Qualified Immunity – Under Attack?

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What if…..?

Around lunchtime on February 7, 2017, the assistant principal of Gretna Middle School noticed a “strange guy” standing outside the gate of the school and contacted Officer Thompson, a Gretna police officer assigned as the school resource officer. The “strange guy” was later identified as Kendole Joseph, a man with paranoid schizophrenia who had not taken his medication. The assistant principal described Joseph as “nervous and shaky” and reported that he “was staring,” “not walking straight but rather weaving,” talking to himself, saying “stuff she couldn't make out,” shaking his leg, and biting his nails.

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What if….?

She asked Officer Thompson and Officer Morvant, another school resource officer, to check Joseph out. Officer Morvant approached Joseph and heard him yelling, “Help me from the police.” Before Officer Morvant said anything, Joseph began running away from the school and pulling on the locked door handles of nearby cars, pleading for “help [ ] from the police.” Officer Morvant found this behavior “odd” and “erratic” and knew that Joseph was possibly “emotionally disturbed.” He radioed other officers in the area to report “a suspicious person who was fleeing.”

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What if….?

Officers Martin and Leduff heard this radio transmission and spotted Joseph near a convenience store. They parked their marked police car, exited, and gave loud verbal commands for Joseph to come to them. Despite these commands, Joseph entered the store, and the officers followed him. Officer Martin saw no weapon in Joseph's hands or any indication that he had one in his waistband, nor did he make any threatening moves like he was reaching for a weapon.

As Officer Martin entered the store, he trained his gun on Joseph, who was shouting, "Help me, help me somebody call the cops …. They're trying to kill me." When Officer Martin instructed Joseph to get on the ground, Joseph jumped over the checkout counter.

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What if….?

The convenience-store manager, who was behind the counter at the time, testified that Joseph looked scared and immediately "went face down." Once on the ground, Joseph covered his face with his hands and assumed the fetal position. Seconds later, Officers Martin and Leduff followed Joseph over the counter. Officer Martin, weighing 300 pounds, immediately placed his full weight onto Joseph, who was still lying on the floor with his legs bent toward his chest. Officer Leduff began holding Joseph's upper body down. Officer Morvant entered the store next, briefly stopped to look over the counter, then walked behind the counter and began holding Joseph's lower body down. Officer Thompson then entered, followed by Officer Dugas, and both observed Joseph and the officers from the front side of the counter. At that point, approximately thirty seconds after Officer Martin jumped over the counter, he ordered Joseph to put his hands behind his back and deployed his taser for eleven seconds. Meanwhile, Officers Thompson and Dugas walked around the counter and continued observing from behind the counter. Officer Dugas handed a baton to Officer Martin, who jabbed it downward, striking Joseph at least twice with the pointed end.

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What if….?

A few seconds later, Officers Varisco, Costa, and Rolland entered the store, followed shortly by Officer Faison. Officers Varisco and Faison observed from the front side of the counter, and Officers Costa and Rolland walked behind the counter. Officer Varisco reached over to offer his taser to the officers behind the counter. Officer Costa briefly observed from behind the counter, then entered the scrum, holding Joseph's lower body down. At that point, Officer Morvant left the scrum and made his way to the front side of the counter, where he continued to observe. Officer Rolland continued to observe from behind the counter.

Officer Verrett then entered the store. Two seconds later, Officer Martin deployed his taser again, for three seconds. A few seconds later, Officer Bartlett entered the store and began to observe from the front side of the counter. Officers Faison and Verrett walked behind the counter and observed from there.

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What if….?

Officers Martin, Thompson, Dugas, and Costa began attempting to drag Joseph from the narrower area behind the counter to the wider area, on the path to the door.

Officer Costa then kicked Joseph twelve to thirteen times while holding onto the counter. During this time, Officer Verrett entered the scrum. Officer Martin then punched Joseph in the head three times. Officers Martin, Thompson, Dugas, Costa, Faison, and Verrett resumed their efforts to drag Joseph toward the wider area, while Officer Leduff observed. Once in the wider area, Officer Martin punched Joseph in the face three times. Officer Bartlett then jumped over the counter and began holding Joseph down. Seconds later, Officer Costa punched Joseph in the head six times.

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What if….?

Three-and-a-half minutes after Officer Costa's last strike, Officers Martin, Costa, and Verrett placed Joseph in handcuffs and leg shackles. Officers Martin, Verrett, Rolland, and Varisco carried him, face down, to Officer Martin's patrol car. There, all officers except Officer Thompson placed Joseph feet-first in the car and pulled him "across the seat from the other side, bent his legs up, and shut the doors with [Joseph] in a prone position on the seat facedown." Joseph became unresponsive, at which point medical personnel, who had arrived on the scene before Joseph was carried out of the store, examined him for the first time. They performed CPR and took Joseph to the hospital, where he died from his injuries two days later.

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What if….?

In total, Joseph endured twenty-six blunt-force injuries to his face, chest, back, extremities, scrotum, and testes. Throughout the eight-minute encounter, Joseph was on the ground, experiencing acute psychosis, and continuously yelling. Officer Bartlett recalled Joseph "yelling random things" and pleading for someone to "call the police." Officer Faison and the store manager recalled him pleading for someone to "call the real police." Officer Leduff recalled Joseph calling for his mother and "saying all types of things," including that he was "about to be killed." The store manager recalled Joseph calling out for his mother and repeatedly yelling, "My name is Kendole Joseph," and "I do not have a weapon."

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What if….?

- What if the officers who punched and kicked the plaintiff worked for your department?

- Would your agency discipline or terminate the primary actors?

- Would your agency discipline or terminate the officers who failed to intervene?

- How would you feel as a member of the community?

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What if…

The U.S. Fifth Circuit held:

Viewing the facts in Plaintiffs' favor, a reasonable jury could find that Joseph was not actively resisting arrest, and that Officers Martin and Costa immediately, repeatedly inflicted significant physical force. This permits a finding that Officers Martin and Costa failed to use measured and ascending force commensurate with Joseph's resistance, and therefore used excessive force in violation of the Fourth Amendment and in violation of the clearly established law. [DENIED QUALIFIED IMMUNITY]

And, while Plaintiffs meet half their burden to prove that genuine disputes of material fact exist as to whether Officers Leduff, Morvant, Thompson, Dugas, Varisco, Rolland, Faison, Verrett, and Bartlett violated Joseph's constitutional rights, halfway is not good enough. Plaintiffs fail to meet their burden to show that Officers Leduff, Morvant, Thompson, Dugas, Varisco, Rolland, Faison, Verrett, and Bartlett violated clearly established law. [GRANTED QUALIFIED IMMUNITY]

Joseph et al v. Bartlett et al, 981 F.3d 319 (5th Circuit 2020)

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Community reaction to Qualified immunity (QI)

Could rulings like the preceding one contribute to the community angst regarding QI? How do you explain to a rational person that the onlooker police officers had no way of knowing they were supposed to stop their fellow officers from administering a severe beating to a non-resisting suspect?

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What is qualified immunity?

It is a defense to being sued in federal court, which is different from a defense raised at trial.

It was created by the USSC response to 42 U.S. Code, Section 1983 – the Civil Rights Act.

In 1982 the USSC established eligibility for qualified immunity:

"We therefore hold 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 would have known."

Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982)

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Rationale for QI

"Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful."

Harlow, at 2738

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Two-part test for QI

"A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry…If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable."

Saucier v. Katz, 121 S.Ct. 2151 (2001)

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Modified two-part test for QI

"On reconsidering the procedure required in Saucier, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."

Pearson v. Callahan, 129 S.Ct. 808 (2009)

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Why have QI?

"As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."*

- Officers and public officials need qualified immunity to carry out their jobs. Public officials, and particularly police officers, perform vital tasks that may require split-second decisions in stressful circumstances. Taking away qualified immunity could lead to officers being hesitant to act when it is most needed.

- Removing qualified immunity could open up public officials and police to unwarranted lawsuits, in which judges and juries could second-guess split-second decisions and lead to significant costs for cities, police officers, and other public officials.

- Officers do not have absolute immunity, and they can be held liable when they violate a clearly established constitutional right.

- The narrow interpretation of clearly established precedent is appropriate. Officers should not be forced to apply an abstract right under the Constitution to specific circumstances in split-second decisions. Officers cannot be expected to be legal scholars or think through legal arguments when attempting to make an arrest.

- Officers must have room to make mistakes or have moments of bad judgment without worrying about being sued.**

**Malley v. Briggs, 106 S.Ct. 1092 (1986)*

***Findlaw article, updated 9/21/2021; https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html*

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Opposition to QI

- Liability is necessary to hold officers accountable for excessive force. As it stands officers are free to maliciously violate the Fourth Amendment and other Constitutional rights of citizens without any cost to themselves, provided some obscure court case hasn't already dealt with almost the exact same situation.

- The fear of rampant lawsuits against police are overblown. Many municipalities indemnify their officers, meaning the city would pay for any settlement, not the officers themselves.

- The current doctrine as applied today in courts leads to hairsplitting and it is often impossible for plaintiffs to meet the burden.

- The doctrine is applied inconsistently and can greatly depend on the judge or judges involved in the case. For example, one judge has argued that "a court can almost always manufacture a factual distinction" when determining whether a previous precedent precludes an officer from getting qualified immunity.

Findlaw article, updated 9/21/2021; https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html

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What is the primary concern regarding the availability of QI?

There is certainly no shortage of opinions on QI on the internet or among the pundits. The majority of articles located on the internet were calling for the abolition of the doctrine of QI.

Much concern was directed at the second prong of the test i.e., whether the officer's conduct violated clearly established law. Many commentators and authors argued the lower courts and appellate courts required plaintiffs to find an almost perfect match in prior case law that would put the officer on notice about her conduct in a particular situation. They contend this imposes an impossible burden for the plaintiff.

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Is QI in danger?

The answer depends somewhat upon perspective. QI is a defense to being sued in federal court under federal civil rights law.

In order for QI to be in danger, the USSC would have to seriously restructure its application or abrogate the doctrine.

Alternatively, Congress could enact legislation eliminating or limiting its application.

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Does the USSC seem inclined to limit QI?

At least one Justice on the Court thinks the current application of the QI defense deserves serious reconsideration. In one recent case which the Court refused review, Justice Clarence Thomas dissented from that decision:

"I have previously expressed my doubts about our qualified immunity jurisprudence. See Ziglar v. Abbasi, 582 U. S. ____, 137 S.Ct. 1843, 1869–1872, 198 L.Ed.2d 290 (2017) (THOMAS, J., concurring in part and concurring in judgment). Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition."

Baxter v. Bracey, 140 S.Ct. 1862 (Mem) (2020)

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USSC perspective

Some commentators have opined that the Court may be waiting to see how Congress addresses the issue.

"It appears that in denying review of many recent police-related qualified immunity cases as described above, the Supreme Court is waiting to see what happens with qualified immunity in the U.S. Congress before agreeing to review and possibly modify or change its current qualified immunity doctrine. If Congress abolishes qualified immunity, the judicially created qualified immunity doctrine will cease to exist. If Congress fails to act, the Court is likely to step in and reconsider its current parameters of the doctrine."

Qualified immunity for LEOs is under assault: Will the doctrine survive the attack? Mike Callahan, The Objectively Reasonable Officer, 3/26/2021, Police 1 by Lexipol

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Congressional efforts

Following the George Floyd incident Congress drafted, and the House approved, the "George Floyd Justice in Policing Act of 2021." The Act has not been approved by the Senate. The language addressing qualified immunity states:

SEC. 102. QUALIFIED IMMUNITY REFORM.

Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended by adding at the end the following:

"It shall not be a defense or immunity in any action brought under this section against a local law enforcement officer (as such term is defined in section 2 of the George Floyd Justice in Policing Act of 2021), or in any action under any source of law against a Federal investigative or law enforcement officer (as such term is defined in section 2680(h) of title 28, United States Code), that--

(1) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or

(2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.

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State efforts to eliminate QI

There has been considerable buzz concerning state's efforts to eliminate or reduce QI for police officers. New Mexico, Colorado, and Connecticut have eliminated, or restricted qualified immunity and the city of New York has eliminated the defense.

Or have they?

Remember, QI is a defense under a federal lawsuit filed for an alleged violation of a federal statute or the federal constitution. States do not have the authority to eliminate a federal defense in a federal cause of action.

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What is the impact of state actions regarding QI?

In order for a state action to impact the concept of QI, the state must (1) have a state cause of action similar to a section 1983 civil rights cause of action, and (2) eliminate qualified immunity as a defense to the state cause of action.

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Texas' attempt to "eliminate" QI

CPRC Sec. 135.0002. PEACE OFFICER LIABILITY FOR DEPRIVATION OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER COLOR OF LAW. [from SB 1224]

(a) A person may bring an action for any appropriate relief, including legal or equitable relief, against a peace officer who, under the color of law, deprived the person of or caused the person to be deprived of a right, privilege, or immunity secured by the Texas Constitution.

(b) A person must bring an action under this chapter not later than two years after the day the cause of action accrues.

Sec. 135.0003. APPLICABILITY OF OTHER LAW; PROHIBITED DEFENSES. (a) Notwithstanding any other law, a statutory immunity or limitation on liability, damages, or attorney's fees does not apply to an action brought under this chapter.

(b) Notwithstanding any other law, qualified immunity or a defendant's good faith but erroneous belief in the lawfulness of the defendant's conduct is not a defense to an action brought under this chapter.

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Texas and attorney's fees

In addition to creating a cause of action similar to Sec. 1983, and eliminating the QI defense, the lawmakers wanted to make sure attorneys would accept these cases, so they included a provision for attorney's fees. Notice only the prevailing "plaintiff" can ask for fees, not the prevailing "party". Defendants can seek fees if they prevail, and the lawsuit was deemed frivolous (which is part of the reason the USSC created QI).

Sec. 135.0004. ATTORNEY'S FEES AND COSTS.

(a) In an action brought under this chapter, a court shall award reasonable attorney's fees and costs to a prevailing plaintiff.

(b) In an action brought under this chapter, if a judgment is entered in favor of a defendant, the court may award reasonable attorney's fees and costs to the defendant only for defending claims the court finds frivolous.

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Who would pay under the Texas scheme?

As previously noted, one reason for the QI defense was a concern for the financial well being of public servants, including police officers. Proponents of abolishing QI argue that most local governments and states already indemnify officers against judgments. The Texas legislature wanted to make sure the plaintiffs were paid, so they included a mandatory indemnification clause.

Sec. 135.0005. INDEMNIFICATION REQUIRED; EXCEPTION.

(a) Notwithstanding any other law and except as provided by Subsection (b), a public entity shall indemnify a peace officer employed by the entity for liability incurred by and a judgment imposed against the officer in an action brought under this chapter.

(b) A public entity is not required to indemnify a peace officer employed by the entity under Subsection (a) if the officer was convicted of a criminal violation for the conduct that is the basis for the action brought under this chapter.

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The mandatory indemnification scheme conflicts with Monell liability

Vicarious liability does not apply between cities and their officers. The USSC explained that in order for the city to be liable for a civil rights violation, the city's policy or practice must have brought about the injury.

"We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."

MONELL v. DEPARTMENT OF SOCIAL SERVICES OF the CITY OF NEW YORK et al., 98 S.Ct. 2018 (1978)

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The Texas scheme

The statute proposed this session would have:

- Eliminated QI;

- Required cities to indemnify all officers, save those who could be convicted in a timely fashion;

- The indemnification would apply even if the officer violated city and department policy and had been properly trained;

- "Prevailing" plaintiffs' attorneys would receive payment from the city as well.

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