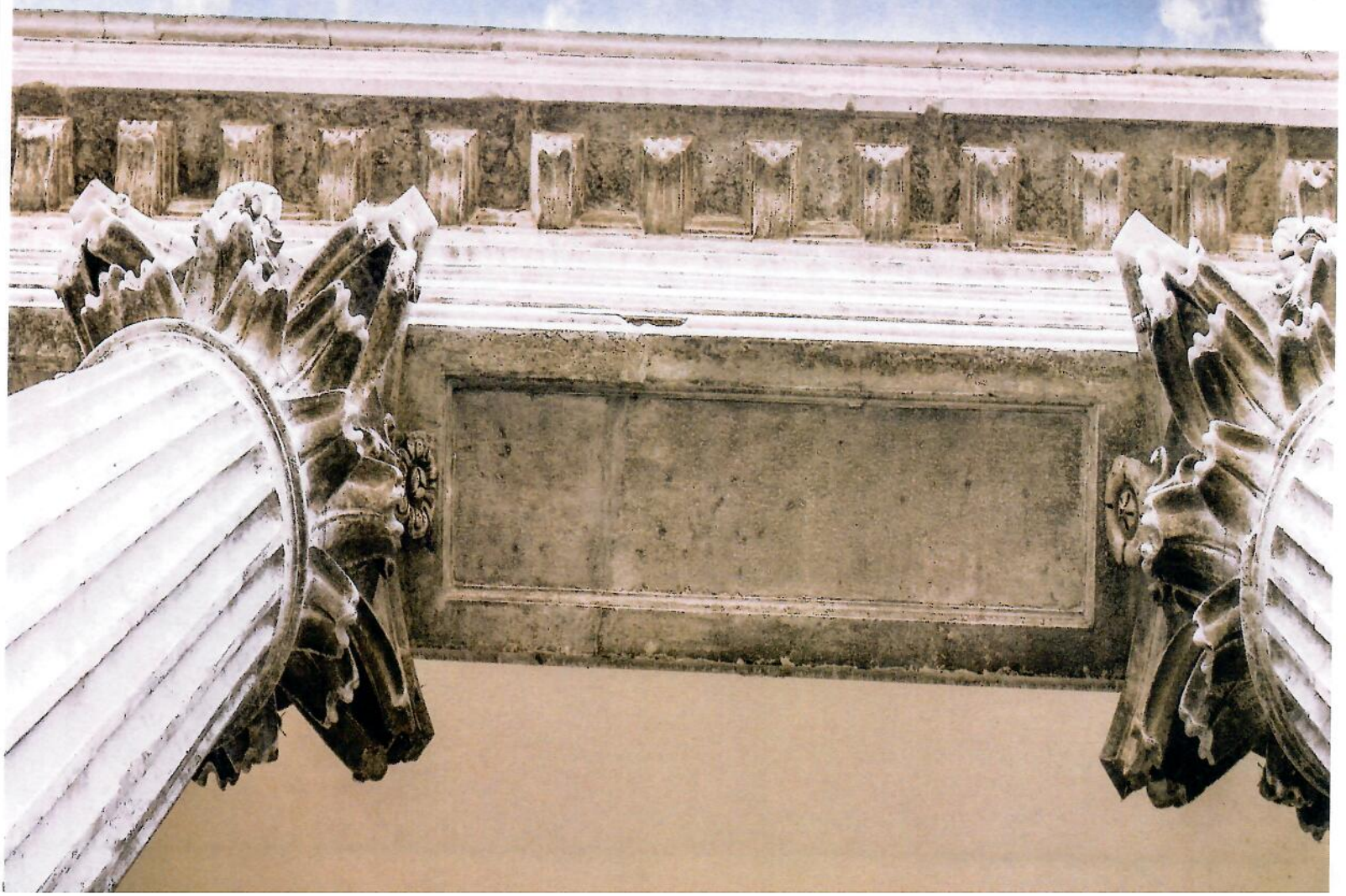
THE TROUBLE WITH QUALIFIED IMMUNITY

BY DAVID HELBRAUN



A day of reckoning seems near. With the monumental shift in public perception of police behavior following the murder of George Floyd on camera, and the resulting flood of protests by people of all colors, ages, and backgrounds throughout the U.S. – and indeed throughout the world – cries to end police lawlessness are reaching a fever pitch. More and more people are waking up to the fact that police departments are rarely, if ever, held accountable when they abuse their special rights to search, hit, Tase, maim, or kill folks they claim posed some imminent threat to police officers or others.

The problems with U.S. police departments stem from myriad causes. These include a "blue code of silence" that keeps police abuses quiet; strong union contracts that render dismissal or other administrative sanctions for genuine misconduct unlikely; conflicts of interest for district attorneys or other local officials who are reluctant to investigate and act upon those abuses that do come to light; minimal education standards for police; lack of diversity in police departments; increased militarization of local police forces staffed with Persian Gulf and Afghan War vets, and equipped with Defense Department hand-me-down tanks; as well as our societal failure to comprehensively address problems such as homelessness and mental health, leaving it to police officers, rather than other trained professionals, to deal as best they can with crises resulting from those issues.

A lack of genuine legal accountability is another major cause. As trial lawyers, we uphold the right of citizens to pursue some measure of accountability through our civil justice system. But when law enforcement officers are sued in Federal Court for egregious abuses of their authority to arrest or use force (lesser abuses are all too common and rarely pursued in court), police receive a unique legal dispensation known as "qualified immunity," by which judges – not juries – can deem the defendant officers immune from suit.[1]

There is nothing "qualified" about this misbegotten doctrine's legal effect: complete immunity from any accountability in federal court. Every civil rights lawyer knows that, sooner or later, they will face a defense summary judgment motion asking the court to grant immunity to the government actor defendants in a case.

The Creation of "Qualified Immunity"

The doctrine of Qualified Immunity ("QI"), is simply a federal court doctrine of immunity for those acting under color of legal authority – government actors, including the police. It is a judicially-created legal doctrine. While various, less generalized, immunities have been created by state legislatures, QI is an over-arching concept created by the U.S. Supreme Court in the 1960's, which has over time become the tail that wags the dog of police accountability. Qualified Immunity is a judicial invention that shields police even when they have clearly abused their power and deprived citizens of their constitutional rights.

One of the most important national civil rights laws protecting citizens' constitutional rights is 42 U.S.C. Section 1983. Passed by Congress as part of the Reconstruction-era 1871 Civil Rights Act (then widely known as the Ku Klux Klan Act), it permitted citizens to sue in Federal court when local (or, on occasion, state) laws or officials violated their rights. Section 1983 specifically provides that state actors "shall be liable to the party injured" for "the deprivation of any rights."

Mostly dormant during the 90 years following its enactment, Section 1983 was revitalized by the U.S. Supreme Court in 1961, when it held that the law provided a remedy for a family who had been terrorized when thirteen Chicago police officers broke into and ransacked their home. *Monroe v. Pape* 365 U.S. 167. Section 1983 became the primary basis for suits against government actors for violating constitutional civil rights – warrantless entries into homes, suppression of free speech, excessive use of force on civil rights protesters, equal protection in federal employment, etc. Section 1983 is basically the only means by which the people may bring to bear the power of the Federal courts to address civil rights and other abuses by government officials.

Six years after *Monroe*, however, the Court first enunciated the notion of a "qualified immunity" in those types of cases. Pierson v. Ray, 386 U.S. 547. A group of Episcopal priests brought suit against the police officer who arrested them for breach of the peace when they entered a segregated coffee shop in a Trailways bus station in Tougaloo, Mississippi, in 1961. They also sued the judge who sentenced them to four months in jail.

After first affirming an absolute "judicial immunity" for the judge, the Court went on to create a further so-called "qualified" immunity for the police officer as well – excusing him "from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional." In other words, an officer acting in good faith in some legal gray area should receive the benefit of the doubt for that judgment call. This, according to the Court, was no different than the idea that a police officer "... who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." (386 U.S. at 555.)[2]

The Court sought to protect police from fear of personal financial harm resulting from a lawsuit. A police officer should not be put in the position of having to choose whether to "be charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does," the Court said (386 U.S. at 555.) This supposed financial liability exposure has been a major underpinning of the Court's QI rationale ever since – even though, in practice, officers are actually routinely indemnified by their government employers.

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The Tightening of the QI Noose

Subsequent Supreme Court cases cited supposed additional burdens justifying this legal immunity for government officials. According to the Court, simply responding to discovery and attending a trial could promote such fear of being sued that it would "dampen the ardor" of responsible public officials to unflinchingly discharge their duties, and even deter people from seeking any public office. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). So great was this potential chilling effect on government actors, the Court believed, that in 1982 it deleted the requirement that a police officer even show they had had a good faith belief that their conduct had been reasonable under the law: since an official's subjective intent likely could not be resolved short of trial, that requirement was deemed "incompatible" with the Court's qualified immunity goals. *Id.*

A few years later, the Court decided that government defendants in a Section 1983 case could file interlocutory appeals of any denials of a qualified immunity motion. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This, of course, substantially increases the costs and delays for plaintiffs in Section 1983 litigation.

Then, in 2001, the Supreme Court in *Saucier* v. Katz (533 U.S. 194) – a case arising out of the arrest of a protester holding a sign opposing animal experimentation, during a speech by Vice President Gore in the Presidio – decided that district court judges should engage in a two-step analysis for all QI claims: first, whether the plaintiff's constitutional rights were violated; second, whether the constitutional violation was "clearly established" at the time of the violation. If the violation was not "clearly established" at the time, then QI should be granted.

Theoretically, the first step in applying *Saucier* would, over time, generate district court opinions elaborating upon what types of police conduct, under what sorts of circumstances, were unconstitutional – even if QI was granted in a case because the constitutional violation was deemed not "clearly established" when it occurred, the first *Saucier* step would arguably at least begin to create a sort of database of violations that would necessarily be "clearly established" the next time they occurred. However, in 2009, the Supreme Court decided that district courts could skip the first step, and go directly to the second, in order to, once again, lessen the burdens of lawsuits on public officials. *Pearson v. Callahan* 555 U.S. 223, 236-237 (2009). And in 2011, the Court indicated that "clearly established" meant "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731.

How Qualified Immunity Strips Citizens of Their Right To Redress Under Section 1983

Whether a violation was "clearly established" or not may sound sensible, but in practice it has led to Federal judges granting immunity to defendants unless the plaintiff can point to a prior case with the same fact pattern as her own. Section 1983 has been transformed from a statute protecting against deprivations of "any rights" under the Constitution, into one protecting deprivations only of so-called "clearly established rights."

The QI doctrine has, then, effectively rendered *immaterial* whether there was a constitutional violation, how egregious the violation was, or whether the defendants acted in good faith – unless that violation is deemed sufficiently similar to a prior case in which the same conduct has already been held unconstitutional. Conduct that anyone would see as wrongful is nonetheless routinely held to be shielded from redress, because fewer and fewer appellate cases can penetrate the protections of QI and call out constitutional violations.

In the police misconduct context, a QI motion will inevitably be presented, arguing that the allegedly excessive nature of a defendant officer's particular use of force was not sufficiently clearly established at the time to avoid application of the immunity. Section 1983 claims are analyzed based on the "totality of the circumstances" presented in each particular case, so whether a constitutional violation was "clearly established" can easily be framed as turning solely on the unique facts presented in each case.[3]

Claims of excessive use of force – deploying a police canine to repeatedly bite an unarmed person, or breaking the arm of someone who happened to be standing nearby when they walked away without realizing the officer wanted to ask them questions – will always depend on the particular and unique facts of each encounter. Since the question whether police use of force was excessive or not inevitably turns on the unique fact pattern of each case, the "clearly established" violation standard becomes fraught with ambiguity.

In practice, courts enforce QI so aggressively to shield officers that even plainly excessive police misconduct is held non-actionable. Only the most egregious examples of misconduct – breaking an arm for merely refusing to show I.D., choking to death a suspect already subdued and handcuffed – pass the threshold of "clearly established" rather than being excused as circumstances too unclear to be deemed constitutional deprivations for which police should actually be held accountable.

The End of QI?

Qualified immunity has no basis in constitutional law, constitutional history, legislative intent, or, even, strict textual interpretation. It is a constitutionally unmoored creation of the U.S. Supreme Court to impose a policy of protecting police decision-making in all but the most egregious circumstances, preventing accountability among law enforcement departments across the country.

Ideological opposites such as Justice Sotomayor and Justice Thomas have criticized the doctrine, and public policy groups across the political spectrum have filed amici arguing for an end to QI. Some federal judges are penning opinions decrying the outcomes they are nevertheless compelled to order under the doctrine. *See, inter alia, Jamison v. McClendon* (August 4, 2020).[4]

Remarkably, the Supreme Court scheduled *thirteen certiori* petitions concerning QI for their conference this spring, leading some to hope that change was in the air.

In one of those cases, *Kelsey v. Ernst*, the Eighth Circuit en banc granted immunity to a police officer who grabbed a small woman in a bear hug and slammed her to the ground, breaking her collarbone and knocking her unconscious,

when she walked away from him after he told her to "get back here." In another, the Eleventh Circuit granted immunity to a police officer who shot a ten-year old in the knee, while repeatedly attempting to shoot a pet dog that wasn't threatening anyone. And in another, the Sixth Circuit said that a prior case holding it unconstitutional for police to deploy a canine against a suspect who had surrendered by laying on the ground did not "clearly establish" that it was unlawful for police to deploy a canine against a suspect who had surrendered by sitting on the ground with his hands up.

Any one of those *cert* petitions presented opportunities for the Court to dial back — or even completely eliminate – QI, and restore Section 1983 to what Congress created as an essentially strict liability cause of action to hold public officials accountable.

But on June 13, 2020, the Supreme Court yet again denied a hearing on all pending QI cert petitions for the term. The day of reckoning may not be so near, after all.

Editor's Note: As for Congress stepping in to undo QI, the Ending Qualified Immunity Act was passed by the House on June 25, 2020. This bill eliminates the defense of qualified immunity in civil actions for deprivation of rights. The bill provides that under the statute allowing a civil action alleging deprivation of rights under color of law, it shall not be a defense or immunity to any such action that (1) the defendant was acting in good faith or believed that his or her conduct was lawful at the time it was committed; (2) the rights, privileges, or immunities secured by the Constitution or laws were not clearly established at the time of their deprivation; or (3) the state of the law was such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.

A similar bill was introduced in the Senate on July 1, 2020, and is currently stalled there requiring bipartisan support to pass.

End Notes

1. The Qualified Immunity (QI) doctrine is a creation of the federal courts. While various state law statutory immunities may apply to government actions, the QI doctrine does not exist under state law. Some states have civil rights statutes – for instance, California's Bain Act and Unruh Act – which can be alternative routes to holding government officials accountable, in light of increasingly unfriendly federal judges and the abuse of the federal QI doctrine.
2. An officer may have "probable cause" to arrest someone – a degree of proof considerably less than the "beyond a reasonable doubt" standard necessary to convict – and that person may then be acquitted, without invalidating the asserted probable cause to arrest in the first place.
3. Claims for excessive use of force basically require proof that an "objectively reasonable" officer would not have employed the challenged force under the "totality of the circumstances" presented at the time the officer used that force. The totality of the circumstances analysis considers such factors as: the severity of the crime prompting the use of force, whether the suspect poses an imminent threat to the officer or others, and whether the suspect is actively resisting or attempting to escape. Graham v. Connor 490 U.S. 386 (1986).
4. documentcloud.org/documents/7013933-Jamison-v-McClendon.html