

Qualified Immunity Acknowledges Legal Realities

Kail Decker, City Attorney and
Patrick Mitchell, Chief of Police, City of West Allis



After the outrageous murder of George Floyd by a Minneapolis police officer, many politicians, citizens, and organizations began to elevate their call for police reform. As a result, many thoughtful and logical measures are on the table or have already been implemented. But not every idea is well-reasoned. One of the ideas that would be devastating is the elimination of qualified immunity.

Generally, qualified immunity is a defense in a civil lawsuit in which a plaintiff claims a government actor violated that plaintiff's rights. First set forth in *Pierson v. Ray*, 286 U.S. 547 (1967), a police officer is immune from liability for violating a person's constitutional rights if the officer acted in good faith and reasonably believed that act to be constitutional at the time. While the rule has expanded somewhat since that case, the *Pierson* court succinctly described the nature of the doctrine: "a police officer is not charged with predicting the future course of constitutional law."

After the holding in *Monroe v. Pape*, 365 U.S. 167 (1961), broadened the availability of civil lawsuits against government officials for civil rights violations, courts quickly realized the untenable situation police officers face. No matter how much the law develops in case law or statutes, there will never be an exhaustive list of all possible acts categorized as constitutional or unconstitutional. The concepts of curtilage, probable cause, and reasonable suspicion are not so rigidly definable that they can be used to create such a list. Otherwise courts would have done this

already and there would be no further need to litigate civil rights claims today; the answers would be obvious. Simply put, the reality is that it is impossible for an officer to know with certainty whether every action taken is constitutional at that time. Qualified immunity is an acknowledgement of that reality.

This article focuses on police action, but it is important to note that qualified immunity applies to all government actors, not just law enforcement. If qualified immunity is eliminated, the negative consequences would stack up quickly.

Officers faced with a circumstance never covered by published case law (and there are many such instances) will have to decide whether to take action and risk the taxpayer's checkbook or refrain from action and pass on the opportunity to do what the officer does not know for certain, but reasonably believes to be lawful. This juxtaposition would result in more police inaction because officers would be trained in that manner by budget-conscious municipalities. Good faith crime detection, investigation, and intervention would slow to a crawl under the threat of liability after-the-fact. The consequences could be tragic.

For example, assume an officer observes a vehicle weaving within its lane at 2:00 a.m. and observes some other act that 1) is not illegal, 2) indicates the driver is impaired, and 3) has never been addressed by a Wisconsin case. Based on current law, this situation falls in between the clear standards of constitutional and unconstitutional stops set by Wisconsin

courts and the officer must make a decision.

With qualified immunity, that officer could stop the vehicle immediately in a good faith effort to apply the constitution to a new factual scenario. If a court later finds the stop to be unconstitutional, the driver will not face a conviction and qualified immunity prevents the taxpayers from financial liability just for the officer seeking to do the right thing when the constitutionality of the action appeared likely.

Without qualified immunity, that officer would hesitate until the driver does something that the officer knows to be reasonable suspicion. While the officer believes the driver to be intoxicated, the officer is unable to say with certainty that stopping the driver was constitutional. At that point, the driver could pass out, swerve off the roadway, and kill a pedestrian. The conviction for vehicular manslaughter would stand, and the officer was certain not to violate the driver's rights. But a person would be dead because our laws demanded certainty in a world in which that concept is scarce.

Since 1967, courts have rightfully determined that the former scenario is the better outcome than the latter. That is, society benefits enough from an officer's good faith actions to give them the benefit of the doubt in legally unforeseen situations.

Take a real example: in New Jersey in 2016, officers entered the common areas of a rooming house while searching for a shooting suspect. The officers located and

arrested a resident of the rooming house after he was found to have a quantity of marijuana and a firearm. After a conviction in lower courts, the New Jersey Supreme Court overturned it and found, unlike the common areas of an apartment, officers needed a search warrant to enter the common areas of a rooming house.

The ruling is logical but nuanced. A reasonable officer at that time likely saw no need to differentiate between a rooming house and an apartment building because the courts had not addressed that yet. Qualified immunity is the reason those officers, who made a reasonable decision at the time, did not unknowingly create liability for the taxpayers who employ them. Without it, New Jersey taxpayers could be footing the bill for something their officers did under what appeared to be standard procedure at the time.

When examining qualified immunity and lawsuits, it is important to note that lawsuits almost always occur for actions that officers take, not for actions which they don't take. The elimination of qualified immunity would result in officers conducting a risk versus reward analysis before they act just like the example above. Officers would incur risk by acting and, with the exception of very few circumstances, would incur no liability or greatly reduced liability for not acting. If officers stop taking calculated risks designed to benefit society, while at the same time intentionally not taking action this would create a dangerous situation for society because many officers and agencies would choose to train officers not to act. Numerous police departments are currently utilizing this practice when dealing with suicidal subjects who pose no risk to others. Whether that policy is good or bad is up for debate, but the perception of financial liability has driven that policy choice. There is no reason to believe departments would act any differently when faced

with the same liability issues caused by the elimination of qualified immunity.

The lack of qualified immunity would also slow or halt the development of constitutional law. If officers are not seeking to apply the constitution to a new set of facts, there will be fewer cases within which to develop the law. That is the only real source of guidance for officers. That stream of information would be slowed to a trickle, primarily leaving past cases as the only guidance. This lack of development would lead ambitious individuals who wish to violate the law to adjust their tactics to ensure they stay in the blind spots not yet covered by the law in order to operate unhindered.

In addition, qualified immunity has not protected police officers from liability in many instances. Under today's standards, courts award damages under civil rights claims when it is shown that the officer violated a person's clearly established right. There is still a burden and specific method to prove that qualified immunity applies in a given case, so the "qualified" part of qualified immunity already incentivizes officers to act reasonably. If an officer takes unreasonable action, it was something other than qualified

immunity that gave that officer the confidence to do so.

Qualified immunity applies to all units of government to include cities, towns, villages, counties, and the state, and is cited by government to seek the dismissal of frivolous lawsuits. The elimination of qualified immunity will increase costs for all units of government as frivolous lawsuits will increase. As any litigator will tell you, the standard for dismissing a lawsuit for frivolousness under civil procedure rules is very high. If that were the only standard, governments on every level would have to defend cases that allege just enough to avoid a frivolous label. And all along the way, certain plaintiffs would enjoy the real purpose of their litigation: the satisfaction of harassing the officers who made the arrest and costing taxpayer dollars to defend the case.

If citizens want to reduce incidents of excessive force committed by officers, there is no need to eliminate qualified immunity.

Focusing on accountability measures and training would help. Even adjusting the standard for when qualified immunity

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applies is an option as long as the end result does not create the negative consequences highlighted in this article. But the complete elimination of qualified immunity would not only harm well-intentioned officers and governmental entities, but it would also harm society as officers would stop taking action. Officers have always been trained to risk their personal safety for their fellow citizens, but the added financial risk without qualified immunity would be enough to change how officers act in the future.

Qualified immunity is not something to be cheered or celebrated. Rather, it exists solely out of the need to avoid detrimental consequences for communities. Instead of teetering on the razor's edge between insolvency or lawlessness, qualified immunity is the widened platform in between that balances the community's rights with those of people who interact with police.

U.S. Senator Lindsey Graham recently was quoted as saying that the elimination of qualified immunity might be a good thing. Senator Graham stated, "If you're subject to being sued, you act differently than if you're not." Senator Graham was absolutely correct, but for the wrong reasons. Senator Graham likely believed that the elimination of qualified immunity would change how officers act, but the reality is that the end of qualified immunity would change whether or not they do act, and that would be incredibly harmful for society.

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About the Authors:

Patrick Mitchell is the Chief of Police with the City of West Allis and has 35 years of law enforcement experience. Chief Mitchell has been Chief for five years and previously served with the

Milwaukee Police Department for 27 years, and the Wisconsin Department of Justice for three years. Chief Mitchell has extensive experience as a law enforcement trainer and currently serves as the 1st Vice President of the Wisconsin Chiefs of Police Association. Contact Patrick at pmitchell@westalliswi.gov

Kail Decker is the West Allis City Attorney. He has represented Wisconsin cities for over 12 years, including Green Bay and Milwaukee, and is an advocate of police reform measures that increase safety for both police officers and the public without reducing the effectiveness of law enforcement. He is the chair-elect of the Administrative and Local Government Law Section of the Wisconsin State Bar. Contact Kail at kdecker@westalliswi.gov

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