Qualified Immunity of Law Enforcement Officials

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"Hundreds of Police Agencies Losing Insurance Coverage," *The Washington Post,* October 26, 1976, p. A3.

"Many Insurers Leave Field, Citing Surge in Lawsuits," *The Wall Street Journal,* November 7, 1977, p. 1.

"Are Officers Afraid to Act?" *The Wall Street Journal,* November 7, 1977, p. 1.

Headlines, such as those quoted above, reveal a serious problem facing law enforcement agencies everywhere. The surging number of lawsuits charging police officers with a variety of misconduct has caused insurance carriers to drop their coverage of a large number of departments. Where coverage is continued, or a new policy sought, departments have found the new premium rates exorbitant or even prohibitive.

This does not mean that a law enforcement officer is a poor risk. On the contrary, most suits are won by the officer.[1] The problem, primarily, is attributable to the skyrocketing cost of litigation. Even if the officer wins in the lawsuit, the insurance premiums are likely to go up.

Litigation expenses create pressure on the agency to settle the claim out of court. The temptation to settle may be great, even if the claim against the officer lacks merit. Settlement may appear attractive when compared to the long-run litigation costs, but it must be assessed in light of the morale problem it may cause and the increased number of suits it may invite in the future. Perhaps even more important than the cost involved is the need to carry a case forward simply to establish a principle. This was done in *Hill* v. *Rowland.*[2]

In *Hill,* two police officers were sued in Federal court for violating plaintiff's constitutional rights, which violation assertedly arose from Hill's warrantless arrest without probable cause. The defendant officers asked the judge to instruct the jury that the defense of good faith and probable cause was available to them. That is, if the officers reasonably believed in good faith that the arrest was constitutional, then it would be the jury's duty to render a verdict for the officers even though the arrest was in fact unconstitutional. The judge refused the defendants' request, but rather instructed the jury that the standard of probable cause was an objective one, not personal to the officers.

The jury found for the plaintiff and assessed money damages against both officers in the amount of $2.50 each. It would have no doubt been cheaper to pay the damages, but an important principle was involved. On appeal, the court's ruling was reversed. The appellate court found the judge had improperly instructed the jury as to the defense available to the officers. The test of liability was not the objective test of probable cause, but rather the partly subjective test of the reasonable good faith belief of the officer in the legality of the arrest.

The *Hill* case has aided officers everywhere in gaining a better understanding of the concept of probable cause. Furthermore, it has been a case of immense value to attorneys asked to defend similar cases.

There is no doubt that the cancellation of insurance coverage, increased premiums, and escalating litigation costs are all serious problems, but none of them compare in significance with the problem facing law enforcement agencies suggested by the last quoted headline: "Are Officers Afraid to Act?" If an officer feels that he faces the prospect of monetary loss because of a reasonable mistake he might make while performing his duty, a duty which calls for the exercise of discretion, he may indeed be afraid to act. Even the most conscientious officer will be deterred from exercising his judgment independently and forcefully if the likely prospect is a civil suit in which he risks personal, financial loss.

Surely, society is not served by an officer who is afraid to act, or is unduly timid in the exercise of his discretion. He must perform his duty in a firm, vigorous, and enthusiastic manner. The fear of financial loss and of being tied up in a long, debilitating lawsuit may have a chilling effect on those desirable qualities.

If the work of law enforcement agencies is to go forward, everyone from the newest man on the force to the chief administrator must be assured that action taken in good faith fulfillment of their responsibilities and within the bounds of reason will not be punished, and they need not exercise their discretion with undue timidity. The public interest is served by nothing less.

"The law ought to, and does, provide the law enforcement officer with protection when he acts in good faith and reasonably believes that his conduct is lawful."

It states the obvious to say that a law enforcement officer is called upon to use discretion and make decisions. One of his primary responsibilities is to see that public order is maintained. In doing so, he is required to make decisions in an atmosphere of confusion, ambiguity, and swiftly moving events. He is called upon to act under circumstances where judgments are tentative. He often discovers that the unambiguous course of action becomes clear only by use of hindsight. If such is the obligation imposed upon the officer by the duties of his office, it would be manifestly unjust to subject him to civil liability for the reasonable exercise of such discretion.

If an officer fails to act when action is needed, or if he fails to implement decisions when they are made, he does not fully and faithfully perform the duties of his office. The law ought to, and does, provide the law enforcement officer with protection when he acts in good faith and reasonably believes that his conduct is lawful. The nature of that protection is the subject of this article. The U.S. Supreme Court's formulation of this protection is called "qualified immunity." This article will discuss several cases interpreting this immunity, as analyzed by the Court in connection with civil actions against police officers filed pursuant to Title 42, U.S. Code, Section 1983 (hereafter section 1983).[3]

Qualified Immunity Doctrine.

It has long been the rule in this country that certain officials, acting in their official capacities, are immune from lawsuits. It is well established that certain common law immunities survive in section 1983 litigation.[4] Certain officials have absolute immunity, while others have only qualified immunity.

Absolute v. Qualified Immunity.

The procedural difference between absolute and qualified immunity is important. The U.S. Supreme Court has stated that absolute immunity defeats a lawsuit at the outset.[5] It is a complete bar to a lawsuit. Thus, so long as the official's action was within the scope of his employment, he cannot be sued successfully. On the other hand, the fate of an official with only qualified immunity depends upon the circumstances and motivations of his actions.

Absolute immunity is easy to understand and apply. It is absolute protection against civil liability. The official will not even be put to the task of defending against the allegations. Examples of those officials whom the Supreme Court has declared to have such immunity are State legislators,[6] judges,[7] and prosecuting attorneys.[8]

Qualified immunity is not so easy to understand and is even more difficult to apply. As one Justice expressed it, "It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: the 'immunity' disappears at the very moment when it is needed."[9]

The U.S. Supreme Court has considered several times the immunity of State officers when sued under section 1983 for alleged violations of constitutional rights. These decisions are instructive for present purposes.

Pierson v. *Ray*[10] presented the issue of whether immunity is available to local police officers (that segment of the executive branch of State government most frequently exposed to situations which can give rise to claims under section 1983). Relying on common law, the Court held that police officers were entitled to a defense of "good faith and probable cause," even though an arrest might subsequently be proven unconstitutional. The Court observed that common law had never granted police officers absolute immunity.

Several years later, in *Scheuer* v. *Rhodes,*[11] the Court was faced with the issue of whether "higher officers of the executive branch" of State governments were immune from liability under section 1983 for violations of constitutionally protected rights. There, the governor of a State, the senior and subordinate officers of the State National Guard, and a State university president had been sued on grounds that they had suppressed a civil disturbance in an unconstitutional manner. Holding that the officials involved were not entitled to absolute immunity, the Supreme Court pointed out:

". . . in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[12]

Subsequent decisions have applied the *Scheuer* standard in other contexts. In *Wood* v. *Strickland,*[13] school administrators were held entitled to claim a similar qualified immunity. A school board member would lose his immunity from a section 1983 suit

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only if "[he] knew or reasonably should have known that the action [he] took within [his] sphere of official responsibility would violate the constitutional rights of the student affected, or if [he] took the action with the malicious intention to cause a deprivation of [constitutional] rights or other injury to the student."

Last term, the Court, in *Procunier* v. *Navarette,*[14] furnished further instruction regarding the qualified immunity doctrine. In that case, Navarette, an inmate of Soledad Prison in California, filed a complaint charging prison officials and others with interfering with his outgoing mail, which conduct allegedly violated his constitutional rights. The officials moved for dismissal for failure to state a claim on which relief could be granted or alternatively for summary judgment. The claim was not that they shared the absolute immunity accorded judges and prosecutors, but that they were entitled to the qualified immunity accorded those officials involved in *Scheuer.* Affidavits in support of the motion and counter-affidavits opposing it were before the district court. The court granted summary judgment. Navarette appealed to the U.S. Court of Appeals for the Ninth Circuit. While agreeing that the officials had qualified immunity, the court of appeals held the officials were not entitled to summary judgment because there were issues of fact to be resolved, and because when the facts were viewed, most favorably to Navarette, the defendants were not entitled to judgment as a matter of law.[15] The Supreme Court reversed, holding that the rights Navarette alleged to have been violated were not "clearly established" at the time of the conduct complained of, and therefore no remedy for past conduct is allowable. The officials, under the qualified immunity doctrine, were entitled to summary judgment as a matter of law.

The significance of *Procunier* is that law enforcement officers are protected by qualified immunity, as a matter of law, if their actions are not clearly prohibited by statutory or decisional law when they acted and if they do not act with malice. The officer should not only be protected from possible liability, but also, in most cases, from the risks and financial burdens of a trial itself.

This does not mean that the citizen whose constitutional rights have been violated is left without a remedy. On the contrary, the Court's majority has persistently emphasized that the extension of absolute immunity from liability to law enforcement officers would seriously erode the protection provided by basic constitutional guarantees. It is not unfair to hold liable an officer who knows, or should know, that he is acting outside the law, and to insist on an awareness of clearly established constitutional limits. The Court has reasoned that while officers are not absolutely immune, the public interest is sufficiently protected by giving officers and their superiors qualified immunity.

The chief of police or other high executive officers do not have absolute immunity. The Court recently stated:

"It makes little sense to hold that a government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees."[16]

Damages for Violation of Section 1983.

Only where qualified immunity cannot be established will an officer be subject to pay personal damages. The measure of such damages is often speculative. The U.S. Supreme Court addressed this problem last term in an interesting case, *Carey* v. *Piphus.*[17] There, two students were suspended from a public elementary school and a public secondary school without being given an adjudicatory hearing. The students filed suit, and on stipulated facts, a Federal district court held that the students had been suspended without the procedural due process required by the 14th amendment, and that they were entitled to declaratory relief, but that their claims for damages failed for complete lack of proof.

The U.S. Court of Appeals for the Seventh Circuit reversed,[18] holding that the students were entitled to recover substantial nonpunitive damages even if they did not prove that any other injury was caused by the denial of procedural due process. Such damages should be awarded, the court held, even if there was no proof of individualized injury to the plaintiff, such as mental distress. Furthermore, the students were entitled to substantial nonpunitive damages even though

it may later be determined that the suspensions were justified in the first place. The plaintiff had successfully contended that substantial damages should be awarded under section 1983 for the deprivation of constitutional rights whether or not any injury was caused by the deprivation. This, the plaintiff argued, is appropriate because constitutional rights are valuable in and of themselves, and because of the need to deter violation of constitutional rights. Furthermore, deprivation of constitutional rights may be **presumed** to cause some injury.

On appeal, the Supreme Court of the United States reversed. In the absence of proof of **actual** injury, the students were entitled to receive only nominal damages, not to exceed $1, from the school officials. The amount of damages recoverable for a violation of a constitutional right generally must be evaluated in the context of the interests sought to be protected by the right, and the common law tort rules of damages.

The basic purpose of a damage award in section 1983 cases is to compensate persons for injuries caused by the deprivation of constitutional rights. The plaintiff must be able to prove what injuries he has suffered. Thus, injury will not be presumed.

In *Carey,* an award of substantial damages for injuries caused by the suspension of public school students not accorded procedural due process would constitute a windfall, rather than compensation. The Court also stated that the officials would be entitled to prove in mitigation of special damages that the plaintiffs probably would have been suspended even if there had been a hearing.

One additional case that may have significance to a State official, decided last term by the Court, is *Butz* v. *Economou.*[19] While the opinion dealt with immunity of a top Federal executive (Secretary of Agriculture), it could nevertheless prove valuable to a State officer defending a section 1983 allegation. The Court held that it would be untenable to draw a distinction for purposes of immunity between suits brought against State officials under section 1983 and suits brought directly under the Constitution against Federal officials. Such officials, even though they might be of cabinet level, should enjoy no greater zone of protection when they violate Federal constitutional rules than do State officers. Therefore, the defendant was entitled to no more than qualified immunity. Responding to the prospect that such officials might find themselves inundated with suits which might have a devastating effect upon the exercise of their discretion in a vigorous and forthright manner, the Court suggested that Federal courts be alert to insubstantial lawsuits and to quickly terminate them; that unless the complaint states a compensable claim for relief it should not survive a motion to dismiss; and that the Federal courts firmly apply the Federal Rules of Civil Procedure to ensure that officials are not harassed by frivolous lawsuits.

Message to Law Enforcement Officials.

(1) You have a qualified immunity from monetary liability under Title 42, U.S. Code, Section 1983.

(2) This immunity is unavailable if you act with such disregard of another's clearly established constitutional rights that your action cannot reasonably be characterized as being in good faith. That is, if you knew or reasonably should have known that the action you took within the sphere of official responsibility would violate the rights of another, you no longer have immunity.

(3) Given this immunity, damage suits alleging constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for judgment on the pleadings. Properly supported motions documenting both the subjective and the objective elements of the defense of good faith with supporting material should be filed.

(4) Only where the qualified immunity is not established will an officer be subject to personal damages. But even there, those damages would be nominal, unless the plaintiff can prove actual damages.

(5) *Procunier's* interpretation of the qualified immunity doctrine reduces the likelihood of an officer being subject to trial for violating constitutional rights. *Carey* reduces the likelihood of large, speculative damages awarded against law enforcement officers where the qualified immunity doctrine is not available. *Butz's* message to courts below is that officials should not be harassed by frivolous lawsuits, and that Federal courts should dismiss insubstantial claims. **FBI**

Footnotes

[1] "Survey of Police Misconduct Litigation 1967–1971," (1974), Americans for Effective Law Enforcement, Inc., Legal Defense Center.

[2] 474 F.2d 1374 (4th Cir. 1973).

[3] Title 42, U.S. Code, Section 1983 reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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."

[4] *Pierson* v. *Ray,* 386 U.S. 547 (1967).

[5] *Imbler* v. *Pachtman,* 424 U.S. 409 (1976).

[6] *Tenny* v. *Brandhove,* 341 U.S. 367 (1951).

[7] *Pierson* v. *Ray, supra* note. 4.

[8] *Imbler* v. *Pachtman, supra* note. 5.

[9] *Butz* v. *Economou,* 57 L.Ed. 2d 895, 925 (1978) (Justice Rehnquist, dissenting).

[10] *Pierson* v. *Ray, supra* note 4.

[11] *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974).

[12] *Id.* at 243.

[13] 420 U.S. 308 (1975).

[14] 55 L.Ed. 2d 24 (1978).

[15] *Navarette* v. *Enomoto,* 536 F.2d 277 (9th Cir. 1976).

[16] *Butz* v. *Economou, supra* note 9, at 915.

[17] 55 L.Ed. 2d 252 (1978).

[18] 545 F.2d 30 (7th Cir. 1976).

[19] *Butz* v. *Economou, supra* note 9.

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