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A Commentary on Qualified Immunity in the Aftermath of City of Tahlequah v. Bond

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A Commentary on Qualified Immunity in the Aftermath of *City of Tahlequah v. Bond*

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[Y]ou could make a good argument that the police should be held to a higher standard than regular citizens. And you could make a good argument they should be held to the same standard. But it's hard to conceive of a convincing argument that they should be held to a lower one. But that's exactly what we've done.

Radley Balko¹

I. INTRODUCTION

In an October 18, 2021 *per curiam* decision by the U.S. Supreme Court, officers who shot and killed Dominic Rollice while he was drunk and holding a hammer, were ruled entitled to qualified immunity against the civil suit filed by the administrator of his estate, Austin P. Bond.² In rejecting the lower court ruling that the officers were not entitled to qualified immunity,³ the Court found that “neither

memoir, *Straddling White and Black Worlds: How Interpersonal Interactions with Young Black People Forever Altered a White Man's Understanding of Race*, which explores how his racial consciousness was shaped through interactions with his godchildren and their families and friends, as well as a variety of experiences interacting with Black children in educational and recreational settings.

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¹RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 336 (2014) (citing Tim Lynch, *Double Standards and Police Shootings*, CATO INST. (Dec. 1, 2006), <https://www.cato.org/blog/double-standards-police-shootings> [https://perma.cc/JJ2N-QAD2]).

²*City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 211 L. Ed. 2d 170 (2021).

³*Bond v. City of Tahlequah, Oklahoma*, 981 F.3d 808 (10th Cir. 2020).

the panel majority nor the respondent have identified a single precedent finding a Fourth Amendment violation under similar circumstances.”⁴

In this Article, we argue that the *Bond* decision continues a line of judicial decisions that make it difficult for plaintiffs to seek civil redress against officers who cause serious injury or death to private citizens.⁵ We note that this judicial trend runs counter to public demand for police accountability and thwarts the legislative intent behind the enactment of 42 U.S.C.A. § 1983.⁶ We suggest that police practice, policy, standards and training—not judicial opinions—should govern whether officers will be immune from the consequences of their actions, especially in areas where a substantial amount of empirical evidence exists to alert officers to behaviors that unnecessarily cause serious harm. We suggest that when cases involve any of these specific behaviors known to endanger life, that fact should constitute *prima facie* evidence that qualified immunity will not apply. In addition, we contend that a proportionality analysis is essential to any consideration of qualified immunity. Under this analysis, cases that involve police contact for low-level, non-violent offenses, but that result in serious injury or death to the private citizen, should presumptively exclude officers from making a quali-

⁴ *Bond*, 12 S. Ct. at 12.

⁵ In the companion case, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 211 L. Ed. 2d 164 (2021), the U.S. Supreme Court reversed a Ninth Circuit decision, *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), arguing that *LaLonde* was too factually dissimilar from *Cortesluna* to provide fair notice to the officer that his conduct was unlawful. The Ninth Circuit had reasoned that *LaLonde* and *Cortesluna* both involved suspects who were lying face-down on the ground and were not resisting either physically or verbally, and on whose backs the defendant officers leaned with a knee, causing allegedly significant injury. In reversing the Ninth Circuit’s decision in *LaLonde*, the Supreme Court argued that *LaLonde* and *Cortesluna* were factually distinct in several key respects. In *Cortesluna*, the Court indicated that the officer in the *LaLonde* case was responding to a noise complaint involving an unarmed man who made no threat when approached by police, and that the officer deliberately dug his knee into the man’s back for a couple of minutes. In contrast, the Court noted that the officer in *Cortesluna* was responding to a serious alleged incident of domestic violence involving a man armed with a knife, and that the officer placed his knee on the man’s back for no more than eight seconds in order to allow fellow officers to retrieve the man’s knife.

⁶ Carroll Doherty et al., *Majority of Public Favors Giving Civilians Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July, 9, 2020), <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/E3DB-6MP4]. For a discussion of police accountability and what can be done to achieve it, see, e.g., Michael D. White, Henry F. Fradella & Michaela Flippin, *How Can We Achieve Accountability in Policing? The (Not-So-Secret) Ingredients to Effective Police Reform*, 25 LEWIS & CLARK L. REV. 405 (2021).

fied immunity claim.⁷ In light of the U.S. Supreme Court's restrictive rulings that we believe unduly favor the police, we conclude by reporting the actions that states have taken to limit the applicability of qualified immunity within their jurisdictions.

II. THE HISTORY AND EVOLUTION OF QUALIFIED IMMUNITY

The high-profile police killings of George Floyd and Breonna Taylor in 2020 sparked a renewed dialogue over police officers' use of force, especially officers' use of deadly force directed at Black people.⁸ Central to the discussion of potential reforms has been a call for the elimination of qualified immunity.⁹ While on its face qualified immunity is a race-neutral concept, in historical reality the concept was created in response to litigation that revived the Civil Rights Act of 1871 (42 U.S.C.A. § 1983), originally referred to as the Ku Klux Klan Act.¹⁰ Congress enacted the Ku Klux Klan Act to assist the government in combating widespread racially-motivated violence directed at Black people in the South following the Civil War.¹¹ The Act, commonly known as "Section 1983," was intended to provide

⁷Unless officers can show by clear and convincing evidence that an actual threat of serious bodily injury was imminent, they should not be granted qualified immunity in these circumstances. As an alternative, the factual determination of whether an imminent threat of serious bodily injury existed should be made by a civil trial jury rather than be precluded from its consideration by a grant of qualified immunity.

⁸See Whitney K. Novak, Cong. Rsch. Serv., LSB10492, *Policing the Police: Qualified Immunity and Considerations for Congress* (ver. 4, 2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB10492/4> [<https://perma.cc/M8HA-VWVR>]; White et al., *supra* note 6, *passim*; see also Gene Denby, *An Immune System*, NPR: CODE SWITCH (July 8, 2020), <https://www.npr.org/2020/06/12/876212065/an-immune-system> [<https://perma.cc/85SL-WGE3>].

⁹See, e.g., White et al., *supra* note 6, at 445–46 ("Our list of the most important legal reforms includes . . . [a]bolishing qualified immunity for police in Section 1983 cases and dispensing with departmental indemnification of officers when they engage in unconstitutional acts, while also exploring the potential for police officers to carry mandatory liability insurance so that judgments are not rendered uncollectable without taxpayer money underwriting them . . .").

¹⁰Ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C.A. §§ 1983, 1985 & 1986); see *Historical Highlights: The Ku Klux Klan Act of 1871*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ [<https://perma.cc/3C7W-S5AT>]; see also Michael S. Day et al., Special Commission to Investigate and Study the Impact of Qualified Immunity Doctrine to the Administration of Justice in the Commonwealth: Final Report 7 (Jan. 4, 2022), <http://lawyersforcivilrights.org/wp-content/uploads/2022/01/QI-Commission-FINAL-Report.pdf> [<https://perma.cc/MT9T-4FG9>].

¹¹Day et al., *supra* note 10, at 7; see also Lee Sutton, *Civil Rights Act of 1871*, AM. HERITAGE (Apr. 20, 2013), <https://www.americanheritage.com/content/civil-rights-act-1871> [<https://perma.cc/VA9U-SLEZ>]; Tiffany R. Wright, Ciarra N. Carr & Jade W.P. Gasek, *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 DICK. L. REV. 685, 689 (2022).

individuals with a civil remedy for deprivations of their constitutional rights by anyone acting “under color of” state or local law.¹² The Ku Klux Klan Act reflected Congress’ recognition that Black people needed a legal mechanism by which to challenge the behavior of White law enforcement officials who were either participating in intimidation, harassment, assault, and murder of Blacks as members of the Klan, were in collusion with the Klan, or who were doing little or nothing to stop members of the Klan (and other White vigilantes) from attacking and terrorizing Black people.¹³ The protective power of the law was seriously undermined within twelve years after its enactment.¹⁴ In *United States v. Harris*, the Court held that the federal government did not have the power to penalize crimes such as assault and murder. The Court also ruled that Section 1983 only applied to state actions, not the actions of individuals.¹⁵ As a result of the *Harris* decision, the 1871 Civil Rights Act laid dormant for nearly ninety years.¹⁶

Litigators affiliated with the Civil Rights Movement of the 1950s and 1960s breathed new life into Section 1983 when they began to frequently invoke it in lawsuits against state and local government officials.¹⁷ In 1961, the U.S. Supreme Court in *Monroe v. Pape* fully reopened the door for federal civil rights lawsuits against state and local officials for deprivations of people’s constitutional rights. By holding that a plaintiff does not need to seek a state remedy before

¹²Chris Reed, *How an 1871 Civil Rights Law Morphed into a Police Protection Act*, SAN DIEGO UNION-TRIB. (June 23, 2020, 11:22 AM), <https://www.startribune.com/how-an-1871-civil-rights-law-morphed-into-a-police-protection-act/571442332/> [<https://perma.cc/9R8S-WPNE>].

¹³See Jack M. Beermann, *The Supreme Court’s Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199 (1993); Madeleine Carlisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here’s What to Know*, TIME (June 3, 2021, 6:35 PM), <https://time.com/6061624/what-is-qualified-immunity/> [<https://perma.cc/KP65-TQP8>]; Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NAT’L CONST. CTR. BLOG (Apr. 20, 2021), <https://constitutioncenter.org/blog/looking-back-at-the-ku-klux-klan-act> [<https://perma.cc/4SBX-A9CT>].

¹⁴*U.S. v. Harris*, 106 U.S. 629, 643, 1 S. Ct. 601, 27 L. Ed. 290 (1883).

¹⁵In *Harris*, the U.S. Supreme Court ruled that a sheriff leading an armed lynch mob into a Tennessee jail to attack four Black prisoners was acting in his capacity as a private individual and not on behalf of the state. *Harris*, 106 U.S. at 641; see also Andrew Glass, *Grant Signs KKK Act into Law, April 20, 1871*, POLITICO (Apr. 20, 2019, 9:54 AM), <https://www.politico.com/story/2019/04/20/this-day-in-politics-april-20-1279376> [<https://perma.cc/27AE-V58W>].

¹⁶See Lynn Adelman, *The Supreme Court’s Quiet Assault on Civil Rights*, DISSENT MAG. Fall, 2017, <https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983> [<https://perma.cc/FX8Z-CQL9>]; Beermann, *supra* note 13, at 201.

¹⁷Adelman, *supra* note 16.

seeking a federal remedy under 42 U.S.C.A. § 1983,¹⁸ Section 1983 became the principal means of enforcing constitutional rights in the United States.¹⁹

However, six years after resuscitating Section 1983 in *Monroe v. Pape*, in *Pierson v. Ray* the U.S. Supreme Court again curtailed plaintiffs' ability to successfully sue state and local officials for deprivations of federal constitutional rights by creating the qualified immunity doctrine.²⁰ Reasoning that Section 1983 should be interpreted against the backdrop of common tort law liability, the holding in *Pierson v. Ray* provided police officers with "qualified immunity" from Section 1983 lawsuits insofar as they acted in "good faith" when enforcing the law as they understood it at the time. The immunity was applicable even if the relied upon law was later found unconstitutional.²¹ This "good faith" qualified immunity standard provided police officers with a viable defense to avoid civil liability for harms they cause to people while acting in their official capacity.

The "good faith" standard for establishing qualified immunity remained in effect until 1982, when the U.S. Supreme Court replaced it with a "clearly established" rights standard in *Harlow v. Fitzgerald*.²² In *Harlow*, the Court held that "[p]ublic officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which [a] reasonable person would have known."²³ The Court reasoned that officers' entitlement to qualified immunity should not depend on whether they acted in good faith, because determining officers' intentions would burden officers with having to defend themselves in litigation and take them away from doing their jobs.²⁴ To protect officers from having to participate in time-consuming discovery and trial defending against "insubstantial" claims, the Court replaced an assessment of officers' intentions with an assessment of whether of-

¹⁸ Adelman, *supra* note 16 (citing *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)).

¹⁹ Adelman, *supra* note 16.

²⁰ *Pierson v. Ray*, 386 U.S. 547, 557, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967); see also Day et al., *supra* note 10, at 9; Joanna Schwartz, *Qualified Immunity Is Burning a Hole in the Constitution*, POLITICO (Feb. 19, 2023, 7:00 AM), <https://www.politico.com/news/magazine/2023/02/19/qualified-immunity-is-burning-a-hole-in-the-constitution-00083569> [<https://perma.cc/QV53-U7L2>].

²¹ *Pierson*, 386 U.S. at 556–57; see also Novak, *supra* note 8, at 2; Schwartz, *supra* note 20.

²² *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); see also Carlisle, *supra* note 13; Schwartz, *supra* note 20.

²³ *Harlow*, 457 U.S. at 818.

²⁴ *Harlow*, 457 U.S. at 815–20; see also Schwartz, *supra* note 20.

ficers had sufficient notice that their conduct was unlawful.²⁵ Consequently, under *Harlow*, unless plaintiffs could identify “clearly established law” that put officers on notice that their conduct was prohibited, officers would be entitled to qualified immunity.²⁶

Although the Court in *Harlow* did not specify what it meant by “clearly established law,” the Court’s decisions over the next four decades created an increasingly narrow standard that has become extremely difficult for Section 1983 plaintiffs to meet.²⁷ After the *Harlow* decision, federal courts began applying a two-part test to determine whether to grant qualified immunity to police officers accused of violating people’s constitutional rights.²⁸ In order to proceed to trial and overcome officers’ claims of qualified immunity, potential plaintiffs were required to show both that a violation of a clearly established statutory or constitutional right occurred and that a reasonable person would have known that his behavior constituted such a violation.²⁹ In use of force cases this typically meant a violation of the Fourth Amendment.³⁰ Applying the Supreme Court’s standard for use of force set forth in *Graham v. Connor*, plaintiffs were required to show that the officers’ use of force was objectively “unreasonable” under the totality of the circumstances.³¹

In *Anderson v. Creighton*, the Supreme Court indicated a right is “clearly established” if there is case law that has addressed the specific issue in dispute or has sufficiently detailed the contours of the right to make it indisputable that the officers’ conduct was

²⁵ *Harlow*, 457 U.S. at 808, 813–15, 818–19 & n.35; see also Day et al., *supra* note 10, at 9, 14–15; Joanna Schwartz, Opinion, *Supreme Court Just Doubled Down on Flawed Qualified Immunity Rule. Why that Matters*, USA TODAY (Oct. 19, 2021, 7:00 PM), <https://www.usatoday.com/story/opinion/2021/10/19/qualified-immunity-supreme-court-doubles-down/8506437002/> [<https://perma.cc/V4YV-7C4G>].

²⁶ *Harlow*, 457 U.S. at 818.

²⁷ Schwartz, *supra* note 20.

²⁸ See, e.g., *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (per curiam).

²⁹ See Harper Neidig & Marty Johnson, *Police Reform Fight Hinges on Qualified Immunity*, THE HILL (May 25, 2021, 6:00 AM), <https://thehill.com/homenews/house/555172-police-reform-fight-hinges-on-qualified-immunity/> [<https://perma.cc/T8BK-BFQ3>].

³⁰ See, e.g., Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> [<https://perma.cc/U5ZK-PWSZ>]; see also Day et al., *supra* note 10, at 9; Neidig & Johnson *supra* note 29; Schwartz, *supra* note 20.

³¹ Schwartz, *supra* note 20 (citing *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

unlawful.³² The Court has repeatedly admonished lower courts to avoid defining “clearly established law” at a “high level of generality.”³³ Through a series of decisions, including *Brosseau v. Haugen*,³⁴ *Pearson v. Callahan*,³⁵ *Ashcroft v. al-Kidd*,³⁶ *Mullenix v. Luna*,³⁷ *Kisela v. Hughes*,³⁸ *City of Tahlequah v. Bond*,³⁹ and *Rivas-Villegas v. Cortesluna*,⁴⁰ the Supreme Court enunciated that “clearly established” law means that there is a prior court decision from either the same appellate jurisdiction or the U.S. Supreme Court,⁴¹ provided that the precedent has facts so similar to those in the current plaintiffs’ case that officers would have been put on notice that what they were doing was wrong.⁴² In practice, this has come to mean that, in order to allow plaintiffs to proceed with their lawsuit, federal courts must be presented with a prior case involving nearly identical facts.⁴³

In fleshing out this “clearly established law” part of the qualified immunity test over the past two decades, federal courts’ qualified immunity decisions increasingly have indicated that even very minor factual distinctions between a plaintiff’s case and a seemingly factually similar prior case will result in a finding that the prior case cannot serve as precedent for the instant one.⁴⁴ For example, in *Baxter v. Bracey*, the Sixth Circuit granted qualified immunity to two police

³² *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

³³ See, e.g., *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 211 L. Ed. 2d 170 (2021); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

³⁴ *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).

³⁵ *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

³⁶ *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

³⁷ *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015).

³⁸ *Kisela v. Hughes*, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018).

³⁹ *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 211 L. Ed. 2d 170 (2021).

⁴⁰ *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 211 L. Ed. 2d 164 (2021).

⁴¹ In its ruling in *Cortesluna*, the Court appears to have signaled that circuit precedent might not be sufficient to constitute “clearly established” law. Throughout the *Cortesluna* decision, the Court repeatedly referenced the absence of specific U.S. Supreme Court case law with the same facts presented in the instant case:

Although “this Court’s case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate . . .” This inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition . . .”

Cortesluna, 142 S. Ct. at 7–8 (internal citations omitted).

⁴² Day et al., *supra* note 10, at 10; Schwartz, *supra* note 20.

⁴³ Carlisle *supra* note 13; Neidig & Johnson *supra* note 29.

⁴⁴ Day et al., *supra* note 10, at 18.

officers, reasoning that the officers' deployment of a police dog against a suspect who had surrendered and was sitting with his hands up was factually dissimilar to a prior case that held it was unlawful to use a police dog against an unarmed suspect lying on the ground with his hands at his sides.⁴⁵ The court reasoned that the factual discrepancies prevented the defendants' from having "notice that a canine apprehension was unlawful in these circumstances."⁴⁶ Consequently, the factual specificity that the U.S. Supreme Court has required to satisfy the "clearly established law" prong has resulted in federal courts increasingly granting qualified immunity even in cases where officers have engaged in egregious behavior.⁴⁷

Establishing that qualified immunity is not applicable in any given case was made more convoluted in 2009. In *Pearson v. Callahan*, the Court ruled that it is not necessary for a court to consider the reasonableness of an officer's conduct if there is no "clearly established law" (meaning, no prior decided case with identical facts) providing the officer with notice that such conduct is wrongful.⁴⁸ Effectively, *Pearson* allows federal courts to skip the first part of the test—the determination of whether there was a constitutional or statutory violation—and, instead, make a ruling based solely on the existence, or not, of a precedent case (one which must have identical or nearly identical facts).⁴⁹ If a court does not make a determination that a right has been violated in a case before it, then the facts

⁴⁵ *Baxter v. Bracey*, 751 Fed. Appx. 869, 872 (6th Cir. 2018).

⁴⁶ *Baxter*, 751 Fed. Appx. at 872.

⁴⁷ See, e.g., Chung et al., *supra* note 30 (reporting Reuters' investigation of incidents where police engaged in excessive force, and yet were granted qualified immunity); Denby *supra* note 8; Reed *supra* note 12; Martin Kaste, 'Qualified Immunity': A Doctrine That Made It Much Harder to Sue The Police, NPR: ALL THINGS CONSIDERED (June 8, 2020), <https://www.npr.org/2020/06/08/872470083/qualified-immunity-a-doctrine-that-made-it-much-harder-to-sue-the-police> [<https://perma.cc/5S4H-MVAX>]; Schwartz, *supra* note 20; Nick Sibilla, *Cop Who Accidentally Shot 10-Year-Old When Aiming For Family Dog Can't Be Sued, Federal Court Rules*, FORBES (July 18, 2019, 9:30 AM), <https://www.forbes.com/sites/nicksibilla/2019/07/18/cop-who-accidentally-shot-10-year-old-when-aiming-for-family-dog-cant-be-sued-federal-court-rules> [<https://perma.cc/9UNL-VELA>]; see also Editorial Bd., *Fix Qualified Immunity Travesty That Lets Police Off the Hook After Violating Civil Rights*, USA TODAY (July 27, 2021, 3:16 PM), <https://www.usatoday.com/story/opinion/todays-debate/2021/07/08/congress-must-reform-qualified-immunity-policing-travesty/7778437002/> [<https://perma.cc/6U33-45RL>].

⁴⁸ *Pearson v. Callahan*, 555 U.S. 223, 226, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

⁴⁹ Chung et al., *supra* note 30; see also Day et al., *supra* note 10, at 10; Schwartz, *supra* note 20.

of that case cannot be used as a precedent to “clearly establish” the right in later cases.⁵⁰

The impact of the *Pearson* decision is reflected in research from 2020. The results suggest that the ruling has substantially limited the ability of plaintiffs to overcome officers’ claims of qualified immunity.⁵¹ The findings show that federal courts have increasingly skipped determining whether police used excessive force in violation of the Fourth Amendment, and granted immunity to the police in more than half of the excessive force cases reviewed between 2015 and 2019.⁵² The study also found that civil rights lawyers were increasingly declining to take cases that they thought had merit because they did not think they could meet the high bar of finding a prior case with near identical facts.⁵³ The increasing possibility that potentially meritorious civil cases are going unaddressed because of judicially-created technicalities, at a time when the public is calling for greater police accountability,⁵⁴ exacerbates already strained relations between the populace and government actors.

Pearson’s limiting of “clearly established” precedents adds to an existing problem of precedent-building in high-profile excessive force cases, such as George Floyd’s and Breonna Taylor’s, that were settled out of court. When such high-profile cases are settled before a court can determine whether police used excessive force in violation of the Fourth Amendment, the settlements prevent the facts of those cases from becoming applicable precedents in later cases where victims endure similar police conduct.⁵⁵ For instance, it is quite conceivable that if George Floyd’s case had not been settled with the City of Minneapolis in 2020, officer Derek Chauvin could have been shielded from liability by qualified immunity because there was no prior case with near identical facts within that circuit to meet the “clearly established” law standard.⁵⁶ Indeed, in at least eight different states, officers who have killed people with a knee on the back or neck in the same manner in which Chauvin killed Floyd, have been granted qualified immunity in civil rights lawsuits brought against them.⁵⁷

Aside from making it increasingly difficult for plaintiffs to meet the

⁵⁰Day et al., *supra* note 10, at 10.

⁵¹Chung et al., *supra* note 30.

⁵²Chung et al., *supra* note 30.

⁵³Chung et al., *supra* note 30.

⁵⁴See Doherty et al., *supra* note 6; White et al., *supra* note 6, at 452 (opining that “the momentum for change seem[ed] overwhelming” at that time).

⁵⁵Chung et al., *supra* note 30; Schwartz, *supra* note 20.

⁵⁶Schwartz, *supra* note 20.

⁵⁷Schwartz, *supra* note 20.

narrow, high-bar of finding prior cases with near identical facts, the Supreme Court's "clearly established" law standard has also led to inconsistencies in how cases with near-identical facts are treated across different circuits.⁵⁸ A victim of excessive force in one circuit may have a "clearly established" law precedent available to overcome an officer's claim of qualified immunity, whereas a victim of the exact same type of excessive force may not have a "clearly established" legal precedent based on those facts in another circuit.⁵⁹ Accordingly, officers will be immune from suit in the circuit without the precedent case.⁶⁰

Differences in judges' jurisprudential and political philosophies may also lead to inconsistencies in the application of qualified immunity across circuits.⁶¹ For instance, Reuters' analysis of courts' granting of qualified immunity to police officers in excessive force cases since 2005 found that the U.S. Court of Appeals for the Fifth Circuit, which tends to be more politically conservative, granted police officers' requests for qualified immunity in 64% of excessive force cases.⁶² In contrast, the research found that the Ninth Circuit, which tends to be more politically liberal, granted police officers' requests for qualified immunity in 42% of excessive force cases during the same time period.⁶³ These inconsistencies are exacerbated further by settlements of high-profile cases. While such settlements have become prevalent, they are not the result of a fully litigated trial. This can lead to victims of virtually identical police excessive force experiences being treated differently either across or within a particular circuit.⁶⁴ In the next Part, we argue that rather than holding officers to standards set by the judiciary, the more acceptable practice—and one which would be more in line with current demands for police accountability—would be to assess the behavior of accused officers against known practice, policy, standards and training within the profession and the relevant empirical evidence related to each.

III. POLICING AND THE PREVENTION OF UNNECESSARY HARM

To adequately address public concerns about police accountability

⁵⁸ See Andrew Chung, Lawrence Hurley, Andrea Januta, Jackie Botts & Jaimi Dowdell, *Shot by Cops, Thwarted by Judges and Geography*, REUTERS (August 25, 2020, 10:00 AM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-variations/> [<https://perma.cc/98VE-83LD>].

⁵⁹ Chung et al., *supra* note 58.

⁶⁰ Chung et al., *supra* note 58.

⁶¹ Chung et al., *supra* note 58.

⁶² Chung et al., *supra* note 58.

⁶³ Chung et al., *supra* note 58.

⁶⁴ Chung et al., *supra* note 30; Schwartz, *supra* note 20.

for lethal harm, policing should not be exempt from current demands for evidence-based criminal justice practices. When a documented body of empirical evidence exists establishing the harmfulness of specific police behaviors, narrowly constructed case law should not preclude officers from civil liability when they engage in those behaviors. The following excerpt from Joanna Schwartz's 2023 article, "Qualified Immunity Is Burning a Hole in the Constitution" supports our suggestion that empirical evidence related to police practice, policy, standards and training, not judicial opinions, should govern whether officers will be immune from the consequences of their actions:

Even if officers learned about the cases that clearly establish the law for qualified immunity purposes, there is no reason to believe that they could remember the facts and holdings of those cases and then recall those facts and holdings during high-speed, high-stress interactions. As one federal judge wrote, "It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: 'Are the facts here anything like the facts in *York v. City of Las Cruces*?'⁶⁵

Policing has been identified as a profession for more than eighty years,⁶⁶ consequently we suggest that police be treated like other professionals. There are practices, policies, standards and training that identify appropriate and inappropriate behavior. There are training academies and seminars designed to convey information about expected police performance. There is a wide array of research on police practice that is publicly available;⁶⁷ and, there are a multitude of policing organizations that meet regularly to share practical and legal knowledge related to law enforcement operations.⁶⁸ Much of the training is scenario based and designed to prepare officers for

⁶⁵Schwartz, *supra* note 20; see also *York v. City of Las Cruces*, 2007 WL 9734088 (D.N.M. 2007), *aff'd*, 523 F.3d 1205 (10th Cir. 2008) (affirming the district court ruling that three police officers were not entitled to qualified immunity for allegedly violating the plaintiff's First and Fourth Amendment rights during an arrest where the suspect, James York, sustained substantial physical injuries).

⁶⁶George L. Kelling & Mark H. Moore, U.S. Dep't of Just., Off. of Just. Programs, *The Evolving Strategy of Policing*, 4 PERSP. ON POLICING 1 (1988), <https://www.ncjrs.gov/pdffiles1/nij/114213.pdf>.

⁶⁷Much of this work was conducted by police organizations, academics, journalists, legal, and community-based groups.

⁶⁸Examples of such organizations include the International Association of Chiefs of Police, the Major City Chiefs Association, the Fraternal Order of Police, the National Organization of Black Law Enforcement Executives, and the National Sheriff's Association, in addition to state police chiefs associations and state police officer associations.

circumstances that may arise in the real world.⁶⁹ While it is true that vignettes cannot adequately prepare an officer for all “high-speed, high-stress interactions,” there are recurring patterns of harmful police-civilian encounters that have developed over time that make it appropriate to apply a “knew or should have known” standard when assessing whether an officer is entitled to qualified immunity (if the concept continues to exist).⁷⁰ In the sections in this Part, we focus on four areas of concern: life-threatening restraint techniques, the use of chemical irritants, conducted energy devices, and contagious shooting.

A. Life-Threatening Restraint Techniques: What We Know

Deadly force is defined as the amount of force capable of causing death.⁷¹ Several techniques that police use to restrain people have caused death, even when the underlying behavior was non-violent, a minor infraction, or did not constitute an offense at all.⁷² Neck restraints are an example. They typically come in two forms—a restraint that cuts off the flow of air to a suspect’s lungs, commonly known as a chokehold; and, a maneuver that reduces the flow of blood to the brain, commonly known as a vascular neck restraint or carotid.⁷³

During chokeholds the flow of oxygen is restricted by placing an arm or object (e.g., police baton) across the front of an individual’s neck/throat. Chokeholds are generally not approved within departmental policy, unless the situation is one in which the officer would

⁶⁹Michael D. Lynch, *Developing a Scenario-Based Training Program: Giving Officers a Tactical Advantage*, 74 FBI L. ENFT BULL. 1 (2005).

⁷⁰See, e.g., Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), <https://www.cato.org/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police> [<https://perma.cc/UR8X-MBYU>].

⁷¹INT’L ASS’N OF CHIEFS OF POLICE [IACP], NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE (2020), [https://www.iacp.org/sites/default/files/2020-07/National Consensus Policy On Use Of Force%202020%20v3.pdf](https://www.iacp.org/sites/default/files/2020-07/National%20Consensus%20Policy%20On%20Use%20Of%20Force%202020%20v3.pdf) [<https://perma.cc/P85J-4XQR>].

⁷²The deaths of Freddie Gray in Baltimore, Maryland and Eric Garner in New York City serve as examples. See Delores Jones-Brown, Akiv Dawson, Kwan Lamar Blount-Hill, Kenethia McIntosh-Fuller, Paul Oder & Henry F. Fradella, *Am I My Brother’s Keeper: Can Duty to Intervene Policies Save Lives and Reduce the Need for Special Prosecutors in Officer-Involved Homicide Cases?*, 57 CRIM. L. BULL. 675 (2021).

⁷³See, e.g., COUNCIL ON CRIM. JUST., TASK FORCE ON POLICING, CHOKEHOLDS AND OTHER NECK RESTRAINTS: POLICY ASSESSMENT (2021), [https://assets.foleon.com/eu-west-2/uploads-7e3kk3/41697/pdf - chokeholds.d78d7aa1fada.pdf](https://assets.foleon.com/eu-west-2/uploads-7e3kk3/41697/pdf-chokeholds.d78d7aa1fada.pdf) [<https://perma.cc/425E-YW7B>]; Jack Ryan, *Neck Restraints Choke Holds/Carotid Holds What Law Enforcement Policy/Training Tells Us The Medical/Scientific Debate What the Cases Tell Us*, LEGAL LIAB. & RISK MGMT. INST. (Sept. 8, 2020), <https://www.lirmi.com/articles/legal-updates/2020-chokeholds/> [<https://perma.cc/PT9L-GZCK>].

have been authorized to use deadly force, that is, one in which the person confronted represented an imminent risk of death or serious bodily injury to an officer or another person.⁷⁴ In addition to temporarily blocking the intake of air, chokeholds have been known to cause damage to the trachea and result in a person suffocating.⁷⁵ The New York City Police Department (NYPD) banned the use of chokeholds in 1993.⁷⁶ Nonetheless, in 2014, an NYPD officer used what has been debated as either a chokehold or carotid restraint on Eric Garner which resulted in the death of the forty-three-year-old father of six.⁷⁷ The officer was not criminally indicted, but the case did result in a \$5.9 million civil settlement.⁷⁸ Police had originally approached Garner for allegedly selling loose cigarettes.⁷⁹

The neck-restraint-related death of Eric Garner was not an isolated incident in contemporary policing. Additional examples include the deaths of Allen Simpson in Dallas, Texas; Dustin Boone in Las Vegas, Nevada; Gerald Arthur in New Orleans, Louisiana; Elijah Mc-

⁷⁴ E.g., Memorandum from Deputy Att'y Gen. Lisa Monaco, Chokeholds & Carotid Restraints; Knock & Announce Requirement (Sept. 13, 2021), https://www.justice.gov/d9/pages/attachments/2021/09/14/2021.09.13_chokehold_carotid_restraint_knock_and_announce_policy_final_0.pdf [<https://perma.cc/9T68-8MZJ>] ("I am directing the Department's law enforcement components to revise their policies to explicitly prohibit the use of chokeholds and the carotid restraint technique unless deadly force is authorized . . ."); see also Ewan Palmer, *More Than a Dozen Police Departments Have Banned Neck Holds Since George Floyd's Death—Minneapolis Police Hasn't*, NEWSWEEK (June 4, 2020, 7:03 AM), <https://www.newsweek.com/minneapolis-police-ban-neckhold-restraint-george-floyd-1508626> [<https://perma.cc/6BY7-7W2W>].

⁷⁵ Jillian M. Berkman, Joseph A. Rosenthal & Altaf Saadi, Viewpoint, *Carotid Physiology and Neck Restraints in Law Enforcement: Why Neurologists Need to Make Their Voices Heard*, 78 JAMA NEUROLOGY 267 (2020), <https://doi.org/10.1001/jamaneurol.2020.4669>.

⁷⁶ The NYPD chokehold ban reads: "Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air." *Patrol Guide: Force Guidelines, Procedure No. 221-01*, N.Y.C. POLICE DEP'T (June 1, 2016), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-01-force-guidelines.pdf [<https://perma.cc/4PCX-UNQV>].

⁷⁷ Christina Carrega, *5 Years after Eric Garner's Death a Look Back at the Case and the Movement It Sparked*, ABC News (July 16, 2019, 2:42 AM), <https://abcnews.go.com/US/years-eric-garners-death-back-case-movement-sparked/story?id=63847094> [<https://perma.cc/6CS3-YJPZ>].

⁷⁸ J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N.Y. TIMES (July 13, 2015), <https://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html> [<https://perma.cc/GCJ6-NKUA>].

⁷⁹ Conor Friedersdorf, *Eric Garner and the NYPD's History of Deadly Chokeholds*, THE ATLANTIC (Dec. 4, 2014), <https://www.theatlantic.com/national/archive/2014/12/context-for-the-punishment-free-killing-of-eric-garner/383413/> [<https://perma.cc/VGF7-G73P>].

Clain in Aurora, Colorado; Muhammad Abdul in Phoenix, Arizona; and Hector Arreola in Columbus, Georgia.⁸⁰ Many police agencies banned the use of chokeholds as early as the 1980s.⁸¹ In the aftermath of the death of George Floyd, the use of chokeholds has been restricted in nearly half of all U.S. states.⁸²

In contrast to chokeholds, vascular neck restraints are sometimes approved by law enforcement agencies as a lesser means of force aimed at gaining control of a person that is not responsive to police presence or police commands.⁸³ A vascular neck restraint is the application of force on the sides of an individual's neck via the forearm and bicep of an officer. This is intended to incapacitate an individual by causing a temporary disruption in the flow of blood to the brain without causing any permanent or long-term effects.⁸⁴ In its Standard 4.1.7, the Commission on Accreditation for Law Enforcement Agencies (CALEA),⁸⁵ a national police accrediting agency, specifically prohibits the use of chokeholds unless deadly force is authorized under the kind of situation in which the officer and civilian are

⁸⁰ See, e.g., Monika Evstatieva & Tim Mak, *How Decades of Bans on Police Chokeholds Have Fallen Short*, NPR: MORNING Ed. (June 16, 2020, 5:11 AM), <https://www.npr.org/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short> [<https://perma.cc/E3HL-UYRF>]; Katie Wedell, Cara Kelly, Camille McManus & Christine Fernando, *George Floyd Is Not Alone. "I Can't Breathe" Uttered by Dozens in Fatal Police Holds Across U.S.*, USA TODAY (June 13, 2020, 3:00 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/06/13/george-floyd-not-alone-dozens-said-cant-breathe-police-holds/3137373001/> [<https://perma.cc/9WUT-QB3W>].

Like the Garner case, cases in the group that resulted in civil recoveries for damages were pursuant to a settlement and thus did not provide a legal precedent for similar cases in the future.

⁸¹ Evstatieva & Mak, *supra* note 80.

⁸² Emma Tucker, *Bans on Chokeholds for Federal Officers Latest in Nationwide Push to Hold Police to a "Higher Standard,"* CNN (Sept. 15, 2021, 5:56 PM), <https://www.cnn.com/2021/09/15/us/police-accountability-george-floyd/index.html> [<https://perma.cc/WZ3U-DUEX>].

⁸³ William P. Bozeman et al., *Safety of Vascular Neck Restraint Applied by Law Enforcement Officers*, 92 J. FORENSIC & LEGAL MED. 102446 (2022), <https://doi.org/10.1016/j.jflm.2022.102446>.

⁸⁴ Von Kliem, *Top Medical Experts Explore Safety of Vascular Neck Restraints. Will Their Findings Matter?*, FORCE SCI. NEWS (Nov. 11, 2022), <https://www.forcescience.com/2022/11/top-medical-experts-explore-safety-of-vascular-neck-restraints/> [<https://perma.cc/7YVU-QRPG>].

⁸⁵ According to its website, CALEA was created in 1979 "as a credentialing authority through the joint efforts of law enforcement's major executive associations. The CALEA program seals are reserved for use by those public safety agencies that have demonstrated compliance with CALEA standards and have been awarded CALEA Accreditation by the Commission." *About Us*, CALEA, <https://calea.org/> [<https://perma.cc/P3V2-5CBZ>] (last visited May 5, 2023) (touting CALEA accreditation as the "gold standard in public safety").

engaged,⁸⁶ but in its Standard 4.1.6 merely emphasizes the need for special training when vascular neck restraints are an approved level of force within a police agency.⁸⁷

The lethal nature of neck restraints has been documented in many cases. As early as 1982, the Los Angeles Police Department restricted the use of carotid holds after a Los Angeles Times report revealed that sixteen deaths were attributable to the carotid restraint in the previous seven years.⁸⁸ Between 2016 and 2018, more than 100 individuals were seriously injured across the state of California when a vascular neck restraint was used.⁸⁹ While some argue that vascular neck compressions are a safe technique and that deaths and serious injuries are unlikely to occur,⁹⁰ critics argue that the use of any form of neck restraint should not be used in democratic societies.⁹¹ Neurologists report that medical concerns may arise within five seconds of the application of a neck restraint,⁹² a fact that led the American Academy of Neurology to call for a national prohibition on law enforcement use of all types of neck restraints.⁹³ Even some in law enforcement leadership and labor organizations recom-

⁸⁶The spirit of the law in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), would thus limit such use to cases in which the person confronted by the police presents a significant risk of serious physical injury or death.

⁸⁷CALEA, LAW ENFORCEMENT STANDARDS MANUAL (6th ed. 2022) (on file with authors). Note that the CALEA *Standards Manual* is not accessible to the public. The third author received this information from a CALEA-accredited agency.

⁸⁸Javier Panzar, *Police Wrestle with Definition of Chokehold*, L.A. TIMES (Dec. 9, 2014), <https://www.latimes.com/nation/la-na-chokehold-20141210-story.html> [<https://perma.cc/JSE2-BERQ>]; see also Lawren Linehan & Wesley Juhl, *ACLU Calls on Las Vegas Police to Stop Using Neck Restraints*, TRAINING INST. ON STRANGULATION PREVENTION (May 15, 2018), <https://www.strangulationtraininginstitute.com/aclu-calls-on-las-vegas-police-to-stop-using-neck-restraints/> [<https://perma.cc/FU8L-LEBR>].

⁸⁹Ben Poston, *Police Agencies are Banning a Controversial Neck Hold After George Floyd's Death*, L.A. TIMES (June 5, 2020), <https://www.latimes.com/california/story/2020-06-05/george-floyd-carotid-neck-hold-police> [<https://perma.cc/379T-9D45>].

⁹⁰Bozeman et al., *supra* note 83, at *3.

⁹¹Laura Rose Matteis, Note, *Stay Away From the Neck: Why Police Chokeholds and Other Neck Restraints Violate International Human Rights*, 38 T. JEFFERSON L. REV. 101 (2015); Kimberly Kindy, Kevin Schaul & Ted Mellnik, *Half of the Nation's Largest Police Departments Have Banned or Limited Neck Restraints Since June*, WASH. POST (Sept. 6, 2020, 10:47 PM), <https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/> [<https://perma.cc/UA5T-L8VQ>].

⁹²Berkman et al., *supra* note 75, at 267–68.

⁹³AAN Position Statement on the Use of Neck Restraints in Law Enforcement, AM. ACAD. NEUROLOGY (June 9, 2021), <https://www.aan.com/advocacy/use-of-neck-restraints-position-statement> [<https://perma.cc/VV68-DBHJ>]; see also Ryan Prior, *Use of Neck Restraints by Law Enforcement Should Be Prohibited*, American Academy

mend vascular neck restraints be removed from the options police officers can use, except in deadly force situations.⁹⁴ Consequently, we suggest that their use should not entitle officers to claims of qualified immunity except in the rarest of cases.

The death of George Floyd while he was in the custody of the Minneapolis Police Department brought renewed attention to other potentially lethal techniques that officers use to restrain civilians.⁹⁵ It is now well recognized that death may occur when an officer places a knee on an individual's back or neck or places his or her entire body weight on a suspect as a means to control him⁹⁶ or her.⁹⁷ Though testimony during the criminal trial of Derek Chauvin indicated that his behavior was outside the training procedures for the Minneapolis Police Department (MPD),⁹⁸ cases in which officers kneel on the necks of persons in custody continue to appear in the national news.⁹⁹

In other cases, persons in custody die when officers "pile on" their bodies, compressing their chest, until the individuals cannot breathe.¹⁰⁰ Positional asphyxia is commonly the cause of death in such incidents. The 1995 death of Jonny Gammage in Brentwood, Pennsylvania (a suburb of Pittsburgh), and the 2023 death of Irvo Otieno in Virginia are examples of the inherent danger of this police

of Neurology Says, CNN (June 10, 2021, 6:31 AM), <https://www.cnn.com/2021/06/10/health/american-academy-of-neurology-neck-restraints/index.html> [<https://perma.cc/PJ4H-5JM9>].

⁹⁴IACP, *supra* note 71, at 15 ("Given the inherently dangerous nature of vascular neck restraints, the *Consensus Policy* allows their use only when deadly force is authorized.").

⁹⁵Wedel et al., *supra* note 80.

⁹⁶The 1995 police killing of Jonny Gammage in Brentwood, Pennsylvania, serves as an example. See, e.g., Lee Wolverton, "I'm Only 31": The Legacy of Jonny Gammage, *PITT. MAG.* (Sept. 18, 2019), <https://www.pittsburghmagazine.com/im-only-31-the-legacy-of-jonny-gammage/> [<https://perma.cc/C855-U6KV>].

⁹⁷The Dajeria Becton case serves as an example. See Jones-Brown et al., *supra* note 72, at 679, 726.

⁹⁸Associated Press, *Police Chief: Kneeling on George Floyd's Neck Violated Policy*, *POLITICO* (Apr. 5, 2021, 5:33 PM), <https://www.politico.com/news/2021/04/05/george-floyd-kneeling-trial-479090> [<https://perma.cc/XLW9-YYQQ>].

⁹⁹Stella Chan & Leah Asmelash, *Man Dies After Police Kneel on His Neck for Nearly 5 Minutes, Family Says in Wrongful Death Claim*, CNN (Feb. 24, 2021, 3:37 AM), <https://www.cnn.com/2021/02/23/us/angelo-quinto-antioch-police-department-death-trnd/index.html> [<https://perma.cc/G8HG-JVA4>]; Grace Eliza Goodwin & Rebecca Cohen, *A Louisville Police Sergeant Ignored that a Cop Kneelt on a Man's Neck for Nearly 2 Minutes—But Did Note that An Officer Broke One of Their Fingernails, DOJ Alleges*, *INSIDER* (Mar. 8, 2023, 12:33 PM), <https://www.insider.com/louisville-police-ignored-officer-kneeling-on-mans-neck-doj-alleges-2023-3> [<https://perma.cc/R947-NUZF>].

¹⁰⁰See Wolverton, *supra* note 96.

practice.¹⁰¹ Similarly, “hog tying” (also referred to as a hobble restraint) or handcuffing individuals behind their backs, placing them facedown, and then kneeling or sitting on their bodies are also recognized ways in which civilians have died in police custody, due to positional asphyxia.¹⁰² Since information about all of these inherently dangerous practices has long been known within the profession, we argue that it is not necessary for a plaintiff to rely on a particular judicial ruling to have a valid civil cause of action when a case involves any of these police actions. The policing profession is already on notice that these restraint techniques are potentially lethal and should not be used to detain or arrest someone who is not engaged in life-threatening behavior.¹⁰³

B. Chemical Irritants: What We Know

Law enforcement's response to the August 2014 protest in Ferguson, Missouri, following the death of Michael Brown, raised

¹⁰¹ Wolverton, *supra* note 96; Campbell Robertson & Neelam Bohra, *Another Mental Illness Tragedy Spurs Questions About Virginia's Health System*, N.Y. TIMES (Mar. 27, 2023), <https://www.nytimes.com/2023/03/23/us/irvo-otieno-virginia-mental-health.html> [<https://perma.cc/GP6L-U9F9>].

¹⁰² See Katie Wedell et al., *supra* note 80; Knowledge of the fatal nature of such actions is not new. Research supported by the U.S. Department of Justice in the mid-1990s also identified these police practices as ways in which civilians were known to die in police custody. See *Positional Asphyxia - Sudden Death*, NAT'L L. ENFORCEMENT TECH. CTR. BULL. (Nat'l Inst. of Just. June 1995) [hereinafter NLETC BULL.], <https://www.ncjrs.gov/pdffiles/posasph.pdf> [<https://perma.cc/C8H4-32NU>] (drawing from a report prepared by International Association of Chiefs of Police based on research conducted by forensic pathology professor Dr. Charles S. Petty and medical examiner Dr. Edward T. McDonough). This report notes that some of the of actions police took against George Floyd could, on their own, result in sudden death for individuals who already suffer from preexisting medical conditions. In fact, nearly a decade before Floyd's death, David Smith died from positional asphyxia resulting from being held face down by an officer of the MPD. Martin Kaste, *Minneapolis Police Were Sued A Decade Ago In Similar Restraint Case*, NPR: ALL THINGS CONSIDERED (May 29, 2020, 8:26 PM), <https://www.npr.org/2020/05/29/865341322/minneapolis-police-were-sued-a-decade-ago-in-similar-restraint-case> [<https://perma.cc/B8GX-BCYE>]; see also David K. Li, *Man's Family Sues Sacramento Police and Security Guards After Death in Custody*, NBC NEWS (July 9, 2020, 4:51 PM), <https://www.nbcnews.com/news/us-news/man-s-family-sues-sacramento-police-security-guards-after-death-n1233348> [<https://perma.cc/HZQ7-CJTS>]; Craig Smith, *TPD In-custody Death: Independent Autopsy Puts More Blame on Officers*, KGUN ABC-CHANNEL 9 (July 21, 2020, 11:46 AM), <https://www.kgun9.com/news/local-news/tpd-in-custody-death-independent-autopsy-puts-more-blame-on-officers> [<https://perma.cc/B5S8-PVUD>].

¹⁰³ The Freddie Gray case in Baltimore serves as an example. To be clear, the threat must be against the officer or the public, not against oneself. In the case of George Floyd, he began to hurt himself (by banging his head against the interior of the police vehicle window) before he was removed from the car and killed. See Jones-Brown et al, *supra* note 72, at 686 n.46.

serious questions about the policing of public protests.¹⁰⁴ Of considerable concern was the use of tear gas on peaceful protestors.¹⁰⁵ Though the use of chemical irritants is considered a non-lethal alternative to physical force,¹⁰⁶ police deployment of tear gas or OC pepper spray has caused death or serious injury when misused or used on persons with various preexisting health conditions such as asthma, COPD, or other respiratory difficulties.¹⁰⁷ We contend that the assessment of whether qualified immunity should apply for officers who cause serious injury while using chemical irritants should not turn on the narrow question of whether there is a precedent case with nearly identical facts. Instead, it should turn on whether excessive force was used under the circumstances.

A 1994 National Institute of Justice (NIJ) report examining the use of OC spray, hereinafter referred to as pepper spray, noted its growing popularity and acceptance among police agencies as, “a safe and effective method of incapacitating violent or threatening subjects.”¹⁰⁸ It later refers to “hostile arrestees”¹⁰⁹ and “actively combative individuals who have resisted or ignored verbal commands, or when there is a danger of officer injury.”¹¹⁰ Absent such circumstances, the use of chemical irritants should be considered excessive force. In other words, we suggest that chemical irritants should not be used simply because a civilian is “uncooperative” or “noncompliant,” but is not violent, threatening, or physically combative. We also contend that when an officer uses chemical irritants under circumstances that do not meet these standards, the legal concept of *talem qualem* should apply—meaning that the officer “takes his victim as he finds him”—and, therefore, any unexpected frailty of the injured person is not a valid defense to the

¹⁰⁴ See, e.g., Edward R. Maguire, *New Directions in Protest Policing*, 35 ST. LOUIS U. PUB. L. REV. 67 (2015).

¹⁰⁵ INST. FOR INTERGOV'TL RSCH., OFF. CMTY. ORIENTED POLICING SERVS., U.S. DEPT. OF JUST., AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI (2015); Maguire, *supra* note 104, at 71, 80 (citing Joel Currier, *Judge Orders St. Louis Area Police to Give Protesters Tear Gas Warning and Time to Flee*, ST. LOUIS POST-DISPATCH (Dec. 11, 2014), http://www.stltoday.com/news/local/crime-and-courts/judge-orders-st-louis-area-police-to-give-protesters-tear/article_d93628c7-cc4e-5dfa-9873-cd4baf59ad73.html [<https://perma.cc/52HX-K58M>])).

¹⁰⁶ U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, NAT'L INST. OF JUST., TECH. ASSESSMENT PROGRAM, NCJ 181655, OLEORESIN CAPSICUM: PEPPER SPRAY AS A FORCE ALTERNATIVE (1994) [hereinafter NIJ, *OC Pepper Spray*], <https://www.ojp.gov/pdffiles1/nij/grants/181655.pdf> [<https://perma.cc/8XNE-DWWR>].

¹⁰⁷ NIJ, *OC Pepper Spray*, *supra* note 106, at 3, 5.

¹⁰⁸ NIJ, *OC Pepper Spray*, *supra* note 106, at 1.

¹⁰⁹ NIJ, *OC Pepper Spray*, *supra* note 106, at 2.

¹¹⁰ NIJ, *OC Pepper Spray*, *supra* note 106, at 5.

seriousness of the harm caused by the police action.¹¹¹ It is worth noting that NIJ acknowledged that deaths were known to occur from pepper spray use at the time of issuing its 1994 technical assessment. This report is part of the body of knowledge available within the profession, from which officers are put on notice that deployment of chemicals during public encounters is inherently dangerous.

In addition to pepper spray, tear gas is another chemical irritant used by contemporary police departments, despite its known potential harmful effects. The inherent danger of tear gas use can be traced to its origins. It was used as a weapon during World War I and later banned.¹¹² When a person is exposed to tear gas, it causes the eyes to burn, compromises breathing, and may result in long-term lung damage.¹¹³ "Exposure can cause blindness, chemical burns, respiratory failure, and even death."¹¹⁴ Somewhat ironically, although the use of tear gas is banned during wartime, the police use it during protests as a means to disperse crowds.¹¹⁵ The International Association of Chiefs of Police supports the use of tear gas when other options are not available or not effective, but emphasizes that the use is to prevent injuries.¹¹⁶ However, there have been numerous injuries and deaths from the use of tear gas.¹¹⁷ This has prompted police administrators to place restrictions on its use. For example, in the aftermath of protests surrounding the death of George Floyd, the Dallas Police Department limited its use of tear gas. Tear gas can only be used if approved through the Chief's

¹¹¹ See, e.g., WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 261 (4th ed. 1971).

¹¹² Amanda Arnold, *Tear Gas Is a Chemical Weapon*, *THE CUT* (June 10, 2020), <https://www.thecut.com/2020/06/tear-gas-is-a-chemical-weapon-why-can-cops-use-it.html> [<https://perma.cc/7FQJ-PPES>]; Jessica Moss, *Tear Gas and the Politics of Protest Policing*, *COUNCIL ON FOREIGN RELS.*, (Aug. 26, 2020, 12:00 PM), <https://www.cfr.org/in-brief/tear-gas-and-politics-protest-policing> [<https://perma.cc/8Y98-WLZP>].

¹¹³ Arnold, *supra* note 112.

¹¹⁴ Moss, *supra* note 112.

¹¹⁵ Arnold, *supra* note 112; Moss, *supra* note 112.

¹¹⁶ Andrew Selsky, *Report: 119K People Hurt by Riot-Control Weapons Since 2015*, *AP NEWS* (Mar. 23, 2023), <https://apnews.com/article/tear-gas-protests-black-lives-matter-police-32b9317942e6fd26889cae65753ad001> [<https://perma.cc/KG93-2W69>].

¹¹⁷ Selsky, *supra* note 116; see also Rohini J. Haar, Vincent Iacopino, Nikhil Ranadive, Sheri D. Weiser & Madhavi Dandu, *Health Impacts of Chemical Irritants Used for Crowd Control: A Systemic Review of the Injuries and Deaths Caused by Tear Gas and Pepper Spray*, 17 *BMC PUB. HEALTH* 1 (2017), <https://doi.org/10.1186/s12889-017-4814-6>.

office.¹¹⁸ In Boston, the police can only use tear gas when an on-scene police supervisor sees acts of violence or property damage¹¹⁹ and believes other means to de-escalate the situation would be ineffective.¹²⁰ Since tear gas is a chemical weapon, some police agencies restrict its use to special units such as SWAT teams; and, only allow it to be used by specially trained personnel.¹²¹

Cases involving police use of tear gas are no stranger to the civil courts. Philadelphia settled a class action lawsuit where tear gas was used by police during the George Floyd protests of 2020. The amount awarded was over \$9 million.¹²² Portland, Oregon paid a quarter of a million dollar settlement for police use of tear gas during the 2020 protests.¹²³ *Alsaada v. City of Columbus*¹²⁴ and *Anti Police-Terror Project v. City of Oakland*¹²⁵ are cases in which federal courts, at least temporarily, restricted the use of tear gas, recognizing that such police action is contrary to protecting citizens' rights afforded by the U.S. Constitution.¹²⁶ Although some police leaders have been

¹¹⁸ Jozelyn Escobedo, *Chief Renee Hall Issues Order Limiting Police Use of Tear Gas, Rubber Bullets at Protests*, WFAA NEWS (July 22, 2020, 11:42 AM), <https://www.wfaa.com/article/news/local/chief-rene-hall-issues-order-limiting-police-use-of-tear-gas-rubber-bullets-at-protests/287-779e61ce-a1d8-4673-aa4d-ab17747e20f3> [<https://perma.cc/AX5U-DZZ2>].

¹¹⁹ Given the medical complications that tear gas exposure can cause—including its potential lethality, see *supra* notes 112–114 and accompanying text, the authors feel strongly that tear gas should not be used solely to prevent destruction of property.

¹²⁰ Christopher Gavin, *Kim Janey Signs Ordinance Restricting Boston Police Use of Tear Gas, Rubber Bullets*, BOSTON.COM (May 13, 2021), <https://www.boston.com/news/politics/2021/05/13/kim-janey-signs-ordinance-restricting-boston-police-use-of-tear-gas-rubber-bullets/> [<https://perma.cc/23VE-F75S>].

¹²¹ See *General Order 12.100: Use of Force*, TYLER POLICE DEP'T (June 12, 2020) [hereinafter Tyler PD Gen. Order 12.100], <https://www.cityoftyler.org/home/showpublisheddocument/5549/637348187262030000> [<https://perma.cc/4K3X-KC29>].

¹²² Michael Tanenbaum, *Philly Reaches \$9.25 Million Settlement in Lawsuit Over Police Response to 2020 Protests*, PHILLY VOICE (Mar. 20, 2023), <https://www.phillyvoice.com/philly-protests-police-lawsuit-settlement-george-floyd-tear-gas-i676/> [<https://perma.cc/N5UT-Q2HG>].

¹²³ Claire Rush, *Portland, Oregon Settles Lawsuit Over Police Use of Tear Gas*, AP NEWS (Nov. 29, 2022), <https://apnews.com/article/technology-police-oregon-george-floyd-lawsuits-d5a9ba9112dd31a5a527a065f18f74da> [<https://perma.cc/R2PR-TPPC>].

¹²⁴ *Alsaada v. City of Columbus, Ohio*, 2021 WL 3375834 (S.D. Ohio 2021).

¹²⁵ *Anti Police-Terror Project v. City of Oakland*, 477 F. Supp. 3d 1066 (N.D. Cal. 2020).

¹²⁶ See, e.g., Marc Kovac, *Federal Injunction Prevents Columbus Police From Using Tear Gas, Wooden Bullets*, COLUMBUS DISPATCH (Apr. 30, 2021, 11:14 AM), <https://www.dispatch.com/story/news/politics/state/2021/04/30/federal-judge-bars-columbus-pd-use-tear-gas-wooden-bullets-and-more/7316480002/> [<https://perma.cc/K>].

supportive of ways to improve policing, banning the use of tear gas has not been one of them and state legislatures have similarly been hesitant to ban its use.¹²⁷ While the use of tear gas by law enforcement is not entirely prohibited, these state court settlements and federal court injunctions provide notice to officers that some uses of this chemical irritant against members of the public are wrongful.

Unlike the irritants used in tear gas, *oleoresin capsicum* (OC) is a naturally occurring substance drawn from the oils of cayenne and other peppers.¹²⁸ Like tear gas, use of the irritant by law enforcement officers is intended to incapacitate those who come in contact with the sprayed mist.¹²⁹ Also like tear gas, contact with pepper spray may cause almost immediate burning of the skin and burning, tearing and swelling of the eyes.¹³⁰ Once inhaled, the respiratory tract becomes inflamed and swollen, which restricts the person's capacity to breathe.¹³¹ Consequently, though the effects of exposure to pepper spray are intended to be temporary, serious injuries or death have occurred in relation to its use.¹³² This is particularly true in cases where the substance is sprayed directly into a person's face,¹³³ or when used on someone with a pre-existing health condition. This may include drug and/or alcohol abuse.¹³⁴ Death may also occur if

752-ZU7B]; Jon Kawamoto, *Federal Court Order Restricts Oakland Police Use of Tear Gas, Rubber Bullets*, EAST BAY TIMES (July 31, 2020, 12:19 PM), <https://www.eastbaytimes.com/2020/07/30/federal-court-order-restricts-oakland-police-use-of-tear-gas-rubber-bullets/> [https://perma.cc/ZQ7J-GN9C].

¹²⁷ Lindsey Van Ness, *Tear Gas Bans: A Policing Change Not Gaining Traction*, PEW: STATELINE (Aug. 4, 2020, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/04/tear-gas-bans-a-policing-change-not-gaining-traction> [https://perma.cc/CN3S-NB22].

¹²⁸ NIJ, *OC Pepper Spray*, *supra* note 106, at 1.

¹²⁹ NIJ, *OC Pepper Spray*, *supra* note 106, at 1.

¹³⁰ NIJ, *OC Pepper Spray*, *supra* note 106, at 1.

¹³¹ NIJ, *OC Pepper Spray*, *supra* note 106, at 1.

¹³² One of the most egregious police abuses of pepper spray occurred in East Orange, New Jersey during 1999. Twenty-seven-year-old Earl Faison, an asthmatic, was deliberately sprayed in his nostrils with pepper by a police officer who inaccurately believed that he had killed a female officer days earlier. Earl Faison died from the police encounter and officers were subsequently convicted in federal court for causing his death. Ronald Smothers, *Officers in New Jersey Guilty in Beating Case*, N.Y. TIMES (Dec. 20, 2000), <https://www.nytimes.com/2000/12/20/nyregion/officers-in-new-jersey-guilty-in-beating-case.html> [https://perma.cc/EJ6V-JF23].

¹³³ See Smothers, *supra* note 132.

¹³⁴ See, e.g., John E. Mendelson et al., *Capsaicin, an Active Ingredient in Pepper Sprays, Increases the Lethality of Cocaine*, 28 FORENSIC TOXICOLOGY 33 (2010), <https://doi.org/10.1007/s11419-009-0079-9>.

pepper spray is used on someone who is experiencing positional asphyxia.¹³⁵

Officers are trained in the use of pepper spray and consequently are responsible for the health and safety of the person this level of force is used against. Best practices require officers to inform individuals that they are about to be sprayed before doing so.¹³⁶ This can allow a person to comply with commands and avoid this type of police contact. If officers use pepper spray, they must subsequently provide the sprayed individuals with ventilation and water to flush the chemical out of their eyes. Officers are also required to monitor people for at least thirty minutes after they are sprayed to determine if they are in medical distress.¹³⁷ Common guidelines on the proper use of pepper spray suggest it should not be used on children under age twelve or on persons over age fifty-five. It should not be used on women who are visibly pregnant;¹³⁸ on persons with obvious breathing problems;¹³⁹ or, within one meter, which is 3.4 feet, of the person at whom the spray is directed.¹⁴⁰

Despite these medically-warranted caveats, the written policy of at least one CALEA-accredited police agency which permits the use of pepper spray if necessary to subdue an uncooperative person recommends that it be used prior to making physical contact with the person without specifying any additional prohibitions, guidelines, or restrictions.¹⁴¹ The stated reasoning behind the policy is that pepper spray is the best alternative use of force to minimize injury to the person who is not cooperating and to minimize injury to officer(s). We contend that without clearly stated prohibitions, guidelines, or

¹³⁵ John Granfield, Jami Onnen & Charles S. Petty, Int'l Ass'n of Chiefs of Exec. Brief, Police, Pepper Spray and In-Custody Deaths (1994), <https://www.aele.org/la/w/2009all01/iacp-oc-deaths1994.pdf> [<https://perma.cc/86UL-4CVU>]; Tori Semple, Bryce Jenkins & Craig Bennell, *Injuries and Deaths Proximate to Oleoresin Capsicum Spray Deployment: A Literature Review*, 94 POLICE J. 184 (2021), <https://doi.org/10.1177/0032258X209268>.

¹³⁶ Such notice has even been ordered by courts. See Currier, *supra* note 105.

¹³⁷ NIJ, *OC Pepper Spray*, *supra* note 106, at 4.

¹³⁸ We suggest that if a woman claims to be pregnant, officers must accept that claim and refrain from using pepper spray during the contact with her. The possibility that there might be harm to a fetus should take precedence over officers' belief or disbelief of her claim.

¹³⁹ This would include on persons who are using portable oxygen; who have breathing-related medication on their person; who claim they have a breathing condition; or who are showing obvious physical signs of respiratory distress, such as excessive and persistent coughing, wheezing, or gasping for air.

¹⁴⁰ Otto M.J. Adang & Jos Mensink, *Pepper Spray: An Unreasonable Response to Suspect Verbal Resistance*, 27 POLICING: AN INT'L J. 206 (2004), <https://doi.org/10.1108/13639510410536823>.

¹⁴¹ Tyler PD Gen. Order 12.100, *supra* note 121, § 12.104(E), at 4.

restrictions (similar to those noted in our previous paragraph), this agency's policy leaves substantial room for misuse of this police practice. Because guidelines do exist within the policies of other departments, we contend that there is ample evidence available within the profession, to put officers on notice of appropriate and inappropriate use of pepper spray,¹⁴² despite the deficiencies in this individual agency's written policy.

For example, as noted previously, NIJ suggests that pepper spray may only appropriately be used against crime suspects who are violent and threatening, not as a routine procedure for gaining compliance to police commands in non-life threatening or non-violent situations. In research by the first author of this article, high school students reported being indiscriminately sprayed by police who wanted them to disperse after a school event.¹⁴³ In a successful civil suit against the Windsor, Virginia Police Department, police body-worn camera footage captured an Army lieutenant being pepper sprayed in the face while he was seated in his vehicle with his hands outside the window showing that he was unarmed. He had been stopped for having an improperly displayed license plate.¹⁴⁴ In other publicized incidents, police pepper sprayed a nine-year-old girl in Rochester, New York¹⁴⁵ and a sixty-four-year-old man in Trenton, New Jersey.¹⁴⁶ Citing that this level of force was not appropriate,

¹⁴² Adang & Mensink, *supra* note 140, at 216–17.

Even if one concurs . . . that OC is a relatively safe and effective use-of-force alternative, it does not follow that OC should be the preferred option in situations where suspects are verbally resistant. Designating pepper spray as the preferred option in situations where suspects are verbally resistive seems unreasonable and could even be seen as a form of abuse. Applying a very painful stimulus to a non-violent, non-co-operating suspect (by spraying him with pepper spray) will often be disproportionate given the fact that there are less radical techniques available, if applied well.

Adang & Mensink, *supra* note 140, at 216–17.

¹⁴³ See Delores Jones-Brown, *Debunking the Myth of Officer Friendly: How African American Males Experience Community Policing*, 16 J. CONTEMP. CRIM. JUST. 209, 221 (2000).

¹⁴⁴ Sara Smart & Nouran Salahieh, *An Army Lieutenant Pepper-Sprayed by Virginia Police During a Traffic Stop Was Awarded \$3,600*, CNN (Jan. 20, 2023, 8:51 PM), <https://www.cnn.com/2023/01/18/us/virginia-police-stop-army-lieutenant-award-lawsuit/index.html> [<https://perma.cc/5XHL-YK3A>].

¹⁴⁵ Tim Stelloh, *3 Officers Suspended After Police Pepper Spray 9-Year-Old Girl in Rochester, N.Y.*, NBC NEWS (Feb. 1, 2021, 5:21 AM), <https://www.nbcnews.com/news/us-news/police-pepper-spray-9-year-old-girl-rochester-n-y-n1256313> [<https://perma.cc/95SN-9SNR>].

¹⁴⁶ S.P. Sullivan, *N.J. Man Died in Hospital 18 Days After Police Pepper Sprayed Him. Cop Now Faces Criminal Charge*, NJ.COM NEWS (Jan. 4, 2023, 5:16 PM), <https://www.nj.com/news/2023/01/nj-man-died-in-hospital-18-days-after-police-pepper-sprayed-him-cop-now-faces-criminal-charge.html> [<https://perma.cc/X27R-QK4D>].

each department subsequently disciplined the officers and at least one of these officers faced criminal charges.¹⁴⁷

The outcomes of these cases reconfirm that, as with any police use of force, the use of pepper spray, must be reasonable under the circumstances. In *Wilkins v. City of Tulsa*, the U.S. Court of Appeals for the Tenth Circuit found that when officers had already restrained an individual, the use of pepper spray amounted to excessive force. In reaching the decision that the police were not eligible for qualified immunity, the court considered 1) the severity of the suspected crime; 2) whether the individual was an imminent threat to the safety of the officers or other persons; and, 3) whether the suspect was actively resisting or evading arrest.¹⁴⁸ Applying these factors, the court reasoned that “a reasonable officer would have known that use of pepper spray on Mr. Wilkins when he was facedown, handcuffed, legs secured, and not resisting was unconstitutional. Our precedent clearly established that force against a subdued suspect who does not pose a threat violates the Fourth Amendment.”¹⁴⁹

C. Conducted Energy Devices (e.g. Tasers): What We Know

The conducted energy device (CED) has become common among the less-lethal¹⁵⁰ force options available to and used by police in the United States.¹⁵¹ Axon Enterprise Inc., formerly Taser International Inc., manufactures the most popular and widely-used brand of CEDs; thus the term “taser” has become synonymous with conducted

¹⁴⁷ Stelloh, *supra* note 145; Sullivan, *supra* note 146.

¹⁴⁸ *Wilkins v. City of Tulsa, Oklahoma*, 33 F.4th 1265, 1273 (10th Cir. 2022).

¹⁴⁹ *Wilkins*, 33 F.4th at 1277.

¹⁵⁰ Originally dubbed non-lethal force, as the number of deaths attributed to these devices grew, the language associated with such use was modified to reflect the factual reality that CEDs are not non-lethal, but rather are less-lethal than gunfire. Nonetheless, the use of tasers under certain circumstances is readily capable of causing death and has done so on many occasions. See, e.g., Jo Ciavaglia, Josh Salman & Katie Wedell, *Lethal Force? Tasers Are Meant to Save Lives, Yet Hundreds Die After Their Use by Police*, USA TODAY (Apr. 23, 2021, 2:02 AM), <https://www.usatoday.com/in-depth/news/investigations/2021/04/23/police-use-taser-s-ends-hundreds-deaths-like-daunte-wright/7221153002/> [<https://perma.cc/37KG-D EJR>]; Samantha Kummerer, *An Estimated 500 People Have Died from Police Use of Tasers Nationwide Between 2010-2021*, WTVD ABC 11 NEWS (Jan. 19, 2023), <https://abc11.com/taser-stun-gun-deaths-nc-nationwide-raleigh-police/12719372/> [<https://perma.cc/KT7Z-EPEH>]. For an insightful, albeit somewhat dated (as of this writing more than a decade after the study was originally published), empirical analysis of factors contributing to CED-related deaths, see Michael D. White & Justin Ready, *Examining Fatal and Nonfatal Incidents Involving the TASER: Identifying Predictors of Suspect Death Reported in the Media*, 8 CRIMINOLOGY & PUB. POL'Y 863 (2009), <https://doi.org/10.1111/j.1745-9133.2009.00600.x>.

¹⁵¹ *Product Catalog*, Axon (n.d.), <https://www.axon.com/products?productCategory=cews> [<https://perma.cc/LK7J-ACKF>] (last visited May 7, 2023).

energy device.¹⁵² Tasers are designed to temporarily incapacitate an individual by delivering a high voltage shock to the body. Their acceptable use has been justified as a means to minimize harm to officers and to members of the public who officers are trying to control. Although CEDs are designated as one of the less-lethal use of force options available to officers, it has been documented that their use is accompanied by life-threatening risks to the public.¹⁵³ Reuters reported there have been over 1,000 deaths related to the use of tasers since 2000, with approximately 153 of the deaths being due to direct or contributing effects.¹⁵⁴ When death occurs after a CED has been used, often police agencies claim that the death is attributable to the decedent's drug use, underlying health conditions, or so-called "Excited Delirium Syndrome" (ExDS).¹⁵⁵ Knowledge of these

¹⁵² See, e.g., Paul A. Haskins, *Conducted Energy Devices: Policies on Use Evolve to Reflect Research and Field Deployment Experience*, 281 NAT'L INST. JUST. J. 45, 53 n.7 (2019) ("Taser technology is so ubiquitous that the name has become synonymous with CED."), <https://www.ojp.gov/pdffiles1/nij/252721.pdf> [<https://perma.cc/DD6V-ZQFR>]; White & Ready, *supra* note 150, at 864 n.1.

¹⁵³ Elizabeth Seals, *Police Use of Tasers: The Truth is Shocking*, 38 GOLDEN GATE U. L. REV. 109 (2007).

¹⁵⁴ *Reuters Finds 1,005 Deaths in the U.S. Involving Tasers, Largest Accounting to Date*, REUTERS (Aug. 22, 2017, 5:00 AM) [hereinafter *Reuters, Taser Deaths*], <https://www.reuters.com/article/us-axon-taser-toll/reuters-finds-1005-deaths-in-u-s-involving-tasers-largest-accounting-to-date-idUSKCN1B21AH> [<https://perma.cc/A3UD-JZ4D>]. A majority of the deaths also involved other types of force such as batons or pepper spray.

¹⁵⁵ Reuters, *Taser Deaths*, *supra* note 154 (noting that one in four persons who died from CED-related injuries "suffered from mental illness or neurological disorders"); Laura Sullivan, *Tasers Implicated in Excited Delirium Deaths*, NPR: ALL THINGS CONSIDERED (Feb. 27, 2007, 1:02 PM), <https://www.npr.org/2007/02/27/7622314/tasers-implicated-in-excited-delirium-deaths> [<https://perma.cc/CTU5-YAN6>]. According to the *Journal of Paramedic Practice*,

Excited delirium syndrome involves extreme agitation and aggression in a patient with an altered mental status; around one in ten cases ends in cardiac arrest. It has two main triggers: acute drug use and psychiatric illness. Patients display violent behaviour, increased pain tolerance and great strength; they pose significant risks to themselves and those around them. Contact with persons in this state can end with the individual experiencing cardiac arrest.

Brian Sengstock & Janet Curtis, *Excited Delirium Syndrome*, 14 J. PARAMEDIC PRAC. 105 (2022), <https://doi.org/10.12968/jpar.2022.14.3.105>.

ExDS is a controversial term. It "has no International Classification of Diseases (ICD-9 or ICD-10) code, which means it cannot be assigned as a diagnosis or as a cause of death for statistical purposes" and it "has never appeared in any version of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM)." BRIANNA DA SILVA BHATIA, MICHELE HEISLER, JOANNA NAPLES-MITCHELL, ALTAf SAADI & JULIA SHERWIN, PHYSICIANS FOR HUM. RTS., "EXCITED DELIRIUM" AND DEATHS IN POLICE CUSTODY: THE DEADLY IMPACT OF A BASELESS DIAGNOSIS 30 (2022), <https://phr.org/wp-content/uploads/2022/03/PHR-Excited-Delirium-Report-March-2022.pdf> [<https://perma.cc/PF3H-V2DM>]. The organization Physicians for Human Rights cautions that ExDS "cannot be disentangled from its racist and unscientific origins." DA SILVA BHATIA ET AL., *supra*,

potentially lethal contributing factors raise serious questions about the appropriateness of CED use in each specific incident.¹⁵⁶

Among the most controversial CED deaths are incidents where officers claim they intended to use a CED but used their firearm instead. Highly publicized cases involving this set of facts include the police killing of Oscar Grant in Oakland, California during 2009 and Daunte Wright in Brooklyn Center, Minnesota during 2021.¹⁵⁷ Because CED manufacturers have responded to earlier claims that the devices are too similar to firearms and that modifications should be made to make them look different from and have a different firing

at 66. Indeed, ExDS, a term invented by forensic pathology, has “come to be used as a catch-all for deaths occurring in the context of law enforcement restraint, often coinciding with substance use or mental illness, and disproportionately used to explain the deaths of young Black men in police encounters.” DA SILVA BHATIA ET AL., *supra*, at 4.

Putting aside the illegitimacy of ExDS as a diagnosis and cause of death, the purported pathophysiology associated with ExDS cautions against using a CED on a person experiencing it because CED use can exacerbate the condition and even hasten their death. DA SILVA BHATIA ET AL., *supra*, at 39 (citing Comm’n for Pub. Complaints Against the Royal Can. Mounted Police, RCMP Use of the Conducted Energy Weapon (CEW): Interim Report (Dec. 11, 2007, <https://www.crcc-ccetp.gc.ca/pdf/InterimTaserReport.pdf>). In fact, back in 2005 Taser International warned that CED use against those exhibiting ExDS were “at significant and potentially fatal health risks from further prolonged exertion and/or impaired breathing” that CEDs can cause. Amnesty Int’l USA, AMR 51/030/2006, Amnesty International’s Continuing Concerns About Taser Use 17 (2006), <https://www.amnesty.org/en/wp-content/uploads/2021/08/amr510302006en.pdf> [<https://perma.cc/SA9E-G7VM>] (quoting Taser Int’l, Inc., Quarterly Report on Form 10-Q for The Three Months Ended September 30, 2005, at 6 (2005)).

¹⁵⁶ Reuters provides an interactive website that allows viewers to examine the details of situations involving deaths in which law enforcement personnel used a CED. The site might serve as a valuable resource for officer training. See *Shock Tactics: A Reuters Examination of 1,081 Deaths Involving Tasers*, REUTERS <https://www.reuters.com/investigates/special-report/usa-taser-database/#> [<https://perma.cc/H6P3-8JSE>] (last visited May 7, 2023).

¹⁵⁷ In the case of Oscar Grant III, a White police officer with the Bay Area Rapid Transit (BART) agency said that he meant to fire his Taser at Grant, who was Black, but shot him with his on-duty firearm instead. Grant was lying face-down on the train platform when he was shot. See Alex Emslie & Dan Brekke, *BART Releases Report With New Details of Officers’ Roles in Oscar Grant Killing*, KQED NEWS (May 1, 2019), <https://www.kqed.org/news/11744106/bart-releases-report-with-new-details-of-officers-roles-in-oscar-grant-killing> [<https://perma.cc/8WLN-Z7A2>].

Daunte Wright was stopped for having an air freshener hanging from his car’s rearview mirror. During the course of the stop, it was reportedly discovered that he had an outstanding warrant. Officer Kimberly Potter, a twenty-six-year police veteran, stated that she attempted to tase Wright as he tried to pull away from the traffic stop. Instead, she fatally shot him with her duty weapon. *What to Know About the Death of Daunte Wright*, N.Y. TIMES (Feb. 21, 2022) [hereinafter NYT, Daunte Wright], <https://www.nytimes.com/article/daunte-wright-death-minnesota.html> [<https://perma.cc/QW9C-88QZ>].

mechanism than department issued handguns,¹⁵⁸ we contend that current claims of mistake or accident related to reported mix-ups between tasers and firearms in incidents that result in serious bodily injury or death, should not be given serious consideration for qualified immunity.

Mistaking the taser for an officer's duty weapon should not occur for several reasons. First, best practices recommend that the CED be placed opposite the officers' firearm with a forward facing holster and that officer's receive specific training that emphasizes the potential for serious injuries or death if this less-lethal force option is utilized.¹⁵⁹ At least one CALEA-accredited police department specifically includes such training and practice within its written policies and procedures.¹⁶⁰ Second, the comparative weight of a CED and an on-duty firearm is substantially different. As currently designed, the taser weighs ounces, while a loaded on-duty firearm may weigh two pounds or more.¹⁶¹ Also as currently designed, the color of the taser is bright yellow, a change that was purposely adopted to clearly distinguish on-duty firearms from CEDs.¹⁶² In criminally convicting Kimberly Potter for the shooting death of Daunte Wright, jurors noted that they were compelled to reject the now former police officer's claim that she mistakenly fired her handgun, believing it was her CED, because of the factual distinctions between the two department-issued devices. Even if her claims were true, they found that her failure to distinguish the two weapons constituted criminal conduct. They were also not convinced that CED use was warranted at the point when the officer fired.¹⁶³

Finally, for agencies that allow officers to use CEDs, there is

¹⁵⁸Howard E. Williams, *Weapon Confusion: TASER CEWs, Firearms, and Human Error Theories*, — CRIM. JUST. REV. — (forthcoming) (advanced online publication available at <https://doi.org/10.1177/07340168221123238>).

¹⁵⁹Greg Conner, *Essential Elements in TASER Policy and Procedure*, 54 LAW & ORDER 8 (2006).

¹⁶⁰Tyler PD Gen. Order 12.100, *supra* note 121, § 12.104(G)(5), at 6.

¹⁶¹*See, e.g.*, Chris Kaye, *Brooklyn Center Police Chief Says "We Train with Our Handguns on Our Dominant Side and Our Taser on Our Weak Side," Casting Doubt on 'accidental Discharge' Theory*, INSIDER (Apr. 12, 2021, 8:00 PM), <https://www.insider.com/police-are-trained-to-know-difference-between-taser-and-gun-2021-4> [<https://perma.cc/4PB7-J7KK>]; *see also* Anna Boone, Matt DeLong & Matt McKinney, *Breaking Down the Video: What Happened During Daunte Wright's Fatal Traffic Stop*, STAR TRIB. (Minneapolis) (Apr. 15, 2021), <https://www.startribune.com/daunte-wright-brooklyn-center-minnesota-kim-potter-police-shooting-bodycam-taser-handgun/600021041/> [<https://perma.cc/CZV3-MDUW>].

¹⁶²Kaye, *supra* note 161.

¹⁶³NYT, *Daunte Wright*, *supra* note 157; Nicholas Bogel-Burroughs, *Kimberly Potter Is Convicted of Manslaughter for Killing Daunte Wright*, N.Y. TIMES (DEC. 23, 2021), <https://www.nytimes.com/live/2021/12/23/us/kim-potter-trial-verdict#manslaughter-kim-potter-verdict> [<https://perma.cc/NKK2-PL53>].

considerably more written guidance than there is for the use of pepper spray.¹⁶⁴ Our review of a CALEA-certified agency that has written policies regarding both practices reveals that the policy for CED use is, (perhaps understandably) more detailed than the policy permitting the use of pepper spray. For CED use, there are more explicit prohibitions, such as not using the weapon if the intended subject has been in contact with a flammable substance; or not using the device when an individual could fall and be substantially injured or killed (such as over water or an elevated surface).¹⁶⁵ The policy states that a CED is not to be used as a punitive measure and is not to be used on a person who is not demonstrating overt aggression toward an officer. Like pepper spray, the written policy prohibits the use of a CED on a visibly pregnant woman. It also states that CEDs should not be used on someone operating a vehicle, an individual showing signs of mental health distress, or on certain classifications of people—including children, the elderly, or individuals who are physically disabled.¹⁶⁶

These prohibitions provide fertile ground for asserting civil liability against officers who violate them under circumstances that are not life-threatening to the officer(s) or the public-at-large. If plaintiffs can demonstrate that the law enforcement profession—often including the officer's own department—has acknowledged the wrongfulness of the police behavior that they or a loved-one endured, such a showing should nullify qualified immunity. Indeed, we contend that to limit or exclude recovery of damages under such circumstances, in favor of a set of legalistic rules created by judicial caveat, perpetuates an untenable situation that not only thwarts the intent of the Civil Rights Act of 1871, but also greatly reduces victims' perception of the legitimacy of the federal courts and their commitment to protecting the civil rights of civilians.

¹⁶⁴ Compare Tyler PD Gen. Order 12.100, *supra* note 121, § 12.104(E), at 4 (providing two paragraphs of directives concerning the use of chemical irritant spray), with Tyler PD Gen. Order 12.100, *supra* note 121, §§ 12.104(F)–(G), at 4–8 (providing multiple pages of directives concerning the use of CEDs); compare also Administrative Directive 112.008 - *Response to Resistance*, PLANO POLICE DEP'T (Sept. 27, 2022) [hereinafter Plano Admin. Directive 112.008], <https://public.powerdms.com/PLANOPD/list/documents/339> [<https://perma.cc/G3AU-MXTN>], § IV.C(3), at 5–6 (containing just over one page of guidance on chemical irritant use), with Plano Admin. Directive 112.008, § IV.C(6), at 7–9 (presenting roughly two pages of guidance on CED use).

¹⁶⁵ In 2008, a NYPD lieutenant ordered that a naked man, standing on the ledge of an apartment building, be tased. The man fell to his death and days later the lieutenant committed suicide reportedly out of fear that he would be charged with the man's death. *N.Y. Policeman Commits Suicide After Taser Death*, REUTERS (Oct. 2, 2008, 10:23 AM), <https://www.reuters.com/article/us-newyork-taser/n-y-policeman-commits-suicide-after-taser-death-idUSTRE4916S920081002> [<https://perma.cc/2AZ8-82FB>].

¹⁶⁶ Tyler PD Gen. Order 12.100, *supra* note 121, § 12.104(G)(1), at 5.

D. **Contagious Shooting: What We Know**

In 2016, Ronald Davis, a former police chief, mentioned the police need to look beyond what is legal and focus on what is preventable because, he maintained, most police shootings are, in fact, preventable.¹⁶⁷ He contended that the police are too quick to use deadly force, instead of seeking alternatives that involve lesser means of force. By discharging their firearms, police officers create an immediate risk of lethal harm. This risk is substantially increased when more than one officer is firing. The question of *contagious shootings* arises when there is more than one officer on the scene and shots are fired by multiple officers—so much so that they give rise to questions as to whether all of the shots were required to stop a real or perceived threat;¹⁶⁸ or, whether the incident involved officers succumbing to a sympathetic reflex to shoot because one or more fellow officers on the scene fires their weapons.¹⁶⁹

Officers do not receive specific training on contagious fire.¹⁷⁰ Often, police officers will report that they do not know how many bullets they fired during a shooting.¹⁷¹ However, according to former POST commissioner Davallis Rutledge, each officer must be responsible for their own use of deadly force and must independently believe there is an imminent threat of serious bodily injury or death to him/

¹⁶⁷ Kimberly Kindy, Julie Tate, Jennifer Jenkins, Steven Rich, Keith L. Alexander & Wesley Lowery, *Fatal Police Shootings in 2015 Approaching 400 Nationwide*, WASH. POST (May 30, 2015, 9:0 PM), https://www.washingtonpost.com/national/fatal-police-shootings-in-2015-approaching-400-nationwide/2015/05/30/d322256a-058e-11e5-a428-c984eb077d4e_story.html [<https://perma.cc/M6C5-SM7E>]; see also MALCOLM K. SPARROW, HANDCUFFED: WHAT HOLDS POLICING BACK, AND THE KEYS TO REFORM 232–34 (2016) (discussing Kindy et al., *supra*).

¹⁶⁸ Scottie Andrew, *Why Police Shoot So Many Times to Bring Down a Suspect*, CNN (Aug. 26, 2020, 1:14 PM), <https://www.cnn.com/2020/08/26/us/why-police-shoot-so-many-rounds-trnd/index.html> [<https://perma.cc/5D3X-GH8G>]. Police training encourages officers to shoot until the threat ceases to exist. Emma Bowman, *The Akron Police Shooting Renews Questions About Officer Training*, NAT'L PUB. RADIO (July 4, 2022, 8:0 AM), <https://www.npr.org/2022/07/04/1109648170/akron-police-us-e-of-force> [<https://perma.cc/NBS4-BBAR>]. When officers shoot reflexively, it is not clear if and when a reassessment of the potential threat occurs. In a personal communication with a supervising officer within the NYPD, the lead author was advised that that police agency trains officers to shoot three times then stop to reassess the threat. When officers fire continuously without stopping to reassess the threat, it seems highly likely that they are engaging in overkill—that is continuing to fire even after the civilian target has been killed or substantially incapacitated.

¹⁶⁹ Davallis Rutledge, *Reflex Fire*, POLICE MAG. (Sept. 30, 2007), <https://www.policemag.com/training/article/15348949/reflex-fire> [<https://perma.cc/PR5U-NYWH>].

¹⁷⁰ Chuck Joyner, *Fighting the Contagious Fire Phenomenon*, POLICE ONE (Jan. 29, 2010), <https://www.policeone.com/police-products/firearms/articles/1996906-Fighting-the-contagious-fire-phenomenon/> [<https://perma.cc/53F5-TKTA>].

¹⁷¹ Andrew, *supra* note 168.

herself or some other person before commencing fire.¹⁷² Training and the law do not permit an officer to just fire his weapon because others are doing so.¹⁷³ One empirical study that examined shootings in the Philadelphia Police Department found no evidence to support a contagion effect.¹⁷⁴ Nonetheless, Chuck Joyner, a former law enforcement officer, is certain the phenomenon exists.¹⁷⁵ Joyner explained his belief from having observed officers at the firing range. There, during firearms training, officers are in groups and they are firing their guns alongside other officers. According to Joyner, thus firing in concert with other officers becomes part of a mindset to shoot when other officers are shooting. This behavior is not only dangerous to those who are the intended targets, it is also dangerous to police officers and uninvolved bystanders.

There have been numerous police incidents where multiple officers fire their weapons after at least one officer begins to shoot. Officers are trained to fire until the threat is no longer present, but at what point is the number of rounds excessive? In 1999, Amadou Diallo was shot at forty-one times while he was standing in the doorway to his apartment building in New York City.¹⁷⁶ Eight officers fired their weapons toward unarmed Jayland Walker in Ohio.¹⁷⁷ Multiple officers fired fifty bullets at unarmed Sean Bell in New York City in 2006; and, more than fifty bullets were fired at an armed suspect wanted for murder in Dallas in January 2023.¹⁷⁸ In this latter incident, the armed suspect shot at the officers two times and six officers

¹⁷²Rutledge, *supra* note 169.

¹⁷³Rutledge, *supra* note 169.

¹⁷⁴Michael D. White & David Klinger, *Contagious Fire? An Empirical Assessment of the Problem of Multi-shooter, Multi-shot Deadly Force Incidents in Police Work*, 58 CRIME & DELINQ. 196 (2012), <https://doi.org/10.1177/0011128708319581>.

¹⁷⁵See Joyner, *supra* note 170.

¹⁷⁶Ronald Weitzer, *Incidents of Police Misconduct and Public Opinion*, 30 J. CRIM. JUST. 397 (2002), [https://doi.org/10.1016/S0047-2352\(02\)00150-2](https://doi.org/10.1016/S0047-2352(02)00150-2); see also Amy Waldman, *The Diallo Shooting: The Overview; 4 Officers Enter Not-Guilty Pleas to Murder Counts in Diallo Case*, N.Y. TIMES (Apr. 1, 1999), <https://www.nytimes.com/1999/04/01/nyregion/diallo-shooting-overview-4-officers-enter-not-guilty-pleas-murder-counts-diallo.html> [<https://perma.cc/C754-XPYW>].

¹⁷⁷Bill Hutchinson, Matt Foster & Kiara Alfonseca, *Jayland Walker Was Unarmed When 8 Ohio Officers Opened Fire on Him, Body Camera Footage Shows*, ABC NEWS (July 4, 2022, 9:27 AM), <https://abcnews.go.com/US/black-man-unarmed-ohio-officers-opened-fire-family/story?id=86149929> [<https://perma.cc/9QMC-XCY5>].

¹⁷⁸Kelli Smith, *Dallas Police Officer Fired About 55 Times at 18 Year Old After He Shot Cop, Chief Says*, DALLAS MORNING NEWS (Jan. 27, 2023), <https://www.dallasnews.com/news/crime/2023/01/27/dallas-police-officers-fired-about-55-times-at-18-year-old-after-he-shot-cop-chief-says/#> [<https://perma.cc/AY4X-4TSA>].

returned a total of fifty-seven shots.¹⁷⁹ These are only a few of many incidents across the United States in which police fired double-digit rounds toward civilians, lending credence to the notion of contagious shooting.¹⁸⁰

Evidence of the possible existence of contagious shooting is not new. In 1995, police in New York fired 125 times at a robbery suspect who never fired at them or anyone else.¹⁸¹ In Cleveland, in 2012, police fired 137 bullets into a car occupied by an unarmed Black couple, after a half-hour chase.¹⁸² The one officer who fired his weapon forty-nine times was acquitted of criminal charges following a four-week bench trial, even though he fired fifteen bullets into the front windshield of the car once it had come to a stop.¹⁸³ Police are trained that they are responsible for each round they fire.¹⁸⁴ What responsibility should officers bear when they shoot many times,

¹⁷⁹ Maria Guerrero & Meredith Yeomans, *Dallas Police Release Video From Shootout with Capital Murder Suspect Wednesday*, NBC-DFW (Jan. 27, 2023, 10:27 PM), <https://www.nbcdfw.com/news/local/dallas-police-release-video-from-shootout-with-capital-murder-suspect-wednesday/3180693/> [<https://perma.cc/6F8V-S54B>].

¹⁸⁰ In 2020, five officers fired 125 shots at a Black man in Tampa, Florida. Scott McDonald, *5 Florida Cops Who Fired 125 Rounds to Kill a Black Man Won't Face Charges*, NEWSWEEK (June 25, 2020, 9:37 PM), <https://www.newsweek.com/5-florida-cops-who-fired-125-rounds-kill-black-man-wont-face-charges-1513542> [<https://perma.cc/EN7C-YFLN>].

¹⁸¹ Julia Layton, *What is Contagious Shooting?*, HOWSTUFFWORKS (Nov. 28, 2006), <https://people.howstuffworks.com/contagious-shooting.htm> [<https://perma.cc/87LL-TB3Y>].

¹⁸² Troy L. Smith, *Netflix Documentary "137 Shots" Delves into Notorious 2012 Cleveland Police Chase and Shooting*, CLEVELAND.COM (Dec. 14, 2021, 2:35 PM), <https://www.cleveland.com/entertainment/2021/12/netflix-documentary-137-shots-delves-into-notorious-2012-cleveland-police-chase-and-shooting.html> [<https://perma.cc/MUD3-WL4J>]. See generally *137 SHOTS* (Netflix & Boardwalk Pictures 2021) (Michael Milano, director; Orlando Bagwell et al., producers).

¹⁸³ Associated Press, *Cleveland Police Officer Who Fired 137 Shots at Two Unarmed Suspects Has Been Acquitted of Manslaughter*, BUSINESS INSIDER (May 23, 2015, 8:13 AM), <https://www.businessinsider.com/cleveland-police-officer-who-fired-137-shots-at-two-unarmed-suspects-has-been-acquitted-of-manslaughter-2015-5> [<https://perma.cc/VUZ7-VDT3>]. The civil suit was settled with the victims' families for \$3 million. Associated Press, *Families of Two People Killed by Cleveland Police to Split \$3m Settlement*, THE GUARDIAN (Nov. 18, 2014, 1:57 PM), <https://www.theguardian.com/us-news/2014/nov/18/families-two-people-killed-cleveland-police-settlement> [<https://perma.cc/HDX6-JTC3>].

¹⁸⁴ Warren Wilson, *Mechanical Offset Review for Optics*, POLICE 1 (June 18, 2018), <https://www.police1.com/police-products/firearms/accessories/sights-scopes/articles/mechanical-offset-review-for-optics-RCFj5R4Wd7i0Zpa/> [<https://perma.cc/E2EP-RS22>] ("[W]e are responsible for each round fired until it reaches its final resting place . . ."). See generally U.N. Congress on the Prevention of Crime & the Treatment of Offenders, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials § 11(d), at 3 (Sept. 7, 1990), <https://www.ohchr.org/sites/default>

claiming to perceive a threat when one does not exist? In the 1995 incident in New York, where 125 bullets were fired by police, the officers were determined to have been shooting in response to the echo of their own shots.¹⁸⁵ Many of these multiple-officer, multiple-shot cases have resulted in civil settlements, but not criminal convictions for the officers involved.¹⁸⁶ In cases like the death of Amadou Diallo and Breonna Taylor,¹⁸⁷ where the victims were fired upon at night in or near multi-family residential buildings, the facts raise a substantial likelihood that uninvolved others could have been seriously harmed by the police behavior. Accordingly, it seems inappropriate that federal judicial opinion might preclude these wholly innocent victims from successfully suing the police for their reckless behavior. Even in the absence of specific training on the topic, the repetitive occurrence of these apparent sympathetic or reflexive fire incidents alerts officers to this danger—an awareness we believe should not allow for escape from liability by invoking qualified immunity.

E. Proportionality Assessments

Each of the foregoing police practices enjoy some level of acceptance within the profession. However, their misuse—use that is outside the dictates of formal training, that is excessive, or that otherwise occurs under circumstances not permitted by law or policy—should not be shielded from civil liability. A continuous thread in the discussion of three out of four of these practices (neck restraints, chemical irritants, and CEDs) is that they are intended to be nonlethal or less-lethal, but can still cause serious injury or death. Based on this knowledge, the use of such practices should not be

[ult/files/firearms.pdf](#) [<https://perma.cc/8C6A-62UU>] (“[L]aw enforcement officials are accountable for the firearms and ammunition issued to them.”).

¹⁸⁵Michael Wilson & William K. Rashbaum, *50 Shots Fired, and the Experts Offer a Theory*, N.Y. TIMES (Nov. 27, 2006), <https://www.nytimes.com/2006/11/27/nyregion/27fire.html> [<https://perma.cc/F4D4-FW5M>].

¹⁸⁶The Breonna Taylor case in Louisville, Kentucky serves as an example. Thirty-two shots were fired into her home and the apartment of adjacent neighbors. *Breonna Taylor: What Happened on the Night of Her Death?*, BBC NEWS (Oct. 8, 2020) [hereinafter BBC, *Breonna Taylor*], <https://www.bbc.com/news/world-us-canada-54210448> [<https://perma.cc/234R-KMUZ>]. No criminal charges were sustained, but the family of Breonna Taylor received a \$12 million settlement. Rukmini Callimachi, *Breonna Taylor's Family to Receive \$12 Million Settlement From City of Louisville*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html> [<https://perma.cc/6SNL-492L>].

¹⁸⁷In the case of Breonna Taylor, the police fired thirty-two times into her apartment, with ten bullets entering the apartment of her neighbor. They suspected her of drug involvement but had no proof that she was ever engaged in a crime of violence. Her boyfriend fired only once with a legally owned gun. The number of bullets fired in response showed no regard for residents of the complex where Taylor resided. BBC, *Breonna Taylor*, *supra* note 186.

routine or ordinary. They must be justifiable based on the level of threat the civilian presents through his conduct or the level of harm that conduct has inflicted or has the potential to inflict on officers or the general public. When civilians die during police encounters where the amount of force used by police is substantially greater than the potential harm of the suspected or known conduct, there should be a presumption that officers will not be able to avail themselves of the protection of qualified immunity. Examples would include traffic stops for equipment violations or technical infractions like hanging air fresheners from rearview mirrors; having tinted windows; engaging in non-violent misdemeanors or public order offenses (like littering, jaywalking, public urination, graffiti, etc.); or when engaging in legal activities, like peaceful protests.¹⁸⁸ If jurisdictions are unwilling to definitively ban qualified immunity for injuries that occur under these or similar circumstances, officers should at least be required to affirmatively assert a convincing defense before the courts can consider such a claim.¹⁸⁹ In the next Part, we review how some states have addressed the issue of qualified immunity on broader terms than those considered by the U.S. Supreme Court.

IV. QUALIFIED IMMUNITY AND THE STATES

Though the Court's decision in *City of Tahlequah v. Bond* narrowed the circumstances under which a plaintiff can seek damages against an officer under Section 1983, states have taken independent action to address police accountability within their jurisdictions. Since June, 2020, new legislation or judicial rulings within seven states and the City of New York have restricted police officers' ability to make a qualified immunity claim under state (as opposed to federal)

¹⁸⁸The killing of Daunte Wright, which started with a traffic stop for a hanging air freshener, serves as a poignant example. *Daunte Wright Case: How Seemingly Minor Traffic Stops Can Turn Deadly*, ABC NEWS (Dec. 15, 2021, 4:02 AM), <https://abcnews.go.com/US/daunte-wright-case-seemingly-minor-traffic-stops-turn/story?id=81629179> [<https://perma.cc/6SZ5-JXQQ>]. Some criminal law reforms have gone as far as to propose that many motor vehicle infractions, that do not entail dangerous operation of vehicles, be eliminated from police enforcement. Joshua Vaughn, *After Daunte Wright's Death, Advocates Press Leaders to Get Police Out of Traffic Enforcement*, THE APPEAL (Apr. 14, 2021), <https://theappeal.org/after-daunte-wrights-death-advocates-press-leaders-to-get-police-out-of-traffic-enforcement/> [<https://perma.cc/9XFX-FU2W>]; White et al., *supra* note 6, at 449 (discussing a range of police reforms while noting that "Virginia targeted pretextual stops by enacting legislation banning traffic stops for a range of minor infractions."); see also Libo Jany, *Long-Delayed Study to Have Civilians, Not Police, Make L.A. Traffic Stops Set for Release*, L.A. TIMES (May 9, 2023, 5:00 AM), <https://www.latimes.com/california/story/2023-05-09/long-delayed-plan-to-have-civilians-not-police-make-traffic-stops-set-for-release> [<https://perma.cc/5URT-D32R>].

¹⁸⁹For a discussion of the doctrine of proportionality as it relates to the killing of Eric Garner, see Jones-Brown et al., *supra* note 72, at 696–703.

law.¹⁹⁰ Colorado, New Mexico, Montana and Nevada have virtually banned police officers from asserting such claims. Connecticut, Massachusetts, California and the City of New York have placed limits on their applicability. The legislative bans in Colorado and New Mexico were passed in 2020 and 2021. The Connecticut and Massachusetts legislation was passed in 2020. They curtail police officers' ability to invoke qualified immunity when lawsuits allege deprivations of rights guaranteed by the states' constitutions.¹⁹¹ California and New York City passed legislation in 2021 that limits officers' ability to claim immunity in cases based on state or local law.¹⁹²

A. Four States with Broad Restrictions on Qualified Immunity

In 2002, the Montana Supreme Court rejected qualified immunity in state causes of action arising from state actors who deprive Montanans of their civil rights based on provisions in the state constitution.¹⁹³ Twenty years later, the Supreme Court of Nevada followed the lead of Montana's highest court to become the second state whose highest court banned police officers from raising qualified immunity against civil claims arising under the state constitution.¹⁹⁴ The court reasoned that any holding to the contrary would "threaten to undermine this State's public policy . . . that state actors should generally take responsibility when they commit wrongs."¹⁹⁵ As of this writing in mid-2023, these two states have the only courts to have issued judicial decisions banning qualified

¹⁹⁰ *Qualified Immunity State Reforms*, INST. FOR JUST. (n.d.), <https://ij.org/qualified-immunity-state-reforms/> [<https://perma.cc/UHV9-BP4K>] (last visited May 7, 2023).

¹⁹¹ Day et al., *supra* note 10, at 13–14; see also Nick Sibilla, *New Massachusetts Law Will Decertify Rogue Cops, Revoke Their Immunity*, FORBES (Jan. 9, 2021, 1:15 PM), <https://www.forbes.com/sites/nicksibilla/2021/01/09/new-massachusetts-law-will-decertify-rogue-cops-revoke-their-immunity/> [<https://perma.cc/WK94-TQZM>]; Nick Sibilla, *New Connecticut Law Limits Police Immunity In Civil Rights Lawsuits, But Loopholes Remain*, FORBES (July 31, 2020, 9:09 PM) [hereinafter Sibilla, *Conn.*], <https://www.forbes.com/sites/nicksibilla/2020/07/31/new-connecticut-law-limits-police-immunity-in-civil-rights-lawsuits-but-loopholes-remain/> [<https://perma.cc/PL9W-BA X7>].

¹⁹² Nick Sibilla, *New California Law Makes It Easier To Sue Cops Who Violate Civil Rights*, FORBES (Oct. 4, 2021, 8:30 PM) [hereinafter Sibilla, *Cal.*], <https://www.forbes.com/sites/nicksibilla/2021/10/04/new-california-law-limits-legal-immunity-for-cops-prison-guards/> [<https://perma.cc/2C2B-8VJN>]; Nick Sibilla, *New York City Bans Qualified Immunity For Cops Who Use Excessive Force*, FORBES (Apr. 29, 2021, 10:55 AM) [hereinafter Sibilla, *NYC*], <https://www.forbes.com/sites/nicksibilla/2021/04/29/new-york-city-limits-qualified-immunity-makes-it-easier-to-sue-cops-who-use-excessive-force/> [<https://perma.cc/WU83-ZRPS>].

¹⁹³ *Dorwart v. Caraway*, 2002 MT 240, 312 Mont. 1, 58 P.3d 128 (2002).

¹⁹⁴ *Mack v. Williams*, 522 P.3d 434, 451, 138 Nev. Adv. Op. No. 86 (Nev. 2022).

¹⁹⁵ *Mack*, 522 P.3d at 451 (internal citations and alterations omitted).

immunity. Two other states, however, have done so via legislative actions.

On June 19, 2020, with the passage of the Enhanced Law Enforcement Integrity Act (SB20-217), Colorado became the first state to statutorily ban the use of qualified immunity in state civil actions against most law enforcement agents. SB20-217 created a new civil cause of action permitting Coloradans to sue all local law enforcement officers, sheriff's deputies, and Colorado State Patrol officers for damage arising from claims that officers deprived the plaintiff of rights guaranteed under the Colorado Constitution's Bill of Rights.¹⁹⁶ The statute also provides that officers who fail to intervene when such rights are being violated by other officers are similarly prohibited from using qualified immunity as a defense.¹⁹⁷ SB20-217 allows successful plaintiffs to be awarded attorneys' fees and costs.¹⁹⁸ The statute generally requires employer indemnification of officers.¹⁹⁹ However, if an employer finds that officers acted without a good faith and reasonable belief that their actions were lawful, then each individual officer is personally liable for five percent of the judgment or up to \$25,000.²⁰⁰ Indemnification is not required if an officer is convicted of a crime arising from the same conduct unless the officer is unable to satisfy a monetary judgment.²⁰¹

We note that Rep. Leslie Herod (D) and Senate President Leroy Garcia (D) had unsuccessfully introduced an earlier version of SB20-217 in both 2019 and 2020. Those bills had been in response to the 2019 police killings of Elijah McClain and De'Von Bailey by members of different police departments in Colorado. The early bills failed, despite the fact that the McClain case received considerable national

¹⁹⁶Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM), <https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/> [https://perma.cc/S39G-RXU2]. Notably, SB20-217 "applies to all local law enforcement officers, sheriff's deputies, and Colorado State Patrol officers." Sibilla, *supra*. It does not, therefore, apply to government officials who do not work in law enforcement or to state-level law enforcement officers other than those who work for the Colorado State Patrol.

¹⁹⁷Sibilla, *supra* note 196. For a comprehensive discussion on police duties to intervene when fellow officers use excessive force, see Jones-Brown et al., *supra* note 67, *passim*.

¹⁹⁸Sibilla, *supra* note 196.

¹⁹⁹Sibilla, *supra* note 196.

²⁰⁰Sibilla, *supra* note 196.

²⁰¹Day et al., *supra* note 10, at 14.

attention.²⁰² The police killing of George Floyd, however, served as the impetus for the bill to become law.²⁰³

New Mexico joined Colorado in banning qualified immunity with its enactment of the New Mexico Civil Rights Act (HB 4) on April 7, 2021.²⁰⁴ HB 4 provides a civil cause of action against any government employee for deprivations of civil rights under the New Mexico Bill of Rights. Importantly, it bars the use of qualified immunity as a defense.²⁰⁵ Unlike Colorado's SB20-217, HB 4 only allows individuals to bring claims against a government employee's employer. Plaintiffs suing a law enforcement agency must provide written notice to that agency within one year of the incident, and liability is capped at \$2 million per claimant per incident.²⁰⁶

HB 4 is an outgrowth of the New Mexico Legislature and Governor Lujan Grisham's establishment of the New Mexico Civil Rights Commission in June of 2020. The Commission was tasked with making recommendations regarding police reform, among others.²⁰⁷ The Commission issued a report to the New Mexico Legislature in January, 2021 recommending that qualified immunity be banned for police officers. However, Republicans on the Civil Rights Commission and in the New Mexico Legislature refused to vote for a version of the bill that would have included allowing aggrieved persons to sue

²⁰² Alex Burness & Saja Hindi, *How Colorado Found the Political Will to Pass a Sweeping Police Reform Law in Just 16 Days*, DENV. POST (June 19, 2020, 8:26 PM), <https://www.denverpost.com/2020/06/19/colorado-police-reform-accountability-bill/> [<https://perma.cc/VG6A-U6K8>]. Legislators indicated that the protests outside of the Capitol after the death of George Floyd resulted in a synergy inside the Colorado capitol to quickly pass SB20-217. Burness & Hindi, *supra*; see also Leslie Herod & Mari Newman, *Colorado Took a Revolutionary Step to Reform Policing. Here's How We Did It*, USA TODAY (Oct. 28, 2021, 9:01 AM), <https://www.usatoday.com/story/opinion/2021/10/28/colorado-hold-cops-accountable-qualified-immunity/6101915001/> [<https://perma.cc/J5QC-F2VH>]. But cf. Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 6, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [<https://perma.cc/HH45-UNW6>].

²⁰³ Burness & Hindi, *supra* note 202.

²⁰⁴ Susan Dunlap, *Guv Signs New Mexico Civil Rights Act into Law, Ends Qualified Immunity*, ACLU-N.M. POL. RPT. (Apr. 7, 2021), <https://nmpoliticalreport.com/2021/04/07/guv-signs-new-mexico-civil-rights-act-into-law-ends-qualified-immunity/> [<https://perma.cc/75QD-XHBD>].

²⁰⁵ Nick Sibilla, *New Mexico Enacts Landmark Bill Against Qualified Immunity*, INST. FOR JUST. (Apr. 7, 2021), <https://ij.org/press-release/new-mexico-enacts-landmark-bill-against-qualified-immunity/> [<https://perma.cc/MY9U-795S>].

²⁰⁶ Day et al., *supra* note 10, at 14.

²⁰⁷ Dunlap, *supra* note 204; see also *New Mexico Ends Qualified Immunity for Abusive Police*, EQUAL JUST. INITIATIVE (Apr. 9, 2021), <https://ej.org/news/new-mexico-ends-qualified-immunity-for-abusive-police/> [<https://perma.cc/M6CH-GKB8>].

individual officers.²⁰⁸ Eventually the legislators agreed to the compromise that permits plaintiffs to only sue municipal employers, as the law expressly prohibits plaintiffs from naming individual officers in a state civil rights suit.²⁰⁹

B. U.S. Jurisdictions with Narrower Restrictions on Qualified Immunity

New statutory limits on qualified immunity enacted in a handful of other states and New York City are more limited in their scope. For instance, Massachusetts enacted what is commonly referred to as the “Police Reform Act” (PRA) in 2020 which only makes qualified immunity unavailable to law enforcement officers who have been decertified.²¹⁰ Decertification, a process which makes officers unable to work as law enforcement again, is rare—only existing in about eleven states²¹¹—and usually requires conviction of a crime (whether by trial or guilty plea).²¹² However, it may also result from failure to comply with or maintain compliance with mandated training requirements.²¹³

The statutory scheme in Massachusetts requires plaintiffs to show that law enforcement officers interfered or attempted to interfere with their civil rights using “threats, intimidation, or coercion.”²¹⁴ This is a very narrow focus—one that a special commission established to

²⁰⁸For a discussion of the politics prior to enactment of the law, see Jacob Sullum, *New Mexico Could Be the Third State to Authorize Lawsuits Against Abusive Cops Without Qualified Immunity*, REASON (Feb. 19, 2021, 12:55 PM), <https://reason.com/2021/02/19/new-mexico-could-be-the-third-state-to-authorize-lawsuits-against-abusive-cops-without-qualified-immunity/> [<https://perma.cc/MW2B-CZRR>].

²⁰⁹Kindy, *supra* note 202.

²¹⁰Steve Brown & Ally Jarmanning, *Here's What's in The Massachusetts Police Reform Law*, WBYR NEWS (Apr. 7, 2021), <https://www.wbur.org/news/2020/12/01/massachusetts-police-reform-legislation-explainer> [<https://perma.cc/VN86-2SCJ>]; see also Day et al., *supra* note 10, at 11.

²¹¹*Law Enforcement Officer Decertification Database*, NAT'L CONF. ST. LEGS., <https://www.ncsl.org/civil-and-criminal-justice/law-enforcement-officer-decertification-database> [<https://perma.cc/L9AF-MWY5>] (last visited May 7, 2023).

²¹²See, e.g., VA. CODE § 15.2-1707 (setting forth Virginia's framework for the decertification of law-enforcement officers); MASS. GEN. LAWS ch. 6E, § 10(a) (2023) (creating a Peace Officer Standards and Training (POST) Commission authorized to revoke an officer's certification upon a showing, by clear and convincing evidence, that an officer committed a felony or a hate crime, inflicted excessive force that resulted in death or serious bodily injury, failed to intervene, or submitted false timesheets). The POST Commission also is empowered to decertify an officer if it determines that “the officer is not fit for duty as an officer and the officer is dangerous to the public.” MASS. GEN. LAWS ch. 6E, § 10(a) Additionally, the commission has the discretion to suspend or revoke an officer's credentials over misdemeanors or biased policing. MASS. GEN. LAWS ch. 6E, § 10(a).

²¹³VA. CODE § 15.2-1707.

²¹⁴*Doe v. Senechal*, 66 Mass. App. Ct. 68, 845 N.E.2d 418 (2006).

study qualified immunity suggested be removed.²¹⁵ In its Final Report issued on January 4, 2022, the commission reasoned that because the “threat, intimidation, or coercion” requirement is difficult to meet in Massachusetts state courts, most claims against officers would continue to be brought pursuant to § 1983 in federal court.²¹⁶ Consequently, this would effectively defeat the purpose of establishing a basis for a separate state claim. Despite this finding, the Commission was unable to reach a consensus about whether to amend the existing qualified immunity standard, end qualified immunity completely, or leave the qualified immunity standard unchanged.

Massachusetts’ 2020 Police Reform Act was crafted with virtually no public hearings, so there is not much legislative history available to ascertain what shaped the final bill.²¹⁷ However, there is evidence that police unions and organizations lobbied hard against it and played a significant role in its revision.²¹⁸ The original bill, introduced in the Massachusetts Legislature in the summer of 2020, sought a broad ban on qualified immunity. But the bill soon changed—against the recommendation of the special commission—to allow for consideration of qualified immunity claims in most circumstances. The change occurred after a police union took out a full-page ad in *The Boston Globe* urging readers to call Massachusetts legislators in opposition to the bill.²¹⁹ In 2021, strong opposition from the Massachusetts law enforcement lobby²²⁰ helped to eliminate a provision that would have placed the burden of proof on police officers to

²¹⁵ See Day et al., *supra* note 10, at 19 (recommending that the Massachusetts Civil Rights Act be amended “to remove the ‘threats, intimidation, or coercion’ requirement for claims against law enforcement officers” and that the standard for qualified immunity abolish the “‘clearly established’ requirement”).

²¹⁶ Day et al., *supra* note 10, at 21.

²¹⁷ Matt Murphy, *Police Body Camera Panel Faces “Most Contentious Issue”*, WWLP News (Jan. 4, 2022, 7:43 PM), <https://www.wwlp.com/news/state-politics/police-body-camera-panel-faces-most-contentious-issue/> [<https://perma.cc/ACN3-JFCB>].

²¹⁸ Brown & Jarmanning, *supra* note 210; see also Kindy, *supra* note 202.

²¹⁹ Kindy, *supra* note 202.

²²⁰ Opposition from law enforcement also helped to water down the Special Commission’s recommendations regarding qualified immunity. New England Police Benevolent Association (NEPBA) President Lt. Christopher Ryan and other law enforcement representatives on the commission prevented that commission from making any substantive recommendations on changing qualified immunity. Shira Schoenberg, *Commission Sharply Split on Qualified Immunity Proposals*, COMMW. MAG. (Jan. 5, 2022), <https://commonwealthmagazine.org/criminal-justice/commission-sharply-split-on-qualified-immunity-proposals/> [<https://perma.cc/HT8E-998K>]. In its 2022 Final Report, the Special Commission recommended waiting two years before revisiting the issue of qualified immunity:

The Police Reform Law became effective on July 1, 2021, and it will only be possible for legislators, scholars, attorneys, and advocates to understand and appreciate its impacts, including any impacts of police decertification on civil rights claims, after some time has

show why they were not liable in a civil suit, rather than require the plaintiffs to first establish that they were.²²¹

The Connecticut Legislature, like the Colorado Legislature, responded to protesters' demands for greater police accountability by introducing a police accountability bill that included a provision banning officers from invoking qualified immunity in civil suits.²²² Connecticut's qualified immunity legislation - An Act Concerning Police Accountability (HB 6004) - was enacted on July 31, 2020. It goes further than Massachusetts' 2020 law by providing an expanded state constitutional tort remedy that enables plaintiffs to sue any law enforcement officer for any deprivation of rights under the Connecticut Declaration of Rights.²²³ However, similar to early federal standards, HB 6004 grants officers immunity if they "had an objectively good faith belief that their conduct did not violate the law." Unlike Colorado's SB20-217, HB 6004 only permits victims to collect attorneys' fees if an officer's actions were "deliberate, willful, or committed with reckless indifference."²²⁴ Like the Colorado law, HB 6004, requires municipalities and police departments to indemnify their officers. It also requires the government to pay for the defendants' legal defense, except when officers have engaged

passed. A two-year review period from the date this report is filed will allow interested parties to assess the implementation and impact of the 2020 amendments to the qualified immunity provision of the Massachusetts Civil Rights Act, as well as recent qualified immunity reform in other jurisdictions.

Day et al., *supra* note 10, at 20.

NEPBA President Ryan warned that any changes to qualified immunity would carry an "overwhelming cost" for municipalities by "open[ing] up floodgates as far as lawsuits." Schoenberg, *supra*. Besides steering the narrative away from police violence, law enforcement representatives like Ryan tried to disconnect the high-profile police killings of George Floyd and Breonna Taylor in other states from what was happening in Massachusetts. Ryan stated in 2022, "We don't have these problems, yet we get painted with a broad brush on a national level." Schoenberg *supra*. Unlike in Colorado and New Mexico, there appears to have been a greater effort on the part of law enforcement in Massachusetts to prevent high-profile police killings garnering national attention from reigniting outrage about how police were treating people of color in Massachusetts.

²²¹Brown & Jarmanning, *supra* note 210.

²²²Kindy, *supra* note 202; see also Julia Werth, *House Passes Wide-Ranging Police Accountability Law, Votes Down Amendment to Strip Qualified Immunity Provisions*, CT. EXAMINER (July 24, 2020), <https://ctexaminer.com/2020/07/24/house-passes-wide-ranging-police-accountability-law-votes-down-amendment-to-strip-qualified-immunity-provisions/> [<https://perma.cc/W8AF-XKGC>].

²²³Sibilla, *Conn.*, *supra* note 191.

²²⁴Sibilla, *Conn.*, *supra* note 191 (quoting H.B. 6004, § 41(f), Gen. Assemb., July Spec. Sess. (Conn. 2020) (enacted and codified at CONN. GEN. STAT. ANN. § 52-571k (West 2023))).

in “a malicious, wanton, or willful act”— otherwise it does not expand personal liability for officers.²²⁵

In California, Governor Gavin Newsom signed State Bill 2 (SB 2) into law on September 30, 2021.²²⁶ The bill represents an expansion of the Tom Bane Civil Rights Act of 1987.²²⁷ SB 2 eliminates several immunity provisions shielding law enforcement officers from civil rights lawsuits.²²⁸ Most notably, SB 2 provides for police officer decertification, expands the list of circumstances that will disqualify a person from employment as a peace officer, and requires law enforcement agencies to investigate all complaints for claims of serious misconduct by peace officers, regardless of whether the subject officer(s) is still employed by the agency.²²⁹ With regard to qualified immunity, SB 2 leaves intact a provision under the Bane Act that requires plaintiffs to meet the high bar of showing that officers had “specific intent” to interfere with a person’s constitutional rights, or that the interference was “deliberate and spiteful.”²³⁰ The statute also requires that state and local governments indemnify officers who are sued. This largely precludes officers from having to pay civil judgments out of their own pocket(s).²³¹ SB 2 has been criticized for these two restrictive provisions.²³²

Like the police accountability/reform bills in other states, SB 2 was introduced in the legislature following nationwide calls for police accountability and growing opposition to the concept of qualified im-

²²⁵ Sibilla, *Conn.*, *supra* note 191 (quoting H.B. 6004, § 41(e), Gen. Assemb., July Spec. Sess. (Conn. 2020) (enacted and codified at CONN. GEN. STAT. ANN. § 52-571k (West 2023))).

²²⁶ Governor Newsom Signs Policing Reform Legislation, CAL. OFF. GOVERNOR (Sept. 30, 2021), <https://www.gov.ca.gov/2021/09/30/governor-newsom-signs-policing-reform-legislation/> [<https://perma.cc/4DJD-6NN3>].

²²⁷ Tom Bane Civil Rights Act, Cal. Stats. 1987, ch. 1277, § 3 (codified as amended at CAL. CIV. CODE § 52.1 (2023)).

²²⁸ California State Senator Steven Bradford introduced the Kenneth Ross, Jr. Police Decertification Act of 2020 as Senate Bill 731, but passage failed on the California Assembly Floor. *Bradford Bill on Police Decertification Dies on Assembly Floor*, (Sept. 3, 2020), <https://sd35.senate.ca.gov/news/2020-09-03-bradford-bill-police-decertification-dies-assembly-floor> [<https://perma.cc/H3R9-K3SZ>]. He reintroduced the bill as SB 2 in the wake of the police killing of George Floyd in 2021. Governor Newsom Signs Policing Reform Legislation, *supra* note 226.

²²⁹ Kenneth Ross Jr., Police Decertification Act of 2021, Cal. Stats. 2021, ch. 409 (S.B. 2) (2021) (codified at CAL. CIV. CODE § 52.1; CAL. GOV’T CODE § 1029; CAL. PENAL CODE §§ 832.7, 13503, 13506, 13509.5, 13509.6, 13510, 13510.1, 13510.8, 13510.85, 13510.9, & 13512).

²³⁰ Sibilla, *Cal.*, *supra* note 192; *see also SB 2 (Bradford)*, SEN. JUDICIARY COMM. (Mar. 11, 2021), https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/sb_2_bradford_sjud_analysis.pdf [<https://perma.cc/8X85-DYNB>].

²³¹ Sibilla, *Cal.*, *supra* note 192.

²³² Sibilla, *Cal.*, *supra* note 192.

munity for law enforcement in the wake of the death of George Floyd.²³³ It was designed to provide greater police accountability. Specifically, it sought to correct the Bane Act's failure to sufficiently address civil rights violations by police following a series of California state court rulings that severely narrowed the reach of the Act. At a hearing on April 27, 2021, California State Senator Steven Bradford (D), SB 2's sponsor, and other members of the California Senate Judiciary Committee, expressly linked the police killing of George Floyd to the police killing of Darren Burley in California in 2012.²³⁴ Burley, like Floyd, was an unarmed Black man whom police killed when they placed knees on his back and on the back of his head near his neck, causing Burley to asphyxiate.²³⁵ Bradford and other legislators' pointed out the similarities in the Floyd and Burley cases, and emphasized that the police-involved death of Floyd had reinvigorated public outrage over police killings and violence directed at Black people and other persons of color within the state. Nonetheless, strenuous opposition from several powerful California law enforcement organizations prevented SB 2 from having the full effect intended by its sponsor. Those organizations included the California Police Chiefs Association, the California State Sheriffs' Association, and the California Peace Officers' Association. In the end, their efforts prevented the bill's supporters from eliminating the "specific intent" and "deliberate and spiteful" requirements that were initially judicial, not statutory, provisions of the law.²³⁶

Finally, although the City of New York is not a state, the municipality contains more than 8.5 million people and operates a police department of approximately 36,000 sworn members.²³⁷ On April 25, 2021, New York became the first city in the United States to enact legislation banning police officers from using qualified immunity as a defense in civil litigation.²³⁸ This law, INT-2220, created a new local civil right protecting New Yorkers against unreasonable searches and seizures and against excessive force. To support this new civil right, the law bans the use of qualified immunity as a defense in

²³³ SB 2 (Bradford), *supra* note 230.

²³⁴ SB 2 (Bradford), *supra* note 230.

²³⁵ Don Thompson, *LA County Owes \$8M to Man Killed like George Floyd?* WASH. POST (Aug. 10, 2020, 9:15 PM), https://www.washingtonpost.com/national/courts-la-county-owes-8m-to-man-killed-like-george-floyd/2020/08/10/30068f48-db70-11ea-b4f1-25b762cddb4_story.html [<https://perma.cc/HJR9-5ZRQ>].

²³⁶ Sibilla, *Cal.*, *supra* note 192; *see also* SB 2 (Bradford), *supra* note 230.

²³⁷ *About NYPD*, N.Y. POLICE DEP'T (Apr. 16, 2023), <https://www.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> [<https://perma.cc/RFE6-9TMW>].

²³⁸ Jeffery C. Mays & Ashley Southall, *It May Soon Be Easier to Sue the N.Y.P.D. for Misconduct*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/nyregion/nyc-qualified-immunity-police-reform.html> [<https://perma.cc/D9WM-KN2M>].

suits that allege that the right has been violated.²³⁹ However, officers who are sued under this provision are entitled to indemnification by the department.²⁴⁰ Though the New York City Council's (NYCC) push to ban qualified immunity was fueled by the national protests in response to the death of George Floyd,²⁴¹ the City had its own history of large-scale protests associated with many high-profile police killings of Black and Brown men, including Eric Garner, Amadou Diallo, Patrick Dorismond, Ousmane Zongo, Anthony Baez, and Sean Bell.²⁴² The NYCC's drive to create a right to sue police for Fourth Amendment and excessive force violations was shaped, in part, by a longstanding pattern of complaints against NYPD officers which continued to cost substantial money in settlement of misconduct cases. For example, the NYPD received more than 300,000 complaints of misconduct since 1985 and paid out more than \$1.1 billion for police misconduct cases since 2015.²⁴³ The NYCC's creation of this right to sue also was fueled by a recognized concern with the high percentage of civil rights cases in which NYPD officers had been able to successfully invoke a qualified immunity defense.²⁴⁴ Researchers from the NYCC found at least 180 lawsuits between 2018 and 2021 in which qualified immunity was invoked, and judges granted qualified immunity to officers in approximately 100 of those cases.²⁴⁵ In light of these patterns, despite strong opposition from New York City's police unions, the NYCC was able to pass INT-2220 as one means to address police accountability through civil actions.²⁴⁶

V. SUMMARY AND CONCLUSION

Although the U.S. Supreme Court decisions in *City of Tahlequah*

²³⁹ Mays & Southall, *supra* note 238.

²⁴⁰ Michael Sisitzky & Simon McCormack, *NYC Just Missed a Chance to Transform the NYPD*, N.Y. C.L. UNION (Apr. 5, 2021), <https://www.nyclu.org/en/news/nyc-just-missed-chance-transform-nypd> [<https://perma.cc/ZY9N-2LYB>].

²⁴¹ Jenna Flanagan, *George Floyd Protest Engulfs City and Nation*, WLIW PBS THIRTEEN METRO FOCUS (June 1, 2020, 6:30 PM), <https://www.thirteen.org/metrofocus/2020/06/exploring-hate-george-floyd-eric-garner-vgl5q3/> [<https://perma.cc/8H3Y-F4WC>].

²⁴² Flanagan, *supra* note 241.

²⁴³ Sibilla, *NYC*, *supra* note 192; see also David Straughan, *New York City Ends Qualified Immunity for The NYPD*, INTERROGATING JUST. (Mar. 31, 2021), <https://interrogatingjustice.org/prosecutors/york-city-qualified-immunity/> [<https://perma.cc/7BS5-HT7M>].

²⁴⁴ Mays & Southall, *supra* note 238.

²⁴⁵ Mays & Southall, *supra* note 238.

²⁴⁶ Taylor Romine, *NYPD Officers Are No Longer Protected from Civil Lawsuits After City Council Passes Police Reform Legislation*, CNN (Mar. 26, 2021, 3:00 PM), <https://www.cnn.com/2021/03/25/us/nyc-police-reform-nypd/index.html> [<https://perma.cc/VU2Z-U2NL>].

v. Bond and *Rivas-Villegas v. Cortesluna* have been heralded by some law enforcement organizations as rightfully upholding police officers' entitlement to qualified immunity for injuries and deaths that occur as they exercise their official duties,²⁴⁷ recurring patterns of police practice that disproportionately result in death or serious injury to Black people and other persons of color continue to spark public protests and demands that this judicially created protection from civil liability be removed. In this Article, we argued that ample evidence demonstrates that in, at least, four areas of police practice—restraint techniques, the use of chemical irritants, CED use, and contagious shootings—police are on notice that substantial harm may flow from less than careful utilization of these police uses of force. Consequently, officers either know or should know that they will be held civilly liable when unnecessary (i.e., avoidable) harms, such as serious injury or death, occur as a result of one of these practices. Settlements of these incidents without a trial have prevented their facts from becoming part of legal precedence that could provide consistency and clarity to the application of qualified immunity under federal law. However, several states have responded to their constituents' demands for greater police accountability by establishing qualified immunity standards of their own, either by statute or judicial ruling. As a result, the residents of seven states—California, Colorado, Connecticut, Massachusetts, Montana, Nevada, and New Mexico—and those of the City of New York have access to civil remedies on grounds that are less narrow than the possibility of recovery via section 1983 suits.

The question remains whether other states will follow the lead of any of these jurisdictions. We fear that far too many states are content to punt on this political football²⁴⁸ by leaving their residents to rely on highly limited and overly technical federal judicial rulings as a

²⁴⁷Press Release, *U.S. Supreme Court Upholds Precedent in Two Qualified Immunity Cases — FOP Had Filed Amicus in Support of Officers*, NAT'L FRATERNAL ORDER OF POLICE (Oct. 21, 2021), <https://fop.net/2021/10/us-supreme-court-upholds-precedent-in-two-qualified-immunity-cases/> [<https://perma.cc/QHL5-R6AZ>].

²⁴⁸Proponents of qualified immunity, most notably, police unions and organizations, have argued that any limits on qualified immunity will reduce public safety, hurt the retention and recruitment of officers, and cause individual officers to go bankrupt. Billy Binion, *New Mexico Abolishes Qualified Immunity*, REASON (Apr. 7, 2021, 4:55 PM), <https://reason.com/2021/04/07/new-mexico-abolishes-qualified-immunity-police-government-officials/> [<https://perma.cc/8C4V-23JA>]; see also Day et al., *supra* note 10, at 15–16; Kindy, *supra* note 202; Josh LaBella, *Police Rally against Accountability Bill Cut Short after BLM Protesters Arrive*, CT. INSIDER (July 28, 2020, 7:01 PM), <https://www.ctinsider.com/news/article/Police-rally-against-accountability-bill-cut-15438225.php> [<https://perma.cc/9RNP-EQBD>]; Werth *supra* note 222.

In terms of public safety, there is no available data establishing a nexus between rising crime rates and restrictions on qualified immunity. During the period between 2020 and 2022, when some states and New York City limited qualified immunity, the rate of violent and property crime went up in many states that have no

basis for successfully seeking redress in cases where police activity

limits on qualified immunity and went down in most states that enacted limits on qualified immunity (e.g., New Mexico, Connecticut, and Massachusetts). Ames Grawert & Noah Kim, *Myths and Realities: Understanding Recent Trends in Violent Crime*, BRENNAN CTR. FOR JUST. (July 12, 2022), <https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime> [https://perma.cc/7BZC-VZ7J]; see also Cathy Habas, *The State of Safety in New Mexico 2023*, SAFEWISE (Mar. 13, 2023), <https://www.safewise.com/blog/safest-cities-new-mexico/> [https://perma.cc/5QJ6-RK96]; Hugh McQuaid, *State Stats Show Most Crime Declined with Exceptions*, CT. NEWS JUNKIE (Dec. 15, 2022, 12:41 PM), <https://ctnewsjunkie.com/2022/12/15/state-stats-show-most-crime-declined-with-exceptions/> [https://perma.cc/4G7C-MYRN]; No Change in Year-to-Year Homicides in Mass., WBUR News (Jan. 16, 2023), <https://www.wbur.org/news/2023/01/16/no-change-in-year-to-year-homicides-in-mass> [https://perma.cc/2RQG-89UN]. Although the crime rate has increased in Colorado since the passage of SB20-217 banning qualified immunity as a defense for most officers, crime was already increasing in Colorado before the passage of the bill for reasons about which some speculate might involve the decriminalization of certain types of addictive drugs or the reduction of penalties for many crimes. *Crime in Colorado in 2022: The Data on Colorado's Increasing Crime Problem*, COMMON SENSE INST. (Oct. 3, 2022), <https://commonsenseinstitute.org/crime-in-colorado-in-2022-the-data-on-colorados-increasing-crime-problem/> [https://perma.cc/F5RS-SN82]; see also Shaun Boyd, *Crime Report Shows Colorado No. 1 for Violent Crime among 22 Most Populous States-Many Victims Aren't Reporting*, CBS News (Apr. 3, 2023, 5:38 PM), <https://www.cbsnews.com/colorado/news/crime-report-colorado-violent-crime-victims/> [https://perma.cc/7ZFU-276A]. Moreover, any increases in crime in Colorado and other states since 2020 are likely attributable to factors related to the COVID-19 pandemic, such as socioeconomic instability and disruptions to community life, as well as the increasing proliferation of firearms used to commit violent crimes. Grawert & Kim, *supra*.

Regarding the claim that limits on qualified immunity will harm the retention and recruitment of officers, data from Colorado shows that there have been no negative effects on either retention or recruitment since the passage of SB20-217. Kindy, *supra* note 202; see also Diane Goldstein, *Qualified Immunity: 8 Myths about Why Police Need It to Protect the Public*, USA TODAY (Sept. 16, 2021, 6:01 AM), <https://www.usatoday.com/story/opinion/2021/09/16/policing-qualified-immunity-8-myths/8337916002/> [https://perma.cc/HGC5-DMX2]. There was actually a decrease in the percentage of officers leaving the force in Colorado after the passage of SB20-217 compared to the three years prior to 2020. Goldstein, *supra*. There also has been no change in the number of police cadets in Colorado since the passage of SB20-217. Kindy, *supra* note 202. Lastly, there is no empirical support for the claim that individual officers will go bankrupt without qualified immunity protections. Research by UCLA Law Professor Joanna Schwartz found that officers were indemnified in 99.6% of civil rights cases, with the agency or municipality covering their legal costs. Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014). In addition, Schwartz also found that governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement. Schwartz, *supra*, at 960 ("Law enforcement officers employed by the forty-four largest jurisdictions in my study were personally responsible for just .02% of the over \$730 million paid to plaintiffs in police misconduct suits between 2006 and 2011."). These research findings raise a serious question of whether civil suits can have the desired deterrent effect when officers are not required to lose their own personal assets when they cause harm.

is the source of their harm. Whether a national consensus to ban qualified immunity can ever be reached remains uncertain. In the meantime, there must be some uniform mechanism to provide relief for victims of knowingly dangerous police behavior that is both unnecessary and avoidable.