An Impenetrable Shield: How the Supreme Court’s Reformulation of the Qualified Immunity Doctrine Undermines Constitutional Rights

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INTRODUCTION

At the 2016 Grammy Awards, Compton rapper Kendrick Lamar made a powerful statement about racial inequality, social injustice, and the systemic failures of the criminal justice system. Dressed in prison blues and shackled from his hands and feet, Lamar led a chain gang on stage and performed “The Blacker the Berry” and a rendition of “Alright.” His politically charged performance highlighted issues of mass incarceration, police brutality, and the plight of African American males in the United States. Lamar, along with other artists, has been inspired and influenced by the growing Black Lives Matter movement—a coalition of grassroots organizations seeking to reform the criminal justice system. Of the many issues the Black Lives Matter movement has raised, perhaps none is as prevalent and rampant as the recent increase in police misconduct.

From Michael Brown to Freddie Gray, police departments nationwide have been highly scrutinized for their use of excessive force on nonviolent individuals. In light of the recent protests, however, police officers continue to escape liability for their misconduct. Under 42 U.S.C. §1983, civil right plaintiffs may file suit in federal court against state officials and local governments that violate certain constitutional or statutory rights while “acting under the color of law.” (42 U.S.C. §1983). Government officials generally raise qualified immunity as a defense, which protects them 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.” (Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Unfortunately, the Supreme Court has made it virtually impossible for plaintiffs to recover civil damages for police officers that
engage in egregious misconduct or use excessive force on nonviolent individuals. As a result, the constitutional contours surrounding qualified immunity has only served to shield government officials from liability at the expense of protecting fundamental constitutional rights.

In response to this topical issue, the goal of this Paper is to examine the constitutional landscape surrounding qualified immunity and describe the legal effects it has on society. Part I evaluates the doctrinal evolution of qualified immunity, including the Supreme Court’s decision in *Pearson v. Callahan*. Part II then surveys the consequences and effects of qualified immunity post-*Pearson*. Part III concludes that the existing standards for qualified immunity fails to strike the proper balance between protecting the Fourth Amendment rights of those subjected to excessive force and giving law enforcement officers the leeway to properly perform their jobs.

**PART I**

As an initial matter, it is important to understand the origins of the qualified immunity doctrine. As briefly mentioned, civil right plaintiffs who have suffered a constitutional violation at the hands of a state or local official acting under color of law may seek civil remedies under 42 U.S.C. § 1983. Historically, the Court has long recognized that “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’” (*Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1879))). Similarly, federal officials are liable under the Constitution pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. (*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).
The Supreme Court has articulated that government officers may raise the legal doctrine of qualified immunity as a defense—a common law defense that offers government defendants legal protection from personal liability. In *Harlow v. Fitzgerald*, the Court held 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 of which a reasonable person would have known.” (*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court created the qualified immunity doctrine under the recognition that “with increasing frequency . . . plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts.” (*Harlow*, 457 U.S. at 817).

Prior to *Harlow v. Fitzgerald*, to establish a qualified immunity defense, an officer had to show that they acted in good faith, and reasonably believed that their conduct was within the constitutional parameters of the Fourth and Eighth amendments. (*Harlow v. Fitzgerald*, 457 U.S. at 816-18; *see also* U.S. v. Leon, 468 U.S. 897, 923, n. 23 (1984) (“In Harlow, we eliminated the subjective component of the qualified immunity public officials enjoy in suits seeking damages for alleged deprivations of constitutional rights.”); Crawford-El v. Britton, 523 U.S. 574, 588 (1998) (“[A] defense of qualified immunity may not be rebutted by evidence that the defendant’s conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant’s subjective intent is simply irrelevant to that defense.”). The Court reasoned that eliminating the subjective standard would reduce the number of frivolous suits at the summary judgment stage. (*Harlow v. Fitzgerald*, 457 U.S. at 817-18).
Despite the Court’s original intentions, however, the doctrinal evolution of qualified immunity has served to undermine the constitutional rights of individuals. Under the theory of qualified immunity, only “the plainly incompetent or those who knowingly violate the law” will be found liable under § 1983. (Malley v. Briggs, 475 U.S. 335, 341 (1986)). But what exactly does “knowingly violate the law” really mean? Better yet, what constitutes “clearly established” law? Must there be a case directly on point? For many years, the Supreme Court, and appellate courts alike, grappled with these questions.

In 2002, in the case of Hope v. Pelzer, the Supreme Court shed light on some of these questions. In Hope, the Court held that a prison guard who “twice handcuffed [the plaintiff] to a hitching post to sanction him for disruptive conduct” could be held liable for violating the Eight Amendment. (Hope v. Pelzer, 536 U.S., 730, 733 (2002)). Here, the Court turned to the issue of “fair notice” and reasoned that a prison guard is not precluded just because “the very action in question has [not] previously been held unlawful.” (Id. at 739). The Court further articulated that a government “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” (Id. at 746).

This articulation, however, was short-lived. Following Hope, the Supreme Court quickly backtracked and ruled in Brosseau v. Haugen that it was not clearly established that a government official who shoots a fleeing man accused of nonviolent crimes has used excessive force. (Brosseau v. Haugen, 543 U.S. 194, 199-201 (2004) (per curiam)). This was a surprising decision considering that almost two decades ago the Supreme Court had previously held that it was unreasonable for an officer to seize and kill an unarmed suspect. (Id. at 197 (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985))).
In 2001, the Supreme Court sought to clarify the legal standard to establish qualified immunity. In *Saucier v. Katz*, the Court established that courts must undertake a two-step inquiry for analyzing qualified immunity claims. (*Saucier v. Katz*, 533 U.S. 194 (2001).) First, courts must determine that the facts alleged by the plaintiff established a violation of a constitutional right. (*Id.* at 201). If the plaintiff asserted a constitutional violation, the court would then examine whether the right was “clearly established” at the time of the alleged misconduct. (*Id.*)

The logic behind this mandatory sequencing was that it would ensure the development of what constitutes “clearly established” law. In other words, this procedure would force courts to identify unconstitutional violations, and in so doing, future civil rights plaintiffs would have the benefits of raising valid § 1983 claims.

A mere eight years later, however, the Supreme Court unanimously overruled two-step inquiry requirement and held that it was within the courts’ discretion to determine whether to follow the mandatory sequencing procedure set forth in *Saucier*. (*Pearson v. Callahan*, 555 U.S. 223 (2009). On January 21, 2009, in *Pearson v. Callahan*, the Supreme Court held that “while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be address first in light of the circumstances in the particular case at hand.” (*Id.* at 236).

To date, the most difficult inquiry, and often determinative, is what constitutes “clearly established” law. As it stands, constitutional amendments generally cannot form “clearly established” law without judicial interpretation. (*See e.g.*, Anderson v. Creighton, 483 U.S. 635, 639 (1987)). As a result, this inquiry is determined in light of the specific facts of the case.
(Saucier, 533 U.S. at 201). Certain courts have articulated that a right is “clearly established” if it meets three characteristics: (1) the law is defined with reasonable clarity; (2) the Supreme Court or the controlling circuit court has recognized the right; and (3) a reasonable defendant would have understood that his conduct was unlawful. (See Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003); Young v. Luna v. Pico, 356 F.3d 481, 490 (2d Cir. 2004)).

Determining whether a right constitutes “clearly established” law is further complicated when there is a circuit split on the issue. (For a discussion on how courts determine what is “clearly established” law, see Alexander A. Reinert, Does Qualified Immunity Matter?, 8 U. ST. THOMAS L.J. 477 (2011)). For instance, certain circuits like the Third and Ninth Circuits have held that a right can constitute a “clearly established” law even if there is a circuit split. (See e.g., Morgan v. Morgensen, 465 F.3d 1041, 1046 (9th Cir. 2006); Bieregu v. Reno, 59 F.3d 1445, 1458-59 (3d Cir. 1995) (determining that a law can be clearly established so long as “no gaping divide has emerged in the jurisprudence”)). On the contrary, the Sixth and Eighth Circuits have held that circuit splits may render the law unclear. (See e.g., Baranski v. Fifteen Unknown Agents, 452 F.3d 433, 449 (6th Cir. 2006) (en banc); Mo. Prot. & Advocacy Servs. V. Mo. Dep’t of Mental Health, 447 F.3d 1021, 1025-26 (8th Cir. 2006)).

Undeniably, the Supreme Court’s decision in Pearson has altered the constitutional contours that define qualified immunity. While courts are not obliged to conduct a two-step sequencing analysis, certain courts continue to follow this approach. For instance, a recent empirical study examined the effect of Pearson qualified immunity decisions, and found that while circuit courts have generally begun avoiding constitutional determinations, district courts have not done so. (Colin Rolfs, Qualified Immunity After Pearson v. Callahan, 59 UCLA L. REV.
This inconsistency hinders a plaintiff’s right to recover civil damages for constitutional violations.

As Ninth Circuit Judge Stephen R. Reinhardt has noted, “one particularly alarming consequence of the Court’s recent decisions is that they rely on qualified immunity as a mechanism to stunt the development of constitutional rights.” (Stephen R. Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1248 (2015)).

PART II

The doctrinal evolution of qualified immunity has led to a series of unintended (and perhaps intended) consequences. Among the most notable is the Supreme Court’s willingness to grant qualified immunity to private actors working with the government. (See e.g., Eagon Through Eagon v. City of Elk City, 72 F.3d 1480, 1490 (10th Cir. 1996) (holding that a private citizen employed as an event chairman was entitled to qualified immunity); Williams v. O’Leary, 55 F.3d 320, 323-24 (7th Cir. 1995) (holding that a private physician whose employer provided medical services to a prison was entitled to qualified immunity). In Frazier v. Bailey, for instance, the First Circuit explicitly stated “that individuals . . . under contract with the government, are entitled to qualified immunity defense because they are the functional equivalent of public officials.” (Frazier v. Bailey, 957 F.2d 920, 929 (1st Cir. 1992)).

Naturally, as with many qualified immunity-related cases, the Supreme Court has oscillated in its decision-making. For instance, in Richardson v. McKnight, the Court held that prison guards who were employed by a private prison management firm and assumed to be
acting under the color of state law were not entitled to qualified immunity. *(Richardson v. McKnight, 521 U.S. 399 (1997)).* Despite this, recent Supreme Court decisions have made it easier for courts to grant private individuals qualified immunity.

Most recently, in the seminal case of *Filarsky v. Delia*, the Supreme Court ruled, “a private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under § 1983.” *(Filarsky v. Delia, 132, S. Ct. 1657, 1658 (2012)).* In *Filarsky*, Delia, a firefighter for the City of Rialto, California, was suspected of faking an illness to receive disability benefits and time to make improvements to his home. After being seeing purchasing fiberglass insulation and other home improvement materials, the City of Rialto hired a private attorney, who specialized in employment and labor law, to investigate the situation. City investigators and the private attorney went to Delia’s home, and without a warrant requested to enter the home to search for evidence. Delia sued the City, the fire department, and the private attorney on the grounds that the investigation violated his Fourth Amendment rights.

The *Filarsky* Court held that the private attorney was entitled to the same immunity as a full-time employee of the government because the City relies on the occasional services of private individuals. In making its determination, the Court distinguished *Filarsky* from *Wyatt v. Cole*, where the Court held that a private person, who had acted in conjunction with a sheriff in invoking a state replevin statute to allegedly deprive the plaintiff of property without due process, was not entitled to qualified immunity defense available to the government official. *(Wyatt v. Cole, 504 U.S. 158 (1992)).* The Court reasoned “unlike the defendants in *Wyatt*, who were using the mechanisms of government to achieve their own ends, individuals working for the government in pursuit of government objectives are ‘principally concerned with enhancing the public good.’” *(Filarsky v. Delia, 132 S. Ct. at 1667 (quoting Wyatt v. Cole, 504 U.S. at*
In doing so, the Supreme Court essentially left the door open for private individuals to be eligible for qualified immunity so long as they serve a government interest.

Shortly after, in the case of *Currie v. Cundiff*, the United States District Court for the Southern District of Illinois reaffirmed the Supreme Court’s decision in *Filarsky*, holding that private health care workers employed by a private corporation under contract with the county to provide health care services to inmates at a county jail were entitled to qualified immunity.

(Currie v. Cundiff, 870 F.Supp.2d 581 (2012); *see also* Ford v. Wexford Health Sources, Inc., No. 12 C 4558, 2013 WL 474494, at *8 (N.D. Ill. Feb. 7, 2013) (“a privately employed medical official working at a prison may invoke qualified immunity is open question in the Seventh Circuit.”); Braswell v. Shoreline Fire Dep’t, 622 F.3d 1099 (2010)) (“Here, as in *Filarsky*, Dr. Somers is an individual hired by the government to assist in carrying out its work . . . . Accordingly, Dr. Somers is entitled to assert qualified immunity.”).

The Supreme Court’s recent decisions in *Filarsky* and *Currie* seem to squarely contradict past precedent. (*See, e.g.*, Toussie v. Powell, 323 F.3d 178, 1983 (2d Cir. 2003) (denying qualified immunity for a private doctor who was working in a prison; Jensen v. Lane Cnty., 222 F.3d 570, 576-80 (9th Cir. 2010) (holding no qualified immunity for privately organized group of psychiatrists under contract to provide psychiatry services to mental health detainees.). This is a striking shift in precedent that will further limit an individual’s right to recover for constitutional violations. (*See generally* Karen Blum, Erwin Chemerinsky, & Martin A. Schwartz, Qualified Immunity Developments: Not Much Hope Left for Plaintiffs, 29 TOURO L. REV. 633, 641 (2013) (explaining that “*Filarsky* may signal to a new trend: private actors working closely with the government may obtain qualified immunity based on the nature of their relationship with state officials, even if the private actor had independent profit incentive.”).
In theory, this means that private individuals working in the capacity of police enforcement may insulate themselves under the qualified immunity doctrine. A 2014 report from the American Civil Liberties Union revealed that a number of SWAT teams in Massachusetts are operated by what are known as law enforcement councils (LEC) and function as privately held corporations (and not government agencies). (Radley Balko, Massachusetts SWAT teams claim they’re private corporations, immune from open records laws, THE WASHINGTON POST). For example, an estimated 240 of the 351 police departments in Massachusetts belong to an LEC, and each LEC may operate a wide-range of specialized units, including Crisis Negotiation Teams, Mobile Operations Motorcycle Units, and Computer Crimes Units. (Id.) The decision to create hundreds of privately held 501(c)(3) organizations is particularly concerning in the context of qualified immunity, because it shields individuals from liability who may not be traditionally eligible for qualified immunity.

PART III

Striking a proper balance between protecting Fourth Amendment rights of those subjected to excessive force and giving law enforcement officers discretion to do their job is difficult. But, not impossible. So, why do we continue to see the scale weigh in favor of protecting government officials over preserving Fourth Amendment rights. Take the following case for example.

Donald Rickard was driving his white Honda Accord in West Memphis, Arkansas, when he was pulled over because the car had only one operating headlight. Police officers asked him if he had been drinking, and he responded that he had not. After being asked to produce his driver’s license and to step out of the vehicle, Rickard made the ill-fated decision to speed away. This commenced a five-minute high-speed chase on the Interstate 40 towards Memphis, Tennessee.
During the chase, Rickard and the police officers swerved through traffic and reached speeds of over 100 miles per hour. In the end, police officers fired 15 shots into his car, killing Rickard and a fellow passenger.

Rickard’s surviving daughter sued six police officers, the mayor, and the chief of police of West Memphis under § 1983, on the grounds that the officers used excessive force in violation of the Fourth and Fourteenth Amendments. On May 27, 2014, in the case of Plumhoff v. Rickard, the Supreme Court reversed the decision of the Court of Appeals for the Sixth Circuit and ruled unanimously that the police officers were protected under the qualified immunity doctrine. (Plumhoff v. Rickard, 572 U.S. __ (2014)). In its decision, the Justice Scalia explained that it “stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.” (Id. at 11). In doing so, the Supreme Court effectively gave police officers the green light to shoot drivers of high-speed chases, even if their actions result in death.

Should police officers have a free pass to use excessive force? What exactly constitutes excessive force? Does qualified immunity unfairly protect police officers from egregious misconduct at the expense of individual’s constitutional rights? These are the types of questions that have been asked for decades across court rooms, police stations, and neighborhood streets.

Despite the increased awareness concerning police misconduct across the country, many, if not most, police officers continue to evade liability under the qualified immunity framework. As the Majority in Pearson explained,“[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties
reasonably.” (Pearson v. Callahan, 55 U.S. at 231). In light of these competing interests, however, it is apparent that the current framework has failed to strike a proper balance. As discussed, the Supreme Court has floundered in its attempt to clarify the qualified immunity doctrine. On the contrary, the Court has strengthened a government official’s ability to shield themselves from liability.

One of the major reasons why government officials have received far greater legal protections in comparison to civil right plaintiffs, particularly in the context of Fourth Amendment violations, is that the Supreme Court has failed to explain what constitutes reasonableness. Rachel A. Harmon argues that courts have provided minimal guidance on how to determine reasonableness under the Fourth Amendment. (Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1132-33 (2008) (Lower Courts “have recited Graham as if it were a mantra and then gone on to try to make sense of the facts of individual cases using intuitions about what is reasonable for officers to do.”)).

For example, in *Graham v. Connor*, the Supreme Court ruled that the appropriate constitutional standard when assessing allegations of excessive force is an “objective reasonableness” standard that requires “a careful balancing of ‘nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing government interests at stake.” (Graham v. Connor, 490 U.S. 389, 396 (1989) (quoting Garner, 471 U.S. at 8)). The Court explained that reasonableness should be judged from the perspective of a reasonable officer “rather than with the 20/20 vision of hindsight.” (Graham, 490 U.S. at 396). Unsurprisingly, appellate courts have consistently struggled to apply the objective reasonableness standard. (*See e.g.*, Katz v. United States, 194 F.3d 962, 968 (9th Cir. 1999), red’d sub. nom. Saucier v. Katz, 533 U.S. 194 (2001); Frazell v. Flanigan, 102 F.3d 877 (7th Cir.
In *Anderson v. Creighton*, Justice Stevens, argued that the objective reasonableness standard provides officers “two layers of insulation from liability” and thus “the Court counts the law enforcement interest twice and the individual’s . . . interest only once.” (*Anderson v. Creighton*, 483 U.S. 635, 659-64 (1987) (Stevens, J., dissenting)). Therefore, it is no surprise that appellate courts have consistently struggled to apply the objective reasonableness standard. (See e.g., *Katz v. United States*, 194 F.3d 962, 968 (9th Cir. 1999), red’d sub. nom. *Saucier v. Katz*, 533 U.S. 194 (2001); *Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996); *Street v. Parham*, 929 F. 537, 540 (10th Cir. 1991); *Holt v. Artis*, 843 F.2d 242, 245-46 (6th Cir. 1988). In *Saucier v. Katz*, Justice Ginsburg cautioned that the two-part objective reasonableness standard is susceptible to confusion. (Saucier v. Katz, 533 U.S. at 210) (Ginsburg, J., concurring). He further articulated that “[o]nce it has been determined that an officer violated the Fourth Amendment by using ‘objective unreasonable’ force as that term is explained in *Graham v. Connor*, there is simply no work for a qualified immunity inquiry to do.” (*Id.* at 216-17).

To make matters worse, in 2011, in the case of *Ashcroft v. al-Kidd*, the Supreme Court rearticulated the reasonableness standard by replacing the word “a” with “every” in the phrase “a reasonable official should know.” (*Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011)). In effect, Justice Scalia heightened the standard by requiring that “every” reasonable official should know that their actions were unconstitutional. This is clearly a nearly impenetrable standard that prevents people from raising a viable claim.
As an alternative, the Supreme Court must reformulate a new standard that hold government officials accountable for their actions. The best method to ensure accountability is to implement strict liability for egregious conduct in light of the circumstances. Under this new standard, government officials that undertake egregious conduct defined by past precedent would automatically trigger strict liability. Notably, the most difficult part about this standard will be determining what constitutes egregious behavior. This determination, however, can and should be taken from various other contexts, including criminal law.

**Conclusion**

After decades of tackling this conundrum, the Court has impressively favored government officials over other people’s constitutional rights. Although there has been a growing movement to address police misconduct, the Supreme Court has consistently failed to strike a proper balance between protecting the Fourth Amendment rights of those subjected to excessive force and giving law enforcement officers the leeway to properly perform their job. It is undisputed that police officers risk their lives to protect and serve our communities, yet that is no excuse to grant them a free pass to use unabridged authority and excessive force to keep the peace. To this end, embracing a strict liability standard would serve to hold officers accountable for their actions and instill a sense of trust among the community and law enforcement.