

Cases

"Only the Plainly Incompetent"-A Federal Judge Takes Qualified Immunity to Task

By IMLA Editorial Staff

"What shall a 'good citizen,' or a 'good police officer,' do when the United States Constitution tells them one thing and their common sense another?" So began the opinion by federal Senior Judge Jack Weinstein of New York's Eastern District earlier this summer in in . The citizen in this instance was Larry Thompson (Thompson), a US Navy veteran, a Post Office supervisor, and a married father of two with a good reputation. In January 2014, his sister in law, Camille Watson (Watson) called 911 to report that Thompson was abusing his two-week old daughter. EMTs arrived. Watson provided no additional corroboration other than to say that she had seen red rashes on her niece's buttocks; to the responders she seemed "strange" and perhaps had "a learning disability." She led them "upstairs" to Thompson's Brooklyn apartment, but he would not let them in, so police were summoned.

The EMTs informed the officers that they had a "report of a child being abused" and they needed to "check the baby out." Police knocked on Thompson's door and requested entry; he responded "[n]ot without a search warrant. I don't agree to you[] coming in without one." Thomson alleges that when officers attempted to enter and he blocked their path, he was knocked to the floor, choked, kicked and punched while handcuffs were applied. The EMTs took the child to a hospital, where the red marks were determined to be diaper rashes.

Thompson was transported to the precinct house, then to a hospital where he was prescribed pain medication and a neck brace. He was held in custody for two days, during which he was arraigned on charges of Obstructing Governmental Administration and Resisting Arrest. He was never charged with child abuse, and all charges were dismissed on motion of the Brooklyn District Attorney.

He sued the officers for: (1) unlawful entry; (2) false arrest; (3) excessive force; (4) malicious prosecution; (5) denial of right to a fair trial; (6) failure to intervene; and (7) denial of medical treatment. Refusing qualified immunity, Judge Weinstein denied the officers' summary judgment motions and ordered that the first six claims proceed to trial:

> Qualified immunity is denied. Its grant, in the instant case, would be inconsistent with the purpose of 42 U.S.C. § 1983. "[Section] 1983 was [created] to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." Courts should be encouraged and "allowed to play their historic role as the guardians of constitutional rights, not prohibited from doing so by a judiciary that elevates its concern for comity above the constitutional rights to which all persons are entitled." The courts, police, and public, will benefit from a clarifying jury decision in this often replicated situation. (citations omitted).

Weinstein's opinion would be relatively unremarkable but for its extended critique of the current Supreme Court interpretation of qualified immunity, and his own explication of the principle. He notes that the doctrine "has recently come under attack as over-protective of police and at odds with the original purpose of section 1983: 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'"

Stating that "the Court's expansion of immunity, specifically in excessive force cases, is particularly troubling," he cites a critic who pointed to the recent *Kisela* decision.

> The Supreme Court's decision [in Kisela v. Hughes, 138 S. Ct. 1148 (2018)] serves to expand qualified immunity for police officers to an unprecedented and dangerous degree, becoming, as Justice Sotomayor aptly noted in her dissent, 'an absolute shield for law enforcement officers' and 'gutting the deterrent effect of the Fourth Amendment.' As the nation continues to mourn the recent deaths of [citizens] at the hands of police, we remain concerned that this ruling will undermine efforts to hold law enforcement officers accountable for their use of excessive force, which has led to the tragic loss of too many innocent lives.

He cites more of Justice Sotomayor's dissent in *Kisela*: "This decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells . . . the public [and officers] that palpably unreasonable conduct will go unpunished." As the Judge articulated (and as thoroughly discussed in our feature on the doctrine in this issue, qualified immunity shields "all but the plainly incompetent." Police officers are immune from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

He faults the *Harlow* decision as the beginning of retreat from a defensible posture. While *Harlow* noted that "[Q]ualified immunity would [traditionally] be defeated if an official . . . took the action with the malicious intention to cause a deprivation of constitutional rights or other injury," that opinion expanded immunity to any conduct that is not in violation of a "clearly established" law, regardless of whether the official acted in good or bad faith. "The change in the law means that even officers who intentionally or maliciously flout the Fourth Amendment are immune from suit if their actions were "objectively reasonable."

Weinstein's main criticism is with the sequence in which qualified immunity is now examined:

> *Saucier v. Katz,* 533 U.S. 194 (2001) required district courts to first determine whether a constitutional violation had occurred, and if so, proceed to determine whether the law was "clearly established" at the time. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) rejected *Saucier*, allowing courts to grant qualified immunity without

> analyzing whether or not a constitutional violation had occurred, but solely on the finding that the right at issue was not "clearly established." If the law is not "clearly established," an officer's actions, the Court assumes, can only be reasonable. This approach has led to decisions like *Mullenix*, where the Court declined to address the question of whether a plaintiff's constitutional rights were violated, but decided only if the right was "clearly established."

He references with respect the standard originally expressed in *Hope v. Pelzer*, 536 U.S. 730 (2002), which called for defining "clearly established law" at a "high level of generality;" the key inquiry being whether officers are on "notice their conduct is lawful." In *Hope*, the Court overruled the Eleventh Circuit, finding that officers had fair warning that shackling a prisoner to a post for seven hours in a standing position with only two water breaks and no opportunity to use the facilities violated his constitutional rights. Butr the "high level of generality" standard was short-lived: in *Ashcroft v. al-Kidd*, Justice Scalia inserted the word "every" in the operative sentence, so that the new rule of law became that a right is clearly established only when "[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right." (emphasis added).

As Weinstein sees it, the failure to address whether an act is constitutional prevents the creation of "clearly established" law needed to guide law enforcement and courts on narrow issues not yet decided by the Supreme Court, as indicated in this cite from a Michigan Law Review article: "At a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices, this trend toward granting immunity while failing to articulate constitutional rights will surely have far-reaching, negative repercussions. (Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity,* 113 Mich. L. Rev. 1219, 1250 (2015).

The Supreme Court's policy justifications for qualified immunity, says Weinstein, have evolved over time, but always in the background is the threat of financial cost to government officials. While individuals appear to be at risk, in reality, individual police officers are virtually always indemnified by governmental treasuries. If the immunity springs from a more generalized desire to avoid "unnecessary litigation," that too is suspect: Weinstein cites sources positing that qualified immunity actually may *increase* the costs and delays associated with Section 1983 litigation—he points to a report which found that although only 3.9% of 979 cases studied presented facts in which qualified immunity could be raised, the defense was in fact raised by defendants in more than 37% of these cases–and was sometimes raised multiple times, at the motion to dismiss stage, at summary judgment, and through interlocutory appeals.

He also cites empirical evidence refuting the theory that the time and expense of litigating qualified immunity cases is worthwhile because it protects defendants from discovery and trial:

> But in the five districts in my study, just 8.6% of qualified immunity motions brought by defendants in my docket dataset resulted in case dismissals. The remaining 91.4% of qualified immunity motions brought by defendants required the parties and judges to dedicate time and resources to briefing, arguing, and deciding the motions without shielding defendants from discovery and trial. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 60–61 (2017).

That study found that, even in cases when immunity was granted, it was most often done at summary judgment stage, failing to avoid litigation due to the extensive fact discovery required to litigate a motion for summary judgment.

This is an unacceptable situation for Weinstein. "The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress; state governments are protected by sovereign immunity and municipalities are not liable under *Monell* unless individual liability can be first proven. See, e.g., *Cordero v. City of New York*, 282 F. Supp. 3d 549, 557 (E.D.N.Y. 2017). His solution? "Courts should, when reasonable, follow Saucier's guidance to first analyze whether a constitutional violation occurred, instead of skipping to whether the right at issue was "'clearly established.'"

Applying the law to the facts before him, Weinstein declined to find grounds for qualified immunity, allowing six of the seven counts to go to trial. That proceeding began on September 4, 2018, and will no doubt be followed with interest. ML

Amicus Corner Cont'd from page 35

(in *Lozman* Justice Kagan asked whether the rule should apply to "serious" crimes or felonies) there would be a rule that says probable cause bars a First Amendment retaliation claim; however in less serious cases, perhaps these Justices would allow the suit to go forward even if the officer had probable cause to arrest if there was evidence of retaliatory animus.

Based on all of this, the best case scenario is that there are five votes that would conclude that the probable cause precludes retaliatory arrest claims as a matter of law. However, if the Court is looking for a compromise, it may find in favor of the officers, but fashion a rule that does not totally preclude these cases from going forward in a situation where probable cause to arrest exists. Specifically, the Justices could try to carve out the bar fight or riot / protest examples from less serious arrests. Of course, we won't know for sure until the Court issues its decision, which will be sometime before June 2019.

1. Matt White, Arctic Man: Wild Rides and Crazed Nights at America's Most Extreme Ski Race, SB Nation, July 23, 2014, available at: https://www.sbnation.com/longform/2014/7/23/5923357/arctic-man-alaska-ski-race-profile. The race itself involves a skier barreling down a mountain and linking up with a snowmobiler by grabbing a tow rope (think water skiing) and then speeding behind the snowmobile at 90 mph. To watch a short 2-minute video about the festival, click here: https://www.youtube.com/watch?v=xA8RxM31OzU

2. *See Reichle v. Howards* 566 U.S. 658 (2012), oral argument transcript, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-262.pdf

3. Judge Kavanaugh authored a dissent from the denial of rehearing en banc in *District of Columbia v. Wesby.* In his dissent from denial, he argued the officers should have been granted qualified immunity, making some of the same types of arguments the Chief Justice seems concerned about in terms of personal liability for officers for civil rights claims.

4. *See Lozman v. City of Riviera Beach,* oral argument transcript, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-21_67ip.pdf ML