DAILY NEWS

How to hold NYC cops accountable

NICK SIBILLA

FEB 27, 2021

Galvanized by the tragic killing of George Floyd and subsequent months of protests, the New York City Council held a hearing last week on a bill that would bypass one of the biggest obstacles to police accountability: "qualified immunity." It should become law.

Crafted by the U.S. Supreme Court nearly 40 years ago, the principle of qualified immunity means that victims of police misconduct can only move forward with their lawsuits if they show that their rights were "clearly established" when they were violated.

Consider Shaniz West. Back in 2014, police in Caldwell, Idaho, asked Shaniz if they could "get inside" her home because they believed her ex-boyfriend (then a wanted fugitive) was inside. She agreed and handed them her keys. Police decided to call in a SWAT team to bombard her house with tear gas grenades. Her home was completely unlivable for months. To vindicate her Fourth Amendment rights, Shaniz sued the officers and the city.

Unfortunately for her, courts had never decided a case where police so egregiously exceeded a homeowner's consent to "get inside." Citing this "absence of a controlling precedent," the U.S. Ninth Circuit Court of Appeals granted qualified immunity to police, thwarting her lawsuit. On behalf of Shaniz, the Institute for Justice (where I work) filed a petition with the Supreme Court, urging the justices to hear her case. Unfortunately, the high court denied that petition, along with a dozen other legal challenges to qualified immunity, last summer.

By requiring that rights be "clearly established," the Supreme Court has created a challenging uphill battle for plaintiffs. An investigation by Reuters found that in recent years, federal appellate courts granted qualified immunity to law enforcement in 57% of excessive force cases. Yet even when courts reject qualified immunity, that only means that a plaintiff's case may advance; they can ultimately still lose on the merits.

As a federal doctrine, qualified immunity can only be completely abolished by either the Supreme Court or Congress. But there's a third option: robust local reform. Sponsored by Stephen Levin and Helen Rosenthal, the new Council legislation would create a "right of security against unreasonable search and seizure" (similar to the Fourth Amendment) in New York City and provide for a new "civil action" that would let individuals sue law enforcement officers who violated their rights. In other words, New York City would create an alternative to hold rogue agents accountable. Today, at least 20 states (including New York) have enacted some type of cause of action to remedy constitutional violations.

Unfortunately, state courts in New York and elsewhere have largely imported qualified immunity from the federal judiciary, thwarting the ability of victims to hold law enforcement accountable. To circumvent this barrier to justice, the City Council's bill would smartly "prevent the use of the doctrine of qualified immunity" as a potential defense. That means that officers could no longer hide behind the "clearly established" standard to escape civil rights lawsuits.

This type of innovative reform is quickly becoming popular, both with policymakers and the public at large. Just last summer, Colorado became the first state to pass legislation that blocks qualified immunity as a defense to state constitutional claims. Similar bills are also under consideration in Albany and at least a dozen other state legislatures. Nationwide, one poll conducted by the Cato Institute and YouGov found that nearly two-thirds of Americans support eliminating qualified immunity.

Defenders of qualified immunity claim that reform would unleash a torrent of costly litigation. But the cost of protecting someone's constitutional rights involves values very different from the typical line-item in a budget. Any rise in costs (should it even occur) would merely reflect the heavy price already borne by the victims of rogue government agents.

Fears that officers could go bankrupt are also unfounded. First, municipalities and law enforcement agencies almost always foot the bill for civil rights cases. A nationwide survey of police indemnification practices by UCLA Law Prof. Joanna Schwartz found that "New York City Police Department officers were required to contribute to just .49% of the civil rights cases in which plaintiffs received payment," with the median officer payment a mere $2,125. In fact, indemnification is so common, "an officer employed by the NYPD has a 1 in 308 chance of contributing to a settlement during a twenty-year career."

Moreover, agencies and municipalities could readily avoid taking a financial hit by preventing and deterring the misconduct that would trigger the liability in the first place. Vicarious liability would act as a powerful incentive for good governance. Indeed, fretting over costs is a tacit and rather telling admission that constitutional rights are routinely violated by law enforcement.

Fix qualified immunity in New York City, and start recalibrating a skewed balance of power.