THE *TERRY* DILEMMA: A GAME THEORETIC ANALYSIS OF QUALIFIED IMMUNITY FOR POLICE OFFICERS

SUZANNE BARTH*

I. INTRODUCTION

The 2014 shooting of Michael Brown, an unarmed black teenager, ignited a dialogue about police violence against people of color in the United States and helped launch the Black Lives Matter movement.[1] The resultant movement against police violence raised questions about how to better hold officers accountable for offenses committed against innocent

* J.D. Candidate, Boston University School of Law, 2019; B.A., Economics and Sociology, *cum laude*, Wellesley College, 2016. Thanks to Jill Kingsbury, Professor Keith Hylton, and the Public Interest Law Journal staff for their insight and assistance.

[1] Wesley Lowery, *Black Lives Matter: Birth of a Movement*, THE GUARDIAN (Jan. 17, 2017), https://www.theguardian.com/us-news/2017/jan/17/black-lives-matter-birth-of-a-movement.

civilians.[2] Many urged police departments to adopt body camera policies, arguing that officers would practice more restraint if their actions were recorded.[3] Others asked why prosecutors are so frequently unable to secure indictments against police officers who have killed unarmed civilians.[4] Still others spoke out against the qualified immunity doctrine, suggesting it is a roadblock to securing justice.[5] This article addresses the debate on the impact of qualified immunity on civilians' ability to hold police officers accountable for violations of constitutional rights that occur during *Terry* stops. Specifically, this article adapts an economic game theory model to critique qualified immunity's impact on police behavior during *Terry* stops and argues that qualified immunity must be reconsidered.

Part II provides some relevant legal background on the qualified immunity debate, including the birth of the "*Terry* Stop" in *Terry v. Ohio*, the civil action for damages, the qualified immunity doctrine, and a recent qualified immunity case from the U.S. Court of Appeals for the Ninth Circuit, *Thomas v. Dillard*. Part III reviews the game theory model used in the argument section of this article: The Prisoner's Dilemma. Part IV models the *Terry* stop as a Prisoner's Dilemma between police officers and civilians. The model suggests that qualified immunity for police officers reduces the incentive for officers to respect suspects' Fourth Amendment rights and suggests the need to eliminate qualified immunity for police officers. Finally, Part V concludes.

II. LEGAL BACKGROUND

A. *The Birth of the "Terry Stop"*

Interactions between police officers and civilians are highly regulated,

---

[2] *See, e.g.*, David A. Graham, *What Can the U.S. Do to Improve Police Accountability?*, THE ATLANTIC (Mar. 8, 2016), https://www.theatlantic.com/politics/archive/2016/03/police-accountability/472524/; Karen Fleshman, *What Can We Do to Hold Police Accountable?*, THE HUFFINGTON POST (June 26, 2017), https://www.huffingtonpost.com/entry/what-can-we-do-to-hold-police-accountable_us_59509962e4b0f078efd982f5; Jamelle Bouie, *Keeping the Police Honest*, SLATE (Aug. 29, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/08/policing_the_police_america_s_law_enforcement_needs_greater_accountability.html.

[3] *E.g.*, Maya Wiley, *Body Cameras Help Everyone – Including the Police*, TIME (May 9, 2017), http://time.com/4771417/jordan-edwards-body-cameras-police/.

[4] *E.g.*, Chase Madar, *Why It's Impossible to Indict a Cop*, THE NATION (Nov. 25, 2014), https://www.thenation.com/article/why-its-impossible-indict-cop/.

[5] *E.g.*, Radley Balko, *The Case Against Qualified Immunity*, THE WASHINGTON POST (Jan. 12, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/01/12/the-case-against-qualified-immunity/?utm_term=.6d37188ce28a.

and for good reason. The framers of the U.S. Constitution endowed criminal defendants with numerous rights, and the Supreme Court has held that these fundamental rights require police officers to follow certain procedures during their interactions with suspects.[6] In the 1968 case *Terry v. Ohio*, the Supreme Court issued an opinion that addressed police officers' license to frisk civilians for weapons during investigatory stops.[7] In *Terry*, John Terry alleged that Police Detective Martin McFadden unlawfully seized him to perform a frisk for weapons.[8] McFadden stopped Terry after observing him and another man walking suspiciously up and down a street block, peering repeatedly into the same store window, and speaking with a third man.[9] McFadden suspected that Terry was planning to rob the store and that he might be armed.[10] McFadden approached Terry and his companions and began to ask them questions.[11] When one of the men mumbled something in response to the questions, McFadden seized Terry, frisked him for weapons, and found that he was carrying a revolver.[12] Terry was subsequently convicted of carrying a concealed weapon.[13] The Supreme Court of Ohio dismissed Terry's appeal, but the United States Supreme Court granted certiorari to determine whether Terry's Fourth Amendment rights had been violated by the trial court's admission of the revolver seized by McFadden.[14]

Terry argued that the Fourth Amendment limits an officer's ability to search civilians until there is probable cause to believe that they have committed a crime.[15] Only once armed with this "specific justification," he argued, could police officers arrest and search suspects.[16] The *Terry* opinion suggested that failure to limit the police's power to seize and search civilians absent probable cause would "exacerbate police-community tensions in the crowded centers of our Nation's cities."[17] The Supreme

---

[6] *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (requiring that police officers have a reasonable suspicion based on specific articulable facts to perform a frisk for weapons on civilians during an investigative stop); Miranda v. Arizona, 384 U.S. 436 (1966) (requiring that police officers advise individuals subject to custodial interrogation of various constitutional rights).

[7] 392 U.S. at 1.

[8] *Id.* at 4.

[9] *Id.* at 6.

[10] *Id.*

[11] *Id.* at 6-7.

[12] *Id.* at 7.

[13] *Id.* at 4.

[14] *Id.* at 8.

[15] *Id.* at 11.

[16] *Id.*

[17] *Id.* at 12.

Court ultimately held, however, that Terry's Fourth Amendment rights against unreasonable searches and seizures were not violated because McFadden had "reasonable grounds to believe that [Terry] was armed and dangerous."[18] The Supreme Court also held that an officer must have a reasonable suspicion that a suspect is armed and dangerous, and such suspicion must be based on articulable facts, not merely a "hunch."[19] Reasonable suspicion to conduct a frisk, however, need not rise to the level of probable cause.[20] The Supreme Court rested its decision on the state's interest in preventing crime and "the need for law enforcement officers to protect themselves and potential victims of violence in situations where they may lack probable cause for an arrest."[21]

Since its release in 1968, the *Terry* decision has been highly controversial in Fourth Amendment legal scholarship. Some agree with the *Terry* majority that concerns related to police safety justify officers' authority to frisk suspects for weapons with less than probable cause.[22] Others argue that *Terry* has eroded Fourth Amendment rights and has disproportionately harmed communities of color.[23] However, despite the *Terry* decision, those who believe their constitutional rights have been violated by a public official are not without remedy. Federal law entitles them to bring a civil action for damages against the culpable official.[24]

B. *The Civil Action for Damages*

In the wake of the Civil War and a renewed wave of unchecked violence against African Americans, Congress passed the Civil Rights Act of 1871, colloquially known as the Ku Klux Klan Act.[25] Congress's goal in passing this statute was to remedy state officials' indifference toward the persecution of African Americans.[26] The statute included 42 U.S.C. § 1983 ("§ 1983"), granting a civil cause of action to those whose constitutional or statutory rights have been violated by an individual wielding state

---

[18] *Id.* at 30.

[19] *Id.* at 27.

[20] *Id.*

[21] *Id.* at 22-24.

[22] *E.g.*, Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 N.Y.U. J. OF LEGIS. AND PUB. POL'Y 883, 885 (2013).

[23] *Id.*

[24] *See* 42 U.S.C. § 1983 (2012).

[25] *See generally* CONG. GLOBE, 42d Cong., 1st Sess., app. at 78 (1871) (comments of Rep. Perry); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484-85 (1982).

[26] *See* Eisenberg, *supra* note 25.

authority.[27] In 1961, the Supreme Court confirmed that § 1983 applies to state officials acting under color of state law.[28] Three years after the *Terry* decision, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court clarified that a parallel cause of action exists against federal officials as well.[29] While § 1983 does not furnish civilians with any additional substantive rights, it is an important mechanism through which individuals may hold public officials personally accountable for their unconstitutional conduct.[30]

C. *Qualified Immunity*

Although § 1983 and *Bivens* vastly improved civilians' ability to hold state and federal officials accountable for violations of their constitutional and statutory rights, such advances are tempered by the availability of immunity defenses, which preclude liability under certain conditions.[31] Public officials may assert either absolute or qualified immunity.[32] Absolute immunity completely bars § 1983 suits against certain public officials.[33] Qualified immunity offers public officials somewhat less protection, but still "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[34] Absolute immunity has been granted to legislators carrying out their legislative duties, judges fulfilling their judicial obligations, and certain members of the executive branch.[35] Other executive officials, however, are only entitled to *qualified* immunity.[36]

The qualified immunity doctrine has been justified as "an attempt to balance competing values."[37] Although § 1983's civil action for damages incentivizes public officials to respect individuals' constitutional and

---

[27] 42 U.S.C. § 1983.

[28] Monroe v. Pape, 365 U.S. 167, 171 (1961).

[29] 403 U.S. 388 (1971).

[30] *See* 42 U.S.C. § 1983.

[31] A. Allise Burris, *Qualifying Immunity in Section 1983 and Bivens Actions*, 71 TEX. L. REV. 123, 124-25 (1992).

[32] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[33] *See* Malley v. Briggs, 475 U.S. 335, 341 (1986).

[34] *Id.*

[35] *See, e.g.*, *Harlow*, 457 U.S. at 807 (enumerating the various Executive Branch officials entitled to absolute immunity to be: prosecutors, "executive officers engaged in adjudicative functions," and the President of the United States); Stump v. Sparkman, 435 U.S. 349 (1978) (affording absolute immunity to a judge who ordered the sterilization of a minor); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975) (holding that legislators acting within the "legitimate legislative sphere" are immune from suit).

[36] *Harlow*, 457 U.S. at 807.

[37] *Id.*

statutory rights, the Supreme Court has recognized a need to protect public officials from liability when they act wrongfully, but reasonably.[38] In *Harlow v. Fitzgerald*, a landmark case for qualified immunity, the Supreme Court suggested several reasons to offer public officials such protection.[39] These rationales included "the expenses of litigation, the diversion of official energy from pressing public issues[,] . . . the deterrence of able citizens from acceptance of public office," and the idea that public officials perform their official duties better absent the fear of retaliatory litigation.[40] Thus, the Supreme Court decided that, instead of fully litigating individuals' § 1983 claims, a qualified immunity defense permits many "insubstantial lawsuits" to be disposed of by "motion for summary judgment based on the defense of immunity."[41]

Although these public policy rationales are intuitive, recent empirical legal scholarship suggests that qualified immunity does not truly serve the intended purpose of filtering out frivolous lawsuits.[42] UCLA Law Professor Joanna Schwartz surveyed over a thousand lawsuits against law enforcement officers over the course of two years and found that "qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end."[43] Schwartz acknowledged, however, that the qualified immunity doctrine likely influences civil rights litigation in other ways, such as discouraging potential plaintiffs from filing lawsuits in the first place.[44]

Prior to the year 1982, qualified immunity defenses raised by defendant public officials could be defeated if the plaintiff demonstrated either an objective or subjective element.[45] The objective element addressed the defendant public official's presumptive knowledge while the subjective element focused on the official's intent in taking the allegedly unlawful action.[46] The Supreme Court articulated this standard as follows:

> Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights

---

[38] *Id.* at 819.

[39] *Id.* at 814.

[40] *Id.*

[41] *Id.* at 808.

[42] *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017).

[43] *Id.*

[44] *Id.* at 10.

[45] *Harlow*, 457 U.S at 815.

[46] *Id.*

> of the [plaintiff], or if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . ."[47]

Due to the relevance of the defendant public official's state of mind in the actions, qualified immunity was also referred to as "good faith" immunity.[48]

In 1982, however, the Supreme Court revisited the qualified immunity doctrine in *Harlow*.[49] The plaintiff in *Harlow*, Ernest Fitzgerald, alleged that certain aides to President Nixon, and President Nixon himself, conspired to unlawfully terminate him from his post at the Department of the Air Force.[50] The White House aides argued to the Supreme Court that they should be granted absolute immunity due to their close connection to the President.[51] The Supreme Court held that the White House aides failed to demonstrate that they were entitled to absolute immunity on these grounds.[52] The aides were, however, entitled to qualified immunity.[53] In deciding that the White House aides were entitled to such protection, the Supreme Court recognized that the "good faith" immunity inquiry too frequently required cases to go to trial because "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."[54] The subjective element of the "good faith" immunity doctrine cut against the public policy argument that qualified immunity should defeat frivolous claims before the costs of discovery and trial are required.[55] The Supreme Court acknowledged this flaw in the previous qualified immunity doctrine and announced a new standard.[56]

In articulating the new standard, the Supreme Court further held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[57] This revised standard eliminated the subjective component of good faith immunity, transforming the qualified immunity standard to an objective inquiry as to whether the law

---

[47] *Id.* (citing Wood v. Strickland, 420 U.S. 308, 322 (1975)).

[48] *Harlow*, 457 U.S. at 815.

[49] *Id.* at 802.

[50] *Id.*

[51] *Id.* at 808.

[52] *Id.* at 813.

[53] *Id.*

[54] *Id.* at 816.

[55] *Id.* at 815-16.

[56] *See id.* at 817-18.

[57] *Id.* at 818.

was clearly established at the time of the alleged action.[58] Although the qualified immunity standard announced in *Harlow* has survived largely unchanged to this day, the Supreme Court has notably revisited the qualified immunity doctrine on several occasions.[59]

In 2001, the Supreme Court updated the qualified immunity doctrine in *Saucier v. Katz*.[60] In *Saucier*, plaintiff Elliot Katz alleged that the defendant, a military police officer named Donald Saucier, had used excessive force in arresting him.[61] The United States District Court for the Northern District of California denied Saucier's qualified immunity defense because the law on excessive force was clearly established at the time of Katz's arrest and the qualified immunity inquiry required deciding the merit of Katz's Fourth Amendment excessive force claim.[62] On appeal, the Ninth Circuit affirmed the denial of qualified immunity using the same rationale.[63] The Supreme Court, however, disagreed that the qualified immunity inquiry was so similar to the inquiry on the merits that it was rendered redundant.[64] Instead, the Supreme Court announced a two-part analysis for qualified immunity claims.[65] First, the court must decide whether the plaintiff has alleged a violation of a constitutional right.[66] This first step requires that the court consider the facts of the case "in the light most favorable to the party asserting the injury."[67] If the plaintiff has failed to allege a constitutional violation, the qualified immunity inquiry ends there.[68] If, however, the plaintiff's claim does successfully allege a constitutional violation, only then should the court consider whether the right in question was clearly established at the time of the defendant's alleged action.[69] The purpose of this two-part qualified immunity test was to ensure that courts continue to "set forth principles which will become the basis for a holding that a right is clearly established."[70] Without this requirement, the Court feared that the "law's elaboration from case to case"

---

[58] *See id.* at 816.

[59] *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 200 (2001); Pearson v. Callahan, 555 U.S. 223, 227 (2009).

[60] Saucier v. Katz, 533 U.S. 194, 200 (2001).

[61] *Id.* at 197.

[62] *Id.* at 199.

[63] *Id.* at 199-200.

[64] *Id.* at 200.

[65] *Id.*

[66] *Id.* at 201.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

might be halted.[71] Thus, the Supreme Court mandated the *Saucier* two-part analysis for all future qualified immunity inquiries.[72]

Just eight years later in 2009, however, the Supreme Court took up the qualified immunity doctrine again in *Pearson v. Callahan*.[73] The plaintiff, Afton Callahan, alleged that police officers violated his Fourth Amendment rights by conducting a search of his home without a warrant after he welcomed an undercover informant into his home.[74] Upon review, the Court decided to reconsider whether the two-step analysis should, in fact, be mandated in *every* qualified immunity case.[75] The Court noted that the *Saucier* procedure had been poorly received by the lower courts because it was too inflexible.[76] The mandatory *Saucier* two-step analysis resulted in unnecessary expenditure of judicial resources on difficult questions that had no effect on the outcome of the case and often violated the doctrine of constitutional avoidance.[77] Thus, the Supreme Court overruled *Saucier* and held that the "*Saucier* protocol should not be regarded as mandatory in all cases."[78] Instead, courts may choose to follow the *Saucier* protocol in appropriate circumstances, but the general qualified immunity inquiry "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'"[79]

Aside from the Supreme Court's relatively brief experiment with the mandatory *Saucier* protocol in the 2000s, the qualified immunity doctrine has remained largely the same since its redefining in *Harlow*. Qualified immunity shields public officials from lawsuits unless they violate an individual's "clearly established" constitutional or statutory rights.[80] Further, qualified immunity inquiries must be analyzed "from the perspective 'of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'"[81] Thus, qualified immunity serves as a formidable obstacle to civilians attempting to hold police officers accountable for violations of their constitutional or statutory rights. The following recent case from the Ninth Circuit illustrates the power of the qualified immunity shield in the face of constitutional violations.

---

[71] *Id.*

[72] *See id.*

[73] 555 U.S. 223, 227 (2009).

[74] *Id.*

[75] *See id.* at 233.

[76] *Id.* at 234.

[77] *Id.* at 236-41.

[78] *Id.* at 236.

[79] *Id.* at 244 (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)).

[80] Plumhoff v. Rickard, 134 S.Ct. 2012, 2023 (2014).

[81] *Id.* at 2023 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

D. *Thomas v. Dillard*

On September 21, 2010, Palomar College Police Officer Christopher Dillard received two possibly unrelated phone calls.[82] The first call was made at 3:42 p.m. and concerned a domestic violence incident on Palomar College's Escondido campus.[83] The caller did not offer any details beyond that the suspect was a black man.[84] The second call, made less than an hour later at 4:20 p.m., reported that a man wearing a purple shirt had pushed a woman near storage containers on the Escondido campus.[85] The second caller neither reported the suspect's race nor mentioned any domestic violence.[86]

After the second phone call, Dillard drove his police car to the Escondido campus storage containers, where he saw a woman, Amy Husky, and a black man wearing a purple shirt, Correll Thomas, emerging from behind the storage containers.[87] Husky and Thomas, both Palomar College students, were dating.[88] Dillard exited his vehicle and approached Husky and Thomas.[89] Dillard told them that they were not in any trouble and asked whether they had identification.[90] While nothing suggested that a crime had occurred, Dillard observed that both students seemed "startled" and "fidgety."[91] Then, Dillard asked Thomas for his consent to search him for weapons, which Thomas declined.[92] Dillard advanced on Thomas and asked again for his consent to search for weapons.[93] Thomas declined for a second time.[94] Dillard then told Thomas that he was investigating an incident involving a man in a purple shirt pushing a woman and again asked for Thomas's consent to search him.[95] Thomas and Husky both denied that any such incident had occurred, and for a third time, Thomas declined to consent to Dillard's request to search him for weapons.[96]

Dillard then moved forward, intending to grab Thomas to forcibly frisk

---

[82] Thomas v. Dillard, 818 F.3d 864 (9th Cir. 2016).
[83] *Id.* at 872.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 873.

him for weapons.[97] Thomas stepped backwards to avoid being grabbed.[98] Dillard then stepped back, pointed his Taser at Thomas, and called for backup.[99] Dillard continued to hold Thomas at Taser-point until an Escondido police officer arrived on the scene approximately six minutes later.[100] The Escondido police officer pointed her handgun at Thomas and told him to put his hands up.[101] Thomas complied with this request.[102] Dillard then threatened to fire his Taser at Thomas if he did not get down on his knees.[103] Thomas refused to drop to his knees.[104] Dillard then fired his Taser at Thomas, incapacitating him with a painful surge of electrical current.[105] After being treated by paramedics, Thomas was arrested.[106] He was charged with unlawfully resisting, delaying, or obstructing a peace officer.[107] Six months passed before the charges were dismissed.[108]

In the aftermath of this encounter, Thomas filed a civil suit against Dillard under 42 U.S.C. § 1983.[109] Thomas alleged that Dillard violated his Fourth Amendment rights by unlawfully seizing him to conduct a weapons search and that Dillard used excessive force in firing his Taser.[110] Dillard moved for summary judgment based on the doctrine of qualified immunity, which shields public officials, like police officers, from liability if they violate an individual's statutory or constitutional rights due to a reasonable mistake of law.[111] The United States District Court for the Southern District of California held that Dillard had used excessive force, in violation of Thomas's Fourth Amendment rights, and denied Dillard's qualified immunity defense.[112] Dillard appealed the district court's decision to the Ninth Circuit, arguing that he was entitled to qualified immunity on both counts.[113]

The appellate court affirmed that Dillard violated Thomas's Fourth

---

[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 874.

Amendment right against unreasonable seizure and that Dillard's use of the Taser constituted unlawful excessive force.[114] Ultimately, however, the Ninth Circuit reversed the district court's denial of qualified immunity, granting Dillard summary judgment for both offenses.[115] The Ninth Circuit held that the nature of an alleged domestic violence incident is insufficient to establish the reasonable suspicion required to conduct a *Terry* frisk and that Dillard had violated Thomas's Fourth Amendment rights.[116] However, the Court further held that because this standard was not clearly established at the time of the encounter, Dillard was entitled to qualified immunity.[117] The Ninth Circuit also determined that the law surrounding the permissible use of Tasers was unclear and Dillard could not have reasonably known that such use would constitute excessive force.[118] Thus, Dillard was also entitled to qualified immunity on Thomas's excessive force claim.[119]

In considering whether Dillard had violated Thomas's Fourth Amendment right against unlawful seizure, the Ninth Circuit concluded that *only* the potential domestic violence nature of the call weighed in favor of suspecting that Thomas was armed.[120] None of the remaining facts suggested that Thomas was armed.[121] Dillard argued that the alleged domestic violence incident was sufficient to find that he had a reasonable suspicion to frisk Thomas for weapons.[122] The Ninth Circuit rejected the argument that domestic violence crimes were more likely to involve weapons than other types of crimes.[123] The court also held that although domestic violence crimes often involve risk of death or injury for police officers, the category of "domestic violence" is too broad to grant officers an unqualified right to frisk suspects without additional facts to support a reasonable suspicion that the suspect is armed and dangerous when responding to such incidents.[124] The Supreme Court held in *Terry* that a frisk for weapons is only justified when an officer has a reasonable suspicion based on "specific and articulable facts," and not merely a "hunch," that a suspect is armed and dangerous.[125] Although the facts presented by Dillard failed to meet this standard for reasonable suspicion,

---

[114] *Id.* at 871.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 878.
[121] *Id.* at 884-86.
[122] *Id.* at 878.
[123] *Id.*
[124] *Id.* at 880.
[125] *Id.* at 887.

the Ninth Circuit granted Dillard qualified immunity because language used by the court in previous domestic violence cases recognized the danger posed by domestic violence incidents without clearly stating that such cases do not "presumptively justify a weapons frisk."[126]

In deciding whether Dillard used excessive force on Thomas by shooting him with a Taser, the court considered the severity of the suspected crime, the danger the suspect posed to the officer, and whether the suspect resisted arrest or attempted to flee the scene.[127] The Ninth Circuit noted that the crime Dillard suspected Thomas had committed was not particularly serious, that Dillard "had scant reason to believe Thomas posed an immediate threat to [Dillard] or anyone else," and that Thomas did not forcibly resist or flee the scene.[128] Given these facts, the Ninth Circuit held that Dillard's use of force against Thomas was unreasonable and violated Thomas's Fourth Amendment rights.[129] Despite this finding of excessive force, the Ninth Circuit held that Dillard was entitled to qualified immunity because the law surrounding the use of Tasers on uncooperative suspects was unclear at the time of the incident.[130]

As illustrated by the holdings of *Thomas*, the qualified immunity doctrine makes it difficult to hold police officers accountable for violations of a person's constitutional and statutory rights. The lack of accountability under the qualified immunity doctrine has produced a toxic set of incentives that encourage over-policing. The impact of qualified immunity on police interactions with suspects can be understood using a model from behavioral economics: the prisoner's dilemma. This article's analysis suggests that the qualified immunity doctrine is untenable and should be reconsidered.

III. ECONOMIC BACKGROUND

Economics is a famously boring subject.[131] To many, economics conjures visions of mind-numbing graphs replete with the first-quarter projections of some widget firm. However, contrary to popular belief, economic theory is limited in application only by the imagination of its student. Game theory is a particularly applicable economic sub-discipline that attempts to explain a myriad of seemingly unpredictable human behaviors. One of the most famous game theory models is the Prisoner's Dilemma. The classic set up for the Prisoner's Dilemma is as follows: two

---

[126] *Id.* at 888.

[127] *Id.* at 889.

[128] *Id.* at 890.

[129] *Id.* at 891.

[130] *Id.*

[131] Donald Cox, *Why is Economics So Boring?*, THE LIBRARY OF ECONOMICS AND LIBERTY (Nov. 7, 2005), http://www.econlib.org/library/Columns/y2005/Coxequation.html.

players are arrested for a serious crime, but the police lack sufficient evidence to convict them both of the serious charge.[132] The players are kept sequestered.[133] If the players "cooperate" and neither confesses, they will each be convicted of a lesser crime and sentenced to only one year in prison.[134] If only one player "defects" and confesses, the defector will walk away free, and the other player will be convicted and sentenced to three years in prison.[135] If both players defect and confess to the crime, they will both be convicted and sentenced to two years in prison.[136]

The socially optimal outcome is the one that minimizes the combined prison sentence for both of the players.[137] However, if the players act rationally and in their own self-interest, then they will each choose to confess to the crime.[138] No matter what course of action their accomplice chooses, each player's prison time is individually minimized by confessing (i.e., If Player 1 confesses, then Player 2 should also confess, to shorten her expected prison time from three years to two; and if Player 1 stays silent, then Player 2 should nevertheless confess, to shorten her expected prison time from one year to none).[139] Thus, the dominant strategy in the Prisoner's Dilemma is to confess to the crime.[140] When each player has a dominant strategy, neither has an incentive to change her behavior.[141] This outcome is called the Nash Equilibrium.[142] Table 1, included at this article's end, illustrates the range of possible outcomes for each player in the Prisoner's Dilemma.

The Prisoner's Dilemma has been used to understand "the competition between individual self-interest and group motivation" in many unique scenarios.[143] Section IV of this article will explore the decisions made by police officers and civilians during *Terry* stops through the lens of the Prisoner's Dilemma.

---

[132] RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 8 (1994).

[133] ROBERT V. DODGE, SCHELLING'S GAME THEORY: HOW TO MAKE DECISIONS 138 (2012).

[134] *Id.* at 138-39.

[135] *Id.* at 139.

[136] *Id.*

[137] *Id.* at 138.

[138] *Id.*

[139] *Id.* at 138.

[140] *Id.* at 137.

[141] *Id.*

[142] *Id.*

[143] *Id.*

IV. MODEL 1: THE *TERRY* DILEMMA

This section adapts the classic Prisoner's Dilemma to analyze the choices that both police officers and civilians make during investigatory stops. This analysis includes an argument that the qualified immunity doctrine shapes police officers' incentives during these encounters, giving rise to an equilibrium in which suspects' Fourth Amendment rights are frequently disrespected. Given that police officers have used *Terry* stops to disproportionately target people of color, and that these stops lead to the watering down of Fourth Amendment rights,[144] public policy demands that the qualified immunity doctrine be reevaluated and possibly rescinded.

During investigatory stops, both police officers and suspects have decisions to make, just like the two prisoners in the classic Prisoner's Dilemma. The two prisoners in the Prisoner's Dilemma must make precisely the same choice (to either testify against their partner in crime or not) without consulting one another, while the players in the *Terry* Dilemma must make different, yet interrelated, decisions.[145] In the *Terry* Dilemma, the players interact directly with one another, but they are still unable to trust one another. There is little time for deliberation, and the consequences of each player's decision are potentially severe.

At the start of the *Terry* Dilemma, the police officer, having an inarticulable hunch that the suspect is engaged in criminal activity, has approached the suspect and asked her to consent to a search of her person for weapons. It is unclear whether the officer's hunch would pass muster to justify a *Terry* frisk, but the officer has requested the search hoping that the suspect will consent and thereby waive any constitutional right she might have otherwise asserted. Thus, the stage is set for the *Terry* Dilemma. The suspect must decide whether she will consent to the search, and the police officer must decide whether to conduct a search of the suspect regardless of the suspect's consent.

In the classic Prisoner's Dilemma, the only factor weighing on the prisoners' minds is the amount of prison time they will ultimately face.[146] In the *Terry* Dilemma, however, both the suspect and the police officer must quickly consider a variety of factors to make their decisions. The suspect will weigh her potential criminal liability, her physical safety, and her constitutional rights. The police officer will consider his own physical safety (and that of the greater community), his masculinity and dominance over the suspect, and his liability for the outcome of the encounter.

---

[144] Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1277 (1998).

[145] Dodge, *supra* note 132, at 138.

[146] *Id.* at 139.

A. *The Suspect's Considerations: Criminal Liability, Physical Safety, and the Fourth Amendment*

The first of the three factors the suspect considers when deciding whether to consent to the search is what criminal liability she might face if she consents and what criminal liability she might face if she declines. If the suspect is carrying contraband of any kind and decides to consent to the search, she expects criminal sanction for this possession. If the contraband-possessing suspect does not consent to the search, she runs the risk that the police officer will search her anyway and discover the contraband. If she declines and the officer conducts a search despite her dissent, the suspect may expect a greater criminal sanction than if she had merely consented to the search because the police officer may also cite her for obstruction of justice or resisting arrest.[147] These additional charges could disadvantage the suspect in plea negotiations and may result in greater criminal liability than if she had simply consented to the search.

If the suspect is not carrying contraband, she may not completely disregard all fear of criminal sanctions. If the suspect declines to cooperate with a belligerent police officer, she may still face criminal charges. In many jurisdictions, obstructing a peace officer, a misdemeanor offense that does not require using force against the officer, carries stiff fines and potential jail time.[148] The possibility of facing obstruction charges and a potential conviction is not necessarily remote. For example, the plaintiff in *Thomas* was charged with unlawfully resisting, delaying, or obstructing a peace officer for his refusal to consent to Officer Dillard's request to search him.[149] Thus, if criminal sanctions were the only factor weighing on a suspect while deciding whether to consent to a search, she should consent regardless of whether she is carrying contraband.

Fear of criminal liability, however, is not the only relevant factor to the suspect's *Terry* Dilemma decision. The suspect may also consider her own physical safety. It has been widely reported that the police in the United States kill civilians at much higher rates than police forces in other comparable countries.[150] In 2017, 987 people were shot by the police.[151]

---

[147] *See, e.g.*, Thomas v. Dillard, 818 F.3d 864, 873 (9th Cir. 2016).

[148] *See, e.g.*, MONT. CODE ANN. § 45-7-302 (2017); 720 ILL. COMP. STAT. 5/31-1 (2017).

[149] *Thomas*, 818 F.3d at 873.

[150] *See, e.g.*, Jamiles Lartey, *By the Numbers: Us Police Kill More in Days Than Other Countries Do in Years*, THE GUARDIAN (June 9, 2015), https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries; Kuang Keng Kuek Ser, *When It Comes to Police Shootings, the US Doesn't Look like a Developed Nation*, PUBLIC RADIO INTERNATIONAL (July 12, 2016), https://www.pri.org/stories/2016-07-12/when-it-comes-police-shootings-us-doesnt-look-developed-nation.

[151] *Fatal Force*, THE WASHINGTON POST: Police Shootings 2017 Database,

Nearly sixty percent of those killed were armed with a gun, but ten percent were unarmed.[152] Less is known about police shootings that result in injury but not death.[153] The facts in *Thomas*, as discussed above, exemplify another possibility: that the officer will respond to a suspect's refusal to give consent to a search with brute force.[154]

Police violence is not experienced equally by suspects of all races.[155] Black individuals are disproportionately victims of police violence when compared to their percentage of the general population.[156] A study by the Center for Policing Equity found that the mean use-of-force rate against black suspects was 3.6 times higher than the rate for white suspects, suggesting that black suspects would be justified in fearing for their own physical safety while interacting with the police.[157] A survey conducted by National Public Radio affirms this inference, revealing that nearly a third of black respondents reported avoiding calling the police for help for fear of being discriminated against because of their race.[158] The situation is so tenuous that activists revived David Miller's famous poster, "10 Rules of Survival If Stopped By the Police," as a video campaign in 2015, urging caution to young black men and women during their encounters with police.[159]

Given the state of police violence in the United States and the prevalence of violence against people of color in particular, the suspect in the *Terry* Dilemma must carefully consider her own physical safety when deciding whether to comply with the officer's request to search her person. If she is unarmed and declines to provide her consent to the search, a suspect necessarily risks that the police officer will react with extreme physical

---

https://www.washingtonpost.com/graphics/national/police-shootings-2017/.

[152] *Id.*

[153] Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, THE WASHINGTON POST (Sept. 8, 2014), https://www.washingtonpost.com/?utm_term=.95423aa553f4.

[154] *See* Thomas v. Dillard, 818 F.3d 864, 873 (9th Cir. 2016).

[155] German Lopez, *Police Shootings and Brutality in the US: 9 Things You Should Know*, VOX (May 26, 2017), https://www.vox.com/cards/police-brutality-shootings-us/us-police-racism.

[156] Black people make up approximately 13 percent of the United States population. In striking comparison, they make up 31 percent of people shot and killed by the police. *Id.*

[157] Phillip Atiba Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, CTR. FOR POLICING EQUITY 1, 15 (July 2016), http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

[158] *Discrimination in America: Experiences and Views of African Americans*, NATIONAL PUBLIC RADIO 1 (Oct. 2017), https://www.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf.

[159] SALT Project, *Get Home Safely: 10 Rules of Survival*, VIMEO (Jan. 13, 2015, 5:46 PM), https://vimeo.com/116706870.

force, as happened in *Thomas*, thus jeopardizing her physical safety.[160] However, if she is unarmed and consents to the search, she may perceive a smaller likelihood of being physically harmed.[161] Thus, if the suspect is unarmed, and she considers only her physical safety, she should consent to the officer's search. Although consenting to the search does not amount to a guarantee that an *armed* suspect will be free of police violence,[162] she may view her compliance as minimizing this risk, making consent to the search the optimal strategy for armed suspects as well.

With such dramatic potential outcomes for the suspect's criminal liability and physical safety, it may be unrealistic to expect the suspect to consider her Fourth Amendment rights.[163] The plaintiff's refusal to consent to a weapons search in *Thomas*, however, demonstrates that suspects likely do consider at least the perceived fundamental fairness of the proposed search, if not explicitly their own Fourth Amendment rights.[164] Thomas refused to consent to the search because he did not believe the search was justified.[165] His refusal to consent preserved his Fourth Amendment right to be free from unreasonable searches, which he later asserted by filing a civil action against Officer Dillard.[166] Thus, if the suspect declines to consent to the search, she preserves her right to be free of unreasonable searches, whereas

---

[160] *See* Thomas v. Dillard, 818 F.3d 864, 873 (9th Cir. 2016).

[161] This perception may or may not reflect reality. Many high-profile cases have demonstrated that even when suspects are cooperative, they are sometimes subject to violence, including deadly violence, at the hands of police officers. *See, e.g.*, Ray Sanchez, *What We Know About the Controversy in Sandra Bland's Death*, CNN (July 22, 2015), https://www.cnn.com/2015/07/21/us/texas-sandra-bland-jail-death-explain/index.html; Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, THE WASHINGTON POST (June 21, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?utm_term=.9a3c6fa84baa.

[162] Philando Castile, a black man who was licensed to carry a firearm, was shot by police in 2016 after he calmly informed the officer that he was carrying a weapon, demonstrating that cooperation with the police is hardly a guarantee of safety. *See* Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html.

[163] It is also unclear whether the average suspect is even aware of her Fourth Amendment rights. In 2017, the Annenberg Public Policy Center of the University of Pennsylvania released the results of a national survey, revealing that thirty-seven percent of respondents could not name any of the rights guaranteed in the First Amendment, and only twenty-six percent could identify the three branches of government. Press Release, Annenberg Pub. Policy Ctr., Americans Are Poorly Informed About Basic Constitutional Provisions (Sept. 12, 2017), https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/2017/09/Civics-survey-Sept-2017-complete.pdf.

[164] *See Thomas*, 818 F.3d at 872-73.

[165] *Id.*

[166] *Id.* at 873.

if she consents to the search, she waives her ability to claim that the right was violated.

If the suspect is carrying contraband for which she expects to face criminal sanctions, the preservation of her Fourth Amendment right to be free from unreasonable searches would permit her to seek the protection of the exclusionary rule at trial.[167] The exclusionary rule prevents the prosecution from admitting evidence against a defendant if police obtained the evidence in violation of the Constitution.[168] Given this protection, if the contraband-carrying suspect was only to consider how her decision would impact her Fourth Amendment rights, she would likely decline to provide consent to the search. If the suspect was not carrying contraband, however, and considered only her own Fourth Amendment rights, she may be indifferent regarding whether to consent to the search or not.

Of course, in the *Terry* Dilemma, the suspect has much more to consider than just her own Fourth Amendment rights. She may also consider her potential criminal liability and physical safety. Neither of these factors provide any compelling reason to decline consent to the officer's search, and each offers persuasive reasons to consent.[169] Thus, the suspect will most often conclude that it is in her best interest to consent to the officer's search.

B. *The Police Officer's Considerations: Physical Safety, Dominance, and Liability*

Police officers have an undeniably dangerous job.[170] The rate of fatal injuries for police officers greatly exceeds that of other occupations.[171] Although forty-one percent of police fatalities between 2009 and 2014 resulted from transportation accidents, more than fifty-five percent of officer deaths were the result of violence committed by suspects or inmates.[172] The courts in both *Terry* and *Thomas* acknowledged the

---

[167] *See* Terry v. Ohio, 392 U.S. 1, 13 (1968) ("Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct.").

[168] *Id.* (holding that exclusion is often warranted when actions by state agents violate constitutional guarantees).

[169] I leave to other scholars the question of whether a suspect's consent can truly be voluntary, given the extent of the officer's power over the suspect.

[170] *See Injuries, Illnesses, and Fatalities*, BUREAU OF LABOR STATISTICS (Apr. 27, 2018), https://www.bls.gov/iif/oshwc/cfoi/police-officers-2014.htm ("Police officers have a higher risk of incurring a work-related injury or illness than most other occupations.").

[171] *Id.* (comparing the rate of police officers' fatal work injuries – 13.5 per 100,000 – to the rate for all occupations – 3.5 per 100,000 for all occupations).

[172] *Id.*

inherent dangers of police work.[173] In *Terry*, the Supreme Court held that a police officer is justified in frisking a suspect for weapons in part by a need "to dispel [the officer's] reasonable fear for his own or others' safety" and "to discover weapons which might be used to assault him."[174] In *Thomas*, the Ninth Circuit "[accepted] the proposition that domestic violence calls present a significant risk to police officers' safety," but stopped short of permitting officers license to frisk all individuals suspected of domestic violence on these grounds.[175]

Given the dangers involved for police officers conducting investigatory stops, the first factor the officer will consider in his *Terry* Dilemma decision is his physical safety. The police officer does not know for certain whether the suspect is carrying a concealed weapon and will not know for certain until he performs the frisk. If the suspect is carrying a weapon, the police officer faces the possibility that she will wield it against him or another civilian, causing injury or death. Thus, unless and until the police officer frisks the suspect, he will perceive himself to be in danger of attack by the suspect and her hypothetical weapon. Given that the police officer prefers not to be attacked, if he considers only his physical safety, he will always choose to frisk the suspect regardless of the suspect's consent.

In addition to the presence of frequent danger, another inherent element in policing is masculinity. In his 2009 article *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, law professor Frank Rudy Cooper argues that police officers use *Terry* stops to "stage masculinity contests" and to "boost their masculine esteem."[176] This behavior thereby also "boost[s] [the officer's] racial esteem," because officers primarily target young men of color.[177] Cooper argues that an officer boosts his own masculinity and consolidates his power in the community by emasculating the suspect.[178] The *Terry* stop then becomes a "masculinity contest" when the suspect proffers a "masculinity challenge" by contradicting the officer.[179]

In the *Terry* Dilemma, the suspect may challenge an officer's masculinity if she declines to provide her consent to the requested search. If the suspect declines to consent and the police officer proceeds cautiously and does not perform a *Terry* frisk without the suspect's consent, he will likely

---

[173] *See* Terry v. Ohio, 392 U.S. 1, 23–24 (1968) (observing that many law enforcement officers are killed in the line of duty); Thomas v. Dillard, 818 F.3d 864, 880 (9th Cir. 2016).

[174] *Terry*, 392 U.S. at 30.

[175] 818 F.3d at 880.

[176] Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 675 (2009).

[177] *Id.* at 676.

[178] *Id.* at 701.

[179] *See id.* at 723-24.

emasculate himself by forfeiting his power.[180] If, instead, the officer frisks the suspect despite her refusal to consent, he will retain his masculinity.[181] Thus, if masculinity and dominance are the police officer's only concerns in the *Terry* Dilemma, and if the police officer prefers to retain his masculinity rather than emasculate himself, he will choose to perform the search regardless of whether the suspect consents.

The final factor a police officer will consider in making his *Terry* Dilemma decision is what liability he might face for making a potentially unconstitutional search. As described in Section IIB above, civilians may bring a civil action for damages against an official who violates their rights. Although a judgment may limit an offending officer's liability to declaratory relief, it could also include monetary damages.[182] If the officer chooses not to search the suspect, he will face no liability. A suspect cannot hold the officer responsible for making an unreasonable search if no search actually occurred.

If the officer makes the search without the suspect's consent, the officer has three defensive protections against liability. The first defense is the relative unlikelihood that a suspect will invest the resources necessary to file a claim against the officer and attempt to hold him fiscally liable.[183] Commencing such a proceeding would require that the suspect invest substantial time and energy, making such action relatively unlikely. The *Terry* Court created the officer's second defense against liability: the officer's ability to state a reasonable suspicion based on articulable facts that the suspect engaged in criminal activity.[184] If a suspect commenced a § 1983 action against the police officer and a court determined that he lacked a reasonable suspicion based on articulable facts, the police officer *may* be liable for violating the suspect's Fourth Amendment rights.[185] As it happens, however, the officer has one last defense against liability: the qualified immunity doctrine.[186] Thus, if the police officer simply articulates a reasonable suspicion or if he persuades a court that his mistake

---

[180] *See id.* at 699.

[181] *See id.* at 700.

[182] *See* 42 U.S.C. § 1983 (2012).

[183] Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863 (2012) ("Lawsuits . . . under-represent the universe of misconduct allegations. [A] 2002 BJS survey found that people who believed the police mistreated them sued infrequently—approximately one percent of the time.") (citing Matthew R. Durose et al., Contacts between Police and the Public: Findings from the 2002 National Survey, U.S. DEP'T OF JUSTICE: BUREAU OF JUSTICE STATISTICS i, v (Apr. 2005)).

[184] *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts.").

[185] *See id.* at 30.

[186] *See supra* Section IIC.

of fact or law was reasonable, the officer will escape liability.

The police officer's *Terry* Dilemma decision, however, is influenced by more than his potential liability for Fourth Amendment violations. He will also consider his physical safety and masculinity.[187] Because qualified immunity shields the police officer from liability and because he wishes to maintain his safety and masculinity, the police officer will most often choose to frisk the suspect regardless of her consent.

C. *The Terry Dilemma's Nash Equilibrium and Social Optimum*

The previous two subsections established that both the police officer and the suspect consider different factors in the *Terry* Dilemma and that these factors push each player toward a particular choice. Under the set of conditions laid out above, suspects will tend to consent to searches, and police officers will tend to frisk suspects regardless of whether the suspect consented or not. This is the Nash Equilibrium for the *Terry* Dilemma because neither the police officer nor the suspect has any incentive to unilaterally change their choice. However, just as in the Prisoner's Dilemma, the *Terry* Dilemma's Nash Equilibrium is not the socially optimal outcome.

This article argues that the socially optimal outcome would be for more police officers to choose not to frisk suspects and for more suspects to refuse to consent to a search. Section IIIA detailed how police violence plays a large role in suspects' decision-making and how people of color are disproportionately disadvantaged by this violence. Section IIIA also noted how suspects' refusals to consent to a search may subject them to increased criminal liability because in many jurisdictions a prosecutor could also charge dissenting suspects with obstructing a peace officer. Section IIIB described how police officers use masculinity to dominate civilians. Physical violence and masculinity contests should not impact a suspect's or a police officer's decision in the *Terry* Dilemma. Civilians should not fear physical violence at the hands of police officers who are sworn to protect them, nor should police officers use their authority to dominate and emasculate civilians.

1. The Fourth Amendment as a Public Good

In the classic Prisoner's Dilemma, the socially optimal outcome is for both prisoners to remain silent because their silence minimizes their

---

[187] Although Cooper noted that he did not focus his article on establishing the use of masculinity by policewomen, "Policewomen . . . are subject to the norms of [a] male-dominated field" and are thus "likely also prone to act in those ways." Cooper, *supra* note 175, at 679.

collective jail time.[188] Thus, the two prisoners made up the entire society in the classic Prisoner's Dilemma. It is hard to imagine who would benefit from a reduction in their sentences other than the prisoners and their immediate families. This article argues that in the circumstances of a *Terry* Dilemma, however, society should also include the community of civilians that may become suspects themselves in further iterations of the Dilemma (i.e., the model must consider what is best for the public at large rather than just the individual suspect and police officer). Thus, the entire society has an interest in the outcome of the *Terry* Dilemma because each individual may become a suspect at some point in their lives.

Law Professor Thomas W. Merrill, in his 1995 article "*Dolan v. City of Tigard*: Constitutional Rights as Public Goods" supports the argument that certain constitutional rights are public goods.[189] Merrill states that a constitutional right is a public good when "the exercise of the right not only produces a private benefit for the rights-holder, but also generates positive externalities that benefit third parties or society more generally."[190] Merrill cites classic examples of constitutional provisions that serve as public goods, including free speech and separation of powers.[191] Although these provisions affect individual actors, their exercise and enforcement create a more free and informed society.[192] This article submits that a suspect's Fourth Amendment right to be free from unreasonable searches is a public good, and that as such, it is worthy of governmental protection and prioritization.

If a suspect declined to consent to a search in the *Terry* Dilemma, she would refuse to waive her Fourth Amendment right to be free of unreasonable searches.[193] The preservation of this right might—or might not—benefit her in subsequent litigation. If a court finds that the police officer lacked reasonable suspicion to search her for weapons, her criminal defense would benefit from the exclusion of any evidence obtained from the unreasonable search. She would also have a cause of action against the police officer who violated her Fourth Amendment rights under § 1983.[194] These benefits are undoubtedly private; however, the exercise of her Fourth

---

[188] *See* Thaler, *supra* note 131, at 8.

[189] Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 862 (1995).

[190] *Id.*

[191] *Id.* at 870-71 (considering "the production of information [to be] a public good" and understanding separation of powers "as serving broader public purposes").

[192] *Id.* at 871 ("Separation of powers provisions, for example, can similarly be seen not only as protecting specific institutional actors, but also as serving broader public purposes in promoting public deliberation and protecting the system of checks and balances.").

[193] *See* U.S. CONST. amend. IV.

[194] *See* 42 U.S.C. § 1983 (2012).

Amendment rights also benefits the public at large. If more individual suspects exercised their right to decline a search, many more may feel empowered to do the same. If more suspects exercised their Fourth Amendment rights, their actions would more frequently force the state to comply with constitutional standards justifying invasions of privacy rather than continuing to rely on civilians waiving their rights by providing their consent.

Some may argue that such an outcome is undesirable because if fewer suspects consent to searches the police would find it more difficult to solve and prevent dangerous crimes. To these challenges, this article responds with the words of Justice Goldberg in the majority opinion of *Escobedo v. Illinois*: "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[195] Fear of violence and intimidation plague the *Terry* Dilemma, and racial and ethnic minorities bear the brunt of this fear.[196] State-sanctioned violence and intimidation are unacceptable crime-fighting tactics and are a particularly intolerable response to the free exercise of one's constitutional rights.

An outcome wherein more suspects decline to give consent to searches and more police officers choose not to search the suspect without the suspect's consent is preferable to the *Terry* Dilemma's Nash Equilibrium.[197] Such an outcome would indicate that suspects feel free to choose between giving consent and withholding it and that police officers respect suspects' Fourth Amendment rights and only proceed with searches when reasonable suspicion of criminal activity exists.

2. Qualified Immunity and Police Officer Incentives

Because a Nash Equilibrium exists in the *Terry* Dilemma, neither the suspect nor the police officer will change their decision without some modification to the circumstances. Achieving the socially optimal outcome for the *Terry* Dilemma requires a change in policy that will shift the suspect's and the police officer's decision-making processes. This article argues that the reconsideration and elimination of qualified immunity will resolve the *Terry* Dilemma and push the police officer and suspect toward the socially optimal outcome.

Scholars widely regard the qualified immunity doctrine as a substantial barrier to success in § 1983 suits against public officials.[198] While

---

[195] Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

[196] Maclin, *supra* note 144, at 1277.

[197] *See supra* Section IVC.

[198] Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 812 (2010).

discussing the challenges that § 1983 plaintiffs face in actions against federal public officials (a "*Bivens* action"), the United States District Court for the District of Colorado described it this way:

> We are aware of the perils plaintiffs must overcome to successfully bring a *Bivens* action. They must plead their case with greater specificity than other claims, contend with the government's sovereign immunity, and overcome the procedural advantages afforded to defendants.[199] Moreover, even after a plaintiff has overcome these difficulties, an individual defendant can assert an immunity defense. As a result, bringing a *Bivens* action is a Herculean task with little prospect of success.[200]

Thus, rescinding the qualified immunity doctrine would eliminate a substantial barrier to plaintiffs in § 1983 lawsuits and would increase access to justice for suspects after police officers have violated their constitutional rights.

Courts have justified the qualified immunity doctrine on the basis that imposing financial liability on public officials would deter "[t]he most capable candidates" for government positions "from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure."[201] In other words, the courts fear that if the legislature rescinds the qualified immunity doctrine, police forces may dwindle as officers resign and candidates withdraw applications, fearing that they may lose their life savings to a civil judgment against them.[202] However, a nationwide study of police indemnification practices conducted by Joanna Schwartz allays this concern.[203] Schwartz's study concludes that "[p]olice officers are virtually always indemnified."[204] Specifically, she found that:

> Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9,225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities,

---

[199] *See* Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 338 N.C.L.REV. 337 (1989).

[200] Vaughan & Potter 1983, LTD. v. United States, Civ. No. 91-F-1767, 1992 WL 235868, at *3 (D. Colo. July 29, 1992).

[201] Wood v. Strickland, 420 U.S. 308, 320 (1975).

[202] *Id.*

[203] Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (finding "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement").

[204] *Id.* at 890.

counties, and states in these cases.[205]

Although Schwartz did not herself assert that Congress should revoke qualified immunity on this basis alone, she did conclude that police officer liability is an improper basis for sustaining the practice, given the nationwide realities of police indemnification.[206]

This article's analysis, however, suggests that the qualified immunity doctrine for police officers should be eliminated to reduce the barriers to § 1983 plaintiffs who allege constitutional violations during *Terry* encounters. Although other safeguards still heavily shield officers from financial responsibility for their actions, a judgment against them may have consequences for both their own employment status and their department's reputation.[207] Thus, the elimination of qualified immunity for police officers would change an officer's *Terry* Dilemma considerations without completely upending the system of policing in the United States.

Police officers would certainly still consider their own physical safety. Police officers may even continue to assert their masculinity against suspects. They will no longer, however, have a third defense against civil liability if they choose to search a suspect without a reasonable suspicion based on articulable facts that the suspect was engaged in criminal activity. Without this defense against liability, officers will have to proceed more cautiously in frisking suspects without their consent. Additionally, upon the repeal of qualified immunity, suspects may feel more empowered to exercise their constitutional rights. As more suspects feel empowered to exercise their Fourth Amendment rights and more police officers feel compelled to respect these rights, the *Terry* Dilemma as we know it will move toward a more socially optimal result.

V. CONCLUSION

Despite the tedium of economic theory, with a bit of imagination, it may be applied to a myriad of scenarios and is a useful tool for evaluating social problems. Social movements over the past several years have illuminated a serious social ill in American policing: the use of extreme force by police officers against civilians, particularly civilians of color, and the lack of justice afforded to those whose constitutional rights have been violated.[208] The qualified immunity doctrine protects police officers who have violated

---

[205] *Id.*

[206] *Id.* at 890-91 ("[I]t seems clear that civil rights doctrine should not rely on counterfactual assumptions about officers' liability exposure.").

[207] *Id.* at 923-24.

[208] *See, e.g.*, Holly Yan, *"Black Lives Matter" Cases: What Happened After Controversial Police Killings*, CNN (June 26, 2017), https://www.cnn.com/2017/06/26/us/black-lives-matter-deaths-outcomes/index.html.

an individual's constitutional rights if the constitutional right in question was not "clearly established" at the time of the violation.[209] The recent case of *Thomas v. Dillard* provides an example of the qualified immunity doctrine immunizing a police officer who violated a civilian's rights during a *Terry* stop.[210] This article proposes that a *Terry* stop may be imagined as a Prisoner's Dilemma, in which suspects' and police officers' individual circumstances and incentives lead them to make socially sub-optimal choices. Officers will too often choose to frisk a suspect regardless of whether the suspect consents to the search, and suspects will too often consent to a search, watering down the protection of their Fourth Amendment rights. The elimination of qualified immunity for police officers will not have the dire consequences that the Court has foreseen in the past, but will instead resolve the *Terry* Dilemma, strengthening our Fourth Amendment rights and encouraging police officers to frisk suspects only when they have clearly established cause to do so.

---

[209] *See* Thomas v. Dillard, 818 F.3d 846 (9th Cir. 2016).

[210] *See id.*

VI. APPENDIX

Table 1: Classic Prisoner's Dilemma

Player 1 and Player 2 have been arrested for a crime, are being interviewed separately, and each must decide whether to stay silent or confess.

		Player 1	
		Cooperate *(stay silent)*	Defect *(confess)*
Player 2	Cooperate *(stay silent)*	Socially Optimal Outcome 1 year, 1 year	3 years, 0 years
	Defect *(confess)*	0 years, 3 years	Nash Equilibrium 2 years, 2 years

Table 2: The *Terry* Dilemma

The police officer has approached the suspect and asked for her consent to search because he is unclear whether he has reasonable suspicion for a *Terry* frisk.

<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="4">Police Officer</td></tr>
<tr><td colspan="2">No Terry frisk</td><td colspan="2">Terry Frisk</td></tr>
<tr><td rowspan="4">Suspect</td><td rowspan="2">Refuse to consent to search</td><td colspan="2">Social Optimum</td><td>Fear of Police Violence

Cooperate to Reduce Liability

Waive Fourth Amendment Rights</td><td>Increased Sense of Safety

Asserting Masculinity

Three Layers of Liability Protection</td></tr>
<tr><td>Fear of Police Violence

Cooperate to Reduce Criminal Liability

Preserve Fourth Amendment Rights</td><td>Decreased Sense of Safety

Emasculation

Free of Liability</td><td colspan="2"></td></tr>
<tr><td rowspan="2">Consent to search</td><td rowspan="2">Reduced Fear of Police Violence

Potential for increased Criminal Liability

Waive Claim to Fourth Amendment Rights</td><td rowspan="2">Decreased Sense of Safety

Emasculation

Free of Liability</td><td colspan="2">Nash Equilibrium</td></tr>
<tr><td>Reduced Fear of Police Violence

Potential for increased Criminal Liability

Preserve Claim to Fourth Amendment Rights</td><td>Increased Sense of Safety

Asserting Masculinity

Three Layers of Liability Protection</td></tr>
</table>