(NON)POLICE BRUTALITY

Shawn E. Fields†

† Professor of Law, California Western School of Law. Many thanks to the brilliant minds who have provided feedback on aspects of this project, including Bobbi Jo Boyd, Tony Ghiotto, Gustavo Ribeiro, Joanna Schwartz, Erin Sheley, Christopher Slobogin, and Daniel Yeager. I benefitted greatly from feedback at presentations at the Southeastern Association of Law Schools, University of Oregon School of Law, University of Kentucky Rosenberg School of Law, University of Tennessee Knoxville School of Law, and Chapman Fowler School of Law. I extend my deepest gratitude to Noël Harlow, whose support and encouragement made this Article possible. All errors are my own.

INTRODUCTION

Among the many ills attributed to police in America, none dominates the reform conversation like police brutality.[1] Shocking videos of violence seared into our collective consciousness,[2] together with shameful statistics confirming the sheer scope and racially disparate impact of police use of force,[3] command our attention and spur urgent calls to action. Demands for increased accountability have resulted in a range of reform

---

[1] Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 713-20 (2017) (viewing the "essential" need for police reform solely through a police violence lens); Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 675-78, 679 (2016) (cataloguing the "reform menu" for police violence and noting that "[s]cholars have long been concerned about the prevalence of unlawful police violence against civilians."); *cf.* Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1046 (2021) (observing that the dominant focus on "individual prosecutions will do little to reform policing . . . because police violence is systemic.").

[2] Reha Kansara, *Black Lives Matter: Can Viral Videos Stop Police Brutality?*, BBC NEWS (July 5, 2020), https://www.bbc.com/news/blogs-trending-53239123 (describing how a viral video of police violence "transfixed people because of the callous nature of the killing coupled with the brazen nature of the police . . . .") [https://perma.cc/RHY8-FPF7]; Cody Mello-Klein, *How do Videos of Police Brutality Affect us, and How Should we Engage with them?*, NE. GLOB. NEWS (Feb. 6, 2023), https://news.northeastern.edu/2023/02/06/police-brutality-videos-impact/ [https://perma.cc/Y3GU-96XX] (noting how "the video of the brutal beating lingers in the minds of many."); Kimberly Fain, *Viral Black Death: Why We Must Watch Citizen Videos of Police Violence*, JSTOR DAILY (Sep. 1, 2016), https://daily.jstor.org/why-we-must-watch-citizen-videos-of-police-violence/ [https://perma.cc/244A-BZLR] (arguing that society has a collective responsibility to watch these videos: "[w]hen viral black death transforms the white cultural gaze from perceived black criminality toward shared racial empathy, interracial efforts for reforming policing in America seem within our grasp.").

[3] *See infra* Part I.A-B.

efforts, from de-escalation trainings[4] and calls to end qualified immunity[5] to redefining what we mean by "reasonable force."[6]

Concurrent with these efforts to redress police brutality when it happens are efforts to prevent it from happening by removing police from the public safety equation.[7] Municipalities increasingly rely on nonpolice public safety experts—from substance abuse counselors and mental health interventionists to homeless outreach teams and violence interrupters—to address safety issues once solely within the purview of armed police.[8] These "alternate responders" aim to resolve public safety concerns with less unnecessary conflict, violence, and death.[9]

But what happens when these nonpolice agents themselves engage in acts of unjustified brutality? The answer: not much. Police face at least the theoretical threat of sanction

---

[4] Barbara E. Armacost, *Police Shootings: Is Accountability the Enemy of Prevention?*, 80 OHIO ST. L.J. 907, 960–61 (2019) (describing de-escalation training reform efforts across the police sector); Annie Sweeney, *Police 'De-Escalation' Training—How it Could Help Chicago*, CHI. TRIB. (June 11, 2018), https://www.chicagotribune.com/news/ct-police-training-las-vegas-chicago-met-20160324-story.html [https://perma.cc/MHN9-45ZP]; Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 662–65 (calling for inclusion of the presence or absence of de-escalation trainings and techniques as relevant factors in Fourth Amendment use of force analysis).

[5] Adam A. Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1483 (2022) ("Both national and state-level ACLU chapters have issued multiple calls to end qualified immunity."); Luke Barr, *New York City Moves to End Qualified Immunity, Making it the 1st City in the US to Do so*, ABC NEWS (Mar. 29, 2021), https://abcnews.go.com/Politics/york-city-moves-end-qualified-immunity-making-1st/story?id=76752098# [https://perma.cc/TAD5-E6G5]; Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 311–12 (2020) ("[T]here have been growing calls by courts, as well as by a number of commentators and advocacy organizations across the political spectrum, to reconsider qualified immunity or do away with the defense altogether.").

[6] Lee, *supra* note 4, at 665.

[7] *See* Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 930 (2021) ("Policing in the United States . . . puts primacy on what is unique about the police—using force and law—to achieve 'public safety.' Force and law, though, are an odd match, at best, for the actual problems the police are called out daily to address."); Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1515–16 (2021) (advocating for removing police from traffic safety to "reduce possibilities for pretextual traffic stops to escalate into police violence against drivers and passengers.")

[8] Shawn E. Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV. 1023, 1040–48 (2023) (summarizing the rise of nonpolice public safety agents equipped to address public safety needs without resort to violence).

[9] *See id.*; Ric Simmons, *Constitutional Double Standards: The Unintended Consequences of Reducing Police Presence*, 91 GEO. WASH. L. REV. 817, 818 (2023) (describing municipal "experiment[s]" replacing police with nonpolice "alternate responders" to "decrease the footprint of the police in the community, [which will] hopefully de-escalate situations that might otherwise escalate into violence.").

when employing excessive force for having committed an "unreasonable seizure" under the Fourth Amendment.[10] But nonpolice alternate responders operate largely free from such constitutional restraints for their violent acts for three primary reasons.[11] First, courts consistently limit the Fourth Amendment's excessive force jurisprudence to seizures involving criminal investigations and arrests, activities in which alternate responders definitionally do not engage.[12] Second, the Supreme Court's narrow definition of "seizure" excludes violent dispersal tactics designed to compel citizens to leave an area, a legal loophole with particular relevance to nonpolice homeless outreach personnel increasingly called upon to break down encampments and relocate unhoused persons.[13] Third, the one constitutional provision that applies equally to police and nonpolice government activity—the Due Process Clause—fails to restrain illegitimate violent acts unless they "shock the contemporary conscience," a standard infected with outdated conceptions of what types of bodily invasions constitute shocking behavior, especially in the nonpolice context.[14]

Virtually no scholarly literature has explored the violent acts of nonpolice alternate responders in general, much less the lack of constitutional safeguards protecting citizens from them.[15] This Article provides the first sustained treatment of what I call "nonpolice brutality," evaluates the troubling

---

10 *See* Graham v. Connor, 490 U.S. 386, 395 (1989).

11 *See infra* subparts II.B–C.

12 *See* JL v. N.M. Dep't of Health, 165 F. Supp. 3d 996, 1042 (D.N.M. 2015) (collecting cases); Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977) ("[T]he principal concern of [the Fourth Amendment] . . . is with intrusions on privacy in the course of criminal investigations.") (citing Whalen v. Roe, 429 U.S. 589, 604 n. 32 (1977)); *see also infra* subpart II.B.

13 *See infra* subpart II.C.

14 Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) ("[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."); *see also infra* subpart II.D.

15 Scholarly literature on nonpolice violence tends to focus on private policing rather than public nonpolice violence. *See, e.g.*, Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1645–50 (2019); Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 940 (2019). Recent literature exposing the lack of constitutional safeguards against nonpolice abuse has focused on investigative activity related to Fourth Amendment searches and Fifth Amendment interrogation, not violence. *See* Simmons, *supra* note 9, at 826–27; Fields, *supra* note 8, at 1030. Osagie Obasogie and Anna Zaret published a terrific article in 2021 exploring excessive force claims in the narrow context of medical professionals using chemical restraints, the analysis of which is relevant to this Article. *See generally* Osagie K. Obasogie & Anna Zaret, *Medical Professionals, Excessive Force, and the Fourth Amendment*, 109 CALIF. L. REV. 1 (2021).

reasons why such unreasonable seizures operate outside the Fourth Amendment's excessive force jurisprudence, and charts the unintended implications for the police reform movement.

The time is right for this discussion. Alternate responders play an increasingly prominent role in public safety, with crisis interventionists, social workers, and others responding directly to 911 calls in tandem with or in place of armed police.[16] Following the murder of George Floyd in 2020, pilot programs around the country proliferated authorizing medical technicians, mental health workers, and other conflict resolution professionals to replace law enforcement entirely in responding to emergencies.[17] But the risk of violent confrontation, illustrated by recent high-profile cases involving alternate responders brutalizing the unhoused[18] and violently sedating a motionless victim to death,[19] highlights the need to address the near impunity with which these alternate responders operate.

This Article proceeds in three Parts. Part I provides context for the police brutality epidemic and explores the rise of alternate responders as a proposed solution to this epidemic. Part II evaluates why excessive force jurisprudence so rarely applies to noncriminal, nonpolice activity and charts implications of that reality for a present and future public safety relying increasingly on alternate responders. This Part also highlights the limitations of the Due Process Clause to meaningfully constrain nonpolice violence. Part III offers jurisprudential

---

16 Fields, *supra* note 8, at 1042–45.

17 *See infra* subpart I.D.

18 Krista M. Torralva, *New Video Shows Dallas Paramedic Kicking Homeless Man at Least Nine Times Before Police Arrived*, DALL. NEWS (Oct. 20, 2021), https://www.dallasnews.com/news/investigations/2021/10/20/new-video-shows-dallas-paramedic-kick-homeless-man-at-least-nine-times-before-police-arrive/ [https://perma.cc/NMH3-JSDV].

19 Beth Schwartzapfel & Cary Aspinwall, *'Using Medication as a Weapon': What's the Consequence when a Paramedic is Involved in a Deadly Police Encounter?*, USA TODAY (Sep. 22, 2021), https://www.usatoday.com/story/news/investigations/2021/09/22/paramedics-charged-manslaughter-elijah-mcclain-case-its-rare/5799209001/ [https://perma.cc/N9SR-MZ89] (describing case of Elijah McClain, who died in part because paramedics "injected McClain with the sedative ketamine—far too much for his body weight . . . without checking his vital signs, clearing his airway, or attempting to talk to him."); Colleen Slevin & Matthew Brown, *Paramedics were convicted in Elijah McClain's death. That could make other first responders pause*, ASSOC. PRESS (Dec. 23, 2023), https://apnews.com/article/elijah-mcclain-death-officers-trial-acef1eabe02b458f53d30d8fe3bf76a4 [https://perma.cc/57JP-23CK]. The Elijah McClain case, which resulted in a rare conviction of two paramedics for negligent homicide, "was the first among several recent criminal prosecutions against medical first responders to reach trial, potentially setting the bar for prosecutors for future cases."

solutions to subject more nonpolice brutality to constitutional scrutiny—solutions that are grounded in the text and purpose of the Fourth Amendment and which should find supporters across the ideological spectrum.

I
Nonpolice as a Response to Police Brutality

The institution of policing in America has faced withering criticism for decades for the systemic and inequitable harms it inflicts on society. Scholars routinely decry discriminatory, racialized practices,[20] dragnet surveillance,[21] over- and under-policing of marginalized communities,[22] ambivalence towards constitutional restraints,[23] and insulation from accountability.[24] But no single issue garners more mainstream attention than police brutality.[25] Like clockwork, video of a violent and often

---

20 *See generally* Alex Chohlas-Wood et al., *Identifying and Measuring Excessive and Discriminatory Policing*, 89 U. Chi. L. Rev. 441 (2022); Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. Pitt. L. Rev. 721 (2004); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 Minn. L. Rev. 2397 (2017); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054 (2017); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479 (2016).

21 *See generally* Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 Emory L.J. 527 (2017); Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 Tex. L. Rev. 1349 (2004); Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. Rev. 1143 (2022).

22 *See generally* Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. Rev. 1287 (2016); Jonathan Jackson et al., *Centering Race in Procedural Justice Theory: Structural Racism and the Under- and Overpolicing of Black Communities*, 47 L. & Hum. Behav. 68 (2023); Sarah L. Swan, *Discriminatory Dualism*, 54 Ga. L. Rev. 869 (2020).

23 *See generally* Thomas P. Crocker, *The Fourth Amendment and the Problem of Social Cost*, 117 Nw. U. L. Rev. 473 (2022); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789; *cf.* Nirej Sekhon, *Police and the Limit of Law*, 119 Colum. L. Rev. 1711, 1720 (2019) (describing "[c]onstitutional criminal procedure's [reciprocal] ambivalent relation to the police [as] exemplified by excessive force jurisprudence.").

24 *See generally* Joanna Schwartz, Shielded: How the Police Became Untouchable (Viking 2023); David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-Racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives*, 98 Denv. L. Rev. 629 (2021); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018).

25 *See* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 Yale L.J. 778, 784–85 (2021).

deadly police encounter with an unarmed citizen thrusts the issue into the spotlight year after year.[26]

Not surprisingly, these watershed moments of reflection often result in moments of action as reformers attempt to reduce or eliminate unnecessary police violence.[27] This section contextualizes the police brutality epidemic in America, with particular attention to its disparate impact on intersectional communities of color. It also highlights an increasingly popular reform—the alternate responder—as a way to eliminate police brutality by eliminating police.

A. The Police Brutality Epidemic

Violence is "central to police work."[28] Some level of physical force, even violence, is inherent in a job where armed government agents are empowered to detain and arrest citizens against their will, including citizens who are committing or have committed a violent crime.[29] Yet the ubiquity of police force and violence in daily life is inescapable; police make an arrest every three seconds in America, and police turn to deadly violence almost three times a day.[30]

---

26 Giselle Rhoden & Jacquelyne Germain, *The Jayland Walker Shooting Revives Debate About How Police Interact with Black People. Here are other High-Profile Cases*, CNN (July 7, 2022), https://www.cnn.com/2022/04/16/us/police-shootings-outcomes-controversies/index.html [https://perma.cc/494B-FEYA] ("It often feels like a matter of when it will happen again and not if.").

27 Simonson, *supra* note 25, at 784 ("Since the uprisings in Ferguson [after Michael Brown's death] and Baltimore [after Freddy Gray's death], . . . the last six years have seen far-reaching changes in how the public and legal scholars alike think about police—changes that have only intensified in the wake of the 2020 uprisings [after George Floyd's death]."); Shawn E. Fields, *The Procedural Justice Industrial Complex*, 99 IND. L.J. 563, 589 (2024) ("In the immediate aftermath of the [Michael Brown] shooting and protests, President Obama announced the creation of two federal organizations designed to enhance trust and perceptions of legitimacy between police and communities of color.").

28 Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1795–96 (2020).

29 Ndjuoh MehChu, *Policing as Assault*, 111 CALIF. L. REV. 865, 890 (2023) (explaining that "policing *is* violence."); ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR xv (Foreword) (Beacon Press 2017) (observing that the term police brutality is meaningless because "violence is inherent to policing."); Adam A. Davidson, *Managing the Police Emergency*, 100 N.C. L. REV. 1209, 1214 (2022) ("The violence of police is inherent to how we have chosen to implement public safety across the country.").

30 *Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/6YBH-KX6A] (last visited Aug. 30, 2024) (reporting that 1,164 people were killed by police in 2023, more than an eighteen percent increase from 2017); Rebecca Neusteter & Megan O'Toole, *Every Three Seconds: Unlocking Police Data on Arrests*, VERA INST. OF JUST.

Even in a country of 330 million people, ten million annual arrests and over 1,000 annual deaths at the hands of police sets the United States apart.[31] Police in America kill at a rate three to over thirty times higher than other industrialized nations.[32] Arrest and incarceration rates far exceed those of other democratic countries.[33] And non-lethal uses of force by police in America often used to effectuate arrests exceed those of their counterparts in other industrialized nations.[34]

This violence extends beyond force used to arrest and kill, however. "[S]tate and local police conduct [eight] million searches annually of pedestrians and automobiles alone," and in doing so routinely use force through the use of guns, pepper spray, and tasers.[35] Increasingly common and violent

---

(Jan. 2019), https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview [https://perma.cc/KU4A-MBXZ].

31 *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/2GMD-34DE] (last visited Aug. 30, 2024)) (estimating U.S. population of 337, 020,329); *Fatal Force*, *supra* note 30; Neusteter & O'Toole, *supra* note 30.

32 FRANKLIN E. ZIMRING, WHEN POLICE KILL 74–85 (Harvard Univ. Press 2017); Jamiles Lartey, *By the Numbers: US Police Kill More in Days than Other Countries Do in Years*, THE GUARDIAN (June 9, 2015), https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries [https://perma.cc/GD2N-JRSY] (noting that police in England & Wales killed 55 people in 24 years between 1990 and 2014, while police in the United States killed 59 people in the first 24 days of 2015); *Rate of Civilians Killed by the Police Annually in Selected Countries, as of 2019*, STATISTA (July 4, 2024) https://www.statista.com/statistics/1124039/police-killings-rate-selected-countries/ [https://perma.cc/D2UZ-TUX2] (United States police kill 33.5 people per 10 million residents, compared with 9.8 in Canda, 8.5 in Australia, 0.5 in England & Wales, and 0.2 in Japan.).

33 Michelle Ye Hee Lee, *Yes, U.S. Locks People up at a Higher Rate than any Other Country*, WASH. POST (July 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/ [https://perma.cc/767Z-VN5K]. This has been true for decades. *See* Jesse Jackson, *Reclaiming Our Youth From Violence*, 36 B.C. L. REV. 913, 915 (1995) (observing that the arrest rate in United States inner cities for people under 25 is "the highest . . . on earth.").

34 Amelia Cheatham & Lindsay Maizland, *How Police Compare in Different Democracies*, COUNCIL ON FOREIGN RELS. (Mar. 29, 2022), https://www.cfr.org/backgrounder/how-police-compare-different-democracies [https://perma.cc/2SJV-9M3X]](describing differences in use of force between United States and countries in Europe, including that "[i]n the United States, police are armed, increasingly with military-grade equipment," while "more than a dozen other democracies generally do not arm their police with guns . . . ." and that, while "U.S. police can legally use deadly force if they reasonably believe they or other people are in danger . . . the European Convention on Human Rights . . . permits force only when 'absolutely necessary,' and individual countries more strictly regulate its use.").

35 BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 7–11 (Farrar, Strous & Giroux 2017).

SWAT raids, the increased availability and use of militarized "battlefield" weaponry against citizens, and invasive body cavity searches before and after arrests all add to the reality that policing in America has become more violent in its execution without any clear justification for this change.[36]

This ubiquitous violence is neither justified, necessary, nor the product of a few "bad apples."[37] "At least 85,000 law enforcement officers across the [United States] have been investigated or disciplined for misconduct over the past decade," a number accounting for more than ten percent of all uniformed police in the country.[38] "Tens of thousands" of the corresponding investigations have involved claims of police brutality.[39] These epidemic levels of police violence are felt most acutely by the communities historically and explicitly targeted by law enforcement: communities of color, especially Black Americans.[40]

B. Police Brutality, Race, and Intersectionality

Any discussion of police brutality in America is closely followed by a discussion of the racialized nature of this brutality.[41] And for good reason. Overwhelming, indisputable evidence exists that people of color, especially Black and Brown people, are disproportionately targeted for and the recipients of police use of force, including both lethal and nonlethal forms of police brutality; a handful of studies on this subject are

---

36 *See id.*; *see*, e.g., RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 36–37 (2014).

37 FRIEDMAN, *supra* note 35, at 10–11 ("One wishes things like this could be attributed solely to bad apples, but incidents like these are all too common."); Lee, *supra* note 4, at 636 ("This is not a matter of just a few 'bad apples' misbehaving . . . .").

38 John Kelly & Mark Nichols, *We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records*, USA TODAY (June 11, 2020), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/ [https://perma.cc/HY45-3Y9C].

39 *Id.* (describing that these misconduct investigations of 85,000 police officers include 22,924 investigations of using excessive force, 3,145 allegations of rape, child molestation and other sexual misconduct and 2,307 cases of domestic violence).

40 Carbado, *supra* note 20, at 1482 ("[P]olice violence against African-Americans [is] a structural phenomenon and not simply . . . a product of rogue police officers who harbor racial animus against black people."); Akbar, *supra* note 28, at 1797 ("Police are a conduit of segregation, gentrification, and displacement, creating and maintaining spatially and racially concentrated inequality.").

41 *See, e.g.*, Simonson, *supra* note 25, at 784–85.

worth highlighting to illustrate the impetus behind reformers' urgent call to replace armed police with unarmed alternate responders.[42]

No adequate federal database of fatal police shootings exists, but several studies have catalogued the racialized nature of police killings.[43] An August 2019 study by the National Academy of Sciences based on police-shooting databases found that between 2013 and 2018, Black men were 2.5 times more likely than White men to be killed by police.[44] This disparate impact rises for unarmed citizens. A study from the University of California at Davis found that "the probability of being {black, unarmed, and shot by police} is about 3.49 times the probability of being {white, unarmed, and shot by police} on average."[45] The risk of death for Black men at the hands of police is so great—approximately 1-in-1,000—that they are more like to die by cop than to die by drowning, fire or smoke inhalation, or a bicycle accident.[46]

This disparity cannot be explained by greater justification for shooting Black individuals. An independent analysis of *Washington Post* data on police killings found that, "when factoring in threat level, black Americans who are fatally shot by police are no more likely to be posing an imminent lethal threat to the officers at the moment they are killed than white Americans fatally shot by police."[47]

---

42 *See, e.g.*, Friedman, *supra* note 7, at 925–36 (calling for replacing police with nonpolice first responders in part because of the disparate use of violence against people of color); Woods, *supra* note 7, at 1515–16 (advocating for removal of police from traffic enforcement in part because of discriminatory pretextual traffic stops).

43 *See* Mark Tran, *FBI Chief: "Unacceptable' that Guardian Has Better Data on Police Violence*, THE GUARDIAN (Oct. 8, 2015) https://www.theguardian.com/us-news/2015/oct/08/fbi-chief-says-ridiculous-guardian-washington-post-better-information-police-shootings [https://perma.cc/YSV2-6KFF].

44 Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PROC. NAT'L. ACAD. OF SCI. 16793, 16974 (2019), https://www.pnas.org/doi/full/10.1073/pnas.1821204116 [https://perma.cc/RG7T-ESG6].

45 Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County–Level in the United States, 2011-2014*, PUB. LIBR. OF SCI. ONE, Nov. 2015, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0141854 [https://perma.cc/3BDS-R2HW].

46 *See* Edwards, Lee & Esposito, *supra* note 44, at 16794; *Preventable Deaths: Odds of Dying*, NAT'L. SAFETY COUNCIL, https://injuryfacts.nsc.org/all-injuries/preventable-death-overview/odds-of-dying/ [https://perma.cc/928W-5JYS] (last visited Sep. 1, 2024).

47 *See* Wesley Lowery, *Aren't more white people than black people killed by police? Yes, but No*, WASH. POST (July 11, 2016), https://www.washingtonpost.com/

Disproportionate violence is not limited to fatal shootings. A Harvard study found that police officers are more likely to use their hands, push a suspect into a wall, use handcuffs, draw weapons, push a suspect onto the ground, point their weapon, and use pepper spray or a baton when interacting with Black individuals.[48] This study confirmed findings by the Center for Policing Equity, which found that "African Americans are far more likely than whites and other groups to be the victims of use of force by police, even when racial disparities in crime are taken into account."[49]

Studies of individual departments bear out this disproportionate treatment. In Columbus, Ohio, while Black people comprise 28% of the population, they were the recipients of about half of all police use-of-force incidents from that city's police department.[50] In Charleston, South Carolina, Black people comprised 22% of the population but were the recipients of 61% of all police use-of-force incidents.[51] The numbers were even more dramatic in Minneapolis, where Derek Chauvin murdered George Floyd.[52] A *New York Times* examination after Floyd's murder found that while Black people make up 19%

---

amphtml/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/ [https://perma.cc/Q9EG-FNGD].

48 Roland G. Fryer, Jr., An Empirical Analysis of Racial Differences in Police Use of Force 7, 39 (Nat'l Bureau of Econ. Rsch., 2018), https://www.nber.org/papers/w22399.pdf [https://perma.cc/WKH3-JNZU]; *see also* Quoctrung Bui & Amanda Cox, *Surprising New Evidence Shows Bias in Police Use of Force but Not in Shootings*, N.Y. Times (July 11, 2016), https://www.nytimes.com/2016/07/12/upshot/surprising-new-evidence-shows-bias-in-police-use-of-force-but-not-in-shootings.html [https://perma.cc/TQA6-ZLH8] (discussing Fryer's study).

49 Timothy Williams, *Study Supports Suspicion that Police Are More Likely to Use Force on Blacks*, N.Y. Times (July 7, 2016), https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html [https://perma.cc/GKV6-KKT6]; Phillip Atiba Goff, Tracey Lloyd, Amanda Geller, Steven Raphael & Jack Glaser, The Science of Justice: Race, Arrests, and Police Use of Force (Ctr. for Policing Equity 2016), http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf [https://perma.cc/DQ3X-F95H].

50 Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof.*, Wash. Post (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/UP8Q-AZLU].

51 Frank Knaack, Alex Yurcaba & Sophie Beiers, People's Budget Coalition, Building a Safe and Just Charleston: From Eliminating Racist Policing to Investing in Life Affirming Services 4 (2021); Denise Rodriguez, Racial Bias Audit of the Charleston, South Carolina, Police Department 18–19 (2019).

52 Richard A. Oppel, Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. Times (June 3, 2020), https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html [https://perma.cc/N3SB-R2X6].

of the Minneapolis population and 9% of its police, they were on the receiving end of 58% of the city's police use-of-force incidents.[53]

This disproportionality in the use of force is particularly apparent in the use of restraints. A Stanford study of police practices in Oakland, California, found that in a thirteen-month period, "2,890 African Americans were handcuffed but not arrested . . . while only 193 whites were cuffed [and not arrested]. When Oakland officers pulled over a vehicle but didn't arrest anyone, 72 white people were handcuffed, while 1,466 African Americans were restrained."[54]

Disproportionate violence is not limited to Black men. In her powerful book *Invisible No More*,[55] Andrea Ritchie catalogued how disproportionate police violence against the Black community is felt even more acutely by those at the intersections of race, gender, disability, sexual orientation, and gender identity.[56] Black women and girls face the double threat of racialized and sexualized violence.[57] Black people with neurodivergence or other mental health issues face the double threat of racialized violence and violence owing to an uninformed, untrained, and trigger-happy officer misinterpreting symptoms of illness.[58] Black LGBTQIA+ people face the double threat of

---

53 *Id.*

54 Rebecca C. Hetey, Benoît Monin, Amrita Maitreyi & Jennifer L. Eberhardt, *Data for Change: A Statistical Analysis of Police Stops, Searches, Handcuffings, and Arrests in Oakland, Calif., 2013-2014*, STAN. UNIV: SOC. PSYCH. ANSWERS TO REAL-WORLD QUESTIONS, (2016), https://sparq.stanford.edu/sites/g/files/sbiybj19021/files/media/file/data_for_change_june_2016.pdf [https://perma.cc/DV6N-EB3C]; Tom Jackman, *Oakland Police, Stopping and Handcuffing Disproportionate Numbers of Blacks, Work to Restore Trust*, WASH. POST (June 15, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/06/15/oakland-police-stopping-and-handcuffing-disproportionate-numbers-of-blacks-work-to-restore-trust/ [https://perma.cc/6YGM-S2Y8].

55 RITCHIE, *supra* note 29.

56 *Id.* at 2–3 ("[W]omen's experiences of policing . . . are uniquely informed by race, nation, gender, gender identity and expression, sexual orientation, poverty, disability, and mental health.").

57 *Id.* at 112–13 (describing a 2003 study of young women in New York City where "almost two in five young women described sexual harassment by police officers. Thirty-eight percent were Black, 39 percent Latinx, and 13 percent Asian or Pacific Islander.").

58 *Id.* at 91–92 (describing historical pseudo-scientific connection between race and mental illness, describing Black women escaping enslavement as "lunatic slaves," indigenous women resisting reservation agents as "Indian defectives," and the "resistance to slavery pathologized as mental illness inherent in African-descended people"); *see also* Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2057–58 (2017).

racialized violence and violence stemming from one's "suspicious" "failure" to conform to heteronormative modes of presentation and behavior.[59]

A University of Chicago study provides perhaps the most damning evidence of the dangerousness of anti-Black racial bias among officers.[60] The study assessed the ability of police officers to determine whether to shoot a target that flashed before them and compared police reactions with samples from the general population.[61] The targets featured a mix of photographs of armed and unarmed Black and White individuals.[62] While "both [populations] exhibited robust [anti-Black] racial bias in response speed . . . [o]fficers outperformed community members on a number of measures, including overall speed and accuracy."[63]

C. Removing the "Problem" in Police Brutality

Ubiquitous police violence in America exists in part because we have acquiesced to ubiquitous police presence in America. Many assume police spend their time investigating and responding to violent crime (where police use of force might be justified), but the vast majority of a police officer's time is spent addressing nonviolent, noncriminal social welfare issues.[64] American policing has become "a gnarl of overlapping services"[65] with officers asked to serve as "veterinary surgeon, mental welfare officer, marriage guidance counselor, home-help

---

59 *See* RITCHIE, *supra* note 29, at 128; Shawn E. Fields, *The Elusiveness of Self-Defense for the Black Transgender Community*, 21 NEV. L.J. 975, 981–83 (2021) (describing under- and over-enforcement of criminal laws against Black transgender community based on transphobic tropes about deviance).

60 *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1009–15 (2007).

61 *Id.* at 1009.

62 *Id.* at 1009–10.

63 *Id.* at 1006 (confirming that officers were quicker to shoot armed Black individual and to choose not to shoot unarmed White individuals but were slower to shoot armed White individuals and to choose not to shoot unarmed Black individuals).

64 Fields, *supra* note 8, at 1037 ("One national study found that 80-90% of an officer's time is spent on handling noncriminal situations . . . ."); Friedman, *supra* note 7, at 926 (Traditional "[c]rimefighting" is a "very small part of what police do every day, and the actual work they are called upon to do daily requires an entirely different range of skills . . . .").

65 Derek Thompson, *Unbundle the Police*, THE ATLANTIC (June 11, 2020), https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/ [https://perma.cc/N9C4-SLBY].

to the infirm, welfare worker friend and confidant."[66] Approximately 80% of an officer's time is spent responding to nonviolent, noncriminal behavior,[67] and up to half of police killings involve interactions with a mentally ill or substance-addicted individual for whom a medical or mental health intervention would be more appropriate.[68] And yet, the public considers it the duty of the police to respond to its calls and crises like a 24-hour general purpose responder.[69] Given the structurally violent orientation of policing as an institution and its particularly abhorrent treatment of vulnerable communities, the demand that police respond to "everything everywhere all at once" is a dangerous one.[70]

As a result, much of the conversation around reducing discriminatory policing and police brutality has turned to police abolition and the use of alternate responders. Many abolitionists highlight the structurally violent, exploitative, and racialized history of policing as a primary reason to replace police on the streets.[71] Professor Amna Akbar observes that racialized "[p]olice violence is not a problem of 'bad apples' or singular incidents," but "an everyday occurrence. It occurs in schools,

---

66 Sylvester Amara Lamin & Consoler Teboh, *Police Social Work and Community Policing*, 2 COGENT SOC. SCI., 2016, at 6.

67 *See* George T. Patterson, *Police Social Work* ENCYCLOPEDIA OF SOC. WORK 1 (Terry Mizrahi & Larry E. Davis, 20th ed. 2008).

68 Hurubie Meko & Brittany Kriegstein, *He Was Mentally Ill and Armed. The Police Shot Him Within 28 Seconds*, N.Y. TIMES (Mar. 30, 2023), https://www.nytimes.com/2023/03/30/nyregion/nypd-shooting-mental-health.html [https://perma.cc/H5MZ-JT7G]; Marti Hause & Ari Melber, *Half of People Killed by Police Have a Disability: Report*, NBC NEWS (Mar. 14, 2016), https://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371 [https://perma.cc/7F6Z-F8XH] ("Police have become the default responders to mental health calls."); Justin Ellis, *Media Missing the Story: Half of All Recent High Profile Police-Related Killings Are People with Disabilities*, RUDERMAN FAM. FOUND. (Mar. 8, 2016), https://rudermanfoundation.org/media-missing-the-story-half-of-all-recent-high-profile-police-related-killings-are-people-with-disabilities/ [https://perma.cc/RLC8-5ZHP].

69 ALBERT J. REISS, JR., THE POLICE AND THE PUBLIC 63 (1972).

70 SHAWN E. FIELDS, THE NEW PUBLIC SAFETY: POLICE REFORM AND THE LURKING THREAT TO CIVIL LIBERTIES (forthcoming Sep. 2025) (manuscript at 15–18) (on file with author).

71 *See* ALEX S. VITALE, THE END OF POLICING 27 (2017) ("The origins and function of the police are intimately tied to the management of inequalities of race and class."); Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/JQ3F-QVM3] ("There is not a single era in United States history in which the police were not a force of violence against black people . . . . So when you see a police officer pressing his knee into a black man's neck until he dies, that's the logical result of policing in America . . . he is doing what he sees as his job.").

cars, homes, streets, pools, and every police department."[72] Given policing's central role as "a regressive and violent force in a historical struggle over the distribution of land, labor, and resources,"[73] one cannot expect a "kinder, gentler" police force to suddenly appear.[74] Decades of training to improve police have not allowed us to escape this violence. "Plans for change must include taking incremental steps with an eye toward making the cops obsolete . . . ."[75]

Others who promote the use of alternate responders do so by seeking to "unbundle" or "disaggregate" the policing function, removing from a violent police officer's jurisdiction a whole host of social welfare issues that require a nonviolent, nonpunitive response.[76] These advocates observe the mismatch between the culture of police violence and the reality of individual officers' daily lives. Professor Barry Friedman has highlighted that, regardless of whatever implicit bias or procedural justice trainings to which police might be exposed, fundamentally, police are "trained in force and law . . . ."[77] In studying thousands of hours of pre-service police academy training, Friedman and his law students observed that trainees do take courses in mediation, social work, and medical skills.[78] But the vast majority of the time in training is spent "on how to use force and engage in law enforcement," the skills both the public and future officers assume police spend most of their time using.[79]

But that is simply not true. Police officers are primed to use violence to enforce criminal law, but most of their time is spent on nonviolent, noncriminal matters.[80] When one recognizes that an officer's trained orientation to view the world with a "jaundiced" eye[81] and respond in force to all threats is mismatched to what a cop actually does all day, it becomes

---

72 Akbar, *supra* note 28, at 1795.

73 *Id.* at 1787.

74 Vitale, *supra* note 70, at 27.

75 Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, Truthout (Sep. 16, 2015), https://truthout.org/articles/big-dreams-and-bold-steps-toward-a-police-free-future/ [https://perma.cc/9DQZ-D8NH]; *see also* Akbar, *supra* note 28, at 1783.

76 Thompson, *supra* note 64; Friedman, *supra* note 7, at 931.

77 Friedman, *supra* note 7, at 978.

78 *Id.* at 947–948.

79 *Id.* at 948.

80 Patterson, *supra* note 66; Fields, *supra* note 8, at 1037–38.

81 Charles L. Becton, *The Drug Courier Profile: 'All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye*,' 65 N.C. L. Rev. 417, 445 (1987).

clear that the best way to reduce police violence is to remove police entirely from situations where force and law simply has no place.[82]

D. The Rise of the Alternate Responder

Municipalities across the country have heeded these calls to remove police from the equation where possible, replacing armed police with unarmed experts in addiction, mental health, homelessness, and other noncriminal matters.[83] Proposals reallocating government resources from police to these alternate responders almost invariably receive increased support following a high-profile act of police brutality, indicating that a primary goal of these programs is to reduce police violence.[84] Lawmakers acknowledge as much, observing that the direct motivation driving alternate response mechanisms is a desire to end police brutality.[85]

The most commonly deployed alternate responders include paramedics triaging medical emergencies, mental health and substance abuse counselors responding to noncriminal crises, homelessness outreach teams working with an exploding unhoused population across the country, and social workers

---

82 Friedman, *supra* note 7, at 931 (asking three questions to understanding public safety needs: "What is a cop DOING here?," "What is a COP doing here?," and "What is a cop doing HERE?"); Fields, *supra* note 8, at 1038-39 (critiquing the "unnecessary marriage of nonviolent, noncriminal social need and violent 'warrior cop' response [because it] predictably leads to unnecessary and tragic violent confrontation").

83 Fields, *supra* note 8, at 1040–48.

84 *See, e.g.*, Khaleda Rahman, *Overwhelming Support for Non-Police First Responder Agency: Poll*, NEWSWEEK (June 17, 2020), https://www.newsweek.com/overwhelming-support-non-police-first-responder-agency-1511362 [https://perma.cc/QZ7K-T25H] (describing poll finding broad support for a policy that nonpolice agents should respond to mental health, crises, homelessness issues, and unarmed suspects following George Floyd's murder).

85 Natasha Williams, *Louisville Launches Pilot Program that Gives Alternative to Sending Police to all 911 Calls*, WLKY (Oct. 13, 2021), https://www.wlky.com/article/louisville-launches-pilot-program-that-gives-alternative-to-sending-police-to-all-911-calls/37954146 [https://perma.cc/MP6X-QE6L] (describing creation of the DOVE delegate "deflection model" program after Louisville uprisings in 2020, with the Council President explaining that it would "save lives" to not send armed police to all calls); *see generally Investing in Evidence-Based Alternatives to Policing: Civilian Crisis Response*, VERA INST. OF JUST. (Aug. 2021), https://www.vera.org/downloads/publications/alternatives-to-policing-civilian-crisis-response-fact-sheet.pdf [https://perma.cc/JA9S-5XWR] (describing impetus behind creation of alternative response programs in Eugene, Oregon, San Francisco, Denver, Los Angeles, and New York City).

addressing longer-term public health and safety issues.[86] Some municipalities employ violence interrupters to break cycles of violence between organized criminal gangs.[87] Many of these nonpolice agents co-respond with police to calls for help, acting as non-carceral interventionists in collaboration with cops ready to take over if a situation escalates.[88] Other alternate response agencies operate wholly outside police jurisdiction, utilizing an alternative emergency call line not available to police and responding to crises without any police involvement.[89]

These changes to public safety appear to have an impact. Arrest rates decrease when alternate responders are involved, as do rates of violence.[90] As expected, these alternate responders train not to use violence themselves.[91] But instances of nonpolice brutality have occurred, including acts of unjustified

---

86 *Id.* (describing a San Francisco Street Crisis Response Team "made up of a social worker, peer counselor, and paramedic" and similar programs in Los Angeles and New York using "mental health professionals and emergency medical technicians."); Fields, *supra* note 8, at 1042–49.

87 *See* V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 Cardozo L. Rev. 1453, 1509–11 (2019) (describing use of violence interrupters); Tom Crann & Megan Burks, *Now Better Trained and Resourced, Minneapolis Violence Interrupters to Hit Streets Next Month*, MPR News (May 27, 2021), https://www.mprnews.org/story/2021/05/27/now-better-trained-and-resourced-minneapolis-violence-interrupters-to-hit-streets-next-month [https://perma.cc/LQ32-488W] (Violence interrupters played a key role in the "Minneapolis Office of Violence Prevention" after "the murder of George Floyd renewed calls for a drastic change.").

88 Int'l Ass'n of Chiefs of Police & U. Cin. Center for Police Rsch. & Pol'y, Assessing the Impact of Co-Responder Team Programs: A Review of Research 1-5, https://www.theiacp.org/sites/default/files/IDD/Review%20of%20Co-Responder%20Team%20Evaluations.pdf [https://perma.cc/A2SL-M55J]; Fields, *supra,* note 8 at 1044 (describing the "predominant co-responder model" used by social workers embedded with police).

89 *See CAHOOTS (Crisis Assistance Helping Out on the Streets)*, White Bird Clinic, https://whitebirdclinic.org/cahoots/ [https://perma.cc/SH39-HARQ] (describing agency responding without police to public safety emergencies on an independent line); *cf.* Judy Ann Clausen & Joanmarie Davoli, *No-One Receives Psychiatric Treatment in a Squad Car*, 54 Tex. Tech L. Rev. 645, 683 (2022) ("CAHOOTS supplements the police, as noted by a report by the Eugene Police Department. 'CAHOOTS is a valued partner . . . [and] EPD and CAHOOTS are partner organizations.'").

90 *Investing in Evidence-Based Alternatives to Policing: Civilian Crisis Response*, *supra* note 85 ("In Denver, Colorado, Support Team Assistant Response (STAR) . . . ha[s] successfully responded to 1,323 calls, none of which resulted in injury, arrest, or the need for police backup.").

91 *About*, Dove Delegates, https://www.dovedelegates.org/about [https://perma.cc/WNE5-WU3D] (last visited Sep. 10, 2024) (Utilizing imagery of Nelson Mandela and the symbol of a dove of peace, DOVE delegates in Louisville, Kentucky "lead with healing" as a way to "dismantle systems of oppression" through nonviolence.).

violence committed by firefighters frustrated with drug-addicted[92] and forcible removal of homeless people from camps by homelessness outreach personnel, sometimes accompanied assault and destruction of property.[93]

While removing police to reduce police violence makes good sense as a matter of policy, one cannot assume that doing so will also provide greater legal protections for those who fall victim to nonpolice brutality. In fact, the opposite is likely true for at least three reasons. First, the constitutional provision used to restrain and redress unlawful government violence—the Fourth Amendment's "unreasonable seizures" clause—may not even apply. Courts have repeatedly declined to find that the Fourth Amendment applies in cases of shocking physical abuse—including abuse of minor children, sexual assault and rape, and violence leading to death—unless the victim is being arrested or is the subject of a criminal investigation.[94] Second, the Supreme Court's narrow definition of "seizure" exempts from Fourth Amendment scrutiny a range of violent conduct perpetrated by government actors and relevant to the work of alternate responders. Third, the U.S. Constitution's only other source of protection from government brutality, the Due Process Clause, has proven woefully inadequate to address even the most unjustified government abuses, including sexual violence.

II
Nonpolice Brutality and the Fourth Amendment

The Fourth Amendment provides "the primary source of legal regulation and restraint on police use of force."[95] In constitutional parlance, police brutality amounts to an "unreasonable

---

92 Claire Anderson, *'No regrets!' Shocking video shows firefighter punching handcuffed patient*, Express (Dec. 15, 2022), https://www.express.co.uk/news/us/1709918/miami-firefighter-suspended-Robert-Webster-punch-patient-video-dxus [https://perma.cc/T97S-HGS4].

93 Claire Rush, Janie Har & Michael Casey, *From San Francisco to New York City, Cities are Cracking Down on Homeless Encampments. Advocates Say That's Not the Answer*, The Mercury News (Nov. 28, 2023), https://www.mercurynews.com/2023/11/28/cities-crack-down-on-homeless-encampments-advocates-say-thats-not-the-answer/#:~:text=Cities%20across%20the%20U.S.%20are%20struggling%20with%20and,there%20aren%E2%80%99t%20enough%20homes%20or%20beds%20for%20everyone [https://perma.cc/82FS-UE23].

94 *See infra* subpart II.B.

95 Fields, *supra* note 8, at 1049; Gardner v. Buerger, 82 F.3d 248, 251 (8th Cir. 1996) ("[T]he Fourth Amendment is also a 'primary source[] of constitutional protection against physically abusive government conduct.'" (quoting Graham v. Connor, 490 U.S. 386, 394 (1989))); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 556 (1999) ("[T]he larger purpose for which the Framers adopted the text [was] to curb the exercise of discretionary authority by [law enforcement] officers.").

seizure" under the Fourth Amendment, and a body of "excessive force" jurisprudence has defined the contours of what constitutes unlawful police violence.[96] But what becomes of this jurisprudence when governments replace police with nonpolice alternate responders? And what role will the Fourth Amendment play in regulating and responding to the violent actions of these nonpolice agents? This Part answers both questions.

A. A Jurisprudence That Facilitates Violence

The law regarding police use of force "has been developed primarily by United States Supreme Court case law, with state statutes and lower court decisions mirroring the Court's essential rulings."[97] The Court first attempted to define a precise legal standard for "excessive force" in the 1985 decision *Tennessee v. Garner*,[98] but the current controlling standard was announced four years later in 1989 in *Graham v. Connor*.[99] In that case, a diabetic man named Dethorne Graham was initially suspected of robbing a convenience store, but police quickly determined that his erratic behavior stemmed from low insulin levels and the onset of diabetic shock.[100] Mr. Graham eventually lost consciousness.[101] Undeterred, police handcuffed the unconscious Graham, slammed his body against the hood of his car, and threw him into the back of a police car.[102] Graham suffered "a broken foot, cuts on his wrist, a bruised forehead, and an injured shoulder . . . "[103]

The trial and appellate courts initially dismissed Graham's Fourth Amendment claim, applying *Garner* that there was no unconstitutional, unreasonable seizure.[104] The Supreme Court reversed on this point, finding that all police excessive force

---

96 County. of Los Angeles v. Mendez, 581 U.S. 420, 428 (2017) ("An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances.").

97 SHAWN E. FIELDS, NEIGHBORHOOD WATCH 106 (Cambridge University Press, 2022).

98 Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that officers may use deadly force to prevent an arrestee's escape only where the officer has probable cause to believe the suspect poses a threat of serious physical harm to the officer or others).

99 Graham v. Connor, 490 U.S. 386, 397–99

100 *Id.* at 388–89 (1989).

101 *Id.* at 389.

102 *Id.*

103 *Id.* at 390.

104 Graham v. City of Charlotte, 644 F. Supp. 246, 249 (W.D.N.C. 1986), *aff'd*, 827 F.2d 945, 951 (4th Cir. 1987), *rev'd*, 471 U.S. at 392.

cases should be analyzed under the Fourth Amendment.[105] The Court then held that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of . . . "'the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake."[106] In doing so, the Court emphasized the importance of "identifying the specific constitutional right allegedly infringed," noting that "the Fourth Amendment [is one of] the two most textually obvious sources of constitutional protection against physically abusive government conduct" (the other being the Eighth Amendment's prohibition against cruel and unusual punishment).[107]

Having identified the Fourth Amendment as the proper place to redress government physical brutality, the Court then emphasized that this balancing of rights and government interests requires application of an objective standard of reasonableness, divorced from the subjective beliefs, intents, or motives of the officer on the scene.[108] While this objective standard was hailed as "a breakthrough,"[109] the Court's definition of "objective reasonableness" proved exceptionally deferential to law enforcement:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[110]

---

105 *Graham*, 490 U.S. at 395.

106 *Id.* at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

107 *Id.* at 392, 394–95 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, and not the more generalized notion of 'substantive due process,'" applies.).

108 *Id.* at 397.

109 *Mr. Graham and the Reasonable Man*, WNYC STUDIOS: RADIOLAB, WNYC STUDIOS: MORE PERFECT, (Nov. 30, 2017), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/mr-graham-and-reasonable-man?tab=transcript [https://perma.cc/QZ2S-93U7] (statement of Graham's attorney, articulating belief that the objective standard would provide better protections for civilians against police violence).

110 *Graham*, 490 U.S. at 396–97 (citing Terry v. Ohio, 392 U.S. 1, 20–21 (1968)); Lee, *supra* note 4, at 645 ("The Fourth Amendment is not violated merely because an officer was mistaken, so long as his mistake was reasonable.") (citing *Graham*, 490 U.S. at 396).

In the decades since *Graham*, this famous passage has worked to insulate officers from accountability while justifying heinous acts of police brutality in two primary ways. First, the idea of reasonableness articulated "is circumscribed very tightly by time."[111] "Rather than allowing juries to consider what a reasonable officer would do in general, taking into account all of the information the officer on the scene had prior to the use of force and the calculations a reasonable officer would have made with that information, courts and juries may only consider what a reasonable officer would have done in that 'split[] second.'"[112] This "split-second syndrome can overwhelm other decision processes and lead to instantaneous assessments of risk and threat" that unfairly ignore the broader context and whether alternatives to lethal force existed.[113] Split-second syndrome is dangerous, considering the rise of "warrior cop" police force trainings "preach[ing] that police work is inherently violent" and priming cops to kill at any moment, including in that split second in response to a furtive movement.[114] It also works to rubber stamp racialized police brutality, given ubiquitous implicit racial biases priming cops to view dark-skinned individuals as more prone to violence and thus more dangerous to a cop deciding whether to shoot.[115] Further, as a matter of practice, qualified immunity works to defeat most use-of-force claims.[116]

Second, the "reasonableness" standard itself does not require officers to use force only when necessary, to use available less violent alternatives, or even to resist exacerbating the conflict. In fact, in case after case, the Supreme Court has confirmed that an officer's conduct exacerbating a confrontation

---

111 *Mr. Graham and the Reasonable Man supra* note 109.

112 FIELDS, *supra* note 97, at 109 (quoting *Graham*, 490 U.S. at 396–97); County. of Los Angeles v. Mendez, 581 U.S. 420, 428 (2017) (any event taking place immediately prior to the use of force acts as a superseding event and breaks the chain of causation up to that point, rendering anything that happened prior to that moment irrelevant).

113 Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 965 (2020).

114 Alain Stephens, *The "Warrior Cop" Is a Toxic Mentality. And a Lucrative Industry*, SLATE (June 19, 2020), https://slate.com/news-and-politics/2020/06/warrior-cop-trainings-industry.html [https://perma.cc/R32Y-6ZPQ]; *see also* Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 234 (2015).

115 *See* Paul Butler, *The System is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J., 1419, 1457 (2016).

116 Michael L. Wells, Scott v. Harris *and the Role of the Jury in Constitutional Litigation*, 29 REV. LITIG. 65, 95, 108 (2009).

and making physical conflict more likely is simply *irrelevant* to the reasonableness calculation.[117] Likewise, the Supreme Court has found that an officer's use of force, including deadly force, can be objectively reasonable even if the officer knew about and simply refused to use an available, less lethal type of force.[118]

In short, the Fourth Amendment's excessive force jurisprudence does more to facilitate police violence than restrain and redress it. One might wonder, then, why we should bother even considering how this impotent doctrine will apply to acts of nonpolice brutality. After all, if a broken doctrine designed primarily for police fails to restrain and redress police violence, how can we expect it to more effectively restrain and redress violence by an unintended audience: nonpolice alternate responders?

The answer is that, if excessive force doctrine applied to nonpolice brutality, one can reasonably argue that it should more effectively constrain nonpolice actors. Excessive force jurisprudence is informed (perhaps too much so) by the reality that police are expected to confront potentially violent criminals and situations and are authorized and expected to use force when doing so; indeed, police have a "monopoly" on lawful violence.[119] Alternate responders have no such authority or mandate; they are not a part of the monopoly of lawful violence. In fact, their mandate is inapposite to police violence. Medical

---

117 Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 416, 426 (2008) ("[T]he temporal focus in many circuits on the moment of decision to shoot in assessing an officer's reasonableness, as opposed to also analyzing pre-seizure conduct which may exacerbate the necessity to employ deadly force . . . ."); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 216, 293–99 (2017) ("[I]ll-considered statements in *Graham* and other decisions reinforce a 'split-second' theory of policing that sets the wrong constitutional floor.").

118 Fagan & Campbell, *supra* note 113, at 962 (Under *Graham*, "situations in which an officer perceives an immediate threat do not require a risk calculation wherein the officer first considers a menu of actions before deciding how to respond . . . ") (citing Graham v. Connor, 490 U.S. 386, 396–97 (1988); *cf.* Fields, *supra* note 8, at 1089 (observing that more courts "have become willing to hear expert testimony from officers opining on whether the force used by an officer was not just reasonable, but *necessary*.").

119 Matthew L.M. Fletcher, *Erasing the Thin Blue Line: An Indigenous Proposal*, 2021 MICH. ST L. REV. 1447, 1473 (The "police are authorized to employ the government's monopoly on violence."); Robert Leider, *The State's Monopoly of Force and the Right to Bear Arms*, 116 NW. U. L. REV. 35, 72 (2021) ("[E]ven if a state has a monopoly on the legitimate use of violence, nothing inherently requires state officers to exercise the state's monopoly of force.").

first responders, mental health professionals, and social workers all follow a code of professional ethics centered on doing no harm to patients and clients.[120] Their primary goal centers on individual patient well-being, not public safety through law enforcement.[121] One could reasonably conclude, then, that *no* amount of physical force is objectively reasonable when compared to the inherent need to use force when subduing and arresting criminal suspects. At a minimum, one might imagine a far more tightly defined standard for what qualifies as "objectively reasonable" use of force in the nonpolice alternate responder context.

This claim is what makes application of excessive force doctrine to nonpolice brutality relevant. In theory, it should protect citizens more than it currently does in the police brutality context. I say "in theory" because the foregoing paragraph surmises what *might* happen when the Fourth Amendment applies to nonpolice brutality. Under current case law, the Fourth Amendment mostly *does not* apply to nonpolice brutality at all. Rather than more tightly regulating acts of violence committed by nonpolice actors, existing jurisprudence confirms that these actors operate entirely free of any Fourth Amendment constitutional restraints.

B. Violence Outside Criminal Investigations

Courts routinely claim that the "primary purpose of the Fourth Amendment [is] to prohibit unreasonable intrusions in the course of criminal investigations."[122] When the "challenged conduct falls outside the area to which the Fourth Amendment

---

120 *See, e.g.*, *Code of Ethics*, NAT'L ASSOC. EMERGENCY MED. TECHNICIANS, https://www.naemt.org/about-ems/code-of-ethics [https://perma.cc/4AN6-VJJN] (last visited Aug. 31, 2024) (providing list of eleven ethical guidelines, the first being "[t]o conserve life, alleviate suffering, promote health, do no harm, and encourage the quality and equal availability of emergency medical care."); *Revision of Ethics Code Standard 3.04*, AM. PYSCH. ASSOC., https://www.apa.org/ethics/code/standard-304 [https://perma.cc/ZN42-UWBM] (last visited Aug. 31,2024) ("Psychologists take reasonable steps to avoid harming their clients/patients . . .Psychologists do not participate in, facilitate, assist, or otherwise engage in . . .any act by which severe pain or suffering, whether physical or mental, is intentionally inflected on a person . . . .").

121 Obasogie & Zaret, *supra* note 15, at 51 ("[T]he police are oriented to public criminal justice goals while medical professionals are oriented to individual patients' well-being.").

122 *See* JL v. N.M. Dep't of Health, 165 F. Supp. 3d 996, 1042 (D.N.M. 2015) (collecting cases); Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977) (citing Whalen v. Roe, 429 U.S. 589, 603–04 n.32 (1977));New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) ("[T]he evil toward which the Fourth Amendment was primarily

most commonly and traditionally applies—law enforcement," courts are reluctant to find that the conduct constitutes a "search" or a "seizure" sufficient to trigger the Amendment's protection.[123] Thus, "the line between a traditional criminal investigation . . . and a search or seizure designed primarily to serve *non*-criminal . . . goals . . . is a line of considerable constitutional significance."[124] It is also "thin and, quite arguably, arbitrary."[125]

The United States Supreme Court has recognized that the Fourth Amendment can apply "in a range of settings beyond traditional law enforcement investigations, including in cases involving . . . non-law enforcement government actors: school officials, building inspectors, and employers."[126] But in doing so, the Court "has been careful to observe that the application of the amendment [sic] is limited" in these nonpolice contexts, and it often employs a more deferential "special . . . needs" reasonableness standard to nonpolice activities that requires neither probable cause nor a warrant.[127]

The vast majority of these nonpolice cases concern whether the amendment applies to a nonpolice *search* that yields evidence later used in a criminal prosecution.[128] Rarely has the Court confronted when a nonpolice *seizure* might trigger Fourth Amendment scrutiny. The few lower court cases considering

---

directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband . . . .").

123 U.S. v. Attson, 900 F.2d 1427, 1430 (9th Cir. 1990); *see, e.g.,* Blasko v. Doerpholz, No. 16-CV-30185-MGM, 2016 U.S. Dist. LEXIS 185495, *4 (D. Mass. Aug. 22, 2016).

124 JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMMONS, UNDERSTANDING CRIMINAL PROCEDURE 293 (7th ed. 2017).

125 York v. Wahkiakum Sch. Dist., 178 P.3d 995, 1003 n.13 (Wash. 2008) (quoting *id.*); *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) ("[L]little or no effort has been made to explain" when a search or seizure is noncriminal.).

126 Jonathan Ostrowsky, Comment, *#MeToo's Unseen Frontier: Law Enforcement's Sexual Misconduct and the Fourth Amendment Response*, 67 UCLA L. REV. 258, 284 (2020); *T.L.O.*, 469 U.S. at 330 (school administrators); Camara v. Mun. Court of S.F., 387 U.S. 523, 538 (1967) (building inspectors); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989) (federal railway employer).

127 *Attson*, 900 F.2d at 1430 (quoting *Nat'l Treasury Emps. Union*, 489 U.S. at 665) (collecting cases); Fields, *supra* note 8, at 1051 (describing the "irony about the Supreme Court's treatment of noncriminal investigations. The Fourth Amendment's restraints exist to protect law-abiding citizens from arbitrary and unnecessary intrusions. Yet in the noncriminal context, the Court has often required 'law-abiding persons to open up their homes, businesses, papers, effects, and even bodies to *greater* scrutiny than occurs with criminal suspects.'") (quoting DRESSLER, MICHALES & SIMMONS *supra* note 123, at 294).

128 *See* DRESSLER, MICHALES & SIMMONS *supra* note 124, at 294–96.

when brutality outside criminal investigations triggers Fourth Amendment scrutiny typically concern police sexual misconduct, medical personnel, or school resource officers.[129] The following subparts examine these cases holistically and illustrate how courts undertake two threshold inquiries before agreeing to apply the Fourth Amendment to acts of brutal violence. First, courts ask whether the agent committed the violent act during the course an investigation, criminal or otherwise.[130] Second, courts ask whether the agent was subjectively motivated to carry out a governmental objective when using physical force.[131] If the answer to either question is "no," courts rarely find the existence of a Fourth Amendment seizure, thus obviating the need to consider whether the force in question was unconstitutionally excessive.

1. *Noninvestigative Brutality: Sexual Misconduct*

When the Supreme Court first held that the Fourth Amendment could apply to nonpolice entities like housing inspectors in *Camara v. Municipal Court of San Francisco*,[132] the language of the opinion suggested a broad application to all government conduct that could fairly be characterized as a search or seizure. The Court observed that "[t]he basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials . . . thus giv[ing] concrete expression to a right of the people" and not just the criminally accused.[133]

The guarantee of bodily integrity made explicit in the Fourth Amendment's text and recognized in *Camara* suggested a broad "right of the people to say 'NO' to the government's attempts to . . . seize," whether that government actor was a police officer or whether the attempted seizure occurred during the course of a government investigation.[134] Referencing

---

129 *See infra* subpart II.B.

130 *Id.*

131 *Attson*, 900 F.2d at 1433.

132 387 U.S. 523, 538 (1967).

133 *Id.*; Michigan v. Tyler, 436 U.S. 499, 506 (1978) (holding the Fourth Amendment applicable to firefighters entering a home: "[T]here is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman . . . .").

134 Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 735 (2014) ("The Fourth Amendment gives the right to say, 'No,' to the government's attempts to search and seize.").

Camara's language decades later, Justice Anthony Kennedy argued that "any invasion of a person's personal security" ought to trigger the Fourth Amendment, including not just "a serious assault . . . [but] any offensive touching."[135]

But lower courts limited *Camara*'s holding in subsequent cases, emphasizing that the Fourth Amendment applied only if nonpolice actions were "designed to elicit a benefit for the government in an investigatory or, more broadly, an administrative capacity."[136] This limitation led "the vast majority of courts [to] only apply the Fourth Amendment to cases involving arrestees, suspects, or other investigative settings" involving police officers.[137]

Most cases applying this "investigative or administrative" requirement have done so in the context of suspicionless regulatory searches, including mandatory employee drug tests.[138] The most common application of this investigative or administrative requirement in the seizure context centers on police sexual misconduct. In general, these cases adhere closely to the "investigative" requirement.[139] If an officer sexually assaults someone during the course of an active criminal investigation, the Fourth Amendment will apply.[140] But "if [an officer] sexually assaults a person in her home, in a noninvestigative setting," the Fourth Amendment "generally does not" apply.[141]

For example, in *United States v. Langer*, an officer who pulled over female drivers, detained them on the side of the road, and pushed them against the car while forcibly kissing them was found to have committed a "severe infraction of the Fourth Amendment," because the assaults occurred during the course of a traffic stop investigation.[142] But in *Poe v. Leonard*,

---

135 Transcript of Oral Argument at 5–7, United States v. Lanier, 520 U.S. 259 (1997) (No. 95–1717), 1997 WL 7587 (quoting Kennedy, J.).

136 Doe v. Luzerne Cnty., 660 F.3d 169, 179 (3d Cir. 2011) (quoting *Attson*, 900 F.2d at 1429).

137 Ostrowsky, *supra* note 126, at 275; Fontana v. Haskin, 262 F.3d 871, 882 (9th Cir. 2001) ("Sexual misconduct by a police officer toward another generally is analyzed under the Fourteenth Amendment; sexual harassment by a police officer of a criminal suspect during a continuing seizure is analyzed under the Fourth Amendment.").

138 *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 662, 668 (1989).

139 *See, e.g.*, United States v. Langer, 958 F.2d 522, 524 (2d Cir. 1992).

140 *See* Montanez v. City of Syracuse, No. 16-CV-0550, 2019 WL 315058, at *16 (N.D.N.Y. Jan. 23, 2019).

141 Ostrowsky, *supra* note 126, at 258.

142 *Id.* at 522–24.

the Second Circuit held that an on-duty officer who surreptitiously videotaped women undressing in a closed room did not commit a Fourth Amendment violation (in this case, a search), because it "occurred outside of a criminal investigation or other form of governmental investigation or activity" and was instead "for personal reasons."[143]

These contrasting cases highlight the "arbitrary" distinction between investigative and noninvestigative activity.[144] The officer in *Langer* was engaged in "investigative activity" only to the extent that he used the pretext of a traffic stop to perpetrate sexual violence, even though sexual violence can never serve a legitimate investigative function. Yet despite the fact that the officers in both *Langer* and *Poe* were on duty during the time of their misconduct, clearly engaged in the sexual misconduct "for personal reasons," and engaged in severe, unwarranted, and nonconsensual violations of privacy and liberty, only one was held to have even triggered (much less violated) the Fourth Amendment.

One might read these cases and conclude that nonpolice alternate responders will be held responsible for acts of physical violence, including sexual violence, committed while in the course of carrying out their public safety duties but not for similar acts committed while either off-duty or when not engaged in public safety-oriented behaviors. Such a result would seem arbitrary and contrary to the Fourth Amendment's text and purpose, but at least it would be fairly justiciable.[145] But even this unsatisfactorily narrow application can prove unworkable. As the Supreme Court rightly observed in *Terry v. Ohio*, a lawful police investigation can turn into an unlawful

---

143 282 F.3d 123, 125, 130, 136–37 (2d Cir. 2002).

144 York v. Wahkiakum Sch. Dist., 178 P.3d 995, 1003 n.13 (Wash. 2008) (citing DRESSLER, MICHALES & SIMMONS *supra* note 124, at 293).

145 *See* U.S. v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference with the privacy and personal security of individuals."); Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion—which is at the core of the Fourth Amendment—is basic to a free society."); Mapp v. Ohio, 367 U.S. 643, 656 (1961) ("The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society.'") (quoting Wolf, 338 U.S. at 27); Schmerber v. California, 384 U.S. 757, 767 (1966) (*Mapp* and *Wolf* "reaffirm[] that broad view of the [Fourth] Amendment's purpose . . . .").

seizure in a matter of seconds, leading this type of investigative versus noninvestigative line drawing to absurd results.[146]

For example, in *Montanez v. City of Syracuse*, a Syracuse police officer responded to a 911 call from a woman claiming that her sister had kidnapped her daughter and took her from New York to Alabama.[147] Officer Chester Thompson responded, and upon arrival, he saw that only the caller and her newborn son were in the apartment.[148] Once inside the apartment, Thompson told the woman she "was pretty," he "commented on [her] rear end and made a sexual comment about [her] lips," he pulled out his penis and told the woman to perform oral sex, and then he instructed her to "get a condom" before raping her.[149] The court admitted that Officer Thompson "was in Plaintiff's apartment in response to a 911 call, and thus on police business," but nevertheless declined to apply the Fourth Amendment.[150] The court concluded that because "there is no evidence that Thompson sexually assaulted Plaintiff during the course of an arrest or seizure or that Plaintiff was under suspicion of criminal activity," the Fourth Amendment simply did not apply.[151] Thus, despite the officer in *Montanez* clearly acting within the scope of his duties by responding to a 911 call alleging criminal activity, which clearly involves criminal investigative conduct, the Fourth Amendment did not apply to this police brutality because the victim of the brutality herself was neither a suspect nor an arrestee.[152]

The implications of this case in the alternate responder context are troubling and far-reaching. If the Fourth Amendment does not apply to a rape by a police officer when responding to a 911 call solely because the victim was not a criminal suspect

---

146 392 U.S. 1,17–18 (1968) ("[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.").

147 2019 WL 315058 at *8 (N.D.N.Y. Jan, 23, 2019).

148 *Id.*

149 *Id.* (alterations in original).

150 *Id.* at *15.

151 *Id.* (citing Jones v. Wellham, 104 F.3d 620, 628 (4th Cir. 1997) (holding that officer's rape of plaintiff, who was neither a suspect nor an arrestee, implicated substantive due process and not the Fourth Amendment)); D.G. v. City of Las Cruces, No. 14-CV-368, 2015 WL 13665421, at *7 (D.N.M. Mar. 25, 2015) ("[C]ases in our Circuit have yet to consider the application of the Fourth Amendment to a sexual assault by an officer on a person not in custody in the typical, criminal context.").

152 2019 WL at *15; *cf* U.S. v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment . . . if . . . a reasonable person would have believed that he was not free to leave.").

or arrestee, one can scarcely imagine when the Amendment would apply to nonpolice actors. Indeed, the very purpose of a nonpolice alternate responder is to authorize a government actor to respond to *noncriminal* activity with a *noninvestigative*, *non-carceral* response to a public safety concern.[153] Alternate responders generally have no power to investigate criminal activity or make arrests as a result of their role as alternatives to criminal enforcement; thus, any potential targets of their nonpolice violence by extension will not be a "suspect" or "arrestee" as understood in *Montanez*.[154]

This reasoning has particular salience in the context of paramedics. EMTs respond to 911 calls just as the officer in *Montanez*, but the purpose of their response is to triage medical emergencies, not initiate criminal investigations.[155] A paramedic who responds to a call and subsequently assaults a victim (sexually or otherwise) almost certainly does so free from Fourth Amendment scrutiny. This nonpolice actor is doubly insulated; not only are they not assaulting a criminal suspect or arrestee, but unlike *Montanez*, they were never responding to a criminal emergency at all.

This narrow application of the Fourth Amendment against police officers in clear instances of abhorrent physical brutality while engaged in on-duty tasks strongly suggests an even more narrow application of the Amendment and its excessive force jurisprudence to nonpolice alternate responders. One such case involving a nonpolice actor—a judge—indicates as much. In *United States v. Lanier*, a state court judge sexually assaulted numerous court employees and litigants, actions for which he was criminally convicted.[156] On appeal, the judge argued that his convictions should be overturned because an essential element of the statute under which he was convicted was the violation of a constitutional right, and he had not

---

153 *See* Fields, *supra* note 8, at 1076.

154 *Montanez*, 2019 WL at *15. The Fourth Amendment might apply in the co-responder context, where both police and nonpolice personnel respond to an emergency. If police have initiated a criminal investigation or effectuated an arrest and the nonpolice actor on scene commits violence against that suspect or arrestee, it is possible though not conclusive under the reasoning of *Montanez* that the alternate responder would be subject to the amendment's excessive force standard. *Id.*

155 Obasogie & Zaret, *supra* note 15, at 51 (observing that "[m]edical professionals and the police may work together in responding to emergencies" even if they serve different goals during those emergencies).

156 73 F. 3d 1380, 1380, 1384 (6th Cir. 1996).

violated anyone's constitutional rights.[157] A panel of judges on the Sixth Circuit Court of Appeals initially rejected this argument, finding that sexual assault by a government actor constitutes a Fourth Amendment unreasonable seizure.[158] But upon a rehearing *en banc*, the Sixth Circuit vacated the convictions.[159] Notably, over the course of five separate opinions, the Sixth Circuit never considered whether the judge violated the Fourth Amendment but simply assumed his actions did not constitute a Fourth Amendment seizure.[160] Instead, the court concluded that his actions were not "conscious shocking" and thus did not constitute a violation of the victim's Fourteenth Amendment due process rights.[161]

Sexual misconduct cases also highlight the Court's unwillingness to apply the Fourth Amendment absent the types of brute physical force which might give rise to the "typical" excessive force case: the use of firearms, tasers, batons, or fists. Where officers physically abuse victims through coercion and manipulation, courts are reluctant to find a Fourth Amendment seizure.[162] For example, in *Rogers v. City of Little Rock*, an officer stopped a victim for a broken taillight, followed her into her house, began touching and kissing her, and used his position of authority to demand that she take off her clothes.[163] Although the officer pushed the victim onto the bed and raped her, the Eighth Circuit Court of Appeals concluded that the Fourth Amendment did not apply, because the case was "not about excessive force, but rather about a nonconsensual violation of intimate bodily integrity . . . ."[164]

In the nonpolice context, alternate responders are in significant positions of power over vulnerable individuals experiencing a public safety crisis and have opportunities to coerce

---

157 *Id.* at 1387–88.

158 33 F.3d 639, 651–52 (6th Cir. 1994).

159 73 F.3d at 1384.

160 *Id.* at 1393.

161 *Id.* at 1394; *see also* Peters v. Woodbury Cnty., 979 F. Supp. 2d 901, 949 (N.D. Iowa 2013) (describing the substantive due process "shock[s] the conscience" standard as "more burdensome" than the Fourth Amendment "objective reasonableness" standard for excessive force cases) (quoting Wilson v. Spain, 209 F.3d 713, 716 (8th Cir.2000)).

162 *See* Josephine Ross, *Blaming the Victim: 'Consent' Within the Fourth Amendment and Rape Law*, 26 HARV. J. RACIAL & ETHNIC JUST. 1, 2 (2010) ("[L]ike rape law, the Fourth Amendment fails to recognize that subtle forms of coercion are incompatible with true consent.").

163 152 F.3d 790, 793–94 (8th Cir. 1998).

164 *Id.* at 796.

nonconsensual physical touching. Social workers in particular develop close professional relationships with vulnerable clients as they help patients, families, and groups cope with challenges in their lives.[165] Social worker guidelines prohibit even consensual sexual relationships with clients.[166] Yet dozens of high-profile cases of predatory social worker sexual violence against clients, sometimes minors, highlight the real risk of manipulation and coercion in relationships built on trust and closeness but with inherent power imbalances.[167] But the non-physical coercion defining such sexual violence almost certainly would not qualify as a Fourth Amendment "seizure" under current case law.

Of course, nonpolice violence need not be sexual in nature. A paramedic who pushes down a patient and forces or coerces them to take antipsychotic medication against their will. A social worker who forces their way into a client's house and physically compels the homeowner to open a locked bedroom. A homeless outreach crisis interventionist who forcibly packs up someone's tent and pushes them out of a park. All of these examples involve physical touching and coercion that might fairly be characterized as "not about excessive force, but rather about a nonconsensual violation of intimate bodily integrity . . . ."[168] The fact that these nonconsensual touchings are both not as invasive as rape and not conducted by police officers only further compels the conclusion that courts will not apply the Fourth Amendment to them.

Again, this narrow view of Fourth Amendment applicability ignores the plain text, purpose, and original design of

---

165 *See* Mia Soto, *Social Workers are Rejecting Calls for Them to Replace Police*, The Appeal (Aug. 20, 2020), https://theappeal.org/social-workers-are-rejecting-calls-for-them-to-replace-police [https://perma.cc/7MQN-ZGE8].

166 *Code of Ethics of the National Association of Social Workers*, 1.09 (2008) (prohibiting social workers from engaging in sexual activities with current and former clients as well as clients' relatives or close friends).

167 *See, e.g.*, Bethany Bruner, *Ohio Social Worker Accused of Having Sexual Relationship with 13-Year-Old Client*, USA Today (Oct. 9, 2023), https://www.usatoday.com/story/news/nation/2023/10/09/ohio-social-worker-payton-shires-sex-crime-arrest/71117791007/ [https://perma.cc/PQ3S-L6GG]; School Social Worker Arrested for Sexual Assault: Hartford Police , FOX61 (Jan. 18, 2024), https://www.fox61.com/article/news/local/hartford-county/hartford/hartford-connecticut-school-social-worker-arrest-sexual-assault-charge/520-768c7287-c465-4fa9-ab7e-a8fafeddc8b8 [https://perma.cc/97SA-HNKK]; Postmedia News, *Social Worker Accused of Sex Assault, Indecent Act at Brampton Shelter*, Toronto Sun (Jan. 12, 2024), https://torontosun.com/news/local-news/social-worker-accused-of-sex-assault-indecent-act-at-brampton-shelter [https://perma.cc/59G2-WR89].

168 *Rogers*, 152 F.3d at 796.

the amendment—to protect citizens from all unreasonable government invasions of privacy and dignity, "regardless of whether [they] arise[] from a traditional investigative or custodial setting."[169] The Fourth Amendment's protection against government brutality is not limited—or at least ought not be limited—to subjectively motivated criminal investigations. The Fourth Amendment is objective, and its application should "focus on what [the government] does—not where, when, or why [it] does it."[170] "The fact that sexual misconduct constitutes a different kind of" physical brutality—one that can never be justified by attempting to arrest, restrain, investigate, defend, or protect—"should not render a victim less protected; a physical intrusion is still a [Fourth Amendment] seizure."[171] Because sexual assault is among the most severe types of physical force, it ought to be recognized for what it is: brutality.[172]

Indeed, in the context of sexual assault, the answer to both the *seizure* question and the *excessive force* question ought to be obvious. First, most forms of government sexual misconduct ought to trigger the application of the Fourth Amendment because they constitute seizures; a reasonable person in the victim's position would not feel free to reject the agent's demands or end the encounter. Second, most nonconsensual sexual contact ought to be viewed as constituting excessive force, because the balance of the assault's intrusiveness (significant) against the state's justification (none) will always weigh in favor of the victim.[173] The fact that courts find these answers so difficult to reach against abhorrent police misconduct gives one little reason to believe courts will meaningfully redress nonpolice noninvestigative brutality.

---

169 Ostrowsky, *supra* note 126, at 258.

170 *Id.*

171 *Id.* at 266; Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1059 (2011) ("[T]he concept of security . . . was repeatedly referenced in the framing era as defining the nature of the right that was to be protected . . . .").

172 *See* 740 Ill. Comp. Stat. Ann. 22/102 (West 2010) (Illinois' sexual assault protection order statute states that "[s]exual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims.").

173 *See* Graham v. Connor 490 U.S. 386, 396 (1989) (requiring "careful balancing '. . . [of] the individual's Fourth Amendment interests' against the countervailing governmental interests"); Frederick E. Vars, *Delineating Sexual Dangerousness*, 50 HOU. L. REV. 855, 879 (2013) (describing a balancing test in the context of sexual assault).

2. *Subjective Motivations: Paramedics and Psychiatrists*

When lower courts held that the Fourth Amendment only applied to nonpolice conduct "designed to elicit a benefit for the government," they implicitly injected a subjective intent component into the analysis.[174] This intent threshold is presumed in the typical Fourth Amendment case involving "the conduct of law enforcement officers engaged in criminal investigations" and using force to complete those investigations.[175] "But determining whether noncriminal intrusions are subjectively motivated by investigative or administrative benefits has proven significantly more difficult, and cases in this area are inconsistent at best . . . ."[176] In the excessive force context, the actions of paramedics, psychiatrists, and other medical personnel present the most common fact patterns.

In *United States v. Attson*, the Ninth Circuit found that the Fourth Amendment did not apply to a government-employed doctor who had taken a blood sample from a criminal suspect and conducted a blood alcohol analysis on it because the physician had acted "for purely medical reasons [and] did not possess the requisite intent to engage in a search or seizure under the [F]ourth [A]mendment."[177] Although evidence existed that police had requested the doctor take and analyze a blood sample, the doctor averred that he had taken the blood sample for medical reasons independent of the criminal investigation.[178] The fact that the doctor "offered specific medical [noninvestigative] reasons for taking the blood sample," claimed that "police requests did not influence his decision," and chose not "to turn over the results" of the analysis to police sufficiently immunized his actions from the requisite intent necessary to cross the Fourth Amendment threshold.[179]

---

174 Doe v. Luzerne County, 660 F.3d 169, 179 (3rd Cir. 2011).

175 United States v. Attson, 900 F.2d 1427, 1432 (9th Cir. 1990).

176 Fields, *supra* note 8, at 1053–54.

177 *Attson*, 900 F.2d at 1433; *see also* Blakso v. Doerpholz, 15-cv-30185-MGM, 2016 WL 185495, *51–52 (D. Mass 2016) (noting that doctor's activity in *Attson* was not a search "notwithstanding the fact that the prosecution ultimately obtained the evidence in response to a grand jury subpoena and used it in defendant's trial for manslaughter").

178 *Attson*, 900 F.2d at 1433.

179 *Id.*

Attson, widely followed as a "leading" case by other circuits,[180] is often discussed in the context of Fourth Amendment searches.[181] Analysis centers on whether a blood draw constituted a search, yet both the involuntary confinement of the suspect and the involuntary piercing of the skin can and should be considered under a seizure analysis as well.[182] Instead, subsequent cases relying on *Attson*'s rationale have declined to apply the Fourth Amendment to egregious cases of physical brutality perpetrated by medical personnel.[183]

Though there exist "very few cases dealing with the Fourth Amendment's application in the context of paramedics . . . rendering emergency medical assistance," limited case law confirms that such nonpolice actors operate largely free of excessive force constitutional constraints.[184] For example, in a Sixth Circuit case involving EMT response to a seizure of an epileptic man, the court found "no case authority holding that paramedics answering a 911 emergency request for help engage in a Fourth Amendment 'seizure' of the person when restraining the person while trying to render aid."[185] In that case, paramedics restrained the man by "using their bodies to apply weight and pressure to [the man's] head, neck, shoulders, arms, torso and legs" and "[i]n a further effort to . . . protect themselves, they tied his hands and ankles behind his back and continued to apply pressure to [him] while he was in a prone position"

---

180 *See Blasko*, 2016 WL 185495, at*50; *see also* United States v. Inman, 558 F.3d 742, 745–46 (8th Cir. 2009) (relying on *Attson*); United States v. McAllister, 18 F.3d 1412, 1418 (7th Cir. 1994) (same).

181 *See, e.g., Inman*, 558 F.3d at 745–46 (relying on *Attson* to find that private search of computer for child pornography without a warrant did not implicate the Fourth Amendment because the searcher had noncriminal motives related to curiosity about the computer owner's girlfriend).

182 *See* Schmerber v. California, 384 U.S. 757, 767 (1966) (confirming that drawing blood by piercing the skin constitutes a seizure).

183 *See generally infra* notes 187–196.

184 Martinez v. City of Los Angeles, No. CV 21-1429-MCS, 2021 U.S. Dist. LEXIS 146030, at *23–*24 (C.D. Cal. May 10, 2021) (quoting Haas v. County of El Dorado, 2:12-CV-00265-MCE, 2012 U.S. Dist. LEXIS 56801T *5 (E.D. Cal. Apr. 23, 2012); Obasogie & Zaret, *supra* note 15, at 37 ("While there are not any Supreme Court decisions that directly deal with medical providers using force, a few federal district and circuit courts have examined this topic.").

185 Peete v. Metropolitan Gov't of Nashville, 486 F.3d 217, 220, (6th Cir. 2007); *see also* Pena v. Givens, 637 F. App'x 775, 780–81 (5th Cir. 2015) (noting there is no "'controlling authority—or a robust consensus of persuasive authority,' . . . suggesting that medical personnel 'seize' patients when restraining them in the course of providing treatment." (quoting Wyatt v. Fletcher, 718 F.3d 496, 503 (5th Cir.2013)).

until he died.[186] Because the paramedics acted solely to provide medical aid, the Fourth Amendment did not apply to this clearly unreasonable seizure.[187] Absent a Fourth Amendment claim, the court concluded there is no "constitutional liability for the negligence, deliberate indifference, and incompetence" of medical professionals who intended to "render solicited aid in an emergency . . . ."[188]

Three years later, the Sixth Circuit applied the same logic to police responding to a medical emergency, stating that officers acting in an "emergency-medical-response capacity" who restrain a citizen in crisis are not subject to the Fourth Amendment.[189] In contrast, officers who respond to a medical 911 call by handling individuals, subduing them, and handcuffing them because they refuse to submit to their verbal commands are subject to the Fourth Amendment, because such command-and-control tactics amount to "a law-enforcement capacity . . . ."[190]

A similar reluctance to apply the Fourth Amendment to mental health responders informs the limited case law addressing the issue. Indeed, courts have refused to apply the Fourth Amendment even when the seizure at issue—potentially lengthy involuntary commitment to a mental health facility—"raises concerns that are closely analogous to those implicated by a criminal arrest . . . ."[191] In *Scott v. Hern*, the Tenth Circuit did not inquire into whether the Fourth Amendment applied to a government psychiatrist's determination that an individual should receive temporary involuntary treatment at a mental health hospital—possibly because the decision was motivated

---

186 *Peete*, 486 F.3d at 220 (quoting the complaint).

187 *Id.* at 222 (No unreasonable seizure occurred because "the paramedics acted in order to provide medical aid" and did not act "to enforce the law, deter or incarcerate").

188 *Id.* at 221.

189 McKenna v. Edgell, 617 F.3d 432, 439–40 (6th Cir. 2010) (concluding that, if the officers acted in a medical-response capacity, then petitioner's claim "would amount to a complaint that he received dangerously negligent and invasive medical care" and that "if any right to be free from such unintentional conduct by medical-emergency responders exists under the Fourth Amendment, it is not clearly established."); *see also* Estate of Barnwell v. Grigsby, 801 F. App'x 354, 370 (6th Cir. 2020) ("[T]he evidence clearly indicates that the defendants' conduct served a medical-emergency function, rather than a law-enforcement function."); Obasogie & Zaret, *supra* note 15, at 42 (observing these Sixth Circuit cases "reaffirmed the importance of distinguishing between actions intended for medical purposes and actions in support of law-enforcement aims").

190 *McKenna*, 617 F.3d at 444.

191 Pino v. Higgs, 75 F.3d 1461, 1468–69 (10th Cir. 1996).

by a desire to help an ill patient, not to elicit a government investigative benefit.[192] Notably, the Tenth Circuit held in cases both before and after *Scott* that the Fourth Amendment applied when the same determinations that had been made by a psychiatrist in *Scott* were instead made by law enforcement.[193] Even though the court acknowledged that mental health evaluations and criminal arrests are "equally intrusive," the uniform worn by the government actor imposing this intrusion appeared to make all the constitutional difference, a cautionary outcome for a world increasingly relying on nonpolice mental health first responders.[194]

The implications here are far-reaching. Mental health emergency responders enjoy broad support across ideological lines, with more than 2,700 mental health crisis intervention teams authorized to respond to emergencies around the country.[195] Intervention teams are often authorized to take actions—including sending individuals in crisis to involuntary civil commitment—that are equally as intrusive as criminal arrests. Yet under current precedent, these actions appear not to trigger a Fourth Amendment excessive force analysis, even though they unquestionably constitute a "seizure," plainly understood. And while determinations about civil commitment may not appear analogous to traditional excessive force cases involving physical violence, both the significant restraint on liberty itself and the force necessary to effectuate such a restraint make these determinations critically relevant to the question of

---

192 216 F.3d 897, 910 (10th Cir. 2000).

193 *See* Meyer v. Bd. of Cnty. Comm'rs of Harper Cnty., 482 F.3d 1232, 1239 (10th Cir. 2007) (holding officers' seizure of an individual for an emergency mental health evaluation must be supported by probable cause); *Pino*, 75 F.3d at 1468 ("Because a seizure of a person for an emergency mental health evaluation raises concerns that are closely analogous to those implicated by a criminal arrest, and both are equally intrusive, we conclude that the 'probable cause' standard applies here . . . .").

194 *Compare Pino*, 75 F.3d at 1468 (applying the Fourth Amendment to police officers seizing a mentally ill person for their own benefit), *with Scott*, 216 F.3d at 910 (applying Due Process Clause to a psychiatrist diagnosis that led to involuntary commitment); *see also* Cantrell v. City of Murphy, 666 F.3d 911, 923 (5th Cir. 2012) (applying Fourth Amendment's probable cause standard to police officers who detained mentally ill person who posed a substantial risk of harm to himself); Pena v. Givens, 637 F. App'x. 775, 780 (5th Cir. 2015) (granting qualified immunity to psychiatric technicians in lethal force restraint case because no controlling authority established that their conduct amounted to a seizure under the Fourth Amendment).

195 *See Crisis Intervention Team (CIT) Programs*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/advocacy/crisis-intervention/crisis-intervention-team-cit-programs/ [https://perma.cc/G4E6-9BSF].

whether and to what extent nonpolice actors can ever be held liable for unreasonable seizures.

3. *Quasi-Police Brutality: School Resource Officers*

Courts have also indicated that the Fourth Amendment's excessive force jurisprudence may not apply to brutal physical violence by "nonpolice" first responders in another context: K-12 schools.[196] As schools grapple with how best to secure their campuses in an age of mass shootings, they frequently turn to school resource officers, or SROs.[197] These SROs are typically sworn law enforcement officers who are employed by local police or sheriff's departments and placed in schools to protect campuses from internal and external threats.[198] While their "beat" is limited to the school and they liaise directly with school administrators instead of other officers in their department, SROs nonetheless almost always retain the same core powers to search, seize, arrest, and use force as their colleagues elsewhere in the community.[199] In this sense, SROs are far closer to "traditional" police than alternate responders like social workers and mental health first responders.

And yet, many courts have declined to apply the Fourth Amendment's excessive force jurisprudence even to SROs, because it is not "clearly established" that this core constitutional

---

196 *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 620–21 (6th ed. 2020); Hayenga v. Nampa Sch. Dist. No. 131, 123 F. App'x. 783, 786 (9th Cir. 2005) (granting summary judgment on excessive force claim by student against school resource officer because it was not clear that the Fourth Amendment applied to such government agents).

197 *See generally* Jillian Peterson, James Densely & Gina Erickson, *Presence of Armed School Officials and Fatal and Nonfatal Gunshot Injuries During Mass School Shootings, United States, 1980–2019*, JAMA NETWORK (Feb. 16, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2776515 [https://perma.cc/ZD8G-PSFN] ("After deadly school shootings at Columbine, Sandy Hook, and Parkland, many states mandated School Resource Officers or provided funding for districts to hire them."); Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html [https://perma.cc/5RUM-4NKN] ("[T]he everyday presence of officers in hallways did not become widespread until the 1990s . . . [w]hen concern over mass shootings . . . led federal and state officials to offer local districts money to hire officers . . . .").

198 *Supporting Safe Schools*, U.S Dep't. of Just., https://cops.usdoj.gov/supportingsafeschools [https://perma.cc/KY9W-6ERW] (last visited Sep. 7, 2024) ("SROs are sworn law enforcement officers responsible for safety and crime preventing in schools. A local police department, sheriff's agency, or school system typically employs SROs . . . .").

199 *Id.*

police restraint applies to these specialized "quasi-police."[200] Here, again, whether the Fourth Amendment applies appears to turn on murky line-drawing, including whether a court views an SRO more as a school administrator or a police officer. As one California federal court observed, "[s]ome courts have concluded that a school resource officer is considered a 'school official' when evaluating the constitutionality of a search or detention [and apply relaxed Fourth Amendment standards] . . . . [But] police officers who are assigned to a school as a school resource officer [also] have the responsibility to help to provide a safe and secure environment for students and faculty while at the school," duties which more closely align with the law enforcement function.[201]

The Fifth Circuit, recognizing the split in federal Circuit authority as to "whether a student has a Fourth Amendment right to be free of excessive *disciplinary* force," has dismissed excessive force claims as inapplicable to SROs.[202] For example, in *J.W. v. Paley*, a special education student brought suit against an SRO for tasing him when the student attempted to leave school grounds.[203] The student had punched another student and destroyed school property before heading for the exit "so he could walk home and calm down."[204] When SRO Paley was called to assist in blocking the exit, he began to "drive stun" the student on his bottom right torso and upper back, tasing him continuously for fifteen seconds after the student was laying "face down on the ground and not struggling."[205]

Officer Paley did not argue that his actions were constitutionally permissible or even reasonable under a Fourth

---

200 T.W. v. Dolgos, 884 F.3d 172, 185–86 (4th Cir. 2018) (finding no "clearly established" right for "a calm, compliant" elementary school student to be free from being handcuffed by a school resource officer because such excessive force claims are only clearly recognized as applying against police officers); Elizabeth A. Shaver & Janet R. Decker, *Handcuffing a Third Grader? Interactions Between School Resource Officers and Students With Disabilities*, 2017 UTAH L. REV. 229, 229–30 (discussing similar cases); Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L.J. 25, 39 (describing school officials as "performing quasi police functions"); State v. V.C., 600 So. 2d 1280, 1285 n.1 (Fla. Dist. Ct. App. 1992) (describing SRO and "his quasi-police role from the outset").

201 J.M. v. Parlier Unified Sch. Dist., No. 1:21-CV-0261, 2021 WL 5234770, *4 (E.D. Cal. Nov. 9, 2021).

202 J.W. v. Paley, 860 F. App'x. 926, 930 (5th Cir. 2021) (emphasis added).

203 *Id.* at 928.

204 *Id.* at 927–28.

205 *Id.* at 928.

Amendment use of force analysis.[206] Instead, he claimed the Fourth Amendment did not apply to him.[207] The court agreed, observing that "our law is, at best for Paley, inconsistent on whether a student has a Fourth Amendment right to be free of excessive disciplinary force applied by school officials" and concluding that this "divide in our authority is the antithesis of clearly established law supporting the existence of a Fourth Amendment claim in this context."[208]

In contrast, the Sixth Circuit Court has concluded without much discussion that SROs clearly fall within the ambit of excessive force jurisprudence.[209] Considering this circuit split, and in the absence of controlling Fourth Circuit precedent, a South Carolina federal court found that the excessive force doctrine applied to an SRO, at least in cases of egregious brutality resulting in a criminal arrest.[210] In *Murphy v. Fields*, a sixteen-year-old student with a learning disability alleged that she put her head on her desk and began fiddling with her fingernails when she could not understand an algebra assignment.[211] The teacher mistook this motion as the student using her cell phone and demanded she leave the classroom for violating the school's cell phone use policy.[212] When the student refused, SRO and Richland County Sheriff's Deputy Benjamin

206 *See generally id.*

207 *See id.* at 930.

208 *Id.* at 927, 930; *See also* T.O. v. Fort Bend Indep. Sch. Dist., 2 F.4th 407, 415 (5th Cir. 2021) (no clearly established right against school officials' use of excessive force exists in the Fifth Circuit); Flores v. Sch. Bd. of DeSoto Par., 116 F. App'x 504, 506, 510 (5th Cir. 2004) (rejecting Fourth Amendment challenge to a teacher's choking a student); Fee v. Herndon, 900 F.2d 804, 810 (5th Cir. 1990) ("[T]he paddling of a recalcitrant student does not constitute a [F]ourth [A]mendment search or seizure."); *cf.* Keim v. City of El Paso, 162 F.3d 1159, 1159 n.4 (5th Cir. 1998) (finding excessive force claims against a police officer and school security guard were "properly analyzed under the Fourth Amendment . . . ."); Curran v. Aleshire, 800 F.3d 656, 664 (5th Cir. 2015) (denying qualified immunity on Fourth Amendment excessive force claim brought against SRO who slammed student into a wall).

209 *See* Williams v. Morgan, 652 F. App'x 365, 374 (6th Cir. 2016) (applying *Graham*'s factors to conclude a school resource officer used excessive force by breaking a student's arm in response to the student's misbehavior); E.W. v. Det. Pub. Sch. Dist., No. 20-1790, 2022 U.S. App. LEXIS 7724, at *9, *11 (6th Cir. Mar. 21, 2022) (same with respect to an SRO breaking a student's jaw).

210 Murphy v. Fields, No. 3:17-2914-CMC-PJG, 2019 U.S. Dist. LEXIS 184280, at *21–*22 (D.S.C. Aug. 29, 2019).

211 *Id.* at *3.

212 *Id.* at *4.

Fields was called in to escort her out.[213] Fields asked the student several times to leave her seat, but she refused.[214]

Fields grabbed the student under her chin and leg and flipped the desk over with the student in it. Fields then pulled the student out of the desk and threw her across the room. Other students recorded the incident on their cell phones.[215] Fields ultimately arrested the student, and he arrested another student as well for "cursing and yelling" during the incident.[216] The student suffered a hairline wrist fracture requiring physical therapy, required counseling, and endured consistent bullying from classmates about the incident.[217]

Fields argued that the case should be dismissed because it was not clearly established that the Fourth Amendment applied to SROs engaged primarily in school safety.[218] The South Carolina court disagreed, finding that arrests effectuated by SROs using traditional law enforcement methods to subdue arrestees triggered Fourth Amendment scrutiny.[219]

Whether excessive force claims apply to SROs is not central to a discussion about alternate responder liability, because SROs remain sufficiently employed and empowered as traditional police officers that they cannot credibly be categorized as nonpolice alternate responders. Rather, the fact that a government officer as closely aligned to traditional crimefighting police as an SRO may not be subject to excessive force claims only further confirms that similar claims against nonpolice agents like social workers and violence interrupters are likely to fail.

C. The Narrow Meaning of "Seizure"

The foregoing section highlights how the Court's narrow application of the Fourth Amendment to nonpolice contexts dooms most nonpolice brutality claims. The Supreme Court's cramped and narrow definition of the word "seizure" itself stands as a further impediment to Fourth Amendment applicability in at least some nonpolice brutality contexts.

As discussed above, an unreasonable seizure "acts as the constitutional hook giving rise to civil rights [non]police

---

213 *Id.* at *4–*5.

214 *Id.* at *5–*6.

215 *Id.* at *6–*7.

216 *Id.* at *8.

217 *Id.* at *8–*9

218 *Id.* at *9.

219 *Id. at *21–22.*

brutality claims."[220] But as with Fourth Amendment searches, "the issue of whether [non]police conduct constitutes a seizure is a matter of threshold significance."[221] Unless the action in question is a "seizure," the Fourth Amendment simply does not apply at all, and nonpolice actors can behave as arbitrarily and violently as they want and not trigger scrutiny.[222] Thus, the question of what constitutes a seizure "is of paramount importance."[223]

Paradigmatically, an arrest of a suspect constitutes a seizure of that person.[224] The Supreme Court has also held that circumstances short of an arrest can constitute a seizure, "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[225] The Court has further clarified that "[a] person is seized by the police . . . when the officer, '"by means of physical force or a show of authority,'" terminates or restrains [the person's] freedom of movement . . . 'through means intentionally applied.'"[226]

On its face, this "terminates or restrains [one's] freedom of movement" language could apply equally to restraint by means of submission or restraint by means of repelling someone from an area. In both cases is the person's "freedom of movement" "restrain[ed] . . . ."[227] But it is clear from court precedent regarding police crowd control techniques that only the former type of restraint constitutes a seizure. An officer seeking to disperse a crowd of protesters often uses force to do so, but that officer's "intent often is not to make the protester succumb to the officer's grasp, but to disperse the crowd and make the protester go away."[228] Courts have regularly held that this type of forceful, often brutal, restraint on liberty does not trigger the Fourth Amendment; "[t]hus, it appears by implication that a

---

220 Shawn E. Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. DAVIS L. REV. 347, 359 (2021).

221 DRESSLER, MICHALES & SIMMONS *supra* note 124, at 109.

222 *Id.*; *see also* County. of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) ("[The Fourth] Amendment covers only 'searches and seizures . . . .'").

223 Shawn Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. Davis L. Rev. 347, 360 (2021).

224 *See* Henry v. United States, 361 U.S. 98, 100 (1959).

225 United States v. Mendenhall, 446 U.S. 544,554 (1980).

226 Brendlin v. California, 551 U.S. 249, 254 (2007) (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991)) (citations omitted) (emphasis omitted).

227 *Id.*

228 Fields, *supra* note 223, at 360.

restraint on movement only constitutes a Fourth Amendment seizure if that restraint renders someone not 'free to leave' as opposed to being not 'free to stay.'"[229]

For example, in *Dundon v. Kirchmeier*, the District of North Dakota declined to grant a preliminary injunction where there were excessive force claims against police brought by people protesting construction of the Dakota Access Pipeline through indigenous lands.[230] One night while protestors slept, police used fire hoses, rubber bullets, concussion grenades, and bean bag projectiles to force protestors to leave, injuring about 200 people in the process.[231] The court held that "the Fourth Amendment did not apply at all to any of the police conduct"[232] because "police sought to disperse [the activists], [not] arrest them."[233] Likewise, in *Edrei v. New York*, a case involving the violent dispersal of demonstrators protesting the death of Eric Garner, the court declined to apply the Fourth Amendment to police use of long-range acoustic devices to force protestors to leave, finding that a "seizure" only takes place when police use "force intentionally to restrain a person and gain control of [their] movements."[234]

This reluctance to find a seizure "[w]here suspects are free to leave but are not free to go about their business" has important implications in certain unique nonpolice brutality contexts.[235]

---

229 *Id.* at 361 (emphasis omitted).

230 Dundon v. Kirchmeier, 2017 U.S. Dist. LEXIS 222696, *65–*66 (D.N.D. Feb. 7, 2017).

231 *See id.* at *8; *see also* Karen J. Pita Loor, *Symposium: Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 817, 831–32, 839, 843 (2020) (highlighting the "militarized police response" to the peaceful demonstrators, including the "use of military vehicles, water cannons, fire hoses, and special impact munitions against indigenous water protectors . . .").

232 Pita Loor, *supra* note 231, at 839.

233 *See id.* at 817; see also *Dundon*, 2017 U.S. Dist. LEXIS 222696, at 58 ("The Plaintiffs have neither alleged they were arrested or detained by law enforcement officials . . . nor alleged they were informed by law enforcement officers they were not free to leave and walk away.").

234 254 F. Supp. 3d 565, 574 (S.D.N.Y. 2017) (citing Salmon v. Blesser, 802 F.3d 249, 255 (2d Cir. 2015)).

235 Renee Paradis, Note, *Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 333 (2003).

1. *Mass Displacement: Homeless Encampments*

Municipalities increasingly rely on homeless outreach as an alternative to police to respond to protracted public health and safety issues. This role has become even more pronounced in the last five years. In 2018, the Ninth Circuit ruled in *Martin v. Boise* that punishing homeless people with no other place to go—as evidenced by a lack of public shelter beds—violates the Eighth Amendment's prohibition on cruel and unusual punishment.[236] The decision shined a spotlight on the nation's growing affordable housing crisis and the lack of adequate shelter alternatives in many major cities.[237] It also sent cities and states scrambling to "craft[] convoluted policies like a new camping ban in Portland, Oregon that prohibits homeless camping during the hours of 8am to 8pm."[238]

Other cities, like San Diego, California—recently dubbed "the most expensive place in America" owing largely to its runaway real estate prices compared to modest median incomes[239]—have attempted to comply with *Martin* by creating "safe-sleeping sites" throughout the city, forcibly relocating the unhoused into these sites and breaking down unsanctioned encampments outside these sites.[240] While San Diego police

---

236 902 F.3d 1031, 1048 (9th Cir. 2018) (overruled by City of Grants Pass v. Johnson, 603 U.S. 520, 556 (2024)); *see also* Johnson v. City of Grants Pass, 50 F.4th 787, 808 (9th Cir. 2022) (voiding portions of the city's anti-camping ordinance as violating the Eighth Amendment, because it prohibited a class of unhoused persons from engaging in activity they could not avoid) *rev'd* by City of Grants Pass v. Johnson, 603 U.S. 520, 561 (2024); Coal. On Homelessness v. City of San Francisco, 90 F.4th 975, 977, 982 (9th Cir. 2024) (affirming preliminary injunction in similar anti-camping ordinance) (abrogated by City of Grants Pass v. Johnson, 603 U.S. 520, 561 (2024)).

237 *See* Jennifer Ludden, *Homelessness in the U.S. Hit a Record High Last Year as Pandemic Aid Ran Out*, NPR (Dec. 15, 2023), https://www.npr.org/homelessness-affordable-housing-crisis-rent-assistance ("Homelessness has been rising since 2017 in large part because of the country's massive shortage of affordable housing.") [https://perma.cc/LU2T-7KNZ].

238 Rachel M. Cohen, *Cities Are Asking the Supreme Court for More Power to Clear Homeless Encampments*, Vox (Oct. 10, 2023), https://www.vox.com/2023/10/10/23905951/homeless-tent-encampments-grants-pass-martin-boise-unsheltered-housing [https://perma.cc/Z6AY-BXMX].

239 *Most Expensive Places to Live in the U.S. in 2023-2024*, U.S. News & World Report, https://realestate.usnews.com/places/rankings/most-expensive-places-to-live [https://perma.cc/Q73D-8FJS] (last visited Apr. 24, 2025).

240 *See Safe Sleeping Program*, City of San Diego, https://www.sandiego.gov/homelessness-strategies-and-solutions/services/safe-sleeping-program [https://perma.cc/YJ6K-Q2XX] (last visited Aug. 29, 2024); Ciara Encinas, *An Inside Look at San Diego's 2nd Safe Sleeping Site for Homeless*, ABC 10 News San Diego (Oct. 20, 2023), https://www.10news.com/news/local-news/san-diego-news/an-inside-look-at-san-diegos-2nd-safe-sleeping-site-for-homeless [https://

have assisted in these forced relocations and made at least one arrest, much of the relocation effort has been carried out by nonpolice members of the city's Homelessness Outreach Team (HOT), with support from the city's nonpolice Environmental Services Department.[241] HOT members reach out to unhoused members of the community, give residents notice that they are in violation of the city's new ordinance, and work to connect residents with resources for temporary shelters and safe sleeping sites. The Environmental Services Department, meanwhile, "require[s] homeless residents to temporarily relocate" and then "clean-up" encampments by destroying personal belongings, engaging in activity that traditionally would satisfy the "means intentionally applied" element for Fourth Amendment seizure purposes.[242] The use of nonpolice agents to conduct this work appeared intentionally designed to comply with *Martin*; given the fact that San Diego County "ha[d] nowhere near the number of beds needed to hold the more than 5,000 people sleeping outside countywide," the city would have run afoul of the Eighth Amendment if police arrested the unhoused for sleeping in public.[243]

---

perma.cc/8XS2-S52E] (describing site opened by the city after "passing the unsafe camping ordinance over the summer."); Lisa Halverstadt, *San Diego's Homeless Response Took a Punitive Turn in 2023*, VOICE OF SAN DIEGO (Dec. 28, 2023), https://voiceofsandiego.org/2023/12/28/san-diegos-homeless-response-took-a-punitive-turn-in-2023/ [https://perma.cc/8BR2-9AJN] ("In 2023, as public frustrations about the region's homelessness crisis peaked, leaders presented more punitive answers to that question.").

241 *See* Cody Dulaney & Danielle Dawson, *Mayor Gloria's Push for Homeless 'Progressive Enforcement' Leads to Eightfold Spike in Arrests*, INEWSSOURCE (June 10, 2022), https://inewsource.org/2022/06/10/san-diego-homeless-arrests/ [https://perma.cc/JP7B-KUS8];*see also* Lisa Halverstadt, *New Police Chief Bolsters Agency's Homelessness Response*, VOICE OF SAN DIEGO (Nov. 13, 2024), https://voiceofsandiego.org/2024/11/13/new-police-chief-bolsters-agencys-homelessness-response/ [https://perma.cc/Y7S6-7KEC] (describing joint police-HOT collaboration to move homeless off streets through progressive enforcement model); Will Hunstberry & Lisa Halverstadt, *San Diego Police Have Already Cleared Large Homeless Encampments Downtown*, VOICE OF SAN DIEGO (July 28, 2023), https://voiceofsandiego.org/2023/07/28/san-diego-police-have-already-cleared-large-homeless-encampments-downtown/ [https://perma.cc/9LYH-EN8L].

242 *See* Halverstadt, *supra* note 240 (quoting Mayor Todd Gloria: "When we ask you to come off the street and we have a place for you to go, no is not an acceptable answer."); Lisa Halverstadt, *What Happened After the City Cracked Down on Homeless Camps*, VOICE OF SAN DIEGO (Oct. 10, 2022), https://voiceofsandiego.org/2022/10/10/what-happened-after-the-city-cracked-down-on-homeless-camps/ [https://perma.cc/YFT4-Q93B].

243 Blake Nelson & Paul Sisson, *Move-Ins are Underway at Newest Safe Sleeping Site as San Diego Enforces Homeless Camping Ban*, SAN DIEGO UNION TRIBUNE (Oct. 23, 2023), https://www.sandiegouniontribune.com/news/homelessness/

But the intent of these nonpolice personnel using force to disperse the unhoused from unsanctioned encampments appears indistinguishable from police attempting to disperse protesters from a city street. In both cases, the government actor is trying to make people leave, "rather than . . . detain and arrest them."[244] Given courts' reluctance to find a Fourth Amendment seizure in the protest policing context, it seems similarly unlikely that a court would find a seizure in the mass homeless displacement context. Thus, neither the forcible destruction of one's home nor the forcible movement of an individual's person—even, presumably by brutal physical means—would give rise to a Fourth Amendment excessive force claim.

Understanding the extent to which nonpolice personnel can brutally disperse homeless individuals with impunity has urgent relevance. A 2022 Ninth Circuit decision, *Johnson v. Grants Pass*, extended *Martin* and declared that cities could not impose civil fines against the unhoused for sleeping outside "when they have no shelter" options within the city limits.[245] In January 2024, the Ninth Circuit went further, declaring that even narrowly time-limited anti-camping ordinances with limited geographic scopes violated the Eighth Amendment where there existed fewer available shelter beds than could accommodate the entire homeless population.[246] Meanwhile, "the crisis of unsheltered homelessness in America has grown more severe, municipal backlash to court rulings that have limited cities' response to the crisis has grown more organized, and what to do about people living in tents has become one of the most urgent issues in American politics."[247] Forty-two percent of the nation's homeless population lives in the nine Western states

story/2023-10-23/san-diego-safe-sleeping-site-homeless-camping-ban [https://perma.cc/25L3-Z2UB]; Halverstadt, *supra* note 240 (describing creation of a new "CARE Court" system designed as an alternative to criminal punishment but which forces mentally ill homeless individuals into involuntary treatment programs).

244 Paradis, *supra* note 235, at 334.

245 Johnson v. Grants Pass, 50 F.4th 787, 805, 808, 812 (9th Cir. 2022).

246 Coal. on Homelessness v. City of San Francisco, 90 F.4th 975, 977 (2024); *cf. id.* at 982 (Bumatay, J., dissenting) ("Today, we let stand an injunction permitting homeless persons to sleep *anywhere*, *anytime* in public in the City of San Francisco unless adequate shelter is provided.").

247 Rachel M. Cohen, *The Supreme Court Will Decide What Cities can Do About Tent Encampments*, Vox (Jan. 12, 2024), https://www.vox.com/scotus/2024/1/12/24036307/supreme-court-scotus-tent-encampments-homeless [https://perma.cc/B58L-KRUD].

under the Ninth Circuit's jurisdiction.[248] In response to these rulings, "[l]eaders from dozens of cities and states—both liberal and conservative," asked the United States Supreme Court to reverse these Ninth Circuit precedents and return to the ability to enforce civil and criminal penalties against the homeless, including through forcible relocation.[249]

In June 2024, the Court did just that, ruling in *Grants Pass v. Johnson*[250] that enforcing criminal camping bans against the unhoused did not violate the Eighth Amendment. But while this ruling means a likely return to traditional police enforcement activities against the unhoused, cities like San Francisco have employed joint homeless outreach response models whereby uniformed police and members of the city's Department of Public Works "sweep" encampments by breaking down and destroying unhoused persons' property, issuing citations for illegal "camping," and forcibly removing people from public property before fencing it off.[251]

2. *Mass Disruption: Violence Interrupters*

Violence interrupters, perhaps more than any other alternate responder, put themselves directly in the path of violent confrontation.[252] By working to prevent gun and gang violence and to interrupt the cycles of trauma that lead to violence, these street interventionists often come face-to-face with brutal criminal activity.[253] A 2022 report from the University of Illinois at Chicago revealed "the strain and trauma . . . many of these frontline violence prevention workers face as they try

---

248 *Id.*; *see generally 2022 Annual Homelessness Assessment Report (AHAR) to Congress*, U.S. DEP'T OF HOUS. AND URB. DEV. (2022), https://www.huduser.gov/portal/sites/default/files/pdf/2022-ahar-part-1.pdf [https://perma.cc/JPY3-LFGJ] (last visited Oct. 20, 2024).

249 Cohen, *supra* note 247; Docket, Grants Pass v. Johnson (No. 23-175), https://www.supremecourt.gov/docket/docketfiles/html/public/23-175.html [https://perma.cc/G8PN-WZPW].

250 City of Grants Pass v. Johnson, 603 U.S. 520 (2024).

251 *See* Angela Hart, *Tossed Medicine, Delayed Housing: How Homeless Sweeps are Thwarting Medicaid's Goals*, CNN (Sep. 11, 2024), https://www.cnn.com/2024/09/11/health/homeless-encampments-sweeps-san-francisco-kff-health-news-partner/index.html [https://perma.cc/TCZ5-ZFUH].

252 *See* Gimbel & Muhammad, *supra* note 86, at 1510.

253 *Id.* (violence interrupters are often deployed to "possible 'trigger situations'—events like the release of a shooter from prison, the anniversary of a conflagration, or even a party bringing together rivals—that carry a high potential for violent outbreaks.").

to combat gun violence" in Chicago neighborhoods" and elsewhere around the country.[254]

One critical aspect of violence interruption is identifying through investigative work when a major gang battle or other potential violent flareup is about to take place and stepping in to defuse the situation before it gets out of hand.[255] Of course, the goal is to encourage rival gang members or others in conflict to leave an area peacefully, but what if an interventionist himself uses physical force to compel a gang member to leave the scene? Once again, any such violent confrontation likely would fall outside the Fourth Amendment's reach, since the goal of the interventionist in using force was to disperse rather than to detain.

3. *Mass Dispersement: Nonpolice Crowd Control*

Virtually all mass crowd control activities in the United States are carried out by law enforcement.[256] Reform debates in this context center less on removing police from this aspect of public safety and more on prohibiting the use of certain violent tactics, such as chemical munitions, acoustic devices, and police dogs.[257] But it bears mentioning, however briefly, that use of nonpolice alternate responders to control and disperse crowds almost surely would fall outside the Fourth Amendment's purview for the same reasons described above.[258] As cities experiment with the use of alternate responders to manage crowds and protect property from a range of social disturbances, including mass protests, any recourse for acts of brutality in repelling protesters will have to come from somewhere other than the Fourth Amendment.

Where governments will not or cannot control mass protests, private businesses have hired private security to protect

---

254 Josiah Bates, *Much Like the Victims They Try to Help, Gun Violence Prevention Workers Have Scars*, TIME (Feb. 17, 2022), https://time.com/6148263/gun-violence-prevention-workers-trauma/ [https://perma.cc/S8JZ-7YBR].

255 *See* Gimbel & Muhammed, *supra* note 86, at 1510.

256 TIMOTHY ZICK, MANAGED DISSENT: THE LAW OF PUBLIC PROTEST 25 (2023).

257 *See* Fields, *supra* note 232, at 364–66; Pita Loor, *supra* note 241, at 831–32.

258 At least some precedent exists for employing nonpolice actors to manage crowds. *See* Pallamary v. Elite Show Servs., 2018 U.S. Dist. LEXIS 164614, *4 (S.D. Cal. Sep. 25, 2018) (citing undisputed allegations that the San Diego Chargers professional football team "entered into a contract with [Elite] to provide 'non-police officer crowd control and security enforcement' for [] football games . . . .").

their assets from looting and vandalism.[259] These and other private actors fall outside the reach of the Fourth Amendment, which requires state action.[260] Under some circumstances, however, a private security team's contractual arrangement with a government agency could trigger Fourth Amendment scrutiny. A private party that acts "as an instrument of the state in effecting a search or seizure" may be subject to the amendment's reach.[261] During nationwide protests following George Floyd's murder, the City of Chicago spent over a million dollars contracting with private security guards to protect businesses from looting protestors.[262] Whether excessive force employed by these private guards to protect businesses would have met the Fourth Amendment's state action requirement depends on whether the city knew and acquiesced to the challenged conduct.[263] But even if it had, the type of force used—whether used to detain or disperse a looter—likely would prove dispositive in the analysis.

D. The Limits of Due Process Claims

Many of the instances of misconduct discussed above that fell outside the Fourth Amendment's purview were also analyzed by courts under the Constitution's Fourteenth Amendment's Due Process Clause.[264] Even where government brutality

---

259 *Id.*; *see also* Jeanette Settembre, *Small Businesses, Retailers Hire Private Security to Protect Stores*, FOX BUSINESS (June 5, 2020), https://www.foxbusiness.com/retail/small-businesses-retailers-private-security-protect-against-looting [https://perma.cc/2UKT-ARXS]; *City of Chicago Paying up to $1.2 Million to Private Security Firms to Deter Looting*, NBC 5 CHICAGO (June 6, 2020), https://www.nbcchicago.com/news/local/city-of-chicago-paying-up-to-1-2-million-to-private-security-firms-to-deter-looting/2285718/ [https://perma.cc/U74V-LEDF]("The private guards will not be armed and will not have police powers, but are meant to be 'another set of eyes and ears to support efforts to deter looters,' Mayor Lori Lightfoot's office said . . . .").

260 Walter v. U.S., 447 U.S. 649, 656 (1980).

261 U.S. v. Walther, 652 F.2d 788, 791 (9th Cir. 1981).

262 *City of Chicago Paying up to $1.2 Million to Private Security Firms to Deter Looting* , *supra* note 270.

263 *Id.*; In re Kerlo, 311 B.R. 256, 263 (C.D. Cal. 2004) ("The general principles for determining whether a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes have been synthesized into a two part test . . . (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the private party intended to assist law enforcement efforts or further his own ends.") (citing U.S. v. Reed, 15 F.3d 928, 931 (9th Cir. 1994).

264 *See* Poe v. Leonard,, 282 F.3d 123, 136–37 (2d Cir. 2002) (discussing whether officer's secret videotaping of nude women in dressing rooms implicated a Fourth Amendment privacy claim); Scott v. Hern,, 216 F.3d 897, 910 (10th Cir.

does not constitute excessive force, the misconduct might still have violated a victim's constitutional due process rights.[265] It is reasonable to ask, then, why it matters so much whether physical brutality gets remedied under the Fourth Amendment when there exists another constitutional remedy. The answer lies in the nature of the Due Process Clause as a weak catch-all provision, a vague constitutional right of "last resort" that rarely provides victims of brutality with adequate relief.[266]

The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[267] Among other things, this clause prohibits the government from depriving someone of their life, liberty, or property in a way that is so arbitrary and uncivilized that it "shocks the contemporary conscience."[268] Unlike the Fourth Amendment, this "shocks the conscience" test applies to all state actors and all state conduct. This test arose in large part as a catch-all provision of last resort where a government agent engaged in egregious behavior, but that behavior did not neatly fit into one of the more narrowly defined constitutional guarantees.[269] Indeed, "the entire premise behind substantive due process requires that no other explicit constitutional protection exists."[270]

2000) ("The Due Process Clause prohibits a state from involuntarily committing an individual unless he is a danger to himself or others."); J.W. v. Paley, 860 Fed. App'x. 926, 928 (5th Cir. 2021) ("[S]tudents cannot assert substantive due process claims against school officials based on disciplinary actions.").

265 *See* Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) (analyzing claim of excessive force against an arrestee under the Due Process Clause); Sanchez v. Figueroa, 996 F. Supp. 143, 147 (D. Puerto Rico Feb. 23, 1998) ("Claims of excessive force outside of the context of a seizure are analyzed under substantive due process principles.") (quoting Landol-Rivera v. Cruz Cosme, 902 F.2d 791, 796 (1st Cir. 1990)).

266 *See* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (describing substantive due process "right to ultimate bodily security" as "a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible.").

267 U.S. CONST. Amend. XIV.

268 DePoutot v. Raffaelly, 424 F.3d 112, 118 (1st Cir. 2005).

269 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1718 (2012) ("The Framers specifically enumerated protections that they regarded as especially important, and then added a catch-all. It is impossible to give 'due process of law' its historical meaning and avoid redundancy.").

270 Ostrowsky, *supra* note 125, at 279; Chapman & McConnell, *supra* note 280, at 1721 ("The Due Process Clause is tucked into a compound sentence without a proper subject.").

Doctrinally, then, substantive due process should apply only when no other constitutional provision explicitly prohibits the conduct in question. It is this preference for explicit textual sources of constitutional protections that led the Supreme Court in *Graham*[271] to find that all police use of force cases would be analyzed as unreasonable seizures under the Fourth Amendment.[272] Yet courts have declined to apply the Fourth Amendment to many instances of police and nonpolice brutality, either because the individual was not "seized" in a traditional way, because the victim was not an arrestee or a criminal suspect, or because the government actor harbored no investigative or administrative motive.[273] What is left to fill in the gaps when government actors brutalize citizens is the Due Process Clause's shocks the conscience test.

This test fails victims in three primary ways. First, the threshold for a violation of this test is much higher than the Fourth Amendment's unreasonable seizure and excessive force tests.[274] To truly "shock the conscience," a government actor's conduct must be "beyond the pale," and it must leave no doubt about the egregious wrongness of the action.[275] As the Fourth

---

271

272 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.").

273 *See generally supra* subparts II.B–C.

274 *See* U.S. v. Guidry, 456 F.3d 493, 506 n.8 (5th Cir. 2006) (describing the Fourteenth Amendment's shocks the conscience standard as a higher bar than the Fourth Amendment standard); Hicks v. Moore, 422 F.3d 1246, 1253 n.7 (11th Cir. 2005) (same); Kathryn R. Urbonya, *Public School Officials' Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, GEO. WASH, L. REV.4 (2000)(comparing "the more protective ground" of the Fourth Amendment standard with the "deep chasm of the Fourteenth Amendment's difficult 'shocks-the-conscience' standard").

275 Fraser v. Pa. State Univ., 654 F. Supp. 3d 443, 457 (M.D. Pa. 2023) ("Substantive due process does not target government actions that are merely taken for an 'improper purpose' or in 'bad faith.' 'Conscience shocking actions go beyond actions compensable in ordinary intentional and negligent tort law.'") (quoting Walsh v. Krantz, 2008 U.S. Dist. LEXIS 44204 at *32 (M.D. Pa 2008); Kadakia v. Rutgers, 633 F. App'x 83, 87 n.10 (3d Cir. 2015) (conscience shocking government actions must go "beyond the pale" of regular decision making) (quoting Mauriello v. Univ. Medicine & Dentistry, 782 F. 2d 86, (3d Cir. 1986); Hodge v. Jones, 31 F.3d 157, 167 (4th Cir. 1994) (The "residual protections of 'substantive due process' [require] allegations of 'state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.'") (quoting Rucker v. Hartford County, 946 F. 2d 157, 167 (4th Circ. 1991).

Circuit explained in *Hodge v. Jones*, the "residual protections of 'substantive due process' . . . [require] allegations of 'state action so arbitrary and irrational, so unjustified by any circumstance of governmental interest, as to be literally incapable'" of explanation.[276] Thus, unlike the Fourth Amendment, where courts balance the governmental interest in using force against the important liberty interests of citizens, the due process shocks the conscience test requires a finding that no governmental interest did or could possibly exist.

Here again, police sexual misconduct cases provide a helpful, if discouraging, illustration. Despite the obvious lack of any legitimate government interest, police sexual assault cases turn on archaic notions of what kinds of sexual violence are truly "shocking." The analysis often depends on how and where the officer touched the victim, for how long, how many times, whether and to what extent brute physical force was used, whether and to what extent the victim physically resisted, and whether the encounter "sounds more like 'harassment' than an 'egregious assault.'"[277] The only unanimous agreement on this point is that forcible rape shocks the conscience.[278] All other types of sexual assault, including compelled nude photography, forcible oral sex, and other horrific behavior, only occasionally "shocks the conscience" of judges and juries weighing the constitutional culpability of government predators.[279]

This reality highlights a second way this test fails victims of government violence: it relies on the subjective motivations of government wrongdoers and subjective beliefs of judges about what "shocks the conscience" rather than the objective "seizure" and "reasonable use of force" tests of the Fourth Amendment. In a judiciary "that lacks the diversity of the American people, a judge's conscience may not accurately represent the collective conscience of society."[280] Particularly on the federal

---

276 *Hodge*, 31 F. 3d at 167.

277 *Hawkins v. Holloway*, 316 F.3d 777, 785–86 (8th Cir. 2003) (describing allegations of sexual molestation as "offensive behavior in the context of junior high locker room style male horseplay," but *not* "behavior that the Constitution prohibits under the rubric of contemporary conscience shocking substantive due process").

278 State v. Brown, 550 So. 2d 922, 924 (1989); Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 809 (2008); Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 15 (1987).

279 *See infra* notes 283–286.

280 Ostrosky, *supra* note 126, at 291; Decker v. Tinnel, No. 2:04-CV-227, 2005 WL 3501705, at *7 (N.D. Ind. Dec. 20, 2005) ("The standard for judging a

bench, where unelected political appointees serve for life, the demographic makeup of the federal judiciary fails to mirror that of the general population.[281] An older, whiter, disproportionately male federal bench may not share the same values for what shocks the conscience as contemporary society.[282]

For example, in the Seventh Circuit case *Alexander v. DeAngelo*, Judge Richard Posner (one of the most well-known and influential appellate judges of the last half century), considered whether an officer's sexual assault sufficiently shocked the conscience to amount to a due process violation.[283] The officers, under a false threat of imprisonment, forced the victim to perform oral sex as part of a prostitution sting.[284] Judge Posner, while ultimately agreeing with his colleagues that the officer's conduct "narrowly" violated the victim's due process rights, observed that it was a close case because "she may think oral sex no big deal (some young people nowadays do not consider it 'real' sex at all) . . . she did not express indignation," and the assault itself was no worse than "the usual risk of being beaten up . . . by a drug dealer."[285]

This case illustrates the third way due process inadequately protects victims of government brutality. Unlike the objective inquiry of the Fourth Amendment, courts assessing potential due process violations take into account the subjective motivations of government actors and may find no violation if otherwise shocking behavior was conducted for what the actor thought were legitimate motives.[286] In *Alexander*, the

---

substantive due process claim is whether the challenged action would 'shock the conscience of *federal judges*.'") (emphasis added); County. of Sacramento v. Lewis, 523 U.S. 833, 862 (1998) (criticizing an interpretation of precedent that would make the test reliant on "*my unelected conscience* . . . .") (Scalia, J., concurring) (emphasis added); *Id.* at 857 (Kennedy, J., concurring) ("[T]he [shocks the conscience' test] has the unfortunate connotation of a standard laden with subjective assessments.").

281 *Diversity of the Federal Bench*, AM. CONST. SOC'Y, https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/ [https://perma.cc/AW7Z-2Y5E] (last visited Sep. 2, 2024) ("Courts should look like the people they represent . . . [J]udges who sit on the federal bench are overwhelmingly white and male."); Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 TENN L. REV. 247, 248 (2016) ("[T]he federal judiciary scores highly on surface-level diversity but fares very poorly on measures of deep-level diversity.").

282 *Diversity of the Federal Bench*, *supra* note 281.

283 Alexander v. DeAngelo, 329 F.3d 912, 915–17 (7th Cir. 2003).

284 *Id.* at 917.

285 *Id.* at 918 ("[I]nducing a confidential informant to engage in sex as part of a sting operation does not always give rise to a claim under Section 1983.").

286 Graham v. Connor, 490 U.S. 386, 397 (1989) (rejecting substantive due process test for excessive force claims because "consideration of whether the

officers claimed that their sexual misconduct was part of the "act" of being undercover and trying to root out a dangerous prostitution ring.[287] While the argument ultimately failed, the fact that the officer's subjective motivations were relevant at all further highlights the weakness of this catch-all remedy.

One place where subjective motivations often doom due process claims of physical brutality involve SROs. In these cases, officers often attempt to justify their violent abuse of schoolchildren with reference to their own beliefs and fears, defending their actions as trying to protect other children from violence, or worse, a potential mass shooting.[288] The fears ingrained in all American parents about school shootings become fair game for the officer trying to explain why he handcuffed an unarmed and defenseless disabled student to a desk and flipped the desk over.[289] Such brutality assessed under the Fourth Amendment would be subject to an objective reasonableness inquiry, but not under the Due Process Clause. Instead, "historically, students have fallen into this chasm when they have used the substantive due process component of the Fourteenth Amendment to challenge a school official's authority to hit them as punishment for violating school rules,"[290] because SROs successfully introduce evidence of subjective beliefs that would be irrelevant in a Fourth Amendment excessive force context.[291] Courts have provided students "with greater protection when the students have invoked the Fourth Amendment to challenge school officials' searches" and seizures than the Due Process Clause, further highlighting the "more protective ground" upon which Fourth Amendment rights rest than the last resort due process right.[292]

---

individual officers acted in 'good faith' or 'maliciously and sadistically for the very purpose of causing harm,' is incompatible with a proper Fourth Amendment analysis.").

287 *Alexander*, 329 F.3d at 917.

288 *See* Peterson, *supra* note 204.

289 Murphy v. Fields, No. 3:17-2914-CMC-PJG, 2019 U.S. Dist. LEXIS 184280, *6–*8 (2019).

290 Urbonya, *supra* note 274, at 4.

291 *See* Gumz v. Morrissette, 772 F.2d 1395, 1407 (7th Cir. 1985) (describing that officer intent is irrelevant to Fourth Amendment analysis: "[T]he officer's evil design does not invalidate his acts if the facts otherwise support his deeds.").

292 Urbonya, *supra* note 274, at 4–5.

E. Nonpolice Qualified Immunity

This Part began with a discussion of the Supreme Court's failure to hold police accountable for brutality with its overly deferential "objective reasonableness" jurisprudence. But even if a court finds that an act of police violence constitutes excessive force, that officer almost invariably remains shielded from liability on qualified immunity grounds.[293] A growing chorus of scholars and activists have highlighted the Court's embarrassing and unjustified expansion of qualified immunity to protect police officers from liability at all costs.[294] For purposes of this Article, however, it bears asking if the same broad immunity might shield alternate responders from liability for their violent acts.

Limited case law on point is mixed but suggests that nonpolice alternate responders may not enjoy the same kind of blanket "absolute" immunity police have come to expect when facing challenges to their violent acts.[295] Many qualified immunity cases involving nonpolice violence—including paramedics, social workers, and psychiatrists—turn on the threshold question discussed throughout this Article: whether such government actors can ever "seize" someone within the meaning of the Fourth Amendment.[296] If the law is not clearly established on that point, then courts grant qualified immunity.[297] Nonpolice qualified immunity cases thus often turn on the purely legal question of whether the amendment applies, in contrast to the intensely fact-sensitive inquiry central to police qualified immunity cases where Fourth Amendment applicability is presumed.[298] However, many courts that have applied the Amend-

---

293 Schwartz, *supra* note 24, at 112–135; Baude, *supra* note 24, at 82 (noting that between 1982 and 2017 the Supreme Court heard thirty police excessive force qualified immunity cases and ruled in favor of the police in twenty-eight of them); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 118 (2009) (The doctrine of qualified immunity "has metastasized into an almost absolute defense to all but the most outrageous conduct.").

294 *See, e.g.*, Baude, *supra* note 24, at 81–82.

295 Hassel, *supra* note 293, at 118.

296 Thompson v. Cope, 900 F.3d 414, 417, 422 (7th Cir. 2018) (granting paramedic qualified immunity because it was not clearly established paramedic had effectuated a seizure by sedating arrestee undergoing a medical emergency).

297 *Id.;* Estate of Barnwell v. Roane Cnty., No. 3:13-CV-124-PLR-HBG, 2016 U.S. Dist. LEXIS 144359, at *22–*23 (E.D. Tenn. June 16, 2016) (granting qualified immunity to paramedic because his conduct did not "violate clearly established statutory or constitutional law").

298 Estate of Barnwell v. Grigsby, 801 F. App'x 354, 370 (6th Cir. 2020), 681 F. App'x at 369 (finding it is not clear paramedics can ever "seize" patients under the Fourth Amendment and thus that qualified immunity is proper).

ment to nonpolice brutality claims have subsequently denied qualified immunity, in part because it is easier to "clearly establish" that paramedics and social workers ought not hog tie,[299] beat up,[300] or chemically sedate to death[301] their patients than it is to "clearly establish" that similar conduct is forbidden in the police-suspect context. That more nonpolice brutality civil rights cases may survive qualified immunity when the Fourth Amendment applies to such cases further confirms the importance of understanding the contours of the Amendment's applicability.

One last point bears emphasis. Throughout this Article, I have presumed that victims of nonpolice brutality want to and should bring civil rights lawsuits for violations of the Fourth Amendment under Section 1983, the statute enabling private vindication for violation of constitutional rights.[302] But why not

---

299 Paramedics are clearly prohibited from "hog-tying" patients, in contrast with police. *Compare Application of Restraints by EMS Personnel*, ORANGE CNTY. EMS (Apr. 1, 2019), https://www.ochealthinfo.com/sites/hca/files/import/data/files/38654.pdf [https://perma.cc/5LZT-U3QV] (Patients "shall not be 'hog-tied' (e.g., prone position with arms and/or legs flexed backwards and restrained behind the patient)"), *and Patient Restraint*, REGIONS HOSP. EMERGENCY MED. SERVS. YEAR 2000 EMS GUIDELINES, http://wearcam.org/decon/full_body_restraint.htm [https://perma.cc/9TCV-CVZZ] (last visited Sep. 3, 2024) ("Restraining a patient's hands and feet together behind the patient (hog-tying) is not allowed. The only exception is a prisoner or suspect in the custody of law enforcement or prison authorities"), *with* Luepker v. Taylor, No. 4:09CV1657-DJS, 2010 U.S. Dist. LEXIS 66897, at *26 (E.D. Mo. 2010) (finding an officer's use of "pepper spray, a baton, a taser, and a hog-tie restraint technique were objectively reasonable"), *and* Timpa v. Dillard, 20 F.4th 1020, 1032, 1038 (5th Cir. 2021) (denying qualified immunity to officers who hog tied and applied pressure to suspect until he died, but only because the restraint lasted fourteen minutes).

300 Judd v. City of Baxter, 780 F. App'x 345, 349 (6th Cir. 2019) (denying qualified immunity where paramedic "forcefully jumped on top of" patient while he "lay helplessly on the ground handcuffed."); *Police: Patient Assaulted by EMT in Ambulance*, CONN. POST (Apr. 20, 2016), https://www.ems1.com/assault/articles/police-patient-assaulted-by-emt-in-ambulance-FjKFFw7ZU81Xqi1f/ [https://perma.cc/SR8J-F7KK].

301 Haas v. Cnty. of El Dorado, No. 2:12-cv-00265-MCE-KJN , 2012 U.S. Dist. LEXIS 56801 at *24–*25 (E.D. Cal. April 23, 2012) (denying paramedic qualified immunity his patient "was conscious, competent to refuse medical assistance and did not present any danger" and where the paramedic injected the patient with a tranquilizer "not for the purpose of rendering medical aid but for the purpose of assisting law enforcement officers.")).

302 Vega v. Tekoh, 142 S. Ct. 2095, 2101 (2022) ("Section 1983 provides a cause of action against any person acting under color of state law who 'subjects' a person or 'causes a person to be subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.") (quoting 42 U.S.C § 1983—Civil Action for Deprivation of Rights).

simply bring a private tort action for battery?[303] If the Fourth Amendment usually does not apply to nonpolice actors and is relatively incapable of offering redress even when it does, why not bypass the amendment entirely and seek money damages for battery?

Two reasons. First, any federal qualified immunity defense brought by a government actor, police or otherwise, almost always has a state analog that applies equally to state private torts.[304] Thus, if an excessive force claim is likely to be dismissed on qualified immunity grounds, so is a battery claim. Second, civil rights cases offer both personal and societal advantages over private tort cases. Section 1988's attorney fee-shifting statute incentivizes attorneys to take these important cases and affords a measure of financial ability and protection for victim-plaintiffs.[305] These cases also provide important vehicles to demand institutional change through injunctive relief (and wider media coverage) that often are not available in private lawsuits.[306] Of course, doing so requires overcoming qualified immunity, a tall order no matter the case or claim.

III
Nonpolice Brutality as Unreasonable Seizure

Current excessive force jurisprudence narrowly limits when and to what extent the Fourth Amendment will apply to nonpolice brutality. Much of this jurisprudence is analytically flawed and unsupported by history, text, and precedent.

---

303 Stevenson v. City of Seat Pleasant, 743 F.3d 411, 420 (4th Cir. 2014) (considering claim for battery arising from police brutality); Littleton v. Swonger, 502 F. App'x 271, 275 (4th Cir. 2012) (same); Harvey v. City of Stuart, 296 F. App'x 824, 825 n.1 (11th Cir. 2008) (same).

304 Thompkins v. Mun. of Penn Hills, No. 22-3012, 2023 U.S. App. LEXIS 28037, at *4 (3d Cir. 2023) (federal "qualified immunity is a defense only to violations of federal law under § 1983. Immunity from state law claims is governed by the state's immunity doctrine.") (quoting El v. City of Pittsburgh, 975 F.3d 327, 334 n.3 (3d Cir. 2021); Germany v. City of Huntsville, No. 23-10907, 2024 U.S. App. LEXIS 772, at *11, *26 (11th Cir. Jan. 11, 2024) (affirming qualified immunity grant to police officer on state law assault and battery claims).

305 Murphy v. Smith, 583 U.S. 220, 226 (2018) ("Congress enacted what is now 42 U.S.C. § 1988(b) to authorize discretionary fee shifting in civil rights suits.").

306 Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 Brook. L. Rev. 1057, 1083, 1102 (1989) (observing that government officials may be immune from money damages in civil rights cases but not injunctive relief); *cf.* Alexander Reinart, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. Rev. 737, 766 (2021) ("[T]he Court has limited the potential power of Section 1983 in multiple ways [including] limitations on injunctive relief.").

This final section charts a more consistent and persuasive path forward for excessive force claims that redirects the excessive force inquiry towards the target of the violence, defines "seizure" in accordance with the Amendment's intended purpose, and supports nonpolice brutality claims when brutality has the potential to further police criminal investigation regardless of intent.

A. A Target Theory of Fourth Amendment Seizures

In Fourth Amendment search law, only someone whose personal Fourth Amendment privacy rights have been violated has standing to challenge an unlawful search.[307] Evidence that is seized after an unlawful search of one person and used in a criminal trial of someone else may not be challenged by the defendant against whom it is used unless that individual defendant's rights were violated.[308] For example, if police unlawfully search my purse while it is on my person and find illegal drugs that are then used in a criminal prosecution against you, you have no standing to challenge introduction of the evidence, because police only violated my Fourth Amendment reasonable expectation of privacy, not yours.[309] The Supreme Court has rejected the so-called "target theory" of standing, which would have granted you standing to challenge introduction of the drugs since you were the "target" of the search.[310]

Such thorny standing issues almost never arise in the seizure context. "Although lower court case law is thin, apparently there is no doubt that a person may challenge a seizure of her own person."[311] This makes sense, because anyone who is personally seized and subjected to unlawful violence as a result has simultaneously suffered both the constitutional violation and the harm from such violation. Unlike unlawful searches, which may harm individuals in the future who were not party

---

307 Rakas v. Illinois, 439 U.S. 128, 137 (1978) (denying ability of parties "to raise vicarious Fourth Amendment claims"); Alderman v. United States, 394 U.S. 165, 180 (1968) ("We adhere to the general rule . . . that Fourth Amendment rights are personal rights which, like some other constitutional guarantees, may not be vicariously asserted.").

308 Rawlings v. Kentucky, 448 U.S. 98, 104-05, 110 (1980) (denying motion to suppress drugs found in purse that did not belong to defendant, because defendant had no reasonable expectation of privacy in the purse).

309 *Id.*

310 *Rakas*, 439 U.S. at 140 ("Having rejected petitioners' target theory," the court then considers whether a defendant's other rights are violated").

311 DRESSLER, *supra* note 124, at 295.

to the constitutional violation, in the context of violence, the violation and the injury are inseparable. The "target" is always the constitutional victim.

But while standing to challenge a seizure rarely presents problems, the Court's narrow application of the "unreasonable seizures" clause outside police-dominated criminal investigations implicitly ignores the target of the constitutional violation: the victim of government-sponsored violence. Conditioning application of the Amendment in clear cases of excessive force on the subjective motivations or job title of the government agent committing the violence ignores the rights and injuries of the "target" of the violence. Courts have refused to apply the Fourth Amendment at all to some deeply invasive acts of government violence—including rape, nonconsensual surgical intrusions, involuntary commitment, severe beatings, and lethal restraints—simply because the action was not committed by a police officer or subjectively motivated by a desire to investigate a crime or arrest a suspect.[312] These outcomes are unjustifiable; unlike with searches, in the seizure context, the rights-holder and the target of the injury are always inseparable, and refusal to apply the right to the injured party implicitly denies the victim "standing" without historical, textual, or precedential justification.[313]

Thus, I propose a target theory of Fourth Amendment seizures that redirects the inquiry away from the government actor committing the rights violation and instead considers the objective intrusion into a citizen's liberty and bodily dignity interests. This approach removes justiciability issues inherent in divining the intent of government actors and allows courts to more easily and consistently apply the Fourth Amendment to clear cases of excessive force.[314] This approach also accords

---

312 *See supra subp*arts II.B–C.

313 I recognize that whether someone has "standing" to assert a claim differs from whether that claim applies to particular conduct. But analytically, the Supreme Court's substantive Fourth Amendment standing doctrine, which differs from Article III standing, provides a useful lens through which to view the failures of excessive force jurisprudence. Fourth Amendment standing in search law cares about granting redress to the person harmed by the search. Yet Fourth Amendment excessive force law denies redress to persons harmed by seizures even when the conduct otherwise would give rise to a claim.

314 Hoard v. Hartman, 904 F.3d 780, 788 (9th Cir. 2018) ("Put simply, officer intent . . . serves as the core dividing factor between constitutional and unconstitutional applications of force.")

with the original purpose of the Fourth Amendment.[315] While most nonpolice Fourth Amendment cases involve administrative searches instead of seizures, the reasoning of the cases reflecting the original design of the Amendment apply with equal force here: "[i]f the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards."[316] As a result, "[t]he focus of the Amendment is [ ] on the security of the person, not the identity of the searcher or the purpose of the search."[317]

This approach views the Fourth Amendment fundamentally as granting liberty and privacy rights to individuals who can seek redress when the government unlawfully infringes on those personal rights, rather than as granting and restraining power of only certain types of government actors. While the text of the Amendment limits what types of conduct triggers scrutiny (searches and seizures), it does not limit what type of government actor is subject to it. A target theory of seizures focuses on the conduct and gives rights of redress to those injured by the conduct, regardless of the uniform, job title, or intent of the government actor.

B. Objective Restraints on Liberty

Refocusing the seizure inquiry on the target of the violation only solves one problem with nonpolice brutality jurisprudence. A further impediment to Fourth Amendment applicability is the Supreme Court's artificially narrow definition of "seizure." The Court's refusal to recognize broad categories of dispersal-motivated excessive uses of force as triggering Fourth Amendment scrutiny has created a dangerous zone of impunity for officers and threatens to do the same in some particularly important alternate-responder contexts.[318]

The relevant inquiry here should not be on what type of physical restraint the government actor subjectively attempted

---

315 *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1328 (charting the history of the Fourth Amendment and concluding that the Fourth Amendment entails "a general protection against [the] government," not just police); Thomas B. McAffee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 90 (1998) (observing that Madison contemplated the Fourth Amendment as necessary for restricting the government in all its functions).

316 Marshall v. Barlow's, Inc., 436 U.S. 307, 312–13 (1978).

317 Dubbs v. Head Start, Inc., 336 F.3d 1194, 1206 (10th Cir. 2003).

318 *See supra subp*art II.C.

but instead objectively on whether a restraint on liberty occurred. A restraint on liberty theory of seizure would trigger Fourth Amendment scrutiny anytime a government actor intentionally used force or a show of authority to restrain one's freedom of movement, whether that restraint resulted in submission or dispersal. This expansive view of "seizures" not only promotes "the goal of deterring [non]police misconduct" but more importantly accords with the fundamental liberty rationale underlying the Fourth Amendment.[319] The historical purpose of the Amendment was not only to protect the privacy of individuals from the oppressive intrusion of general warrants but also to protect citizens from unwarranted government coercion and force.[320] Where protection from unreasonable searches is premised on the fundamental precept of privacy from a snooping government, protection from unreasonable seizures is premised on the equally fundamental precept of liberty from a violent government in all its forms.

By refocusing seizures as restraints on liberty rather than total submission, any government-directed restraint on physical movement becomes a seizure, whether that restraint takes the form of a citizen unable to resist the bone-breaking grip of a paramedic or a mass of unhoused persons physically pushed out and unable to return to their homes. This approach readily "accords with the historical, constitutional understanding of a seizure separate and apart from any common law definition more akin to an arrest."[321] It also, admittedly, opens the door to constitutional scrutiny of potentially large swaths of routine government conduct.

But that is a good thing. Defining a larger scope of police conduct as "seizure" does not declare it unlawful; it merely subjects it to a constitutional reasonableness calculus, one which recent Court history suggests will still tilt heavily in favor of the government actor.[322] Thus, declaring it a seizure when an EMT straps down a patient having a seizure does not unnecessarily

---

319 Pita Loor, *supra* note 241, at 839–40.

320 Olmstead v. United States, 277 U.S. 438, 463 (1928) (stating the "well-known historical purpose" of the Fourth Amendment "was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will."); *Martinez-Fuerte*, 428 U.S. at 554 ("The Fourth Amendment imposes limits to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.").

321 Fields, *supra* note 223, at 373.

322 Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2036 (2018) ("The

open the floodgates of litigation. Instead, it merely provides an opportunity to confirm the eminent reasonableness of that paramedic's conduct in the rare case where the patient sees fit to waste their time with such a suit. More importantly, additional constitutional scrutiny of government use of force is sorely needed, especially for a Court that has "abdicated" its responsibilities on that front.[323]

C. Nonpolice Entanglement with Police

Despite the attraction of an expanded excessive force jurisprudence and broadened definition of seizure, major doctrinal upheaval in this area appears unlikely in the near future.[324]N However, one alternative approach to nonpolice brutality claims which utilizes the Court's existing "extensive entanglement with law enforcement" case law may provide a successful avenue for redress, at least in the co-responder context.[325]

In the Fourth Amendment search law context, the Court has recognized a special class of nonpolice searches that trigger the Amendment but which do not require the usual showing of individualized suspicion of criminal activity supported by either reasonable suspicion or probable cause.[326] These so-called "special needs" searches often involve suspicionless

---

Supreme Court has largely abdicated any role in regulating police stops that do not produce evidence of criminality.").

323 *Id.*

324 *A Reform and Revolution to Fourth Amendment Jurisprudence*, HARV. C.R.-C.L. L. REV. (Jan. 31, 2023), https://journals.law.harvard.edu/crcl/a-reform-and-revolution-to-fourth-amendment-jurisprudence/ [https://perma.cc/ND7M-D73T] (lamenting the current Supreme Court's "narrowing of Fourth Amendment protections . . . ."); Adam A. Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1480 (2022) (describing roadblocks to Fourth Amendment reform); Kindaka J. Sanders, *The New Dread, Part II: The Judicial Overthrow of the Reasonableness Standard in Police Shooting,* 71 CLEV. ST. L. REV. 1029, 1110 (2023) ("Equally clear is that the Trump Supreme Court is the most regressive Supreme Court has been since the early 1950s.").

325 Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) The Supreme Court Do?*, 33 J. L. MED. & ETHICS 102, 125 (2005).

326 DRESSLER, *supra* note 124, at 293–94; Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (Special needs "beyond the normal need for law enforcement make the warrant and probable cause requirement impracticable."); New Jersey v. T. L. O., 469 U. S. 325, 351 (1985) (Blackmun, J., concurring); *cf.* Gerald Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law,* 19 HASTINGS CONST. L. Q. 295, 299–300 (1992) (observing that the Court's special needs cases "are individually flawed for failing to adhere to their conceptual antecedents, and are collectively flawed by requiring that the Supreme Court interpret the [Fourth] [A]mendment in an ad-hoc and unprincipled fashion.").

administrative or regulatory searches—such as housing inspections, workplace safety inspections, and federal employee drug tests—that have important noncriminal purposes and apply equally to everyone.[327] However, courts may subject these purportedly noncriminal searches to traditional probable cause and warrant requirements if the search program or the individuals conducting the searches are so "extensively entangled with law enforcement" as to render the searches indistinguishable from "general crime control" searches.[328]

In these cases, "the purpose for a search has been the most important factor in deciding whether the search deserves a legitimate special need unrelated to law enforcement, or instead 'is ultimately indistinguishable from the general interest in crime control.'"[329] For example, in *Ferguson v. City of Charleston*,[330] a state hospital implemented a policy to identify pregnant patients suspected of drug abuse that allowed staff members to test patients without their consent and report positive drug tests to the police.[331] The Supreme Court recognized that "the ultimate goal of the program may well have been to get the women in question into substance abuse treatment" but that the immediate objective of the searches "was to generate evidence for *law enforcement purposes* in order to reach that goal."[332] Given that the institutional "purpose of the Charleston program . . . was to use the threat of arrest and prosecution in order to force women into treatment," this "extensive involvement of law enforcement officials" made the policy "indistinguishable from general crime control."[333] As a result, traditional probable cause and warrant requirements applied.[334]

At first blush, this case seems inapplicable to nonpolice alternate responders, whose purpose is to find noncriminal,

---

327 *See* Fields, *supra* note 8, at 1052, 1054–57 (discussing special needs doctrine).

328 Ferguson v. City of Charleston, 532 U.S. 67, 80 (2001); Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 FORDHAM L. REV. 2013, 2035 (2019) (observing that presence of policies requiring disclosure of confidential information to law enforcement might constitute "extensive entanglement" requiring application of the Fourth Amendment's probable cause and warrant requirements).

329 Maclin, *supra* note 325, at 115.

330 Ferguson v. City of Charleston, 532 U.S. 67 (2001)

331 *Ferguson*, 532 U.S. at 70–72.

332 *Id.* at 82–83.

333 *Id.* at 81–84.

334 *Id.* at 85–86.

non-carceral pathways towards public safety. But an alternative institutional purpose approach would allow courts to assess whether the purpose of a nonpolice agency is tied to investigating activity that remains formally criminal but unlikely to be prosecuted as a practical matter. Substance abuse counselors, social workers, and homelessness outreach teams (at least in jurisdictions with anti-camping ordinances)[335] are tasked with addressing public safety issues arising from criminal activity even if the goal may be to find a resolution short of investigation and referral for arrest. While divining the subjective intent of these alternate responders would remain difficult, the institutional purpose prong of *Ferguson* and related extensive entanglement cases may provide the proper Fourth Amendment hook in cases of nonpolice brutality. Moreover, while *Ferguson* focuses on probable cause requirements for *searches*, an analogous argument can be made based on extensive entanglement that nonpolice agents should in similar circumstances be subject to the full force of Fourth Amendment *seizure* law.

Nonpolice brutality claims based on impermissibly extensive entanglement with law enforcement likely have the most resonance in co-responder programs where alternate responders ride along and respond to calls with police officers.[336] Here, extensive entanglement claims should extend to whether the programmatic practice of the agency invites a criminal investigation, regardless of the stated or actual purpose.[337] When crisis interventionists respond to 911 calls with law enforcement, the likelihood of a criminal investigation and arrest is compared to an interventionist responding on her own without

---

335 *See* Langley v. City of San Luis Obispo, No. CV 21-07479-CJC, 2022 U.S. Dist. LEXIS 96169, at *2 (C.D. Cal. Feb. 7, 2022) ("Despite this shortage [of shelter beds], the City has continued to strictly enforce ordinances to prevent unhoused residents from sheltering in the City's open spaces and streets, effectively criminalizing homelessness."); Cobine v. City of Eureka, No. C 16-02239, 2016 U.S. Dist. LEXIS 58228, at *8 (N.D. Cal. May 2, 2016) ("Because the City has threatened criminal prosecution in order to enforce the notice to vacate and enforce the anti-camping ordinance, Plaintiffs contend that Eureka is effectively criminalizing homelessness.").

336 *See* Hou. Police Dep't Mental Health Div., *Crisis Call Diversion Program*, https://www.houstoncit.org/ccd/ [https://perma.cc/C3KN-Z4GQ] (last visited Sep. 7, 2024) (describing crisis intervention co-responder model embedded in police department.); Friedman, *supra* note 7, at 988.

337 Fields, *supra* note 8, at 1077 ("Whether nonpolice agencies have impermissibly extensive entanglement with law enforcement also should depend on whether the programmatic practice of the agency invites a criminal investigation, regardless of the stated or actual purpose.").

police. In some cases, the presence of a nonpolice agent on the scene may actually invite a more successful criminal investigation, to the extent that the citizen-suspect trusts and confides in the alternate responder in ways they would not with law enforcement.[338] An officer at the scene with goals often in conflict with the alternate responder may attempt to pressure the nonpolice actor to seek relevant information or exert physical force to further a criminal investigation.[339] In such cases, where a program's practice is likely to lead to a penal response regardless of its stated purpose, the Court has found extensive entanglement with law enforcement and applied the Fourth Amendment accordingly.[340] Thus, a citizen in crisis subjected to nonpolice violence at the hands of an overly aggressive mental health first responder may find success sustaining an excessive force claim if a police officer is also present on the scene. This reconceptualization of extensive entanglement doctrine provides at least one practical, achievable half-measure of protection for citizens subject to nonpolice brutality.

CONCLUSION

Municipal reliance on nonpolice professionals to promote public health and safety represents a welcome and long overdue reform in American life. The inefficacy and dangerousness of relying on armed police alone to secure the peace has been laid bare in countless empirical studies and in the images and cell phone videos of tragic deaths seared into our collective consciousness. Dispatching mental health providers, paramedics,

---

338 *See* Nina Chamlou, *The Growing Movement to Use Social Workers Instead of Police*, AFFORDABLE COLLEGES. (Oct. 28, 2021), https://www.affordablecollegesonline.org/college-resource-center/news/social-workers-instead-of-police/ [https://perma.cc/SJ7H-CY3Y] (criticizing social work collaboration with police, because social workers attempt to build trust and "show up with a willingness to listen" while police "come armed with tasers, guns, and batons, prepared to deploy violence and punishment"); Obasogie & Zaret, *supra* note 15, at 51–52 (discussing need for clear firewalls between medical professionals and police to protect sensitive health information being used in a criminal prosecution); Teneille R. Brown, *When Doctors Become Cops* , U. UTAH COLL. OF L. (Jan. 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346154 [https://perma.cc/YU8L-PVCQ] (describing "blurred lines" between doctors and police and increased role doctors play in criminalizing women seeking reproductive healthcare).

339 Obasogie & Zaret, *supra* note 15, at 51.

340 *See* City of Indianapolis v. Edmond, 531 U.S. 32, 35, 38, 45 (2000) (striking down suspicionless vehicle checkpoint with the noncriminal stated purpose of "interdict[ing] illegal drugs" and preventing the introduction of drugs into the city, but which in practice resulted in the arrest and prosecution of all motorists found in possession of illegal drugs).

social workers, homelessness experts, and substance abuse counselors to triage society's many noncriminal, nonviolent safety issues promises to reduce the unnecessary and epidemic police brutality to which we have all become accustomed.

Yet we must carefully calibrate how we deploy our nonpolice professionals so they do not simply become "quasi-police" extensions of an already ubiquitous law enforcement. Co-responder models, where paramedics and mental health workers feel pressured by police to investigate, interrogate, and restrain citizens in need, threaten to exacerbate rather than alleviate the problem of police brutality. Moreover, rules governing these alternate responders must reflect the serious need to restrain nonpolice actors from engaging in the same violent acts as the police they replaced. This Article charts how current Fourth Amendment jurisprudence fails to do this, how and why it can, and why in this moment getting it right is so critically important.