The Washington Post

Tom Cotton should put some legislation where his mouth is

Radley Balko

November 10th, 2021

Last month, Sen. Tom Cotton (R-Ark.) wrote an essay in National Review defending qualified immunity, the judge-made legal doctrine that makes it difficult to sue government officials — most notably police officers — when they violate a citizen's constitutional rights. Most of his arguments are wrong or misleading. But one point he makes is intriguing, provided the senator puts some legislation where his mouth is.

Cotton's arguments for qualified immunity aren't new, and most are easily refuted. For example, he argues that eliminating qualified immunity is just a stealth effort to "defund" the police. Yet much of the high-profile criticism of the doctrine has come not from Black Lives Matter or police abolitionists, but from libertarian groups such as the Cato Institute and the Institute for Justice, and scholars such as University of Chicago law professor Will Baude, who contributes to the right-leaning Volokh Conspiracy blog.

Cotton also repeats the false claim that eliminating qualified immunity would cause police officers to face financial hardship or "bankruptcy." In fact, a 2014 study found that "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement."

In addition, Cotton argues that "officers who violate department policies can be disciplined or fired, and those who commit crimes are criminally prosecuted just like anyone else." However, serious discipline for officer misconduct is rare, and made rarer by police culture that punishes whistleblowers.

But Cotton also writes that "victims of police errors or crimes also often receive financial compensation from the department or by suing the city government." Here's where it gets interesting. By "suing the city government," Cotton is referring to what's known as a Monell claim. It's named for the Supreme Court decision that laid out criteria for when cities can be held liable for constitutional violations by police and other officials. As with qualified immunity, the court's rulings after Monell have been confusing and contradictory, but mostly they've only further limited plaintiffs' ability to sue.

Normally when someone injures you in the course of his or her job, you can hold that person's employer liable under the doctrine of *respondeat superior*. But the Supreme Court explicitly rejected that doctrine for constitutional violations. Instead, plaintiffs harmed by government employees' unconstitutional conduct must show the employing agency was so lacking in training, policy and oversight that constitutional violations were all but inevitable.

This has made Monell claims nearly impossible to win — and extraordinarily expensive. Attorneys must accumulate a massive record of malfeasance, disciplinary reports and training documents — and from agencies often reluctant to document their mistakes.

For a good example, we need look no further than Cotton's backyard. A few years ago, I wrote about Josh Hastings, a Little Rock police officer who fatally shot 15-year-old Bobby Moore in 2012. The ensuing litigation revealed that Hastings's disciplinary record wasn't an anomaly. He was hired despite having attended a Ku Klux Klan meeting, then lying about it on his application. Hastings then accumulated an astonishing disciplinary record before killing Moore — which he lied about as well. Several of Hastings's training officers and superiors had gobsmacking records of abuse, racism, shootings and lying. The department had early warning software to detect problem officers, but mostly ignored it.

Hastings's misconduct was so brazen that the city fired him after the shooting — a rare case in which a city has refused to indemnify an officer. Moore's family sued Hastings personally, and actually won in court. But they could only recover whatever assets Hastings had, and by then he was broke and unemployed.

So the family also filed a Monell claim. As one policing expert told me at the time, if any police department could be vulnerable to such a claim, it would be the Little Rock Police Department. Yet the claim was rejected by a federal district court judge, whose ruling was upheld by a (badly flawed) decision from the 8th Circuit.

Sadly, that outcome is standard in Monell claims. Perhaps the most infamous example of this futility is the case of John Thompson, a Louisiana man wrongly convicted of two separate crimes, and nearly executed. In his Monell claim against Orleans Parish (La.), Thompson pointed out that District Attorney Harry Connick and his subordinates had been repeatedly rebuked for egregious misconduct by state and federal courts, including the Supreme Court itself. He showed how Connick provided no training about disclosing exculpatory evidence, and that the office had previously withheld exonerating evidence in convicting several other people later found to be innocent. Despite all this, in 2011 the Supreme Court overturned a $14 million jury verdict in Thompson's favor.

There are two reasons we let people whose rights have been violated sue for damages: to deter future misconduct, and to make victims whole. There's a lot of debate about whether those goals are better served by personal lawsuits or municipal lawsuits. Cotton seems to think municipal liability is the better route. So let's take him at his word, and look forward to his legislation making it easier to sue a city or state when its cops and prosecutors violate the rights of its citizens. We might be waiting for a while.