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A Movement to Repeal and Replace 'Qualified Immunity' Is Brewing

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Last week the Supreme Court fumbled a tremendous opportunity to fix the doctrine of "qualified immunity" — the very mess it created decades ago.

This policy has helped perpetuate police misconduct for more than 50 years. No other single reform is as critical in this moment. Qualified immunity is not grounded in the Constitution, its history or statutory text. Today, this well-intentioned creation of the courts has metastasized into near-complete immunity for any police wrongdoing.

We both have unique perspectives on this issue. One of us is a former police officer and the other was raised by one. We respect and appreciate the job that law enforcement performs in our communities.

But we also believe in liberties protected by the Constitution, and demand accountability when government officials, including police, deprive people of their rights.

Qualified immunity actually has roots in the 1870s. The Reconstruction Congress passed a federal statute, Section 1983, to give newly freed slaves and others a tool to combat violence by the Ku Klux Klan, who often worked in concert with state and local officials.

The law says plainly that state officials who violate civil rights "shall be liable to the party injured" — and so under Section 1983, state officials (including police officers) can be sued for violating a person's constitutional rights while acting "under color" of state law. In other words, an officer acting to enforce the law who steps outside of it to do so could be held liable.

This statute was used infrequently until the 1960s, when plaintiffs leaned on it to push against state inaction on civil rights. Then, the Supreme Court invented qualified immunity, under Section 1983, as an affirmative defense out of a fear that police officers would be overwhelmed by frivolous suits based on split-second decisions taken in good faith that, nonetheless, turned out to be wrong.

This is where the problems began.

It got worse over the years: plaintiffs invoking Section 1983 also faced a requirement — later grafted on by the Supreme Court — that they show that it was "clearly established" that the conduct at issue was illegal. This means plaintiffs must show that a court in the jurisdiction has stated, on a nearly identical set of facts, that specific conduct was a civil rights violation.

That's challenging enough, but the court has also told lower courts to skip consideration of whether particular conduct is illegal if there is direct case to point to as an example. The result:

courts are making a lot less constitutional law than they used to — which makes it harder to show that the misconduct was "clearly established."

Through this process of judicial tinkering, qualified immunity has been transformed into a free pass for all but the most egregious instances of police misconduct.

As scholars at the Cato Institute have noted, qualified immunity has protected cops who stole money from businesses they were investigating, who shot a 10-year-old lying prone on the floor while aiming for the docile family pet, or who sicced a dog on a suspect who had surrendered, all because these actions supposedly were not "clearly established" violations.

Concerns about personal liability for officers have also proven to be overblown. Studies show that more than 99 percent of all civil rights settlements are paid not by individual officers who violated constitutional rights but by taxpayers who have indemnified police as part of union contracts.

The expansion of the qualified immunity defense has so twisted Section 1983 that scholars on both the right and the left, federal judges appointed by presidents from both parties, and even Supreme Court justices as divergent as Clarence Thomas and Sonia Sotomayor have called for revisiting the doctrine.

Thankfully, there is real reform beginning to take hold across the country. Colorado has just abolished qualified immunity in its state-law equivalent to Section 1983. We expect other states will follow suit with reforms or even repeals. But the Supreme Court's inaction means that Congress must act to re-level the federal playing field in civil rights litigation.

Some in Congress are taking up this banner. Sen. Mike Braun (R-Indiana) just introduced a proposal to reform qualified immunity, without doing away with the defense entirely. Essentially, Braun proposes to flip the burden in these cases.

Under his bill, officers would be required to show that some governing law or statute permitted their conduct. They would only be able to invoke the defense of qualified immunity if they could show they were acting under some specific legislative authority.

This change would have a number of positive effects. First, it would make it easier for plaintiffs to build a case against the offending officer or officers. Second, it would put pressure on Congress and state legislatures to pass laws that better define, for officers and the public, the limits of permissible use of force by police.

It is always better that democratically elected bodies, and not unelected courts, weigh in as the conscience of the community on policing tactics. And placing the burden on officers to demonstrate that their actions were permitted by law seems like a more textually faithful way to approach Section 1983.

These two thoughtful changes will help law enforcement repair their relationships with the communities — especially those of color — they are charged with serving and protecting.

In the end, the public is safer, and the job of policing is made easier when there are effective means of holding to account the small minority of officers who misuse their authority. Fixing qualified immunity is a key step to creating accountability.