The Word of the Police Against the Silence of the Dead: Race, Gender, Mental Health, and Excessive Force

Zalondria Graham

Abstract

It is no secret that there is an issue of police brutality in marginalized communities. While there are many suggestions on how to resolve it—including police training, erasure, or police accountability committees—this Note turns to the role of the court. The court has the power to classify or excuse specific police conduct as unreasonable. Traditionally the court reviews excessive force by looking at the severity of the crime, the immediate threat to the officers or others, if there was resistance to an arrest or flight, and may consider additional factors. It would then balance those factors against the type of forced used. Currently many case outcomes show a lack of consideration for unique variables, causing the excusing of police violence, especially against those living with mental illness. In this note, the author argues the current doctrine of excessive force analysis leaves room for the use of an intersectional lens. An intersectional perspective would allow the court to incorporate factors that considerably address police violence on multi-vulnerable persons, such as people of color living with mental illness. This leaves more room for reprimanding police brutality instead of excusing it.

During the editing of this note, the discussion about ending qualified immunity increased in the midst of nationwide protests against police brutality. The author of this Note supports ending qualified immunity with the goal of no longer shielding law enforcement from the consequences of

their bad behavior. In the alternative, this Note suggests that the use of an intersectional lens can also provide a solution by ending the way the court currently analyzes excessive force cases.

About the Author

Zalondria Graham is a graduate of UCLA Law Class of 2020, where she specialized in the Critical Race Studies Program and the David J. Epstein Program in Public Interest Law and Policy. During her time in law school, she became an enthusiastic scholar of critical race theory and Kimberlé Williams Crenshaw's theoretical framework, intersectionality. Her passion for helping others not only pushed her to explore theory that allowed her to critically analyze legal concepts and doctrine, but led her on a journey of expanding her awareness on the variety of ways the legal system might affect various groups.

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Introduction

I spent Christmas in a mental health facility. Just a few days before, I had no idea how it felt to see a loved one spiraling from their norm. Our days together felt normal, so it took me a while to ask for help. Yes, I noticed them skipping subjects and topics, but I rationalized their behavior — after all, many people do that, even I do sometimes. I became more concerned when they became irritable towards anyone for any little thing, but I justified this behavior as stress.

The biggest red flag came when I no longer felt safe in the passenger seat of their car due to erratic driving. I contacted their mom, who informed me that they were currently experiencing a mental health break. She met us, and we worked to try to convince them to get a mental health evaluation. When we got them to the emergency doors of the hospital, they refused to go in. Their mom had been through this many times before, and she knew she needed police involvement to help her child. Standing outside the hospital emergency room, I watched as two squad cars with four police officers came in response to her call. As the officers approached, two placed their hands on the guns in their holsters. The

mom quickly intervened to explain the situation. She informed them that her child only had keys in their pockets and that we only needed assistance with getting a mental health evaluation.

Through the interaction, I remained silent. I was angry. Why would the police walk up with their hands on their guns when no one was doing anything threatening? My loved one had a calm conversation with the police and agreed to the evaluation. I was shocked. Even while having a severe mental health episode, my loved one's priority was not having a negative interaction with the police. It turns out that my loved one lives with Bipolar II Disorder. While they got the help they needed, many others do not, and I realize that this moment could have taken a turn for the worse.

This personal experience allowed me to reflect on mental illness and various other intersections that may impact police interaction with minorities. I realized that during the situation, I never thought to call the police. Even when my loved one's mom had to call for police assistance, she warned me first as if to prepare me for the interaction. My only thought was that interactions with the police could lead to their death. With my loved one unwilling to walk through the emergency doors with us, however, police involvement was necessary to get them the evaluation they needed. These realizations encouraged me to further explore the issue of police interactions with Black people with mental illness. In this process, I came across the death of Kayla Moore.

On February 12, 2013, the death of Kayla Moore became another tragic case where "the word of the police was against the silence of the

dead."[1] Ms. Moore was a Black transgender woman diagnosed with schizophrenia.[2] Berkeley police came to Ms. Moore's home in response to a call for help from her roommate because Ms. Moore was experiencing a mental health episode.[3] Instead of focusing on her mental health emergency, the police attempted to arrest Ms. Moore based on a warrant for a man 20 years her senior, who shared the name Ms. Moore had at birth.[4] Several officers overpowered Ms. Moore and suffocated her in

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1. Moore v. City of Berkeley, No. C14-00669-CRB, 2016 WL 6024530 (N.D. Cal. Oct. 14, 2016).

2. Id. See also Andrea Ritchie, Mental Illness is Not a Capital Crime: On the Disproportionate Impact of Police Violence on Women of Color (2017), https://lithub.com/mental-illness-is-not-a-capital-crime (illuminating the brutalization of Black Women who live or are perceived to live with mental illness by police); Schizophrenia, Nat'l Inst. Mental Health, https://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml (last visited April 22, 2019) (defining schizophrenia as a chronic and severe mental disorder that affects how a person thinks, feels, and behaves).

3. Moore, 2016 WL 6024530, at 6.

4. Id.; See also Kimberlé Williams Crenshaw & Andrea J. Ritchie, Say Her Name: Resisting Police Brutality Against Black Women, African Am. Policy Forum (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf (bringing attention to the importance of being inclusive on the issue of police violence, specifically how Black women are absent from the discussion or narrative for those that

the process.[5] Noticing that something was wrong, Berkeley Police failed to give adequate lifesaving treatment (cardio pulmonary resuscitation, or CPR) to Moore because they did not have a device to keep her lips from touching theirs.[6] To add insult to injury, the officers referred to Ms. Moore using transgender slurs, and her body was left exposed throughout and after the police violence.[7] In the subsequent court case against the officers, the court ruled that the force used by the officers against Ms. Moore was reasonable, which means the court felt the officers' actions were just.[8]

The murder of people of color at the hands of the police is a popular topic in today's media and is primarily publicized by movements such as Black Lives Matter and Say Her Name.[9] Another alarming aspect of police killings is the death of people with mental illnesses.[10] It is not

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experience police violence).

5. Moore, 2016 WL 6024530, at 6.

6. RITCHIE, supra note 2.

7. Id.

8. Moore, 2016 WL 6024530, at 7.

9. See generally BLACK LIVES MATTER, https://blacklivesmatter.com (last visited on June 20, 2020). See also Crenshaw & Ritchie, supra note 4.

10. See People with Untreated Mental Illness 16 Times more Likely to Be Killed by Law Enforcement, TREATMENT ADVOCACY CTR., https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness/2976-people-with-untreated-mental-illness-16-times-more-likely-to-be-killed-by-law-enforcement-.

uncommon for the police to receive a call requesting their assistance to help someone experiencing a mental health episode. Sadly, it is also not uncommon to hear stories of how these encounters resulted in the death of the person needing help.

Another popular subtopic of police violence is police interactions with the queer and trans community.[11] Given the prevalence of police violence towards people of color, unique issues arise when police have interactions with people who have multiple overlapping identities. There are intersectional issues[12] surrounding police encounters with individuals who identify on the margins in multiple ways — for example a person

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11. See Christy Mallory, Amira Hasenbush & Brad Sears, Williams Inst., Discrimination and Harassment by Law Enforcement Officers in the LGBT Community (2015) (discussing the pervasive problem of discrimination and harassment by law enforcement based on sexual orientation and gender identity). See generally Andrea Ritchie, et al., Queer (In) Justice: The Criminalization of LGBT People in the United States (Michael Bronski ed., Beacon Press 2011).

12. Intersectionality centers the experience of marginalized communities to contrast the community's multidimensional experience with the single-axis analysis that distorts that experience. It highlights the erased experiences and brings attention to the limiting inquiry into the other-wise privileged members of the group. See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. (1989).

who is Black, a woman, queer, and lives with a mental illness possesses multiple overlapping identities. Professor Camille Nelson highlights these intersectional issues with a survey of civil cases against police officers. The cases show that police exercise their discretion with the mentally ill in markedly different ways depending on the person's race.[13]

While there are many issues that stem from police interactions with people who live with mental illness, this Note focuses specifically on police interactions when the officers are aware they are facing an individual in a mental health crisis. In California, these calls are informally referred to as 5150 calls, which is named after the section of law that governs them.[14] While many suggest police training as a solution, this

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13. Camille A. Nelson, Racializing Disability, Disabling Race: Policing Race and Mental Status, 15 Berkeley J. Crim. L. 4 (2010).

14. See Cal. Welfare & Inst. Code, § 5150 (a).

> When a person, as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, professional person in charge of a facility designated by the county for evaluation and treatment, member of the attending staff, as defined by regulation, of a facility designated by the county for evaluation and treatment, designated members of a mobile crisis team, or professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention, or placement for evaluation and treatment in a facility designated by the county for evaluation and treatment

Note proposes a different solution that addresses the legal doctrine that ultimately governs these situations. Application of this legal doctrine has the power to excuse or condemn police killings of persons needing psychiatric help. An intersectional lens is necessary when analyzing whether police conduct went too far because it allows for a more comprehensive understanding of all the variables involved. This Note asks the judicial system to address an intersectional issue, the apparent disregard for multi-vulnerable people of color with mental illness killed by police, by reviewing the factors set out in Graham v. Connor with an intersectional lens. Graham v. Connor is the existing Supreme Court case that provides the legal doctrine for analyzing these situations.

Part I provides the history surrounding why and how police became the first responders to individuals experiencing mental health crises. It also overviews the problem of police violence towards individuals with marginalized identities. Additionally, it discusses police use of force on people of color and reveals how mental illness, gender identity, and gender expression compound the issue. Part II introduces the current legal doctrine applicable to these situations. This Part explains how courts currently analyze police use of force on people of color with mental

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> and approved by the State Department of Health Care Services. At a minimum, assessment, as defined in Section 5150.4, and evaluation, as defined in subdivision (a) of Section 5008, shall be conducted and provided on an ongoing basis. Crisis intervention, as defined in subdivision (e) of Section 5008, may be provided concurrently with assessment, evaluation, or any other service.

illness and why the current doctrine does not address the issues highlighted in this Note. Part III considers how the doctrine leaves room for the use of an intersectional lens that would allow for a more appropriate and comprehensive evaluation of the totality of the circumstances. Finally, Part IV presents other helpful proposals to address the problem of police brutality that do not focus solely on the judiciary.

I. Background

A. Police as First Responders

The prejudice at play in police interactions with multi-vulnerable persons with mental illness is complicated by the fact that police officers serve as first responders to mental health issues. Some say that this problem of police being the first responders started with the federal government taking on the fiscal responsibility of addressing mental health due to increased interactions between police and the mentally ill.[15] The federal government's involvement with mental health evolved from the work of Robert Felix and his push for a federal mental health plan that started with the passage of the National Mental Health Act, which became law on July 3, 1946.[16] The problem appears to derive from a

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15. See E. Fuller Torrey, American Psychosis: How the Federal Government Destroyed the Mental Illness Treatment System, (2014) (discussing the consequences of the shift from state control of addressing mental health to the federal government).

16. See Torrey, supra note 15, at 24.

misunderstanding of mental illness or a lack of interest in exploring the relevant issues.[17]

Research shows that, since 1956, 400,000 state hospital beds closed.[18] Increased costs of mental health care, advances in medical care, and goals of federal control of mental health led to nationwide deinstitutionalization or the closing of psychiatric hospitals.[19] There was a failure to replace those psychiatric hospitals with sufficient numbers of community-based facilities and follow-up services.[20] Advances in medication made it possible for those with severe mental illness to live safely in their communities, but there was inadequate access to the services

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17. See id. at 58 ("The mental health centers legislation passed by Congress was fatally flawed. It encouraged the closing of state mental hospitals without any realistic plan regarding what would happen to the discharged patients, especially those who refused to take medication they needed to remain well. It included no plan for the future funding of the mental health centers. It focused resources on prevention when nobody understood enough about mental illness to know how to prevent them.").

18. See id. at 76.

19. See Melissa Schaefer Morabito & Kelly M. Socia, Is Dangerousness a Myth? Injuries and Police Encounters with People with Mental Illness, 14 Criminology & Pub. Pol'y. 253 (2015) (challenging the stigma of people with illness as dangerous during police interactions). See also Torrey, supra note 15.

20. Doris A. Fuller et al., Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters 5 (2015).

and resources to meet the needs of those that lived in their communities with mental illness.[21]

U.S leaders also played a role in deinstitutionalization and the movement toward police becoming first responders. During his time in office, President John F. Kennedy showed concern for mental illness as a social issue but not as a medical one, as revealed by his support of Robert Felix's community health centers and by his signing of the mental health bill on October 31, 1963.[22] The goals of community health centers were the prevention of new cases of mental illness and the treatment of existing cases.[23] Federal expenditures to state-sponsored mental health care slowed to encourage the creation and funding of these centers.[24]

During President Nixon's term from 1970 to 1974, the prejudice towards mental health spending was evident through the elimination of mental health beds, the lapsing of Kennedy's Community Mental Health Center program, and the push for the states to assume responsibility for the program.[25] By 1981, during the term of President Ronald Reagan, the Community Mental Health Center program died when the funds to support the program were block granted to the states.[26] Over the course of Felix's mental health plan, states became less involved in mental

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21. Id.

22. See TORREY, supra note 15, at 55.

23. See id. at 47.

24. See id. at 45–59.

25. See id. at 75–80.

26. Id. at 87–88.

health programming. The focus moved away from psychoses and the hospitalization of people with mental illness. Authority and responsibility for the mental illness treatment system disappeared. Plans for aftercare were nonexistent.[27] In fact, in states like California, it became more difficult to involuntary commit and hold people with mental illness.[28]

While one can argue that the closing of mental hospitals initiated police contact with the mentally ill, the failure to continue to provide adequate resources is a point that, mental health expert, Dr. E Fuller Torrey emphasizes when speaking on the problem of how police became first responders.[29] Without adequate resources, the most common settings for addressing the need of those living with mental illness became hospital emergency rooms and the criminal justice system.[30] In the 1970s, the estimates of seriously mentally ill persons in jail were around 5 percent.[31] By the 1980s, the number had risen to around 10 percent, and by the

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27. Id. at 87–93.

28. Id. at 96 ("California passed the landmark Lanterman-Petris-Short (LPS) Act, which virtually abolished involuntary hospitalization except in extreme cases. Thus, by the early 1970s California had moved most mentally ill patients out of its state hospitals and, by passing LPS, had made it very difficult to get them back into a hospital if they relapsed and needed additional care.").

29. See TORREY, supra note 15.

30. FULLER ET AL., supra note 20, at 5.

31. TORREY, supra note 15, at 117.

1990s it increased to around 15 percent.[32] From 2007 to 2012, the estimates rose again varying between 20 and 40 percent.[33]

Not only did the number of mentally ill persons in jails and prisons rise, but calls for police to transport mentally ill persons to hospitals also increased.[34] Thus, with no alternative, law enforcement officials became the first responders to mental health-related calls. Studies show that 10 to 20 percent of law enforcement calls involve a mental health issue.[35] Moreover, the increase of officers on the streets through community policing parallels the increase in hospital discharges of people with mental illnesses, revealing further variables that likely contributed to increasing police contact with the mentally ill.[36] In conclusion, history and policies at the federal and state level have led to police being first responders when

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32. Id.

33. Id.

34. See id. at 121 ("In North Carolina, where state law makes county sheriffs responsible for such transport, the shortage of beds caused by the closing of state psychiatric hospitals has put an intolerable burden on the sheriffs. In 2010, 100 sheriff's departments 'reported more than 32,000 trips last year to transport psychiatric patients for involuntary commitments . . . . Fourteen sheriff's offices reported having a deputy wait with a patient for five days or more until a bed in a psychiatric unit came open.'").

35. FULLER ET AL., supra note 20, at 5.

36. Id.

an individual is experiencing a mental health crisis — a problematic fact that has led to countless lawsuits and the loss of many lives."

B. Mental Illness Compounds the Issue of Police Interaction on Vulnerable Communities

The fact that police are first responders when an individual is experiencing a mental health crisis only compounds the issue of police violence on marginalized communities. When it comes to subduing or interacting with apprehending individuals, police have discretion in the type of approach they employ. However, this discretion usually becomes a problem when bias comes into play. Police use of force on racial minorities is something that is highlighted in today's media,[37] and more importantly, something highlighted by critical race scholars, such as Devon

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37. See Sheriff: Orange County Deputy Used Excessive Force, FOX35Orlando (Apr. 15, 2019, 11:15 PM), http://www.fox35orlando.com/news/local-news/sheriff-orange-county-deputy-used-excessive-force (announcing the suspension of Deputy Ayler Cruz after tasing a Black man who asked why he had to follow the deputy's instructions to get on the ground). See also Andrew Fan, Chicago Police Are 14 Times More Likely to Use Force Against Young Black Men Than Against Whites, Intercept (Aug. 16, 2018, 6:02 AM), https://theintercept.com/2018/08/16/chicago-police-misconduct-racial-disparity; Sirry Alang, How to Dismantle Racism and Prevent Police Brutality, USA Today (May 12, 2017, 11:25 AM), https://www.usatoday.com/story/opinion/policing/2017/05/12/how-dismantle-racism-and-prevent-police-brutality/101481438.

Carbado,[38] Andrea J. Ritchie,[39] and Kimberlé Crenshaw.[40] Police use of force on racial minorities is also the focus of many social justice rights organizations.[41] On the other hand, many disability rights scholars and activists bring attention to the issue of police violence towards individuals

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38. See Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 CAL. L. REV. 125, 129 (2017) ("Because every encounter police officers have with African Americans is a potential killing field, it is crucial that we understand how Fourth Amendment law effectively 'pushes' police officers to target African Americans and 'pulls' African Americans into contact with the police.").

39. See ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 2 (2017) ("Black women, long the backbone of efforts to resist state violence, are insisting that we will no longer only play the role of aggrieved mother, girlfriend, partner, sister, daughter, or invisible organizer, and demanding recognition that we, too, are targets of police violence.").

40. See Crenshaw & Ritchie, supra note 4.

41. See BLACK LIVES MATTER, supra note 9. See also ANTI POLICE TERROR PROJECT, https://www.antipoliceterrorproject.org/ ("seeking to build a replicable and sustainable model to eradicate police terror in communities of color"); CHICAGO TORTURE JUSTICE MEMORIALS, https://chicagotorture.org/ (aiming "to honor and to seek justice for the survivors of Chicago police torture and the African American communities affected by the torture.").

with mental illness.[42] Even without the benefit of complete data, independent news databases that analyze fatal police encounters estimate the involvement of mental illness in at least 25 percent of the deadly encounters.[43] Discussion of mental health also includes a recognition of police interactions with houseless persons and communities because a large percentage of these individuals live with mental health issues.[44]

All these issues are important, and together they prove there is a need for more recognition of the unique experience of multi-marginalized individuals who are victims of police violence. Many activists, scholars,

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42. See People with Untreated Mental Illness 16 Times more Likely to Be Killed by Law Enforcement, Treatment Advocacy Ctr., https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness/2976-people-with-untreated-mental-illness-16-times-more-likely-to-be-killed-by-law-enforcement-. See also, Fuller et al., supra note 20, at 12 (explaining that "the death rate for individuals with serious mental illness killed during law enforcement interactions is . . . 16 times greater than the death rate for those without such a condition"); Nelson, supra note 13.

43. Fuller et al., supra note 20 at 5.

44. See Carly Masenthin, Peace of Mind: Improving Conflict Between Law Enforcement and the Mentally Ill Homeless While Exploring Sustainable Community Solutions for Care, 27 Kan. J. L.J. L.J. L.J.L. & Pub. Pol'y. 103, 106 (2017) (advocating for better police training on mental illness, and de-escalation techniques, as well as more community resources to address homelessness).

and social justice organizations already bring attention to the intersectionality issue present in police violence. For example, the Say Her Name campaign centers on the experience of Black women during police interactions while also acknowledging how gender identity, sexual identity, and mental illness, among other factors, contribute to the problem.[45] Black Lives Matter also works to affirm the lives of all Black lives marginalized in various ways, such as Black lives along the gender spectrum, those marginalized within Black liberation movements, and those living with disabilities, to name a few.[46] This Note follows their lead by pointing out how mental illness compounds the issue of police violence towards those who are both racial and gender minorities.[47] The unique issues surrounding these interactions are further reasons why the excessive

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45. See generally Crenshaw, supra note 4 (honoring "the intention of the #BlackLivesMatter movement to lift up the intrinsic value of all Black lives by serving as a resource to answer the increasingly persistent call for attention to Black women killed by police.").

46. RITCHIE, supra note 38 (quoting Black Lives Matter co-founder, Alicia Garza, "Black Lives Matter affirms the lives of Black queer and trans folks, disabled folks, Black-undocumented folks, folks with records, women and all Black lives along the gender spectrum. It centers those that have been marginalized within Black liberation movements").

47. See Crenshaw, supra note 4 (detailing the stories of Black women who died due to police violence, including the stories of Black women diagnosed with mental illness and where police were aware of their mental health status before they came in contact with the women).

force analysis in the courts should do more to address police violence when it involves multi-marginalized individuals.

Camille Nelson's research adds significantly to the conversation about unique experiences with police violence by explaining the interaction between race, mental illness, and police use of force. She explains that "race and disability morph into one another to construct the perfect criminal who is perceived as requiring the use of disciplinary force and punishment."[48] Nelson's statement derives from her analysis of multiple cases of police interactions with mentally ill or suspected mentally disturbed individuals that resulted in vastly different uses of police discretion. She articulates police discretion into three different modalities in how police often deal with the mentally ill—medical, criminal, and punitive.[49]

The three modalities represent the progression of police use of force during interactions with the mentally ill. The police typically start with a focus on getting the individual medical attention, the next phase is to focus on containment, and the final phase is to focus on immediate physical punishment.[50] The results of Camille Nelson's case analysis revealed that the police had a higher tendency to deescalate with the goal of

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48. Camille A. Nelson, Frontlines: Policing at the Nexus of Race and Mental Health, 43 FORDHAM URB. L.J. 615, 618 (2016) (discussing the intersection of race, mental health, and policing through exploration of "the interacting constitutive dynamics at work in the construction of the criminal subject.").

49. Nelson, supra note 13, at 4–5.

50. Id. at 5–6.

medical attention for whites even when whites are a danger to themselves and others.[51] For example, Nelson refers to the story of a white individual, Clarence Coghlan. Officers came to Mr. Coghlan's home after his family requested that the Sheriff's office serve a lunacy writ on him to commit him to a psychiatric hospital.[52] Mr. Coghlan owned weapons, and when the police arrived, he threatened to shoot if they did not leave, and then immediately fired shots at the officers.[53] The officers did not fire back, retreated, waited for backup, and attempted to express their desire to help over a bullhorn.[54] It was not until Mr. Coghlan came out of the home with rifles, ignored the police pleading to talk, and began firing at the officers, that the officers responded with deadly force.[55]

Nelson's research also showed an immediate tendency towards punitive modality and escalation when dealing with people of color, even when these individuals showed no physical aggression.[56] For example, Marshall Marbly was an African-American male who was living in his car. Police responded to calls that Mr. Marbly was standing in the street, acting as if he was shooting at cars.[57] He was allegedly known

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51. Id. at 21–29.

52. Coghlan v. Phillips, 447 F. Supp. 21, 23–24 (S.D. Miss. 1977).

53. Id. at 25.

54. Id. at 25–26.

55. Id.; See also Nelson, supra note 12, at 26.

56. Nelson, supra note 12, at 37–54.

57. Ali v. City of Louisville, 395 F. Supp. 2d 527, 529–30 (W.D. Ky. 2005).

to be mentally ill by several officers.[58] The police arrived on the scene, drew their guns, and demanded Mr. Marbly out of his car while smashing the windows and deflating his tires. They did this even though they were under the impression that Mr. Marbly only had a cane and a flashlight.[59] Mr. Marbly came out of the back window and struck an officer with his cane.[60] That resulted in the deployment of pepper balls, two officers initially shooting, then more officers shooting, all while Mr. Marbly was still inside the car.[61] Professor Nelson's research shows with Mr. Coghlan, a white male, police are capable of practicing patience and restraint until extreme actions were directed towards them. Yet, with Mr. Marbly, an African-American male, patience was practically nonexistent.

While Nelson's work brings attention to the issue of police interactions with people of color with mental illness, the Say Her Name campaign helps to sharpen the importance of gender when discussing this issue. The campaign does significant work to highlight the experience of Black women and bring more attention to the fact that Black women are also dying of police violence.[62] While there are scores of

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58. Id. at 530.

59. Id.

60. See id. at 534.

61. See id. at 531–32.

62. See generally Crenshaw, supra note 4, at 1 ("The resurgent racial justice movement in the United States has developed a clear frame to understand the police killings of Black men and boys, theorizing how they are systematically criminalized and feared across disparate class

Black women falling victim to racialized police violence, the campaign also brings awareness to the story of Black women diagnosed with mental illness and their encounters with the police. Kayla Moore's story was one of the stories highlighted. Unfortunately, Ms. Moore's story is one of many that the campaign highlights to shed more light on the problem of police use of force.

The Say Her Name campaign highlights countless narratives that depict the problem of police jumping to the extreme when they could have taken more precautions. It also highlights the assumption of danger when police decide to use force, and the over-calculation of the amount of force needed when police come in contact with particular persons. A story featured by the campaign that exemplifies these problems is the story of Michelle Cusseaux, who died at her home after police arrived to take her to a mental health facility.[63] Ms. Cusseaux was in the middle of changing a lock and was using a hammer to complete the task.[64] The police arrived to take Ms. Cusseaux to the mental health facility, but she refused to let them in.[65] The police broke through the screen door, saw

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backgrounds and irrespective of circumstance. Yet Black women who are profiled, beaten, sexually assaulted, and killed by law enforcement officials are conspicuously absent from this frame even when their experiences are identical.").

63. Crenshaw, supra note 4, at 16.

64. Id.

65. Id.

Ms. Cusseaux with the hammer in hand, and shot her in the heart.[66] The officer admitted that while Ms. Cusseaux said nothing threatening, he shot her because she had anger in her face as if she was going to hit someone with the hammer.[67] Assumptions, like the officer's, put more lives at risk by causing officers to jump to conclusions, instead of practicing patience to dispel their initial beliefs.

Another account depicts the story of Shereese Francis. Ms. Francis lived with schizophrenia and was emotionally distraught, leading her family to call for an ambulance.[68] Four police officers arrived at her home and tried to convince Ms. Francis to go to the hospital, but she refused.[69] The police claimed she was uncooperative and lunged at them. In response, the officers pinned Ms. Francis down, and attempted to handcuff her.[70] Ms. Francis stopped breathing during the officer's attempt to pin her down and soon after, a medical official pronounced her dead.[71] Pinning her down was too extreme of a response, especially knowing that Ms. Francis was in an erratic state upon arrival.

The work of both Professor Nelson and the Say Her Name campaign highlights the importance of thinking intersectionally about police violence. Intersectionality is paramount to think about and disrupt the

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66. Id.

67. Id.

68. Crenshaw, supra note 4, at 17.

69. Id.

70. Id.

71. Id.

epidemic of police violence taking place. Campaigns like Say Her Name advocate that a comprehensive approach reveals that the epidemic of police violence across the country is about how police relations reinforce the structural marginality of all members of Black communities in a myriad of ways.[72] Intersectionality is a framework for mapping how particular systems of oppression may uniquely impact different members within the community.[73] An intersectional approach is necessary because it highlights the disproportional treatment of multi-vulnerable communities.[74] This Note argues that the Court does not give attention to the unique ways specific individuals may experience police encounters.[75] The way the Court analyzed the use of force in Moore's case shows how

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72. Id. at 6.

73. See Crenshaw, supra note 12. See also Kimberlé Williams Crenshaw, Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991).

74. See generally Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis, 38 J. WOMEN IN CULTURE & SOC'Y. 785 (2013) (explaining that what makes an analysis intersectional is its adoption of an intersectional way of thinking about the problem of sameness and difference in its relation to power).

75. See Crenshaw, supra note 12, at 140 ("This focus on the most privileged group members marginalizes those who are multiply- burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.").

justice is limited for people who, because of race, sex, gender, and disability, face different obstacles when interacting with the police.[76]

The Graham factors are the current precedent for analyzing police use of force cases. This Note is not asking for a new legal doctrine. It is instead suggesting that the existing doctrine can do a better job accounting for vulnerable individuals with mental illness when performing excessive force analysis using the Graham factors. The courts can better account for these vulnerable individuals by using an intersectional lens. [77] An intersectional lens would allow the court to have an analysis that acknowledges the experience of similarly marginalized persons, such as Ms. Moore, when analyzing the reasonableness of an officer's use of force. This lens is significant because courts currently do not acknowledge these qualities that marginalized individuals possess when they analyze excessive force in police interactions. For example, Ms. Moore has overlapping identities as a Black trans woman with mental health

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[76.] See Crenshaw, supra note 73, at 1246. (For example, "where systems of race, gender, and class domination converge, as they do in the experience of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.").

[77.] As discussed in detail below, in Part II, the Graham factors consist of (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.

concerns.[78] If the Court can acknowledge the experience of marginalized individuals like Ms. Moore, then it has a better chance of addressing the needs of others who may be similarly marginalized victims of police violence. Additionally, this acknowledgement would allow courts to better understand the structural issue at hand, and work toward justice for marginalized individuals like Ms. Moore.[79]

II. Legal Doctrine

Families that seek vindication of their loved one's injuries or deaths from the courts face an uphill battle because of qualified immunity.[80]

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78. Noah Gaiser, Say Her Name: How You Can Support Justice for Kayla Moore, Mills Pol'y F. (Oct. 25, 2017), http://www.millspolicyforum.com/gender-equity-lgbtq/say-name-can-support-justice-kayla-moore/ / ("The Moore family's case stands at the nexus of so many societal ills – namely racism, transphobia, criminalization of people with mental illness and fatphobia. Kayla Moore's life embodied intersectional experience, and her overlapping identities as a Black, trans woman with mental health concerns fall outside the boundaries of prevailing legal theories.").

79. See Kimberle W. Crenshaw, From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control, 59 UCLA L. Rev. 1418, 1424 n.13 (2012) ("If we center women of color in our analysis, it seems to me we are in a better position to think not only about how their lives are impacted by the criminal justice [sic] but to take on broader questions of structural reform within the criminal justice system.").

80. Eleanor G. Jolley & Tim Donahue, Sr., A Cursory Overview to

Qualified immunity allows an officer to escape liability for his or her use of force. The current analysis of police use of force cases does not consider the issues mentioned in Part I, which leads courts to do a poor job addressing police violence against marginalized communities. Applying the Graham factors with an intersectional lens helps reveal why the current factors leave room for interpretation that would benefit victims of police violence with certain gender, sex, and race identities, as well as individuals with mental health conditions.

Some courts only apply the three factors of Graham without recognizing other contributing factors.[81] Regardless of whether a court uses only the three factors or a totality of the circumstances approach, the Graham analysis should be more favorable to those experiencing mental

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Section 1983 as it Applied to Violations of the Fourth and Eighth Amendments, 39 Am. J. Trial Advoc., 519, 539 (2016) ("Qualified immunity is intended to balance the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. Qualified immunity is meant to protect all but the plainly incompetent or those who knowingly violate the law.").

81. See Jay Gold, Contemporary Trends in Qualified Immunity Jurisprudence: Are Circuits Courts Misapplying Graham v. Connor?, 28 Utah B. J. 26, 29 (2015) ("Numerous circuits have misapplied Graham by applying factor-based tests to officers' conduct rather than grappling with the totality of the circumstances. This approach does not invariably lead to incorrect results, but it can produce such results in some cases.").

health episodes. These cases should allow for precedent that puts officers on notice that their use of force is excessive against this vulnerable community.

A. Explaining the Law of Excessive Force

1. Clearly established Precedent is Essential to Put Officers on Notice that Certain Conduct is not Tolerated; Without It Extreme Use of Force by Police Can Go Unpunished by the Court

The court must answer two questions when deciding to grant or deny qualified immunity— first, did the officer's conduct violate a federal right, and second, was this right clearly established at the time the violation occurred such that a reasonable person would have known that his conduct was unconstitutional?[82] Saucier v. Katz required the Court to determine if there was a violation of a federal right first,[83] however Pearson v. Callahan eliminated the restriction on the order in which a court answers each question.[84] Thus, courts could start their analyses with the second question and determine if a violation was clearly established before the case in question.[85] Determining that the violation was not clearly established before the incident in question is enough to

82. See Saucier v. Katz, 533 U.S. 194 (2001).

83. Id.

84. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

85. Id.

grant qualified immunity. This outcome means a court does not have to address the question of if there was a constitutional violation.[86]

An example helps demonstrate the harsh reality of the clearly established requirement on a civil rights claim. In Holloman v. Markowski, the United States Court of Appeals for the Fourth Circuit granted the officers involved qualified immunity from the shooting and killing of Maurice Johnson.[87] Mr. Johnson was an unarmed, mentally ill African American male who was shot by two white officers of the Baltimore Police Department less than one minute after encountering him.[88] Mr. Johnson's mother, Marcella Holloman, contacted the police to ask for assistance in getting her son to a hospital for medical care because they successfully helped to get him there in the past.[89] Mr. Johnson was in the backyard when the

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86. Pearson, 555 U.S. at 237 ("Saucier's two-step protocol 'disserve[s] the purpose of qualified immunity' when it 'forces the parties to endure additional burdens of suit — such as the cost of litigating constitutional questions and delays attributable to resolving them — when the suit could otherwise be disposed of more readily.'").

87. Stephen L. Braga, Holloman v. Markowski: An Opportunity for Further Reflection on Police Encounters with People in Mental Health Crisis, 36 Dev. Mental Health L. 1, 2 (2017).

88. Id.

89. Id. at 3.

officers arrived.[90] Ms. Holloman reminded the officers of her son's mental health status and asked them not to shoot him.[91]

When Mr. Johnson stepped inside the house, officers surrounded him and screamed at him to calm down, even though he made no aggressive gestures or sudden movement towards the officers.[92] When one of the officers moved to seize Mr. Johnson, a struggle commenced, resulting in Mr. Johnson punching one of the officers.[93] All three tumbled to the floor with Mr. Johnson in between.[94] While all were still struggling, the officer below Johnson pulled out his gun and squeezed the trigger twice into Mr. Johnson's chest.[95] The officer on top of Johnson drew his gun and fired into Mr. Johnson's back. Johnson died from the gunshot wounds.[96]

The court used its discretion to start its analysis with the second question of clearly established law and found no cases similar in facts that gave officers notice that their actions were unreasonable.[97] When courts look to the second qualified immunity question first, they are simply looking to see if there is a case with the same facts as the case at hand. If they do not find a case with the same facts, they determine

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90. Id.

91. Id. at 4.

92. Id.

93. Id.

94. Id.

95. Id.

96. Id.

97. Id. at 8–9.

that there was no clearly established right to put the officers on notice. In other words, if a case with the same facts has not been brought before the court, qualified immunity is granted. In Mr. Johnson's case, the Court started its analysis with the second question, whether there was clearly established right. The Court found no cases with similar facts, and thus, found that the officers had not been put on notice that their actions were unreasonable. Qualified immunity was granted.

While unfortunate, the Holloman case shows the importance of established precedent, primarily because of the specificity requirement. Since the Court had discretion to start with the second question — whether there was a clearly established right to put the officers on notice — and since the Court found there was so no such right, the Court failed to even analyze whether a constitutional violation took place. This type of analysis leaves police violence towards certain groups a largely unaddressed issue.

2. When Determining Whether a Constitutional Violation Took Place Current Case Law Allows Room to Incorporate an Intersectional Lens

Current case law applies a very fact-specific analysis to determine if a violation of a Fourth Amendment right occurred.[98] The Fourth

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[98.] Graham v. Connor, 490 U.S. 386, 396 (1989) (explaining that determining whether force is reasonable in a particular case requires an inquiry that is incapable of precise definition or mechanical explanation and requires careful attention to the facts and circumstances of each particular case).

Amendment protects citizens against unreasonable search and seizures.[99] This fact-specific analysis is what allows the court to develop a precedent of Fourth Amendment violations. By ruling that a violation occurred, the court recognizes the wrongdoing of the police. Still, the court would have to grant the officer(s) qualified immunity if there was no precedent established beforehand that put the officers on notice that their conduct was wrong. The case would then become precedent for future cases. Thus, the best way to address the doctrine of excessive force is to have more cases that rule against the officers, to put them on notice that their violent conduct towards multi-marginalized persons is unacceptable. Due to the importance of establishing precedent, this Part focuses on the first prong of the Saucier requirements.

It is difficult for an individual to bring a claim of excessive force. Cases of excessive force by police generate a complex body of case law, leaving an unclear line of what people's rights are regarding police use of force.[100] These claims are brought under the Fourth Amendment

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99. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

100. Brandon Garrett & Seth Stoughton, A Tactical Fourth Amendment, 103 Virginia L. Rev. 211, 213 (2017) ("Members of the public may assume that police rules and procedures provide detailed direction about when officers can use deadly force. However, many agencies train officers to respond to threats according to a force 'continuum' that does not provide hard-edged rules for when police can use deadly force.").

because excessive force falls within the prohibition on unreasonable seizures. To prove a violation of the Fourth Amendment, the plaintiff must prove that the amount of force used by an officer was unreasonable.[101] When an officer's conduct proves to be excessive, he or she is not entitled to the limited protection of qualified immunity, which helps shield from liability. The court analyzes reasonableness from the perspective of a reasonable government actor who is similarly situated to the actor in question.[102] The court looks at what other reasonable officers would do if they were in the same position as the officer facing the excessive force claim. If other officers would have reacted similarly, then the court will likely grant qualified immunity.

The court must determine whether the nature of the force was reasonable under the circumstances. This determination requires looking at the "nature and the quality of the intrusion on the individual's Fourth Amendment interest,"[103] which entails a balancing of the factors laid out from Graham v. Connor.[104] The factors of Graham traditionally analyze the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.[105] The analysis also takes into account how an officer's job often involves split-second

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101. Saucier, 533 U.S. at 201–02.

102. Id. at 202.

103. See Graham v. Connor, 490 U.S. 386, 396 (1989)

104. See Id. at 393.

105. Id. at 396.

decisions.[106] Although the Court's analysis allows for a balancing of each factor, the factor that provides the most sway is the question of the immediate threat. Thus the question of immediate threat is where most of the Court's discussion takes place.

The three factors mentioned by the Graham court are not exhaustive.[107] The court must also take into account the totality of the circumstances to decide whether an officer's conduct has violated a person's constitutional rights.[108] By looking at the totality of the circumstances, the court may take into consideration additional factors that help to bring context to the issue at hand and provide more information to come to an appropriate decision. Case law already states that courts should take into consideration when it is apparent to the officers that the

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106. Id. at 396–97. See also Tennessee v. Garner, 471 U.S. 1, 20 (1985) (explaining that while the court recognizes that police must make split-second decisions, adopting the rule of allowing deadly force only against dangerous suspects is not difficult to apply or lead to "inappropriate second- guessing of police officers' split-second decisions").

107. See Young v. City of Los Angeles, 655 F.3d 1156, 1163 (9th Cir. 2011) (recognizing that the facts and circumstances of every excessive force case varies). See also Bryan v. MacPherson, 630 F.3d 805, 826 (9th Cir. 2010) (stating that the court examines the totality of the circumstances and considers "whatever specific factors may be appropriate in a particular case, whether or not listed in Graham").

108. Graham, 490 U.S. at 396.

individual involved is mentally disturbed.[109] For 5150 calls or similar calls, officers are considered "on notice," and thus, they are expected to deploy assistance in helping the individual.

While there is some recognition that officers should take mental illness of the individual involved into account, some jurisdictions have explicitly declared that they will not make a second track analysis for mental illness.[110] However, the courts do not need to create a second track analysis. The existing factors leave room for mental illness to be a consideration in determining the reasonableness of the force employed.[111] Similarly, the analysis also leaves space for courts to take into account how multi-vulnerable individuals have unique experiences during police interactions. By ignoring police brutality, courts run the risk of sanctioning these actions through inaction in addressing them.

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109. Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001).

110. Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010) ("Although we have refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals, we have found that even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using force is diminished by the fact that the officers are confronted with a mentally ill individual.").

111. See Deorle, 272 F.3d at 1283.

III. The Results of Excessive Force Analysis without an Intersectional Lens

Unfortunately, it is not surprising that the current way courts analyze cases results in a failure to consider the intersectional problem described in the previous section. It is helpful to see how the court analyzed Kayla Moore's case to understand how the current approach to excessive force cases is preserving a system where police are not held accountable and the vulnerable are left unprotected. The Court's analysis of Ms. Moore's case resulted in the police officers involved receiving qualified immunity. In Moore v. City of Berkeley, the court used a three-step approach to analyze Ms. Moore's case.[112] First, the court considered the type and amount of force inflicted.[113] Second, it considered the government's interest in the use of force.[114] Third, it balanced the gravity of the intrusion on the individual against the government's need for that intrusion.[115] They also took into account the fact that it should have been apparent to the officers that Ms. Moore was emotionally disturbed.[116] In Kayla Moore's case, the nature and quality of the force used was the suffocation of Ms. Moore to the point of her death by the officers.

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112. See Moore v. City of Berkeley, No. C14-00669-CRB, 2016 WL 6024530 (N.D. Cal. Oct. 14, 2016).

113. Id. at *4. (I see this at *13)

114. Id.

115. Id.

116. Id.

Although the Court admitted that a reasonable jury could find that the officers' actions contributed to Ms. Moore's death, they still ruled the officers' actions were reasonable.[117] The court felt that the first Graham factor cut in the officers' favor because the officers did not strike or tase Ms. Moore, but instead used their body weight to pin her down.[118] Yet, the court felt that the officers had a diminished interest in using force because they were confronting someone who was mentally ill and not someone committing a crime.[119] The final consideration the court made is that officers may use physical coercion when taking someone into custody.[120] The court argued that the moment the officers tried to arrest Ms. Moore, she resisted, so the officers could not discern if Ms. Moore was bucking for air or resisting arrest.[121] The court concluded that the force used was reasonable based on what the officers knew at the time.[122]

The first noticeable problem with the court's analysis of Ms. Moore's case is its reference to "the nature and quality of the force used" as the

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117. Moore, 2016 WL 6024530 at *12 ("Only the involved officers saw what happened from then on. So, without body camera footage, the Court must rely on medical analysis and officer testimony alone. Faced with this conflicting evidence, a reasonable jury could find that Moore died because of the struggle.").

118. Id. at *4

119. Id. at *14.

120. Id.

121. Id. at *15.

122. Id.

first factor of Graham. The first Graham factor is the severity of the crime.[123] While the type of force is relevant to the analysis, the courts typically balance the type and amount of force used by the officers against the weight of the Graham factors, not as the first factor as the Court did in this case.[124] In other words, the Graham factors serve as the way to determine the governmental interest at stakeagainst whatever

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123. Graham v. Connor, 490 U.S. 386, 396–97 (1989).

124. For cases that analyze the nature and quality of the intrusion against the government's interest, see the following: Deorle v. Rutherford, 272 F.3d 1272, 1280 (9th Cir. 2001) (exemplifying how the court standard is to look at the force applied and balance it against the need for that force to find that deploying a cloth — cased shot is unreasonable to investigate an "emotionally disrobed individual."); Vos v. City of Newport Beach, 892 F. 3d 1024 (9th Cir. 2018) (finding that the nature of the intrusion, deadly force, against the government's interest in responding to erratic behavior could be found by a reasonable jury to be insufficient to justify deadly force); Mattos v. Agarano, 661 F. 3d 433, 441 (9th Cir. 2011) (explaining that "we apply Graham by first considering the nature and quality of the alleged intrusion; we then consider the governmental interest at stake"); Bryan v. MacPherson, 630 F.3d 805, 823 (9th Cir. 2010) (explaining that "we must balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interest at stake"); Armstrong v. Village of Pinehurst, 810 F.3d 892, 899 (4th Cir. 2016) (explaining how the standard is to examine the nature and quality of the force used against the governmental interest).

form of force the officers deployed. In Ms. Moore's case, the court did not analyze the Graham factors to determine the governmental interest at stake until after they analyzed the nature and quality of the force used. To be clear, the court appears to misapply the Graham balancing test by analyzing the nature and quality of the force as the first Graham factor.[125] This misapplication led to the court failing to recognize the severity of pinning down someone experiencing a mental health episode making the action it appear minimal when compared to more sever tactics the police might have used as alternatives. However, had the court properly applied the Graham factors, they may have had a clearer understanding that even pinning someone down could be detrimental and inappropriate.

What makes the Court's favoring of the first factor for the officers even more troubling is the Court's admittance that "the officers had a diminished interest in using force"[126] because they were not there for a crime but to help someone mentally ill. This statement proves the first Graham factor, severity of the crime, favors Moore because the police were there to assist her, not arrest her for a crime. Finding the first factor in favor of the officers, despite acknowledging there was no crime, renders the court's decision suspect. Even the authority it relies on, Glenn v. Washington County, recognizes that the Graham factors help to evaluate the strength of the government's interest against the nature of the force used.[127]

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125. See Moore, 2016 WL 6024530 at *14.

126. Id. at *14.

127. See Glenn v. Washington County, 673 F.3d 864, 871–79 (9th Cir.

Ms. Moore's case helps highlight a troubling issue in applying the Graham factors to cases where someone calls the police to deploy mental health assistance. For medical emergency calls to the police requesting help for someone in a mental health crisis, the first factor should be in favor of the plaintiff. The police are there to assist the individual, so no crime analysis should be involved in their case. Although the condition of the one needing help may be severe, this is not what the severity of the crime factor is assessing. Thus, when police are responding to 5150 calls, this factor should always go in favor of the plaintiff. Arguably, and outside of the scope of this Note, in many cases involving police interaction with people with mental illness, not just 5150 calls, this factor should be in the plaintiff's favor because many cases involving the mentally ill involve nuisance-type crimes.[128]

2011).

[128.] FULLER ET AL., supra note 20, at 5. (Additional research shows that many calls regarding those that exhibit signs of having a mental health episode are for nuisance type crime. "[S]tudies consistently find that 10-20% of law enforcement calls involve a mental health issue. Most of these calls result from behavior that falls under the all-purpose umbrella of "public nuisance" — vagrancy, loitering or urinating in public, trespass — or from individuals endangering themselves."). See also Hammer v. Gross, 932 F.2d 842, 846 (9th Cir. 1991) (holding that when the alleged conduct is a misdemeanor and non-violent, then the severity of the crime is low and there is little reason for the government to use force).

The second factor of Graham is where the majority of the concern lies and plays a pivotal role in swaying the court. The second factor asks whether the suspect was an immediate threat to the safety of the officers or others. In Ms. Moore's case, it is unclear how the court analyzed the immediate threat factor. After the court found the first factor in favor of the officers, they began discussing how the police were confronting someone with a mental illness and not someone committing a crime.[129] They also discussed how Ms. Moore's lashing out and kicking did not warrant the use of the gun but did warrant the restraining of Ms. Moore's limbs.[130] Based on the court's articulated three-step approach, these facts determine the second step, which they state as the government's interest in the use of force.[131] By labeling the restraining of Ms. Moore's limb as warranted, the court's second step in the analysis also goes in favor of the officers.

The problem with this court's analysis of its second step is that the Graham factors usually analyze the government's interest in the use of force. Here, however, it appears as if the court tried to combine the first two articulated factors of Graham because it recognized there was no crime but highlighted that actions like Ms. Moore's struggling could have significant consequences.[132] Yet the precedent that this court relies on, Abston v. City of Merced, involves a case where a decedent, impaired by

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129. Moore, 2016 WL 6024530 at *14.

130. Id.

131. Id. at *13.

132. Id. at *14.

drug use, kicked an officer enough to require surgery and required four officers to restrain him; nevertheless, the court, still thought the officers' use of body compression could be found to be a violation of the Fourth Amendment.[133] Thus, outside of the apparent application problems, the court appeared to have clear guidance on considering someone's mental impairment, but still failed to give it the appropriate weight. Another distinction between the two cases is that Abston involved a recording which helped tell the story of what happened versus the court in Ms. Moore's case only relying on the police and officials' accounts.[134]

The second factor of Graham is where most of the analysis and debate lies and is critical for cases involving mental illness. Involving the police for assistance during mental health episodes is often due to the person requiring a hold in a mental health facility for proper treatment. In California, these holds are 5150s. To be placed on a 5150, the victim needs to be a danger to themselves or others. Kayla Moore's case is one where the officers were aware that she needed mental health services. The court was aware that at least one officer had prior experience in dealing with Moore's condition due to being deployed for a wellness check.[135]

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133. Abston v. City of Merced, 506 F. App'x 650, 652 (9th Cir. 2013).

134. Id. ("A bystander captured the last few minutes of Abston's life on video. On that video, Abston is seen face-down, handcuffed and ankle-shackled, while defendant applies pressure to his back.").

135. Moore, 2016 WL 6024530 at *1–*3.

The immediate threat factor of Graham is one place where the court should take into consideration the individual's mental capacity, especially since the immediate threat factor holds more weight than the others. It is critical to consider one's mental capacity since it determines if a person can follow police commands, orders, or direction. Additionally, depending on the individual's mental state, the individual may be affected by the way police act toward them, and the actions of the police may aggravate the individual or escalate the interaction. Many police departments are aware of the need for de-escalation tactics, while others simply ensure that mental health professionals are present on the scene. Thus, the courts can better evaluate the immediacy of the threat, while avoiding the creation of a separate track analysis for mental health emergencies. They can do so by considering an individual's mental capacity in the immediate threat factor of the existing Graham analysis.

The third factor is another place where the courts should consider an individual's mental capacity and needs. This would allow for the courts to find this factor in favor of the plaintiff in cases like Ms. Moore's. The third factor asks whether the individual was actively resisting arrest or attempting to evade arrest by the officers.[136] When an individual is experiencing a mental health crisis, and seeks assistance from the police, the purpose of police presence is to assist with getting the victim help, not to arrest them for a crime. In Moore, the court's final step in its evaluation of whether a constitutional violation took place was balancing the gravity of the intrusion against the need for the government's intrusion. This

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136. Graham v. Connor, 490 U.S. 386, 397 (1989).

balancing would require the court to weigh the officer's use of body compression against the need to handcuff Kayla Moore and take her into custody. The court, however, focused on the fact that officers may use physical coercion when someone is resisting arrest.[137] The court did not consider the fact that Ms. Moore was not being arrested, but instead, was seeking assistance getting medical care to address her mental health issues. When addressing this third factor, the court concluded that the officers' actions were reasonable based on what they knew, or rather, did not know, at the time of their interaction with Ms. Moore. This appeared to be an attempt at highlighting that the officers were not aware of Kayla Moore's enlarged heart. Again, the court performed this analysis while completely ignoring the fact that the police were there to give Ms. Moore medical assistance. This resisting arrest factor gives ample room for the courts to acknowledge the individual's mental health issues and doing so would change the analysis in calls like Ms. Moore's where no arrest was being pursued.

Unfortunately, Kayla Moore's case is one of many where the police were called to assist, but instead, took someone's life. While Ms. Moore's case saw its day in court, others never make it in front of a judge. Some may end in settlements before they have any type of analysis done by a court. Some may be in the hands of a board dedicated to reviewing police actions. Many others simply never come to light. What Kayla Moore's case reveals, however, is when one court got the opportunity to take their stance on the issue, it failed to consider the full context

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137. Moore, 2016 WL 6024530 at *14.

of the problem. The lack of intersectional thinking in Ms. Moore's case left egregious actions by officers unaddressed.

THE APPLICATION OF AN INTERSECTIONAL LENS

Now that we know what the court failed to do and how the court failed to do it, reviewing Ms. Moore's case with an intersectional lens helps to explain what intersectional thinking can do. By using an intersectional lens, the court can expand their understanding about what is objectively reasonable. Improving the Graham factors is not a new idea,[138] but this Note adds to the previous discussion by advocating for the Court to recognize how police violence targets those marginalized in multiple ways. Intersectionality allows the court to acknowledge the experience of the victim when they take the facts in the light most favorable to the plaintiff.[139] In the context of police brutality, this can allow the court to incorporate more facts into the existing framework of the Graham factors. Since the court must analyze the totality of the circumstances,

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138. Brandon Garrett & Seth Stoughton, A Tactical Fourth Amendment, 103 VIRGINIA L. REV. 211, 213 (2017) (advocating for the creation of a more useful Fourth Amendment doctrine by focusing on an empirical grounding that provides a better ideal around constitutional reasonableness).

139. See Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 140 U. CHICAGO LEGAL F. (1989). See also, Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991).

the Graham factors leave enough room to allow an intersectional lens that would help the court consider how officers are treating marginalized members of society.

First, it is essential to note that Kayla Moore's case highlights multiple problems with the Court's granting of qualified immunity based on the determination that the court did not find a constitutional violation. Thus, it would not do her case justice to overlook that there was an apparent misapplication of the factors that contributed to the court's ruling. Although the previous Part addresses this point, it is worth noting again because that is an additional factor outside of the court's lack of intersectional thinking that contributed significantly to the lack of justice for Kayla Moore.

Second, there was also an apparent ignoring of critical elements of Kayla Moore's case. The above critique of the court's analysis reveals how the court's awareness of her mental health, the fact that no others were in the room beside the officers,[140] and the primary purpose of the police presence only played a minor part in the court's consideration when balancing the totality of the circumstances. The court could have done so much more to incorporate and acknowledge these key facts in their analysis. For example, the court failed to discuss additional factors such as failure to warn, the statement of officers regarding Ms. Moore's gender and sex, or that officers could have benefitted from being more patient with Ms. Moore. To review the court's analysis with

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140. See Moore, 2016 WL 6024530 at *12 ("Officer Brown ordered Sterling, Moore's purported caretaker, out of the apartment.").

an intersectional lens, more facts needed to be brought in that the court either failed to mention or barely considered.

The first Graham factor, the severity of the crime, would be resolved in Ms. Moore's favor because the police were there for a medical emergency, not a crime. The police were aware they were called for no other reason than to get Ms. Moore the help she needed,[141] so there is not an argument in favor of the police on this factor. The focus should not be on the struggle between the officers and Ms. Moore, but instead, on what brought them to the scene. The resisting arrest factor would also be resolved in Ms. Moore's favor because the police officers were there to provide aid, not to arrest her. Although Officer Smith found outstanding warrants on Ms. Moore, this is still not enough for this factor to sway in favor of the police actions for two reasons. One reason is that there is a counter view that the warrant was for a man twenty years Ms. Moore's senior.[142] Another is that no facts suggest that the police ever informed Ms. Moore at any point that they were arresting her based on the warrant. The way the facts progress in the case suggests the officer in charge was more focused on Ms. Moore's mental illness instead of the warrant.[143] With two of the factors being more in favor of Ms. Moore due to the type of case at hand, the second Graham factor benefits the most from an intersectional lens.

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141. Id. at *2.

142. See Crenshaw, supra note 4, at 17.

143. See Moore, 2016 WL 6024530 at *4.

For the immediate threat factor, the Court would likely not put as much weight on the officers' version of the facts. The court would likely recognize the officers' accounts are against someone who can no longer tell their side of the story. Since the court is required to view the facts in favor of the non-moving party, this may shift the court's analysis to put less weight on officers' stories, and more weight on the non-moving party's version of the facts.[144]

Intersectionality could also help the Court not immediately view Kayla Moore's action as threatening. It would allow the Court to emphasize Ms. Moore's experience and take into account that no officer gave any warning that they were about to grab her while she was having a mental health episode. Instead of seeing Ms. Moore's action as a threat, the court may find that Ms. Moore's physical actions were actually reasons to take precaution rather than apply force. Ms. Moore initially moved away from the officers. If the court considered Ms. Moore's mental state, they may have seen this as a sign of Ms. Moore trying to maintain her safety. At that point, Ms. Moore likely did not understand the police presence, and she was likely confused by their suddenly trying to grab at her. There are also no facts in the record that Kayla Moore verbally threatened the officers or had a weapon on her to harm them. These facts, their totality, support the fact that Ms. Moore was actually not a threat to the officers.

One fact used by the court could have been reused in another part of the court's analysis if the court used an intersectional lens. The alleged

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144. See Celotex Corp. v. Catrett, 477 U.S. 317, 339 (1986).

warrant for Ms. Moore's arrest was only used by the court while analyzing whether Ms. Moore was resisting arrest. However, the fact could also be useful to the court in another way since one of the officers took it upon himself to look at Kayla Moore's record.[145] After the officer found a warrant which he thought belonged to Ms. Moore,this biased the officers and caused them to lose sight of the primary purpose of their visit — to help Ms. Moore, not to arrest her.[146] Although the officer's intent does not play a role in the analysis, this fact could go to the reasonableness of the officer's actions. In this way, an intersectional lens would help highlight the police's failure to distinguish between criminal activity and a mental health emergency.

In Kayla Moore's case and many others, an analysis of the Graham factors could have allowed for two of the factors to be in favor of the individual needing help, Ms. Moore. Yet, the Court did not see that because they failed to use an intersectional lens in their analysis.

Other courts have faced this same issue, and at least one has tried to address the issue by essentially creating a separate track analysis. In the Estate of Hill by Hill v. Miracle, the Court argues that applying the Graham factors to medical emergencies is equivalent to a baseball player entering the batter's box with two strikes already against him.[147] By analogizing the application of the Graham factors to medical emergencies as having two strikes against the officer, the Sixth Circuit argues that the

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145. See Moore, 2016 WL 6024530 at *3.

146. See Crenshaw, supra, note 4, at 17.

147. Estate of Hill v. Miracle, 853 F.3d 306, 313 (6th Cir. 2017).

traditional Graham analysis of objective reasonableness only applies to non-medical emergencies.[148] This dilemma led the Sixth Circuit Court of Appeals to establish a new track analysis.[149] In contrast, the Ninth Circuit previously announced its desire not to create a separate track analysis.[150]

Focusing on the fact that the Graham factors are still good law and the guiding framework in evaluating all cases of police excessive force, an intersectional framework fits perfectly in the current doctrine. It can be

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148. See id.

149. See id. at 314 ("Where a situation does not fit within the Graham test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask: (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others? (2) Was some degree of force reasonably necessary to ameliorate the immediate threat? (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?").

150. Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010) ("Although we have refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals, we have found that even 'when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using force is diminished by the fact that the officers are confronted with a mentally ill individual.'") (quoting Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001)))))))).

helpful when thinking through the three main factors or additional factors because courts aim to analyze the totality of the circumstances. It also can satisfy the divide in circuit courts on how to address the analysis of police violence on mentally ill persons, while allowing courts to address the concern of the growing epidemic of police violence on various marginalized communities. Kayla Moore's case shows the danger of the courts taking a narrow and close-minded view on the use of force on those who are vulnerable to police violence. Thus, an intersectional framework would help to correct this problem and would provide much needed-precedent to protect the communities most at risk for police violence.

While an intersectional framework works to more sharply point out the different failures committed in Ms. Moore's case, it also incorporates many of the suggestions scholars, advocates, and victims of police violence have been emphasizing for some time now. For example, it can take into account officer training by expanding the courts' views on what an objectively reasonable officer should do. A great example of this is in Los Angeles. In Los Angeles, there are team models at work that focus on improving police interaction with mentally ill persons.[151] If the training is widespread across the department, then there can be an expectation that an officer that received training takes every precaution to assist the

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151. Charles Dempsey, Beating Mental Illness: Crisis Intervention Team Training and Law Enforcement Response Trends, 26 S. Cal. Interdisc. L.J. 323, 327 (2017)("[T]hey employ all three of these response strategies: training the front-line officers (CIT), utilizing a Co-Responder Team (CRT), and establishing an intensive case management team.").

person experience a mental health episode, especially in the context of 5150s. However, the analysis can be pushed even further by acknowledging an expectation that officers be more cautious of gender and racial minorities with mental illness. These communities tend to have more tension with the police, and holding officers accountable for this tension by expecting them to be more cautious would increase the safety of all parties involved.

There are also other proposals that the courts could take into consideration. One is paying more attention to the danger of escalation when analyzing the immediate threat or the totality of the circumstances. Another suggestion is for the courts to take into account that an individual experiencing a mental health episode may not be able to comprehend the demands given to them. The inability to follow demands weighed heavily against Ms. Moore due to the Court's emphasis that Ms. Moore's physical responses to police action can have significant consequences.[152] Instead, the Court should have looked at the facts in Ms. Moore's favor and saw the struggle as evidence of the opportunity for patience by reasonable officers. Ms. Moore's case alone exemplifies what happens when the police do not practice patience in dealing with vulnerable persons. Still, sadly there are too many stories to turn to that help amplify this problem.

The use of an intersectional lens allows courts to make use of the objectively reasonable analysis to make police interaction safer for all

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152. Moore v. City of Berkeley, No. C14-00669-CRB, 2016 WL 6024530 (N.D. Cal. Oct. 14, 2016), at *5.

parties involved. Because the analysis requires courts to read the facts in favor of the plaintiff, who is often the decedent, the case doctrine allows a clear avenue for acknowledging the experiences of vulnerable persons. In other words, the doctrine of excessive force analysis is already open to the framework of intersectionality. It is merely up to the judges to apply the relevant facts during the analysis. Additionally, because the Graham factor analysis allows for consideration of additional factors, the doctrine allows space for courts to be more sensitive to the police violence against multi-vulnerable communities.

IV. Other Suggested Solutions

While courts can develop case law addressing the issue of excessive force, many interactions do not see their day in court for a variety of reasons. Thus, the courts' inability to address the issue lies in the fact that not many cases reach the point of judge analysis or the stage of pursuing a lawsuit at all. Thus, there are many scholars, organizers, and advocates concerned with police brutality that offer a solution to the problem of police killings. Many of these may derive from a focus on protecting a specific community. However, they are still applicable in providing a suggestion for combating the issue of police violence on the intersecting identity of gender, race, and mentally ill persons. The suggestions below involve addressing the issue of police brutality by focusing on different actors. These different actors can also take an intersectional approach to ensure solutions geared toward helping multi-vulnerable persons facing police violence.

One suggestion for those involved in the criminal justice system is collecting more data on police interactions with people who have a mental illness, whether the police were aware of the mental illness before the interaction or not.[153] Generally, the government does not have an accurate count of people who die from fatal encounters with the police.[154] Data collected should provide a demographic break down to see which populations who suffer from mental illness are more at risk for police violence, similar to a study performed by Camille Nelson. Data would help identify the issue, but it would require combining the data with other efforts to resolve the continued pattern of police violence.

Some of these efforts involve more police training that provides crisis intervention, de-escalation, or behavioral health training.[155] An example of this is the Crisis Intervention Team (CIT), also referred to as the "Memphis Model." The goal of this model is to improve officer and consumer safety and redirect individuals with mental illness from the judicial system to the health care system.[156] In many places, the adoption of this model means increasing or mandating police training or providing additional training on de-escalation or behavioral health-related topics.[157] There is

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153. See FULLER ET AL., supra note 20. See also Robin S. Engel, Police Encounters with People with Mental Illness: Use of Force, Injuries and Perception of Dangerousness, 14 CRIMINOLOGY & PUB. POL'Y 247 (2015).

154. FULLER ET AL., supra note 20, at 6.

155. Dempsey, supra note Error! Bookmark not defined., at 325.

156. Id. at 323–24.

157. Id. at 325.

broad adoption of this model, but there are a variety of ways in which it is being applied. For example, some communities do not focus on community collaboration because the sole focus is police training.[158] The Crisis Intervention Team model has been around since 1988, and has been adopted by many cities.[159]

Another suggestion involves having trained psychiatrists work with officers and having these psychiatrists accompany police on psychiatric emergency calls. This idea resembles something called a Co-Responder Team model.[160] This model would require the dispatching of a specially trained officer and mental health clinician that would respond to the person in crisis together. The first deployment of this model was by the Los Angeles County Sheriff Department in 1992.[161] It goes by the title of the Mental Evaluation Team (MET). The goals of the model are preventing unnecessary incarceration or hospitalization of mentally ill persons,

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158. Sheryl Kubiak et al., Countywide Implementation of Crisis Intervention Teams: Multiple Methods, Measures and Sustained Outcomes, 35 Behav. Sci. L. 456, 457 (2017) See also Fuller et al., supra note 20, at 10–11.

159. Dempsey, supra note Error! Bookmark not defined., at 324. ("The 'Memphis Model' or some form of it, has been adopted by communities and jurisdictions across more than forty states and in some states, including Maine, Connecticut, Ohio, Georgia, Florida, Utah, Kentucky, Texas, and California, it has been adopted as a statewide initiative.").

160. Id. at 326. See also Fuller et al., supra note 20, at 10.

161. Dempsey, supra note Error! Bookmark not defined., at 326.

providing care in the least restrictive environment, preventing the duplication of mental health service, and allowing patrol officers to return to their field duties as soon as possible.[162]

There are different versions of the Co-responder team model across the states.[163] Overall, this model involves the inclusion of individuals who would be more dedicated to the interest of the mentally ill individual involved. In others, this model may likely involve individuals who have the mindset of de-escalation that the "Memphis Model" lacked.

An additional suggestion is training the operators who receive the calls and contact law enforcement about mental health emergencies. In conclusion, these proposals show a desire to address the problem. They all focus on improving the police and collecting the data to have an accurate reflection of what is taking place during police interaction with race and gender minorities that live with mental illness. These suggestions, along with the judicial adoption of an intersectional lens, can contribute significantly to addressing the intersectional problem of police violence on multi-vulnerable communities.

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162. Id.

163. Id. ("Today, the CRT model is used by hundreds of jurisdictions across the United States, Canada, England, and Australia including San Diego County (PERT), Los Angeles County (MET and SMART), Baltimore County (MCT), Seattle Police Department (CIT), Vancouver Police Department (AOT), Leicestershire Police (Triage-Car), and Queensland Police Service (MHP).").

Conclusion

Police interaction with race and gender minorities with mental illness is too much of a recurring issue for the judicial branch to not seek a resolution. The current factors used in excessive force cases do not address the unique facts when officers are attempting to help an individual experiencing a mental health crisis. The situation is too unique to sit by and say that these factors do an adequate job of addressing this issue. Perhaps officers are simply not the best people to handle those experiencing a mental health crisis. But until they are no longer the first responders, the courts must declare and review when their actions go too far. Kayla Moore's case shows that the Court struggles with establishing a precedent to halt police violence against marginalized groups. An intersectional framework would allow the court to acknowledge the experiences of marginalized people and would help the Court more accurately find when an officer's conduct violates an individual's constitutional rights. My personal experiences have shown me how vulnerable my loved one is when experiencing a mental health episode while dealing with the police. I would like the court to understand the state that my loved one is in. I can imagine the desires for others who want a court to stop shielding police from the violence they are inflicting. Applying an intersectional lens to the existing analysis could help bring justice to families of victims like Ms. Moore.