ACCOUNTABILITY FOR GOVERNMENT AGENTS

Congress should

- ensure that our federal civil rights laws fulfill their core purpose of providing a remedy to individuals whose constitutional rights have been violated by government officials;
- amend 42 U.S.C. § 1983 to eliminate the defense of qualified immunity for all state and local officials;
- amend 42 U.S.C. § 1983 to eliminate absolute prosecutorial immunity;
- create joint-and-several liability for public employers whose employees violate people's constitutional rights; and
- create an explicit statutory cause of action against federal officials who violate people's constitutional rights.

In the landmark Supreme Court case of *Marbury v. Madison*, Chief Justice John Marshall stated: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

Stated differently, constitutional rights mean little if state actors can violate those rights with impunity. Such rights would become, in James Madison's words, "parchment barriers"—symbolic commitments to individual liberty that do nothing in practice to deter or prevent unlawful misconduct by government agents. Accountability for public officials is therefore an absolute necessity for the rule of law in general and for our constitutional order in particular.

Congress created a robust means for ensuring the accountability of state and local officials back in 1871, when it passed what would become our primary civil rights statute. That statute is presently codified at 42 U.S.C. § 1983 and thus is usually called "Section 1983" after its place in the *United States Code*. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, which itself was part of a series of "Enforcement Acts" designed to

help secure the promise of liberty and equality enshrined in the then recently enacted Fourteenth Amendment.

As currently codified, the statute states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In other words, the statute states simply and clearly that any state actor who violates someone's constitutional rights "shall be liable to the party injured." The purpose behind creating such a cause of action is quite simple: individuals whose rights are violated deserve a remedy, and at a structural level, the potential for such a remedy ensures accountability among public officials.

Despite its sweeping language, however, Section 1983 today regularly fails to achieve the deterrent and remedial purposes for which it was designed. This failure is largely the result of egregious Supreme Court doctrines that have effectively rewritten the statute by protecting state officials from liability even when they violate constitutional rights—namely, qualified immunity and absolute prosecutorial immunity. Congress should therefore amend Section 1983 to clarify that the statute means what it says—that a person acting under color of state law who causes the violation of someone's constitutional rights "shall be liable to the party injured."

But Congress can also ensure official accountability by expanding the scope of Section 1983 in two key respects. First, Congress should create joint-and-several liability for public employers whose employees commit constitutional violations. This action will ensure that victims of official misconduct are always fully compensated for their injuries, and it will also give public employers the proper financial incentives to devise hiring, training, and retention policies that minimize the risk of such injuries occurring. Second, Congress should create a statutory cause of action against *federal* officials who violate people's constitutional rights so that victims of such misconduct do not have to rely on the Court-created *Bivens* remedy.

Eliminate Qualified Immunity

As noted above, Section 1983 provides in clear, unambiguous language that any person acting under color of state law who violates someone's federally

protected rights "shall be liable to the party injured." It does not provide for any defenses, qualified or otherwise. This approach comports with Founding-era and 19th-century common law, which generally permitted private torts against government officials whenever they acted unlawfully.

But the Supreme Court effectively rewrote this statute by inventing the doctrine of "qualified immunity." This judicial doctrine shields state and local officials from liability, even when they act unlawfully, so long as their actions did not violate "clearly established law." In practice, this is a huge hurdle for civil rights plaintiffs, because the Court has repeatedly insisted that "clearly established law must be 'particularized' to the facts of the case." In other words, to overcome qualified immunity, civil rights plaintiffs generally must show not just a clear legal *rule*, but a prior case in the relevant jurisdiction with functionally identical *facts*.

Although the Supreme Court has always purported to say that an exact case on point is not strictly necessary, it has also stated that "existing precedent must have placed the statutory or constitutional question beyond debate." And in practice, lower courts routinely hold that even seemingly minor factual distinctions between a case and prior precedent will suffice to hold that the law is not "clearly established." To give just a couple of concrete examples:

- In *Baxter v. Bracey*, the Sixth Circuit granted qualified immunity to two police officers who deployed a police dog against a suspect who had already surrendered and was sitting on the ground with his hands up. A prior case had already held that it was unlawful to use a police dog without warning against an unarmed suspect lying on the ground with his hands at his sides. But despite the apparent factual similarity, the *Baxter* court found this prior case insufficient to overcome qualified immunity because "Baxter does not point us to any case law suggesting that *raising his hands, on its own*, is enough to put [the defendant] on notice that a canine apprehension was unlawful in these circumstances." In other words, prior case law holding unlawful the use of police dogs against nonthreatening suspects who surrendered by *lying on the ground* did not "clearly establish" that it was unlawful to deploy police dogs against nonthreatening suspects who surrendered by *sitting on the ground with their hands up*.
- In *Latits v. Phillips*, the Sixth Circuit granted immunity to a police officer who rammed his vehicle into the car of a fleeing suspect, drove the suspect off the road, then jumped out of his vehicle, ran up to the suspect's window, and shot him three times in the chest, killing him. The court acknowledged that several prior cases had clearly established that "shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment,

absent some indication suggesting that the driver poses more than a fleeting threat." Even though that statement would seem to govern this case exactly, the majority held that these prior cases were "distinguishable" because they "involved officers confronting a car in a parking lot and shooting the nonviolent driver as he attempted to *initiate* flight," whereas here "Phillips shot Latits *after* Latits led three police officers on a car chase for several minutes." The lone dissenting judge in this case noted that "the degree of factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet."

Thus, given how the "clearly established law" test works in practice, whether victims of official misconduct will get redress for their injuries turns not on whether state actors broke the law, nor even on how serious their misconduct was, but simply on the happenstance of the fact patterns of prior judicial decisions.

Perhaps most disturbingly, the doctrine can have the perverse effect of making it *harder* to overcome qualified immunity when misconduct is *more* egregious—precisely because extreme, egregious misconduct is less likely to have arisen in prior cases. In the words of one federal judge, "To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."

There is no shortage of cases illustrating this point, but the following two are representative:

- In *Corbitt v. Vickers*, police officers pursued a criminal suspect into an unrelated family's backyard, at which time one adult and six minor children were outside. The officers demanded that they all get on the ground, everyone immediately complied, and the police took the suspect into custody. But then the family's pet dog walked into the scene, and without any provocation or threat, one of the deputy sheriffs started firing at the dog. He repeatedly missed, but he did strike a 10-year-old who was still lying on the ground nearby. The child suffered severe pain and mental trauma and had to have orthopedic surgery to repair his leg. The Eleventh Circuit granted qualified immunity on the grounds that no prior case law involved the "unique facts of this case." One judge did dissent, reasonably explaining that "no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children."
- In *Kelsay v. Ernst*, Melanie Kelsay was playing at a public pool with her friend, when some onlookers thought her friend might be assaulting her and called the police. The police arrested her friend, even though she

> repeatedly told them he had not assaulted her. While talking with a deputy, Matt Ernst, Kelsay saw that her daughter had gotten into an argument with a bystander and tried to go check on her. Ernst grabbed her arm and told her to "get back here," but Kelsay again said she needed to go check on her daughter, and began walking toward her. Ernst then ran up behind her, grabbed her, and slammed her to the ground in a "blind body slam" maneuver, knocking her unconscious and breaking her collarbone. The Eighth Circuit granted Ernst qualified immunity on the grounds that no prior cases specifically held that "a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer."

Qualified immunity has therefore substantially undermined both the remedial and deterrent purposes of Section 1983. Victims of official misconduct, even egregious misconduct, are routinely left with no remedy, simply because the fact patterns of their cases differed from the facts of prior cases. And public officials are not given the proper incentives to conform their conduct to constitutional limitations.

Fortunately, for all the harm that qualified immunity has caused, the fix is quite simple. Congress simply needs to amend Section 1983 to clarify that the statute means what it says and that the judicially invented defense of qualified immunity is inapplicable to claims brought under the statute. The following language would accomplish this goal:

> It shall not be a defense or immunity to any action brought under this section that (1) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant; or (2) the defendant believed his or her conduct to be lawful at the time when the conduct was committed, or that the defendant did not intend to cause a deprivation of the rights, privileges, or immunities secured by the Constitution and laws.

Subsection (1) is simply the elimination of qualified immunity in its current form—that is, the "clearly established law" standard that was first articulated in the 1982 decision in *Harlow v. Fitzgerald*. Subsection (2) clarifies that courts should not return to the pre-*Harlow* conception of qualified immunity, which also depended on the defendant's "subjective good faith"—that is, the defendant's actual beliefs and intentions with respect to the underlying constitutional violation.

Finally, Congress could include clarifying language in an amendment to Section 1983 that would head off one of the most persistent misunderstandings about qualified immunity—namely, the misconception that qualified immunity

is somehow necessary to protect the discretion of police officers to make split-second decisions in the field.

The doctrine of qualified immunity only matters when a public official has, in fact, violated someone's federally protected rights. This means that if police officers have not committed any constitutional violation, then by definition they do not need qualified immunity to protect themselves from liability, because they have not broken the law in the first place. And the Supreme Court has made crystal clear that when police officers make good-faith mistakes of judgment—like arresting someone who turns out to be innocent, or using force that turns out to have been unnecessary—then they have not violated the Fourth Amendment at all, as long as they acted reasonably. In other words, deference to reasonable, on-the-spot decisions by police officers is already baked into our substantive Fourth Amendment jurisprudence, and qualified immunity is unnecessary to protect it.

Nevertheless, the fear that eliminating qualified immunity would deny officers the discretion to make difficult, on-the-spot decisions in the field—however misplaced—is, and is likely to remain, one of the primary obstacles to the dissolution of qualified immunity. Thus, to defuse any misunderstandings on what the effect of eliminating qualified immunity would be, the following language could be included in an amendment to Section 1983:

> Nothing in this section shall be construed to hold a law enforcement officer personally liable in an action brought under this section alleging excessive force in violation of the Fourth Amendment to the United States Constitution, unless the officer's use of force was objectively unreasonable. For the purposes of this subsection, "objectively unreasonable" means "unreasonable from the perspective of a reasonable officer on the scene at the time at which the use of force occurred.

To be clear, this language is essentially just restating black-letter Fourth Amendment doctrine, so its inclusion in an amendment to Section 1983 would not actually change the state of the law. But it would clarify, both to the lawmakers and to the public, that the elimination of qualified immunity would not generally expose police officers to liability for reasonable, good-faith mistakes.

Eliminate Absolute Prosecutorial Immunity

Qualified immunity applies across the board to any state or local official who might be sued under Section 1983 for violating someone's constitutional rights. But the Supreme Court has invented a separate doctrine—equally unsupported by the text or history of Section 1983—that also severely undermines official accountability: *absolute* immunity for prosecutors.

To briefly restate the relevant statutory framework here, Section 1983 creates liability for any person acting "under color of" state law—which would obviously include prosecutors—and it provides for no immunities on its face. Nevertheless, in the 1976 decision in *Imbler v. Pachtman*, the Supreme Court held for the first time that prosecutors are absolutely immune from Section 1983 suits pertaining to the "judicial phase of the criminal process." The main rationale underlying the Court's decision to permit such a defense was the principle that Section 1983 should be interpreted in light of background common-law principles, and that absolute prosecutorial immunity was "based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties."

As many scholars and jurists have since explained in detail, however, the *Imbler* Court almost certainly got its historical analysis wrong. As Justice Antonin Scalia explained in 1997, historically, absolute judicial immunity "extended only to individuals who were charged with resolving disputes between other parties or authoritatively adjudicating private rights." When Section 1983 was first passed, there was no clear concept of "prosecutorial immunity," in part because the modern office of a public prosecutor was basically nonexistent in 1871. But most prosecutorial *functions* would have been considered, in 19th-century parlance, "quasi-judicial"—"that is, official acts involving policy discretion but not consisting of adjudication." But if prosecutorial functions were quasi-judicial under 19th-century common law, then individuals performing such functions were *not* entitled to absolute immunity.

As a practical matter, though absolute prosecutorial immunity is more limited in scope than the defense of qualified immunity, its application is even more egregious. No matter how willfully or maliciously a prosecutor violates a criminal defendant's constitutional rights, and no matter how devastating the consequences for the victim, a prosecutor can simply *never* be held accountable in a civil rights suit for misconduct pertaining to the initiation or litigation of criminal charges.

One of the most common and damaging constitutional violations that prosecutors commit in this context is withholding exculpatory material from the defense. Under *Brady v. Maryland*, prosecutors are obligated to turn over material evidence that might exonerate the defendant—for example, statements or other evidence that someone besides the defendant committed the crime. It is difficult to assess exactly how often prosecutors fail to meet their *Brady* obligations, but there is ample reason to believe such violations are widespread.

Consider the example of Michael Morton, who was wrongfully convicted for the murder of his wife and spent nearly 25 years behind bars. Morton was exonerated in 2011 on the basis of DNA testing, but a subsequent investigation

revealed that Ken Anderson, the prosecutor in his case, intentionally withheld evidence that could have exonerated him before he was ever convicted. Anderson ultimately pleaded guilty to criminal contempt of court and became the first prosecutor to *ever* spend time in jail for misconduct that led to a wrongful conviction—he was sentenced to 10 days, of which he served 5. Yet not even this conviction has any bearing on his absolute immunity, leaving Morton with no remedy against the official who cost him a quarter century of his life.

The simplest and most straightforward solution to this glaring lack of accountability would be for Congress to clarify that a defendant's acting in a prosecutorial capacity is not a defense or immunity under Section 1983. However, as an intermediate measure, Congress could also amend the statute to say that no such immunity applies when there has been a *judicial finding* of prosecutorial misconduct, as would be common in cases involving defendants who were later exonerated.

Create Joint-and-Several Liability for Public Employers

Qualified immunity and absolute prosecutorial immunity are doctrines that apply to public officials sued in their individual capacity. But another crucial question for government accountability is how our civil rights laws should apply to public *employers* when one or more of their employees violate someone's rights.

At common law, the traditional rule for employer liability was *respondeat superior* ("let the master answer"), meaning that employers are liable for their employees' acts committed in the course of their employment. But that is not the rule that applies today in Section 1983 cases. In *Monell v. Department of Social Services*, the Supreme Court held that municipalities *do* count as "persons" under Section 1983, but that they can only be sued directly when a "policy or custom" of the municipality directly caused the underlying constitutional violation. Thus, the mere fact that a public employee violated someone's rights in the course of their employment is not enough to hold their employer liable.

In *Monell*, the Court held that this doctrine does not apply to municipal employers under Section 1983—in other words, just because a municipal employee commits a constitutional violation does not mean that the municipality itself is liable. Instead, a plaintiff must also show that the violation was committed pursuant to an official "policy or custom" of the municipal body.

It is debatable whether the *Monell* Court was correct in interpreting Section 1983 in such a manner in the first place. After all, unlike qualified immunity and absolute prosecutorial immunity, *respondeat superior* is a rule that *was* well established in 19th-century common law, and it is reasonable to think that the Reconstruction Congress intended this rule to apply to Section 1983.

But regardless of whether *Monell* was correctly decided, Congress today can and should amend Section 1983 to create employer liability directly whenever a public employee violates someone's constitutional rights.

There are two primary reasons why employer liability is an important supplement to qualified immunity and absolute immunity reform. First, employer liability guarantees a complete remedy to victims of official misconduct, in light of the fact that public employers are the entities that actually have the funds to cover most judgments. Even today, individual Section 1983 defendants are nearly always fully *indemnified* by their employers. In the law enforcement context, for example, law professor Joanna Schwartz found that out of all dollars paid out in civil rights suits against individual police officers, 99.98 percent of those dollars were actually paid by the officers' employers. Second, employer liability gives public employers the proper financial incentives to structure their hiring, training, and retention policies in a manner that discourages employees from committing violations in the first place.

However, it is equally important that employer liability function as a *supplement* to individual liability, not an *alternative* to it. Making employers solely liable for the misconduct of their employees might serve the remedial purpose of making victims whole, but it would fail to provide the individualized deterrence that is also a crucial component of civil rights laws. Even if individual defendants are typically indemnified, there's a major difference between *some* skin in the game, and *no* skin in the game.

The best solution is therefore a *shared liability* regime (or joint-and-several liability, in technical terms) between public employers and employees. The following language, if adopted as an amendment to Section 1983, would accomplish this goal:

> If any person acting under color of law subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, the public employer of that person shall be jointly and severally liable to the party injured for the conduct of its employee in an action at law, suit in equity, or other proper proceeding for redress, regardless of whether a policy or custom of the public employer caused the violation.

The benefits of such a shared-liability regime are numerous. It guarantees that victims of misconduct will always get a complete remedy. It provides accountability for individual officers while still recognizing that employers will generally be the ones paying for the bulk of any judgments. And, perhaps most important, it both permits and incentivizes states and localities to experiment

with different systems on how to apportion liability between employers and employees.

For example, in June 2020, Colorado enacted qualified immunity reform that allows individuals to sue police officers who violate their constitutional rights, without qualified immunity; presumptively guarantees full indemnification by the officer's employer; but if the department determines the officer "did not act upon a good faith and reasonable belief" that the conduct in question was lawful, makes the officer personally responsible for a small portion of the judgment (5 percent or $25,000, whichever is less). In other words, it gives officers skin in the game, but to a degree they could reasonably be expected to cover.

If Congress created shared liability between employers and employees, it would effectively leave the choice about how best to apportion responsibility to states and localities. Some would presumably adopt Colorado-style caps on the individual contribution, whether by statute or by contract. Some might employ a system in which police departments fund individual officer liability insurance. And if a particular jurisdiction truly wanted to avoid individual liability entirely, it could do that too, simply by guaranteeing that public employers are always responsible for the entire judgment. Shared liability at the federal level is therefore the approach to civil rights reform that will best allow us to see the virtues of federalism in action.

Create a Statutory Cause of Action against Federal Officials

Shared liability gives states flexibility in apportioning liability to state employees. But just as important is the method by which *federal* employees may be held accountable for constitutional violations. Although the Framers clearly intended federal officials to be liable for unconstitutional misconduct, the current avenue for this has proved ineffective.

For most of this nation's history, federal officials could be held personally liable for unconstitutional misconduct at common law. Plaintiffs bypassed sovereign immunity through the enumeration principle, which treated public officials who exceeded their constitutional authority as having no authority at all—and no immunity either.

This manner of holding government actors accountable was a natural continuation of English jurisprudence. Among the most famous cases on the Framers' minds when they penned the Constitution was *Carrington v. Entick*. In *Carrington*, Lord Halifax, the English secretary of state, issued a false warrant ordering four of the king's messengers to break into the home of British author John Entick to seize "seditious papers" supporting Halifax's political rivals. Because Halifax and his subordinates acted outside their legal authority, they were

found liable for trespass at common law. The U.S. Supreme Court would go on to laud *Carrington* as the "true and ultimate expression of constitutional law."

But the common law proved unable to adapt to novel constitutional violations. For instance, though courts agreed that wiretapping without a warrant was a Fourth Amendment violation, it could not rightly be called trespass. The divergence of the common law and constitutional jurisprudence left many rights effectively unenforceable.

The Supreme Court remedied this situation in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which created an independent cause of action for constitutional violations by federal officials. With the passage of the Federal Employees Liability Reform and Tort Compensation Act of 1988 barring most common-law tort suits, *Bivens* actions replaced the common law as the primary vehicle for citizens to enforce their constitutional rights against federal employees.

Yet the accountability promised by *Bivens* has proved elusive. Government data analyzing roughly 12,000 *Bivens* claims from 1971 to 1985 revealed only 5 where plaintiffs ultimately recovered damages. The largest bar to recovery was the defense of qualified immunity.

Congress can restore the accountability envisioned by the Framers by supplanting *Bivens* with a statutory cause of action, parallel to Section 1983, that would allow citizens to enforce their constitutional rights against federal officials. This statute should include the same amended language recommended for Section 1983: establishing shared liability between federal employees and their employers, and barring the defense of qualified immunity.

Suggested Readings

Baude, William. "Is Qualified Immunity Unlawful?," *California Law Review* 106 (2018): 45–90.

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Schweikert, Jay R. "Qualified Immunity: A Legal, Practical, and Moral Failure." Cato Institute Policy Analysis no. 901, September 14, 2020.

Selby, Daniele. "Only One Prosecutor Has Ever Been Jailed for Misconduct Leading to a Wrongful Conviction." Innocence Project, November 11, 2020.

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