THE WALL STREET JOURNAL.

A Step Toward Accountability in Policing

Scott Michelman and David Cole

September 10, 2020

As the nation roils over police abuse and racial injustice, Democrats and Republicans often disagree about how best to respond. But on one matter there is significant agreement: The judge-made doctrine of "qualified immunity" is part of the problem. That rule provides that victims whose constitutional rights were violated can't sue police officers or other government officials for damages, unless the actions were so egregious that no reasonable officer would believe them lawful. In practice, it means that countless violations go entirely unremedied.

The rule has come under broad attack. Supreme Court Justices Clarence Thomas and Sonia Sotomayor don't agree about much, but they have both questioned qualified immunity. The ACLU (where we work), the NAACP Legal Defense Fund and the libertarian Cato Institute and Institute for Justice are all working together to reform it. More than police accountability is at stake: The rule of law cannot be squared with impunity for constitutional violations.

As an example of how strictly the doctrine of qualified immunity has been applied, consider the case of Alexander Baxter, whom we represented in a case that the Supreme Court recently declined to review. In early 2014, Mr. Baxter was bitten by a police dog that was unleashed on him while he was sitting with his hands in the air, having surrendered to Nashville, Tenn., police. The bite was deep enough that he required emergency medical treatment.

Claiming that he was the victim of excessive force, Mr. Baxter sought compensation in a suit against the two officers responsible for the attack. But a federal court of appeals ruled that even if the use of force was unconstitutional, the officers were immune, because in that court's most similar legal precedent, police attacked a man who surrendered by lying down, not by sitting down with his hands up.

Mr. Baxter's case isn't unusual. Countless government officials have been granted immunity for egregious violations, including school officials who ordered a strip search of a middle-school student in violation of her Fourth Amendment privacy rights; a community college president who fired an employee for testifying truthfully in court, in violation of his First Amendment rights; Nixon administration officials who conspired to retaliate against a whistleblower in violation of the First Amendment; and President Nixon's attorney general John Mitchell, who authorized wiretaps without the warrant required by the Fourth Amendment.

The upshot is that qualified immunity makes unaccountability the norm and accountability the hard-won exception. Injunctions prohibiting future violations are unavailable, the Supreme Court has ruled, unless you can show that a particular violation is likely to happen to you personally in the future. And criminal prosecutions of police officers or any other government officials for constitutional violations are exceedingly rare. Few constitutional violations are crimes, and even

for actions like police shootings that might violate both the Constitution and criminal laws, the standard for proving a crime is much more demanding than for civil liability. Many prosecutors are reluctant to press charges, in part because they regularly rely on police officers' testimony to support their cases. The criminal charges against the Minneapolis police officer who killed George Floyd are the exception, not the rule.

Accordingly, for most constitutional wrongs, the only realistic avenue for redress is a suit for civil damages. But because of qualified immunity, that route is all too often a dead end. Our legal system holds criminal defendants, usually people untrained in the law, to the maxim that "ignorance of the law is no excuse." Why do we tolerate a lower standard for government officials like police officers, who ostensibly receive training in the law and take an oath to uphold the Constitution?

The history of qualified immunity offers no principled answer. The Supreme Court created the doctrine in the 1967 case Pierson v. Ray, in which a group of clergymen were arrested for attempting to integrate a segregated coffee shop at a Mississippi bus terminal. They sued the arresting officers under a provision of the 1871 Ku Klux Klan Act that authorized lawsuits seeking compensation for constitutional violations. The Court held that the officers who arrested the clergymen should escape liability if they acted in good faith, thus introducing the rule that would become known as qualified immunity. Although, as the Court has since acknowledged, the 1871 statute "on its face admits of no immunities," in Pierson the Court reasoned that the law was enacted against a historical "background" protecting officials from claims for damages if they acted in good faith, and thus Congress must have meant to incorporate that defense without saying so.

As Justice Thomas recently opined, 'there likely is no basis' in historical practice for the rule. The Supreme Court just made it up.

However, as William Baude, a University of Chicago law professor and Federalist Society awardee, has shown, the historical common law recognized no such immunity. On the contrary, the "strict rule of personal official liability…was a fixture of the founding era." Some of the nation's most influential jurists, including Chief Justice John Marshall and Justice Oliver Wendell Holmes, Jr., rejected similar immunity rules. As Justice Thomas recently opined, "there likely is no basis" in historical practice for the rule. The Court just made it up. Especially for justices who advocate strict adherence to the text of statutes and the Constitution, the doctrine has no legitimate foundation.

The Court's policy justifications for the rule fare no better. Police unions warn, and the Court itself has speculated, that if officers faced large judgments when they violate rights, few people would join police departments, and those that do would be overly deterred from exercising their authority. If police officers risk losing their homes if they search someone illegally, they might decide it's better not to search at all.

But in fact, officers don't pay such judgments personally. A comprehensive 2014 study by Joanna Schwartz of UCLA Law School showed that in more than 99% of cases, the government "indemnifies" the officer—that is, it pays the judgment itself, often through insurance policies. So immunity effectively allows governments, not individual officers, to escape liability for constitutional violations; and that in turn reduces their incentive to ensure respect for constitutional rights.

The Supreme Court has also surmised that having to defend lawsuits might "distract" police from their duties. But nearly all the work in these cases is done by government lawyers, not the officers themselves. In any event, having to answer for constitutional violations isn't a "distraction" but a fundamental feature of the rule of law.

The costs of qualified immunity to the legal system are considerable. The doctrine stultifies the development of constitutional law, because rather than ruling on a constitutional claim, the courts can simply conclude that the constitutional right in question wasn't "clearly established" with enough specificity at the time of the violation and dismiss the claim. This leaves unclear what the Constitution demands for future cases and sets the stage for yet more grants of immunity in similar situations. As one federal appellate judge recently bemoaned, a hodgepodge of contradictory decisions "leaves the 'clearly established' standard neither clear nor established."

Qualified immunity weakens respect for the rule of law by ensuring that many constitutional violations go unredressed.

Most fundamentally, qualified immunity weakens respect for the rule of law by ensuring that many constitutional violations go unredressed. As Justice Sotomayor has noted, that "sends an alarming signal to law enforcement officers and the public": that officers "can shoot first and think later."

The Supreme Court regrettably passed up the opportunity to reconsider the doctrine of qualified immunity in Mr. Baxter's case this June, over a powerful dissent from Justice Thomas. But it did so only after waiting more than a year, suggesting that it was taking the issue seriously, and may take it up in the future. The fact that at least one conservative justice objects strenuously to the rule means that if the liberal justices agree, judicial reform is possible.

The Court may have denied review because, in the wake of the killing of George Floyd, bills to reform or abolish qualified immunity have been introduced on Capitol Hill, with bipartisan support, and the justices may be waiting to see what Congress does. The major policing bill in the House would reform qualified immunity, but only for police officers, not for the many other government officials who have been let off the hook. Other bills offer more comprehensive reform.

State courts and legislatures can also be part of the solution. In legislation enacted this summer, Colorado provided a right to sue its officials under state law for constitutional violations and specifically rejected the defense of qualified immunity. Although states cannot change federal law, nothing prevents them from following Colorado's example. Indeed, Virginia has the chance to do so now, if its Senate and governor approve the qualified immunity reform bill passed by the House of Delegates earlier this month.

The recent unrest sparked by police abuse calls for widespread reform. One place to start is with a judge-made doctrine that finds no foundation in history, statute or the Constitution and that has been roundly criticized by conservatives and liberals alike. Police officers and other government officials are bound by the Constitution; they should not be shielded from accountability when they violate basic constitutional rights.