

# Richmond Times-Dispatch

## Qualified immunity and government accountability

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If a cop violates your constitutional rights, should you be entitled to any money? That's a question the Virginia General Assembly has been debating regarding an obscure legal doctrine called "qualified immunity."

Most people are surprised to learn that you can't necessarily get compensation when a police officer violates your rights. After all, the rest of us have to pay for the harms we cause. If I rear-end you in a car accident, I have to pay you. Or if a doctor overlooks a tumor growing in your brain, she has to pay you, too. Why should police officers get special treatment when they make mistakes?

The best argument for why officers get special treatment is that they face tough questions in difficult circumstances. Constitutional law is sometimes fuzzy and so even well-meaning officers are sometimes unsure whether they have probable cause to make an arrest. Compounding this challenge is that the officer is sometimes being asked to make this decision in the dark, and in the rain and at 2 a.m.

If she gets it wrong, maybe she's not as blameworthy as when I rear end you while I'm looking at my phone. Qualified immunity is a legal doctrine that steps in and protects officers who make, as one court puts it, "bad guesses in gray areas."

The problem, however, is how "gray areas" is defined. Unless the same or nearly the same conduct has previously been held unconstitutional by a particular federal court of appeals, the courts presume that the officer was acting in a "gray area."

To see the doctrine in action, consider the case of *Robles v. Prince George's County*. In that case, officers from one county arrested a person wanted on a warrant in a neighboring county. It was 3:30 a.m., and the officers did not particularly want to make the long drive to the neighboring county to drop the suspect off at the police station.

So they drove just across the county line and zip tied him to a light pole in the middle of a deserted parking lot. After they left, they called in an anonymous report of a man wanted on a warrant tied to a light pole. Luckily, the man was picked up before he was harmed.

This was unconstitutional. Easily so. Indeed, in a subsequent lawsuit, the court called it "Keystone Kop activity that ... lacks any conceivable law enforcement purpose." It was also a violation of state law and police regulations. Moreover, the officers even knew "that they were acting inappropriately." But were they liable for their constitutional violation?

No. They were entitled to qualified immunity because no court had previously ruled that this particular course of conduct was unconstitutional. Prior cases had held that tying people together or to a chair for an extended period of time was unconstitutional. But light poles and zip ties? That was a new one. A “gray area” apparently.

If qualified immunity protects officers who engage in “Keystone Kop activity,” why should we keep it? The argument seems to be money. Because cities and counties (not the individual officers) pay damages in these cases, their overall costs might go up and those increased costs may be passed on to taxpayers. There are two problems with this argument.

First, in focusing on their financial costs, cities and counties ignore another cost: the suffering of those abused by police. This is a real cost and if cities and counties don’t pick up the tab, victims will have pick it up instead. That’s patently unfair.

Imagine if you sue a hospital after a botched surgery and the hospital argues “we know we made a mistake, but if we have to pay for our mistakes, our costs will go up and we’ll just have to pass those costs on to other patients.” Does that seem fair to you?

Second, there is a way to control costs: better management. With good training and strong, ethical leadership, a department need not be subject to massive cost overruns. But you don’t have to take my word for it. Insurance companies that insure police departments — and thus who have a financial stake in reducing legal liability — have figured out how to improve officer conduct and thus lower financial claims against the departments.

It is common these days to consider the source when consuming media. I’m a liberal law professor, you might think, so of course I’m against qualified immunity. If so, then why are conservatives like Supreme Court Justice Clarence Thomas against it as well? Or the libertarian Cato Institute?

Indeed, groups of all political stripes have been joining together to file “cross-ideological” briefs opposing qualified immunity. This is not a liberal versus conservative issue. It’s an issue of government accountability, and all of us can agree on that.