Julia Yoo
IREDALE & YOO

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The problem with policing in the United States

IMMUNITIES FOR POLICE ARE EATING AWAY AT OUR CONSTITUTIONAL RIGHTS

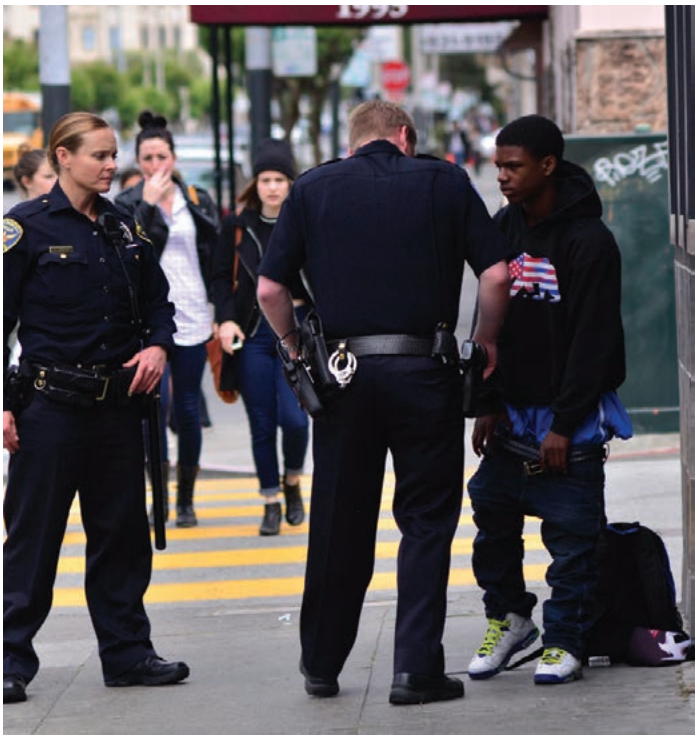
"Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services." (President Barack Obama's Task Force on 21st Century Policing.)

A fundamental tenet of our system of governance is that no man is above the law and both king and pauper must adhere to the same set of rules. But immunities for law enforcement, whether judge-created doctrines such as qualified immunity or other governmental immunities, erode the principle of equal enforcement of laws. Immunities destroy community trust and create the perception of a two-track system of power: Police officers may kill, beat, maim, and lie, while the communities they police are incarcerated and impoverished with no recourse and no forum to vindicate their rights.

In a country where our fundamental principle is equality under the law, our community members, particularly young people of color, do not feel as if they are being treated fairly. These immunities, eating away at our constitutional rights, send a clear message to victims of police misconduct: Law enforcement officials are above the law.

In federal court, the Supreme Court has minted get-out-of-jail-free cards for law-breaking police officers through the doctrine of qualified immunity. Qualified immunity protects officers from liability when they violate people's constitutional rights, unless they violate "clearly established" federal law. Even if a police officer violates someone's constitutional rights, the victim cannot obtain redress for their injuries unless that victim demonstrates the officer violated a "clearly established" right – meaning, a constitutional right explicitly recognized by a prior court ruling in nearly identical factual circumstances. Qualified immunity is purely a judge-created doctrine – it has no basis in constitutional or statutory text. Yet, qualified immunity is aggressively enforced by the Supreme Court where civil rights cases go to die. Nearly all of the Supreme Court's civil rights opinions have granted qualified immunity for defendant-officials. In the nearly 40 years since *Harlow v. Fitzgerald* (1982) 457 U.S. 800, the Supreme Court has immunized government officials from liability in approximately thirty cases. In the past four decades, civil rights plaintiffs have only prevailed in a total of three cases: *Hope v. Pelzer* (2002) 536 U.S. 730; *Groh v. Ramirez* (2004) 540 U.S. 551; and *Taylor v. Riojas* (2020) 141 S.Ct. 52.

Today, many lower courts vigorously shield officers from accountability unless victims can pinpoint other cases declaring essentially identical conduct unconstitutional. In June of 2020, the Supreme Court announced that it would decline to hear any of the cases pending before it on qualified immunity, leaving aggrieved victims of police violence without any hope of justice or accountability. Justice Clarence Thomas dissented from SCOTUS' denials, expressing misgivings about qualified immunity. Justice Thomas suggested future plaintiffs consider challenging additional constraints on civil-rights actions.



One of the cases SCOTUS refused to hear was *Jessop v. City of Fresno*, where the victim alleged that officers stole over $225,000 in cash and rare coins during a search of his home. The Ninth Circuit noted the act was "morally wrong," but protected the officers from suit by granting qualified immunity, because the Court had not previously held that stealing property seized under a search warrant was a constitutional violation. What is worse, *Jessop* refused to hold that stealing cash and gold coins *violates* the Constitution, meaning that it is still not clearly established and the next victim of theft will likewise be denied justice.

This is a direct result of *Pearson v. Callahan* (2009) 555 U.S. 223, in which the Court eradicated the requirement that courts first adjudicate whether the official's conduct violated the Constitution. As a result, district courts now grant qualified immunity without ever deciding whether a constitutional violation occurred in the first instance, creating a never-ending loop of constitutional violations: Victims cannot seek civil justice against officers who harmed them because the harmful conduct has not been "clearly established," but because so many cases are dismissed without the court addressing whether the challenged conduct was a violation, it can never become established. Cases like *Jessop* create constitutional stagnation, where the jurisprudence is never established, continuing to excuse the most egregious misconduct. This is particularly troubling in the advent

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ADVOCATE
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of new technologies in weaponry, where there can be no prior case addressing the constitutional limits of the new weapons.

In case the message to the victims that government officials are above the law is not clear enough, the courts afford officers yet another layer of advantage through interlocutory appeals. An officer who is denied qualified immunity is entitled to immediately appeal that ruling, which stays the litigation and adds years to litigation. This is an advantage no other litigant is entitled to. There can be no trust in a community where one side is treated with such deference and preference.

In California, the Bane Act protects the constitutional rights of the victims of police misconduct. Similar to the federal law which allows victims of governmental abuse to seek redress in federal court, the Bane Act allows Californians to seek justice in state courts. The Bane Act does not permit qualified immunity as a defense as some of the other states do. However, the Bane Act permits other immunities that are equally harmful, including absolute immunity given to officers who frame innocent people by planting evidence and lying under oath.

In 2017, a Los Angeles police officer accidentally filmed himself placing cocaine in a suspect's wallet. In July of 2020, the Los Angeles District Attorney's office revealed that a total of 25 LAPD officers were under investigation for falsifying records about arrestees' gang affiliations, implicating the rights of more than 750 people. Gang affiliations allow prosecutors to seek harsher sentences against defendants, which sometimes leads to innocent people pleading guilty to crimes they did not commit. In California, the fact that officers plant evidence, falsify records and lie under oath has no relevance. The immunity is absolute and victims may never seek justice for malicious prosecution under the Bane Act.

Why then, in the past four decades, have we failed to remedy the problems? It is because we as a community buy into the fear-mongering that without immunity, there will be universal lawlessness, some dystopian darkness that will fall. Some argue that taking away immunities for police officers would erode morale, deter people from applying to work as police officers, and incentivize officers on the job to stop enforcing the law. But there is no evidence to support such contentions. We had plenty of police officers before the Supreme Court introduced the "clearly established law" requirement in the 1980s, and officers did their jobs with honor. Indeed, officers who seek to ignore their oath of office unless they receive immunity for misconduct, cannot be trusted to wield deadly force.

Our acceptance that police officers who violate the law should be exempt from liability became crystal clear when California Senator Steven Bradford introduced SB 731 in 2020. This bill would have required decertification of law-breaking officers, meaning they would lose their license as police officers. It would have abolished government immunities that deny victims of police violence accountability and justice. This bill died on the Assembly floor after the excess insurers and police interests engaged in a campaign of disinformation and fear mongering. They threatened that officers would walk off their jobs in fear of losing their homes and pensions as a result of frivolous lawsuits. Some legislators accepted this argument, choosing to ignore the mandatory indemnification statute in the state of California. In an election year, our legislators were afraid and we as their constituents allowed them to be.

In addition to eroding any sense of equity in our communities of color, immunities also harm police officers, the majority of whom enter the profession with a true sense of purpose to serve the public. Immunities take away the public trust and confidence that is critical for officer safety and effective policing. It is time to bring honor to the profession and treat law enforcement officials like licensed professionals. It is time to hold our police officials and our elected officials accountable.

How to restore trust and confidence in law enforcement

In recent years, an unlikely coalition of progressives and libertarians seeking to end qualified immunity has emerged. Progressives argue that qualified immunity improperly denies recovery to victims and encourages police misconduct. Some legal conservatives and scholars have questioned qualified immunity's doctrinal foundations. These critics argue that the Supreme Court improperly and without authority created the doctrine, which was not enumerated in the Constitution or in any federal statute. Supreme Court justices at opposite ends of the ideological spectrum – Clarence Thomas and Sonia Sotomayor – have recently questioned the court's qualified immunity jurisprudence.

Through the courts

In *Kisela v. Hughes*, Justice Sotomayor criticized the Court's decisions for undermining government accountability by "sanctioning a 'shoot first, think later' approach to policing." In *Ziglar v. Abbasi*, Justice Thomas criticized the doctrine for straying from its common law foundations and recommended to his colleagues that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." We can rebuild trust and bring back accountability to our system when either the Supreme Court or Congress eliminates qualified immunity.

One of the paths to bringing justice to victims of misconduct is for civil rights attorneys to form a strong coalition. The National Police Accountability Project trains civil rights attorneys and files amicus briefs on behalf of victims of police misconduct in various circuit courts and the Supreme Court. They do so often in conjunction with the Cato Institute.

While it is unpredictable when the Supreme Court may find "an appropriate case," the civil-rights bar must, at a minimum, coordinate our efforts to avoid the kind of constitutional stagnation found in the Ninth Circuit in *Jessop*. While we wait for the appropriate case to find its way to the Supreme Court, practitioners

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must be strategic about the cases we bring and appeal. It would be a mistake to assume that the recent decision in *Tanzin v. Tanvir* signals SCOTUS's intent to abolish qualified immunity. While *Tanzin* held that damages remedy is appropriate relief under the Religious Freedom of Restoration Act, the Court explicitly declined to address qualified immunity because the parties did not present the issue. As Justice Thomas noted, "Both the Government and respondents agree that government officials are entitled to assert a qualified immunity defense when sued in their individual capacities for money damages under RFRA."

Through legislation

The second path is through local and national legislation. In 2020, members of Congress introduced legislation to abolish qualified immunity in the wake of the George Floyd killing, though Senate Republicans made clear they will oppose eliminating it. Ending Qualified Immunity Act is sponsored by not just a long list of Democrats, but also the Republican-turned-Libertarian Justin Amash, from Michigan, and, most recently, Representative Tom McClintock, a California Republican.

Emerging from this broad coalition is the Campaign to End Qualified Immunity run by Ben Cohen and Jerry Greenfield that is bringing together business leaders, creative artists, lawyers, advocates, and athletes to build support for federal solutions. Ben and Jerry have a long history of engagement in criminal justice reform. Ben and Jerry have now formed an impressive coalition of stake-holders, business leaders and activists, who come from a wide spectrum of political affiliations and beliefs. These include the Cato Institute, the ACLU, Players' Coalition, and the National Police Accountability Project. The coalition includes civil justice activists and leaders like Aloe Bacc, the Grammy nominated singer/songwriter who received the California Justice award of 2020 for his leadership in last year's effort to amend the California Bane Act.

These coalition members are calling on legislators across the country to do the right thing. With the Supreme Court leaving it to Congress to fix this ill for the moment, coalition members are working with representatives and senators from both sides of the aisle to introduce bills to limit or eliminate qualified immunity. On the state side, Colorado successfully passed a sweeping police-reform bill, which in part disallows qualified immunity as a defense to liability. States like New Mexico and New York are also introducing their own bills to repeal qualified immunity for law enforcement officials. To date, over 500 bills across the country have been drafted to address police misconduct and/or qualified immunity.

In addition to eliminating qualified immunity in federal courts, it is critically important that victims of misconduct have access to justice in their states' courts. In 2015, two professors examined 844 federal appellate cases for the years 2009 through 2012 involving qualified immunity. (Aaron L. Nielsen and Christopher J. Walker, "The New Qualified Immunity," Southern California Law Review 89 (2015): 34-35.) Of those 844 cases, courts decided the merits question first in 665 claims. Out of these 665 cases, the courts decided that there was no constitutional violation to begin with in nearly 92 percent of the cases in which they reached the merits. Even without qualified immunity, victims face enormous hurdles in federal courts.

Public perception of fairness

Equally problematic is that of public perception of fairness. One out of every four active federal judges today is a Trump appointee. Given the rhetoric that has come out of the White House in the past four years, victims of police misconduct have a deep sense of mistrust. This mistrust was undoubtedly amplified by the deadly riot at the Capitol on January 6, 2021, as the nation watched some police officers calmly allow barricades to open to the lawless mob and take selfies with domestic terrorists. The world witnessed Donald Trump incite violence and noted the disparate treatment of the largely white rioters compared to the treatment of protesters this past summer who were beaten, shot with projectile weapons, tear-gassed, soaked in chemical weapons, kettled and subject to mass false arrest – for peacefully chanting and holding signs.

The events of the January insurrection should be viewed in context of the events in 2007, when the Capitol police arrested 200 anti-war activists, led by veterans, who sought to peacefully deliver a letter to the door of Congress. A long road to healing awaits this country. And the community's hunger and demand for more police accountability was demonstrated by the number of local ballot initiatives that passed in November setting up new community controls and oversight. This is why the time is now to amend the California Bane Act to eliminate immunities and to allow the victims of deadly force to bring claims under wrongful death so that victims may seek justice in state courts.

Immunities create a toxic environment of community distrust in which we publicly observe bad officers act with impunity. Undoing the harm of qualified and absolute immunities is one step, but a significant step, towards true transformation of the system of racial inequality. We must ensure that officers who abuse the power vested in them by the people are held accountable when they violate the rights and lives of the very people they have sworn to serve and protect.

Julia Yoo is a partner with Iredale & Yoo *in San Diego. She is the President of the National Police Accountability Project and a member of the Board of Governors of the Consumer Attorneys of California.*