Statement to the U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity

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Understanding the Limited Role of Qualified Immunity in Police Litigation and a More Modest Approach to Reform

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About the Author

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Statement

I'd like to thank the subcommittee for the invitation to testify. It is always an honor and a privilege to address members of Congress on important policy issues, such as the one being discussed today.

I'd like to begin by noting that I am not entirely against the idea of reform when it comes to qualified immunity—which I think is best understood as a defense against *ex post facto* liability.[1] At the end of my remarks, I will offer what I think is a middle ground reform that falls between outright abolition and the status quo.

While reform is worth considering, some skepticism of the dominant narrative that has influenced the discourse about qualified immunity is in order. That narrative has focused on the role the defense has played in police litigation—particularly suits related to uses-of-force—and it posits that qualified immunity essentially functions as an unpierceable shield against liability for police officers, such that officers internalize a sense of impunity that in turn leads them to misbehave in ways they otherwise wouldn't if they had more financial skin in the game.[2] As such, the abolition of qualified immunity is often held up as a way to significantly reduce excessive uses-of-force.

While this narrative has succeeded in influencing both public opinion and various reform efforts, it is wrong for three reasons:

First, this narrative assumes without evidence that officers regularly *and accurately* assess their likelihood of successfully mounting a qualified immunity defense in light of the binding precedents in their respective jurisdictions when deciding whether (and, if so, how) to use force.[3] A sizeable body of research has shown that, in the context of situations involving the use-of-force, police officers overwhelmingly tend toward an "intuitive" decision-making process, which, according to a 2018 paper on this subject, "involves recognizing and identifying

[1] This statement will assume a relatively sophisticated understanding of qualified immunity on the part of readers, but those interested in a brief, but more-thorough, review of the doctrine should consider my colleague James R. Copland's recent essay on this topic. *See*, James R. Copland, *Qualifying the Debate Over Qualified Immunity*, NEWSWEEK (Apr. 28, 2021).

[2] For examples of this argument, see: Editorial Board, *How the Supreme Court Lets Cops Get Away With Murder*, NEW YORK TIMES (May 29, 2020) ("[I]t is the Supreme Court that has enabled a culture of violence and abuse by eviscerating a vital civil rights law to provide police officers what, in practice, is nearly limitless immunity from prosecution for actions taken while on the job."); Yohnka, et al., *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021) ("Qualified immunity makes it nearly impossible for individuals to sue public officials by requiring proof that they violated 'clearly established law.'"); Editorial Board, *End the Court Doctrine That Enables Police Brutality*, NEW YORK TIMES: A SERIES ON GEORGE FLOYD AND AMERICA (2021) ("In practice, qualified immunity has become what Justice Sonia Sotomayor has called an 'absolute shield' that 'tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.'").

[3] It's worth noting that recent research casts doubt on the suggestion that officers are regularly surveying the legal landscape and are being trained in accordance with litigation outcomes. *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, UNIVERSITY OF CHICAGO LAW REVIEW (2021).

cues, and then matching them to patterns organized in the individual's long-term memory."[4] That study presented the results of an assessment of police recruit decision-making in use-of-force contexts, which "indicate[d] that recruits used an intuitive approach to make use of force decisions."[5] That study "found no evidence of recruits using a purely analytical approach to their force decisions."[6]

The main reason for this tendency toward an intuitive approach to use-of-force decisions is that the encounters in which these decisions are generally made tend to be rapidly unfolding and volatile situations that simply don't lend themselves to the type of analysis that would go into an officer assessing his or her risk of personal liability based on the type and level of force used.

The ***second*** reason the standard story about qualified immunity doesn't hold water is that the available data seem to undermine the claim that the defense accounts for a significant share of police litigation outcomes. For example, the Legal Aid Society maintains a database of lawsuits (2,387 of them) filed against the New York Police Department (NYPD) between January 2015 and June 2018. Filtering those cases by disposition produces just 74 cases resolved in favor of the police defendants. Even if all 74 of those cases were disposed of on qualified immunity grounds, we're still only talking about 3% of the cases in the database.[7]

I'd also like to point the subcommittee to an empirical assessment of qualified immunity published in a 2017 issue of the Yale Law Journal by UCLA law professor (and noted qualified immunity abolitionist) Joanna C. Schwartz, which makes a case for abolition by illustrating that it "rarely serve[s] its intended role as a shield from discovery and trial."[8] Her study found that less than 4% of the more than 1,100 cases analyzed resulted in whole or partial grants of dismissal or summary judgement on qualified immunity grounds.[9] As professor Schwartz noted in the *Wall Street Journal* less than two years ago, unsuccessful cases against police tend to fail because of other procedural and substantive infirmities.[10] In that very same letter to the editor, professor Schwartz went on to note that "abolishing qualified immunity won't flood the courts with frivolous suits,"[11] undermining any suggestion that the explanation for why qualified immunity doesn't account for a particularly large share of police litigation outcomes owes to some large number of cases that did not get filed in anticipation of being disposed of on immunity grounds.[12]

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[4] See, e.g., Hine, et al., *Exploring Police Use of Force Decision-Making Processes and Impairments Using a Naturalistic Decision-Making Approach*, CRIMINAL JUSTICE AND BEHAVIOR (Aug. 2018).
[5] *Id.*
[6] *Id.*
[7] *See,* CAPstat, NYC Federal Civil Rights Lawsuit Data, 2015 to June 2018, https://www.capstat.nyc.
[8] Joanna C. Schwartz, *How Qualified Immunity Fails*, YALE LAW JOURNAL 127, no. 1 (October 2017).
[9] *Id.* ("Qualified immunity was the reason for dismissal in just 3.9% of the cases in my dataset in which the defense could be raised, and just 3.2% of all cases in my dataset.").
[10] Joanna C. Schwartz, *Letters: Police Reforms Must Be Fair and Workable*, THE WALL STREET JOURNAL (June 18, 2020).
[11] *Id.*
[12] *See also*, Joanna C. Schwartz, "*Qualified Immunity's Selection Effects*," NORTHWESTERN UNIVERSITY LAW REVIEW 114, no. 5 (March 2020) (concluding that "Attorneys do not reliably decline cases vulnerable to attack or dismissal on qualified immunity grounds.").

The ***third*** major flaw in the dominant narrative about qualified immunity is that abolishing the defense wouldn't actually result in police officers having more financial skin in the game, because it's not actually the true source of financial protection for police officers. That's because when individual police officers are successfully sued, their employers indemnify them against liability—that is, they pick up the tab—pursuant to contractual or statutory obligations to do so. It's worth going back to the work of professor Schwartz, who empirically assessed the role of indemnification in police litigation and found in a 2014 study that, "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement."[13] There is simply nothing in the available data indicating that abolishing qualified immunity would do anything to change this standard (indeed, nearly universal) practice.

While the idea that qualified immunity reform will significantly reduce both justifiable or excessive police uses of force is misguided, there are nevertheless a number of troubling examples in which dubious factual distinctions from prior cases have been drawn in order to grant qualified immunity on the grounds that the asserted right was not "clearly established" at the time. This, on its own, is reason enough to consider proposals to reform qualified immunity with an eye toward limiting the number of cases in which constitutional harms go without redress.

In a 2001 case called *Saucier v. Katz*,[14] the Supreme Court stated that qualified immunity analyses should first assess whether there was a rights violation *before* assessing whether the right was clearly established. Unfortunately, however, the Supreme Court reversed itself eight years later in a case called *Pearson, et al. v. Callahan*,[15] which gave judges the discretion to skip the first of these two questions.

The short version of my ***middle-ground proposal*** is to legislatively re-establish the *Saucier* sequence. Requiring courts to confront the constitutional or statutory questions before them in §1983 cases would both promote the development of the law in the civil rights arena, and more-quickly shrink the scope of not-yet-established rights. Preventing courts from leaving these questions unanswered may not eliminate the potential for grants of immunity based on dubious and absurdly narrow factual distinctions from prior precedents, but it will prevent situations in which multiple officers in the same jurisdiction get to avail themselves of qualified immunity in cases involving the same conduct over a period of time because courts have continually punted the question of whether the conduct was unlawful—and it would do this while maintaining the availability of the defense in cases in which sufficient legal notice was lacking, which, I think is important, given the signal the defense's abolition might send to an

[13] Joanna C. Schwartz, *Police Indemnification*, NEW YORK UNIVERSITY LAW REVIEW, Vol. 89, No. 3 (Jun. 2014).
[14] 533 U.S. 194 (2001).
[15] 555 U.S. 223 (2009).

embattled law enforcement community that understandably feels unfairly demonized[16] (even if the abolition of the defense won't change all that much in practice).

Another reason I think it's worth considering re-establishing the *Saucier* sequence is that it is often assumed that grants of qualified immunity based on the "clearly established" prong of the analysis involved actual violations of constitutional or federal civil rights; but this is not obviously the case. Making it clear to the public that liability is denied because the conduct wasn't actually unconstitutional is an important end to pursue, to the extent grants of immunity undermine public trust in law enforcement.

I hope this statement contributes to a better understanding of the realities underlying this important debate, and I look forward to addressing any questions raised by these points as best I can.

Thank you.
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[16] I should note, too, that police departments around the country—particularly in large urban areas—are experiencing a long-standing recruitment and retention crisis (*see*, *The Workforce Crisis, and What Police Agencies Are Doing About It*, POLICE EXECUTIVE RESEARCH FORUM (Sep. 2019); and *Survey on Police Workforce Trends*, POLICE EXECUTIVE RESEARCH FORUM (Jun. 2021). As such, being attuned to perceptions of members of the law enforcement profession can help stem the tide of this problem, which could be exacerbated by legislative action perceived as hostile, which, in turn, could have the effect of disincentivizing high-quality recruits and officers from continuing to pursue careers in law enforcement, thereby reducing the quality of policing and increasing the risk of misconduct.