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The Scope of Federal Qualified Immunity in Civil Rights Cases

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❖ **Introduction**

Government officials, including peace officers, are shielded from federal civil rights liability for their discretionary official acts by a doctrine known as *qualified immunity*. Under this doctrine, government officials cannot be held individually liable for federal civil rights violations unless their conduct violated a “clearly established ... right of which a reasonable person would have known.” [Harlow v. Fitzgerald](#), #80-945, 457 U.S. 800, 818 (1982).

The inquiry whether the right violated was “clearly established” must be conducted from the perspective of the specific conduct of the government official. While liability is not conditioned upon the official’s exact action having previously been held unlawful, the right alleged to be violated “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” [Creighton v. Anderson](#), #85-1520, 483 U.S. 635, 640 (1987). Properly interpreted, the qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” [Malley v. Briggs](#), #84-1586, 475 U.S. 335, 341 (1996).

The definition of the scope of conduct protected by qualified immunity is constantly evolving. Given the infinite factual variations of official misconduct that come before the courts under civil rights law, the courts must develop this doctrine on a case-by-case basis, and cannot be expected to formulate a one-size-fits-all test for the applicability of the immunity.

The qualified immunity doctrine shields individual government officials from or the whole range of possible constitutional and civil rights violations, including First Amendment, Search and Seizure, Excessive force, Self-incrimination, Right to Counsel, Cruel and Unusual Punishment, Due Process and Equal Protection. For some fields, including the First Amendment, the current scope of the doctrine has become mired in confusion. See [Morse v. Frederick](#), #06-278, 127 S.Ct. 2618 (2007).

But one field that has produced enough appellate litigation to achieve a modicum of clarity in the scope of the immunity doctrine is excessive force. In the context of an excessive force case, liability generally depends on the well-established objective reasonableness test established in [Graham v. Connor](#), #87-6571, 490 U.S. 386 (1989).

But the qualified immunity doctrine protects the individual officer from liability unless the victim can also show that the officer acted in subjective bad faith. This dual burden of proof on an individual claiming excessive force was clarified by the United States Supreme Court in [Saucier v. Katz](#), #99-1977, 533 U.S. 194 (2001). Recently, the Supreme Court rendered a broad interpretation of the immunity for excessive force under borderline circumstances in [Brosseau v. Haugen](#), #03-1261, 543 U.S. 194 (2004).

The federal civil rights statute that most often sets the stage for an excessive force claim is 42 U.S. Code §1983, which provides for liability of “Every person” acting under the color of state law who violates rights “secured by the Constitution” and by federal statutes. A parallel field of liability for federal agents has been formulated under federal common law, known as the “Bivens” doctrine after its seminal case [Bivens v. Six Unknown Named Federal Narcotics Agents](#), #301, 403 U.S. 388 (1971).

❖ **42 U.S. Code §1983**

42 U.S. Code §1983, provides that

“Every person who, under color of any statute, ordinance, regulation, custom or usage of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress....”

❖ Harlow v. Fitzgerald

The modern rule of qualified immunity was formulated in [Harlow v. Fitzgerald](#), #80-945, 457 U.S. 800 (1982). During the Watergate era, a proliferation of civil rights suits were filed against President Nixon and high-level members of his administration alleged a wide variety of abuses of executive powers. A. E. Fitzgerald, an employee of the Air Force Financial Management Office, allegedly terminated for threatening to publicly disclose corrupt purchasing practices, sued *Nixon and his presidential counsel Bryce Harlow* for retaliatory termination.

In [Nixon v. Fitzgerald](#), #79-1738, 457 U.S. 731(1982), the Supreme Court reaffirmed the doctrine of absolute immunity of the highest level of governmental officials, holding that it was essential to the ability of government to secure the services of individuals to carry out official policy that the President and certain other high executive officials must be protected from any individual civil liability for their official acts. In [Harlow v. Fitzgerald](#), the Court simultaneously rejected an assertion that the President's absolute immunity extended to certain lesser executive officials such as the counsel to the President in that case.

The Court held that while these lesser executive officials were not entitled to the same absolute immunity as the President, it was nevertheless essential to grant them some degree of immunity “to shield them from undue interference with their duties and from potentially disabling threats of liability,” (457 U.S. at 806), which was described as a “qualified or good faith immunity.” *Id.* at 807.

In *Harlow*, qualified immunity was defined as protection from liability for discretionary functions of government officials unless the conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 818. This standard of “objective reasonableness ... as measured by reference to clearly established law” was crafted to “avoid excessive disruption of government” and to “permit the resolution of many insubstantial claims on summary judgment.” *Id.*

This newly-defined immunity then filtered down to the broad spectrum of government officials at all levels, across the full range of constitutional and federal rights that can be the subject of a federal civil rights suit under *Bivens* or section 1983. For each constitutional right and each case, courts needed to examine what was meant by the language “clearly established ... rights of which a reasonable person would have known.”

❖ Saucier v. Katz

In [Saucier v. Katz](#), #99-1977, 533 U.S. 194 (2001), the Supreme Court had an occasion to apply the test of clearly established rights to an excessive force case. As Vice President Al Gore was speaking at an environmental ribbon-cutting event at the San Francisco Presidio, military police used unnecessary roughness in ejecting a heckler who had come forward with a sign espousing animal rights. *Id.* at 197-198.

The Supreme Court observed that the clearly established law for purposes of qualified immunity analysis was furnished by *Graham v. Connor*, which tested the use of force for objective reasonableness ... in light of the circumstances the officer faced on the scene (533 U.S. at 199-200), with reference to “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396 (cited in *Saucier*, 533 U.S. at 205).

The Ninth Circuit in *Saucier* had held that the *Graham* test of liability completely incorporated the qualified immunity analysis. Since the *Graham* test has an assessment of reasonableness of the use of force built into the liability test, the appellate court ruled that *Graham* “already affords officers latitude for mistaken beliefs as to the amount of force necessary,” and consequently, there was no further need for any separate test of qualified immunity. 533 U.S. at 203.

The Supreme Court found that reasoning defective. The Court recognized that an officer who passed the *Graham* test of course was free of liability and obviously did not also need to meet a test for qualified immunity. But if the officer fails the *Graham* test, the facts must still be put through a further test for qualified immunity because the officer may still be relieved of liability if the conduct did not violate the suspect’s clearly established constitutional right, which is an inquiry that is not fully built into the *Graham* test.

Specifically, the *Graham* test protects an officer who makes a *reasonable mistake of fact*. For example, an officer who uses force because he reasonably expected a suspect to fight back would generally be protected from liability even if it turns out the suspect did not have any such intention. *Id.* at 205. But the qualified immunity test contains “a further dimension” that is not in the *Graham* test, which protects an officer from a *reasonable mistake of law*. *Id.*

In other words, the qualified immunity test protects an officer who reasonably but mistakenly believes a use of a certain degree of force is not condemned by clearly

established law. As stated in the opinion, “An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.” *Id.*

Where an officer’s justification for using force is based on perceptions reasonably made on the scene but mistaken in retrospect, then the officer is protected by the *Graham* test itself. But where the officer makes a decision in the field to use a level of force that turns out in retrospect to be disapproved by legal precedent, the qualified immunity test protects the officer from liability as long as it was reasonable under the given circumstances to be mistaken about the what the law permits.

The Court recognized that “*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances.” *Id.* Qualified immunity operates “to protect officers “from the sometimes ‘hazy border between excessive and acceptable force,’ (citation), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” *Id.* at 206. Accordingly, the Court held, “in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.” *Id.*

Based on the concept that qualified immunity entails a test for reasonable legal error in cases where the officer fails the *Graham* test, the Supreme Court in *Saucier* reversed the Ninth Circuit. Examining the defendant officer’s use of force at the Gore speech, the Court found that there was no precedent clearly establishing excessiveness of the level of roughness that was used, considering the officer’s mission to protect the Vice President, the fact that the heckler was not seriously injured, and the fact that another individual was arrested along with the heckler, raising a further possibility that other protestors were in the crowd. *Id.* at 208-209.

❖ **Brosseau v. Haugen**

In [Brosseau v. Haugen](#), #03-1261, 543 U.S. 194 (2004), the Supreme Court reversed a Ninth Circuit decision that had denied qualified immunity to an officer who used deadly force in a dangerous incident. A felony suspect capped a half hour foot chase by locking himself into the driver’s seat of a Jeep. Officer Rochelle Brosseau of the Puyallup, Washington Police Department shattered the window in an unsuccessful effort to grab the keys, but the suspect got the Jeep started and drove off in defiance of Officer Brosseau’s orders, whereupon the officer shot the suspect in the back. *Id.* at 195-196. Officer

Brosseau claimed to have acted to protect the safety of other officers on foot, occupied vehicles in the suspect's path, and other citizens. *Id.* at 197.

The Ninth Circuit Court of Appeals denied qualified immunity, on the basis that the officer had violated the suspect's clearly established constitutional rights. *Id.* at 196. Precedent for the situation came from [Tennessee v. Garner](#), #83-1035, 471 U.S. 1 (1985), which found a Fourth Amendment violation where an officer fatally shot a fleeing unarmed teenage burglary suspect in the back. See *Brosseau*, 543 U.S. at 197. Clarifying the standard of liability under the facts of that case, the Court in *Garner* had explained that "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11.

The Ninth Circuit in *Brosseau* found that *Garner* and *Graham* clearly established the unlawfulness of shooting the suspect under the circumstances. *Id.* at 198-199. The Supreme Court, however, found the relevant body of precedent included several federal appellate precedents addressing facts relevant to an officer's decision "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." 543 U.S. at 200.

These cases "found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others." *Id.* The Court concluded, "this area is one in which the result depends very much on the facts of each case. *Id.* at 201. Thus, "The cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment." *Id.*

Brosseau primarily illustrates that in testing for qualified immunity in an excessive force situation, the inquiry into whether the use of force violated clearly established law cannot be conducted in a vacuum, but must consider the precise degree of force the officer actually used under the particular circumstances shown in the case. The Ninth Circuit, concluding from *Garner* that it was unconstitutional to shoot a suspect fleeing apprehension from a property crime, disregarded the distinction that Officer Brosseau's suspect was in a vehicle, was regarded as desperate to escape, and was believed to pose an imminent danger if permitted to escape into the community.

The Supreme Court came to the opposite conclusion by synthesizing relevant precedent examining factual characteristics more closely on point to the case in question. Qualified immunity would have been seriously eroded if the Supreme Court had approved the Ninth Circuit's abstract analysis of clearly established rights.

Application of qualified immunity usually does not defeat the plaintiff's entire case. Subject to a different set of governmental immunities, the plaintiff can still often impose liability on the government itself by showing police misconduct resulted from a policy or established practice of tolerating similar abuses, or inadequate training. But from the perspective of those injured by individual government employees, qualified immunity is one of the most difficult obstacles to recovery of damages.

❖ **What qualified immunity means to officers and trainers**

As a government employee, qualified immunity works against officers who have an occasion to sue their employers for wrongful discipline or for a constitutional violation in the workplace such as an unreasonable drug test or locker search.

But as an officer in the field, qualified immunity protects the officer from most of the worst risks of civil liability for excessive force and other violations that can occur in citizen contacts. To obtain the maximum benefit of the doctrine, however, officers must pay careful attention to the training they receive about the legal criteria for reasonable and excessive force, and for standards and grounds for search and detention of suspects.

Because the test for qualified immunity inquires into whether a use of force violated the suspect's "clearly established" legal rights of the victim, officer training curricula must be tailored to placing officers on specific notice of the quantum of force in given situations that has been tolerated by controlling court precedents. Law enforcement agencies widely recognize that their training curricula in these subjects must be designed to assist officers in understanding any clear legal precedents and legal rules that govern their decisions about using force in the field.

Assuming an agency offers proper training in case law that defines the legitimate boundaries of officers' authority to use force, courts will generally hold the officer responsible for having knowledge of the information in the agency's training curriculum, whether or not the officer properly assimilated that information.

So, for the field officer, the legal training on use of force is not only designed to keep the officer in good standing with his or her supervisors, it can make the difference between liability or a successful defense if a disgruntled citizen brings civil rights litigation. Even though the study of case precedent is less exciting than the physical and tactical challenges of field training, the prospect that an officer may need to rely on the qualified immunity doctrine means he or she must give a full measure of intellectual devotion to the legal aspects of the use of force curriculum.

- **AELE note:** The Supreme Court recently revisited qualified immunity and concluded that federal courts are not mandated to apply the two-step test mandated by *Saucier*. [Pearson v. Callahan](#), #07-751 2009 U.S. Lexis 591

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