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Section 1983 & Qualified Immunity: Qualifying the Death of Due Process and America's Most Vulnerable Classes Since 1871. Can It Be Fixed?

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SECTION 1983 & QUALIFIED IMMUNITY: QUALIFYING THE DEATH OF DUE PROCESS AND AMERICA'S MOST VULNERABLE CLASSES SINCE 1871. CAN IT BE FIXED?

INTRODUCTION

> *[O]nly those who are required to justify freedom can fully understand it.*
>
> —Henry Steele Commager
> *Freedom, Loyalty, Dissent*[1]

Police and excessive use of force have grappled with an inextricable bond since the inception of modern policing. Boston demonstrated this in 1838 with the establishment of our first American police department.[2] At this early stage in American policing, recent immigrants from European countries bore the brunt of harsh treatment

1. HENRY STEELE COMMAGER, FREEDOM, LOYALTY, DISSENT 3 (1954).

2. Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN (July 27, 2017), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098 [https://perma.cc/C9ZL-JLUV].

and bias in policing tactics.[3] However, police soon focused their unwanted attentions on African Americans migrating north in search of refuge from the horrors of post–Civil War life in the Jim Crow south.[4] While violence has always factored into American policing, the actual debate about the role of police officers and their propensity towards violence surfaced in the 1960s, when Dr. Martin Luther King Jr.'s 1963 "March on Washington" captivated America with its demand for "an End to Police Brutality Now!"[5]

The tumultuous and inequitable history of our nation necessitated the establishment of 42 U.S.C. § 1983, promulgating civil action for deprivation of rights.[6] Congress passed the ancestor of Section 1983, Section 1 of the Ku Klux Klan Act of 1871 (KKK Act), over 100 years ago following the enactment of the Fourteenth Amendment.[7] The KKK Act enforced the newly enacted constitutional rights of African Americans.[8] From there, the modern form of the statute, Section 1983, came to fruition.[9] Section 1983 contains much of the same language and declares that the public can sue state and local government officials for monetary damages in their individual capacity if they violate a person's constitutional rights while performing actions in their official capacity.[10] "Qualified immunity protects government officials from such lawsuits" only in cases of a violation of "clearly established" law, federally or in constitutional rights.[11]

Recently, qualified immunity has protected police officers accused of using excessive force, specifically in cases such as *Kisela v. Hughes*.[12] In that case, officer Andrew Kisela shot Amy Hughes while on duty in Tucson, Arizona, after he and two other officers responded to calls of a woman engaging in erratic behavior with a knife.[13] Officer Kisela remained on scene for about a minute, when he thought he saw Hughes step toward a civilian woman with her knife out.[14]

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3. *Id.*
4. *Id.*
5. *Id.*
6. *A Short History of Section 1983 and the Struggle for Prisoners' Rights*, JAILHOUSE LAW'S HANDBOOK, http://jailhouselaw.org/monitoring-your-lawyer-and-case [https://perma.cc/XVB3-7FLW] (last updated 2010).
7. *Id.*
8. *Id.*
9. *See generally* 42 U.S.C. § 1983 (1996).
10. *Id.*
11. Lisa Soronen, *Qualified Immunity Ruling for Police Officer Causes a Stir*, NAT'L CONF. ST. LEGIS. (Apr. 10, 2018), http://www.ncsl.org/blog/2018/04/10/qualified-immunity-ruling-for-police-officer-causes-a-stir.aspx [https://perma.cc/9XTS-PLZB].
12. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018).
13. *Id.* at 1150.
14. *Id.* at 1151.

Hughes had ignored two previous commands to drop the weapon.[15] Instead of continuing to attempt to control the situation with more verbal commands, Kisela shot Hughes, begging the question of whether Kisela's actions violated clearly established law.[16] Notice that, in accordance with qualified immunity's elements, this question differs significantly from the average person's usual question of whether the situation warranted deadly force.

The Ninth Circuit originally ruled that Kisela used unreasonable force in violation of the Fourth Amendment and denied him qualified immunity, determining that his actions constituted an obvious constitutional violation.[17] However, the Supreme Court overturned this decision, implicitly highlighting that they had not previously established this law.[18] Because of the constant onslaught of new police brutality cases and the relatively new decision in *Kisela v. Hughes*, this particular topic has failed to receive the spotlight it deserves, though some state judges have since protested the Supreme Court's decision in *Kisela*, specifically and in other cases with similar outcomes.[19] In particular, Judge Weinstein of the Eastern District of New York spoke out on *Kisela* shortly after the decision.[20]

For this Note, I will demonstrate how disproportionately the recent decision impacts people of color in that, with certain races, courts more frequently find vagueness in whether the officer denied the person of their constitutional rights and whether the situation warranted their violence. With discord between state courts, federal courts, and the Supreme Court,[21] we must re-evaluate what qualifies as an obvious legal violation, considering the history of police brutality in America and how that [dis]colors the present decision.

I will also proffer solutions on how to remedy the dissonance between actually protecting our uniformed officers and condoning intolerance under the guise of "protecting officers."[22] Previously proffered solutions to this plight include the following:(1) using an exclusionary rule as an alternative to or a sword with § 1983; (2) applying sanctions elaborated on by statutory provisions similar to Rule 11

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15. *Id.*
16. *Id.* at 1154–55.
17. *Id.* at 1151.
18. *Kisela*, 138 S. Ct. at 1155.
19. *See, e.g.*, Alan Feuer, *The 96-Year-Old Brooklyn Judge Standing Up to the Supreme Court*, N.Y. TIMES (June 14, 2018), https://www.nytimes.com/2018/06/14/nyregion/the-96-year-old-brooklyn-judge-standing-up-to-the-supreme-court.html [https://perma.cc/B23F-BQJE].
20. *Id.*
21. *See* Soronen, *supra* note 11.
22. *See infra* Part IV.

of the Federal Rules of Civil Procedure;(3) instituting strict liability to all claims to ensure we hold someone responsible; and (4) shifting the burden of determining "clearly established" from judge to jury.[23]

These solutions have established issues, ultimately disqualifying them from becoming the ultimate resolution. The proper course of action could involve a reversion to *Saucier*'s rule of determining the constitutional violation *first* to force the court into creating precedent and, therefore, clearly established law.[24] However, a middle-ground solution could also involve following *Cugini v. City of New York*'s recent decision, where the court did not determine whether a violation existed *first*, but still created precedent by adding a third step to the qualified immunity analysis: the court's judgment that these pleaded facts will not automatically give rise to dismissal on qualified immunity grounds in future cases.[25] Additionally, the media should also change the way they report such incidents to ensure proper coverage and avoid incorrect perceptions of the events.[26] Lastly, the police—as an institution working with all races, ethnicities, genders, and socioeconomic classes—should complete an implicit bias course, mandated by an alteration to the statute.[27] With these adjustments, Section 1983 should rise from the ashes and return to its original purpose.

I. A RUN-THROUGH OF § 1983'S INCEPTION AND AMERICA'S LONG-STANDING POLICING PROBLEMS

> *Police are the entry point, the gatekeepers, of the criminal justice system. They make discretionary decisions everyday about who is likely to commit a crime and who should be targeted by the criminal justice system; about who should be stopped, questioned, searched, and arrested. These decisions are made on the basis of individual police officers' life experiences—their training, their instincts, their prejudice and bias. And all too often, they are decisions informed by race.*
>
> —Tavis Smiley,
> *The Covenant with Black America*[28]

23. *See infra* Part IV.
24. *See infra* Part V.
25. Cugini v. City of New York, 941 F.3d 604, 608, 617–18 (2d Cir. 2019).
26. *See infra* Conclusion.
27. *See infra* Part VI.
28. Xavier Pickett, *Policing Black Communities*, 30 PUB. JUST. REP. 1, 1–2 (2007).

Protecting African-Americans' newly minted constitutional rights created a need for a statutory defense like Section 1983.[29] After the Fourteenth Amendment solidified freed slaves' technical citizenship and their technical representation within the government of the United States, people needed an instrument to ensure that they could vindicate any violation of such constitutional rights.[30] Among other determinations, the Ku Klux Klan Act of 1871 highlighted that any person can sue anyone else if a person deprives them of their statutory and constitutional rights.[31]

The Ku Klux Klan Act created checks on the insidious outbreak of violence by racially motivated marauders, chiefly left unrestrained after the Civil War.[32] America hoped to provide a remedy for the violation of constitutional rights and, in doing so, foster peace and justice in the region through civil enforcement.[33] Disallowing people from participating in normal American life could now be prosecuted, and the statute essentially opened federal courts to private citizens in order to guard the people's federal rights from the rogue states.[34]

Amos T. Akerman authored much of this statute, to the surprise of many who know of his tumultuous history.[35] Akerman, once a Confederate soldier, served as Attorney General in the Grant Administration after the war.[36] Once the war ran its course and the Union soldiers declared victory, Akerman discarded his deep-seated Confederate ideals when creating Georgia's new constitution, making the prosecution of members of the Ku Klux Klan a priority of the newly formed justice department.[37] Akerman once observed that "[s]ome

29. *See* 42 U.S.C. § 1983.

30. U.S. CONST. amend. XIV, § 1 (stating that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

31. Civil Rights Act of 1871, Pub. L. No. 41-22, 17. Stat. 13. (summarizing that "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . .").

32. *See Ku Klux Act passed by Congress*, HISTORY, https://www.history.com/this-day-in-history/ku-klux-act-passed-by-congress [https://perma.cc/VD28-WA46] (last updated July 28, 2019).

33. *See id.*

34. *See id.*

35. *See Akerman, Amos T. (1821–1880)*, ENCYCLOPEDIA, https://www.encyclopedia.com/history/news-wires-white-papers-and-books/akerman-amos-t-1821-1880 [https://perma.cc/83PC-9GXR] (last updated Dec. 11, 2019) [hereinafter *Ackerman*].

36. *See id.*

37. *See id.*

of [those] who had adhered to the Confederacy felt it to be [their] duty when [they] were to participate in the politics of the Union, to let Confederate ideas rule . . . no longer . . . ," and he stuck with this assertion.[38] He went further, stating that "[i]n the great conflict, one party had contended for nationality and liberty, the other for state rights and slavery. We thought that our surrender implied the giving up of all that had been in controversy."[39] He asserted these views as a delegate to the Constitutional Convention of 1867–1868, where he supported suffrage for African Americans despite owning eleven slaves as a farmer in pre–Civil War Georgia.[40]

Akerman wanted to create a law that isolated bigots from the rest of Southern society, essentially freezing the undesirable views out of the Southern states.[41] This legislation proved so effective that he became overwhelmed prosecuting all those who espoused these ideals, so he began to narrow his focus on the ring leaders of racially motivated hate groups.[42] He also successfully lobbied for and helped establish the Department of Justice; Akerman and government officials from this newly formed department went on to prosecute, convict, and imprison hundreds of Klan members between 1870 and 1872.[43] This work consumed Akerman; while he rejoiced at the success of the program, he also disliked the business as it "revealed a perversion of moral sentiment among the Southern whites" and thought that it spelled disaster for the South.[44] Akerman resigned from his appointed position early after financial burdens grew too great, and the Grant administration halted his prosecutions.[45] Not all of Washington shared the fervor for righting the injustices against African Americans, and Grant acceded to those who thought Akerman went too far.[46]

In contrast to Akerman's fervent use of the statute, plaintiffs rarely utilized this act as a sword, probably because the people who needed it most still struggled with basic problems of surviving in

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38. *Id.*
39. *Id.*
40. *See Akerman*, *supra* note 35.
41. *See id.*
42. *Id.*
43. *See Amos Tappan Akerman*, AM. L. & LEGAL INFO., https://law.jrank.org/pages/4212/Akerman-Amos-Tappan.html [https://perma.cc/F4VS-LWU9] (last visited Mar. 22, 2020).
44. *Id.*
45. *See id.*
46. *See Akerman*, *supra* note 35 (noting that Secretary of State Hamilton Fish specifically recorded in his diary after a cabinet meeting that Akerman told many stories of alleged KKK members castrating African Americans "with terribly minute and tedious details in each case" that he thought "[i]t has got to be a bore to listen twice a week to this same thing." Fish embodied the callous indifference that allows atrocities continue, despite knowing the issue exists).

their day-to-day lives while avoiding arrests for other new charges targeting freed slaves.[47] Section 1983 mirrors the KKK Act closely, remaining as a safeguard for everyone's rights and privileges afforded to them by the United States Constitution.[48] Specifically, this updated act states the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[49]

While this provision does not solely protect the American public from police officers violating their constitutional rights, many cases involve a dispute with a citizen and a police officer, mainly because more opportunities arise for police officers to disregard constitutional provisions when interacting with the public as compared to those available to most other government officials.[50] Because of the close interaction between officers and the public, Section 1983 claims filed for officers' conduct warrant the focus of this analysis.[51]

II. WHAT QUALIFIES FOR § 1983 PROTECTIONS: A CASE ANALYSIS

> *[T]he Constitution does not create 'rights' which people carry around with them like their personal*

47. Laws such as "vagrancy" appeared in places like Shelby County, Alabama and elsewhere in the deep South, which punished "a person [for] not being able to prove at a given moment that he or she is employed." DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 1 (2009). Such offenses targeted black men almost exclusively and sent them to hard labor prison camps that mirrored slavery "in all but name," particularly evident when private prison owners bartered and sold men amongst groups of other prison owners to fit the labor they desired. *Id.* at 2.

48. 42 U.S.C. § 1983 (1996).

49. *Id.*

50. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 661 (1978) (referencing the suit compelling pregnant employees to take unpaid leaves of absence before medical reasons required leave).

51. CHRISTINE EITH & MATTHEW R. DUROSE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 5 (2011) (counting 40,015,000 interactions between the public and police in 2008, meaning the police have 109,630 interactions with the public per day).

> *effects. Rather, it provides for the creation of governments, and places certain limitations on what those governments may do.*
>
> —Wayne McCormack,
> *Federalism and Section 1983: Limitations of Judicial Enforcement of Constitutional Protections, Part I*[52]

Section 1983 looks good on its face but possesses a few problems in practice. To ameliorate these issues, we must understand the current pattern of how courts decide cases and why, starting from how courts looked at this issue in the past. In *Harlow v. Fitzgerald*, the Court focused on the scope of the immunity available to senior aides and advisors of the President in a suit for damages based upon their official acts.[53] While this does not directly reflect the standard police cases which will be the focus here, this case sets many boundaries for how Section 1983 cases would travel through the justice system and who gains protection from these suits in the future.[54] There, Fitzgerald alleged that the officials participated in a conspiracy to violate his constitutional and statutory rights by aiding President Nixon.[55] Harlow, though he did not qualify for absolute immunity from suit,[56] claimed that his position as a police officer gave him the protection of *qualified* immunity.[57] This case illuminates the concrete and important purpose of qualified immunity: the need to protect officials required to exercise their discretion in difficult, split-second choices and the related public interest in encouraging the vigorous exercise of this official authority.[58]

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52. Wayne McCormick, *Federalism and Section 1983: Limitations of Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 2 (Jan. 1974).

53. Harlow v. Fitzgerald, 457 U.S. 800, 802 (1982).

54. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574 (1998).

55. *Harlow*, 457 U.S. at 802.

56. Absolute immunity applies to certain government officials, including prosecutors, legislators, and—applicable in our case—judges. Clinton v. Jones, 520 U.S. 681 (1997). A judge's actions circumvent absolute immunity only if the harm did not arise from a judicial act. Forrester v. White, 484 U.S. 219 (1988) (where a subordinate court employee claimed the judge terminated her employment based on her sex). *Stump v. Sparkman* determined a two-factor test to define "judicial act:" (1) whether judges normally perform the function, relating to the "nature of the act itself" and (2) whether the parties dealt with the judge in his judicial capacity, looking to the "expectations of the parties." 435 U.S. 349 (1978).

57. Officers may plead the affirmative defense of qualified immunity to these constitutional claims by filing a motion for summary judgment. FED. R. CIV. P. 12(b)(6). In order to succeed, officers must show that their conduct as a "government official . . . performing discretionary functions . . . d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818; *see also* Hope v. Pelzer, 536 U.S. 730, 752 (2002) (stating that the defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law" (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

58. *Harlow*, 457 U.S. at 807 (referencing Butz v. Economou, 438 U.S. 478, 506 (1978)).

Harlow also demonstrates that defendant police officers must plead this affirmative defense of qualified or "good faith" immunity.[59] At the time of this case, the Court determined a two-step analysis in crafting this "good faith" defense, including both an "objective" and a "subjective" condition to gain the protection.[60] The objective element involved a presumptive knowledge of and respect for "basic, unquestioned constitutional rights"; the subjective component referred to the "permissible intentions" of the officer in the stated situation.[61]

An official in such a case destroys the applicability of qualified immunity if they "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury. . . ."[62] The first test involved an inquiry into the subjective malice of the officer, whereas the altered test focuses on objective, legal reasonableness of the official action in question.[63] *Harlow* helped determine the trajectory of Section 1983 cases moving forward.

Anderson v. Creighton delves deeper into the more specific issue of police officer immunity from Section 1983 litigation.[64] The specific "question presented [involved] whether a federal law enforcement officer . . . [can] be held personally liable for . . . damages" when they "participated in a search that violat[ed] the Fourth Amendment . . . if a reasonable officer could have believed that the search comported with [that] Amendment."[65] There, FBI agent Russell Anderson and other officers conducted a warrantless search of the Creighton family's home because they believed that a bank robber hid in their midst, but the house contained no robber.[66] The district court granted summary judgment for Anderson, because probable cause existed and exigent circumstances rose to bar the officers from securing a warrant.[67] Nevertheless, the court of appeals reversed, holding that the lower court should not have granted summary judgment on qualified immunity grounds since the right violated—the Fourth Amendment right against unreasonable search of a house—was "clearly established."[68]

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59. *Id.* at 815.
60. *Id.*
61. *Id.* (citing Wood v. Strickland, 420 U.S. 308, 322 (1975)).
62. *Id.*
63. *Id.* at 815–20; *see also* Anderson v. Creighton, 483 U.S. 635, 645 (1987).
64. *Anderson*, 483 U.S. at 635–37.
65. *Id.*
66. *Id.* at 637.
67. *Id.*
68. *Id.* at 637–38.

Justice Scalia wrote for the Court that, although "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees" in cases against government officials, permitting these suits against them can create substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties and negatively affect their resulting work product.[69] Qualified immunity steps in here, shielding government officials as long as their actions could *reasonably have been thought consistent* to comport with constitutional rights.[70]

Anderson also clarifies the position of the Court on the operation of the "clearly established" rule, which depends on how the Court will apply the relevant legal principle.[71] If the Court applied the test of "clearly established law" at a high level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*.[72] Justice Scalia thought that, in tests for "clearly established law," plaintiffs could "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[73] This would place police officers at a ridiculous disadvantage, in Justice Scalia's eyes.[74] He went further, announcing that:

> [S]uch an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages.[75]

The Court mentions that Anderson's search did not cross into the realm of objectively legally unreasonable just because warrantless searches violate the Fourth Amendment if unsupported by probable cause.[76] Courts do not want to make the scope or extent of immunity contingent on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated.[77] Immunity with qualifications for different types of police work would

69. *Id.* at 638 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).
70. *Anderson*, 483 U.S. at 638.
71. *Id.* at 639.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 640.
76. *Anderson*, 483 U.S. at 640–41.
77. *Id.* at 641.

not give conscientious officials a reasonable assurance of protection that the doctrine attempts to afford to the officials.[78] The Court goes on to conclude that they should not hold objectively legally reasonable judgments against the individual police officers personally.[79]

Ultimately, the Court agreed that qualified immunity should protect police officers who conduct unlawful, warrantless searches of innocent third parties' homes when searching for a fugitive.[80] Scalia argued that "security would be utterly defeated" if officials hesitated in reacting to official police business because of the fear of being left vulnerable by new exceptions to this protection, "without entangling themselves in the vagaries of the English and American common law."[81] In reality, fear of violating citizens' rights could act to ensure that the police behave and protect the public at large. Does there not exist a happy medium between paralyzing police officers with the fear of lawsuit and inspiring much needed reflection on the actions they take? More vigorous and thorough training on how to handle sticky situations would provide officers with ample experience, creating more comfortability with following citizens' Constitutional rights.

Four years later, *Allen v. City of Los Angeles*[82] set the issue of police violence on fire, as an amateur cameraman caught Rodney King's brutal beating on camera and released the footage to the press for all of America to witness.[83] The appeal in question, brought by the passenger of King's car, arose from the "Rodney King incident" of March 3, 1991, where Allen was forced at gunpoint to the ground, handcuffed, frisked, placed in a police car, and questioned while officers similarly forced King to the ground and beat him for the sole insurrections of speeding and failing to stop.[84] Surprisingly, the district court granted summary judgment in favor of the officers there and concluded that qualified immunity applied "because they reasonably could have believed their actions did not violate Allen's civil rights."[85] The Court of Appeals for the Ninth Circuit similarly justified the actions of the police, citing the search as a legitimate *Terry* stop,[86]

78. *Id.* at 643.

79. *Id.* at 644–45.

80. *Id.* at 644.

81. *Id.* at 646 (protecting officers from a too harsh rule regarding personal liability in their professional capacity as police officers).

82. *See* Allen v. City of Los Angeles, 92 F.3d 842 (9th Cir. 1996), *overruled in part by* Acri v. Varian Ass'n, 114 F.3d 999 (9th Cir. 1997).

83. *Video of Rodney King Beaten by Police Released*, ABC NEWS, https://abcnews.go.com/Archives/video/march-1991-rodney-king-videotape-9758031 [https://perma.cc/82J7-QN8B] (last visited Mar. 22, 2020).

84. Allen v. City of Los Angeles, 66 F.3d 1052, 1054 (9th Cir. 1995).

85. *Id.*

86. Terry v. Ohio, 392 U.S. 1, 30 (1968) (utilizing the rule that the officer must have "reasonable grounds to believe that [subject] was armed and dangerous, and it was

because they reasonably could have believed that their conduct comported with recognized law in light of clearly established law and the totality of the circumstances.[87] However, speeding in a car should not allow for the police to force the *passenger* to the ground when they are already handcuffed, especially when they had no active part in driving the car that was speeding. Is apprehending the perpetrators of a routine traffic violation enough of a public interest to justify the interference of the police into the realm of unconstitutionality? And when is the desire for police effectiveness going too far by allowing officers too much discretion to decide what is reasonable and who they maim with that discretion? The Court has left these questions unanswered to this day.

Eighteen years had passed before the *Pearson v. Callahan* decision, where officers conducted a warrantless search of the respondent's house after an undercover informant voluntarily named the house in question as a location for the sale of methamphetamine.[88] The court of appeals held that summary judgment on qualified immunity grounds *did not apply* for the officers in question, because the respondent cited facts to support a violation of his Fourth Amendment rights.[89] The court also determined that the unconstitutionality of the officers' conduct was clearly established.[90]

Three years after *Pearson*, Shelly Kelly in *Messerschmidt v. Millender* obtained police protection in order to move out of her apartment shared with her ex-boyfriend.[91] The former boyfriend still approached and fired at her with a sawed off shotgun while she attempted to relocate.[92] She reported this incident and documented his previous violent nature and his connection to a gang.[93] The detective confirmed this testimony and "drafted an application for a warrant authorizing a search of the Millenders' home for all firearms and ammunition, as well as evidence indicating gang membership" in response to this information.[94] The magistrate granted the application, and the police conducted a search, which was later objected to as an unreasonable search and seizure in violation of the Fourth Amendment.[95]

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necessary for the protection of [the officer] and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized").

87. *Allen*, 66 F.3d at 1054 (citing Alexander v. County of Los Angeles, 64 F.3d 1315, 1319 (9th Cir. 1995)).

88. Pearson v. Callahan, 555 U.S. 223, 227 (2009).

89. *Id.*

90. *Id.* (basing this qualification on the procedure mandated in Saucier v. Katz, 533 U.S. 194, 209–10 (2001)).

91. Messerschmidt v. Millender, 565 U.S. 535 (2012).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 535–36.

The Court highlighted the overbroad nature of the categories of firearms, firearm-related material, and gang-related material, and it ruled that the warrant and subsequent search violated the Fourth Amendment.[96] However, the Court also granted the officers qualified immunity.[97] To violate the Fourth Amendment and negate the possibility of qualified immunity, the Court related that the warrant must have been "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,"[98] because the magistrate controls whether the facts reach the threshold of probable cause to issue a warrant.[99] However, the Court found that the officers could have reasonably thought that probable cause supported the scope of the warrant, therefore allowing qualified immunity protections.[100]

A few years later in *City & Cnty. Of San Francisco v. Sheehan*, the Court also ruled that qualified immunity protected officers from liability for the injuries they caused to Sheehan.[101] Sheehan lived in a group home for individuals with mental illnesses, where she began to act violently towards her social workers.[102] The home called the officers to help escort her to another facility for temporary evaluation and treatment, but Sheehan threatened to kill them when they entered her room.[103] In order to subdue her, the officers sprayed her with pepper spray and then shot her multiple times when the spray did not subdue Sheehan.[104] She later sued two officers in their personal capacities, claiming that they violated her Fourth Amendment rights.[105] The officers, again, enjoyed the shield of qualified immunity because the law they violated was not clearly established, giving "government officials breathing room to make reasonable but mistaken judgments."[106] Although their training highlighted that they must accommodate those with disabilities, the court decided that the failure to follow their training does not itself negate qualified immunity where it would otherwise be warranted.[107]

The discussion of qualified immunity reached a head when a judge in the Eastern District of New York strongly opposed its

96. *Id.*
97. *Messerschmidt*, 565 U.S. at 536.
98. *Id.* (quoting United States v. Leon, 468 U.S. 897, 923).
99. *Id.*
100. *Id.* at 537.
101. City & Cnty. of San Francisco v. Sheehan, 135 S.Ct. 1765, 1769 (2015).
102. *Id.*
103. *Id.* at 1770.
104. *Id.* at 1171.
105. *Id.*
106. *Id.* at 1774 (quoting Ashcroft v. al-Kidd, 563 U.S. 731 (2011)).
107. *Sheehan*, 135 S. Ct. at 1777.

application in a recent case from Tucson, Arizona.[108] Officers responded to a call about a woman acting erratically with a knife.[109] Hughes had been seen hacking at a tree with the knife earlier in the day, and officers observed her approach another woman on the scene with this same knife.[110] Officers asked twice for her to drop the knife, and, although she did not acknowledge the presence of the officers or acquiesce to dropping the weapon, she remained calm throughout.[111] Officers shot Hughes four times for holding a knife, maintaining that they subjectively believed Hughes endangered the woman and that Hughes seemed somewhat distressed.[112] The Court of Appeals first held that the record was sufficient to show Kisela violated the Fourth Amendment with his conduct, and that it constituted a "clearly established" violation because "the constitutional violation was obvious and because the Circuit precedent" was "analogous."[113] The Supreme Court reviewed this decision and, after citing *Tennessee v. Garner*,[114] refused to determine whether *Kisela* violated the Fourth Amendment and granted him qualified immunity in this case as the conduct did not violate clearly established law.[115]

Notably, Justice Sotomayor delivered a scathing dissent to this decision.[116] She mentioned that Hughes retained her composure when the officers arrived, stood a full six feet away from her roommate outside of their apartment, had not committed any illegal act, and did not raise the knife in the direction of anyone in the area, least of all the police officers on the scene.[117] In fact, other officers on the scene stated that they "wanted to continue relaying verbal command[s]," that they did not feel violence was yet appropriate.[118] Regardless of other mitigating factors that pointed to more verbal cues, Kisela believed that Hughes posed enough of a danger to the officers to use deadly force by shooting her four times, "without giving . . . warning that he would open fire . . . leaving her seriously injured."[119] Justice Sotomayor called this conduct "unreasonable" and opined that

108. *See* Feuer, *supra* note 19.
109. Kisela v. Hughes, 138 S. Ct. 1148, 1151 (2018).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* (citing Kisela v. Hughes, 862 F. 3d 775, 785 (2016)).
114. Tennessee v. Garner, 471 U.S. 1, 11 (1985) (stating that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force").
115. *Kisela*, 138 S. Ct. at 1152.
116. *Id.* at 1155.
117. *Id.*
118. *Id.*
119. *Id.*

the Court misinterpreted "the facts and misapplie[d] the law, effectively treating qualified immunity as an absolute shield" to liability regardless of conduct.[120] Unfortunately, the majority of the Court did not share her view of the facts, and qualified immunity took one step closer to absolute immunity enjoyed by judges and prosecutors.[121]

A few months later, the court headed by Judge Weinstein in the Eastern District of New York decided *Thompson v. Clark*, which emulated how he believed the doctrine of qualified immunity should apply to officer cases.[122] Camille Watson called dispatch and reported that Thompson had abused her two-week-old niece based on some red marks on her buttocks.[123] A set of cops attempted to enter the house and conduct the search without the search warrant, which Thompson vehemently denied to give consent to.[124] He attempted to block the officers' path into his apartment, but the officers began beating him.[125] The officers also claimed that he flailed his arms excessively to prevent them from successfully placing the handcuffs on his wrists.[126] They then took the child from the apartment to check for signs of abuse, which did not exist beyond red marks indicating diaper rash.[127] The court ultimately dismissed the child abuse charges against Thompson, but he brought this subsequent action in response to the conduct of police at his house.[128] In the ensuing opinion, the court recognizes qualified immunity's tumultuous history and application with the courts, citing it as inherently contrary to the initial purpose of Section 1983.[129]

The court recognizes that frequent defenders of constitutional rights lash out against qualified immunity with each new excessive force case the courts encounter.[130] The opinion specifically points to

120. *Id.*
121. *See Kisela*, 138 S. Ct. at 1148.
122. Thompson v. Clark, 2018 U.S. Dist. LEXIS 105225, at *36 (EDNY 2018).
123. *Id.* at *7.
124. *Id.* at *8.
125. *Id.* at *9.
126. *Id.*
127. *Id.*
128. *Thompson*, 2018 U.S. Dist. LEXIS 105225, at *10.
129. *Id.* at *16 (quoting Wyatt v. Cole, 504 U.S. 158, 161 (1992)) (stating the purpose of Section 1983 as existing "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."); *see also* Jon O. Newman, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html [https://perma.cc/FJV3-XV3A].
130. *Thompson*, 2018 U.S. Dist. LEXIS 105225, at *16–17 (citing Press Release, NAACP Legal Defense and Educational Fund, Inc. (LDF), Statement on U.S. Supreme Court Decision Expanding Qualified Immunity for Police (Apr. 2, 2018), https://www.naacpldf.org/press-release/ldf-statement-qualified-immunity-decision-eastern-district-new-york) (stating that "The Supreme Court's decision [in Kisela v. Hughes, 138 S. Ct. 1148

Harlow, which decided that while officers acting with malicious intent or intentional subversion in mind would fall under this statute, those who did so in a case where they did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known" would walk free.[131]

The trajectory highlighted above summarizes the current state of Section 1983 and the immunities that bar relief from violations of civil rights. The outcome here differs markedly from how the original statute meant to apply to constitutional and statutory cases. In the inception of this law, the legislature intended their creation to protect the Thirteenth, Fourteenth, and Fifteenth Amendments adopted after the conclusion of the Civil War. These Amendments deny the ability to own slaves, highlight equal protection and due process under the law as applied to the states, and protect the right to vote when faced with condemnation based on race.[132]

As we move further away from the original legislative history of Section 1983, the Court and lower courts have forgotten the true protective purpose of the legislation.[133] With new case law blunting the edge of the Section 1983 sword, we risk completely invalidating the law as we know it. Change must come for this legislation to survive and live out its true purpose, as promulgated in the history of the statute.

III. QUICK AND DIRTY OVERVIEW OF ANALYZING SECTION 1983 CASES: HOW TO CITE THROUGH AN EXCESSIVE FORCE CASE

> *But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.*
>
> —James Madison, *Federalist No. 51*[134]

(2018)] serves to expand qualified immunity for police officers to an unprecedented and dangerous degree, becoming, as Justice Sotomayor aptly noted in her dissent, 'an absolute shield for law enforcement officers' and 'gutting the deterrent effect of the Fourth Amendment.' As the nation continues to mourn the recent deaths of [citizens] at the hands of police, we remain concerned that this ruling will undermine efforts to hold law enforcement officers accountable for their use of excessive force, which has led to the tragic loss of too many innocent lives").

131. *Id.* (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

132. *See* U.S. CONST. amend. XIII, XIV, XV.

133. *See supra* Part II.

134. James Madison, *Federalist Papers No. 51*, B. RTS. INST. (1788), https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-51 [https://perma.cc/2JYT-B8UU].

When a grievance by a state actor occurs, a plaintiff must file the case in a specific way in order to have a prayer of surviving summary judgment, let alone succeed in court. The statute of limitations for 42 U.S.C. § 1983 claims originates in the state law where the constitutional tort occurred, meaning that the client must file before the time demonstrated in the state the violation occurred.[135] Next, a plaintiff must turn to the direct language of the law. Under § 1983, a plaintiff can sue a person acting "under color of" state law for violating their rights secured under the Constitution or statutory law.[136] Acting "under color of" state law means the state enabled or empowered the actor to do the job; it does not require the conduct to be legal under state law.[137] Employment by state or local government generally suffices to determine a state actor, establishing police officers and judges as state actors easily in most cases.[138]

Next, plaintiffs must determine: (1) if these actors violated their rights, (2) which amendments constitute the most textually relevant ones, and (3) what defenses could exculpate the defendants from liability.[139] Section 1983 requires the usual *Twombly*[140] and *Iqbal*[141] standard of pleading, meaning the factual allegations in the complaint must plausibly make a case of liability. Subsequently, the defendants will usually move for summary judgment, but courts must accept the plaintiff's version of events as fact unless corroborating video exists directly contradicting their story.[142] Summary judgment hinges on whether a rational jury could find for the nonmoving party; if it could, summary judgment is not appropriate.[143] These qualifications limit which claims plaintiffs can plausibly raise in the Section 1983 context.

Moving forward in the legal process, qualified immunity specifically does not require the court to find a violation of the plaintiffs' constitutional rights first.[144] Courts determine the "clearly established"

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135. Wilson v. Garcia, 471 U.S. 261, 276 (1985). However, when the Section 1983 action accrues, federal law determines the limitations period. Chardon v. Fernandez, 454 U.S. 6 (1981) (holding that the claim accrued when plaintiff learned he was to be fired, not when Chardon was actually terminated).

136. 42 U.S.C. § 1983 (1996).

137. Monroe v. Pape, 365 U.S. 167 (1961).

138. *Id.*

139. Graham v. Connor, 490 U.S. 386 (1989).

140. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (1955) (stating that the complaint must contain enough factual material to support the claim asserted).

141. Ashcroft v. Iqbal, 556 U.S. 662, 663 (1937) (determining that a complaint will only survive a motion to dismiss if it alleges nonconclusory facts that, taken as true, state a claim to relief that is plausible on its face).

142. Scott v. Harris, 550 U.S. 372 (2007).

143. Walker v. Mod-U-Kraf Homes, LLC, 775 F.3d 202, 204 (2014).

144. Pearson v. Callahan, 555 U.S. 223, 227 (2009) (striking down the sequential requirement from Sacramento v. Lewis, 523 U.S. 833 (1998) and Saucier v. Katz, 533

factor by examining the law at the time of the wrongful action instead of the time of the court decision date.[145] Unfortunately for plaintiffs, the Supreme Court has maintained that judges should not define "clearly established law" with a high "level of generality," clarifying that, for qualified immunity to apply, the right must be "particularized," or "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[146] Allowing retrospective liability would eviscerate the requirement of notice at the core of qualified immunity. As a matter of policy, courts do not second-guess the split-second judgment of officers merely because that judgment caused harm.[147] If a court finds that a constitutional right has been violated *and* that the right was clearly established, then qualified immunity cannot protect a state actor from their wrongful acts.[148]

IV. RE-EVALUATION OF § 1983: WHEN "CLEARLY ESTABLISHED" ELIMINATES THE LEGAL PROTECTIONS AS WE KNOW THEM

> *The right to be let alone—the most comprehensive of rights and the right most valued by civilized men.*
> —Supreme Court Justice Louis D. Brandeis, *Olmstead v. United States*[149]

As the analyses of current case law and the summary of filing a possibly efficacious Section 1983 claim demonstrates, succeeding in this realm and holding bad actors accountable proves exceedingly difficult. While the purpose of allowing police officers to make quick decisions without *undue* worry of prosecution remains a valid and noble aim of qualified immunity, we must decide when an officer has reached the realm of "undue"—versus solely taking necessary—precautions in an employment that all but requires the use of deadly weapons.

Good intentions here may not be good enough. As Daniel Webster preached, "[g]ood intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good

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U.S. 194 (2001) of establishing a violation first before analyzing whether the law was clearly established).

145. *Id.*

146. Anderson v. Creighton, 483 U.S. 635, 639–40 (1987).

147. McLenagan v. Karnes, 27 F.3d 1002 (1994) (referencing Slattery v. Rizzo, 939 F.2d 213 (1991)).

148. *See id.*; *see also Anderson,* 483 U.S. at 635.

149. Olmstead v. United States, 277 U.S. 438, 478 (1928).

intentions."[150] He goes on in his writing, discussing the proclivity of "men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters."[151] We have to hold our police officers to a higher standard. Although good intentions do not always secure citizens' rights, this motive quite outweighs the alternative of intentionally created rights violations. The most concerning cases arise out of pure bias against specific police targets based on race, gender, socio-economic class, or even previous interactions with law enforcement generally. Despite this overarching thought, bias and malintent currently do not allow for successful Section 1983 suits in America.[152]

Another important issue arises in the manner of deciding clearly established law. In order to see whether something qualifies as clearly established for the officer, a judge must "slosh . . . through the factbound morass" in the case at hand, and just a slight difference in facts of the case as compared to a decided case could disqualify it as being a clearly established law.[153] Section 1983 was conceived of in order to protect the citizen's rights, and this cannot be denigrated. Multiple possible solutions exist to this issue, but the legislature and the courts would need to create these alterations together.

A. The Efficacy of an Exclusionary Rule

An exclusionary rule has the potential to work as an alternative or a sword with Section 1983 to enforce this act and promote justice. The exclusionary rule, unique to American law, describes the principle that evidence seized by police in a situation where a Fourth Amendment violation occurred may not be used in trial for any reason.[154] *Mapp v. Ohio* confirmed this and ruled by a majority of six that evidence obtained in violation of the Fourth Amendment of the United States Constitution, prohibiting "unreasonable searches and seizures," may not penetrate into the realm state courts.[155] This established that the federal exclusionary rule forbidding the use of constitutionally obtained evidence in federal courts also applied to the states

150. CHERYL K. CHUMLEY, POLICE STATE U.S.A.: HOW ORWELL'S NIGHTMARE IS BECOMING OUR REALITY 36 (2014) (quoting Daniel Webster's speech delivered at Niblo's Saloon in New York on March 15th, 1837, as found in EDWIN WHIPPLE, GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 393 (2006)).

151. *Id.*

152. *See* Newman, *supra* note 129.

153. Scott v. Harris, 550 U.S. 372, 383 (2007).

154. *Exclusionary Rule*, ENCYC. BRITTANICA, https://www.britannica.com/topic/exclusionary-rule [https://perma.cc/XSM6-6DWU].

155. Brian Duigan, *Mapp v. Ohio*, ENCYC. BRITTANICA, https://www.britannica.com/event/Mapp-v-Ohio [https://perma.cc/EKF5-9BDW].

through the incorporation doctrine, referring to "the theory that most protections of the . . . Bill of Rights are guaranteed [to apply to] the states through the [D]ue [P]rocess [C]lause of the Fourteenth Amendment," prohibiting the "states from denying life, liberty, or property without due process of [the] law."[156]

If this rule applied to the conduct of police officers, any type of action by the officer that did not conform to the enumerated constitutional rights and the subsequent case law would be persecuted in a Section 1983 litigation. Critics of qualified immunity would enjoy this avenue as it all but obliterates the concept of qualified immunity, throwing the protections afforded to our police officers to the wind.[157] Because of this bright line deletion of the protections that may allow officers to safely complete their jobs, the alterations to Section 1983 litigation should focus elsewhere.

Qualified immunity does still exist for the important purpose of allowing split-second decisions and actions to occur in some of the most trying situations that any American would have to deal with in their lines of work.[158] At the same time, other individuals whose jobs involve life-threatening, quickly made decisions also suffer from litigation when things go array, specifically physicians in emergency situations who then face medical malpractice litigation if the patient or next of kin believes a mistake occurred.[159] Because of this remaining uncertainty, we must continue to search for better alternatives to how qualified immunity applies to cases without completely eviscerating the protections for our officers.

B. Could Sanctions Work?

As a more doable option, we could impose sanctions via newly enacted statutory provisions in order to curtail these violations. The eleventh Federal Rule of Civil Procedure for attorneys provides a template for a new sanction law to be created in this realm.[160] However, this Rule of Federal Procedure only attaches if Fed. R. Civ. Pro. 11(b)

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156. *Id.*

157. *See* Evan Bernick, *It's Time To Limit Qualified Immunity*, GEO. J.L. & PUB. POL'Y BLOG (Sept. 18, 2018), https://www.law.georgetown.edu/public-policy-journal/blog/its-time-to-limit-qualified-immunity [https://perma.cc/DF8B-FSGF].

158. *See* Anderson v. Creighton, 483 U.S. 635 (1987); *see also* Allen v. City of Los Angeles, 66 F.3d 1052 (9th Cir. 1995).

159. *See Medical Liability and Malpractice*, NAT'L CONF. ST. LEGIS. (Mar. 20, 2014), http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-and-malpractice.aspx [https:perma.cc/899P-CKSU].

160. FED. R. CIV. PRO. 11(c)(1) (stating that "[i]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee").

has been violated in a calculable manner.[161] While these sanction laws focus on attorneys' downfalls and seek to ameliorate those issues, a new statute could emulate this tenor for police officers. For example, in Fed. R. Civ. Pro. 11(b)(1), the mirrored statute for police officers could refer to police action conducted "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[162] Other sections of statutes could, likewise, abound by taking the words meant to apply to lawyers and applying them to fit armed officers. If attorney work can produce situations where sanctions apply, so too do the life-threatening actions of armed officers.

C. Why Strict Liability Will Not Work

Other critics of Section 1983 have mentioned strict liability upon the city or municipality employing the state actor when a constitutional violation occurs as a viable and effective option.[163] Strict liability exists whenever a defendant proves liable for committing an action, regardless of what their intent or mental state was when committing the action.[164] In criminal law specifically, possession crimes and statutory rape both exemplify strict liability offenses.[165] If the municipalities could shoulder the liability of officers when a constitutional violation occurs, this could theoretically shield the officers from worrying in the moment about right from wrong, while simultaneously pressuring municipalities to train officers to the utmost of their abilities to ensure that violations do not occur to drain their pockets. Additionally, this could incentivize the public to refrain from filing frivolous suits, as the cash out from this litigation would end up coming from the taxpayers' pockets.

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161. FED. R. CIV. PRO. 11(b) ("Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.").

162. *Id.*

163. Kristen Clanton, *8.3 Damage Claims Against Cities and Counties Under Section 1983*, FED. PRAC. MANUAL FOR LEGAL AID ATT'YS, SHRIVER CTR., http://federalpracticemanual.org/chapter8/section3 [https://perma.cc/MM6H-8EVX] (last updated 2013).

164. *Strict Liability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_liability [https://perma.cc/UCM4-J57X].

165. *Id.*

Five issues prove deadly for this seemingly good fix of the defense of qualified immunity. Firstly, taking the pressure off police officers may open up the floodgates of litigation because they feel as though they do not need to ponder the correct way to approach a difficult situation. Less thought into police officers' actions could lead to gratuitous rights violations, ultimately meaning more suits and an eventual suffocation of our legal system with Section 1983 strict liability cases. Secondly, municipalities may conduct cost-benefit analyses on the benefit of training officers versus the cost of litigation, possibly finding that the cost of training officers actually outweighs any cost of litigation that could occur from police misconduct. This, again, would not disincentivize bad behavior, as we hope Section 1983 would.

Alternatively, if municipalities accept this strict liability principle and train accordingly, more suits may still be filed as plaintiffs may look at this as the new "slip-and-fall," easy-money legal scheme. Furthermore, the fact that the money would originate from taxpayers' pockets may not deter the bulk of the Section 1983 litigation cases filed, as most of these come from Eighth Amendment violations from prisoners, who do not currently pay taxes.[166] Finally, a fundamental fairness issue exists in requiring the friends and family of those abused at the hands of the system, *not* in an Eighth Amendment context, to pay through taxes for the police misconduct that injured them. At first, strict liability may sound like a feasible option to ensure that constitutional rights remain protected, but a shift to strict liability may cause more problems in this system than currently exist.

D. From Judge to Jury: "Clearly Established" Shift

Another possible option may exist in shifting the decision in this matter from the judge ruling on summary judgment to the jury as a precursor to the actual trial or in the main trial itself. The argument here stems from uneasiness on where the judicial loyalty lies.[167] People see that judges, prosecutors, and police officers work together in many matters, making people unsure about allowing the judge—and possible friend of the officer—free reign to decide whether or not the case can even get to trial.[168] This solution would erase that bias issue while also ensuring that decisions would fit with the

166. *See Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533, 533 (1978).

167. *See* Emily Saul, *Ex-cops Accused of Raping Teen Ask Judge to Order Special Prosecutor*, N.Y. POST (Jan. 15, 2019), https://nypost.com/2019/01/15/ex-cops-accused-of-raping-teen-ask-judge-to-order-special-prosecutor [https://perma.cc/7DTX-SDSP].

168. *See Ties that Bind*, GUARDIAN (Dec. 31, 2015), https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings [https://perma.cc/GPM9-VQWB].

current climate of society. The issue here includes the possibility that a layperson would not have the ability to make this decision with their knowledge base. While this would encourage people to operate based on how their gut responds to acts of violence against civilians, this would produce wildly different outcomes with different demographics present in the jury box.[169] Also, making the layperson responsible for these decisions eviscerates the hope that police officers could use current case law to inform their decisions, because the layperson usually does not stay informed of new cases, unless blasted by the media. Officers would, instead, have to gauge the general affect of American citizens as a whole to come to a conclusion, which would prove decidedly impossible to see through. Unfortunately, a jury would likely not fix this issue.

E. Establishing Constitutional Violations: Where the Solution Lies

Another issue arises in that a judge can easily cop out of making a decision on whether something will count as a constitutional violation for future cases.[170] The judge can determine that the incident did not include a clearly established law and legally dismiss it without determining whether it would have violated the plaintiff's constitutional rights if the police were on notice.[171] Failing to determine this aspect effectively ensures that a case never survives past summary judgment, as it will never become law and, therefore, not clearly established.[172] This may impact different municipalities unevenly and further substantiates the issue.[173] Because of this ability to dismiss without creating case law on whether the facts will now give rise to a clearly established violation, the law becomes stagnant and does not advance to better our law enforcement and society at large.

1. The Flaws of Returning to Old Law

Courts could follow *Saucier*'s guidance to first analyze whether a constitutional violation occurred, instead of skipping to whether the right at issue was "clearly established."[174] The failure to first address

169. *See* Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 180 (2007).

170. *See* Kisela v. Hughes, 138 S. Ct. 1148 (2018) (showing a judge skipping past the constitutional violation question and only answering the "clearly established" question).

171. *Id.* at 1153.

172. *Id.*

173. D. Trubek et al., *Civil Litigation Research Project: Final Report, Part A*, at I-58, I-72 (1983).

174. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219, 1249 (2015).

the constitutional question is an avoidance of the court's "essential function of explaining and securing the protections of the Constitution by failing to inform law enforcement officers, among others, which practices are constitutional, and which are not."[175] For example, some scholars have thought that,

> free from Saucier, overworked judges may want to take the 'short route' instead of dealing with the merits of a case. This creates future costs. Judges constantly taking the easy way out in one area of the law creates a situation where 'civil rights questions go repeatedly unanswered.' This becomes a cycle where a constitutional violation need not be answered 'because the law is unclear, and the law is unclear because the violation continues to go unaddressed.'[176]

If returning to *Saucier* creates complications, courts could look to change the *application* of qualified immunity instead. It has been suggested that courts return to the standard expressed in *Hope v. Pelzer*, which defined "clearly established law" at a high level of generality.[177] The key inquiry becomes, in this analysis, whether officers are on "notice their conduct is unlawful."[178]

The two above suggested fixes to the process of finding a constitutional violation may each contain flaws, as they return to old law. Returning to old law negates any reasons why the legal system has moved away from those precedents in favor of something, seemingly, more beneficial. Because of this, a new solution to the "clearly established" issue warrants a new beginning for handling Section 1983 cases.

2. Following the Second Circuit: The Resolution

The Second Circuit recently heard and decided *Cugini v. City of New York*, which may hold the solution to many woes regarding modern Section 1983 litigation.[179] The plaintiff here, Donna Cugini, alleged a federal claim for excessive force against Officer Palazzola under the Fourth and Fourteenth Amendments.[180] Officer Palazzola arrested Ms. Cugini in conjunction with a complaint of domestic

175. *Id.*; *see also* Michael Silverstein, *Rebalancing* Harlow*: A New Approach to Qualified Immunity in the Fourth Amendment*, 68 CASE W. RES. L. REV. 495, 522 (2017).

176. Silverstein, *supra* note 175, at 522 (referencing Thompson v. Clark, 2018 U.S. Dist. LEXIS 105225, *30–31 (EDNY 2018)).

177. *Id.* at 519.

178. Hope v. Pelzer, 536 U.S. 740, 739 (2002).

179. Cugini v. City of New York, 941 F.3d 604 (2d Cir. 2019).

180. *Id.* at 607.

stalking and harassment, brought by Ms. Cugini's estranged sister.[181] As a result of a temporary detention and forceful handcuffing, Ms. Cugini suffered serious bodily injury, including permanent nerve damage to her wrist.[182]

During the original handcuff placement, Ms. Cugini said "ouch," and her body shuddered; Officer Palazzola did not loosen the cuffs but, instead, tightened them and said "don't make me hurt you."[183] However, the substandard removal of the cuffs actually caused Ms. Cugini to suffer the injury at hand.[184] During removal of the cuffs, Officer Palazzola allegedly tightened the cuffs further instead of loosening them for removal, then tugged at them excessively while they remained tight around Ms. Cugini's wrists.[185] Eventually, an officer called for another officer to remove the cuffs.[186] After her release that day, Ms. Cugini immediately went to the hospital, where she "began experiencing [increased] pain, numbness, and twitching in her arms."[187] She continues to suffer from permanent nerve damage and, as a result, cannot perform many basic household functions.[188] According to the district court, Officer Palazzola enjoyed qualified immunity "because [Ms.] Cugini gave only brief physical and nonverbal manifestations of her discomfort while handcuffed," meaning that she "failed to alert Palazzola sufficiently to her distress."[189]

On appeal, Ms. Cugini contended that the district court wrongly dismissed her claim of excessive force, so the appeals court looked to case law on Fourth Amendment violations to verify the decision.[190] To determine whether officers used *excessive* force, the court looked to the balance between the plaintiff's Fourth Amendment interests and the government's countervailing interests, such as "the severity of the crime and whether the suspect poses a safety or flight risk or resists arrest."[191] A plaintiff must also demonstrate that they made the officer reasonably aware that the force was excessive.[192] "A plaintiff satisfies this requirement if" either (1) "the unreasonableness of the

181. *Id.*
182. *Id.* at 608.
183. *Id.* at 609.
184. *Id.* at 609–10.
185. *Cugini*, 941 F.3d at 609.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 607.
190. *Cugini*, 941 F.3d at 607.
191. *Id.* at 608 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).
192. *Id.* at 608–09 (citing Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015)) ("[O]bjective reasonableness determination must be made 'from the perspective of a reasonable officer on the scene, including what the officer knew at the time.'").

force used was apparent under the circumstances, or" (2) "the plaintiff signaled her distress, verbally or otherwise, such that a reasonable officer would have been aware of her pain," or (3) both occurred.[193]

The appeals court found that "the *Graham* factors weig[hed] decidedly" in Ms. Cugini's favor, as: (1) "the crime . . . [was] relatively minor"; (2) no indication existed that "she posed a safety threat" because of her voluntary surrender; and (3) "she did not try to flee or resist" the handcuff attempt.[194] As such, "a reasonable jury could find that the severity of Palazzola's intrusion—continuing to tighten the plaintiff's handcuffs after she expressed physical pain and using force strong enough to cause her permanent injury—was unjustified."[195] The court further states that a reasonable officer should have known that this force exceeded necessary force in the situation, establishing a Fourth Amendment violation.[196]

The appeals court next turned to the issue of qualified immunity, assessing whether "'under clearly established law, every reasonable officer would have concluded that [the defendant's] actions violated [the plaintiff's] Fourth Amendment rights in the particular circumstance presented by the uncontested facts and the facts presumed in [the plaintiff's] favor.'"[197] In order to analyze this in context, courts "consider Supreme Court decisions, [the court's] own decisions, and decisions from other circuit courts."[198]

These decisions determine that handcuffing is not per se unreasonable, but tight handcuffing can give rise to a constitutional violation.[199] However, because the analysis must be "particularized" to the facts of each individual case, the legal issue here focused on "whether, at the time of Cugini's arrest, clearly established law required an officer to respond to a complaint by a person under arrest where, as here, that person exhibited only non-verbal aural and physical manifestations of her discomfort."[200] The court compared *Shamir v. City of New York* to *Arroyo v. City of New York* where, in the former, the plaintiff did make verbal complaints and showed officers the effect of the tight handcuffs and, in the latter, the plaintiff never made any complaints

193. *Id.* at 608 (citing *Graham*, 490 U.S. at 386).
194. *Id.* at 613–14.
195. *Id.* at 614.
196. *Cugini*, 941 F.3d at 615.
197. *Id.* (quoting Brown v. City of New York, 862 F.3d 182, 190 (2d Cir. 2017)).
198. Simon v. City of New York, 893 F.3d 83, 92 (2d Cir. 2018); *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 746 (2011) ("[Q]ualified immunity is lost when plaintiffs point either to cases of controlling authority in their jurisdiction at the time of the incident or to a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.") (internal quotation marks omitted).
199. *See Cugini*, 941 F.3d at 615.
200. *Id.* at 616 (following the particularized standard of Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

at all.[201] Because Ms. Cugini's case fit squarely between those two previous standards for analyzing handcuffing-based excessive force claims, the court found that a reasonable officer might not have been on notice of excessive force where only nonverbal distress to handcuffs was indicated.[202] Therefore, the appeals court affirmed the district court's dismissal of the case on qualified immunity grounds.[203]

However, Ms. Cugini's case ends this trend.[204] The court decides that, although Officer Palazzola might not have been on notice of the constitutional violation, every other officer is from this decision forward.[205] The court establishes that "officers can no longer claim . . . that they are immune from liability for using plainly unreasonable force in handcuffing a person or using force that they should know is unreasonable based on the arrestee's manifestation of signs of distress on the grounds that the law is not 'clearly established.'"[206] This is significant because it creates clearly established law where there was none before, allowing such claims to make it to the courtroom instead of failing on summary judgement on qualified immunity grounds.[207]

After looking through case law and projecting the costs and benefits of other solutions, I propose that other courts should follow the Second Circuit's lead in future cases that may involve qualified immunity as a defense. Future courts should provide a roadmap for future cases to determine if the specific facts should give rise to a constitutional violation, even if such facts previously did not create a constitutional violation. Determining that certain force now qualifies as a clearly established constitutional violation both protects officers from suit where they were not on notice of violations, while also protecting the public where such cases have occurred previously, but failed solely due to dismissal on qualified immunity grounds. This solution requires courts to take a more active role in creating the case law, but it will heighten the transparency and perceived equity of how courts look at these cases in the future. It also ensures that the law, as well as police officers' actions, evolves with the times and

201. *Id.* at 616–17; *see* Shamir v. City of New York, 804 F.3d 553, 555, 557 (2d Cir. 2015) (inferring a handcuffing-based excessive force claim where the complaint alleged that the plaintiff did make verbal complaints, repeatedly asked that the handcuffs be loosened, complained that the handcuffs were "really tight" and "really hurt," and showed police officers his "really discolored," "really swollen" hands) (internal quotations omitted); *cf.* Arroyo v. City of New York, 683 F. App'x 73, 75 (2d Cir. 2017) (affirming grant of summary judgment for defendants on handcuffing-based excessive force claim where plaintiff "alleged no physical injury and never asked for the handcuffs to be removed").

202. *Cugini*, 941 F.3d at 616–17.

203. *Id.* at 618.

204. *Id.* at 616–17.

205. *Id.* at 617.

206. *Id.*

207. *Id.* at 617–18.

stays modern to protect everyone's rights. Requiring courts to establish law, even in cases where qualified immunity is currently appropriate and the court orders summary judgment, should become the future of excessive force cases to ameliorate some of the most pressing issues in Section 1983 litigation.

V. POLICE BRUTALITY COLORED BY RACE AND SOCIO-ECONOMIC STATUS: AN ADDITIONAL SOLUTION TO THE EPIDEMIC

> *Forget dogs: do people distinguish between being stumbled over and being kicked?*
>
> —Alice Ristroph[208]

As Paul Hoffman demonstrates, "the problem of police abuse in [this] nation's cities is longstanding."[209] He further proffers that the video of Rodney King's beating provided proof that the ideal of justice equally through all races, genders, and socio-economic classes proved to be a part of utopia.[210] However, the lack of accountability demonstrated by the United States justice system was already obviously established by this time, as only three cases involving police brutality were actually prosecuted in a ten-year period between 1981 and 1991.[211] As dictated by Hoffman, "the King video compelled a visible federal response to police brutality in Los Angeles."[212]

Geoffrey P. Alpert and William C. Smith discuss the odd role that the police play within our society of having the ability to use both psychological and physical force upon citizens as a part of their day-to-day employment.[213] They also demonstrate a discord between how police view the force they dole out versus how citizens view that same force; citizens much more frequently characterize force as

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208. Alice Ristroph, *Criminal Law: State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353 (2008) (creating a play on words by referencing "even a dog distinguishes between being stumbled over and being kicked").

209. Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1456 (1993); *see, e.g.*, Gunnar Myrdal, *An American Dilemma: The Negro Problem & Modern Democracy* 535, 535–37 (1944); U.S. COMM'N ON CIVIL RIGHTS, JUSTICE 26 (1961) ("[P]olice brutality in the United States is a serious and continuing problem in many parts of the country"); NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 299–307 (1968).

210. Hoffman, *supra* note 209, at 1456.

211. David Freed, *Federal Prosecutors Usually Keep Hands Off*, L.A. TIMES (July 7, 1991), https://www.latimes.com/archives/la-xpm-1991-07-07-mn-3081-story.html [https://perma.cc/ZGK6-YFNZ].

212. Hoffman, *supra* note 209, at 1457.

213. Geoffrey P. Alpert & William C. Smith, *How Reasonable is the Reasonable Man?*, 85 J. CRIM. L. & CRIMINOLOGY 481 (1994).

unnecessary, unsurprisingly, since each party approaches the situation with their own mindset at the forefront of their analysis.[214] They also relate that "[t]he targets of police abuse are almost always lower class males, and the most common factor associated with abuse is disrespect shown to the police by these suspects."[215]

Hubert Williams, the president of the Police Foundation and former Chief of Police of Newark, admitted that "[p]olice use of excessive force is a significant problem in this country, particularly in our inner cities."[216] Since the King beating until at least 1993—just as before the King beating—the problem of police abuse in minority communities has remained a major public controversy in a number of cities, including New York, Miami, Washington, D.C., and Detroit.[217]

As articulated by police chiefs and scholars alike, prejudice and discord continue to play a role in policing, despite strides made in protections for such groups.[218] The only true way to fix these inherent insensitivities within certain members of our society involves training them to be better. Bias and insensitivity training exposes people to ideas they may never have encountered before, asking them to think critically about innate biases and offering evidence of how such innate biases can negatively impact the people they encounter in their line of work.[219] In professions that work with the entire spectrum of human existence—including people of all races, genders, socio-economic statuses—we should mandate the completion of sensitivity courses referencing each of the above situations. Professions who work with a variety of people include police officers, doctors, lawyers, and teachers, to name a few. By instructing influential people in these professions about situations that may not have mirrored their own, biases can begin to dwindle.[220]

However, as with most influential change, the mountain that is 'inherent biases' would need time to properly erode from the constant wave of new knowledge approaching.[221] Many cities and municipalities have begun working with these bias training centers already,

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214. *Id.* at 482–83.

215. *Id.* at 483 (citing ALBERT J. REISS, JR., THE POLICE AND THE PUBLIC 147 (1971)).

216. INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, REPORT OF THE INDEPENDENT COMMISSION, I (1991) [hereinafter the CHRISTOPHER COMMISSION REPORT].

217. *See, e.g.*, Doron P. Levin, *Detroit Suspends Policemen in Fatal Beating of Motorist*, N.Y. TIMES (Nov. 7, 1992), https://www.nytimes.com/1992/11/07/us/detroit-suspends-policemen-in-fatal-beating-of-motorist.html [https://perma.cc/82TY-KATN].

218. CHRISTOPHER COMMISSION REPORT, *supra* note 216, at iii–iv.

219. Diana Yates, *Police Training Institute Challenges Police Recruits' Racial Biases*, PHYSORG (Aug. 2, 2016), https://phys.org/news/2016-08-police-racial-biases.html [https://perma.cc/6WBP-N498].

220. *Id.*

221. *Id.*

with varied success.[222] One more notable study occurred with New York City police officers.[223] The police officers took a higher education ethics course made specifically for them, conforming to the following restrictions and theories:

> [Critical Race Theory] pedagogy aims to help students overcome "color-blind" thinking, which minimizes awareness of racism, by raising their critical understanding of racism and framing it as a pervasive and institutionalized reality that everyone has a responsibility to change. Using the Color Blind Racial Awareness (COBRA) Scale, critical awareness in three cluster areas, white privilege, institutional discrimination, and blatant racism, is measured among those completing the ethnic studies course and a comparison group of officers completing a different college course for police. Conclusions reflect on the impact of the course on students' awareness of racism, the correlation of identity and awareness of racism, the hypothetical impact of such awareness in policing and possibilities for future research.[224]

While I am awaiting responses in regard to these trainings, I assume the ethics course for police officers produced at least some changes to the biases some officers hold. I believe that applying this model might be costly on the front end, but would save cities money and time litigating cases where bias played a role. I also believe that employing such a model would create a level of understanding, within the law enforcement community, of those in society that they might not have appreciated before taking this course.

VI. MEDIA IMPACT ON FORCE CASES: MAKING THE PROBLEM WORSE

The media as an institution must disseminate ideas and ensure that the public engages with the politics of their state.[225] However, coverage of certain topics can hinder public engagement and expedient resolution of cases, specifically between the general public and the officers that should serve and protect us.[226]

In an ideal situation, the media and the police force would work together to inform society on current crime events in order to keep

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222. The state of Illinois has its own Police Training Institute, which trains police recruits from about 500 different departments across Illinois. *Id.*

223. Avram Bornstein, et al., *Critical Race Theory Meets the NYPD: An Assessment of Anti-Racist Pedagogy for Police in New York City*, 23 J. CRIM. JUST. EDUC. 1 (2012).

224. *Id.*

225. Juan Liu, The Role Of Media In Promoting Good Governance And Building Public Perception About Governance: A Comparison Of China And The United States (Jan. 2017) (unpublished Ph.D. dissertation, Wayne State University) (on file with author).

226. Alyce McGovern & Nickie D. Phillips, *Police, Media, and Popular Culture*, OXFORD RES. ENCYC. CRIMINOLOGY & CRIM. JUST. (Aug. 2017).

the public safe.[227] That relationship turns on its head when the police may be involved in the issue. Information on how the police interact with their community is invaluable, but the way this information reaches the public matters.[228] Eighty-one percent of officers believe that the media treats the police unfairly in reports.[229] Many news articles sensationalize police interactions with the community, because such language creates more interest in their news, meaning more business for them specifically.[230] What they may not realize is that sensationalization changes how the public sees the subject of the article and, in turn, the relationship between police and the public.[231]

A strong example of this media issue comes from the Mario Ocasio Case from New York City's Bronx borough. The case at hand involved an emergency call about an emotionally disturbed person who had taken K2, a synthetic form of marijuana which has notoriously caused serious medical issues with those who have taken it.[232] Ocasio's girlfriend called emergency services when Ocasio demonstrated adverse side effects and threatened her with a pair of scissors.[233] However, as seen in the original report from 2015, the focus does not fall on the threatening gestures and excessive aggression caused by the K2 that necessitated more force than a normal paramedic call, but instead on an alleged "cover up" that police supposedly designed immediately after Ocasio's death.[234] Even though this

227. Katrin Hohl, The Role Of Mass Media And Police Communication In Trust In The Police: New Approaches To The Analysis Of Survey And Media Data (Sept. 2011) (unpublished Ph.D. thesis, London School of Economics) (on file with the author).

228. *Id.* at 90.

229. John Gramlich &. Kim Parker, *Most Officers Say the Media Treat Police Unfairly*, PEW RES. CTR. (Jan. 25, 2017), https://www.pewresearch.org/fact-tank/2017/01/25/most-officers-say-the-media-treat-police-unfairly [https://perma.cc/F648-QYQC].

230. Kristina Adams, *How the Media Uses Language to Manipulate You*, WRITER'S COOKBOOK (Nov. 21, 2014), https://www.writerscookbook.com/media-uses-language-manipulate [https://perma.cc/7DAQ-8WQ6].

231. Suzan I. Wadi & Dr. AsmaaAwad Ahmed, *Language Manipulation in Media*, 3 INT'L J. ON STUD. ENG. LANG. & LIT. 16, 21 (July 2015).

232. *K2 Drug Facts and Statistics*, WHITE SANDS TREATMENT, https://whitesandstreatment.com/addiction-articles/rehab-center-advice/k2-drug-facts-statistics [https://perma.cc/BU8R-K43U]. While K2 should imitate the effects of THC, the synthetic form of the drug is increasingly more dangerous than naturally growing marijuana, causing irregular heartbeats, psychosis, unexpected aggressive behavior, or sudden stroke.

233. Thomas Tracy, *Jury Tosses Federal Wrongful Death Lawsuit Against Cops Who Tasered Man Threatening Girlfriend While High on K2*, DAILY NEWS (Feb. 13, 2020), https://www.nydailynews.com/new-york/nyc-crime/ny-jury-tosses-federal-wrongful-death-suit-20200214-blv773dsrzgq5kqw2mjzlf5hla-story.html [https://perma.cc/97J4-EVHT].

234. Victoria Bekiempis, *Lawsuit: NYPD Withholding Evidence in Alleged Taser Death*, NEWSWEEK (Oct. 13, 2015), https://www.newsweek.com/nypd-police-involved-death-taser-new-york-police-department-382325 [https://perma.cc/KB8A-7ZAT].

article mentions briefly that their information originates in the complaint filed by Ocasio's mother, the article mainly reads as though it is fact: as though the NYPD truly murdered this man and then proceeded to hide evidence that would confirm this fact.[235]

The resulting jury trial occurred in February 2020 and resulted in a complete defense verdict: the jury cleared all five cops of all charges.[236] This verdict comes not in small part because a K2-induced heart attack—not actions of the cops—caused this man's untimely death, but a reader would never know this possibility from the first article from 2015.[237] I proffer that this mismatch in the story spun by the media and reality aids in furthering the rift between police and the community. Newsweek also has not followed up on their original article to correct public perception about the officers or NYPD as a whole. A *Daily News* article alone reported on the culmination of this trial, and even they both sensationalized the title to receive more views and incorrectly reported on some of the pertinent information of the case. For example, the title only appears as "Jury tosses federal wrongful death lawsuit against cops . . . " when seen on search engines, serving as clickbait for the public.[238] They also falsely reported this as a "wrongful death lawsuit" when it instead focused on possible excessive force, as the K2-induced heart attack decidedly caused Ocasio's death.[239]

All of these false and overstatements in the media do not run without repercussions. Recently, an armed aggressor ambushed two police officers in two separate occasions in assassination attempts.[240] Surveillance video shows a man walking into precinct headquarters, ducking around a corner to then return with a gun drawn in attack against the officer.[241] As Mayor Bill de Blasio asserted, "this was an attempt to assassinate police officers. . . It was a premeditated effort to kill."[242] Police Commissioner Dermot Shea then specifically blamed criticism of police and demands for criminal justice changes for creating an atmosphere that fails to discourage attacks on officers.[243]

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235. *Id.*
236. Tracy, *supra* note 233.
237. *Id.*
238. *Mario Ocasio K2 NYPD*, GOOGLE, https://www.google.com/search?q=mario+ocasio+K2+NYPD&rlz=1C1GCEA_enUS867US867&oq=mario+ocasio+K2+NYPD&aqs=chrome..69i57.5471j0j7&sourceid=chrome&ie=UTF-8 [https://perma.cc/59M7-QTA9].
239. Tracy, *supra* note 233.
240. Josh Bacon, *2 New York Officers Shot in 'Assassination Attempts;' Trump Rips Mayor Bill de Blasio*, USA TODAY (Feb. 9, 2020), https://www.usatoday.com/story/news/nation/2020/02/09/assassination-attempt-new-york-officers-shot-manhunt-underway/4706850002 [https://perma.cc/KK3Q-4Z6F].
241. *Id.*
242. *Id.*
243. *Id.*

He also said that, "words matter and affect people's behavior," which highlights that the media can change police-community interactions as well as reduce the safety of armed officers.[244]

The influential role that media plays in community outreach causes a necessity within the public to receive their unbiased report to form opinions on this matter.[245] "With great power comes great responsibility."[246] This is especially true here. The media's role may require the imposition of limits on how this information can be portrayed to the public. Instead of sensationalizing the story, articles should be required to limit the adjectives they use that may incite anger or distrust between officers and the public.

Censorship concerns would most definitely arise with any suggestion at changing the way the media reports on such cases.[247] Such an idea implicates the people's First Amendment rights of freedom of speech, while also unearthing the negative views associated with the "Big Brother" atmosphere of censorship in China.[248] I am most certainly not advocating for total censorship of our media; on the contrary, I know that the media must report on these matters. However, I believe that honest and ethical reporting about the interactions between police and the public is absolutely essential to promote trust and further good experiences between these two entities, and such opinions have been verified in recent events. Media outlets should make it a priority to factually report on such matters and scan for sensationalization of excessive force cases.

CONCLUSION

Section 1983 began as a sword against racist practices in a post–Civil War era, and it is time to resharpen our blades through fixing the current state of this statute. This sentiment of protection through the threat of aggression can act as a strong deterrent to unnecessary police action when used correctly. However, we must

244. *Id.*

245. *See* Hohl, *supra* note 227, at 90.

246. The origin of the quote seems to be hotly contested. Most know the phrase as one from Voltaire or the popular Spider-Man comic book, but sources have unearthed this phrase from as early as the French Revolution in 1793, found in a few decrees made by the French National Convention: "They must consider that great responsibility follows inseparably from great power." *With Great Power Comes Great Responsibility*, QUOTE INVESTIGATOR, https://quoteinvestigator.com/2015/07/23/great-power [https://perma.cc/42TZ-6QCN].

247. Biena Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/media-censorship-china [https://perma.cc/6P9T-5CPx] (last updated Feb. 17, 2017).

248. *Id.*

alter this law to accord to our current needs. The law is not a stagnant lake but a moving, flowing river of ideas and solutions to American society's current issues. We have been taught to revise, revisit, relearn throughout our legal careers, and now it is time to apply this sentiment to a dated statute in need of reviving.

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