Section 1983 and Police Use of Force: Towards a Civil Justice Framework

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Conversations about police use of force have peaked in recent years as social movements and the increased visibility of police killings have led to demands for change and accountability.[1] Unfortunately, criminal prosecutions are rare, which has led victims and their families to seek justice through civil actions. 42 U.S.C. § 1983 is the most common legal vehicle to do this and allows people who have suffered violations of their constitutional rights to seek and receive money for the harm done to them.

Section 1983 has a remarkable history. This statute emerged after the Civil War as part of the Civil Rights Act of 1871 to promote social and political inclusion for Black people, many of whom were formerly enslaved and had been facing violent backlash from Whites.[2] During these years, Blacks were subjected to brutal forms of terrorism connected to resistance by white supremacists and apathy by others who benefited from whiteness's privileges.[3] Kidada E.

DOI: https://doi.org/10.15779/Z380G3H04C

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1. The social unrest and protests following the killing of George Floyd by Minneapolis police officers have been described as the largest movement in American history. *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/9W3C-R2J7].

2. "Section 1983 was first enacted as section 1 of the Civil Rights Act of 1871, which attempted to deal with widespread legal abuses and physical violence, often backed by the Ku Klux Klan, against Southern Blacks and their white supporters." Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484 (1982).

3. In WHITE BY LAW, Ian Haney López explores the social and legal construction of whiteness and its value to Whites — even those who may not act overtly to maintain racial boundaries. Haney López writes "[c]ontemporary evidence suggests that among Whites, White identity continues to be highly valued. Despite its superficial transparency, Whites widely continue to recognize the value of their own Whiteness. In *Two Nations: Black and White, Separate, Hostile, Unequal*, Andrew Hacker recounts the following: When White college students were asked what sort of compensation they would expect should they have to endure the remainder of their lives as someone suddenly made physically 'Black' but not otherwise changed, the majority 'seemed to feel that it would not be out of place to ask

Williams' book, "I Saw Death Coming," provides chilling details of the violence used to intimidate and disenfranchise Blacks. Williams writes of this postwar period:

> Some Confederates' indifference to free Black people's lives was reflected in unremitting waves of extremist violence. Enslavers' refusal to release Black people from bondage rippled across the South. First they retaliated by maiming and killing Black people trying to escape or rescue their kin. Then came the raging torrent of assassinations of Black voters and officeholders. When that wasn't enough to keep men . . . from the polls, extremists unleashed the tidal force of Klan strikes on Black southerners generally. Reporting on conditions in Texas in 1868, Secretary of War Edwin Stanton wrote that the killings of Black people were so common as to "render it impossible to keep an accurate account of them." This violence could only occur, Stanton added, because it was "countenanced, or at least not discouraged by the majority of white people where it occurred."[4]

The acceptance of this violence by Whites in these communities was reflected in law enforcement. Not only did police look the other way, but they often participated in unlawful acts against Black people. During Congressional discussions of the Civil Rights Act of 1871 (in which Section 1 ultimately became what is now known as 42 U.S.C. § 1983), Representative Perry provided a vivid description of the problem:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.[5]

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for $50 million, $1 million for each coming black year.' Although this figure seems more metaphorical than accurate in its roundness, it is a metaphor that testifies to the immense value Whites attach to White identity. But perhaps these students were far more accurate than they could imagine in estimating the value of White identity. After all, what would one pay to be accorded the differing treatment meted to Whites as opposed to Blacks?" Ian Haney López, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 140 (10th Anniversary ed. 2006).

4. KIDADA E. WILLIAMS, I SAW DEATH COMING: A HISTORY OF TERROR AND SURVIVAL IN THE WAR AGAINST RECONSTRUCTION xvii (2023).

5. *See* CONG. GLOBE, 42d Cong., 1st Sess., app. at 78 (1871).

In light of this active participation in criminal behavior by police, prosecutors, local judges, and juries, § 1983 was meant to give newly freed Black citizens access to *federal courts* so that they could at least have a legal forum outside of indifferent (if not complicit) localities, where they could bring civil charges against public officials who violate their constitutional rights.

Yet this access to federal courts to bring civil suits against the police and others never fully materialized. With the end of Reconstruction and the entrenching of Jim Crow, § 1983 remained largely unused for ninety years.[6] It was not until *Monroe v. Pape* (1961) that the Supreme Court broadly acknowledged that plaintiffs can bring § 1983 civil suits against police officers who violated their constitutional rights—even in situations where the unlawful behavior was not approved by the State or was contrary to established practices.[7] In the years following *Monroe*, federal courts began expanding § 1983's scope by "interpret[ing] the meaning of 'state action' and 'color of state law,' allow[ing] property and liberty interests to be adjudicated under the statute,[8] and determin[ing] that plaintiffs need not exhaust state remedies before seeking relief."[9]

This re-imagining of § 1983 after *Monroe* expanded plaintiffs' access to federal courts when their constitutional rights were violated. The Court was also engaged in a parallel process of developing the substance of Constitutional protections—especially across the Fourth,[10] Eighth,[11] and Fourteenth[12] Amendments. This transformation across civil rights and constitutional

6. "Section 1983, enacted as part of the Civil Rights Act of 1871 to enforce the guarantees of the fourteenth amendment by providing a cause of action in federal court, lay dormant as a result of restrictive judicial construction until the Supreme Court's 1961 decision in *Monroe v. Pape*." Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135–36 (1977).

7. Monroe v. Pape, 365 U.S. 167, 183–85 (1961).

8. The Supreme Court has noted that § 1983, as a civil rights statute, is not limited to asserting rights regarding personal property. In *Lynch v. Household Finance Corporation*, the Court stated that "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. Congress recognized these rights in 1871 when it enacted the predecessor of § 1983 . . . ." 405 U.S. 538, 552 (1972).

9. Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 421 (2022).

10. *See, e.g.*, Chimel v. California, 395 U.S. 752, 763 (1969) (describing the contours of an unreasonable search); Katz v. United States, 389 U.S. 347, 353 (1967) (extending Fourth Amendment protections against unreasonable searches to electronic and telephonic communications).

11. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment).

12. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

landscapes led to a remarkable increase in litigation against police officers for using excessive force.[13]

Yet, only six years after the *Monroe* decision, the Supreme Court began chipping away at this access by developing new rules out of thin air—most notably, qualified immunity. Over four decades, from *Pierson v. Ray* (1967) to *Pearson v. Callahan* (2008), the Court slowly created a qualified immunity doctrine that makes it unusually difficult for plaintiffs to successfully bring excessive force cases against police unless they can show (1) that a constitutional violation occurred and (2) that the right itself was "clearly established."[14]

In *Saucier v. Katz* (2001), the Court held that the qualified immunity inquiry had to occur in that *particular sequence*.[15] But *Pearson* stands out as the end game of qualified immunity, in that it allowed courts to examine the "clearly established" prong prior to the factual inquiry about whether a violation occurred. This effectively allowed courts to dismiss excessive force claims before reaching the merits of a case by simply finding that the claimed violation was not clearly established, which entitled officers to qualified immunity and shielded them from civil suits.[16] Unless plaintiffs can show a case *with the exact same fact pattern* where a federal court in that jurisdiction found the actions of the police violated a constitutional right, courts tend to dismiss the claim.[17] Thus, in a rather circular route, we are back to the proverbial square one: the descendants of formerly enslaved people facing blatant and routine state sponsored terror by the police and other complicit public officials,[18] yet having little access to the courts to seek a remedy.

13. *See Suing the Police in Federal Court*, 88 YALE L.J. 781, 781 n.3 (1979) (noting that from 1971 to 1977, suits against law enforcement claiming civil rights violations increased from 2000 to 6000. Moreover, "civil rights actions in general have increased from 287 in 1960 to 13, 113 in 1977.").

14. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV 605, 613–18 (2021).

15. "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level . . ." 533 U.S. 194, 200 (2001).

16. "On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson v. Callahan, 555 U.S. 223, 236 (2009).

17. *See. e.g.*, Baxter v. Bracey, 751 Fed. Appx. 869, 872 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020) (Plaintiffs' §1983 claim against officers for releasing a police dog on him thwarted by qualified immunity because plaintiff "does not point us to any case law suggesting that raising his hands, on its own, is enough to put [officer] Harris on notice that a canine apprehension was unlawful in these circumstances"); *see also* Obasogie & Zaret, *supra* note 9, at 409–12 (describing the details in *Baxter v. Bracey* leading the court to affirm a qualified immunity defense).

18. For a description of how prosecutors, judges, and other officials can become complicit in police violence, *see* NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016).

Qualified immunity is just one of many issues surrounding § 1983 litigation that make it difficult for plaintiffs to have their day in court.[19] The substantial barriers to § 1983 litigation mirror concerns raised by civil justice advocates in other contexts, who draw attention to the remarkable hurdles put in place to limit plaintiffs' ability to use the civil legal system to have their rights protected. Traditionally, conversations concerning civil justice have focused on issues such as forced arbitration, unavailability of class action lawsuits, restrictions on punitive damage awards, limited access to jury trials, and other ways that ordinary people are treated unfairly by not being able to fully avail themselves of courts to have their interests robustly represented and vindicated in civil matters. As Dean Erwin Chemerinsky notes, "[t]oo often, the courthouse doors are closed to those who have suffered serious injuries and violations of their rights. . . . [Civil justice movements] can make a real difference in access to the American justice system."[20]

This Symposium is designed to begin a conversation on why it is important to think about the use of excessive force by police and barriers to § 1983 lawsuits as a civil justice problem. The idea is simple: when § 1983 and other legal tools that are specifically designed to give plaintiffs access to the courts are rendered ineffective by developments such as qualified immunity, limits on municipal liability,[21] and other unjust rules and practices, then a civil justice matter arises—one that is conceptually linked to traditional understandings of civil injustice such as consumers or workers being forced to arbitrate a claim or the shrinking use of jury trials. What is at stake is the health of our democracy. Can ordinary citizens use law to hold the State, corporations, and other private actors accountable for wrongdoing? Or does civil law only exist for those with power? Civil justice advocacy and legal reform are designed to bring fairness and accountability to democracy, and the undermining of constitutional torts should be viewed with the same concern and insistence on change.

The Essays in this Symposium Issue will help us begin this discussion. Fred Smith uses a fictitious debate between two law professors to probe and explore what Smith characterizes as the "legitimacy paradox" in constitutional torts. This paradox involves a tension between advocating for reform in existing § 1983 litigation mechanisms and more transformational, abolitionist approaches that highlight broader illegitimacies in American law. Joanna Schwartz extends the conversation started in her book *Shielded: How the Police Became Untouchable*

19. *See, e.g.*, Joanna Schwartz, *Municipal Immunity*, 109 VIR. L. REV. 1181, 1187 (2023) (finding that it is more difficult for plaintiffs to successfully assert municipal liability than defeat qualified immunity in § 1983 litigation).

20. Erwin Chemerinsky, *Civil Justice Research Initiative*, https://civiljusticeinitiative.org [https://perma.cc/J45P-7PA6].

21. *See., e.g.*, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2184–85 (2005) (examining and re-contextualizing the historical arguments for and against municipalities' *respondeat superior* liability).

by highlighting the importance of moving debates about non-reformist reform beyond technical discussions about changing laws and policies and towards changing the underlying social forces that put people in the position to have their rights violated. Frank Rudy Cooper offers a close doctrinal reading of key Fourth Amendment cases to understand how dicta can become holdings without principled foundations, normalizing certain forms of injustices in excessive force cases. Derecka Purnell's Essay historicizes § 1983 as a way to caution advocates and victims' families against overestimating the ability of the statute to bring about civil justice in meaningful ways. And Hedwig Lee, Abhery Das, and Michael Esposito offer a deep and expansive look at the health consequences of policing.

Taken together, these Essays will help readers begin to understand the conceptual linkages between reform efforts surrounding § 1983 police use of force litigation and broader community-level advocacy for civil justice, both of which seek to transcend institutional barriers that prevent demands for justice and accountability from reaching courthouses. The hope is that readers will be inspired to think more deeply about these connections, and that these conversations can lead to innovative ways to support broader civil justice movements.