The Bridge: Interdisciplinary Perspectives on Legal & Social Policy

Volume 8
Issue 1 *Police Misconduct and Qualified Immunity: The Court's Brain Child & A License to Kill*

Article 1

2024

Qualified Immunity: The Court's Brain Child & License to Kill

Laisha Harris
Harris County Public Defender's Office, laisha.harris@pdo.hctx.net

“Qualified Immunity – The Court’s Brain Child & A License to Kill”

by Laisha Harris

Abstract: Qualified immunity, a defense created by the imagination of the Supreme Court, prevents citizens of their right to hold law enforcement officers liable when they clearly violate a citizens constitutionally protected right. Throughout this paper, I will describe the historical context of Supreme Court decisions regarding qualified immunity, clarifying the errs in logic that perpetuate a system of racial violence, while using the doctrine of *stare decisis* to justify the overturning of the decisions that created the defense of qualified immunity.

Table of Contents

Introduction

In the United States, the rights and liberties of its citizens are granted in the Constitution. The Fourth Amendment of the Constitution protects citizens from unreasonable searches and seizures without a warrant or probable cause.[1] The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without sufficient due process of law.[2] The Fourteenth Amendment provides that no State shall enact laws prohibiting or depriving a citizen of life, liberty, or property without due process of law.[3] While certain "privacy rights" are not explicit in the Constitution, the Supreme Court has exercised judicial discretion to establish marital rights and the right to procreate.[4]

Roe v. Wade, coupled with *Planned Parenthood v. Casey*, permitted women the opportunity to seek the medical procedure known as abortion. In 1976, the Supreme Court found that access to abortion is a fundamental right that a state may not infringe absent satisfaction of strict scrutiny.[5]

In *Dobbs v. Jackson's Women's Health*, in 2022, the Supreme Court changed its mind and held that access to abortions ought be a decision left for the state for three reasons: (1) The Constitution make no mention of abortion; (2) abortion is not a provision that is deeply rooted in American history or tradition since the procedure was entirely unknown until the 20th century; and (3) the doctrine of *stare decisis* requires that *Roe* and *Casey* be overruled.[6]

[1] USCS U.S. Const. amend. IV.
[2] USCS U.S. Const. amend. V.
[3] USCS U.S. Const. amend. XIV, § 1.
[4] *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[5] *Roe v. Wade*, 410 U.S. 113 (1973).
[6] *Dobbs v. Jackson Women's Health Org*, 142 S. Ct. 2228, 2242–43 (2022).

In the *Dobbs* opinion, the Supreme Court ends with three insightful statements that serve as the justification for this conversation: "Abortion presents a profound moral question. The Constitution does not prohibit citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority."[7] Although I personally disagree with the holding in *Dobbs*, the Court's reasoning for overturning of *Roe* demonstrate that the Court *could*, maybe even *should*, overturn the decisions that created and expanded the doctrine of qualified immunity.

The court-made doctrine of qualified immunity presents a similarly profound moral question. When can a citizen seek redress when a police officer uses excessive force without probable cause? When the Court decided *Monroe*, it was the custom and practice of the City of Chicago Police Department to use constitutionally impermissible tactics during investigations, such as improper interrogation techniques, but they could not be held liable.[8] Although it was the custom, it was not constitutional. Unlike the issue of abortion, there was already legislation enacted to provide for a civil remedy for when any rights or privileges secured by the Constitution have been deprived.[9] United States Code, Title 42, 42 U.S.C.S. § 1983 explicitly provides that "every person" who "subjects or causes to be subjected any citizen of the United States. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution" shall be liable to the party injured in an action at law. Notwithstanding, *Monroe v. Pape*, *Pierson v. Ray*, *Tennessee v. Garner*, *Graham v. Connor*, and *Scott v. Harris* arrogate the authority of what is provided for by Congress. There are constitutional references to liberties and life, there is a legal avenue to seek redress for deprivation of those rights, and yet, qualified immunity makes the chance of recovery nearly impossible.

[7] *Dobbs*, 2284.
[8] *Monroe v. Pape*, 365 U.S. 167, 258 (1961).
[9] 42 U.S.C.S. § 1983 (LexisNexis).

Throughout this paper, I will describe the historical context of Supreme Court decisions regarding qualified immunity, clarifying the errs in logic that perpetuate a system of racial violence, while using the doctrine of *stare decisis* to justify the overturning of the decisions that created the defense of qualified immunity. The reasoning stated by the Court in *Dobbs* will serve as the framework for the argument in favor of overturning decisions regarding qualified immunity.

The Right to Abortion and *Dobbs*

The Court's decision in *Dobbs* will serve as a guide for my analysis of the cases where qualified immunity was developed, and how the Fourth Amendment was negatively impacted. Abortion will be referenced for analytical purposes, rather than substantive. The analysis and reasoning are cited directly from the opinion written by Supreme Court Justice Samuel Alito.

When a State enacts legislation that discriminates against a class of persons, or infringes on a fundamental right, the classification of the discrimination dictates the level of scrutiny the legislation is analyzed under.[10] For actions involving race, religion, or a fundamental right, strict scrutiny must be satisfied.[11] Strict scrutiny means that the government must show compelling justification furthering a narrowly tailored government objective.[12] Fundamental rights include the right to marry,[13] right to counsel,[14] and other protections under the Bill of Rights.[15] Strict scrutiny is the most rigorous burden because fundamental rights are involved. Rational basis requires that the challenger show that the regulation is not rationally related to a legitimate government

[10] *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).
[11] *Id.*
[12] *Id.*
[13] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[14] *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[15] *Pointer v. Texas*, 380 U.S. 400 (1965), *Griswold v. Connecticut*, 381 U.S. 479 (1965). *McDonald v. City of Chi.*, 561 U.S. 742 (2010).

interest.[16] The rational basis requirement applies to things a person does not have a fundamental right to or protection for, such as age,[17] wealth,[18] or welfare.[19]

In *Roe*, the Court conferred a broad right to a pre-viability abortion.[20] In *Casey*, the Court provided for medical exceptions and standards of consent, basing the conclusion on *stare decisis*.[21] *Roe* was egregiously wrong from the start, with exceptionally weak reasoning that has damaging consequences.[22] Since *Casey* was based on *Roe*, the *Dobbs* Court needed to assess the strength of grounds under which *Roe* was decided by addressing three issues: (1) whether the Fourteenth Amendment's reference to "liberty" protects a particular right (to abortion), (2) whether the right at issue (abortion) is rooted in the Nation's history, tradition, and what is an essential component of what is described as "ordered liberty," and (3) whether the right to obtain an abortion is a part of a broader entrenched right that is supported by other precedents.[23]

Constitutional Reference

The analysis must begin with "the language of the instrument."[24] First, the Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show the right is somehow implicit in the constitutional text.[25] *Roe* held that the right to an abortion is a part of a privacy right, that which is also not mentioned.[26] A medical procedure that only one sex can undergo does not trigger heightened scrutiny unless the

[16] *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).
[17] *Gregory v. Ashcroft*, 501 U.S. 452 (1991).
[18] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).
[19] *Califano v. Aznavorian*, 439 U.S. 170 (1978).
[20] *Dobbs*, 2240.
[21] *Id.*
[22] *Dobbs*, 2242.
[23] *Dobbs*, 2244.
[24] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).
[25] *Dobbs*, 2246.
[26] *Dobbs*, 2244.

regulation is "mere pretext" designed to effect invidious discrimination against one sex or the other.[27] Next, the Court turned to the "bold assertion that the abortion right is an aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[28]

Rooted in American History & Tradition

In deciding whether a right falls into a liberty protected by the Fourteenth Amendment, the Court has long asked whether the right is "deeply rooted" in "history and tradition" and whether it is "essential" to the Nation's scheme of ordered liberty.[29] There was no support in American law for a constitutional right to an abortion until the latter part of the 20th century.[30] No court had recognized such right until a few years before *Roe* was decided.[31] In fact, when the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy.[32] *Roe* ignored or misstated history and *Casey* declined to reconsider *Roe*'s faulty historical analysis, therefore, the Court must set the record straight.[33] The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions.[34]

Doctrine of *Stare decisis*

It must next be considered whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*.[35] *Stare decisis* plays an important role in Supreme Court case law, and the Court has explained that it serves many valuable ends, protecting the interests of those who have taken action in reliance on a past decision.[36] It "fosters evenhanded decision making"

[27] *Dobbs*, 2245.
[28] *Id.*
[29] *Id.*
[30] *Dobbs*, 2248.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Dobbs*, 2253.
[35] *Dobbs*, 2261.
[36] *Id.*

requiring that cases be decided in a like manner, contributing to the actual and perceived integrity of the judicial process.[37] *Stare decisis* is not an inexorable command, but when a constitutional decision goes astray, "the country is usually stuck with the bad decision unless we correct our own mistake."[38] Some of the most important constitutional decisions have overruled prior precedents: *Brown v. Board of Education*, *Plessy v. Ferguson*, and *West Coast Hotel v. Parrish*. "No Justice of this court has ever argued that the Court should never overrule a constitutional decision" because overruling a precedent is a serious matter that is not a step to be taken lightly.[39]

The quality of reasoning in a prior case has an important bearing on whether it should be reconsidered.[40] *Roe* implicitly conferred a right to obtain an abortion, lacking a decision grounded in text, history, or precedent.[41] The elaborate scheme of dividing pregnancy into three trimesters was the Court's own brainchild, failing to justify the critical distinction between pre and post-viability abortions.[42]

Another important consideration in deciding whether a precedent should be overruled is whether the rule can be understood and applied in a consistent and predictable manner.[43] *Casey*'s "undue burden" test scored poorly on the workability scale because whether a particular obstacle qualifies as "substantial" is often open to reasonable debate.[44]

Roe and *Casey* led to the distortion of many important but unrelated legal doctrines that provides further support for overruling those decisions.[45] Abortion cases have diluted the strict

[37] *Dobbs*, 2262.
[38] *Id.*
[39] *Dobbs*, 2263-2264.
[40] *Dobbs*, 2265.
[41] *Id.*
[42] *Dobbs*, 2266.
[43] *Dobbs*, 2272.
[44] *Gibbons*, 22 U.S. 1
[45] *Dobbs*, 2273.

standard for facial constitutional challenges, they have ignored the third-party standing doctrine, they have disregarded res judicata principles, and distorted First Amendment doctrines.[46]

Lastly, it must be considered whether overruling *Roe* and *Casey* will upend substantial reliance interests, "where advance planning of great precision is most obviously a necessity."[47] Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, the authority to regulate abortion must be returned to the people and their elected representatives.[48]

In *Roe*, the Court federally approved access to abortion for women in the United States. With *Dobbs*, the Court exercised its authority to "remedy" the court-created access to abortion and refer the power to each individual state. Similarly, through *Monroe*, *Pierson*, and *Graham*, the Court has created a defense that broadly confers an immunity to law enforcement who intentionally, or unintentionally, violate the civil rights of United States citizens. Just as the Court created the right to abortion with fatally flawed reasoning, the doctrine of qualified immunity is equally—if not substantially more—flawed.

[46] *Dobbs*, 2275-2276.
[47] *Dobbs*, 2276.
[48] *Dobbs*, 2278.

What is Qualified Immunity?

Qualified immunity is an affirmative defense which, for the purposes of this paper, limits liability in actions under 42 U.S.C. § 1983 against state or municipal law enforcement officials.[49] When a law enforcement official has a good faith belief in the arrest, search, or use of force, they may be entitled to qualified immunity.[50]

What is 42 U.S.C. § 1983

42 U.S.C.S. § 1983 is available to redress deprivations under color of state law of rights, privileges, and immunity secured by federal statutes as well as by the Constitution.[51] The federal statute's primary purpose is the preservation of human liberty and human rights.[52]

Is Qualified Immunity in the Constitution, or Federal Statutes?

No. Although 42 U.S.C. § 1983 contains no immunity provisions, the Supreme Court determined that Congress *intended* to incorporate certain common law immunities which were compatible with the overall remedial and deterrent purposes of the statute.[53]

Is Qualified Immunity a Right Rooted in American History or Tradition?

No. Qualified immunity is an affirmative defense to a civil suit, it is not a right.[54] Additionally, the defense was not acknowledged in lower courts until the late 20th century.

Is Qualified Immunity Entrenched in a Right Supported by Precedent?

[49] *Corsair Special Situations Fund, L.P. v. Engineered Framing Sys.*, 694 F. Supp. 2d 449 (D. Md. 2010)
[50] 1 Civil Rights Actions P2A.04 (2022).
[51] *Bamberger Broad. Serv. v. Orloff*, 44 F. Supp. 904 (S.D.N.Y. 1942).
[52] *Davey v. Tomlinson*, 627 F. Supp. 1458, 1986 (E.D. Mich. 1986). S. Dist. LEXIS 29460 (E.D. Mich. 1986).
[53] 1 Police Civil Liability 42 U.S.C. § 8.10. Defenses, p 1.
[54] *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

No. Again, qualified immunity is not a right although its applicability has been repeatedly expanded.

Discussing qualified immunity directly without historical context is not compelling. The provision of immunity is relatively new. However, the deprivation of human, and civil rights, as it relates to persons of color, is so deeply woven into America's fabric, I am not surprised that its impact in the judicial system has not been assessed.

First, as did the *Dobbs* Court, we will analyze the rights that are protected under the Constitution. The Constitution created and vested power within Congress to make all laws necessary and proper for the carrying into execution the powers vested by the Constitution.[55] Congress has attempted to enact legislation that enforces and protects rights and privileges of the citizens of color. Throughout history, the Supreme Court has undermined Congressional and Constitutional authority by expanding the lack of accountability for law enforcement, chipping away at the value of fundamental rights and the ability to seek redress for racially motivated discrimination and violence.

Second, we will dig deep into what rights have been traditionally provided to citizens of color. Historical context is imperative when analyzing *how* we got to qualified immunity and *why* a judicial adjustment is necessary. Acknowledgement of American tradition and history should demystify arguments that qualified immunity is just.

Finally, three cases will be analyzed to affirm why the decisions around qualified immunity should not stand: *Monroe*,[56] *Pierson*,[57] and *Graham*[58]. *Monroe* was overturned but provided a gap

[55] USCS, Art 1, 42 U.S.C. § 8.
[56] *Monroe*, 365 U.S. 167.
[57] *Pierson v. Ray*, 386 U.S. 547 (1967).
[58] *Graham v. Connor*, 490U.S. 386 (1989).

of fourteen years where law enforcement and municipalities could not be held liable for violations under 42 U.S.C. § 1983. Within those fourteen years, the Supreme Court decided *Pierson*, granting an affirmative defense of "good faith" when making an arrest. After *Monroe* was overturned, and municipalities were held they *can* be held liable for violations under 42 U.S.C. § 1983, the Court decided *Graham*, creating the "objectively reasonable" standard for police use of force. The "objectively reasonable" standard is analyzed by the Court when assessing whether an officer is entitled to qualified immunity. This standard is ambiguous, detrimental to the protections under the Fourth Amendment, enables racially motivated oppression, and diminishes the capacity of the community to trust and respect law enforcement.

The deprivation of rights and oppression of persons of color is deeply rooted in American tradition and history. The doctrine of qualified immunity arose from the heels of the Civil Rights Movement, providing a loophole for the continuance of racially motivated discrimination, violence, and oppression. Qualified immunity has provided more protection for law enforcement acting *outside* of the color of law than has been referenced or intended by the Constitution.

"The Language of the Instrument"

The analysis must begin with "the language of the instrument."[59] The Constitution creates our government system with three branches. The House of Representatives and Congress enact federal legislation, or laws.[60] The Executive Branch enforces the law.[61] The Supreme Court interprets the law and its alignment with the Constitution.[62] Protected under 42 U.S.C. § 1983, for the purpose of this analysis, are the Fourth, Thirteenth, Fourteenth, and Fifteenth Amendment.

Fourth Amendment

On December 15, 1791, Congress added Amendments to the Constitution, known as the Bill of Rights. The Fourth Amendment provides the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall be issued, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched or the person or thing to be seized.[63] Albeit the Fourth Amendment did not apply to persons of color in 1791, it is clear in the language of the Constitution that a right is conferred for persons to be secure in themselves and their constitutionally protected area unless presented with *probable cause*. During 1791 and 1893, there were no exceptions to the warrant requirement.[64] There was no need to deviate from the standards provided by the Constitution until after the Civil War.

[59] *Gibbons*, 22 U.S. 1.
[60] USCS U.S. Const. art. I.
[61] USCS U.S. Const. art. II.
[62] USCS U.S. Const. art. III.
[63] USCS U.S. Const. amend. IV, § 1.
[64] *In re Swan*, 150 U.S. 637 (1893).

Thirteenth Amendment

On January 3, 1865, the United States Congress ratified the Thirteenth Amendment, stating that neither slavery nor involuntary servitude, ***except for as punishment for crime whereof the party has been duly convicted,*** shall exist within the United States or any place subject to their jurisdiction.[65] The ratification of the Thirteenth Amendment gave enslaved Africans their freedom, so long as they remained law-abiding citizens. As will be later discussed, legislatures learned that they could keep the former enslaved in their place by criminalizing expected conduct, such as prohibiting Blacks from owning or renting property while simultaneously making homelessness a crime. The depths of the impact of the Thirteenth Amendment exception are thoroughly described in Michelle Alexander's "The New Jim Crow," and I encourage the reading to fully grasp the importance of this paragraph. For the purpose of this paper, the Thirteenth Amendment does not serve as a constitutional reference but marks the moment in time where racially motivated violence and corruption began to compromise the integrity of the judicial system.

Fourteenth Amendment

On July 9, 1868, the United States Congress ratified the Fourteenth Amendment, providing that no State shall make or enforce any law which abridges the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person equal protection of the laws.[66] 42 U.S.C. § 6 grants Congress the power to enforce provisions of the Fourteenth Amendment through appropriate legislation.[67] Based on the language of the Fourteenth Amendment, ***all*** persons are entitled to privileges or immunities, equal protection of the laws, and the right to life, liberty, and property and cannot be

[65] USCS U.S. Const. amend. XIII, § 1.
[66] USCS U.S. Const. amend. XIV, § 1.
[67] USCS U.S. Const. amend. XIV, § 6.

taken away without due process. The Fourteenth Amendment clearly provides that all citizens, including those with a previous condition of servitude, are entitled to the same liberties and protections as those who held persons in conditions of servitude. A person's right to life is clear, all people have the right to live. Liberty confers not only freedom from bodily restraint, but the right of the individual to contract, engage in common occupations of life, to marry, acquire useful knowledge, establish a home, raise children, worship God, and generally enjoy those privileges essential to the orderly pursuit of happiness by free persons.[68]

Fifteenth Amendment

On February 3, 1870, the United States Congress ratified the Fifteenth Amendment conferring the right of citizens in the United States to vote, and this right shall not be denied or abridged by any State on account of race, color, or previous condition of servitude.[69] Taking the term "citizens" to include all persons capable of claiming or establishing "citizenship" in the United States, citizens include everyone, irrespective of gender or race.

To summarize, the Constitution grants Congress the power to enact legislation, the President to enforce legislation, and the Supreme Court to interpret cases involving the legislation. Incorporated in the Constitution are the Bill of Rights, conferring upon persons the right to be secure in their persons and homes, the right to vote, equal protection of laws, privileges, immunities, and the protection against deprivation of life, liberty, and property. The standard conferred in the Fourth Amendment is probable cause and the standard conferred in the Fifth and Fourteenth Amendment is due process.

[68] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[69] USCS U.S. Const. amend. XV, § 1.

While Congress ratified Amendments conferring rights and protections to all American citizens, States continued to embrace a system inconsistent with the expectation. It is worth pointing out that during these developments, the country was not as technologically advanced as we are today. The telephone did not reach the United States until after 1876.[70] The first television broadcast in the United States was in 1939.[71] The fax machine took until 1964 and email, 1969.[72] It is reasonable to conclude that there was no way to get the entire country on one accord without reliable means of mass communication. While the decisions made and enacted were documented in a way where I am able to easily search and retrieve, there was no method of mass communications after the Civil War unless there was face to face contact. Yet somehow, in response to the newly added Amendments, organized violence and disruption began to detrimentally impact the newly freedmen in a way that required the Enforcement Acts.[73] Although the Constitution conferred rights and protections, the Executive Branch needed to be empowered by Congress to use force to *protect* Black citizens. Blacks were free, but they were not being protected. States began enacting legislation such as Black Codes and Jim Crow Laws that will later be discussed, intended to disenfranchise potential black voters. Congress sought to remedy that through the disregarded Enforcement Acts.

[70] Library of Congress, Invention of the Telephone: Chronicling America. ISSN 2475-2703. Retrieved October 30, 2023.
[71] Gregory, Thomas. History Cooperative. "The First TV: A Complete History of Television." Jan. 2022. Retrieved October 30, 2023.
[72] Knerl, Linsey. Hewlett Packard. "When Was the Fax Machine Invented?" Dec. 2019. Retrieved October 30, 2023, and Swatman, Rachel. Guiness World Records. "1971: First Ever Email." Aug. 2015. Retrieved October 30, 2023.
[73] United States Senate: The Enforcement Acts of 1870 and 1871. Retrieved February 2023.

The Enforcement Acts[74]

The Enforcement Act of 1870 prohibited discrimination by state officials in voter registration on the basis of race, color, or previous condition of servitude and established penalties for interfering with a person's right to vote.

The Enforcement Act of 1871, also known as the Ku Klux Klan Act, intended to turn intimidation tactics used into federal offenses and made state officials liable for deprivation of civil rights or equal protections of the laws. The language of the Act says, "Every person," not limited to those acting as members of the Klan. The Act also permitted the president to use military power to protect against voter fraud.

The Civil Rights Act of 1875 provided for equal treatment of all citizens, regardless of race or previous condition of servitude, and granted access to public schools, churches, cemeteries, theaters, and accommodations.[75] In 42 U.S.C. § 2, any person who is denied access to these facilities on account of race would be entitled to monetary restitution under a federal court of law.

United States v. Stanley (1883)

Through *Stanley*, the Supreme Court reasoned that Congress lacked the proper authority to enforce the Enforcement Acts because those powers were not granted under the Thirteenth and Fourteenth Amendment.[76] The Thirteenth Amendment allows Congress to enforce legislation abolishing badges and incidents of slavery or servitude, with the premise of racism being notably absent.[77] "When thousands of coloreds were free, enjoying the essential rights of life, liberty, and property, no one thought it was any invasion of his status as a freeman because he was subjected

[74] *Id*.
[75] United States Senate: Landmark Legislation: Civil Rights Act of 1875. Retrieved February 2023.
[76] *United States v. Stanley*, 109 U.S. 3, 11 (1883).
[77] *Id* at 24.

to discrimination. Mere discrimination on account of race or color were not regarded as badges of slavery."[78] Here, the Supreme Court refused to acknowledge that there was any societal consequences to the American institution of slavery by saying "it would be running the slavery argument into the ground to make it apply to every act of discrimination."[79] This argument was made by the Court in 1883, not even twenty years after the end of the Civil War.

The problem with this rationale—whether Justices recognized this at the time or not—is that our very existence in America is a badge incident of slavery. The institution of American slavery was created two hundred years before the American Revolution was fought. Not only was slavery embedded in the principles of the founding documents, but slave labor contributed to national and political equity. As it is often difficult to identify a concept—in this case, white supremacy, or systemic racism—as it is being created, I will concede that Justices may not have recognized discrimination as a badge of slavery at the time *Stanley* was decided.

The Supreme Court further held that the Fourteenth Amendment allows Congress to prohibit legislation predicated on State law or proceedings as *corrective* legislation, but Congress cannot take the right of States to enact laws that would otherwise be prohibited by the Fourteenth Amendment.[80] Congress does not have the power to prohibit conduct of municipalities or private individuals.[81] If there were laws that adversely affect one's rights, the remedy could be found in corrective legislation made by Congress counteracting the effect of State laws or acts that are prohibited by the Fourteenth Amendment.[82] In other words, Congress cannot prohibit a state from

[78] *Id* at 25.
[79] *Id* at 24.
[80] *Stanley*, 109 U.S. at 11.
[81] *Id* at 12.
[82] *Id* at 25.

enacting unconstitutional legislation, but can respond with appropriate legislation *correcting* an unconstitutional act of the state.

In the absence of the ability to review laws enacted in each state—such as the Black Codes and Jim Crow Laws—due to the lack of infrastructure and technological advancements, it could be reasonable that Congress did not have the wherewithal to reference the State laws that adversely affected the rights of a particular race. Although they were not referenced by Congress at the time, such discriminatory laws did exist. Further, as appropriate legislation was eventually drafted, it is worth emphasizing the duration of time to which the branches of government enabled the deprivation of what we now recognize as civil rights. In 1978, the Supreme Court said that "it is finally necessary to interpret 42 U.S.C. § 1 to conform that [municipalities] were intended to be included within the 'persons' to whom that section applies."[83] Using the same content to deny liability to cities, the Court's language changed to where "the debate shows conclusively that the constitutional objections. . .would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights."[84] By the time it became possible to hold a municipality liable in an action under 42 U.S.C. § 1983, law enforcement had already been authorized to use the affirmative defense of 'qualified immunity.'

Federal Legislation: 42 U.S.C. § 1983

"***Every person*** who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, ***subjects or causes to be subjected, any citizen*** of the United States. . . 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

[83] *Trans Alaska Pipeline Rate Cases v. Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 669 (1978).
[84] *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 669.

proper proceeding for redress, except that in any action brought against a judicial officer for an act. . . taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." *Id.*

42 U.S.C. § 1983 is good law, meaning that the Supreme Court found Congress had the appropriate authority when it was enacted. An action may be brought against a local government for constitutional deprivations pursuant to a governmental 'custom.'[85] As previously mentioned, Congress has the power to enact legislation regarding powers expressly granted to them by the Constitution. Congress thus provided citizens a remedy for when their rights, privileges, or equal protections under the laws have been deprived by use of a law or custom.

In 1865, there were appropriate Constitutional references providing for the equal protection of laws, liberties, rights, and immunities of *all* citizens of the United States, white, black, and beyond. It was the specific intent of the Legislative Branch to provide an adequate remedy for persons who are discriminated against because of the immutable color of their skin. Language such as "Every person" indicates that there was a call upon *all* persons in the United States to reflect on how persons of color are treated and ***change*.** Presumably, the Founding Fathers sought to have three branches working together within a system so that growth could be acquired in all facets. Congress *tried* to provide a remedy under 42 U.S.C. § 1983 and their authority was undermined by a Supreme Court that did not rely on or did not have, the appropriate context.

[85] *Id* at 690.

"American History and Tradition"

In deciding whether a right is a liberty protected by the Fourteenth Amendment, the Court has long asked whether the right is "deeply rooted" in "history and tradition" and whether it is "essential" to the Nation's scheme of ordered liberty.[86] In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what the Amendment protects with what are our own enthusiastic views of what liberty Americans should enjoy.[87]

The Fourth Amendment, in force since 1789, protects citizens from unreasonable searches and seizures without probable cause or a properly issued warrant by the State or its agents. The language of 42 U.S.C. § 1983 has existed since 1866, providing a civil remedy for those deprived of rights and privileges by persons acting "under the color of law." The court-made doctrine of qualified immunity has been used to decline liability in actions under 42 U.S.C. § 1983 and the Fourth Amendment, applicable to states through the Fourteenth. The question at issue can be framed in two ways: whether the provision—or the deprivation of rights—to persons of color is deeply rooted in history and tradition, essential to the Nation's scheme of ordered liberty.

Historical Context

Slavery and Key Players

On June 21, 1788, the United States Constitution was ratified as the Supreme Law of the United States of America. In 1788, it was perfectly legal to capture, abuse, enslave and kill people

[86] *Dobbs*, 2247.
[87] 42 U.S.C. § 1983.

of color. The system of slavery in America is brutally distinct than other forms of slavery.[88] Enslaved Africans and people of color were property, belonging to plantation owners who were also representatives of government and the State. For example, enslaved people were property belonging to Presidents George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, William Henry Harrison, James Polk, Andrew Johnson, John Tyler, Martin Van Buren, and Ulysses S. Grant,[89] as well as Supreme Court Justices John Marshall and Joseph Story[90] and over 1,800 members of Congress.[91] The founding principles of this country were conceptualized with the explicit and intentional notion that the enslaved were property and ought be regarded as such.[92]

The deprivation of human rights as it pertained to enslaved Africans was embraced until the country began to expand into new (native) territory and the question arose: should slavery be allowed in the newly acquired territories? That question could not be answered without analyzing the economic impacts on the expansion of slavery, the societal impact of continuing slavery, and the state's right to choose. However, the scheme of the Nation's liberty did not originally include the enslaved of non-white.

The American Civil War

By 1860, South Carolina withdrew from the Federal Union, followed by Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas. Adding Arkansas, Tennessee, Virginia and North Carolina, these states formed the Confederate States of America.[93] Acknowledging the

[88] Hannah-Jones, Nikole. *The 1619 Project: A New Origin Story*. Nov. 16, 2021.
[89] The White House Historical Association. *Slavery in the President's Neighborhood FAQ*. Retrieved March 2023.
[90] Finkelman, Paul. *Supreme Injustice*. Feb. 8, 2018.
[91] Weil, Julie Zauzmer; Blanco, Adrian; Dominguez, Leo. "More than 1,700 Congressmen once enslaved Black People. This is who they were, and how they shaped the nation." *Washington Post*. Retrieved March 2023.
[92] *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 231 (Feb. 2, 1824).
[93] Freeman, Joanne. Library of Congress. *Timeline of the Civil War*.

Southern slave states is imperative in analyzing the impact of systemic racism in relation to the states which historically embraced American slavery and the reluctance of said states to provide equal protections of the law to persons of color. When the war ended, those states were tasked with the responsibility of housing those that were formerly enslaved. The Thirteenth Amendment was enacted *before* Southern states rejoined the Union, so it is safe to assume they did not entirely consent to its enactment. Mississippi did not ratify the Thirteenth Amendment into their Constitution until 2013.[94] At the end of the Civil War, six former Confederate army officers founded the American Terrorist Organization, Ku Klux Klan.[95]

Reconstruction

During Reconstruction, the former Confederate states were required to abolish slavery, swear an oath of loyalty to the Union, and pay off war debts.[96] The Civil Rights Act of 1866 declared "all persons" born in the United States to be citizens, over the veto of President Andrew Johnson.[97] However, President Johnson told states that the federal government would "look the other way" so long as war debts were paid.[98] With no guidance or expectation of how the freedmen were to be treated as newly inducted American citizens, Southern states began to pass legislation such as Black Codes and Jim Crow Laws. Not only were the "Black Codes" and Jim Crow Laws intentionally designed to infringe the human rights of Black Americans, but the individuals who comprised the judicial system in the Southern states were stacked with former Confederate

[94] Waldon, Ben. "Mississippi Officially Abolishes Slavery, Ratifies 13th Amendment." ABCNews. Published Feb. 19, 2013. Retrieved April 17, 2023.
[95] Southern Poverty Law Center. "Ku Klux Klan: A History of Racism and Violence." Sixth Edition, 2011. Retrieved March 2023. (pg. 11).
[96] History.com Editors. "Reconstruction." HISTORY. A&E Television Networks. Oct. 29, 2009. Retrieved March 2023.
[97] *Id.*
[98] *Id.*

soldiers. Those who fought to keep Blacks enslaved were finding new and creative ways to deprive them of their human rights.

Black Codes and Jim Crow Laws

The Black Codes and Jim Crow Laws were widespread and heinous. For instance, Mississippi required written proof of employment for the year or else one could be forced to forfeit wages or be subject to arrest. Although Blacks could own and dispose of property, they could not own, rent, or lease land. State and city laws made it illegal for Blacks to own property while also making vagrancy a punishable offense. Employment opportunities were limited to the role of a servant, housekeeper, or farmer.[99] Texas permitted Blacks the right to own, inherit and dispose of property, but they could not serve on juries, vote, run for office, or participate in trial as a witness.[100] Louisiana prohibited persons of color from assembly in churches for the purpose of worship.[101] In all but 10 states, there was a ban on interracial marriage.[102] Indiana, not a slave state, held that "states had the right to regulate and preserve this God-given institution and no interference by the government would be permitted. . .the State, under its police power, [is] able to pass laws prohibiting marriage between a white person and an African American person."[103]

These laws were written by the representatives of the states where they were enacted, and those legislators were voted for by the people of said state. The executives of the state ensured that such laws would be enforced to their fullest extent. Meanwhile, the judiciaries of the state interpreted the laws as valid, or worthy of enforcement. In Southern states, the legislative,

[99] The Law Library of Louisiana. "History of the Codes of Louisiana: Black Code." Retrieved October 30, 2023.
[100] Moneyhon, Carl H. Texas State Historical Association. "Black Codes," *Handbook of Texas Online*, accessed October 30, 2023.
[101] *African Methodist Episcopal Church v. New Orleans*, 15 La. Ann. 441 (1860).
[102] *Pace v. Ala.*, 106 U.S. 583 (1882).
[103] *State v. Gibson*, 36 Ind. 389 (1871).

executive and judiciary embraced and perpetuated systemic racism with arbitrary legislation intended to return the freedman back to the condition of servitude. Laws were rooted in unrealistic expectations such as literacy and wealth, when prior to the Civil War, a Black man was not allowed to learn to read and had no rights to property. No institution was required to provide an equal education to Black students until 1954. Not only were personal growth opportunities limited, but Black communities were plagued with racially motivated violence.

Racially Motivated Violence

After the Civil War, Klan members used violence and terrorism to enforce "political and social order."[104] Cloaked in white masks, the secret organization spread rapidly throughout the country, emphasizing that "Radicals" had robbed the State of their power and sent the states into debt.[105] As Klan membership increased throughout the states, so did the violence. By 1915, Ku Klux Klan membership peaked at 4 million, while individuals members remained anonymous by wearing white hoods in public.[106] The anonymity of such growing membership across the United States made it nearly impossible to determine if public servants, teachers, bankers, or police officers, were also members of the Klan.

In this vigilante environment, if citizens—*not the court of law*—found you guilty of a crime, mobs of the community would form to watch the brutal beating and torture of the perpetrator. Between 1877 and 1950, the Equal Justice Initiative reported nearly 4,400 lynchings across the United States.[107] At least 10% of Black legislators that were elected became victims of

[104] Southern Poverty Law Center. "Ku Klux Klan: A History of Racism and Violence." Sixth Edition, 2011. Retrieved March 2023. (pg. 10).
[105] *Id* at pg. 13.
[106] *Id* at pg. 23.
[107] *Lynching in America: Confronting the Legacy of Racial Terror*. Equal Justice Initiative. Third Edition, 2017.

Klan violence, seven of whom were killed.[108] Sometimes, Klansman would ride through the night, covered in sheets and masks so their identities are not disclosed, and terrorize Black families with a riot, cross-burning, assault, rape, and even murder.[109] In Tennessee, a group of white men shot Thomas Devert, a black man accused of murdering a white girl, in the head while crossing the river, removed his body from the water, and gathered all of the Black residents to a railyard to watch his body being dragged by a locomotive and then burn.[110] In Little Rock, Arkansas, a mob group kidnapped John Carter, forced him out of a vehicle with a noose around his neck, and shot him 200 times, before driving the corpse throughout the Black neighborhoods.[111] In Missouri, a mob took Horace Duncan and Fred Coker from jail and hanged them from town square, burned and shot their corpses while a crowd of 5,000 men, women, and children watched.[112] Prior to the Civil Rights Movement, and arguably during and afterwards, racially motivated violence was not the priority of law enforcement. For almost one hundred years, mobs of "average citizens" were empowered to inflict violence on communities of color while the Government failed to intervene.

Fourteenth Amendment and Enforcement Acts of 1860, 1861, and 1875

Congress made their first effort to "counteract" such use of violence and intimidation against Black Americans with the Enforcement Act of 1870, designed to enforce the Fourteenth Amendment and Civil Rights Act of 1866. The Fourteenth Amendment prohibits the State or its

[108] History.com Editors. "Ku Klux Klan." HISTORY. A&E Television Networks. Oct. 29, 2009. Retrieved March 2023.
[109] Southern Poverty Law Center. "Ku Klux Klan: A History of Racism and Violence." Sixth Edition, 2011. Retrieved March 2023. (pg. 12).
[110] Elliot Jaspin. Buried in the Bitter Waters: The Hidden History of Racial Cleansing in America Ch. 8 (2007; intern cite from Equal Justice Initiative: Lynching Report: Confronting the Legacy of Racial Terror. Third Edition, at 179. Retrieved April 17, 2023.
[111] Stockley, Grif. Ruled by Race: Black/White Relations in Arkansas from Slavery to Present, pg. 191-195. (2009); internal cite from *Id* at 180.
[112] "Mob's Terrible Deed," The Citizen (KY) Apr. 19, 1906; "Negroes Lunched," The Sedalia Democrat (MO) Apr. 16, 1906; "Riot at Springfield," The Clarance Courier (MO) Apr. 16, 1906; internal cite from *Id* at 189.

actors from depriving any citizen the right of life, liberty, or property without due process.[113] The Civil Rights Act of 1866 provides that all citizens shall have the same right. . .as is enjoyed by white citizens. . .to inherit, purchase, lease, sell, hold, and covey real and personal property.[114]

In 1875, Congress enacted another Enforcement Act intended to prohibit racial discrimination in public places, such as restaurants and public transportation.[115] However, in October of 1883, the Supreme Court held that Congress lacked the power to enact the Civil Rights Act of 1875 by either the Thirteenth or Fourteenth Amendment.[116] The Court did not analyze whether Congress had authority to enact legislation under the commerce power, which would be made explicit with the Civil Rights Act of 1964.[117] The Court simply determined that Congress had not enacted appropriate legislation that would provide (1) a remedy against law enforcement for violating civil rights of citizens, or (2) a remedy against State or municipal actors who did not explicitly authorize the violation of a citizen's civil rights.

In the noteworthy decision in *Plessy v. Ferguson* in 1896, the Supreme Court decided that the protections under the Fourteenth Amendment spanned towards political rights like voting and jury duty, rather than social issues such as racial discrimination. Under the "separate but equal" decision, racist Southern states were empowered to create and continue the racially dividing legislation we know as Jim Crow Laws.

Civil Rights Movement

With the Civil Rights Act of 1964, Congress made it unequivocally clear that their authority to prohibit discrimination in public facilities, schools, and federally assisted programs lay within

[113] USCS U.S. Const. amend. XIV, § 1.
[114] Civil Rights Act of 1866. April 9, 1866, Ch. 31, 14 Stat. 27.
[115] Force Act of 1870. May 31, 1870, Ch. 114, 16 Stat. 140.
[116] *Stanley*, 109 U.S. at 25.
[117] *Id.*

their Constitutional and Commerce Power.[118] While Congress was eventually able to use their power to prohibit racial discrimination against Blacks, *one hundred years* passed since the end of the Civil War. An additional hundred years of cruelty, murder, and mistreatment though no longer under the guise of physical bondage, but as free American citizens entitled to liberties and human rights. The presumption that racism would promptly end upon the appropriate enactment of legislation by Congress was absolute farse.

The enactment of the Civil Rights Act of 1965 marked moments in history including both change and stagnation. While the Black vote was protected, there was little to no defense against the growing police presence in predominately black communities. The Federal Bureau of Investigation worked to disrupt the activities and progress of social groups in America, civil rights groups included. The expected continuing works of the Civil Rights Movement came to a slow halt upon the assassination of leaders such as Martin Luther King Jr., John F. Kennedy, Medgar Evans, Wharlest Jackson, Malcolm X, and Fred Hampton.[119] While mourning the loss of the leaders the Black community were relying on for change, the community became sucked into the webs of mass incarceration.

Police Brutality

It is a common misconception that police officers have a duty to protect citizens within their community. The Supreme Court has said the Fourteenth Amendment confers no right to governmental aid, even when such aid may be necessary to secure life, liberty, or property interests.[120] Police do not have a responsibility to protect citizens from private violence and they

[118] Civil Rights Act of 1964, enacted July 2, 1964, 78 Stat. 241.
[119] Harris, Laisha (2021) "A Tale of Two Americas," The Bridge: Interdisciplinary Perspectives on Legal & Social Policy: Vol. 6: Iss. 2, Article 2. Available at: https://digitalscholarship.tsu.edu/thebridge/vol6/iss2/2
[120] *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

are infrequently held liable for their own acts of violence. Black Americans make up 12.4% of the United States population,[121] 38% of the prison population,[122] and police, on average, are responsible for taking 251 black lives per year,[123] not counting the number of those who die while incarcerated but before conviction. 68% of police killings each year involve a Black person, yet we are only 12% of the population. The numbers don't make sense because Black people are not statistically the most violent offenders arrested[124] nor the most convicted yet are almost three times more likely to be killed by police.[125]

The convictions of officers involved in the death of George Floyd, and ultimately those involved in the death of Tyre Nichols, occurred under exceptionally unprecedented circumstances. For George Floyd, the entire world was at home watching as he was asphyxiated in real time. Tyre Nichols was brutally beaten and killed for no reason by black uniformed officers. The value of a black life has been so belittled and diminished to the point where the phrase "I feared for my life" is sufficient for a 'justifiable homicide.' Essentially, there are circumstances where a police officer is justified in the killing of a citizen when the officer is arguably protecting or enforcing the law.

Judicial Context: Qualified Immunity and Use of Force

Monroe v. Pape (1961)

In *Monroe v. Pape,* the Supreme Court set the stage for what would evolve into the blanket doctrine of qualified immunity. On October 29, 1958, the complaint states that thirteen Chicago police officers broke down two doors of the Monroe apartment and forced the Monroe couple out

[121] United States Census Bureau. *Quick Facts: United States*. Retrieved February 2023.
[122] Federal Bureau of Prisons. *Inmate Race.* Retrieved February 2023.
[123] *Id.*
[124] U.S. Dept. of Justice. Statistical Brief. "Race and Ethnicity of Violent Crime Offenders and Arrestees, 2018." Office of Justice Programs. *Bureau of Justice Statistics.* January 2021. Appendix Table 1. Retrieved May 5, 2023.
[125] Mapping Police Violence. Retrieved May 2023.

of bed at gun point to stand naked in the center of the living room.[126] Mr. Monroe was struck several times with a flashlight, called a "black boy" and a "nigger" by Deputy Chief of Detective Pape.[127] Other officers hit and kicked the children, pushed them to the floor, threw clothes from the closet to the floor, dumped clothes out of drawers and ripped mattress covers, with no warrant or probable cause.[128] Mr. Monroe was taken to the police station and detained for ten hours, questioned about a murder that occurred two days prior, with no access to a phone to call his family or an attorney, still no warrant or probable cause.[129] The facts of *Monroe* make it abundantly clear that the City of Chicago Police Department had violated the Fourth Amendment.

After reviewing the language and purpose of 42 U.S.C. § 1983, the court held that Congress intended to give a remedy to parties deprived of constitutional rights, privileges and immunities by officials who abuse their position. The officers involved had indeed acted under the color of law to deprive the Monroe family of the liberties intended to be protected, thus "the complaint states a cause of action."[130] Their actions were "under the color of law" due to the longstanding custom and usage of the Police Department of the City of Chicago to arrest and confine persons in jail cells for a long period of time on "open charges."[131] However, the City of Chicago argued that Congress had not intended to include municipalities when they used the phrase "Every person."[132] Congress had intended to give a remedy, but the remedy did not include the city and its agents.

In the dissent of the opinion, Justice Frankfurter poses the question, "Why would the Forty-second Congress. . .[enact legislation to provide] tort relief in the federal courts for violation of

[126] *Monroe*, 365 U.S. at 203.
[127] *Id.*
[128] *Monroe*, 365 U.S. at 203
[129] *Id* at 169.
[130] *Id* at 187.
[131] *Id* at 203.
[132] *Id* at 191.

constitutional rights by acts of policeman acting pursuant to state authority, [and] not also provide the same relief for violations of constitutional rights by a policeman acting in violation of state authority?"[133] To ask that question without authority "is to abstract this statute from its historical context."[134] The Court concluded that in 1871, Senators felt "antagonized" by the thought of applying provisions for municipal liability.[135] In 1978, the Supreme Court overturned that particular decision permitting municipalities to be sued, but there was never a remedy for the *Monroe* family, and the like. It is also worth mentioning that the population of the United States increased fivefold in the one hundred and six years between the initial debate in 1871 and when the court referenced the debate in 1978.[136] Liability on a city in 1871 would have had a different impact than it would in 1958, or even 1978.

Between 1960 and 1974, police officers killed 4,649 civilians.[137] Until 1978, cities and local governments were not held liable for violations under 42 U.S.C. § 1983. In 1962, Los Angeles police raided and shot seven members of the Nation of Islam, killing one and paralyzing another.[138] In 1963, Alabama police officers were captured on video using fire hoses and dogs to disperse Black protestors who were marching against segregation and racial discrimination.[139] In 1964, an off-duty white officer shot and killed a black teenager in Harlem, causing a six day riot in New York.[140] In 1965, riots erupted in Los Angeles, California in response to the police beating a young

[133] *Id* at 247.
[134] *Id* at 248.
[135] *Id* at 190.
[136] United States Census Bureau. Quick Facts.
[137] Fyfe, James. *Readings on Police Use of Deadly Force*. Police Foundation. 1982. Pg. 61 retrieved March 2023.
[138] Rice, Keith. "The Death of Ronald Stokes and the Birth of Black Power in Los Angeles." *CSU Northridge University Library*. Apr. 5, 2022. Retrieved March 2023.
[139] Library of Congress. "The Civil Rights Act of 1964: A Long Struggle for Freedom, Birmingham, Alabama, Protests." Courtesy of CBS News.
[140] Kuiper, Kathleen. "Harlem race riot of 1964." *Britannica Encyclopedia.* Retrieved March 2023.

man, and his family, while effectuating an arrest for reckless driving.[141] In 1966, riots erupted in Detroit, Michigan in response to local police using numbers, tactical gear, and violence to intimidate civilians and prevent them from reporting their brutality and misconduct.[142] During the decisions that granted leniency to law enforcement violating the constitutional right of citizens, Black communities across the country were protesting the very abuse of authority the Supreme Court authorized. Groups of Black and white advocates called "Freedom Riders" traveled on regularly scheduled buses in the South for seven months to *test* the Supreme Court decision that declared segregated facilities unconstitutional.[143] One of the arrested Freedom Riders was future Senator John Lewis.

Pierson v. Ray (1967)

On September 13, 1961, a group of fifteen clergymen, three Black, were arrested and convicted under a Mississippi Code that made it unlawful to "congregate with others in public" and refusing to move when ordered to do so by police.[144] Trial evidence revealed that the clergymen undertook a "prayer pilgrimage" to promote racial equality, integration, and report to a church convention in Detroit.[145] While waiting at the train terminal, the clergymen entered into a "White Waiting Room Only" and were ordered by police to "move on." The clergymen replied they wanted to eat at the terminal restaurant and refused to leave.[146] Unbeknownst to the officers, the Supreme Court had held in *Boynton v. Virginia* that it is unconstitutional to discriminate based

[141] Jerkins, Morgan. "She Played a Key Role in the Police Response to the Watts riots. . ." *Time Magazine.* August 3, 2020. Retrieved March 2023.
[142] Matthew D. Lassiter and the Policing and Social Justice HistoryLab. "Detroit Under Fire: Police Violence, Crime Politics, and the Struggle for Racial Justice in the Civil Rights Era" (University of Michigan Carceral State Project, 2021). Retrieved March 2023.
[143] *Morgan v. Virginia*, 328 U.S. 373 (1946) and *Boynton v. Virginia*, 364 U.S. 454 (1960).
[144] *Pierson*, 386 U.S. at 549.
[145] *Id* at 551.
[146] *Id* at 552.

on race in interstate commerce,[147] which caused the reversal of *Thomas v. Mississippi*, rendering the segregation laws unconstitutional.[148] The officers argued that they should not be held liable because they acted in good faith and had probable cause in making an arrest under a statute they believed to be valid.[149] The officers had a good faith belief and probable cause to believe that by the presence of black clergymen in a white waiting room, violence or disruption could ensue and thus the arrest was warranted. Therefore, the court held that the defense of good faith and probable cause is applicable to actions under 42 U.S.C. § 1983.[150] The case was reversed and remanded for a jury to determine whether they believed the officer's defense of good faith regarding wrongful arrest and false imprisonment.[151] The reasoning behind this decision will be analyzed in the next section, but these cases exemplify times where the Supreme Court declined to create accountability for civil rights violations involving law enforcement.

Tennessee v. Garner (1985)

In 1985, the Court held that the use of deadly force—constituting a seizure under the Fourth Amendment—is constitutional to apprehend felons who are believed to be dangerous.[152] In *Garner*, officers responded to what they believed was a potential burglary. Garner, the possible suspect, fled the yard of the suspected breaking in and stopped at a six-foot fence. Officer Hymon called out "police, halt," and took a few steps towards Garner.[153] Garner began to climb over the fence, and "convinced that if Garner made it over the fence he would elude capture," Hymon shot Garner in the back of the head. Garner died at the hospital.[154] Garner's father brought an action

[147] *Id* at 457.
[148] *Id* at 549.
[149] *Id* at 555.
[150] *Id* at 557.
[151] *Id.*
[152] *Tenn. v. Garner*, 471 U.S. 1 (1985).
[153] *Id* at 3.
[154] *Garner*, 471 U.S. 1.

under the Fourth, Fifth, Sixth, and U.S. Const. amend. VIII.[155] The Supreme Court ruled that where the officer has probable cause to believe that the suspect poses a threat of serious, physical harm to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force.[156]

Scott v. Harris (2004)

In 2004, the Supreme Court extended qualified immunity to violations of the Fourth Amendment, provided the use of force is "objectively reasonable."[157] In *Scott*, a deputy engaged in a high-speed pursuit of a driver, rear ended the bumper causing a crash, thereby rendering the driver quadriplegic. Deputy Scott concluded that he was entitled to qualified immunity.[158] In order to determine whether Scott was entitled to immunity, the court had to determine whether Harris' Fourth Amendment rights were violated. Using *Garner*, the Court determined that the use of force used by Deputy Scott was reasonable in light of the totality of the circumstances.[159]

There had been no support in American law for an affirmative defense of qualified immunity until the latter part of the 20th century. The timing of the defense indicates an intentional effort by the Supreme Court to avoid assigning liability when force is used against "noncompliant" Black citizens. One might conclude when States were permitted to discriminate, prior to the Civil Rights Act of 1964, there was no need to hold law enforcement liable for violence against citizens because *everyone* was involved in inflicting violence onto Blacks. However, once that behavior no longer became lawful, appointed Supreme Court Justices created a logically flawed outlet for police violence to go unchecked. The inescapable conclusion is that the deprivation of human and

[155] *Id* at 5.
[156] *Id* at 11.
[157] *Scott v. Harris*, 550 U.S. 372, 376 (2007).
[158] *Id* at 377.
[159] *Id* at 384.

constitutional rights ***is*** deeply rooted in American history and tradition that was never essential to the Nation's scheme of ordered liberty. This is not an attack on the potential good will of those who serve as officials under the color of law. It is uncomfortable for many people to talk about some of the unpleasant truths of how the United States has treated people of color in the past. Thankfully, "the rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible."[160] Some of the most important constitutional decisions have overruled prior precedents, and those cases so happen to include the increase of protections for Black Americans.

[160] *Memphis v. Overton*, 216 Tenn. 293, 392 S.W.2d 98 (1965).

"Doctrine of *Stare Decisis*"

In appropriate circumstances, the Supreme Court must be willing to reconsider and overrule constitutional decisions, if necessary.[161] *Brown v. Board of Education*, prohibiting segregation by race in public schools because "separate" is not "equal." This decision overturned *Plessy v. Ferguson*. Additionally, *West Virginia Bd. of Ed. v. Barnette*, provided that public school students cannot be compelled to salute the flag in violation of sincere beliefs.[162] This overturned *Minersville School Dist. v. Gobitis*, which allowed public schools to require salute to the American flag as a condition of their attendance.[163] As the decision to overrule a previous case is not a decision to be made lightly, there are five factors the court will weigh: the nature of the error, the quality of the court's reasoning, the "workability" of the objectively reasonable standard, the disruptive effect on other areas of law, and the absence of concrete reliance.[164] These five factors all weigh in favor of overruling *Pierson* and *Graham.*

The Nature of the Error: Fundamentally Erroneous and Improper

Pierson v. Ray (1967)

In April 1967, the Supreme Court held that officers may make an arrest without probable cause so long as they have a good faith belief in the arrest, vis a vis *Pierson v. Ray*.[165] Rather than decide on a remedy, the Court affirmed a defense and remanded the case to be decided on whether a jury believed that the officer reasonably believed in good faith the arrest was constitutional. The problem with this course of action is rooted in the timeline and facts of the related cases and statute.

[161] *Dobbs*, 2263.
[162] *Id.*
[163] *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).
[164] *Dobbs*, 2265.
[165] *Pierson*, 386 U.S. at 557.

The reasoning in *Pierson* was rooted in the reversal of *Thomas v. Mississippi*, but *Thomas* had not been adjudicated at the time the *Pierson* parties were arrested.

Thomas involved a case of fifteen Freedom Riders that arrived via bus in Jackson Mississippi May 24, 1961 and were arrested for disorderly conduct.[166] *Thomas* was reversed four years later with no opinion or guidance as to how to interpret Mississippi Code to be in line with the Fourteenth Amendment.[167] Essentially, it seems you cannot discriminate against patrons engaging in interstate commerce, such as traveling via bus or train. However, the Supreme Court did not issue an opinion, but simply decided that the decision by Mississippi courts should be reversed. Mississippi Supreme Court then released the defendants with $100.00 for their court costs. At no point was there a discussion about how the police were to engage with black citizens or interpret what the law meant after the enactment of the Civil Rights Act of 1965.[168] In the absence of a written opinion, there was no explicit guidance of "how to" or "what to avoid" by doing a thorough analysis of the facts that lead to arrests in *Thomas.* By failing to clarify in *Thomas* or *Pierson* what constitutes a lawful arrest, the Court fostered ambiguity and judicial inconsistency.

The clergymen in *Pierson*, also Freedom Riders, were arrested September 13, 1961. **At the time of the arrest, Thomas had not been decided and the Mississippi law had not been overturned**. This means that at the time the *Pierson* plaintiffs were arrested, it was still lawful to discriminate based on race. Thus, the officer was not relying on good faith of the law but was instead acting under explicitly authorized authority in Mississippi law that warranted an arrest for "disorderly conduct" when trying to remove Black patrons from a method of transportation. Even though testimony indicated the clergymen were arrested for refusing to comply with an arbitrary

[166] *Thomas v. State*, 252 Miss. 527, 540 (Feb. 1964).
[167] *Thomas v. Mississippi*, 1965 US LEXIS 1359 (Apr. 26, 1965).
[168] *Thomas v. State*, 252 Miss. 527 (May 1, 1965).

request by an officer to "move along," there was a reasonable "good faith belief" that the officers request was constitutional.[169] At the time, it was still lawful to make arbitrary requests against Black patrons. The defense of "good faith" is fundamentally erroneous in this instance because there is no way the arresting officers in *Pierson* could have been relying on anything other than a law that permitted the seizure of a persons without adequate probable cause. At this juncture, the Court could have used their power to draw a line between what level of abuse of power is constitutionally permissible and what is not. However, in *Thomas,* the Court simply said "reversed," a mere four months before the opinion in *Pierson* was issued. In *Pierson*, not only did the Court create an affirmative defense of "good faith," but the Court also contradicted itself, chipping away at the Fourth Amendment in the process. In *Beck v. Ohio*, the Court said, "good faith on the part of the arresting officer is not enough.[170] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police."[171] Notwithstanding, *Pierson* was decided, and the protections of the Fourth and Fourteenth Amendment are, in fact, evaporating.

Graham v. Connor, (1989)

November 12, 1984, Dethrone Graham felt the onset of an insulin reaction and went into a convenience store to purchase orange juice in Charlotte, North Carolina.[172] Due to a long line, Graham left *with* his friend Berry, *in* Berry's car. They were followed by Officer Connor who felt "suspicious that something was amiss."[173] Half a mile later, the officer made an investigative stop

[169] *Pierson v. Ray*, 352 F.2d 213 (5th Cir. Oct. 1965).
[170] *Henry v. United States*, 361 U.S. 98, 102 (1959).
[171] *Beck v. Ohio*, 379 U.S. 89, 97 (1964).
[172] 42 U.S.C. § 1983.
[173] *Id.*

with no evidence of probable cause. Berry told the officer that Graham was suffering from a sugar reaction and the officer ordered the two to wait while he called for backup.[174] Graham got out of the car and passed out. Backup arrived, rolled Graham to his side, and placed him in handcuffs, despite Berry's pleas that Graham just needed sugar.[175] Graham was verbally taunted, shoved face down onto the hood of the police vehicle, and thrown headfirst in the police car.[176] After refusing to allow Berry to give Graham orange juice, Graham was driven home and released. At some point, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, injured shoulder, and a persistent ringing in his right ear.[177] An action was brought under 42 U.S.C. § 1983 and the Fourteenth Amendment for excessive use of force. The Fourth Circuit of Appeals affirmed the finding that the amount of force was appropriate under the circumstances, based on the good faith effort to maintain and restore order in face of a potentially explosive situation.[178] The Supreme Court remanded the action to be reevaluated under the "proper" Fourth Amendment standard of "objectively reasonable.[179]

The decision in *Graham* is fundamentally erroneous due to the initial seizure of Graham and his passenger without probable cause. When a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.[180] Temporary detention of persons during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of this person within the meaning of the Fourth Amendment.[181] The decision to stop an automobile is reasonable where the police of probable cause to believe that a

[174] *Id* at 389.
[175] *Id*.
[176] *Graham v. Connor*, 490 U.S. 386, 388 (1989)
[177] *Id* at 390.
[178] *Id*.
[179] *Id* at 399.
[180] *Terry v. Ohio*, 392 U.S. 1, 16 (1968).
[181] *Whren v. U.S.*, 517 U.S. 806, 809-810 (1996).

traffic violation has occurred.[182] Other than observing Graham leaving a convenience store, Officer Connor had no specific or articulable facts that criminal activity was afoot at the time he decided to follow the vehicle Graham was in. The officer did not observe a traffic violation when the vehicle was stopped, nor was there evidence of criminal activity when Graham was handcuffed while unconscious. The record indicates that officers did not tend to Graham's aid with concern for his medical well-being, but rather shoved his face into the hood of the car and threw him headfirst into a patrol vehicle.[183] It was unnecessary for the court to remand for further analysis. It was abundantly clear that officers had no probable cause for the initial stop, and there was no need to determine if the force used thereafter was reasonable.

The Quality of Reasoning is Weak, Exceptionally Flawed, and Contextually Ambiguous.

Pierson

The *Pierson* decision is erroneously subjective, contextually ambiguous, and catastrophic to the concept of 'liberty' in America as it applies to citizens and their interactions with the police. At the time of the decision, segregation in schools had been declared unconstitutional, communities across the country were struggling with the transition, and the Supreme Court had enabled the uncertainty by muddying the expectation of probable cause with "good faith." The timeline between the arrests of *Thomas* and *Pierson* demonstrates that both arrests were made before the Court rendered any opinion about the lawfulness of the Mississippi statute. The referenced analysis by the Court—as to whether the officers believed the statute was valid when they made the arrest—is irrelevant because there was no challenge to the arrest in the four months between the arrests of the Freedom Riders. Rather, the Court made the asinine decision to provide

[182] *Id* at 810.
[183] *Graham v. Connor*, 490 U.S. 386, 389 (1989).

the defense of "good faith" in actions brought against law enforcement. Both parties in *Thomas* and *Pierson* were arrested in 1961. The Supreme Court reversed *Thomas* on May 1 of 1965. The Court issued an opinion of *Pierson* April of 1967. It is impossible for the Court to expect that any impact their decision in *Thomas* would have any impact on an arrest that happened *before* their reversal was effective. Had the Court analyzed the facts at issue from the context of what was permissible in 1961, the Court would have been able to recognize that the arrests in *Pierson* were not predicated on sufficient probable cause and that a defense for said action is unnecessary. When the clergymen were arrested in 1961, Freedom Riders were actively and intentionally working to force southern states to comply with federal law and end discrimination on busses and trains.[184] Yet, the Supreme Court failed to recognize their opportunity, and lives were taken as a consequence.

Notwithstanding the Civil Rights Act, protests against police violence continued. In 1967, Newark Police Department shot and killed 26 protestors, firing more than 12,000 bullets[185] and in Detroit, the police killed 47.[186] In 1968, South Carolina Highway Patrol shot at a group of protestors.[187] In 1969, Omaha Police shot at a group of teenagers and killed Vivian Strong.[188] In 1970, Mississippi Highway Patrol shot at a group of student protestors.[189] Between 1973 and 1974, police shot 320 citizens, 79% of whom were Black; there were approximately 30% fatalities.[190]

---

[184] Fairfax, Lisa M. "Social Activism Through Shareholder Activism." 76 Wash & Lee L. Rev. 1129, 1132. Summer, 2019.
[185] Yi, Karen. "Remembering the 26 people who died in the Newark Riots." *True Jersey*. Jul. 12, 2017. Retrieved March 2023.
[186] Matthew D. Lassiter and the Policing and Social Justice HistoryLab. Detroit Under Fire: Police Violence, Crime Politics, and the Struggle for Racial Justice in the Civil Rights Era (University of Michigan Carceral State Project, 2021). Retrieved March 2023.
[187] Zinn Education Project. "Feb. 8, 1968: Orangeburg Massacre." *This Day in History.* Retrieved March 2023.
[188] Wisch, Robyn. "Remembering Vivian Strong." *Nebraska Public Media*. June 19, 2009. Retrieved March 2023.
[189] Wyckoff, Whitney Blair. "Jackson State: A Tragedy Widely Forgotten." *National Public Radio.* May 3, 2010. Retrieved March 2023.
[190] Fyfe, James. *Readings on Police Use of Deadly Force*. Police Foundation. 1982. Pg. 45 and 48 retrieved March 2023.

All but the incidents in Detroit were ruled "justifiable homicide" based on police policies that permit whatever force necessary to make the arrest.[191] Police were responsible for the largest figures on number of citizens killed in 1973 and 1974, substantially disproportionate of those sentenced to death after a criminal conviction.[192]

Graham

The *Graham* court reasoned that the "reasonableness" of the officers' actions ought be considered because officers are tasked with making split-second decisions in tense, uncertain, and rapidly evolving situations.[193] Reasonableness in an excessive force case must be "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.[194] Officer Connor saw a Black person leaving a store quickly and thought to follow the car.[195] The situation was escalated to "potentially explosive" by Connor's reluctance to believe that Graham was diabetic, suffering from an insulin reaction.[196] Graham did not attempt to flee, did not attempt to swing on or attack the officers, nor was Graham communicating with profanity or obscenities. Graham, and his friend Berry, were pleading for orange juice.[197] Graham was unconscious when he was handcuffed.[198] Graham was handcuffed when officers began to use force and there are no facts that indicate that any officer did not have control of the situation. The argument for further analysis is unnecessary because no facts supported the need to use force. The rationale for denying recovery under § 1983 is substantially flawed because the error was blatant and obviously unreasonable. There were no facts that

[191] *Id* at 56.
[192] *Id* at 88.
[193] *Graham v Connor*, 490 U.S. 386, 397 (1989).
[194] *Id* at 399.
[195] *Id*.
[196] *Id* at 388.
[197] *Id* at 389.
[198] *Id*.

indicated Officer Connor should not believe that Graham was actually suffering from a sugar deficiency. There were no facts that indicated Graham, or Berry, committed a criminal offense inside the convenience store, or while operating a motor vehicle on a public highway. It would only be reasonable to make such assumptions if there are embedded racial predispositions that one holds about the quality and character of people of color. The "reasonable" standards created therein created more ambiguity and inconsistency, making it impossible to seek redress for a violation of civil rights.

The "good faith" standard is vague and "objectively reasonable" is inherently standardless.

As previously mentioned, there was no reason for the arresting officers in *Pierson* to rely on good faith because there was no challenge to the law at the time of the arrest. Furthermore, the Court had previously provided that "good faith on the part of the arresting officer is not enough."[199] Under the Fourth Amendment, probable cause—amounting to more than bare suspicion but less than evidence that would justify a conviction—must be shown before a search or seizure can take place, or a warrant may be issued.[200] Probable cause may not be established simply by showing that the officer who made the challenged arrest or search subjectively believed he had grounds for his actions.[201] Subjectivity is based or influenced by personal decisions or feelings.[202] "If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate."[203] The Fourth Amendment protects against unreasonable searches and seizures. If an officer is able to use personal experiences to establish a level of reasonableness, then there is no standard of reason because it would truly "depend" on the facts at play and the perspective of the

[199] *Henry v. United States*, 361 U.S. 98, 102 (1959).
[200] Black's Law Dictionary. *Thomson Reuters*, 11th ed. June 2019. "Probable cause," pg. 1454.
[201] *Id*.
[202] Merriam-Webster's Collegiate Dictionary (10th ed.). 1999.
[203] *Beck*, 379 U.S. at 97.

officer involved. Yet, in *Pierson*, the Court relied on the officer's "good faith" to provide an affirmative defense. In this case, "good faith" is not only erroneous, but subjective. It was taken further with a "reasonable" standard of deadly force. It was taken too far with "objectively reasonable" use of force. The line between what level of force is permissible has proven to be impossible to draw with precision.

When interpreting the quality of the phrase "objectively reasonable," one must account for the context to which it is used. Merriam-Webster's dictionary states that "objective" means "expressing or dealing with facts or conditions as perceived *without* distortion by personal feelings . . . or interpretations."[204] "Reasonable" is defined as "being in accordance with reason."[205]

In the context of the Fourth Amendment, "reasonableness" may be determined weighing the "facts and circumstances [they're confronted with, with no] regard to underlying intent or motivation. The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene."[206] The "objectively reasonable" standard is thereby unworkable because it creates inconsistency which causes confusion and loss of faith in governmental institutions. If what is considered "objectively reasonable" has individual and independent perspective or significance, there is no evenhanded decision making contributing to the actual or perceived integrity of the judicial process. Law enforcement themselves are thus unclear as to what level of force is authorized, which can cause additional confusion when qualifying the consequences of police use of force.

[204] Merriam-Webster's Collegiate Dictionary (10th ed.). 1999.
[205] *Id*.
[206] *Graham,* 490 U.S. at 396.

From 1980 to 2018, the National Vital Statistics System did not report 17,000 deaths, estimated to account for half of deaths caused by police.[207] Not only did Black people represent the greatest number of under-reported deaths, but the analysis of the data also demonstrates that Blacks and Hispanics are killed at a rate 3-5 times higher than that of white people.[208] Data regarding police related deaths have been misclassified and or under-reported yet the rate of violence persists. One could argue that medical examiners, along with police officers, don't really know when an act of force that causes death is a clear 'homicide' or one that is 'justified.' Notwithstanding, the amount of force an officer has been allowed to use against a citizen of color has expanded from an arrest to serious bodily injury and death.

On October 3, 1974, Memphis Police Department in Tennessee responded to an unoccupied residence on a suspected burglary call.[209] An officer intercepted a fifteen year old boy who attempted to flee by jumping the fence. The officer fired at the upper part of his body, as he was trained, and shot Edward Garner in the head. The officer had been taught it was proper to kill a fleeing felon rather than allowing the felon to escape.[210] It was permissible in the State of Tennessee, and at least twenty other states, to use whatever force is necessary to apprehend a suspected felon rather than requiring the police to use creative investigative or adequate communication strategies to solve crimes.[211] Garner's estate brought an action against the Memphis Police Department. In 1979, the Sixth Circuit Court of Appeals affirmed the finding that the individual defendants acted in good faith reliance on Tennessee law which allows an officer to

[207] The Lancet. "Fatal police violence by race and state in the USA, 1980-2019: a network meta-regression." Vol. 398, Issue 10307, P1239-1255, October 02, 2021. Retrieved March 2023.
[208] *Id*.
[209] *Garner v. Memphis Police Dep't*, 600 F.2d 52, 53 (6th Cir. June 18, 1979).
[210] *Id*.
[211] *Tenn. V. Garner*, 471 U.S. 1, 16 (1985).

use all the necessary means to effect an arrest.[212] In the opinion by the Supreme Court in 1985, the Court said "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally ***unreasonable***; a police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.[213] However, there are circumstances where deadly force is constitutionally reasonable to prevent a felon from escape: when the officer has probable cause to believe the suspect poses a threat of serious physical harm, to the officer or others; if the suspect threatens the officer with a weapon; or, if there is probable cause to believe that a crime has been committed involving the infliction of serious physical harm.[214]

On March 29, 2001, Victor Harris was clocked driving 73mph in a 55mph zone.[215] Deputy Reynolds attempted to conduct a traffic stop, but Harris, driving on a suspended license, "scared and wanting to get home," refused to stop.[216] Reynolds radioed dispatch and reported that he was in pursuit of a fleeing vehicle but did not describe the underlying offense.[217] The facts of the case were disputed, but according to Harris, Harris' vehicles came into contact with Deputy Scott in a parking lot before reaching the highway. Scott then joined the pursuit, taking over as lead, and requested approval from his supervisor to make physical contact with Harris' vehicle.[218] Supervisor Fenninger said over the radio, "Go ahead and take him out. Take him out."[219] Scott hit Harris' bumper causing the vehicle to travel down an embankment and crash. As a result, Harris was rendered a quadriplegic.[220] Reynolds and Scott were Coweta County Sheriff's Deputies,

[212] *Garner v. Memphis Police Dep't*, 710 F.2d 240 (6th Cir. June 16, 1983).
[213] *Garner*, 471 U.S. at 11.
[214] *Id*.
[215] *Harris v. Coweta Cnty.*, Civil Action File No. 3:01-CV-148-WBH, 2003 U.S. Dist. LEXIS 27348, at *2 (N.D. Ga. Sept. 25, 2003).
[216] *Id* at 2.
[217] *Id* at 3.
[218] *Id* at 4.
[219] *Id* at 5.
[220] *Id* at 6.

trained by the State of Georgia. Coweta County does not provide any training involving high-speed pursuits or the use of deadly force other than with firearms.[221] The Court of Appeals concluded that the law of the state required officers to give "fair notice" before ramming a vehicle under those circumstances, and that Scott was not entitled to qualified immunity.[222] The Supreme Court disagreed, resolving two other questions instead: whether the officers conduct violated a constitutional right and whether the right was clearly established in light of the specific context of the case.[223]

To answer the former, it must be decided whether Scott's actions constituted deadly force under *Garner* preconditions.[224] Since the preconditions were not met in this case, Scott's actions were ***per se unreasonable***.[225] However, since *Garner* said nothing about police chases or a police car bumping a fleeing vehicle, it doesn't matter if his actions constituted "deadly force," all that matters is whether is actions were "reasonable."[226] It was Harris who placed himself in danger by unlawfully engaging in a reckless, high-speed chase that ultimately confronted Scott with two evils.[227] The Supreme Court found little difficulty in concluding that Scott's actions were ***reasonable***.[228] Thus, the Court found Scott was entitled to qualified immunity and the Court of Appeals judgement was reversed.[229]

The *Scott* Court determined that Harris placed the public in danger by choosing to flee and causing a high speed chase. What else could the officer have done? Arguably, there were many

[221] *Id* at 7.
[222] *Scott*, 550 U.S. at 376.
[223] *Id* at 377.
[224] *Id* at 382.
[225] *Id*.
[226] *Id* at 383.
[227] *Id* at 384.
[228] *Id*.
[229] *Id* at 386.

options. Based on his training, Scott could have used a speaker to demand that Harris to pull over, indicating that the police would force him to pull over. Scott could have let the officer who engaged the pursuit take the lead since that officer observed the probable cause giving authorization for the stop. Scott could have orchestrated a blockade to attempt an arrest rather than causing physical contact with the vehicle.

Why is an officer capable of effectuating his duties only upon the infliction of force? More importantly, why would a police officer be immune from the consequences of his own mistakes, or abuse of authority? The *Scott* court found Scott's actions reasonable even though the actions were not authorized by state statute. Thus, a jury would not need to determine whether Scott was entitled to immunity because it was abundantly clear Scott had no other option.

The application of "objectively reasonable" requires "careful attention" to the facts and circumstances of each case, plus "careful balancing" of the nature and quality of the intrusion and government interests.[230] Some officers are capable of deescalating situations involving persons of color, some are not. Some are capable of outrunning a suspect and apprehending them without incident. Some can even apprehend a mass-murder suspect and provide him with a meal. It is very possible for it to be unreasonable to use a firearm to force compliance of a suspect that police fear is capable of evading arrest. It is very possible for the expectation of those who carry badges and authority to be increased to that of a person worthy of respect from the community, rather than one who commands it through force and intimidation. The continuous provision of nuance to the rule doesn't make the standard more rigorous, it pushes the finish line of justice further out of reach. Whether or not an officer's actions were "objectively reasonable" is inherently standardless.

[230] *Graham*, 490 U.S. at 396.

On its face, it would seem appropriate to accept the use of deadly force against citizens if they're in the commission of committing a felony, posing a risk of injury to an innocent person, or are involved in a crime that includes the use deadly force. In practice, police have learned to indulge in rhetoric that sounds plausible but is later contracted with video footage or witness testimony. Plain clothes officers fired 50 rounds at three men, killing Sean Bell because an officer "heard, 'get my gun."[231] Officers shot Amadou Diallo 19 times, firing 41 shots, because officers suspected that the wallet Diallo was reaching for was a weapon.[232] Raymond Tensing shot and killed Samuel DuBose because he was "being dragged by DuBose's vehicle." Body camera footage clearly demonstrated that Tensing's version of the shooting was incorrect.[233] Michael Slager claimed that Walter Scott was "coming towards him with a taser" when in reality, Slager fired multiple shots while Scott was running away.[234] 17-year old Erik Cantu was shot four times, charged with evading detention and assault on an officer until body-camera footage revealed the officer was in the wrong.[235] Stephon Clark was shot ten times because officers mistakenly perceived Clark to have a weapon.[236] None of the incidents involved the commission of a felony. However, this "master narrative" allows police officers to avoid blame while reinforcing the notion that Black people are dangerous.[237]

[231] Stanford Libraries. Say Their Names: Green Library Exhibit supporting the Black Lives Matter movement. Retrieved April 17, 2023.
[232] Solis, Jorge. "Who was Amadou Diallo and why is the story of his death still relevant?" Newsweek. June 18, 2020. Retrieved April 17, 2023.
[233] Harvard Law Review. Recent Event. The Shooting of Samuel DuBose: University Police Officer Shoots and Kills Non-University-Affiliated motorist During Off-Campus Traffic Stop. 129 Harv. L. Rev. 1168. February 2016. Retrieved April 17, 2023.
[234] *United States v. Slager*, No. 2:16-cr-00378-DCN, 2018 U.S. Dist. LEXIS 6382, at *3 (D.S.C. 2018)
[235] John Quinones, Erica Y. King, Meredith Deliso, and Sabina Ghebremedhin. Family of Texas teen shot by police in McDonald's parking lot speaks out. ABC News. October 26, 2022. Retrieved April 17, 2023.
[236] Office of the California Attorney General. Press Release. Report of Attorney General Regarding Criminal Investigation into the Death of Stephon Clark. March 5, 2019. Retrieved April 17, 2023.
[237] Pipkins, Martel A. Race and Justice. "I Feared for my Life:" Law Enforcement's Appeal to Murderous Empathy. 2019, Vol. 9(2) 180-196, pg. 184. Retrieved April 17, 2023.

Despite all the training, specialized qualifications, experience on the job and what they've learned from their seniors, some police officers have not yet learned how to engage with the black community without the use of violence. There is no consistency regarding what level of force an officer is permitted to use against a suspect because the standard is based on the individual perspective of the officer. There is no way to 'fact check' whether a person was truly in fear in that moment because the perspective of each individual officer will be different. There is no way to prove whether someone actually was feeling fear, or if they felt empowered. The expectation of "objectively reasonable" force presents a wide gray area and is filled with ambiguity. It is a bold assumption of the Court that "objective reasonableness" is adequate to protect the Fourth Amendment.

Monroe, *Pierson*, *Garner*, *Graham*, and *Scott* have led to dilution of the purpose of the Fourth Amendment, ignored the requirement of probable cause, distorted the expectation of privacy, disintegrated the meaning of due process, undermined the authority, and abrogated the impact of 42 U.S.C. § 5 of the Fourteenth Amendment.

First, the decision in *Monroe* was imprudent and erroneous. Immunity for municipalities was not proscribed by the Constitution or Congress, nor did legislatures intend to extend immunity to local governments. Second, the holding in *Pierson* chipped away at probable cause leading to *Garner* which disregarded the authority vested in Congress and protections of the people under the Constitution. Law enforcement officers may seize a *suspect*, not a felon, with no insight as to their racial biases or motivations, so long as in their perspective, the actions were reasonable considering the circumstances, ignoring the language of the Fourth Amendment and Fourteenth Amendment. It is constitutionally permissible for state actors to take a human life and they are immune from the consequences of their actions. By extending qualified immunity for flouted

violations of the human and civil rights, the Court's decisions have distorted the expectation of justice and diminished the capacity to seek redress under the First Amendment.

Reliance Interest in the License to Kill

Finally, it must be analyzed whether overruling *Pierson*, *Graham* or *Scott* would upend substantial reliance interests.[238] Traditional reliance interests arise where advance planning of great precision is most obviously a necessity.[239]

Quite frankly, adequately planning exactly how law enforcement or city officials ought to engage with persons that were once considered property is an obvious necessity. At no point in American history has there been a pause to stop and address the egregious condition and consequences of what slavery did—to the masters ***and*** to the slaves. The former were enabled with a conflated sense of superiority while the latter were belittled and degraded. The masters relied on the law to affirm their beliefs about their sense of superiority and when that got taken away, they took their frustration out on the formerly enslaved. The Government, even society, did not openly discuss exactly what the consequences would be if thousands of free persons were to be added into a society that was not used to treating those persons as human. Overruling the Court's decisions in cases involving racially motivated violence and qualified immunity would not upend traditional reliance interests because those interests were never considered.

As it relates to concrete reliance, the Court is ill-equipped to assess generalized assertions about the national psyche.[240] The opinions in *Pierson, Graham*, and *Scott* perceived a more intangible form of reliance because there is no constitutional right to qualified immunity. The

[238] *Dobbs*, 2276.
[239] *Id.*
[240] *Id.*

immunity itself is a qualified one that cannot fairly be enlarged without jeopardizing the privacy and security of citizens.[241] Whether or not a person is entitled to qualified immunity is not a concrete reliance because their immunity is tied to their 'objective reasonableness.'

Law enforcement agencies are not without the power, or internal counsel required to enact policies that are aligned with the protections of the Constitution. States are capable of allocating their funds towards appropriate and adequate training programs. Police do not need to be defunded, per se. They can, however, be properly trained and held accountable for wrongfully taking a life. There may be an impression that eliminating the doctrine of qualified immunity would adversely affect law enforcement and their ability to adequately do their jobs. When the military is in insurgency territory, their ethical rules draw the line at "First, do no harm. Over time, you will find ways to do what you have to do."[242] If a police officer is incapable of protecting or enforcing the law without taking the life of a citizen, they should be encouraged to find another line of work.

The American people's belief in the rule of law would be shaken if they lost respect for the Court as an institution that decides important cases based on principle, not "social and political pressures.[243] If the Court refuses to review their decisions regarding "objectively reasonable" and "qualified immunity," there are two loud messages that will ring throughout the community: the Court is run by the police and that Black lives are dispensable. There is an added danger that the public will perceive the decision as having been made under fire – but the court cannot allow their decision to be affected by any extraneous influences such as concern about the public's reaction

[241] *Jones v. Perrigan*, 459 F.2d 81, 83 (6th Cir. Apr. 26, 1972); *Henry*, 361 U.S. 98.
[242] Shinn, Theodore K., FMI 3-24.2, C-9, "Tactics in Counterinsurgency and Military Ethics in Counterinsurgency: A New Look at an Old Problem." *Headquarters Department of the Army*. Fort Leavenworth, Kansas, 2007. Retrieved March 2023.
[243] *Dobbs*, 2278.

to their work.[244] A precedent of the Court is subject to the principles of *stare decisis* under adherence to precedent is the norm, but not an inexorable command.[245] That is not how *stare decisis* operates.[246]

Conclusion

It wasn't until Justice Thurgood Marshall joined the bench that the Supreme Court had an inkling as to what it's like being a Black person in America. We were kidnapped from our homeland, placed in chains, taken to a foreign land, beaten to submission, sold, forced into labor, beaten, raped, chased, or killed if we sought to escape, and fought in a war for a country to recognize us as humans with rights. Afterwards, we were taunted by Klansman, murdered by lynch mobs, discriminated by private and public business owners, when we built our own, it was burned down, when we protested, we were met with water hoses and dogs, and when our leaders spoke up, they were assassinated. Now, Black parents are giving their children "the conversation," because Heaven forbid, your hands are not visible during a traffic stop or you say the wrong thing to the wrong officer. If that happens, because of cell phones and body cameras, the world may be able to watch as you cry out for your mother and take your last breath and then you *might* receive justice. It's almost as if people don't understand police brutality unless they watch it in its most aggressive form.

Qualified immunity, as a Court-created phenomenon was built on several foundational cases, but the decisions are flawed. When *Pierson* was decided, there was no reason to provide for the defense of "good faith" because there was no altered faith at the time of the arrest. The rationale was contextually flawed, and the Court missed a prime opportunity to address racially motivated

[244] *Henry*, 361 U.S. 98.
[245] *Henry*, 361 U.S. 98
[246] *Dobbs*, 2279.

violence and the scope of police liability. When *Graham* was decided, there was no reason for the officer to use any amount of force because there was no probable cause for the stop. The standard of "objectively reasonable" is an unproductive oxymoron. The error lies in the attempt by the Court to create a standard to which police are to abide by when in practice, creates a license to kill unarmed, "potentially threatening" citizens. The standard is unworkable, and the consequences significantly outweigh any benefit of protecting law enforcement who abuse and misuse their power at the expense of the people. The Court has the power to remedy its mistakes, and the decisions in *Monroe*, *Pierson*, and *Graham* are a few examples of places to start.

We, the people, elect Congressional and Executive leaders who, in turn, appoint Justices cloaked with responsibility of interpreting the laws against the principles of the Constitution. It could be said that for years, we have operated with a fixed mindset. *The laws of the land are unchangeable. We have to live with, we must settle, with the proposed intent of those who built their wealth on the backs of slaves.* This fixed mindset has stalled progression in this country while politicians line their pockets, and the people are left without. On the other hand, a growth mindset allows for change. It is possible for all of humanity to be propelled into a more profitable state. It is possible for a community to reflect on where they have been to adequately direct where they are headed. It is possible to acknowledge a mistake, apologize, and inquire on how to make it right. That requires asking the tough questions, thinking about the tough answers, and using facts and sound logic to support your reasoning.

The issue of qualified immunity, in relation to police brutality, presents a profound moral question, just like abortion. The costs of an abortion are not so astronomical to place a young woman into debt. Courtesy of modern technology, the procedure can now be done safely. But there are also groups of persons who believe that terminating a pregnancy is taking the life of a child.

The moral questions surrounding abortion and qualified immunity are essentially one in the same: where do we draw the line when it comes to taking a "life?" If I had to choose between my access to an abortion and my ability to survive a traffic stop by law enforcement, without hesitation, I would choose the latter.

It is imperative that someone in the federal government, preferably the Supreme Court, take the time to look at where we were, where we are, and where we want to be. While drafting this paper, I have come across three nauseating cases of excessive police force and violence against persons of color. In **November of 2022**, Rasheem Carter was beheaded and mutilated in Jefferson County, Mississippi.[247] On **January 7, 2023**, five *Black* police officers in Memphis, Tennessee brutally beat 29-year-old Tyre Nichols to death.[248] And in **January 19 of 2023**, Georgia State Police shot 13 bullets at 26-year-old activist Manuel Esteban Páez Terán while seated on the ground with his hands raised.[249] These are not remnants of a past. This is the present.

The Constitution confers rights and liberties to its citizens. Federal law provide that citizens may seek redress when they have been deprived of their constitutional rights. American history and tradition is deeply rooted in the deprivation of rights of persons of color, which is all the more reason to overturn the courts previous decisions. Precedent is fatally flawed by refusing to acknowledge the impact of racially motivated discrimination. The Court can, and should, review their standing decisions that allow law enforcement to kill citizens with no recourse. Based on the reasoning in *Dobbs*, it is something the Supreme Court is capable of doing. The purpose of this

[247] Dakin And one, Kevin Conion, and Ryan Young. "The family of Rasheem Carter, a Black man found dead in Mississippi, alleges he was murdered. Here's what we know." CNN. March 15, 2023. Retrieved March 2023.
[248] Caldwell, Travis and Ray Sanchez. "5 former Memphis police officers charged in Tyre Nichols' death plead not guilty." CNN. Feb. 17, 2023. Retrieved March 2023.
[249] Antoñanzas, Miguel Angel. "Autopsy commissioned by the family of Manuel Páez Terán reveals that he died with his hands up." CNN Español. Mar. 11, 2023. Retrieved and translated March 2023.

paper is to implore the Supreme Court to find an opportunity to right an egregious wrong. The Founders of this Nation brought us to America, and it was later decided that we should be entitled to the rights and privileges of this land. At some point, we must address, at bare minimum acknowledge, the system that perpetuates racism and oppression. Otherwise, it will never stop. If the system cannot be changed, then it must be destroyed.