AGENDA

Independence City Commission

September 30, 2020

Civic Center Memorial Hall 5:30 PM

To participate by conference call:
1 785-289-4727 Conference ID: 465 234 924#

I. SPECIAL SESSION

Documents:

SPECIAL MEETING NOTICE - 09302020.PDF

A. Call To Order

II. CITY MANAGER'S COMMENTS

A. Reorganization

III. DISCUSSION

A. Discuss The Police Department's Response To The Chamber Of Commerce's Subcommittee, The Diversity Task Force (DTF), Policing Subcommittee Concerns Regarding Police Reforms.

Documents:

DIVERSITY TASK FORCE TALKING POINTS POLICE REFORMS.PDF

IV. ADJOURNMENT

NOTICE OF SPECIAL MEETING TO THE BOARD OF COMMISSIONERS OF THE CITY OF INDEPENDENCE, KANSAS

Notice is hereby given that a special meeting of the board of commissioners of the City of Independence, Kansas, will be held at the Memorial Hall, Penn and Chestnut, Independence, Kansas, at 5:30 p.m., on September 30, 2020, for the following purpose (s):

City Manager Comments

A. Reorganization.

Discussion

A. Discuss the police department's response to the Chamber of Commerce's subcommittee, the Diversity Task Force (DTF), Policing Subcommittee concerns regarding police reforms.

Date: September 30, 2020

David Schwenker, City Clerk

CERTIFICATE OF SERVICE OF NOTICE

I, David Schwenker, the duly appointed, qualified and acting City Clerk of the City of Independence, do hereby certify that on this 30th day of September 2020, I served a true copy of the Notice of Special Meeting on each and every member of the Board of Commissioners of the City of Independence in the manner provided by law.

Date: September 30, 2020

David Schwenker, City Clerk

WAIVER OF REGULAR NOTICE OF AND CONSENT TO SPECIAL MEETING

We, the undersigned members of the Board of Commissioners of the City of Independence do hereby accept service of the notice of special meeting waiving any and all irregularities in such service and in such notice and consent and agree that the said members of said Board of Commissioners shall meet at the time and place named in such notice and for the purpose stated therein.

Mayor

Commissioner

Commissioner

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

Special Commission Meeting: Diversity Task Force Talking Points

1. Bias based-policing-Governing Policies 401 Bias-Based Policing & 504 Traffic and Parking Citations (Appendix A)
    a. Is there disparate treatment of subgroups?

IPD Officer Initiated Activity Disparity Index June 2016 through August 2020			
Race/Ethnicity	**Independence Disparity Index**	**Independence+ICC Diparity Index**	**Disparity Index Range**
American Indian/Alaska Native	0.4	0.3	.2 to 2.2
Asian/Pacific Islander	0.1	0.1	.1 to .2
Black	1.7	1.3	1.2 to 2.7
Other	0.8	0.9	-12.5 to .4
White	1.0	1.1	1
Hispanic	0.5	0.6	NA

Figure 1 Source Document Appendix A

Independence & ICC Racial Demographics Comparision			
Race/Ethnicity	**Independence Race Demographics**	**+ or -**	**ICC Race Demographics**
American Indian/Alaska Native	91	73	62
Asian/Pacific Islander	257	150	37
Black	568	209	349
Other	66	70	NA
White	7563	252	829
Hispanic*	617		112
Non-Categorized (omitted)	N/A		89
2 or more races (omitted)	302	129	N/A
*Taken from USCB Quick Facts not source table			
Source: US Census Bureau 2018 ACS Table B02001			

Figure 2 Source Document Appendix A

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

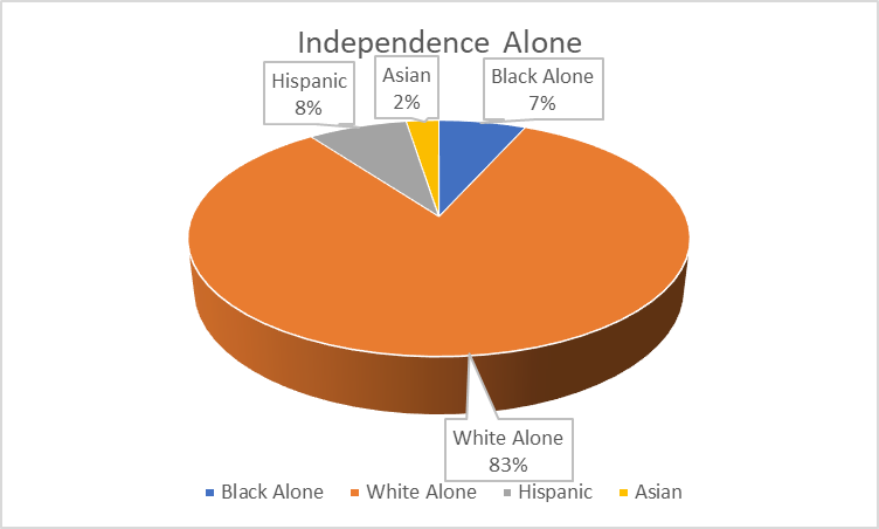


Figure 3 Source Document Appendix A

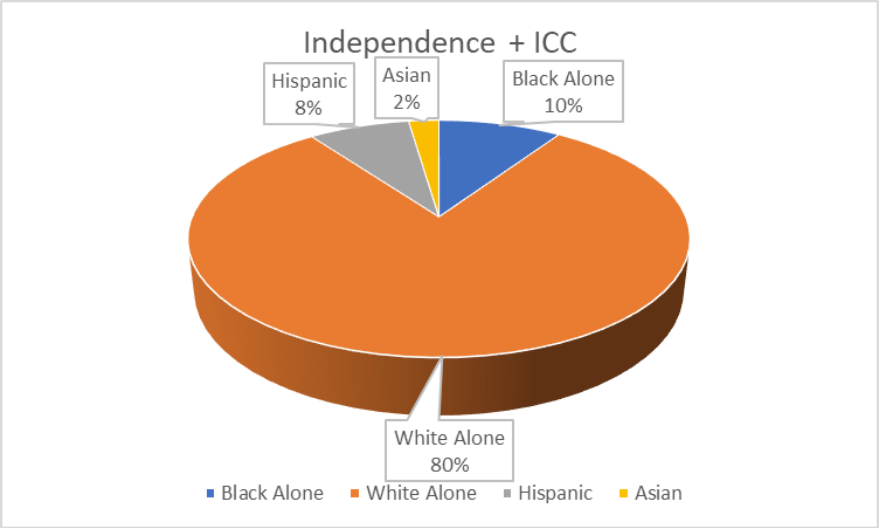


Figure 4 Source Document Appendix A

i. Limitations of BBP data
    1. Utilize crash statistics for comparison?
        a. Demographic statistics compare total population, officers are only contacting those operating a motor vehicle
    2. US 160 & US 75
        a. How many out of town drivers are included in our stops but not our demographics?
    3. ICC impact on Independence Demographics 15% percentage increase
        a. ICC is approximately one mile south of town on 17th

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

b. Independence is the only practical option for all student needs and activities
c. ICC utilizes locations in the city for sporting events
i. Football
ii. Baseball (still active during counting period)
iii. Softball (still active during counting period)
d. A portion of ICC's campus is in town
4. Excluded all those that claimed 2 or more races (3.5% of total population, range of 2-5% of population)
a. How do you reliably assign them to a race/ethnicity category?
5. Hispanic data taken from different US Census Bureau source (Quick Facts)
6. IPD BBP database limitations
a. Hispanic is an ethnicity so it is an "and/and" data point, not an exclusive "or" (i.e., black or white, could be black AND Hispanic, or white AND Hispanic).
b. Entries largely based on officer perception
i. Bi-racial person could claim one race for US Census but officer may perceive that person to be another race due to ethical requirements
7. + or – feature on US Census Bureau Table
a. Creates significant margin of error for each population
b. Forces computation of a high and low range instead of a dependable disparity index
ii. Drawing conclusions from the data
1. We must be careful drawing any solid conclusions from the data
2. Collecting this data and monitoring officer conduct for BBP is voluntary and not required by state law. The purpose of providing and interpreting the data is to demonstrate transparency and that IPD is constantly seeking to serve the community more equitably
b. Non Bias-based Policing Form (see Appendix A)
c. This is voluntary for IPD to participate data collection is not required, KSA 22-4611a.(a)(c)(1)-(15) governs what data should be collected (Appendix A)
2. Training-Source Documents Appendix B
a. How often do they train on weapons?
i. Currently we qualify once a year, many officers train on their own
ii. Goal is to train four times a year
1. Kansas Commission on Peace Officers Standards and Training (KS-CPOST) Qualification

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

2. Tactical Shoot
3. Force-on-Force Exercises
4. Patrol Rifle Training

b. How frequently do they require qualification for weapons?
   i. Required by KS CPOST once annually achieve 70% minimum on prescribed course of fire

c. How frequently do they train on soft skills like de-escalation, anti-bias?
   i. Anti-bias training-FIP Annually as required by KSA 22-4610

3. Policy & Procedure-Source Documents Appendix C
   a. UOF
      i. Is there a policy against chokeholds?
         1. The term chokehold is misleading and inflammatory. The word "choke" does not appear in our policy manual this is likely a reference to the Carotid Control Hold (Use of Force 300.3.4)
            a. The Carotid Control Hold does not restrict the airway, it restricts blood flow to the brain
            b. Policy limits when it can be used
         2. What does the research say?
         3. Are communities safer and more crime free?
         4. How do these policy changes impact actual UOF severity of injury to officers and suspects?
         5. Is this the time to blindly act or should we see how the research plays out in other communities
         6. What is the case law driving this change?
         7. What is the frequency of death among martial arts competitors that apply carotid control type holds frequently in training and competition?
      ii. Is there a policy on the duty to intervene?
         1. UOF 300.2.1 Duty to Intercede- Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law should promptly report these observations to a supervisor.
         2. This a great place to insert that IPD voluntarily reports qualifying UOF to the FBI UOF Database.
            a. Qualifying incidents
               i. When a fatality to a person occurs connected to use of force by a law enforcement officer

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

ii. When there is serious bodily injury to a person connected to use of force by a law enforcement officer
iii. In the absence of either death or serious bodily injury, when a firearm is discharged by law enforcement at or in the direction of a person.

3. IPD has also volunteered to participate in a comprehensive statewide UOF data gathering project being started by KBI and the KS Attorney General.

b. Can the Code of Conduct and all other policies be placed on the city website?
   i. The **Law Enforcement Code of Ethics** adopted by the IACP in 1957 is the second page of our policy manual
   ii. Our contract grants us the ability to post the policy manual on our website (Contract Date 9-1-2017 Section 3 Paragraph 5, last sentence)
   iii. As a result of these discussions and the audit we have set a goal of posting our policy manual on our website by the end of 2021
      1. This will take time as a committee will be formed to review each policy to redact any policies or portions of policies that contain information regarding tactical responses (KSA 45-221)
   iv. Officers must also take the oath required for certification by KAR 106-3-6

c. Is there a policy against using no-knock warrants?
   i. There is not a policy against no-knock warrants
   ii. Richards v. Wisconsin, 520 US 385 (1997) is the SCOTUS ruling that applies to no knock warrants
      1. In Richards, the Supreme Court held officers "must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."
      2. How does forbidding no-knock warrants affect public safety? Officer safety? I believe this is not a time to make change blindly but a time to observe practices around the nation and see how each affects the community and officer safety.

(Justifying a No-Knock Entry, Lexipol, Ken Wallentine, 11-19-2019)

d. What are the school resource officer policies?
   i. There are no specific policies directed at the SRO. SRO position is mentioned in Community Relations 343 [343.6(d)]
   ii. The term juvenile appears approximately 181 times in approximately 10 different policies

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

iii. Independence PD adopts the National Association of School Resource Officers (NASRO) position on the role of the SRO
    1. The goals of well-founded SRO programs include providing safe learning environments in our nation's schools, providing valuable resources to school staff members, fostering positive relationships with youth, developing strategies to resolve problems affecting youth and protecting all students, so that they can reach their fullest potentials. NASRO considers it a best practice to use a "triad concept" to define the three main roles of school resource officers: educator (i.e. guest lecturer), informal counselor/mentor, and law enforcement officer. NASRO FAQ What are appropriate roles of school resource officers?

e. Do the officers have qualified immunity?
    i. Encourage you to view video at this link Daigle Law Group Qualified Immunity Video
    ii. Qualified Immunity is a US Supreme Court (SCOTUS) decision, not legislation
        1. Can a legislature remove a constitutional protection?
        2. No, constitution states legislatures can make any law and overrule any SCOTUS decision except those with a constitutional basis
            a. All government employees across the US are covered under case law governing QI
            b. Intent is to prevent frivolous lawsuits
                i. Shut down government function for fear of making a decision
                ii. Bankrupt local government through legal costs
    iii. Qualified immunity is grossly misrepresented as a shield from liability that encourages misconduct
        1. Not a special liability protection for police
        2. Does not insulate officers from liability for egregious misconduct
        3. Purpose is to hold government officials accountable
            a. balance holding government officials accountable while shielding them from harassment, distraction, and liability when they act reasonably
                i. also shields taxpayer as many government officials are indemnified (means the governing entity pays for the suit)
            b. allows breathing room to make reasonable but mistaken decisions when there is no law to guide them
            c. government can get things wrong when there is no law to

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

guide what they should have been doing
    d. it is not automatic, you have to qualify to get the immunity
4. SCOTUS established two-part test in Saucier v Katz 533 US 194 (2001)
    a. Do the facts most favorable to the plaintiff show the officer's conduct violated a constitutional right?
    b. Would it be clear to a reasonable officer that his conduct was unlawful in the situation he confronted?
5. UCLA Law Professor Joanna Schwarts (See Appendix C) studied 1,183 42 USC 1983 cases in five federal districts over a 2 year period
    a. Found QI was used in 4% of eligible cases
    b. Her argument is it's so little used it isn't serving it's purpose of preventing frivolous suits
    c. I argue her study also shows that it is not being abused as a blanket shield
6. 42 USC Section 1983 Allows for civil rights claims against government officials acting in official capacity
    a. Applies to all government officials, not just law enforcement

f. Weaponizing Police
    i. If a report of a suspicious person is received by dispatch, what is the policy or procedure before an officer is sent?
        1. All dispatchers are required to be Emergency Police Dispatch (EPD) certified. When practical dispatchers are required to use Emergency Police Dispatch cards when taking calls for service. EPD Cards create standard information gathering for nearly every type of call imaginable.
            a. Initial Entry Card
                i. Address
                ii. Caller name
                iii. Exactly what happened
                iv. Are you there now?
                v. When?
            b. Suspicious Person Card
                i. Weapons?
                ii. What's suspicious about the person?
                iii. Vehicle description
                iv. (Not suspicious) Where's the person now?
                v. How did person leave?

vi. Description of vehicle they left in?
vii. Is anyone in danger now?

c. Exit card
   i. Do you want officer contact?
   ii. Caller clothing description
   iii. Caller vehicle description
   iv. Ask witnesses to stay
   v. Suspect info
      1. Race, gender, age, clothing, build/height/weight, hair color/length/style
      2. Facial hair, tattoos, piercings, jewelry
      3. Complexion
      4. Eye color
      5. Demeanor
      6. Name/relationship
      7. Address/phone number
   vi. Vehicle description
   vii. Victim description

ii. Where is the line for engagement with a citizen by an officer on a report of a suspicious person? When do you not engage the citizen?
   1. Policy 400 Patrol governs this under 400.3 Function (f) Responding to routine calls for service, such as public assistance or public safety.
      a. Policy states responding to these calls for service is a function they are expected to perform
      b. Officers could choose not to engage if there was an obvious articulable reason not to or because it is a low priority call and there are other calls pending
      c. Dispatch is not permitted to “screen” calls but is required to dispatch all calls received
         i. It would create unnecessary risk for the dispatcher and the city to ignore citizen requests for service
      d. Officers can detain someone for reasonable suspicion (articulable list of facts or circumstances that may cause a reasonable person to suspect someone may be involved in criminal/dangerous activity)
      e. If officers cannot develop probable cause (reasonable believes there is criminal activity related to the person) they must let them go
   2. De-escalation/verbal judo techniques

        a. Training plan w/ Parsons PD
            i. We use trainers certified annually by Dolan Consulting Group

g. What is the procedure for transferring information from dispatch to officers?
    i. Applicable information is typically broadcast over the radio

h. Complaints
    i. What is the process for investigating misconduct and complaints?
        1. Acceptance and handling of these matters are governed by IPD Policy 1010 Personnel Complaints
            a. If the violation is a policy issue it is investigated by either the Administrative Sergeant, the chief of police, or whoever the chief assigns it to.
            b. If it is a suspected criminal violation, we attempt to have it investigated by an independent agency, usually KBI, MGSO or Coffeyville PD.
        2. Complaints are accepted/available via the following:
            a. City Website
            b. Independence Public Library
            c. Any member of the PCAC
            d. Dispatchers
            e. Police Officers
            f. All IPD personnel are required to provide and accept complaint forms
            g. IPD investigates anonymous, third-party, and situations where the complainant refuses to provide a completed complaint form
    ii. Do we have an independent civilian review board for misconduct and complaints?
        1. Yes and no. We have a Police Chief's Advisory Committee. One purpose of the PCAC is to serve as our Community Advisory Board as written in KSA 22-4610(a)(3)(A) & (B).
        2. This is a voluntary measure, police departments are not required to have these boards/committees by state law.
            a. In this capacity the PCAC has authority to review policies related to bias-based policing.
            b. The committee has agreed to review complaints related to bias-based policing if the complainant chooses to release information and present their complaint to the PCAC.
            c. The committee receives annual training on Bias Based Policing as required by KSA 22-4610(a)(3)(B.)

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

d. The PCAC has also requested to review complaints for citizens that are dissatisfied with the outcome of the police investigation.
    i. This would require the complainant to release confidential information and would require a review by our attorneys to ensure we do not violate personnel privacy.
e. The PCAC can review and offer input on department policy if they choose. For additional information regarding the PCAC the orientation meeting agenda has been redacted to remove inapplicable information and then placed in the source documents.

iii. How often do we review complaints
1. Complaints are reviewed annually or as needed for the following purposes, there may be other reasons for review not listed:
    a. Training issues/needs
    b. Policy shortcomings/modifications
        i. Recently reviewed returned property policy due to citizen complaint. Citizen turned in $100 in found cash. No one claimed the cash and citizen was upset because they could not get it back. We reviewed policy and law as well as other agency best practices. We proposed modified city ordinance and modified our policy to allow us to return found property to the finder under specific conditions and after a specified time.
    c. Personnel file review (for disciplinary decisions or promotions)
    d. Annual stats compilation
    e. Upon officer request-Beard Policy is an example
2. Annual training schedule for each policy
    a. This list is not all encompassing but it is our goal to cover these topics as scheduled
    b. Some of this list is tentative as we are implementing a new training system
    c. All training is dependent upon position in the department
        i. Emergency Operations Plan (supervisors every two years)
        ii. CPR/first-aid refresher (every two years)
        iii. Pursuit driving (all licensed employees yearly)

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

iv. Firearms training (all licensed employees quarterly) annual qualification, semi annual w/ back ups
v. Defense tactics (all licensed employees yearly)
vi. Carotid restraint (all licensed employees yearly)
vii. TASER annually
viii. impact weapon annually
ix. chemical weapon annually?
x. other control devices (yearly)
xi. use of force policies (all licensed employees review yearly)
xii. Search, seizure and arrest (all licensed employees yearly)
xiii. Use of body armor (all licensed employees every two years)
xiv. Ethics (all licensed employees every three years)
xv. discriminatory harassment, annually
xvi. best practices child abuse investigations-dependent upon position
xvii. safety measures when arresting parent, guardian, or adult caregiver
xviii. missing persons investigations-dependent upon position
xix. hate crime training-annually
xx. public safety camera system-dependent upon position
xxi. interaction with mentally disabled, civil commitments, and crisis intervention
xxii. active shooter response
xxiii. racial/bias based-policing/ fair and impartial policing
xxiv. patrol rifle
xxv. homeless legal and social issues
xxvi. preliminary investigations
xxvii. anti-retaliation training
xxviii. employee speech and the use of social networking

d. Part of new training program
i. social media in the work place
ii. anti-harassment in the work place
iii. constitutional and community policing
iv. arrest, search, & seizure (4th Amendment)

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

v. sexual harassment in the work place
vi. hate crimes training
vii. constitutional law
viii. human trafficking
ix. vehicle safety
x. firearm safety
xi. litigation procedures
xii. public recording of police activities
xiii. introduction to incident command system
xiv. developing effective communication skills
xv. officer liability
xvi. body worn cameras
xvii. off duty safe and ready
xviii. interview and interrogations
xix. evidence
xx. courtroom testimony
xxi. protecting from opiod exposure
xxii. HIPAA
xxiii. Armed suspects
xxiv. Report writing
xxv. Time management
xxvi. Cyber security
xxvii. Stress
xxviii. Intelligence
xxix. Professionalism
xxx. Resiliency
xxxi. Drug trends
xxxii. Domestic violence & officer safety
xxxiii. Conflict resolution
xxxiv. Leadership
xxxv. Employee recognition
xxxvi. Generational differences
xxxvii. Goal setting
xxxviii. Supervision

iv. Complaint statistics
1. Are these in YER?-We have not included complaints in YER up to this point
a. 2019
i. Exonerated-16
ii. Sustained-9

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

iii. Unfounded-19
iv. Not Sustained-2
v. Disciplinary actions-8

b. 1010.6.4 Explains Dispositions
   i. Unfounded - When the investigation discloses that the alleged acts did not occur or did not involve department members. Complaints that are determined to be frivolous will fall within then classification of unfounded.
   ii. Exonerated - When the investigation discloses that the alleged act occurred but that the act was justified, lawful and/or proper.
   iii. Not sustained - When the investigation discloses that there is insufficient evidence to sustain the complaint or fully exonerate the member.
   iv. Sustained - When the investigation discloses sufficient evidence to establish that the act occurred and that it constituted misconduct.

2. What stats would the DTF like to see?
3. We make changes to what we report based on citizen/activist request
4. Complaint form Appendix C

i. Diversity Task Force appreciates current policies in place but what happens when I leave and a next chief may not have the same priorities?
   i. Polices written by attorneys
   ii. Based on KSA USC BP & Case law
   iii. Only way to provide "permanence" is by making policies ordinance
      1. Dangers of this
         a. Difficulty in changing policy to keep up with current laws, practices, and case law
            i. Often policy must change rapidly to keep up with these changes and delaying change weeks in the hopes commissioners will approve the change is not practical, appropriate, and does not serve the best interest of reducing risk for the city, which ultimately insures citizens are protected from police misconduct.
            ii. Policy should not be politicized but foundational
         b. Difficulty in changing policy
            i. Good policy is only a keystroke away, unless it's an

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

ordinance

c. Commission's role
    i. Commission doesn't have direct oversight of departmental employees or departmental policies
    ii. Commission sets general policy, not personnel policy for the city
    iii. Commissioners answer to the people
    iv. City manager answers to commission
    v. Police chief answers to city manager
    vi. Commission members are elected from all walks of life and while exceptions do occur, commissioners do not typically have a background or expertise in law enforcement.
d. There are some policies that I would support enshrining in ordinance
    i. Data collection for BBP in accordance with state law
    ii. Establishment of Community Advisory Boards in accordance with state law
    iii. Require KORA eligible IPD policies to be posted public
    iv. I suspect there may be other policies we can consider for ordinance
        1. We need to establish goals
        2. Select policies that achieve those goals
        3. Work together to weigh the consequences of making policy law
            a. Change often comes with drawbacks that should be predicted and weighed prior to implementation to ensure the change does more good than harm
        4. Proceed appropriately based on evidence/logic, not "what ifs"

4. Budget (Appendix D)
    a. Training-$24,000 (2020) (2019 Actual $18,162.22 of $20,000 authorized)
    b. KLETC provides the 560-hour Basic Training Program to all new officers
    c. KSA 74-5607a requires certified officers to have 40 hours of in-service training
    d. In 2019 IPD had 17 officer positions filled requiring the organization to have a total of 680 hours at a minimum to for each officer to maintain certification.

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

e. IPD officers attended 1906 hours of training 180% over the required minimum
f. AVG cost of $9.52/training hour includes all travel expenses. Does not include munitions or expendable items, OT, fuel, and vehicle maintenance.
g. Firearms & Ammunition-$868.72 Actual 2019
    i. We have large surplus of ammunition due to previous police chief so this number is artificially low
h. EMC Insurance
    i. Cost? $9,798 annually and we get 10% discount for using Lexipol Policy Management System

5. How can the Diversity Task Force Help
    a. Exercise the same level of empathy and respect for officers that officers are expected to provide the community
        i. Assume good intentions until evidence supports otherwise
        ii. Examples
    b. Be willing to support and recognize achievements of PD & its relationship with the community
        i. Examples
        ii. Supporting evidence?
            1. Thank you cards?
                a. We have mailed out over 30 thank you cards to individuals, business, church groups, and organizations for donations of food, gift cards, equipment etc. since the pandemic started.
            2. Inclusion in the Community Unity Event and DTF Vigils in the past
            3. Indian Criminology & Forensic Science Association Webinar Series 2020. Session 22: Deliberations on Advanced Topics on Applied Criminology and Forensic Science: Community Policing
            4. Fund raising successes
                a. Outer Vest carriers-$2,745.99
                b. K9-Over $40,000 to date
                c. Juvenile Intake-Completely outfitted by donations from business, churches, individuals and others
    c. We are better together
        i. We are ready to have conversations
            1. I have been invited to various vigils and the community unity event
            2. Presented with DTF member at 1st Friday about the Community Unity Event
            3. Diversity includes all voices, including those we suggest changes for

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

a. Include everyone in the discussion
b. Understand that other views have validity and changing systems is far more complicated that it appears
    i. Changing systems can have unintended consequences that hurt more than help
    ii. Change must be evaluated based on facts and evidence, not emotions, what's trendy, anecdotal evidence, or media hype

ii. Consider the problems facing our community and collaborate to address what specifically needs addressed here
    1. No one size fits all solutions
    2. Wholistic approach, no one miracle cure for social problems
    3. Solutions need to be applicable to our community and based on evidence/research
    4. Community oversight boards
        a. What oversight currently exists internally?
            i. Supervisors
            ii. Captain
            iii. Chief
            iv. Body cameras
            v. Car cameras
            vi. Recorded phone and radio frequencies
            vii. Bias-based policing monitoring
            viii. Complaint monitoring
            ix. Discipline monitoring
        b. What oversight already exists externally?
            i. City manager
            ii. City commission
            iii. PCAC
            iv. Lexipol Audit
            v. Civilian volunteers-Volunteers play a powerful role in accountability, transparency, & community policing. They are deeply immersed in the behind the scenes conduct and business practices yet are not dependent upon IPD for financial support. Volunteers are viewed as aiding transparency because they independently support the organization. Volunteers can blow the whistle on misconduct without risking financial, career, or reputational loss.

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

1. Promotion decision
2. Hiring decision
3. Volunteer service positions

5. Citizen review boards are not practical
    a. Professional review boards are populated by members of the profession. We see this in medicine, dentistry, building trades, the list is exhaustive. Review boards must consist of subject matter experts, not lay persons. This best protects the city from lawsuits, which means citizens are best protected from police misconduct.
    b. There is probably some method of collaboration that can result in more transparency regarding police complaints but there are times when complainants and personnel should have confidentiality.
    c. The department is too small to publicize much detail regarding complaints and personnel actions. However, the department keeps extensive documentation on complaints and personnel matters to present the facts should there be a need for discipline decision making or lawsuits (employment or citizen).
    d. Community boards not legally liable for the outcomes of their decisions
        i. The city, the city manager, the police chief, and the officers will be sued personally, not a civilian oversight committee
        ii. Personnel actions are confidential by city policy
        iii. Department is small enough and complaints few enough that release of a minor bit of information may make it easy to ID officer(s) involved thus jeopardizing personnel confidentiality
        iv. Suggestion to work together:
            1. What is the goal or outcome desired to be reached through an external community board?
            2. What are some alternatives to achieve that goal?
            3. What information can/should be released to promote trust and transparency?

iii. Collaborate to develop surveys-I love that someone was so interested in community views of IPD they developed a survey. It is also rewarding the

survey shows positive attitudes toward IPD by ICC, followers of the DTF Facebook page, and the Family of Christ Church(Diversity Task Force Policing Subcommittee Report & Diversity Task Force Perception Survey, Appendix D). Surveys are part of our policy (343 Community Relations 343.5 Surveys, Appendix C).

1. Develop validated/unbiased questions
    a. BOJ, DOJ
    b. What do we want to measure?
    c. Work with local educators to design?
    d. How do we target a valid sample?
2. Combine resources to gain broader reach
3. We welcome surveys as an opportunity to improve operations & hear more voices
    a. To be valid surveys need to be set up to measure what we want to measure and should be able to obtain results that can be duplicated if sampled again.
    b. How many took survey-larger, valid samples tend to provide more reliable results
4. Listen to other points of view
    a. Mental health crisis response teams
        i. We have discussed with FCMH but expensive and we haven't been able to find funding resources
    b. Is it possible to design a mental health team to respond when a military response is not immediately necessary?
        i. Police do not make a military response to any activities
            1. Police make tactical responses that fall within the guidelines of the constitution, applicable statutes, policy, and case law
            2. The term military response is inflammatory and misleading
            3. IPD has worked with FCMH & MG County Attorney (prosecutor) to implement Crisis Intervention Team but it must be a county-wide team to work successfully
                a. IPD has been sending 2-4 patrol officers a year through CIT with help from FCMH. Our goal is to have patrol division trained in CIT.
                b. Been working with FCMH since 2017

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

to develop a Crisis Intervention Team but have not been able to generate adequate interest in SEK area law enforcement organizations to entice the trainers to allow us to host the training

4. We are doing what we can, but the bottom line is, if you don't have the funding and support you can't make it happen.

c. Our response to this category of calls will generally be governed by Policy 409 Crisis Intervention Incidents

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

Appendix A

Traffic and Parking Citations

504.1 PURPOSE AND SCOPE

This policy outlines the responsibilities for issuing, correcting, voiding and dismissing traffic and parking citations.

504.2 POLICY

It is the policy of the Independence Police Department to enforce traffic laws fairly and equally. Authorized members may issue a traffic citation, parking citation, or written or verbal warning based upon the circumstances of the contact and in the best interest of the motoring public and community safety.

504.3 RESPONSIBILITIES

The Records Section shall be responsible for the supply and accounting of all traffic and parking citations issued to members of this department. Citations will be kept in a secure location and issued to members by the Records Section staff. Members will sign for the citation books when issued or upon return of unused citations.

Members of the Independence Police Department shall only use department-approved traffic and parking citation forms that meet statutory requirements (K.S.A. § 8-2106).

504.3.1 WRITTEN OR VERBAL WARNINGS

Written or verbal warnings may be issued when the department member believes it is appropriate, however; department members are required to issue a written warning unless a justifiable exigency exists for the officer or the motorist. The Records Section should maintain information relating to traffic stops in which a written warning is issued. Written warnings are retained by this department in accordance with the established records retention schedule.

504.4 TRAFFIC CITATIONS

504.4.1 CORRECTION

When a traffic citation is issued but is in need of correction, the member issuing the citation shall submit the citation and a letter to his/her immediate supervisor requesting a specific correction. Once approved, the citation and letter shall then be forwarded to the Records Section. The Administrative Assistant or the authorized designee shall prepare a letter of correction to the court having jurisdiction and notify the citation recipient in writing.

504.4.2 VOIDING

Voiding a traffic citation may occur when the citation has not been completed or when it is completed but not issued. All copies of the voided citation shall be presented to a supervisor for approval. The citation and copies shall then be forwarded to the Records Section.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

504.4.3 DISMISSAL

Members of this department do not have the authority to dismiss a traffic citation once it has been issued. Only the court has that authority. Any request from a recipient to dismiss a citation shall be referred to the Captain. Upon a review of the circumstances involving the issuance of the traffic citation, the Captain may request the Patrol Captain to recommend dismissal. If approved, the citation will be forwarded to the appropriate prosecutor with a request for dismissal. All recipients of traffic citations whose request for dismissal has been denied shall be referred to the appropriate court.

Prior to a court hearing, a member may submit a request for dismissal of a traffic citation to his/her supervisor. The request must be in writing and should include the reason for dismissal (i.e., in the interest of justice, prosecution is deemed inappropriate). Upon a review of the circumstances involving the issuance of the traffic citation, the supervisor may forward the request to the Patrol Captain to recommend dismissal. If approved, the citation will be forwarded to the appropriate prosecutor with a request for dismissal.

Should a member determine during a court proceeding that a traffic citation should be dismissed in the interest of justice or where prosecution is deemed inappropriate, the member may request the court to dismiss the citation. Upon such dismissal, the member shall notify his/her immediate supervisor of the circumstances surrounding the dismissal and shall complete any paperwork as directed or required, and forward it to the Patrol Captain for review.

504.4.4 DISPOSITION

The court and file copies of all traffic citations issued by members of this department shall be forwarded to the member's immediate supervisor for review by the end of each shift. The citation copies shall then be filed with the Records Section.

Upon separation from appointment or employment with this department, all members who were issued traffic citation books shall return any unused citations to the Records Section.

504.4.5 JUVENILE CITATIONS

Completion of traffic citation forms for juveniles may vary slightly from the procedure for adults. The juvenile's age, place of residency and the type of offense should be considered before issuing a juvenile a citation.

504.4.6 DATA COLLECTION

Any traffic stop data collected by the Department shall be in compliance with Kansas law. Racial or other bias-based policing data shall be reported as required by the Bias-Based Policing Policy (K.S.A. § 22-4610; K.S.A. § 22-4611a).

504.5 PARKING CITATION APPEALS

Parking citations may be appealed in accordance with local and state law.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

Bias-Based Policing

401.1 PURPOSE AND SCOPE

This policy provides guidance to department members that affirms the Independence Police Department 's commitment to policing that is fair and objective (K.S.A. § 22-4606 through K.S.A. § 22-4611).

Nothing in this policy prohibits the use of specified characteristics in law enforcement activities designed to strengthen the department's relationship with its diverse communities (e.g., cultural and ethnicity awareness training, youth programs, community group outreach, partnerships).

401.1.1 DEFINITIONS

Definitions related to this policy include (K.S.A. § 22-4609):

Enforcement action - Any law enforcement act during a nonconsensual contact with an individual in:

(a) Determining the existence of probable cause to take into custody or to arrest an individual.

(b) Constituting a reasonable and articulable suspicion that an offense has been or is being committed so as to justify the detention of an individual or the investigatory stop of a vehicle.

(c) Determining the existence of probable cause to conduct a search of an individual or a conveyance.

Racial or bias-based policing - The unreasonable use of race, ethnicity, national origin, gender or religion by a law enforcement officer in deciding to initiate an enforcement action. It is not racial or other biased-based policing when race, ethnicity, national origin, gender or religion is used in combination with other identifying factors as part of a specific individual description to initiate an enforcement action.

401.2 POLICY

The Independence Police Department is committed to providing law enforcement services to the community with due regard for the racial, cultural or other differences of those served. It is the policy of this department to provide law enforcement services and to enforce the law equally, fairly, objectively and without discrimination toward any individual or group.

401.3 RACIAL/BIAS-BASED POLICING PROHIBITED

Racial or bias-based policing is strictly prohibited.

This includes but is not limited to, using the race, ethnicity, national origin, gender or religion of a person (K.S.A. § 22-4610):

(a) As a general indicator or predictor of criminal activity.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

(b) In the course of any law enforcement action unless an officer is seeking to detain, apprehend or otherwise be on the lookout for a suspect sought in connection with a crime who has been identified or described in part by race, ethnicity, national origin, gender or religion.

(c) In the course of any reasonable action in connection with a status offense, such as runaways, child in need of care, missing persons and other non-criminal caretaker functions unless the person is identified or described in part by race, ethnicity, national origin, gender or religion.

(d) As a motivating factor in making law enforcement decisions or actions unless the person is identified or described in part by race, ethnicity, national origin, gender or religion.

(e) As the basis for discretionary law enforcement (e.g., citation, arrest, warning, search, release or treating a person with respect and dignity).

401.4 MEMBER RESPONSIBILITIES

Every member of this department shall perform his/her duties in a fair and objective manner and is responsible for promptly reporting any suspected or known instances of bias-based policing to a supervisor. Members should, when reasonable to do so, intervene to prevent any bias-based actions by another member.

401.4.1 REASON FOR CONTACT

Officers contacting a person shall be prepared to articulate sufficient reason for the contact, independent of the protected characteristics of the individual.

To the extent that written documentation would otherwise be completed (e.g., arrest report, field interview (FI) card), the involved officer should include those facts giving rise to the contact, as applicable.

Except for required data-collection forms or methods, nothing in this policy shall require any officer to document a contact that would not otherwise require reporting.

401.4.2 REPORTING TRAFFIC STOPS

Each time an officer makes a traffic stop, the officer shall report any information as required in the Traffic and Parking Citations Policy.

401.5 SUPERVISOR RESPONSIBILITIES

Supervisors should monitor those individuals under their command for compliance with this policy and shall handle any alleged or observed violations in accordance with the Personnel Complaints Policy.

(a) Supervisors should discuss any issues with the involved officer and his/her supervisor in a timely manner.

1. Supervisors should document these discussions, in the prescribed manner.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

(b) Supervisors should periodically review Mobile Audio/Video (MAV) recordings, portable audio/video recordings, NA None (NA None) data and any other available resource used to document contact between officers and the public to ensure compliance with this policy.

1. Supervisors should document these periodic reviews.
2. Recordings or data that capture a potential instance of racial or bias-based policing should be appropriately retained for administrative investigation purposes.

(c) Supervisors shall initiate investigations of any actual or alleged violations of this policy.

(d) Supervisors should take prompt and reasonable steps to address any retaliatory action taken against any member of this department who discloses information concerning racial or bias-based policing.

401.6 STATE REPORTING

The Records Section shall submit an annual report to the Attorney General on or before July 31 for the preceding period of July 1 to June 30. The report shall consist of the number of racial or other biased-based policing complaints received and additional information as required by K.S.A. § 22-4610(d).

401.7 ADMINISTRATION

The Patrol Captain should review the efforts of the Department to provide fair and objective policing and submit an annual report, including public concerns and complaints, to the Chief of Police. The annual report should not contain any identifying information about any specific complaint, member of the public or officer. It should be reviewed by the Chief of Police to identify any changes in training or operations that should be made to improve service.

Supervisors should review the racial or bias-based policing report submitted to the Attorney General and the annual Department report and discuss the results with those they are assigned to supervise.

This policy and the department's data collection procedures shall be available for public inspection during normal business hours (K.S.A. § 22-4610(b)).

401.7.1 COMPLAINTS OF RACIAL OR OTHER BIASED-BASED POLICING

The Department shall conduct ongoing community outreach and communication efforts to inform the public of a person’s right to file a complaint with this department and/or the Office of the Attorney General that includes the procedure for filing the complaint and the complaint process (K.S.A. § 22-4610(c)).

Any person who believes that he/she is the subject of racial or other bias-based policing may file a complaint in accordance with the Personnel Complaints Policy.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

401.8 TRAINING

Annual training on racial or bias-based policing and review of this policy should be conducted as directed by the Training Officer (K.S.A. § 22-4610(c)).

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

	Kansas		Independence city, Kansas	
Label	Estimate	Margin of Error	Estimate	Margin of Error
Total:	2,908,776	*****	8,847	±25
White alone	2,460,619	±3,181	7,563	±252
Black or African American alone	169,801	±2,013	568	±209
American Indian and Alaska Native alone	24,050	±1,027	91	±73
Asian alone	83,531	±1,270	216	±111
Native Hawaiian and Other Pacific Islander alone	2,143	±326	41	±49
Some other race alone	67,588	±3,099	66	±70
Two or more races:	101,044	±2,762	302	±114
Two races including Some other race	9,398	±962	10	±17
Two races excluding Some other race, and three or more races	91,646	±2,631	292	±112

Race and Hispanic Origin	
White alone, percent	85.5%
Black or African American alone, percent (a)	6.4%
American Indian and Alaska Native alone, percent (a)	1.0%
Asian alone, percent (a)	2.4%
Native Hawaiian and Other Pacific Islander alone, percent (a)	0.5%
Two or More Races, percent	3.4%
Hispanic or Latino, percent (b)	7.3%
White alone, not Hispanic or Latino, percent	79.5%
Population Characteristics	

From: Anita Chappuie <achappuie@indycc.edu>
Sent: Monday, June 29, 2020 9:23 AM
To: Jerry Harrison <jharrison@indycc.edu>
Subject: Re: Enrollment Data

Perfect! Our total number of students for that time period was 1308.

AY 2019 Students by Gender	
Male	664
Female	640
Declined to identify	4

AY 2019 Students by Race/Ethnicity Field	
White	829
Native American	62
Asian	15
African American	349
Hawaiian/Pacific Islander	22
Hispanic	112
Nonresident Alien	6
Declined to identify	83

Note: This is a duplicated count. Meaning that some students indicated more than one race/ethnicity field.

Independence Police Department Non-Biased Based Policing Form

Profile Entry Form		
Primary Officer		
Additional Officers		
Date of Stop		
Time of Stop		
Duration of Stop (Circle one)	0-15 16-30 31+	
Patrol Zone	East West	
Traffic Stop Field Interview	Citizen Data	Source
Driver/Citizen Age		Investigation/ Observation
Driver/Citizen Race	American Indian/Alaskan Native Asian/ Pacific Islander Black Other White Unknown	Investigation/ Observation
Driver Gender	Male Female	Investigation/ Observation
Driver/Citizen Ethnicity	Hispanic/ Latino Not Hispanic/ Latino Unknown	Investigation/ Observation
Officer Aware of Driver Info Prior to Stop	YES	NO

	Registration State	**KS Registration: County**
Vehicle Registration Data		
Number of Vehicle Occupants Including Driver	1 2 3 4 5 6 7 8 9 +	

How Contact initiated Circle 1	Call Related	Self-Initiated
Primary Reason for Stop	Equipment Violation Moving Violation Pre-existing Knowledge Reasonable Suspicion	Render Service Special Detail Suspicious Circumstances Field Interview
Type of Action by officer	Arrest Other Action Warning MPO/STO sec#_____	Other Assistance Provided Search Citation/NTA#_____ Written Warning_____
Arrest Type	DUI____ Traffic Crime____ Resisting____ Warrant____	Drug Crime____ Property Crime____ Person Crime____ Other____
Did Traffic Stop/Contact Result in Search	YES	NO

Complete if YES on Search:	**Document Indicators (DOT)**	**Search Type**
Rational for Search	Search Incident to Arrest Verbal Indicators Vehicle Indicators Physical/Visual Indicators	Consent Inventory Consent Requested but denied K9 Deployment PC Search Plain View PC Search Stop & Frisk (FI) Search Warrant

2017 Kansas Statutes

22-4611a. Cities, counties, comprehensive plans; contents; data collection. (a) The governing body of a city or the sheriff of the county may develop a comprehensive plan in conjunction with a community advisory board, if one exists, or with community leaders to prevent racial or other biased-based policing or may require the law enforcement agency of such city or county to collect traffic or pedestrian stop data and make such data available to the public.

(b) Any comprehensive plan adopted pursuant to this section shall include the following:

(1) Policies prohibiting racial or other biased-based policing to guide well-meaning officers and address racist officers;

(2) policies to promote the recruitment and hiring of a diverse workforce to ensure the workforce is comprised of people who can police in a race-neutral and nonbiased fashion;

(3) training to promote employees' controlled responses to override racial and other biases;

(4) ongoing training of supervisors to enable them to detect and respond effectively to biased behavior;

(5) implement a style of policing that promotes positive interactions between police officers and all communities;

(6) whether or not the governing body or sheriff has included data collection as part of the comprehensive plan; and

(7) other matters deemed appropriate.

(c) Data collection, if required, may consist of, but shall not be limited to, one or more of the following for every vehicle or pedestrian stop:

(1) Originating agency and officer identifier number;

(2) time and date of the stop;

(3) duration of the stop in ranges of one to 15 minutes, 16 to 30 minutes or more than 30 minutes;

(4) beat, district, territory or response area where the traffic stop is conducted;

(5) primary reason for the officer's investigation, and specifically, whether the stop was call related or self initiated;

(6) primary reason for the stop, and specifically, whether the stop was based on a moving violation, an equipment violation, reasonable suspicion of a criminal offense, other violation, to render service or assistance, suspicious circumstances, pre-existing knowledge or special detail;

(7) if a vehicle stop, the county code of vehicle registration, if registered in Kansas, and state code, if registered outside Kansas;

(8) age, race, gender and ethnicity of the primary person stopped by the officer;

(9) source of the information required by paragraph (8), and specifically, whether it was obtained from officer perception or investigation;

(10) whether the officer was aware of the information required by paragraph (8) prior to the stop;

(11) if a vehicle stop, the number of occupants in the stopped vehicle, including the driver;

(12) type of action taken, including citation, warning, search, arrest, assistance provided or no action. If the action taken is an arrest, the data collection shall also include the type of arrest, including warrant, resisting arrest, property crime, persons crime, drug crime, traffic crime, DUI or other type of arrest;

(13) if a search was conducted, the rationale for the search, including vehicle indicators, verbal indicators, physical or visual indicators, document indicators (DOT), incident to arrest or other rationale;

(14) if a search was conducted, the type of search, including consent search, consent requested but consent denied, inventory, stop and frisk, search warrant, incident to arrest, plain view or probable cause; or

(15) if a search was conducted, the type of contraband seized, if any, including currency, firearms, other weapons, drugs, drug paraphernalia, alcohol products, tobacco products, stolen property or other contraband.

(d) Nothing in this section shall require a governmental entity to collect data concerning pedestrian stops.

History: L. 2011, ch. 94, § 5; July 1.

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

Appendix B

KS·CPOST Annual Firearms Qualification Requirements

ANNUAL REQUIREMENTS

COURSE OF FIRE

COURSE RULES

ANNUAL REPORTING

Kansas Law (KSA 74-5607)

Kansas law states in relevant part, "[T]he commission shall adopt the rules and regulations that are necessary to ensure that law enforcement officers are adequately trained and to enforce the provisions of [The Kansas Law Enforcement Training Act.] Such rules and regulations shall include, but are not limited to, the **establishment of a course of fire as a standard qualification for active law enforcement officers to carry firearms** [bold and underline emphasis added] that may also be used for qualified retired officers to carry firearms pursuant to federal law."

Effective Implementation Date

Developed by KS·CPOST pursuant to 2005 Kansas Senate Bill No. 195 (KSA 74-5607), the required annual Training Year (TY) statewide firearms qualification standard will become effective beginning with Training Year 2007 (TY07) and thereafter. TY07 is defined as July 1, 2006 through June 30, 2007. Thereafter, a training year is identified as the period of time from July 1st through June 30th.

Annual Firearm Qualification Required: Full & Part-time Officers

KS·CPOST requires that all full-time and part-time police officers and law enforcement officers as defined by KSA 74-5602(f) must qualify (achieve a passing score of 70% or greater in accordance with course management rules) at least once annually on the KS·CPOST statewide firearms qualification course of fire. There is no established or set time during the Training Year when the required annual firearms qualification must occur; however, officers must complete the KS·CPOST qualification process with their duty weapon on or before the last day of each Training Year. For more details, click on one of the categories listed on the left side of this page.

Updated March 23rd, 2012

22-4610. Same; law enforcement policies preempting profiling, requirements; annual training required; community advisory boards; annual reports of complaints. (a) All law enforcement agencies in this state shall adopt a detailed, written policy to preempt racial or other biased-based policing. Each agency's policy shall include the definition of racial or other biased-based policing found in K.S.A. 22-4606, and amendments thereto.

(b) Policies adopted pursuant to this section shall be implemented by all Kansas law enforcement agencies within one year after the effective date of this act. The policies and data collection procedures shall be available for public inspection during normal business hours.

(c) The policies adopted pursuant to this section shall include, but not be limited to, the following:

(1) A detailed written policy that prohibits racial or other biased-based policing and that clearly defines acts constituting racial or other biased-based policing using language that has been recommended by the attorney general.

(2) (A) The agency policies shall require annual racial or other biased-based policing training which shall include, but not be limited to, training relevant to racial or other biased-based policing. Distance learning training technology shall be allowed for racial or other biased-based policing training.

(B) Law enforcement agencies may appoint an advisory body of not less than five persons composed of representatives of law enforcement, community leaders and educational leaders to recommend and review appropriate training curricula.

(3) (A) For law enforcement agencies of cities or counties that have exercised the option to establish community advisory boards pursuant to K.S.A. 2017 Supp. 22-4611b, and amendments thereto, use of such community advisory boards which include participants who reflect the racial and ethnic community, to advise and assist in policy development, education and community outreach and communications related to racial or other biased-based policing by law enforcement officers and agencies.

(B) Community advisory boards shall receive training on fair and impartial policing and comprehensive plans for law enforcement agencies.

(4) Policies for discipline of law enforcement officers who engage in racial or other biased-based policing.

(5) A provision that, if the investigation of a complaint of racial or other biased-based policing reveals the officer was in direct violation of the law enforcement agency's written policies regarding racial or other biased-based policing, the employing law enforcement agency shall take appropriate action consistent with applicable laws, rules and regulations, resolutions, ordinances or policies, including demerits, suspension or removal of the officer from the agency.

(6) Provisions for community outreach and communications efforts to inform the public of the individual's right to file with the law enforcement agency or the office of the attorney general complaints regarding racial or other biased-based policing, which outreach and communications to the community shall include ongoing efforts to notify the public of the law enforcement agency's complaint process.

(7) Procedures for individuals to file complaints of racial or other biased-based policing with the agency, which, if appropriate, may provide for use of current procedures for addressing such complaints.

(d) (1) Each law enforcement agency shall compile an annual report for the period of July 1 to June 30 and shall submit the report on or before July 31 to the office of the attorney general for review. Annual reports filed pursuant to this subsection shall be open public records and shall be posted on the official website of the attorney general.

(2) The annual report shall include:

(A) The number of racial or other biased-based policing complaints received;

(B) the date each racial or other biased-based policing complaint is filed;

(C) action taken in response to each racial or other biased-based policing complaint;

(D) the disposition of each racial or other biased-based policing complaint;

(E) the date each racial or other biased-based policing complaint is closed;

(F) whether or not all agency law enforcement officers not exempted by Kansas commission on peace officers' standards and training received the training required in subsection (c)(2)(A);

(G) whether the agency has a policy prohibiting racial or other biased-based policing;

(H) whether the agency policy mandates specific discipline for sustained complaints of racial or other biased-based policing;

(I) whether the agency has a community advisory board; and

(J) whether the agency has a racial or other biased-based policing comprehensive plan or if it collects traffic or pedestrian stop data.

History: L. 2005, ch. 159, § 5; L. 2011, ch. 94, § 3; May 26.

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

Appendix C

Use of Force

300.1 PURPOSE AND SCOPE

This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.

300.1.1 DEFINITIONS

Definitions related to this policy include:

Deadly force - Force reasonably anticipated and intended to create a substantial likelihood of causing death or very serious injury.

Force - The application of physical techniques or tactics, chemical agents or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed or restrained.

Imminent - Ready to take place; impending. Note that imminent does not mean immediate or instantaneous.

300.2 POLICY

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Independence Police Department recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

300.2.1 DUTY TO INTERCEDE

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law should promptly report these observations to a supervisor.

300.3 USE OF FORCE

Officers shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose.

Copyright Lexipol, LLC 2020/04/21, All Rights Reserved.
Published with permission by Independence Police Department

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by this department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force.

300.3.1 USE OF FORCE TO EFFECT AN ARREST

A law enforcement officer or any person summoned or directed to assist in making a lawful arrest need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. A law enforcement officer is justified in the use of any force he/she reasonably believes to be necessary to both effect the arrest and also to defend him/herself or another from bodily harm while making the arrest (K.S.A. § 21-5227).

300.3.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

When determining whether to apply force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include, but are not limited to:

(a) Immediacy and severity of the threat to officers or others.

(b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.

(c) Officer/subject factors (i.e., age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).

(d) The effects of drugs or alcohol.

(e) Individual’s mental state or capacity.

(f) Proximity of weapons or dangerous improvised devices.

Copyright Lexipol, LLC 2020/04/21, All Rights Reserved.
Published with permission by Independence Police Department

(g) The degree to which the individual has been effectively restrained and his/her ability to resist despite being restrained.

(h) The availability of other options and their possible effectiveness.

(i) Seriousness of the suspected offense or reason for contact with the individual.

(j) Training and experience of the officer.

(k) Potential for injury to officers, suspects and others.

(l) Whether the individual appears to be resisting, attempting to evade arrest by flight or is attacking the officer.

(m) The risk and reasonably foreseeable consequences of escape.

(n) The apparent need for immediate control of the individual or a prompt resolution of the situation.

(o) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.

(p) Prior contacts with the individual or awareness of any propensity for violence.

(q) Any other exigent circumstances.

300.3.3 PAIN COMPLIANCE TECHNIQUES

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

(a) The degree to which the application of the technique may be controlled given the level of resistance.

(b) Whether the individual can comply with the direction or orders of the officer.

(c) Whether the individual has been given sufficient opportunity to comply.

The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

300.3.4 CAROTID CONTROL HOLD

The proper application of the carotid control hold may be effective in restraining a violent or combative individual. However, due to the potential for injury, the use of the carotid control hold is subject to the following:

(a) The officer shall have successfully completed department-approved training in the use and application of the carotid control hold.

Copyright Lexipol, LLC 2020/04/21, All Rights Reserved.
Published with permission by Independence Police Department

(b) The carotid control hold may only be used when circumstances perceived by the officer at the time indicate that such application reasonably appears necessary to control an individual in any of the following circumstances:

1. The individual is violent or physically resisting.
2. The individual, by words or actions, has demonstrated an intention to be violent and reasonably appears to have the potential to harm officers, him/herself or others.

(c) The application of a carotid control hold on the following individuals should generally be avoided unless the totality of the circumstances indicates that other available options reasonably appear ineffective, or would present a greater danger to the officer, the individual or others, and the officer reasonably believes that the need to control the individual outweighs the risk of applying a carotid control hold:

1. Individuals who are known to be pregnant
2. Elderly individuals
3. Obvious juveniles
4. Individuals who appear to have Down syndrome or who appear to have obvious neck deformities or malformations, or visible neck injuries

(d) Any individual who has had the carotid control hold applied, regardless of whether he/she was rendered unconscious, shall be promptly examined by medical personnel and should be monitored until examined by medical personnel.

(e) The officer shall inform any person receiving custody, or any person placed in a position of providing care, that the individual has been subjected to the carotid control hold and whether the individual lost consciousness as a result.

(f) Any officer attempting or applying the carotid control hold shall promptly notify a supervisor of the use or attempted use of such hold.

(g) The use or attempted use of the carotid control hold shall be thoroughly documented by the officer in any related reports.

300.3.5 USE OF FORCE TO SEIZE EVIDENCE

In general, officers may use reasonable force to lawfully seize evidence and to prevent the destruction of evidence. However, officers are discouraged from using force solely to prevent a person from swallowing evidence or contraband. In the instance when force is used, officers should not intentionally use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted. Officers are encouraged to use techniques and methods taught by the Independence Police Department for this specific purpose.

Copyright Lexipol, LLC 2020/04/21, All Rights Reserved.
Published with permission by Independence Police Department

300.4 DEADLY FORCE APPLICATIONS

Use of deadly force is justified in the following circumstances:

(a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes would be an imminent threat of death or serious bodily injury.

(b) An officer may use deadly force to stop a fleeing subject when the officer has probable cause to believe that the individual has committed, or intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to any other person if the individual is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

Imminent does not mean immediate or instantaneous. An imminent danger may exist even if the suspect is not at that very moment pointing a weapon at someone. For example, an imminent danger may exist if an officer reasonably believes any of the following:

1. The individual has a weapon or is attempting to access one and it is reasonable to believe the individual intends to use it against the officer or another.
2. The individual is capable of causing serious bodily injury or death without a weapon and it is reasonable to believe the individual intends to do so.

300.4.1 SHOOTING AT OR FROM MOVING VEHICLES

Shots fired at or from a moving vehicle are rarely effective. Officers should move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants. An officer should only discharge a firearm at a moving vehicle or its occupants when the officer reasonably believes there are no other reasonable means available to avert the threat of the vehicle, or if deadly force other than the vehicle is directed at the officer or others.

Officers should not shoot at any part of a vehicle in an attempt to disable the vehicle.

300.5 REPORTING THE USE OF FORCE

Any use of force by a member of this department shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances. To collect data for purposes of training, resource allocation, analysis and related purposes, the Department may require the completion of additional report forms, as specified in department policy, procedure or law.

300.5.1 NOTIFICATIONS TO SUPERVISORS

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

(a) The application caused a visible injury.

Copyright Lexipol, LLC 2020/04/21, All Rights Reserved.
Published with permission by Independence Police Department

(b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.

(c) The individual subjected to the force complained of injury or continuing pain.

(d) The individual indicates intent to pursue litigation.

(e) Any application of the Conducted Energy Weapon (CEW) or control device.

(f) Any application of a restraint device other than handcuffs, shackles or belly chains.

(g) The individual subjected to the force was rendered unconscious.

(h) An individual was struck or kicked.

(i) An individual alleges any of the above has occurred.

300.6 MEDICAL CONSIDERATIONS

Prior to booking or release, medical assistance shall be obtained for any person who exhibits signs of physical distress, has sustained visible injury, expresses a complaint of injury or continuing pain, or was rendered unconscious. Any individual exhibiting signs of physical distress after an encounter should be continuously monitored until he/she can be medically assessed.

Based upon the officer's initial assessment of the nature and extent of the individual's injuries, medical assistance may consist of examination by an emergency medical services provider or medical personnel at a hospital or jail. If any such individual refuses medical attention, such a refusal shall be fully documented in related reports and, whenever practicable, should be witnessed by another officer and/or medical personnel. If a recording is made of the contact or an interview with the individual, any refusal should be included in the recording, if possible.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force. This notification shall include a description of the force used and any other circumstances the officer reasonably believes would be potential safety or medical risks to the subject (e.g., prolonged struggle, extreme agitation, impaired respiration).

Individuals who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called "excited delirium"), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical assistance as soon as practicable and have medical personnel stage away (see the Medical Aid and Response Policy).

300.7 SUPERVISOR RESPONSIBILITIES

When a supervisor is able to respond to an incident in which there has been a reported application of force, the supervisor is expected to:

Copyright Lexipol, LLC 2020/04/21, All Rights Reserved.
Published with permission by Independence Police Department

(a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.

(b) Ensure that any injured parties are examined and treated.

(c) When possible, separately obtain a recorded interview with the individual upon whom force was applied. If this interview is conducted without the individual having voluntarily waived his/her *Miranda* rights, the following shall apply:

1. The content of the interview should not be summarized or included in any related criminal charges.
2. The fact that a recorded interview was conducted should be documented in a property or other report.
3. The recording of the interview should be distinctly marked for retention until all potential for civil litigation has expired.

(d) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas.

1. These photographs should be retained until all potential for civil litigation has expired.

(e) Identify any witnesses not already included in related reports.

(f) Review and approve all related reports.

(g) Determine if there is any indication that the individual may pursue civil litigation.

1. If there is an indication of potential civil litigation, the supervisor should complete and route a notification of a potential claim through the appropriate channels.

(h) Evaluate the circumstances surrounding the incident and initiate an administrative investigation if there is a question of policy noncompliance or if for any reason further investigation may be appropriate.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

300.7.1 SERGEANT RESPONSIBILITY

The Sergeant shall review each use of force by any personnel within his/her command to ensure compliance with this policy and to address any training issues.

300.8 TRAINING

Officers will receive periodic training on this policy and demonstrate their knowledge and understanding.

Copyright Lexipol, LLC 2020/04/21, All Rights Reserved.
Published with permission by Independence Police Department

300.9 USE OF FORCE ANALYSIS

At least annually, the Patrol Captain should prepare an analysis report on use of force incidents. The report should be submitted to the Chief of Police. The report should not contain the names of officers, suspects or case numbers, and should include:

(a) The identification of any trends in the use of force by members.

(b) Training needs recommendations.

(c) Equipment needs recommendations.

(d) Policy revision recommendations.

Copyright Lexipol, LLC 2020/04/21, All Rights Reserved.
Published with permission by Independence Police Department

LAW ENFORCEMENT CODE OF ETHICS

As a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation and the peaceful against abuse or disorder; and to respect the constitutional rights of all to liberty, equality and justice.

I will keep my private life unsullied as an example to all and will behave in a manner that does not bring discredit to me or to my agency. I will maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed both in my personal and official life, I will be exemplary in obeying the law and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or abuse and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of police service. I will never engage in acts of corruption or bribery, nor will I condone such acts by other police officers. I will cooperate with all legally authorized agencies and their representatives in the pursuit of justice.

I know that I alone am responsible for my own standard of professional performance and will take every reasonable opportunity to enhance and improve my level of knowledge and competence.

I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession . . . law enforcement.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

45-221. Certain records not required to be open; separation of open and closed information required; statistics and records over 70 years old open. (a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:
(1) Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 2017 Supp. 75-4315d, and amendments thereto, or the disclosure of which is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 2017 Supp. 75-4315d, and amendments thereto, to restrict or prohibit disclosure.
(2) Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.
(3) Medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients.
(4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries or actual compensation employment contracts or employment-related contracts or agreements and lengths of service of officers and employees of public agencies once they are employed as such.
(5) Information which would reveal the identity of any undercover agent or any informant reporting a specific violation of law.
(6) Letters of reference or recommendation pertaining to the character or qualifications of an identifiable individual, except documents relating to the appointment of persons to fill a vacancy in an elected office.
(7) Library, archive and museum materials contributed by private persons, to the extent of any limitations imposed as conditions of the contribution.
(8) Information which would reveal the identity of an individual who lawfully makes a donation to a public agency, if anonymity of the donor is a condition of the donation, except if the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public officer or employee.
(9) Testing and examination materials, before the test or examination is given or if it is to be given again, or records of individual test or examination scores, other than records which show only passage or failure and not specific scores.
(10) Criminal investigation records, except as provided herein. The district court, in an action brought pursuant to K.S.A. 45-222, and amendments thereto, may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure:
(A) Is in the public interest;
(B) would not interfere with any prospective law enforcement action, criminal investigation or prosecution;
(C) would not reveal the identity of any confidential source or undercover agent;
(D) would not reveal confidential investigative techniques or procedures not known to the general public;
(E) would not endanger the life or physical safety of any person; and
(F) would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.
If a public record is discretionarily closed by a public agency pursuant to this subsection, the record custodian, upon request, shall provide a written citation to the specific provisions of paragraphs (A) through (F) that necessitate closure of that public record.
(11) Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent.
(12) Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility.
(13) The contents of appraisals or engineering or feasibility estimates or evaluations made by or for a public agency relative to the acquisition of property, prior to the award of formal contracts therefor.
(14) Correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual.
(15) Records pertaining to employer-employee negotiations, if disclosure would reveal information discussed in a lawful executive session under K.S.A. 75-4319, and amendments thereto.
(16) Software programs for electronic data processing and documentation thereof, but each public agency shall maintain a register, open to the public, that describes:
(A) The information which the agency maintains on computer facilities; and
(B) the form in which the information can be made available using existing computer programs.
(17) Applications, financial statements and other information submitted in connection with applications for student financial assistance where financial need is a consideration for the award.
(18) Plans, designs, drawings or specifications which are prepared by a person other than an employee of a public agency or records which are the property of a private person.
(19) Well samples, logs or surveys which the state corporation commission requires to be filed by persons who have drilled or caused to be drilled, or are drilling or causing to be drilled, holes for the purpose of discovery or production of oil or gas, to the extent that disclosure is limited by rules and regulations of the state corporation commission.
(20) Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

(21) Records of a public agency having legislative powers, which records pertain to proposed legislation or amendments to proposed legislation, except that this exemption shall not apply when such records are:
(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or
(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.
(22) Records of a public agency having legislative powers, which records pertain to research prepared for one or more members of such agency, except that this exemption shall not apply when such records are:
(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or
(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.
(23) Library patron and circulation records which pertain to identifiable individuals.
(24) Records which are compiled for census or research purposes and which pertain to identifiable individuals.
(25) Records which represent and constitute the work product of an attorney.
(26) Records of a utility or other public service pertaining to individually identifiable residential customers of the utility or service.
(27) Specifications for competitive bidding, until the specifications are officially approved by the public agency.
(28) Sealed bids and related documents, until a bid is accepted or all bids rejected.
(29) Correctional records pertaining to an identifiable inmate or release, except that:
(A) The name; photograph and other identifying information; sentence data; parole eligibility date; custody or supervision level; disciplinary record; supervision violations; conditions of supervision, excluding requirements pertaining to mental health or substance abuse counseling; location of facility where incarcerated or location of parole office maintaining supervision and address of a releasee whose crime was committed after the effective date of this act shall be subject to disclosure to any person other than another inmate or releasee, except that the disclosure of the location of an inmate transferred to another state pursuant to the interstate corrections compact shall be at the discretion of the secretary of corrections;
(B) the attorney general, law enforcement agencies, counsel for the inmate to whom the record pertains and any county or district attorney shall have access to correctional records to the extent otherwise permitted by law;
(C) the information provided to the law enforcement agency pursuant to the sex offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, shall be subject to disclosure to any person, except that the name, address, telephone number or any other information which specifically and individually identifies the victim of any offender required to register as provided by the Kansas offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, shall not be disclosed; and
(D) records of the department of corrections regarding the financial assets of an offender in the custody of the secretary of corrections shall be subject to disclosure to the victim, or such victim's family, of the crime for which the inmate is in custody as set forth in an order of restitution by the sentencing court.
(30) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.
(31) Public records pertaining to prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the state. This exception shall not include those records pertaining to application of agencies for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.
(32) Engineering and architectural estimates made by or for any public agency relative to public improvements.
(33) Financial information submitted by contractors in qualification statements to any public agency.
(34) Records involved in the obtaining and processing of intellectual property rights that are expected to be, wholly or partially vested in or owned by a state educational institution, as defined in K.S.A. 76-711, and amendments thereto, or an assignee of the institution organized and existing for the benefit of the institution.
(35) Any report or record which is made pursuant to K.S.A. 65-4922, 65-4923 or 65-4924, and amendments thereto, and which is privileged pursuant to K.S.A. 65-4915 or 65-4925, and amendments thereto.
(36) Information which would reveal the precise location of an archeological site.
(37) Any financial data or traffic information from a railroad company, to a public agency, concerning the sale, lease or rehabilitation of the railroad's property in Kansas.
(38) Risk-based capital reports, risk-based capital plans and corrective orders including the working papers and the results of any analysis filed with the commissioner of insurance in accordance with K.S.A. 40-2c20 and 40-2d20, and amendments thereto.
(39) Memoranda and related materials required to be used to support the annual actuarial opinions submitted pursuant to K.S.A. 40-409(b), and amendments thereto.
(40) Disclosure reports filed with the commissioner of insurance under K.S.A. 40-2,156(a), and amendments thereto.
(41) All financial analysis ratios and examination synopses concerning insurance companies that are submitted to the commissioner by the national association of insurance commissioners' insurance regulatory information system.
(42) Any records the disclosure of which is restricted or prohibited by a tribal-state gaming compact.
(43) Market research, market plans, business plans and the terms and conditions of managed care or other third-party contracts, developed or entered into by the university of Kansas medical center in the operation and management of the university hospital which the chancellor of the university of Kansas or the chancellor's designee determines would give an unfair advantage to competitors of the university of Kansas medical center.
(44) The amount of franchise tax paid to the secretary of revenue or the secretary of state by domestic corporations, foreign corporations, domestic limited liability companies, foreign limited liability companies, domestic limited partnership, foreign limited partnership, domestic limited liability partnerships and foreign limited liability partnerships.
(45) Records, other than criminal investigation records, the disclosure of which would pose a substantial likelihood of revealing security measures that protect: (A) Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services; (B) transportation and sewer or wastewater treatment systems, facilities or equipment; or (C) private property or persons, if the records are submitted to the agency. For purposes of this paragraph, security means measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping. Security measures include, but are not limited to, intelligence information, tactical plans, resource deployment and vulnerability assessments.

(46) Any information or material received by the register of deeds of a county from military discharge papers, DD Form 214. Such papers shall be disclosed: To the military dischargee; to such dischargee's immediate family members and lineal descendants; to such dischargee's heirs, agents or assigns; to the licensed funeral director who has custody of the body of the deceased dischargee; when required by a department or agency of the federal or state government or a political subdivision thereof; when the form is required to perfect the claim of military service or honorable discharge or a claim of a dependent of the dischargee; and upon the written approval of the commissioner of veterans affairs, to a person conducting research.
(47) Information that would reveal the location of a shelter or a safehouse or similar place where persons are provided protection from abuse or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault.
(48) Policy information provided by an insurance carrier in accordance with K.S.A. 44-532(h)(1), and amendments thereto. This exemption shall not be construed to preclude access to an individual employer's record for the purpose of verification of insurance coverage or to the department of labor for their business purposes.
(49) An individual's e-mail address, cell phone number and other contact information which has been given to the public agency for the purpose of public agency notifications or communications which are widely distributed to the public.
(50) Information provided by providers to the local collection point administrator or to the 911 coordinating council pursuant to the Kansas 911 act, and amendments thereto, upon request of the party submitting such records.
(51) Records of a public agency on a public website which are searchable by a keyword search and identify the home address or home ownership of a law enforcement officer as defined in K.S.A. 2017 Supp. 21-5111, and amendments thereto, parole officer, probation officer, court services officer or community correctional services officer. Such individual officer shall file with the custodian of such record a request to have such officer's identifying information restricted from public access on such public website. Within 10 business days of receipt of such requests, the public agency shall restrict such officer's identifying information from such public access. Such restriction shall expire after five years and such officer may file with the custodian of such record a new request for restriction at any time.
(52) Records of a public agency on a public website which are searchable by a keyword search and identify the home address or home ownership of a federal judge, a justice of the supreme court, a judge of the court of appeals, a district judge, a district magistrate judge, a municipal judge, the United States attorney for the district of Kansas, an assistant United States attorney, a special assistant United States attorney, the attorney general, an assistant attorney general, a special assistant attorney general, a county attorney, an assistant county attorney, a special assistant county attorney, a district attorney, an assistant district attorney, a special assistant district attorney, a city attorney, an assistant city attorney or a special assistant city attorney. Such person shall file with the custodian of such record a request to have such person's identifying information restricted from public access on such public website. Within 10 business days of receipt of such requests, the public agency shall restrict such person's identifying information from such public access. Such restriction shall expire after five years and such person may file with the custodian of such record a new request for restriction at any time.
(53) Records of a public agency that would disclose the name, home address, zip code, e-mail address, phone number or cell phone number or other contact information for any person licensed to carry concealed handguns or of any person who enrolled in or completed any weapons training in order to be licensed or has made application for such license under the personal and family protection act, K.S.A. 2017 Supp. 75-7c01 et seq., and amendments thereto, shall not be disclosed unless otherwise required by law.
(54) Records of a utility concerning information about cyber security threats, attacks or general attempts to attack utility operations provided to law enforcement agencies, the state corporation commission, the federal energy regulatory commission, the department of energy, the southwest power pool, the North American electric reliability corporation, the federal communications commission or any other federal, state or regional organization that has a responsibility for the safeguarding of telecommunications, electric, potable water, waste water disposal or treatment, motor fuel or natural gas energy supply systems.
(55) Records of a public agency containing information or reports obtained and prepared by the office of the state bank commissioner in the course of licensing or examining a person engaged in money transmission business pursuant to K.S.A. 9-508 et seq., and amendments thereto, shall not be disclosed except pursuant to K.S.A. 9-513c, and amendments thereto, or unless otherwise required by law.
(b) Except to the extent disclosure is otherwise required by law or as appropriate during the course of an administrative proceeding or on appeal from agency action, a public agency or officer shall not disclose financial information of a taxpayer which may be required or requested by a county appraiser or the director of property valuation to assist in the determination of the value of the taxpayer's property for ad valorem taxation purposes; or any financial information of a personal nature required or requested by a public agency or officer, including a name, job description or title revealing the salary or other compensation of officers, employees or applicants for employment with a firm, corporation or agency, except a public agency. Nothing contained herein shall be construed to prohibit the publication of statistics, so classified as to prevent identification of particular reports or returns and the items thereof.
(c) As used in this section, the term ''cited or identified'' shall not include a request to an employee of a public agency that a document be prepared.
(d) If a public record contains material which is not subject to disclosure pursuant to this act, the public agency shall separate or delete such material and make available to the requester that material in the public record which is subject to disclosure pursuant to this act. If a public record is not subject to disclosure because it pertains to an identifiable individual, the public agency shall delete the identifying portions of the record and make available to the requester any remaining portions which are subject to disclosure pursuant to this act, unless the request is for a record pertaining to a specific individual or to such a limited group of individuals that the individuals' identities are reasonably ascertainable, the public agency shall not be required to disclose those portions of the record which pertain to such individual or individuals.
(e) The provisions of this section shall not be construed to exempt from public disclosure statistical information not descriptive of any identifiable person.
(f) Notwithstanding the provisions of subsection (a), any public record which has been in existence more than 70 years shall be open for inspection by any person unless disclosure of the record is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or by a policy adopted pursuant to K.S.A. 72-6214, and amendments thereto.
(g) Any confidential records or information relating to security measures provided or received under the provisions of subsection (a)(45) shall not be subject to subpoena, discovery or other demand in any

administrative, criminal or civil action.

History: L. 1984, ch. 187, § 7; L. 1984, ch. 282, § 4; L. 1986, ch. 193, § 1; L. 1987, ch. 176, § 4; L. 1989, ch. 154, § 1; L. 1991, ch. 149, § 12; L. 1994, ch. 107, § 8; L. 1995, ch. 44, § 1; L. 1995, ch. 257, § 6; L. 1996, ch. 256, § 15; L. 1997, ch. 126, § 44; L. 1997, ch. 181, § 15; L. 2000, ch. 156, § 3; L. 2001, ch. 211, § 13; L. 2002, ch. 178, § 1; L. 2003, ch. 109, § 22; L. 2004, ch. 171, § 30; L. 2005, ch. 126, § 1; L. 2008, ch. 121, § 4; L. 2009, ch. 83, § 27; L. 2009, ch. 125, § 1; L. 2010, ch. 112, § 2; L. 2011, ch. 30, § 192; L. 2011, ch. 84, § 23; L. 2012, ch. 147, § 1; L. 2013, ch. 72, § 2; L. 2013, ch. 133, § 18; L. 2014, ch. 120, § 6; L. 2015, ch. 68, § 10; July 1.

Revisor's Note:

Section was amended three times in the 2004 session, see also 45-221g and 45-221h.

Section was amended twice in the 2009 session without reconciliation, see also 45-221i. Section was also amended by L. 2009, ch. 109, § 2, but that version was repealed by L. 2009, ch. 143, § 37 and L. 2009. ch. 125, § 2.

Section was amended three times in the 2012 session, see also 45-221j and 45-221k.

Section was also amended by L. 2013, ch. 8, § 1 and L. 2013, ch. 105, § 6, but those versions were repealed by L. 2013, ch. 133, § 37.

106-3-6. Oath required for certification. As a condition to certification as an officer, each applicant shall swear or affirm the following: "On my honor, I will never betray my badge, my integrity, my character, or the public trust. I will always have the courage to hold myself and others accountable for our actions. I will always uphold the constitution of the United States and of the state of Kansas, my community, and the agency I serve." (Authorized by and implementing K.S.A. 2011 Supp. 74-5607, as amended by L. 2012, ch. 89, sec. 5; effective, T-106-6-28-12, July 1, 2012; effective Oct. 12, 2012.)

Laws & Legal Resources.

Richards v. Wisconsin, 520 U.S. 385 (1997)

Justia Opinion Summary and Annotations

Syllabus Case

OCTOBER TERM, 1996

Syllabus

RICHARDS *v*. WISCONSIN

CERTIORARI TO THE SUPREME COURT OF WISCONSIN No. 96-5955. Argued March 24, 1997-Decided April 28, 1997

In *Wilson* v. *Arkansas,* 514 U. S. 927, this Court held that the Fourth Amendment incorporates the common-law requirement that police knock on a dwelling's door and announce their identity and purpose before attempting forcible entry, recognized that the flexible reasonableness requirement should not be read to mandate a rigid announcement rule that ignores countervailing law enforcement interests, *id.,* at 934, and left it to the lower courts to determine the circumstances under which an unannounced entry is reasonable. *Id.,* at 936. Officers in Madison, Wisconsin, obtained a warrant to search petitioner Richards' motel room for drugs and related paraphernalia, but the Magistrate refused to give advance authorization for a "no-knock" entry. The officer who knocked on

Richards' door was dressed, and identified himself, as a maintenance man. Upon opening the door, Richards also saw a uniformed officer and quickly closed the door. The officers kicked down the door, caught Richards trying to escape, and found cash and cocaine in the bathroom. In denying Richards' motion to suppress the evidence on the ground that the officers did not knock and announce their presence before forcing entry, the trial court found that they could gather from Richards' strange behavior that he might try to destroy evidence or escape and that the drugs' disposable nature further justified their decision not to knock and announce. The State Supreme Court affirmed, concluding that *Wilson* did not preclude the court's *pre-Wilson per se* rule that police officers are *never* required to knock and announce when executing a search warrant in a felony drug investigation because of the special circumstances of today's drug culture.

Held:

1. The Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for felony drug investigations. While the requirement can give way under circumstances presenting a threat of physical violence or where officers believe that evidence would be destroyed if advance notice were given, 514 U. S., at 936, the fact that felony drug investigations may frequently present such circumstances cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Creating exceptions to the requirement based on the culture surrounding a general category of criminal behavior presents at

---

386

Syllabus

least two serious concerns. First, the exception contains considerable overgeneralization that would impermissibly insulate from judicial review cases in which a drug investigation does not pose special risks. Second, creating an exception in one category can, relatively easily, be applied to others. If a *per se* exception were allowed for each criminal activity category that included a considerable risk of danger to officers or destruction of evidence, the knock-and-announce requirement would be meaningless. The court confronted with the question in each case has a duty to determine whether the facts and circumstances of the particular entry justified dispensing with the requirement. A "noknock" entry is justified when the police have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime. This standard strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of

balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. Cf. *Maryland* v. *Buie,* 494 U. S. 325, 337. Pp.391-395.

2. Because the evidence in this case establishes that the decision not to knock and announce was a reasonable one under the circumstances, the officers' entry into the motel room did not violate the Fourth Amendment. That the Magistrate had originally refused to issue a noknock warrant means only that at the time the warrant was requested there was insufficient evidence for a no-knock entry. However, the officers' decision to enter the room must be evaluated as of the time of entry. Pp. 395-396.

201 Wis. 2d 845, 549 N. W. 2d 218, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

David R. Karpe, by appointment of the Court, 519 U. S. 1106, argued the cause for petitioner. With him on the briefs were *John Wesley Hall, Jr., Henry R. Schultz,* and *Jack E. Schairer*.

James E. Doyle, Attorney General of Wisconsin, argued the cause for respondent. With him on the brief was *Stephen W Kleinmaier,* Assistant Attorney General.

Miguel A. Estrada argued the cause for the United States as amicus curiae urging affirmance. On the brief were Acting Solicitor General Dellinger, Acting Assistant Attorney

---

387

Full Text of Opinion

Oral Argument - March 24, 1997

Opinion Announcement - April 28, 1997

Disclaimer: Official Supreme Court case law is only found in the print version of the United States Reports. Justia case law is provided for general informational purposes only, and may not reflect current legal developments, verdicts or settlements. We make no warranties or guarantees about the accuracy, completeness, or adequacy of the information contained on this site or information linked to from this site. Please check official sources.

Justia Annotations is a forum for attorneys to summarize, comment on, and analyze case law published on our site. Justia makes no guarantees or warranties that the annotations are accurate or reflect the current state of law, and no annotation is intended to be, nor should it be construed as, legal advice. Contacting Justia or any attorney through this site, via web form, email, or otherwise, does not create an attorney-client relationship.

Justifying a No-Knock Entry

November 19, 2019 | Ken Wallentine

Share this post:

-
-
-

Geiger v. Sloan, 780 Fed. Appx. 150 (5th Cir. 2019)

An officer prepared an affidavit for a no-knock search warrant at Ricky Keeton's trailer home. The officer had been investigating Keeton for approximately one year. One night, the officer saw an informant drive away from Keeton's trailer. Officers stopped the informant and found methamphetamine and a pipe in his car. The informant told the officers he had just purchased methamphetamine from Keeton and Keeton had a large amount of methamphetamine and $20,000 in cash in the trailer.

The officer obtained a warrant and assembled a SWAT team. The SWAT team intended to use a battering ram and pry bar on the back door of the trailer. The officers also breached the sewer line in order to capture anything flushed down the toilet in the trailer. Before the team could attempt entry, Keeton woke up. He told his girlfriend he heard noise and grabbed a pellet gun before going out to investigate. When Keeton heard the ram hit the back door, he went to the door. The door opened about two feet and quickly closed.

The primary officer gave conflicting statements about Keeton's actions after the door opened slightly. Nonetheless, the SWAT officers fired approximately 50 bullets at Keeton, striking him six times and killing him. A subsequent search revealed 9 ounces of methamphetamine, but not the cash alleged to be in the trailer.
Keeton's heirs sued, alleging the search was unreasonable and the officers used excessive force to execute the warrant. The trial court denied qualified immunity for the officers and the agency. The appellate court upheld the denial of qualified immunity and ordered the matter to proceed to trial.

In *Richards*, the Supreme Court held officers "must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."

The court's opinion recites critical factors for officers who request and serve a no-knock warrant. The court began by reminding officers there is no blanket authority for a no-knock warrant when the warrant is drug-related, citing the Supreme Court decision in *Richards v. Wisconsin* (520 U.S. 385 (1997)). It was questionable whether the warrant even authorized a no-knock execution. Though the officer mentioned no-knock authorization in the *affidavit*, nothing in the *warrant* plainly authorized entry without notice. Presumably, the same officer prepared both documents.

In *Richards*, the Supreme Court held officers "must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." The Court instructed lower courts to examine the circumstances of the individual case, not a particular category of alleged crimes. In this case, the court noted the warrant and the affidavit failed to state how giving Keeton notice before executing the warrant "would create any danger, futility, or risk of inhibiting the investigation."

The affidavit did assert Keeton had dogs and surveillance cameras, but the court observed the breach of the sewer line and the capture of the downstream flow from the toilet mitigated the risk of destruction of evidence. The investigating officer later stated the informant told an officer, who told another officer, who told the investigating officer Keeton had guns. However, the informant testified he never mentioned guns to any officer. Neither the affidavit nor the warrant mentioned any guns.

The court also pointed to critical contradictions in the investigating officer's various statements about whether he saw Keeton with a gun and disputed evidence concerning whether all the bullets were fired through the closed door and walls of the trailer. The court noted other

contradictions in statements by other involved officers. The substantial defects in the affidavit and the warrant related to no-knock authorization, combined with the contradictory testimony, meant the court could not find—on the basis of the record before it—the officers could have reasonably believed Keeton posed a threat of serious harm.

Critical lessons from this case: First, carefully state the reasonable suspicion that providing notice would permit the destruction of evidence (and why alternative means of preventing the destruction are not reasonable), and/or why providing notice would endanger the officers or others. Second, ensure the stated basis for a no-knock entry is included in both the affidavit and the warrant. A best practice is to ask a prosecutor or department legal advisor to review both documents for legal sufficiency and consistency. At the very least, ask an experienced investigator to proofread the affidavit and warrant.

This blog was featured in our *Xiphos* newsletter, a monthly legal-focused law enforcement newsletter authored by Ken Wallentine. Subscriptions are free for public safety officers, educators and public attorneys. Subscribe here!

KEN WALLENTINE is the Chief of the West Jordan (Utah) Police Department and former Chief of Law Enforcement for the Utah Attorney General. He has served over three decades in public safety, is a legal expert and editor of Xiphos, a monthly national criminal procedure newsletter. He is a member of the Board of Directors of the Institute for the Prevention of In-Custody Death and serves as a use of force consultant in state and federal criminal and civil litigation across the nation.

Community Relations

343.1 PURPOSE AND SCOPE

The purpose of this policy is to provide guidelines for community relationship-building.

Additional guidance on community relations and outreach is provided in other policies, including the:

- Hate Crimes Policy.
- Limited English Proficiency Services Policy.
- Communications with Persons with Disabilities Policy.
- Chaplains Policy.
- Patrol Policy.
- Suspicious Activity Reporting Policy.

343.2 POLICY

It is the policy of the Independence Police Department to promote positive relationships between department members and the community by treating community members with dignity and respect and engaging them in public safety strategy development and relationship-building activities, and by making relevant policy and operations information available to the community in a transparent manner.

343.3 MEMBER RESPONSIBILITIES

Officers should, as time and circumstances reasonably permit:

(a) Make casual and consensual contacts with community members to promote positive community relationships (see the Contacts and Temporary Detentions Policy).

(b) Become reasonably familiar with the schools, businesses and community groups in their assigned jurisdictional areas.

(c) Work with community members and the department community relations coordinator to identify issues and solve problems related to community relations and public safety.

(d) Conduct periodic foot patrols of their assigned areas to facilitate interaction with community members. Officers carrying out foot patrols should notify an appropriate supervisor and Dispatch of their status (i.e., on foot patrol) and location before beginning and upon completion of the foot patrol. They should also periodically inform Dispatch of their location and status during the foot patrol.

343.4 COMMUNITY RELATIONS COORDINATOR

The Chief of Police or the authorized designee should designate a member of the Department to serve as the community relations coordinator. He/she should report directly to the Chief of Police or the authorized designee and is responsible for:

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

(a) Obtaining department-approved training related to his/her responsibilities.

(b) Responding to requests from department members and the community for assistance in identifying issues and solving problems related to community relations and public safety.

(c) Organizing surveys to measure the condition of the department's relationship with the community.

(d) Working with community groups, department members and other community resources to:

1. Identify and solve public safety problems within the community.
2. Organize programs and activities that help build positive relationships between department members and the community and provide community members with an improved understanding of department operations.

(e) Working with the Patrol Captain to develop patrol deployment plans that allow officers the time to participate in community engagement and problem-solving activities.

(f) Recognizing department and community members for exceptional work or performance in community relations efforts.

(g) Attending City council and other community meetings to obtain information on community relations needs.

(h) Assisting with the department's response to events that may affect community relations, such as an incident where the conduct of a department member is called into public question.

(i) Informing the Chief of Police and others of developments and needs related to the furtherance of the department's community relations goals, as appropriate.

343.5 SURVEYS

The community relations coordinator should arrange for a survey of community members and department members to be conducted at least annually to assess the condition of the relationship between the Department and the community. Survey questions should be designed to evaluate perceptions of the following:

(a) Overall performance of the Department

(b) Overall competence of department members

(c) Attitude and behavior of department members

(d) Level of community trust in the Department

(e) Safety, security or other concerns

A written summary of the compiled results of the survey should be provided to the Chief of Police.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

343.6 COMMUNITY AND YOUTH ACTIVITIES AND PROGRAMS

The community relations coordinator should organize or assist with programs and activities that create opportunities for department members and community members, especially youth, to interact in a positive setting. Examples of such programs and events include:

(a) Department-sponsored athletic programs (e.g., baseball, basketball, soccer, bowling).

(b) Police-community get-togethers (e.g., cookouts, meals, charity events).

(c) Youth leadership and life skills mentoring.

(d) School resource officer/Drug Abuse Resistance Education (D.A.R.E.®) programs.

(e) Neighborhood Watch and crime prevention programs.

343.7 INFORMATION SHARING

The community relations coordinator should work with the Public Information Spokesperson to develop methods and procedures for the convenient sharing of information (e.g., major incident notifications, significant changes in department operations, comments, feedback, positive events) between the Department and community members. Examples of information-sharing methods include:

(a) Community meetings.

(b) Social media (see the Department Use of Social Media Policy).

(c) Department website postings.

Information should be regularly refreshed, to inform and engage community members continuously.

343.8 LAW ENFORCEMENT OPERATIONS EDUCATION

The community relations coordinator should develop methods to educate community members on general law enforcement operations so they may understand the work that officers do to keep the community safe. Examples of educational methods include:

(a) Development and distribution of informational cards/flyers.

(b) Department website postings.

(c) Presentations to driver education classes.

(d) Instruction in schools.

(e) Department ride-alongs (see the Ride-Alongs Policy).

(f) Scenario/Simulation exercises with community member participation.

(g) Youth internships at the Department.

(h) Citizen academies.

Instructional information should include direction on how community members should interact with the police during enforcement or investigative contacts and how community members can make

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

a complaint to the Department regarding alleged misconduct or inappropriate job performance by department members.

343.9 SAFETY AND OTHER CONSIDERATIONS

Department members responsible for community relations activities should consider the safety of the community participants and, as much as reasonably practicable, should not allow them to be present in any location or situation that would jeopardize their safety.

Department members in charge of community relations events should ensure that participating community members have completed waiver forms before participation, if appropriate. A parent or guardian must complete the waiver form if the participating community member has not reached 18 years of age.

Community members are subject to a criminal history check before approval for participation in certain activities, such as citizen academies.

343.10 COMMUNITY ADVISORY COMMITTEE

The Chief of Police should establish a committee of volunteers consisting of community members, community leaders and other community stakeholders (e.g., representatives from schools, churches, businesses, social service organizations). The makeup of the committee should reflect the demographics of the community as much as practicable.

The committee should convene regularly to:

(a) Provide a public forum for gathering information about public safety concerns in the community.

(b) Work with the Department to develop strategies to solve public safety problems.

(c) Generate plans for improving the relationship between the Department and the community.

(d) Participate in community outreach to solicit input from community members, including youth from the community.

The Training Officer should arrange for initial and ongoing training for committee members on topics relevant to their responsibilities.

The Chief of Police may include the committee in the evaluation and development of department policies and procedures and may ask them to review certain personnel complaints for the purpose of providing recommendations regarding supervisory, training or other issues as appropriate.

343.10.1 LEGAL CONSIDERATIONS

The Chief of Police and the community relations coordinator should work with the City Attorney as appropriate to ensure the committee complies with any legal requirements such as public notices, records maintenance and any other associated obligations or procedures.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

343.11 TRANSPARENCY

The Department should periodically publish statistical data and analysis regarding the department's operations. The reports should not contain the names of officer, suspects or case numbers. The community relations coordinator should work with the community advisory committee to identify information that may increase transparency regarding department operations.

343.12 TRAINING

Subject to available resources, members should receive training related to this policy, including training on topics such as:

(a) Effective social interaction and communication skills.

(b) Cultural, racial and ethnic diversity and relations.

(c) Building community partnerships.

(d) Community policing and problem-solving principles.

(e) Enforcement actions and their effects on community relations.

Where practicable and appropriate, community members, especially those with relevant expertise, should be involved in the training to provide input from a community perspective.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

Frequently Asked Questions

About NASRO

Directors and Staff

Frequently Asked Questions

State Association - Contact Information

By-Laws

NASRO W-9

What is a school resource officer?

Does NASRO certify school resource officers?

Are school resource officers usually armed?

What are appropriate roles of school resource officers?

The goals of well-founded SRO programs include providing safe learning environments in our nation's schools, providing valuable resources to school staff members, fostering positive relationships with youth, developing strategies to resolve problems affecting youth and protecting all students, so that they can reach their fullest potentials. NASRO considers it a best practice to use a "triad concept" to define the three main roles of school resource officers: educator (i.e. guest lecturer), informal counselor/mentor, and law enforcement officer.

How many school resource officers are there in the United States?

What evidence exists that school resource officers are valuable?

Do school resource officers contribute to a school-to-prison pipeline?

How should school resource officers respond to active shooter incidents?

How many school resource officers should a school have?

Should schools arm teachers, or others who are not law enforcement officers?

How should school resource officers be selected?

- **How do I become a school resource officer?**
- **Can I register someone from our department under my login/account?**
- **How do I register myself or someone else for training?**
- **Do I have to set up an account every time I want to take a class?**
- **How do I get a copy of my certificate if I attended a class?**
- **Do I receive a free membership when I attend a class or conference?**
- **When will you have a class in my state?**
- **Can I hold/reserve a spot in a class?**

Facebook Twitter LinkedIn More 24

National Association of School Resource Officers
2020 Valleydale Road, Suite 207A
Hoover, AL 35244
Office: (205) 739-6060
Fax: (205) 536-9255

(888) 316-2776

twitter.com/nasro_info

facebook.com/NASRO.o

© National Association of School Resource Officers. All rights reserved.

Website by Accrisoft

THE YALE LAW JOURNAL

JOANNA C. SCHWARTZ

How Qualified Immunity Fails

ABSTRACT. This Article reports the findings of the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. Qualified immunity shields government officials from constitutional claims for money damages so long as the officials did not violate clearly established law. The Supreme Court has described the doctrine as incredibly strong—protecting "all but the plainly incompetent or those who knowingly violate the law." Legal scholars and commentators describe qualified immunity in equally stark terms, often criticizing the doctrine for closing the courthouse doors to plaintiffs whose rights have been violated. The Court has repeatedly explained that qualified immunity must be as powerful as it is to protect government officials from burdens associated with participating in discovery and trial. Yet the Supreme Court has relied on no empirical evidence to support its assertion that qualified immunity doctrine shields government officials from these assumed burdens.

This Article is the first to test this foundational assumption underlying the Supreme Court's qualified immunity decisions. I reviewed the dockets of 1,183 Section 1983 cases filed against state and local law enforcement defendants in five federal court districts over a two-year period and measured the frequency with which qualified immunity motions were brought by defendants, granted by courts, and dispositive before discovery and trial. I found that qualified immunity rarely served its intended role as a shield from discovery and trial in these cases. Across the five districts in my study, just thirty-eight (3.9%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds. And when one considers all the Section 1983 cases brought against law enforcement defendants—each of which could expose law enforcement officials to burdens associated with discovery and trial—just seven (0.6%) were dismissed at the motion to dismiss stage and thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds. My findings enrich our understanding of qualified immunity's role in constitutional litigation, belie expectations about the policy interests served by qualified immunity, and show that qualified immunity doctrine should be modified to reflect its actual role in constitutional litigation.

AUTHOR. Professor of Law, UCLA School of Law. For helpful conversations and comments, thanks to Will Baude, Karen Blum, Alan Chen, Beth Colgan, Richard Fallon, William Hubbard, Aziz Huq, John Jeffries, Justin Murray, Doug NeJaime, James Pfander, John Rappaport, Alexander Reinert, Louis Michael Seidman, Stephen Yeazell, and participants in workshops at The University of Chicago Law School, Duke University School of Law, Harvard Law School, and UCLA School of Law. Special thanks to Benjamin Nyblade, who calculated the statistical significance of my findings. Thanks also to Michelle Cuozzo, David Koller, Rosemary McClure, David Schmutzer, and the expert research staff at UCLA's Hugh & Hazel Darling Law Library for excellent research assistance, and thanks to R. Henry Weaver, Arjun Ramamurti, Kyle Edwards, Kyle Victor, Erin van Wesenbeeck, and the editors of the *Yale Law Journal* for excellent editorial assistance.

The original dataset used in this Article is preserved in eYLS, Yale Law School's data repository, under an embargo until the author completes future research using this data. The dataset will be available at digitalcommons.law.yale.edu/ylj.

ARTICLE CONTENTS

INTRODUCTION 6

I. QUALIFIED IMMUNITY'S EXPECTED ROLE IN CONSTITUTIONAL LITIGATION 12

A. The Court's Concerns About the Burdens of Litigation 13

B. Doctrinal Impact of the Court's Desire To Protect Defendants from Discovery and Trial 15

1. Defendants' State of Mind 16

2. The Order of Battle 16

3. Interlocutory Appeals 17

C. The Lack of Empirical Support for the Court's Concerns and Interventions 18

II. STUDY METHODOLOGY 19

III. FINDINGS 25

A. Cases in Which Qualified Immunity Cannot Play a Role 27

B. Defendants' Choices: The Frequency and Timing of Qualified Immunity Motions 28

C. District Courts' Decisions: The Success Rate of Qualified Immunity Motions 36

D. Circuit Courts' Decisions: The Frequency and Success of Qualified Immunity Appeals 40

E. The Impact of Qualified Immunity on Case Dispositions 41

IV. IMPLICATIONS 47

A. Toward a More Accurate Description of Qualified Immunity's Role in Constitutional Litigation 48

B. Why Qualified Immunity Disposes of So Few Cases 51

1. Qualified Immunity Is Ill Suited To Dispose of Cases 53

2. Qualified Immunity Is Unnecessary To Dispose of Cases 56

C. Implications for the Balance Struck by Qualified Immunity 58
1. Interests in Protecting Government Officials 59
2. Interests in Government Accountability 64
D. Moving Forward 70

CONCLUSION 76

INTRODUCTION

The United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal. The Supreme Court has long described qualified immunity doctrine as robust—protecting "all but the plainly incompetent or those who knowingly violate the law."[1] And the Court's most recent qualified immunity decisions have broadened the scope of the doctrine even further.[2] The Court has also granted a rash of petitions for certiorari in cases in which lower courts denied qualified immunity to law enforcement officers, reversing or vacating every one.[3] In these decisions, the Supreme Court has scolded lower courts for applying qualified immunity doctrine in a manner that is too favorable to plaintiffs and thus ignores the "importance of qualified immunity 'to society as a whole.'"[4] As Noah Feldman has observed, the Supreme Court's recent qualified immunity decisions have sent a clear message to lower courts: "The Supreme Court wants fewer lawsuits against police to go forward."[5] And the Court believes that qualified immunity doctrine is the way to keep the doors to the courthouse closed.

Among legal scholars and other commentators, there is a widespread belief that the Supreme Court is succeeding in its efforts. Scholars report that qualified immunity motions are raised frequently by defendants, are granted fre-

1. Malley v. Briggs, 475 U.S. 335, 341 (1986).

2. *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64-65 (2016); *see also infra* note 183 and accompanying text.

3. *See* Scott Michelman, Taylor v. Barkes*: Summary Reversal Is Part of a Qualified Immunity Trend*, SCOTUSBLOG (June 2, 2015, 11:17 AM), http://www.scotusblog.com/2015/06/taylor-v-barkes-summary-reversal-is-part-of-a-qualified-immunity-trend [http://perma.cc/86EN-KSLT]; *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 45), http://ssrn.com/abstract=2896508 [http://perma.cc/ZF4C-N3DR] (observing that the Supreme Court found officers violated clearly established law in just two of the twenty-nine qualified immunity cases decided by the Supreme Court since 1982). In one of its most recent qualified immunity decisions, *White v. Pauly*, the Supreme Court vacated the lower court's decision and remanded for further proceedings. But, in so doing, the Court explained that the defendant "did not violate clearly established law . . . [o]n the record described by the Court of Appeals." 137 S. Ct. 548, 552 (2017).

4. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

5. Noah Feldman, *Supreme Court Has Had Enough with Police Suits*, BLOOMBERG VIEW (Jan. 9, 2017, 3:08 PM), http://www.bloomberg.com/view/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits [http://perma.cc/M88T-52VJ].

quently by courts, and often result in the dismissal of cases.[6] As Ninth Circuit Judge Stephen Reinhardt has written, the Supreme Court's recent qualified immunity decisions have "created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights."[7] Three of the foremost experts on Section 1983 litigation—Karen Blum, Erwin Chemerinsky, and Martin Schwartz—have concluded that recent developments in qualified immunity doctrine leave "not much *Hope* left for plaintiffs."[8]

The widespread assumption that qualified immunity provides powerful protection for government officials belies how little we know about the role qualified immunity plays in the litigation of constitutional claims.[9] The scant evidence available on this topic points in opposite directions. Studies of quali-

---

6. *See* Martin A. Schwartz, *Section 1983 Litigation*, FED. JUD. CTR. 143 (2014), http://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf [http://perma.cc/JMQ9-92XN] (describing qualified immunity as "the most important defense" in Section 1983 litigation, and stating that "courts decide a high percentage of Section 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity" (footnote omitted)); *see also* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.5, Westlaw (database updated Aug. 2017) ("Under *Harlow*, defendants on summary judgment motion frequently will be dismissed without a consideration of the merits."); Susan Bendlin, *Qualified Immunity: Protecting "All but the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1023 (2012) ("Public officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another."); John C. Jeffries, *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in other words, to create immunity from *trial* as well as from *liability*—has been largely successful." (footnote omitted)).

7. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015); *see also* Caryn J. Ackerman, Comment, *Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1028 (2006) (describing qualified immunity doctrine as "arguably one of the most significant obstacles for § 1983 plaintiffs").

8. Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013). *Hope* refers to *Hope v. Pelzer*, a 2002 Supreme Court decision denying qualified immunity to prison guards who had handcuffed the plaintiff to a hitching post. 536 U.S. 730 (2002). The decision is viewed as more "plaintiff friendly" than the Court's subsequent qualified immunity decisions. Blum, Chemerinsky & Schwartz, *supra*, at 654.

9. *See infra* note 57 and accompanying text (describing the lack of empirical research concerning qualified immunity litigation practice and the justifications underlying the doctrine). For research regarding other aspects of qualified immunity doctrine, see *infra* notes 10, 180.

fied immunity decisions have found that qualified immunity motions are infrequently denied, suggesting that the doctrine plays a controlling role in the resolution of many Section 1983 cases.[10] But when Alexander Reinert studied the dockets in *Bivens* actions—constitutional cases brought against federal actors—he found that grants of qualified immunity led to just 2% of case dismissals over a three-year period.[11] If qualified immunity protects all but the "plainly incompetent or those who knowingly violate the law,"[12] and qualified immunity motions are infrequently denied, how can qualified immunity be the basis for dismissal of such a small percentage of cases?

More than descriptive accuracy is at stake in answering this question—it goes to a core justification for qualified immunity's existence. Although the concept of qualified immunity was drawn from defenses existing in the common law at the time 42 U.S.C. § 1983 was enacted, the Court has made clear that the contours of qualified immunity's protections are shaped not by the common law but instead by policy considerations.[13] In particular, the Court seeks to balance "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[14] Since the doctrine's inception, the Court has repeatedly stated that financial liability is one of the burdens qualified immunity is intended to protect against.[15] Yet, as I showed in a prior study, law enforcement defendants are almost always indemnified and thus rarely pay anything towards settle-

10. *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999) (finding that qualified immunity was denied in 20% of federal cases over a two-year period); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 691 (2009) (finding that qualified immunity was denied in 14% to 32% of district court decisions); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 545 (2010) (finding that qualified immunity was denied in approximately 32% of appellate decisions).

11. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010).

12. Malley v. Briggs, 475 U.S. 335, 341 (1986).

13. Justice Thomas has recently criticized this approach, arguing that qualified immunity doctrine should mirror historical common law defenses. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870-72 (2017) (Thomas, J., concurring in part and concurring in the judgment). For a discussion of this argument, and the relevance of my findings to this argument, see *infra* note 203 and accompanying text.

14. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

15. *See infra* notes 33-36 and accompanying text.

ments and judgments entered against them.[16] Near certain and universal indemnification drastically reduces the value of qualified immunity as a protection against the burden of financial liability.

In recent years, the Court has focused increasingly on a different justification for qualified immunity: the need to protect government officials from nonfinancial burdens associated with discovery and trial.[17] This desire has arguably shaped qualified immunity more than any other policy justification for the doctrine.[18] Yet we do not know to what extent discovery and trial burden government officials, or the extent to which qualified immunity doctrine protects against those assumed burdens. Although both questions demand critical investigation, this Article focuses on the latter. Assuming that discovery and trial do impose substantial burdens on government officials, and that shielding officials from discovery and trial is a legitimate aim of qualified immunity doctrine, to what extent does qualified immunity actually achieve its intended goal?

To answer these questions, I undertook the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. I reviewed the dockets of 1,183 lawsuits filed against state and local law enforcement defendants over a two-year period in five federal district courts—the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Eastern District of Pennsylvania, and the Northern District of California.[19] I tracked several characteristics of these cases including the frequency with which qualified immunity was raised, the stage of the litigation at which qualified immunity was raised, the courts' assessments of defendants' qualified immunity motions, the frequency and outcome of interlocutory and final appeals of qualified immunity decisions, and the cases' dispositions.

I found that, contrary to judicial and scholarly assumptions, qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end. Qualified immunity is raised infrequently before discovery begins: across the districts in my study, defendants raised qualified immunity in motions to dismiss in 13.9% of the cases in which they could raise the defense.[20] These motions were less frequently granted than one might expect: courts granted motions to dismiss in whole or part on qualified immunity

16. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).

17. *See infra* notes 37-41 and accompanying text.

18. *See infra* Section I.B.

19. *See infra* Part II for a description of my study design and methodology.

20. *See infra* Tables 2 & 3 and *infra* note 111 and accompanying text.

grounds 13.6% of the time.[21] Qualified immunity was raised more often by defendants at summary judgment and was more often granted by courts at that stage. But even when courts granted motions to dismiss and summary judgment motions on qualified immunity grounds, those grants did not always result in the dismissal of the cases—additional claims or defendants regularly remained and continued to expose government officials to the possibility of discovery and trial. Across the five districts in my study, just 3.9% of the cases in which qualified immunity could be raised were dismissed on qualified immunity grounds.[22] And when one considers all the Section 1983 cases brought against law enforcement defendants—each of which could expose law enforcement officials to whatever burdens are associated with discovery and trial—just 0.6% of cases were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds.[23]

Although courts rarely dismiss Section 1983 suits against law enforcement on qualified immunity grounds, there is every reason to believe that qualified immunity doctrine influences the litigation of Section 1983 claims in other ways. The threat of a qualified immunity motion may cause a person never to file suit, or to settle or withdraw her claims before discovery or trial.[24] Qualified immunity motion practice and interlocutory appeals of qualified immunity denials may increase the costs and delays associated with Section 1983 litigation. The challenges of qualified immunity doctrine may cause plaintiffs' attorneys to include claims in their cases that cannot be dismissed on qualified immunity grounds—claims against municipalities, claims seeking injunctive relief, and state law claims. Qualified immunity likely influences the litigation of cases against law enforcement in each of these ways. But, as my study makes clear, qualified immunity does not affect constitutional litigation against law enforcement in the way the Court expects and intends.

One should not conclude based on my findings that the Supreme Court simply needs to make qualified immunity stronger. As a preliminary matter, qualified immunity may not be well suited to weed out only insubstantial cases.[25] Moreover, my data suggest that qualified immunity is often fundamentally

21. *See infra* Table 7 (showing that qualified immunity was granted in whole in 9.1% of cases in which a qualified immunity motion was raised at the motion to dismiss stage, and was granted in part in 4.5% of such cases).

22. *See infra* Table 11 and accompanying text.

23. *See infra* Table 12 and accompanying text.

24. For further discussion of these possibilities, see *infra* notes 117-122 and accompanying text.

25. *See infra* text accompanying notes 204-205.

ill suited to dismiss filed cases, regardless of their underlying merits.[26] Although district courts recognize that they should dispose of cases as early as possible on qualified immunity grounds, plaintiffs can often plausibly plead clearly established constitutional violations and thus defeat motions to dismiss. Factual disputes regularly prevent dismissal at summary judgment. And even when courts grant qualified immunity motions, additional defendants or claims often remain that continue to expose government officials to the burdens of litigation. My data also suggest that qualified immunity is less essential than has been assumed to serve its intended protective function. The Supreme Court suggests in its opinions that qualified immunity is the only barrier standing between government officials and the burdens of discovery and trial. Instead, my study shows that litigants and courts have a wide range of tools at their disposal to resolve Section 1983 cases.

One also should not conclude based on my findings that qualified immunity is more benign than has been assumed. My findings do show that Section 1983 claims against the police are infrequently dismissed on qualified immunity grounds. But qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith.[27] The fact that few cases are dismissed on qualified immunity grounds does not fundamentally undermine these critiques.

Qualified immunity doctrine is intended by the Court to balance "the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties responsibly."[28] Were qualified immunity reliably insulating government officials from the burdens of litigation in insubstantial cases, one could argue that the doctrine's incoherence, illogic, and overprotection of government officials were unfortunate but necessary to further government interests. Yet available evidence suggests that qualified immunity is not achieving its policy objectives; the doctrine is unnecessary to protect government officials from financial liability and ill suited to shield government officials from discovery and trial in most filed cases. Qualified immunity may, in fact, increase the costs and delays associated with constitutional litigation. Qualified immunity might benefit the government in other ways, and further

26. *See infra* notes 136-138 and accompanying text.

27. For a discussion of these critiques, see *infra* notes 176-185 and accompanying text.

28. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

research is necessary to explore this possibility.[29] But the evidence now available weakens the Court's current justifications for the doctrine's structure and highly restrictive standards. The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions.[30] Given my findings, it is high time for the Supreme Court to reconsider that balance.

The remainder of the Article proceeds as follows. Part I describes the Supreme Court's assumptions about the burdens of discovery and trial for government officials, and the ways in which these assumptions have shaped qualified immunity doctrine. In Part II, I describe the methodology of my study. In Part III, I set forth my findings about the frequency with which law enforcement defendants raise qualified immunity, the frequency with which courts grant qualified immunity, the frequency and outcome of qualified immunity interlocutory and final appeals, and the frequency with which qualified immunity disposes of plaintiffs' cases. In Part IV, I consider the implications of my findings for descriptive accounts of qualified immunity's role in constitutional litigation and expectations about the policy interests served by qualified immunity doctrine. I also suggest adjustments to qualified immunity that would create more consistency between the doctrine and its actual role in constitutional litigation.

I. QUALIFIED IMMUNITY'S EXPECTED ROLE IN CONSTITUTIONAL LITIGATION

The Supreme Court has long viewed qualified immunity as a means of protecting government officials from burdens associated with participating in discovery and trial in insubstantial cases. Indeed, the Supreme Court has justified several major developments in qualified immunity doctrine over the past thirty-five years as means of protecting government officials from these assumed burdens. In this Part, I describe the Court's stated assumptions about the purposes served by qualified immunity, the ways in which those assumptions have shaped qualified immunity doctrine, and the lack of evidence supporting the Court's concerns and interventions.

29. See *infra* notes 161-163 and accompanying text for a description of remaining questions about the way qualified immunity doctrine functions and the extent to which it achieves its intended goals.

30. Anderson v. Creighton, 483 U.S. 635, 642 n.3 (1987).

A. The Court's Concerns About the Burdens of Litigation

The Supreme Court has made clear that its qualified immunity jurisprudence reflects the Court's view about how best to balance "the importance of a damages remedy to protect the rights of citizens" against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[31] Yet the Court's descriptions of the ways in which qualified immunity protects government officials have shifted over time.

The Supreme Court's original rationale for qualified immunity was to shield officials from financial liability. The Court first announced that law enforcement officials were entitled to a qualified immunity from suits in the 1967 case of *Pierson v. Ray*.[32] That decision justified qualified immunity as a means of protecting government defendants from financial burdens when acting in good faith in legally murky areas.[33] Qualified immunity was necessary, according to the Court, because "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does."[34] The scope of the qualified immunity defense is in many ways consistent with an interest in protecting government officials from financial liability. For example, qualified immunity does not attach in claims against municipalities, claims against some private actors, and claims for injunctive or declaratory relief.[35] Indeed, the Court has been clear that municipalities and private prison guards are not entitled to qualified immunity in part because neither type of defendant is threatened by personal financial liability.[36]

---

31. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

32. 386 U.S. 547 (1967).

33. *Id.* at 555; *see also* Wood v. Strickland, 420 U.S. 308, 319 (1975) ("Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.").

34. *Pierson*, 386 U.S. at 555.

35. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009) (observing that qualified immunity is not available in "criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages"); Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that private prison guards are not entitled to qualified immunity); *Wood*, 420 U.S. at 315 n.6 ("[I]mmunity from damages does not ordinarily bar equitable relief as well.").

36. *See Richardson*, 521 U.S. at 411 (finding that private actors' insurance "increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear

The Supreme Court's decision in *Harlow v. Fitzgerald*, fifteen years after *Pierson*, expanded the policy goals animating qualified immunity. The Court explained in *Harlow* that qualified immunity was necessary not only to protect government officials from financial liability, but also to protect against "the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[37]

In subsequent cases, the Court has focused increasingly on the need to protect government officials from burdens associated with discovery and trial, with the expectation that qualified immunity can protect government officials from those burdens. In *Mitchell v. Forsyth*, the Court reaffirmed the *Harlow* Court's conclusion that qualified immunity was necessary to protect against the burdens associated with both trial and pretrial matters, like discovery, because "'[i]nquiries of this kind can be peculiarly disruptive of effective government.'"[38] In *Ashcroft v. Iqbal*, the Court again emphasized the value of qualified immunity in curtailing the time-intensive discovery process. As the Court explained:

> The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and

of unwarranted liability potential applicants face"); Owen v. City of Independence, 445 U.S. 622, 653 (1980) (concluding that municipalities should not be protected by qualified immunity in part because concerns about overdeterrence are "less compelling, if not wholly inapplicable, when the liability of the municipal entity is at stake"). The Court has offered little explanation why the qualified immunity defense is not available in claims for nonmonetary relief.

37. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

38. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting *Harlow*, 457 U.S. at 817).

> resources that might otherwise be directed to the proper execution of the work of the Government.[39]

In recent years, the interest in shielding government officials from the burdens of discovery and trial has taken center stage in the Court's qualified immunity calculations. In 1997, the Supreme Court made clear that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity."[40] Twelve years later, in 2009, the Court described protecting government officials from burdens associated with discovery and trial as the "'driving force' behind [the] creation of the qualified immunity doctrine."[41]

The Court's interest in protecting government officers from burdens associated with discovery and trial extends not only to defendants but to other government officials who may be required to testify, respond to discovery, or otherwise participate in litigation. In *Filarsky v. Delia*, the Court held that a private actor retained by the government to carry out its work was entitled to qualified immunity in part because the "distraction of lawsuits . . . will also often affect any public employees with whom they work by embroiling those employees in litigation."[42]

B. Doctrinal Impact of the Court's Desire To Protect Defendants from Discovery and Trial

Over the past thirty-five years, the Court's interest in protecting government officials from discovery and trial has shaped qualified immunity in several important ways. Granted, some aspects of qualified immunity doctrine are inconsistent with the Court's interest in protecting government officials from discovery and trial. After all, government officials must participate in discovery and trial in claims against municipalities—as witnesses, if not as defendants. In addition, government officials must participate in discovery and trial in claims for declaratory and injunctive relief. Yet, in the years since *Pierson*, the Court's concerns about the burdens of discovery and trial have led the Court to remove the subjective prong of the qualified immunity defense, adjust the process by which lower courts assess qualified immunity motions, and allow interlocutory appeals of qualified immunity denials.

---

39. Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (citation omitted).

40. *Richardson*, 521 U.S. at 411.

41. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

42. 566 U.S. 377, 391 (2012).

1. *Defendants' State of Mind*

The Court's interest in shielding government defendants from discovery and trial underlay its decision to eliminate the subjective prong of the qualified immunity defense. From 1967, when qualified immunity was first announced by the Supreme Court, until 1982, when *Harlow* was decided, a defendant seeking qualified immunity had to show both that his conduct was objectively reasonable and that he had a "good-faith" belief that his conduct was proper.[43] In *Harlow*, the Supreme Court concluded that the subjective prong of the defense was "incompatible" with the goals of qualified immunity because an official's subjective intent often could not be resolved before trial.[44] Moreover, during discovery, gathering evidence of an official's subjective motivation "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."[45] By eliminating the subjective prong of the qualified immunity analysis, the Court believed it could "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[46]

2. *The Order of Battle*

The Court's concerns about burdens associated with litigation also influenced its decisions regarding the manner in which courts should analyze qualified immunity. The Supreme Court believes that lower courts deciding qualified immunity motions are faced with two questions—whether a constitutional right was violated, and whether that right was clearly established. But the Court has wavered in its view regarding the order in which these questions must be answered—what is often referred to as "the order of battle." In 2001, the Supreme Court held in *Saucier v. Katz* that a court engaging in a qualified immunity analysis must first decide whether the defendant violated the plaintiff's constitutional rights and then decide whether the constitutional right was clearly established.[47] The Court insisted on this sequence because it would allow "the law's elaboration from case to case . . . . The law might be deprived of

43. *Harlow*, 457 U.S. at 815-16.

44. *Id.*

45. *Id.* at 817.

46. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting *Harlow*, 457 U.S. at 817-18).

47. 533 U.S. 194, 201 (2001).

this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[48]

Eight years later, in *Pearson v. Callahan*, the Court reversed itself and concluded that *Saucier*'s two-step process was not mandatory.[49] In reaching this conclusion, Justice Alito, writing for the Court, relied heavily on the fact that courts considered the process mandated by *Saucier* to be unduly burdensome.[50] Justice Alito also explained that the process wasted the parties' resources, writing that "*Saucier*'s two-step protocol 'disserve[s] the purpose of qualified immunity' when it 'forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.'"[51] Concerns about the burdens of litigation therefore led the Court to allow lower courts not to decide the first question—whether the conduct was unconstitutional—if they could grant the motion on the ground that the right was not clearly established.

3. *Interlocutory Appeals*

The Court's interest in protecting government officials from the burdens of discovery and trial also motivated its decision to allow interlocutory appeals of qualified immunity denials.[52] Generally speaking, litigants in federal court can only appeal final judgments; interlocutory appeals are not allowed unless a right "cannot be effectively vindicated after the trial has occurred."[53] The question decided by the Court in *Mitchell v. Forsyth* was whether qualified immunity should be understood as an entitlement not to stand trial that cannot be remedied by an appeal at the end of the case. In concluding that a denial of qualified immunity could be appealed immediately, the Court relied on its assertion in *Harlow* that qualified immunity was "an entitlement not to stand trial or face

48. *Id.*

49. 555 U.S. 223 (2009).

50. *Id.* at 236-37.

51. *Id.* at 237 (alteration in original) (quoting Brief of National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 30, *Pearson*, 555 U.S. 223 (No. 07-751)).

52. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985). Note that a defendant can immediately appeal a decision that the law was clearly established, but cannot immediately appeal a denial of qualified immunity made on the grounds that there exists a genuine issue of fact for trial. *See* Johnson v. Jones, 515 U.S. 304, 319-20 (1995).

53. *Mitchell*, 472 U.S. at 525.

the other burdens of litigation."[54] If qualified immunity protected only against the financial burdens of liability, there would be no need for interlocutory appeal; defendants denied qualified immunity could appeal after a final judgment and before the payment of any award to a plaintiff. Instead, the Court concluded, qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."[55] Only an interest in protecting officials from discovery and trial can justify this holding.

C. The Lack of Empirical Support for the Court's Concerns and Interventions

The Supreme Court's qualified immunity decisions over the past thirty-five years have relied on the assumptions that discovery and trial impose substantial burdens on government officials, and that qualified immunity can shield government officials from these burdens. Four years after it decided *Harlow*, the Court asserted that the decision had achieved the Court's goal of facilitating dismissal at summary judgment.[56] In subsequent years, the Court's repeated invocation of the burdens of discovery and trial, and repeated reliance on qualified immunity doctrine to protect defendants from those assumed burdens, suggest the Court's continued faith in these positions. Yet the Court has relied on no empirical evidence to support its views.

Scholars have decried the lack of empirical evidence about the realities of civil rights litigation relevant to questions about the proper scope of qualified immunity doctrine and the extent to which the doctrine achieves its intended purposes. Twenty years ago, Alan Chen complained that the Court and its critics make assertions about the role of qualified immunity in constitutional litigation without evidence to support their claims.[57] Although scholars have em-

---

54. *Id.* at 526.

55. *Id.*

56. *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and *we believe it sufficiently serves this goal*." (emphasis added)). Scholars appear to agree. *See supra* note 6 and accompanying text.

57. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 102 (1997) ("Presently, there is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics. While the Court has consistently hypothesized that significant social costs are engendered by § 1983 and *Bivens* litigation against individual government officials, it has never relied on empirical data concerning the impact of constitutional tort litigation on officials' actual behavior. Similarly, while other commentators also have observed that qualified immunity liti-

pirically examined some questions about qualified immunity—paying particular attention to the impact of *Pearson* on the development of constitutional law—the same is largely true today.[58] As Richard Fallon has observed, "[W]e could make far better judgments of how well qualified immunity serves the function of getting the right balance between deterrence of constitutional violations and chill of conscientious official action if we had better empirical information."[59] This Article, and my research more generally, aims to fill that gap.

II. STUDY METHODOLOGY

To evaluate the role that qualified immunity plays in the litigation of Section 1983 suits, I reviewed the dockets of cases filed from January 1, 2011 to December 31, 2012 in five districts: the Southern District of Texas, Middle District of Florida, Northern District of Ohio, Eastern District of Pennsylvania, and Northern District of California. Several considerations led me to study these five districts.

I chose to look at decisions from district courts in the Third, Fifth, Sixth, Ninth, and Eleventh Circuits because I expected that judges from these circuits might differ in their approach to qualified immunity and to Section 1983 litigation more generally. This expectation was based on my review of district court qualified immunity decisions from each of the circuits, as well as a view, shared by others, that judges in these circuits range from conservative to more liberal.[60] Moreover, commentators believe that courts in these circuits vary in their approach to qualified immunity, with judges in the Third and Ninth Circuits favoring plaintiffs, and judges in the Eleventh Circuit so hostile to Section 1983 cases that they are described as applying "*un*qualified immunity."[61]

---

gation may generate substantial social costs, they have offered no supporting empirical data either." (footnotes omitted)).

58. *See supra* notes 10-12 and *infra* notes 179-180 and accompanying text.

59. Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 500 (2011).

60. *See, e.g.*, Reinert, *supra* note 11, at 832 n.126 (citing Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 312 fig.4 (2007)).

61. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 250 n.151 (2013) (quoting Elizabeth J. Normal & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002)); *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (citation omitted)); Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447-48 (2000) (describing the Eleventh Circuit as having a very restrictive view and

I chose these five districts within these five circuits for two reasons. First, I expected that these five districts would have a large number of cases to review: from 2011 to 2012, these districts were among the busiest in the country, as measured by case filings.[62] Second, these five districts have a range of small, medium, and large law enforcement agencies and agencies of comparable sizes.[63]

I chose to review dockets instead of relying on the most obvious alternative—decisions available on Westlaw.[64] Although Westlaw can quickly sort out decisions in which qualified immunity is addressed by district courts, Westlaw could not capture information essential to my analysis about the frequency with which qualified immunity protects government officials from discovery and trial. First, a Westlaw search could capture no information about the number of cases in which qualified immunity was never raised. In addition, a Westlaw search could not capture information about the number of cases in which qualified immunity was raised by the defendant in his motion but was not addressed by the court in its decision. Even when a defendant raises a qualified immunity defense and the district court addresses qualified immunity in its decision, the decision may not appear on Westlaw—Westlaw does not capture motions resolved without a written opinion, and includes only those opinions that are selected to appear on the service.[65] In other words, opinions on

other circuits, including the Third Circuit, as having a broader view of what constitutes "clearly established" law).

62. *See Judicial Facts and Figures*, ADMIN. OFF. U.S. CTS. tbl.4.2 (Sept. 30, 2012), http://www.uscourts.gov/sites/default/files/statistics_import_dir/Table402_6.pdf [http://perma.cc/697A-JWVH].

63. For example, the Philadelphia and Houston Police Departments are both large, with between 5,000 and 7,000 officers; the Cleveland Police Department, San Francisco Police Department, and Jacksonville Sheriff's Office are midsized, with between 1,600 and 2,000 officers; the Orlando Police Department and Oakland Police Department each have between 750 and 800 officers; and all five districts have smaller agencies. *See* Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies (CSLLEA)*, NAT'L ARCHIVE CRIM. JUST. DATA (2008) [hereinafter *BJS Law Enforcement Census Data*], http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681 [http://perma.cc/MLQ3-W2AH].

64. Most empirical studies examining qualified immunity have relied on decisions available on Westlaw. *See* sources cited *supra* note 10 and *infra* note 180. One notable exception is Alexander Reinert's study of *Bivens* dockets. *See* Reinert, *supra* note 11, at 834.

65. Relying on Westlaw would have significantly reduced the number of qualified immunity opinions in my dataset. There are a total of 365 district court decisions on motions raising qualified immunity in my dataset. *See infra* Table 6. I searched on Westlaw for each of the 365 qualified immunity decisions I found on Bloomberg Law, and 178 (48.8%) of those decisions were available on Westlaw. Nineteen of fifty-six decisions (33.9%) on qualified immunity motions from the Southern District of Texas were available on Westlaw; forty-one of ninety-one (45.1%) decisions on qualified immunity motions from the Middle District of

Westlaw can offer insights about the ways in which district courts assess qualified immunity when they choose to address the issue in a written opinion and the opinion is accessible on Westlaw, but can say little about the frequency with which qualified immunity is raised, the manner in which all motions raising qualified immunity are decided, and the impact of qualified immunity on case dispositions.

I reviewed the dockets of cases filed in 2011 and 2012 in the five districts in my study.[66] I searched case filings in the five districts in my study through Bloomberg Law, an online service that has dockets otherwise available through PACER and additionally provides access to documents submitted to the court—complaints, motions, orders, and other papers.[67] Within Bloomberg Law, I limited my search to those cases that plaintiffs had designated under the broad term "Other Civil Rights," nature-of-suit code 440.[68] This search generated 462 dockets in the Southern District of Texas, 465 dockets in the Northern District of Ohio, 674 dockets in the Middle District of Florida, 712 dockets in

Florida were available on Westlaw; thirty-seven of sixty-one (60.7%) decisions on qualified immunity motions from the Northern District of Ohio; forty-six of seventy-six (60.5%) decisions on qualified immunity motions from the Northern District of California; and thirty-five of eighty-one (43.2%) decisions on qualified immunity motions from the Eastern District of Pennsylvania. *Cf.* David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (finding that only 3% of all district court orders appear on Westlaw).

66. I chose this two-year period because it is a recent period in which most (if not all) cases have been resolved by the time of this Article's publication.

67. *See* E-mail from Tania Wilson, Bloomberg BNA Law Sch. Relationship Manager, W. Coast, to Kelly Leong, Reference Librarian, UCLA Sch. of Law (July 8, 2016, 12:18 PM) (on file with author) ("[Bloomberg Law] ha[s] everything on PACER. We are also able to obtain docket sheets and documents via courier retrieval (which would fill in the gap of some cases not available electronically).").

68. Every complainant in federal court must choose from various "Nature of Suit" codes on the "Civil Cover Sheet," also known as Form JS 44. *See* Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 452 & n.71 (2006). Code 440 designates "Other Civil Rights" actions, excluding specific categories related to voting, employment, housing, disabilities, and education. The official description for Code 440 offers, as an example, an "[a]ction alleging excessive force by police incident to an arrest." *Civil Nature of Suit Code Descriptions*, U.S. CTS. (Aug. 2016), http://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf [http://perma.cc/F8A2-7H7T]. It is possible that some plaintiffs in Section 1983 cases against state and local law enforcement did not choose Code 440. Code 550, for example, is titled "Prisoner Petitions–Civil Rights," but its proper use is limited to suits "alleging a civil rights violation by corrections officials." *Id.* Bloomberg Law separately allows users to filter using the "Cause of Action" field on the Civil Cover Sheet. But that field does not impose a limited set of options on complainants, and I found that many Section 1983 cases were not correctly designated. Accordingly, I used the nature-of-suit search.

the Northern District of California, and 1,435 dockets in the Eastern District of Pennsylvania. I reviewed the complaints associated with these 3,748 dockets and included in my dataset those cases, brought by civilians, alleging constitutional violations by state and local law enforcement agencies and their employees.[69]

I limited my study to cases brought by civilians against law enforcement defendants for several reasons. First, many of the Supreme Court's qualified immunity decisions have involved cases brought against law enforcement. Of the twenty-nine qualified immunity cases that the Supreme Court has decided since 1982, almost half have involved constitutional claims against state and local law enforcement.[70] Because the Court has developed qualified immunity doctrine (and articulated its underlying purposes) primarily in cases involving law enforcement, it makes sense to examine whether the doctrine is meeting its express goals in these types of cases.

Limiting my study to Section 1983 cases against state and local law enforcement also creates some substantive consistency across the cases in my dataset. Most Section 1983 cases against state and local law enforcement allege Fourth Amendment violations—excessive force, false arrest, and wrongful searches—and, less frequently, First and Fourteenth Amendment violations. Restricting my study to suits by civilians against state and local law enforcement facilitates direct comparison of outcomes in similar cases across the five districts in my study. Finally, much of my own prior research has focused on lawsuits against state and local law enforcement, and maintaining this focus here allows for future synthesis of my findings.[71]

---

69. I limited my study to state and local law enforcement agencies identified in the Bureau of Justice Statistics' *Census of State and Local Law Enforcement Agencies*. *See BJS Law Enforcement Census Data*, *supra* note 63. I excluded decisions involving other types of government officials, including some government officials that perform law enforcement functions, like law enforcement employed by school districts, state correctional officers, and federal law enforcement. I have additionally excluded Section 1983 actions brought by law enforcement officials as plaintiffs. Finally, I removed duplicate filings, cases that were consolidated, and cases that were improperly brought against law enforcement agencies located outside of the five districts.

70. *See* Baude, *supra* note 3, at 45. In the remaining fifteen cases, two alleged constitutional violations by state corrections officials, nine alleged constitutional violations by federal law enforcement, and four asserted constitutional claims against government officials not involved in the criminal justice system. *See id.*

71. *See, e.g.*, Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144 (2016); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023 (2010); Schwartz, *supra* note 16; Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841 (2012) [hereinafter Schwartz, *What Police Learn*].

The resulting dataset includes a total of 1,183 cases from these five districts: 131 cases from the Southern District of Texas, 225 cases from the Middle District of Florida, 172 cases from the Northern District of Ohio, 248 cases from the Northern District of California, and 407 cases from the Eastern District of Pennsylvania. For each of these dockets, I tracked multiple pieces of information relevant to this study, including whether the plaintiff(s) sued individual officers and/or the municipality, the relief sought by the plaintiff(s), whether the law enforcement defendant(s) filed one or more motions to dismiss on the pleadings or for summary judgment, whether and when the defendant(s) raised qualified immunity, how the court decided the motions raised by the defendant(s), whether there was an interlocutory or final appeal of a qualified immunity decision, and how the case was ultimately resolved.[72] Although some of this information was available from the docket sheet, I obtained much of the information by reading motions and opinions linked to the dockets on Bloomberg Law.

Although some of my coding decisions were straightforward, others involved less obvious choices. Because my coding decisions may make most sense when reviewed in context, I have described those decisions in detail in the footnotes accompanying the data.[73] Throughout, my coding decisions were guided by my focus on the role that qualified immunity played in the resolution of cases and the frequency with which the doctrine meets its goal of shielding government officials from discovery and trial.

My dataset is comprehensive in the five chosen districts. It includes most—if not all—Section 1983 cases filed by civilians against state and local law enforcement in these federal districts over a two-year period, and it offers insights about how frequently qualified immunity is raised in these cases, how courts decide these motions, and how the cases are resolved. There are, however, several limitations of the data. First, although I selected these five districts in part to capture regional variation, they may not represent the full range of court and litigant behavior nationwide. The marked differences in my data across districts do, however, suggest a considerable degree of regional variation. Second, the data offer no information about the role of qualified immunity in state

72. I tracked additional information as well, including whether the plaintiff was represented, the attorneys involved in the cases, and the law enforcement agencies implicated in the cases. These data are relevant to subsequent related projects I intend to undertake and are not reported in this Article.

73. For descriptions of my coding decisions, see, for example, *infra* notes 82, 87, 88, 91, 93, 98.

court litigation. This is in part because Bloomberg Law does not offer much information about the litigation of constitutional cases in state courts.[74]

Third, although this study sheds light on the litigation of constitutional claims against state and local law enforcement officers, it does not necessarily describe the role qualified immunity plays in the litigation of constitutional claims against other types of government employees. It may be that the types of constitutional claims often raised in cases against law enforcement—Fourth Amendment claims alleging excessive force, unlawful arrests, and improper searches—are particularly difficult to resolve on qualified immunity grounds in advance of trial. Fourth Amendment claims may be comparatively easy to plead in a plausible manner (and so could survive a motion to dismiss), and such claims may be particularly prone to factual disputes (making resolution at summary judgment difficult). If so, perhaps qualified immunity motions in cases raising other types of claims would be more successful. On the other hand, John Jeffries has argued that it may be particularly difficult to clearly establish that a use of force violates the Fourth Amendment because Fourth Amendment analysis requires a fact-specific inquiry about the nature of the force used and the threat posed by the person against whom force was used, viewed from the perspective of an officer on the scene.[75] Further research should explore whether qualified immunity plays a different role in cases brought against other government actors, or cases alleging different types of constitutional violations.

Fourth, qualified immunity may be influencing the litigation of constitutional claims in ways that cannot be measured through the examination of case

---

74. I looked at state court dockets available on Bloomberg Law for counties in the Northern District of California and found that very few had any information about motions filed (in the instances that they were not removed to federal court). In addition, federal constitutional cases filed in state court are at least sometimes removed to federal court. In the Northern District of California, fifty-five of the 248 cases filed during the study period—22.2%—were initially filed in state court and removed to federal court. In the Northern District of Ohio, fifty-nine of the cases were removed from state court, which constitutes 34.3% of the 172 cases filed in federal district court over those two years. In the Southern District of Texas, twenty-seven cases were removed from state court, amounting to 20.6% of the 131 total filings in federal district court. In the Eastern District of Pennsylvania, sixty-three of the cases were removed from state court, which constitutes 15.5% of the 407 cases filed in federal court over these two years. In the Middle District of Florida, sixty of the cases were removed from state court, which constitutes 26.7% of the 225 cases filed in federal court over these two years. Of course, these figures do not capture how many cases were filed in state court but were not removed.

75. *See* Jeffries, *supra* note 6, at 859-61.

dockets.[76] For example, my study does not measure how frequently qualified immunity causes people not to file lawsuits. It also does not capture information about the frequency with which plaintiffs' decisions to settle or withdraw their claims are influenced by the threat of a qualified immunity motion or decision. Exploration of these issues is critical to a complete understanding of the role qualified immunity plays in constitutional litigation. I discuss these issues in more depth in Part IV, and future research should explore these questions.[77] Yet this Article illuminates several important aspects of qualified immunity's role in Section 1983 cases. Moreover, by measuring the frequency with which qualified immunity motions are raised, granted, and dispositive, this Article reveals the extent to which the doctrine functions as the Supreme Court expects and critics fear.

III. FINDINGS

The Supreme Court has explained that a goal of qualified immunity is to "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[78] Logically, qualified immunity will only achieve this goal in a case if four conditions are met.

First, the case must be brought against an individual officer and must seek monetary damages. Qualified immunity is not available for claims against municipalities or claims for noneconomic relief. Second, the defendant must raise the qualified immunity defense early enough in the litigation that it can protect him from discovery or trial. If the defendant seeks to protect himself from discovery, he must raise qualified immunity in a motion to dismiss or a motion for judgment on the pleadings; if a defendant seeks to protect himself from trial, he can raise qualified immunity at the pleadings or at summary judgment.[79]

---

76. For further discussion of these remaining questions about the role of qualified immunity in constitutional litigation, see *infra* text accompanying notes 118-122.

77. *See infra* notes 162-163 and accompanying text.

78. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)).

79. In some instances, motions for summary judgment may be made before the parties have engaged in full-fledged discovery, either because the parties will attach documentary evidence to their Rule 12 motion and the court will convert the motion to one for summary judgment, or because the parties will engage in partial discovery sufficient only to address the qualified immunity question. For further discussion of the frequency with which defendants in my

Third, for a qualified immunity motion to protect government officials against burdens associated with discovery or trial, the court must grant the motion on qualified immunity grounds.[80] Finally, the grant of qualified immunity must completely resolve the case. If qualified immunity is granted for an officer on one claim but not another, that officer will continue to have to participate in the litigation of the case. Even when a grant of qualified immunity results in the dismissal of all claims against a defendant, that defendant may still have to participate in the litigation of claims against other defendants. To be sure, the government official who has been dismissed from the case may no longer feel the same psychological burdens associated with the litigation and may have lesser discovery burdens than he would have had as a defendant. But the grant of qualified immunity will not necessarily shield him from the burdens of participating in discovery and trial.

This Part describes my findings regarding the frequency with which each of these conditions is met. I empirically examine six topics: (1) the number of cases in which qualified immunity can be raised by defendants; (2) the number of cases in which defendants choose to raise qualified immunity; (3) the stage(s) of litigation at which defendants raise qualified immunity; (4) the ways in which district courts decide qualified immunity motions; (5) the frequency and outcome of qualified immunity appeals; and (6) the frequency with which qualified immunity is the reason that a case ends before discovery or trial.

My findings regarding these six topics show that, at least in filed cases, qualified immunity rarely functions as expected. Qualified immunity could not be raised in more than 17% of the cases in my dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed sua sponte by the court before the defendants had an opportunity to answer or otherwise respond. Defendants raised qualified immunity in 37.6% of the cases in my dataset in which the defense could be raised. Defendants were particularly disinclined to raise qualified immunity in motions to dismiss: they did so in only 13.9% of the cases in which they could raise the defense at that stage. Courts granted (in whole or part) less than 18% of the motions that raised a qualified immunity defense. Qualified immunity was the reason for dismissal in just 3.9% of the cases in my dataset in which the defense

dataset moved for summary judgment without discovery, see *infra* note 86 and accompanying text.

80. It is possible that a court could deny a qualified immunity motion in part or whole, but the motion could nevertheless influence the courts' other rulings regarding discovery or other pretrial matters. I have not endeavored to measure these possible secondary effects of denied qualified immunity motions.

could be raised, and just 3.2% of all cases in my dataset. The remainder of this Part describes each of these findings in more detail.

A. Cases in Which Qualified Immunity Cannot Play a Role

There are certain types of cases in which qualified immunity cannot play a role. The Supreme Court has held that qualified immunity does not apply to claims against municipalities and claims for injunctive or declaratory relief.[81] Accordingly, qualified immunity cannot protect government officials from discovery or trial in cases asserting only these types of claims. In my docket dataset of 1,183 cases, ninety-nine cases (8.4%) were brought solely against municipalities and/or sought only injunctive or declaratory relief.[82]

TABLE 1.
FREQUENCY WITH WHICH QUALIFIED IMMUNITY CAN BE RAISED, IN FIVE DISTRICTS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Section 1983 cases against municipalities/seeking solely injunctive or declaratory relief	14	26	13	22	24	**99 (8.4%)**
Cases brought against individual defendants, seeking damages, but dismissed by court before defendants respond	11	44	20	7	23	**105 (8.9%)**
Section 1983 cases in which QI can be raised by defendants	106	155	139	219	360	**979 (82.8%)**
Total Section 1983 cases filed	**131**	**225**	**172**	**248**	**407**	**1,183**

81. *See supra* notes 35-36 and accompanying text.

82. In some of these instances, plaintiffs apparently intended to sue individual officers (indicated by the fact that they named Doe defendants) but were ultimately unable to identify the officers. When Doe defendants are identified in the complaint and subsequently named, I count these as cases against individual defendants; when Doe defendants are named but their true identities are never identified, I count these as cases only against the municipality, as the Doe defendants could not raise a qualified immunity defense unless they were identified. In other instances, plaintiffs might have intentionally named only the municipality.

Even when cases are brought against individual officers and seek monetary relief, there are some cases in which defendants have no need to raise qualified immunity as a defense—cases dismissed sua sponte by the court before the defendants respond to the complaint. In these cases, qualified immunity is unnecessary to protect defendants from discovery and trial. In the five districts in my docket dataset, 105 (8.9%) complaints naming individual law enforcement officers and seeking damages were dismissed sua sponte by district courts before defendants answered or responded. Most often, district courts dismissed these cases pursuant to their statutory power to review pro se plaintiffs' complaints and dismiss actions they conclude are frivolous or meritless.[83] Other cases were dismissed by the court at this preliminary stage because the plaintiffs never served the defendants or failed to prosecute the case, or because the court remanded the case to state court for lack of subject matter jurisdiction before the defendants were served or responded.

Qualified immunity can only protect government officials from discovery and trial in cases in which government defendants can raise the defense. Defendants could not raise qualified immunity in 8.4% of cases in my docket dataset because those cases did not name individual defendants and/or seek damages. Qualified immunity was unnecessary to shield government officials from discovery or trial in another 8.9% of cases in my dataset because these cases were dismissed by the district courts before defendants could raise the defense. Accordingly, defendants could raise a qualified immunity defense in a total of 979 (82.8%) of the 1,183 complaints filed in the five districts during my two-year study period.

B. Defendants' Choices: The Frequency and Timing of Qualified Immunity Motions

Qualified immunity can only protect a defendant from the burdens of discovery and trial if she raises the defense in a dispositive motion. Accordingly, this Section examines the frequency with which defendants raise qualified immunity and the stage of litigation at which they raise the defense.[84]

---

83. *See* 28 U.S.C. § 1915(e)(2) (2012). A total of seventy-one cases were dismissed on these grounds. Note that district courts could exercise this power based on a belief that the defendants were entitled to qualified immunity. However, none of these § 1915(e) dismissals referenced or appeared to rely on qualified immunity as a basis for the decision.

84. Because qualified immunity is an affirmative defense, government defendants may also raise qualified immunity in their answers. *See* FED. R. CIV. P. 8(c)(1). I did not track the frequency with which government defendants raised qualified immunity in their answers because my focus is on the frequency with which qualified immunity leads to case dismissal, but I found

TABLE 2.
FREQUENCY WITH WHICH QUALIFIED IMMUNITY IS RAISED

District	Total cases in which QI could be raised	Total cases raising QI
S.D. TX	106	58 (54.7%)
M.D. FL	155	84 (54.2%)
N.D. OH	139	66 (47.5%)
N.D. CA	219	74 (33.8%)
E.D. PA	360	86 (23.9%)
Total	**979**	**368 (37.6%)**

Defendants raised qualified immunity one or more times in 368 (37.6%) of the 979 cases in which defendants could raise the defense. The frequency with which defendants raised qualified immunity varied substantially by district. Defendants in the Southern District of Texas and the Middle District of Florida were most likely to raise the qualified immunity defense; in these districts, defendants brought one or more motions raising qualified immunity in approximately 54% of the cases in which the defense could be raised. Defendants in the Eastern District of Pennsylvania were least likely to raise the qualified immunity defense; defendants brought one or more motions raising qualified immunity in approximately 24% of cases in which the defense could be raised. Defendants in the Northern District of California brought qualified immunity motions in 33.8% of possible cases, and in the Northern District of Ohio defendants raised qualified immunity in 47.5% of possible cases.

I also explored the stage(s) of litigation at which qualified immunity was raised. Of the 368 cases in which qualified immunity was raised at least once, defendants in ninety-five (25.8%) cases raised qualified immunity only in a motion to dismiss or motion for judgment on the pleadings, defendants in 229 (62.2%) cases raised qualified immunity only in a motion for summary judgment, and defendants in forty-one (11.1%) cases raised qualified immunity at both the motion to dismiss and summary judgment stages. Based on my review of motions and opinions available on Bloomberg Law, I can confirm only three cases in which defendants included qualified immunity in a motion at or after trial for judgment as a matter of law. My data almost certainly underrepresent the role qualified immunity plays at or after trial, however, as Bloomberg

no instances in which a defense raised in an answer led to dismissal without a separate motion raising the defense.

Law does not include oral motions or court decisions issued without a written opinion.[85]

TABLE 3.
TIMING OF QUALIFIED IMMUNITY MOTIONS

District	QI raised only at MTD/ pleadings	QI raised only at SJ	QI raised only at/after trial	QI raised at both MTD & SJ	QI raised at both SJ & at/ after trial	Total
S.D. TX	15 (25.9%)	37 (63.8%)	0	6 (10.3%)	0	**58**
M.D. FL	33 (39.3%)	32 (38.1%)	0	18 (21.4%)	1 (1.2%)	**84**
N.D. OH	14 (21.2%)	49 (74.2%)	0	3 (4.5%)	0	**66**
N.D. CA	11 (14.9%)	56 (75.7%)	0	6 (8.1%)	1 (1.4%)	**74**
E.D. PA	22 (25.6%)	55 (64.0%)	1 (1.2%)	8 (9.3%)	0	**86**
Total	**95 (25.8%)**	**229 (62.2%)**	**1 (0.3%)**	**41 (11.1%)**	**2 (0.5%)**	**368**

Across the five districts in my study, defendants raised qualified immunity at summary judgment approximately twice as often as they did at the motion to dismiss stage. In cases where defendants brought one or more qualified immunity motions, defendants in 73.9% of the cases raised qualified immunity at summary judgment, whereas defendants in 37.0% of the cases raised qualified immunity in a motion to dismiss. There is, however, regional variation in this

85. Even more difficult to decipher is the role qualified immunity might play in jury deliberations. Although qualified immunity is a question of law, juries may be called upon to resolve factual disputes relevant to qualified immunity and have been allowed to decide qualified immunity in some instances. *See, e.g.*, Mesa v. Prejean, 543 F.3d 264, 269 (5th Cir. 2008) ("The issue of qualified immunity is a question of law, but in certain circumstances where 'there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.'" (citation omitted)); Hale v. Kart, 396 F.3d 721, 728 (6th Cir. 2005) ("[A] court can submit to the jury the factual dispute with an appropriate instruction to find probable cause and qualified immunity if the factual inquiry is answered one way and to find probable cause and qualified immunity lacking if the inquiry is answered in another way."). This study does not attempt to measure the frequency with which qualified immunity is invoked in jury instructions, or the frequency with which juries' decisions are influenced by such instructions.

regard. Defendants in the Middle District of Florida were equally likely to raise qualified immunity at the pleadings stage and at summary judgment, whereas in the Northern District of Ohio and the Northern District of California defendants were more than three times more likely to raise qualified immunity at summary judgment than they were to raise the defense in a motion to dismiss.

Defendants in the Middle District of Florida were also more likely to raise qualified immunity at more than one stage of litigation—they raised qualified immunity at multiple stages of litigation in nineteen (22.6%) of the cases in which they raised the defense. Defendants in the other districts less frequently raised qualified immunity at multiple stages of litigation; they did so in six (10.3%) of the cases in which the defense was raised in the Southern District of Texas, in seven (9.5%) of the cases in which the defense was raised in the Northern District of California, in eight (9.3%) of the cases in which the defense was raised in the Eastern District of Pennsylvania, and in three (4.5%) of the cases in which the defense was raised in the Northern District of Ohio.

I additionally sought to calculate how frequently defendants chose to raise qualified immunity motions in all the cases in which such motions could be brought. This calculation is relatively straightforward regarding motions to dismiss. Defendants could have brought motions to dismiss on qualified immunity grounds in any of the 979 cases in which the defense could be raised and did so in 136 (13.9%) of these cases.

Calculating the number of possible summary judgment motions on qualified immunity grounds is more complicated. Although defendants could bring a summary judgment motion in any case in which they could offer some evidence in support, defendants generally do not move for summary judgment without first engaging in at least some formal discovery.[86] It is difficult to discern from case dockets to what extent parties have engaged in discovery, but the dockets do reflect whether a case management order has been issued, which generally sets the discovery schedule and is the first step of the discovery process. If entry of a case management order can serve as an indication that a case

86. I located five cases in my dataset—two from the Southern District of Texas and one each from the Northern District of California, Eastern District of Pennsylvania, and Middle District of Florida—in which defendants appear to have moved for summary judgment without first conducting discovery. *See* Egan v. Cty. of Del Norte, No. 1:12-cv-05300 (N.D. Cal. Oct. 11, 2012); Goodarzi v. Hartzog, No. 4:12-cv-02870 (S.D. Tex. Sept. 25, 2012); Rollerson v. City of Freeport, No. 4:12-cv-01790 (S.D. Tex. June 14, 2012); Kline v. City of Philadelphia, No. 2:11-cv-04334 (E.D. Pa. July 6, 2011); Hill v. Lee Cty. Sheriff's Office, No. 2:11-cv-00242 (M.D. Fla. Apr. 27, 2011). In two of these cases, *Rollerson* and *Hill*, the defendants brought a motion to dismiss and simultaneously moved for summary judgment in the alternative; the courts in both cases granted defendants' motions to dismiss without addressing the summary judgment motions.

has entered discovery, and if one accepts that defendants in cases that have conducted some discovery could move for summary judgment, then there are 577 cases in my dataset in which defendants could have moved for summary judgment. Defendants brought summary judgment motions on qualified immunity grounds in 272 (47.1%) of these cases.

I also calculated the total number of qualified immunity motions brought by defendants. Defendants sometimes raised qualified immunity in multiple motions to dismiss or summary judgment motions that were resolved by the court in separate opinions: if, for example, defendants moved to dismiss on qualified immunity grounds, the court granted the motion with leave to amend, and the plaintiff filed an amended complaint, the defendants might again move to dismiss on qualified immunity grounds.[87] Defendants filed a total of 440 qualified immunity motions in the 368 cases in which they raised the defense. Table 4 reflects the stage of litigation at which these 440 motions were brought and, again, reflects that defendants file significantly more qualified immunity motions at summary judgment than at the motion to dismiss stage. Of the 440 qualified immunity motions filed, 154 (35.0%) were filed in a motion to dismiss or motion for judgment on the pleadings, and 283 (64.3%) were filed at summary judgment.

87. There were a handful of instances in which different defendants contemporaneously filed separate motions to dismiss or summary judgment motions raising qualified immunity. If the motions were filed at approximately the same time and were resolved by a single district court opinion, I coded them as a single motion because I believe it more accurately reflects the time needed by the parties and the court to resolve each qualified immunity issue as it arose.

TABLE 4.
TOTAL QUALIFIED IMMUNITY MOTIONS FILED, BY STAGE OF LITIGATION

District	Total MTDs/pleadings raising QI	Total SJ motions raising QI	Total QI motions at/after trial	Total QI motions
S.D. TX	23 (33.3%)	46 (66.7%)	0	**69**
M.D. FL	59 (53.2%)	51 (45.9%)	1 (0.9%)	**111**
N.D. OH	17 (23.9%)	54 (76.1%)	0	**71**
N.D. CA	23 (25.3%)	67 (73.6%)	1 (1.1%)	**91**
E.D. PA	32 (32.7%)	65 (66.3%)	1 (1.0%)	**98**
Total	**154 (35.0%)**	**283 (64.3%)**	**3 (0.7%)**	**440**

TABLE 5.
NUMBER OF QUALIFIED IMMUNITY MOTIONS PER CASE

District	Number of motions in which QI was raised						Total cases in which QI could be raised
	Zero	One	Two	Three	Four	Five	
S.D. TX	48 (45.3%)	48 (45.3%)	9 (8.5%)	1 (0.9%)	0	0	**106**
M.D. FL	71 (45.8%)	63 (40.6%)	17 (11.0%)	4 (2.6%)	0	0	**155**
N.D. OH	73 (52.5%)	61 (43.9%)	5 (3.6%)	0	0	0	**139**
N.D. CA	145 (66.2%)	61 (27.9%)	11 (5.0%)	1 (0.5%)	0	1 (0.5%)	**219**
E.D. PA	273 (75.8%)	76 (21.1%)	11 (3.1%)	0	0	0	**360**
Total	**610 (62.3%)**	**309 (31.6%)**	**53 (5.4%)**	**6 (0.6%)**	**0**	**1 (0.1%)**	**979**

Table 5 reflects the distribution of these 440 motions among the 368 cases in which the defense was raised. Table 5 shows that when defendants raise qualified immunity they usually do so in only one motion, but that defendants in the Southern District of Texas and Middle District of Florida are more likely

than defendants in the other three districts to file multiple motions raising qualified immunity.

Finally, I explored how frequently defendants raise other types of defenses in motions to dismiss or for judgment on the pleadings and in summary judgment motions. Qualified immunity is usually one of several arguments defendants make in their motions to dismiss and for summary judgment. Indeed, defendants sometimes move to dismiss or for summary judgment without raising qualified immunity at all.

Of the 979 cases in my docket dataset in which defendants could raise qualified immunity, defendants filed a total of 462 motions to dismiss, and 154 (33.3%) included a qualified immunity argument.[88] Defendants in the Middle District of Florida were the most likely to raise qualified immunity in motions to dismiss or for judgment on the pleadings—defendants included a qualified immunity argument in 45.4% of their motions, compared with 39.0% of the motions filed by defendants in the Southern District of Texas, 32.1% of the motions filed by defendants in the Northern District of Ohio, 26.2% of the motions filed by defendants in the Eastern District of Pennsylvania, and 23.5% of the motions filed by defendants in the Northern District of California. Motions to dismiss or for judgment on the pleadings that did not raise qualified immunity argued instead that the complaint did not satisfy plausibility pleading requirements, concerned a claim that was barred by a criminal conviction, or otherwise did not state a legally cognizable claim.[89]

88. *See infra* Figure 1. I have included in my count of motions to dismiss and for summary judgment instances in which the municipality moved to dismiss but the individual defendant(s) did not. One could take issue with this choice, as municipalities are not protected by qualified immunity. Yet I included these motions in my calculation because they reflect opportunities in which the law enforcement defendants moved to dismiss but failed to raise qualified immunity in the motion.

89. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (setting out the plausibility pleading standard); Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) (holding that a plaintiff seeking damages for an unconstitutional conviction or sentence must have that conviction or sentence declared invalid before a Section 1983 claim can proceed).

FIGURE 1.
MOTIONS TO DISMISS/FOR JUDGMENT ON THE PLEADINGS

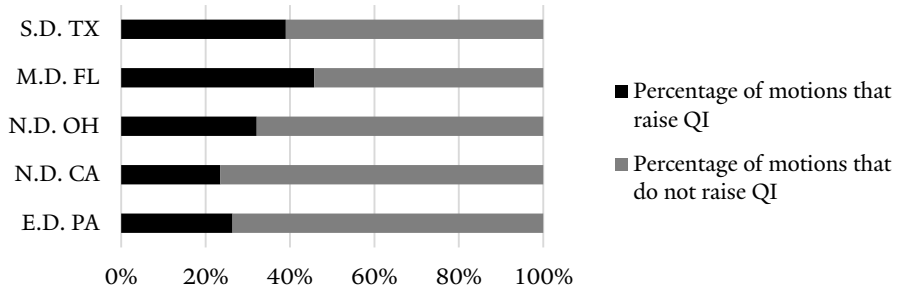
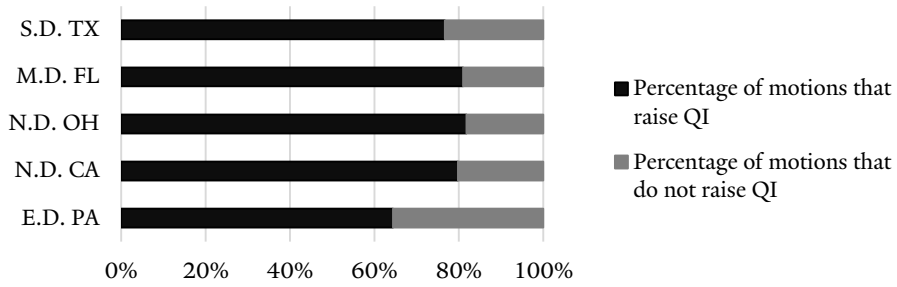


FIGURE 2.
SUMMARY JUDGMENT MOTIONS



Defendants in all five districts were far more likely to include a qualified immunity argument in their summary judgment motions. Defendants filed 374 motions for summary judgment, and 283 (75.7%) of those motions included an argument based on qualified immunity. There was some variation among the districts in this area as well, although the regional variation was less pronounced here than in other aspects of qualified immunity litigation practice.[90]

90. Qualified immunity was raised in 64.4% of summary judgment motions filed in the Eastern District of Pennsylvania, 76.7% of summary judgment motions filed in the Southern District of Texas, 79.8% of summary judgment motions filed in the Northern District of California, 81.0% of summary judgment motions filed in the Middle District of Florida, and 81.8% of summary judgment motions filed in the Northern District of Ohio.

C. District Courts' Decisions: The Success Rate of Qualified Immunity Motions

This Section examines how frequently district courts grant motions to dismiss and for summary judgment on qualified immunity grounds. As I have shown, qualified immunity is almost always raised in conjunction with other arguments in motions to dismiss or for summary judgment. My focus here is on the way the district court evaluates the qualified immunity argument.

TABLE 6.
SUCCESS OF MOTIONS RAISING QUALIFIED IMMUNITY

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
QI denied	15 (21.7%)	33 (29.7%)	27 (38.0%)	30 (33.0%)	34 (34.7%)	**139 (31.6%)**
QI granted in part	7 (10.1%)	7 (6.3%)	6 (8.5%)	5 (5.5%)	1 (1.0%)	**26 (5.9%)**
QI granted in full	16 (23.2%)	18 (16.2%)	3 (4.2%)	11 (12.1%)	5 (5.1%)	**53 (12.0%)**
QI in the alternative/fails 1st step	5 (7.2%)	12 (10.8%)	11 (15.5%)	9 (9.9%)	13 (13.3%)	**50 (11.4%)**
Grant (not on QI)	7 (10.1%)	13 (11.7%)	12 (16.9%)	13 (14.3%)	17 (17.3%)	**62 (14.1%)**
Grant (reasoning unclear)	2 (2.9%)	2 (1.8%)	0	0	5 (5.1%)	**9 (2.0%)**
GiP (not on QI or QI in alt.)	4 (5.8%)	6 (5.4%)	2 (2.8%)	8 (8.8%)	6 (6.1%)	**26 (5.9%)**
Not decided	13 (18.8%)	20 (18.0%)	10 (14.1%)	15 (16.5%)	17 (17.3%)	**75 (17.0%)**
Total motions	**69**	**111**	**71**	**91**	**98**	**440**

In the five districts in my docket dataset, defendants raised qualified immunity in a total of 440 motions. Table 6 reflects the way in which district courts resolved those motions.[91] Across the five districts in my study, qualified

91. I have coded decisions in a way that focuses on the role of qualified immunity in the decision. If a defendant's motion raises multiple arguments and qualified immunity is granted but all other bases for the motion are denied, I coded that decision as granted on qualified immunity grounds. Conversely, if a defendant's motion raises multiple arguments and qualified immunity is denied and all other bases for the motion are granted, I coded that decision as denied on qualified immunity. Included in the "QI granted in part" row are decisions in which one or more defendants who have moved to dismiss on qualified immunity grounds

immunity motions were denied 31.6% of the time.[92] Qualified immunity motions in these five districts were granted in part—on some claims or defendants but not others—5.9% of the time and granted in full on qualified immunity grounds 12.0% of the time. In another 11.4% of the decisions, courts concluded that the plaintiff had not met her burden of establishing a constitutional violation and either declined to reach the second step of the qualified immunity analysis (whether a reasonable officer would have believed that the law was clearly established) or granted qualified immunity in the alternative.[93] Courts in 14.1% of the decisions granted defendants' motions on other grounds without addressing qualified immunity, and in another 2.0% of the decisions the courts offered little or no rationale. Courts in 5.9% of the decisions granted the motion in part without mentioning qualified immunity, or on qualified immunity in the alternative. And district courts in my study did not decide 17.0% of the motions raising qualified immunity, usually because the cases settled or were voluntarily dismissed while the motions were pending.

There was substantial variation in courts' decisions across the districts in my study. The Southern District of Texas had the lowest rate of qualified immunity denials (21.7%). In the remaining four districts, judges denied 30-38% of defendants' qualified immunity motions. The Southern District of Texas also had the highest rate of qualified immunity grants: courts in the Southern District of Texas granted 33.3% of defendants' qualified immunity motions in part or full on qualified immunity grounds. In contrast, courts in the Eastern District of Pennsylvania granted only 6.1% of the qualified immunity motions in whole or part on qualified immunity grounds.[94]

---

were awarded qualified immunity but qualified immunity was denied for some defendants or claims.

92. This finding is consistent with findings in other qualified immunity studies described *supra* note 10, even though there are significant differences in our datasets and the manner in which we coded decisions.

93. If a court did not specify which step of the qualified immunity analysis was dispositive, or concluded that the law was not clearly established without resolving whether a constitutional violation occurred, I coded these decisions as grants or partial grants on qualified immunity grounds. These decisions are reflected in rows two and three of Tables 6-8.

94. The differences in the frequency with which motions are granted or granted in part on qualified immunity grounds (rows two and three in Table 6) across the five districts are statistically significant ($\chi^2 = 23.32$, $p<.001$). But the differences in the frequency with which qualified immunity is denied (row one in Table 6) across the five districts are not statistically significant ($\chi^2 = 5.15$, $p=.27$). The differences in the frequency with which motions are granted in the alternative or granted in part on grounds other than qualified immunity (rows four, five, six, and seven in Table 6) across the five districts are also not statistically significant ($\chi^2 = 5.58$, $p=.23$).

TABLE 7.
RULINGS ON MOTIONS TO DISMISS/ON THE PLEADINGS THAT RAISED QUALIFIED IMMUNITY

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
QI denied	6 (26.1%)	17 (28.8%)	4 (23.5%)	7 (30.4%)	12 (37.5%)	**46 (29.9%)**
QI granted in part	2 (8.7%)	2 (3.4%)	1 (5.9%)	2 (8.7%)	0	**7 (4.5%)**
QI granted	4 (17.4%)	5 (8.5%)	0	2 (8.7%)	3 (9.4%)	**14 (9.1%)**
QI in the alternative/fails 1st step	1 (4.3%)	3 (5.1%)	4 (23.5%)	0	2 (6.3%)	**10 (6.5%)**
Grant (not on QI)	3 (13.0%)	11 (18.6%)	2 (11.8%)	6 (26.1%)	4 (12.5%)	**26 (16.9%)**
Grant (reasoning unclear)	0	2 (3.4%)	0	0	4 (12.5%)	**6 (3.9%)**
GiP (not on QI or QI in alt.)	2 (8.7%)	6 (10.2%)	2 (11.8%)	3 (13.0%)	3 (9.4%)	**16 (10.4%)**
Not decided	5 (21.7%)	13 (22.0%)	4 (23.5%)	3 (13.0%)	4 (12.5%)	**29 (18.8%)**
Total motions	**23**	**59**	**17**	**23**	**32**	**154**

TABLE 8.
RULINGS ON SUMMARY JUDGMENT MOTIONS THAT RAISED QUALIFIED IMMUNITY

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
QI denied	9 (19.6%)	15 (29.4%)	23 (42.6%)	23 (34.3%)	21 (32.3%)	**91 (32.2%)**
QI granted in part	5 (10.9%)	5 (9.8%)	5 (9.3%)	3 (4.5%)	1 (1.5%)	**19 (6.7%)**
QI granted	12 (26.1%)	13 (25.5%)	3 (5.6%)	9 (13.4%)	2 (3.1%)	**39 (13.8%)**
QI in the alternative/fails 1st step	4 (8.7%)	9 (17.6%)	7 (13.0%)	8 (11.9%)	11 (16.9%)	**39 (13.8%)**
Grant (not on QI)	4 (8.7%)	2 (3.9%)	10 (18.5%)	7 (10.4%)	13 (20.0%)	**36 (12.7%)**
Grant (reasoning unclear)	2 (4.3%)	0	0	0	1 (1.5%)	**3 (1.1%)**
GiP (not on QI or QI in alt.)	2 (4.3%)	0	0	5 (7.5%)	3 (4.6%)	**10 (3.5%)**
Not decided	8 (17.4%)	7 (13.7%)	6 (11.1%)	12 (17.9%)	13 (20.0%)	**46 (16.3%)**
Total motions	**46**	**51**	**54**	**67**	**65**	**283**

I additionally evaluated differences in courts' decisions at the motion to dismiss and summary judgment stages.[95] Of the 154 motions to dismiss and motions for judgment on the pleadings raising qualified immunity, courts granted seventy-nine (51.3%) of the motions in whole or part. Twenty-one (26.6%) of those seventy-nine full or partial grants were decided on qualified immunity grounds. Of the 283 summary judgment motions raising qualified immunity, courts granted 146 (51.6%) in whole or part. Fifty-eight (39.7%) of those 146 full or partial grants were decided on qualified immunity grounds. In other words, although courts were equally likely to grant summary judgment motions and motions to dismiss, courts were more likely to grant summary judgment motions on qualified immunity grounds than they were to grant motions to dismiss on qualified immunity grounds. But courts more often than not granted both types of motions on grounds other than qualified immunity.

95. *See supra* Tables 7 & 8. Because the three qualified immunity motions raised at or after trial are not included in these tables, there are a total of 437 motions included in these two tables—three fewer than the 440 motions included in Table 6.

D. Circuit Courts' Decisions: The Frequency and Success of Qualified Immunity Appeals

A complete examination of the role qualified immunity plays in constitutional litigation must examine the frequency and outcome of qualified immunity appeals. Defendants can appeal denials of qualified immunity immediately, and any qualified immunity decision can be appealed after a final judgment in the case.[96]

TABLE 9.
INTERLOCUTORY APPEALS OF QUALIFIED IMMUNITY DENIALS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Affirmed	3	3	7	2	0	**15 (36.6%)**
Reversed	0	3	1	0	1	**5 (12.2%)**
Reversed in part	0	0	2	1	0	**3 (7.3%)**
Dismissed for lack of jurisdiction	0	0	1	0	0	**1 (2.4%)**
Withdrawn	2	3	6	5	0	**16 (39.0%)**
Pending	0	0	0	1	0	**1 (2.4%)**
Total interlocutory appeals	**5**	**9**	**17**	**9**	**1**	**41**

Defendants immediately appealed 41 of the 189 qualified immunity decisions in my docket dataset that were denied or granted in part and thus could have been appealed at this stage of the litigation—an interlocutory appeal rate of 21.7%. Across the five districts in my dataset, more than one-third of the lower courts' decisions were affirmed on interlocutory appeal, 12.2% were reversed in whole, 7.3% were reversed in part, and 39.0% were withdrawn by the parties without a decision by the court of appeals.

96. *See supra* Section I.B.3.

TABLE 10.
FINAL APPEALS OF QUALIFIED IMMUNITY GRANTS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Affirmed	7	5	3	1	1	**17 (65.4%)**
Reversed	0	0	1	1	0	**2 (7.7%)**
Affirmed in part	0	0	0	0	0	**0**
Withdrawn/ dismissed without decision	3	4	0	0	0	**7 (26.9%)**
Pending	0	0	0	0	0	**0**
Total appeals by plaintiff(s)	**10**	**9**	**4**	**2**	**1**	**26**

I also tracked the frequency with which plaintiffs appealed qualified immunity grants after a final judgment in the case.[97] Plaintiffs appealed twenty-six (32.9%) of the seventy-nine decisions granting defendants' motions on qualified immunity grounds in whole or part.[98] Lower court decisions granting qualified immunity were affirmed 65.4% of the time and reversed 7.7% of the time. Almost 27% of the appeals were withdrawn without a decision.

E. The Impact of Qualified Immunity on Case Dispositions

A final question concerns the frequency with which a grant of qualified immunity results in the dismissal of Section 1983 cases. There are multiple ways to frame this inquiry. First, there is the question of which cases should be counted in the numerator—cases dismissed on qualified immunity grounds. I have included qualified immunity grants in this category unless the court ended its qualified immunity analysis after concluding that the plaintiff could not establish a constitutional violation, or granted the motion on qualified immunity in the alternative. Although the question of whether a constitutional violation occurred is the first step of the qualified immunity analysis, the court

97. There was one case in the docket dataset in which a defendant appealed a qualified immunity decision at the end of the case. The jury verdict in the case was affirmed with no mention of qualified immunity. *See* Ayers v. City of Cleveland, 773 F.3d 161 (6th Cir. 2014).

98. I have not tracked appeals of motions granted on qualified immunity in the alternative, granted in whole or in part on other grounds, or granted based on unclear reasoning.

would also need to resolve this question in the absence of qualified immunity. And although a court's decision to grant qualified immunity in the alternative may influence its dispositive holding in some manner, the qualified immunity decision was not necessary to resolve the case.[99]

In addition, I have counted a case as dismissed on qualified immunity grounds only if the entire case has been dismissed as a result of the motion. One might assume that a grant of qualified immunity will always end a case. Yet there are multiple scenarios in which a case can continue after a grant of qualified immunity. At the pleadings stage, a court may grant a motion to dismiss on qualified immunity but also grant the plaintiff an opportunity to amend her complaint.[100] Not all defendants in a case will necessarily move to dismiss on qualified immunity grounds,[101] or a defendant may seek qualified immunity regarding some but not all claims against him.[102] State law claims may also remain for which qualified immunity is not available, and these claims may proceed in federal court or be remanded to and pursued in state court.[103]

---

99. If I included these cases in my count, the total number of cases dismissed on qualified immunity grounds would increase from thirty-eight to seventy-one: a total of fifteen cases in the Southern District of Texas, twenty-three cases in the Middle District of Florida, twelve cases in the Northern District of Ohio, eight cases in the Northern District of California, and thirteen cases in the Eastern District of Pennsylvania. This amounts to 7.3% of all cases in which qualified immunity could be raised, and 6.0% of all the cases in my dataset.

100. *See, e.g.*, Daleo v. Polk Cty. Sheriff, No. 8:11-cv-2521 (M.D. Fla. Nov. 7, 2011).

101. *See, e.g.*, Tarantino v. Canfield, No. 5:12-cv-0434 (M.D. Fla. Aug. 3, 2012); Roberts v. Knight, No. 4:12-cv-1174 (S.D. Tex. Apr. 18, 2012); Brivik v. Law, No. 8:11-cv-2101 (M.D. Fla. Sept. 15, 2011); Terrell v. City of La Marque, No. 3:11-cv-0229 (S.D. Tex. May 16, 2011).

102. *See, e.g.*, Jones v. City of Lake City, No. 3:11-cv-1210 (M.D. Fla. Dec. 6, 2011); Snowden v. City of Philadelphia, No. 2:11-cv-5041 (E.D. Pa. Aug. 5, 2011); Castillo v. City of Corpus Christi, No. 2:11-cv-0093 (S.D. Tex. Apr. 5, 2011); Kelley v. Papanos, No. 4:11-cv-0626 (S.D. Tex. Feb. 22, 2011).

103. *See, e.g.*, McKay v. City of Hayward, No. 3:12-cv-1613 (N.D. Cal. Mar. 30, 2012); Stephenson v. McClelland, No. 4:11-cv-2243 (S.D. Tex. June 15, 2011). There are eight cases in my dataset—six in the Middle District of Florida, one in the Northern District of Ohio, and one in the Eastern District of Pennsylvania—in which the federal claims were dismissed on qualified immunity grounds and the state law claims were remanded to state court. I have sought information about whether plaintiffs continued to litigate these claims in state court by contacting the plaintiffs' attorneys in these cases. Attorneys in two cases confirmed that they pursued the state claims in state court, and both cases resulted in settlements in state court. *See* E-mail from Nicholas Noel, attorney for plaintiffs in *O'Neill v. Kerrigan*, No. 5:11-cv-3437 (E.D. Pa. June 5, 2011), to author (Mar. 2, 2017, 12:18 PM) (on file with author) (confirming that the case was refiled in state court and settled after the federal claims were dismissed on qualified immunity grounds); E-mail from Jerry Theophilopoulos, attorney for plaintiffs in *Merricks v. Adkisson*, No. 8:12-cv-1805 (M.D. Fla. Aug. 10, 2012), to author (Mar. 13, 2017, 6:50 AM) (on file with author) (confirming that plaintiff refiled the case in state court after the federal claims were dismissed on qualified immunity grounds, and that the case settled

In addition, municipalities cannot assert qualified immunity; accordingly, if there is a municipality named in the case at the time qualified immunity is granted, the case will continue.[104] Under each of these circumstances, government officials still face the possibility that they will be required to participate in discovery and trial as defendants, representatives of the defendants' agency, and/or witnesses to the events in question.[105]

TABLE 11.
IMPACT OF QUALIFIED IMMUNITY, BY STAGE OF LITIGATION

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Motions raising QI on the pleadings	23	59	17	23	32	**154**
Total QI grants on the pleadings	4	5	0	2	3	**14**
Case dismissals on QI at the pleadings	3	3	0	0	1	**7**
Motions raising QI at summary judgment	46	51	54	67	65	**283**
Total QI grants at SJ	12	13	3	9	2	**39**
Case dismissals on QI at SJ	9	10	3	3	2	**27**
Total QI appeals by Ds	5	9	17	9	1	**41**
Total reversals	0	3	1	0	1	**5**
Case dismissals from appeal	0	2	1	0	1	**4**

at mediation for $30,000). Attorneys in two cases confirmed that the cases were not refiled in state court. *See* E-mail from Cynthia Conlin, attorney for plaintiffs in *Olin v. Orange Cty. Sheriff*, No. 6:12-cv-1455 (M.D. Fla. Sept. 25, 2012), to author (Mar. 2, 2017, 10:31 AM) (on file with author) (reporting that plaintiff did not pursue state law claims in state court after federal claims were dismissed on qualified immunity grounds); E-mail from W. Cort Frohlich, attorney for plaintiffs in *Spann v. Verdoni*, No. 8:11-cv-0707 (M.D. Fla. Apr. 4, 2011), to author (Mar. 2, 2017, 10:15 AM) (on file with author) (reporting that the state claims were not refiled in state court after summary judgment was granted on the federal claims). I sought but did not receive information about the other four cases.

104. *See, e.g.*, *McKay*, No. 3:12-cv-1613; Porter v. City of Santa Rosa, No. 3:11-cv-4886 (N.D. Cal. Oct. 3, 2011); *Terrell*, No. 3:11-cv-0229.

105. *See supra* note 42 and accompanying text (describing the Court's concerns about burdens on government officials who are not named defendants).

As Table 11 shows, there are fifty-three motions in my dataset that district courts granted in full on qualified immunity grounds—fourteen at the pleadings stage and thirty-nine at summary judgment. Of those fifty-three motions, thirty-four (64.2%) were dispositive, meaning that the cases were dismissed as a result of the qualified immunity decision. Half of qualified immunity grants at the pleadings stage led to case dismissals, and 69.2% of qualified immunity grants at summary judgment led to case dismissals. Defendants brought forty-one interlocutory appeals of qualified immunity denials, and courts of appeals reversed five (12.2%) of those decisions. All five reversals were of summary judgment decisions, and four of the five resulted in case dismissals. In total, qualified immunity led to dismissal of thirty-eight cases in my dataset.

The next question, when thinking about the impact of qualified immunity on case disposition, is how to frame the denominator—the universe of cases against which to measure the cases dismissed on qualified immunity grounds. It is my view that the broadest definition of the denominator—all 1,183 Section 1983 cases filed against law enforcement—offers the most accurate picture of the role qualified immunity plays in Section 1983 litigation. Yet, as I will show, there are at least three ways to frame the denominator, and each answers a different question about the extent to which qualified immunity achieves its intended goals.

One way to think about the impact of qualified immunity is to consider the frequency with which a defendant's motion to dismiss or for judgment on the pleadings, for summary judgment, or for judgment as a matter of law on qualified immunity grounds actually leads to the dismissal of a case—whether because the motion is granted or because the motion is denied by the district court but reversed on appeal. Presumably, a defendant will only bring a qualified immunity motion when two conditions are met: he has a non-frivolous basis for the motion, and he believes that the costs of bringing the motion are justified by the likelihood of success or some other benefit associated with the motion. Accordingly, this framework assesses the frequency with which qualified immunity results in the dismissal of cases in which both these things are true.

Defendants brought 440 qualified immunity motions in a total of 368 cases in the five districts in my study: defendants raised qualified immunity in 154 motions to dismiss and raised qualified immunity in 283 summary judgment motions. Courts granted 9.1% of the motions to dismiss on qualified immunity grounds, and 4.5% of the motions resulted in case dismissals. Courts granted 13.8% of the summary judgment motions on qualified immunity grounds, and 9.5% of the motions resulted in case dismissals. Defendants brought forty-one interlocutory appeals of qualified immunity denials, courts of appeals reversed

five (12.2%) of those decisions, and four of the five were dismissed as a result. In total, thirty-eight (8.6%) of the 440 qualified immunity motions raised by defendants in my dataset resulted in case dismissals, and 10.3% of the 368 cases in which qualified immunity was raised were dismissed on qualified immunity grounds.

Another way to assess the impact of qualified immunity on case outcomes is to examine what percentage of the 979 cases in my dataset in which qualified immunity could be raised were in fact dismissed on qualified immunity grounds. One objection to this framing might be that it includes cases that defendants declined to challenge on qualified immunity grounds. But qualified immunity motions would not necessarily have failed in these cases; rather, defendants in these cases concluded that the costs of raising the defense were not justified by the likelihood of success or other benefits of bringing the motions. Moreover, this broader framework illustrates the frequency with which qualified immunity doctrine serves its intended and expected role of shielding government officials from burdens associated with discovery and trial. Evaluated in this manner, qualified immunity is less frequently successful. Qualified immunity was the basis for dismissal in 3.9% of the 979 cases in which the defense could be raised: just seven (0.7%) of cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and thirty-one (3.2%) of cases were dismissed on qualified immunity grounds at summary judgment—either by the district court or on appeal.

Indeed, to evaluate fully the role that qualified immunity plays in the resolution of constitutional claims against law enforcement, the most appropriate denominator is the complete universe of 1,183 cases in my dataset. This approach includes cases that could not be resolved on qualified immunity grounds—because the cases were either brought only against municipalities or sought only equitable relief. But to the extent that the Court views qualified immunity doctrine as a shield for all government officials—not only defendants—from burdens associated with discovery and trial, a thorough assessment of qualified immunity's role should take account of all the cases in which government officials must participate. Qualified immunity was the basis for dismissal in 3.2% of the 1,183 cases in my dataset: 0.6% of cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and 2.6% of cases were dismissed on qualified immunity grounds at summary judgment—either by the district court or on appeal.[106]

106. These findings are consistent with another study that used dockets to track case outcomes in *Bivens* actions. *See* Reinert, *supra* note 11, at 843 (finding qualified immunity to be "the basis for a dismissal in only 5 out of the 244 complaints studied").

My data show that qualified immunity is rarely the formal reason that Section 1983 cases are dismissed. How, then, are Section 1983 suits against law enforcement resolved? Table 12 reports case outcomes for the 1,183 cases in the five districts in my study.

TABLE 12.
CASE DISPOSITIONS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Settlement/R.68 Judgment	41	59	69	103	218	**490**
Voluntary/stipulated dismissal	30	37	34	45	36	**182**
Sua sponte dismissal before defendant responds	11	50	27	11	27	**126**
Dismissed as sanction	1	1	0	0	3	**5**
Dismissed for failure to prosecute	1	7	7	24	3	**42**
Remanded to state court	0	8	0	3	5	**16**
Motion to dismiss granted (not based on QI)	11	21	12	16	26	**86**
Summary judgment granted (not based on QI)	17	13	16	21	33	**100**
Directed verdict for D (not based on QI)	0	0	0	1	2	**3**
MTD granted based on QI	**3**	**3**	**0**	**0**	**1**	**7 (0.6%)**
SJ granted based on QI	**9**	**10**	**3**	**3**	**2**	**27 (2.3%)**
QI granted at or after trial	**0**	**0**	**0**	**0**	**0**	**0**
QI granted on appeal	**0**	**2**	**1**	**0**	**1**	**4 (0.3%)**
Case open, stayed, or on appeal	0	0	2	5	5	**12**
Trial – plaintiff verdict	0	0	1	2	4	**7**
Trial – defense verdict	7	11	0	12	37	**67**
Split verdict	0	1	0	0	2	**3**
Other	0	2	0	2	2	**6**
Total cases	**131**	**225**	**172**	**248**	**407**	**1,183**

If one adopts the standard definition of plaintiff "success" to include jury verdicts, settlements, and voluntary or stipulated dismissals, the plaintiffs in my dataset succeeded in 682 (57.7%) cases.[107] This success rate is similar to the results of Theodore Eisenberg and Stewart Schwab's studies of non-prisoner Section 1983 cases.[108] The remaining 42.3% of cases resolved in various ways: 256 (21.6%) were dismissed on motions to dismiss or for judgment on the pleadings, at summary judgment, or at or after trial on grounds other than qualified immunity; 173 (14.6%) were dismissed sua sponte before defendants answered, dismissed as a sanction, or dismissed for failure to prosecute; and thirty-seven (3.1%) were dismissed for other reasons or remain open. Thirty-eight (3.2%) were dismissed on qualified immunity grounds.

My data do not capture how frequently qualified immunity influences plaintiffs' decisions to settle, or how frequently cases are decided on qualified immunity grounds even though other defenses are available. Instead, my data reflect the frequency with which a grant of qualified immunity formally ends a case. There is, once again, marked regional variation in the frequency with which qualified immunity leads to the dismissal of Section 1983 actions.[109] But despite this regional variation, grants of qualified immunity motions infrequently end Section 1983 suits before discovery, and are infrequently the reason suits are dismissed before trial.

IV. IMPLICATIONS

My findings undermine prevailing assumptions about the role qualified immunity plays in the litigation of Section 1983 claims. Accordingly, in this Part I consider the implications of my findings for ongoing discussions about the proper scope of qualified immunity in relation to its underlying purposes. First, I revisit empirical claims implicit in the Supreme Court's qualified im-

---

107. *See id.* at 812-13 n.13 (describing the common definition of plaintiff "success" in similar studies). Even those who adopt this standard definition recognize that it is likely over-inclusive—at least some of these cases are settled or withdrawn on terms unfavorable to the plaintiff. *See id.* Note that I am including the three split verdicts in my count of plaintiff successes.

108. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 730 (1988) (finding that "[n]onprisoner constitutional tort cases succeed[ed] about half the time" in their study of filings in three districts); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 682 (1987) (finding that "[t]he success rate for counseled cases (which eliminates nearly all prisoner cases) is about one-half" in their study of the Central District of California).

109. *See supra* Table 12; *see also infra* text accompanying note 115 (describing this variation).

munity decisions in light of my findings. Next, I consider why qualified immunity disposes of so few cases before trial. Armed with this more realistic appraisal of qualified immunity's role, I argue that the Court has struck the wrong balance between fairness and accountability for law enforcement officers. Finally, I suggest that qualified immunity doctrine should be adjusted to comport with available evidence about the role the doctrine plays in constitutional litigation.

A. *Toward a More Accurate Description of Qualified Immunity's Role in Constitutional Litigation*

The Court's qualified immunity decisions paint a clear picture of the ways in which the Court believes the doctrine should operate: it should be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible), it should be strong (protecting all but the plainly incompetent or those who knowingly violate the law), and it should, therefore, protect defendants from the time and distractions associated with discovery and trial in insubstantial cases. Commentators similarly believe that qualified immunity is often raised by defendants, usually granted by courts, and causes many cases to be dismissed.[110]

My study shows that, at least in filed cases, qualified immunity rarely functions as expected. Defendants could not or did not need to raise qualified immunity in 17.3% of the 1,183 cases in my docket dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed sua sponte by the court before the defendants had an opportunity to answer. Defendants raised qualified immunity in motions to dismiss and motions for judgment on the pleadings in only 13.9% of the cases in which the defense could be raised.[111] Courts granted those motions on qualified immunity grounds 9.1% of the time, but those grants were not always dispositive because additional claims or defendants remained, or because plaintiffs were given the opportunity to amend. As a result, just seven of the 1,183 cases in my docket dataset were dismissed at the motion to dismiss stage on qualified immunity grounds.

Qualified immunity more often prevented cases from proceeding past summary judgment. Defendants were more likely to include qualified immuni-

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

111. There was a total of 979 cases in which qualified immunity could be raised, and defendants raised motions to dismiss or for judgment on the pleadings on qualified immunity grounds in 136 of those cases. *See supra* Tables 2 & 3.

ty in motions for summary judgment than in motions to dismiss, and courts were more likely to grant summary judgment motions than motions to dismiss on qualified immunity grounds.[112] Moreover, courts of appeals reversed five denials of summary judgment motions on interlocutory appeal and granted qualified immunity in these cases. Yet qualified immunity motions at the summary judgment stage rarely shield government officials from discovery because most summary judgment motions require at least some depositions or document exchange.[113] And grants of qualified immunity at summary judgment relatively rarely achieved their goal of protecting government officials from trial—such decisions by the district courts or courts of appeals disposed of plaintiffs' cases just thirty-one times across the five districts in my study, amounting to just 2.6% of the 1,183 cases in my dataset.

Qualified immunity is likely raised more often at or after trial than my data suggest. But even if many more qualified immunity motions are made during or after trial, and even if qualified immunity regularly convinces judges and juries to enter defense verdicts, qualified immunity would still fail to serve its expected role. Qualified immunity doctrine is intended to shield government officials from burdens associated with litigation and trial. A grant of qualified immunity entered during or after trial has come too late to shield government officials from these assumed burdens.

My data demonstrate considerable regional differences in the litigation and adjudication of qualified immunity across the country. Scholars have observed that the federal circuits interpret qualified immunity standards differently.[114]

---

112. *See supra* Table 4 (showing that 64.3% of qualified immunity motions were made at summary judgment); *supra* Table 8 (showing that 13.8% of qualified immunity motions made at summary judgment were granted).

113. *See supra* note 79 and accompanying text.

114. Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) ("One has to look hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves." (footnotes omitted)); Jeffries, *supra* note 6, at 852 ("[D]etermining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court."); Jeffries, *supra* note 61, at 250 n.151 ("There is considerable variation among the circuits. The Ninth Circuit often construes qualified immunity to favor plaintiffs and is often reversed for that reason. The Eleventh Circuit leans so far in the other direction that it has been called the land of '*un*qualified immunity.'" (citations omitted)); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 40-41 (2015) (finding circuit variation in the frequency with which the Fifth, Sixth, and Ninth Circuits courts exercise their discretion under *Pearson* to decide whether a constitutional violation occurred); Wilson, *supra* note 61, at 447-48 (describing variation in the ways circuit courts analyze whether the law is clearly established).

My findings suggest that regional differences in qualified immunity doctrine affect the decisions of courts and litigants. Defendants in the Southern District of Texas and the Middle District of Florida were more likely to raise qualified immunity than defendants in the Eastern District of Pennsylvania and the Northern District of California; courts in the Southern District of Texas and the Middle District of Florida were more likely to grant defendants' qualified immunity motions than were judges in the Eastern District of Pennsylvania and the Northern District of California; and grants of qualified immunity ended more cases in the Southern District of Texas and the Middle District of Florida than in the Eastern District of Pennsylvania and the Northern District of California. But even in the Southern District of Texas—the district in my dataset most likely to dismiss cases on qualified immunity grounds—just 2.3% of all suits were dismissed on qualified immunity grounds at the motion to dismiss stage, and 6.9% of all suits were dismissed at summary judgment on qualified immunity grounds.[115] Unless the vast majority of law enforcement officer defendants in the Southern District of Texas are "plainly incompetent" or have "knowingly violate[d] the law,"[116] qualified immunity is not playing its expected role even in the district in my dataset most sympathetic to the defense.

Although qualified immunity is rarely the reason that Section 1983 cases end, there are other ways in which qualified immunity doctrine might influence the litigation of constitutional claims against law enforcement. For example, qualified immunity may discourage people from ever filing suit. Available evidence suggests that just 1% of people who believe they have been harmed by the police file lawsuits against law enforcement.[117] We do not know how frequently qualified immunity doctrine plays a role in the decision not to sue. But available evidence suggests that qualified immunity often factors into plaintiffs' attorneys' decisions about whether to accept potential clients. When Alexander Reinert interviewed plaintiffs' attorneys about qualified immunity in *Bivens* cases, attorneys reported that "the qualified immunity defense play[s] a substantial role at the screening stage."[118] Attorneys described being discouraged from accepting civil rights cases both because qualified immunity motions can be difficult to defeat and because the costs and delays associated with litigating qualified immunity can make the cases too burdensome to pursue.[119] But at-

115. *See supra* Table 12.

116. Malley v. Briggs, 475 U.S. 335, 341 (1986).

117. *See* Schwartz, *What Police Learn*, *supra* note 71, at 863.

118. Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011).

119. *Id.* at 492-94.

torneys also described qualified immunity as one of many factors they considered when deciding whether to accept a case, and we do not know how attorneys weigh these different considerations.[120]

Even when cases are filed, qualified immunity may influence litigation decisions in ways that are not easily observable through docket review. For example, it may be that a pending qualified immunity motion will cause a plaintiff to settle her claims. Consistent with this theory, seventy-five (17.0%) of the qualified immunity motions in my dataset were never decided, presumably because the parties settled while the motions were pending.[121] Of the sixty-seven qualified immunity interlocutory and final appeals in my dataset, twenty-three (34.3%) were withdrawn or dismissed without decision, which suggests that many of those cases settled while on appeal.[122] When the Supreme Court has described the ways in which it expects qualified immunity to shield government officials from discovery and trial, it has never suggested that the doctrine might serve this function by discouraging people from filing lawsuits or pursuing their claims. But these are certainly ways in which qualified immunity could achieve this goal.

A complete understanding of the frequency with which qualified immunity protects government officials from discovery and trial would measure these other potential litigation effects. For the time being, available evidence suggests that qualified immunity may make it more difficult for plaintiffs to secure representation and may encourage plaintiffs to settle, but it is infrequently the formal reason that cases end.

B. Why Qualified Immunity Disposes of So Few Cases

The Supreme Court designed qualified immunity to protect "all but the plainly incompetent or those who knowingly violate the law."[123] Why, then, does it lead to the dismissal of so few cases? One possibility is that qualified immunity doctrine discourages people from filing cases that are unlikely to meet qualified immunity's exacting standard.[124] But even if qualified immunity

---

120. *Id.*

121. *See supra* Table 6.

122. *See supra* Tables 9 & 10.

123. Malley v. Briggs, 475 U.S. 335, 341 (1986).

124. *See supra* notes 118-122 and accompanying text. For further discussion of selection effects, see Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1965 (2009); and George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

has this selection effect, plaintiffs would continue to file cases in which qualified immunity motions *might* be successful. Consistent with this theory, defendants raised qualified immunity in more than one-third of the Section 1983 cases in which the defense could be asserted, and courts granted 51.4% of motions raising qualified immunity in full or part.[125] Yet most of these motions to dismiss and summary judgment motions raised multiple arguments, and courts only granted 17.9% of these motions in part or whole on qualified immunity grounds. Ultimately, qualified immunity resulted in the dismissal of only 3.9% of the cases in which the defense could be raised. Although the threat of qualified immunity may cause some people not to sue, this selection effect does not explain why qualified immunity plays such a limited role in the resolution of motions raising qualified immunity and in the disposition of cases that are filed.

The Supreme Court's decisions suggest another theory that could partially explain why qualified immunity disposes of few cases: because courts improperly deny defendants' qualified immunity motions. For this reason, and because of the "importance of qualified immunity 'to society as a whole,'" the Supreme Court has taken the unusual step of "often correct[ing] lower courts when they wrongly subject individual officers to liability."[126] Yet qualified immunity grant rates are lower than expected even in the circuits generally believed to be the most amenable to qualified immunity: 33.3% of motions raising qualified immunity were granted in whole or part on qualified immunity grounds in the Southern District of Texas, and 22.5% of motions raising qualified immunity were granted in whole or part on qualified immunity grounds in the Middle District of Florida.[127] Moreover, only 9.2% of cases from the Southern District of Texas and 6.7% of cases from the Middle District of Florida were actually dismissed on qualified immunity grounds. Unless one believes that the Southern District of Texas and the Middle District of Florida, as well as the Fifth and Eleventh Circuits, are regularly flouting the letter and spirit of the Supreme Court's qualified immunity doctrine, error in the lower courts is an unconvincing—or at least incomplete—explanation for these findings.

My data suggest two additional explanations for why qualified immunity disposes of so few cases: the doctrine is not well suited to dismiss many claims before trial, and qualified immunity is often unnecessary to serve its intended role.

---

125. *See supra* Table 6.

126. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

127. *See supra* Table 6.

1. *Qualified Immunity Is Ill Suited To Dispose of Cases*

Qualified immunity motions are infrequently dispositive in part because the doctrine is ill suited to dispose of many cases before trial. Although qualified immunity doctrine creates a seemingly insurmountable barrier for plaintiffs, the standards for review at the motion to dismiss and summary judgment stages may prevent courts from granting defendants' motions. At the motion to dismiss stage, a defendant's qualified immunity motion should be denied so long as the plaintiff has plausibly alleged a violation of a clearly established right. As one district judge from the Middle District of Tennessee observed,

> The rationale for the existence of qualified immunity is to avoid imposing needless discovery costs upon government officials, so determining whether the immunity applies must be made at an early stage in the litigation. At the same time, the determination of qualified immunity is usually dependent on the facts of the case, and, at the pleadings stage of the litigation, there is scant factual record available to the court. Since plaintiffs are not required to anticipate a qualified immunity defense in their pleadings, and since at this stage of the litigation the exact contours of the right at issue—and thus the degree to which it is clearly established—are unclear, the Sixth Circuit advises that qualified immunity should usually be determined pursuant to a summary judgment motion rather than a motion to dismiss.[128]

This is a common refrain in circuit courts across the country[129] and decisions in my dataset.[130]

---

128. Turner v. Weikal, No. 3:12-cv-0915, 2013 WL 3272481, at *3 (M.D. Tenn. June 27, 2013) (internal quotation marks and citations omitted).

129. *See, e.g.*, Wesley v. Campbell, 779 F.3d 421, 433-34 (6th Cir. 2015); Owens v. Balt. City State's Attorneys' Office, 767 F.3d 379, 396 (4th Cir. 2014); Newland v. Reehorst, 328 F. App'x 788, 791 n.3 (3d Cir. 2009); Field Day, LLC v. Cty. of Suffolk, 463 F.3d 167, 191-92 (2d Cir. 2006); St. George v. Pinellas Cty., 285 F.3d 1334, 1337 (11th Cir. 2002); Alvarado v. Litscher, 267 F.3d 648, 651-52 (7th Cir. 2001); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976).

130. *See, e.g.*, Order Denying Motion to Dismiss at 2-3, Dudley v. Borough of Upland, No. 2:12-cv-5651 (E.D. Pa. July 19, 2013), ECF No. 33 ("Without discovery, I cannot determine whether the Officers acted reasonably. For instance, it is unclear what the Officers knew about the warrant when they arrested Plaintiff and whether the warrant bore an expiration date. Viewing the factual allegations in the light most favorable to Plaintiff, it may have been objectively unreasonable that the Officers failed to look into the validity of a 2 ½-year-old warrant. Accordingly, I cannot yet determine whether the Officers are entitled to qualified immunity." (citation omitted)); Report and Recommendation at 15, Coldwater v. City of Clute, No. 3:12-cv-0028 (S.D. Tex. Aug. 30, 2012), ECF No. 41 ("Accepting the allegations in

District courts also find that factual disputes prevent resolution on qualified immunity grounds at summary judgment. Alan Chen has argued that the Supreme Court's qualified immunity decisions "have embedded a central paradox into the doctrine": although the Court repeatedly writes that "qualified immunity claims can and should be resolved at the earliest stages of litigation," it ignores the fact that these determinations "inherently entail nuanced, fact-sensitive, case-by-case determinations involving the application of general legal principles to a particular context."[131] My data offer anecdotal evidence to support Chen's observation. In the five districts in my study, courts repeatedly found that factual disputes prevented summary judgment on qualified immunity grounds.[132] In these decisions, courts duly recited the benefits of resolving

her Amended Complaint as true, the Court cannot conclude, at least at this juncture in the litigation, that the conduct of these Defendants was objectively reasonable in the light of then clearly established law."); Pippin v. Kirkland, No. 8:12-cv-0776, 2012 WL 12903175, at *2 (M.D. Fla. July 3, 2012) ("[A]ccepting all factual allegations in the Complaint as true, it is not possible to determine whether Defendant Kirkland is entitled to qualified immunity."); Mantell v. Health Prof'ls Ltd., 5:11-cv-1034, 2012 WL 28469, at *4 (N.D. Ohio Jan. 5, 2012) ("[T]he Court takes no stance on whether discovery will ultimately support these allegations against any of the moving defendants and the issues may appropriately be revisited during summary judgment practice in this matter. However, for the purposes of a motion to dismiss, the complaint properly pleads deliberate indifference and precludes a finding of qualified immunity *at this time*."); Nishi v. Cty. of Marin, No. 4:11-cv-0438, 2011 WL 1807043, at *2 (N.D. Cal. May 11, 2011) ("[R]esolution of the qualified immunity defense frequently raises issues of fact that are more appropriately determined at a later stage. While such a defense may thus very well prove viable at a future stage of these proceedings, it does not present an adequate basis for dismissal here.").

131. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006); *see also* Jeffries, *supra* note 61, at 252-53.

132. *See, e.g.*, Martin v. City of Reading, 118 F. Supp. 3d 751, 765-67 (E.D. Pa. 2015) ("[A]s the Court of Appeals for the Third Circuit recently observed in a case involving a claim of excessive force that arose out of the use of a Taser, 'if there are facts material to the determination of reasonableness in dispute, then that issue of fact should be decided by the jury.' . . . Thus, affording Defendant Errington qualified immunity at this time is inappropriate in light of the genuine dispute between the parties of the facts bearing on his entitlement to immunity." (quoting Geist v. Ammary, 617 F. App'x 182, 185 (3d Cir. 2015))); Hayes v. City of Tampa, No. 8:12-cv-2038, 2014 WL 4954695, at *8 (M.D. Fla. Oct. 1, 2014) ("[C]onstruing the record as a whole in favor of Hayes, whether Hayes's 'stance, demeanor and facial expression' justified Miller's use of a taser is a genuine issue of material fact."); McKissic v. Miller, 37 F. Supp. 3d 907, 918 (N.D. Ohio 2014) ("[W]hen the facts as alleged by the Plaintiff and supported by some evidentiary materials, are taken to be true, there remains a question of fact as to whether Officer Miller's actions constituted excessive force in violation of the Fourth Amendment of the U.S. Constitution."); Bui v. City of San Francisco, 61 F. Supp. 3d 877, 902 (N.D. Cal. 2014) ("[B]ased on the evidence presented by both sides . . . the court cannot decide as a matter of law whether it would have been 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' In these circumstances, the

qualified immunity at the earliest possible stage and qualified immunity's intended role as protection from discovery and trial. Yet the same courts found that factual disputes made summary judgment inappropriate.

The Supreme Court's recent decision in *White v. Pauly* provides additional anecdotal evidence of this underappreciated phenomenon. In *White v. Pauly,* the Supreme Court held that it would be appropriate to grant summary judgment on qualified immunity grounds to an officer who shot and killed a suspect without first identifying himself and ordering the suspect to drop his gun, because "[n]o settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the defendant] confronted here."[133] The decision has been described as evidence that the Supreme Court "wants fewer lawsuits against police to go forward."[134] This may well be true. Yet the decision in *White v. Pauly* did not end Daniel Pauly's lawsuit; as Justice Ginsburg notes in her concurrence, the Court's decision "leaves open the propriety of denying summary judgment" based on various factual disputes about the officer's conduct.[135]

Plaintiffs' decisions about how to frame their cases also make qualified immunity ill suited to dispose of many cases. Defendants could not raise a qualified immunity defense in 8.4% of the cases in my study because the plaintiffs did not sue an individual officer for money damages.[136] Even in cases in which defendants could raise qualified immunity, plaintiffs' other pleading decisions sometimes diminished the impact of qualified immunity. In the vast majority of cases asserting claims against individual officers for money damages, plaintiffs also included claims against municipalities, claims for injunctive relief, and/or state law claims that could not be dismissed on qualified immunity grounds.[137] Even when a plaintiff brings a claim for damages against an indi-

court denies Defendants' motion insofar as it asks the court conclude that the officers are entitled to qualified immunity." (citation omitted) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001))); Nunez v. City of Corpus Christi, No. 2:12-cv-0092, 2013 WL 4040373, at *3 (S.D. Tex. Aug. 7, 2013) (denying qualified immunity because "there is considerable dispute regarding the timing of Hobbs' shots, the position of the vehicle at the time the shots were fired, and the immediacy of the threat posed to Officer Hobbs").

133. 137 S. Ct. 548, 552 (2017).

134. Feldman, *supra* note 5.

135. *Pauly*, 137 S. Ct. at 553 (Ginsburg, J., concurring).

136. *See supra* Table 1.

137. In the Southern District of Texas, defendants could raise qualified immunity in 106 cases in my dataset; in ninety-nine of those cases, plaintiffs also named municipalities as defendants. In the Middle District of Florida, defendants could raise qualified immunity in 155 cases in my dataset; in 149 of those cases, plaintiffs also named municipalities as defendants. In the Northern District of Ohio, defendants could raise qualified immunity in 139 cases in my da-

vidual defendant (for which qualified immunity is available), the defendant raises a qualified immunity defense, and the court grants the motion, claims against the municipality, claims for injunctive relief, and state law claims may remain.[138]

2. *Qualified Immunity Is Unnecessary To Dispose of Cases*

My data also suggest that qualified immunity may lead to the dismissal of few cases because cases are so often resolved on other grounds. Qualified immunity could not be raised in 126 (10.7%) of the cases in my study because the judges dismissed the cases sua sponte before the defendants could answer or otherwise respond.[139] In these cases, qualified immunity doctrine was unnecessary to shield defendants from discovery and trial.

Qualified immunity was also often unnecessary to dispose of cases at the motion to dismiss stage. Defendants in the cases in my dataset clearly held this view: even when defendants could raise qualified immunity at the motion to dismiss stage, they often chose not to do so.[140] More often than not, when defendants moved to dismiss or for judgment on the pleadings, they did not include a qualified immunity argument. Instead, defendants moved to dismiss for failure to plead plausible claims for relief or failure to assert a constitutional violation, among other grounds. Even when defendants raised qualified immunity at the motion to dismiss stage, and courts concluded that the cases should be dismissed, courts often resolved the motions on other grounds. Courts granted, in whole or part, seventy-nine (51.3%) out of the 154 motions to dismiss or for judgment on the pleadings that raised qualified immunity. Of

taset; in 129 of those cases, plaintiffs also named municipalities as defendants. In the Northern District of California, defendants could raise qualified immunity in 219 cases in my dataset; in 209 of those cases, plaintiffs also named municipalities as defendants. In the Eastern District of Pennsylvania, defendants could raise qualified immunity in 360 cases in my dataset; in 357 of those cases, plaintiffs also named municipalities as defendants.

138. *See supra* notes 102-104 and accompanying text (providing examples of these cases from my dataset).

139. *See supra* Table 12. In addition to the 105 cases dismissed sua sponte that were brought against individual defendants, *see supra* Table 1, twenty-one cases brought against municipalities or seeking injunctive relief were also dismissed before defendants answered or otherwise responded. These dismissals were most often based on the court's power to dismiss frivolous pro se claims sua sponte, but others were dismissed at this early stage for failure to prosecute or lack of subject matter jurisdiction. Cases dismissed for failure to prosecute or remanded to state court *after* defendants responded to the complaints are counted separately in Table 12.

140. *See supra* Figure 1; *supra* note 88 and accompanying text.

those seventy-nine grants, twenty-one (26.6%) were granted on qualified immunity grounds, and fifty-eight (73.4%) were granted on grounds other than qualified immunity.[141]

Qualified immunity played a more substantial role at summary judgment. Defendants raised qualified immunity arguments in most of their summary judgment motions.[142] And when courts granted defendants' summary judgment motions in whole or part, they relied on qualified immunity 39.7% of the time.[143] Still, courts decided a clear majority of the motions on other grounds. Most often, these summary judgment motions were granted in whole or part because the plaintiff could not establish a genuine dispute about a material question of fact. This finding should not come as a surprise to at least one member of the Court—Justice Kennedy noted in *Wyatt v. Cole* that the Court's summary judgment decisions reduced the need for qualified immunity to shield government officials from trial. As Justice Kennedy explained:

> *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. However, subsequent clarifications to summary-judgment law have alleviated that problem . . . . Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.[144]

When the Supreme Court discusses qualified immunity, it appears to presume that qualified immunity is the only barrier standing between government officials and discovery and trial. Instead, my study illustrates that there are other tools that parties can—and often do—use to resolve Section 1983 cases before trial.[145]

***

---

141. *See supra* Table 7. I include in the latter category cases where qualified immunity was the alternate ground for decision and cases where the court's reasoning was unclear.

142. *See supra* Figure 2.

143. *See supra* Table 8. Summary judgment was granted in whole or in part 146 times. Of those cases, the court relied on qualified immunity fifty-eight times.

144. Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (citations omitted).

145. *Accord* Fallon, *supra* note 59, at 504-05 (observing that other mechanisms can be used to achieve the goals of qualified immunity).

In this Section, I have offered some possible explanations for why cases are infrequently dismissed on qualified immunity grounds. This phenomenon is not solely attributable to plaintiffs' decisions not to file cases in which qualified immunity motions might be successful. Nor can lower courts be shouldered with all the blame for the low rate of qualified immunity dispositions. Instead, my data suggest that qualified immunity doctrine is ill suited in some cases and unnecessary in others to serve its intended role.

My data also make clear that qualified immunity's role in Section 1983 litigation is the product of decisions made by multiple actors—judges, defendants, plaintiffs, and the litigants' attorneys. Moreover, there is at least some evidence to suggest that district judges' varying inclinations to grant qualified immunity motions may influence defendants' and plaintiffs' litigation decisions. In jurisdictions with judges who most often granted defendants' qualified immunity motions—the Southern District of Texas and the Middle District of Florida—defendants brought qualified immunity motions more frequently, and plaintiffs more frequently crafted their cases in ways that prevented defendants from raising the defense. Conversely, in jurisdictions with judges who less frequently granted defendants' qualified immunity motions—the Eastern District of Pennsylvania and the Northern District of California—defendants less frequently brought qualified immunity motions, and plaintiffs less frequently crafted their cases to avoid the defense. A complete understanding of the role of qualified immunity in constitutional litigation against law enforcement must attend to regional differences in the dynamic interactions between judges, defendants, and plaintiffs. I plan to explore these interactions in future work.

C. Implications for the Balance Struck by Qualified Immunity

The Supreme Court has explained that qualified immunity is intended to balance "the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[146] Many have argued, and I agree, that the Court's qualified immunity doctrine puts a heavy thumb on the scale in favor of government interests, and disregards the interests of individuals whose rights have been violated.[147] My research offers an additional reason to believe that the Supreme Court has gotten the balance wrong: qualified immunity doctrine does not appear to be necessary or well

146. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

147. *See, e.g.*, Blum, Chemerinsky & Schwartz, *supra* note 8 (criticizing the Court's qualified immunity jurisprudence along these lines); Reinhardt, *supra* note 7 (same).

suited to protect government officials "from harassment, distraction, and liability when they perform their duties reasonably."[148] This observation makes it even more difficult to justify the burdens the doctrine appears to place on plaintiffs.

1. *Interests in Protecting Government Officials*

The Supreme Court explained in *Harlow* that qualified immunity was necessary to protect government officials from four harms: 1) "the expenses of litigation"; 2) "the diversion of official energy from pressing public issues"; 3) "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'"; and 4) "the deterrence of able citizens from acceptance of public office."[149] The Court has relied on no empirical evidence to support its conclusions that these threats exist, or that qualified immunity can protect against them. Although questions remain about the government interests served by qualified immunity, this study and my prior research suggest that qualified immunity doctrine is often unfit to protect against some of these harms, and often unnecessary to protect against others.

The first—and frequently repeated—justification for qualified immunity is that it protects government officials from the burdens of financial liability. But my prior research has shown that qualified immunity is unnecessary to serve this role—virtually all law enforcement defendants are provided with counsel free of charge, and are indemnified for settlements and judgments entered against them. In the six-year period from 2006 to 2011, law enforcement officers in forty-four of the seventy largest law enforcement agencies paid just 0.02% of the dollars awarded to plaintiffs in police misconduct suits.[150] In thirty-seven small and midsized agencies, no officer contributed to settlements or judgments to plaintiffs awarded during this period. Officers were indemnified even when they were disciplined, fired, and criminally prosecuted for their misconduct. And no officer paid a penny of the punitive damages awarded to plaintiffs in these jurisdictions. I could confirm only two jurisdictions in which officers contributed to settlements and judgments during the study period—New York City and Cleveland.[151] In these jurisdictions, the median contribu-

148. *Pearson*, 555 U.S. at 231.

149. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (alteration in original) (citations omitted).

150. *See* Schwartz, *supra* note 16, at 890.

151. *See id.* at 926-29. An officer was not indemnified for a $300 punitive damages judgment in Los Angeles, but the officer never paid the award. And officials believed—but could not con-

tion was $2,250, and no officer contributed more than $25,000.[152] Given this evidence, qualified immunity cannot be justified as a means of protecting officers from personal financial liability.

In recent years, the Supreme Court has described "the 'driving force' behind creation of the qualified immunity doctrine" to be resolving "'insubstantial claims' against government officials . . . prior to discovery."[153] But qualified immunity resulted in the dismissal of just 0.6% of the cases in my dataset before discovery, and resulted in the dismissal of just 3.2% of the 1,183 cases in my dataset before trial.

Indeed, qualified immunity may actually increase the costs and delays associated with Section 1983 litigation. Although qualified immunity terminated only 3.9% of the 979 cases in my dataset in which qualified immunity could be raised, the defense was in fact raised by defendants in more than 37% of these cases—and was sometimes raised multiple times, at the motion to dismiss stage, at summary judgment, and through interlocutory appeals.[154] Each time qualified immunity is raised, it must be researched, briefed, and argued by the parties and decided by the judge. And litigating qualified immunity is no small feat. John Jeffries describes qualified immunity doctrine as "a mare's nest of complexity and confusion."[155] Lower courts are "hopelessly conflicted both within and among themselves" as a result.[156] One circuit court judge reported that "[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face."[157]

The time and effort necessary to resolve qualified immunity motions could nevertheless further the goals of qualified immunity doctrine if it effectively protected defendants from discovery and trial. But in the five districts in my study, just 8.6% of qualified immunity motions brought by defendants in my docket dataset resulted in case dismissals.[158] The remaining 91.4% of qualified immunity motions brought by defendants required the parties and judges to

---

firm—that employees of the Jacksonville Sheriff's Office and the Illinois State Police may each have been required to contribute to one settlement during the study period.

152. *Id.* at 939.

153. *Pearson*, 555 U.S. at 231 (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

154. *See supra* Tables 4 & 5.

155. Jeffries, *supra* note 6, at 852.

156. Blum, *supra* note 114, at 925 (footnotes omitted).

157. Wilson, *supra* note 61, at 447; *see also* Blum, *supra* note 114, at 945-46 (quoting two judges' descriptions of the complexities of determining whether a law is clearly established).

158. *See supra* Table 11 (thirty-eight of the 440 qualified immunity motions raised by defendants resulted in case dismissals).

dedicate time and resources to briefing, arguing, and deciding the motions without shielding defendants from discovery and trial.

Even in the cases in which qualified immunity motions resulted in case dismissals, it is far from certain that qualified immunity saved the parties and the courts time. As Alan Chen has observed, when considering the efficiencies of qualified immunity, "the costs eliminated by resolving the case prior to trial must be compared to the costs of trying the case . . . . [T]he pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by that defense."[159] In this study, I have not calculated how much time was spent litigating qualified immunity motions, or compared that time with the amount of time spent preparing for and conducting a trial. Yet—given the complexity of qualified immunity doctrine, the use of interlocutory appeals of qualified immunity denials, the fact that most trials in my docket dataset lasted just a few days, and the possibility that a case will settle instead of going to trial even when qualified immunity is denied—the aggregate benefits of qualified immunity do not necessarily outweigh its costs for government officials.

In *Pearson*, the Supreme Court wrote that the *Saucier* two-step qualified immunity analysis "'disserve[s] the purpose of qualified immunity' when it 'forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.'"[160] Given the costs and delays associated with qualified immunity motion practice and the infrequency with which qualified immunity motions terminate Section 1983 cases, the doctrine arguably disserves its own purposes.

Although qualified immunity doctrine appears to do little to shield defendants from burdens associated with litigation in filed cases—and may in fact increase the amount of time spent on a substantial number of those cases—my data leave open the possibility that qualified immunity doctrine shields government officials from burdens associated with discovery and trial in other ways, namely by causing people never to file insubstantial claims or to settle them quickly.[161] The possibility that qualified immunity doctrine serves its intended purpose in these ways, however, does not mean that it actually does. At

---

159. Chen, *supra* note 57, at 100.

160. Pearson v. Callahan, 555 U.S. 223, 237 (2009) (alteration in original) (quoting Brief for National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent, *Pearson*, 555 U.S. 223 (No. 07-751)).

161. *See supra* notes 117-122 and accompanying text (discussing case selection and settlement behavior effects).

least two pressing questions would have to be answered before qualified immunity doctrine could be justified on these grounds.

First, what are the merits of cases that are never filed or settled quickly because of qualified immunity? If qualified immunity doctrine discourages people from filing or pursuing insubstantial cases, the doctrine is meeting its express goals.[162] But if the doctrine discourages people from filing or pursuing meritorious cases because the briefing and interlocutory appeals associated with qualified immunity would be too expensive, the doctrine is not sorting cases in the way anticipated by the Court. Although more research is necessary to answer this question, available evidence offers reason for concern. Alexander Reinert's interviews with attorneys who bring *Bivens* actions suggest that people with strong claims may sometimes be unable to find a lawyer because the cost of litigating qualified immunity is too high or because the conduct at issue has not been clearly established by prior cases.[163] Some people who do file their cases may settle at a discount, not because their cases are weak but because they cannot afford to litigate qualified immunity in the district court or on interlocutory appeal.

Second, how frequently does qualified immunity cause plaintiffs not to file or to settle insubstantial cases? The costs associated with litigating qualified immunity and the difficulty of overcoming a qualified immunity motion may cause plaintiffs not to file some insubstantial cases. But other, independent considerations may cause plaintiffs not to file such cases, including rigorous pleading requirements, stringent standards for proving underlying constitutional violations, and minimal potential damages awards. Without further study, it is not possible to conclude that qualified immunity, rather than these alternative considerations, is responsible for plaintiffs' decisions to settle or never file insubstantial cases.

In short, there is limited evidence to support the hypothesis that qualified immunity serves its purpose through screening cases or coercing settlement. Indeed, some evidence suggests that the doctrine may be discouraging plaintiffs from filing or pursuing meritorious cases because qualified immunity would take too long or cost too much to litigate. Our existing knowledge about qualified immunity's effects on filing and settlement decisions cannot justify the doctrine on these grounds.

The Supreme Court has mentioned, but dwelled little upon, two other possible benefits of qualified immunity doctrine—that it lessens "the danger that

---

162. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (discussing qualified immunity's goal of preventing "insubstantial claims" from proceeding to trial).

163. *See* Reinert, *supra* note 118, at 491-95.

fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" and that it mitigates "the deterrence of able citizens from acceptance of public office."[164] The available evidence casts doubt on these rationales as well. The Court has written that dangers of overdeterrence should dissipate for officials who are not financially responsible for settlements and judgments.[165] Consistent with this observation, studies have found that "the prospect of civil liability has a deterrent effect in the abstract survey environment but that it does not have a major impact on field practices."[166] Further, civil liability does not appear to play a sizable role in people's decisions to apply to become police officers. Police departments around the country report difficulties finding recruits, but the long list of reasons police officials believe people are not applying does not include the threat of being sued.[167] These speculative benefits cannot justify qualified immunity's highly restrictive standards.

Perhaps the Court believes that qualified immunity doctrine serves other interests that it has failed to mention. Even if officers are almost always indemnified, and cases are rarely dismissed on qualified immunity grounds, qualified

---

164. *Harlow*, 457 U.S. at 814 (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

165. Owen v. City of Independence, 445 U.S. 622, 655-56 (1980) (explaining that the overdeterrence rationale for qualified immunity "loses its force" when "the threat of personal liability is removed").

166. VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (4th ed. 2006) (citing several studies); *see also* Schwartz, *supra* note 16, at 942-43 (discussing studies of civil liability as a deterrent to aggressive police behaviors).

167. *See, e.g.*, Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts To Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015), http://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081 [http://perma.cc/4MFX-3ZE9]; Edmund DeMarche, *'Who Needs This?' Police Recruits Abandon Dream Amid Anti-Cop Climate*, FOX NEWS (Sept. 2, 2015), http://www.foxnews.com/us/2015/09/02/who-needs-this-police-recruits-abandon-dream-amid-anti-cop-climate.html [http://perma.cc/DAC4-EQR3]; Daniel Denvir, *Who Wants To Be a Police Officer?*, CITYLAB (Apr. 21, 2015), http://www.citylab.com/crime/2015/04/who-wants-to-be-a-police-officer/391017 [http://perma.cc/RB27-LEUZ]; Mori Kessler, *Thinning Blue Line: Police See Declines in Applicants*, ST. GEORGE NEWS (Dec. 13, 2015), http://www.stgeorgeutah.com/news/archive/2015/12/13/mgk-thinning-blue-line-police-decline [http://perma.cc/L2ENVRE2]; Oliver Yates Libaw, *Police Face Severe Shortage of Recruits*, ABC NEWS (July 10, 2016), http://abcnews.go.com/US/story?id=96570 [http://perma.cc/NJ27-866M]; John Vibes, *Surprised? Some Police Departments Experiencing Sharp Decline in New Applicants*, FREE THOUGHT PROJECT (Feb. 20, 2015), http://thefreethoughtproject.com/good-news-areas-find-people-police [http://perma.cc/7KFB-RABB]; William J. Woska, *Police Officer Recruitment: A Public-Sector Crisis*, POLICE CHIEF (Apr. 2016), http://www.policechiefmagazine.org/police-officer-recruitment-a-public-sector-crisis [http://perma.cc/S57T-5T5N].

immunity doctrine may somehow reduce the costs of litigation for the municipalities that end up paying the settlements and judgments on behalf of their officers.[168] Qualified immunity doctrine may encourage the development of constitutional law because it allows courts to announce new constitutional rules without fear of subjecting defendants to financial liability.[169] In this Article, I do not evaluate the sensibility of—or empirical support for—these alternative justifications for qualified immunity. Neither has been relied upon by the Court. If these or other policy interests motivate the Supreme Court's qualified immunity jurisprudence, the Court should be explicit about those motivations so that courts, practitioners, and scholars can evaluate the sensibility of these interests and measure the extent to which qualified immunity advances them. Until then, we are left with the justifications for qualified immunity doctrine that the Court has offered. Available evidence suggests that the doctrine is unnecessary to serve some of qualified immunity's key goals and ill suited for others.

2. *Interests in Government Accountability*

My research indicates that filed lawsuits are rarely dismissed on qualified immunity grounds. As I have argued, this finding suggests that qualified immunity doctrine rarely achieves its intended function as a shield for government officials against discovery and trial in filed cases. What are the implications of this finding for the other side of qualified immunity's balance, described by the Court both as "the importance of a damages remedy to protect the rights of citizens"[170] and as "the need to hold public officials accountable when they exercise power irresponsibly"?[171] Commentators have long criticized qualified immunity doctrine for protecting government officials at the expense of Section 1983's accountability goals. If qualified immunity is not doing much to protect government officials, does that allay concerns that the doctrine compromises government accountability? In other words, do my data suggest that qualified immunity does little of great significance, either to defendants' benefit or to plaintiffs' detriment?

---

168. *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 856 (2007).

169. *See, e.g.*, Jeffries, *supra* note 61, at 247 ("Limitations on money damages facilitate constitutional evolution and growth by reducing the cost of innovation. Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout.").

170. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing Butz v. Economou, 438 U.S. 478, 504-05 (1978)).

171. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

Evidence that few cases are dismissed on qualified immunity grounds suggests that the direst descriptions of qualified immunity's impact on plaintiffs perhaps go too far. Critics assert that qualified immunity closes the courthouse door for plaintiffs.[172] And there is no shortage of decisions by the Supreme Court and lower courts dismissing cases on qualified immunity grounds.[173] Yet, my study suggests that qualified immunity doctrine appears to close the courthouse door far less frequently than critics have assumed—at least once a case is filed. My findings do not, however, undermine other concerns raised about the impact of qualified immunity on plaintiffs' claims. Qualified immunity could significantly damage law enforcement accountability without protecting officials from the burdens of discovery and trial.

First, qualified immunity doctrine may discourage people from filing their cases or may cause them to settle or withdraw their claims.[174] If qualified immunity had this effect only on insubstantial cases, the doctrine would be achieving its intended role, albeit in a manner unexpected by the Court. But if qualified immunity is causing people not to file or to settle meritorious cases, as available anecdotal evidence suggests, then the doctrine is preventing people from vindicating their rights and holding government accountable.[175]

Moreover, my findings do not undermine other common critiques of the doctrine. Qualified immunity doctrine has been criticized by courts and scholars alike for being confusing and difficult to apply, and leading to inconsistent adjudications.[176] These characteristics of qualified immunity doctrine may well increase the time it takes courts to decide qualified immunity motions, even as the decisions are infrequently dispositive.[177]

In addition, many are critical of the Court's decision in *Pearson* to allow lower courts to grant qualified immunity without first assessing whether a defendant violated the constitutional or statutory rights of the plaintiff.[178] Their fear is that if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitu-

---

172. *See supra* notes 6-8 and accompanying text.

173. *See supra* note 3 and accompanying text.

174. *See supra* notes 162-163 and accompanying text.

175. *See supra* notes 162-163 and accompanying text.

176. *See supra* notes 155-159 and accompanying text.

177. *See* Chen, *supra* note 57, at 99 ("Plaintiffs, defendants, and trial courts are likely to expend substantial resources simply litigating the qualified immunity defense—an elaborate sideshow, independent of the merits, that in many cases will do little to advance or accelerate resolution of the legal claims.").

178. *See supra* Section I.B.2 (describing *Pearson*).

tional right at issue will never become clearly established. This catch-22 may lead to constitutional uncertainty and stagnation, making it more difficult for plaintiffs to prevail on constitutional claims and offering little guidance to government officials about the scope of constitutional rights.[179] Scholars who have studied the impact of *Pearson* have found some evidence to support these concerns.[180] The fact that few cases are dismissed on qualified immunity grounds is immaterial to this critique. The Supreme Court's decision in *Pearson* to allow lower courts to grant qualified immunity without deciding whether a right has been violated may still lead to constitutional uncertainty, particularly in cases involving new technologies or practices.[181]

Finally, many have argued that the Supreme Court's qualified immunity decisions protect bad actors. The Court's disregard of subjective intent protects officers who act in bad faith, so long as their conduct does not violate clearly established law.[182] In addition, a government official who has acted in a clearly unconstitutional manner can be shielded from liability simply because no prior case has held similar conduct to be unconstitutional. The Supreme Court's re-

---

179. *See, e.g.*, Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 502-06 (2009); Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120; James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1605-06 (2011).

180. *See* Nielson & Walker, *supra* note 114; *see also* Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 428 & n.121 (2009) (predicting that *Pearson* will lead to constitutional stagnation); Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468 (2011) (finding that after *Pearson* district courts often answered both steps of the qualified immunity analysis, but circuit courts more often decided qualified immunity motions without ruling on the underlying constitutional right); *cf.* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011) (finding that circuit courts followed the *Saucier* two-step process "most of the time").

181. *See, e.g.*, Matthew Slaughter, *First Amendment Right To Record Police: When Clearly Established Law Is Not Clear Enough*, 49 J. MARSHALL L. REV. 101 (2015) (describing circuit variation in analysis of the right to record the police); Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285 (2012) (describing circuit variation in analysis of qualified immunity for claims involving electronic control devices).

182. For example, in *Ashcroft v. al-Kidd*, the Supreme Court held that the then-Attorney General John Ashcroft was entitled to qualified immunity, even though he authorized federal prosecutors to use the material-witness statute pretextually, because qualified immunity doctrine "demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer." 563 U.S. 731, 740 (2011).

cent decisions have made it increasingly difficult to meet this standard.[183] It is, as John Jeffries has written, "as if the one-bite rule for bad dogs started over with every change in weather conditions."[184] Even this critique of qualified immunity is left largely intact by my findings. Qualified immunity's disregard for officials' subjective intent, and the need for precedent that "place[s] the statutory or constitutional question beyond debate,"[185] may insulate bad actors from financial liability, but still expose them to discovery and trial if other claims or defendants remain.

McKay v. City of Hayward,[186] a case from the Northern District of California in my docket dataset, illustrates how qualified immunity can impair government accountability in these ways without shielding defendants from discovery or trial. On May 29, 2011, officers from the Hayward Police Department used a police dog to track an armed suspect who had robbed a restaurant.[187] The dog guided the officers to an eight-foot wall. Without any warning, the officers lifted the dog over the wall. On the other side of the wall was the backyard of a mobile home belonging to Jesse Porter, an 89-year-old who had no connection to the robbery. The dog bit Porter on the leg, leaving a wound so severe that Porter's leg had to be amputated. Mr. Porter was then moved into a residential

---

183. Despite the confusion in the doctrine, the Supreme Court's most recent decisions suggest that it is very difficult to show that conduct violates "clearly established law." Although the Court once held that the obviousness of a constitutional violation can defeat qualified immunity even without a case on point, *see* Hope v. Pelzer, 536 U.S. 730 (2002), in recent years the Court's primary focus has been whether a prior court has held the right to be clearly established, *see* Blum, Chemerinsky & Schwartz, *supra* note 8, at 652-53. The Court's recent decisions have made it difficult to clearly establish the law in other ways as well. In 1999, the Court explained that a plaintiff could show the law was clearly established by pointing to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority." Wilson v. Layne, 526 U.S. 603, 617 (1999). Yet in more recent decisions, the Court has backed away from this position; it now only assumes *for the sake of argument* that controlling circuit authority or a consensus of cases of persuasive authority can clearly establish the law. *See* Kinports, *supra* note 2, at 70-71 (describing this shift in the law). The Court's most recent decisions also suggest that the facts of the prior decision must closely resemble those of the instant case. The Court has repeatedly assured plaintiffs that it "do[es] not require a case directly on point," but requires that "existing precedent must have placed the statutory or constitutional question beyond debate." Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (citing *al-Kidd*, 563 U.S. at 741). In recent years, the Court has reversed several lower court decisions for relying on prior precedent that established constitutional principles at too-general a level. *See, e.g.*, White v. Pauly, 137 S. Ct. 548 (2017); *Mullenix*, 136 S. Ct. 305.

184. Jeffries, *supra* note 61, at 256.

185. *Mullenix*, 136 S. Ct. at 308 (citing *al-Kidd*, 563 U.S. at 741).

186. No. 3:12-cv-1613 (N.D. Cal. Mar. 30, 2012).

187. The facts of the case are taken from the district court's summary judgment decision. *See* McKay v. City of Hayward, 949 F. Supp. 2d 971, 975-76 (N.D. Cal. 2013).

care facility, where he died two months later. Mr. Porter's children sued the involved officers and the City of Hayward under federal and state law.

At summary judgment, the district court in *McKay* granted the officers qualified immunity.[188] The court found that, to survive summary judgment, the plaintiffs had to be able to show that the failure to warn before seizure by a police dog constitutes a Fourth Amendment violation. The court surveyed Ninth Circuit cases involving police dogs and found that "[n]o Ninth Circuit case holds explicitly that failure to warn before seizure by a police dog constitutes a violation of the Fourth Amendment."[189] The court surveyed other circuits and found some variation: the Fourth and Eighth Circuits had held that the failure to give a warning before using a police dog violates the Fourth Amendment, but the Eleventh, Seventh, and Tenth Circuits had held that failure to warn before deploying a police dog was "not dispositive of the reasonableness of seizing an individual with a police dog."[190] Because of this variation among circuits, the court in the Northern District of California concluded that that the unconstitutionality of the officers' conduct had not been clearly established.

The decision granting qualified immunity in *McKay* did not shield government officials from burdens associated with either discovery or trial. In McKay's case, qualified immunity was raised at summary judgment, after the officers had already participated in discovery. The motion was granted less than two weeks before trial was scheduled to begin.[191] Moreover, even after the court granted qualified immunity to the individual officers, the officers still faced the prospect of trial. In addition to the Section 1983 claims against the two individual officers, the plaintiffs brought state law claims against the individual officers and state and federal claims against the City—the qualified immunity defense did not apply to any of these claims.[192] In the days following the court's summary judgment decision, the parties drafted and submitted voir dire questions, multiple motions in limine, and briefs regarding whether the

188. *Id.* at 985.

189. *Id.* at 983.

190. *Id.* at 984.

191. *See* Case Management Minutes, *McKay*, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF No. 67.

192. *McKay*, 949 F. Supp. 2d at 985, 988.

trial should be separated into three stages.[193] The case settled and the court entered a conditional dismissal the day trial was scheduled to begin.[194]

Although the district court's qualified immunity decision in *McKay* did not shield officials from discovery and was not formally the reason the case did not go to trial, it did negatively affect interests in government accountability. The qualified immunity motion likely increased the amount of time spent by the attorneys for the plaintiffs and defendants.[195] The grant of qualified immunity in *McKay* may also have ripple effects that extend far beyond the parties to the litigation. The district court found that it was not clearly established in the Ninth Circuit that deploying police dogs without a prior warning violates the Constitution. This decision may cause lawyers to decline to represent people with similar claims. One could argue that qualified immunity is serving its intended role by discouraging people from bringing Section 1983 cases when the underlying constitutional rights have not been clearly established. But this position goes further than the Court's own justification for qualified immunity doctrine: to protect government officials from insubstantial claims.[196] That no prior court has decided a given constitutional issue does not imply that a case raising it lacks merit.

Uncertainty about the constitutionality of deploying a police dog without a prior warning may also influence police departments' policy and training decisions. Although the Supreme Court appears confident that police departments can regulate themselves,[197] police officials look to court decisions to guide their policies and trainings.[198] Were, for example, the Ninth Circuit to hold that

---

193. *See McKay*, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF Nos. 76-79.

194. *See* Order of Conditional Dismissal, *McKay*, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF No. 81.

195. In some cases, the grant of qualified immunity might cause plaintiffs to settle instead of going to trial or cause plaintiffs to settle for an amount smaller than they would have otherwise accepted. In this case, the plaintiffs' attorney reported that the qualified immunity grant had a "negligible" impact on the value of the case because the *Monell* claim remained and, "[u]nlike many civil rights cases, [the plaintiffs] had good evidence to support the *Monell* claim." E-mail from Matthew D. Davis, Attorney for Plaintiffs in *McKay*, 949 F. Supp. 2d 971, to author (Nov. 28, 2016, 9:17 AM) (on file with author).

196. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982) (discussing qualified immunity's goal of preventing "insubstantial claims" from proceeding to trial).

197. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 598-99 (2006) (asserting that the rise of police professionalism and internal discipline reduces the need for the exclusionary rule to deter police misbehavior).

198. For examples of instances in which court decisions have influenced police department policies and trainings, see POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 18 (Mar. 2016), http://www.policeforum.org/assets/30%20guiding

officers should give prior warnings before using police dogs, departments in the jurisdiction of the Ninth Circuit would likely train their officers to issue warnings under these circumstances. Without such a decision, and with the *McKay* court's conclusion that there is no clearly established constitutional right to such a warning, departments may be less likely to train their officers to give such warnings.[199] These costs to government accountability accrue whether or not qualified immunity protects government officials from discovery and trial.

D. Moving Forward

The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions.[200] My research has, indeed, undermined the Court's assumptions about the purposes served by qualified immunity doctrine. In this Section, I consider how these findings should shape qualified immunity doctrine moving forward.

My findings suggest that the Court's efforts to advance its policy goals through qualified immunity doctrine has been an exercise in futility. In *Harlow v. Fitzgerald*, the Supreme Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action."[201] The Court believed that "[t]he transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits."[202] Some—including Justice Thomas—have argued that this transformation was a mistake because the scope of qualified immunity doctrine should mirror the common law de-

%20principles.pdf [http://perma.cc/G9YU-C4UA] (explaining that after the Fourth Circuit held that using a Taser repeatedly in drive-stun mode was unconstitutional, "several agencies in jurisdictions covered by the Fourth Circuit ruling amended their use-of-force and ECW [Electronic Control Weapons] policies" in response to the decision); and Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. L.F. 437, 452 n.53, 455 n.68.

199. *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580-81 (2008) (observing that, when a United States Supreme Court decision removed the exclusionary rule as a remedy for conduct that violated California constitutional law—searching garbage without a warrant—police in California were "trained to ignore" California law).

200. Anderson v. Creighton, 483 U.S. 635, 641 n.3 (1987).

201. *Id.* at 645 (citing *Harlow*, 457 U.S. at 815-20).

202. Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

fenses that existed in 1871, and should not reflect the Court's policy preferences at all.[203]

This Article offers an additional reason to conclude this transformation was a mistake: the doctrine does not serve its intended policy objectives. Although the Supreme Court repeatedly describes qualified immunity doctrine as a means of shielding government officials from the costs and burdens of litigation, I have found officers are virtually always indemnified, and that qualified immunity is rarely the reason that Section 1983 cases end. Future research can explore whether qualified immunity causes plaintiffs not to file or pursue insubstantial claims, or advances the doctrine's goals in other ways. At this point, however, available evidence contradicts the Court's assumptions about the role qualified immunity plays in constitutional litigation.

Justices sympathetic to qualified immunity's policy goals might conclude based on my findings that they should further strengthen qualified immunity doctrine to protect defendants. I would discourage this approach for several reasons. First, it is far from clear that qualified immunity doctrine is well designed to weed out only "insubstantial" cases. Available evidence suggests that some people may decline to file or pursue their claims because of the cost of litigating qualified immunity, even when they might succeed on the merits.[204] And cases alleging clearly unconstitutional behavior may be dismissed on qualified immunity grounds simply because no prior case has held sufficiently similar conduct to be unconstitutional.[205] Strengthening qualified immunity doctrine would presumably aggravate these preexisting concerns.

Setting aside the question of whether such a shift is desirable, I am not convinced that it is feasible. It is hard to imagine how the Court could make qualified immunity doctrine any stronger than it already is.[206] Perhaps members of the Court believe that lower courts are not applying qualified immunity doctrine as expansively as they should. Indeed, the Court's flurry of recent

203. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret[ing] the intent of Congress in enacting' the Act. . . . Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." (citations omitted)).

204. *See supra* notes 174-175 and accompanying text.

205. *See supra* notes 182-184 and accompanying text.

206. *See supra* note 183 and accompanying text (describing recent shifts in the doctrine).

summary reversals suggests that it is attempting to encourage lower courts to follow course.[207]

But even if all judges applied qualified immunity doctrine as expansively as does the Supreme Court, qualified immunity doctrine would likely still fall short of its intended role in many cases filed against law enforcement. Plaintiffs could often still plead a plausible entitlement to relief at the motion to dismiss stage, and could often still raise factual disputes at summary judgment that prevent dismissal on qualified immunity grounds. Plaintiffs would continue to include claims against municipalities, claims for declaratory or injunctive relief, and state law claims in their cases that qualified immunity cannot resolve.[208] Defendants would still sometimes conclude that other defenses or an inexpensive settlement is preferable to the added costs of qualified immunity motion practice. And courts would continue to dismiss cases for multiple other reasons besides qualified immunity. Presumably the number of cases dismissed on qualified immunity grounds would increase somewhat, but given litigation dynamics and other applicable doctrines, many cases would remain in which qualified immunity never shielded government officials from discovery or trial. Qualified immunity is the Supreme Court's hammer. But many civil rights damages actions against law enforcement are not nails.

The fact that qualified immunity is often ill suited and unnecessary to advance the Court's policy objectives provides additional reason to adopt Justice Thomas's view and realign the doctrine with historical common law defenses. According to those who have studied the common law at the time Section 1983 was passed, little would remain of qualified immunity if the Court adopted this approach.[209] But other defenses would remain—including arguments that

---

207. *See* Baude, *supra* note 3 (commenting on numerous summary reversals by the Supreme Court).

208. The Court could conceivably hold that qualified immunity can be asserted by municipalities and in claims for injunctive and declaratory relief. But the Court has already held that qualified immunity does not apply to both types of claims. And the Court has no power to create a qualified immunity defense for state claims.

209. For discussion of the common law and government practices in place when Section 1983 became law, see Alschuler, *supra* note 179, at 506 ("A justice who favored giving § 1983 its original meaning or who sought to restore the remedial regime favored by the Framers of the Fourth Amendment could not have approved of either *Pierson* or *Harlow*."); Baude, *supra* note 3, at 1 (observing that qualified immunity is justified as "deriv[ing] from a common law 'good faith' defense," but that "[t]here was no such defense"); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1924 (2010) ("During the early republic, the courts—state and federal—did not take responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability. These were mat-

plaintiffs cannot state plausible claims for relief in their complaint or cannot establish material factual disputes at summary judgment. Defendants would still be able to argue that plaintiffs cannot meet the Court's exceedingly rigorous standards for constitutional violations.[210] Even in the absence of qualified immunity, these other procedural and substantive barriers would prevent many Section 1983 cases from being filed, proceeding to discovery, or advancing to trial.

If the Court is unwilling to eliminate or dramatically restrict qualified immunity, it could make more modest alterations that would align the doctrine with evidence of its role in constitutional litigation. For example, the Court could undo adjustments to qualified immunity doctrine that were expressly motivated by an interest in shielding government officials from discovery and trial in filed cases. In *Harlow*, the Court eliminated consideration of officers' subjective intent because it believed doing so would "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[211] My study shows that the Court's elimination of the subjective prong of qualified immunity in *Harlow* should be viewed as a failed experiment. Despite courts' and commentators' assumptions to the contrary,[212] the decision in *Harlow* appears to have done little to shield government officials from discovery and trial in filed cases.

Restoring the subjective prong to qualified immunity analysis could also mitigate at least one serious concern with the doctrine. Currently, government officials acting in bad faith or with knowledge of the unconstitutionality of their behavior can be shielded from liability simply because no prior case proscribed their conduct. If the subjective prong were restored to the qualified immunity analysis, government officials would not be entitled to qualified immunity if they knew or should have known that their conduct was unlawful. A recent Supreme Court case, *Mullenix v. Luna*, illustrates how reversing *Harlow* might address this concern.[213]

---

ters for Congress to adjust through indemnification and other modes of calibrating official zeal.").

210. For discussions of the difficulty of establishing constitutional violations against law enforcement see, for example, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

211. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)).

212. *See supra* notes 6 and 56 and accompanying text.

213. 136 S. Ct. 305 (2015) (per curiam).

The facts relevant to *Mullenix* began when Tulia Police Department officers attempted to arrest Israel Leija, Jr. for violating misdemeanor probation.[214] Leija fled the scene in his car, and officers from several agencies participated in the pursuit. Officers set up spike strips on the highway to puncture Leija's tires as he drove by—a strategy they had been trained to use in just this type of situation. Texas Department of Public Safety Trooper Chadrin Mullenix decided that instead of setting up spike strips he would try to disable Leija's car by shooting at it.[215] He had received no training in shooting at a car to disable it and was instructed by his supervisor not to do so.[216] Nevertheless, Mullenix fired six rounds at Leija's car as it passed under the bridge where Mullenix was standing. Leija died, with one of the shots determined to be the cause of death.[217] Soon after the shooting, Mullenix remarked to his supervisor, "How's that for proactive?"—an apparent reference to a conversation they had had early in the day in which the superior had criticized the officer for not taking enough initiative.[218]

The district court denied Mullenix's motion for summary judgment on qualified immunity grounds, Mullenix filed an interlocutory appeal, and the Fifth Circuit affirmed the district court. The Supreme Court granted Mullenix's petition for certiorari and reversed. The Court did not answer whether Mullenix violated the Constitution but instead held that prior cases had not clearly established that his conduct was unconstitutional.[219] Mullenix's remark to his supervisor played no role in the analysis, as "an officer's actual intentions are irrelevant" to the qualified immunity analysis.[220] Restoring the subjective prong to the qualified immunity analysis would likely change the outcome of a case like *Mullenix*. Mullenix's "How's that for proactive?" statement would once again be relevant to the qualified immunity analysis, and would constitute at least triable evidence of bad faith.[221]

The Court could also reconsider other adjustments to qualified immunity made with the express goal of shielding defendants from burdens of discovery and trial. For example, the Court granted defendants the right to immediately appeal denials of qualified immunity as a means of shielding defendants from

---

214. Luna v. Mullenix, 773 F.3d 712, 715 (5th Cir. 2014), *rev'd per curiam*, 136 S. Ct. 305 (2015).

215. *Mullenix*, 136 S. Ct. at 306.

216. *Id.* at 306-07.

217. *Id.* at 307.

218. *Id.* at 316 (Sotomayor, J., dissenting).

219. *Id.* at 312 (majority opinion).

220. *Id.* at 316 (Sotomayor, J., dissenting).

221. *See id.*

burdens of discovery and trial.[222] Yet my data show interlocutory appeals of qualified immunity denials infrequently serve that function. Defendants filed interlocutory appeals of 21.7% of decisions denying qualified immunity in whole or part. Of the appeals that were filed, just 12.2% of the lower court decisions were reversed in whole, and just 9.8% of the interlocutory appeals filed resulted in case dismissals. Interlocutory appeals may have prompted case resolutions in another way—39.0% of interlocutory appeals were never decided, apparently because the cases were settled while the motions were pending.[223] But defendants' interlocutory appeals rarely resulted in case dismissals on qualified immunity grounds. It is far from clear that interlocutory appeals shield defendants from litigation burdens—the time and money spent briefing and arguing interlocutory appeals may in fact exceed the time and money saved in the relatively few reversals on interlocutory appeal. If so, the policy objectives motivating *Mitchell* militate in favor of eliminating the right of interlocutory appeal.

Finally, and still more modestly, the Court could reconsider the restrictive manner in which it defines "clearly established law." John Jeffries has written that the Court's narrow definition of clearly established law is inspired by its interest in facilitating qualified immunity dismissals at summary judgment.[224] My data show that the Court's decisions are not having their intended effect. Yet, as others have pointed out, the Court's doctrinal framework creates confusion in the lower courts and protects bad actors when there is no prior case on point.[225] Jeffries's proposed solution is to focus the qualified immunity inquiry not on whether the law was clearly established but, instead, on whether the defendant's conduct was "clearly unconstitutional."[226] I believe that my data support a more complete transformation of the doctrine, but this adjustment would at least be a step in the right direction.

At this point, it is impossible to predict what impact these proposed changes to qualified immunity doctrine would have on the litigation of constitutional claims against law enforcement. Perhaps narrowing the qualified immunity de-

---

222. *See supra* Section I.B.3.

223. *See supra* Section III.D; *cf.* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1179 (1990) (assessing the impact of interlocutory appeals for qualified immunity denials, and reporting that "the district judges with whom I have spoken . . . all believed that defendants used the *Mitchell* appeal as a delaying tactic that hampered litigation that would otherwise be tried or settled relatively quickly").

224. *See* Jeffries, *supra* note 6, at 866. For the Court's most recent decisions interpreting what constitutes clearly established law, see *supra* note 183.

225. *See supra* notes 176-185 and accompanying text.

226. *See* Jeffries, *supra* note 6, at 867.

fense, restoring the subjective prong, or eliminating qualified immunity altogether would dramatically increase the number of suits filed against the police, or increase the number of filed cases that were settled or tried. On the other hand, these changes might inspire courts to place other limits on Section 1983 claims to maintain the status quo.[227] This Article does not predict how changes to qualified immunity doctrine might influence the collection of doctrines relevant to constitutional litigation, or suggest the ideal ways in which they should relate. My suggestions are motivated by a less lofty ambition—to achieve greater consistency across qualified immunity doctrine's structure, intended policy goals, and actual role in constitutional litigation.

CONCLUSION

In recent years, the Supreme Court has dedicated an outsized portion of its docket to qualified immunity motions in cases against law enforcement because, it has explained, the doctrine is so "important to 'society as a whole.'"[228] But the Court relies on no evidence to back up this fervently held position. Instead, my research shows that qualified immunity doctrine infrequently plays its intended role in the litigation of constitutional claims against law enforcement. Qualified immunity doctrine is unnecessary to shield law enforcement officers from financial liability, and the doctrine infrequently protects government officials from burdens associated with discovery and trial in filed cases. Further exploration of dynamics unobservable through my dataset could reveal other ways in which qualified immunity influences the litigation of civil rights actions against law enforcement. At this point, however, available evidence indicates that qualified immunity often is not functioning as assumed, and is not achieving its intended goals. In an ideal world, all open empirical questions about Section 1983 litigation would be answered before any applicable doctrine was adjusted. But it is my view that the perfect should not be the enemy of the good.[229] The Supreme Court, as well as lower courts, should adjust their qualified immunity decisions to comport with this evidence.

---

227. *See* Fallon, *supra* note 59, at 486-89 (observing that adjustments to qualified immunity may influence other aspects of constitutional doctrine).

228. White v. Pauly, 137 S. Ct. 548, 551 (2017) (quoting City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015)).

229. *See* Schwartz, *supra* note 16, at 961.

Patrol

400.1 PURPOSE AND SCOPE

The purpose of this policy is to define the patrol function and address intraorganizational cooperation and information sharing.

400.2 POLICY

The Independence Police Department provides patrol services 24 hours a day, seven days a week and will prioritize responses to requests for emergency services using available resources to enhance the safety of the public and department members.

400.3 FUNCTION

Patrol will generally be conducted by uniformed officers in clearly marked law enforcement vehicles in assigned jurisdictional areas of Independence. The function of patrol is to respond to calls for assistance and reports of criminal activity, act as a deterrent to crime, enforce state and local laws, identify community needs, provide support and assistance to the community and respond to emergencies.

Patrol services include, but are not limited to:

(a) Responding to emergency calls for service.

(b) Apprehending criminal offenders.

(c) Providing mutual aid and assistance to other agencies for emergency and law enforcement-related activities.

(d) Preventing criminal acts, traffic violations and collisions, maintaining public order and discovering hazardous situations or conditions.

(e) Responding to reports of both criminal and non-criminal acts.

(f) Responding to routine calls for service, such as public assistance or public safety.

(g) Directing and controlling traffic.

(h) Carrying out crime prevention activities, such as residential inspections, business inspections and community presentations.

(i) Carrying out community-oriented policing and problem-solving activities, including the application of resources to improve or resolve specific problems or situations and contacting or assisting members of the public in a positive way.

(j) The application of resources to specific problems or situations within the community that may be improved or resolved by community-oriented policing and problem-solving strategies.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

400.4 INFORMATION SHARING

To the extent feasible, all information relevant to the mission of the Department should be shared among all divisions and specialized units on a timely basis. Members should be provided with opportunities on a regular basis to share information during the daily briefings and to attend briefings of other divisions or specialized units.

Additionally, information should be shared with outside agencies and the public in conformance with department policies and applicable laws. Members are encouraged to share information with other units and divisions.

400.5 CROWDS, EVENTS AND GATHERINGS

Officers may encounter gatherings of people, including, but not limited to, civil demonstrations, public displays, parades, sporting events and civic, social and business events. Officers should monitor such events as time permits in an effort to keep the peace and protect the safety and rights of those present. A patrol supervisor should be notified when it becomes reasonably foreseeable that such an event may require increased monitoring, contact or intervention.

Officers responding to an event or gathering that warrants law enforcement involvement should carefully balance the speech and association rights of those present with applicable public safety concerns before taking enforcement action.

Generally, officers should consider seeking compliance through advisements and warnings for minor violations, and should reserve greater enforcement options for more serious violations or when voluntary compliance with the law is not achieved.

Officers are encouraged to contact organizers or responsible persons to seek voluntary compliance that may address relevant public safety concerns.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

Personnel Complaints

1010.1 PURPOSE AND SCOPE

This policy provides guidelines for the reporting, investigation and disposition of complaints regarding the conduct of members of the Independence Police Department. This policy shall not apply to any questioning, counseling, instruction, informal verbal admonishment or other routine or unplanned contact of a member in the normal course of duty, by a supervisor or any other member, nor shall this policy apply to a criminal investigation.

1010.2 POLICY

The Independence Police Department takes seriously all complaints regarding the service provided by the Department and the conduct of its members.

The Department will accept and address all complaints of misconduct in accordance with this policy and applicable federal, state and local law and municipal rules and the requirements of any employment agreements.

It is also the policy of this department to ensure that the community can report misconduct without concern for reprisal or retaliation.

1010.3 PERSONNEL COMPLAINTS

Personnel complaints include any allegation of misconduct or improper job performance that, if true, would constitute a violation of department policy or federal, state or local law, policy or rule. Personnel complaints may be generated internally or by the public.

Inquiries about conduct or performance that, if true, would not violate department policy or federal, state or local law, policy or rule may be handled informally by a supervisor and shall not be considered a personnel complaint. Such inquiries generally include clarification regarding policy, procedures or the response to specific incidents by the Department.

1010.3.1 COMPLAINT CLASSIFICATIONS

Personnel complaints shall be classified in one of the following categories:

Informal - A matter in which the Sergeant is satisfied that appropriate action has been taken by a supervisor of rank greater than the accused member.

Formal - A matter in which a supervisor determines that further action is warranted. Such complaints may be investigated by a supervisor of rank greater than the accused member or referred to the Captain, depending on the seriousness and complexity of the investigation.

Incomplete - A matter in which the complaining party either refuses to cooperate or becomes unavailable after diligent follow-up investigation. At the discretion of the assigned supervisor or the Captain, such matters may be further investigated depending on the seriousness of the complaint and the availability of sufficient information.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

1010.3.2 SOURCES OF COMPLAINTS
The following applies to the source of complaints:

(a) Individuals from the public may make complaints in any form, including in writing, by email, in person or by telephone.

(b) Any department member becoming aware of alleged misconduct shall immediately notify a supervisor.

(c) Supervisors shall initiate a complaint based upon observed misconduct or receipt from any source alleging misconduct that, if true, could result in disciplinary action.

(d) Anonymous and third-party complaints should be accepted and investigated to the extent that sufficient information is provided.

(e) Tort claims and lawsuits may generate a personnel complaint.

1010.4 AVAILABILITY AND ACCEPTANCE OF COMPLAINTS

1010.4.1 COMPLAINT FORMS
Personnel complaint forms will be maintained in a clearly visible location in the public area of the police facility and be accessible through the department website. Forms may also be available at other City facilities.

Personnel complaint forms in languages other than English may also be provided, as determined necessary or practicable.

1010.4.2 ACCEPTANCE
All complaints will be courteously accepted by any department member and promptly given to the appropriate supervisor. Although written complaints are preferred, a complaint may also be filed orally, either in person or by telephone. Such complaints will be directed to a supervisor. If a supervisor is not immediately available to take an oral complaint, the receiving member shall obtain contact information sufficient for the supervisor to contact the complainant. The supervisor, upon contact with the complainant, shall complete and submit a complaint form as appropriate.

Although not required, complainants should be encouraged to file complaints in person so that proper identification, signatures, photographs or physical evidence may be obtained as necessary.

1010.5 DOCUMENTATION
Supervisors shall ensure that all formal and informal complaints are documented on a complaint form. The supervisor shall ensure that the nature of the complaint is defined as clearly as possible.

All complaints and inquiries should also be documented in a log that records and tracks complaints. The log shall include the nature of the complaint and the actions taken to address the complaint. On an annual basis, the Department should audit the log and send an audit report to the Chief of Police or the authorized designee.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

1010.6 ADMINISTRATIVE INVESTIGATIONS

Allegations of misconduct will be administratively investigated as follows.

1010.6.1 SUPERVISOR RESPONSIBILITIES

In general, the primary responsibility for the investigation of a personnel complaint shall rest with the member's immediate supervisor, unless the supervisor is the complainant, or the supervisor is the ultimate decision-maker regarding disciplinary action or has any personal involvement regarding the alleged misconduct. The Chief of Police or the authorized designee may direct that another supervisor investigate any complaint.

A supervisor who becomes aware of alleged misconduct shall take reasonable steps to prevent aggravation of the situation.

The responsibilities of supervisors include, but are not limited to:

(a) Ensuring that upon receiving or initiating any formal complaint, a complaint form is completed.

  1. The original complaint form will be directed to the Sergeant of the accused member, via the chain of command, who will take appropriate action and/or determine who will have responsibility for the investigation.

  2. In circumstances where the integrity of the investigation could be jeopardized by reducing the complaint to writing or where the confidentiality of a complainant is at issue, a supervisor shall orally report the matter to the member's Captain or the Chief of Police, who will initiate appropriate action.

(b) Responding to all complaints in a courteous and professional manner.

(c) Resolving those personnel complaints that can be resolved immediately.

  1. Follow-up contact with the complainant should be made within 24 hours of the Department receiving the complaint.

  2. If the matter is resolved and no further action is required, the supervisor will note the resolution on a complaint form and forward the form to the captain.

(d) Ensuring that upon receipt of a complaint involving allegations of a potentially serious nature, the Captain and Chief of Police are notified via the chain of command as soon as practicable.

(e) Promptly contacting the Personnel Department and the Captain for direction regarding the supervisor's role in addressing a complaint that relates to sexual, racial, ethnic or other forms of prohibited harassment or discrimination.

(f) Forwarding unresolved personnel complaints to the Sergeant, who will determine whether to contact the complainant or assign the complaint for investigation.

(g) Informing the complainant of the investigator’s name and the complaint number within three days after assignment.

(h) Investigating a complaint as follows:

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

1. Making reasonable efforts to obtain names, addresses and telephone numbers of witnesses.
2. When appropriate, ensuring immediate medical attention is provided and photographs of alleged injuries and accessible uninjured areas are taken.

(i) Ensuring that the procedural rights of the accused member are followed.

(j) Ensuring interviews of the complainant are generally conducted during reasonable hours.

1010.6.2 ADMINISTRATIVE INVESTIGATION PROCEDURES

Whether conducted by a supervisor or the Captain, the following applies to employees:

(a) Interviews of an accused employee shall be conducted during reasonable hours and preferably when the employee is on-duty. If the employee is off-duty, he/she shall be compensated.

(b) Unless waived by the employee, interviews of an accused employee shall be at the Independence Police Department or other reasonable and appropriate place.

(c) No more than two interviewers should ask questions of an accused employee.

(d) Prior to any interview, an employee should be informed of the nature of the investigation.

(e) All interviews should be for a reasonable period and the employee's personal needs should be accommodated.

(f) No employee should be subjected to offensive or threatening language, nor shall any promises, rewards or other inducements be used to obtain answers.

(g) Any employee refusing to answer questions directly related to the investigation may be ordered to answer questions administratively and may be subject to discipline for failing to do so.

1. An employee should be given an order to answer questions in an administrative investigation that might incriminate the member in a criminal matter only after the member has been given a *Garrity* advisement. Administrative investigators should consider the impact that compelling a statement from the employee may have on any related criminal investigation and should take reasonable steps to avoid creating any foreseeable conflicts between the two related investigations. This may include conferring with the person in charge of the criminal investigation (e.g., discussion of processes, timing, implications).
2. No information or evidence administratively coerced from an employee may be provided to anyone involved in conducting the criminal investigation or to any prosecutor.

(h) The interviewer should record all interviews of employees and witnesses. The employee may also record the interview. If the employee has been previously interviewed, a copy of that recorded interview should be provided to the employee prior to any subsequent interview.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

(i) All employees subjected to interviews that could result in discipline have the right to have an uninvolved representative present during the interview. However, in order to maintain the integrity of each individual's statement, involved employees shall not consult or meet with a representative or attorney collectively or in groups prior to being interviewed.

(j) All employees shall provide complete and truthful responses to questions posed during interviews.

(k) No employee may be compelled to submit to a polygraph examination, nor shall any refusal to submit to such examination be mentioned in any investigation.

1010.6.3 ADMINISTRATIVE INVESTIGATION FORMAT

Formal investigations of personnel complaints shall be thorough, complete and essentially follow this format:

Introduction - Include the identity of the members, the identity of the assigned investigators, the initial date and source of the complaint.

Synopsis - Provide a brief summary of the facts giving rise to the investigation.

Summary - List the allegations separately, including applicable policy sections, with a brief summary of the evidence relevant to each allegation. A separate recommended finding should be provided for each allegation.

Evidence - Each allegation should be set forth with the details of the evidence applicable to each allegation provided, including comprehensive summaries of member and witness statements. Other evidence related to each allegation should also be detailed in this section.

Conclusion - A recommendation regarding further action or disposition should be provided.

Exhibits - A separate list of exhibits (e.g., recordings, photos, documents) should be attached to the report.

1010.6.4 DISPOSITIONS

Each personnel complaint shall be classified with one of the following dispositions:

Unfounded - When the investigation discloses that the alleged acts did not occur or did not involve department members. Complaints that are determined to be frivolous will fall within the classification of unfounded.

Exonerated - When the investigation discloses that the alleged act occurred but that the act was justified, lawful and/or proper.

Not sustained - When the investigation discloses that there is insufficient evidence to sustain the complaint or fully exonerate the member.

Sustained - When the investigation discloses sufficient evidence to establish that the act occurred and that it constituted misconduct.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

If an investigation discloses misconduct or improper job performance that was not alleged in the original complaint, the investigator shall take appropriate action with regard to any additional allegations.

1010.6.5 COMPLETION OF INVESTIGATIONS
Every investigator or supervisor assigned to investigate a personnel complaint or other alleged misconduct shall proceed with due diligence in an effort to complete the investigation within one year from the date of discovery by an individual authorized to initiate an investigation.

1010.6.6 NOTICE TO COMPLAINANT OF INVESTIGATION STATUS
The member conducting the investigation should provide the complainant with periodic updates on the status of the investigation, as appropriate.

1010.7 ADMINISTRATIVE SEARCHES

Assigned lockers, storage spaces and other areas, including desks, offices and vehicles, may be searched as part of an administrative investigation upon a reasonable suspicion of misconduct.

Such areas may also be searched any time by a supervisor for non-investigative purposes, such as obtaining a needed report, radio or other document or equipment.

1010.8 ADMINISTRATIVE LEAVE

When a complaint of misconduct is of a serious nature, or when circumstances indicate that allowing the accused to continue to work would adversely affect the mission of the Department, the Chief of Police or the authorized designee may temporarily assign an accused employee to administrative leave. Any employee placed on administrative leave:

(a) May be required to relinquish any department badge, identification, assigned weapons and any other department equipment.

(b) Shall be required to continue to comply with all policies and lawful orders of a supervisor.

(c) May be temporarily reassigned to a different shift, generally a normal business-hours shift, during the investigation. The employee may be required to remain available for contact at all times during such shift, and will report as ordered.

1010.9 CRIMINAL INVESTIGATION

Where a member is accused of potential criminal conduct, a separate supervisor or investigator shall be assigned to investigate the criminal allegations apart from any administrative investigation. Any separate administrative investigation may parallel a criminal investigation.

The Chief of Police shall be notified as soon as practicable when a member is accused of criminal conduct. The Chief of Police may request a criminal investigation by an outside law enforcement agency.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

A member accused of criminal conduct shall be provided with all rights afforded to a civilian. The member should not be administratively ordered to provide any information in the criminal investigation.

The Independence Police Department may release information concerning the arrest or detention of any member, including an officer, that has not led to a conviction. No disciplinary action should be taken until an independent administrative investigation is conducted.

1010.10 POST-ADMINISTRATIVE INVESTIGATION PROCEDURES

Upon completion of a formal investigation, an investigation report should be forwarded to the Chief of Police through the chain of command. Each level of command should review the report and include their comments in writing before forwarding the report. The Chief of Police may accept or modify any classification or recommendation for disciplinary action.

1010.10.1 CAPTAIN RESPONSIBILITIES

Upon receipt of any completed personnel investigation, the Captain of the involved member shall review the entire investigative file, the member's personnel file and any other relevant materials.

The Captain may make recommendations regarding the disposition of any allegations and the amount of discipline, if any, to be imposed.

Prior to forwarding recommendations to the Chief of Police, the Captain may return the entire investigation to the assigned investigator or supervisor for further investigation or action.

When forwarding any written recommendation to the Chief of Police, the Captain shall include all relevant materials supporting the recommendation. Actual copies of a member's existing personnel file need not be provided and may be incorporated by reference.

1010.10.2 CHIEF OF POLICE RESPONSIBILITIES

Upon receipt of any written recommendation for disciplinary action, the Chief of Police shall review the recommendation and all accompanying materials. The Chief of Police may modify any recommendation and/or may return the file to the Captain for further investigation or action.

Once the Chief of Police is satisfied that no further investigation or action is required by staff, the Chief of Police shall determine the amount of discipline, if any, that should be imposed. In the event disciplinary action is proposed, the Chief of Police shall provide the member with a written notice and the following:

(a) Access to all of the materials considered by the Chief of Police in recommending the proposed discipline.

(b) An opportunity to respond orally or in writing to the Chief of Police within five days of receiving the notice.

1. Upon a showing of good cause by the member, the Chief of Police may grant a reasonable extension of time for the member to respond.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

2. If the member elects to respond orally, the presentation shall be recorded by the Department. Upon request, the member shall be provided with a copy of the recording.

Once the member has completed his/her response, or if the member has elected to waive any such response, the Chief of Police shall consider all information received in regard to the recommended discipline. The Chief of Police shall render a timely written decision to the member and specify the grounds and reasons for discipline and the effective date of the discipline. Once the Chief of Police has issued a written decision, the discipline shall become effective.

1010.10.3 NOTICE OF FINAL DISPOSITION TO THE COMPLAINANT
The Chief of Police or the authorized designee should ensure that the complainant is notified of the disposition (i.e., sustained, not sustained, exonerated, unfounded) of the complaint.

1010.11 PRE-DISCIPLINE EMPLOYEE RESPONSE

The pre-discipline process is intended to provide the accused employee with an opportunity to present a written or oral response to the Chief of Police after having had an opportunity to review the supporting materials and prior to imposition of any recommended discipline. The employee shall consider the following:

(a) The response is not intended to be an adversarial or formal hearing.

(b) Although the employee may be represented by an uninvolved representative or legal counsel, the response is not designed to accommodate the presentation of testimony or witnesses.

(c) The employee may suggest that further investigation could be conducted or the employee may offer any additional information or mitigating factors for the Chief of Police to consider.

(d) In the event that the Chief of Police elects to conduct further investigation, the employee shall be provided with the results prior to the imposition of any discipline.

(e) The employee may thereafter have the opportunity to further respond orally or in writing to the Chief of Police on the limited issues of information raised in any subsequent materials.

1010.12 RESIGNATIONS/RETIREMENTS PRIOR TO DISCIPLINE

In the event that a member tenders a written resignation or notice of retirement prior to the imposition of discipline, it shall be noted in the file. The tender of a resignation or retirement by itself shall not serve as grounds for the termination of any pending investigation or discipline.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

1010.13 POST-DISCIPLINE APPEAL RIGHTS

Non-probationary employees have the right to appeal a suspension without pay, punitive transfer, demotion, reduction in pay or step, or termination from employment. The employee has the right to appeal using the procedures established by any employment agreement and/or personnel rules.

1010.14 PROBATIONARY EMPLOYEES AND OTHER MEMBERS

At-will and probationary employees and members other than non-probationary employees may be disciplined and/or released from employment without adherence to any of the procedures set out in this policy, and without notice or cause, at any time. These individuals are not entitled to any rights under this policy. However, any of these individuals released for misconduct should be afforded an opportunity solely to clear their names through a liberty interest hearing, which shall be limited to a single appearance before the Chief of Police or the authorized designee.

In cases where an individual has been absent for more than a week or when additional time to review the individual is considered to be appropriate, the probationary period may be extended at the discretion of the Chief of Police.

1010.15 RETENTION OF PERSONNEL INVESTIGATION FILES

All personnel complaints shall be maintained in accordance with the established records retention schedule and as described in the Personnel Records Policy.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

Police Chief Advisory Board Agenda

1. Taking complaints
    a. You are required to facilitate complaints as needed.
        i. Email me a request for a complaint form and I will send it to you or contact me to make arrangements to get one
        ii. Then you will need to give it to the citizen
        iii. After they have completed the form you need to accept it and ensure it is delivered to me
        iv. Questions?
2. Terms
    a. Terms will be for one year with the option to request a one year extension
        i. This is to allow for as many different people as possible to be heard
3. Meetings
    a. I anticipate 1 a month for approximately an hour
4. Training
    a. Occasionally you will be asked to participate in training with officers for example:
        i. Use of force scenarios to learn an officer's perspective
        ii. Ride alongs to experience what officers experience
        iii. Fair & Impartial Policing training
5. Being a voice
    a. You will be advertised as being a member of the committee. This way people know they can come to you with suggestions or concerns
    b. You are required to make sure I hear about suggestions and concerns
    c. Remember, this position has many responsibilities, but ultimately if you only do one thing right, you have to be a voice for people in our community and forward their concerns or suggestions, no matter how you feel about them
    d. Your most important responsibility is to be a liaison between the police chief and the citizens
    e. We hope you will also be a cheer leader for law enforcement
        i. When people gripe about police and spread misinformation we hope you will not argue, but at least tell the truth
        ii. This is ultimately your choice but it is my hope that your involvement with the committee will help you understand police-work and realize the decision making priorities we face-in so doing, we hope to earn your support
6. Meeting Minutes
    a. Need a secretary of the committee to take minutes to publish what was discussed
7. Authority
    a. The board has no authority to investigate officer conduct
    b. No decision making authority
    c. serves as a source to improve the body of knowledge for decision making
8. Trust
    a. It is important we all start from a position of trust
        i. I trust that you are a part of this committee to help improve the police department

        ii. I trust that you have no agendas or hard feelings toward law enforcement in general
        iii. I need you to trust that your police department is constantly striving to do the right thing and improve on our practices
        iv. Not asking you to be a rubber stamp on my decisions-if you disagree or don't like a practice we need to discuss it openly & fairly
        v. I do ask that you not do anything to undermine the police department or to undermine the committee
            1. Don't use it to influence others for your gain
            2. Don't use it to influence Law Enforcement if you come into contact with them for any reason
                a. These actions will damage the reputation of the committee and will appear to give favor to committee members in the public's eye
                b. These actions will also cause police to not trust the committee and not support our goals
9. Retention & Removal of committee members
    a. Committee members may be retained longer than their original term at the discretion of the chief, if the committee member requests to remain on the committee
        i. Due to continuity of the committee
        ii. Due to needs of the committee
        iii. Due to lack of qualified applicants to the committee
        iv. This is not a conclusive list
    b. Committee members may be removed before the end of their term at the discretion of the chief
        i. Attempting to use their position for personal gain
        ii. Attempting to use their position to influence others inappropriately
        iii. Any action on the part of the committee member that damages the goals, purpose or reputation of the committee
        iv. If a committee member no longer is able or desires to serve
        v. This is not a conclusive list
10. Meeting Times
    a. Best time of day
        i. 5:00
        ii. 5:30
        iii. 6:00
    b. Best day of week
        i. Monday
        ii. Tuesday
        iii. Wed
        iv. Thursday
    c. Best week of month
        i. 1st
        ii. 2nd

iii. 3rd
iv. 4th

11. Motions:
    a. Appoint Secretary
    b. Set meeting week, day, time, location
12. Next meeting Agenda

22-4610. Same; law enforcement policies preempting profiling, requirements; annual training required; community advisory boards; annual reports of complaints. (a) All law enforcement agencies in this state shall adopt a detailed, written policy to preempt racial or other biased-based policing. Each agency's policy shall include the definition of racial or other biased-based policing found in K.S.A. 22-4606, and amendments thereto.

(b) Policies adopted pursuant to this section shall be implemented by all Kansas law enforcement agencies within one year after the effective date of this act. The policies and data collection procedures shall be available for public inspection during normal business hours.

(c) The policies adopted pursuant to this section shall include, but not be limited to, the following:

(1) A detailed written policy that prohibits racial or other biased-based policing and that clearly defines acts constituting racial or other biased-based policing using language that has been recommended by the attorney general.

(2) (A) The agency policies shall require annual racial or other biased-based policing training which shall include, but not be limited to, training relevant to racial or other biased-based policing. Distance learning training technology shall be allowed for racial or other biased-based policing training.

(B) Law enforcement agencies may appoint an advisory body of not less than five persons composed of representatives of law enforcement, community leaders and educational leaders to recommend and review appropriate training curricula.

(3) (A) For law enforcement agencies of cities or counties that have exercised the option to establish community advisory boards pursuant to K.S.A. 2017 Supp. 22-4611b, and amendments thereto, use of such community advisory boards which include participants who reflect the racial and ethnic community, to advise and assist in policy development, education and community outreach and communications related to racial or other biased-based policing by law enforcement officers and agencies.

(B) Community advisory boards shall receive training on fair and impartial policing and comprehensive plans for law enforcement agencies.

(4) Policies for discipline of law enforcement officers who engage in racial or other biased-based policing.

(5) A provision that, if the investigation of a complaint of racial or other biased-based policing reveals the officer was in direct violation of the law enforcement agency's written policies regarding racial or other biased-based policing, the employing law enforcement agency shall take appropriate action consistent with applicable laws, rules and regulations, resolutions, ordinances or policies, including demerits, suspension or removal of the officer from the agency.

(6) Provisions for community outreach and communications efforts to inform the public of the individual's right to file with the law enforcement agency or the office of the attorney general complaints regarding racial or other biased-based policing, which outreach and communications to the community shall include ongoing efforts to notify the public of the law enforcement agency's complaint process.

(7) Procedures for individuals to file complaints of racial or other biased-based policing with the agency, which, if appropriate, may provide for use of current procedures for addressing such complaints.

(d) (1) Each law enforcement agency shall compile an annual report for the period of July 1 to June 30 and shall submit the report on or before July 31 to the office of the attorney general for review. Annual reports filed pursuant to this subsection shall be open public records and shall be posted on the official website of the attorney general.

(2) The annual report shall include:

(A) The number of racial or other biased-based policing complaints received;

(B) the date each racial or other biased-based policing complaint is filed;

(C) action taken in response to each racial or other biased-based policing complaint;

(D) the disposition of each racial or other biased-based policing complaint;

(E) the date each racial or other biased-based policing complaint is closed;

(F) whether or not all agency law enforcement officers not exempted by Kansas commission on peace officers' standards and training received the training required in subsection (c)(2)(A);

(G) whether the agency has a policy prohibiting racial or other biased-based policing;

(H) whether the agency policy mandates specific discipline for sustained complaints of racial or other biased-based policing;

(I) whether the agency has a community advisory board; and

(J) whether the agency has a racial or other biased-based policing comprehensive plan or if it collects traffic or pedestrian stop data.

History: L. 2005, ch. 159, § 5; L. 2011, ch. 94, § 3; May 26.

Independence Police Department

Complaint Against Police Personnel

COMPLAINT AGAINST POLICE PERSONNEL FORM

COMPLAINANT INFORMATION		
Name:		
Current address:		
City:	State:	ZIP Code:
Phone:	E-mail:	Cell phone:

INCIDENT INFORMATION		
Date of Incident:		
Incident Location:		Incident Time:
Witness:	Witness:	Witness:
Name of Officer or Employee:		

STATEMENT OF ALLEGATION

SIGNATURES

I authorize the verification of the information provided on this form. I understand that this complaint will be investigated and if this complaint is false, I may be subject to civil and/or criminal action.

Signature of applicant:	Date:

2017 Kansas Statutes

45-254. Law enforcement recordings using body camera or vehicle camera; criminal investigation records; disclosure. (a) Every audio or video recording made and retained by law enforcement using a body camera or a vehicle camera shall be considered a criminal investigation record as defined in K.S.A. 45-217, and amendments thereto. The provisions of this subsection shall expire on July 1, 2021, unless the legislature reviews and reenacts this provision pursuant to K.S.A. 45-229, and amendments thereto, prior to July 1, 2021.

(b) In addition to any disclosure authorized pursuant to the open records act, K.S.A. 45-215 et seq., and amendments thereto, a person described in subsection (c) may request to listen to an audio recording or to view a video recording made by a body camera or a vehicle camera. The law enforcement agency shall allow the person to listen to the requested audio recording or to view the requested video recording, and may charge a reasonable fee for such services provided by the law enforcement agency.

(c) Any of the following may make a request under subsection (b):

(1) A person who is a subject of the recording;

(2) a parent or legal guardian of a person under 18 years of age who is a subject of the recording;

(3) an attorney for a person described in subsection (c)(1) or (c)(2); and

(4) an heir at law, an executor or an administrator of a decedent, when the decedent is a subject of the recording.

(d) As used in this section:

(1) "Body camera" means a device that is worn by a law enforcement officer that electronically records audio or video of such officer's activities.

(2) "Vehicle camera" means a device that is attached to a law enforcement vehicle that electronically records audio or video of law enforcement officers' activities.

History: L. 2016, ch. 82, § 1; July 1.

Records Maintenance and Release

804.1 PURPOSE AND SCOPE

This policy provides guidance on the maintenance and release of department records. Protected information is separately covered in the Protected Information Policy.

804.2 POLICY

The Independence Police Department is committed to providing public access to records in a manner that is consistent with the Kansas Open Records Act (K.S.A. § 45-215 et seq.).

804.3 CUSTODIAN OF RECORDS

The Chief of Police shall designate a Custodian of Records. The Custodian of Records is the official custodian pursuant to K.S.A. § 45-217. The responsibilities of the Custodian of Records or the custodian's designee include, but are not limited to:

(a) Managing the records management system for the Department, including the retention, archiving, release and destruction of department public records.

(b) Maintaining and updating the department records retention schedule, including:

1. Identifying the minimum length of time the Department must keep records.
2. Identifying the department division responsible for the original record.

(c) Establishing rules regarding the inspection and copying of department public records as reasonably necessary for the protection of such records as provided by K.S.A. § 45-220.

(d) Identifying records or portions of records that are confidential under state or federal law and not open for inspection or copying.

(e) Establishing rules regarding the processing of subpoenas for the production of records.

(f) Ensuring the availability of a current schedule of fees for public records as allowed by law (K.S.A. § 45-218; K.S.A § 45-219).

(g) Ensuring a brochure on public records is available to the public that contains a description of the basic rights of a person who requests public information, the responsibilities of the Department, and the procedures and costs for inspecting or obtaining a copy of the public record (K.S.A. § 45-227).

(h) Developing and maintaining reasonable written procedures and practices to protect personal information, as defined by K.S.A. § 50-7a01, from unauthorized access, use, modification or disclosure. Procedures should include how members are to be trained to protect personal information (K.S.A. § 50-6,139b).

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

Recruitment and Selection

1000.1 PURPOSE AND SCOPE

This policy provides a framework for employee recruiting efforts and identifying job-related standards for the selection process. This policy supplements the rules that govern employment practices for the Independence Police Department and that are promulgated and maintained by the Personnel Department.

1000.2 POLICY

In accordance with applicable federal, state, and local law, the Independence Police Department provides equal opportunities for applicants and employees regardless of actual or perceived race, ethnicity, national origin, religion, sex, sexual orientation, gender identity or expression, age, disability, pregnancy, genetic information, veteran status, marital status, or any other protected class or status. The Department does not show partiality or grant any special status to any applicant, employee, or group of employees unless otherwise required by law.

The Department will recruit and hire only those individuals who demonstrate a commitment to service and who possess the traits and characteristics that reflect personal integrity and high ethical standards.

1000.3 RECRUITMENT

The Administration Captain should employ a comprehensive recruitment and selection strategy to recruit and select employees from a qualified and diverse pool of candidates.

The strategy should include:

(a) Identification of racially and culturally diverse target markets.

(b) Use of marketing strategies to target diverse applicant pools.

(c) Expanded use of technology and maintenance of a strong internet presence. This may include an interactive department website and the use of department-managed social networking sites, if resources permit.

(d) Expanded outreach through partnerships with media, community groups, citizen academies, local colleges, universities and the military.

(e) Employee referral and recruitment incentive programs.

(f) Consideration of shared or collaborative regional testing processes.

The Administration Captain shall avoid advertising, recruiting and screening practices that tend to stereotype, focus on homogeneous applicant pools or screen applicants in a discriminatory manner.

The Department should strive to facilitate and expedite the screening and testing process, and should periodically inform each candidate of his/her status in the recruiting process.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

1000.4 SELECTION PROCESS

The Department shall actively strive to identify a diverse group of candidates who have in some manner distinguished themselves as being outstanding prospects. Minimally, the Department should employ a comprehensive screening, background investigation and selection process that assesses cognitive and physical abilities and includes review and verification of the following:

(a) A comprehensive application for employment (including previous employment, references, current and prior addresses, education, military record)

(b) Driving record

(c) Reference checks

(d) Employment eligibility, including U.S. Citizenship and Immigration Services (USCIS) Employment Eligibility Verification Form I-9 and acceptable identity and employment authorization documents. This required documentation should not be requested until a candidate is hired. This does not prohibit obtaining documents required for other purposes

(e) Information obtained from public internet sites

(f) Financial history consistent with the Fair Credit Reporting Act (FCRA) (15 USC § 1681 et seq.)

(g) Local, state and federal criminal history record checks

(h) Polygraph or voice stress analyzer (VSA) examination (when legally permissible)

(i) Medical and psychological examination (may only be given after a conditional offer of employment)

(j) Review board or selection committee assessment

1000.4.1 VETERAN PREFERENCE

The Department will provide veteran preference as required (K.S.A. § 73-201).

1000.4.2 WAIVERS

The Administration Captain shall obtain a written waiver from applicants for an officer position if the applicant has been employed by another state or local law enforcement agency or government agency (K.S.A. § 75-4379). Applicants who refuse to execute the waiver shall not be considered for employment (K.S.A. § 75-4379).

The assigned background investigator shall include a copy of the waiver signed by the applicant with each request for information submitted to a law enforcement or government agency that has previously employed the applicant (K.S.A. § 75-4379).

1000.5 BACKGROUND INVESTIGATION

Every candidate shall undergo a thorough background investigation to verify his/her personal integrity and high ethical standards, and to identify any past behavior that may be indicative of the candidate's unsuitability to perform duties relevant to the operation of the Independence Police Department.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

1000.5.1 NOTICES
Background investigators shall ensure that investigations are conducted and notices provided in accordance with the requirements of the FCRA (15 USC § 1681d).

1000.5.2 REVIEW OF SOCIAL MEDIA SITES
Due to the potential for accessing unsubstantiated, private or protected information, the Administration Captain should not require candidates to provide passwords, account information or access to password-protected social media accounts.

The Administration Captain should consider utilizing the services of an appropriately trained and experienced third party to conduct open source, internet-based searches and/or review information from social media sites to ensure that:

(a) The legal rights of candidates are protected.

(b) Material and information to be considered are verified, accurate and validated.

(c) The Department fully complies with applicable privacy protections and local, state and federal law.

Regardless of whether a third party is used, the Administration Captain should ensure that potentially impermissible information is not available to any person involved in the candidate selection process.

1000.5.2 RECORDS RETENTION
The background report and all supporting documentation shall be maintained in accordance with the established records retention schedule.

1000.5.2 DOCUMENTING AND REPORTING
The background investigator shall summarize the results of the background investigation in a report that includes sufficient information to allow the reviewing authority to decide whether to extend a conditional offer of employment. The report shall not include any information that is prohibited from use, including that from social media sites, in making employment decisions. The report and all supporting documentation shall be included in the candidate's background investigation file.

1000.6 DISQUALIFICATION GUIDELINES
As a general rule, performance indicators and candidate information and records shall be evaluated by considering the candidate as a whole, and taking into consideration the following:

- Age at the time the behavior occurred
- Passage of time
- Patterns of past behavior
- Severity of behavior
- Probable consequences if past behavior is repeated or made public

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

- Likelihood of recurrence
- Relevance of past behavior to public safety employment
- Aggravating and mitigating factors
- Other relevant considerations

A candidate's qualifications will be assessed on a case-by-case basis, using a totality-of-the-circumstances framework.

1000.7 EMPLOYMENT STANDARDS

All candidates shall meet the minimum standards required by state law. Candidates will be evaluated based on merit, ability, competence and experience, in accordance with the high standards of integrity and ethics valued by the Department and the community.

Validated, job-related and nondiscriminatory employment standards shall be established for each job classification and shall minimally identify the training, abilities, knowledge and skills required to perform the position's essential duties in a satisfactory manner. Each standard should include performance indicators for candidate evaluation. The Personnel Department should maintain validated standards for all positions.

1000.7.1 STANDARDS FOR OFFICERS

Candidates shall meet the minimum standards established by Kansas law, including those provided in (K.S.A. § 74-5605):

(a) Be a United States citizen.

(b) Has been fingerprinted and a search of local, state and national fingerprint files has been made to determine whether the candidate has a criminal record.

(c) Not have been convicted of any felony, misdemeanor crime of domestic violence or a misdemeanor offense that reflects on honesty, trustworthiness, integrity or competence.

(d) Have obtained a high school diploma or the equivalent of a high school education.

(e) Possess a valid driver's license and have a good driving record.

(f) Be of good moral character sufficient to warrant the public trust as a law enforcement officer.

(g) Have completed a psychological test approved by the Kansas Commission on Peace Officers' Standards and Training (KS·CPOST) to determine that the candidate does not have a mental or personality disorder that would adversely affect the ability to perform the essential functions of a law enforcement officer.

(h) Be free of any physical or mental condition which adversely affects the ability to perform the essential functions of a law enforcement officer with reasonable skill, safety and judgment.

(i) Be at least 21 years of age.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

804.4 PROCESSING REQUESTS FOR PUBLIC RECORDS

Any department member who receives a request for any record shall route the request to the Custodian of Records or the authorized designee. If the Custodian of Records determines the requester is not the custodian of the requested record, the requester shall be notified and provided the name and location of the custodian of the public record, if known or readily ascertainable (K.S.A. § 45-218).

804.4.1 REQUESTS FOR RECORDS

The processing of requests for any record is subject to the following (K.S.A. § 45-218; K.S.A. § 45-219):

(a) All requests for records shall be made in writing.

1. A request will not be returned, delayed or denied because of any technicality unless it is impossible to determine the records requested (K.S.A. § 45-220).

(b) The Department is not required to create records that do not exist.

(c) Copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices shall not be provided unless such items were shown or played at a public meeting.

1. If a record is copyrighted by a person other than the Department, the record shall not be copied.

(d) Requesters shall not make copies of public records electronically by inserting, connecting or otherwise attaching an electronic device to any computer or other electronic device of the Department.

(e) When a record contains both material with release restrictions and material that is not subject to release restrictions, the restricted material shall be redacted and the unrestricted material released (K.S.A. § 45-221(d)).

1. A copy of the redacted release should be maintained in the case file for proof of what was actually released and as a place to document the reasons for the redactions. If the record is audio or video, a copy of the redacted audio/video release should be maintained in the department-approved media storage system and a notation should be made in the case file to document the release and the reasons for the redacted portions.

(f) Computerized information shall be provided in the form requested unless the Department does not have the capability to produce the requested form.

(g) Each request for a record shall be acted upon as soon as possible, but no later than the end of the third business day after receipt of the request.

(h) If access to a record request is not granted immediately, the requester shall be provided a detailed explanation of the cause for the delay and notified of the place and earliest time and date the record will be available for inspection.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

(i) Payment of any associated fees is required prior to the release of records.

804.4.2 DENIALS

When a record request is denied, the requester shall be provided a written statement of the grounds for denial, upon request, no later than the end of the third business day after receipt of the request. The statement shall include the citation to the specific provision of law that denies access (K.S.A. § 45-218).

The Custodian of Records may refuse to provide access to a public record or to permit inspection if the request places an unreasonable burden on the Department to produce the records or there is reason to believe repeated requests are intended to disrupt other essential department functions. A refusal must be supported by a preponderance of evidence (K.S.A. § 45-218).

804.5 RELEASE RESTRICTIONS

Examples of release restrictions include, but are not limited to (K.S.A. § 45-221):

(a) Personal identifying information, including an individual's photograph; Social Security and driver identification number; name, address and telephone number; and medical or disability information that is contained in any driver's license record, motor vehicle record or any department record, including traffic accident reports are restricted except as authorized by the Department, and only when such use or disclosure is permitted or required by law to carry out a legitimate law enforcement purpose (18 USC § 2721; 18 USC § 2722; K.S.A. § 75-3520).

(b) Personnel records, performance ratings or individually identifiable records pertaining to members or applicants for employment, except for names, positions, salaries or actual compensation employment contracts/agreements and length of service.

(c) Information that would reveal the identity of an undercover agent or informant reporting a specific violation of law.

(d) Records which represent the work product of an attorney.

(e) Records of emergency or security information or procedures of the Department.

(f) Information that would reveal the location of a shelter, safe house or similar place where persons are provided protection from abuse, or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault.

(g) Victim information (K.S.A. § 38-2310).

(h) Records related to children in need of care (K.S.A. § 38-2213).

(i) Records that would reveal the location of a victim of domestic violence, sexual assault, human trafficking or stalking who is enrolled in the Kansas Secretary of State's Safe at Home (SaH) Address Confidentiality Program (K.S.A. § 75-451).

(j) Juvenile law enforcement records (K.S.A. § 38-2310).

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

(k) Criminal investigation records, including audio or video recordings taken with body-worn or in-car cameras, unless ordered by a court or allowed for by K.S.A. § 45-254.

(l) Records that are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.

(m) Records containing information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of personal privacy.

(n) An individual's email address, cellular telephone number and other contact information which has been given to the Department for the purpose of department notifications or communications which are widely distributed to the public.

(o) Records that would disclose the name, home address, zip code, email address, telephone number or cellular telephone number, or other contact information for any person who is licensed to carry concealed handguns, has enrolled in or completed any weapons training in order to be licensed, or has made application for such license under the Personal and Family Protection Act, unless allowed by law.

(p) Recordings or statements made during a custodial interrogation related to a homicide or felony sex offense (K.S.A. § 22-4620).

(q) Any other information that may be appropriately denied by K.S.A. § 45-221 and Kansas law.

804.5.1 REQUIRED RELEASE

Upon request, the Custodian of Records shall allow the following individuals to review recordings captured by a body-worn device or in-car camera (K.S.A. § 45-254):

(a) A person who is a subject of the recording.

(b) A parent or legal guardian of a person under 18 who is a subject of the recording.

(c) The attorney for a subject of the recording.

(d) An heir at law, an executor or an administrator of a decedent, when the decedent is a subject of the recording.

804.6 SUBPOENAS AND DISCOVERY REQUESTS

Any member who receives a subpoena duces tecum or discovery request for records should promptly contact a supervisor and the Custodian of Records for review and processing. While a subpoena duces tecum may ultimately be subject to compliance, it is not an order from the court that will automatically require the release of the requested information.

Generally, discovery requests and subpoenas from criminal defendants and their authorized representatives (including attorneys) should be referred to the County Attorney, City Attorney or the courts.

All questions regarding compliance with any subpoena duces tecum or discovery request should be promptly referred to legal counsel for the Department so that a timely response can be prepared.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

804.7 RELEASED RECORDS TO BE MARKED

Each page of any written record released pursuant to this policy should be stamped in a colored ink or otherwise marked to indicate the department name and to whom the record was released.

Each audio/video recording released should include the department name and to whom the record was released.

804.8 SECURITY BREACHES

Members who become aware that any Independence Police Department system containing personal information may have been breached should notify the Administrative Assistant as soon as practicable.

The Administrative Assistant shall conduct a prompt investigation to determine the likelihood that personal information has been or will be misused (K.S.A. § 50-7a02).

The Administrative Assistant shall ensure the required notice is given to any resident of this state whose unsecured personal information is reasonably believed to have been misused or where there is a reasonable likelihood that the information will be misused (K.S.A. § 50-7a02).

Notice shall be given in the most expedient time possible and without unreasonable delay consistent with the legitimate needs of the Independence Police Department and consistent with any measures necessary to determine the scope of the breach or to restore the reasonable integrity of the agency data system. Notice may be delayed if notification will impede a criminal investigation (K.S.A. § 50-7a02).

For the purposes of the notice requirement, personal information includes an individual's first name or first initial and last name in combination with any one or more of the following (K.S.A. § 50-7a01):

(a) Social Security number

(b) Driver's license number or Kansas identification card number

(c) Full account number, credit or debit card number, or any required security code, access code, or password that would permit access to an individual's financial account

If the breach reasonably appears to have been made to protected information covered in the Protected Information Policy, the Administrative Assistant should promptly notify the appropriate member designated to oversee the security of protected information (see the Protected Information Policy).

804.9 EXPUNGEMENT

Expungement orders received by the Department shall be reviewed for appropriate action by the Custodian of Records. The Custodian of Records shall expunge such records as ordered by the court. Records may include, but are not limited to, a record of arrest, investigation, detention or conviction. Once expunged, members shall respond to any inquiry as though the record did not exist.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

Independence Police Department

Jerry Harrison Chief of Police
811 W. Laurel
Independence, Kansas 67301
General Office (620)332-1700 Fax (620)332-1703

Appendix D

74-5607a. Certification for full-time and part-time law enforcement officers; annual training; provisional certificate. (a) The commission shall not issue a certification as a full-time police officer or law enforcement officer unless such officer has been awarded a certificate attesting to satisfactory completion of a full-time officer basic course of accredited instruction at the training center or at a certified state or local law enforcement training school or has been awarded such a certificate for not less than the number of hours of instruction required by the Kansas law enforcement training act at the time such certificate was issued or received a permanent appointment as a full-time police officer or law enforcement officer prior to July 1, 1969, or was appointed a railroad policeman pursuant to K.S.A. 66-524, and amendments thereto, on or before January 1, 1982. No person shall receive certification as a part-time police officer or law enforcement officer unless such officer has been awarded a certificate attesting to the satisfactory completion of a part-time officer basic course of instruction in law enforcement at the training center or at a certified state or local law enforcement training school.

(b) Beginning the second year after certification, every full-time police officer or law enforcement officer shall complete annually 40 hours of continuing law enforcement education or training in subjects relating directly to law enforcement. Failure to complete such training shall be grounds for suspension of a certificate issued under the Kansas law enforcement training act until such training is completed, except that the commission may stay any such suspension upon a showing of hardship upon the employing law enforcement agency. The commission, in consultation with the director of police training, shall adopt rules and regulations regarding such education or training. Such education or training may include procedures for law enforcement to follow when responding to an allegation of stalking. Every city, county and state agency shall send to the director certified reports of the completion of such education or training. The commission shall maintain a record of the reports in the central registry.

(c) Subject to the provisions of subsection (d):

(1) Any person who is appointed or elected as a police officer or law enforcement officer and who does not hold a certificate as required by subsection (a) may be issued a provisional certificate for a period of one year. The commission may extend the one-year period for the provisional certificate if in the commission's determination the extension would not constitute an intentional avoidance of the requirements of subsection (a). If a person's provisional certificate expires or is revoked, the person shall not be issued another provisional certificate within one year of the expiration or revocation. A provisional certificate shall be revoked upon dismissal from any basic training program authorized by K.S.A. 74-5604a, and amendments thereto. A provisional certificate may be revoked upon voluntary withdrawal from any basic training program authorized by K.S.A. 74-5604a, and amendments thereto.

(2) Any police officer or law enforcement officer who does not complete the education or training required by subsection (b) by the date such education or training is required to have been completed shall be subject to revocation or suspension of certification and loss of the officer's office or position.

(d) The commission may extend, waive or modify the annual continuing education requirement, when it is shown that the failure to comply with the requirements of subsection (a) or (b) was not due to the intentional avoidance of the law.

History: L. 1982, ch. 322, § 4; L. 1988, ch. 306, § 2; L. 1995, ch. 180, § 10; L. 2006, ch. 170, § 13; L. 2008, ch. 137, § 7; L. 2012, ch. 89, § 6; July 1.

Subcommittee questions and request for a copy of the IPD policies

Jeri Hopkins <jeri@iplks.org>

Tue 7/28/2020 9:38 AM

To: Jerry Harrison <jerryh@independenceks.gov>; wjcleaver@sbcglobal.net <wjcleaver@sbcglobal.net>

Jerry,

Please see the questions below that the subcommittee came up with. The DTF would also like to receive a copy of the IPD's policies before our next meeting on August 24th so that we might be better informed.

Thank you for being so forthcoming at our meeting last night. I personally learned a great deal!

Best Regards,
Jeri Kay

Jeri Kay Hopkins, Director
Independence Public Library
620-331-3030
jeri@iplks.org

What are the written policy and procedures?
- Is there a policy against chokeholds?
- Can the Code of Conduct and all other policies be placed on the city website?
- Is there a policy on the duty to intervene?
- Is there a policy against using no-knock warrants?
- What are the school resource officer policies?
- Do the officers have qualified immunity?
- If a report of a suspicious person is received by dispatch, what is the policy or procedure before an officer is sent?
- Where is the line for engagement with a citizen by an officer on a report of a suspicious person? When do you not engage the citizen?
- What is the procedure for transferring information from dispatch to officers?
- What is the process for investigating misconduct and complaints?
- Do we have an independent civilian review board for misconduct and complaints?

What are the training methods?
- How often do they train on weapons?
- How frequently do they require qualification for weapons?
- How frequently do they train on soft skills like de-escalation, anti-bias?

What is the budget of the department?
- How much is spent on training?
- How much do we spend on firearms and bullets

Is it possible to design a mental health team to respond when a military response is not immediately necessary?

Is there disparate treatment of subgroups?

Who is the liability insurance provider?

How can we help?

Diversity Task Force | Policing Subcommittee Report

The Subcommittee on policing met twice in the last month. We conducted a survey on attitudes to the police department from students at Independence Community College and on the DTF Facebook page. We discussed police interactions with members of the Family of Christ Church. We also did research on issues and solutions to problems experienced in other communities. The following is a report of our findings and next steps that we recommend the Diversity Task Force take.

FINDINGS

1. Attitudes toward the police: The survey showed that 90% of the people in Independence have a positive attitude toward the Independence police department. Only 2% have a negative attitude with the remaining 8% being neutral. Although, the survey methodology is not scientific. Also the hispanic community does not report having significant encounters with the police department and they generally have a positive attitude toward the police department.
2. Community Oversight Boards: Other communities in Kansas have an impartial community board with oversight of complaints against the police department, police training, code of ethics and the overarching system. This would allow for transparency and confidence in the system. There are three different models for this process:
    a. Investigative model: external impartial body that does the investigation
    b. Review boards: review the internal investigation done by the police department. This is the less expensive model
    c. Auditor monitor: This model requires professionals in policing to serve as auditors. This type of model also has jurisdiction over police training, the code of ethics, and overarching system. This is usually the most expensive model
2. Mental Health Crisis Response team: A team with extensive training on responding to people in mental health crisis. There is a strong need for such a team in Independence whether it is part of the police force or another organization.

RECOMMENDATIONS

1. Invite Police Chief Harrison to the next DTF meeting to ask him questions about the police department's policies and procedures, budget, training methods, community oversight board for complaints and a mental health crisis response team.
2. Address Commission to change policies.
3. Courageous Conversations.
4. Book Club: Scheduled for September 1 @ 6pm either virtually or at the library.
5. Diversity Task Force members read books on race relations.
    a. 10 Books About Race To Read Instead Of Asking A Person Of Color To Explain Things To You
    b. 62 great books by Black authors, recommended by TED speakers

Diversity Task Force Perception Survey

This survey is completely anonymous. Answer the following below.

* Required

How old are you? *

Your answer

What is your ethnicity? *

Your answer

Gender *

- Female
- Male
- Prefer not to say
- Other:

Where is your hometown? *

Your answer

Request edit access

Do you feel comfortable talking to law enforcement? *

- Always
- Sometimes
- Never

Would you call the police if you were in trouble? *

- Always
- Sometimes
- Never

Do you believe calling the police will make a situation better? *

- Always
- Sometimes
- Never

How would you describe your views of the police? *

- Positive
- Neutral
- Negative

Request edit access

How would you describe any encounters you have had with the police? *

- Positive
- Neutral
- Negaitve

In the box below, please describe a time when you had an encounter with law enforcement. (negative or positive)

Your answer

Do you feel that racism is a problem in the United States? *

- Yes
- No

Do you feel like you have been discriminated against personally? *

- Yes
- No

Since living in Independence, what has your overall experience been? *

- Positive
- Negative

Request edit access

If negative, please explain:

Your answer

Submit

Never submit passwords through Google Forms.

This content is neither created nor endorsed by Google. Report Abuse - Terms of Service - Privacy Policy

Google Forms

Source document for assessment of Likert Scale in surveys: UKEssays. (November 2018). Validity And Reliability Of The Likert Scale Psychology Essay. Retrieved from https://www.ukessays.com/essays/psychology/validity-and-reliability-of-the-likert-scale-psychology-essay.php?vref=1

Request edit access

Crisis Intervention Incidents

409.1 PURPOSE AND SCOPE

This policy provides guidelines for interacting with those who may be experiencing a mental health or emotional crisis. Interaction with such individuals has the potential for miscommunication and violence. It often requires an officer to make difficult judgments about a person's mental state and intent in order to effectively and legally interact with the individual.

409.1.1 DEFINITIONS

Definitions related to this policy include:

Person in crisis – A person whose level of distress or mental health symptoms have exceeded the person's internal ability to manage his/her behavior or emotions. A crisis can be precipitated by any number of things, including an increase in the symptoms of mental illness despite treatment compliance; non-compliance with treatment, including a failure to take prescribed medications appropriately; or any other circumstance or event that causes the person to engage in erratic, disruptive or dangerous behavior that may be accompanied by impaired judgment.

409.2 POLICY

The Independence Police Department is committed to providing a consistently high level of service to all members of the community and recognizes that persons in crisis may benefit from intervention. The Department will collaborate, where feasible, with mental health professionals to develop an overall intervention strategy to guide its members' interactions with those experiencing a mental health crisis. This is to ensure equitable and safe treatment of all involved.

409.3 SIGNS

Members should be alert to any of the following possible signs of mental health issues or crises:

(a) A known history of mental illness

(b) Threats of or attempted suicide

(c) Loss of memory

(d) Incoherence, disorientation or slow response

(e) Delusions, hallucinations, perceptions unrelated to reality or grandiose ideas

(f) Depression, pronounced feelings of hopelessness or uselessness, extreme sadness or guilt

(g) Social withdrawal

(h) Manic or impulsive behavior, extreme agitation or lack of control

(i) Lack of fear

(j) Anxiety, aggression, rigidity, inflexibility or paranoia

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

Members should be aware that this list is not exhaustive. The presence or absence of any of these signs should not be treated as proof of the presence or absence of a mental health issue or crisis.

409.4 COORDINATION WITH MENTAL HEALTH PROFESSIONALS

The Chief of Police, or designee, should collaborate with mental health professionals to develop an education and response protocol. It should include a list of community resources to guide department interaction with those who may be suffering from mental illness or who appear to be in a mental health crisis.

409.5 FIRST RESPONDERS

Safety is a priority for first responders. It is important to recognize that individuals under the influence of alcohol, drugs or both may exhibit symptoms that are similar to those of a person in a mental health crisis. These individuals may still present a serious threat to officers; such a threat should be addressed with reasonable tactics. Nothing in this policy shall be construed to limit an officer's authority to use reasonable force when interacting with a person in crisis.

Officers are reminded that mental health issues, mental health crises and unusual behavior are not criminal offenses. Individuals may benefit from treatment as opposed to incarceration.

An officer responding to a call involving a person in crisis should:

(a) Promptly assess the situation independent of reported information and make a preliminary determination regarding whether a mental health crisis may be a factor.

(b) Request available backup officers and specialized resources as deemed necessary and, if it is reasonably believed that the person is in a crisis situation, use conflict resolution and de-escalation techniques to stabilize the incident as appropriate.

(c) If feasible, and without compromising safety, turn off flashing lights, bright lights or sirens.

(d) Attempt to determine if weapons are present or available.

(e) Take into account the person's mental and emotional state and potential inability to understand commands or to appreciate the consequences of his/her action or inaction, as perceived by the officer.

(f) Secure the scene and clear the immediate area as necessary.

(g) Employ tactics to preserve the safety of all participants.

(h) Determine the nature of any crime.

(i) Request a supervisor, as warranted.

(j) Evaluate any available information that might assist in determining cause or motivation for the person's actions or stated intentions.

(k) If circumstances reasonably permit, consider and employ alternatives to force.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

409.6 DE-ESCALATION

Officers should consider that taking no action or passively monitoring the situation may be the most reasonable response to a mental health crisis.

Once it is determined that a situation is a mental health crisis and immediate safety concerns have been addressed, responding members should be aware of the following considerations and should generally:

- Evaluate safety conditions.
- Introduce themselves and attempt to obtain the person's name.
- Be patient, polite, calm and courteous and avoid overreacting.
- Speak and move slowly and in a non-threatening manner.
- Moderate the level of direct eye contact.
- Remove distractions or disruptive people from the area.
- Demonstrate active listening skills (i.e., summarize the person's verbal communication).
- Provide for sufficient avenues of retreat or escape should the situation become volatile.

Responding officers generally should not:

- Use stances or tactics that can be interpreted as aggressive.
- Allow others to interrupt or engage the person.
- Corner a person who is not believed to be armed, violent or suicidal.
- Argue, speak with a raised voice or use threats to obtain compliance.

409.7 INCIDENT ORIENTATION

When responding to an incident that may involve mental illness or a mental health crisis, the officer should request that the dispatcher provide critical information as it becomes available. This includes:

(a) Whether the person relies on drugs or medication, or may have failed to take his/her medication.

(b) Whether there have been prior incidents or suicide threats/attempts, and whether there has been previous police response.

(c) Contact information for a treating physician or mental health professional.

Additional resources and a supervisor should be requested as warranted.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

409.8 SUPERVISOR RESPONSIBILITIES

A supervisor should respond to the scene of any interaction with a person in crisis. Responding supervisors should:

(a) Attempt to secure appropriate and sufficient resources.

(b) Closely monitor any use of force, including the use of restraints, and ensure that those subjected to the use of force are provided with timely access to medical care (see the Handcuffing and Restraints Policy).

(c) Consider strategic disengagement. Absent an imminent threat to the public and, as circumstances dictate, this may include removing or reducing law enforcement resources or engaging in passive monitoring.

(d) Ensure that all reports are completed and that incident documentation uses appropriate terminology and language.

(e) Conduct an after-action tactical and operational debriefing, and prepare an after-action evaluation of the incident to be forwarded to the Captain.

(f) Evaluate whether a critical incident stress debriefing for involved members is warranted.

409.9 INCIDENT REPORTING

Members engaging in any oral or written communication associated with a mental health crisis should be mindful of the sensitive nature of such communications and should exercise appropriate discretion when referring to or describing persons and circumstances.

Members having contact with a person in crisis should keep related information confidential, except to the extent that revealing information is necessary to conform to department reporting procedures or other official mental health or medical proceedings.

409.9.1 DIVERSION

Individuals who are not being arrested should be processed in accordance with the Involuntary Civil Commitments Policy.

409.10 NON-SWORN INTERACTION WITH PEOPLE IN CRISIS

Non-sworn or clerical members may be required to interact with persons in crisis in an administrative capacity, such as dispatching, records request and animal control issues.

(a) Members should treat all individuals equally and with dignity and respect.

(b) If a member believes that he/she is interacting with a person in crisis, he/she should proceed patiently and in a calm manner.

(c) Members should be aware and understand that the person may make unusual or bizarre claims or requests.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department

If a person's behavior makes the member feel unsafe, if the person is or becomes disruptive or violent, or if the person acts in such a manner as to cause the member to believe that the person may be harmful to him/herself or others, an officer should be promptly summoned to provide assistance.

409.11 EVALUATION

The Captain designated to coordinate the crisis intervention strategy for this department should ensure that a thorough review and analysis of the department response to these incidents is conducted annually. The report will not include identifying information pertaining to any involved individuals, officers or incidents and will be submitted to the Chief of Police through the chain of command.

409.12 TRAINING

In coordination with the mental health community and appropriate stakeholders, the Department will develop and provide comprehensive education and training to all department members to enable them to effectively interact with persons in crisis.

Copyright Lexipol, LLC 2020/08/06, All Rights Reserved.
Published with permission by Independence Police Department