Bystanding Officer Liability and the George Floyd Murder Trial

This month's trial of three former Minneapolis police officers involved in the murder of George Floyd brings to the fore a question that has only recently been addressed by our courts: What obligations does an officer have to *intervene* when faced with another officer's unconstitutional use of force? The ability to hold officers liable for constitutional violations dates back to Reconstruction, when Congress established two mechanisms for bringing claims against government officials for constitutional violations. The first, Section 242 of Title 18 of the U.S. Code, allows for *criminal* prosecution of individual officers, like those recently convicted of violating George Floyd's civil rights. The second, Section 1983 of Title 42, permits private citizens to bring *civil* cases against officers for harm done.

Because it is a civil statute, Section 1983 benefits from a robust body of case law through which judges have had the opportunity to elaborate on the framework for determining when a constitutional right has been violated. Criminal cases, by contrast, are more often decided by a jury without the same need to develop legal jurisprudence. Courts and prosecutors will, therefore, look to interpretations of Section 1983 when assessing criminal charges under Section 242. A brief review of the courts' application of the Fourth Amendment in the context of Section 1983 cases may thus provide some insight into how the case against the three former Minneapolis officers unfolded. It is also instructive when considering the content and efficacy of police department training and policies.

At its core, the Fourth Amendment provides the right of people to be free from "unreasonable seizures," which the Supreme Court explained occurs anytime an officer "restrains the freedom of a person to walk away." In 1989, in the seminal case *Graham v. Connor*, the Supreme Court clarified that an "unreasonable seizure" under the Fourth Amendment occurs if an officer uses excessive force during an arrest or investigatory stop. Dethorne Graham brought claims against officers for use of excessive force after he was arrested for acting suspiciously and erratically while having an insulin attack. Mr. Graham was handcuffed, shoved onto the hood of his friend's car, and thrown into the rear of a police cruiser and, as a result, sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.

The Supreme Court explained that the outcome determinative question was whether the officers' behavior was "reasonable" for an objective officer on the scene. The factors considered when assessing "reasonableness" were: (1) the nature of the intrusion on the individual weighed against the governmental interest at stake, (2) the severity of the crime at issue and whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest.

In the 30 years since *Graham*, the Supreme Court has provided clarifications for how courts should analyze these claims, but the core of the analysis has not changed. The goal is to assess the "reasonableness" of the officers' actions taking into account the totality of the circumstances. For example, in 2015, in *Kingsley v. Hendrickson*, Justice Breyer expanded the *Graham* factors to include: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting."

In assessing "reasonableness," some Circuit Courts have looked to police department policies addressing the use of force. For example, in 2018, in *Darden v. City of Fort Worth*, the Fifth Circuit stated that while "the violation of police department policies is [not] sufficient to make out a constitutional violation, we have found their existence and corresponding notice to officers relevant in analyzing the reasonableness of a particular use of force under the totality of the circumstances." In

Drummond ex rel. Drummond v. City of Anaheim, the Ninth Circuit similarly stated that the court "may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable." During the recent trial of the three officers who stood by while one of their colleagues knelt on Mr. Floyd's neck for more than nine minutes, the prosecution elicited testimony from several Minneapolis Police Department (MPD) witnesses that characterized their actions as far outside the scope of MPD's policies and proffered trainings. Meanwhile, the defense attempted to demonstrate that their actions were consistent with faulty MPD policy and trainings, presumably in an attempt to persuade the jury that their inaction was constitutionally sound.

This "reasonableness" inquiry has recently been expanded to circumstances like that in the George Floyd trial, where an officer failed to intervene to protect an individual from a constitutional violation. In 2020, the Third Circuit heard *El v. City of Pittsburgh*, a case involving an officer who watched while her colleague slammed a man against the wall and pavement for taking a few steps in his direction. The court explained that a "police officer has a duty to take reasonable steps to protect a victim from another officer's use of excessive force, *but only if there is a realistic and reasonable opportunity to intervene*." The "reasonableness" in this context centers around the duration of the incident. Too short, and an officer has no time to act and cannot be held liable.

It's unclear what amount of time is long enough to trigger liability for failure to intervene. In *El*, the Third Circuit found that five seconds was not long enough. In *Abdullahi v. City of Madison*, the Seventh Circuit held that 30 to 45 seconds was probably long enough. In George Floyd's case, the officers stood by for over nine minutes, surely long enough to intervene. Stated another way, it is incumbent on a secondary officer to intervene and/or render medical aid the longer he/she is on the scene to observe an unconstitutional use of force by a fellow officer. Notably, none of the cases forming this body of law articulate a lesser liability for "rookie" officers, which was one of the arguments put forth by the defense in the George Floyd murder trial.

However, the existence of a constitutional violation is not alone sufficient for criminal liability. Unlike Section 1983, criminal charges brought under Section 242 require proof of "willfulness." In other words, the officer must have acted with "specific intent" to deprive an individual of their rights. Specific intent is one of the most difficult states of mind for a prosecutor to prove even when a defendant *affirmatively* acts to violate the constitution. Conceptually, when prosecuting a defendant for a *failure to act,* it would appear to be an even more significant barrier.

Generally speaking, claims for failure to intervene have to overcome an additional barrier. Known as the "fair warning requirement," a person cannot be held liable for behavior he or she did not reasonably believe was unconstitutional. (In the context of Section 1983 claims, this principle is known as "qualified immunity".) This means that the liability of the Minneapolis officers depended, in part, on whether or not the jury found that a reasonable officer was on notice that they had an obligation to intervene when faced with another officer's unconstitutional use of force. Again, this is why the defense attempted to lay blame on what they characterized as faulty MPD policies and training. In essence they argued, "My actions were consistent with the faulty training I was provided, therefore I did not have fair warning that my failure to intervene was unreasonable and cannot be a constitutional violation." However, in light of cases like *El* and *Abdullahi*, it was certainly arguable that the fair warning requirement had been met with respect to the failure to intervene claims against them. The nine minutes former officers Tou Thao, J Alexander Kueng and Thomas Lane witnessed George Floyd dying at the hands of their senior officer, Derek Chauvin, provided more than ample time for them to realize that an unconstitutional use of force was being exerted.

Officers should command our respect given the hard tasks that they perform every day. The difficulty of performing these tasks is only increased if they have to be performed in front of a hostile crowd, and officers have been known to make split second mistakes under pressure, such as grabbing their gun instead of their taser in order to completely subdue a partially subdued suspect who is passively resisting arrest (lying limp instead of following the officers command to provide their wrists for handcuffing). Officers alleged to be involved in the murder of George Floyd appeared to be impervious to the pleas of Mr. Floyd or bystanders, which only seemed to embolden their use of force – as if their bravado show of control over Mr. Floyd reaffirmed their authority to physically control the scene. Rather, the involved officers should have refocused their attention to Mr. Floyd's increasing distress and pleas for help once it was clear that he no longer posed a threat to officer safety. Each officer on the scene had an independent obligation to intervene to stop the unconstitutional actions of Officer Chauvin.

In order to prevent these types of tragic circumstances from occurring again, police departments would be wise to train officers when they are under duress so that they become accustomed to the pressure and can reflexively think more clearly. Football teams use the analogous tactic of piping loud crowd noise into their practice sessions so that the players become accustomed to playing in difficult environments. It's not enough for police departments to change their policies regarding an officer's duty to intervene and/or render medical aid to a suspect, their trainings must also reflect those policy changes. Fortunately, this shift in emphasis appears to be happening in police departments across the country. However, these changes are too late for Mr. Floyd and former officers Thao, Kueng and Lane, who were just criminally convicted of violating Mr. Floyd's civil rights.

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