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Schwartz, Joanna

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THE UNINDEMNIFIED

Joanna C. Schwartz*

ABSTRACT

Police officers rarely pay anything towards settlements and judgments entered against them. This observation has been taken to mean that local governments virtually always agree to indemnify their officers and pay the entirety of settlements and judgments entered against them. Yet indemnification decisions are more nuanced, complex, and uncertain—and officers are denied indemnification more often—than payout data suggest.

This Article examines the unindemnified: the authority under which officers may be denied indemnification by their employers; the circumstances in which local governments deny or threaten to deny officers indemnification; the ways that indemnification denials influence the litigation of civil rights cases (including why even unindemnified officers rarely pay); the impact of indemnification denials and threatened denials on our system of constitutional remediation; and steps that legislators, government officials, and litigants could take to better align indemnification rules and practices with the compensatory and deterrence goals of §1983.

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* Honorable Harry Pregerson Professor of Law, UCLA School of Law. Thanks to Tom Baker, Farhang Heydari, Christopher Slobogin, Benjamin Zipursky, and participants in workshops at Fordham Law School and Vanderbilt Law School for insightful comments on earlier drafts. For excellent research assistance, thanks to Jack Coppinger and Alexandra Guadagno. Thanks, finally, to the attorneys who spoke with me about their experiences with indemnification threats and denials in civil rights suits.

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INTRODUCTION

Police officers rarely contribute anything toward settlements and judgments entered against them. From 2006-2011, in 81 jurisdictions across the country, plaintiffs were awarded more than \$730 million to resolve police misconduct suits.¹ Yet police officers in those 81 jurisdictions personally contributed to payments in just .41% of those cases, and contributed just .02% of the total awarded.² No officer personally satisfied a punitive damages judgment entered against them, and officers were spared financial sanctions even when they violated policy, were fired, and/or were sent to prison for their misdeeds.³

These findings have been taken to mean that local governments virtually always agree to indemnify their police officers and pay the entirety of settlements or

¹ See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).

² See *id.*

³ See *id.*

judgments entered against them; a sort of de facto *respondeat superior* liability.⁴ Yet indemnification decisions are more nuanced, complex, and uncertain—and local governments deny officers indemnification more often—than payout data suggest.

This Article examines the unindefnified: the authority by which police officers may be denied indemnification by their employers; the circumstances under which local governments deny officers indemnification; the ways in which indemnification denials influence the litigation of police misconduct cases (including why even unindefnified officers rarely pay); the impact of indemnification denials and threatened denials on our system of constitutional remediation; and steps that legislators, government officials, and litigants could take to better align indemnification rules and practices with the compensatory and deterrence goals of §1983. Although I flagged these topics for future inquiry more than a decade ago,⁵ and

⁴ See, e.g., Aaron L. Nielson & Christopher J. Walker, Qualified Immunity and Federalism, 109 Geo. L.J. 229, 264 (2020) (“[T]here is often little difference functionally between suits against officers in their individual capacities and suits against those same officers in their official capacities...because the government almost always indemnifies the officers.”); Noah Smith-Drelich, *The Constitutional Tort System*, 96 Ind. L.J. 571, 580 (2021) (“[I]ndemnification constitutes a de facto form of vicarious liability, a private tort doctrine that shifts the financial costs of wrongdoing from individual employee tortfeasors to their employers.”). This was also the conclusion I initially drew from these findings, see Schwartz, *supra* note 1 at 840, although further research and reflection led me to revise my views in the ways outlined in the sources cited *infra* note 6 and throughout this Article. For other scholarship assuming that widespread indemnification is equivalent to a de facto *respondeat superior* liability, see, for example, John C. Jeffries, J., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 50 (1998) (“In the generality of cases, constitutional tort actions against government officers are functional substitutes for direct access to government treasuries.”); David F. Hamilton, The Importance and Overuse of Policy and Custom Claims: A View from One Trench, 48 DePaul L. Rev. 723, 729-32 (1999) (arguing that “widespread” indemnification obviates the need for plaintiffs to pursue claims against municipalities).

⁵ See Schwartz, *supra* note 1 at 917 (“Variation in government indemnification practices—and other variations across jurisdictions in judges’ application of qualified immunity and other doctrines, the strength of the plaintiffs’ bar, city attorney practices and community norms—may well impact whether cases are filed, how plaintiffs’ lawyers frame their clients’ claims, the frequency with which plaintiffs recover, and the amount plaintiffs receive. Future research should examine these distinctions to better understand regional variations in litigation practice and the extent to which §1983 doctrine achieves its deterrence and compensation goals in different parts of the country.”).

have touched on them periodically since,⁶ this is the first in-depth exploration of these important and overlooked facets of constitutional litigation.⁷

Part I sets out what we know: There is a wide range of indemnification statutes, rules, and policies across the country, and police officers virtually never pay anything in settlements or judgments against them, yet local governments deny officers indemnification more often than their near-universal insulation from financial liability suggests. Some jurisdictions have policies of never indemnifying their officers.⁸ Other jurisdictions periodically deny officers indemnification on the ground that their conduct violates the terms of applicable indemnification provisions.⁹ Yet, even when local governments deny or threaten to deny indemnification, their officers rarely pay.¹⁰

Part II peers inside the black box of indemnification decisionmaking to explore when and why local governments deny or threaten to deny officers indemnification,

⁶ See Joanna C. Schwartz, *Municipal Immunity*, 109 Va. L. Rev. 1181, 1227-28 (2023) (reporting that in jurisdictions with policies of never indemnifying their officers, or that threaten to deny officers indemnification, lawyers must bring municipal liability claims to assure relief) [hereinafter *Municipal Immunity*]; Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 Mich. L. Rev. 1539, 1537 (2020) (explaining that “[a]lthough...officers virtually never contribute to the satisfaction of settlements and judgments entered against the, there is significant variation among cities’ and counties’ indemnification policies and practices.”) [hereinafter *Civil Rights Ecosystems*]; Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 Geo. L.J. 305, 332-34 (2020) (describing indemnification decisionmaking as contingent and depending on a number of different factors, even as individual officers rarely pay) [hereinafter *Qualified Immunity and Federalism All the Way Down*].

⁷ There are additional important—yet largely overlooked—facets of our constitutional litigation compensation scheme that must wait for another day. For example, some local governments fail to satisfy their obligations to indemnify because they are bankrupt or so cash-strapped that they take the position that they do not have the resources to satisfy police settlements and judgments entered against their officers. See, e.g., *Civil Rights Ecosystems*, supra note 6, at 1564-65 (discussing the difficulty of executing judgments against officers in East Cleveland, Ohio, because of the financial troubles in that jurisdiction); Melissa B. Jacoby, *Unjust Debts: How Our Bankruptcy System Makes America More Unequal*, 91-122 (The New Press: 2025) (describing how local governments have used bankruptcy laws to erase millions in civil rights litigation debt). Bankrupt and cash-strapped municipalities’ obligations to satisfy settlements and judgments on behalf of their officers raise complex questions about government finances, accountability, and §1983 litigation that merit examination but are beyond the scope of this Article.

⁸ See infra note 60 and accompanying text.

⁹ See infra note 61 and accompanying text.

¹⁰ See infra notes 65-70 and accompanying text.

how these decisions influence civil rights litigation, and what indemnification uncertainty means for officers themselves. Drawing on cases in which indemnification was disputed, interviews with dozens of attorneys, and correspondence with local government officials, this Part illuminates the legal, strategic, financial, and political considerations that appear to shape local governments' indemnification decisions. Local governments' decisionmaking calculus varies by jurisdiction, reflecting differences in what might be called their civil rights ecosystems¹¹—the local mix of legal rules, people, and informal practices that influence how constitutional accountability operates on the ground. As a result, the same indemnification policy can be applied in vastly different ways depending on the strength of the plaintiffs' bar, the pressures applied by unions, the likelihood of a plaintiff's verdict at trial, and the strategic behavior of municipal counsel in that jurisdiction. Regardless of a local government's reason for denying (or threatening to deny) an officer indemnification, indemnification uncertainty consistently disadvantages plaintiffs, while leaving most officers' bank accounts untouched.¹² Prevailing wisdom is that denying officers indemnification will put the officers' finances at risk. Instead, it is plaintiffs, not officers, who tend to suffer financially when officers are denied indemnification.

Part III considers the implications of these findings. Commentators have assumed that widespread indemnification amounts to a de facto *respondeat superior* liability.¹³ Current indemnification practices may seem indistinguishable from de facto *respondeat superior* to officers, as they rarely pay anything toward settlements and judgments against them. Current practices may also seem indistinguishable from de facto *respondeat superior* to plaintiffs in jurisdictions that always (or nearly always) indemnify their officers. But in jurisdictions that regularly deny—or threaten to deny—their officers indemnification, current practices are a far cry from *respondeat superior*. In these jurisdictions, indemnification denials and threatened denials increase the challenges of civil rights litigation for plaintiffs in several ways, giving local governments a strategic boost in an adversarial setting already gravely tilted in their favor.

Part IV offers several recommendations to better align indemnification policies and practices with the compensatory and deterrence goals of Section 1983. Indemnification laws were enacted with the expectation that governments would compensate plaintiffs when their officers acted within the scope of the indemnification laws' terms, and officers would pay plaintiffs when they violated those terms. Yet, in places where indemnification is uncertain, both the compensatory and deterrence goals of indemnification laws are frustrated. Plaintiffs go uncompensated or

¹¹ See Civil Rights Ecosystems, *supra* note 6.

¹² For further discussion of the reasons even unindemnified officers rarely pay, see *infra* Part II.C.3.

¹³ See *supra* note 4 and accompanying text.

undercompensated when indemnification is uncertain, and decisions by local government officials and plaintiffs combine to protect the finances of officers regardless of the depths of their misconduct. Legislatures could amend their indemnification laws so that plaintiffs are assured compensation when they are awarded a settlement or judgment and officers are actually financially sanctioned when they have violated the terms of the indemnification agreement.¹⁴ Local government officials charged with making indemnification decisions could also commit to exercise their authority in ways that do not frustrate these compensation and deterrence goals.¹⁵

Unless and until these types of reforms are adopted, it will be left to plaintiffs and their lawyers to counteract the destabilizing effects of indemnification denials and threatened denials. In this vein, I suggest various ways that plaintiffs can ensure indemnification—or, at least, secure clarity about governments’ indemnification decisions—as early as possible, and create litigation and political consequences for local governments that use indemnification denials strategically to discourage plaintiffs from vindicating their rights under Section 1983.¹⁶

I. WHAT WE KNOW: INDEMNIFICATION RULES AND OUTCOMES IN CONSTITUTIONAL TORT CASES

Indemnification agreements are promises by an employer to provide their employees with financial protections when sued, including the costs of defending a case and the payment of any judgment entered against them.¹⁷ Indemnification agreements are considered necessary to employ and retain employees, particularly when their work exposes them to personal liability,¹⁸ and are common in employment agreements in a variety of fields.¹⁹

¹⁴ For steps that could be taken by state and local legislators see *infra* Part IV.A.

¹⁵ For steps that could be taken by local government decisionmakers, see *infra* Part IV.B.

¹⁶ For further discussion of these strategies, see *infra* Part IV.C.

¹⁷ For a comprehensive description of indemnity see generally James L. Buchwalter, Cause of Action to Enforce Contractual Right of Indemnification Respecting Personal Injury Claims, 75 Causes of Action 2d 551 (2016) (updated July 2025).

¹⁸ See, e.g., Joseph P. Monteleone & Nicholas J. Conca, 51 Business Lawyer 573, 574 (1996) (explaining that statutes permitting indemnification of corporate officers and directors were “intended to encourage capable individuals to serve as directors and officers secure in the knowledge that they would be insulated from personal liability if corporate actions, taken in good faith, were brought under attack by way of a legal proceeding.”).

¹⁹ For descriptions of indemnification agreements in a range of contexts, see Bernard Black, Brian Cheffins, & Michael Klausner, Outside Director Liability, 58 Stan. L. Rev. 1055, 1083-

This Part sets out what we know about indemnification rules, decisions, and outcomes in constitutional tort litigation—focusing, specifically, on litigation against state and local law enforcement officers. There is a tangle of state laws, local policies, and local government officials’ discretionary decisions that determine whether law enforcement officers will be indemnified by their employers.²⁰ Despite wide variation across the country in indemnification rules and policies, police officers virtually never pay anything in settlements or judgments entered against them.²¹ Yet indemnification is not as certain as the payout numbers suggest: some jurisdictions have policies of never indemnifying their officers, and other jurisdictions sometimes deny—or threaten to deny—their officers indemnification.²²

A. *On the Books: Indemnification Laws and Policies*

Although employers have been indemnifying their employees for centuries, local government agreements to indemnify their officers against legal liability are a relatively new phenomenon.²³ Before 1961—when the Supreme Court first recognized the right to sue local government officials for constitutional violations under §1983—there was little need for indemnification because suits against local officials were relatively uncommon.²⁴ But the number of §1983 suits against police officers and other government officials grew dramatically, from several hundred to tens of thousands

84 (describing the role of indemnification protections in outside director liability); Buchwalter, *supra* note 17 (describing indemnification of personal injury claims); Di Guo, Xinyu Hua, & Kun Jiang, Indemnification, Monitoring, and Competition: Evidence from R & D Contracts, 24 *Am. L. & Econ. Rev.* 203 (2022) (describing indemnification agreements in research and development contracts).

²⁰ See *infra* Part I.A. A similar tangle of laws, policies, and practices inform indemnification decisions in the private sector, as well. For one discussion, see Pamela H. Bucy, Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal, 24 *Ind. L.J.* 279 (1991).

²¹ See *infra* Part I.B.

²² See *infra* Part I.C.

²³ Note that Congress regularly assumed the costs of liability awards against federal government officers in the early 19th century. James E. Pfander & Jonathan L. Hunt, Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic, 85 *N.Y.U. L. Rev.* 1862 (2010).

²⁴ Even without formal indemnification provisions, there were ways for officers to avoid personal liability when they were sued. For a description about how this process worked in Chicago before 1961, see *infra* note 48.

between 1961 and 1979.²⁵ During this same period, the municipal liability insurance market collapsed; such insurance had been widely available, but premiums doubled in the mid-1970s and many jurisdictions were left uninsured.²⁶ As John Rappaport explains: “Then—and only then—did the law enforcement community begin to express ‘dismay about legal liability.’”²⁷

Concerns about rising civil rights litigation and liability and the fall of the municipal insurance market led state legislatures to pass statutes requiring or allowing for the indemnification of judgments against police officers and other government employees.²⁸ The legislative history of these statutes suggest that legislators considered indemnification protections necessary for police departments to hire and retain officers who would act decisively without threat of financial liability.²⁹ But state legislatures also created indemnification exceptions and limits; as the sponsors of an indemnification bill in Nassau County wrote, they did not intend to provide “blanket immunity” but to “alleviate [officers’] concern that their actions, although improper, may subject them to personal liability.”³⁰

States took different approaches to balancing interests in protecting officers from financial liability when they act properly and exposing them to liability when they act improperly. Surveys of state indemnification statutes published in 1983 and 2020 each found a wide range of provisions.³¹ Some states require that both state and local

²⁵ See Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 523 (1982) (“Between 1961 and 1979, nonprisoner civil rights cases filed in federal district courts increased from 296 to 13,168; state prisoner filings in federal courts showed a similar jump, increasing from 218 in 1966 to 11,195 in 1979.”).

²⁶ See John Rappaport, How Private Insurers Regulate Public Police, 130 Harv. L. Rev. 1539, 1555-56 (2017).

²⁷ *Id.* at 1556.

²⁸ These concerns also led states to create municipal liability pools that would protect municipalities in lieu of insurance. See *id.*

²⁹ See Qualified Immunity and Federalism All the Way Down, *supra* note 6, at 323 (indemnification statutes were passed to ‘assure ‘the zealous execution of official duties by public employees,’ ‘avoid placing a burden upon state employment,’ and ‘create a secure working environment wherein employees do not feel paralyzed in the performance of their duties for fear of being sued.’”) (quoting *Chang v. County of Los Angeles*, 204 Cal. Rptr. 3d 293, 298 (Ct. App. 2016); *Miller v. Egan*, 828 A.2d 549, 561 (Conn. 1995); *Strength v. Ala. Dep’t of Fin.* 622 So. 2d 1283, 1288 (Ala. 1993)).

³⁰ See Qualified Immunity and Federalism All the Way Down, *supra* note 6, at 325.

³¹ See Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 85 (1983) (surveying state indemnification statutes in the early 1980s); Nielson and Walker, *supra* note 4 (surveying state indemnification statutes in 2020).

employees be indemnified; some cover state but not local employees (or vice versa); some give state and local governments discretion to determine whether they will indemnify their officers.³² State indemnification statutes vary in agencies' obligations to provide representation to their officers: Some states mandate that agencies provide their officers with representation while others leave it to the agencies' discretion.³³ State statutes also differ in their indemnification exceptions: some require employers to indemnify officers' conduct so long as it is within the course and scope of employment; others allow or require employers not to indemnify officers for conduct that is intentional, reckless, willful, malicious, criminal, fraudulent, or grossly negligent, or for awards of punitive damages.³⁴ Sixteen state statutes have indemnification caps ranging from \$25,000 to \$5 million.³⁵ As Aaron Nielson and Christopher Walker explain, their 2020 survey of state indemnification statutes "demonstrates the extraordinary depth, complexity, and diversity of state indemnification practices at play."³⁶

The depth, complexity, and diversity of state police indemnification statutes is amplified by variation in local jurisdictions' rules and practices. In some jurisdictions, the scope of indemnification protections are the product of union agreements or local laws; in others, indemnification practices are informal and unwritten.³⁷ These local rules and practices—which are consistent with, but build on, state law—may set out how, when, and by whom indemnification decisions are made, and how officers can challenge indemnification denials.³⁸ Local rules may also cap indemnification—for example, Houston limits indemnification to \$100,000 per officer and \$300,000 per incident.³⁹ These local indemnification rules and practices can be cloaked in obscurity,

³² Nielson and Walker, *supra* note 4, at 269-72.

³³ Compare Cal. Gov't Code §825(a) (imposing the duty to defend on California agencies for conduct within the course and scope of employment so long as the request for representation was timely made) with Fla. Stat. § 111.07 (providing that any "agency of the state, or any county, municipality, or political subdivision of the state" is authorized to defend its employees from civil actions, including "any civil rights lawsuit seeking relief personally against [the employee]" and that if no defense is provided to the employee, and the employee "prevails in the action," the employer entity must reimburse the employee for "for court costs and reasonable attorney's fees.").

³⁴ Nielson & Walker, *supra* note 4, at 272-78 273 & n.246.

³⁵ *Id.* at 278-79.

³⁶ *Id.* at 269.

³⁷ See *Qualified Immunity and Federalism All the Way Down*, *supra* note 6, at 331-32.

³⁸ See *id.* at 332.

³⁹ See *Civil Rights Ecosystems*, *supra* note 6, at 1576-77.

particularly if they are not committed to writing.⁴⁰ Available information about practices in a handful of jurisdictions reveal a range of decisionmakers (including city attorneys, city councils, administrative law judges) applying a range of provisions to determine officers' entitlement to indemnification.⁴¹

Jurisdictions also vary in the timing of their indemnification decisions. Some jurisdictions decide indemnification at the outset of a case.⁴² Others wait to formally decide whether an officer is entitled to indemnification until there is a final judgment.⁴³ Indeed, indemnification provisions regularly provide that the officer's entitlement to indemnification depends on factors that can only be determined after trial, including what the evidence revealed,⁴⁴ whether punitive damages were

⁴⁰ See, e.g., Telephone interview with plaintiff's attorney Mike Laux (Aug. 12, 2024) (explaining, when describing indemnification in Little Rock, Arkansas: "[I]t's all very murky. It's all very clandestine. You never get a straight answer about a lot of things when you're talking the way...an insurer would."). It may be that a lack of clarity about indemnification policies and practices afford local governments strategic benefits during litigation. See *infra* note 116 and accompanying text for further discussion of this possibility.

⁴¹ See, e.g., Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 Vill. L. Rev. 839 (2017) (describing indemnification practices in Philadelphia); *City of Minneapolis v. Lehner*, No. A16-0608, 2017 WL 24682, at *1-2 (Minn. Ct. App. Jan. 3, 2017) (describing the indemnification decisionmaking process in Minneapolis); *Lemma v. Nassau Cty. Police Officer Indemnification Bd.*, 105 N.E.3d 1250, 1253 (N.Y. 2018) (describing the indemnification decisionmaking process in Nassau County); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 Fordham Urb. L.J. 587, 592-96 (2000) (describing the indemnification decisionmaking process in New York City); Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 Suffolk U.L. Rev. 831, 847-50 (2005) (describing local indemnification provisions across the country).

⁴² See, e.g., Schwartz, *supra* note 1, at 916 n.134 (explaining that New Jersey and Honolulu decide whether to indemnify officers at the outset of the case; at the same time that they decide whether to provide officers with representation).

⁴³ See Ilann M. Maazel, *Punitive Damages and Indemnification: What Should Juries Be Told?*, N.Y.L.J. Mar. 20, 2012, at 3 ("Many municipalities, including the City of New York, take the litigation position that indemnification decisions are not made until after trial."). See also *infra* notes 44-45 (describing a variety of conditions in state indemnification laws that require indemnification decisions be made post-trial).

⁴⁴ See, e.g., Ravenell & Brigandi, *supra* note 41, at 845 (explaining that Pennsylvania law requires a municipality to indemnify a police officer "when a judge determines that the official caused the injury while acting within the scope of his or her duties *unless*...[a] judge or jury has determined that the officer's 'act[ion] constituted a crime, actual fraud, actual malice, or willful misconduct,' in which case the municipality is prohibited from indemnifying a police officer.").

awarded,⁴⁵ and/or whether the officer participated adequately in the defense of his case.⁴⁶ In cases that resolve through pre-trial settlements—which account for the vast majority of successful police misconduct suits—the government may never make a formal indemnification decision.⁴⁷

B. At the Bank: Litigation Payouts

Indemnification rules governing litigation against law enforcement officers are a hodgepodge, with varying exceptions, limitations, and processes applicable in nearly 18,000 agencies across the country. Yet, despite this significant variation in indemnification rules, policies, and practices, police officers virtually never pay anything in settlements and judgments against them.

Police officers have been insulated from the costs of civil rights litigation for at least half a century.⁴⁸ A study of police misconduct suits filed between 1970 and 1977

⁴⁵ Nielson & Walker, *supra* note 4, at 277-78 (describing provisions in sixteen states that prohibit or permit the denial of indemnification for punitive damages).

⁴⁶ See, e.g., Cal. Gov't Code § 825(a) (conditioning indemnification on a requirement that "the employee or former employee reasonably cooperates in good faith in the defense of the claim or action."); Ill. St. § 350/2(a) (explaining that a state employee's request for representation in a suit "shall constitute an agreement by the State employee to cooperate with the Attorney General in his defense of the action and a consent that the Attorney General shall conduct the defense as he deems advisable and in the best interests of the employee."); Mont. Code. Ann. § 2-9-305(6) (requiring that indemnified officers must "cooperate reasonably" with their defense); Nev. Rev. Stat. § 41.0349 (providing that an officer will be denied indemnification after a judgment is entered if the "employee failed to cooperate in good faith in the defense of the action"); North Dakota Code § 32-12.2-03(6) (requiring that indemnified officer must provide "complete disclosure and cooperation" in their defense); Okla. Stat. tit. 51, § 162(B) (requiring that, in order to recover indemnification, the judge must conclude by a preponderance that "the employee reasonably cooperated in good faith in the defense of the action upon which the judgment or settlement was awarded and for which indemnification is sought"); Or. Rev. Stat. § 30.285(4) (providing that the employee will be automatically indemnified so long as they "shall cooperate fully with the Attorney General and the department [of Admin. Services] in the defense" and can be denied indemnification if the employee "has not so cooperated or has otherwise acted to prejudice defense of the claim").

⁴⁷ The same is true in other areas of law. See Back, Cheffins & Klausner, *supra* note 19, at 1060 n.10 (2006) ("In most settlements [of suits against directors and officers], the issue of whether a payment is made on behalf of outside directors or by the company directly is avoided. The company and the D&O insurer fund a settlement, and the parties agree that the defendants do not acknowledge a violation.").

⁴⁸ Police officers were likely shielded from the costs of settlements and judgments even longer than that. See Jay McMuller, Tells How City Wiggles Out of Paying Damages for Cops, *Chicago Daily News* (Mar. 6, 1959) (describing how the plaintiffs suing officers for misconduct would first file a lawsuit against the officer and then, after getting a judgment, file a second suit

in Connecticut federal courts found that police officers did not have to contribute to settlements or judgments in more than 98% of the lawsuits filed against them.⁴⁹ A study of civil rights cases filed in 1980 and 1981 in the Central District of California found no evidence of officers paying for judgments against them.⁵⁰

Today, police officers remain largely shielded from the financial costs of legal liability. When I studied payouts in police misconduct cases in forty-four law enforcement agencies across the country between 2006 and 2011, I found that officers contributed to settlements and judgments in just .41% of the approximately 9225 civil rights suits resolved in plaintiffs' favor, and paid just .02% of the more than \$735 million awarded to plaintiffs in those cases.⁵¹ Only two jurisdictions—New York and Cleveland—confirmed that officers had contributed to settlements during that period. Just one officer—a New York City police officer who was off-duty when his dog attacked the plaintiff—satisfied a settlement in full.⁵² In the others, officers made a modest contribution—the median payment was \$2,250⁵³—to a larger settlement paid by the city. Even in New York and Cleveland, contributions were rare; extrapolating from my study data, a New York City police officer had a 1 in 308 chance of contributing to a settlement during a twenty-year career, and a Cleveland officer's chances were 1 in 242.⁵⁴ I additionally tracked payouts in 37 medium and small law enforcement agencies across the country and found that officers never contributed to settlements and judgments against them during the six-year study period.⁵⁵

Although indemnification statutes, rules, and policies are written to exempt the worst actors from indemnification's protections, officers disciplined, fired, and/or sent to prison did not contribute to millions in settlements and judgments entered against

against the city to get it to pay the award). Federal law enforcement are shielded from the costs of settlements and judgments against them as well. See James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 *Stan. L. Rev.* 561 (2020) (finding that Federal Bureau of Prison officers did not contribute to settlements and judgments awarded in more than 95% of the successful *Bivens* cases against them).

⁴⁹ See Lant B. Davis, John H. Small & David Wohlberg, *Suing the Police in Federal Court*, 88 *Yale L.J.* 781, 810-12 (1979).

⁵⁰ See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 *Cornell L. Rev.* 641, 686 (1987).

⁵¹ See Schwartz, *supra* note 1, at 890.

⁵² See *id.* at 926.

⁵³ See *id.* at 939.

⁵⁴ See *id.* at 914.

⁵⁵ See *id.* at 890.

them during this six-year study period.⁵⁶ Juries awarded more than \$9.3 million in punitive damages to plaintiffs in twenty cases in the 2006-2011 study, but officers did not pay a penny of those punitive damages awards.⁵⁷

C. *Between Policy and Payout: Available Evidence About Indemnification Decisions*

Although local governments have varying authority and discretion to indemnify their officers when they are sued, officers almost never pay anything toward settlements and judgments entered against them. Commentators have taken this evidence to mean that local governments virtually always agree to indemnify their officers and pay the entirety of settlements and judgments entered against them.⁵⁸ Yet, as I have explained in prior work, available evidence suggests that local governments' indemnification decisionmaking is more contingent and complex.⁵⁹

In many jurisdictions, it is taken as a foregone conclusion that officers will be indemnified and indemnification plays a minimal role in the litigation of civil rights cases.⁶⁰ In other jurisdictions, indemnification can be a hotly contested issue. Some jurisdictions refuse to indemnify all of their officers as a matter of policy.⁶¹ Other jurisdictions occasionally deny officers indemnification on the ground that their conduct falls within one or more exceptions to the applicable indemnification policy.⁶² A local government's decision to deny its officer indemnification can be announced at

⁵⁶ See *id.* at 923-25.

⁵⁷ See *id.* at 917-18.

⁵⁸ See sources cited *supra* note 4.

⁵⁹ See sources cited *supra* note 6.

⁶⁰ See, e.g., *Civil Rights Ecosystems*, *supra* note 6, at 1576 ("According to plaintiffs' attorneys in Philadelphia, the city's attorneys sometimes threaten not to indemnify officers but actually refuse to indemnify rarely, 'and only in situations where officers have been criminally charged and removed from the force.' The City of Philadelphia estimates that it indemnifies 99% of officers who have settlements or judgments entered against them."); Emery & Maazel, *supra* note 41, at 587-88 (describing the near-certainty of officer indemnification in New York City).

⁶¹ See *Municipal Immunity*, *supra* note 6, at 1228 ("Attorneys report that some places—including El Paso, Texas; Harris County, Texas; Memphis, Tennessee; and many places in Arkansas—have a policy of refusing to indemnify their officers, such that plaintiffs must have a colorable *Monell* claim in order to secure any relief.").

⁶² See, e.g., *infra* notes 156-173 and accompanying text (describing an indemnification denial in Durham, North Carolina). See also *Qualified Immunity and Federalism All the Way Down*, *supra* note 6, at 332-35 (describing several cases in which officers were denied indemnification).

any stage of litigation, from just after a suit is filed until after a final judgment is entered in the case.⁶³ And some jurisdictions regularly threaten to deny their officers indemnification without making good on those threats.⁶⁴

Even when officers are denied indemnification, they rarely suffer financial consequences. There are exceptions to this rule: I have periodically learned of cases in which plaintiffs sought to collect damages awards directly against unindemnified officers.⁶⁵ More often, though, it appears that plaintiffs, local governments, and officers act in ways that shield officers' bank accounts.⁶⁶ Plaintiffs may pursue claims against the municipality instead of or in addition to the unindemnified officer.⁶⁷ Plaintiffs may decide not to seek to collect an award against an unindemnified officer if the costs of enforcement would outstrip the award.⁶⁸ Officers may assign their right to seek indemnification to the plaintiff in exchange for an agreement not to pursue relief against the officer directly.⁶⁹ A jurisdiction that has formally denied an officer indemnification may nevertheless pay to resolve a settlement or judgment against them.⁷⁰

⁶³ See *Civil Rights Ecosystems*, supra note 6, at 1582-83 (describing one case in which the indemnification decision was made during litigation, in time for the plaintiff's attorney to amend the complaint to add a municipal liability claim); *id.* at 1569 n.139 (describing a case in which the decision to deny indemnification was made post-verdict).

⁶⁴ See Schwartz, supra note 1, at 931-36 (describing local governments' empty threats to deny officers indemnification).

⁶⁵ See *Qualified Immunity and Federalism All the Way Down*, supra note 6, at 334 (describing some of these cases). For additional cases, see *infra* Part II.C.3.

⁶⁶ See *Qualified Immunity and Federalism All the Way Down*, supra note 6, at 333-34.

⁶⁷ See *Civil Rights Ecosystems*, supra note 6, at 1582-83 (describing one case in which an officer was denied indemnification in time for the plaintiff's attorney to amend the complaint to add a municipal liability claim); Joanna Schwartz, *Shielded: How the Police Became Untouchable*, 197 (Viking: 2023) (describing a case in which the plaintiff won at trial against the City of Chicago after the named officer was denied indemnification).

⁶⁸ See, e.g., Schwartz, supra note 1, at 928-29 (describing a case in which the city of Los Angeles did not indemnify a \$300 punitive damages verdict that the plaintiff never sought to collect); *Municipal Immunity*, supra note 6, at 1228 n.211 (describing a case in which a plaintiff never sought to collect a \$7500 settlement against an unindemnified officer).

⁶⁹ See Schwartz, supra note 1, at 929 (describing a case in which a Massachusetts state police officer was denied indemnification; the officer and the plaintiff entered into binding arbitration; and the officer assigned his right to seek indemnification to the plaintiff in exchange for release from the arbitration award).

⁷⁰ See *id.* at 919 (describing El Paso's policy of never indemnifying officers, but willingness to settle cases on its officers' behalf).

To add yet another layer of complexity to the relationship between indemnification and payment decisions, officers may contribute to settlements or judgments against them even when they are not formally denied indemnification. As described above, in my study, I found thirty-seven cases—out of more than 9225—in which I could confirm officers paid between \$250 and \$25,000 towards settlements and judgments against them.⁷¹ Thirty-five of those cases were brought against New York City police officers, and in all but one of them, officers contributed to a larger settlement paid by city.⁷² Yet New York City's indemnification statute does not contemplate this type of contribution; the statute provides that the city will either indemnify an employee for the entire amount of the settlement or judgment, or will deny indemnification altogether.⁷³ Moreover, lawyers who practice in New York City report that these types of contributions have been demanded by the New York City's comptroller—who disburses settlements but is not tasked with deciding indemnification—as a modest financial sanction.⁷⁴

At the end of the day, despite variation in indemnification practices and decisions, the bottom line remains the same: officers virtually never pay anything toward the settlements and judgments entered against them.⁷⁵ Yet open questions remain about when and under what circumstances local governments deny officers indemnification, the impact of those indemnification denials on the litigation of civil rights cases, and how even unindemnified officers remain shielded from financial sanctions.⁷⁶ It is to these pressing questions that I now turn.

II. UNDERSTANDING INDEMNIFICATION DECISIONMAKING IN CONSTITUTIONAL TORT CASES

Gathering information about how governments make indemnification decisions, and how those decisions impact the litigation of civil rights cases, has proven extremely difficult. There is little direct evidence with which to understand government indemnification decisionmaking both because local governments may not

⁷¹ See *id.* at 926-27.

⁷² See *id.*

⁷³ N.Y. Gen. Mun. Law §50-k(3) (McKinney 2014).

⁷⁴ See Schwartz, *supra* note 1, at 928 (offering this possible explanation for officer contributions to settlements in New York City); see also Emery & Maazel, *supra* note 41, at 592-93 (explaining that the Corporation Counsel decides whether an officer should be indemnified).

⁷⁵ See Schwartz, *supra* note 1, at 917.

⁷⁶ For an earlier articulation of these questions, see Schwartz, *supra* note 1 at 917; see also *supra* note 5 and accompanying text.

make an official indemnification decision until there is a final judgment in a case and because local government officials appear to keep these decisions close to the vest.⁷⁷

In my 2014 *Police Indemnification* study, I sought records reflecting the number of police misconduct cases resolved between 2006-2011; the amount of compensatory and punitive damages awarded; and any amount paid by individual officers.⁷⁸ I submitted these requests to the 70 largest law enforcement agencies and 70 smaller agencies, and received responses from a total of 81 jurisdictions. In 2024, I submitted public records requests to the same 140 agencies, seeking those same records for the period 2018-2023, and additionally seeking records reflecting every case in which the jurisdiction declined to indemnify an employee. As with the 2014 study, a subset of jurisdictions responded with records reflecting the number of lawsuits resolved and amount paid by the jurisdiction and its officers. Once again, jurisdictions reported very few instances in which an officer paid anything toward a settlement or judgment against them. Most jurisdictions ignored my request for records reflecting indemnification decisions. Representatives from a handful of jurisdictions reported that they were unaware of any indemnification denials, but did not have records to confirm that belief.

As a result, I do not have a comprehensive tally of how often or in which cases local governments denied or threatened to deny officers indemnification. Yet I have learned of dozens of cases across the country in which indemnification was contested, and my review of local government officials' statements in these cases offer at least circumstantial evidence of their practices, strategies, and motivations.⁷⁹ Interviews and correspondence with dozens of plaintiffs' attorneys and government officials offer additional insights about the ways in which indemnification denials and threatened denials influence litigation decisions and outcomes.⁸⁰

⁷⁷ See *supra* notes 40 and 47 and accompanying text.

⁷⁸ See Schwartz, *supra* note 1, at 903.

⁷⁹ I learned of some of these cases through public records requests and related research that informed my first indemnification study. See generally Schwartz, *supra* note 1. Other cases were subsequently brought to my attention by plaintiffs' attorneys, Westlaw research, and news reports. See, e.g., *Qualified Immunity and Federalism All the Way Down*, *supra* note 6, at 333-34 (describing some of these cases).

⁸⁰ In 2019, I surveyed almost 100 plaintiffs' lawyers in five federal districts and interviewed thirty-five of those attorneys in depth. See Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev. 1101, 1114-19 (2020) (describing the methodology of that study). In both the surveys and the interviews I posed questions about the frequency of indemnification denials and threatened denials, and their impact on the litigation of civil rights cases. I have additionally interviewed several lawyers who represented clients in cases brought to my attention in which indemnification was contested. In the discussion that follows, I cite to attorney interviews conducted for the 2020 study in the same way that those

In this Part, drawing on this voluminous anecdotal evidence, I set out a range of choices and interests that appear to motivate local governments' decisions about whether to indemnify their officers; the ways in which indemnification uncertainty may affect the litigation of constitutional tort cases; and the impact of indemnification denials on officers. Along the way, I describe several cases in which indemnification was contested or denied to illustrate these dynamics in action.

A. *Local Governments' Indemnification Calculus*

How does a local government decide whether to indemnify its officers? The prevailing wisdom is that local governments almost always decide to indemnify their officers because protecting officers' finances allows them to hire and retain a workforce willing to vigorously enforce the law.⁸¹ By this logic, it would make sense for a local government to deny an officer indemnification only when an officer is sued for wrongdoing off the job or has engaged such egregious misconduct that they should be punished—by way of financial sanctions—for their wrongdoing.⁸²

Although the prevailing wisdom may explain some local governments' indemnification decisions, it most assuredly does not explain them all. If denying officers indemnification discourages them from vigorously enforcing the law, why would local governments adopt blanket policies of denying their officers indemnification?⁸³ If indemnification denials undermine workforce morale, why would local governments threaten to deny officers indemnification and then satisfy

interviews were cited in that study; by reference to the district in which they practice, and a letter distinguishing attorneys from the same district (e.g., E.D. Pa. Attorney B). When I cite to interviews conducted for this Article, I refer to the attorneys by name.

⁸¹ See Nielson & Walker, *supra* note 4, at 268 (“The failure to indemnify (which, in effect, would lower an officer’s salary) would make it harder to recruit, hire, and retain the best people. And it would discourage officers from making tough decisions to faithfully execute the law if those decisions could open them up to personal liability.”); Ravenell & Brigandi, *supra* note 44, at 869-70 (explaining that “advanced knowledge that they will be indemnified in most circumstances reduces the likelihood that people will refuse to become police officers because of the fear of liability” and “should protect their ardor.”). Note that this same rationale was supplied in support of state indemnification statutes. See *supra* note 29 and accompanying text.

⁸² See Ravenell & Brigandi, *supra* note 44, at 868 (“Although the City [of Philadelphia] has a great deal of discretion regarding questions of police indemnification, the City traditionally only uses this discretion to deny indemnification when there is little question that the police official has engaged in criminal conduct.”). Note that these types of exclusions for bad behavior were also contemplated by the drafters of state indemnification statutes. See *supra* note 30 and accompanying text.

⁸³ See *supra* note 61 and accompanying text.

settlements or judgments against them?⁸⁴ If indemnification denials are intended to impose financial sanctions for the most egregious misconduct, why would a local government indemnify officers who have had punitive damages awarded against them, or have been disciplined or punished or gone to prison for their misdeeds?⁸⁵

Available evidence suggests that local governments' indemnification decisions are guided not only by the extent of officers' culpability, but also by strategic, political, and financial concerns.

1. The Benefits of Denying Indemnification

Consider, first, why a local government might deny—or threaten to deny—an officer indemnification. Local governments appear sometimes to follow the prevailing wisdom, and deny officers indemnification as a financial sanction for egregious behavior.⁸⁶ Yet available evidence suggests that local governments deny officers indemnification for other reasons, as well.

For example, denying an officer indemnification can have strategic litigation benefits for the government. It is well-known that plaintiffs tend not to seek “blood money” from judgment-proof defendants,⁸⁷ and unindemnified police officer

⁸⁴ See *supra* note 62 and accompanying text.

⁸⁵ See *supra* note 57 and accompanying text.

⁸⁶ See, e.g., *Whitson v. Hanna*, No. 1:18-cv-2076, 2023 WL 2570224 (D. Colo. Mar. 6, 2023) (county declines to indemnify sheriff who sexually assaulted a developmentally disabled woman); *Municipal Immunity*, *supra* note 6, at 1227-28 (describing *Alfaro v. City of Houston*, where the city refused to indemnify an officer who raped four women while on duty); Nancy Leong, *Municipal Failures*, 108 *Cornell L. Rev.* 345 348 (describing *J.K.J. v. Polk County*, where the county refused to indemnify an officer who sexually assaulted two women at the jail for an \$11.5 million judgment against him).

⁸⁷ See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 *Law & Soc'y Rev.* 275, 275 (2001) (“As both scholars and practitioners report, personal injury lawyers rarely bring a case unless there is an insured defendant (or a solvent self-insured organization) on the other side.”); Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 *Mich. J. Race & L.* 251, 261 (2016) (“When you select defendants, make sure you are suing defendants that are either insured or have resources to pay a judgment. If the individual defendants were discharged and will not be indemnified or covered by the entity, then take care to ensure that you will be able to collect any award from them. Obtaining a judgment against a defendant who cannot pay will not solve the client's goal of receiving fair compensation.”); Stephen G. Gilles, *The Judgment-Proof Society*, 63 *Wash. & Lee L. Rev.* 603, 605 (2006) (explaining that most plaintiffs and their lawyers will not pursue claims against judgment-proof defendants); Stephen C. Yeazell, *Re-Financing Civil Litigation*,

defendants are unlikely to have the resources to satisfy a significant settlement or judgment.⁸⁸ So, if a local government denies—or credibly threatens to deny—an officer indemnification, the plaintiff might abandon their case or accept a modest settlement. A plaintiff could, alternatively, pursue claims against solvent defendants—including the municipality, another officer who *will* be indemnified, or a private party. But such claims may be an inadequate substitute: There will not always be a solvent defendant whose conduct merits suit, and municipal liability claims are more expensive and difficult to prove than claims against individual officers.⁸⁹ As a result, the plaintiff's municipal liability claims might fail (where a claim against the individual officer would have succeeded), or the plaintiff may accept a reduced settlement instead of risking that they will. In other words, by denying—or threatening to deny—an officer indemnification, a local government may dramatically reduce the value of a plaintiff's claim.

Government officials have acknowledged using the threat of indemnification denials strategically against plaintiffs during settlement negotiations. In a presentation entitled “Police Misconduct: Defense Strategies: Damages and Attorneys’ Fees,” an attorney who represents police officers in Washington, D.C. observed that, “[i]n negotiations with plaintiff’s counsel, it can be useful to point out that the employing municipality or insurance carrier is not necessarily obligated to pay punitive damages and a judgment against an individual officer may not be recoverable.”⁹⁰ The risk manager for San Bernardino tacitly acknowledged withholding indemnification decisions to gain just this type of settlement leverage. As

51 De Paul L. Rev. 183, 186 (2001) (“No one working on a contingent fee intentionally sues an insolvent defendant.”).

⁸⁸ In May 2024, the median annual salary for law enforcement officers in the United States was \$77,270. U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, <https://www.bls.gov/ooh/protective-service/police-and-detectives.htm#tab-1>. Scarce available evidence suggests that officers infrequently purchase law enforcement liability insurance. See Bruce Praet, Should Cops Buy Liability Insurance? *Police One* (Sept. 25, 2020) (recommending that police officers not buy personal liability insurance because “the odds are pretty slim” than an officer “could face personal liability”); Deborah Ramirez, Marcus Wraight, Lauren Kilmister & Carly Perkins, Policing the Police: Could Mandatory Professional Liability Insurance for Officers Provide a New Accountability Model?, 45 *Am. J. Crim. L.* 407, 436-39 (2017) (proposing that officers be required to carry personal liability insurance, and describing the relative novelty of the idea).

⁸⁹ For discussion of the challenges of pleading and proving municipal liability claims, see *Municipal Immunity*, *supra* note 6, at 1213-26.

⁹⁰ Wayne C. Beyer, Assistant Attorney General, Office of the Attorney General for the District of Columbia, *Police Misconduct: Defense Strategies: Damages and Attorneys’ Fees*, Georgetown University Law Center Continuing Legal Education, 2011 WL 2111844, at *17 (Mar. 24-25, 2011).

he told me, the county regularly sends its officers reservation-of-rights letters when they are sued, explaining that it plans to represent and indemnify them but reserves the right to reverse that decision at the conclusion of the case.⁹¹ Yet, he explained, when officers invariably called, concerned, he would assure them that the reservation-of-rights letter was part of the normal process, that it benefitted both the officer and the department, and that the officer would be indemnified in the end.⁹²

Government attorneys have also used the uncertainty of indemnification to gain tactical advantages during and after trial. In New York City, government attorneys have used the possibility that officers would be denied indemnification of punitive damages as basis to “ask[] courts to give jury instructions implying that officers will have to pay,” “ask courts to hold hearings on officers’ ability to pay,” and “ask[] officers on the witness stand about their salaries, numbers of children, and anything else that might convey to the jury the impression that the officers’ personal finances are at play.”⁹³ Yet available evidence suggests that New York City always satisfies punitive damages awards entered against the police officers it represents.⁹⁴ After trial, attorneys for Prince George’s County, Maryland and the California Highway Patrol have used the possibility that their officers would be denied indemnification as a basis to ask courts to reduce the punitive damages awards entered against them, only to have the governments pay the entirety of the (reduced) awards.⁹⁵

A second benefit of denying an officer indemnification is financial; the local government is relieved of the burden of satisfying the settlement or judgment on the officer’s behalf. Several cases in which local governments have denied or threatened to deny their officers indemnification alleged very significant damages.⁹⁶ In others, local governments defended their officers throughout litigation, only denying them indemnification after the jury entered six- and seven-figure verdicts against the

⁹¹ See Schwartz, *supra* note 1, at 932.

⁹² *Id.* at 932-33.

⁹³ *Id.* at 933.

⁹⁴ *Id.* at 934.

⁹⁵ *Id.* at 934-35.

⁹⁶ See, e.g., Shaila Dewan, *Why a Police Shooting Victim’s Family Won’t Get a \$100 Million Payout* (Nov. 21, 2024) (describing Dallas’s refusal to represent or indemnify Amber Guyger, who shot and killed Botham Jean in his apartment; the jury’s verdict was \$100 million); *Gillispie v. Miami Township, Ohio*, 2025 WL 1276900 (6th Cir. May 2, 2025) (describing Miami Township’s unsuccessful effort to deny indemnification to an officer in a wrongful conviction case that resulted in a \$45 million verdict).

officers.⁹⁷ The amount of financial exposure may well have influenced indemnification denials in these cases.

Finally, local governments may deny an officer indemnification as a means of punishing the officer for failing to take some action during the course of the litigation. In Los Angeles County, two sheriff's deputies were apparently denied indemnification because they invoked the Fifth Amendment repeatedly during trial.⁹⁸ Durham, North Carolina reportedly threatened to deny a police officer indemnification if he refused to consent to a settlement.⁹⁹ New York City apparently denied a sergeant indemnification after he resisted the city's request that he contribute \$1000 to a settlement.¹⁰⁰

2. The Benefits of Indemnification

Consider, now, how a local government might benefit by indemnifying its officers. As commentators and the drafters of state indemnification statutes have noted, when local governments indemnify their officers, the assurance of financial protection may encourage officers' retention and vigorous enforcement of the law.¹⁰¹ Local government officials have also reported indemnifying officers—even when punitive damages were awarded against them—because they believed the officers did nothing wrong.¹⁰²

⁹⁷ See *infra* notes 156-173 and accompanying text (describing Durham, North Carolina's denial of indemnification following a multi-million dollar verdict); *infra* notes 175-179 and accompanying text (describing Cleveland, Ohio's indemnification denials following two multi-million dollar verdicts).

⁹⁸ Schwartz, *supra* note 1, at 930.

⁹⁹ See Amended Complaint, *Dowdy v. City of Durham*, No. 23-cv-0133, ¶107 (M.D.N.C. Apr. 27, 2023) ("Dowdy was told by [the city's attorney] on multiple occasions, that he must consent to a settlement because if he refused to do so the City would decline to indemnify him.").

¹⁰⁰ Brief and Special Appendix for Defendant-Cross-Claimant-Appellant Sergeant Josh Ferrara, *Ekukpe v. City of New York*, 2019 WL 2914093 (2d Cir. July 3, 2019) (claiming that the city offered Sgt. Ferrara the opportunity to participate in a potential settlement if he contributed \$1,000, but that when "[c]ounsel for Sgt. Ferrara requested that Sgt. Ferrara's contribution be reduced...the City chose to settle the case on behalf of the City and another officer" and deny Ferrara indemnification.").

¹⁰¹ See *supra* notes 29, 58 and accompanying text.

¹⁰² See Daniel Connolly, *To Say That Officers Are Not Disciplined Is False*, *New York Law Journal* (Mar. 15, 2019) (explaining that New York City represents and indemnifies officers who city officials believe did not violate law or policy, regardless of whether a jury awards punitive damages); Schwartz, *supra* note 1, at 922 (describing Columbus's and Oklahoma City's decisions to pay post-trial settlements on behalf of their officers, even though punitive damages were awarded and the cities was prohibited from indemnifying punitive damages

Indemnification under either of these scenarios is intended to protect valued officers from financial liability. But local government officials appear sometimes to indemnify their officers—even when the government officials believe the officers engaged in wrongdoing—to reap other kinds of benefits.

For example, a local government may decide to indemnify an officer as a way of reducing or avoiding conflict with the officer or union representatives. An officer denied indemnification may be able to administratively appeal that denial or sue for denial of due process if the government has not followed the proper procedure in reaching its decision.¹⁰³ Defending against these challenges and appeals may not only cost the local government time and money, but may also prompt union pushback.¹⁰⁴ Given these costs, conflicts, and political consequences, a local government may conclude that it is less expensive and simpler to indemnify the officer—even if they have arguably violated the terms of the indemnification agreement and/or were disciplined, punished, or criminally charged for their conduct.

A local government might be particularly inclined to indemnify an officer, even if there is basis to deny them indemnification, when efforts to discipline, terminate, or prosecute the officer have been unsuccessful. Even when a local government wishes to fire an officer, complex appeals processes may make it impossible to do so.¹⁰⁵ Criminally convicting an officer is equally—if not more—difficult, given the substance of the laws and juries’ and judges’ common deference to officers.¹⁰⁶ Denying

awards; a Columbus official explained that, in their case, they entered the post-trial settlement because they believed the punitive damages award was unwarranted).

¹⁰³ For descriptions of administrative and judicial review afforded officers when they are denied indemnification, see sources cited *supra* note 44.

¹⁰⁴ See, e.g., Libor Jany, *City Attorney Decides Against Defending Ex-Cop in Federal Lawsuit*, *The Minnesota Star Tribune* (Mar. 14, 2016) (reporting that the police union president criticized Minneapolis’s decision to deny representation and indemnification to a former officer sued for kicking a handcuffed suspect, arguing that “it could have a chilling effect on officers who, without the city’s legal backing, might become more passive for fear of being prosecuted or sued.”).

¹⁰⁵ See Rachel Moran, *Ending the Internal Affairs Farce*, 64 *Buff. L. Rev.* 837 (2016) (describing multiple deficiencies of internal affairs investigations); Stephen Rushin, *Police Union Contracts*, 66 *Duke L.J.* 1191 (2017) (describing complex procedural protections for officers who departments seek to discipline or fire).

¹⁰⁶ See German Lopez, *Police Officers Are Prosecuted for Murder in Less Than 2 Percent of Fatal Shootings*, *Vox* (Apr. 2, 2021); Radley Balko, *‘If You Don’t Get At That Rot, You Just Get More Officers Like Josh Hastings,’* *Wash. Post* (Nov. 2, 2018) (explaining that “[t]he trial of a police officer puts prosecutors in a perilous position. They rely on the police to investigate crimes, arrest suspects and provide evidence. If a prosecutor loses the respect and cooperation of the police department, it can make his or her job a lot more difficult.”).

indemnification to an officer who has defeated other efforts to sanction him may seem to government officials to be more trouble than it is worth.

Take, for example, the case brought by Clayton Tiffany against Nicholas Tartaglione, an officer from the tony Westchester County village of Briarcliff Manor who assaulted Tiffany on four separate occasions in 1999 and 2000.¹⁰⁷ After the fourth assault, the village fired Tartaglione and the local district attorney prosecuted Tartaglione for perjury in another case.¹⁰⁸ Tartaglione was acquitted of the criminal charge after a bench trial, and then sued the village and its officials twice; one case sought to get his job back, and the other alleged his due process rights were violated when the village pursued false perjury charges.¹⁰⁹ After a four-year court battle, Tartaglione won reinstatement to the force and a \$300,000 backpay award.¹¹⁰ Shortly thereafter, the village's insurer paid \$200,000 to settle Tiffany's claims against Tartaglione.¹¹¹ Although we do not know why the village decided to pay this settlement on Tartaglione's behalf, it may well have been to avoid yet another legal dispute—this time over indemnification—with Tartaglione.¹¹² In other words, although a local government may decide to indemnify an officer in order to retain them, the government may also decide to indemnify an officer they do not want to retain but cannot manage to discipline or fire.

A local government might agree to indemnify an officer who has violated the terms of their indemnification policy as a means of securing another benefit from the officer. For example, a local government may agree to indemnify an officer in exchange for their agreement to resign. A local government might also agree to indemnify an officer in exchange for their commitment to testify in a certain way. In fact, when one officer was denied indemnification post-trial, he sued his employer, arguing that city officials “assured him that the City would protect him from an adverse verdict and fully defend him” as a way to “secure his cooperation” during the litigation.¹¹³

Finally, a local government may decide to indemnify an officer to secure benefits with the public. In cases that have garnered significant public attention, denying the officer indemnification—and leaving the plaintiff without the ability to recover

¹⁰⁷ See Complaint, *Tiffany v. Tartaglione*, No. 7:00-cv-2283 (S.D.N.Y. Mar. 24, 2000).

¹⁰⁸ See *Tartaglione v. Pugliese*, No. 01-cv-9874, 2002 WL 31387255 (S.D.N.Y. Oct. 23, 2002).

¹⁰⁹ Marcela Rojas, *Activist, Officer Reach Settlement*, *Journal News* (Sept. 11, 2003).

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² For discussion of this possibility, see Schwartz, *supra* note 67, at 189.

¹¹³ See *infra* note 165 and accompanying text.

against a solvent defendant—would be politically unpalatable.¹¹⁴ Indeed, police officers have been indemnified for—and have not otherwise been required to contribute to—multimillion dollar settlements in the almost all of the highest profile police misconduct cases in recent memory.¹¹⁵

3. Weighing Indemnification's Costs and Benefits

My description of the costs and benefits of indemnification is admittedly based in part on inference and supposition and may well be incomplete. Even so, it should be clear that local governments' indemnification calculus likely takes account of far more than just the extent of an officer's culpability in the case at hand.

This discussion also makes clear that local governments' indemnification decisions may necessitate strategic, political, and financial tradeoffs. For example, denying an officer indemnification may benefit the local government in litigation, but inspire blowback from the officer or union. How might local government decisionmakers balance these competing interests?

Perhaps, in a local government's ideal world, it would threaten not to indemnify officers in ways that are credible to plaintiffs and their attorneys, while simultaneously assuring officers that their finances are not in jeopardy.¹¹⁶ But achieving such a balance is easier said than done. If a local government regularly threatens not to indemnify but always pays settlements and judgments on its officers' behalf, officers and the union may be appeased but plaintiffs' attorneys will not take threatened indemnification denials seriously. On the other hand, if a local government does sometimes deny its officers indemnification and refuses to pay settlements and judgments on their behalf, plaintiffs may be discouraged from filing cases, but officers and the union may revolt.

Government officials will not weigh these costs and benefits of indemnification in a uniform way. Local governments' analyses of these factors will, instead, likely depend on the particular facts of a case, the amount of damages sought, and public attention and outcry about the underlying incident. In addition, local government

¹¹⁴ Defense counsel for a New York City police officer made this argument when appealing the city's decision to deny indemnification. See *infra* note 140 and accompanying text.

¹¹⁵ See *A Look at Big Settlements in US Police Killings*, AP News (Mar. 12, 2021) (describing the settlements in cases brought by the families of George Floyd, Laquan McDonald, Freddie Gray, Philando Castile, Tamir Rice, Akai Gurley, Michael Brown, and Eric Garner). One notable exception is the \$100 million verdict against Amber Guyger, who killed Botham Jean in Dallas in 2018. See *supra* note 96.

¹¹⁶ Perhaps government officials' efforts to play both sides of this coin explains their reluctance to share information about their indemnification policies and practices. See *supra* note 40.

officials will likely assess the costs and benefits of indemnification in light of the jurisdiction's civil rights ecosystem, including the applicable indemnification rules and policies; the robustness of the plaintiffs' bar (including the willingness of plaintiffs' lawyers to pursue cases against unindefended officers and/or the municipality); and the extent to which union officials and other law enforcement representatives demand indemnification of their officers.¹¹⁷

Compare, for example, the indemnification dynamics in two dramatically different civil rights ecosystems—El Paso, Texas, and New York City. Because Texas law does not mandate officer indemnification, jurisdictions across the state have adopted a range of different policies.¹¹⁸ El Paso has a policy of never indemnifying its officers for judgments against them,¹¹⁹ and apparently encourages its officers not to buy insurance.¹²⁰ Moreover, Texas debtor law exempts a person's home, wages, and most personal property from being seized to satisfy a judgment.¹²¹ El Paso officers are, thus, essentially judgment proof. Moreover, El Paso's collective bargaining agreement requires the city to provide officers with private defense counsel when they are sued,

¹¹⁷ See Civil Rights Ecosystems, *supra* note 6, at 1599-1600.

¹¹⁸ See Tex. Civ. Prac. & Rem. Code Ann § 102.002 (1979) authorizing local governments to indemnify their officers). See also *supra* note 39 (describing Houston's policy, which authorizes indemnification up to \$100,000 per officer and \$300,000 per incident); *infra* note 119 (describing El Paso's policy of never indemnifying officers); City of Austin Resolution 870409-02 (Apr. 9, 1987) (authorizing the city manager to indemnify its officers when sued) (on file with author); Telephone Interview with S.D. Tex Atty A (Apr. 25, 2017) (reporting that officials in Nueces County, Texas, threaten not to indemnify but often end up paying in the end); Telephone Interview with S.D. Tex. Attorney B (May 17, 2017) (reporting that Houston and Fort Worth have both threatened not to indemnify, but have ended up paying to resolve cases on behalf of their officers).

¹¹⁹ See Answer, *Barnes v. City of El Paso*, No. 22-cv-0161, at ¶ 40 (W.D. Tex. May 5, 2022) (admitting that “[t]he City of El Paso does not require and does not have insurance or other indemnification for Constitutional and civil right violations of their employees including police officers.”).

¹²⁰ See Amended Complaint, *Barnes v. City of El Paso*, No. 22-cv-0161, at ¶ 40 (W.D. Tex. May 5, 2022) (“It is the official policy, or unofficial custom of The City of El Paso that its police and other employees to not obtain such insurance or indemnification so that they remain ‘judgment proof’ in the event of litigation.”).

¹²¹ See Texas Property Code 42.001 (exempting “current wages” from “garnishment, attachment, execution or other seizure” by judgment creditors unless it is for court-ordered child support payments); Texas Property Code Chapter 41 (exempting real property that has been designated as a homestead from seizure by judgment creditors); Texas Property Code Chapter 42 (exempting physical property from seizure by judgment creditors valued at up to \$50,000 for an individual and \$100,000 for a family).

and does not cap their fees,¹²² so lawyers appointed to represent El Paso officers “litigate the heck out of these cases.”¹²³

Plaintiffs can sue the city of El Paso instead of or in addition to claims against unindemnified officers. But municipal liability claims, tough to plead and prove anywhere, are particularly challenging in the Fifth Circuit given judges’ interpretation of municipal liability doctrine and apparent sympathies for government defendants in civil rights cases.¹²⁴ The difficulty of proving a *Monell* claim is further heightened in Texas because state law allows law enforcement agencies not to turn over any records while an investigation is ongoing.¹²⁵ And the challenges of proving a *Monell* claim against the City of El Paso are especially daunting because El Paso officers did not wear body cameras until recently and because few lawsuits are filed challenging El Paso officers’ conduct—circumstances that limit available evidence about officer misconduct.¹²⁶

For all of these reasons, it should come as no surprise that plaintiffs’ attorneys are hesitant to sue El Paso and its police officers.¹²⁷ One local civil rights attorney reports that he has to seriously consider, among other factors, the question of indemnification. He commented that many others who have brought suit against the El Paso police have regrets once they realize that the City will pay for endless defense fees for individual officers but will not indemnify the officers sued in the event of an actual judgment or settlement.¹²⁸

Common wisdom suggests that no one would agree to be a police officer in a jurisdiction with a policy of never indemnifying its officers. Yet the El Paso city

¹²² Articles of Agreement between City of El Paso, Texas and El Paso Municipal Police Officers’ Association, Sept. 1, 2023 to August 31, 2027, at 25 (adopted Mar. 28, 2023).

¹²³ See Email from plaintiff’s attorney Chris Benoit (Mar. 16, 2026, 2:12 PM).

¹²⁴ See generally Municipal Immunity, *supra* note 6 (describing the challenges of pleading and proving municipal liability claims); *id.* at 1230-31 (explaining that a grant of qualified immunity dooms a municipal liability claim for failure to train in the Fifth Circuit). For further discussion of the difficulty of pursuing municipal liability claims in the Fifth Circuit, see Civil Rights Ecosystems, *supra* note 6, at 1572 n.154.

¹²⁵ See Telephone Interview with plaintiff’s attorney Chris Benoit (June 12, 2025) (notes on file with author).

¹²⁶ See *id.*

¹²⁷ See Amended Complaint, *Barnes v. City of El Paso*, No. 22-cv-0161, at ¶ 40 (W.D. Tex. May 5, 2022) (explaining that the combination of no indemnification, no insurance, and protective debtor laws “actively discourages litigants and attorneys from filing lawsuits because there is often no ability to recover just compensation for violations of constitutional rights.”).

¹²⁸ See Benoit, *supra* note 123.

attorney commented to me that officers are confident they will not be held personally liable, and officers' confidence appears well founded.¹²⁹ From 2006-2011 and 2018-2013, El Paso paid more than \$2.2 million to resolve twenty-two police misconduct cases filed against the city and its approximately 1,100 sworn officers.¹³⁰

El Paso officers did not pay a penny to resolve these cases, even though they were officially denied indemnification. In two cases, people having mental health crises were killed by El Paso officers, and family members sued the involved officers and the City of El Paso. In those two cases, the *Monell* claim survived summary judgment and the City of El Paso ended up paying significant sums—\$600,000 in one case and \$1,200,000 in another—as trial neared, with the unindefnified officers paying nothing.¹³¹ In other cases, the individual officers and the city were sued for excessive force and the claims against the city were dismissed, but the city nevertheless paid tens of thousands of dollars to settle the cases on behalf of the officers.¹³² It is El Paso's position that such settlements are not the same as indemnification, and make financial sense because it is less expensive to pay the modest settlement than to continue paying for the officer's representation.¹³³

El Paso is not the only jurisdiction with a policy of never indemnifying its officers: Little Rock, Arkansas; Memphis, Tennessee; and a number of jurisdictions in Texas, Mississippi, and Oklahoma apparently do as well.¹³⁴ On paper, this type of arrangement would be attractive to any jurisdiction looking to reduce their legal liabilities. Yet a policy of never indemnifying officers would not be viable in civil rights

¹²⁹ See Schwartz, *supra* note 1 at 932 (describing a 2012 conversation with the city's attorney). Emails to the city attorney and the El Paso police union in 2024 and 2025 went unanswered.

¹³⁰ El Paso reportedly paid \$279,000 to resolve sixteen police misconduct suits filed against the city and its officers between 2006-2011. See Schwartz, *supra* note 1, at 964. Between 2018-2023, El Paso reports that it paid \$1,995,000 to resolve six police misconduct suits. See Email from Mary La Rue, Public Records Coordinator, City of El Paso, to author (July 8, 2024) (producing information about lawsuits and payouts from 2018-2023). For the number of sworn officers in El Paso, see <https://policefundingdatabase.org/explore-the-database/locations/texas/el-paso/>

¹³¹ For discussion of both cases see Elida S. Perez, *El Paso City Council Opts for Settlement Rather Than Trial in Police Excessive Force Case*, *El Paso Matters* (June 22, 2023).

¹³² See, e.g., Order, *Sinegal v. City of El Paso*, No. 3:19-cv-0107 (W.D. Tex. Apr. 3, 2020) (dismissing plaintiff's case against the City of El Paso); Email from Mary La Rue, *supra* note 130 (reporting that El Paso paid \$50,000 to settle *Sinegal*). See also, e.g., Order, *Gaytan v. City of El Paso*, No. (Sept. 29, 2020) (dismissing plaintiff's case against the City of El Paso); Email from Mary La Rue, *supra* note 130 (reporting that El Paso paid \$50,000 to settle *Gaytan*).

¹³³ See Schwartz, *supra* note 1, at 919.

¹³⁴ See *supra* note 61 and accompanying text.

ecosystems with state statutes or local policies mandating indemnification, a plaintiffs' bar willing to pursue claims against unindemnified officers, and/or union representatives eager to challenge indemnification denials.

New York City is one such example. Plaintiffs and their lawyers bring hundreds of cases against New York City police officers and the city every year, and the city pays tens of millions of dollars annually to resolve these cases.¹³⁵ Between 2006-2011, officers were required contribute to settlements or judgments in just thirty-five cases, and paid just a few thousand dollars on average.¹³⁶ Although New York City does not make its indemnification decisions publicly available, police union attorney Mitchell Garber estimates that only three officers have been denied indemnification following a jury verdict over the past twenty years: one was off-duty during the event in question; one refused to testify or otherwise participate in his defense; and one resisted the city's request that he contribute \$1,000 to the settlement of the case.¹³⁷

When the city does threaten not to indemnify an officer, or attempts to use such a threat in litigation, plaintiff's attorneys and union officers representing the officer will push back.¹³⁸ As civil rights attorneys Richard Emery and Ilan Maazel describe,

¹³⁵ See Schwartz, *supra* note 1, at 962 (reporting payments of more than \$348 million between 2006-2011 in 6887 police misconduct cases).

¹³⁶ See Schwartz, *supra* note 1, at 962.

¹³⁷ See Defendant New York City Police Officer Juan Santiago's Memorandum of Law in Support of His Motion For An Evidentiary Hearing on the Issue of Indemnification and Opposition to the City of New York's Determination Not to Approve Indemnification, *Ekukpe v. City of New York*, No. 16-cv-5412, at 2-3 (S.D.N.Y. Aug. 28, 2018) (describing two cases in which officers were denied indemnification after trial). See also *supra* note 100 (describing one case in which a sergeant was denied indemnification after resisting the city's request that he contribute to a settlement).

¹³⁸ For an example of plaintiffs' attorneys' resistance to indemnification denials or threatened denials, see Schwartz, *supra* note 1, at 933-34 (describing a case against a New York City police officer in which plaintiff's counsel pushed for a jury instruction that New York City is authorized to indemnify its officers for punitive damages, citing evidence that the City had satisfied every punitive damages award entered against its officers over the past ten years). For an example of defense counsel's resistance to threatened indemnification denials, see Defendant New York City Police Officer Juan Santiago's Memorandum of Law in Support of His Motion For An Evidentiary Hearing on the Issue of Indemnification and Opposition to the City of New York's Determination Not to Approve Indemnification, *Ekukpe v. City of New York*, No. 16-cv-5412 (S.D.N.Y. Aug. 28, 2018) (challenging city's post-trial assertion that it would deny indemnification to its officers). For other evidence of the New York Police Department's unions' willingness to take aggressive action, see Larry Celona, Shawn Cohen & Bruce Golding, Arrests Plummet 66% with NYPD in Virtual Work Stoppage, *N.Y. Post* (Dec. 29, 2014) (describing a dramatic drop in arrests amidst disputes between the union and mayor).

“[b]asic political realities” make blanket indemnification denials impossible in New York City.

Police officers organize in very powerful unions, most notably the Patrolmen’s Benevolent Association in New York, which in turn exert pressure on the mayor and the city’s lawyer, the “Corporation Counsel,” to represent and indemnify the officers. And the mayor, of course, depends on his police force to preserve the low crime rate that remains the perceived crown jewel of this administration.¹³⁹

In the view of union attorney Mitchell Garber, the pressure to indemnify officers comes not from union officials but from the press and public.¹⁴⁰ Regardless of whether the pressure to indemnify comes from the union, plaintiffs’ counsel, or the press and the public, or a combination of these sources, the result is the same: New York City “regularly indemnifies police officers regardless of whether they acted intentionally, recklessly, or brutally; whether or not they violated federal or state law; or whether or not they violated the rules and regulations of the New York City Police Department (‘NYPD’).”¹⁴¹ The same appears to be true in other jurisdictions with police forces and unions that vigorously oppose indemnification denials, a vibrant civil rights bar, and active community engagement against police misconduct.¹⁴²

B. The Impact of Indemnification Uncertainty on Constitutional Tort Litigation

Regardless of a local government’s reason for denying (or threatening to deny) an officer indemnification in a police misconduct case, indemnification uncertainty will

¹³⁹ Emery & Maazel, *supra* note 41, at 588; see also *supra* note 136.

¹⁴⁰ Brief for Defendant-Cross-Claimant-Appellant P.O. Juan Santiago, *Ekukpe v. Santiago*, Nos. 19-769, 19-770, at *30 (July 3, 2019) (arguing that “indemnification decisions are often made for reasons of political expediency without regard to the facts”). See also *supra* note 114 and accompanying text.

¹⁴¹ Emery & Maazel, *supra* note 41, at 587-88. See also Brief for Defendant-Cross-Claimant-Appellant P.O. Juan Santiago, *Ekukpe v. Santiago*, Nos. 19-769, 19-770, at *32 (July 3, 2019) (describing several multi-million dollar settlements paid by New York City in cases that were “politically sensitive” and had “extensive press coverage”).

¹⁴² See, e.g., E.D. Pa. Attorney C (explaining that Philadelphia “does not have to indemnify any municipal employee who is found to have engaged in willful misconduct, but as a matter of routine, they do because obviously because the FOP [Fraternal Order of Police] would be up in arms if every time there was a state tort there was judgment against a cop, and then the city said, ‘See ya.’”); N.D. Ca. Attorney C (explaining that jurisdictions usually indemnify officers even when they aren’t obligated to because “the public entities don’t want to have a divisive relationship with their cops.”). For a description of the civil rights ecosystems in Philadelphia and the Bay Area, see Schwartz, *supra* note 6.

invariably advantage the government and disadvantage the plaintiff. Consider how a local government's decision to deny or threaten to deny an officer indemnification shifts the balance of power in the government's favor at each stage of litigation.

1. At Filing

Imagine that a local government has a policy of not indemnifying its officers, or declares at the outset that it will not indemnify an officer in a particular case. What impact will that declared indemnification denial have on the litigation?

As previously mentioned, plaintiffs tend not to pursue cases against judgment-proof defendants and police officers are typically judgment proof.¹⁴³ So, if a local jurisdiction has a policy of never indemnifying its officers, or announces that it will not indemnify an officer at the outset of any given case, a plaintiff and their attorney have three suboptimal choices: 1) abandon the case; 2) sue the unindemnified officer; or 3) sue the municipality or another solvent defendant officer instead, or in addition to, the unindemnified officer.¹⁴⁴

The ways in which a plaintiff and their attorney evaluate these options will, like local governments' indemnification decisions, turn on the facts of the case and the civil rights ecosystem. A plaintiff cannot know for sure whether a local government's threat not to deny its officer is serious—particularly in jurisdictions where final indemnification decisions are not made until the conclusion of the litigation,¹⁴⁵ and courts have regularly rejected plaintiffs' efforts to determine whether an officer will be indemnified or to demand indemnification before the officer's liability is established.¹⁴⁶ But the plaintiff can assess the likelihood that the jurisdiction will

¹⁴³ See *supra* notes 87-88 and accompanying text. For an example of plaintiffs' attorneys' reluctance to pursue blood money in the civil rights context see, for example, E.D. Pa. Attorney A (describing a case in which Philadelphia declined to indemnify an officer in a shooting case because of other misconduct, and the attorney "was left in a position where I had a pretty good case against him on the police shooting, but it would've have been futile. I didn't want to take a verdict against him. I didn't want to take any damages against him. So I just, I'm just proceeding against the municipality and we'll see how that goes.").

¹⁴⁴ See, e.g., S.D. Tex. Attorney A (explaining that when a department threatens to deny indemnification to an officer "I always sue the entity").

¹⁴⁵ See *supra* notes 43-47 and accompanying text.

¹⁴⁶ See, e.g., *Doe v. City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004) (explaining that courts should rarely decide indemnity before liability); *Jackson v. City of Cleveland*, 925 F.3d 793, 807-08 (6th Cir. 2019) "[A]s a general matter, a claim for indemnification for damages that may be awarded on an underlying tort claim should not be adjudicated on the merits until the underlying claim is adjudicated."; *Gillispie v. City of Miami Township*, No. 3:13-cv-416, 2020 WL 5629677, at *39 (S.D. Ohio Sept. 21, 2020) (dismissing plaintiff's indemnification claim

make good on its threat to deny the officer indemnification based on the outcomes of prior similar threats or the strength of the union's or officer's opposition.¹⁴⁷ The plaintiff and their attorney will also consider the strength of a municipal liability claim, which could turn on available evidence, the relative friendliness or hostility of judges in the jurisdiction to such claims, and circuit interpretations of applicable Section 1983 doctrines. The plaintiff and their attorney will additionally consider the likely size of a settlement or judgment—which will, also, depend on the civil rights ecosystem—to determine whether the added costs and risks of pursuing a *Monell* claim are worth the anticipated reward.

Whether an indemnification denial dooms a plaintiff's case may, thus, depend on the jurisdiction in which the case arose. In El Paso, the fact that officers are unindemnified discourages plaintiffs' lawyers from suing because municipal liability claims are considered extremely difficult to bring in the Fifth Circuit.¹⁴⁸ Yet lawyers in Chicago took a case against an unindemnified officer that no El Paso lawyer would likely accept, confident that they could prevail on the municipal liability claim—or at least overcome defendants' summary judgment motion—and secure a substantial settlement or judgment.¹⁴⁹

2. During Litigation

Local governments' indemnification decisions may shift over time. As a result, a government could threaten a plaintiff that it will not indemnify its officer and then

against the city, explaining that “his indemnification claim is premature and, at this point, it is speculative whether the alleged harm that is the basis for the indemnification claim will ever come to pass.”); *Barnhouse v. City of Muncie*, 499 F. Supp. 3d 578, 604 (S.D. Ind. 2020) (dismissing plaintiff's indemnification claim for lack of subject matter jurisdiction, reasoning that “[t]he indemnification claim is not yet ripe because liability has not been established, no judgment has been entered, and a settlement has not been reached, and furthermore, there are no allegations that the City of Muncie is refusing to indemnify the police officer defendants if they are found liable.”).

¹⁴⁷ Lawyers report that some jurisdictions regularly threaten to deny officers indemnification during settlement negotiations, but rarely make good on those threats. See, e.g., S.D. Tex. Attorney A, *supra* note 118 (reporting that officials in Nueces County, Texas, threaten not to indemnify but often end up paying in the end, and hypothesizing that “they’re maybe just using [the indemnification threat] as a mechanism to lower how much they have to pay.”); Civil Rights Ecosystems, *supra* note 6, at 1568 (explaining that defense attorneys regularly threaten not to indemnify Philadelphia police officers, but very rarely deny indemnification).

¹⁴⁸ See *supra* notes 127-128 and accompanying text.

¹⁴⁹ See, e.g., *Shielded*, *supra* note 67, at 195-209 (describing a case in which an officer was denied indemnification and the plaintiff successfully sued the city of Chicago).

reassess in light of litigation decisions made by the plaintiff and rulings by the court. A plaintiff's calculations about how to respond to a threatened indemnification denial may also shift over time. But while the local government stands to benefit from its ability to reconsider the costs and benefits of indemnifying over the course of a case, the uncertainty of indemnification is almost certainly a detriment to plaintiffs.

For example, if the local government threatens to deny an officer indemnification but the plaintiff considers the threat to be empty, they may file a case against the officer without a municipal liability claim. But if, during discovery, the officer is fired or criminally prosecuted and it becomes more likely that the local government will, in fact, deny the officer indemnification, the plaintiff may need to amend their complaint to include the more complex *Monell* claim.¹⁵⁰ Even if the *Monell* claim ultimately proves successful, the indemnification decision will have required the plaintiff to change their litigation strategy and invest more in the case to pursue municipal liability.

There are multiple scenarios in which the government's ability to delay its final indemnification decision will disadvantage the plaintiff. Imagine the local government asserts that it will not indemnify its officer and the plaintiff proceeds anyway, naming both the unindemnified officer and the municipality. Imagine that the plaintiff's attorney, convinced that they have a strong *Monell* claim, invests thousands of dollars in time, depositions, and a retained expert who writes an extensive report detailing inadequacies in the department's policies and practices. Now imagine that the defendant officer and municipality both move for summary judgment.

If the *Monell* claim is dismissed at summary judgment but the claim against the individual officer is allowed to proceed, the plaintiff has partially prevailed but is left in a dire position from a financial perspective. The plaintiff can go to trial against the officer, hoping she will win and the local government will ultimately indemnify the officer or agree to a post-trial settlement paid for by the government. The plaintiff can go to trial against the officer, hoping she will win and the dismissal of the *Monell* claim will be reversed on appeal. But the plaintiff may go to trial, win against the officer, and then be left with a judgment that the officer cannot and the local government will not pay. The plaintiff might, alternatively, accept a settlement offer (made by the jurisdiction to resolve the case against the officer) that will invariably be discounted to reflect the uncertainty and undesirability of the other three options.

Even if the court denies the summary judgment motion in its entirety the local government is still left holding most of the cards. At that point, the plaintiff can accept

¹⁵⁰ One attorney described suing a Philadelphia officer in state court for a fatal shooting, and then learning that the officer had been arrested for unrelated conduct, tested positive for steroids, and was fired. "And I realized, 'Oh boy.' So I amended the complaint and added the Monell claim and they immediately removed." E.D. Pa. Attorney A.

an offer by the government to settle the case, or the plaintiff can go to trial and risk that the *Monell* claim will fail at or after trial.

In the best of all possible worlds—in which the plaintiff wins at trial against the municipality—the plaintiff is left, as a financial matter, no better off than if the officer had been indemnified from the start. Indeed, the plaintiff is most likely worse off, because she had to bear the costs and risks of pleading and proving municipal liability to secure relief.

3. At and After Trial

Because indemnification is the right to have a judgment satisfied by an employer, a local government may not make a final indemnification decision until the very end of the case. Indeed, some jurisdictions explicitly condition indemnification on findings that can only be made at trial, including whether the officer acted maliciously or willfully, or whether punitive damages were warranted.¹⁵¹

Plaintiffs' attorneys can mitigate against a last-minute indemnification denial by shifting their trial strategy. For example, if applicable indemnification rules would not allow indemnification of punitive damages awards or compensatory damages awards for willful or malicious conduct, plaintiffs can voluntarily dismiss their punitive damages claims and abandon arguments that officers were acting willfully or maliciously. Such efforts, taken to insulate against an indemnification denial, may also underplay the scope of the officers' wrongdoing or the extent of the plaintiff's harm. But the alternative may well be worse.

If a local government defends their officers throughout discovery and trial, then announces after trial that they will deny the officer indemnification, the plaintiff's options are particularly slim. The plaintiff's attorney has likely invested tens or hundreds of thousands of dollars' worth of their time plus expenses into the case, and they cannot shift their litigation strategy at this late stage to pursue claims against a different, solvent defendant. In these circumstances, the plaintiff can try to negotiate a post-judgment settlement paid for by the government; try to regain some strategic advantage by reviving dismissed claims against the municipality or another solvent defendant; or pursue a collection action against the unindemnified officer.

C. *How Officers Respond to Indemnification Denials*

Local governments have any number of reasons that they might decide to deny an officer indemnification: as a sanction for the wrongdoing that is the subject of the lawsuit; as a strategic maneuver to prompt plaintiffs to abandon their cases or settle

¹⁵¹ See *supra* notes 44-45 and accompanying text.

at a discount; or as a punishment for inadequately participating in the defense of the case. The previous section made clear that indemnification denials or threatened denials—regardless of their motivation—disadvantage plaintiffs and benefit local governments in litigation. How, then, do indemnification denials and threatened denials impact officers?

1. Challenges to Indemnification Denials

How an officer responds to an indemnification denial will likely depend on the sincerity with which it is made. If the government telegraphs to the officer that it is simply threatening the indemnification denial to gain a strategic advantage in litigation against the plaintiff and will protect the officer's finances at the end of the day—as the risk manager apparently does in San Bernardino—the officer might not contest the decision.¹⁵² But if a local government's threat not to indemnify is genuine, the officer will likely want to do everything possible to protect their assets. As an attorney who represents Memphis officers explained, when officers are sued and receive the conflict letter making clear they will not be indemnified, they begin worrying about their minivan and the mortgage—even as the attorney assures the officer that no unindemnified Memphis officer has contributed to a settlement or judgment in thirty years.¹⁵³

The options available to an officer when they have been denied indemnification vary depending on the civil rights ecosystem. In cities like El Paso, Memphis, and Little Rock, where officers have no right to indemnification, there is little that an officer can do to contest their indemnification denial. Other jurisdictions have elaborate procedures, set out in union agreements or state or local laws, by which officers can seek administrative and judicial review of indemnification denials. For example, if Minneapolis decides not to indemnify an officer, the officer can request a hearing before an administrative law judge and a final decision by the city council that is then subject to judicial review.¹⁵⁴

¹⁵² See *supra* note 91-92 and accompanying text (describing San Bernardino's practice of officially withholding indemnification decisions while assuring deputies that their finances are not at risk).

¹⁵³ See Telephone Interview with Memphis defense attorney Betsy McKinney (August 22, 2025) (notes on file with author).

¹⁵⁴ See *City of Minneapolis v. Lehner*, No. A16-0608, 2017 WL 24682, at *1-2 (Minn. Ct. App. Jan. 3, 2017) (describing the process of indemnification reviews).

When an officer contests an indemnification decision, they often have a surprising ally: the plaintiff.¹⁵⁵ Because the plaintiff's chances of financial recovery are threatened by an indemnification denial, they have good reason to raise their own challenges to the local government's decision. This two-front war can result in a complex and protracted indemnification dispute between the government on the one hand and the plaintiff and officer on the other.

Consider, for example, the case of *Howard v. City of Durham*.¹⁵⁶ In 2016, Darryl Howard was released from prison after serving more than two decades for murders he did not commit. A year after his release, Howard sued Durham, North Carolina and Durham police officers involved in his prosecution, arguing that they fabricated and suppressed evidence.¹⁵⁷ The trial court dismissed the claim against the city and all but one defendant, Darrell Dowdy, who had been the lead detective in the case.¹⁵⁸ On December 1, 2021, after a nearly four-week trial, a jury found Dowdy liable and awarded Howard \$6 million.¹⁵⁹

After several closed door meetings about the verdict, the city council announced that it would not indemnify Howard for the \$6 million verdict or the \$4 million in plaintiff's attorneys' fees accrued during the litigation.¹⁶⁰ The city contended that its indemnification denial was consistent with a city resolution that exempted officers' entitlement to defense and indemnification if they have "acted or failed to act because of actual fraud, corruption, or actual malice."¹⁶¹ It is, apparently, the only instance in which Durham has ever denied an officer indemnification.¹⁶²

¹⁵⁵ This is true in the private-law context as well. As Tom Baker has observed, plaintiffs and uninsured or underinsured defendants may join forces to pursue payment by the deepest-pocketed defendant. See Tom Baker, Transforming Punishment Into Compensation: In the Shadow of Punitive Damages, 1998 Wis. L. Rev. 211, 222.

¹⁵⁶ For an overview of the case's facts and the litigation, see *Howard v. City of Durham*, 68 F.4th 934 (4th Cir. 2023).

¹⁵⁷ Complaint, *Howard v. City of Durham*, No. 1:17-cv-0477 (M.D.N.C. May 24, 2017).

¹⁵⁸ *Howard v. City of Durham*, 68 F.4th 934, 945 (4th Cir. 2023).

¹⁵⁹ See *id.*

¹⁶⁰ Thomasi McDonald, How Durham Council is Skirting \$6 million Payment to Wrongfully Convicted Man, *Indy Week* (June 1, 2022). For the amount of attorneys' fees owed Howard's attorneys, see Virginia Bridges, Former Durham Officer Claims City Abandoned Him, After Defending Him for Years, *The News & Observer* (June 2, 2023).

¹⁶¹ Thomasi McDonald, How Durham Council is Skirting \$6 million Payment to Wrongfully Convicted Man, *Indy Week* (June 1, 2022).

¹⁶² See Amended Complaint, *Dowdy v. City of Durham*, No. 23-cv-0133, at ¶79 (M.D.N.C. Apr. 27, 2023).

Officer Dowdy sought a stay of any execution of the judgment, citing financial hardship.¹⁶³ Dowdy then sued Durham. As Dowdy alleged in his complaint, city officials had been aware of the evidence in the case from the start, had assured Dowdy that they would provide him with defense and indemnification, and had vigorously disputed the plaintiff's claims throughout the case.¹⁶⁴ In Dowdy's view, he had been used by the city "as a pawn."¹⁶⁵

On the one hand, in order to secure his cooperation, they have assured him that the City would protect him from an adverse verdict and fully defend him in the case brought by Howard. After the adverse jury verdict, the City now takes the position with Howard's attorneys and Captain Dowdy that the City is under no obligation to pay.¹⁶⁶

Dowdy sought damages against Durham for breach of its promise to indemnify and violation of his due process rights for failing to follow the terms of the applicable city resolution governing indemnification.¹⁶⁷

Howard was allowed to intervene in Dowdy's case against Durham, over Durham's opposition.¹⁶⁸ Meanwhile, Howard appealed the district court's dismissal of the claims against the city and two other officers. In March 2023, the Fourth Circuit reversed the dismissal of the claims against the two officers, and remanded their case back to the district court for trial.¹⁶⁹ More than a year later, as trial was approaching, Howard settled his case against the two officers, with Durham paying a total of \$7.75 million¹⁷⁰—a substantial amount, to be sure, although less than the approximately \$10 million owed, with attorneys' fees, after trial. Moreover, Howard's attorneys' reasonable fees would have been substantially higher at the time of the 2024 settlement than they were at the conclusion of the 2021 trial, given the work needed

¹⁶³ McDonald, *supra* note 158.

¹⁶⁴ See Amended Complaint, *Dowdy v. City of Durham*, No. 23-cv-0133, at ¶ 48 (M.D.N.C. Apr. 27, 2023).

¹⁶⁵ See *id.*

¹⁶⁶ *Id.* at ¶ 64.

¹⁶⁷ *Id.* at ¶ 79.

¹⁶⁸ See Brief in Support of Motion to Intervene as Plaintiff, *Dowdy v. City of Durham*, No. 1:23-cv-0133 (M.D.N.C. May 9, 2023).

¹⁶⁹ *Howard v. City of Durham*, 68 F.4th 934 (4th Cir. 2023).

¹⁷⁰ Virginia Bridges, *Durham Shifts Course, Pays Darryl Howard Millions for Wrongful Conviction, Prison Time*, *The Herald* (May 30, 2024).

to appeal the trial court's decision, intervene in Dowdy's case, and prepare for a second trial against the two reinstated officers.¹⁷¹

Although Dowdy's indemnification denial was not officially reversed, his finances remained protected. Two months after the \$7.75 million settlement with the two officers, paid for by Durham, Howard filed a satisfaction of the \$6 million judgment against Dowdy, reporting that "said judgment has been fully paid."¹⁷² Dowdy even came out ahead, as a financial matter: Durham paid \$350,000 to settle Dowdy's suit against the city.¹⁷³

Other cases have traveled a similar path when indemnification has been denied, with the plaintiff joining forces with the officer to dispute his indemnification denial, and the government forced to wage a two-front war.¹⁷⁴ Some of those cases are still being litigated, and others have resulted, like *Howard*, in a global settlement paid for by the government.

Cleveland, Ohio tried to avoid this type of drawn-out dispute in a devilishly clever way: by denying officers indemnification in two cases with multi-million dollar verdicts, then paying for lawyers to file for bankruptcy on the officers' behalf.¹⁷⁵ In what makes sense only as a quid pro quo, the officers did not contest their indemnification denial or include the right to indemnification in their bankruptcy petitions.¹⁷⁶ This arrangement was an apparent effort to avoid conflict between the city's and the officers' interests: the indemnification denial would spare the city—and the bankruptcy petition would spare the officers—from having to pay the multi-million dollar verdicts. One of the plaintiffs sued Cleveland and its attorneys, asserting claims for indemnification, tortious interference with the enforcement of a judgment, and other claims; the case made its way to the Ohio Supreme Court, which held that only the officer, not the plaintiff, had the right to challenge a denial of indemnification.¹⁷⁷ After years of litigation between the plaintiffs and the city about

¹⁷¹ See email from Anna Benvenuti Hoffmann to author (Sept. 2, 2025) (on file with author) (estimating that plaintiffs' counsel in *Howard* spent approximately 800 hours litigating indemnification and other issues post-verdict).

¹⁷² See Satisfaction of Judgment, *Howard v. City of Durham*, No. 1:17-cv-477 (M.D.N.C. July 25, 2024).

¹⁷³ Virginia Bridges, Durham Shifts Course, Pays Darryl Howard Millions for Wrongful Conviction, Prison Time, *The Herald* (May 30, 2024).

¹⁷⁴ For some examples, see *infra* notes 183-184 and accompanying text.

¹⁷⁵ Kyle Swenson, How Cleveland's Trying to Get Out of Paying \$18.7 Million in Judgments Against Two Cleveland Police Officers, *Cleveland Scene* (Jan. 13, 2016).

¹⁷⁶ See *id.*

¹⁷⁷ See *Ayers v. Cleveland*, 160 Ohio St.3d 288 (2020).

its obligations to indemnify the officers, Cleveland settled both cases for millions (but at a steep discount), with the officers paying nothing.¹⁷⁸ Cleveland was criticized strenuously in the local and national media for what was perceived as a deeply cynical effort to dodge liability, and has not tried this maneuver since.¹⁷⁹ No other jurisdiction has, thus far, experimented with this approach.

2. No-Cost Resolutions

If an officer is denied indemnification and cannot get the indemnification denial reversed, and the plaintiff nevertheless pursues a case against the unindemnified officer, there are several ways the officer's personal finances might nevertheless remain protected. First, the plaintiff could lose: the officer could be granted qualified immunity at a motion to dismiss or summary judgment; the defendant could win at trial; or the judge could overturn the plaintiff's verdict. This collection of defendant-friendly outcomes occur far more often than do plaintiffs' verdicts in police misconduct cases.¹⁸⁰ Second, the local government could negotiate a global settlement that resolves the claims against the officer. All of the cases resolved against unindemnified El Paso police officers between 2006-2011 and 2018-2023 took one of these two paths—dismissal or a global settlement paid for by the government.¹⁸¹ The same is apparently true of every case resolved against unindemnified Memphis police officers over the past thirty years.¹⁸²

Third, the officer could agree to assign their right to seek indemnification to the plaintiff's lawyer in exchange for a promise not to try to collect the award against the officer personally. If the plaintiff assigned the right to indemnification is successful, they will recover from the government.¹⁸³ If the plaintiff assigned the right to

¹⁷⁸ See John Caniglia, Cleveland Agrees to Pay \$4.85 Million to Wrongfully Convicted Man Who Spent 11 Years in Prison, Cleveland.com (Dec. 1, 2020); Eric Heisig, Cleveland Agrees to Pay \$3.7 Million to Family of Euclid Man Killed By Off-Duty Officer in 2012, Cleveland.com (Sept. 25, 2018).

¹⁷⁹ See, e.g., Radley Balko, Cleveland's Vile, Embarrassing Scheme to Avoid Paying Victims of Police Abuse, Wash. Post (Jan. 20, 2016); Swenson, *supra* note 175.

¹⁸⁰ See How Qualified Immunity Fails, *supra* note 6, at 46 tbl.12.

¹⁸¹ See *supra* notes 130-133 and accompanying text.

¹⁸² See Telephone Interview with McKinney, *supra* note 153.

¹⁸³ For example, in *Maimaron v. Oxner*, the Massachusetts state police refused to indemnify its officer, Oxner, who assaulted a man, Maimaron, while off duty; Maimaron was awarded \$400,000 in damages and attorneys' fees against Oxner in binding arbitration; Oxner assigned his right to seek indemnification to Maimaron in exchange for release from the indemnification

indemnification is unsuccessful, the plaintiff recovers nothing.¹⁸⁴ Either way, the officer's finances are protected.

Finally, if a plaintiff secures a judgment against an unindemnified officer, the plaintiff may decide not to collect on the claim. Plaintiffs sometimes abandon efforts to collect on smaller claims, presumably concluding a small judgment is not worth the cost of collecting.¹⁸⁵ Plaintiffs may also abandon efforts to collect on larger claims if there is no chance that the officer will be able to satisfy the judgment because, for example, the officer is in prison.¹⁸⁶

3. When Officers Pay

Despite these many ways in which unindemnified officers can avoid personal financial liability, there are instances in which an officer is denied indemnification, the officer cannot reverse the indemnification denial, the plaintiff pursues a case against the unindemnified officer, the plaintiff secures a judgment, the government is unwilling to resolve the case on the officer's behalf, and the plaintiff seeks money directly from the officer. This prospect was anticipated by Tom Baker, whose research suggests that plaintiffs' attorneys are generally reluctant to pursue blood money but are more likely to do so when the defendant has breached social norms that result in serious injury.¹⁸⁷ As one Chicago plaintiff's attorney explained: "It really has an intrinsic value that goes above and beyond the dollar amount, having the police officer writing a check out of his own account. There's a feeling of justice there for the client,

award; Maimaron sued the Commonwealth of Massachusetts; and the case settled for \$580,000, paid for by the state. See Schwartz, *supra* note 1, at 929 (describing the case).

¹⁸⁴ Another permutation is that the plaintiff can agree, after the verdict, to forgive the officer's debt, in exchange for the officer's agreement to assign to the plaintiff any amount he receives following his claim for indemnification. See, e.g., *Keenan v. City of Philadelphia*, 936 A.2d 566, 567-68 (Pa. Sup. Ct. 2007).

¹⁸⁵ See *supra* note 68.

¹⁸⁶ Take, for example, the case of *Alfaro v. City of Houston*, in which an officer, denied indemnification, had raped several women while on the job; the judge entered a \$3.6 million default judgment against the officer. *Municipal Immunity*, *supra* note 6, at 1228-29. The officer will be in prison until at least 2042. See Jayme Fraser, *Ex-HPD Officer Sentenced to Life in Rape*, *Houston Chronicle* (Oct. 8, 2012); Telephone Interview with plaintiff's attorney Benjamin Hall (Dec. 10, 2021) (notes on file with author).

¹⁸⁷ See Baker, *supra* note 87, at 296-301.

and that's important. It's also an extra psychological piece to help make the client satisfied."¹⁸⁸

What a plaintiff can actually recover from an unindemnified officer is a separate question. It can be relatively straightforward to collect against unindemnified officers who have substantial assets.¹⁸⁹ But officers do not tend to have resources sufficient to satisfy settlements and judgments against them.¹⁹⁰ As a result, officers have been able to erase or limit their financial obligations through the protections of debtors' laws, reduced settlements that take account of the officer's limited assets, and bankruptcy law, which discharges debts arising from civil rights lawsuit judgments so long as the officer's conduct was not found to be willful and malicious.¹⁹¹

The case brought by the family of 15-year-old Bobby Moore, who was killed in 2012 by Little Rock police officer Josh Hastings, illustrates the twists and turns that could lead to an officer being held personally financially responsible, and the types of limits that can be placed on that responsibility. Attorney Mike Laux agreed to represent Moore's mother, Sylvia Perkins, in her case against Hastings and Little Rock. Although Laux knew that Little Rock had a policy of not indemnifying its officers, and Hastings had been fired and criminally charged, Laux believed that this would be just the rare type of case in which he could prove municipal liability.¹⁹²

Officer Hastings had only been employed by the Little Rock police department for five years, but had used force at least 41 times and had accumulated dozens of

¹⁸⁸ Steve Mills, *City Usually Pays When a Police Misconduct Suit Is Settled—But Some Defendants Want Cops Punished*, Chi. Trib. (Apr. 15, 2012).

¹⁸⁹ See, e.g., Robert Crowe, *Inmate Awarded Guard's Beach House*, Houston Chron. (Dec. 3, 2004) (describing a case in which a Texas prisoner sued a prison guard for raping him, and the officer personally paid \$7200 in \$50 monthly installments and deeded his beach house, valued at \$30,000, to the plaintiff to settle the case. See also Schwartz, *supra* note 1, at 992 (describing a Cleveland case in which an off-duty officer shot and killed someone at a housing complex where he was working security, and the officer agreed to assign \$12,000 he was owed by the housing complex to the estate to resolve the case).

¹⁹⁰ See *supra* note 88 and accompanying text.

¹⁹¹ See Gilles, *supra* note 87, at 623-62 (describing various federal and state protections); Nicole Langston, *Discharge Discrimination*, 111 Cal. L. Rev. 1131, 1136-38 (2023) (describing bankruptcy provisions that allow individuals to discharge debt stemming from civil rights violations so long as their conduct was not willful or malicious, and several examples of officers who have discharged civil rights judgments in excessive force cases).

¹⁹² See Telephone Interview with plaintiff's attorney Mike Laux (Aug. 12, 2024) (transcript on file with author). Hastings was criminally charged twice—both times, the juries deadlocked—and the prosecutor dropped all charges against him a few weeks before a third trial was set to begin. See Balko, *supra* note 106.

misconduct complaints, more than thirty of which were sustained.¹⁹³ Hastings had lied on his employment application; denying that he had ever participated in a hate group when he had actually attended a meeting of the Ku Klux Klan.¹⁹⁴ There was copious evidence that the Little Rock police department did a terrible job of supervising and investigating its officers.¹⁹⁵ Laux pulled together all of this evidence during discovery and opposed Little Rock's summary judgment motion with an expert report and dozens of exhibits.¹⁹⁶ The district court nevertheless granted the city's summary judgment motion.¹⁹⁷ Laux expected that he would win a reversal on appeal.¹⁹⁸ But before he could appeal the dismissal of the municipal liability claim, he needed first to try the case against the officer.¹⁹⁹ He did, and won a \$415,000 judgment against Officer Hastings following an eight-day trial.²⁰⁰ The court additionally awarded Laux \$382,586 in attorneys' fees.²⁰¹

Laux expected that the court of appeals would reverse the dismissal of his claim against Little Rock, and that the case could then proceed against Little Rock—or he could negotiate a favorable settlement with Little Rock to resolve the judgment against Hastings and the open claims against the city.²⁰² But the court of appeals affirmed the district court dismissal of the *Monell* claim.²⁰³

The city remained steadfast in its denial of indemnification, and refused to pay a penny of the nearly \$800,000 awarded to Sylvia Perkins and her attorney. When Laux attempted to execute on the judgment against Hastings, Hastings filed for bankruptcy.²⁰⁴ Ultimately, Laux and Hastings's attorney negotiated for Hastings to pay Perkins a total of \$12,500.²⁰⁵ In this case, unlike almost every police misconduct

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See Interview with Mike Laux, *supra* note 192.

¹⁹⁷ See *Perkins v. Hastings*, No. 4:15-cv-00310, 2017 WL 5759976 (E.D. Ark. Jan. 27, 2017).

¹⁹⁸ See Interview with Mike Laux, *supra* note 192.

¹⁹⁹ See *id.*

²⁰⁰ See *Perkins v. Hastings*, 915 F.3d 512 (8th Cir. 2019).

²⁰¹ See *id.*

²⁰² See Interview with Mike Laux, *supra* note 192.

²⁰³ See *Perkins v. Hastings*, 915 F.3d 512 (8th Cir. 2019).

²⁰⁴ See Interview with Mike Laux, *supra* note 192.

²⁰⁵ See *id.*; see also Final Order, *In re: Joshua Ryan Hastings*, No. 4:18-bk-11333 (E.D. Ark. Sept. 20, 2020).

case I have studied over the past decade, an officer was denied indemnification and was required to pay from his own bank account to satisfy a judgment entered against him. Yet it was the plaintiff who bore the financial brunt of that indemnification denial. Perkins and her attorney received just 1.5% of what they was awarded, while Hastings paid just 1.5% of what he owed.

III. IMPLICATIONS

This Article has opened the black box of police officer indemnification to reveal a complex assortment of government interests that may factor into indemnification decisions; strategic advantages to government defendants (and disadvantages to plaintiffs) of indemnification uncertainty; and the governments' and plaintiffs' interests that combine to protect officers' finances even when they are officially denied indemnification. Kenneth Abraham and Catherine Sharkey have argued that "[t]he glaring gap in tort theory is its failure to take adequate account of liability insurance."²⁰⁶ Arguably, the—or at least, *a*—glaring gap in Section 1983 law is its failure to take adequate account of indemnification. The fact that officers rarely pay for settlements and judgments entered against them undermines various assumptions undergirding qualified immunity, municipal liability, and the prohibition of punitive damages against municipalities.²⁰⁷ But indemnification threats and denials also have significant implications for Section 1983 practice, theory, and law, including the dynamics of Section 1983 litigation; the extent to which Section 1983 achieves its compensation and deterrence goals; and common recommendations for improving our system of constitutional tort remediation.

A. *For Descriptions of Section 1983 Litigation*

Indemnification plays a minimal role in prevailing descriptions of constitutional tort litigation. Rather, indemnification is often taken as a given—a *de facto respondeat superior liability* by which the government's finances are almost always seamlessly substituted for the officer's finances at some point during litigation.²⁰⁸ In some jurisdictions—including New York, Philadelphia, Chicago, Los Angeles, and elsewhere—this appears to be a mostly accurate description of indemnification's role. Government officials in these jurisdictions may threaten to deny officers indemnification, or may require officers to contribute a nominal amount to a settlement, but there is little risk that an officer will be denied indemnification. In

²⁰⁶ Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 *Yale L.J.* 2165, 2165 (2023).

²⁰⁷ See Schwartz, *supra* note 1, at 937-60 (describing these implications).

²⁰⁸ See sources cited *supra* note 4.

other jurisdictions—including places that always deny officers indemnification, like El Paso, and places that more regularly deny or credibly threaten to deny officers indemnification—indemnification does not function like *de facto respondeat superior* liability at all.

For local governments, indemnification uncertainty is more strategically advantageous than *de facto respondeat superior* liability. Because the local government does not have to make a formal indemnification decision until the end of litigation, it can use the threat that it will deny indemnification strategically: to discourage a plaintiff from filing a lawsuit; to force a plaintiff to take on a more complicated, expensive, and risky case against the municipality; to settle a case for less than it is worth; or to convince a judge to reduce a jury's verdict after trial. At each step along the way, the government can reassess whether to indemnify in light of decisions made by the plaintiff, rulings by the court, and pushback by the union. And even the local government's official indemnification decision is not the last word: Local governments have formally declined to indemnify officers and then paid settlements or judgments on their behalf.

The aspects of indemnification uncertainty that benefit local governments disadvantage plaintiffs. If a plaintiff and their lawyer believe that an officer will be denied indemnification, they are often left with three unappealing options: abandon their case; sue an unindemnified (and, thus, likely, judgment proof) officer; or pursue a case against the municipality in addition to or instead of the unindemnified officer, knowing that municipal liability claims are particularly complicated, expensive, and difficult to win. Moreover, plaintiffs and their attorneys must make these consequential decisions in moments of great uncertainty: before they know whether the local government will actually deny indemnification; before they know what evidence will support their municipal liability claim; and before they know whether the presiding judge or jury will find their municipal liability allegations meritorious. Civil rights litigation is costly and risky even when the plaintiff can be assured that the defendant officer will be indemnified. By introducing the possibility that an officer will be denied indemnification, the local government further increases the costs and risks to plaintiffs of pursuing civil rights claims.

Although indemnification denials and threatened denials disadvantage plaintiffs and advantage local governments, they have a less direct impact on individual officers. Surely, officers do not want to be personally sued, and would be reasonably concerned if their employer denied or threatened to deny them indemnification.²⁰⁹ But generous indemnification provisions, political pressures on local governments to protect their officers, and plaintiffs' reluctance to pursue claims against judgment-proof defendants mean that officers—even officers denied indemnification—rarely pay settlements and judgments entered against them. In other words, officers in most cases, at the end of

²⁰⁹ See *supra* note 153 and accompanying text.

the day, continue to enjoy a de facto *respondeat superior* liability, even when they are officially denied indemnification.

B. For Section 1983's Compensation and Deterrence Goals

Section 1983 suits have long been understood as a mechanism to compensate people when their rights are violated, and deter officers and governments from engaging in misconduct.²¹⁰ There is plenty of (merited) skepticism that Section 1983 doctrine achieves these paired goals.²¹¹ But, assuming for the moment that it roughly does, how do the indemnification dynamics described in this Article inform our understanding of Section 1983 lawsuits' powers of compensation and deterrence?

Indemnification helps to achieve lawsuits' compensation goals in places where it is widespread and cases in which it is certain. In such places and cases, plaintiffs can be assured that any settlement or judgment they are awarded will be satisfied.²¹² Although indemnification advances Section 1983's compensatory goals, it limits a primary way in which lawsuits might deter officers by insulating officers from financial risk.²¹³ And because law enforcement agencies do not typically pay

²¹⁰ This is an assumption often repeated by the Supreme Court. See, e.g., *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (“The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”) (citation omitted). Commentators echo the view that Section 1983 is intended to compensate and deter. See, e.g., Richard J. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Cal. L. Rev. 933, 969-70 (2019) (explaining that constitutional remedies are intended to “provide compensation to the victims of official misconduct...afford a mechanism for holding wrongdoers individually accountable to those whom they have injured,” and, “help maintain a rule-of-law regime in which officials do not stray systematically or routinely outside of constitutional bounds.”). Tort law is recognized to serve other purposes as well, including corrective justice, civil recourse, and retribution, and the effects of indemnification on each of these objectives should be considered in future work. C.f. Tom Baker, *What is Insurance for Tort Law?* Va. L. Rev. (forthcoming 2026) (exploring the impact of insurance on these varied objectives of tort law).

²¹¹ See *infra* notes 216-218 and accompanying text.

²¹² Note that the certainty of payment accompanying indemnification does not exist when the jurisdiction is cash-strapped or bankrupt. For more discussion of this issue, see *supra* note 7.

²¹³ There are other, non-financial reasons that lawsuits might deter officers—negative publicity, the experience of sitting for depositions or trial, or negative employment ramifications. For discussion of the seemingly limited effects of these non-financial effects, see Schwartz, *supra* note 1, at 953. Further, even officers assured indemnification may (irrationally) fear being held personally liable. C.f. Baker, *supra* note 210, at n.100-102.

settlements and judgments from their budgets, lawsuit payouts don't reliably influence police department conduct either.²¹⁴

Where indemnification is uncertain or unavailable, the compensatory power of civil rights lawsuits is unquestionably compromised. A case may never be brought because no attorney is willing to bear the financial risk of pursuing a potentially judgment-proof defendant, or pivoting to a costly pursuit against the municipality. And if such a case is brought, a threatened indemnification denial may cause the case to be settled at a steep discount.

Yet indemnification denials and uncertainty do not necessarily increase the deterrent power of lawsuits on individual officers. Although the deterrent effect of lawsuits may well be stronger in cases in which officers believe they will be held personally financial liable, a denial of indemnification will not necessarily threaten an officer's finances. When indemnification uncertainty leads a plaintiff to sue the local government instead of the officer, that officer is spared whatever deterrent power the suit against him might have had. When an indemnification denial comes with a sub rosa assurance that the officer's finances will remain protected, the deterrent power of the suit will presumably be comparable to a case in which the officer was indemnified. The same is likely true when an officer employed by a jurisdiction that never indemnifies its officers is sued, but learns from his attorney that no officer from that jurisdiction has contributed to a settlement or judgment in thirty years.²¹⁵ Indemnification denials and threatened denials therefore appear to reduce Section 1983's compensatory power without necessarily increasing Section 1983's deterrent effects.

Now consider the types of cases and places where Section 1983's compensatory power is limited because indemnification is uncertain. In places that deny or threaten to deny indemnification to the worst actors, it may be that the most egregious cases—cases that will result in multi-million dollar verdicts, cases where officers engaged in willful or malicious conduct, and cases against officers who have been convicted of crimes and sent to prison—are the most vulnerable to indemnification denials. In such jurisdictions, the plaintiffs most likely to recover compensation are those who have suffered some, but not too much, harm: cases alleging minimal wrongdoing will result in no compensation because judges and juries will deny liability, and cases alleging maximal wrongdoing will result in no compensation because officers will be denied indemnification. In places that deny or threaten to deny indemnification for reasons unrelated to the officer's actions that gave rise to the suit—as a punishment of the officer for not testifying at trial, for example, or because the jurisdiction has a blanket policy of never indemnifying its officers—the compensatory power of Section 1983

²¹⁴ See *id.* at 954-55.

²¹⁵ See Telephone Interview with McKinney, *supra* note 153.

depends on factors having nothing to do with the severity of the plaintiff's harms or the officer's misconduct.

We have long known that Chief Justice Marshall's assertion in *Marbury v. Madison*—"every right, when withheld, must have a remedy"—is subject to a multitude of caveats and qualifications.²¹⁶ Plaintiffs whose rights have been violated will not be compensated if the court grants the officers qualified immunity and dismisses any municipal liability claim, or if the plaintiffs cannot find a lawyer or plead a plausible complaint.²¹⁷ Moreover, plaintiffs may be undercompensated for violations of their rights for any number of reasons.²¹⁸ Some decry any discrepancy between right and remedy; others believe such a gap prevents the costs of enforcing constitutional rights from growing too high, and predict courts would shrink the scope of constitutional protections without one.²¹⁹ But even those who see value in maintaining some gap between right and remedy would likely struggle to justify the contours of the particular gap created by indemnification denials and uncertainty. What theory of constitutional tort remedies can justify a system that denies compensation to people whose rights were violated simply because they were

²¹⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

²¹⁷ For the various challenges of pleading and proving constitutional tort cases, see generally *Shielded*, *supra* note 67.

²¹⁸ See Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DePaul L. Rev. 627, 667 (1999) ("Indemnification is a poor substitute for vicarious liability because . . . to a jury it may still appear that any damages may be paid out of the employee's own pocket."); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev. 1101, 1134 (2020) (describing lawyers' concerns that plaintiffs will not be compelling to a jury if they are not "likeable," "credible," and "articulate," if they were arrested in connection with incident, or if they have a criminal record).

²¹⁹ See, e.g., Fallon, *supra* note 210 at 938 ("[I]f damages were automatically available for every search and seizure that a court deemed 'unreasonable' under the Fourth Amendment—regardless of any legally plausible or good faith belief of the police officer who conducted it that it was lawful under the circumstances—then we could expect a narrowing of operative standards of constitutional 'reasonableness.' Otherwise the social costs of Fourth Amendment rights would grow intolerably high."); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 248 (2013) ("[Without qualified immunity,] every extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages. In some circumstances, that prospect might not matter. In others, it surely would. The impact of inhibiting constitutional innovation in this way is impossible to quantify, but I think it would prove deleterious."); Darryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 914-15 (1999) (imagining that, if Congress expanded Section 1983 liability and eliminated qualified immunity, there "would be a wholesale rewriting of constitutional rights" and "while it is impossible to predict just how various rights would be transfigured, drastically increasing the cost of rights would surely result in some curtailment").

subjected to particularly egregious misconduct; or because their rights were violated by officers who did not participate in the defense of their cases to their employers' satisfaction; or because their rights were violated in a jurisdiction that uses the threat of indemnification denials strategically or denies indemnification to all of its officers (having concluded that the benefits outweigh the costs of doing so)?

C. For the Law and Practice of Section 1983

The assumption of near-universal indemnification has informed various arguments about Section 1983 doctrine and practice, including that officers should more regularly be held personally responsible for settlements and judgments, that municipal liability claims are unnecessary to secure compensation, that qualified immunity doctrine is unnecessary to shield officers from financial liability, and that local governments' indemnification practices reflect a reliance on qualified immunity doctrine that should not be disturbed by the Supreme Court. How should evidence of indemnification's role in civil rights litigation inform these arguments about the law and practice of Section 1983?

These findings certainly call into question the argument that officers should be denied indemnification more often so that officers will feel the financial sting of settlements and judgments entered against them. Plaintiffs' and their lawyers' justified reluctance to spend time and money litigating against judgment-proof officers means that plaintiffs are likely to abandon cases against unindemnified officers, or pursue claims against different, solvent defendants. Accordingly, denying officers indemnification will not necessarily cause those officers to feel a financial sting and may, further, leave the plaintiff without remedy.

These findings also call into question the notion that plaintiffs need not file municipal liability claims when their sole goal is to assure compensation.²²⁰ This may be true in parts of the country where indemnification is virtually certain (and in cases where qualified immunity is not an issue). But in jurisdictions and cases in which indemnification is uncertain, plaintiffs do need to rely on municipal liability claims to assure relief.²²¹

Evidence that officers virtually never pay anything in settlements and judgments against them has been used for cross purposes in debates about qualified immunity doctrine. Some have argued that this evidence undermines a key justification for qualified immunity doctrine; that it is needed to shield officers from financial liability when they have not violated clearly established law.²²² Another argument, offered by

²²⁰ See, e.g., Hamilton, *supra* note 4, at 737–39.

²²¹ See Municipal Immunity, *supra* note 6, at 1227–29.

²²² See, e.g., Schwartz, *supra* note 1, at 938–43.

Aaron Nielson and Christopher Walker, is that states' near-universal indemnification of officers reflects such strong reliance on the protections of qualified immunity that the Supreme Court should not disturb the controversial doctrine.²²³

Available evidence about indemnification practices reaffirm that most officers are, indeed, protected from the costs of litigation. Regardless of whether an officer is indemnified as an official matter, they almost never pay. The infrequency with which officers personally contribute to settlements and judgments against them continues to undermine a driving rationale for qualified immunity doctrine.

Available evidence does, however, undermine the reliance-based *stare decisis* argument offered by Nielson and Walker. Nielson and Walker argue that states' reliance on qualified immunity—evidenced by the near-universal indemnification of officers—strengthens the *stare decisis* power of the doctrine. Yet available evidence makes clear that officers' protection from liability comes not local governments' decisions always to indemnify their officers for the entirety of settlements and judgments entered against them, but instead from the complex ways in which local government officials apply their discretion and plaintiffs and officers respond.²²⁴ States' indemnification provisions are not as reliant on qualified immunity doctrine as Nielson and Walker argue.

This evidence suggests a final insight about current qualified immunity debates. Defenders of qualified immunity doctrine argue that the doctrine is the only shield protecting officers from bankruptcy when they make reasonable mistakes. As I have previously argued, it is indemnification statutes, not qualified immunity, that protect most officers from financial liability.²²⁵ But exceptions to this rule, in which officers' personal finances are threatened, should be understood not as the result of inadequate legal protections for officers, but as the result of decisions by those officers' employers not to indemnify them. It is local governments' decisions to deny officers indemnification—not the prospect of limiting qualified immunity—that should be the target of unions', officers', and law enforcement advocates' scorn.

IV. RECOMMENDATIONS

Section 1983 suits are intended to compensate and deter. In jurisdictions in which indemnification is a near-certainty, the compensatory goal is roughly met but officers

²²³ See generally Nielson & Walker, *supra* note 4.

²²⁴ See *Qualified Immunity and Federalism All the Way Down*, *supra* note 6, at 335-36. Note, also, that I do not believe eliminating qualified immunity will actually result in a dramatic increase in liability. For further discussion of the basis for this conclusion, see Joanna C. Schwartz, *After Qualified Immunity*, 120 *Colum. L. Rev.* 309 (2020).

²²⁵ See *Police Indemnification*, *supra* note 1, at 938-43.

are not deterred by those financial outlays.²²⁶ Yet this Article makes clear that Section 1983's deterrence goals would not be better served by eliminating indemnification. Instead, in jurisdictions that refuse to indemnify their officers, or selectively deny or threaten to deny their officers indemnification, the costs and risks of seeking relief skyrocket for plaintiffs while officers' resources remain largely protected.

If I was rebuilding our system of constitutional tort remediation, I would substitute *Monell* doctrine for vicarious liability against municipalities whose officers violate people's constitutional rights while acting in the course and scope of their employment, and would institute separate financial or disciplinary penalties intended to deter officers who engage in wrongdoing.²²⁷ In that world, plaintiffs who could prove their rights are violated would be compensated, officers would be sanctioned, and indemnification threats or denials could not be used strategically to discourage people from vindicating their rights.²²⁸

Obviously, that is not the world in which we live. And although Congress or the Supreme Court could take the steps necessary to put such a system into place, neither has any apparent inclination to do so. There are, however, indications that some state and local governments are interested in adjusting their laws and practices to better compensate people whose constitutional rights have been violated and deter misconduct by officers. So, in this Part, I offer several recommendations that could be adopted by state and local legislators to achieve these goals, and recommendations that could be followed by local government officials charged with making indemnification decisions. I also suggest strategies that may be used by plaintiffs to limit the damaging effects of indemnification uncertainty on their cases unless or until such reforms are adopted.

²²⁶ See *supra* notes 217-218 and accompanying text (explaining why Section 1983's compensatory goal is only roughly met even when indemnification is a near-certainty).

²²⁷ For further elaboration of these recommendations and how they might be achieved, see Joanna C. Schwartz, *Municipal Immunity* at 1235-43.

²²⁸ Accord Fallon, *supra* note 114, at 979 (observing that "adoption of a formal system of entity liability should not have a huge impact on government outlays" but should nevertheless have "welcome effects" including municipal liability in places that do not indemnify officers, more certain compensation for plaintiffs, and clarity to voters and jurors about "where financial responsibility lies."); Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 *Duke L.J.* 1701, 1744 (date) (arguing that Congress should mandate entity liability for municipal, state, federal governments and observing that "[w]ith governments paying up front, the perceptions of everyone in the system—from unrepresented plaintiffs to Supreme Court Justices—would better fit the reality of which parties ultimately absorb defense-side costs...and would help match doctrine with experience, reduce the incentives for defense counsel to hide the ball in ethically dubious ways, and allow all participants to make and implement strategic decisions with a more accurate understanding of the dynamics at play.").

A. *For State and Local Legislators*

Although laws passed by state and local legislatures in the 1970s and 1980s vary significantly in the types of conduct covered and excluded from protection,²²⁹ the legislatures presumably shared the expectation that governments would indemnify their officers (so plaintiffs would be compensated by those governments) when officers acted within the scope of the indemnification laws' terms, and governments would deny officers indemnification (so that plaintiffs would be compensated by officers) when they did not. Instead, plaintiffs go uncompensated or undercompensated when local governments deny or threaten to deny officers indemnification, and decisions by local government officials and plaintiffs combine to protect the finances of officers regardless of the depths of their misconduct.

Assume, at least for the purposes of argument, that state and local legislatures want indemnification systems in which officers suffer financial sanctions when they engage in wrongdoing, and indemnification threats and denials cannot be used to prevent deserving plaintiffs from seeking or securing relief. How might state and local legislative bodies adjust current indemnification laws to achieve these goals?

One option would be to institute rules mandating officer indemnification, but allowing jurisdictions to require officers to contribute to settlements or judgments if they have engaged in wrongdoing.²³⁰ In 2020, Colorado passed a statute with this type of provision, requiring indemnification but allowing local governments to demand that officers make a modest contribution—of 5% of the total payment or up to \$25,000—if they acted in bad faith.²³¹ No Colorado jurisdiction has, as of yet, exercised its option to require employee contribution. But this arrangement, at least in theory, allows plaintiffs to be compensated when they prevail without fully insulating officers from the costs of their misconduct.

Another option would be for state or local legislatures to require officers to carry liability insurance. States often require automobile owners, health care providers, and

²²⁹ See Part I.A.

²³⁰ Christopher Slobogin has made a similar suggestion—proposing that officers be financially sanctioned when they violate the Fourth Amendment (or the agency be financially sanctioned if the officer was found to have acted in good faith)—as an alternative to the exclusionary rule. See Christopher Slobogin, *Rehabilitating Criminal Justice: Innovations in Policing, Adjudication, and Sentencing* 50-52 (2025). Slobogin's proposal is, however, explicitly independent of any civil damages action that could be brought by the plaintiff; instead, it would be sought by a state agency and would go to the victim or the state. *Id.*

²³¹ See Colo. Rev. Stat. §§ 13-21-131(2)(b), 13-21-131(3), 13-21-131(4)(a) (2021).

construction contractors to have insurance.²³² In some industries, employees' assets are protected by both insurance and indemnification.²³³ In contrast, we have parts of the country—like Memphis, El Paso, and Little Rock—where officers who are given guns and badges and the constitutional authority to use deadly force have neither indemnification nor insurance and, so, are essentially judgment proof. Mandated insurance of police would achieve the same benefits as mandated insurance in other industries; it would ensure that when people are harmed by police, there will be adequate resources to make them whole.

Mandated police liability insurance could also create a financial sanction—through increased premiums or reduced coverage—for officers who engage in risky conduct.²³⁴ In 2016, Minneapolis attempted to put an initiative on its ballot to require officers to have liability insurance; the proposal was that the city would pay the base premium and officers would be responsible for paying any upward adjustments to their insurance rates caused by their behavior.²³⁵ The Minneapolis police union ultimately prevented this initiative from being placed on the ballot, but this effort offers a useful blueprint for other jurisdictions considering such an approach.²³⁶

Finally, legislatures could mandate joint and several liability between officers and their employers. This approach would allow the officer and the department to resolve who was responsible for the harms at issue, and divide payment obligations to reflect that responsibility. Yet, because joint and several liability requires that the prevailing plaintiff be made whole, it would not sacrifice plaintiff compensation for officer deterrence. In 2021, New York City passed a law with this type of provision, making individual officers liable for Fourth Amendment violations (without the protections of qualified immunity) and providing that “[t]he employer of a covered individual...is liable, based upon the conduct of such covered individual.”²³⁷

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²³³ See Black et al., *supra* note 19.

²³⁴ For further discussion of the benefits of mandated officer liability insurance, see Ramirez et al., *supra* note 88; Deborah Ramirez & Tamar Pinto, *Policing the Police: A Roadmap to Police Accountability Using Professional Liability Insurance*, 73 Rutgers L. Rev. 307 (2021).

²³⁵ See Ramirez et al., *supra* note 88, at 438 (describing the Minneapolis ballot initiative).

²³⁶ Deborah Ramirez and Tamar Pinto have suggested, in the alternative, that local governments require officers to pay the first \$25,000 of any settlement or judgment entered against them, and that that personal financial liability will prompt officers to purchase insurance. See Ramirez & Pinto, *supra* note 234, at 337-38.

²³⁷ See Jay Schweikert, *Employer Liability Is Not an Adequate Solution to Qualified Immunity*, Cato Institute (Apr. 28, 2021) (quoting the text of the New York City law).

Even if legislatures do not want to expand local government responsibility for settlements and judgments in cases where officers have violated the terms of the applicable indemnification agreement, they could improve the current system by making their indemnification provisions more straightforward and transparent. Colorado law, which mandates indemnification unless an officer has been criminally convicted, offers one bright line rule.²³⁸ The benefit of a bright line, whatever that line may be, is that it can prevent government attorneys from using the statutes strategically and allow plaintiffs to better assess the risks and benefits of going forward. Statutes that require the local government to decide whether to indemnify at the outset of the case is another way of creating clarity and certainty for both plaintiffs and officers.²³⁹

B. For Indemnification Decisionmakers

Local government officials who decide whether to indemnify their officers in individual cases could also adjust their decisionmaking calculus. Local officials are likely uninterested in making their decision to indemnify officers more transparent to plaintiffs, especially as indemnification uncertainty strengthens their bargaining position in litigation. But there are several reasons that local governments might benefit from making indemnification more certain for officers.

In addition to the obvious political costs of threatening to deny officers indemnification, indemnification uncertainty carries financial costs for local governments. Remember that local governments often pay unindemnified officers' attorneys' fees—including the fees spent contesting the officers' indemnification denials. Investigative reports have documented the hefty sums paid to private attorneys who defend police officers in civil rights cases in various cities, including Chicago and El Paso.²⁴⁰ It may ultimately be more cost-effective for local governments to indemnify officers, represent them in house (instead of providing them with private counsel), and avoiding costly fights about whether the officers will be indemnified. Assuring officers that they will be indemnified may also encourage officers to be more forthcoming with counsel about facts underlying the case, which could be useful both

²³⁸ Colo. Rev. Stat. § 13-21-131(4)(a) (2021).

²³⁹ See *supra* note 42 and accompanying text.

²⁴⁰ See Chuck Goudie & Barb Markoff, *Chicago Pays \$40 Million Annually to Private Firms, Same as Entire Law Department Budget*, ABC7 (Feb. 23, 2023); Robert Moore, *El Paso Taxpayers Spend More Than \$1.7 Million to Defend Police in Four Deadly Force Lawsuits*, El Paso Matters (July 28, 2020).

to craft an effective legal defense and to learn about areas of policy and personnel concern that could be relayed to police officials.²⁴¹

Local governments could also decide to indemnify their officers, but impose financial sanctions on those who have violated law or policy. This is the apparent approach adopted by New York City's comptroller's office.²⁴² Chicago and Cleveland have also required officers to contribute modest sums in isolated cases.²⁴³ Requiring contributions in this manner replicates the strategy employed by the Colorado statute but, importantly, can be adopted by local government officials who make indemnification decisions without a formal change in union rules or law. Such financial contributions are an underappreciated tool for local government officials to sanction their officers, and may be especially useful when union-negotiated procedural protections have made it impossible to discipline or fire them.²⁴⁴

C. For Plaintiffs

Plaintiffs and their attorneys cannot directly change state or local law, or local governments' indemnification decisions. Nevertheless, there are various ways in which plaintiffs can reduce indemnification uncertainty and discourage that uncertainty from being used against them.

When a jurisdiction threatens to deny their officer indemnification, the plaintiff can employ various methods to get more certainty, sooner, about the government's indemnification decision in their case. Throughout litigation—in pleadings, depositions, and requests for admission—the plaintiff can seek statements by the government that the officer's conduct falls within the bounds of their indemnification obligations, and later use those statements to contest an indemnification denial. To take a simple example, California officers must be indemnified if they were acting within the course and scope of their employment;²⁴⁵ so, in pleadings and discovery,

²⁴¹ Accord Hamilton, *supra* note 4, at 731 (observing that “a commitment by the local government to indemnify the individual defendants certainly offers a way for the defendants to maintain a united front against the plaintiff”).

²⁴² See *supra* notes 71-74 and accompanying text.

²⁴³ See Schwartz, *supra* note 1 at 912 (describing two officer contributions in Cleveland); Mills, *supra* note 187 (describing officer contributions in Chicago cases).

²⁴⁴ For descriptions of these types of procedural protections, see, for example, Kevin M. Keenan & Samuel Walker, An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights, 14 B.U. Pub. Int. L.J. 185 (2005); Stephen Rushin, Police Union Contracts, 66 Duke L.J. 1191 (2017).

²⁴⁵ Cal. Gov't Code §825(a).

government employers can be asked to acknowledge that the officers was acting within the course and scope.

The plaintiff can also get clarity about the government's indemnification position in cases in which the plaintiff has sued both the officer and the municipality, the government has not committed to indemnify the officer, and one attorney represents both defendants. In such cases, the plaintiff can argue that the same attorney cannot represent both the officer and department while the indemnification decision is pending because of a conflict of interest.²⁴⁶ There is a potential conflict whenever an officer and municipality are both named as defendants in a Section 1983 action.²⁴⁷ As the Second Circuit has explained:

A municipality may avoid liability by showing that the employee was not acting within the scope of his official duties, because his unofficial actions would not be pursuant to municipal policy. The employee, by contrast, may partially or completely avoid liability by showing that he was acting within the scope of his official duties. If he can show that his actions were pursuant to an official policy, he can at least shift part of his liability to the municipality. If he is successful in asserting a good faith immunity defense, the municipality may be wholly liable because it cannot assert the good faith immunity of its employees as a defense to a section 1983 action.²⁴⁸

This conflict is exacerbated if the municipality is withholding its indemnification decision until the conclusion of the case, and has the authority to deny indemnification to officers who have acted in bad faith, maliciously, willfully, or outside the course and

²⁴⁶ Courts have held that plaintiffs have standing to bring such disqualification motions. See, e.g., *Kevlik v. Goldstein*, 724 F.2d 844, 848 (1st Cir. 1984) (joining the Fourth and Fifth Circuits in concluding that a disqualification motion can be sought by opposing counsel); *Robinson v. New York*, No. 08-cv-0908, 2010 WL 2775850, at *1 n.4 (W.D.N.Y. July 14, 2010) (plaintiff had standing to seek defense counsel's disqualification); *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) ("The authority of federal courts to disqualify attorneys derives from their inherent power to preserve the integrity of the adversary process") (citation omitted).

²⁴⁷ See, e.g., *Hamilton*, *supra* note 4, at 743-44; Dina Mishra, Note, When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in §1983 Litigation, 119 *Yale L.J.* 86, 88-90 (2009); Lawrence Rosenthal, Legal Ethics as a Roadblock to Police Accountability, 82 *Miss. L.J.* 1, 34-36 (2022); Nicole G. Tell, Note, Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a §1983 Police Misconduct Suit, 65 *Fordham L. Rev.* 2825, 2840-41 (1997).

²⁴⁸ *Dunton v. Suffolk Cnty., State of N.Y.*, 729 F.2d 903, 907 (2d Cir.), amended on other grounds, 748 F.2d 69 (2d Cir. 1984). See also *Carrero v. Farrelly*, 280 F. Supp. 3d 774, 776-77 (D. Md. 2017) (collecting cases describing this conflict).

scope of their employment.²⁴⁹ Under such circumstances, the plaintiff can argue that the attorney should be disqualified from representing the officer unless the municipality agrees to indemnify the officer, or agrees the officer was acting in good faith and within the course and scope of their employment during the times relevant to the case.²⁵⁰ The latter admission should also foreclose a future denial of indemnification on these grounds.

Plaintiffs can additionally use a viable *Monell* claim as a negotiating tool to assure indemnification. Chicago, for example, sometimes commits to satisfy any judgment against their officers in exchange for the plaintiff's agreement to bifurcate discovery on their *Monell* claim.²⁵¹ This type of agreement will be unappealing to plaintiffs committed to pursuing their municipal liability claims, particularly if they are unconcerned that the defendant officer will be denied indemnification. But this type of agreement may prove an attractive compromise to plaintiffs in cases where indemnification is less certain and the *Monell* claim has been included to increase the likelihood of a solvent defendant.

In cases and places where local governments withhold their indemnification decisions until after trial, a plaintiff can argue that the fact and terms of indemnification are admissible to challenge the officers' credibility. Courts have generally refused to admit evidence of officer indemnification (unless the defendant has opened the door by erroneously suggesting that the officer will be personally responsible for the judgment).²⁵² In refusing to admit evidence of indemnification,

²⁴⁹ See *Higgins v. Town of Southampton*, 613 F. Supp. 2d 327 329 (E.D.N.Y. 2009) (finding a conflict of interest, necessitating separate representation, when the town's asserted the employee acted in bad faith and was not entitled to indemnification).

²⁵⁰ See, e.g., *Coggins v. County of Nassau*, 615 F. Supp. 2d 11, 33 (E.D.N.Y. 2009) (finding no conflict of interest between the defendant officer and the county because the county's indemnification board had concluded it was financially responsible for any verdict or judgment against the defendant officers); *Lieberman v. City of Rochester*, 681 F. Supp. 2d 418, 427 (W.D.N.Y. 2010) (finding disqualification inappropriate because the city affirmed the officers were acting within the scope of their employment and agreed to indemnify the officers for compensatory and punitive damages).

²⁵¹ See, e.g., *Williams v. City of Chicago*, 315 F. Supp. 3d 1060, 1080 (N.D. Ill. 2018). See also *Hamilton*, *supra* note 4, at 732-33 (arguing that the threat of a successful *Monell* claim "may also be used to put pressure on a reluctant local government to solve the indemnification issue early and thereby to avoid the *Monell* trial.").

²⁵² See, e.g., *Pryor v. Corrigan*, 124 F.4th 475, 498 (7th Cir. 2024) ("[A]ny evidence or argument about indemnification is barred at trial as irrelevant and highly prejudicial under Federal Rules of Evidence 401 and 403. The only exception is when defendants raise an officer's inability to pay damages; then, a plaintiff may introduce evidence of indemnification."); *Larez v. Holcomb*, 16 F.3d 1513, 1518 (9th Cir. 1994) ("It has long been the rule in our courts that evidence of insurance or other indemnification is not admissible on the issue of damages, and,

some courts have reasoned that the fact of indemnification would prejudice the local government, whose deep pockets might inspire juries to overcompensate plaintiffs.²⁵³ Other courts have argued that Federal Rule of Evidence 411—which provides that evidence of insurance is not admissible to show negligence—applies to indemnification agreements.²⁵⁴ But, regardless of whether a jurisdiction applies Rule 411 to evidence of indemnification, plaintiffs should be able to argue that the local government’s pending decision about whether to indemnify the officer may bias officers’ testimony.²⁵⁵

Officers seeking to assure their indemnification may refrain from testifying about gaps in training and supervision, a toxic police culture, and other facts that would strengthen the plaintiff’s *Monell* claim or put the municipality in a bad light. Anecdotal evidence suggests that officers would have good reason to believe their trial testimony may determine whether they are indemnified; One officer described in this Article was allegedly promised indemnification in exchange for cooperating with the defense’s trial strategy²⁵⁶ and others were allegedly denied indemnification for asserting their Fifth Amendment rights.²⁵⁷ Indeed, many jurisdictions explicitly condition an officer’s indemnification on his cooperation with the defense of his case.²⁵⁸

should any such information reach the ears of the jurors, the court should issue a curative instruction.”); *Vargas v. Lopez*, No. 23-cv-02490, 2025 WL 2944765 (N.D. Cal. Oct. 16, 2025) (ruling that evidence of indemnification is not relevant and likely prejudicial, but that “evidence of indemnification may be introduced to impeach Defendants should they elicit testimony or argument falsely suggesting that they will personally be liable for paying any judgment or that payment of such a judgment will cause financial strain.”) (citation omitted).

²⁵³ See *Pryor*, 124 F.4th at 498;

²⁵⁴ See *Goldenson v. Steffens*, No. 2:10-cv-0040, 2014 WL 3105033, at *7 (D. Maine July 4, 2014) (collecting cases demonstrating courts’ split on whether FRE 411 applies to evidence of indemnification).

²⁵⁵ Federal Rule of Evidence 411 allows admission of insurance information as relevant to a witness’s “bias or prejudice,” or to prove “agency, ownership, or control.” See also *Lawson v. Trowbridge*, 153 F.3d 368, 380 (7th Cir. 1998) (citing another case in support of the proposition that “evidence may be admitted over a collateral source objection if introduced for purposes of impeaching a witness’ credibility.”); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1014 (9th Cir. 2028) (“Evidence of indemnification is generally inadmissible but may be used to show prejudice or bias of a witness”); *Fuery v. City of Chicago*, 2015 WL 13682033 (N.D. Ill. Nov. 30, 2015) (suggesting that evidence of indemnification could be admitted to show bias, but concluded that the plaintiffs had failed “to elaborate what bias this evidence will establish” and allowing plaintiffs to “re-raise their argument with more particularity at trial.”).

²⁵⁶ See *supra* note 166 and accompanying text.

²⁵⁷ See *supra* note 98 and accompanying text.

²⁵⁸ See *supra* note 46 (describing some of these statutory provisions).

Evidence of the terms of such an indemnification agreement, and what the defendant officer understands this cooperation to require, should be relevant to a jury's assessment of the officer's credibility and bias so long as a final indemnification decision has not been made. The prospect of such information being admitted at trial may lead a local government to finalize their indemnification decision before trial.

In jurisdictions that refuse to indemnify any of their officers as a matter of policy, plaintiffs' options are more limited. Often, the only hope in such places is to gather evidence to support both the individual liability and *Monell* claims, defeat defendants' summary judgment motions, and negotiate a global settlement paid by the government. Another option is to pressure the local government to begin indemnifying its officers. This may be a campaign that plaintiffs' counsel and officers' associations or unions can collectively pursue.

Plaintiffs do have one way of pressing officers to demand indemnification in places like El Paso, Memphis, and Little Rock—by more regularly suing unindemnified officers and seeking to collect against them individually. Some attorneys may resist pursuing “blood money” because they do not want to put the officer in financial jeopardy, because it is costly and complicated to pursue a judgment against a defendant with limited assets, or because any recovery may be outstripped by the costs of executing on the judgment. For all of these reasons, a plaintiff and their lawyer may conclude that it makes no financial sense to pursue officers' personal finances in any given case. Nevertheless, if plaintiffs and their attorneys do sue officers and execute on judgments against them, officers and union officials in those jurisdictions may begin forcefully agitating for indemnification. In other words, accepting the financial risks associated with pursuing blood money in a few cases may lead to more certain indemnification—and, thus, more certain compensation—in the future.

CONCLUSION

Police officers rarely pay anything towards settlements and judgments entered against them. Yet this Article demonstrates that indemnification decisions are more nuanced, complex, and uncertain—and officers are denied indemnification more often—than payout data suggest. When local governments deny or threaten to deny indemnification, for any number of reasons, they gain significant strategic advantages in litigation against plaintiffs, while officers' finances often remain untouched.

Evidence of the way this facet of civil rights litigation functions on the ground should inform policy, practice, and strategy moving forward. State and local legislatures can adjust their laws in ways that assure compensation for those harmed by unconstitutional policing, while ensuring that officers who engage in serious misconduct are not wholly insulated from consequences for their actions. Such a system could be achieved with statutes that require indemnification but authorize

contributions from officers found to have violated policy, liability insurance, or joint and several liability between officers and their employers. At a minimum, the process by which indemnification decisions are made should be transparent, predictable, and announced early, limiting government gamesmanship. Until such steps are taken, it will be left to plaintiffs in jurisdictions that regularly deny—or threaten to deny—their officers indemnification to seek out creative ways to prevent indemnification uncertainty from undermining the compensatory and deterrence goals of §1983.