A STUDY OF POLICE USE OF FORCE AND QUALIFIED IMMUNITY

INTRODUCTION

Expectations for police are evolving as communities and states reexamine their relationships with law enforcement. The institution of policing in the United States has undergone different phases of self-governance and stratification, and thanks in part to the country's federalist design, it has largely avoided standardization or oversight. As a result, American police do not have a common understanding of when and how to use force in interactions with suspects or the public. Without a clear guideline from Congress, the courts have left the decision making to officers themselves. Relying on officers to determine the reasonability of their own conduct is central to the legal doctrine of qualified immunity (QI), which is defined as legal immunity of public employees from liability for violations of individual civil rights while conducting their job, unless the employee violated a clearly established constitutional right. Using QI as a legal defense for police use-of-force poses major questions about police accountability, civil rights, and individual and public safety.

SCOPE OF THIS STUDY

This study is a continuation of the previous Fact Sheet by the League of Women Voters of Montgomery County (LWVMC), "A Study of Civilian Oversight of Law Enforcement and Police Accountability," (December 2022).[1] This study examines use of force policies and practices by police departments in Montgomery County, the state of Maryland, and across the United States. It also considers recommendations for police training and disciplinary policies for using force in law enforcement interactions with the public, as well as excessive use of force incidents. This study also examines the legal doctrine of QI as it is granted to US law enforcement officials by the courts and how this application affects police accountability efforts for excessive use of force.

While the League of Women Voters of the United States (LWVUS) has positions on some of these aspects of policing, it currently lacks a formal position on QI. This Fact Sheet concludes with a series of consensus questions which, if adopted by the LWVMC membership, will give the organization a specific set of positions upon which to base future activities and advocacy as they relate to police use of force and QI of police.

ERAS OF POLICING IN THE US

Use of force to maintain public safety is a necessary part of policing but as we noted in the earlier Fact Sheet, violence, brutality, and racism have been recurring problems in policing throughout the history of the U.S.[2] Early police departments in the American South originated from 18th-century slave patrols formed to apprehend runaways, while in the North the earliest police departments were enforcement squads hired by local politicians to maintain order. Brutality against Blacks in the South under Jim Crow laws and against marginalized populations in northern cities, such as the poor, immigrants, and the mentally ill, was widespread. Police were allowed to make their own internal rules and they had little oversight or training. They were rarely held accountable for injury or death of civilians at the hands of officers.[3]

Since its origins, policing has gone through multiple "eras" of evolution; the earliest is commonly referred to by criminal justice researchers as the Political Era (1840-1930). This marked the establishment of the first municipal police departments, which were heavily influenced or outright controlled by political machines and made officers vulnerable to corruption or termination based on the interests of political leaders. Though they were not typically required to undergo formal training, officers were highly visible on foot patrol in their precincts.

This period was followed by the Reform Era (1930-1970), sometimes also called the "professional" era, when police departments sought legitimacy and recognition of law enforcement as a separate institution. This era saw the reduction of political patronage in hiring decisions and police departments began to separate themselves from the rest of government, with more autonomy than most agencies. Enforcing the law was the primary goal, and criminal law and police training academies seeded technical expertise.[4] Yet this training, particularly during the fraught Civil Rights movement of the 1950s and 60s, neglected the police's earlier relationship with citizens and communities. The findings of the Kerner Commission appointed by President Lyndon Johnson in 1968 to determine the causes of the Detroit riots in 1967 underline just how much training had failed in the service of public safety. The Commission determined that it was in fact police brutality and systemic racism that caused the urban unrest and recommended policies to improve training and promote equity in departments by hiring more minority officers.[5]

This ushered in the Community Policing Era, which began in earnest in the 1980s and continued into the 2000s. Emphasizing police/community collaboration, this approach introduced forensic science and technology-assisted surveillance, as well as educational programs on crime reduction and public safety. It also saw increased demands for police to answer for stop-and-search tactics, racial profiling, heightened fears of terrorism, and uneven levels of federal funding for community policing.[6] The Community Policing Era could not erase the us-vs.-them attitude in many police departments sowed by the War on Drugs and the electoral successes of politicians campaigning on "law and order" in the 1960s and beyond. Over-policing of communities of color was common and while the press periodically reported police killings of civilians, who were disproportionately Blacks and other minorities, little was done to examine the root of the problem.[7] Police academies began to adopt an aggressive, military approach that focused on training in firearms and self-defense rather than skills like conflict resolution. The federal 1033 Program established in the 1990s allowed local police to purchase surplus military equipment including items like armored vehicles and grenade launchers.[8]

Throughout these eras, policing in the U.S. has remained a highly decentralized service. Under our federalist system, the national government has little control over the activities of local or state policing, which is considered to be a local government function. This has hindered attempts by federally appointed commissions and task forces to enforce reforms to policing and resulted in a hodge podge of use of force policies, which until the mid-1980s varied widely.[9] The standard for how police should behave in pre-arrest scenarios, where the majority of police killings occur, thus remained a grey area. It was in this context that the Supreme Court created a standard for judging police use of force that would become a cornerstone of all decisions regarding police use of force for the next thirty years.

THE RULING IN *GRAHAM V. CONNOR*

The landmark 1989 Supreme Court case *Graham v. Connor* (490 US 386) provided a framework for judging whether police have used "excessive" or "reasonable" force in an investigatory stop. The case was brought by Dethorne Graham against M.S. Connor, a police officer in Charlotte, NC. Graham, who had diabetes, attempted to buy juice from a convenience store to counteract a reaction to insulin but rushed back out of the store when he saw the checkout line was too long. Connor, observing what he considered to be odd behavior by Graham, approached the plaintiff and questioned him. Other officers arrived as backup and Graham was handcuffed but released once they determined nothing unlawful had happened in the store. During that time, Graham was denied treatment for his diabetic condition and sustained injuries while handcuffed.[10]

A NEW STANDARD FOR POLICE USE OF FORCE: *GRAHAM V. CONNOR*

Graham first filed suit in Federal district court claiming that Connor used excessive force and violated his Fourteenth Amendment right to due process. On appeal judges disagreed on whether the case should have been based on the Fourth Amendment's protection against unreasonable search and seizure, or on the Fourteenth Amendment's protection against infringement of individual civil rights. The case was ultimately brought before the Supreme Court, which determined that a Fourth Amendment analysis was the only Constitutional framework suitable for determining the reasonableness of use of force in a pre-arrest scenario because it balanced the "reasonable" needs of the government to maintain order against the individual's right against unreasonable searches and seizures. Using this Fourth Amendment analysis, the Court ruled that when police are sued for using excessive force in investigatory stops, the courts must be guided by what a "reasonable police officer on the scene" would do in that situation, not what a "reasonable man" would do, the legal standard generally employed by both civil and criminal courts. The court ruled that due to the inherent dangers in policing and the need for split-second decisions, judges or juries could not consider evidence of the officer's motivation or intent for using force or any facts unknown to the officer at the time of the event. According to the Court the totality of circumstances for determining reasonable officer behavior can include, but is not limited to, the immediate threat to the safety of the officer or others; whether the subject is actively resisting; the time available to the officer to make decisions, in circumstances that are tense, uncertain and rapidly evolving; the seriousness of the crime(s) involved and the danger the subject poses to the community. The Reasonable Police Officer standard has since become deeply ingrained in police culture and informs how law enforcement officials shape policy.

THE IMPACT OF *GRAHAM V. CONNOR*

Nearly all police manuals continue to lift wording from *Graham v. Connor* as a necessary guide for cadets and police publications praise the precedent for enforcing police officers' rights to perform their duties without suffering injuries. Yet, according to University of Pennsylvania law professor and ex-police officer Seth Stoughton writing in the Regulatory Review, the *Graham* decision did not adequately describe the boundary between reasonable and necessary force, leaving both courts and police officers with imprecise guidance. Stoughton notes that the lower courts have adopted the "split second" assumption, focusing on the precise moment at which force was used rather than looking more broadly at whether an officers tactical decisions leading up to the use of force were reasonable. For civilian juries determining what a "reasonable police officer" would have done under the same circumstances leads to speculation and reinforces the view that only another police officer could judge the actions of a peer.[11]

Other critics have pointed out that the Graham decision's focus on Fourth Amendment analysis over Fourteenth Amendment claims for violation of substantive civil rights, limits the ability of citizens to bring lawsuits under Title 42 of the United States Code, Section 1983. This section was created to enable citizens to sue those operating "under the color of law" for such violations and remains one of the few civil remedies available to those who allege mistreatment or brutalization by police. Further, by obviating the ability of judges and juries to examine the intent of police officers, *Graham* creates an unjust burden on plaintiffs as it fails to take into consideration the racial bias that underlies many police interactions with the public.[12]

The sheer number of police officers nationwide who have been exonerated of killing unarmed civilians under the Graham standard concerns lawmakers and legal scholars. Nonetheless, it remains the standard by which police use of force is judged and it appears that neither the Supreme Court nor Congress intends to counterattack it. One exception was a 1994 Congressional mandate authorizing the Department of Justice (DOJ) to investigate police departments, which they determined had patterns of civil rights violations. DOJ was able to secure consent decrees from such departments, which were essentially court-ordered "improvement plans" with agreed-on reforms monitored by an oversight board.[13] Consent decrees have had mixed success, however. In 2014 prompted by police killings of four

young Black males and the public's lack of trust in police, then President Barack Obama convened the President's Task Force on 21st Century Policing to discuss how to make policing more accountable. The resulting report emphasized the need to reform police culture from a warrior mentality into one that emphasizes police officers as guardians and promoted the use of best practices, particularly in the use of force. This re-evaluation of the purposes and methods of policing has been continued since then by criminologists, law enforcement officials and by organizations such as the Police Executive Research Forum (PERF), an independent research organization based in Washington, DC.[14]

BEST PRACTICES IN USE OF FORCE AND DE-ESCALATION

As we have shown, policing in the U.S. has traditionally been characterized by a police-centered approach, especially where vulnerable populations are concerned. Ensuring officer well-being, relying on officer discretion, and enabling incentivized outcomes of policing, such as quota systems for arrests, have been the paramount considerations that have governed interactions between law enforcement agents and those who are suspected of illegal activity. The notion of what is and what is not appropriate use of force in policing, however, has evolved over time. Officers are increasingly expected to use de-escalation techniques by default rather than relying on use of force.

Since 1976 PERF has identified best practices and developed policy to improve the delivery of police services. Its board of directors is made up of active police chiefs from across the US and Canada. In its 2016 report, "Guiding Principles on Use of Force," PERF describes a set of tenets derived from research, field work and discussions with law enforcement professionals of all ranks, including Tom Manger, then the police chief of Montgomery County and currently the chief of US Capitol Police. "These Guiding Principles are particularly relevant to situations that involve subjects who are unarmed or are armed with weapons other than firearms," Manger stated for the report. "The Guiding Principles also are relevant to police encounters with persons who have a mental illness, a developmental disability, a mental condition such as autism, a drug addiction, or another condition that can cause them to behave erratically and potentially dangerously."[15]

The following statements summarize these principles and have direct implications for policing policy. We also provide examples where Montgomery County or the state of Maryland either live up to or fail to comply with these principles:

1. **The sanctity of human life should be at the heart of everything the agency does.** Law enforcement agency mission statements, policies, and training curricula should emphasize both the sanctity of all human life—including criminal suspects and police officers—and the importance of treating all persons with dignity and respect. In Montgomery County, for example, this notion is embodied in Bill 27-20E, enacted on August 10, 2020, which requires the Montgomery County Police Department (MCPD) to prioritize the safety and dignity of every human life, promote fair and unbiased policing, and protect vulnerable populations.[16]

2. **Agencies should continue to develop best policies, practices, and training on use-of-force issues that go beyond *Graham v. Conner*.** The 1989 ruling should be the starting point, not the goal, for determining acceptable use of force by police. Law enforcement agencies should give officers concrete guidance for meeting this legal standard and also to help officers avoid situations where split-second decisions are likely to result in injury or death to themselves or others.

3. **Police use of force must meet the test of proportionality.** Officers should use only a level of force necessary to mitigate the threat and achieve a lawful objective safely and effectively. Officers should use critical decision-making to choose an appropriate response option and be prepared to reassess the situation as it evolves. While Bill 27-20 cited above prohibits MCPD

from using deadly force except as a last resort, it also requires MCPD to develop a use-of-force policy that protects "vulnerable populations," defined as: people with disabilities, children, the elderly, pregnant women, people with limited English proficiency, people with mental or behavioral disabilities or impairments, and people disproportionately impacted by inequities. However, as of this writing the agency has not complied with the requirement to create such a policy.[17]

4. **De-escalation should be adopted by all law enforcement agencies as a formal policy.** Law enforcement agency directives should make it clear that de-escalation is the preferred approach in most if not all critical incidents. DOJ defines de-escalation as "the strategic slowing down of an incident in a manner that allows officers more time, distance, space and tactical flexibility during dynamic situations on the street." DOJ views de-escalation as more than a set of specific skills—the department considers it an overarching approach to incident resolution and community policing.[18] PERF maintains that officers should be adept in the art of de-escalation and required to receive ongoing training in de-escalation theory and practice. Supervisors should hold officers accountable for adhering to de-escalation procedures.[19] De-escalation can take many forms. Sometimes it is as simple as the choice of words an officer uses in an interaction. According to a study of traffic stops of Black drivers published by the Proceedings of the National Academy of Sciences for example, encounters where police officers begin by issuing a command or failing to give a reason for the stop are three times more likely to escalate.[20] Failure to de-escalate can have dire consequences, as exemplified by the fatal shooting of Hamed Ghorouni Delcheh by Montgomery County Sheriff's Office Deputy Domenic Mash on July 20, 2022. Delcheh, a home invasion suspect, was acting aggressively while carrying a knife. A bystander was also shot.[21]

5. **Document use-of-force incidents and review data and enforcement practices to ensure that they are fair and non-discriminatory.** Law enforcement agencies should issue regular reports to the public on use-of-force data. Moreover, all police incidents that result in death or serious bodily injury should be reviewed by specially trained personnel. PERF maintains that law enforcement agencies should be transparent in providing information following use- of-force incidents and that these reports can help to increase public trust in policing as well as guide improvements to policy and officer training. The Maryland Public Safety Article 3-524 (D) (I) stipulates that police officers must "fully document all use-of-force incidents that the officer observed or was involved in."[22] MCPD use-of-force data is available online through annual reports and dataMontgomery.[23] The database, however, is not user friendly and critical data elements are lacking. The Montgomery County Office of Legislative Oversight has found inconsistencies in dataMontgomery datasets about police interactions with the public, namely traffic and pedestrian stops.[24] Moreover although, MCPD's "Annual Use-Of-Force Report 2022," tallies use-of-force incidents, it does not characterize the nature of the incidents in any detail or provide demographic information on individuals included in any of these data points.[25]

As it stands, Maryland and Montgomery County have enacted legislation in recent years aimed at making policing more transparent and accountable. But if we use the PERF Guiding Principles as a model, much more can be done to encourage de-escalation and limit use of force.

De-escalation training can be effective, at least in the short term. In 2019 the Metro Police Department in Louisville, KY, worked with researchers to implement PERF-developed de-escalation training. The result was a 28.1% decrease in use-of-force incidents, a 26.3% reduction in citizen injuries, and a 36% reduction in officer injuries.[26] Yet despite the positive outcomes such training could have for officers' well-being as well as those of civilians, there are few legal deterrents to officers using force in the line of duty. This is due in part to an inherent safeguard most officers receive when making the kinds of split-second decisions PERF's Guiding Principles hope to avoid. That safeguard is qualified immunity.

DEFINING QI AND HOW IT RELATES TO POLICE ACCOUNTABILITY

As noted above, QI is a legal doctrine that protects state and local officials including law enforcement officers from individual liability while conducting their jobs, unless the official violated a clearly established constitutional right. "Clearly established" means that at the time of the official's conduct, the law was sufficiently clear that every reasonable official would understand that what they were doing was unconstitutional.

QI was first established to protect government employees from frivolous lawsuits, but over time its application has broadened to create a kind of shield against holding officials—notably police officers—accountable. To show that a right is clearly established, a plaintiff must identify an earlier decision that found the same conduct under the same circumstances to be illegal or unconstitutional. If no decision exists, QI protects the official by default.

QI is not meant to protect the most grossly incompetent or egregious behavior by government officials. Yet because courts can be extremely specific about what qualifies as a prior case, critics of the doctrine argue that a significant amount of behavior skirts accountability even by reasonable standards. For example, a man sued Nashville police officers in 2015 for allowing their K-9 dog to bite him while he lay on the ground with his hands still.[27] The court granted the officers QI because the plaintiff was *sitting with his hands raised*, rather than *lying on the ground with his hands at his side*, as in the prior case he attempted to cite as precedent.[28]

Prior to QI, the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, first provided the mechanism to sue state actors for civil rights violations. Those state actors could be sued for personal liability.[29] In 1967 the court established QI when it ruled in the case of *Pierson v. Ray 386 U.S. 547, 557* that government officials who acted "reasonably and in good faith" were shielded from strict liability.[30] The case stemmed from Mississippi police officers who arrested a group of civil rights activists and violated the group's Fourteenth Amendment rights. These officials were exonerated because according to Mississippi state law at the time, they had acted in good faith and could not be held personally liable for their actions. That state law was later deemed unconstitutional.

In 1982 the Court ruled in *Harlow v. Fitzgerald* that QI was granted to all government officials "performing discretionary functions," saying they "generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known."[31] The court argued this was necessary to balance the need to hold government officials accountable for violations of constitutional rights, against the need to protect those officials from "harassment, distraction, and liability when they perform their duties reasonably."[32]

UCLA law professor Joanna Schwartz argues this system fails to prevent costly and frivolous lawsuits against government officials. In her 2017 analysis of 1,183 cases filed against state and local law enforcement defendants in five federal court districts, Schwartz found that only 3.9% of cases were dismissed on grounds of QI when such a defense could be raised.[33] This means that not only are cases proceeding to trials, but since law enforcement officials are almost always indemnified from personal liability, municipalities usually cover police legal settlements, making them ultimately a financial burden on taxpayers.[34]

QI is not a federal statute—it is enshrined into law at the state and sometimes local level and can apply to state and local officials. The Supreme Court, Congress, and the states have the power to eliminate QI through legislation or judicial precedent and eliminating the doctrine would immediately apply to all government workers under the purview of that authority. Some recent instances of banned or limited QI are:

- **New Mexico:** banned QI for government employees who violate someone's constitutional rights when it passed the New Mexico Civil Rights Act in 2021.[35]
- **Colorado**: banned QI for police officers in 2020. The Enhance Law Enforcement Integrity Act allows citizens to bring individual lawsuits against Colorado police officers for alleged civil rights violations but caps potential judgements against them at $25,000.[36]
- **Connecticut**: made it easier for individuals to sue officers in civil court for damages in cases of police misconduct under a 2020 state law.[37] Connecticut's law still grants police officers QI if they "had an objectively good faith belief that [their] conduct did not violate the law," without defining either "objectively" or "good faith belief." The law also does not make officers personally liable for such damages and requires that their employer indemnify them unless the officer committed a "malicious, wanton or willful act."
- **New York City**: ended QI for New York Police Department officers in instances of unreasonable search and seizure and excessive use of force per a 2021 law by the city council.[38] However, the law did not apply to other government workers including corrections officers or those in child services. A pair of bills were introduced in the New York state legislature this year to reform QI, but they are still in committee.

Most state efforts to ban QI have failed.[39] Maryland made one such attempt in 2023: the Police Immunity and Accountability Act, sponsored by State Del. Jheanelle Wilkins, D-Montgomery, was meant to end QI as a legal defense.[40] However, it was significantly amended in committee to remove all references to QI and its only function is that a court must "notify the Maryland Police Training and Standards Commission of the filing of a civil action against a police officer involving allegations that the police officer wrongfully caused the death of or serious bodily injury to an individual."[41]

A Pew Research Center opinion survey in 2020 found that two-thirds of Americans (66%) supported civilians' ability to sue police officers to hold them accountable for misconduct or excessive use of force.[42] The same survey found that 64% thought police did not use the right amount of force in each situation, and 69% felt police did not do a good job of holding officers accountable for misconduct. Supreme Court justices, conservative and liberal, also have questioned the application of the QI doctrine in recent years. Justice Clarence Thomas has said the doctrine's legal standing is shaky and that the "clearly established law" test is not stated in Section 1983.[43] Justice Sonia Sotomayor has called out the court for using QI as an "absolute shield" and criticized its interpretation of "reasonable" officer behavior in multiple rulings.[44]

Why has QI remained in use until now? The Supreme Court has written in various rulings that QI allows police to make judgment calls in fast-moving, high pressure and dangerous situations. As such, some supporters of QI have raised concerns that eliminating it altogether would be a deterrent for police to carry out their jobs or join the field altogether. Law enforcement and their benevolent organizations frequently make this argument in their support for QI.[45] Since the doctrine has been limited in just a few jurisdictions in recent years, little data exists to support or disprove this argument. Another commonly made point in favor of QI is that eliminating it would cause police to suffer financially but this argument is disputed by advocates of reform since, as previously noted, police are already indemnified from personal liability in most cases. QI is not guaranteed, but as the Reuters analysis shows, the courts are more likely to side with police than plaintiffs in QI cases.[46]

LWV POSITIONS ON QI

At present, neither LWVUS, LWVMD, LWVNCA nor LWVMC have positions on QI but that has not prevented some Leagues from speaking on the issue. These leagues have relied on the racial justice resolution passed by delegates of the 2020 Convention to address QI,[47] which states in part, "the League believes in individual liberties, civil rights, human rights, and voting rights writ large…that the League

advocates against systemic racism in the justice system and, at a minimum, to prevent excessive force and brutality by law enforcement."

In 2021, the League of Women Voters of Massachusetts submitted testimony to the state's Special Commission on Qualified Immunity, urging the commission to "recommend the end of the qualified immunity doctrine [in Massachusetts] so that we protect the civil rights of all residents."[48] A bill had been proposed in the state legislature to eliminate the doctrine and the testimony countered claims by opponents of the bill that it would cause police officers to "lose their homes." The Special Commission ultimately chose not to amend the doctrine.

In 2022, the LWVUS referenced QI in a statement after the George Floyd Justice in Policing Act passed the US House of Representatives.[49] The LWVUS lamented that the bill "falls short of our goals for ending qualified immunity, preventing quick-knock raids, and ensuring that individuals are able to demand accountability when officers violate their constitutional rights." The bill has not made it out of the U.S. Senate.

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CONSENSUS QUESTIONS

Does the LWVMC membership wish to establish positions on police use of force and/or QI and if so, what would those positions be?

1. Should policing be guided by the following principles in its use of force policies (see page 4-5 for more details)?
    a. The sanctity of human life should be at the heart of everything the agency does.
    b. Agencies should continue to develop best policies, practices, and training on use of force issues that go beyond *Graham v. Conner*.
    c. Police use of force must meet the test of proportionality.
    d. De-escalation should be adopted by all law enforcement agencies as a formal policy.
    e. Document use of force incidents, and review data and enforcement practices to ensure that they are fair and non-discriminatory.
2. Should police officers be afforded qualified immunity? (Qualified immunity is defined as legal immunity of public employees from liability for violations of individual civil rights while conducting their job unless the employee violated a clearly established constitutional right.)
3. Should the doctrine of qualified immunity be amended in order to protect individuals' civil liberties and constitutional rights, and to make police liable for violations of those rights?

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