

## Testimony for Special Committee on Qualified Immunity

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To: Manning, Jacqueline O. (HOU) <Jacqueline.O.Manning@mahouse.gov>

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Dear Ms. Manning,

Below is my testimony for the Special Commission on Qualified Immunity.

Thanks,

Julie Bernstein

Senator Eldridge, Representative Day and Members of the Commission,

My name is Julie Bernstein, I live in Dover, Massachusetts and am a volunteer with *Digital Fourth*.

Whereas in 1871, [42 U.S. Code Section 1983](#) was intended to redress state-sanctioned violence against Black people, in [1967](#) and again in [1982](#) the Supreme Court severely diminished its impact by creating qualified immunity. The lack of any consensus at the federal level to reform qualified immunity means that it is necessary for states to address this issue on their own because, in the words of the Major Cities Chiefs Association,

**“In order for a court to find that qualified immunity does not apply, plaintiffs need to demonstrate that their rights were violated and that it was clearly established at the time of the incident that the officer’s actions violated those rights. To prove this, plaintiffs must point to a previous case in the relevant jurisdiction, with a substantially similar set of facts, in which the court determined an officer’s conduct violated an individual’s constitutional rights. Due to the varying interpretations for meeting the clearly established rights standard, qualified immunity protections have been applied in some extraordinary cases where the officer engaged in egregious behavior that the MCCA does not condone.”**

In 1978, the Supreme Court [created a path](#) for individuals to bring Section 1983 lawsuits against local municipalities or departments in its [Monell v. New York City Department of Social Services](#) decision. Unfortunately, courts have [since held](#) that *Monell* liability applies only when a department has been “[deliberately indifferent](#)” in its failure to train or supervise an employee.

[Colorado](#), [Connecticut](#), and [New Mexico](#) have all recently created a path for victims of civil rights abuses by police to seek damages in state court without having to overcome qualified immunity. The potentially chilling impact of qualified immunity on a citizen’s ability to document police abuses was highlighted in March when the [Tenth Circuit ruled](#) that Denver police were entitled to qualified immunity from a lawsuit accusing them of detaining Levi Frasier and searching his tablet without his consent after he used it to record police using force while making an arrest. The decision was made even though the Denver police department trained officers that the First Amendment protected the right to record, and the officers by their own admission knew their conduct violated the First Amendment. The impact of such a decision is evident when we consider that in June a federal civil rights [lawsuit](#) was filed against the City of Boston by four people who claimed that they were physically attacked and injured by Boston police at the end of a protest last summer, despite not being arrested or charged with crimes. Three of them provided video evidence to support their allegations. Parenthetically, in Massachusetts, out of roughly 480 law enforcement agencies, [only about a dozen have body cameras](#) and even fewer have dashboard cameras. One can’t help but wonder whether their presumption of qualified immunity causes police officers to feel lackadaisical about documenting their conduct.

Last year, in its review of the Springfield Police Department Narcotics Bureau, the U.S. Department of Justice concluded that "there is reasonable cause to believe that Narcotics Bureau officers engage in a pattern or practice of excessive force in violation of the Fourth Amendment of the United States Constitution... Specifically, our investigation identified evidence that Narcotics Bureau officers repeatedly punch individuals in the face unnecessarily, in part because they escalate encounters with civilians too quickly, and resort to unreasonable takedown maneuvers that, like head strikes, could reasonably be expected to cause head injuries." The reason that such abuses continued was clarified recently by Luke Ryan, a criminal defense and civil rights attorney in western Massachusetts, who told WBUR that few allegations of police abuse become lawsuits, in part because, as a consequence of qualified immunity, the bar for what will be a successful case is so high.

On January 25, 2020, Marvin Henry, a father of four from Boston who worked as a massage therapist in Needham, bought iced tea and cough drops at a Needham CVS, and lunch at a local pizza store, before he was stopped and detained for 30 minutes by four police officers as he returned to his vehicle. The stop was in response to a 911 call by a CVS clerk who reported that a man and a woman were stealing from the store. According to the officers, the clerk identified Henry as one of the shoplifters, so they handcuffed him, patted him down, and told him to open his vehicle for a search. They released him less than 30 minutes later after he showed them a receipt for the items he purchased. He was never charged with a crime. The Needham police department conducted its own internal investigation which cleared the officers of any misconduct, save for failing to file a police report. They then hired a law firm to conduct an independent investigation, which concluded that the pat-down search of Henry by the police officers violated department policy and "applicable constitutional principles." It also raised questions about the store clerk's identification of Henry as the alleged shoplifter, which was the basis for handcuffing him and temporarily holding him. Using store video recordings, the investigators said the claims of the police officers that the clerk had identified Henry as the shoplifter did not hold up. Mr. Henry was traumatized by the ordeal, and while Needham Chief of Police John J. Schlittler said that he would review all of the recommendations in the report, one can't help but wonder if the stop would have played out very differently in the absence of qualified immunity.

According to a recent investigation conducted by ProPublica and WBUR of civil asset forfeiture in Worcester County, "**Among the 396 cases that they reviewed, there were more than 90 instances where people lost money or cars, taken most often during traffic stops, frisks and home searches — even though there weren't related drug convictions or drug charges.**" For these individuals, these illegal seizures may have eliminated their transportation to work or their rent, yet as long as qualified immunity pertains, they would face great difficulty in convincing a court that there was not probable cause for their search and seizure.

I have a great deal of respect for the police, and I believe that most of them are motivated by their dedication to protect and serve the public. I am sure that most do their best to respect the rights of citizens. Nonetheless, when anyone has tremendous power to impact people's lives, they should have to answer for inflicting real harm and people should be compensated for their injuries.

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Julie Bernstein

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