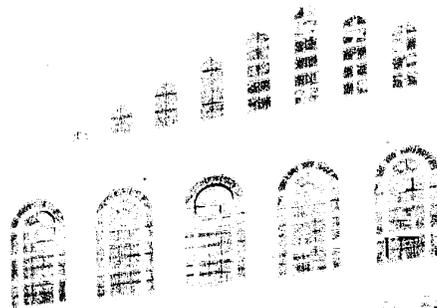


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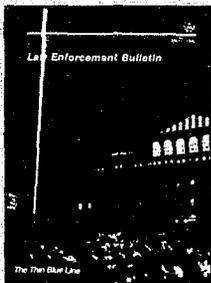
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The Cover: During a candlelight ceremony at the proposed site of the National Law Enforcement Officers Memorial, a crystal blue laser symbolizes the "thin blue line" of protection law enforcement officers provide. See page 24. Cover photo courtesy of Walter Gundy.

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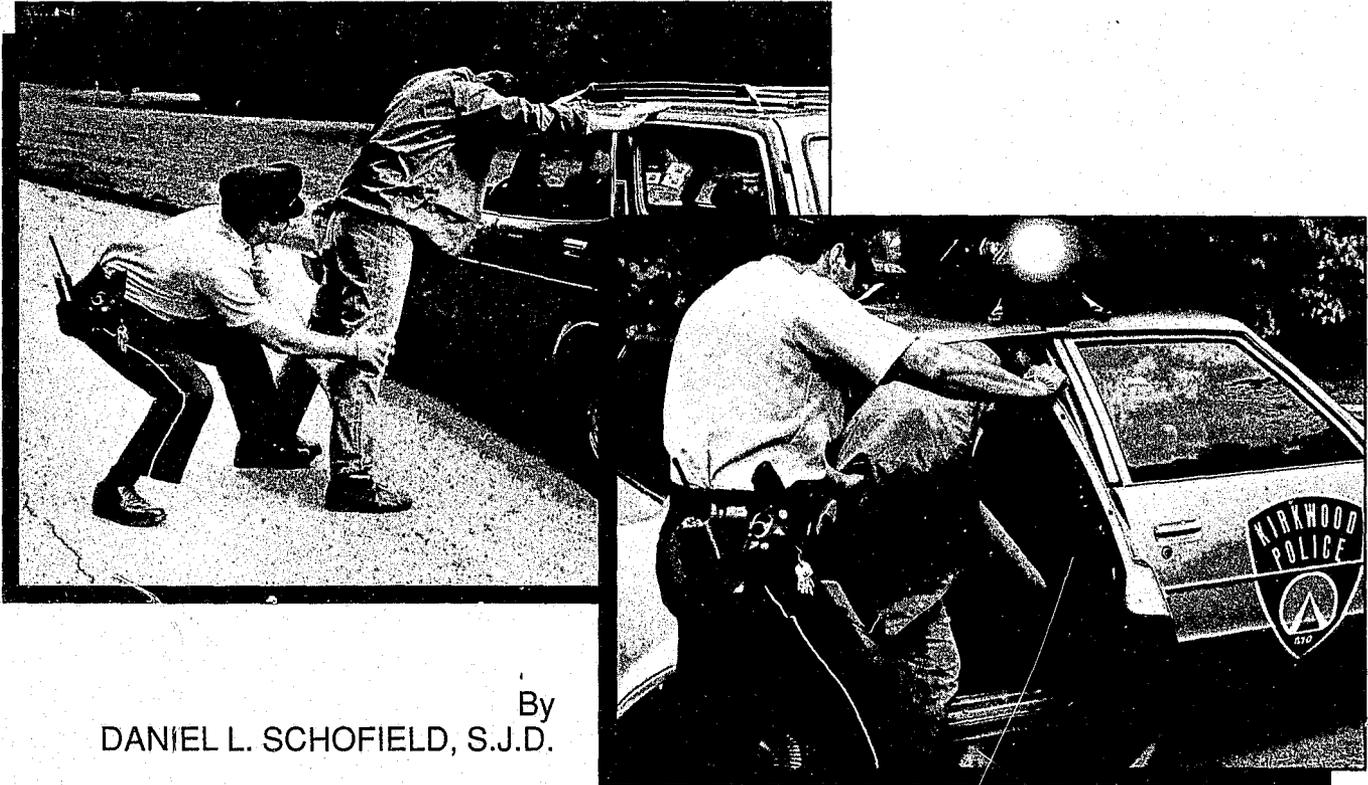
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Personal Liability

The Qualified Immunity Defense



By
DANIEL L. SCHOFIELD, S.J.D.

Law enforcement officers face many stressful situations inherent in their profession, including the threat of being sued and held personally liable for money damages because of their actions. Since officers are often placed in fast-breaking situations, they must decide whether to arrest or search with little opportunity to ob-

tain prior legal advice. By its very nature, law enforcement inevitably places officers in situations where they must make difficult judgments, balancing the extent of the authority they exercise with the constitutional rights of the citizens they serve. Citizens rightly expect officers to understand the constitutional principles that govern their conduct. At

the same time, law enforcement effectiveness often depends on officers' confidence and willingness to act swiftly and decisively to combat crime and protect the public.

However, the fear of personal liability can seriously erode this necessary confidence and willingness to act. Even worse, law enforcement officers who have an un-

realistic or exaggerated fear of personal liability may become overly timid or indecisive and fail to arrest or search—to the detriment of the public's interest in effective and aggressive law enforcement. In order to accurately assess their potential exposure to personal liability, law enforcement officials must understand the constitutional law that governs their conduct. They must also understand the protection of qualified immunity that shields officers from personal liability for unconstitutional law enforcement activity that is deemed objectively reasonable.

This article discusses recent court decisions that clarify the extent of protection from personal liability offered by the qualified immunity defense. The article's primary purpose is to allay officers' unrealistic concerns for personal liability that can inhibit law enforcement effectiveness and undermine morale. It discusses the following aspects of the immunity defense—immunity rationale and scope, the "objective legal reasonableness" test, the "clearly established law" requirement, applicability to unconstitutional law enforcement conduct, and procedural considerations in asserting the defense.

Immunity Rationale and Scope

Immunity is a legally recognized exemption from liability. Recently, in the case of *Forrester v. White*,¹ the Supreme Court described the rationale for immunity as follows:

"Suits for monetary damages are meant to compensate the vic-

tims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in govern-

ing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it."²

These considerations have led courts to create both absolute and qualified immunity defenses. The Supreme Court has been "...quite sparing in its recognition of claims to absolute official immunity,"³ which is limited to officials whose special functions demand total

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...a law enforcement officer's entitlement to qualified immunity is not a mere defense to liability, but an immunity from suit itself....
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protection from suit, such as judges and prosecutors, "...intimately associated with the judicial phase of the criminal process."⁴ While law enforcement officers do not receive absolute immunity protection, the U.S. Court of Appeals for the 10th Circuit held that law enforcement officers charged with the duty of executing facially valid court orders do enjoy absolute immunity from liability for damages resulting from conduct prescribed by that order.⁵ The court found that enforcing a court order is intrinsically associated with a judicial proceeding. Also, it determined that the public interest in the enforcement of court orders essential to the effective function of the judicial process far outweighs the benefit to be gained by making law enforcement officers liable for decisions they are powerless to control.⁶

Courts generally agree, however, that most law enforcement functions do not require absolute immunity protection. For example, in *Malley v. Briggs*, the Supreme Court refused to expand the scope of absolute immunity to the decision of a Rhode Island State trooper to apply for an arrest warrant. In this case, the Court decided that a rule of qualified rather than absolute immunity would give police "ample room for mistaken judgments," and yet not "deter an officer from submitting an affidavit when probable cause to make an arrest is present."⁸

The Court noted that a damages remedy for an arrest following an objectively unreasonable request for a warrant imposes a cost directly on the officer responsible for the unreasonable request and

directly benefits the victim of the police misconduct. The Court commented on the trooper's expansive qualified immunity protection by noting, "[O]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost."⁹

Qualified immunity is designed to insulate responsible law enforcement officers "from undue interference with their duties and from the potentially disabling threat of liability," and it shields from civil liability "all but the plainly incompetent or those who knowingly violate the law."¹⁰

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...law enforcement officers do not normally receive absolute immunity protection...
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Immunity Based on "Objective Legal Reasonableness"

In 1982, the Supreme Court adopted an objective standard for courts to use in determining whether immunity shields official action. The Court described the parameters of qualified immunity defense as follows:

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages in-

sofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a *reasonable person would have known*."¹¹

That standard was further clarified 5 years later when the Court defined "objective legal reasonableness" as the touchstone for a qualified immunity defense. That decision in *Anderson v. Creighton*¹² involved a suit against a Special Agent of the Federal Bureau of Investigation alleging an unconstitutional warrantless search. The U.S. Court of Appeals for the Eighth Circuit had rejected the Agent's claim for qualified immunity, concluding that the law was clearly established that persons are protected from warrantless searches of their homes unless the searching officers have probable cause and exigent circumstances.¹³ The Agent sought review of that court of appeals decision in the Supreme Court. He argued that he was entitled to qualified immunity if he could establish as a matter of law that a reasonable officer could have believed the search to be lawful.

The Supreme Court agreed with the Agent that the court of appeals had erroneously refused to consider whether it was clearly established that the circumstances confronting the Agent did not constitute probable cause and exigent circumstances. The Court made clear that the availability of the qualified immunity defense generally turns on the "objective legal reasonableness" of the action in question assessed in light of the legal rules that were clearly estab-

lished at the time that action was taken.¹⁴

Law enforcement officers do not lose their qualified immunity simply because it is shown that they violated a generalized right, such as the right of citizens to be free from unreasonable searches and seizures. Instead, it must be shown that the law was clearly established in a "particularized" sense, so that "the contours of the right" are clear enough for any reasonable officer to know that what he or she is doing violates that right.¹⁵ This particularity requirement does not mean that law enforcement officers will always be protected by qualified immunity unless the very action in question has been held unlawful. Rather, it means that the illegality must be apparent in light of preexisting law before officers lose their immunity protection.¹⁶ The Court held that law enforcement officials should not be held personally liable when they "...reasonably but mistakenly conclude that probable cause is present."¹⁷ The "objective legal reasonableness" test applied to an allegedly unlawful search requires an examination of the information possessed by the searching officials. The relevant question to be resolved is whether a reasonable officer *could have believed* the Agent's warrantless search to be lawful in light of *clearly established law* and the information that the searching Agent possessed.

The "Clearly Established Law" Requirement

The unlawfulness of the challenged conduct must be apparent in light of preexisting law.¹⁸ The Supreme Court has instructed that

the actions of a reasonably competent officer should be assessed in the light of the legal rules that were "clearly established" at the time the action was taken.¹⁹ A legal right is "clearly established" if the

as the nonbinding precedent.²³ Fourth, courts should determine whether at the time of the incident there was a wide diversity of cases arriving at differing results, or any cases rejecting a similar claim.²⁴

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...unconstitutional police conduct that fails to meet the test of 'objective legal reasonableness' is not entitled to immunity protection.

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contours of that right are sufficiently clear that reasonable law enforcement officials would understand that what they are doing violates that right. Therefore, a qualified immunity defense will generally fail if the plaintiff proves that the law which an officer allegedly violated was "clearly established" at the time the challenged conduct occurred and that a reasonably competent officer should have known of that law.

The Ninth Circuit Court of Appeals said that a determination of whether a legal right was "clearly established" requires courts to survey the legal landscape that existed at the time of the challenged conduct.²⁰ First, in the absence of binding precedent, courts should look to available decisional law from courts in other jurisdictions.²¹ Second, comparisons to previously settled cases should not be limited to "...looking for a repetition of the very action in question."²² Third, courts should determine the likelihood that the Supreme Court or courts in the relevant jurisdiction would have reached the same result

The court said that law enforcement officers are charged with knowledge of constitutional enforcement developments and should not be allowed "...to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law."²⁵ However, courts agree that officers "...are not required to predict the future course of constitutional law."²⁶

The lack of binding precedent or the existence of conflicting decisions usually results in a finding that a law was not "clearly established."²⁷ For example, the 11th Circuit Court of Appeals ruled that two deputy sheriffs were protected from personal liability by qualified immunity for an allegedly unlawful seizure because their conduct did not violate clearly established law.²⁸ The court concluded the plaintiff had the burden of proving that the law allegedly violated by the deputies was "clearly established" at the time the detention occurred and that this burden was not met "...simply by making general, conclusory allegations of some con-

stitutional violation or by stating broad legal truisms."²⁹ Instead, the court said that "plaintiffs must prove the existence of a clear, factually-defined, well-recognized right of which a reasonable police officer should have known."³⁰ The right allegedly violated must have been sufficiently particularized and clear so that reasonable officers in the deputies' position would understand that their particular seizure violated that right.³¹

In that regard, the court held that the case authorities cited by the plaintiff failed to establish that the law was "clearly established" because they involved seizures that were factually distinguishable from the deputies'. Moreover, other court decisions had actually determined that such seizures were constitutionally reasonable. Since the "...line between the lawful and the unlawful is often vague, making it

prior cases involving concrete circumstances and facts similar to the case at issue.

Applicability of Immunity Defense to Unconstitutional Law Enforcement Conduct

The Supreme Court in *Ander-son v. Creighton* made it clear that qualified immunity will protect a law enforcement officer from personal liability if unconstitutional conduct meets the test of "objective legal reasonableness." The Court held that extending qualified immunity to constitutional violations is a reasonable accommodation between governmental need and individual freedom, and is necessary to give conscientious law enforcement officers the assurance of protection that is the object of the immunity doctrine.³³ The Court stated that law enforcement officers should "...know that they will not

legedly made an arrest without probable cause.³⁵ The court noted that "even in the absence of probable cause for an arrest, qualified immunity provides officers with an additional layer of protection against civil liability."³⁶ A fourth amendment violation, although by definition unreasonable, does not foreclose an additional reasonableness inquiry for purposes of qualified immunity.³⁷

The court agreed that the right to freedom from arrest without probable cause is beyond a doubt clearly established. However, it also concluded that the Supreme Court's decision in *Anderson* "mandates an inquiry into the facts surrounding the officer's action in order to determine whether in the light of preexisting law the unlawfulness was apparent."³⁸ Similarly, the Eighth Circuit Court of Appeals concluded that the defense of qualified immunity protects law enforcement officers in cases where they mistakenly conclude that probable cause to arrest is present.³⁹ Since actual probable cause is not necessary for an arrest to be objectively reasonable, the court said the issue is "not probable cause in fact but arguable probable cause."⁴⁰

Of course, unconstitutional police conduct that fails to meet the test of "objective legal reasonableness" is not entitled to immunity protection. In that regard, the Fifth Circuit Court of Appeals held that immunity is lost where it is objectively determined that no reasonable law enforcement officer could have believed that the action was constitutionally justified in light of clearly established law.⁴¹

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[The qualified immunity defense does] offer generous protection to conscientious officers who make objectively reasonable mistakes.

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difficult for officers to know precisely which seizures are constitutional," the court said qualified immunity protection should only be lost when a law enforcement officer engages in unconstitutional conduct that crosses a bright line.³² The court then cautioned that this bright line is not to be found in legal abstractions, such as the general requirement that seizures be reasonable, but rather in specific

be held personally liable as long as their actions are reasonable in light of current American law."³⁴

Applying this "objective legal reasonableness" standard, Federal appellate courts have recently upheld immunity defenses for allegedly unconstitutional law enforcement conduct. For example, the Seventh Circuit Court of Appeals upheld a qualified immunity defense for a deputy sheriff who al-

Procedural Considerations in Asserting the Immunity Defense

In many cases, the "objective legal reasonableness" test, as clarified by the Supreme Court in *Anderson v. Creighton*, will allow law enforcement officers to successfully assert their qualified immunity from personal liability in a motion for summary judgment, thereby avoiding the protracted and time-consuming processes of litigation.⁴² The Supreme Court has stated that a law enforcement officer's entitlement to qualified immunity is not a mere defense to liability, but an immunity from suit itself and the concomitant burdens of discovery.⁴³ Accordingly, a trial court's denial of an officer's motion for summary judgment based on qualified immunity raises a question of law that can be immediately appealed by the officer.⁴⁴ However, the defense of qualified immunity is not waived if an officer chooses not to take an immediate appeal; officers retain the right to assert at trial their qualified immunity based on "objective legal reasonableness."⁴⁵

The Eighth Circuit Court of Appeals described the two-step process that courts should follow in deciding whether to grant qualified immunity on a motion for summary judgment prior to allowing a plaintiff the opportunity to conduct discovery:

"...the trial court must first determine whether the law prohibiting the alleged police conduct was clearly established at the time it occurred....Second, a trial court must determine whether the police conduct, as alleged by the plaintiff, con-

stituted actions that a reasonable officer could have believed lawful."⁴⁶

A law enforcement officer is entitled to dismissal of a suit prior to discovery where the trial court determines either: (1) That the relevant law was not clearly established, or (2) that another reasonable officer possessing the specific information available to the officer in question could have reasonably

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The qualified immunity defense does not excuse clearly unconstitutional or offensive police misconduct.
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believed the actions taken were lawful. The court observed that when the litigants disagree as to the actions taken, some discovery may be necessary before a motion for summary judgment can be granted.⁴⁷ However, such discovery should only occur if there is a substantial factual disagreement as to what actions the law enforcement officers actually took, and should be limited to determining the applicability of the qualified immunity defense.⁴⁸

Conclusion

The threat of personal liability is one of many risks associated with the law enforcement profession. An officer's discretionary decision to arrest or search inevitably increases the risk of a subsequent lawsuit.

While this risk can be minimized by comprehensive departmental policies, thorough training, and attentive managerial controls, officers ultimately have a personal responsibility to insure that their conduct conforms to constitutional requirements. The qualified immunity defense does not excuse clearly unconstitutional or offensive police misconduct. It does, however, offer generous protection to conscientious officers who make objectively reasonable mistakes. The availability of a qualified immunity defense should be encouragement to responsible officers that they can perform their vital law enforcement functions without a constant fear of personal liability.

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Footnotes

¹ 108 S.Ct. 538 (1988).

² *Id.* at 542.

³ *Id.*

⁴ *Imbler v. Pachtman*, 96 S.Ct. 984, 995 (1976).

⁵ *Valdez v. City and County of Denver*, 878 F.2d 1285, 1288 (10th Cir. 1989). In *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989), a police officer's testimony on the witness stand was afforded absolute immunity.

⁶ *Id.* at 1289. In *Pleasant v. Lovell*, 876 F.2d 787, 805 (10th Cir. 1989), officers were afforded absolute immunity for their actions in assisting prosecutors in serving grand jury subpoenas.

⁷ 106 S.Ct. 1092 (1986).

⁸ *Id.* at 1097.

⁹ *Id.* at 1098 (citations omitted).

¹⁰ *Id.* at 1096.

¹¹ *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). For a comprehensive analysis of the *Harlow* decision, see Higginbotham, "Defending Law Enforcement Officers Against Personal Liability in Constitutional Tort Litigations," *FBI Law Enforcement Bulletin*, vol. 54, Nos. 4-5, April and May 1985.

¹² 107 S.Ct. 3034 (1987).

¹³ See, *Creighton v. City of St. Paul*, 766 F.2d 1269 (8th Cir. 1985).

¹⁴ 107 S.Ct. at 3038.

¹⁵ *Id.* at 3039.

¹⁶ *Id.*

¹⁷ *Id.*