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The right to sue and defend in the courts of the several states are essential privileges of citizenship.[1] The Supreme Court has explained these rights as essential to a civilized society:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.[2]

Eight generations ago, this right was unavailable to black people, even freed slaves. Why? Because, in 1789, descendants of African slaves were never intended to be citizens.[3] Thus, even federal courts lacked Article III jurisdiction over claims brought by freed slaves.[4]

After a failed attempt at self-determination in the 1860's, the former Confederate states were required to abandon slavery and to recognize the equal citizenship and rights of black Americans.[5] And new citizens did pursue their claims in court, with early litigation addressing testamentary bequests that former slaves enforced as new citizens. In 1869, the Georgia Supreme Court acknowledged this and held, "While a freedman may, in the Courts of this State, enforce any legal equity which was created in his favor, while a slave, that did not then contravene the policy of the law [i.e., receiving a bequest], he cannot maintain an action for injuries which he may have received, or for wages on account of labor done by him, while he was a slave."[6]

Clearly, these newfound rights were tenuous in the several states. Then, and for years to come, local governments failed to protect African Americans from violence and discrimination and were sometimes complicit in those violations. During congressional debates in 1871 about how to strengthen the rights of former slaves, Kansas Representative David Perley Lowe stated:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.[7]

To aid in the enforcement of the Fourteenth Amendment's guarantee of equal rights and due process, Congress passed the Ku Klux Klan Act of April 20, 1871, also known as the Civil Rights Act of 1871.[8] The law is codified at 42 U.S.C. § 1983 and provides (as enacted):

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[9]

The statute contained no affirmative defenses. Thus, Congress created a federal cause of action to pursue damages from state actors who violate individuals' constitutional rights. For years, Section 1983 had little use, as the Supreme Court narrowly interpreted the state action requirement of the Fourteenth Amendment in *the Civil Rights Cases* of 1883.[10] Corollary legislation included Rev. Stat. § 1980, codified at 42 U.S.C. § 1985, provides a narrow cause of action to redress conspiracies to violate civil rights.

In 1915, the Supreme Court considered the appeal of election officials who were ordered to pay damages to three black men, for violating their Fifteenth Amendment right to vote in an election under a "grandfather provision" in state voting laws.[11] The defendants argued that they were just following state law, and that they could not be liable because they did not act with malice.[12] The Court found these arguments to be without merit and sustained the damages award.[13]

Monroe v. Pape is a seminal case on Section 1983, in which the Supreme Court held that state actors who abuse their state-law authority, can be held liable for violating the federal civil rights of their victims.[14] There, police officers conducted a warrantless home invasion, ransacked the plaintiffs' home, arrested the man of the house without a warrant, denied him the right to a phone call, interrogated him, and then released him. The Supreme Court definitively held that liability under Section 1983 can arise not only when state actors are enforcing an illegal state law, but also when they misuse their state-law authority.[15] Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.[16]

It took six years for the Court to begin its process of cabining in the *Monroe* decision. In *Pierson v. Ray*, Mississippi police officers arrested civil rights protesters under an anti-loitering law that was later found to be unconstitutional.[17] The officers claimed that they were not enforcing segregation by arresting the individuals, but rather attempting to prevent violence. The Court decided that Section 1983 must be viewed against the background of general tort principles, and that a false imprisonment action at common law could be defeated by good faith and probable cause.[18]

Qualified immunity, as we know it today, was born in 1982 when the Supreme Court decided *Harlow v. Fitzgerald*.[19] There, the Court overruled prior precedent that "good faith" was a defense to civil rights violations because "bare allegations of malice should not subject government officials either to the costs of trial or to the burdens of broad reaching discovery."[20] Thus, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[21]

Qualified immunity is "an immunity from suit rather than a mere defense to liability … it is effectively lost if a case is erroneously permitted to go to trial."[22] Courts evaluating pleas of qualified immunity by state actors by deciding if the plaintiff's complaint states a violation of a constitutional right, and if so, whether the right was "clearly established."[23] It has been said that, "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[24] Under this standard, state actors are only charged with knowledge of "cases of controlling authority in their jurisdiction at the time of the incident" and "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[25]

Under courts' reductionist interpretation of what rights are "clearly established," actions that most would say violates an individual's constitutional rights are routinely held not to because no prior precedent involved the exact facts. For example, the growth of qualified immunity and the militarization of local law enforcement agencies[26] have arguably shielded the following police action from accountability:

a) Officers executed a search warrant and reported seizing $50,000 in cash, when they were alleged to have taken over $150,000 in cash and $125,000 in rare coins. They were granted qualified immunity because no case on point fairly warned them that theft was prohibited by the Fourth Amendment.[27]

b) A homeowner gave police permission to enter her home to look for her ex-boyfriend, though she told the officers she did not believe the ex-boyfriend was at her home, but she had no problem with them checking. The officers spent half a day destroying her home with shotgun-fired tear gas grenades. Because no clearly established authority prohibited their conduct, officers were not liable to their now-homeless victim.[28]

c) A juvenile pretrial inmate, out for a shower, unlocked cells to allow two other inmates to attack a fourth inmate. The guards were watching TV when it happened, and no clearly established case otherwise directed them to prevent the attack.[29]

d) An officer was granted qualified immunity when he shot and killed an armed occupant of a house, because it was reasonable under clearly established law for the officer to assume that other officers had announced police presence.[30]

e) A driver involved in a high-speed chase surrendered and laid down next to his car. The arresting officer handcuffed the suspect before holstering his gun and shot the suspect in the shoulder. Because the officer testified that it was an accident, he was awarded qualified immunity.[31]

f) A federal court determined that a dean's recommendation of nonrenewal of an Asian faculty member was infected by discrimination. The provost embraced the recommendation of nonrenewal, even though he acknowledged that the professor had demonstrated the presence of discrimination and a high turnover rate among minority faculty. Because the faculty member's dispute could be viewed as a "personal grievance," the Tenth Circuit awarded the provost qualified immunity in response to the professor's First Amendment claim.[32]

What is the right to sue for redress of grievances if violations of the law are only redressable if the law was "clearly established"? Many now protest that people are dying on the streets due to misconduct by law enforcement. Looking back, the notion of limiting Section 1983 to violations of "clearly established law," and disregarding the motive or intent of the alleged violator, would have been unheard of in the 19th century. Holding state actors liable for violating people's constitutional rights is the point of § 1983 and its purpose appears to be eroding away.

Moreover, there is serious doubt that one of the primary justifications offered for qualified immunity – that it derives from a common law "good faith" defense – withstands scrutiny. As noted, the Court's decision in *Pierson v. Ray* analogized to common law suits for false arrest, in which an officer would not be liable for a false arrest if he acted in good faith and with probable cause, even if the victim's innocence were later proved.[33] As an initial matter, it is questionable that such a good faith defense was well established in suits about constitutional violations at the time Section 1983 was enacted. To the extent such a defense existed, it was much narrower than a general immunity to suit.[34] Regardless, following *Pierson*, the Court quickly began to expand its new immunity doctrine well beyond the scope of any common law defense,[35] and morphed the good faith defense into an objective analysis of the reasonableness of the official's conduct,[36] which was unknown to the common law.

Another common justification the Court gives for qualified immunity is lenity for officials who, it believes, cannot be expected to anticipate constitutional rulings that even federal courts may not.[37] The doctrine of leniency derives from criminal law and is an odd fit in the context of civil liability under Section 1983. Ironically, however, the Court's decisions rarely if ever extend the same leniency to actual criminal defendants.[38]

The tide may be changing. Many district Courts are speaking up on this issue. In *White v. City of Topeka*, for example, Judge Crabtree collected authorities for the proposition that qualified immunity is in serious need of an overhaul, while nevertheless applying the doctrine to shield an officer from liability for killing a suspect.[39] With an outflow of questionable court decisions shielding officers solely because they act under color of state law, it is time for the Supreme Court to reconsider the path that qualified immunity has created. Only then, can the original purposes of 42 U.S.C. § 1983 be arguably vindicated.

1 Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823)

2 Chambers v. Baltimore & O.R. Co., 207 U.S. 142, 148 (1907)

3 Dred Scott v. Sandford, 60 U.S. 393, 15 L. Ed. 691 (1857), superseded by U.S. Const., 14th Amendment (1868)

4 *Id.*

5 U.S. Const., 13th Amendment, 14th Amendment.

6 Green v. Anderson, 38 Ga. 655, 655 (1869)

7 Cong. Globe, 42d Cong., 1st Sess., p. 374, quoted in Monroe v. Pape, 365 U.S. 167, 175, 81 S. Ct. 473, 477–78, 5 L. Ed. 2d 492 (1961), overruled by Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)

8 17 Stat. 13; Rev. Stat. Section 1979. See Monroe v. Pape, 365 U.S. 167, 171, 81 S. Ct. 473, 475, 5 L. Ed. 2d 492 (1961), overruled by Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)

9 Monroe v. Pape, 365 U.S. 167, 168–69.

10 109 U.S. 3, 11 (1883); Nahmod, S., SECTION 1983 IS BORN: THE INTERLOCKING SUPREME COURT STORIES OF TENNEY AND MONROE https://law.lclark.edu/live/files/16471-lcb174art3nahmodpdf

11 Myers v. Anderson, 238 U.S. 368 (1915)

12 Argument for Plaintiff in Error, Myers v. Anderson, 238 U.S. at 371.

13 Myers v. Anderson, 238 U.S. 368.

14 Monroe v. Pape, 365 U.S. 167.

15 Monroe v. Pape, 365 U.S. 167, 187. The Court also held that municipalities could not be held liable under 42 U.S.C. § 1983, a ruling which was overturned by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which allows municipal liability under § 1983 under only limited circumstances. Note, *respondeat superior* is not an available theory under § 1983. Monell, 436 U.S. 658, 691.

16 United States v. Classic, 313 U.S. 299, 326 (1941) (citations omitted).

17 Pierson v. Ray, 386 U.S. 547 (1967)

18 Pierson v. Ray, 386 U.S. 547, 557.

19 Harlow v. Fitzgerald, 457 U.S. 800 (1982)

20 Harlow v. Fitzgerald, 457 U.S. 800, 817

21 *Id.*

22 Pearson v. Callahan, 555 U.S. 223, 231 (2009) quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)

23 Pearson v. Callahan, 555 U.S. 223, 232.

24 Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

25 Ashcroft v. al-Kidd, 563 U.S. 731, 746 quoting Wilson v. Layne, 526 U.S. 603, 617 (1999).

26 Mummolo, J., Militarization fails to enhance police safety or reduce crime but may harm police reputation, Proceedings of the National Academy of Sciences of the United States of America, July 2, 2018, https://www.pnas.org/content/115/37/9181

27 Jessop v. City of Fresno, 936 F.3d 937, 940 (9th Cir. 2019), cert. denied sub nom. Jessop v. City of Fresno, California, 140 S. Ct. 2793 (2020), reh'g denied, 206 L. Ed. 2d 956 (Aug. 3, 2020).

28 West v. City of Caldwell, 931 F.3d 978, 982 (9th Cir. 2019), cert. denied sub nom. West v. Winfield, 207 L. Ed. 2d 1052 (June 15, 2020)

29 Contreras on behalf of A.L. v. Dona Ana Cty. Bd. of Cty. Commissioners, 965 F.3d 1114, 1123 (10th Cir. 2020)

30 White v. Pauly, 137 S. Ct. 548, 551 (2017)

31 Bryant v. Gillem, 965 F.3d 387 (5th Cir. 2020)

32 Singh v. Shonrock, No. 15-CV-9369-JWL, 2017 WL 4552139, at *1 (D. Kan. Oct. 12, 2017), aff'd in part, rev'd in part sub nom. Singh v. Cordle, 936 F.3d 1022 (10th Cir. 2019)

33 Pierson v. Ray, 386 U.S. 547, 555 (1967).

34 William Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45, 55 (2018).

35 *E.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

36 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

37 William Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45, 71–72 (2018).

38 William Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45, 77 (2018).

39 White v. City of Topeka, No. 18-4050-DDC-JPO, 2020 WL 5761550, at *1 (D. Kan. Sept. 28, 2020)