

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

**Law Enforcement Officers Should Continue to Benefit from the
Qualified Immunity Doctrine**

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

**By
Jarrett R. Hill**

**Deer Park Police Department
Deer Park, Texas
September 2022**

ABSTRACT

Qualified Immunity represents an importance balance. Qualified immunity provides protection for police officers, as well as other public officials, from civil lawsuits. It will allow police officers to do their jobs, as well as hold the bad actors accountable for their actions. Supporters of qualified immunity argue that law enforcement officers would be exposed to lawsuits and second guessed in the courts without this protection. On the other hand, opponents of qualified immunity argue law enforcement officers are free to violate the rights of citizens with impunity. In 1967, the U.S. Supreme Court refined the qualified immunity doctrine. Qualified immunity is not the result of any specific law passed by Congress. Qualified Immunity is an important doctrine that needs to exist to protect the officer and provide them the ability to do the job they have sworn to do. Officers are human and should be allowed room to make mistakes. Officers should not be afraid to do their jobs, fearing frivolous civil lawsuits or baseless legal actions when making split second decisions. Denying officers the benefit of Qualified Immunity could lead to their failure to act, cause them to leave the profession prematurely and can cause an increase in crime rates for the communities that need police the most. Law enforcement officers should continue to benefit from the qualified immunity doctrine.

TABLE OF CONTENTS

	Page
Abstract	
Introduction	1
Position	3
Counter Arguments	9
Recommendation	12
References	14

INTRODUCTION

President John F. Kennedy proclaimed May 15 as “National Police Week” and noted the law enforcement officers have been protecting America since birth (Waxman, 2017). In reality, policing in America is a modern invention (Waxman, 2017). After the birth of our nation, security and law enforcement was conducted by volunteers and evolved over time (Waxman, 2017). It was driven by politics, economics, and the need for public order (Waxman, 2017). In 1838, Boston, Massachusetts had the first publicly funded police force, which consisted of full-time officers with full-time duty assignments (Waxman, 2017). Boston, being a large commercial shipping center, had been hiring people to protect and safeguard the shipments (Waxman, 2017). The related costs for maintaining the police force was eventually transferred to the citizens, aka tax payers, arguing it was for the collective good of all Bostonians (Waxman, 2017).

As the nation continued to grow, so did the need for police officers, and a more robust role in law enforcement. Major metropolitan cities began to establish police departments. New York Police Department was established in 1844 (Lepore, 2020). New Orleans and Cincinnati Police Departments were established in 1852 (Lepore, 2020). Other major metropolitan cities formed their respective police departments in the late 1850's (Lepore, 2020). The modern-day police officer is expected to carry many different titles (officer, protector, caretaker, social worker), conduct themselves in an unbiased manner, be a trained professional and polite, all while enforcing the laws they swore to uphold (Lepore, 2020).

Fast forward to the 21st Century with the ever changing political, social, and technological climates. Long before Black Lives Matter and other calls to defund the police and bring an end to qualified immunity, there was a rallying cry from musicians, calling to “Abolish the police” dating to 1988 (Lepore, 2020). Officers have been captured on recording devices violating the rights of people as far back as the early 1990’s (Lyons, 2020). The videoed abuse of Rodney King put a name to the face of police misconduct and excessive force (Lyons, 2020). Recently in 2020, there have been calls to draft legislation, aimed at abolishing the qualified immunity doctrine for police officers (Lyons, 2020). Determining what qualified immunity is and its role in policing are important. Qualified immunity was created by the Supreme Court in 1967, involving Pierson v. Ray, where a police officer was awarded qualified immunity. The United States Supreme Court determined an officer acting in good faith, while in the commission of his duties, could not be held liable for a false arrest. Fast forward 15 years later to 1983. In the case of Harlow v. Fitzgerald, qualified immunity doctrine was greatly expanded. The United States Supreme Court ruled that police officers and other public officials are entitled to immunity, unless the official knew or should have known their acts or actions violated the constitutional rights of the accused plaintiff (Findlaw, 2021).

Those that are in favor of qualified immunity for police officers argue that it is a necessary protection. This protection, provided to officers, allows them to do their job without being sued (Findlaw, 2021). Without qualified immunity officers would second guess themselves, fail to act, or be hesitant to act. The

consequence could mean life or death for the officer and the community.

Removing qualified immunity could open up police officers to unwarranted and frivolous lawsuits, in which judges and juries could second guess those split-second decisions. The affects could be detrimental and lead to excessive costs for both the officer and the employing department (National Police Support Fund, 2021).

Qualified immunity allows officers to continue to report to duty each day and serve their community. Without this protection, officers will choose not to continue to do the job they were hired to do. Officers will quit or retire in vast numbers, knowing they do not have the support or backing of the courts. Officers will not be willing to subject themselves to the heavy scrutiny that will come if qualified immunity is dissolved. It will be harder to find, hire, train and retain new officers.

Lastly, the community will suffer. There will be less police presence on the streets, ensuring law and order and protection for its citizens. Without police officers, crime rates will increase, and communities will become victimized. Law enforcement officers should continue to benefit from the qualified immunity doctrine.

POSITION

Law enforcement officers are exposed take risks day in and day out. Besides the risks of the day-to-day dangers faced by police officers, one risk includes the possibility of being sued civilly for an official action they performed. An officer, who is acting in their official capacity, can be sued for intentionally violating a person's constitutional

rights. Police officers have various defenses available to assert their defense, including, but not limited to the traditional defenses available in a civil case. In addition, officers are protected by a doctrine called qualified immunity (Schott, 2012).

Case law, dated October 2021, handed down by the United States Supreme Court, has shown support of police officers accused of excessive force and the qualified immunity doctrine has been applied. The below examples are reversals to the lower courts that ruled against qualified immunity. The reversals were seen as a much-needed reminder to the lower courts on the Supreme Court's stance and interpretation of qualified immunity. The first case example concerned Officer Daniel Rivas-Villegas, from Union City, California who responded to a 911 emergency call from a female child (Sullivan, 2021). The child, her mother and older sister had barricaded themselves inside a room, hiding from defendant, Ramon Cortesluna, boyfriend of the mother (Sullivan, 2021). The female child reported Cortesluna was destroying things in the house with a chainsaw, and when confronted by officers, it was determined he was armed with a knife (Sullivan, 2021). Bean bag rounds were fired at Cortesluna, leading him to lie down and obey orders (Sullivan, 2021). Officer Rivas-Villegas knelt on Cortesluna's back and held up his arms, while assisting officers retrieved the knife (Sullivan, 2021). Cortesluna sued for excessive use of force; however, Officer Rivas-Villegas claimed he was protected by qualified immunity, having acted within the scope of the law and policy of his department (Sullivan, 2021). The 9th Circuit Court of Appeals determined Officer Rivas-Villegas was not entitled to qualified immunity and cited similarities to a previous case, LaLonde v. the County of Riverside. (Sullivan, 2021). In that case, police officers were not awarded qualified immunity after they were

found to have knelt down on a facedown suspect who was not resisting the efforts at arrest (Sullivan, 2021). This case was later reversed by the United States Supreme Court, citing several obvious factors separating the incidents apart (Sullivan, 2021). The officers in *LaLonde* were responding to a noise complaint, unlike a domestic violence emergency. *LaLonde* was not armed, while Cortesluna was armed with a knife. Finally, Rivas-Villegas had knelt on Cortesluna for only eight seconds as officers retrieved the knife (Sullivan, 2021).

In the second case example, police officers in Tahlequah, Oklahoma, responded to an emergency call from a woman whose ex-husband, Dominic Rollice, was drunk and refusing to leave her home (Sullivan, 2021). Officers confronted Rollice in the garage. Rollice took possession of a hammer and moved toward them, while raising the hammer higher (Sullivan, 2021). The two officers shot and killed Rollice (Sullivan, 2021). A lower court found that the officers had violated Rollice's Fourth Amendment rights when they recklessly created the situation that led to the fatal shooting (Sullivan, 2021). The lower court alleged the officers forced the confrontation that resulted in the death of Rollice, by creating a deadly situation by cornering him in the garage (Sullivan, 2021). The United States Supreme Court reversed the lower court's decision, saying neither of the cases cited by the lower court established that the officers' conduct was unlawful (Sullivan, 2021). In both of these cases, it is clear that the United States Supreme Court believes that officers should be guarded against frivolous lawsuits, harassment, distractions and liability when they are reasonable in performing their daily duties and answering the call to help someone in crisis.

By the nature of the job of the modern-day police officer, force is used or has the potential to be used on every interaction. The International Association of Chiefs of Police defines Use of Force as any amount of effort required by police to compel compliance by an unwilling subject (National Institute of Justice, 2020). Officers receive guidance from their respective agencies, but no universal set of rules governs when an officer should or should not use force and the degree to which it should be used (National Institute of Justice, 2020). Force can escalate from verbal commands to soft empty hand tactics, hard empty hand tactics, impact weapons, less lethal weapons and ultimately deadly force. Police officers are permitted to use the least amount of force necessary to affect an arrest or other lawful purpose. The officer is not the only person that plays an active role in determining what degree of force is used. A large amount of liability or determinability rests with the suspect. The level of resistance shown or displayed by a suspect will determine the amount of force used. It is important to point out that the use of force continuum is nothing more than a set of options. An officer is not expected to move from one tool to another in a predetermined order. Officer presence or verbal direction can escalate into a deadly force situation within a matter of seconds. Officers engaging in use of force situations need qualified immunity. Officers that face frivolous lawsuits and are held personally liable will have a tendency to hesitate, which can have devastating consequences. The qualified immunity doctrine allows officers to have peace of mind, knowing when they are reasonably performing their duties in good faith and are shielded. It is important to note that qualified immunity isn't absolute immunity. An officer who knowingly violates someone's constitutional

rights is not protected under the doctrine. Qualified immunity protects against willful violation and evidently incompetent acts (475 US 335, 1986).

For many, law enforcement is a calling. It is a duty to serve others. Most people's reaction to danger is to run away. When people need help, most look inward and move toward a stance of self-perseverance. There isn't a time when a person calls for a police officer and no one comes. Doing this job is not for the faint of heart. Answering the call to serve as a police officer, without qualified immunity, is a hard position to fill. During 2021, there have been many calls to defund police departments, coupled with ending qualified immunity. Understanding this is merely a legal doctrine and not law, removing it will require changes at the legislative level. The calls for police to not have this protection could be devastating to the profession. Seasoned officers will not want to risk the time they have put on the job, as well as the potential to lose their retirement benefits and any assets they have acquired over the course of their career. After the educated, intelligent and tenured officers have departed, finding the trainers of the new generation of police officers will be difficult. Agencies across Texas are facing a critical shortage of qualified applicants. Without the protection of qualified immunity, agencies could be forced to lower their hiring standards, resulting in less qualified applicants or less qualified officers patrolling the streets. A prime example is what is happening in Milwaukee, WI. Milwaukee police have experienced a spike in retirements during 2020 (Owens, 2020). Madison, WI has faced a larger than average number of departures, which were attributed to retirements, in part, to the negative media narrative centered on policing, defunding of departments and calls to end qualified immunity (Owens, 2020). The story is similar in other major metropolitan

locations, such as New York, Denver, Chicago, Pittsburgh, San Francisco, Austin, and Minneapolis where good and highly skilled officers are retiring in high numbers (Owens, 2020). Retaining qualified immunity ensures future officers will answer the call and the profession will continue. Without the protection of qualified immunity, it's harder to staff the shifts. Besides the large number of officers departing, fewer recruits are taking their places. One study revealed that 63% of law enforcement agencies across the country saw a decrease in police applicants. Fewer and fewer recruits are joining law enforcement (Wexler, 2019). The Nation needs law enforcement officers. Smaller police presence has a direct relation to increased crime. Criminals who believe their likelihood of getting caught decreases will be more emboldened to commit crime. Increased police presence on the streets and in the neighborhoods reduces robbery, larceny, auto theft, and murder (Mello, 2018).

Without qualified immunity, communities suffer, and crime rates will increase. Calls for bringing an end to qualified immunity, as well as defunding the police, have been at the forefront since early 2020. This is demoralizing, not only for the police, but also for the community in which they serve. Communities need cops. When officers feel they are not supported and feel they are "under the microscope" they will move from a proactive role in the community to a reactive role. The need to be proactive when addressing crime prevention strategies is paramount. Without proactive policing, crime rates will soar. In June of 2020, there were large metropolitan cities across the United States that shifted funds from police departments to social services and social programs (Pagones, 2021). These shifts led some departments to lay off officers and cancel recruiting (Pagones, 2021). A drastic uptick in murder rates and violent crime

were a direct result (Pagones, 2021). New York City is a good example of the effects of defunding and arguing to end qualified immunity. As of March 2021, murders are up 11.8% (Pagones, 2021). As of April 2021, there were 76 murders, year to date, compared to 68 reported in 2020 (Pagones, 2021). The number of shootings also increased with 220 being reported as of March 2021, compared to 157 recorded shootings during the same time in 2020 (Pagones, 2021). Police data also showed the number of shooting victims from 2020 to 2021, also increased from 177 in 2020, to 246 in 2021 (Pagones, 2021). It is evident and the numbers don't lie. Crime rates have increased in other major cities across the United States, including Houston and Los Angeles. More police officers are needed to safeguard the communities they serve.

The calls for ending qualified immunity and defunding the police, are demoralizing, stokes fear into police officers and is nothing more than a means to an end. The end will be fewer officers, higher crime, dangerous neighborhoods and an increased number of crime victims. Bringing the qualified immunity doctrine to an end is a slippery slope. It is a social experiment that has real world consequences. People have the right to be secure in their person and property. Having this security is by maintaining rule of law. Law enforcement officers should continue to benefit from the qualified immunity doctrine, so they may continue to be proactive in their efforts to seek out criminal behavior and safeguard the people and communities they serve.

COUNTER ARGUMENTS

There are multiple arguments currently being discussed against qualified immunity. One argument is officers are currently protected under qualified immunity and are free to use excessive force against individual on a regular basis. They argue

that if qualified immunity is stripped from officers, use of force encounters will decrease. By definition, officers engage in this conduct on a daily basis. As discussed early in this paper, use of force ranges from officer presence to deadly force. The use of force is gauged on a standard of reasonableness and is subjective to each situation. Officers are taught to use the least amount of force reasonably necessary to affect an arrest or bring a situation to a conclusion. Reasonableness is judged not only by the officer, but also by the employing department and potentially a prosecuting attorney, judge or jury. When examining and comparing the number of daily police interactions in America to the use of deadly force by police, it is evident that this is a rare event. Emotion plays a large role when family, friend and community view a deadly police encounter. Regardless of the outcome of the investigation, the family of the person killed rarely believes the use of force was reasonable (Pollock et al., 2011). In America, many uses of force are not crimes. Criminal charges brought against police officers are rare and it is not uncommon for grand juries to “no bill” or decline to indict police officers. Attorneys for police officers argue that their use of force was justified, citing that the officer was forced to make a split-second decision with the circumstances with which they were presented. These are also referred to as “rapid evolving police encounters” (Krishnakumar, 2021). It is important to consider that removing qualified immunity would force police officers to be slow to act, be more reserved and fear consequences (Nemeth, 2019). Police officers are not going to work each day looking to have a deadly encounter or use force excessively in the course of their duties. Police officers make around 10 million arrests per year, not to mention millions of other citizen encounters that end without an arrest (Mac Donald, 2020). When examining 1,000

civilian shootings (2015-2020), the vast majority of whom were armed, data does not suggest there is a problem with excessive use of force (Mac Donald, 2020). Using the same numbers shown above, an estimated 50 million arrests were made by police over that five-year period resulting .00002% of the arrests ending in a shooting (Mac Donald, 2020). Imagine the change to the average when taking into consideration the hundreds of millions of interactions police have with communities that don't end in arrest.

Another argument for abolishing qualified immunity is it is the only legal way to hold officers accountable for misconduct. Qualified immunity for police officers is often argued as unlawful protection for officers that are knowingly violating a person's constitutional rights. Advocates for the removal of qualified immunity argue police officers are not accountable and are escaping justice (Lyons, 2020). This is a failed argument that does not take into consideration the departmental policies or criminal laws. Federal laws are designed to ensure officers are held to the highest standards. In the event an excessive use of force claim is made, and the officer is awarded qualified immunity, his department, city, county, or state agency can be held civilly liable for damages. Qualified immunity strictly applies to lawsuits against government officials (police officers). It does not restrict suits against the government (employing agency), for damages caused by the officials' actions (Mihalek, 2020). Agencies should have specific policies and general orders in place to investigate officers and subject them to disciplinary action when warranted. Disciplinary action should include termination and referral to a prosecuting attorney if the conduct is criminal in nature. Other complainants may call for joint investigations or shared investigations between different departments and agencies. An agency may request assistance from an outside

supporting agency, including, but not limited to, the Texas Rangers. When done in this fashion, there is a genuine effort to ensure a proper and impartial investigation and avoid any conflict of interests.

Finally, there are many avenues to prosecute officers in Texas. According to the Texas Penal Code, police officers can be charged with a variety of crimes ranging from the mistreatment of citizens, referred to as Official Oppression, in addition to an assortment of different assaultive type crimes. Instances are rare, but an officer can be charged with felony offenses, to include criminally negligent homicide, manslaughter, and murder (Texas Penal Code, 2020). An officer that is convicted in state court for a criminal offense resulting from excessive use of force can potentially be prosecuted under Federal law, 42 USC 1983. There are many different avenues to hold officers accountable for their actions, ranging from departmental investigation and disciplinary procedures, as well as State and Federal prosecution. Training and education is paramount in preventing these types of instances from occurring. A department that fails to regularly train and educate its officers, will make or break a claim of qualified immunity (489 U.S. 378, 1989).

RECOMMENDATION

Law enforcement officers should continue to benefit from the qualified immunity doctrine. Qualified immunity provides police officers with protection from frivolous civil lawsuits. Their conduct cannot violate clearly established law or constitutional rights of which a reasonable officer would have known the action to be unconstitutional. Qualified immunity is not absolute immunity. Individuals can recover damages from police officers who knowingly violate an individual's constitutional rights.

Qualified immunity is needed and viewed as an essential part of policing and American jurisprudence. Police officers need to have the ability to respond to incidents without pause. Officers need to have the ability to make split-second decisions and rely on the current state of the law when making those decisions. The protection afforded to police officers under qualified immunity is important. Officer's good faith actions, based on their understanding of the law at the time of their action, will not later be found to be unconstitutional. Loss of the protection, afforded under qualified immunity, would have a chilling effect on the law enforcement profession and the community it serves. The loss of qualified immunity would limit an officer's ability and willingness to respond to a critical incident without hesitation. Staffing shortages would compound as many tenured officers would leave the profession and hiring additional qualified candidates will be a challenge. Communities would suffer from the lack of police and police officers moving away from pro-active policing and preventing crime, to reactive policing and responding to crimes already committed. A call to reduce, eliminate, or limit qualified immunity is not an attempt at forming a constructive path forward. Efforts to remove or restrict qualified immunity would have an injurious effect on the policing profession and the community.

REFERENCES

- Findlaw (2021). *Pros vs cons of qualified immunity: Both sides of debate*. Retrieved November 9, 2021, from <https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html>.
- Krishnakumar, P. (2021, April 21). *Why it's rare for police officers to be convicted of murder*. CNN. Retrieved November 9, 2021, from <https://www.cnn.com/2021/04/20/us/police-convicted-murder-rare-chauvin/index.html>.
- Lepore, J. (2020). The Invention of the Police. *The New Yorker*.
<https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police>
- Lyons, C. (2020). *Police under scrutiny*. CQ Researcher by CQ Press. Retrieved November 9, 2021, from <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2020100900>.
- Mac Donald, H. (2020, July 6). *There is no epidemic of fatal police shootings against unarmed Black Americans*. USA Today. Retrieved November 9, 2021, from <https://www.usatoday.com/story/opinion/2020/07/03/police-black-killings-homicide-rates-race-injustice-column/3235072001/>.
- Mello, S. (2018). *More cops, less crime - Princeton University*. Princeton.edu. Retrieved November 9, 2021, from <https://www.princeton.edu/~smello/papers/cops.pdf>.

- Mihalek, D. (2020). opinion contributor. *Qualified Immunity Protects against Frivolous Lawsuits*. TheHill. <https://thehill.com/opinion/criminal-justice/503963-qualified-immunity-can-prevent-frivolous-lawsuits>.
- Nemeth, M. (2019). How was that reasonable? The misguided development of qualified immunity and excessive force by law enforcement officers. *Boston College Review*, 60(3), 989–1022. Retrieved November 9, 2021, from <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3759&context=bclr>.
- National Institute of Justice. (2020). *Overview of police use of Force*. Retrieved November 9, 2021, from <https://nij.ojp.gov/topics/articles/overview-police-use-force>.
- National Police Support Fund (2021). *Why we need qualified immunity*. Retrieved November 9, 2021, from <https://nationalpolicesupportfund.com/why-we-need-qualified-immunity/>.
- Owens, R. J. (2020, November 25). *Opinion: Wisconsin's law enforcement officers are leaving in droves. Here's what we can do to keep communities safe*. Milwaukee Journal Sentinel. Retrieved November 9, 2021, from <https://www.jsonline.com/story/news/solutions/2020/11/25/wisconsin-police-officers-leaving-profession-droves/6313619002/>.
- Pagones, S. (2021, April 1). Police defunded: Major cities feeling the loss of police funding as murders, other crimes soar. *Fox News*. Retrieved November 9, 2021, from <https://www.foxnews.com/us/police-defunded-cities-murders-crime-budget>.

Pollock, J., Pete Blair, J., Montague, D, Nichols, T., Curnutt, J., Burns, D. (2011).

Reasonableness and reaction time - SAGE Journals. Retrieved November 9, 2021, from <https://journals.sagepub.com/doi/full/10.1177/1098611111423737>.

Schott, R. G. (2012). *FBI L. Enforcement Bull.*, 81, 22. Qualified immunity: How it protects law enforcement officers. <https://leb.fbi.gov/articles/legal-digest/legal-digest-qualified-immunity-how-it-protects-law-enforcement-officers>

Sullivan, B. (2021, October 18). *The U.S. Supreme Court rules in favor of officers accused of excessive force*. NPR. Retrieved November 9, 2021, from <https://www.npr.org/2021/10/18/1047085626/supreme-court-police-qualified-immunity-cases#:~:text=Qualified%20immunity%20refers%20to%20a,accused%20of%20violating%20constitutional%20rights.&text=Otherwise%2C%20officers%20are%20protected%20from%20liability>.

Texas Penal code title 1. introductory provisions ... - Texas. (2020). Retrieved November 9, 2021, from <https://statutes.capitol.texas.gov/Docs/SDocs/PENALCODE.pdf>.

Waxman, O. B. (2017). *The history of police in America and the first force*. Time. Retrieved November 9, 2021, from <https://time.com/4779112/police-history-origins/>.

Wexler, C. (2019). *The workforce crisis, and what police agencies are doing*. Police Forum. Retrieved November 9, 2021, from <https://www.policeforum.org/assets/WorkforceCrisis.pdf>.