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**SLAYING THE SERPENTS: WHY ALTERNATIVE
INTERVENTION IS NECESSARY TO PROTECT THOSE
IN MENTAL HEALTH CRISIS FROM THE STATE-
CREATED DANGER “SNAKE PIT”**

*Kathleen Giunta**

The Black Lives Matter protests in 2020 and ongoing reports of police brutality around the United States sparked extensive debate over qualified immunity and the legal protections that prevent police accountability. Individuals experiencing mental health crises are especially vulnerable to police violence, since police officers lack the requisite skills and knowledge to provide effective crisis support during mental health emergencies. Although the state-created danger doctrine was created by the courts as an exception to qualified immunity, it is so rarely applied that individuals harmed or even killed by police are left without legal remedy. This Note explores qualified immunity and the state-created danger doctrine as they currently exist. In addition, this Note describes the current crisis intervention techniques taught to police officers around the United States, which are highly variable from district to district and require officers to serve medical assessment roles that they are ill-equipped for. Since qualified immunity is rooted in long-standing case precedent, and the state-created danger doctrine rarely applies to those in the midst of a

* J.D. Candidate, Brooklyn Law School, 2023. B.A., The City College of New York, 2018. I would like to thank my parents, Mary and Gavin, and my dear friend Emilia for their unending love, support, and belief in me. Thanks to Professor Alice Ristroph for her insight and advice when researching this Note topic. Thank you to Interrupting Criminalization, led by Mariame Kaba and Andrea J. Ritchie, along with countless other abolitionist thinkers and organizers, who continue to educate so many through their work and who inspired this Note. I would also like to sincerely thank the *Journal of Law and Policy* staff for all of their hard work, thoughtful edits and comments, and support throughout this process.

mental health crisis, this Note calls for widespread implementation of alternative crisis intervention. Alternative crisis intervention would protect individuals before a deadly encounter with police officers occurs. Further, 9-1-1 operators should be separated from police departments, in order to shift towards appropriate dispatch of mental health support in emergency situations and further mitigate the chance for police violence, protecting civilians from ever falling victim to the state-created danger “snake pit.”

INTRODUCTION

Between January 1, 2015 and February 9, 2022, police officers killed over 1,500 individuals in the midst of a mental health crisis.¹ This figure represents one in five cases in which police fatally shot a person, and highlights an ongoing problem with police responses to acute mental health crises.² One such instance took place in December 2020—Angelo Quinto’s mother called the Antioch, California police when Angelo, a thirty-year-old Hispanic man, experienced an episode of paranoia.³ Although Angelo’s mother calmed him down by the time officers arrived to the scene, the responding officers nonetheless forcibly removed Angelo from his mother’s arms, laid him face down on the ground, and knelt on his neck for more than four minutes until he “became lifeless.”⁴ In response to the police killing of Angelo, the Contra Costa County mayor announced reforms, including the establishment of a mental health crisis response team within the police force.⁵ The political

¹ Julie Tate et al., *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last updated Mar. 1, 2022) [<https://perma.cc/74T9-NXSN>] (listing all fatal police shootings as reported in the news and compiled in one database, broken down into demographic).

² Minyvonne Burke, *Policing Mental Health: Recent Deaths Highlight Concerns Over Officer Response*, NBC NEWS (May 16, 2021), <https://www.nbcnews.com/news/us-news/policing-mental-health-recent-deaths-highlight-concerns-over-officer-response-n1266935> [<https://perma.cc/WDP5-HCTJ>].

³ *Id.*

⁴ *Id.*

⁵ Jacey Fortin, *California Man Died After Police Knelt on Him for 5 Minutes, Family Says*, N.Y. TIMES (Feb. 25, 2021),

discussion surrounding police reform and the institution of crisis response teams is increasingly volatile, especially after Black Lives Matter protests swept the nation during the summer of 2020 in response to the killing of George Floyd, and sparked an ongoing debate about police reform across the country.⁶ Sixty-three percent of Americans support reallocating a portion of police funding to create first responder programs that specifically deal with issues related to mental illness.⁷ However, the political conversation around “defunding the police” and prosecution of police has become so contentious that activists and politicians struggle to implement policies to meaningfully change policing practices.⁸

The nuanced political environment surrounding policing is complicated by the legal mechanisms that protect officers from liability for acts committed while in the line of duty.⁹ Currently under 42 U.S.C. § 1983, officers are entitled to qualified immunity, which shields government officials from personal liability for money damages and lawsuits unless their conduct violates a “clearly established” statutory or constitutional right.¹⁰ While there are exceptions to qualified immunity, such as the state-created danger doctrine, the current formulation of qualified immunity protects essentially all officers except for the “plainly incompetent or those who knowingly violate the law.”¹¹ The state-created danger doctrine provides a narrow exception to the shield from liability, establishing that an officer may be liable when their actions “creat[e] a dangerous

<https://www.nytimes.com/2021/02/25/us/angelo-quinto-death-police-kneel.html> [https://perma.cc/ZZ6C-AY9L].

⁶ William Saletan, *Americans Don’t Want to Defund the Police. Here’s What They Do Want.*, SLATE (Oct. 17, 2021), <https://slate.com/news-and-politics/2021/10/police-reform-polls-white-black-crime.html> [https://perma.cc/Q2PT-SBSA].

⁷ *Id.*

⁸ *See id.*

⁹ See Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), <https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf> [https://perma.cc/6ZU9-H379].

¹⁰ SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION: A CONTEXT AND PRACTICE CASEBOOK, *Qualified Immunity*, 592–93 (Carolina Academic Press, 3d ed. 2020).

¹¹ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

situation or rende[r] citizens more vulnerable to danger.”¹² But the application of this exception is not uniform in all circuit courts,¹³ is not effectively applied when police violently respond to individuals in acute mental health crisis, and is even more obscured in situations regarding excessive use of force.¹⁴

This Note analyzes qualified immunity as it currently exists as an impassable shield protecting the police, with an in-depth assessment of the state-created danger doctrine. Further, this Note will discuss how different circuit courts use the state-created danger doctrine to hold government officials and officers liable for harms against those experiencing mental health crises. Given these seemingly immovable legal doctrines, this Note considers how preventive measures—through alternative crisis intervention—may present a viable solution to supporting individuals during mental health crises. Part I of this Note provides background on the development of qualified immunity, as well as recent state responses to qualified immunity resulting from political pressures to hold police officers accountable. Part II of this Note describes the state-created danger doctrine as developed through legal precedent, and how the state-created danger doctrine was applied to situations where mentally ill persons died by suicide. Part III of this Note explores the crisis intervention techniques that police officers use and evaluates the success of the current crisis intervention programs. Part IV of this Note discusses community-based alternatives to crisis intervention that may be more effective than policing, especially considering the failings of the legal system in post-facto prosecution

¹² *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993) (describing the door left open by *DeShaney* for liability under very specific circumstances).

¹³ See Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. REV.* 1, 3–4 (2014).

¹⁴ See Arthur H. Garrison, *Criminal Culpability, Civil Liability, and Police Created Danger: Why and How the Fourth Amendment Provides Very Limited Protection from Police Use of Deadly Force*, 28 *GEO. MASON U. C.R. L.J.* 241, 278 (2018); see also Latasha M. James, Comment, *Excessive Force: A Feasible Proximate Cause Approach*, 54 *U. RICH. L. REV.* 605, 612–13 (2020) (describing factual causation as the requirement that “but for the plaintiff’s act or omission, the defendant would not have sustained damages” and describing proximate cause as requiring a “direct relation between the injury asserted and the injurious conduct alleged”).

or civil suits when individuals have been irreparably harmed or killed by officers.

I. QUALIFIED IMMUNITY

A. *The Underpinnings of Qualified Immunity*

The basis for qualified immunity as a protection for officers is rooted in the language of 42 U.S.C. § 1983, which states in part:

that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.¹⁵

Typically, § 1983 is the primary statutory avenue for individuals to seek civil damages for a deprivation of any right or privilege granted to them by the Constitution or other federal statutes.¹⁶ Qualified immunity is a defense that can be asserted to circumvent liability, if the claim is made in response to conduct that occurred while the defendant was serving in their capacity as a government official.¹⁷ The Supreme Court explored the scope and purpose behind the statutory protection for officers built into § 1983 in *Harlow v. Fitzgerald*,¹⁸ stating that “public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”¹⁹ The Court justified qualified immunity as a means to protect public officers from harassing litigation, since the absence of such a protection may “encourage officials to avoid conduct that exposes them to liability, even if such conduct might also produce benefits to the public at

¹⁵ Garrison, *supra* note 14, at 243; 42 U.S.C. § 1983 (emphasis added).

¹⁶ Dani Kritter, *The Overlooked Barrier to Section 1983 Claims: State Catch-All Statutes of Limitations*, CALIF. L. REV. ONLINE (Mar. 2021), <https://www.californialawreview.org/the-overlooked-barrier-to-section-1983-claims-state-catch-all-statutes-of-limitations/> [https://perma.cc/YZ4M-JPN8].

¹⁷ Ricks & Tenenbaum, *supra* note 10, at 592–93.

¹⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

¹⁹ *Id.*

large.”²⁰ In more recent years the Supreme Court found qualified immunity applied to a police officer that injured a civilian by kicking down her yard door in pursuit of someone else²¹ and an officer waiting nearby on an overpass that shot a suspect fleeing pursuit despite the fact that other officers set up spike strips to more safely stop the vehicle down the road.²² Although the issue in *Harlow* was whether senior aides and advisors of the President were immune from suit,²³ the Court ruled on immunity for official positions more broadly. It held that officials with “special functions or constitutional status,” like legislators and judges, have an absolute immunity, while executive officials generally, like police officers, have a qualified immunity.²⁴

When considering whether an officer is shielded by qualified immunity, courts previously applied a two-prong test with both “subjective” and “objective” components.²⁵ Qualified immunity could only be overcome if the officer “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.”²⁶ After *Harlow*, the Court changed the test and held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁷ Accordingly, courts now determine whether an officer is shielded by qualified immunity based on whether the conduct was objectively reasonable,

²⁰ Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 572 (2020).

²¹ *Stanton v. Sims*, 571 U.S. 3, 5 (2013).

²² It was also noted in this case that the officer who decided to shoot the vehicle to stop it had “not received training in this tactic and had not attempted it before.” *Mullenix v. Luna*, 577 U.S. at 7–9, 11 (2015).

²³ *Harlow*, 457 U.S. at 806.

²⁴ *Id.* at 807.

²⁵ *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

²⁶ *Id.* at 322.

²⁷ *Harlow*, 457 U.S. at 818.

and whether the individual right violated was “clearly established.”²⁸

The *Harlow* Court eliminated the subjective branch of the two-prong inquiry to ensure that qualified immunity issues would be resolved on summary judgment, evading trials for government officials and saving government resources.²⁹ The Court, however, failed to foresee the challenges for lower courts in determining what is considered “clearly established,” leading to subsequent circuit splits.³⁰ Ultimately, the problem with qualified immunity can be categorized in three main parts.³¹ First, many courts determine that existing constitutional rights are not “clearly established” if they are not sufficiently clear “on the ground” or if there is not concrete applicable legal precedent.³² Second, not all courts agree what sources the “clearly established” law must come from.³³ Sometimes, only precedent from the highest Court can illuminate what is “clearly established,” while in other circuits, lower court or adjacent circuit decisions can be considered.³⁴ Third, the more general an individual right, the more likely an official is shielded by qualified immunity because the unlawfulness of the conduct must be directly connected to the right or statute in some way.³⁵ These three restrictive factors make qualified immunity incredibly difficult to defeat in practice.³⁶

²⁸ Ricks & Tenenbaum, *supra* note 10, at 592–93; *see also* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (explaining the “clearly established” inquiry requires that the “contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right”).

²⁹ John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

³⁰ *Id.*; *see also* Vinyard v. Wilson, 311 F.3d 1340, 1350–51 (11th Cir. 2002) (developing a three-stage inquiry which divides qualified immunity cases into three categories of “clearly established” law in which the right or law either has “obvious clarity,” “broad statements of principle [that] are not tied to particularized facts,” or “precedent that is tied to the facts”).

³¹ Jeffries, Jr., *supra* note 29, at 854.

³² *Id.* at 854–55.

³³ *Id.* at 858–59.

³⁴ *Id.*

³⁵ *Id.* at 859–60.

³⁶ *Id.* at 862; *see also* Saucier v. Katz, 533 U.S. 194 (2001) (distinguishing between the excessive force and qualified immunity inquiries because the

B. Recent Changes to Qualified Immunity Doctrines and Policy

The impenetrability of qualified immunity, along with public demands to hold police officers accountable for their actions, pushed some states to address qualified immunity on a local level.³⁷ Civil unrest surrounding qualified immunity sparked a fight in Congress—since qualified immunity is a federal doctrine—over how to best reform the protection.³⁸ Opponents of qualified immunity argue that it makes officer accountability impossible, which is additionally problematic considering that qualified immunity is not rooted in the U.S. Constitution or U.S. Code, but judicial activism that occurred during the Civil Rights Movement to protect officers that wrongfully arrested Black priests participating in Freedom Rides.³⁹ Proponents of qualified immunity argue that it prevents frivolous lawsuits, builds trust between community members and law enforcement by allowing officers to maintain public safety, and ensures that there is not a “chilling effect” on police hiring since liability could deter recruiting and retaining officers.⁴⁰

After negotiations over the George Floyd in Policing Act of 2021 failed in the Senate, it was clear that the Democratic and Republican parties are too ideologically opposed to reach a

excessive force standard requires “deference to the judgment of reasonable officers on the scene” while the qualified immunity inquiry is more related to legal constraints on police conduct, stating that “if the officer’s mistake as to what the law allows is reasonable, however, the officer is entitled to the immunity defense”).

³⁷ Emma Tucker, *States Tackling ‘Qualified Immunity’ for Police as Congress Squabbles Over the Issue*, CNN POLITICS (Apr. 23, 2021), <https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html> [<https://perma.cc/7SZB-9GB6>].

³⁸ *Id.*

³⁹ Radley Balko, *The Ugly Origins of Qualified Immunity*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/opinions/2021/10/26/ugly-origins-qualified-immunity/> [<https://perma.cc/5V4Q-9SZR>]; see also *Pierson v. Ray*, 386 U.S. 547 (1967).

⁴⁰ NAT’L POLICE SUPPORT FUND, *Qualified Immunity Pros and Cons*, <https://nationalpolicesupportfund.com/qualified-immunity-pros-and-cons/> (last visited Feb. 11, 2022) [<https://perma.cc/4T6V-QZMU>].

bipartisan deal on qualified immunity reform,⁴¹ and so approximately twenty-five states took it upon themselves to formulate policy responses that end or limit qualified immunity.⁴² While Colorado and New Mexico were the first states to pass legislation altering qualified immunity,⁴³ New York City was the first city to issue a ban of qualified immunity for police officers.⁴⁴ New York City blunted qualified immunity by creating a new cause of action that allows individuals to sue police officers who violate their rights under the New York state constitution without granting officers qualified immunity as a defense.⁴⁵ However, the New York City ban against qualified immunity is misleading because it only applies to unreasonable searches and seizures, not violations of any other constitutional rights.⁴⁶ It also only applies to the New York City Police Department and not any other government official, such as corrections officers, school employees, social workers, or any other New York state employees.⁴⁷ Therefore, corrections officers or state police officers that cause harm while on the job are still

⁴¹ H.R. 1280, 117th Cong. (2021) (stating that the purpose of the “George Floyd Justice in Policing Act of 2021” is “[t]o hold law enforcement accountable for misconduct in court, improve transparency through data collection, and reform police training and policies,” further detailing reform surrounding qualified immunity, collection of statistics, providing framework for independent investigations of police action, adjusting police appropriations, and improving police training protocol); *see also* Jack Turman & Ed O’Keefe, *Bipartisan Police Reform Talks, Sparked by George Floyd’s Death, Collapse in Congress*, CBS NEWS (Sept. 22, 2021), <https://www.cbsnews.com/news/police-reform-dead-george-floyd-justice-policing-act/> [<https://perma.cc/4LT9-K8SD>] (describing the failed discussions within the legislation to enact new federal police reforms via the George Floyd in Policing Act, which would “raise professional standards,” “create a lot more transparency,” and “create accountability”).

⁴² Tucker, *supra* note 37.

⁴³ *Id.*

⁴⁴ Nick Sibilla, *New York City Bans Qualified Immunity for Cops Who Use Excessive Force*, FORBES (Apr. 29, 2021), <https://www.forbes.com/sites/nicksibilla/2021/04/29/new-york-city-limits-qualified-immunity-makes-it-easier-to-sue-cops-who-use-excessive-force/?sh=679bd4a567e9> [<https://perma.cc/5E36-492Y>].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

protected from civil liability without any remedy.⁴⁸ With such substantive loopholes on the local level, and the federal failings to reform qualified immunity via the George Floyd in Policing Act,⁴⁹ qualified immunity remains a towering obstacle to anyone seeking police accountability post-facto when an individual has been harmed or killed by an officer.⁵⁰

II. STATE-CREATED DANGER DOCTRINE

The infrequent application of the state-created danger doctrine to police misconduct in response to acute mental health crisis makes crystalline the failings of qualified immunity.

A. *The Development of the State-Created Danger Doctrine*

Prior to the development of the state-created danger doctrine, several circuit courts expressed concern over such a doctrine.⁵¹ In *Bowers v. De Vito*, the Seventh Circuit protested the development of an exception to qualified immunity, since Judge Posner explained that the Constitution does not require state or federal governments to provide protection for civilians, but Judge Posner nonetheless said:

⁴⁸ *Id.*

⁴⁹ Turman & O'Keefe, *supra* note 41.

⁵⁰ See Nathaniel Sobel, *What Is Qualified Immunity, and What Does It have to Do With Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), <https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-to-do-police-reform> [<https://perma.cc/PPT6-2JFP>] (describing qualified immunity doctrine and its history via case precedent, stating that “the Supreme Court’s construct of a ‘reasonable officer’ has shifted since *Harlow* to grant government officials greater deference” and quoting ACLU lawyer Scott Michelman who stated that “in order for a plaintiff to overcome qualified immunity, the right violated must be so clear that its violation in the plaintiff’s case would have been obvious not just to the average ‘reasonable officer’ but to the least informed, least reasonable ‘reasonable officer’”).

⁵¹ See Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL OF RTS. J. 1165 (2005) (discussing the state-created danger doctrine, the different tests applied to assess the doctrine across circuits, and proposes a new and generalized state-created danger doctrine).

If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.⁵²

In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court first seriously considered whether officers have a duty to protect people from harm.⁵³ There, a four-year-old was severely beaten by his father, and the child's guardian filed suit against the Department of Social Services after they failed to adequately respond to child abuse complaints.⁵⁴ Although the Supreme Court held that the government has no affirmative duty to protect people from privately inflicted harms, the majority opinion notably carved out exceptions for those in government custody or in circumstances where the government created the danger, giving rise to the "state-created danger" doctrine.⁵⁵

Circuit courts have dealt with the carve-outs in *DeShaney* differently: some circuits have determined that there must be both government custody *and* a state-created danger, while others have provided two separate exceptions.⁵⁶ This bifurcation in approaches, in addition to a variety of precedent amongst the circuits, led to differing theories on what is required to establish state-created danger.⁵⁷

Negligence on the part of an officer is considered inadequate to establish state-created danger, but deliberate indifference in emergency situations that "shocks the conscience" can lead to officer liability.⁵⁸ This deliberate indifference standard, introduced by the Supreme Court in *County of Sacramento v. Lewis*, is such a high threshold that it is barely applied in the years since *Lewis* was decided.⁵⁹ However, in one case coming from the First Circuit, the

⁵² *Bowers v. De Vito*, 686 F.2d 616, 618 (7th Cir. 1982).

⁵³ Chemerinsky, *supra* note 13, at 1–2; *see DeShaney v. Winnebago Cnty Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989).

⁵⁴ *DeShaney*, 489 U.S. at 193.

⁵⁵ Chemerinsky, *supra* note 13, at 3.

⁵⁶ *Id.* at 3–4.

⁵⁷ *Id.*

⁵⁸ *Id.* at 12–13; *see also Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998).

⁵⁹ Chemerinsky, *supra* note 13, at 13; *see also Lewis*, 523 U.S. at 850–53.

court decided that two Maine State Police officers were not protected by qualified immunity and could be found liable by a jury after they left the victim of kidnapping, grave threats, and repeated rape alone despite knowing that her attacker was actively fleeing police and pursuing her, ultimately kidnapping her again because of the officers' negligence.⁶⁰ Lower courts have also found that deliberate indifference in non-emergency situations may be sufficient to show state-created danger, but this is still a substantially difficult threshold to meet.⁶¹

Since there is no clear guidance from the Supreme Court on how to assess state-created dangers, different circuits have created their own unique tests.⁶² The Sixth Circuit created a three-part test in *Jones v. Reynold*, stating that there can be a state-created danger claim if the plaintiff establishes:

[A]n affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's action placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.⁶³

The Eighth Circuit, however, created a five-part test to assess state-created danger in *Hart v. City of Little Rock*, which requires that the plaintiff prove:

(1) they were members of a limited, precisely definable group, (2) [the government's] conduct put them at significant risk of serious, immediate, and proximate harm, (3) the risk was obvious or known to [the government], (4) [the government] acted recklessly in conscious disregard of the risk, and (5) in total, [the government's] conduct shocks the conscience.⁶⁴

⁶⁰ *Irish v. Fowler*, 979 F.3d 65, 70–71 (1st Cir. 2020).

⁶¹ *Chemerinsky*, *supra* note 13, at 14–15.

⁶² *Id.* at 15.

⁶³ *Jones v. Reynolds*, 438 F.3d 685, 690–91 (6th Cir. 2006).

⁶⁴ *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005).

Further differences between circuit approaches include a different number of factors with varying language,⁶⁵ resulting in an unwieldy and variable approach to application of the doctrine.⁶⁶ In the context of police or government official responses to mental health crises, these differing approaches render officer liability even more uncertain.

B. Circuit Split Over Suicide Under an Officer's Watch

Although scenarios where officers directly perpetrate violence appear to be clear cases where there should be accountability, officer negligence or non-violent affirmative actions also result in deep harm. Despite this potential for harm, application of the state-created danger doctrine still varies wildly.⁶⁷ One such example is the circuit split over whether an officer can be held liable when a person under their watch dies by suicide.⁶⁸ In *Armijo v. Wagon Mound Public Schools*, the Tenth Circuit held that a school principal and school counselor could be held liable under the state-created danger doctrine when Philadelfio Armijo, a sixteen-year-old student, committed suicide after being suspended from school and sent home.⁶⁹ The school counselor drove Philadelfio to his home, which he knew was empty and contained firearms, without contacting Philadelfio's parents after Philadelfio expressed an intent to shoot

⁶⁵ See *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3rd Cir. 1995). The Third Circuit created a four-part test for state-created danger, with the factors being: "(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." Notably, all three approaches require different degrees of officer knowledge that their actions created a risk.

⁶⁶ Chemerinsky, *supra* note 13, at 17–18.

⁶⁷ See Chemerinsky, *supra* note 13, at 26 (describing how characterization of the police commission or omission becomes "enormously important when litigating" because of how it affects application of the state-created danger doctrine, and how "there is a radical difference in the law" between certain circuit courts).

⁶⁸ See *Armijo v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1256–57 (10th Cir. 1998); *Wilson v. Gregory*, 3 F.4th 844, 844–45 (6th Cir. 2021).

⁶⁹ *Armijo*, 159 F.3d at 1256–57.

himself.⁷⁰ In sending Philadelfio home, the school principal and counselor's conduct satisfied the five-part test for state-created danger, with the same five factors articulated earlier under the Eighth Circuit test.⁷¹ In addition, the court found that the principal and counselor had "created the danger or increased the plaintiff's vulnerability to the danger in some way."⁷²

Alternatively, the Sixth Circuit determined that suicide cannot fall under the state-created danger doctrine.⁷³ In *Wilson v. Gregory*, Cheryl Huelsman urged her daughter to call 9-1-1 while her husband, Jack Huelsman, suffered from a bipolar episode and symptoms of paranoia.⁷⁴ When an officer responded to the scene, he knew that Jack had mental illness and access to firearms, and yet the officer told paramedics they could leave Jack alone inside the home while talking to Cheryl outside, during which time Jack died by suicide.⁷⁵ Although the officer was trained in crisis intervention, he stated that he believed Jack was lucid and not in the midst of a mental health crisis.⁷⁶ The court held that these circumstances did not fall under the state-created danger doctrine because under qualified immunity, the officer did not have "sufficient warning of the possible unconstitutionality of their conduct" and "failure to act is not an affirmative act under the state-created danger theory."⁷⁷

Wilson v. Gregory illuminates how the state-created danger doctrine fails to hold police officers liable for their actions (or inactions) when interacting with mentally ill persons. In the absence of a specific affirmative action by officers to create a danger, the Sixth Circuit determined that the officer did not contribute to the harm that ultimately led to Jack's suicide.⁷⁸ However, the decision to send away EMS services—after the 9-1-1 call indicated Jack was potentially suicidal—could be seen as an affirmative act that

⁷⁰ *Id.*

⁷¹ *Hart*, 432 F.3d at 805.

⁷² *Armijo*, 159 F.3d at 1263.

⁷³ *Wilson*, 3 F.4th at 844–45.

⁷⁴ *Id.*

⁷⁵ *Id.* at 849–52.

⁷⁶ *Id.* at 851–52.

⁷⁷ *Id.* at 859.

⁷⁸ *Id.*

contributed to the harm.⁷⁹ Sending away EMS services after a 9-1-1 call regarding a suicide threat is not so dissimilar from sending Philadelfio home from school after he expressed the potential to shoot himself, which was a key consideration in the Tenth Circuit's analysis of whether the danger was state-created.⁸⁰ However, these two cases demonstrate that the different state-created danger tests assess officer action—or inaction—differently, resulting in unpredictable outcomes for those seeking accountability when officers could have prevented or mitigated a serious harm.

C. Officer Liability for Excessive Force Claims

Unfortunately, it is just as complex to establish liability for police officers who use excessive force under the state-created danger doctrine. When considering excessive force claims, plaintiffs must clearly demonstrate a chain of events in which the officer's initial behavior, pre-seizure conduct, and use of force is not changed or “broken” by the plaintiffs' behavior.⁸¹ Courts require “both factual causation and proximate cause” which creates an incredibly high burden for plaintiffs to establish a state-created danger.⁸² The Third Circuit has explained this requirement by stating that “as long as the officer's use of force was reasonable given the plaintiff's acts, then despite the [police creation of danger or jeopardy], the plaintiff's own conduct would be a superseding cause that limited the officer's liability.”⁸³ Although the baseline tests for state-created

⁷⁹ *Wilson*, 3 F.4th at 849–51.

⁸⁰ *Armijo*, 159 F.3d at 1256–57.

⁸¹ *Garrison*, *supra* note 14, at 262.

⁸² *Id.*; *see also* *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (distinguishing between the excessive force and qualified immunity inquiries because the excessive force standard requires “deference to the judgment of reasonable officers on the scene” while the qualified immunity inquiry is more related to legal constraints on police conduct, stating that “if the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense”).

⁸³ *Garrison*, *supra* note 14, at 263 (citing *Lamont v. New Jersey*, 637 F.3d 177, 186 (3d Cir. 2011)).

danger vary, most courts adopt a similar use of force analysis to determine the reasonableness of officer conduct.⁸⁴

Further, if the officer is “confronted with events creating a ‘hyper-pressurized environment,’” the court may require a showing of “deliberate intention to harm the plaintiff.”⁸⁵ This is because limited time to reflect on the circumstances weighs in the officer’s benefit under the “shocks the conscience” requirement.⁸⁶

Since courts generally defer to the officer when considering reasonableness and fact-based analyses, like whether conduct shocks the conscience, it seems very unlikely that qualified immunity will be dismantled. Because of the high threshold for qualified immunity, the higher threshold for the state-created danger doctrine, and arguably the highest threshold for excessive use of force claims, it is abundantly clear that revolutionizing legal liability doctrine will not provide the urgent protections needed for mentally ill persons who come into contact with police. The line of cases that establish qualified immunity and limit the availability of state-created danger doctrine and excessive force claims insulate officers from any practical liability.

Ultimately, the original concerns voiced by the Seventh Circuit about the state-created danger doctrine were wholly unnecessary because aside from a small number of exceptions, officers are almost always protected from the consequences of their actions. However, mentally ill persons are thrown into the snake pit every time 9-1-1 responds to the scene of an acute mental health crisis. With high legal thresholds, harmed persons are again thrown into the snake pit while attempting to prove liability in court. In order to truly eliminate the snake pit, mental health crisis intervention needs to be entirely overhauled.

III. CURRENT CRISIS INTERVENTION TECHNIQUES IN POLICING

The primary crisis intervention model adopted by police forces across the United States is often referred to as the “Memphis Model,” since it was first created in Memphis, Tennessee by the

⁸⁴ *Id.* at 264.

⁸⁵ *Id.* at 266.

⁸⁶ *Id.*

National Alliance on Mental Illness,⁸⁷ police officers, mental health professionals, and other community leaders after a young Black man was fatally shot by police officers.⁸⁸ In that 1987 incident, police officers went to the LeMoyné Gardens public housing project to respond to a call regarding a young Black man who was reported to be threatening people with a knife.⁸⁹ The twenty-seven-year-old man, Joseph DeWayne Robinson, was seen self-harming with a butcher knife, inflicting over 120 wounds on his own body.⁹⁰ While what transpired when police arrived on the scene is disputed, police fatally shot Joseph multiple times.⁹¹ After this tragic killing, community members were enraged about police brutality and the racialized dynamic of multiple white officers killing a young Black man in the midst of a mental health crisis.⁹² This community outrage led to the mayor of Memphis organizing a taskforce, with the National Alliance on Mental Illness at the helm, to develop a better

⁸⁷ The National Alliance on Mental Illness is an organization that “provides advocacy, education, support and public awareness so that all individuals and families affected by mental illness can build better lives.” NAT’L ALL. ON MENTAL ILLNESS, *Who We Are*, <https://nami.org/About-NAMI/Who-We-Are> (last visited Dec. 1, 2021) [<https://perma.cc/PF2H-D7VX>].

⁸⁸ CIT CTR., *The CIT Program: Background*, <http://www.cit.memphis.edu/overview.php?page=1> (last visited Nov. 7, 2021) [<https://perma.cc/GM9E-HD9L>]; see also Amy C. Watson & Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners*, BEST PRAC. MENTAL HEALTH 1 (2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3769782/pdf/nihms500811.pdf> [<https://perma.cc/6ZE9-TK27>] (discussing crisis intervention techniques as a “front-door approach” to addressing mentally ill persons in the criminal justice system, and describing what the role of a mental health practitioner should be in relation to police forces, since previously there had been vast, mutual distrust between mental health practitioners and police officers).

⁸⁹ CIT CTR., *supra* note 88; Daniel Connolly, *Memphis Police Crisis Intervention Team Approaches 30 Years, but How Effective Is It?*, COM. APPEAL (Aug. 6, 2017), <https://www.commercialappeal.com/story/news/crime/2017/08/06/memphis-police-mental-health-crisis-team-30-years/493740001/> [<https://perma.cc/QPT5-D4TX>].

⁹⁰ CIT CTR., *supra* note 88; Connolly, *supra* note 89.

⁹¹ CIT CTR., *supra* note 88; Connolly, *supra* note 89.

⁹² CIT CTR., *supra* note 88.

protocol for police officers to respond to crises and more effectively work with individuals who suffer from mental illness.⁹³

The Memphis Crisis Intervention Team, or “CIT,” is “an innovative police based first responder program” that is intended to serve as “pre-arrest jail diversion for those in mental illness crisis.”⁹⁴ The model consists of a select group of police officers who are specially trained in crisis intervention, and these officers “perform the usual duties of uniform patrol officers but [are specifically] available for immediate dispatch to mental health crisis scenes.”⁹⁵ CIT officers make vital decisions on the ground, such as whether individuals need to be transported for mental health evaluations or receive other mental health or social services.⁹⁶ The training received by CIT officers encompasses a variety of topics, such as “mental health diagnoses, psychiatric medications, and issues of drug abuse and dependence,” “cross-cultural sensitivity,” the life experiences and struggles of mentally ill persons, and “intensive training in verbal de-escalation skills with consistent attention to officer safety.”⁹⁷

Since the Memphis CIT model has gained popularity, mental health professionals have expressed cautious optimism about the ways that CIT can be implemented by officers.⁹⁸ Generally, the CIT model has three core components: “(1) ongoing elements; (2) operational elements; and (3) sustaining elements.”⁹⁹ The ongoing elements include police department partnerships and relationships with community health providers, overarching department policy

⁹³ *Id.*

⁹⁴ *About CIT*, CIT CTR., <http://www.cit.memphis.edu/aboutCIT.php> (last visited Nov. 7, 2021) [<https://perma.cc/RB95-R5XR>].

⁹⁵ *Memphis Model*, CIT CTR., <http://www.cit.memphis.edu/overview.php?page=2> (last visited Nov. 7, 2021) [<https://perma.cc/H8X6-HEHE>].

⁹⁶ *Id.*

⁹⁷ *Training*, CIT CTR., <http://www.cit.memphis.edu/overview.php?page=3> (last visited Nov. 7, 2021) [<https://perma.cc/UQ4T-DWGN>].

⁹⁸ Watson & Fulambarker, *supra* note 88, at 3.

⁹⁹ Charles Dempsey, *Beating Mental Illness: Crisis Intervention Team Training and Law Enforcement Response Trends*, 26 S. CAL. INTERDISC. L. J. 323, 324 (2017).

and procedure, and community planning and networking.¹⁰⁰ The operational elements consist of the technical training for officers, how officers are dispatched and coordinated to respond to crises, and how officers interface with mental health providers in transporting an individual.¹⁰¹ Finally, the sustaining elements include general outreach and evaluation of the CIT programs to determine how they are functioning over time.¹⁰²

A. Implementation of the Memphis CIT Model

The Memphis CIT model was so positively received initially that there are now over 1,000 CIT programs in operation, in the United States and abroad.¹⁰³ Within the United States, the Memphis CIT model has been adopted in over forty states.¹⁰⁴

1. Voluntariness

CIT training is voluntary in most jurisdictions, so officers do not have to become CIT-specialized unless they choose to do so.¹⁰⁵ While the CIT curriculum includes a variety of different “didactic, experiential and practical skills/scenario based training formats,” proponents of the model have expressed that CIT is beneficial for police forces because it creates crisis intervention protocol and shifts police departments away from standard procedure of investigation and arrest and toward a more collaborative model that involves mental health and social services providers.¹⁰⁶

In Texas, a bill titled The Bob Meadows Act mandated at least sixteen hours of crisis intervention training for all Texas Peace Officers, while in New Mexico, the legislature mandated forty hours

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Watson & Fulambarker, *supra* note 88, at 3.

¹⁰⁴ Dempsey, *supra* note 99, at 324–25 (stating that Maine, Connecticut, Ohio, Georgia, Florida, Utah, Kentucky, Texas, and California have all adopted the Memphis CIT model).

¹⁰⁵ Watson & Fulambarker, *supra* note 88, at 3 (noting that the voluntary training program under the Memphis CIT model is approximately forty hours).

¹⁰⁶ *Id.* at 2.

of crisis intervention training as a part of the basic officer training regimen for new recruits.¹⁰⁷ Some jurisdictions went even further in developing effective mental health crisis response: in California, Los Angeles police officers are required to attend a “two-week Police Science Leadership course” where they complete crisis intervention training, and then officers receive an additional four hours of crisis intervention training every two years through refresher courses.¹⁰⁸

2. Transportation Protocol

CIT programs differ in how mentally ill persons are transported after officers have responded to a call.¹⁰⁹ In Memphis, officers who transport a mentally ill person for treatment bring the individual to a central psychiatric medical center that has a non-refusal policy, which prioritizes officers’ time and enables them to return to their work swiftly.¹¹⁰ Cities like Philadelphia and Chicago have specific medical facilities designated for dropping off individuals in need of medical services that may extend beyond psychiatric evaluation, like medication refills or social services.¹¹¹ However, these examples are outliers, and a 2006 CIT program survey revealed that only one third of all programs have formal agreements to work with

¹⁰⁷ Dempsey, *supra* note 99, at 325.

¹⁰⁸ *Id.*

¹⁰⁹ Watson & Fulambarker, *supra* note 88, at 3.

¹¹⁰ The Med is the primary medical center in Memphis, where officers transport individuals in need of mental health treatment and evaluation. The Med is set up to ensure that there is quick and effective communication between the medical community, police department, and state hospitals, in addition to preventing situations where officers drop off individuals in a manner called “dumping,” or when officers “misrepresent[t] the situation to off-load the consumer in trouble.” This collaborative effort between officers and medical professionals is meant to ensure there is more substantial trust between the two components of the CIT program, and allow doctors the time and information necessary to determine where individuals should be referred, whether that be a hospital or other social service program such as substance abuse support or elderly patient support for crises like dementia. *Id.*

¹¹¹ *Id.*

mental health providers to streamline transportation or hospitalization.¹¹²

The delicate relationship between mental health providers and police officers complicates the effective referral of individuals with mental health struggles to medical support.¹¹³ This relationship became particularly clear when the Memphis taskforce was first developing potential models of CIT in the late 1980s.¹¹⁴ At that time, mental health providers and police officers did not trust each other, because providers believed that police were not knowledgeable enough to respond to crises, and officers believed that providers did not supply effective enough care to prevent mentally ill individuals from carceral contact in the future.¹¹⁵ This distrust between mental health providers and police officers persists, and presents a formidable obstacle to the implementation of CIT models across cities.¹¹⁶ The CIT model inherently depends upon community collaboration, especially since mental health providers facilitate the development of CIT protocol, so a strong relationship between police and mental health providers is vital to the success of CIT programs.¹¹⁷

3. Problems with the Memphis CIT Model

Although Memphis's collaborative CIT model appears to provide a promising approach to mental health crisis response, it is not without flaws. Since only 30% of police departments nationally have formalized relationships with medical centers like the Memphis CIT program, it is unclear to what extent the transfer of individuals from officer custody to medical professionals occurs effectively on a national level, if at all.¹¹⁸ In addition, officers continue to express feelings of inadequacy in regards to department

¹¹² Kathleen Hartford et al., *Pre-arrest Diversion of People with Mental Illness: Literature Review and International Survey*, BEHAV. SCIS. & THE L. 24, 845, 853 (Wiley Interscience, 2006); *see also id.*

¹¹³ Watson & Fulambarker, *supra* note 88, at 6.

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.* at 5–6.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Hartford et al., *supra* note 112, at 853; *see generally id.*

responses to mental health crisis, long since the implementation of CIT programs.¹¹⁹ Police are typically the first responders when there is a mental health crisis, and the research on CIT programs remains inconclusive regarding whether serious injury or death for persons with mental illness interacting with officers has substantially decreased.¹²⁰

B. The Co-Responder Team

An alternative crisis intervention response method, known as “the Co-Responder Team,” or “CRT,” was also implemented in some jurisdictions as either a supplement to the CIT model or as an alternative to CIT.¹²¹ CRT involves a specially-trained police officer and a mental health provider being called by field officers to respond to a mental health crisis together.¹²² The goals of CRT are similar to those of CIT, namely to “prevent unnecessary incarceration and/or hospitalization of mentally-ill individuals,” “provide alternate care in the least restrictive environment,” “prevent the duplication of mental health services,” and “allow patrol officers to return to field duties as soon as possible.”¹²³ While hundreds of police departments across the United States use the CRT model in crisis intervention, the CRT and CIT models both require an intensive amount of coordination, and systems vary regarding “how a mental health crisis call . . . is triaged and managed.”¹²⁴

¹¹⁹ Virginia G. Cooper et al., *Dispositional Decisions with the Mentally Ill: Police Perceptions and Characteristics*, POLICE Q., 7–8 (2004).

¹²⁰ Michael S. Rogers et al., *Effectiveness of Police Crisis Intervention Training Programs*, J AM. ACAD. PSYCH. L. 47(4), 3–5 (2019) (describing how the “fragmented and overlapping U.S. law enforcement system presents challenges in terms of oversight and monitoring” and that a taskforce initiated under President Obama found that there were challenges in smaller departments “deploying or consistently operating a CIT model that closely follows the core elements of the Memphis approach”).

¹²¹ Dempsey, *supra* note 99, at 326.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 328.

C. The Mechanics of a CIT or CRT Call

Typically, CRT or CIT officers have four primary methods of resolving a crisis: “arrest, involuntary hospitalization, informal disposition (e.g., conflict resolution), or no action.”¹²⁵ Often, when a mentally ill person is arrested during an interaction with a police officer, they are arrested for misdemeanor offenses, which are more reflective of mental illness than overarching criminality.¹²⁶ Even when mentally ill persons are arrested for felony offenses, those arrests are “for security purposes and lack of alternatives,” as opposed to officers pursuing justice for more serious crimes.¹²⁷

Several factors play a role in how officers respond to crisis situations.¹²⁸ Some of these factors include “the ‘publicness’ of the behavior, whether or not the offender is a known neighborhood character, the degree to which a person is thought to become a behavior problem during the disposition, and whether the officer believes the individual meets commitment criteria.”¹²⁹ Other factors include the officer’s own attitude towards due process of law, the amount of time it takes to bring an individual to a jail versus commit them to a medical facility, and the race of the individual interacting with officers.¹³⁰ These types of “dispositional decisions,” which can be defined as the individualized determinations officers make on how to respond to an emergency call,¹³¹ are vital moments in an individual’s interaction with the criminal legal system, and officers hold all of the power when making determinations on where and how to refer individuals to services.¹³²

¹²⁵ Cooper et al., *supra* note 119, at 3.

¹²⁶ *Id.* (stating that misdemeanor arrests for offenses such as disorderly conduct or trespassing are “often symptomatic of mental illness”).

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *Id.* at 4.

¹³⁰ *See id.*

¹³¹ *Id.* at 3–4.

¹³² *Id.* at 5.

D. Barriers to Effective Implementation of CIT and CRT Programs

1. Officer Attitude

One threat posed to the effective implementation of CIT and CRT programs in the long-term is officer outlook towards mental health intervention as a part of their day-to-day operations.¹³³ In a study conducted in 2004 regarding officer outlook on mental health intervention, three in ten officers did not even know about their department's mental health liaison for de-escalating mental health crisis situations.¹³⁴ The study revealed that even those who were aware of their mental health liaison "might have a strained relationship with the liaison," reinforcing the understanding that officers and mental health providers do not have a substantial enough relationship to successfully facilitate CIT or CRT programs that depend heavily on collaboration.¹³⁵

2. Officers' Lack of Diagnostic Abilities

When officers trained in CIT or CRT are dispatched to evaluate a person in the midst of a mental health crisis, the standard law enforcement perspective of "ask[ing] for compliance, order[ing] compliance, then mak[ing] them comply," is not always a plausible strategy.¹³⁶ Ideally, CIT and CRT trained officers are expected to be flexible in their approach through listening, empathizing, asking, and paraphrasing in order to communicate more effectively and determine how to best approach the crisis situation.¹³⁷ Once the situation is de-escalated, the individual's mental condition is assessed.¹³⁸ While a CRT approach requires a mental health practitioner to complete this assessment, a CIT approach—or alternative jurisdictional approach—requires an officer to perform

¹³³ *Id.* at 10.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Dempsey, *supra* note 99, at 330.

¹³⁷ *Id.* at 331–32.

¹³⁸ *Id.* at 332.

the mental health assessment, which can lead to a mixed outcome depending on the effectiveness of CIT training in that jurisdiction, among other factors.¹³⁹ While some officers may benefit from and utilize these training lessons, there is not clear evidence of the training's success, and a 2015 study from the Treatment Advocacy Center in Virginia revealed that mentally ill persons are still 16% more likely to have a fatal encounter with law enforcement.¹⁴⁰ This statistic implies that many officers struggle to successfully interact with mentally ill persons, and the communication techniques taught through CIT or CRT programs are not foolproof.

In order to more effectively respond to crisis situations and mitigate officer discretion, many jurisdictions attempted to create separate dispatches, so that dispatchers use the information provided to them over the phone to more accurately determine what are “mental health related calls” and what are calls requiring regular officer response.¹⁴¹ Dispatchers must ask specific questions and make flash decisions on who to send to the scene of a crisis, and therefore dispatcher training is also implicated in the effort to respond to mental health crises appropriately.¹⁴² Dispatcher training protocols vary, so not all dispatchers are trained in this form of diversion inquiry, and the data collected on 9-1-1 calls is so broad that it is difficult for researchers to even assess whether responses are effective.¹⁴³

¹³⁹ See *id.* at 332–33.

¹⁴⁰ TREATMENT ADVOC. CTR., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters* (Dec. 2015), <https://www.treatmentadvocacycenter.org/overlooked-in-the-undercounted> [<https://perma.cc/C6BJ-GR6H>].

¹⁴¹ See Dempsey, *supra* note 99, at 328–29.

¹⁴² *Id.* at 329; see also *Tips for Successfully Implementing a 911 Dispatch Diversion Program*, THE COUNCIL OF STATE GOV'TS JUST. CTR. (Oct. 2021), <https://csgjusticecenter.org/publications/tips-for-successfully-implementing-a-911-dispatch-diversion-program/> [<https://perma.cc/489G-JRXF>] (providing guidance to police departments on how to implement a 9-1-1 dispatch diversion program, which could “help communities conserve public safety resources and reduce reliance on police by first determining whether law enforcement is necessary for the response,” and providing a basic framework on how to begin considering implementation and training for a dispatch diversion program).

¹⁴³ S. Rebecca Neusteter et al., *The 911 Call Processing System: A review of the Literature as it Relates to Policing*, VERA INST. OF JUST., 11–12 (July 2019),

Further, the presence of “co-occurring disorders” muddles the mental health assessment phase of the CIT or CRT approach, since it may not be clear to an officer whether the behaviors are caused by mental health crisis or something else, like substance abuse.¹⁴⁴ Co-occurring disorders may greatly influence the decision-making process of an officer in determining where to refer or transport an individual, and many departments have differing policies on taking mentally ill persons into custody and even how to physically restrain mentally ill persons.¹⁴⁵ Regardless of differing policies, officers are typically given “a great deal of discretion,” and since officers are not mental health experts, discretionary decisions are not likely to best serve individuals.¹⁴⁶

E. Critiques of Studies of CRT and CIT Generally

Since CIT and CRT programs were viewed as potentially great reforms to policing practices, medical and legal communities hoped to study outputs in community care and individual diversion. But since there are so many diverse approaches to crisis intervention, and officers still have vast discretion in decision-making, there are concerns regarding studies and analyses of these programs.¹⁴⁷ Most studies of CIT reviewed the “planning, deployment, and procedural functioning of the CIT process itself, including the selection, training, operations, and measurement or self-report of CIT-trained officers.”¹⁴⁸ However, these studies lack evidence-based outcomes such as how many individuals are successfully diverted to mental health support and related social services, and how many arrests are prevented by CIT or CRT programs.¹⁴⁹

<https://www.vera.org/downloads/publications/911-call-processing-system-review-of-policing-literature.pdf> [<https://perma.cc/MPR3-FL65>].

¹⁴⁴ Dempsey, *supra* note 99, at 333.

¹⁴⁵ *Id.* at 333, 335–36 (detailing the LAPD protocol for detaining a person with mental illness, and diversion methods that have been employed by the LAPD and California legislature).

¹⁴⁶ *Id.* at 335.

¹⁴⁷ Rogers et al., *supra* note 120, at 4.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

Although CIT and CRT programs have existed since 1988, police departments continue to request more time and money to garner the statistics required for evidence-based analysis.¹⁵⁰ But increased policing budgets are antithetical to community calls to divest funds from policing to mental health providers generally.¹⁵¹ Even if police departments were provided more extensive funding to properly train and deploy officers with a deep understanding of de-escalation practices, the CIT International leader, Michael Woody, stated that “[s]ome people simply don’t have the patient temperament to become a CIT officer,” underscoring the need to think outside of the police force for solutions to crisis intervention.¹⁵²

IV. COMMUNITY-BASED MENTAL HEALTH ALTERNATIVES TO POLICE INTERVENTION

In many ways, the investment into CIT programs—which continue to lack positive evidence-based outcomes¹⁵³—is a proliferation of a core issue that abolitionists have with modern policing: continued investment from the state and calls from politicians to better govern, train, or equip officers to do their jobs only re-legitimizes and attempts to repair a police force that perpetrates violence “without acknowledging the centrality of violence to their function or the scale, history, and power of the institution.”¹⁵⁴ As a result of abolitionist demands to divest, dismantle, and delegitimize policing and carceral structures, in combination with the recent Black Lives Matter protests, new campaigns to defund the police are gaining popularity.¹⁵⁵ The

¹⁵⁰ Connolly, *supra* note 89.

¹⁵¹ Gianeen Magno, *Divest and Invest: How Reallocating Police Funds to the Social Determinants of Health Can Improve Public Health and Safety*, CHILD.’S DEF. FUND TEX. (July 9, 2020), https://cdfutexas.org/policy/media/cdf_tx_blog/divest-and-invest/ [<https://perma.cc/P7X2-5K58>].

¹⁵² Connolly, *supra* note 89.

¹⁵³ *Id.*

¹⁵⁴ Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF L. REV. 1781, 1802 (2020).

¹⁵⁵ *Id.* at 1826–27.

defund movement proposes that “cities cut their police budgets, and that school districts and universities cut their ties with police departments” and localities instead invest in social programs like affordable housing, stronger health care structures, and better education systems.¹⁵⁶

A. Attempts to “Defund the Police” and Backlash

In light of the shortcomings in police response to mental health crises, especially after the murder of George Floyd, Minneapolis became ground zero for the “defund the police” movement.¹⁵⁷ Minneapolis had a ballot measure in the 2021 election that would have “removed the Minneapolis Police Department from the city charter and replaced it with a ‘public-health oriented’ Department of Public Safety.”¹⁵⁸ Despite the momentum of the “defund the police” movement, the vote failed.¹⁵⁹ This failure was largely due to opponents of the measure repeatedly highlighting the uncertainties that could come from creating an entirely new system of public safety services.¹⁶⁰ However, abolitionist thinkers have long emphasized that improving policing as a means to end police violence is more myth than possibility,¹⁶¹ in part because “the state has invested in police and prisons over housing, health care, and school for poor, working-class, Black and brown communities.”¹⁶²

In addition to Minneapolis’ vote to dismantle the police force, there were several 2021 state votes on policing that resulted in mixed outcomes.¹⁶³ In Austin, Texas, a vote calling for the city to hire

¹⁵⁶ *Id.* at 1827, 1830.

¹⁵⁷ See Martin Kaste, *Minneapolis Voters Reject a Measure to Replace the City’s Police Department*, NPR (Nov. 3, 2021), <https://www.npr.org/2021/11/02/1051617581/minneapolis-police-vote> [<https://perma.cc/A5K2-5VMZ>].

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

¹⁶¹ Akbar, *supra* note 154, at 1782.

¹⁶² *Id.* at 1784–85.

¹⁶³ Danielle Kurtzleben, *Local Elections Yield Mix Results on Police Reform*, NPR (Nov. 7, 2021), <https://www.npr.org/2021/11/07/1053326386/local-elections-yield-mix-results-on-police-reform> [<https://perma.cc/NN5C-SZSF>].

hundreds of new police officers was opposed by over two-thirds of voters.¹⁶⁴ In Cleveland, Ohio, citizens voted for a measure establishing a thirteen-member police oversight board that will have “the ultimate power to discipline officers and do investigations, for the first time in Cleveland’s history.”¹⁶⁵ These two votes in Austin and Cleveland seem to reflect a positive shift away from policing, especially in Austin where the vote for more police triggered a political discussion surrounding budgeting realities.¹⁶⁶ In many other districts, like Seattle and Long Island, “tough-on-crime candidates” were elected to mayoral and district attorney positions.¹⁶⁷ The reform and radicalization of community mental health crisis intervention is inextricably woven into the evolution of policing, and some of the most “promising results” from this public shift away from policing are seen in community responses to mental health crisis.¹⁶⁸

B. State and City Crisis Intervention Programs Outside of Policing

As states and localities search for better solutions to crisis intervention and innovate infrastructure outside of policing to align with community calls to defund the police, a few specific programs have begun to stand out. Denver’s Department of Safety’s Support Team Assisted Response Program (“STAR”) is an example of a crisis intervention program created by a state agency.¹⁶⁹ This

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (quoting Phillip Atiba Goff, the CEO of Center for Policing Equity, in conversation regarding the recent election results).

¹⁶⁶ *Id.* (discussing how firefighters and the mayor of Austin stated that “if we give law enforcement more money, there’s less money for some of the other things you want, like fire and medical,” which Phillip Atiba Goff went on to describe as a rare public discussion regarding law enforcement budgets, “because no one wants to talk about the things that are getting missed because we spend so much on law enforcement”).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ DENVER THE MILE HIGH CITY, *Support Team Assisted Response (STAR) Program*, <https://www.denvergov.org/Government/Agencies-Departments-Offices/Public-Health-Environment/Community-Behavioral-Health/Behavioral->

program was created in 2020, and it “deploys Emergency Response Teams that include Emergency Medical Technicians and Behavioral Health Clinicians to engage individuals experiencing crisis related to mental health issues, poverty, homelessness, and substance abuse.”¹⁷⁰ The program was based upon a crisis intervention approach pioneered in Eugene, Oregon called Crisis Assistance Helping Out On The Streets (“CAHOOTS”).¹⁷¹ CAHOOTS, created in 1989, was specifically designed to tackle nonemergency and mental health support calls.¹⁷² CAHOOTS and STAR, hereinafter referred to as the west coast model, represent a more innovative approach to crisis intervention that does not involve policing. Both programs can be specifically requested by a 9-1-1 caller, where a dispatcher determines whether a west coast model team or a police officer is the correct response.¹⁷³

1. The Unique Issue of the 9-1-1 Call

The west coast model highlights a key moment in the crisis response that could allow for less police interaction with those in mental health crisis: the 9-1-1 call. Some CIT training programs have included 9-1-1 dispatchers in order to use the pivotal moment of the call to prevent police violence, and the west coast model has similarly recognized this moment as the opportunity to deploy more appropriate resources.¹⁷⁴ Determining how to dispatch community crisis intervention presents the greatest challenge in the shift away

Health-Strategies/Support-Team-Assisted-Response-STAR-Program (last visited Dec. 1, 2021) [<https://perma.cc/4SM9-2V2L>].

¹⁷⁰ *Id.*

¹⁷¹ Ben Adam Climer & Brenton Gicker, *CAHOOTS: A Model for Prehospital Mental Health Crisis Intervention*, PSYCHIATRIC TIMES (Jan. 29, 2021), <https://www.psychiatrictimes.com/view/cahoots-model-prehospital-mental-health-crisis-intervention> [<https://perma.cc/MKA9-9A6Z>]; Grace Hauck, *Denver Successfully Sent Mental Health Professionals, not Police, to Hundreds of Calls*, USA TODAY (Feb. 8, 2021), <https://www.usatoday.com/story/news/nation/2021/02/06/denver-sent-mental-health-help-not-police-hundreds-calls/4421364001/> [<https://perma.cc/P7U7-9TZM>].

¹⁷² *Id.*

¹⁷³ DENVER THE MILE HIGH CITY, *supra* note 169.

¹⁷⁴ *Id.*; *see* Dempsey, *supra* note 99, at 328.

from policing as a response to mental health crisis. For example, New York City has mobile crisis teams, “group[s] of behavioral health professionals—such as social workers, peer specialists and family peer advocates—who can provide care and short-term management for people who are experiencing severe behavioral crisis,” but these teams must be requested via a unique phone number that is not likely to be known by someone in the midst of a crisis situation.¹⁷⁵ As a result, it is possible that the most plausible avenue to direct individuals in the midst of a mental health crisis away from police is at the juncture of a 9-1-1 call, but for now it remains unclear what sort of data the west coast model will yield in utilizing 9-1-1 dispatchers in this way.

While in some cities, like Eugene and Denver, 9-1-1 dispatch is not controlled by police,¹⁷⁶ in other cities, like New York City, 9-1-1 dispatch is directly controlled by the police department.¹⁷⁷ Even in cities like Eugene and Denver, dispatchers still have “close ties to police and default to diverting mental health calls to them.”¹⁷⁸ Control over 9-1-1 dispatch presents a vital issue for alternatives to police response, because “[d]ispatch autonomy in selecting which calls are routed to police and clear protocols defaulting to routing to mental health crisis response are critical to significantly reducing the control of the police.”¹⁷⁹

Beyond considering how 9-1-1 dispatchers operate and who controls 9-1-1 calls, the decisions regarding the makeup of crisis

¹⁷⁵ *Crisis Services/Mental Health: Mobile Crisis Teams*, NYC HEALTH, <https://www1.nyc.gov/site/doh/health/health-topics/crisis-emergency-services-mobile-crisis-teams.page> (last visited Dec. 1, 2021) [<https://perma.cc/3STN-PH2H>].

¹⁷⁶ Mimi E. Kim et al., *Defund the Police – Invest in Community Care: A Guide to Alternative Mental Health Responses*, INTERRUPTING CRIMINALIZATION (May 2021), <https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/60ca7e7399f1b5306c8226c3/1623883385572/Crisis+Response+Guide.pdf> [<https://perma.cc/47TT-DJQJ>].

¹⁷⁷ See NEW YORK CITY POLICE DEP’T, *Police Communications Technicians*, <https://www1.nyc.gov/site/nypd/careers/civilians/police-communications-technicians.page> (last visited Dec. 1, 2021) [<https://perma.cc/K85Y-S3M5>].

¹⁷⁸ Kim et al., *supra* note 176.

¹⁷⁹ *Id.*

intervention teams are also vital.¹⁸⁰ Every state program involves a variety of different mental health professionals, but even the original CAHOOTS program in Eugene has central roles for professionals that “do not necessarily have a college degree, licenses, etc.”¹⁸¹ However, the Eugene program seeks individuals that have other work or life experience in crisis de-escalation and public-service skills, which may be preferable.¹⁸² The medical component of crisis intervention teams may pose financial roadblocks to effective programs. The Eugene program hired EMTs, paramedics, and nurses, but Interrupting Criminalization, an initiative at the forefront of decriminalization and decarceration, highlights how including EMTs, as opposed to paramedics, could lower overall staffing costs for crisis intervention programs, which allows for a more expansive program.¹⁸³ Hiring considerations, like choosing EMTs over paramedics to enable a larger program, are weighed differently by different crisis intervention programs, which could affect the success of programs as more and more alternatives to policing are developed.

2. The Future of State-Implemented Crisis Intervention Programs

Despite the potential shortcomings of the west coast model, there is a political push for greater funding for such alternatives. Senator Ron Wyden from Oregon, along with six other senators, proposed the CAHOOTS Act in order to secure more funding for the expansion of crisis intervention teams around the country.¹⁸⁴ After the introduction of this bill, the Biden administration incorporated a \$952,951 planning grant for the Oregon Medicaid program,¹⁸⁵ in addition to grants for nineteen other states that

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 14.

¹⁸³ *Id.*

¹⁸⁴ Jeff Merkley, *Senators Propose Funding to Improve Public Safety with Mobile Crisis Response Teams*, WHITE BIRD CLINIC (Feb. 19, 2021), <https://whitebirdclinic.org/cahoots-act> [<https://perma.cc/MHG3-PD7T>].

¹⁸⁵ Ron Wyden, *Wyden Applauds \$952,951 CAHOOTS Planning Grant for Oregon*, RON WYDEN U.S. SENATOR FOR OREGON (Sept. 20, 2021),

currently have crisis intervention programs in place.¹⁸⁶ The use of these funds over the coming year will be key to understanding the success of mobile crisis intervention programs as they expand. However, the west coast model and similar programs may not be adequate since there is a valid distrust amongst marginalized communities in calling 9-1-1 due to the potential for police brutality.¹⁸⁷ This distrust, in combination with the inadequate police responses to mental health crises, led to an increased emphasis on grassroots crisis intervention organizations across the United States.

C. Alternatives to State-Implemented Crisis Intervention Programs

Since police still play a vital role as “gatekeepers to both the mental health and criminal justice systems,”¹⁸⁸ programs like CIT and CRT leave officers with too much discretion and maintain the potential for violence in the period between police arriving and mental health professionals subsequently arriving. As a result, many small organizations are deploying their own crisis intervention alternatives to 9-1-1.¹⁸⁹ These grassroots initiatives represent a valuable possibility in the future of crisis intervention. Community members that operate crisis intervention units are a beacon of alternative hope for those in mental health crisis, and do not depend upon more police training—which is difficult to evaluate—or

<https://www.wyden.senate.gov/news/press-releases/wyden-applauds-952951-cahoots-planning-grant-for-oregon-> [<https://perma.cc/FB8V-BE5M>] (noting that the planning grants awarded to Medicaid programs in various states specifically allocate funds for Medicaid to support implementation of mobile crisis intervention programs statewide around the nation).

¹⁸⁶ *Biden-Harris Administration Awards \$15 Million to 20 States for Mobile Crisis Intervention*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Sept. 20, 2021), <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-awards-15-million-20-states-mobile-crisis-intervention> [<https://perma.cc/9XHQ-TN57>].

¹⁸⁷ Juleyka Lantigua-Williams, *Police Brutality Leads to Thousands Fewer Calls to 911*, ATLANTIC (Sept. 28, 2016), <https://www.theatlantic.com/politics/archive/2016/09/police-violence-lowers-911-calls-in-black-neighborhoods/501908/> [<https://perma.cc/4FWB-FGY3>].

¹⁸⁸ Watson & Fulambarker, *supra* note 88, at 2.

¹⁸⁹ *See infra* notes 190–99.

legislative action—which is slow to enact, if not impossible, in the current political environment. While funding for grassroots programs is still a sizable obstacle to their effective development, they pose the only short-term protections for individuals in mental health crisis until advocates can pass valuable legislation to divest funding from the police, create alternate forms of 9-1-1 dispatch that are not police dependent, and focus on building stronger social safety nets.

In Sacramento, Mental Health First was launched in January of 2020, and it specifically depends on an independent hotline not connected to 9-1-1.¹⁹⁰ The program is run by a team of volunteers that are trained to de-escalate confrontation and provide resources to individuals dealing with mental health issues.¹⁹¹ It relies on fostering strong community networks, canvassing neighborhoods, and connecting to twenty-four-hour businesses where there may be a need for mental health services.¹⁹²

In Fulton county, Georgia, the Policing Alternatives & Diversion Initiative was developed in 2017 and funded, in large part, by the city of Atlanta to respond to “non-emergency quality of life concerns related to mental health, substance use or extreme poverty.”¹⁹³ They receive calls and references for support through 3-1-1 instead of 9-1-1.¹⁹⁴ Many other programs, like Cambridge

¹⁹⁰ Project Nia & Interrupting Criminalization, *Mental Health First*, 1 MILLION EXPERIMENTS, <https://millionexperiments.com/Mental-Health-First> (last visited Dec. 1, 2021) [<https://perma.cc/6JQE-6LUW>].

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Project Nia & Interrupting Criminalization, *Policing Alternatives & Diversion Initiative (PAD)*, 1 MILLION EXPERIMENTS, <https://millionexperiments.com/PAD> (last visited Dec. 1, 2021) [<https://perma.cc/7VHY-CWTW>].

¹⁹⁴ *Id.*

Heart,¹⁹⁵ Relationships Evolving Possibilities,¹⁹⁶ Powderhorn Safety Collective,¹⁹⁷ and Little Earth Protectors,¹⁹⁸ were proposed or established in various parts of the United States to meet the same need: responding to crisis without 9-1-1 or police intervention.¹⁹⁹ Independent crisis intervention programs are emerging around the country, though activists have pointed out that “there is no one size fits all solution” to mental health responses.²⁰⁰ Continued local innovation will undoubtedly benefit communities in the long run.

¹⁹⁵ Cambridge HEART, also known as the Cambridge Holistic Emergency Alternative Response Team Program, is a proposed program envisioned by The Black Response Cambridge. *Resources on Cambridge Holistic Emergency Alternative Response Team*, CAMBRIDGE HEART PROGRAM, <https://linktr.ee/CambridgeHEARTProgram> [<https://perma.cc/9A68-BTT9>] (last visited Feb. 10, 2022); *see also* THE BLACK RESPONSE, <https://www.theblackresponsecambridge.com/> (last visited Feb. 10, 2022) [<https://perma.cc/UY96-EVDY>].

¹⁹⁶ *Revolutionary Emergency Partners*, RELATIONSHIPS EVOLVING POSSIBILITIES, <https://repformn.org/revolutionary-emergency-partners/> (last visited Feb. 10, 2022) [<https://perma.cc/2Y8H-VMZT>] (Relationships Evolving Possibilities is a network of abolitionists based in Minneapolis that has developed a hotline to pioneer crisis intervention in which community members can call the number listed on their website and be connected to a person “trained in mental health first aid and de-escalation” or be otherwise referred to trustworthy community providers.).

¹⁹⁷ *Powderhorn Safety Collective*, ONE MILLION EXPERIMENTS, <https://millionexperiments.com/Powderhorn-Safety-Collective> [<https://perma.cc/6GY3-Q36C>] (last visited Feb. 10, 2022) (The Powderhorn Safety Collective is a community-based organization in Minneapolis consisting of volunteers that utilize the applications Discord and Citizen to monitor potential crises in the area and respond to emergencies.); *see also* *Powderhorn Safety Collective*, FACEBOOK, <https://www.facebook.com/Powderhorn-Safety-Collective-110798767447531/> (last visited Feb. 10, 2022) [<https://perma.cc/84HP-9RAW>] (Little Earth Protectors is a “neighborhood public safety group” that organizes community patrols, assists with disputes and drug-related medical emergencies, and monitors the police in Minneapolis.).

¹⁹⁸ *LITTLE EARTH PROTECTORS*, ONE MILLION EXPERIMENTS, <https://millionexperiments.com/Little-Earth> (last visited Feb. 10, 2022) [<https://perma.cc/5QRD-DEG4>].

¹⁹⁹ Project Nia & Interrupting Criminalization, *Not 9-1-1*, ONE MILLION EXPERIMENTS, <https://millionexperiments.com/Not-9-1-1> (last visited Dec. 1, 2021) [<https://perma.cc/FD39-FWW3>].

²⁰⁰ *See* Kim et al., *supra* note 176, at 21.

As cities and states innovate, continued comparison between each locality's crisis alternatives will provide meaningful insights into the benefits and shortcomings of each method for diverting individuals in mental health crisis away from police and toward mental health resources.

CONCLUSION

An analysis of qualified immunity and the state-created danger doctrine reveals the legal system's failure to hold officers accountable when they do not adequately respond to a mental health crisis. Police officers are poorly equipped to successfully respond to mental health crises and there are demonstrative repercussions through the death, bodily harm, and incarceration of individuals during mental health crises. As the nation goes through a political reckoning regarding the role of police officers and police brutality in day-to-day life, finding alternatives to policing will become more and more pressing.

While 9-1-1 calls are pivotal to the deployment of alternatives to policing, 9-1-1 lines are too often controlled by police forces or dispatchers with a bias to refer the majority of calls to police officers. Funding and regulations for crisis intervention teams, at this point, were only provided for districts with pre-existing crisis intervention alternatives. States or cities that wish to implement their own crisis intervention programs must overcome the political obstacles present in divesting funding from powerful entities like police forces. Until there is more substantial legislation on the state or federal level separating 9-1-1 operation from police control and providing framework for the development of community mental health crisis response alternatives, police brutality in response to mental health crises will persist, and the state-created danger "snake pit" will continue to claim civilians, leaving officers insulated from liability for their faulty decision-making.