

LAWFARE

Hold Police Accountable by Changing Public Tort Law, Not Just Qualified Immunity

Paul Stern

June 24, 2020

Politicians, scholars and jurists on both sides of the aisle have pointed to the elimination of qualified immunity as a means to ensure greater law enforcement accountability in the wake of George Floyd's tragic death. Congressional Democrats recently introduced the Justice in Policing Act of 2020, which aims to establish a national standard for policing and combat racial bias in policing—by, among other things, doing away with qualified immunity. Organizations along the political spectrum, including the American Civil Liberties Union and the Cato Institute, have joined in the call to eliminate the doctrine. Justice Clarence Thomas recently dissented from the denial of certiorari in a case involving qualified immunity, raising his “strong doubts” about the doctrine as it relates to actions brought against officers acting under the color of state law.

The judicially created doctrine was conceived as a means of striking the proper balance between permitting compensation for the conduct of officials acting with ill motives, while not punishing those officers who, in good faith, did not know that their conduct would violate the constitutional rights of the plaintiff. Part of that analysis required a subjective assessment of whether the official acted with permissive intent. The Supreme Court later found the subjective element of the good-faith defense incompatible with its concern that well-intentioned officers often had to endure the stresses and burdens of a fact-intensive investigation, extensive discovery and a trial. Casting aside the subjective standard, the Supreme Court devised an objective test, which asked whether the officer's conduct violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”

The basic premise that a constitutional right be “clearly established” may appear innocuous enough, lest the official be financially responsible for conduct for which there was no reasonable basis to know it would subsequently be deemed unconstitutional. However, the Supreme Court later clarified that the factual context of the legal precedent must be sufficiently specific so that officers are not confused about whether it applied in their particular circumstances. As a result, courts are tasked with determining whether “every reasonable official would have understood that what he is doing violates that right.” In other words, the fact that the conduct was unconstitutional must be “beyond debate.” Given that each encounter with law enforcement is factually unique, and courts do not need to resolve the issue of whether the conduct was indeed constitutional before concluding that the immunity applies, the doctrine has been chastised as protecting “all but the plainly incompetent or those who knowingly violate the law.”

While a great deal of recent writing has focused on the inequity created by qualified immunity, it is important to keep in perspective the extent to which its elimination could serve as a

meaningful reform mechanism. The U.S. Supreme Court has historically drawn a sharp distinction between constitutional torts, such as excessive force, and common-law torts, such as assault, battery and negligence. Many acts of police wrongdoing may not constitute constitutional violations and thus would not be addressed by reforms to qualified immunity. Accountability would then have to stem from state tort law.

Consequently, to the extent that public tort law can serve as a viable mechanism for law enforcement accountability, eliminating statutory privileges and indemnification regulations may serve as a greater vehicle for reform than qualified immunity. That is not to suggest that the federal government cannot play a role in promoting reform. However, when it comes to federal statutes, Congress should once again examine the Federal Tort Claims Act instead of focusing solely on actions based on 42 U.S.C. § 1983 as a means of initiating law enforcement accountability.

Constitutional Immunity Versus Statutory Privilege

On the evening of Oct. 3, 1974, two Memphis police officers responded to a “proowler inside call.” When they arrived on scene, a woman standing on her porch notified the officers that the break-in was occurring next door. When one of the officers went to the back of the neighboring home, he discovered the fleeing suspect, Edward Garner, crouched at the base of a six-foot-high chain-link fence enclosing the backyard. The officer was able to see Garner’s face and hands and, although he could not be certain, was “reasonably sure” Garner was unarmed. The officer shouted “police, halt” and took steps toward Garner. Garner began climbing the fence. Believing Garner would escape if he made it over the fence, the officer fatally shot him in the back of the head. Garner’s father brought a civil action pursuant to § 1983, which provides a federal remedy against state officials acting under the color of law who violate the federal Constitution.

In *Tennessee v. Garner*, the Supreme Court held that the shooting was an unconstitutional seizure under the Fourth Amendment. The court reasoned that the governmental interest in preventing felons from successfully fleeing capture and avoiding prosecution could not outweigh the suspect’s fundamental livelihood. In the court’s view, “[w]here 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 to do so.”

While the unconstitutionality of killing a fleeing felon may seem unassailable by today’s standards, that pronouncement was far from inevitable in 1974. At that time, the governing Tennessee statute permitted the shooting. The statute read, “If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.” The Memphis Police Department policy likewise permitted the use of deadly force in cases of burglary. Tennessee was in keeping with the common-law rule. The Restatement (Second) of Torts had been interpreted by many municipalities to permit police officers to use deadly force during a felony arrest when such force was necessary to prevent escape.

Although such deadly-force statutes had not yet been deemed unconstitutional prior to *Tennessee v. Garner*, many states had taken it upon themselves to craft statutes that provided their citizens

with greater protections. As noted by the Minnesota Supreme Court around the time of *Garner* decision, “Although the courts have overwhelmingly favored the common-law rule, commentators, law reformers, police department administrators, and legislatures increasingly tend to favor the more restrictive rule as to the scope of the privilege.” Eighteen states allowed for the use of deadly force “only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested.” States began forbidding the use of deadly force for any reason but to prevent violent felonies.

The differences between the various state laws surrounding the fleeing-felony rule not only demonstrate the constitutional limits of permissible police force but also underscore the importance of state privilege law. In circumstances akin to *Tennessee v. Garner*, an officer’s conduct may be deemed unconstitutional even if it was explicitly authorized under a state statute. In such circumstances, the officer nonetheless may be found personally liable, and financially responsible, absent qualified immunity. While this may be an extreme example of a constitutional right not being “clearly established,” it highlights the rationale for why the immunity exists in its original articulation.

Alternatively, for states that had banned the use of deadly force to effectuate the arrest of a fleeing felony prior to *Garner*, a remedy already existed: The use of deadly force would not have been privileged. As opposed to an immunity, a privilege is an affirmative defense asserted to justify conduct that ordinarily may constitute a tort but under particular circumstances does not subject the perpetrator to liability. An officer who unreasonably deviated from the policy could be found to have breached the appropriate standard of care and, consequently, committed a battery. Thus, before the Supreme Court articulated the constitutional prohibition on using deadly force against fleeing felons, states were using their privilege law to afford their citizens greater protection and to hold their officers more accountable.

In her dissent in *Tennessee v. Garner*, Justice Sandra Day O’Connor expressed sympathy for the “tragic and unfortunate” outcome of the case. Still, the justice raised concerns about relying on evolving police procedures to articulate constitutional lines. The dissent balked at using social science and shifting notions of best practices to establish constitutional barriers:

There is no question that the effectiveness of police use of deadly force is arguable and that many States or individual police departments have decided not to authorize it in circumstances similar to those presented here. But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality.

O’Connor was writing in 1974, but her jurisprudence holds true today. The current rebuke of certain techniques, such as chokeholds or firing upon moving vehicles, does not portend their constitutional demise. As states and municipalities tailor their policies to meet the unique challenges of their communities, there should be an emphasis on the manner in which privilege law shapes law enforcement conduct.

While police techniques, such as broken windows theory, often fall in and out of societal favor, communities can reassess whether an officer is privileged to use such techniques well before

they are deemed unconstitutional. Lawmakers can likewise determine whether the justification for the use of force requires more than a mere preponderance of evidence. Courts determine constitutional standards—but lawmakers have the authority to establish standards when enacting statutory tort law.

Excessive Force Versus Antecedent Negligence

Many law enforcement reformers tout deescalation and force-mitigation techniques as successful policing tools. Based on the premise that officers should resolve situations without using force whenever possible, these techniques stress the importance of considering a person's potential medical conditions, mental impairments and physical limitations before resorting to the use of force. While the research on deescalation and force mitigation appears promising, it's not clear whether these techniques can be evaluated through a constitutional lens.

The historical distinction between the Supreme Court's Fourth Amendment excessive force jurisprudence and traditional common-law torts, such as assault, battery and negligence, makes clear that generic tort cases can examine a broader array of conduct than can constitutional litigation. Negligence cases can evaluate the preceding conduct of the officer that escalated the situation, rather than merely assess the "final frame" when the force was exerted. While it may be difficult to conceive of an interaction that ends in a shooting as mere negligence, embracing that theory of liability allows lawmakers to reconsider how privilege statutes can better address such precipitous conduct.

In *Graham v. Connor*, the Supreme Court articulated an objective reasonableness test when determining whether a law enforcement officer engages in excessive force. The court rejected the premise that the officer's subjective intent should govern the analysis, such as whether the officer acted "maliciously and sadistically." In espousing the objective standard, the court emphasized that officers must be afforded deference when making quick decisions during precarious confrontations: "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." By articulating a test that focuses predominantly on the moment in which the officer exerts force, the court left open the question of the extent to which preceding conduct should influence the constitutional analysis.

In 2017, the Supreme Court was asked to weigh in on how to assess preceding conduct that proximately caused a police shooting. In *County of Los Angeles v. Mendez*, deputies from the Los Angeles County Sheriff's Department received a tip that an armed and dangerous parolee-at-large, Ronnie O'Dell, was possibly living at a home in Lancaster, California. The sheriff's department devised a plan to apprehend O'Dell at the residence that included sending officers to approach the house from both the front and the rear. During the briefing, the officers learned that a couple, including a pregnant woman, was living in the backyard of the home. Upon approaching the home, three officers knocked on the front door while two other deputies went to the back of the property. The two deputies searched the backyard, which "included three metal storage sheds and a one-room shack made of wood and plywood." The couple living in the backyard had built the shack and kept a BB gun, which resembled a small-caliber rifle, to use on

rats and other pests. When the deputies opened the door to the shed—without a warrant—the couple awoke from a nap. The man thought it was the owner of the home and picked up the BB gun so he could stand up and place it on the floor. Upon seeing the BB gun, Deputy Conley yelled “Gun!” and the deputies discharged 15 rounds, severely injuring the couple.

The plaintiffs asked the Supreme Court to review the test articulated in *Graham*. They argued that the *Graham* progeny inappropriately narrowed the inquiry to the “final frame” of the engagement. In their estimation, the test should be more holistic, taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it.

The Supreme Court noted that it had not granted certiorari on the question and, therefore, declined to address the merits of the argument. Nonetheless, the grounds for its ruling provide significant insight into the broader causation analysis. The U.S. Court of Appeals for the Ninth Circuit had ruled that the warrantless search of the backyard was unconstitutional but that the subsequent shooting was reasonable under *Graham*. The appellate panel nonetheless allowed the excessive force claim to go forward based on the theory that the unconstitutional act (that is, the warrantless search) provoked the violent confrontation (the shooting).

The Supreme Court unanimously rejected the provocation rule. As the court explained, “Excessive force claims ... are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.” Implicit in this explanation is that the “conduct” at issue was the use of force rather than any preceding actions. And if the officer acted reasonably when using force, “there is no valid excessive force claim.” In rejecting the provocation rule, the court dispelled the notion that a Fourth Amendment violation (excessive force) can be predicated on a different Fourth Amendment violation (warrantless search). The Court said that “[t]hey should be analyzed separately.”

If the claims of wrongful conduct are analyzed separately, the question becomes whether the initial conduct proximately caused the plaintiff’s injuries and, if so, how the conduct should be characterized. To conceptualize the issue, imagine if the facts of *Mendez* were slightly different. In this hypothetical, the deputies still approached the home from both the front door and the backyard. The two deputies who committed the warrantless search by going through the backyard still came upon the man with the BB gun that resembled a small-caliber rifle. However, in response to seeing the man holding the gun, it was the deputies who arrived from the *front* door—rather than those who came through the backyard—who fired. The officers who fired did not conduct an unconstitutional search, as they entered through the front door. And, assuming (as the court found in *Mendez*) that the shooting was based on a reasonable belief of an imminent deadly threat, the shooting would be deemed privileged and, consequently, would not constitute excessive force. With respect to the deputies who arrived from the backyard, their conduct may have been wrongful and may even have proximately caused the couple’s injuries by escalating the situation; however, it is difficult to characterize such wrongfulness as excessive force, given that they did not fire their weapons.

Part of defining the conduct includes determining whether it was intentional. In *Mendez*, the causation analysis was still within a broader constitutional inquiry, as the intentionality of the warrantless search is itself a violation of the Fourth Amendment. But when the preceding

conduct is deemed unintentional, it can no longer be viewed as a constitutional tort. As the Constitution guards against the “misuse of power,” Fourth Amendment seizure occurs “only when there is a governmental termination of freedom of movement through means intentionally applied.”

For example, the intentional creation of a roadblock by an officer may constitute a Fourth Amendment violation when it proximately causes the plaintiff to crash into it. But such intentionality is not always so easy to determine. Does an officer who steps in front of a moving vehicle act intentionally or negligently? Do officers who drive upon a scene without taking proper precautions intentionally or negligently escalate a situation?

This characterization conundrum is highlighted in *Young v. City of Killeen, Texas*. There, an officer killed Young when he reached toward the floorboard of his vehicle. At trial, a police procedure expert testified that the officer’s conduct was inconsistent with standard practices in numerous ways:

(1) failure to use his radio; (2) failure to utilize a back-up unit; (3) dangerous placement of his patrol car in a “cutoff” maneuver; (4) ordering the two men to exit their car rather than issuing an immobilization command to remain in the car with their hands in plain view; (5) increasing the risk of an incident by having two suspects getting out of a car; [and] (6) abandoning a covered position and advancing into the open, where the odds of overacting would be greater.

The district court found the officer who shot Young liable on both constitutional and state tort grounds, reasoning that the officer acted negligently by creating a danger that “not only placed [himself] in a position of greater danger but also imperiled Young by creating a situation where a fatal error was likely.” Moreover, the officer violated Young’s constitutional rights by using excessive force. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the lower court with respect to the constitutional claim because the lower court’s “findings and conclusions demonstrate that the judge found fault only with the way the officer stopped and confronted Young and not with the shooting itself.” The appeals court reasoned that “[t]he only fault against [the officer] was his negligence in creating a situation where the danger of such a mistake would exist. We hold that no right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts.”

Although the Fifth Circuit reversed the constitutional decision, it nonetheless affirmed the lower court’s negligence ruling because the officer violated police procedures, thereby creating a danger of foreseeable harm. According to the Fifth Circuit, the distinction “is necessary to avoid collapse of the jurisprudence of deadly force into a negligence action.” In other words, while the officer’s preceding conduct was not sufficiently intentional to warrant a constitutional remedy, the antecedent negligence was nonetheless redressable under a traditional causation analysis.

The fact that some courts still grapple with the fallacious concept of “negligent use of excessive force” underscores that, until the larger problem of reconciling constitutional tort law with common-law tort law is resolved, reform based solely on § 1983 actions will remain elusive. And if law enforcement agencies concern themselves only with the constitutionality of their

employees' conduct, training concentrates on the instant moment in which an officer uses deadly force without substantial reflection on the reasons such confrontations tend to escalate.

Accountability should not rise and fall on such analytic nitpicking. Legislatures don't need to limit remedies based on that truncated analysis. Even when certain conduct does not rise to the level of a Fourth Amendment violation, it may nonetheless constitute a tort.

Negligence cases can evaluate the preceding conduct of the officer that escalated the situation, rather than merely assess the "final frame" when the force was exerted. Camden, New Jersey provides one model for how this could work. In 2019, the city revamped its use-of-force policy. The policy reads, "The Constitution provides a 'floor' for government action. This Department aspires to go beyond *Graham* and its minimum requirements." The policy intends to ensure that deescalation techniques are used whenever feasible and that force is used only as a last resort. It has been credited for a 95 percent reduction in reports of excessive force in Camden. Based on that policy, accountability for officers failing to deescalate does not depend on any constitutional infirmity; rather, the antecedent conduct can itself be found tortious as a deviation from the city's deescalation policy.

Bureaucratic Payment Structure

While much of the tort reform necessarily must occur at the state level, many state tort statutes mirror the Federal Tort Claims Act (FTCA). As a result, Congress can amend the FTCA to serve as a model for comprehensive remedial regimes that ensures suits are brought against, and judgments are paid by, the appropriate level of government. Indeed, it would not be the first time Congress amended the FTCA to encourage law enforcement reform.

In 1974, Congress amended the FTCA to permit civil actions against the United States based on certain misconduct committed by law enforcement officers. The amendment was passed in response to public outcry regarding federal narcotics officers engaging in abusive and illegal "no-knock" raids. Aggrieved parties were permitted to bring actions against the United States for intentional torts, such as assault, battery and malicious prosecution.

In establishing the new type of action, Congress understood the potential for law enforcement abuses and devised a limited waiver of immunity aimed at preventing future wrongfulness. In the words of Sen. Charles H. Percy, the amendment was created "to bring actions directly against the Federal government to recover for the damage [plaintiffs] sustained due to the intentional or willful misdeeds of Federal officers. This, it seems to me, is only right and fair under the circumstances."

Following the enactment of the FTCA law enforcement proviso, the question became whether constitutional tort claims were still needed against federal actors despite the alternative remedy. Writing for the Supreme Court, Justice William Brennan offered four bases to conclude that constitutional remedies remained necessary. First, the constitutional action is brought against the individual rather than the government and, therefore, the threat of personal liability served as a great deterrent. Second, constitutional torts allow for punitive damages, which the FTCA does not. Third, the FTCA does not provide for jury trials, unlike in cases regarding constitutional tort

claims. Fourth, the Supreme Court rejected the premise that remedies for constitutional infractions “should be left to the vagaries of the laws of the several States” Because FTCA actions are based on state substantive law, rather than a federal jurisprudence, it cannot serve as a grand protectorate of constitutional rights. The Supreme Court concluded that “without a clear congressional mandate [it could not] hold that Congress relegated respondent exclusively to the FTCA remedy.”

With respect to the first rationale, the deterrent effect of having public officials held personally liable for their damages has been more academic than empirical. As a practical matter, civil servants are typically not in a financial position to pay substantial judgments. In devising the FTCA remedy, Congress understood that constitutional awards would often serve as a “hollow remedy.” And government entities often indemnify officers, thereby ensuring wrongdoers do not incur the economic consequences of their actions. As a result, the historic justification has given way to the more recent concern that good-natured public officials must endure burdensome and stressful litigation to clear their names.

This is not to suggest the FTCA has served as an effective deterrent against misconduct. Under the Federal Tort Claims Act, most settlements and judgments are paid through the general Judgment Fund—a permanent, indefinite congressional appropriation fund that neither the agency nor the officer is required to reimburse based on their tortious conduct. Absent monetary liability, agencies have no incentive to modify past practices and mitigate future damages. Indeed, the disconnect between the agency and the monetary award creates a perverse incentive for law enforcement officers to either not take the litigation seriously or view the general corpus as a hush fund to pay off aggrieved victims.

Law enforcement officials err, sometimes negligently, sometimes intentionally, and sometimes punitively. Public tort law should reflect this reality. Congress and the states can reform their tort claims acts to ensure monetary damages are incurred at the proper governmental level—whether it be the individual, department or city—to best incentivize better decision-making and encourage greater risk management. Lawmakers should look to eliminate payments through judgment funds and indemnification clauses to force the relevant stakeholders to internalize monetary awards and promote behavioral modification. Legislatures can further reexamine their own tort claims acts to evaluate whether punitive damages and jury trials would provide greater accountability.

With respect to the “vagaries of the laws of the several States,” the reliance on constitutional remedies succeeds only when the Supreme Court is willing to identify constitutional wrongs. In that vein, it is difficult to conceive of the high court’s excessive force jurisprudence as a path to institutional reform. The same justice who fretted over relying on state tort law also famously wrote, “The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.”

Legislators need not be submissive to constitutional pronouncements when devising public tort law aimed at compensating victims, deterring wrongful conduct and holding public officials accountable. Reformulating qualified immunity may promote greater compensation and

accountability—but if lawmakers are serious about meaningful reform, they cannot rest when they've provided the constitutional floor.