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There Is Nothing 'Conservative' About Letting Police Violate Our Rights

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Newly-minted Virginia Gov. Glenn Youngkin appears on track to become somewhat of a star in the Republican Party. He ran a successful campaign around the more lightning-rod issues of the moment: nixing critical race theory in public schools, lifting remaining restrictions around COVID-19, cutting taxes by a significant margin, and prohibiting the public from holding government actors accountable in civil court when they violate your constitutional rights.

For the limited government advocate, one of these is not like the others.

Qualified immunity allows state and local agents to infringe on your rights without fear of civil suits if the precise way in which they violate those rights has not been "clearly established" in a prior court ruling. Buried underneath that legalese are stories that would be comical if they didn't involve real people who had no recourse after dealing with misbehaving civil servants.

It's how two police officers in Fresno, California, were able to avoid a lawsuit after allegedly pocketing $225,000 from two suspects—who, it bears mentioning, were never charged with a crime—during the execution of a search warrant. It's how a cop in Coffee County, Georgia, was able to skirt civil court after shooting a 10-year-old boy who was lying on the ground, leaving his family with the bill after he needed extensive care from an orthopedic surgeon. It's how cops have been able to assault and file bogus charges against people, destroy their property, and violate their First Amendment rights while victims are left without the privilege of asking a jury for damages.

The legal doctrine became a bipartisan target for reform after the death of George Floyd in May 2020. Before that, discussions around qualified immunity were mostly conducted by think tanks and outlets like *Reason*. But despite a select few Republicans willing to come to the table, a faction of the back-the-blue right still offers a sort of reflexive defense of the doctrine. Like this:

It's a retort worth addressing in good faith when considering it likely undergirds a great deal of support for qualified immunity among conservatives like Youngkin, who in almost every other instance would claim that their ideology stands for keeping government honest and accountable to the people it serves.

Hochman, an Intercollegiate Studies Institute fellow at *National Review,* is correct that there's been a spike in violent crime, something that many people interested in criminal justice reform would like to conveniently ignore. The problem: That metric has just about nothing to do with qualified immunity, and hinges on a fundamental misunderstanding of how the doctrine works.

Put more plainly, the response implies that because we're experiencing an uptick in violent offenses, police officers need to be able to steal, shoot children, assault surrendered suspects, and destroy property. I prefer to believe that good cops—of which there are many—can do their jobs without relying on illegal tactics.

"Conservatives who embrace qualified immunity do law enforcement a tremendous disservice. I think there's nothing more demoralizing to good police officers than being trapped in the profession with bad police officers," says Clark Neily, senior vice president for legal studies at the Cato Institute. "If you're going to be thoughtful about it, police do not have the ability to just unilaterally prevent or solve violent crime….As long as police officers are perceived as being institutionally unaccountable, [they] will not have the support of the community." Confidence in police hovers just over 50 percent, according to a 2021 Gallup poll, up 3 points from a record low in 2020—the first time it ever fell below a majority.

Importantly, the response—that victims of police misconduct should have no recourse during times of higher crime rates—fails to account for how qualified immunity actually works in practice. For starters: More than 99 percent of judgments handed down against cops are paid out by taxpayers, according to a study conducted by Joanna Schwartz, a law professor at UCLA. That's because municipalities indemnify their employees from having to pay full judgments—or from having to pay anything at all. About 0.02 percent of those damages came from the actual individual government actors. Their bad behavior did not bankrupt them.

But can't victims just sue the city? They can try, but it's likely they'll be unsuccessful there as well. Municipalities are protected by the *Monell* doctrine, which shields cities from lawsuits unless they had a specific policy or rule on the books that enabled the misbehavior in question. In many ways, it's an even more difficult standard to overcome than qualified immunity.

But what about the onslaught of frivolous suits that would come down against the police? That also misses the mark, particularly when considering that it is not possible to simply enter a federal courthouse and file a lawsuit because you're mad at the cops. Before suing a government actor, a plaintiff must satisfy two conditions: that the public servant affirmatively violated someone's constitutional rights, and that the violation of the rights is clearly established in prior case law. Without qualified immunity, a would-be litigant would still need to prove to a federal judge that his constitutional rights were infringed on. Qualified immunity is only the second part—the part that sends a victim searching for a perfect court precedent where another victim experienced a near-identical sort of misconduct.

It's for that reason that the doctrine gives license to some disturbing behavior—the sort that should concern anyone who positions himself as a defender of responsible governance. An example: "The City Officers ought to have recognized that the alleged theft was morally wrong," but the police "did not have clear notice that it violated the Fourth Amendment." This is a

real quote from a real decision from a real federal court—the U.S. Court of Appeals for the 9th Circuit—awarding qualified immunity to two government actors who we apparently cannot trust to know that stealing during a search warrant is unconstitutional unless there is some obscure court precedent saying so. I'd posit that most of the public has more faith in police to do their jobs with integrity. I certainly do.

Though qualified immunity reform appears to be in the legislative graveyard, the Supreme Court has been willing to comment more on the topic as of late. Its two most outspoken detractors are Associate Justice Sonia Sotomayor and Associate Justice Clarence Thomas, the former being one of the most liberal jurists while the latter is arguably the most conservative. "I have previously expressed my doubts about our qualified immunity jurisprudence," wrote Thomas in a 2020 lone dissent after every other justice declined to hear a case pertaining to two officers who were given qualified immunity after allegedly releasing a police dog on a suspect who had already surrendered. The high court is a particularly suitable venue for that pushback: It legislated qualified immunity into existence a few decades ago in direct contention with current civil rights law. Opposition to that sort of judicial policy making is typically a hallmark of conservatism, although in this area it's less politically expedient.

But perhaps most insidious in this case is the idea that principles around limited and accountable government should be subject to change based on the year—a strange argument for any conservative.