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PERSPECTIVE

Take qualified immunity out of the equation

By Sanford Jay Rosen

On May 4, 1970, four white, middle- class Kent State University students were shot dead by the Ohio National Guard on their campus commons. Nine others were wounded. Shortly after, I was in Ohio investigating what had happened for the ACLU, and how it should respond. I recommended filing numerous law suits and defending some bogus criminal prosecutions.

One of the cases the ACLU brought was for damages under the 1871 Civil Rights Act, 42 U.S.C. Section 1983, for violation of the victims' federal civil right to be free from excessive force by government agents.

Before the Kent State cases were tried, the victims had to go to the U.S. Supreme Court. The district court had dismissed their suits on the ground that they were actually against the state of Ohio, which has sovereign immunity from suit. The 6th U.S. Circuit Court of Appeals affirmed. The Supreme Court disagreed and decided that Ohio's governor, Ohio National Guard officers and troops, and the Kent State University president were not protected by sovereign or any other absolute immunity, and could be sued for the guardsmen's use of deadly force.

However, what the court gave with one hand, it took away with the other — holding that the defendants were protected by "qualified immunity" if they were acting in "good faith" in their respective contexts and roles. See Scheuer v. Rhodes, 416 U.S. 232 (1974).

Over time, qualified immunity of government actors has judicially morphed to become increasingly protective of police use of deadly force. Qualified immunity prevents trial — and even discovery — in excessive force cases, unless the victims and their counsel can convince the trial court that the officer's decision to use force in the precise circumstances alleged had previously been ruled unlawful in a prior case. The victim must not only convince the trial judge at the pleading stage, but must also endure months or years of appellate process, bcause officers get an interlocutory appeal in almost all qualified immunity denials.

The Kent State victims got past the qualified immunity hurdle, and their damages cases were tried and lost in the U.S. District Court for the Northern District of Ohio in 1975. I was hired to represent the victims on their appeal under the aegis of the ACLU. With a lot of help from many others, I got the 6th Circuit to send the case back for a new trial. See Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977). Then, I had the privilege of being retained by the victims to retry the case. In late 1978, the case settled after four days of trial for a bunch of money and an historic written acknowledgment of the wrong.

Another campus shooting, just 10 days after the Kent State shootings, this time at predominantly black Jackson State College, presents a stark contrast. Two black people were killed and 12 others were wounded. The families of the two who were killed, as well as three of the wounded victims, sued Mississippi Highway Safety Patrol and Jackson Police Department officers whom they deemed responsible. They lost their federal court jury trial and their appeal. See Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974). As a result, these victims got nothing from the civil justice system. Although qualified immunity was not at issue, the trial judge ruled that the city of Jackson was absolutely immune from their civil rights suit.

Fifty-one years after white students were shot by officers of the law at Kent State University, countless people have been killed by police excessive deadly force. The vast majority have been black and other people of color. Ubiquitous digital cameras increasingly capture these often unjustifiable killings and have kick-started the nation's second civil right revolution — the Black Lives Matter movement.

To get the nation past the moment, it is time to take "qualified immunity" out of the police and government accountability equation. It is a judicial construct that keeps getting in the way of making progress through the rule of law. Justice Clarence Thomas is right to have continued reservation about the legitimacy of judicial grafting qualified immunity into Section 1983 actions.

U.S. Sen. Tim Scott (R-S.C.) is also right that it is time to get rid of limitations that make it extraordinarily difficult to sue the municipalities and other government agencies and supervisors that employ the police who use excessive force. Currently, they can be sued for their police officer's use of excessive force if the victim has a basis for pleading and then proves that the municipality had a policy, custom or practice that was a moving force in its police officer's use of excessive force. And even if the suit is successful, the municipality cannot be hit with punitive damages. These limitations are naked judicial constructs that are found nowhere in Section 1983 itself.

It is time for a reality check. Public employers should be liable under the common law doctrine of respondeat superior for their police and other employees' constitutional torts, just like private employers are liable for their employees' torts.

While Congress considers cleaning up the judicial mess that the Supreme Court has made of Section 1983, it should also do the right thing and amend the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. Section 1988 to authorize the courts to include expert fees as part of the attorney fees awards in Section 1983 lawsuits, and those brought under other federal civil rights statutes, rather than limiting that authority to employment rights laws suits. Plaintiffs can rarely win these cases without expert witnesses.

As the saying goes: "money talks." If we really want government to make Black lives matter, government has to be accountable for police excessive force. It has to properly train, hire, direct, equip and discipline its police. To get the job done, we have to make it increasingly costly when government fails its responsibilities and its police use excessive force. ■

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