

## Pumphrey Law Scholarship Essay

### The Immunity Infliction

By Ishir Vaidyanath

**If you could make ONE change to the criminal justice system, what would it be? Support your answer with research and evidence.**

Currently, qualified immunity is plaguing the American criminal justice system because it is a judicially created doctrine that shields government officials from being held personally liable for constitutional violations like the right to be free from excessive police force, for money damages under federal law, and racially motivated assaults—so long as the officials did not violate “clearly established” law. Therefore, qualified immunity is a detrimental doctrine that harms the American public on a daily basis.

First, qualified immunity is upheld and justified by the United States Federal Government. Cornell Law School explained that, “qualified immunity protects a government official from lawsuits alleging that the official violated a plaintiff’s rights, [...] When determining whether or not a right was “clearly established,” courts consider whether a hypothetical reasonable official would have known that the defendant’s conduct violated the plaintiff’s rights. [...] the Supreme Court held that federal government officials are entitled to qualified immunity.” The Courts are therefore actually siding almost exclusively with officials such as prosecutors and the President so they are protected and shielded from criminal prosecutions and lawsuits while American citizens bear the brunt of these doctrines. Second, qualified immunity is also used in 49 states across the nation. Ilya Somin, a professor at George Mason University, stated that, “Colorado is the first state to specifically negate the availability of qualified immunity as a defense through legislation. In nearly all other states, state courts have incorporated a similar or identical version of federal qualified immunity.” With almost the entire nation following this procedure, it is crucial to eliminate it from law everywhere.

There are multiple issues that a repeal of qualified immunity will solve for. The first harm is the lack of police accountability. Qualified immunity shields government officials from liability for damages — even if they have violated the Constitution — so long as they did not violate “clearly established” law. Nathaniel Sobel, a graduate of Harvard Law School wrote that: “Plaintiffs in excessive force cases against police have had a harder time getting past qualified immunity since [...] qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’ [...] in order for a plaintiff to overcome qualified immunity, the right violated must be so clear that its violation in the plaintiff’s case would have been obvious not just to the average ‘reasonable officer’ but to the least informed, least reasonable ‘reasonable officer.’” This is a lose-lose situation for the plaintiffs because there is no precedent and clearly established law and therefore there is no liability. *Saucier v. Katz* (2001) held that when assessing a qualified immunity defense, courts must first determine whether there was a violation of a constitutional right and then move on to analyze whether the law was clearly established. But in *Pearson*, the justices reversed course, allowing courts to grant qualified immunity based only on the clearly established prong—and without ever determining if there was a constitutional violation. Qualified immunity’s inconsistency lets the police get away with constitutional violations. No wonder then that the community has diminishing trust in the very officers who are supposed to protect them. Jay Schweiker, an Articles Editor for the Harvard Law Review and holder of a B.A. in political science and economics from Yale University, said that the doctrine regularly permits egregious unconstitutional misconduct to go

unaddressed, exacerbating an ongoing crisis of accountability in law enforcement more generally. That obviously hurts the victims of police misconduct, but it also[...] permits police officers to get away with unconscionable constitutional violations.” The inconsistencies of qualified immunity make it nearly impossible to prevent police officers from wriggling out of punishment for clear violations, damaging community relationships.

And this lack of accountability opens the door for preventable racial discrimination by preventing justice for those who wrongly kill. According to the Innocence Project, “Among the thousands of people exonerated in the last 30 years, half were wrongfully convicted in cases involving police and/or prosecutorial misconduct, according to a recent report from the National Registry of Exonerations. Yet, [...]officers accused of or known to have engaged in misconduct often receive more legal protection than innocent people. Without meaningful police accountability, such misconduct can and does lead to injustice, including wrongful convictions, and — as in Taylor’s case — needless death. [...] Taylor, an emergency medical worker, was killed by police officers, who entered her apartment and fired 20 rounds at the 26-year-old and her boyfriend in March.” Yet the Taylor case is not isolated: her death, along with those of countless other people of color like George Floyd, Elija McClain, and Daniel Prude have sparked nationwide calls for justice and changes in our law system. The Innocence Project continues that we need an end to qualified immunity to create answerability, a society with more “racial equality and an end to the disproportionate use of violence against and over-incarceration of people of color, particularly Black Americans.”

Thus, to solve the issues presented, we must abolish qualified immunity and require that police officers carry liability insurance — that would create a real change in officer behavior to reduce police brutality. According to another article by Jay Schweiker, in this scenario “officers would have a clear, direct interest in making sure their own behavior conforms to constitutional standards — because unprofessional officers who routinely commit misconduct would see their premiums go up, and would eventually be priced out of the market.” Full accountability is the most crucial method to reduce violence because it holds people liable and compels change. The article continues that “qualified immunity is the main obstacle to this sort of accountability, and that’s why it has to be abolished.”

Ultimately, qualified immunity is an overall detriment to society. It not only favors government officials, but it also unfairly targets minorities through the growing systemic racial bias and flaws in the criminal justice system. To solve these aforementioned issues and the ongoing crisis of the American criminal justice system, we must abolish this outdated policy.

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