary. Nor does qualified immunity foreclose other avenues of relief to a complainant, such as civil claims under state law, criminal prosecution or disciplinary proceedings.[23]

Timothy P. O'Connor is a member of Meyer & O'Connor, LLC. The views expressed here are his own and not the views of Meyer & O'Connor, LLC or any client thereof. This article relies on the decisions of the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit, which are the federal appellate courts for Illinois.

[1] See, e.g., *Zadeh v. Robinson*, 928 F.3d 457, 478-81 (5th Cir. 2019) (Willett, J., concurring, dissenting); H.R. 1720, § 102 ("qualified immunity reform").
[2] *Reed v. Palmer*, 906 F.3d 540, 546 (7th Cir. 2018) (citation, quotation marks omitted).
[3] See, e.g., *Comsys, Inc. v. Pacetti*, 893 F.3d 468, 472-74 (7th Cir. 2018) (claims against mayor, other city officials barred by qualified immunity).
[4] HR 1720, if enacted, may well be interpreted to deprive at least some non-law enforcement officials of qualified immunity. The definition of "local law enforcement officer" (§2(6)) is arguably broad enough to encompass some non-law enforcement officials and the prohibition of qualified immunity is not limited to claims arising from a law enforcement context. HR 1720, § 102.
[5] *Neely-Bey Tarik El v. Conley*, 912 F.3d 989, 1000 (7th Cir. 2019)
[6] *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).
[7] *Campbell v. Kallas*, 936 F.3d 536, 545 (7th Cir. 2019) (citations, internal quotations omitted).
[8] *Gerhartz v. Reichert*, 779 F.3d 682, 687-89 (7th Cir. 2015); *Seiser v. City of Chicago Et Al.*, 762 F.3d 647, 656-59 (7th Cir. 2014).
[9] *Gerhartz v. Reichert*, 779 F.3d at 687; *Seiser*, 762 F.3d at 657.
[10] *Missouri v. McNeely*, 569 U.S. 141 (2013)
[11] *Leiser v. Kloth*, 933 F.3d 696, 703-05 (7th Cir. 2019).
[12] *Leiser*, 933 F.3d at 704.
[13] *Id.*
[14] *D.Z. v. Buell*, 796 F.3d 749, 755 (7th Cir. 2015)
[15] Jaicomo, Bidwell, "Qualified Immunity: Police Act Like Laws Don't Apply. They're Right," *USA Today*, May 30, 2020.
[16] *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)
[17] *Kisela*, 138 S. Ct. at 1152.
[18] *Estate of Escobedo v. Bender*, 600 F.3d 770, 781 (7th Cir. 2010)
[19] *Leiser*, 933 F.3d at 703-05.
[20] *Kisela*, 138 S. Ct. at 1152.
[21] See, e.g., *Harnishfeger v. United States*, 943 F.3d 1105, 1120-21 (7th Cir. 2019); *Rainsberger v. Benner*, 913 F.3d 640, 647-54 (7th Cir. 2019); *Lewis v. City of Chicago*, 914 F.3d 472, 477 (7th Cir. 2019); *Hardeman v. Curran*, 933 F.3d 816, 820-25 (7th Cir. 2019); *Estate of Clark v. Walker*, 865 F.3d 544, 551-53 (7th Cir. 2017); *Alicea v. Thomas*, 815 F.3d 283, 291-92 (7th Cir. 2016); *Milan v. Bolin*, 795 F.3d 726, 727-30 (7th Cir. 2015).
[22] See, e.g., *Abbott v. Sangamon County*, 705 F.3d 706, 732 (7th Cir. 2013) ("every time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case ... involving that particular weapon is decided") (citation, quotation marks omitted); *Becker v. Elfreich*, 821 F.3d 920, 929 (7th Cir. 2016) (no need for prior case "involv[ing] a police dog ... to clearly establish that you cannot allow a dog to violently attack ... a suspect" such as plaintiff); *Weinmann v. McClone*, 787 F.3d 444, 451 (7th Cir. 2015) (even absent analogous decisions, "we would still be unable to uphold a finding of qualified immunity . . .").
[23] For example, in *Jessop v. City of Fresno*, 936 F. 3d 937 (9th Cir. 2019), which the Supreme Court recently declined to review and where plaintiffs claimed officers had stolen over $200,000.00, plaintiffs "acknowledge[d] ... that they had access to an adequate ... remedy under California tort law." *Jessop v. City of Fresno*, 2017 U.S.Dist.LEXIS 120931 at *25 (E.D. Cal. July 31, 2017).

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