

• CENTER FOR JUSTICE RESEARCH AT TEXAS SOUTHERN UNIVERSITY •

POLICE REFORM ACTION BRIEF: REDEFINING QUALIFIED IMMUNITY PROTECTION FOR POLICE OFFICERS



FOURTH BRIEF IN THE “REIMAGINING POLICING” SERIES



The Problem: The U.S. court system established the doctrine of qualified immunity in 1967 to protect government employees “acting in good faith.” It was claimed that qualified immunity would allow police officers to do their job effectively, including making split-second, life-or-death decisions without fear of frivolous lawsuits or verdicts based on information not available at the time of action.

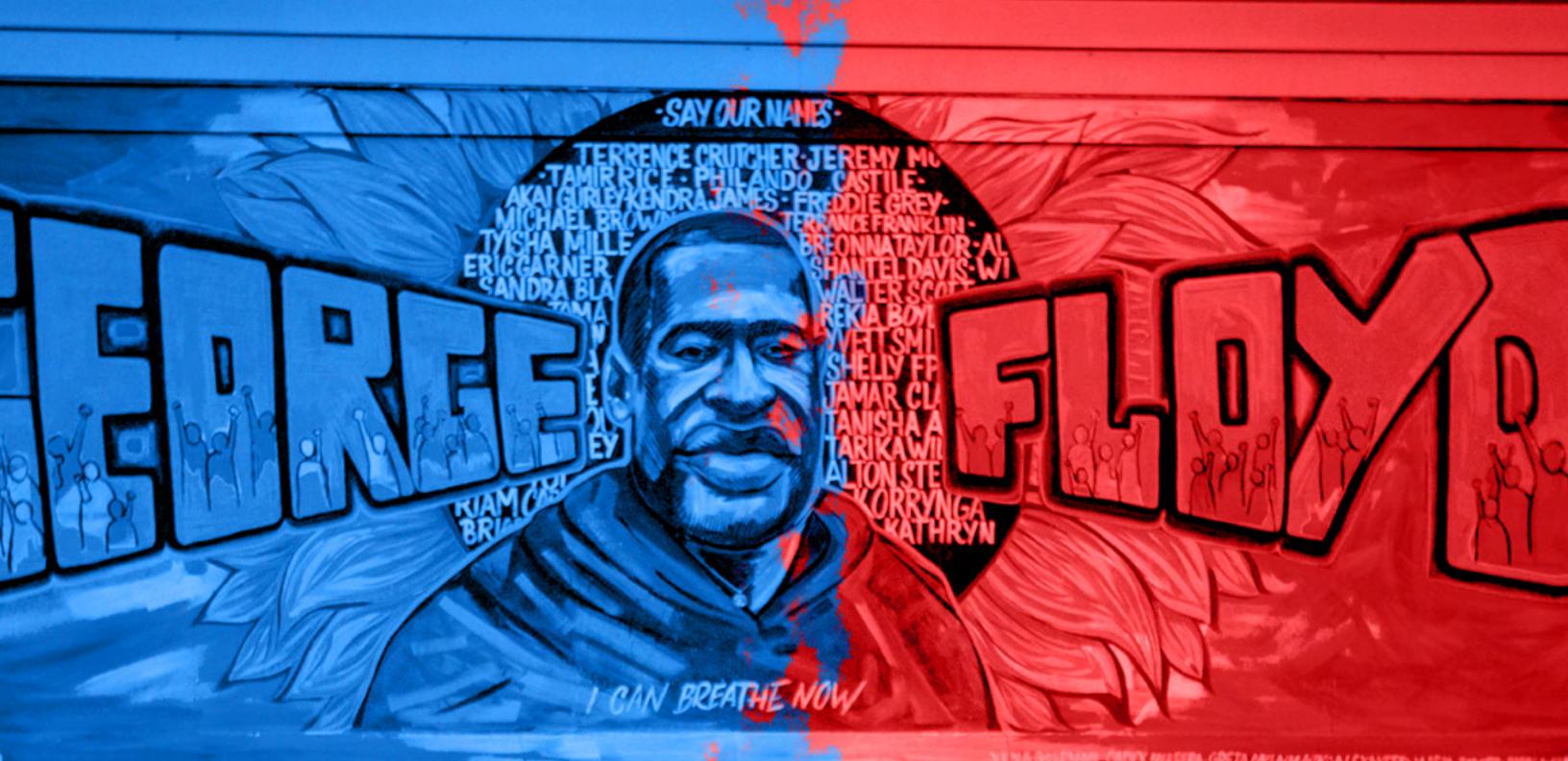
Over the years, court rulings have greatly expanded qualified immunity, effectively preventing police officers from being held accountable in the court of law¹. This immunity potentially incentivizes police abuse by limiting accountability measures, a

common perception that has yet to be empirically validated. **The exercise of qualified immunity inflates the power of law enforcement and adequately deflects the actions of officers that violate the civil rights of others.** This loophole of police accountability often leaves victims of police misconduct with no civil remedy.

A secondary fault to the doctrine is that lower courts have not applied qualified immunity similarly across jurisdictions. For example, **data shows district courts apply qualified immunity unevenly in cases involving police shootings and brutality.** A review of 435 cases of excessive force lawsuits -

“Police accountability often leaves victims of police misconduct with no civil remedy.”

¹ Schweikert, J. (2020). Qualified Immunity: A Legal, Practical, and Moral Failure. CATO Institute.



277 in California and 158 in Texas - shows judges in Texas are more likely to "grant immunity to officers who used force against unarmed civilians than judges in California did for officers in cases where civilians were armed," reports Reuters². The analysis also found officers are 3.5 times more likely to have their petitions accepted by the Supreme Court than petitions they receive from civilians, setting a growing trend for America's highest court to intervene in police brutality cases.

The Immunity Expansion: The legal parameters of qualified immunity have been widely litigated throughout state and federal courts since its inception

in *Pierson v. Ray* (1967)³. The court asserted that "the common law has never granted police officers an absolute and unqualified immunity." Rather, the doctrine of qualified immunity declared that officers "should not be liable if they acted in good faith and with probable cause" when acting "under a statute that they believed to be valid." In *Harlow v. Fitzgerald* (1982)⁴, the court replaced the subjective "good faith" test with a determination of whether the behavior passed an "objective reasonableness" test. In *Anderson v. Creighton* (1987)⁵, the court said that qualified immunity applied unless it was "sufficiently clear that a reasonable official would understand that what he/she is doing violates that

Judges in Texas are more likely to
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force against unarmed civilians..."

2 Januta, A., Dowdell, J., & Botts, J. (2020). Taking the measure of qualified immunity: How Reuters analyzed the data. Reuters.

3 *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967)

4 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

5 *Anderson v. Creighton*, 483 U.S. 635 (1987)



Source: The Wall Street Journal

right" and that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."

The current interpretation places an undue burden of proof in these cases to prove police officers had full mental awareness that their actions were in direct violation of a citizen's constitutional right. Thus, this standard grants umbrella protection to police by increasing the difficulty in showing qualified immunity should not be afforded.⁶ In decision after decision, the courts have moved police protections closer to absolute immunity. The court also minimized the rights of those victimized by police.

Reform Efforts: The May 25, 2020 killing of George Floyd by a Minneapolis police officer while three other officers stood by has placed police misconduct and qualified immunity at the forefront of national conversations on actionable police reform. In Congress, Democratic U.S. Rep. Ayanna Pressley of Massachusetts and Senators Ed Markey and Elizabeth Warren Michigan introduced the Ending Qualified Immunity Act⁷, which proposes eliminating the defense of qualified immunity for police officers in civil actions for brutality or other civil rights violations.

State legislatures are acting as well. For instance, Colorado passed a bipartisan bill to address qualified immunity as part of broader police reform packages. The bill allows individuals to file claims against an officer if their constitutional rights have been violated and effectively eliminates qualified immunity for police officers by holding them accountable for misconduct. **It is a modest reform at best – but it is progress.** The new bill, signed by Jared Polis, Colorado Governor, asserts that "SB-217 is a state analogue to Section 1983, our main federal civil rights statute. Whereas Section 1983 creates a

⁶ Chung, A., Hurley, L., Botts, J., Januta, A., & Gomez, G. (2020). For cops who kill, special Supreme Court protection. Reuters.

⁷ Lacy, A. (2021). Massachusetts' Progressive Lawmakers Push Congress to Abolish Qualified Immunity. The Intercept.



cause of action allowing individuals whose rights are violated under the *federal* Constitution to bring a lawsuit for damages in *federal* court, SB-217 allows individuals whose rights are violated under the state constitution to bring a lawsuit for damages in *state* court.”⁸

Police unions, supported by Republican lawmakers, contend that “qualified immunity does not serve to protect illegal and unethical actions of police officers. Rather, it ensures that a public official, who often must make a split-second decision, does not hesitate in a dangerous or life-saving situation.”⁹ In defending qualified immunity, police unions ignore the role of quality recruitment and training necessary to see improvements in police-community relations. They also ignore the ever-growing number of cases where police escape accountability for indefensible acts that are disproportionately taken against Black Americans.^{10 11} As it currently applies, qualified immunity protection is ostensibly established to promote police officer safety. Yet, in reality, it masks the improprieties of police misconduct in what has assuredly become a reactionary police force. As such, **qualified immunity has drastically undermined efforts to establish policing as a profession defined through advanced critical thinking and awareness requirements.**

“Over the years, court rulings have greatly expanded qualified immunity”

⁸ Schweikert, J. (2020). Colorado Passes Historic, Bipartisan Policing Reforms To Eliminate Qualified Immunity. CATO Institute.

⁹ DaCosta-Klipsa, N. (2020). The Mass. House passed a police reform bill. But the ACLU says it ‘misses the mark.’ Boston.com.

¹⁰ Ingraham, C. (2020). Police Unions and Police Misconduct: What the Research Says About the Connection. The Washington Post.

¹¹ Buchanan, M., Jawetz, T., & Wylie, S. (2021). Promoting Accountability: State and Federal Officials Shouldn’t Be Above the Law. Center For American Progress.



Source: NY Times

Policing America's communities while maintaining public safety has become the greatest civil rights issue of the 21st Century. As they exist today, qualified immunity protections have significantly reduced the ability of law enforcement executives to foster officer accountability and prevent victims of abuse from seeking justice.

We believe it is possible to balance officer and community interest, as they should support each other.

Any progressive qualified immunity movement in the name of police reform will require lawmakers on both sides of the aisle to abandon deeply entrenched politicized ideologies that are counterproductive to informed decision-making and contrary to equity-based public safety. The status quo is unacceptable. The courts' invention and then expansion of the qualified immunity doctrine has unjustly tipped the scales of justice against members of historically disenfranchised communities and potentially has emboldened police officers to serve as both judge and jury.

The CJR Solution: We support revising qualified immunity protections for law enforcement to a more finite definition that ensures police officers are held accountable for brutality, civil rights violations, and other illegal conduct. In the spirit of advancing police reform on a national, state, and local scale, CJR recommends the following:

- Redefine qualified immunity protections to prioritize protecting civilians from police brutality instead of shielding officers from being charged for injuries and deaths they cause. This is essential to deterring police misconduct and upholding the 1st and 4th Amendment rights of victims of police violence in courts.
- Enact federal and state legislation to establish common standards for limited qualified immunity provisions. State legislatures should not wait on federal action to enact reforms needed in their communities.
- Utilize independent prosecutors in all police investigations in order for officer misconduct to be objectively reviewed and held accountable, where necessary.
- Enhance education and training within police agencies to ensure that officers have the knowledge, skills, and tools to respond appropriately in carrying out their duties without violating the civil rights of those they aim to protect.



This action brief is one in a series of briefs that offer concrete solutions to save lives, reduce police brutality, promote equal justice, and build safe, positive relations between police and the people they serve. Other action briefs cover:

- [Ban Chokeholds](#)
- [Duty to Intervene](#)
- [Ban No-Knock Warrants](#)

The Center for Justice Research (CJR) is issuing a series of action briefs offering concrete solutions to save lives, reduce police brutality, promote equal justice, and build safe, positive relations between police and the people they serve. Our first installment supports a zero-tolerance chokehold approach, and our second installment supports widespread duty to intervene policies (add the link here).

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The Center for Justice Research at Texas Southern University is available to advise on evidence-based, effective police reform policies and practices on the national, state, and local levels with concrete steps that law enforcement can take to bridge the racial divide. They can be reached at justice.research@tsu.edu or 713-313-6843.

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