End qualified immunity

BY CLARK NEILY, BEN COHEN AND JERRY GREENFIELD

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On the heels of news that police in Buffalo, N.Y. would not be criminally charged for brutally shoving a 75-year-old protester to the ground came video of officers in nearby Rochester pepper-spraying an emotionally traumatized nine-year-old girl as she begged for mercy in the back of a squad car. Other horrific recordings show police methodically squeezing the life out of George Floyd, Daniel Prude, and Tony Timpa — the latter after he called 911 for help while experiencing a mental-health incident.

And while public confidence in police has never been lower, the cause has never been clearer: qualified immunity. Qualified immunity is a judge-made legal defense that prevents police and other government officials from being held civilly liable for violating people's rights. To overcome the defense, civil rights plaintiffs usually have to identify a prior case with identical facts as their own. In other words, it's quite common for courts to say "Yes, your rights were violated — but there's no prior case where someone else's rights were violated in quite the same way, so you lose."

The judiciary's fabrication of qualified immunity is especially galling because it distorts one of the most important laws in our nation's history — the Ku Klux Klan Act of 1871. During and after Reconstruction, many local law-enforcement officials either belonged to the KKK, or declined to take action against the Klan's brutalization of Black people. So Congress passed a law to allow all citizens, and especially freedmen, to sue any state actor who violates their constitutional rights. But qualified immunity has twisted the law to have the opposite effect.

Here's what qualified immunity has wrought. One month ago, a panel of judges granted qualified immunity to Arlington, Texas, officers who, fully conscious of the risk, set Gabriel Olivas on fire by shooting tasers at him after he splashed gasoline on himself while having a mental breakdown. Last summer, a judge granted immunity to the officers who killed Tony Timpa by kneeling on his back for over 14 minutes, even as he begged for help 44 times. And in July 2019, a panel of judges granted immunity to an officer who shot a ten-year-old boy lying on the ground a few feet away, while repeatedly attempting to shoot a nonthreatening pet dog.

Unfortunately, these tragic results are not exceptional: they are the rule. Indeed, an investigation by Reuters documented that police won 56 percent of excessive-force cases in which they asserted qualified immunity, "making it easier for officers to kill or injure civilians with impunity."

Last summer, Democratic, Republican, and Libertarian members of Congress introduced several bills that would eliminate or modify qualified immunity, and at least two of those proposals have been reintroduced for consideration by the 117th Congress. But presented with a golden opportunity to prevent injustice, ensure accountability, and restore public confidence in police by repealing qualified immunity, policymakers find themselves inundated with self-serving and sometimes blatantly dishonest objections from the Fraternal Order of Police, and similar law-enforcement groups. Consider three of the leading myths.

First, some say we need qualified immunity so police won't hesitate when making split-second decisions involving life and death. But the law is already highly deferential to police, giving them plenty of leeway to make reasonable — if ultimately mistaken — decisions in the heat of the moment, by applying an "objective reasonableness" standard to excessive-force claims. In other words, officers who make good-faith errors in judgment have not violated anyone's rights in the first place, and so by definition, they don't need qualified immunity to protect them. Moreover, it is fanciful to suppose that police in life-or-death situations have perfect recall of dozens, if not hundreds of court cases and are able to pluck out and apply the most relevant legal precedents before deciding whether to throw a punch or squeeze a trigger.

Second, the notion that qualified immunity is necessary to protect police from frivolous lawsuits or the burden of distracting litigation has been thoroughly debunked. Because qualified immunity only matters where someone's rights *have* been violated, the doctrine only screens out potentially meritorious cases, not frivolous ones. When lawsuits genuinely lack merit, other legal rules are perfectly sufficient to dismiss them. Moreover, scholarship by UCLA professor Joanna Schwartz shows that qualified immunity is mostly used to dismiss cases *after* discovery — which is the longest and most costly phase of litigation — so most of the "inconvenience," from the defendant's perspective, has already occurred. In other words, qualified immunity is not only unlawful and unjust — it is failing at its own goals.

Finally, there's the concern that holding police civilly liable for their misconduct will lead to ruinous judgments and discourage people from going into law enforcement. But these fears too are baseless. Professor Schwartz's research indicates that 99.98 percent of all damages awards in police misconduct cases are paid not by the individual officer, but by the department or other government employer pursuant to near-universal indemnification agreements. And far from making law enforcement a more desirable career, qualified immunity has dramatically undermined public trust in and respect for police officers by subjecting them to a vastly lower standard of accountability than that to which they hold ordinary citizens. There is ample evidence that policing is far more difficult and dangerous when officers lack community trust, which means that qualified immunity is making it *harder*, not easier, for police to do their jobs.

Thus, it is no accident that the campaign to end qualified immunity is among the most demographically, ideologically, and culturally diverse movements in living memory and presents an extraordinary display of unity in a sea of toxic polarization. When an issue manages to unite Ben & Jerry, the Cato Institute, the ACLU, the NAACP, Americans for Prosperity, the Second Amendment Foundation, and Justice Clarence Thomas — along with more than 1,000 professional athletes, 450 creative artists, and nearly 700 business leaders — there's really only one question: Whose side are *you* on?

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