

# When Probable Cause Fails, Leading to Assault by Cops

This discussion on the limits of legal liability for assault by government agents ensued after an article titled, “A Black realtor who was handcuffed by police in Michigan as he was showing a home to a Black father and his son has filed a lawsuit” was posted to the r/Libertarian subreddit. Enjoy!

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**Skyler:** Good, he should. I would call that assault.

**incruente:** Which thing that happened was assault?

**Skyler:** Assault is making people feel threatened for their safety, liberty, or property. Arresting somebody without just cause (self-defense) is an act of assault and should be compensated.

**incruente:** Were any of them arrested?

**Skyler:** I would say putting your hands on somebody and then immobilizing them is a type of arrest.

**incruente:** You would be wrong. That is being detained, not arrested.

**Skyler:** It’s a spectrum from detained to arrest to kidnap to falsely imprison. All wrong and must be compensated for if innocent.

**incruente:** So if anyone is ever detained, and later turns out to be innocent, regardless of if there was reasonable suspicion, they should get paid?

**Skyler:** They are owed restitution, yes.

**incruente:** So, just to be totally clear, anyone detained is owed restitution if they are innocent, no matter how low level the detention or what the circumstances are surrounding it?

**Skyler:** In my opinion, yes. You can’t violate someone’s life, liberties, or property without consequences, with impunity. We usually call that crime, oppression, or tyranny depending on the scale and scope. Do you disagree?

**incruente:** I disagree that you should pay absolutely anyone who gets detained while being innocent. There are times when a temporary detention is the result of a perfectly reasonable suspicion. Let me give you an example.

In 1980, a team of armed men stormed the Iranian embassy in London and took the people inside hostage. Six days later, after negotiations had totally failed and the gunmen had already killed one hostage, a pair of teams from the SAS stormed the building and successfully extracted all but one of the remaining hostages. Two more were wounded, and one of the hostages tackled a gunman before he could kill one of the troops (for what it's worth, that one hostage was a police officer who refused to eat for the entire crisis, in order to avoid using the bathroom; he didn't want to be escorted by one of the gunmen for fear they would discover the revolver he had managed to conceal). As they were leading everyone from the building, it turned out that two of the "hostages" were themselves gunmen; when identified, one of them produced a hand grenade and was subsequently separated from the group and shot. The other, the only gunman who survived the raid, was later sentenced to life in prison.

Because of this and other raids, many antiterrorist units are trained to treat every hostage, every extracted individual, as potentially hostile. This is not the only time that hostile individuals have attempted to hide among the innocent. Everyone is kept and processed, not just to make sure that the guilty are found, but to make sure that the innocent get the help they need.

Now, because this is the internet, someone is almost certainly going to point out that this is a different situation. Yes, of course this is a very, very, VERY different situation. That is not the point. At no point have I ever even remotely suggested that the Iranian Embassy crisis is the same thing as a few cops detaining a realtor and his clients for a few minutes. The point I'm trying to illustrate is that there are times when it is proper and appropriate to detain people that are almost certainly innocent, because the harm in doing so is very low, and the potential cost of not doing so is incredibly high. I deliberately selected a very extreme situation in order to make the principle extremely clear. As the situations become less extreme, the validity becomes less certain, and more open to discussion.

**Skyler:**

*There are times when a temporary detention is the result of a perfectly reasonable suspicion.*

I don't disagree with this. [I thought that I had already conceded on probable cause, but I can't find the comment now], which is what you're talking about. And I'm sure any free market dispute adjudicator worth staying in business will also have some standard of probable cause that will be called on to determine if the detainment was unreasonable or a

violation. I'm not opposed to that. The principle remains that you may not initiate force against the life, liberty, or property of other people with impunity. "Being black in a nice house" should not be enough for probable cause, and in the linked scenario, they are owed restitution. Millions? Probably not, that's a ridiculous amount for "a few minutes".

What I am opposed to is the state and deciding these standards monopolistically instead of competitively by dispute adjudicators trying to earn business by creating a reputation of justice and fairness.

**incruente:**

*don't disagree with this. [I thought that I had already conceded on probable cause, but I can't find the comment now], which is what you're talking about*

I also seem to remember we had agreed that probable cause is a thing, but my concern is that (and I may have misunderstood you) you think that if someone is stopped or detained with probable cause, they should still be compensated if they turn out to be innocent. That doesn't seem appropriate to me. The entire point of establishing probable cause is to say "yes, there's a good enough chance that something is amiss here that it's appropriate to investigate further". If we tell cops they're going to have to pay out damages to every innocent person, even if they acted appropriately and stopped people only with probable cause, they're going to be disincentivized to stop anyone. It would be like telling a doctor they're going to have to pay damages for any biopsy that turned out negative, even if all noninvasive information available had indicated a disease was likely.

*And I'm sure any free market dispute adjudicator worth staying in business will also have some standard of probable cause that will be called on to determine if the detainment was unreasonable or a violation. I'm not opposed to that. The principle remains that you may not initiate force against the life, liberty, or property of other people with impunity. "Being black in a nice house" should not be enough for probable cause, and in the linked scenario, they are owed restitution. Millions? Probably not, that's a ridiculous amount for "a few minutes".*

Oh, I absolutely don't think you should be able to stop people with impunity, and being any race in a nice or crappy house is not sufficient cause for suspicion. But I think there's space between "never stop anyone" and "stop people with impunity", and that law enforcement should (not always does, but should) operate in that space. I would much, much rather live in a world where the cops stop me a few times in my life, or even detain me for a few minutes a couple times, because of reasonable suspicions that turned out to be totally innocent than to live in a world where they never stop anyone.

*What I am opposed to is the state and deciding these standards monopolistically instead of competitively by dispute adjudicators trying to earn business by creating a reputation of justice and fairness.*

Law enforcement is one of the very few functions that I think it's appropriate for the government to perform, because I cannot imagine it being done fairly by private actors. These dispute adjudicators, as you said, would be trying to earn money. Sure, some of them may act as if they're pursuing justice, but in the end they're as greedy as the rest of us, and they may find it more profitable to pursue market dominance, or the APPEARANCE of justice rather than the real article, or some such perversion of their function.

**Skyler:**

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I hope you can see why this is a dis-analogy. Cops use coercion, doctors get permission.

*and that law enforcement should (not always does, but should) operate in that space.*

Perhaps a fundamental disagreement we may have is on the existence of “law enforcement”. I don’t believe they should exist, or would exist in a free society. They seem to be a function of the state. Here’s what I prefer:

<https://everything-voluntary.com/lets-get-back-peace-officers-away-law-enforcers>

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I see this is as a much bigger problem for monopoly providers of law and order. The incentives that profit-earning firms and individuals face are very different when they can’t lose customers to a competitor very easily.

**incrudente:**

*I hope you can see why this is a dis-analogy. Cops use coercion, doctors get permission.*

I can point out differences if any two compared things, too. The question is, is the difference RELEVANT? The point in this instance is not the voluntary nature of the interaction. It’s the chilling effect caused by punishing people for not doing any wrong.

*Perhaps a fundamental disagreement we may have is on the existence of “law enforcement”. I don’t believe they should exist, or would exist in a free society. They seem to be a function of the state. Here’s what I prefer:  
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That article is still describing law enforcement. A rose by any other name.

*I see this is as a much bigger problem for monopoly providers of law and order. The incentives that profit-earning firms and individuals face are very different when they can't lose customers to a competitor very easily.*

Except that monopoly providers can be set up as something other than a business. The government is not supposed to run at a profit.

**Skyler:**

*It's the chilling effect caused by punishing people for not doing any wrong.*

Getting permission to take a biopsy and being wrong is a very different thing than coercing someone and being wrong. Again, convention/common law will develop a standard for probable cause and only force restitution if that standard is violated. I think we agree on this.

*That article is still describing law enforcement. A rose by any other name.*

Patently false. I have doubts that you even read it. Peace officers are a very different job than law enforcement. For starters, they aren't enforcing any laws. And second, their entire *raison d'être* is maintaining the peace by securing self-ownership and property rights. These days, most of what law enforcers do is violate self-ownership and property rights. Antithetical concepts, not "a rose by any other name".

*The government is not supposed to run at a profit.*

Everything and everyone is run for a profit. All human action occurs because of the expectation of profit, monetary or otherwise.

**incruente:**

*Getting permission to take a biopsy and being wrong is a very different thing than coercing someone and being wrong. Again,*

*convention/common law will develop a standard for probable cause and only force restitution if that standard is violated. I think we agree on this.*

I'm not sure we do. Suppose an officer has probable cause and stops someone who turns out to be innocent. Why should that person be compensated, if the officer did nothing wrong?

*Patently false. I have doubts that you even read it. Peace officers are a very different job than law enforcement. For starters, they aren't enforcing any laws. And second, their entire raison d'être is maintaining the peace by securing self-ownership and property rights. These days, most of what law enforcers do is violate self-ownership and property rights. Antithetical concepts, not "a rose by any other name".*

Okay. Assume I'm lying if you wish.

*Everything and everyone is run for a profit. All human action occurs because of the expectation of profit, monetary or otherwise.*

I disagree.

**Skyler:**

*Suppose an officer has probable cause and stops someone who turns out to be innocent. Why should that person be compensated, if the officer did nothing wrong?*

"did nothing wrong" according to what probable cause standard? For starters, you wasted their time, and for all you know that has major consequences down the line. Perhaps they were late for an important meeting, and then suffered negatively from that, etc. A simple stop could have serious consequences. All of this would come out in dispute adjudication,

and a judgment made.

*I disagree.*

Why did you type this? What motivated you to respond to what I said? Let me guess: what I said made you feel uneasy and you were compelled by a desire to alleviate the feeling of uneasiness (to profit) by responding. You can't escape the action axiom:

<https://mises.org/library/doubt-action-axiom-try-disprove-it>

**incrudente:**

*did nothing wrong" according to what probable cause standard?*

The one that society has reached a consensus on.

*For starters, you wasted their time, and for all you know that has major consequences down the line. Perhaps they were late for an important meeting, and then suffered negatively from that, etc. A simple stop could have serious consequences. All of this would come out in dispute adjudication, and a judgment made.*

For all I know, saying "excuse me, sir" to someone could startle them, causing them to jump into traffic and die.

*Why did you type this? What motivated you to respond to what I said? Let me guess: what I said made you feel uneasy and you were compelled by a desire to alleviate the feeling of uneasiness (to profit) by responding. You can't escape the action axiom:*

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No, I typed it because I disagree. To elaborate seemed pointless, since you obviously feel comfortable assuming that I'm lying about things.



**Skyler:**

*The one that society has reached a consensus on.*

Consensus via the coercive and monopolistic power of the state? That's your standard for consensus then? Hmm...

*causing them to jump into traffic and die.*

*argumentum ad absurdum*

*you obviously feel comfortable assuming that I'm lying about things.*

Never said you were lying. I said I had doubts. Doubts aren't the same as an accusation, or an assumption. I could doubt that you read it, or doubt that you comprehended it. I gave you the relatively greater benefit of the doubt there.

**incrudente:**

*Consensus via the coercive and monopolistic power of the state? That's your standard for consensus then? Hmm...*

Okay..make that assumption if you want.

*argumentum ad absurdum*

If you like.

*Never said you were lying. I said I had doubts.*

If only there were some way to find things out instead of assuming.

*Doubts aren't the same as an accusation, or an assumption. I could doubt that you read it, or doubt that you comprehended it. I gave you the relatively greater benefit of the doubt there.*

Okay. I choose to give you the benefit of not assuming your position when I can ask you.

**Skyler:**

*Okay..make that assumption if you want.*

I asked the question.

*If only there were some way to find things out instead of assuming.*

You gave no indication that you read any further than the title, or even just the URL. It was as if you read "law enforcers / peace officers"... "oh its a rose by another name" without reading further. I don't think you would have said that had you read the essay, because it's not at all the argument I make.

**incrudente:**

*I asked the question.*

Motivated by what?

*You gave no indication that you read any further than the title, or even just the URL. It was as if you read "law enforcers / peace officers"... "oh its a rose by another name" without reading further. I don't think you would have said that had you read the essay, because it's not at all the argument I make.*

Okay. Again, it's your choice about whether to ask and what to assume, if anything.

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The conversation had broken down by this point and wasn't about the original disagreement, so I never replied. In theory, any assault is owed restitution, but in practice some degree of probable cause will absolve this liability. I see no valid probable cause in the original story, so I wish the victim luck in his lawsuit against the police officers and their masters.