



ISSUE BRIEF | Center for Law & Justice

PROTECTING QUALIFIED IMMUNITY

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TOPLINE POINTS

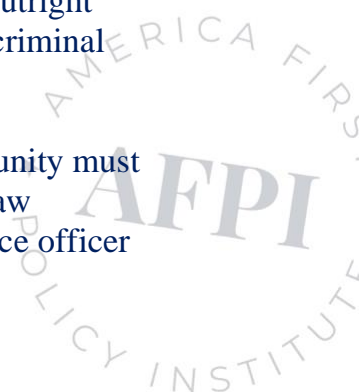
- ★ Qualified Immunity is a legal doctrine that protects certain government actors from personal liability while performing their official duties.
- ★ The political left has sought to curb—or outright eliminate—qualified immunity as a protection for police officers accused of misconduct.
- ★ Eliminating qualified immunity would have a chilling effect on proactive policing and would endanger public safety.

Introduction

Amid the ongoing debate over police reform, few issues arouse the passions of both sides of the argument more than the fate of qualified immunity, which provides qualified—not absolute—immunity from civil liability to government officials performing discretionary duties within their official capacity ([Kirby, 2000](#)).

These protections are essential in allowing the law enforcement community to actively enforce laws, protect communities, and uphold the rule of law. Removing the protections afforded through qualified immunity would do little to increase individual officer accountability for misconduct, primarily because legitimate misconduct and outright criminality on the part of a police officer can already be pursued through the criminal justice system or other methods of civil redress.

Serious misconduct on the part of any member of the law enforcement community must be rooted out and exposed, as the failure to do so undermines public faith in law enforcement as an institution and the rule of law itself. But attempting to reduce officer



misconduct and increase accountability by exposing individual officers to the potential for even greater personal liability only decreases the effectiveness of law enforcement and harms public safety.

It is inaccurate to suggest that the only way to hold police officers accountable for misconduct or criminality is to eliminate the doctrine of qualified immunity. Such a suggestion presumes that officers who engage in illegal behavior are not currently held to account. That presumption is false. For example, 21 police officers in the United States were charged with either murder or manslaughter based on actions taken on duty in 2021—the highest number ever recorded in a single year ([Ortiz, 2022](#)). Notwithstanding the veracity or strength of the case in each of those charges, it is hard to argue that the justice system is turning a blind eye toward officers suspected of serious misconduct or criminal behavior.

Even considering behavior that does not rise to the level of criminal conduct but that may constitute a violation of civil rights, redress under the Civil Rights Act of 1871 can be sought against an officer's employer, most likely a state or municipal law enforcement agency, even if qualified immunity was granted to the individual officer in question. Under Section 1983 of the Civil Rights Act of 1871, individuals have a means to redress constitutional breaches by these officers, although pinning civil responsibility on a department or municipality necessitates more than merely demonstrating an officer's transgressions. One must prove that the infringement sprang from an entrenched policy or custom of the institution, be it an official policy, a pervasive unwritten practice, or the dictates of a key decision-maker. In essence, the institution's foundational practices must be the catalyst for the offensive conduct ([Bersani & Condon, 2016](#)).

The barriers to civil redress enshrined in Section 1983 notwithstanding, it is simply erroneous to imply that no legitimate civil or criminal recourse exists for officer misconduct absent the elimination of qualified immunity.

Understanding Qualified Immunity

While the historic development of qualified immunity runs deep, its modern interpretation and applicability were established in the 1982 Supreme Court decision *Harlow v. Fitzgerald* ([Novak, 2023](#)). Prior to *Harlow*, in supporting a defense against civil liability, a government official had to establish that the official had acted in “good faith” and that the official's actions were objectively reasonable, although the “good faith” argument, whether a civil rights violation had occurred or not, had no standard against which to be applied ([University of Pennsylvania Law Review, 1984](#)).



In *Harlow*, the Court clarified the application of qualified immunity by stating that “government officials performing discretionary functions generally are shielded 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” ([Supreme Court, 1982](#)).

The Court further articulated that the doctrine of qualified immunity balanced two competing, but necessary, interests: 1) the “importance of a damages remedy to protect the rights of citizens;” and 2) the need to “protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority” ([Supreme Court, 1982](#)).

Critics of qualified immunity, and in particular its application in allegations of civil rights abuses by law enforcement officers, argue that the threshold for holding individual officers accountable for their actions is too steep. Others have argued that since most police departments indemnify their officers from personal liability, this form of *de facto* protection makes holding officers personally accountable nearly impossible, with or without the invocation of qualified immunity ([Novak, 2023](#)).

Supporters of qualified immunity argue that it is an essential protection, particularly for law enforcement officers who need to make split-second decisions with potential life-and-death consequences ([Novak, 2023](#)). Inhibiting that decision-making process with concerns about personal liability would be dangerous, both for the individual officer and for the public.

The Debate

In the wake of recent high-profile police use-of-force events, some of which inspired widespread civil unrest, looting, and violence across the Nation, federal legislators across the political spectrum called for police reform measures designed to increase accountability and transparency within the law enforcement community. Among the more contentious proposals has been the undoing of qualified immunity as a personal liability protection for police officers ([Johnson, 2021](#)).

In 2021, Sen. Ed Markey (D-MA) led the push in the Senate to eliminate qualified immunity protections for police officers, citing the need to do so as essential to the pursuit of racial justice. Using inflammatory language, Sen. Markey said the “justice system is failing to hold accountable law enforcement officers who engage in police brutality and kill black and brown Americans.” He added, “There will not be true racial justice until we end qualified immunity” ([Markey, 2021](#)).



Rep. Ayanna Pressley (MA-07), who in 2021 also introduced legislation in the House of Representatives similarly aimed at ending qualified immunity, echoed Sen. Markey's sentiments. "We must be bold and unapologetic in our pursuit of policy that increases police accountability and addresses the crisis of police brutality plaguing black and brown communities," Pressley stated ([Markey, 2021](#)).

On the other side of the debate, Sen. Tim Scott (R-SC) has argued that a compromise could exist whereby qualified immunity is protected by shifting financial liability away from individual officers and onto their departments ([Binion, 2021](#)), though he acknowledged that eliminating the doctrine entirely was a "poison pill" in ongoing negotiations over police reform measures due to strong opposition from then-President Donald J. Trump ([Quinn, 2020](#)).

The issue became a primary sticking point in bipartisan police reform negotiations in the 117th Congress, culminating in a failure among legislators to find sufficient common ground on the substance of a bill ([Gregorian & Caldwell, 2021](#)).

The debate over qualified immunity has continued into the 118th Congress, with Senator Markey and Rep. Pressley re-introducing legislation to repeal the doctrine ([Markey, 2023](#)) while Rep. Jim Banks (IN-03) introduced legislation to codify the doctrine into law, arguing that "law enforcement officers risk their lives every day to keep our families and communities safe. Subjecting officers to frivolous, unending lawsuits from the same criminals they put behind bars would be a miscarriage of justice and bankrupt almost every police department in the country" ([Banks, 2023](#)).

Further supporting the notion that qualified immunity should be enshrined into law by Congress, Fraternal Order of Police national president Patrick Yoes stated, "The doctrine of qualified immunity protects government officials carrying out official acts from being sued unless the official violated a person's statutory or constitutional rights." He added, "Every single factual scenario an officer encounters is different and unknown. It is almost impossible for an officer to determine how a legal doctrine will apply to a split-second factual scenario" ([Banks, 2023](#)).

Outside of the realm of federal legislation, several states have taken it upon themselves to address the issue of qualified immunity within the legal confines of their own state laws. States like Colorado and New Mexico have passed laws to either diminish or effectively end qualified immunity, allowing individuals to hold officers accountable in state courts for violations of their rights ([Tucker, 2021](#)). However, this patchwork of state laws creates a fragmented legal landscape, leading to inconsistencies in how officers are protected or held accountable across different jurisdictions.



Qualified Immunity and the Impact on Policing and Public Safety

Ending the protections afforded to police officers through qualified immunity could have a significant impact on proactive policing and public safety and likely would exacerbate existing challenges to recruiting and retention within the law enforcement profession.

Chuck Wexler, executive director of the Police Executive Research Forum, spoke to the concerns felt by officers over increased scrutiny and the potential for litigation affecting their policing habits. “You just have to be honest and say that police in America are far more cautious today about stopping someone than they were a year ago,” Wexler said. “Proactive policing is much more complicated. And now we’re in the post George Floyd era, which makes police understandably cautious” ([Sanchez et al, 2021](#)).

The phenomenon of de-policing, understood as the pulling back by officers from proactive police work, has on numerous occasions been correlated with an uptick in crime. As Jason Johnson, president of the Law Enforcement Legal Defense Fund, articulated, when an ACLU-inspired lawsuit curtailed proactive policing in Chicago by 82% in 2016, murders rose by 58% over the same period. Similarly, in the wake of charges brought against officers in the death of Freddy Gray in Baltimore, arrests declined by 28% while murders rose by 55% ([Johnson, 2021](#)).

Proactive policing helps reduce crime ([Weisburd & Majmundar \(Eds\), 2018](#)). Unlike responsive policing, where police officers respond to citizen calls for service—usually as crime is occurring or in its immediate aftermath—proactive policing methods actively seek to deter and prevent crime from occurring in the first place. Proactive policing also carries with it inherent risks, as situations tend to be more dynamic and unpredictable. When officer safety challenges arise, police officers are often required to make split-second decisions involving myriad use-of-force options.

When use-of-force situations occur, they carry with them the higher potential for accusations, whether legitimate or otherwise, of police misconduct ([DOJ, 2020](#)). Qualified immunity offers individual officers—when acting in good faith and not deliberately attempting to violate a citizen’s civil rights—the understanding that even if they are confronted with such allegations of misconduct, their personal lives and livelihoods will not be threatened. This security is essential to supporting a criminal justice environment conducive to protecting and upholding the rule of law in society.

These individual officer protections also need not run contra to a legitimately aggrieved party seeking redress for a violation of civil rights. Federal law currently allows for such redress, and policy recommendations easing the burden by which an aggrieved party may



seek a civil remedy against an officer's employer have enjoyed robust debate in recent years ([Institute for Justice, n.d.](#)).

Conclusion

Enacting policies that may inhibit proactive policing is anathema to public safety and ending or severely curtailing qualified immunity protections for police officers could have a chilling effect on their willingness to engage in crime-reducing, proactive policing. Efforts to hold officers accountable for legitimate instances of misconduct or criminality should not be distracted by the pursuit of policies that could have the unintended consequence of weakening public safety.

If they chose to do so, federal legislators could eliminate any uncertainties surrounding the protections afforded to police officers through qualified immunity by codifying it into law. Such a legislative move could uphold these protections at the federal level, while also allowing for a well-defined scope of accountability. During a period of escalating crime rates, it is imperative that the balance between protecting law enforcement officers and holding them accountable is finely tuned to ensure the maintenance of public safety and civil order.

The codification of qualified immunity could offer a more structured and predictable legal landscape, thereby supporting the proactive policing measures necessary for effective crime prevention and community safety. Through a careful and considered legislative approach, the principles of qualified immunity could be preserved, while also addressing the concerns of accountability and transparency in law enforcement practices.



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