SOCIAL MOVEMENT THEORY AND THE ROLE OF QUALIFIED IMMUNITY IN INCREASING POLITICAL VIOLENCE

CESAR M. ESTRADA*

INTRODUCTION

On April 20, 2021, a Minneapolis jury returned a guilty verdict on three different homicide charges for former Minneapolis Police Officer Derek Chauvin for the murder of George Floyd in May 2020.[1] George Floyd's murder, long down the list of police killings of Black Americans, was not unique in and of itself. In 2020 alone, 1,126 people were killed by police officers in the United States, and, similarly, in 2021, 1,134 people were killed by police—a disproportionate amount of whom are Black compared to the Black share of the population.[2] George Floyd's death, however, was unique in that it brought

* Juris Doctor Candidate, Notre Dame Law School, 2022; Bachelor of Arts, University of Notre Dame, 2017. Many thanks to Professor Debra Javeline, Ph.D., of the Notre Dame Political Science Department for allowing me to take her Ph.D. seminar, *Political Protest, Social Movement and Revolution*, and introducing me to the social science literature studying political movements and political violence. I am very grateful for all of her guidance through the interdisciplinary writing process. Additional thanks to all of my classmates in the seminar for the lively and invaluable discussions that informed me during my writing process. Lastly, thank you to my colleagues on the *Notre Dame Journal of Law, Ethics & Public Policy* for their diligent edits. All errors are my own.

1. Ashley Southall & Johanna Barr, *Chauvin Found Guilty of Murdering George Floyd*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/live/2021/04/20/us/derek-chauvin-verdict-george-floyd.

2. Mapping Police Violence reports that in 2021, Black people were 28% of those who were killed by police, despite only being 13% of the population. *2020 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org. This report also finds that Black people are three times more likely to be killed by the police than white people despite being *less likely* to be armed than white people. *Id.* Furthermore, Mapping Police Violence only collects data of police *killings* and does not include data on broader police violence, such as, *inter alia*, assault and battery, police dog bites, destruction of property, excessive use of force with batons, pepper spray, and tasers, harassment, unnecessary and unreasonable searches and seizures, and the deprivation of other civil liberties involving physical violence or otherwise. The collection of this type of data is difficult to find because of the different mechanisms state and local government have with regard to disclosure of police misconduct and complaints data, including limitations on disclosure and punishment that stem from contractual obligations from employment contracts attained by police unions. This citation refers to the statistics of police killings, but the argument of this Note will encompass the broader spectrum of police violence against civilians, not simply homicides, which is a lot more difficult to quantify.

about an unprecedented level of protest across the United States and abroad.[3] The George Floyd protests did not arise in a vacuum, however, but instead the protests should be understood as the natural culmination and escalation of over a decade of protests against police killings of Black Americans. These protests are bringing about a once-in-a-generation racial and political reckoning—one that acknowledges that police violence towards civilians, particularly communities of color, is out of control.[4] Ironically, the increase in civil protests against police brutality has been countered by police officers nationwide with an increased level of police brutalization of civilians.[5]

Interestingly, however, despite Derek Chauvin's *criminal* conviction, the NAACP's president, Derrick Johnson—after Chauvin had been found guilty of all three homicide charges—called for an end to qualified immunity for police officers, a *civil* protection.[6] Qualified immunity for police officers is brought under 42 U.S.C. § 1983 to use as a defense when police officers are accused of violating people's constitutional rights.[7] This is not surprising, since across the

3. By June of 2020, some estimates suggest that nearly twenty-six million people in the United States had participated in demonstrations over the death of George Floyd in over 4,700 demonstrations nationwide. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html. *See also* Rachel Pannett et al., *George Floyd's Death in U.S. Sparks Outcry Abroad*, WALL ST. J. (June 3, 2020), https://www.wsj.com/articles/george-floyds-death-in-u-s-sparks-outcry-abroad-11591123234.

4. *See* Deidre McPhillips, *Deaths from Police Harm Disproportionately Affect People of Color*, U.S. NEWS & WORLD REP. (June 3, 2020), https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color (compiling data from the *Mapping Police Violence* database that reports that in 2019 alone, 54% of people who died as a result of harm from police were identified as Asian, Black, Hispanic, Native American, and Pacific Islander). Furthermore, as the public begins to see the disproportionate effects police brutality has on communities of color, there have been collateral consequences in public safety and law enforcement, such as the increasing erosion of public trust of police officers and police departments as keepers of the peace. *See generally* Rick Jervis, *Who are Police Protecting and Serving? Law Enforcement Has History of Violence Against Many Minority Groups*, USA TODAY (June 13, 2020), https://www.usatoday.com/story/news/nation/2020/06/13/mistrust-police-minority-communities-hesitant-call-police-george-floyd/5347878002/.

5. In 2020, the Human Rights Watch released a report finding that "[l]aw enforcement officers across the United States responded to many of [the George Floyd] peaceful protests with violence, excessive force, and abuse. They beat up protesters, conducted mass arrests, and fired teargas, pepper spray, stun grenades, and rubber bullets to disperse and *discourage* protests.". *See generally "Kettling" Protesters in the Bronx: Systemic Police Brutality and Its Costs in the United States*, HUM. RTS. WATCH (Sept. 30, 2020), https://www.hrw.org/report/2020/09/30/kettling-protesters-bronx/systemic-police-brutality-and-its-costs-united-states (emphasis added). In the case of protests in the Bronx, for example, the Human Rights Watch found that the police response to the *peaceful* protest in the Bronx was met with *intentional* and *planned* police violence against civilians. *Id.*

6. Maggie Astor, *Lawmakers and Activists React to the Derek Chauvin Verdict*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/chauvin-verdict-reaction-obama.html.

7. *See* Civil Rights Act of 1871, 42 U.S.C. § 1983.

ideological spectrum, American liberals and conservatives agree that qualified immunity is a problem and must be abolished, or substantively curtailed, as a mechanism for addressing police brutality.[8] Criminal convictions of police officers, whether for homicide as in the case of Chauvin, or for other forms of criminal police misconduct, are exceedingly rare.[9] At its creation, § 1983 was intended as a tool for individuals to bring suit against government officials in courts of law for violation of their civil rights.[10] Nevertheless, although the original intent of the law has been handicapped by the Supreme Court's creation of the qualified immunity doctrine,[11] abolishing the doctrine can begin to serve the original purpose of the creation of the cause of action: for individuals to hold government officials accountable for violation of their civil rights.

---

8. For example, civil rights organizations like the NAACP and conservative think-tanks such as the Cato Institute are both on record calling for the *abolition* of the qualified immunity doctrine. *See* Press Release, NAACP, Civil Rights Leaders Call on Congress to Pass George Floyd Justice in Policing Act (Feb. 24, 2021), https://naacp.org/articles/civil-rights-leaders-call-congress-pass-george-floyd-justice-policing-act (stating support of a House bill that would end qualified immunity). *See also* Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, 901 CATO INST. POL'Y ANALYSIS 1 (2020), https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf. Furthermore, the only social group that actively advocates for the qualified immunity doctrine to remain untouched, if not bolstered, is the police themselves. *See* Jay Schweikert, *Blatant Misrepresentations of Qualified Immunity by Law Enforcement*, CATO INST. (Oct. 6, 2020), https://www.cato.org/blog/blatant-misrepresentations-qualified-immunity-law-enforcement (documenting how the discussion of qualified immunity is largely plagued by misinformation in large part due to the misrepresentations by police unions and law enforcement groups regarding what qualified immunity is and what would happen if it is indeed abolished).

9. The criminal prosecution of police officers is rife with structural, procedural, and legal difficulties. Structurally, there exists a blatant conflict of interest between local prosecutors' offices, who are in charge of prosecuting police officers should the need arise, and police departments because of the proximity of prosecutors and the police. It has been suggested by some legal academics that the conflict of interest is so great that local prosecutors should be disqualified from prosecuting their local police officers. *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016). Nevertheless, even if police prosecutions are removed from the local jurisdiction, this does not remove procedural difficulties, such as overcoming the "blue wall of silence," an informal understanding between law enforcement officers to refuse to testify against each other, normally enforced by extraordinary peer pressure and alienation from their own colleagues. *See* Jennifer E. Koepke, Note, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211 (2000). Lastly, even when the structural and procedural issues of criminally prosecuting a police officer can be overcome, the Supreme Court has actively accepted and perpetuated a legal regime that allows police officers to use violent force against civilians with impunity as an unfortunate, but necessary, byproduct of preserving law and order; therefore, reaching a guilty verdict on whatever charge, if any is even brought, against a police officer is incredibly difficult. *See* Samuel Goldsmith, *The Misguided Constitutionalization of the Enabled Police Force*, 8 GEO. J.L. & MOD. CRITICAL RACE PERSP. 191 (2016).

10. Civil Rights Act of 1871, 42 U.S.C. § 1983.

11. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799 (2018) (noting that "qualified immunity's shield against government damages liability is stronger than ever").

Derrick Johnson's statements are not surprising because organizations like the NAACP, as well as civil rights movement organizations like the Black Lives Matter movement,[12] understand that any meaningful reform of policing practices and police accountability necessarily includes a reimagination of the qualified immunity doctrine, if not wholesale abolition of it.[13] Until qualified immunity is reformed and police officers can be held accountable in civil courts[14] for violating people's civil rights, it is reasonable to expect that police violence will continue to increase—or at least remain at the current high levels.[15] Moreover, this inability to hold police officers accountable in courts

---

12. Similar to the NAACP president's statement after the criminal conviction of former officer Derek Chauvin's killing of George Floyd, the Black Lives Matter organization released a press statement after the Kenosha, Wisconsin District Attorney made the decision not to pursue criminal charges against police officer Rusten Sheskey for the shooting of Jacob Blake in August 2020. In their statement, the BLM organization stated, "[w]e must dismantle anti-Black racism by ending qualified immunity . . . [and] defund[] the police." *See* Press Release, Black Lives Matter Glob. Network, Black Lives Matter Global Network Responds After Wisconsin District Attorney Won't Charge Kenosha Police Officer in Jacob Blake Shooting (Jan. 5, 2021), https://blacklivesmatter.com/black-lives-matter-global-network-responds-after-wisconsin-district-attorney-wont-charge-kenosha-police-officer-in-jacob-blake-shooting/.

13. Two-thirds of Americans support the right to sue police officers, even if it makes policing more difficult. *Majority of Public Favors Giving Civilians the 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/.

14. This Note does not consider reforms to the criminal legal framework, federal or state. However, for an interesting discussion about an addition to the Model Penal Code to proscribe oppressive conduct by police officers, see generally David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. REV. 165 (1996) (proposing that misuse of authority and use of excessive force by police officers, referred to as "Official Oppression," and other forms of low-level brutality, such as verbal abuse and harassment which has an outsize impact on minorities and poor communities, should be criminalized conduct). *See also* TARYN A. MERKL, BRENNAN CTR. FOR JUST., PROTECTING AGAINST POLICE BRUTALITY AND OFFICIAL MISCONDUCT: A NEW FEDERAL CRIMINAL CIVIL RIGHTS FRAMEWORK (Apr. 29, 2021) (arguing that the go-to federal statute for prosecuting official misconduct, 18 U.S.C. § 242, is a woefully inadequate statute for prosecuting police misconduct and proposing that the federal government enact a criminal statutory framework that protects the fundamental constitutional rights of people who come into contact with public officials).

15. *E.g.*, *2020 Police Violence Report*, *supra* note 2 (noting that police killings of civilians slightly increased from 2020 to 2021). Moreover, allowing civilians to collect damages will not in and of itself change police culture. Already billions of dollars are paid out annually by municipal governments to civilians for police misconduct. Instead, researchers have suggested, for example, that a solution to decrease police violence is to restructure civilian payouts by moving to a liability insurance model of damages payout. Some municipalities are already starting to switch to this model. The benefits of this model, as suggested by the Brookings Institution, include the ability for municipal governments to be able to detect which "bad apples" are causing their insurance premiums to increase, and therefrom municipal governments or police unions who pay the insurance premiums can take action against those individual officers. The implication of this market-driven solution is that when city governments, police departments, or police unions can pinpoint with certainty which officers are more of a financial liability than they are worth, they will be rooted out,

of law for the violence they exert on the public is increasing anger and frustration from the masses against law enforcement, courts, and other political institutions that, as suggested by social movement theory, will lead to political protest, if not violence.[16]

In the last sixty years, the Supreme Court and federal courts have only strengthened the qualified immunity protection afforded to police officers by creating a legal standard that is increasingly more difficult to overcome in the lower courts. Americans have a foundational expectation that our legal system renders justice on those who break the law, and the discrepancy between this expectation and the inability of the legal system to hold police officers accountable for their crimes and violations against civilians is tearing at the social fabric of this country.

This Note argues that the doctrine of qualified immunity needs to be abolished because it is unjust. The injustice being perpetuated in American courtrooms is increasing distrust in the police and other legal and political institutions amongst most social groups, but markedly in the Black community.[17] This increase in distrust due to the inability to hold police officers accountable stemming from the pervasiveness and breadth of the qualified immunity protections suggests that, in accordance with social movement theory borrowed from sociology and political science, will increase frustration amongst individuals and lead to political unrest and violence in a population that increasingly no longer finds policing as legitimate.

Part I lays out the original justification for the creation of the qualified immunity doctrine and then explains the distorted and misguided modern legal standard as applied today to showcase the absurd lengths to which lower courts are going to immunize police officers from accountability. Part II argues that social movement theory can be used to explain that the increase of nationwide movements calling for the abolition or defunding of the police is, in part, due to the qualified immunity doctrine and its implementation in the lower courts. Moreover, Ted Gurr's social movement theory,[18] on which this Note is based, although not predictive, suggests that there will be an increased level of civic engagement in protests, peaceful and violent, and will not decrease until the discrepancy between the American understanding of justice and accountability

---

thus by implication forming a police force that includes fewer officers that have a proclivity to abuse their power. *See* Rashawn Ray, *How Can We Enhance Police Accountability in the United States?*, BROOKINGS INST. (Aug. 25, 2020), https://www.brookings.edu/policy2020/votervital/how-can-we-enhance-police-accountability-in-the-united-states/.

16. *See infra* Part II.

17. *See* Laura Santhanam, *Two-thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS (June 5, 2020), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do (reporting that nearly half of Black Americans, about 48%, have no trust that police will treat them equally to white people, and an additional 17% have "just some" trust that they will get treated equally).

18. TED ROBERT GURR, WHY MEN REBEL (1970). For a fuller discussion of Gurr's social movement theory, see *infra* PART II.

better matches the level of accountability currently being rendered against police misdeeds. Lastly, abolishing or curtailing qualified immunity will not be sufficient to quell the rise of civil unrest we are witnessing today, but it will be a necessary component of any meaningful policing reform in achieving that end.

PART I: QUALIFIED IMMUNITY: LEGAL STANDARD, JUSTIFICATIONS, AND EGREGIOUS APPLICATIONS

As part of its Reconstruction Era efforts to ensure the rights and societal integration of formerly enslaved Black Americans, the United States Congress passed the Civil Rights Act of 1871 to provide, among other protections, a civil enforcement mechanism for individual citizens to enforce their civil rights.[19] This enforcement mechanism came in the form of a cause of action, codified today in 42 U.S.C. § 1983, which allows individuals to sue state officials who deprived them of their statutory or constitutional civil rights. As currently codified, § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[20]

Notably, the statute only creates a cause of action and does not provide for any immunities, qualified or otherwise. Furthermore, there is no complementary statute or constitutional doctrine that, explicitly or by implication, creates a qualified immunity against § 1983 claims.[21] Nevertheless, the Supreme Court contrived a misguided defense almost one hundred years after the creation of § 1983, and it has quickly given police officers carte blanche to act, and even kill, with impunity.

A. Modern Legal Standard and Common Justifications

The qualified immunity doctrine stems from the 1967 Supreme Court decision in *Pierson v. Ray*, where the court held that a police officer acting in good faith when enforcing a law that is later found to be unconstitutional is free from § 1983 liability.[22] Nevertheless, the misguided and uncontrollable qualified immunity standard did not begin to form until 1982, in the case *Harlow v. Fitzgerald*, where the Court shifted from a "good faith" defense to an "objective reasonableness" standard.[23] Citing "general" and "special" costs "to

19. Civil Rights Act of 1871, 42 U.S.C. § 1983.

20. *Id.*

21. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47–51 (2018).

22. Pierson v. Ray, 386 U.S. 547 (1967).

23. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

society as a whole" in their reasoning for abandoning the good faith standard, the Court decided that allowing a determination of good faith to be considered by a jury would be too costly to government officials.[24] The foundation for the good faith standard at its inception in 1967 was already questionable,[25] and in turn, the foundation for amending the standard from good faith to objective reasonableness stands on doubly precarious grounds since empirical studies have shown that the qualified immunity litigation infrequently protects government officials from the burdens associated with discovery and trial in filed cases.[26] *Harlow* widely expanded the qualified immunity defense to protect public officials from liability for unconstitutional conduct where the law governing the officer's conduct was unclear at the time of the violation or, alternatively, where they behaved objectively reasonably.[27]

As the modern standard for determining qualified immunity stands, the Court determined in *Saucier v. Katz*, that a reviewing court must determine: (1) whether a public official has violated a plaintiff's constitutionally protected right; and (2) whether the right the official violated was clearly established at the time of the violation.[28] Qualified immunity is defeated when both of these elements are answered sequentially in the affirmative.[29] Nevertheless, soon after establishing the sequential analysis in *Saucier*, the Court later loosened the qualified immunity inquiry by holding in *Pearson v. Callahan* that lower courts could grant qualified immunity without first ruling on the constitutionality of the defendant's behavior.[30] Instead, the lower courts can look first and only to the second factor—whether "clearly established" law was violated—and on that determination alone dismiss the case on qualified immunity grounds.[31] Taken and applied together, *Saucier* and *Pearson* have created a vicious cycle where lower courts are not setting precedent for what qualifies as "clearly established" that future victims of police violence can utilize to establish the second factor

24. *See id.* at 816. *See also* Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2069 (2018) ("The goal of modern qualified immunity doctrine is to provide courts with a means for dismissing claims early on in the life cycle of a case, thus shielding defendants from the burdens of discovery, let alone trial.").

25. *See* Baude, *supra* note 21 (arguing that qualified immunity, despite the *Pierson* court's claim that it was derived from common law principles, is not consistent with the history of the common law, and furthermore the doctrine is unlawful and inconsistent with conventional principles of statutory interpretation).

26. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

27. *See* Reinert, *supra* note 24, at 2069.

28. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

29. *Id.* at 200–01.

30. *See* Pearson v. Callahan, 555 U.S. 223, 236–37 (2009) ("[W]e now hold that the *Saucier* protocol should not be regarded as mandatory in all cases . . . . *Saucier*'s two-step protocol disserves the purpose of qualified immunity when it forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.") (citations omitted).

31. *Id.*

and hold police officers accountable.[32] This leads to a perpetuating cycle of police violence lawsuits being dismissed for lack of precedent establishing the second factor[33] because federal courts have taken the self-aggrandizing view that the only source of law that establishes whether something is "clearly" established is Supreme Court or Circuit Court precedent,[34] and no other sources of law like municipal policies and police department guidelines, can be used to satisfy the second prong of the qualified immunity test.[35]

It is reasonable to ask why qualified immunity is so impervious to criticism from the public and slow to be curtailed by the federal courts. Some scholars have suggested that there is an ingrained sense that qualified immunity is derived from "ordinary principles of statutory interpretation," and thus, the Supreme Court's proverbial hands are tied in weakening the doctrine.[36] But that is not the case, because the qualified immunity doctrine exists only within the precedent that has been established by the Supreme Court itself and does not have an anchor in a statutory scheme or other non-Supreme Court positive law.[37] Instead, the hesitation to end qualified immunity stems from a social understanding of what policing is and the dangers of the job. Among the most common refrain for maintaining the qualified immunity protection is that eliminating it will have a detrimental effect on police officers ability to act and

32. *See* Schwartz, *supra* note 11, at 1815–16.

33. For example, in 2009 the Eleventh Circuit dismissed a case against police officers on qualified immunity grounds wherein the officers killed a man in custody after "hogtying" him which led to health complications. *See* Lewis v. City of W. Palm Beach, 561 F.3d 1288 (11th Cir. 2009). The Eleventh Circuit held that hogtying was not clearly established to be a violation of the Fourth Amendment and dismissed on qualified immunity grounds. *Id.* at 1291. Instead of setting precedent by answering whether hogtying was a constitutional violation in the case then before the court, which would have been done had the court addressed the first prong of the *Saucier* test, the Eleventh Circuit dismissed the case based on the second prong alone. *Id.* A few years later, however, a district court in the Eleventh Circuit was confronted with the same question in *Callwood v. Phenix City*, No. 2:15CV182-WHA, 2016 WL 6661158, at *20 (M.D. Ala. Nov. 10, 2016). There, the judge said that there was no precedent establishing that the officer's use of a hog-tie restraint was unlawful. *Id.* at *11. If only the Eleventh Circuit had ruled on that question when it was presented to them a few years earlier, perhaps the plaintiff in *Callwood* could have held the officers accountable, even if the victim in *Lewis* could not.

34. *See, e.g.*, Frasier v. Evans, 992 F.3d 1003, 1015 (10th Cir. 2021) ("[J]udicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of [plaintiff's] First Amendment rights was irrelevant to the clearly-established-law inquiry.").

35. *See id.* at 1023 ("In conclusion, we hold that . . . [i]rrespective of whether the officers subjectively knew from their training that Mr. Frasier possessed a First Amendment right to record [the police] performing their official duties in public spaces, this right (which we assume to exist) was not clearly established law in August 2014 when [the police] allegedly retaliated against Mr. Frasier for recording them.").

36. *See* Baude, *supra* note 21, at 47.

37. *Id.*

make difficult split second decisions without hesitating and risking their lives.[38] In 2013, for example, a Michigan police officer, responding to reports of an armed man outside a business establishment, shot a fourteen-year-old boy after stopping the boy to investigate.[39] When the officer asked the boy, who was carrying a toy gun that he was using to play cops and robbers with his friends in his neighborhood, to put his hands in the air, the boy instinctively tossed the gun on the ground after which the officer immediately shot him.[40] In its opinion granting the officer qualified immunity, the Sixth Circuit stated that "[q]ualified immunity allows police officers 'breathing room to make reasonable but mistaken judgments . . . .'"[41]

However, even when courts have ample evidence that the police have hours of breathing room to make difficult decisions—even enough time to seek counsel—the court will still grant qualified immunity. For example, in Caldwell, Idaho, police officers were granted qualified immunity after they destroyed the home of a woman who gave officers permission to enter her house to seek a fugitive.[42] When the plaintiff was arriving home, she saw police officers surrounding her home, who explained to her that they suspected a fugitive was hiding inside her house and asked for permission to enter.[43] Plaintiff agreed and handed the keys to her front and back doors to the officers, who later called a SWAT team, shot tear gas into her home through the windows, broke inside, and in the process, destroyed her home, which was empty.[44] The question before the court was whether the police officers should have known that the search they conducted exceeded the scope of the plaintiff's consent, to which the Ninth Circuit said the officers did not exceed their power.[45] In their reasoning, the court stated that the plaintiff never expressed time limitations, physical limitations of where officers could search, or a manner of entry.[46] Even if the reasonable person does not assume that there is an implied limitation to enter through the front door and not break through the

38. *See* Joanna C. Schwartz & Seth Stoughton, *The Unnecessary Protection of Qualified Immunity*, JUSTIA: VERDICT (June 26, 2020), https://verdict.justia.com/2020/06/26/the-unnecessary-protection-of-qualified-immunity.

39. *See* Nelson v. City of Battle Creek, 802 F. App'x 983 (6th Cir. 2020).

40. The facts here are eerily similar to the infamous shooting of twelve-year-old Tamir Rice in Cleveland, Ohio, which occurred one year after the events of *Nelson*. *See* Shaila Dewan and Richard A. Opel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html. Twelve-year-old Tamir Rice was fatally shot by police in November 2014 when two officers approached him in a gazebo and a park where Tamir was playing with a toy gun. *Id.*

41. *Nelson*, 802 F. App'x at 986.

42. *See* West v. City of Caldwell, 931 F.3d 978 (9th Cir. 2019).

43. *Id.* at 988 (Berzon, J., dissenting).

44. *Id.*

45. *Id.* at 987–88.

46. *Id.* at 986.

windows when one is handed the keys to a home,[47] it seems unreasonable for the same qualified immunity that shields police officers from illegal and deadly split-second decisions to also protect officers who were too lazy to clarify the scope of their permission despite having ample time to seek clarification.

Another common excuse for not eliminating the toxic qualified immunity defense is the unease of making police officers personally liable financially for their actions. The Supreme Court keeps this consideration at the forefront of their perpetuation of qualified immunity as a necessary aspect of policing even if it leads to unfair circumstances for civilians.[48] Nevertheless, despite empirical evidence showing that municipal and state governments indemnify approximately 99.98% of the dollars that plaintiffs recover in lawsuits alleging civil rights violations, the Supreme Court continues to countenance the belief that abolishing qualified immunity will mean that officers will go personally bankrupt for their actions.[49] Ironically, this indemnification scheme is present even in jurisdictions that, by law or policy, prohibit government indemnification of police officers against whom damages are awarded for civil rights violations of civilians.[50] Despite the evidence that governments are wont to bail out officers who commit civil rights violations even in circumstances that violate the department's own internal policies and laws,[51] or even go against direct orders from their supervisors,[52] the Supreme Court continues to pretend that police officers need to be protected financially by qualified immunity.

---

47. *Cf. id.* at 989–90 (Berzon, J., dissenting) (noting that the reasonable person would have known that the officers should have assumed that the plaintiff meant for them to enter through the front door, or, in the alternative, asked her for clarification since there was plenty of time in between breaking in and receiving her permission).

48. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967) (stating that a police officer should not be forced to "choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does").

49. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 888–89 (2014).

50. *Id.* at 890.

51. *See*, *e.g.*, Frasier v. Evans, 992 F.3d 1003, 1023 (10th Cir. 2021) (holding that a reasonable officer would not have known that civilians have a right to record the police despite the fact that all the officers in the department receive training informing them of that right).

52. For example, in *Mullenix v. Luna*, 577 U.S. 7, 20 (2015), the Supreme Court granted an officer qualified immunity despite the fact that the officer went against direct orders from his supervisor. During the pursuit of a man evading police arrest, Officer Mullenix, who was standing at an overpass, decided to shoot into the driver's vehicle despite the fact that he knew spike strips had already been put in place that would halt the driver's evasion. *Id.* at 15–16, 20–25. Mullenix radioed his idea to his supervisor, who told him to stand by because the spikes had already been set up. *Id.* at 9. Mullenix proceeded to shoot six times into the driver's vehicle, killing him. *Id.* at 9–10. The Supreme Court held that Mullenix was entitled to qualified immunity despite going against orders because they had never before held that shooting into a civilian's car during a high-speed chase to violate the Fourth Amendment. *Id.* at 15. True to form, the Court dismissed on qualified immunity grounds without answering the question of whether indeed the shooting into a moving vehicle during a high-speed chase is indeed a violation of the Fourth Amendment, thus precluding any future officers who chose to evade orders like Officer Mullenix from being held accountable. *Id.*

Seeing that the qualified immunity standard as established in *Harlow* has been wholly devoid of any tangible connection to promoting good policing and holding bad officers accountable for their actions, it seems that the men who created the doctrine have been blindsided by the speed at which the federal courts have since warped the standard. For example, liberal icon Justice William Brennan, joined by Justices Thurgood Marshall and Harry Blackmun, concurred in the holding of *Harlow* planting the seeds of the modern qualified immunity doctrine, justified his decision by stating:

> I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes.[53]

Justice Brennan's concurrence has proven to be deeply wrong and has been contradicted by federal courts since. In March 2021, for example, a federal court held that "it is therefore 'irrelevant' whether each officer defendant actually believed—or even in some sense knew—that his conduct violated a statutory or constitutional right . . ." when granting a police officer qualified immunity after the officer took a protestor's mobile device, looked through it, and deleted the video the plaintiff had been recording of the police officer brutalizing an arrestee.[54] It is clear that the *Harlow* standard has grown beyond the bounds of the reasoning of at least three of the men who established it, and is being used to protect even the bad police officers guilty of abusing their power as protectors of the social order.[55]

B. Egregious Applications of the Qualified Immunity Standard

It is easy to miss how harmful the effect of qualified immunity has been on the public conception of justice without first seeing the outrageous (and numerous) examples of decisions granting qualified immunity to police officers

---

53. *See* Harlow v. Fitzgerald, 457 U.S. 800, 820–21 (1982) (Brennan, J., concurring) (citations omitted).

54. *See Frasier*, 992 F.3d at 1016.

55. For example, even when a jury finds that a police officer acted with malice when brutalizing a plaintiff, the federal courts will still find that the officer is entitled to qualified immunity on base technicalities. *See, e.g.*, Shafer v. Cnty. of Santa Barbara, 868 F.3d 1110 (9th Cir. 2017) (holding that an officer who was found by a jury to have acted with malice and excessive force when injuring a non-violent college student by throwing him on the ground during a demonstration at the University of California, Santa Barbara, was still entitled to qualified immunity because it was not clearly established whether the force used by the officer was excessive in the context of a *misdemeanor* violation even if his conduct would have been excessive had the conduct been deemed to be a felony). In 2019, the Supreme Court denied certiorari to consider this case. Shafer v. Padilla, 138 S. Ct. 2582 (2018).

and other government officials. Qualified immunity is raised by defendants most commonly in several contexts: Fourth Amendment claims against unreasonable searches and seizures and Eighth Amendment claims of use of excessive force raised by civilians and claims of cruel and unusual punishment raised by incarcerated people against corrections officers. Regardless of the ideological proclivities of any particular federal circuit, the reality is that in all the federal circuits, courts are willing to let police officers escape liability on the smallest technicalities.

For example, in the Second Circuit, New York State prison inmates brought an action alleging that they were sexually abused by their corrections officer and that supervising prison officials were deliberately indifferent to the sexual assault.[56] Circuit precedent previously held that "[w]here no legitimate law enforcement or penological purpose can be inferred from the defendant's alleged conduct, the [sexual] abuse itself *may*, in some circumstances, [violate the Eighth Amendment]."[57] Leaving the potential for some sexual abuse allegations to not constitute an Eighth Amendment violation, the Second Circuit granted qualified immunity to the corrections officers stating that "[a] reasonable officer could therefore have believed that the sexual abuse here alleged, *even if it might violate state criminal law or subject him to tort liability*, did not violate the Eighth Amendment."[58]

The Fifth Circuit granted qualified immunity to an officer who pepper sprayed an inmate in the face without any provocation.[59] The Fifth Circuit recognized that the pepper spraying could cross the line separating a *de minimis* use of force from a cognizable one; still, the Court ruled that "it was not *beyond debate* that [spraying an inmate with pepper spray without provocation] did [cross the line], so the law wasn't clearly established."[60]

In the Sixth Circuit case *Nelson v. City of Battle Creek* mentioned above,[61] the Sixth Circuit, in deciding whether shooting a boy who tossed his toy gun on the floor was clearly established to be excessive force, determined that it was not clearly established because precedent cited by the plaintiff had only established that shooting a man who was lowering his weapon on police command was a constitutional violation, but in this case the child threw his toy gun on the floor when the command was to raise his hands.[62]

In the Eighth Circuit, a naked man suffering from schizophrenia and who claimed to be God was tased repeatedly by police officers until he died in front of his home after the decedent's mother called for help.[63] The Eighth Circuit reasoned that although it was clearly established that non-violent, non-fleeing

56. *See* Crawford v. Cuomo, 721 F. App'x 57 (2d Cir. 2018).

57. *See* Boddie v. Schnieder, 105 F.3d 857, 861 (2d. Cir. 1997) (emphasis added).

58. *See Crawford*, 721 F. App'x at 59 (emphasis added).

59. McCoy v. Alamu, 950 F.3d 226 (5th Cir. 2020).

60. *Id.* at 233.

61. *See supra* notes 34–35; Nelson v. City of Battle Creek, 802 F. App'x 983 (6th Cir. 2020).

62. *Id.*

63. De Boise v. Taser Int'l, 760 F.3d 892 (8th Cir. 2014).

subjects should be free from multiple tasings, the law was not clearly established regarding a subject acting aggressively towards officers (a subject who, it should not be overlooked, was naked, unarmed, and clearly hallucinating).[64] Instead of taking the time to make a determination as to whether this particular set of facts gave rise to a constitutional violation and therefore set a precedent for future cases, the Eighth Circuit, much like most courts considering qualified immunity, began and ended their inquiry with the second factor, completely ignoring the constitutional question.[65] Cases like *De Boise*, which involve victims of police violence who are suffering from mental illnesses that cause temporary lapses in mental stability cannot be ignored. There is a long line of cases where police officers, who are not trained in handling people afflicted with mental disabilities, will readily use deadly force against them.[66] As an ancillary issue, with the continued inability of police officers to handle police calls involving those afflicted with mental health issues, qualified immunity functionally endorses the unabashed execution of those inflicted with mental disabilities or other persons suffering from temporary incapacitation without any consequences for the police officers.[67]

---

64. *Id.* at 897.

65. *Id.* at 896 ("Here, we begin with the second inquiry. Though the outcome of this encounter was tragic, and even if the reasonableness of the officers' action was questionable, Appellants cannot defeat the officers' defense of qualified immunity . . . .").

66. Indeed, the burgeoning social movements to defund or abolish the police emphasize the need to reallocate policing funds to mental health and social services. *See* Matthew Rozsa, *Why Defunding the Police Means Investing in Mental Health*, SALON (Aug. 11, 2020, 2:58 PM), https://www.salon.com/2020/08/11/why-defunding-the-police-means-investing-in-mental-health/; *see also* David Sachs, *6-Month Experiment Replacing Denver Police With Mental Health Teams Dubbed A Success*, NPR (Mar. 8, 2021, 4:22 PM), https://www.npr.org/2021/03/08/974941422/6-month-experiment-replacing-denver-police-with-mental-health-teams-dubbed-a-suc.

67. For example, in 2021 the Fifth Circuit denied *en banc* review of one of its panel decisions granting qualified immunity to a police officer who tased a suicidal man who was doused in gasoline even though the police officer knew that doing so would result in the man catching fire and burning down his house. *See* Ramirez v. Guadarrama, 2 F.4th 506 (5th Cir. 2021). The decedent was under the influence of methamphetamines when he doused his home and himself in gasoline and was threatening to kill himself. *See* Ramirez v. Guadarrama, 844 F. App'x 710, 711–13 (5th Cir. 2021). The decedent's son called 911 to try to prevent his father from setting himself on fire and burning down their home, but when the officers confronted the decedent inside the home, the officer tasered the man and endangered the lives of the officers, the wife, son, and the man suffering from an altered state of mind who was set on fire as a result of the tasing. *Id.* In another egregious case granting qualified immunity to a police officer in the Fifth Circuit, the police shot and killed a suicidal man suffering from depression after his wife called the police for help after fearing that the decedent may have overdosed on pills in an attempt to take his life. *See* Harris v. Serpas, 745 F.3d 767, 769–71 (5th Cir. 2014). The police officers entered the barricaded room where the decedent, who was unresponsive in his bed, refused to drop the knife he was holding, leading the police to shoot and kill the suicidal man. *Id.* Similarly, the Fifth Circuit granted qualified immunity to police officers who shot and killed a suicidal man who did not drop his weapon. *See* Rice v. ReliaStar Life Ins. Co., 770 F.3d 1122, 1134 (5th Cir. 2014). In the Tenth Circuit, a man admitted to the hospital due to suffering from hypoxia—low levels of oxygen to the brain—was shot and killed by police officers after the man became belligerent due to his inability to understand that he was admitted to the

Bordering on the absurd, the Eleventh Circuit granted qualified immunity to an officer who, "without necessity or any immediate threat or cause," attempted to shoot the family pet of an arrestee while the defendant and his six children were lying on the ground obeying police orders, and accidentally missed and shot the ten-year-old child instead.[68] The Eleventh Circuit noted that the victims in this case "failed to present [the court] with any materially similar case from the United States Supreme Court, [the Eleventh Circuit], or the Supreme Court of Georgia that would have given [the officer] fair warning that [shooting at a dog without any cause, missing the target, and instead shooting a child laying on the ground] violated the Fourth Amendment."[69] In light of this, the Eleventh Circuit dismissed the case on qualified immunity grounds for failing to establish that shooting a child is a violation of the Fourth Amendment.[70]

---

hospital and attempted to free himself from the IV tubes and medical equipment keeping him alive. *See* Aldaba v. Pickens, 844 F.3d 870, 874–75 (10th Cir. 2016). Frustratingly, the Tenth Circuit had originally affirmed the district court's denial of summary judgment for the three law enforcement officers seeking qualified immunity. *See* Aldaba v. Pickens, 777 F.3d 1148 (10th Cir. 2015). But the Supreme Court granted petitioner's request for certiorari and vacated the Tenth Circuit's ruling and remanded for further consideration based on its ruling in *Mullenix v. Luna*, 577 U.S. 7 (2015). On reconsideration, the Tenth Circuit unjustly granted the officers' motion to dismiss on qualified immunity grounds. *See* Aldaba v. Pickens, 844 F.3d 870.

68. *See* Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019).

69. *Id.* at 1315.

70. *Id.* A close reading of this case will reveal that the judge's reasoning, at least in part, for deciding to grant qualified immunity was because the police officer did not intend to shoot the child laying on the ground, only did so accidentally after intending to shoot the dog without cause. *Id.* Nevertheless, whether the officer intended to shoot the child or the dog, this conduct can still reasonably be considered a violation of the Fourth Amendment. The Fourth Amendment protects a person's right against "unreasonable searches and seizures." U.S. CONST. amend. IV. The Supreme Court has held that the application of physical force, such as shooting at someone, with intent to restrain is a seizure under the Fourth Amendment, even if the force does not succeed in subduing the person. *See* Torres v. Madrid, 141 S. Ct. 989, 993–94 (2021). Moreover, fundamentally, the Fourth Amendment has been traditionally understood to protect against infringements of property. *See* Olmstead v. United States, 277 U.S. 438, 464 (1928) ("The [Fourth Amendment] itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or things to be seized."). Dogs are considered property for purposes of the Fourth Amendment. *See, e.g.*, Carroll v. Cty. of Monroe, 712 F.3d 649, 651 (2d Cir. 2013) (holding that the unreasonable killing of a companion animal constitutes an unconstitutional seizure of personal property under the Fourth Amendment); Brown v. Battle Creek Police Department, 844 F.3d 556, 566 (6th Cir. 2016) (holding that for purposes of the qualified immunity inquiry, at least in the Sixth Circuit, police officers have notice that unreasonably shooting a Plaintiff's dog constitutes a seizure under the Fourth Amendment). Joining these two fundamental Fourth Amendment principles—that (1) that applying physical force against someone, even if unsuccessful, is a seizure; and (2) a seizure under the Fourth Amendment does not only apply to seizing a person but also their property—it is not farfetched to conclude that the facts in *Corbitt* reasonably constitute a violation of the Fourth Amendment. *Corbitt* is another egregious example of conduct that can clearly be considered to be in violation of the protections afforded to all persons under the United

The Fifth Circuit held that in a case where an inmate sought to sue corrections officers for holding him for six days in cells filled with "massive amounts of feces" and raw sewage and then leaving him to sleep there naked on the floor, it was not clearly established that forcing an inmate to bear those conditions was a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.[71] The Fifth Circuit justified its decision by saying that "[t]hough the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end, we hadn't previously held that a time period so short [6 days] violated the Constitution . . . therefore [it was] not beyond debate that the defendants broke the law."[72] This is one of the rare instances where the outcome is so shocking that the Supreme Court steps in to reverse.[73] However, despite this rare case where the Supreme Court corrects an injustice, plaintiffs should not be under the impression that the Supreme Court will step in to help them in their battle for accountability, as the Supreme Court only hears about eighty cases of the nearly 8,000 petitions that are filed each year.[74] Moreover, through 2018, the Supreme Court had heard only thirty cases confronting the issue of qualified immunity, out of which only two plaintiffs prevailed against their officer-defendants.[75] And this does not take into account the action in the Supreme Court's "shadow docket" that is increasingly being used to reverse denials of qualified immunity with the benefit of keeping these decisions under the radar and away from public scrutiny.[76]

In a tortured opinion granting the police officer qualified immunity, Judge Carlton Reeves of the Southern District of Mississippi, called qualified immunity "unsustainable" and pleaded with the Supreme Court to eliminate the doctrine.[77] In the case before Judge Reeves, a white police officer, under the excuse that the plaintiff-driver's temporary car tag was "folded over to where [the officer] couldn't see it," decided to stop the plaintiff-driver (Jamison) who

States Constitution, but because there is not a case on point with effectively the same fact pattern, the federal courts will refuse to grant relief to the civilian who has had their rights violated due to police misconduct.

71. *See* Taylor v. Stevens, 946 F.3d 211, 218, 222 (5th Cir. 2019).

72. *See id.* at 222 (citations omitted).

73. *See* Taylor v. Riojas, 141 S. Ct. 52 (2020) (reversing *Taylor v. Stevens*, 946 F.3d 211 (5th Cir. 2019)).

74. *See Supreme Court Procedure*, SCOTUS BLOG, https://www.scotusblog.com/supreme-court-procedure/.

75. *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018).

76. *See* Baude, *supra* note 21, at 48 ("[The Supreme Court increasingly] exercises jurisdiction in cases that would not otherwise satisfy the certiorari criteria and reaches out to summarily reverse lower courts at an unusual pace. Essentially, the Court's agenda is to especially ensure that lower courts do not improperly deny any immunity. This approach sends a strong signal to lower courts and elevates official-protective qualified immunity cases."); *see id.* at 85 (stating that summary reversals of § 1983 liability is an area of the law that is subject to "repeated attention" by the Supreme Court's shadow docket).

77. *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020).

was a black man.[78] The officer then proceeded to subject Jamison to a nearly two hour stop, where he badgered Jamison about what he was hiding in the car, pressured him to consent to a search, lied to him that he "got [a] phone call [about] 10 kilos of cocaine," and brought out a canine to sniff the car.[79] The search found nothing.[80] Jamison was just a man driving home. Yet, Jamison was subjected to a two-hour search, where he was bullied by an officer who later admitted to acting at every step without any suspicion that there was any wrongdoing on behalf of Jamison.[81] Feeling that his hands were tied by cruel Supreme Court precedent, Judge Reeves granted the officer qualified immunity and remarked that while "Jamison left the stop with his life[, t]oo many others have not."[82] In his sixty-nine page opinion, Judge Reeves chronicled the origins of 28 U.S.C. § 1983 and its intended efforts to protect citizens from abuses by government officials, which they can no longer do because of the Supreme Court.[83] It is important to quote Judge Reeves at length:

> The Constitution says everyone is entitled to equal protection of the law – even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called "qualified immunity." In real life it operates like absolute immunity. . . . Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. Countless more have suffered from other forms of abuse and misconduct by police. Qualified immunity has served as a shield for these officers, protecting them from accountability. This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer's motion seeking as much is therefore granted. But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine . . . 'This has to stop.'[84]

Judge Reeves is not alone. In the incisive and cutting words of Supreme Court Justice Sonia Sotomayor, who also calls for a reformation of the qualified immunity doctrine, the Supreme Court has "render[ed] the protections of the Fourth Amendment hollow" and promoted a "'shoot first, think later' approach to policing."[85] In order to restore public trust, qualified immunity must be

78. *Id.* at 392.
79. *Id.* at 393.
80. *Id.* at 394.
81. *Id.*
82. *Id.* at 391.
83. *Id.*
84. *Id.* at 391–93 (citations omitted).
85. Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

abolished,[86] or cases like the ones cited in this section will continue to happen every day without any accountability for the police officers perpetrating these crimes and civil rights violations.

PART II: FRUSTRATION-AGGRESSION THEORY AND THE INCREASED POTENTIAL FOR POLITICAL VIOLENCE

The scope of this Note does not address the normative question of whether the American conception of justice is coherent or desirable. The reality is that Americans have a distinctly vindictive expectation of justice and morality in relation to law breaking.[87] In the political realm, for example, generations of politicians have appealed to this distinctive American psyche with repeated and routine calls for "law and order."[88] Generally, scholars have noted that:

> Implicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed people rather than ordinary people who have committed crimes. Offenders' criminality is thus both immutable and devaluing: it is a feature of the actor, rather than merely the act, and, as such, it diminishes offenders' claim to membership in the community and loosens offenders' grip on certain basic rights.[89]

---

86. *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, *supra* note 13.

87. One way to gauge this is by analyzing American views on the death penalty. For example, in June 2021, the Pew Research Center reported that 60% of Americans are in favor of the death penalty as a form of punishment and 64% view it as "morally justified" form of punishment despite the fact that 78% understand that there is "some risk" of executing the innocent. *See Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RSCH. CTR. (June 2, 2021), https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/. This is also notwithstanding the fact that a majority of Americans, 56%, understand the death penalty as more likely to affect Black people compared to white people accused of similar crimes. *Id.* In comparison, with the exception of Belarus, the entire European continent has either abolished the use of the death penalty or no longer uses the death penalty as a form of punishment. *See Death Penalty: Key Facts About the Situation in Europe and the Rest of the World*, EUROPEAN PARLIAMENT (July 28, 2020), https://www.europarl.europa.eu/news/en/headlines/world/20190212STO25910/death-penalty-in-europe-and-the-rest-of-the-world-key-facts; *see also* Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, art. 1, Nov. 4, 1950, E.T.S. No. 114 (European treaty abolishing the use of the death penalty for its member states).

88. *See* Peter Grier & Noah Robertson, *From Goldwater to Trump, the Long History of 'Law and Order' Politics*, CHRISTIAN SCI. MONITOR (Sept. 2, 2020), https://www.csmonitor.com/USA/Politics/2020/0902/From-Goldwater-to-Trump-the-long-history-of-Law-and-Order-politics (chronicling the Republican Party's appeal to "law and order" in their political messaging throughout the decades and its successful entrenchment as a fixture in American politics).

89. *See* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 941 (2016) (conducting a comparative analysis of the philosophical foundations of American and European conceptions of justice with regard to criminality).

This idea extends outside the criminal law and has a counterpart in tort law.[90] Understanding this foundational principle in the American conception of the rule of law—the transactional view that that if you break the rules, you will be punished—is important for the scope of this Note. Americans have a basic expectation that no one, no matter their station, is above the law, and everyone must follow the laws and societal rules for justice and order to be maintained.[91] Criminality, but more specifically rule-breaking, is contrary to the American national ethos.[92]

When this conception of justice-rendering does not match what is happening in American courtrooms problems begin to arise. Specifically, political protest and political violence begin to brew among the general public. Sociologist Ted Gurr built a frustration-anger-aggression theory borrowed from the field of psychology to develop an explanation for what leads people to rebel against their government in the sociological context.[93] Gurr's proposition is simple: the greater the "frustration"[94] an individual sustains, the greater the quantity of "aggression"[95] against the source of frustration will be.[96] Gurr equates aggression to anger, and the larger the anger present at the individual level, the higher the potential that over time, and with enough people affected, that anger will turn into one of three general forms of political violence: turmoil,

90. Tort law is the vehicle by which individuals can seek damages for wrongs committed against them without having to involve the state or the criminal law. The prevalence of tort suits plays a large part of the narrative that the United States is a litigious society. Whereas in other cultures the obligations that one owes to be careful toward another or to otherwise refrain from injuring someone else is viewed as created by, and owed exclusively to, the state, this is not the case in the United States. Americans view the obligations and responsibilities that individuals owe to each other as part of "civil society." Therefore, it can be understood that our collective imagination about the duties that we owe to each other culminate inside the American courtroom, where we are granted the ability to seek redress for the wrongs committed against us by our fellow citizens. *See* JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 40 (4th ed. 2016).

91. Not even the sovereign leader, for example, is above the law. Throughout the entirety of this country's history, not even the president has been categorically entitled to immunity from criminal or civil proceedings. *See* Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) ("[N]ot even the President[] is categorically above the common duty to produce evidence when called upon in a criminal proceeding.") (citations omitted). *See also* Clinton v. Jones, 520 U.S. 681 (1997) (holding that the President does not have immunity from civil damages litigation).

92. This idea is evinced more or less by the visceral disgust that many American liberals had toward Donald Trump during his tenure as president. Trump would often be accused of breaking norms (in addition to breaking laws), and many op-eds were written about how he was "destroying" the presidency and the rule of law. *See, e.g.*, Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/ (arguing that Trumpism was brought about in part by a sharp decline in citizens' trust in American institutions).

93. *See generally* GURR, *supra* note 18.

94. Gurr defines frustration as an "interference with goal-directed behavior." *Id.* at 33.

95. Gurr defines aggression as "behavior designed to injure, physically or otherwise, those toward whom it is directed." *Id.* at 33.

96. *Id.* at 9.

conspiracy, or internal war.[97] The likelihood of some form of political violence has a proportional relationship to the size of the frustration, or, as Gurr would frame it, the size of the "discontent."[98] The magnitude of the discontent can be understood in terms of the size of what Gurr calls "relative deprivation," by which he means the discrepancy between value expectations and value capabilities.[99] "Value expectations" of a collectivity are the average value positions to which its members believe they are justifiably entitled.[100] In other words, value expectations are the baseline qualities of a society which its people believe they are owed as members of that society. "Value capabilities," on the other hand, are the average value positions its members perceive themselves capable of attaining or maintaining when taking into account the instant social, political, and economic context of the society.[101] In other words, value capabilities are those things which people believe they can achieve if their goals are not frustrated. Restated succinctly: relative deprivation is the size of the gap between what a society, or individual in the society, believes they are entitled versus what a society, or individual in the society, is actually able to achieve.[102]

Specifically relevant to this Note, the role of "decremental deprivation" is especially important in predicting the likelihood of political violence. Decremental deprivation is the disequilibrium wherein value expectations

---

97. *Id.* at 334.

98. *Id.* at 12–13.

> The primary causal sequence in political violence is first the development of discontent . . . . Deprivation-induced discontent is a general spur to action. Psychological theory and group conflict theory both suggest that the greater the intensity of discontent, the more likely is violence. The specificity of this impulse to action is determined by men's beliefs about the sources of deprivation, and about the normative and utilitarian justifiability of violent action directed at the agents responsible for it.

99. *Id.* at 46.

100. *Id.* at 27.

101. *Id.* at 27.

102. Let's take this illustrative example of one way relative deprivation has increased over the last few decades. In the 1970s, a typical one-earner family with an income of $42,450 could afford to cover their mortgage payment, health insurance costs, car payments, maintenance, gas, repairs, pay their taxes, and still be left with more discretionary income than a *two-earner* family with an income of $73,770 in 2004 with similar expenses. For the specific expense calculation of these two typical families, see Elizabeth Warren, *The Middle Class on the Precipice*, HARV. MAG. (2006), https://www.harvardmagazine.com/2006/01/the-middle-class-on-the-html. The 2004 family might recall their childhood, remembering how their household growing up was able to cover all the basic expenses with only one parent working, yet they are stuck with both parents working and being worse off than their parents were. It would be reasonable for the 2004 family to believe that they should be able to expect that working full time means that they can cover their expenses, and to be able to build a family (value expectations). But in reality, the 2004 family recognizes that working longer hours, spending less time on leisure and raising a family, and paying more for goods and services due to rising costs of basic expenditures like a mortgage, childcare, education, medical bills, and unforeseen emergencies, means that they will not be able to live the way earlier generations had (value capabilities). The gap between these two ideas is what Gurr would describe as relative deprivation.

remain constant while value capabilities fall.[103] Gurr describes this type of relative deprivation as the "more common source of collective violence than any other pattern of [relative deprivation]."[104] This is an intuitive observation, as Gurr describes, because "[people] are likely to be more intensely angered when they lose what they have than when they lose hope of attaining what they do not yet have."[105]

Before tying Gurr's theory to the current American crisis in police accountability, it should be admitted that social movement theory in the aggregate has moved away from Gurr's relative deprivation theory. There are several reasons for this, namely that Gurr's theory most clearly focuses on why

---

103. GURR, *supra* note 18, at 46–50.

104. *Id.* at 50. The example in note 102 used to illustrate the concept of relative deprivation can also be used to demonstrate the concept of decremental deprivation. Applied to the fact pattern discussed, decremental deprivation is the transition from the value capabilities of the 1970s (being able to afford a home, medical expenses, raise a family, etc., in a single income household) to the value capabilities of 2004 (multiple income families that work longer hours understanding that they will not to be able to afford the basic lifestyle that their parents were able to afford a generation earlier). The process of Americans losing the hope that they will ever be able to live the lifestyle that was once possible is decremental deprivation. In fact, a strong argument can be made that we are currently seeing the political ramifications and social unrest being caused because of this increasing financial instability that is exacerbating decremental deprivation. Scholars and political commentators have speculated that Donald Trump's election, and the subsequent growing destabilization of American democracy, can be tied directly to the 2008 financial crisis. *See, e.g.*, Gabriel T. Rubin, *How the Financial Crisis Led to Trump's Election*, WALL ST. J. (Nov. 21, 2016) https://www.wsj.com/articles/how-the-financial-crisis-led-to-trumps-election-1479744388. In fact, the Washington Post reports that nearly 60% of the people facing charges related to the January 6, 2021 Capitol Hill insurrection showed signs of prior money troubles, such as evictions and foreclosures, high debt, unpaid taxes, and had a bankruptcy rate nearly twice as high as that of the American public. *See* Todd C. Frankel, *A Majority of the People Arrested for Capitol Riot Had a History of Financial Trouble*, WASH. POST (Feb. 10, 2021), https://www.washingtonpost.com/business/2021/02/10/capitol-insurrectionists-jenna-ryan-financial-problems/. Political scientist Cynthia Miller-Idriss, consulted in this article, states:

> I think what you're finding is more than just economic insecurity but a deep-seated feeling of precarity about their personal situation, and that precarity—combined with a sense of betrayal or anger that someone is taking something away—mobilized a lot of people that day. These are people who feel like they've lost something.

Id. (quotations adjusted for continuity). Indeed, Gurr would say this is a prime example of decremental deprivation, and that this decremental deprivation increase the potential for political violence which culminated in the Capitol Hill insurrection on January 6, 2021. *Id.*

105. GURR, *supra* note 18, at 50. In the field of behavioral economics, this is known as "prospect theory," as developed by economists Daniel Kahneman and Amos Tversky. Prospect theory suggests that people underweigh outcomes that are probable in comparison with outcomes that are certain. Prospect theory suggests that agents measure their losses or gains relative to their specific situation as their reference point rather than in absolute net gains or losses. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 274 (1979) ("[P]eople normally perceive outcomes as gains and losses, rather than as final states of wealth or welfare. Gains and losses . . . are defined relative to some neutral reference point.").

social movements start is lacking in its address of how social movements are sustained and what determines their success. Social theorists after Gurr developed other theories, such as resource mobilization theory, to address these questions that were unanswered by Gurr, or that social scientists were not sufficiently pleased with Gurr's explanations.[106] In this sense, Gurr's theory is somewhat "outdated" because it does not adequately answer the pertinent questions political scientists and sociologists of today are asking.[107] Nevertheless, even resource mobilization theorists take into account grievances of the movement participants and do not discard their importance;[108] subsequent social scientists' focuses lie elsewhere,[109] such as exploring the functions of the social movement organization rather than Gurr's question of *why* men (and women) rebel and less so *how* they rebel. The role of grievance is an important and intuitive aspect of what leads people to protest.[110] Therefore, acknowledging the shortcomings of Gurr's theory with relation to the functions and specifics of social movements, this Note only focuses on the relationship between qualified immunity as an additional grievance that increases the potential for individuals to protest and does not venture into explaining or

106. *See, e.g.*, John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOCIO. 1212 (1977) (developing a theory that takes into account a larger support base for a social movement that incorporates those who do not have a direct stake in the success of the movement, but can nonetheless aid it with monetary or labor resources and develop the movement infrastructure) *and* WILLIAM GAMSON, THE STRATEGY OF SOCIAL PROTEST (Serina Beauparlant et al. eds., 2d ed. 1990); Edward N. Muller, *A Test of a Partial Theory of Potential for Political Violence*, 66 AM. POL. SCI. REV. 928, 929 (1972) (finding that relative deprivation perceived with respect to welfare values was the least consequential predictor of potential for political violence).

107. *See, e.g.*, Steven E. Finkel et al., *Personal Influence, Collective Rationality, and Mass Political Action*, 83 AM. POL. SCI. REV. 885, 900 (1989) ("Previous research on determinants of individual participation in collective political action has not dealt adequately with the free-rider problem posed by conventional rational choice theory. Grievance explanations [e.g., Gurr's relative deprivation theory] ignore utility calculations and the free-rider dilemma completely. Explanations based on the perceived likelihood of group success fail to provide a meaningful linkage between perceptions of group success and the participation of any given individual.").

108. *Id.* at 885 ("Relative deprivation . . . ha[s] long been considered [a] principal psychological determinant[] of individual participation in protest and unconventional political behavior. . . . While there have been frequent debates over the forms of discontent that are most important for particular kinds of protest in particular settings, consensus on the general applicability of the grievance theory of protest remains.").

109. For example, rational choice theory is concerned with exploring the free-rider problem and determining why people who are not directly impacted by the success of social movements still choose to partake in the social movement when they have nothing to gain. *See* Edward N. Muller & Karl-Dieter Opp, *Rational Choice and Rebellious Collective Action*, 80 AM. POL. SCI. REV. 471 (1986).

110. Gurr developed his ideas on already existing scholarship explaining the relationship between frustration and aggression. *See, e.g.*, JOHN DOLLARD, ET AL., FRUSTRATION AND AGGRESSION (1939).

forecasting how individuals will protest, which aggrieved or non-aggrieved persons will be doing the protesting, or how successful their efforts will be.[111]

Applying relative deprivation theory, it is clear that Americans expect police officers to protect them, not kill them or violate their civil rights.[112] In the American context, the "value expectations" correspond with the American understanding that rule breakers must be punished, be it through the criminal law or through civil damages.[113] Correspondingly, the "value capabilities" can be said to be falling, especially from the vicious progression of the strengthening of the qualified immunity doctrine the Supreme Court and lower federal courts have created since *Pierson* and *Harlow* because victims of police violence are increasingly unable to gain redress through state or federal courts, and Congress is failing to act in rectifying the judiciary's policy making with regard to qualified immunity. Qualified immunity is directly connected to decreasing value capabilities because more Americans are becoming aware of the obstacles posed by the qualified immunity doctrine in the pursuit of justice against victims of police aggression, and as the doctrine becomes more impenetrable over time, the expectation of what can be achieved in the courts begins to decrease.[114]

Moreover, in 2020, after the George Floyd killing, the Pew Research Center conducted a poll that found two-thirds of Americans say that "civilians need to have the power to sue police officers for using excessive force."[115] The

---

111. As an additional matter, this Note does not attempt to numerically quantify any of Gurr's variables, such as relative deprivation, value capabilities, or value expectations, as applied to the qualified immunity argument. Nevertheless, this Note argues that these concepts exist and, at a minimum, can be qualitatively compared to link the negative effects the qualified immunity doctrine has on increasing the potential for political violence.

112. A poll conducted in March 2021 indicates that 69% of Americans trust local police and law enforcement to promote justice and equal treatment for people of all races. *See Americans' Trust in Law Enforcement, Desire to Protect Law and Order on the Rise*, IPSOS (Mar. 4, 2021), https://www.ipsos.com/en-us/americans-trust-law-enforcement-desire-protect-law-and-order-rise.

113. *See supra* notes 87–92.

114. Perhaps a decade ago, it would have been farfetched to claim that the value capabilities variable was decreasing in magnitude *because* of qualified immunity. For the most part, the contrived standard has been an obscure legal doctrine that has just recently come into the spotlight. For example, the American Civil Liberties Union, a supporter of ending qualified immunity, pleasantly noted that in addition to the "Justice for George," "#SayHerName," "I Can't Breathe," and "No Justice, No Peace" cardboard signs that have been common over mass protests of the last few years, a new addition has come into the mix—signs calling for the abolition of qualified immunity. *See* Ed Yohnka et al., *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/. This is not surprising. More Americans are beginning to understand that qualified immunity has been standing in the way of justice.

115. *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, *supra* note 13. The Pew Research Center is not alone in its findings—a poll conducted by the Cato Institute also found that about two-thirds of Americans support eliminating qualified immunity so that police officers can be sued for misconduct even if there is no previous legal case

same Pew report showed that in the last four years, there has been a declining share of the population that believes the police are (1) protecting people from crime, (2) using the right amount of force for each situation, (3) treat racial ethnic groups equally, and (4) holding officers accountable when misconduct occurs.[116] A contemporaneous poll conducted by Gallup found that 94% of Americans believe that policing needs to be changed, with 58% stating that "major changes" are needed and 36% stating that only "minor changes" are needed.[117] The idea of "major changes" is vague and gives little insight as to *how* policing should be reformed, but Gallup also polled the proposal to abolish the police.[118] There, Gallup found that only 15% of American support

---

with similar facts that ruled officers may not engage in that conduct. *See* 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.

116. *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, *supra* note 13. Although the poll shows that distrust in the police has started to decline in the last four years, this should not be taken to suggest that this is a new problem. Minority and poor communities have a long history of being targets of police brutality. *See generally* David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and A Modern Attempt at Reform*, 28 COLUM. HUM. RTS. REV. 165, 170 (1996) (arguing that police "naturally target those at the 'bottom of the heap[,]' which falls along race- and class-based lines affecting minorities and poor people the most with low level forms of police violence, such as verbal harassment and beatings). Despite this historical violence towards minority and poor communities, a more likely explanation as to why there is increasing distrust in the police in recent years is due to the ubiquity of handheld video recording devices and dissemination of those videos by civilian bystanders on the internet. Social scientists have stated that:

> These forms of secondary visibility enabled by the development of new media reach well beyond the barriers of proximity and timing and, along with the rapid adoption of body-worn cameras, have transformed police work into a high visibility career. Despite being historically the most visible of all criminal justice institutions, the police have, until relatively recently, mostly been subjected only to primary forms of visibility—visible only to those directly involved in, or within sight of, actual police-citizen interactions. However, the various technologies that police officers have used to conduct surveillance of others for decades are now also being used for surveillance of their own work, a reality exacerbated by the affordances of new medial platforms and increasingly affordable surveillance-enabling technologies (e.g., smartphones and cameras).

Bryce Clayton Newell, *Context, Visibility, and Control: Police Work and the Contested Objectivity of Bystander Video*, 21 NEWS MEDIA & SOCIETY 60, 61 (2019) (arguing that the use of media platform and new technologies has allowed civilians to bring about unwanted visibility and accountability to police officers) (citations omitted).

117. Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes'*, GALLUP (July 22, 2020), https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx.

118. Herein lies a further ambiguity when Americans call for the abolition of the police. For some, "abolish" the police has become shorthand for defunding police departments and diverting the money to community development that address the systemic issues that lead to criminality while allowing police departments to exist in some form of another. Other, more committed and fervent

abolishing the police, with greatest support in people younger than 35, of whom 33% support the abolition of the police.[119]

The increased intensity of the relative deprivation currently being experienced by Americans, specifically Black Americans,[120] is increasing the potential for violence.[121] In many instances, the violence is already here as evidenced by the violent riots that occurred in Minneapolis after the George Floyd protests in the summer of 2020. With Gur's theory of the relationship between discontent and the potential for political violence, it is reasonable to believe that with the continued reign of qualified immunity as the impenetrable shield for police accountability, the United States can expect sporadic protests to continue, and their potential to end in violence to also increase, especially because individuals are placing blame directly on the police and on qualified immunity.

The role of blame is crucial in providing further support for the conclusion that qualified immunity is going to increase political participation through protests.[122] Political scientist Debra Javeline argues that the greater the specificity that aggrieved individuals attribute blame to individual persons or entities, the greater the probability that those individuals will partake in protests.[123] Javeline notes that there are two different types of "blames" that can be attributed: blame for causing a problem (causal blame) and blame for failing to rectify a problem (treatment blame), and both serve separate functions.[124] Causal blame seeks to hold culprits accountable, and treatment blame seeks to identify and pressure problem-solvers.[125] Whichever type of blame is being attributed, however, Javeline argues that the factor that

---

activists, argue for the literal abolition of police departments. *See* Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html.

119. Crabtree, *supra* note 117.

120. Laura Santhanam, *Two-thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS (June 5, 2020), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do.

121. It is imperative to add here that Gurr rejects a culturally-specific explanation of political violence and argues that the link between frustration, anger, and political violence should be generalizable across countries, cultures, and classes. GURR, *supra* note 89, at 357 ("There is not much support here for the view that political violence is primarily a recourse of vicious, criminal, deviant, ignorant, or undersocialized people. Men and women of every social background . . . have resorted to violence against their rulers."). Thus, the fact that the frustration being caused by the qualified immunity doctrine and general police aggression towards Black Americans is evincing more revolutionary rhetoric and actions from Black Americans does not mean that they are more prone to violence. Gurr posits that any frustration that alienates a specific group will evince that specific group to resort to protest or violence against their oppressor.

122. *See generally* Debra Javeline, *The Role of Blame in Collective Action: Evidence from Russia*, 97 AM. POL. SCI. REV. 107 (2003).

123. *Id.* at 107.

124. *Id.*

125. *Id.* at 107–08.

determines how likely it is to lead individuals to protest is the level of specificity individuals are able to place on a single person or entity.[126]

Both causal and treatment blame are present in the current American social movements to hold police accountable. Causal blame is placed directly on police officers who kill and at the police tactics they use to instigate more violence against civilians.[127] There is also treatment blame present in the movement. As discussed in the INTRODUCTION, every organizer and organization coupled their criticism of the Derek Chauvin *criminal* trial with the qualified immunity doctrine, a legal immunity existing only in the *civil* courts.[128] This indicates that people recognize the structural failure of the justice system, both through civil and criminal courts, in holding rogue police officers accountable for their actions. Furthermore, it is not just the judiciary that is impeding access to justice, but Congress' failure to rectify qualified immunity doctrine, which has grown out of control.[129] The presence of both causal and treatment blame, if Javeline is correct, is creating an increased specificity of blame in individual actors and entities, specifically police officers, police departments, and the justice system, and Congress and its legislators, and suggests an increase in the likelihood that individuals will partake in protests.

Furthermore, although there is an increase in treatment blame placed on the courts who grant qualified immunity to abusive cops even in clearly unjust circumstances, a rising share of the population is also placing treatment blame for perpetuating a toxic police culture to police unions. Gallup found that 98% of all Americans support changing management practices so that officers who abuse their power are not allowed to serve, but only 56% support eliminating police unions.[130] Although their impact in perpetuating racist and violent police practices is critically understudied,[131] it is not a secret that police unions fight tooth and nail to defend and keep on the workforce even those officers who are accused of misconduct.[132] Police unions fight to force municipalities to sign contracts that force local governments to erase an officer's disciplinary records or allow them to forfeit sick leave in lieu of suspension, and they make it more difficult for residents to seek accountability by forcing imposing arbitration

126. *Id.*

127. *See generally* HUM. RTS. WATCH, *supra* note 5.

128. *See supra* note 6 and accompanying text.

129. *See* Marianne Levine & Nicholas Wu, *Lawmakers Scrap Qualified Immunity Deal in Police Reform Talks*, POLIITCO (Aug. 17, 2021), https://www.politico.com/news/2021/08/17/lawmakers-immunity-police-reform-talks-505671.

130. Crabtree, *supra* note 117.

131. Eleanor Lumsden, *How Much is Police Brutality Costing America?*, 40 U. HAW. L. REV. 141, 149–50 (2017) (noting that without a deeper understanding of the role of police unions in maintaining the status quo in policing practices, increasing accountability and transparency in law enforcement will be difficult).

132. *See* Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html.

clauses for conflict resolution.[133] Moreover, police unions will run million-dollar campaigns against individual municipal government officials when they try to amend police contracts or otherwise alter the police department's culture,[134] publicly call for the removal of politicians seeking reform,[135] and have even been accused of orchestrating slower police response times in the local districts of local government officials seeking to divert money away from the police budget.[136] Furthermore, in the larger public debate about qualified immunity, police unions, as noted above, play a large role in spreading misinformation and misleading messaging about what abolishing qualified immunity actually entails.[137]

This rogue legal doctrine is increasing the likelihood of political violence in addition to the unrest we have already witnessed in the aftermath of every major police killing in the last ten years.[138] The time to end qualified immunity is now. The persistence of qualified immunity is increasing the likelihood of protest, and the more injustice that the American legal system perpetuates, the magnitude of the relative deprivation that is being felt by many Americans will continue to increase.

CONCLUSION

Applying Gurr's theory of social movement with regard to the likelihood of political violence, the strengthening of the qualified immunity doctrine by federal courts, the inability for local governments to curtail police misconduct by holding them accountable outside of the courtroom, and other factors such as the violent role police unions play in maintaining the status quo is increasing the intensity of decremental deprivation. This is because, while Americans still hold on to their notions of justice and accountability, they are not seeing police officers being held accountable for their actions. With each police killing, uses of excessive force, sexual assaults, killing of Black children, unnecessary and suspicionless traffic stops, among countless other forms of violations of civil rights, that go unpunished, the public loses more trust in the police and legal institutions.[139] This increase in distrust directly aimed at the police is increasing

133. Lumsden, *supra* note 131.

134. Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017), https://www.reuters.com/investigates/special-report/usa-police-unions/.

135. Scheiber et al., *supra* note 132.

136. *Id.*

137. *See* Jay Schweikert, *Blatant Misrepresentations of Qualified Immunity by Law Enforcement*, CATO INST. (Oct. 6, 2020), https://www.cato.org/blog/blatant-misrepresentations-qualified-immunity-law-enforcement.

138. For example, there have been major incidents of political unrest after the killings of: Michael Brown in Ferguson; 12-year-old Tamir Rice in Cleveland; Eric Garner in New York City; Philando Castile; Amadou Diallo; Botham Jean; Breonna Taylor; Rayshard Brooks; Sandra Bland; Alton Sterling; Stephon Clark; Daunte Wright; and countless more.

139. Santhanam, *supra* note 120.

the likelihood of political protest and political violence. If qualified immunity is not curtailed or abolished, social movement theory suggests that the potential for violence will increase because the magnitude of relative deprivation is increasing.

This reckless qualified immunity regime is not unstoppable. As has been noted by qualified immunity scholars, "there are [] cracks in qualified immunity's armor."[140] Across the political and legal spectrum, think tanks, politicians, and even ideologically opposite Supreme Court justices are questioning the qualified immunity's legal foundation.[141] It is clear that the time to abolish qualified immunity is now. Qualified immunity is not predicated on any statutory grounds or even in common law principles,[142] or anything else tangible beyond contrived Supreme Court opinions. It is the pure manifestation of the Supreme Court's policy preferences. When a police officer, unprompted, shoots a child and the family cannot gain redress or even hold the officer accountable for his actions,[143] among too many other examples, then we can see that this legal doctrine has failed. Cops, entrusted to *serve and protect* members of society, should not be allowed to trample on the rights of civilians. If anything, it seems reasonable that a society should hold those who are in charge of our protection—and our lives—to a higher standard and scrutinize and punish their misconduct more than the punishment an average member of the society would receive for the same infraction.

It is the duty of the Supreme Court justices to revisit and revise, and preferably to abolish, this atrocious and dangerous immunity. If the Supreme Court fails its duty to the American people—to ensure that everyone has the ability to seek redress for crimes committed against them, even by government officials—then the Congress needs to act. Until then, the fabric of American society will continue to be tugged at until it rips, and simply because the Supreme Court is too afraid to hold police officers accountable for their actions.

140. *See* Schwartz, *supra* note 11, at 1798.

141. As noted above, Justice Sonia Sotomayor has published scathing dissents regarding the court's qualified immunity doctrine. *See supra* note 85. However, recently, Justice Clarence Thomas, by some measures the most conservative justice currently sitting on the Court, also called for the Court to reconsider its qualified immunity jurisprudence. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring).

142. *See* Baude, *supra* note 21.

143. *See supra* notes 68–70.