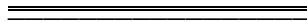


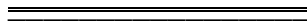
**The Bill Blackwood
Law Enforcement Management Institute of Texas**



**Qualified Immunity for Law Enforcement Officers
Society's Best Interest**



**A Leadership White Paper
Submitted in Partial Fulfillment
Required for Graduation from the
Leadership Command College**



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ABSTRACT

Qualified immunity is the doctrine established by the United States Supreme Court in the late 1960s which prevents an officer from being held personally liable from lawsuits alleging the officer violated a person's rights (Mihalek, 2020). Qualified immunity balances societies need to hold law enforcement officers accountable for their actions with the officers need to be protected from personal liability when they are acting in good faith in the performance of their duties (Legal Information Institute, n.d.a). There have been calls to strip law enforcement officers of qualified immunity, to hold them accountable for their actions. Qualified immunity should be retained for law enforcement because it protects them from frivolous lawsuits, allows them to perform their duties in life and death confrontations without fear of being held personally liable, and preserves the rule of law and community order. If qualified immunity is stripped from law enforcement there will be an exodus of trained, experienced, professional law enforcement officers which will result in a rise in violent criminal behavior, anarchy, and vigilantism, making the United States an unsafe place to live.

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INTRODUCTION

It is generally recognized that modern policing began in England when the enforcement was a collection of volunteers with no training, working without policies and procedures, who had the authority to arrest and search without warrants (Rennison & Dodge, 2015). Sir Robert Peel is credited with organizing, formalizing, and professionalizing law enforcement, beginning with the London Metropolitan Police Department (Rennison & Dodge, 2015). Peel's guiding principles emphasized applying the law impartially, cooperating with the public, and utilizing force only when necessary (Rennison & Dodge, 2015). The changes were difficult to achieve and resulted in the dismissal of numerous officers over the first few years (Rennison & Dodge, 2015). The reforms resulted in a major drop in crime for the area (Rennison & Dodge, 2015).

In the colonial United States, security and law enforcement was conducted by volunteers or people serving in a part time capacity paid for by prominent members of the community (Charles Koch Institute, 2019). In the late 1800s, it ran the spectrum from large organized departments in Boston, New York, and Chicago, to small single man Town Marshalls or the County Sheriff and his posse, who were responsible for apprehending offenders and collecting taxes. In all of these eras the lack of education, formalized police training, and established policies and procedures allowed corruption and personal agendas to dictate how and when laws were enforced and to what degree force was used to affect the "lawful purpose" (Charles Koch Institute, 2019).

In the early 1900s, August Vollmer began to use technology, record keeping, and statistics to assist with crime fighting (Rennison & Dodge, 2015). Vollmer was a driving force in professionalizing police and believed that law enforcement officers

should be educated (Rennison & Dodge, 2015). Policing has continued advancing, with the modern law enforcement officer who is expected to be intelligent, educated, even tempered, and to uphold the law equally without bias.

As a result of the proliferation of personal recording devices, some police officers have been documented violating their oaths of office and falling drastically short of societal expectations for the position they hold. Beginning with the beating of Rodney King by law enforcement officers in the 1990s and with the death of George Floyd, the public is demanding law enforcement be held accountable for their actions. Some of the suggested reforms are to divert police funding to community projects, restricting the use of force allowed, and the abolition of qualified immunity (Lyons, 2020).

Qualified immunity is the doctrine established by the United States Supreme Court in the late 1960s, which prevents an officer from being held personally liable from lawsuits alleging the officer violated a person's rights (Mihalek, 2020). Qualified immunity balances the need to hold law enforcement officers accountable for their actions when the officers need to be protected from personal liability, as long as they are acting in the good faith performance of their duties (Legal Information Institute, n.d.a)

Qualified immunity protects officers from "frivolous" lawsuits. Without qualified immunity, an officer is exposed to potential litigation whenever a plaintiff disagrees with the way an officer handled a "routine situation." It also protects law enforcement officers from personal liability when the officer faces life and death situations, which occur in fractions of seconds. The Supreme Court ruled in *Malley v. Briggs*, 475 U.S. 335 (1986)

that, “as a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law” (para. 3).

Qualified immunity keeps society safer by ensuring experienced, educated, professional officers remain in the law enforcement profession. Without qualified immunity, officers would need to weigh the risk of having to fight lawsuits for false or frivolous allegations, which is expensive and would put officers at risk of losing their life savings from incidents at work. Officers will be less willing to act in a proactive manner to prevent or detect crime because they will be personally subject to civil litigation. Officers already face a negative public perception, negative media coverage, and potential criminal arrest for lawful actions they take at work. All of these things take a heavy toll on them and their families. It is unreasonable to expect officers to bear the cost of civil liability. There are other remedies which hold law enforcement officers accountable for their actions to include their parent-agency being held liable for the officer’s actions. Qualified immunity should be retained for law enforcement officers, or the consequences will be dire.

POSITION

Qualified immunity protects law enforcement officers from frivolous lawsuits, allowing them to be free from harassment and financial loss during “routine situations.” In 2018, A Texas state trooper arrested a woman for driving while intoxicated. The woman filed a complaint alleging the trooper violated her civil rights during the arrest by sexually assaulting her (Mihalek, 2020). She put those allegations out on social media platforms and retained an attorney for the purpose of suing the trooper for violating her civil rights (Mihalek, 2020). During the ensuing internal affairs investigation, the

allegations were proven to be false with the video obtained from the trooper's in-car video system (Mihalek, 2020). Complaints are taken seriously and investigated. Depending on the alleged violation(s) there may be several parallel investigations conducted to include the parent agencies' internal affairs unit for policy violations, the District Attorney's Office for state criminal violations, or the local United States Attorney's office for civil rights violations. In order for an officer to make the claim for qualified immunity, the parent agency must decide if the officer's actions were within the scope of employment and reasonable. In this instance, qualified immunity would have prevented the woman from being able to directly sue the trooper for the alleged civil rights violation; however, she could still have sued the Texas Department of Public Safety for the trooper's conduct (Mihalek, 2020). The Supreme Court ruled in *Pearson vs Callahan* that an officer should be shielded from harassment, distraction, and liability when they perform their duties reasonably (Legal Information Institute, n.d.a).

By virtue of being the police, law enforcement officers are engaging in the use of force during any activity where they are participants. Police officers are allowed to utilize the least amount of force necessary to affect a lawful purpose, one level above the level of force presented to them. The use of force continuum begins with command presence and verbal commands, then, depending on the situation, can escalate to soft hand controls, hard hand tactics, intermediate impact weapons, less lethal weapons, and deadly force. Law enforcement officers routinely face dangerous circumstances. An officer's daily activity can range from making "routine traffic stops" for minor traffic violations to answering calls for service involving mental health issues, simple or felonious assaults, weapons violations, or a potential ambush. Upon approaching a

scene, an officer does not know the violator's criminal history, recent activity, possession of concealed weapons, or potential other criminal activity which may be afoot. This puts the officer at a serious disadvantage because he/she must quickly assess the person(s) they are dealing with, determine if there are multiple suspects, evaluate the threat level, note to what extent there are bystanders, recognize if the extent conditions help or hinder them, and decide if the suspects are engaging in any criminal activity. During all use of force encounters, the suspect plays a pivotal role in determining what level of force is used against them. In circumstances when suspect(s) do not comply with command presence and verbalized lawful orders, the officer will need to escalate to soft hand control to restrain the suspect. If the suspect actively resists the officer, the officer has the option to escalate to intermediate impact weapons. If the suspect goes after a police weapon or he/she displays a weapon, then the use of deadly force is an option. Incidents can deescalate just as quickly as they escalate and officers should attempt to gain compliance through verbal commands; however, the suspect's actions ultimately dictate whether this happens or not. All of this can happen in seconds. If an officer can be sued and held personally liable, it would likely cause them to hesitate in their justifiable use of force, which could be disastrous to them or another. Qualified immunity provides law enforcement officers with the peace of mind to make life and death decisions, while acting in good faith, and within the bounds of what a reasonable officer would do.

The retention of Qualified immunity ensures the preservation of law and order, ensures the people's right to be secure in their properties and persons from unlawful searches and seizures from the police, and ensures the preservation of safety and

security from unlawful actors. The unreasonable officer is not protected by qualified immunity if they willfully violate a persons civil rights because it does not protect against the plainly incompetent and willful violator (Malley v. Briggs, 475 U.S. 335, 1986).

Preserving qualified immunity ensures that law enforcement officers have the peace of mind to proactively take routine and critical lawful actions to prevent and detect crime.

Without that security, officers' concerns of personal civil liability will chill their desire to be proactive. There is a direct correlation between proactive and reactive law enforcement strategies on violent crime. Recent statistics prove that when police stop being proactive because of calls to defund and negative press, violent crime increases (Pagones, 2021). Several large metropolitan areas including Los Angeles, California; Minneapolis, Minnesota; New York, New York; Portland, Oregon; and Austin, Texas have partially defunded their police departments in response to protesters complaints about the police involved death of George Floyd, while in custody. Defunding efforts have led to a spike in early retirements, layoffs, and reductions in hiring (Pagones, 2021). For those who choose to stay in the profession, morale is low, which is causing enforcement to be reactive rather than proactive (Main, 2021).

Beginning in June 2020, Los Angeles saw a 38% increase in murders through December 31, 2020 (Pagones, 2021). From January 1, 2021 to March 13, 2021, there was a 28% increase in murders, a 93% increase in shootings, and an 8.4% increase in aggravated assaults, for the same time period the prior year (Pagones, 2021). In Minneapolis, from July 2020 to March 2021, there was a 49% increase in murders, and violent crime was up 22% for the same time period the prior year (Pagones, 2021). In New York, from January 1, 2021 to March 21, 2021, there was an 11.8 increase in

murders, and a 40% increase in shootings for the same time period the prior year (Pagones, 2021). In Portland, from July 2020 to February, 2021, there was a 370% increase in murders; assaults were down 6.4% for the same time period the prior year (Pagones, 2021). In Austin, Texas, from June 2020 to February 2021, there was a 10% increase in murders and a 26% increase in aggravated assaults for the same time period the prior year (Pagones, 2021). These figures demonstrate what defunding police departments do to violent crime statistics. Imagine what those statistics would look like with fewer law enforcement officers available, because of the loss of qualified immunity. Seasoned officers will be less likely to stay in the profession knowing they risk their lives and life savings by proactively enforcing the law or by even staying in law enforcement at all. The call to defund police departments and hold officers more accountable has resulted in significant increases in the retirements and resignations of seasoned officers not eligible to retire in major cities such as Chicago, Minneapolis, and New York (Main, 2021). Due to the reduced number of officers, agencies have had to cut proactive community-oriented policing, shift to response only policing, and pay more overtime to cover the shifts where they are short on personnel to work (Main, 2021).

Without qualified immunity, intelligent, educated, and physically fit candidates will be less likely to seek out the law enforcement profession. Beginning in the early 1990s, there was already a steady decrease in the number of qualified applicants for police positions which was attributed to a strong economy (United States Department of Justice, n.d.). With the significant negative media portrayal, calls to defund, and threats to remove qualified immunity, there are even fewer applicants who are willing to risk their life and life savings to be in an already dangerous profession. Agencies were

already lowering their hiring standards in order to attract a larger applicant pool (United States Department of Justice, n.d.). There is no question that when law enforcement employment standards are lowered the quality of the officer is lowered, which diminishes the public's perception. All of these factors will cause a further lowering of standards, which will only perpetuate the problem.

People want to be secure in their person and property, which has been maintained by the rule of law, through the courts and law enforcement officers. In the absence of the rule of law, the worst-case scenario is anarchy, which is ruled by the person who is quickest to impose his will upon others through violence. The best case is groups of people apprehending and punishing criminal perpetrators by their own hands through vigilantism. Anger is the most common emotional response to criminal acts because the victim wants the perpetrator to be punished (Silke, 2001). In the article, "Dealing with Vigilantism," Silke points out vigilantes are normal people who have been repeatedly victimized and who have a perception that law enforcement is ineffective in carrying out its duties. He also argues that over the course of time vigilante groups will co-opt the legitimate law enforcement system and will handle their grievances with violence (Silke, 2001). When a mob rules there is no guarantee civil rights will be protected, the least amount of force will be used to affect a lawful purpose, evidence will be used to ensure the accused party actually committed a crime, the accused will have the right to counsel, and the accused will have a fair trial before a jury of peers. The Seattle Capitol Hill Organized Protest (CHOP) is an example of what happens when the police abandon their duty to act. Initially, media portrayed the CHOP zone a festival like atmosphere where people were grilling food, reciting poetry, and a

six square block peaceful protest for equality and change (Burns, 2020). In the 23 days CHOP was in existence, there were four shootings, two of which resulted in the unrelated deaths of a 19-year-old and a 16-year-old, arson, vandalism, and several sexual assaults (Burns, 2020). Prior to the police sweep to clean out the area Police Chief Carmen Best stated, “The CHOP has become lawless and brutal” (Flood, 2020, para. 7).

COUNTER ARGUMENTS

Qualified immunity for law enforcement officers is viewed as controversial at best and as an unlawful protection of officers who are egregiously violating the public’s civil rights with impunity. Those who are proposing qualified immunity be stripped from law enforcement argue that the police are not held accountable for excessive uses of force, thereby escaping justice (Lyons, 2020). The belief is that if officers can be privately sued for their actions, the ordinary American citizen will receive justice because the officer will have to pay out of their personal savings. They also argue, this encourages officers to be more cautious and utilize less force when they are conducting their law enforcement duties (Nemeth, 2019).

This argument does not take into account that there are remedies in place to ensure police officers’ actions are held to account. First, if an officer receives qualified immunity, the parent agency can still be held civilly liable for any damages done (Mihalek, 2020). Second, if it is proven that an officer violated someone’s civil rights, they are subject to their agency’s internal investigation process and disciplinary program. In Texas, the officer is also subject to criminal prosecution, under Chapter 39.03, for official oppression, a Class A Misdemeanor. In cases of excessive force, an

officer can be criminally charged, under Texas Penal Code 22.01, for assault, a class A Misdemeanor; Texas Penal Code 22.02, for aggravated assault, a felony; Texas Penal Code 22.05, for deadly conduct, a Class A misdemeanor, and a felony under some circumstances; Texas Penal Code 19.05, for criminally negligent homicide, a felony; Texas Penal Code 19.04, for manslaughter, a felony; and Texas Penal Code 19.03, for murder, a felony. If an officer is convicted in state court in Texas for any offense above a Class C Misdemeanor, their licenses could be suspended for no less than 60 days for a Class B Misdemeanor, 120 days for a Class A Misdemeanor, and up to 30 years for a felony. Repeat offenders can be suspended indefinitely (Texas Commission on Law Enforcement, 2021). Third, the officer is also subject to federal prosecution by the Department of Justice United States Attorney's office for 18 USC 241, Conspiracy Against Rights if there was more than one person, and 18 USC 242 Provisions of Acts Under Color of Law, both of which are federal felonies. Any convictions under these federal statutes would also cause a suspension of their Texas Peace Officers license for the prescribed period of time (Texas Commission on Law Enforcement, 2021). Anyone can be convicted in both state and federal court for the same act(s) and it is not double jeopardy because they each have separate statutes and jurisdictions. Under most circumstances the federal government will wait to see what the outcome of the state prosecution is before action is taken.

Finally, according to 42 USC 1983, Civil Action for Deprivation of Rights, any person operating under the color of law who deprives another of their rights is subject to liability to the injured party (Legal Information Institute, n.d.b). In order for an officer's defense of qualified immunity to be removed, the officer must have violated someone's

“clearly established” constitutional right (Legal Information Institute, n.d.b). If an officer is convicted in state or federal court for any of the previously listed offenses, they will have violated a clearly established statutory or constitutional right beyond a reasonable doubt and therefore be subject to personal liability.

Another argument against qualified immunity for law enforcement officers is that officers regularly use excessive force. As stated earlier, officers are allowed to utilize the least amount of force necessary to affect a lawful purpose, one level above the level of force presented to them. The standard for the amount of force which can be used is judged by reasonableness. The use of deadly force by law enforcement is a rare event with traumatic consequences (Blair et.al., 2011). When a loved one is killed by the police, the family rarely believe that the use of force was reasonable or justified, even when it has been cleared by investigation (Blair et.al., 2011). This argument does not take into account the numbers of instances where officers did not use the level of force they were legally and ethically authorized to use. Numerous officers have been interviewed and described utilizing restraint in multiple encounters when they were justified to use deadly force but did not (Pinizzotto et al., 2012). During any encounter, there are multiple factors which cause a situation to escalate to the use of deadly force; however, it seems the only factors that are reported by the media are the ones which demonize the use of deadly force by the officer. An objective person should analyze all of the factors which lead up to a deadly force encounter. For example, the reason the person initially came into contact with the police, the appearance of or access to weapons, the person moving to a place or location where they could retrieve weapons, or the person not following the lawful commands of the officer. If any or all of these

factors are present at the time of the encounter, the person is responsible for placing themselves into a position where the use of deadly force is more likely. Compliance with the lawful orders of an officer deescalates encounters with the police and prevents the use of deadly force. There are very few studies on police restraint; however, there is data which suggests numerous officers have exercised restraint when they were justified in the use of deadly force (Pinizzotto et al. 2012). Since the 1990s, police agencies have been engaging in teaching de-escalation skills such as “Verbal Judo” in an attempt to equip officers with a means to prevent deadly force encounters (Dart, 2019). Officers are also trained to provide life saving measures to the perpetrator who they had just encountered in a life-or-death struggle. The external factors of negative media portrayal, potentially making a mistake and facing civil and or criminal liabilities, pressure by society to not use lethal force, combined with the internal factors of personal belief systems, the desire to help people not harm them, and the emotional toll a life and death struggle places on them and their loved ones are all factors an officer takes into consideration when they are dealing with the public. These considerations are what motivate an officer to use restraint in deadly force encounters. Unfortunately, when restraint is used it is rarely reported by the media, and there currently are no databases which collect the data.

RECOMMENDATION

Society has a vested interest in keeping trained, experienced, professional people working in law enforcement. History has shown untrained voluntary enforcers are more likely to be corrupt and use excessive force when dealing with the public (Rennison & Dodge, 2015). First, it is recommended that law enforcement agencies conduct 24

hours of training every quarter in the use of force, defensive tactics, de-escalation tactics, firearms, and first aid. Well trained officers are less likely to use an inappropriate amount of force. Second, departments should document their use of force encounters for all levels of force to include a separate category for restraint used when deadly force was justified. This data would help refute the false narrative that police regularly use excessive force. Finally, qualified immunity should be retained for law enforcement officers to ensure they are protected from harassment, distraction, and liability when they perform their duties reasonably (Legal Information Institute, n.d.a). Qualified immunity provides the public with protection from law enforcement officers who are incompetent or willfully violate the law, because there are both criminal and civil liabilities which are in place to hold them accountable (Legal Information Institute, n.d.a). If Qualified immunity is stripped from law enforcement, there will be an exodus of trained, experienced, professional law enforcement officers, which will result in a rise in violent criminal behavior, anarchy, and vigilantism, making the United States an unsafe place to live.

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