Qualified Immunity CLE

I. Background (1st 15 minutes)

A. ***Mullenix v. Luna***

- The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." citing *Pearson v. Callahan*, 555 U.S. 223, (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, (1982)).
- A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." quoting *Reichle v. Howards*, 132 S.Ct. 2088 (2012).
- "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, (2011).
- Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." quoting *Malley v. Briggs*, 475 U.S. 335, (1986).
- "We have repeatedly told courts ... not to define clearly established law at a high level of generality." This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" quoting *Brosseau v. Haugen*, 543 U.S. 194 (2004).

B. ***Tennessee v. Garner***

- Fleeing Felon Rule: "[C]ommon-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death."
- "The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts,9 the presently available evidence does not support this thesis."

C. ***Pierson v. Ray***

- "We hold that the defense of good faith and probable cause, which the court of appeals found available to the officers in the common-law action for false arrest and imprisonment is also available to them in the action under §1983."
- "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 mulcted in damages if he does."

D. ***Harlow v. Fitzgerald***

- "The subjective element of the good-faith defense frequently has proved incompatible with our admonition…that insubstantial claims should not

proceed to trial…Until [the] threshold immunity question is resolved, discovery should not be allowed."

E. Buckley v. Fitzsimmons

- "In *Tenney v. Brandhove*, 341 U.S. 367 (1951), however, we held that Congress did not intend § 1983 to abrogate immunities 'well grounded in history and reason.'"
- "Certain immunities were so well established in 1871, when § 1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish" them.

F. Saucier v. Katz

- "The first [threshold question] must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered."

G. Hope v. Pelzer

- For a constitutional right to be clearly established, its contours "must be sufficiently clear . . . [t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."
- "The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity."

II. Academia & Public Perception (2nd 15 minutes)

A. ***Ziglar v. Abbasi***

- "Our qualified immunity precedents…represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." (Buckley, supra)

B. ***Mullenix v. Luna***

- [The officer] fired 6 rounds in the dark at a car traveling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it. Mullinix's rogue conduct killed the driver…Because it was clearly established under the Fourth Amendment that an officer in Mullenix's position should not have fired the shots, I respectfully dissent.
- "A reasonable officer could not have thought that shooting would stop the car with less danger or greater certainty than waiting."

C. The Yale Article (Prof. Joanna C. Schwartz)

- As Noah Feldman has observed "the Supreme Court wants fewer lawsuits against police to go forward." And the Court believes that qualified immunity doctrine is the way to keep the doors to the courthouse closed.

- The Court has made clear that the contours of qualified immunity's protections are shaped not by the common law but instead by policy considerations.
- The threat of a qualified immunity motion may cause a person never to file suit, or to settle or withdraw her claims before discovery or trial.
- And, the findings.

D. Prof. Schwartz's Latest Article
- "[T]he clearly established standard is fundamentally flawed—it misunderstands the way officers are educated about the scope of their constitutional authority."
- "More than three-fourths of the 328 training outlines I reviewed referenced no court decision applying *Graham* and/or *garner.* Even when training outlines do reference such cases, the outlines suggest that the trainers do not educate officers about the underlying facts and holdings of the cases."

E. *Latits v. Phillips; Jessop v. City of Fresno; Baxter v. Bracey*
- Latits led officers on a high speed police chase. Officer Phillips shot and kill Latits after ramming his car to stop the chase. The court held that the officer's use of deadly force was objectively unreasonable but controlling law did not clearly establish that it was unreasonable, and Phillips was entitled to qualified immunity.
- Officers of the City of Fresno allegedly stole over $275,000 in cash and rare coins while executing a search warrant at Jessop's home. The court stated that the officers were entitled to qualified immunity because the court had not made any prior ruling that theft while executing a search warrant violated the Fourth Amendment and therefore the law was not clearly established.
- Baxter was cornered by Officers while robbing a house. Baxter surrendered and sat on the ground with his hands in the air. Despite surrendering, the officer released a police dog on Baxter, seriously injuring him. The court held that the officer was entitled to qualified immunity despite a prior 6th Circuit holding that officers violated the Fourth Amendment when they released a dog on a suspect who had surrendered and was lying on the ground with his hands at his side. The difference between the positioning of the hands, the court said, was enough to distinguish the two situations, and therefore the law was not clearly established.

F. State & National Legislation
- The Ending Qualified Immunity Act, Congresswoman Pressley
- "George Floyd Act of 2020"

G. Professors Blum, Chemerinsky, & Martin Schwartz
- "The extent of Pearson's negative effect on the development and clarification of constitutional rights is also apparent in lower court decisions, which demonstrate the courts' willingness to ignore the merits question, leaving the constitutional issue for another day."

- "The Harlow standard for thirty years focused on whether it was clearly established law that a reasonable officer should know; now it must be law that "every" reasonable officer should know. Now, after Ashcroft v. Al-Kidd, it must be a right that is beyond dispute (*debate).
- "Hope, while not overruled, is largely ignored or distinguished by both the Supreme Court and lower courts."

H. Social Media: Celebrities Weigh In

- Demi Levato tweeted: "Rest in power, George Floyd. We must keep fighting to end qualified immunity. Please follow @NAACP for news, updates on how you can help." Which prompted the following responses
  - Clark Neily (@ConLawWarrior): "Awaiting the Chauvin verdict, I'm struck again by the sheer magnitude of SCOTUS's error in inventing qualified immunity out of whole cloth. How many people would still be alive—perhaps even George Floyd—if police were held to the same standard of accountability as the rest of us?
  - Jesse Kelly (@JesseKellyDC): You wanna end qualified immunity? Fine. End it and watch all the good cops retire. But better tie that DIRECTLY to allowing people in urban areas the right to own firearms. Otherwise, your libertarian pipe dream is just dooming those poor people.
  - Regina King (@ReginaKing): Join me and the @NAACP_LDF in calling your Senators to pass the George Floyd Justice in Policing Act. The bill ends qualified immunity which is critical to holding officers accountable for their actions.
- ***https://www.washingtonpost.com/outlook/2020/06/03/police-abuse-misconduct-supreme-court-immunity/***

III. QI Today, Tomorrow, & Improvements

A. Hot takes from a Municipal League General Counsel

- What's the Purpose
  - ❖ The Gray Areas: "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Saucier*.
  - ❖ "Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful. Officers sued in a § 1983 civil action have the same fair notice right as do defendants charged under 18 U.S.C. § 242, which makes it a crime for a state official to act willfully and under color of law to deprive a person of constitutional rights." *Hope, supra.*
- Provide Assurance to Officers
  - ❖ "There is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"*Harlow, supra.*

- Avoid Rigors of Trial
    - ❖ Interlocutory Appeal

B. How can QI be improved?
    - First, the Purpose of QI is not to avoid discovery, but to avoid trial—Thus the need for interlocutory appeals. We don't use QI that much. Only for Interlocutory Appeals
    - Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." 533 U.S., at 205, 121 S.Ct. 2151.
    - "There is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"*Harlow, supra.*
    - Officers sued in a civil action for damages…have the same right to fair notice as do defendants charged w/ the criminal offence defined in 18 USC §242 which makes it a crime for a state official to act "willfully" and under color of law to deprive a person of rights protected by the constitution.

C. What about the Jury?
    - Like in *Mullenix,* the dissent in *Kisela* picks the facts upon which to focus – as does the majority.
    - Is Q.I. better left for determination after a jury has determined the facts?
    - Of course, officers lose the immunity from trial aspect, but perhaps better case law can be produced.

A. Bring back to *Saucier*…answer the merits question.
B. But…"When a court of appeals addresses the merits question and declares a constitutional right has been violated, but the defendant prevails on the qualified immunity prong of the analysis, an interesting problem is presented. May the defendant, the prevailing party in the court below, seek review in the Supreme Court of the merits question that was decided in the plaintiff's favor?
C. While the defendant officials whose conduct has been deemed unconstitutional are shielded from liability in the case decided, future conduct under similar circumstances will be governed by the newly declared constitutional standard and qualified immunity will not be afforded."
D. *Blum, Chemerinsky, & Schwartz:* "[T]he development of constitutional law is by no means entirely dependent of cases in which the defendant may see [QI]. Most of the constitutional issues that are presented in §1983 damages actions…also arise in cases which that defense is not available, such as criminal cases and §1983 cases against a municipality, as well as§1983 cases against individuals where injunctive relief is sought instead of or in addition to damages."
E. *Training*
F. ***Hope* has to be a part of the equation.**