



# Policing, Qualified Immunity, and the Rise of the Warrior Cop

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**T**he death of George Floyd under the knee of a Minneapolis police officer triggered a once-in-a-generation groundswell of public awareness about policing and injustices embedded in the justice system. Street protests and demonstrations, mostly peaceful, emerged in more than 2,000 cities and towns and in all 50 states.

Florida has not been immune to these protests. Concerns about excessive

force continue to crop up in places such as Tallahassee,<sup>1</sup> Tampa,<sup>2</sup> Jacksonville,<sup>3</sup> Sarasota,<sup>4</sup> and Miami, among others. For example, in 2014, an unarmed black man was killed in Pasco County<sup>5</sup> (north of Clearwater) after county sheriffs' deputies mistook a hand movement for a reach for a gun during a small-scale prescription drug bust. Concerns about excessive force and inadequate training led to a formal agreement<sup>6</sup> between the U.S. Department

of Justice and the city of Miami's police department to institute, monitor, and enforce a renewed commitment to best practices in 2016.

### **The Taxpayers' Burden of Police Misconduct**

Protests aside, police misconduct is expensive. Between 2000 and 2015, The Wall Street Journal reported<sup>7</sup> that the 10 largest US cities paid out a combined \$1 billion for police misconduct claims. These cities paid \$248 million in 2015 alone, a significant increase from 2000. Police misconduct claims accounted for more than two-thirds of the police payouts in New York City; Chicago; Philadelphia; Washington, D.C.; Dallas; and Baltimore between 2000 and 2014.

In Florida, a lawsuit against the Palm Beach County<sup>8</sup> sheriff cited a series of 10 civilian payouts and civil court judgements over 18 months against deputies, amounting to \$6 million, as evidence of a "culture of excessive force." A 10-month investigation by the Orlando Sentinel<sup>9</sup> found the Orlando Police Department used force 3,100 times between 2000 and 2014. These incidents injured 1,900 people with most requiring professional medical attention. Lawsuits resulted in payouts of \$3.6 million for excessive force. Interestingly, while use of force was common among officers, the Sentinel found just five percent of the cops accounted for one quarter of the incidents.

This trend toward more reports of police misconduct and greater payouts is strikingly at odds with U.S. crime rates. Crime, including violent crime, has fallen dramatically<sup>10</sup> over the past twenty years.

While crime rates increased somewhat between 2014 and 2016, the reversal was not dramatic and may well reflect a plateau rather than a long-term trend upward.

### **More Training is Not Enough**

The question then becomes: Are there policy reforms that can reduce instances of excessive use of force and police misconduct?

Training is part of the solution but not enough in and of itself. Weeding out applicants with a track record of use of force also would help. Those with repeated accusations or claims of excessive force should be reassigned to positions that do not require interactions with suspects, or they should be fired. Training, for its part, could do more to emphasize de-escalation and non-lethal alternatives to firearm-dependent approaches to use of force.

Training could also include what the business world calls "cultural competency": understanding, communicating, and interacting productively with people from different cultures. While the level of stress police undergo is different from the business world, and requires different approaches, the issues of communication and interpretation are similar to those working in aligned occupations such as social work, clinical psychology, and law. Department policies could also do a much better job of helping law enforcement officers evaluate when and how force should be applied or used. Arrests for nonviolent offenses where the suspect is known -- Eric Garner selling cigarettes on a sidewalk in New York or George Floyd passing a counterfeit \$20 bill in Minneapolis -- may not be suitable for

applying deadly force.

But these strategies and recommendations have been around for decades. The continued frequency of excessive use of force cases suggests more systemic reform would be of greater value for many law enforcement agencies. In these cases, the problem is not an isolated arrest or a “bad apple.” The scale and variety of the incidents suggests law enforcement agencies should examine patterns of behavior and judgements in conflict situations.

### **Qualified Immunity**

Systemic change is difficult without institutional change.

One of the more important institutional reforms supported by those from both the political left and right would be reforming the concept of “qualified immunity.” Qualified immunity is not a specific policy, but rather a judicial doctrine. In theory, qualified immunity protects law enforcement officers from undue financial liability if they commit acts while performing their job. Their work puts them in inherently risky situations, sometimes requiring snap judgements. Subjecting law enforcement officers to financial liability because they made an error in judgement in an uncertain moment of high tension would prevent them from performing their jobs. Imagine a cop hesitating to rescue a child from a life-threatening assault because they were worried about making the wrong decision and being sued.

On the surface, qualified immunity seems completely reasonable. Police need to be incentivized to protect citizens from personal and property damage. They rarely

earn enough to retain attorneys in the event they are sued.

In practice, qualified immunity has become a shield for even the most egregious behavior. The courts have interpreted the doctrine so narrowly that even police officers that violate the constitutional rights of suspects are immune to civil penalties. An analysis of 9,225 civil cases<sup>11</sup> where local jurisdictions or police were found liable for damages by law professor Joanna Schwartz found less than one percent of the officers involved were held personally responsible for financial damages (amounting to 0.2 percent of the entire financial payout by governments).

When the U.S. Supreme Court first introduced the concept, the intent was to protect police departments from nuisance lawsuits or attempts by trial attorneys to sue for damages despite good faith attempts to enforce the law. Schwartz’s research, however, found that the doctrine reduces the number of lawsuits brought because, in part, attorneys do not think they can win.

The doctrine has also become increasingly porous and broad. As federal judge Don Hewitt wrote in one legal opinion, “To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior — no matter how palpably unreasonable — as long as they were the first to behave badly.” Professor Schwartz is even more blunt:<sup>12</sup> “Qualified immunity is historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of constitutional law.”

David French, an attorney with impeccable conservative credentials,

writes in the National Review<sup>13</sup> that “after generations of judges have interpreted the statute, the phrase ‘shall be liable’ has come to mean ‘may occasionally be liable.’” Even officers who have exhibited gross negligence -- such as breaking down the wrong door and shooting an innocent person -- cannot be found criminally liable. Soberingly, under current judicial doctrine, killing someone who is innocent does not count as a violation of their constitutional rights.

Rolling back qualified immunity has unusually broad support. One friend of the court brief<sup>14</sup> arguing for dismantling this doctrine was filed on the behalf of such ideologically diverse organizations as the American Civil Liberties Union, the Second Amendment Foundation, Americans for Prosperity, the National Police Accountability Project, Reason Foundation, Freedom Partners Chamber of Commerce, the Institute for Justice, and the Law Enforcement Action Partnership.

### **Malpractice Insurance for Police Departments**

But reining in qualified immunity probably does not go far enough. The remedy still relies primarily on the court system which compartmentalizes use of force and dilutes the impact into discrete events. Court cases follow lengthy investigations and are drawn out over years. They take a life of their own, often distancing the incident and its consequences from the broader issues. Each case is viewed as a discrete incident rather than an indication of a pattern that needs to be addressed systemically.

A potentially more far-reaching solution would require police departments to carry the functional equivalent of private malpractice insurance.<sup>15</sup> University of Maryland sociologist and Brookings Institution scholar Rashawn Ray<sup>16</sup> argues that this reform has much more potential to reduce excessive force complaints and payouts. By shifting payments away from discrete, compartmentalized incidents - creating the potentially misleading impression police misconduct is about individual “bad apples” -- private insurance would provide dramatic incentives to look at the problem holistically.

Private insurers set rates using actuaries who specialize in evaluating risks and estimating the potential liability for insurers. Even with qualified immunity in place, private insurance companies could hold police departments and other law enforcement agencies liable for negligence, poor judgement, or the negative consequences of their behavior through their insurance pricing and risk assessments. By shifting the responsibility for payouts to insurance companies and allowing insurance rates to be set based on the likelihood of a civil payout, the entire law enforcement agency has incentives to align policies, procedures, and objectives around organization minimizing instances, events, and behaviors that put the department at great financial liability -- like police misconduct.

Moreover, the insurance rates become a measure of effectiveness and success. Taxpayers and elected officials will have more transparency into police department

practices and their consequences. Lower premiums imply lower financial risk and, implicitly, fewer instances of excessive use of force. Similarly, higher insurance payments would reflect higher levels of systemic abuse and exposure. Higher insurance premiums should put pressure on department budgets. Elected officials and law enforcement representatives would have stronger incentives to address systemic problems to reduce their exposure.

Thus, we would expect police departments and other law enforcement agencies to be proactive in their training and programming focused on reducing exposure. Departments that emphasize de-escalation, non-lethal means of restraint, and prioritize protection of persons and property, including suspects, will have less exposure and lower premiums.

### **Moving Beyond “A Few Bad Apples”**

Grappling with police misconduct is an important policy issue that states, cities, and counties need to address forthrightly. Regardless of how one views the current spate of urban violence, the initial protests in the wake of George Floyd’s death drew widespread and diverse support because the concerns, if not details of the specific cases, were legitimate. Police misconduct appears to the general public to be more widespread and less well managed than police departments are willing to admit.

Rising complaints about police misconduct should not be surprising given the way law enforcement is shielded from bearing the consequences of poor training,

bad judgement, and excessive reliance on lethal force to subdue suspects. If suspects are treated with the presumption of guilt, and officers assume their targets will respond to an arrest with a life-threatening response directed at law enforcement, police will consequently prioritize their own safety over the civil rights of the suspects. When this behavior and attitude becomes ingrained in the organization’s culture, incidents of excessive force and police misconduct are all but inevitable.

The key to remedying the situation is aligning incentives more appropriately so that law enforcement agencies balance the rights of citizens with the needs of officers to perform their work as safely as possible. Creating institution-wide incentives to consider the consequences of use of force by reining in qualified immunity and requiring law enforcement agencies to carry malpractice insurance would create powerful incentives to restructure use-of-force training, reassign officers prone to police misconduct, avoid hiring officers with a track record of excessive force, and move policing back toward an attitude of community guardianship.

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