SLATE

The Supreme Court Broke Police Accountability. Now It Has the Chance to Fix It

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The video of George Floyd's death that emerged on Tuesday is both shocking and distressingly familiar. Floyd, a 46-year-old black man, is lying on the ground as a white police officer pins him to the ground by the neck. We hear Floyd begging the officer to stop, telling him repeatedly: "I cannot breathe." But the officer does not let up, and his colleagues taunt Floyd as he dies. "You having fun?" one asks. "You a tough guy," another says. "Tough guy, huh?" After killing Floyd, the officers falsely claimed he had "physically resisted officers," necessitating their brutal response.

We've seen this before, over and over and over again: police officers, usually white, killing black people who pose no threat to their safety. Although we have only recently begun to witness these executions ourselves thanks to smartphones, they are not a new phenomenon. For as long as law enforcement has existed in the United States, white officers have murdered black people. After the Civil War, Congress sought to address the problem by letting victims and their families sue abusive government officials. But the Supreme Court has butchered that law to prevent countless victims of police brutality from seeking justice through one of the only state-sanctioned avenues available to them. At their conference on Thursday, the justices will have an opportunity to begin unraveling the catastrophic case law that allows so many officers—including, apparently, Floyd's killers—to murder civilians with impunity. The court has an obligation to fix what it broke.

Although the Constitution bars government officials from engaging in race discrimination, conducting unreasonable searches and seizures, or taking someone's life without due process, those guarantees do not enforce themselves. Congress recognized this problem during Reconstruction, when Southern state officials refused to protect newly freed black citizens, instead colluding with white civilians to terrorize them. In response, Congress passed three Enforcement Acts, which, among other things, allowed individuals to sue state officials who violate their civil rights in federal court. That provision, now known as Section 1983, provides the basis for most federal lawsuits against state police officers.

Under the Supreme Court's current interpretation of Section 1983, however, it is not enough for victims to prove a violation of some constitutional right. They must also demonstrate that this right is "clearly established," meaning a court has previously found that a very similar offense violated the Constitution. If a victim cannot meet this burden, the state official receives "qualified immunity," and the lawsuit fails. Notably, the words *clearly established* do not actually appear in Section 1983. They are a gloss that SCOTUS imposed upon the law, a

reflection of the justices' personal belief that law enforcement needs wiggle room when making split-second decisions.

The addition of a "clearly established" requirement has transformed Section 1983 into a rubber stamp for egregious police misconduct. It is almost always possible for a judge to insist that a right is not "clearly established" because there is no precedent with the exact same facts. Two cases from 2017 illustrate the absurdity of this rule. In one, a court granted qualified immunity to Deputy Richard Sylvester, who shot a man to death in his own apartment for no reason. Why? The victim had no "clearly established" right not to be murdered in his home by a cop. In the other, a court granted qualified immunity to Officer Terence Garrison, who let his police dog maul a homeless man whom he knew to be innocent. The court explained that the victim had no "clearly established" right not to be randomly disfigured by a police dog.

For years, the Supreme Court has encouraged decisions like these by smacking down those few judges who dare to deny qualified immunity to police officers. Today, though, there is an emerging, cross-ideological consensus that the court's jurisprudence here has spiraled out of control. Led by the libertarian Cato Institute, a broad coalition of progressive and libertarian groups has urged SCOTUS to reevaluate its qualified immunity precedent. They've gotten a boost from both Justice Sonia Sotomayor—who has condemned the "shoot first, think later" policing encouraged by the doctrine—and Justice Clarence Thomas, who has announced his desire to "reconsider our qualified immunity jurisprudence." Nevertheless, a Reuters investigation found that lower courts have increasingly sided with police over victims in qualified immunity cases over the last decade.

The fight against out-of-control qualified immunity has produced a flood of appeals that force SCOTUS to confront the consequences of its own handiwork. On May 18, the court turned away three of these appeals, including a jaw-dropping case in which police were granted qualified immunity after literally stealing $225,000. (There is no clearly established right not to be robbed by cops, the court held.) But there are still 10 on the docket. These cases include:

• *Baxter v. Bracey*, in which two officers received qualified immunity after siccing their police dog on a suspect who had surrendered and was sitting on the ground with his hands up.

• *Corbitt v. Vickers*, in which a police officer received qualified immunity after barging into a family's yard, shooting a 10-year-old child who was lying on the ground, and attempting to shoot a docile dog who posed no threat.

• *Cooper v. Flaig*, in which police officers received qualified immunity after using a stun gun on an unarmed black man nine times while he was undergoing a mental health episode, killing him. The officers continued to stun the victim while he lay face down on the floor with his hands cuffed behind his back. They laughed as he died in front of them.

These cases show that George Floyd's killing was not an aberration. And while the nation's police brutality problem cannot be pinned solely on the Supreme Court, the justices have facilitated a law enforcement culture that tolerates extreme, even sadistic violence against civilians. The court's qualified immunity jurisprudence tells cops across the country that they will not face consequences if they injure or kill someone for no good reason. As long as the police can concoct some rationalization for their conduct after the fact, courts will let them off the hook.

This is a mess of the Supreme Court's own making. The justices invented the doctrine of qualified immunity, and they have a responsibility to abolish it. Floyd's killing is a graphic example of the dangers posed by a police force that does not fear legal repercussions. The casualties of emboldened, unaccountable police forces are mounting. It will only become harder for the courts to turn away families like Floyd's.