Testimony of Chip Wilder LICSW

For

The Special Commission on Qualified Immunity

Public Comment Hearing August 20, 2021

I am submitting this testimony as an experienced mental health clinician and a citizen of the Commonwealth. Qualified Immunity as a legal concept, I believe, has implications both for police as well as any other agents of a state or municipal authorities. There are two contexts which I urge the commission to thoroughly consider in the matter of qualified immunity.

First, as I understand the issue, there is legal historical precedent, on a federal level, that qualified immunity from civil suits has been regularly dismissed prior to any court procedure. <https://theappeal.org/qualified-immunity-explained/>

“Qualified immunity freezes constitutional law. As mentioned previously, in order to overcome the defense of qualified immunity, a victim must show that law enforcement violated “clearly established” law by pointing to a case arising in the same context and involving the same conduct. This has given courts a shortcut to resolving cases: Instead of reviewing, analyzing, and applying constitutional doctrine to determine whether a person’s rights were violated, a court can instead simply say that there has been no sufficiently similar case in the past. The result is that fewer courts ever resolve constitutional issues, and constitutional rights are hardly ever “clearly established.”

Qualified immunity has a valid role in policing and the actions of any agency of government. The issue of “clearly established” constitutional rights has, as noted above, greatly prevented a fair and just application of consideration of an individual’s constitutional rights in determining the actual qualified immunity that an actor may have in situation of alleged harm. Therefore, I believe, that the Commonwealth should explore and establish a legal modification to the concept of “clearly established” that allows any substantive question of potential unnecessary harm to proceed through the legal process.

Secondly, objective and accurate actions of individuals must be understood within the context of the most current scientific knowledge of brain-based behavior. For example, a very relevant area of research is the role of affect in determining awareness and action by Dr. Lisa Feldman-Barrett, Distinguished Professor of Psychology, Northeastern University on a neuropsychological process she identifies as “affective realism”:

’This phenomenon is called affective realism because we experience supposed facts about the world that are created in part by our feelings.” (Feldman Barrett, L., (2017), **How Emotions Are Made: The Secret Life of the Brain**, Mariner Books, Houghton Mifflin, NY . p. 75).

Dr Feldman Barrett’s research illustrates how preconscious mental experiences of affect, in part, determine behaviors prior to rational processing. The commission would benefit, if it had not planned to do so, to engaged scientists such as Dr. Feldman Barrett or others who offer state of the art information about the neurobiological underpinnings of actions that are critical context for developing statutory structures by which qualified immunity is considered.

Thank you for your attention to this testimony.

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