FEDERAL QUALIFIED IMMUNITY AND HOW IT BECAME SO PROBLEMATIC

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> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the 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."

42 U.S.C. §1983

I. Background

Since 1982, the U.S. Supreme Court has confronted the qualified immunity issue in over 30 cases. Plaintiffs have prevailed three times. Since June 2020, the Court has denied certiorari in 18 cases where qualified immunity was in issue.

II. The Test – Its Evolution and the Current Standard

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

-police officers could be sued for damages under §1983 for arresting plaintiffs pursuant to an unconstitutional statute if "the defense of good faith and probable cause" was available to them.

Scheuer v. Rhodes, 416 U.S. 232 (1974)

-transforming the claim-specific defense in *Pierson* into a general defense applicable to *all* §1983 claims that the defendant officer had "reasonable grounds coupled with good-faith belief" for believing his actions to be constitutional.

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

-eliminating the subjective branch of qualified immunity and holding that 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 should have known.

III. What is Clearly Established Law; What Court; Need a Case on Point?

Anderson v. Creighton, 483 U.S. 635 (1987)

-answering the questions left by *Harlow* just how clearly established a constitutional right had to be before the defendant could be held liable for violating it and, more importantly, at what level of specificity that inquiry should be made.

-and demanding clarity at a fairly concrete level, such that "in light of pre-existing law the unlawfulness must be apparent" to a reasonable person in the actor's situation.

Ullery v. Bradley, 949 F.3d 1282 (10th Cir. 2020)

-stating that the defendant's argument that only the Supreme Court can clearly establish law in the particular circumstances of a case, "we do not think only Supreme Court precedents are relevant in deciding whether a right is clearly established. Following the Supreme Court's lead, nearly all of our sister circuits, like us, consider both binding circuit precedent and decisions from other circuits in determining whether the law is clearly established. . . . Defendant's argument therefore conflicts with Supreme Court authority, our precedents, and the decisions of our sister circuits."

IV. Sequencing

Saucier v. Katz, 533 U.S. 194 (2001)

-two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that the plaintiff has alleged violate a constitutional right. Second, if the plaintiff has satisfied the first step, then the court must decide whether the right at issue was "clearly established" at the time of the defendant's misconduct.

Pearson v. Callahan, 555 U.S. 223 (2009)

-reconsidering the two-step procedure required in *Saucier*, and concluding that while the sequence set forth is often appropriate, it should no longer be regarded as mandatory.

V. Affirmative Defense

Gomez v. Toledo, 446 U.S. 635 (1980)

-qualified immunity is an affirmative defense. But, once raised, some courts hold that the burden then shifts to the plaintiff to show that the right allegedly violated was clearly established. *See, e.g., Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019); *Daugherty v. Sheer*, 981 F.3d 386 (D.C. Cir. 2018); *Felarca v. Birgeneau*, 891 F.3d 809 (9th Cir. 2018); *Rivera-Corraliza v. Morales*, 794 F.3d 208 (1st Cir. 2015); *Becker v. Bateman*, 709 F.3d 1019 (10th Cir. 2013); *Mannoia v. Farrow*, 476 F.3d 403 (7th Cir.

2007); *Gardenhire v. Schubert*, 205 F.3d 303 (6th Cir. 2000); *Pierce v. Smith*, 117 F.3d 806 (5th Cir. 1997). Other courts place burden on the defendant. See, e.g., *Slater v. Deasey*, 789 Fed.Appx. 17 (9th Cir. 2019); *Outlaw v. City of Hartford*, 884 F.3d 351 (2d Cir. 2018); *Halsey v. Pfeiffer*, 750 F.3d 273 (3d Cir. 2014); *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2007); *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25 (1st Cir. 2001).

VI. Importance of Facts

Kisela v. Hughes, 584 U.S. ____, 138 S.Ct. 1148 (2018)

-this case lies at the intersection of two doctrines. The first is qualified immunity, which applies unless the action violated "clearly established law." This and other decisions establish that the search for sufficiently definite guidance in the precedents is heavily fact-dependent. Second doctrine is the Fourth Amendment standard of "objective reasonableness" for the use of deadly force. This doctrine is also fact-dependent, "require[ing] careful attention to the facts and circumstances of each particular case." Moreover, reasonableness is not to be judged in hindsight, but with "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."

VII. No Case on Point Necessary; No Qualified Immunity

Hope v. Peltzer, 536 U.S. 730 (2002)

-qualified immunity did not apply to a lawsuit challenging the Alabama Department of Correction's use of the "hitching post", a punishment whereby inmates were immobilized for long periods of time.

Groh v. Ramirez, 540 U.S. 551 (2004)

-law enforcement officers' use of a search warrant that does not describe the items sought but is approved by a magistrate judge, violates the Fourth Amendment's prohibition of unreasonable searches and seizures. Further, officers can be sued for executing the warrants, despite the fact that no court had previously held such a search unconstitutional.

Taylor v. Riojas, 592 U.S. ____, 141 S.Ct. 52 (2020) (per curiam)

-because any reasonable correctional officer should have realized that Taylor's conditions of confinement offended the Eighth Amendment, the U.S. Court of Appeals for the Fifth Circuit erred in granting the officers qualified immunity. Granted, vacated, remanded.

Prince v. Alamu, Cert. Docket No. 20-31 (Feb. 22, 2021)

-claim that a prison guard used excessive force in violation of the Eighth Amendment when he pepper-sprayed in inmate a single time immediately at the end of a disturbance in the prisoner's housing unit. The Fifth Circuit held that while the guard violated the Eighth Amendment, he was entitled to qualified immunity.

-summary disposition vacating judgment and remanding to the Fifth Circuit for further consideration in light of *Taylor v. Riojas*.

VIII. Private Defendants

Wyatt v. Cole, 504 U.S. 158 (1992)

-no qualified immunity for private parties who invoked state replevin, garnishment, or attachment statutes and were sued under §1983 when those statutes were later declared unconstitutional.

Richardson v. McKnight, 521 U.S. 399 (1997)

-no qualified immunity for guards at a privately run correctional facility.

Estate of Jensen by Jensen v. Clyde, 989 F.3d 848 (10th Cir. 2021)

-private doctor who was employed by county on part-time basis, in providing medical services to inmates at county jail where he worked alongside the jail's officers and full-time staff, had ability to raise qualified immunity defense.

Tanner v. McMurray, M.D., 989 F.3d 860 (10th Cir. 2021)

-no qualified immunity for private medical professionals employed full-time by a multi-state, for-profit corporation systematically organized to provide medical care in correctional facilities.

IX. Other Cases of Note

Owen v. City of Independence, 445 U.S. 622 (1980)

-No qualified immunity for municipalities (no history, tradition, or policy supports qualified immunity).

Craft v. White, 840 Fed.Appx. 372 (10thCir. Jan. 14, 2021)

-qualified immunity for officers on plaintiff's claims of malicious prosecution and retaliatory prosecution.

Frasier v. Evans, 992 F.3d 2003(10th Cir. Mar. 29, 2021)

-no clearly established First Amendment right to film the police even though there was no argument that the officers forfeited the clearly established law question in the district court.

Huff v. Reeves, 996 F.3d 1082 (10th Cir. May 10, 2021)

-relying on *Taylor v. Riojas* to reverse grant of qualified immunity to officer who repeatedly shot the plaintiff who had been taken hostage after a bank robbery.

Truman v. Orem City, ____F.3d____, 2021 WL 2621109 (10th Cir. June 25, 2021)

-citing *Taylor v. Riojas* to reverse grant of qualified immunity to prosecutor who was alleged to have fabricated evidence which was used in a criminal case against the plaintiff.

Dalton v. Chief Ed Reynolds et al., ____F.3d____, 2021 WL 2641859 (10th Cir. June 28, 2021)

-noting that although not factually identical, factually similar cases have clearly established that providing less protection to domestic violence victims, or certain sub-classes of domestic violence victims, violates the Equal Protection Clause.