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Qualifying the Debate Over Qualified Immunity

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Last week, Senator Tim Scott (R-SC) suggested he was seeking a compromise designed to unstick bipartisan negotiations over federal police reform. Scott's proposal relates to qualified immunity, a legal doctrine cabining federal liability against individuals, including police officers, acting "under color of" state law. Both progressive and libertarian policy advocates have been pushing to abolish this doctrine, but to date, congressional partisans have broadly split on the issue.

My colleague Rafael Mangual and I have argued that Congress *should* address qualified immunity doctrine, in some fashion. I have not yet seen Senator Scott's draft text, but it's being touted as focusing on how courts apportion liability to municipal governments rather than individual officers. That makes some sense: There is little practical difference in whether liability attaches to officers or municipal governments, since municipalities almost always indemnify officers anyway. But we should think clearly about what qualified immunity and related reforms are likely to do—and we should be reluctant to oversell these reforms' likely impact in changing police behavior.

Qualified immunity limits the ability of plaintiffs to sue for damages under the Ku Klux Klan Act of 1871. Principally intended to permit the federal government to take action to squelch the then-emergent KKK, this law also provided for private citizens to file lawsuits in federal court to enforce federal constitutional and legal rights—Congress was understandably skeptical, at the time, that the governments of the recently rebelling states would enforce those rights on behalf of newly freed slaves. This provision of law remains codified in essentially its original form, as Section 1983 of Chapter 42 of the U.S. Code.

Early on, what is now Section 1983 was seldom invoked. A 1969 note in the *Harvard Law Review* found only 19 cases invoking the provision in its first 65 years. Things changed after 1961, when the Supreme Court decided *Monroe v. Pape*, a case in which police officers in Chicago had unreasonably searched and detained individuals in their family home without a warrant. The Court determined that the officers were acting "under color of" state law as defined in Section 1983, even though there was no state law or custom clearly permitting such searches. Section 1983 lawsuits exploded. In the year *Monroe* was decided, 1961, federal records show 296 civil rights cases of all types; by 1995, that number had swelled to 76,878.

In 1967, in *Pierson v. Ray*, the Supreme Court first articulated what would ultimately become the doctrine of qualified immunity. In its initial form, qualified immunity was essentially a prohibition against retroactivity: The Court wouldn't attach liability to police officers for enforcing a state law on the books in 1961, notwithstanding that the Court had declared the law unconstitutional as applied in a similar case four years later, in 1965.

The Court changed its qualified immunity test 15 years later, in *Harlow v. Fitzgerald*. Whereas *Pierson* had relied on a subjective standard—trying to discern officers' actual beliefs about the law's constitutionality—the Court in *Harlow* adopted an objective "reasonable person" standard based on whether a statutory or constitutional right had been "clearly established" at the time of the alleged violation. This remains the basic qualified immunity standard used by federal courts in Section 1983 cases today.

Qualified immunity is not a unicorn. In *Pierson*, in addition to establishing qualified immunity for government officials like police officers, the Supreme Court held that judges are *absolutely immune* from Section 1983 liability. That's generally true for prosecutors and legislators, too—notwithstanding that unlike police officers, who make split-second, often life-and-death decisions, all these other government officials have the ability to contemplate and research legal questions before they act. Nor are judge-made liability rules unique to Section 1983; the Supreme Court has spelled out doctrines that shape other entire areas of law, such as antitrust, which are similarly predicated on terse, bare-bones 19th-century statutes.

As Senator Scott's compromise suggests, lawsuits against individual government officials are not the only way to seek compensation under Section 1983. In 1978, in *Monell v. Department of Social Services*, the Supreme Court reversed its decision in *Monroe* that a municipal government did not count as "a person" liable under the 1871 Act. But the Court also decided that local governments would not be strictly liable for government agents' actions unless they were directed by an official "policy statement, ordinance, regulation or decision." Courts have subsequently expanded that—including permitting lawsuits premised on a failure to train—but it remains difficult to bring Section 1983 cases against municipalities.

Into that breach steps Senator Scott, who has suggested that abolishing qualified immunity is a "poison pill" for federal policing reform. That was essentially his position when the senator and I discussed the issue in December. Senator Scott presumably has a pretty good read on the politics here, at least from the Republican perspective: Last summer, Senator Mike Braun (R-IN) introduced a bill that would have effectively narrowed qualified immunity doctrine to something approximating *Pierson*—and made municipalities strictly liable for their agents' violations—but after some public blowback, he didn't reintroduce it this session. And a House bill sponsored by some Republicans would essentially *ratify* the Supreme Court's current qualified immunity standard.

Assuming that Senator Scott's proposal would significantly broaden the scope for municipal liability under Section 1983, I would tend to think that supporters of qualified immunity reform would jump enthusiastically to support this alternative—at least in comparison to no change in the legal doctrine at all. UCLA School of Law Professor Joanna Schwartz, one of the foremost academic proponents of qualified immunity reform, has done just that, calling Scott's proposal "HUGE." As Schwartz observes, municipalities already indemnify officers against this class of lawsuits as a matter of course; while such indemnification statutes "aren't watertight," they apply "in over 99 percent of cases."

I'm thus confused as to why Cato Institute vice president Clark Neily—a vigorous advocate for reforming qualified immunity—so immediately and aggressively attacked Senator Scott's entreaty as "breathtakingly cynical." To be sure, Neily is correct that "taxpayers pick up the tab" when municipalities lose Section 1983 lawsuits; but that's overwhelmingly true when officers lose such suits in their individual capacities, too, given the ubiquity of indemnification statutes. And Neily's preferred policy solution—holding officers and municipalities jointly and severally liable in such litigation—would effectively end up in the same place. Municipal governments, not cops, are the ones with deep pockets.

Overall, I support Congress acting to reform this area of law. I hold a general belief that our elected legislators should decide our political questions; today's Congress should therefore decide what liability standards work best for this important area of law, and not punt the issue to judges scrutinizing what the law meant in 1871. I also agree that courts have too often applied the *Harlow* "clearly established" standard to limit liability based on idiosyncratic fact-pattern distinctions—something the Supreme Court itself recently signaled.

I would caution, however, that we should expect the impact of any of these reforms to be more marginal than miraculous. Qualified immunity doctrine does nothing to shield officers from criminal prosecution or disciplinary actions. And when Professor Schwartz studied Section 1983 case dockets, she found that qualified immunity was the basis for dismissal or summary judgment in less than 4 percent of cases.

It's important to try to adjust policy levers to reduce police misconduct while protecting hard-earned public safety gains tied to proactive policing. But in a nation in which 686,665 full-time police officers interact with 53.5 million Americans on an annual basis, making more than 10 million arrests, mistakes will happen—tragic, negligent and, sadly, even malicious.