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The Courts Encourage It, So We Do It: Police Excessive Force Against Minorities

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Abstract

A continuing problem of American criminal justice is the frequency of violence directed against minorities by police. One cause of this is the leniency of courts, especially the Supreme Court, toward police officers accused of using excessive force. This position paper reviews the legal decisions that have granted a large degree of immunity to police in their use of force. It describes three doctrines: Qualified immunity, in which a public official is shielded from a lawsuit unless his/her actions violated a "clearly established" constitutional right; summary judgment, a judicial decision based on paper evidence without testimony; and limitations on *respondeat superior* liability, by which a municipality is largely excused from the principle that an employer is responsible for the torts of employees. For each doctrine, its original intent is described, and the history of judicial decisions is reviewed that led to the *unintended* consequence of excusing excessive police use of force.

Keywords: Minorities, police, excessive force, due process

Introduction

Before Michael Brown, or Eric Garner, or Rodney King, there was 15-year-old Edward Garner. In 1974, Edward Garner, an unarmed African-American boy, was caught fleeing the scene of a suspected burglary. Officer Elton Hymon of the Memphis Police Department saw Edward Garner climbing over a six-foot fence to evade capture. Tennessee law of the time and Memphis Police policy permitted police officers to shoot any suspected felon fleeing a crime scene, Officer Hymon shot and killed Edward Garner. Edward Garner's family sued for damages.

When the Supreme Court heard the case in 1985, it seemed to be a victory for all victims of police violence. Despite being legal in about half the states at the time, the Court found that shooting an unarmed suspect simply to prevent his or her escape was unconstitutional.

Doctrines That Encourage Police Violence

Since then, however, the Supreme Court has done little to ameliorate the ongoing problem of police violence. In the same era the Court decided *Garner*, other judicial developments undermined plaintiffs seeking to hold police officers liable for excessive force. Judges, particularly those on the Supreme Court, created and molded doctrines in a way that encourages police violence.

The first of these, the doctrine of qualified immunity, would exculpate countless police officers who made highly questionable decisions to shoot first and think later. Second, the summary judgment standard was reconceived, giving judges the power to conduct "trials by paper," which excluded worthy plaintiffs from having their days in court. Finally, the Court failed to impose respondent superior liability on municipalities for civil rights violations, thereby reducing pressure on police departments to take aggressive preventative action. In sum, these doctrines represent ways in which the courts encourage police violence.

Qualified Immunity

Of the three problematic doctrines, qualified immunity is the most heavily criticized. While scholars and judges have been criticizing qualified immunity for many years, there has been an uptick in criticism since the rise of the Black Lives Matter movement, with one of the key contemporary denunciations being that qualified immunity contributes to the ongoing problem of police violence (Carbado, 2016; Chemerinsky, 2014; *Kisela v. Hughes*, 2018; Schwartz, 2018). Exculpating police for excessive force may not have been the original intent of qualified immunity, but it has been the effect of the Supreme Court's application of this doctrine to police violence cases.

Simply stated, qualified immunity is a key defense police can use against constitutional claims, including excessive force claims. The defense immunizes police from a lawsuit unless they violate a clearly established statutory or constitutional right of which a reasonable officer would have known (*Harlow v. Fitzgerald*, 1982). Qualified immunity is meant to protect all but the "plainly incompetent" (*Malley v. Briggs*, 1986).

The judicial analysis of a qualified immunity defense involves two questions, which the court may address in any order. The first question is whether the plaintiff's alleged facts equate to a constitutional right violation. The second question is whether that right was "clearly established" at the time of the police misconduct. Qualified immunity applies unless the official's conduct violates such a right (*Pearson v. Callahan* , 2009).

The analytic framework of qualified immunity developed between 1982 and 2009 in cases that did not involve any substantial police violence. Nevertheless, the Supreme Court has consistently emphasized that qualified immunity be applied to police violence cases. In its current form, the analytical framework of qualified

immunity perpetuates a legal system where police are excused from liability for violence if they can articulate virtually any complexity or ambiguity in the law as applied to their case.

How qualified immunity became attached to police violence cases.

To understand qualified immunity and its relationship to police violence, one must start with 42 U.S.C. § 1983. This law dates to 1871, when Congress passed it as part of the Ku Klux Klan Act, designed to help fight civil rights violations in the southern states (Baude, 2018). Section 1983 gives plaintiffs a private cause of action against state officials who violate constitutional rights.

One broad constitutional right that 42 U.S.C. § 1983 can vindicate is the Fourth Amendment right to be free of unreasonable searches and seizures. During the 1980s, the Supreme Court formalized the judicial conception of police violence cases as Fourth Amendment seizure cases. This formalization began with 1985's *Tennessee v. Garner*, which specifically conceptualized police lethal force as a Fourth Amendment seizure (471 U.S. 1). Then, 1989's *Graham v. Connor* announced that all excessive force cases would be analyzed as Fourth Amendment violations of the right to be free of unreasonable seizure (490 U.S. 386). After *Graham v. Connor*, whether police use of force violated the Fourth Amendment was determined by measuring the nature and quality of the force against the countervailing government interest at stake (490 U.S. at 396). Prior to *Garner* and *Graham*, police violence claims were sometimes analyzed as substantive due process violations under the Fourteenth Amendment (490 U.S. at 392-93).

Victims of police violence now demand compensation for Fourth Amendment violations under 42 U.S.C. § 1983. Qualified immunity is a police defense to Section 1983 liability. However, the qualified immunity defense exists nowhere in the text of Section 1983. The defense that would be called "qualified immunity" was originally conceived in the 1967 case of *Pierson v. Ray* (268 U.S. 547). *Pierson* involved the 1961 arrest of a group of people who refused to leave a segregated Mississippi bus terminal (386 U.S. at 549).

Police executed the arrests pursuant to a Mississippi anti-loitering law which the Supreme Court ruled unconstitutional in 1965 (*Thomas v. Mississippi*). When *Pierson* reached the Supreme Court, the arresting officers were excused from liability on an analogy to the common-law principle that an arresting officer could not be held liable for an arrest pursuant to probable cause, even if the suspect's innocence was later proven (Schwartz, 2018). This analogy became the basis for qualified immunity. The Court then expanded *Pierson*'s good-faith defense from false arrests to executive action generally (Baude, 1974).

The 1982 Supreme Court case, *Harlow v. Fitzgerald*, stands as the fountainhead of modern qualified immunity. In that case, the Court purged the nascent qualified immunity doctrine of its subjective "good faith" component. The Court redefined

qualified immunity as a shield from civil damages insofar as the state actor's actions "do not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (457 U.S. 800). The *Harlow* Court further announced the purpose of qualified immunity was to limit the substantial social costs of insubstantial lawsuits. The Court anticipated that fear of personal liability and harassing litigation would unduly inhibit officials in the discharge of their duties (472 U.S. 511).

Yet, *Harlow v. Fitzgerald* had nothing to do with police activity. It involved a government contractor who lost his job after testifying before Congress about cost overruns on a Defense Department aviation project. Over the course of the 1980s, the doctrine of qualified immunity infiltrated the Fourth Amendment: *Mitchell v. Forsyth* (472 U.S. 511, 1985) involved warrantless wiretaps, *Malley v. Briggs* (475 U.S. 335, 1986) involved false arrest, and *Anderson v. Creighton* (483 U.S. 635, 1987) involved the warrantless search of a home.

How qualified immunity came to undermine victims of police violence.

The key problem with qualified immunity as it applies to police violence is that the Supreme Court demands an exacting level of specificity when it comes to determining what the "clearly established right" being violated is (Schwartz, 2018). Violent police encounters typically involve a complex set of objective facts and subjective police concerns, and any haziness regarding the "reasonableness" of the use of force will push any illegality outside of "clearly established law." This gives police officers an enormous shadow in which they can use violence with impunity, even where that violence is, in fact, unconstitutional.

This problematic policy traces back to 1987's *Anderson v. Creighton*, which involved a warrantless search of a home for a suspect the offending officer reasonably, but erroneously, thought was in the Creighton's home. The officer entered the home without a warrant, stating that the warrantless search was justified by exigent circumstances (Id. at 637). The Eighth Circuit Court of Appeals found that the existence of exigent circumstances was disputed and that the right to be free from warrantless searches unless there are exigent circumstances was clearly established (Id. at 637). This reasoning lead the Eighth Circuit to find that qualified immunity did not protect the officer.

The Supreme Court disagreed. It began its analysis with an examination of the "clearly established" standard:

> The operation of this standard . . . depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the

> same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties, by making it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages. It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. (483 U.S. at 639-640)

Creighton v. Anderson's directive that a police officer must violate a right that is highly specific would come to undermine many victims of police violence from seeking compensation for their injuries.

In the aforementioned *Graham v. Connor*, which came two years after *Creighton v. Anderson*, the Supreme Court found that the Fourth Amendment establishes a right to be free from unreasonable use of police force (Carbado, 2016). But did that mean the right to be free from police violence became "clearly established?"
The case that attempted to answer this question was 2001's *Saucier v. Katz* (533 U.S. 194). The Plaintiff in *Saucier v. Katz* was a protestor who was shoved, without injury, into a police van. The Ninth Circuit held that the right to be free from unreasonable force was clearly established by *Graham* and that there was therefore no qualified immunity if the amount of force used was unreasonable. The Supreme Court ruled this conclusion erroneous, stating:

> [T]here is no doubt that *Graham* v. *Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* that the right the official is alleged to have violated must have been "clearly established" in a more

> particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. . . .
>
> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It 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. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. (Id. at 201-202, 205)

Saucier v. Katz therefore gave police license to use violence and then argue that the particular facts of their particular situation had never been "clearly established" as an unreasonable use of force. For example, in *Brousseau v. Haugen* (543 U.S. 194, 2004), the Supreme Court found that an officer had qualified immunity when she shot and killed a suspect who ignored her commands and tried to leave the scene in his truck. By explaining that she was "fearful for the other officers on foot who [she] believed were in the immediate area [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area" (Id. at 197), the Court found that her actions fell in "hazy area between excessive and acceptable force" (Id. at 201, citing *Saucier v. Katz*, 533 U.S. at 206).

How *Pearson v. Callahan* impeded the development of excessive force law.

In order to eliminate the "hazy area" in which the officer in *Brousseau v. Haugen* was able to escape liability, it is necessary for the Fourth Amendment law to develop beyond the "general" prohibition of unreasonable force in *Graham v. Connor*. By the time *Saucier v. Katz* was decided, the Supreme Court had not at all developed the limits of Fourth Amendment excessive force beyond *Graham v. Connor*. In seeming recognition of this fact, the Court in *Saucier v. Katz* ordered lower courts to engage in a two-part inquiry where qualified immunity was concerned (533 U.S. at 207). First, the court would have to determine whether a constitutional violation occurred. Second, the court would have to determine whether, in the circumstances facing the officer, the amount of force he used had been prohibited by clearly established law (533 U.S. at 207). This two-step analysis would force the lower courts to develop Fourth Amendment law.

By 2009, the Supreme Court decided that the mandatory two-prong analysis was too cumbersome. In *Pearson v. Callahan* (555 U.S. 223, 2009), the Supreme Court determined that lower courts would be permitted to simply dismiss cases on the grounds that the particular use of force had not been clearly established as excessive. While acknowledging that the first prong of the *Saucier v. Katz* analysis was meant to further the development of Constitutional law, the decision to stop the courts from developing the law was made in the interest of "scarce judicial resources" (Id. at 236). Since *Pearson v. Callahan*, the Supreme Court has not limited police use of force any further than the general rule of reasonableness in *Graham*.

Attacks on qualified immunity from the left and the right.

Although the doctrine of qualified immunity has not undergone any significant changes since 2009, it has since become the subject of serious doubt by the most liberal and most conservative members of the Supreme Court (Schwartz, 2018). Justice Sotomayor has twice accused the Supreme Court of encouraging police to take a "shoot first, think later" approach by always ruling in favor of police officers in qualified immunity cases (*Kiesla v. Hughes*, 2018; *Mullenix v. Luna,* 2015).

Sotomayor's ire in these two cases was provoked by facts she felt clearly violated the general rule that no unreasonable force should be used against a suspect. In *Kisela v. Hughes*, police shot a woman who had committed no illegal act and who was not even suspected of having committed a crime. The woman was standing in front of her house with a knife at her side, her roommate about six feet away from her. The police claimed that she had refused to drop the knife, but it was not clear that the woman heard the command, and the woman's roommate told the police to "take it easy" (138 S. Ct. at 1151). The police attempted no lesser use of force before reverting to deadly force. *Mullenix v. Luna* (136S. Ct. at 305) involved the fatal shooting of a driver who led police on a high-speed chase. Seconds before the car was to hit tire spikes police officers set up, another police officer shot the driver, against the order of his commander, which was to wait to see whether the spikes worked. In both of these cases, the fact that the officers used deadly force when non-deadly force might have worked seemed to Sotomayor to violate the right clearly established in *Graham v. Connor*.

On the conservative side of the Court, Clarence Thomas has suggested that qualified immunity has no legitimate foundation. In *Ziglar v. Abbasi* (137 S. Ct. at 1871), Thomas wrote in a concurring opinion that the legal justification for qualified immunity, an assumption that the defense existed at common law when Section 1983 was passed in 1871, is far removed from the historical truth. While the Court may have acceptably made a connection with a common law defense in *Pierson v. Ray*, the later development of qualified immunity "completely reformulated qualified immunity along principles not at all embodied in the common law" (137 S. Ct. at 1871). Thomas chastised the Court's development of qualified immunity as a departure from an interpretation of Congress's will in 1871

to "precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make" (137 S. Ct. at 1871).

The Summary Judgment Standard

Summary judgment is a legal procedure whereby a party, usually the defense, may ask the judge to review the evidence to be presented at trial and dismiss meritless claims or spurious defenses on the paper evidence (Wald, 1998). In federal courts, where most police violence cases take place, summary judgment is guided by Federal Rule of Civil Procedure 56. All first-year law students learn that summary judgment is appropriate where "there is no genuine issue of material fact" (Wald, 1998). In three 1986 cases, the meaning of "genuine issue of material fact" moved from being a standard that only cut down frivolous claims to one that can cut down plaintiffs with any hole in the paper evidence underlying their case.

Rule 56 was drafted in 1937. Until 1986, judges largely frowned upon summary judgment (Childress, 1987). This was especially true in civil rights cases and other cases broadly conceived as "complex" or involving issues of "public policy" (Wald, 1998).

In the mid-1980s, however, the times were ripe for a change of perspective on summary judgment (Wald, 1987). At the time, there was rising concern about "the litigation explosion, a flood of prisoner and pro se cases swamping the courts, a diminishment in public sympathy for the downtrodden, and an escalation of rhetorical attacks on judicial activism" (Wald, 1987).

Into this milieu came a trio of 1986 cases which toughened the summary judgment standard against plaintiffs and encouraged trial judges to make more aggressive use of summary judgment (Id. at 1913-14). The three cases were *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (475 U.S. 574), an anti-trust case, *Anderson v. Liberty Lobby, Inc.* (477 U.S. 242), a libel case, and *Celotex v. Catrett* (477 U.S. 317), an asbestos case. These cases encouraged judges to try cases on paper rather than before juries (Childress, 1987). Emphasis would now be placed on the paper evidence on the record (Id. at 185). Facts could not be "genuine" unless they had basis in the record (Id. at 185). The record had to show more than "some metaphysical doubt as to the material facts" (*Matushita*, 475 U.S. at 586). Before this trio of cases, any competing inference might have defeated a motion for summary judgment; afterwards, the plaintiff had the burden of pointing out a quantum of paper evidence that could lead a reasonable juror to rule in plaintiff's favor (Childress, 1987).

Civil rights cases notoriously fall victim to summary judgment, largely because qualified immunity is often decided at summary judgment. But judges also conduct "trials by paper" (See id. at 184) against plaintiffs who could convince juries their clearly established rights were violated based on circumstantial evidence and testimony they could produce at trial.

A glaring example of the "trial by paper" problem is *Salazar-Limon v. Houston* (826 F.3d 272 (5th Cir. 2016)). This case began when a police officer stopped Ricardo Salazar-Limon for weaving over the lanes of a highway and speeding. The officer ordered Salazar-Limon out of his truck and attempted to handcuff him. Salazar-Limon disobeyed and started walking back to his truck. The police officer claimed that Salazar-Limon reached for his belt, as if to grab a gun. The officer responded by shooting Salazar-Limon. Salazar-Limon was not in fact armed. The injuries left Salazar-Limon partially paralyzed.

The Fifth Circuit upheld summary judgment for the police officer because Salazar-Limon never produced pre-trial testimony in the form of deposition testimony or an affidavit specifically stating that he had *not* reached for his belt. The Fifth Circuit thus concluded that the evidence Salazar-Limon had reached for his belt as if to grab a gun was uncontroverted. This, it held, meant there was no disputed material fact regarding the Officer's perception, and his perception justified the use of deadly force. (826 F.3d 272 (5th Cir. 2016))

Salazar-Limon petitioned the Supreme Court to review the case, which it declined to do, thus leaving the Fifth Circuit's harsh and questionable application of the summary judgment standard in place (137 S. Ct. 1277 (U.S. 2017)).

In dissent, Justice Sotomayor stated that the Court had abused the summary judgment standard. Salazar-Limon testified that the officer told him to stop walking and then *immediately* shot him. The summary judgment standard requires judges to draw reasonable inferences for the plaintiff when the facts are disputed (*Anderson v. Liberty Lobby*, 477 U.S. at 265). In Sotomayor's opinion, Salazar-Limon's testimony that he was shot *immediately* after hearing the command was enough for a jury to infer that Salazar-Limon had not grabbed his belt. That inference would mean Salazar-Limon's rights had been violated.

Another way that courts abuse the summary judgment standard is by dismissing excessive force claims when the victim cannot pinpoint his attacker by virtue of being attacked from behind. A recent example is *Jutrowski v. Township of Riverdale* (904 F.3d 280 (3d Cir. 2018)). In this case, police pulled a drunk man out of a car and wrestled him to the ground. While on the ground, he was kicked in the face for no reason. Because the Plaintiff was on the ground, he could not see which of the officers on the scene kicked him in the face. The event should have been caught on video camera, but the arresting officer whose dashboard camera would have been in the position to capture the event did not activate his camera. The Third Circuit Court of Appeals held that Plaintiff's inability to state exactly which officer had kicked him in the face warranted summary judgment. Even though the police officer's not turning on his camera was the reason Plaintiff could not tell who had kicked him in the face, the court still interpreted the events as not raising a disputed issue of material fact.

The decision was not an isolated event. The *Jutrowski* Court cited a 1997 Third Circuit case, *Sharrar v. Felsing* (128 F.3d 810 (3d Cir. 1997)). In *Sharrar v. Felsing*, the court affirmed summary judgment for the defendant police officers because the Plaintiff had been injured from behind and could not identify which of the police involved in the raid of a house had injured him. Ronald Sharrar was handcuffed, lifted up from behind by one of the police officers on the scene, and thrown into the back of a police car. In the process, his shoulder came out of the socket. The Court of Appeals held that: "Ronald Sharrar, who could recognize all of the defendant officers, was unable to identify which police officers were in the police car with him at the time of the alleged abuse. There was therefore no evidentiary basis on which to hold these defendants liable" (Id. at 821).

In *Jutrowski* and *Sharrar*, the courts abused the summary judgment standard by exculpating police who attack while the victims could not see. Although the application of law in these cases seems technically sound, it is gravely unjust. The courts in these cases sent a clear message to police officers: "Kick them from behind." The use of summary judgment to dismiss "kicked from behind" cases is an abuse that encourages police violence.

Monell Liability

Another court-created means of encouraging police violence is the high bar the Supreme Court created for holding municipalities liable for excessive force. Normally, employers are held liable for the torts of their employees under a *respondeat superior* theory, meaning that the employer is held directly liable for the bad acts of its employees. However, under the so-called *Monell* doctrine, a municipality may only be held liable under Section 1983 for a policy or custom which violates constitutional rights.

While the summary judgment standard that developed in the 1980s was intended to be an anti-plaintiff creation, *Monell* liability was actually intended to be a pro-plaintiff development. *Monell v. New York City Dept. of Social Servs.* (436 U.S. 658 (1978)) was a 1978 Supreme Court case that sought to hold the City of New York liable for having the unconstitutional policy of forcing pregnant women to take unpaid leave from work. In 1961, the Supreme Court had ruled in *Monroe v. Pape* (365 U.S. 167 (1961) that municipalities could not be held liable under Section 1983. In *Monell*, the Supreme Court found *Monroe's* conclusion faulty and held that municipalities could be liable where a constitutional violation was executed pursuant to a policy or custom of the municipality.

Still, critics have complained that the ongoing problem of police violence warrants a liability standard less favorable to municipalities (Nielsen & Walker, 2015). A less municipality-friendly legal standard, like *respondeat superior*, would force municipalities to take police violence more seriously. As it stands now, a municipality does not have to worry about liability in the event one bad apple abuses his authority, but if municipalities could be held liable for the acts of their

employees automatically, municipalities might be pressured to take an even more aggressive position against police violence.

Conclusion

The judiciary plays a role in the ongoing problem of police violence. Court-created rules like qualified immunity, the summary judgment standard, and the *Monell* doctrine insulate defendants from liability for police violence. These rules disincentivize police departments from taking a harder stance against the use of excessive force.

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