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Special Legislative Commission to Study Qualified Immunity
Sen. James Eldridge & Rep. Michael Day, Chairs

QUALIFIED IMMUNITY LETS POLICE OFF THE HOOK FOR VIOLATING CIVIL RIGHTS, DENIES MASSACHUSETTS' RESIDENTS THE ABILITY TO SEEK JUSTICE, AND LEAVES VICTIMS TO BEAR THE FULL COST OF POLICE VIOLENCE

Dear Senator Eldridge, Representative Day, and Members of the Commission:

We should hold police officers to a higher standard than flat-out incompetence. But when civil rights laws extend officers a qualified immunity defense, that is the low standard by which police officers claim they should be judged when they violate people's rights, including under the Massachusetts Civil Rights Act here in the Commonwealth. As a society we have entrusted law enforcement officers with the enormous power and responsibility to deprive people of liberty if they are suspected or accused of a crime, to use force against civilians, and in some instances even to use deadly force. To whom much is given, much more is required. As such, police officers or their employers should be held accountable when they violate the rights of residents of the Commonwealth. The first step is to fix qualified immunity.

Police violence happens here. The Commonwealth is home to at least 200 incidents[1] of police killings or other acts of violence within the last 20 years. The long list of inappropriate police misconduct and violence includes:

- Worcester police allegedly violently assaulting a 10 year old autistic boy;[2]
- Lynn police officers fatally shooting Denis Reynoso, an Iraq War veteran reportedly suffering from post-traumatic stress disorder;[3]
- A school police officer allegedly picking up a student and shoving him down the hallway at Springfield's Kiley Middle School;[4]

[1] *It Happens Here,* ACLU OF MASSACHUSETTS (available at https://data.aclum.org/it-happens-here/).
[2] Brad Petrishen, *Mother of autistic boy sues Worcester police after bone broken, records withheld*, TELEGRAM & GAZETTE (SEPT. 22, 2020) (available at https://www.telegram.com/story/news/2020/09/22/mother-of-autistic-boy-sues-worcester-police-after-bone-broken-records-withheld/114116142/).
[3] Travis Andersen, *Military veteran killed in Lynn after police shoot him in altercation,* THE BOSTON GLOBE (Sept. 6, 2013) (available at https://www.bostonglobe.com/metro/2013/09/05/one-person-transported-hospital-after-lynn-shooting/gRXMT3FwNQmyY5gX3DwjpK/story.html).
[4] Dan Glaun, *Sources: Springfield Police school resource officer recorded shoving Kiley Middle School student to the ground identified as Lawrence Pietrucci Jr.*, MASSLIVE (May 1, 2019) (available at https://www.masslive.com/news/2019/05/sources-springfield-police-school-resource-officer-recorded-shoving-kiley-middle-school-student-to-the-ground-identified-as-lawrence-pietrucci-jr.html).

- Three Holyoke police officers allegedly beating a 12-year-old boy unconscious;[5]
- Allegations that the Amherst police pepper-sprayed John Donovan, stomped on his phone, and arrested him for filming them while they arrested another person at a St. Patrick's Day celebration; and
- A Reading police officer shot and killed Alan Greenough as he stood in a parking lot next to his apartment.[6]

Systemic police violence also happens here. Last summer the U.S. Department of Justice, released a scathing report[7] finding that the Springfield Police Department's narcotics bureau "engages in a Pattern or Practice of Unreasonable Force in Violation of the Fourth Amendment."[8] The DOJ found instances of egregious misconduct, including blows to the head, threatening to commit murder and plant evidence, telling someone "welcome to the white man's world," and falsifying reports.[9] The DOJ also found that its report "likely undercounts" the true instances of police misconduct.[10] The SPD has the dubious distinction of being the *only police department in the entire country* to be investigated by the DOJ under the Trump Administration.

So, if both individual and systemic police violence happens here, why don't we hear more about the victims of that violence having their day in court?

Because qualified immunity denies victims the opportunity to seek justice. The legal doctrine of qualified immunity, which purports to interpret the Massachusetts Civil Rights Act passed by the Legislature, shields police from being held accountable to their victims. It can and does protect police even when they blatantly and seriously violate people's civil rights, including by excessive use of force resulting in serious physical harm or even death. The doctrine's practical effect is to deny many victims of police violence their day in court.

In fact, many victims of violent police misconduct and civil rights abuses never even seek justice because they know it will be futile. No matter how compelling the facts or egregious the violation of rights, if the officer can demonstrate that the law they violated was not "clearly established" at the time of the incident by another case involving nearly identical facts, the victim will likely lose. When the circumstances have not been precisely the same, courts have blocked lawsuits even while acknowledging serious wrongdoing by the police.

Police officers do not need a court decision with nearly identical facts to know whether something they're doing is wrong or whether the force they are using is excessive. Nor do they need qualified

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[5] Dennis Hohenberger, *Holyoke settles police excessive force lawsuit for $65,000*, MASSLIVE (Feb. 7. 2020) (available at https://www.masslive.com/news/2020/02/holyoke-settles-police-excessive-force-lawsuit-for-65000.html).

[6] Shelley Murphy, *An agonizing year of waiting for answers following Reading police shooting*, THE BOSTON GLOBE (Feb. 13, 2019) (available at https://www.bostonglobe.com/metro/2019/02/13/year-after-police-shooting-family-waits-for-answers/2h8QZ8IR99tE2XGAM2QWtJ/story.html).

[7] Press Release, Department of Justice, Justice Department Announces Findings of Investigation into Narcotics Bureau of Springfield, Massachusetts Police Department (July 8, 2020) (available at https://www.justice.gov/opa/press-release/file/1292901/download).

[8] *See id.* at 10.

[9] *See, e.g.*, *id.* at 2, 10-16, 17-19.

[10] *Id.* at 11 n.14; *see also id.* at 16-19.

immunity in order to have the latitude to take reasonable steps in response to dangerous or exigent circumstances; that latitude is separately afforded to police officers through the constitutional standards that govern police searches and seizures.[11] When that deferential case law does not clearly establish that something a police officer wants to do is lawful, they should err on the side of not hurting people or otherwise violating their rights. They should not commit violence first and get qualified immunity later.

Qualified immunity doctrine also makes no sense because police officers generally do not read case law to find out what is lawful and what is not. As an assistant district attorney in Suffolk County for eight years, I regularly discussed changes in the law regarding stop and frisk based on recently decided cases. But in my eight years I rarely, if ever, encountered an officer that read case law. **The notion that an officer doesn't know something is wrong unless there's a case on point, but *does* know it's wrong if there is a case on point they haven't read, is simply a fiction that is exploited by lawyers after-the-fact — and it is a dangerous fiction because it protects officers who wrongfully hurt people.**

Ideally, Massachusetts civil rights law would protect victims by allowing them to have their day in court, and protect police officers from undue criticism by holding them to high standards of behavior. But that's not what our law does. Unfortunately, under qualified immunity, as a practical the Massachusetts Civil Rights Act protects "all but the plainly incompetent."[12]

Massachusetts fails its residents by maintaining a system that tracks the federal qualified immunity doctrine. Over time, as the U.S. Supreme Court has become more and more conservative, this concept has been expanded to become "a nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights."[13] Qualified immunity denies justice for people who have been beaten, kicked, sexually assaulted, tased, or killed by police.

Perversely, as the doctrine has evolved, qualified immunity has come to not only protect police from liability, but also to prevent constitutional course-correcting litigation altogether. Essentially, courts have decided that since police are entitled to broad immunity from liability, they need not go through the exercise of even determining if the officer violated the constitution, because the result would be no redress for the victim either way.[14] This has prevented the law from evolving to safeguard people's rights against police violence.

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[11] *See, e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989) (setting forth an objectively reasonableness standard for assessing whether an officer's conduct complied with the Fourth Amendment, which is sensitive to the facts and circumstances of each case).

[12] *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (interpreting 42 U.S.C. § 1983); *see Duarte v. Healy*, 405 Mass. 43 (1989) ("We conclude it to be consistent with the intent of the Legislature in enacting the [Massachusetts] Civil Rights Act to adopt thereunder the standard of immunity for public officials developed under Section 1983."). Although some cases, including *Malley*, refer to the possibility that officers who knowingly violate the law will be denied qualified immunity, the governing test is actually "objective," which means that officers can secure qualified immunity even if they *did* intend to violate the law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

[13] Andrew Chung ET AL., *For cops who kill, special Supreme Court protection*, REUTERS (May 8, 2020) (available at https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/).

[14] *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that courts may decide "which of the two prongs of the qualified immunity analysis should be addressed first").

Qualified immunity lets police off the hook for violence, and leaves victims to bear the full cost of its harms.

For instance in 2015 the ACLU represented Judith Gray, a 57-year-old woman who wandered away from the hospital where she had been admitted for treatment for bipolar disorder. The hospital asked the police to bring her back. Because she was experiencing symptoms of her illness, she refused to go with the police officer. The officer, who outweighed her by 75 pounds, grabbed her, took her to the ground, and tased her because she did not voluntarily give him her hands for handcuffing. A federal appellate court concluded that "a jury could find that [the officer] violated Gray's Fourth Amendment rights," but court concluded that the officer was nevertheless "shielded by qualified immunity" because, in its view, the case law at the time of the incident had not clearly established the illegality of a "single use of [a] Taser in drive-stun mode to quell a nonviolent, mentally ill individual who was resisting arrest" by not presenting her hands for handcuffing while lying still on her stomach.[15]

Presumably most adults in the United States would have understood, at the time of this incident, that if they encountered a barefoot 57-year-old woman who had wandered away from a hospital while suffering mental illness, it would be completely outrageous to attempt to "help" that woman by taking her to the ground and tasing her in the back. But a police officer secured qualified immunity on the theory that, unlike other adults, he could not know that what he did was wrong unless there was clearly established case law telling him so. *As a result, Ms. Gray's rights were violated, and she was denied justice because of qualified immunity.*

There are several other examples of Massachusetts cases where victims of police abuse were denied justice because of qualified immunity. In *Rodrigues v. Furtado*,[16] when a police officer's search for drugs in a woman's apartment turned up dry, he forced her to a hospital and demanded a doctor search her vagina, where he also did not find drugs. *Ms. Rodrigues's body and rights were violated, and she was denied justice because of qualified immunity.*

There's also the case of *Shedlock v. Department of Correction*,[17] where prison guards at MCI-Norfolk repeatedly assigned a man who could not climb stairs to a cell on the second or third floor. When he refused to go to his assigned cell because he could not climb the stairs, guards punished him by putting him in solitary confinement. *Mr. Shedlock was humiliated and his rights were violated, and he was denied justice because of qualified immunity.*

In *Clancy v. McCabe*,[18] a State Trooper with a known history of inappropriate conduct, including a six-month suspension stopped and illegally strip-searched a woman on the side of the road while making suggestive comments. *Ms. Clancy was subjected to sexual harassment and public humiliation, her rights were violated, and she was denied justice because of qualified immunity.*

[15] *Gray v. Cummings*, 917 F.3d 1, 10, 12 (1st Cir. 2019)
[16] *Rodrigues v. Furtado* 410 Mass. 878, 880-882 (1991)
[17] *Shedlock v. Dep't of Corr.*, 442 Mass. 844, 846 (2004)
[18] *Clancy v. McCabe*, 441 Mass. 311, 311-312 (2004)

Similarly, in *Evariste v. City of Boston,*[19] the Boston Police strip-searched a man in public because he was with people known to the police as drug users and had "bulges in his clothing." The police found no drugs. *Mr. Evariste was publicly humiliated, his rights were violated, and he was denied justice because of qualified immunity.*

All of these cases were thrown out because of qualified immunity. In other words, the absurdly high standard of qualified immunity led courts to conclude that an officer could not have known that he should not: tase a vulnerable woman who wandered away from a hospital; take a woman to a doctor to have her vagina forcibly searched for drugs; punish a disabled man for being unable to climb stairs; sexually harass a woman during a traffic stop; or strip search a man in public.

Let's be clear: restricting or even eliminating qualified immunity would not leave police defenseless or mean victims of police violence simply win their cases. Beyond the firewall of qualified immunity, officers' actions are judged by an objective reasonableness standard. Officers whose conduct is reasonable do not need immunity. **Changing qualified immunity would merely give victims their day in court.**

Despite the great need for reform, attempts to date have not focused on victims of police violence.

In 2020, the Legislature passed An Act Relative To Justice, Equity And Accountability In Law Enforcement In The Commonwealth.[20] In addition to creating this commission to investigate and study the qualified immunity doctrine, the legislation sought to limit the impact of the qualified immunity doctrine by denying immunity to officers who have been decertified through the newly created Peace Officer Standards and Training Commission (though it is difficult to imagine circumstances where an officer's conduct toward a victim would be so egregious that it would lead to decertification without losing immunity, even if this were not spelled out in statute).[21]

Unfortunately, this ancillary reform is not an effective or efficient remedy for victims of police violence for several reasons. First, it seems likely that an officer will be decertified only for conduct that clearly violates one of the enumerated rules set out in the new law, so the decertification process may well entrench rather than reform a "clearly established" standard for holding officers accountable for violating people's rights.[22] Second, to reap any possible benefit under the new scheme, a victim must wait for the POST commission to revoke an officer's certification before seeking justice in the courts, and the decertification process will likely take years. Decertification can happen only after an investigation, which can be delayed for up to a year. Additionally, at the conclusion of the investigation the officer can request the suspension proceedings be delayed for *another* year. The lengthy process will compromise the victim's opportunity to seek timely justice in the courts. Meanwhile, the victim or their family is left to bear the full cost of medical bills, funeral expenses, and the emotional trauma of experiencing state violence.

[19] *Evariste v. City of Bos.*, Civil Action No. 18-12597-FDS at 2, (D. Mass. Mar. 23, 2020)
[20] 2020 Mass. Acts 253
[21] 2020 Mass. Acts 253 § 37
[22] 2020 Mass. Acts 253 § 30

Decertification and overcoming qualified immunity should not be linked. The decertification process is rightly focused on whether or not an officer is fit for the job. Victims of violence should not have to wait for an administrative process to conclude before they can have their day in court.

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It is time for Massachusetts to address qualified immunity head on, to seriously restrict the doctrine or eliminate it altogether. Massachusetts policymakers never wrote qualified immunity into our state Civil Rights Act; the doctrine was simply read in by the courts. But it falls to the legislature to end this failed experiment that has added judicial insult to literal injury for so many victims of police violence across the Commonwealth.

In the last year, other states have examined the impact of the qualified immunity doctrine and have completely eliminated it as a defense in certain cases. In Colorado and New Mexico, lawmakers established new state civil rights laws that provide recourse for those whose rights have been violated by police, without the constraints of qualified immunity. Massachusetts should follow their lead and fix our broken law.

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