

Qualified Immunity of the Police A Talk with Professor Fred Smith, Jr.

Qualified Immunity Doctrine

- Qualified immunity
 - Qualified immunity shields government officials from civil suits for money damages unless they violate “clearly established law” that a reasonable official would have known at the time of the violation.
- Most civil suits against a police officer start with a § 1983 claim.
 - 41 U.S.C. § 1983 civil action for deprivation of rights:
Every person who “under color of any [law]” subjects any person “to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.”¹
- Qualified immunity has no historical roots in common law. Modern scholars consider it a court-made doctrine.
 - In *Pierson v. Ray*, the Supreme Court extended the common law subjective good faith defense to tort liability to § 1983 actions.² It reasoned that Congress, though silent, had intended to preserve the defense in a § 1983 action.
 - In *Harlow v. Fitzgerald*, the Supreme Court established qualified immunity as an objective standard, rather than subjective.³
 - The Supreme Court noted in *Anderson v. Creighton* that it had created qualified immunity “along principles not at all embodied in the common law.”⁴
- A “clearly established right” that a reasonable officer would know at the time of the violation
 - *Hope v. Pelzer*⁵
 - Pelzer, an Alabama inmate, was handcuffed to a hitching post for hours on two occasions for disruptive behavior. He filed a § 1983 action against three guards.
 - The lower court found the guards were entitled to qualified immunity, and the District Court entered summary judgment for the guards. The Eleventh Circuit affirmed, also finding that the use of hitching posts violated the Eighth Amendment but that the guards were entitled to qualified immunity because Hope did not establish that the officers

¹ Link to text of § 1983: <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/html/USCODE-2010-title42-chap21-subchapl-sec1983.htm>

² 386 US 547 (1967): <http://cdn.loc.gov/service/ll/usrep/usrep386/usrep386547/usrep386547.pdf>

³ 457 U.S. 800 (1982): <http://cdn.loc.gov/service/ll/usrep/usrep457/usrep457800/usrep457800.pdf>

⁴ 483 U.S. 635, 645 (1987): <http://cdn.loc.gov/service/ll/usrep/usrep483/usrep483635/usrep483635.pdf>

⁵ 536 U.S. 730 (2002): <http://cdn.loc.gov/service/ll/usrep/usrep536/usrep536730/usrep536730.pdf>

- were on notice that their conduct was unlawful by showing cases with “materially similar” facts to this case.
- The Supreme Court reversed, finding that the Eleventh Circuit erred in its requirement that Hope show previous cases with facts fundamentally similar to his. The question, rather, is whether the state of the law at the time of the violation gave the officers “fair warning” that their conduct was unconstitutional.
 - Groh v. Ramirez⁶
 - Groh, a Bureau of Alcohol, Tobacco and Firearms agent, executed an inadequate warrant that failed to specify the items to be seized. Ramirez filed suit against Groh and other agents under § 1983, alleging eight claims, including a Fourth Amendment violation.
 - The District Court granted the defendant’s summary judgment, finding no Fourth Amendment violation, and that even if such a violation had occurred, the agent had qualified immunity. The Ninth Circuit affirmed, except on the Fourth Amendment claim, finding the warrant invalid. It also found Groh was not entitled to qualified immunity as the leader of a search who fails to make sure the warrant is valid, citing *United States v. Leon*, 468 U. S. 897 (1984).
 - The Supreme Court affirmed, finding the agent not entitled to qualified immunity because “It would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted,” citing *Saucier v. Katz*, 533 U.S. 194, 202.

Post-Ferguson and a Question of Accountability

- Justifications of qualified immunity—does it still hold up?
 - Purported goals
 - To ensure that officers are not inhibited in the performance of their duties by the threat of litigation.
 - Reduce litigation costs and ensure effective administration of government.
 - Professor Joanna Schwartz of UCLA Law conducted a study in which she collected data from 81 state and local law enforcement agencies of the number of damages actions against an officer over a six-year period, the amounts paid, and the amounts paid by individual officers.⁷ She found that among the 44 largest law enforcement agencies, officers contributed to settlements in 0.41% of the cases where there were payments to plaintiffs

⁶ 540 U.S. 551 (2004): <http://cdn.loc.gov/service/ll/usrep/usrep540/usrep540551/usrep540551.pdf>

⁷ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297534

- and 0.02% of the total awards to plaintiffs.⁸ Officers are rarely required to pay any money damages or settlements against them. Among those who did pay, the median was \$2,240 and no officer paid more than \$25,000.⁹ Most jurisdictions indemnify officers, either by law or policy. In places where indemnification is prohibited, municipalities nonetheless indemnify for settlements. Schwartz's finding does not support the stated justification.
- In another study, Professor Schwartz examined data collected over a two-year period from five federal districts on § 1983 suits against police officers.¹⁰ Only 3.8% were dismissed on qualified immunity grounds before trial.¹¹ Qualified immunity, even when raised, fails by in large to reduce litigation costs and burdens early on.
 - Smith sees a movement toward greater accountability for law enforcement and other aspects of the criminal justice system in this “post-Ferguson” age that we are in now.
 - A growing number of scholars and advocates are calling for a reform of qualified immunity.
 - In *Allah v. Milling* in which a petitioner sought a writ of certiorari, a group of leading qualified immunity scholars¹² and a broad range group of public interest groups¹³ filed amicus briefs, urging the Supreme Court to revisit the doctrine. The interest group amicus is especially notable because organizations across ideological and political lines signed, including the ACLU, the Second Amendment Foundation, the Law Enforcement Action Partnership (made up of law enforcement professionals), and the Alliance Defending Freedom (a religious-liberties advocacy group).

⁸ *Id.* at 890

⁹ *Id.* at 939

¹⁰ Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 15 (2017):

<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=9263&context=yjlj>

¹¹ *Id.* at 60

¹² Brief for scholars of the law of qualified immunity: https://www.supremecourt.gov/DocketPDF/17/17-8654/52994/20180711164040870_17-8654 - Scholars of the Law of Qualified Immunity - cert. amicus brief.pdf

¹³ Brief of cross-ideological groups: https://www.supremecourt.gov/DocketPDF/17/17-8654/52935/20180711143053649_7.11.2018_Panideological%20Amicus%20Brief%20FINAL.pdf