The Future of Qualified Immunity

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Introduction

- Legal scholars and civil rights advocates questioning the legal basis for qualified immunity, as well as the policies underlying the doctrine
- Justice Thomas has urged the Court to reconsider the doctrine; lower court judges have also expressed their opinion that the doctrine has allowed law enforcement officers to avoid accountability
- Recent events have propelled qualified immunity into the public discourse, with calls to overhaul or completely abolish the doctrine

Questions for Discussion

- How have courts applied qualified immunity in light of recent events?
- Are there any identifiable trends in the case law?
- What do these trends suggest about the future of qualified immunity?

Review of Qualified Immunity Case Law

- Cases from courts of appeals from 2020 and 2021
- Excessive force cases
  - Substantial number, making for robust review of emerging trends
  - Often the most difficult, where courts are reviewing questions at the hazy border between acceptable and excessive force
  - Cases in the national spotlight
- Cases with disagreement, either between district court and appellate court, or among members of the same panel
- Whittled down to twenty cases for close scrutiny

Summary: By the Numbers

- In twelve out of twenty cases, or **60%**, the courts of appeals held that the officers were not entitled to qualified immunity on the excessive force issue
- In **50%** of the cases, there was a dissent
- In one cases five justices dissented from the denial of a rehearing en banc in a case where the panel held that the officers were entitled to qualified immunity
- A panel rehearing was granted in one case where the panel held that the officers were entitled to qualified immunity

Three Main Themes

- Defining contours of right with appropriate level of specificity or generality
- Identifying material facts
  - Selecting facts to include in definition of the right
  - Applying precedent to the facts
- Determining whether reasonableness is a question for the jury

Defining Contours of the Right

Generality vs. Specificity

Defining Contours of the Right

- U.S. Supreme Court has held that the proper definition of the right requires a high degree of specificity and that the inquiry must be undertaken in light of the specific context of the case.
- Court has routinely admonished courts for defining the right at too high a level of generality; broad propositions do not create clearly established law
- Narrow exception for obvious cases: no materially similar case but unlawfulness of conduct readily apparent - *Hope v. Pelzer*

Defining Contours of the Right

- Broad propositions generally still insufficient
- But courts indicating interest in applying *Hope v. Pelzer* exception for obvious cases, where there is no case on point with material facts but the unlawfulness is apparent

Day v. Wooten, 947 F.3d 453 (7th Cir.)

- Day caught shoplifting; ran across mall parking lot to gas station where he was apprehended and handcuffed; was obese, had heart condition, and was sweating and breathing heavily when handcuffed
- Officers tried to calm him and position him so he could breathe better; called paramedics, who determined he did not need treatment
- Condition deteriorated, became unresponsive; taken to hospital where he was pronounced dead; autopsy listed handcuffs as contributing factor, along with obesity and heart condition

Day v. Wooten, 947 F.3d 453 (7th Cir.)

- District court denied QI; defined as the right to have officers consider preexisting injury or health condition when handcuffing
- Seventh Circuit reversed; broad proposition insufficient for creating clearly established law

Day v. Wooten, 947 F.3d 453 (7th Cir.)

- Material facts that distinguish case from precedent, which involved cases where officers were aware/should have been aware of condition
  - Day never told officers or paramedics he had heart condition
  - Never complained of handcuffs
  - Nothing to suggest handcuffs were too tight
  - Breathing difficulty appeared related to Day's running across the parking lot

Stewart v. City of Euclid, 970 F.3d 667 (6th Cir.)

- Officers responded to report of suspicious vehicle; found Stewart asleep inside
- Officers woke him but did not identify themselves; one officer opened Stewart's car door
- Stewart started driving away; officer jumped into the car; Stewart continued driving but not recklessly
- Officer repeatedly struck and tased Stewart, to no avail; eventually shot him multiple times in the torso

Stewart v. City of Euclid, 970 F.3d 667 (6th Cir.)

- Sixth Circuit affirmed district court's grant of QI
  - No case involving officer being driven in suspect's car

- Dissent:
  - Majority evaluated issue too narrowly
  - Officer created dangerous situation
  - Obvious case: cannot use force against fleeing suspect who does not post an imminent threat of physical injury or death; fact that officer was inside car, although novel, not material

Cantu v. City of Dothan, 974 F.3d 1217 (11th Cir.)

- Lawrence suspected of driving without license after he attempted to drop stray dog at shelter
- Officers attempted to handcuff Lawrence; he evaded by running around his car
- Officers tased him twice in abdomen; Lawrence jerked back but was not incapacitated; officer grabbed hold of him
- Brief struggle ensued; Lawrence grabbed taser – dispute over whether he attempted to gain control of taser or push it away defensively
- Officer shot Lawrence in stomach without warning

Cantu v. City of Dothan, 974 F.3d 1217 (11th Cir.)

- District court granted QI
  - Described Lawrence as confrontational, uncooperative, resistant
  - Said he was a threat when he grabbed the taser

- Eleventh Circuit reversed
  - Obvious case – driving without a license, unarmed, held by officer who outweighed him, never gained control of taser, shot without warning
  - Criticized district court for not considering totality of circumstances

Determining & Weighing Material Facts

Using Facts to Define The Right & Apply Precedent

Determining & Weighing Material Facts

- U.S. Supreme Court has held in excessive force cases question whether officers' actions are objectively reasonable is assessed under totality-of-circumstances
- Three factors particularly important:
  - Severity of the crime at issue
  - Whether suspect poses an immediate threat
  - Whether suspect is actively resisting or attempting to evade arrest

Determining & Weighing Material Facts

- Courts struggling with
  - To what extent context leading up to use of force should be balanced against threat posed by suspect at time force is used
  - Whether to take suspect's mental illness or impairment into consideration
  - Whether officers created situation that gave rise to need to use force
- Determination on these issues impacts how the court defines right at issue and how it applies or distinguishes precedent

Reavis v. Frost, 967 F.3d 978 (10th Cir.)

- Coale was suspect in stabbing incident; officer stopped his vehicle, approached window, and ordered him to show his hands
- Coale did not comply; accelerated truck forward and around officer; when side mirror passed by officer, officer shot into Coale's vehicle
- Court affirmed denial of QI; Coale posed no immediate threat
- Dissent: majority failed to consider totality of circumstances; in light of rapidly unfolding events, officer could not predict Coale's next move

Cortesluna v. Leon, 979 F.3d 645 (9th Cir.)

- Officers responded to call that Cortesluna had chainsaw and was trying to break into room where woman and children were barricaded
- Cortesluna came out with his hands up, knife in his pocket; officers ordered him to keep his hands up; he slowly moved them down; officers shot him with beanbag round, pushed him to ground, kneed him in back
- Court reversed grant of QI on issue of knee in back; Cortesluna was lying down and not resisting; that is critical moment to analyze
- Dissent: Cannot downplay threat from comfort of chambers dangers that officers face in making arrests; Cortesluna was armed, suspected of serious crime

Tan Lam v. City of Los Banos, 976 F.3d 986 (9th Cir.)

- Sonny had history of mental health issues, stopped taking medication, tried to hit his father
- Father called 911, asked for specialized treatment; police officer arrived
- Officer went into Sonny's room; Sonny yelled at him to get out
- Officer approached him, grabbed his shoulder; Sonny pushed him into hallway

Tan Lam v. City of Los Banos, 976 F.3d 986 (9th Cir.)

- According to officer, Sonny approached him with scissors, stabbed him in forearm
- Officer shot Sonny in his leg, retreated down hall to clear his gun, which was jammed
- Once officer cleared his gun, he shot a second time down the hall without warning, hitting Sonny in the chest
- Evidence supported that Sonny no longer had scissors when he was shot second time

Tan Lam v. City of Los Banos, 976 F.3d 986 (9th Cir.)

- Jury returned verdict for plaintiff; officer renewed motion for judgment as a matter of law on QI grounds; district court denied motion
- Ninth Circuit affirmed denial of QI
  - Must consider cases where suspect was previously armed but no longer so at the time of deadly force; clearly established under that line of cases
  - Desire to quickly resolve a potentially dangerous situation is not a sufficient government interest

Tan Lam v. City of Los Banos, 976 F.3d 986 (9th Cir.)

- Dissent
  - Majority does not consider totality; specificity is important
  - One-on-one confrontation in confined space, in which suspect used deadly weapon to wound a police officer; deadly shot fired quickly after first
  - Events unfolded and escalated quickly; had to make quick judgment and not wait to see what Sonny would do next

Estate of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir.)

- Jones was homeless, diagnosed with schizophrenia, walking in street
- Officer asked for ID and any weapons; Jones said he had “something”; officer called for backup, demanded Jones put his hands on patrol car
- Jones tried to move away, asking what he did wrong; officer tased him, to no effect; second officer arrived and tased Jones, claimed Jones hit him in the face; third officer arrived
- Jones ran and hid in doorway of bookstore; officers cornered him, told him to get on ground; Jones said he did not do anything, then put his hands up; officers grabbed him, tumbled down stairs

Estate of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir.)

- Officers wrestled him into chokehold to stop him from resisting; two more officers arrived, making five total
- Jones was face down on ground, kicking his legs; officer tased him again to no effect
- While in chokehold, one officer felt poke in his side, yelled that Jones had knife; officers withdrew and Jones' arm dropped
- While motionless, officers surrounded him, ordered him to drop knife; he did not verbally respond
- Officers fired 22 rounds

Estate of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir.)

- District court granted QI; Jones resisted arrest, fled, attempted to stab officers, was not secured, and was armed
- Fourth Circuit reversed
  - Two facts define right at appropriate level of specificity: (1) although armed, Jones had been secured immediately before he was released, and (2) he was incapacitated
  - Must consider context: Jones was walking in street, without housing, had evident mental health challenges; officers quickly escalated the situation; Jones was merely scared and confused

Sok Kong v. City of Burnsville, 960 F.3d 985 (8th Cir.)

- Kong had been sitting in car in McDonald's parking lot for over 30 minutes jumping up and down and waving knife around, exhibiting mental impairment
- Officers knocked on window; Kong did not acknowledge their presence; officers broke window, ordered him to drop knife
- Kong did not comply; officers tased him; Kong reacted by swinging knife toward officers; they tased him again; he fell out onto pavement
- Kong jumped up and ran across parking lot toward highway, while customers were driving in and out of parking lot
- Officers fired at him, striking him in the back and side

Sok Kong v. City of Burnsville, 960 F.3d 985 (8th Cir.)

- Court reversed denial of QI
  - Not clearly established that officers could not shoot someone waving knife erratically near bystanders and not complying with orders
  - Impaired mental state does not reduce need for immediate and significant threat a suspect poses
  - Officers must make split-second judgments without benefit of hindsight

Sok Kong v. City of Burnsville, 960 F.3d 985 (8th Cir.)

- Dissent
  - Should have responded as if it were a mental health crisis, not a felony
  - No bystanders in immediate area

James v. New Jersey State Police, 957 F.3d 165 (3d Cir.)

- Woman called 911 to reported that Gibbons violated TRO and was waving gun around
- Officers spotted Gibbons walking along road; he told officers to stay away
- Officers exited vehicle and saw Gibbons with gun pointed at his own head; officer drew weapon and asked him to drop gun; he did not comply, told officers to stay away
- While separated by about 7-15 yards, officer shot Gibbons twice

James v. New Jersey State Police, 957 F.3d 165 (3d Cir.)

- District court denied QI; said officer may not use deadly force against suspect unless officer reasonably believes suspect poses a threat of serious bodily injury to officers or others
- Third Circuit reversed denial of QI
  - District court viewed at too high a level of generality, did not consider facts that Gibbons was armed, ignored orders to drop gun, was mentally ill and off medication

James v. New Jersey State Police, 957 F.3d 165 (3d Cir.)

- Dissent on Denial for Rehearing En Banc
  - Case squarely controlled by precedent holding that if suspect stops advancing and does not pose threat to anyone but himself, deadly force is objectively excessive
  - Majority fails to meaningfully distinguish precedent; relies on immaterial facts or ones that weigh against use of force
  - Emotionally disturbed person; government interest diminished
  - Situation rapidly unfolded because officer acted too quickly without trying to deescalate

Reasonableness of Officer's Belief

Question of Law or Question for Jury

Question of Reasonableness for Jury

- Recurring themes - whether officer reasonably perceived suspect was actively resisting arrest, attempting to flee, reaching for weapon, e.g.:
  - Jury could find officer's tasing of suspect lying on stomach with hands underneath unreasonable
  - Jury could find officer's mistaken belief that suspect on motorcycle was trying to flee unreasonable
  - Jury could find officer's mistaken belief that suspect was reaching for gun in console unreasonable

Smart v. City of Wichita, 951 F.3d 1161 (10th Cir.)

- Crowds leaving bars and music venues in downtown Wichita; officers present for crowd control
- Gun shots went off in crowd; officers saw Smart crouched down and running in opposite direction of crowd; believed he was shooter
- Officers fired at him, but he kept running, turned into alleyway; officers fired again
- Smart was unarmed; turned out not to be shooter

Smart v. City of Wichita, 951 F.3d 1161 (10th Cir.)

- Court affirmed grant of QI
  - Officers made split-second decision with active shooter in chaotic, crowded setting
- Dissent
  - No longer active shooter; was fleeing
  - Jury could conclude that mistake of fact whether Smart was shooter and was still active was unreasonable

Summary & Future of Qualified Immunity

Summary of Trends

- Use of *Hope* to identify obvious cases
- Recognition of needs of individuals with mental health issues; alternative ways to handle without force; factor to be considered in totality of circumstances
- Greater scrutiny of whether officers were forced to make split-second judgment; Did officers have opportunity to deescalate? Did officers create the situation that required use of force?
- Emphasis on context leading up to use of force
- Where force was lethal, greater scrutiny of reasonableness of officers' actions, particularly mistakes of fact

Future of Qualified Immunity

- U.S. Supreme Court issued per curiam decision in *Taylor v. Riojas*, an Eighth Amendment conditions of confinement case, holding that 5th Circuit erred in granting QI; vacated and remanded *McCoy v. Alamu*, Eighth Amendment case involving assault of inmate, for further consideration in light of *Taylor*

Future of Qualified Immunity

- Supreme Court demonstrated its willingness to deny QI in egregious cases, but is not taking up the larger question whether QI itself should be reconsidered
- Courts of appeals are giving greater scrutiny to and testing the limits of QI, and are showing willingness to deny QI in cases with deadly force
- But these cases also demonstrate the need for QI in gray areas of excessive force; constitutional questions are difficult, involve balancing of many factors courts that courts disagree on; QI is needed to give fair notice to officers and also to avoid creating bad constitutional law