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Current Issues in Constitutional Litigation

A CONTEXT AND PRACTICE CASEBOOK

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CURRENT ISSUES IN CONSTITUTIONAL LITIGATION: A CONTEXT & PRACTICE CASEBOOK (3D ED. 2020)

By Sarah E. Ricks & Evelyn Tenebaum

Chapter 1 Historical Context and Introduction to Modern 42 U.S.C. § 1983

p. 37, *For further discussion*

3. In October 2024, the Supreme Court heard oral argument on the question of "[w]hether exhaustion of state administrative remedies is required to bring claims under 42 U.S.C. § 1983 in state court." In advocating against administrative exhaustion as a prerequisite for litigating a Section 1983 claim in state court, Petitioner argued:

> Over four decades ago, this Court established in *Patsy v. Board of Regents* that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to [42 U.S.C.] § 1983." 457 U.S. 496, 516 (1982). In the decision below, the Supreme Court of Alabama defied *Patsy* and dismissed petitioners' § 1983 claims for failure to exhaust state administrative remedies. The Supreme Court of Alabama reasoned that *Patsy* does not apply to § 1983 suits brought in state court, and that § 1983's preemptive effect "would at most allow ... plaintiffs to bring their unexhausted claims in *federal* court." [citation omitted]. That conclusion followed from the Supreme Court of Alabama's view that the "national government has no 'power to press a State's own courts into federal service' by compelling them to exercise jurisdiction in contravention of their own State's laws." [citation omitted].
>
> The decision below defies this Court's clear precedent. It cannot be squared with *Patsy*, which authoritatively interpreted § 1983 to foreclose the application of state administrative exhaustion requirements.

Brief of Petitioner in *Williams v. Washington*, 2024 WL 1639749 at 2-3 (April 11, 2024). The case is pending as this goes to press.

Chapter 2 Eighth Amendment Prisoner Litigation

p. 62, *For further discussion*, before note 1.

"The Cruel and Unusual Punishments Clause focuses on the question what 'method or kind of punishment' a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about

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securing a conviction for that offense." *City of Grants Pass v. Johnson*, _ U.S. _, 144 S.Ct. 2202, 2216 (2024) (further citation omitted).

p. 78, *For further discussion* at the end of Note 1

See Taylor v. Riojas, __ U.S. __, 141 S. Ct. 52 (2020) (holding conditions of confinement violated inmate's Eighth Amendment rights where he was housed for six days in a cell covered in "massive amounts" of feces and later in a cell that was frigidly cold and equipped with only a clogged drain to dispose of bodily waste, in an order granting certiorari, vacating the judgment, and remanding).

Chapter 4 Substantive Due Process Part Two: Exceptions to DeShaney

p. 247, after first note

Does the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, _ U.S. __, 142 S. Ct. 2228, 2247 (2022) suggest that courts should limit or even repudiate the state-created danger doctrine? Several Ninth Circuit judges think so. On behalf of four judges, a Ninth Circuit dissent argued that "the state-created danger exception finds no support in the text of the Constitution, the historical understanding of the 'due process of law,' or even Supreme Court precedent." *Murguia v. Langdon*, 73 F.4th 1103, 1104 (9th Cir. 2023), cert. denied, _ U.S. _, 144 S.Ct. 553 (Mem) (Jan. 8, 2024) (Bumatay, J., dissenting from denial of rehearing *en banc*). The dissent argued *Dobbs* should prompt reconsideration of the legitimacy of state-created danger:

> [A]s the Court recently emphasized, we should be reluctant to recognize rights not mentioned in the Constitution to "guard against the natural human tendency to confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs* [142 S. Ct. at 2247]. As such, at least one circuit has questioned the legitimacy of this recent-vintage right. *See Fisher v. Moore*, 62 F.4th 912, 913 (5th Cir. 2023) (declining to adopt state-created danger doctrine because of the Supreme Court's "forceful pronouncements signaling unease with implied rights not deeply rooted in our Nation's history and tradition"). And given its opaque origins, the doctrine has also caused a split among the other circuits about how to apply it.
>
> Even if the state-created danger doctrine is properly considered a substantive due process right (which may be doubtful), we should reject its undue expansion and align it with the text of the Due Process Clause and Supreme Court precedent to the extent possible. But since the inception of the doctrine, courts have increasingly broadened its reach. *See* Matthew Pritchard, *Reviving* DeShaney: *State-Created Dangers and Due Process First Principles*, 74 Rutgers U. L. Rev. 161, 175 (2021). Now, almost any conceivable action by a State actor can lead to a constitutional violation. And every expansion of the right moves the doctrine farther away from the Constitution and the Court's precedent.
> . . .
> Instead, we should have recognized that the Due Process Clause requires a "deprivation of liberty" because it was intended to prevent abuses of coercive state authority—not torts that happen to be committed by State actors. *DeShaney*, 489 U.S. at 200. So we

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> should have confined the "state-created danger" doctrine to only encompass affirmative acts by a State actor that constitute the use of the government's coercive power to restrain the liberty of another. If those acts place a plaintiff in harm's way, then we may rightfully have a constitutional violation. But without a restraint of liberty, we remain in the realm of ordinary torts. . . . It's long past due that we revisit the state-created danger doctrine.

Murguia, 73 F.4th at 1104.

In declining to adopt the state-created danger doctrine, the Fifth Circuit reasoned it is "particularly hesitant to expand the reach of substantive due process" in part because the Supreme Court in *Dobbs* "forcefully. . . underscored that substantive due process is a disfavored doctrine prone to judicial improvisation" and "reiterated—with gusto—that rights protected by substantive due process "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' " *Fisher v. Moore*, 73 F.4th 367, 373-74 (5th Cir. 2023), cert. denied, _ U.S. _, 144 S.Ct. 569 (2024); *but see* id. at 375 (concurrence arguing "[i]t is well past time for this circuit to be dragged screaming into the 21st century by joining all those other circuits that have now unanimously recognized the state-created danger cause of action.") (Wiener, J., concurring).

Chapter 5 Action under "color of" state law

p. 286, *For further discussion,* add Note 3

This law in is flux. In 2024, the Supreme Court articulated a rule distinguishing state action from private action in the specific context of a public official's social media communication. The Supreme Court held "a public official's social-media activity constitutes state action under § 1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Lindke v. Freed*, 601 U.S. 187, 198 (2024).

In the different context of off-duty police violence, it is not yet clear whether *Lindke* will prompt circuits to change their existing standards for differentiating private from state action. *Lindke*'s new rule may be consistent with established "color of law" doctrine in the context of off-duty police violence. For example, in applying *Lindke*, the Sixth Circuit reasoned that its existing precedent recognizing misuse of state power is consistent with *Lindke*:

> As *Lindke* put it, state officials can satisfy the Court's "actual authority" test even if they go beyond (or "[*m*]*isuse*") the power that the State has entrusted them. 601 U.S. at 199 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Even before *Lindke*, our cases made the same point when they noted that officers can engage in state action if their conduct arose from an "*apparent* duty" of their office or "*ostensible* state authority[.]" (citation omitted). We interpret these statements—consistent with *Lindke*—to cover fact patterns when an official exercises state authority but exceeds the scope of the delegation. 601 U.S. at 200.

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Mackey v. Rising, 106 F.4th 552, 560 (6th Cir. 2024). Because local governments give police authority to use physical force on its behalf, the Sixth Circuit reasoned in dicta, police can be state actors when they purport to use that authority:

> [Police] can act in their official capacities even when they use physical coercion (or the threat of coercion) while off the clock. Yet States normally give these officers the power to use force for the States in the exercise of their law-enforcement tasks. So these cases typically turn on . . . : Did an officer 'purport to use' the delegated 'authority' when engaging in the challenged force? *Lindke*, 601 U.S. at 201. On the one hand, we have held that police officers purported to use that authority when they, for example, allegedly 'announced themselves as officers' and placed the plaintiff 'under arrest.' On the other hand, we have held that a police officer did not purport to use this authority when, for example, he broke up a late-night fight at a Waffle House without identifying himself.

Mackey, 106 F.4th at 563-64 (all further citation omitted).

But the Ninth Circuit rule differentiating state action from private action in the context of off-duty police conduct may not be consistent with the Supreme Court's ruling in *Lindke*. In identifying state action in the context of public officials using social media, the Ninth Circuit applied its own state action test:

> which holds that an off-duty state employee acts under color of law if she (1) "purports to or pretends to act under color of law"; (2) her "pretense of acting in the performance of [her] duties had the purpose and effect of influencing the behavior of others"; and (3) the "harm inflicted on plaintiff related in some meaningful way either to the officer's governmental status or to the performance of [her] duties." [citations omitted].

O'Connor-Ratliff v. Garnier, 601 U.S. 205, 208 (2024) (*per curiam*). The Supreme Court vacated and remanded "because the approach that the Ninth Circuit applied is different from the one we have elaborated in *Lindke* . . . ." *Id.*

<u>Chapter 6</u> Fourth Amendment Standards and Police Misconduct

p. 319 - Add to Chapter Overview, after cite to *County of Sacramento v. Lewis*

See Torres v. Madrid, _ U.S. __ , 141 S.Ct. 989, 1003 (2021) (the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued; where police fired weapons into suspect's vehicle as she drove off, the suspect was seized).

p. 336, after *Graham*, add *For further discussion*

In October 2024, the Supreme Court granted certiorari to consider the scope of Fourth Amendment protection against unreasonable force. The Question Presented is:

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> The Fourth Amendment prohibits a police officer from using "unreasonable" force. U.S. Const. amend. IV. In *Graham v. Connor*, this Court held that reasonableness depends on "the totality of the circumstances." 490 U.S. 386, 396 (1989) (quotation marks omitted). But four circuits - the Second, Fourth, Fifth, and Eighth - cabin *Graham.* Those circuits evaluate whether a Fourth Amendment violation occurred under the "moment of the threat doctrine," which evaluates the reasonableness of an officer's actions only in the narrow window when the officer's safety was threatened, and not based on events that precede the moment of the threat. In contrast, eight circuits - the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits - reject the moment of the threat doctrine and follow the totality of the circumstances approach, including evaluating the officer's actions leading up to the use of force.
>
> In the decision below, Judge Higginbotham concurred in his own majority opinion, explaining that the minority approach "lessens the Fourth Amendment's protection of the American public" and calling on this Court "to resolve the circuit divide over the application of a doctrine deployed daily across this country." Pet. App. 10a-16a (Higginbotham, J., concurring). The question presented -- which has divided twelve circuits -- is:
>
> Whether courts should apply the moment of the threat doctrine when evaluating an excessive force claim under the Fourth Amendment.

Petition for Certiorari in *Barnes v. Felix*, 2024 WL 2728079, at *i (May 22, 2024). Argument is scheduled for January 2025.

p. 337, Add to end of Note 1, Development of Doctrine in the Lower Courts: Applying *Garner* & *Graham*

; see City of Tahlequah v. Bond, 595 U.S. __, __ (2021) (*per curiam*) (refusing to decide "whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment").

<u>Chapter 7</u> Distinguishing 4th, 14th, and 8th Amendment Claims

p. 410 - *For further discussion* before Note 1

In a 2021 case concerning physical force against a pretrial detainee, the Supreme Court declined to decide whether the force was reasonable or whether the constitutional right was clearly established. Instead, the Court remanded those questions to the Eighth Circuit. The Court reasoned that, "[a]lthough the Eighth Circuit cited the *Kingsley* factors, it is unclear whether the court thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him." *Lombardo v. City of St. Louis*, _ U.S. __, 141 S. Ct. 2239, 2241-42 (2021) (granting certiorari, vacating the judgment, and remanding).

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Chapter 9 Absolute Immunity

p. 497 – Add to Chapter Overview after cite to *Clinton v. Jones*

See Trump v. Vance, _ U.S. _, 140 S. Ct. 2412, 2431 (2020) (President is not absolutely immune from state criminal subpoenas seeking his private papers).

Chapter 10 Other Statutes and Recurring Procedural Issues

p. 551, after *Sole*, add *For further discussion*

The Supreme Court granted certiorari in 2024 to address:

1. Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988.
2. Whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a nonjudicial event that moots the case, to prevail under 42 U.S.C. § 1988.

Petition for Certiorari in *Lackey v. Stinnie*, 2024 WL 3164237 at *i (June 20, 2024).

The Fourth Circuit had recently joined the majority of circuits in holding that a plaintiff who successfully obtains a preliminary injunction can qualify as a "prevailing party." "When a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney's fees." *Stinnie v. Holcomb*, 77 F.4th 200, 210 (4th Cir. 2023), *cert. granted sub nom Lackey v. Stinnie*, 2024 WL 3851068 (Aug. 19, 2024). In so holding, the Fourth Circuit reversed its own longstanding precedent and mended a circuit split. 77 F.4th at 207-10. The Fourth Circuit reasoned, in part, that "almost every other circuit" agreed with its 2023 construction of "prevailing party":

> [A]ll have concluded that a plaintiff whose case is rendered moot after she wins a preliminary injunction – so that the injunction by definition cannot be "reversed, dissolved, or otherwise undone" by a later order, *Sole*, 551 U.S. at 83 – may qualify as a prevailing party in appropriate circumstances.

Id. at 209. The case is pending as this goes to press. Here is the transcript of the oral argument before the Supreme Court.

p. 578, *For further discussion*, add Notes 5 & 6

5. In October 2024, the Supreme Court granted certiorari on the following question:

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> In cases subject to the Prison Litigation Reform Act, do prisoners have a right to a jury trial concerning their exhaustion of administrative remedies where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim?

Perttu v. Richards, 2024 WL 3086785, at *i (June 17, 2024).

6. Individual Supreme Court Justices have contributed to debate about the scope of the exhaustion requirement of the PLRA. Justice Thomas dissented from a denial of certiorari because "whether a prisoner who fails to comply with [the PLRA's] exhaustion requirement may cure the defect by filing an amended or supplemental complaint after his release" is an important issue that has divided the Circuits and "I see no reason to continue allowing certain prisoners in the Third and Ninth Circuits to proceed unencumbered by the PLRA's exhaustion requirement while those in the Fifth and Eleventh Circuits are required to comply." *Wexford Health v. Garrett*, _ U.S. _, 140 S.Ct. 1611, 1611-12 (2020).

If an inmate faces imminent risk from the spread of COVID, could a prison's long delay in the grievance procedures exempt the plaintiff from the exhaustion requirement? Justice Sotomayor suggests the answer is "yes":

> This Court has made clear that the PLRA requires exhaustion only of "available" judicial remedies. *Ross* v. *Blake*, 578 U. S. ——, ——, 136 S.Ct. 1850, 1858–1859 (2016). "[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose.' " *Ibid*. (some internal quotation marks omitted). Thus, when a grievance procedure is a "dead end"—when "the facts on the ground" indicate that the grievance procedure provides no possibility of relief—the procedures may well be "unavailable." *Id.*, ——, 136 S.Ct., at 1859.
>
> The Fifth Circuit seemed to reject the possibility that grievance procedures could ever be a "dead end" even if they could not provide relief before an inmate faced a serious risk of death. But if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like Covid–19, the procedures may be "unavailable" to meet the plaintiff's purposes, much in the way they would be if prison officials ignored the grievances entirely. *Ibid.*

Valentine v. Collier, _ U.S. __, 140 S. Ct. 1598, 1601 (2020) (statement of Sotomayor, J., with whom Ginsburg, J. joins, respecting the denial of application to vacate stay).

p. 580, D.2., **Heck v. Humphrey** ***Bar on 42 U.S.C § 1983 Actions***, add to end

What must plaintiff show to prevail on a claimed Fourth Amendment violation for unreasonable seizure pursuant to legal process? The Court granted certiorari to answer this question: "Whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence," [citing 11th Circuit], or that the proceeding "ended in a manner

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that affirmatively indicates his innocence," [citing 2d Circuit]." *Thompson v. Clark*, _ U.S. _, 141 S.Ct. 1682 (2021).

The Supreme Court chose the former. In *Thompson v. Clark*, 596 U.S. 36 (2022), the Court held that plaintiff could satisfy the "favorable termination" requirement if the criminal prosecution ended without a conviction and declined to require an affirmative indication of innocence. "Because the American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence, we similarly construe the Fourth Amendment claim under § 1983 for malicious prosecution. . . [R]equiring a plaintiff to show that his prosecution ended with an affirmative indication of innocence is not necessary to protect officers from unwarranted civil suits—among other things, officers are still protected by the requirement that the plaintiff show the absence of probable cause and by qualified immunity." *Thompson*, 596 U.S.at 48–49.

In 2024, the Supreme Court refined the plaintiff's burden in a Fourth Amendment malicious prosecution claim. The Court held:

> This case involves what is often called a Fourth Amendment malicious-prosecution claim under 42 U.S.C. § 1983. To succeed on such a claim, a plaintiff must show that a government official charged him without probable cause, leading to an unreasonable seizure of his person. *See Thompson v. Clark*, 596 U.S. 36, 43, and n. 2 (2022). The question presented here arises when the official brings multiple charges, only one of which lacks probable cause. Do the valid charges insulate the official from a Fourth Amendment malicious-prosecution claim relating to the invalid charge? The answer is no: The valid charges do not create a categorical bar. We leave for another day the follow-on question of how to determine in those circumstances whether the baseless charge caused the requisite seizure.

Chiaverini v. City of Napoleon, Ohio, 602 U.S. 556, 558-59 (2024).

<u>Chapter 11</u> Qualified Immunity

p. 642, *For further discussion*, add at end

Did the Supreme Court signal lower courts to be more willing to recognize obvious constitutional violations? Some Fifth Circuit judges think so. Dissenting from a refusal to rehear a panel opinion that had granted police qualified immunity, Judge Willett summarized the Supreme Court's indirect warning to lower courts to curb qualified immunity by recognizing obvious constitutional violations without a factually similar case:

> [T]he panel opinion collides with recent warnings from the Supreme Court summarily negating grants of qualified immunity for obvious constitutional violations. Twice in recent months, the Supreme Court has vacated immunity grants. . . And while these quiet, "shadow docket" actions may not portend a fundamental rethinking of qualified immunity, the Court seems determined to dial back the doctrine's harshest excesses. . . .

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Most importantly here, the Court is warning us to tread more carefully when reviewing obviously violative conduct.

First came *Taylor v. Riojas* . . . [__ U.S. __, 141 S. Ct. 52 (2020)]. The Court summarily reversed our decision granting qualified immunity to prison officials who confined a prisoner for several days in a pair of "shockingly unsanitary cells"—the first cell **"covered, nearly floor to ceiling, in massive amounts of feces"** (with one officer telling another that Taylor would "have a long weekend"), and the second cell "frigidly cold" and flooded with raw sewage, in which Taylor "was left to sleep naked" (with another officer expressing hope that Taylor would "f***ing freeze"). The Supreme Court held that the prison officials had fair warning, without a factually similar case, that these conditions were plainly unconstitutional. . . .

Indeed, *Taylor* was the first time in 16 years (and just the third time *ever*) that the Supreme Court expressly found official misconduct to violate "clearly established" law. In *Taylor*, the Court harkened back nearly 20 years to *Hope v. Pelzer*, which held that, when a constitutional violation is sufficiently obvious, qualified immunity can be denied even absent a previous case declaring virtually identical conduct unconstitutional. . . [T]he Court's intervening cases have sent the opposite message: Officers cannot be sued for violating someone's constitutional rights unless the specific actions at issue have previously been held unlawful. *Taylor*, however, declares that the obviousness principle has vitality and that egregiousness matters. In summarily reversing us without full briefing or argument, the Court sent the message that not only were we wrong, we were *obviously* wrong. . . .

And though a rarity, *Taylor* was not a one-off. . . [T]he Supreme Court doubled down in another case from our circuit, *McCoy v. Alamu*, involving an inmate gratuitously assaulted with pepper spray "for no reason at all" by a prison guard who was angry with another inmate. [*McCoy v. Alamu*, —— U.S. ——, 141 S. Ct. 1364 (2021)]. The Court issued a "grant, vacate, and remand" order directing us to reconsider in light of *Taylor*. The Supreme Court's reliance on *Taylor* confirms that the Court does not consider that case an anomaly, but instead a course correction signaling lower courts to deny immunity for clear misconduct, even in cases with unique facts.

As in *Taylor*, we granted qualified immunity in *McCoy* because there was no case with materially similar facts. . . [The Supreme Court's] message is low-key but loaded. These two orders make clear that the Court is earnest about reining in qualified immunity's severest applications. This doctrinal clarification may not amount to sweeping reexamination, but the upshot is plain: In cases with "particularly egregious facts," courts must not strain to absolve constitutional violations. Even if the precise fact pattern is novel, there is no need for a prior case exactly on point where the violation is obvious.[44]
. . .
In my judgment, nothing better captures the yawning rights-remedies gap of the modern immunity regime than giving a pass to alleged conscience-shocking abuse at the motion-to-dismiss stage and step one of the immunity inquiry.
* * *

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> This year America commemorates the sesquicentennial of our preeminent civil rights statute, 42 U.S.C. § 1983, the text of which promises a federal remedy for the violation of "any" right—not just "clearly established" ones. Nonetheless, the atextual, judge-created doctrine of qualified immunity shields lawbreaking officials from accountability, even for patently unconstitutional abuses, thus largely nullifying § 1983. The pages of F.3d abound with head-scratching examples:
>
> > • stealing $225,000 while executing a search warrant [*Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, ––– U.S. ––––, 140 S. Ct. 2793 (2020)]
> > • shooting a 10-year-old boy in the leg while repeatedly trying to shoot the nonthreatening family dog [*Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, ––– U.S. ––––, 141 S. Ct. 110 (2020)]
> > • releasing a police dog on a surrendered suspect (since the suspect was *sitting* on the ground while in a prior case the suspect was *lying* on the ground) [*Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018), *cert. denied*, ––– U.S. ––––, 140 S. Ct. 1862, (2020)]
>
> [W]hile qualified immunity has enjoyed special solicitude at the Supreme Court, perhaps these "particularly egregious facts" will prompt another meaningful message from the Court, one that marries law with justice (and common sense) and makes clear that those who enforce our laws are not above them.

Ramirez v. Guadarrama, 2 F.4th 506, 522-24 (5th Cir. 2021) (Willett, J., joined by Graves and Higginson, Circuit Judges, dissenting from the denial of rehearing en banc) (footnotes omitted).

Further, Justice Thomas has continued to register his "strong doubts about our § 1983 qualified immunity doctrine." *Baxter v. Bracey*, __ U.S. __, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari); *Hoggard v. Rhodes*, __ U.S. __, 141 S. Ct. 2421 (2021) ("we should reconsider. . . the judicial doctrine of qualified immunity") (statement of Thomas, J., respecting the denial of certiorari).

Yet, despite criticism of qualified immunity from Justices, judges, and the public, the Supreme Court has continued to adhere to and arguably strengthen the doctrine. For example, in reaffirming that, if "not an obvious case," plaintiff must show a violation of clearly established law by "identify[ing] a case that put [defendant] on notice that his specific conduct was unlawful," the Supreme Court has hinted that the body of law to consult for the "clearly established" inquiry might be limited to *its own* decisions. Because the number of Supreme Court rulings is far smaller than the thousands of annual federal circuit court rulings, if rights were limited to only those "clearly established" by the Supreme Court, immunity would expand. *See*, *e.g.*, *Rivas-Villegas v. Cortesluna*, 595 U.S. _ (2021) (*per curiam*) ("[e]ven assuming that Circuit precedent can clearly establish law for purposes of §1983, [a specific 9th Circuit precedent] is materially distinguishable and thus does not govern the facts of this case").

In 2024, the Supreme Court declined opportunities to address qualified immunity. For example, a petition for certiorari attacked both the legitimacy of qualified immunity for lacking

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sound foundation as well as federal court application of the doctrine. Eugene R. Fidell et al, Petition for a Writ of Certiorari in *Martinez v. Jenneiahn*, 2023 WL 8582389 (No. 23-611) (Dec. 5, 2023). The Petition argued new scholarship demonstrated that the original language of 42 U.S.C. § 1983 expressly abrogated state law immunities and that key language was omitted from the statute when Congress ordered codification.

> [T]he original text of the Civil Rights Act of 1871 specifically abrogated state common-law defenses, thereby precluding qualified immunity. Recent scholarship has reinvigorated interest in the original text as evidence that "any immunity grounded in state law has no application to the cause of action we now know as Section 1983." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 238 (2023); *see, e.g., Price v. Montgomery County*, 72 F.4th 711, 727 n.1 (6th Cir. 2023) (Nalbandian, J., concurring in part) (discussing this scholarship).
>
> Judges have contended that this renewed attention to the original text should trigger a "seismic" shift in our understanding of Section 1983. *Rogers*, 63 F.4th at 980-981 (Willett, J., concurring) ("[T]he Supreme Court's original justification for qualified immunity that Congress wouldn't have abrogated common law immunities absent explicit language-is faulty because the 1871 Civil Rights Act expressly included such language."); *see, e.g., Erie v. Hunter*, 2023 WL 3736733, at *2 n.2 (M.D. La. May 31, 2023) (Jackson, J.) (calling for this Court to grapple with the original text, which "inarguably eliminates all ... immunities"); *Thomas v. Johnson*, 2023 WL 5254689, at *7 (S.D. Tex. Aug. 15, 2023) (Rosenthal, J.) (noting that "the original text" may have resulted in "the abrogation of the common law immunities that form the basis of contemporary qualified immunity jurisprudence").
>
> a. As originally enacted, the Civil Rights Act of 1871 read:
>
> > Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, **any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding**, be liable to the party injured * * *."
>
> Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (emphasis added).
>
> This text plainly abrogated state common law, including the common-law immunities that formed the original basis for qualified immunity. . . . Accordingly, in 1871, an ordinary reader of the Civil Rights Act would have unambiguously understood Congress to have created liability that was not limited by state common-law immunities. Indeed, that is precisely what the legislative debates suggest Congress understood as well. *See* Reinert, *supra*, at 238-239 & nn.247-250 (collecting legislative evidence);

Petition in *Martinez*, 2023 WL 8582389 at *17-*19, cert. denied, 144 S.Ct. 811 (Feb. 20, 2024). Justice Sotomayor argued "[t]his new scholarship reinforces why, at a minimum, this immunity doctrine should be employed sparingly." *Price v. Montgomery Cnty., Kentucky*, 144 S.Ct. 2499,

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2500 (July 22, 2024) (statement of Sotomayor, J., respecting the denial of certiorari); *see also* Petition for Certiorari in *Benning v. Oliver*, 2023 WL 884651, *12-13 (Dec. 15, 2023), cert. denied, 144 S.Ct. 1457 (April 29, 2024) (arguing for the same and other reasons that the Supreme Court should "Overrule, Pare Back, Or Clarify" qualified immunity; Supreme Court should clarify that "where officials are not faced with making split-second decisions, precise factual correspondence between prior decisions and the instant case is not necessary to overcome qualified immunity).

Other teaching materials:
news stories, videos, reports by governments & non-profits, websites

News Stories

Chapter 1 – Historical Context

Magazine article connecting 2021 coup attempt and Reconstruction/Redemption violence
NPR radio on 2021 coup attempt and 1898 Wilmington

Chapter 2 – Eighth Amendment Prison Litigation

Mississippi jails mental health patients

Fifth Circuit ruling that lifetime disenfranchisement violates cruel & unusual punishment clause

Feb. 2022 op-ed re: Covid vaccine & prison guards

Ohio inmates sue prison for failure to protect from white supremacist stabbing:

Georgia & other state prisons failing to treat medical conditions

U.S. Department of Justice finds Alabama's prisons routinely violate the Eighth Amendment rights of prisoners by failing to protect them from prisoner-on-prisoner violence and sexual abuse and failing to provide safe conditions

Nance v. Ward, _ U.S. _, 142 S.Ct. 2214 (2022) (death row inmate can use Section 1983 as the procedural vehicle to challenge the method-of-execution where alternative method was not authorized under state law)

Supreme Court holds violation of Miranda is not basis for Section 1983 damages remedy. Vega v. Tekoe (2022)
https://www.scotusblog.com/2022/06/tantamount-to-nothing-miranda-rights-cannot-be-wronged/

Supreme Court holds Eighth Amendment Excessive Fines clause incorporated via 14th Am & applies to states

Incarceration of women and girls – report by The Sentencing Project

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Federal Bureau of Prisons administrator testifies before legislature about addressing reports of sexual misconduct by inmates and employees

Prison conditions: In Brooklyn, prison lost heat & power, inmates living in cold:

Delaware prison riot lawsuit: http://www.wboc.com/story/39905386/inmates-charged-in-prison-riot-claim-abuse-in-lawsuit

2021 update of non-profit report on Covid in correctional facilities. As of June 2020, coronavirus outbreaks in correctional facilities and over 570 incarcerated people and 50 correctional staff had died. June 2020 ACLU Report has details.

Detainees have sued jails and prisons for 14th and 8th Amendment claims based on failure to curb the spread of COVID. ACLU suit filed on behalf 2000 detainees in a Dallas, Texas facility.

Pittsburgh ballot initiative to ban solitary confinement

COVID spread to 70% of tested federal inmates

Losing a relative to prison, then Covid

To hear directly from inmates, website Prison Radio has voice commentaries. Radio journalist Noelle Hanrahan directs the non-profit and took this class at Rutgers Law in 2020.

Chapter 3 – Fourteenth Amendment Substantive Due Process

Prosecutors' confidential informant murdered (paywall):
http://www.philly.com/philly/news/crime/anthony-reaves-chester-bennett-homes-murder-20170903.html

Article discussing creative settlement terms & reparations Alexis Karteron, Reparations for Police Violence, 45 N.Y.U. Rev. L. & Soc. Change 405 (2021)

Chapter 5 – Action Under Color of Law

Watch for Exercise 5B, p. 313. This is the raw footage from a security camera in the bar where an off-duty police officer beat up the bartender. It has graphic violence. Consider who put the video on YouTube and why. https://www.latimes.com/87452008-132.html

Chapter 6 – Fourth Amendment

President Biden's 2022 Executive Order on effective, accountable policing

Pro Publica Dec. 2023 report on police body cameras

Most police body camera footage is not released to the public

Justice Department reports on police departments (sampling)
Nov. 2024 report on Trenton, New Jersey

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2022 report on Albuquerque, New Mexico police reform progress
2022 Justice Dept. launches investigation of Worcester, Mass.
Police dept. Pattern and Practice investigations, 1994-2017:
https://www.justice.gov/crt/file/922421/download
news coverage of 2015 report on Ferguson, MO

George Floyd Justice in Policing Act of 2020

Non-profit report: Guide to Fair, Safe, Community Policing

Non-profit report:
State Attorneys' General Potential to Reform Police and End Police Brutality

ACLU Criminal Law & Police Reform Project

RadioLab podcast on Graham & The Reasonable Man:

Washington Post Police Shootings Database, 2015-present

Frontline documentary about Policing the Police, study of Newark NJ

Police driving maneuver killed 30 people 2016-20: Pit Maneuver by police

Pro bono excessive force litigation by private firm

Interview with author of "The End of Policing"

American Law Institute policing blog posts

Complaint to United Nations filed by law school clinic & ACLU (including Tue Ho, who took this class at Rutgers Law in 2021):

> Drexel School of Law and American Civil Liberties Union (ACLU) of Pennsylvania filed a letter of allegation with UN Special Procedures on behalf of the protesters and residents who experienced and witnessed police brutality in response to Black Lives Matter protests in May/June 2020 across Philadelphia.
>
> We allege Philadelphia violated their rights to peaceful assembly and freedom of expression and used excessive force in violation of international law. We also allege that the Philadelphia Police Department's policies on the use of force do not comply with international human rights standards and that the City's police accountability procedures are inadequate. We also created an illustrative timeline here.

Philadelphia $9.25 million settlement with George Floyd police misconduct protesters

Dec. 2023: Mississippi sheriff proposed reforms after officers plead guilty to torture

Chapter 7 – Post Arrest Excessive Force Claims

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Book review. Flint Taylor (Peoples Law Office Chicago) on Chicago Police Officer Jon Burge Torture cases

Article discussing Chicago reparations for Jon Burge torture cases by Rutgers Prof. Alexis Karteron (2021)

In 2015, Chicago approved compensating victims of police torture. 60 living victims eligible for up to $100,000. Additional terms: Survivors and families of victims given psychological counseling and free college tuition; public memorial to the deceased victims; Chicago students learn about police officer Burge's conduct. https://en.wikipedia.org/wiki/Jon_Burge#City_reparations

Chapter 8 – Procedural Due Process

California police fired for domestic violence

This interview with Jill Burella is about her police officer husband attacking her. Excerpt from a radio documentary co-authored by Noelle Hanrahan, a student in this class at Rutgers Law in 2020. Out of the Shadows (c) Prison Radio 2002

Chapter 9 – Absolute Immunity

Federal judiciary approves new judicial conduct rules addressing judges' sexual harassment

Do Immigration judges need more independence - conversion to Article 1 judges?

4th Circuit holds judge does not get immunity for accompanying sheriff in executing warrant

In 2022, in the "Kids for Cash" judicial scandal, a federal court awarded the former Pennsylvania juvenile detainees $206 million in compensatory and punitive damages against the two corrupt ex-judges. Wallace v. Powell, No. 3:09-CV-286, 2022 WL 3447197 (M.D. Pa. Aug. 16, 2022)

The Lawyers' Committee for Civil Rights Under Law filed a lawsuit alleging that three judges in White County, OK routinely jailed indigent defendants who can't afford to pay court-ordered fines and fees. The lawsuit also named an Oklahoma state agency, alleging it is complicit in incentivizing attorneys to close cases quickly, in the absence of recognizing defendants' rights.

Chapter 10 - Other Statutes & Recurring Procedural Issues

Settlement, including attorneys fees – Philadelphia pays $60 million in police misconduct settlements over 18 months. Excerpt from Sept. 2024 news story in Philadelphia Inquirer:

> "Federal lawsuits over police misconduct have cost Philadelphia taxpayers around $60 million since the beginning of [2023], according to an Inquirer analysis of city figures and legal filings — the highest pace of spending on that issue in recent memory, and a rate that is unlikely to slow down anytime soon. The payouts have ranged from a few thousand dollars for accusations of false arrests or excessive force by officers, to several million dollars for wrongful conviction cases. People involved in those suits have typically sued after being released from prison, blaming detectives or police officials for conducting shoddy or corrupt investigations that put them there."

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Attorneys Fees - petition for fees denied & results in sanctions for Pennsylvania attorney
https://casetext.com/case/young-v-smith-52

Chapter 11 – Qualified Immunity

Reuters multi-part investigation of police excessive force and qualified immunity (May - December 2020), plus shorter individual stories

Cato Institute podcast on Qualified Immunity & why Supreme Court should revisit; Cato lawyer explaining basics of qualified immunity

Bloomberg Law video explaining Qualified Immunity

CBS Sunday Morning TV show video explaining Qualified Immunity

Professor Ricks op-ed: Supreme Court should make it easier to sue cops who violate civil rights

News coverage of new state statutes creating state analogue to Section 1983 with limited or without qualified immunity

New Mexico
New Mexico
Connecticut

Instagram sites or search #EndQualifiedImmunity or #QualifiedImmunity:

https://www.instagram.com/endqualifiedimmunitynow/

https://www.instagram.com/endingqualifiedimmunity/

https://www.instagram.com/qualified_immunity/

https://www.instagram.com/explore/tags/qualifiedimmunityreform/

Other videos

Role of Child Protective Service Worker, Social Worker, Lawyers

Frontline on Maine child protective service agency

1. Please watch all of Part 2 (15 minutes), which includes a meeting between the child protective service workers and the lawyer, about whether to remove a 2-year old child from his home:

   https://www.youtube.com/watch?v=YSsC5cHVCWA

2. If you want to see the next step in 2-year old Mark's case, please watch the first 5 minutes of Part 3:

   https://www.youtube.com/watch?v=PslCKn1L22k

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3. Interview about role of child protective service worker/social worker in investigating allegations of abuse or neglect. While this is a UK video, and the procedural terms "conference" and "core group" do not apply, this gives a good overview of steps in the process:

   https://www.youtube.com/watch?v=VcsFzoBrmb0

ACLU YouTube Channel – various topics, incl. mass incarceration, racism in poicing
https://www.youtube.com/channel/UC7M42vQrNmZ0tnmmenLWwBA

Websites & Non-profits

Justice Collaboratory – criminal justice reform based at Yale Law, incl. police and policy clinic, prosecutor reform

ACLU Prisoners' Rights Project

CATO Institute Criminal Justice/Constitution and Law

Prison Policy Initiative

Abolitionist Law Center, Pennsylvania non-profit challenging prison policy

Amistad Law Project Philadelphia-based challenging mass incarceration

Cato Institute Unlawful Shield, focused on reforming qualified immunity

Center for Policing Equity