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Excessive Force: Justice Requires Refining State Qualified Immunity Standards for Negligent Police Officers

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CONTENTS

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INTRODUCTION

This Note was written before the summer of 2020 when many people within the legal community began a long-overdue reckoning with how the courts and law enforcement have contributed to racial injustice. At the time this Note was written, the idea of abolishing qualified immunity for law enforcement officers was not as widely discussed as it is now. It is the author's opinion that qualified immunity should be removed entirely as part of a large-scale reformation of how we enforce laws and keep people safe. With this larger idea in mind, this Note recommends one way to change the state-standard of qualified immunity so that it does not bar a more recent type of negligence claim against police officers who commit torts against people in their custody. Lawsuits are one, narrow, way to hold law enforcement officers accountable for wrongdoing, and lawsuits cannot undo a legacy of racial discrimination. However, lawsuits are one stop-gap measure that can draw attention to certain dangerous practices of law enforcement and the government entities that are supposed to supervise them.

Plaintiffs face challenges holding law enforcement officers who use excessive or deadly force accountable in federal court. Current case law gives law enforcement officers a free pass to use excessive or deadly force without acknowledging that they could save lives instead.[1] In August 2019, the lay of the land changed when the Washington Supreme Court released its opinion in *Beltran-Serrano v. City of Tacoma*,[2] which made available state-level claims other than a Section 1983 Civil Rights (§ 1983) claim in federal court. This Note is intended to serve as a resource for practitioners litigating state-level claims post-*Beltran-Serrano* and for families seeking justice for their loved ones.

Civil suits against law enforcement officers and the agencies that employ them are one of many tools available to victims of excessive or deadly force to hold law enforcement officers accountable. Due to great community interest in addressing police officers' use of excessive force—which disproportionately affects people of color, especially young black

1. *See generally* Graham v. Connor, 490 U.S. 386, 396–97 (1989). *See* Osagie K. Obasogie, *The Bad-Apple Myth of Policing*, THE ATLANTIC (Aug. 2, 2019), https://www.theatlantic.com/politics/archive/2019/08/how-courts-judge-police-use-force/594832 [https://perma.cc/5HLJ-PG2U] (providing an overview of how courts defer to police department practices to determine what constitutes reasonable conduct when officers use excessive or deadly force). Dr. Obasogie is the author of an extensive empirical study of how cases like *Graham* and its progeny influenced courts to defer to police departments. *See* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1281–336 (2019).

2. Beltran-Serrano v. City of Tacoma, 442 P.3d 608 (Wash. 2019).

men,[3] and people facing mental health crises[4]—organizations and governmental entities have been formed to address the need for training and community engagement to prevent law enforcement's use of excessive and lethal force.[5] However, meaningful community engagement addressing law enforcement accountability toward the people they police is new and still evolving.[6] While not a perfect remedy, civil suits can offer redress for plaintiffs and shed light on unjust practices within law enforcement agencies.[7] By bringing forth a lawsuit, plaintiffs raise public awareness, which in turn may become a catalyst for long-term reform.

This Note will examine the implications of the Washington Supreme Court's opinion in *Beltran-Serrano v. City of Tacoma*,[8] in which the court allowed a plaintiff to bring a negligence claim, in addition to intentional tort claims, against a police officer who used excessive force. This Note will recommend that, when a plaintiff sues a law enforcement officer or agency for negligence, the Washington state judiciary modify its analysis of the qualified immunity defense to mirror the analysis in negligence claims by applying the totality of the circumstances test. This modification can ensure the qualified immunity affirmative defense does not unjustly block post-*Beltran-Serrano* negligence claims.

In recommending this new analysis, this Note will examine Washington State's civic and legal context, which encourages access to justice for plaintiffs by allowing them to file suit against the government in state courts as an alternative to the challenging mechanism of bringing a § 1983 civil rights claim in federal court. *Beltran-Serrano* created the possibility of new opportunities for plaintiffs to seek justice when they or their loved ones are harmed or killed by police officers who disregard their

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3. Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men [https://perma.cc/LAL9-EHS3].

4. *See generally* Susan Mizner, *Police 'Command and Control' Culture Is Often Lethal – Especially for People with Disabilities*, AM. C.L. UNION (May 10, 2018), https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/police-command-and-control-culture-often-lethal [https://perma.cc/G6KF-HN3M].

5. For some local examples, see, e.g., *King County Office of Law Enforcement Oversight (OLEO)*, KING CNTY. (Jan. 17, 2018), https://www.kingcounty.gov/independent/law-enforcement-oversight.aspx [https://perma.cc/AM5X-ALHS]; *Our Story*, NOT THIS TIME!, https://www.notthis time.global/our-work/our-story/ [https://perma.cc/9W9J-MHPA].

6. *See generally* Toshiko G. Hasegawa, Assessing Public Priorities for Police Oversight in King County 10 (2019) (M.A. dissertation, Seattle University) (on file with author) (overview of law enforcement oversight offices in the region).

7. Lilly Fowler, *Report: Sheriff's Office Should Be More Transparent on Police Shootings*, CROSSCUT (June 13, 2018), https://crosscut.com/2018/06/report-sheriffs-office-should-be-more-transparent-police-shootings [https://perma.cc/FB3S-EF4Y]. In the aftermath of an officer's use of deadly force, the lawsuit and accompanying public pressure encouraged the King County Sheriff's Office to change the way it shares investigations with the media and public. *Id.*

8. Beltran-Serrano v. City of Tacoma, 442 P.3d 608, 609 (Wash. 2019).

training and would otherwise not be held accountable. Solely addressing how law enforcement officers are trained will not solve many of the systemic problems that make it difficult to hold law enforcement officers accountable for wrongful conduct. However, currently, the courts still consider whether an officer followed their training when determining the wrongfulness of the officer's actions. Until this legal framework is changed, the type of training a law enforcement officer receives and whether they follow that training will affect their liability within the legal system.

Part I of this Note will begin by sharing additional context about the need for increased accountability from police officers to the public. Part II will give an overview of the legal mechanisms typically used in excessive force cases at the national level and the barriers to recovery plaintiffs face, including the defense of qualified immunity. Part III will explain how Washington State's procedures and standards for addressing police misconduct differ from similar cases at the federal level. Part IV will examine the recent *Beltran-Serrano* decision and its potential to increase the tools available to plaintiffs to hold a police officer accountable if the officer disregards their training. Part V will describe how *Beltran-Serrano* does not address how to litigate Washington's state-specific standard of qualified immunity. Part V will also describe how Washington's standard of qualified immunity is applied and pose questions that the *Beltran-Serrano* decision has not answered. Furthermore, Part V will recommend that Washington State revise its standard of qualified immunity in light of the *Beltran-Serrano* decision to ensure defendants cannot continue to use qualified immunity to block these new negligence claims because: (1) the existing cases guiding our state-standard of qualified immunity can be significantly distinguished from the circumstances of negligence in *Beltran-Serrano*—or more generally, from cases regarding the use of excessive force, which requires a new standard of analysis; and (2) Washington State's unique jurisprudence and laws encouraging access to justice for plaintiffs and interest in meaningful accountability for law enforcement officers show a public policy interest in ensuring police officers deescalate situations instead of using excessive force.

I. CHALLENGES WITH POLICE ACCOUNTABILITY AT THE NATIONAL AND STATE-LEVEL

In light of recent wrongful shootings by police officers in Washington State,[9] there is increased focus on officer training and

9. *See generally* Steve Miletich, Christine Willmsen, Mike Carter & Justin Mayo, *Shielded By the Law*, SEATTLE TIMES (Sept. 26, 2015), http://projects.seattletimes.com/2015/killed-by-police/

supervision and whether additional training or better supervision will prevent incidents of wrongful killings, especially when victims are disproportionately persons of color,[10] individuals experiencing mental health crises, or both.[11] In addition to Washington State, there is national attention focused on the need for law enforcement officers to receive proper training and subsequently to follow their training to ensure they do not unintentionally hurt anyone.[12]

Because of the severity of the types of injury an officer may cause when they do not follow their required protocol, our nation has experienced a widespread and increased level of community engagement calling for a change to police practices to end law enforcement's use of excessive and deadly force and to hold officers accountable for their actions when they do use excessive force.[13] Washington counties have differed in their responses to cases of excessive force. For two contrasting examples of progress on how local governments have handled law enforcement accountability, Snohomish County and King County are illustrative. For one extreme example of how challenging it can be to prevent a law enforcement officer from causing harm, in the case of *Peters v. Snohomish County*, Snohomish County settled a wrongful death lawsuit involving the family of a young man killed by a law enforcement officer and fired the officer in question, only for the newly elected sheriff to re-hire the same officer.[14] By contrast, King County, in an attempt to move toward providing more accountability, created an entirely new, independent agency to increase community involvement in holding accountable King County law enforcement officers.[15] Developments

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[https://perma.cc/DVY3-9MEK] (compiling information on police shootings in Washington state, including the number of officers charged for their actions).

10. Khan, *supra* note 3.

11. *See generally* Brief of Amicus Curiae of American Civil Liberties Union of Washington, *Beltran-Serrano*, 442 P.3d 608 (No. 95062-8) [https://perma.cc/CGN7-6GZ5].

12. Martha Bellisle, *AP Exclusive: Accidental Shootings Show Police Training Gaps*, ASSOCIATED PRESS (Dec. 9, 2019), https://apnews.com/009ac6cf0a174a58d88d9d01308aedd6 [https://perma.cc/UV9X-PRBU].

13. *See generally* THE OPPORTUNITY AGENDA, TRANSFORMING THE SYSTEM 67 (Aug. 15, 2016), http://transformingthesystem.org/pdfs/Transforming-The-System-CJReport.pdf [https://perma.cc/W636-VK3B] (providing several suggestions for how to improve accountability for law enforcement officers and departments).

14. Mike Carter, *New Sheriff in Snohomish County Rehires Deputy Fired for 'Unjustified' Shooting that Resulted in $1 Million Settlement*, SEATTLE TIMES (Jan. 21, 2020), https://www.seattletimes.com/seattle-news/crime/new-sheriff-in-snohomish-county-says-he-will-rehire-deputy-fired-for-unjustified-shooting-that-resulted-in-1-million-settlement/ [https://perma.cc/6VZK-7QZS].

15. *History of OLEO*, KING CNTY. (Feb. 13, 2019), https://www.kingcounty.gov/independent/law-enforcement-oversight/about/History.aspx [https://perma.cc/RE42-RQWD] (outlining the history of the Office of Law Enforcement Oversight).

in coming years will demonstrate whether these accountability mechanisms succeeded.

Additionally, organizations at the local and national level[16] are dedicated to ensuring police officers, and the local governments who employ them, are held accountable when law enforcement officers kill.[17] These organizations also seek larger, systemic change such as defunding police departments.[18] In addition to community efforts to change the laws and policies surrounding police transparency and accountability, plaintiffs and their attorneys are also holding police officers and police departments accountable for harm to plaintiffs through civil suits.[19] However, for several reasons, these suits are challenging for plaintiffs to win.

II. BACKGROUND ON FEDERAL LEGAL MECHANISMS TO HOLD POLICE OFFICERS AND DEPARTMENTS ACCOUNTABLE & QUALIFIED IMMUNITY AS A BARRIER TO JUSTICE

Several legal tools exist to combat excessive force, each with varying degrees of success. The most well-known legal remedy is to sue both the police officer and the officer's governmental employer in federal court for violating the 42 U.S.C. § 1983 of the Civil Rights Act.[20] The Civil Rights Act is implicated when a police officer violates a constitutional right, most often under the Equal Protection and Due Process Clauses of the Fourteenth Amendment or the right against unreasonable searches and seizures under the Fourth Amendment.[21] To succeed in these causes of action, plaintiffs must show that the government official acted under the *color of law*—meaning the actions were part of the official's duties—and the official's actions under the color of law violated the plaintiff's constitutional rights.[22] Section 1983 claims have created an area of constitutional law known as "constitutional torts."[23]

16. *See generally Reforming Police*, AM. C.L. UNION, https://www.aclu.org/issues/criminal-law-reform/reforming-police [https://perma.cc/C4CF-NXMH].

17. *See generally Our Demands*, BLACK LIVES MATTER: SEATTLE, https://blacklivesseattle.org/our-demands/ [https://perma.cc/RXX7-4LJW].

18. *See generally Our Demands*, BLACK LIVES MATTER: SEATTLE, https://blacklivesseattle.org/our-demands/ [https://perma.cc/RXX7-4LJW].

19. *See* 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/ [https://perma.cc/CHF9-N28W] (discussing several sources that say this can have mixed results).

20. 42 U.S.C. § 1983.

21. U.S. CONST. amend. IV; U.S. CONST. amend. XIV.

22. 42 U.S.C. § 1983; *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

23. *See generally* Susanah M. Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved from Extinction?*, 55 FORDHAM L. REV. 1 (1986).

However, significant barriers exist to successfully raising a § 1983 claim. First, trying a case in federal court takes significant time and resources that many plaintiffs and attorneys do not have.[24] Second, the nature of wrongful shootings or excessive force by police officers often involve situations where events unfold quickly enough that the federal court may consider whether a law enforcement officer had to make a "split-second decision" before using excessive force, which, if true, can lead courts to be especially deferential to the officer's judgment when determining the reasonableness of the officer's actions.[25] Third, plaintiffs face challenges when they sue under the Civil Rights Act because law enforcement officers can claim qualified immunity from suit.[26]

Law enforcement officers often use the defense of qualified immunity to shield themselves from personal liability for their misconduct. "Qualified Immunity" is the privilege that police officers use as a shield to protect themselves from being individually sued for actions they took in the course of their official duties.[27] Other government officials, in addition to law enforcement officers, enjoy this privilege.[28] At the federal level, a police officer can claim qualified immunity from suit if their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known.[29] A defendant-police officer can assert qualified immunity as a question of law in a motion for summary judgment to dismiss the liability claim. If the court accepts the qualified immunity defense, then the officer becomes immune from civil liability as a matter of law. If a federal court denies the officer's qualified immunity defense, a jury can examine the facts and determine whether the officer's use of force was reasonable.[30]

At the federal level, qualified immunity is one of the most challenging defenses to surmount when suing a law enforcement officer for constitutional violations.[31] Critics of the doctrine argue that qualified

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24. *See* Graham, *supra* note 19.

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

26. *See generally* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (arguing that the U.S. Supreme Court interpreted the *Harlow* decision incorrectly and discussing the barriers raised by qualified immunity, which—the author argues—may not be a barrier to liability to the extent that courts have treated it).

27. April Rodriguez, *Lower Courts Agree—It's Time to End Qualified Immunity*, AM. C.L. UNION (Sept. 10, 2020), https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/ [https://perma.cc/MZ2T-72JS].

28. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 611 (1978).

29. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

30. Emma Andersson, *The Supreme Court Gives Police a Green Light to 'Shoot First and Think Later,'* AM. C.L. UNION (Apr. 9, 2018), https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/supreme-court-gives-police-green-light-shoot [https://perma.cc/QF5P-ASLS].

31. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (citing Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

immunity has led to the dismissal of many meritorious suits against law enforcement officers based on the premise that the officers should be shielded from the burden of financial liability and the hardship of litigation.[32] UCLA Professor Joanna Schwartz found that the burden of litigation is not always as high as law enforcement officers argue, and many municipalities indemnify officers from suit, thereby shielding them from personal liability.[33] Additionally, U.S. Supreme Court justices have critiqued the doctrine of qualified immunity for its tendency to result in favorable outcomes for police officers who use excessive force.[34] For instance, in one case upholding qualified immunity for a law enforcement officer who shot a woman who was behaving erratically while holding a knife, Justice Sotomayor dissented, stating that this decision allowed officers to "shoot first and think later."[35] Furthermore, strict textualists have also raised concerns about qualified immunity because the doctrine is not based on the text of the constitution.[36]

Likewise, surmounting the defense of qualified immunity is difficult for plaintiffs because it is hard to determine, as a matter of law, whether a law enforcement officer's use of excessive force was reasonable. United States Supreme Court precedent holds that the reasonableness of a law enforcement officer's actions depends on whether the officer violated a clearly established law. In excessive force cases, "'the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[37] Federal courts use precedent to "help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful."[38] In other words, because excessive force cases turn so closely on the facts that lead to a split-second decision by an officer, plaintiffs face difficulties in comparing their cases to ones that have already been litigated to show the officer's use of excessive force was unreasonable under the Fourteenth Amendment. A plaintiff with a legitimate claim against an officer can find themselves with a tough hill to climb if no prior cases are analogous to the circumstances in which the officer used excessive or deadly force against them.

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32. Andersson, *supra* note 32.

33. Schwartz, *supra* note 26, at 6.

34. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1158 (2018) (Sotomayor, J., dissenting).

35. *Id.* at 1162.

36. *See generally* Matt Ford, *Should Cops Be Immune from Lawsuits?*, NEW REPUBLIC (Sept. 12, 2018) (citing *Kisela*, 138 S. Ct. at 1155–62 (Sotomayor, J., dissenting)), https://newrepublic.com/article/151168/legal-revolt-qualified-immunity [https://perma.cc/EK9F-E58Y].

37. *Kisela*, 138 S. Ct. at 1153 (citing Mullenix v. Luna, 577 U.S. 7, 13 (2015)).

38. *Id.*; *see also* Andersson, *supra* note 32.

Due to the immense challenge of overcoming the barrier of qualified immunity in federal court, those seeking to hold law enforcement agencies and officers accountable can instead turn to Washington State courts for guidance, which employ a different doctrine under a different historical context to examine claims against government entities.

III. WASHINGTON STATE CLAIMS AGAINST LAW ENFORCEMENT OFFICERS: NEGLIGENCE AS A PERMISSIBLE THEORY & THE LIMITATIONS ON QUALIFIED IMMUNITY

Apart from bringing a federal claim, a lesser-known judicial remedy for holding police officers accountable includes pursuing a tort claim in a state court system. In addition to claiming that a constitutional right was violated, a plaintiff can claim that a police officer violated a duty the officer owed to the plaintiff.[39] One advantage to bringing claims based on the state common law theory of negligence in lieu of a federal claim is that plaintiffs can avoid the challenges associated with the federal-specific qualified immunity defense.

Several Washington cases have laid the foundation for suing police officers for excessive or deadly force in tort. *Beltran-Serrano* is not the first Washington Supreme Court opinion that held police officers liable under the theory of negligence. Police officers have been held liable for the negligent performance of their duties in serving protective orders, failing to respond to calls for help in a timely manner, engaging in negligent chases, and negligently causing the infliction of emotional distress (which caused severe harm or even death to the plaintiffs).[40] Washington common law regarding officer negligence traces back to as early as 1926 in *Jahns v. Clark*, in which a sheriff and his deputies were held liable for civil damages resulting from shooting a person because the officer mistook him for a bootlegger.[41] However, it was not until the landmark case *Beltran-Serrano* that these past cases were discussed in one opinion revealing their common themes.[42] Each of these cases focused on different fact-specific situations where each plaintiff was harmed in a different way.[43]

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39. Mead, *supra* note 25 (citing 2 FOWLER V. HARPER & OSCAR S. GRAY, THE LAW OF TORTS § 11.5 (2d ed. 1986); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 5–7, § 4 (5th ed. 1984)).

40. *See, e.g.*, Washburn v. City of Federal Way, 310 P.3d 1275 (Wash. 2013); Chambers-Castanes v. King County, 669 P.2d 451 (Wash. 1983); Mason v. Bitton, 534 P.2d 1360 (Wash. 1975); Garnett v. City of Bellevue, 796 P.2d 782 (Wash. Ct. App. 1990).

41. Jahns v. Clark, 138 P. 293 (Wash. 1926).

42. Beltran-Serrano v. City of Tacoma, 442 P.3d 608, 611 (Wash. 2019).

43. *See, e.g.*, *Washburn*, 310 P.3d at 1279; *Chambers-Castanes*, 669 P.2d at 451; *Mason*, 534 P.2d at 1360; *Garnett*, 796 P.2d at 782.

The Washington Supreme Court has held that every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others.[44] Law enforcement officers and the government entities that employ them must uphold this same duty to avoid causing harm to others with intentional acts.[45] Additionally, reaffirming the jurisprudence and Washington's policy determination that officers owe a duty of care to the public, the legislature has weighed-in with several statutes applying a standard of gross negligence for law enforcement-related activities.[46] Washington State's statutory framework implies that the state has an interest in holding law enforcement officers accountable when they act negligently. As this Note will discuss later, the courts can continue to fulfill this policy goal by reducing the barrier of qualified immunity.

Washington State has its own common law standards for how to hold law enforcement officers liable in tort that differs from federal law, but qualified immunity still remains a barrier to holding law enforcement officers liable. State and local governments are not fully immune because allowing complete immunity would undermine the value of tort liability to protect victims, deter dangerous conduct, and provide a fair distribution of the risk of loss.[47] Washington originally had a "sovereign immunity" doctrine,[48] but later cases and statutes limited how it could be invoked.[49] However, it was not until *Beltran-Serrano* that the Washington Supreme Court clarified how a state-level negligence claim could be used *in addition* to other claims against police officers for use of excessive force.[50] Ultimately, qualified immunity remains an unanswered question in light of the changes to negligence claims against police officers at the state-level.[51]

IV. NEW DEVELOPMENTS WITH *BELTRAN-SERRANO V. CITY OF TACOMA*: CONFLICTING THEORIES NOW PERMISSIBLE

Before *Beltran-Serrano*, Washington did not allow plaintiffs to sue law enforcement officers under a negligence and intentional tort claim

44. RESTATEMENT (SECOND) OF TORTS § 281cmt. E (AM. L. INST. 1965).

45. Robb v. City of Seattle, 295 P.3d 212 (Wash. 2013).

46. *See, e.g.*, WASH. REV. CODE § 71.05.510 (2018); WASH. REV. CODE § 7.69A.040 (1985).

47. Eastwood v. Horse Harbor Found., Inc., 241 P.3d 1256, 1271 (Wash. 2010) (Chambers, J., concurring).

48. WASH. REV. CODE § 4.96.010 (1993).

49. WASH. REV. CODE § 4.92.090 (1963).

50. Beltran-Serrano v. City of Tacoma, 442 P.3d 608 (Wash. 2019).

51. *See* Brief of Appellants at 16 n.13, *Beltran-Serrano*, 442 P.3d 608 (No. 95062-8) (discussing the lack of clarity surrounding how qualified immunity has not been addressed in terms of negligence claims against police officers); *see also infra* Part VI.

simultaneously. Additionally, *Beltran-Serrano* was the first time the Washington Supreme Court allowed a totality-of-the-circumstances analysis when deciding the reasonableness of an officer's actions. *Beltran-Serrano* also expanded the type of claims that may be brought against police officers.[52] Mr. Beltran-Serrano was shot and rendered severely disabled by Officer Volk, a police officer employed by the City of Tacoma.[53] Beltran-Serrano sued the City for assault and battery and argued that "Officer Volk improperly, unreasonably, and unnecessarily escalated the situation, and that the City failed to properly train and supervise officers to address situations in which someone had a mental health episode, and to exercise appropriate force."[54]

These claims arose from an interaction between Officer Volk and Mr. Beltran-Serrano. Officer Volk approached Mr. Beltran-Serrano to dissuade him from panhandling.[55] When it appeared that Mr. Beltran-Serrano did not understand English, Officer Volk called an officer to interpret.[56] From the available evidence, the plaintiff was experiencing a mental health episode at the time because he appeared disoriented and began to dig a hole in the ground.[57] When Mr. Beltran-Serrano tried to leave the scene, Officer Volk tased and shot him.[58] The escalation occurred before the interpreting officer arrived on the scene to communicate with Mr. Beltran-Serrano in Spanish.[59] The Washington Supreme Court noted that "the total time between when Officer Volk called for a Spanish-speaking officer and the shooting was 37 seconds."[60] The court found that none of Officer Volk's actions followed the Tacoma Police Department's procedures on how to deescalate situations with members of the public experiencing mental health episodes or disorders—a fact that the court found compelling in reaching its decision to expand civil claim options for those harmed by an officer's use of excessive force.[61]

Furthermore, the Washington Supreme Court held that plaintiffs could bring multiple "conflicting"[62] tort claims, meaning Beltran-Serrano

52. Alexis Krell, *Man Shot by Tacoma Cop Can Pursue Damages Against City, State Supreme Court Rules*, SEATTLE TIMES (June 14, 2019), https://www.seattletimes.com/seattle-news/crime/man-shot-by-tacoma-cop-can-pursue-damages-against-city-state-supreme-court-rules/ [https://perma.cc/5BPN-ULGB].

53. *Beltran-Serrano*, 442 P.3d at 609.

54. *Id.* at 610.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 610.

60. *Id.*

61. *Id.* at 611–12.

62. *Id.* at 609.

could sue Officer Volk both for negligence (unreasonably escalating the situation) and for assault (the actual intentional injury to Beltran-Serrano).[63] Although assault is an intentional tort and negligence need not be intentional, the court held that both of these claims could be brought at the same time and would not be barred solely because assault and negligence do not share the same elements.[64]

Additionally, the court reaffirmed its past holdings that officers owe a duty of care to the public. For example, the court held that Officer Volk owed a duty of care to Mr. Beltran-Serrano based on Officer Volk's affirmative conduct throughout their interaction.[65] The court reasoned that, because Officer Volk engaged with Mr. Beltran-Serrano and attempted to explain the panhandling law to him, she assumed a duty of care toward him and then violated that duty when she physically injured him.[66] And in so concluding, the court built additional doctrine on top of its precedent when it held that a plaintiff could hold an individual officer liable[67] because the public duty doctrine[68] does not insulate the officer as a governmental employee from tort liability.[69]

Moreover, in allowing multiple "conflicting" tort claims, the court also allowed a totality-of-the-circumstances analysis in determining the reasonableness of the officer's actions between the time she approached Mr. Beltran-Serrano and when she shot him.[70] This was the first time the Washington Supreme Court used this analysis in a case where law enforcement officers used excessive or deadly force.[71] The court evaluated every action Officer Volk took, from speaking to Mr. Beltran-Serrano in English to following him when he tried to remove himself from the interaction.[72] Most importantly, the court cited to the fact that Officer

63. *Id.* at 611–12.

64. *Id.*

65. *Id.* at 613–14.

66. *Id.* at 615.

67. *See infra* Part VI. The Public Duty Doctrine is a "focusing tool" used by Washington courts to evaluate whether a government official owes a duty to the public at large versus a specific plaintiff in tort cases against governmental entities. Munich v. Skagit Emergency Commc'ns Ctr., 175 Wn.2d 871, 886, 288 P.3d 328 (2012) (Chambers, J., concurring).

68. *See also* Debra L. Stephens & Brian P. Harnetiaux, *The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*, 30 SEATTLE U. L. REV. 35, 56 (2006).

69. *Beltran-Serrano*, 442 P.3d at 615.

70. *Id.* at 611–12.

71. The Washington Supreme Court previously applied a similar analysis by considering the totality of the circumstances of the negligent service of a protection order. Washburn v. City of Federal Way, 310 P.3d 1275 (Wash. 2013). The court found that the officer acted unreasonably when he attempted to serve an anti-harassment order to the victim's violent romantic partner while the victim and her abuser were alone in their home; the woman was killed by her abuser. *Id.*

72. *Beltran-Serrano*, 442 P.3d at 611–12.

Volk's conduct violated the established training protocols of the City of Tacoma Police Department.[73]

Although the Washington Supreme Court allowed tort claims against police officers prior to *Beltran-Serrano*, the court has yet to address how separate negligence claims against individual police officers can proceed without being blocked by the defense of qualified immunity nor has the court answered the question of how an officer may claim qualified immunity from these clarified negligence claims.

V. QUALIFIED IMMUNITY REMAINS UNADDRESSED POST-*BELTRAN-SERRANO*

The recent *Beltran-Serrano* decision has opened the door to more Washington State tort claims against police officers for failing to follow training protocols and harming individuals they encounter in their official duties. Plaintiffs have filed cases using these claims in the lower courts.[74] However, now that the door is open to these types of claims, the next question to address is the issue of qualified immunity when a law enforcement officer and the officer's employer are held liable. In all likelihood, in any case alleging a police officer's use of excessive force, the police officer-defendant will assert the defense of qualified immunity in a motion for summary judgment. Answering the question of the applicability of qualified immunity to state-level claims will (1) ensure that these new claims may proceed, (2) avoid confusion in the lower courts, and (3) remain consistent with Washington's unique jurisprudence that has historically allowed people harmed by government action to seek accountability.

The procedural fairness problems with qualified immunity at the federal level have received significant criticism,[75] which is one reason why state claims based on Washington's unique common law may appeal to potential plaintiffs. With *Beltran-Serrano*'s clarification that negligence claims may be brought when a police officer uses excessive force, it is

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73. *Id.* at 610. If an officer violates training protocols, the officer's actions may be considered unreasonable—and therefore negligent—for failing to de-escalate the situation, thus acting contrary to the officer's training. *Id.*

74. *See, e.g.*, Brief of Appellants, Watness v. City of Seattle, 457 P.3d 1177 (Wash. Ct. App. 2019) (No. 79480-9-I), 2019 WL 3540005; Steve Miletich, *Judge Dismisses Claims Against 2 Seattle Police Officers in Fatal Shooting of Charleena Lyles*, SEATTLE TIMES (Jan. 8, 2019), https://www.seattletimes.com/seattle-news/crime/judge-dismisses-claims-against-2-seattle-police-officers-in-fatal-shooting-of-charleena-lyles/ [https://perma.cc/8K3C-G9AD].

75. The challenges with qualified immunity were mentioned by presidential candidates. *See* Nick Sibilla, *Bernie Sanders, Elizabeth Warren Want New Limits on "Qualified Immunity" for Police Misconduct*, FORBES (Sept. 30, 2019), https://www.forbes.com/sites/nicksibilla/2019/09/30/bernie-sanders-elizabeth-warren-want-new-limits-on-qualified-immunity-for-police-misconduct/#538afde22e51 [https://perma.cc/8EKX-ZKBB].

foreseeable that more of these claims will be introduced in state courts without a need for § 1983 claims. However, the next challenge is addressing Washington state's own qualified immunity standard.

The law is unsettled about whether qualified immunity can block these new negligence claims at the state level. Washington State has its own standard for qualified immunity that differs from the federal qualified immunity standard but still creates similar problems regarding police accountability. In Washington, a law enforcement officer may claim state qualified immunity from intentional tort claims, such as false imprisonment, false arrest, and assault and battery,[76] "if the officer was (1) carrying out a statutory duty, (2) according to the procedures dictated to him by statute and superiors, and (3) while acting reasonably."[77] Slightly different circumstances apply in false imprisonment or false arrest cases, but the same general framework applies.[78]

However, the Washington qualified immunity standard differs when applied to excessive force claims. For instance, qualified immunity is unavailable as a defense against any intentional tort claim, like assault and battery, without a further examination of the facts.[79] Instead, courts must examine the actions of a law enforcement officer under a *reasonableness* standard. If the court finds that the law enforcement officer's actions were objectively reasonable, then the defense of qualified immunity applies in either intentional tort claims or § 1983 claims arising from the same facts.[80] Thus, in an excessive force case that alleges an intentional tort, a defendant may raise the defense of qualified immunity.

Nonetheless, questions remain regarding the applicability of the doctrine in instances where a plaintiff brings negligence claims in an excessive force case. However, the *Beltran-Serrano* decision has now clarified that a negligence claim may be pursued at the same time as an intentional tort claim.[81] It is clear that, in a case involving a law enforcement officer's use of excessive or deadly force, the officer could assert a defense of qualified immunity if a plaintiff sued the officer for assault, but the court has not yet addressed what would happen if the law enforcement officer claimed qualified immunity as a defense to the new claim of negligence based on an analysis of the totality of the circumstances.

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76. Staats v. Brown, 991 P.2d 615 (Wash. 2000); Gallegos v. Freeman, 291 P.3d 265 (Wash. Ct. App. 2013).

77. *Staats*, 991 P.2d at 627 (citing Guffey v. State, 690 P.2d 1163, 1167 (1984)); *see also* McKinney v. City of Tukwila, 13 P.3d 631 (Wash. Ct. App. 2000).

78. *Staats*, 991 P.2d at 615.

79. *Id.*; *McKinney*, 13 P.3d at 631.

80. *Gallegos*, 291 P.3d at 265; *McKinney*, 13 P.3d at 631.

81. Beltran-Serrano v. City of Tacoma, 442 P.3d 608, 609 (Wash. 2019).

Because the *Beltran-Serrano* case clarified the role of the prior Washington Supreme Court precedent regarding when a police officer can be found negligent, each new case arising from this claim will raise new questions about how to implement this new rule. *Beltran-Serrano* clarified that plaintiffs may bring both intentional torts and negligence claims, and a court must analyze the totality of the circumstances to determine whether an officer's actions were reasonable. Two of the most important remaining questions are how and when the state-level standard of qualified immunity will hamper these claims and whether it should.

VI. COURTS MUST ADDRESS THE QUESTION OF WASHINGTON STATE QUALIFIED IMMUNITY IN NEW NEGLIGENCE CLAIMS

1. The New Negligence Claims Are Distinct from Past Cases that Govern Washington's Standard of Qualified Immunity – A New Test Is Needed

Because Washington state's qualified immunity doctrine rests on intentional torts, the test for qualified immunity must be updated to reflect the new negligence analysis from *Beltran-Serrano*.[82] Instead of examining which intentional tort the law enforcement officer committed—and now that there is precedent—Washington State courts should apply the totality of the circumstances test in determining whether an officer's actions were reasonable.[83] In *Staats v. Brown*,[84] *McKinney v. City of Tukwila*,[85] and *Gallagos v. Freeman*[86]—all key cases that make up Washington's standard of qualified immunity—law enforcement officers were sued for using excessive force in situations involving clear intentional torts such as battery and false arrests, but in these cases, the courts did not examine whether the officers followed their training when determining whether an officer's actions were reasonable nor did the courts analyze whether an officer assumed a certain duty of care towards plaintiffs, as the court did in *Beltran-Serrano*.

Furthermore, only one of these cases—*Staats*— was decided by the Washington Supreme Court. In *Staats*, the court described very narrow grounds under which a law enforcement officer could claim qualified immunity from an intentional tort claim. *Staats* focused on the an employee of the Washington Department of Fisheries who used excessive force to arrest the plaintiff for alleged violations of construction laws along

82. *Id.*
83. *Gallegos*, 291 P.3d at 265; *McKinney*, 13 P.3d at 631.
84. Staats v. Brown, 991 P.2d 615 (Wash. 2000).
85. *McKinney*, 13 P.3d at 631.
86. *Gallegos*, 291 P.3d at 265.

the Snake River.[87] The officer asserted qualified immunity against claims of false arrest, false imprisonment, and assault and battery.[88] The court held that the officer could not claim qualified immunity from these specific state tort claims but made no mention of negligence.[89] Additionally, the court opined that the plaintiff's arrest was "contrary to existing law" and that it would be unwarranted to extend "judicially invented qualified immunity to these circumstances."[90]

This seminal decision created narrow grounds for when a law enforcement officer may claim qualified immunity as a defense to state tort claims; however, the case provides no guidance for how a court may evaluate a negligence claim if the negligent acts of a law enforcement officer do not violate existing law, even if they violate internal protocol. To allow an officer to claim qualified immunity in a negligence claim post-*Beltran-Serrano* without re-examining qualified immunity would require using cases with no similar facts to compare torts that are distinct from each other. Because courts at both the state and federal level should consider analogous cases to decide whether an officer acted reasonably,[91] without a change to the state qualified immunity standard, courts would be comparing the elements of negligence to those of intentional torts like assault or battery. The same catch-22 that shields law enforcement officers from liability could render *Beltran-Serrano*'s negligence analysis dead on arrival.

Because the court in *Beltran-Serrano* pulled its analysis of the totality of the circumstances from other cases involving negligence by law enforcement officers,[92] and to maintain consistency with *Beltran-Serrano*, the Washington Supreme Court should clarify that the totality of the circumstances analysis encompasses an evaluation of whether an officer's actions were reasonable for purposes of analyzing a qualified immunity defense. Moreover, courts should no longer determine if qualified immunity applies simply based on whether a law enforcement officer violated existing law. In *Beltran-Serrano*, the court examined the interaction between Officer Volk and Mr. Beltran-Serrano under a holistic approach rather than simply focusing on whether the officer violated a specific statute.[93]

87. *Staats*, 991 P.2d at 617.

88. *Id.* at 626.

89. *Id.* at 626–27.

90. *Id.* at 628.

91. Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (citing Mullenix v. Luna, 577 U.S. 7, 12 (2015)).

92. *See, e.g.*, Washburn v. City of Federal Way, 310 P.3d 1275, 1279 (Wash. 2013); Garnett v. City of Bellevue, 796 P.2d 782 (Wash. 1990).

93. *See generally* Beltran-Serrano v. City of Tacoma, 442 P.3d 608, 609 (Wash. 2019).

Beltran-Serrano has opened the door to hold law enforcement officers liable for negligence claims in addition to intentional tort claims. Now, courts will have an opportunity to examine the reasonableness of a police officer's actions leading up to their use of excessive force. Examining officer actions in context will increase judicial scrutiny.' This approach will ensure accountability for those who have been harmed because of an officer's lack of reasonable care.

2. The Public and the Courts Prioritize Accountability to Ensure Law Enforcement Officers Follow Their Training

The Washington Supreme Court should ensure that the state standard of qualified immunity does not unnecessarily prevent the new negligence claims described in *Beltran-Serrano* because the public has great interest in ensuring police officers have adequate training and follow that training.[94] Additionally, civic activism has shown that the public cares greatly about holding law enforcement officers and agencies accountable if they cause harm.[95] Although proper training is only one step to ensure law enforcement officers serve and protect their community, there has been increased scrutiny of the adequacy of their training in recent years.[96]

In multiple ways, our state's elected officials and the public as a whole have emphasized the importance of proper de-escalation training.[97] Advocates for police accountability stated their goal was "to save lives."[98] This stated public policy goal coupled with Washington's unique common law framework to hold police officers liable for excessive force shows there is support for increased tools to hold police officers accountable. This public support should encourage the Washington Supreme Court to ensure clarified negligence claims have a chance to move through lower courts without being blocked by the qualified immunity defense.

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94. *See, e.g.*, *November 6, 2018, General Election Results*, WASH. SEC. STATE (Nov. 27, 2018), https://results.vote.wa.gov/results/20181106/State-Measures-Initiative-to-the-Legislature-940-Initiative-Measure-No-940-concerns-law-enforcement_ByCounty.html [https://perma.cc/5K6R-MFVT] (showing the election results in favor of an initiative to expand and improve police de-escalation training in Washington state).

95. For example, recent Black Lives Matter protests have been some of the largest protests in U.S. history. *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/L3WV-JSDN].

96. For example, some surveys show that implicit bias trainings do not prevent police officers from using excessive force. *See How Effective Are Police Training Reforms? We're Totally Fooling Ourselves, Expert Says*, CBS NEWS (June 3, 2020), https://www.cbsnews.com/news/police-reform-training-george-floyd-death-effectiveness/ [https://perma.cc/ZN8U-QA2X].

97. WASH. REV. CODE § 9A.16.040 (2019); WASH. REV. CODE § 43.101.450 (2019).

98. Joseph O'Sullivan, *Washington Lawmakers Move Quickly on Police Deadly Force Law*, SEATTLE TIMES (Mar. 6, 2018), https://www.seattletimes.com/seattle-news/politics/washington-lawmakers-close-to-deal-changing-police-deadly-force-laws/ [https://perma.cc/CHV6-CUQK].

In 2019, the Washington State legislature finalized changes to the state's criminal statute regarding police officers' use of deadly force by changing the required mens rea from malicious intent to less than malice.[99] House Bill 3003 passed the legislature[100] first with a referendum clause to be sent to the voters and then as an amended bill post-initiative.[101] This measure passed with 59% of the votes in favor of the referendum.[102]

Additionally, as part of the negotiation to create this change in law, citizens for police accountability, law enforcement advocacy groups, cities, and legal professionals agreed to make several changes to the implementation of de-escalation training.[103] Representatives of the stakeholders formed a task force established by the state legislature. The task force agreed that the state Criminal Justice Training Commission, which creates and administers trainings for law enforcement officers,[104] does not have the funding it needs to fulfill its duties.[105] Additionally, the task force created a mechanism to track data about deadly force incidents and subsequent lawsuits so there is more state-level information to examine when making policy changes in this area.[106] The broad coalition of stakeholders who agreed on the importance of creating, funding, and implementing comprehensive de-escalation training for police officers shows a clear intent and support by the public to emphasize that police departments should participate in these trainings and that law enforcement officers should follow de-escalation protocol in situations where escalation could lead to excessive force.

When deciding whether to allow a claim against a police officer and the municipality that employs the officer based on the officer's failure to follow training, Washington state has signaled a strong public interest in encouraging comprehensive de-escalation trainings based on recent legislation and the ballot measure. This public policy process has made clear that if a law enforcement officer and their department does not comply with de-escalation training, they are violating a stated legislative

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99. Walker Orenstein, *Legislature Approves Compromise Deal to Change Police Deadly Force Law*, THE NEWS TRIB. (Mar. 8, 2018), https://www.thenewstribune.com/news/politics-government/article204245584.html [https://perma.cc/MX4V-7YA6].

100. H.B. 3003, 65th Leg., Reg. Sess. (Wash. 2018).

101. Orenstein, *supra* note 102.

102. *See November 6, 2018, General Election Results*, *supra* note 94.

103. WASH. STATE JOINT LEGIS. TASK FORCE ON THE USE OF DEADLY FORCE IN CMTY. POLICING, FINAL REPORT TO THE LEGISLATURE AND GOVERNOR (Dec. 1, 2016) [hereinafter FINAL REPORT], http://www.defender.org/sites/default/files/Final%20Report_Jt.%20Leg.%20TF%20Deadly%20Force%20Community%20Policing.pdf [https://perma.cc/2F2M-T2DP].

104. *Training the Guardians of Democracy*, WASH. STATE CRIM. JUST. TRAINING COMM'N, https://www.cjtc.wa.gov/about/about-the-commission [https://perma.cc/8D7K-VYX6].

105. FINAL REPORT, *supra* note 103, at 18.

106. *Id.*

goal.[107] Plaintiffs must have the opportunity to present facts to a jury showing that a police officer did not follow their training and the jury must have the opportunity to evaluate these facts instead of the claim never seeing the light of day due to qualified immunity.

Although the deadly force statute itself regards criminal standards instead of tort liability, the evidence of its passage through the legislature twice and once on the ballot shows that these issues regarding training are at the forefront of public interest and should be considered holistically when evaluating the strength of negligence claims based on training or lack thereof.

In addition to recent policy developments regarding police accountability, Washington state has a long history of promoting access to justice for plaintiffs seeking accountability from government agencies. Updating the state standard of qualified immunity to ensure that clarified negligence claims against police officers can proceed is consistent with Washington state's unique history of increasing access to justice for plaintiffs. In the early 1960s, Washington was an early state to overturn the traditional doctrine of sovereign immunity which had made it almost impossible to sue any governmental body.[108] Furthermore, when this waiver of sovereign immunity was enacted, it was one of the broadest waivers in the country.[109] And since the waiver was enacted, the legislature has made minimal changes to this law that made it easier to hold government entities liable in tort.[110] However, although Washington's doctrine of sovereign immunity was overturned, there are limits to when a governmental entity can be held liable in tort. Subsequent cases evaluating the change to state and local governmental liability created a focusing test in addition to traditional qualified immunity: the public duty doctrine.[111] While not the focus of this Note, changes to the public duty doctrine show an intent by the Washington Supreme Court to ensure that it does not always preclude justice for plaintiffs.

Because Washington state has unique jurisprudence and legislation as far back as the 1960s that seeks to level the playing field between government entities and the plaintiffs who try to hold them accountable—not to mention the recent updates in *Beltran-Serrano*—all of these changes in law build consensus to make the state-level standard of qualified immunity less challenging for plaintiffs. The state standard of qualified

107. H.B. 3003, 65th Leg., Reg. Sess. (Wash. 2018).

108. Stephens & Harnetiaux, *supra* note 71, at 41.

109. *Id.* at 42.

110. *Id.* at 42–43.

111. *Beltran-Serrano* also clarifies the application of the public duty doctrine. *Beltran-Serrano*, 442 P.3d at 551–52.

immunity applies "if the officer was (1) carrying out a statutory duty, (2) according to the procedures dictated to him by statute and superiors, and (3) while acting reasonably."[112] Now the reasonableness of a law enforcement officer's actions can be determined by the totality of the circumstances of the direct interaction between the officer and the plaintiff.[113] The combination of these two doctrines seeks an opportunity to examine the specific facts alleged by a plaintiff instead of dismissal on procedural grounds before the plaintiff ever has a day in court.

Pending cases will test how courts apply qualified immunity post-*Beltran-Serrano*. An example of a developing case where the question of qualified immunity arose was *Commissioner Eric Watness v. City of Seattle*. The plaintiffs in this case appealed similar questions of law based on the *Beltran-Serrano* decision.[114] The plaintiff represents the estate of Charleena Lyles, a woman who was killed by police officers in her home when she experienced a mental health episode.[115] The plaintiff relies on precedent set by *Beltran-Serrano* to contend that the officers' intentional harm to Ms. Lyles does not foreclose a negligence claim.[116] Additionally, the plaintiffs also contend that the officers can be considered negligent because they failed to follow the de-escalation and non-lethal force protocol discussed in their training materials from the Seattle Police Department.[117] However, the claims against the individual officers were dismissed and were not appealed to the Washington Supreme Court. It remains to be seen whether this case will implicate the reasoning in *Beltran-Serrano*.

Washington state courts have an opportunity to clarify whether qualified immunity can foreclose negligence claims against law enforcement officers in light of the *Beltran-Serrano* decision. Now that the Washington Supreme Court has clarified how to analyze the totality of the circumstances for whether a law enforcement officer acts negligently in using excessive force, the Washington Supreme Court should next clarify how to analyze qualified immunity as post-*Beltran-Serrano* decisions appear in the lower courts. This unanswered question of law presents an additional opportunity to hold law enforcement officers accountable when they cause harm.

112. *Id.*; *see also* McKinney v. City of Tukwila, 13 P.3d 631 (Wash. Ct. App. 2000).
113. *Beltran-Serrano*, 442 P.3d at 612.
114. *Id.* at 608.
115. Brief of Appellants, *supra* note 74, at *8, *14.
116. *Id.* at 4.
117. *Id.* at 15–17.

CONCLUSION

In light of the continued use of excessive and deadly force by law enforcement officers, even when they are given proper training, the issue of how law enforcement officers can be held liable in our justice system will remain. Due to the recent United States Supreme Court decisions that reinforced the problematic qualified immunity doctrine in federal courts, more civil rights advocates will seek to try cases in Washington State courts to achieve an outcome that is at least a fairer process, though still far from perfect.

Washington state's common law tort doctrine has evolved based on a public policy desire of ensuring that those harmed by the government have a fair process to seek redress. With the possibility of expanding negligence claims against law enforcement officers who harm someone as a result of not following the proper protocol, the issue of qualified immunity will be fought in the lower courts to ensure that the door to allow these new claims is not closed due to technicalities, so the wronged plaintiffs and their families have the chance to tell their stories in court. The Washington Supreme Court and courts of appeal should clarify the state standard of qualified immunity to ensure that the totality of the circumstances is examined in cases of excessive force because without civil action, these facts may never be shared with the public. Without the continued use of these new negligence claims, civil rights advocates will lose one of a few available tools to hold police officers and departments accountable for when they cause harm.