POLICE MISCONDUCT AND THE DUTY TO INTERVENE: WHY STOP AT EXCESSIVE FORCE?

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ABSTRACT

While a law enforcement officer's duty to intervene is well-established in federal law with respect to another officer using excessive force, it is less clear whether officers have a duty to intervene when they witness other forms of misconduct. In fact, a complex multi-circuit court split reveals the law in this area is the subject of lively debate and still in a state of flux. Resolution of this question, if left to the courts, may well take years to resolve. Further, even amongst the states, policies range widely. Increased public outcry in this area demands a re-examination of old policy and law, with an eye towards the moral and ethical expectations society holds for police. As a matter of public policy, law enforcement officers should not stand idly by when they are aware of and have the opportunity to intervene in a violation of someone's rights. Instead, they can and should have a statutory duty to intervene whenever possible when they witness a violation of any person's rights at the hands of another officer.

While a number of police unions have publicly opposed police reform legislation as being anti-law enforcement, police, as a whole, largely favor reform in this area: most police officers already believe they have a duty to intervene in police misconduct. Nationally and internationally recognized police policy advocates recommend policies establishing a duty to intervene.

The tests and standards for enforcing a duty to intervene already exist in case law and policy, albeit scattered across a myriad of sources. *Graham v. Connor* establishes reasonableness factors with respect to excessive force. The qualified immunity standards identify tests for clearly established constitutional rights such that an officer ought to know when a right is being violated. The circuit courts have established a consistent test for when an officer has a reasonable opportunity to intervene in another's misconduct. The circuits have also settled on failure to intervene as proximate causation for continuing violations of civil rights.

A duty to intervene may be enforced through criminal law, civil law, or a combination of both. Arguably, there is no need to extend criminal law to failure to intervene, because accomplice liability doctrine can already be used to prosecute an officer who has opportunity to intervene and fails to do so in when that officer has an established duty to act. The creation of a civilly enforced statutory duty to intervene via the proposed model legislation will clarify the public's significant interest in the protection of all rights, and society's desire to hold those responsible for enforcing the law to a standard that includes holding themselves to that law.

INTRODUCTION

Imagine a peaceful protest on private property with permission of the property owner. A large group gathers, chanting slogans, holding signs, perhaps asking passersby to sign a petition in support of their cause. Reporters gather to cover the story. There are no acts of violence, and no damage to any property, but the group's message is controversial, perhaps supporting Black Lives Matter in a community where a recent police shooting has inflamed public sentiment on both sides of the issue. Now, imagine a police officer responds to this event, and tells the crowd and even the reporters they must leave, or they will be arrested. Imagine this officer does so while a few other officers are standing within hearing of the first officer, though the additional officers do not assist the first officer.

Imagine another scenario. This time, a juvenile is taken into custody and subjected to hours of intimidating and coercive interrogation by a detective, without his parents, without an attorney, and without obtaining a proper waiver of Miranda rights. Other officers are present from time to time during the interview and watch on closed circuit television. The other officers do nothing.

Imagine one last scenario. Two officers are at a traffic stop. One officer, acting on nothing more than a hunch that a driver may have contraband concealed on their person transports the driver to a police station and performs a body cavity search on the driver, without consent, without probable cause, and without a warrant. The second officer, aware of the circumstances of the search, takes no action.

In each of the above scenarios, at least one officer has violated someone's civil rights under the Bill of Rights.[1] While these

1. *See* U.S. CONST. amend. I (protecting freedom of speech, freedom of the press, and peaceable assembly); U.S. CONST. amend. V (protecting against

hypothetical situations represent, hopefully, extreme examples of police misconduct, they are based on actual incidents.[2] Recent events such as the murder of George Floyd in Minneapolis, Minnesota, in May, 2020, the death of Breonna Taylor in Louisville, Kentucky, in March, 2020, and Elijah McClain in Aurora, Colorado, in August, 2019, (to name just a few) and the resulting civil unrest across the nation have brought police and use of force concerns prominently into the public eye.[3] Concerns about law enforcement and excessive force, however, are nothing new. With respect to excessive force, a long history of public outrage has resulted in the idea that a law enforcement officer who witnesses excessive force at the hands of another officer has a duty to intervene to stop that force.[4]

What about incidents that do not involve excessive force? In each of the scenes suggested above, one officer takes an action in violations of a citizen's civil rights, while another officer, with knowledge of the first officer's action, does nothing at all. While the initiating officer may be liable for her actions, what of the second? Does the second officer, knowing of his partner's ongoing violation of a person's civil rights, have an obligation to do anything about it? Many people may be surprised to learn that, in many jurisdictions, the second officer bears no liability at all.

The right to be free from excessive force is sacrosanct, and law enforcement officers should intervene to stop a violation of that right, but this does not mean that other rights do not deserve similar protection. This note will examine the arguments for establishing a statutory duty to intervene in cases for law enforcement officers who are aware of another officer's misconduct and propose legislation to

compelled self-incrimination); U.S. CONST. amend. IV (protecting against unreasonable search and seizure).

2. *See, e.g.*, Zack Kopplin, *Baton Rouge Cops Throw Protesters into Street, Arrest Them for Being There*, DAILY BEAST (Apr. 13, 2017), https://www.thedailybeast.com/cheats/2016/07/10/baton-rouge-cops-contain-and-threaten-to-arrest-press; WVEC 13 News Now, *Prosecutors Drop Criminal Charges in Newport News Due to 'Bad Interrogation'*, YOUTUBE (Jan. 31, 2019), https://www.youtube.com/watch?v=Vybt0VHRj_k; ABC15 Arizona, *Phoenix Officer Admitted She Broke the Law Conducting Cavity Search Without Consent*, YOUTUBE (Aug. 1, 2019), https://www.youtube.com/watch?v=0QhsI5p5LVs.

3. Steve Eder et al., *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?*, N.Y. TIMES (last updated Oct. 10, 2021), https://www.nytimes.com/2021/04/18/us/police-reform-bills.html.

4. Jonathan Aronie & Christy E. Lopez, *Keeping Each Other Safe: An Assessment of the Use of Peer Intervention Programs to Prevent Police Officer Mistakes and Misconduct, Using New Orleans' EPIC Program as a Potential National Model*, POLICE Q. 1, 10 (2017).

establish such a duty. Public policy, including public perception of law enforcement and the psychology of intervention, and law enforcement support for intervention even in the face of opposition, informs the need for stronger measures with respect to a law enforcement officer's duty to intervene in the misconduct of other officers, as examined in Part I. Next, current case and statutory law surrounding an officer's duty to intervene is examined in Part II. Finally, Part III introduces the tests and standards for establishing a nation-wide policy, currently scattered across a myriad of case and statutory law, and a simple, encompassing model statute that will incorporate those tests and standards. These will establish a consistent duty to intervene when law enforcement officers across the country witness any form of misconduct by fellow officers.

I. THE CASE FOR INTERVENTION

Under the authority granted by the people through the government, law enforcement officers may substantially impact individual rights. Society extends great trust in those tasked with enforcing the law, and accepts that police authority extends to the power, in some situations, to deprive us of life and liberty.[5] As part of that trust, should we not also demand that officers hold each other to the highest standards? As a matter of public policy, I believe we should. Justification for a law enforcement officer's duty to intervene in all misconduct is informed by both the public's perception of officers, and the psychology of intervention. Further, duty to intervene is already supported by law enforcement.

A. Public Policy Arguments for a Duty to Intervene

1. Public Perception and Failure to Intervene

When law enforcement officers fail to intervene in the misconduct of other officers, the relationship between police and the community at large suffers. While police departments maintain that officer misconduct stems from a small number of corrupt or malicious employees, when the public directly observes officer misconduct compounded by another officer's failure to intervene, they tend to assume all officers are corrupt.[6] Public disdain for police in general results not just from a few officers committing misconduct, but also

5. *See, e.g.*, Tenn. v. Garner, 471 U.S. 1, 3 (1985).
6. *See* Aronie & Lopez, *supra* note 4, at 15.

from seeing officers who could stop that misconduct and choose not to.[7]

Across the country, particularly since George Floyd's murder, protests calling for police reform have presented a long list of grievances surrounding police misconduct and insisting on new measures to prevent it. For example, the American Civil Liberties Union has decried some recent reforms as focused on how to handle police misconduct after it occurs, rather than preventing it in the first place.[8] Establishing a duty to intervene has been expressly identified in many reform groups' publications.[9]

Additionally, groups such as the Active Bystandership for Law Enforcement (ABLE) Project advocate for the duty to intervene by providing no-cost training to law enforcement agencies.[10] The ABLE Project, managed by the Center for Innovations in Community Safety at Georgetown Law, expressly identifies that law enforcement "must do a better job intervening when necessary to prevent their colleagues from causing harm or making costly mistakes."[11] By creating a duty to intervene in all forms of misconduct and not just excessive force, these demands can be satisfied by preventing acts of misconduct through law enforcement officers holding each other to account, and mitigating incidents when they do occur by stopping further misconduct.

2. The Psychology of Intervention

Studies have shown that once one bystander officer intervenes in misconduct, it becomes easier for other officers to intervene. A number of psychological blocks, such as the tendency to overlook a problem when others nearby also overlook the problem, the assumption that another person will correct the problem, and personal embarrassment, predispose officers to inaction in the face of

7. *Id.* at 14–15 (quoting MICHAEL W. QUINN, WALKING WITH THE DEVIL: WHAT BAD COPS DON'T WANT YOU TO KNOW AND GOOD COPS WON'T TELL YOU 106 (2d ed. 2005)).

8. Eder et. al., *supra* note 3.

9. *E.g.*, *#8CantWait Updates Since June 2020*, CAMPAIGN ZERO, https://8cantwait.org/ (last visited Nov. 6, 2022); Eline de Brujin, *What Do Protesters Want? Here are 10 Demands Sent to the Dallas Police Department, Local Leaders*, WFAA NEWS (June 3, 2021, 5:51 PM), https://www.wfaa.com/article/news/local/george-floyd-protests-dallas-changes-police/287-3a793b3c-406a-4ff0-bd19-4a0391c5c752.

10. *See Active Bystander for Law Enforcement (ABLE) Project*, GEO. L., https://www.law.georgetown.edu/cics/able/ (last visited Nov. 6, 2022).

11. *Id.*

misconduct.[12] Further, when one person fails to act, others are less likely to act themselves.[13] As a result, failure to intervene can become self-perpetuating, but these studies also showcase how, once intervention is established, that intervention is also self-perpetuating to the benefit of all involved.

Officers witnessing misconduct experience psychological stress which tends to cause them to engage emotional self-defense measures such as distancing and dehumanizing.[14] Law enforcement officers tend to have greater negative psychological stress when a critical incident involves misconduct.[15] An officer's repeated exposure to misconduct may cause greater psychological damage.[16] In turn, this can lead to bystander officers not only self-justifying misconduct on the part of others, but also engaging in misconduct themselves.[17]

A majority of police officers surveyed reported that it is not unusual for police officers to ignore misconduct by fellow officers.[18] On the other hand, where one officer takes the lead to intervene in misconduct, other officers will tend to intervene as well.[19] Further, surveyed officers indicated that when a police authority figure takes a stand against police misconduct, this can prevent that misconduct.[20] Finally, most surveyed officers also agreed that a "code of silence" where officers turned a blind eye towards misconduct by other officers was not necessary for good policing, and "whistle blowing" on other officers' misconduct was worthwhile.[21] An established duty to intervene can only encourage an otherwise reluctant officer to act when faced with another officer's misconduct, protecting not only the involved and bystander officers, but the public as a whole.

B. Law Enforcement Support of Duty to Intervene–Current Police

12. Aronie & Lopez, *supra* note 4, at 4–5.

13. *Id.* at 5.

14. *Id.* (citing Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY AND SOC. PSYCH. BULL. 3, 331 (2011)).

15. *Id.* at 12–13.

16. *Id.* at 13 (citing Douglas William Green, Traumatic Stress, World Assumptions, and Law Enforcement Officers (Sept. 2016) (Ph.D. dissertation, City University of New York) (CUNY Academic Works)).

17. Aronie & Lopez, *supra* note 4, at 6.

18. DAVID WEISBURD ET AL., POLICE ATTITUDES TOWARD ABUSE OF AUTHORITY: FINDINGS FROM A NATIONAL STUDY 3 (2000).

19. Aronie & Lopez, *supra* note 4, at 5.

20. WEISBURD ET AL., *supra* note 18, at 12.

21. *Id.* at 5.

Policies

Already, law enforcement officers in general support a duty to intervene. While a significant number of police unions have publicly opposed many police reforms and unions in St. Louis, Cleveland, Baltimore, New York City, and other locations have openly fought against reforms,[22] eighty-four percent of police officers surveyed already believe they should have a duty to intervene.[23] It is illogical for officers who already believe they should intervene in misconduct to oppose an actual requirement that they do so. Major police unions, however, exert significant power over police policy and protection from misconduct.[24] The very fact that these same police unions oppose reforms argues in favor of establishing that duty in law rather than hoping individual departments will effectively enforce it on their own.

Beyond generalized support from officers on the streets, nationally and internationally recognized police policy groups support a duty to intervene. Consider the Commission on Accreditation of Law Enforcement Agencies' model policy which covers not only excessive force, but all forms of police misconduct.[25] The policy states officers must "intervene within their scope of authority and training and notify appropriate supervisory authority if they observe another agency employee or public safety associate engage in any unreasonable use of force or if they become aware of any violation of departmental policy, state/provincial or federal law, or local ordinance."[26] Similarly, the International Association of Chiefs of Police model policy goes beyond incidents of excessive force and established, "a duty to intervene to prevent or stop wrongdoing by another officer."[27] The Police Executive Research Forum model policy also establishes a duty to intervene for all instances of misconduct, not merely excessive force.[28]

22. Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (last updated Apr. 2, 2021), https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html.

23. Aronie & Lopez, *supra* note 4, at 3 (citing RICH MORIN ET AL., BEHIND THE BADGE 13 (2017)).

24. William Finnegan, *How Police Unions Fight Reform*, NEW YORKER (July 27, 2020), https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform.

25. E-mail from Mark Mosier, Reg'l Manager, Comm'n on Accreditation of L. Enf't Agencies, to author (Oct. 19, 2021, 10:23 CDT) (on file with author).

26. *Id.*

27. INT'L ASS'N OF CHIEFS OF POLICE, STANDARDS OF CONDUCT 2 (2019).

28. POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 41 (2016).

Further, eighty of the largest 100 cities in the United States have police departments that already have a duty to intervene in either use of force or ethics policy.[29] Law enforcement training academies across the country already have training requirements regarding constitutional rights, and while training in civil rights and training on intervention techniques may not be synonymous, officers trained regarding civil rights can be reasonably expected to recognize how they apply, and when a violation occurs.[30]

Nor is the duty to intervene in all cases of misconduct a new concept—Commissioner William Bratton, on assuming command of the New York City Police Department, addressed officers stating, "[w]hen that man or woman next to you is brutal or corrupt or stealing, it is part of your oath that you just can't stand by, that's not enough."[31] This speech occurred in 1994.[32] While many departments and policing organizations accept a duty to intervene policy, stronger measures are needed to reduce all forms of police misconduct.

C. Civil Versus Criminal Liability for Failure to Intervene

While there are potentially valid arguments for criminalizing a failure to intervene, criminal culpability is already available through the doctrine of accomplice liability when the acting officer's conduct rises to criminal excessive force and a bystander officer with the opportunity to intervene fails to do so, provided the duty to intervene is otherwise established.[33] One of the principles of accomplice liability is the that an accomplice may be held liable for the conduct of another, even if the accomplice's assistance did not cause the offense, and the offense would have been committed even without the accomplice's presence or assistance.[34] It is important to note, however, accomplice liability with respect to an omission only attaches where the accomplice had an established duty to act.[35]

While police use of excessive force arguably carries a greater harm than police violations of other rights, the right to be free from

29. *#8CantWait Updates Since June 2020*, supra note 9.

30. BRIAN A. REAVES, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013 5 (2021).

31. WILLIAM BRATTON & PETER KNOBLER, TURNAROUND, HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC XVIII (1947).

32. *Id.* at X.

33. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 445, 468 (8th ed. 2018).

34. *Id.*

35. *Id.*

excessive force should not be held inviolable at the expense of permitting the violation of other rights without penalty. Any differences in the level of harm visited by an unlawful violation of free speech or other rights as compared to the right to be free from excessive force can be accounted for by the determination of damages in a civil trial, or by defining different criminal penalties based on the perceived level of societal harm as determined by the legislative branch where, as may be the case with excessive force, an incident indicates criminal culpability. Unfortunately, at this moment, there is almost no consistent guidance from either the courts or statutory law concerning an officer's duty to intervene.

II. THE CURRENT STATE OF THE LAW REGARDING DUTY TO INTERVENE

As a matter of principle, no constitutional right should be held more dearly than another. Inconsistent policies, however, may lead to certain rights, particularly the right to be free from excessive force, being enforced more strictly than others. There is significant disagreement between the federal circuits, interpretations of federal law, and legislation established in the states regarding police misconduct and a duty to intervene, particularly with respect to an officer's duty to intervene in misconduct that does not involve excessive force.

A. Current Federal Case Law

The duty to intervene is well established in federal case law with respect to excessive force.[36] The Eleventh Circuit, for example, held, "[i]f a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes places in his presence, the officer is directly liable under Section 1983."[37] While not addressing a duty to intervene, the United States Supreme Court, in *District of Columbia v. Heller*, nevertheless held, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[38]

36. *E.g.*, Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986) (citing Bruner v. Dunaway, 684 F.2d 422, 426 (6th Cir. 1982)).

37. *Id.*

38. D.C. v. Heller, 554 U.S. 570, 634 (2008) (emphasis in original).

In spite of this, the duty to intervene with respect to constitutional violations other than excessive force is the subject of the complex multi-circuit split here discussed. Existing federal law could be interpreted to establish a duty to intervene for any violation of civil rights.[39] The United States Supreme Court, however, has yet to rule on the extension of a peace officer's duty to intervene from cases involving use of excessive force to cases involving any violation of any right. The federal circuit courts are far from united in their answers to this problem.

While all circuits and their districts uphold a duty to intervene with respect to excessive force, not all circuits provide the same protections with respect to violations of other rights. Courts have taken four approaches to this issue. Some lower federal courts have applied a peace officer's duty to intervene to excessive force only.[40] Some circuits have applied duty to intervene to excessive force and other Fourth Amendment violations.[41] There are other circuits where duty to intervene applies to any clearly established constitutional right.[42] Finally, one circuit has failed to establish any clear direction regarding failure to intervene outside of an excessive force incident.[43] The current multi-circuit court split with respect to police officer's duty to intercede when observing another officer violate the clearly established constitutional rights of any citizen leads to those rights being unevenly available to citizens across the country.

1. Applying Duty to Intervene to Excessive Force Alone

The First Circuit has taken the approach that an officer's duty to intervene applies only to cases of excessive force. For example, in *Torres-Rivera v. O'Neill-Cancel*, the First Circuit upheld an officer's duty to intervene in excessive force where an officer took no action to prevent another officer from assaulting the plaintiffs.[44] At least one

39. *See* 42 U.S.C. § 1983; 18 U.S.C. § 242.

40. *E.g.*, Torres-Rivera v. O'Neill-Cancel, 406 F.3d 43, 50–52 (1st Cir. 2005); *see* ACTIVE BYSTANDERSHIP FOR LAW ENF'T (ABLE) PROJECT, THE LEGAL DUTY TO INTERVENE BY LAW ENFORCEMENT OFFICERS: A COMPENDIUM OF KEY CIRCUIT CASES (2021) [hereinafter ABLE PROJECT, KEY CIRCUIT CASES].

41. *E.g.*, Hamilton v. Kindred, 845 F.3d 659, 662 (5th Cir. 2017); Whitley v. Hanna, 726 F.3d 631, 646 (5th Cir. 2013); *see* ABLE PROJECT, KEY CIRCUIT CASES, *supra* note 41.

42. *E.g.*, Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994); *see* ABLE PROJECT, KEY CIRCUIT CASES, *supra* note 41.

43. *See* ABLE PROJECT, KEY CIRCUIT CASES, *supra* note 41.

44. *See Torres-Rivera*, 406 F.3d at 51–52.

district court in the circuit, however, has not extended the duty to intervene to non-force cases. The district court, in *Cosenza v. City of Worcester* held that a duty to intervene was not clearly established with respect to violations not related to excessive force.[45] In *Cosenza*, the plaintiff was wrongfully convicted after the defendants knowingly destroyed evidence and used an impermissibly suggestive photo lineup to frame him for an assault and at least one defendant failed to intervene in the incident.[46] This case, then, demonstrates that, in the First Circuit, officers cannot be held liable for failing to intervene in an unlawful seizure of a person when no excessive force was used.

2. Applying Duty to Intervene to Additional Fourth Amendment Rights

The Fifth Circuit, in *Whitley v. Hanna*, also upheld a duty to intervene in an excessive force incident, while denying liability for failure to intervene in other misconduct.[47] In *Whitley*, the plaintiff was a juvenile victim of sex crimes, and the suspect was a police officer.[48] The defendants, other officers investigating the suspect's crimes, knowingly allowed the suspect to commit additional sexual acts with the plaintiff in order to build their criminal case.[49] The appellate court affirmed the district court's judgment dismissing the suit against the investigating officers for failing to intervene in the suspect's actions sooner.[50]

Further, in *Hamilton v. Kindred*, the Fifth Circuit, in reviewing a body cavity search the district court determined was unlawful, agreed with the district court's holding that the search constituted a use of force where duty to intervene applied.[51] The court thereby applied a duty to intervene to other Fourth Amendment violations, but stopped short of extending a duty to intervene to a non-force right.[52] Also, as in the First Circuit, a Fifth Circuit district court, in *Perez v. Tedford*, held that no duty to intervene existed for law enforcement officers

45. Cosenza v. City of Worcester, 355 F. Supp. 3d 81, 101 (D. Mass. 2019).

46. *See id.* at 91.

47. *See* Whitely v. Hanna, 726 F.3d 631, 646–47 (5th Cir. 2013) (citing Hale v. Townley, 45 F.3d 914, 919 (5th Cir. 1995)).

48. *Id.* at 634–35.

49. *Id.* at 636.

50. *Id.* at 635.

51. Hamilton v. Kindred, 845 F.3d 659, 662 (5th Cir. 2017).

52. *Id.*

outside of a use of excessive force.[53] *Perez* involved a police officer, who, in the presence of another officer violated the plaintiff's First Amendment rights by demanding the plaintiff's employer take disciplinary action against her after the plaintiff made a Facebook post highly critical of the police department.[54]

3. Applying Duty to Intervene to All Constitutional Rights

At the same time, some circuits hold that police officers have a duty to intervene with respect to violations of constitutional rights beyond excessive force. The Eleventh Circuit, in *Keating v. City of Miami*, denied qualified immunity to officers who had failed to intervene to stop other officers from violating the First Amendment rights of peaceful protesters.[55] The Sixth Circuit, in *Jacobs v. Village of Ottawa Hill*, held that an officer could be liable for failing to intervene in another officer's unlawful investigatory detention.[56] Another Sixth Circuit case, *Smith v. Ross*, held that a law enforcement officer could be held liable if that officer denied equal protection to individuals exercising protected rights.[57]

The Second Circuit more clearly states its position than any other circuit accepting duty to intervene for not only Fourth Amendment violations, but any constitutional violation. In *Ricciuti v. N.Y.C. Transit Authority*, the Court held that officers who failed to intervene in an unlawful arrest could be liable under 42 U.S.C. § 1983.[58] But the Second Circuit had already gone even further in *Anderson v. Branen*, holding, "[i]t is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence."[59] The *Anderson* court, though itself examining an excessive force claim, discussed duty to intervene beyond issues of excessive force, holding, "[a]n officer who fails to intercede is liable

53. *See* Perez v. Tedford, No. SA-13-CV-429-XR, 2013 U.S. Dist. LEXIS 179495, at *7 (W.D. Tex. Dec. 13, 2013).

54. *See Id.* at *2–3.

55. *See* Keating v. City of Mia., 598 F.3d 753, 767 (11th Cir. 2010).

56. *See* Jacobs v. Vill. of Ottawa Hill, 5 F. App'x 390, 395 (6th Cir. 2001) (citing Bruner v. Dunaway, 684 F.2d 422, 426 (6th Cir. 1982)).

57. *See* Smith v. Ross, 482 F.2d 33, 36–37 (6th Cir. 1973).

58. *See* Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 129 (2d Cir. 1997) (citing O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988)); 42 U.S.C § 1983 (section 1983 holds that anyone acting under color of law who deprives another of any rights, privileges or immunities may be held liable to the injured party).

59. Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 2994).

for the preventable harm caused by the actions of [] other officers where that officer observes or has reason to know . . . that *any constitutional violation has been committed by a law enforcement official.*"[60]

4. Conflicting or No Decisions on Application of Duty to Intervene Beyond Excessive Force

At least one circuit has made conflicting decisions supporting or refuting a duty to intervene outside of excessive force claims. The Tenth Circuit, in *Harris v. Mahr*, held that a police officer could not be liable for failure to intervene in an unlawful search, because a duty to intervene in unlawful searches was not clearly established law.[61] In that case, however, the court cites its own apparently contradictory precedent in *Vondrak v. City of Las Cruces*, where it held (as the Second Circuit held in *Anderson*) "that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence."[62] The court justified this contradiction by saying the *Vondrak* holding was a, "highly generalized statement," which was not applicable to the specific facts of an unlawful search.[63]

Finally, the Third Circuit has issued no opinions regarding application of a duty to intervene outside of the Fourth Amendment.[64] District courts within the Third Circuit, however, have offered conflicting opinions on the subject.[65] In *Armstrong v. Furman*, the court for the Western District of Pennsylvania found no duty to intervene in a case where a corrections officer did not intervene in another corrections officer's violation of an inmate's First Amendment rights.[66] The plaintiff in *Armstrong* filed suit after a hearing officer upheld disciplinary action against him, knowing that the corrections officer who initiated the action did so because the plaintiff had filed a grievance against that corrections officer about confiscated property.[67] By contrast, in *Stokes v. Denson*, the court for

60. *Id.* (emphasis added); *O'Neill*, 839 F.2d at 11–12.

61. *See* Harris v. Mahr, 838 F. App'x 339, 343 (10th Cir. 2020).

62. *See* Vondrak v. City of Las Cruces, 535 F.3d 1198, 1210 (10th Cir. 2008) (quoting *Anderson*, 17 F.3d at 557).

63. *See Harris*, 838 F. App'x at 343.

64. *See* ABLE PROJECT, KEY CIRCUIT CASES, *supra* note 41, at 26.

65. *See Id.*

66. *See* Armstrong v. Furman, No. 19-cv-141, 2020 U.S. Dist. LEXIS 169990, *1, *17–18 (W.D. Pa. Sept. 16, 2020).

67. *Id.* at *6.

the District of New Jersey held a corrections officer could be liable for failure to intervene in another corrections officer's violation of an inmate's First Amendment rights by stopping the acting officer from interfering with the plaintiff's mail.[68] Statutory law can and should be employed to remedy this confusing situation by expressly establishing an affirmative duty to intervene for all police misconduct.

B. Current Statutory Law

The federal government and the several states have adopted different strategies for dealing with police misconduct and a duty to intervene outside of excessive force incidents. Federal law may already support an established duty to intervene in all cases. State laws on the other hand, run the gamut from total silence on the subject to criminalization of failure to intervene.

1. Existing Federal Law

Existing federal law already supports the idea that law enforcement officers either do or should have a duty to intervene not only in cases of excessive force, but for any constitutional violation. 18 U.S.C. § 242 criminalizes actions where an officer, "under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States ."[69] The United States Department of Justice discussed using § 242 in prosecutions of use of excessive force and other forms of police misconduct, including theft, false arrest, and deliberate indifference to medical needs or the risk of harm to individuals in police custody, in its policy statements regarding law enforcement misconduct.[70]

The Department of Justice further recognized the failure to intervene as a violation of constitutional rights, and even goes so far as to state:

> An officer who purposefully allows a fellow officer to violate a victim's Constitutional rights may be prosecuted for failure to intervene to stop the Constitutional violation. To prosecute such an officer, the government must show that the defendant

68. *See* Stokes v. Denson, No. 19-cv-20663, 2021 U.S. Dist. LEXIS 84078, *1, *6 (D. N.J. Apr. 30, 2021).

69. 18 U.S.C. § 242.

70. *Law Enforcement Misconduct*, DEP'T OF JUST. (last updated July 6, 2020), https://www.justice.gov/crt/law-enforcement-misconduct.

> officer was aware of the Constitutional violation, had an opportunity to intervene, and chose not to do so. This charge is often appropriate for supervisory officers who observe uses of excessive force without stopping them, or who actively encourage uses of excessive force but do not directly participate in them.[71]

However, despite earlier discussion surrounding a host of misconduct in addition to excessive force, no explanation is provided for the apparent disparity between the Department's public statements on a law enforcement officer's duty to intervene and the circuit split surrounding constitutional violations other than excessive force, or its own statements apparently limiting enforcement actions for failure to intervene to excessive force cases.

Additional support for a law enforcement officer's duty to intervene in any observed violation can be found in 42 U.S.C. § 1983, cited in *Byrd*.[72] Section 1983 reads, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[73]

Arguably, a law enforcement officer who is aware of an ongoing violation of someone's rights at the hands of a fellow officer, and takes no action to intervene, causes the victim to be subjected to a continuing deprivation of rights. While federal statutory law appears to support duty to intervene, the confusion resulting from the circuit split has left the matter open to interpretation.

2. Existing State Law

The states, seeking clarity in the void at the federal level, have begun enacting their own provisions regarding law enforcement duty to intervene. Here too, although more excusable, there is no clear direction established.[74] Some states have enacted legislation requiring

71. *Id.*

72. *See* Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986).

73. 42 U.S.C. § 1983.

74. *See generally Legal Duties and Liabilities*, NAT'L CONF. OF STATE LEGISLATURES (Jan.12, 2021), https://www.ncsl.org/research/civil-and-criminal-

officers to report what they view as excessive force.[75] A number of states have enacted legislation requiring officers to intervene when they observe excessive force.[76] Some states have enacted legislation requiring both a duty to report and a duty to intervene.[77] Only one state has applied a duty to intervene to misconduct beyond excessive force, and even there the duty is limited to specified forms of misconduct.[78]

In states which have established a statutory duty to intervene, the states have adopted several means of enforcement, and as might be expected, the penalties imposed for failure to intervene vary significantly from one state to another. For example, in California, the statutory duty to intervene establishes neither criminal nor civil remedy for a failure to intervene.[79] Instead, the statute merely directs law enforcement agencies to establish policy requiring officers to intervene.[80] Further, the required policy need only apply to cases of excessive force.[81] In New York, the duty to intervene statute directs the Municipal Police Training Council to establish, "guidelines regarding excessive use of force including duty to intervene."[82] New York's law also requires police departments to adopt use of force policy at least as restrictive as the Municipal Police Training Council's model policy, but no penalties are specified for failure to intervene.[83] Similarly, Minnesota's duty to intervene statute applies only to incidents of excessive force, and provides that an officer who fails to intervene in another officer's excessive force may be disciplined by the certifying board.[84] Nevada law also compels a law enforcement officer to intervene in another officer's use of excessive force, but required intervention is limited to no more than "issu[ing] a direct order to stop the use of such physical force," and no penalties, either

justice/legal-duties-and-liabilities.aspx (and interactive map) [hereinafter NAT'L CONF. OF STATE LEGISLATURES].

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*; H.B. 4205, 80th Leg. Assemb. Spec. Sess. (Or. 2020) (establishing a law enforcement officer's duty to intervene in cases of excessive force, sexual misconduct, discrimination, criminal acts, or violation of fitness for duty standards).

79. *See* CAL. GOV'T CODE § 7286 (Deering 2022).

80. *See Id.* § 7286(b)(9).

81. *See Id.* § 7286(b).

82. N.Y. EXEC. LAW § 840(4)(d)(2)(v) (McKinney 2022).

83. *See Id.* § 840(4)(d)(3).

84. *See* MINN. STAT. § 626.8475 (2022).

civil or criminal, are provided in the statute for failing to intervene.[85] In Vermont, failure to intervene in excessive force is classified as "Category B conduct."[86] Category B conduct must be investigated by an officer's employing agency.[87] The Vermont Criminal Justice Council may, upon finding an officer failed to intervene, impose sanctions ranging from a written warning to permanent revocation of the officer's certification.[88] New Mexico passed legislation requiring permanent revocation of a police officer's certification if the officer is convicted of a crime involving the failure to intervene in an unlawful use of force, but fails to identify crimes that constitute failure to intervene.[89]

Two states have enacted stronger penalties with respect to failure to intervene. Colorado law directly establishes an affirmative duty to intervene in excessive force for all on-duty law enforcement officers, but not for other forms of misconduct.[90] The Colorado statute criminalizes failure to intervene as a misdemeanor.[91] Connecticut's duty to intervene statute goes further still, expressly providing for the prosecution of the bystander officer, "for the same acts . . . as the police officer who used unreasonable, excessive or illegal force."[92]

Only Oregon has established a statutory duty to intervene in cases of excessive force or other misconduct.[93] Oregon's duty to intervene law requires police officers to intervene in another officer's misconduct.[94] In the statute, misconduct is defined as incidents involving excessive force, sexual misconduct, discrimination, criminal acts, or violation of fitness for duty standards.[95] Thus, even this more encompassing legislation does not include violations of all civil rights or other abuses.

Closely related to the duty to intervene in misconduct is a duty to report it to a supervisor or other authority because an officer is unlikely

85. NEV. REV. STAT. § 193.355 (2022).

86. VT. STAT. tit. 20, § 2401(2)(G) (2022).

87. *See Id.* § 2404(a)(1)(A).

88. *See Id.* § 2406(a).

89. *See* N.M. STAT. ANN. § 29-7-15 (2022).

90. *See* COLO. REV. STAT. § 18-8-802(1.5)(a) (2022).

91. *See Id.* § 18-8-802(1.5)(d).

92. CONN. GEN. STAT. § 7-282e(a)(1) (2022).

93. *See* OR. REV. STAT. § 181A.681 (2022); *see* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 75 (interactive map).

94. *See* OR. REV. STAT. § 181A.681(2); H.B. 4205, 80th Leg. Assemb. Spec. Sess. (Or. 2020).

95. *See* OR. REV. STAT. § 181A.681(1); Or. H.B. 4205.

to be held accountable for bad acts, even if another officer intervened to stop them, where no authority is aware of the misconduct. New Hampshire, while not requiring officers to intervene in the misconduct committed by other officers, does require officers to report such misconduct after observing it.[96] Most states with a statutory duty to intervene also enacted a statutory duty to report misconduct.[97] Ironically, in New Mexico and New York, a law enforcement officer has a duty to intervene in the misconduct of another officer, but no obligation to report what they saw to anyone after they were forced to intervene.[98] In the remaining forty-one states, law enforcement officers have no statutory duty to intervene, or even report, cases of excessive force or any other misconduct by another officer.[99] This variety of responses from the states, particularly the fact that in most states law enforcement officers have no statutory duty to either report or intervene in misconduct, illustrates the need for legislative action. The various standards from case and statutory law across the country also provide guidance in identifying the issues to be resolved by statute.

III. ESTABLISHING A COMMON RULE

A. Standards of Liability

The question, then, is what standard should apply when determining when a law enforcement officer has a duty to intervene in the actions of another officer? There are a number of criteria already established for analyzing constitutional rights questions with respect to law enforcement actions, and these rules, combined, provide a basis for holding law enforcement officers accountable for misconduct committed by other officers. These standards include the *mens rea* of knowingly, a reasonable opportunity to intervene, proximate cause, objective reasonableness, and the clearly established rights standard. These principles, in turn, provide a path to the proposed legislation.

96. *See* N.H. REV. STAT. ANN. § 105:19(II) (2022).

97. *See* CAL. GOV'T CODE § 7286(b)(3) (Deering 2022); COLO. REV. STAT. § 18-8-802(1.5)(b)(I) (2022); CONN. GEN. STAT. § 7-282e(a)(2)); MINN. STAT. § 626.8475(b) (2022; NEV. REV. STAT. § 193.355(3) (2022); OR. REV. STAT. § 181A.681(3) (2022); Or. H.B. 4205; VT. STAT. ANN. tit. 20, § 2401(2)(G) (2022).

98. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 75 (interactive map).

99. *See id.*

1. The Knowingly Standard

Case law demonstrates that the appropriate *mens rea* standard for applying a duty to intervene to bystander officers is knowingly. *Wood v. Strickland* and *Harlow v. Fitzgerald* illuminate the appropriate culpable mental state when considering liability for violations of rights.[100] *Wood* established that a government official is not immune from liability, "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate [] constitutional rights."[101] *Harlow* reaffirmed the *Wood* standard.[102] These cases establish, from the clearly established rights prong of the qualified immunity test, that a "knowingly" standard is appropriate when judging the actions of officials accused of violating constitutional rights. Because it would be unreasonable to expect someone to take steps to stop or prevent an act which they do not understand to be a violation of rights, the same standard is appropriate when judging the actions of officials accused of failing to intervene in a violation.

2. The Reasonable Opportunity to Intervene Standard

With respect to the use of excessive force, the courts have long held that in order for an officer to have a duty to intervene to stop another officer's bad acts, the intervening officer must have had a reasonable opportunity to intervene. In *Byrd v. Brishke*, the Seventh Circuit held that a law enforcement officer has a duty to intervene to stop excessive force by other officers that occurs "in his presence or otherwise within his knowledge."[103] In *Smith v. Mensinger*, the court held that a corrections officer could be held liable for excessive force by other officers if they "had a reasonable opportunity to intervene and simply refused to do so."[104] In *O'Neill v. Krzeminski*, the court held that an officer could not be held liable for injuries the plaintiff sustained at the hands of other officers, even though the defendant was present, because the attack occurred so quickly that the defendant "had no realistic opportunity to attempt to prevent them," and "[t]his was not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit

100. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

101. *Wood*, 420 U.S. at 322.

102. *See Harlow*, 457 U.S. at 815.

103. Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972).

104. Smith v. Mensinger, 293 F.3d 641, 650 (3d Cir. 2002).

collaborator."[105] In *Figueroa v. Mazza*, the court listed factors to consider, in addition to the duration of the incident, in determining whether an officer had a reasonable opportunity to intervene, including, "the number of officers present, their relative placement, the environment in which they acted, [and] the nature of the assault."[106] The *Figueroa* court also made clear that many other factors could be included when considering whether an opportunity to intervene was reasonable.[107] The concept of reasonable opportunity to intervene is equally applicable to misconduct outside of excessive force as it is to excessive force itself.

3. The Proximate Cause Standard

The United States Supreme Court has already established proximate causation as the standard for determining liability for Fourth Amendment claims raised under 42 U.S.C. § 1983, and this standard can be applied to other violations, as well. In *County of Los Angeles v. Mendez*, the court held that a plaintiff can recover damages proximately caused by a Fourth Amendment violation.[108] While, here, the plaintiffs could not recover based on an excessive force claim, injuries proximately caused by an unlawful search were held compensable.[109]

Proximate causation of injuries was previously established as a requirement for failure to intervene in the Second Circuit in *O'Neill v. Krzeminski*.[110] In *O'Neill*, two officers used excessive force against the plaintiff, and a third, nearby, did not intervene to stop them.[111] The court held that the third officer, however, could not be liable for this excessive force because his omission was not the proximate cause of the plaintiff's injuries.[112] This allows the inference that, had the third officer's failure to intervene been a proximate cause of the plaintiff's injuries, that officer would have been liable.

105. O'Neill v. Krzeminski, 839 F.2d 9, 11–12 (2d Cir. 1988).

106. Figueroa v. Mazza, 825 F.3d 89, 107 (2d Cir. 2016).

107. *Id.*

108. *See* Cnty of L.A. v. Mendez, 137 S. Ct. 1539, 1548 (2017) (citing Heck v. Humphrey, 512 U.S. 477, 483 (1994)).

109. *See id.*

110. *See O'Neill*, 839 F.2d at 11.

111. *See id.* at 10.

112. *See id.* at 11.

4. The Objectively Reasonable Standard

Any violation of rights by a law enforcement officer must be analyzed based on an objective standard. *Graham v. Connor* firmly established the objective reasonableness standard with respect to use of force evaluations.[113] In *Graham*, the Court recognized the fact that officers do not always have all necessary information to make a fully informed decision, and required that lack of information be considered in "[t]he calculus of reasonableness."[114] Further, the Court stated the objective reasonableness standard was applicable not only in use of force analysis, but also in search and seizure analyses in general.[115] The Court went on to discuss the idea that, even "malicious and sadistic behavior" does not bear upon the reasonableness of police actions.[116]

In *Terry v. Ohio*, the Court, again analyzing a Fourth Amendment seizure, also concluded such analyses must be determined based on an objective standard, and added that the analysis must be based on the facts available to an officer at the time the officer takes action.[117] Further, in *Scott v. United States*, the Court affirmed an appellate holding basing analysis of a Fourth Amendment question on reasonableness and the totality of the circumstances.[118]

Additional cases have applied the reasonableness standard to analysis of restrictions placed on rights other than those guaranteed by the Fourth Amendment. For example, in *Harlow*, discussing the respondent's allegations of a public official's violation of constitutional and statutory rights, the Court held, "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[119] The Court expressly rejected a subjective approach to analysis of the actions of government officials.[120] Objective reasonableness, already employed to establish whether a

113. *See* Graham v. Connor, 490 U.S. 386, 388 (1989).

114. *Id.* at 396–97.

115. *See id.* at 397 (internal quotations omitted) (citing Scott v. United States, 436 U.S. 128, 137–39 (1978)).

116. *See id.* (internal quotations omitted).

117. *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1986).

118. *Scott*, 436 U.S. at 131.

119. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

120. *See id.* at 817–18.

primary actor is liable for their actions, is equally applicable to bystander liability.

5. The Clearly Established Rights Standard

While the idea of qualified immunity for law enforcement officers has, in recent times, come under significant public scrutiny, the concept and the standards used to determine when it applies have significant value with respect to liability for law enforcement officers and the duty to intervene. In *Harlow*, the Court held, "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."[121] Cited in *Harlow*, *Wood* held that an official must be held to a standard based on, "unquestioned constitutional rights."[122] "Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgement for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system."[123] These cases establish that, for a deprivation of rights to be held against a law enforcement officer, the right must be clearly established at the time of the violation. The requirement that a protection be clearly established should apply equally to an officer with a duty to intervene in a violation as to the officer committing the act, because a bystander officer cannot be expected to recognize a duty to intervene if the acting officer could not themselves determine they were committing misconduct. These standards, already established in case law, collectively identify a solution to the problem at hand. Combining them into legislation can bring clarity to the law and ensure civil rights protections for all.

B. Proposed Model Legislation

As a matter of public policy, police officers should not stand idly by when they witness misconduct by another officer. Creating a civilly enforceable duty to intervene will establish a duty to intervene for the purposes of prosecuting under the doctrine of accomplice liability should the primary actor's conduct rise to a criminal level. With respect to lesser cases of excessive force which may not rise to the level of a criminal action, or to violations of civil rights where the

121. *Id.* at 818 (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978)).
122. *Id.*; Wood v. Strickland, 420 U.S. 308, 322 (1975).
123. *Wood*, 420 U.S. at 322.

acting officer does not commit an independent crime, civil remedies should be applied to an officer who knowingly fails to intervene when having a reasonable opportunity to do so. The continued failure of the judicial system to establish a clear and consistent national policy towards law enforcement officers' duty to intervene when another officer violates a person's established rights demonstrates the need for action by the legislative branch.

A statutory duty to intervene need not be complex. While this note has explored a wide range of law, cases, and policies suggesting a pathway to establishing a duty to intervene, the proposed model statute is simple and to the point:

> *Any law enforcement officer who knows of misconduct by any other law enforcement officer which violates the clearly established rights of any person, and who knowingly fails to intervene to stop the other officer from continuing that misconduct when there is a reasonable opportunity to do so, is civilly liable to the person whose rights were violated, to the same extent as the officer committing the violation, regardless of the rank or position of any involved officer.*

This legislation, if enacted, will encourage law enforcement officers to take direct action to uphold citizens' civil rights in the event that a fellow officer fails to do so, and provide an additional remedy to victims of police misconduct. By using already established standards, the proposed model fits into current law enforcement standards and training. Further, adoption of these standards limits the need for additional interpretation in the courts.

CONCLUSION

The need for and potential benefits of reducing police misconduct are clear. Further, as a matter of public policy, police misconduct should be eliminated, or at the very least, minimized. The unusually complicated circuit court split is indicative of a lack of uniform public policy regarding law enforcement and a duty to intervene in misconduct outside of excessive force. The wide range of decisions, laws, and policies in place throughout the nation, means that protection of an individual's rights under the Constitution, and means to redress violations of those rights, are highly variable. This variability in the range of policies, case law, and statutory law demonstrates the need to establish a common standard. Whether adopted piecemeal by state and local governments, or at once through federal action, the time has come to settle this question in favor of protecting all rights of all people by passing legislation establishing a

law enforcement officer's affirmative duty to intervene in all incidents of police misconduct.