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The Supreme Court has abdicated its duty to the Bill of Rights

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The Supreme Court, having created the problem of qualified immunity to shield police from being held liable for their misconduct, keeps refusing to fix it.

This week, the court declined to review an especially outrageous ruling by the U.S. Court of Appeals for the 10th Circuit involving a Denver man who was detained for recording a traffic stop, then had his computer confiscated and searched.

No one doubts the man, Levi Frasier, had the right to record the stop. To date, six federal appeals courts have ruled there is a constitutional right to record police officers in public, a sentiment shared by the overwhelming majority of constitutional scholars. No federal appeals court has ruled the other way. In fact, the law is so well established that the officers in Denver were trained that citizens have such a right, and to respect it.

Yet the 10th Circuit ruled that because *that circuit* had yet to rule on the matter, the right was not yet "clearly established." In a truly remarkable sentence, the court added, "It is therefore 'irrelevant' whether each officer defendant actually believed — or even in some sense knew — that his conduct violated . . . the First Amendment."

In my last column, I looked at the origins of qualified immunity, the court-created doctrine that makes it extremely difficult to sue police officers for abuse and other constitutional violations. As I previously pointed out, legal scholars generally point to 1967's *Pierson v. Ray* as the court's first major decision affording protection to law enforcement (and other government officials) from civil liability for constitutional violations, so long as the violations were in good faith.

But that decision required courts (or juries) to determine the state of mind of the officers accused, always a difficult thing to discern. So in 1982, the court revised the policy and created qualified immunity as we know it today. To successfully sue a police officer, a plaintiff must pass a two-prong test, showing that: (A) the police violated the plaintiff's constitutional rights,

and (B) a reasonable person should have known the officers' actions were unconstitutional under "clearly established" law.

The thinking was that officers and other government officials should not be held accountable for vague or confusing case law. But the courts have since stretched that sensible idea to preposterous lengths.

For example, in 2019, the 11th Circuit ruled that a district attorney who lied to state legislators so they'd vote against compensating a wrongly convicted man was entitled to qualified immunity because there was no clear case law stating the district attorney's lies were unconstitutional.

In 2001, the court added more structure to the doctrine, ruling that federal courts should determine prong A before considering prong B. This was important — if fairly obvious — guidance: If the courts never rule on whether a police action is unconstitutional, it will never be "clearly established" that particular action is unconstitutional, allowing it to be repeated.

And yet, eight years later, in *Pearson v. Callahan*, the court discarded that ruling, deciding that federal courts no longer need to consider prong A at all.

Meanwhile, the courts' treatment of prong B has grown increasingly ridiculous. Plaintiffs are now required to find precedent cases with near-identical fact patterns, to the point of absurdity. In one infamous recent example from the 6th Circuit, Nashville police sicced a police dog on a suspect after he surrendered. The courts had already ruled that siccing a dog on a surrendering suspect is unconstitutional, but in the precedent case the suspect had surrendered by lying down. In the Tennessee case, the suspect surrendered by sitting and raising his hands. So the plaintiff lost.

The courts have justified these protections by arguing that officers shouldn't be punished for split-second decisions made when lives are at stake. But the "split second" rationale is largely a myth. And in more than 99.9 percent of these cases, police officers are indemnified from damages — taxpayers pay for cops' mistakes, not the cops themselves.

Some federal courts have continued to deny police officers qualified immunity with sensible rulings based on precedent cases with facts that are similar, but not nearly identical. The Supreme Court has overturned many of those rulings. As Justice Sonia Sotomayor pointed out in a 2017 dissent, this is a stark departure from, say, death penalty or wrongful conviction cases, in which the court tends to defer to the factual findings of the lower courts.

And according to Patrick Jaicomo of the Institute for Justice,in at least nine cases since 2012 alone, courts granted qualified immunity solely on prong B, without ever considering prong A. This has created an Escherian scheme in which a past failure to recognize a constitutional right allows courts to decline to enforce that same right, in perpetuity.

Like other courts, the 10th Circuit refused to decide on prong A in Frasier's case this week — which means that, simultaneously, even as the right to record police exists, the police in those districts can violate it with impunity. And as the Cato Institute's Jay Schweikert told me in an

interview, “even the circuits that have recognized the right could later water it down by requiring near identical facts to the precedent cases.”

George Orwell famously wrote, “If you want a picture of the future, imagine a boot stamping on a human face — forever.” In defiance of everything we know about violence and state power — and for that matter most of human history — somehow, the Supreme Court has decided that the boot deserves more protection than the face.