Courts and Legislatures Have Systematically Condoned Police Brutality in Small Ways That Lead to Big Consequences

by Brendan Shiller

Everyone has heard of Michael Brown and Philando Castile and Eric Garner and George Floyd. Few have heard of Andy Montanez. On March 20, 2009, the Northwest Side Chicago resident was outside drinking with friends after a funeral. Chicago Police Officer Vincent Fico and his partner saw Andy drinking on the public way. Andy was known to Chicago police. Although drinking on the public way is the type of "crime" that often goes unchecked by police, it is a good excuse for arresting someone that the police want to take off the street for a night.

Drunk and grieving, the handcuffed Montanez took the opportunity of the entire ride to the police station to tell Fico exactly what he thought of the arrest and of Fico, in very colorful language. Fico was himself known to the Chicago streets. Between 2007 and 2011, Fico was sued 11 times and received 16 citizen complaints. Fico managed to rack up these complaints while part of an infamous gang tactical team that operated out of the Grand and Central police station. His compatriots included now-disgraced and fired police officer Sean Dailey and oft-sued officers Michael Napoli, John Frano, and Sergeant Salvatore Reina.

After enduring 15 minutes of Andy Montanez's best monologue on the deficiencies of Chicago policing in general, and the inadequacies of Fico in particular, Fico pulled into the 25th district police station parking lot, parked the car, while his partner sat in the passenger's seat, and opened the backdoor to "roughly" remove Montanez. Montanez kicked at Fico. It is disputed whether Montanez kicked Fico's knee or groin. Fico then proceeded to treat Montanez's face as a punching bag for the next couple of minutes. Handcuffed, Montanez took it. Amazingly, he just suffered cuts and bruises—no broken bones or permanent damage.

In addition to this public drunkenness charge, Montanez received an aggravated battery to a police officer charge for his kicking of Fico. That's a class 2 felony in Illinois, meaning a 3- to 7-year prison sentence. Montanez, having a criminal record and being charged with battering a police officer, was denied a reasonable bond. So, as is usually the case with incarcerated pretrial detainees, he eventually pled guilty to what might have been a beatable case in order to ensure a light sentence.

Montanez shopped for an attorney to take his civil case, and mostly ran into rejections. This is not surprising given the combination of factors.

It is true that citizens are protected against the unreasonable use of force by state actors under the 4th Amendment to the United States Constitution. It is also true that the 4th Amendment is applied to state actors through the 14th Amendment. Further, for a century and a half now, the federal government has given a civil private right of action to people who are victims of unconstitutional acts committed by state actors "under color of law," as codified by 42 U.S.C. § 1983—originally passed during Reconstruction specifically meant to allow citizens to enforce the 13th, 14th and 15th amendments. But, while all this is true, the interaction between Montanez and Fico—although on the face of it brutal and a violation of the 4th Amendment—is one that for the most part society often quietly condones, and therefore so does often the law.

The initial problem with the case, as with any claim of excessive force or any type of misconduct against a police officer, is the threshold issue of qualified immunity. The Supreme Court has held that, in order for an officer to be held liable for an excessive force claim, it had to be clear that the conduct that they were engaged in was clearly unconstitutional in general at the time the force was used, and that the officer would have known it was unconstitutional. Courts have twisted this to protect officers in myriads of creative ways. Sometimes, the contortions by the court protect officers if a civil plaintiff cannot point to a nearly identical fact pattern. For instance, earlier this year, the Supreme Court let stand a 9th Circuit ruling that officers who stole $225,000 during a warrant search likely knew the stealing was illegal, but likely did not know it violated the 4th Amendment prohibition against unlawful seizures, and therefore were immune from civil suit. *See Jessop v. City of Fresno*, 918 F.3d 1031 (9th Cir. 2019).

Luckily for Andy, beating someone to a pulp is recognized as a constitutional violation.

The second and much more difficult obstacle, however, is the Heck doctrine, and in particular how that plays out in the 7th Circuit. *See Heck v. Humphrey*, 512 U.S. 477 (1994). Under this doctrine, plaintiffs cannot bring Section 1983 claims that would in any way cause doubt on a state criminal conviction. It is almost inevitable (in Chicago at least) that when excessive force is used against an arrestee, the arrestee will be charged with what some civil rights attorneys call the "unholy trinity of charges"—resisting arrest, disorderly conduct, and aggravated battery to a police officer. The purpose of adding these charges is the (almost always correct) belief that the person who was beat up will eventually plead guilty to one of those charges, to avoid spending more time in jail on pretrial incarceration. And the (almost always correct) belief is that if the person does plead guilty, that will bar any civil claim.

For Andy, the eighth civil rights firm that he shopped his case to decided it was worth the gamble that Heck did not bar his claim. Eventually the court would agree.

But Andy's legal and societal hurdles were higher than that. Although neither qualified immunity nor *Heck* barred his claim (although they have barred many other claims), society still does not truly want to protect an alleged gang member with a criminal history from being beaten up every once in a while by a police officer. And the law reflects this unsaid truism in several other ways.

First, if Andy were to testify (as he would have to in a civil case where he was the plaintiff), his criminal record would mostly be admissible. And, although Fico had 11 lawsuits and 16 civilian complaints in a short four-year period, none of that is admissible -- mostly because the system is set up to ensure that lawsuits are settled without admission of liability and complaints are resolved without finding of guilt.

But, in addition to those evidentiary considerations that reflect societal values about whose background is relevant and whose is not, the courts have constructed use of force standards which give greater protections to police officers than civilians. This is particularly true for deadly force. In essence, a subjective standard of reasonableness is used in the Northern District of Illinois (and other Seventh Circuit jurisdictions) for excessive force cases, as juries are instructed, among other things, that "it is not necessary that" an objective "danger actually existed" to find a police officer not liable for unreasonable force if the officer believed the danger existed. And that an "officer is not required to use all practical alternatives to avoid a situation where deadly force is justified." And that the jury "must not consider whether Defendant's intentions were good or bad." *See* 7th Circuit Pattern Jury Instructions, Instruction 7.10 (2016). Luckily for Andy, even a jury could find that no danger existed as he lay out with his hands cuffed behind his back getting pummeled in the face.

When Andy shopped his civil case to law offices, he said what almost every victim of police brutality said—he wanted to change the system and he wanted the cop punished. Well, that almost never happens. Illinois, like almost every state in the union, has statutory protections both in the form of the Tort Immunity Act. There are a myriad of protections—including a requirement that officers be indemnified by the agency that employs them. This means cops almost never pay a damage award. There are also protections in the form of heightened standards of liability.

So, the reasons that eight law firms rejected Montanez's case are the same reasons that thousands of excessive force claims do not get filed every year in Chicagoland: (1) qualified immunity; (2) the Heck doctrine; (3) uneven evidentiary rulings; (4) unequal use of force standards; and (5) the Tort Immunity Act. And the fact that these thousands of "small" police brutality cases do not get filed serves as incentive to police officers to continue their conduct.

There is one law that worked in Montanez's favor, 42 U.S.C. § 1988, which calls for the defendant in a Section 1983 case to pay fees if they lose. It is meant to encourage attorneys to take cases like Montanez's where there are low damages. And that is why the firm that eventually took Montanez's case did take it, and did take it to trial, and did win a $1,000 compensatory award and a $1,000 punitive award. And the $1,000 punitive award that Fico had to pay is undoubtedly the reason that since 2012 he has not been sued and has not received another citizen complaint. In fact, in the summer of 2012 he testified in a different case that he had left the tactical team and become a dog handler to avoid civilian contact and more complaints.

But despite the success and obtaining damages for the client, and actually deterring Fico, when the fees were litigated, both the District Court and the Circuit Court revealed how much they disfavored this type of case by reducing the attorney fees by nearly three-quarters, thus disincentivizing the firm from ever taking such a case. *See Montanez v. Simon*, No. 13-1692 (7th Cir. 2014).

Montanez vindicating his rights via Section 1983 under these circumstances was literally a 1 in 10,000 shot for all of the reasons explained above. So, if the courts and civil actions are not really a deterrent, then how can police brutality and police racism be reduced? Recent studies are pretty clear on what is effective and what is not.

More training, including implicit bias training, has simply shown no efficacy in reducing violence. But changing the use of force standards—raising them and equalizing them with the standards for civilians—does reduce police brutality. *See, e.g. Campaign Zero-Research Identified Reforms* (2016 Data on Largest U.S. Police Depts.).

Body cameras do not reduce police violence, but removing qualified and statutory immunities does. See, e.g., Joanna C. Schwartz, "How Qualified Immunity Fails," 127 Yale L.J. 2 (2017), and Simon Black, "Qualified Immunity and Police Unions: Removing the Easily Spotted Bad Apple is Very Difficult," River Cities Reader, June 10, 2020.

Better training on how to deal with mental health and similar calls does not reduce police brutality, but taking those calls away from the police and giving them to other trained professionals does. See, e.g., Anna V. Smith, "There's Already an Alternative to Calling the Police," High Country News, June 11, 2020.

Providing more funds to community policing does not reduce violence, but reducing police and civilian interaction by making certain offenses (such as gambling, prostitution, loitering, etc.) ticketable and not arrestable does reduce police violence. See Samuel Walker & Morgan Macdonald, "An Alternative Remedy for Police Misconduct: A Model State 'Pattern or Practice' Statute," 19 Geo. Mason U. Civ. Rts. L.J. 479, 504-507 (2009).

The reason there are a dozen George Floyds every year is that every year there are 10,000 Andy Montanezes. And until our society accepts that we have conspired to encourage the George Floyd deaths by silently condoning the Andy Montanez beatings, things will not change. These changes require many avenues including greater investment in Black and Brown communities. But when it comes to police accountability and police reform and the constitution, the four straightforward changes detailed above will result in greater accountability and less brutality.

Brendan Shiller is Managing Partner at SPJS Law and Board President of The Westside Justice Center.