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Cops Who Allegedly Assaulted and Arrested a Man for Standing Outside His Own House Are Protected by Qualified Immunity

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Two police officers who allegedly assaulted a man outside of his own house and arrested him on bogus charges after failing to identify themselves as law enforcement are protected by qualified immunity and cannot be sued, a federal court confirmed Monday.

Shase Howse, the appellant, alleges that on July 28, 2016, a group of men pulled up to his home in an unmarked vehicle without uniforms on and asked him if he lived at the residence. After Howse answered in the affirmative, Officer Brian Middaugh of the Cleveland Police Department (CPD) pressed Howse on if he was *sure* he lived there. "Yes, what the fuck?" Howse allegedly responded, still unaware Middaugh was a cop. Middaugh, commenting on Howse's bad attitude, then exited the unmarked vehicle and approached him on the porch, asking him once again if he lived there. Howse said he did.

Following that exchange, Howse alleges that Middaugh commanded him to put his hands behind his back because he was going to jail. Howse did not oblige, telling Middaugh that he lived at the residence and that he'd done nothing wrong. Middaugh then threw him to the ground, and with the help of CPD Officer Thomas Hodous, handcuffed him while Howse resisted. It was after he was tackled that Howse realized the men were police officers.

As he lay on the porch, Howse's mother, who heard the noise from inside, exited the residence, where she says she saw one man straddling her son while another punched his head with a closed fist, causing Howse's head to hit the porch. She, too, did not initially realize they were officers.

Howse was eventually jailed for several days before posting bond, and charged with two counts of assault and one count of obstructing official business. The Cuyahoga County Prosecutor's Office eventually dismissed those charges.

Howse then brought three claims against Middaugh and Hodous: one for excessive force in violation of the Fourth Amendment, another for malicious prosecution in violation of the Fourth Amendment, and the last for assault and battery in violation of Ohio law. He also brought one claim against the City of Cleveland, arguing that the municipality shares liability for the officers' constitutional violations. He first filed his suit the United States District Court for the Northern

District of Ohio at Cleveland, where a panel granted the officers qualified immunity and dismissed the case against the city. Howse then appealed.

In rejecting Howse's suit, Circuit Judge Amul Thapar of the Sixth Circuit Court of Appeals illustrated what makes qualified immunity so confounding: public officials can violate your civil rights without consequence if those rights have not been "clearly established" by existing case law.

"'Clearly established' means that the law is so clear at the time of the incident that every reasonable officer would understand the unlawfulness of his conduct," Thapar writes in his majority opinion. "To avoid 'paralysis by analysis,' qualified immunity protects all but plainly incompetent officers or those who knowingly violate the law."

Reasonable officers should know basic right from wrong, Thapar implies, yet according to qualified immunity, they also need the judiciary to spell out those fundamentals with myopic detail.

What's more, the doctrine has indeed been used to protect "plainly incompetent officers" and "those who knowingly violate the law." Consider the two cops in Fresno, California, who allegedly stole \$225,000 while executing a search warrant. The U.S. Court of Appeals for the 9th Circuit ruled that "the City Officers ought to have recognized that the alleged theft was morally wrong," but that they "did not have clear notice that it violated the Fourth Amendment." Both officers were granted qualified immunity.

Then there was the sheriff's deputy in Coffee County, Georgia, who shot a 10-year-old boy while aiming at the family's non-threatening dog while in pursuit of a suspect who had no connection to the little boy or his dog. Because there was no case law saying that shooting someone while aiming at something else infringes on someone's rights, the deputy received qualified immunity. Or the police officer in Los Angeles who shot a 15-year-old boy one morning because he saw the boy's friend holding a plastic airsoft gun replica. In that case, there was no legal precedent that said accidentally shooting a bystander infringes on the bystander's rights, though the U.S. Court of Appeals for the 9th Circuit acknowledged that "a rational finder of fact" would conclude that the officer's conduct "shocked the conscience and was unconstitutional under the Fourteenth Amendment." The officer got qualified immunity anyway.

But Thapar's decision is in a league of its own, says Clark Neily, vice president for criminal justice at the Cato Institute. "It requires a certain amount of effort to write an exceptionally bad qualified immunity opinion, but this is, by any standard, an exceptionally bad one," Neily says. "Simply refusing to interact with police, and even being rude to them, does not provide probable cause for them to make an arrest, which is really what this case boils down to."

Thapar disagrees. "Howse argues that the officers violated his clearly established right to be free from 'unreasonable government intrusions,'" he writes, calling that basic constitutional standard "much too vague." The officers needed to be specifically told by the courts that assaulting someone who disobeys an order and using "additional force" when that person resists arrest violates the Fourth Amendment.

The primary problem with that framing, Neily notes, is that it assumes Howse *should have been arrested in the first place*. Yet when determining whether to grant qualified immunity, the courts are legally required to accept the plaintiff's version of events. After all, the decision to withhold qualified immunity only gives someone the *right* to sue a public official.

For their part, the officers allege Howse was "lingering suspiciously" (in front of his own house) and that the area is "known for violence, drugs, and gang activity." They admit that Howse confirmed he lived at the home, but their doubts about his honesty led them to "investigate more," leading to the violent confrontation. In his decision, Thapar pays lip service to Howse's account but proceeds to rule under the assumption that his arrest was warranted.

It's for that reason the Sixth Circuit erred in denying the petition for a rehearing en banc, said Circuit Judge Julia Smith Gibbons in a dissent published Monday. "In qualified immunity cases, we have long held that a plaintiff's right must be defined with careful attention to the 'specific factual circumstances' of the case," she writes. "And yet, in framing Shase Howse's right in this case, the panel fails to account for his suspected criminality (none), location (home), or conduct (truthfully answering questions)."

Gibbons also takes issue with the majority's dismissal of the malicious prosecution claim—a decision she calls "a precedent-setting error of exceptional public importance." Thapar asserts that, in resisting arrest "by stiffening up his body and screaming at the top of his lungs," Howse provides probable cause for the charge of obstructing official business. "And because there was probable cause for *that* charge," Thapar writes, "Howse cannot move forward with *any* of his malicious-prosecution claims," notwithstanding the fact that Howse's original crime was sitting outside of his own house.

On the assault and battery claim, the officers invoked "an Ohio statutory provision which provides a general grant of immunity to government employees." Thapar, a former federal prosecutor, granted that as well.

The Sixth Circuit's dismissal joins a mounting pile of decisions that protect public officials at the expense of the very people they've sworn to serve. But qualified immunity has come under new scrutiny amid protests surrounding George Floyd, the unarmed black man killed by former Minneapolis police officer Derek Chauvin. Rep. Justin Amash (L–Mich.) recently introduced a bill to kill the doctrine.

"We have an astonishing double standard in this country where members of law enforcement hold we the citizens to a very high standard of accountability," says Neily. "It is not a defense that you didn't know that your conduct was illegal. But when the shoe is on the other foot, and the question is what standard of accountability members of law enforcement should be held to, they insist that it be so low that it is practically zero."