

Testimony of Judge Jon O. Newman
Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the Committee on the Judiciary of the United States House of Representatives
“Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity”
March 31, 2022

My name is Jon O. Newman. I am a senior judge of the United States Court of Appeals for the Second Circuit. I have served as a federal judge for 50 years, nearly 8 years on the District Court for the District of Connecticut and more than 42 years on the Court of Appeals, of which I was Chief Judge for five years. Previously I was the United States Attorney for the District of Connecticut for five years.

I appreciate the Committee’s invitation to testify on the subject of qualified immunity and the broader topic of civil rights litigation reform. These subjects have been a major interest of mine for 44 years, ever since I first wrote about them in 1978,¹ and continued to be of interest while I presided at the trial of more than 30 police misconduct cases as a District Judge. I testified on these subjects before this very Subcommittee on May 5, 1992, at the invitation of then Chairman Don Edwards.²

My testimony today makes two suggestions for strengthening section 1983 of Title 42, the basic statute authorizing civil lawsuits for actions taken under color of law that violate the Constitution. My suggestions are : (1) create liability of an employer, usually a

¹ See Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Action*, 87 YALE L.J. 447 (1978).

² See Testimony of Judge Jon O. Newman, Hearings, “Federal Response for Police Misconduct,” Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives at 14 (May 5, 1992).

city, for the action of a public employee, such as a police officer, that denies any person a constitutionally protected right, and (2) authorize the United States, acting by the local United States Attorney, to initiate a civil suit under section 1983, or intervene in an existing suit, to remedy the denial of a person's constitutional rights.

I start with a few words about the defense of qualified immunity for police officers. This defense has been a contentious issue for decades. The defense is not contained in the Constitution, in section 1983, or in any federal statute. The phrase "qualified immunity" was first used by the Supreme Court in 1974 in *Scheuer v. Rhodes*,³ a rather late development, considering that the predecessor of section 1983 entered federal statutory law in the Civil Rights Act of 1871.⁴ *Scheuer* concerned a suit seeking damages from a governor and other state officials for the 1970 shooting deaths at Kent State University. *See id.* at 234. Interestingly, the Court articulated the defense, not to give the defendants protection, but to make sure they were not insulated from liability by the absolute immunity available to judges and legislators.⁵

The Supreme Court's first decision providing police officers with the defense that it had called "qualified immunity" in *Scheuer* was the 1967 case *Pierson v. Ray*.⁶ The Court relied on the availability of the defense at common law in actions for false arrest, together with the statement in *Monroe v. Pape*⁷ that section 1983 "should be read against the

³ 416 U.S. 232, 247 (1974).

⁴ Act of April 20, 1871, ch. 22, 42d Cong, 1st Sess. § 1, 17 Stat. 13.

⁵ *See* 416 U.S. at 248.

⁶ 386 U.S. 547 (1967).

⁷ 365 U.S. 167 (1961).

background of tort liability that makes a man responsible for the natural consequences of his actions.”⁸ Although *Monroe* had drawn from the common law a basis to *impose* liability on a public official, *Pierson* drew from the common law a *defense* to liability. In *Pierson*, the Court, following the common law, said that the defense to a section 1983 claim would be available where a police officer had probable cause for an arrest and acted in good faith.⁹

One problem with the defense of qualified immunity is that it is difficult for a jury to understand. After presiding at several police misconduct trials, I sent a questionnaire to jurors who had served in a number of such cases. Their responses (and the response rate was high for this sort of inquiry) revealed that the jurors had little, if any, understanding of the qualified immunity defense at all.¹⁰

Critics of the qualified immunity defense contend that it permits many violations of constitutional rights to go unremedied in lawsuits against police officers. Proponents of the defense contend that it is necessary to protect police officers from personal liability for making on-the-spot decisions that later appear to have violated a person’s constitutional rights. There is force to both arguments.

I suggest that the arguments about qualified immunity could be defused and section 1983 could be made an effective remedy for police misconduct by making two changes to the statute.

⁸ *Id.* at 187.

⁹ 386 U.S. at 557. For a more detailed account of the history and evolution of the defense of qualified immunity, see Jon O. Newman, *On Reasonableness: The Many Meanings of Law’s Most Ubiquitous Concept*, THE JOURNAL OF APPELLATE PRACTICE AND PROCESS 47-57, available at <https://journals.librarypublishing.arizona.edu/appellate/article/id/2208>.

¹⁰ See Note, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979).

1. The first needed change is to create liability of an employer, usually a city, for the action of a public employee, such as a police officer, that denies any person a constitutionally protected right, and (2) authorize the United States, acting by the local United States Attorney, to initiate a civil suit under section 1983, or intervene in an existing suit, to remedy the denial of a person's constitutional rights.

Congress has authority to authorize such employer liability under its power to enforce the Fourteenth Amendment,¹¹ because that amendment makes the provisions of the Fourth Amendment, which prohibits unreasonable arrests, unreasonable searches, and uses of excessive force, enforceable against the States through the Due Process Clause of the Fourteenth Amendment.¹²

There would be nothing novel about making municipal employers liable for the constitutional torts committed by police officers they employ. Cities are liable today under the ancient doctrine of *respondeat superior* for all sorts of torts committed by their employees. A city is liable, for example, when the driver of a garbage truck negligently injures a pedestrian. The irony is that the constitutional tort of violating a person's constitutional rights is the only tort, committed by a municipal employee, for which a municipal employer is *not* liable.

I recognize that in some cities, a contract between a city and a police union provides that the city will indemnify a police officer found liable in a lawsuit under section 1983. However, the jury in these cases does not know about that contract and will frequently find

¹¹ See Const. amend XIV, § 5.

¹² See *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

the officer not liable to avoid what they think will be the imposition of liability for damages on the officer. Creating municipal liability would make the police officer's municipal employer a defendant in the section 1983 suit, and inform the jury that the employer would be liable for any damages awarded.

I also recognize that under current section 1983 law, a city can be found liable for the constitutional torts of its employees in one extremely limited circumstance. Such municipal liability is now available only under the highly restrictive standard established by the Supreme Court in *Monell v. Department of Social Services*.¹³ The Court ruled that a city could be found liable for an employee's denial of a constitutional right if "action pursuant to official municipal policy of some nature caused a constitutional tort."¹⁴ So, to take a well known recent case, if a police officer uses the excessive force of a prolonged chokehold that results in the death of a person whom the officer has arrested, the officer's municipal employer is liable under *Monell* only if using a chokehold that causes death is an official municipal policy. Such a policy is highly unlikely ever to be proved. The restrictive *Monell* standard should be replaced by ordinary municipal liability. The municipal employer should be liable for a police officer's unconstitutional action taken under color of law simply because it employed the officer, just as that employer is liable today for every other tort its employees commit in the course of their employment.

If employer liability is established for the constitutional torts of public employees such as police officers, the issue would then arise as to the status of the defense of qualified

¹³ 436 U.S. 658 (2018).

¹⁴ *Id.* at 691.

immunity. One point would be clear. The defense would not be available to the employee's employer, whether local, city, or state. The Supreme Court ruled in *Owen v. City of Independence*,¹⁵ that the employer of an employee entitled to qualified immunity is not itself entitled to that defense.¹⁶

With employer liability established, the status of qualified immunity with respect to the employee would be subject to several possibilities:

The defense could be retained in its present form with the victim relying primarily on a lawsuit against the employer.

Or the defense could be somewhat narrowed by eliminating the component of good faith and making the defense available to the officer only where the officer's conduct was not clearly beyond constitutional limits. Such a narrowing would be similar to the statutory limitation on a federal court's authority to issue a writ of habeas corpus to a prisoner challenging a state court conviction. The habeas corpus statute provides that the writ may not be granted unless the state court's decision was "an unreasonable application of clearly established Federal law,"¹⁷ and the Supreme Court has ruled in *Lockyer v. Andrade*¹⁸ that the state court's decision must be not only erroneous and not only clearly erroneous, but even more unreasonable than that.¹⁹

¹⁵ 445 U.S. 622 (1980).

¹⁶ *Id.* at 638.

¹⁷ 28 U.S.C. § 2254(d)(1).

¹⁸ 538 U.S. 63 (2003).

¹⁹ *Id.* at 75.

Or the defense could be eliminated because the plaintiff would recover from the employer and have no need to seek recovery from the employee.

Or the liability of the employee itself could be eliminated, leaving the victim to rely solely on a lawsuit against the employer.

There is ample precedent in federal law for precluding a lawsuit against a public employee when a public employer is liable for a tort committed by a public employee. The Federal Tort Claims Act authorizes suit against the United States and precludes a suit against an employee of the United States.²⁰ The United States displaces the employee as a defendant in the lawsuit.

I take no position on any of these options. My first suggestion is to urge amendment of section 1983 by creating employer liability for constitutional torts committed by public employees.

2. A second needed change to section 1983 would be authorizing the United States, acting by the local United States Attorney, to have the discretion to bring a section 1983 suit on behalf of a victim of police misconduct or to intervene in a suit that the victim has already initiated. The United States Attorney would not be required to bring such a suit, or to intervene in an existing suit, but would simply have the discretion to do so in appropriate

²⁰ See 28 U.S.C. § 2679(b)(1) (A lawsuit against the United States for “the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee who act or omission gave rise to the claim,” and “[a]ny other civil action or proceeding for money damages arising or relating to the same subject matter against the employee or the employee’s estate is precluded.”).

circumstances. Again, the enforcement clause of the Fourteenth Amendment provides authority for Congress to make this change.

And, as with employer liability, there would be nothing novel about permitting the United States to bring a suit alleging denial of a person's protected rights. The United States can now bring a lawsuit to prevent denial on account of race or color of a person's right to vote,²¹ to prevent a discriminatory test for voting,²² to implement the 26th Amendment,²³ to remedy discrimination in employment,²⁴ and to remedy discrimination in public accommodations.²⁵

Permitting the United States Attorney to initiate, or intervene in, a lawsuit under section 1983 to remedy the violations of a person's constitutional rights resulting from police misconduct would have a significant benefit. The victim of police misconduct is sometimes a person with one or more felony convictions and for that reason is subject to substantial impeachment when testifying as the plaintiff. If the United States Attorney brought the lawsuit, the victim would still be a witness, subject to impeachment, but the prestige of the United States as plaintiff would substantially enhance the victim's credibility and increase the chances of a verdict finding a constitutional violation. The entire atmosphere of the trial would change dramatically. The investigatory resources of

²¹ 52 U.S.C. § 10308(d) (action to prevent violation of 52 U.S.C. § 10301).

²² 52 U.S.C. § 10504.

²³ 52 U.S.C. § 10701(a)(1).

²⁴ 42 U.S.C. § 2000e-5(f)(1).

²⁵ 42 U.S.C. § 2000a-5(a).

the United States Attorney's office would be available to develop the evidence. A federal agent would sit at counsel's table.

Creating employer liability for an employee's denial of constitutional rights and authorizing the United States Attorney to initiate, or intervene in, a section 1983 lawsuit to remedy such a denial would be important changes. With these two changes, section 1983 would be reinvigorated to help achieve the three objectives of police misconduct litigation. The first objective is helping to deter such misconduct before it occurs. Once employers such as cities know that they are liable for constitutional torts, they can be expected to enhance their training programs to reduce the number of occasions when they must pay money because their employees have acted unlawfully. The second objective is providing some compensation to the victims of police misconduct. The third objective is to have the community, speaking through the jury, express its condemnation of the unconstitutional action taken by a police officer.

I thank the Committee for this second opportunity to present these proposals.