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Panel I Discussion: The Criminal Justice System: "George Floyd Bill" & Qualified Immunity

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Panel I Discussion:

The Criminal Justice System: "George Floyd Bill" & Qualified Immunity

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Hyperlink to presentation:

<https://www.youtube.com/watch?v=EGKcAmz07e0>

TRANSCRIPTION:

Howard Henderson

Good morning, and we welcome everyone to this first panel. We're so excited to have our guests with us this morning. Let me do a brief introduction so we can get into this conversation. This morning, we have Atty. Joanna Schwartz with us from UCLA. Atty. Schwartz is one of the legal experts that we came across when we were researching this space. We're so elated to have her be part of this conversation, and we will be glad to learn what she's able to bring to the table in terms of understanding qualified immunity and the George Floyd Act as it stands in Texas.

We also have April Frazier Camara, who has become a great colleague of mine, and who we now understand we have a lot in common. We are both from the same state of Tennessee, and we also know that she's a great legal mind. We're glad to have her here representing Washington, DC, and her group. April, we're so glad to have you here. We look forward to having a conversation, and we know that you're going to add a lot to what we bring to the table today.

We also have Chris Colbert, who is an expert in his own right. He will be able to explain his experience in interviewing individuals who have been family members of victims of qualified immunity and police abuse.

Now, let's kick this off with a conversation. Joanna, we have had plenty of previous discussions about qualified immunity and what that means. Can you tell us, in your own words, what qualified immunity means? Also, what are some of the most pressing challenges when dealing with qualified immunity around the country?

Joanna Schwartz

Thank you and thank you so much for having me here. It's an honor to be part of this conversation.

Qualified immunity is a defense that law enforcement officers and other government officials can raise when they are sued for money or damages in a civil rights suit. It happens when a person brings forward a case saying their constitutional rights have been violated. Then, a police officer or other government official can raise the defense of qualified immunity that indicates the case against should be dismissed, not because they didn't violate the Constitution, but because the right that was violated was not clearly established. What the definition of 'clearly established' is has changed over the years.

This doctrine was created by the Supreme Court. The Supreme Court has repeatedly issued divisions that make it harder to achieve this goal. Still, today, if you read the Supreme Court's decision, the message that they are clearly sending is that in order for a right to be 'clearly established,' or for a person to get past the qualified immunity defense, they have to find a prior court decision from court system they are part of (i.e., Court of Appeals) that held identical conduct as unconstitutional. If they can't find a case, as in the police officer has violated someone's rights in a way that hasn't been done before, then the officer can be dismissed from the suit.

The cases have to have very similar facts. There is a case, *Baxter v. Bracey*¹ in which a person was suspected of a burglary. He sat down, raised his hands in the air, and surrendered. The police still released their dogs on him. The dogs beat, bit, and maimed him.

This person brought forward a lawsuit, and the officers claimed qualified immunity. There was a prior case where police dogs had been released on someone who had surrendered lying down.² In that case, the court said that the action was unconstitutional, and it was excessive force.

The court considering the case of the man who had had the dog released on him while he was sitting with his hands in the air said, "The factual differences between someone lying on the ground and someone sitting with their hands in the air are enough to mean that the law was not clearly established."

The Supreme Court has made it even harder to move past this hurdle because they have told courts that they can grant qualified immunity without ruling whether the officer's conduct was unconstitutional. So, on the one hand, they're telling plaintiffs, "You have to find a prior case with virtually identical facts." And, on the other hand, they're telling courts, "You don't have to decide whether the Constitution was violated."³ There's a lot of things wrong with qualified immunity.

The officer's intent doesn't matter to the analysis. The officer can intentionally violate the law knowing their actions were wrong. However, if there is not a prior court decision, it doesn't matter. The final thing to note is the standard requiring a prior court decision with virtually identical facts

¹ [Baxter v. Bracey, 140 S. Ct. 1862 \(2020\)](#).

² *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012).

³ *Pearson v. Callahan*, 555 U.S. 223 (2009)

is justified by the Supreme Court on the idea that officers need to notice that what they are doing is wrong.

I've done research that reveals that officers are never educated about these cases. They're not told about the facts and underlying circumstances of every single court decision. They would never have the time to do that in their training. So, the whole notion that we need a prior court decision has no basis in how officers are actually trained.

The qualified immunity defense is justified as a protection for officers because they need financial protection from liability. I've done research that shows that officers virtually never pay in settlements or judgments entered against them. The whole justification for this defense, which is so harmful to people whose rights have been violated, isn't even needed under the justification that defenders of the doctrine offer for it.

Those are some of the problems with qualified immunity.

Howard Henderson

Thanks so much. Now, I want to get you in this conversation, Atty. April Frazier Camara. Again, I didn't want to spend a lot of time on the front end introducing everyone because I want to get into the conversation. You are an expert and a force to be reckoned with because you bring together some unique pieces to this conversation. One is in your position as the Director of the Black Public Defender Association associated with the National Legal Aid & Defender Association.

Talk to me about how you see all of this in terms of dealing with police officers, dealing with qualified immunity, and the impact of qualified immunity on the role of a public defender. How do you think it impacts the criminal justice system?

April Frazier Camara

First of all, thank you, Professor Henderson, for inviting me here today and organizing this amazing symposium to talk about this important issue. As you said, I'm the co-founder of the Black Public Defender Association, and one critical piece that we realized was missing, even in the public defender community, is an analysis of race and the criminal legal system. For Black defenders, we understand both professionally and personally how this impacts our communities. We also know the history of qualified immunity and it being used as a tool to justify the terrorism in our community by law enforcement.

One missing component, oftentimes when we do the legal analysis, is exploring historically how this tool has been used for legal justification of terrorism inflicted upon the Black community by law enforcement. Thus, there is no legal recourse for the Black community.

When we look at the origin of these doctrines, people have to understand why they have been so narrowly tailored and interpreted by the Supreme Court. You cannot divorce that analysis from an analysis of American history and the horrors of White supremacy in this country. That's what our conversations around policy reform, as Black defenders, bring together – the history of racism and the horrors of the criminal legal system.

As many of you know, 80% of people who come in contact with the criminal legal system are represented by public defenders. They cannot afford counsel. Oftentimes as public defenders, we see ordinary daily injustices that law enforcement and prosecutors turn a blind eye to the client we meet in lockup. The client has a black eye and is a female client who complains about an officer touching her inappropriately. Unless you get to the level of abuse and harm in cases like George Floyd, very rarely do you hear about those daily injustices that take place. It really, truly is a part of the culture of many law enforcement communities, but it is also a culture of the system that allows people to be harmed with there being no consequences.

For public defenders, what does it take for an officer like Derek Chauvin to have the courage to publicly lynch someone on a busy street in daylight? It took a number of ordinary, daily abuses and injustices that were never addressed, and oftentimes, public defenders may have raised those issues in court. They may have clients file complaints with the Citizen Complaint Review Board, and those calls are oftentimes ignored.

That's where we get to the level of abuse that makes the news because we allow for those daily injustices that happen every day. We may pass by a traffic stop where we see someone being abused or their rights being violated, and those daily abuses are never addressed. Then we get to a national awakening because you lynch someone in public.

I want to talk about how important it is for us to tie this legal analysis to the history of racism and White supremacy in this country. We also have to talk about how the American legal system has legalized a lot of the abuse. It's time for us to challenge them. Similar to *Brown v. Board of Education*, just because it's "legal" does not mean that it is just or equitable.

Howard Henderson

You've given us so much, April and Professor Schwartz. I wish I could take notes on what you both have given us. Unfortunately, I have to moderate this panel, and hopefully, my students are taking copious notes for me.

Chris, you bring a unique perspective to this conversation. When we look at your background, and when we understand where you're coming from, you have done some great work in making sure that people get this story in mainstream America. Particularly when we look at the projects that you've worked on around the country and the people you've worked with - one, in particular, comes to mind. Your project tells a story and helps us understand what it means to be victimized by the police in this country. Can you help us bring this down to the level where you've talked to the families of these victims and what you've learned through interviewing these individuals around the country?

Chris Colbert

Thank you, I'm very much humbled by being on this stage with all these great thought leaders and the great work that you all are doing.

We worked on a project called [Say Their Name](#), a podcast series where we were going around the country talking to families about their loved ones who have been killed or assaulted by police. As

you were setting up there, it is important that we hear directly from these families because we don't often hear from them, and if we do, they tend to be in sound bites and clickbait articles that are meant to get your attention. These narratives tend to be controlled by the media and by the police, and so we wanted to hand this platform over to the families to give their perspective because let's just assume that the media's doing nothing nefarious. They still tend to take the police's side in terms of what the story is. They will run with that immediately, and part of that is because the media service is all about being the first out of the gate. A lot of times, they don't have time to fact-check things. They're just taking the police at their word, which many times is incorrect, as we found talking to these families. That's where it's important to talk to these families – to get their perspective and understanding not only of what happened but their journey for justice.

That's also where it plays into this qualified immunity conversation as these families are victimized. When they lose their loved one, or their loved one is assaulted, then there is a re-victimization that happens as you go through the court system. They delay the process to be able to get restitution. Obviously, now with COVID, you have other delays that are beyond their regular delay tactics. Now, you actually have a pandemic on top of that. But that costs money. That costs emotional and mental strain on these families on top of what they're already experiencing. Then when you look at qualified immunity, you are up against an unwinnable foe, as was touched on by Professor Schwartz earlier.

You have to prove now what the intent was or what the officer was feeling. How do you disprove what the officer is feeling if they're telling you they felt scared for their life?

One case in particular that I wanted to mention here is that of Robbie Tolan in Bellaire, Texas, which is just outside of Houston. Robbie was shot back in 2008, I believe, and he did live to tell his own story. I say it's kind of fortunate that he lived to tell his story, but let's not forget that he has lived every single day with the physical and emotional trauma of what he experienced. So, let's not look at him as a great success story. He is living this every single day, but at the same time, his family was actually able to fight all the way to the Supreme Court and win a case on qualified immunity.⁴ It took them almost eight years to fight and get that case heard and won in the Supreme Court. To do so, they had to sell their home. This is a family where the father was a Major League Baseball player, almost a Hall of Fame baseball player on top of that. Robbie Tolan, the one who was shot, was actually drafted to the Washington Nationals and was in his first year of climbing up that system.

His career was taken away from him from being shot, and a family that is that well-off still had to sell their home to be able to fight against qualified immunity. That shows you how difficult it is and the strain that it takes on a family, just from a financial standpoint. Let's also remember that they had a home to sell. Not all families have a home to sell. They don't have those means to get money. Robbie's family also had favors from lawyers who were giving them pro bono work and things like that. That's not to throw the blame at the lawyers here. They also have to get paid to make a living.

⁴ *Tolan v. Cotton*, 572 U.S. 650, 134 S. Ct. 1861 (2014)

At the same time, the system is set up for failure for many of our communities. I'm just going to recount one thing that a family member told us. Once, when they were in the courts, the judge said to the jurors, "If you think that the officer may have feared for their life, you must acquit." If that is what we're up against, we can't win.

With them [Robbie's family] winning the Supreme Court case within its first, I believe, five or six months, that case was cited in helping over 500 other court cases just within that first five months. That being said, we are still facing qualified immunity as an issue. Even though that is a precedent, it's not being applied at a great enough rate and scale to be able to actually help in the way that we need to.

We need to change laws. We can't just have a precedent. We have to change laws.

Howard Henderson

Chris, I really appreciate that because you provided us some context to this.

Joanna, let me ask you a question. You put out an interesting article in 2018, *The Case Against Qualified Immunity*⁵, where you articulated the chinks in the armor of qualified immunity, per se. We are in the Fifth Circuit right now, well I am, and we understand what that means for qualified immunity. You articulated the places where qualified immunity received greater levels of support from the courts. Can you speak to that? What does that mean for us to be in these uniquely draconian areas of the country where qualified immunity seems to be a lot stronger than others? And, can you speak to how qualified immunity looks different in circuits like the Fifth Circuit?

Joanna Schwartz

Yes, thank you for that question. I really appreciate that. Chris mentioned Robbie Tolan as well as the case out of the Fifth Circuit out of the Northern District of Texas. I've looked at qualified immunity in Texas. With no disrespect for your state, Texas is the worst when it comes to qualified immunity. The Fifth Circuit, which is the Court of Appeals that hears cases that come out of Texas, is the worst Court of Appeals. You have a really, really hard road to climb when it comes to qualified immunity.

One thing they've done is allowed the courts to have their own rule, which the Supreme Court has never said is the right rule. The rule is that if a defendant argues qualified immunity or raises qualified immunity, there are heightened pleading requirements on the plaintiff at the beginning. Meaning the plaintiff has to come forward with additional facts to show exactly what happened in the case that can defeat qualified immunity. And then Texas law doesn't require law enforcement agencies to turn over any information related to these cases so long as it's part of an ongoing investigation. There's pressure on either side. The laws that the police do not have to turn over any information, and then the court says, "You have to give us detailed information about what happened before you can go forward."

⁵ Joanna Schwartz, *The Case Against Qualified Immunity*, 93 *Notre Dame L. Rev.* 1797 (2018)

There was a case brought by the family of a man named Tony Timpa out of Dallas, Texas . He was killed beneath the knee of two police officers who put their weight on him while he was handcuffed and his feet were zip-tied.⁶ The officers held him down for 14 minutes until he died. This was a case in which the family couldn't know anything about what happened because he had passed away unlike, Robbie Tolan, whose family was around him. Tony Timpa had no family, and he was no longer there to tell his story. There was video footage, including body camera video, that the city of Dallas refused to turn over because there was an ongoing investigation. The lawyer and the family had to file a complaint with bare-bones information that they were able to glean from the police incident report. Then the city tried to get the case dismissed because the complaint didn't have enough information, even though the city was holding the information and refused to turn it over.

That's a rule specific to Texas, which impacts the difficulty in state law regarding qualified immunity. The judges are very sympathetic to qualified immunity, which has further effect in that lawyers are reluctant to bring these cases forward. As Chris said, lawyers have to keep the lights on. Lawyers try to bring these cases forward and invest tens of thousands of dollars of their own money because in these cases, lawyers do not get paid unless their client wins. Then, they get a portion.

They invest 10, 20, 30 thousand dollars of their own money, and then the case gets dismissed. The lawyer thinks, "You know what? I'm going to go back to my personal injury cases. I'm going to go back to my medical malpractice cases. This stuff is too hard."

I looked at lawsuit filings in the city of Houston, a city with thousands of police officers and millions of people, over a two-year period. In two years, I found 25 cases alleging police misconduct. In Philadelphia, a city of comparable size, there were 10 times as many lawsuits. In Houston, during that two-year period, there were five cases where a plaintiff recovered anything in those suits. In four of the five cases, someone had died. In the fifth, deadly force was used, but they managed not to perish. In Philadelphia, there were 10 times as many verdicts and were 100 times more awarded to plaintiffs in these cases. In the city of Houston, there was not a single person in that two-year period who recovered anything for false arrest, wrongful searches, or anything that didn't include force. That is partially because of qualified immunity, but it's also all the downstream effects, such as the fact that lawyers are concerned about bringing these cases forward. There is not a functioning system of civil rights enforcement, in my view, right now in the state of Texas because Texas state law is combined with qualified immunity.

Howard Henderson

I appreciate when you contextualize it to Texas and Houston and understanding what it looks like in relation to the national landscape.

⁶ *Timpa v. Dillard*, Civil Action No. 3:16-CV-3089-N, 2020 U.S. Dist. LEXIS 118365 (N.D. Tex. 2020)(appeal filed (Aug. 27, 2020)(No. 20-10876).

Atty. Frazier Camara, one of the points that I didn't bring up was the fact that you are the chair of the American Bar Association Criminal Justice Section. Can criminal justice reform actualize without adequately addressing qualified immunity?

April Frazer Camara

I think the answer is no. Professor Schwartz brought up a really good point about enforcement. It's a myriad of issues of accountability. The focus is on police misconduct, but as someone who has clients that are kept in cages, I'm concerned about prison conditions and how people are dehumanized in general in the criminal legal system. The relief under Section 1983 has been stripped. Prison rights advocates have not been able to enforce humane conditions for people who are incarcerated. This is whether or not we are going to allow for the enforcement of civil and human rights within the criminal legal system.

I don't think we can talk about comprehensive criminal legal system reform without talking about qualified immunity. When she shared those numbers about Houston, we have to talk about how that plays into the culture within the Black community. If you live somewhere where you see rampant police misconduct, and there's never accountability, no one ever wins. You want us to have faith in this same system, but the integrity of the criminal legal system is tied to whether or not there is enforcement as well.

We need to dismantle the criminal legal system and rebuild a much smaller and humane system. But for those who have faith in the existing system, you should be concerned because how do you expect communities to have faith in a system that never protects them? They never win, and they never feel like people who are bad actors are being held responsible.

Howard Henderson

Chris, I want to piggyback off what Atty. Frazier Camara has laid out around the defund the police conversation and its role in qualified immunity being one of those spaces where we need a lot of change. From a person who is well-versed in media messaging, what role does the media's message play in our approach to qualified immunity? I mean this in terms of educating the public and understanding how we may go about making change. We've seen what social media has been able to do over the last three years in terms of galvanizing people, particularly young people, around a common message and fighting for social justice.

Can you speak to how you may suggest that the media can utilize its best practices to help reform the criminal justice system and, most notably in our case, qualified immunity?

Chris Colbert

Media plays a very large part in all of this. They're the ones that control the narrative, and depending on who they're getting their information from, it is how the public will interpret these situations going forward. From that standpoint alone, in terms of who they are deciding is giving the correct facts, how are they giving fair balance to the actual families?

I see very few times that the families are truly given a platform. Part of that is doing quick news stories that are a minute to three or five minutes long. You can't capsule what has happened in

that amount of time. We need to take a new look at how we do our media coverage or, at least as citizens, have a realization that, "Okay, this is just introducing me to the story. I have to dig deeper somewhere else to get more." That's where I implore other media companies to do what we have done in terms of handing over our platform to the families and their advocates to talk about their perspectives.

In terms of how it then plays into qualified immunity, I think it's talking directly to the families about their experiences. For instance, Markeeta Thomas', who's also in the Houston area, brother Danny Ray Thomas, was killed in 2018. He had a manic episode in the middle of the street with his pants around his ankles and hands at his sides. There was no way he could've had a weapon. He had a mental health struggle that was all predicated on his children being killed by his wife a few months earlier. Instead of responding with somebody who could give him mental health care, they sent an officer who, within seconds of coming out of his car, shot and killed him.⁷

As Markeeta was trying to fight and get some kind of restitution, the prosecutors would come to her to get information. None of the information that she gave was presented in court. None of it – including information indicating the officer had actually threatened her brother months earlier. The officer said, "I'm going to, one day, catch you and shoot you in the back." He didn't shoot him in the back when he killed him. He shot him in his front. But at the same time, there was a threat that was never brought up in the court case. That kind of information is what the public needs to hear to understand that this system is rigged. It's set up in a way that is not going to provide restitution for these families.

And that's where the media can come into play. We have to hand our platforms over to these families and their advocates to be able to give us that other side of the story. Or, from my perspective, the real story.

Howard Henderson

We're going to close out shortly because I want to make [sic] sure we respect our time, but this conversation is so powerful.

Joanna, you lay out what you see as a prescription to change this situation. You identify certain factors that you think need to be in place to make it happen, but you also discussed in one of your articles about police training. What they're trained to do, what they're not trained to do and, and how that impacts how they interpret legislation, particularly *Graham v. Connor*.

If we're going to change qualified immunity in this country, what are those key elements that need to be in place? How do we get there?

Joanna Schwartz

Well, it's the big question. My point of view is that we need to end qualified immunity. Officers do not need qualified immunity. Part of the reason for that is there are so many other protections

⁷ Ketterer, *Former deputy found not guilty in shooting of Danny Ray Thomas*, Houston Chronicle (Aug. 8, 2019); <https://www.chron.com/news/houston-texas/houston/article/Jurors-deliberating-verdict-in-shooting-of-Danny-14291506.php>.

that are already in place for law enforcement. Defenders of qualified immunity say, "We need the defense so that officers acting in good faith aren't bankrupted for split-second mistakes that they make." But the evidence shows that officers almost never pay anything in these cases. There is no danger of bankruptcy there. The Fourth Amendment, as interpreted by the Supreme Court, in the *Graham versus Connor*⁸ case, which is the bedrock for police training and the Fourth Amendment, says that officers can make reasonable mistakes. They can shoot the wrong person, search the wrong person, or arrest the wrong person as long as the mistake was reasonable. I mentioned that because those decisions, those mistakes are still going to be protected by the Fourth Amendment, even if qualified immunity goes away.

There's a separate conversation that if we were to get rid of qualified immunity, should the Fourth Amendment be in the structure that it gives so much discretion and so much leeway to government decisions? I personally don't think it should, but that's the second set of conversations.

If qualified immunity goes away, it means that the cost, burdens, and complications of litigating these cases are going to get lower. It means that more lawyers will probably be willing to take these cases. It means that when these cases are filed, the focus is going to be on what the officers did in terms of whether they violated the Constitution. Not whether someone can find a prior court decision. The focus will be on what the officers actually did, and that's really important.

There are going to be more decisions that are issued by courts that explain what the Constitution requires. Right now, there's a lot of decisions that grant qualified immunity but don't explain whether the law was violated. To the extent that police departments want to train their officers about the law, qualified immunity makes it harder to even understand what the law is. There are a lot of important things that ending qualified immunity will do, but it is not a cure-all.

In connecting to Ms. Frazier Camara's comment in the beginning, ending qualified immunity is a very important piece of the puzzle. Qualified immunity is a manifestation of racism in the criminal justice system and abuse of power in the system. But ending qualified immunity on its own is not going to end everything. There is still that backdrop. It's the most important first step that a state legislature, Congress, or the Supreme Court could take. But there is a lot more to be done in terms of training in the way we think about what the police's role is in our society and how we think about investigating and supervising the officers that we do have.

It's one piece, but it's an important piece.

Howard Henderson

Atty. Frazier Camara, what's step number two? Where do we go from here?

Because oftentimes, we have panel discussions, and we pontificate about a problem, but you're very solutions-oriented.

⁸ *Graham v. Connor*, 490 U.S. 386 (1989)

I've watched the work that you all do, and you focus on addressing problems with solutions that make a difference and are racially equitable. In the recent piece we put out on Saving Black Lives as a collaborative effort, we talked about the fact that race neutrality doesn't necessarily exist.

From your perspective, what should step two be?

April Frazer Camara

We have to have a very serious conversation in America about reparations. We have to do something to right the wrongs of the past. When we talk about all of the cases, all of the harm that has been done to Black, Brown, and un-resourced communities, it's one thing to repeal or change qualified immunity, but what happens to Markeeta?

My uncle died in jail, and, fortunately, we got a settlement. But what do you do to repair the harm that you have done for centuries to Brown and Black communities through the defense of qualified immunity? Reparations have to be a part of the conversation.

Let me just say this about where we are as a country: There is a need for us to focus on unity and how we move forward, but you cannot unify a country until you confront and address the harm that has been done. That's why we have to talk about reparations, and we have to talk about how do we offer restitution to people who have been harmed by the system.

Howard Henderson

That's a good point and one that we oftentimes are afraid to have conversations about.

Chris, I'll give you the final word before we close. We're on the campus that has a historical law school, Thurgood Marshall School of Law. We also have the Barbara Jordan - Mickey Leland School of Public Affairs, and we have the School of Communication. We are located in the heart of Houston, Texas, and in the belly of the Fifth Circuit. From your perspective as a media person, what can be done to make sure we help this Fifth Circuit move in the right direction?

Chris Colbert

There are a lot of steps. There's not going to be a one-size-fit-all for any of this. Accountability is something that is big, and in the grand scheme of things, I think a public database that allows us to see the records of police officers and their history is key.

As it's been touched on before, there tends to be a pattern of escalation where officers see they can get away with things. Then, eventually, someone dies, or they actually kill somebody. They do that over and over again. But, they may be moved around to different regions. A public database will help us hold our public officials' feet to the fire around these things.

It also can help us combat qualified immunity. I'm not a lawyer, so I don't know this for certain, but a database can allow us to see, "Oh, this person has a history of claiming they feared for their life. Well, there's a pattern that shows they're going after specific people and harming them in different ways so that qualified immunity doesn't apply here."

Specific to Houston and the Fifth Circuit, it is a situation that is rigged against communities of color. From a media standpoint, we have to tell these in-depth stories of these individuals. I hate to bring up the same thing again, but in terms of what the media can do, they have to make sure that they're giving an opportunity to the lawyers, like yourselves, and these families to talk about what it is that they're up against. Or how they have been re-victimized in this process so that the world can understand, "Okay, this is a specific area that needs addressing." Houston specifically has an issue that needs to be addressed.

Howard Henderson

Professor Schwartz, Atty. Frazier Camara, and Chris Colbert, you have given us something to take with us to develop an action plan, which is very powerful. We understand that it's going to take unique conversations, and it's going to take collaborative efforts from folks like you all, so we appreciate you.

Larry Taylor

Wait, Howard. I do appreciate staying on time. Right now, we're going to open it up for some questions and answers from the attendees to the panelists.

Professor, you were absolutely correct – practicing civil rights in the state of Texas is a tremendous uphill battle. One of the things I'd like to mention is qualified immunity doesn't necessarily just stay within criminal law or criminal activity. You also have activities, like in Breonna Taylor's case, that involve someone who is a bystander of a criminal investigation, or some kind of criminal activity, that is injured but also prohibited from getting justice because of this qualified immunity. The Texas Supreme Court has written an opinion that has basically shut the door on an opportunity for that type of justice to come forth. I just wanted to make sure that I put that out there.

The first question we have is, "What kind of pressure can we put on the city hall officials to address these issues? I live in Dallas. We have a new police chief and are in a city council that is majority African-American." Great discussion. Howard let's go ahead and get you involved. What do you think, my friend?

Howard Henderson

First of all, I'm a Ph.D. in criminal justice. I would be foolish if I wanted to take a stab at that, but I will say this: I think the best thing to do is to link up with experts like Atty. Frazier Camara, Professor Schwartz, and Chris Colbert. We need to be able to identify the problem but also keep highlighting the individuals that are engaged in this process. People don't know who's on the city council, so they can't hold people accountable. They don't know who they are, and there's no light being shed on these people who are making critical decisions at a very local level. We tend to think about a lot of these issues from a federal standpoint, but the reality of it is 80% of our criminal justice system is a local issue. We need to begin to look at it from that standpoint, but I open that up to the experts on the panel.

Larry Taylor

I was just going to say that being here at Texas Southern as a graduate of our law school, there this movement of reforms taking place. Dr. Henderson talked about the importance of collaboration, but the community should be driving what the solutions are. That means making sure you tap into the expertise of legal experts and media because we have to be aligned with what the community sees as the solution. I think it's a great question, and for people who study these issues academically, such as public defenders and people who work in the system, you can't be moving these reforms if you're not in alignment with the community. The power is in our communities and in the work that Chris is doing to elevate the voices. Even as public defenders, we should not be the voice. It's the voice of directly impacted people. Any effort should be driven by the community, and experts should only be coming in to advise, not to lead the movement.

Thank you. Dr. Schwartz, someone asked if you could define qualified immunity one more time.

Joanna Schwartz

Sure, I know it's hard to understand. It sort of makes your head spin when you actually hear it.

The Supreme Court created it, and it says that officers have qualified immunity unless they violated clearly established law. The way that they've defined clearly established law is that it can't be defined at a state of generality like the standard for *Graham v. Connor*.⁹ It has to be specific, particularized to the facts before them. So what it comes to mean in practice is that a plaintiff has to find a prior court decision where a court held that an officer acted unconstitutionally, and the way in which that officer acted is factually very similar to the case at hand.

Larry Taylor

Thank you, Professor. One of the attendees asked, and I'll go ahead and answer this one, "How can we keep in contact or find more information out about the speakers?"

If you take a look on your screens, you can go down to the schedule, and at this particular event, there is a section where you can actually click on the speakers. Their information will pull up their bios, emails, and any social media they may have. That information is available to you on the actual platform itself.

Next question, and Chris, I'll throw this one at you. The question is, "The police body cameras, what kind of effect have they had on changing or addressing this issue?"

Chris Colbert

I think all footage is good. It gives us more to work with, but unfortunately, we're seeing that that is not making a full difference either. We're still up against the qualified immunity aspect of, "Did you fear for your life?" and you can't see that on the video. We can, but in the court of law, we still cannot prove what is in someone's mind. The video doesn't show what is in someone's mind, so as much as those videos help – and we should continue to push to make sure we have those body cameras – it's not always applied in a way that helps us against qualified immunity.

⁹ *Id.*

That being said, we still need to push to make sure there are requirements for all officers. Not every police department makes it a requirement. Just looking at LA, LA's police department and LA's sheriff department have different requirements in terms of utilizing body cams. The sheriff's department doesn't have to, whereas the police department has a higher rate of having to use them. Also, there's ensuring that they're on at all times. We're seeing a lot now where the body cams are turned on after the shooting happens or after the assault happens. Yes, it's great that you get some of that back time, but you get no audio. You can't see what that verbal communication back and forth between the officer and the victim was. So, they can claim that they gave all these warnings, but there's no audio to support it. We still have to set up systems and make sure they are used properly.

Just to pivot real quick to the last question I answered in terms of the media's responsibility, one other aspect that I didn't mention because we were really focusing on qualified immunity is that it's the media's responsibility to also tell the story of these individuals. Who were they as human beings? We continue to look at them as hashtags and statistics, and that does a disservice to them and their families. We hold police at such high stature, so when we see these victims who are killed, many times, the media will run with a mugshot or run with some kind of football picture that vilifies them or makes them look more aggressive than maybe they really were. I know from talking to the families that they have not been consulted about what photo to use for their loved one. They've never been asked if they have a picture for them or ask who this human being is, so they're not just seen as a statistic or as a villain if they were not. That's the other piece for media – we need to tell the actual stories of these human beings and memorialize them so we can get behind them. They are humans, just like our brothers, sisters, mothers, and fathers. I just wanted to make sure I added that piece in as well.

Larry Taylor

I'm going to try to leave us with some hope that things are actually moving forward. Professor, could you tell us of any success stories with legislation that is moving qualified immunity forward?

Howard Henderson

Absolutely. There are states across the country that are introducing and considering bills that would create a right to sue under the state constitution without qualified immunity as a defense. Texas is considering that kind of bill right now, and I hope that it gets passed.

In June of 2020, Colorado passed an exciting statute.¹⁰ You could look it up. It's Senate Bill 217 in Colorado, and it creates the right to sue for violation of the state constitution with no qualified immunity as a defense. There's a couple of other things that it does to support really important parts of the process, such as it provides for attorney's fees for people who bring these state law claims. It also requires that the city pays for the settlement and judgment in any case unless the officer was convicted of a crime. I disagree with that part, but I'll take it in general. The statute also says that if the city finds that their officer has acted in bad faith, they will require the officer

¹⁰ Colorado Revised Statutes, § 13-21-131.

to pay up to \$25,000 or 5% of the settlement or judgment, whichever is less. If they can't pay that amount, then the city will cover that rest. I think that that's a really exciting portion as well.

It creates some financial responsibility for the officer, but it doesn't leave the person whose rights have been violated without compensation. In my mind, making sure that people whose rights have been violated get some form of compensation, which will never be enough to make them fully whole, is a really important first step. Colorado's statute is a model for us for the future, in terms of state law with no qualified immunity, attorney's fees, required indemnification, and a financial sanction for officers.

Larry, I wanted to highlight New York City Council is actually considering a bill to create a reparations fund for victims of police misconduct. A lot of great movement is taking place at the local and state level. I would tell people to be creative and not be weighted to a narrow fix. We have to be creative in figuring out strategies to not only correct behavior moving forward but addressing how we restore people who have been wronged in the past.

Larry Taylor

I can just piggyback off of both of those, I don't know if everybody in the audience understands this, but when you see settlements that happen for these families, that money is coming from taxpayers' money. That's not coming from the police departments. That's not coming from the officer themselves. As Professor Schwartz mentioned before, it's great what Colorado is doing because once you start hitting people in their pockets, that's when change begins to happen. I just wanted to make sure people understood that right now, you are paying to help these families.