Can You Please Send Someone Who Can Help? How Qualified Immunity Stops the Improvement of Police Response to Domestic Violence and Mental Health Calls

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Society interacts with the police in many ways. However, there is a great deal of tension between the police and the public at large. This paper focuses on the tension between domestic violence victims, persons with signific

ant psychological conditions ("PWSPC"), and the police. Currently, police spend equal amounts of time with these two groups as any other activity they do but spend disproportionately less time training on how to deal with them. Victims of domestic violence and PWSPC are often left empty-handed *after being wronged by the police. Victims of domestic violence whom the police have created or worsened their position through their actions try to sue under the State Created Danger doctrine. When PWSPC experience excessive use of force, they file claims against the police for excessive use of force under the Fourth Amendment. Both standards are high enough, and even if these standards are met, the officers are likely covered under qualified immunity. As it stands, litigants would have to establish sufficient facts to prove that their constitutional rights have been violated and that their constitutional right was clearly established.*

This paper recognizes that abolishing qualified immunity is unlikely to happen and proposes a different approach. Qualified immunity could be abolished by the United States Supreme Court or Congress, but this outcome is unlikely to happen. Recently, several states and cities have created different methods for citizens to sue police officers, making qualified immunity not a defense, and switching liability to police departments. Similarly, some police departments have put strategies in place to better their mental health and domestic violence responses. This paper argues that while shifting the liability to police departments will not affect officers directly, it is the most feasible approach given the large amount of opposition to abolishing qualified immunity. Thus, my recommendation is based on shifting liability to police departments for police departments to keep implementing these strategies and improve training.

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Introduction

Repeat after me,

> I, [insert your name], do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of [insert the state], and that I will bear true faith and allegiance to the same and to the Governments established in the United States and in this State, under the authority of the people So help me God.[1]

These are the words by someone who has just sworn to protect you and your loved ones. But whom do you call when they cannot help? Whom do you call when they are not qualified to help you? What if you are a victim of domestic violence looking for help? What if you are calling because your family member who is a PWSPC[2] is having an episode?

The police as an institution have a complicated history in our country. Initially, in the North, the original idea behind the police was to create a night watch, but in the South, the police's sole purpose was the preservation of slavery.[3] Through the years, the police have disproportionately targeted people of color through their various duties.[4] Today, we frequently come in contact with the police. In 2019, there were 697,195 full-time law enforcement officers in the United States.[5] Standing alone, this number would be the sixth largest military in the entire world.[6]

Consider the stories of Jane Doe and John Doe.[7] Jane Doe is a victim of domestic violence, who after several instances of domestic violence, has decided to call the police. When the police arrive, instead of arresting the abuser, they downplay the situation and maybe even tell Jane that everything seems okay. The next time that the police come, Jane displays traits consistent with being a victim of domestic violence, but she is scared to tell them anything else because her abuser is sitting five feet away from her, so the police tell her that she needs to stop calling as she has repeatedly called "for

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[1] N.J. Rev. Stat. § 41:1-1 (2013).

[2] Throughout this paper, PWSPC will refer to people experiencing symptoms of schizophrenia, bipolar disorder, major depression, or some other significant psychological condition both in a singular and a plural manner. SPC will only refer to the condition itself.

[3] Olivia B. Waxman, *How the U.S. Got Its Police Force*, Time (May 18, 2017), https://time.com/4779112/police-history-origins/ [https://perma.cc/7CPC-2B3T].

[4] *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 333–-36 (1998).

[5] See Erin Duffin, Number of Full-Time Law Enforcement Officers in the United States 2004 to 2018, Statista (Sept. 30, 2019), https://www.statista.com/statistics/191694/number-of-law-enforcement-officers-in-the-us/ [https://perma.cc/VAL9-Q65B].

[6] *See* Magdalena Szmigiera, *Largest Armies in the World by Active Military Personnel 2021*, Statista (Mar. 30, 2021), https://www.statista.com/statistics/264443/the-worlds-largest-armies-based-on-active-force-level/ [https://perma.cc/92EP-2FFA].

[7] The following two scenarios were created based on the author's research for this paper. While these scenarios are fictitious, they accurately represent how interactions between victims of domestic violence or PWSPC and the police. Application of case law to real scenarios could be seen below. *See infra* Section II.B.

no reason." The next time that Jane got abused she went ahead and got a temporary restraining order.[8] After seeing how the police were reluctant to help Jane, her abuser ends up abusing her again.[9]

As to John Doe, he is a 30-year-old schizophrenic who is having a panic attack. John is locked in his room or the bathroom. His mother, not knowing what to do, calls the police. While it is not their first encounter with John, his mother tells the police about his condition, and reassures them that he is not a dangerous person. When the police arrive to their house, they tell John how they are going to come in and they are his friend. "We are only here to help," they say. John, who has no control over his emotions, does not cooperate. Finally, the officers go into the room where john is, find him agitated and confused so he starts running towards the officers, who resort to shooting him.

If you were Jane Doe or John Doe's mother, what would you do? The answer is probably to sue the police. Unfortunately, suing the police for a violation of civil rights comes with obstacles like finding an attorney who is willing to get paid based on the award, if any, and to do it for a case that is likely to get dismissed due to qualified immunity.[10] Sadly, if you do decide to sue the police, you would be among the very few that do, given that people who feel that they have been harmed by the police only sue about 1% of the time.[11] Some of the reasons why people do not sue include "ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration."[12]

This paper contributes to the ample world of qualified immunity academia by exploring its intersection with domestic violence and PWSPC. Other scholars have focused their qualified immunity studies on different and often broader topics. For example, Professor Chen focused on how both courts and commentators of qualified immunity usually fail to appreciate the unique issues of fact that are inherent to qualified immunity cases.[13] Similarly, Professor Schwartz, who has written several articles on qualified im-

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[8] *Restraining Order*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION ("A restraining order is an order that . . . [forbids] the defendant from certain listed actions that . . . pose a risk of unlawful conduct. In particular, a restraining order is used to limit a person with a propensity for threatening or harming another person from contact, communications, or proximity with that person.").

[9] Currently jurisdictions are split as to what acts by the police are enough to complete this fact pattern. The general idea is that the police officers would need to "communicate[. . .], explicitly or implicitly, official sanction of private violence." Romero v. City of N.Y., 839 F. Supp. 2d 588, 619 (E.D.N.Y. 2012).

[10] *See generally* Tyrrell v. Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 634 (E.D.N.Y. 2011).

[11] *Id.* at 863 (citing Matthew R. Durose, Erica L. Schmitt & Patrick A. Langan, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY, at V (2005).

[12] *Id.* (citing Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988)).

[13] Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U.L. REV. 1, 6 (1997).

munity, usually focuses on the viability of qualified immunity, how police departments deal with lawsuits, and other quantitative studies.[14]

This paper follows a descriptive and evaluative approach. First, this paper identifies the current tension between the police and the public, and how it specifically affects victims of domestic violence and PWSPC. Second, it tries to show how victims are left emptyhanded by detailing the process in which victims would seek remedy when wronged by the police. Qualified immunity serves as a barrier to incentivizing police officers to do better when dealing with the public and attempts to provide a solution.

This paper is organized as follows. Part I outlines the current tension between the police and the public by exploring different concepts that *could* influence such tension. It aims to illustrate some of the reasons as to why the tension exists without alleging correlation or causation. Recognizing qualified immunity as a problem, Part II provides an outline of how a claim in which qualified immunity is raised transpires by first, laying out and then applying to two recent newsworthy cases the current relevant case law relating qualified immunity, the Fourth Amendment, and the State Created Danger exception. Part III explores different ways to solve the problem of qualified immunity as a barrier for reform. The first two Sections of Part III address how the Supreme Court and Congress are the only bodies that can end or modify the doctrine, focusing specifically on how Congress is currently in the process of implementing a new bill. The third Section describes how some states are currently passing statutes creating new ways for citizens to sue to "end" qualified immunity. Lastly, it describes how local police departments can address the tension through the implementation of task forces, recruitment, and training. Since all the possible solutions are either in the process of being implemented or have been recently implemented, Part IV is divided into two parts. First, Part IV analyzes possible reactions and oppositions to the different solutions described in Part III. Then, considering the reactions and oppositions, I propose a course of action that involves a combination of all the possible solutions.

I. The Tension Between the Public and the Police

It *should not* surprise anyone either reading this paper or any other paper that there is tension between the police and the public. Section A seeks to show how the public feels about police by exploring a couple of theories that could create tension. Section B focuses on the police's view on the public's opinion of the police, what the police think of themselves, and what they think about their training. Finally, while this paper is intended to show a

[14] *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 863–64 (2012) (examining how police departments gather information to identify problems within the force); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 9–10 (2017) (exploring how qualified immunity does not usually end cases involving civil rights, including summary judgment, interlocutory appeals, and final judgments resulting on appeals).

larger issue of distrust between the public and the police, Part C focuses on the two specific police-public encounters that are the primary focus of this paper — domestic violence and mental health related calls.

A. The apparent tension between the public and the police

Distrust in the police is not a new phenomenon. Police intrusions in relation to searches and seizures can be traced back to the colonies when the British had the power to search and seize personal property.[15] Today, we face other problems with the police as the public experiences more and more encounters with the police. 58% of respondents in a study answered that there need to be major changes in policing practices in the United States.[16] While support for different reforms varied, 97% of respondents agreed that we should require officers to have a good relationship with the public.[17]

Encounters with police can lead to threats or excessive use of force. In 2018, approximately 61.5 million people had some type of contact with the police,[18] compared to 40 million in 2008.[19] In 2018, 2% of these people with contacts experienced some threat or use of force, which amounts to 1.25 million people.[20] A U.S. Department of Justice ("DOJ") study of the Seattle police department found that 20% of uses of force were excessive.[21] Similarly, another DOJ study found most shootings by the police in the city of Albuquerque unconstitutional or unjustified.[22]

Prosecution of police for actions that take place in the line of duty is rare, which leads to public distrust because the public feels like the failure to prosecute means enabling future misconduct.[23] The failure to prosecute police officers shifts the public view of police from protectors to adversaries.[24] Failure to prosecute does not include private actions by citizens under Section 1983.[25] Instead, failure to prosecute refers only to prosecutors failing to prosecute officers in their jurisdiction; prosecuters are reluctant to even

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[15] *See* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 377–402 (2009).

[16] Steve Crabtree, *Most Americans Say Policing Needs "Major Changes"*, GALLUP (July 22, 2020), https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx. [https://perma.cc/RAY7-RMRR].

[17] *Id.*

[18] Erika Harrell & Elizabeth Davis, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018, at 1 (2020), https://www.bjs.gov/content/pub/pdf/cbpp18st.pdf [https://perma.cc/ZCM4-NX9R].

[19] Christine Eith & Matthew R. Durose, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 1 (2011), https://www.bjs.gov/content/pub/pdf/cpp08.pdf [https://perma.cc/76VD-8ZAT].

[20] *Id.* at 5.

[21] U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 17 (Dec. 16, 2011) https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [https://perma.cc/Z9KU-AZUU].

[22] U.S. DEP'T OF JUST., C.R. DIV., RE: ALBUQUERQUE POLICE DEPARTMENT 2 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf.

[23] John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 804 (2000).

[24] *See id.* at 789.

[25] 42 U.S.C. § 1983. *See infra* Part II.A.

charge an officer because of their desire to maintain working relationships.[26] This has led to 66% of the population wanting the power to sue police officers as a way of holding them accountable for excessive use of force or police misconduct.[27]

The public cannot rely solely on internal investigations. Internal complaints are reviewed by officers in the same police department as the officers being complained about.[28] A 2002 study showed that police departments received about 6.6 complaints of officer use of force per every 100 officers.[29] Out of the 26,000 citizen complaints in the study: 34% were not followed because there was insufficient evidence; 25% were found not to be based on actual facts; 23% of the time the officers were exonerated of any liability; 8% of the complaints were found to have sufficient evidence to justify disciplining the officer; and 9% of the complaints had other outcomes.[30]

Some departments actively engage in practices to deter the public from filing complaints. A DOJ investigation of the city of Ferguson argues that the city's practice of making it difficult for the community to file any complaints worsens the trust the community has in the police.[31] The report also found that the department was making it harder for employees to take complaints from the public.[32] For example, a lieutenant criticized a sergeant for taking a complaint from a person who was not the victim, which is against the department's policy, and a captain did the same to another city employee for taking complaints from a citizen.[33] In Newark, New Jersey, the DOJ found that only 5 percent of complaints were sustained over a period of three years and that the department engaged in discriminatory practices when reviewing complaints.[34] When citizens would complain, the investigating officers would interview the person regarding their own criminal history and use that information to mark the person as untruthful.[35] In contrast, the

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[26] Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 688–89 (1996).

[27] *See Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020) [hereinafter Power to Sue Police Officers], https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/ [https://perma.cc/Y58B-SLKL].

[28] *Symposium, Exploring Police Accountability in America: IN POLICE WE TRUST*, 62 VILL. L. REV. 953, 972 (2017).

[29] Mark J. Hickman, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., *Citizen Complaints About Police Use of Force*, at 1 (2006), https://www.bjs.gov/content/pub/pdf/ccpuf.pdf [https://perma.cc/TD3C-HQH6].

[30] *Id.*

[31] C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. [https://perma.cc/499Q-9JKL].

[32] *Id.*

[33] *Id.*

[34] U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 39 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [https://perma.cc/5GPS-DV9].

[35] *Id.*

investigators would not put any weight on the officers' past conduct, even if the officers had been named in numerous previous complaints.[36]

Public trust in the police can decrease after a display of police use of force. A study found that after the police beating of a man went viral, the police received about 17% fewer 911 calls the following year because people dealt with their problems themselves.[37] A series of polls taken after the deaths of Michael Brown[38] and Eric Garner[39] showed that about half of the community had little to no confidence in the investigation of Brown's shooting.[40] 42% of the white community trusted that police-involved deaths were properly investigated while only 19% of the Black community did.[41]

The events of 2020 brought the tension to new levels. The killings of George Floyd[42] and Breonna Taylor[43] sparked the outrage that we saw during the year towards police brutality.[44] Those events have given rise to many initiatives, including defunding the police, a movement to reallocate police funding into other programs.[45] It seems that the majority of the public wants to see the reallocation of police funds into other programs but are less willing to support the slogan "defund the police."[46] Ultimately, while the public's view of the police is a broader issue, this Paper will try to further explore a

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[36] *Id.* at 40.

[37] *See* Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 Am. Soc. Rev. 857, 865 (2016), https://assets.documentcloud.org/documents/3114813/Jude-911-Call-Study.pdf [https://perma.cc/3QKP-AFKS]. *But see* Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 Geo. J. On Poverty L. Pol'y 135, 143 (2002) (discussing a different view in middle-class or predominantly white neighborhoods).

[38] *Timeline of Events in Shooting of Michael Brown in Ferguson*, AP News (Aug. 8, 2019), https://apnews.com/9aa32033692547699a3b61da8fd1fc62 [https://perma.cc/NSD2-P4Z8].

[39] *Eric Garner Dies in NYPD Chokehold*, History, (July 17, 2014), https://www.history.com/this-day-in-history/eric-garner-dies-nypd-chokehold [https://perma.cc/B4LB-G8VK].

[40] *See* Stark Divisions in Reactions to Ferguson Police Shooting, Pew Research Ctr., 2 (Aug. 18, 2014), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2014/08/8-18-14-Ferguson-Release.pdf [https://perma.cc/2WFT-8797].

[41] *See* Peter Moore, *Poll Results: Police*, YouGov (Aug. 14, 2014), http://cdn.yougov.com/cumulus_uploads/document/vl0h3on24q/tabs_OPI_police_force_20140814.pdf [https://perma.cc/FS2X-YT87].

[42] *See George Floyd: What Happened in the Final Moments of His Life*, BBC News (July 16, 2020), https://www.bbc.com/news/world-us-canada-52861726 [https://perma.cc/7S5V-2N9W].

[43] *See* Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. Times (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/YU99-F9JP].

[44] *See* Serena Bettis & Laura Studley, *Black Lives Matter: A 2020 protest timeline*, The Rocky Mountain Collegian, (June 10, 2020), https://collegian.com/2020/06/category-news-black-lives-matter-a-2020-protest-timeline/ [https://perma.cc/UY4U-WTCG].

[45] *See* Rashawn Ray, *What Does "Defund the Police" Mean and Does it Have Merit?*, Brookings Inst. (June 19, 2020), https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/PSZ5-3UBT].

[46] *See* Nathaniel Rakich, *How Americans Feel About 'Defunding The Police'*, FiveThirtyEight (June 19, 2020, 5:58 AM), https://fivethirtyeight.com/features/americans-like-the-ideas-behind-defunding-the-police-more-than-the-slogan-itself/ [https://perma.cc/HW6N-CH5J].

narrow aspect of it — police interaction with PWSPC and victims of domestic violence.[47]

B. Police perspectives on the issue

Police officers have different perspectives than the public on the ongoing tension. Officers call exposure to battered or dead children, line of duty killings, uses of force, and physical attacks on their person the most stressful parts of their job.[48] When questioned about police and the public's current trust with them, one officer pointed out that police do not tend to admit their fault and instead "tend to be protective of [their] industry."[49]

The use of force is one of the most controversial topics. A study by the Department of Justice surveyed 925 random officers from 121 different police departments.[50] The study found that 75.5% of officers do not believe it is acceptable to use more force than is legally allowed to control someone, even if that person has assaulted an officer.[51] Further, 62.4% of those officers answered that their fellow officers seldom used more force than necessary when making an arrest, and 53.5% of them seldom used more force than necessary when responding to verbal abuse.[52] Regarding whistleblowing, 67.4% of officers said that they would be given the cold shoulder if they were to report a fellow officer's misconduct, and 52.4% of them believe that it is usual for officers to turn a blind eye on each other's improper conduct.[53]

There is a disconnect between officer and public perspective as to the police's job and the risks it entails. When surveyed, 86% of officers think that the public simply does not understand the different risks and challenges that officers must face.[54] By contrast, the same study found that 83% of adults think that they do understand the challenges of being a police officer.[55] The researchers found this single issue to be where most of the dis-

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[47] *See* discussion *infra* section I.C.

[48] *See* John M. Violanti, Deska Fekedulegan, Tara A. Hartley, Luenda E. Charles, Michael E. Andrew, Claudia C. Ma & Cecil M. Burchfiel, *Highly Rated and Most Frequent Stressors Among Police Officers: Gender Differences*, 41 Am. J. Crim. Just., 645, 655–56 (2016).

[49] *See* Boer Deng & Jessica Lussenhop, *George Floyd death: What US Police Officers Think of Protests*, BBC News (June 26, 2020), https://www.bbc.com/news/world-us-canada-53159496 [https://perma.cc/HNG4-YDGB].

[50] David Weisburd, Rosann Greenspan, Edwin E. Hamilton, Hubert Williams & Kellie A. Bryant, Nat'l Inst. of Justice, Police Attitudes Toward Abuse of Authority: Findings from a National Study 1 (2000).

[51] *Id.* at 2.

[52] *Id.* at 3.

[53] *Id.* at 5.

[54] *See* Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, Behind the Badge: Amid Protests and Calls for Reform, How Police View Their Jobs, Key Issues and Recent Fatal Encounters Between Blacks and Police, Pew Research Ctr. 9 (Jan. 11, 2017), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2017/01/Police-Report_FINAL_web.pdf [https://perma.cc/3U9A-Q6YG]. This study does a deep dive on several key questions regarding policing and the public. This specific study focused on surveying 8,000 police officers, all of which were part of police departments of 100 officers or more.

[55] *Id.*

parity is placed among both groups.[56] However, while officers felt that the public did not understand the risk involved with being a police officer, 61% of them believed that the public still held respect for the police.[57]

C. Tension Between the Police, Domestic Violence Victims, and PWSPC

The tension described above is also present in scenarios where the police respond to domestic violence calls and calls involving PWSPC. Subsection 1 of this section discusses some of the aspects of domestic violence calls and attempts to show how some of these factors amounts to tension. Subsection 2 gives a brief description of SPC and shows how police encounters with PWSPC disproportionally end in fatalities.

1. Domestic violence

Domestic violence is a big problem in our society. Approximately, every minute about 20 people experience physical violence at the hands of an intimate partner, which totals around 10 million people a year.[58] The National Coalition Against Domestic Violence reports that there are more than 20,000 calls to domestic violence hotlines on a single day.[59] However, when looking for protection under the law, victims may not be so willing to seek help.

Domestic violence is rarely reported to the police. In fact, only 27% percent of women and 13.5% of men report domestic violence episodes to the police.[60] Victims tend not to call the police as doing so angers the abuser, possibly leading to even more abuse.[61] Further, a victim's belief of whether the police will be able to help is one of the most important factors when a victim is considering seeking help, but victims assume that police assistance, if any, would be inadequate.[62] Domestic violence victims express how officers do not usually inform them of the available options that victims have and often lean towards the side of not interfering.[63]

While victims often fail to report, domestic violence remains a key player in police activity. Some officers see domestic violence calls as frustrat-

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[56] *Id.* at 20.

[57] *Id.* at 48.

[58] *See National Statistics*, NCADV, https://ncadv.org/statistics [https://perma.cc/FUK6-ZN63]. This and all figures used in this section are in reference to studies done in the United States.

[59] *Id.*

[60] *See* ANDREW R. KLEIN, PRACTICAL IMPLEMENTATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES, NAT'L INST. OF JUST. 5 (2009).

[61] *See* James Walter, *Police in the Middle: A Study of Small City Police Intervention in Domestic Disputes*, 9 J. POLICE SCI. & ADMIN. 243, 259 (1981).

[62] *Id.*

[63] TERRY DAVIDSON, CONJUGAL CRIME-UNDERSTANDING AND CHANGING THE WIFE BEATING PATTERN 7–8 (1978).

ing, dangerous, and, in some cases, not real police work.[64] These calls are considered dangerous because they tend to result in an officer being assaulted at a higher rate than any other police activity.[65] Domestic violence takes as much of the police's time as any other activity does.[66] However, police officers spend less time training for domestic violence scenarios compared to others.[67] While the typical police officer spends 840 hours training in the police academy, they only spend 13 hours learning how to deal with domestic violence scenarios.[68]

If a victim does decide to seek help, it may not lead to a solution. When help arrives, victims may be reluctant to allow police to intervene for reasons including not wanting their children to see their parent being taken away and concerns about job security and household income.[69] When fathers are taken away and incarcerated, a family's income declines by an average of 22%, and 65% of some families cannot meet household needs.[70] Even if the victim does allow the police to intervene, victims often refuse to press charges or to testify, and officers tend not to make an arrests in these situations because the victim, who would be the witness, may not testify.[71]

Some studies have found that about 24% to 40% of police officer engage in domestic violence.[72] Studies have also found that some officers would be fired for a positive drug test but would not receive the same result if they were to engage in domestic violence.[73] Similarly, roughly 20% of officers who have been found to engage in some type of domestic violence have also been named in a lawsuit under Section 1983 at some point in their career.[74]

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[64] Michael G. Breci & Ronald L. Simons, *An Examination of Organizational and Individual Factors that Influence Police Response to Domestic Disturbances*, 15 J. Police Scl. & Admin. 93, 94 (1987).

[65] FBI, Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted 41 (1986).

[66] *See* Walter, *supra* note 63.

[67] *See* Brian A. Reaves, U.S. Dep't of Just., Bureau of Just. Stat., State and Local Law Enforcement Training Academies, 2013 1 (2016) [hereinafter Academy Study, 2013].

[68] *Id.*

[69] Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 Yale L. J. 788, 807 (1986).

[70] *See* Annie E. Casey Foundation A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities 3 (2016).

[71] Eve. S. Buzawa, Carl G. Buzawa & Evan D. Stark, Responding to Domestic Violence: The Integration of Criminal Justice and Human Services 412 (2012); *see also* Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence law reform*, J. Gender Race & Just. 15, 583–84 (2012) (discussing government actors ignoring domestic violence victim's pleadings to stay out of court).

[72] Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, Atlantic (Sep. 19, 2014), https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/ [https://perma.cc/DE7T-K4Y4].

[73] Sarah Cohen, Rebecca R. Ruiz & Sarah Childress, *Departments Are Slow to Police Their Own Abusers*, N.Y. Times, (Nov. 23, 2013), https://www.nytimes.com/projects/2013/police-domestic-abuse/index.html [https://perma.cc/NSD5-MHCA].

[74] *See* Philip M. Stinson, Sr. & John Liederbach, *Fox in the Henhouse: A Study of Police Officers Arrested for Crimes Associated with Domestic and/or Family Violence*, 24 Crim. Just. Pol'y Rev. 601, 607 (2013).

Lastly, officers give a great amount of deference to fellow officers under investigation for acts of domestic violence compared to the general public.[75]

2. Mental health calls

There is tension between the police and PWSPC. In 2019, approximately 5.2% of adults living in the United States suffered from a "serious mental illness" ("SMI").[76] An SMI is defined as a mental, behavioral, or emotional disorder that causes serious functional impairment leading to limits or interfere on one or more major life activities.[77] 65.5% of individuals with SMI received mental health services, which leaves close to five million receiving no treatment.[78] When it comes to interactions between police and PWSPC, scholars have described the relationship as a burden, claiming that police are unfairly criticized by mental health professionals.[79] Some have labeled police as "street corner psychiatrist[s]" or "amateur social workers."[80]

Police receive high amounts of mental health related calls. Data from the New York City Police Department shows that their officers respond to an estimated 400 calls related to mental health per day, or 12,000 per month.[81] These numbers increased for ten years in a row before dropping for the first time in 2019 by 8,000 fewer calls during that year.[82] An Arizona police department reported more calls regarding SMI than about crimes like burglaries or auto theft.[83]

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[75] Friedersdorf, *supra* note 72.

[76] Nat'l Inst. of Mental Health, *Mental Illness*, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml#:~:text=mental%20illnesses%20are%20common%20in,mild%20to%20moderate%20to%20severe [https://perma.cc/TR4A-RYHY]. The national institute of mental health also recognizes "Any Mental Illness" which cover mental, behavioral, or emotional disorder ranging from various degrees, and which affect 20% of all adults in the United States. Id. This paper will not differentiate between "serious" or "any" "mental illnesses" when discussing scenarios involving PWSPC.

[77] *Id.*

[78] Beth Han, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health*, SAMHSA, 5 (Sept. 2020), https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf [https://perma.cc/XH87-VSXT].

[79] Pauletter M. Gillig, Marian Dumaine, Jacqueline Widish Stammer, James R. Hillard & Paula Grubb, *What Do Police Officers Really Want from the Mental Health System?* 41 Hosp. & Cmty Psychiatry, 663–65 (2006).

[80] Linda A. Teplin & Nancy S. Pruett, *Police as Street Corner Psychiatrists: Managing the Mentally Ill*, 15 Int'l J.L. & Psych. 139 (1992).

[81] Dep't of Investigation's Off. of the Inspector General for the New York City Police Dep't, DOI's Office Of The Inspector General For The New York City Police Department Releases a Report and Analyses on The Nypd's Crisis Intervention Team Initiative 2 (Jan. 19, 2017), https://www1.nyc.gov/assets/doi/reports/pdf/2017/2017-01-19-OIGNYPDCIT-Report.pdf [https://perma.cc/7KF4-BU87].

[82] Dean Meminger, *Exclusive: There Were 8,000 Fewer 911 Calls Regarding People in a Mental Health Crisis Last Year*, Spectrum News (Oct. 28, 2020), https://www.ny1.com/nyc/all-boroughs/public-safety/2020/10/29/nypd—-health-clinician-talk-about-working-with-mentally-ill [https://perma.cc/A3KC-54BR].

[83] Darren DaRonco & Carli Brosseau, *Many in Mental Crisis Call Tucson Police Health Agency to Help TPD Prioritize Queries Starting this Summer*, Ariz. Daily Star (Apr. 14,

Training seems disproportionately low compared to the high amount of time the police spend responding to mental health related calls. In 2004, a survey of police departments in Pennsylvania showed that about half of the officers did not feel like they were qualified to handle PWSPC.[84] A DOJ study of 664 state and local police departments showed that 90% of them had SMI as a topic in their academy curriculum.[85] The same study showed that those academies devoted 10 hours of total training involving SPC.[86] By contrast, the recruits received 71 hours total on firearm skills.[87]

Police encounters with PWSPC often lead to fatalities. In the past year, 1,422 PWSPC have died via gunshot wound by the hands of the police.[88] That number constitutes 22% of all people who have been shot and killed by the police.[89] Similarly, an accounting of the people who were shot by the police in the state of Maine between 2000 and 2011 found that nearly half of all victims had an SMI.[90] A study of all people killed by police between 2005 and 2013 showed that 60% of them had a SPC that contributed to the incident.[91] The risk of being killed by police during an incident is 16 times higher for PWSPC than the average member of the public.[92]

II. Qualified immunity reinforces the tension between the police and the public

Qualified immunity reinforces the tension between the police and the public by leaving people wronged by the police without a remedy and leaving police officers unpunished after their wrongdoing. In addition, qualified immunity leaves PWSPC and domestic violence victims that have been harmed by the police empty handed.

2013), https://tucson.com/news/local/crime/many-in-mental-crisis-call-tucson-police/article_a03800d9-6608-5907-9fc4-74ad7f9c441a.html [https://perma.cc/8P5D-AWQ5].

[84] Jim Ruiz & Chad Miller, *An Exploratory Study of Pennsylvania Police Officers' Perceptions of Dangerousness and Their Ability to Manage Persons with Mental Illness*, 7 Police Q. 359, 368 (2004).

[85] Reaves, *supra* note 67, at 7.

[86] *Id.*

[87] *Id.* at 5.

[88] Julie Tate, Jennifer Jenkins & Steven Rich, *Fatal Force*, Wash. Post (updated April 27, 2021) https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/HM29-9GZC].

[89] *Id.*

[90] Portland Press Herald, *Maine Police Deadly Force Series: Day 1*, https://www.pressherald.com/interactive/maine_police_deadly_force_series_day_1/ [https://perma.cc/3JFN-MP7D].

[91] Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED (Sep. 30, 2014), https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill [https://perma.cc/3S47-G57S].

[92] *See* Doris A. Fuller, H. Richard Lamb, Michael Biasotti & John Snook, Treatment Advocacy Ctr., Overlooked in the Undercounted: The Role Of Mental Illness in Fatal Law Enforcement Encounters 12 (Dec. 2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf [https://perma.cc/H7QU-PHEV].

This Part focuses on the relevant case law involving qualified immunity as well as its application to relevant cases today. Section A outlines the qualified immunity framework and the substantive claims which are brought by domestic violence victims and PWSPC who are looking for remedy for acts committed by the police. Section B applies the caselaw from Part A to two different scenarios from that received public attention recently to show how the law dictates the possible outcomes of the parties involved.

A. Current case law

Current case law provides that qualified immunity is a defense to substantive claims alleging civil rights violations. Qualified immunity is often invoked in response to claims brought under 42 U.S.C. Section 1983 ("Section 1983"), a statutory source of law that originated under Reconstruction.[93] Enacted as part of the Civil Rights Act of 1871, otherwise known as the Ku Klux Klan Act, Section 1983 was enacted to enforce the Fourteenth Amendment and firm up protections for formerly enslaved people who had been living under the strictures of the Black Codes.[94] Section 1983 provides a remedy for persons who have suffered a deprivation of a right, privilege or immunity protected under the law by someone acting under the color of the law.[95] Acting under the color of the law means that the defendant in question was clothed with the power of law and acting in service of their position, i.e., a police officer making an arrest.[96]

Since qualified immunity is an affirmative defense,[97] the analysis of the relevant case law is split in two parts. The discussion that follows unfolds in three parts. Subsection 1 analyzes the current qualified immunity doctrine. It begins by discussing potential targets of suits brought under Section 1983; the two-part test that claimants must meet to successfully defeat a qualified immunity defense: (1) that the facts amount to a violation of a protected right and (2) that the right was clearly established; and the current circuit split as to what constitutes clearly established law. Subsection 2 focuses on Fourth Amendment doctrine in the context of qualified immunity as it deals with cases of domestic violence and PWSPC. The Fourth Amendment is implicated when PWSPC sue for excessive use of force and in scenarios involving police search when dealing with domestic violence.[98] Lastly, Subsection 3 focuses on the state created danger exception to the Due Process

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[93] William Baude, *Is Qualified Immunity Unlawful?,* 106 CALIF. L. REV. 45, 49 (2008).
[94] *See* Quern v. Jordan, 440 U.S. 332, 342 (1979).
[95] *See* 42 U.S.C. § 1983. In Smith v. Wade, 461 U.S. 30, 51 (1983), the Supreme Court held that punitive damages could be awarded against a defendant in a § 1983 case if the plaintiff proved that the defendant acted with "reckless or callous disregard for the plaintiff's rights" or intentionally violated the law.
[96] *See* West v. Atkins, 487 U.S. 42, 49 (1988).
[97] Gomez v. Toledo, 446 U.S. 635, 639–41 (1980).
[98] *See infra* section II.A.2.

Clause, which generally does not protect citizens from other private citizens, as it applies to domestic violence victims.

1. Qualified immunity

The Supreme Court created qualified immunity with the goal of protecting government officials against various harms associated with the litigation of insubstantial lawsuits.[99] The Court sought to empower officers to do their job without the threat of litigation, so long as the officers acted in good faith.[100] Further doctrinal developments to the defense enabled the resolution of cases where defendants successfully invoked qualified immunity prior to discovery.[101]

The statute itself does not provide much clarity as it only refers to "[e]very person."[102] Thus, that aspect of the statute has required some definition. First, states themselves cannot be sued under Section 1983 because states are not considered natural "persons."[103] Further, state officials acting in their official capacities are not "persons."[104] This is because suing a state official in their official capacity is essentially suing that state official's office, which is then the same as suing the state itself.[105] By contrast, as the Supreme Court explained in *Monell*, local and municipal governmental entities and the officers they employ are all considered to be a "person" for purposes of Section 1983.[106] However, in order for the local government to be held liable, the plaintiff must show that the action in question was a result of the local government's policy or custom.[107] Lastly, if the defendant is an officer, the officer must be then acting in a discretionary way.[108] While officer im-

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[99] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[100] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 15 (2017) (describing decisions where the court focuses primarily on qualified immunity's goal to protect officials from the burdens associated with discovery and trial).

[101] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[102] *See* 42 U.S.C. § 1983 ("Every person who, under color of [law] . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .").

[103] Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

[104] *Id.*

[105] *Id.* (citing Brandon v. Holt, 469 U.S. 464, 471 (1985); Kentucky v. Graham, 473 U.S. 159, 165–66 (1985)).

[106] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

[107] *Id.* at 694. *But see* Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) (holding that a city may be held liable for decisions made by an official with policymaking authority for the local government itself); *see also* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. §1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2187–-91 (2005). Further, when the municipality is found to be liable, it generally has no qualified immunity defense like officers do. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980).

[108] Holloman v. Harland, 370 F.3d 1252, 1263–67 (11th Cir. 2004).

munity is qualified and not absolute, it sets out to protect "all but the plainly incompetent or those who knowingly violate the law."[109]

When a defendant raises a qualified immunity defense, courts engage in a two-part test to determine whether the defendant will be subject to suit. First, the court asks whether the alleged facts give rise to a violation of a constitutional right.[110] Second, the court asks whether the right implicated was "clearly established" at the time of the alleged conduct.[111] When applying this test, judges have the opportunity to decide which of these two prongs of the test should be addressed first.[112] While the test used to be a subjective one[113], as it stands, the test looks to see whether a reasonable officer would know that their individual conduct would violate an established right.[114]

What constitutes a clearly established right is not so clear. First, courts have grappled as to how precise the clearly established precedent must be.[115] "The contours of the right" in question have to be clear enough that the reasonable officer would understand their conduct violates the Constitution.[116] For example, in a Fourth Amendment suit, the relevant question is not whether the Fourth Amendment was clearly established, but whether a reasonable officer would have believed the search in question was lawful under the Fourth Amendment.[117] Whether the specific officer knew that the law in question was clearly established is irrelevant because courts presume that if the precedent exists, a reasonable officer should know it does.[118] Lastly, the Supreme Court has made it clear that clearly established does not require a case "directly on point" with the facts of the case, but instead that the "existing precedent must have placed the . . . question [of clearness]

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[109] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[110] Saucier v. Katz, 533 U.S. 194, 201 (2001).

[111] *Id.*

[112] Pearson v. Callahan, 555 U.S. 223, 236 (2009). The Pearson decision is also read to mean that the court could decide the case without the finding that the law is clearly established. After Pearson, courts have reduced the number of times in which they address the constitutional question which leads to courts finding fewer constitutional violations. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37 (2015).

[113] *See* Wood v. Strickland, 420 U.S. 308, 322 (1975). This test was abandoned in part because its subjective analysis created too many questions of fact and made it difficult for the court to decide these cases at the summary judgment stage without allowing for a trial. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982). The principle of not going on to trial is seen further as a denial of summary judgment based on qualified immunity gives rise to an interlocutory appeal instead of an automatic trial. *See* Mitchell v. Forsyth, 472 U.S. 511, 527–30 (1985).

[114] *Harlow*, 457 U.S. at 818 (1982).

[115] *See generally* Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 510–12 (2008). There are other aspects of the law that rely on officers acting on counsel's advice but for our purposes, it will not be part of the analysis. *See generally* Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice,* 110 NW. U.L. REV. 525 (2016).

[116] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[117] *Id.* at 640–41.

[118] *Harlow*, 457 U.S. at 818–19.

beyond debate,"[119] or give the officer fair notice.[120] In some occasions, courts would find that the actions were a violation of a right but the right was not clearly stablished, thus the court would grant qualified immunity but make it clearly established for the next defendant.[121]

Second, the courts must decide where that possible clearly established law comes from. It goes without question that decisions by the Supreme Court of the United States constitute clearly established laws.[122] Similarly, federal courts of appeal look at precedent from their own circuit when assessing whether a right was clearly established.[123] Absent controlling authority the Supreme Court has looked at whether there is "consensus of [persuasive] cases," and has refused to lean towards one side when there is a disagreement among the persuasive authority.[124] Notably, district court opinions are not controlling precedent for the context of qualified immunity.[125]

2. The Fourth Amendment

Claims dealing with police encounters relating to PWSPC or domestic violence implicate the Fourth Amendment. The Fourth Amendment is understood to have two individual prongs: (1) protection from unreasonable searches and seizures, and (2) the requirement that there is probable cause when issuing a warrant.[126] The Fourth Amendment applies only to governmental action and is generally inapplicable to private actors even if they engage in unreasonable searches and seizures.[127] A "seizure" occurs when an officer uses physical force or a show of authority by police.[128] When force results in the "termination of freedom of movement through means intentionally applied," a seizure has occurred.[129]

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[119] Ashcroft v. al-Kidd, 563 S. Ct. 731, 740 (2011). The Supreme Court has, on occasions, reversed lower courts because the courts misunderstood the clearly established analysis and how it applies to specific cases. *See* White v. Pauly, 137 S. Ct. 548, 552 (2017).

[120] Hope v. Pelzer, 536 U.S. 730, 740 (2002).

[121] Martinez v. City of Clovis, 943 F.3d 1260, 1276–77 (9th Cir. 2019).

[122] *See* Wood v. Moss, 134 S. Ct. 2056, 2061 (2014); Ryburn v. Huff, 132 S. Ct. 987, 990 (2012).

[123] Vincent v. Yelich, 718 F.3d 157, 167–68 (2d Cir. 2013) (citing Piesco v. Koch, 12 F.3d 332, 345 (2d Cir. 1993)).

[124] Wilson v. Layne, 526 U.S. 603, 617 (1999).

[125] Ashcroft v. al- Kidd, 131 S. Ct. 2074, 2084 (2011); *see also* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.").

[126] U.S. CONST. amend. IV.

[127] United States v. Jacobsen, 466 U.S. 109, 113 (1984). Searches by private parties could be attributed to an officer if an officer instigated such a search. Cassidy v. Chertoff, 471 F.3d 67, 74 (2d Cir. 2006). The general rule is that there must be "a sufficiently close nexus" between the action and the government so that the actions of the private party are treated as the government's actions. United States v. Stein, 541 F.3d 130, 146 (2d Cir. 2008).

[128] California v. Hodari D., 499 U.S. 621, 626–27 (1991).

[129] *See* Brower v. Cnty. of Inyo, 489 U.S. 598, 597 (1989); *see also* Torres v. Madrid, 141 S. Ct. 989, 1003 (2021) ("We hold that the application of physical force to the body of a person with intent to restrain is a seizure . . .").

Fourth Amendment doctrine does not necessarily ban all use of force, and instead carries with it a right in the hands of the officer to threaten or apply some degree of physical force.[130] In the words of the Court in *Johnson v. Glick,* "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" would be a violation of the Fourth Amendment.[131] Instead, all claims of excessive force, regardless of whether it is deadly or not, in the context of a seizure, arrest or investigative stop are analyzed under the Fourth Amendment reasonableness standard.[132] The court balances the "nature and quality of the intrusion" with the governmental interest at stake in order to determine if the use of force was reasonable under the circumstances.[133] This analysis requires a careful review of the "facts and circumstances" of each case taking into account the government's interest in applying that force.[134] Under *Graham* the plaintiff must show that the force used was excessive while considering: (1) the severity of the relevant crime, (2) whether the alleged suspect posed a threat to officers or others, and (3) whether the suspect resists arrest or takes flight[135] The Sixth and Ninth Circuits take into account a person's SPC when evaluating use of force.[136]

When it comes to warrants, Fourth Amendment jurisprudence has created certain exceptions to the requirement. The first exception is the emergency aid doctrine, which applies to situations requiring the police to respond immediately like rendering aid, protecting the public from harm, and the protecting of property.[137] The Supreme Court has held that "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[138] It then clarified that even in emergency circumstances, an officer must have a reasonable belief that there is an imminent threat of violence.[139]

Police officers are allowed to enter a home if they see an altercation, injury, or need to prevent both. In *Stuart*, four police officers arrived at a house, heard an altercation inside, and were able to see four adults attempt-

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[130] *Id.* at 396; *See also* Deorle v. Rutherford, 272 F.3d 1272, 1280 (9th Cir. 2001) ("To put it in terms of the test we apply: the degree of force used by [the officer] is permissible only when a strong governmental interest compels the employment of such force.").

[131] Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

[132] *Graham*, 490 U.S. at 395.

[133] *Id.* at 396.

[134] *Id.*

[135] *Id.*

[136] Drummond v. City of Anaheim, 343 F.3d 1052, 1058 (9th Cir. 2003); Champion v. Outlook Nashville, Inc., 380 F.3d 893, 904 (6th Cir. 2004). The test looks at the totality of the circumstances, but these two circuits have expressively referenced SPC when dealing with PWSPC.

[137] Missouri v. McNeely, 569 U.S. 141, 147–49 (2013).

[138] Brigham City v. Stuart, 547 U.S. 398, 403 (2006). Prior to Stuart the focus of the emergency doctrine used to rely heavier on the officer's motivation. See People v. Mitchell, 347 N.E.2d 607, 609 (N.Y. 1976) (requiring that the search must not be motivated by an intent to arrest and seize evidence).

[139] Ryburn v. Huff, 566 U.S. 469, 474 (2012).

ing to restrain a juvenile.[140] The juvenile then broke free and struck one of the adults in the face, who proceeded to spit blood in a sink.[141] When the altercation continued, the officers proceeded to open the screen door and announce their prescience, which produced no results.[142] The officers then stepped into the kitchen, announced their presence, and the altercation finally ceased.[143] The lower court found that the injury caused by the juvenile did not trigger the emergency aid doctrine because it did not give rise to a reasonable belief that an "unconscious, semi-conscious, or missing person" was in the home and injured or dead.[144] The Supreme Court disagreed, finding that the officers' entry was reasonable given the commotion, that their attempts to knock would have been futile, and the clear altercation happening inside.[145]

In *Sheehan*, a woman who suffered from a schizoaffective disorder lived in a group home for PWSPC.[146] After a social worker received no answer from Sheehan during a wellness check,[147] the social worker used a key to enter the room. He found Sheehan, who was not responding to questions but sprang up and yelled, "Get out of here! You don't have a warrant! I have knife, and I'll kill you if I have to."[148] The social worker recognized Sheehan required "some sort of intervention" and called the police so they could assist in transporting her to another facility.[149]

When the officers arrived, they also knocked on Sheehan's door, received no answer, and entered the room with a key.[150] As the officers entered her room, Sheehan grabbed a kitchen knife and started to approach the officers while yelling, "I am going to kill you. I don't need help. Get out." so the officers retreated, and Sheehan closed the door.[151] At this point the officers were worried that she may gather other knives or even flee, so they claim they had to either wait for backup or enter the room to subdue Sheehan.[152] The officers decided to re-enter by having the larger officer push

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[140] *Stuart*, 547 U.S. at 400–01.
[141] *Id.* at 401.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 401–02 (quoting Brigham City v. Stuart, 122 P.3d 506, 513–14 (2005)).
[145] *Stuart*, 547 U.S. at 406. The court also found that there was nothing in the Fourth Amendment that had a requirement that the person needing the aid had to be unconscious and noted that the role of the officer includes violence prevention not just providing aid. *Id.*
[146] City & Cty. of S.F. v. Sheehan, 575 U.S. 600, 602–03 (2015). While she lived in a group home, members of the group home had a private room for themselves. *Id.* This is an important clarification because it shows the expectation of privacy in connection to the Fourth Amendment argument and because it overrides any argument of third-party consent.
[147] *Id.*
[148] *Id.* at 603.
[149] *Id.* California law allows for the temporary detention individuals who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled, thus, the social worker completed an application to have Sheehan detained in order to be evaluated and possibly treated. *Id.*; *see also* CAL. WEL. & INST. CODE § 5150.
[150] *Sheehan,* 575 U.S. at 603.
[151] *Id.* at 604.
[152] *Id.* at 604–05.

the door open while the other would pepper spray Sheehan.[153] When the officers reentered the room, Sheehan was again agitated, so the officers pepper sprayed her but she did not drop the knife, which caused one of the officers to shoot her twice and then again, multiple shots until she collapsed.[154]

The Court found that the first entry into Sheehan's room was constitutional because the officers responded to an emergency.[155] Similarly, the Court found that the second entry was part of a continuous emergency.[156] The court found the use of force reasonable and tried to resolve the question of whether the officer's failure to accommodate Sheehan's illness violated clearly established law for purposes of qualified immunity.[157] The court answered no and held that there was no clearly established precedent showing there was not an objective need for immediate entry, and that no matter how carefully the officers read the relevant cases, they would not have known that opening a person's door to prevent from gathering more knives or escaping would violate a constitutional right.[158]

Another exception to the warrant requirement is the exigent circumstances doctrine.[159] The doctrine usually entails the immediate action to protect the destruction of evidence or the protection of the public or other responding personnel.[160] Under this exception a warrantless search is allowed if "there is compelling need for official action and no time to secure a warrant."[161] In the aspect of domestic violence, several different scenarios have been found to be sufficient to satisfy the exigent circumstances doctrine. First, If the police arrive at the scene and find the property to be disheveled after receiving information that witnesses believe a woman may be getting assaulted.[162] If the police arrive at the house and see a clear sign of injury like

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[153] *Id.* The officers conceded that they did not take Sheehan's SPC s into consideration when deciding how to approach the situation. Sheehan v. City & Cty. of S.F., 743 F.3d 1211, 1219 (9th Cir. 2014). One of the officers said that Sheehan's condition was a "secondary issue" since she was a violent woman. *Sheehan*, 575 U.S. at 605.

[154] *Sheehan*, 575 U.S. at 605–06.

[155] *Id.* at 610–12 (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

[156] *Id.* (following Michigan v. Tyler, 436 U.S. 499, 511 (1978)).

[157] *Sheehan*, 575 U.S. at 613.

[158] *Id.* The court also ruled that an expert who testified that the officers ignored their training in their decision to reenter the room was irrelevant to a qualified immunity analysis, and rather, even if against their training, a reasonable officer could believe their actions were justified. *Id.* at 616.

[159] The exigent circumstance exception undoubtedly overlaps in many cases with the emergency aid doctrine, and in the emergency aid doctrine is seen as a type of exigency. *See* Missouri v. McNeely, 569 U.S. 141 (2013). However, the exigent circumstances doctrine involves other scenarios that are not just rendering aid. *See e.g.,* Michigan v. Fisher, 558 U.S. 45, 49 (2009).

[160] *See* Thacker v. City of Columbus, 328 F.3d 244, 254 (6th Cir. 2003) (justifying a warrantless entry for the protection of police and paramedics); *see also* Fletcher v. Town of Clinton, 196 F.3d 41, 49 (1st Cir. 1999) (referencing to both the destruction of evidence and safety as exigent circumstances).

[161] *McNeely*, 569 U.S. at 149 (quoting Michigan v. Tyler, 436 U. S. 499, 509 (1978)).

[162] *See* United States v. Brooks, 367 F.3d 1128, 1135 (9th Cir. 2004) (responding to a call regarding a dispute in a disheveled hotel room).

blood, it is likely to be considered an exigent circumstance.[163] Also, loud screams in the middle of the night can create an exigent circumstance.[164] Courts also take into consideration whether the officer is aware of prior domestic violence incidents in the residence.[165] Lastly, the Seventh[166] and Eighth[167] circuits would find exigent circumstances based on sufficient facts given in a 911 call.

When dealing with domestic violence, the issue of consent can be a problematic situation. Generally, entry into a person's house without a warrant is not reasonable,[168] unless there is an exception or the party consents to the search.[169] Consent can also arise in situations where a third party has "common authority" to the premises.[170] In *Georgia v. Randolph,* the court tried to reconcile both *Matlock* and *Rodriguez*, and held that when a potential defendant who is standing at the door objects to a search of the premises, a third party's consent cannot arise to a reasonable search.[171] However, if the potential objecting party is not present, or might be near the premises but is not invited to take a stance on the search, the third party's consent is valid.[172]

In situations where the police justify their entry with a reasonable fear that a victim might be hurt or getting her belongings, an entry might be justified even if the alleged aggressor is located.[173] In *Black*, Black's ex-girlfriend, Walker, called 911 and reported that Black had beaten her, that he had a gun.[174] Walker then told the 911 dispatcher that she intended to go back to the home with her mother to retrieve several items and that both of them would wait for the officers in the front of the house.[175] When the police arrived at the house, they saw no sign of Walker, but found Black — who knew why they were there — sitting in the backyard.[176] The court

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[163] *Thacker*, 328 F.3d at 256.

[164] *See* United States v. Barone, 330 F.2d 543, 544 (2d Cir. 1964) (finding that officers had a duty to investigate given the loud screams in the middle of the night).

[165] Tierney v. Davidson, 133 F.3d 189, 192–93, 197–99 (2d Cir. 1998).

[166] United States v. Richardson, 208 F.3d 626, 630 (7th Cir. 2000).

[167] United States v. Cunningham, 133 F.3d 1070, 1072–73 (8th Cir. 1998).

[168] Payton v. New York, 445 U.S. 573, 586 (1980).

[169] Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (objecting defendant was asleep when a third party consented to a search). Based on my research and understanding of these cases, the term "third party" does not necessarily refer to a visitor or a friend but relatives too.

[170] United States v. Matlock, 415 U.S. 164, 171 (1974) (finding consent when the defendant did not have an opportunity to object to a consenting third party).

[171] Georgia v. Randolph, 547 U.S. 103, 121 (2006).

[172] *Id.* The *Randolph* Court also ruled out the argument that the police had to take affirmative steps to find a possible objecting defendant when they might not be present. *Id.* Further, the Court limited its holding to cases in which there are evidentiary searches and when the police are acting to protect the domestic violence victim. *Id.* at 118-19. Yet, the Court mentioned situations like an officer having "good reason" to believe a threat exist and the need to possibly protect a third party while they gather their belongings as possible exigent circumstances. *Id.*

[173] *See* United States v. Black, 482 F.3d 1035, 1039 (9th Cir. 2007).

[174] *Id.* at 1039.

[175] *Id.*

[176] *Id.*

found that the officers' belief that Walker could have been pulled back into the house and was hurt inside created an exigent circumstance.[177]

There are also the cases in which the police act as caretakers.[178] The Supreme Court first recognized this exception in *Cady v. Dombrowski*.[179] Community caretaking includes acts like providing aid, preserving property, and creating an overall feeling of safeness in the area.[180] The court's holding separates searches while engaging in community caretaking from other searches and holds that the former does not require a warrant and is subject to the Fourth Amendment's reasonableness standard.[181] In the context of searching automobiles, the court described these searches as being "totally divorced from the detection, investigation, or acquisition of evidence" in relation to criminal law.[182] However, the Supreme Court has not expanded its application of the community caretaking exception outside of automobile searches.[183]

3. State created danger

Victims of domestic violence bring constitutional law claims under the Fourteenth Amendment's Due Process Clause. The Due Process Clause of the Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[184] The Supreme Court has determined that the state's failure to protect an individual against another private individual's violence does not constitute a violation of their due process rights.[185] However, language in *DeShaney* has been read as the Court suggesting that the state creates an affirmative duty to protect

[177] *Id.*

[178] Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 272 (1998).

[179] Cady v. Dombrowski, 413 U.S. 433, 447–48 (1973).

[180] Livingston, *supra* note 180.

[181] *Cady*, 414 U.S. at 447–48.

[182] *Id.* at 441.

[183] Vargas v. City of Philadelphia, 783 F.3d 962, 972 (3d Cir. 2015) (applying the exception to situations where a person needs medical attention is seized for non-investigatory purposes or the scene requires protection of the individual or the community).

[184] U.S. CONST. Amend. XIV, § 2.

[185] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). In the context of domestic violence, a state's failure to enforce a restraining order does not trigger protections under procedural or substantive due process. Castle Rock v. Gonzales 545 U.S. 748 (2005) ("[reconciling Castle Rock and DeShaney,] the benefit that a third party may receive form having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."). After *Castle Rock*, domestic violence victims have resorted to filing state tort claims, which are not part of this section. *See e.g.,* Massee v. Thompson, 90 P.3d 394 (Mo. 2004).

when the state creates the danger itself.[186] This is known as the state created danger doctrine, which has been adopted by several circuits.[187]

In order to find that the state has created a danger, the defendant must have affirmatively acted in a manner which either created or enhanced the danger to an individual by a private party.[188] The affirmative conduct of a defendant gives rise to a violation of the Due Process Clause if it, explicitly or implicitly, transmits an "official sanction of private violence."[189] The defendant must have acted in a way in which would "shock the conscience," and in some situations, deliberately indifferent behavior may rise to that level.[190] There is no specific definition for shocking the conscience, so a court must look at the facts of a specific case and determine whether it shocks the conscience.[191] The defendant must affirmatively create the danger; the defendant's acts must be more than mere negligence; and there must be a factual connection between the acts and the harm.[192] Further, the injury to the victim must have been a foreseeable consequence of the defendant's conduct and not just result from a possibility of harm to the general public.[193] Lastly, the court takes into consideration whether through their acts, the defendants violated a state law or deviated from proper police training.[194] The state created danger doctrine along with qualified immunity creates a two-step process in which plaintiffs have to first prove that the officers' actions amounted to state created danger and then prove that the right was clearly established.[195]

Police officers who act in a way that could lead the abuser to believe that the officers are enabling or would fail to intervene in the domestic violence could lead to liability under the state created danger doctrine. In *Okin*,

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[186] *See DeShaney*, 409 U.S. at 201 ("While the State may have been aware of the dangers that [plaintiffs] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). The Constitution is understood to create negative rights, a right that essentially "restrains the government," rather than creating affirmative rights or a "right to government services." *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 576–78 (2015) (explaining the *DeShaney* decision).

[187] *See e.g.,* Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001).

[188] Coyne v. Cronin, 386 F.3d 280, 287 (1st Cir. 2004). The danger must also be created for that specific party instead of creating danger for the public. *See e.g.,* Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998).

[189] Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 429 (2d Cir. 2009).

[190] Rivera v. Rhode Island, 402 F.3d 27, 37–38 (1st Cir. 2005).

[191] *See* County of Sacramento v. Lewis, 523 U.S. 833, 850–51 (1998).

[192] Irish v. Fowler, 979 F.3d 65, 74 (1st Cir. 2020).

[193] Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006).

[194] *See* Irish v. Maine, 849 F.3d 521, 528 (1st Cir. 2017).

[195] *See Fowler*, 979 F.3d at 79 (reversing a grant of summary judgment based on qualified immunity because the officers were on notice that notifying a suspect that they were under investigation for criminal activity and misleading the victim about the level of police protection she had, which constituted state created danger); *see also* Martinez v. City of Clovis, 943 F.3d 1260, 1276–77 (9th Cir. 2019) (holding that the state created danger applies when an officer "reveals a domestic violence complaint, . . . [makes] comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim" as well as praising the victim in a manner which communicates that they may continue the abuse, but granting qualified immunity anyway).

the Second Circuit reversed a grant of summary judgment based on qualified immunity on a state created danger claim.[196] Over a fifteen-month period, Okin made several calls and reports to the police that she was a victim of domestic violence in the hands of Sears.[197] During one of the calls, the officers responded but only spoke with Sears about football and did not address the alleged abuse nor the bruises Okin presented to them.[198] Further, the officers showed a "dismissive and indifferent attitude toward Okin's complaints," which made Okin more vulnerable.[199] The court found that under these facts there was a genuine issue of material fact as to whether the offices' action shocked the conscience.[200] The court went on to deny qualified immunity to the officials after looking at Second Circuit precedent, saying: "police officers are prohibited from affirmatively contributing to the vulnerability of a known victim by engaging in conduct . . . that encourages *intentional* violence against the victim . . . ."[201]

In *Graves*, Williams stabbed and killed Veronica, his pregnant wife, moments after she had just gotten a protective order against him.[202] Prior to the following events, Williams, Major Russell and Deputy Major Lioi of the police department had been friends over a year.[203] Veronica obtained a temporary restraining order, and the city of Baltimore issued a warrant for Williams' arrest because Williams had assaulted Veronica by restraining her and cutting her hair.[204] From there, an officer did not follow proper procedure with the warrant and took it to a different station.[205] During that week, Williams suspected that his wife had taken action against him, so he contacted Russell to find out what happened, who then told Williams what his wife had done.[206] While Russel encouraged Williams to turn himself in, he advised that he should wait until after the weekend to avoid being detained over the weekend.[207] The following week officers, as well as Russell, attempted to arrest Williams but failed to do so because "it was dark and no one answered the door."[208] Throughout the next several days, Williams and Russell engaged in several personal conversations that involved ways to surrender, instances of leniency as to when to surrender, and how to properly deal with the situation.[209] Days later, Williams stabbed Veronica.[210]

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[196] *Okin*, 577 F.3d at 426.
[197] *Id.* at 415–27. Admittedly, the facts of *Okin* stretch over 13 pages and this summary does a disservice to the several instances of abuse, which were reported to the police.
[198] *Id.* at 421
[199] *Id.* at 430.
[200] *Id.*
[201] *Id.* at 434.
[202] Graves v. Lioi, 930 F.3d 307, 314 (4th Cir. 2019). The court addressed them as Mr. and Mrs. Williams, but I want to show separation by not using her married name.
[203] *Id.* at 311.
[204] *Id.*
[205] *Id.* at 312.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.* at 312–14.
[210] *Id.* at 312.

The court categorized the text messages, the failure to enforce the warrant, and the continuous postponed surrendering as "inactions and omissions", incapable of creating a causal link to her eventual death, saying that "at most . . . [the officers] agreed to allow a cooperating individual that posed no known immediate risk to self-surrender."[211] Therefore, the court found that the actions of the officers did not create or enhance the danger to the victim.[212] The court held that because Veronica's rights were not violated, the officers were entitled to qualified immunity for their actions.[213] The court also noted that even if the actions were unlawful, the right was not clearly established thus the court would have granted qualified immunity regardless.[214]

B. Application of Qualified Immunity, Fourth Amendment Doctrine, and the State Created Danger Exception

This Section aims to show how a court would likely rule today when faced with one of these specific claims. Subsection 1 applies the qualified immunity and Fourth Amendment case law detailed above as it relates to the PWSPC. Subsection 1 is based on the facts from an incident involving a man suffering from Schizophrenia in Milwaukee who died in a police encounter.[215] Subsection 2 shows how qualified immunity and the state created danger exception would apply to a set of facts. Subsection 2 applies the law to the facts of an incident from a New Jersey town.

1. PWSPC scenarios

This subsection follows the facts of Adam Trammel, a 22-year-old Schizophrenic who encountered the police after one of his neighbors called the police because he was naked in the hallway.[216] When the police arrived, Trammel seemed to be having a breakdown and was taking a shower to calm down, as he did when he felt anxious.[217]

Since the police called Adam several times and Adam remained unresponsive even when the officers entered the bathroom, the entry was reasonable because any other attempt to contact Adam would have been futile.[218] Then, the officers tased Adam 15 times and applied two different sedatives in order to restrain him and get him medical care.[219] The officer's successful

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[211] *See id.* at 325–30, 32.
[212] *Id.* at 331.
[213] *Id.* at 331–32.
[214] *Id.* at 332. The Fourth Circuit is one of the several circuits that looks at the Supreme Court and decisions from their own circuit to determine clearly established law. *See id.* at 333.
[215] Aleem Maqbool, *Don't Shoot, I'm Disabled*, BBC NEWS (Oct. 4, 2018) https://www.bbc.com/news/stories-45739335 [https://perma.cc/PA2Z-Q82Z].
[216] *Id.*
[217] *Id.*
[218] *Id.*; *see also supra* note 140 and accompanying text.
[219] Maqbool, *supra* note 217.

restraining of Adam through tasing and sedation constitutes a seizure under the Fourth Amendment.[220]

The use of excessive force was unreasonable. Unlike the victim in *Sheehan*, Adam was neither armed nor did he run toward the officers. Instead, Adam splashed the officers with water from his shower.[221] Further distinguishing Adam from the victim in *Sheehan* who expressed to the officers that she would kill them if they entered the room, Adam remained calm during the encounter but just did not respond to the officers' commands.[222] Notably, Adam was not committing a crime at the time the time he was tased and sedated.[223] When it comes to being a threat to the officers or the public, the 911 call and the body cam video clearly show that Adam was not acting violent but only "naked in the corridor, talking about the devil."[224] Lastly, the officers indicated they were not trying to arrest him, but get him help. Therefore, applying the *Graham* factors, the use of force was unreasonably excessive and accordingly a violation of his Fourth Amendment right.[225]

The officers are likely entitled to qualified immunity. First, the officers qualify as a "person" under Section 1983.[226] Second, as explained above, the officers' actions were a violation of the Fourth Amendment, which satisfies the first prong of qualified immunity.[227] In evaluating whether the right was clearly established, while the officers' actions were a violation of the Fourth Amendment, the proper inquiry has to be construed more specifically. Instead the inquiry would be whether a reasonable officer would have known that seizing Adam by tasing him and sedating him when he was not responding to their commands was unlawful.[228] Looking at Seventh Circuit precedent, it is clearly established that officers "cannot resort as an initial matter to lethal force on a person who is merely passively resisting and has not presented any threat of harm to others."[229] However, unlike *Williams* the officers used their tasers instead of a gun making the case more like *Sheehan* where the officers started with pepper spray.[230] Therefore, the court is likely to find that the right was not clearly established and grant qualified immunity to the officers.

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[220] *Id.*; *Brower*, 489 U.S. at 626–27.
[221] *See supra* notes 152–153; Maqbool, *supra* note 215.
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *See supra* note 136.
[226] *See supra* notes 104–110.
[227] *See supra* note 112.
[228] *See supra* notes 117–118.
[229] *See e.g.*, Estate of Williams v. Ind. State Police Dep't, 797 F.3d 468, 485 (7th Cir. 2015).
[230] *See supra* note 156.

2. Domestic violence

The facts stated in this subsection follow the story of a Paterson, New Jersey woman whose name was kept out of the article.[231] In this part, to preserve the woman's anonymity, she will be called "Jane." Similarly, the boyfriend, who is also not named, will be called "Chris." Jane arrived at the police department with her two-month-old trying to file a report against her boyfriend who had assaulted her. When she arrived, the officer refused to take her statements, blew kisses at the phone her brother was using to record and called her a "cry baby."[232]

The police officer acted in a way that could lead Chris to believe that the officer was enabling or would not intervene in the domestic violence. Like the officers in *Okin* who showed dismissive and indifferent attitudes towards Okin by talking to the husband about football, the officer here showed the same attitude towards Jane by blowing kisses towards the camera.[233] While the enabling events in *Okin* happened in front of the abuser and Chris was not present in the police department during Jane's encounter, the police's action could have the same effect because Jane's video was shown in the news, which means that Chris could have seen it.[234] Lastly, the officer not being willing to take down her complaint in and of itself likely does not reach the level of enabling or not being likely to intervene, but adding the statement of "cry baby" and his acts of blowing the kiss does.

The officers' actions shock the conscience, and are a factual link to a possible future act of abuse and a violation of New Jersey law.[235] The court in *Okin* found that talking with the abuser about football instead of interviewing the victim created enough of a factual dispute as to whether the actions shocked the conscience, thus the officer not taking the statements from Jane and calling her a "cry baby" likely shocked the conscience.[236] While the officer's acts could be considered an omission like the acts of the defendants in *Graves*, his comments towards Jane were made in a manner that "emboldens [Chris] to continue abusing" like *Martinez*, which would create a causal link with Jane's future abuse.[237] Lastly, the officer likely violated a New Jersey law requiring an officer to arrest and take into custody a domestic violence sus-

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[231] Michelle Charlesworth, *NJ Woman Accuses Police of Mocking Her After She Was Abused by Boyfriend*, EyeWitness News (Jan. 7, 2021) https://abc7ny.com/woman-victimized-twice-domestic-violence-abuse-police-inaction/9442445/ [https://perma.cc/2555-SPNR] [hereinafter NJ Woman]. The case was chosen due to its recency and proximity given that it is in the state of New Jersey. Due to its recency, there is no indication that there was another instance of domestic violence, but this part will treat the facts as to what would happen if there was another incident after the encounter with the police.

[232] Charlesworth, *supra* note 233.

[233] *See supra* note 199 and accompanying text; Charlesworth, *supra* note 233.

[234] *Id.*

[235] *See supra* notes 192–93 and accompanying text.

[236] *See supra* notes 199–201.

[237] *See supra* notes 212–13; *see also supra* note 196.

pect if the complaining victim shows signs of domestic violence.[238] Therefore, Jane is likely to succeed in her state-created danger claim.

The officer is likely entitled to qualified immunity. The officer constitutes a person for purposes of Section 1983.[239] The violation of Jane's Due Process rights is a violation of her constitutional right.[240] Then the court would need to see whether a reasonable officer would have known that it was clearly established that officers refusing to take a domestic violence victim's statement, making derogatory terms towards them, and engaging in other similar acts would be a violation of her due process rights.[241] Looking at Third Circuit precedent, the officer's actions are a failure to use his authority, which the court has previously refused to find as a violation of a right, and granted qualified immunity.[242] Therefore, the court is likely to find that Jane's right was not clearly established and instead find qualified immunity.

III. Remedying the Tension Between the Police and the Public Through Various Possibilities

Several remedies could be implemented to relieve the tension between the public and the police. While most of the public wants police reform,[243] many want the police to spend the same amount of time in their neighborhoods as they do now.[244] Thus, none of the possible remedies described below address a situation in which there is no police. A three-year study of 844 U.S. Court of Appeals opinions identified 52 claims where the court granted qualified immunity even after identifying constitutional violations.[245] Therefore, most of the subsections below address qualified immunity or a different method to bring claims against the police.

Section A focuses on the Supreme Court abolishing or reworking qualified immunity as well as the viability of the court addressing qualified immunity's validity. Section B describes how congress is trying to address qualified immunity by enacting a statute that would amend Section 1983. Section C explores how different states are addressing qualified immunity by creating state statutes that serve as different methods of suing police officers. Part D focuses on how police departments and other agencies can follow internal reform to improve the tension between the police and the public.

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[238] N.J. Stat. Ann. § 2C:25-21a(1).

[239] S*ee supra* notes 101–111.

[240] *See supra* note 112.

[241] *See* Charlesworth, *supra* note 231.

[242] Burella v. City of Phila., 501 F.3d 134, 147–48 (3d Cir. 2007) (quoting Bright v. Westmoreland Cty., 443 F.3d 276, 284 (3d Cir. 2006)).

[243] *See supra* note 18.

[244] Lydia Saad, *Black Americans Want Police to Retain Local Presence*, Gallup (Aug. 5, 2020), https://news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx [https://perma.cc/R46L-JYR8].

[245] Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1882–83 (2018).

A. Abolishing or Reworking Qualified Immunity by the Supreme Court

Since qualified immunity is a judicially created defense, it makes sense to begin with its creator. If the Court abolishes qualified immunity, the Court will have to go against decades of precedent. If the Supreme Court does abolish qualified immunity as a defense, it would allow for suits for damages under Section 1983. This solution would have the biggest impact since there would need to be congressional action to recreate it. If the Supreme Court were to abolish or redress qualified immunity, it is hard to imagine what that result would look like. Some scholars have discussed that the answer would be the Court going back to its previous precedent.[246] However, such a result is unlikely.

The Court has not addressed the validity of qualified immunity in the context of overturning precedent. The Court has articulated a multifactor test to determine whether precedent should be overturned. Some of the factors considered when deciding to overturn precedent include: (a) the quality of the precedent's reasoning; (b) the workability of the established rule; (c) whether it is consistent with related decisions; (d) developments since the rule first originated; and (e) reliance on the decision.[247] The Supreme Court has not addressed qualified immunity in the context of overturning the doctrine, and usually only addresses the claim in their substantive value.[248] However, language in *Anderson* has been interpreted to mean that the Court is likely to revisit the defense if its justifications seem to be undermined.[249]

Current members of the Court are not likely to join in overruling the doctrine.[250] The most vocal member of the Court in opposing qualified immunity is Justice Sotomayor. In *Mullenix v. Luna*, Justice Sotomayor expressed that qualified immunity created a notion of "shoot first, think later" which essentially makes the "protections of the Fourth Amendment hollow."[251] In 2018, Justice Sotomayor reiterated her point that it renders a shoot first and think later attitude, and expressed how it "tells the public that palpably unreasonable conduct will go unpunished."[252] Similarly, Justice Thomas has expressed that when the appropriate case comes, the court should reconsider qualified immunity as it has parted from what it was

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[246] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1832–33 (2018).

[247] Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2478–79 (2018).

[248] *See e.g.,* Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017); see Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018) (describing several of these cases where the Supreme Court repeatedly grants qualified immunity without ruling on the first prong).

[249] *The Case Against Qualified Immunity*, *supra* note 248, at 1821.

[250] This section refers to the members of the court as of April 2021. The 9 Current Justices of the U.S. Supreme Court. https://tucson.com/news/national/the-9-current-justices-of-the-us-supreme-court/collection_5d491442-d98e-5a29-9ffd-e99507179c25.html#9 [https://perma.cc/4444-C43K].

[251] Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

[252] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

thought to be at common law.[253] Lastly, Justice Gorsuch—then on the Tenth Circuit—commented on how qualified immunity is there to protect law enforcement officers who are "effectuating their sworn obligation."[254] The other members of the Court seem not to take a more vocal stand on the topic.

As to narrowing or reworking qualified immunity, the Court seems to have taken steps towards that end. The Court had an opportunity to address qualified immunity again in the 2021 case of *McCoy v. Alamu*.[255] In *McCoy,* the Fifth Circuit granted qualified immunity because it found that the right was not established "beyond debate."[256] The court granted certiorari and in a summary disposition, reversed and remanded the Fifth Circuit for further consideration in light of *Taylor v. Riojas*.[257] In *Taylor*, the Supreme Court reversed the Fifth Circuit and found that "[no] reasonable officer" would have believed that their actions were constitutionally permissible.[258] This has been believed to be an attempt by the court to stay away from the "beyond debate" test and pointing courts to stay within the "no reasonable officer" test's boundaries.[259] However, in its most recent qualified immunity cases, the Court reversed both cases on the basis that none of the cases with similar facts "come[ ] close to establishing that the officers' conduct was unlawful," but with no mention of the reasonable officer test.[260]

B. Congressional action

The legislative branch can act by creating a new method for citizens to seek damages or amending Section 1983. Congress enacted Section 1983 under Section Five of the Fourteenth Amendment, which grants Congress the power to enforce the amendment via legislation.[261] Thus, if Congress acts, it is likely to do so in a similar manner.

Congress was working on passing legislation to address qualified immunity. The events of 2020 led legislators to introduce three bills looking to reform policing.[262] In its latest form, H. R. 1280, known as the George

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[253] *Ziglar*, 137 S. Ct. at 1872.
[254] Cortez v. McCauley, 478 F.3d 1108, 1141 (10th Cir. 2007) (Gorsuch, J., dissenting).
[255] McCoy v. Alamu, 141 S. Ct. 1364 (2021).
[256] McCoy v. Alamu, 950 F.3d 226, 234 (5th Cir. 2020).
[257] *McCoy*, 141 S. Ct. 1364 (2021).
[258] Taylor v. Riojas, 141 S. Ct. 52, 54 (2020).
[259] Colin Miller, *The Supreme Court Issues a (Possibly) Landmark Ruling on Qualified Immunity*, EVIDENCE PROFBLOGGER (Feb. 23, 2021), https://lawprofessors.typepad.com/evidenceprof/2021/02/yesterday-the-united-states-supreme-court-issued-a-summary-disposition-inmccoy-v-alamu-that-could-end-up-being-a-landmark-r.html?utm_source=Feedburner&utm_medium=email&utm_campaign=Feed%3A™ypepad%2Fiuae+%28Evidence Prof+Blog%29 [https://perma.cc/J278-UW7T].
[260] City of Tahlequah, Oklahoma v. Bond, 142 S. Ct. 9, 12 (2021); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8–9 (2021).
[261] U.S. CONST. Amend. XIV, § 5.
[262] Chloee Weiner, *House Approves Police Reform Bill Named After George Floyd*, NPR (March 3, 2021), https://www.npr.org/2021/03/03/973111306/house-approves-police-reform-bill-named-after-george-floyd [https://perma.cc/AQQ4-MQ36].

Floyd Justice in Policing Act of 2021 got enough votes to pass in the House of Representatives.[263] First, Section 101 of the Act would amend Section 242 of Title 18 by removing "willfully" and replacing it with "knowingly or recklessly."[264] Section 242 allows for criminal prosecution of state actors for the deprivation of rights.[265]

The George Floyd Justice in Policing Act also addresses Section 1983. Section 102, if passed, would revise 42 U.S.C. § 1983 to directly address qualified immunity.[266] The language of Section 102 says that "[i]t shall not be a defense or immunity" that a defendant acted in good faith or reasonably believed that their action was lawful, or that the right in question was not clearly established.[267] This language would directly address qualified immunity jurisprudence as we know it.[268] Thus, Section 102 would end qualified immunity as a defense, and if the Supreme Court seeks to revive it, it would need to be outside of the language prohibited by the section.

If Congress were to want to solidify qualified immunity as a defense and States continued to seek ways to end qualified immunity,[269] congressional action would need to be different. Generally, Congress cannot direct states to act in a certain way because of the doctrine of anti-commandeering.[270] Therefore, Congress cannot command states who have passed legislation to try to end qualified immunity to reverse such acts. Instead, because of preemption, Congress would need to codify qualified immunity by expressively making it a defense available to government actors by enacting a new statute that would provide qualified immunity to state actors at all times and not just only in the context of 1983 actions.[271]

While the George Floyd Justice in Policing Act would not directly address domestic violence and PWSPC, it would remove qualified immunity as a bar for recovery. With qualified immunity not being a defense to Section 1983, PWSPC who have been victims of excessive use of force by the police would be able to recover monetary damages because the officers would not be able to raise the qualified immunity defense. As to domestic violence scenarios, victims who have been placed in dangerous situations because of police misconduct would be able to recover damages via the state-created danger doctrine. Both PWSPC and domestic violence victims would still

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[263] George Floyd Justice in Policing Act of 2021, H.R.1280, 117th Cong. (2021) (as passed by House, Mar. 3, 2021). To enact legislation Congress must meet both bicameralism and presentment, which means that the bill must go through both houses of Congress and then it must be signed by the President. *See generally* INS v. Chadha, 462 U.S. 919, 946–47 (1983). Thus, the bill has several steps before its enactment.

[264] George Floyd Justice in Policing Act of 2021, H.R.1280, 117th Cong. § 101 (2021).

[265] 18 U.S.C. § 242.

[266] *See* George Floyd Justice in Policing Act of 2021, H.R.1280, 117th Cong. § 102 (2021).

[267] *Id.*

[268] *See* supra section II.A.1.

[269] *See* infra section IV.B.

[270] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018).

[271] *See* Kansas v. Garcia, 140 S. Ct. 791, 801 (2020).

need to prove excessive use of force and state-created danger claims, respectively.

C. State legislature or local municipalities

State legislatures can create different avenues for domestic violence victims and PWSPC to seek remedy. Given that qualified immunity is a judicially created defense, the doctrine of preemption would not bar states from enacting legislation that prohibits the use of qualified immunity as a defense in certain actions.[272] However, if qualified immunity is codified as a defense to all state actors all the time, these actions by the states would not be proper because of preemption.[273] After the events of 2020, several states have enacted state statutes in efforts to end qualified immunity by creating alternate ways to bring claims seeking remedy.[274] These alternate remedies come into play because many states have statutes requiring agencies to pay for representation when an officer is facing a Section 1983 lawsuit.[275] The ways the states of Colorado, New Mexico, and the City of New York have sought to end qualified immunity are detailed below.

Colorado enacted a statute to allow monetary damages similarly to Section 1983. Colorado was the first state in the nation to enact legislation to bar qualified immunity as a defense for violations of state law.[276] Subsection (3)(1) of the statute creates liability for state actors who violate a right secured by Colorado's bill of rights, Article II of the State's constitution.[277] Subsection (2)(b) states that "qualified immunity is not a defense to liability pursuant to this section."[278] Further, this statute includes liability when the police officer fails to intervene.[279] Subsection (4) forces the officer's employer to indemnify the officer for actions that are brought under this statute, unless the officer did not act in good faith, a reasonable belief that their acts were lawful, or was found guilty in a criminal action for the conduct in connection to the claim.[280]

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[272] *See* Integrity Mgmt. Int'l, Inc. v. Tombs & Sons, Inc., 836 F.2d 485, 487 (10th Cir. 1987). Section 1983 is a federal statute; thus, States cannot amend it. This Section refers to state statues in which citizens can bring state law claims.

[273] *See id.*

[274] Nick Sibilla, *New Mexico Bans Qualified Immunity for All Government Workers, Including Police*, FORBES (Apr. 7, 2021), https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=69c4cf7279ad [https://perma.cc/N5BH-MVJR] (listing the States that have acted on qualified immunity).

[275] *See e.g.,* N.Y. PUB. OFF. LAW §17.

[276] Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020), https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=64b9e503378a [https://perma.cc/83XY-2TPB].

[277] COLO. REV. STAT. § 13-21-131(1).

[278] COLO. REV. STAT. § 13-21-131(2)(b).

[279] COLO. REV. STAT. § 13-21-131(1).

[280] COLO. REV. STAT. § 13-21-131(4)

New Mexico enacted legislation to allow more victims of police misconduct to seek compensation. The bill's sponsor, Representative Georgene Louis, mentioned how making state agencies accountable for their actions builds trust between the agencies and the community.[281] Section (3) of the statute provide that a person is able to bring actions for a deprivation of their rights under the New Mexico Constitution's bill of rights.[282] Section (4) states that no state officer shall enjoy qualified immunity for the deprivation of a citizen's right.[283] New Mexico's statute also addresses omission as a violation.[284] Subsection (3)(C) limits the scope of the statute by providing that all claims should be brought "against a public body."[285] Thus, a person who has been harmed by a police officer would likely need to sue the police department.

New York City became the first city in the country to take steps toward ending qualified immunity by making it easier to bring legal action.[286] After signing the bill, the mayor announced that it will not make the officer liable for damages, but instead, would make the city and the police department liable.[287] Unlike Colorado and New Mexico, New York City's law addresses qualified immunity by mirroring the Fourth Amendment of the United States Constitution and creating liability for a state officer who violates that right or fails to intervene on the violation of that right.[288] Subsection 8-803 (b) clarifies that it is the employer of the actor who is then liable for any violation of a right.[289] Lastly, subsection 8-804 states that qualified immunity or "any other substantially equivalent immunity" are not defenses to actions brought under this ordinance.[290]

None of the statutes and regulations referenced above allow the officer to be directly liable for their actions. However, by creating other methods in which actions could be brought, they could still have a positive impact in the current tension between the public, domestic violence victims and PWSPC. Increasing the number of claims brought against police officers would indirectly affect the officer's behavior by exposing information about police practices.[291] Schwartz argues that through litigation documents—"complaints,

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[281] *New Mexico Ends Qualified Immunity for Abuse Police*, EQUAL. JUST. INIT. (April 09, 2021), https://eji.org/news/new-mexico-ends-qualified-immunity-for-abusive-police/ [https://perma.cc/QHE5-9L6D].

[282] N.M. Stat. Ann. § 41-4A-3 (West).

[283] N.M. Stat. Ann. § 41-4A-4 (West).

[284] N.M. Stat. Ann. § 41-4A-3(B) (West).

[285] *Id.*

[286] Luke Barr, *New York City Moves to End Qualified Immunity, Making it 1st City in the US to Do So*, ABC NEWS (March 29, 2021), https://abcnews.go.com/Politics/york-city-moves-end-qualified-immunity-making-1st/story?id=76752098#:~:text=In%20New%20York%2C%20the%20City,officer%20Derek%20Chauvin's%20murder%20trial [https://perma.cc/5ZC7-4PUJ].

[287] *Id.*

[288] N.Y.C. Admin. Code §§ 8-802, 8-803.

[289] *Id.*

[290] *Id.*

[291] Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 360 (2020).

discovery, motion practice, and trial"—valuable information will come to light, which will lead to improving police behavior.[292]

D. Internal action by police departments or academies

Unlike legislative bodies, police departments cannot enact laws for citizens to sue police officers. Instead, police departments can implement other types of remedies that can improve the tension among the police and the public. For years, scholars have called for joint action teams as they recognize that the police and mental health services alone cannot provide effective intervention, thus, they must act together.[293] As to domestic violence, there has been a growth in the movement towards decriminalization.[294] While the initiatives below do not directly address qualified immunity, they attack the root of the problem.

Implementing Community-Oriented Policing ("COP") can lead to the reform sought. COP is a style of policing based on the partnership of police departments with other agencies to proactively solve problems in the community.[295] A common theme in COP is to look beyond the criminal justice system and embrace the police's social work aspect.[296] Some of the skills developed through COP include proper use of discretion; enhanced communication skills; better abilities to build trust and partnerships; public speaking; and proper conflict resolution abilities.[297] Generally, a successful implementation of COP is correlated with good police officer training and a more responsive administration.[298] Unlike other models of policing, COP focuses on de-specialization, thus it encourages its practices to be adopted agency-wide instead of through the creation of specialized teams.[299] COP also bridges the gap of trust among the public and the police by providing social services to residents and participating in neighborhood activities.[300]

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[292] *Id.* at 357–58.

[293] *See* Richard Lamb, Linda E. Weinberger & Walter J. DeCuir Jr., *The Police and Mental Health*, 53 PSYCHIATRIC SERVICES 1266–71 (2002); Randy Borum *Improving High Risk Encounters Between People With Mental Illness And The Police,* 28 J. OF THE AM. ACADEMY OF PSYCHIATRY AND THE LAW: 332–37 (2000).

[294] *See generally* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018).

[295] U.S. DEP'T OF JUST., OFF. OF CMTY. ORIENTED POLICING SERVICES, COMMUNITY POLICING DEFINED 1 (2003), https://cops.usdoj.gov/RIC/Publications/cops-p157-pub.pdf [https://perma.cc/LH4B-CVMK] [hereinafter OFFICE OF COP].

[296] Catherine L. Fisk & Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 730 (2017).

[297] OFFICE OF COP, *supra note* 297, at 19.

[298] Richard E. Adams, William M. Rohe & Thomas A. Arcury, *Implementing Community-Oriented Policing: Organizational Change and Street Officer Attitudes,* 48 CRIME & DELINQ. 399, 403–04, 421 (2002).

[299] OFF. OF COP, *supra* note 297, at 7.

[300] Charlie Beck & Connie Rice, *How Community Policing Can Work*, N.Y. TIMES (April. 17, 2021), http://www.nytimes.com/2016/08/12/opinion/how-community-policing-can-work.html [https://perma.cc/AH28-JS2C].

COP directly addresses mental health crisis and domestic violence scenarios by engaging in different partnerships. Through partnerships, COP facilitates some of the services that a police department is not able to provide like mental health services.[301] For example, when an officer concludes that they are dealing with PWSPC, the officer determines what the ongoing problem is and whether there is a mental health professional or a caseworker who can help.[302] Partnerships also help with domestic violence. For example, the Marin County Sheriff's office assigned a full-time officer to work within the Marin Abused Women's Service center, which led to the creation of the Community Action Team and the Community Policing Action Team.[303] Both action teams engaged in the training of their members—police officers and other members of the community—in different domestic violence topics so they can work together to solve problems from domestic violence, also identified by the action teams.[304]

Police departments can implement the help of medical experts and at times, the police may not even respond at all. In two communities of New York City, mental health related 911 calls will be answered by some mental health professionals and not by the police.[305] The new team will be qualified to handle "suicide attempts, substance misuse and serious mental illness, as well as physical health problems."[306] In scenarios where a weapon is involved or the individual can create an imminent risk of harm, police officers will respond with the mental health teams.[307] This approach is similar to what are called "CAHOOTS" programs that responded to about 24,000 cases in 2019, only needing the police in 150 of those.[308]

The city of West Orange, New Jersey, is one of the municipalities to deploy what they call the Domestic Violence Response Team ("DVRT"), a team of volunteers trained and screened by the police department to provide

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[301] OFF. OF COP, *supra* note 295, at 8.

[302] *See id.* at 26.

[303] Jane Sadusky, *Community Policing and Domestic Violence: Five Promising Practices*, BATTERED WOMEN'S JUST. PROJECT at 18, https://www.bwjp.org/assets/documents/pdfs/community_policing_and_domestic_violence.pdf [https://perma.cc/5XG4-3BNP].

[304] *Id.* The action teams identified four specific problems with domestic violence: "1) underreporting by victims and the community; 2) insufficient education about domestic violence; 3) need for a change in attitude from blaming victims to holding perpetrators accountable; and 4) need for law enforcement to approach the 'verbal domestic' as an opportunity for intervention." *Id.*

[305] Caitlin O'Kane, *Mental Health 911 Calls Will Be Handled by Medical Experts Instead of NYPD in New Pilot Program*, CBS NEWS (Nov. 11, 2020), https://www.cbsnews.com/news/mental-health-911-calls-medical-experts-respond-new-york-city/ [https://perma.cc/2HUR-3FPF].

[306] *Id.*

[307] *Id.*

[308] *Id.* The cities of Albuquerque, Oregon, Denver, Los Angeles, San Francisco, and Eugene have implemented similar approaches. *Id.*; *see also* Christina Maxouris, *These Mental Health Crises Ended in Fatal Police Encounters. Now, Some Communities Are Trying a New Approach*, CNN, (Oct. 10, 2020), https://www.cnn.com/2020/10/10/us/police-mental-health-emergencies/index.html (detailing different police approaches to mental health crises across the country).

domestic violence victims with emergency support and other alternatives.[309] DVRT members are required to complete a 40-hour training course.[310] The DVRT provides a "less authoritarian atmosphere" to victims who have experienced trauma or may be reluctant to seek help.[311] The DVRT can provide advice, provide referrals for counseling, guidance in seeking temporary restraining orders, arrange shelter, a 24-hour hotline, etc.[312]

Police departments[313] can improve the quality of the police force overall by improving their recruitment. This can begin by engaging in more proactive advertisement using posters, TV ads, and attending local high schools and universities, rather than relying on posting their availability on their website.[314] Then, police departments should provide more transparency regarding both the minimum qualifications for the job as well as the benefits of being a police officer.[315] Lastly, police departments should increase their efforts to recruit from minorities and other unrepresented groups.[316]

Police departments could also benefit from having more college-educated officers. In 1971, 8.5% of women and 14.6% of men 25 years-old or older had completed four years of college or more, compared to 38.3% and 36.6% in 2020.[317] A recent survey shows that 30% of officers have a four-year degree, but the survey suggests that these came as efforts to gain promotions and not when these officers were recruits.[318] As the population becomes more educated, police officers should follow the same trend, especially since having gone through college would create "older, more mature, and well rounded" officers.[319] Similarly, officers would gain exposure to diversity, tol-

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[309] WEST ORANGE, Domestic Violence Response Team-DVRT. https://www.westorange.org/268/Domestic-Violence-Response-Team-DVRT [https://perma.cc/7476-EJKJ].

[310] Craigh McCarthy, *Police are Asking for Volunteers to join the Domestic Violence Response Team as well as the Auxiliary Police*, PATCH (July 18, 2013), https://patch.com/new-jersey/westorange/west-orange-police-seeks-volunteers [https://perma.cc/M6CU-5C3D].

[311] WEST ORANGE, *supra* note 311.

[312] *Id.*

[313] For purposes of this section, police departments will also include police academies. This is because hiring practices vary by jurisdiction—in some jurisdictions, police academies hire new officers and send them to an academy, and in other jurisdictions police departments hire officers after they have left the police academy. United States Dep't of Just., Community Relations Services Toolkit for Policing, Policing 101, https://www.justice.gov/crs/file/836401/download [https://perma.cc/S2EU-Q9B8].

[314] Michael D. White & Gipsy Escobar, *Making Good Cops in The Twenty-First Century: Emerging Issues for The Effective Recruitment, Selection and Training of Police in the United States and Abroad*, 22 INT'L REV. OF LAW, COMPUTERS & TECH. 119, 120 (2008).

[315] *Id.* at 121.

[316] *Id.*

[317] Erin Duffin, *Percentage of the U.S. Population Who Have Completed Four Years of College or More From 1940 to 2020*, by gender, STATISTA (June 11, 2021), https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender/ [https://perma.cc/H6E8-FBGR].

[318] Christie Gardiner, *Policing Around the Nation: Education, Philosophy, And Practice* 4, 2 (2017), https://www.policefoundation.org/wp-content/uploads/2017/10/PF-Report-Policing-Around-the-Nation_10-2017_Final.pdf [ ].

[319] White & Escobar, *supra* note 314, at 122.

erance, and understanding by constantly interacting with people who act and think differently than them.[320]

More than just a college education, police officers would benefit from having specialized legal training. Police officers do not need the same amount of training as lawyers, but they should at least have an equivalent training in topics like substantive criminal law and criminal procedure.[321] Linetsky argues that this would also benefit police departments economically because departments would spend less resources handling lawsuits resulting from officers misapplying the law.[322] As to constitutional law, officers could learn more than black-letter concepts, and instead increase the amount of "theoretical underpinnings and historical developments" of constitutional protections to apply it to new scenarios every day.[323] Lastly, officers could hone their new knowledge by taking scenario-based training or fact pattern tests, both while in their academy training and while on the force.[324]

IV. A Plan Going Forward

Looking at the possibilities, there should be a good way to go forward. Section A of this Part focuses on how the remedies described in Part III could be received. Section A analyzes how scholars and other groups would react or refuse to cooperate with the abolishment or rework of qualified immunity, or other remedies discussed in Part III. Lastly, Section B of this Part proposes a path going forward by taking into consideration the critiques set forth in Section A.

A. How would these responses be received?

Opponents of abolishing qualified immunity propose a procedural rework rather than overruling the doctrine. Pro-qualified immunity scholars call for a rework of the standard set forward in *Pearson*.[325] The Supreme Court's holding in *Pearson* allows the judges to proceed without first deciding on whether the facts constitute a violation of constitutional law.[326] Nielsen and Walker argue for more uniformity in the lower courts by requiring courts to explain their reasoning as to why the lower courts decided to use the *Pearson* discretion in not answering the constitutional question.[327] Second, they propose for the Court to alter its certiorari review and give less weight as to whether an opinion is unpublished or not when deciding

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[320] *Id.*

[321] Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M.L. Rev. 1, 39 (2018).

[322] *Id.* at 40.

[323] *Id.* at 41.

[324] *Id.* at 44–46.

[325] *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853 (2018).

[326] *See supra* note 114 and accompanying text.

[327] Nielson & Walker, *supra note* 327, at 1884.

whether to review qualified immunity cases.[328] Lastly, they call for the Court to address the *Pearson* discretion and informally discourage the use of discretionary power in a "strategic way."[329]

Scholars are more likely to support the way states are addressing qualified immunity. Peter Schuck argues that police departments have the ability to evaluate police practices, use different training methods, and different strategies based on deterrence, thus, police departments are a better target to bear the cost of liability.[330] Alternatively, displacing the liability from the individual officer to the police departments allows for victims to be able to recover on their judgment given that the individual officers are not likely to be able to pay a judgment against them.[331] The states who are enacting laws against qualified immunity are also requiring police departments to indemnify the officers.[332]

Legislative opponents to ending qualified immunity would oppose bills that enter the Senate that try to end qualified immunity as a protection of the officers. After the George Floyd Justice in Policing Act passed the House of Representatives, Republican legislators expressed how the bill would make it harder for police officers to do their jobs and would "weaken and possibly destroy our community's police forces."[333] Recently, Republican Senator Tim Scott, who is leading the talks for the negotiations of qualified immunity, announced that the plan going forward is shifting the burden from officer to police department instead of the abolishment of the doctrine.[334]

There is no concrete evidence that ending qualified immunity affects how officers would act in their day-to-day interactions and attitudes. Studies have found that the threat of a lawsuit does not affect "field practices" of policing because officers do not tend to think about being sued when doing their job.[335] Similarly, a study of the Cincinnati Police Department showed an increasing pattern of aggression by officers who had been previously

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[328] *Id.*

[329] *Id.*

[330] PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 85 (1983).

[331] *See* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 796 (1999).

[332] *See supra* Section III.C.

[333] Kelsey Vlamis, *The House Passed a Police Reform Bill Named for George Floyd that Would Ban Choke Holds and "Qualified Immunity" for Officers*, YAHOO! (Mar. 4, 2021), https://news.yahoo.com/house-passed-police-reform-bill-080540582.html [https://perma.cc/HM8M-YMG2].

[334] Manu Raju, Jessica Dean & Ted Barrett, *GOP Senator Floats Compromise on Policing Legislation as Bipartisan Talks Pick Up Pace*, CNN (Apr. 21, 2021), https://www.cnn.com/2021/04/21/politics/policing-reform-talks-congress-latest-negotiations/index.html [https://perma.cc/7Y9L-S8AG].

[335] *See* VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (4th ed. 2006).

sued.[336] In contrast, 62% of officers who responded to a study answered that officers who know that they can face civil liability are "deterred from violating an individual's civil rights."[337]

The biggest pushback is likely to come from police unions. Police unions have been identified as the primary factor against police reform for years.[338] Police unions are responsible for police bargaining agreements that include things like their salary, benefits, access to preferred shifts, promotions, and disciplinary processes.[339] In some instances, officers have the right to consult with an attorney or representatives from their respective police union even when they have to make a report about a shooting involving themselves or a fellow officer.[340] Similarly, through police unions many states have created what are known as Law Enforcement Bill of Rights, which generally create a new set of laws that govern police procedure for misconduct.[341] Investigations note that if any initiative has any chance of success, it has to work to redraft collective bargaining agreements.[342] Thus, any action—abolishing, reworking, and/or internal change—would require a bargaining of the current collective bargaining agreements.

Certain groups would be against the introducing initiatives that involve diversity, especially if it involves police officers. An Illinois legislator tried to incorporate critical race theory, as well as "courses on procedural justice, arrest and use and control tactics, search and seizure, cultural competence," and constitutional use of force as part of police officers' training.[343] These actions received opposition from the local fraternal order of police, which stated that police officers needed less time in the classroom, and that these initiatives could place officers' lives in danger.[344] Similar arguments have been made in other areas of society, as opponents to such training frequently claim to "want[ ] to avoid certain feelings of discomfort or even shame" in certain groups.[345]

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[336] *See* Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 352, 360, 363 (2003).

[337] Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD. INT'L REV. POLICE DEV. 19, 26 (1995).

[338] *See generally* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017).

[339] *Id.* at 738.

[340] *Id.* at 741.

[341] *See e.g.,* N.M. STAT. ANN. § 29-14-4 (2013).

[342] CIVIL RIGHTS DIV., U.S. DEP'T OF JUST. & U.S. ATT'Y'S OFF. FOR N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT at 111 (2017), https://www.justice.gov/opa/file/925846/download [https://perma.cc/5G4A-JRYP].

[343] Rachel Hilton, *Lawmaker Wants Police Officers Taught How Racism, 'Ignorance' Prevent Them From Doing Their Jobs Fairly*, CHI. SUN TIMES, (Apr. 19, 2021), https://chicago.suntimes.com/2021/4/19/22392451/critical-race-theory-police-officers-racism-race-lashawn-ford-fop-catanzara [https://perma.cc/UQ94-KLQV].

[344] *Id.*

[345] Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, TIME, (July 13, 2021), https://time.com/6079716/conservative-case-against-banning-critical-race-theory/ [https://perma.cc/W9UN-RQV4].

Funding and scope are common reasons why some groups oppose changes to police qualifications and training, both during the academy and after. Requiring a college degree would reduce the diverse pool of candidates that could become police officers by excluding candidates who are from disadvantaged groups that did not have access to secondary education.[346] When it comes to funding, places where police trainees bear the costs of the police academy, every new subject or training that adds time to the length of the police academy will be reflected in the tuition paid by officers.[347] Similarly, in places where police departments bear the cost of putting officers through the academy, a more robust police academy program would affect its cost in both tuition and officer salary.[348] Yet, sometimes the cost of not training police officers can far exceed the cost of more training.[349]

B. My recommendation

As the final piece of this paper, I propose a course of action to address the tension between the police and the public, and qualified immunity as a barrier to change. Since abolishing qualified immunity, either via the Supreme Court or Congress, seems to be the least likely outcome, my proposed solution involves a happy medium.[350] I propose to encourage States to keep passing legislation that places liability on the police departments to incentivize them to implement special programs.

As explained in Parts III.A, III.B, and IV.A, the Supreme Court is unlikely to abolish the doctrine of qualified immunity and members of Congress are opposing the passing of the George Floyd Justice in Policing Act. Further, the opposition to abolishing qualified immunity supports the idea that agencies should carry the weight of litigation,[351] thus these scholars would not have a problem with this prescription. Similarly, members of Congress who oppose abolishing the doctrine are also pushing toward shifting liability to the agencies.[352] Thus, these groups should not oppose the States passing more statutes.[353]

Police agencies would respond by implementing programs that would make the tension between the police and the public better. Given that practically all the states that are passing legislation to end qualified immunity are successful in eliminating it as a defense, citizens should be more successful in their claims.[354] Thus, this would be an incentive for the agencies to implement more of the program described in Part III.D. These programs of

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[346] White & Escobar, *supra* note 316, at 122.
[347] Linetsky, *supra* note 323, at 40.
[348] *Id.*
[349] *Id.* (citing Telephone interview with Robert Meader, Commander, Columbus Ohio Police Department (May 12, 2017).
[350] *See* Parts III.A, III.B.
[351] *See supra* notes 332–334.
[352] *See supra* note 336.
[353] *See supra* section III.C.
[354] *See supra* Section III.C.

course would then benefit domestic violence victims and PWSPC who have suffered at the hands of the police.

Put simply, we should encourage States to keep passing statutes that address qualified immunity by passing the liability to the police departments. Then, police departments would need to react to the new amount of claims they will be receiving to reduce the costs involved with litigation. Lastly, police departments would have to improve internally by implementing programs that make the tension between the police and the public better.

Conclusion

There is tension between the public and the police. Between training, use of force, and accountability there are many reasons why the public could feel a certain way towards police officers. Likewise, there are reasons why the police may have a different perspective toward the public. Specifically, victims of domestic violence and PWSPC face harder challenges when they count on the police to help, but officers might not be properly situated to help. Currently, qualified immunity serves as a barrier for officers to want to do better by protecting them from liability.

Qualified immunity leaves victims empty handed. PWSPC, or their families, who experienced excessive use of force would need to sue the police under Fourth Amendment unreasonable use of force doctrine. Similarly, victims of domestic violence who have had their situation worsen by their interaction with the police, assuming the police created or blustered that danger, need to filed action under the state created danger exception. While I recognize that plaintiffs still must prove their substantive claims, qualified immunity leaves victims empty handed even if they do succeed in proving their claims. As it stands, plaintiffs need to prove that the facts constitute a violation of a constitutional right, and show that the law was clearly established, which creates a shield for police officers and contributes to the failure to improve the current tension between the public and the police.

The proposed combined approach is a path to better days. Qualified immunity, an identified barrier to change, could be addressed in several ways. Both the Supreme Court and Congress can take steps toward abolishing the defense as it stands. Also, individual states can enact new laws that would allow victims to seek a remedy through other means outside of Section 1983 and preventing the use of qualified immunity as a defense. The current way states are looking to "end" qualified immunity is by creating new ways for citizens to sue, but it will be police departments that will carry the burden. Lastly, while internal police action cannot end qualified immunity, it can attack the problem by implementing different programs in the community. Currently, most of the opposition remains against abolishing the doctrine. Therefore, considering viability, the correct course of action should be to encourage states to keep creating statutes for victims to sue and making police agencies liable, which will force those agencies to then create more

programs that would make the relationship between the police and the public better.