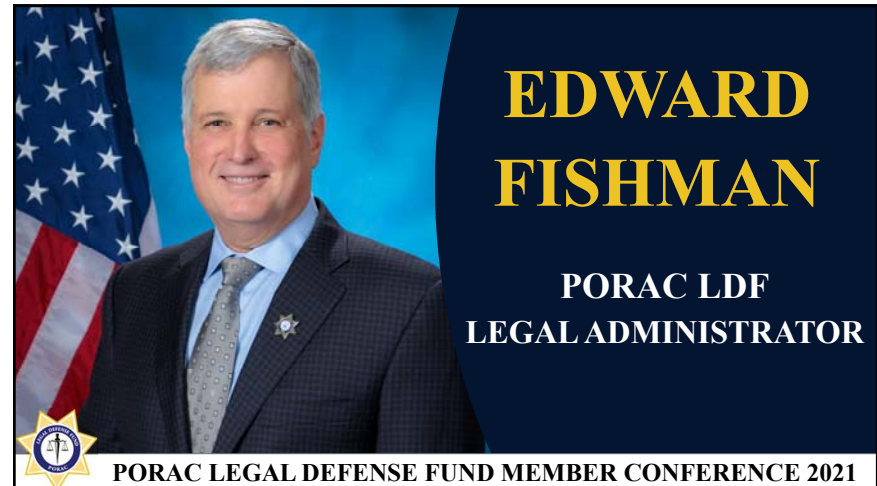




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CIVIL COVERAGE

(Only for acts or omission within the Scope of Employment)

***Employer "Should":
"DEFEND & INDEMNIFY"***



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CIVIL COVERAGE

- ✓ If your employer refuses to represent you; or,
- ✓ A legal conflict of interest between you and your employer; or,
- ✓ Inadequate representation by your employer; or,
- ✓ A considerable likelihood that punitive damages could be awarded against you.

***Then... You will be provided with independent counsel
by the Legal Defense Fund***



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CIVIL CASE MONITORING

If your employer defends, but does NOT indemnify (i.e. “reservation of rights”), then:

- ✓ Experienced Civil Attorney Monitors case
- ✓ Watches for Conflicts
- ✓ Available to consult with member



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QUALIFIED IMMUNITY

RICK PINCKARD

LDF Panel Attorney
Bobbitt Pinckard & Fields, APC



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- ✓ Rick Pinckard is the managing partner of Bobbitt Pinckard & Fields, APC, in San Diego, California. He has been a California licensed attorney for over 33 years.
- ✓ His practice areas include negotiating and enforcing collective bargaining agreements, representation in administrative investigations and disciplinary appeals, course-and-scope criminal defense, and litigation of writs and appeals.



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QUALIFIED IMMUNITY

PAST-PRESENT-FUTURE

PORAC LEGAL DEFENSE FUND
MEMBER CONFERENCE
LAS VEGAS
JULY 19, 2021
RICK PINCKARD

BOBBITT, PINCKARD & FIELDS

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THE COMMUNITIES WE PROTECT & SERVE

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WHY THE PROTESTS?
 WHAT'S THE MOTIVATION BEHIND CALLS TO ABOLISH QUALIFIED IMMUNITY?

BECAUSE QUALIFIED IMMUNITY MORE OFTEN THAN NOT **PUTS THE DEEP POCKETS** OF THE MUNICIPALITY...
 ...**OUT OF REACH** OF THE PLAINTIFFS' GRASP

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EARLIEST BEGINNINGS

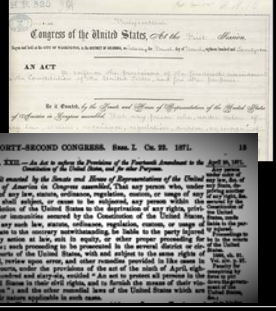
- EVOLUTIONARY PATH OF QUALIFIED IMMUNITY BEGAN IN APRIL 1871 WHEN CONGRESS ENACTED **42 U.S.C. § 1983**, AS PART OF THE "ENFORCEMENT ACTS OF 1871"
- "**SECTION 1983**" WAS ENACTED IN SPECIFIC RESPONSE TO VIOLENCE BY THE KU KLUX KLAN
- SECTION 1983 PROVIDED GROUNDS FOR **PRIVATE LAWSUITS IN FEDERAL COURT FOR MONEY DAMAGES AGAINST ANYONE—INCLUDING GOVERNMENT OFFICIALS**

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ORIGINAL LANGUAGE OF "SECTION 1983"

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States...shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress



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NOT MUCH CHANGE TO LANGUAGE IN 150 YEARS

ORIGINAL TEXT 1871

- “[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States...shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress....”

CURRENT TEXT 2021

- “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....”

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SECTION 1983

- AS ORIGINALLY DRAFTED AND ENACTED BY CONGRESS, SECTION 1983 DID NOT INCLUDE ANY PROVISION FOR QUALIFIED IMMUNITY
- SECTION 1983 HAS BEEN AMENDED SEVERAL TIMES OVER THE PAST 150 YEARS
- NONE OF THE AMENDMENTS HAVE ADDED PROVISIONS FOR QUALIFIED IMMUNITY—NOR PROHIBITED IT
- SO, WHERE DID QUALIFIED IMMUNITY ORIGINATE...?

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ROOTS OF QUALIFIED IMMUNITY AS APPLIED TO LAW ENFORCEMENT—THE U.S. SUPREME COURT, NOT CONGRESS

- **PIERSON V. RAY, 386 U.S. 547 (1967)**
 - A POLICE OFFICER SHOULD BE EXCUSED FROM LIABILITY FOR FALSE ARREST WHERE HE ACTED UNDER A STATUTE THAT HE REASONABLY BELIEVED TO BE VALID BUT THAT WAS LATER HELD UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED.
 - DEFENSE OF GOOD FAITH AND PROBABLE CAUSE IS AVAILABLE TO OFFICERS IN A COMMON-LAW ACTION FOR FALSE ARREST AND IMPRISONMENT; THEREFORE, IT IS ALSO AVAILABLE TO THEM IN AN ACTION UNDER THE CIVIL RIGHTS ACT FOR DAMAGES FOR DEPRIVATION OF SUCH RIGHTS.
 - DECISION WAS VERY NARROW IN SCOPE

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FURTHER EXPANSION OF THE DOCTRINE OF QUALIFIED IMMUNITY BY THE U.S. SUPREME COURT

- EXPANDED SCOPE OF *PIERSON* TO OTHER CONSTITUTIONAL VIOLATIONS THAT HAD NO COMMON LAW DEFENSE(S)
- EXPANSION TO ANY GOVERNMENT OFFICIAL NOT PROTECTED BY ABSOLUTE IMMUNITY, AS LONG AS ACTING IN “GOOD FAITH”
- ABANDONMENT OF “SUBJECTIVE TEST OF GOOD FAITH” (WHICH HAD REQUIRED AN ACTUAL SINCERE BELIEF THAT ACTIONS WERE LEGAL)
- ADOPTION OF NEW STANDARD: “THEIR CONDUCT DOES NOT VIOLATE CLEARLY ESTABLISHED STATUTORY OR CONSTITUTIONAL RIGHTS OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN”

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COURT EXAMINES TWO PRONGS: CAN BE EXAMINED IN EITHER ORDER

- (1) WHETHER THE FACTS ALLEGED SHOW THE OFFICER'S CONDUCT ACTUALLY VIOLATED A CONSTITUTIONAL RIGHT
- (2) WHETHER A CONSTITUTIONAL RIGHT HAS PREVIOUSLY BEEN "CLEARLY ESTABLISHED"
- ANALYSIS OF ONE PRONG MAY BE DISPOSITIVE ON THE REMAINING PRONG

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OBJECTIVE STANDARD

- IRRELEVANT WHETHER OR NOT OFFICER WAS ACTUALLY ACTING IN GOOD FAITH
- WHETHER THE FACTS ALLEGED SHOW THE OFFICER'S CONDUCT ACTUALLY VIOLATED A CONSTITUTIONAL RIGHT (FIRST PRONG) IS ANALYZED UNDER *GRAHAM v. CONNOR*, 490 U.S. 386 (1989)

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"CLEARLY ESTABLISHED LAW" ANALYSIS

- "CLEARLY-ESTABLISHED LAW" PRONG OF THE Q/I DEFENSE IS DESIGNED TO GIVE GOV'T OFFICIALS 'BREATHING ROOM' TO MAKE REASONABLE BUT MISTAKEN JUDGMENTS ABOUT OPEN LEGAL QUESTIONS.
- THE DISPOSITIVE INQUIRY IN ANALYZING THE CLEARLY-ESTABLISHED PRONG OF THE Q/I DEFENSE IS WHETHER IT WOULD BE CLEAR TO A REASONABLE OFFICER THAT HIS/HER CONDUCT WAS UNLAWFUL IN THE SITUATION, BASED ON THE LAW AT THE TIME.
- Q/I BALANCES 2 IMPORTANT INTERESTS: THE NEED TO HOLD OFFICIALS ACCOUNTABLE WHEN THEY EXERCISE POWER IRRESPONSIBLY AND THE NEED TO SHIELD OFFICIALS FROM HARASSMENT, DISTRACTION, AND LIABILITY WHEN THEY PERFORM THEIR DUTIES REASONABLY.

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"CLEARLY ESTABLISHED"

- WHETHER A CONSTITUTIONAL RIGHT IS "CLEARLY ESTABLISHED," REQUIRES THERE TO BE A PUBLISHED COURT DECISION ON SUBSTANTIALLY SIMILAR FACTS FROM THE SAME CIRCUIT
 - IF NO PRIOR PUBLISHED CASE ADDRESSING SPECIFIC CONDUCT AND CONCLUDING THAT THE SPECIFIC CONDUCT WAS UNCONSTITUTIONAL—Q/I SHOULD BE GRANTED
 - IF PRIOR PUBLISHED CASE HAS DETERMINED SPECIFIC CONDUCT TO BE UNCONSTITUTIONAL—Q/I SHOULD BE DENIED
 - DETERMINATIONS CANNOT BE BASED ON "OVERLY GENERALIZED" PRINCIPLES
 - ONLY 2 OUT OF THE 30 Q/I CASES TAKEN BY THE U.S. SUPREME COURT FROM 1982-2017, RULED AGAINST GRANTING QUALIFIED IMMUNITY

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IN THE *ABSENCE* OF CLEARLY ESTABLISHED LAW

THE “CLEARLY ESTABLISHED LAW” INQUIRY OF THE QUALIFIED IMMUNITY DEFENSE ALLOWS **ALL BUT** THE **PLAINLY INCOMPETENT** OR **THOSE WHO KNOWINGLY VIOLATE THE LAW** TO HAVE IMMUNITY FROM SUIT.

MALLEY v. BRIGGS, 475 U.S. 335 (1986)

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CASE EXAMPLES FROM VARIOUS CIRCUITS

- *GARZA v. BRIONER*, 943 F.3d 740 (5th Cir. 2019)
- *JORDAN v. HOWARD*, 987 F.3d 537 (6th Cir. 2021)
- *PEROZA-BENITEZ*, 2021 U.S. APP LEXIS 10126 (3rd Cir. 2021)
- *S.B. v. COUNTY OF SAN DIEGO*, 864 F.3d 1010 (9th Cir. 2017)
- *O'DOAN v. SANFORD*, 991 F.3d 1027 (9th Cir. 2021)
- *CONLOGUE v. HAMILTON*, 906 F.3d (1st Cir. 2018)
- *LENNOX v. MILLER*, 968 F.3d 150 (2nd Cir. 2020)
- *WILLIAMS v. STRICKLAND*, 917 F.3d 763 (4th Cir. 2019)
- *ESTATE OF WILLIAMS BY ROSE v. CLINE*, 902 F.3d 643 (7th Cir. 2018)
- *QURAIISHI v. ST. CHARLES COUNTY*, 986 F.3d 831 (8th Cir. 2021)
- *FRASIER v. EVANS*, 992 F.3d 1003 (10th Cir. 2021)
- *SEBASTIAN v. ORTIZ*, 918 F.3d 1301 (11th Cir. 2019)

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EFFECT OF QUALIFIED IMMUNITY

- IF GRANTED, QUALIFIED IMMUNITY ON A CAUSE OF ACTION BROUGHT UNDER TITLE 42 U.S.C. § 1983 IS NOT SIMPLY A DEFENSE TO LIABILITY, BUT **CONFERS IMMUNITY** FROM SUIT
- ONCE GRANTED, QUALIFIED IMMUNITY RESULTS IN THE **OFFICER** BEING **DISMISSED** OUT OF THE LAWSUIT
- ONCE THE OFFICER IS DISMISSED, THE ONLY REMAINING ISSUE IS WHETHER A CLAIM AGAINST THE MUNICIPALITY EXISTS UNDER *MONELL v. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK*, 436 U.S. 658 (1978)

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BASIS FOR “*MONELL*” LIABILITY

- OFFICER’S UNCONSTITUTIONAL ACTS ARE BASED UPON:
 - OFFICIAL AGENCY POLICY
 - KNOWN UNOFFICIAL CUSTOM/PRACTICE
 - DELIBERATE INDIFFERENCE BY AGENCY
- IF NO *MONELL* CLAIM EXISTS, PLTF’S ENTIRE LAWSUIT IS DISMISSED ON SUMMARY JUDGMENT—WITHOUT ANY OPPORTUNITY TO PRESENT ANY EVIDENCE TO A JURY

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CURRENT NET EFFECT OF QUALIFIED IMMUNITY AND *MONELL*

- OFFICER IS OUT OF THE SUIT
- MUNICIPALITY IS OUT OF THE SUIT
- PLAINTIFF HAS NO PATH TO PERSONAL MONETARY DAMAGES ENVISIONED BY SECTION 1983

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BENEFITS OF QUALIFIED IMMUNITY

- PER U.S. SUPREME COURT IN, *HARLOW V. FITZGERALD*, 457 U.S. 800 (1982):
 - AVOID THE EXPENSE AND DISRUPTION OF GOVERNMENT SERVICES CAUSED BY FRIVOLOUS LITIGATION
 - AVOID THE DETERRENCE OF "ABLE CITIZENS" FROM ACCEPTANCE OF PUBLIC OFFICE
 - AVOID FEAR OF BEING SUED FROM DAMPENING "THE ARDOR OF ALL BUT THE MOST RESOLUTE OFFICIALS, IN THE UNFLINCHING DISCHARGE OF THEIR DUTIES"

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CRITICS' REBUKE

- CRITICS ASSAIL QUALIFIED IMMUNITY FOR LEAVING LEGITIMATE VICTIMS WITHOUT A REMEDY
- CRITICS COMPLAIN THAT THE COURT EXCEEDED ITS CONSTITUTIONAL AUTHORITY AND VIOLATED THE SEPARATION OF POWERS PRINCIPLES BY LEGISLATING THRU JUDICIAL FIAT, A DOCTRINE THAT CONGRESS DID NOT INCLUDE IN THE CIVIL RIGHTS STATUTES (TITLE 42 U.S.C. § 1983)
- CRITICS SAY DEVELOPMENT OF LAW IS INHIBITED

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PROCEDURAL/PLEADING ASPECTS OF QUALIFIED IMMUNITY

SEE COURSE OUTLINE, PAGES 6 - 7

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REALITIES FOR LAW ENFORCEMENT MOVING FORWARD

- ABOLISHMENT—IS IT POSSIBLE?
 - REVERSAL OF PRECEDENT BY U.S. SUPREME COURT
 - FEDERAL LEGISLATIVE ACTION (SEE H.R. 1280, § 102)

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FEDERAL LEGISLATIVE ACTION

■ H.R. 1280, § 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...OFFICER... OR IN ANY ACTION UNDER ANY SOURCE OF LAW AGAINST A FEDERAL...OFFICER... 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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H.R. 1280, § 102—QUALIFIED IMMUNITY REFORM: PROBLEMATIC LANGUAGE

- "IT SHALL NOT BE A **DEFENSE** OR IMMUNITY"
 - COULD BE INTERPRETED TO IMPOSE STRICT LIABILITY EVEN IF NOT THE INTENT
 - CAN **DEFENSE** AND **IMMUNITY** BE TREATED SEPARATELY?
 - COULD IT EVISCERATE *GRAHAM V. CONNOR* "OBJECTIVELY REASONABLE" STANDARD?

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ABOLISHMENT—IS IT FEASIBLE?

- DEPENDS ON HOW IT IS ACCOMPLISHED
- JUST AT THE FEDERAL LEVEL
- FEDERAL LEVEL WITH PRESSURE ON THE STATES
- NO FEDERAL ACTION, JUST FEDERAL PRESSURE ON STATES
- FEDERAL AND/OR STATE ACTION IN CONJUNCTION WITH LOSS OF DEFENSE AND INDEMNIFICATION
- FEDERAL OR STATE ACTION IN CONJUNCTION WITH APPLICATION OF RESPONDEAT SUPERIOR

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ABOLISMENT GOALS MUST BE DISCERNED

- PUNISH ACTUAL WRONG-DOERS
- PROVIDE REMEDIES/COMPENSATORY DAMAGES TO LEGITIMATE VICTIMS OF ACTUAL POLICE MISCONDUCT
- SIMPLY REDISTRIBUTE WEALTH TO ACHIEVE SOCIALIST AGENDA
- DIVERT FUNDING FROM POLICE AND POLICING TO PLAINTIFFS' POCKETS

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INFLAMMATORY RHETORIC vs. MEANINGFUL ACTION

- LOTS OF INCENDIARY TALK
- LOTS OF HORROR STORIES—BASED MOSTLY UPON FACTS ALLEGED IN COMPLAINTS WHICH THE COURT MUST ACCEPT AS TRUE
- SOME ACTION HAS BEEN LARGELY SYMBOLIC AT BEST
- INITIAL EMPHASIS IN THE SENATE WAS NOT ABOUT SUBSTANCE BUT ABOUT PASSING LEGISLATION ON THE 1-YR YEAR ANNIVERSARY (MAY 25TH) OF GEORGE FLOYD'S DEATH—A DEADLINE THEY ULTIMATELY MISSED

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FEDERAL ACTION:

- HOUSE PASSED H.R. 1280—THE “GEORGE FLOYD JUSTICE IN POLICING ACT OF 2021” WITH SECTION 102 – QUALIFIED IMMUNITY “REFORM”
- NO CONSENSUS YET IN THE SENATE—TOO MUCH GRANDSTANDING AND POLITICAL POWER STRUGGLES AMONG THE KEY PLAYERS

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STATE ACTION:

- MINNESOTA—GROUND ZERO FOR THE MOVEMENT—FAILED TO ADDRESS QUALIFIED IMMUNITY REFORM IN LATEST POLICE “REFORM” ENACTMENT SIGNED BY GOVERNOR
- COLORADO, NEW MEXICO, CONNECTICUT, MASSACHUSETTS AND NEW YORK CITY HAVE ENACTED “REFORMS” ON QUALIFIED IMMUNITY—FLORIDA IS CURRENTLY LOOKING AT OPTIONS

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COLORADO SB 20-217 § 3, ENACTED JUNE 18, 2021

■ **“CONCERNING MEASURES TO ENHANCE LAW ENFORCEMENT INTEGRITY”:**

- CREATES 'MINI' SECTION 1983 CAUSE OF ACTION
- ABOLISHES QUALIFIED IMMUNITY FOR VIOLATION
- MANDATES DEFENSE & INDEMNIFICATION, UNLESS...
- CAPS OFFICER'S DAMAGES EXPOSURE TO LESSER OF 5% OR \$25K, IF 'UNLESS' IS FOUND

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CONNECTICUT HB 6004 § 41, ENACTED JULY 31, 2020

■ **“AN ACT CONCERNING POLICE ACCOUNTABILITY”:**

- CREATES 'MINI' SECTION 1983 CAUSE OF ACTION
- CODIFIES GOOD FAITH/IGNORANCE BY OFFICER AS SOLE SOURCE OF “GOVERNMENTAL” IMMUNITY
- INCLUDES HOLD HARMLESS CLAUSE FOR INDIVIDUAL OFFICER
- OFFICER IS FINANCIALLY LIABLE FOR COSTS OF DEFENSE AND JUDGMENT IF COURT FINDS MALICIOUS, WANTON OR WILLFUL MISCONDUCT

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MASSACHUSETTS SENATE ACT NO. 2963, ENACTED DECEMBER 1, 2020

■ **“AN ACT RELATIVE TO JUSTICE, EQUITY AND ACCOUNTABILITY IN LAW ENFORCEMENT IN THE COMMONWEALTH”:**

- CREATES 'MINI' SECTION 1983 CAUSE OF ACTION
- TIES IMMUNITY TO DECERTIFICATION STANDARDS; OR 'KNOWINGLY UNLAWFUL' CONDUCT OR CONDUCT NOT OBJECTIVELY REASONABLE
- DOES NOT ADDRESS DEFENSE & INDEMNIFICATION

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NEW MEXICO HOUSE BILL 4, §§ 3-6, ENACTED APRIL 7, 2021

■ **“NEW MEXICO CIVIL RIGHTS ACT”:**

- CREATES 'MINI' SECTION 1983 CAUSE OF ACTION
- CODIFIES AND APPLIES **RESPONDEAT SUPERIOR** (SUITS MUST BE AGAINST ENTITY, NOT OFFICER)
- PROHIBITS QUALIFIED IMMUNITY

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MINNESOTA H.F. NO. 63, ENACTED JUNE 27, 2021

■ **“PUBLIC SAFETY SYSTEM FOCUSED ON TRANSPARENCY, ACCOUNTABILITY, AND VIOLENCE PREVENTION”:**

- NEW REGULATIONS ON NO KNOCK WARRANTS
- APPROPRIATING FUNDS FOR BWC EQUIPMENT
- CREATE STATE MISCONDUCT DATABASE
- CREATE EARLY WARNING SYSTEM
- IN 223 PAGES, NOT ONE WORD ON QUALIFIED IMMUNITY

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NEW YORK CITY ORDINANCE

- PURELY SYMBOLIC
- RETURNED UNSIGNED BY MAYOR
- LIMITED ONLY TO SEARCH & SEIZURE ISSUES
- ABOLISHED QUALIFIED IMMUNITY—AT A LOCAL LEVEL—WHATEVER THAT MEANS

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CONNECTING THE DOTS: KEY PLAYERS

- **SENATOR COREY BOOKER** – EXTREMELY WELL EDUCATED; ARTICULATE; UNABASHED ANTI-QUALIFIED IMMUNITY ACTIVIST; HOSTILE TO THE INTERESTS OF LAW ENFORCEMENT
- **SENATOR TIM SCOTT** – UNIVERSITY EDUCATED; RESPECTABLE; ARTICULATE; GENERALLY CONSERVATIVE; NOT OVERTLY HOSTILE TO LAW ENFORCEMENT, BUT SUPPORTS POLICE REFORM
- **REPRESENTATIVE KAREN BASS** – WELL EDUCATED; INTRODUCED POLICE REFORM BILL NAMED AFTER A CONVICTED AND VIOLENT FELON; MIREN IN IDENTITY POLITICS; HOSTILE TO INTERESTS OF LAW ENFORCEMENT

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OTHER OUTSIDE INFLUENCE

- CATO INSTITUTE / ACLU / OTHER “STRANGE BEDFELLOWS”
 - CHARLES KOCH
 - GEORGE SOROS
 - BEN COHEN & JERRY GREENFIELD

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NOT SO HIDDEN MOTIVATION

- ARE INDIVIDUAL LAW ENFORCEMENT OFFICERS THE INTENDED TARGETS, OR JUST PAWNS IN A LARGER SCHEME?
- IS IT MORE ABOUT INDIRECTLY DEFUNDING THE POLICE TO AVOID THE POLITICAL LIABILITY OF OVERT AND DIRECT DEFUNDING OF POLICE?

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IN CONCLUSION

- NATIONAL REFORM "DISCUSSION" ON QUALIFIED IMMUNITY IS NOT OVER
- ALREADY LIMITED IN APPLICABILITY—EVEN WITHOUT "REFORM"
- MORE OF A CONCERN FOR STATES AND LOCAL GOV'T ENTITIES THAN FOR OFFICERS
- A REAL CONCERN FOR OFFICERS IF THERE IS LOSS OF DEFENSE AND IDEMNIFICATION

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