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## Should Tort Law Care About Police Officers?

*Ellen M. Bublick & Jane R. Bambauer*

**ABSTRACT.** Should police officers be able to file tort lawsuits for injuries that they suffer while on duty? In this Essay, written in response to Professor Sarah L. Swan’s *The Plaintiff Police*, Professors Ellen M. Bublick and Jane R. Bambauer contend that the common law has expanded, and should continue to expand, the civil legal rights of wrongfully injured people, including people wrongfully injured while employed as police officers. Beginning with a review of recent appellate opinions in suits filed by police, Bublick and Bambauer outline the types of actions that would be eliminated by a proposed ban on police officer injury suits. They next examine police suits through the popular, if inaccurate, frame that civilians can obtain virtually no civil remedies based on police misconduct. From the baseline of actual suits, Bublick and Bambauer argue that civil enforcement is valuable to hold both civilians and officers accountable for the unjustified harms that they cause to each other.

### INTRODUCTION

If a person purposely shoots at and injures another, should the shooter be accountable to pay damages to the person harmed? Absent significant justification, in almost every circumstance in every state, the answer is yes.<sup>1</sup> But in *The Plaintiff Police*, Professor Sarah L. Swan argues that if the injured person is a police officer, the answer should be no.<sup>2</sup> If the officer is hit by a negligent driver’s

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1. See, e.g., *Quinn v. Zerkle*, 111 F.4th 281, 298 (4th Cir. 2024) (noting that if the officer intentionally shot the plaintiff, the officer may be held liable for battery under state law); *State Farm Mut. Auto. Ins. Co. v. Hill*, 775 A.2d 476, 477-78, 480-82 (2001) (holding that an injured police officer could sue a motorist who stole a vehicle, engaged in a high-speed chase, and intentionally crashed into the car of an officer who created a rolling roadblock).
  2. Sarah L. Swan, *The Plaintiff Police*, 134 YALE L.J. 1182, 1190, 1260, 1264 (2025) (“Reviving the professional-rescuer rule, and potentially making it even more robust vis-à-vis the police by including intentional acts within its purview, is an easy lever with which to begin the process of limiting plaintiff police claims.”).

car, she argues for the same result: no tort claim. Professor Swan would dramatically limit police claims to exclude intentional, reckless, and negligent torts, with only narrow exceptions.<sup>3</sup>

As support for this extreme measure, *The Plaintiff Police* draws on the backdrop of historical racism, significant abuses of police power, and a set of cases that push the limits of tort liability no matter who brings the claim.<sup>4</sup> That set includes *Doe v. McKesson*, in which a police officer who was severely injured by a rock-throwing protestor filed suit against Black Lives Matter (BLM) protest organizers (a case that we have previously criticized as insufficiently protective of First Amendment rights).<sup>5</sup> Alongside concerns about racism in policing, *The Plaintiff Police* draws on the widespread perception that injured civilians can rarely obtain civil remedies for police abuses.<sup>6</sup> Together, these impressions of vindictive police plaintiffs, and immunity from tort liability, foster a reflexive hostility to the police. In light of these impressions, Professor Swan argues that any possibility of civil action or recovery by police officers will be disproportionate to civilian legal actions, worsen power differentials, dampen political participation, and harm local citizen-community participation.<sup>7</sup> On that basis, *The Plaintiff Police* argues for a draconian, if easy to administer, rule: if the plaintiff is a police officer, the court should toss out the plaintiff's claims at the start of the case.<sup>8</sup>

We are aware of no state or country that has granted its entire population absolute immunity from civil liability for the tortious, even criminal, harms that its civilians inflict on police. And we think there are good reasons they haven't.

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3. *Id.* at 1248-49, 1248 n.373; *id.* at 1265 (“In the specific circumstance of plaintiff police litigation, because of the many harms that such litigation creates, workers’ compensation and administrative remedies should be the sole avenues of financial recovery.”). The sole exceptions that Professor Swan permits are for products-liability actions and claims against corporations.
  4. *Id.* at 1190-1207, 1212-23.
  5. *Id.* at 1194-95; Ellen M. Bublick & Jane R. Bambauer, *Tort Liability for Physical Harm to Police Arising from Protest: Common-Law Principles for a Politicized World*, 73 DEPAUL L. REV. 263, 297 (2024) (criticizing the judicial opinions in a number of protest-related cases including *Doe v. McKesson*, 339 So.3d 524 (La. 2022), in which the Louisiana Supreme Court did not address important First Amendment concerns). See generally DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS 605-08 (2d ed. 2016) (providing background about the firefighter’s rule).
  6. Swan, *supra* note 2, at 1232-39.
  7. *Id.* at 1229-48.
  8. *Id.* at 1247-48. Professor Swan’s proposed rule incorporates what is portrayed as an anti-SLAPP provision, which prevents strategic and abusive litigation against public participation by stopping suit even before a motion to dismiss. *Id.* at 1248-54. But with respect to police, Professor Swan’s proposal would stop almost all litigation, whether abusive or not. *Id.* at 1248-49, 1248 n.373.

In this Response, we argue that the arc of U.S. common law runs in the exact opposite direction: the common law has expanded, and should continue to expand, the civil legal rights of wrongfully injured people, including civilians wrongfully injured by police and police wrongfully injured by civilians.<sup>9</sup>

*The Plaintiff Police* uses officer suits from injuries suffered during BLM protests to argue that tort claims filed by police officers are necessarily “a familiar backlash to African Americans who dare seek equal justice under the law.”<sup>10</sup> Racial equality is not served by complete immunities for civilian misconduct any more than “law and order” is served by complete immunities for police officers who abuse their power. However, the tort claims filed by Capitol police officers injured on January 6th serve as important counterpoints – reminders that officers’ personal rights of redress are an important feature of equal justice under the law.<sup>11</sup>

In Part I, we lay out our understanding of the current state of affairs for civil claims pursued by police and contrast it with the picture of current suits painted by *The Plaintiff Police*. In Part II, we correct the record about police defendants, showing that the civil-justice system should, and does, allow for a range of claims against individual police officers, their departments, and federal, state and local entities. In Part III, we challenge Professor Swan’s normative claim that officers’ pursuit of individual tort claims for injuries suffered is inherently bad for society. To the contrary, we see much value in deterring tortious or otherwise unlawful conduct through civil, rather than criminal, enforcement, both for police and for civilians.

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9. See Ellen M. Bublick, *Tort Common Law Future: Preventing Harm and Providing Redress to the Uncounted Injured*, 14 J. TORT L. 279, 281, 298, 308 (2021) (arguing that the future of tort common law lies with cases “weaving traditional goals of harm prevention and rights of redress with contemporary norms of equality” to prevent and redress foreseeable physical harms to previously uncounted injury victims, including firefighters and people discriminated against based on race and gender); see also Bublick & Bambauer, *supra* note 5, at 265 n.18 (arguing that “[i]t is time for courts to consider whether civil recourse has been too stingy to both types of victims” – that is, victims of violence *by* police and *against* police); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION 86–90 (9th ed. 2022) (outlining judicial and academic criticism of the federal qualified-immunity doctrine).
  10. Swan, *supra* note 2, at 1212 (quoting Janell Ross, *Why Did Cleveland Sue Tamir Rice’s Family? And Why Is a Chicago Officer Suing the Estate of a Teen He Killed?*, WASH. POST (Feb. 23, 2016, 8:00 AM EST), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/23/why-did-cleveland-sue-tamir-rices-family-and-why-is-a-chicago-officer-suing-the-estate-of-a-teen-he-killed> [https://perma.cc/9QWK-BKB8]).
  11. Tatyana Tandanpolie, *‘The Last Leg Standing’: Jan. 6 Civil Lawsuit Seeks to Hold Trump Responsible for Attacks on Police*, SALON (Jan. 24, 2025), <https://www.salon.com/2025/01/24/the-last-leg-standing-jan-6-civil-seeks-to-hold-responsible-for-on-police> [https://perma.cc/NHP2-YACS]; Aquilino Gonell, *I Was Nearly Killed on Jan. 6th. Four Years Later I Feel Betrayed All Over Again*, BULWARK (Jan. 6, 2025), <https://www.thebulwark.com/p/january-6th-four-years-later-aquilino-gonell-feel-betrayed> [https://perma.cc/R3UC-9S9C].

## I. THE POLICE AS PLAINTIFFS

We begin with what we think is a necessary corrective to the descriptive account of police civil claims. We then place these cases in the context of larger tort trends.

### A. *Cherry-Picking the Police Plaintiffs*

*The Plaintiff Police* presents a small set of civil claims – only a few dozen from the last twenty-five years – as though they represent the “current plaintiff police litigation landscape.”<sup>12</sup> By the article’s account, the trend in civil suits brought by police cluster around several types of claims: (1) suits against individuals for hurling insults at police (namely, a cite to one news article about a case of a civilian’s racist rant against a Chinese-American detective that we believe may well have been awful but lawful and rightly dismissed);<sup>13</sup> (2) defamation claims (which, as Professor Swan explains, require police, as public officials, to satisfy extremely high standards of pleading and proof);<sup>14</sup> (3) claims for emotional distress when the police officer was involved in a shooting (one case brought as a counterclaim for which the officer received no monetary award, and a second case brought against a person who reportedly fired 200 rounds at officers from his home). A third news report concerned an officer claim for PTSD against an electric company whose allegedly negligent downed power line electrocuted a man the officer could not save;<sup>15</sup> and (4) claims against protest organizers and others based on violence perpetrated by other participants – a category that includes claims against defendants as far ranging as Donald Trump, January 6th rioters, and BLM organizers.<sup>16</sup>

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12. Swan, *supra* note 2, at 1191.

13. *Id.* at 1192 (citing Jonah E. Bromwich, *Why This N.Y.P.D. Detective Is Suing a Protester*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/04/29/nyregion/nypd-protester-racism-lawsuit.html> [<https://perma.cc/Y7Z6-DZ4U>]); see Eric Goldman, *The Digital Deplatforming Report: Characterizing Internet Users’ Content Moderation Experiences*, TUFTS UNIV. DIGIT. PLANET (Nov. 30, 2022), [https://digitalplanet.tufts.edu/wp-content/uploads/2023/02/DD-Report\\_3-Eric-Goldman-11.30.22.pdf](https://digitalplanet.tufts.edu/wp-content/uploads/2023/02/DD-Report_3-Eric-Goldman-11.30.22.pdf) [<https://perma.cc/3G4E-D49R>] (describing the category of “lawful-but-awful” speech).

14. Swan, *supra* note 2, at 1197-1201.

15. *Id.* at 1204-07; *Jury Rules in Favor of LeGrier Family in Lawsuit Against Chicago Cop Robert Rialmo*, NBC CHI. (June 27, 2018, 11:13 PM), <https://www.nbcchicago.com/news/local/jury-rules-in-favor-of-legrier-family-in-lawsuit-against-chicago-police-officer-robert-rialmo/2037436> [<https://perma.cc/MG6Y-ZMST>]; Kirby Newman-Rea, *Man Arrested After 200 Rounds Fired from Multiple Weapons in McMinnville*, YAMHILL CNTY. NEWS-REG. (July 30, 2022), <https://newsregister.com/article?articleId=43832> [<https://perma.cc/3MA3-W6EN>].

16. Swan, *supra* note 2, at 1192-96.

When discussing claims that police officers have brought based on physical injuries, *The Plaintiff Police* devotes a full page to recounting the dropped counterclaim of an injured police officer who was shot by Breonna Taylor’s boyfriend, but it spends only a paragraph on “run-of-the-mill” negligence cases based on injuries that occur in the course of the plaintiff’s police work.<sup>17</sup>

This account leaves a misleading impression that tort claims that are, or would be, brought by police officers are either self-serving in a larger power struggle between the police and overpoliced communities or are mundane and easily handled through workers’ compensation. But our review of recent cases provides a different impression – that, in fact, on-duty police often confront acts of negligence, recklessness, or malice that are not inherent to the nature of policing and should be amenable to accountability, deterrence, and compensation through the tort system.

Looking at the full set of appellate opinions in tort cases filed by police officers from the last five years, we found that dozens of state appellate and supreme-court cases have grappled with facts that test the limits of their state’s firefighter’s rules – that is, rules limiting certain lawsuits when a rescuer’s injury was caused by the very negligence that occasioned the rescuer’s presence. Several of these cases were indeed among the high-profile, protest-related cases discussed by *The Plaintiff Police* (for instance, based on the use of a chemical spray against an officer who collapsed and died on January 6th).<sup>18</sup> A few of the recent appellate opinions involve facts that would be most closely covered by a traditional firefighter’s rule. Those cases involve officers who were injured by a dangerous person the defendant called police to remove from their premises.<sup>19</sup> The remaining

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17. Compare *id.* at 1201-02 (describing the Breonna Taylor litigation), with *id.* at 1204 (describing these “run-of-the-mill” cases). The officer shot by Breonna Taylor’s boyfriend voluntarily dismissed the lawsuit when the government paid \$2 million to settle the boyfriend’s claim. Josh Wood, *Ex-LMPD Cop Mattingly, Shot in Breonna Taylor Raid, Drops Lawsuit Against Kenneth Walker*, COURIER J. (May 22, 2023, 5:22 PM ET), <https://www.courier-journal.com/story/news/local/breonna-taylor/2023/05/22/ex-lmpd-cop-mattingly-shot-in-breonna-taylor-raid-drops-lawsuit-against-kenneth-walker/70245168007> [<https://perma.cc/H5V5-MEBS>].

18. Swan, *supra* note 2, at 1192-96; see also *Garza v. Trump*, 709 F. Supp. 3d 1, 3 (D.D.C. 2024) (denying a motion to dismiss in part in a case where a rioter “deployed the chemical spray at Officer Sicknick, incapacitating him” and “Officer Sicknick would collapse later that night and die the next day”).

19. See, e.g., *Wall v. Starbucks Corp.*, 179 N.Y.3d 739, 741 (2022) (dismissing a police officer’s lawsuit based on the firefighter’s rule); *Santander v. Seward*, 700 S.W.3d 126, 155-58 (Tex. App. 2023) (allowing a lawsuit to survive a motion to dismiss where there was a genuine issue of material fact as to whether the firefighter’s rule applied); *Rathmell v. Smith*, No. 1856, 2024 WL 4532917, at \*2-4 (Md. App. Ct. Oct. 21, 2024) (affirming the dismissal of a case where the officer, called as a result of a domestic dispute, was harmed during the arrest but where the officer did not sue the person who committed the subsequent harm for an intentional tort – a

majority of cases offer sad vignettes of facts that deserve consideration in tort law, particularly because any other injured person in the same situation would overcome a motion to dismiss. The cases do not fit into the narrative of an inappropriate, let alone vindictive, police plaintiff trend. The questions asked in the recent cases include:

- If an officer directs a driver to move their car forward, and the driver – not intentionally but with gross negligence – drives directly into the officer, can the officer sue for damages?<sup>20</sup>
- Can an officer who falls on a crumbling, negligently maintained set of outdoor steps that are accessible to the public sue the (insured) homeowner? Should it matter that the officer was pursuing an unrelated third party on foot at the time, and that anybody else (including the fleeing felon) could have sued the homeowner in the same situation?<sup>21</sup>
- Can an officer who is pushed off a bridge by a truck while the officer was attempting to contain loose dogs sue the negligent truck driver?<sup>22</sup>
- Can an officer sue two women who shoved him, causing injuries, while he was attempting to arrest their friend?<sup>23</sup> (In case it matters, this occurred at a gas station, not at a protest.)
- When Walmart negligently or recklessly maintains a water main that subsequently bursts, causing a frozen lake to form over the parking lot, does an officer have a claim if he is injured while tending to other emergencies caused by the frozen conditions?<sup>24</sup>

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suit that would have been permitted). In the absence of a bar to suit under the firefighter's rule, these might be cases of no negligence on the caller's part.

20. *Topper v. Thomas*, No. 170, 2022 WL 38424, at \*1 (Md. Ct. Spec. App. Jan. 4, 2022).
21. *Maloney v. Wellspring, Inc.*, No. 2020-CA-1056-MR, 2021 WL 3700204, at \*1 (Ky. Ct. App. Aug. 20, 2021); cf. *Maher v. White*, 125 N.Y.3d 445, 447-48 (2020) (finding no liability because the defendants were not the premises' owners after a police officer sued when the front edge of a step broke while the officer was executing a parole arrest warrant).
22. *Wooster Motor Ways, Inc. v. Gonterman*, No. 2023-SC-0062-DG, 2024 WL 4576167, at \*1-2 (Ky. Oct. 24, 2024); see also *Progressive N. Ins. Co. v. City of Rocky River*, No. 18 CV 524, 2019 WL 5394206, at \*1, \*6 (N.D. Ohio Aug. 16, 2019) (dismissing a case involving similar facts related to setting up flares).
23. *Meurice v. Hesselgrave*, No. NNI-CV21-6024086-S, 2022 WL 2902692, at \*1-2 (Conn. Super. Ct. July 21, 2022).
24. *Silva v. Walmart, Inc.*, No. FBTCV186074120S, 2020 WL 3058145, at \*1 (Conn. Super. Ct. May 8, 2020); see also *Maher*, 125 N.Y.3d at 447-48 (involving a broken stair inside a dwelling); *Gordon v. Union Pac. R.R. Co.*, No. C096270, 2024 WL 226489, at \*1 (Cal. Ct. App. Jan. 22, 2024) (involving a broken crossing gate), *review denied* (May 1, 2024).

## SHOULD TORT LAW CARE ABOUT POLICE OFFICERS?

- Can an officer who is severely injured by a speeding car that was stolen from Dollar Rent A Car sue Dollar for negligent entrustment and negligent hiring and training?<sup>25</sup>
- Can a wounded officer, and a deceased officer's estate, sue Home Depot for premises liability when the retailer's private security guard detained a felon with an outstanding arrest warrant, but did not inform the officers that, contrary to customary practice, the guard had not searched the detainee for a weapon?<sup>26</sup>
- Can an officer's estate sue the county for wrongful death based on inadequate training and staffing that resulted in greater risk to officers?<sup>27</sup>

These police-initiated claims are not materially different from the sorts of claims recently adjudicated on behalf of firefighters. For example:

- Can firefighters recover when a driver crashes his car into a fire truck and then fails to cooperate with firefighter instructions, causing further injury?<sup>28</sup>
- Can a firefighter maintain a claim when a warehouse owner did not warn firefighters that the wall above a stairwell was unfinished, even though the owner knew the firefighters would not be able to foresee that hazard in the dark and smoke-filled building?<sup>29</sup>
- Can a firefighter sue for gross negligence when the firefighter's presence was required at the scene of a fire that was the property's third fire in less than two weeks, and the county health department had told the defendant to take actions required by fire codes to reduce the risk?<sup>30</sup>

The adjudications in these cases address legal issues at varied stages of litigation and result in varied success by police and firefighter plaintiffs. But the cases do not scream out for drastic recovery-stripping reforms to tort law. If anything, they raise doubts about the wisdom of the firefighter's rule to the extent that the injured plaintiffs are undercompensated by workers' compensation,

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25. *Cauwels v. Johnson*, No. CGC-13-530331, 2023 WL 3860401, at \*1-2 (Cal. Ct. App. June 7, 2023).

26. *Santander v. Seward*, 700 S.W.3d 126, 134-36, 156-58 (Tex. App. 2023), *review granted* (Sept. 27, 2024).

27. *Est. of McCartney ex rel. McCartney v. Pierce Cnty.*, 513 P.3d 119, 124 (Wash. Ct. App. 2022).

28. *See Rattary v. Favro*, 315 Cal. Rptr. 3d 702, 704-05 (2023).

29. *See Dolsen v. VeoRide, Inc.*, 235 N.E.3d 1258, 1261 (Ind. 2024).

30. *See Ipsen v. Diamond Tree Experts, Inc.*, 466 P.3d 190, 192 (Utah 2020) ("A mulch fire occurred on the property of appellee, Diamond Tree Experts, Inc. In the week before the mulch fire, there had been at least two other fires on the property.").

defendants have available insurance, and defendants are under-deterred.<sup>31</sup> Moreover, many of these claims address the responsibilities of commercial entities and communities to address unsafe working conditions that cause serious harms to professional rescuers (as would be required with respect to private rescuers).<sup>32</sup> And while these cases bear little resemblance to the concerns that prompt the proposed ban on police plaintiff suits, the breadth of the proposed rule would end this entire category of actual cases just the same.

### B. *The Evolution of Firefighter Suits*

*The Plaintiff Police* frames recent tort claims by police as a reaction against progressive social movements, especially the BLM and #MeToo protests. The article also references the many recent lawsuits that stem from the January 6th violence but does not frame police claims as a reaction against extremist right-wing movements.<sup>33</sup> Many social and legal factors, including racial tension in policing, contribute to evolving opportunities for police suits in recent decades. Professor Swan usefully harkens back to police plaintiff cases filed during the civil-rights movement of the twentieth century, which led to constitutional restrictions on defamation suits, for example. But the long-term trend toward increased police suits also has a more ecumenical and commonplace doctrinal trajectory.

Common-law restrictions on police suits in the United States typically stem from a doctrine known as the “fireman’s rule,” now the “firefighter’s rule,” as noted above.<sup>34</sup> The rule has been articulated in many ways and is subject to many exceptions. A Utah Supreme Court case recites its core principle in this way: “[A]

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31. See *Jolly v. Hoegh Autoliners Shipping AS*, 546 F. Supp. 3d 1105, 1110 (M.D. Fla. 2021). Injured firemen were fighting a fire on board a vessel “when an explosion occurred. Trapped in a stairwell, the Firemen were exposed to extreme temperatures and hit with the power of the blast. The Firemen suffered injuries that included severe burns, broken bones, lacerations, and emotional trauma. The Spouses were deprived of the care, comfort, consortium, and services of their husbands because of the incident as well.” *Id.* (citations omitted). The defendants were alleged to have negligently created the dangers on board or to have failed to provide information important to fighting the blaze. See *id.* at 1112, 1115-16.

32. One corporate defendant falsely told firefighters responding to a fire at its trash incineration facility that “the fire system was fully operable and that the burning waste was household rather than industrial waste.” *Cockey v. Covanta Fairfax, Inc.*, 109 Va. Cir. 14, 21 (2021); see also *Jolly*, 546 F. Supp. 3d at 1117 (“It would be wholly inconsistent for a body of law that rewards the voluntary rescuer to in turn punish or disadvantage the professional rescuer.”); *Wagner v. Int’l Ry. Co.*, 133 N.E. 437, 438 (N.Y. 1921) (“The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion.”).

33. Swan, *supra* note 2, at 1196 & n.74.

34. See *Bublick & Bambauer*, *supra* note 5, at 270.



person does not owe a duty of care to a professional rescuer for injury that was sustained by the very negligence that occasioned the rescuer's presence and that was within the scope of hazards inherent in the rescuer's duties."<sup>35</sup>

The rule was traditionally grounded in two doctrinal concepts. First, landowner duties varied by the status of entrants on the land. Under this system, firefighters were classified as licensees—persons to whom a landowner's only duty was not to engage in willful or wanton conduct.<sup>36</sup> They were *not* classified as invitees, to whom an ordinary duty of reasonable care would have been owed. Second, firefighters were said to have assumed the normal, apparent risks expected in a dangerous job.<sup>37</sup>

For decades, tort scholars criticized the firefighter's rule. Dean Prosser's hornbook called the classification of police and other firefighters as noninvitees "quite foolish."<sup>38</sup> A number of state courts never adopted the rule.<sup>39</sup> Nor did other countries follow suit.<sup>40</sup>

Even with a firefighter's rule in place, however, many officer claims were not barred. As the Prosser hornbook noted, actors must still "refrain from injuring [officers] intentionally, or by willful and wanton misconduct."<sup>41</sup> Furthermore, the firefighter's rule did *not* apply when "independent acts of misconduct" (distinct from the act that occasioned the rescuer's presence) caused the injury.<sup>42</sup> Courts have frequently permitted police recoveries in contexts that fall outside the firefighter's rule—for example, when an officer stopped one car and was struck by another, and when an officer, in hot pursuit of a fleeing suspect, was injured by the collapse of a dilapidated fence.<sup>43</sup>

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35. *Ipsen*, 466 P.3d at 192 (quoting *Fordham v. Oldroyd*, 171 P.3d 411, 415 (Utah 2007)); *see also* *Dolsen v. VeoRide, Inc.*, 235 N.E.3d 1258, 1260 (Ind. 2024) (explaining that "first responders—firefighters and others—cannot recover damages based on the negligence that caused the emergency to which they responded").

36. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 61, at 429-30 (5th ed. 1984).

37. *Id.* at 430-31.

38. *See id.* at 431; DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* §§ 363-365 (2d. ed. 2011).

39. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS, cmt. b (AM. L. INST., Tentative Draft No. 3, 2024) (noting the firefighter's rule).

40. English courts, after reviewing the American doctrines, were "in no doubt whatever that the American 'fireman's rule' has no place in English law." *Ogwo v. Taylor* [1988] 1 AC (HL) 431, 432 (Lord Bridge of Harwich) (appeal taken from Eng.). Canadian courts have relied on the English cases to resolve similar questions about the duty of care. *See Sheoran v. Interior Health Auth.*, 2023 BCCA 318 (CanLII), para. 75 (Can. B.C. S.C.).

41. KEETON ET AL., *supra* note 36, at 430.

42. *Id.* at 431; *see* DOBBS ET AL., *supra* note 5, at 609-10.

43. KEETON ET AL., *supra* note 36, at 431 n.45.

Year by year, adherence to the firefighter's rule has dwindled. Its two main doctrinal foundations have now been widely abandoned: duties of reasonable care are often owed to licensees (and some trespassers), and all-or-nothing rules of assumption of the risk have been replaced by newer forms of comparative fault and apportionment of responsibility.<sup>44</sup> Meanwhile, insurance covers injured officers' losses in the same way as others' losses.<sup>45</sup> With insurance coverage available and foundational concepts removed, common-law courts have increasingly minimized or discarded the firefighter's rule.<sup>46</sup>

As the firefighter's rule has faded, police officers, like other "firefighters," face fewer obstacles to filing ordinary tort suits.<sup>47</sup> They are regarded more like ordinary tort claimants, and they are treated as such in other common-law countries such as the United Kingdom and Canada.<sup>48</sup> The American Law Institute's *Restatement (Third) of Torts* strongly supports this trend (and voted to remove the rule entirely).<sup>49</sup>

Courts provide a range of explanations for allowing police to file tort claims. Most track the long-held purposes of any tort suit: "to prevent the commission of wrongs; to compel redress to those who have suffered from them, and to inflict punishment in proper cases."<sup>50</sup> This logic applies to police suits no less than to others.

44. Bublick & Bambauer, *supra* note 5, at 266.

45. See Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 7 YALE L.J. 2165, 2204 (2024).

46. See *id.* ("In early decisions challenging the rule, courts expressed reservations that the abolition of the fireman's rule would place an undue burden on a single negligent individual."). However, when later opinions noted that various forms of insurance might be available to cover the claims, the opinions began to permit firefighters' recoveries in more cases. *Id.* at 2205-06. See generally KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* (2008) (explaining the "twin star" relationship between tort liability and insurance).

47. Bublick & Bambauer, *supra* note 5, at 266.

48. See, e.g., *King v. Sussex Ambulance NHS Trust*, [2002] EWCA (Civ) 953 [21]; [2002] ICR 1413 (Eng.); *Sheoran v. Interior Health Auth.*, 2023 BCCA 318 (CanLII), para. 75 (Can. B.C. S.C.).

49. The main dispute in the American Law Institute was whether to limit the firefighter's rule or dissolve it. It chose the latter. *Restatement (Third) of Torts: Miscellaneous Provisions*, AM. L. INST. (2024), <https://www.ali.org/projects/show/torts-miscellaneous-provisions> [<https://perma.cc/YD3N-LUT9>] ("A motion to replace the black letter on the Firefighter's Rule passed.").

50. THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 1 (1879); *Jolly v. Hoegh Autoliner Shipping AS*, 546 F. Supp. 3d 1105, 1117 (M.D. Fla. 2021) (reviewing other state laws and holding that both Florida law and maritime law "support a duty to act reasonably and in consideration for the safety of others," including firefighters).

C. *Police Officers as People: The Doctrine of Equal Consideration*

The long-term trend toward treating injured officers in the same or similar manner as other plaintiffs make good sense.<sup>51</sup> As the South Carolina Supreme Court wrote when it declined to adopt the firefighter’s rule, “The more sound public policy – and the one we adopt – is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment.”<sup>52</sup>

Professor Swan argues that the “socially progressive interests” that usually “push[] for litigation expansions” should now reject police claims in order to promote social equality.<sup>53</sup> However, choosing disfavored claimants based on an overtly political calculus would be a poor expressive choice for the law.<sup>54</sup> To say that police officers alone should be stripped of their common-law legal rights of physical security would deny their humanity in a way that is difficult to reconcile with any theory of interpersonal justice in private law or any utilitarian calculus.<sup>55</sup>

Officers are symbols of raw power, as Professor Swan claims, but they are also more than that (or, should we say, less). When a police officer files a tort action against a civilian, the officer is suing *as* a civilian. Unlike in a criminal arrest, a civil claim requires the officer to approach the court in the same manner as any other human, not as an agent of the government. It requires the officer to pay for their own legal representation, to bear reputational costs personally, and to use their own time to pursue the case. They can file tort claims only for wrongs and harms that they have personally suffered and that would be actionable by others. As in other contexts, if an officer abuses the legal process, a range of

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51. See James E. Pfander, *Ordinary Law, Constitutional Torts and Governmental Accountability*, JOTWELL: CTS. L. (Feb. 5, 2024), <https://courtslaw.jotwell.com/ordinary-law-constitutional-torts-and-governmental-accountability> [<https://perma.cc/6MSH-959G>] (reviewing Samuel Beswick, *Equality Under Ordinary Law*, 4 SUP. CT. L. REV. (3d) 65, 87 (2024), <https://ssrn.com/abstract=4528664> [<https://perma.cc/3M3T-44FY>] and arguing that one key measure of legal performance is how well the system compares to “the rules of tort law that govern ordinary citizens in ordinary proceedings before ordinary courts”).

52. *Minnich v. Med-Waste, Inc.*, 564 S.E.2d 98, 103 (S.C. 2002).

53. Swan, *supra* note 2, at 1220 (emphasis omitted).

54. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 405, 405-09 (2017) (outlining the importance of what the tort law says, not only what it does).

55. Sarah L. Swan, *Public Duties for the New City*, 122 MICH. L. REV. 315, 317 (2023) (“The first job of government is to protect its people.” (citing Ben A. McJunkin, *Ensuring Dignity as Public Safety*, 59 AM. CRIM. L. REV. 1643, 1647 (2022))). The people who government must protect include officers and civilians. For example, Professor Swan argues that police officers’ duties of care are “the most basic articulation of the norms and obligations flowing between members of our society.” Swan, *supra*, at 315.

consequences can, and should, follow—for example, sanctions and liability for tortious abuse of process.

As with civil claims more generally, officers' claims protect important individual interests and require reasonable care by others. The family of a civilian killed in a robbery would have a tort claim against a co-conspirator who drove the getaway car.<sup>56</sup> Civilians physically assaulted at the Capitol on January 6th could sue their assailants for battery.<sup>57</sup> A person whose picture was displayed without consent on merchandise sold by another could seek damages for misappropriation.<sup>58</sup> Likewise, when officers are killed, injured, or demeaned in similar situations, their injury claims stem not from their official power, but from their human frailty. Like others, they are vulnerable to physical harms and emotional and financial distress.<sup>59</sup> And like other workers, they are entitled to concern for their safety.<sup>60</sup> As Lady Justice Hale, the former President of the United Kingdom Supreme Court, wrote in a case in the United Kingdom, firefighters, police officers, ambulance technicians, and others whose public-service occupations are inherently dangerous “accept the risks which are inherent in their work, but not the risks which the exercise of reasonable care on the part of those who owe them a duty of care could avoid.” In short, people must avoid excess preventable dangers to officers, as to others, and the tort system should buttress that social goal.

This result is consistent with a general equality principle applied in other common-law countries. The idea of “legal equality” entails “the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law

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56. See, e.g., *Halberstam v. Welch*, 705 F.2d 472, 472 (D.C. Cir. 1983) (holding that the live-in companion of a burglar was “civilly liable, as joint venturer and co-conspirator, for killing which occurred during course of burglary, even though she was not present at time of murder burglary”).
57. Lawmakers who were at the Capitol are but one example. See Associated Press, *Justice Department Says Trump Can Be Sued by Capitol Police for Jan. 6 Actions*, PBS (Mar. 2, 2023, 6:50 PM EST), <https://www.pbs.org/newshour/politics/justice-department-says-trump-can-be-sued-by-capitol-police-for-jan-6-actions> [<https://perma.cc/7CSZ-4F5N>].
58. *Cheatham v. Paisano Publ'ns, Inc.*, 891 F. Supp. 381, 385-86 (W.D. Ky. 1995) (outlining the requirements for a plaintiff to bring a claim for damages based on the “improper appropriation of another’s name or likeness on a t-shirt”); RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”).
59. Swan, *supra* note 2, at 1201-07 (mentioning suits in which police officers should be denied the right to sue in each of these contexts).
60. *King v. Sussex Ambulance NHS Trust* [2002] UKHL 953, [21] (appeal taken from Eng.) Outside of the United States, other common-law countries permit officers to bring civil suits on par with the citizenry at large. See generally *Ogwo v. Taylor* [1988] AC 431 (HL) (appeal taken from Eng.) (holding that a fireman could claim damages for injuries sustained while responding to a negligently started fire).

Courts.”<sup>61</sup> The principle is that “the rights protected by tort law are typically justifiable without reference to special features of the right-holder or duty-bearer.”<sup>62</sup> Accordingly, police officers, as people, are right-holders who should be entitled to assert their general legal rights.<sup>63</sup> Permitting officer suits embraces the humanity and equality of persons, and this equality principle reinforces claims of civilian rights, as well.

## II. POLICE AS DEFENDANTS

*The Plaintiff Police* claims that affording near-complete civil immunity to all who harm officers amounts to equal treatment. According to the article, current law creates an “accountability mismatch” between tort remedies available to officers and those available to civilians.<sup>64</sup> The article claims that it is “nearly impossible” to recover against tortious officers,<sup>65</sup> whereas “police can sue citizens with relative ease.”<sup>66</sup>

We doubt that access to civil damages is as lopsided as Professor Swan suggests (if it is lopsided in this direction at all). On the police plaintiff side, our review of the last five years of appellate-court cases suggests that officers face a difficult road to recovery. Indeed, almost all of the opinions concern special firefighter’s rules that would bar *only* firefighter plaintiffs’ claims.<sup>67</sup>

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61. Beswick, *supra* note 51, at 66 (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 120 (Roger E. Michener ed., Liberty Fund 1982) (1893)).

62. Sandy Steel, *Public Authority Liability for Careless Failure to Protect from Harm*, 16 J. TORT L. 333, 339 (2023).

63. The principle of nondiscrimination, as the South Carolina Supreme Court called it, or of equality, as it has been described in Canada and the United Kingdom, could help injured police and those injured by police alike. *See id.* at 338-39; Beswick, *supra* note 51, at 67-73; *supra* note 52 and accompanying text. Consistent with this principle, Lord Hoffmann has criticized the United States’s firefighter’s rule (which applies when an individual is “unable to recover for injury caused by negligence” due to his occupation) as “an affront to the idealised model of the law of torts as a system of corrective justice between equals.” *White v. Chief Constable of South Yorkshire*, [1998] 2 AC (HL) 59 (appeal taken from Eng.). In Canada, courts have held that “a public official who willfully interferes with another’s person or property” will be “liable at common law in the same way as a private person in the absence of a lawful justification.” Liability of public authorities for negligence in the performance of functions that ordinary people do not perform is “a more fraught enquiry,” but even there, the liability of private persons “is the starting point.” Beswick, *supra* note 51, at 65.

64. *See* Swan, *supra* note 2, at 1232-38.

65. *Id.* at 1236.

66. *Id.* at 1182.

67. *See, e.g.,* *Cauwels v. Johnson*, No. A154493, 2023 WL 3860401, at \*4 (Cal. Ct. App. June 7, 2023) (“Although originally limited to cases involving firefighters, using the name

More importantly, the mismatch claim greatly understates the extent to which civilians can, and do, recover in civil actions against police. The article contends that persons suing police face “procedural, doctrinal, and substantive hurdles [that] have made it *nearly impossible*” to sue successfully.<sup>68</sup> That contention is itself somewhat incredible based on the article’s own acknowledgement that civilians file “a continuous deluge of claims” against police.<sup>69</sup> The article notes, for example, that “[w]ell over 5,000 lawsuits are brought against the New York City Police Department (NYPD) each year.”<sup>70</sup> If claims against police rarely succeeded, it would be hard to imagine a mechanism that would afford claimants the legal resources to file this “continuous deluge”<sup>71</sup> of nonviable claims.

In truth, these are not futile suits. The same New York City Comptroller report that lists the 6,891 lawsuits filed against the NYPD in fiscal year 2023 also reports that NYPD settlements for these cases totaled \$266.7 million (an average of \$38,700 per suit, an amount nearly forty percent greater than the last Bureau of Justice Statistics estimate of the national median for tort awards, in 2005).<sup>72</sup> The average cost of personal-injury police action claims settled pre-litigation was \$17,609, while the average cost of those resolved during litigation was \$68,702. The aggregate cost of civil-rights-claim payouts in particular was \$145.4 million in FY 2023 and \$144.0 million in FY 2022.<sup>73</sup> The NYPD was the New York City agency “with the highest tort claim settlement and judgment costs” by a large measure.<sup>74</sup> “Health and Hospital” claims, in contrast, paid out

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‘firefighter’s rule’ is somewhat of a misnomer because the doctrine of nonliability now applies to police officers and certain other occupations.”).

68. Swan, *supra* note 2, at 1238 (emphasis added); cf. JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 9-16 (2023) (tracing the history of unsuccessful lawsuits against the police and noting how the Supreme Court has recently limited the reach of § 1983 suits against the police).

69. Swan, *supra* note 2, at 1185.

70. *Id.* at 1185 n.2.

71. Swan, *supra* note 2, at 1185.

72. Press Release, New York City Comptroller Brad Lander, City Paid \$1.45B in Settlements Last Fiscal Year, NYC Comptroller Finds in FY 2023 Claims Report (Apr. 16, 2024), <https://comptroller.nyc.gov/newsroom/city-paid-1-45b-in-settlements-last-fiscal-year-nyc-comptroller-finds-in-fy-2023-claims-report> [https://perma.cc/J9KG-KHSF] (reporting that the fiscal year (FY) 2023 New York settlements were “a 12 percent increase from \$239.1 million in FY 2022 (but still 21 percent below the high of \$338.2 million in FY 2017)”); THOMAS H. COHEN, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 228129, TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1 (Nov. 2009), <https://bjs.ojp.gov/content/pub/pdf/tbjtsco5.pdf> [https://perma.cc/4VAZ-WY4L].

73. *Annual Claims Report Fiscal Year 2023*, N.Y.C. COMPTROLLER 23 (Apr. 2024), <https://comptroller.nyc.gov/wp-content/uploads/documents/Annual-Claims-Report-FY2023.pdf> [https://perma.cc/ME28-AL3L].

74. *Id.*

a mere \$23.3 million.<sup>75</sup> Of the ten largest individual tort claims against the city in fiscal year 2023, six settlements were for reversed convictions and two for excessive police force.<sup>76</sup>

The NYPD is not alone. Police departments and governmental agencies all over the country pay substantial sums for settlements and judgments to resolve lawsuits alleging police misconduct.<sup>77</sup> Chicago paid over \$100 million in settlements in 2024.<sup>78</sup> Professor Joanna Schwartz calculated that police-misconduct payments in forty-four jurisdictions from 2006 to 2011 totaled three-quarters of a billion dollars.<sup>79</sup>

*The Plaintiff Police* treats these large numbers of lawsuits and payouts throughout the country not only as if they are inadequate to the actual harms suffered in the community (as they likely are, and as claims for injuries nearly always are), but as though they amount to virtually *no* right of recovery at all.<sup>80</sup> On the basis of the bold and strange assertion that plaintiff civilians have no civil recourse against harms by police, the article claims that officers' access to tort remedies should "match" the civilians'. That is, they should largely be barred.

But not only are civilians recovering in many police misconduct cases, the legal rules support these claims. Civilians can bring an array of misconduct-based causes of action against police and those around them.<sup>81</sup> There are at least two sets of civil legal actions that civilians can pursue to obtain money damages

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75. *Id.* at 25.

76. *Id.* at 8-10.

77. See Keith L. Alexander, Steven Rich & Hannah Thacker, *The Hidden Billion Dollar Cost of Repeated Police Misconduct*, WASH. POST (Mar. 9, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements> [<https://perma.cc/52F9-GPKV>]; Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 960 (2014) ("Law enforcement officers employed by the forty-four largest jurisdictions in my study were personally responsible for just .02% of the over \$730 million paid to plaintiffs in police misconduct suits between 2006 and 2011.").

78. Heather Cherone, *Final Tally: Chicago Taxpayers Spent at Least \$107.5M to Resolve Police Misconduct Lawsuits in 2024, Analysis Finds*, WTTW NEWS (Feb. 10, 2025), <https://news.wttw.com/2025/02/10/final-tally-chicago-taxpayers-spent-least-1075m-resolve-police-misconduct-lawsuits-2024> [<https://perma.cc/3GPN-4W64>].

79. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 960 (2014) ("Law enforcement officers employed by the forty-four largest jurisdictions in my study were personally responsible for just .02% of the over \$730 million paid to plaintiffs in police misconduct suits between 2006 and 2011.").

80. Swan, *supra* note 2, at 1242 ("Police officers are shielded from suits that citizens bring but are empowered to bring suits themselves.").

81. See, e.g., John F. Breads, Jr., *When Police Officers Are Sued: An Overview of Police Misconduct Litigation in Maryland*, LOC. GOV'T INS. TR. 2-4 (July 27, 2017), <https://www.lgit.org/DocumentCenter/View/1931/Litigation-Roadmap> [<https://perma.cc/24YE-HQ7L>] (outlining the many routes for bringing claims of police misconduct in Maryland).

for police misconduct: tort claims and civil-rights claims. Tort claims arise under state law. Civil-rights claims are often pursued under federal law but may also have state or local analogues.<sup>82</sup> Tort and civil-rights claims for injuries caused by police can be filed against many different entities, including officers themselves, police departments, cities, counties, states, and the federal government.<sup>83</sup>

In the context of excessive force, officers can be sued in their personal capacity for ordinary intentional torts, such as battery<sup>84</sup> and assault.<sup>85</sup> An active issue in this context is the extent to which vicarious liability should apply to officers' intentional torts.<sup>86</sup>

Civilians can also pursue claims against officers for negligent or reckless conduct, subject to state statutory requirements. In Arizona, for example, “[a]s a general rule, public entities and public employees are subject to tort liability for

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82. 18 U.S.C. § 1983 (2018); *see also* Breads, *supra* note 81 (providing an example of a state mechanism for suing police officers for rights violations: the Maryland Declaration of Rights).

83. For a useful guide to civil-rights actions under Section 1983 with respect to municipalities and officers sued in their personal capacity, see the Ninth Circuit Staff Attorney’s guide. Off. of Staff Att’ys, *Section 1983 Outline*, U.S. CT. OF APPEALS FOR THE NINTH CIR. (2024), [https://cdn.ca9.uscourts.gov/datastore/uploads/guides/section\\_1983/Section-1983-Revised-2024.pdf](https://cdn.ca9.uscourts.gov/datastore/uploads/guides/section_1983/Section-1983-Revised-2024.pdf) [https://perma.cc/6FH7-46TM]; *see also* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION (2024) (describing the scope of Section 1983 claims). For examples of state tort cases and statutes for intentional, reckless, and negligent torts (including against the state), see Breads, *supra* note 81; *infra* notes 84-97; *see also* *Officer Liability—State Law Torts and the FTCA*, FED. L. ENF’T TRAINING CTRS., <https://www.fletc.gov/officer-liability-state-law-torts-and-ftca-mp3> [https://perma.cc/C6WA-D5DC] (offering a basic overview of state tort law claims). Suits against the federal government can be more difficult. Recent Supreme Court cases have limited civil-rights claims against federal officers under *Bivens*. *See* *Ziglar v. Abbasi*, 582 U.S. 120, 140 (2017). However, claims based on the conduct of federal officials can proceed under the Federal Tort Claims Act (FTCA). The “intentional tort exception” in the FTCA has a carve out “known as the ‘law enforcement proviso’ that renders the United States potentially liable for certain intentional torts committed by federal investigative or law enforcement officers.” *See* MICHAEL D. CONTINO & ANDREAS KUERSTEN, CONG. RSCH. SERV., R45732, *THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW* 4 (2023).

84. *Quinn v. Zerkle*, 111 F.4th 281, 298 (4th Cir. 2024).

85. As the Iowa Supreme Court recently wrote in the case of a plaintiff whose spouse was arrested at gunpoint, “our courts have held that confronting another with a shotgun is substantial evidence in support of a jury’s verdict finding civil assault by a private person under state tort law.” *White v. Harkrider*, 990 N.W.2d 647, 656 (Iowa 2023). Whether officers were justified in pointing weapons at the plaintiff is a fact question to be addressed at the summary-judgment or trial stage. *Id.* at 657.

86. John C.P. Goldberg & Benjamin C. Zipursky, *Sherman v. Department of Public Safety: Institutional Responsibility for Sexual Assault*, 16 J. TORT L. 283, 294 (2023).



their negligence.”<sup>87</sup> Yet significant exceptions remain.<sup>88</sup> For instance, a civilian injured because of a police officer’s negligent driving can sue for negligence.<sup>89</sup> However, if the driver is performing a discretionary act within the scope of her public duties – say, driving to the scene of a crime in a police car with emergency lights on – the officer enjoys qualified immunity under state law.<sup>90</sup> In Arizona, however, the dreaded phrase “qualified immunity” does not have the same meaning as it does in federal civil-rights cases. Under Arizona law qualified immunity means that the plaintiff must show either recklessness or an intentional tort.<sup>91</sup> To be sure, that is not an easy burden to prove, but it does not import the unhelpful contours of federal qualified-immunity law. A heightened standard of care for discretionary acts is in some ways akin to the reason for Good Samaritan laws: society sometimes wants police officers to race to the scene of a crime, not only at a heightened risk to others but also at a heightened risk to themselves.<sup>92</sup> Another way to reframe the state-law recklessness standard for discretionary acts might be reasonable care under emergency circumstances.

The sense that civilians can rarely succeed in suits against police seems to stem from criticism of the federal qualified-immunity defense under § 1983. Nearly half of the pages devoted to civil actions for damages in *The Plaintiff Police* address qualified immunity under § 1983.<sup>93</sup> The federal qualified-immunity doctrine shifted from the subjective standard of what a *particular officer* actually believed, to an objective standard—what a *reasonable* officer would have

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87. *Spooner v. City of Phoenix*, 435 P.3d 462, 466 (Ariz. Ct. App. 2018) (“[T]he parameters of duty owed by the state will ordinarily be coextensive with those owed by others.” (quoting *Ryan v. State*, 656 P.2d 597, 598-99 (1982))).

88. *Id.*

89. *Jennings v. Agne*, 520 P.3d 665, 669 (Ariz. Ct. App. 2022).

90. *Id.* (“Driving is generally a ministerial task that precedes official duties. But driving in response to an emergency call for backup is not a ministerial task.”).

91. *Spooner*, 435 P.3d at 467-68; see also *Anderson v. Commack Fire Dist.*, 212 N.E.3d 309, 313-14 (N.Y. 2023) (noting that *privileged* conduct under the emergency-vehicle statute is subject to a recklessness standard, but that the ordinary negligence standard of care applies to *unprivileged* conduct).

92. *State Farm Mut. Auto. Ins. Co. v. Hill*, 775 A.2d 476, 477-79 (2001) (concerning an officer injured in a police chase); Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, *Behind the Badge*, PEW RSCH. (Jan. 11, 2017), <https://www.pewresearch.org/social-trends/2017/01/11/behind-the-badge> [<https://perma.cc/FZ7R-XM4E>] (finding that officers were more reluctant to stop and question people who seem suspicious for reasons related to public scrutiny and perceived hostility). For the logic of Good Samaritan laws, see *Understanding the Good Samaritan Law: Protections for Lifesavers*, CPR SELECT (Nov. 4, 2024), <https://www.mycprcertificationonline.com/blog/good-samaritan-law> [<https://perma.cc/H6DZ-K67T>].

93. Swan, *supra* note 2, at 1232-39.

believed.<sup>94</sup> Somewhere along the way, the Supreme Court tied that objective standard to whether the courts had clearly established a particular right in decided case law.<sup>95</sup> Through that link, the Court unduly narrowed the set of cases that are likely to survive qualified-immunity review.<sup>96</sup> We agree that the narrowed version of an objective test for officer notice is ill-advised. However, it does not eliminate § 1983 actions.<sup>97</sup>

Moreover, as noted, § 1983 actions are part of a larger system of torts and civil-rights actions. Attorneys prefer to file § 1983 actions because that statute provides for attorney fees and punitive damages.<sup>98</sup> But even when a § 1983 claim is unavailable, the plaintiff can still plead a range of ordinary state tort claims. Sometimes these claims also face a qualified-immunity defense.<sup>99</sup> That defense may require the plaintiff to prove that the officer engaged in gross negligence, as it does in Arizona, but it still provides the opportunity for suits, settlements, and recoveries.<sup>100</sup>

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94. *Graham v. Connor*, 490 U.S. 386, 399 n.12 (1989).
  95. *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (good faith defense); see WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 3 (2023).
  96. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 607 (2021). This rule is too often described as a complete bar to sue, even though on its own terms that is not quite correct. Human Rights Watch, for example, has an article with a title that makes the same claim. Allyson Collins, *Shielded from Justice: Police Brutality and Accountability in the United States*, HUM. RTS. WATCH 104 (June 1998) <https://www.hrw.org/reports/pdfs/u/us/usp01986.pdf> [<https://perma.cc/5J3R-56H3>] (“The amounts paid in civil lawsuit settlements and following judgments in police brutality cases varied greatly in the cities examined by Human Rights Watch. . . . Of the cities examined, Philadelphia was among those paying the largest amounts to settle civil lawsuits alleging police misconduct. Between July 1993 and November 1996, the city agreed to pay \$32.6 million in settlements and civil jury awards arising from lawsuits alleging police misconduct. . . . The *Philadelphia Inquirer* estimated in 1996 that the year’s payouts would fund 250 police officers for a year.” (internal citations omitted)). In fact, thousands of Section 1983 claims are filed every year, and only a sliver of them are dismissed on qualified-immunity grounds. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017).
  97. *Packard v. Budaj*, 86 F.4th 859, 867 (10th Cir. 2023).
  98. *Section 1983 Outline*, *supra* note 83, at 76, 90.
  99. See, for example, Arizona Tort Claims Act, ARIZ. REV. STAT. § 12-820.02 (2023), which is discussed in *Spooner v. City of Phoenix*, 435 P.3d 462 (Ariz. Ct. App. 2018).
  100. *McDonald v. Napier*, 425 P.3d 230, 238 (2018); see Ben Bradley, *Phoenix City Council Approves \$5M Settlement in Police Use-of-Force Case*, ARIZ.’S FAM. (Dec. 7, 2023), <https://www.azfamily.com/2023/12/07/phoenix-city-council-approves-5m-settlement-police-use-of-force-case> [<https://perma.cc/L4US-U98X>]; Christina Morales, *Phoenix Settles with Black Family After Police Drew Guns over Reported Doll Theft*, N.Y. TIMES (Aug. 2020), <https://www.nytimes.com/2020/08/29/us/phoenix-police-settlement.html> [<https://perma.cc/JQP5-BQG8>].

Even if claims against tortious police conduct were as difficult to bring as Professor Swan suggests they are, this would have little bearing on how to handle the claims that police file beyond providing a superficial symmetry. If patients have a difficult time winning medical-malpractice claims against doctors, for example, it would hardly remedy the problem to bar doctors from suing people who run red lights and injure them in crashes. The litigation bar that Professor Swan would impose on officers is punitive and poorly tailored to the problem of qualified immunity. It would also cause other unrelated harms.

### III. THE SOCIAL BENEFITS OF (APPROPRIATE) CIVIL RECOURSE FOR POLICE OFFICERS

Ultimately, Professor Swan's proposal rests on arguments that police tort suits are bad for society — that they exacerbate power disparities,<sup>101</sup> chill political participation,<sup>102</sup> and provide police with yet another tool to harass the constituents they are supposed to serve.<sup>103</sup>

We have little doubt that a tort system that attracts frivolous lawsuits or undertakes no discussion of officer duties in constitutionally sensitive contexts would be a disservice to society. Thus, we recognize that the optimal standard for tort claims brought by active-duty police officers may deviate to some degree from the standards applied to other plaintiffs based on the policing context. As we have previously described with respect to police injuries in the context of protests, constitutional, statutory, and contextual concerns may reshape common-law rules in particular sets of cases.<sup>104</sup> We agree, for example, that First Amendment concerns were insufficiently accounted for in the case of *Doe v. Mckesson*, in which a police officer filed a lawsuit against a BLM organizer based on acts of physical violence perpetrated by other protest participants.<sup>105</sup> But a near-complete bar to police civil suits, as Professor Swan advocates, misses the mark by a mile and is more likely to degrade police-civilian relationships than to improve them.

#### A. Tort Law (Probably) Deters, and Deterrence Is Needed

The immunity Professor Swan proposes will likely increase (or, at least, fail to deter) violence and other harmful behavior. While Professor Swan recognizes

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101. Swan, *supra* note 2, at 1186.

102. *Id.* at 1244-45.

103. *Id.* at 1253.

104. Bublick & Bambauer, *supra* note 5, at 289-97.

105. *Id.* at 297.

that civil liability can deter unlawful conduct,<sup>106</sup> she casts doubt on its role in this context. According to Professor Swan, “civil deterrents are rarely as powerful as criminal ones, and criminal deterrents are already grave in the context of harm to police.”<sup>107</sup>

We are not convinced. First, there is evidence that tort law deters harmful conduct, even in situations in which actors are not consciously thinking through the risks of lawsuits. For example, no-fault insurance led to increased auto accidents even though people have ample non-tort incentives to avoid car crashes.<sup>108</sup> And states adopting medical-malpractice damages caps experienced more birth injuries after the change in law even though doctors have many reasons to care for their patients.<sup>109</sup> Likewise, deterrence is one of the reasons that Professor Swan’s objection to expansive federal qualified-immunity rules protecting police has some heft: if police are not successfully sued, they are not deterred. The U.S. Supreme Court “considers it ‘almost axiomatic’ that civil rights damages actions deter government employees and policymakers.”<sup>110</sup>

Moreover, because of tort law’s broader scope, it can have a greater deterrent effect than does the criminal law. The scope of tort liability and the scope of criminal law differ in important respects. For example, negligence and defamation liability are not, and should not be, covered by criminal statutes to the same

<sup>106</sup>. Swan, *supra* note 2, at 1227.

<sup>107</sup>. *Id.* at 1265 (internal citation omitted).

<sup>108</sup>. Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities* 18 (Nat’l Bureau of Econ. Rsch., Working Paper No. 9602, 2003), [https://www.nber.org/system/files/working\\_papers/w9602/w9602.pdf](https://www.nber.org/system/files/working_papers/w9602/w9602.pdf) [<https://perma.cc/VHN7-Y4ZQ>].

<sup>109</sup>. Zenon Zabinski & Bernard S. Black, *The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform*, 84 J. HEALTH ECON. art. no. 102638, at 1, 11, 15 (2022) (showing that difference-in-differences analyses of five states that adopted damages caps during 2003-05 had more nonfatal patient-safety events relative to control states); Janet Currie & W. Bentley MacLeod, *First Do No Harm?: Tort Reform and Birth Outcomes* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 12478, 2006), [https://www.nber.org/system/files/working\\_papers/w12478/w12478.pdf](https://www.nber.org/system/files/working_papers/w12478/w12478.pdf) [<https://perma.cc/F5VX-Z72K>]. Overall, the empirical evidence related to the deterrent effect of damages caps and no-fault traffic-accident rules run across a range, with some finding the expected deterrent effect and some finding no effect. Benjamin Van Rooij & Megan Brownlee, *Does Tort Deter? Inconclusive Empirical Evidence About the Effect of Liability in Preventing Harmful Behavior*, in *THE CAMBRIDGE HANDBOOK OF COMPLIANCE* 311, 318 (Benjamin Van Rooij & D. Daniel Sokol eds., 2021). That said, liability rules need to be designed appropriately. If the standards for recovery are too easy to satisfy or allow for inappropriately high damage awards, liability risk can cause behavior that is both costly and unsafe. Paul H. Rubin & Joanna M. Shepherd, *Tort Reform and Accidental Death*, 50 J.L. & ECON. 221, 222 (2007).

<sup>110</sup>. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1024 (2010) (quoting *Carlson v. Green*, 446 U.S. 14, 21 (1980)).

degree. Tort law can reach a wider range of negligent actors, such as businesses and landowners, who are sensitive to liability risk. In a range of contexts related to drunk driving, for example, tort law is more effective than criminal law at reducing accidents and saving lives.<sup>111</sup> In part, this is because of tort law's influence on actors whose negligent conduct creates risk. For example, in one study, when bar owners and managers perceived a higher probability of a tort suit, they "increased the bar's level of precaution in serving obviously intoxicated adults" and its level of monitoring "to avoid serving alcoholic beverages to minors."<sup>112</sup> These tort-induced precautions lowered "motor vehicle fatality rates as well as fatality rates for other alcohol-related causes."<sup>113</sup> Tort law effected this change with fewer resources than some alternative strategies. For instance, an empirical study found that just one or two dram-shop cases (cases in which plaintiffs injured by a drunk driver sue a bar or restaurant for overserving alcohol) were as effective in inducing precautions as a ten-million-dollar increase in spending on policing.<sup>114</sup> Injuries suffered by police officers often stem from negligent acts such as the careless driving of others, and tort liability is particularly important to deterrence in the negligence realm.

As to acts of violence and other criminal behaviors, civil justice adds value by "reliev[ing] the pressures on an overloaded system of criminal justice" with respect to minor crimes.<sup>115</sup> It provides an avenue for justice that is less harsh and life-altering than a criminal prosecution. In *Mathias v. Accor Economy Lodging, Inc.*, a well-known opinion on punitive damages, Judge Richard Posner describes how tort law can take pressure off of criminal law using the example of spitting in another's face.<sup>116</sup> Although this conduct is a criminal battery, the public does not need to devote its resources to prosecuting the minor offense because it can be addressed by punitive damages in a tort action for battery.<sup>117</sup>

Professor Swan contends that the "relatively low numbers of homicides against police officers suggest that this is already an area of high deterrence."<sup>118</sup> However, she notes that police suffer 16,000 on-the-job assaults per year that

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111. See Frank A. Sloan, Emily M. Stout, Kathryn Whetten-Goldstein & Lan Liang, DRINKERS, DRIVERS, AND BARTENDERS 191 (2000).

112. *Id.*

113. Frank A. Sloan, Emily M. Stout, Lan Liang & Kathryn Whetten-Goldstein, *Liability, Risk Perceptions, and Precautions at Bars*, 43 J.L. & ECON. 473, 497 (2000).

114. *Id.* at 495.

115. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003).

116. *Id.*

117. *Id.*

118. Swan, *supra* note 2, at 1266; see also *id.* at 1232 n.278 ("The total number of officers killed in the line of duty in any given year tends to be around sixty").

lead to physical injuries.<sup>119</sup> The number of assaults themselves reached a ten-year high of 79,000 in 2023.<sup>120</sup> Swan assures readers that many of these thousands of assaults result in “relatively minor injuries.”<sup>121</sup> That calculation still leaves many thousands that do not. Also, small injuries are the ones least likely to be deterred by the criminal law.<sup>122</sup> Police may rightly be reluctant to make arrests for minor crimes given the severity of criminal punishment and the limited availability of resources to prosecute crimes. For instance, during recent protests, no criminal charges were pursued in many instances despite video evidence showing protestors deliberately throwing objects at police<sup>123</sup>—straightforward batteries actionable under state law. Professor Swan counsels that certainty of punishment in encounters with police is important to deterrence. But that certainty (or at least a high likelihood) will only be achieved with the help of the civil law.

If criminal law is the only tool police can use to deter minor or less culpable harms, they can, of course, seek resources and political buy-in to prosecute more people. But all of the concerns about power imbalances and overly harsh or unfair treatment apply with greater force to arrest and prosecution than to civil lawsuits. Indeed, one advantage of recognizing tort claims for individual officers is that police *would not* have to use their police powers for what are more trivial and essentially private harms. Judge Guido Calabresi sees the greater use of tort law as a sign of progress. As societies become more social-democratic, tort law’s liability rule “become[s] one of the dominant elements in the legal structure.”<sup>124</sup> Professor Swan’s proposal would make arrest and prosecution—the most threatening and demeaning aspects of state power—the sole means of redress for minor acts of violence, negligence, or harassment.

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119. *Id.* at 1267; see also *id.* at 1267 nn.478 & 479 (“If the number of officers assaulted but with no injury resulting is included, the total rises to 60,105 in 2020.”). Apparently of the 1,180 officers assaulted with knives only 9.7% were “injured,” which seems like a much more limited definition of injury than the tort law would have. *Id.*

120. *Assaults on Law Enforcement in the US Reached a 10-Year High in 2023*, AP NEWS (May 14, 2024), <https://apnews.com/article/law-enforcement-killings-assaults-fbi-report-c28d9f71f84a09fa05cbcc513c023c95> [<https://perma.cc/6EB8-B6A8>].

121. Swan, *supra* note 2, at 1267.

122. See Laurel Eckhouse, *Metrics Management and Bureaucratic Accountability: Evidence from Policing*, 66 AM. J. POL. SCI. 385, 397 (2022) (finding that additional pressure to arrest for minor crimes after the introduction of a quantitative arrest-monitoring system failed to result in statistically significant decreases in serious crime outside of New York City).

123. See, e.g., Sean Mahoney, ‘Beyond Unacceptable:’ Tucson Police Officers Association Reacts to Dropped Assault Charge Against Protestor, KOLD (May 2, 2024), <https://www.kold.com/2024/05/02/beyond-unacceptable-tucson-police-officers-association-reacts-dropped-assault-charge-against-protester> [<https://perma.cc/HNZ4-ZMHV>].

124. Guido Calabresi, *Toward a Unified Theory of Torts*, 1 J. TORT L. 1, 2 (2007).

Criminal prosecutions are also inadequate mechanisms for accountability because they do not provide compensation to the victim. Professor Swan suggests a workers' compensation system as an alternative. However, a no-fault compensation scheme in this context would face the same challenges that plague many others. Workers' compensation systems do not provide adequate deterrence; rather, they may cause a sizable increase in worker accidents.<sup>125</sup> Other no-fault compensation systems, such as no-fault auto insurance, also seem to cause a higher rate of injuries and fatalities.<sup>126</sup> In addition, these compensation systems alone consistently provide much lower levels of compensation than do systems combined with tort law, which is why both approaches are pursued in other contexts.<sup>127</sup> Damages for items such as loss of consortium and emotional distress are particularly neglected in compensatory schemes. Without an accountability rationale for the payouts, recipients of compensation funds appear to be welfare recipients, which undermines social acceptance and compensation levels even further.<sup>128</sup>

*B. Detering Violence Against Police Improves Political Participation and Police-Community Interactions*

Professor Swan is concerned that civil lawsuits brought by police plaintiffs, even if they deter tortious conduct against police, ultimately dampen citizens' political participation and worsen the relationship between police and the community.<sup>129</sup> The empirical support for this position is exceedingly weak. Remarkably, *The Plaintiff Police* offers no support for the key claim that "[w]hen individuals have a negative encounter with a police officer, and that police officer then goes on to sue them, the problem of political withdrawal is exacerbated."<sup>130</sup> The article anticipates a drop in political participation based on some studies

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125. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381-87 (1994).

126. Cohen & Dehejia, *supra* note 108, at 18.

127. Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L.J. 659, 663 (2003).

128. Martha T. McCluskey, Professor, No-Fault Means More Fault for Victims, Panel Commentary, Sept. 11 Victims' Compensation Fund, Session of Tort and Compensation Law and Insurance Law Sections, AALS Annual Meeting (Jan. 2003).

129. Swan, *supra* note 2, at 1188.

130. *Id.* at 1247. Similarly, the article provides only a single cite to a theoretical piece for the following empirical claim: "One might think such suits would result in *more* civic engagement and mobilization by motivating impacted people to improve the system for others. But in fact, the research suggests that the far more common response is disengagement from civic life generally." *Id.* at 1248 & n.373.

related to arrests or “inappropriate stops.”<sup>131</sup> The only “evidence” of a chilling effect created by civil lawsuits is a claim that in 1993 a Seattle police officers’ guild filed defamation claims against six civilians who had previously filed police complaints.<sup>132</sup> Although the complaints were dismissed in internal procedures (a footnote tells us), the defamation claims nevertheless are said to have caused a seventy-five percent drop in complaints over the next six months.<sup>133</sup> But a search for the baseline data of that statistic reveals that the claimed data is itself a mirage. *The Plaintiff Police* cites to a 1998 Human Rights Watch article,<sup>134</sup> which in turn cites to a political screed designed to destabilize the CIA,<sup>135</sup> which cites to (1) a Seattle Police Department Investigation audit report that provides no support whatsoever for the 75% claim, and (2) a 1995 Seattle newspaper article that contains no data at all.<sup>136</sup> The underlying question in the Washington Supreme Court—an important one—was whether absolute or qualified privilege attached to a civilian’s defamatory claim about an officer made with actual malice, by a doctor who had been given a speeding ticket.<sup>137</sup> Defamation cases, though, are already very difficult for police plaintiffs, or any public officials, to bring. They are already subject to common-law privileges and constitutional protections, as well as anti-SLAPP rules in most states.<sup>138</sup> Professor Swan also recites the facts

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131. *Id.* at 1247.

132. *Id.* at 1211.

133. *Id.* at 1244 & nn.344-45.

134. Collins, *supra* note 96.

135. Lynne Wilson, *Cops v. Citizen Review*, COVERT ACTION Q., Winter 1995-96, at 7, 7, <https://www.invisin.ru/upload/CAQ/55,%20Winter%201995-1996.pdf> [<https://perma.cc/QUW3-3UGE>]; Robert Baer, *Foreign Policy: Spy Versus Rogue Spy*, NPR (Nov. 10, 2010, 8:37 AM ET), <https://www.npr.org/2010/11/10/131211560/foreign-policy-spy-versus-rogue-spy> [<https://perma.cc/DG7G-6CBP>] (claiming the founder, Philip Agee, was “a paid traitor”).

136. Jane Hadley, *Issue of Suits Filed by Police Raised in Court*, SEATTLE POST-INTELLIGENCER, June 27, 1995, at B1. The Seattle internal investigation report has a full year of data for 1994 (634 complaints), but only three months of data for 1995 (104 complaints)—so no comparison on the data itself was possible without knowing seasonal trends. While the report said that the 1995 three-month complaint numbers were lower than the 1994 three-month complaints, it also said that 1994 was a high number compared to 1993, and that a new system of discipline and investigations and a “strict tone about misconduct” might be helping.

137. *Richmond v. Thompson*, 922 P.2d 1343, 1347 (Wash. 1996); Richard Seven, *Trooper Sues, Wins Against Motorist—Doctor Who Alleged Assault Must Pay for Defaming Officer*, SEATTLE TIMES (Nov. 18, 1993), <https://archive.seattletimes.com/archive/19931118/1732507/trooper-sues-wins-against-motorist---doctor-who-alleged-assault-must-pay-for-defaming-officer> [<https://perma.cc/953Z-TBGA>] (reporting that the jury found that the doctor had “maliciously” damaged the reputation of the officer).

138. *Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922, 923-24 (8th Cir. 2001) (fair report privilege); *York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1963) (First Amendment



of a case in which a police officer countersued the estate of a decedent that the officer had shot.<sup>139</sup> She concludes that political participation would likely decline in a situation like this, even though the article previously stated that the claim was “unusual,” “social media lit up with shock” over the case, and the civilian plaintiff was awarded over one million dollars by the jury, while they found for the officer on the countersuit but awarded him no damages.<sup>140</sup>

To be sure, there is not a great amount of relevant evidence for Professor Swan, or for us, to draw on.<sup>141</sup> But we think the prediction that claims by injured police deter political participation and community relationships is wrong for several reasons.

First, tort liability may actually encourage greater participation in political protests. There is credible research finding that people stop attending protests when a radical fringe of the protest movement engages in violence.<sup>142</sup> So, if protest attendance is a good measure of political participation, deterring protestor violence through tort liability (as well as real-time crowd control) could foster engagement. Indeed, even the protest movement that Professor Swan focuses on — the BLM movement — is well-served by effective deterrents against violence. For political organizations opposed to racism, public support declines when members engage in violence.<sup>143</sup> And the rules cannot be crafted to deter violent

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limitations); *Anti-SLAPP Legal Guide*, REPS. COMM. FOR FREEDOM PRESS (July 2019), <https://www.rcfp.org/anti-slapp-legal-guide> [<https://perma.cc/Y4FN-LBB4>].

139. Swan, *supra* note 2, at 1205.

140. *Id.* at 1205-06.

141. Professor Swan cites to an example in which a police officers’ guild sued for defamation based on a complaint of police misconduct, and citizen complaints subsequently dropped by seventy-five percent. *Id.* at 1211. She also uses evidence about reductions in political participation following police misconduct and general negative interactions. *Id.* at 1245-48.

142. Zachary C. Steinert-Threlkeld, Alexander M. Chan & Jungseock Joo, *How State and Protester Violence Affect Protest Dynamics*, 84 J. POL. 798, 807 (2022) (“When protesters engage in violence, recorded subsequent protest size is smaller ( $p < .05$ ).”); Melissa De Witte, *Violence by Protestors Can Lead the Public to Support Them Less*, *Stanford Sociologist Says*, STAN. REP. (Oct. 12, 2018), <https://news.stanford.edu/stories/2018/10/how-violent-protest-can-backfire> [<https://perma.cc/9N9K-29FW>]; ERICA CHENOWETH & MARIA J. STEPHAN, *WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT* 10 (2011). However, the literature on the impact of a violent radical fringe for the success of a movement is mixed. See Elizabeth Tompkins, *A Quantitative Reevaluation of Radical Flank Effects Within Nonviolent Campaigns*, in *RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE* 103, 108-10, 130-31 (Patrick G. Coy ed., 2015); Eric Shuman, Siward Hasan-Aslih, Martijn van Zomeren, Tamar Saguy & Eran Halperin, *Protest Movements Involving Limited Violence Can Sometimes Be Effective: Evidence from the 2020 BlackLivesMatter Protests*, 119 PROC. NAT’L ACAD. SCI., Mar. 28, 2022, at 1, 2; Devorah Manekin & Tamar Mitts, *Effective for Whom? Ethnic Identity and Nonviolent Resistance*, 116 AM. POL. SCI. REV. 161, 162 (2021).

143. Matthew Feinberg, Rob Willer & Chloe Kovacheff, *The Activist’s Dilemma: Extreme Protest Actions Reduce Popular Support for Social Movements*, 119 J. PERSONALITY SOC. PSYCH. 1086, 1086

protests for some causes but not for others. The First Amendment demands that any rules set are viewpoint-neutral.<sup>144</sup>

Moreover, if civil lawsuits can help reduce violence against police officers – at protests or elsewhere – then they can relieve the tension that plagues police-civilian encounters. This is because a decrease in assaults on police officers could reduce officers’ fears about interacting with civilians. Policing is a dangerous and demanding job: in 2019, more than 56,000 police officers in the United States were physically assaulted, and 48 were killed.<sup>145</sup> In 2023, assaults reached 79,000, and there were 60 line-of-duty felonious deaths.<sup>146</sup> These experiences lead to physical and psychological distress,<sup>147</sup> and they may make the job less attractive to the skilled workforce.<sup>148</sup> A reduction in violence – by both civilians *and* fellow officers – would help police departments recruit higher-quality, more professional employees that are necessary to modernize policing.<sup>149</sup>

Meritorious lawsuits, and even occasional frivolous lawsuits (if filed by police at rates equivalent to other plaintiffs), are unlikely to hurt police-community relationships, even if they don’t help them. And Professor Swan presents no evidence that police suits have been particularly subject to abuse. To the contrary,

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(2020); Christi Metcalfe & Justin T. Pickett, *Public Fear of Protesters and Support for Protest Policing: An Experimental Test of Two Theoretical Models*, 60 CRIMINOLOGY 60, 79 (2022).

144. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

145. *Law Enforcement Officers Killed and Assaulted, 2019: Officers Assaulted*, FED. BUREAU INVESTIGATION, <https://ucr.fbi.gov/leoka/2019/topic-pages/officers-assaulted> [<https://perma.cc/KXY3-ED5Q>]; Crim. Just. Info. Div., *Officers Feloniously Killed*, FED. BUREAU INVESTIGATION, <https://ucr.fbi.gov/leoka/2019/topic-pages/officers-feloniously-killed> [<https://perma.cc/GJ67-UM7D>].

146. *Assaults on Law Enforcement in the US Reached a 10-Year High in 2023, the FBI Says*, AP NEWS (May 14, 2024, 10:59 AM CST), <https://apnews.com/article/law-enforcement-killings-assaults-fbi-report-c28d9f71f84a09fa05cbcc513c023c95> [<https://perma.cc/R8EG-W45L>]; *Statistics on Law Enforcement Officer Deaths in the Line of Duty from January Through August 2024*, FED. BUREAU INVESTIGATION, <https://le.fbi.gov/cjis-division/cjis-link/statistics-on-law-enforcement-officer-deaths-in-the-line-of-duty-from-january-through-august-2024> [<https://perma.cc/7J22-MSJE>].

147. Isabo Goormans, Agnes Verbouw & Christophe Vandeviver, *More than Just a Scratch: A Scoping Review on Physical and Psychological Consequences of Violence Against Police*, 25 TRAUMA, VIOLENCE & ABUSE 2535, 2542-43 (2023) (finding that an indifference to the officers’ victimization from the legal system compounds the stress, particularly if there are no consequences imposed on the assailant).

148. Elissa Phillip Gentry & W. Kip Viscusi, *When Patients Are Assailants: Valuing Occupational Risks in Health Care* 14 (Vanderbilt Univ. L. Sch. Working Paper, Paper No. 23-32, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4430369](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430369) [<https://perma.cc/ZJF8-BF35>].

149. Peter Charalambous, ‘Vicious Cycle’: *Inside the Police Recruiting Crunch with Resignations on the Rise*, ABC NEWS (Apr. 6, 2023), <https://abcnews.go.com/US/police-departments-face-vicious-cycle-challenges-retaining-recruiting/story?id=98363458> [<https://perma.cc/Q96L-A3KD>].

the smattering of anecdotes Professor Swan recounts tends to show that the current litigation system is able to weed out meritless cases without additional tools.<sup>150</sup> Consider one of the examples from her article, in which an officer filed a slip-and-fall suit against a homeowner after responding to a call. Professor Swan says: “Even in less politically fraught contexts—like an officer slipping on a puddle after responding to a 911 call about a drowning child who is grievously injured—a plaintiff police suit is likely to be experienced as a difficult moment in one’s relationship with the city.”<sup>151</sup> In the end, the officer herself dismissed the claim and was also fired from her job after a public outcry over the suit.<sup>152</sup>

Although it’s not entirely clear from Professor Swan’s discussion, we doubt that this moment would be experienced as a serious blow to police-community relations if the officer did end up saving the child, regardless of the suit’s merits. Moreover, it will often be private insurance that pays for such liability. Had it been a neighbor who attempted to rescue the child, the suit could surely have been brought. But the actual outcome—dismissal and termination—suggests that significant practical hurdles to officers’ suits already exist without the addition of a complete bar to suit.

## CONCLUSION

How is it that our perception of police-initiated tort suits differs so greatly from Professor Swan’s, and from the other torts and policing scholarship? All of us need better empirical studies and greater examination of the large and varied suits that comprise officer injury claims. Yet we are also concerned that a particular social narrative is undermining both the descriptive and normative work in legal scholarship in this area.

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150. See, e.g., C.J. Ciaramella, *Defamation Lawsuit Against Afroman Filed by Ohio Cops Will Partially Proceed*, REASON (Oct. 18, 2023, 1:56 PM), <https://reason.com/2023/10/18/defamation-lawsuit-against-afroman-filed-by-ohio-cops-will-partially-proceed> [https://perma.cc/V4RH-42J5] (dismissing misappropriation claims because the question was emotional humiliation rather than the monetary value of the officers’ likeness, but permitting officers defamation claims against Afroman to continue based on Afroman’s statements that officers wanted to kill him and that they stole money from him). The plaintiff in that case was represented by the ACLU. *Id.*

151. Swan, *supra* note 2, at 1248.

152. Staff Writer, *Police Officer Sues Grief-Stricken Family*, COLUMBUS DISPATCH (Oct. 11, 2007), <https://www.dispatch.com/story/news/2007/10/11/police-officer-sues-griefstricken/23798660007> [https://perma.cc/66S4-UPXF]. Rene Stutzman, *Chief Fires Officer Who Sued Families over Injury*, ORLANDO SENTINEL (Oct. 12, 2018, 11:12 PM EDT), <https://www.orlandosentinel.com/2007/12/05/chief-fires-officer-who-sued-family-over-injuries> [https://perma.cc/5R6S-TLFF].

*The Plaintiff Police* creates a dichotomy between “raced, marginalized, and gendered” civilian defendants and powerful “enforcer” police plaintiffs. This binary assumption is increasingly inaccurate. Trends in policing undermine an identity-based approach to categories of civilians and police. American police forces are increasingly diverse.<sup>153</sup> A Pew Center survey found that in 2013 (the most recent year for which they had data), 27% of officers in America were racial or ethnic minorities. Black Americans were represented in proportion to their share of the population (about 12%), and Hispanic Americans constituted 12% of the police force.<sup>154</sup> Modern police forces are not only racially diverse but also recruited from working and lower-middle class backgrounds.<sup>155</sup> In many major cities, police forces are broadly representative of the communities they serve.<sup>156</sup>

Further, the dichotomous framing portrays police officers and communities of color as antagonists in a longstanding group conflict.<sup>157</sup> To be sure, this dynamic is real and deserves continued attention.<sup>158</sup> However, the zero-sum

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153. Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, *Inside America's Police Departments*, PEW RSCH. CTR. (Jan. 11, 2017), <https://www.pewresearch.org/social-trends/2017/01/11/inside-americas-police-departments> [<https://perma.cc/QR7U-EWXA>].

154. *Id.*

155. Harlan Hahn, *A Profile of Urban Police*, 36 LAW & CONTEMP. PROBS. 449, 449 (1971) (“[S]tudies have revealed that most men entering police ranks emerge from working and lower middle-class backgrounds. Two separate surveys of the graduates of the New York City Police Academy, for example, found that nearly eighty per cent of the fathers of policemen were employed as laborers or service workers.”); see also *Police Pay Gap: Many of America's Finest Struggle with Poverty Wages*, NBC NEWS (Oct. 26, 2014), <https://www.nbcnews.com/feature/inplain-sight/police-pay-gap-many-americas-finest-struggle-poverty-wages-n232701> [<https://perma.cc/ZHW5-HCCF>] (noting that some police officers earn middle class wages and others poverty wages).

156. See Lauren Leatherby & Richard A. Oppel, Jr., *Which Police Departments Are as Diverse as Their Communities?*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/interactive/2020/09/23/us/bureau-justice-statistics-race.html> [<https://perma.cc/VJ3C-5F9U>]. Though female officers are fewer in number, approximately thirteen percent of officers identify as female. Veera Korhonene, *Gender Distribution of Full-Time U.S. Law Enforcement Employees in 2023*, STATISTA (Nov. 21, 2024), <https://www.statista.com/statistics/195324/gender-distribution-of-full-time-law-enforcement-employees-in-the-us> [<https://perma.cc/S2LX-RFKK>].

157. Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. CHI. LEGAL F. 407, 418 (“Second, the racial identity of those with whom police most engage accentuates group conflict. Here, the argument is less that group conflict pits white against black, and more that group conflict is understood as police officers versus black and brown civilians.”).

158. Racially disparate rates of traffic stops, arrests, and enforcement often cannot be explained entirely by differences in the rates of crime commission, suggesting discrimination or implicit bias continues to mar modern policing. See Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697, 607 (2012) (describing the selective enforcement of criminal trespass by race or public housing status); Report of Jeffrey Fagan, Ph.D. at 52-55, *Floyd v. New York*, 302 F.R.D. 69 (S.D.N.Y. 2014) (No. 08 Civ. 01034) (describing bias in the use of “high crime area” justifications for stops after

framing—that deprivations for police are good for communities of color—creates more layers of injustice. For example, twenty-nine percent of the Capitol Police Force is Black.<sup>159</sup> A rule that would block suit and recovery by the 140 Capitol Police officers who were beaten, sprayed with chemical irritants, crushed by the crowd, assaulted, and taunted during the January 6th riots would not protect “raced, marginalized and gendered people” — rather, the bar to suit would compound those officers’ injuries.

The theory of an accountability mismatch in which “police can sue with relative ease” and injured civilians can rarely obtain civil remedies for police abuses is neither supported nor sound.<sup>160</sup> Claims of police immunity from tort and civil-rights claims have been exaggerated to almost mythical proportions. Numerous causes of action, thousands of claims, and hundreds of millions of dollars paid in settlements and judgments (in New York City in 2024 alone) are dismissed as equivalent to *no* cause of action or recovery at all.<sup>161</sup> We have no doubt that more and different legal remedies to police violence are appropriate, and that some court doctrines are flawed. But it is time to think about the political, analytical, and rhetorical effects of academics’ deliberate blindness to the array of civil remedies that can be, and are, frequently and successfully deployed by individuals in cases of police misconduct.

In one section of her article, Professor Swan thoughtfully articulates officers’ interests in access to courts, compensation, and deterrence.<sup>162</sup> However, she never incorporates those interests into the rule she proposes.<sup>163</sup> How have we gotten to a place in which police forces have been demonized to such an extent that it can be argued on the pages of this prestigious *Journal* that even a deliberate attempt to kill an officer might merit no civil legal remedy for its human

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controlling for crime commission); Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1095 (2005) (finding evidence of racial bias in state troopers’ decisions to search stopped vehicles after controlling for law violation rates).

159. Joshua Kaplan & Joaquin Sapien, “No One Took Us Seriously”: Black Cops Warned About Racist Capitol Police Officers for Years, PROPUBLICA (Jan. 14, 2021, 5:30 AM EST), <https://www.propublica.org/article/no-one-took-us-seriously-black-cops-warned-about-racist-capitol-police-officers-for-years> [<https://perma.cc/BMM5-CZUQ>].

160. Swan, *supra* note 2, at 1182.

161. *Mullenix v. Luna*, 577 U.S. 7, 25-26 (2015) (Sotomayor, J., dissenting) (arguing that qualified immunity is “sanctioning a ‘shoot first, think later’ approach to policing”); Joanna Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 314 (2020) (describing the cross-ideological consensus that qualified immunity causes Section 1983 to “fail[] to provide accountability for official wrongdoing”).

162. Swan, *supra* note 2, at 1224-27.

163. *Id.* at 1248-50.

victim?<sup>164</sup> In her discussion of why police should be singled out for adverse treatment in tort law, Professor Swan quotes a memorable comment from an online forum: “[T]here’s a reason nobody’s ever made a song called f\*\*\* the fire department.”<sup>165</sup> The quote is a reminder of the unique power and abuses of American police forces, and a validation of the hostility against them. However, police officers are not merely the historical power and abuses of “the police” writ large. They are also human workers in dangerous jobs who are entitled to others’ care for their safety and well-being. There’s a reason that no court has yet made “f\*\*\* the police” into a tort doctrine. We hope they never will.

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164. *Id.* at 1248-49, 1248 n.373, 1260, 1263-65 (recognizing that “the amount an officer can receive through workers’ compensation and other administrative systems will likely be significantly less than they theoretically might receive if successful in a police plaintiff lawsuit” and that “many plaintiff police suits involve intentional acts”; yet arguing that “[r]eviving the professional-rescuer rule, and potentially making it even more robust vis-à-vis the police by including intentional acts within its purview, is an easy lever with which to begin the process of limiting plaintiff police claims”).

165. *Id.* at 1260.