Ending Law Enforcement's Accountability Crisis: The Case Against Qualified Immunity

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by

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Abstract:

People have been marching in the streets to speak up against police brutality, and many people care about reducing police misconduct, but not everyone knows about qualified immunity. In some cases, courts can excuse officers' unconstitutional actions to prevent officers from being held accountable in civil proceedings. Almost all police misconduct is excused and incentivized by one legal doctrine: qualified immunity. 42 U.S. Code § 1983 states that the doctrine "protects a government official from lawsuits alleging that the official violated a plaintiff's rights, only allowing suits where officials violated a 'clearly established' statutory or constitutional right." In this essay, I am going to use an eclectic mode of argument to suggest that qualified immunity is illegitimate. The multiple methods of my eclectic argument are an originalist constitutional interpretation and an examination of the incentive structures implicated by this doctrine.

Introduction:

In the United States, professional accountability is partly ensured by the threat of civil suits, but the doctrine of qualified immunity short-circuits this process. Qualified immunity implies that a right has to be clear to a "reasonable" officer for misconduct to carry out in the suit. If the courts think the law may not have been "clearly established" to an officer, they have immunity. When convenience is prioritized, rights are violated. When rights are violated, Democracy is at risk.

These questions guide my search in examining the legality of qualified immunity: How can the interpretation of the law align most with intended constitutional rights while simultaneously ensuring that the public is protected by law enforcement? How was qualified immunity created, and what grounds does it stand on? Should laws represent what the Constitution implies, or should convenience for officers and public officials be the priority in

lawmaking? How has qualified immunity affected civilians? How does qualified immunity stand concerning due process rights and the equal protection clause?

This paper analyzes legal theorists' research on qualified immunity with precedent, codes, and an examination of due process and equal protection as it applies to this doctrine. Lastly, by using an eclectic interpretive methodology, I will argue that qualified immunity does not have a legal or moral basis. The different prongs of this eclectic argument consist of an originalist view of the law and of an examination of the societal implications of qualified immunity. I am interested in four kinds of literature that will collectively answer my questions: court cases, codes, acts, and articles from legal scholars.

Literature Review:

I want to suggest that qualified immunity is unconstitutional and implements harmful incentive structures. In this section, I will examine the arguments judges and legal scholars have made for qualified immunity. Next, I will examine the case precedents that have defined qualified immunity. Lastly, I will conclude with arguments against qualified immunity.

There are multiple reasons given in favor of qualified immunity. Convenience and common law are the main arguments that proponents make for qualified immunity. The convenience claim is that officers would spend more time in court dealing with litigation than they could be out doing their job if they were held accountable for all misconduct (Mandery, 1994). Other theories discussed by legal scholars and judges as justifications for qualified immunity are common-law defenses, good faith defenses, compensation for an earlier mistaken statute, and that it provides a "fair warning" to officials (Baude, 2018). The common law defense specifically makes a notion about decision-making while under duress, but duress is forced, and becoming an officer is chosen. Although some of these defenses have some logical basis, there is not an apparent constitutional reason for qualified immunity's existence. Convenience is not a

legal reason for the implementation of a law. Along with the convenience and functionality argument, some argue that it would be difficult to find enough people to work as the police if the police were in constant fear of being prosecuted for misconduct. Convenience and biases in lawmaking can cause inequities for the people the justice system works for, and sacrificing people's rights for convenience violates the values the United States stands for.

Qualified immunity prevails in many cases, but these few cases I am going to discuss in this section have helped to define it and set it in stone. How qualified immunity is implemented has shifted, and many legal scholars have reasons to explain the illegitimacy of qualified immunity. In 2001, Katz in *Saucier v. Katz* alleged that Saucier, a military policeman, violated his Fourth Amendment by using excessive force. The *Saucier* procedure required courts to examine constitutionality before how "clearly established" a law may be, and nine years later, *Pearson v. Callahan* reversed this standard (*Saucier v. Katz*, 2001; *Pearson v. Callahan*, 2009). Qualified immunity shifted with the citing of *Harlow v. Fitzgerald* in *Pearson v. Callahan*: "Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (2009, §2A). In this case, the court said the officers could have "reasonably believed" that their conduct was lawful, leaving them protected under qualified immunity.

Pearson v. Callahan is significant because, from this case on, courts can take the vague "clearly established" term to rule on qualified immunity before they approach the constitutionality of an action. The reasons the courts changed these standards were because not doing so could waste resources in some cases, and determining constitutionality beforehand would not always affect the outcome of the case (*Pearson v Callahan*, 2009). There are several

reasons why the doctrine of qualified immunity should be abandoned: it violates the equal protection clause and due process rights of the Constitution, and creates undesirable incentives for police that cause injustices.

Qualified immunity has many legitimate criticisms. An overwhelming number of legal scholars from all levels of political and social backgrounds have critiques of qualified immunity, and if not specifically qualified immunity, then more broadly, critiques of the current law enforcement systems in place (Mandery 1994; Baude 2018; Cohen 2021; Chang 2022; Crocker 2022; Jaicomo, Bidwell 2022; Ravenell 2022; Reuters 2022; Stoughton 2022; Schwartz 2023). This paper narrows in on qualified immunity as a violation of due process rights and the equal protection clause (5th and 14th Amendments). Since I am focusing on qualified immunity from a constitutional perspective, I rely heavily on precedent, codes, and constitutional legitimacy. Qualified immunity's harmful incentive structures give a moral reason for it to be examined, but its legitimacy is also questionable from a legal perspective. This paper intends to fill the gap between stories of police misconduct and the legal misuse of power underlying these morally hefty dilemmas.

According to William Baude, qualified immunity is a reconstruction of the *Ku Klux Klan Act*, which was created to combat civil rights violations around the time slavery was abolished (Baude, 2018). This shows that a lot of police misconduct historically involves racial bias and its effect on people's ability to make split-second decisions. This also shows that injustice can hide underneath appealing language. People in positions of power, including police, have the ability to violate the Constitution without civil penalties so long as they can argue they were acting in "good faith" when doing so. [1]

[1] *Ku Klux Klan Act of 1871*: "Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes… a set increasingly detailed efforts to curb the violence and protect African Americans and Reconstruction authorities and allies in the South"

Qualified immunity has been created for convenience and functionality: “Qualified immunity arises from and interacts with sovereign immunity in doctrinal and functional terms” (Crocker, 2022, Abstract). Laws made by those within the justice system make it simpler for those working in the justice system. This means the government and its entities cannot be sued without its consent.

Legal scholar Joanna Schwartz noted that the Black Lives Matter movement increased interest in qualified immunity. Schwartz, Jaicomo, and Bidwell state that qualified immunity cases are not attractive for many lawyers because they are difficult to win and provide little financial incentive. Civil rights plaintiffs struggle to win lawsuits to overcome qualified immunity, even when plaintiffs have what should be considered legitimate complaints. This leads to the fact that “qualified immunity has no basis in any American law, congressionally enacted statute, or the Constitution” (Jaicomo, Bidwell, 2022, Conclusion). In these types of civil rights cases, Schwartz described that if people win these cases against officers, the city or police are usually the ones that are fronting the bill for police misconduct. Schwartz references Justice Scalia when explaining the issue with legal loopholes: “The warrant requirement has become so riddled with exceptions that it [is] basically unrecognizable” (Schwartz, 2023, 59). This statement from Justice Scalia explains the unclear legality and vague language behind what is acceptable in police officers’ eyes.

Schwartz discusses the problem with qualified immunity, the final judgment rule, and how its creation for efficiency plays into the issue of winning these Section 1983 cases. An important distinction from Schwartz derives from case law established in *Graham v. Connor,* which held that “a use of force can be constitutional, even if it was unnecessary…” (Schwartz 2023, 64). This case can be used in an officer’s defense in a qualified immunity argument.

Schwartz continues to reference cases dealing with qualified immunity and the problematic nature of the vague language defining what "reasonable" and "good" mean when examining officers' actions in court. Lastly, Schwartz references multiple justices and judges from a range of political preferences and their strong oppositions to qualified immunity; Justice Thomas, who is a right-leaning originalist; Justice Sotomayor, who is a left-leaning and progressive; and Judge Willett, who is also a right-leaning judge who was appointed by Donald Trump to the Fifth Circuit Court of Appeals (*Ballotpedia*, 2023). This suggests that the view that qualified immunity is illegitimate is not just from a partisan view.[2]

Patrick Jaicomo and Anya Bidwell have two main arguments against qualified immunity: it is difficult to overcome in a lawsuit, and it has been created in a controversial way through judicial policymaking that allows for partisanship. Qualified immunity "emphasizes the policy-making dynamics of the judicial process through description and analysis of the components of the system developed within history and in interaction with other government and political agencies" (Schubert, 1974, Annotation). Judicial policymaking focuses on political views influencing legal interpretations (Peabody, 2007). The forms of judicial activism that take place are overturning precedent and assuming a high profile to make political decisions (Peabody, 2007). Trusting that judicial policymaking will only be used for positive progression and the lessening of inequality can be dangerous for the well-being of democracy.

Judicial policymaking allows for partisan, inconsistent, and unconstitutional interpretations to become enforceable laws. Judicial policymaking "takes seriously the socioeconomic and political milieus out of which court cases come" (Schubert, 1974, Abstract). Passions and political biases sometimes pervade the law when socioeconomic and political

[2] The final judgment rule is a legal principle that prevents appeals from ongoing cases in trial court (Schwartz, 2023, 64).

milieus are considered. That is why some interpret the Constitution as originalists, who believe that the "Constitution means today what it meant when it was originally ratified" (Dworf and Morrison 2010, 61). Originalism can be consistent and lessen personal bias.

Not only does qualified immunity lack a legal basis, but it also suggests what behavior is acceptable for police. According to Jesse Chang, qualified immunity creates norms for acceptable police behavior (Chang, 2022). The vehicle in Chang's statement is the incentive structures that police use to act, which are used to explain acceptable or reasonable behavior. Chang explains here that police act with as much power as they do because they are just responding to "local notions of acceptable police behavior" given to them by those also in power.[3] These scholars reference both legal and moral arguments concerning qualified immunity that can help to describe power relationships between police and civilians.

Methods and Data

I am using eclecticism in my argument, which is a legal method of reasoning that combines multiple methods. In this case, the multiple methods are an originalist constitutional view and an examination of the incentive structures implied by qualified immunity. Eclecticism is a superior examination method because it combines reasoning to examine the doctrine from multiple perspectives. I hypothesize that qualified immunity has little to no legal basis and that it has created harmful incentive structures that have upheld violence and power dynamics between the powerful and powerless. The particular legal violations of qualified immunity violate due process and the equal protection clause. [4]

[3] This argument from Chang about harmful incentive structures prevails in the Stanford prison experiment. This experiment simulated prison and had participants act as either guards or prisoners.The experiment showed that the participants embraced their role in the experiment, and some participants went to extreme extents to embrace their power. (Konnikova, 2015). This experiment shows that when someone is told they have power, they are going to embrace it.

[4] For the eclectic method of legal interpretation, see Dorf and Morrison, 2010; Fallon, 1987; Feldman, 2014.

The harmful incentive structures implied by qualified immunity give reason to look into the constitutionality of qualified immunity. The harmful incentive structures implied by qualified immunity prevail through police violence, excessive force, systemic racism, and attitudes of police that are not as virtuous as they should be in a position meant to protect the public. The legality also appears problematic when qualified immunity is examined through a legal lens. I examined many cases to apply an originalist interpretation to reveal the illegitimacy of many qualified immunity rulings. [5]

I will be using Supreme Court cases, United States Codes, constitutional language, and originalist interpretation methods to support my claims about the unconstitutionality and harmful implications of qualified immunity. My qualitative study includes theory, reasoning, precedent, and originalism, which makes my argument eclectic.

Empirics

[6]Section 1983 of Title 42 of the United States Code is a part of the *Civil Rights Act* of 1871, and it was passed right after the Civil War. This Title established the right of citizens to sue for monetary damages and not just injunctions. The specific language in this act created qualified immunity:"...except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity…" (42 U.S. Code § 1983). This passage from 42 U.S.C. uses the term "judicial capacity" to excuse the misuse of power by essentially saying ignorance

[5] *Pierson v. Ray (1967), 42 USC 1983, Harlow v. Fitzgerald (1982), Malley v. Briggs (1986), Graham v. Connor (1989), Kyllo v. United States (2001), Saucier v. Katz (2001), Pearson v. Callahan (2009), Messerschmidt v. Millender (2012),* and *Tanzin v. Tanvir (2020), and McCoy v. Alamu (2020)*

[6] USC 42: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia" (*Cornell Law*).

within misuse of power is allowed and free of legal pursuance. Another way of interpreting this is that an officer is not always liable to prosecution. Qualified immunity applies to more than just police, it applies to public officials as well. The Constitution would not condone criminal acts not being equally interpreted through the judicial process, let alone some people having immunity to the law and not others.

Some recent cases of police misconduct, brutality, and murder have gotten pressure from the public through the media: Khari Illidge, Eric Garner, Johnny Lejia, Breonna Taylor, and George Floyd. Many people that have watched recent videos of police brutality can see the difference between mistakes and misuse of power by officers. In Breonna Taylor's and George Floyd's cases, officers attempted to use qualified immunity as a defense. Anyone who argues that the justice system isn't set up to benefit some more than others is sadly mistaken.

The first case I would like to examine is *Pierson v. Ray* from 1967, which is about officers accusing Black men sitting in at a bus stop to protest segregation of disrupting the peace. Courts later ruled the officers' action as unconstitutional. The officers should have been charged with false imprisonment but were not because of qualified immunity. Officers' training should cover what circumstances cause the need for an officer to detain a person and when not to. So if the issue does not lie in officer training, then justice should be pursued, and courts are responsible for not accusing officers of misconduct or ignorance about their actions, especially in cases of clear misconduct.

Fifteen years later, *Harlow v. Fitzgerald* from 1982 created the standard that qualified immunity applies whenever a violated right is not clearly established and when immunity can be used for "functional" purposes. This case concerns an unlawful discharge from the Air Force. White House aides to former President Nixon were the co-defendants. *Harlow v. Fitzgerald*

discusses “functionality” and the term “reasonableness,” which have been used to cover unconstitutional misconduct by police. Specifically, “objective reasonableness” was created with judicial policymaking, and allows courts the ability to excuse conduct because it is not “deeply ridden.” The law applying to some people and not others contradicts the standards set in the Constitution for equal protection. The American justice system needs to stop making false promises. It is supposed to protect citizen’s rights, citizen’s Democracy, and the citizen’s justice system.

Not long after that, *Malley v. Briggs* from 1986 was examined. This case is about the Rhode Island State Police monitoring two telephone calls for which they had a court-authorized wiretap. The police heard talk of marijuana on the calls from an acquaintance of the respondents’ daughter. The Rhode Island state trooper, Malley, charged the respondents with possession of marijuana. Briggs made alleged violations of the Fourth Amendment and the court ruled that under 42 U.S.C. § 1983 that “a police officer who believes that the facts stated in an affidavit are true and submits them to a neutral magistrate might be entitled to immunity under the ‘objective reasonableness’ standard of *Harlow v. Fitzgerald*” (475 U.S. 339). The court ruled that there was no probable cause for this warrant and that a reasonable officer wouldn’t believe so either. This case was a win for the plaintiffs and is evidence of the idea that immunity isn’t absolute for police since the officers were not awarded absolute immunity in this case.

Three years later, an important case in qualified immunity precedent occurred. *Graham v. Connor* from 1989 is about Graham having an insulin reaction and heading to the store to get orange juice to counteract these effects. As he saw a long line, he rushed out of the store to go to his girlfriend’s house, and this caused the cops nearby to be suspicious of his urgency. As Graham waited on the curb with the initial officers, the second set of officers showed up and

accused him of acting differently than others with the same reaction and said he must be drunk. They then arrested him with tightly bound handcuffs. As he asked them to check his diabetes machine in his pocket, he was told to shut up, and the door was shut on him. The officers then drove him home, and Graham ended up having an insulin reaction, broken foot, cut wrists, and abrasions over his eye; he suffered long-lasting effects and expenses because of these police officers' actions.

Graham v. Connor is unique because it was "subject to the objective reasonableness standard of the Fourth Amendment, rather than a substantive due process standard under the Fourteenth Amendment" (1989, Primary Holding). This means that the facts and circumstances related to the use of force should drive the analysis rather than any improper intent or motivation by the officer who used force. Initially, these officers were not held accountable, but the Supreme Court then reversed this decision and held Officer Connor accountable because he violated the Fourth Amendment through his "unreasonable" intentions. This is one case example of officers being held accountable for misconduct.[7]

As we enter the early 2000s, we continue to see the Fourth Amendment being violated. *Kyllo v. United States* from 2001 is about thermal imaging being used to look for high-intensity lamps inside Kyllo's home that are used to grow marijuana without a warrant. This case concerns the Fourth Amendment and people's right to be protected from unreasonable searches and seizures. *Kyllo v. United States* cited *California v. Ciraolo f*rom 1986, which explained that law enforcement officers have always been able to look into homes from the public street with their plain eyes as much as they would like under the Fourth Amendment. Although this is true, the evidence from this case was suppressed because this technology gave officers more than the ability to drive by and look with their eyes. The argument also explains that although this

[7] Another relevant example is *Malley v. Briggs* (1986).

thermal imaging device was detecting heat radiating from the home, that from this remains unclear distinctions for technology that leaves people more and more susceptible to losing their right to privacy. Overall, thermal imaging was labeled as unconstitutional, and Kyllo won the case, which meant the officers needed to explain why they violated this homeowner's Fourth Amendment. Although Kyllo ended up winning the case, he did spend time in jail, whereas the officers and government officials, in this case, did not.

The "clearly established" rule paves deeper into precedent in the next case I examine. *Saucier v. Katz* from 2001 is about a military policeman and a protester. Katz was protesting at Vice President Gore's speech at a San Francisco army base, and Saucier used excessive force to arrest him. Katz alleged that Saucier had violated his Fourth Amendment. This case is unique to many others I discuss above because qualified immunity was determined to be "inappropriate." The ruling contained two parts in this case; "First, it found that the law governing Saucier's conduct was clearly established when the incident occurred. It, therefore, moved to a second step: to determine if a reasonable officer could have believed, in light of the clearly established law, that his conduct was lawful" (*Saucier v. Katz*, 2001, Syllabus). The courts considered the circumstances and reasonableness of the officer's actions when ruling against qualified immunity.

It is possible that evidence of excessive force or assault on a body is enough to combat an officer's claim of intent, but not every case of misconduct has these types of circumstances. Defendants shouldn't have to have a video of themselves getting assaulted or physically injured to have their word considered against an officer's word. Physical injuries or being shot isn't always enough to win the case either. Many cases discuss excessive force used by police when making arrests and with treatment inside corrections facilities. Officers typically have some

defense as to why excessive force was needed, and courts seem to strongly consider those claims under the qualified immunity doctrine.

The *Saucier* procedure used to require courts to examine unconstitutionality before how "clearly established" a law was (*Saucier v. Katz, 2001*). Qualified immunity was redefined in *Pearson v. Callahan* to redirect the focus of qualified immunity to the clear establishment of a law. In this case, the Utah Court of Appeals reviewed a drug possession and distribution case where Pearson sold to an undercover informant whom he had let into his home. Pearson argued that this violated his Fourth Amendment, which is his right to only have his home searched when there is probable cause and a warrant. The "consent-once-removed" doctrine also applies to this case, which means additional officers can enter the home once an undercover officer discovers contraband. Once again, the courts ruled that the officers could have "reasonably believed" that these actions were constitutional, and the courts ruled in favor of the officers even though there was no warrant (*Pearson v. Callahan*, 2009). [8]

This shift between *Saucier v. Katz* and *Pearson v. Callahan* in this eight-year period is significant because, after the shift in *Pearson v. Callahan*, courts can take the vague "clearly established" term to rule on qualified immunity before they approach the constitutionality of misconduct. The courts changed because they claimed it wasted resources in some cases and that determining unconstitutionality would not always affect the outcome of the case (*Pearson v. Callahan*, 2009).

Once again, when examining a case, I find that there are more issues with warrants and Fourth Amendment violations. *Messerschmidt v. Millender* from 2012 is about unlawful warrants and officer-qualified immunity. This case dives deep into the roots and incentives of qualified

[8] "Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*Pearson v. Callahan,* 2009).

immunity and therefore warrants consideration at length. The case is about a woman asking police for assistance when she feared getting assaulted. The police did not follow through; she was assaulted, and a warrant was sought, but not processed correctly, and not enough evidence was found for the case to follow through. Officers were provided with qualified immunity under the "objective good faith implied in *United States v. Leon.*" This case is unique because "the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides." It was also stated that the officers "could reasonably have believed that the scope of the warrant was supported by probable cause" (Syllabus, a).

Messerschmidt v. Millender is significant because it contains dissents and an opinion that pressures the courts to have a "critical eye" when looking at qualified immunity defenses. A differing view from Chief Justice Roberts on the *Messerschmidt v. Millender* case explains that the officers shouldn't have had immunity "from personal liability because this invalidity was so obvious that any reasonable officer would have recognized it" (2012, §1). The opinion from the case also explained that the court gave the officers qualified immunity because "they reasonably relied on the approval of the warrant by a deputy district attorney and a judge" (Syllabus). The opinion continued to state that the warrant failed to establish probable cause. The opinion seems to blame whoever approved the warrant and not the officers in this case.

This case is important because many justices admit the constitutional illegitimacy of the search while the opinion still awarded the officers involved qualified immunity. In Chief Justice Roberts' opinion of the court from the *Messerschmidt v. Millender* case, he references precedent: "Even a cursory reading of the warrant in [that] case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was

constitutionally fatal" (*Groh* v. *Ramirez,* 2004, §3C). In other cases, Justice Clarence Thomas emphasized the importance of vindicating individual rights and checking the government's power (Bidwell and Jaicomo, 2022). Justice Sotomayor's and Justice Ginsberg's dissent explained that a "reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause" (2012, §2).

The last case I examined from three years ago upholds precedent in *McCoy v. Alamu*. In this case, McCoy was sprayed with a chemical spray in his face while in his prison cell by Officer Alamu. McCoy allegedly threw water at Alamu, and at one point, Alamu also claimed that McCoy also threatened him with a weapon. McCoy and Alamu never seemed to agree on the facts of the altercation. The Fifth Circuit Court of Appeals ended up granting summary judgment in favor of Alamu under qualified immunity because he acted in "good faith" (2020). The opinion of this case said an officer would have to assault a civilian for "no reason" to be held accountable (§3).

An interesting point from Evan Mandery is that courts may account for the social costs of decisions when implementing doctrinal equilibration and modifications in cases involving qualified immunity (1994). This implies that the media or the public is pressuring the courts.This didn't prevail in *McCoy v. Alamu,* but Mandery states that in future cases, we may continue to see a more "critical eye" when looking at qualified immunity defenses. [9]

Many recent cases that consist of officers using qualified immunity as a defense also contain excessive force. Many of these cases have also gained a following in the media and have increased support for the Black Lives Matter movement and for lessening police misconduct overall. The 2011 case of Johnny Leija consists of Leija being sick with pneumonia and then

[9] Another example of use of the "critical eye" is in *Tanzin v. Tanvir,* which consists of litigants filing against federal officials for religious discrimination under the *Religious Freedom Restoration Act of 1993*. The "RFRA provides, as one avenue for relief, a right to seek damages against Government employees."

being pinned by the police, leading to his death. Khari Illidge's case involved excessive force in 2013. Illidge was stunned six times, put in a hogtie with his hands and feet, and ended up dying. In 2014, the death of Eric Garner occurred after New York City police put him in a lethal chokehold. Breonna Taylor's case from 2020 consisted of seven police officers entering her home and shooting her to death based on drug suspicions. Lastly, the most well-known case from the past few years is George Floyd's case from 2020. An officer kneeled on Floyd's neck until he died after he was rumored to have used a fake $20 bill (Chung et al, 2020).

Taylor and Floyd's cases are the most prominent in the media, and they both ended up winning their cases. Taylor and Floyd's cases didn't let qualified immunity stand between the officers and justice for the victims of police violence. These decisions were influenced partly by the circumstances of the cases but mostly by the pressure and frustration from the public finding out about these cases of misconduct in the media. Taylor's and Floyd's cases seem to also have the Court participating in "doctrinal equilibration" to account for social costs in these cases (*McCoy v. Alamu*, 2020).

Findings and Analysis

Historically, America has seen convenience and functionality overpower everyone's rights, but these harms have been most severe for women and people of color. Through examination of cases involving qualified immunity, this has prevailed yet again. The first issue stemming from qualified immunity is the incentive structure problem, but there is also a constitutional problem. This eclectic combination of reasoning has proved my hypothesis of the illegitimacy of qualified immunity.

Incentive structures give people in power and certain groups incentives to act in certain ways. When people are told they are above the law, they will act like they are. Qualified

immunity is an example of messaging and encouraging incentives. The human desire for convenience, combined with the ability to use judicial policymaking, has created qualified immunity. Psychologically, one can argue that when people are told they have power or are above the law, they will act as if, even if that means immortality. For example, the Stanford prison experiment placed people in prison as guards or prisoners, and people continued to become more powerful or more submissive as the experiment continued. [10]

The precedent developed from the years of qualified immunity being ruled on has created harmful incentive structures while violating the U.S. Constitution. The Supreme Court needs to use the privileges provided by *stare decisis* and the Constitution to overturn this precedent. *Stare decisis* requires a compelling reason to drift from precedent (Clarkson, 2012). Qualified immunity's violations of due process and equal protection are compelling enough reasons to eliminate qualified immunity as an option for officers' defense.

Stare decisis implies sticking to some wrong decisions, but it encourages precedent change when there is a compelling reason (*Clarkson and Miller*, 2012; *Dobbs v. Jackson Women's Health Organization*, 2022). Qualified immunity's elimination is the most legally correct and ethical solution for improving citizens' lives regarding police brutality, systemic racism, and maintaining constitutional rights. Qualified immunity has led to death, mistreatment, and clear constitutional violations. This suggests the need for a change in precedent for the qualified immunity doctrine. If the doctrine is going to remain, it will need to be amended to follow what the Constitution implies.

The Supreme Court rulings and precedents protecting qualified immunity have no legal basis because rulings in favor of immunity does not align with the Constitution's language and

[10] This shows "evidence of the atavistic impulses that lurk within us all; it's said to show that, with a little nudge, we could all become tyrants" (Konnikova, 2015). In other words, when people are told they are above the law, they are going to act as if they are.

deeply rooted interpretations. That language from the Constitution being; "...unreasonable searches and seizures…," "...nor be deprived of life, liberty, or property, without due process of law…," and that "...the accused shall enjoy the right to a speedy and public trial..."(Amendments 4, 5,6). Not to mention the importance of the equal protection clause in the Fourteenth Amendment that is clearly being violated when some citizens have immunity to the law, and others don't.

Critics argue that no one would want to be a police officer if they feared being prosecuted and that qualified immunity protects "split-second decisions." Being in fear of prosecution brings up the problem that officers may not fully understand the laws they are enforcing. Suppose officers are not confident and willing to put their own well-being on the line to protect best and serve the people with the knowledge they do have about constitutional rights. In that case, they are either not being adequately trained or have corrupt incentives that they know would unintentionally prevail through their service. There is a problem with this argument, and making an excuse of fear of prosecution isn't legitimate because many people fear being stereotyped and mistreated by the police every day, specifically people of color in this country.

Critics also claim that qualified immunity protects officers' mistakes from "split-second decisions." Many people argue that police need leniency in their actions because they are making split-second decisions in dangerous and undesirable situations. This argument is legitimate, but not all cases that have used qualified immunity as a defense have caused officers to make split-second or constitutionally questionable decisions. Necks being kneeled on and officers shooting based on instinct or fear is clearly not protected in many cases. As body-worn-camera footage and civilian filmed videos are being spread of interactions with police, people are able to see and judge these "split-second decisions."

With certain career choices comes great responsibility. Doctors carry lives in their hands, teachers raise the youth, people in the trades build and maintain homes and tools for life, and public officials and police maintain the safety and well-being of citizens and Democracy. Other important careers and positions of power are held to high standards, so why not hold law enforcement officers to those standards as well? Especially when life-versus-death situations frequently occur within the career.

Conclusion

I asked these questions to reach my conclusion: How can the interpretation of the law align most with intended constitutional rights while simultaneously ensuring that the public is protected by law enforcement? How was qualified immunity created, and what grounds does it stand on? Should laws represent what the Constitution implies, or should convenience for officers and public officials be the priority in lawmaking? How has qualified immunity affected civilians? How does qualified immunity stand concerning due process rights and the equal protection clause?

The interpretive method of eclecticism shows that different methods of interpretation and reasoning can be used to make an even stronger argument than an argument made from just one method of reasoning (Dorf and Morrison, 2010). In this case, I contrasted an originalist view of the legality of qualified immunity with an examination of the morally harmful incentive structures implied by qualified immunity. In this essay, I have examined the constitutionality and history of qualified immunity in a number of Supreme Court decisions. I also analyzed due process rights, equal protection, and specific constitutional language.

In the case of qualified immunity, both originalist arguments and moral arguments line up toward the illegitimacy of qualified immunity. Using evidence, I have argued that qualified

immunity is unconstitutional and that this unconstitutionality has had lasting negative effects on the systems and the people whom the systems function for. The unconstitutionality violates due process rights and the equal protection clause. Its illegitimacy with incentive structures prevail through the examination of fact patterns and opinions in cases involving police misconduct.

In short, qualified immunity was created for convenience's sake as a form of judicial policymaking. If one invests in the Constitution, convenience for power systems should not be a priority. The public can still be protected and represented even if officers do not have legal immunity. Qualified immunity has been violating the Constitution while simultaneously creating harmful incentives within positions of power. Qualified immunity rulings will hopefully shift to strictly address a matter's constitutionality, not the "good faith" of an officer's conduct. With recent pressure from citizens to improve conditions around police brutality and injustices against people of color, qualified immunity seems to be standing on shaky ground.

The previous Supreme Court rulings for qualified immunity do not have a legal basis because they do not align with the Constitution's language and deeply rooted interpretations. Therefore, current interpretations made by courts based on previous Supreme Court cases are unconstitutional. For courts of law to be instilling the rights ensured by the Constitution, qualified immunity needs to be ruled unconstitutional. Justice Sotomayor dissented in a case involving qualified immunity, *Kisela v. Hughes,* that "...Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished…" (Cohen, 2021, 1; *Kisela v. Hughes,*§3, 15). This is one of the most telling and legitimate statements from a dissent for qualified immunity.

I would like to predict that unconstitutionality and media coverage of misconduct will pressure courts to rule against convenience in cases involving police misconduct. However, history has shown that systems in America uphold power in unethical ways. Simply look at the way people of color and women have been treated historically and to this day. [11]

Society needs police, and not every officer that enters the force is inherently bad, but the laws and systems around police need improvement. Qualified immunity has caused harmful attitudes, harmful actions, and has not upheld basic intended rights, leading to misrepresentation of the legal and moral intentions set by the Constitution. My eclectic argument that combines originalism and harmful incentives overrides any common law or convenience argument made in favor of qualified immunity. Democracy may crumble if qualified immunity isn't re-examined.

[11] The current supreme court justices overturned important precedent for women's rights in the *Dobbs v. Jackson Women's Health Organization* case, which discusses a person's right to an abortion (2022).

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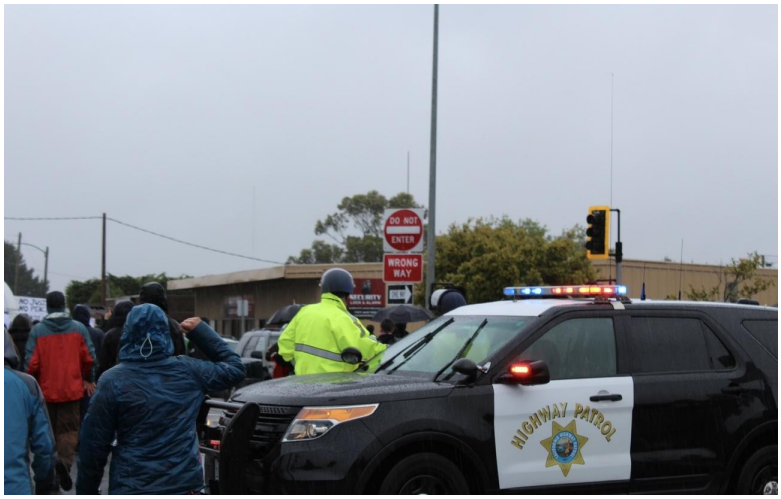
Police Misconduct: It's Time For Legal Change

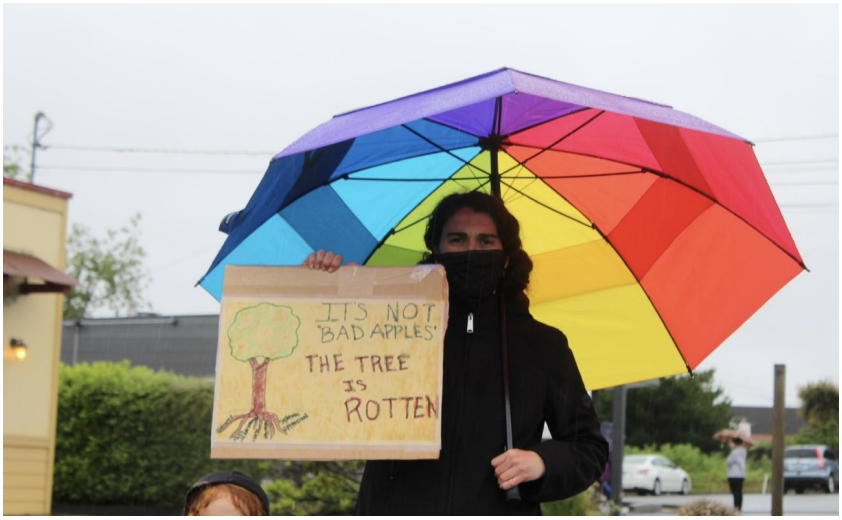
By Mikayla Minton March 2023



Black Lives Matter march in Humboldt County, California in 2020. (Credit: Mikayla Minton)

[The officer who killed Breonna Taylor was just rehired as a cop](). After the murder of Breonna Taylor, "Four officers were formally charged by the Justice Department with civil rights violations but Cosgrove was not one of them" (NPR).

Many people care about police misconduct, but not everyone knows about qualified immunity. Almost all police misconduct is incentivized by one doctrine; qualified immunity. This doctrine gives officers an excuse for unconstitutional actions to avoid accountability. [42 U.S. Code § 1983]():



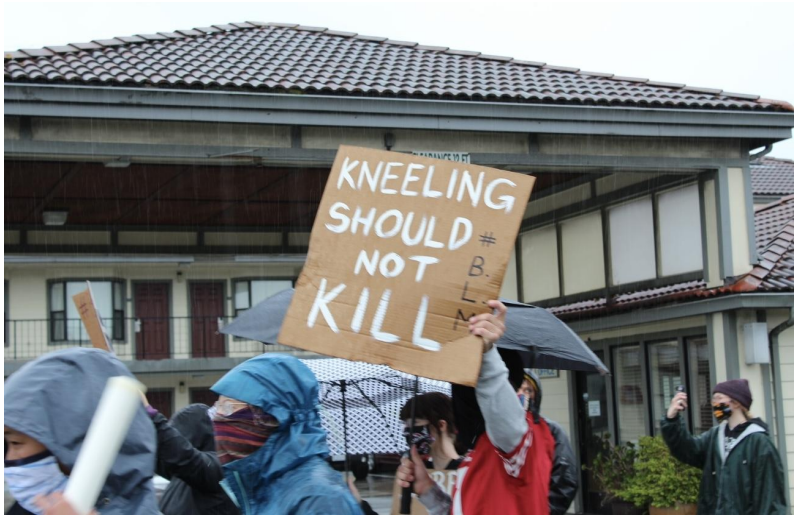
Black Lives Matter march in Humboldt County, California in 2020. (Credit: Mikayla Minton)

"...protects a government official from lawsuits alleging that the official violated a plaintiff's rights, only allowing suits where officials violated a 'clearly established' statutory or constitutional right."

A popular argument in favor of qualified immunity says that police wouldn't want to work as police if they were in fear of prosecution and that the courts would be clogged with police misconduct cases if qualified immunity didn't exist. This argument is invalid because it says convenience for officers and courts is the reason for its existence. This is lazy and has no real legal basis. Some argue common law's notions about duress play into qualified immunity's legality, but duress isn't chosen. The career of law enforcement is. Bad cops act in the way they do because they are told they are above the law, and getting rid of qualified immunity for police would change their "I'm above the law" mindset.

On average, police kill about 1,000 people a year. African Americans are disproportionately affected. Even more people are affected by police misconduct every day. Misconduct can be brutality, searching without a warrant, and any kind of constitutional violation.

One case specifically impacted qualified immunity greatly. An important shift in qualified immunity occurred in *Pearson v. Callahan*, which was about Callahan letting an undercover officer into his home to buy drugs. The officer didn't have a warrant.



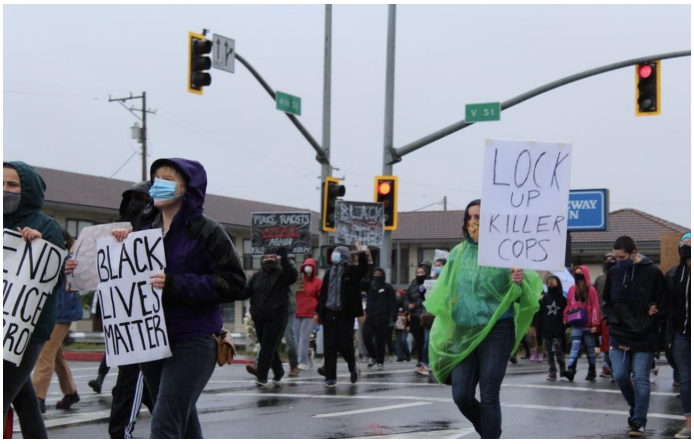
Black Lives Matter march in Humboldt County, California in 2020.
(Credit: Mikayla Minton)

Callahan took this Fourth Amendment violation of a search without a warrant to the Supreme Court and lost because the officer was awarded qualified immunity. This is because the court stated that they would look at how "clearly established" a law was before they looked at the constitutionality of an officer's actions. To someone who hasn't studied the law, not many laws would be "clearly established," and few officers have law degrees. I would argue that most people, despite their careers, know that viable warrants are needed for a police search. Most officers in this case and other similar cases can find ways to argue that they were unaware of their actions being wrong. Qualified immunity also considers if officers were using "good faith" when acting; once again, vague language like this leaves room for manipulation.

The terms "clearly established" and "good faith" are problematic because they are so vague. Most people can argue that they didn't understand something or that they meant well. In these cases, constitutional violations are constitutional violations. Point blank.

Police officers are in a position that requires integrity and honor, and this should indicate "good faith," but it doesn't always mean officers are acting in good faith. Courts need to do the right thing, not the convenient thing.

Sometimes it is difficult for people to see through a badge to examine an officer's intentions, but it isn't moral or legal for some citizens to be immune to the law, and others not. Qualified immunity violates due process, the equal protection clause, and depending on the case, other Amendments as well.



It is one thing to have moral reasons for something being wrong and another to have legal reasons, but when there are both, the solution should be obvious. Qualified immunity limits citizens' rights and liberties.

Black Lives Matter march in Humboldt County, California in 2020. (Credit: Mikayla Minton)

Qualified immunity provides police officers with legal immunity, and a mindset that they are above the law as they are carrying guns and representing the justice system that citizens desire to invest trust in. Communities need police officers with the proper intentions, qualifications, and that can take accountability. Qualified immunity is unconstitutional. Spread the word.

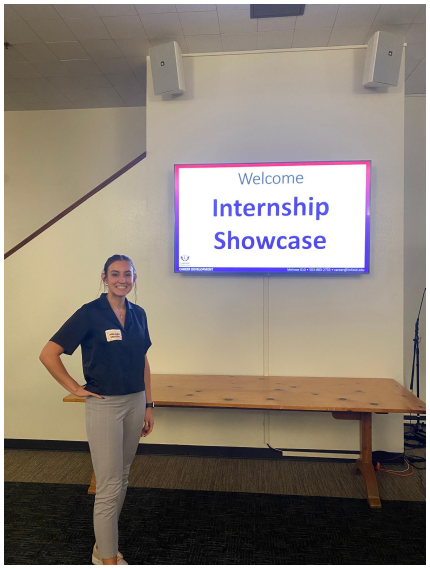


Image taken at the Linfield University Internship Showcase.
(Credit: Alex Burkeen)

Biography

My name is Mikayla Minton, and I am a third-year law, rights, and justice major and journalism and media studies minor at Linfield University. I am passionate about social justice, and I am a believer that voicing through the law will best help people. I have been researching and writing my senior thesis since September. I got my inspiration for my thesis during my summer internship at the Humboldt County District Attorney's Office. I learned a lot about the law, and one of the cases that stuck out to me most from the summer was a case involving the Fourth Amendment. Another intern and I were asked to write a motion to combat a motion to dismiss evidence from a search, and I learned a lot about legal loopholes while working on this. My thesis then evolved from an interest in loopholes concerning the Fourth Amendment to the doctrine that protects cops and public officials in all misconduct; qualified immunity.