Issue 2
August 2023

Institute for Youth in Policy

The Journal of Policy Analysis

The Journal of Policy Analysis

Issue 2

August 2023

The Institute for Youth in Policy

journal@yipinstitute.org

Dear Esteemed Reader,

We welcome you to this edition of The Journal of Policy Analysis, a cradle of unique and ground-breaking research in nonpartisan, multidisciplinary policy. In our pages, you will discover a trove of scholarly rigor that utilizes varied methodologies, infusing precision with the power to stir thought.

As an integral facet of the Institute for Youth in Policy (YIP), we are guided by the motto "Policy over party," fostering an environment that propels individuals into significant, practical experiences. Our aim? To nurture the civic leaders of tomorrow. YIP, a nonpartisan and nonprofit entity, takes pride in empowering our youth with a strong foundation in policy education. Our influence stretches across thousands of high schools, colleges, and graduate institutions, all while attracting millions of website visitors.

I extend my heartfelt gratitude to the diligent staff on this issue. Your tireless efforts in upholding the standards of our work do not go unnoticed. Equally, our appreciation extends to you, our readership; your engagement is the lifeblood of our impact.

Your voice matters to us, and we encourage you to engage with our content. For submissions, kindly refer to our form at Link. We also welcome your insightful responses to the papers published in this edition. Through your critical reflections, invoking fresh or established research to support or challenge our authors' conclusions, we continue enriching our field's dialogues.

Warm Regards,

Michael Yang
Editor-in-Chief
michael@yipinstitute.org

Letter from the Executive Director,

Dear Reader,

I am delighted to welcome you to the second issue of the Journal of Policy Analysis, a publication representing the culmination of our collective policy efforts at the Institute for Youth in Policy (YIP).

Our world is a complex tapestry of ideas and perspectives, and nowhere is this more apparent than in the sphere of policy-making. Since YIP's inception in 2020, we have set out to navigate this complexity by engaging young adults in policy discourse, fostering a community of thinkers as diverse as they are passionate about shaping the future. This journal is a testament to that endeavor and a beacon of our aspirations.

The Journal of Policy Analysis serves as an epicenter where scholarship meets policy, where rigorous, nonpartisan research illuminates the challenges of our time and informs the solutions of tomorrow. Our commitment to this mission is unwavering, and our robust partnerships with esteemed academic institutions and centers underscore it. These relationships enrich our research and provide invaluable perspectives that help to shape our work.

This second issue comes to you at a critical juncture. As policy-based divisiveness continues to permeate our society, the need for enlightened discourse and constructive engagement has never been greater. We stand in the midst of these challenges, not daunted but invigorated, for it is through these very challenges that we find the opportunity to make a difference.

In the pages that follow, you will find a collection of articles that embody the spirit of YIP. These articles, written by some of the brightest young minds in policy analysis, represent the pinnacle of our research efforts. They challenge conventional thinking, explore diverse perspectives, and invite you to become a participant in the dialogue, not just a passive observer.

As the Chief Executive Officer of YIP, I am privileged to witness and participate in this transformative journey. The dedication and passion of our team, our partners, our reviewers, and our contributors are what make this publication possible. I invite you to delve into this second issue of the Journal of Policy Analysis. I hope it inspires you as much as it inspires us and that it ignites in you the same passion for policy discourse that lies at the heart of our work at YIP.

Thank you for joining us on this journey, and I look forward to the discourse, dialogue, and discovery that lies ahead.

Paul Kramer

Chief Executive Officer & Chairman, Institute for Youth in Policy

Table of Contents

On Qualified Immunity, Legal and Practical Analyses Thereof, and Prospects for Reform

Shantanu R. Kamat
University of California, Berkeley in the College of Letters and Science

Abstract:

I consider the doctrine of qualified immunity in the case of law enforcement from multiple vantage points. I look at the doctrine's constitutional and common law basis, history, and examples of its application in practice. This research project utilizes multiple types of sources, including news articles, research papers, law review articles, and court cases, to ensure that the analysis of a complex issue is conducted holistically and that no significant angle goes unaddressed. Furthermore, I incorporate quotes and lessons I learned from Patrick Jaicomo, an attorney at a public interest law firm who is considered an expert in immunity doctrines. I corresponded with Mr. Jaicomo over the course of the preliminary research phase of this project, and he has allowed me to publish his responses to my questions in this work. After conducting legal, historical, and practical analyses of qualified immunity, I review the primary arguments made in favor and against the doctrine and how lawmakers have attempted to change it. To finish, I conclude that qualified immunity ought to be reformed or eliminated and offer recommendations for ways to proceed.

Keywords— qualified immunity, QI, immunity, immunity doctrines, law enforcement, police, criminal justice, criminal justice reform, constitutional rights

I. Executive Summary

Qualified immunity is a doctrine that protects government officials like police officers from liability when they infringe on someone's constitutional and/or statutory rights if those rights were not "clearly established" at the time they were violated. To determine whether a police officer's actions meet the "clearly established law" threshold, courts look to case law in the jurisdiction in which the case occurs. To overwhelm the "clearly established" bar and procure legal remedies for transgressions upon their rights, plaintiffs effectively need to identify a previous instance in case law where a similar fact pattern occurred and was found to involve unlawful actions by law enforcement. The doctrine of qualified immunity and the way it has been applied recently have come under scrutiny. Critics claim that it fails to achieve a balance between police accountability and law enforcement's crime-fighting prerogatives and creates insurmountable barriers for victims of police abuse to have their rights vindicated.

Qualified immunity was a doctrine created by the Supreme Court in Harlow v. Fitzgerald in 1982, although its contours have been appreciably shaped by subsequent decisions of the high court as well. Recently, a few federal judges, most notably Justice Clarence Thomas of the Supreme Court and Judge Don Willett of the Court of Appeals for the Fifth Circuit, have called the court's qualified immunity jurisprudence into question. However, whether the judiciary is ready to refashion or reconsider the doctrine is unclear. After the death of George Floyd in 2020, legislators working in Congress and state legislatures have proposed reforms to rein in or abolish qualified immunity. At the federal level, proposed bills like the Ending Qualified Immunity Act, sponsored by Congressman Justin Amash, have fallen through. However, state lawmakers have been more successful with both Colorado and New Mexico removing or reforming the qualified immunity defense for state constitutional violations in state courts.

Nevertheless, the failure to implement reforms to qualified immunity in most jurisdictions has been striking. It has raised questions about how special interests and their incentives affect the debate and the legislative process. Recommendations for overcoming these barriers are offered.

II. Pointed Summary

- Qualified immunity is a doctrine that protects government officials like police officers from liability when they infringe someone's constitutional and/or statutory rights if those rights do not fall under the category of "clearly established law."
- In practice, a rights violation is only considered "clearly established" if it has been established in case law in the relevant jurisdiction and that case had a similar fact pattern as the scenario at issue.
- It is crucial to understand the stakeholders involved in the qualified immunity debate, as well as how their incentive structures affect their decision-making.

- Critics argue that qualified immunity allows for egregious transgressions against civil rights established by the Constitution and statute, treats police officers and others differently under the law, and degrades the public's trust in law enforcement.
- Supporters argue that qualified immunity is necessary for police recruitment, to protect officers who make "split-second, life-or-death" decisions, and to shield individual officers against frivolous lawsuits.
- Some judges like Justice Clarence Thomas have taken issue with the way in which qualified immunity jurisprudence has developed. Still, whether the Supreme Court is prepared to reconsider the doctrine is unclear.
- Federal attempts to reform or eliminate the qualified immunity defense by means of legislation like the Ending Qualified Immunity Act have not managed to clear both houses of Congress due to gridlock and the controversial nature of criminal justice reform.
- Most states have failed to reform qualified immunity, but Colorado and New Mexico are two notable exceptions.

III. Overview

In November 2016, a 12-year-old girl from Union City, CA, called 911 to report that she, her sister, and her mother barricaded themselves inside a room in their house to protect themselves from Ramon Cortesluna, her mother's boyfriend. Mr. Cortesluna, who was wielding a chainsaw and was angry and intoxicated, posed a danger to the caller and her family. The 911 operator collected details about Mr. Cortesluna's physical description and dispatched five Union City police officers, including Daniel Rivas-Villegas, to the house. After observing the house, the officers arrived at the door, announced themselves, and demanded that Mr. Cortesluna open it. Upon their demand, Mr. Cortesluna surrendered himself to the officers and dropped his weapon. After Mr. Cortesluna dropped to his knees about ten feet in front of the officers, one cop noticed a knife in his left pocket. He loudly demanded that Mr. Cortesluna put his hands up. Mr. Cortesluna initially turned his head toward the officer but subsequently dropped his head and his hands. This prompted one officer to fire two beanbag rounds into Mr. Cortesluna's stomach and hip. Mr. Cortesluna subsequently complied with the officers' instructions. He raised his hands and got onto the ground. Then, Mr. Rivas-Villegas approached Mr. Cortesluna and placed his left knee on the suspect's back, applying pressure while moving and holding his arms behind his back.

Mr. Cortesluna brought suit against Mr. Rivas-Villegas, alleging that the Union City police officer used excessive force against him in violation of the Fourth Amendment to the Constitution. The lawsuit eventually reached the U.S. Court of Appeals for the Ninth Circuit. The federal court, which has appellate jurisdiction in California and other western states, denied qualified immunity to the officer, likening the situation to LaLonde v. County of Riverside, a 2000 case in which immunity was denied to officers who knelt on a facedown suspect.

In 2021, however, the Supreme Court reversed the decision of the Ninth Circuit Court of Appeals in an unsigned per curiam opinion. In Rivas-Villegas v. Cortesluna, the Supreme Court repudiated the analogy between the police-suspect interaction in Union City and LaLonde. For one thing, Mr. Cortesluna was armed with a knife, which no party to the case disputes. In LaLonde, the suspect was unarmed. The reason for police involvement was different in the two cases. In LaLonde, police were called to the scene to respond to a neighbor's noise complaint. In Rivas-Villegas, the concern was an established and time-sensitive risk of domestic violence. For this reason and others, the Supreme Court determined that Mr. Rivas-Villegas should have been given immunity and consequently granted his petition for certiorari.

In many ways, this six-year-old police situation in Union City is emblematic of broader debates over the doctrine of qualified immunity, which KQED describes as "a series of legal precedents that protect government officials — including police officers — accused of violating constitutional rights." Qualified immunity (QI) jurisprudence requires "complainants [to] show that the officer violated 'clearly established law,' most often by pointing to factually similar previous cases." For that reason, the importance of utilizing case law as a metric of comparison - as the Supreme Court did in Rivas-Villegas - should not be understated. As a result of QI and especially its so-called "clearly established" test, police officers are often granted immunity from legal liability when criminal suspects, for example, allege that their rights have been violated.

Opponents of qualified immunity could point to the Union City situation and argue that even when officers demonstrably use excessive force, including kneeling on suspects and firing at suspects who, in all probability, posed little immediate danger, they are immune from the law and the Constitution. Proponents of qualified immunity, on the other side, could point to the same course of events and use it as a specific example of how officers sometimes need discretion and force when dealing with suspects who posed a threat to others, in this case, Mr. Cortesluna's girlfriend and her children.

Of course, domestic violence situations are not the only places in which officers have been given qualified immunity. Critics have pointed to examples like the 2014 case in which Denver police officers, including Christopher Evans, received qualified immunity for punching and otherwise using force against a man named David Flores during a traffic stop and subsequently pressured an onlooker named Levi Frasier to delete a video he was filming of the interaction. Despite the protections for freedom of speech and the press under the First Amendment and relevant Denver police department training, the U.S. Court of Appeals for the Tenth Circuit reversed a federal district court's denial of qualified immunity, reasoning that only prior court cases "authoritatively define the boundaries of permissible conduct in a way that government-employer training never can." The Supreme Court denied certiorari in the case.

Cases like the ones in Union City and Denver have put the doctrine of qualified immunity front and center in the contemporary debate about criminal justice reform. In this brief, I discuss the definition and history of the doctrine, its advantages and disadvantages, and policy actions that can be considered to reform it.

IV. Explanation and History

A. What is Qualified Immunity?

In general, qualified immunity is a type of governmental immunity conditional upon a state actor acting in good faith, typically as established by case law. In particular, qualified immunity gives government officials like police officers immunity from legal liability "for acts that violate someone's civil rights if it can be shown that the acts do not violate established statutory or constitutional rights of which a reasonable person would be aware," according to Merriam-Webster. Qualified immunity can be invoked by police officers as an affirmative defense when they are sued for performing unlawful acts such as violating someone's rights guaranteed by the Constitution.

The so-called "clearly established" test is the centerpiece of qualified immunity jurisprudence. The test "only allow[s] suits where officials violated a 'clearly established' statutory or constitutional right." The legal rationale for the "clearly established" test is to erect a careful balance between what are widely considered two vital societal interests with regard to policing. Justice Samuel Alito, delivering the opinion of a unanimous court in Pearson v. Callahan, explains, "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Conceiving the modern debate over qualified immunity through this balancing act framework reveals why people take their positions on the issue. People who view limiting the scope or discretion of the police and eliminating law enforcement abuses as the most crucial goal - this tends to include progressives and libertarians - tend to view qualified immunity skeptically. On the other hand, those who view empowering police and promoting campaigns to crack down on crime as more important - including conservatives - tend to view qualified immunity in a positive light.

However, the "clearly established" aspect of qualified immunity is not as straightforward as it may seem. Given that there is no firm consensus about what "clearly established" rights are, some critics have blasted the test as unreasonably vague and a moving target that stacks the deck against plaintiffs seeking relief for violations of rights. Jay Schweikert, the author of a policy analysis titled "Qualified Immunity: A Legal, Practical, and Moral Failure," describes the "clearly established" test as "an amorphous, malleable standard." Mr. Schweikert, a research fellow with the Cato Institute's Project on Criminal Justice, continues: "It generally requires civil rights plaintiffs to show not just a clear legal rule but a prior case with functionally identical facts" (emphasis in original). This functionally means that when someone sues an officer, it is insufficient to show that their constitutional or statutory rights were violated. Instead, they must demonstrate that the officer knew or was expected to know that their actions constituted such violations based on prior case law. Moreover, it is not enough to draw out fundamental legal or constitutional matters from previous cases; one must show that how their rights were violated is sufficiently similar to an earlier case in which a police officer violated the rights of another. As

Mr. Schweikert puts it, "The law must be 'particularized' to the facts of the case," this type can only be achieved by invoking "a prior case in the relevant jurisdiction with functionally similar facts."

Patrick Jaicomo is an attorney for the Institute for Justice (IJ), a nonprofit, public-interest law firm. He has represented several clients who have alleged that police officers violated their constitutional rights, and he has argued against qualified immunity in front of the courts. I reached out to Mr. Jaicomo to get his expertise about the doctrine. (See "Appendix" for a full biography of Patrick Jaicomo and his response to my questions.) He concurs with Mr. Schweikert's claim that qualified immunity's "clearly established" test is unclear. Mr. Jaicomo, though, goes one step further. "First, I would say that the 'clearly established' test is a misnomer," he tells me. This was an assertion that I did not expect. However, the postulation that qualified immunity somewhat and adeptly maintains a balance between the dual interests of empowering police to restrict crime and ensuring that officers are held accountable raises more questions than it answers. This is especially true given that the stated mechanism for maintaining the delicate balance is comparing current litigants' encounters with police at present with previous litigants' situations in case law. Mr. Schweikert writes, "[m]odern qualified immunity doctrine … has proven impossible to apply with predictability or consistency. Indeed, perhaps no other Supreme Court doctrine has engendered as much confusion and division among lower court judges as the Court's amorphous instructions on when a given right is clearly established." The Supreme Court has promulgated handy pieces of advice to lower courts. Chief among them is to avoid generalizations and always prioritize a case's particular facts when seeking to resolve questions of "clearly established law." But these nuggets provide little more than a general framework to handle immunity claims. They do not clearly delineate which rights have been established and which have not. They amount to little more than an English teacher urging essay-writing students to maintain concision, avoid run-on sentences, cite sources, and incorporate facts and details. These are useful pointers, but they are insufficient to resolve the students' questions about the prompt and the substance of the essay. Lower courts are left to navigate a messy quagmire of cases, precluding clear and universal standards from emerging.

As a result, lower courts have decided qualified immunity cases very differently, with many finding that officers are entitled to qualified immunity and others being more reluctant to grant it. This is not problematic on its own, but the "unpredictable nature of qualified immunity also deters meritorious lawsuits from being filed in the first place." Attorneys recognize that in some federal judicial districts, claims alleging constitutional rights violations are unlikely to succeed either due to judges' tendency to grant immunity or because case law is too limited in the jurisdiction to mount a compelling claim that a "clearly established" right has been flouted. The problem is not limited to unclear signaling to lower courts. For the "clearly established" test to hold water, it must be absorbed by the police. Mr. Jaicomo is concerned about qualified immunity on these grounds. "Police and other government workers are not carefully monitoring the federal reports for the newest circuit decisions to govern their behavior," he informs me.

"They are relying … on broad, general statements of constitutional law, which are the focus of their in-house training. So it's not as if the standard reflects what is established in the minds of police officers."

Mr. Jaicomo's contention that police officers, courts, and individuals have differing conceptions of what is "clearly established" is not only a hunch; there is empirical evidence that indicates that training for police officers is inadequate, only deals with general principles and fails to capture the "particularized" facts of the case that the Supreme Court emphasizes for evaluating qualified immunity defenses. Mr. Jaicomo referred me to Professor Joanna C. Schwartz's University of Chicago Law Review article titled "Qualified Immunity's Boldest Lie." Professor Schwartz, who works at the UCLA School of Law, conducted a study that examines department policies, training materials, etc., at California police departments to assess how holistic these resources are and whether they adequately describe case law holdings and facts for cases interpreting Graham and Garner in the Ninth Circuit. (Graham v. Connor and Tennessee v. Garner are two important Supreme Court cases in which the court laid out standards for when the use of excessive force by police officers is reasonable. Graham and Garner are significant because the tests they established for excessive force claims emphasize the particular circumstances in which the officer used force. For example, it is less likely that a plaintiff's claim that his rights were constitutionally violated will succeed if an officer had a significant and legitimate reason to believe that the suspect posed an immediate threat to others.)
While police officers are indeed "regularly informed" of the general principles delineated by the Supreme Court in Graham and Garner, Professor Schwartz's "review of California police department policies and training, advice from government attorneys, and other sources make clear that officers are not educated about the facts and holdings of cases applying Graham and Garner to various factual scenarios." If officers are not informed about "precisely the types of cases that the Supreme Court says are necessary to give fair notice to officers and establish the law for the purposes of qualified immunity," the central premise of the doctrine (as one that requires an understanding of "clearly established law" in the relevant jurisdiction and knowing how it applies in policing scenarios) crumbles. She contends that since case law in this area is expansive, complex, and at times contradictory, it is inevitable that officers will not be able to comprehend the holdings and facts of prior cases fully.

B. History of Qualified Immunity?

An unabridged history of the qualified immunity doctrine will not be provided here for reasons of brevity, but a short overview of the relevant decisions of the Supreme Court that have molded qualified immunity will be communicated.

There is some scholarly debate about which Supreme Court case set up the modern doctrine of qualified immunity. I find its origins in Harlow v. Fitzgerald (1982) as do other sources. However, there was a case fifteen years earlier that was consequential as well. In Pierson v. Ray (1967), Chief Justice Earl Warren, writing for an 8-1 majority, ruled that police officers

were not entitled to absolute immunity, but they could be exempted from liability if they could show that they had a subjective belief that they were acting in good faith and had probable cause. It is in Pierson v. Ray that the following famous line is found: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does." This foreshadowed one of the key arguments in favor of qualified immunity decades later: forcing officers to bear the brunt of a judgment for liability would complicate the efficacious performance of their crime-fighting duties. In Pierson, the Warren court effectively said that "it would be unfair to hold government officials to constitutional rules they were not aware of at the time of the violation."

Although the majority opinion in Pierson contained references to absolute or unqualified immunity, which the court concluded was appropriate for judges but not for law enforcement, it was Harlow v. Fitzgerald that established the doctrine proper, which we know today. In Harlow, the 8-member majority said that certain executive branch officials, such as the president of the United States and prosecutors, were entitled to absolute immunity but that most federal officials, like presidential aides, were entitled to qualified immunity. The foremost holding of Harlow was "that government officials performing discretionary functions, 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" at the time it occurred in the words of Justice Lewis Powell's majority opinion. Because the "clearly established" test is the chief component of modern qualified immunity jurisprudence, Harlow can, in no uncertain terms, be classified as qualified immunity's progenitor. Although the standard established in Harlow was deferential to government officials, the majority cautioned that it should be taken as "no license to lawless conduct."

Qualified immunity jurisprudence has since moved to require finding a functionally similar fact pattern rather than merely the same constitutional or legal principle. Moreover, the court has repeatedly reaffirmed that if it is plausible that a reasonable officer "could have believed … [a] warrantless search," for instance, the search that was at issue in Anderson v. Creighton (1987), was "lawful in light of clearly established law and the information the searching officers possessed," he or she is to be granted immunity notwithstanding the court finds that the search indeed violated the Fourth Amendment to the Constitution.

In Pearson v. Callahan (2009), the case in which Justice Samuel Alito-led majority wrote the canonical words about qualified immunity's goal of balancing the interests of public accountability against protections for government officials, the Supreme Court ruled that courts should be able "to grant qualified immunity based only on the established prong—and without ever determining if there was a constitutional violation." In doing so, the two-step test laid out by the court in Saucier v. Katz (2001), wherein courts were required to make a determination of whether a constitutional violation occurred based on the facts of the case prior to adjudicating whether qualified immunity ought to be granted under the "clearly established" standard, was abandoned. This, in Judge Don Willett's words, creates a "catch-22." It retards the development

of case law because it leaves unresolved the question of whether the actions of law enforcement amount to a violation of constitutional and/or statutory rights. This keeps the contours of what is considered "clearly established law" small, which makes it harder for future litigants to obtain relief.

C. Relevance of Qualified Immunity Today

Much of the contemporary focus on criminal justice reform is a result of the death of George Floyd, a black man who was killed in May 2020 when Minneapolis police officer Derek Chauvin kneeled on his neck for more than nine minutes when attempting to arrest him for paying for a pack of cigarettes with a counterfeit bill. Mr. Floyd's death resulted in nationwide protests demanding changes to policing practices. Several proposals have been floated in the past two years to address what some view as unfair or racially disproportionate policing. These include but are not limited to banning chokeholds, eliminating no-knock raids, defunding the police, creating national standards for police training and de-escalation, restructuring Fraternal Order of Police contracts, and changing police culture. The merits and relative benefits of each of these reforms can be considered elsewhere. (It is important to note that proposals for criminal justice reform are not equally meritorious, and some could have consequences that impair the reformist cause or contribute to other detrimental effects on society.) However, what is relevant here is that reforms to qualified immunity have also been proposed in light of the renewed criminal justice reform moment. As Sarah D. Wire of the Los Angeles Times writes, "[q]ualified immunity has entered the popular lexicon in the last few years, especially since the murder of George Floyd in 2020."

V. People and Institutions

A. Stakeholders

Although the doctrine of qualified immunity is applicable to a wide variety of government officials, this brief considers it in the context of police officers. Consequently, police groups are one of the major stakeholders in the issue. Police unions tend to support qualified immunity, viewing the doctrine as an essential factor that helps law enforcement perform its critical duties to protect and serve communities. The Fraternal Order of Police, for example, which describes itself as "the world's largest organization of sworn law enforcement officers, with more than 364,000 members in more than 2,100 lodges," backs qualified immunity, viewing attacks on the legal doctrine as deleterious to police recruitment. Moreover, the group has filed amicus briefs defending the doctrine, which its president Patrick Yoes says "is so critical to the work of law enforcement" in serious situations like domestic violence. Likewise, the International Association of Chiefs of Police (IACP), which describes itself as "the world's largest and most influential professional association for police leaders," is "fervently opposed to change the qualified immunity protections," which it considers "an essential part of policing and American jurisprudence." A statement released by the IACP argues that qualified immunity "allows police

officers to respond to incidents without pause, make split-second decisions, and rely on the current state of the law in making those decisions. This protection is essential because it ensures officers that good faith actions, based on their understanding of the law at the time of the action, will not later be found to be unconstitutional. The loss of this protection would have a profoundly chilling effect on police officers and limit their ability and willingness to respond to critical incidents without hesitation."

In addition to law enforcement-aligned groups, the vast majority of elected Republicans oppose significant changes to qualified immunity. Discussions about altering qualified immunity proved to be a sticking point in Senate Judiciary Committee negotiations over criminal justice reform in the first year of the 117th Congress. Senate Minority Leader Mitch McConnell, speaking for Senate Republicans, voiced concern about Democrats' insistence that the qualified immunity doctrine be weakened or eliminated entirely. Other senior Republicans, including Senator John Cornyn of Texas and Senator Chuck Grassley of Iowa, the latter of whom serves as ranking member of the Senate Judiciary Committee, have also expressed skepticism along similar lines, articulating concerns about police recruitment and opening up law enforcement for more lawsuits. Although Senator Tim Scott of South Carolina, the lead Republican negotiator on the criminal justice reform bill, had reportedly been open to a compromise on qualified immunity reform, reformers' hopes were dashed. The qualified immunity provisions were scrapped as the deal was not wholly acceptable to either the left or the right.

Civil liberties organizations and criminal justice advocacy groups are another major class of stakeholders. They tend to oppose qualified immunity, viewing the doctrine as excessively deferential to police officers and other public officials. Groups that oppose qualified immunity include the NAACP Legal Defense Fund, which says it "allows law enforcement to cross legal lines they know they should not while dehumanizing members of our communities." Other groups that believe qualified immunity should be eliminated are the American Civil Liberties Union (ACLU) and the Equal Justice Initiative (EJI), which argues that "the Court's doctrine has served as the basis for denying a remedy to victims of violent and deadly police misconduct, effectively creating a category of injuries without repair."

Many elected Democrats oppose qualified immunity, with the 2020 Democratic Party platform calling for "reining in the doctrine of qualified immunity." Democrats have included provisions to limit or end qualified immunity in a proposed police reform bill, and 65 Democratic members of the House of Representatives cosponsored Congressman Justin Amash's Ending Qualified Immunity Act (H.R.7085). Eliminating qualified immunity is especially supported by the progressive wing of the Democratic Party, which believes it is a nonnegotiable issue in criminal justice reform negotiations.

It is important to note that although the qualified immunity debate tends to break down along partisan lines, this is only sometimes true. For example, some moderate Democrats, either out of a desire to achieve a bipartisan compromise or to maintain the interests of police officers and unions, have said that removing qualified immunity from the criminal justice reform

discussion may be justifiable. Much to the chagrin of House progressives, House Majority Whip Jim Clyburn said that he "will never sacrifice good on the altar of perfect" and was willing to look to other ideas that may be more acceptable in the minds of his Republican colleagues. Some Democrats have walked back support for eliminating qualified immunity. For example, Terry McAuliffe "backed away from his support for ending qualified immunity" in his campaign for the Virginia Governor's Mansion against Republican businessman Glenn Youngkin although he had previously argued for doing away with the doctrine. Individuals and groups which identify themselves with libertarianism or the libertarian right tend to support eliminating qualified immunity. Libertarian Congressman Justin Amash introduced the Ending Qualified Immunity Act (H.R.7085), and think tanks like the Cato Institute have produced research and policy analyses calling the doctrine into question. Some conservatives have supported curtailing qualified immunity. Congressman Tom McClintock is the only Republican cosponsor of Mr. Amash's proposed legislation. In remarks delivered at the House Judiciary Committee Oversight Hearing on Police Practices and Law Enforcement Accountability in June 2020, Mr. McClintock blasted the doctrine: "Qualified immunity as currently applied has no place in a nation ruled by law." He continued, "For every right, there must be a remedy, and qualified immunity prevents a remedy for those whose rights have been violated by officials holding a public trust. Reforming qualified immunity simply holds public officials to the same standards as any other citizen exercising the same powers." Republican Senators Mike Braun and Mike Rounds have shown a willingness to accept adjustments to qualified immunity, although both oppose getting rid of the doctrine altogether. Mr. Braun introduced legislation titled the "Reforming Qualified Immunity Act" (S.4036) to restrict what he considers to be the excesses and improper applications of the modern iteration of the doctrine. Although Mr. Braun's bill was supported by some conservative groups, it attracted no Senate cosponsors and was faced with a strong backlash from some quarters.

B. Interests and Incentives

One of the most critical lessons in economics is that incentives matter. (See chapter 2 of Charles Wheelan's Naked Economics titled "Incentives matter: Why you might be able to save your face by cutting off your nose [if you are a black rhinoceros].") However, it is applicable to public policy analysis as well. Political scientists like Mancur Olson incorporated a careful study of incentives in political science concepts like collective action. The incentive structure at play is important to draw out when considering policing issues. I will not illustrate the entire incentive structure at play here. Future policy analyses should explore this issue. However, I will briefly lay out a few issues that could be incorporated into a framework to analyze the incentives that matter to stakeholders in the qualified immunity issue.

One of the critical parts of public policy analysis in the area of criminal justice is understanding why change appears so intractable. What are the reasons for indifference, and more importantly, why does overcoming this first burden often fail to result in concrete action? It

would be inaccurate to say that no policy change has been made. For example, in 2018, both houses of Congress passed, and President Donald Trump signed the bipartisan First Step Act, which made a wide breadth of changes to policing practices, offered opportunities to cut lengthy prison sentences, made changes to mandatory minimum sentences, and encouraged programs to rehabilitate prisoners and reduce recidivism rates, among other things. States have also changed policing and sentencing policies, as I discuss in the "Tried Policy" section.

Despite some changes, entrenched special interests have managed to stymie efforts to reform qualified immunity. (This section does not deal with whether these reforms are good ideas. See the "Current Stances" section for a discussion of the advantages and disadvantages of eliminating or reducing the application of qualified immunity.) In the "Stakeholders" section, police unions were identified as key in the defense of qualified immunity. Police unions indeed play a large role in federal politics and deliberations over criminal justice matters. Police unions and their interests have caused a rift within the ranks of Democratic policymakers, which has come to the surface recently. Laura Barrón-López writes, "Democrats and police unions haven't been friendly for some time, but up until now, the two groups have avoided a full-blown war. The collapse of the federal bargaining bill shows how fast the cultural and political ground is shifting as Democrats question what little is left of the relationship." Police-aligned groups like the Fraternal Order of Police—despite being willing to accept some legislative reforms, including the First Step Act—have remained steadfast in their desire to maintain qualified immunity for the sworn law enforcement officers who constitute their membership.

Despite significant momentum in state legislative bodies to rein in qualified immunity, "in state after state, the bills withered, were withdrawn, or were altered beyond recognition," writes Kimberly Kindy. "At least 35 state qualified-immunity bills have died in the past 18 months, according to an analysis by The Washington Post of legislative records and data from the National Conference of State Legislatures." The reasons why reforms were not adopted or were watered down are complex, but one primary reason appears to be what Ms. Kindy describes as "multifaceted lobbying campaigns by police officers and their unions targeting legislators, many of whom feared a public backlash if the dire predictions by police came true." Police unions, which represent officers, have claimed that allowing more suits against individual officers would financially hurt them and that police ought to receive the benefit of the doubt given that they make difficult life-or-death decisions in uncertain and dangerous situations. (The veracity of these arguments is evaluated in the "Current Stances" section.)

Police unions function as interest groups that represent their members in matters involving the state. In this case, the members are police officers, who generally feel that public policy should default on the side of giving them more discretion rather than less. Unions spend money and resources to defend their members in arbitration hearings, and according to Noam Scheiber, Farah Stockman, and J. David Goodman, "They have also been remarkably effective at fending off broader change, using their political clout and influence to derail efforts to increase accountability." Their importance in the administration of municipal police departments and in

local, state, and national politics means that they are a player whose power must be appreciated. Some unions even spend hundreds of thousands of dollars backing political candidates. Police unions have fruitfully mounted advertisement campaigns and have used rhetoric to articulate reasons why strengthening police and, to an extent defeating changes to police practices is necessary for public safety. "So far, police are winning the argument nearly everywhere," Mr. Scheiber, Ms. Stockman, and Mr. Goodman observe, meaning advocates face a tough road ahead of them to implement profound and lasting changes to qualified immunity.

Radley Balko, who writes about criminal justice issues in the pages of the Washington Post, recommends utilizing a public choice-themed framework for understanding the inaction and sluggishness involved in criminal justice reform. Mr. Balko is referring to public choice theory, a school of political economy that uses an economic frame of mind to analyze politics. The school, which was pioneered by economists James M. Buchanan and Gordon Tullock (the former of whom later won the Nobel Memorial Prize in Economic Sciences), stipulates that government actors are fallible and self-interested human beings, just like actors in a market setting. Working from this fundamental observation and others, public choice economists attempt to understand the incentives facing elected officials, government employees, and state institutions. Mr. Balko begins to do so for the particular cases of police officers and prosecutors. Mr. Balko posits that legal features or loopholes (depending on how you normatively evaluate them) like "good faith" exceptions that are reminiscent of the modern qualified immunity doctrine "essentially become road maps for unscrupulous police or prosecutors" because it is exceedingly difficult to prove that an officer was acting maliciously or in "bad faith." Consequently, rates of officers using excessive force may be higher than they otherwise would be because the large possibility of immunity from legal liability removes the disincentive to reckless actions. Recognizing that the lessons of public choice have been applied in a wide variety of policy areas, save criminal justice, Mr. Balko suggests using its tools to analyze questions ranging from civil asset forfeiture to drug searches to the election of county sheriffs. Incentives appear literally everywhere, and it would behoove policymakers and future researchers to seek to understand them in all of their complexity, whether they choose to adopt the public choice theory approach or some novel framework.

The incentives of not just police officers and the groups that represent their interests matter. It is necessary to consider the special incentives facing politicians as well. Politicians care, perhaps more than any other aim, about winning elections. Research finds that the prospect of future reelection campaigns incentives politicians to sponsor legislation, take part in floor votes, and participate in committees. One study finds that although politicians are not just "single-minded seekers of reelection," politicians choose policy priorities, for example, through the lens of winning favor with voters for an upcoming election. Lisa Hager, a political scientist at South Dakota State University, writes, "Members of Congress often use policy-making activities to pursue reelection by engaging in position-taking and credit-claiming activities." For this reason, understanding what voters want and whether politicians can deliver on those preferred

outcomes is necessary. There is not a great deal of public opinion about qualified immunity specifically, but the polling that does exist finds a majority of Americans in favor of eliminating the doctrine. A national survey conducted by the Cato Institute in 2020 finds 63% in favor of eliminating qualified immunity, including a majority of Democrats and independents (79% and 64%, respectively) and a minority of Republicans (42%). 79% said that a police officer who violates someone's rights should face consequences even if he or she did not know of the illegality of his or her actions. In a Pew Research poll, 66% of respondents (84% of Democrats and lean-Democrats, and 45% of Republicans and lean-Republicans) said that "civilians need to have the power to sue police officers in order to hold them accountable for excessive use of force or misconduct." Notably, both polls find that eliminating qualified immunity is much more popular than controversial proposals like defunding police departments, an idea that is opposed by a majority of Americans.

The next question that needs to be addressed is whether public opinion will translate into policy outcomes. (This is a question that is tackled in depth in the "Tried Policy" and "Policy Options" sections.) This question interests me greatly, and there is a burgeoning field of political science research that sets out to answer it. In "Democracy for Realists: Why Elections Do Not Produce Responsive Government," for example, Christopher H. Achen of Princeton University and Larry M. Bartels of Vanderbilt University lambast the so-called "folk theory of democracy," which maintains (erroneously in their view) that the voting public makes their decisions at the ballot box based on coherent policy preferences. They unpack and demolish this view because voters are ignorant and vote based on partisan affiliation and other facets of group identity. Researchers should build on this work and seek to understand how voters feel about qualified immunity and whether they can meaningfully signal these preferences to interested policymakers.

I asked Patrick Jaicomo whether he "think[s] that public appetite for criminal justice reform will result in action aimed at reforming qualified immunity, or [if] hurdles like police unions and prosecutors concerned with crime stymie efforts at reform." He replied: "It's hard to guess what public opinion will accomplish. It could be everything, or it could be nothing. We are still committed to pushing for reforms in courts, Congress, and the public square. Nevertheless, I have to admit that I am less optimistic about congressional reform given that all of the protestings that took place after George Floyd was killed apparently was not enough to get Congress to find a solution."

VI. Current Stances

A. Reasons to Eliminate Qualified Immunity

There are several arguments that have been offered in support of and in opposition to qualified immunity. I will start with the latter. The following are the main arguments for eliminating or curbing the doctrine.

1. Eliminating qualified immunity is necessary to curtail abuses of individual rights

There are simply too many instances where police officers have egregiously violated individuals' rights and got away with it due to qualified immunity, the argument goes. As Ben Sperry notes in an op-ed, "The doctrine prevents many cases of illegal conduct by police from even progressing to a hearing in front of a jury." This deprives individuals of the opportunity to seek meaningful recourse in a court of law and deters otherwise valid and compelling lawsuits from being pursued because they face near-impossible odds as long as courts abide by the prevailing interpretation of qualified immunity. Without a reliable mechanism of accountability, rights, including those guaranteed by the Constitution, become empty promises. A right that is called a right, but is repeatedly disrespected, may not be worthy of the name.

It has been clearly established that the "clearly established" test lies at the heart of contemporary criticism of qualified immunity. It imposes a requirement that litigants be ultra-specific, not only when identifying previous instances in which a particular constitutional right was violated, but in which the right was violated in a practically similar way. "[I]f a correctional officer pepper-sprayed an inmate in prison without cause," Mr. Sperry notes in referring to the legal dilemma faced by a Texas inmate named Prince McCoy, who sued a correctional officer for groundlessly spraying him with a chemical agent in McCoy v. Alamu, "the case cited to rebut that officer's qualified immunity can't be one finding that police officers may not tase someone at a traffic stop for no reason" even though both involve the use of unnecessary force by agents of the state and similarly implicate Fourth Amendment and Eighth Amendment concerns.

It is no wonder that two commentators described the "clearly established" test as "the minnow that has swallowed the whale." There are no clear and consensus standards for which rights have been "clearly established," opening up the case law to hundreds of different and contradictory interpretations. Achieving what Justice Alito in Pearson v. Callahan termed a balance between "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably" is essential. However, the modern application of qualified immunity has tipped the scale far toward the latter side of the balance, unfairly prejudicing officers to the detriment of those alleging severe violations of human rights. The requirement that a rights violation be "clearly established" as such and the burden that places on litigants eviscerates the valid benefits of the doctrine and makes it a cesspit of confusion, contradiction, and bias. The difficulty with coherently determining what has been "clearly established" as a right in case law and what falls outside of this category leaves "lower courts … with a Catch-22. They cannot enforce a right without it being established, but the only way to establish the right is to enforce it."

Because the most atrocious of police abuses are likely to be more unique than fact patterns involving more common forms of police misconduct, it is often those who have incurred the most unimaginable deprivations of constitutional rights who find it the most difficult to seek justice. If there is no case law with an arbitrarily similar fact pattern in the relevant jurisdiction,

courts will default on the side of granting qualified immunity to the officer who has allegedly violated the person's rights. Perhaps the most shocking time when a federal court gave qualified immunity to an officer was in Corbitt v. Vickers. According to Jay Schweikert's summary of the facts and the U.S. Court of Appeals for the Eleventh Circuit's decision, law enforcement officers in Coffee County, Georgia, were chasing a criminal suspect who made his way into the backyard of the Corbitt family, who were otherwise unrelated to the suspect or the case. The officers made their way into the backyard, where one adult and six children were told to get on the ground. They did, and the officers successfully apprehended the suspect. What followed is where the controversy arises. The Corbitt family's dog entered the backyard and acted in a manner that posed no significant threat. One officer named Michael Vickers nevertheless twice attempted to shoot at the dog. The first shot missed the dog, and the second shot missed the dog and hit Amy Corbitt's 10-year-old child, who sustained significant damage to his knee, as well as mental trauma from the incident. Amy Corbitt, on behalf of herself and her child, sued Mr. Vickers on the grounds that he used excessive force in contravention of the Fourth Amendment and the Fourteenth Amendment to the Constitution. The district court denied qualified immunity, but the Eleventh Circuit Court of Appeals reversed. According to Mr. Schweikert, the majority "said that there was no prior case law involving the 'unique facts of this case,' in which a child was accidentally shot while the officer was intending to shoot someone (or something) else," so qualified immunity must be granted. The Eleventh Circuit also explicitly neglected to settle the constitutional question and was content with only deciding that qualified immunity ought to be granted. Judge Don Willett of the U.S. Court of Appeals for the Fifth Circuit, in criticizing this approach, wrote, "Translation: If the same officer tomorrow shoots the same child while aiming at the same dog, he will receive the same immunity. Ad infinitum." Although the "clearly established" requirement at first seems reasonable, a closer examination of its practical effects reveals that it is often applied narrowly and stringently by both police officers and judges. Patrick Jaicomo, an attorney with the Institute for Justice, "say[s] that the 'clearly established' test is a misnomer" that covers grave constitutional concerns. He remarks that "[p]olice and other government workers are not carefully monitoring the federal reports for the newest circuit decisions to govern their behavior. They are relying (as demonstrated by Prof. Joanna Schwartz) on broad, general statements of constitutional law, which are the focus of their in-house training. So, it's not as if the standard really reflects what is 'clearly established' in the minds of police officers." If police officers are ill-informed about the contours of "clearly established" rights, they are more likely to violate these rights - either due to a lack of information resulting from the lacuna in their training or because they lack the incentive to ensure their actions respect constitutional and statutory rights. Ambiguity about what "clearly established" means has led courts to "resort to a restrictive definition of clearly established law, requiring a controlling precedent in the jurisdiction where the violation took place," notes Tyler Finn. (See the "What is Qualified Immunity?" section for further elaboration.) This matters for protecting constitutional

rights (for example, the First Amendment right to record police officers on duty), which may not be wholly protected under the current qualified immunity regime.

Judge Don Willett, a judge on the U.S. Court of Appeals for the Fifth Circuit who is a big critic of qualified immunity, has penned a few piercing opinions lambasting the doctrine. In Zadeh v. Robinson, his opinion concurring in part and dissenting in part, argued that the "clearly established" test operates as a "legal deus ex machina" that precludes Fourth Amendment claims, for example, of being vindicated before the law. "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." Judge Willett synthesized his views in his dissent in Cole v. Carson: "The real-world functioning of modern immunity practice—essentially 'heads government wins, tails plaintiff loses'—leaves many victims violated but not vindicated." This is the thrust of the main argument against qualified immunity. It stacks the deck against victims of serious rights violations and means that constitutional and statutory guarantees go unfulfilled for many Americans.

2. Eliminating qualified immunity is necessary to ensure that police officers and other citizens are treated equally under the law. Radley Balko writes, "There's a good argument to be had over whether police officers should be held to the same legal standards as the rest of us, or, given the high stakes that come with those powers, we should hold them to a higher standard — complete fidelity to the letter and spirit of the law.

But in a free society, there is no substantive argument that the officials we entrust with these powers should be held to a lower legal standard, that we should let them pick and choose which laws they want to follow" (emphasis in original). Yet this is what qualified immunity has done, the argument posits. It has excused police officers and government officials from the consequences of violating the rights of citizens. This is particularly problematic because it creates two standards of law: one for state actors like police officers and another for other citizens. Qualified immunity means that police officers are treated far more leniently for the same behavior that would earn ordinary citizens jail time. The old adage that "no one is above the law" is particularly relevant here. Perhaps the adage should be revised in light of legal doctrines like qualified immunity to"no one should be above the law" to make clear that this should be a position Americans should fight for rather than being a wholly accurate description of how matters have panned out.

3. Eliminating qualified immunity would help rebuild trust in law enforcement

National survey results detected a decrease in trust in law enforcement beginning in 2020. Scottie Andrew reported for CNN that only 48% of Americans had "a great deal of" or "a lot of" trust in the police in 2020, a three-decade low that is down from 53% in 2019 based on Gallup polling data. Mr. Andrew conjectured that this is in part a result of increased media coverage and attention to the deaths of black Americans like George Floyd at the hands of police and noted

that the drop in confidence in the police is particularly acute among blacks. Since 2020, some of the lost confidence in the police, among black Americans and the American public in general, has been restored. However, confidence in law enforcement is below what it was in the pre-pandemic United States. According to Gallup, as of July 2021, only 11% of black adults, 17% of white adults, and 35% of Hispanic adults have "a great deal" of or "quite a lot" of confidence in the criminal justice system. Over the three-year period from December 2018 to December 2021, the percentage of Americans who have "not too much" trust in police officers or "no confidence at all" increased from 22% to 31% based on data from Pew Research Center. The percentages of Americans who have "a great deal" of confidence in police officers and "a fair amount" of confidence in police officers decreased from 30% to 20% and 78% to 69%, respectively, over the same time period. Restoring trust in law enforcement is important. After all, police officers are members of a community. They are the members of the citizenry who play the vital role of keeping the streets safe, ensuring public order, apprehending criminals, and helping to lock away those who violate the rights of the largely law-abiding population. Law enforcement can more expeditiously perform their duties when they have the trust of their communities. Individuals who trust police officers are more likely to report crimes, assist law enforcement with investigations into criminal wrongdoing, be aware of corruption and official malfeasance, and otherwise participate as active citizens in their communities.

However, restoring trust in law enforcement requires action to be taken. Changes to the structure and police practices of police and sheriff's departments and is a place to start. In the "Relevance of Qualified Immunity Today" section, I wrote that proposals to reform policing "include, but are not limited to, banning chokeholds, eliminating no-knock raids, defunding the police, creating national standards for police training and de-escalation, restructuring Fraternal Order of Police contracts, and changing police culture." However, reforming qualified immunity may be the most critical factor that will help society achieve its goal of restoring trust in police officers. The two biggest reasons it does so were explained above: reining in the doctrine would substantially reduce the frequency with which individuals' inherent rights are violated and would ensure that police officers and others are treated equally before the law. Constitutional liberties like the freedom of speech, the freedom of the press, the right to be free from arbitrary uses of force, and the right not to be searched without proper cause is deeply ingrained in the American legal tradition and are guaranteed by the U.S. Constitution. By removing the defense of qualified immunity, which often serves as a barrier to protecting these liberties, citizens can be more assured of their dignity as free people and as American citizens. Additionally, by synchronizing the legal procedure and penalties in use-of-force lawsuits, for example, by eliminating the qualified immunity loophole, which allows police to get away with actions that would be a one-way ticket to prison if performed by someone besides law enforcement personnel, citizens would feel on the same level with police officers. With qualified immunity in place, ordinary citizens may feel that police officers are too often "above the law." Given that police officers are

citizens and members of the community, too, it is essential that they are treated like everyone else and held to the same standards as their non-police brethren.

A community that has genuine trust in law enforcement officers who are appropriately held accountable for their performance and deeds, good and bad, is likely to be more resilient against crime, disorder, and other societal ills. Ben Harris and James Devereaux explain why police accountability is crucial: "When members of society do not trust that law enforcement will be held accountable for its failings, mostly at the expense of a few, then it impacts the ability of law enforcement to protect people. When law enforcement is truly needed, such as to control rioting and violence, trust that any aggressive interventions are fair and reasonable will have already been compromised, which in turn leads to less trust and more potential rioting, which leads to more heavy-handed police interventions and so forth." Furthermore, they explain why eliminating qualified immunity would be beneficial to the cause of increasing the public's trust in police in a manner consistent with the incentives-focused framework I develop in the "Interests and Incentives" section: "Abolishing qualified immunity raises the costs of misbehavior. And as the cost of abuse increases, so will the reputation of law enforcement as an institution that serves all, as bad actors are priced out of the occupation." Jay Schweikert, answering a question from Congressman Jerry Nadler, stated that qualified immunity "has undermined the efficacy of the law enforcement community by exacerbating the public's unfortunately accurate perception that police officers who routinely commit misconduct are not held accountable." To the extent that changing qualified immunity improves prospects for police accountability, reform in this area could help repair the legitimacy crisis of law enforcement. The public, by and large, seems to agree with qualified immunity reform when polled. Most American adults believe qualified immunity should be eliminated and that people should be allowed to sue police officers for misconduct. I spell out a few noteworthy data from a 2020 survey in the "Interests and Incentives" section: "63% [are] in favor of eliminating qualified immunity including a majority of Democrats and independents (79% and 64% respectively) and a minority of Republicans (42%). 79% said that a police officer who violates someone's rights should face consequences even if he or she did not know of the illegality of his or her actions." It is crucial to keep in mind that most Americans do not know about qualified immunity and its significance in the criminal justice system. Education may be a requisite first step in eventually realizing significant change.

B. Reasons to Keep Qualified Immunity

There are several arguments in favor of qualified immunity. These arguments and my assessment of their merit are discussed below.

1. Qualified immunity is essential for police recruitment

Eliminating qualified immunity, the argument goes, would exacerbate recruitment and retention difficulties in municipal police departments. Police unions and organizations like the Fraternal Order of Police frequently make this argument. Conservative lawmakers have also

embraced it. Senator John Cornyn, a Republican from Texas, remarked, "We're already having trouble recruiting police, and police are retiring early," implying that eliminating qualified immunity would exacerbate the issue by "making it possible for trial lawyers and people to sue for money." According to CNN, "Cornyn's concerns were echoed by a range of rank-and-file Senate Republicans as well as some of the more senior members of the conference." Senator Tom Cotton, a Republican from Arkansas and one of qualified immunity's staunchest defenders, wrote, "Few officers would continue policing if, any time they arrest a criminal, they could face protracted litigation."

Whether the concerns of Mr. Cornyn, Mr. Cotton, and other policymakers skeptical of altering qualified immunity are warranted is an empirical question. In setting about answering it, it helps to look at police recruitment and retention numbers, which more and less show that recruiting and retaining officers has become more challenging for municipal police departments. Although there are no official aggregated nationwide statistics, there is reason to believe that cities, small and large, have faced a recruitment crisis when it comes to police departments. According to a report by the International Association of Chiefs of Police (IACP), 78% of departments said they had difficulties in recruiting qualified candidates, 65% said that not enough potential candidates were applying to join law enforcement, and 75% said that recruitment challenges are greater today than they were five years prior.

Mike Neilon of the Philadelphia Fraternal Order of Police said the past few years have presented police departments with "the perfect storm" of factors that have coalesced to pose concerns for maintaining their ranks. "We are anticipating that the department is going to be understaffed by several hundred members," he expressed. The numbers corroborate his prediction: the Philadelphia police department has only 6012 officers, 368 less than its target. Senior members of the Philadelphia Police Department and city government are concerned about the low number of candidates for recruitment and the high number of officers considering leaving or retiring from the department.

A June 2021 report published by the Police Executive Research Forum found that "agencies are currently filling only 93% of the authorized number of positions available." Departments experienced a 5% decline in hiring, as well as a worrying 18% rise in resignations and a striking 45% increase in retirements between April 1, 2020, and March 31, 2021. "The exodus is affecting departments large, small, and in between," notes Eric Westervelt. Indeed, the problem affects municipal police departments across the nation. In addition to Philadelphia, San Jose, Oakland, San Diego, Chicago, Seattle, Atlanta, Kansas City, and Portland have experienced problems with recruiting and retaining police. This unfortunately comes amidst a wave of crime in large cities. Indeed, rising rates of homicide and other violent crimes have gripped urban communities across the country in the last few years.

There are multiple possible explanations for the recruitment and retention crisis. Two culprits for recruitment and retention difficulties are the pandemic that caught departments unprepared to make the switch to virtual training and screening, and a "nationwide discussion

about policing" and law enforcement budgets spurred by the death of George Floyd. Recruitment has been tough in recent years due to a plethora of factors including bureaucratic mismanagement within police departments, young people entering other professions, and the views of a vocal minority who harbor an antipathy to policing and the officers who take on this profession. Neil MacFarquhar, who focused on the retention crisis in Asheville, North Carolina for the New York Times, found that police felt that they were being unfairly vilified. Some officers said that they were excluded from social circles or threatened just for being cops amid unruly protests catalyzed by the death of George Floyd. Police departments, in the last two years, have been subject to intense scrutiny, and this at times, has contributed to an "anti-cop climate" in which many officers are discouraged from continuing in the law enforcement profession.

Despite the validity of the claim that recruitment has been far from easy for police departments recently, it is dubious to say that repealing qualified immunity would exacerbate the issue. As Jay Schweikert notes, "Police officers are nearly always indemnified for any settlements or judgments against them, meaning that their municipal employers, not the officers themselves, actually end up paying." He cites a well-regarded law review article paper titled "Police Indemnification" by UCLA Professor Joanna C. Schwartz, which reviews data on indemnification in civil rights damages actions in 44 large and 37 mid-sized and small law enforcement agencies in the United States. Professor Schwartz finds that "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement." If, on average, officers themselves are only personally liable for 2 cents out of every one hundred dollars in settlements and judgments for official misconduct, they will bear a very insignificant part of the burden in a world in which they can be sued for violations of constitutional rights beyond those that meet the "clearly established" standard. Consequently, removing the qualified immunity defense would not do much, if anything, to dissuade officers from staying in law enforcement and recruits from joining, even if it will allow more litigation from those who seek recourse for alleged rights violations.

Removing qualified immunity would also not open officers up to unrestricted and outrageous amounts of litigation and liability because "even in the absence of qualified immunity, it is by no means easy to demonstrate that a police officer violated your constitutional rights." Litigants who allege serious misconduct on the part of police still need to meet a high burden to show that what officers did violated the Constitution or rights established by statute. Furthermore, officers would still be able to defend themselves on the grounds that what they did was reasonable given the circumstances. Consequently, officers that keep in mind their responsibility to respect the rights and dignity of those they interact with have very little to fear. They will not be driven out of the law enforcement profession. Lurking underneath the argument that qualified immunity is required to maintain recruitment and retention at a reasonable level is the belief that police will only have an incentive to join police departments if there are few, if any, limits on their behavior when interacting with citizens. This criticism seems dubious. Underlying it is the overly cynical view that the assurance that officers will be allowed to act, more or less,

with impunity on the job is viewed in the minds of prospective recruits as a requisite factor in their decision to join the ranks of law enforcement.

There indeed seems to be some dip in law enforcement recruitment capabilities in recent years. Some municipalities are struggling to replace retiring officers with younger recruits, partly due to an environment in which the death of George Floyd looms large. The mistake in the argument is the claim that qualified immunity, which dooms litigants from achieving much-needed legal remedies, is needed to sustain department ranks. As Mr. Schweikert notes, although many major professions like doctors, architects, and lawyers are given some sort of immunity protection in certain situations, none of them are granted such a wide latitude to dismiss legal claims against themselves. Making it easier for victims who feel that they have been unjustly treated to pursue their claims in a court of law will not destroy the profession, nor make it significantly more intractable to repair falling recruitment and retention rates.

2. Police officers sometimes need to use force and make "split-second, life-or-death decisions"

Police officers indeed have to make split-second decisions when interacting with people in uncertain situations. In fact, developing an intuition about split-second decisions features in a large portion of police officers' training. Mr. Schweikert paraphrases one argument in support of qualified immunity as follows: "It is both unfair and unwise for courts to second guess these [split-second] decisions, and holding officers personally liable whenever they make the 'wrong call' will deter them from carrying out their duties in the first place." A more nuanced version of this argument is that police officers need discretion to perform their duties properly and that the "clearly established" standard serves as a protection for officers whose actions were reasonable, but resulted in unfortunate outcomes, like injury to a suspect. The Fraternal Order of Police made an argument along these lines after the death of Ma'Khia Bryant in Columbus, Ohio. Police officers, in trying to break up a chaotic fight, noticed a combatant with a knife who may have been about to stab a woman. The police officer fired, accidentally killing Ms. Bryant. The Fraternal Order of Police described the decision as "[a]n act of heroism, but one with tragic results." They noted that the incident "illustrates that 'split-second, life-or-death decisions' are all too real, and none of them are easy."

The idea that police sometimes need to use force and make life-or-death decisions with only a fraction of a second of time to think is a valid point. It has become painfully clear after the failed police response in Uvalde, Texas, that police must act quickly and may need to use lethal force to neutralize an active threat. It is true that cops may need to use force when lives are immediately on the line. However, it does not logically follow that we must acquiesce to a legal system that rarely punishes officers for apparent and egregious violations of individuals' rights. Officers often need to use force, but a doctrine that protects an officer who accidentally shoots a child after trying and failing to shoot a dog (Corbitt v. Vickers) need not be maintained.

I asked Patrick Jaicomo, an opponent of qualified immunity, "[w]hat [he would] say to critics that say police officers need leeway to thoroughly perform their duties including immunity from legal liability." Mr. Jaicomo replied that "police are already provided leeway to perform their duties by the Constitution" (emphasis in original). For example, "[t]he Fourth Amendment only prohibits unreasonable searches and seizures. If reasonableness is not enough leeway for the police they should consider another line of work" (emphasis in original). Constitutional law jurisprudence already provides limiting principles.

Proponents of qualified immunity are correct when they argue that police need to make split-second, life-or-death decisions in an effort to thwart immediate threats to human lives. However, there are other protections for officers in these cases. The law would still consider police encounters with civilians in excessive force suits holistically, considering whether an officer had a reasonable basis for acting in the way he or she did. Jay Schweikert points to Graham v. Connor, in which the Supreme Court established an "objective reasonableness" standard. The "objective reasonableness" test in Graham is deferential to police and provides that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The fraught circumstances of a criminal situation matter when assessing a police officer's actions, and those actions must be assessed from the perspective of an officer who is presumptively viewed as reasonable.

Jay Schweikert testified on the topic of misconceptions about qualified immunity before the House Committee on the Judiciary. He said, "Qualified immunity is not a good-faith defense, and it is not necessary to protect the discretion of police officers to make difficult on-the-spot decisions in the field. … The doctrine of qualified immunity only matters when a public official has in fact, violated someone's federally protected rights. That means if a police officer is [sic] has not committed any constitutional violation, then by definition, they don't need qualified immunity to protect themselves because they haven't broken the law in the first place. And the Supreme Court has made crystal clear that when police officers make good-faith mistakes of judgment, such as arresting someone who turns out to be innocent or using force that turns out with the benefit of hindsight to have been unnecessary they have not violated the Fourth Amendment at all so long as they acted reasonably. In other words, deference to reasonable on-the-spot decisions by police officers is already baked into our substantive Fourth Amendment jurisprudence. … The cases where qualified immunity ends up mattering aren't those where officers made reasonable mistakes of judgment. They're the cases where officers acted in bad faith, but where courts simply had yet to address that exact scenario." Graham's "objective reasonableness" standard asks us to interpret an officer's actions in a manner favorable to police discretion in the "tense, uncertain and rapidly evolving" situations that typify police work, Barry Friedman, an NYU law professor, and others have criticized the Rehnquist-led majority for creating a "lodestar" that "created this impression that almost nothing is out of bounds."

Nevertheless, Graham's "objective reasonableness" standard and Tennessee v. Garner's holding that the Fourth Amendment allows officers to use deadly force when they have a legitimate reason to believe that a fleeing suspect poses an immediate danger to others pale in comparison to qualified immunity, which prevents any semblance of accountability if a similar fact pattern in the relevant jurisdiction is not identified. Force, including lethal force, is sometimes necessary, but exercising such power cannot always be excused. Otherwise, we risk excusing some egregious violations of constitutional rights such as those discussed herein.

3. Eliminating qualified immunity would delegitimize law enforcement in the eyes of the public

Sometimes the argument is made that qualified immunity reform is a broader attempt to hamstring the police's crucial role in society. Senator Tom Cotton wrote that "[a]ny effort to abolish or significantly curtail this indispensable protection is a veiled attempt to defund, defame, and disarm the police in the midst of the worst violent-crime wave in a generation." Although it is unfortunately true that some who argue for the abolition of qualified immunity also adopt views like a major defunding of police or a reduction in their crime-fighting prerogatives, it is also true that qualified immunity and its more extreme alternatives need not coexist, especially since reforming qualified immunity has the support of a majority of the public while defunding the police definitely does not according to national surveys from the Cato Institute and Pew Research Center.

Although its critics blast qualified immunity as an attempt to delegitimize law enforcement, in fact, the opposite is true. Qualified immunity delegitimizes law enforcement by allowing severe violations of individual rights and in turn tarnishing the public's perception of law enforcement. I explain why eliminating qualified immunity may boost law enforcement's public image and help it gain the public's trust in the "Reasons to Eliminate Qualified Immunity" section, but some points about how qualified immunity affects law enforcement's legitimacy and position in society are important to note.

In one Cato Institute study, 86% of police officers surveyed agreed that "highly publicized incidents, where police had a fatal encounter, have made it harder to do their jobs." As I have previously explained, "A community that has genuine trust in law enforcement officers who are properly held accountable for their performance and deeds, good and bad, is likely to be more resilient against crime, disorder, and other societal ills." Rebuilding trust starts with ensuring that deadly force is only employed when it is truly needed and within the boundaries established by statute and by the Constitution. Qualified immunity "incentivizes police departments to hang on to bad officers" according to the study, which means that officers who perform their duties honorably have to work alongside those who do not. The misdeeds of the few who fail to respect individuals' constitutional rights and dignity may be applied through association to the majority of officers who do nothing of the sort, contributing to a crisis of confidence in a crucial pillar of civil society: law enforcement.

The authors of the study, James Craven, Jay Schweikert, and Clark Neily, write, "Good police shouldn't carry the burden of being lumped together with the proverbial bad apples who wantonly violate people's rights." Recently, some law enforcement groups like the Major Cities Chiefs Association (MCCA), the Law Enforcement Action Partnership, and the National Organization of Black Law Enforcement Executives have taken to calling for an end to qualified immunity. This is another example of how alliances sometimes crosscut and shows that police may be beginning to recognize that the judicially-created doctrine delegitimizes their line of work. Weeding out cops who neglect to treat citizens with baseline standards of dignity - by eliminating the doctrine of qualified immunity that allows for these abuses - allows cops that perform their job with care and composure to focus on their law enforcement duties, free from those whose actions are in stark contradistinction to the values to which they adhere.

4. Qualified immunity is a necessary protection against excessive lawsuits

Supporters of a qualified immunity claim that the doctrine is necessary to disincentivize spuriously lawsuits that would embroil officers in unnecessary and excessive litigation that would distract them from doing their duties as sworn members of the law enforcement community. In a National Review op-ed, Senator Tom Cotton made the argument that qualified immunity "protects officers from malicious lawsuits that would otherwise financially cripple them and hollow out departments." Mr. Cotton compared the immunity proffered by the doctrine to the immunity granted to other public officials like judges, politicians, and park rangers. Although this paper has focused on the role of qualified immunity in policing, it is true that qualified immunity applies to a wide range of government officials beyond the police. The question of whether qualified immunity for non-police government officials is just or valuable will not be resolved here, but the claim that qualified immunity is needed to protect officials against lawsuits should be subjected to scrutiny because frivolous lawsuits are a problem unrelated to qualified immunity.

As Jay Schweikert explained in testimony about civil rights litigation reform before the House Committee on the Judiciary, "[T]he doctrine only matters, where (1) a public official has violated someone's rights, but (2) a court holds that those rights were not clearly established at the time of the violence. So by definition, it [qualified immunity] only makes a difference where the underlying case is meritorious. If a civil rights suit is actually frivolous, in other words, if it lacks legal or factual merit, then other tools of civil procedures are perfectly capable of dismissing those claims." In other words, qualified immunity only applies where a constitutional and/or statutory violation has been determined to occur (in which case qualified immunity would lead to the suit being dismissed on the grounds that the right was not "clearly established"). If a lawsuit lacks merit (if it is spurious or frivolous), it means that no constitutional or statutory violation has occurred, which in turn means that the suit will not proceed to the stage in which qualified immunity is a relevant factor.

VII. Tried Policy

A. States

Given the inaction of Congress and of federal courts in rolling back qualified immunity, Ilya Somin, a law professor at George Mason University's Antonin Scalia Law School, recommends that state governments enact reform measures, recognizing that state and local police are responsible for most law enforcement operations in the United States. State legislators have indeed taken the lead in proposing reforms to qualified immunity. In the last two years, lawmakers in Colorado, Connecticut, Minnesota, Illinois, New Mexico, Massachusetts, and New York City have attempted to rein in the doctrine in various ways and with varying degrees of success. This section focuses on the successes of lawmakers in Colorado and New Mexico, the two states which have passed laws that make it easier for litigants to file lawsuits in state courts alleging a violation of rights guaranteed by state laws or the state constitution.

The Colorado General Assembly passed the Enhance Law Enforcement Integrity Act (SB20-217) on June 13, 2020. The legislation is sweeping and covers a broad scope of criminal justice reform measures. For example, it will require most state officers to wear body cameras, requires timely reporting of data relating to the use of deadly force and violations of department policy, restricts the use of projectiles and chemical agents by law enforcement against protesters, prohibits chokeholds, establishes penalties for an officer's failure to intervene when another attempts to unlawfully use deadly force, creates a database cataloging data about officers' failure to follow protocols, establishes a procedure for the revocation of peace officer certification for failure to complete training, and empowers the Colorado attorney general to prosecute officers who repeatedly violate rights or department policies. The act also makes important changes to the legal framework for lawsuits alleging rights violations. According to the official summary of the bill, "[t]he act allows a person who has a constitutional right secured by the bill of rights of the Colorado constitution that is infringed upon by a peace officer to bring a civil action for the violation." In other words, the legislation allows litigants in use-of-force claims, for example, to bring suit against police officers who they allege have violated their rights under the Colorado Constitution in state court. The legislation clarifies that qualified immunity shall not be a defense against these civil claims. Furthermore, if an officer is determined to not have acted in good faith, they can personally incur financial penalties equal to 5% of the judgment, up to $25,000. The officer's employer, usually a municipal police department, would otherwise indemnify the officer for the claim and pay the amount delineated by the judgment.

Colorado State Representative Leslie Herod set out to answer the question of how the Colorado General Assembly's attempt to reform qualified immunity and policing practices succeeded, whereas elsewhere attempts at change, including a previous bill to eliminate qualified immunity, met an immovable brick wall. "Thousands of people from across the state were all singing from the same page" as a result of an environment conducive to criminal justice reform in which images of police abusing their powers were widely disseminated on social media and the internet, she said. In fact, Colorado's policing reform bill was passed no more than three weeks following the death of George Floyd in Minnesota, after which demands for change to

police practices were louder than ever. After "16 intense days" of negotiations, progress on the issue was made, and the bill that became the Enhance Law Enforcement Integrity Act was drafted. Ms. Herod says that she is still not sure how a diverse coalition of liberals, some conservatives, civil rights groups like the ACLU, and interest groups representing law enforcement was assembled and mobilized to get SB20-217 past all the hurdles. She simply said, "The system – our great American experiment – actually worked. The pressure coming directly from the people of Colorado demanding change was immense, and it was bipartisan and reached across racial demographics." Colorado's bill is an instructive lesson that shows that change is not impossible, despite what it may sometimes seem.

On April 7, 2021, New Mexico passed the New Mexico Civil Rights Act (HB 4), which bars officials from employing the state analog of the qualified immunity defense in civil rights suits brought under the New Mexico Constitution. The 20 New Mexico Civil Rights Act is similar to Colorado's Enhance Law Enforcement Integrity Act. Both acts eliminate the state version of the qualified immunity defense and clear the road for litigants to file lawsuits in state courts. Both acts deal with qualified immunity and policing by instituting a means of procuring remedies to violations of rights established by the states' respective bills of rights in the New Mexico and Colorado state constitutions. Both legislative reforms were also supported by a diverse coalition. The New Mexico Civil Rights Act was backed by civil rights groups like the ACLU of New Mexico, the Innocence Project, the National Police Accountability Project, and the Institute for Justice, as well as the New Mexico chapter of the Charles Koch-backed Americans for Prosperity.

There are conspicuous differences between the two states' pieces of legislation as well. Firstly, the New Mexico Civil Rights Act eliminates the qualified immunity defense for all state government employees, making it in one important respect broader than the Enhance Law Enforcement Integrity Act, which only applies to law enforcement officers in Colorado. However, in one significant way, New Mexico's reform is narrower than that of Colorado. At the eleventh hour, HB 4 was altered to include a section (Section 8) that requires government bodies to indemnify employees for judgments brought under the New Mexico Civil Rights Act and pay the entirety of the judgment and all litigation costs. Under the new New Mexico law, "agencies are held vicariously liable for the actions of their employees, while the individual government workers are not at risk of personal liability." By contrast, Colorado's law moved slightly away from the prevailing complete indemnification practice by opening up police officers to personal liability for up to 5% of the judgment in cases where they demonstrably acted in bad faith. Under Colorado's law, the potential liability of a small portion of the judgment means that officials have "skin in the game," whereas "individual defendants can never be personally liable for the injuries they cause" in New Mexico, observes Jay Schweikert. According to the Washington Post, the removal of the provision that would have allowed litigants to identify individual officers or government employees who violated their rights and open them up to personal liability was done so discreetly that even staunch supporters of the bill, including those who testified before the

state legislature, did not initially know that the change had happened. Advocates for HB 4 believe that the bill was changed at the behest of law enforcement lobbies, who had been warning about potential repercussions of the legislation: anti-crime police operations would be derailed, officers would go bankrupt, and members of the law enforcement community would resign en masse. Nevertheless, Mr. Schweikert described the New Mexico Civil Rights reform as a historic and "welcome beacon of hope."

Law professor Ilya Somin has observed that despite incipient momentum to rework or do away with qualified immunity at the state level, the efforts of state lawmakers have largely gone begging. New Mexico, Colorado, and the other states that have made reforms to qualified immunity are the exceptions rather than the rule. Mr. Somin postulates that the principal problem with qualified immunity reform is that the concentrated interests of a well-organized minority tend to win over the dispersed interests of a mostly apathetic majority. (See chapter 8 of Charles Wheelan's Naked Economics titled "The Power of Organized Interests: What economics can tell us about Politics.") Mr. Somin reasons, "While large majorities of the general public oppose QI, most do not follow the details of reform legislation, and only a few voters see QI reform as one of their highest priorities. By contrast, police and other law enforcement interests are well aware of the issue, do follow relevant legislation closely, and are more than willing to punish state legislators who cross them." A Washington Post analysis has shown that entrenched interests, police unions being chief among them, have managed to ensure that "in state after state, the bills [to undo qualified immunity] withered, were withdrawn, or were altered beyond recognition." Despite New Mexico being a relative success story in qualified immunity reform, it nevertheless offers a cautionary tale that legislators may end up acquiescing to special interest groups even if they otherwise think that legislative action at curbing qualified immunity is a needed idea. Other state attempts to restrict qualified immunity have suffered worse fates than the New Mexico Civil Rights Act, with 35 reform bills dying between April 2020 and October 2021.

B. Federal

Although a federal attempt to eliminate, roll back, or change qualified immunity has not passed the finish line, Congresspeople have proposed pieces of legislation that would do just that. Congressman Justin Amash sponsored the Ending Qualified Immunity Act (H.R.7085), a short bill that amends 42 U.S.C. § 1983 by eliminating the defense of qualified immunity in civil actions in which rights have allegedly been deprived under the color of law and explicitly repudiates the "clearly established" standard that has become the centerpiece of the judicial interpretation of the doctrine. In a "Dear Colleague" letter from the congressman's office, Mr. Amash rebukes the Supreme Court's qualified immunity decisions as being positioned "in contravention of the text of the statute [the Civil Rights Act of 1871] and the intent of Congress. It is time for us to correct their mistake. My bill, the Ending Qualified Immunity, does this by explicitly noting in the statute that the elements of qualified immunity outlined by the Supreme Court are not a defense to liability." The bill attracted 66 cosponsors: 65 Democrats and 1

Republican. In fact, the bill was tripartisan, being officially backed by several Democrats, one Republican (Congressman Tom McClintock), and one Libertarian (Mr. Amash himself). Despite the support that the legislation attracted, no further action was taken on the bill in the House of Representatives or the Senate, where it was introduced as S.4142 by Senator Ed Markey. Senator Mike Braun, a Republican from Indiana, sponsored the Reforming Qualified Immunity Act (S.4036) a few weeks after Mr. Amash introduced his bill. Unlike the Ending Qualified Immunity Act, Mr. Braun's bill modifies, rather than eliminates, qualified immunity. According to a press release accessible on Mr. Braun's official Senate website, Mr. Braun views the original conception of qualified immunity as advantageous but believes the doctrine over time had deviated from its original purpose of protecting government employees from liability when they acted in good faith. "The Reforming Qualified Immunity Act re-instates the original qualified immunity standard. Government employees, including law enforcement officers, would be permitted to claim qualified immunity when sued under 42 U.S.C. § 1983 only when: Conduct alleged to be unlawful had previously been authorized or required by federal or state statute or regulation. [Or a] court had found that alleged unlawful conduct was consistent with the Constitution and federal laws." The Reforming Qualified Immunity Act "attracted no Senate cosponsors and was faced with a strong backlash from some quarters," I wrote in the "Stakeholders" section.

The George Floyd Justice in Policing Act (H.R.1280) was introduced by House Democrats in 2021. The bill is expansive, and its pros and cons cannot be discussed here for the sake of space. Among its multitudinous provisions are measured to prohibit carotid holds and chokeholds at the federal level, incentivize their elimination in the 50 states by conditioning federal law enforcement funding of their elimination, update police training, prohibit no-knock warrants in certain federal cases, shift from a willfulness standard to a recklessness standard when evaluating claims of police misconduct, speeding up the adoption of body cameras, creating a national registry for incidents of serious police misconduct, and end qualified immunity at the federal level, according to NBC News. According to Congress.gov, the legislation has 199 cosponsors in the House of Representatives in addition to Congresswoman Karen Bass, who sponsored the bill. H.R.1280 passed in the House on March 3, 2021, by a 220-212 vote, with all but two Democrats voting in favor of the bill and all but one Republican voting against it. No further action was taken on the bill as Senate Republicans and Senate Democrats were unable to resolve their differences of opinion and reach a compromise.

In June 2020, Senate Republicans, led by Senator Tim Scott and aided by Senator Mitch McConnell, proposed a "policing bill that would discourage, but not ban, tactics such as chokeholds and no-knock warrants" according to the Washington Post. The bill was seen as a more restrained version of the Democrats' legislation, tackling similar issues but offering solutions that Democrats averred were "literally not sufficient" and "woefully inadequate" in the words of two prominent Democratic Senators. Senate Democrats led by Senator Chuck Schumer used the procedural filibuster to block debate on the Republican proposal. Several frustrating

rounds of negotiations took place over more than twelve months. In August 2021, Politico reported that qualified immunity reform, which was "one of the main points of contention in the police reform negotiations," was withdrawn from the talks between Republican and Democratic negotiators. This development was much to the chagrin of some progressives, including Congresswoman Cori Bush, who "called the removal of qualified immunity a redline." Other Democrats, like House Majority Whip Jim Clyburn, were willing to make concessions to seek a finalized agreement. The following month, however, talks collapsed amid legislative gridlock, with the parties unable to reach a consensus on what should be included in the bill.

I asked Patrick Jaicomo about the likelihood that federal legislators will take action to revise the qualified immunity doctrine: "Do you think that public appetite for criminal justice reform will result in action aimed at reforming qualified immunity, or will hurdle like police unions and prosecutors concerned with crime stymie efforts at reform?" Mr. Jaicomo's answer was equivocal: "It's hard to guess what public opinion will accomplish. It could be everything, or it could be nothing. We are still committed to pushing for reforms in courts, Congress, and the public square. But I have to admit that I am less optimistic about congressional reform given that all of the protestings after George Floyd was killed was not enough to get Congress to find a solution."

VIII. Policy Options

A. Judicial

There are two principal ways to approach this issue: by means of the judicial branch and by means of the legislative branch. Both methods are important, but going to the judicial route may be the best way to start. There are two reasons why. Firstly, engaging the judiciary by fighting on behalf of victims who have had their rights violated by those in positions of power can help deliver immediate relief to such individuals who have no place but the courts to which to turn. Patrick Jaicomo, who works as an attorney at "a public interest law firm which has represented clients before federal courts including the Supreme Court," tells me that "fundamentally, as attorneys, our first goal is to serve our clients. And filing these lawsuits to vindicate the rights of our clients and make them whole is independently valuable to both them and us. If it weren't, public interest lawyers should consider another line of work."

Secondly, the judiciary is the branch of government responsible for inventing the qualified immunity doctrine, which has metastasized into a major problem as courts keep adding to its jurisprudential morass. I asked Mr. Jaicomo about "what role [he] see[s] litigation playing in not only helping individual clients procure compensation for police abuses, but also at chipping away at … a confusing patchwork of immunity doctrines' (from 'Constitutional GPA' by Miller, Cairns, Bidwell, Jaicomo, and Morton) like qualified immunity." He replied, "Since qualified immunity is a legal doctrine, litigation is hugely important for shaping its contours. Obviously, Congress is another avenue for change—one that we also pursue. But the Supreme Court created

this problem in Harlow v. Fitzgerald (and Pierson v. Ray before that), so bringing legal challenges is one way to fix it, even if incrementally."

That being said, what can courts do to change or get rid of qualified immunity? Lower courts cannot do a whole lot. In his Cole v. Carson dissent, Judge Don Willett, who has served since 2018 on the Court of Appeals for the Fifth Circuit, expressed his disappointment at modern qualified immunity doctrine but said that there was little he could do to improve it: "[A]s a middle-management circuit judge, I take direction from the Supreme Court. And the Court's direction on qualified immunity is increasingly unsubtle. We must respect the Court's exacting instructions— even as it is proper, in my judgment, to respectfully voice unease with them." And voicing unease he has done, but he has been joined by a few of his federal court colleagues. It is clear that the judicial solution to the qualified immunity mess must come from the Supreme Court. However, commentators including Mark Joseph Stern and Ilya Somin have expressed skepticism that the high court will be fixing the qualified immunity doctrine anytime soon, pointing to two cases - Rivas-Villegas v. Cortesluna (discussed in "Overview") and City of Tahlequah v. Bond - in which no justices dissented from the Supreme Court overturning lower courts' findings that officers were not entitled to qualified immunity.

Not everyone is in agreement with this line of reasoning though. Patrick Jaicomo, an expert on the high court's qualified immunity jurisprudence, believes that a major recalibration of qualified immunity by the judiciary could be on the horizon. "Three sitting justices of the Supreme Court – Clarence Thomas, Sonia Sotomayor, and Neil Gorsuch – have at times articulated skepticism about the extent to which qualified immunity is granted in cases involving interactions between police officers and citizens," I wrote in my communication to Mr. Jaicomo. "Notably, Justice Thomas, in dissenting from the denial of certiorari in Baxter v. Bracey, criticized federal courts' QI jurisprudence and what he sees as a deviation from the statutory text. What do you view as the prospects for federal courts scaling back the doctrine, and how would you contrast that with prospects of legislative-driven reform?" In responding to my query, Mr. Jaicomo referred me to a law review article he co-authored with Anya Bidwell that was recently published in the Journal of Law & Criminology.

In "Recalibrating Qualified Immunity: How Tanzin v. Tanvir, Taylor v. Riojas, and McCoy v. Alamu Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity," Mr. Jaicomo and Ms. Bidwell find promise in three Supreme Court decisions since 2020 that may be harbingers of a judicial rollback of qualified immunity. Before 2020, they write, the Supreme Court assiduously and almost unanimously rejected appeals that challenged the application of qualified immunity. Justice Clarence Thomas was the only justice who occasionally dissented from the denial of these petitions. He frequently "write[s] separately … to note [his] growing concern with [the Supreme Court's] qualified immunity jurisprudence," its deviation from common law, and its failure to conduct a historical analysis with respect to the Civil Rights Act of 1871 as he did in Ziglar v. Abbasi. Justice Thomas reiterated his concerns with qualified immunity when he dissented from the denial of certiorari in Baxter v. Bracey, a

case in which a police dog bit Alexander Baxter when he was being apprehended even though he had already raised his hands and was surrendering to officers. Mr. Baxter sued alleging that his Fourth Amendment rights were violated, but the Court of Appeals for the Sixth Circuit concluded that the officers could not be held liable under the "clearly established" test even though their actions were unconstitutional. No justice, save Justice Thomas, would have granted Mr. Baxter's petition. In his dissent from the denial of certiorari, Justice Thomas expressed his most powerful words against qualified immunity, which he said "stray[s] from the statutory text" and whose "clearly established law" standard has no historical or common law basis.

Beginning in 2020, justices, in addition to Justice Clarence Thomas, have indicated that they want the often outrageous applications of qualified immunity to be curtailed. Taylor v. Riojas was a case in which a Texas prisoner was forced to spend six days naked in prison cells that were covered with feces and sewage, unreasonably cold, smelled of an appalling odor, had no bed or toilet, and had only contaminated water. The case made its way to the Court of Appeals for the Fifth Circuit, which ruled that although the prison guards' conduct violated the Eighth Amendment's disallowance of "cruel and unusual punishment," they could not be held personally liable because there was no "clearly established law" that prohibited officials from housing inmates in the particular type of inhumane conditions at issue in Taylor "for only six days." "The Fifth Circuit erred in granting the officers qualified immunity on this basis," says the unsigned per curiam opinion. "[N]o reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." The Supreme Court granted the petition for certiorari, vacated the decision of the Fifth Circuit, and remanded for further proceedings. In ruling the way that it did, the high court "breathed new life into" Hope v. Pelzer, a 2002 case before the Rehnquist court that concerned an Alabama prisoner who was cuffed for seven hours to a hitching post in the heat without any food or sufficient water and was taunted by prison guards. A John Paul Stevens-led Supreme Court majority reversed lower courts' decisions and found that the prison officials were not entitled to qualified immunity due to the egregiousness of the offense and the obviousness of the constitutional violation that it entailed. The Supreme Court "doubled down on Taylor just three months later with its decision in McCoy v. Alamu" by using summary reversal to grant certiorari, reverse the Fifth Circuit's decision, and remand the case in which a prison official sprayed a chemical agent in the face of a prisoner for no apparent reason. According to Patrick Jaicomo and Anya Bidwell, this shows that Taylor was unlikely to have been an aberration and could signal the beginning of a contemporary shift to a more restrained version of qualified immunity that is more favorable to litigants alleging police abuse.

Finally, although the case Tanzin v. Tanvir is not about qualified immunity, it "addressed the analytical foundation of the doctrine" according to Mr. Jaicomo and Ms. Bidwell. The Supreme Court, in a unanimous decision authored by Justice Clarence Thomas, held that litigants may seek "to obtain money damages against federal officials in their individual capacities" under

the Religious Freedom Restoration Act (RFRA) of 1993. The case involved Muslims who alleged that agents working for the Federal Bureau of Investigation placed them on the No Fly List in retaliation for refusing to act as informants and provide information about individuals in their communities. In its ruling, the court expanded the definition of "government" to include "officials" in specific contexts. It ruled that damages against individual government officials constitute "appropriate relief" under the RFRA for cases where the First Amendment right to freely practice religion is violated. Patrick Jaicomo and Anya Bidwell explain that "[t]he cases cited by Justice Thomas [in Tanzin] not only establish the historical availability of damages but the historical unavailability of court-created immunities" (emphasis in original). This could have weighty implications for the court's qualified immunity jurisprudence. "Tanzin makes clear that policy cannot permit the Court to create special protections for government officials—no matter how good the policy reasons. Further, Tanzin is explicitly connected by analogy to constitutional claims and the historical backdrop of Section 1983. … Combined with the Court's decisions in Taylor and McCoy, Tanzin signals that the Court's 2020 term could be the beginning of the end for qualified immunity."

B. Legislative

The other means of reform is by working through Congress. There are some advantages to this approach. Firstly, the judicial interpretation of qualified immunity emerged out of what critics say is a mistaken interpretation of the Civil Rights Act of 1871 and 42 U.S.C. § 1983. Legislation can be used to clarify that a right has not been "clearly established" at the time it was deprived by a government official and is not an acceptable defense to liability under section 1983 of the U.S. Code. This was the approach of the Ending Qualified Immunity Act (H.R.7085). Secondly, notwithstanding Mr. Jaicomo's well-informed and tenable optimism about judicial remedies to the doctrine in the near future, there may not be enough justices with a desire to roll back qualified immunity on the Supreme Court. We might place the upper bound for justices skeptical at how extensively qualified immunity has been applied at four: Justice Clarence Thomas, Justice Sonia Sotomayor, Justice Neil Gorsuch, and Justice Ketanji Brown Jackson. Out of the four, only Justice Thomas has called for revisiting the question of whether the doctrine as a whole is valid, whereas the rest have expressed dissatisfaction with how far-reaching it has become. Thirdly, law professors Aaron L. Nielson and Christopher J. Walker strongly recommend legislative, as opposed to judicial, reform on the grounds that judicial action could upset the applecart of qualified immunity's delicate entanglements with principles of federalism. "[F]ederalism dimensions counsel in favor of statutory stare decisis by the federal judiciary and careful, evidence-based reform by state legislatures and Congress. In short, because qualified immunity is the product of federalism-infused statutory interpretation that has now generated significant reliance and robust experimentation, it follows that qualified immunity's critics should stop looking to the Supreme Court for judicial action. They should instead 'take their objections across the street, [where] Congress can correct any mistake it sees.'"

Although neither Congressman Justin Amash's Ending Qualified Immunity Act (H.R.7085) nor Senate Democrats' George Floyd Justice in Policing Act (H.R.1280) cleared both houses of Congress, there have since been attempts to rein in the doctrine. Congresswoman Ayanna Pressley in the House of Representatives, who cosponsored Mr. Amash's bill, and Senator Ed Markey in the Senate reintroduced the Ending Qualified Immunity Act as H.R.1470 and S.492 in the 117th Congress with a very similar text to the original bill. The House bill has 41 cosponsors, and the Senate version has been cosponsored by Senator Elizabeth Warren and Senator Bernie Sanders. It remains to be seen whether this iteration of the legislation will succeed and become law.

IX. Conclusion and Recommendations

Based on the analysis of the advantages and disadvantages of qualified immunity conducted in the "Current Stances" section, I conclude that the doctrine of qualified immunity should be eliminated entirely, and failing that should at least be substantially reformed and restricted.

The following are recommendations to various stakeholders that are based on an examination of previous policy attempts ("Tried Policy") and options moving forward ("Policy Options").

Recommendations to researchers and journalists:

1. Researchers, writers, and journalists should work to establish a meta-framework for criminal justice policy analysis that adequately incorporates a study of actors and incentives. This meta-framework should take seriously the role that economic tools can play in public policy research. Some writers have begun to observe the fact that the structures of criminal justice are one area where not very much analysis from the economic perspective has been applied and have begun to fill in the gap. (See Radley Balko's article "Public choice theory is crucial to understanding the criminal justice system.") Researchers, writers, and journalists should recognize that this is a promising area for future research that could have interesting implications for public policy development with regard to qualified immunity, as well as incarceration, civil asset forfeiture, drug searches, county sheriff elections, and more.

2. Writers and journalists should alter the way in which they write about qualified immunity and other criminal justice issues. Too often, policy analysis and especially journalism about criminal justice is either moralistic or episodic. That is, an article about criminal justice reform either takes a position that the authors argue is the most just, equal, or reasonable. Alternatively, authors sometimes merely report the facts of policy deliberations, such as quotes from party leaders, roll call votes, and significant solutions or themes discussed or proposed. Digging deeper and establishing a coherent theory of the incentives facing stakeholders (individual police officers, police unions, state legislatures, U.S. Congress, etc.) in the qualified immunity debate is

advisable. I will leave it to others to build on my preliminary examination of the incentive structures. Recommendations to the American public: 1. The American public should seek to learn more about qualified immunity. Although it is difficult to assess what percentage of the population is aware of the fundamentals of the doctrine, I would conjecture that it is a small minority. This research paper is an excellent place to start learning about qualified immunity, but there are also other valuable resources. See, for example, Nathaniel Sobel's article "What Is Qualified Immunity, and What Does It Have to Do With Police Reform?" or Jay Schweikert's policy analysis "Qualified Immunity: A Legal, Practical, and Moral Failure." Reuters's four-part investigation, whose first part is available at this URL, provides a gripping introduction to the doctrine and is replete with images, videos, and charts. It won a Pulitzer Prize in Explanatory Reporting.

3. After immersing themself in qualified immunity, Americans should voice opinions about the issue. When polled, a majority of the public believes that it should be possible for individual officers to incur liability for violations of constitutional and statutory rights, including and up to the complete elimination of the doctrine that precludes such liability if the deprived right in its unique fact pattern was not "clearly established." However, it is unclear whether a public that passively supports doing away with qualified immunity will be enough to culminate in a change in the halls of Congress. Being more vocal about qualified immunity specifically (rather than policing reforms broadly) and crafting demands around this issue could help level the playing field, if only a little.

4. The segment of the American public that opposes qualified immunity should find a way to organize better collectively. My incentives-centered analysis finds that pro-qualified immunity interest groups like police unions will win out in policy debates because they are small and well-organized. Opponents of qualified immunity need to find a consistent way to overcome collective action problems and articulate clear demands to influence the decisions of state and federal legislators. The success of Colorado's Enhance Law Enforcement Integrity Act was propelled by a cross-partisan coalition of civil liberties groups, conservative advocacy organizations, and some groups aligned with law enforcement. Interested stakeholders across the country should look to replicate this model in their own states.

Recommendations to federal courts:
1. Unless a judge is one of the nine justices on the Supreme Court, jurists' hands are largely tied with regard to making fundamental changes to qualified immunity jurisprudence. They must follow the "exacting instructions" of the Supreme Court. Following the lead of Judge Don Willett, however, judges on Circuit Courts of Appeals can and should "respectfully voice unease" with the Supreme Court's direction on its immunity doctrines. The qualified immunity doctrine

needs a "thoughtful reappraisal," and federal judges' concurrences or dissent to this effect, even if not legally actionable, could have a powerful impact.

2. Chief Justice John Roberts and Associate Justices Samuel Alito, Sonia Sotomayor, Elena Kagan, Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson should follow the lead of Associate Justice Clarence Thomas in questioning the judicial foundations of qualified immunity. Justices Sonia Sotomayor, Neil Gorsuch, and Ketanji Brown Jackson have, at times, questioned the ways in which qualified immunity has been applied, particularly in cases of apparent and abhorrent abuses of individual rights. However, none have questioned whether the doctrine should ultimately exist or whether it comports with the original meaning of the Civil Rights Act of 1871 and the common law in the postbellum nineteenth century. The origins of qualified immunity lie in the opinions of the court in Harlow v. Fitzgerald and somewhat in Pierson v. Ray. If the doctrine is to be rolled back, it is primarily the responsibility of the institution that birthed it.

Recommendations to Congress:
1. Members of Congress who are interested in qualified immunity reform should speak to their colleagues and work to build a bipartisan coalition that promotes the issue as the centerpiece of any future police reform bill.

2. Congress should amend federal civil rights statutes by explicitly stating that qualified immunity is not a legitimate defense for police officers for liability for violating constitutional or statutory rights even if those rights do not surpass the vague bar for being "clearly established." Ben Sperry explains, "Congress need not wait. They can change the law at any time by amending 42 USC § 1983 to clarify there is no immunity for police officers that engage in unreasonable force."

3. To that end, the House of Representatives should pass H.R.1470, which was sponsored by Congresswoman Ayanna Pressley of Massachusetts, and the Senate should pass S.492, which was sponsored by Senator Ed Markey of Massachusetts. The President of the United States should sign this Ending Qualified Immunity Act, a simple, single-issue bill that would offer the aforementioned clarification about immunity, reject the so-called "clearly established" test and upend the flawed judicial interpretation of qualified immunity under the statutes related to landmark civil rights legislation.

4. Although there are merits to bundling qualified immunity reform into broader criminal justice reform bills, there are detriments to this approach as well. To avoid qualified immunity reform being tangled into other, possibly more controversial, attempts at policing reform, I suggest

making legislation on qualified immunity a single-issue bill. This is not an absolute rule, and qualified immunity reform by Congress would be welcome.

5. Congress should reinforce safeguards besides qualified immunity that protect police officers when they made unfortunate mistakes in the performance of their duties when their actions were reasonable given the circumstances, performed in accordance with their training, and showed respect for the individual liberties and dignity of the civilians with whom they interact. Perhaps, Congress should consider codifying the "objective reasonableness" standard established in Graham v. Connor into statute. Critically, the "objective reasonableness" standard "has nothing to do with qualified immunity," as Jay Schweikert explains. "In Graham, the Court was simply explaining that unless an officer acts objectively unreasonable, under the circumstances known to them at the time, they haven't violated the Fourth Amendment at all." By contrast, qualified immunity would shield a police officer from liability even after finding that they committed a Fourth Amendment violation, for instance. Qualified immunity and Graham's "objective reasonableness" standard operate on two different levels. This research project finds substantial reasons to repudiate the former. I offer no firm conclusion on the latter, but lawmakers concerned about safeguarding the police's crucial role in maintaining order and protecting members of their community could consider codifying such protections that are currently only developed in case of law while still working toward the reform or elimination of qualified immunity. To be clear, though, the contents of this paper "should not be read to endorse … reliance on Graham and Garner," as Professor Joanna C. Schwartz writes in her article about qualified immunity.

Recommendations to state legislatures:

1. In the face of federal inaction on this issue, state legislators should move quickly to introduce bills eliminating the state equivalent of qualified immunity. These bills can either be a part of a larger policing reform package, as was the case with Colorado's Enhance Law Enforcement Integrity Act (SB20-217), or can be introduced as a standalone measure.

2. State legislators should collaborate with other party caucus members representing various constituencies and interests. They should also be bold in reaching out across the aisle to legislators of the other party.

3. State legislators should attempt to assemble cross-partisan coalitions consisting of civil liberties groups, conservative advocacy organizations, and minority rights groups, as well as liberals and conservatives of all stripes. This was the case in Colorado, where SB20-217 was supported by the ACLU, Black Lives Matter activists, and even some law enforcement lobbies. The details of the legislation were hammered out within sixteen days, and the bill passed the Colorado General Assembly was signed by Governor Jared Polis shortly thereafter. A similar phenomenon happened in New Mexico. In the "Tried Policy" section, I wrote that the "New

Mexico Civil Rights Act was backed by civil rights groups like the ACLU of New Mexico, the Innocence Project, the National Police Accountability Project, and the Institute for Justice, as well as the New Mexico chapter of the Charles Koch-backed Americans for Prosperity." Bringing together groups that ordinarily do not find themselves in agreement about controversial issues could maximize the chances that a bill will be supported by a majority of both houses of a state legislature.

4. State legislators should attempt to pass a qualified immunity reform bill quickly. To that end, they should avoid getting bogged down in tangential subjects while negotiating and focus on the central issue of qualified immunity and the accompanying "clearly established" test. Colorado passed SB20-217 within three weeks after George Floyd was killed by a Minneapolis police officer due to the speed with which negotiators decided upon a legislative package. By contrast, federal attempts at criminal justice reform quickly become more and more untenable, and the possibility of identifying and acting upon areas of agreement disintegrates as the negotiations go on for months.

Recommendations to political parties:

1. American political parties, large and small, should incorporate provisions in their party platforms that call on Congress to reform or repeal the modern iteration of qualified immunity.

2. The Democratic Party should justify qualified immunity reform in its messaging and communications on the grounds that it denies justice to many individuals who have endured tremendous violations of their civil rights.

3. The Republican Party should justify qualified immunity reform in their messaging and communications on limited-government grounds. Reforming qualified immunity would limit the power of government officials to violate the constitutional liberties that have been well-ingrained in the American legal system since the time of the Founding Fathers. They can also make the case that qualified immunity is a form of judicial activism - an example of legislating from the bench.

X. Acknowledgements

The Institute for Youth in Policy wishes to acknowledge Ahad Khan, Michael Yang, Katelin Wong, Nolan Ezzet, and other contributors for developing and maintaining the Policy Department within the Institute.

The author would like to thank Patrick Jaicomo, an attorney with the Institute for Justice, for responding to his communication requesting comment on his questions about the doctrine of qualified immunity and for permitting him to publish his responses.

XI.References

[1] Achen, Christopher H. and Larry M. Bartels. 2016. Democracy for Realists: Why Elections Do Not Produce Responsive Government. Princeton, NJ: Princeton University Press.

[2] Alaban, Lloyd. 2021. "Report: Declining San Jose police applications reflect a national trend." San José Spotlight, August 18, 2021. https://sanjosespotlight.com/report-declining-san-jose-police-applications-reflect-national-trend/.

[3] Amash, Justin (@justinamash). 2020. "This week, I am introducing the Ending Qualified Immunity Act to eliminate qualified immunity and restore Americans' ability to obtain relief when police officers violate their constitutionally secured rights." Twitter post, May 31, 2020. https://twitter.com/justinamash/status/1267267244029083648. [4] Anderson v. Creighton, 483 U.S. 635 (1987).

[5] Andrew, Scottie. 2020. "Americans' confidence in police falls to its lowest level in nearly three decades, new Gallup poll shows." CNN, August 12, 2020. https://www.cnn.com/2020/08/12/us/american-confidence-in-policing-n ew-low-trnd/index.html.

[6] Balko, Radley. 2017. "Public choice theory is crucial to understanding the criminal justice system." The Washington Post, July 21, 2017. https://www.washingtonpost.com/news/the-watch/wp/2017/07/21/public-choice-theory-is-crucial-to-understanding-the-criminal-justice-system/ .

[7] Balko, Radley. 2021. "The ugly origins of qualified immunity." The Washington Post, October 26, 2021. https://www.washingtonpost.com/opinions/2021/10/26/ugly-origins-qualified-immunity/.

[8] Barrón-López, Laura. 2020. "Democrats' Coming Civil War Over Police Unions." Politico, October 14, 2020. https://www.politico.com/news/magazine/2020/10/14/police-reform-police-unions-qualified-immunity-democratic-party-420122.

[9] Baxter v. Bracey, 590 U.S. ____, ____ (2020) (Thomas, J., dissenting from denial of certiorari).

[10] Binion, Billy. 2020. "A Senate Republican Has Officially Come Out Against Qualified Immunity." Reason, June 23, 2020. https://reason.com/2020/06/23/republicans-qualified-immunity-police-mike-braun-senate/.

[11] Binion, Billy. 2021. "Cops Tried To Force a Man To Delete a Video of Them Beating a Suspect. They Got Qualified Immunity." Reason, March 30, 2021. https://reason.com/2021/03/30/qualified-immunity-cops-free-speech-force-man-delete-video-beating-suspect/.

[12] Binion, Billy. 2021. "Tim Scott Is Proposing a Major Reform to Qualified Immunity." Reason, April 22, 2021. https://reason.com/2021/04/22/tim-scott-is-proposing-a-major-reform-to-qualified-immunity/.

[13] Binion, Billy. 2020. "With 1 Republican Cosponsor, Rep. Justin Amash Gains Tripartisan Support To End Qualified Immunity." Reason, June 11, 2020. https://reason.com/2020/06/11/justin-amash-tom-mcclintock-republican-cosponsor-tripartisan-support-to-end-qualified-immunity/.

[14] Brandt, Tyler. 2020. "To Curtail Police Impunity, Rep. Justin Amash Announces Legislation to End 'Qualified Immunity.'" Foundation for Economic Education, June 3, 2020. https://fee.org/articles/to-curtail-police-impunity-rep-justin-amash-announces-legislation-to-end-qualified-immunity/.
[15] Braun, Mike. 2020. "Senator Mike Braun introduces Reforming Qualified Immunity Act." Senator Mike Braun, June 23, 2020. https://www.braun.senate.gov/node/755.
[16] Carney, Jordain. 2021. "McConnell signals concern over changes to qualified immunity in police reform." The Hill, June 1, 2021. https://thehill.com/homenews/senate/556321-mcconnell-signals-concer%20n-on-changes-to-qualified-immunity/.
[17] Carney, Jordain. 2020. "Republican rift opens up over qualified immunity for police." The Hill, June 19, 2020. https://thehill.com/homenews/senate/503496-republican-rift-opens-up-over-qualified-immunity-for-police/
[18] Cato Institute. "End Qualified Immunity." Cato Institute. https://www.cato.org/qualified-immunity.
[19] Chung, Andrew, Lawrence Hurley, Jackie Botts, Andrea Januta, and Guillermo Gomez. 2020. "Supreme Defense." Reuters, May 8, 2020. https://www.reuters.com/investigates/special-report/usa-police-immunit%20y-scotus/.
[20] City of Tahlequah v. Bond, 595 U.S. ____ (2021) (per curiam). [21] Cole v. Carson, No. 14-10228 (5th Cir. 2019).
[22] Colorado General Assembly. Enhance Law Enforcement Integrity. SB20-217. 72nd Gen. Assem., 2nd reg. sess. Introduced in Senate June 3, 2020. https://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf.
[23] Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019).
[24] Cotton, Tom (@TomCottonAR). 2021. "Few officers would continue policing if, any time they arrest a criminal, they could face protracted litigation. … " Twitter post, March 5, 2021. https://twitter.com/TomCottonAR/status/1368019697397080065.
[25] Cotton, Tom. 2021. "In Defense of Qualified Immunity." National Review, October 27, 2021. https://www.nationalreview.com/2021/10/in-defense-of-qualified-immunity/.
[26] Craven, James. 2021. "Police Officers Never Learn 'Clearly Established Law.'" Cato Institute, May 10, 2021. https://www.cato.org/blog/police-officers-never-learn-clearly-establishe%20d-law.
[27] Datta, Srijita. 2022. "Police unions spend millions lobbying to retain their sway over big US cities and state governments." OpenSecrets, June 16, 2022. https://www.opensecrets.org/news/2022/06/police-unions-spend-millions-lobbying-to-retain-their-sway-over-big-us-cities-and-state-governments/.
[28] Dean, Mensah M., Julie Shaw, and Vinny Vella. 2021. "Police faces see recruitment struggles, surge in retirements." Associated Press, May 1, 2021. https://apnews.com/article/shootings-police-philadelphia-death-of-george-floyd-racial-injustice-044da7c63aa4bc07770c75755aec459f.
[29] DeBolt, David. 2022. "Police officers are increasingly leaving Oakland. How can the city retain them, and diversify?" The Oaklandside, March 9, 2022. https://oaklandside.org/2022/03/09/police-officers-leaving-oakland-attrition-diversity/.

[30] De Mar, Charlie. 2022. "Chicago Police Department seeks to recruit Marines amid officer shortage." CBS News, June 23, 2022. https://www.cbsnews.com/news/chicago-police-department-seeks-to-recruit-marines-amid-officer-shortage/.
[31] Dhir, Rajeev. 2022. "Who Was James M. Buchanan Jr.?" Investopedia, May 4, 2022. https://www.investopedia.com/terms/j/james-m-buchanan-jr.asp.
[32] DiSalvo, Daniel. 2022. "Interest groups, local politics, and police unions." Interest Groups & Advocacy 11, no. 2 (June): 263-277. https://doi.org/10.1057/s41309-021-00146-9.
[33] The Editorial Board. 2021. "On qualified immunity reform, states are leading on policing rogue officers." USA Today, August 6, 2021. https://www.usatoday.com/story/opinion/todaysdebate/2021/08/06/police-qualified-immunity-states-leading/5460787001/.
[34] Edmondson, Catie. 2020. "Senate Democrats Plan to Block G.O.P. Police Bill, Stalling Overhaul." The New York Times, June 23, 2020. https://www.nytimes.com/2020/06/23/us/politics/congress-police-refor%20m-senate.html.
[35] Equal Justice Initiative. "Qualified Immunity." Equal Justice Initiative. https://eji.org/issues/qualified-immunity/.
[36] Finn, Tyler. 2019. "Qualified Immunity Formalism: 'Clearly Established Law' and the Right to Record Police Activity." Columbia Law Review 119, no. 2 (March): 445-486. https://columbialawreview.org/content/qualified-immunity-formalism-clearly-established-law-and-the-right-to-record-police-activity/.
[37] Fouirnaies, Alexander and Andrew B. Hall. 2021. "How Do Electoral Incentives Affect Legislator Behavior? Evidence from U.S. State Legislatures." American Political Science Review 116, no. 2 (May): 662-676. https://doi.org/10.1017/S0003055421001064.
[38] Fraternal Order of Police. "About the Fraternal Order of Police." Fraternal Order of Police. https://fop.net/about-the-fop/.
[39] Fraternal Order of Police. 2018. "FOP Partners with President Trump on Criminal Justice Reform." United States Senate Committee on the Judiciary, November 9, 2018. https://www.judiciary.senate.gov/imo/media/doc/2018-11-09%20-%20FOP%20endorses%20First%20Step%20Act.pdf.
[40] Fraternal Order of Police. 2021. "Statement of National FOP President: Split-Second Decision Saves a Life, but Not Without Tragedy." Fraternal Order of Police, April 22, 2021. https://fop.net/2021/04/statement-of-national-fop-president-split-second-decision-saves-a-life-but-not-without-tragedy/.
[41] Fraternal Order of Police. 2021. "U.S. Supreme Court Upholds Precedent in Two Qualified Immunity Cases – FOP had filed amicus in support of officers." Fraternal Order of Police, October 21, 2021. https://fop.net/2021/10/us-supreme-court-upholds-precedent-in-two-qua%20lified-immunity-cases/.
[42] Gomez, Henry J. 2021. "Here's what the George Floyd Justice in Policing Act would do." NBC News, April 21, 2021. https://www.nbcnews.com/politics/congress/here-s-what-george-floyd-justice-policing-act-would-do-n1264825.

[43] Goodman, J. David. 2022. "Aware of Injuries Inside, Uvalde Police Waited to Confront Gunman." The New York Times, June 9, 2022.
https://www.nytimes.com/2022/06/09/us/uvalde-shooting-police-respon%20se.html.
[44] Graham v. Connor, 490 U.S. 386 (1989).
[45] Grammel, Shannon M. 2017. "Judge Gorsuch on Qualified Immunity." Stanford Law Review Online 69 (March): 163-170.
https://www.stanfordlawreview.org/online/spotlight-qualified-immunity/.
[46] Griffin, Dan. 2021. "Split-second decision, firearms training 'crucial' as police shootings scrutinized nationally." WLWT5, April 21, 2021.
https://www.wlwt.com/article/split-second-decision-firearms-training-crucial-as-police-shootings-scrutinized-nationally/36192822#.
[47] Hager, Lisa. 2018. "Are Members of Congress Simply 'Single-Minded Seekers of Reelection'? An Examination of Legislative Behavior in the 114th Congress." PS: Political Science & Politics 51, no. 1 (January): 115-118. https://doi.org/10.1017/S1049096517001974.
[48] Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[49] Harris, Ben and James Devereaux. 2020. "Police Accountability Begins With Ending Qualified Immunity." Foundation for Economic Education, June 16, 2020.
https://fee.org/articles/police-accountability-begins-with-ending-qualified-immunity/.
[50] Herod, Leslie and Mari Newman. 2021. "Colorado took a revolutionary step to reform policing. Here's how we did it." USA Today, October 28, 2021.
https://www.usatoday.com/story/opinion/2021/10/28/colorado-hold-cops-accountable-qualified-immunity/6101915001/.
[51] Hindi, Saja. 2020. "Colorado among first in U.S. to pass historic police reforms following protests." The Denver Post, June 13,
2020.https://www.denverpost.com/2020/06/13/colorado-police-reform-bill-pa%20sses-legislature/.
[52] Hindi, Saja. 2020. "Here's what Colorado's police reform bill does." The Denver Post, June 13, 2020.
https://www.denverpost.com/2020/06/13/colorado-police-accountability%20-reform-bill/.
[53] History.com Editors. 2021. "George Floyd is killed by a police officer, igniting historic protests." History, May 24, 2021.
https://www.history.com/this-day-in-history/george-floyd-killed-by-police-officer.
[54] Hope v. Pelzer, 536 U.S. 730 (2002).
[55] Hudson Jr., David L. 2021. "Supreme Court could review case involving filming of police using force." The Free Speech Center, September 21, 2021.
https://www.mtsu.edu/first-amendment/post/2218/supreme-court-couldreview-case-involving-filming-of-police-using-force.
[56] International Association of Chiefs of Police. "About IACP." International Association of Chiefs of Police.
https://www.theiacp.org/about-iacp.
[57] International Association of Chiefs of Police. "IACP Statement on Qualified Immunity." International Association of Chiefs of Police.
https://www.theiacp.org/sites/default/files/IACP%20Statement%20on%%2020Qualified%20Immunity.pdf

[58] International Association of Chiefs of Police. "The State of Recruitment: A Crisis for Law Enforcement." International Association of Chiefs of Police. https://www.theiacp.org/sites/default/files/239416_IACP_RecruitmentB%20R_HR_0.
[59] Jackson, Jonathan and Ben Bradford. 2010. "What is Trust and Confidence in the Police?" Policing: A Journal of Policy and Practice 4, no. 3 (August): 241-248. https://doi.org/10.1093/police/paq020.
[60] Jaicomo, Patrick and Anya Bidwell. 2022. "Recalibrating Qualified Immunity: How Tanzin v. Tanvir, Taylor v. Riojas, and McCoy v. Alamu Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity." Journal of Criminal Law and Criminology 112, no. 1 (Winter): 105-144. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?art%20icle=7715&context=jclc.
[61] Jones, Jeffrey M. 2021. "In U.S., Black Confidence in Police Recovers From 2020 Low." Gallup News, July 14, 2021. https://news.gallup.com/poll/352304/black-confidence-police-recovers%202020-low.aspx.
[62] Kalmbacher, Colin. 2021. "Justice Sotomayor Pens Lone Dissent in Qualified Immunity Case Where Trooper Shot and Killed Man Who 'Never Threatened' Him." Law & Crime, October 4, 2021. https://lawandcrime.com/supreme-court/justice-sotomayor-pens-lone-dissent-in-qualified-immunity-case-where-trooper-shot-and-killed-man-w%20ho-never-threatened-him/.
[63] Karlik, Michael. 2021. "Attorneys blast federal decision disregarding Denver officer training on First Amendment." Colorado Politics, March 29, 2021. https://www.coloradopolitics.com/courts/attorneys-blast-federal-decision-disregarding-denver-officer-training-on-first-amendment/article_4c4b%205ffa-90c7-11eb-9186-9f9d25a55e29.html./.
[64] Karlik, Michael. 2021. "SCOTUS declines to hear Denver case involving First Amendment right to record police." Colorado Politics, November 1, 2021. https://www.coloradopolitics.com/colorado-in-dc/scotus-declines-to-hear-denver-case-involving-first-amendment-right-to-record-police/article_%20cd71137e-3b3d-11ec-b074-8f03d4e382b6.html./.
[65] Kennedy, Brian, Alec Tyson, and Cary Funk. 2022. "Americans' Trust in Scientists, Other Groups Declines." Pew Research Center, February 15, 2022. https://www.pewresearch.org/science/2022/02/15/americans-trust-in-sci%20entists-other-groups-declines/
[66] Kim, Seung Min and John Wagner. 2020. "Senate GOP unveils policing bill that would discourage, but not ban, tactics such as chokeholds and no-knock warrants." The Washington Post, June 17, 2020. https://www.washingtonpost.com/powerpost/senate-republicans-to-unveil-competing-police-reform-bill/2020/06/17/39ae8304-b085-11ea-856d5054296735e5_story.html.
[67] Kindy, Kimberly, Kevin Schaul, and Ted Mellnik. 2020. "George Floyd's killing has already prompted some police departments to ban neck holds and require intervention." The Washington Post, July 16, 2020. https://www.washingtonpost.com/graphics/2020/national/police-use-offorce-chokehold-carotid-ban/.
[68] Kindy, Kimberly. 2021. "Dozens of states have tried to end qualified immunity. Police officers and unions helped beat nearly every bill." The Washington Post, October 7, 2021. https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html.
[69] Kirkpatrick, David D. 2021. "Split-Second Decisions: How a Supreme Court Case Shaped Modern Policing." The New York Times, April 25, 2021. https://www.nytimes.com/2021/04/25/us/police-use-of-force.html.

[70] Knobeloch, Payton. 2020. "Sen. Braun Halts Qualified Immunity Bill Amid Fox News Interview, Police Union Backlash." WFYI Indianapolis, July 2, 2020. https://www.wfyi.org/news/articles/sen-braun-halts-qualified-immunitybill-amid-fox-news-interview-police-union-backlash.
[71] Ku Klux Klan Act, 42 U.S. Code § 1983.
[72] Lacy, Akela. 2021. "How Moderate Democrats Derailed Police Reform." The Intercept, September 24, 2021. https://theintercept.com/2021/09/24/police-reform-bill-democrats/.
[73] LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 1999).
[74] Lartey, Jamiles. 2018. "Trump signs bipartisan criminal justice overhaul First Step Act into law." The Guardian, December 21, 2018. https://www.theguardian.com/us-news/2018/dec/21/trump-prison-reform-first-step-act-signed-law.
[75] Legal Information Institute. 2020. "Governmental immunity." Cornell Law School, July 2020. https://www.law.cornell.edu/wex/governmental_immunity.
[76] Legal Information Institute. "Qualified immunity." Cornell Law School. https://www.law.cornell.edu/wex/qualified_immunity.
[77] Levine, Marianne and Nicholas Wu. 2021. "Lawmakers scrap qualified immunity deal in police reform talks." Politico, August 17, 2021. https://www.politico.com/news/2021/08/17/lawmakers-immunity-police-reform-talks-505671.
[78] A Little Piece of Light, Active Advocate, African American Ministers In Action, Alliance for Justice, American Atheists, American Civil Liberties Union, American Friends Service Committee, et al. 2021. "Groups Urge Senate Leadership to End Qualified Immunity." Human Rights Watch, May 10, 2021. https://www.hrw.org/news/2021/05/10/groups-urge-senate-leadership-end-qualified-immunity.
[79] Lopez, German. 2019. "The First Step Act, explained." Vox, February 5, 2019. https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-theunion-trump-first-step-act-criminal-justice-reform.
[80] Lucas, Ryan. 2021. "FBI Data Shows An Unprecedented Spike In Murders Nationwide In 2020." NPR, September 27, 2021. https://www.npr.org/2021/09/27/1040904770/fbi-data-murder-increase2020.
[81] MacFarquhar, Neil. 2021. "Why Police Have Been Quitting in Droves in the Last Year." The New York Times, June 24, 2021. https://www.nytimes.com/2021/06/24/us/police-resignations-protests-asheville.html.
[82] McClintock, Tom. 2020. "Remarks on Police Reform." Congressman Tom McClintock, June 10, 2020. https://mcclintock.house.gov/newsroom/press-releases/remarks-on-police-reform.
[83] McCoy v. Alamu, No. 18-40856 (5th Cir. 2020).
[84] Merriam-Webster.com Dictionary. "Qualified immunity." Merriam-Webster. https://www.merriam-webster.com/dictionary/qualified%20immunity.
[85] Miller, Marie, Megan Cairns, Anya Bidwell, Patrick Jaicomo, and Kendall Morton. "Constitutional GPA." Institute for Justice. https://ij.org/report/constitutional-gpa/.
[86] Moomaw, Graham. 2021. "At first debate, McAuliffe walks back support for ending qualified immunity for police." Virginia Mercury, September 16, 2021.

https://www.virginiamercury.com/2021/09/16/at-first-debate-mcauliffewalks-back-support-for-ending-qualified-immunity-for-police/.
[87] NAACP Legal Defense and Educational Fund, Inc. "End Qualified Immunity." NAACP Legal Defense and Educational Fund, Inc. https://www.naacpldf.org/endqi/.
[88] National Conference of State Legislatures. 2021. "Qualified Immunity." National Conference of State Legislatures, January 12, 2021.
https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx.
[89] Neily, Clark. 2021. "The Conservative Case against Qualified Immunity." Cato Institute, August 25, 2021.
https://www.cato.org/blog/conservative-case-against-qualified-immunity.
[90] Newall, Mallory, Chris Jackson, and Johnny Sawyer. 2021. "Americans' trust in law enforcement, desire to protect law and order on the rise." Ipsos, March 5, 2021.
https://www.ipsos.com/en-us/americans-trust-law-enforcement-desire-protect-law-and-order-rise.
[91] New Mexico Legislature. New Mexico Civil Rights Act. HB 4. 55th legis., 1st sess. Introduced in House January 19, 2021.
https://www.nmlegis.gov/Sessions/21%20Regular/final/HB0004.pdf.
[92] Nielson, Aaron L. and Christopher J. Walker. 2020. "Qualified Immunity and Federalism." Georgetown Law Journal 109, no. 2 (December): 229-303.
https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/01/Nielson_Walker_Qualified-Immunity-and-Federalism.pdf.
[93] Olson, Jr., Mancur. 1965. The Logic of Collective Action: Public Goods and the Theory of Groups. Cambridge, MA: Harvard University Press.
[94] Orenstein, Walker and Solomon Gustavo. 2021. "Last year, Minneapolis police announced a new policy on no-knock warrants. Since then, they've asked for 90 of them." MinnPost, September 3, 2021.
https://www.minnpost.com/metro/2021/09/last-year-minneapolis-police-announced-a-new-policy-on-no-knock-warrants-since-then-theyve-asked-for-90-of-them/.
[95] Pagones, Stephanie. 2022. "Small, mid-sized US police agencies reeling from loss of officers, job recruitment woes amid anti-cop climate." Fox News, May 13, 2022.
https://www.foxnews.com/us/us-police-departments-cops-job-recruitment-anti-cop-climate.
[96] Palmer, Chris. 2021. "Police recruiting is down across the country. 'We are working in a movement,' Philly's top cop tells the incoming class." The Philadelphia Inquirer, July 12, 2021.
https://www.inquirer.com/news/philadelphia-police-first-recruiting-academy-class-pandemic-20210712.html.
[97] Patrick Jaicomo, email message to author, July 15, 2022, "Appendix."
[98] Pearson v. Callahan, 555 U.S. 223 (2009).
[99] Peters, Gerhard and John T. Woolley. 2020. "2020 Democratic Party Platform." The American Presidency Project, August 17, 2020.
https://www.presidency.ucsb.edu/documents/2020-democratic-party-platform.
[100] Pierson v. Ray, 386 U.S. 547 (1967).
[101] Police Executive Research Forum. 2021. "Survey on Police Workforce Trends." Police Executive Research Forum, June 11, 2021.
https://www.policeforum.org/workforcesurveyjune2021.

[102] Pressley, Ayanna. 2021. "Pressley, Markey Reintroduce Legislation to Fully End Qualified Immunity." Representative Ayanna Pressley, March 1, 2021. https://pressley.house.gov/media/press-releases/pressley-markey-reintroduce-legislation-fully-end-qualified-immunity.
[103] Pride, Rob. 2021. "Police recruitment was already tough. Attacks on qualified immunity make matters worse." USA Today, November 26, 2021. https://www.usatoday.com/story/opinion/voices/2021/11/26/attacking-qualified-immunity-hurts-policing/8654304002/.
[104] The Pulitzer Prizes. 2021. "2021 Pulitzer Prizes." The Pulitzer Prizes, 2021. https://www.pulitzer.org/prize-winners-by-year/2021.
[105] Raju, Manu and Jessica Dean. 2021. "Changes to qualified immunity in policing deal face Senate GOP resistance." CNN, May 26, 2021. https://www.cnn.com/2021/05/26/politics/policing-deal-qualified-immunity-senate-republicans/index.html
[106] Ray, Rashawn and Clark Neily. 2021. "A better path forward for criminal justice: Police reform." Brookings Institution, April 2021. https://www.brookings.edu/research/a-better-path-forward-for-criminaljustice-police-reform/.
[107] Rivas-Villegas v. Cortesluna, 595 U.S. ____ (2021) (per curiam). [108] Root, Damon. 2021. "A Promising Qualified Immunity Decision From a Potential Biden SCOTUS Nominee." Reason, March 5, 2021. https://reason.com/2021/03/05/a-promising-qualified-immunity-decision-from-a-potential-biden-scotus-nominee/.
[109] Saucier v. Katz, 533 U.S. 194 (2001).
[110] Scheiber, Noam, Farah Stockman, and J. David Goodman. 2020. "How Police Unions Became Such Powerful Opponents to Reform Efforts." The New York Times, June 6, 2020. https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html.
[111] Schwartz, Joanna C. 2014. "Police Indemnification." New York University Law Review 89, no. 3 (June): 885-1005. https://www.nyulawreview.org/issues/volume-89-number-3/police-indemnification/.
[112] Schweikert, Jay R. 2021. "New Mexico's landmark qualified immunity reform gets its mostly right." Las Cruces Sun News, April 11, 2021. https://www.lcsun-news.com/story/opinion/2021/04/11/new-mexico-enacts-landmark-qualified-immunity-reform/7175036002/.
[113] Schweikert, Jay. 2019. "Eleventh Circuit Grants Immunity to Officer Who Shot Child Lying on the Ground." Cato Institute, July 15, 2019. https://www.cato.org/blog/eleventh-circuit-grants-immunity-officer-who-shot-child-lying-ground.
[114] Schweikert, Jay. 2020. "The Most Common Defenses of Qualified Immunity, and Why They're Wrong." Unlawful Shield, June 19, 2020. https://www.unlawfulshield.com/2020/06/the-most-common-defenses-of-qualified-immunity-and-why-theyre-wrong/.
[115] Schweikert, Jay. 2020. "Qualified Immunity: A Legal, Practical, and Moral Failure." Cato Institute, September 14, 2020. https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure.

[116] Schweikert, Jay. 2022. "Jay Schweikert testifies at the hearing, 'Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity,' before the House Committee on the Judiciary." Cato Institute, March 31, 2022.
https://www.cato.org/multimedia/media-highlights-tv/jay-schweikert-testifies-hearing-examining-civil-rights-litigation.
[117] Segers, Grace. 2021. "Progressives insist that ending qualified immunity must be part of police reform legislation." CBS News, May 21, 2021.
https://www.cbsnews.com/news/police-reform-qualified-immunity-progressives/.
[118] Sibilla, Nick. 2021. "New Mexico Bans Qualified Immunity For All Government Workers, Including Police." Forbes, April 7, 2021.
https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/.
[119] Sobel, Nathaniel. 2020. "What Is Qualified Immunity, and What Does It Have to Do With Police Reform?" Lawfare, June 6, 2020.
https://www.lawfareblog.com/what-qualified-immunity-and-what-doesit-have-do-police-reform.
[120] Somin, Ilya. 2021. "Qualified Immunity Reform Stalls in the States - and in the Supreme Court." The Volokh Conspiracy, October 19, 2021.
https://reason.com/volokh/2021/10/19/qualified-immunity-reform-stalls-in-the-states-and-in-the-supreme-court/.
[121] Somin, Ilya. 2020. "States Can Reform Qualified Immunity on their Own." The Volokh Conspiracy, June 26, 2020.
https://reason.com/volokh/2020/06/26/states-can-reform-qualified-immunity-on-their-own/.
[122] Sonmez, Felicia and Mike DeBonis. 2021. "Republicans, Democrats unable to reach deal on bill to overhaul policing tactics in the aftermath of protests over killing of Black Americans." The Washington Post, September 22, 2021.
https://www.washingtonpost.com/powerpost/policing-george-floyd-congress-legislation/2021/09/22/36324a34-1bc9-11ec-a99a-5fea2b2da34b_story.html.
[123] Sperry, Ben. 2020. "How qualified immunity promotes the unreasonable use of force by police officers." The Hill, June 2, 2020.
https://thehill.com/blogs/congress-blog/politics/500673-how-qualified-immunity-promotes-the-unreasonable-use-of-force-by/.
[124] Stern, Mark Joseph. 2021. "The Supreme Court Deals a Harsh, Unanimous Blow to Police Reform." Slate, October 18, 2021.
https://slate.com/news-and-politics/2021/10/supreme-court-qualified-immunity-reform.html.
[125] Sullivan, Becky. 2021. "What the Recent Supreme Court Ruling in Favor of Police Officers Means for Qualified Immunity." KQED, October 18, 2021.
https://www.kqed.org/news/11892795/what-the-supreme-court-ruling-in-favor-of-police-officers-means-for-qualified-immunity.
[126] Tanzin v. Tanvir, 592 U.S. ____ (2020).
[127] Taylor v. Riojas, 592 U.S. ____ (2020) (per curiam).
[128] Tennessee v. Garner, 471 U.S. 1 (1985).

[129] U.S. Congress. House. Ending Qualified Immunity Act. H.R.1470. 117th Cong., 1st sess. Introduced in House March 1, 2021. https://www.congress.gov/bill/117th-congress/house-bill/1470.
[130] U.S. Congress. House. Ending Qualified Immunity Act. H.R.7085. 116th Cong., 2nd sess. Introduced in House June 4, 2020. https://www.congress.gov/bill/116th-congress/house-bill/7085.
[131] U.S. Congress. House. George Floyd Justice in Policing Act of 2021. H.R.1280. 117th Cong., 1st sess. Introduced in House February 24, 2021. https://www.congress.gov/bill/117th-congress/house-bill/1280.
[132] U.S. Congress. Of ice of the Clerk, U.S. House of Representatives. Roll Call 60, H.R.1280. 117th Cong., 1st sess. March 3, 2021. https://clerk.house.gov/Votes/202160.
[133] U.S. Congress. Senate. Ending Qualified Immunity Act. S.492. 117th Cong., 1st sess. Introduced in Senate March 1, 2021. https://www.congress.gov/bill/117th-congress/senate-bill/492.
[134] U.S. Congress. Senate. Ending Qualified Immunity Act. S.4142. 116th Cong., 2nd sess. Introduced in Senate July 1, 2020. https://www.congress.gov/bill/116th-congress/senate-bill/4142.
[135] U.S. Congress. Senate. First Step Act of 2018. S.756. 115th Cong., 1st sess. Introduced in Senate March 29, 2017. https://www.congress.gov/bill/115th-congress/senate-bill/756.
[136] U.S. Congress. Senate. Reforming Qualified Immunity Act. S.4036. 116th Cong., 2nd sess. Introduced in Senate June 23, 2020. https://www.congress.gov/bill/116th-congress/senate-bill/4036.
[137] Wang, Amy B. 2021. "Rep. Clyburn says qualified immunity doesn't have to be part of policing reform bill." The Washington Post, May 9, 2021. https://www.washingtonpost.com/politics/2021/05/09/rep-clyburn-saysqualified-immunity-doesnt-have-be-part-policing-reform-bill/.
[138] Westervelt, Eric. 2021. "Cops Say Low Morale And Department Scrutiny Are Driving Them Away From The Job." NPR, June 24, 2021. https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-anddepartment-scrutiny-are-driving-them-away-from-the-job.
[139] Wheelan, Charles. 2019. "Incentives Matter: Why you might be able to save your face by cutting off your nose (if you are a black rhinoceros)." In Naked Economics: Undressing the Dismal Science, 31-56. New York: W.W. Norton & Company.
[140] Wheelan, Charles. 2019. "The Power of Organized Interests: What economics can tell us about politics." In Naked Economics: Undressing the Dismal Science, 182-197. New York: W.W. Norton & Company.
[141] Winkley, Lyndsay. 2022. "Why are cops leaving the San Diego Police Department? City sees biggest exodus since 2009." Los Angeles Times, July 3, 2022. https://www.latimes.com/california/story/2022-07-03/number-of-officers-who-left-san-diego-police-department-spiked-in-2022.

[142] Wire, Sarah D. 2021. "What is qualified immunity, the court creation that keeps cops from being sued over civil rights abuses?" Los Angeles Times, May 25, 2021. https://www.latimes.com/politics/story/2021-05-25/what-is-qualified-immunity-how-is-george-floyd-connected.
[143] Wise, Justin. 2021. "State Lawmakers Tackle Qualified Immunity Defense." Law360, May 2, 2021. https://www.law360.com/articles/1380397/state-lawmakers-tackle-qualified-immunity-defense.
[144] Yohnka, Ed, Julia Decker, Emma Andersson, Aamra Ahmad. 2021. "Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable." American Civil Liberties Union, March 23, 2021. https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable.
[145] Young, Ryan, Devon M. Sayers, and Ray Sanchez. 2022. "'We need them desperately': US police departments struggle with critical staffing shortages." CNN, July 20, 2022. https://www.cnn.com/2022/07/19/us/police-staffing-shortages-recruitment/index.html.
[146] Zadeh v. Robinson, 928 F.3d 457 (5th Cir. 2019).
[147] Zaru, Deena and Tonya Simpson. 2020. "'Defund the police' movement 6 months after killing of George Floyd." ABC News, November 25, 2020. https://abcnews.go.com/US/defund-police-movement-months-killing-george-floyd/story?id=74296015.
[148] Ziglar v. Abbasi, 582 U.S. 120 (2017).

XII. Appendix

I reached out to Patrick Jaicomo, an attorney with the Institute for Justice (IJ) with expertise in qualified immunity jurisprudence, to ask him some questions about the doctrine.

The Institute for Justice is a nonprofit, public-interest law firm whose "mission is to end widespread abuses of government power and secure the constitutional rights that allow all Americans to pursue their dreams." IJ attorneys have argued ten cases before the Supreme Court with eight victories, as well as several cases before other federal courts.

In addition to being an attorney with the Institute for Justice, Mr. Jaicomo is "one of the leaders of IJ's Project on Immunity and Accountability," where he tackles issues arising from immunity doctrines including de facto immunity under Bivens jurisprudence, government employment immunity, and qualified immunity. Mr. Jaicomo has argued cases before federal courts. Most notably, in November 2020, Mr. Jaicomo argued Brownback v. King before the Supreme Court. Mr. Jaicomo's client James King alleged that his Fourth Amendment rights were violated after he was beaten by undercover FBI agents who incorrectly identified him as a criminal suspect. Mr. Jaicomo earned a J.D. from the University of Chicago Law School and a B.A. from the University of Notre Dame. He clerked for The Honorable Stephen J. Markman of the Michigan Supreme Court.

I contacted Mr. Jaicomo on IJ's "Contact Us" page on July 15, 2022, due to his extensive experience researching and arguing about qualified immunity from a legal perspective. Below is

my message to Mr. Jaicomo. Below my message to him is Mr. Jaicomo's response. I received permission to publish this response for noncommercial use in accordance with my position as a Summer Fellow at the Institute for Youth in Policy.

My message to Patrick Jaicomo (July 15, 2022):

—

Dear Mr. Jaicomo,

My name is Shantanu Kamat. I am a student at the University of California, Berkeley, where I plan to study political science. I am currently a Summer Fellow at the Institute for Youth in Policy (YIP) [https://www.yipinstitute.com/], a nonpartisan youth-led organization that aims to foster constructive political discourse and produce policy research. Due to my interest in the field of criminal justice, I am pursuing a research project into the doctrine of qualified immunity. I wanted someone with experience in legal battles on the issue to weigh in, and accordingly, I wanted to pose the following questions.

1. Removing qualified immunity would allow lawsuits against police officers for rights violations beyond those "clearly established." What would you say to critics that say police officers need leeway to thoroughly perform their duties including immunity from legal liability?
2. The Institute for Justice is a public interest law firm that has represented clients before federal courts, including the Supreme Court. On those lines, what role do you see litigation playing in not only helping individual clients procure compensation for police abuses but also in chipping away at what you describe as "a confusing patchwork of immunity doctrines" (from "Constitutional GPA" by Miller, Cairns, Bidwell, Jaicomo, and Morton) like qualified immunity?
3. Three sitting justices of the Supreme Court – Clarence Thomas, Sonia Sotomayor, and Neil Gorsuch – have at times articulated skepticism about the extent to which qualified immunity is granted in cases involving interactions between police officers and citizens. Notably, Justice Thomas, in dissenting from the denial of certiorari in Baxter v. Bracey, criticized federal courts' QI jurisprudence and what he sees as a deviation from the statutory text. What do you view as the prospects for federal courts scaling back the doctrine, and how would you contrast that with prospects of legislative-driven reform?
4. Do you think that public appetite for criminal justice reform will result in action aimed at reforming qualified immunity, or will hurdles like police unions and prosecutors concerned with crime stymie efforts at reform?
5. May I include your responses to these questions, in part or in full, as part of a research project in accordance with my position as a Summer Fellow at the Institute for Youth in Policy? The Institute for Youth in Policy is a nonpartisan organization exempt from federal income tax under Internal Revenue Code (IRC) Section 501(c)(3). This research project is intended solely for educational and informational purposes and not for commercial use.

I appreciate your time and expertise, and I look forward to a response back.

Sincerely,
Shantanu Kamat
Summer Fellow at the Institute for Youth in Policy (YIP)

—

Mr. Jaicomo replied by email later on the same day (July 15, 2022).
Patrick Jaicomo's response:

—

Hey Shantanu,
I received your questions, and here are some short answers.
1. First, I would say that the "clearly established" test is a misnomer. Police and other government workers are not carefully monitoring the federal reports for the newest circuit decisions to govern their behavior. They are relying (as demonstrated by Prof. Joanna Schwartz) on broad, general statements of constitutional law, which are the focus of their in-house training. So, it's not as if the standard really reflects what is "clearly established" in the minds of police officers. Second, more directly to your question, police are already provided leeway to perform their duties by the Constitution. The Fourth Amendment only prohibits unreasonable searches and seizures. If reasonableness is not enough leeway for police, they should consider another line of work.
2. Since qualified immunity is a legal doctrine, litigation is hugely important for shaping its contours. Obviously, Congress is another avenue for change—one that we also pursue. But the Supreme Court created this problem in Harlow v. Fitzgerald (and Pierson v. Ray before that), so bringing legal challenges is one way to fix it, even if incrementally. More fundamentally, as attorneys, our first goal is to serve our clients. And filing these lawsuits to vindicate the rights of our clients and make them whole is independently valuable to both them and us. If it weren't, public interest lawyers should consider another line of work.
3. For this one, I would refer you to a law review article I wrote.
4. It's hard to guess what public opinion will accomplish. It could be everything or it could be nothing. We are still committed to pushing for reforms in courts, Congress, and the public square. But I have to admit that I am less optimistic about congressional reform given that all of the protestings that took place after George Floyd was killed apparently was not enough to get Congress to find a solution.
5. Sure.
Patrick

—

(emphasis in original)

Social Mobility in Latin America: The Effects of Regional Trade Agreements on Distributional Outcomes

Lucca Caregnato

Abstract:

This research examines the relationship between regional trade agreements and social mobility in Latin America through theoretical and empirical lenses. Beginning with a comprehensive review of historical and political contexts of regionalism in Latin America, including economic liberation, peace agreements in Central America, and democratization of the Southern Cone, this study will highlight the emergence of regional trade agreements as a tool of economic integration. In analyzing the macroeconomic implications of these agreements, we pay particular attention to their effects on income distribution and social mobility – two crucial factors in determining inclusive and sustainable growth. This brief draws on empirical assessments of trade openness and reforms to find evidence suggesting an inclusive multilateral approach to trade can positively contribute to social mobility and income equality in Latin America.

Keywords— free-trade, integration, regionalism, socioeconomic, regional trade agreements (RTAs), neoliberalism, privatization

Executive Summary

In recent decades, economic integration, facilitated by regional trade agreements (RTAs), has become a prominent trend in historically disadvantaged regions. Riding the wave of globalization that brought about multilateral organizations like the GATT and later the WTO following the end of World War II, geographic proximities and similar economic development trajectories prompted regional cooperation on trade.

One such region was Latin America, where RTAs aimed to foster cross-border commerce, investment flows, and growth in a region with historically low levels of economic integration. Attempts at regional trade integration were made as early as 1960 with the formation of LAFTA, yet not until the 1990s did RTAs gain prominence in the region, with agreements such as Mercosur and The Andean Community. However, Latin America's growth potential has not translated into more equal distributional outcomes. Despite the potential for RTAs to promote social mobility and reduce income inequality, evidence suggests that these agreements have had little effect on leveling the playing field in Latin America, as they did in other regions such as Europe. In evaluating the impact of RTAs on social mobility in Latin America, this brief will examine the theoretical underpinnings of regionalism and income inequality, review the history and context of RTAs in Latin America, and analyze empirical evidence on the effectiveness of these agreements in promoting social mobility and reducing income inequality.

Overview

Grinding poverty and limited social mobility have plagued Latin America for decades. Through periods of neoliberalism, democratization, and economic liberation, unfulfilled promises of inclusive growth and equitable distribution have led to persistent inequality and limited upward mobility. As worldwide trends toward economic integration continue – emerging in response to shifting geopolitical alliances, protectionist movements, and technological advancement – it is crucial to examine the applicability of regional trade agreements in a Latin American context. Where do these agreements fit into the region's historical, political, and economic landscape?

Pointed Summary

- Latin America faces persistent challenges in income inequality, economic disparities, and limited social mobility.
- Strengthening institutional frameworks, policy coherence, transparency, and accountability are essential for successful implementation.
- Harnessing diverse perspectives from policymakers, academics, economists, and civil society representatives through nonpartisan approaches enables holistic and nuanced policymaking.
- Stakeholders must transcend partisan divides and identify shared priorities to enact policies prioritizing social inclusion, economic diversification, and sustainable growth.

Relevance

The Gini coefficient is a commonly used measure of income inequality, with a score of 0 indicating perfect equality and 1 indicating a complete absence of equality. In Latin America, the Gini coefficient ranges from 0.38 to 0.53, making it the most unequal region in the world with persistent levels of poverty, income inequality, and social exclusion (Figure 1). The coexistence of high levels of inequality alongside RTAs in the region raises questions about the effectiveness of these agreements in promoting social mobility and reducing income disparities.

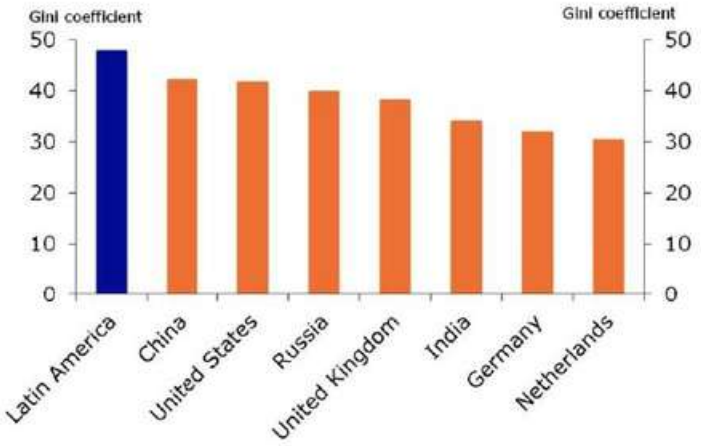

Figure I
Gini Coefficients comparing Latin America to other countries

In exploring this issue, it is necessary to consider the potential means through which RTAs could affect income distribution. One mechanism is increased cross-border trade, which could create new employment opportunities and increase access to goods and services at lower prices; this could benefit lower-income households, reducing income inequality. We see examples of this positive impact in some areas, such as the success of Mexico's manufacturing industry under NAFTA, where employment and wages have increased, creating a robust middle class. While applicable to some cases, this is not universally true throughout Latin America. Instead, studies have shown that south-south RTAs – agreements between two or poorer countries – are likely to generate trade diversion and exacerbate income inequality, especially when external tariffs are high. Trade liberalization in Latin America often involves the removal of protections from unskilled-labor-intensive sectors, ultimately reducing the price of labor and disproportionately increasing income inequality. Previous research on Chile found that liberalization has substantially increased wage inequality due to technological changes and transformations in the economy's productive structure, ultimately leading to a rise in skilled labor demand and leaving unskilled workers vulnerable. This pattern reverberates in other studies, which suggest that financial liberalization and high-technology exports, in the context of a liberal trade regime, contribute to increased inequality. A secondary consequence of trade liberalization is increased competition from cheap, unskilled labor-intensive products from poorer countries,

particularly in industries like farming, textiles, and apparel. Domestic producers in these industries may suffer job losses and shrinking markets, while wealthier households benefit from affordable imported goods. We see an example of this in the impact of NAFTA on Mexico's agricultural sector, where small farmers failed to compete with subsidized American agribusiness. Rural poverty increased, inequality deepened, and migration to urban areas rose. Similar outcomes may be predicted in contexts with comparably vulnerable unskilled labor-intensive sectors, as found in various Latin American countries. In order to avoid exacerbating income inequality and further marginalizing vulnerable sectors within these economies, it is essential to consider the short-term and long-term impacts of regional trade agreements.

Current Stances

The consensus among scholars is that the effects of regional trade agreements on distributional outcomes in Latin America are not homogeneous; rather, the impact depends on a variety of factors like the strength and nature of each region's economic engagement with external trade partners, the level of protection afforded to vulnerable sectors, and the overall functioning of domestic labor markets.

In analyzing the relevance and desirability of multilateral free trade agreements in the region, contemporary research differentiates between preferential trade agreements and multilateral free trade agreements, highlighting the potential economic welfare benefits of the former. A preferential trade agreement, such as a regional trade agreement, targets specific countries or regions for tariff concessions, granting preferential treatment to signatories over non-signatories. These agreements can facilitate increased trade flows and economic integration among participating countries, which can translate into positive distributional outcomes such as increased wages for workers in specific sectors or geographic regions, plus decreased prices for consumers.

The European Free Trade Association (EFTA) has seen such benefits through regional integration and trade liberalization: formed of Iceland, Liechtenstein, Norway, and Switzerland in 1960 as a response to the formation of the European Community, EFTA's members have all seen significant economic growth as a result of mutual trade agreements and an increase in cross-border investment. Members now enjoy free trade relations and access to other regions' markets through EFTA-managed free-trade agreements, including benefits like access to the single energy markets.

Economists believe such a template can be emulated and customized in Latin America to cater to the region's specificities. Current theories suggest that reducing trade barriers in Latin America through preferential trade agreements, as opposed to multilateral free trade agreements, can likely boost intra-regional trade and spur economic growth. However, as the stagnation of other regional trade agreements in Latin America has shown, these benefits are not automatic or guaranteed, and a reevaluation of the potential effects is necessary as Latin America moves to expand its preferential trade agreements.

The current stance of Joe Biden's administration on regional trade agreements for Latin America reflects a distinct approach that focuses on enhancing economic prosperity in the region through means other than new trade agreements. The plan – The Americas Partnership for Economic Prosperity – aims to mobilize new investments, fortify supply chains, promote decarbonization and biodiversity, facilitate inclusive trade, and update the "social contract" between governments and their people. Although not explicitly rejecting regional trade agreements, this approach acknowledges the potential downsides and seeks to prioritize human rights, labor standards, and environmental protection in economic development efforts.

Tried Policy

A convergence around economic liberalization began following the paradigm shift towards neoliberal policies in the 1980s, which saw Latin American countries adopt market-oriented reforms to tackle economic inefficiencies. The emphasis was on competitiveness, private entrepreneurship, and technical competence - a neoliberal consensus that became the focus of development efforts, as seen in Chile's political alliance through the Concertacion coalition of parties. Pinochet-era reforms were the first to pave the way for this transition, embracing free market policies and privatization to attract foreign investment. These policies initiated a trend that would be implemented by other countries in the region as well: debt crisis and change in government prompted Venezuela to loosen trade restrictions, instability in Peru catalyzed its embrace of market-oriented reforms, and Argentina's economic recession pushed it towards privatization initiatives. Through this paradigm shift, companies switched from government to private ownership, legal and political restructuring supported free-market business activities, and financial instruments created room for international investors. These policies, known as the Washington Consensus, prioritized fiscal discipline as a means to improve social mobility and encourage long-term economic growth in the region. Although not a formal agreement, the Washington Consensus acted as a blueprint for trade agreements that emerged in Latin America after its introduction. However, these attempts to liberalize regional trade resulted in mixed distributional outcomes with rising inequality due to increases in wealth concentration and cuts in social spending. Surface-level reforms, including those emerging from early neoliberal policy measures, did contribute to the region's liberalization; yet, it was later policy initiatives of the United States and other global actors which actuated the process of regionalism in Latin America. With the conceptualization of NAFTA came the consolidation of North America as the dominant player in regional integration, leaving Latin American nations to play a supporting role. Initially, bilateral agreements were connected to the US hub, replacing the original blueprint for regional integration and reinforcing Latin America's place within a North-Americanized system. Although a few Latin American countries received fast-track offers of accession in the 1990s, these offers were ultimately not accepted due to concerns around sovereignty and labor rights; thus, regional integration saw reorientation towards promoting the development of regional trade blocs.

In 1991, the Southern Cone Common Market (Mercosur) was established as a free-trade region, reflecting Latin America's renewed effort at regional integration. The agreement's loose structure offered member countries some flexibility and autonomy in policy-making while providing opportunities for coordinated governance within the bloc. However, as the bloc's economy grew, so did its inequities.

Firstly, major economic players within Mercosur, such as Argentina and Brazil, consolidated power at the expense of smaller member states like Paraguay and Uruguay. We find evidence of GDP disparities among Mercosur countries, with Brazil and Argentina making up 95% of the bloc's total GDP, with economies of scale rendering smaller nations uncompetitive. Moreover, the shift towards free trade within Mercosur was not accompanied by social policies adequately addressing displacement and the effects of market forces on labor, as had been seen in early Western European integration initiatives like the European Coal and Steel Community. Unaccountable economic growth and the absence of social safety nets marginalized low-income populations, particularly in rural areas, where social movements like the Landless Workers Movement in Brazil have been born out of agrarian reform struggles perpetuated by the growth of neoliberal economic policies.

Attempts at improving social inclusion within Mercosur have been made, such as the creation of the Social and Productive Development Fund in 2004; however, structural inequalities persist, with the bloc continuing to prioritize neoliberal economic growth over social welfare. Although Mercosur has brought about economic growth and integration within member states, this growth is unsustainable if not accompanied by equitable distribution of benefits and social protections for vulnerable populations; thus, policymakers must prioritize the development of social policies that counteract market forces while also creating pathways for low-income communities to benefit from regional integration.

Policy Problem

Stakeholders

As with any economic or political initiative, regional integration within Latin America must consider its impact on all stakeholders, particularly those marginalized or underrepresented. Considerations must be made for smaller member states and low-income populations vulnerable to displacement, unemployment, and inequality in the face of neoliberal economic policies, as evidenced by the disparities within Mercosur.

One of the key stakeholders in this process is the Governments and International Organizations involved in implementing regional integration policies. The objective of these entities, primarily following the Pinochet-era "Washington Consensus," was to prioritize economic growth based on neoliberal principles – the proliferation of deregulation and privatization, among other measures, at the expense of social welfare. The parasitic effects of these policies, like the United States 301 actions targeting the Brazilian licensing regime, presented themselves through increased poverty and environmental degradation, leading to widespread social unrest. Today, Governments and International Organizations understand they

must prioritize the development of social policies that counteract market forces while also creating pathways for low-income communities to benefit from regional integration. It is in these stakeholders' best interest to ensure that the benefits of regional integration are distributed equitably across member states and communities, focusing on providing necessary social protections for vulnerable populations.

Another key stakeholder in this process is the private sector, particularly multinational corporations and investors. These entities have historically often been beneficiaries of regional integration, as they can leverage their resources and capital to take advantage of the increased economic opportunities presented by free trade agreements. Latin America has seen a surge in foreign direct investment in recent years, particularly in sectors like energy and extractive industries, creating a dual effect of economic growth and environmental degradation. Thus, the region is no stranger to the exploitative practices of multinational corporations seeking profit at any cost, often with little regard for social and environmental consequences – often known as the "extractive imperative." Evidence of such practices can be seen in the Magdalena Medio region of Colombia, where oil and mining companies have displaced indigenous communities, destroyed ecosystems, and contributed to human rights violations. These practices must be counteracted by regulatory frameworks and increased accountability measures for the private sector. The private sector, in turn, should be encouraged to invest in socially responsible and sustainable business practices alongside public-private collaborations that ensure the equitable distribution of benefits from regional integration. This approach will not only mitigate the damaging effects of the extractive imperative, but it will also help achieve the inherent goals of these business entities – profit and economic growth.

A third important stakeholder in the conversation around distributional outcomes in Latin America is the marginalized and vulnerable populations – indigenous communities, small-scale farmers, and workers in the informal sector. These groups have historically been excluded from the benefits of regional integration, with their lands and livelihoods often threatened by large-scale development projects and extractive industries. In the face of liberalization policies, these populations prioritize not only economic benefits but also the protection of their human rights and the preservation of their environments and cultures. Despite legal frameworks recognizing their collective rights, these communities often face asymmetric relationships with the private sector due to their cultural diversity and dependence on foreign direct investment in their regions. The Amazon Rainforest fires that devastated Brazil in 2019 are a tragic example of the intersection of economic growth and environmental degradation, disproportionately affecting indigenous communities. In this case, agribusiness interests seeking to expand monoculture farming operations were the driving force behind the deforestation and destruction of critical ecosystems. As such, these groups seek mechanisms that ensure their participation in decision-making processes, granting them agency and a voice in determining the future direction of regional trade agreements.

Risks of Indifference

To indulge in apathy and disregard the unequal distributional outcomes of regional trade agreements is immoral and poses a grave threat to socioeconomic and environmental stability in Latin America. Indifference erodes the region's social fabric, perpetuating systems of inequality and hindering inclusive economic growth – a prerequisite for achieving sustainable development goals.

One area of concern regarding indifference is Latin America's economic competitiveness in the global market. In an era of globalized markets, nations must seek to enhance their productivity, diversify their economies, and attract foreign direct investment (FDI) to foster sustained growth. Liberalization and regional integration are key components to achieving these goals; however, indifference to the unequal distributional outcomes of regional trade agreements can have the opposite effect – neglecting social mobility in this process will result in stagnant economies, decreased competitiveness, and increased poverty rates. Failing to participate in regional integration initiatives leaves Latin American countries isolated from vital economic networks, hindering their capacity to innovate, grow and compete.

A secondary concern of indifference is the risk of squandering critical geopolitical opportunities and relegating the region to the fringes of global economic governance. Latin America is home to abundant natural resources, a young and growing population, and emerging economies that together have the potential to shape the trajectory of global economic and political systems. In an increasingly interconnected world, where regional blocs shape international trade dynamics, passive disengagement diminishes Latin America's voice and influence in setting trade rules, forging strategic partnerships, and safeguarding its long-term economic interests. In navigating the region's growing inclusion in global trade, proactive policies are necessary to address income disparities and promote economic growth.

Nonpartisan Reasoning

Nonpartisanship is a prerequisite to addressing the issue of social mobility and economic growth in Latin America. By transcending partisan divides, stakeholders can identify shared priorities and enact policies prioritizing equitable economic development – one that emphasizes social inclusion, economic diversification, and sustainable growth.

Harnessing diverse perspectives through nonpartisanship is one way to bring proactive policies to the forefront. Individuals from diverse backgrounds, including policymakers, academics, economists, and civil society representatives, can come together to evaluate the link between trade liberalization/deindustrialization and its ultimate impact on poverty and income inequality. This convergence of knowledge enables a holistic and nuanced approach to policymaking in Latin America, one that can identify the root causes of economic stagnation and adopt targeted solutions to drive inclusive growth.

Another benefit of nonpartisanship is the long-term stability and resilience it fosters in the region. Nonpartisanship, transcending short-term political cycles, enables policymakers to implement sustainable solutions that can weather economic and political shocks in the long run;

policies that promote social mobility and economic growth must be grounded in long-term planning and foresight. Without political gridlock, confidence in the region's future economically is strengthened, incentivizing investment and creating a virtuous cycle of sustainable growth and development.

A third advantage of this dynamic approach is the broad public support it garners. Collective accountability in the formulation/implementation of policies enhances trust in public institutions, empowering citizens to hold their representatives accountable for delivering on their commitments. Such an approach builds momentum for economic reform and bolsters the legitimacy of trade agreements, ensuring their broad-based adoption; partisan divides, on the other hand, can erode public trust and hamper momentum for structural reforms.

Policy Options

Three policy options emerge from the current economic affairs in Latin America: Inclusive Multilateral Trade Agreements, Bilateral Trade Agreements with Social Clauses, and Preferential Trade Agreements with Development Focus.

Let us first analyze the possibility of an Inclusive Multilateral Trade Agreement in a Latin American context. Against the backdrop of increasing economic openness and socio-political stability in the region, such an agreement promises to stimulate exports and encourage privatization, ensuring trade benefits are distributed fairly across different sections of society. The defining characteristic of such an agreement is its broad scope and inclusivity – incorporating a wide range of countries, trading partners, and industries to create a robust and diverse economic network. This agreement type is all-encompassing; it addresses traditional trade issues such as tariffs and quotas while incorporating labor standards, environmental protection, and intellectual property provisions. Such loose criteria ensure that countries of varying economic development and political orientation levels can participate in the agreement, creating a more equitable distributional outcome. The approach's "inclusive" nature also strengthens the agreement's legitimacy, ensuring a collective effort towards shared goals rather than an imposition by one or more dominant actors. However, the challenge in achieving such a multilateral agreement lies in its complexity and difficulty reconciling disparate interests. Harmonization of regulations and standards, coupled with resistance from players unwilling to relinquish advantageous positions, can result in a lengthy negotiation process – this may lead to a loss of momentum and eventual collapse of negotiations. We can also not ignore that the current global political climate, featuring increasing protectionism and nationalist sentiments, may make it even more challenging to achieve an inclusive multilateral trade agreement in the near future. The WPO attempted to create such an agreement with the Doha Development Agenda in 2001, but the negotiations have remained stalled due to disagreements among member countries and increasing protectionism. Nevertheless, there are still reasons to be optimistic about the prospects of an inclusive multilateral trade agreement. Considering social mobility in the region, an inclusive approach can help rebalance the gains from trade and mitigate potential negative

impacts on vulnerable groups by incorporating labor standards and environmental protection provisions.

Now let's analyze the possibility of Bilateral Trade Agreements with Social Clauses in a Latin American Context – our second option. This type of agreement, while more limited in scope than multilateral agreements, still has the potential to address issues related to inequality and social mobility. The "bilateral" aspect allows for countries to negotiate the terms directly with one another, enabling a more tailored approach that can better attend to specific domestic concerns. Because two countries negotiate these agreements – as opposed to larger multilateral forums – it can lead to a quicker negotiation process and the ability to focus on specific areas of concern. Specific reciprocity and quid pro quo mean that each country can negotiate for concessions in areas of importance to them, such as reducing tariffs on certain goods or improving market access; this contrasts the one-size-fits-all approach of multilateral agreements, where each country is required to make concessions across the board. The "social clause" aspect of bilateral agreements refers to a commitment by participating countries to adhere to labor and environmental standards in the trade relationship. In Latin America, where income inequality is a pervasive issue, such agreements could serve as a tool to promote social mobility and reduce the concentration of wealth – something exacerbated by free trade. United States Trade Promotion Agreements, such as the 2011 United States-Jordan Free Trade Agreement, have successfully utilized this framework to incorporate labor standards and environmental protections into trade agreements in a bilateral context. In this example, Jordan agreed to an enforceable labor rights provision, which helped to improve working conditions and wages for Jordanian workers. However, it's important to note that there is still debate surrounding the effectiveness of such provisions and whether they address underlying issues related to inequality. For one, bilateral agreements risk trade diversion, whereby countries may divert trade away from more efficient producers in favor of members of a preferred trade agreement. In this scenario, intra-regional exchange may increase at the expense of global efficiency gains. A second concern is that bilateral agreements may contribute to increased fragmentation and politicization of the global trading system by superseding more universal rules with a patchwork of conflicting regulations. Bilateralism has emerged as an increasingly popular approach to international trade relations, offering a more efficient and targeted solution for countries seeking to negotiate favorable deals with trade partners. Consequently, a network of bilateral agreements has sprouted, with each agreement tailored to countries' specific needs and interests. If applied in Latin America, bilateralism could address pressing social and economic issues, such as income inequality, in a more targeted fashion.

Finally, a third option that requires consideration is a Preferential Trade Agreement with a Development Focus. Such an agreement would prioritize the economic development of participating countries – promoting trade liberalization and increased market access – and would seek to alleviate poverty and reduce economic disparities indirectly. This form of regionalism has the potential to support a more liberal trading system, as it promotes free trade within a bloc and helps build a multilateral system through trade negotiations among a smaller number of larger

regional groups in the long run. Liberalism, when applied in conjunction with a development-focused approach in a Latin American context, would be achieved by reducing tariffs/trade barriers and providing technical assistance and capacity-building initiatives to help less-developed countries improve their competitiveness. Measures such as these, plus targeted investment in infrastructure and human capital, could help create an environment that fosters economic growth and reduces the region's inequality. In its current form, MERCOSUR can be characterized as a Preferential Trade Agreement with a Development Focus, as it aims to promote economic development and social rights among its members while also pursuing a liberal approach to international trade relations. Since its inception in the early nineties, the southern cone bloc has expanded and deepened its integration efforts, effectively reducing tariffs and non-tariff barriers among member countries. Having evolved into a cohesive regional organization, integration within MERCOSUR has resulted in intensified economic activity and the creation of a sizable internal market; yet, the organization faces ongoing challenges related to coordination and implementation, particularly regarding external trade negotiations and the strengthening of institutions. Divergent interests among member countries and their respective economic priorities have hindered the organization's ability to address these issues – the level of inequality in contemporary Latin America reflects the effectiveness of MERCOSUR's approach to promoting development-focused trade liberalization. However, we cannot overlook MERCOSUR's efforts toward post-neoliberal regionalism. With the democratization of Latin America providing a catalyst for economic liberalization, MERCOSUR has become a means of promoting free trade within a development-focused approach that considers the region's unique needs and priorities. The bloc's institutional redesign in the early 2000s was a significant step towards advancing a social and economic development agenda by implementing political projects that emphasized the need for a more democratic arena in which subnational actors participate. As such, we must consider the potential long-term effects of MERCOSUR's prospects for advancing greater socioeconomic inclusion throughout the region and if it can overcome current challenges. Implementing a Preferential Trade Agreement would essentially be a continuation of MERCOSUR – a means of consolidating regional integration and addressing economic disparities by reducing trade barriers. Despite this, the lack of a unified system for the recognition, protection, and promotion of products within MERCOSUR contributes to market disparities and poses obstacles to the bloc's overall integration. For this policy option to be successful, the bloc must prioritize institutional strengthening and coordination to ensure that all member countries can fully participate in the emerging internal market.

Conclusions and Recommendations

The pace of globalization and interdependence within markets is accelerating. Continued efforts towards promoting development-focused trade liberalization through a post-neoliberal regionalist approach have sought to address persistent issues in Latin America – including income inequality and economic disparities – through initiatives such as MERCOSUR and the

Andean Community. Liberalization can be a tool for socio-economic inclusion by building on the bloc's institutional redesign and inclusion of subnational actors.

Regionalism is not isolationism; it promotes cooperation, dialogue, and harmonization between nations with unique needs. The European Union (EU) exemplifies this. Formed in 1957 as the European Economic Community (EEC), it has grown into a sprawling political and economic union of 27 member states bound by shared values, history, and geography. Using an inclusive multilateral approach, the EU has developed a unified product recognition, protection, and promotion system that has facilitated economic relations among its members while promoting the alignment of ideas and goals. Their Erasmus+ program is a prime example of how cross-border cooperation can foster mutual understanding and drive progress; the European Regional Development Fund has played a crucial role in financing infrastructure projects that benefit all members; the EU's common market has allowed intra-regional trade to account for 67% of total exchange. Who would not want to emulate such success?

Considering the experience of the EU as a model, we recommended that Latin America continue to prioritize regional integration through an Inclusive Multilateral Trade policy. A multilateral approach is characterized by loose cooperation between states without exclusivity, thus allowing countries to pursue policies that serve their interests while contributing to the growth of the region as a whole. This model is purposely wide-reaching, focusing on promoting free trade between diverse subgroups and accounting for different levels of economic development within them. A rising tide lifts all boats – in the Latin American context, inclusive multilateralism can address issues in income distribution through improved market access. The recommended approach achieves this by incorporating tariff concessions, regulatory harmonization, and capacity-building programs to strengthen the region's economic linkages, channeling investment toward the most disadvantaged populations. Institutional frameworks can, furthermore, enhance policy coherence and ensure transparency in decision-making, promoting accountability among the stakeholders involved. The current fragmented approach – characterized by various subregional agreements – perpetuates a "spaghetti bowl" effect of multiple overlapping arrangements that create a patchwork of regulations that hinder market access rather than facilitate this. Conversely, an inclusive multilateral policy can streamline regulations and achieve economies of scale, prompting greater regional integration and creating a more competitive economic bloc.

The neoliberal era of Latin American regionalism, and the culmination of subregional agreements like MERCOSUR, have shown that a sovereignty-protective approach is insufficient to promote sustained progress in social mobility. Inequality in the region remains pervasive, with the top 10% of earners holding over 70% of the income share. Multilateralism is not a silver bullet solution, but it offers a vetted and proven approach to regional integration that prioritizes inclusivity and a shared commitment to free trade.

Acknowledgments

The Institute for Youth in Policy wishes to acknowledge Ahad Khan, Michael Yang, Katelin Wong, Nolan Ezzet, and other contributors for developing and maintaining the Policy Department within the Institute.

References

[1] Andean Community (CAN) The Andean Community is a trade bloc of four countries - Bolivia, Colombia, Ecuador and Peru. Chile, Arge, https://www.mea.gov.in/Portal/ForeignRelation/Andean_Community_February.2013

[2] What is the "Spaghetti Bowl Phenomenon" of FTAs?, 23 May 2006, https://www.rieti.go.jp/en/columns/a01_0193.html.

[3] Almog, Assaf. "Bilateral Trade Agreements and the Interconnectedness of Global Trade." Frontiers, 7 November 2018, https://www.frontiersin.org/articles/10.3389/fphy.2018.00134/full

[4] Babington, Charles. "Partisan Views Affect Trust in Government." The Pew Charitable Trusts, 9 September 2021, https://www.pewtrusts.org/en/trust/archive/summer-2021/partisan-views-affect-trust-in-government

[5] Balduzzi, Brian. "Progressing Towards an Equal and Growing Latin America." Samuel Curtis Johnson Graduate School of Management, 26 February 2018, https://www.johnson.cornell.edu/article/emerging-markets-institute/research/emi-at-work/47289/progressing-towards-an-equal-and-growing-latin-america-an-argument-for-progressive-tax-to-redistribute-income-and-reduce-inequality/.

[6] Bassetti, Massimo. "Latin America: The Most Unequal Region in the World." Focus Economics, 6 June 2017, https://www.focus-economics.com/blog/inequality-in-latin-america/.

[7] Campbell, Heidi, et al. "Mercosur: South America's Fractious Trade Bloc." Council on Foreign Relations, 9 May 2023, https://www.cfr.org/backgrounder/mercosur-south-americas-fractious-trade-bloc.

[8] Carothers, Thomas. "Accountability, Transparency, Participation, and Inclusion: A New Development Consensus?" Carnegie Endowment for International Peace, 20 October 2014, https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968.

[9] "Convergence of Regional Disparities in Argentina and Brazil: The Implications for MERCOSUR Carola B. Ramón-Berjano." Chatham House, https://www.chathamhouse.org/sites/default/files/public/General/ramon_paper.pdf.

[10] De Miguel, Sergio. "Deforestation drove massive Amazon rainforest fires of 2019." Purdue University, 16 December 2020, https://www.purdue.edu/newsroom/releases/2020/Q4/deforestation-drove-massive-amazon-rainforest-fires-of-2019.html.

[11] "EFTA's contribution to the European and world economy." Parliamentary Assembly of the Council of Europe, https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9256&lang=EN.

[12] "Eight— Development Ideas in Latin America: Paradigm Shift and the Economic Commission for Latin America." Scholars at Harvard, 14 April 2018, https://scholar.harvard.edu/files/ksikkink/files/international_development_sikkink.pdf.

[13] "Expansion of NAFTA: Issues and Obstacles Regarding Accession by Latin American States and Associations." Digital Commons @ Georgia Law, https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1494&context=gjicl.

[14] Fabian, Judit, and Judit Fabian. "Preferential Trade Agreements vs. Multilateralism - Canadian Global Affairs Institute." cgai.ca, https://www.cgai.ca/preferential_trade_agreements_vs_multilateralism. 2023.

[15] "FDI inflows to Latin America spike." Economist Intelligence Unit, 10 August 2022, https://www.eiu.com/n/fdi-inflows-to-latin-america-spike/. Accessed 3 June 2023.

[16] "Final Yoshimichi formato CEPALx." Repositorio CEPAL, https://repositorio.cepal.org/bitstream/handle/11362/4072/6/S20121009_en.pdf.
[17] "Fostering Investment in Infrastructure." OECD, https://www.oecd.org/daf/inv/investment-policy/Fostering-Investment-in-Infrastructure.pdf
[18] Gabel, Matthew J. "European Community (EC)." Britannica, https://www.britannica.com/topic/European-Community-European-economic-association.
[19] Gilmour, Matthew. "The Pinochet Regime and Chilean Politics." E-International Relations, 3 April 2013, http://e-ir.info/2013/04/03/the-pinochet-regime-and-chilean-politics/.
[20] "The Gini coefficient." Office for National Statistics, 26 April 2022, https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/methodologies/theginicoefficient.
[21] "Gini index - Latin America & Caribbean | Data." World Bank Data, https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZJ.
[22] "Growth,instability and the convertibility crisis in Argentina." Cepal, https://www.cepal.org/sites/default/files/publication/files/10884/77025043I_en.pdf.
[23] Hernández, Jose Ignacio. "The Venezuelan External Public Debt Crisis: Everything Everywhere All at Once." CSIS, 30 March 2023, https://www.csis.org/analysis/venezuelan-external-public-debt-crisis-everything-everywhere-all-once.
[24] "History of the MST." Friends of the MST, https://www.mstbrazil.org/content/history-mst.
[25] "How Developing Countries Can Get the Most Out of Direct Investment." World Bank, 25 October 2017, https://www.worldbank.org/en/topic/competitiveness/publication/global-investment-competitiveness-report.
[26] "How Has NAFTA Affected The Manufacturing Sector In Mexico Since Its Inception In 1994?" News & Insights for Manufacturing in Mexico, 7 November 2021, https://insights.tetakawi.com/how-has-nafta-affected-the-manufacturing-sector-in-mexico-since-its-inception-in-1994.
[27] Hudson, Nicholas, and René Streiff. "The European Coal and Steel Community: the Path Towards European Integration." PDXScholar, https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1304&context=honorstheses.
[28] "Inequality in Latin America: a global measurement." Repositorio CEPAL, https://repositorio.cepal.org/bitstream/handle/11362/40423/1/RVI118_Amarante.pdf.
[29] "Inforegio - European Regional Development Fund." European Commission, https://ec.europa.eu/regional_policy/funding/erdf_en.
[30] Jaumotte, Florence, et al. "Rising Income Inequality: Technology, or Trade and Financial Globalization?; Florence jaumotte, Subir Lall, and Chris Papageorg." International Monetary Fund, https://www.imf.org/external/pubs/ft/wp/2008/wp08185.pdf.
[31] "Jordan Free Trade Agreement | United States Trade Representative." USTR, https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta.
[32] "JUST RELEASED: Private sector guidance on social clauses in trade agreements." International Organisation of Employers, 7 April 2022, https://www.ioe-emp.org/news/details/just-released-private-sector-guidance-on-social-clauses-in-trade-agreements.
[33] "Latin America: Fragmentation and Forecasts." The Heritage Foundation, 2 June 2005, https://www.heritage.org/americas/report/latin-america-fragmentation-and-forecasts.
[34] "The Latin American Free Trade Association." International Trade Commission, https://www.usitc.gov/publications/other/pub60.pdf.
[35] Linscott, Mark. "A triple threat is putting the multilateral trading system at risk. What can the WTO do about it?" Atlantic Council, 30 November 2022, https://www.atlanticcouncil.org/blogs/new-atlanticist/a-triple-threat-is-putting-the-multilateral-trading-system-at-risk-what-can-the-wto-do-about-it/.

[36] "MERCOSUR - Latin American Jurisdictions." Oxford LibGuides, https://libguides.bodleian.ox.ac.uk/law-latinamerica/mercosur
[37] "MERCOSUR Preferential Trade Agreement (PTA) Negotiations - Mcommerce." Ministry of Commerce, https://commerce.gov.in/international-trade/trade-agreements/indias-current-engagements-in-rtas/mercosur-preferential-trade-agreement-pta-negotiations/.
[38] "Mercosur: Struggling to Meet Diverging Needs." Stratfor, 20 November 2015, https://worldview.stratfor.com/article/mercosur-struggling-meet-diverging-needs.
[39] Milner, Helen V. "Dynamics of Political Polarization Special Feature: National polarization and international agreements." NCBI, 6 December 2021, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8691121/.
[40] Morris, Brittany Elena. "NAFTA an empty basket for farmers in southern Mexico | Chiapas: State of Revolution." Cronkite School, https://cronkite.asu.edu/projects/buffett/chiapas/nafta-an-empty-basket-for-farmers-in-southern-mexico/.
[41] Mulugetta, Yacob. "Poverty in Latin America: Where do we come from, where are we going?" Brookings Institution, 10 May 2016, https://www.brookings.edu/opinions/poverty-in-latin-america-where-do-we-come-from-where-are-we-going/.
[42] Naim, Moises, et al. "Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion? - Moises Naim - Paper prepared for the IMF Conference on Second Generation Reforms, Washington, D.C." International Monetary Fund, 26 October 1999, http://imf.org/external/pubs/ft/seminar/1999/reforms/naim.htm.
[43] "New Trends in Regional Integration of Developing Countries." Search eLibrary :: SSRN, 28 March 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393013.
[44] Overly, Steven. "Biden's 'ambitious' economic plan for Latin America offers a 'social contract,' not trade agreements." Politico, 7 June 2022, https://www.politico.com/news/2022/06/07/biden-economic-partnership-americas-summit-00037621.
[45] "The pace and scale of change is unprecedented..." Cornell eCommons, https://ecommons.cornell.edu/bitstream/handle/1813/73928/The_Global_Employer_Forum_FutureWorks_2017.pdf?sequence=1&isAllowed=y.
[46] "Productive development in open economies | CEPAL." Cepal, https://www.cepal.org/en/publications/13092-productive-development-open-economies.
[47] Rasure, Erika. "Multilateral Trade Agreements: Definition, Pros and Cons." The Balance, 21 April 2022, https://www.thebalancemoney.com/multilateral-trade-agreements-pros-cons-and-examples-3305949.
[48] Santos, Bruna, and Josh Kaplan. "(Agri)business as Usual: Curbing Deforestation in the Amazon Rainforest." Wilson Center, 12 August 2019, https://www.wilsoncenter.org/blog-post/agribusiness-usual-curbing-deforestation-the-amazon-rainforest.
[49] "Section 301 of the Trade Act of 1974." CRS Reports, 3 January 2023, https://crsreports.congress.gov/product/pdf/IF/IF11346. Accessed 3 June 2023.
[50] "Social Clauses in Trade Agreements." TradeLab, https://www.tradelab.org/single-post/social.
[51] "Sweeping Protectionism Under the Rug: Neoprotectionist Measures Among Mercosur Countries in a Time of Trade-Liberalization." Digital Commons @ Georgia Law, https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1331&context=gjicl.
[52] Thiele, Lisa, and Victoria Zorn. "Quid pro quo? The benefit of reciprocity, multiplexity, and multireciprocity in early career peer support - Applied Network Science." Applied Network Science, 12 March 2019, https://appliednetsci.springeropen.com/articles/10.1007/s41109-019-0118-3.
[53] "30 Years of Mercosur: What Has it Brought its Members?" Nearshore Americas, 26 March 2021, https://nearshoreamericas.com/30-year-anniversary-mercosur-south-america/.
[54] "Trends in Income Inequality and its Impact on Economic Growth." OECD, https://www.oecd.org/els/soc/trends-in-income-inequality-and-its-impact-on-economic-growth-SEM-WP163.pdf.

[55] Tupy, Marian L., and Anthony de Jasay. "European Union." Econlib, https://www.econlib.org/library/Enc/EuropeanUnion.html. Accessed 3 June 2023.
[56] "Untitled." Language selection | Internal Market, Industry, Entrepreneurship and SMEs, 31 January 2023, https://single-market-economy.ec.europa.eu/system/files/2023-01/ASMR%202023.pdf.
[57] Volckhausen, Taran, and Morgan Erickson. "Colombia's 'Heart of the World': Mining, megaprojects overrun indigenous land." Mongabay, 15 January 2020, https://news.mongabay.com/2020/01/colombias-heart-of-the-world-mining-megaprojects-overrun-indigenous-land/.
[58] "WTO | Doha Development Agenda." World Trade Organization, https://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm.

Unconstitutionality of Presidential Inaction

Pearl Kapoor

Abstract:

This research examines the constitutionality of presidential inaction, creates an evidence-based theory, and strengthens its claims using previous legal and constitutional texts and academic research. A president is often viewed as a higher being than the average citizen of a nation since they are exempt from getting sued for a majority of potential reasons. This superior status may cause them to take undue advantage of their power, through action or inaction. This paper focuses solely on inaction and provides evidence to prove its inadmissibility. Typically, research papers related to this topic discuss how presidential inaction can and is excused occasionally, but this research paper provides a concrete argument about how it is strictly unconstitutional.

I. Executive Summary

When the President purposefully abandons their duty to enforce laws passed by the Legislative branch of the government, they are single-handedly making national policies, with no interbranch cooperation or communication, or approval through checks and balances, undermining the power the constitution holds. This is called 'Presidential Inaction.' The Constitution addresses how a President could be removed from office under 'high crimes' through the impeachment process. Still, it does not elaborate on prosecution in court and the Supreme Court has also not released a verdict on the same topic. And while a former president can be convicted for something he did while in office, it is unjust for him not to be held accountable while committing offenses. The author of this article believes that presidential inaction, especially in policymaking, is unconstitutional.

II. Overview

This author will be collecting qualitative research using historically relevant texts like the Federalist Papers and the Constitution, as well as previous research papers. Legal professionals, such as law professors and constitutional law attorneys may also be interviewed regarding the specifics of the data already available. Old cases that examine presidential limitations (Franklin v Massachusetts) and acts like the Administrative Procedure Act might be analyzed and incorporated to provide accurate and relevant evidence.

Since strict limitations have not yet been imposed on the governance by a President, it may be used to the advantage of the Executive branch and undermine the constitutional hierarchy. The author expects to conclude how inaction could be illegal with a strong legal foundation.

A. Pointed Summary

- The principle of separation of powers in the U.S. Constitution establishes a system of checks and balances among the legislative, executive, and judicial branches of government.
- The Constitution grants the President certain powers and responsibilities, including the duty to faithfully execute the laws of the land.
- Presidential inaction, or the failure to carry out this duty, can lead to a violation of the Constitution's separation of powers.
- When the President fails to enforce a law or fulfill a constitutional duty, it can undermine the authority of the legislative branch and threaten the democratic process.
- Examples of presidential inaction that may be unconstitutional include failure to enforce environmental regulations, neglecting to address voting rights issues, and refusal to implement laws passed by Congress.
- Remedies for presidential inaction may include legal challenges, congressional oversight and investigation, and impeachment proceedings.

- It is important for policymakers and citizens to be vigilant in monitoring and addressing cases of presidential inaction to uphold the Constitution and maintain the integrity of our democratic system.

B. Relevance

This research is extremely relevant to all citizens of the US as it informs them about a loophole in the laws that the government might be taking advantage of and urges them to take action against it. A prime example of this would be the presidency of Donald Trump. Although a widely controversial topic, Democrats have argued that they witnessed an unacceptable response from law enforcement, emblematic of how police officers treat white supremacists with gentleness, a contrast to the brutality they continue to show BIPOC and LGBTQ+ activists demanding justice. There was deliberate inaction from the administration, which delayed the dispatch of the National Guard and prevented them from restoring order in time. This example of inaction resulted in multiple injuries and may have bigger consequences in the future if not acted upon.

A. Current Stances

James Madison, 4th US President, father of the Constitution, and co-author of the Federalist Papers, designed the Constitution with the separation of powers in mind. It was meant to ensure no powers, especially executive, ran amok or became tyrannical.

"The legislative, executive, and judiciary departments ought to be separate and distinct; so that neither exercise power properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time," penned Madison in the Federalist Paper No. 47.

Madison clearly stated how he wished that the three branches of the government were contained within their powers. There was no need for one branch that governed alone. When a president chooses to administer policies through inaction, the president is overriding the power of the legislative branch since it is the proper procedure for the president to bring the policy they do not agree with in front of Congress to ensure a fair trial that determines whether the president may or may not enact a certain law. A president, however, may not simply ignore any law or rule that they are not fond of.

Looking at the larger picture, a President can not be sued for their misdeeds either. The Administrative Procedure Act rules the process by which federal agencies create and issue regulations and rules. It states that the "reviewing court shall compel agency action unlawfully withheld or unreasonably delayed and hold lawful and set aside agency actions found illegal…" Moreover, it mentions the right to withhold power from agencies that are more powerful than needed, acting contrary to human rights, disregarding legal procedures, or being unwarranted or unsupported.

Some forms of inaction can be permissible even if they defy the very core values of the structure of the Constitution and the Madisonian principles that are supposed to govern the country. These instances are only allowed because of loopholes in the law. For example, when President Obama announced DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) it could not be declared unconstitutional because it was not expressed as an executive action.

Peter L Strauss, an American lawyer and author, proposed that agencies could be a part of the executive branch but Congress could be allowed to determine the exact nature of each agency's relationship with the executive. In this way, the president could function in an oversight role instead of an authoritarian one. By providing the president with a bystander role, not only are they involved in the ongoing processes, but they also do not have the discretion to interfere directly with the decisions of Congress.

B. Tried Policy

In the Franklin v Massachusetts case ruling in 1992, the court explicitly stated, "the President is not an 'agency' under APA and therefore is not subject to review under APA, although Presidency is subject to constitutional review." Since the President does not comply with the APA, a less strict policy named the "nonstatutory review" governs presidential actions. Despite not having any requirements, it is useful, which is surprising since it does not have a formal structure.

For background information, the non-statutory review is a judicial review that is not governed by a specific law or statutory position. It is capable of raising doubts about whether or not specific actions are suitable to be judged by courts at all. Even though the President is exempt from APA, the non-statutory review is a method of judicial supremacy over executive actions.

III. Policy Problem

A. Stakeholders

Quite obviously, the President would be one of the biggest stakeholders since it is their inaction that leads to this debate of constitutionality. Congress is another major party that would be affected by inactive executive power since this limits its ability to pass laws and effectively complete its duty. With the debate of the interpretation of the Constitution comes the Judiciary branch of the government. Presidential inaction greatly impacts the public since it impacts their rights and freedoms, directly or indirectly. Foreign governments may also have varying reactions to this latent form of government. Allies, such as Canada and the UK, may be concerned about the impact of the inaction on trade, diplomacy, and other crucial aspects that may harm their interests. Adversaries, such as Russia and China, may consider this lack of initiative a weakness and use it to further their agendas and use propaganda on an international level.

B. Risks of Indifference

The risks of indifference to the unconstitutionality of presidential inaction are significant and can have critical consequences for the functioning of a democratic society. Firstly, when a President fails to act on a matter that is within their constitutional authority, it creates a power vacuum that allows other government officials or entities to assume authority and take actions that are not in the best interests of the public. This leads to a breakdown in the rule of law and undermines the democratic principles that are the foundation of a stable society. Secondly, when the courts or other oversight mechanisms fail to hold a President accountable for their inaction, it sets a dangerous precedent that undermines the checks and balances that are essential to the functioning of a democratic system. This encourages future Presidents to disregard their constitutional duties and responsibilities, knowing that they will not face any consequences for their actions. Finally, failing to hold a President accountable for their inaction can erode public trust in government institutions and the rule of law. This can lead to a loss of faith in the democratic process and may even result in civil unrest or other forms of social instability and rebellion. In short, the risks of indifference to the unconstitutionality of presidential inaction are significant and can have far-reaching consequences for the health and well-being of our society. We must remain vigilant in upholding the rule of law and ensuring that our elected officials are held accountable for their actions or inactions.

C. Nonpartisan Reasoning

Presidential inaction is not an issue that targets a specific party or wing of the political spectrum; it affects the government as a whole. The basis of the successful legal system of the United States is our constitution, established in 1787. Since then, legality and constitutionality have been synonymous and have helped build the foundations of justice in our nation. However, presidential inaction undermines everything that our Constitution and founding principles stand for. The negligence of duty is almost as heinous as an outright refusal to obey a law. Not only are primary figures of authority refusing to fulfill responsibilities, but they are influencing thousands of individuals that look up to them to do the same. By diminishing the national administrative laws, unconstitutional presidential inaction is a non-partisan issue and must be treated with importance and impartiality by Democrats and Republicans alike.

IV. Policy Options

Several policy options could potentially be implemented to prevent or address presidential inaction. Here are a few examples:

1. Legislative Action: One option would be for Congress to pass legislation that specifically mandates the president to take certain actions in a given situation. This could clarify the president's duties and responsibilities and provide clear guidance on what is expected of them.

2. Judicial Review: If a president's inaction is believed to be unconstitutional, the matter could be brought before the courts for judicial review. This could result in a court order

compelling the president to take certain actions or enforce the constitutional duties and responsibilities of the president.

3. Executive Orders: A president could issue executive orders that require specific actions to be taken in a given situation. While these orders would only be binding during the term of the issuing presidents, they could help ensure timely and effective action on important issues.

4. Congressional Oversight: Congress could also exercise its oversight powers to hold the president accountable for inaction. This could involve holding hearings or investigations, requesting information, and demanding that the president take action.

V. Conclusions and Recommendations

Since strict limitations have not yet been imposed on the governance by a President, inaction may be used to the advantage of the Executive branch and undermine the constitutional hierarchy. The author concludes how inaction is illegal with a strong legal foundation and urges for stricter regulation of the responsibilities that are held by national figures of authority.

Acknowledgments

The Institute for Youth in Policy wishes to acknowledge Ahad Khan, Michael Yang, Katelin Wong, Nolan Ezzet, and other contributors for developing and maintaining the Policy Department within the Institute.

References

"Franklin v. Massachusetts | Case Brief for Law School | LexisNexis," accessed June 6, 2023, https://www.lexisnexis.com/community/casebrief/p/casebrief-franklin-v-massachusetts.

Chris Horan, "Judicial Review of Non-Statutory Executive Powers," Federal Law Review 31, no. 3 (2003), accessed June 6, 2023, http://classic.austlii.edu.au/au/journals/FedLawRw/2003/22.html.

"Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant," accessed June 6, 2023, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2347&context=facpub.

Jonathan R. Siegel, "Suing the President: Non-Statutory Review Revisited," Columbia Law Review 97, no. 6 (Oct. 1997), pp. 1612-1709, accessed June 6, 2023, https://www.jstor.org/stable/1123388?read-now=1&seq=9&#8203

"Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion," accessed June 6, 2023, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1611&context=jcl.

"Policing Executive Teamwork: Rescuing the APA from Presidential Administration," accessed June 6, 2023, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4417&context=mlr.

Behind Bars: An Analysis of Government Prisons vs Private Prisons

Ahad Khan
Stevenson University

Introduction

The growing number of prisoners and prisons is a contentious issue. Proposed ideas of solving this issue include decriminalizing certain crimes, building more government prisons, building private prisons, and building both private and government prisons. Privatization is "the process of transferring property from public ownership to private ownership or transferring the management of a service or activity from the government to the private sector" (Varner, 2006, p. i). The definition of a truly private organization is "characterized by competition in a free marketplace. A private organization does not enjoy any monopoly powers conferred by the state. Nor are the taxpayers forced to pay for the services of any private organization through their tax dollars" (Hunter, 2016, Para. 2). This paper will focus on three primary areas of privatization: competition between public and private prisons, privatization's positive effect in daily life, and the inefficiency of the government.

In Washington State, the state-run prisons are at an average of 141% design capacity for prisoners, which is more than 4,800 than originally planned (Montague, 2001). City and county jails in Washington State are at 110% of design capacity (Montague, 2001). In Texas, after implementing a privatization program, they found that the average cost of private prisons per inmate was $35.25 per day (Montague, 2001). In a state-operated prison, it was $42.47 (Montague, 2001). The Washington State, Legislative Budget Committee, compared the cost of private prisons in Louisiana and Tennessee to a proposed state-operated prison in Washington (Montague, 2001). They found that private prisons achieved savings from 15 to 46% per inmate, even after accounting for the cost of living and facility design (Montague, 2001). This finding shows that through competition, prices to operate private prisons are lower than government prisons. In Louisiana, two privately operated prisons saved the state 11 to 13% when compared to a government prison (Montague, 2001). These private prisons also outperformed government prisons in safety, discipline, and community placement (Montague, 2001). The State of New Mexico evaluated a state, federal, and private women's facility using eight different categories of performance (Montague, 2001). The private prison outperformed the state and federal prisons in six of the eight categories (Montague, 2001). These studies demonstrate that private jails provide better service. However, according to Hunter (2016), a private organization does not have monopoly powers conferred by the state. Also, taxpayers are forced to pay for the services of any private company through their taxes (Hunter, 2016). Private prisons used in the current United States correctional system are not private because they earn revenue from taxpayers.

Many other aspects of daily life have been affected by privatization and the innovation that comes with it. The package shipping sector has been transformed by two private companies. In 1970, FedEx launched its tracking number system (Baldwin, 2013). The tracking number is the greatest contribution from FedEx; it allows one to enter a set of numbers and letters into FedEx.com and find exactly where the package is (Baldwin, 2013). In 1980, FedEx began purchasing the 800MHz spectrum in North America to create towers and a nationwide wireless data and communications network tied into FedEx's mainframe (Baldwin, 2013). FedEx drivers could share tracking information from their trucks long before mobile carriers offered any sort of cellular data (Baldwin, 2013). In a free market, FedEx developed breakthrough technologies. In six markets, the business Kozmo.com claimed to deliver anything consumers purchased in an hour or less. Customers were paying less for the items than the delivery price; therefore, they were losing money. They tried to create a delivery fee, but the customers revolted and caused the company to fail (Pumphrey, 2015). In 2009, Amazon tested same-day delivery by slowly offering the service to seven cities and charging a $6 delivery fee for Prime members and $15 for non-members (Pumphrey, 2015). By 2014, customers had ordered ten times as many items as they did in 2013 (Pumphrey, 2015). This led to Amazon creating the free option for 14 cities in May 2015 (Pumphrey, 2015). Amazon is now experimenting with Prime Now, which could shorten delivery times to only an hour (Pumphrey, 2015). Prime Now is only available in Manhattan, Brooklyn, Miami, and Baltimore (Pumphrey, 2015). Amazon is waiting for approval

for Prime Air, which is proposed to deliver packages in 30 minutes or less by using drones (Pumphrey, 2015). FedEx and Amazon revolutionized the package delivery sector, demonstrating that privatization works. Prior to FedEx and Amazon, packages got there when they got there, customers hoped. Other areas of privatization that have been successful include toll roads, bridges, tunnels, utilities, lotteries, and airports. The State of Texas entered into an agreement with Cintra Zachry to design, build, and operate a 316-mile toll road (Varner, 2006). This road stretches from Dallas to San Antonio and is part of the Trans-Texas Corridor system (Varner, 2006). The Chicago Skyway and the Indiana Toll Road were leased to a consortium led by Cintra de Infraestructuras de Transporte and Macquarie Infrastructure Group" (Varner, 2006, p. 10). The Chicago Skyway, which runs for 7.8 miles, "was leased for 99 years in exchange for an upfront payment of $1.83 billion" (Varner, 2006, p. 10). "The Indiana Toll Road, which is 157 miles long and runs along Indiana's northern border, was leased for 75 years at a cost of $3.85 billion" (Varner, 2006, p. 10). These amounts have led to 40 times revenues and 60 times operating profits (Varner, 2006). The State of Illinois also utilized the privatization of toll roads:

> Illinois has approximately 274 miles of toll roads located primarily in the suburbs of Chicago. These roads are operated and maintained by the Illinois State Toll Highway Authority. Roads included in the Illinois Tollway system are the Northwest Tollway (I90 and I-39), the North-South Tollway (I-355), the Ronald Reagan Memorial Tollway (I-88), and the Tri-State Tollway (I-80, I-294, and I-94) (Varner, 2006, p. 10)

"The Illinois Tollway System is currently in the middle of a 10-year, $5.3 Congestion Relief Program that began in 2005" (Varner, 2006, p. 10). There will be lanes will be added to 117 miles of the existing roadways in Illinois (Varner, 2006, p. 10). In addition, a "12.5-mile extension will be added to the North-South Tollway from I-55 to I-80" (Varner, 2006, p.10). The state of Illinois, by using toll roads, achieved millions of dollars in revenue.

> In 2005, the Illinois Tollway System had revenues of approximately $625 million. Of this $625 million, $600 came from tolls and toll evasion recovery, $4 million was brought in from concessions, and the final $21 million stemmed from investment income. These revenues were offset by $205 million in maintenance and operational expenses and $99 million in debt service. This left approximately $320 million for the renewal, replacement, and improvement of the tollway system (Varner, 2006, p. 10).

Bridges and tunnels, which collect tolls, have been privatized throughout the U.S. In Illinois, there are plans to build a bridge connecting St. Louis, Missouri, with East St. Louis, Illinois (Varner, 2006). Some politicians in Missouri have been vocal about supporting the financing of this bridge through a public-private partnership in which a private company would finance and operate the bridge (Varner, 2006). The company would collect the tolls to repay the cost of construction and to make a profit. In the privatization of utilities, three utilities that have been privatized are electric, natural gas, water, and sewer. Eight investor-owned public utilities provide electric service to residential customers in Illinois. These companies are under the regulation of the Illinois Commerce Commission (ICC). These companies are AmerenCILCO, AmerenCIPS,

AmerenIP, Commonwealth Edison Company, Interstate Power and Light Company, MidAmerican Energy Company, Mt. Carmel Public Utility Company, and South Beloit Water, Gas, and Electric Company (Varner, 2006). The State of Illinois successfully achieved a state of open competition in the retail sector for electricity. Through the Illinois Electric Service Customer Choice and Rate Relief Act of 1997, customers were given greater choice in who supplies their electric power services (Varner, 2006). By the end of 2000, all non-residential customers had the option to choose their electric supplier (Varner, 2006). Suppliers that are able to provide service include a customer's current electric utility, another Illinois electric utility, or an alternative retail electric supplier certified by the ICC (Varner, 2006). Thirteen investor-owned public utilities provide gas services to residential customers in Illinois, which are also under the regulation of the ICC (Varner, 2006). These companies were utilized for natural gas:

> AmerenCILCO, AmerenCIPS, AmerenIP, Atmos Energy Corporation Consumers Gas Company, Illinois Gas Company, Interstate Power and Light Company, MidAmerican Energy Company, Mt. Carmel Public Utility Company, Nicor Gas Company, North Shore Gas Company, People Gas Light and Coke Company, and South Beloit Water, Gas, and Electric Company (Varner, 2006, p. 12-13)

In Illinois, 31 water, 4 sewer, and 13 combined water and sewer utilities are investor-owned (Varner, 2006). These privately owned utilities provide water for approximately 1.2 million people and sewer service to 127,000 people, mainly concentrated in the Chicago metropolitan area (Varner, 2006). The privatization of lotteries in Illinois has been successful for those private companies that took advantage of an opportunity:

> In May of 2006, Governor Rod Blagojevich proposed the sale or lease of the State's lottery to fund improvements in the State's educational funding. In July of 2006, the Illinois Office of Management and Budget put out a request for proposals from firms interested in advising the state on the proposed privatization of its lottery. The proposal was based on an up-front purchase fee of approximately $10 billion which was valued by an initial proposal by Goldman, Sachs & Co. In FY 2006, the lottery had revenues of $1.985 billion and transferred $670.5 million to the general revenue fund. This would indicate a revenue-to-purchase price multiple of 5.0 times and a profit-to-purchase price multiple of 14.9 times (Varner, 2006, p. 15)

In the 1990s, there were difficulties when trying to find bidders (Varner, 2006). Now, there are many companies that are qualified, including "GTECH, Lottomatica S.p.A, Camelot Group, Tattersall Limited, Scientific Games Corp., and International Game Technology" (Varner, 2006, p. 15-16). Airports have been successfully privatized in Australia, Great Britain, Canada, Mexico, and The Netherlands (Varner, 2006). A survey by the General Accounting Office found that 90% of the employees in the biggest 69 airports in the U.S. were employed by private companies (Varner, 2006). These employees conducted services such as ticketing, baggage handling, cleaning, concessions, and ground transportation (Varner, 2006). The 10% of the workers employed by the government were usually local and state government personnel

performing administrative and public safety duties (Varner, 2006). In New York, there have been multiple successful cases of privatizing airports.

> The Stewart Airport in New York is operated under a 30-year lease by the National Express bus company of Great Britain. The Port Authority of New York and New Jersey contracted with a private group to finance, build, and operate the International Arrivals Building at Kennedy Airport. BAA plc entered into an agreement with the Indianapolis Airport Authority to operate all of the airports under their supervision, including Indianapolis International Airport (Varner, 2006, p. 17)

These are only a few examples of the many parts of daily life that have become privatized.

Privatization also has positive effects on many different aspects of business performance, such as economic performance, productivity, prices, use of goods, and consumption of goods. Regarding economic performance, an OECD report reviewed research on the effects of privatization and found "overwhelming support for the notion that privatization brings about a significant increase in the profitability, real output and efficiency of privatized companies" (Edwards, 2017, p. 96). Also, a review of dozens of academic studies in the Journal of Economic Literature concluded that privatization "appears to improve performance measured in many different ways, in many different countries" (Edwards, 2017, p. 96). An analysis of 825 companies listed on the Shanghai Stock Exchange found that private enterprises perform better than mixed-ownership firms, with 513 mixed-ownership firms and 312 private firms (Megginson & Netter, 2001). Another study looked at the economic performance of the top 500 non-US industrial companies in 1983. It showed that state-owned and mixed (state and private) ownership enterprises are much less profitable and productive than privately held firms using four profitability ratios and two measures of X-efficiency (Megginson & Netter, 2001). They also discovered that mixed firms are no more profitable than SOEs (state-owned enterprises), implying that full private control, rather than partial ownership, is required to boost performance (Megginson & Netter, 2001). More than 50 Canadian industries were privatized in the 1980s and 1990s, according to 2012 research, including an airline, a railroad, manufacturers, and energy and telecommunications companies. It discovered that the overall effects have been mostly good and in many cases, overwhelmingly so (Boarding & Vining, 2012). Capital expenditures, dividends, tax revenues, and sales per employee all tended to rise (Boarding & Vining, 2012). Using representative panel data from 1,701 Bulgarian and 2,047 Romanian manufacturing enterprises, it was found that higher price-cost margins are connected with privatization (Konings, Cayseele, & Warzynski, 2005). This effect is stronger in highly competitive sectors, implying that privatization and the formation of competitive markets are complementary (Konings, Cayseele, & Warzynski, 2005). It also implies that privatized enterprises cut costs rather than raise prices because firms in highly competitive marketplaces are more inclined to price hike (Konings, Cayseele, & Warzynski, 2005). In industries with high product-margin concentration, import penetration is related to reduced price-cost margins, but this effect is

reversed in more competitive sectors (Konings, Cayseele, & Warzynski, 2005). Productivity is increased by privatization. According to Edwards (2017), in the decade following privatization, labor productivity in the electricity and gas industries nearly doubled. In the long run, shifting from total state ownership to private ownership would boost productivity growth by 1.6 to 2% each year (Megginson & Netter, 2001). Claessens and Djankov (2002) investigated 6000 companies and discovered that Privatization is linked to considerable increases in sales revenues and labor productivity, as well as fewer job losses to a lesser extent. As the time since privatization passes, the positive effect of privatization grows in economic magnitude and statistical significance (Claessens & Djankov, 2002). In the absence of state-owned enterprises in Vietnam, productivity gains from trade could have been 66 percent higher five years after WTO entrance (Baccini, Impullitti, Malesky, 2019). Edwards (2017) concluded that the effect of privatization on prices benefited British customers since privatization and competition decreased prices and enhanced service quality. After a decade of privatization, real prices for telecommunications, industrial gas, and residential gas fell by 50%, 50%, and 25%, respectively, according to a Treasury analysis (Edwards, 2017). Real prices were down more than 25% a decade after electricity privatization (Edwards, 2017). The environment also benefited from the electrical reform because the privatized industry moved quickly to replace coal with natural gas as a fuel source (Edwards, 2017). Cost savings of 20% to 50% were reported in over 100 independent studies as a result of privatization and, more crucially, greater competition (Hike, 1993). In the long run, switching from total state control to private ownership would reduce costs by 1.7 to 1.9 percent per year (Megginson & Netter, 2001). On the effects of use and consumption, Edwards (2017) reported that the share of British Telecom service calls completed within eight days soared from 59 percent to 97 percent in the decade after privatization. Before privatization, it had taken months and sometimes a bribe to get a new telephone line (Edwards, 2017). Under Margaret Thatcher's privatizations, the share of British citizens owning equities soared from 7 percent to 25 percent (Edwards, 2017). According to Fang, Lerner, and Wu (2017), after state-owned firms are privatized, innovation increases. According to Shirley (1992), research demonstrates that privatization almost invariably results in an increase in investment and innovation. According to an analysis of two household surveys conducted in the 1990s, there is a positive premium for working in the private sector over the state and privatized state enterprises, and this premium is reduced but not eliminated when differences in firm and worker characteristics and hours worked across sectors are controlled (Brainerd, 2000). Unlike state ownership, private ownership allows profit and loss to be used. Customers that are satisfied continue to patronize businesses that have provided them with excellent service. Entrepreneurs who fail to please their customers, on the other hand, are quickly driven out of business. Similarly, private road owners will have every motivation to reduce accidents, whether through technology breakthroughs, improved laws of the road, enhanced techniques of identifying inebriated and other undesirable drivers, and so on. If they fail or do poorly compared to their peers, they will be demoted from their position of authority. According to Austrian economist

Walter Block's (2009) research, it costs two dollars to create a mile of road through the public sector for every $1 spent by a private company. As a result of our state's road management, 40,000 people die on them each year (Block, 2009). According to the same study, switching to a totally privatized road system would save an estimated 25,000 deaths every year (Block, 2009). After reviewing research from many disciplines, it is clear that privatization has a positive effect when used. It is fair to determine that the privatization of prisons would follow this pattern.

Comparing the government and private companies, theoretically, private companies would be more efficient. The federal government can have cost overruns, make bad decisions, and misallocate investments with very few mechanisms created to prevent this. When there are guaranteed taxpayer funds that are funding one's activities, they would have no incentive to create a profit. Private companies have a built-in mechanism to prevent these problems. The mechanism is bankruptcy and the profit incentive, which is what drives every private company to become successful and create innovations. If a company does make bad decisions, has cost overruns, and misallocates investments; it will lose money or go bankrupt. The companies have to make good decisions, or they will suffer the consequences. The government does not have this mechanism to keep it in line. People tend not to spend other people's money as carefully as their own, which explains how the government spends its funding. For lawmakers, the source of funding can seem distant. Private companies must weigh the costs and benefits before spending their own money. Poorly performing government agencies are not subject to takeover bids or bankruptcy like private companies are. Around 10% of U.S. companies go out of business every year (Edwards, 2014). Governmental managers have no profit incentive, no incentive to reduce waste, and cut costs. Without profits to worry about, lawmakers often favor budget increases without thinking if the expansion will add net value to society above the taxpayer costs. Also, without the profit incentive, there is no motivation to produce innovations, and there is less motivation to produce better services with higher quality. There has been research that shows that "cost overruns are more frequent on government projects than on private-sector projects" (Edwards, 2014, Para. 10). Also, due to the frequent change of political parties controlling government, many agencies experience continuous changes in the mission of their agency. For example, the Customs and Border Protection Agency (CBP) has had its policies change from zero-tolerance policies under President Donald Trump from 2017-2021 to more relaxed policies under President Joe Biden in 2021 (A. Bielawski, Personal Communication, April 1, 2021. Under Biden's policy, the chief of the U.S. Border Patrol Rodney Scott was forced out of the CBP (Spagat, 2021). The incentives in government policies are inherently negative; if they were positive, it would cause all of those who are carrying out the work to be unemployed. For example, those vested in ending the War on Poverty actually had an interest in losing it because they would lose their jobs if they won the War on Poverty. Another example of how this works is that the "employment in the Department of Agriculture went up 47% (78,000 to 115,000) from 1952 and 1972, while the number of farms dropped 45% (5.2 million to 2.9 million) in the same

time frame" (Brownfield, 1977, Para. 5). Theoretically and practically, the government has been found to be less efficient than private companies.

Opponents of privatizing prisons claim that private prisons are a result of failed privatization attempts. These people could not be further from the truth. Private prisons, as they attempt to debunk or oppose, are not really private because they act as agents of the state. The problem is not that it is private, the problem is that the government has a monopoly on prisons and creates contracts with private companies (Calton, 2019). These contracts are funded through taxpayer money (Calton, 2019). Due to this, the prisons are not private. These prisons are wholly dependent on the government, how can a private company be reliant on forced taxpayer payments be considered private? These prisons are simply an extension of the government, where funds come from forced taxpayer money. The "private prisons" have been criticized for having prisoner abuse, poor living conditions, and contaminated food (Hunter, 2016). This problem exists because the government is responsible for creating these facilities and the demand for more prisoners. The government created the demand for more prisoners in the "tough on crime" era in the 1970s and 1980s and the War on Drugs. Policies, such as mandatory minimum sentences, were created in the War on Drugs (Hunter, 2016). The government was unable to keep up with the number of prisoners, so they decided to turn to private companies rather than reforming their policies. As of 2014, roughly 50 percent of prisoners in federal prisons were serving time for drug-related offenses (Hunter, 2016). Without the drug wars, there would only be a fraction of the number of prisoners. These prisons are not private. Blaming these problems on privatization is wrong and a logical fallacy.

Rather than keep the current model of prisons, the government-run and private prisons, we should attempt to create a truly private prison free from the monopoly the government has. True private prisons are free-market prisons, which would be significantly better than "private" and government prisons. Free-market prisons would allow prisoners to improve their skills, education, and work experience. This would incentivize productivity and peace. Prisoners would be allowed to make money while in prison, pay the prison, and pay the victim's family. Their income could be allocated as such: 25% to the prison, which would prevent taxpayers from having to pay for prisons; 25% to the prisoner to incentivize him to work, and 50% to the victim (or victim's family) for restitution. This model could be modified by judges depending on different crimes. Prisoners wishing to improve their skills through training and education will have the opportunity to do so because it will increase profits for the company. This will also incentivize the prevention of violence because they will be punished if they do not work. For drug addicts, prisons could allow medical uses of drugs but ban recreational ones. This would allow the prisoners to make more money and will decrease the likelihood that they resume their drug habit upon release.

Private prisons, in effect now, are arguably more efficient than the prisons run by the government. The government as a whole has no incentive to perform well. Also, privatization is historically effective. Based on the data, it is believable that private prisons would be more

efficient than government-run prisons. In the era of evidence-based corrections, is it time to start the move toward privatization? The answer to that question is yes. Private prisons are the solution to the prison crisis in the United States.

References

Baccini, L., Impullitti, G., Malesky, E. 2019, May 17. *Globalization and state capitalism: Assessing the effects of Vietnam's WTO entry.* Vox. https://voxeu.org/print/64176#

Baldwin, R. (2018, January 15). *Shipshape: Tracking 40 Years of FedEx Tech.* Wired. https://www.wired.com/2013/04/40-years-of-fedex/.

Block, W. (2009). *The Privatization of Roads and Highways*. Mises Institute. https://cdn.mises.org/The%20Privatization%20of%20Roads%20and%20Highways_2.pdf

Boardman, A. & Vining, A. *A Review and Assessment of Privatization in Canada. University of Calgary School of Public Policy.* https://www.policyschool.ca/wp-content/uploads/2016/03/boardman-vining-privatization.pdf

Brainerd, E. (2000). *How Does Privatization Affect Workers? The Case of the Russian Mass Privatization Program.* William Davidson Institute. https://ideas.repec.org/p/wdi/papers/2000-303.html

Brownfield, A. (1977, June 1). *The Inherent Inefficiency of Government Bureaucracy*. Foundation for Economic Education. https://fee.org/articles/the-inherent-inefficiency-of-government-bureaucracy/.

Calton, C. (2019, August 6). *The Problem with Private Prisons Is Not that They Are Private*. Mises Institute. https://mises.org/wire/problem-private-prisons-not-they-are-private.

Claessens, S. & Djankov, S. (2002, March). *Privatization Benefits in Eastern Europe*. Journal of Public Economics. https://www.researchgate.net/publication/222703978_Privatization_Benefits_in_Eastern_Europe

Edwards, C. (2021, January 21). *Why Is the Federal Government So Wasteful?* Cato Institute. https://www.cato.org/commentary/why-federal-government-so-wasteful.

Edwards, C. (2017). *Margaret Thatcher's Privatization Legacy*. Cato Institute. https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2017/2/cj-v37n1-7.pdf?queryID=e63b40ffca8b3e1fe3bfb7ce8d47194a

Fang, L., Lerner, J., Wu, C. (2017). *Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China*. Sci-Hub. https://sci-hub.hkvisa.net/10.1093/rfs/hhx023

Friday, L. (2019, September 3). *A More Sane Alternative to Government Prisons*. Mises Institute. https://mises.org/wire/more-sane-alternative-government-prisons.

Hike, J. (1993, March). *Cost Savings From Privatization: A Compilation of Study Findings*. Reason Foundation. https://reason.org/wp-content/uploads/files/b987e7bd89f4c4e21c8a73857b7001e8.pdf

Hunter, B. (2016, August 30). *Don't Confuse "Private" Prisons with Free-Market Prisons*. Mises Institute. https://mises.org/wire/dont-confuse-private-prisons-free-market-prisons.

Konings, J., Van Cayseele, P., & Warzynski, F. (2005). The Effects of Privatization and Competitive Pressure on Firms' Price-Cost Margins: Micro Evidence from Emerging Economies. The Review of Economics and Statistics, 87(1), 124–134. http://www.jstor.org/stable/40042927

Montague, E. (2001). *Private Prisons: A Sensible Solution*. Washington Policy Center. https://www.washingtonpolicy.org/publications/detail/private-prisons-a-sensible-solution.

Megginson, W. L., & Netter, J. M. (2001). From State to Market: A Survey of Empirical Studies on Privatization. Journal of Economic Literature, 39(2), 321–389. http://www.jstor.org/stable/2698243

Pumphrey, C. (2015, July 9). *How Amazon Same-day Delivery Works*. HowStuffWorks. https://money.howstuffworks.com/amazon-same-day-delivery4.htm.

Shirley, M. (1992). *The What, Why, and How of Privatization: A World Bank Perspective*. Fordham Law Review. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2976&context=flr

Spagat, E. (2021, June 23). *Border Patrol chief who supported Trump's wall is forced out*. Associated Press. https://apnews.com/article/donald-trump-joe-biden-border-patrols-government-and-politics-f16303ec4f526598ba1625aabccebbed

Varner, B. (2006, October). *Government Privatization: History, Examples, and Issues*. Commission on Government Forecasting and Accountability. https://cgfa.ilga.gov/Upload/2006Gov_Privatization_Rprt.pdf.

Author Bios

Shantanu R. Kamat is an undergraduate student at the University of California, Berkeley, where he is double majoring in Political Science and Economics. His academic pursuits are broad, with interests spanning international relations, U.S. foreign policy, criminal justice, and the study of capitalism, among others. His tenure at the Institute for Youth in Policy was marked by distinctions such as being named a Distinguished Fellow, and serving effectively as the Newsletter Director. Beyond this, Shantanu has leveraged his academic prowess in roles such as a Research Assistant to Ph.D. candidates at UC Berkeley and Stanford, engaging in in-depth research on terrorism, insurgency, and civilian targeting. He also founded the Third Party Review, a platform for unbiased political analysis.

Pearl Kapoor is a driven and intellectually curious high-school student passionate about law and business, focusing particularly on constitutional law. With an exceptional ability to analyze complex legal concepts and a keen eye for detail, she thrives on dissecting constitutional principles and their practical applications. Her dedication to understanding the intricate workings of our legal system, coupled with her strong business acumen, positions them as a future advocate for justice. Through their unwavering commitment to education and involvement in mock trial competitions, Pearl aspires to make a lasting impact in the field of constitutional law.

Ahad Khan is a senior at Stevenson University, pursuing his Bachelor of Science in Criminal Justice, Master of Science in Crime Scene Investigation, and minor in Legal Studies. He has received two certifications from the Federal Emergency Management Agency. He plans to go to law school and practice criminal law.