AN OVERVIEW OF THE LEGAL DUTY TO INTERVENE BY LAW ENFORCEMENT OFFICERS

ACTIVE BYSTANDERSHIP FOR LAW ENFORCEMENT (ABLE) PROJECT*

The Georgetown Innovative Policing Program
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Introduction

On May 25, 2020, Minneapolis Police Officers James Kueng, Thomas Lane, and Tou Thao stood by for 9 minutes and 29 seconds as they watched Officer Derek Chauvin kneel on George Floyd's neck. The three officers did not intervene on Mr. Floyd's behalf to prevent his unlawful death, and each now face state and federal criminal charges – with Kueng and Thao being charged with failing to intervene to stop Officer Chauvin from violating Mr. Floyd's constitutional right to be free from an unreasonable seizure.[1]

In what many courts have recognized to be the leading case on the duty to intervene, the Seventh Circuit Court of Appeals stated nearly 50 years ago in *Byrd v. Brishke*:

> [I]t is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge.[2]

Under this principle, which recognized the now well-established duty to intervene, law enforcement officers are generally required to intervene when they observe a fellow officer infringing on certain constitutional rights of citizens.

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[1] Officer Chauvin was convicted of second and third-degree murder and second-degree manslaughter on April 20, 2021, and was sentenced to 270 months in prison for his crimes. Case No. 27-CR-20-12646, *State of Minnesota v. Derek Chauvin* (Hennepin Cnty. Criminal Court, Minn.).

On May 6, 2021, a federal grand jury indicted former officers Kueng and Thao under 18 U.S.C. § 242 for their failure to intervene in Chauvin's murder of George Floyd. Case No. 21-CR-108, *United States v. Derek M. Chauvin, Tou Thao, J. Alexander Kueng, and Thomas K. Lane* (D. Minn.). Officers Kueng, Lane, and Thao also face state criminal charges for aiding and abetting second-degree murder and second-degree manslaughter. Case No. 27-CR-20-12953, *State of Minnesota v. J. Alexander Kueng* (Hennepin Cnty. Criminal Court, Minn.); Case No. 27-CR-20-12951, *State of Minnesota v. Thomas Kiernan Lane* (Hennepin Cnty. Criminal Court, Minn.); Case No. 27-CR-20-12949, *State of Minnesota v. Tou Thao* (Hennepin Cnty. Criminal Court, Minn.).

[2] *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972). This affirmative duty to intervene is consistent with the U.S. Supreme Court's holding over 100 years ago that persons in the custody or control of law enforcement officers have a right to be protected from "lawless violence." *Logan v. United States*, 144 U.S. 263, 285 (1892), *abrogated on other grounds by Witherspoon v. State of Ill.*, 391 U.S. 510 (1968).

This paper will provide an introductory overview of each element of the duty to intervene under federal law, highlighting cases that provide useful guidance on the circumstances in which officers have been held to an affirmative duty to intervene as compared to those where they have not. The paper will also briefly discuss the bases for civil liability of individual officers, the effect of qualified immunity to shield officers from suit, liability for law enforcement agencies, as well as criminal liability.

The Law on the Duty to Intervene

Law enforcement officers have an affirmative legal duty to intervene in a reasonable manner when they observe, and have a realistic opportunity to prevent, a fellow officer from infringing on an individual's constitutional rights.

❖ *When Do Courts Recognize a Duty to Intervene?*

The constitutional right most often recognized by courts in duty-to-intervene claims is the Fourth Amendment right to be free from excessive force. Indeed, every federal circuit has recognized that officers have a legal duty to intervene to prevent a fellow officer's use of excessive force.[3]

There is less agreement among the courts as to whether officers have a duty to intervene to prevent a fellow officer from violating other constitutional rights, such as the right to be free from unlawful searches or seizures, or malicious prosecutions. While some circuits construe the duty to intervene broadly to require officers to intervene to prevent all constitutional violations, other circuits define the duty more narrowly, declining to recognize it outside the context of excessive force.

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[3] *E.g., Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n.3 (1st Cir. 1990), *cert. denied*, 500 U.S. 956 (1991)*; O'Neill v. Krzeminski*, 839 F.2d 9, 12 (2d Cir. 1988); *Smith v. Mensinger*, 293 F.3d 641, 650-51 (3d Cir. 2002) (citing *Baker v. Monroe Township*, 50 F.3d 1186, 1193-94 (3d Cir. 1995)); *Randall v. Prince George's Cty.*, 302 F.3d 188, 203-04 (4th Cir. 2002); *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995); *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir. 1982); *Brishke*, 466 F.2d at 11; *Putman v. Gerloff*, 639 F.2d 415, 423-24 (8th Cir. 1981); *U.S. v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994), *aff'd in part, rev'd in part on other grounds*, 518 US. 81 (1996); *Lusby v. T.G. Y. Stores, Inc.*, 749 F.2d 1423, 1433 (10th Cir. 1984), *vacated on other grounds*, *City of Lawton v. Lusby*, 474 U.S. 805 (1985); *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986); *Martin v. Malhoyt*, 830 F.2d 237, 259 (D.C. Cir. 1987).

For example, in *Bunkley v. City of Detroit*, the Sixth Circuit recognized a duty to intervene in unlawful arrests.[4] There, defendant officers argued that at the time of plaintiff's arrest in 2014, neither the Supreme Court nor the Sixth Circuit had clearly established the particular right at issue – *i.e.*, the right to have an officer intervene to prevent an unlawful arrest. Without such clearly-established law, officers had no notice that they had a duty to intervene to prevent violations of that right. In rejecting the officers' argument, the Sixth Circuit reviewed prior precedent to conclude that the duty of officers to intervene in arrests made without probable cause "was stated in precedent 'clear enough that every reasonable official would interpret it to establish' this rule."[5]

In *Livers v. Schenck*, the Eighth Circuit reached a different conclusion.[6] There, the court explained that while the Eighth Circuit had previously recognized a duty to intervene to prevent excessive force, it had not yet addressed whether there was a similar duty to intervene to prevent other constitutional violations.[7] The *Livers* court refused to impose liability for a failure to intervene under these circumstances: "Where, as here, the federal circuits disagree on whether conduct violates the Constitution, and our court has not addressed the question . . . it is unfair to subject police to money damages" for failing to intervene outside of the excessive force context.[8] Similarly, in *Jones v. Cannon*, the Eleventh Circuit held that there was no controlling authority from either the Supreme Court or the Eleventh Circuit "clearly establishing that once an officer

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4 *Bunkley v. City of Detroit*, 902 F.3d 552 (6th Cir. 2018).

5 *Id.* at 566 (quoting *District of Columbia v. Wesby*, 583 U.S. 577, 590 (2018)). *See also Anderson v. Branen*, 17 F.3d 552, 558 (2d Cir. 1994) (recognizing a duty to intervene to prevent an unlawful arrest); *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128-29 (2d Cir. 1997) (same); *Cotto v. City of Middletown*, 158 F. Supp.3d 67, 86 (D. Conn. 2016) (recognizing a duty to intervene in unlawful strip search).

6 *Livers v. Schenck*, 700 F.3d 340 (8th Cir. 2012).

7 *Id.* at 360.

8 *Id.* (collecting cases from the Second, Fourth, Seventh, and Tenth Circuits recognizing a duty to intervene outside of the excessive force context but noting that the Eleventh Circuit in comparison has refused to find a duty to intervene outside the excessive force context); *Andrews v. Schafer*, 888 F.3d 981, 984 n.4 (8th Cir. 2018) (citing *Livers* with approval that the Eighth Circuit does not recognize a failure to intervene outside of the excessive force context).

While the *Livers* court broadly held that there was no duty to intervene outside the excessive force context, the specific issue in *Livers* was whether there was a clearly established right to have officers intervene to prevent another officer from falsifying evidence.

knows another officer has fabricated a confession . . . that police officer has a constitutional duty to intervene to stop the other officer's conduct."[9]

The U.S. Supreme Court has yet to decide the scope of an officer's duty to intervene.

❖ *Elements of the Duty to Intervene*

Bystander officers who fail to intervene in their fellow officers' violation of an individual's constitutional rights may be held legally liable for the underlying constitutional violation. Bystander liability rests on the theory that by deliberately choosing not to intervene in the face of clearly unconstitutional conduct, despite having a reasonable opportunity to do so, the officer becomes a "tacit collaborator" in the misconduct.[10] Bystander liability also recognizes that officers owe a greater responsibility to intervene to protect individuals from harm inflicted by fellow officers than they do to protect individuals from harm inflicted by members of the general public.[11]

Federal courts generally recognize the following three elements of the duty to intervene:

(1) the officer observes or has reason to know that an individual's constitutional rights are being violated;

(2) the officer has a realistic opportunity to intervene and prevent the harm; and

(3) the officer can take reasonable steps to try to prevent the harm.[12]

When the bystander officer fails to intervene in the above circumstances, he violates a constitutional right that is "analytically the same as the right violated by the person who strikes

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[9] *Jones v. Cannon*, 174 F.3d 1271, 1286 (11th Cir. 1999). Both *Livers* and *Jones* were decided in the context of whether the bystander officers were entitled to qualified immunity on the failure-to-intervene claims asserted against them, which is discussed in more detail below.

[10] *See O'Neill*, 839 F.2d at 11-12.

[11] Courts have held that law enforcement officers and other state actors only have a duty to protect individuals from other members of the public when a "special relationship" exists between the state and the individual. *Deshaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (recognizing a special relationship when the State takes a person into custody against their will).

[12] *E.g.*, *Floyd v. City of Detroit*, 518 F.3d 398, 406 (6th Cir. 2008) (citing *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997)).

the blows."[13] Courts have explained that by doing nothing, the bystander officer not only fails to prevent the constitutional harm, but in fact endorses and encourages it:

> The approving silence emanating from the officer who stands by and watches as others unleash an unjustified assault contributes to the actual use of excessive force, and we cannot ignore the tacit support such silence lends to those who are actually striking the blows. Such silence is an endorsement of the constitutional violation resulting from the illegal use of force. . . . We will not immunize such conduct by suggesting that an officer can silently contribute to such a constitutional violation and escape responsibility for it.[14]

Each element of the duty to intervene is discussed in further detail below.

(1) *Officers must observe or have reason to know of the constitutional violation*

The first element requires that the bystander officer observes or otherwise has reason to know of the underlying violation of an individual's constitutional rights.

First, as an initial matter, there can be no liability for a failure to intervene if there is no underlying constitutional violation.[15] Where, for example, one officer is deemed to have used a reasonable amount of force to effectuate an arrest, then the bystander officer cannot be liable for failing to intervene.

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[13] *Koon*, 34 F.3d at 1447 n.25.

[14] *Mensinger*, 293 F.3d at 651. While *Mensinger* was decided in the context of a failure to intervene to prevent cruel and unusual punishment in violation of the Eighth Amendment, the principle stated above applies with equal force to a bystander officer's failure to intervene in the use of excessive force.

[15] *Abdullahi v. City of Madison*, 423 F.3d 763, 767-68 (7th Cir. 2005) ("Though legally distinct, the fate of plaintiff's failure to intervene claim is closely linked to that of her excessive force claim since, by definition, if there was no excessive force then there can be no failure to intervene."). *See also, e.g., Jones v. Norton*, 809 F.3d 564, 576 (10th Cir. 2015) (affirming summary judgment in defendants' favor on the failure-to-intervene claim based on the finding that there was no underlying constitutional violation).

Second, the bystander officer must observe or otherwise have reason to know of the underlying constitutional violation. The relevant inquiry is whether a reasonable person in the position of the bystander officer would know that a fellow officer was violating an individual's constitutional rights.[16]

Whether the bystander officer has in fact observed the officer's conduct and would reasonably know that it was unconstitutional may be a fact-specific inquiry dependent on the circumstances of each case. On one end of the spectrum are cases where there is no question that an officer physically present on the scene actually observed his fellow officer's conduct and knew it to be unlawful.[17] On the other end of the spectrum are cases where it is undisputed that officers responding to a call for backup arrived on the scene *after* the alleged unlawful conduct took place.[18]

Cases in between these two ends of the spectrum may require a careful examination of what the bystander officer could or could not observe. For example, in *Hunter v. City of Leeds*, multiple officers engaged in a vehicular pursuit of an armed suspect, each in separate patrol cars.[19] The suspect stopped outside a residence, parking his car in the carport. The first officer on the scene, Officer Kirk, got out of his patrol car and ordered the suspect to show his hands. When Officer Kirk believed that the suspect was pointing a gun, he fired multiple shots.[20] The second officer to arrive on the scene, Officer Jackson, was positioned behind Officer Kirk in such a way that although he saw Officer Kirk fire his weapon, the carport obstructed his view of the suspect. Because Officer Jackson did not have a view of the suspect, he could not have assessed at the time the suspect was shot whether Officer Kirk's use of deadly force was unjustified. Under these

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[16] *Cotto*, 158 F. Supp. 3d at 83.

[17] *See, e.g., Phelps v. Coy*, 286 F.3d 295, 301 (6th Cir. 2002) (holding that no reasonable officer would not know that force used against a person who is already handcuffed, unresisting or incapacitated is unconstitutionally excessive) (collecting cases).

[18] *E.g.*, *Cunningham v. Gates*, 229 F.3d 1271, 1289-90 (9th Cir. 2000); *Bruner v. Dunaway*, 684 F.2d 422, 426-27 (6th Cir. 1982).

[19] *Hunter v. City of Leeds*, 941 F.3d 1265 (11th Cir. 2019).

[20] *Id.* at 1272.

facts, the Eleventh Circuit held that Officer Jackson had no duty to intervene because he had no reason to believe that the suspect's constitutional rights were being violated.[21]

(2) *Officers must intervene when they have a "realistic opportunity" to do so*

Whether the officer has a "realistic" or "reasonable" opportunity to intervene is often the most critical issue in determining whether an officer has a duty to intervene. Any number of different factual scenarios are possible, and whether there was a realistic opportunity to intervene in each scenario may depend on multiple factors. In the context of excessive force, relevant factors may include, for example, the events immediately preceding the assault, the nature and duration of the assault, the number of officers present, each officer's physical proximity in relation to the assault, and what other events were unfolding at the same time as the assault. These case-specific facts make it difficult to identify bright line rules clearly delineating when bystander officers have a realistic opportunity to intervene and when they do not. But case law can provide meaningful guidelines.

Courts have held, for example, that an hour-long unlawful strip search provided more than enough opportunities for bystander officers to intervene, as did unlawful uses of force which lasted several minutes.[22]

On balance, courts have generally held that when excessive force happens very quickly and without warning – in a matter of a few seconds – bystander officers had no realistic opportunity to

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[21] *Id.* at 1282-83.

[22] *Cotto*, 158 F. Supp. 3d at 82-83 (refusing to set aside jury verdict finding officers liable for failing to intervene in the unlawful strip search); *Krout v. Goemmer*, 583 F.3d 557, 566 (8th Cir. 2009) (holding that a jury could find that officers had a reasonable opportunity to intervene in an assault which lasted five minutes); *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 (11th Cir. 2000) (affirming jury verdict finding officer liable for a failure to intervene in an unlawful use of force which lasted approximately two minutes).

See also El v. City of Pittsburgh, 975 F.3d 327, 335 (3d Cir. 2020) (making general observation that "[n]aturally enough, the duration of the incident is key to determining whether there was a reasonable opportunity. There may be a genuine issue of fact regarding a reasonable opportunity to intervene where the allegedly excessive force lasts about fifteen minutes, or where the event unfolds in multiple stages. By contrast, where an incident is momentary, its brevity may defeat a failure-to-intervene claim.") (alterations from original).

intervene. For example, where a suspect was struck one to three times in quick succession without warning by one officer, courts have held that the bystander officer did not have a realistic opportunity to intervene.[23]

But seconds count. In *Figueroa v. Mazza*, plaintiff was arrested and placed in the backseat of a parked police car.[24] Without warning or provocation, an unidentified officer suddenly threw open the car's back door and assaulted plaintiff while he was seated in the backseat. Meanwhile, Officers Failla and Chan, seated in the front seat, did nothing to intervene. The Second Circuit reversed the lower court's judgment that, as a matter of law, the assault happened too quickly for the two officers to have had a realistic opportunity to intervene.[25] The court explained that even if the assault lasted a mere twenty seconds, that may have been enough time for Officers Failla and Chan to attempt just one of the following acts of intervention: (1) exit the vehicle to engage the assaulting officer; (2) turn around and reach into the backseat to protect plaintiff; or (3) simply tell the assaulting officer to stop. Because they did nothing, the Second Circuit found that a reasonable jury could find that Officers Failla and Chan were tacit collaborators in the use of excessive force.[26]

Other cases have involved a sequence of events during which an officer was held to have had a realistic opportunity to intervene as to the subsequent event, but not as to the initial event that occurred without warning. In *O'Neill v. Krzeminski*, plaintiff O'Neill was arrested for breach of peace, handcuffed, and transported to a police station.[27] During a verbal altercation with two officers at the station, O'Neill was struck three times in rapid succession by both officers while still handcuffed. He was then dragged by the throat across the detention area by one of the two assaulting officers. A third officer, Officer Conners, stood by observing everything, but did nothing to intervene. The Second Circuit determined that whether Officer Conners had a reasonable opportunity to intervene had to be assessed separately with respect to the two successive

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[23] *E.g., Miller v. Gonzalez*, 761 F.3d 822, 826-27 (7th Cir. 2014) (collecting cases); *O'Neill*, 839 F.2d at 11.

[24] *Figueroa v. Mazza*, 825 F.3d 89 (2d Cir. 2016).

[25] *Id.* at 106.

[26] *Id*. at 108.

[27] *O'Neill*, 839 F.2d at 10.

incidents. The Court held that, as a matter of law, no reasonable jury could find Officer Conners liable for failing to intervene in the first incident; it happened suddenly without warning and in rapid succession.[28] Officer Conners, however, could be liable for failing to intervene in the subsequent dragging of plaintiff across the floor by his throat, and that issue could be presented to a jury. Having just seen the plaintiff beaten without justification, the court recognized that Officer Conners was alerted to the need to protect plaintiff from further abuse.[29]

Finally, courts generally agree that when an officer is physically present at the scene but actively occupied in other legitimate police conduct, they do not have a realistic opportunity to intervene. For example, if an officer is actively restraining or arresting one suspect, he has no realistic opportunity to intervene in the unlawful assault of a second suspect.[30] Stated differently, courts have generally observed that officers do *not* have a legal duty to abandon one suspect to come to the aid of another.

(3) *Officers must take reasonable steps to prevent the harm*

While reasonable steps to prevent the harm may typically, at least in the context of excessive force, involve physical intervention to step in between the offending officer and their victim, the duty to intervene may require the bystander officer to intervene in some manner, even when there is no opportunity to physically intervene.

In *Yang v. Hardin*, for example, Officers Brown and Hardin of the Chicago Police Department were investigating a robbery at plaintiff's store when Officer Brown got into an altercation with plaintiff. The altercation escalated when Officer Brown shoved plaintiff, drove off recklessly with plaintiff hanging onto the car door, and then punched plaintiff in the face.[31] The Seventh Circuit observed that throughout these events, Officer Hardin stood by and did not speak or intervene in any manner despite plaintiff's repeated pleas for Officer Hardin to call the sergeant on duty.[32] In

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[28] *Id.* at 11-12.

[29] *Id.* at 12.

[30] *E.g.*, *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998) (citing *Riley v. Newton*, 94 F.3d 632, 635 (11th Cir. 1996)).

[31] *Yang v. Hardin*, 37 F.3d 282, 283-84 (7th Cir. 1994).

[32] *Id.* at 284.

holding Officer Hardin liable for failing to intervene, the court held: "At a minimum Officer Hardin could have called for a backup, called for help, or at least cautioned Officer Brown to stop."[33]

In *Cotto v. City of Middletown*, the court refused to set aside the jury verdict finding three officers liable for failing to prevent an illegal strip search conducted by a fourth officer on the scene.[34] In doing so, the court listed off a number of steps the officers could have taken with minimal effort, any one of which may have been deemed reasonable intervention. They included, *inter alia*, taking over for the offending officer when he shouted a racial slur at plaintiff; encouraging the offending officer to move the strip search off the side of the main road to a more private location; blocking plaintiff from view of passerby simply by standing between plaintiff and the road; or even grabbing a pair of gloves from the squad car for the offending officer to use.[35] Instead, the three officers did nothing, standing around talking and even laughing when the offending officer pulled the plaintiff's pants down. Under these circumstances, the court held that the jury could have reasonably found the officers liable for the offending officer's infringement of plaintiff's Fourth Amendment rights to be free from an unlawful search.[36]

Finally, it is important to note two factors that play a significant role in police culture and how officers interact with one another, but likely have no bearing on the legal analysis of the duty to intervene. First, courts have found it irrelevant that the bystander officer is from a different law

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[33] *Id.* at 285. *See also, e.g., Diebitz v. Arreola*, 834 F. Supp. 298, 304 (E.D. Wis. 1993) (holding that even accepting as true the bystander officer's claim that she had no time to physically intervene in a fellow officer's assault that lasted between 30-60 seconds, she could have made "some type of effort to protect the plaintiff, had she chosen to do so, even if it was as small of a gesture as shouting at her fellow officers to stop beating the plaintiff.").

The Seventh Circuit in *Yang* also rejected the lower court's reliance on the fact that Officer Hardin would have been alone in his attempts to intervene in Officer Brown's assault. The court explained that "[t]he number of officers present and able to intervene to save an innocent person from unconstitutional summary punishment inflicted by a fellow officer, in no way correlates with the officer's duty to intercede. Each police officer present has an independent duty to act." *Id.* at 286.

[34] *Cotto*, 158 F. Supp. 3d at 82-83.

[35] *Id.* at 83.

[36] *Id.* at 82-83.

enforcement agency than the one committing the constitutional violation (the "offending officer").[37] Second, courts have placed no significance on the fact that the bystander officer is of lower rank than the offending officer.[38] Indeed, the 1972 decision in *Byrd v. Brishke* specifically recognized that while the duty to intervene is "obvious[ ]" when the bystander officer is a supervisory officer who is in charge of the offending officers, the duty similarly applies to nonsupervisory officers "for to hold otherwise would be to insulate nonsupervisory officers from liability for reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace."[39]

This issue of rank is pertinent to the circumstances surrounding Mr. Floyd's death. Officer Chauvin was the ranking officer on the scene, with 19 years on the force, as compared to the other officers. Two of the officers, Officers Kueng and Lane, were actually on their first week on the job, and Officer Chauvin was their training officer. How this will factor into the trials for the other officers remains to be seen.[40]

Bases for Civil Liability

❖ *Civil Liability for Individual Officers*

Civil suits against state and local law enforcement officers for failing to intervene are most commonly brought in federal court, under the Civil Rights Act of 1871, codified in 42 U.S.C. § 1983

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[37] *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995) ("The fact that [officers] Fox and Fant were from different law enforcement agencies does not as a matter of law relieve Fant from liability for a failure to intervene.") (citing *Harris v. Chanclor*, 537 F.2d 203, 205-06 (5th Cir. 1976)).

[38] *E.g., Mensinger*, 293 F.3d at 650-51; *Putman*, 639 F.2d at 423.

[39] *Brishke*, 466 F.2d at 11.

[40] The cases against these officers are ongoing as of the writing of this paper. *See supra* note 1.

("section 1983").[41] Section 1983 is not in itself a substantive right but a remedial statute for vindicating violations of constitutional rights such as the Fourth Amendment's protection against unreasonable searches and seizures. The officer may be subject to both compensatory and punitive damages, as well as attorney's fees under 42 U.S.C. § 1988.

❖ *The Role of Qualified Immunity in Shielding Individual Officers from Civil Liability*

The judicially-created doctrine of qualified immunity may shield bystander officers from civil liability for failure-to-intervene claims. The Supreme Court established in *Harlow v. Fitzgerald* that government officials performing discretionary (as opposed to ministerial) functions are generally immune from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[42]

Qualified immunity tries to balances two important, yet often competing, interests: the need to hold officers accountable when they abuse or neglect their police powers versus the need to shield officers from liability when performing their duties reasonably.[43] Once a bystander officer

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[41] "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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[.]" 42 U.S.C. § 1983.

State law claims – for instance, under a state's civil rights legislation or under common law for assault, battery, false arrest, or emotional distress – may also be brought for failure to intervene, either in federal court in conjunction with section 1983 claims or separately in state court. *See Floyd v. City of Detroit*, 518 F.3d 398, 403-04 (6th Cir. 2008) (section 1983 claims accompanied by state common law claims for assault and battery, gross negligence, willful and wanton misconduct, and intentional infliction of emotional distress); *Commonwealth v. Adams*, 416 Mass. 558, 564-65 (1993) (recognizing a claim for failure to intervene under the Massachusetts Civil Rights Act consistent with federal law).

[42] *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). Qualified immunity is not merely an affirmative defense to liability, but immunity from having to bear the costs and burdens of litigation. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), *receded from on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). As such, courts are to resolve the potentially dispositive issue of qualified immunity early on in the proceedings. *Saucier*, 533 U.S. at 201. And, questions of law as to the denial of qualified immunity are immediately appealable under 28 U.S.C. § 1291 notwithstanding the absence of a final judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

[43] *Pearson*, 555 U.S. at 231.

asserts qualified immunity, it is plaintiff's burden to refute it by showing that (1) the officer's failure to intervene violated a constitutional right, *and* (2) that right was "clearly established" at the time of the alleged incident such that a reasonable officer would have known that his failure to intervene was itself unlawful.[44]

Qualified immunity is a continually evolving area of law dependent on the facts of each case, with varying results across circuits. Ordinarily, courts require either a Supreme Court or published intra-circuit decision with analogous facts (or clear weight of authority from other circuits) to hold that a right was "clearly established."[45] Some courts have interpreted this requirement strictly despite egregious facts: "[W]e cannot deny qualified immunity without identifying a case in which an officer acting under similar circumstances was held to have violated the Fourth Amendment, and without explaining why the case clearly proscribed the conduct of that officer."[46] Other courts, however, have held that precedent involving closely analogous facts are not always required to put officers on fair notice that their conduct violates established law.[47] That is, a sliding scale is

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[44] *See Saucier*, 533 U.S. at 202. *Cf. Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law.").

[45] *E.g.*, *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007).

[46] *Estate of Joseph v. Bartlett*, 981 F.3d 319, 345 (5th Cir. 2020). In *Bartlett*, nearly ten officers were alleged to have stood by and observed the decedent being repeatedly struck, kicked and tased by fellow officers for eight minutes, during which decedent was experiencing an acute psychosis but not actively resisting arrest. *Id.* at 325-327. While the Fifth Circuit observed that there was enough evidence for a jury to find that each of the officers failed to intervene in the unlawful use of force which resulted in death, those officers were nevertheless immune from suit because "[p]laintiffs d[id] not identify a single case to support the argument that any reasonable officer would have known to intervene under these circumstances." *Id.* at 345.

[47] *Casey*, 509 F.3d at 1284. Indeed, the Supreme Court reiterated in *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002), that precedent involving "fundamentally similar" facts is not required to defeat qualified immunity. Qualify immunity may be denied even in "novel factual circumstances" so long as "officials can still be on notice that their conduct violates established law[.]" *Id.*

more appropriate: "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation."[48]

❖ *Civil Liability for Law Enforcement Agencies*

Failure-to-intervene claims against federal law enforcement agencies are brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* ("*Bivens*" claims)[49] and/or the Federal Tort Claims Act, 28 U.S.C. § 1346.

Law enforcement agencies generally may not be held vicariously liable solely because they employ officers who fail to intervene. Agencies may, however, be liable under *Monell v. Department of Social Services* ("*Monell* claims") if the plaintiff can demonstrate that his injury was caused by an agency policy or custom so deficient as to amount to deliberate indifference to the constitutional rights of the public.[50]

While *Monell* claims are harder to establish than section 1983 claims against individual officers, the current climate of global protests and growing intolerance of systemic police misconduct may increase the viability of *Monell* claims going forward. In June 2020, the Sixth Circuit reversed a lower court's ruling dismissing *Monell* claims against the City of Euclid, Ohio on summary judgment.[51] Noting that the case raised a "gravely important issue" of police use of force "that has dominated the nation's attention" in recent months, the Court held that a reasonable jury could find that the City of Euclid's official policy or custom of indifference to the use of force caused plaintiff's injuries.[52] The Court specifically pointed to the Euclid Police use-of-force training

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[48] *Id.* (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)) (internal quotation marks omitted). In holding that the bystander officer in *Casey* was not entitled to qualified immunity, the Tenth Circuit explained that no prior case with the same facts was necessary in order to put officers on notice that they had a duty to intervene in another officer's tackling, tasing, and beating of a peaceful citizen arrested for a nonviolent misdemeanor, who was neither fleeing nor resisting arrest. *Casey*, 509 F.3d at 1285.

[49] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[50] *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). The United States Attorney General may also bring a civil suit against law enforcement agencies under 34 U.S.C. § 12601 for a pattern or practice of depriving individuals of their constitutional rights.

[51] *Wright v. City of Euclid*, 962 F.3d 852 (6th Cir. 2020).

[52] *Id.* at 860, 880-82.

materials which included a clip of a Chris Rock comedy skit with offensive references to police abuse of African Americans, a cartoon depicting a police officer in riot gear assaulting an unarmed civilian with a club, and a meme of officers with their guns drawn in a situation where the use of deadly force was unquestionably inappropriate. The Court held that under those facts, plaintiff had presented sufficient evidence of an official policy or custom permitting or acquiescing to the use of excessive force to allow him to proceed to trial on the *Monell* claim.[53]

Although the *Monell* claim in *Wright* was not decided within the specific context of a failure-to-intervene claim, its analysis of an official policy or custom of deliberate indifference may be applied with equal force in the failure-to-intervene context.[54] As referenced above, given the growing societal consensus against police misconduct, coupled with the general propensity of courts and juries to reflect current societal norms, courts may be more willing to hold law enforcement agencies liable for an official policy or custom permitting or even encouraging officers to stand by and do nothing while fellow officers infringe on individuals' constitutional rights.

Bases for Criminal Liability

Officers may also be held criminally liable for their failure to intervene. 18 U.S.C. § 242 makes it a crime for a person acting under color of law to willfully deprive another of a right or privilege protected by the Constitution or laws of the United States. The offense is punishable by a range of sentences depending on the severity of the crime and the resulting injury to the victim.

To prove a violation of section 242, the government must prove beyond a reasonable doubt that (1) the officer deprived a victim of a right protected by the Constitution; (2) the officer acted willfully; and (3) the officer was acting under color of law.[55] The government must prove that the officer knew that their actions were wrong and violated the Constitution, but decided to proceed anyway. According to the Civil Rights Division of the U.S. Department of Justice, an officer who

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[53] *Id.* at 880-82.

[54] The Sixth Circuit in *Wright* affirmed summary judgment for defendants on the failure-to-intervene claim based on the specific facts of the case, which the court held did not present a realistic opportunity for officers to intervene. *Id.* at *11.

[55] U.S. Department of Justice, Civil Rights Division, Criminal Section: Law Enforcement Misconduct, https://www.justice.gov/crt/law-enforcement-misconduct.

purposefully allows a fellow officer to violate a victim's constitutional rights may be prosecuted under section 242 for their failure to intervene.[56]

There have been a number of criminal prosecutions for failing to intervene. In *U.S. v. Reese*, the Ninth Circuit affirmed the conviction of a supervising police officer with the Oakland Housing Authority for his failure to prevent the use of excessive force by his officers.[57] The Ninth Circuit made clear that Officer Broussard's conviction had nothing to do with guilt by association or supervisory liability:

> Instead, Broussard's convictions rest entirely on the wrongfulness of his own conduct in connection with the attacks by [fellow officers], that is, his willful refusal to act in the face of the ongoing assaults perpetrated in his presence. He could have and should have acted. He chose not to.[58]

Officers who stood by in Mr. Floyd's case now face charges under 18 U.S.C. § 242 for their failure to intervene.[59]

Conclusion

Law enforcement officers have a clearly-established legal duty to intervene when they observe and have a realistic opportunity to prevent fellow officers from violating certain constitutional rights.

Failing to intervene despite a legal duty to do so may subject officers, and the law enforcement agencies that train and supervise them, to significant legal liability. Beyond just legal liability, the harms of not intervening can be significant – of course to the victim whose rights were violated,

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[56] *Id.*

[57] *U.S. v. Reese*, 2 F.3d 870 (9th Cir. 1993).

[58] *Id.* at 890. *See also U.S. v. Serrata*, 425 F.3d 886, 894-96 (10th Cir. 2005) (affirming conviction under 18 U.S.C. § 242 for defendant's failure to intervene in an assault on a detainee which lasted approximately 40-45 seconds, during which time the detainee was lying defenseless with his hands cuffed behind his back, while defendant stood within arm's reach and did nothing).

[59] *See supra* note 1.

but also to both the bystander officer who failed to intervene and the officer who committed the underlying constitutional violation, as well as the public's confidence in effective policing.[60]

Now, more than ever, there is a real opportunity to educate and train law enforcement agencies and their officers on the benefits of *active* bystandership and peer intervention, to prepare officers to successfully intervene to prevent harm and to create a law enforcement culture that supports such peer intervention. Active bystandership training, the mission of the ABLE (Active Bystandership for Law Enforcement) Project can be a very effective tool in preventing police misconduct, saving lives, and restoring the public's trust in policing.

[60] *See generally* Jonathan Aronie and Christy E. Lopez, "Keeping Each Other Safe: An Assessment of the Use of Peer Intervention Programs to Prevent Police Officer Mistakes and Misconduct, Using New Orleans' EPIC Program as a Potential National Model," *Police Quarterly 20* no. 3 (2017) (also noting evidence suggesting that officers suffer health risks, including mental health, and other personal costs from observing officer misconduct).