Bound By Oath | Season 2 | Episode 6: Pierson to Pearson

John: Hello and welcome to Episode 6 of Bound By Oath. Brought to you by the Institute for Justice's Center for Judicial Engagement. I'm John Ross, and on this episode we're going to talk about the birth of qualified immunity and its transformation into the doctrine that we have today. If this is your first time listening, you may want to back up and start with Episode 1. When we left off the last episode, the Supreme Court had thrown open the courthouse doors to civil rights claims against state and local officials. But within just a few years, the Supreme Court began to retreat starting in a case called *Pierson v. Ray*.

BBO Montage

Scott Michelman: One of the great ironies of the Warren Court's legacy is that at the same time it was expanding constitutional rights -- it was mostly expanding doctrines like 1983 -- there was at the end of the Warren Court's run in the late sixties perhaps a bit of buyer's remorse or maybe a responsiveness to the political opposition that was brewing to the Warren Court.

John: That's Scott Michelman, who is the legal director of the ACLU of DC and a lecturer at Harvard Law. The Warren Court that he is referring to is known for its Chief Justice, Earl Warren.

Scott Michelman: Nixon in 1968 famously ran essentially against Earl Warren, among other things, and the Supreme Court was a major campaign issue.

John: From the mid 1950s to late 1960s, the Warren Court expanded a variety of constitutional rights. We've talked before about incorporating the Bill of Rights against the states. That project accelerated during the Warren Court, which said states now needed to comply with, among other things, the double jeopardy clause, the right to a speedy trial, and the prohibition on cruel and unusual punishment. The Warren Court pushed back against segregation. It upheld new civil rights legislation. It barred state-sponsored prayer in public schools, and it overturned bans on interracial marriage. The Court also created new rules for criminal procedure; for instance, requiring prosecutors to turn over exculpatory evidence to the defense, requiring criminal defendants to have access to a lawyer, and requiring that suspects be read their rights. All of which, depending on your perspective, counts either as trying to live up to the ideals this country was founded on or, alternatively, just making up a bunch of stuff and calling it what the Constitution demands -- stuff that the Constitution was not interpreted as demanding a few years before or a hundred years before. According to President Eisenhower appointing Justice Warren was quote "the biggest damned-fool mistake I ever made."

Scott Michelman: This was a Court that that really reshaped what the Constitution meant in ways that made a lot of its provisions really come alive. But at the same time, there was backlash to that. The Supreme Court was an issue in the 1968 campaign. There were bumper stickers and signs that said impeach Earl Warren, the Chief Justice. And the legacy of that reverberates today.

John: And perhaps it had already begun to reverberate in 1967 when, in the case of *Pierson v. Ray*, the Court invented qualified immunity out of whole cloth.

Scott Michelman: This was a case you would expect the Warren Court to have been extremely sympathetic to. It was a case about the arrest of an interracial group of clergy who had traveled to the South in order to protest the segregation of transit facilities. And they were arrested in Mississippi for some vague law like disturbing the peace. That law would later be struck down by the Supreme Court, but it was on the books when they were arrested.

John: In 1961, a group of Episcopal priests were catching a bus out of Jackson, Mississippi and they tried to pop into a cafe in the bus station first. According to police, there was a crowd of 25 to 30 white people at the station who were quote "in an ugly mood" and who at any moment were about to erupt into violence because of the presence of the civil rights activists. The priests, on the other hand, said there was no crowd in the station. This is their lawyer arguing before the Supreme Court:

> **Carl Rachlin**: One of the priests said, "We're on our way to Chattanooga. We have tickets -- it will be a long trip, we wanted to have coffee or sandwich or something before we take off on our trip."

John: The officers ordered the priests to leave. The priests refused, and they were arrested under a Jim Crow statute that gave police very broad authority to arrest people gathering in public places if it looked like the gathering might lead to a public disturbance.

> **Carl Rachlin**: And they were then taken off in the traditional Jackson paddy wagon to the jail. All the petitioners here remained in jail for at least seven and Father Jones I think something like 17 or 18 days.

John: But if there was no crowd and there was no imminent breach of the peace, it seems like that's not actually why they were arrested.

> **Carl Rachlin**: And we say the record reflects … that they were convicted because that sign outside the bus station said that anyone who entered that bus station who was Negro was in violation of the law. Because that sign said, "White Only by order of the police."

John: By 1961, the Supreme Court had ruled that segregated transit facilities violated federal law. Those rulings were widely ignored in practice. But in court the police couldn't say they made the arrests to uphold segregation. They had to come up with some other justification. In any event, a Mississippi justice of the peace took the police at their word and gave each priest the maximum sentence: four months in jail and a $1,700 fine in today's dollars.

Scott Michelman: They got those convictions ultimately thrown out or dropped. Then they sued and said you didn't have good reason to arrest us. And the people they sued included the police who arrested them and a justice of the peace who presided over their initial convictions.

John: The priests sued under Section 1983.

Scott Michelman: You would expect the Warren Court to be extremely sympathetic to the plaintiffs -- these civil rights activists -- and yet the Court unanimously found that the officers were entitled to a defense they referred to as good faith and probable cause.

John: Because of the way that the case came up on appeal, the Supreme Court had to assume that the officers were telling the truth about the existence of the angry crowd. If they had in fact lied and made the arrests in bad faith, that was a question for a jury to decide later. What was before the Court was whether the officers could be held liable for damages if they made the arrests in good faith carrying out a law prohibiting congregating in public places that had not yet been ruled unconstitutional. And in 1967 the Court ruled that no, in that case they would not be liable.

Scott Michelman: What they did was they with this relatively brief and not carefully reasoned or lengthily reasoned decision, the Supreme Court kicked off two huge immunity doctrines that would come to undermine many, many, many applications of Section 1983 to ensure accountability.

John: One immunity doctrine that comes from *Pierson v. Ray* is absolute immunity. By a vote of 8 to 1, the Court said the justice of the peace was absolutely immune from suit. We're going to do a whole episode on absolute immunity later. So let's put a pin in that. But additionally, the Court also introduced the idea of a more qualified immunity -- that the officers would be immune from suit if they were acting in good faith and based on probable cause.

Scott Michelman: Nobody dissented from that holding surprisingly and with little analysis, the Court just said: Oh, well, there's this sort of old tort defense. And we just generally think this is applicable.

John: The Court ruled that back when Congress wrote Section 1983, there were defenses that

officers could raise when they were sued for committing a tort like false arrest or trespass.

Scott Michelman: The Supreme Court said: well, we assume that in 1871, Congress was well aware of these common law background rules and would have said something if it meant to abrogate them.

John: The text of Section 1983 doesn't say anything about immunities or background rules. It just says if someone acting under color of law violates your constitutional rights, you can sue them. No exceptions or caveats. One way of interpreting that lack of exceptions is that Congress didn't intend for there to be any. But in *Pierson*, the Supreme Court said it meant something else: that it in the 19th century it was such common knowledge that there were immunities embedded in the law that there was no need to mention them in the statute.

Scott Michelman: The biggest historical blunder in the decision is the notion that this good faith and probable cause defense was a general principle of official immunity law. It took on this status as deeply rooted in history.

John: In *Pierson* v. Ray, the Supreme Court said that there is a deep history in the common law of immunities for public officials. And it is true that judges and legislators did have immunities in the common law against some kinds of claims. But those immunities had never extended to executive branch officials like police. Nevertheless, in just a few sentences, and with no citations to any old cases or treatises, the Court said otherwise.

Scott Michelman: In fact, that was a distortion. Recent scholarship has shown that the general

rule of official liability in the early years of the Republic, including in several opinions by legendary Chief Justice John Marshall, was that if officers violated the Constitution, they were liable even if they were behaving in perfect good faith. And, if the legislature later thought that was an unfair result, they could pass a private bill to indemnify them, that is cover their losses.

John: At oral argument, the lawyer for the police officers argued, however, that if the Supreme Court ruled against her clients, they would be personally liable. And so would police all across the country.

> **Elizabeth Watkins Hulen Grayson**: I would like to urge … the Court to give this case serious consideration because of … the effect it will have on our police forces all over the country if they are … subject to money damages with little pay and families …. It can have a disastrous effect on protection of the public.

Scott Michelman: The Warren Court's reasoning is very closely tied to the notion that these officers are going to be personally on the hook for their constitutional violations. And maybe an officer could make a reasonable and good faith mistake that might subject that person to serious financial liability.

John: And there's another thing that the Court might have been concerned about.

Scott Michelman: The 1950s and 60s under the Warren Court were a period of incredible expansion of Americans constitutional rights. And a lot of these provisions had been underused, under-interpreted, given cramped readings. And it was time to make them real and concrete and meaningful. But to the Court, thinking about all of the police officers -- and in *Pierson* also a

judge who was going to be sued -- putting together the new broad interpretation of Section 1983 with the new broader application of the Bill of Rights to constrain state action and state power, they might have thought, well, maybe that's too much. And maybe it's not fair for the Court to apply very new concepts and new expansions in the law to people acting before those expansions had occurred, or just as those expansions were occurring. And so that that may have been their thinking in *Pierson*, why they would have thought that they wanted to give officers a little bit of room. That rationale it really ages poorly. Because today you do not have the types of major expansions in constitutional and civil rights law that you had in the 1960s. So if they were concerned about police officers being held liable for conduct in 1961 in enforcing a law that the Supreme Court didn't hold unconstitutional until 1965 that's not a fact pattern you see very often today. The Supreme Court is not in the business of expanding very many rights today. So there's just not the same kind of risk that even if you think it's unfair for the officer ~~to,~~ to have to answer for constitutional law that's constantly evolving. It's just not evolving at the speed or in the way that it was.

John: As for the priests, the Supreme Court ordered a new trial where they would be able to argue that the officers had acted in bad faith. But the case went no further. As best we can tell, the priests and their lawyers decided not to pursue it. After *Pierson v. Ray*, the Supreme Court began to expand the new immunity doctrine it had created.

Scott Michelman: The doctrine metastasized from there. In a series of cases in the 1970s, one about the Kent State shooting and one about a couple of students who faced school discipline for spiking the punch at an extracurricular event. In such disparate cases, the Court expanded the scope of immunity.

John: The first time the Supreme Court used the phrase “qualified immunity,” it was in the Kent State case, where National Guard officers shot 13 students at a protest over the Vietnam War, killing four of them.

Scott Michelman: So it went beyond a defense of quote “good faith and probable cause” available only to officers to a defense available to high government officials as in the Kent State case and it reached the governor and the head of the Ohio National Guard. And then in the school discipline case the Supreme Court extended it to school administrators as well. And today qualified immunity is basically available to any government official.

John: And then in 1982, in a case called *Harlow v. Fitzgerald*, the Court completely changed the doctrine. The qualified immunity doctrine that we have today comes from *Harlow*.

Scott Michelman: In *Harlow*, the Court said: it's too easy to allege bad faith on the part of the officer and then once the bad faith allegation is made, it has to be proved or disproved in discovery. And that takes up lots of time and resources and it doesn't enable the officer to get out of the case early enough. So we're going to simply lop off the good faith part of good faith and probable cause. So now the officer only needs probable cause, which by then had become this idea that the officer hadn't violated clearly established law.

John: The strange thing about *Harlow* is that it governs all these cases about police misconduct and prison conditions, but the case itself isn't about any of those things. Basically what it’s about is personnel policy.

Scott Michelman: It was about a whistleblower in the federal government who had testified to cost overruns back in the 1960s for a military project.

John: Ernest Fitzgerald was a Department of Defense analyst who had discovered massive cost overruns in an Air Force project. He testified about it before Congress and essentially got fired for that testimony. President Nixon bragged about getting him fired and went on record saying he was the one who made the decision. His spokesperson later retracted that, but it turned into a pretty big deal. There were congressional hearings. Internal memos were released. And in one of the memos, an aide to President Nixon said that Fitzgerald was very smart and was doing great work. But because he was not loyal to the president he should quote "bleed for a while."

Scott Michelman: So Mr. Fitzgerald sued under the First Amendment saying I had a First Amendment right to give my testimony to Congress, blow the whistle on these cost overruns. And in retaliating against me for my speech you've violated my First Amendment rights.

John: Fitzgerald sued President Nixon, but the claims against the president were dismissed. But he also sued two White House aides, and in *Harlow v. Fitzgerald*, the Supreme Court had to decide whether the claims against the aides could go to trial. The Supreme Court said they couldn't. And, in the process, it upended the way qualified immunity worked. It wasn't going to be about good faith or bad faith -- figuring out what was in someone's heart was fact-intensive and difficult. And the Court announced it was replacing that test with something that at least sounds more objective: whether the government had violated what the Court called a "clearly

established" right.

Scott Michelman: The Court became more concerned, not just with shielding officers, but shielding them early in the case -- of shielding them not just from liability, but what it referred to as the burdens of litigation, distraction from their job. It's a bit of a canard, of course, because the people who really spend their time on this litigation on the government side are not the actors who are sued, but the government's lawyers. And that's their job to defend the government. So what if the cop or the the presidential aide or other government official has to spend a few hours with the lawyers and sit for a deposition? That's sort of the cost of doing business I would say.

John: Nevertheless, in 1982, the Court got rid of the good faith requirement because it resulted in too many cases going to discovery and going to trial.

Scott Michelman: When *Harlow* limited the test to the question of clearly established law, it became very important to figure out what the law was because courts were going to grant immunity to officers if the plaintiff couldn't show that prior case law should have put a reasonable officer on notice.

John: The Court made that clear in a 1987 case called *Anderson v. Creighton*. The facts of the case, which never got past just being allegations, are remarkably similar to *Monroe v. Pape*.

Scott Michelman: *Anderson vs Creighton* was about an FBI agent who entered a home without a warrant in search of a fugitive who didn't turn out to be there.

John: Like *Monroe v. Pape*, an all-white group of officers -- this time the FBI and St. Paul, Minnesota police -- raided a black family's home with guns drawn. Like *Monroe*, police allegedly assaulted the father and then arrested him and released without charge the next day. Like *Monroe*, there were young children in the home, and an officer hit one of them while she was screaming for her mother. Like *Monroe*, the officers didn't have a warrant, and the raid didn't help them solve the crime they were investigating.

Scott Michelman: This was a violation of the Fourth Amendment. And the plaintiffs said, well, even without our question about good faith that you knocked off in *Harlow*, we still have this question of whether you violated clearly established rights of which a reasonable officer would have known. And you did. The Fourth Amendment is well established. The warrant requirement is well established. The Supreme Court said no, no, no. You actually have to show something even more specific to overcome qualified immunity.

John: It turned out that agents were looking for Mrs. Creighton's brother, who was a suspect in an armed robbery. And not only had the Creighton's house been raided, but so had several other relative's houses -- also without warrants. In court, Agent Anderson of the FBI argued that it would have been too hard to get a warrant because it was night time on a holiday. And he argued he didn't need a warrant because he was in hot pursuit of a suspect who could have been destroying evidence in the Creighton's home if he had turned out to be there. The U.S. Court of Appeals for the Eighth Circuit said the case had to go to trial. Maybe a jury would decide Agent Anderson had a strong enough reason not to get a warrant, but he certainly wasn't immune from suit. The Supreme Court however reversed and said that it wasn't enough that

officers generally need a warrant to raid a private home. There needed to be a prior case holding that a warrant is necessary in the same circumstances of this particular raid -- essentially that when someone is suspected of a violent crime you need a warrant to go charging into their relatives' houses at night.

Scott Michelman: That makes the development of precedent very important. Because that's what plaintiffs need to show. And, as an attorney litigating cases where qualified immunity is raised, I end up citing a lot of caselaw. Because I want to show that no reasonable officer could have thought what they did -- what I've sued them for -- was permissible at the time they did it.

John: *Anderson v. Creighton* is also significant for another reason.

Scott Michelman: The plaintiffs argued that the FBI officer who's the defendant was likely to be indemnified.

John: The Creighton family argued that because Agent Anderson probably wasn't going to pay any judgment against him out of his own pocket, he shouldn't receive qualified immunity.

Scott Michelman: And the Court brushed that argument aside in a footnote and said, Well, we we doubt that's true in any widespread basis, you haven't shown that, and we don't believe that. Well, it is true. Professor Joanna Schwartz has shown that well over 99 percent of judgments against officers are not paid by officers.

John: We talked to Professor Schwartz on Episode 3. She looked at nearly 10,000 recent cases

from across the country, and found officers did not pay damages 99.98 percent of the time.

Scott Michelman: Indemnification by state and local governments is a fact of life and officers are not going to be paying out of pocket for these judgments. And in those circumstances, why shouldn't the officer at least have to go through the discomfort of explaining his unconstitutional behavior to his government, which is going to have to pay for it, maybe facing some some disciplinary consequences? And maybe thinking twice before he does it again? Not to mention that the plaintiff gets compensated for a constitutional wrong rather than having the case thrown out based on the officer's immunity.

John: Since *Anderson v. Creighton*, the Court has put additional hurdles in front of civil rights plaintiffs. In 2009, in a case called *Pearson v. Callahan*, the Supreme Court completed the doctrinal picture and gave us the qualified immunity that we have today. Prior to *Pearson v. Callahan* ...

Scott Michelman: An officer could receive immunity if the law was was not clearly established. But en route to that decision, the court would still say what the law is, would make a judgement about the constitutionality so officers would be on notice for next time. And plaintiffs in the future could overcome qualified immunity. As Justice Stevens noted in a dissenting opinion in the late 90s, qualified immunity provides what he called one free violation for the officers.

John: In *Pearson v. Callahan*, the Supreme Court said that if a court decided a right wasn't clearly established, it could just stop the analysis there. But if courts don't need to make a constitutional ruling, there's nothing to clearly establish any law for the future. And that's how

you get cases like the ones we talked about on Episode 3, where the police rammed a mother's car off the road even though she was traveling well below the speed limit. She didn't get any relief, and the rest of us didn't get any rules about when the police can and can't ram their car into yours.

Scott Michelman: So Justice Stevens' one free violation becomes an unlimited number of free violations. Because somebody does something wrong. The plaintiff sues. The defendant says qualified immunity. And the court says yes, not clearly established. Well, what's the law now? Well, nothing. We didn't establish the law, we just said it wasn't clearly established. So whatever it was is still a mystery, is still unsaid. So the perpetuation of the non-clearly-established state of the law means immunity can be granted for the same conduct over and over.

John: And even when there is a case that you'd think does clearly establish something, courts routinely find reasons to distinguish it and hold that it doesn't apply.

Scott Michelman: And this notion of clearly established law, applying to the specific circumstances has gotten more and more strict over time. So as a result, plaintiffs very frequently lose because the courts say things like, well, you just don't have a case right on point.

John: For example, last year Professor Michelman and his colleagues at the ACLU appealed a decision from the Sixth Circuit to the Supreme Court.

Scott Michelman: There was a man named Alexander Baxter, who had been pursued on suspicion of residential burglaries in Nashville.

John: Mr. Baxter, who was homeless, fled from police and tried to hide in the basement of a home.

Scott Michelman: They cornered him, and they had a police dog. And they had the dog by the collar. Mr. Baxter surrendered by sitting down and putting his hands up. And then even though the dog handler officer had time to notice that Mr. Baxter had surrendered, had his hands up was not posing a threat, he nonetheless released the police dog.

John: Without warning or telling Mr. Baxter to submit in some other way, an officer released the dog, which bit Mr. Baxter in his armpit.

Scott Michelman: So our argument was very simple. Any officer should have known that it's excessive force to unleash a police dog to attack a suspect who has surrendered.

John: And indeed in the Sixth Circuit there was a prior case holding that unleashing a dog on a surrendered suspect is unconstitutional.

Scott Michelman: It's a case about a man who was fleeing from the police, and the police had a dog. And the man gave himself up by lying on the ground. And the officer in that case nonetheless unleashed the police dog and the dog attacked the plaintiff.

John: But the Sixth Circuit said that earlier case was not sufficiently on point.

Scott Michelman: The U.S. Court of Appeals for the Sixth Circuit said, no, no, no. That was a different case. That was not a case about a man with his hands up. That was a case about a man who was lying down. This type of hyper-focus on the precise facts of the case threatens to turn qualified immunity and in fact has turned it into near absolute immunity. So that what began, let's remember, 50 years ago as a defense of good faith and probable cause is now a defense of presumptive immunity unless the plaintiff can point to an identical case previously decided on the same facts.

John: The ACLU appealed the Sixth Circuit's ruling, but last year the Supreme Court declined to hear the case.

Scott Michelman: We have come so far not just from *Pierson versus Ray* but from the historical understanding of officer accountability that Chief Justice Marshall's original and famous dictum that where there's a right there's a remedy simply doesn't appear to apply anymore.

John: As we mentioned on Episode 3, last fall the Supreme Court took a tiny step toward restoring official accountability in the case of *Taylor v. Riojas*. And since we released Episode 3, the Court has taken one more tiny step in that direction. We are going to take a quick break, and when we come back, we'll talk about that and what it might mean. But first, now that we've examined how the doctrine of qualified immunity has developed, we're going to look at examples of how it has played out since 2009 when the Court decided *Pearson v. Callahan*.

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BREAK

Anthony: Hi, I am Anthony Sanders, the director of IJ's Center for Judicial Engagement, which brings you this podcast. On Tuesday April 20th, we are having a live event on Zoom that listeners to this podcast will surely want to attend. Because April 20th is the 150th anniversary of the passage of Section 1983, or as it was called then Section One of the Ku Klux Klan Act of 1871. We are bringing together a great group of scholars and litigators to talk about the history of Section 1983 and its present use. You'll learn even more than you've already learned listening to this podcast. To join, please go to ij.org slash event slash outrage legislation or find the link in this episode's details.

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John: And we're back. As we talked about on Episode 3, one problem with qualified immunity -- if not the problem with qualified immunity -- is that it generates outcomes that are random. One panel of judges may say that surrendering with your hands up instead of by lying down means officers get qualified immunity. But a different panel may disagree. Lower courts sometimes make super-fine distinctions and sometimes they don't. Some circuits are more friendly to plaintiffs than others. And so are some judges. But even factoring that in ultimately whether a plaintiff eventually gets their day in court is just random. To help dig into that and the way qualified immunity cases have played out in the lower courts since the Supreme Court's decision in *Pearson v. Callahan*, I turned to Clark Neily, who is the vice president for criminal justice at the Cato Institute. In each case, we're going to talk about allegations. If everything happened the way plaintiffs said it happened, is that enough to get plaintiffs past qualified

immunity and in front of a jury? We'll start with a case out of Abilene, Texas from 2016. It involves the execution of a search warrant at a business, and the killing of the proprietor of that business, a man named Marcus Cass.

Clark Neily: Mr. Cass was a supervisor of a business establishment called the Abilene Gold Exchange. And one of the things that they did was they dealt in used jewelry. And of course, there's some chance that some of the jewelry that you're buying may have been stolen. So there are certain reporting requirements and certain forms that they have to file. And there was a suspicion that they weren't keeping up with those forms.

John: In the past, when police had wanted to check on the Gold Exchange's paperwork, they had just walked in and asked for it. But on the day in question, and with no evidence of illegal activity other than missing paperwork, they decided to mount a guns-drawn raid.

Clark: They went in, as police will say tactically. There were four officers -- three in plainclothes with bulletproof vest over their street clothes.

John: Some of the officers had the word police printed in large letters on their vests. But Officer Smith who confronted Marcus Cass at the entrance to an office only had a badge clipped to his belt to identify him as police.

Clark Neily: Cass presumably is afraid that they're being robbed. That is, one has to imagine, the kind of business hazard that people in this line of work are exposed to. So he's carrying a

pistol and he begins to draw the pistol. Officer Smith sees him going for his gun and essentially already has is out. So he beats him to the draw and shoots him twice and kills him.

John: Seven seconds after officers first entered the store, Officer Smith killed Mr. Cass. It’s extremely likely that Mr. Cass didn’t know he was drawing on a police officer. Surveillance footage shows that from the angle he was facing Officer Smith he would not have seen the badge. All he would have seen was a man in dark clothes with sunglasses and a gun. Allegedly the officers didn’t announce that they were police, and unfortunately the video doesn’t have sound.

Clark Neily: It appears that either they didn't announce it all or they didn't announce effectively. There's actually a third party witness who testifies. And he was about 25 feet away and never heard the police announce themselves. But the police claimed they did. So it's disputed.

John: And of course Mr. Cass would not have been expecting police to be entering the office with guns drawn, because in the past they had just walked in. Which leads the question: why did police raid the business in the first place?

Clark Neily: There's some evidence that they chose to go in heavy, armed and aggressive in part because they just didn't like the guy to just send a message and put this person in this place.

John: One week before the raid, Mr. Cass testified at a city council meeting against a piece of legislation that the police department had been advocating. The measure created new rules that

would apply to his business. And at the meeting Mr. Cass testified that the rules were unreasonable and that the police had already told him to comply with those rules, even though they hadn't yet been enacted into law. Allegedly, Mr. Cass' remarks made the chief of police visibly angry. So when Mr. Cass' family -- his widow, his mother, and his children -- sued, one of the arguments that they made was that the raid was in retaliation over Mr. Cass' speech. That claim was dismissed, however, because after deposing the chief and some of the other officers, there was no evidence that the chief had ordered the raid. But Mr. Cass's family also alleged that the police used excessive force.

Clark Neily: And there's essentially two distinct theories. The first theory is whether Mr. Cass's Fourth Amendment rights to be free from unreasonable seizure was violated when the police created an unnecessarily dangerous situation. It seems quite clear that they could have just walked into the business like any other customer -- simply walked up to the counter, showed that they had a warrant and requested the documents.

John: That first theory -- that Officer Smith used excessive force when he shot Mr. Cass -- went nowhere.

Clark Neily: Unfortunately, the Fifth Circuit held that the only thing that's relevant on this particular theory of excessive force is whether at the moment that he decided to fire the shots, the officer reasonably believed that his safety was in danger. And of course, the answer is yes. There's really no dispute that Mr. Cass was in the process of drawing a pistol. It was a matter of life and death. And presumably Officer Smith did what he was trained to do under those circumstances.

John: All the steps that police took to create a dangerous situation where none had existed before -- all of that is irrelevant.

Clark Neily: That's a matter, as the panel said, of binding Fifth Circuit precedent. You just don't get to look and see whether the unnecessarily dangerous situation was the result of unreasonable choices on the part of the police officers. I think that creates horrendous incentives. I think it makes all of us less safe. And I think it's unnecessarily indulgent of the police. And it makes tragedies like this all the more likely.

John: As we said earlier, there are two steps in a qualified immunity decision. First, was there a constitutional violation? And, second, if there was, can the plaintiff point to an earlier case on point? Here, the claim failed on the first step; there was no constitutional violation. In other circuits, whether officers caused the dangerous situation they found themselves in *is* relevant. But not the Fifth. However, Mr. Cass's survivors made another excessive force claim.

Clark Neily: Now, there was a second theory that the plaintiffs in this case advanced, and it was that the the decision to execute the search warrant in an aggressive, armed way was itself unreasonable. And on that one, the court agreed in essence that it was unreasonable, but there was no clearly established law sufficiently on point to overcome qualified immunity.

John: To its credit, the Fifth Circuit said that an armed raid over a suspected bookkeeping infraction is unreasonable, and going forward it can lead to liability. Because of *Pearson v. Callahan*, the court wasn't required to do that. But what if the next raid is over a different kind of

infraction? Or it's a raid of a home instead of a business? The next panel might say that the decision in *Cass* isn't on point and that the law isn't clearly established.

Clark Neily: There is a really alarming and troubling footnote -- footnote six in the opinion -- and I'm going to quote it. The panel says quote: "We are troubled by the unwillingness of the city's counsel to concede at oral argument even that there was anything unwise about the raid, which suggests that nothing will be done to prevent a repetition of this tragedy in the future." That I think maybe is the key to this opinion as far as I'm concerned. It's so clear that the city is unrepentant, that the unnecessary and tragic death of Mr. Cass made little if any impression on the city. And there is every reason to believe that they learned nothing from it.

John: So police kill a man a week after he criticized the police, and everybody gets immunity. In the next case we're going to talk about, the harm to the plaintiff wasn't nearly as severe. But this time, the court didn't grant immunity. The case is *Chestnut v. Wallace* out of the Eighth Circuit last year.

Clark Neily: This is a false arrest case and the underlying facts are that a man named Kevin Chestnut was jogging in a park in St. Louis. He stopped to watch a traffic stop. His explanation is that there'd been some issues with traffic stops in this park. There's been some confrontations. And so it's a probably a combination of curiosity and maybe also a little bit of civic duty to provide some oversight to your fellow citizens while they're interacting with the police.

John: After watching the stop, he continued jogging. And a few minutes later, he sees the same officer pull over another motorist.

Clark Neily: And he again stops and watches this traffic stop from about 30 to 40 feet away. This time, the officer notices that he's watching her. I think he's wearing a yellow jogging suit. So he's pretty noticeable. And she calls for back up and tells the backup that she's afraid that this guy's following her. And when the backup officer arrives, he demands the jogger's name, date of birth, and social security number, so he can check to see if he's got any outstanding warrants.

John: A frisk of Mr. Chestnut didn't turn up any weapons, and he answered most of the officer's questions. But he refused to give his full social security number. He just gave the last four digits.

Clark Neily: And when some other officers arrive, Officer Wallace directs them to handcuff him which they do. Up until this point -- the point where the cuffs were put on -- this is what is viewed by the courts as a consensual encounter, meaning if the police officer wants to come up to you and ask for your name, your date of birth, your social security number, they're perfectly entitled to do that. But they have to let you walk away, if you choose to do so.

John: After a few minutes, he gave officers his full social security number, and after confirming he didn't have any warrants, they released him. When he sued over being handcuffed, the officers argued that the fact that he only gave partial information gave them reasonable suspicion to detain him.

Clark Neily: To put yourself in the shoes of a police officer -- apparently this all happened at night -- a nighttime traffic stop is a pretty hazardous activity for police to engage in. The two most dangerous things for police to do are responding to a domestic dispute and a nighttime traffic stop. So the concern that the initial officer had I think is not unfounded. And when the backup shows up and just wants to get a straight story from this guy like what he's doing, who he is, what's up -- that's not unreasonable, either. But this is one of those few areas of the law where there are really bright lines. And police don't get to put you in handcuffs just because they want more information -- just because they want to clarify what you're doing.

John: And that's ultimately what the Eighth Circuit ruled. There is a Fourth Amendment right not to be detained absent reasonable suspicion, and that right is clearly established.

Clark Neily: There was no reasonable suspicion that he engaged in any criminal activity. All he had done was observe a traffic stop, which we're all entitled to do. And the fact that he gave only partial information doesn't provide you with any greater basis to detain him than if he had just said, No, I'm not sharing any of that with you. Which he had a right to do and walk away.

John: One judge, however, dissented. And he argued that the prior case that the majority said clearly established the law wasn't sufficiently on point. The prior case involved a man -- who happened to be a civil rights lawyer -- walking with his daughter and two grandaughters and stopping to watch police from across a street as they questioned some young men. The lawyer only watched one stop, not two like Mr. Chestnut. Plus, the lawyer gave officers all they information they asked for. And he was arrested, not just detained. So in the view of the dissent, that is so much worse that it didn't put the police on notice that merely handcuffing Mr. Chestnut

was unconstitutional. But the majority brushed that aside and held that citizens can passively observe officers from a distance without being hassled, and any differences between the two cases are legally irrelevant. Which is great. The court said what the law is. But it's so random. Mr. Chestnut was handcuffed for a few minutes, and he gets his day in court. Mr. Cass was killed in a completely unnecessary and very fishy raid, and there's no remedy. In the next three cases that we'll cover, public officials were accused of telling lies -- lies that caused a lot of harm. And sometimes they got away with it, and sometimes they didn't.

Clark Neily: So this case is called *Bailey versus Twomey*. Bailey is the plaintiff. She is a woman who had a restraining order against her ex husband.

John: The case is from 2019 out of the Tenth Circuit. Ms. Bailey was in physical fear of her husband, now her ex-husband, who had been arrested for assaulting her. And when he came back to their house to get some of his things, he had to have a police officer escort him there so he didn't violate a protective order.

Clark Neily: As soon as the husband arrives Mrs. Bailey slides behind Officer Twomey. And in the process, she quotes "brushed or touched Officer Twomey's back or his belt." He immediately grabs her wrist, turns her around, hits her very hard in the chest, knocking her to the floor.

John: At that point, a second officer, Officer Walker, arrived.

Clark Neily: And they have some discussion about what if anything should happen regarding Mrs. Bailey. And Officer Twomey apparently tells Officer Walker that he does not plan to arrest

her because quote: he doesn't think she did anything illegal. But Officer Walker talks him into making an arrest simply to improve his position and make it easier to defend a subsequent civil lawsuit. So after some discussion back and forth, he changes his mind. He arrests her for interfering with an officer.

John: And then she spent six months in jail before being criminally prosecuted and ultimately acquitted by a jury.

Clark Neily: So Mrs. Bailey then sues for excessive force, illegal detention, malicious prosecution, and a violation of her 14th Amendment right to fair trial. And the basis for really all of these claims is that Officer Twomey initially expressed -- and one can assume candidly expressed -- his initial view that he was not inclined to arrest her because he didn't know she had done anything illegal.

John: According to the complaint, to make the charges stick Officer Twomey changed his story, and claimed that he thought Ms. Bailey had tried to reach for his gun. Which is to say that he lied. And the question for the court was whether Officer Twomey's conduct violated the Constitution, and if so, was it clearly established. And on the excessive force claim, the court said there's no such thing as a general right not to be forcibly taken to ground when you aren't a threat. You have to show something more specific. Ms. Bailey pointed to a prior case where an officer tackled someone who had his hands in the air. But the court said that man was in full view of the officer, whereas Ms. Bailey was stepping outside of the officer's view. And Ms. Bailey had brushed Officer Twomey, whereas in the prior case there was no indication the man touched the officer before being tackled. So the two cases could be distinguished. But on the

more serious claims, that Officer Twomey caused Ms. Bailey to spend months in jail and be prosecuted based on lie, those also didn't go to a jury.

Clark Neily: The court doesn't really get to the clearly established part because they conclude that, whatever his subjective motivations may have been, based on the facts that are alleged in the complaint there was a sufficient basis to make an arrest and therefore there was no false arrest, nor any of the other claims supported.

John: In the court's view, brushing up against an officer is close enough to interfering with an officer to justify an arrest. And because there was arguable probable cause for an arrest, it doesn't really matter if that wasn't the real reason for the arrest.

Clark Neily: One can argue about whether or not the allegations in the complaint really did add up to probable cause. But once the court comes to that conclusion, it doesn't really matter that the police officer may have lied later or that he may have had improper motivations to make the arrest. If the reader believes that simply sliding behind a police officer and brushing up against him does form probable cause to make an arrest for interference of the police officer, then the rest of the opinion seems sound. But I think it really does come down to that question.

John: The case didn't get as far as to whether there was a clearly established constitutional right that had been violated -- because the court said there was no constitutional violation.

Clark Neily: If we believe that Officer Twomey lied in his affidavit, and said that he thought she might have been trying to go for his gun I think this reflects a very serious problem in American

policing. American police, unlike for example their European counterparts, have embraced deceit as a legitimate investigative technique. American police routinely lie to suspects. They routinely lie, for example, in the context of a traffic stop or other interactions with citizens in an effort to get people to say or do something that's beneficial to the police officer or aids in the investigation, and this is considered to be fair play. There's a fairly robust body of psychological literature that indicates when deceit is routinely practiced and accepted in one forum it tends to seep over into others. And it's common knowledge that we have a testilying problem with police -- that police routinely lie on the stand. There's actually been some empirical evidence to demonstrate this. For example, up until a change in Supreme Court doctrine, when police were engaged in foot pursuits of suspected drug dealers almost without exception they would say that they chased the person, caught them, did a pat down, and discovered drugs. When the Supreme Court held that you had to have reasonable suspicion to do the pat down, suddenly in all of these same pursuit cases, the drug dealers were throwing ~~the~~ the drugs to the side as they ran.

John: According to the police, overnight drug dealers everywhere changed their behavior. They no longer kept their drugs on them as they ran. They started throwing them away.

Clark Neily: In fact, they're almost certainly doing the exact same thing. And what's changing is that the police are simply claiming that the drugs were thrown because then they don't have to have a Fourth Amendment justification for performing a pat down. From these and many other sources, we know to a pretty high degree of certainty that police routinely lie in court.

John: We'll put a link to those sources on the webpage. In the next case, a police officer once again got an innocent person thrown in jail. But this time, the case against the officer was allowed to go forward.

Clark Neily: There's a case called *Rainsberger versus Benner* out of the Seventh Circuit that's been getting a lot of attention.

John: *Rainsberger v. Benner* was decided in 2019, and the opinion was written by then-Judge Amy Coney Barrett, who of course now sits on the U.S. Supreme Court.

Clark Neily: The essence of the case is that a man was arrested and charged with murdering his elderly mother. And the charges against him are ultimately dismissed, and he sued the detective who obtained the arrest warrant for falsifying the arrest warrant. He not only stated some things that weren't true, he also omitted exculpatory information.

John: Because of the procedural posture the case was in, Detective Benner of the Indianapolis Metropolitan Police Department conceded that he knowingly or recklessly made false statements in his affidavit asking for a warrant. That's an artifact of something we talked about on Episode 3: interlocutory review.

Clark Neily: A government official who has been denied qualified immunity has the ability to appeal that even before the case is over, which is quite unusual. It's kind of a little special gift that the Supreme Court has given to government officials. The rest of us would have to wait until the case was over in order to appeal a non-final district court ruling. But under qualified

immunity, government officials get to appeal the denial of qualified immunity on an interlocutory basis, meaning while the case is still going on. But what they have to do is they have to, in effect, accept the facts that have been plausibly alleged by the plaintiff. So the police officer in this case was basically stuck with the facts as the plaintiff alleged them. And the only argument really available to him was that: Yes, I included some lies in the affidavit. And yes, I excluded some exculpatory information. But it wasn't material. In other words, if you take out all my lies, and you put in the exculpatory information that I omitted, then the arrest warrant would still have issued.

John: A little further down the road he could argue the allegations weren't true, but the district court said they were plausible and the case could go on, without qualified immunity in the way, and that's the ruling the detective appealed to the Seventh Circuit.

Clark Neily: One of the allegations is that the detective, Benner, represented in the arrest warrant that contrary to his version of the events, Mr. Rainsberger actually made a phone call before discovering his mother's body. And this put him in the vicinity using his phone before the murder happened.

John: Which was important because Mr. Rainsberger had told police that he hadn't been in the area.

Clark Neily: What the officer failed to clarify was that, in fact, consistent with Mr. Rainsberger's story, he made the phone call after discovering his mother's body. And the way the detective made it look as if the phone called come before is that he didn't note that the call was routed

through a cell tower in another state that was in another time zone an hour behind -- and the detective knew it.

John: In addition, Detective Benner failed to mention that DNA from two men was found at the crime scene, neither of which belonged to Mr. Rainsberger.

Clark Neily: And Detective Benner just tries to wish this away by saying, well, it might have been from paramedics who responded or something like that. Now, of course, that's something he could have checked out. But he didn't. He simply omitted from the warrant application that he had this DNA result.

John: Ultimately, Mr. Rainsberger was incarcerated for two months before he was released on bail, and charges were hanging over him for a year until the case was dropped.

Clark Neily: I don't think we can presume to know what was in Detective Benner's mind other than it seems utterly implausible to suppose that this many errors could have been done by mistake. Maybe this is the best face we can put on it: he really believed that Rainsberger was the perpetrator and if they could just get him into custody everything else would kind of fall into place. There's no reason I don't think from the face of the opinion to suppose that he had some personal animus against Rainsberger. But in some ways, I think that's even more chilling. That at least if it was a personal animus you could just say, well, look, these two guys had a beef and that's why this happened. In some ways, it's more ominous to suppose that this detective operates with a mindset that, look if I just have to tell some lies in order to get somebody in custody once we start sweating them we'll get the confession that we're looking for.

John: Mr. Rainsberger sued Detective Benner under Section 1983, and it went up to the Seventh Circuit to answer the question: is there a clearly established constitutional right at stake?

Clark Neily: There is a constitutional right not to be arrested on the basis of a deliberately fraudulent application for an arrest warrant. That right was violated. And is clearly established in the Seventh Circuit.

John: Every reasonable officer knows you're not allowed to lie on an application for an arrest warrant, and there are plenty of cases that say so. But in the next case, which was decided in 2019, there was no caselaw telling a prosecutor that he wasn't allowed to tell the lie that he told.

Clark Neily: So *Echols v Lawton* from the Eleventh Circuit is a really disgraceful case. The bottom line is that a man who was falsely convicted is later exonerated by DNA evidence. A bill is introduced in the Georgia legislature to compensate him for his seven years of false imprisonment before he was exonerated. In an effort to defeat this -- and this is not unusual, by the way, to pass a bill to compensate a particular exoneree -- in an effort to defeat that legislation the DA falsely represents to the legislature that Mr. Echols remains under indictment and therefore is not eligible for this compensation. That's false. He's not under indictment. And according to the allegation in the complaint, which we have to credit, the DA knows this.

John: So Mr. Echols filed a lawsuit alleging that the district attorney defamed him. Usually, and again we'll talk about this more on a later episode, prosecutors are entitled to absolute immunity. But here it's qualified immunity.

Clark Neily: To represent that somebody has committed a crime and is under indictment for that crime falsely is what's called libel per se. It means you don't have to prove any particular damages. It's just defamatory. And to make a long and miserable and frustrating story short, the Eleventh Circuit recognizes that there is a constitutional right to be free of being defamed. But there just didn't happen to be clear enough caselaw on point.

John: Because there was no prior case saying that a district attorney can't lie to the legislature in precisely this scenario, the Eleventh Circuit had to presume that not every reasonable prosecutor would know it was wrong.

Clark Neily: The thing about this case that I really want to emphasize is the extent to which qualified immunity infantilizes law enforcement. The extent to which it suggests that somehow because you're a police officer or a prosecutor, you should be held to a much different standard than the rest of us. That maybe there was some ambiguity in your mind about whether it's okay to go and lie about somebody in the context of a legislative proceeding where your office has falsely convicted them of a crime. Whereas the rest of us it is 100 percent clear. We know that you don't do that. I think the *Echols* case is, in some ways, qualified immunity on a plate. It is the face of qualified immunity. The way that qualified immunity so often operates to relieve from civil liability a government official who has indisputably done something wrong. They've done something they know is wrong. They've inflicted a significant injury on somebody as a result,

and they get to walk away from it simply because of the mere happenstance that they live in a jurisdiction where the caselaw has just not matured to the point where there's a case exactly on point and that is the only reason they get to walk away from it. I think there's very little to commend a doctrine that routinely produces results like that.

Conclusion

John: Ultimately, we all live in a jurisdiction -- literal and metaphorical -- where there is no caselaw directly on point. Either because an official has done something so incompetent or so wrong that it's never been done before. Or because, even if there is a case on point, courts can always find ways to distinguish the prior case. However, in the last few months, the Supreme Court has taken some tiny steps toward recalibrating the doctrine. As we said on Episode 3, for a couple decades in qualified immunity cases, the Court repeatedly reversed lower courts that denied qualified immunity and refused to shield officials from accusations of misconduct. By contrast, the justices never overturned a lower court that granted qualified immunity. Last fall, however, that trend finally came to a halt in the case of *Taylor v. Riojas*. In *Taylor*, the Supreme Court said any prison official would know that keeping an inmate in essentially an open sewer for a few days violates the Constitution and there didn't need to be a case precisely on point. And then in February of 2021, after we released Episode 3, the Supreme Court did it again. In the case of *McCoy v. Alamu*, the Court summarily reversed a Fifth Circuit ruling that actually we talked about briefly on Episode 3. In *McCoy*, the Fifth Circuit said that it was unconstitutional for a prison guard to allegedly pepper spray an inmate for no reason and without warning -- but that the officer was off the hook anyway because prior cases involved officers tasing, punching, and beating people with batons for reason, not pepper spraying them. So the Supreme Court does

seem to be sending lower court judges a message that they now have a little more room to rule for plaintiffs. But as to whether the Court will make serious changes to the doctrine, your guess is as good as mine. The Court has justified qualified immunity on the grounds that officers pay judgments out of their own pockets. We now know that's not true. Some justices have justified qualified immunity on the grounds that *Monroe v. Pape* was wrong about the meaning of the color of law. But *Monroe v. Pape* was correctly decided. The Court has justified qualified immunity on the grounds that officers in the 19th century were generally immune from these kinds of claims in the common law tradition. We now know that's not true. Can we take the Court at its word that if its justifications for qualified immunity are not solid, that it will reconsider the doctrine? We can hope so. One thing is certain: there will be no lack of cases asking the Court to do just that, and at IJ we're going to be bringing many of them. On the next episode, we're going to talk about a different way you can vindicate your constitutional rights in federal court. You may not be able to sue the official who violated your rights, but you may be able to sue the city or town or county that employs them. Coming up on Episode 7: municipal liability.

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