

## Criminal Justice Reform:

### Ending Qualified Immunity to Restore the Constitutional Balance

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tl;dr

*“Qualified immunity” is a doctrine that protects government officials, such as police officers, from civil rights lawsuits when they are acting in their official capacity. Criminal justice reform efforts should focus on ending qualified immunity and restoring the constitutional balance between empowering officers to protect the public while also deterring violations of civil liberties.*

#### The Debate:

In an age of unrest due to recorded police misconduct, there are calls for criminal justice reform. The debate has primarily focused on slogans, such as Black Lives Matter versus Blue Lives Matter, or Defund the Police versus Defend the Police. While there have been many proposals for outlawing particular police practices and increasing training, one of the most important aspects of holding police accountable for misconduct has received more limited attention: civil rights litigation.

**But...** civil rights lawsuits have limited ability to hold officers accountable due to the doctrine of qualified immunity. In a civil rights lawsuit, the goal is to make the victim (or their families) of a rights violation whole

by awarding monetary damages. But in many cases, qualified immunity protects police from liability by imposing nearly insurmountable procedural hurdles. This protects a large swath of police misconduct from accountability by civil rights lawsuits.

#### KEY TAKEAWAYS

##### CIVIL RIGHTS LAWSUITS ARE DESIGNED TO HOLD POLICE OFFICERS LIABLE FOR MISCONDUCT

The purpose of civil rights lawsuits is to give Americans redress when their constitutional rights are violated by public officials. Originally passed as part of the Civil Rights Act of 1871 to combat oppressive government conduct and vigilante groups like the Ku Klux Klan, the statute known as Section 1983 grants plaintiffs the right to sue when their civil rights are violated. Civil rights cases alleging unreasonable or excessive force generally rely on the Fourth Amendment.

##### POLICY SHOULD ALIGN INCENTIVES BY DETERRING MISCONDUCT WHILE EMPOWERING OFFICERS TO PROTECT THE PUBLIC

A well-functioning legal system would balance the need to empower police officers to protect the public with the need to deter

police misconduct. Theoretically, the optimal balance is struck by holding officers liable when they genuinely commit a wrong. This is necessary to deter future bad conduct and properly align officer incentives going forward. Juries should, after hearing all the evidence, make a decision about whether constitutional rights were violated and the extent of damages necessary to make a plaintiff whole.

In “excessive force” cases, officers are already given considerable deference under the law. Jurors must consider the situation from the perspective of a “reasonable officer,” giving due deference to officers to make split second decisions. As in other areas of the common law that rely on a “reasonable person” standard, civil rights cases would eventually develop a “reasonable officer” standard to determine when police officers acting unreasonably and should be held accountable.

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### QUALIFIED IMMUNITY INTERFERES WITH A WELL FUNCTIONING LEGAL SYSTEM

Courts apply a two-part analysis when determining whether an official is entitled to qualified immunity: (1) whether the facts alleged by the plaintiff amount to a constitutional violation, and (2) if so, whether the constitutional right was “clearly established” at the time of the misconduct. In other words, even where there are facts alleged which would be a constitutional violation, if there is not a previous case with *nearly identical* facts where a court found a violation of the law, the case will be dismissed. In practice, the level of similarity necessary means that the bulk of cases are treated as novel, and officers are granted qualified immunity.

Qualified immunity thus prevents the development of a well-functioning system because plaintiffs are often unable to get to a jury even when judges agree the conduct

alleged, if proven, would be illegal. This allows police misconduct to continue without the accountability that civil rights lawsuits are supposed to provide.

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### ENDING THE QUALIFIED IMMUNITY DOCTRINE WOULD HELP RESTORE THE CONSTITUTIONAL BALANCE

To restore the constitutional balance, qualified immunity must be reconsidered. Courts believed government officials needed “breathing room to make reasonable but mistaken judgments about open legal questions,” but the reality is qualified immunity has served as a shield for misconduct. Congress should pass legislation clarifying that qualified immunity is unavailable when government officials break the law and courts should overturn this judge-created doctrine. At the very least, the doctrine should be abrogated in cases of excessive force to allow for the development of the law on what is “reasonable.”

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For a fuller explanation of these and related issues, see Ben Sperry’s op-ed in The Hill: [“How qualified immunity promotes the unreasonable use of force by police officers,”](#) and his blog post on Truth on the Market: [“Setting Up a Fair System for Determining Police Misconduct: Towards A Law & Economics Analysis of Qualified Immunity.”](#)

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