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WATCHING THE SKY NOT FALL: A STUDY OF STATE QUALIFIED IMMUNITY REFORMS

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ABSTRACT

Police violence like that visited on George Floyd in the summer of 2020 and unfolding today in cities around the country, elicits strong reactions. Reform-minded critics of police brutality call insistently for changes in the law of police accountability and in particular the law of qualified immunity. Defenders of the status quo worry that reforms will lead to a parade of horrors: an explosion of litigation, much of it frivolous; an increase in government payouts and insurance premiums; interference with effective police work; and the introduction of more significant challenges to hiring and retaining qualified officers.

Although predictions about the dire consequences that would flow from reform are often based more on anecdote than careful empirics, they were successful in preventing the enactment of reforms in the aftermath of George Floyd's murder, except in two states: Colorado and New Mexico. Both states adopted new laws making a series of changes that included withdrawal of the defense of qualified immunity for officers sued by the victims of police violence.

In this Article, we report the results of a study of the impact of these reform measures. We focused on the experience of the two reform states (Colorado and New Mexico) and compared them to states that made no similar changes (Utah and Washington). We collected data through a series of public information requests directed to law enforcement agencies in all four states. The requests sought pre- and post-reform information on litigation filings, payouts, insurance premiums, and employee turnover.

We find that the reforms do not appear to be associated with extreme or even significant increases in lawsuit filings, payouts, premiums, or employee turnover. Rather, the data paint a picture of remarkable stability in the incidence and budgetary impact of litigation against police officials and their agencies. While we caution against treating this preliminary study as the last word on the subject, we conclude that the post-reform resilience of the civil rights litigation system casts doubt on many of the most alarming predictions of the opponents of reform.

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WATCHING THE SKY NOT FALL: A STUDY OF STATE QUALIFIED IMMUNITY REFORMS

INTRODUCTION

The murder of George Floyd and the civil rights reckoning that followed solidified two related concerns in the public mind: that police violence and overreach occur far too often and that the institutions of police accountability and oversight often fail to afford appropriate redress to victims.¹ Federal, state, and local government bodies rushed to enact various provisions to address the first of these concerns, including prohibitions of chokeholds and no-knock warrants and requirements that officers try to de-escalate confrontations before using force.² But federal, state, and local efforts to address the second of these concerns—improved police accountability and more effective constitutional rights enforcement—have proven far more politically fraught.

Legislative proposals to improve police accountability focused primarily on the reform of qualified immunity. A doctrine created by the United States Supreme Court in 1967,³ qualified immunity shields officers from liability, even when they have violated the Constitution, so long as they have not violated “clearly established” law.⁴ In the year after George Floyd’s murder, bills were introduced in Congress and in more than half of the states to restrict or eliminate qualified immunity.⁵

¹ See, e.g., Kadijatou Diallo & John Shattuck, *George Floyd and the history of police brutality in America*, BOSTON GLOBE (June 1, 2020); Keith Ellison, *The Death of George Floyd, The Trial of Derek Chauvin, and Deadly-Force Encounters with Police: Have We Finally Reached an Inflection Point? Or Will the Cycle of Inaction Continue?* 50 GEO. L.J. ANN. REV. CRIM. PROC. i, v-xiii (2021); Amy Mitchell, Mark Jurkowitz, J. Baxter Oliphant & Elisa Shearer, *Majorities of Americans Say News Coverage of George Floyd Protests Has Been Good, Trump’s Public Message Wrong*, PEW RESEARCH CENTER (June 12, 2020) (reporting significant public interest in Black Lives Matter protests); Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RESEARCH CENTER (June 12, 2020) (reporting that two-thirds of adults support Black Lives Matter movement).

² See, e.g., Kimberly Kindy, Kevin Schaul & Ted Mellnik, *Half of the Nation’s Largest Police Departments Have Banned or Limited Neck Restraints Since June*, WASH. POST (July 16, 2020); National Conference of State Legislatures, *Law Enforcement Legislation: Significant Trends 2022* (describing more than 4,500 bills considered between May 2020 and May 2022 to regulate police use of force); N’dea Yancey-Bragg, *Justice Department Prohibits Federal Officers From Using Chokeholds, Limits No-Knock Warrants*, USA TODAY (Sept. 16, 2021).

³ *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982).

⁵ See Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020); Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021); Nick Sibilla, *New York City Bans Qualified Immunity For Cops Who Use Excessive Force*, FORBES (Apr. 29, 2021).

These proposed bills triggered a heated debate. Sponsors and other supporters of reform efforts argued that qualified immunity insulates officers from consequences when they behave egregiously, and that eliminating qualified immunity would better secure individual rights by deterring future violations and compensating victims for their losses.⁶ But law enforcement officers, local government officials, and union leaders defended qualified immunity as an essential protection for reasonable official action.⁷ Without qualified immunity, the argument went, officers would face ruinous liability for reasonable mistakes made in a split second and local governments would face higher costs in the form of new demands to pay judgments and new increases in insurance premiums.⁸ The heightened threat of personal liability was also expected to make it more difficult to hire and retain officers.⁹ Both sides of the debate relied on anecdotes, expert opinions, and inferences drawn from the role qualified immunity had thus far been thought to play in constitutional tort litigation.

In most jurisdictions, defenders of qualified immunity prevailed; indeed, some states not only retained qualified immunity but also strengthened the defense and insulated it from reform.¹⁰ But there were notable exceptions. In June 2020, Colorado enacted a bill that included several accountability measures, including a right to sue law enforcement officers for violations of the state constitution without the protections of qualified immunity.¹¹ In 2021, New Mexico passed a similar bill.¹² New York City, Connecticut, and Massachusetts also passed legislation that partially limited qualified immunity.¹³ Interesting in their own right, these police reform measures also

⁶ See *infra* notes 63-**Error! Bookmark not defined.** and accompanying text for further description of these arguments.

⁷ See *infra* notes 70-78 and accompanying text for further description of these arguments.

⁸ See *id.*

⁹ See *id.*

¹⁰ See Gary S. Gilden, *Legislative Efforts to Abolish Qualified Immunity Yield Mixed Results*, STATE CT. RPT. (May 30, 2024).

¹¹ See COLO. REV. STAT. § 13-21-131 (2021).

¹² See New Mexico Civil Rights Act, H.B. 4, 55th Leg., 2021 Reg. Sess. (N.M. 2021), https://www.nmlegis.gov/Sessions/21%20Regular/Amendments_In_Context/HB0004.pdf [<https://perma.cc/4PEL-K9VP>]. In testimony before the New Mexico Civil Rights Commission, we offered recommendations for reform, many of which were adopted in the Commission's report. See N.M. CIV. RTS. COMM'N, REPORT 9 (Nov. 20, 2020), <https://www.generalservices.state.nm.us/uploads/files/RMD/CRC/New%20Mexico%20Civil%20Rights%20Commission%20Report.pdf> [<https://perma.cc/UHG8-2EJP>].

¹³ See Ilya Somin, *Connecticut Passes Law Curbing Qualified Immunity—but with Loopholes*, REASON (Aug. 2, 2020) (describing Connecticut's statute, which creates a state law right to sue but gives immunity to officers "who had an objectively good faith belief that [their] conduct did not violate the law."); Nick Sibila, *New Massachusetts Law Will Decertify Rogue Cops, Revoke Their Immunity*, FORBES (Jan. 9, 2021) (describing Massachusetts's statute, which removes qualified immunity's protections for officers who are decertified and who violated the Constitution through "threats, intimidation, or coercion"); Jeffrey C. Mays & Ashley Southall, *It May Soon Be Easier to Sue the N.Y.P.D. for Misconduct*, N.Y. TIMES (Mar. 25, 2021) (describing the New York City bill, which removes qualified immunity for claims of unreasonable searches and seizures and excessive force).

make it possible to evaluate the claim that eliminating qualified immunity will sharply burden state and local budgets and over-deter police officers, making them harder to hire and retain.

To begin to study the effects of legislatively eliminating qualified immunity, we set out to compare the experience in four states for the period 2017-2023. As for states, we chose Colorado and New Mexico (reform states) and Washington and Utah (control states), states that resemble Colorado and New Mexico in some ways but did not reform their own qualified immunity regime.¹⁴ As for the study period, we chose six years that captured the states' experience both before and after the reforms were enacted. We then made public record requests to hundreds of jurisdictions in the selected states, including state and local governments and their law enforcement agencies. We sought information concerning the total number of lawsuits filed; the funds expended to pay settlements or judgments in such litigation; the rates of officer retention; and the costs of municipal liability insurance. By enabling us to compare the experience of the reform states to that of relatively similar control states, this study offers, to our knowledge, the first systematic measurement of the impact of legislative qualified immunity reforms.

This Article reports four main findings from the study. First, we find no increase in lawsuit filings in the aftermath of the adoption of reform measures in the reform states (post-2020 in Colorado and post-2021 in New Mexico).¹⁵ To put these findings in context, throughout the 2017-2023 time period, most law enforcement jurisdictions in Colorado, New Mexico, Utah, and Washington report very little litigation. Indeed, more than 40 percent of the jurisdictions reported having experienced no litigation at all in the years 2017-2023. Instead, a very small percentage of jurisdictions – all of which are among the most populous in their respective states – are responsible for an overwhelming amount of litigation; ten percent of the jurisdictions experienced seventy percent of the lawsuit filings reported and three percent of the jurisdictions faced more than 50 percent of the reported litigation. There may be a range of explanations for the disparate experience of jurisdictions with large population centers, but it does suggest that police litigation is concentrated in the largest few jurisdictions within each of these states.¹⁶

Second, the data we have collected suggest that state-level reforms are not associated with increased lawsuit payouts.¹⁷ Whether measured by total payouts, payouts per population unit, or payouts per officer, there is little evidence that state-level reforms have uniformly resulted in larger judgments or settlements. Instead, to the extent we can observe patterns in the data, they suggest that New Mexico and Utah had relatively consistent payouts from 2017-23, while both Colorado and Washington experienced sharper swings of increased and decreased payouts during this period.

¹⁴ See *infra* note 106 (describing these similarities).

¹⁵ For further discussion of these findings, see *infra* Part II.B.

¹⁶ For a similar finding in New York State, see Sydney Cresswell & Michael Landon-Murray, TAKING MUNICIPALITIES TO COURT: AN EXAMINATION OF LIABILITY AND LAWSUITS IN NEW YORK STATE LOCAL GOVERNMENTS 5, 12, 20 (2013) (reporting that New York State's fifteen largest counties are responsible for 98 percent of statewide liability costs and New York City alone is responsible for two-thirds of the lawsuit and liability costs incurred by the entire state—a finding unsurprising to the authors given the large jurisdictions' "population, density, and service and employee levels.").

¹⁷ For further discussion of these findings, see *infra* Part II.C.

Third, our data offer no basis to conclude that the abrogation of qualified immunity and other police accountability reforms are associated with changes in insurance premiums.¹⁸ If the cost of insurance were associated with state-level reforms, we would have expected the premiums in the two reform states, Colorado and New Mexico, to have diverged from those in the non-reform states, Washington and Utah. Instead, the results are mixed across reform and non-reform states. Experience in Colorado, a reform state, was most similar to that in Washington, a non-reform state. Similarly, the experience of New Mexico (reform) bore a closer resemblance to that of Utah (non-reform) than to the other states in the study. It thus appears that premium changes were not associated with reform, *per se*, but with other factors.¹⁹

Fourth, and finally, the data suggest that the reform states did not experience greater difficulty retaining officers as measured by employee turnover.²⁰ To the extent law enforcement retention presents a problem in any particular jurisdiction, those difficulties appear to have little to do with the existence or absence of qualified immunity doctrine.²¹

We acknowledge certain limitations, and particularly those that arise from a study that exploits a natural experiment. Apart from limiting qualified immunity, the New Mexico and Colorado statutes each contain multiple provisions that might affect the post-enactment findings in our study.²² In addition, any number of changes in the legal ecosystem of constitutional tort litigation across the country over the past five years may have influenced lawsuit filings, payouts, insurance rates, and officer retention in New Mexico and Colorado, and in Utah and Washington. We would also expect other local differences (changes in local economies or in state insurance regulation, for example) to have an impact on some of the data we examine here. It also may well be that the full expression of reform statutes' effects will not appear until litigants have become more knowledgeable about the statutes and courts have interpreted their provisions. It may take years before we fully understand the impact of the reforms on the nature of claiming, the retention of employees, the price of insurance, and perhaps most importantly the deterrent effect of the new law.

¹⁸ For further discussion of these findings, see *infra* Part III.D.

¹⁹ As we discuss further below, similar findings have been reported in the context of medical malpractice reforms. See generally Bernard S. Black, David A. Hyman, Myungho Paik, William M. Sage, & Charles Silver, *MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS & WHY TORT REFORM HASN'T HELPED* (2021) (summarizing data regarding impact of medical malpractice reform and concluding that higher insurance premiums are not related to the medical malpractice legal regime)

²⁰ For further discussion of these findings, see *infra* Part III.E.

²¹ These results are broadly consistent with studies examining the impact of tort reform measures on physicians' mobility. See Black, et al., *supra* note 19, at 11 (summarizing data finding no relationship between physician supply and malpractice reforms); Jonathan Klick, Thomas Stratmann, *Medical Malpractice Reform and Physicians in High-Risk Specialties*, 36 J. LEGAL STUD. S121, S122 (2007) (reporting that only one tort reform measure, caps on noneconomic damages, has a statistically significant impact on physicians' mobility and only among doctors in high-risk specialties); David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. LEGAL STUD. S143 (2007) (reporting that noneconomic damages cap do not affect physician supply for the "average resident" but that such caps are correlated with greater supply of "frontier rural specialist[s]").

²² See *infra* Part I.C (describing the Colorado and New Mexico statutes).

Yet the data available at this early stage indicate that the catastrophic predictions of those opposing reform of qualified immunity have not come to pass. We find no evidence that eliminating the protections of qualified immunity over the two to three years of post-reform experience revealed in public records caused lawsuit rates to spike, officers to be financially ruined, insurance rates and municipal budgets to skyrocket, or police forces to be decimated. Some critics of reform might worry that this stability reflected a change in police practices, as officers grew fearful of liability and moderated their efforts to enforce the law. But we looked for an overall reduction in incidence of arrest and use of force and the admittedly limited available evidence shows no significant post-reform change in the intensity of policing.

Some may take from these findings that qualified immunity and other accountability reforms are inconsequential—we discourage this conclusion. We expect the constitutional torts ecosystem is adjusting and will continue to adjust dynamically to changes in liability rules, both in terms of the behavior of police departments and their officers and in terms of the claiming behavior of victims of police-involved violence. Relative stability may reflect a combination of behavioral changes, including increased care on the part of officers (thereby reducing the incidence of constitutional violations) and increased claiming by those with claims that qualified immunity might have previously foreclosed. From this perspective, the payouts and filings might remain relatively stable but the median claim may have changed, from one that at the time of filing had support in clear law to one that appears favorable on balance despite the absence of crystal clear precedents.²³

We therefore encourage state legislatures to think creatively and expansively about their powers and responsibilities to curb government abuses. Colorado and New Mexico’s elimination of qualified immunity and adoption of other policing reforms illustrates the critical role states can play in strengthening civil rights enforcement, one they can achieve without federal intervention.²⁴ In the current moment, states’ powers to curb federal officers’ abuses is critically important to explore.²⁵ We previously laid out what we termed a “new federalist” approach to civil rights enforcement that focuses on the reform opportunities available to state and local actors.²⁶ We remain confident that such measures can shift civil rights ecosystems, although our findings make clear that such changes may not produce immediate changes in the incidence and success of litigation. Even a dramatic legal change like eliminating qualified immunity may have marginal

²³ Relative stability might mask a change in the nature of the median claim, from one under the old regime that at the time of filing had support in clear law to one that appears favorable on balance despite the absence of crystal-clear precedents. If so, then the reforms will have achieved their goal in reducing unjustified violence and better assuring redress for police conduct ultimately adjudged unlawful. There is mixed evidence on the question of whether the quality of the median claim changed in somewhat similarly dynamic ways when the Supreme Court tightened the pleading standard. Compare William H.J. Hubbard, *The Empirical Effects of Twombly and Iqbal*, 14 J. Emp. Leg. Stud. 474 (2017); with Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, Va. L. Rev. (2015).

²⁴ See generally Alexander Reinert, Joanna C. Schwartz, James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737 (2021).

²⁵ See State Democracy Research Initiative, Explaining State Checks Against Federal Overreach, University of Wisconsin Law School (Aug. 8, 2025), <https://statedemocracy.law.wisc.edu/research-explainers/2025/exploring-state-checks-against-federal-overreach/>.

²⁶ See *id.*

systemic effects, at least at the outset, thereby giving state legislatures valuable time to consider the impact of initial reforms as they contemplate more expansive changes.

We discuss our study and its findings in four parts. In Part I, we situate our study in a broader context. To do so, we first offer an overview of available federal constitutional tort remedies and summarize the debates over the likely impact of instituting reforms to one key doctrine—the qualified immunity defense. Then, we describe recent debates about qualified immunity that accompanied the legislation in Colorado and New Mexico. In Part II, we describe the methodology of our study. We report our findings in Part III. Finally, in Part IV, we discuss the implications of our findings. A brief conclusion urges policy-makers to reflect on both the data we report and the elements of a system of adjudication that best achieves the optimal balance of deterrence and assured redress.

I. UNDERSTANDING THE CONSTITUTIONAL TORT ECOSYSTEM

To better situate the Colorado and New Mexico statutes at the center of this study, this part begins with an overview of the ecosystem of federal constitutional tort litigation,²⁷ the well-known criticisms of the qualified immunity defense, and the vigorous renewal of that critique beginning in the summer of 2020. After sketching the background, this Part describes the reform measures in Colorado and New Mexico.

A. *The Rise and Fall of Federal Constitutional Tort Remedies*

The individual’s right to sue government officials for constitutional violations has waxed and waned over the 250 years of the nation’s existence.²⁸ Over that period, expansions of the right to sue have been justified by the perceived need to have a federal remedy for state officers’ misconduct.²⁹ Subsequent limitations on that right have been motivated by a consistent set of

²⁷ On the importance of understanding “civil rights ecosystems,” see Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020); Joanna C. Schwartz & Fred O. Smith, Jr., *Civil Rights Deserts*, 139 HARV. L. REV. __ (forthcoming 2026).

²⁸ Some early cases addressed state invasions of federal interests. *See, e.g.*, *United States v. Peters*, 9 U.S. 5 Cranch 115 115 (1809) (limiting the power of state legislatures to control the judgments of federal courts); *Osborne v. Bank of United States*, 22 U.S. 738 (1824) (invalidating state tax and ordering return of assets taken from federal bank). After Reconstruction and the incorporation of fundamental rights against the States via the Fourteenth Amendment, constitutional accountability for state actors became a more pressing concern. On the development of a new model of litigation to accommodate these changes, see James E. Pfander & Samy Abdelsalam, *Pulp Fiction? A Reappraisal of Ex parte Young* (draft available on SSRN) (forthcoming) (explaining the development of the *Ex parte Young* model of affirmative constitutional litigation to enforce duties imposed by the Fourteenth Amendment). That switch led in turn to the eventual recognition of forms of qualified immunity for high government officials alleged to have committed constitutional violations. *See* James E. Pfander & Alexander A. Reinert, *Exploring the Limits of Qualified Immunity under Harlow’s Discretionary Function Test*, 139 HARV. L. REV. __ (2026).

²⁹ The impulse behind the Reconstruction-era adoption of the precursor to section 1983 and other federal statutes implementing the Fourteenth Amendment lay in distrust of the adequacy of state institutions of law enforcement. *See, e.g.*, Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (tracing the way federal law has responded over time to perceived problems with state-level enforcement).

concerns about the dangers of an influx of frivolous lawsuits that overwhelm the courts, bankrupt officers and municipalities, and imperil government operations.³⁰

In 1871, as part of post-Civil War Reconstruction, Congress enacted a raft of reforms in response to reports of Black Southerners being tortured and killed by white supremacist groups. Most relevant to this discussion, the Civil Rights Act of 1871 included the precursor to what is now known as 42 U.S.C. § 1983, creating the right to sue state and local actors in federal court for violations of the United States Constitution.³¹ The legislation was supported by congresspeople who believed that this right to sue was necessary to “protect and defend and give remedies for [constitutional] wrongs to all the people.”³² But opponents of the legislation feared that it gave too much power to the federal courts and allowed plaintiffs to bring claims for constitutional violations that “may be of the slightest conceivable character.”³³ Soon after passage of Section 1983, the Supreme Court issued a series of decisions that undermined the effectiveness of the cause of

³⁰ The Supreme Court and lower courts have regularly invoked these concerns when limiting the right to sue. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 395-96 (1987) (“Many [§ 1983 suits] are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial.”); *Hudson v. Palmer*, 468 U.S. 517, 554 n.30 (1984) (Stevens, J., dissenting) (“I cannot help but think that the Court's holding is influenced by an unstated fear that if it recognizes that prisoners have any Fourth Amendment protection, this will lead to a flood of frivolous lawsuits”); *Smith v. Wade*, 461 U.S. 30, 91 (1983) (Rehnquist, J., dissenting) (describing “staggering effect of § 1983 claims . . . [and the] torrent of frivolous claims under that section. . .”). Commentators have also regularly observed this tendency by the courts. See, e.g., Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 2 (1985) (“There appears to be a growing belief that § 1983 actions are likely to be frivolous complaints by litigants who seek to use the statute to convert or bootstrap garden-variety state-law torts into federal cases.”); Theodore Eisenberg & Steven Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 645 (1987) (discussing perception of flood of § 1983 cases); Jose Roberto Juarez, Jr., *The Supreme Court As the Cheshire Cat: Escaping the Section 1983 Wonderland*, 25 ST. MARY'S L.J. 1, 53-54 (1993) (discussing perception of burden of § 1983 claims); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 657 (1989) (discussing lower court experimentation with heightened fact pleading to address perception that many constitutional torts are frivolous); James J. Park, *The Constitutional Tort Action As Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 397 (2003) (“A substantial portion of the legal community views constitutional tort actions as an unnecessary burden.”). These concerns about mountainous frivolous litigation are not limited to civil rights suits; instead, these concerns have inspired generally-applicable judicial limitations on the right to sue, including pleading and summary judgment standards. See, e.g., Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1209–10 (2014) (discussing the Court's modification of pleading and summary judgment doctrine).

³¹ An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, 17 Stat. 13 (1871). Arguably, the creation of federal jurisdiction was at least as important as the creation of the right to sue itself, given the hostility of Southern state courts to enforcing rights for newly emancipated Black people.

³² Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (remarks of Rep. Shellabarger).

³³ Cong. Globe, 42d Cong., 1st Sess., App. 216 (1871) (remarks of Sen. Thurman).

action.³⁴ As a result, over the first ninety years of its existence, Section 1983 was invoked by plaintiffs only a few dozen times.³⁵

In 1961, the Supreme Court's decision in *Monroe v. Pape* revitalized Section 1983; in that decision, the Court held that people could sue local government officers for violating their constitutional rights even if the plaintiff had an effective remedy against the officers for violations of state law.³⁶ But, in the years that followed, courts and commentators expressed concerns that *Monroe* had opened the courthouse doors too wide and that frivolous suits against government officials would overwhelm the courts and upend local government operations.³⁷

In response to these fears, the Supreme Court imposed a series of limits on the scope of official liability under Section 1983,³⁸ the best known of which—qualified immunity—was first announced in 1967. In that decision, *Pierson v. Ray*, the Court described qualified immunity as a “good faith” defense to liability under §1983.³⁹ Yet the Court has dramatically strengthened qualified immunity over the ensuing years. In 1982, the Court ruled that qualified immunity should be an objective standard—whether the officer violated “clearly established law.”⁴⁰ In practice, this standard now means that a plaintiff must show a prior controlling court decision with nearly identical facts to clearly establish the law.⁴¹ This standard implements the Court's intuition that qualified immunity should protect “all but the plainly incompetent or those who knowingly violate

³⁴ The Supreme Court limited the impact of Section 1983 by limiting the reach of the Fourteenth Amendment, holding that it only applied to state action, not private action, and that the privileges and immunities clause conferred almost no substantive rights that could be enforced. *Hodges v. United States*, 203 U.S. 1, 14 (1906); *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875); *The Slaughter-House Cases*, 16 Wall. 36, 74, 79 (U.S. 1873).

³⁵ See Blackmun, *supra* note 30, at 19 (stating that prior to *Monroe*, the number of § 1983 claims to reach the Court “can almost be counted on one hand”); Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951) (reporting that for first 50 years after enactment of Section 1983, only 21 cases were decided under Section 1983).

³⁶ 365 U.S. 167 (1961).

³⁷ For descriptions of such rising concerns during this period, see Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982); JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 10-13 (2023); Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

³⁸ See *infra* note 51 and accompanying text (describing some other legal barriers).

³⁹ *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

⁴⁰ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁴¹ See, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013) (explaining that qualified immunity is “as if the one-bite rule for bad dogs started over with every change in weather conditions.”). There is an exception to the need to show prior factually similar case law, where the violation of right is so obvious that no reasonable officer could have believed it was permissible. See *Taylor v. Riojas*, 592 U.S. 7 (2020); *Hope v. Pelzer*, 536 U. S. 730 (2002). For discussions of open questions about the narrowness of that exception, see Katherine Mims Crocker, *The Supreme Court's Retentive Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE 1 (2021); Jennifer E. Laurin, *Reading Taylor's Tea Leaves: The Future of Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 241 (2022).

the law.”⁴² The Court now permits lower courts to confer qualified immunity without first specifying the contours of the right in question—thereby leaving an unclear body of law in place to frustrate future litigants.⁴³ And the Court has allowed defendants denied qualified immunity immediately to appeal that denial, adding months or years, and significant complexity, to civil rights litigation.⁴⁴

Each of the Supreme Court decisions strengthening qualified immunity purports to balance the right of individuals to a remedy when their rights have been violated against the perceived need to shield officers from various burdens of suit including financial ruin and the distractions of discovery and trial.⁴⁵ Indeed, the Court views the qualified immunity defense as important not just to officers but to “society as a whole,” suggesting that without the defense officers would not vigorously enforce the law or accept government employment.⁴⁶ Academic commentary has long engaged with these policy considerations. Some scholars echo the Court’s contention that qualified immunity prevents a flood of frivolous litigation, limits the cost of civil rights litigation, and

⁴² *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

⁴³ *Pearson v. Callahan*, 555 U.S. 223 (2009). For empirical assessments of the “sequencing” of the qualified immunity decision, see Paul W. Hughes, *Not A Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401 (2009); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015); Colin Rolfs, *Qualified Immunity After Pearson v. Callahan*, 59 UCLA L. REV. 468, 489 (2011); Ted Sampsell-Jones & Jenna Yauch, *Measuring Pearson in the Circuits*, 80 FORDHAM L. REV. 623 (2011); Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 525 (2010); Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 956-57 (2015).

⁴⁴ See *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). For a discussion of the impact of interlocutory appeals on the arc of Section 1983 cases, see, for example, Bryan Lammon, *Sanctioning Qualified-Immunity Appeals*, 2021 U. ILL. L. REV. ONLINE 130, 131 (2021); Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 MO. L. REV. 1137 (2022); Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. 959 (2021).

⁴⁵ See *Pierson v. Ray*, 386 U.S. at 555; *Pierson v. Callahan*, 555 U.S. 223, 231 (2009).

⁴⁶ *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

ensures that qualified candidates will serve in law enforcement;⁴⁷ others question the historical,⁴⁸ empirical,⁴⁹ and normative justifications⁵⁰ for the defense.

All too often, debates about qualified immunity's ability to balance these competing interests occur in a vacuum, without consideration of many other legal and non-legal factors that make up the civil rights ecosystem. For example, at the same time that the Supreme Court was creating and strengthening qualified immunity, it was erecting other barriers to relief in civil rights cases, including stringent standards for proving constitutional violations and municipal liability, attaining attorneys' fees, and meeting plaintiffs' burdens at pleading and summary judgment.⁵¹ The strength of these legal barriers can be further amplified by non-legal inputs. For example, research has shown that courts' application of qualified immunity doctrine varies by circuit and political party

⁴⁷ See, e.g., Richard H. Fallon, *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 975 (2019) (predicting that eliminating qualified immunity could result in "frivolous and distracting litigation" and impose "unanticipated financial drains on the public fisc [that] could upset budgetary planning and withdraw resources from other needful programs"); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A response to William Baude*, 9 CALIF. L. REV. ONLINE 41, 41 (2018) (eliminating qualified immunity would subject "police officers and other officials who deprive citizens of their constitutional rights...to much more liability than the current law permits"); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1881 (2018) ("Qualified immunity's core effectiveness might well not be in district courts formally utilizing the defense to dispose of Section 1983 lawsuits. Instead, its main influence could be in discouraging people to file section 1983 suits at all...."); Michael L. Wells, *Qualified Immunity After Ziglar v. Abbasi: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 391 (2018) ("If officers were liable for every constitutional violation, they might hesitate before taking a step that produces a public benefit because an error would lead to personal liability.").

⁴⁸ See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); 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); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023).

⁴⁹ See, e.g., Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 102 (1997) (noting that "[w]hile the Court has consistently hypothesized that significant social costs are engendered by §1983 and *Bivens* litigation against individual government officials, it has never relied on empirical data concerning the impact of constitutional tort litigation on officials' actual behavior."). For empirical studies of qualified immunity see, for example, sources cited *supra* notes 43-44; sources cited *infra* note 52; see also Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011) (examining the impact of qualified immunity on case selection decisions); Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010) (finding that qualified immunity is the reason few *Bivens* claims are dismissed); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (finding that qualified immunity is the reason few §1983 police misconduct claims are dismissed).

⁵⁰ See, e.g., Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018).

⁵¹ See SCHWARTZ, *supra* note 37.

of the appointing president.⁵² And in some jurisdictions, such factors as unsympathetic judges and juries and a lack of plaintiffs' attorneys contribute to government practices that make it difficult for Section 1983 claimants to prevail.⁵³

Other institutional factors shape the behavior of law enforcement agencies and their employees but play little role in the Court's modern qualified immunity calculus. For starters, scholars have repeatedly documented that, under an almost invariable practice of officer indemnity, municipalities almost always pay the full cost of liability for a civil rights violation and hold their officers harmless.⁵⁴ Accepting municipal responsibility for the cost of constitutional torts, scholars nonetheless debate the impact of such liability on the way municipalities hire, train, and supervise employees. Some argue that the municipalities' ability to shift the cost of paying judgments to the taxpayers may dampen their tendency to respond to the financial signal of tort liability; others disagree.⁵⁵

Apart from the incidence of liability, the presence of liability insurance can play an important role in the ecosystem of constitutional tort litigation, both by compensating those injured by police misconduct and protecting agencies from significant liability.⁵⁶ Whatever the insurance model, the municipality's loss caused by a finding of liability for a constitutional tort sends a monetary signal to risk managers, encouraging them to consider ways to reduce the financial consequences of police misconduct. Such risk management occurs primarily within the bureaucracy of larger, self-insured municipalities. But nationwide, most departments operate within risk pools or purchase private insurance. For them, risk management may occur outside the government bureaucracy;

⁵² See Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55 (2016); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015); Alexander A. Reinert, *Asymmetric Review of Qualified Immunity*, 20 J. EMPIRICAL L. STUD. 1 (2023).

⁵³ See Schwartz, *supra* note 27; Schwartz & Smith, *supra* note 27.

⁵⁴ See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U.L.REV. 885 (2014) (reporting that officers virtually never contribute to the satisfaction of settlements and judgments entered against them). The incidence of liability thus typically falls on the law enforcement agency itself or—more often—the local government within which it operates. See Joanna C. Schwartz, *How Government's Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) (describing local governments' liability budgeting and payment practices).

⁵⁵ Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000), (making the taxpayer point); cf. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (defending the informational and symbolic values of constitutional tort liability).

⁵⁶ See Schwartz, *supra* note 54, at 1188-92; John Rappaport, *How Private Insurers Regulate the Police*, 130 HARV. L. REV. 1540 (2017) (explaining that municipal liability insurers influence police conduct through underwriting, premium, policy-cancellation, and risk assessment decisions). The fact that governments and agencies may secure insurance coverage that lessens the immediate threat of liability introduces the problem of moral hazard: that is, the possibility that insurance coverage may encourage greater risk taking. See Rappaport, *supra*, at 1543-44 (addressing moral hazard). In our judgment, police officers on the street (virtually shielded from liability) pose a more serious moral hazard problem than the liability-confronting agencies and governments for whom they work, yet such officers may face discipline for failure to comply with workplace policies. Premium increases and other budgetary consequences can be understood as moderating moral hazard at the local government level.

indeed, scholars report that private insurers and risk pool managers deploy a variety of “carrots and sticks” to encourage greater care on the part of police departments.⁵⁷ Such interventions include education and training, identification of high-risk police activities, and even recommended personnel actions to address misconduct by line officers and managers.⁵⁸

Rather than an anomaly, then, premium increases that result from careful underwriting and risk assessment decisions can play a productive role in encouraging greater care in policing and in reducing the incidence of constitutional torts. To the extent that arguments for the reform of the constitutional tort liability system rest on the twin goals of assuring more complete compensation for victims of past harm and more effective deterrence of future police misconduct, the price signal embedded in a premium increase may perform a salutary function. It may do so, moreover, without imposing dramatic new burdens on cramped municipal budgets. Reports indicate that the overall cost of constitutional tort liability makes up less than one percent of city budgets; premiums to insure against such losses represent a correspondingly smaller share of those budgets.⁵⁹

B. Recent Qualified Immunity Debates

High-profile acts of police violence, often directed against Black men, periodically provoke nationwide conversations about race, policing, and government accountability and calls for reform. Qualified immunity entered those conversations in earnest in 2017, when Supreme Court Justice Clarence Thomas criticized the doctrine and recommended that the Court reconsider it.⁶⁰ Advocacy groups across the ideological spectrum—including the ACLU, the Legal Defense Fund, the Cato Institute, and the Institute for Justice—took Justice Thomas’s comments as an invitation to file briefs asking the Supreme Court to end qualified immunity.⁶¹

The murder of George Floyd crystallized concerns about police violence and attracted renewed attention to qualified immunity. Calls by protestors to end qualified immunity were echoed by bills introduced in the House and Senate to end or scale back the doctrine.⁶² Organizations including

⁵⁷ Rappaport, *supra* note 56, at 1548.

⁵⁸ *Id.* at 1573-92.

⁵⁹ Schwartz, *How Governments Pay*, *supra* note 54, at 1164-65 (finding that constitutional tort liability payouts comprise less than one percent of local government budgets).

⁶⁰ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment).

⁶¹ *See, e.g.*, Brief for Institute for Justice, Cato Institute, American Civil Liberties Union & American Civil Liberties Union of Colorado as Amici Curiae Supporting Appellee 16–21, *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2019) (No. 19-1015), 2019 WL 2024705 (discussing qualified immunity’s failings); Brief for Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public’s Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Allah v. Milling*, 139 S. Ct. 49 (2018) (No. 17-8654), 2018 WL 3388317 (arguing that Court should revisit qualified immunity doctrine); ., Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1890-91 (2018) (describing the Cato Institute’s “assault” on qualified immunity); Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html> [https://perma.cc/9CQM-VGP4] (detailing petitions).

⁶² *See* Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020).

the NAACP Legal Defense Fund, the MacArthur Justice Foundation, the Institute for Justice, and the Cato Institute supplemented their reform-minded Supreme Court advocacy with proposals for legislative reform of qualified immunity.⁶³

Advocates for qualified immunity reform in the public square relied primarily on three types of arguments. First, they argued that legal history affords little justification for qualified immunity.⁶⁴ Second, they maintained that qualified immunity undermines police accountability, echoing concerns that Justice Sotomayor had repeatedly raised about the doctrine.⁶⁵ Third, advocates pointed to studies showing that qualified immunity contributes little to the goal of insulating police and other government officials from personal liability. Research shows that, under prevailing practices of indemnification, police officers and other government officials rarely if ever contribute personal resources to the resolution of lawsuits brought against them.⁶⁶ In other words, even where the court rejects a qualified immunity defense, and the jury holds the officer personally liable, the government body that employed the defendant typically pays the judgment. Moreover, when qualified immunity is raised, even unsuccessfully, the availability of interlocutory appeals and the complexity of determining entitlement to immunity adds to the costs of litigating

⁶³ See, e.g., Cato Institute, End Qualified Immunity, available at <https://www.cato.org/qualified-immunity>; Institute for Justice, Project on Immunity and Accountability, available at <https://ij.org/issues/project-on-immunity-and-accountability/>; Legal Defense Fund, Qualified Immunity Working Group, available at <https://www.naacpldf.org/qualified-immunity/qi-work/>; MacArthur Justice Project, The Invisible Shield: How Qualified Immunity Was Created and Nearly Destroyed the Ability to Sue Police Officers in America, available at <https://www.macarthurjustice.org/the-invisible-shield-how-qualified-immunity-was-created-and-nearly-destroyed-the-ability-to-sue-police-officers-in-america-pt-i/>.

⁶⁴ For samples of this historical critique, see, for example, Jay Schweikert, Qualified Immunity: A Legal, Practical, and Moral Failure, Cato Institute (Sept. 14, 2020) (arguing that “qualified immunity lacks any valid legal foundation.”) For scholarship supportive of the lack of legal or historical justification for qualified immunity, see sources *supra* note 48.

⁶⁵ See, e.g., Legal Defense Fund, LDF Statement on Today’s House Vote Advancing the George Floyd Justice in Policing Act of 2020 (June 25, 2020) (quoting LDF President Sherrilyn Ifill as saying: “In supporting this legislation, members of Congress are sending a strong and decisive message that systemic reforms—rooted in transparency and accountability—are the only way to remedy the racist, violent policing that has plagued this country for decades.”); Letter to Senators Charles Schumer and Mitch McConnell, (May 26, 2021), available at <https://www.theusconstitution.org/wp-content/uploads/2021/05/Updated-CAC-Letter-End-Qualified-Immunity-5-26.pdf> (letter from 86 organizations advocating for end of qualified immunity) (arguing that “[t]he judge-made qualified immunity doctrine leaves a gaping hole in federal civil rights laws,...instead of a system of remedies for misconduct, we have a system that breeds impunity.”). For similar concerns raised by Justice Sonia Sotomayor, see, for example, *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (expressing concern that qualified immunity “renders the protections” of the Constitution “hollow”). For scholarship that raises similar objections to qualified immunity doctrine, see sources *supra* note 50.

⁶⁶ See, e.g., John Guzman, Debunking Myths About Qualified Immunity and Examining its Dangerous Realities, Legal Defense Fund, available at <https://www.naacpldf.org/qualified-immunity-myths-and-dangers/> (observing that “officers will not face bankruptcy if qualified immunity is abolished [because]...officers are virtually always indemnified”); Schweikert, *supra* note 64 (noting the ubiquity of indemnification). For scholarship supportive of this critique, see Schwartz, *Police Indemnification*, *supra* note 54.

these suits.⁶⁷ That complexity often does not pay off. Research shows that a very small percentage of cases are dismissed on qualified immunity grounds before discovery or trial, in large part because there are many other barriers to prevailing in constitutional tort cases, undermining the notion that qualified immunity is needed to shield officers from burdens of insubstantial litigation.⁶⁸ And the adjudication of qualified immunity often does not lead to any elaboration of constitutional law because courts can dismiss on qualified immunity grounds without ever deciding whether a plaintiff's rights have been violated.⁶⁹

Calls to end qualified immunity were matched in intensity by defenders of the doctrine, both in reform-minded states and on Capitol Hill. The George Floyd Justice in Policing Act, first introduced into Congress in 2020, contained a provision eliminating qualified immunity among many other provisions.⁷⁰ According to Republican Senator Tim Scott, that change was the most controversial element of the bill—a “poison pill.”⁷¹ Law enforcement officials vigorously objected to the Act's elimination of qualified immunity. The International Association of Chiefs of Police issued a statement urging states and Congress not to enact qualified immunity reform, arguing that the doctrine “allows police officers to respond to incidents without pause, make split-second decisions, and rely on the current state of the law in making those decisions” and that the elimination of qualified immunity “would have a profoundly chilling effect on police officers and limit their ability and willingness to respond to critical incidents without hesitation.”⁷² Indiana Congressman Jim Banks introduced a bill, the “Qualified Immunity Act,” that would have placed

⁶⁷ See, e.g., Jason Tiezzi, Robert McNamara & Elyse Smith Pohl, *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, Institute for Justice at 7 (Feb. 2024). For scholarly observations that qualified immunity may increase the costs and burdens of litigation, see Chen, *supra* note 49, at 100 (hypothesizing that “the pretrial litigation costs caused by the invoking of the qualified immunity defense may cancel out the trial costs saved by that defense”); Schwartz, *supra* note 49, at 60-62 (finding evidence that qualified immunity motion practice and interlocutory appeals may increase the average time and cost needed to resolve civil rights cases).

⁶⁸ See, e.g., Kyle Hawkins, Clark Neily, Fred Smith Jr. & Jay Schweikert, *Qualified Immunity: A Shield Too Big?*, 104 *Judicature* (2020-21) (debating the implications of qualified immunity's low dismissal rate. For scholarship examining this phenomenon, see Reinert, *Measuring the Success*, *supra* note 49; Schwartz, *supra* note 49).

⁶⁹ See, e.g., Blum, *supra* note 61; Anne E. Ralph, *Qualified Immunity, Legal Narrative, and the Denial of Knowledge*, 65 B.C. L. REV. 1317, 1361-76 (2024); Reinert, et al., *supra* note 24, at 788-801; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1815-16 (2018).

⁷⁰ George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. § 102 (2020).

⁷¹ See Sen. Tim Scott says he's not sure there will ever be a law establishing a use of force standard, CNN (June 14, 2020), available at <https://www.cnn.com/2020/06/14/politics/tim-scott-use-of-force-standard-qualified-immunity>.

⁷² See Letter from IACP to Senators Charles E. Schumer, Mitch McConnell, Richard J. Durbin, and Charles E. Grassley (March 4, 2021), available at <https://www.theiacp.org/sites/default/files/Letter%20to%20Senate%20from%20IACP%20on%20Police%20Reform.pdf>; c.f. Jay Schweikert, *Rebutting the IACP's Spurious Defense of Qualified Immunity*, Cato (June 11, 2020). See also, e.g., Rob Pride, *Police Recruitment Was Already Tough. Attacks on Qualified Immunity Make Matters Worse*, USA TODAY (Nov. 26, 2021) (pro-qualified immunity editorial by National Fraternal Order of Police Trustees Chairman).

the doctrine on a firm statutory foundation.⁷³ As Rep. Banks explained in a press release: “Ending qualified immunity is another way of saying abolish the police....I’ve heard from many that work in law enforcement that if we strip them of qualified immunity, they’d be forced to quit, because they couldn’t afford to serve any longer.”⁷⁴ Ultimately, after more than a year of negotiation, the George Floyd Justice in Policing Act died in committee; several reintroductions of the Act have similarly stalled out.⁷⁵

The same fears about the dangers of eliminating qualified immunity played out in state legislative hearings and in the opinion pages of local newspapers. When Washington State considered a bill that would create a state law right to sue without qualified immunity, opponents expressed concern that frivolous and costly lawsuits would flood the courts. For example, the Association of Washington Cities (AWC) opposed the legislation “because of the drastic increase in liability it would bring down on cities.” As the AWC explained:

The bill will likely incentivize people to file a claim regardless of the merits of the case because of the high likelihood of receiving a monetary settlement. The rise in cases against cities and officers will increase the amount of settlements cities would pay out, and increase the risk of massive attorney fees for cases lost at trial. The increased liability will also

⁷³ Qualified Immunity Act of 2020, H.R. 7951, 116th Cong. (2020).

⁷⁴ Rep. Banks Introduces Qualified Immunity Act, U.S. CONGRESSMAN JIM BANKS (Aug. 7, 2020), <https://perma.cc/WF9R-WSVX>.

⁷⁵ The same types of arguments in support of ending qualified immunity were reiterated when the bills were reintroduced. See, e.g. Pressley, Markey Announce Legislation to End Qualified Immunity (April 19, 2023), available at <https://pressley.house.gov/2023/04/19/pressley-markey-announce-legislation-to-end-qualified-immunity/> (quoting Congresswoman Ayanna Pressley as saying: “Police brutality is a crisis plaguing Black and brown communities, and a crisis that will continue to go unchecked until we end the dangerous, unjust, and court-invented doctrine of qualified immunity.”); Booker, Durbin, Warnock, Butler, Markey, Hirono, Padilla, Duckworth, Warren Announce Reintroduction of George Floyd Justice in Policing Act (Aug. 2, 2024), available at <https://www.booker.senate.gov/news/press/booker-durbin-warnock-butler-markey-hirono-padilla-duckworth-warren-announce-reintroduction-of-george-floyd-justice-in-policing-act> (quoting Senator Cory Booker as saying: “We must advance legislation that holds law enforcement accountable for misconduct and ensures these tragedies never happen again.”).

The same arguments against qualified immunity reform were also revitalized at each reintroduction of the legislation. See, e.g., Examining Civil Rights Reform, Part I: Qualified Immunity, HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, ONE HUNDRED SEVENTEENTH CONGRESS, SECOND SESSION (Mar. 31, 2022) (Testimony of William Johnson, Executive Director and General Counsel, National Association of Police Organizations), available at <https://docs.house.gov/meetings/JU/JU10/20220331/114567/HHRG-117-JU10-Wstate-JohnsonW-20220331.pdf>. (asserting that if Congress eliminated qualified immunity, it “would greatly increase the difficulty agencies are having in recruiting and retaining qualified officers” and “[m]orale would also plummet, given that individual officers would now be *personally* liable for the violation of a ‘right’ that did not exist and was not knowable at the time of the incident.”).

contribute to the increased cost of liability insurance, which is quickly becoming a major expense to many cities.⁷⁶

Similar concerns with increased litigation, and an attendant rise in government payouts and insurance premiums, were repeated in state legislative hearings by law enforcement officials, union representatives, and local government attorneys.

Opponents of qualified immunity reform also expressed concern that these bills would chill decisive action by officers and discourage people from working for the government. In Louisiana, these types of fears—championed by the President of Louisiana’s Fraternal Order of Police—helped defeat a bill to eliminate qualified immunity that had enjoyed bipartisan support.⁷⁷ As the Fraternal Order of Police argued in an op-ed published in *USA Today*: “The attacks on qualified immunity have caused instability throughout the law enforcement profession....The possibility to face complete financial ruin even when reasonably believed to have acted under the color of law will not draw the much-needed young people to pursue a career in law enforcement.”⁷⁸

In most states, concerns raised about the dangers of eliminating qualified immunity won out over arguments in favor of legislative reform and the bills died in committee or were voted down.⁷⁹ There were, though, notable exceptions—Colorado, New Mexico, and New York City. We focus here on the statutes passed in Colorado and New Mexico.

C. Colorado and New Mexico Statutes

Both Colorado and New Mexico passed legislation creating a right to sue when police officers violate the state constitution and both foreclosed the assertion of a qualified immunity defense.⁸⁰ Both statutes allowed prevailing plaintiffs to collect their attorney’s fees, in addition to any award of damages.⁸¹ Yet the laws differ in important respects, including the way they define which party should serve as the proper defendant and what forms of official indemnity to make available to officers. Colorado specifies that claims be brought against the individual officers, whereas New Mexico law provides for suit against local governments.⁸² As for indemnity, Colorado jurisdictions

⁷⁶ Candice Bock & Matt Doumit, *Bill Eliminates Qualified Immunity for Police and Increases Liability for Cities* (Jan. 20, 2023), at <https://wacities.org/advocacy/News/advocacy-news/2023/01/20/bill-eliminates-qualified-immunity-for-police-and-increases-liability-for-cities>.

⁷⁷ Wesley Muller, *La. Republicans Block Qualified Immunity Bill, Setting Aside Months of Bipartisan Work*, LOUISIANA ILLUMINATOR (June 1, 2021) (“Imagine the rank and file law enforcement officer that’s in a radio car right now that’s responding to a call. If they hear that qualified immunity has been taken away from them or immunity has been taken away from them in the state of Louisiana, that’s definitely going to affect the way that they respond.”).

⁷⁸ Mark McDonald, *Police Recruitment Was Already Tough. Attacks on Qualified Immunity Make Matters Worse*, USA TODAY (Nov. 26, 2021).

⁷⁹ See Kindy, *supra* note 5 (describing states’ failures to pass qualified immunity reforms).

⁸⁰ See Colo. Rev. Stat. Ann. § 13-21-131(1), (2)(b); N.M. Stat. Ann. §§ 41-4A-3(B) & 41-4A-4

⁸¹ See Colo. Rev. Stat. Ann. § 13-21-131(3); N.M. Stat. Ann. § 41-4A-5.

⁸² Compare Colo. Rev. Stat. Ann. § 13-21-131(1) (creating cause of action against a “peace officer”) with N.M. Stat. Ann. § 41-4A-3(C) (requiring that claims under Act be brought “exclusively against a public body”).

are required to indemnify all officers except those convicted of crimes for the conduct alleged in the lawsuit.⁸³ Colorado also allows local governments to require officers to contribute up to \$25,000 or 5% of a settlement or judgment if the officers are found to have acted in bad faith.⁸⁴ New Mexico provides more simply that governments must indemnify officers for all conduct within the course and scope of their employment.⁸⁵

The processes that led to these bills' passage were also distinct. The Colorado bill, SB-217, was enacted and signed into law in June 2020, after minimal debate.⁸⁶ The New Mexico Civil Rights Act (NMCRA) had a much longer gestation period. The state first appointed a commission to study a range of police reforms; the commission published a 113-page report in November 2020, recommending passage of the statute and supporting their recommendations with evidence, including a study of almost 1,700 civil rights lawsuits that had been filed in New Mexico.⁸⁷ The report also included a lengthy dissent by committee members opposed to passage of the legislation.⁸⁸ Those in opposition argued that the legislation "will dry up the insurance market, reducing the amount of money readily available to pay claims, requiring local governments to self-insure unsustainable amounts of risk, and creating the near certainty that property taxes will need to be imposed to meet uninsured judgments."⁸⁹ The dissenters also expressed concern that the bill would "increase the number and cost of claims, creating the real risk of material, adverse, unintended consequences."⁹⁰

D. On the Need for a Study of Experience under the New Laws

Since the passage of the bills in Colorado and New Mexico, critics have continued to express opposition to the legislation, arguing that it has increased case filings, lowered officer morale, and raised the cost of litigation. But the need for better data seems obvious from a cursory review of these criticisms. In 2021, the Fraternal Order of Police reported that officers were leaving Colorado

⁸³ See Colo. Rev. Stat. Ann. § 13-21-131(4)(a).

⁸⁴ See *id.*

⁸⁵ See N.M. Stat. Ann. § 41-4A-8. Colorado and New Mexico enacted several additional police accountability measures at or near the same time. For example, the Colorado statute provides that any police officer who fails to intervene to prevent the use of unlawful force by another officer can be charged with a misdemeanor; expands the bases for officer decertification; limits allowable force during protests; changes the use of force standard in the state; prohibits the use of chokeholds; requires officers use body cameras; and requires jurisdictions to report all uses of force, officer resignations, unannounced entries, and contacts with civilians. See Colo. SB-217. A year before passing the New Mexico Civil Rights Act, the state passed legislation requiring officers to wear body cameras, and allowing decertification of any officer found to have used unlawful force or who failed to intervene in a police action involving unlawful force. See N.M. Senate Bill 8.

⁸⁶ See Leslie Herod & Mari Newman, *Colorado Took a Revolutionary Step to Reform Policing. Here's How We Did It*, USA TODAY (Oct. 28, 2021).

⁸⁷ See generally N.M. C.R. COMM'N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT (2020), [<https://perma.cc/LA97-UCYY>].

⁸⁸ See *id.* at 46.

⁸⁹ *Id.*

⁹⁰ *Id.* at 47.

law enforcement agencies because of the Colorado bill. In a *USA Today* op-ed, a leader of the FOP wrote:

In Colorado, through internal Fraternal Order of Police communications and other reports, we know our state's officers are retiring early, leaving the profession altogether or moving to other states to continue their careers. This is largely because of the enactment of the Colorado Senate Bill 217, which eliminated qualified immunity for police officers. A vast majority of the agencies in Colorado are experiencing the struggles of being understaffed and not able to retain qualified applicants.⁹¹

To support this broad assertion, the op-ed linked to one news story about the departure of officers in Aurora, Colorado.⁹² But Aurora was also the location of the high-profile killing of Elijah McClain in 2019, which led to massive protests and a city-wide reckoning about racism in policing.⁹³ The op-ed made no effort to separate the potentially confounding impact of the McClain protests and no effort to show a broader state-wide association between employee turnover and the legislative foreclosure of qualified immunity.

In New Mexico, in February 2023, legislation was introduced to do away with the New Mexico Civil Rights Act based on concerns that the law had led to an influx of lawsuits that were negatively affecting officers.⁹⁴ Yet when the state legislature undertook a fiscal impact report to assess that claim, they found that there had been no verdicts or settlements under the state law two years after its passage.⁹⁵ In both states, then, critics have sought to make data-driven arguments about the impact of the new legislation but have no solid studies on which to base their policy arguments. There is, similarly, no data measuring benefits of these enacted bills.

The dearth of empirical work studying the impact of legal change on the litigation of constitutional tort claims presents an ongoing problem. Some past empirical work shows that critics have overstated their fears of an explosion of §1983 litigation.⁹⁶ Reviewing several studies in 2015, Theodore Eisenberg concluded that the number of constitutional tort cases filed “suffered

⁹¹ McDonald, *supra* note 78.

⁹² *See id.*

⁹³ *See infra* notes 129-130 and accompanying text (describing upheaval during this period in Aurora).

⁹⁴ Curtis Segarra, *Committee Tables a Bill Aimed at Removing New Mexico Civil Rights Act*, KRQE (Feb. 6, 2023).

⁹⁵ *See id.*

⁹⁶ For research by Theodore Eisenberg, Stewart Schwab, and Kenneth Clermont about the myths and realities of civil rights litigation, see, for example, Eisenberg, *supra* note 37; Eisenberg & Schwab, *supra* note 30; Theodore Eisenberg, *The Relationship Between Plaintiff Success Rates Before Trial and at Trial*, 154 J.R. STAT. SOC. 111 (1991); Theodore Eisenberg & Kenneth M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014). For research undermining fears of a litigation explosion in prison cases, see W.S. Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOYOLA UNIV. CHI. L. REV. 527 (1975); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); W.B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979).

a long-term decline after 2004.”⁹⁷ But Eisenberg himself recognized that the data could not explain why filings had declined.⁹⁸ Similarly, past studies reveal some disagreement about the degree to which the threat of civil liability shapes the behavior of law enforcement officers. While some studies suggest that law enforcement officers self-report being deterred by the threat of civil liability, other evidence suggests that officers rarely think about the threat of liability while they are on the job.⁹⁹ In the aftermath of George Floyd’s murder, in a study of officer separations in 6,800 law enforcement agencies across 15 states, Ben Grunwald reported an increase in separations but one that “was smaller, later, less sudden, and possibly less pervasive than the retention-crisis narrative suggests.”¹⁰⁰ Finally, studies of the cost of litigation to local law enforcement agencies are scarce,¹⁰¹ making it challenging to determine how and whether legislation like that in Colorado and New Mexico leads to an increase in insurance premiums or in other costs associated with litigation.¹⁰²

II. METHODOLOGY

In setting out to study the impact of state-level civil rights reform measures such as those enacted in Colorado and New Mexico, we sought to provide a broad snapshot based on responses to freedom of information requests.¹⁰³ We directed these requests to every local law enforcement agency in four states: Colorado, New Mexico, Utah, and Washington. We used identically phrased

⁹⁷ Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMP. L. STUD. 4, 22 (2015).

⁹⁸ *Id.* (“It may be that the number of actionable constitutional deprivations by police and other government officials has declined. Equally plausible is that constitutional tort plaintiffs finally became discouraged to some degree by decades of low settlement rates, low trial win rates, appellate level setbacks, and Supreme Court groups of five justices who have been unsympathetic to civil rights plaintiffs.”).

⁹⁹ See, e.g., C.A. Archbold & E. Maguire, *Studying Civil Suits Against the Police: A Serendipitous Finding of Sample Selection Bias*, 5 POLICE Q. 222 (2002); Victor E. Kappeler, *Critical Issues in Police Civil Liability* (Waveland, 4th ed. 2006); R. Michalski & Stephen Rushin, *Police Executive Opinions of Legal Regulation*, 2018 UNIV. ILL. L. REV. 1841 (2018); M.T. Rossler & C. Scheer, *Causes of Police Officer Career Apprehension Following George Floyd*, 27 POLICE Q. 505 (2024). See also Schwartz, *supra* note 69, at 1811-14 (surveying the findings of several studies).

¹⁰⁰ See Benjamin Grunwald, *A Large-Scale Study of the Police Retention Crisis*, DUKE LAW SCHOOL PUBLIC LAW & LEGAL THEORY SERIES, <https://ssrn.com/abstract=4871954>.

¹⁰¹ For one notable example see Schwartz, *How Governments Pay*, *supra* note 54 (reporting results of nationwide study of how cities, counties and states pay settlements and judgments in litigation against law enforcement officers).

¹⁰² For a sampling of studies of medical malpractice see, for example, Bernard S. Black, et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMP. L. STUD. 207 (2006) (reporting on changes in payouts as a result of med-mal reform); David Hyman, et al., *Does Tort Reform Affect Physician Supply?* (concluding that threatened liability did not cause physicians to leave the state of Texas in droves nor did med-mal reform result in measurable changes in physician supply); BERNARD BLACK, ET AL., *supra* note 19.

¹⁰³ In future work, we hope to provide a more granular description based on “docketology” of litigation in state and federal courts.

requests for information from all jurisdictions.¹⁰⁴ We chose Colorado and New Mexico because they had enacted state civil rights enforcement legislation in 2020 and 2021, respectively. In this respect they can be analogized to “treatment” jurisdictions. We chose Utah and Washington as comparator or “control” jurisdictions for multiple reasons. Most importantly, neither had enacted state-level civil rights enforcement measures during the relevant time period, but lawmakers in Washington had considered passing legislation similar to Colorado’s over multiple sessions.¹⁰⁵ We also identified some relevant similarities between the states.¹⁰⁶

To be sure, the jurisdictions we chose, while comparable in many respects, also differ in significant ways. For example, the U.S. Census for 2020 reports differences in the race and ethnicity of the four states.¹⁰⁷ What’s more, the states differ somewhat in terms of average population density. Yet in Colorado, Utah, and Washington roughly the same proposition of the

¹⁰⁴ Each request sought: “1. Any records reflecting each of the lawsuits filed in [state] state or federal court from January 1, 2017 to June 1, 2023, that names as a defendant your agency and/or one or more officers employed by your agency. 2) Any records reflecting the dispositions of each of the lawsuits identified in request #1, including (a) the amount paid in any settlement or judgment and (b) financial contributions to any settlement or judgment made by any individual defendant named in each lawsuit. 3) Any records reflecting the total number of sworn officers employed by your agency and the number of officers who a) retired; b) resigned; or c) were fired in any or all calendar or fiscal years from January 1, 2017 to December 31, 2023. 4) Any records reflecting the terms of liability insurance coverage for your agency, including the cost of premiums and the deductible amount, in any or all calendar or fiscal years from January 1, 2017 to December 31, 2023.”

¹⁰⁵ See, e.g., Laurel Demkovich, *Washington Legislature Looks to Strengthen Police Accountability by Barring Qualified Immunity*, The Spokesman-Review (Feb. 28, 2023) (describing this bill’s repeated introduction over the prior three years).

¹⁰⁶ Colorado, New Mexico, and Utah are all within the Federal Court of Appeals for the Tenth Circuit, making them similar for the purposes of governing federal law. Colorado, Utah, and Washington had some of the lowest poverty rates in the country (at 9.3%, 8.9%, and 9.8% respectively), although New Mexico had one of the highest poverty rates (18.2%). See Talk Poverty.Org, Poverty Data, <https://talkpoverty.org/poverty.html>. The percentage of the population of Colorado and Washington which are identified as White in the 2020 Census is nearly identical (65% and 64% respectively, although the racial makeup of the states differs in other respects. See *infra* note 103. According to the 2020 Census, the percentage of each state’s population living in urban areas is relatively similar, with Colorado, Utah, and Washington reporting 86 percent, 89.8 percent, and 83.4 percent of their population in areas classified as urban. New Mexico is again an outlier, reporting 74.5 percent of people living in urban areas. See United States Census Bureau, State-level Urban and Rural Information for the 2020 Census and 2010 Census, available at <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html>. For other research suggesting that the bulk of lawsuits will be filed in the jurisdictions with the largest populations, see *supra* note 16.

¹⁰⁷ Colorado was 65% White, 22% Hispanic, 3.8% Black, 3.4% Asian, and 1.3% American Indian/Alaska Native. New Mexico was 48% Hispanic, 36.5% White, 9.5% American Indian/Alaska Native, 2.8% multiracial, 1.8% Black, and 1.7% Asian. Washington was 64% White, 13.7% Hispanic, 9.4% Asian, 6.6% multiracial, 3.8% Black, and 2.6% American Indian/Alaska Native. Utah was 75.4% White, 15.1% Hispanic, 2.4% Asian, 2.4% American Indian/Alaska Native, 1.1% Black, and 3.7% multiracial. U.S. Census 2020.

overall state population lives in urban areas.¹⁰⁸ Finally, the number of self-insured localities varies from state to state.¹⁰⁹

We also caution that we would not expect changes in a legal regime to produce immediately measurable differences in lawsuits, payouts, and officer behavior. Each of the states we studied has a different statute of limitations for civil rights claims against law enforcement.¹¹⁰ And once litigation begins, it can take months or years to be resolved. We therefore expected that the impact of legislation such as that enacted in Colorado and New Mexico would not fully be evident until some years after passage. We underscore that this study represents a first attempt to measure the impact of changes that may continue for years to come. Such work should also provide a baseline for future research aimed at examining the impact over a longer period.

We sought information from all jurisdictions in four areas for the years 2017-2023.¹¹¹ First, we requested information regarding the number of lawsuits filed against law enforcement personnel in federal or state court in each of the years in question. Second, we requested information regarding how much was paid in judgments or settlements with respect to litigation involving law enforcement personnel. Third, we requested information regarding annual insurance premiums paid by each jurisdiction. Fourth, and finally, we requested information regarding officer retention during the relevant time period.

The vast majority of jurisdictions responded to our requests for information, although not all responding jurisdictions provided complete data. We offer further information below regarding

¹⁰⁸ According to the 2020 Census, Washington's average population density was 116 persons per square mile, more than twice Colorado's (56 persons per square mile) and Utah's (40 persons per square mile). *See* United States Census Bureau, Population Density of the 50 States, the District of Columbia, and Puerto Rico: 1910 to 2020, available at <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/population-density-data-table.pdf>. New Mexico's average population density was 17.5 persons per square mile, about one-sixth of Washington's. *Id.* For data regarding percentage of the population living in urban areas, *see supra* note 101.

¹⁰⁹ Many large cities in our data sample were self-insured during the relevant time frame. In New Mexico, this was the case for Albuquerque; in Utah, this was the case for Davis County; in Colorado, Denver was self-insured; and in Washington, Clark County and Seattle were self-insured. But some smaller jurisdictions (by population) also were self-insured in our pool, mostly in Washington State (with this being the case for Brewster, Clarkston, Enumclaw, Soap Lake, and Zillah), and one rural jurisdiction in Utah (Juab County). Some jurisdictions near to large cities in Washington State also relied on self-insurance, including Airway Heights and Cheney (outside of Spokane), and Bothell and Clyde Hill (outside of Seattle).

¹¹⁰ Colorado's general personal injury statute of limitations is 2 years. Colo. Rev. Stat. Ann. § 13-80-102. The same statute of limitations applies to claims brought under Colorado's Civil Rights Law. *Id.* § 13-21-131(5).; New Mexico and Washington's general personal injury statute of limitations is 3 years. N.M. Stat. Ann. § 37-1-8; Wash. Rev. Code Ann. § 4.16.080(2). New Mexico has a general 2-year limitations period for personal injury claims brought against municipalities or their employees, but the state's Civil Rights Act has a longer 3-year statute of limitations. N.M. Stat. Ann. § 37-1-24 (claims against municipalities or their employees); *id.* § 41-4A-7 (Civil Rights Act claims). Utah maintains a default 4-year statute of limitations for general personal injury claims and a 2-year limitations period for certain law enforcement claims, wrongful death claims, and claims against the state or its employees. Utah Code Ann. § 78B-2-304; *id.* § 78B-2-307(4).

¹¹¹ We chose these years because they both preceded and post-dated the reforms enacted in Colorado and New Mexico.

response rates. As we collected data from law enforcement agencies, we also began collecting granular data regarding the course of each litigation involving law enforcement personnel that was initiated in federal or state court during the relevant time period. We hope to report the results of this “docketology” research in subsequent work.

We coded responses to our freedom of information requests by state, locality, year, and category of data. We supplemented data regarding officer retention with 2018 Bureau of Justice Statistics data for each jurisdiction.¹¹² We also reviewed available data about crime rates, police uses of force, and police killings for each of the four states during the study period. Our analysis of the data follows.

III. STUDY RESULTS

Our study of the information supplied by law enforcement agencies, whose response rate to our queries exceeded 75 per cent, yields three principal findings. First, the vast majority of the law enforcement agencies in our study reported having been subjected to zero litigation during the study period—findings that raise important questions about both accountability and burden in the context of law enforcement conduct. Second, we found no evidence that the reform states experienced associated increases in law enforcement litigation filings, judgments and settlements, or insurance rates. Indeed, our data suggest that other differences between the states we studied may better account for the patterns of litigation, payouts, and insurance rates than changes in the law. Had the reforms made a significant difference, we would have expected the reform states of Colorado and New Mexico to have experienced changes comparable to one another and different from those in Washington and Utah. But we found instead that Colorado and Washington seemed to experience similar changes over the course of the study period, as did New Mexico and Utah. Finally, in keeping with other research about retention patterns,¹¹³ we found no evidence that the package of changes in reform states was associated with greater difficulty retaining law enforcement line officers.

A. Response Rates

We identified and requested data from 640 local law enforcement agencies in the four states we studied: 169 in Colorado, 111 in New Mexico, 135 in Utah, and 225 in Washington. We received no response at all from approximately twenty-four percent (152) of the law enforcement agencies we surveyed. The response rates varied by jurisdiction, as Appendix Table 1 demonstrates. Colorado and Washington, with response rates of 83 percent and 79 percent respectively, were at the high end, with New Mexico and Utah, with rates of 65 percent and 73 percent respectively, at the low end. And as Appendix Table 2 demonstrates, in all states other than Washington, there was significant variation in what information was provided in the responses from each agency.¹¹⁴

¹¹² The BJS data regarding employment in law enforcement departments is imperfect, as a few entries have negative numbers (records on file with authors).

¹¹³ See Grunwald, *supra* note 100.

¹¹⁴ If a jurisdiction provided information regarding the amount of litigation and/or settlement of litigation, it was coded as having provided a litigation response. If the jurisdiction provided information about officer retention, it was coded as a retention response. If the jurisdiction provided information concerning insurance premiums (or stated that it was self-insured), it was coded as an insurance response.

When one examines response rates by the total population served by the law enforcement agencies which provided responses, the picture looks somewhat different. As Appendix Table 3 shows, New Mexico and Utah are at the high end, with the agencies providing responses representing 92 and 88 percent respectively, of the total population in each state. Colorado and Washington are at the low end, with the responding law enforcement agencies serving 72 and 60 percent respectively of the total population in each state.¹¹⁵ In other words, a higher percentage of jurisdictions in Washington and Colorado provided responses to freedom of information requests, and the jurisdictions which provided responses in Utah and New Mexico represent a greater share of the population in each of those states.

Finally, one can consider the coverage or completeness of the responses by asking what proportion of each state's full-time sworn law enforcement employees worked at agencies that responded to our survey. Appendix Table 4 provides this information, drawing on 2018 Bureau of Justice Statistics data on law enforcement employment by agency. Here again New Mexico and Utah's responses appear to be more representative, with the jurisdictions providing responses in each of those states employing 90 and 82 percent of the total full time sworn officers. The agencies providing responses in Colorado and Washington, by contrast, employed 75 and 62 percent respectively of the total full time sworn officers.

All told, we received a fairly representative collection of responses. On a numerical assessment, we received responses from at least 80% of the agencies in every state. Viewed in terms of the state's total population, we received responses from agencies responsible for law enforcement in cities and counties where at least 60% of the state's population resides.¹¹⁶ Critically, we received responses from almost every major city and county in the covered jurisdictions and from almost 75 percent of the agencies with populations less than 10,000 people.¹¹⁷

¹¹⁵ We used 2020 census population estimates for each jurisdiction we identified and to which we sent requests. Because some jurisdictions are home to multiple law enforcement agencies – for example, both county sheriff's offices and city police departments in the same county – this measure is imperfect.

¹¹⁶ When compared to other studies regarding law enforcement, whether via freedom of information requests or surveys, the response rate in this study is on the very high end. *See, e.g.,* David Cuillier, *Honey v. Vinegar: Testing Compliance-Gaining Theories in the Context of Freedom of Information Laws*, 15 COMM. L. & POL'Y 203, 217 (2010) (in study seeking records from Arizona law enforcement agencies, reporting 58 percent response rate); Matthew W. Logan, Ian T. Adams, Sharon H. Mastracci, *The Protective Effects of Prior Military Service on Burnout in Criminal Justice Professions: A Multiagency Comparison*, 30 PSYCHOL. PUB. POL'Y & L. 7, 10 (2024) (in survey of law enforcement officers in Utah, reporting a response rate of 44% and noting that this was "far higher than the norm found in the literature using survey methodology in the law enforcement officer context."); Justin Nix, Justin T. Pickett, Hyunin Baek, Geoffrey P. Alpert, *Police Research, Officer Surveys, and Response Rates*, 29 POLICING AND SOCIETY 530, 537-38 (2019) (reviewing almost 500 survey studies of policing conducted over several decades to conclude that the mean response rate was 64%, but that rates have decreased over time); Daxton R. "Chip" Stewart, *Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL'Y 265, 269 (2010) (reviewing prior studies of freedom of information requests to local agencies, including law enforcement, showing compliance rates of below 50% to 59%).

¹¹⁷ Of the cities or counties with populations greater than 300,000, we did not receive responses from Arapahoe County Sheriff's Office (Colorado), Larimer County Sheriff's Office (Colorado), Weld County

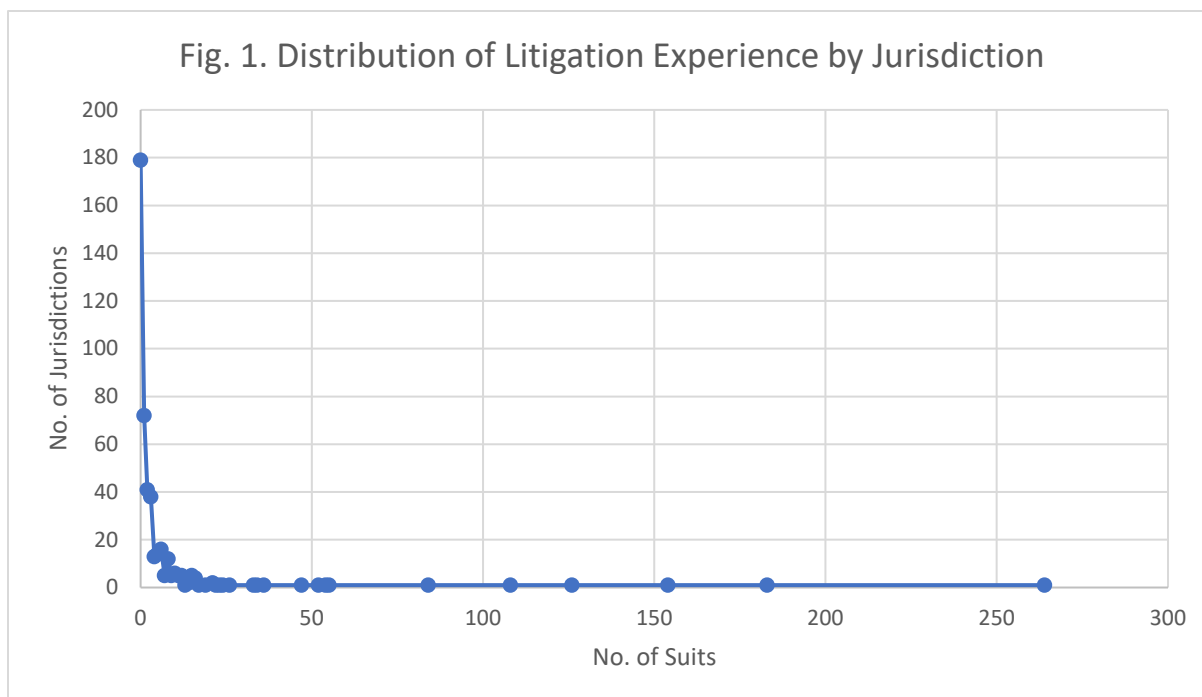
B. Litigation Filing Rates

We requested data about the litigation experience of law enforcement agencies over a seven-year period. Agencies responded by indicating how many times the agency itself or its officers were sued during the period, as well as how much they agreed to pay in settlement of individual litigation during the period. In the next two sections, we report our analysis of the lawsuits filed during the study period. Perhaps most notably, these data reveal that a substantial number of the responding agencies (also sometimes referred to as “jurisdictions”) experienced no litigation whatsoever. Indeed, as Appendix Table 5 indicates, about 40 percent of responding agencies reported that they and their employees were not sued at all during the relevant time frame, and another 40 percent reported being sued between 1 and 5 times, or fewer than one lawsuit per year. Only about 10 percent of jurisdictions reported being sued more than 10 times.

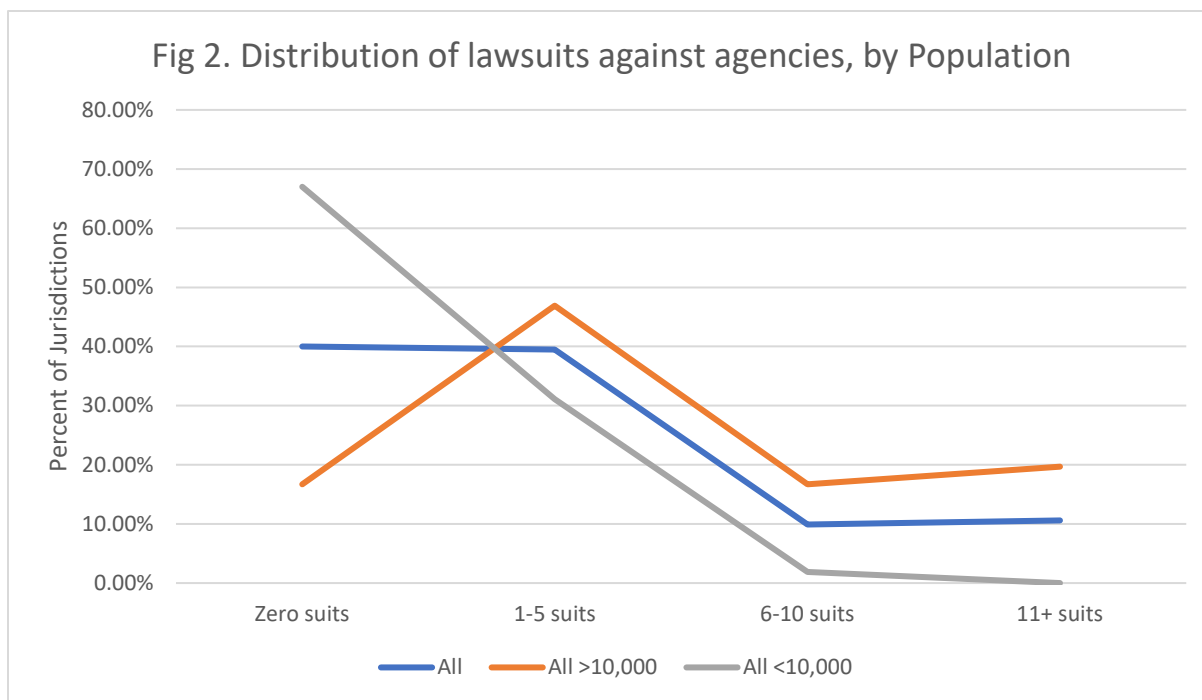
When one considers the incidence of lawsuits within each state, we see the first of many indications that qualified immunity reform is not associated with increased litigation. Colorado and New Mexico both enacted qualified immunity reform, yet report very different patterns with respect to the incidence of litigation. In Colorado, 48 percent of responding jurisdictions reported zero lawsuits, the highest proportion of all 4 states, while New Mexico reported the lowest proportion of zero lawsuit jurisdictions, at 22 percent. And only 8.5 percent of Colorado jurisdictions reported more than 11 lawsuits over the study period, compared to 15 percent in New Mexico. Appendix Table 5 sets out results for all responding jurisdictions and also breaks responses down by State.

Figure 1 offers a graphic illustration of the litigation experience of the responding jurisdictions. Together, one clear takeaway from these data is that very few jurisdictions experienced a significant amount of litigation in the time period we studied; the vast majority of the jurisdictions (251, or 57 percent) reported no litigation at all or a single lawsuit in more than six years.

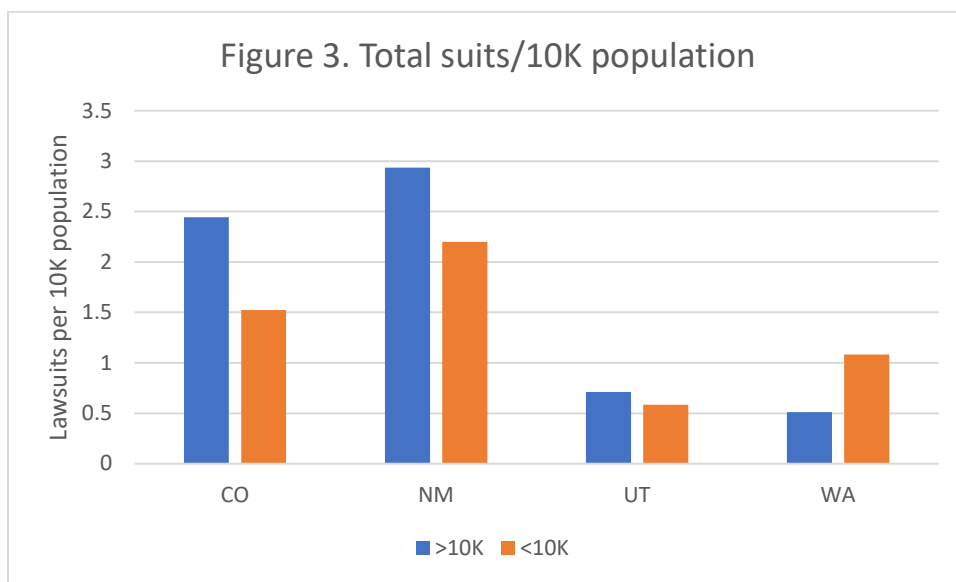
Sheriff’s Office (Colorado); King County Sheriff’s Office (Washington); Pierce County Sheriff’s Office (Washington), Snohomish County Sheriff’s Office (Washington); and Spokane Police Department (Washington). But in many cases we received responses from major city police departments located within those counties (Aurora and Littleton for Arapahoe County; Fort Collins in Larimer County; Greeley for Weld County; Seattle and Bellevue for King County; Tacoma for Pierce County; and Everett for Snohomish County). We also received responses from Spokane County Sheriff’s Office in Washington even though we did not hear from the City of Spokane’s Police Department. We predicted lower response rates in the smaller, rural counties, which may lack the staff to complete information requests, but we received a response of some kind from almost 75 percent of the agencies in jurisdictions with populations less than 10,000.



One can also express these data by observing that the great bulk of reported litigation occurred in a very small number of jurisdictions. In numerical terms, ten percent of the jurisdictions were responsible for 70 percent of the litigation experience over the relevant time period. More dramatically, three percent of the jurisdictions accounted for 50 percent of the litigation experience. Moreover, it appears that the vast majority of litigation involved jurisdictions with large populations. Appendix Table 6 presents the data disaggregated according to jurisdictions with populations of 10,000 or more, with Figure 2 providing a graphic representation. Both reveal that litigation against law enforcement agencies is concentrated in jurisdictions with populations over 10,000 people. Indeed, of the jurisdictions with population of less than 10,000 people, none reported more than 10 lawsuits and fewer than 2 percent reported having been sued between 6 and 10 times over the study period. By contrast, in areas with more than 10,000 people, only 17 percent reported having experienced no litigation and 20 percent reported more than 10 lawsuits over the study period.



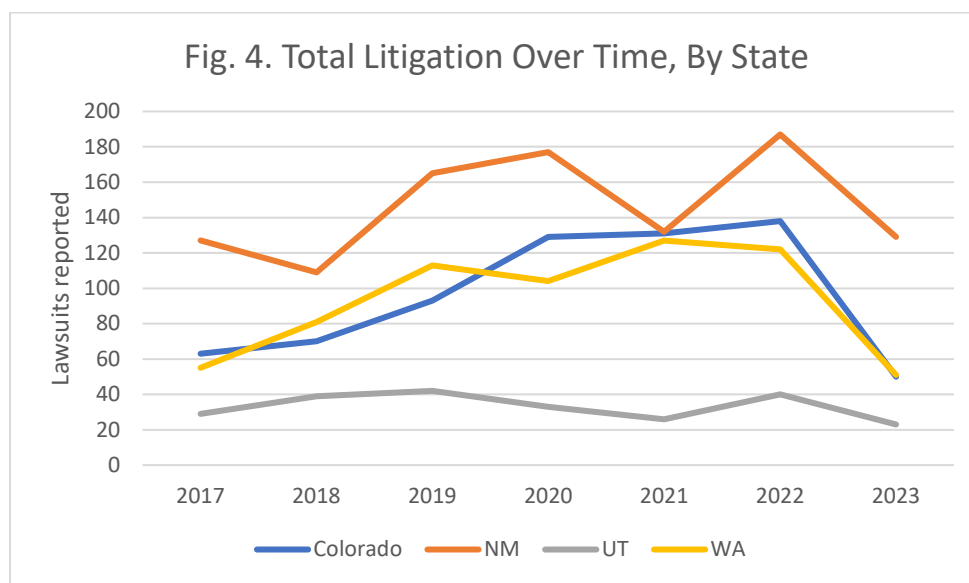
This is not to say that larger jurisdictions were sued at a disproportionate rate given their population size. Figure 3 displays the number of suits filed per 10,000 people in two kinds of law enforcement jurisdictions: those with populations of more and less than 10,000 people. It illustrates that the amount of litigation does not vary as sharply when measured as a proportion of the people living in each jurisdiction.



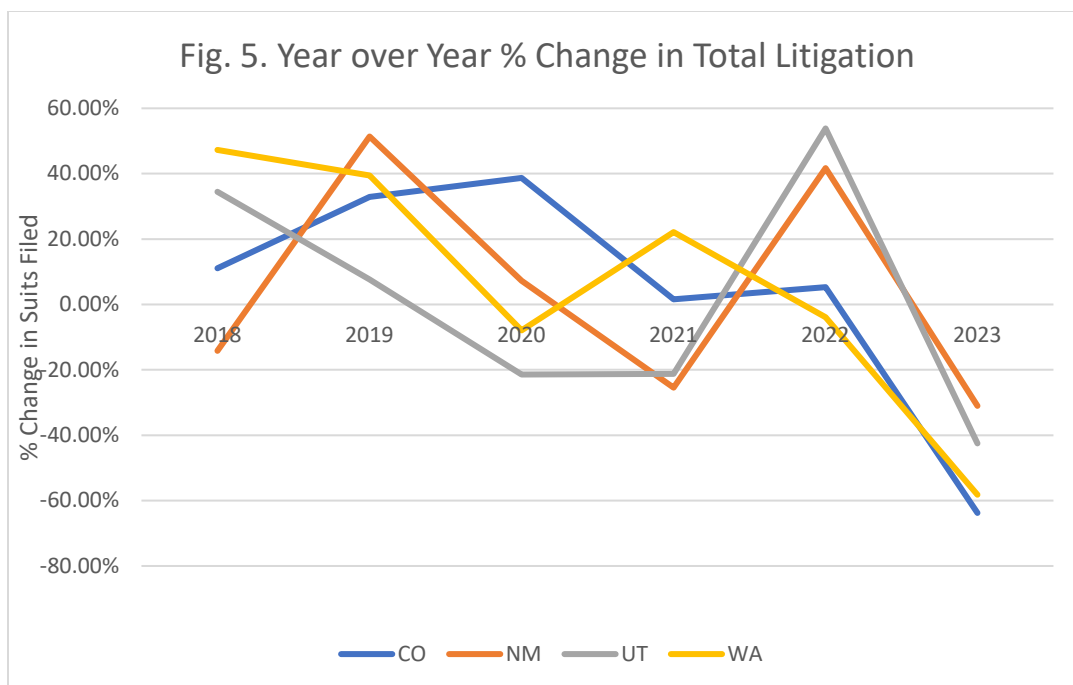
Even though in the aggregate there are more suits per 10,000 people in larger population jurisdictions, there is greater variation in the experience of smaller jurisdictions. Considering each jurisdiction as a separate entity, the average number of lawsuits per 10,000 inhabitants of a jurisdiction is higher in lower population jurisdictions, but the standard deviation in these smaller

jurisdictions is much wider, demonstrating significant variation in this subgroup of the jurisdictions. This is because there are a few outlier jurisdictions that elevate the average.¹¹⁸

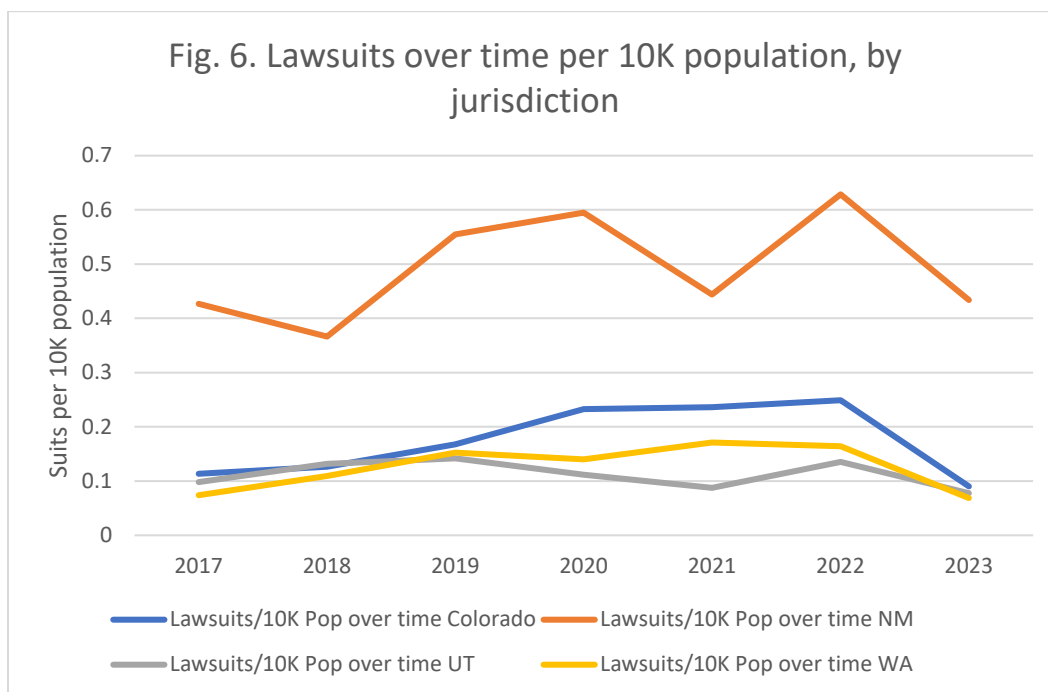
Because two of the jurisdictions we studied enacted relevant legislation during the time period, we also explored whether there is any evidence of a shift in litigation experience in any of the jurisdictions over time. We emphasize that given the time lag between our data collection and the relevant changes in Colorado and New Mexico, it is quite plausible that any changes in litigation experience caused by the new legislation will not have been evident at the time we collected data. Nonetheless, we find it notable that as Figures 4 and 5 indicate, there is no evidence that the jurisdictions that changed their legal regime regarding law enforcement accountability experienced a similar change in litigation patterns. Figure 4 reflects changes over time in total lawsuits filed, while Figure 5 reflects the change in litigation, by percentage of litigation in each prior year, over time. Figure 4 shows that Colorado and Washington experienced a similar trend in a slight increase in total litigation, plateauing in 2021-22 before dropping in 2023. Figure 5 shows that New Mexico and Utah experienced a similar trend in the year over year percentage change decreasing until 2021, spiking in 2022, and then dropping again in 2023. Once again, these suggest that the Colorado-Washington and New Mexico-Utah pairs are more similar to each other than the two “treatment” jurisdictions (Colorado and New Mexico) are to each other.



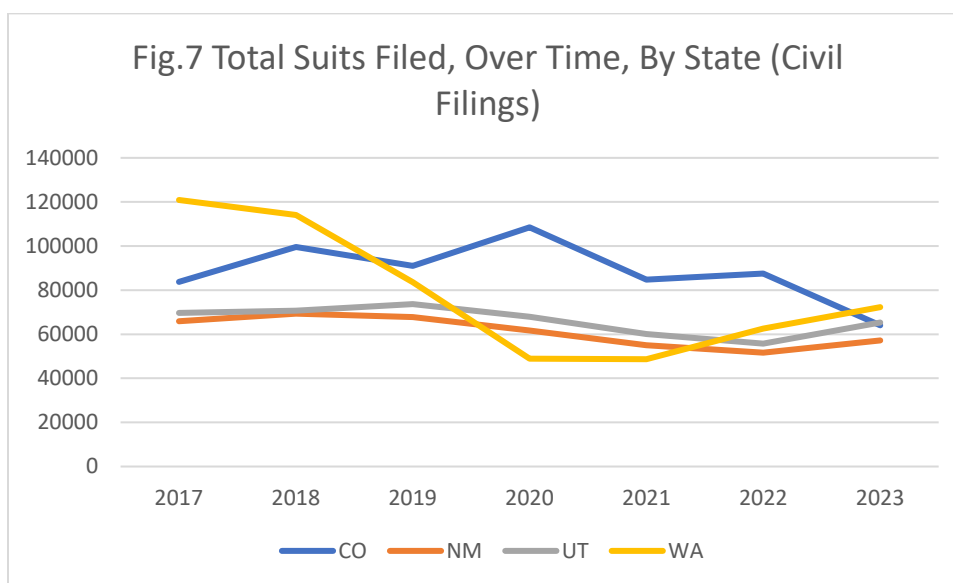
¹¹⁸ Appendix Table 7 provides figures for the mean and standard deviation measures of the average number of lawsuits per 10,000 people, disaggregated by state.



If one examines the same question, change in lawsuits filed over time, but as a function of total population in the covered jurisdictions, there again is little evidence that changed legal regimes in Colorado and New Mexico led to distinct changes in litigation patterns over time. Figure 6 demonstrates this.



If anything, these data suggest that the litigation patterns in cases against law enforcement agencies remained relatively flat, similar to the overall litigation rates in each jurisdiction for all civil filings, reflected in Figure 7.¹¹⁹



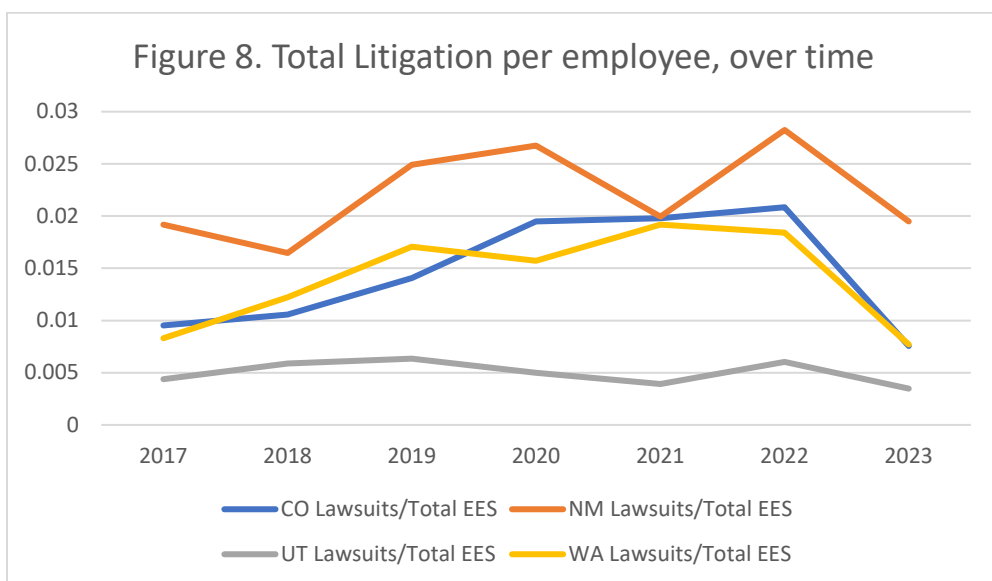
Figures 5, 6, and 7 collectively reflect a “difference-in-difference” analysis. Commonly used in statistical analysis to account for confounders that may be difficult to control for, the analysis compares differences in outcomes over time between “control” and “treatment” groups. Appendix Table 8 explores the “difference-in-difference” in each jurisdiction’s percentage change in litigation experience over time across total lawsuits against law enforcement and total civil filings. These data suggest both that law enforcement lawsuits had a different trajectory than other civil filings but also that the statutory interventions in Colorado and New Mexico do not appear to have significantly affected that trajectory. In Colorado, there appears to be a steady increase in law enforcement litigation leading up to the enactment of its law in 2020, which then falls off, while in New Mexico there is a relatively sharp increase in the year immediately after passage of the legislation, followed by a steep decline.

It is possible that the state-level litigation data obscures more granular differences in each state. To examine this question, we looked to whether the number of law enforcement jurisdictions in Colorado or New Mexico which reported an increase in average filings per year after the introduction of qualified immunity reforms was measurably different from the experience of individual jurisdictions in Washington and New Mexico. If, for instance, a higher percentage of individual jurisdictions in Colorado saw an increase in the average number of filings per year after 2020, while this pattern did not obtain in Washington and New Mexico, the changed legal regime might be one explanation. Appendix Tables 9 and 10 report our findings (both as to all jurisdictions

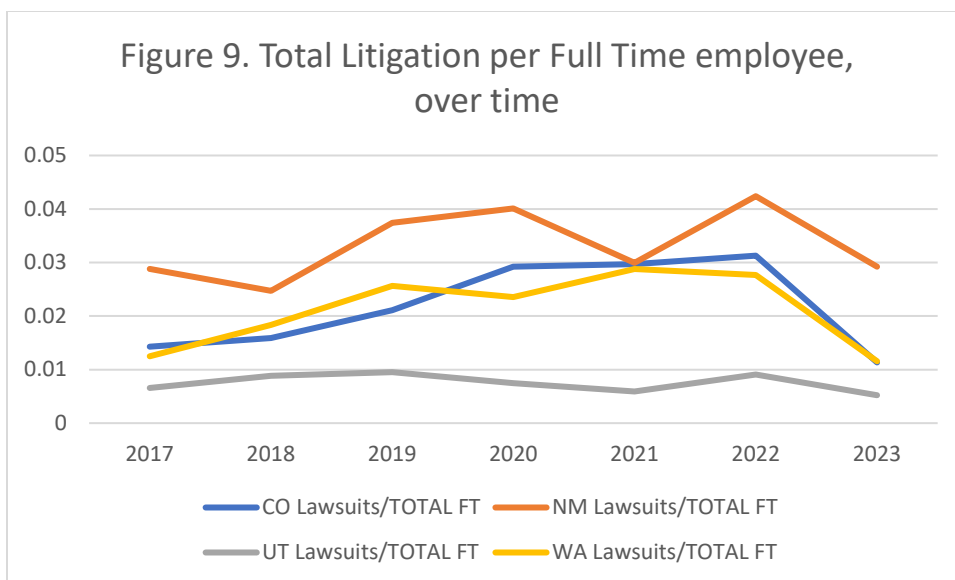
¹¹⁹ These data are based on civil filings in state trial courts with general jurisdiction and in all civil cases filed in the federal courts within these jurisdictions. If one excludes filings for debt collection cases, the pattern looks similar.

within the relevant states and as to those jurisdictions with populations greater than 10,000). Although there were differences on the margins, none of them was statistically significant.¹²⁰

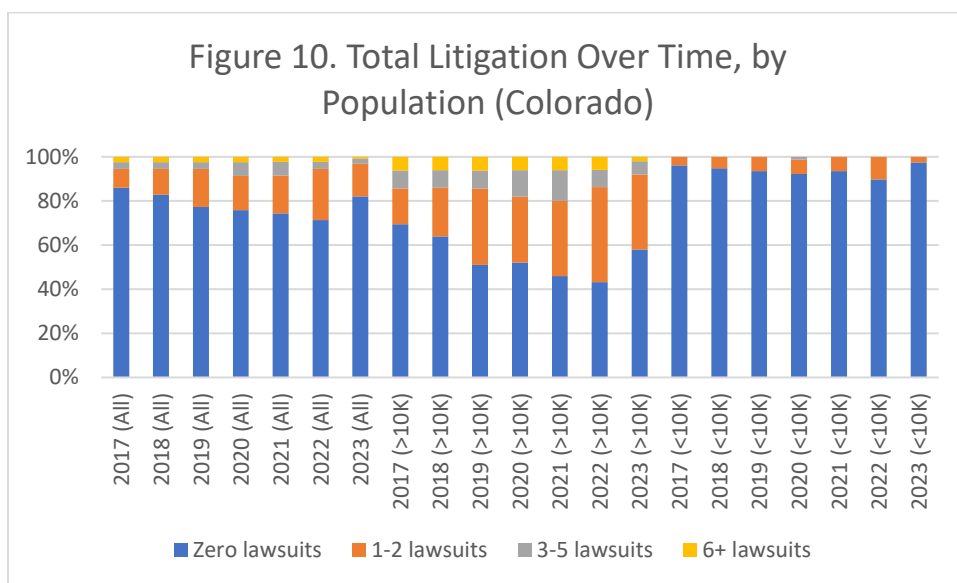
One variable that might explain differences in litigation rates (other than change in legal regime) is total employees. Figure 8 reflects the change over time in total number of lawsuits per total employee, with Figure 9 limited to full-time employees. These again do not suggest that Colorado and New Mexico experienced similar changes in litigation experience as compared to Utah and Washington. Instead, as with Figure 4, they suggest that the most similar pairs to each other are Colorado-Washington and New Mexico-Utah. If the change in the legal regime governing law enforcement accountability were having an effect on these patterns, one would instead expect Colorado and New Mexico to be more similar to each other than either is to Utah and Washington.



¹²⁰ The difference in change for New Mexico overall was on the borderline of statistical significance (Fisher's exact test = 0.055), but when we focused only on the jurisdictions within New Mexico with more than 10,000 people, the difference was not close to being statistically significant (Fisher's exact test = 0.675). See Appendix Tables 9 & 10.



Finally, if one examines whether there have been changes over time in the number of jurisdictions that experience a high volume of lawsuits, Figures 10-13 do not support the proposition that the change in legal regimes in Colorado and New Mexico have resulted in a significant increase in the number of jurisdictions that experienced more than two lawsuits in a given year.¹²¹ And again, they demonstrate that in all jurisdictions, law enforcement agencies responsible for policing populations of fewer than 10,000 people almost never confront any significant numbers of lawsuits.



¹²¹ These Figures are based on the data contained in Appendix Tables 11-14.

Figure 11. Total Litigation Over Time, by Population (New Mexico)

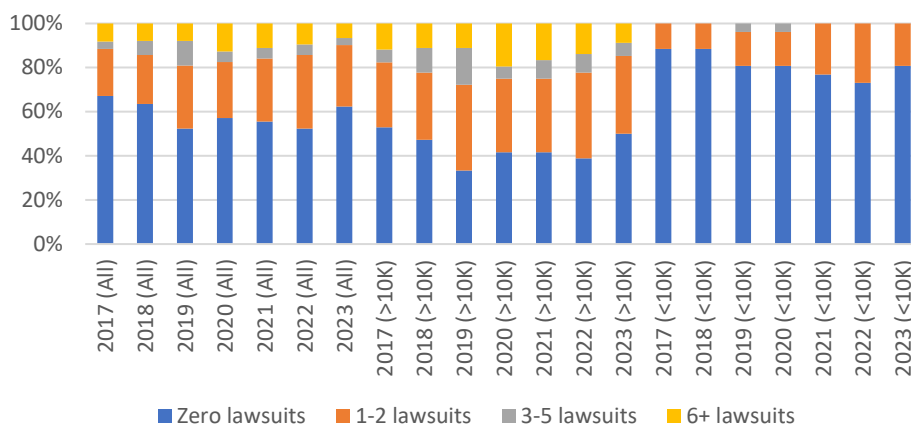
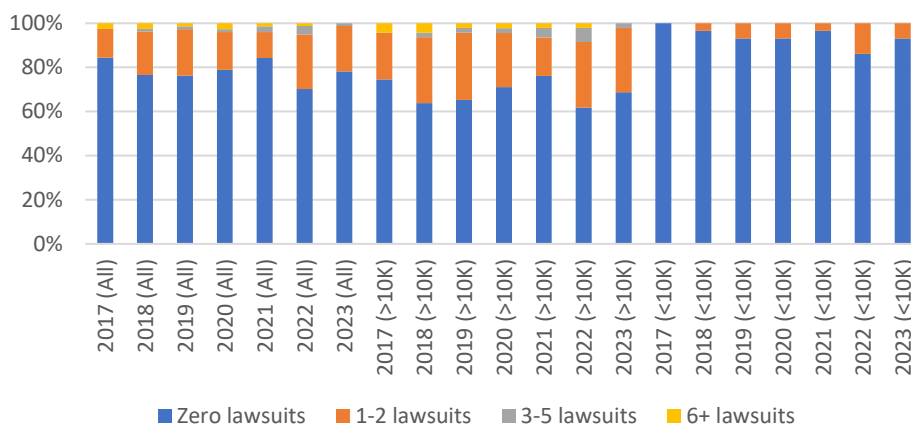
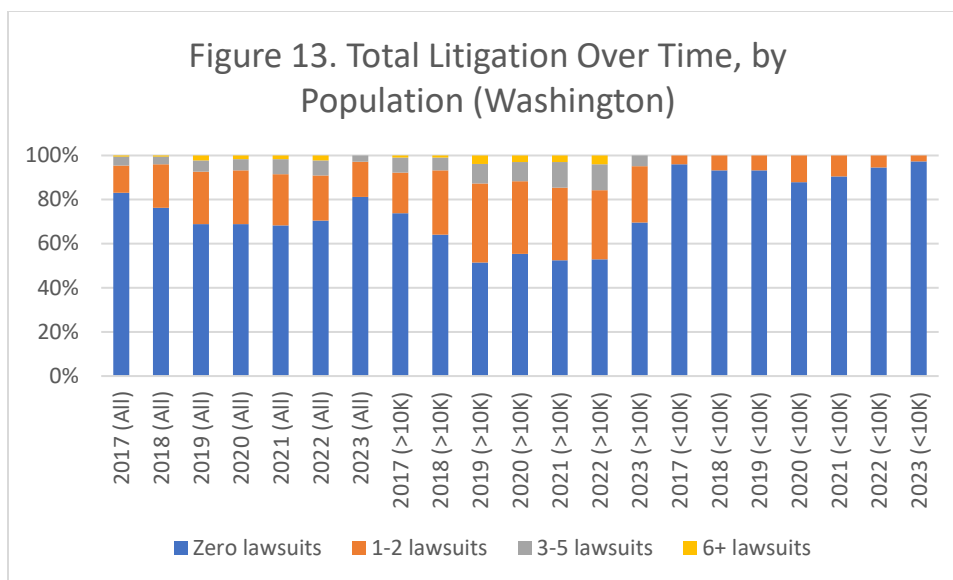


Figure 12. Total Litigation Over Time, by Population (Utah)



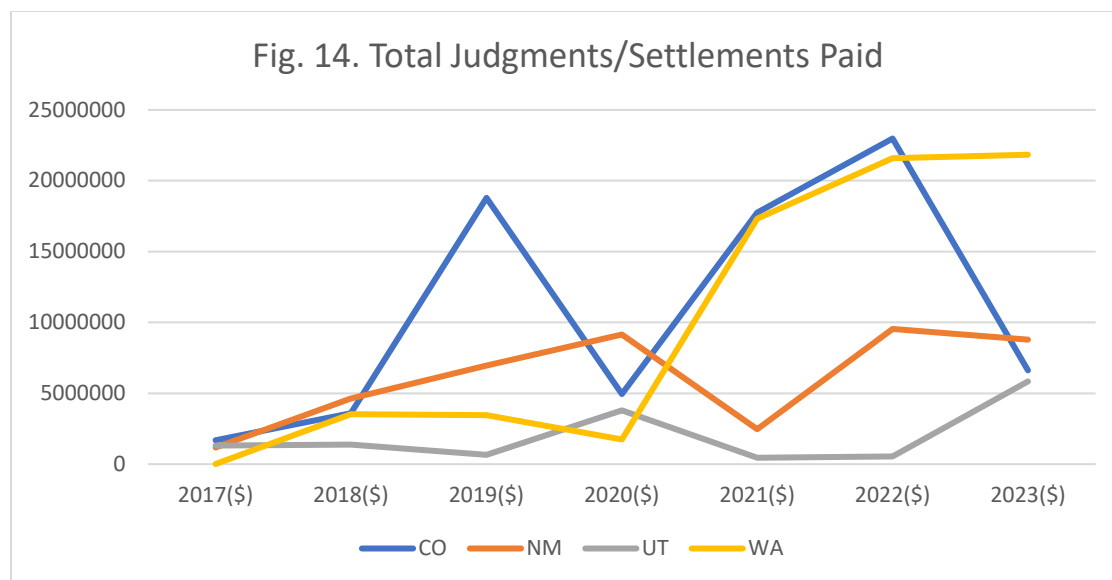


C. Litigation Costs

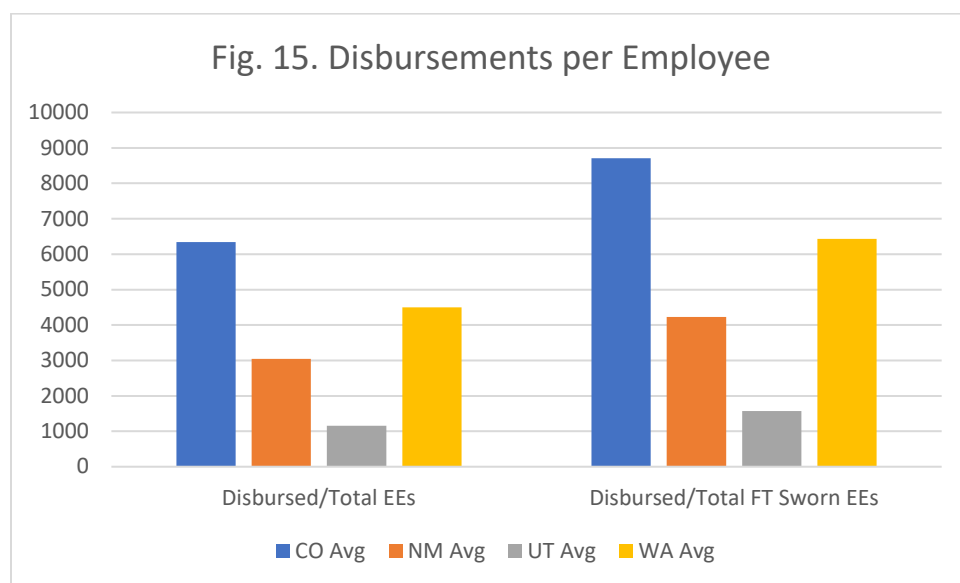
Because critics of legislation like New Mexico's and Colorado's have expressed fear that increased accountability will increase litigation costs for local law enforcement agencies, we report here the data we gathered concerning two categories of costs: costs expended for settlements and judgments; and costs for insurance premiums.¹²² These data, tentative though they are, do not suggest that the change in legal regime in New Mexico and Colorado resulted in similar changes in litigation costs (indeed, as with other data, they suggest instead that Colorado and Washington state's litigation experience has been more similar than different over this time period).

Figure 14 reports the total amount paid in settlements and judgments by jurisdictions in each state during each year of the time period. Between 2020 and 2022, both Washington and Colorado reported nearly identical changes in these expenditures.

¹²² Localities reported total insurance premium costs, not premiums limited to law enforcement.



Again, if we examine disbursements by total number of employees, as reported in Figure 15, there is no indication that state legislation has significantly impacted total disbursements.



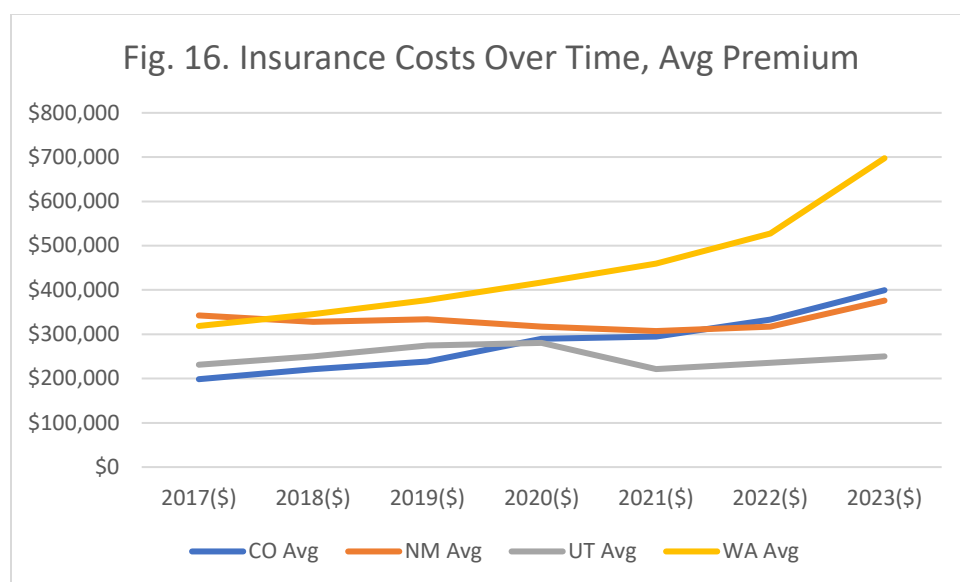
D. Insurance Rates

Debates over the reform of constitutional tort litigation often emphasize the potential impact on municipal liability and insurance rates. In assessing those claims, one should understand that municipalities differ in the way they manage risk. Many of the largest municipalities insure themselves instead of buying insurance coverage.¹²³ That means city managers budget for and pay

¹²³ See Schwartz, *How Governments Pay*, supra note 54, at 1165-66 (reporting that 62 of the nation's 70 largest departments responded to a records request and all were self-insured). Large departments employ many of the nation's sworn officers and account for a large share of constitutional tort liability. *Id.* at 1160.

the successful claims of constitutional tort claimants from city coffers instead of paying premiums to a private insurer. Many small and medium sized departments enter into risk management pools with other departments.¹²⁴ This insurance model emerged after the insurance crisis of the 1980s, enabling departments to share risks and pool funds as a form of shared self-insurance.¹²⁵ Finally, many (predominantly small) departments pay premiums to private insurers for losses due to a finding of official liability in police misconduct and other cases (including automobile liability and employment claims).¹²⁶

Insurance rates reported by law enforcement agencies do not appear to have been significantly affected by the legislation. While the cost of insurance has generally increased over the time period we studied, Washington has shown the sharpest increase, with New Mexico and Utah remaining relatively steady, and Colorado somewhere in between the two. Figures 16 and 17 show this in sharp relief. They reflect the average increase in premium rates between 2017 and 2023, as well as the difference in premium rates (comparing the average rates from 2017-2020 with the average rates from 2021-2023).¹²⁷



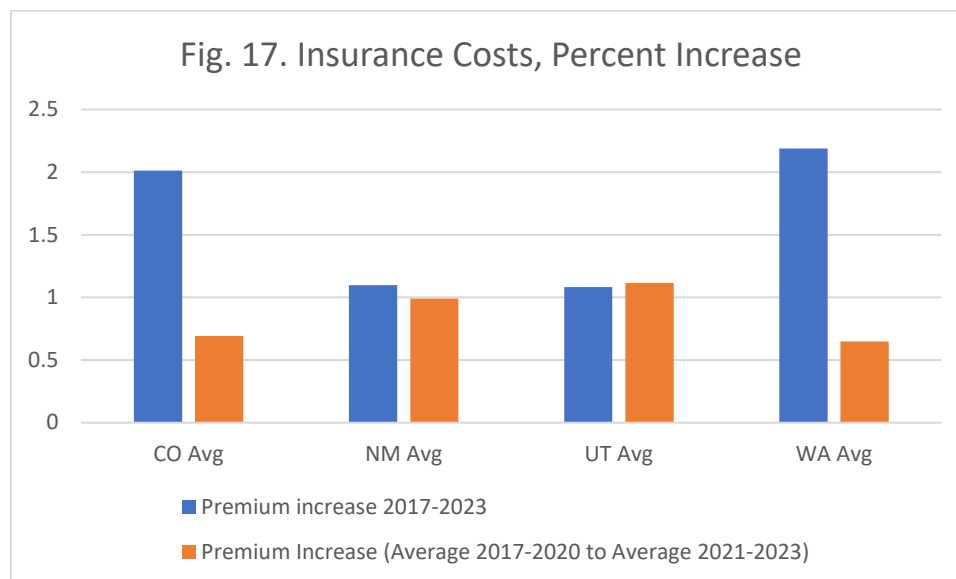
Most departments are relatively small. *Id.* at 1159 n.48 (reporting that 98% of the nation's 18,000 police departments employ fewer than 250 officers).

¹²⁴ One expert estimates that 85% of departments nationwide participate in some sort of risk pool. Schwartz, *How Governments Pay*, supra note 54, at 1164 n.70.

¹²⁵ On the rise of the risk pool in the 1980s, see *id.* at 1162-63.

¹²⁶ Municipalities face liability for a range of claims, including automobile accidents, slip and fall torts, contract claims, and employment disputes. See *id.* at 1161. Police misconduct claims figure prominently in the liability picture. *Id.* at 1161 n.58.

¹²⁷ We note that these Figures exclude self-insured jurisdictions, which do not pay insurance premiums, but which tend to be large jurisdictions that confront a significant amount of law enforcement-related litigation.



E. Officer Retention Rates

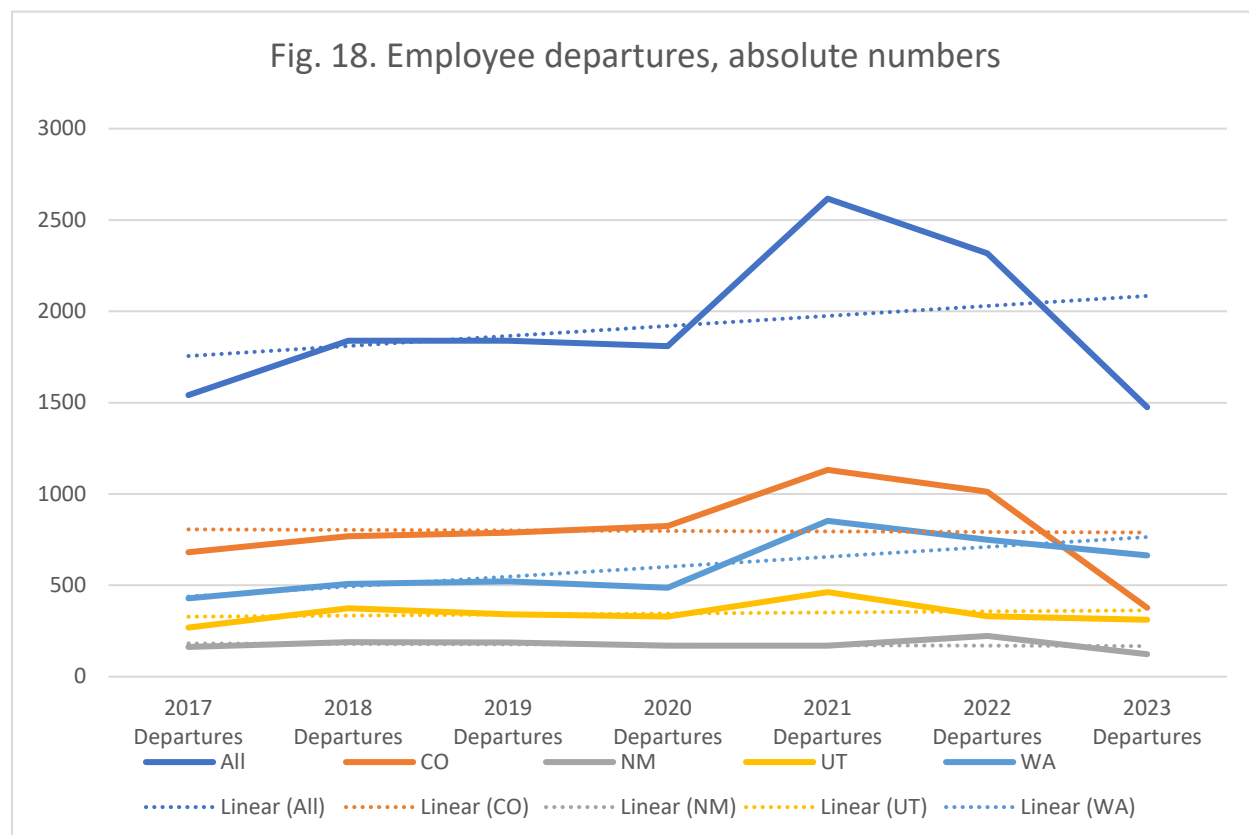
To measure the impact of reforms on the employment experience of law enforcement agencies, we requested officer retention data from local law enforcement in the four states studied. We examine shifts in employment patterns in two ways. First, we evaluate yearly shifts in retention across jurisdictions by reporting relative retention rates over time. If, for example, a department's retention pattern was evenly distributed across the time span of our study, one would expect the number of officers departing the agency to remain relatively stable over time. Appendix Table 15 and Figures 18 and 19 paint similar pictures. While there was an increase in departures over the relevant time period, there is no evidence that Colorado and New Mexico experienced similar or sharper departures than Utah and Washington State. Utah, Washington, and Colorado all experienced higher rates of departure in 2021 and 2022, but not New Mexico

As with our other findings, some outlier jurisdictions report employment turnover that differs sharply from the norm. For example, Aurora, Colorado reported significant officer departures in 2020 and 2021. As noted above, an FOP official pointed to these Aurora data in a *USA Today* op-ed in support of his assertions that Colorado's elimination of qualified immunity was causing officer retirements to spike. But the op-ed failed to consider what happened next. We found that departures in 2022 were comparable to pre-2020 rates, and that fewer officers departed from Aurora employment in 2023 than any other year in our study.¹²⁸ The op-ed also failed to mention that Aurora officers killed Elijah McClain in 2019, triggering both a period of turmoil in the city¹²⁹

¹²⁸ Aurora reported that 51 officers departed in 2017, 57 in 2018, 55 in 2019, 83 in 2020, 117 in 2021, 67 in 2022, and 35 in 2023. Aurora did not report how many officers were hired to replace the departing officers.

¹²⁹ Audra D.S. Burch, *The Trials of Aurora: A Colorado City's Deep Divide Over Policing*, N.Y. TIMES (Sept. 15, 2023).

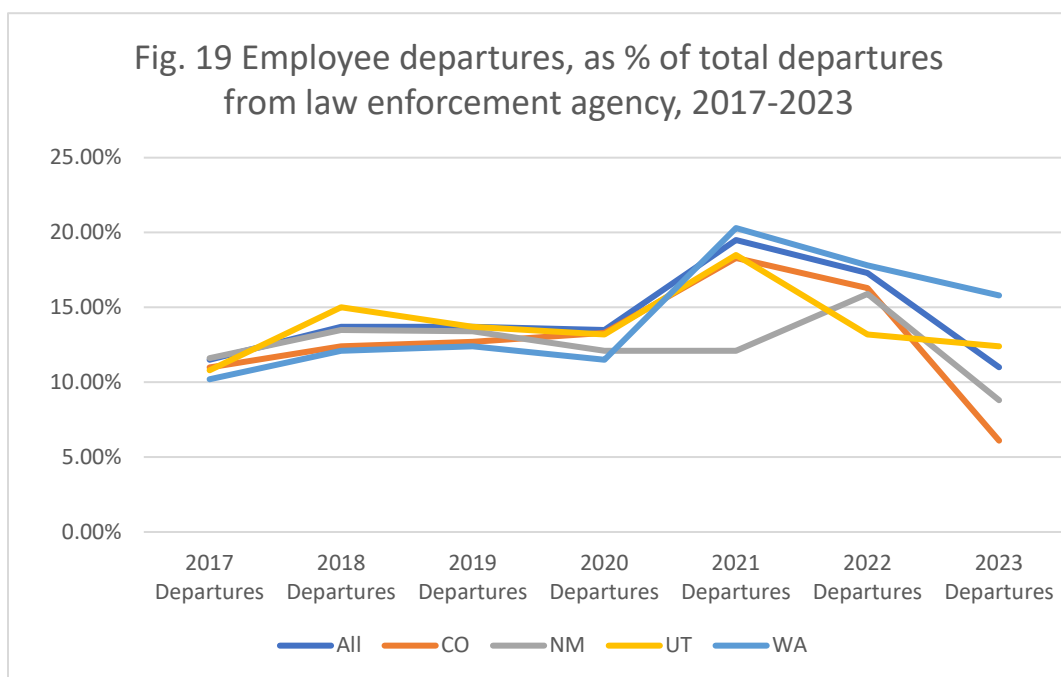
and the initiation of criminal charges against four of the officers in question¹³⁰—factors that may have led to a short-lived surge in officer retirements.

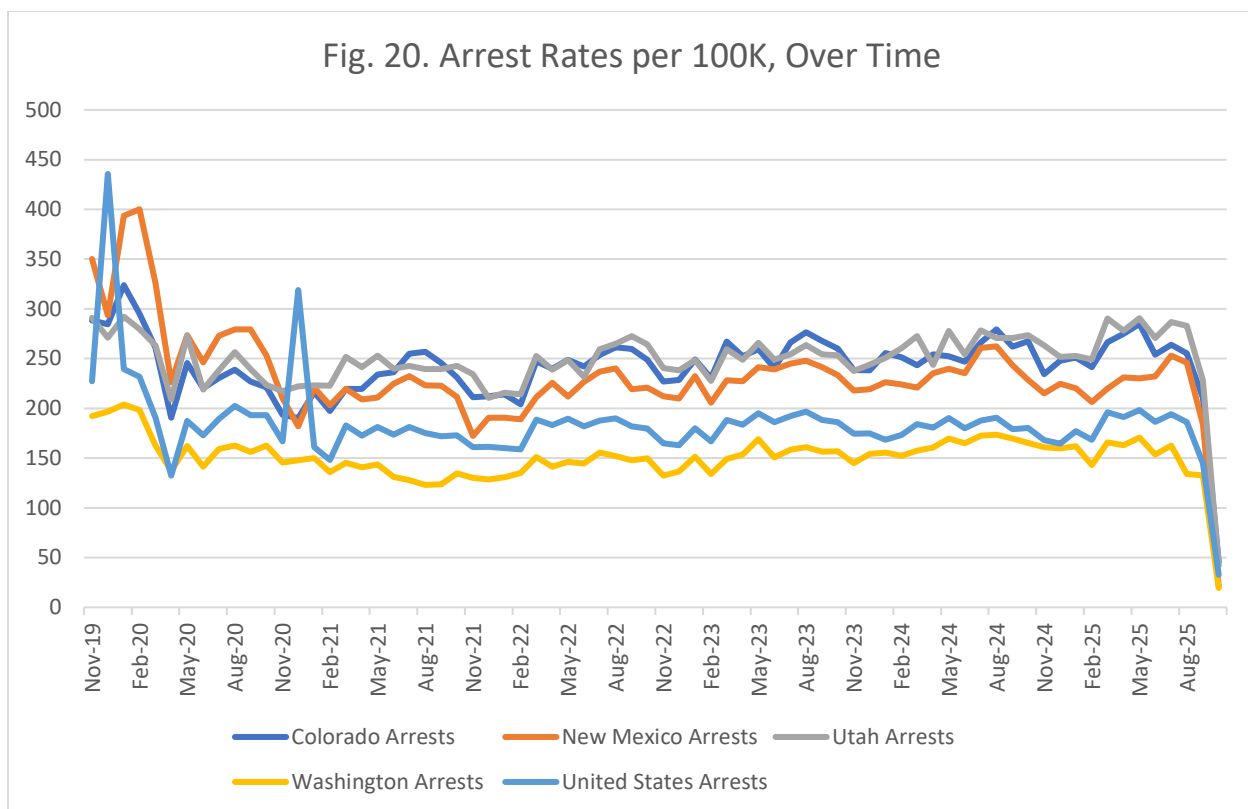


¹³⁰ McDonald, *supra* note 78.

F. Other Indicia of Officer Conduct

Debates about the impact of qualified immunity on policing suggest that the Colorado and New Mexico statutes might have other visible impacts. For example, if officers were chilled by the threat of being sued without qualified immunity as a defense, one might imagine that arrests rates would decrease in New Mexico and Colorado in comparison to the United States as a whole. Available evidence of arrests rates suggests that this did not occur.

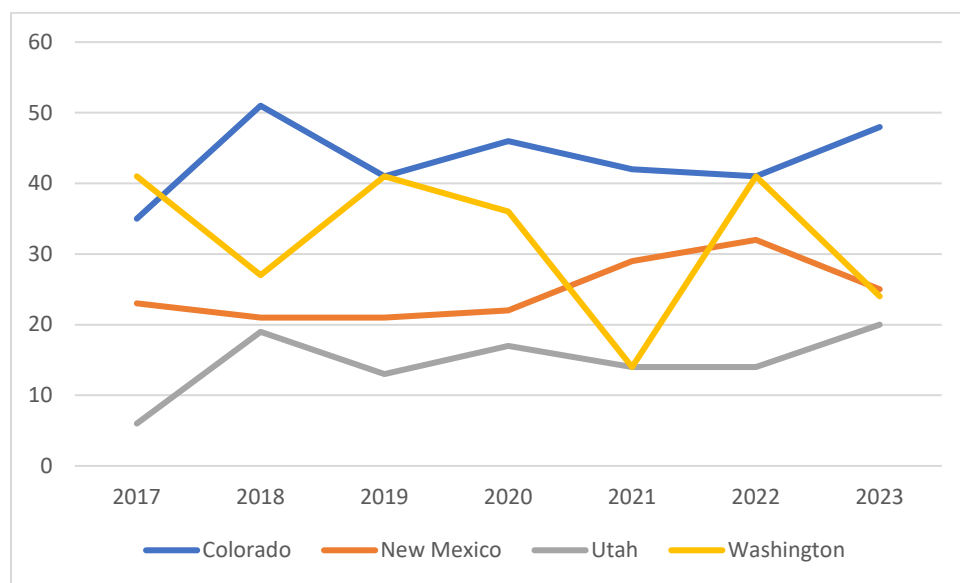




One might also imagine that the threat of suit without the protections of qualified immunity might lead police officers to use fatal and non-fatal force less frequently. Yet available data suggests that police uses of fatal and non-fatal force have not meaningfully changed following the adoption of this legislation. Although there is no official count of the number of police killings each year, Mapping Police Violence has crowd sourced data about police killings since 2013.¹³¹ Their data, while limited because of the source of information do not suggest any meaningful trend that could be correlated to the passage of state police accountability legislation.

¹³¹ See Mapping Police Violence, www.mappingpoliceviolence.org, accessed Nov. 17, 2025.

Fig. 21 Police Killings by State, by Year



Data about non-fatal uses of force are far less complete, but the piecemeal data that is available similarly suggest no spikes or dips that appear to have occurred in the wake of Colorado’s or New Mexico’s legislation.¹³²

IV. IMPLICATIONS

The ecosystem of constitutional tort liability, insurance, and deterrence represents what some scholars describe as a “complex adaptive system,” one with many moving parts and a tendency to adapt in dynamic and somewhat unpredictable ways to changes in law, culture, and the practice of policing.¹³³ Sheer complexity complicates any evaluation of the way legislative reforms may have altered the litigation systems of Colorado and New Mexico. As we have seen, the two states adopted different reform measures, implemented them at different times, and introduced the reforms to state populations and law enforcement agencies that differed in important respects.

This part offers a summary of the apparent implications of our findings while acknowledging the complexity of the subject. We cannot measure the effects of any particular statute, including provisions that reform or eliminate the qualified immunity defense. Moreover, our study focuses on experience in the early years of these reforms, before courts, lawyers, and regulated parties fully understand the meaning of the new laws. Abstracting from the particulars, our study examines

¹³² Mapping Police Violence tracks data from 2017-2022, by state, regarding reported uses of force, police shootings, taser uses, baton/impact weapons, K-9, neck restraints, and chemical spray. The site has reported data from 37% of Colorado agencies; 40% of New Mexico agencies; 11% of Utah agencies; and 50% of Washington agencies. See policedata.org, last accessed Nov. 17, 2025.

¹³³ For discussions of this “complex adaptive system,” see Ronald J. Allen, *Reflections on Evidence, Complexity & Law*, 38 *RATIO JURIS* 72 (July 2025); Ronald J. Allen & Paul Piazza, *The Common Law as a Complex Adaptive System*, 62 *S.D. L. Rev.* __ (forthcoming, 2026); Ronald J. Allen & Nic Elliott-Smith, *Proof Beyond a Reasonable Doubt Doesn’t Exist: Except as an Emergent Property of a Complex Adaptive System*, 115 *J. Crim. L. & Criminology* __ (forthcoming, 2026).

the broad factors that inform debates over constitutional tort reform. This part first describes our results and then places them into the broader context of debates over reform legislation.

A. Constitutional Tort Litigation in Post-Reform New Mexico and Colorado: A Preliminary Assessment

This section summarizes what we learned about the experience of Colorado and New Mexico in the aftermath of their enactment of constitutional tort litigation reforms. As explained above, we focused on the impact of these reforms on the incidence of litigation; payments and settlements; insurance rates; and employee turnover, issues we take up in turn.

1. Lawsuit Incidence

We do not observe any significant increase in the number of lawsuits filed against law enforcement agencies in Colorado and New Mexico after the reforms in those states took effect. On the contrary, we find that the number of lawsuits filed remained relatively flat throughout the period for all the states we studied. Figures 4 and 6 display law enforcement filings over time, showing relative stability. Those outcomes resemble the stability we find in all civil litigation filings in these four states, as reflected in Figure 7. Notably, we find no evidence that the filing experience in the reform states, New Mexico and Colorado, differed from that in the control (no-reform) states of Utah and Washington.

To be sure, one can identify some consistencies and differences in litigation practice in the states under study. For starters, litigation in all the states unsurprisingly appears to center in the largest law enforcement jurisdictions (Figure 1). Those large jurisdictions have the most cases across the board (Figure 2) and tend to have more cases when measured as a ratio of filings per 10,000 people (Figure 3). These proportionally higher rates of litigation in the urban jurisdictions were present before the reforms took effect and likely reflect factors other than legislative reforms, including more ready access to supportive litigation networks and attorneys.¹³⁴ Rural areas tend to have fewer experienced civil rights lawyers and, in all jurisdictions, plaintiffs who proceed without lawyers are highly likely to fail.¹³⁵

One also finds some state-to-state variation in litigation propensity. New Mexico appears to be slightly more litigious than the other states, whether one measures filings over time (Figure 4), filing rates on a per population basis (Figure 6), or filings per law enforcement employee (Figure 8). But we find little evidence that New Mexico experienced a spike in lawsuits following the adoption of reform measures or an increase in filings different in kind from that experienced in the no-reform states.

2. Payments and Settlements

Our study does not show any significant increase in the amount of money Colorado and New Mexico paid to settle claims in the years following their adoption of constitutional tort reforms.

¹³⁴ For discussion of these types of variations in civil rights ecosystems, see Schwartz, *supra* note 27 at 1557-59, 1577-79.

¹³⁵ See Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 677-79 (2023) (reporting that, among almost 1200 police misconduct cases filed in five federal districts, counseled cases were four times more likely to be successful than were *pro se* cases).

Perhaps the most striking observation about the disbursements reported by responding agencies in the four states we studied was that they diverged along lines that differed from the simplistic assumption that reforms would trigger increased payouts. As reflected in Figure 14, the experience of New Mexico bears a closer resemblance to that of Utah (a non-reform state) just as the experience of Colorado more closely resembles Washington (a non-reform state). Both Colorado and Washington faced relatively significant changes in payouts from year to year, but Washington's payouts actually increased in the last two years we studied whereas Colorado's declined sharply. We do not have any information that sheds light on the volatility of the year-to-year payout figures in those two states, but we expect payouts to vary significantly based on idiosyncratic factors, such as the resolution of one or more claims challenging well-publicized police encounters that resulted in severe injuries.

We caution that lawsuits of all kinds, and some forms of constitutional tort litigation,¹³⁶ may take years to resolve. Depending on these time lags, settlements in the aftermath of legislative reforms such as those adopted in Colorado and New Mexico may often address police encounters that occurred before the reforms became legally effective. Our inability to exclude pre-reform police encounters from this study of post-reform payouts introduces some noise into our results.

3. Insurance Rate Changes

Rates of insurance in all four states, except Utah, increased over the period we studied but we found no indication that reform measures were associated with distinctively high premium increases in New Mexico or Colorado, as is reflected in Figures 16 and 17. Indeed, both New Mexico and Colorado experienced modest increases after their reforms took effect, increases well below those experienced by Washington (a no-reform state). Accounting for the premium hikes in Washington poses its own questions. It may bear some association with the rather sharp increase in that state's litigation payouts, as reflected in Figure 14, although experience from the world of tort reform suggests that premiums are not closely tied to claim rates or payouts.¹³⁷ Indeed, some research suggests that the regulatory atmosphere in an individual state can significantly affect insurance premium rate increases.¹³⁸

The insurance experience in the reform states may offer a more useful measure of the expected impact of legislative reform than the absolute amount of settlement payments in the years immediately following enactment of reforms. At least in theory, insurers consider the regulatory experience in the particular state and department and the likelihood of expanded future liability as

¹³⁶ In 2021, for example Seattle agreed to settle a lawsuit for \$3.5 million for a death that occurred in 2017. See Anna Boiko-Weyrauch, *Seattle Settles for 3.5 M in Lawsuit over the 2017 Police Killing of Charleena Lyles*, KUOW (Nov. 30, 2021), available at <https://www.kuow.org/stories/seattle-settles-wrongful-death-suit-with-family-of-charleena-lyles>.

¹³⁷ See *infra* notes 142-145 and accompanying text.

¹³⁸ See Sangmin Oh, Ishita Sen & Ana-Maria Tenekedjieva, Pricing of Climate Risk Insurance: Regulation and Cross-Subsidies (January 15, 2021). Journal of Finance, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3762235> or <http://dx.doi.org/10.2139/ssrn.3762235> (suggesting that insurers more likely to increase premiums in states with fewer regulatory barriers).

they fix current premiums.¹³⁹ To the extent that premiums embed an assessment of likely future experience, then, legislative reforms could more quickly affect premiums than settlement payments.

4. Employee Turnover

As with the other elements we studied, we found little evidence that employee retirements or resignations increased in the aftermath of the reforms adopted in New Mexico and Colorado. As Figures 18 and 19 reveal, all four states displayed relatively consistent patterns of turnover throughout the period under review, including a spike in 2021 and a decline thereafter. New Mexico's rate of turnover remained consistently low throughout the period; Colorado's increased and dropped back; Utah's increased somewhat. The relatively comparable experience among treatment and control states suggests that factors other than those specific to the four states may account for the spike they all experienced in 2021. Two such cross-cutting factors suggest themselves: the onset of the COVID-19 pandemic in 2020 (and the resulting demands it placed on front-line law enforcement) and the national reckoning with police-involved violence that unfolded in the wake of George Floyd's murder.

B. On the Implications of Relative Systemic Stability

To summarize our findings, then, the evidence appears to suggest that the reform states, New Mexico and Colorado, experienced post-reform continuity and stability. In this section, we consider the implications of these findings of relative stability for policy-makers confronting proposals to reform the structure of police accountability litigation. We first explain why states may experience post-reform stability. We then describe the role research should play as policy-makers continue to evaluate reforms and consider adjustments. We then return to the normative issues at the center of the debate over police accountability and qualified immunity.

1. Preliminary Lessons From Systemic Continuity

Debaters in the political arena may rely on anecdote and exaggeration as they describe the likely costs and benefits of proposed reforms. Research into real world consequences thus provides an important way to test the assertions of those debating legal change. The clearest finding that emerges from our study of reforms in New Mexico and Colorado—one of relative systemic continuity—may complicate the simplistic accounts of both the supporters and opponents of qualified immunity reform.

Opponents of reform must confront the fact that New Mexico and Colorado have not experienced the predicted influx of new lawsuits, devastating financial liability, or mass exodus of officers. And although data are limited, we do not find that these reform statutes were associated

¹³⁹ For accounts of the role of expected future liability on insurance rates, see Tom Baker and Sean Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' and Officers' Liability Insurance Market*, 74 U. Chi. L. Rev. 487 (2007) (describing insurers' attempt to set premiums to take account of risk). Yet qualitative studies of insurance practices make clear the imprecision of efforts to forecast future risk. Scholars have thus argued that we update our understanding of insurance practices in light of the adaptability of insurance markets. See Tom Baker, *Uncertainty > Risk: Lessons from the Insurance Runoff Market*, 62 Boston Coll. L. Rev. 59, 70 (2021) (explaining that "legal thought can lessen its concern about the impact of legal change on insurance markets . . . because we can be more confident that those markets will manage through legal change").

with a declining arrest rate or a reduction in police use of lethal and non-lethal force, which might temper claims about the legislation's predicted tendency to chill policing and lead officers to under-enforce the law. By the same token, those who supported reform measures may be surprised to learn that the incidence and impact of constitutional tort litigation has remained relatively flat, instead of responding to the creation of an environment understood as more welcoming to such claims. To be sure, a finding of relative stability as to the incidence of lawsuits may mask underlying changes in the behavior of police officers and the claiming rates of those injured by police violence. But our data do not allow us to fully account for the underlying factors that contribute to relative systemic stability.

Our findings thus resemble those of other scholars whose studies of the systemic impact of constitutional tort litigation found little evidence of the predicted growth in litigation. For example, several meticulous studies by Theodore Eisenberg examined the impact of the Supreme Court's decision in *Monroe v. Pape*, which extended the reach of section 1983 to encompass retail law enforcement on city streets and in prisons. Critics warned of dire consequences, claiming that the 1961 decision led to an "explosion" of Section 1983 cases. Eisenberg rejected that assertion based on a study of civil rights cases filed in the Central District of California: "Section 1983 [claims] are not overwhelming the courts; trial claims, involving little if any federal policy do not dominate district court dockets, and courts are not, at the behest of state prisoners, eagerly overseeing minute details of prison life."¹⁴⁰ In a subsequent study, Eisenberg and co-author Stewart Schwab found that civil rights cases constituted only 4% of the Central District's docket—figures "smaller than the dire warnings and common perceptions suggest" and "result[ed] in the transfer of relatively small amounts of money."¹⁴¹

Similarly dire predictions about runaway medical malpractice litigation have been debunked by empirical examination.¹⁴² For example, many tort reforms have been touted as a way to increase access to physicians, on the theory that doctors would prefer to practice in states with such caps, but empirical data have not supported this theory as a whole.¹⁴³ The converse has been argued in the context of policing – that eliminating qualified immunity will cause retention issues – but the data we report here and Ben Grunwald reports elsewhere do not support that hypothesis. Similarly, study of medical malpractice litigation finds a disconnect between insurance premium increases

¹⁴⁰ Eisenberg, *supra* note 37, at 484.

¹⁴¹ Eisenberg & Schwab, *supra* note 30, at 671. In that study, Eisenberg and Schwab urged that "decision makers demand evidence to support assertions about constitutional tort cases, and that they not act in the empirical void that has dominated discussion to date." *Id.*

¹⁴² See, e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Charles Silver, David A. Hyman & Bernard S. Black, *Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and after HB4*, 51 TEX. TECH. L. REV. 627 (2019).

¹⁴³ See Black, et. al., *supra* note 19 at 11, 13 (finding no evidence that damages caps impacted access to physicians); Klick & Stratmann, *supra* note 21 at S122 (finding that of many reforms only caps on noneconomic damages have a statistically significant effect on access to physicians and even then only in high-risk specialties); Matsa, *supra* note 21, at S143 (2007) (noneconomic damages cap do not impact access to doctors for the "average resident" but are positively correlated with supply of "frontier rural specialist[s]");

and the actual filing and settlement of malpractice claims – much like what we report here.¹⁴⁴ At the same time, while we did not find at this early stage a relationship between legal change and filing rates, studies of medical malpractice reform have found that filing rates (and average payments per claim) decrease in the wake of pro-defendant tort reform.¹⁴⁵

The relative stability of constitutional tort ecosystems may well reflect the complexity of the process by which civil rights claimants secure redress in court. In an earlier study,¹⁴⁶ based on evidence about the role qualified immunity played in almost 1,200 police misconduct cases, one of us predicted that eliminating qualified immunity would not result in a flood of frivolous lawsuits or payments.¹⁴⁷ As Schwartz explained, qualified immunity poses but one of many barriers to success in civil rights cases; even without the immunity defense, those barriers would discourage plaintiffs' attorneys from filing insubstantial cases.¹⁴⁸ The majority of the almost 1,200 police misconduct cases failed for reasons other than qualified immunity and those other barriers to relief would remain in a world without qualified immunity.¹⁴⁹ She also observed that eliminating qualified immunity would not dramatically increase the deterrent power of constitutional tort cases because officers are virtually always indemnified, lawsuit payments are a very small portion of most local governments' budgets, and local governments and officers weigh many considerations—including but not limited to the threat of liability—when making decisions.¹⁵⁰ As she explained, “[i]n a world without qualified immunity, government indemnification, budgeting, and risk-management practices, and the many other drivers of government behavior would continue to minimize lawsuits' deterrent effects.”¹⁵¹

We cannot say what role, if any, these factors played in maintaining a relatively stable constitutional tort litigation environment in the aftermath of the Colorado and New Mexico reforms. We nonetheless view the Schwartz study as a useful way to explain relative systemic continuity. In a world where many factors determine litigation rates and outcomes, reform of the

¹⁴⁴ See Black et al., *supra* note 19, at 8 (finding that changes in the medical malpractice system (the number of paid claims and the payout per claim) can explain only a fraction of the premium spikes that hit Texas during 1999–2003”); Patricia W. Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 VAL. U. L. REV. 559, 587–88 (2009) (finding that tort reform decreased payments and number of claims in Oklahoma, but was not correlated with a decrease in insurance premiums).

¹⁴⁵ See Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183 (2007) (finding that six tort reforms were collectively correlated with a statistically significant decrease in number of cases and certain individual reforms were correlated with a reduction in the number of annual payments and a reduction in average awards), and a reduction in number of cases ; Hatamyar, *supra* note 144, at 587–88; Matsa, *supra* note 21, at S145 (finding that damages caps are correlated with a 24 percent in payments on claims).

¹⁴⁶ See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020).

¹⁴⁷ See *id.* at 316–17.

¹⁴⁸ See *id.* at 344–51.

¹⁴⁹ See *id.* at 328–29.

¹⁵⁰ See *id.* at 351–60.

¹⁵¹ See *id.* at 362.

doctrine of qualified immunity, or any other element of the constitutional tort ecosystem, may not deserve its billing as a pathway to either perdition or salvation.

2. More Research Needed

That said, more granular research into the cases filed may reveal more subtle ways that legislative reforms influence constitutional tort litigation. For example, Schwartz predicted that ending qualified immunity might shift the civil rights ecosystem in five meaningful ways: 1) the cost, risk, and complexity of civil rights litigation might decrease; 2) those decreased costs and risks might encourage lawyers to take more civil rights cases; 3) more cases might go to trial; 4) courts might offer more clarity about the scope of constitutional rights; and 5) courts would issue fewer decisions shielding officers who violated the Constitution from liability.¹⁵² While this study cannot answer these research questions, docketology review would surely help.

Second, further research may reveal how the reforms shape the behavior of those at the center of the civil rights ecosystem: plaintiff's attorneys; judges; defense counsel; risk managers; insurance providers; law enforcement agencies; and officers themselves. Qualitative study may also reveal steps that ecosystem actors have taken to enhance or mute the intended effects of this legislation. As just one example, following passage of the Colorado legislation, which allows local jurisdictions to require officers to contribute to settlements and judgments when they are found to have acted in bad faith, the Greenwood Village city council passed a resolution promising that it would never make a bad-faith finding "no matter what."¹⁵³ Such research can illuminate the interaction between legal reforms and the people, rules, and practices that make up any given civil rights ecosystem.

Finally, research should extend over a longer time period. Implementation of legal reforms takes time, as stakeholders gain knowledge and expertise regarding the legal implications of the new laws and adjust their behavior accordingly.¹⁵⁴ New Mexico lawyers and legislators have predicted that it will take years for courts and litigants to resolve whether and to what extent the state and federal constitutional protections differ, to become fluent in the statute's provisions, and to appreciate the impact of the statute.¹⁵⁵ Any final assessment of the impact of the reforms under review here must await these more comprehensive studies.

New Mexico provides an example of a data-driven approach to legislative reform. When the New Mexico Civil Rights Commission was first considering whether to recommend passage of the New Mexico Civil Rights Act, in 2020, it responded to concerns that the Act would increase

¹⁵² See *id.* at 362-63.

¹⁵³ Greenwood Village Defends Resolution to Protect Officers From Civil Liability, CBS NEWS (July 9, 2020), <https://www.cbsnews.com/colorado/news/greenwood-village-resolution-officers-civil-liability/>.

¹⁵⁴ For example, studies of the implementation of workplace antidiscrimination measures demonstrate this type of incremental advancements and adjustments. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009); Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

¹⁵⁵ See Joanna C. Schwartz, *Constitutional Recalibration: Lessons from New Mexico*, 54 N.M. L. REV. 345 (2024).

government litigation costs by observing that “the Legislature confronts similar questions every time it enacts a statute that allows for litigation,” and has addressed such concerns “by going forward thoughtfully, observing how a statute operates, and readjusting when the facts show it is necessary.”¹⁵⁶ In 2023, two years after New Mexico’s statute was passed, legislation was introduced to do away with the NMCRA based again on concerns about the fiscal impact of the legislation. But that bill was tabled after a fiscal impact report revealed that there had been no verdicts or settlements under the Act in the two years after its passage.¹⁵⁷ This study and future research can offer further insights into the impact of the NMCRA on New Mexico’s civil rights ecosystem—and the impact of the Colorado reforms on Colorado. Continued research may reveal a need for additional reforms or adjustments and provide useful information as other state legislatures consider reform measures.

3. The Normative and Expressive Elements of State Legislative Engagement with Constitutional Remedies

Findings of relative stability should enable policy-makers to reflect on the elements of a just and normatively attractive system of constitutional tort liability, free from the exaggerated claims of defenders of the status quo and the proponents of broad reform. From that normative perspective, the arguments for subjecting the constitutional misconduct of government officials to a test of simple legality seem quite powerful. Critics of qualified immunity highlight the many ways in which the doctrine departs from rule of law values by conditioning remediation on the happenstance that previous decisions established precedents that meet the clear law requirement.¹⁵⁸ Critics have also observed that the doctrine can encourage courts to leave the law unclear instead of finding it and applying it to the problem at hand.¹⁵⁹ Even though the doctrine does not foreclose police accountability altogether, or play a decisive role in every case, it can produce notably unjust outcomes.¹⁶⁰

Statutory reform seeks both to lessen the likelihood of such results and to express a legislative consensus that the rights of individual citizens deserve the respect of law enforcement officers. Expressive theories of law hold that articulations of law have expressive value – that giving authoritative voice to a set of norms or precepts can shape societal attitudes and change behavior

¹⁵⁶ NEW MEXICO CIVIL RIGHTS COMMISSION REPORT, *supra* note 87, at 37.

¹⁵⁷ Segarra, *supra* note 94.

¹⁵⁸ For explications of this critique, see Jeffries, *supra* note 41, at 256-58; John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854-58, 863-66 (2010); Michael L. Wells, *Qualified Immunity After Ziglar v. Abbasi: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 436-38 (2019).

¹⁵⁹ For discussions of the ways qualified immunity encourages this type of constitutional stagnation, see Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120; Nielson & Walker, *The New Qualified Immunity*, *supra* note 52; James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1605-06 (2011).

¹⁶⁰ For illustrations of this point, see Blum, *supra* note 61, Schwartz, *After Qualified Immunity*, *supra* note 146

without necessarily coercing individuals into compliance with the new regime.¹⁶¹ As Cass Sunstein explained, the “real-world consequences” of any change in the law (whether announced by a legislature or by a court) may be “smaller than is conventionally thought.”¹⁶² But the new law may nonetheless contribute to a change in behavior by making a change in societal norms. The expressive message of police accountability reforms may shape the behavior of police officers without necessarily increasing the rate or severity of the sanction imposed for the violation of individual constitutional rights.

State lawmakers may wish to consider these matters of normative justice and expressive consensus as they reflect on proposed reforms to constitutional tort litigation. Recently, we have sought to draw renewed attention to how states and localities can adopt policies that address some of the most pertinent barriers to civil rights litigation.¹⁶³ In that work, we proposed that states and localities consider adopting state law analogs to Section 1983 free of many of the restrictions that impede federal civil rights litigation.¹⁶⁴ We identified the Colorado and New Mexico reforms as examples of a new civil rights federalism, and encouraged other jurisdictions to consider similar legislation.¹⁶⁵ We think the story of relative stability that has emerged in the aftermath of these reforms helps to confirm that states can play a leadership role in restoring norms of government accountability and constitutional compliance without fear that legislation will dramatically disrupt or impede the effective operation of government agencies. To the extent that these or other legislative efforts produce unwanted outcomes, our research suggests that they will do so in incremental ways that can be addressed in a timely manner through further legislative adjustments. Complex adaptive systems, by definition, can adapt to changes in the legal regime.

CONCLUSION

The summer of 2020 was marked by an unprecedented push for an end to qualified immunity, a push echoed more recently in response to violence by federal officers engaged in immigration enforcement. Yet fears about the dangers of eliminating qualified immunity largely drowned out calls for reform. Two states—Colorado and New Mexico—enacted legislation despite those counter-pressures. Both states created a state cause of action without a qualified immunity defense, and this study finds that, in their first few years of existence, these rights to sue have not had the destabilizing effects critics of the legislation imagined. Whether measured by lawsuit filing rates, payouts, insurance premiums, or officer retention, the civil rights ecosystem in Colorado and New Mexico does not appear dramatically, or even noticeably, to have shifted.

More research awaits. Yet the message of relative continuity in these preliminary findings may well deserve the attention of policy-makers in other states. For starters, these findings of stability

¹⁶¹ See Cass Sunstein, *On the Expressive Function of Law*, 124 U. Pa. L. Rev. 2021 (1996). See also Richard H. McAdams, *A Focal Point Theory of Expressive Law*, (2000) (explaining how expressive law may provide a focal point enabling parties to coordinate their behavior to their mutual advantage); Richard H. McAdams, *THE EXPRESSIVE POWERS OF LAW* (2015); Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 L & Soc. Inq. 60 (2017) (viewing the expressive content of law as mediated through social groups rather than as acting on individuals as in the McAdams account).

¹⁶² Sunstein, *supra* note , at 2028.

¹⁶³ See Reinert et al., *supra* note 24.

¹⁶⁴ See *id.* at 769-75.

¹⁶⁵ See *id.* at 740-41.

do not stand alone. Other studies have shown that critics of constitutional tort litigation, like critics of other tort-based ecosystems, often overstate their claims.¹⁶⁶ Indeed, the sheer complexity of these systems of compensation and deterrence, shaped by standards of care, rules of indemnity, and various forms of supervision and risk management, makes it unlikely that dramatic changes would result from reforms that target one or two elements of the system. That argues neither for legislative inaction nor for legislative inattention to available data. But it may rightly persuade policy-makers to take action based on the normative and expressive value of a constitutional tort system that promises to redress police-involved violations of constitutional rights.

¹⁶⁶ *See supra* notes 86-89, 126-28 and accompanying text.

APPENDIX

Following are the Tables described and referenced throughout the Article.

TABLE 1. RESPONSE RATES BY STATE (ANY RESPONSES)

State	Any Response	No Response	Total
CO	140 (82.8%)	29 (17.2%)	169
NM	72 (64.8%)	39 (35.2%)	111
UT	98 (72.6%)	37 (27.4%)	135
WA	178 (79.1%)	47 (21.9%)	225
TOTAL	488 (76.3%)	152 (23.7%)	640

TABLE 2. RESPONSE RATES BY STATE (BY REQUEST)

State	Litigation Response	Retention Response	Insurance Response
CO	129 (76.3%)	105 (62.1%)	84 (49.7%)
NM	60 (54.1%)	47 (42.3%)	63 (56.8%)
UT	78 (57.8%)	83 (61.5%)	60 (44.4%)
WA	177 (78.7%)	176 (78.2%)	166 (73.7%)
TOTAL	444 (69.4%)	411 (64.2%)	373 (58.3%)

TABLE 3. RESPONSE RATES (BY POPULATION)

State	Total Pop. Any Response	Total Pop. No Response	Total Pop.
CO	6,603,234 (72.3%)	2,526,529 (27.7%)	9,129,763
NM	3,245,712 (91.5%)	298,268 (8.5%)	3,245,712
UT	4,138,416 (88.1%)	559,682 (11.9%)	4,698,098
WA	7,428,811 (60.1%)	4,912,602 (39.9%)	12,341,413
Total	12,040,811 (67.1%)	5,917,056 (32.9%)	17,957,867

TABLE 4. RESPONSE RATES (BY SWORN OFFICERS)

State	Total FT Sworn Any Response	Total FT Sworn No Response	Total FT Sworn
CO	9,056 (74.5%)	3,039 (25.5%)	12,095
NM	3,953 (89.6%)	458 (10.4%)	4,411
UT	4,083 (81.6%)	920 (18.4%)	5,003
WA	6,833 (62.3%)	4,132 (37.7%)	10,965

TABLE 5. LITIGATION FILING RATES (BY STATE)

Jurisdiction	Zero lawsuits	1-5 lawsuits	6-10 lawsuits	11+ lawsuits	Total Responses
All	178 (40.0%)	176 (39.5%)	44 (9.9%)	47 (10.6%)	445
CO	62 (48.1%)	46(35.7%)	10 (7.8%)	11 (8.5%)	129
NM	13 (21.7%)	28 (46.7%)	10 (16.7%)	9 (15.0%)	60
UT	32 (41%)	35 (44.5%)	6 (7.7%)	5 (6.4%)	78
WA	72 (40.7%)	69 (38.9%)	18 (10.2%)	19 (10.2%)	178

TABLE 6. LITIGATION FILING RATES (BY POPULATION SIZE)

Jurisdiction	Zero lawsuits	1-5 lawsuits	6-10 lawsuits	11+ lawsuits	Total Responses
All	178 (40.0%)	176 (39.5%)	44 (9.9%)	47 (10.6%)	445
All >10,000	40 (16.7%)	112 (46.9%)	40 (16.7%)	47 (19.7%)	239
All <10,000	138 (67.0%)	64 (31.1%)	4 (1.9%)	0 (0%)	206
CO - >10,000	7 (13.7%)	23 (45.1%)	9 (17.7%)	12 (23.5%)	51
CO - <10,000	55 (70.5%)	22 (28.2%)	1 1.3%)	0 (0%)	78
NM - >10,000	1 (2.8%)	15 (42.9%)	8 (22.9%)	11 (31.4%)	35
NM - <10,000	11 (44%)	12 (48%)	2 8%)	0 (0%)	25
UT - >10,000	12 (24.5%)	26 (53.1%)	6 (12.2%)	5 (10.2%)	49
UT -<10,000	20 (68.9%)	9 (31.0%)	0 (0%)	0 (0%)	29
WA - >10,000	20 (19.2%)	48 (46.2%)	17 (16.3%)	19 (18.3%)	104
WA - <10,000	52 (70.3%)	21 (28.4%)	1 (1.4%)	0 (0%)	74

TABLE 7. AVERAGE NUMBER OF LAWSUITS PER 10K POPULATION, WITH STANDARD DEVIATION, BY STATE

	>10K	<10K
NM	2.78 (SD 2.98)	5.29 (SD 8.57)
UT	0.71 (SD 0.89)	1.12 (SD 2.36)
CO	1.25 (SD 1.25)	2.82 (STDEV 9.99)
WA	0.92 (SD 0.84)	2.13 (SD 6.14)

TABLE 8. YEAR TO YEAR DIFFERENCE IN TOTAL FILINGS AGAINST LAW ENFORCEMENT AND TOTAL CIVIL FILINGS

Year	CO-LE	CO-All	NM-LE	NM-All	UT-LE	UT-All	WA-LE	WA-All
2018	11.11%	18.76%	-14.17%	5.30%	34.48%	1.29%	47.27%	-5.62%
2019	32.86%	-8.55%	51.38%	-2.16%	7.69%	4.30%	39.51%	-26.69%
2020	38.71%	19.18%	7.27%	-9.03%	-21.43%	-7.83%	-7.96%	-41.45%
2021	1.55%	-21.86%	-25.42%	-10.92%	-21.21%	-11.51%	22.12%	-0.60%
2022	5.34%	3.22%	41.67%	-6.07%	53.85%	-7.24%	-3.94%	28.41%
2023	-63.77%	-26.80%	-31.02%	10.86%	-42.50%	17.18%	-58.20%	15.61%

TABLE 9. PERCENT OF INDIVIDUAL LAW ENFORCEMENT JURISDICTIONS REPORTING CHANGE IN LITIGATION FILING, POST COLORADO REFORMS¹⁶⁷

State	Increased Litigation post-2020	No increase in Litigation post-2020
CO	20	49
UT & WA	58	133
CO (>10K)	15	13
UT & WA (>10K)	45	67

Fisher's Exact Test = 0.879 (All) & 0.209 (>10K)

TABLE 10. PERCENT OF INDIVIDUAL LAW ENFORCEMENT JURISDICTIONS REPORTING CHANGE IN LITIGATION FILING, POST NM REFORMS

State	Increased Litigation post-2021	No increase in Litigation post-2021
NM	20	30
UT & WA	49	14

¹⁶⁷ The data in Tables 9 and 10 were compiled by comparing the average number of lawsuits filed per year in each individual law enforcement jurisdiction pre-reforms (2017-2020 for Colorado and 2017-2021 for New Mexico) to the average number of lawsuits filed post-reforms and determining how many jurisdictions saw their average increase versus how many jurisdictions saw their average not change or decrease.

NM (>10K)	13	18
UT & WA (>10K)	40	71

Fisher's Exact Test = 0.055 (All) & 0.675 (>10K)

TABLE 11. FILING RATES IN COLORADO (BY YEAR AND POPULATION)

Year	Zero lawsuits	1-2 lawsuits	3-5 lawsuits	6+ lawsuits	Total Responses
2017 (All)	110	11	4	3	128
2017 (>10K)	34	8	4	3	49
2017 (<10K)	75	3	0	0	78
2018 (All)	106	15	4	3	128
2018 (>10K)	32	11	4	3	50
2018 (<10K)	74	4	0	0	78
2019 (All)	99	22	4	3	128
2019 (>10K)	25	17	4	3	49
2019 (<10K)	73	5	0	0	78
2020 (All)	97	20	8	3	128
2020 (>10K)	26	15	6	3	50
2020 (<10K)	71	5	1	0	77
2021 (All)	96	22	8	3	129
2021 (>10K)	23	17	7	3	50
2021 (<10K)	72	5	0	0	77
2022 (All)	92	30	4	3	129
2022 (>10K)	22	22	4	3	51
2022 (<10K)	70	8	0	0	78
2023 (All)	105	19	3	1	128
2023 (>10K)	29	17	3	1	50
2023 (<10K)	76	2	0	0	78

TABLE 12. FILING RATES IN NEW MEXICO (BY YEAR AND POPULATION)

Year	Zero lawsuits	1-2 lawsuits	3-5 lawsuits	6+ lawsuits	Total Responses
2017 (All)	41	13	2	5	61
2017 (>10K)	18	10	2	4	34
2017 (<10K)	23	3	0	0	26
2018 (All)	40	14	4	5	63
2018 (>10K)	17	11	4	4	36
2018 (<10K)	23	3	0	0	26
2019 (All)	33	18	7	5	63
2019 (>10K)	12	14	6	4	36
2019 (<10K)	21	4	1	0	26
2020 (All)	36	16	3	8	63
2020 (>10K)	15	12	2	7	36
2020 (<10K)	21	4	1	0	26
2021 (All)	35	18	3	7	63
2021 (>10K)	15	12	3	6	36
2021 (<10K)	20	6	0	0	26
2022 (All)	33	21	3	6	63
2022 (>10K)	14	14	3	5	36
2022 (<10K)	19	7	0	0	26
2023 (All)	38	17	2	4	37
2023 (>10K)	17	12	2	3	34
2023 (<10K)	21	5	0	0	26

TABLE 13. FILING RATES IN UTAH (BY YEAR AND POPULATION)

Year	Zero lawsuits	1-2 lawsuits	3-5 lawsuits	6+ lawsuits	Total Responses
2017 (All)	65	10	0	2	77
2017 (>10K)	35	10	0	2	47
2017 (<10K)	29	0	0	0	29
2018 (All)	59	15	1	2	77

2018 (>10K)	30	14	1	2	47
2018 (<10K)	28	1	0	0	29
2019 (All)	58	16	1	1	76
2019 (>10K)	30	14	1	1	46
2019 (<10K)	27	2	0	0	29
2020 (All)	60	13	1	2	76
2020 (>10K)	32	11	1	1	45
2020 (<10K)	27	2	0	0	29
2021 (All)	64	9	2	1	76
2021 (>10K)	35	8	2	1	46
2021 (<10K)	28	1	0	0	29
2022 (All)	54	19	3	1	77
2022 (>10K)	29	14	3	1	47
2022 (<10K)	25	4	0	0	29
2023 (All)	61	16	1	0	78
2023 (>10K)	33	14	1	0	48
2023 (<10K)	27	2	0	0	29

TABLE 14. FILING RATES IN WASHINGTON (BY YEAR AND POPULATION)

Year	Zero lawsuits	1-2 lawsuits	3-5 lawsuits	6+ lawsuits	Total Responses
2017 (All)	147	22	7	1	177
2017 (>10K)	76	19	7	1	113
2017 (<10K)	71	3	0	0	74
2018 (All)	135	35	6	1	177
2018 (>10K)	66	30	6	1	103
2018 (<10K)	69	5	0	0	74
2019 (All)	122	42	9	4	177
2019 (>10K)	53	37	9	4	103
2019 (<10K)	69	5	0	0	74

2020 (All)	122	43	9	3	177
2020 (>10K)	57	34	9	3	103
2020 (<10K)	65	9	0	0	74
2021 (All)	121	41	12	3	177
2021 (>10K)	54	34	12	3	103
2021 (<10K)	67	7	0	0	74
2022 (All)	124	36	12	4	176
2022 (>10K)	54	32	12	4	102
2022 (<10K)	70	4	0	0	74
2023 (All)	143	28	5	0	176
2023 (>10K)	71	26	5	0	102
2023 (<10K)	72	2	0	0	74

TABLE 15. OFFICER DEPARTURES (BY JURISDICTION AND YEAR)

Jurisdiction	2017 Departures	2018 Departures	2019 Departures	2020 Departures	2021 Departures	2022 Departures	2023 Departures	Total Departures
All	1541 (11.5%)	1839 (13.7%)	1840 (13.7%)	1810 (13.5%)	2617 (19.5%)	2317 (17.3%)	1475 (11.0%)	13439
CO	681 (11.0%)	768 (12.4%)	789 (12.7%)	825 (13.3)	1132 (18.3%)	1013 (16.3%)	377 (6.1%)	6194
NM	162 (11.6%)	189 (13.5%)	187 (13.4%)	169 (12.1%)	169 (12.1%)	223 (15.9%)	123 (8.8%)	1400
UT	269 (10.8%)	374 (15.0%)	342 (13.7%)	330 (13.2%)	463 (18.5%)	331 (13.2%)	311 (12.4%)	2502
WA	429 (10.2%)	508 (12.1%)	522 (12.4%)	486 (11.5%)	853 (20.3%)	750 (17.8%)	664 (15.8%)	4212