



CONSTITUTIONAL
Q&A

EXCESSIVE
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THE RUTHERFORD INSTITUTE, a national nonprofit civil liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the integral human rights of all people through its extensive legal and educational programs. The Institute provides its legal services at no charge to those whose constitutional and human rights have been threatened or violated. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms.

“Policing is broken... It has evolved as a paramilitary, bureaucratic, organizational arrangement that distances police officers from the communities they’ve been sworn to protect and serve. When we have shooting after shooting after shooting that most people would define as at least questionable, it’s time to look, not just at a few bad apples, but the barrel. And I’m convinced that it is the barrel that is rotted.”

—Norm Stamper, former Police Chief of the City of Seattle.¹

Stephon Clark, an unarmed twenty-two-year-old African-American, was shot and killed on March 18, 2018 by Sacramento police who had earlier received reports that someone was breaking car windows and hiding in a backyard. Two officers saw Clark in a neighbor’s backyard and chased him into his grandmother’s backyard. After ordering him to raise his hands, not even a second elapsed before the police opened fire on Clark, purportedly believing he had a gun.² But Clark did not have a gun. He had an iPhone in his hand and the police shot at him twenty times.



This incident has sparked nationwide outrage because of the extreme and excessive response of police to the report. A police helicopter was sent for a routine report of vandalism, the police did not give Clark a chance to put his hands up, and then after shooting Clark they delayed in calling for medical assistance. But police actions after the shooting are perhaps the most disturbing part of the story. About seven minutes after the shooting, the officers muted their body cameras and animatedly talked amongst themselves,³ creating suspicion of a coverup.

The investigation into this incident is ongoing, but the evidence suggests an egregious use of excessive force by police. How can a cellphone be mistaken for a gun? And even if it were a gun, police gave Clark no real chance to put his hands up and demonstrate he was not a threat.

Unfortunately, the violence that Clark experienced at the hands of police officers was not an isolated incident. Almost daily there are new reports of inexplicable acts of brutality committed by law enforcement officers:

- Frank Baker, a middle-aged African-American, returned from work on June 24, 2016, and parked his car in a lot near his Minneapolis apartment. As he spoke on his cellphone, Baker was approached by a police officer investigating an anonymous and uncorroborated tip about persons with weapons in the area. The officer ordered Baker out of his car, and Baker complied with his arms raised. Despite Baker's compliance and lack of any aggression, the officer unleashed a trained police dog which attacked Baker's right leg and dragged him along the ground. The officer continued to urge on the dog's attack while another officer who joined the scene began kicking Baker in the ribs. Baker suffered numerous wounds and tissue loss to his leg along with fractures to his ribs that required hospitalization for over two weeks. Subsequently, he was found to be completely innocent and unarmed at the time of the brutal attack.⁴



- A Utah nurse who was protecting the constitutional rights of an unconscious patient by refusing to comply with a police officer's order to draw blood from the patient was grabbed violently by the officer, dragged outside the hospital, and handcuffed. As the nurse told the officer, she was only doing what she was supposed to do, but was attacked by the police officer because she stood up to his illegal demand;⁵



- A distraught teenager who had just witnessed her mentally ill father gunned down by police and was kneeling next to him crying was handcuffed by a police officer who then threw her over his shoulder. The officer then "carried her into the backyard, hung her roughly over the back gate and then threw her onto her feet. [She] was then put in the back of a police car in handcuffs[;]"⁶
- Nandi Cain, Jr., was thrown to the ground, choked and punched over a dozen times by a police officer after the officer stopped Cain for jay-walking. Cain made no aggressive moves toward the officer, and had even removed his jacket to show the officer he had no weapon.⁷

Events like these involving police using excessive force, meaning a force that is objectively unreasonable and unnecessary,⁸ are becoming disturbingly commonplace as police adopt more confrontational, aggressive and

violent tactics in dealing with those whom they are supposed to “protect and serve.” A recent study found that in the year 2012 alone, persons visited hospital emergency rooms almost 140,000 times as a result of encounters with police, including over 55,000 fatal and nonfatal injuries.⁹ In the one-year period beginning June 2015, there was an average of 136 arrest-related deaths each month.¹⁰

The high number of police-inflicted injuries is not surprising considering how widespread training that instills a “warrior mindset” in law enforcement officers has become, leading police to look upon “every individual they interact with as an armed threat and every situation as a deadly force encounter in the making.”¹¹ This type of mentality transforms everyday citizens into enemy combatants in the eyes of law enforcement, and as a result, some police officers feel little concern for the rights of those individuals whom they interact with.

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That the streets of America have become a battlefield in the minds of law enforcement is further reinforced by federal policies that provide police with military-grade weaponry. Under federal programs begun in the 1980's, state and local law enforcement agencies have obtained, at little or no cost, military equipment such as armed helicopters, grenade launchers, and armored vehicles that have turned those agencies from civil forces that protect and serve citizens into para-military forces occupying their communities.¹² Since 1997, the federal government transferred \$5.1 billion worth of such property to state and local police agencies.¹³

Our national government has become complicit in the systemic violence plaguing law enforcement in other ways. Despite federal laws allowing the Justice Department to sue police departments and require they adopt reforms to prevent the unconstitutional brutalization of citizens, the federal government has abdicated its responsibility to protect the civil rights of citizens. Last year, the Justice Department announced it would “pull back” on the enforcement of consent decrees it had worked out with over a dozen state and local police departments with histories of violating the constitutional rights of citizens that required reforms to limit incidents of excessive force.¹⁴ And federal courts, the primary venue for lawsuits seeking recovery for civil rights violations by police, have adopted rules that rig the game in favor of police officers, allowing them to claim immunity from *suit even if the injured citizen proves his constitutional rights were violated*.¹⁵

As Human Rights Watch has noted:

The excessive use of force by police officers, including unjustified shootings, severe beatings, fatal chokings, and rough treatment, persists because overwhelming barriers to accountability make it possible for officers who commit human rights violations to escape due punishment and often to repeat their offenses.... Officers with long records of abuse, policies that are overly vague, training that is substandard, and screening that is inadequate all create opportunities for abuse. Perhaps most important, and consistently lacking, is a system of oversight in which supervisors hold their charges accountable for mistreatment and are themselves reviewed and evaluated, in part, by how they deal with subordinate officers who commit human rights violations. Those who claim that each high-profile case of abuse by a “rogue” officer is an aberration are missing the point: problem officers frequently persist because the accountability systems are so seriously flawed.¹⁶

Just this year, the U.S. Supreme Court issued a ruling that is certain to protect police officers who violate constitutional rights.¹⁷ In that case,

police shot a person who was holding a kitchen knife, but had committed no crime nor made any aggressive movements towards police or others. Nevertheless, the Court, reversing the ruling of a lower court, held that the officer was protected by “qualified immunity” and could not be sued because the majority believed the law was not clear to put the officer on notice that he would be violating the victim’s constitutional rights by shooting her. Justice Sotomayor wrote a powerful dissent, pointing out the Court’s “unflinching willingness to summarily reverse courts for wrongly denying officers the protection of qualified immunity but rarely intervenes where courts wrongly afford officers the benefit of qualified immunity in these same cases.”¹⁸

In a state in which public officials are more focused on maintaining order than with upholding the Fourth Amendment, it is imperative that we know our own rights when it comes to the potential use of excessive force.

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WHAT LAW PROTECTS ME AGAINST BEING HARMED BY POLICE?

Under the United States Constitution, citizens are protected from unnecessary police violence and are allowed to sue for injuries they sustain as a result of such violence. In fact, the Fourth Amendment’s protection against “unreasonable searches and seizures” applies whenever police employ excessive force in the course of conducting an investigation or arresting a person.¹⁹ When police go too far and use unnecessary force against a person, they violate the person’s constitutional protection against unreasonable seizures.

WHAT AMOUNT OF FORCE USED BY POLICE IS CONSIDERED EXCESSIVE AND VIOLATES MY FOURTH AMENDMENT RIGHTS?

Whether the amount of force used by police in making a seizure is “unreasonable” depends on all the facts and circumstances involved in the incident. The factors a court will look at include (1) the severity of any

crime at issue, (2) whether the person was armed, (3) whether the person posed an immediate threat to the safety of the officers or public, (4) whether the person put up resistance to the police officer and the amount of resistance, (5) whether more than one person was involved, and (6) whether other dangerous circumstances existed.²⁰



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There are no hard and fast rules on what police actions constitute excessive force, and the same action may be reasonable in one case and not in another. For example, handcuffing a person would not be considered excessive force if the police are searching an area where they reasonably believe dangerous weapons may be present.²¹ On the other hand, handcuffing is considered excessive if police don't have any reason to suspect a person of a crime and are investigating a matter, such as a missing person, that does not involve a risk of violence.²² Each case involves an examination of the amount of force used by the police and their reasons for using the said amount of force.

IF POLICE USE FORCE UPON ME IN THE COURSE OF AN ARREST, ARE THEY VIOLATING MY RIGHTS?

Not any and all force used by police in carrying out their duties violates the Fourth Amendment. Stopping a person to conduct an investigation or making an arrest necessarily involves the application of some force by police. But when police act unreasonably and use excessive force in carrying out their duties, they violate the Fourth Amendment.²³

IF POLICE HAVE PROBABLE CAUSE TO MAKE AN ARREST, DOES THAT MEAN THEY DO NOT VIOLATE THE FOURTH AMENDMENT IF THEY INJURE THE PERSON THEY ARREST?

Even if police have the legal right to stop or arrest a person, they still may not use excessive force against the person. Thus, where police attempt to stop or arrest a person for a crime and the person tries to escape, the police should not shoot the person in order to prevent his escape unless they have reason to believe that the person poses an immediate threat to the officers or the public.²⁴ And even if a person offers some resistance to an arrest, police are not allowed to respond with force that is plainly more than what is needed to control that person.²⁵

ARE POLICE ALLOWED TO USE ANY LEVEL OF FORCE IN ORDER TO STOP AND APPREHEND A FLEEING SUSPECT?

The Fourth Amendment forbids the use of excessive force in all circumstances and police cannot lawfully use any and all means to capture a suspect. Thus, deadly force, which includes actions that pose a high likelihood of serious injury or death,²⁶ cannot be used to stop a person who is resisting arrest or attempting to flee unless the police have probable cause to believe the person poses a serious danger to the officer or the

public. Unless the person is suspected to have committed an especially dangerous crime or is acting in a way that poses an immediate threat to the safety of the public, an officer should not use deadly force in apprehending a fleeing suspect.²⁷



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If police shoot a fleeing person who is suspected of only a minor offense and have no reason to believe that the person is armed, this is a use of deadly force that violates the Fourth Amendment.²⁸ Police also should not shoot into a moving vehicle in order to stop it unless they have a basis for believing the vehicle poses a clear threat of physical harm to others.²⁹ Additionally, if police are chasing a fleeing automobile and force it off the road at high speeds, this also would be excessive force unless the police had reasons for believing the occupants posed a danger to the public.³⁰

ARE POLICE REQUIRED TO STOP OTHER POLICE OFFICERS WHO ARE USING EXCESSIVE FORCE?

If a police officer sees another officer using excessive force against a citizen, he should not stand by and allow the citizen to be physically and emotionally abused. A law enforcement officer has an affirmative duty to intervene on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers.³¹

WHAT CAN BE DONE TO REDUCE THE NUMBER OF INCIDENTS IN WHICH POLICE UTILIZE EXCESSIVE FORCE?

Current police training practices contribute to the use of deadly force on uncooperative suspects because officers are trained to view incidents through a “worst case scenario” lens. This training leads officers to treat citizens as the potentially dangerous enemy, and has unfortunately resulted in fatal shootings when officers wrongly assess the circumstances.³² For example, officers have mistaken wallets for guns tucked in the waistband, or have interpreted a citizen’s act of raising his hands as drawing a weapon.³³



There are alternatives to these training practices, including the de-escalation tactics that both Chicago and Salt Lake City police teach in their police training. The Chicago Police Department requires training that promotes conflict de-escalation and the “sanctity of life.”³⁴ The Salt Lake City Police Department’s approach to de-escalation involves “more voice commands from the officer and the slight giving and taking ground with a suspect to buy time.”³⁵ These tactics have led to a decrease in deadly shootings, with no fatal officer-involved shootings in Salt Lake City since September 2015.³⁶ These tactics are a non-lethal alternative to deadly force on fleeing persons, as they involve more dialogue between the officer and the citizen. They also emphasize officers leaving space between themselves and the citizen and staying near cover to promote their safety.

WHAT ARE OUR LEADERS DOING TO PREVENT THE USE OF EXCESSIVE FORCE BY POLICE?

The disturbing trend of inaction in the face of the growing problem of police violence against citizens is not limited to the courts. As shown by the recent actions of the United States Justice Department, very little is being done at any level of government to address the systemic conditions and failures that have led law enforcement agencies to act like occupying armies in their treatment of citizens.³⁷ Any reform will only happen if the public stands up for their constitutional right not to be victims of excessive force and demand their representatives protect their rights.



WHAT KIND OF INJURIES CAN A PERSON RECOVER FOR IN AN EXCESSIVE FORCE CLAIM?

In order for a person to have an excessive force claim against police, it is not necessary that he have suffered a severe physical injury. For example, if police officers apply handcuffs so tightly and unreasonably that they cause the arrestee's hands to become swollen and numb, they may be liable for employing excessive force.³⁸ Moreover, the emotional harm from having a gun pointed at you by a police officer also can be the basis for recovery in an excessive force lawsuit.³⁹

Virtually any police action or equipment used to stop and hold a person can be used in a way that gives rise to an excessive force claim. A claim may be based on the manner in which the officer grabs and holds a person.⁴⁰ Handcuffing,⁴¹ using a taser,⁴² deploying of a police dog,⁴³ chasing or stopping a vehicle,⁴⁴ or pointing a gun at a person⁴⁵ may be the basis for a claim for excessive force.

IF I WITNESS OR AM VICTIM TO EXCESSIVE POLICE FORCE, AM I ALLOWED TO RECORD OFFICERS FOR EVIDENTIAL PURPOSES IN AN EXCESSIVE FORCE CLAIM?

The First Amendment protects the right of persons to photograph or record government officials performing their official duties in plainly visible public spaces. An officer may ask you to not interfere with their work if you are standing too close to a scene or posing some other threat of obstruction. However, police are not allowed to order you to stop recording or to seize and destroy any recordings or photographs that you have taken.⁴⁶

IF I AM INJURED BY A POLICE OFFICER, WHAT ARE MY LEGAL OPTIONS?

A person who is injured by a police officer's use of unreasonable, excessive force may seek recovery for his injuries, pain, suffering and other expenses related to the incident under a federal law that allows lawsuits for violations of constitutional rights.⁴⁷ The city, county or town that employs the officer also may be liable if it failed to train police properly on the use of force.⁴⁸ Additionally, some states may allow the person injured to bring a lawsuit against a police officer and/or his employer for assault and battery under the state's personal injury laws.⁴⁹ The fact that the injured person is convicted of the crime that is the reason for the arrest does not prevent him from bringing a lawsuit for damages if the police used excessive force in arresting him.⁵⁰

WHAT OBSTACLES EXIST THAT PREVENT EXCESSIVE FORCE CLAIMS FROM SUCCEEDING?

Lawsuits brought by citizens that seek money damages for injuries inflicted by police officers serve a valuable role in preventing use of excessive force by police. If police know that they would face personal liability if they were to act aggressively and injure citizens, it is likely that they would be more careful and less violent in the way they treat citizens. This includes the way police use the increasingly dangerous weapons they have at their disposal. Moreover, the cities and towns that employ police have an incentive to properly and effectively train officers to limit their use of force because a failure to train police properly may result in the city or town being held responsible for the injuries inflicted by police.



Unfortunately, the courts have created obstacles to recovery on excessive force claims, thereby reducing the deterrence such claims have on police violence. Not only does a citizen have the burden of proof on the claim, but courts have held that the citizen must show that a police officer's use of force was "clearly excessive" and "clearly unreasonable."⁵¹ Courts also hold that police must be given allowance for having to make split-second judgments,⁵² even if this might not have been the actual circumstances of the case. And even if there is evidence that the officer intended to mali-

ciously inflict injury or was motivated by racial hatred against the victim, this cannot be considered in determining the officer's liability.⁵³ Thus, if a citizen does get his case tried by a jury, that jury is basically instructed to give the benefit of the doubt to the police officer.

Moreover, even getting the opportunity to have a jury decide a citizen's excessive force claim has become difficult because of the courts' broad application of immunity given to police officers. The United States Supreme Court has ruled that police and other government officials are protected from civil rights lawsuits by the doctrine of "qualified immunity." This doctrine requires a citizen to prove that the officer's actions violated "clearly established law."⁵⁴ As a practical matter, this means that unless a citizen with an excessive force claim can show that his case is identical to another case that found a police officer liable for excessive force, the claim will most likely be dismissed based on qualified immunity. Indeed, in a dissent from a 2017 United States Supreme Court decision not to review a ruling that a police officer was not liable for shooting an unarmed man in the back as he walked away from the officer, Justice Sotomayor pointed out that the decision continued the Court's "disturbing trend" of granting police qualified immunity in cases involving excessive force and wrote that this trend is harming society as a whole.⁵⁵

WHAT SHOULD I DO IF I BELIEVE POLICE USED EXCESSIVE FORCE AGAINST ME?

If you believe your rights were violated in the manner police treated you, you first should try to obtain the proof that will be needed to support an excessive force claim against the officer. Many police departments now video record interactions between police and citizens with body cameras or dash cameras mounted on police vehicles. Thus, there is a very good chance the encounter with police was recorded. At the earliest opportunity, you should obtain a copy of any recordings using the state and local freedom of information laws. You should also seek medical assistance and an examination at the earliest opportunity in order to get treatment and to assure that the extent of your injuries is documented. It also is impor-

tant to consult with an attorney as soon as possible to help you in obtaining and preserving crucial evidence.

DEFEND YOUR RIGHTS

The Rutherford Institute stands ready to defend your rights if they are violated by the government. Excessive force is a symptom of a larger problem: the police's blatant disregard for people's rights under the Constitution. Excessive force claims are a priority at the Rutherford Institute because they often accompany violations of constitutional rights. By combating excessive force, the Rutherford Institute hopes to discourage unconstitutional police activity. If we do not resist excessive force and attempt to hold officers accountable, Justice Sotomayor's prediction that police will "shoot first and think later" will hold true for years to come.⁵⁶

Just last year, the Rutherford Institute won a settlement for a Texas man who was handcuffed and thrown to the ground by police for refusing to consent to a warrantless search of his house.⁵⁷ Currently, The Rutherford Institute is suing a Virginia county for using a tactical team of heavily-armed officers to arrest a man who police knew had committed no crime and posed no threat to the public.⁵⁸ After launching a flash grenade at the man's truck, police smashed the driver-side window, dragged the man out by his arms, handcuffed, searched and arrested him. And in November 2017, Institute attorneys filed a lawsuit on behalf of a young African-American man who, after being stopped by Louisiana police for a broken taillight, was thrown to the ground, beaten, arrested and hospitalized for severe injuries to his face and arm, all for allegedly "resisting arrest" by driving to a safe, well-lit area before stopping.⁵⁹ For over a quarter century, we have assisted, without charge, persons deprived of their liberty by government officials.

ENDNOTES

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THE RUTHERFORD INSTITUTE stands ready to defend your rights if they are violated by police. For over a quarter century, we have assisted, without charge, persons deprived of their liberty by government officials. If you believe your rights described above were violated and want to seek justice, contact us and we will listen and provide you with the guidance and help that you need.

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