

CIVIL RIGHTS CLAIMS IN THE 21st CENTURY

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Qualified Immunity



- The hottest topic in civil rights law today
 - Qualified Immunity
- More than just lawyers are talking about Qualified Immunity.
 - 1,400 professional athletes, coaches and executives signed a letter asking Congress to abolish qualified immunity.

Qualified Immunity



- Including Tom Brady, Steve Kerr, Drew Brees, and Gregg Popovich



Qualified Immunity



- Excerpts from the Players Coalition letter:
 - “Qualified immunity has shielded some of the worst law enforcement officials in America.”
 - “When police officers kill an unarmed man, when they beat a woman, or when they shoot a child, the people of this country must have a way to hold them accountable in a court of law.”
 - “It is time for Congress to eliminate qualified immunity.”

Qualified Immunity



- Even TikTok is discussing qualified immunity.
 - One video called “How Qualified Immunity Works” has over 380,000 views.
 - But the viral video demonstrates that there are a lot of misunderstandings about what qualified immunity actually does.

**Video
Placeholder**

Qualified Immunity



What does qualified immunity do?

- Qualified Immunity grants government officials immunity in federal civil rights lawsuits unless the plaintiff can show that
 - 1) the government official violated the plaintiff's civil rights and
 - 2) the right was clearly established in the law

Qualified Immunity



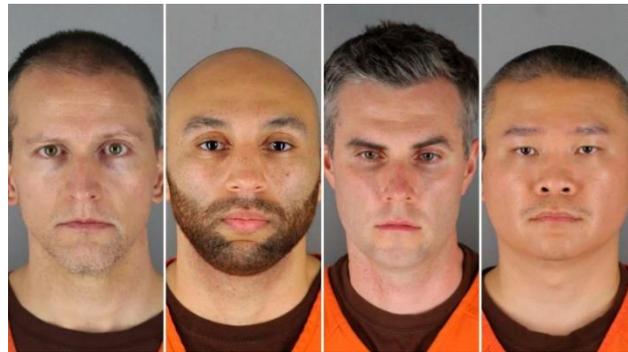
- What qualified immunity does not do:
 - Qualified Immunity does not shield government officials from criminal charges
 - It is not a get out of jail free card
 - Qualified immunity does not prevent plaintiffs from seeking injunctive or declaratory relief



Qualified Immunity



- Qualified immunity does not protect individuals who violate clearly established rights
- The officers involved with the death of George Floyd were all charged criminally and cannot raise qualified immunity as a defense



Qualified Immunity



- Who does qualified immunity protect from civil liability?
 - Local and State government officials
 - Public school teachers and administrators
 - Law enforcement officers
 - Social workers
 - Prison guards
 - State medical board inspectors
 - And other government employees

Qualified Immunity



- Common civil rights claims where qualified immunity may apply:
 - Free speech
 - Excessive force
 - Unreasonable search and seizures
 - Discrimination (equal protection)
 - Unlawful arrests
 - Malicious prosecution
 - Cruel and unusual punishment

Qualified Immunity

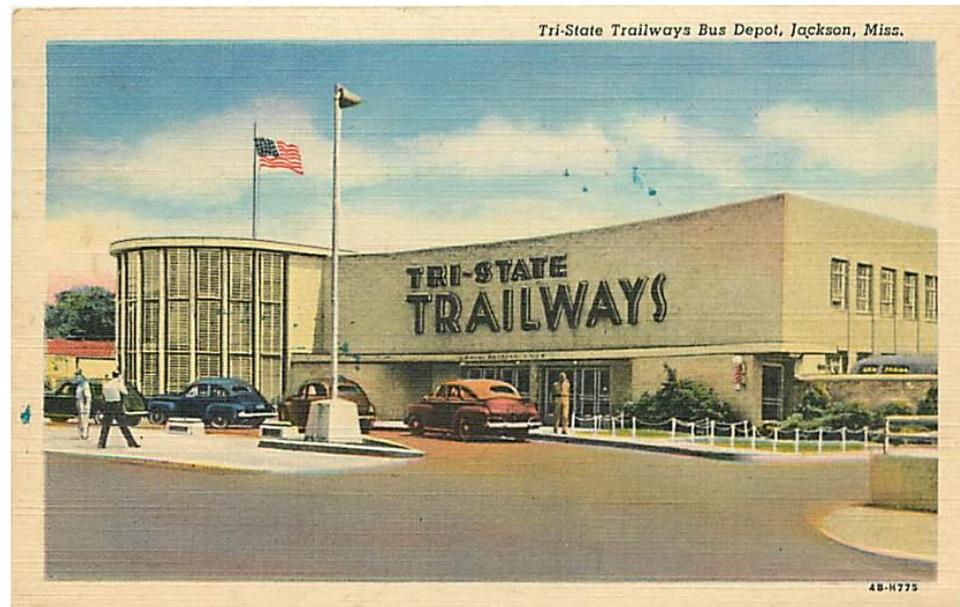


- Where does qualified immunity come from?
 - Qualified immunity is a judge made doctrine that was created by the Supreme Court in a 1967 unlawful arrest case, *Pierson v. Ray*, 386 U.S. 547 (1967).
 - Facts of the case:
 - A group of priests that included Black and white clergy walked into a segregated bus terminal.
 - Two police officers stopped the priests and asked them to leave.

Pierson v. Ray, 386 U.S. 547 (1967)



- The priests refused to leave, so they were arrested.
- The criminal charges were eventually dismissed.
- The priests sued the police officers for unlawful arrest in violation of the Fourth Amendment.



Pierson v. Ray, 386 U.S. 547 (1967)



- Supreme Court's Holding (first version of qualified immunity)
 - A police officer is not liable when “acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied”
 - Good faith immunity (a subjective test)
- *Aftermath*
 - By 1974 the Supreme Court expanded this new qualified immunity defense to all executive actions.
 - By 1982 the Supreme Court announced the modern day version of qualified immunity

Qualified Immunity



- The modern day qualified immunity test comes from *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)
 - Facts of the Case
 - Fitzgerald was an analyst for the Air Force
 - He discovered \$2 billion dollars in cost overruns that had been concealed by the Pentagon
 - Fitzgerald testified before Congress about the overruns
 - He was later dismissed from his position with the Air Force

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)



- Fitzgerald claims he was fired in retaliation for his Congressional testimony
- President Nixon claimed he was personally responsible for firing Fitzgerald, but the Whitehouse later retracted the statement
- Fitzgerald sued President Nixon and his presidential aides for firing him in violation of his First Amendment free speech rights

Qualified Immunity



- Supreme Court's holding:
 - Nixon's aides were performing discretionary functions and were entitled to qualified immunity.
 - The modern day qualified immunity test was born:
 - “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.”

**CONSTITUTIONAL
VIOLATION**

**CLEARLY
ESTABLISHED
LAW**

Clearly Established Law



- “Clearly established law” should not be defined “at a high level of generality.” *Ashcroft v. al-Kidd*, 563 U. S. 731, 742 (2011).
- The clearly established law must be “particularized” to the facts of the case. *Anderson v. Creighton*, 483 U. S. 635, 640 (1987).
- Government officials should not be punished for conduct when they did not have any notice that their actions were unlawful

Qualified Immunity



- Recent high profile incidents involving police officers have put Qualified Immunity in the spotlight
 - Public criticism of qualified immunity has intensified
 - Protests across the country advocating for police reform have called for an end to qualified immunity



Jamison v. McClendon



- Some district court judges have recently issued decisions that are critical of qualified immunity.
- *Jamison v. McClendon*
 - Facts of the case:
 - Clarence Jamison, a Black man, was pulled over while driving a Mercedes
 - The officer claimed his license tags were not visible
 - The officer tried multiple techniques to get Jamison to consent to a search

Jamison v. McClendon



- He lied to Jamison about receiving a call reporting there were drugs in his vehicle
- He promised to ignore small quantities of drugs if he was able to conduct the search
- At one point, the officer reached into Jamison's vehicle while asking for his consent to search the vehicle
- Jamison refused multiple times, but he eventually gave in
- The officer searched Jamison's vehicle and found nothing illegal
- The stop lasted nearly two hours

Jamison v. McClendon



- The district court's holding:
 - The officer violated Jamison's fourth amendment rights because the consent to the search was involuntary.
 - But the officer did not violate clearly established law and was entitled to qualified immunity.
 - There was no precedent that would have placed the Constitutional question "beyond debate."

Jamison v. McClendon

- Judge Reeves dismissed the case based on qualified immunity.
- But he called on the Supreme Court to overturn qualified immunity.



Jamison v. McClendon



- The Supreme Court would “likely prefer that Congress fixes the problem...” but “from TikTok to the chambers of the Supreme Court, there is increasing consensus that qualified immunity poses a major problem to our justice system...Again, I do not envy the task before the Supreme Court. Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of ‘separate but equal,’ so too should it eliminate the doctrine of qualified immunity.”
 - United States District Judge, Carlton W. Reeves

Harmon v. Salt Lake City



- Judge Robert Shelby in *Harmon v. Salt Lake City*
 - In 2017, a Salt Lake City Police Officer shot and killed Patrick Harmon
 - While officers attempted to arrest him, Harmon began to flee
 - Harmon eventually turned back toward the officers and approached them with his hand raised to his chest.
 - The shooting officer believed that Harmon had a knife and threatened to cut the officers

Harmon v. Salt Lake City



- Judge Shelby's holding:
 - The officers were entitled to qualified immunity because a reasonable officer could have believed Harmon posed an immediate threat.

Harmon v. Salt Lake City



- Although Judge Shelby dismissed the excessive force claim on qualified immunity grounds, he provided a disclaimer about the qualified immunity at the beginning of his opinion.
- Judge Shelby first addressed the facts of George Floyd's death and the protests about police brutality.

Harmon v. Salt Lake City



- “Floyd’s death came on the heels of numerous high-profile deaths of Black men and women in interactions with police officers in recent years. These events and others carried the Black Lives Matter movement into the mainstream and invigorated discussion and debate on a wide range of issues surrounding law enforcement and race, including calls in some circles to change the qualified immunity laws this court must apply in this ruling...”

Harmon v. Salt Lake City



- “Because it would be inappropriate to do so, this court expresses no opinion whatsoever about the current protests, movements, counter-movements, opinions, other cases around the country, the wisdom of current qualified immunity laws, or any other matters touching on the important issues we are grappling with as a nation.” Judge Robert Shelby

Qualified Immunity



- If there is so much criticism, then what is qualified immunity good for?
 - To protect government officials who are acting in good faith
 - Public officials perform vital tasks that may require split-second decisions in stressful circumstances. Taking away qualified immunity could lead to officers being hesitant to act when it is most needed.

Qualified Immunity



- Officers must have room to make reasonable mistakes without worrying about being sued
- Qualified Immunity prevents government officials from standing trial, which saves taxpayer money and allows government officials to carry on with their job
- Under qualified immunity, officers are still accountable if they violate clearly established rights
- Officers can still be charged criminally for their actions

Qualified Immunity

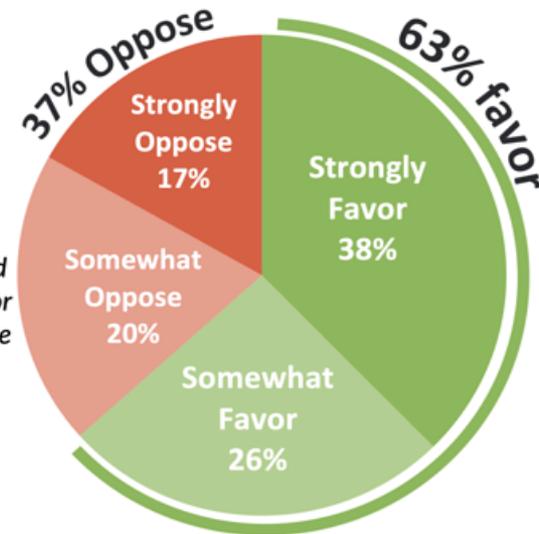


- Is qualified immunity in danger?
- 63% of Americans Favor Eliminating Qualified Immunity for Police Officers

63% Support Eliminating Qualified Immunity for Police Officers

As you may know, qualified immunity protects police officers from being sued for misconduct unless there is a previous legal case with similar facts ruling that officers may not engage in that particular conduct.

Would you favor or oppose eliminating qualified immunity so that police officers could be sued for misconduct even if there is no previous legal case with similar facts?



CATO INSTITUTE SUMMER 2020 NATIONAL SURVEY
Note: Percentages may not add to 100% due to rounding.

Reforming Qualified Immunity



- Two possible ways to change qualified immunity
 - First, the Supreme Court could overrule or make changes to qualified immunity.
 - Two Justices at opposite ends of the political spectrum are critical of the doctrine.



Reforming Qualified Immunity



- Justice Sotomayor
 - The way the Court applies qualified immunity “sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”
 - Justice Sotomayor in dissent, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018).

Reforming Qualified Immunity



- Justice Thomas
 - He is concerned with what the common law at the time of the Civil Rights Act of 1871 said about immunities.
 - “Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, **we should reconsider our qualified immunity jurisprudence.**”
Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017)

Reforming Qualified Immunity

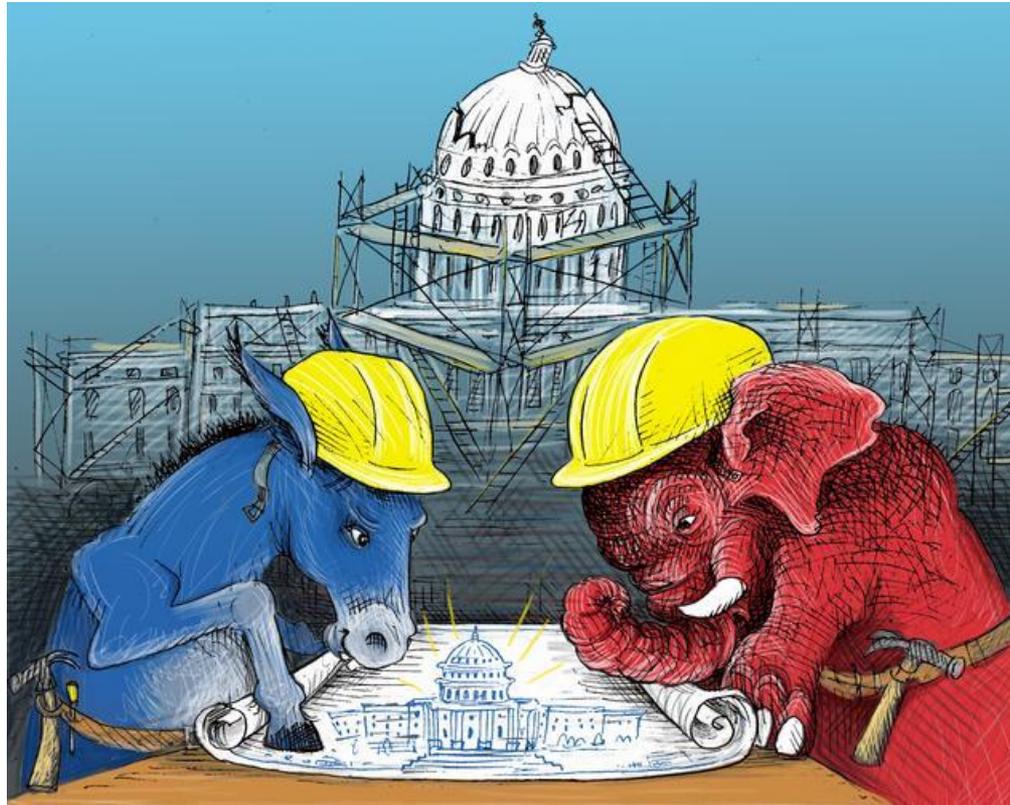


- It is unlikely the Supreme Court will overrule qualified immunity in the near future.
 - On June 15, 2020, the Supreme Court declined to take up a case that would have given it the opportunity to overturn or reform the qualified immunity standard.
 - Justice Thomas was the only justice that dissented to say he would have taken the case.
 - The majority of the Supreme Court consistently applies qualified immunity and shows no sign of abandoning it

Reforming Qualified Immunity



- The other option for reform is Congress



Potential Reforms



- One idea is to end qualified immunity completely



Cory Booker 

@CoryBooker

 US Senate candidate, NJ



Ending qualified immunity would create a far greater level of accountability for police officers who violate someone's civil rights.

Reforming Qualified Immunity



- The Ending Qualified Immunity Act (June 2, 2020)
 - Introduced by Reps. Justin Amash (L–Mich.) and Ayanna Pressley (D–Mass.)
 - 66 Co-sponsors (65 Democrats and 1 Republican)
 - The bill states that qualified immunity can no longer be a defense to civil rights claims.

Reforming Qualified Immunity



- The Reforming Qualified Immunity Act
- Introduced by Republican Senator Mike Braun (IN)
 - The bill does not eliminate qualified immunity completely
 - It reverses the clearly established prong of qualified immunity
 - Currently, a plaintiff has to find precedent showing that a defendant's specific actions violated the law.
 - The bill would make the defendant liable unless the defendant could show any case or statute authorizing their conduct and that they had a good faith belief that their actions were lawful
 - It borrows from the original “good faith” immunity standard from *Pierson v. Ray*, 386 U.S. 547 (1967)

Local Reforms



- Although local governments cannot amend qualified immunity, they can regulate their law enforcement officers
 - Salt Lake City Mayor Mendenhall signed an executive order requiring SLCPD Chief Mike Brown to implement several changes to the department's policies.



Salt Lake City Executive Order



- Some of the reforms include:
 - **Use of Force:** Officers will be required to use de-escalation techniques, unless it is unreasonable to do so, before using force.
 - **Deadly Force:** Limits the use of deadly force, including only using deadly force when no other force will subdue the threat. Requires more supervisors to review every use of force.
 - **Search and Seizure:** Limits the scope and time of searches and requires written or recorded consent to search.
 - **Body Cameras:** Disciplinary actions for officers who fail to activate body cams.

Qualified Immunity



- Reforming qualified immunity would impact more than just law enforcement:
 - Without qualified immunity all government employers would face greater exposure to liability
 - No longer would only the “plainly incompetent” be liable
 - One area that could see a rise in claims is Fourteenth Amendment equal protection claims related to workplace discrimination and sexual harassment

Qualified Immunity



- It is clearly established law that discrimination based on race, religion, national origin, and sex violate the Fourteenth Amendment's equal protection clause.
- Sexual harassment and other sexual misconduct also violate clearly established Fourteenth Amendment principles
- But the “clearly established” determination must be made at the proper level of specificity

Qualified Immunity



- The Tenth Circuit has a sliding scale approach to the clearly established prong of qualified immunity
- “The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.” -Justice Gorsuch from *Wilson v. City of Lafayette* 510 F. App’x 775 (10th Cir. 2013)

Fuqua v. City of Altus



- *Fuqua v. City of Altus*, No. CIV-17-115-HE, 2018 WL 1702339, at *4 (W.D. Okla. Apr. 6, 2018)
 - Plaintiff was the City Manager of the City of Altus, Oklahoma
 - He claims that two city employees were actively discussing his religious affiliation with the city council and accusing him of favoring members of his church
 - Plaintiff even claimed his employees were concerned about a “Mormon Mafia” and that Plaintiff was going to fire them and hire all Mormons
 - The employees likely shared their thoughts about Plaintiff with the Mayor and other members of the city council
 - The city council, including the Mayor, voted to terminate Plaintiff 6-3
 - Plaintiff filed a lawsuit claiming he was terminated based on his religion

Fuqua v. City of Altus



- Holding
 - The Court denied qualified immunity to the Mayor because discrimination based on religion was a violation of clearly established law.
 - However, Plaintiff's employees were granted qualified immunity
 - It was not clearly established that non-supervisory employees without decision making power could be held liable under the circumstances
 - The specific facts as applied to each defendant's situation made the difference between which defendants received qualified immunity and which defendants went to trial

Qualified Immunity



- *Engstrom v. Corry*
 - Section 1983 claims against volunteer firefighters for equal protection violations related to sexual harassment and assault that allegedly occurred at the fire station.

Conclusion



- Qualified Immunity is still good law
 - The Appellate Courts consistently apply and uphold the doctrine.
 - Even judges who do not believe it is good policy know that they will be reversed on appeal if they do not apply qualified immunity
 - There may be some reforms in the future, but qualified immunity will likely remain a valuable tool for defending against civil rights lawsuits