Shepherd
Est 1982 EXPRESS

It’s Time to End Qualified Immunity in Wisconsin

JONATHAN BROSTOFF

APR. 07, 2021

In 2014, Shaniz West came to her Caldwell home in Idaho with her children to find the house surrounded by five police officers. The officers informed her that they were looking for her ex-boyfriend, who was wanted on firearms charges and whom they believed might be inside the house. In response, West told the officers that it was possible that he was inside the house, and they were welcome to check—she left them the keys to the house and left in a friend’s car.

Instead of using the keys that she had left them to search the house, the officers decided to call in a SWAT team. What ensued was an hour-and-a-half long standoff between the SWAT team and what they would eventually realize was an empty house, which they would have learned if they had just used the keys that West had given them. Instead, over the course of that afternoon, the SWAT team bombarded the house with tear gas grenades, breaking windows, destroying her possessions, rendering the house uninhabitable and leaving West and her children homeless.

In compensation, the city gave Ms. West $900 and provided a hotel room for three weeks; not nearly enough to cover the massive amount of damage and disruption to her home and life. But when Ms. West filed a lawsuit against the police department in order to cover the damages, the case was thrown out. How could this have happened?

Violating Rights with Impunity

Well, because in 1982, the U.S. Supreme Court made a mistake. That year, the Court decided to expand and codify an obscure legal doctrine that had first been outlined 15 years prior: “qualified immunity.” In one fell swoop, the Court transformed what had previously been a reasonable protection for public officers acting in good faith and transformed it into a vague, near-catch-all defense that could be used by public officials to violate the constitutional rights of everyday people with virtual impunity. How did it get to that point?

The umbrella concept of “qualified immunity” was first laid out by the Supreme Court in 1967, in the case *Pierson v. Ray*. Responding to a case wherein a group of 12 white and three black civil rights-aligned Episcopal priests were arrested in Mississippi for “breach of peace” when they refused to leave a coffee shop while waiting for a bus. Ultimately, although the U.S. Supreme Court found the Mississippi law under which the clergymen were arrested was unconstitutional, they determined that the arresting officers were not liable for civil damages, because they “...act[ed] under a statute that [they] reasonably believed to be valid, but was later held to be unconstitutional, on its face or as applied.”

In *Pierson v. Ray*, the Supreme Court established a defense for public officials, and for law enforcement specifically, that would protect them from civil liability in cases where it was clear

that they were acting in good faith. Fifteen years later, in the case *Harlow v. Fitzgerald*, things took a turn.

In that case, the Supreme Court chose to amend and expand qualified immunity. Instead of relying on an affirmative, "good faith" defense that would be presented at trial, the Court chose to base qualified immunity claims on the legal concept of "reasonableness," and, critically, shifted the burden of proof onto the claimant rather than the public official. Effectively, the Court decided that requiring officials accused of trampling on individuals' constitutional rights to stand trial and defend their actions was too high a burden, and so officials should be further protected "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Public Officials Off the Hook

With that, the Court chose to codify a version of qualified immunity that broadened its protections of public officials in all but the most egregious cases, to the detriment of everyday people. The decision made in *Harlow* created a new version of qualified immunity that, by the Court's own admission a few years later in *Malley v. Briggs*, granted "ample protection to all but the plainly incompetent or those who knowingly violate the law."

But, as we've seen in the years since, even officials who show incompetence or a willingness to violate the law have been protected by qualified immunity. One need not look very hard to find stories such as those of Alexander Baxter, a homeless Tennessee man who was subjected to a vicious attack by a police dog even after sitting down with his hands in the air and surrendering to police, or of Malaika Brooks, a seven-months pregnant Washington state woman who was tased three times in front of her 11-year-old son after speeding on their way to her son's school, not to mention countless other instances of police brutality over the years—in all of these cases, qualified immunity was used to dismiss civil suits over personal injury, constitutional rights violations and even wrongful death.

Luckily, voices from across the political spectrum are beginning to realize the error of the qualified immunity doctrine and are coming together to say that it is past time this harmful doctrine is abolished. Although this concept has been cast as a partisan issue in recent years, the facts show otherwise. Organizations as ideologically diverse as the Cato Institute, the ACLU, the NAACP, the Institute for Justice, Americans for Prosperity and more, as well as both conservative and liberal jurists and legal scholars have made the case that it is time to reexamine and end the outdated, legally shaky and harmful doctrine of qualified immunity.

Earlier this month, my colleague State Senator LaTonya Johnson and I took measures to add Wisconsin to this growing coalition of voices saying enough is enough and demanding an end to this mistake. Along with 18 of our colleagues, Sen. Johnson and I have introduced LRB-1942, a bill to end qualified immunity for law enforcement officers in Wisconsin.

The people of Wisconsin deserve public officials who will be fully held to account if they violate the constitutional rights of the people they are sworn to protect and serve.

The people of Wisconsin deserve an end to qualified immunity in our state.

Jonathan Brostoff represents the 19th District in the Wisconsin State Assembly.