Police Violence and the Legal Temporalities of Immunity

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Abstract: *I argue that police violence is supported by a legal infrastructure of cultivated ambiguity and indeterminacy. The idea that police discretionary violence manifests a residual state sovereignty over and against the law misses this structure. I turn, instead to Dyzenhaus' concept of a "legal grey hole" and argue that one is being constructed by the federal judiciary to immunize police violence. Such a legal grey hole is being constructed through the layering of legal timeframes—various juridical constructions of time that ban the judgment of hindsight, cultivate procedural complexity, and actively promote a "factbound morass." In the conclusion I argue that regulation and policy below the level of Constitutional jurisprudence may function as a counter-weight to this judicial immunization.*

Introduction:

The Black Lives Matter social movement has brought the issue of racialized police violence out of the shadows of state secrecy. While governmental rationalities surrounding crime as a social problem have always produced detailed statistics on murders, police killings had not been counted.[1] Protests focusing on police killings in Ferguson, Missouri, New York City, and Baltimore helped transform public journalism agendas: Naming the victims of police brutality in their singularity led to efforts to count the victims. *The Guardian*, for instance, instigated a broad investigation into police

violence in the United States, with a comprehensive database "The Counted" to document all police killings in 2015.[2] They reported that, in the first six months of 2015, African-Americans were killed by police "at more than twice the rate of white and Hispanic or Latino people."[3]

What has been called the emergence of a new Civil Rights Movement has also already had apparent effects on institutions: Acting in a kind of secret solidarity with the Black Lives Matter movement,[4] the Justice Department initiated "Pattern or Practice" investigations into the police departments of both Ferguson Missouri and Baltimore Maryland, and issued a scathing report on Ferguson's department.[5] Institutional effects of protests also include Baltimore City State's Attorney Marilyn Mosby's announcement of charges against six police officers in the death of Freddie Gray, occurring in the immediate wake of protests and rioting in Baltimore. Such institutional responsiveness seemed to offer the hope of a newly robust legal accountability. Indeed, the sine qua non of justice for the deaths Freddie Gray, Michael Brown, Eric Garner, and so many others, appeared, to social movement activists and much of the broader public, to lie with the courts.

The indictment of the six Baltimore police officers was quickly followed by skepticism that Mosby had "overcharged" the officers and reminders that criminal convictions of police officers for excessive force are exceedingly rare.[6] Many difficulties in turning to the courts were parsed: The relationships between prosecutors and police as "repeat players"[7] mean that prosecutors are unwilling to bring criminal charges for excessive force and brutality; the Grand Jury system becomes a tool of prosecutorial discretion; cultural frames, racialized fear and unconscious bias structure the perceptions

of various actors within the legal system (police, judges, juries, grand juries), creating victims of police violence and obstructing the pursuit of legal remedies for it; and organizational factors such as a code of silence insulate the police from meaningful oversight.

Less attention has been paid to the legal infrastructure of police violence—the Constitutional jurisprudence concerning reasonable and excessive force. To the extent that the courts and jurisprudence are discussed, it is usually to identify one additional reason it is difficult or almost impossible to bring the police to justice. *The courts defer to the police.* This lament resonates with a critical theoretical literature that situates police power as "other" to law—a residue of sovereign prerogative that evades the grasp of law even as it serves as its violent foundation. In this essay I argue that this critique does not go far enough: It is not that law and the courts are weak or insufficient in their inability or unwillingness to rein in police use of force; Rather, the courts (especially the Supreme Court) are actively constituting police immunity through a jurisprudence that is evolving in troubling ways. In this essay I argue that police violence is supported by a legal infrastructure of *cultivated ambiguity and indeterminacy*. Indeed, what scholars in the field of emergency powers describe as a "legal grey hole" is being constructed by the judiciary to immunize police violence. It is being constructed, I argue, through the layering of legal timeframes—various juridical constructions of time that ban the judgment of hindsight, cultivate procedural complexity, and actively promote a "factbound morass."[8]

Police Power and the Legal Order

When police are understood as law enforcement, the relationship between police and the legal order seems relatively straightforward. However, because even our contemporary 'narrow' policing involves both backwards-looking activities of law enforcement such as detecting and investigating crimes, and forward-looking activities of "community-caretaking,"[9] policing occupies a central (and ambivalent) position in contemporary governance. As Mariana Valverde writes, "Police rationalities and technologies constitute, together, a kind of hinge linking, without mixing, the two central temporalities of legal-political governance of modern states: prevention and punishment, risk management and law enforcement – or to put it rather too generally, future and past."[10] Michel Foucault (somewhat unhelpfully, in my view) declares in his 1978 lectures that "from the seventeenth to the end of the eighteenth century, the word 'police' had a completely different meaning from the one it as today."[11] Several contemporary scholars have productively complicated Foucault's claim of a sharp divide between an older, broader concept of police as a practice of governance and a more modern narrow notion of police as an institutionalization of enforcement power. Barry Ryan, for instance, cites Foucault's claim approvingly but then adds that "it is plausible to suggest that the contemporary understanding of police emerged from the historical meaning."[12] Guillermina Seri argues that "the concept of police evokes at once broad police power – namely, a set of state institutions and regulations – and patrol agents" with the latter conceptualized as "an embodiment of the former".[13] And Valverde examines continuities across periods by emphasizing the survival and flourishing of police-style regulation for health, safety and welfare of the population at the local level.[14]

In connecting contemporary patrol officers with older and broader concepts of

police, recent scholarship has sometimes imagined the police as sovereign agents as opposed to enforcers of law. Markus Dubber does so when distinguishing between the "self-government" of law and the "other-government" of police.[15] Seri provocatively identifies the police power as a form of sovereign prerogative, where sovereignty is understood as "exempted from earthly laws."[16] Seri asserts that "in defining the situation at hand as one in need of intervention, interpreting the law and choosing among alternative rules to apply, passing judgement, and frequently executing their sentence by themselves – even killing, in what amounts to summary executions carried out on the spot without access to a fair and impartial trial – the police have in their hands the most undifferentiated and comprehensive form of state power."[17] The police are the subordinate magistrates who more than any other most clearly exercise the power of the state to kill, "the classical attribution of the sovereign."[18] Sovereignty is thereby contrasted to law, and police become agents of the former, not the latter. Drawing on Agamben, Seri writes "what defines the police then is not the enforcement of the law, but their exercise of sovereign power 'on a case-by-case basis.'"[19] As a correction to the pervasive assimilation of police power to the category of law under the rubric of "law enforcement" Seri's claim is important and salutary. Police appear as a persistent remnant of a form of (sovereign) power that predates and exceeds modern legality, and as an example of the discretionary power that permeates all bureaucracies, and as "extra-legal governance."[20]

Nevertheless, I will argue that a sovereignty contrasted with law is not the best concept for naming, analyzing and critiquing that power and that David Dyzenhaus' concept of a "legal grey hole" is more productive. In the next section I argue that

attention must be paid to the constitutive role of law (in particular "legal timeframes") in producing and shaping the discretion that goes by the name of sovereignty. And in the concluding section I argue that the opposition of sovereignty and law misses a collection of potential constraints on discretion such as administrative rules, policy and even quantitative benchmarking: Governance rationalities that shape the exercise of police discretion and that can be mobilized by reform efforts.

As is recognized in the literature on sovereignty, an entity or actor could either be a de jure sovereign, a de facto sovereign, or both a de jure and de facto sovereign. Now it might seem nonsensical to make such an analytical distinction, for a power that, in Agamben's account, obliterates the very distinction between law and fact. But it is useful to recall that even Carl Schmitt, in identifying the sovereign as simultaneously belonging to the legal order and standing outside of it, acknowledges that the legal order may name or designate who is sovereign even though the legal order is unable to constrain that power.[21] Whether or not the legal order designates who holds sovereign power is less important to Schmitt than that such a power exists. In the literature on sovereignty, the distinction between de jure versus de facto is sometimes made to distinguish between forms of power in a condition of revolution or civil war to distinguish between a legally constituted authority and some kind of insurgent agent displacing it. Often, the distinction is deployed to name a state that retains sovereignty as a matter of legal systems of recognition but has lost its territorial power in actuality.

When it is suggested that the police exercise a sovereign power to kill something like the reverse claim is involved: An entity that is not sovereign by law exercises sovereign power as a matter of fact. The police are not designated as having ultimate or

unlimited power according to law: the police are designated as law *enforcement* and while they are authorized to use force, up to and including the power to kill, that power is not the power of unconstrained "sovereign" decisionism. While the police make discretionary judgments and decisions, those decisions are supposed to be embedded in and constrained by (1) constitutional protections of citizens, (2) state laws governing the use of force and (3) administrative regulations such as organizational policy.

To the extent that these legal forms are not constraining, we might well say that the police hold de facto unconstrained "sovereign" power—in particular contexts and situations they have *as a matter of fact* though not law a kind of *supreme authority*—there is no meaningful higher power. But the police cannot be said to hold de jure unconstrained sovereign power, because they are not legally constituted as having ultimate authority. The key issue then is how to conceptualized the relationship between the police's de jure position and their de facto power. To identify the police as having "sovereign prerogative" power is to hold that their legally subordinated position is meaningless and that the relationship between law and fact is a gap between the ideal and the real. The task of the critical theorist is to rip the legal veil off and reveal the pervasive and essentially unlimited discretionary power that subtends the law. However, this approach is problematic for at least two reasons. First, as Lisa Miller argues, police violence targeting African-Americans is better understood not simply as repressive sovereign power but as part of a broader "racialized state failure" that leaves black citizens double-exposed to both state and non-state violence.[22] Second, the "sovereignty as opposed to legality" way of framing police brutality works, ironically, to let the law

off the hook: it takes attention away from the deep involvement of (Constitutional) law in *establishing and authorizing* discretionary violence in the first place.

To describe law's role in producing the very police discretion that violates it, it is helpful to draw upon another way Seri describes police discretion, and that is the idea of the police operating within a "grey area" of the law. Drawing upon a rich collection of interviews with Argentine police, Seri describes the difference between *illegal* orders from a commanding officer (such as the order to engage in a warrantless search) and other police orders and activities which fall into a "grey area."[23] I suggest that Seri's ethnographic work invites an alternative conceptualization, drawing upon Dyzenhaus' idea of a "legal grey hole." His concept of a legal grey hole, while developed to make sense of emergency executive powers, applies equally well to their close cousin police power, offering a framework to both describe and evaluate discretionary powers that are related to law without being clearly constrained by it.

The advantage of Dyzenhaus' "legal grey holes" concept over the concept of "sovereign prerogative" is that it leaves open two possibilities: The first possibility is that as grey holes police powers are essentially unlimited with a "façade" of law and no substantive legal constraints or protections. They are, in other words, nothing more than "legal black holes" (a space of pure discretion) with, even worse, the fig leaf of legal legitimation without any legal constraints. The second possibility that Dyzenhaus describes is that a legal grey hole may contain elements of legality that can be thickened up by reformers and judges "to turn the form of the rule of law into something substantive" in order to bring meaningful legal constraints to bear upon discretionary power.[24]

These possibilities correspond to what Dyzenhaus describes elsewhere as virtuous and empty cycles.[25] A virtuous cycle promotes the rule of law (a substantive set of constraints on power), while an empty cycle promotes rule by law (an empty legitimating discourse and instrument of power)[26] As Dyzenhaus writes,

> In one cycle, the institutions of legal order cooperate in devising controls on public actors which ensure that their decisions comply with the principle of legality, understood as a substantive conception of the rule of law. In the other cycle, the content of legality is understood in an ever more formal or empty manner. In this case, the compulsion of legality may result in the subversion of constitutionalism."[27]

Legal grey holes are evidence of the "compulsion of legality": the state's need to justify its actions through law. But this compulsion of legality is neither simply good or bad, positive or negative. A virtuous cycle thickens up the legal veneer, and turns it into a real constraint. An empty cycle hollows out the legal covering, rendering it an empty shell.[28]

An advantage, then, of Dyzenhaus's legal grey holes concept is that it provides a way to open up the problem of arbitrary power in a state whose legitimacy is so closely linked to the norms of legality. An approach that rests on the opposition between sovereignty and law misses both the promise *and* the peril of the legal norms that "surround" this power: Casting these norms as little more than a veil, or at best a set of ideals constantly undermined in practice neglects both the possibility that a virtuous cycle of legality might manage to reduce the arbitrariness of the discretionary power and the possibility that an empty cycle of legality might actively constitute this power as the

possession of an agent immune from challenge and even as fully consistent with norms of due process, reasonableness and equality.

Two more aspects of the legal grey holes concept are worth mentioning. First, Dyzenhaus' idea of a legal grey hole, as I have suggested, resonates with the notion of a "grey area" in the law. In the next section I argue that legal grey holes are constituted through judges' active production of indeterminacy. Scalia's "fact-bound morass" is not a constative reference to an inevitable product of the judicial review of policing but a performative production of his legal reasoning. Second, Dyzenhaus' idea of cycles of legality (virtuous and vicious) points (indirectly) to the role of temporality in legal process. After all, cycles of legality develop through time, as particular judicial decisions and frameworks impact other courts, and other state actors and institutions, and as those actors and institutions comply, reinterpret, resist or expand upon them. Not only do cycles of legality develop through the temporal processes of legal decision-making and dissemination, but furthermore those cycles of legality are constituted, as I will show, through the *timeframes* and *timelines* articulated in the judicial opinions themselves. As I will show in the next section, a vicious (and empty) cycle of legality emerged in federal courts' reasonable force jurisprudence out of a pernicious combination of indeterminant balancing tests with layered legal timeframes that resulted in police officer immunity. Finally, as I will argue in the conclusion, we should not think of the virtuous and vicious cycles of legality as static or simply binary possibilities. The need for states to legitimize their violence through legal norms opens up both dangers and possibilities at every turn.[29] And some of those possibilities emerge when different regulatory frameworks and actors engage and collide. Thus attention should be paid toward a whole domain of

authorization and constraint that is rendered invisible by the dichotomy of law and sovereignty: domains of law below the level of the federal Constitution, policy, regulation, even quantitative benchmarking.

Civil Rights Litigation and the Creation of a Legal Grey Hole through Time

The courts can potentially constrain police violence when litigation in a particular case incentivizes police departments to change practices because of unfavorable decisions. The simplest way this occurs is through evidence exclusion. When prosecutors lose cases because police practices result in the exclusion of evidence, the hope is that police departments are incentivized to change their practices. Criminal prosecutions of police officers, by contrast, aim to change behavior more directly through the traditional deterrence function of criminal punishment. Civil litigation, finally, is somewhere in between—like criminal prosecution it seeks to deter through a sanction, but unlike criminal prosecution the sanction is paid by the governing entity as a whole. Lerman and Weaver argue that even when civil suits are successful, they do little to curb police brutality because the individual offending officer rarely pays damages or is subject to any punitive sanction after the court judgment.[30] Nevertheless, civil litigation, particularly in the federal courts remains crucially important: The Supreme Court's jurisprudence concerning police use of force has developed out of civil litigation under a particular provision of the Civil Rights Act of 1871, 42 U.S.C. § 1983, which established that an individual can be liable for depriving another of their constitutional rights when they act "under color of any statute, ordinance, regulation, custom, or usage, of any State."

My argument in this section is that the Supreme Court has created a legal grey hole in the civil rights civil litigation area *through time*: I mean time in (at least) two

ways: First, I want to suggest that the legal grey hole was not an inevitable nor endemic feature of the encounter between legality and police. Rather, in the civil litigation arena it developed and expanded in historical time as earlier more constraining decisions and opinions have been replaced by subsequent more enabling and immunity-granting decisions and opinions. Second, I want to suggest that the Court has created this grey hole by layering multiple *temporalities* in their jurisprudence, whose effect is to grant wide immunity to police officers and departments for civil liability.

The legal grey hole is created through the combination of indeterminant balancing tests and a layering of multiple legal timeframes that together work to create legal immunity. I borrow the idea of legal timeframes from Karin Loevy who, in an insightful analysis of the political and legal life of the ticking time bomb scenario in Israel, shows how this (in David Luban's words, "bewitching"[31]) hypothetical is actually embedded in multiple competing timeframes: In addition to the compressed time-frame of the hypothetical ("there's no time, we have to find the bomb"), the legal order adds, among others, a "procedural timeframe of *order nisi*;… the administrative law timeframe of ex-ante authorization; … [and] the criminal law timeframe of ex-post liability."[32] Loevy's approach to the multiple and layered time-frames embedded in legal practice is vital for understanding the way in which the U.S. Supreme Court has expanded legal immunity for police officers. Following Loevy, I read judicial opinions concerning the constitutionality of police violence with attention to the different ways they frame time. These ways include, first, the procedural timeframes of judicial review, beginning with the post-hoc nature of court evaluation of a case and the prospective nature of legal rule-making out of said evaluation. But, as I will show, another crucial procedural timeframe is established when the court establishes the *order of analysis* of Constitutional questions. Other juridical timeframes

include the imaginative projection and reconstruction of the police officers' experience of the event and the imaginative projection and reconstruction of the police officers' understanding of law. Finally, the Court combines these multiple timeframes to create a fully circular timeframe whose effect is expanding legal immunity for police violence.

The landmark Supreme Court case of *Tennessee v. Garner* (1985) transformed the legal regulation of police violence. Prior to *Garner,* 24 states (including Tennessee) had, adapted from the English common law, rules allowing the police to use any means necessary (including deadly force) to arrest or prevent the escape of a felony suspect, no matter what the felony and regardless of whether the suspect was armed or not.[33] The legal timeframe of the *Tennessee v. Garner* decision involved the post-hoc clarification of Constitutional norms governing police use of force. In *Garner* the Court considered the "reasonableness" of police use of deadly force to stop a suspected felon from escaping and inaugurates its jurisprudence of "reasonable force." In the process it manifested what Jinee Lokaneeta describes as "the liberal state's need to distinguish its own 'humane' violence from 'inhumane' violence."[34] Here the Court considered, amongst other things, "actual departmental polices" in order to identify the line between reasonable and excessive force. In addition, the Court used a balancing test, weighing the extent of the intrusion upon an individual's rights against the state's interests "in effective law enforcement." Crucially, the Court did not simply render a decision after applying the balancing test to the particular facts at hand; It also explicitly declared a rule: "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. … A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[35] Thus one sees the emergence in this case of a potentially virtuous cycle of legality (legal indeterminacy → court decision

→ articulated legal constraints) constituted through a new legal timeframe. The decision in *Garner* created a new Constitutional reasonablesness timeframe: Going forward police officers using force would need to factor in the risk of lower courts finding a Constitutional violation when using deadly force against a fleeing suspect. *Garner's* legal rule inaugurated a juridically structured time-frame for police violence in which officers would need to factor in the increased possibility of legal sanction (both criminal and civil).

While it is always difficult to measure the impact of Court decisions, and it would be unwise to assume that Supreme Court decisions produce the changes they articulate,[36] Tennenbaum, studying police killings from 1976-88, found a nearly 24% reduction in police killings in states whose previous use of force policies were overturned by *Garner* as compared to a 13% reduction in police killings in those states whose laws governing police use of force were already in accordance with the decision.[37]

In *Graham v. Connor* (1989) the Court complicated *Garner's* temporality by introducing the "objective reasonableness" standard. Such a "reasonableness" standard again required a balancing test: balancing the individual's interests (to be free from governmental intrusion) and the government's interests. The term "objective" reflects the idea that the officer's subjective motivation is irrelevant to the process of deciding whether or not excessive force was used. What is relevant is "objective" circumstances and facts, *but only from within a specific timeframe:* the Court asserted that the reasonableness of the intrusion must be evaluated "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[38] In other words, *Graham*'s account of objective reasonableness means that force can be "reasonable" but

based on a perceptual mistake.[39] (Furthermore, the "reasonable officer" test as opposed to a "reasonable person" test means that expert testimony may be introduced.) The *Graham* court says the use of force must be judged from the time-horizon of the event itself, because police officers are "often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving." In other words, the second timeframe of the *Graham* court (the demand that judges project themselves back into the time-horizon of the event itself) is based upon a further *imagined temporality*: the compressed time of the police officer in an apparent emergency, who lacks the time to make reasoned judgments. Objective reasonableness, then, brings in something much more like the police officer's *subjective experience* (or retrospective testimony about that experience) of the event itself.

Finally, the Court asserted that the reasonableness of the use of force, judged from the perspective of the officer at the time, is to be determined by considering "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Rachel Harmon convincingly argues that the effect of this decision is to replace the *rule* established in *Garner* with a collection of *factors*: "the Court in *Garner* weighed the government's interests against those of the suspect as a means to develop a rule to guide and govern police practices… In *Graham*, the Court provided no rule, and instead recommended the weighing technique to lower courts—and presumably to officers—as a primary method for evaluating individual use of force."[40]

With only factors, and no rule, the *Graham* Court's modified temporality (the requirement to project itself back into the time horizon and perspective of a police officer

on the scene) opened the door in subsequent cases for legal indeterminacy to produce legal immunity. Here the time-line is: (vague) legal precedent → police action in condition of uncertainty → possible litigation → court application of precedent to the factual circumstances *as they appeared to a reasonable officer on the scene*.

In 2006, the Supreme Court in *Scott v. Harris* went even further than the Court in *Graham* by sneakily overturning *Garner* -- denying that it instituted a rule: According to Justice Scalia, rather than establishing a rule, "*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation."[41] The trajectory has thus been towards ever greater legal indeterminacy, as the Supreme Court has replaced bright-line rules distinguishing between reasonable and excessive force with fairly vague exhortations to lower courts to engage in fact-specific judgments, balancing the interests of the state, the public and the victim of police violence. In *Scott* the Supreme Court left it to lower courts to apply the balancing test by, in Scalia's words "'slosh[ing] our way through the factbound morass of 'reasonableness.'" without showing lower courts how those balancing tests should turn out for specific kinds of cases. This "factbound morass" becomes even more legally significant when it is incorporated into courts' determination of "qualified immunity," which I discuss in the next section.

Qualified Immunity

The development of the law from *Garner* through *Graham* to *Scott* did not in itself produce a legal grey hole. It produced a certain degree of legal indeterminacy through the replacement of a rule with factors, and legitimated police officers' testimony about their

use of force through the barring of hindsight, but left open the possibility for lower courts to apply the factors and balancing test in ways that would, nevertheless, constrain police use of force. However, the doctrine of *qualified immunity* adds a third time-frame, rendering the analysis circular and producing a legal grey hole. The idea of qualified immunity is that state officials should be shielded from legal liability for the violation of individual rights at least *some* of the time (it is not absolute immunity). To determine when a state official should be so shielded, the Court, again, turns away from the analysis of subjective motivation—an inquiry that would hinge upon whether or not the agent acted in "good faith" or with "malice." Rather, as in *Graham*, the analysis concerns the "objective reasonableness" of the action. Again the court imagines a hypothetical reasonable officer, and projects that person back into the time-horizon of the event. But in the case of qualified immunity, the court asks whether or not such a reasonable police officer would have known that his or her discretionary activity violated a clearly established law. If the law *at the time of the event* was not sufficiently clear then the police officer should receive qualified immunity.

Actors still act in the "shadow of the law" but the shadow has turned into an umbrella: The qualified immunity doctrine asks courts to imagine not simply what would a reasonable officer do at the time but whether a reasonable officer would have known that the conduct under question clearly violated a person's rights.[42] In other words, the court's analysis now requires bracketing not only post-hoc knowledge of facts but also post-hoc knowledge of law. This question then concerns whether the law at the time of the claimed violation was clearly established or not. Where the "objective reasonableness" standard protects perceptual mistakes concerning the facts of a situation,

the qualified immunity defense protects “reasonable” misperceptions about the law.[43] When is a misperception of the law reasonable? When the law at the time of the officer's action was not itself clear: "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."[44]

The doctrine of qualified immunity developed fully in relation to civil rights suits against the police in the early 2000s. *Saucier v. Katz* (2001) established that the purpose of qualified immunity is “to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. An officer might correctly perceive all of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances.” Qualified immunity thus operates on the "hazy border" between excessive and reasonable force.[45] In *Brosseau v Haugen* (2004), this conception is applied, emphasizing explicitly legal indeterminacy *at the time of the police officer’s action* : “If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.”[46] Which leads some commentators[47] to describe it as a "Graham plus" standard: It grants legal immunity when the violation is a close call because the close call is itself evidence of the reasonableness of a misperception of the law. But of course the "close call" analysis is itself enabled by the objective reasonableness jurisprudence which in *Scott* denied that *Garner* created a bright-line rule but instead was simply an example of the weighing of factors in a context-dependent analysis.

The result of the qualified immunity doctrine is two separate analyses, both of which project the court back into the time of the event: one concerning objective reasonableness and the other concerning the reasonableness of the belief about objective reasonableness. As Hassel puts it, "a court must first determine whether a defendant's actions are objectively reasonable. Then, assuming that the actions were not objectively reasonable, the court must determine whether it was nonetheless objectively reasonable for the defendant to have believed his actions were objectively reasonable."[48] In the first analysis, through the time-frame of *Graham*, the Court brackets its *present understanding of the facts* (no hindsight) but projects back in time its *present understanding of the law*. The court uses its understanding of the principles of reasonable force, and then applies them to the factual circumstances of a reasonable officer *at the time* of the event. The court restricts from its analysis post-hoc knowledge of such factual questions as, "was the recipient of police coercion armed or unarmed?" Rather the court asks whether a reasonable officer at the time might have had reason to suspect that the person was armed. So the time-frame is *partly,* but not completely, circular.

But where the objective reasonableness analysis asks the court to bring its present understanding of the law back to the time-horizon of the event, the second, qualified immunity analysis develops a vicious cycle of legal indeterminacy, asking the court to reason from the facts and the law as they were both perceived at the time. In the qualified immunity analysis, the objective reasonableness of the police officer's *belief* that his actions were objectively reasonable hinges upon the clarity of the law *at that time*: Vague Legal Precedent → Police Action in Uncertainty → Court (Non)Application of Vague Legal Precedent to Facts as Both Appeared at the Time.

If the Supreme Court avoids articulating clear rules that emerge from the application of the balancing test as happens in *Scott v Harris*, then qualified immunity is thereby expanded. Replacing rules and principles with balancing tests and factors does not *in itself* indicate an expanding legal grey hole and a vicious cycle upholding arbitrary power. After all, at least some lower courts might take those balancing tests and use them to rule against the police, restraining excessive force. However it is the combination of the vague balancing tests of *Scott* with the *qualified immunity* doctrine that threatens to turn federal law into an ineffective constraint. As Harmon puts it, "*Scott*, even more than *Graham* and *Garner*, makes almost all future cases indeterminate. In many areas of the law, indeterminacy is unfortunate; in the context of § 1983 litigation, because of qualified immunity law, it is devastating."[49] The time-frame of qualified immunity analysis, in combination with the open-ended balancing tests of objective reasonableness all but guarantee the ongoing existence of immunity-producing legal indeterminacy.

The impact of *Scott v. Harris* on qualified immunity can be seen in an appellate court decision from 2009 in *Cordova v. Aragon*. In *Cordova*, the Tenth Circuit Court of Appeals encountered a case that was factually quite similar to *Scott v Harris*, since it dealt with the use of force (in this case shooting, not vehicle-ramming) of a suspect fleeing the police in a vehicle and potential endangering the lives of others. The Appellate Court, first engaging in the objective reasonableness inquiry applied the decision in *Scott* while distinguishing its facts from those of *Scott*: On the one hand, the court begins "sloshing through the fact-bound morass of reasonableness" by distinguishing the type of force employed (shooting at the suspect's head versus ramming the suspect's vehicle in *Scott*) and the dangers posed by the suspect (reckless driving

potentially dangerous to bystanders, but no bystanders present so not an imminent threat, and no imminent threat to the officers themselves). They concluded the analysis by declaring the use of force excessive and unreasonable: "We cannot say, however, that the general risks created by a motorist's fleeing from the police are, without more, enough to justify a shooting that is nearly certain to cause that suspect's death."[50]

On the other hand, the same distinction between the facts of *Cordova* and the facts of *Scott* was used to establish qualified immunity for Officer Aragon: The Court viewed the facts of their case as falling somewhere between the facts of *Scott* and the facts of another excessive force case (*Vaughan*):

> Our case is a hybrid-the risk to potential third parties was as substantial, but less imminent, as in *Scott* and the level of force was nearly certain to cause the death of the suspect. Whether that situation is more like the police using deadly force (but not of a level certain to cause death) to prevent a substantial risk of harm to others, or more like the police shooting a suspect who poses minimal risk of harm to others, is not immediately clear. *Officer Aragon was confronted with a situation that fell between these two lines of cases, and the result was uncertain*.[51]

Thus, for the court, differences in facts—specific aspects of the context of the use of force and the type of force used—not only directly impacted the outcome of the balancing test established in *Scott*, they also appeared to (inevitably) produce qualified immunity as well. While the force used was excessive and unreasonable, Officer Aragon could not have known that because there was no legal precedent *at that time* applying the factors and balancing test to a sufficiently similar set of facts.

In the absence of factually identical contexts and degrees of force, the "factbound morass of reasonableness" will produce legal indeterminacy and thus immunity. What the court neglected to mention was that the need for near factually identically circumstances to produce legal clarity is not an inevitable result of Constitutional Fourth Amendment jurisprudence but a specific contingent accomplishment of the decision in *Scott v. Harris*, which *created* the "factbound morass of reasonableness" by refusing to acknowledge that certain rules concerning reasonable force emerge from prior applications of the balancing test such as in *Garner*.

Fully Circular Legal Time

Cordova, while granting qualified immunity, offered some hope as to the future clarification of law by establishing the unreasonableness of Officer Aragon's use of force even as it granted Aragon immunity. But the Supreme Court provided a route for halting such future clarification of the law of excessive force in 2009, declaring that courts do not need to establish whether or not force was excessive and unreasonable: they could go straight to the analysis of qualified immunity. They did this by altering the *procedural timeframe* of analysis that had been established in *Saucier v Katz* (2001). In that case, the Court had directed lower courts to engage in two analyses (objective reasonableness and qualified immunity), in a particular temporal order. The first one is the objective reasonableness test: the application of precedent to the factual circumstances as they appeared to a reasonable person at the time. After performing this test, if the court determined that the police officer's actions were not "objectively reasonable" (for instance, finding that the officer's stated belief that the victim posed an imminent threat to the officer or others at the time not reasonable), the court then had to ask whether it

was reasonable for an officer to believe that she was acting reasonably. The Court reasoned that the two-step process allows for the development of law: If the law at issue is vague or unclear, qualified immunity may be granted, but the Court is able to remedy the problem for the future actions of state officials.[52] (*Cordova* is an example of that two-step process in action.)

In its most recent jurisprudence, the Court has, crucially, modified the procedural timeline, rendering the circularity of the qualified immunity time-frame vicious. In *Pearson v. Callahan*[53] it declared that courts can grant qualified immunity based on the lack of legal clarity at the time of the event *without first deciding whether or not the police violated constitutional rights*. The two-step process is no longer required and courts can go straight to the issue of qualified immunity and whether or not the law was clearly established at the time of the alleged violation. The Court's decision was unanimous, and was widely praised by legal commentators for removing an unwieldy burden on lower district and appellate courts.

Nevertheless, it is important to note here is the recursive cycle of law in which this decision operates: By freeing courts of the need to do the first order analysis of rights-violations before deciding on qualified immunity, the Supreme Court inhibited the further development and clarification of the law concerning excessive force which in turn functions to strengthen the qualified immunity defense for future cases. Not only does the court's inquiry into the clarity of the law at the time of the alleged civil rights violation work to grant legal immunity, but it also works to prevent any clarification or specification of the law going forward. This recursive cycle expanding legal immunity can be seen in the application of the *Pearson v. Callahan* decision to lawsuits by former

Guantanamo Bay detainees. The Appellate Court for the District of Columbia decided, in *Rasul v. Myers* (2009)[54] to use its discretion (given by the Supreme Court in *Pearson*) to avoid the two-step analysis: Thus, it avoided deciding whether the *Boumedienne* case in the intervening years granted eighth and fourteenth amendment rights to Guantanamo detainees (and not just narrowly, habeas corpus rights), and instead proceeded to grant qualified immunity to state officials because those rights were not clearly established at the time.

Because the courts have layered timeframes (in which they imaginatively project back to the time-horizon of the event) on top of linear legal time (in which judgments are rendered after-the-fact), they have created an expanding legal grey hole. And by modifying the procedural timeframe that had required first an analysis of the alleged constitutional violation and then an analysis of the claim of immunity, the Court has established legal indeterminacy itself as a justification for both immunity in the case at hand and in future cases as well.

Conclusion

On the same day the Department of Justice declined to prosecute Ferguson Missouri Officer Darren Wilson for civil rights violations in the shooting death of Michael Brown, it issued a scathing report as part of a "Pattern and Practice" investigation of the entire police force. Concerning the former—the decision not to prosecute—while this paper has focused on the legal grey hole of *civil litigation* for civil rights violations, it is possible to detect similar forms of legal immunity in the high thresholds for prosecution established by 18 U.S.C. § 242. The legal reasoning overlaps

with that in civil litigation because in the criminal cases the courts use the same standard of "objective reasonableness" developed in the civil cases (*Graham*, *Garner*, and *Scott*) to establish that a rights violation occurred. While there is no qualified immunity defense (according to the Supreme Court in *Pearson*) there is a higher willfulness standard (and "specific intent" requirement) for proving a violation that similarly works to shield police.[55] (*Campaign Zero*, discussed below, recommends eliminating the willfulness standard for Federal Civil Rights prosecutions of police officers.[56]) Perhaps the Court felt less compelled to erect barriers to criminal prosecutions (as opposed to civil litigation) since it assumed that federal prosecutors' discretion would accomplish the very same objective.

Concerning the latter—the Department of Justice's report on the entire police force of Ferguson, as well as the complicity of judges and city officials—it offers the promise of constraining police use of force by using the threat of litigation to address broader and deeper policies and practices. As Coates argues, "the focus on the deeds of alleged individual perpetrators, on perceived bad actors, obscures the broad systemic corruption which is really at the root."[57] Similarly, Madar writes, "far more useful are the DOJ Civil Rights Division's root-and-branch interventions into violently dysfunctional police forces, triggered by 'patterns and practices' of systematic rights violations rather than any one particular incident."[58] Moving beyond both law *and* sovereignty narrowly construed, enables attention to what Harmon describes as the "problem of regulation" and the role of "other institutions and sources of law in regulating the police."[59] As Harmon shows, police use of force is embedded in a dense but also permissive regulatory environment running the gamut from administrative rules to employment and collective

bargaining law to state level licensing regulations. Consent decrees, Memoranda of Understanding and Collaborative Agreements all emerge out of or in the shadow of Department of Justice "pattern or practice" investigations, aiming to change policies and practices at the department level. Furthermore, even tools such as quantitative benchmarking can be deployed in the service of structural reform: A DOJ study cited by Rushin of the Washington D.C. police force contrasted what they discovered to be 15% rate of excessive force incidents as compared to a benchmark "'well-managed and supervised police department' [that] should only expect about 1 or 2 percent of all incidents to involve excessive use of force."[60] And in Cincinnati, Shatmeier describes successful police department reform in the wake of a Department of Justice "pattern or practice" investigation through consent agreements that relied on "experimentalist regulation."[61]

At the level of policy, *Campaign Zero*, comprised of activists affiliated with the Black Lives Matter movement, recently released a set of policy proposals for the reform of police practices and institutions. *Campaign Zero* calls for a range of reforms, including the end of broken windows policing, stronger civilian oversight, mandated body cameras, new kinds of training of officers, the end of practices such as civil forfeiture and the reliance of cities on police-generated fines, eliminating the supply of military surplus equipment to local police departments, the eliminating of police union contracts that shield police from civilian and juridical review, and the strengthening departments' use of force policies.[62]

One way to think about these developments and proposals is through the idea of "rule of law furniture," the other actors and institutions committed to the rule of law as a

normative project.[63] While Fourth Amendment jurisprudence has moved in the direction of a legal grey hole (or what Dyzenhaus calls "rule by law" as opposed to "rule of law") the expanded legal immunities for police violence at the Constitutional level may be undermined in other legal, political and policy venues. One of the peculiarities of legal regulation of police violence is the fact that so much of the Constitutional jurisprudence discussed in this essay developed through civil suits as opposed to either federal prosecutions for civil rights violations or state-level prosecutions for criminal law violations. The precise patterns of influence and diffusion of norms between Constitutional jurisprudence and, for example, state criminal law is beyond the scope of this article. However, the point I wish to make is that opportunities for thickening up legal constraints on the police may be at the interstices of a legal pluralist system—when, for example, *policy guidelines* concerning "reasonable force" move ahead of constitutional jurisprudence and federal judicial decision-making on the same topic.

It would be foolish to claim that the Department of Justice agreements present a panacea for police violence. But it is important to recognize the potential of DOJ investigations and agreements, and the grassroots protest movements that provoke and sustain them. The hope for meaningful reform may lie in areas of policy and regulation that, even as they incorporate the rights of individuals, operate beneath the level of Constitutional jurisprudence. Perhaps, ironically enough, it is the older and wider concept of police (as regulation, as administration) that points the way forward.

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[1] Wesley Lowery, "How Many Police Shootings a Year? No One Knows" *Washington Post* September 8,
[2] "The Counted" http://www.theguardian.com/us-news/series/counted-us-police-killings. They report that police killings are occurring at twice the rate of the FBI's database of justifiable homicides from 2013, that the number is likely to reach 1100 for the year 2015, and that blacks killed by police were almost twice as likely to be unarmed as whites. (Jon Swaine, Oliver Laughland and Jamiles Lartey, "Black Americans Killed by Police Twice as Likely to be Unarmed as White People," *The Guardian* June 1, 2015 http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis).

[3] Laughland, Swaine, and Lartey, "US police killings headed for 1,100 this year, with black Americans twice as likely to die," *The Guardian* July 1, 2015 http://www.theguardian.com/us-news/2015/jul/01/us-police-killings-this-year-black-americans . Meanwhile, the Center on Juvenile and Criminal Justice found that in a 20 year period through 2011, Native Americans were the racial group most likely to be victimized by the police, constituting .8 percent of the national population and 1.9% of all documented police killings (Mike Males, "Who Are Police Killing?" Center on Juvenile and Criminal Justice, August 26, 2014, http://www.cjcj.org/news/8113).

[4] Thanks to Bonnie Honig for this observation.

[5] United States Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department* March 4, 2015 http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

[6] For a good discussion see David A. Graham, "Can the Baltimore Prosecutor Win Her Case?" *The Atlantic* May 5, 2015 http://www.theatlantic.com/politics/archive/2015/05/can-the-baltimore-prosecutor-win-her-case/392489/

[7] Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* Vol. 9, No. 1 (1974), pp. 95-160.

[8] The term is Antonin Scalia's from *Scott v. Harris*. I return to its significance later in the essay.

[9] The term comes from Justice Rehnquist in *Cady v. Dombrowski*

[10] Mariana Valverde, "Jurisdiction and Scale," *Social and Legal Studies* vol 18, no. 2 (2009), p. 147.

[11] Michel Foucault, *Security, Territory, Population*: *Lectures at the College de France, 1977-1978* translated by Graham Burchell (New York: Palgrave Macmillan, 2007), p. 312.

[12] Barry J. Ryan, "Reasonable Force: The Emergency of Global Policing Power," *Review of International Studies* 39 (2013), p. 436

[13] Guillermina Seri, *Seguridad: Crime, Police Power, and Democracy in Argentina* (New York: Bloomsbury, 2012), p. 89.

[14] Mariana Valverde, "Jurisdiction and Scale" *Social and Legal Studies* and "Police Science British-Style: Pub Licensing and Knowledges of Urban Disorders" *Economy and Society* vol 32, no. 2 (2003), pp. 234-252. It is Foucault's reliance on continental models, Valverde argues, that leads Foucault to see classical liberalism as breaking with police insofar as it broke with administrative regulations of the "police economy." Valverde writes "the relation between police and liberalism is not necessarily a negative one, as Foucault almost claims here." (Valverde, "Police, Sovereignty and Law," in Markus Dubber and Mariana Valverde, eds., *Police and the Liberal State* [Palo Alto CA: Stanford University Press, 2008], p. 27)

[15] Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government,* (New York: Columbia University Press, 2005), p. 3.

[16] Seri, p. 159

[17] Seri, p. 158

[18] Seri, p. 165

[19] Seri, p. 167

[20] Seri, p. 160

[21] In this discussion I am limiting myself to those approaches that, following Schmitt, emphasize a tensional relationship between the categories of law and sovereignty. The point of this analysis is not ultimately to develop a theory of sovereignty but rather to conceptualize the relationship between police and the legal order. For an interesting reading of Hobbes as, by contrast, inaugurating a tradition in which "sovereignty is just the name we give the law-constituted, artificial person of the state" see David Dyzenhaus, "Positivism and the Pesky Sovereign," *European Journal of International Law* (2011).

[22] Lisa L. Miller, "Racialized State Failure and the Violent Death Michael Brown" *Theory & Event* vol 17, no. 3 supplement (2014).

[23] Seri, p. 156.

[24] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, (Cambridge UK: Cambridge University Press, 2006), p. 3.

[25] Dyzenhaus, "The Compulsion of Legality," *Emergencies and the Limits of Legality,* edited by Victor Ramraj (Cambridge UK: Cambridge University Press, 2008), pp. 33-59.

[26] Dyzenhaus, *Constitution of Law*, pp. 6-7.

[27] Dyzenhaus, "The Compulsion of Legality," p. 56
[28] Dyzenhaus, "Preventive Justice and the Rule of Law Project," *Prevention and the Limits of the Criminal Law*, edited by Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (Oxford UK: Oxford University Press, 2013), p. 98; "The Compulsion of Legality," p. 56.
[29] Thanks to
[30] Amy Lerman and Vesla Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control*, (Chicago IL: Chicago University Press, 2014), p. 66.
[31] David Luban, "Liberalism, Torture, and the Ticking Bomb," *The Torture Debate in America*, Karen J. Greenberg ed. (New York: Cambridge University Press, 2006), pp. 35-83.
[32] Karin Loevy, "The Legal Politics of Time and Temporality in Emergencies: Ticking-Time in the Israeli High Court of Justice," *Studies in Law, Politics and Society* (forthcoming).
[33] Abraham Tennenbaum, "The Influence of the Garner Decision on Police Use of Deadly Force," *Journal of Criminal Law and Criminology*, 85, 1 (1994), pp. 242-244.
[34] Jinee Lokaneeta, "Torture Debates in the post-9/11 United States: Law, Violence and Governmentality," *Theory & Event* Vol. 13, No. 1 (2010).
[35] *Tennessee v. Garner* 471 U.S. 1 (1985)
[36] See Gerald Rosenberg, *The Hollow Hope* for the most prominent reminder of this.
[37] Tennenbaum, "Influence of Garner Decision," p. 256.
[38] *Graham v. Connor* 490 U.S. 386 (1989)
[39] As Jeffrey May writes, " if the misperception is reasonable then no constitutional violation has occurred" (Jeffrey May, "Determining the Reach of Qualified Immunity in Excessive Force Litigation: When Is the Law 'Clearly Established?'" *American Journal of Trial Advocacy* 35 (2012), See also Madar, "Why It's Impossible to Indict a Cop," *The Nation* November 25, 2014 http://www.thenation.com/article/why-its-impossible-indict-cop/ ("no hindsight is permitted, and wide latitude is granted to the officer's account of the situation, even if scientific evidence proves it to be mistaken.")
[40] Rachel Harmon, "When is Police Violence Justified?" *Northwestern University Law Review* (2008), p. 1129.
[41] *Scott v. Harris* 550 U.S. 372 (2007), pp. 382-3
[42] *Harlow v. Fitzgerald* 457 U.S. 800 (1982), Hassel, "Excessive Reasonableness" p. 123
[43] see May, "Determining the Reach of Qualified Immunity"
[44] *Harlow* (1982), p. 818
[45] *Saucier v. Katz* 533 U.S. 194 (2001)
[46] *Brosseau v Haugen* 543 U.S. 194 (2004)
[47] see May, "Determining the Reach of Qualified Immunity," fn 51
[48] Diana Hassel, "Excessive Reasonableness," *Indiana Law Review* (2009), p. 125.
[49] Harmon, "When is Police Violence Justified?" p. 1140.
[50] *Cordova v. Aragon* (2009) 569 F. 3d 1183
[51] *Cordova v. Aragon* (2009) 569 F. 3d 1183
[52] *Saucier* at 20, discussed in *Pearson*
[53] *Pearson v. Callahan* 555 U. S. ____ (2009)
[54] *Rasul v. Myers* U.S. Court of Appeals, District of Columbia Circuit, No. 06-5209
[55] (according to *U.S. v Brugman*. See also FBI Bulletin)
[56] http://www.joincampaignzero.org/investigations
[57] Ta-Nehisi Coates, "The Gangsters of Ferguson," *The Atlantic* March 5, 2015 http://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/
[58] Chase Madar, "Why It's Impossible to Indict a Cop,"
[59] Rachel Harmon, "The Problem of Policing," *Michigan Law Review* vol. 110, no. 5 (2012), pp. 761-817.
[60] Stephen Rushin, "Federal Enforcement of Police Reform," *Fordham Law Review* vol. 82 (2014), p. 3228
[61] Elliot Harvey Schatmeier, "Reforming Police Use-of-Force Practices: A Case Study of the Cincinnati Police Department," *Columbia Journal of Law and Social Problems* 46 (2013), pp. 539-586.
[62] http://www.joincampaignzero.org/solutions/#solutionsoverview
[63] See Dyzenhaus, *Constitution of Law*, p. 230