THE TENACIOUS POWER OF CONSTITUTIONAL TORTS

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ABSTRACT

There are plenty of reasons for frustration and disappointment in our system of constitutional remediation. The Supreme Court has created so many barriers to relief that people often do not get the remedy that they deserve (or get nothing at all) when their rights are violated. Even when people manage to win, laws, policies, and union agreements insulate local governments and their officers from the consequences of their actions. And the types of incremental victories litigation can provide do not approach the types of transformative changes we need.

Yet constitutional tort litigation remains a critically important tool for people who have been harmed by government and for those who seek long-lasting change. Despite significant doctrinal hurdles, civil rights cases can be won. Lawsuits offer compensation, a day in court, and commemorations of wrongdoing. Court orders or settlements can mandate that government officials change their practices. Lawsuits can announce new standards of care, create financial pressures to improve, unearth valuable information, and focus public attention on issues underlying a case. Civil rights victories, while incremental, can advance ambitious causes—particularly over time and when part of broader campaigns and movement-building.

Articulating and appreciating the benefits of constitutional tort litigation is needed, now more than ever, to counter myths about the dangers of suing officers and local governments that are used to justify qualified immunity and other limitations on the right to sue; to encourage lawyers to continue taking civil rights cases, particularly given the federal government's abdication of its responsibility to investigate and protect against constitutional violations; and to understand how best to harness litigation's strengths in conjunction with other advocacy efforts to reduce government violence and overreach.

TABLE OF CONTENTS

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INTRODUCTION

Section 1983 was enacted during Reconstruction and resuscitated by the Warren Court to provide a right to sue for people whose constitutional rights have been violated.[1] Although Section 1983 has long been touted in lofty and general terms as an important tool to secure justice and deter future misconduct,[2] court opinions and public commentary about Section 1983 offer no end of reasons *not* to sue the government.

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[1] "Section 1983" refers to 42 U.S.C. § 1983, which authorizes people to bring suit against individual officers and local governments that violate the United States Constitution or federal law. For an overview of the history of this and other Reconstruction-era statutes, and the resurrection of §1983 through the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), see generally 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 (1985); Marshall S. Shapo, Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond, 60 NW. U. L. REV. 277 (1965). A parallel story can be told about the waxing and waning right to sue federal officials, although that is not the primary focus of this Article. See, e.g., Erwin Chemerinsky & Burt Neuborne, *Renee Good's Family Should Be Able to Sue the Officer Who Killed Her*, N.Y. TIMES (Jan. 14, 2026); James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 574–78 (2020).

[2] See, e.g., *Monroe*, 365 U.S. at 184 (1961) (explaining that Section 1983 was enacted to protect people harmed by the "[m]issue of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law"); Owen v. City of Independence, 445 U.S. 622, 651-52 (1980) (explaining that Section 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well" and noting that "the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements in constitutional rights"); City of Newport v. Fact Concerts, Inc., 453 U.S.

According to a majority of the justices on the United States Supreme Court and critics of civil rights litigation, suing government officers is dangerous: the burdens and distractions of defending oneself in court and the threat of financial ruin chill decisive action by well-meaning officers and discourage people from working for the government.[3] Suing local governments is considered equally destructive to local governments—such suits are a financial burden and improperly interject judges into the business of managing municipalities.[4]

247, 268 (1981) (explaining that "compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office"); Ziglar v. Abassi, 582 U.S. 120, 150 (2017) ("[D]amages suits 'may offer the only realistic avenue for vindication of constitutional guarantees.'") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)); Whole Woman's Health v. Jackson, 595 U.S. 30, 72 (2021) (Sotomayor, J., concurring in judgment and concurring in part in the opinion) ("§1983's 'very purpose,' consonant with the values that motivated the Young Court some decades later, was 'to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.''") (quoting Mitchum, 407 U.S. at 242; quoting Ex Parte Virginia, 100 U.S. 339, 346 (1880)).

[3] See, e.g., *Harlow*, 457 U.S. at 814 (explaining that the "social costs" of litigation include "the expenses of litigation, the diversion of official energy from pressing public issues…the deterrence of able citizens from acceptance of public office [and]…the danger that the fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). For more recent articulations of these same concerns see, for example, Billy Binion, *Tucker Carlson Might Want to End Qualified Immunity if He Actually Knew What it Was*, Reason (June 26, 2020) (quoting Tucker Carlson as threatening that ending qualified immunity would mean that police officers "could be bankrupted, they could lose their homes. That's unfair. It would also end law enforcement. No one would serve as a police officer."); Rep. Banks Introduces Qualified Immunity Act, Press Release of the Office of U.S. Congressman Jim Banks (Aug. 7, 2020) (asserting that ending qualified immunity was "another way of saying abolish the police" because, without the defense "criminals would…open endless frivolous lawsuits against the officer who put them behind bars" and officers would be "forced to quit, because they couldn't afform to serve any longer.").

[4] See, e.g., City of Los Angeles v. Lyons 461 U.S 95, 112 (1983) (explaining that "the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate."). See also Law Enforcement Legal Defense Fund, Police Reform by Decree: How DOJ Enacts Its Policing Agenda 2 (Aug. 2023) (arguing that consent decrees can result in "higher crime, lower police morale, ballooning costs, drifting timelines, and dissatisfied residents," proving to be "damaging boondoggles rather than bolstering effective and constitutional policing."); George C. Smith, *Lawyers Split the Fee and Taxpayers Foot the Bill,* WALL ST. J. (Feb. 25, 1986) ("The fact is that suing state and local governments on virtually any far-out civil-rights theory has become a veritable cottage industry for thousands of attorneys. As a result, millions of dollars in public funds are being diverted from schools, highways and health programs into the swollen coffers of law firms, liberal activist groups (such as the ACLU), and legal aid societies…"); California Citizens Against Lawsuit Abuse, *More Lawyers, Less Public Services: The Cost of Litigation to California's Cities and Counties* at 2 (Feb. 3, 2018), https://californiacala.org/reports-1/more-lawyers-less-public-services-the-cost-of-litigation-to-californias-cities-and-counties ("[I]t is unacceptable for cities and counties to continue paying out-of-control legal costs while vital social service and public safety programs face budget cuts. The legal system is intended to provide justice for those who have been injured, not to enrich a handful of plaintiffs and their attorneys.").

To read those critical of our current system of constitutional remediation, constitutional tort litigation may seem pointless. A whole host of barriers—including the challenges of finding a lawyer, pleading a claim, proving a constitutional violation, overcoming qualified immunity, and establishing municipal liability—mean that it is exceedingly difficult to win in court.[5] Even when a person does manage to prevail, widespread indemnification of officers, the lack of financial consequences for agencies, and officials' inattention to the information in lawsuits means that damages awards don't carry the deterrent power they should.[6] Courts can order forward-looking reforms, but such orders do not necessarily change government behavior on the ground.[7]

To read those advocating prison or police abolition, constitutional tort litigation may seem unambitious or even counterproductive.[8] By this view, litigation can only be successful when it seeks modest changes and often results in "reformist reforms" that build up, instead of limiting, the power of unjust systems and sap energy from efforts to advance more transformative change.[9]

Often overlooked in recent conversations about these harms, barriers, and limitations are the meaningful and varied benefits of suing the government.[10] This Article helps to fill that

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[5] See infra note 47 and accompanying text (describing these increasingly powerful barriers to relief).

[6] See infra notes 164-167 and accompanying text (describing these barriers to deterrence).

[7] See infra notes 234-235 and accompanying text (describing challenges of changing government behavior).

[8] For descriptions of this view see, for example, Kenneth W. Mack, Law and Local Knowledge in the History of the Civil Rights Movement, 125 Harv. L. Rev. 1018, 1018 (2012) ("A generation ago, young legal academics often desired to explain how the Supreme Court could be an effective participant in the social controversies of the day….At present, such dreams seem hopelessly utopian. Ambitious legal scholars now make their careers by explaining how, as a descriptive or normative matter, one should not expect courts to be agents of social change."); Molly Petchenik, Abolitionist Prison Litigation, 133 Yale L.J. F. 1, 1-2 (Oct. 20, 2023) ("Since before the mid-twentieth century, people in prison have turned to the courts to vindicate their rights in numerous areas, from racial discrimination to overcrowding to medical care. Yet even seasoned practitioners have begun to question the efficacy of this model, as litigation and monitoring stretch on for years while people continue to languish in conditions that, while better than they have been, are still inhumane. Many abolitionists have foresworn this litigation as only strengthening the hold of the carceral state); Fred O. Smith, Jr., Civil Justice and Abolition: An Exercise in Dialectic, 112 Cal L. Rev. 1057, 1065 (2024) (outlining a fictional conversation between two federal courts professors in which one observes: "[O]ne criticism of using civil litigation reform to enhance policing is that no program of reform, however thorough, can eradicate the inherent thread of injustice and racism woven into the fabric of American policing from its inception. Moreover, can't certain proposed reforms distract from efforts to address root causes of public safety problems?").

[9] See infra notes 232-238 and accompanying text (describing these critiques).

[10] For some valuable exceptions to this general rule, see, for example, Baher Azmy, Taking Back the Streets: Impact Litigation as Movement Law, 100 N.Y.U. L. Rev. 277, 319-35 (2025); Alphonse A. Gerhardstein, Making a Buck While Making a Difference, 21 Mich. J. Race & L. 251, 264 (2016); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001); James J. Park, *The Constitutional Tort Action As Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393 (2003). For discussions of the contributions of litigation to broader reform and advocacy efforts, see *infra* notes 250-253. And although recent conversations about government misconduct and accountability often have not articulated the benefits of suing government,

gap. As Part I demonstrates, despite their significant doctrinal hurdles, civil rights cases can be won.[11] As Part II describes, civil rights lawsuits offer important relief for plaintiffs including compensation, information, a day in court, and acknowledgments and commemorations of wrongdoing.[12] Part III observes that court orders or settlements in settlements can mandate that government officials change their practices.[13] Part IV explores the indirect ways in which lawsuits can influence government behavior; by announcing new standards of care, creating financial pressure to improve, unearthing valuable information, and focusing attention on the issues implicated in the case at hand.[14] And Part V argues that civil rights litigation, while incremental, can advance ambitious causes—particularly over time and when part of broader advocacy campaigns, legislative efforts, and movement-building.[15] For all of these reasons—and despite its challenges and limitations—civil rights litigation remains a critically important tool for people who have been harmed by the government, and for those seeking long-lasting change.

Skeptics of the power and potential of civil rights litigation might not object to these observations. They might acknowledge that civil rights suits can sometimes be won and litigation can sometimes confer tangible benefits, even as they dwell on its limitations.[16] They might explain that their criticisms of litigation are offered in an effort to counterbalance overly laudatory portrayals of the power of going to court.[17] But there are several reasons not

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there is a robust literature about the value of litigation more generally. See, for example, ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 9 (Oxford U. Press: 2017) (arguing that litigation can promote enforcement, transparency, participation, and equality) (2017); TIMOTHY LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE (Harvard U. Press: 2008) (describing lawsuits' role in uncovering sexual abuse in the Catholic Church); Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L. REV. 1191 (2014) (arguing that even meritless litigation can unearth facts, develop the law, and support future cases); Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020) (arguing that in the private law context, discovery serves regulatory goals comparable to agency subpoena power).

[11] See infra Part I.

[12] See infra Pt II.

[13] See infra Part III.

[14] See infra Pt. IV.

[15] See infra Pt. V.

[16] See, e.g., Richard Fallon, *Constitutional Constraints*, 97 CAL. L. REV. 975, 1034 (2009) ("At the end of the day, perhaps no more can be said than this: sanctions are an important mechanism of constitutional enforcement; they are sometimes more and sometimes less effective; and they will occasionally be employed misguidedly.").

[17] See, e.g., Nikolas Bowie, Courts are Useful, But We Cannot Depend on Them to Save Democracy, Law & Political Economy Blog (Mar. 4, 2025), https://lpeproject.org/blog/courts-are-useful-but-we-cannot-depend-on-them-to-save-democracy/ ("[F]ederal courts should absolutely enforce the federal laws that the president and the billionaire are violating. It is wrong for any person in a democracy, especially one of its leaders, to claim to be above the law. But the options available to federal courts are simultaneously too limited, weak, and dangerous for us to rely on them to the exclusion of everything else"); Stephen I. Vladeck, *The Courts Alone Can't Save Us*, N.Y. TIMES (Mar. 20, 2025) ("The federal courts, to this point, have done a remarkable job of enforcing legal and constitutional limits on the executive branch. And there's every reason to expect that they will continue to do so. In that respect, the courts may well end up saving the rule of law. But to be fully effective, many of our

just to concede, but to foreground with specificity, all that civil rights litigation can accomplish.

First and foremost, a shared understanding of civil rights lawsuits' importance is a necessary bulwark against Section 1983's further denigration. The Supreme Court has often said that its Section 1983 doctrine aims to balance "the importance of a damages remedy to protect the rights of citizens" against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[18] Although the Court contends that its decisions achieve this balance, nearly all its attention is focused on the need to protect the government.

For example, the Court and commentators argue that qualified immunity is necessary because, without it, frivolous lawsuits will flood the courts, bankrupt well-meaning officers, and discourage them from vigorously enforcing the law or from working in the government altogether.[19] For these reasons, the Court often says that qualified immunity is important not just to officers but to "society as a whole."[20] Although available evidence suggests that the Court's imagined parade of horribles bears scant relationship to reality, [21] this narrative persists. Replacing the Court's empty rhetoric about "the importance of a damages remedy to protect the right of citizens"[22] with concrete evidence about what constitutional tort cases actually accomplish is a necessary counterpoint to the myths about the dangers of suing the government that have been used to justify qualified immunity and other limitations on the right to sue. Similarly, an affirmative expression of the precise benefits and protections that

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legal rights depend upon not just judicial remedies, but also political ones. That entails both new legislation and far more aggressive oversight from members of Congress welcome to changing to changing the partisan political environment, and reasserting checks and balances against the other branches of government.").

[18] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 504-06 (1978)).

[19] See, e.g., Editorial Board, "Qualified Immunity Provides Reasonable Protection for Police Officers," Albuquerque Journal (Aug. 9, 2020) (rhetorically asking, in opposition to proposed state legislation ending qualified immunity: "Do we really want to take a rookie Albuquerque Police Department officer working graveyard in high-crime Albuquerque, making maybe $60,000 a year, and put his or her house on the line for doing something in response to a 911 call that in 20-20 hindsight might have been done better?"); Banks, *supra* note 3; Binion, *supra* note 3.

[20] See, e.g., White v. Pauly, 137 S. Ct. 548, 551 (2017) City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[21] See, e.g., Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885 (2014) (finding that indemnification rules, not qualified immunity, protect officers from the financial consequences of being sued); Joanna C. Schwartz, Qualified Immunity's Boldest Lie, 88 U. Chi. L. Rev. 605 (2021) (finding that officers are not actually trained about the facts and holdings of Section 1983 decisions, undermining Supreme Court's assertion that qualified immunity is necessary to ensure that officers are on notice of the unconstitutionality of their conduct); Joanna C. Schwartz, How Qualified Immunity Fails, 127 Yale L.J. 2 (2017) (finding that, contrary to the Court's assertion that qualified immunity is necessary to shield officers from the burdens of litigation and trial, fewer than 1% of police misconduct cases are dismissed before discovery and fewer than 4% of police misconduct cases are dismissed before trial on qualified immunity grounds).

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

can be conferred by injunctive relief is a necessary counterpoint to concerns about federal courts interfering with local government business.[23]

Recognizing the benefits conferred by Section 1983 litigation also helps to contextualize evidence that our current system of civil rights remediation does not work as it should. For example, the fact that police officers and departments almost never contribute to settlements and judgments entered against them makes clear that lawsuits do not deter in the ways long expected by commentators and courts.[24] But without an understanding of the mechanisms by which Section 1983 lawsuits *do* influence behavior and otherwise contribute to society, it is all too easy to conclude that widespread indemnification means these suits have little value or purpose.

At least, this was the conclusion reached by District Judge William Shubb when deciding an attorneys' fees petition in *Orr v. California Highway Patrol*.[25] In 2015, a federal jury found that a California Highway Patrol officer used excessive force against Harrison Orr, a 76-year-old man, and awarded him $125,000.[26] Judge Shubb reduced Orr's attorneys' fees in part because the widespread indemnification of police officers muted lawsuits' deterrent effect and meant that a damages award against an individual officer did not "provide[] a tangible benefit to the public that renders the full fee counsel seeks."[27] The Ninth Circuit reversed this part of Judge Shubb's fees decision, finding he improperly ignored longstanding precedent assuming that jury verdicts and fee awards have a deterrent effect and observing that a reduction in attorneys' fees would serve only to "reduce the incentive for the California Highway Patrol to make remedial changes to its procedures and training."[28] Grounding judicial assumptions of lawsuits' deterrent power with evidence about how Section 1983 lawsuits actually influence behavior would strengthen arguments that, despite widespread indemnification and other limits on their efficacy, these suits (and associated attorneys' fees awards) have public value.

Articulating the benefits of Section 1983 litigation can also support legal reform efforts. For those who believe that civil rights lawsuits can have no reliable deterrent effect, making it easier to sue may seem as useful as rearranging the deck chairs on the Titanic.[29] Evidence

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[23] *See, e.g., Lyons*, 461 U.S. at 112 ("[T]he need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of irreparable injury which is both great and immediate.").

[24] See Police Indemnification, supra note 21 (reporting that police officers rarely pay settlements and judgments entered against them, and the implications of these arrangements for lawsuits' deterrent effect); Joanna C. Schwartz, How Governments Pay: Lawsuits, Budgets, and Police Reform, 63 UCLA L. Rev. 1144 (2016) (reporting that police departments rarely bear the financial burdens of lawsuit payouts, and the implications of these arrangements for lawsuits' deterrent effects).

[25] Orr v. California Highway Patrol, Civ. No. 2:14-585, 2015 WL 9305021 (E.D. Ca. Dec. 22, 2015), rev'd, Orr v. Brame, 727 Fed. Appx. 265 (9th Cir. 2018).

[26] *Id.* at *1.

[27] *Id.*

[28] Orr v. Brame, 727 Fed. App. 265, 269-70 (9th Cir. 2018).

[29] C.f. Justin Driver & Emma Kaufman, The Incoherence of Prison Law, 135 Harv. L. Rev. 515, 521 (2021) ("In an era of mass incarceration, writing about doctrine might seem a bit like rearranging deck chairs on the *Titanic*").

that our system of constitutional remediation does work to some degree, despite its limitations and flaws, makes clear that our system not only has tangible benefits in its current form but is worth improving. Legislators and advocates can use this evidence to support limitations on qualified immunity, expansions of the right to sue local governments and federal officers, and greater entitlement to attorneys' fees.

Emphasizing the value of Section 1983 lawsuits is additionally key to ensure that lawyers continue bringing civil rights cases. Constitutional tort litigation is complicated, time-consuming, and risky.[30] It takes a significant investment of time and attention for lawyers to become versed in § 1983's intricacies, and it is exceedingly difficult for a person not trained as a lawyer to represent themself.[31] In parts of the country without a cadre of skilled lawyers bringing civil rights cases, those whose rights are violated are more likely to go without relief.[32] Beyond the harm to any one person or any one case, the whole civil rights ecosystem suffers when constitutional violations are not vindicated in the courts: If lawyers bringing Section 1983 cases are not experienced and do not have seasoned attorneys with whom to consult, they may litigate cases in ways that lead to unfavorable rulings, and those unfavorable rulings may make it more difficult to succeed in future cases which will, in turn, further discourage lawyers from taking these cases.[33] Understanding that plaintiffs can and do succeed in their civil rights cases and appreciating the value of this type of litigation can, perhaps, convince more lawyers that the challenges of practicing in this area are worth the effort. And if more skilled lawyers dedicate themselves to bringing Section 1983 cases, the civil rights ecosystem can flourish with better advice and consultation among attorneys, better support for less experienced lawyers, better advocacy, and better results.[34]

Finally, understanding what civil rights suits can achieve may help guide litigation strategy. Much ink has been spilled about all of the things that Section 1983 litigation is not, in its current form, well-suited to accomplish.[35] But for those dedicating themselves to suing the government, it is equally important to think precisely about what litigation *can* accomplish, and how best to take advantage of those strengths in conjunction with other advocacy strategies.

Understanding civil rights litigation's potential has always been important to lawyers pursuing this line of work, but it is of particular salience right now. The Supreme Court is

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[30] See, e.g., Clifford S. Zimmerman, The Scholar Warrior: Visualizing the Kaleidoscope that is Entity Liability, 48 DePaul L. Rev. 773, 773 (1999) ("The civil rights lawyer who pursues a claim under 42 U.S.C. §1983 against a public entity must epitomize the Scholar Warrior, deftly balancing an ever splintering and multiplying framework of what constitutes public entity liability with the tact, fervor, and energy found in only the greatest of strategists and fighters.").

[31] See, e.g., Joanna C. Schwartz, Civil Rights Without Representation, 64 Wm. & Mary L. Rev. 641, 675-94 (2023) (describing the challenges of litigating a Section 1983 case *pro se*).

[32] See id.

[33] Joanna C. Schwartz, Civil Rights Ecosystems, 118 Mich. L. Rev., 1539, 1588-89 (2020); Schwartz, supra note 31, at 694-700 (explaining how the lack of successful cases can make it more difficult to overcome qualified immunity and establish municipal liability and standing to seek injunctive relief).

[34] See Schwartz, supra note 33 (describing this type of virtuous cycle).

[35] See infra notes 232-242 and accompanying text (describing these limitations).

led by a conservative super-majority skeptical of the benefits of suing the government[36] states seem, for now, to have lost their appetite to engage in police reform;[37] and the United States Department of Justice is, for the time being, out of the business of investigating unconstitutional conduct by federal officers, police departments, jails, schools and other government institutions.[38] For each of these reasons, it is critically important to take note of what can be done within the constraints of the law as it currently exists.

In fact, appreciating and harnessing the power of suing the government has never been more important. This Article focuses on §1983 litigation against local governments and their officials and primarily focuses on litigation against state and local law enforcement officers and agencies—both because they are often targets of §1983 suits and because they are a primary focus of research demonstrating that civil rights litigation does not actually influence government behavior in the ways assumed by courts and scholars. But there are broader, immediate, and vigorous debates about the power of courts to meaningfully restrain the executive branch[39] and the prospects of expanding state and federal authority to sue federal officers.[40] Although all agree that litigation is inadequate, on its own, to complete

[36] See, e.g., Brandon Hasbrouck, Movement Judges, 97 N.Y.U. L. Rev. 631, 639—52 (2022) (describing the judiciary's current anti-democracy and rights jurisprudence and inclinations); David Gans, From Qualified Immunity to Voting Rights, the Supreme Court Guts Civil Rights Laws, American Prospect (July 16, 2021), URL [PERMA] (describing the Roberts Court's "evisceration" of civil rights doctrines).

[37] See infra note 278 and accompanying text (describing dwindling police reform efforts five years after George Floyd's murder); 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) (describing more than half the states' introduction of—but failure to pass—legislation creating an alternative to §1983 in the year following George Floyd's murder). Notably, though, there has been a renewed interest in exploring and expanding state court liability for federal officers. See infra note 40.

[38] See Glenn Thrush, Justice Department Orders a Halt to Civil Rights Work, N.Y. Times (Jan. 22, 2025); Daphne Duret et al., Trump is Backing Away from Police Reform. Here's What That Means for 12 Places, The Marshall Project (Mar. 12, 2025); Robert Mackey, Justice Department 'Not Investigating' Renee Good Killing in Contrast to 2020 Inquiry on George Floyd Death, The Guardian (Jan. 18, 2026).

[39] For a small sampling of commentary about the power of the judiciary to restrain the executive branch, see, for example, American Civil Liberties Union, ACLU v. President Trump: Defeat, Delay, Dilute (Jan. 15, 2026), https://assets.aclu.org/live/uploads/2026/01/ACLUvTrump_v5.pdf; Sam Baker, Lower Courts' Growing Power Over the President, Axios (Mar. 23, 2025); Erwin Chemerinsky, *If Trump Defies the Courts, Then What?,* N.Y. Times (Mar. 10, 2025); Jaclyn Diaz, *What Happens if Trump Starts Ignoring Court Rulings? We Break it Down*, NPR (Feb. 12, 2025); Chris Geidner, It Does Matter. Defending the Rule of Law in the Trump Era is Essential, LawDork (May 11, 2025); Steven Greenhouse, Why Does the Supreme Court Keep Bending the Knee to Trump? The Guardian (Oct. 6, 2025); David L. Noll, *Civil Contempt Against a Defiant Executive*, Lawfare (July 10, 2025); Charlie Savage, *Judges Keep Calling Trump's Actions Illegal, But Undoing Them Is Hard*, NY Times (May 23, 2025).

[40] Bills have been introduced in Congress to amend Section 1983 to create a right to sue federal officers. See Qualified Immunity Abolition Act of 2026," S.3625 (2025-26) (proposing to amend Section 1983 so that it allows suit against federal law enforcement officers and eliminates qualified immunity as a defense to all Section 1983 claims). State legislatures are also considering the prospect of passing what are known as "converse-Section 1983" statutes that create a state law cause of action for constitutional violations by federal officers. For an overview of the legality of such legislation, see Harrison Stark, Explainer: State-Created Damages Remedies Against Federal Officials, University of Wisconsin Law

that monumental task, those limitations do not justify fatalism about the entire enterprise. Articulating what suing the government can accomplish and exploiting those strengths is a necessity as immediate as it is evergreen.

I. WINNING IN COURT

Litigation is often portrayed as a battle of wits and power, a duel at sunrise.[41] But when a person sues the government, it is no even playing field—the law is stacked against them.

Congress enacted what has become known as Section 1983 during Reconstruction following the Civil War. It was intended to provide previously enslaved people and their sympathizers with a right to sue the Ku Klux Klan and other white supremacist groups that were torturing and killing them, and the government officials who stood by or participated in that violence.[42] But Section 1983 was rendered nearly toothless almost immediately after it was enacted. In 1873, just two years after Section 1983 became law, the Supreme Court ruled that the Fourteenth Amendment only protected rights related to federal citizenship, such as voting or petitioning the federal government.[43] And in decisions issued in the 1870s and 1880s, the Court ruled that the Fourteenth and Fifteenth Amendments did not prohibit unconstitutional conduct by private actors.[44] Describing the impact of these cases, Justice Blackmun explained: "with a few quick thrusts, the Court cut the heart out of the Civil Rights Acts."[45]

In 1961, towards the peak of the civil rights movement, the Court revived Section 1983 by deciding *Monroe v. Pape*, which recognized for the first time that Section 1983 could be used to sue police officers and other government officials for violating people's constitutional rights, even when state law also provided a potential remedy for this misconduct.[46] But the Court's decisions over the subsequent sixty-five years—creating and repeatedly strengthening qualified immunity, making it extremely difficult to plead and prove municipal liability, limiting standing to seek injunctive relief, restricting the ability to bring class

School, State Democracy Research Initiative (Aug. 1, 2025). Illinois has already passed such legislation, and other states are considering similar bills. For discussion of the Illinois Bivens Act, see Vikram David Amar & Jason Mazzone, The Illinois Bivens Act: A Timely and Productive, If Imperfect, Experiment in Converse-1983 Laws that States Can and Should Enact, JUSTIA (Nov. 14, 2025).

[41] For such portrayals in print, see, for example, Michael Connelly, Lincoln Lawyer (Little, Brown: 2005); Jonathan Harr, A Civil Action (Vintage: 1995); Scott Turow, Presumed Innocent (Farrar Straus & Giroux 1987); Tobert Traver, Anatomy of a Murder (St. Martin's Press: 1958). For such portrayals on film see, for example, A Few Good Men (Columbia Pictures Dec. 11, 1992); Philadelphia (Tristar Pictures, Dec. 14, 1993); The Trial of the Chicago 7 (Netflix, Sept. 25, 2020). For such portrayals on television, watch just about any episode of Boston Legal (2004-2008), L.A. Law (1986-1994), Law & Order (1990-), The Good Wife (2009-2016), or The Practice (1997-2004).

[42] For a description of the debate about and passage of this legislation, see Blackmun, supra note 1; Shapo, supra note 1, at 277; Monroe v. Pape, 365 U.S. 167 (1961).

[43] Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

[44] See United States v. Cruikshank, 92 U.S. 542 (1876); United States v. Harris, 106 U.S. 629 (1883); Civil Rights Case, 109 U.S. 3 (1883).

[45] Blackmun, supra note 1, at 9.

[46] 365 U.S. 167 (1961).

actions, and hemming in lawyers' ability to be paid their reasonable fees even when they prevail—have again turned Section 1983 into a shadow of its originally imagined and potential self.[47]

If suing the government is a duel at sunrise, the Supreme Court has dilated plaintiffs' attorneys' pupils, given them a slingshot against the government's Colt 45, and conjured a sandstorm to blow in their direction. As a result, many people do not get the relief that they deserve (or get nothing at all) when their rights are violated. But many do prevail. A study of police misconduct lawsuits filed in five federal districts across the country found that plaintiffs win (at trial or by settlement), on average, more than half of the Section 1983 cases they bring.[48] In cases where people were represented by attorneys, their success rate jumped to 71%.[49] How can that be? Part of the answer is that defendants are sometimes willing to settle for a modest sum instead of litigating a case to the hilt, and that plaintiffs are sometimes willing to settle at a discount to avoid losing a motion to dismiss or for summary judgment.[50] But it is also true that people suing local governments and government officials can overcome the many barriers to relief by exploiting doctrinal vulnerabilities, finding workarounds, and muscling through.

A. Exploiting Vulnerabilities

Supreme Court justices have crafted doctrinal barriers to relief that reflect their "free-wheeling policy choice[s]," in the words of Justice Thomas, but do not reflect a nuanced understanding of litigation dynamics.[51] Indeed, at the oral argument in *Ashcroft v. Iqbal*—a decision that heightened pleading requirements to protect defendants from the burdens and distractions of defending against insubstantial claims—the justices acknowledged their unfamiliarity with Federal Rules of Civil Procedure already in place to discourage false or meritless allegations in pleadings.[52] The Court's apparent lack of understanding of litigation dynamics led to a ruling that essentially requires plaintiffs to have sufficient evidence to

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[47] For discussions of the conservative turn on the Supreme Court and the erosion of constitutional protections, see generally, for example, Stephen B. Bright & James Kwak, The Fear of Too Much Justice: Race, Poverty, and the Persistence of Inequality in the Criminal Courts (2023); Erwin Chemerinsky, Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights (2021); Joanna Schwartz, Shielded: How the Police Became Untouchable (2023).

[48] See Schwartz, How Qualified Immunity Fails, supra note 21, at 47.

[49] Joanna C. Schwartz, Qualified Immunity's Selection Effects, 114 Nw. U. L. Rev. 1101, 1130 n. 121 (2020).

[50] See Schwartz, How Qualified Immunity Fails, supra note 21, at 51 (reporting that 17% of qualified immunity motions and 34% of interlocutory appeals in this dataset were never decided because the parties settled while the motions and appeals were pending).

[51] Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (alteration in original) (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)).

[52] See Ashcroft v. Iqbal, 556 U.S. 662 (2009), Transcript of Oral Argument (No. 07-1015), at 17-18 (Justice Breyer asks: "Imagine, way before *Twombly*—these rules have been in existence for decades. So we go back years ago. Certainly, there have been many cases where, for whatever reasons, the plaintiffs included allegations that were just factually very unlikely. I want to know where the judge has the power to control discovery in the rules. That's—I should know that. I can't remember my civil procedure course. Probably, it was taught on day 4. (Laughter.)").

plausibly support their allegations before engaging in discovery.[53] This requirement can lead to nonsensical and unjust outcomes, as it did in *Ashcroft v. Iqbal*—how could Javaid Iqbal possibly have access to evidence of the Attorney General's and FBI Director's discriminatory intent before discovery began? But the Court's lack of understanding of litigation dynamics can also create vulnerabilities for plaintiffs to exploit. Take, for example, qualified immunity.

Qualified immunity is, on its face, an impenetrable doctrine. The Supreme Court has explained that, to overcome qualified immunity, a plaintiff must usually find a prior court decision with nearly identical facts.[54] The Supreme Court has allowed that courts can grant qualified immunity without ruling on the merits of the constitutional claim, making it particularly difficult to find clearly established law.[55] There are seemingly endless stories of

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[53] See, e.g., Harvard Law Review, Pleading Standards, 123 Harv. L. Rev. 252, 62 (2009) (explaining that the plausibility pleading standard, which requires plaintiffs to "plead facts showing why alternative explanations for conduct are not as likely as are their claims" will be "a particularly large obstacle in contexts—such as employment discrimination—in which it is improbable that a plaintiff has concrete evidence of a defendant's wrongdoing and motivation before discovery."); Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1, 43 (2010) ("It is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant, especially when the defendant denies access."); A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 459 (2008) ("claims for which intent or state of mind is an element—such as discrimination or conspiracy claim—are more difficult to plead in a way that will satisfy the plausibility standard.").

[54] Although the Court has repeatedly assured plaintiffs that overcoming qualified immunity "do[es] not require a case directly on point," it has also instructed lower courts "not to define clearly established law at a high level of generality" when considering a qualified immunity motion. Ashcroft v. al-Kidd, 563 U.S. 731, 741-42 (2011). "The dispositive question," according to the Court, "is 'whether the violative nature of *particular* conduct is clearly established" and "[t]his inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition." Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (emphasis in original) (quotation marks omitted) (first quoting al-Kidd, 563 U.S. at 742; and then quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004)). The Court has repeatedly reversed lower courts that deny qualified immunity, chiding them for defining "clearly established" law at too high a level of generality. See, e.g., White v. Pauly, 137 S. Ct. 548, 551-52 (2017) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases….Today it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" (citations omitted)). But there is an exception to this general rule; in *Hope v. Pelzer*, 536 U.S. 730 (2002), and again in *Taylor v. Riojas*, 592 U.S. 7 (2020), the Court ruled that no prior similar case is necessary to defeat qualified immunity when the constitutional violation is "obvious." For explorations of the impact of the obviousness exception, see Bailey D. Barnes, The Obvious Violation Exception to Qualified Immunity: An Empirical Study, 99 Wash. L. Rev. 725 (2024); Benjamin S. Levine, "Obvious Injustice" and Qualified Immunity: The Legacy of Hope v. Pelzer, 68 UCLA L. Rev. 842 (2021).

[55] See Pearson v. Callahan, 555 U.S. 223, 236 (2009) (allowing courts to decide whether the law was clearly established without first ruling on whether the plaintiff's constitutional rights were violated). For studies of the impact of *Pearson* on the development of constitutional law and courts' qualified immunity decisions, see Aaron L. Nielson & Christopher J. Walker, The New Qualified Immunity, 89 S. Cal. L. Rev. 1 33-34 (2015) (finding that 26.7% of post-*Pearson* circuit court decisions decided a right was not clearly established without ruling on the constitutionality of the claim); Colin Rolfs, Comment, Qualified Immunity After Pearson v. Callahan, 59 U.C.L.A. L. Rev. 468, 491-93 (2011) (finding that

people who have had their rights violated in egregious ways but cannot prevail because there isn't a prior court case with nearly identical facts.[56] And many cases take extra months or years to litigate because defendants have the right to immediately appeal denials of qualified immunity that turn on legal questions.[57]

Supreme Court and appellate court grants of qualified immunity, and the outrageous facts ruled unconstitutional but not clearly established, may leave one with the impression that qualified immunity is an impossible hurdle to overcome. Yet among almost 1200 police misconduct lawsuits filed in five federal districts across the country, qualified immunity was the basis for dismissal of just 0.6% of cases at the motion to dismiss stage and 2.6% at summary judgment.[58] This is partly because attorneys are discouraged from taking cases where qualified immunity is likely to be raised and granted, and partly because there are many other barriers to relief that cause cases to be dismissed.[59] It is also, in part, because the doctrine is poorly designed to achieve its intended goal of ending cases before discovery and/or trial.

Although the Supreme Court has described qualified immunity as a question of law that should be resolved at the earliest possible stage of litigation, the fact-intensive nature of qualified immunity determinations often makes it impossible for courts to resolve qualified immunity pre-trial.[60] At the pleading stage, a defendant's motion to dismiss should be denied so long as the plaintiff has pled a "clearly established" entitlement to relief. For this reason, as the Seventh Circuit has explained, "the motion-to-dismiss stage is rarely 'the most suitable

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22.6% of district and circuit court decisions after *Pearson* granted qualified immunity without ruling on the merits).

[56] For some of those stories, see Ben Cohen, Above the Law: How "Qualified Immunity" Protects Violent Police (2021); Schwartz, supra note 47, at 71-93.

[57] See Mitchell v. Forsyth, 472 U.S. 511 (1985) (ruling that defendants can immediately appeal a qualified immunity denial that turns solely on legal questions). For discussion of the delays occasioned by *Mitchell*, see Bryan Lammon, Sanctioning Qualified-Immunity Appeals, 2021 U. Ill. L. Rev. Online 130, 138 (in a study of 44 cases in which a court of appeals rejected a defendant's attempt to challenge the factual basis for a qualified-immunity denial, the appeal took an average of more than 440 days); see also Karen Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1888, 1907 (2018) ("[Qualified-immunity] appeals have resulted in expensive, burdensome, and often needless delays in the litigation of civil rights claims."); Gerhardstein, *supra* note 10, at 264 (noting that qualified immunity appeals can take a year or more to resolve).

[58] Schwartz, How Qualified Immunity Fails, supra note 21, at 9-10. See also 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 grants of qualified immunity led to of just 2% of *Bivens* case dismissals over a three-year period).

[59] For discussion of the impact of qualified immunity on attorneys' case selection decisions, see Alexander A. Reinert, Does Qualified Immunity Matter?, 8 U. St. Thomas L.J. 477 (2011) (studying the impact of qualified immunity on attorneys' case selection decisions in *Bivens* actions); Schwartz, supra note 49 (studying the impact of qualified immunity on attorneys' case selection decisions in police misconduct cases). For discussion of the other barriers to relief in civil rights cases that limit the dispositive power of qualified immunity, see Schwartz, How Qualified Immunity Fails, supra note 21, at 56-58.

[60] See Alan K. Chen, The Facts About Qualified Immunity, 55 Emory L. J. 229, 230 (2006); Schwartz, How Qualified Immunity Fails, supra note 21, at 53-54.

procedural setting to determine whether an official is qualifiedly immune.'"[61] Qualified immunity motions are more often raised and granted at summary judgment.[62] But the qualified immunity standard poses a different challenge for defendants at this stage of litigation; if the plaintiff has put forth evidence of a material dispute of fact—and the plaintiff's version of the facts reflects a violation of clearly established law—then a qualified immunity motion should be denied.[63]

These twin qualified immunity challenges are illustrated by the Sixth Circuit's 2015 decision in *Wesley v. Campbell*.[64] Richard Wesley alleged false and retaliatory arrest by a local police officer, in violation of his First and Fourth Amendment rights.[65] The district court granted the officer qualified immunity on the false arrest claim at the motion to dismiss stage, and granted qualified immunity on the retaliatory arrest claim at summary judgment. Wesley appealed, and the Sixth Circuit reversed both decisions. As the Sixth Circuit explained, Wesley's complaint had plausibly pled that his clearly established constitutional rights were violated. Moreover, the court reflected, "[a]lthough an officer's 'entitle[ment] to qualified immunity is a threshold question to be resolved at the earliest possible point,' that point is usually summary judgment and not dismissal under Rule 12."[66] The Sixth Circuit also reversed the district court's grant of qualified immunity on Wesley's retaliatory-arrest claim at summary judgment, explaining that "a triable issue of fact exists regarding both the materiality of the facts [the officer] omitted from her warrant application and whether these omissions demonstrate 'deliberate[ness]" or a "reckless disregard for the truth."[67] The Sixth Circuit sent Wesley's case back down to the district court for trial, and a jury awarded Wesley

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[61] Roldan v. Stroud, 52 F.4th 355 (7th Cir. 2022) (quoting Hanson v. LeVan, 967 F.3d 584, 589 (7th Cir. 2020)). For similar holdings from other circuits see, for example, Wesley v. Campbell, 779 F.3d 421, 433-34 (6th Cir. 2015); Owens v. Balt. City State's Attorneys' Office, 767 F.3d 379, 396 (4th Cir. 2014); Newland v. Reehorst, 328 F. App'x 788, 791 n.3 (3d Cir. 2009); Field Day, LLC v. Cty. of Suffolk, 463 F.3d 167, 191-92 (2d Cir. 2006); St. George v. Pinellas Cty., 285 F.3d 1334, 1337 (11th Cir. 2002); Alvarado v. Litscher, 267 F.3d 648, 651-52 (7th Cir. 2001); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976).

[62] See Schwartz, How Qualified Immunity Fails, supra note 21, at 29-39.

[63] *See* Chen, supra note 60, at 230 ("As any experienced civil rights practitioner or federal trial judge knows, the primary impediment to expedited termination of constitutional tort suits through qualified immunity-based summary judgment claims is the existence of material fact disputes."). *See also, e.g.*, Rosenbaum v. City of San Jose, 107 F.4th 919, 924 (9th Cir. 2024) ("Where factual disputes exist as to the objective reasonableness of an officer's conduct, the case cannot be resolved at summary judgment on qualified immunity grounds"); Estate of Smith v. Marasco, 430 F.3d 140, 147 n.3 (3rd Cir. 2005) ("[I]f there are factual disputes that are material to the question whether a reasonable officer in the defendant's position would have realized that his conduct violated the victim's constitutional rights, it is inappropriate to grant summary judgment.").

[64] 779 F.3d 421 (6th Cir. 2015).

[65] Id.

[66] Id. at 433-34.

[67] Id. at 437.

almost $1.1 million in compensatory and punitive damages (which was affirmed by the Sixth Circuit).[68] The judge awarded Wesley's attorney almost $170,000 in fees and costs.[69]

This anecdote in no way contradicts prevailing criticisms of qualified immunity—the doctrine unquestionably makes civil rights lawsuits more complex, costly, and time-consuming, and denies relief to people whose rights have been violated simply because they cannot find a prior court decision with nearly identical facts.[70] In *Wesley*, the interlocutory appeal of the qualified immunity denials added years to the litigation[71] and more than 160 hours of the plaintiff's attorney's time.[72] But lawyers who litigate civil rights cases advise that by carefully drafting their complaints and highlighting the factual disputes in their oppositions to summary judgment they can sometimes, even if not always, withstand the qualified immunity defense.[73]

B. Finding Workarounds

Another way to avoid the sting of some of the Supreme Court's doctrinal barriers is to find workarounds. For example, qualified immunity only protects individual officers when

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[68] Wesley v. Campbell, 864 F.3d 433 (6th Cir. 2017).

[69] August 8, 2016 Order Adopting Report and Recommendation, Wesley v. Campbell, No. 2:10-cv-00051 (E.D. Ky. Mar. 12, 2010).

[70] See Reinert, supra note 59, at 492-94 (reporting that attorneys found qualified immunity motions to be costly and time-consuming to defend against in *Bivens* litigation); Schwartz, supra note 49, at 1119-23 (describing plaintiffs' attorneys' views that qualified immunity increased the cost, complexity, and duration of civil rights litigation). Note, also, that it is more difficult to overcome qualified immunity motions in some parts of the country than it is in others. For discussion of regional variation in qualified immunity decisions, see Nielson & Walker, supra note 55, at 39-42 (finding that the Fifth Circuit is more likely, compared to the average circuit, to rule on the merits of constitutional claims and less likely to recognize new constitutional rights when deciding qualified immunity motions; and finding that the Ninth Circuit is less likely, compared to the average circuit, to rule on the merits of constitutional claims and more likely to recognize new constitutional rights when deciding qualified immunity motions).

[71] The motion to dismiss on qualified immunity grounds was granted on December 18, 2012. Wesley v. Rigney, 913 F. Supp. 2d 313 (E.D. Ky. 2012). The summary judgment on qualified immunity grounds was granted on June 18, 2013. Wesley v. Rigney, 2013 WL 3107503 (June 18, 2013). The Sixth Circuit appeal reversing these qualified immunity grants was issued on March 2, 2015. Wesley v. Campbell, 779 F.3d 421 (6th Cir. 2015).

[72] See December 29, 2015 Motion for Attorney Fees and Costs, Exhibit Time Sheet, Wesley v. Campbell, No. 2:10-cv-00051 (E.D. Ky. Mar. 12, 2010) (reporting 105 hours to research, prepare, and file the 6th Circuit brief; 3.5 hours to prepare a corrected brief; 3.5 hours to review the defendant's appeal brief; 4.5 hours to obtain and read the cases cited by the defendant; 28 hours to research, prepare, and file a reply brief; 24 hours to prepare for oral argument; 2.5 hours for the oral argument itself; and 1.2 hours to review the 6th Circuit's order). Note, however, that the district court's attorney's fees award reduced by 20% the hours counsel spent on the appellate briefing. See Aug. 8, 2016 Order, supra note 69, at 2.

[73] See Schwartz, supra note 49, at 1126 (describing lawyers' strategies to avoid dismissal on qualified immunity grounds).

they are sued for damages under Section 1983.[74] So, lawyers can inoculate themselves against dismissal of their case on qualified immunity grounds by alleging Section 1983 claims against municipalities, claims for injunctive relief, and state law claims. Although each of these types of claims has its own challenges to overcome, none require a prior identical court decision to secure relief, and most are not subject to interlocutory appeal.[75]

Standing to seek injunctive relief is another doctrinal barrier that can be worked around. In 1983, the Supreme Court ruled that Adolph Lyons could not seek an injunction prohibiting the Los Angeles Police Department's use of chokeholds because Lyons could not prove that he, himself, would be subject to a chokehold in the future.[76] The *Lyons* decision has been criticized for making it nearly impossible to get forward-looking relief in civil rights cases, particularly in cases alleging excessive force by police.[77] But lawyers and their clients have worked around *Lyons* by suing for monetary damages and then negotiating for non-monetary relief in their settlements including policy changes, additional trainings, audits of police practices, meetings with city officials, and commemorations of lost loved ones.[78]

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[74] See, e.g., Pearson v. Callahan, 555 U.S. 223, 242 (2009) (explaining that qualified immunity is not available in "§1983 cases against a municipality, as well as §1983 cases against individuals where injunctive relief is sought instead of or in addition to damages").

[75] See infra notes 81-83and accompanying text (describing the challenges of proving *Monell* liability and seeking injunctive relief). For discussions of the ability to bring state tort claims against government officials and municipalities, see Nancy Leong, Constitutional Accountability Through State Tort Law, 2023 Wisc. L. Rev. 1707; Alexander Reinert, Joanna C. Schwartz & James E. Pfander, New Federalism and Civil Rights Enforcement, 116 Nw. U. L. Rev. 737 (2021).

[76] See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (explaining that Lyons does not have standing to seek injunctive relief unless he can "establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.").

[77] See, e.g., Myriam E. Gilles, Reinventing Structural Reform Litigation, Deputizing Private Citizens in the Enforcement of Civil Rights, 100 Colum. L. Rev. 1384, 1399 (2000) (describing the challenges of seeking injunctive relief under *Lyons*); John C. Jeffries, Jr. & George A. Rutherglen, Structural Reform Revisited, 95 Calif. L. Rev. 1387, 1418 (2007) (arguing that Lyons and related cases "preclude the use of systemic remedies for what are, at bottom, institutional and systemic problems."); Sunita Patel, Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees, 51 Wake Forest L. Rev. 793, 808-09 (2016) (in *Lyons*, "the Supreme Court strongly curtailed the ability of private litigants to challenge police brutality and abuse at a structural level.").

[78] See, e.g., Gerhardstein, supra note 10, at 255-56 (describing settlements that include reforms to taser policies and trainings); id. at 257-60 (describing settlements including "apologies, monuments, and terms that result in personal engagement"). For descriptions of other settlements that include policy changes, apologies, and other non-monetary relief, see, for example, Press Release, Family Agrees to Record Settlement in Sylville Smith Police Shooting Case, Loevy & Loevy (Nov. 7, 2020), https://www.loevy.com/family-agrees-to-record-settlement-in-sylville-smith-police-shooting-case/#:~:text=In%20addition%20to%20a%20financial,to%20do%20so%E2%80%9D;%20and%2C (describing the settlement of a case brought by the family of Sylville Smith, who was shot and killed by a Milwaukee police officer in 2016, which included the payment of $4 million, a commitment to use the circumstances of Smith's shooting as part of new training on de-escalation, and a commitment to change its policies to forbid practices that contributed to Smith's death); Associated Press & KOMO News Staff, King Co. Settles Lawsuit Over Deadly Teen Shooting for $2.25 million (May 5, 2020), https://komonews.com/news/local/king-co-settles-lawsuit-over-deadly-teen-shooting-for-225-million (describing the settlement of a case, brought by the family of Mi'Chance Dunlap-Gittens, who was shot

These negotiated settlements do not obviate the barriers imposed by *Lyons*—some jurisdictions will not agree to these types of terms, and they may be more difficult to implment than are the terms of a court-ordered consent decree (which can, themselves, be difficult to enforce).[79] Nevertheless, by working around *Lyons* in this manner, lawyers have negotiated policy changes to resolve damages cases in which they would not have had standing to seek injunctive relief.

C. Muscling Through

Sometimes winning cannot be achieved by exploiting vulnerabilities or finding workarounds; instead, winning in court is a matter of muscling through. Plaintiffs can muscle through the challenges of qualified immunity by finding a prior case that is sufficiently similar to the case at hand. They can muscle through the challenges of standing to seek injunctive relief by establishing they are likely to suffer similar harms again.

One particularly difficult standard to meet head-on is that for municipal liability. Plaintiffs can sue municipalities under Section 1983, but these claims—referred to as *Monell* claims for the Supreme Court case that first recognized the cause of action—require proof that a municipal custom or policy caused the violation of the plaintiff's rights.[80] Such proof is notoriously difficult to find.[81] Most often in police misconduct cases, there is no municipal policy that is unconstitutional on its face; instead, plaintiffs must show that municipal policymakers were deliberately indifferent to a pattern of prior, similar, proven misconduct.[82] And plaintiffs' *Monell* claims can fail for a variety of reasons: because they cannot point to enough prior incidents; because those prior incidents were insufficiently similar; because

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in the back by King County sheriff's detectives, which included policy changes requiring the use of body and dashboard cameras); Esteban Parra, Wilmington Police's Use-of-Force Tactics Taking Shape, Delaware Online (Mar. 7, 2017) (describing the settlement of a case, brought by the family of Jeremy "Bam" McDole, who was shot by police while in a wheelchair, that includes use-of-force and de-escalation policy and training changes), https://www.delawareonline.com/story/news/crime/2017/03/07/wilmington-delaware-use-force-tactics-taking-shape-police-shooting-jeremy-bam-mcdole/98852116/; Steve Staeger & Marissa Solomon, Family of Christian Glass Receives $19 million Police Settlement, 9News (May 23, 2023), https://www.9news.com/article/news/crime/christian-glass-largest-police-settlement-colorado-history/73-468d1e65-1ae4-44b6-8d37-c270a09c11e6 (describing settlement terms requiring that Glass's parents speak with patrol recruits, a commitment by the county to create a crisis response team, and to certify all of its officers in crisis intervention; Carma Hassan, Holly Yan & Max Blau, Sandra Bland's Family Settles for $1.9M in Wrongful Death Suit, CNN (Sept. 15, 2016), https://www.cnn.com/2016/09/15/us/sandra-bland-wrongful-death-settlement/index.html (describing several changes to jail procedures required by the settlement).

[79] See infra notes 146-147 and accompanying text (describing the challenges of enforcing provisions in consent decrees).

[80] *Monell v. Department of Social Services*, 436 U.S. 658, 663 (1978).

[81] For discussion of these challenges, see, for example, Nancy Leong, Civil Rights Liability for Bad Hiring, 108 Minn. L. Rev. 1 (2023); Nancy Leong, Municipal Failures, 108 Cornell L. Rev. 345 (2023); Joanna C. Schwartz, Monell's Untapped Potential, 125 Colum. L. Rev. 925 (2025); Joanna C. Schwartz, Municipal Immunity, 109 Va. L. Rev. 1181 (2023).

[82] See Schwartz, Monell's Untapped Potential, supra note 81, at 932.

those incidents had not been adjudicated as wrongdoing; or because defendants' were not "deliberately indifferent" to them.[83]

Yet plaintiffs' attorneys do manage to meet this exceedingly difficult standard. In some instances, plaintiffs muscle through by harnessing massive amounts of data to demonstrate a municipal practice or custom. The *Floyd* stop-and-frisk litigation in New York City is one such case.[84] *Floyd* was a class action against the City of New York challenging the police department's practice of engaging in unconstitutional stops and searches.[85] In support of their allegations, plaintiffs relied on millions of official reports of NYPD officers' stops and their expert's sophisticated statistical analysis of those reports.[86] At summary judgment, the court concluded that plaintiffs had created disputed issue of facts, meriting trial, "as to whether the NYPD has engaged in a widespread practice of suspicionless stops and frisks" so widespread as to imply "constructive acquiescence of senior policy-making officials;" as to whether supervisors had a policy or custom of imposing quotas on officers that were the "'moving force' behind suspicionless stops"; as to whether "intentional discrimination was the City's 'standard operating procedure"; and as to whether policymakers were deliberately indifferent to the need to "train, monitor, supervise, and discipline its officers adequately in order to prevent a widespread pattern of suspicionless and race-based stops."[87] Based on this abundant evidence, the court additionally granted plaintiffs' motion for standing to seek injunctive relief and their motion for class certification, and ultimately ruled that the city had an unconstitutional custom of discriminatory and unreasonable stops.[88]

Although *Floyd* is a laudable example of muscling through, plaintiffs do not always need millions of records and an expert's sophisticated statistical analysis to overcome the challenges of municipal liability. Far fewer, publicly available documents have been harnessed to meet these same challenges. Take, for example, *An v. City of New York*, another Section 1983 case seeking injunctive relief against New York City.[89] The plaintiff, Ruben An, alleged that he was arrested while he was filming New York City police officers, and that the City had an widespread policy or custom of arresting or interfering with people who recorded

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[83] See id. at 934-41 (describing these challenges).

[84] For a comprehensive description of the *Floyd* litigation, see Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2288-2316 (2020). *See also* Sarah Mikva Pfander, *The Path to Municipal Liability for Racially Discriminatory Policing*, 69 UCLA L. REV. 1270, 1318 (2023) (describing similar strategies that have proven successful in establishing municipal liability for racially discriminatory policing, including "collecting robust statistics, calling upon organizational reports, identifying…sufficiently similar patterns of constitutional violations, finding examples of a racist culture in a police department, invoking the municipality's racist history, and selecting compelling plaintiffs.").

[85] See Patel, supra note 84, at 2288-98.

[86] For descriptions of data and expert analysis relied upon by Judge Scheindlin, see id. at 2300-08.

[87] Floyd v. City of New York, 813 F. Supp. 2d 417 (S.D.N.Y. 2011).

[88] See Floyd v. City of New York, 283 F.R.D. 153, 178 (S.D.N.Y. 2012) (granting class certification); Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding a widespread custom or practice of unconstitutional stops).

[89] Complaint, An v. City of New York, No. 1:16-cv-5381 (S.D.N.Y. July 6, 2016).

the police.[90] The court dismissed An's case, ruling that six prior lawsuits and a newspaper report were insufficient to "plausibly support an inference of a widespread illegal custom of violating individuals' First Amendment rights at the time of Plaintiff's arrest," which was fatal both to his *Monell* claim and his assertion of standing to seek injunctive relief.[91] An then amended his complaint to include allegations from scores of lawsuits, citizen complaints, and other publicly available reports of people being assaulted or arrested after attempting to record the police.[92] Faced with the bounty of evidence in An's amended complaint, the City did not move to dismiss,[93] and the case ultimately settled with provisions obligating the city to update its patrol guide and trainings about the constitutional protections afforded those recording the police.[94]

In recent years, despite constricting standards, attorneys have mounted sufficient evidence of prior misconduct to establish standing to seek injunctive relief, prove municipal liability, and/or certify class actions in a wide variety of civil rights cases, including cases alleging unconstitutional strip searches of people in custody, jail violence, and a culture of impunity in police departments.[95] My point is not that these barriers are easy to overcome, but that it can be done.

II. MAKING PLAINTIFFS WHOLE

When thinking about the value of Section 1983 litigation, much attention is paid to whether, and to what extent, Section 1983 suits deter misconduct.[96] Yet the value of Section

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[90] See id.

[91] See An v. City of New York, 230 F. Supp. 3d 24 (S.D.N.Y. 2017)

[92] See Amended Complaint, An v. City of New York, No. 1:16-cv-5381 (S.D.N.Y. June 2, 2017).

[93] See Answer of Defendant City of New York, An v. City of New York, No. 1:16-cv-5381 (S.D.N.Y. June 15, 2017).

[94] See Stipulation of Settlement, An v. City of New York, No. 1:16-cv-5381 (S.D.N.Y. Oct. 9, 2018).

[95] See, e.g., Settlement Agreement, Amador v. County of Los Angeles, No. 2:10-cv-1649 (C.D. Cal. Oct. 31, 2019) (setting out the terms of settlement in a class action brought by detainees strip searched in a jail run by the Los Angeles Sheriff's Department, and noting that the court had previously certified the class and granted summary judgment to the plaintiffs on their *Monell* claim); Obrycka v. City of Chicago, No. 07-cv-2372, 2012 WL 601810, at *8 (N.D. Ill. Feb. 23, 2012) (denying the City of Chicago's motion for summary judgment on Obrycka's *Monell* claim, finding "evidence creating a genuine dispute as to the material fact that a code of silence exists within the Chicago Police Department"); Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011) (reversing the district court's dismissal of plaintiff's supervisory liability claim against the Los Angeles Sheriff because the plaintiff, relying on past lawsuits, news stories and report, "alleges numerous incidents in which inmates in Los Angeles County jails have been killed or injured" and that the sheriff knew about and was deliberately indifferent to those reports); Cole v. City of Memphis, 839 F.3d 530 (6th Cir. 2016) (affirming district court class certification decision, verdict against municipality, and entry of injunction and declaratory relief in case challenging Memphis's practice of sweeping Beale Street every weekend night at 3 a.m.); Order, Gonzales v. City of Austin, No. 22-cv-0655 (Mar. 27, 2025) (denying summary judgment to the City of Austin, and finding evidence of a "culture of impunity" created by a practice of "under-investigating and under-disciplining" officers accused of using excessive force).

[96] See, e.g., supra note 27 and accompanying text (describing a case in which the court reduced its award of attorneys' fees to a prevailing plaintiff because widespread indemnification dampened the

1983 litigation cannot be measured solely by the magnitude of its influence on government behavior. It also carries with it important benefits to those who bring the cases. Money is the most obvious benefit of Section 1983 litigation to those bringing suit and should not be underappreciated; it was, after all, a driving motivation for the enactment of Section 1983,[97] and damages can offer critically important financial support for those harmed by government. Litigation can afford other important benefits to plaintiffs, as well; previously unknown information, a day in court, and apologies or commemorations that acknowledge the person's loss and the government's wrongdoing. Appreciating the full benefits of civil rights litigation requires thinking broadly about the types of relief it affords.

A. Money

Most often, when people win their civil rights claims they recover money—and, most often, that money is intended to compensate them for their losses.[98] Through Section 1983 damages actions, people can recover for the cost of medical care or physical rehabilitation after being shot by police officers; the loss of years that they were wrongfully incarcerated; or harms to their reputation and psyche after being retaliated against for expressing constitutionally protected views. Dollars do not actually make a person whole; they cannot revive a loved one, heal an injury, or turn back the clock. But without compensation, people whose rights have been violated by government officials would bear the physical, psychological, and financial costs of those violations themselves.

The Supreme Court has made clear that compensating people for their losses is the "central purpose" of Section 1983,[99] and that the public benefits when people are able to recover for the violation of their rights.[100] This is why Congress enacted Section 1988, allowing for prevailing plaintiffs to recover their attorneys' fees—because "'the public as a

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deterrent effect of the suit, and the compensatory damages award to the plaintiff did not "provide[] a tangible benefit to the public that renders the full fee counsel seeks.").

[97] See infra note 99 and accompanying text.

[98] Punitive damages can also be awarded to punish a defendant in a § 1983 case, but only when a case goes to trial and the jury finds the officer acted with "reckless or callous disregard for the plaintiff's rights." Smith v. Wade, 461 U.S. 30, 51 (1983). Plaintiffs can also be awarded their attorneys' fees when they prevail under Section 1988, although the Supreme Court has limited the award of attorneys' fees to those cases in which there is a court order—cases in which the suit was the catalyst for reforms do not count. See Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001); see also Lackey v. Stinnie, No. 23-621 (U.S. Feb. 25, 2025) (holding that the award of a preliminary injunction does not make the plaintiff a prevailing party entitled to fees). In addition, plaintiffs can waive their right to attorneys' fees as a condition of settlement. See Evans v. Jeff D., 475 U.S. 717 (1986). For a sobering discussion of the impact of these limitations on attorneys' fees, see Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1 (2008).

[99] Felder v. Casey, 487 U.S. 131, 141 (1988). See also Carey v. Piphus, 435 U.S. 247, 254 (1978) ("the basic purpose of a § 1983 damages award should be to compensate persons for injuries that are caused by the deprivation of constitutional rights.'").

[100] See, e.g., City of Riverside v. Rivera, 477 U.S. 561 (1986) (rejecting the notion that "a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated.").

whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff.'"[101] Deterrence is, to be sure, another benefit of Section 1983 suits. Yet, in the Court's view, deterrence is a byproduct of compensation; as the Court wrote in *Memphis v. Stachura*, deterrence "operates through the mechanism of damages that are *compensatory*."[102]

B. Information

Each step of litigation produces a fount of information. The complaint details the plaintiff's allegations about what occurred and the answer details the defendant's responses to those allegations. During discovery, each side can depose key witnesses and parties, and demand information—records, emails, reports, deposition testimony that support their claims and defenses. When plaintiffs bring *Monell* claims, discovery about government policies, practices, and prior misconduct will be particularly wide-reaching.[103] Experts can evaluate those unearthed records and write reports about the constitutionality and sensibility of the parties' behavior. At trial, witnesses can testify and attorneys can introduce evidence supporting their contentions. Litigation can expose valuable information to the public and to government officials;[104] it can also reveal previously unknown, critically important information to the person bringing the case.

After Vicki Timpa was notified that her son, Tony, had died in Dallas police custody, she called the police department repeatedly to learn the circumstances of her son's death.[105] Vicki got different answers every time: one officer told her he had a heart attack; another said officers found him lying next to his car; a third said Timpa had called 911, been put into an ambulance without incident, and died on the way to the hospital.[106] It was only after she sued the department, and her lawyer brought a separate suit against the city for failing to disclose public records, that Dallas agreed to turn over body camera video and 911 recordings.[107] Contrary to what Vicki had been told, those recordings revealed that Timpa called 911

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[101] Id. at 574 (quoting Hensley, 461 U.S. at 444 n.4 (Brennan, J., concurring in part and dissenting in part)).

[102] 477 U.S. 299, 307 (1986). See also *Carey*, 435 U.S. at 256-57 (explaining that, to the extent those damages awards "should deter the deprivation of constitutional rights, there is no evidence that [Congress] meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.").

[103] See supra notes 82-83 and accompanying text (describing the evidence necessary to prove a municipal liability claim). See also G. Flint Taylor, A Litigator's View of Discovery and Prof in Police Misconduct Policy and Practice Cases, 48 DePaul L. Rev. 747, 748-49 (1999) (explaining that Monell claims "facilitate the development of systemic evidence of deliberate indifference to policy brutality, as well as information concerning 'repeater' officers, the functioning of the police disciplinary and counseling system, and the attitudes of police officials towards important police disciplinary issues.").

[104] For further discussion of the value of publicly disclosing information, see infra Part IV.C.

[105] See Cary Aspinall, Police Responded to His 911 Call for Help. He Died. What Happened to Tony Timpa?, Dallas Morning News (Aug. 2, 2019).

[106] See id.

[107] See Schwartz, supra note 47, at 44-45.

because he was having a mental health episode and needed help.[108] Officers who arrived on the scene ziptied Tony's hands and feet and held him down, on his stomach, for more than fourteen minutes, laughing and joking as Timpa lost consciousness and then went still.[109] It was only by suing the city, and then bringing the separate public records lawsuit, that Vicki Timpa was able to learn what happened that fateful night.

C. A Day in Court

Another important benefit of suing the government is the opportunity to have one's day in court.[110] Trial allows for a public airing of the details of what happened and, if the plaintiff prevails, a public acknowledgement of wrongdoing.[111] Marcel Brown won a $50 million jury verdict against the City of Chicago after being wrongfully convicted and imprisoned for nearly ten years.[112] During the two-week trial, Brown and his legal team offered evidence that police fabricated evidence against him and coerced his confession by questioning him—an 18-year-old at the time—for thirty-four hours in a windowless room without a lawyer.[113] Brown testified during trial about his fears when initially arrested, the assaults he suffered in jail, the depression and horror of being found guilty and sentenced, the fraying of his relationships with loved ones, and the challenges of reacclimatizing himself to the free world.[114] Although Brown was initially hesitant to go to trial, he was glad he did: "the world finally got to hear my truth, and they had to face the facts of everything they did wrong to me…[T]he trial meant more to me than the $50 million….I feel I got a piece of me back."[115]

A day in court can be meaningful whether or not a person ultimately prevails at trial. On August 28, 2018, twenty-one-year-old Anthony Vargas was shot and killed by two Los Angeles sheriff's deputies who were responding to a 911 call for an armed robbery.[116] In the

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[108] See Cary Aspinwall & David Boucher, "'You're Gonna Kill Me!': Dallas Police Boy Cam Footage Reveals the Final Minutes of Tony Timpa's Life, Dallas Morning News (July 30, 2019).

[109] See id.

[110] Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 7 (Joseph Sanders & Lee Hamilton eds., 2000); John C.P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 Yale L.J. 524, 606 (2005).

[111] See Azmy, *supra* note 10, at 319-35 (describing the power of testifying, watching, evidence, judgment, and winning in the courtroom, and the ways in which those power-shifting strategies in the *Floyd* stop-and-frisk litigation helped advance the police accountability movement's efforts).

[112] See Hank Sanders, Illinois Man Wrongly Convicted of 2008 Murder Is Awarded $50 Million (Sept. 10, 2024).

[113] See id.

[114] For a description of this testimony, see Closing Argument at 2368-78, Brown v. City of Chicago, 19-cv-4082 (N.D. Ill. 2019).

[115] Abena Bediako, Wrongfully Convicted Man Speaks Out on Record $50M Verdict: 'I Won't Get That Time Back," WTTW (Sept. 25, 2024), https://news.wttw.com/2024/09/25/wrongfully-convicted-man-speaks-out-record-50m-verdict-i-won-t-get-time-back.

[116] Jeanette Marantos, The Homicide Report: Anthony Daniel Vargas, 21, L.A. Times (Aug. 18, 2018), https://homicide.latimes.com/post/anthony-daniel-vargas/.

days after the shooting, a spokesperson for the department said that Vargas had run from the deputies and then engaged in a "violent struggle."[117] When Vargas broke free and started to get up, the spokesman reported, the deputies saw "he ha[d] a gun in his hand, and fearing he [was] going to shoot them, [the deputies] open[ed] fire."[118] The spokesman stated that "Vargas was facing one deputy and had his back to the other…'so he had wounds on various parties of his body.'"[119]

Lisa Vargas, Anthony's mother, sued, alleging that the deputies had used excessive force, that the gun found near Anthony Vargas was planted by the officers, and that the deputies killed Vargas as part of an initiation into a deputy gang, the Banditos, that controlled the East Los Angeles Sheriff's Station.[120] Lisa Vargas, like Vicki Timpa, only learned the circumstances of her son's death after filing suit. The Sheriff's Department would not provide the Vargas family with any additional information about Vargas's death, citing an ongoing investigation. But ten months after the shooting, a copy of Vargas's autopsy was leaked to Vargas's attorney.[121] Contrary to the deputies' claims that they were in a "violent struggle" with Vargas, and were on either side of him when they shot him, the leaked autopsy revealed that Vargas had been shot thirteen times in the back.[122] As Lisa Vargas commented in a press conference about the leaked autopsy, "This is the first time that we're actually getting some kind of information. We did not know where he was shot."[123]

Lisa Vargas rejected multiple offers by Los Angeles County to settle her case because she wanted it to go before a jury. "My purpose for pushing myself through the pain is because I need them exposed," Lisa Vargas explained.[124] Vargas's attorney defeated the deputies' motion for summary judgment on qualified immunity grounds: The court found that—taking the facts in the light most favorable to the plaintiff—the deputies had violated Anthony Vargas's clearly established rights.[125] But, at trial, the judge refused to allow testimony about the shooting deputies' involvement in the Banditos deputy gang, a central theory in Vargas's case.[126] Although the jury heard testimony that the gun recovered under Vargas was

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[117] Id.

[118] Id.

[119] Id.

[120] See First Amended Complaint, Vargas v. County of Los Angeles, No. 2:19-cv-3279 (C.D. Cal. Aug. 19, 2019).

[121] Frank Stoltze, This Leaked Autopsy Appears to Contradict the LA Sheriff's Department's Version of a Fatal Shooting, LAIst (June 13, 2019; https://laist.com/news/this-leaked-autopsy-appears-to-contradict-the-sheriffs-departments-version-of-a-fatal-shooting

[122] See Leticia Juarez, Autopsy Report Reveals East L.A. Man Was Shot 13 Times in Back by Deputies, ABC7 Eyewitness News (June 14, 2019), https://abc7.com/east-los-angeles-deputy-shooting-anthony-vargas/5345736/; Stoltze, *supra* note 121.

[123] Jonathan Gonzalez, Family Lawyer Says 21-Year-Old Killed by Deputies Was Shot 13 Times From Behind, NBC 4 Los Angeles (June 13, 2019).

[124] Kate Cagle, Judge Declares Mistrial in 2018 Deadly Shooting by East LA Deputies, Spectrum 1 News (Apr. 26, 2023), https://spectrumnews1.com/ca/southern-california/public-safety/2023/04/26/judge-declares-mistrial-in-2018-deadly-shooting-by-east-la-deputies?cid=share_clip.

[125] Vargas v. County of Los Angeles, No. 19-cv-3279, 2021 WL 248668 (C.D. Cal. Jan. 5, 2021).

[126] Cagle, supra note 124.

registered to someone in Arizona and did not have Vargas's fingerprints on it, Vargas's lawyer believed that the very existence of the gun swayed the jury.[127] The jury deadlocked and the case ended in a mistrial.[128] Nevertheless, the experience of taking the case to trial had its own value to Vargas's family. As Anthony Vargas's aunt, Stephanie Luna, explained, "[f]or families like mine, who had a loved one killed at the hands of law enforcement, the courtroom is one of the only places where we can challenge the official narrative, present evidence, put a face to the number on the coroner report, and seek some form of accountability."[129]

D. Plaques, Commemorations, and Apologies

As recent fights over confederate monuments have made clear, the images and people we choose to honor have meaning. In the words of Elizabeth Alexander, "[m]onuments put forth ideas and look forward, even when their content is historical. They chart future values by what they revere."[130] For this reason, Al Gerhardstein, a civil rights attorney in Ohio, has repeatedly negotiated for plaques and memorials to resolve civil rights cases on behalf of his clients.[131]

Gerhardstein represented the family of Samuel DuBose, an unarmed Black man who was shot and killed by a white University of Cincinnati police officer during a traffic stop.[132] The settlement included $4.85 million in compensation and several non-economic terms: a personal apology from the university's president; free tuition for DuBose's children; participation in discussions about police reforms by the university's Community Advisory Committee; and a monument.[133]

DuBose's monument is a bench on campus near where the shooting occurred. The bench includes DuBose's silhouette, some musical notes (to commemorate his love of music), and the words: "They that love beyond the world cannot be separated by it."[134] As Da'Shonda Reid, DuBose's fiancé at the time of his death, reflects, the memorial bench "honors the legacy of a fallen soldier to police fascism…[and] will keep his name, legacy, and story alive."[135] It also can offer comfort to his family. Reid explains that their son attended the University of Cincinnati, and that his dorm's window looked out onto the bench. She writes:

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[127] Christian Contreras, Instagram (May 3, 2023) ("It felt like no matter what evidence we put on, the defense leaning jurors could not overcome the fact that a gun was found where Anthony Vargas was shot and killed."), https://www.instagram.com/christianc.esq/p/Crzi3CDrYyT/.

[128] Cagle, supra note 124.

[129] Email from Stephanie Luna to author (Feb. 27, 2025) (on file with author).

[130] Elizabeth Alexander, The Trayvon Generation (2022).

[131] See Gerhardstein, supra note 10, at 258.

[132] Sheryl Gay Stolberg, University of Cincinnati to Pay $4.85 Million to Family of Man Killed by Officer, N.Y. Times (Jan. 18, 2016).

[133] See Gerhardstein, supra note 10, at 259.

[134] Brett Milam & Kate Murphy, 'Sam Day' Memorializes Sam DuBose, 1 Year After Shooting, Cincinnati Enquirer (July 19, 2016).

[135] Text message from Da'Shonda Reid to author (Jan. 16, 2026) (on file with author).

> He would walk by the bench everyday before class to touch it. He said he would channel in on his Daddy's energy and pray unto the MOST HIGH…it gave him continued courage, purpose, and strength. He would go out and sit at the bench often reminiscing of the many times he shared with [his] Dad, it made him feel empowered.
>
> Are [monuments] important? Not as important as the life it represents. But a reminder of a man, woman, even a child that no matter how far we think we've come as a society we have not gotten far enough.[136]

Settlements can also include meetings between the parties, apologies, and the sharing of information.[137] Gerhardstein regularly negotiates for these types of meetings and apologies as part of his practice and finds that they can be quite meaningful to his clients. As Gerhardstein writes:

> In one racial profiling case, for example, this meeting made a big difference. The victims shared their experience undergoing a discriminatory traffic stop where the officer ordered the couple to leave their car and submit to drug-sniffing dogs. The husband and wife were very emotional as they recounted to the officers how it felt to be publicly humiliated, standing for twenty-five minutes outside their car, clearly accused of drug dealing. The officers were moved by the personal story of the victims and apologized sincerely. The victims were also able to talk extensively with the police chief who was implementing policy changes to prevent such stops in the future.[138]

To be sure, family members may not want a plaque or commemoration. And an apology that is not sincere or a meeting that is not respectful may be worse than no apology or meeting at all. But these types of commemorations and conversations—as well as the information that comes out in litigation and the opportunity to have a day in court—are all important possible remedies and benefits to plaintiffs bringing suit, above and beyond any money they may be awarded.

III. MANDATING CHANGE

Whether the result of adjudication or settlement, civil rights lawsuits can mandate that governments change their behavior.[139] Temporary restraining orders and preliminary

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[136] Id.

[137] See, e.g., Editorial Board, Mayor Landrieu's Apology May Help Heal Grievous Wounds Caused by NOPD: Editorial, The Times-Picayune (Dec. 21, 2016) (describing public apology by New Orleans mayor for police killings in the days after Hurricane Katrina); Taylor, supra note 103 (describing apology by Chicago mayor for torture by Chicago police officer Burge and others).

[138] Gerhardstein, supra note 10, at 259.

[139] As noted above, settlements of damages actions may also mandate policy changes. See supra notes 78-79 and accompanying text. These types of policy changes can also be a product of investigations and lawsuits brought by the United States Department of Justice or state attorneys' general. See, e.g.,

injunctions can mandate changes to government behavior while a case is pending.[140] Final court orders and settlements of systemic reform litigation can be broad and wide-ranging.[141] Court-ordered relief in systemic reform cases has meaningfully changed conditions in schools, prisons, and police departments across the country.[142] Orders can also be more targeted, as they were in *An*, mandating that the New York City Police Department change its policies and trainings regarding community members' right to record the police.[143] Instead of or in addition to changes to policies and practices, court orders can effect immediate, tangible relief for the people who brought suit, such as an order that a group of Texas prisoners be housed in air conditioned facilities,[144] or an order that a group of transgender women prisoners not be transferred into men's facilities.[145]

Negotiating these types of terms—whether in a case seeking injunctive relief or in a damages case where such changes are negotiated as a condition of settlement—does not mean

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See, e.g., Stephen Rushin, Competing Case Studies of Structural Reform Litigation in American Police Departments, 14 Ohio State J. Crim. L. 113 (2016); Samuel Walker, Toward Lawful, Professional and Respectful Policing: The Justice Department's Pattern or Practice Program and Other Police Reform Efforts (NYU Press 2024).

[140] One example of the power of preliminary relief can be seen in the case of *Vasquez Perdomo v. Noem*, which challenges wide-ranging constitutional violations by the Department of Homeland Security and U.S. Immigration and Customs Enforcement in Los Angeles. On July 11, 2025, the district court granted plaintiffs a temporary restraining order. See Order Granting Plaintiffs' Ex Parte Applications for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction, Vasquez Perdomo v. Noem, No. 2: 25-cv-5605 (C.D. Cal. July 11, 2025). Almost two months later, the Supreme Court stayed enforcement of the temporary restraining order without explanation. Noem v. Vasquez Perdomo, No. 25A169, 2025 WL 2585637 (U.S. Sept. 8, 2025). Then, almost two months later, the district court granted Perdomo's request for a preliminary injunction. Perdomo v. Noem, No. 2:25-cv-5605, 2025 WL 3192939 (C.D. Cal. Nov. 13, 2025). Defendants appealed that decision in January 2026. Regardless of the final resolution of this case (which will likely post-date the publication of this Article), the TRO and preliminary injunction did provide at least temporary relief for months at a time.

[141] See, e.g., Brown v. Plata, 563 U.S. 493 (2011) (upholding remedial order entered by three-judge district court to reduce California's prison population).

[142] See, e.g., Sally Chung, ALCU Foundation of Southern California, Williams v. California: Lessons From Nine Years of Implementation 7 (Sept. 29, 2013), https://decentschools.org/settlement/Williams_v_California_Lessons_From_Nine_Years_Of_Implementation.pdf (describing the impact of the Williams litigation, which mandated that all California students be provided with the "basic necessities of educational opportunity"); David Rudovsky, Fifty-Five Years of Civil Rights and Criminal Defense Lawyering: Reflections and Lessons Learned, 2024 Civil Rights Litigation Handbook 23, 51-79 (describing the impact of multiple criminal justice and civil rights legal battles in Philadelphia that resulted in consent decrees targeting corruption among the police department's narcotics officers, unconstitutional stop-and-frisk practices, and civil forfeiture); Margo Schlanger, Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics, 48 Harv. C.R.-C.L. L. Rev. 165 (2013) (describing the impact of the *Plata* decision, which mandated the reduction of the California prison population).

[143] See supra notes 89-94 and accompanying text (describing the *An* case and settlement) .

[144] Jolie McCullough, Judge Approves Settlement Mandating Air Conditioning at Hot Texas Prison, The Texas Trib. (May 8, 2018).

[145] Shaila Dewan, Federal Judge Shields More Transgender Inmates from Trump Order, N.Y. Times (Feb. 24 2025).

they will be followed, and implementation of these types of mandated changes can be politically, legally, and bureaucratically complex and lengthy. Sometimes, courts retain jurisdiction and appoint a monitor to oversee implementation of reforms.[146] In such cases, the court can penalize the defendants if they fail to comply, including by extending the period of oversight, holding the defendants in contempt, or even putting the government agency in receivership.[147] In the view of at least some city and law enforcement officials who have been subject to court orders with monitoring, the judge's sustained oversight and pressure is what made it possible to disrupt ingrained police practices and culture.[148]

Mandated changes can shift police practices even without continued judicial monitoring and oversight. Consider, for example, the lawsuit brought by Barbara and Christopher Kenny against the City of Springfield. On March 31, 2019, in Springfield, Oregon, during a traffic stop, police officers beat, tased, shot, and killed 33-year-old Stacy Kenny.[149] Stacy's parents, Barbara and Christopher, had recently moved to Springfield, a medium-sized city adjacent to Eugene, to retire. Less than a year before, Barbara had met with police officials to let them know that Stacy had schizophrenia and was off her medication, but did not have a gun and

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[146] Costs of Jail Deaths Keeps Growing, San Diego Union-Tribune (July 7, 2024) (explaining that "the federal judge who oversaw the case [with a settlement including training and policy changes] is allowed to review whether the department is complying with the agreement for a year.").

[147] The judge's oversight over implementation of the consent decree between the Department of Justice and the Los Angeles Police Department in *United States v. City of Los Angeles*, 2:00-cv-11769 (C.D. Cal. Nov. 3, 2000), was expected to last five years but was extended an additional three years so that the city could fulfill its obligations. See Josh Kleinbaum, LAPD Consent Decree Renewed, L.A. Daily News (May 16, 2006). For a discussion of the use of receivership as a last resort, see Daja E. Henry, A Court May Soon Control the Hinds County Jail. Here's What May Happen Next, The Marshall Project (Mar. 26, 2025), https://www.themarshallproject.org/2025/03/26/hinds-county-jail-receivership (describing litigation against the Hinds County Jail, outside Jackson, Mississippi; the judge overseeing the case has held the county in contempt for failing to follow the terms of the consent decree and has ordered that the jail be placed under receivership); Hernandez Stroud, The Possibilities and Limitations of Receivership for New York City Jails, Vital City (Aug. 3, 2023), https://www.vitalcitynyc.org/articles/the-possibilities-and-limitations-of-a-receivership-in-nyc-jails (describing the possible use of receivership for litigation against the New York City Department of Corrections).

[148] See, e.g., Stephen Downing, Massacre at the DOJ Civil Rights Are Not "Woke." They're the Law, Substack (Apr. 30, 2025), https://stephendowning.substack.com/p/civil-rights-are-not-woke-theyre (quoting Michael Downing, a retired Deputy Chief of the Los Angeles Police Department, as saying, "The reforms the LAPD achieved would never have happened without the consent decree [entered into with the U.S. Department of Justice]. A federal judge monitored 187 specific paragraphs for substantial compliance, and it took us 10 years to satisfy him. We didn't just check boxes—we instituted reform and changed the culture of the organization."); Interview with Milton Dohoney, Former City Manager, Cincinnati, Ohio (Apr. 10, 2025) ("Could I, without the weight of Judge Dlott [who oversaw a collaborative settlement agreement in Cincinnati reforming policing] have forced all that to happen by my authority? You know, maybe, but it would have been a much bigger struggle.").

[149] Megan Banta, Report: Springfield Police 'Immediately Resorted to Force' in Traffic Stop that Led to Death of Stacy Kenny, The Register-Guard (Mar. 31, 2021). Note that "Stacy was transitioning from male to female in the months before her death but requested immediate family still use the name 'Patrick' and male pronouns. The family has requested others respect Kenny's wishes and refer to her as Stacy." Id.

was not dangerous.[150] Yet the traffic stop escalated dramatically; just over four minutes after Stacy's car was first pulled over, two officers had smashed out the front windows of her car, three officers had repeatedly punched her in the face, two officers had tased her, and one had shot her multiple times in the head and body.[151]

The Kennys decided to sue. They were represented by David Park, an Oregon attorney who regularly negotiates policy changes in the settlements of damages actions. The Kennys' case settled during discovery, and the settlement obligated the city not only to pay the Kennys $4.55 million but also to implement wide-ranging reforms, including:

- a critical incident review of the shooting;
- a comprehensive risk management assessment of the department;
- an obligation by the department to submit annual written reports on officers' use of force to the city council, and to make those reports publicly available;
- multiple amendments to the department's use of force policy;
- amendments to the department's awards policy to recognize officers who have successfully deescalated situations; and
- an obligation to replace the city's existing use of force review board with a new force review committee charged with reviewing all deadly and serious force events.[152]

The first provision—a critical incident review—resulted in a thirty-four page report detailing the circumstances of Stacy Kenny's death (based in large part on deposition transcripts and other litigation information).[153] The report, published two years after Kenny's death, garnered press attention[154] and was, in Barbara Kenny's view, the first time that the "true story" of what had occurred to Stacy was made public.[155] The critical incident review also included thirty-three recommendations, including that the police department develop de-escalation policies, improve the investigations of officer-involved shootings and other uses of force, analyze uses of force by officers, and offer condolences to surviving family members after a fatal officer-involved shooting.[156] Six months after the report was published, the

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150 See Michael Gennaco, Barbara Kenny & Kim Kenny, NACOLE Presentation (Nov. 12, 2023), available at https://www.youtube.com/watch?v=Q3Ms24igcKw; see also DAA Identifies Drivers Who Died Sunday in Officer-Involved Shooting in Springfield, NBC16 (Apr. 2, 2019), https://nbc16.com/news/local/da-identifies-driver-who-died-sunday-in-officer-involved-shooting-in-springfield,

151 See id.

152 Settlement Agreement and Release, Kenny v. City of Springfield, Case No. 6:19-cv-1519 (Sept. 18, 2020).

153 Michael Gennaco, OIR Group, Independent Critical Incident Review and Analysis of the Officer-Involved Shooting Death of Stacy W. Kenny (Mar. 2021).

154 See, e.g., Megan Banta, Report: Springfield Police 'Immediately Resorted to Force' in Traffic Stop that Led to Death of Stacy Kenny, The Register-Guard (Mar. 31, 2021).

155 See interview with Barbara and Kim Kenny (Mar. 5, 2025) (transcript on file with author).

156 Gennaco, supra note 153.

newly-appointed chief of police formally responded, agreeing with most of the report's recommendations and describing it "as a roadmap of opportunity for us to follow."[157]

The Kennys attended public meetings, met with city officials, and pushed the chief of police, city manager, mayor, and city council to make the changes mandated by the agreement and the critical incident review.[158] Many of the settlement terms and critical incident review recommendations have been adopted[159] and the Kennys are continuing to advocate for full implementation of all of the terms of the settlement agreement.[160] Even though the Kennys' settlement agreement has no formal enforcement provisions, it has spurred these changes. Barbara remembers the new Springfield police chief commented: "'[T]hat's how these things work…you know, we get sued, so we change.'"[161] Barbara mused: "that was how he accepted that the world worked…that the police department doesn't change unless they get sued. Like, we have to be part of the feedback loop."[162]

IV. PROVOKING CHANGE

Courts and commentators have long presumed that the prospect or imposition of a damages award will push an officer and their employer to take steps that will prevent something similar from happening in the future.[163] But state and local governments have put into place laws, policies, and union agreements that insulate local government and its officers from the consequences of their actions. Police union agreements often shield officers from being disciplined or fired even when their conduct has justified significant settlements or judgments.[164] Officers virtually never pay those settlements and judgments from their bank accounts.[165] Police departments rarely feel financial burdens of payouts, either; instead, the money to satisfy these claims usually often comes from insurers or a general fund.[166] Many police departments do not keep track of the most basic information about these suits—who

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[157] Letter from Springfield Interim Chief of Police Andrew Shearer to City Manager Nancy Newton (Nov. 18, 2021).

[158] Megan Banta, Report: Springfield Police 'Immediately Resorted to Force' in Traffic Stop that Led to Death of Stacy Kenny, The Register-Guard (Mar. 31, 2021).

[159] See Kenny interview, supra note 155.

[160] Email from Barbara Kenny, July 5, 2025 (on file with author).

[161] See Kenny interview, supra note 155.

[162] Id.

[163] See Carlson v. Green, 446 U.S. 14, 21 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect."); City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future"); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981) (expecting that judgments against municipalities will cause policymakers to "discharge…offending officials").

[164] See, e.g., Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 Geo. Wash. L. Rev. 453 (2004); Stephen Rushin, Police Union Contracts, 66 Duke L.J. 1191 (2017).

[165] See Schwartz, Police Indemnification, supra note 21 (finding that police officers rarely pay settlements and judgments).

[166] See Schwartz, supra note 24 (finding that law enforcement agencies are rarely held financially responsible for the costs of lawsuits brought against them and their officers).

has been sued, what they are alleged to have done, and how much has been paid.[167] All too often, successful cases are treated by local governments as the cost of doing business, with no effort made to prevent something similar from happening in the future.

All available evidence makes clear that damages awards do not influence behavior in the ways imagined by the Supreme Court and presumed by standard models of deterrence. But it is wrong to conclude, based on that evidence, that damages lawsuits do not deter. Despite widespread indemnification, protection of police departments' budgets, and inattention to litigation information, civil rights damages suits can influence government behavior in a variety of ways. Litigation can announce new legal obligations that are incorporated into policies and trainings, create financial pressures despite indemnification and budgeting arrangements, unearth valuable information, and influence government behavior by focusing attention on a case.

A. Announcing New Law

Civil rights lawsuits can lead courts to announce new legal obligations or rights. The Supreme Court's qualified immunity doctrine—which allows courts to grant qualified immunity without ruling on the underlying constitutional claim—undoubtedly makes it more difficult to establish new law in civil rights cases.[168] But rulings in civil rights cases have, nevertheless, clarified and developed the law in countless areas, including the police, prisons, schools, and government benefits.[169] Whether or not the plaintiffs ultimately prevail in the cases in which these new legal rules are announced, the legal rulings can be relied upon in future cases.[170]

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[167] See Joanna C. Schwartz, Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking, 57 UCLA L. Rev. 1023 (2010) (finding that many police departments fail to track and analyze information in lawsuits brought against them and their officers).

[168] See Nielson & Walker, supra note 55.

[169] See, e.g., Emma Kaufman & Justin Driver, The Incoherence of Prison Law, 135 Harv. L. Rev. 515 519 (2021) (describing the development of constitutional prison law in the 1970s); see also M.C. by and through S.B. v. Los Angeles Unified School District, 2023 WL 11066079 (Aug. 9, 2023) (ruling that students with disabilities who are educated in integrated settings during the school year also have a right to integrated educational opportunities in the summer); Perry v. Spencer, 94 F.4th 136, 157 (1st Cir. 2024) (ruling that thirty days in solitary confinement presumptively constitutes a "significant and atypical hardship" requiring meaningful procedural protections); Rudisill v. McDonough, 601 U.S. 294 (2024) (ruling that veteran who qualified for education program benefits under separate periods of service was allow to use both benefits up to a 48-month aggregate benefits cap); Asinor v. District of Columbia, 111 F.4th 1129 (D.D. Cir. 2024) (ruling that the Fourth Amendment reasonableness standard applies not only to the seizure of property but also to its retention); infra notes 173-176 (describing various legal obligations regarding police practices articulated as a result of court decisions).

[170] Reinert, supra note 10, at 1226-27 (describing the development of the law of sex discrimination and the treatment of prisoners, including cases that announced new legal rules even as the plaintiffs in the cases were not victorious).

These rulings can also influence the ways in which governments train and supervise their officers.[171] Although police officers do not review the facts and holdings of every legal decision, watershed holdings announcing new legal obligations will be incorporated into police policy manuals and will be the subject of trainings.[172] For example, after the Fourth Circuit held that using a taser repeatedly in drive-stun mode was unconstitutional, "several agencies in jurisdictions covered by the Fourth Circuit ruling amended their use-of-force and ECW [Electronic Control Weapons] policies" in response.[173] After the Supreme Court held that the use of GPS devices to track vehicles was a search protected by the Fourth Amendment, the FBI turned off nearly 30,000 devices.[174] After the California Supreme Court ruled in *Hayes v. County of San Diego* that law enforcement officers could be held liable for negligence based on decisions and conduct leading up to their use of force,[175] the Los Angeles Police Commission changed the way in which it evaluated the propriety of officers' uses of force.[176] The fact that police policies and trainings hew closely to the Fourth Amendment has rightfully been criticized, as constitutional standards do not sufficiently constrain law enforcement conduct and do not take account of best practices supported by research.[177] But there is at least a modest bright side; those court rulings that do announce new constitutional obligations will likely influence policies, trainings, and behavior.

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171 Susan P. Strum, The Legacy and Future of Corrections Litigation, 142 U. Pa. L. Rev. 639, 662-63 (1993) (describing how litigation has shaped prisoners' legal protections and "contributed to the internalization of these standards by staff and administration.").

172 See Ingrid V. Eagly & Joanna C. Schwartz, Lexipol: The Privatization of Police Policymaking, 96 Tex. L. Rev. 891, 903-08 (2018) (describing how Lexipol, a private company that provides thousands of law enforcement agencies with policies and trainings, updates its policy manuals based on legislation and court decisions and other inputs); (explaining that policy manuals are updated with new law); Schwartz, Qualified Immunity's Boldest Lie, supra note 21, at 629-30 (finding that California police officers are trained about watershed court decisions and statutes that change or clarify officers' obligations).

173 Police Exec. Rsch. F., Guiding Principles on Use of Force 18 (2016).

174 Lawrence Rosenthal, Seven Theses in Grudging Defense of the Exclusionary Rule, 10 Ohio St. J. Crim. L. 525, 543 (2013).

175 57 Cal.4th 622 (2013).

176 LAPD Commission Adds to Guidelines for Review of Police Use of Force, NBC L.A. (Feb. 18, 2014), https://perma.cc/6CX7-SKL5.

177 See, e.g., Brandon Garrett & Seth Stoughton, A Tactical Fourth Amendment, 103 Va. L. Rev. 211, 217-18 (2017) (explaining that the Supreme Court's use of force doctrine is "not only poorly suited for police training, but actually counterproductive, confounding efforts to draft clear use-of-force policies" and "providing little meaningful guidance to police officers."); Rachel Harmon, When is Police Violence Justified?, 102 Nw. U. L. Rev. 1119, 1127 (2008) (explaining that the Supreme Court's Fourth Amendment doctrine "does not answer adequately the most basic questions about police uses of force: when a police officer may use force against a citizen, how much force he may use, and what kinds of force are permissible"); see also Jefferson v. Lias, 21 F.4th 74, 90-91 (3d Cir. 2021) (McKee, J., with whom Restrepo and Fuentes, J.J., join, concurring) (explaining that "police departments across this country have essentially come to a consensus that shooting at fleeing suspects in vehicles is never reasonable and will always be very reckless, except for the rarest of circumstances specifically noted in those policies," but Fourth Amendment doctrine does not—and should—"reflect and consider the stringency of these policies.").

B. Imposing Financial Pressures

In the seemingly rare instances in which law enforcement agencies pay settlements and judgments from their budgets, those payouts reportedly influence policymakers' decisions.[178] Yet, most often, officers and police departments do not bear the financial costs of lawsuits brought against them: Instead, lawsuits are paid from central funds or insurers with no financial impact on the officer or the department that employs him.[179] Nevertheless, settlements and judgments can spur the entity paying those bills—either the local government or the insurance company—to push for change.

When anticipated or actual legal payouts are large enough, they will undoubtedly get local governments' attention. Since 2019, when a California law extended the statute of limitations on child sex abuse claims, thousands of lawsuits have been filed against local governments across the state.[180] Global settlements of these claims have cost $4.8 billion in Los Angeles County alone and, according to Los Angeles County's Chief Executive Officer, will "have a significant impact on the County's budget for years to come."[181] In small, uninsured or under-insured jurisdictions, large settlements and judgments can have even more marked impacts, increasing local taxes and occasionally leading to the closure of police departments.[182] Even when lawsuit payouts do not have these dramatic effects, city and county councilmembers, mayors, and other local government officials have been known to question and criticize departments responsible for a spike in settlements and judgments.[183]

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[178] Schwartz, supra note 24, at 1199-1200 (reporting the Los Angeles County Sheriff's Department pays settlements and judgments from their budgets, and that an official commented that this arrangement encourages management not to "mess up.").

[179] See generally id. (reporting that law enforcement agencies' budgets are not typically impacted by the settlements and judgments entered against them and their officers).

[180] See Sophia Bollag, A Looming Threat Could Bankrupt California Counties—and Its Not Fires or Trump, S.F. Chron. (Mar. 3, 2025). For further discussion of these cases, see infra notes 200-201 and accompanying text.

[181] Sara Tiano, $4 Billion Settlement Approved for Survivors of Sexual Abuse While in LA County Custody, The Imprint (Apr. 8, 2025). In two settlements, the county has agreed to pay almost $5 billion to resolve child sex abuse cases. See Cato Hernandez, LA County Approves Another $828 Million to Settle Sex Abuse Claims, LAIst (Oct. 28, 2025).

[182] For example, Inkster, Michigan, paid $1.4 million to settle a case; to satisfy the settlement it raised property taxes by an average of $187. The Detroit Free Press Editorial Board, Inkster Beating Shows Cost of Police Brutality, DETROIT FREE PRESS (June 3, 2015), http://www.freep.com/story/opinion/editorials/2015/06/02/police-inkster-beating/28357021 [https://perma.cc/S5EUANGV]. The town of 25,000 had liability insurance, but only for payouts over $2 million. See Inkster Property Owners on Hook for $1.4 Million Police Beating Settlement, MACOMB DAILY NEWS (June 2, 2015), http://www.macombdaily.com/general-news/20150602/inkster-property-owners-onhook-for-14-million-police-beating-settlement [https://perma.cc/LG9D-56T3]. For descriptions of small law enforcement agencies that have closed after repeated lawsuits and/or an insurer's decision to deny coverage, see Schwartz, supra note 24, at 1190-91.

[183] See Schwartz, supra note 24, at 1175-76, 1175 nn.98-99 (describing questions and criticisms about high lawsuit costs by local officials, reported by current and former government officials in Los Angeles, El Paso, Chicago, and Schaumburg, Illinois).

Publicity about litigation costs can also pressure local governments to take action. Journalists regularly report on the high costs of settlements and judgments against officers and the budgetary impact of those payouts.[184] A series of costly sheriff's deputy settlements in the 1990s prompted Los Angeles County to convene a commission to review the sheriff's department and appoint a special counsel who ended up supervising the city's work for more than twenty years.[185] Reporting about a series of payouts against Detroit police officers reportedly prompted the city to begin tracking the officers named in lawsuits to determine if they need to be retrained, reassigned, or removed from the force.[186] More than 200 wrongful conviction cases pending in Chicago—that could cost the city more than a billion dollars—led an alderman to call for public hearings, a fund for victims of wrongful convictions, and better data analysis to "identify[] police officers that have patterns of excessive force."[187]

In smaller jurisdictions, which often rely on municipal liability insurance, the threat of costly settlements and judgments can prompt insurers to push for policy changes.[188] Municipal liability insurers encourage their insureds to update policies, manage employees stress, deploy body-worn cameras, and train officers in de-escalation. Insurers may also threaten to increase deductibles or reduce coverage if their recommendations are not

[184] See, e.g., Christina Carrega, Millions in Lawsuit Settlements Are Another Hidden Cost of Police Misconduct, Legal Experts Say, ABC News (June 14, 2020), https://abcnews.go.com/US/millions-lawsuit-settlements-hidden-cost-police-misconduct-legal/story?id=70999540; Heather Cherone, With Latest Settlement, Police Pursuits Cost Chicago Taxpayers $101.8M Since 2019: Analysis, WTTW (Feb. 19, 2025), https://news.wttw.com/2025/02/19/latest-settlement-police-pursuits-cost-chicago-taxpayers-1018m-2019-analysis; Phil Gambini, Police Misconduct Costing Buffalo Millions, Investigative Post (July 20, 2020), https://www.investigativepost.org/2020/07/20/police-misconduct-costing-buffalo-millions/; Mark Puente, Undue Force, BALT. SUN (Sept. 28, 2014), http://data.baltimoresun.com/news/police-settlements [https://perma.cc/MN49-9U9G] (reporting that the over $5.7 million spent in settlements and judgments in cases alleging police misconduct could have been used to renovate forty-three playgrounds, resurface seventy-two basketball courts, or hire 124 new police officers).

[185] See James G. Kolts et al., The Los Angeles County Sheriff's Department 1 (192) (asserting that the Kolts Commission inquiry into the Los Angeles Sheriff's Department was prompted by "[a]n increase over the past years in the number of officer-involved shootings," "[f]our controversial shootings of minorities by LASD deputies in August 1991," and the fact that "Los Angeles County . . . paid $32 million in claim arising from the operation of the LASD over the last four years."). See also Merrick Bobb, 34th Semiannual Report of Special Counsel, Los Angeles County Sheriff's Department 1-9 (Aug. 2014), https://assets-us-01.kc-usercontent.com/0234f496-d2b7-00b6-17a4-b43e949b70a2/08bb18bc-5cbd-46f2-96f5-fb588f1e4079/34th%20Semiannual%20Report.pdf (describing the special counsel's work during his twenty-two years of oversight).

[186] Keith L. Alexander, Steven Rich & Hannah Thacker, What You Need to Know About the Cost of Police Misconduct, Wash. Post (Mar. 10, 2022), https://www.washingtonpost.com/investigations/2022/03/10/what-you-need-know-about-cost-police-misconduct/; Keith L. Alexander, Steven Rich & Hannah Thacker, The Hidden Billion-Dollar Cost of Repeated Police Misconduct, Wash. Post (Mar. 9, 2022).

[187] Letter from Gilbert Villegas, City Council, City of Chicago (Apr. 2, 2025) (on file with author).

[188] See generally John Rappaport, How Private Insurers Regulate Public Police, 130 Harv. L. Rev. 1539 (2017).

adopted.[189] In addition, municipal liability insurers track trends in claims against their insureds and mandate policy or practice changes as a condition of continued coverage.[190] A series of multi-million dollar settlements and judgments in cases contesting the use of solitary confinement in New Mexico jails led the state's insurer to push for reforms and the legislature to pass a bill limiting its use.[191] As Matthew Coyte, who has brought dozens of these lawsuits, commented: "You would think that the revelation of the appalling conditions in a public forum might make people change their ways. But I didn't find that to be the case. It was the pocketbook that got the movement in the legislature going."[192]

Springfield, Oregon's insurance company also pushed for improvements in the police department following the settlement of the Kennys' lawsuit. The city's insurance pool doubled their deductible and threatened that they would drop the city from coverage or significantly increase insurance premiums if the city continued having the same "frequency and severity" of claims against the police and jail.[193] In addition to the policy changes mandated by the Kennys' settlement, the insurance provider had their own list of requirements, including an improved screening process for employees, as a condition of continued coverage. As the Springfield police chief (who took office after the settlement) commented, the insurance company's ultimatum was a "hammer" that motivated the department and the city to change."[194]

Financial levers have their limitations. Insurers or government leaders motivated to reduce payouts may prioritize causing people to lose in court over preventing harms from occurring in the first place. As John Rappaport has observed, those motivated to reduce payouts are unlikely to focus adequate attention on claims that do not accrue for a long time (like wrongful convictions) or those that do not cause much in the way of compensable harms (like unlawful stops and frisks).[195] And given insurers' risk adverseness, they are likely to propose incremental change rather than more radical changes to the structure of policing.[196] These limitations suggest that advocates should think strategically about how to use

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[189] See John Rappaport, An Insurance-Based Typology of Police Misconduct, 2016 U. Chi. L. F. 369, 378-82; Rappaport, supra note 188, at 1573-91 (for a detailed description of the many ways in which insurers regulate the police); Kimberly Kindy, Insurers Force Change on Police Departments Long Resistant to It, Wash. Post (Sept. 14, 2022) (describing insurers' requirements that departments change their pursuit policies and adopt other changes to reduce litigation).

[190] For example, when the Idaho County Risk Management Program required that all jails it insures comply with eight requirements—including a policy regarding strip searches and a policy never to have fewer than two officers on duty at a time—or reduce their coverage from $3 million to $1 million, all but eight of the forty-four counties made the changes. Schwartz, supra note 24, at 1189-90.

[191] Katie Rose Quandt, Inside One Lawyer's Quest to End Solitary Confinement, Rolling Stone (Oct. 23, 2020).

[192] Id.

[193] Kindy, supra note 189.

[194] Id.

[195] Rappaport, supra note 189, at 372-73.

[196] Anthony O'Rourke, Guyora Binder, Rick Su, Insurance Risk and Democratic Police Reform, Law and Political Economy Blog (May 23, 2024), https://lpeproject.org/blog/insurance-risk-and-democratic-police-reform/.

financial costs in their campaigns, push for reforms to municipal liability insurance, and complement insurance and financial levers with other strategies. They do not, however, suggest that payouts are wholly disregarded by local governments or should be wholly disregarded by advocates as a tool for reform. Indeed, insurers have sometimes succeeded where activists and officials have failed in getting law enforcement agencies to change their policies and practices.[197]

C. Unearthing Information

As previously described, the wealth of information unearthed during the course of litigation can provide plaintiffs with much-needed information about the circumstances of their case. The wealth of information unearthed during litigation can also be revelatory to the public and to those named in the suits.[198] Notably, information unearthed during litigation can have an impact whether or not there is a settlement or judgment on plaintiff's behalf in any given case.[199]

Allegations in lawsuits can bring incidents of misconduct to public attention. The 2019 California law expanding the statute of limitations for claims of child sexual abuse has resulted in thousands of suits against Los Angeles County and its probation officers,[200] and the allegations in those suits have led the county's probation department to put more than 40 employees on leave and another eight to leave the department, and has led the county board of supervisors to demand information from the probation department about its practices.[201]

Litigation can also surface information to the public that creates pressure to change.[202] In October 2014, Chicago police officer Jason Van Dyke shot and killed seventeen-year-old Laquan McDonald. According to police reports, Van Dyke shot McDonald after the "walked" or "lunged" at officers.[203] But a few weeks after the shooting, a police whistleblower told Craig Futterman—the director of the University of Chicago's Civil Rights and Police Accountability

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[197] Kindy, supra note 189.

[198] See Joanna C. Schwartz, Introspection Through Litigation, 90 Notre Dame L. Rev. 1055 (2015); Zambrano, supra note 10.

[199] For discussion of these benefits in the context of "meritless" litigation, see Reinert, supra note 10, at 1197-98.

[200] See Keri Blakinger & Rebecca & Rebecca Ellis, L.A. County Hit With Record Number of Lawsuits Amid Flood of Child Sex Abuse Claims, L.A. Times (Feb. 6, 2025); Jeremy Loudenback, A Staggering Tally: Cases Alleging Sexual Abuse of Children in Los Angeles County Custody Now Number Thousands, The Imprint (July 12, 2024).

[201] See Loudenback, supra note 200.

[202] See Gilles, supra note 10, at 849, 880 (arguing "that constitutional tort damage remedies levied against municipalities do, in fact, alter the behavior of government policymakers in desirable ways" by "important informational and fault-fixing functions of ... claims").

[203] Ed Pilkington, Laquan McDonald Shooting Puts Rahm Emanuel in Battle Over the Truth, The Guardian (Dec. 3, 2015), https://www.theguardian.com/us-news/2015/dec/03/laquan-mcdonald-shooting-rahm-emanuel-chicago-political-battle

Clinic—that dashcam footage contradicted the official story.[204] When the city denied a public records request by a local journalist, Futterman and attorneys from Loevy and Loevy sued for release of the video. In November 2015, after almost a year of litigation, the court ordered the video's release.[205] The video, released to the public on November 24, 2015, made clear McDonald had been walking away from officers when he was shot, and that officers had covered up the circumstances of the shooting.

The video's impact on the City of Chicago was profound. As Craig Futterman reflects,

> It was as if a curtain were lifted, and suddenly, there was this simple truth that we all knew: Yes, the code of silence exists in Chicago. Yes, there are real and systemic problems of police abuse here in Chicago. It wasn't just that folks had to come to grips with this horrific shooting. While Officer Van Dyke's callous acts were truly extraordinary, I think that what really struck people was seeing how normal it was for every single officer on the scene to circle the wagons and cover up what Van Dyke did. That the life of a 17-year-old kid mattered less than covering for a fellow officer.[206]

The video's release prompted months of protests; firings, reassignments, and retirements of police officers and leadership; an investigation by the Department of Justice; and the creation of a new task force on police accountability.[207] Officer Van Dyke was charged with first degree murder the same day the video was released, and was later convicted of second degree murder and battery and sentenced to seven years in prison.[208]

There are many other profound, if less dramatic, ways in which litigation can unearth valuable information. For example, a lawsuit can generate information that can be used to support later litigation. As explained by G. Flint Taylor, who has sued the Chicago police department for brutality for decades, and has led the litigation on behalf of those tortured by Chicago officer John Burge:

> [*Monell* claims] facilitate the development of systemic evidence of deliberate indifference to police brutality, as well as information concerning "repeater" officers, the functioning of the police disciplinary and counseling system, and the attitudes of police officials towards important police disciplinary issues. If appropriate protective orders are obtained, this information can be shared by lawyers in their various cases against police abusers, obviating the need for extensive discovery in each case, and helping each lawyer to properly evaluate his or her case for settlement and trial.[209]

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[204] Becky Beaupre Gillespie, Lifting the Curtain: Futterman Reflects on the Aftermath of the Laquan McDonald Crisis—and What It Tells Us about How Change Gets Made, University of Chicago Law School (Mar. 30, 2016), https://www.law.uchicago.edu/news/lifting-curtain-futterman-reflects-aftermath-laquan-mcdonald-crisis-and-what-it-tells-us-about

[205] See id.

[206] Id.

[207] Nausheen Husain, Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing, Chicago Trib. (May 24, 2019), https://www.chicagotribune.com/2019/01/18/laquan-mcdonald-timeline-the-shooting-the-video-the-verdict-and-the-sentencing/.

[208] See id.

[209] Taylor, supra note 103, at 749.

Litigation successes can also require local governments to produce information that helps to advance future suits. A prime example is the serial litigation challenging New York City's stop-and-frisk practices. *Floyd v. City of New York* is the case in which Judge Shira Scheindlin ruled that the City's stop-and-frisk practices violated the Constitution. But the key proof supporting the plaintiff's case were reports of the department's stop-and-frisk activity that the settlement of a prior lawsuit, *Daniels v. City of New York*, obligated the New York City Police Department to gather.[210]

Litigation can also inform departments of weaknesses in their policies, trainings, supervision, or staff. Lawsuits regularly include allegations that would be unknown to the department but for the suit because they were never submitted as a citizen complaints or police report.[211] Even when a department is already on notice of the allegations in a complaint, experts who have compared litigation files with internal affairs files have found that the litigation files are far more complete.[212] Despite its value, many departments do not pay attention to litigation information.[213] But there are ongoing efforts to get departments to pay closer attention to the lawsuits brought against them.[214] And departments that gather and analyze information from lawsuits have identified and corrected weaknesses in personnel, training, and supervision.[215]

D. Focusing Attention

Whether or not litigation unearths previously unknown information, it can focus public attention on a case or issue. Press repeatedly report on high-profile lawsuits as they proceed through the courts—when a case is first filed, when new evidence emerges during discovery and trial, and when a case results in a jury verdict or settlement.[216] Investigative journalism

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[210] See Complaint, Floyd v. City of New York, No. 1:08-cv-1034, at ¶ 26 (S.D.N.Y. Jan. 31, 2008). See also Patel, supra note 84.

[211] See Joanna C. Schwartz, What Police Learn from Lawsuits, 33 Cardozo L. Rev. 841, 864 (2012).

[212] See id. at 872.

[213] See Schwartz, supra note 167.

[214] See Schwartz, Monell's Untapped Potential, supra note 81.

[215] For example, the Los Angeles Sheriff's Department's review of lawsuits revealed several troubling trends: prisoners were being injured after they were improperly assigned to top bunks; deputies were repeatedly going to the incorrect address when responding to a call; and people were being injured while be transported. See Schwartz, supra note 211, at 853-54. Once the Sheriff's Department identified these litigation trends, they were able to address the underlying problems. When the Portland police auditor reviewed lawsuits, he found several cases alleging blows to the head against officers assigned to the night shift at one station, and several claims alleging that officers were entering homes without warrants. See id. at 854. Following retraining, both types of allegations declined. See id.

[216] For some examples of press coverage of cases described in this Article at these various stages, see Megan Banta, Report: Springfield Police 'Immediately Resorted to Force' In Traffic Stop that Led to Death of Stacy Kenny, The Register-Guard (Mar. 31, 2021) (describing the findings of the independent review of Kenny's death conducted to fulfill a term of the Kennys' settlement agreement with the City of Springfield, described supra notes 149-162 and accompanying text); Joseph Goldstein, Judge Rejects New York's Stop-and-Frisk Policy, N.Y. Times (Aug. 12, 2013) (describing the court's ruling, in *Floyd v. City of New York*, that New York City's stop-and-frisk practices violated the constitutional rights of

about troubled police departments[217] or practices—such as taser misuse, mistreatment of people in mental health crisis, or unnecessary shootings of people's pets[218]—often relies heavily on lawsuit allegations and discovery to paint their detailed portraits of dysfunction. These types of stories, and the resulting public attention, apparently matter to government officials. When Charles Epp surveyed more than 800 police department officials, in 2000, he found that chiefs "widely share the view that liability's greatest threat is to their agency's public legitimacy and credibility."[219]

These types of stories can also influence government behavior. Take, for example, the case of Dennis Wayne Hope, a Texas prisoner, who was released from solitary confinement after being held there for more than twenty-seven years.[220] Hope brought a lawsuit, *pro se*, challenging the conditions of his confinement, and lost in district court.[221] Easha Anand, then a lawyer at the MacArthur Justice Center, learned about Hope's case, and agreed to represent him.[222] After losing in the Fifth Circuit, they filed a petition for certiorari with the Supreme Court, arguing that Hope's years-long detention in solitary violated the Eighth and Fourteenth Amendments.[223] Four *amicus* briefs detailed the history, legality, administration, and psychological and physical impact of extended solitary confinement.[224] They also used

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New Yorkers, described supra notes 84-88 and accompanying text); Eli Rosenberg, Suit Accuses New York Police of Violating Citizens' Right to Film, N.Y. Times (July 7, 2016) (describing the filing of the *An* case, described supra notes 89-94 and accompanying text); Sanders, supra note 112 (describing the $50 million jury verdict in Marcel Brown's case); Frank Stoltze, This Leaked Autopsy Appears to Contradict the LA Sheriff's Department's Version of a Fatal Shooting, LAIst (June 13, 2019) (describing the autopsy that was leaked to the Vargas's attorney and shared with the press, described supra notes 116-129 and accompanying text).

[217] See, e.g., Shane Bauer, How a Deadly Police Force Ruled a City, New Yorker (Nov. 16, 2020) (detailing the facts in several lawsuits against the Vallejo police department and its officers to illustrate widespread violence in the department); Brian Howey & Nate Rosenfield, How a 'Goon Squad' of Deputies Got Away With Years of Brutality, N.Y. Times (Nov. 30, 2023) (relying on lawsuits to describe long-standing and rampant misconduct by Rankin County Sheriff's deputies).

[218] See, e.g., C.J. Ciaramella, Why Are Detroit Cops Killing So Many Dogs?, Reason (Nov. 15, 2016) (relying on lawsuits to describe spate of police shootings of dogs in Detroit); Kimberly Kindy, Policing Mental Health Crises, Wash. Post (Dec. 11, 2020) (profiling the Kenny family's lawsuit in discussing police use-of-force against people in mental health crises); Nate Rosenfield, Brian Howey & Sarah Cohen, Where the Police Used a Taser on a Bible-Reading Great-Grandmother, N.Y. Times (Jan. 14, 2025) (relying on several lawsuits to describe taser misuse by Mississippi sheriff's deputies).

[219] Charles R. Epp, Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State 97 (U. Chi. Press 2010).

[220] John Kruzel, U.S. Supreme Court Turns Away Suit by Texas Inmate Held 27 Years in Solitary Confinement, Reuters (Apr. 17, 2023).

[221] See Hope v. Harris, No. 9:18-cv-0027, 2020 WL 2186246 (E.D. Tex. May 5, 2020).

[222] See email from Easha Anand to author (Feb. 17, 2025, 9:18am).

[223] See Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit, Hope v. Harris, United States Supreme Court, No. 21-1065, 2022 WL 314019 (Jan. 28, 2022).

[224] See Brief of Professor John F. Stinneford as Amicus Curiae in Support of Appellant, Hope v. Harris, United States Supreme Court, No. 20-40379 (Sept. 28, 2020); Brief of Amici Curiae Professors and Practitioners of Psychiatry, Psychology, and Medicine in Support of Plaintiff-Appellant, Hope v. Harris, United States Supreme Court, No. 20-40379 (Sept. 28, 2020); Brief Amici Curiae of Former Corrections

the attention afforded Hope's certiorari petition to focus awareness on his experience in solitary and solitary confinement more generally. Stories about Hope's petition and the use of and harms of solitary confinement were published in the *New York Times, Washington Post* and elsewhere.[225] Hope wrote an essay about his experience that was shared around the world.[226]

One week before the Supreme Court was scheduled to decide whether to hear Hope's case, Texas decided to release him from solitary confinement.[227] The case is still pending as of January 2026, and the lawyers representing Hope are seeking damages for his lengthy detention in solitary and for placing him in solitary in retaliation for free speech.[228] In Anand's view, it was the campaign waged outside the courtroom that ultimately led to this outcome. As she explains:

> Do I think that Mr. Hope would have been let out of solitary confinement if we'd just written a terrific cert petition? Perhaps.
>
> I think it's far more likely that Texas let Mr. Hope out of solitary confinement not because they were scared of what the Court might do with our petition but because we had used our petition before the Supreme Court to generate this barrage by folks around the country, including by some legislators in Texas, about our client. And as a result of that barrage, I've gotten to hear about Mr. Hope shaking someone's hand for the first time since before the OJ Simpson trial, feeling grass under his feet after more than half a lifetime, the kinds of things that I can't even imagine losing for 27 years. And that's far more than the Supreme Court could have given him even if they sided with us on everything; even if we'd gotten certiorari granted and won, all he would have gotten was into discovery.[229]

As Anand's comments emphasize, Hope's release from solitary confinement occurred without having resolved his suit, and without the Supreme Court having granted certiorari.

Officials Dan Pacholke, Phil Stanley, Dick Morgan, Eldon Vail, and Steve J. Martin in Support of Plaintiff-Appellant and Reversal, Hope v. Harris, United States Supreme Court, No. 20-40379 (Sept. 28, 2020); Brief of Amici Curiae Current and Former Prosecutors and Department of Justice Officials in Support of Plaintiff-Appellant, Hope v. Harris, United States Supreme Court, No. 20-40379 (Sept. 28, 2020).

[225] See Editorial Board, Call Solitary Confinement What It Is: Torture, Wash. Post (Feb. 16, 2022); Adam Liptak, 27 Years in Solitary Confinement, Then Another Plea for Help in Texas, N.Y. Times (Feb. 14, 2022); Brooks Patterson, The Dennis Hope Case: When Solitary Confinement Becomes Cruel and Unusual Punishment, Cleveland Clarion (May 5, 2023); Eric Reinhart, Reconstructive Justice—Public Health Policy to End Mass Incarceration, 388 N. Engl. J. Med. 559 (Feb. 8, 2023); Texas Death Row Inmates Sue Over Solitary Confinement, The Seattle Times (Jan. 26, 2023).

[226] See Dennis Hope, Polunsky Unit, Livingston, Texas (July 15, 2021), https://www.texasletters.org/dennishope. See also email from Easha Anand to author (Feb. 17, 2025, 9:40am) (on file with author).

[227] See Kruzel, supra note 220.

[228] See email from Easha Anand to author (Feb. 17, 2025, 9:18am) (on file with author). See also Docket, Hope v. Harris, No. 9:18-cv-0027 (E.D. Tex. Feb. 16, 2018).

[229] See email from Easha Anand to author (Feb. 17, 2025, 9:40am) (on file with author).

Litigation can focus attention on a case or issue that prompts change regardless of what happens in court.

V. USING LITIGATION AS A TOOL FOR REFORM

People can prevail in civil rights cases, despite many barriers to relief and reform. Litigation offers important benefits to plaintiffs. Beyond the award of money—which has significant value in and of itself—litigation can materially change people's circumstances, reveal information previously unknown to the people bringing the case, offer a day in court, and result in an apology or other commemoration of wrongdoing and loss. And lawsuits can influence government behavior in numerous ways: by mandating changes as a condition of settlement or through the award of injunctive relief; by announcing new legal obligations; by imposing financial pressure; by revealing previously unknown information; and by focusing attention on government practices.

But what do these victories actually achieve? Many people sue with the hopes that they can prevent something similar from happening again in the future: How likely is a lawsuit to realize this goal? There is a long-standing and deep-seated skepticism about what litigation can ever hope to accomplish that has often been articulated around *Brown v. Board of Education*.[230] By one view, *Brown* stands as a towering achievement of civil rights litigation, decades in the making, resulting in the Supreme Court's determination that segregated education was unconstitutional.[231] To others, *Brown* exemplifies the many ways in which litigation is wholly inadequate to the task of social change. Derrick Bell observes *Brown* was achievable because integration was beneficial to white people in power.[232] Michelle Alexander, drawing on Bell's interest convergence framework, argues litigation victories are necessarily limited in their scope, achieved on behalf of the most palatable plaintiffs while leaving without remedy those less sympathetic to a judge or jury.[233] Even when plaintiffs are victorious, court orders are not self-executing and so, Gerald Rosenberg has written, are "often rendered useless" in the face of opposition.[234] Indeed, by this view, decisions like *Brown* can be counterproductive because they provoke backlash, mobilizing

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[230] 347 U.S. 483 (1954).

[231] For stories of this victory see, for example, Richard Kluger, Simple Justice (2004); Charles J. Ogletree, All Deliberate Speed (2004).

[232] See Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980). See also Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 17-18 (1996) (questioning whether the Court is actually countermajoritarian, and observing that "the Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection.").

[233] Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 225-28 The New Press: 2012).

[234] Gerald Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 15-21 (U. Chicago Press: 1991).

those in opposition.[235] Worse still, such courtroom efforts "drain[] resources that could be more effectively employed in other strategies."[236]

In recent years, abolitionists have offered a related critique of police reforms—like improved police training, supervision, and policies—that are often the outcome of successful Section 1983 litigation. As Amna Akbar writes, such reforms "orient action toward entrenching, rather than overthrowing or substituting, a fundamentally corrupt system, institution or set of relations."[237] Such reforms are also criticized for taking the wind out of the sails of more ambitious efforts.[238] A version of these critiques could be offered in response to each of the ways that civil rights litigation typically mandates or provokes change. The types of policy and training changes required through injunctive relief or settlement agreements, recommended by insurers, and adopted by police departments following the announcement of new legal obligations may funnel resources into the criminal legal system. Mandated changes may not meaningfully improve conditions because they are resisted or rejected by officers and supervisors, or because they are too incremental.

But the fact that litigation has limitations and cannot magically cure our problems does not mean that it is useless. Instead, it means that those using litigation as a tool for reform should be mindful of its strengths and limitations; view litigation as a tool in conjunction with other forms of advocacy, organizing, protest, and community building; and take the long view.[239]

A. By exploiting litigation's strengths

Nikolas Bowie is unquestionably correct when he writes, reflecting on the unconstitutional and autocratic upheavals of the second Trump administration, that "the options available to federal courts are simultaneously too limited, weak, and dangerous for us to rely on them to the exclusion of anything else."[240] Stephen Vladeck is equally right that "our legal rights depend upon not just judicial remedies, but also political ones."[241] Litigation is incrementalist, institutionalist, elitist, and expensive. And the court orders it produces—like *Brown*—are not self-executing. For those reasons it should never be the sole tool employed in legal reform efforts.

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[235] See Scott L. Cummings & Douglas NeJaime, Lawyering for Marriage Equality, 57 UCLA L. Rev. 1235, 1237-38 (2010) (describing the "backlash thesis" offered by Rosenberg and others).

[236] Rosenberg, supra note 234, at 423.

[237] Amna A. Akbar, Non-Reformist Reforms and Struggles over Life, Death, and Democracy, 132 Yale L.J. 2497, 2497-98 (2023).

[238] See, e.g., Mychal Denzel Smith, Incremental Change Is a Moral Failure, ATLANTIC (Sept. 15, 2020), https://www.theatlantic.com/magazine/archive/2020/09/police-reform-is-not-enough/614176/ [https://perma.cc/88J9-Q23D] ("The set of demands issued by the police-reform advocacy project Campaign Zero, branded "#8cantwait," threatened to suck up the energy that was forming around defunding the police and divert it toward minor reforms that would have little impact on levels of police violence.").

[239] Accord Christy Lopez, A Pattern of Injustice, Inquest (Aug. 8, 2024).

[240] See Bowie, *supra* note 17.

[241] See Vladeck, *supra* note 17.

But focusing overmuch on litigation's weaknesses risks overlooking its strengths. As this Article has observed, litigation is uniquely capable of unearthing information protected by the government. It is uniquely capable of awarding money to people whose rights have been violated, and compensating lawyers who represent them. It is uniquely capable of bringing in a judge to order compliance or contempt. It is very good at announcing new legal rules, focusing public attention, and pressuring governments to change. And civil courts are more accessible than other formal avenues to seek redress: A person who has been mistreated by the police does not have to wait for an internal affairs investigator or criminal prosecutor to find wrongdoing; instead, she can bring a lawsuit to vindicate her rights.[242]

One who expects the relief mandated or provoked by courts to be self-executing, abolitionist, or sufficient will be disappointed. Instead, it is worth keeping in mind what litigation is well-suited to accomplish, and use litigation to accomplish those things.

B. As part of a broader effort

The movement to integrate schools and society did not begin or end with *Brown v. Board of Education.*[243] Instead, *Brown* was one piece of a much broader effort that included "thousands of marches, boycotts, sit-ins, and the unwritten heroism of thousands of ordinary people."[244] Litigation does not affect meaningful change on its own; instead, litigation serves as part of a broader social strategy.[245] This is what Scott Cummings and Doug NeJaime have called "multidimensional advocacy."[246] The need for multidimensional advocacy is obvious to many doing this type of work. As the former director of the ACLU of Washington State commented: "Litigators already know their work constitutes just one of many pressure points in today's structural reform projects."[247]

There is not a one-size-fits-all approach for litigation in social movements. As Susan Sturm has observed, the role of litigation in these efforts will differ depending on the type of campaign and the decisionmakers involved.[248] Those engaged in these movement efforts can

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[242] Accord Scott L. Cummings & Deborah L. Rhode, Public Interest Litigation: Insights from Theory and Practice, 36 Fordham Urb. L.J. 603, 648 (2009) ("Courts may not always be the most effective dispute resolution forums, but they are often the most accessible; they are open as of right and can force more economically or politically powerful parties to the bargaining table.").

[243] 347 U.S. 483 (1954).

[244] Gary Blasi, Fifty Years After Brown v. Board: Five Principles for Moving Ahead, 19 Berkeley Women's L.J. 443, 443 (2004).

[245] For a small sampling of literature about law and social change see, for example, Cummings & NeJaime, supra note 235; Joel F. Handler, Social Movements and the Legal System: A Theory of Law Reform and Social Change (1978); Deborah L. Rhode, Public Interest Law: The Movement at Midlife, 60 Stan. L. Rev. 2027 (2008); Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 5 (Univ. of Mich. Press, 2d ed. 2004).

[246] See Cummings & NeJaime, supra note 235, at 1242, 1312, 1329-30.

[247] Emily Chiang, Institutional Reform Shaming, 120 Penn. St. L. Rev. 53, 56.

[248] See Susan Sturm, The Legacy and Future of Corrections Litigation 142 U. Penn. L. Rev. 639, 645 (1993) ("the potential and role of litigation varies in different organizational settings, and [] it is a mistake to ignore these organizational differences in assessing and planning the future role of litigation.").

learn from the role of litigation in prior and ongoing campaigns, including those fighting for integration,[249] immigrants' rights,[250] police accountability,[251] prisoners' rights,[252] and marriage equality.[253] As Sherrilyn Ifill, the former director of the NAACP Legal Defense Fund, has written, "none of us can be sure what will 'work'" but "[y]ou try multiple things and find your way in," guided by past successes and failures and keeping in mind that, in those successful campaigns, "persistence, creativity, determination, and focus were key."[254]

C. Over time

The notion that the arc of the moral universe bends unflinchingly towards justice has been complicated by every social justice campaign waged in our country. Instead, there are advancements, retrenchments, further advancements, and further retrenchments. Slavery led to the fight for abolition; then came the Civil War, Reconstruction, and Redemption; Jim Crow begat the civil rights movement and the Warren Court and Congress's expansion of constitutional and civil rights (also known as a second Reconstruction), which begat the subsequent judicial and legislative constriction of those rights and imposition of various procedural limits on their protection.[255] The killings of Trayvon Martin, Michael Brown, and many others, predominantly Black, by law enforcement in the 2010s led to calls that #BlackLivesMatter and for a Third Reconstruction. The murder of George Floyd and Breonna Taylor in 2020 heightened those calls and prompted shifts in the policies and practices of governments and private businesses across the country, but those calls were soon drowned out by calls to be tougher on crime.[256] Beginning in 2025, racial profiling and lawless violence

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[249] See, e.g., Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement (Oxford University Press: 2011) (describing the work of local and national lawyers and activists in Atlanta during the civil rights movement).

[250] See, e.g., Christine Cimini & Doug Smith, An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study, 35 Geo. Immigr. L.J. 431 (2021).

[251] See generally, e.g., Azmy, supra note 10 (describing the integration of impact and movement lawyering strategies and community advocacy in the *Floyd* stop-and-frisk litigation in New York City); Flint Taylor, The Torture Machine: Racism and Police Violence in Chicago (Haymarket Books: 2020) (describing the work of lawyers and community groups to challenge and seek reparations for torture by Chicago police officers); Ali Winston & Darwin Bondgraham, The Riders Come Out at Night: Brutality, Corruption, and Over-up in Oakland (Atria Books: 2023) (describing litigation and community advocacy efforts to fight misconduct in the Oakland police department).

[252] See, e.g., Schlanger, supra note 142; Jules Lobel, Participatory Litigation: A New Framework for Impact Lawyering, 74 Stan. L. Rev. 87 (2022) (describing the active participation of plaintiffs in all aspects of litigation challenging the use of prolonged solitary confinement in California prisons).

[253] See, e.g., Cummings & NeJaime, supra note 235.

[254] Sherrilyn Ifill, Bluesky, Feb. 28, 2025 at 10:38 AM.

[255] For one description of this history, see Angela P. Harris, Equality Trouble: Sameness and Difference in Twentieth-Century Race Law, 88 Cal. L. Rev. 1923 (2000).

[256] For calls for a Third Reconstruction in the 2010s, see, for example, Paul Butler, The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform, 104 Geo. L.J. 1419 (2016). For discussion of the rise of Black Lives Matter see, for example, Megan Ming Francis & Leah Wright-Rigueur, Black Lives Matter in Historical Perspective, 17 Ann. Rev. L. & Soc. Sci. 441 (2021). For calls for abolition see, for example, Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif.

by federal officers in cities across the country has again prompted demands for a dramatic overhaul of our broken systems of government accountability.[257]

There is progress despite this cycle; even retrenchment does not necessarily bring us back to square one. In *The Riders Come Out at Night*, journalists Ali Winston & Darwin Bondgraham write about the decades-long effort to improve the Oakland Police Department through litigation, criminal investigations, and community advocacy. They conclude their book on a hopeful note, celebrating the appointment of a progressive police chief with the observation that Oakland has shown "[i]t is possible to reform the police."[258] Paul Butler, reviewing the book, noted that that reform-minded police chief was fired for misconduct following the book's publication, and concluded that "the limited hope [the authors] offer is overwhelmed by the depravity of the misconduct they describe, as well as the persistent failure of politics and law to hold law enforcement accountable."[259] I draw a different conclusion from this coda. The fact that these types of efforts are frustrating, time-consuming, halting, and incomplete does not mean they are failures. Instead, in the words of Marion Gray-Hopkins, whose son, Gary Hopkins Jr., was killed by Baltimore police in 1999, and who has been fighting for police reform in Maryland ever since: "[I]t's just that change is slow. Change is very small."[260]

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Change is surely slow and small in Los Angeles County, where Anthony Vargas's family has continued to fight against deputy gangs and the culture of violence and impunity in the sheriff's department. But their work illustrates all three of these observations about litigation as a tool in reform efforts: their litigation revealed valuable information about the circumstances of Anthony's killing and gave his family the ability to have their day in court,[261] and that suit has served as just one component of a broader, multidimensional advocacy effort that they (and many others) have spent years pursuing.

L. Rev. 1781 (2020). For descriptions of legislative and policy advancements and retrenchments since 2020, see, for example, Holly Bailey & Tess Allen, On 2nd Anniversary of Floyd's Death, ,Fading Momentum for Police Reform, Wash. Post (May 25, 2022); Yamiche Alcindor & Fiona Glisson, George Floyd's Murder Led to a National Reckoning on Policing, But Efforts Have Stalled or Reversed, NBC News (May 25, 20024).

[257] See, e.g., David French, An Old Theory Helps Explain What Happened to Renee Good, N.Y. Times (Jan. 18, 2026) ("If we can endure this crisis, there will be a time of reflection and reform. It happened after the Civil War. It happened during the civil rights movement. It happened after Watergate. And when the time for reform comes again, it must focus on the abolition of the prerogative state. Angels do not govern us—men and women do—and no man or woman should be immune from the rule of law. We've taken that idea for granted for far too long, to the point where we've abandoned the 'auxiliary precautions' the founders knew we needed. Now we are paying the price in blood.").

[258] Winston & Bondgraham, supra note 251.

[259] Paul Butler, Is Police Brutality Just Part of the Job?, Wash. Post (Feb. 17, 2023).

[260] Calvin Milliner & Ben Porter, Pain, Action and Hope: Activists Have Battled for Police Reform for Decades, News 21 (Oct. 3, 2022), https://inpursuit.news21.com/stories/activists-struggled-for-police-reform-for-decades/.

[261] See supra notes 121-129 and accompanying text.

As Lisa Vargas was litigating her legal claim, she, her sister Stephanie Luna, and other family members were also working with Check the Sheriff, a coalition of families, lawyers, and community members advocating for an end to deputy gangs and violence in the sheriff's department.[262] Following the mistrial in her federal civil rights case, Vargas continued to push for change outside the courts.

The coalition, with the ACLU of Southern California and other groups, has spoken out about deputies' harassment of the Vargas family and others whose family members have been killed by sheriff's deputies.[263] Luna and other family members have repeatedly testified about deputy gangs at town halls hosted by the civilian commission that oversees the Sheriff's Department.[264] The advocacy of the Check the Sheriff coalition,[265] lawsuits by families of loved ones killed by sheriff's deputies and by deputies who alleged workplace retaliation for not joining the gangs,[266] reports detailing deputy gang violence by local government and nongovernmental groups,[267] and local[268] and national[269] reporting have all brought significant public attention to the deputy gangs issue in Los Angeles County.

This multidimensional advocacy presumptively contributed to the passage of Measure A, giving the County Board of Supervisors the power to fire an elected sheriff for cause and the

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[262] For an overview of the work of Check the Sheriff, see checkthesheriff.com/about (last visited Jan. 20, 2026).

[263] ACLU Southern California, No Justice, No Peace: The Los Angeles County Sheriff's Department's Targeted Harassment of Grieving Families (undated) https://www.aclusocal.org/sites/default/files/final_lasd_family_harassment_report.pdf.

[264] Hearing Held Into Allegations of Deputy Gangs in LA County Sheriff's Department, ABC7 Eyewitness News (May 25, 2022); Keri Blakinger, 'To Me They're Punks': Grieving Families Air Concerns at Town Hall on Deputy 'Gangs,' L.A. Times (Apr. 15, 2023), https://www.latimes.com/california/story/2023-04-15/oversight-committee-holds-community-meeting-on-deputy-gangs

[265] See Check the Sheriff, supra note 262.

[266] See Frank Stoltze, Inspector General Blasts LA County Sheriff's New Policy on Deputy Gangs, LAIst (Sept. 24, 2024) (describing $55 million paid out in lawsuits alleging misconduct by deputy gang members).

[267] See, e.g. The Center for Juvenile Law & Policy, LMU Loyola Law School, 50 Years of Deputy Gangs in the Los Angeles Sheriff's Department (Jan. 2021), https://file.lacounty.gov/SDSInter/bos/supdocs/CJLP_Report_LASD_Deputy_Gangs_012021.pdf; Sheriff Civilian Oversight Commission, Report and Recommendations of the Special Counsel to Sheriff Civilian Oversight Commission Regarding Deputy Gangs and Deputy Cliques in the Los Angeles County Sheriff's Department (Feb. 2023), https://file.lacounty.gov/SDSInter/bos/commissionpublications/report/1138014_DeputyGangsSpecialCounselReporttoCOC3.2.2023.PDF.

[268] See, e.g., Sean Beckner-Carmitchel, Families of Victims Killed by LA Police Are Turning Grief into Action, LA Public Press (May 13, 2025), https://lapublicpress.org/2025/05/families-killed-police-action/; Cagle, supra note 124; Cerise Castle, A Tradition of Violence: The History of Deputy Gangs in the Los Angeles County Sheriff's Department, Knock-LA (March-April 2021) (a fifteen-part story).

[269] See CBS News, Los Angeles Sheriff' Deputies Say Gangs Targeting "Young Latinos" Operate Within Department (Feb. 25, 2021), https://www.cbsnews.com/news/los-angeles-sheriffs-deputies-gangs-young-latinos/; Dana Goodyear, The L.A. County Sheriff's Deputy-Gang Crisis, The New Yorker (May 30, 2022).

electoral defeat of Sheriff Villanueva, who was the sheriff when Anthony Vargas was killed.[270] The newly elected sheriff, Robert G. Luna, campaigned on promises to end the deputy gangs in Los Angeles County.[271] Sheriff Luna's promises have yet to be realized—the Sheriff's Department has resisted efforts by the Office of Inspector General to investigate deputy gangs,[272] and shootings by deputies continue.[273] Stephanie Luna, Anthony's aunt, does not believe that the change in leadership will ultimately make a difference: the new sheriff is "just a change in boots," Luna explained, and any meaningful change will "be from the outside in."[274] But, in Luna's view, litigation has and will continue to play a meaningful role in those efforts:

> Suing the government is…about challenging a system that too often works to protect itself rather than those who it claims to serve. It is about setting legal precedents that can help prevent future abuses. Without the ability to bring these cases forward, the only message we send is that police and government agencies can act without fear of repercussions. When we take them to court, we actively disrupt that narrative and demand that accountability be applied to everyone….
>
> It is not just about one case but the broader fight to dismantle systems of violence and create a legal framework that protects people rather than shields those who abuse their authority and power. That is why civil rights lawyers are so important, and we need more people willing to take on this fight and confront systems that shield those who abuse their authority. It is a step toward dismantling systemic violence.[275]

Conclusion

My aim is not to convince readers that skepticism about civil rights litigation is unwarranted. Instead, it is to convince readers that fatalism about civil rights litigation is unnuanced. The fact that winning is difficult does not mean that it is impossible. The fact that the impacts of courtroom victories are muted does not mean those impacts are nonexistent. The fact that there are limits to what litigation can accomplish does not mean that litigation is not worth pursuing. Instead, cases can be won. People who bring those suits can recover money, information, a day in court, and an acknowledgement of wrongdoing. Governments can be made to change, either through judicial mandates or the political and

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[270] See Eric He, Measure A Supporters Celebrate Check on LA County Sheriffs, Fox11 (Nov. 16, 2022).

[271] See id.

[272] See Piper French, The Curious Case Against a Los Angeles Sheriff Watchdog, Bolts (Feb. 28, 2025), https://boltsmag.org/the-curious-case-against-a-los-angeles-sheriff-watchdog/; Frank Stoltze, Judge Blocks Inspector General Investigation Into Deputy Gangs in LA Sheriff's Department, LAIst (July 11, 2023), https://laist.com/news/criminal-justice/judge-blocks-inspector-general-investigation-into-deputy-gangs-in-la-sheriffs-department. The sheriff department's intransigence prompted the resignation of the inspector general and a member of the civilian oversight commission. See Andrea Klick, LA County Inspector General Says Sheriff's Department Recommendations Were Ignored Before His Resignation, L.A. Daily News (Dec. 10, 2025).

[273] See, e.g., Frank Stoltze, LA Sheriff's Sergeant Claims Retaliation for Testimony in Banditos 'Deputy Gang' Lawsuit, LAIst (Jan26, 2022).

[274] https://www.instagram.com/katecagle/reel/Cm9RBVhJ-GY/.

[275] Email from Stephanie Luna to author, supra note 129.

financial pressures of litigation. And these lawsuits are important cogs in wheels advancing justice.

The fact that our system of constitutional remediation can offer these benefits even in its sorry state means that the system is worth improving. In an ideal world, Section 1983 law would change: qualified immunity would be eliminated; vicarious liability would replace *Monell*; standing to seek injunctive relief would be easier to establish; and attorneys' fees doctrine would fairly compensate plaintiffs' lawyers when they prevail. Even without these types of legislative or judicial reworkings of our system, improvements can be made by local government officials and advocates. Currently, financial sanctions do not influence government behavior in a reliable way. But uncertainty about the signal sent by damages awards is no reason to disregard lawsuits as a tool of deterrence. Instead, it is reason to push for adjustments in how the costs of litigation are borne, and to shift advocacy strategies in ways that take advantage of the information unearthed in litigation and the attention paid to cases.

Highlighting all that civil rights suits can accomplish will, hopefully, encourage more lawyers to pursue this work. More lawyers need to bring civil rights cases, particularly in parts of the country where judges, juries, and the law are particularly hostile to these claims.[276] Lawyers need to continue to learn from each other's successes. Lawyers need to be connected to the communities in which they are litigating, to listen to their clients, and to pursue litigation in concert with other advocacy strategies.[277]

We need attorneys to bring these types of cases now more than ever. Minneapolis police officer Derek Chauvin's murder of George Floyd six years ago, and the world-wide protests and legislative action it inspired, is largely, lamentably, in the rearview mirror.[278] But intense national and international attention and high-profile litigation and advocacy is now focused, rightfully, on limiting and responding to abuses by the federal government.[279] Even in its compromised state, constitutional tort litigation can to bring instances of law enforcement and other government misconduct to public attention, provoke policy changes, unearth information, focus attention, and award compensation. Constitutional tort litigation must continue to play these roles so long as there are cases to be pled and argued and won.

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[276] See Schwartz, supra note 31; Schwartz, supra note 33.

[277] For one exploration of this type of practice, see Gerald López, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 163 (1989).

[278] For analyses of police reform efforts five years since George Floyd's murder see, for example, Lawrence Hurley, Five Years After George Floyd's Death, Calls to Reform Qualified Immunity Mostly Fall Silent, NBC News (May 25, 2025); Kat Stafford, Bianca Flowers & Evan Garcia, Five Years After George Floyd's Murder, Racial Justice Push Continues, Reuters (May 26, 2025); Nicholas Turner, Five Years After George Floyd's Murder, What's Changed? Vera Institute (May 23, 2025).

[279] See supra note 39 and accompanying text.