RECENT CASES

FOURTH AMENDMENT — EXCESSIVE FORCE — NINTH CIRCUIT HOLDS FEMALE PLAINTIFFS BROUGHT VALID EXCESSIVE FORCE CLAIMS AGAINST POLICE OFFICERS WHO TASED THEM. — *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc).

In responding to violence against women, feminist legal scholars have frequently debated how the law can best balance viewing women as victims and encouraging female autonomy.[1] Recently, in *Mattos v. Agarano*,[2] the Ninth Circuit, sitting en banc, held that female plaintiffs in two consolidated cases alleged valid excessive force violations arising from tasings by police officers.[3] Analyses in several of the resulting opinions reveal competing assumptions about women. These assumptions transpose the feminist debate over the appropriate legal response to violence against women from domestic violence law to excessive force law. By edging toward unequal treatment of male and female plaintiffs in excessive force suits, the court's analysis has lent urgency to the efforts of those who oppose protectionist treatment of women.

On November 23, 2004, Seattle Police Department Officer Juan Ornelas pulled over Malaika Brooks for speeding and issued a notice of traffic infraction, which Brooks refused to sign.[4] Officer Donald Jones joined Ornelas, and as Brooks became agitated,[5] the officers ordered her to leave her car so that they might arrest her.[6] Brooks refused to exit her car, Jones showed her his taser, and Brooks responded that she was seven months pregnant.[7] The officers discussed how to safely tase Brooks, after which Ornelas opened the car door, removed the keys from the ignition, and dropped them on the floor.[8] Jones then discharged his taser on Brooks's thigh, shoulder, and neck, all within

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[1] *See generally* REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW 322–26 (2d ed. 2002).

[2] 661 F.3d 433 (9th Cir. 2011) (en banc).

[3] *See id.* at 436.

[4] Brooks v. City of Seattle, No. CO6-1681RAJ, 2008 WL 2433717, at *1 (W.D. Wash. June 12, 2008). Because the Ninth Circuit considered the facts of both cases in the context of summary judgment motions, the facts reported here are presented in the light most favorable to the plaintiffs. *See Mattos*, 661 F.3d at 439.

[5] Brooks v. City of Seattle, 599 F.3d 1018, 1020–21 (9th Cir. 2010).

[6] *Brooks*, 2008 WL 2433717, at *1. Sergeant Steven Daman also joined the officers at their request. *See id.* Based on the first names of the officers, it appears that all three were men, though none of the related court opinions explicitly states their gender.

[7] *Id.* at *1–2.

[8] *Brooks*, 599 F.3d at 1021.

approximately one minute.[9] Finally, Jones and Ornelas removed Brooks from her car and arrested her.[10]

Brooks filed suit against the officers in the U.S. District Court for the Western District of Washington, alleging that the tasing violated her Fourth Amendment right to be free from excessive force.[11] District Judge Jones denied the officers' summary judgment motion, finding that they could not invoke qualified immunity because their actions were "objectively unreasonable" and because Brooks's right to be free from such force was clearly established.[12]

A similar chain of events began on August 23, 2006, when four Maui police officers, including Darren Agarano and Ryan Aikala, responded to a domestic dispute between Jayzel Mattos and her husband Troy.[13] After the officers arrived, Troy became agitated, and Agarano asked to speak with Jayzel outside. Jayzel agreed, asking everyone to calm down because her children were sleeping.[14] Before she could move outside, however, Aikala announced that Troy was under arrest, at which point Jayzel stood between Troy and Aikala.[15] When Aikala moved to arrest Troy, he pressed against Jayzel's chest, and she responded by raising her hands and touching him in the process.[16] After asking whether Jayzel was touching an officer, Aikala deployed his taser, which locked Jayzel's joints and caused her to fall.[17] The officers then arrested both Troy and Jayzel.[18]

The Mattoses filed suit against the officers in the U.S. District Court for the District of Hawaii for violating their Fourth Amendment right to be free from excessive force.[19] The officers moved for summary judgment,[20] and District Judge Ezra found triable issues of fact

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[9] *Brooks*, 2008 WL 2433717, at *2.

[10] *Id.* According to Brooks, the taser left permanent scars on her body, but it did not harm her daughter, who was born healthy two months later. *Id.*

[11] *Id.* Brooks also brought state tort claims against the officers and other defendants. *Id.*

[12] *Id.* at *6, *13.

[13] Mattos v. Agarano, 590 F.3d 1082, 1084 (9th Cir. 2010). The other two officers were Stuart Kunioka and Halayudha MacKnight. *Id.* Based on these first names, it appears that all four officers were male, though none of the related court opinions explicitly states their gender.

[14] *Id.*

[15] *Mattos*, 661 F.3d at 439.

[16] *Id.*

[17] *Mattos*, 590 F.3d at 1085.

[18] *Id.* Troy was charged with harassment and resisting arrest, and Jayzel was charged with harassment and obstructing government operations. All charges were eventually either dismissed or dropped. *Mattos*, 661 F.3d at 439.

[19] *Mattos*, 590 F.3d at 1085. The Mattoses also alleged violations of their Fifth and Fourteenth Amendment rights during the incident and included other parties in their suit. *Id.* The district court granted summary judgment in favor of the defendants on these claims. *Id.*

[20] Mattos v. Agarano, No. 07-00220 DAE BMK, 2008 WL 465595, at *1 (D. Haw. Feb. 21, 2008).

regarding whether the tasing constituted excessive force.[21] As such, the court denied summary judgment.[22]

The officers in both cases filed interlocutory appeals to the Ninth Circuit.[23] In each case, a three-judge panel found no Fourth Amendment violation.[24] The Ninth Circuit granted rehearing en banc, vacated both three-judge panel opinions,[25] and combined *Brooks* and *Mattos* for consolidated argument and disposition.[26]

Writing for the panel, Judge Paez[27] held that both Brooks and Mattos alleged valid Fourth Amendment violations, but that the officers in both cases were entitled to qualified immunity.[28] In determining, first, whether the plaintiffs presented valid excessive force claims, the court applied the reasonableness test established by the Supreme Court in *Graham v. Connor*.[29] This test requires a fact-specific inquiry that focuses on "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."[30]

Applying this test to the facts of *Brooks*, the court found that Brooks did not commit a serious offense and that once the keys fell on the floor, she could not reach them given her pregnancy and thus did not pose a threat.[31] Further, the court found no exigent circumstances because the officers had time to consider her pregnancy.[32] The court completed its analysis by noting that though Brooks bore responsibility for escalating the incident, it was "overwhelmingly salient" that "Brooks told Jones, before he tased her, that she was pregnant and less than 60 days from her due date," and that the officer applied the taser three times in one minute.[33] Accordingly, the court held that a factfinder considering the evidence in the light most favorable to Brooks could find the tasing unreasonable.[34]

Applying the same test to *Mattos*, the court found that any crime Jayzel may have committed was minor, she was not threatening, and

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[21] *Id.* at *11.

[22] *Id.*

[23] *Mattos*, 661 F.3d at 438, 439.

[24] *See* Brooks v. City of Seattle, 599 F.3d 1018, 1031; *Mattos*, 590 F.3d at 1084.

[25] *See* Mattos v. Agarano, 625 F.3d 1132, 1132 (9th Cir. 2010); Brooks v. City of Seattle, 623 F.3d 911, 911 (9th Cir. 2010).

[26] *Mattos*, 661 F.3d at 436 n.1.

[27] Judge Paez was joined by Judges Schroeder, Graber, McKeown, Fisher, and Rawlinson.

[28] *Mattos*, 661 F.3d at 436.

[29] 490 U.S. 386 (1989); *see Mattos*, 661 F.3d at 441.

[30] *Graham*, 490 U.S. at 396.

[31] *Mattos*, 661 F.3d at 444 & n.5.

[32] *Id.* at 445.

[33] *Id.*

[34] *Id.* at 446.

she did not resist arrest.[35] The court pointed out that all three of these factors favored the plaintiffs primarily because Jayzel's only actions involved protecting her "breasts from being smashed against Aikala's body,"[36] and "begg[ing] everyone not to wake her sleeping children."[37] Finally, considering the totality of the circumstances, the court acknowledged the danger to police officers who respond to domestic violence[38] but found that Jayzel's status as the victim of that violence,[39] the presence of children, and the lack of warning before the tasing weighed against a finding of reasonableness.[40] Thus, the court concluded that Jayzel "alleged a Fourth Amendment violation."[41]

Nonetheless, the court determined that all of the officers were protected by qualified immunity because they did not violate clearly established law.[42] In reaching this conclusion, the court followed *Ashcroft v. al-Kidd*,[43] which requires a narrow interpretation of legal precedent in qualified immunity assessments.[44] The court looked to three cases decided before both incidents, all of which held that tasing was not excessive force.[45] Though Judge Paez found the facts of each case distinguishable from the facts of *Brooks* and *Mattos*, he could not conclude under *al-Kidd* that all reasonable officers would have known that the tasings in the present cases violated the Constitution.[46]

Judge Schroeder concurred to highlight how clearly the second *Graham* factor — whether the defendant posed a danger — weighed in favor of both Brooks and Mattos.[47] She stressed that both plaintiffs "were women, with children nearby, who were tased after engaging in no threatening conduct."[48] Moreover, she emphasized that "[t]he rele-

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[35] *See id.* at 449–50.

[36] *Id.* at 449 (quoting Plaintiff Jayzel Mattos' Response to Defendant Maui County's First Request for Answers to Interrogatories at 3, Mattos v. Agarano, No. 07-00220 DAE BMK (D. Haw. Feb. 21, 2008)) (internal quotation mark omitted). The court repeatedly characterized Jayzel's actions as protecting her breasts. *See, e.g.*, *id.* ("[T]he most that can be said about her actions is that . . . she attempted to prevent Aikala from pressing up against her breasts.").

[37] *Id.* at 451. The court frequently noted Jayzel's concern for her children. *See, e.g.*, *id.* at 449 ("Jayzel . . . express[ed] concern that the commotion might disturb her sleeping children . . . .").

[38] *See id.* at 450.

[39] The court emphasized the unreasonableness of "tasing the innocent wife of a large, drunk, angry man when there is no threat that either spouse has a weapon." *Id.* at 451.

[40] *See id.*

[41] *Id.*

[42] *See id.* at 448, 452.

[43] 131 S. Ct. 2074 (2011).

[44] *See id.* at 2084 ("We have repeatedly told courts — and the Ninth Circuit in particular — not to define clearly established law at a high level of generality." (citation omitted)).

[45] *See Mattos*, 661 F.3d at 446–48 (citing *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004); *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993); *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992)).

[46] *See Mattos*, 661 F.3d at 448, 452.

[47] *See id.* at 452 (Schroeder, J., concurring).

[48] *Id.*

vant out of circuit cases upholding tasings all involved the tasing of threatening men," a point that she raised "not to suggest that only men can be threatening, but that these women were not."[49]

Chief Judge Kozinski concurred in part and dissented in part.[50] Though he agreed qualified immunity applied in both cases, he argued that none of the officers violated the Fourth Amendment.[51] He asserted that each plaintiff's failure to obey the police entitled the officers to take forceful measures.[52] Chief Judge Kozinski stressed the lack of alternative measures available to the officers,[53] and he accused Judge Schroeder of being "chauvinistic" for asserting that a plaintiff's gender makes her less dangerous and therefore less subject to police control.[54]

Each successive opinion arising from these facts produced an increasingly overt examination of the plaintiffs' gender. These examinations expanded an ongoing feminist debate over how the law should respond to violence against women, drawing clear parallels with the domestic violence context.[55] Yet in this new territory, the argument against protective treatment of female victims is more compelling than it is in the domestic violence context because special consideration of gender in excessive force law creates a clear gender disparity in the treatment of and assumptions about male and female suspects.

In the domestic violence context, this debate pits feminists who push the law to protect women from male violence against those who argue that such treatment undermines women's agency. "Victimization" feminists highlight women's plight in domestic violence in order to seek — often successfully — legal reforms that better protect women through increased criminalization and prosecution.[56] This side em-

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[49] *Id.* at 453.

[50] Chief Judge Kozinski was joined by Judge Bea.

[51] *Mattos*, 661 F.3d at 456 (Kozinski, C.J., concurring in part and dissenting in part).

[52] *See id.* at 453–54.

[53] *See id.*

[54] *Id.* at 458. Chief Judge Kozinski expanded his charge:

> I thought we were long past the point where special pleading on the basis of sex was an acceptable form of argument. Women can, of course, be just as uncooperative and dangerous as men, and I would be most reluctant to adopt a constitutional rule that police must treat people differently because of their sex.

Id. Judge Silverman also concurred in part and dissented in part, and was joined by Judge Clifton. He agreed with Chief Judge Kozinski that there was no constitutional violation in *Brooks*, but believed that the disputed facts in *Mattos* rendered summary judgment inappropriate. *See id.* at 458–59 (Silverman, J., concurring in part and dissenting in part). Moreover, he believed that qualified immunity did not apply to the *Mattos* officers. *See id.* at 459–60.

[55] *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1882–85 (1996). *See generally* GRAYCAR & MORGAN, *supra* note 1, at 322–26; Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

[56] *See* Hanna, *supra* note 55, at 1855–56; *see also* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 557 (1999) ("For many battered women's advocates . . . mandatory arrest, mandatory prosecution, and mandatory reporting

phasizes how domestic violence reflects gendered power imbalances and a worrisome acceptance of violence against women.[57] Yet as these reforms led to prosecutions conducted without victim consent, an opposing viewpoint arose. "Agency" feminists view victimization theories as denying women's agency in causing and preventing domestic violence.[58] The *Mattos* opinions rearticulated this debate in a new context.[59] While the majority and concurrence favored protecting women from (male) police violence, Chief Judge Kozinski pushed back with an antiprotectionist autonomy argument reminiscent of those advanced by agency feminists in the domestic violence context.

On one side, both the majority opinion and Judge Schroeder's concurrence expressed elements of the victimization argument. Repeated references to the plaintiffs' bodies and familial status painted both women as physically and socially weak — an image that cried out for protection. This victimization process began when the majority initially highlighted how Brooks "told the officers, 'I have to go to the bathroom, I am pregnant, I'm less than 60 days from having my baby,'"[60] foreshadowing further reference to her pregnancy as a factor favoring a finding of excessive force.[61] Repeated allusions to Jayzel's breasts again portrayed a prototypical female victim protecting her vulnerable

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policies represent significant political progress in forcing the state to take domestic violence crimes seriously.").

[57] *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 249 (2005) ("By situating male intimate violence within a cultural paradigm, the battered women's movement focused on altering the social conditions that produced, created, and supported such abuse."); *see also id.* at 252 ("Male intimate violence was justified because the husband was vested with the power to physically control his wife's behavior.").

[58] *See, e.g.*, Jessica Dayton, Note, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281, 285–86 (2003); Mills, *supra* note 56, at 568–69 (noting a "contradiction between the feminist commitment to women's self-development and empowerment and some feminists' complete disregard for these principles in their unwavering support for mandatory policies"); Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 959–62 (1999).

[59] Moreover, Judge Schroeder's concurrence explicitly recognized this preexisting framework when she stated, "Judge Kozinski's underlying assumption in *Mattos*, that violence is gender-blind, and concerns for women's safety thus 'chauvinistic,' overlooks the worldwide struggle to combat violence against women." *Mattos*, 661 F.3d at 453 (Schroeder, J., concurring).

[60] *Id.* at 437 (majority opinion).

[61] *Id.* at 444 & n.5. Though consideration of pregnancy does not necessarily equate with consideration of gender, that only women can be pregnant undoubtedly means that the court was highly aware of Brooks's sex during its discussion. Moreover, several scholars have noted the equivalence of pregnancy and being female. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 29 (1988) ("Pregnancy is indeed the paradigmatic experience of physical connection, and it is indeed the core of women's difference . . . ."); *cf.* Megan R. Golden, Note, *When Pregnancy Discrimination Is Gender Discrimination: The Constitutionality of Excluding Pregnant Women from Drug Treatment Programs*, 66 N.Y.U. L. REV. 1832, 1852–56 (1991) (arguing that discrimination on the basis of pregnancy constitutes discrimination on the basis of gender).

body from the aggression of a male authority figure.[62] Beyond these body images, repeated portraits of Jayzel's begging the men around her not to wake her children evoked themes of motherhood. The mere fact of motherhood transformed both plaintiffs from potentially dangerous suspects into victims whose primary role was protecting the family.[63] Using gendered imagery, the opinions articulated the assumption that women require more protection from police violence than men do,[64] culminating in Judge Schroeder's suggestion that female suspects tend to be less dangerous than their male counterparts. And like the victimization feminists of domestic violence law, both opinions used this image to justify changes in the law's response to male police violence[65] against women.

By contrast, Chief Judge Kozinski's opinion echoed themes of the agency perspective. In his view, the argument that female suspects need protection from the police undermines their agency as equal persons capable of "be[ing] just as uncooperative and dangerous as men."[66] Rather than allowing female plaintiffs to empower themselves on equal footing with male plaintiffs, the court's implicit reliance on gender implies that women are less responsible for their interactions with a (male) police force.[67] Chief Judge Kozinski's response picked up on the arguments typical of agency feminists in the domestic violence context who accuse victimization feminists of patronizing women and undermining gender equality.

Although these opinions outlined preexisting feminist arguments from domestic violence law, they necessarily expanded this debate be-

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[62] *Cf.* Abrams, *supra* note 55, at 305 (noting the emergence of an argument that "depictions of women as sexually subordinated encourage a wounded passivity on the part of women and a repressive regulatory urge on the part of state authorities").

[63] This transformation appeared perhaps most clearly in the majority's characterization of Jayzel as "the innocent wife of a large, drunk, angry man," *Mattos*, 661 F.3d at 451, a characterization that denied her agency independent of her aggressive husband.

[64] This line of thinking resembles a strand of feminist thought outside of the domestic violence context, sometimes called "dominance theory," which argues that violence against women reveals pervasive sexism. *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 4 (2009); *see also, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 173–74, 180–81, 183 (1989). This position has also led to opposition that parallels the agency argument in domestic violence. *See, e.g.*, Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 166–67 (2010); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 610–11 (2009).

[65] For a discussion of the prevalence of male as opposed to female police violence, see KIM LONSWAY ET AL., MEN, WOMEN, AND POLICE EXCESSIVE FORCE: A TALE OF TWO GENDERS 2 (2002), which notes that "women currently comprise 12.7% of sworn personnel in big city police agencies . . . . Yet the data indicate that only 5% of the citizen complaints for excessive force and 2% of the sustained allegations . . . in [those] agencies involve female officers."

[66] *Mattos*, 661 F.3d at 458 (Kozinski, C.J., concurring in part and dissenting in part).

[67] *Cf.* JEANNIE SUK, AT HOME IN THE LAW 15 (2009) (noting how some advocates believed the state "embodied the patriarchy").

yond its normal battleground into excessive force jurisprudence.[68] In this new context, the agency argument becomes more urgent, as the victimization stance advocates unequal treatment of female and male plaintiffs. Whereas domestic violence involves legal action motivated by primarily female victims, the excessive force context regularly involves both male and female plaintiffs,[69] thus providing a forum in which courts can treat similarly situated legal actors differently based on gender. As a result, the victimization argument here holds women less responsible than men for their interactions with state actors and sponsors unequal treatment of women by police. Even if this treatment is more favorable to women, such inequality furthers stereotypes about women's physical and social capabilities, undermines women's responsibility for their own actions, and creates a harsher standard for male plaintiffs. Such a stance undercuts women's status as equal citizens carrying as much legal and social autonomy — here defined as moral culpability for one's actions — as men carry.[70] By painting female suspects as limited by their fragile bodies and stereotypical social roles, a victimization approach lowers female autonomy in state interactions and sponsors inequality.[71] This gendered distinction moves beyond the traditional consideration of a plaintiff's unique characteristics, heightening the risk that victimization will create a second-class citizenship based on broad notions of gender.

Overall, the *Mattos* court revealed competing assumptions about women that have played out in a well-developed and highly contentious feminist debate. The presence of this ideological tension within excessive force doctrine breaks new ground for feminist analysis and highlights the need for the agency perspective as the victimization viewpoint edges closer to advocating disparate treatment of male and female plaintiffs based on their sex.

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[68] Though feminist legal scholars have touched on Fourth Amendment doctrine, little analysis of excessive force jurisprudence has emerged. *See generally, e.g.*, *id.*; Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37 (2004); Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153 (2008); Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in* Ferguson v. City of Charleston, 9 DUKE J. GENDER L. & POL'Y 1 (2002); Jennifer R. Weiser, *The Fourth Amendment Right of Female Inmates to Be Free from Cross-Gender Pat-Frisks*, 33 SETON HALL L. REV. 31 (2002).

[69] *See supra* note 45 and accompanying text. By contrast, domestic violence has traditionally been thought to have a disparate impact on women. *See* Miccio, *supra* note 57, at 249, 253.

[70] *Cf.* Goodmark, *supra* note 64, at 22–29 (noting the various definitions of "autonomy" employed by different strands of philosophy and feminist theory).

[71] *See* Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 79 (1997) ("Public representations of women's private conduct, especially stereotypes attaching to motherhood[,] . . . traditionally ha[ve] had a patina of civic significance, defining complicated social roles for women in producing the next generation of citizens.").