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How the Warren Court Enabled Police Abuse

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Senate Republicans have an opportunity to reverse one of Chief Justice Earl Warren's most pernicious legacies—but they seem determined to blow it. Sen. Tim Scott, who is leading the majority's police-reform effort, said Sunday that abolishing "qualified immunity," which protects law-enforcement officers from lawsuits under a law known as Section 1983, is "off the table." Police unions, Mr. Scott said, view it as a "poison pill."

Section 1983 originated in the Civil Rights Act of 1871, which opened federal courts to lawsuits challenging civil-rights violations by defendants acting "under color" of state and local law. It provides that violators "shall be liable" to their victims. The idea was that freed slaves could go to court to enforce their newly won constitutional rights.

It didn't work out that way, and much of the blame lies with the Supreme Court, which in the late 19th century defanged the 14th Amendment, relieving states of their obligation to honor all citizens' federal rights. The court only began to correct that error in the mid-20th century, proceeding on a right-by-right basis under a doctrine known as incorporation.

What the court gave with one hand, it took away with the other. In *Mapp v. Ohio* (1961), the justices held that states were obligated to observe the Fourth Amendment right against unreasonable searches and seizures. But in *Pierson v. Ray* (1967), they relieved state officials from civil-rights liability unless their actions violated "clearly established law." That's "qualified immunity."

The results can be infuriating. In one recent case, police officers escaped liability for siccing an attack dog on a suspect who was sitting with his hands up. A previous case had found a Fourth Amendment violation, but the court held the precedent didn't apply because the suspect in the earlier case was lying on the ground. In another case, cops shot a fleeing driver who posed no threat. In another, police stole a collection of rare coins while executing a search warrant. Because such larceny by officers hadn't arisen in a previous case, the court reasoned, the plaintiff's right not to have his property stolen by police was not "clearly established."

To call this a double standard would be an understatement. Civilians are subject to civil and criminal liability when they violate the law, even when their legal obligations aren't perfectly clear. When state officials violate constitutional rights, qualified immunity often makes it impossible to hold them to account. It's easy to understand why this disparity inspires cynicism about the rule of law.

Warren's rationale for qualified immunity was that officials had historically enjoyed immunity for acts taken in "good faith." He concluded that unless a court had already established that a

particular act violated the law, it couldn't be presumed that Congress intended to impose liability.

But Will Baude of the University of Chicago has demonstrated that there was no general "good-faith defense" for public officials and that qualified immunity can apply even to violations committed in bad faith. Further, Warren's conclusion about Congress's intent is at odds with the statute's language; the words "shall be liable" brook no exception.

The Warren court established qualified immunity at a time when it was rewriting the Constitution by discovering new rights at an astonishing clip. It's possible the justices worried that imposing *liability* for violations of the new rights would encourage resistance and stymie the rights revolution.
Yet as the Warren court relieved itself from the strictures of the Constitution, it did the same for state officials. Qualified immunity has made civil-rights litigation such a crapshoot that it does little to deter misconduct, particularly rights violations by police, which can be remedied only after the fact with money damages.

Some conservatives fear that correcting the error of qualified immunity could alter incentives for the worse, by putting police officers at risk of liability for doing their best to protect the public. That concern is misplaced. Other professionals face tort liability irrespective of whether the law on some point was "clearly established" by a prior court decision. No one argues that hinders the practice of law or engineering.

Besides, unlike most other professionals, police are almost always indemnified by their departments. Police departments take advantage of qualified immunity rather than make difficult choices like confronting or firing bad cops, standing up to police unions, or insisting on use-of-force rules that could deter abuses. In these ways, qualified immunity does a disservice to the overwhelming majority of police who take their duties to their communities seriously.

The Roberts court appears disinclined to correct its predecessor's error, denying review this week in a score of cases asking it to reconsider the doctrine. That means it's up to Congress. House Democrats are promoting legislation that would eliminate immunity for police officers. The only sound objection is that the Democratic plan stops short of ending the failed experiment of qualified immunity altogether.

Limited to police officers, it would leave the doctrine on the books for other state officials, making the Supreme Court less likely to correct its original error. And it would arbitrarily deny recourse to victims of, say religious discrimination by a mayor or racial discrimination by a licensing officer. All state officials, including the police, should be accountable for respecting constitutional rights.

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