

Federal Law Enforcement Statutory and Caselaw Overview

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Overview of Presentation

- Excessive force as defined by the U.S. Supreme Court
- Qualified immunity
- Attempts before the Supreme Court and Congress to get rid of qualified immunity
- Indemnification for excessive force claims
- Questions to think about related to modifying or eliminating qualified immunity

Section 1983 and Qualified Immunity

- 42 U.S.C. Section 1983 is a **vehicle** for bringing civil rights lawsuits (like excessive force claims) against state and local government officials
- Qualified immunity is a **defense** to Section 1983 claims
- Opposite sides of the same coin?

What is Section 1983?

- What is Section 1983?
 - 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...
- Section 1983 makes **government employees** and **officials personally liable** for **money damages** if they violate a persons **federal constitutional** or **statutory rights**

What is Qualified Immunity?

- Defense to Section 1983
- If it applies **state and local government officials can't be successfully sued for money damages for constitutional violations**
- State and local government official are sued but the insurance company/self-funded government entity almost always pays

Use of Force as a Constitutional Violation

- **42 U.S.C. § 1983** makes claims for **money damages** possible where **constitutional violations** have occurred
- Basis of an excessive force claim is the **Fourth Amendment's** prohibition against “**unreasonable searches and seizure**”
- Doesn't have to be deadly force
- Not all deadly force is excessive

Only Four SCOTUS Excessive Force Cases

- Two of them lay out the legal standards
- One modifies/clarifies the standard
- Two apply the standard (both in the car chase context)
 - In both cases the Court finds no excessive force
- **Excessive force standard isn't a bright-line rule**

Tennessee v. Garner (1985)

- Deadly force may not be used unless it is “necessary to prevent the escape **and** the officer has probable cause to believe that the suspect poses a **significant threat of death or serious physical injury to the officer or others**”

Facts

- Officer shot a suspected robber, who appeared to be unarmed, and was escaping on foot over a fence after the officer told him to halt
- **Tennessee law allowed the shooting of those fleeing or forcibly resisting arrest**
- **Police policy allowed the use of deadly force in cases of burglary**

Argument

- Tennessee argued that where probable cause exists **any kind of seizure is possible**
- Court said this argument ignores that it has applied a **balancing test** under the Fourth Amendment based on **reasonableness**

Holding

- The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable
- It is not better that all felony suspects die than that they escape
- Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force
- It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect
- **A police officer may not seize an unarmed, nondangerous suspect by shooting him dead**

Caveat

- Where the officer has **probable cause** to believe that the suspect poses a **threat of serious physical harm**, either to **the officer or to others**, it is not constitutionally unreasonable to **prevent escape** by using **deadly force**
- Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given

Larger Context

- 6-3 decision
- Rejected a common law rule allowing the use of **whatever force was necessary to effect the arrest of a fleeing felon**

Graham v. Connor (1989)

- The Fourth Amendment’s “objective reasonableness” standard, rather than under a substantive due process standard governs force cases
- **Objective reasonableness is more favorable to police officers**

Facts

- Graham, a diabetic, goes into a convenience store for orange juice to avoid an insulin reaction
- Seeing a long line he leaves immediately and asks his friend who was driving him to take him to another friend's house
- An officer stops the car, the friend explains Graham is having a "sugar reaction," the officer says he is going to investigate and calls for backup
- Graham gets out of the car, runs around it twice, and passes out
- Officers throw Graham on roof of the car, inside the police car, and won't give him orange juice
- Officers release him with a broken foot and other injuries after the convenience store confirms he did nothing wrong

Holding

- Today we make explicit what was implicit in *Garner's* analysis, and hold that **all claims that law enforcement officers have used excessive force** -- deadly or not -- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen **should be analyzed under the Fourth Amendment and its "reasonableness" standard**, rather than under a "substantive due process" approach
- Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims

General Balancing Test

- Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of “**the nature and quality of the intrusion on the individual's Fourth Amendment interests**” against the countervailing **governmental interests** at stake
- Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it

Specific Balancing Test

- **Severity** of the crime at issue
- Whether the suspect poses an **immediate threat** to the safety of the officers or others
- Whether he is **actively resisting arrest or attempting to evade arrest** by flight

General Principles

- The “reasonableness” of a particular use of force must be judged from the **perspective of a reasonable officer on the scene**, rather than with the 20/20 vision of hindsight
- The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make **split-second judgments** -- in circumstances that are **tense, uncertain, and rapidly evolving** -- about the amount of force that is necessary in a particular situation
- The “reasonableness” inquiry in an excessive force case is an **objective** one: the question is whether the officers' actions are “objectively reasonable” in light of the facts and circumstances confronting them, **without regard to their underlying intent or motivation**

Larger Context

- Unanimous (with some concurring opinions)
- First time the Court used the term “excessive”
- Not a deadly force case
- Court sent the case back to the lower court to decide if the force was “excessive”
- Excessive force cases are Fourth Amendment case; standard is deferential to law enforcement

Scott v. Harris (2007)

- Applies *Graham v. Connor*
- Law enforcement official may, consistent with the Fourth Amendment, attempt to stop a **fleeing motorist** from continuing his **public-endangering flight by ramming the motorist's car** from behind

Facts

- An 85 MPH high speed chase on a mostly two-lane road ensued after an officer tried to pull Scott over for driving 73 MPH in a 55 MPH speed limit area
- Harris pulled into a parking lot of a shopping center and was nearly boxed in by various police vehicles but evaded the trap by hitting Officer Scott's police car
- Officer Scott's supervisor approved him using a "Precision Intervention Technique" maneuver, which causes the fleeing vehicle to spin to a stop
- Officer Scott did it wrong, the car crashed, and Harris was rendered a quadriplegic
- 10 miles and six minutes

Garner isn't a Rigid Test

- Harris probably didn't pose an **immediate threat of serious physical harm to the officer or others** at the time Officer Harris hit his vehicle
- *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force"
- Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were **reasonable**

Weigh Probabilities Against Relative Culpability

- So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person?
- We think it appropriate in this process to take into account not only the number of lives at risk, but also their **relative culpability**
- It was [Scott], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted

Stop the Chase?!

- We think the police **need not have taken that chance and hoped for the best**
- Whereas Officer Scott's action — ramming respondent off the road — was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not
 - Even if police stopped chasing him how would Harris have known the chase was off?
 - We are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger

Larger Context

- Why the long time gap between *Graham* (1989) and *Scott* (2007)?
- 8-1 decision (Stevens dissenting; concurring opinions by Ginsburg and Breyer)
- Video evidence
 - “Genuinely” disputed facts are viewed most favorably to the plaintiff
 - Court finds no genuine dispute Harris’s actions were dangerous
 - Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury

Plumbhoff v. Rickard (2014)

- Follow up to *Scott v. Harris*
- Police officers didn't violate the Fourth Amendment when they shot and killed the driver of a fleeing vehicle to end a dangerous car chase

Facts

- Donald Rickard drove away after being pulled over because his vehicle had only one operating headlight and was pursued by police
- He drove over 100 miles an hour and passed more than two dozen vehicles before exiting the highway where he made contact with three police cars
- Rickard's tires were spinning and his car was rocking back and forth when Officer Plumhoff fired three shots into his car
- Rickard then reversed his car, nearly hitting an officer on foot, and again fled
- Officers fired 12 shots more killing Rickard and his passenger

Holding

- This case is basically *Scott v. Harris* 2.0
 - Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired — as noted, he managed to drive away despite the efforts of the police to block his path — underscores the point.
- 15 shots wasn't too many
 - If police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended
 - A passenger in the car doesn't change the calculus

Context

- Unanimous opinion (Justices Ginsburg and Breyer don't join all of it)
- Short opinion
- Court also said qualified immunity would apply

Overall Observations

- Crazy to think that in 1984 if your state followed the common law rule police officers could use any amount of force to stop a fleeing or resisting felon
- Excessive force standard is deferential to officers **as long as their safety and the safety of others is at stake**
- No allegation of excessive force based on race in any of the SCOTUS cases
- Very little Supreme Court precedent
- Most if not all federal circuit courts of appeals have decided many, many excessive force cases

Excessive Force is no Free Pass

- Excessively forceful or unduly tight handcuffing
- Handcuffing in the back if an injury is obvious
- Pointing a loaded assault rifle at the head of a prone, non-resistant, innocent person who presents no danger, with the safety off and a finger on the trigger
- Pepper spraying nonviolent and unarmed protesters

Excessive Force is no Free Pass

- Pepper-spray as a pain compliance technique where the suspect is restrained in handcuffs and is only being verbally resistant
- Tasing a drunk driver who was making it difficult to handcuff him and who swore at the officer
- Officers tased a man five times who they knew was mentally ill and was sitting on the ground refusing to return to the hospital

Excessive Force Duty to Intervene Claim

- Observe excessive force
- Reasonably able to prevent it
 - What if only one excessive act took place?
- Equal or lower rank doesn't matter?
- Does every federal circuit court of appeals recognize this claim?

Duty To Intervene Cases

- *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972) (police have duty to prevent plaintiff from being beaten by other police officers in their presence)
- *Ortiz v. Kazimer*, 811 F.3d 848 (6th Cir. 2016) (“police officers are liable for failing to stop ongoing excessive force when they observe it and can reasonably prevent it”)
- *Garcia v. Superior Court*, 50 Cal.3d 728 (1990)
- *Samuels v. Cunningham et al.*, 2003 U.S. Dist. LEXIS 14479 (Dist. Del. 2003) (other officers couldn’t prevent one punch)
- *Jones v. City of Hartford*, 2003 U.S. Dist. LEXIS 17340 (Dist. CT. 2003)
- *Salvato v. Miley*, 790 F.3d 1286 (11th Cir. 2015) (officer who has suffered a traumatic event—shooting someone—still has a duty to intervene)

What is Qualified Immunity?

- Defense to Section 1983 claims—including excessive force claims
- Not contained in Section 1983
- Created by the United States Supreme Court

Modern Test for Qualified Immunity

- Qualified immunity is generally available if the law a government official violated isn't **clearly established**
- *Harlow v. Fitzgerald* (1982)

What does Clearly Established Mean?

- “Clearly established” means that, at the time of the officer's conduct, the law was ‘sufficiently clear’ that **every ‘reasonable official** would understand that what he is doing’ is unlawful
- It protects all government officials except the **plainly incompetent or those who knowingly violate the law**
- While qualified immunity “do[es] not require a case directly on point,” it does require that “existing precedent must have placed the statutory or constitutional question **beyond debate**”

QI Criticized: Police Use of Force

- Qualified immunity applies to **all** state and local government employees who violate **any** constitutional right
- Controversy over qualified immunity focuses (almost entirely) on police use of force
- A court may find at a police officer **used excessive force** but he or she **won't be liable for money damages** if the use of force wasn't **clearly established**

Why is QI So Controversial?

- **Qualified immunity is a one-time free pass to violate someone's rights with no legal consequences as long as the law isn't clearly established**
- This doesn't seem fair to most people

Justifications for Qualified Immunity

- **Why should government officials pay money damages for violating someone's rights when they had no way to know at the time that what they were doing was unconstitutional?**

From SCOTUS

- Expenses of litigation
- Diversion of official energy from pressing public issues
- Deterrence of able citizens from acceptance of public office
- 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”
 - **If police officers hesitate they and/or bystanders may be injured or killed**
- *Harlow v. Fitzgerald* (1982)

If Law is Clearly Established No Mercy

- Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. **Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground.** Although we recognize that our police officers are often asked to make splitsecond decisions, we expect them to do so with respect for the dignity and worth of black lives. **Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept.**
- *Jones v. City of Martinsburg*, 4th Circuit, June 9, 2020

Qualified Immunity in Action—*Mullenix v. Luna*

- Officer Randy Baker had a warrant and tried to arrest Israel Leija, Jr.
- Leija entered the interstate and led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour
- Twice during the chase, Leija called the police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit
- The dispatcher relayed Leija's threats, together with a report that Leija might be intoxicated, to all concerned officers
- An officer trained in their use manned the spike strip at the first location Leija was expected to reach

Qualified Immunity in Action—*Mullenix v. Luna*

- Officer Mullenix wanted to shoot at Leija’s car in order to disable it
- Mullenix had not received training in this tactic and had not attempted it before, but he radioed the idea to another officer who responded with Rodriguez “10– 4”
- Mullenix then asked the dispatcher to inform his supervisor, Sergeant Byrd, of his plan and ask if Byrd thought it was “worth doing.”
- Before receiving Byrd’s response, Mullenix exited his vehicle and, armed with his service rifle, took a shooting position on the overpass
- From this position, Mullenix still could hear Byrd’s response to “stand by” and “see if the spikes work first”

Qualified Immunity in Action—*Mullenix v. Luna*

- Mullenix knew that another officer was located beneath the overpass
- As Leija approached the overpass, Mullenix fired six shots
- Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times
- It was later determined that Leija had been killed by Mullenix's shots
- There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block

Court Grants Qualified Immunity

- Court does not decide whether to use of force was excessive
- Court holds it wasn't beyond debate that that Mullenix's actions were unreasonable
- By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location

Not Everyone Agrees

- Justice Scalia would have gone further: Mullenix didn't intend to kill Leija
- Justice Sotomayor dissented: Mullenix fired six 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. Mullenix's rogue conduct killed the driver, Israel Leija, Jr.
- What is the problem with this case from a government employer's perspective?

Long Before George Floyd's Death Qualified Immunity was Under Attack

- The Right and the left
- Academics
- Justices
- Lower court judges
- Presidential candidates

Qualified Immunity SCOTUS Track Record

- In only two cases since 1982 has the Supreme Court held that police officers have violated clearly established law
- In the last few years the Supreme Court has reversed, without oral argument, at least one lower court case denying police officers qualified immunity
- Court has repeatedly criticized lower courts for viewing the facts of the case through too high a level of generality

Other *Per Curiam* SCOTUS Force Case Decided on Qualified Immunity

- *City of Escondido v. Emmons* (2019)
- *Kisela v. Hughes* (2018)
- *White v. Pauly* (2017)
- *Mullenix v. Luna* (2015)
- *Brosseau v. Haugen* (2004)

Culmination before SCOTUS

- As of Monday the Court was currently considering granting **9 petitions** in qualified immunity cases
- In a number of these cases the victim and/or its *amici* were asking the Court to **eliminate** or **modify** qualified immunity
- The Court had been sitting on at least one of the petitions since **October**

Why Did the Court Deny Cert?

- We don't know but...
- Decision was made before George Floyd was killed
- Probably only one or two Justices willing to eliminate qualified immunity (Sotomayor and Thomas)
- Even if five or more Justices wanted to modify it there probably is no consensus among them how to modify it
- Remember the Hillary Court?

Culmination before Congress

- Justice in Policing Act proposed by Democrats in the House eliminates qualified immunity for state and local police and correctional officers
- Ending Qualified Immunity Act proposed in the House eliminates qualified immunity for **all state and local government employees**
- Expecting a Senate police reform bill today
- Senator Tim Scott (R-SC) says eliminating QI is a “poison pill”

Indemnification is Nearly Absolute

- Joanna Schwartz, *Police Indemnification*, NYU Law Review (2014)
- Governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement
- Law enforcement officers never satisfied a punitive damages award entered against them and almost never contributed anything to settlements or judgments—even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted for their conduct

Indemnification

- State statutes generally require state and local government employers to defend and indemnify employees acting in course and scope of employment
 - These statutes could be changed/eliminated
- Repealing indemnification statutes make it more difficult to attract and retain police officers even if qualified immunity exists
- **If qualified immunity were eliminated would it really be fair to not indemnify employees when no court had ever held their conduct violated the constitution?**

Consequences of QI Going Away

I think

- More excessive force lawsuits
- More **successful** excessive force lawsuits
- Higher cost/more difficulty getting insurance coverage
- Officers hesitate to use force?
- Officers use less excessive force?

Joanna Schwartz think

- Only modest “adjustment to the scope of constitutional rights”
- Success rates would remain relatively constant
- Average cost, time, and complexity associated with litigating claims would decrease
- More lawsuits will be filed but attorneys will still have strong incentives to decline insubstantial cases
- Indemnification will shield most **government agencies** and officials from the financial consequences of damages awards

Some Questions

- Is it fair to victims of excessive force that they may receive nothing (if it wasn't clearly established the use of force was excessive)?
 - Should there be a workers comp system for being injured by the police regardless of anyone's fault?
 - State and local governments sometimes pay settlements regardless—Michael Brown
- Is it fair to police officers that they be legally (if not financially) responsible for a use of force that no court had (yet) said was excessive?
- Will officers hesitate to use force if qualified immunity goes away?
 - Officers and bystanders will be at risk?

Some More Questions

- Can qualified immunity be modified in a way that is both fair to officers and victims (rather than eliminated)?
- Will eliminating or modifying qualified immunity actually cause officers to engage in less excessive force/police departments to better train officers?
- To the extent a higher proportion of POC than white people are a victim of police excessive force, is there a better way to accomplish racial justice by reducing excessive force than eliminating or modifying qualified immunity?
- Do we need more social workers and less police?

Police Use of Force: Surprising, Complex, Heartbreaking

- Joe Sexton, *I Don't Want to Shoot You Brother*, PROPUBLICA, Nov. 29, 2018