2021 RES-159

CALLING FOR THE STATE OF WISCONSIN AND FEDERAL GOVERNMENT TO LEGALLY END QUALIFIED IMMUNITY, ENABLING CIVIL LAWSUITS AGAINST LAW ENFORCERS FOR MISCONDUCT AND MALPRACTICE

The United States Supreme Court created the doctrine of "qualified immunity" in Pierson et al. v. Ray et al. (1967), based on an interpretation of 42 United 12 States Code § 1983, created by the 1871 Ku Klux Klan Act, where the Supreme Court 13 majority interpreted § 1983 as, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being muleted in damages if he does."

The current standard of qualified immunity stems from the US Supreme Court case *Bryce Harlow et al. v. A. Ernest Fitzgerald* (1982), in which the majority decided "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 would have known."; meaning that unless a specific action is deemed illegal or unconstitutional by the courts, that action is covered under qualified immunity.

Legal scholar Katherine Mims Crocker, writing for the Michigan Law Review in May 2019, noted that since *Harlow*, the United States Supreme Court has steadily expanded the doctrine's umbrella to where "the standard for denying qualified immunity from whether 'a' reasonable person would have known of the right in question to whether 'every' reasonable person would have known. And the Court has repeatedly stated that the doctrine shields 'all but the plainly incompetent or those who knowingly violate the law.'. . . And the Court has strictly limited the sources of law that can render a right clearly established, making qualified immunity increasingly easy to obtain."

In the United States Supreme Court case, *Andrew Kisela v. Hughes* (2018), Justice Sonia Sotomayor dissented against qualified immunity by arguing, "It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." Qualified immunity has been used to defend law enforcers who have, for example:

• Lowered a police dog over a wall into a trailer park without warning while chasing a burglary suspect whereby the dog subsequently bit an uninvolved 89-year-old senior who required amputation and died the following month (*McKay et al. v. City of Hayward*, et al., 2013 (949 F. Supp.2d 971)).

• Without warning shot a woman who was non threateningly holding a kitchen knife at her side while standing next to her roommate (*Kisela v. Hughes*, 2018).

Organizations across the political spectrum support curbing qualified immunity, including the American Civil Liberties Union (ACLU), Americans for Prosperity, the Cato Institute, the Institute for Justice, and the National Association for the Advancement of Colored People (NAACP).

According to the Marshall Project, from approximately 2010 to 2019, these cities, among others, had to pay approximately the following in civil claims against police misconduct:

- Milwaukee, $40 million
- Detroit, $57.7 million
- Philadelphia, $116 Million
- Chicago, $467.5 million
- New York, $1.7 billion

Since 2015, the City of Madison in Dane County has paid at least $9.9M for civil claims for the police killing of Paulie Heenan, Tony Robinson, and Ashley DiPiazza.

Legally enabling police officers' subjection to civil lawsuits for egregious behavior and malpractice would require officers to carry liability insurance, effectively having the insurance industry regulate and curb police excesses similar to insurance held by healthcare providers for medical malpractice, thereby forcing the burden of police malpractice onto delinquent police officers rather than the taxpayers they serve.

Assembly Bill 186 and its companion, Senate Bill 295, would make "immunity granted to public officials under current law. . .not apply and. . .not [be] a defense to civil liability claimed against a law enforcement officer for any act or failure to act by the officer done in an official capacity or in the course of his or her employment," according to the Wisconsin Legislative Reference Bureau.

The murder of George Floyd through the actions of a Minneapolis Police Officer in April 2020 renewed national conversation on racial inequity and law enforcement excesses. Ending qualified immunity may be the best way to mitigate law enforcement abuses and reduce taxpayer lawsuit expenditures.

NOW THEREFORE BE IT RESOLVED, that the Dane County Board of Supervisors hereby supports Wisconsin Assembly Bill 186 and Senate Bill 295 and similar State or Federal legislation which would remove qualified immunity as a defense against law enforcement misconduct at all levels of government.

BE IT FURTHER RESOLVED, that this resolution be included in Dane County's Legislative Agenda.

BE IT FINALLY RESOLVED, that the Dane County Board Office and Legislative Lobbyist provide a copy of this resolution to Governor Tony Evers, the Dane County legislative delegation, U.S. Senators Tammy Baldwin and Ron Johnson, and the Wisconsin Congressional delegation.