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JUMPING HURDLES TO SUE THE POLICE

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Article

Jumping Hurdles To Sue the Police

Sunita Patel†

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INTRODUCTION

During the tenure of President Barack Obama, scholars and advocates viewed the best route for federal court review of police practices to be consent decrees negotiated between municipal police departments and the Special Litigation Section in the Civil Rights Division of the Department of Justice (DOJ) pursuant to

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28 U.S.C. § 14141.[1] DOJ fact-finding reports and settlements, like the one in Ferguson, Missouri,[2] exposed egregious practices and sought a culture shift by decrees in police departments across the country. The DOJ Process sometimes also bolstered mobilization to achieve police reform already underway outside the court.[3] Today, the current Administration has taken an official position against using 28 U.S.C. § 14141 authority in favor of potentially unconstitutional exercises of police discretion.[4]

Although the federal executive branch is no longer a driving force behind police reform litigation, the institution of policing is no less harmful to Black and Brown communities. Thus, the questions motivating this Article are: "What can legal advocates do now? How can communities and their lawyers mobilize within the legal process?" Without the DOJ's involvement, injured communities interested in court intervention may turn to section 1983[5] impact litigation, and what legal scholarship terms public

1. 28 U.S.C. § 14141 (2018); *see, e.g.*, Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 527 (2004); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 507–15 (2008); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 58–64 (2009); Jonathan M. Smith, *Closing the Gap Between What Is Lawful and What Is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 337–44 (2016).

2. Sunita Patel, *Towards Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 856–67 (2016) (discussing the death of Michael Brown, the investigation, and resulting settlement).

3. I have explored the unstudied connection between police reform mobilizing and DOJ consent decrees elsewhere. *See generally id.*

4. OFFICE OF THE ATT'Y GEN., PRINCIPLES AND PROCEDURES FOR CIVIL CONSENT DECREES AND SETTLEMENT AGREEMENTS WITH STATE AND LOCAL GOVERNMENTAL ENTITIES (2018), https://www.justice.gov/opa/press-release/file/1109681/download [https://perma.cc/6YCC-LB7R]; *see also* Stephen Rushin, *Police Reform During the Trump Administration*, U. ILL. L. REV. ONLINE (Apr. 29, 2017), https://illinoislawreview.org/symposium/first-100-days/police-reform-during-the-trump-administration [https://perma.cc/H854-QNVU].

5. 42 U.S.C. § 1983 (2018) ("Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."). It lay dormant until 1961, when the Supreme Court resurrected the provision to allow tort liability against individual officers. *See* Monroe v. Pape, 365 U.S. 167, 172 (1961), *partially overruled by* Monell v. Dep't of Social Servs. of N.Y., 436 U.S. 658 (1978) (ruling that municipalities are "persons" for

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law, public interest, or structural reform litigation.[6] Rather than seek monetary damages against particular officers for abusive conduct against individual plaintiffs, structural reform litigation seeks redress from police departments and municipalities for their law enforcement practices and policies.[7] Its goal is to achieve an injunction against, or change in the policies or practices of, a governmental entity. These are cases typically brought as class actions.[8]

Legal scholars have pointed to conservative judicial appointments and Supreme Court doctrine as causes for the shrinking of liberal structural reform litigation.[9] Scholars' views range from "[t]he courthouse door is closed,"[10] to "[p]rocedure and doctrine make it really difficult to obtain substantive review of civil rights and constitutional harms."[11]

purposes of section 1983 liability).

6. Some variation exists in the literature with regard to definitions. For purposes of this Article, these terms carry enough overlap to fit within my description. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288–89 (1976).

7. *See* Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347 (2015).

8. *See, e.g.*, Floyd v. City of New York (*Floyd III*), 861 F. Supp. 2d 274 (S.D.N.Y. 2012).

9. *E.g.*, Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1393–95 (2000) ("By the mid-1970s and early 1980s, however, a number of events signaled the demise of the structural reform revolution, including the appointment of a number of conservative Justices to the Supreme Court."); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1416 (2007) ("[T]he increasing conservatism of the federal bench—the usual explanation for the supposed retrenchment in structural reform litigation—is reinforced by specific doctrinal obstacles.").

10. ERWIN CHEMERINSKY, Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable 47 (2017) (criticizing the Court's treatment of litigants suing police as closing opportunities for review of harmful and unconstitutional practices).

11. Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933 (2019) (discussing the Supreme Court's "increasing hostility to constitutional tort claims" and arguing an ideal regime would expand entity liability for constitutional violations); *accord* Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 187 (2017) ("Given these barriers to securing and defending systemic relief, it is not surprising that institutional reform litigation is commonly understood to be in retreat."); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 346 (1989) ("[M]any courts have enforced numerous rules in ways that adversely affect public interest litigant."); *cf.* SARAH STASZACK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF

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Scholars and litigators cite standing, municipal liability, and class certification as concerning doctrinal hurdles when plaintiffs aim to achieve government accountability for constitutional norms. Frequently discussed is the doctrinal hurdle associated with demonstrating standing for injunctive relief under *City of Los Angeles v. Lyons*.[12] This case often allows police departments to use standing to evade court review of abusive practices. The *Monell v. Department of Social Services of New York* line of cases presents another doctrinal barrier to court reform of municipal agency practices, including police practices.[13] While *Monell* opened the door to holding a municipality liable for governmental harm, subsequent decisions required plaintiffs show the municipality displayed deliberate indifference to plaintiff's constitutional rights.[14] A variety of theories developed over time.[15] Particularly relevant to this Article, *Monell*'s progeny established that where plaintiffs challenge an unofficial policy, plaintiffs must prove the employees' illegal actions were authorized by the municipality or that the practices were "so persistent

JUDICIAL RETRENCHMENT (2015) (arguing that certain classes of litigants and types of litigation were foreclosed from bringing suits prior to the Warren Court era and discussing progressive arguments in favor of limited review during the New Deal); Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 897–904 (2016) (reviewing STASZACK, *supra*) (discussing the role of liberal law makers and Justices in efforts to close the courthouse doors while pointing to the limits for civil rights plaintiffs that follow cases such as *Lyons*, *Iqbal*, and *Monell*).

12. *E.g.*, Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1334 (1999); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984); William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty*, 65 ALA. L. REV. 277 (2013); Harmon, *supra* note 1, at 11–12 (noting that structural reform litigation is a weaker tool to force police department change as a result of *Lyons* and *Rizzo*); Michael J. Schmidtberger, *No Holds Barred in* City of Los Angeles v. Lyons: *Standing to Seek Injunctions in Federal Court Against Municipalities,* 15 COLUM. HUM. RTS. L. REV. 183 (1984).

13. Although *Monell*, 436 U.S. 658 (1978), allowed plaintiffs to proceed with claims against a local municipality for unlawful discriminatory conduct, it struck down the plaintiffs' theory of respondeat superior for an official's supervisory liability. *Id.* at 690; *see also* Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701 (1989); City of Canton v. Harris, 489 U.S. 378 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); City of Los Angeles v. Heller, 475 U.S. 796 (1986); City of Okla. City v. Tuttle, 471 U.S. 808, 823 (1985) ("Policy . . . implies a course of action consciously chosen from among various alternatives.").

14. *See infra* Part I.B; *see also Harris,* 489 U.S. at 379.

15. *See infra* Part I.B.

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and widespread" that persons with decision-making authority possessed actual or constructive knowledge of wrongdoing.[16] More recently, *Wal-Mart Stores, Inc. v. Dukes*, confirmed a higher "significant proof" standard for Rule 23(a)[17] class certification requirements and specifically tightened the basis for showing commonality for class members challenging policies or practices.[18] Scholars view *Wal-Mart Stores, Inc.* as part of mounting attacks on aggregate litigation itself, undermining key processes in civil rights cases.[19] These doctrines seem to erect hard barriers to achieving substantive review for governmental harm.

Some have pointed to the particular difficulties facing litigants suing police.[20] Other scholars look to the district courts to bring into focus what options remain available and offer a broader view of structural reform litigation.[21] Charles Sabel and

16. *See infra* Part I.B.

17. FED. R. CIV. P. 23(a).

18. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

19. *See* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Class Certification*, 59 DEPAUL L. REV. 305 (2010); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T v. Concepcion, 79 U. CHI. L. REV. 623 (2012); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (arguing many courts now require plaintiffs prove substantial portions of their cases on the merits during class certification); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013); *cf.* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline,* 92 N.Y.U. L. REV. 971 (2017) (examining a more recent trend resisting additional restraints on class actions). On policing specifically, see Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593 (2012) (arguing the move towards individuation in constitutional rights adjudication, including the Fourth Amendment context, presents a challenge for class certification).

20. *E.g.*, Jeffries & Rutherglen, *supra* note 9, at 1416 ("Of all the areas in which structural reform is generally accounted a failure, by far the most important is [local police] law enforcement."); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1233 (2005) ("Over the years, however, [the Court] has insisted that liability be imposed only upon a high level of proof of culpability . . . . Moreover, the Court has ruled that a plaintiff seeking to prove liability where the municipality has not directly inflicted an injury . . . [must meet] rigorous standards of culpability and causation . . . .").

21. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 827–45 (2010) (examining federal litigation against government employees using *Bivens* in five districts); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 602–04 (2006) (arguing prison litigation continues in the district court despite

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Bill Simon's path-setting article focused on injunctions in many contexts, but focused comparatively little attention on policing or the legal mobilization that led to liability findings.[22] Prominent scholars have meaningfully reviewed district court cases and undermined the assumption that prison litigation "died" in the face of Supreme Court doctrine and the Prison Litigation Reform Act.[23] In reality, how many police structural reform cases have failed as a result of the doctrinal and evidentiary hurdles the Supreme Court erected is unknown.[24]

This Article fills the gap between Supreme Court determinations and district court practices in police structural reform litigation.[25] This Article argues the nature and quality of information gathered—informally and formally through discovery—is a critical factor in the success of racial profiling litigation. When litigators succeed as they did in the three case examples presented in this Article, the tactical and strategic details of information-production deserves close attention from scholars. As the case examples demonstrate, litigators take the law seriously and attempt to meet the difficult standards, but do not presume doctrine is fixed or formal. This is not to say evidence is the only

mounting doctrinal obstacles and federal litigation creating additional procedures); *see also* Myriam Gilles, *An Autopsy of the Structural Reform Injunction . . . Oops, It's Still Moving!,* 58 MIAMI L. REV. 143 (2003); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1357, 1361–62 (1991). For a similar perspective for structural reform remedies, see Charles Sabel & William Simon, *Destablization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1029–52 (2004).

22. Sabel & Simon, *supra* note 21.

23. *See* Schlanger, *supra* note 21.

24. The total number of section 1983 police misconduct claims brought each year is not reflected in available data, let alone data reflecting cases brought for purposes of equitable relief or structural reform. *See* Katheryn E. Scarborough & Craig Hemmens, *Section 1983 Suits Against Law Enforcement in the Circuit Courts of Appeal*, 21 T. JEFFERSON L. REV. 1, 4–5 (1999). However, the results of Joanna Schwartz's multiple studies give some insight. Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]. She recently studied section 1983 litigation brought by civilians against police defendants in five district courts in five circuits. *Id.* She found 99 (8.4%) out of 1,183 cases were brought solely against municipalities and/or sought only equitable relief (injunctive or declaratory). *Id.* at 27. Although we cannot assume the 99 cases were all structural reform cases—that is, class actions seeking an injunction against a particular police practice—this is a larger proportion and raw number than scholars would likely predict.

25. *See* Rudovsky, *supra* note 20; Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016); Schwartz, *How Qualified Immunity Fails*, *supra* note 24.

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consideration. Indeed, judicial management, opposing counsel, local politics, plaintiffs' resources, media attention, and grassroots mobilizing play roles in the outcomes of such structural reform litigation. This Article does not paint a rosy picture for litigators, but any fair examination of public law litigation needs to account for those cases that win.

This Article presents three significant examples of litigation that managed to overcome the Supreme Court's demands and achieve class-wide injunctive orders. The cases are against large, urban police departments and involve Equal Protection challenges under the Fourteenth Amendment, and unreasonable stop and seizure claims under the Fourth Amendment.[26] That is to say, the litigants center race and ethnicity in their claims though they understand that racial profiling class actions are extremely difficult to win. The case studies are part of a growing archive of section 1983 structural reform litigation against police departments.[27] The case studies are also relevant to larger debates about access to justice, the role of federal courts, the growing study of district courts (providing a different focus than solely on the Supreme Court), and the salience of race in challenges to police department practices.

26. U.S. CONST. amends. IV, XIV, § 1.

27. In the category of cases where race and/or national origin claims are included, see *Campbell v. City of Chicago*, No. 1:17-cv-04467, 2018 WL 1989767 (N.D. Ill. Apr. 22, 2019); *Black Love Resists in the Rust v. City of Buffalo*, No. 1:18-cv-00719, 2019 WL 6907294 (W.D.N.Y. Dec. 19, 2019); *Raza v. City of New York*, No. 1:13-cv-03448-PKC-JMA, 2013 WL 3079393 (E.D.N.Y. June 18, 2013). First Amendment and Eighth Amendment challenges in circumstances of policing protesters and policing homelessness are likewise another category of successful litigation. To date, those cases have not included race as a basis for challenging the police practices. *See* Martin v. City of Boise, 920 F.3d 584, 616–17 (9th Cir. 2019) (finding it unconstitutional to prosecute homeless individuals for sleeping on streets when no shelter is available), *amending and superseding on denial of reh'g* 902 F.3d 1031 (9th Cir. 2018), *cert. denied*, No. 19-247, 2019 WL 6833408 (Dec. 16, 2019); Dinler v. City of New York, No. 04 Civ. 7921 (RJS)(JCF), 2012 WL 4513352 (S.D.N.Y. Sept. 30, 2012) (granting, in part, plaintiff protestors' motions for summary judgment); Jones v. City of Los Angeles, No. 2:03-cv-01142 ER, 2004 WL 7321250 (C.D. Cal. Jan. 27, 2004) (challenging statute criminalizing sitting, lying, or sleeping on any street, sidewalk, or public way because it effectively criminalizes homelessness), *rev'd*, 444 F.3d 1118, *vacated pursuant to settlement*, 505 F.3d 1006 (2006); Service Employee Intern. Union, Local 660 v. City of Los Angeles, 114 F. Supp. 2d 966 (C.D. Cal. 2000) (holding the city's restrictions on the protestors prior to Democratic National Convention unconstitutional and granting a preliminary injunction). Further study is needed to understand more generally the opportunities and challenges with class action litigation against police.

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The three district court cases show that in racial profiling litigation plaintiffs must *at least* gather extensive hard data on police practices and convincing anecdotal evidence of discriminatory conduct. District courts managing (1) *Floyd v. City of New York*, (2) *Ortega-Melendres v. Arpaio*, and (3) *Bailey v. City of Philadelphia* issued decisions within the span of a year.

These victories provide an opportunity for further inquiry into the range of possibilities for litigants, at least at the trial court level. From the lens of doctrinal barriers to successful police structural reform litigation this Article asks, "How did the litigators overcome doctrinal hurdles?" At a time when scholars and advocates view public law litigation in policing as a weak tool, I argue district court structural reform litigation is a viable option for police reform worthy of invigoration.[28] Secondarily, the information-production of the litigation served a valuable purpose, as does the process by which information is gathered. The case studies reveal important information gathering avenues available through media, advocates, and prior litigation.

The Article focuses on these three cases for specific reasons. While *Floyd* has received scholarly attention, the academic treatment of *Floyd* has primarily focused on its statistical analysis and proof for its Fourth Amendment claims.[29] Less attention has been paid to the procedural lessons from the case or the construction of the Fourteenth Amendment race claims for the subclass of Black and Latino stops. *Ortega-Melendres* is now recognized as the underlying case that led President Trump to pardon Sherriff Joe Arpaio's criminal contempt of court.[30] The litigation is well-known among immigration scholars, but it has not been mined by proceduralists to date. *Bailey v. City of Philadelphia* is

28. Different questions should be explored to discern the circumstances when police structural reform litigation should be pursued (beyond merely availability of evidence to prove allegations of unlawful police practices), the relationship to advocacy outside the courtroom with litigation, and the structural reform remedies process. *See* CHEMERINSKY, *supra* note 10; Bagenstos, *supra* note 11; Fallon, *supra* note 11; Parkin, *supra* note 11; Tobias, *supra* note 11. I plan to take up some of these questions in another project.

29. *See, e.g.*, Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495 (2014).

30. Julie H. Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became the Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html [https://perma.cc/3P96-JMK7].

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significant as the first of the three to achieve a class-wide remedial order,[31] and for its influence on reform litigation in New York. As litigation that settled,[32] its inclusion may seem odd because the doctrinal concerns were not formally overcome through motion practice. Nonetheless, the parties' proposed orders made the expected outcome concrete, and even delineated specific elements of class certification and *Monell* liability.[33] *Bailey* provides a fair example of statistical information used in the section 1983 context to achieve police reform, comparable to the Civil Rights Division, but on a smaller scale.[34] Finally, the *Bailey* example juxtaposes the demanding motion practice in *Floyd* and *Ortega-Melendres*, with a primarily behind-the-scenes strategy of achieving a class-wide injunction, remarkably, in the racial profiling context.[35]

To the extent police litigation to obtain damages for unconstitutional actions is unavailable due to qualified immunity, it puts pressure on access to injunctive and equitable relief as the only alternative method to deter police misconduct. This makes the question of how to succeed in equity all the more salient. An important boundary for this Article is that these cases did not pursue damages for the class of harmed individuals; therefore, qualified immunity was not available to the municipal defendants. Other challenges beyond the scope of this Article include heightened pleadings,[36] strict standards for equitable relief in

31. *See infra* notes 567–73 and accompanying text.

32. *See infra* notes 568–73 and accompanying text.

33. *See infra* Part. IV.B.

34. *See infra* Part. IV.B.

35. Of course, it is hard to know the precise representativeness of the cases studied. The point is that they tell a story about overcoming various litigation hurdles that is not fully a part of the scholarly literature.

36. Ashcroft v. Iqbal, 556 U.S. 662 (2009) (applying *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to claims of discrimination). Scholarship on heightened pleadings abound. *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS

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civil rights cases,[37] broadly construed doctrines of qualified immunity[38] and sovereign immunity.[39]

Part I examines the standing, municipal liability, and class certification doctrines that make structural reform litigation against police practices very difficult. For purposes of this Article, the *Lyons* standing hurdle is presented as the "future injury," "speculative harm," and "innocence" impediments. Where no official policy is challenged, the *Monell* line of cases hurdles are labeled the "widespread practice" and "factual parallel" barriers for proving municipal liability. And the *Wal-Mart Stores, Inc.* class action commonality hurdle is described as the "early merits inquiry" obstacle. These categorizations provide a way to understand the litigation process and evidence marshalled in the case examples, but undoubtedly there are other thematic clusters or categorizations embedded in the Supreme Court cases.[40]

This Article focuses on structural reform where equitable relief is at stake. Parts II, III, and IV provide comprehensive case studies of *Floyd*, *Ortega-Melendres*, and *Bailey*. The case studies are a window into moves lawyers have made and evidence they have mobilized to overcome the doctrinal hurdles faced when suing police. Each case study is based on interviews with former

& CLARK L. REV. 15 (2010); Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

37. *See* Missouri v. Jenkins, 515 U.S. 70, 98 (1990); Milliken v. Bradley, 433 U.S. 267, 281 (1977).

38. *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982), prescribed a qualified immunity test that protects governmental officers from liability if the law on the particular rights violation was not "clearly established" at the time of the violation. To defeat qualified immunity, the court must determine, in light of the facts of the case, that the contours of the right were so clearly established that a reasonable officer would know that his conduct violated the Constitution. *Id.* The Court has extended the doctrine to immunize conduct that violates plainly foreseeable decisions, Saucier v. Katz, 533 U.S. 194, 207–08 (2001), and has ruled that qualified immunity protects all but the "plainly incompetent" or those who intentionally violate rights. Malley v. Briggs, 475 U.S. 335, 341 (1986). For a comprehensive study of the role qualified immunity plays in constitutional litigation, see Schwartz, *supra* note 24.

39. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100–01 (1984) (holding that the Eleventh Amendment bars suits against state officers for violations of *state* law). For an overview of the Court's jurisprudence related to state sovereign immunity, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

40. The point is that the themes I prescribe offer new ways of understanding how those cases potentially—underscoring potentially—bear on other structural reform litigation, particularly class actions against police department practices.

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and current plaintiffs' and defendants' attorneys and staff, review of the docket sheets to identify relevant pre-trial motions for analysis, examination of motions and the exhibits submitted to support each motion, and the evidence submitted at trial. Informed by these primary sources, I examined media coverage, advocate reports, press releases, and websites for the organizations and municipalities that litigated the cases, served as organizational plaintiffs, or were otherwise implicated in the cases' histories. Parts II, III, and IV largely demonstrate how, in these cases, litigators were able to navigate the doctrine, even if the requirements were challenging.

Based on the three case studies, Part V collects the lessons learned for police structural reform litigation. As a group of successful litigation, these case studies are noteworthy for what they teach us about how police structural reform litigators, taking doctrine seriously, might approach information gathering and data collection in innovative and new ways to build evidentiary bases for possible success. The case studies show that a court ordered injunction is very difficult to achieve in these types of cases, even with the "right" data and information, and requires other sorts of subterranean factors. Yet, certain kinds of evidence can assist plaintiffs in overcoming the standing, municipal liability, and class certification barriers: hard data and statistical evidence, discriminatory statements by supervisors and central decision-makers, and/or proof of a history of notice and failure to remedy constitutional violations. Layering the evidence presented in the three case studies over the doctrinal requirements reveals that a type of convergence operates in overcoming the hurdles. That is, the same or similar evidence can be used to overcome interlocking aspects of the doctrine. The Article also discusses other mechanisms to obtain information, such as relationships with advocates and community organizations; publicity that creates leads and opportunities for further fact gathering; and court orders requiring data tracking and disclosures following prior litigation. These means are outside the traditional discovery process, but also allow plaintiffs to satisfy the doctrinal standards.[41]

41. One could ask for stronger takeaways or suggest the Article make strong claims on the prospects of police structural reform litigation. I am not in a position to do so because of the representativeness of these case studies.

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I. POLICE STRUCTURAL REFORM LITIGATION

The modern Supreme Court has made it very difficult for those asking federal courts to intervene in the business of another branch of government. For civil rights plaintiffs seeking to reach trial, the Court's requirements are even more demanding. The Court's reluctance to substantively review rights-based claims most often manifests itself in related bodies of law sometimes categorized together as "justiciability." On the basis of interpreting procedural rules and justiciability doctrine, the Supreme Court has made decisions that narrow access to substantive federal court review.[42] When it comes to regulating the government's interference with constitutional or civil rights, the Supreme Court uses varied justiciability doctrines—standing, political question, ripeness, mootness, and immunity—to avoid disposition of substantive rights.[43] Scholarship points primarily to a conservative Supreme Court limiting access to courts, resulting in harms to society's notions of due process, fairness, democracy, and the legitimacy of courts.[44] Justiciability

42. Extensive bodies of literature examine growing limits on substantive federal court review. The literature critical of the Supreme Court's opinions in this regard following the Warren Court era is too voluminous to recount and frames the move as backlash, retrenchment, and restricting access to justice, among others. I generally agree with the view that the Court's justiciability and procedural case law has moved merits questions into the pre-trial arena, altering the cost-benefit analysis of litigation and settlement; and creating a potential chilling effect for meritorious civil rights actions. For some examples of scholarship analyzing the doctrinal limitations for civil litigants, particularly civil rights plaintiffs, in the context of multiple areas of procedure, see generally STEPHEN BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017) (analyzing the conservative reaction to the enablement of private plaintiffs by Democratic Congresses); CHEMERINSKY, *supra* note 10 (arguing a combination of justiciability and remedial doctrine has nearly completely foreclosed federal court review for civil rights plaintiffs); ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (pointing to the Supreme Court's procedural decisions cutting off substantive review of civil rights and discrimination claims as a failure in democratic values due to its result in limiting access to justice, due process, and fairness); STASZACK, *supra* note 11 (criticizing the Court's judicial retrenchment through the subterranean context of procedure to limit the gains of the rights revolution by restricting access to the courts); Richard H. Fallon, Jr. *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006); Thomas, *supra* note 36. The purpose of this Article is to examine what has succeeded at the trial court level in the face of specific doctrinal hurdles in police structural reform cases.

43. Fallon, *supra* note 42, at 637.

44. *See id.*; Jeffries & Rutherglen, *supra* note 9, at 1416.

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ultimately serves as the government's shield, as the Court's procedural decisions sanction violence and harm against marginalized communities by limiting court review.

Section 1983 litigators and police scholars, among others, have long understood that the Supreme Court has made it difficult to reach substantive review of police practices or orders that affect the culture of a police department. Prominent scholars worry that the Supreme Court deploys certain doctrines to avoid review when plaintiffs ask federal courts to closely examine the structure and culture of police departments or to intervene to reform police practices.[45] Legal scholars have viewed Supreme Court doctrine as narrowing the scope of review for police litigants who want systemic change rather than damages.[46] Most commenters have largely focused on police use-of-force or brutality claims. This Article's focus on three successful challenges brings to light room within the doctrine for challenges to car or pedestrian stops.

This Part turns to three pivotal Supreme Court cases and doctrines that create roadblocks to achieving police structural reform injunctions. Scholars concerned with the viability of police structural reform litigation point primarily to the barriers associated with demonstrating standing to seek an injunction under *City of Los Angeles v. Lyons*. The evidentiary burden associated with proving deliberate indifference through a widespread unconstitutional police practice, required by the *Monell v. Department of Social Services of New York* line of cases, is another barrier to reform.[47] More recently, following *Wal-Mart Stores, Inc. v. Dukes*, scholars focus on the mounting attacks against class certification and aggregate litigation for civil rights causes.

45. *See supra* note 11 and accompanying text.

46. *See supra* note 11; *see also* Bandes, *supra* note 12, at 1278–80; Jeffries & Rutherglen, *supra* note 9, at 1403.

47. *E.g.*, Jeffries & Rutherglen, *supra* note 9, at 1402–03 ("In time . . . the Court so narrowed the threshold requirement of 'official policy or custom' that the door once thought open is now nearly closed. The Court also defeated the ingenious stratagem of depicting individual misconduct as evidence of a governmental policy or failure to train. As a result, direct governmental liability is quite exceptional."); Christina Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 230–48 (1986) (analyzing the *Monell* line of cases and the challenge of demonstrating a municipality caused "its own violation" of constitutional norms).

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A. STANDING TO OBTAIN POLICE INJUNCTIONS: *LYONS*

Today, standing is a particularly difficult hurdle when plaintiffs seek an injunction to prevent constitutional harm resulting from an unwritten policy or to require departmental reform to prevent future injury.[48] With regard to criminal enforcement, challenges to an allegedly unconstitutional or unlawful statute or regulation are considered distinct from structural reform litigation based on a pattern of events. Pattern, practice, and custom cases are typically viewed with a deep skepticism for several reasons.[49] First, courts often view them as requiring a court to infer future government conduct based on past events.[50] Second, the class of individuals who will be harmed in the future may be difficult to identify.[51] Third, such challenges involve structural remedies—court injunctions that require a government agency or a set of government actors to modify their actions through institutional reforms.[52]

To satisfy standing for such an injunction, injured plaintiffs must show, with some degree of certainty, that they will be subjected to exactly the same police practice in the future.[53] In

48. Permanent injunctive relief is an act of equitable discretion by a district court. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 310 (1982). A plaintiff must demonstrate: (1) irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that a remedy in equity is warranted when considering the balance of hardships between the plaintiff and defendant; and (4) that the public interest counsels a permanent injunction. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); *see also* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987); *Weinberger*, 456 U.S. at 311–13.

49. *See* Richard H. Fallon, Jr., *How To Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 116–18 (2014); Jeffries & Rutherglen, *supra* note 9.

50. *See* Fallon, *supra* note 49, 117–18.

51. *See id.*

52. *See id.* (citing RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 211–12, 217 (6th ed. 2009)). Scholars define structural reform injunctions in different ways, but the element of institutional reform is foundational. *See* Jefferies, *supra* note 9, at 1387 ("'[I]nstitutional decrees' [were structural reform] injunctions issued by federal courts ordering comprehensive changes in state and local institutions, such as prisons, mental hospitals, and schools, and resulting in pervasive and ongoing judicial supervision."); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 316–17 (2004) ("A structural injunction alters the organizational structure, rather than behavioral aspects . . . .").

53. City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983).

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Lyons, law enforcement officers in Los Angeles stopped twenty-four-year-old, African American Adolph Lyons for a burned out taillight.[54] Guns drawn, they instructed Mr. Lyons to exit the car.[55] In the course of the stop, an officer applied either a "bar arm control" and/or the "carotid-artery control" chokehold until Mr. Lyons passed out.[56] When he regained consciousness, he had defecated and urinated and was spitting blood.[57] He suffered permanent damage to his larynx.[58] Mr. Lyons subsequently brought suit against the Los Angeles Police Department (LAPD), for damages and equitable relief.[59] He argued that an injunction was necessary to prevent the LAPD from further harming him and other members of the public pursuant to application of the LAPD's chokehold policy "where [officers] are not threatened by the use of any deadly force whatsoever."[60] On remand from the Ninth Circuit, the district court enjoined the Los Angeles police from using chokeholds under circumstances in which there was not a threat of death or serious bodily injury.[61] However, the Supreme Court reversed and held that Mr. Lyons did not have standing to seek injunctive relief, because he had not demonstrated one of the required factors for an injunction: "a likelihood of substantial and immediate irreparable injury."[62] Showing an irreparable injury required a "real" and "sufficient likelihood that he will again be wronged in a similar way."[63]

Justice White's standing rationale erects three barriers to structural reform injunctions: the repeated harm, speculative harm, and innocence barriers. The Court refused to acknowledge that the number of chokeholds used by LAPD officers constituted a pattern of repeated harm. Even though the record included evidence of nine illegal chokeholds in the department's history,[64]

54. *Id.* at 114 (Marshall, C.J., dissenting).

55. *Id.*

56. *Id.* at 97–98 (majority opinion).

57. *Id.* at 115 (Marshall, C.J., dissenting).

58. *Id.* at 98 (majority opinion).

59. *Id.* at 97.

60. *Id.* (quoting Count V of Mr. Lyons's amended complaint).

61. *Id.* at 98–99.

62. *Id.* at 111 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

63. *Id.*

64. *But see id.* at 115–16 (Marshall, C.J., dissenting) ("Although the city instructs its officers that use of a chokehold does not constitute deadly force, since 1975 no less than 16 persons have died following the use of a chokehold . . . ."). For an excellent detailed review of the *Lyons* decision, see Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in*

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the 5–4 *Lyons* majority concluded that the history of past illegal conduct was simply insufficient to rise to a level requiring injunctive relief against the entire police department.[65] As a result, Justice White found that the mere possibility that Mr. Lyons "may again be subject to an illegal chokehold [did] not create the actual controversy that must exist" to continue the case.[66] No "repeated harm" had been shown sufficiently to establish a policy, practice, or custom of illegal chokeholds.

In addition, the Court's holding requires that many claims of future injury based on police misconduct be dismissed as "speculative," unless the plaintiffs establish that a particular chain of events will lead to the same injury. According to the Court's logic, to establish "a likelihood of substantial and immediate irreparable injury," Mr. Lyons would have to "violate the law" (e.g., drive with a broken tail light) such that the police would then stop Mr. Lyons and, only after Mr. Lyons acted in a way to provoke a chokehold (e.g., resist arrest, attempt to escape, threaten deadly force), finally, illegally use its chokehold policy.[67] Alternatively, Mr. Lyons's actions would have to lead officers confronting him to use the chokehold in a manner that, contrary to their training, renders him unconscious again.[68] Thus, the "odds" of LAPD officers subjecting Mr. Lyons to the illegal chokehold again was "conjecture" and just as likely as any other resident of Los Angeles being subjected to the same treatment.[69] It is this simultaneous requirement of some probability of future injury and the dismissal of Mr. Lyons's claim of a future injury

Clapper v. Amnesty International USA *and* City of Los Angeles v. Lyons, 23 WM. & MARY BILL RTS. J. 127 (2014).

65. *Lyons*, 461 U.S. at 104. The Court specifically relied on *Rizzo v. Goode*, 423 U.S. 362 (1976), to refute Mr. Lyons's claim that the number of incidents showed an unlawful policy by the LAPD. *Lyons*, 461 U.S. at 104. The Court in *Lyons* summarized the "bad apple" sentiment of police culture baked into *Rizzo*: "the Court also held that plaintiffs' showing at trial of a relatively few instances of violations by individual police officers, without any showing of a deliberate policy on behalf of the named defendants, did not provide a basis for equitable relief." *Id.* (citing *Rizzo*, 423 U.S. at 372).

66. *Lyons*, 461 U.S. at 104.

67. *Id.* at 102–03 ("*[I]f* [plaintiffs] proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed." (quoting *O'Shea*, 414 U.S. at 497) (emphasis in original)).

68. *Id.* at 106.

69. *Id.* at 108.

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that has blocked many prospective police abuse cases for lack of a case or controversy.[70]

Finally, the Court in *Lyons* also imputed an "innocence" factor into the standing test. The Court found significant LAPD's policy of only allowing the use of chokeholds "to gain control of a suspect who is violently resisting the officer or trying to escape."[71] Mr. Lyons had not established that, contrary to this policy, LAPD officers used chokeholds "without any provocation or resistance."[72] Subsequent courts have interpreted this reasoning as requiring plaintiffs to be blameless in provoking officers in order to have standing to enforce injunctions against police.[73] The entrenchment of the innocence barrier is visible when viewed from the defendants' side. The Supreme Court has acknowledged that the same obstacle to standing does not apply in circumstances where the plaintiff is "unable to control or prevent the behavior that prompted the [police officer's] alleged misconduct."[74] Meaning, plaintiffs must not do anything that could be construed as provoking an officer's misconduct. In light of the police officers' control over their own documentation of civilian encounters, such an innocence requirement is difficult to overcome. This formal notion of innocence in *Lyons* restricts plaintiffs and protects defendants: when a plaintiff actually or allegedly violates the law, the doctrine punishes him and others similarly situated by denying future relief from police violence; when a defendant actually violates the law, the doctrine treats him as an anomaly within the system.

70. Jeffries & Rutherglen, *supra* note 9, at 1416–17; *see* JW v. Birmingham Bd. of Educ., 904 F.3d 1248 (11th Cir. 2018); Shain v. Ellison, 356 F.3d 211 (2d Cir. 2004); Curtis v. City of New Haven, 726 F.2d 65 (2d Cir. 1984); Whitfield v. City of Ridgeland, 876 F. Supp. 2d 779 (S.D. Miss. 2012); MacIssac v. Town of Poughkeepsie, 770 F. Supp. 2d 587 (S.D.N.Y. 2011); Alvarez v. City of Chicago, 649 F. Supp. 43 (N.D. Ill. 1986); *see also* Clapper v. Amnesty International USA, 568 U.S. 398, 399 (2013) ("Respondents' standing theory also rests on a speculative chain of possibilities that does not establish that their potential injury is certainly impending or is fairly traceable to § 1881a.").

71. *Lyons*, 461 U.S. at 110 (citation omitted).

72. *Id.* at 105.

73. *E.g.*, Honig v. Doe, 484 U.S. 305, 320 (1988) ("[W]e generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."); *see also* Bray v. City of New York, 346 F. Supp. 2d 480, 487 n.1 (S.D.N.Y. 2004); Roe v. City of New York, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001); Weiser v. Koch, 632 F. Supp. 1369, 1373–74 (S.D.N.Y. 1986); Lake v. Speziale, 580 F. Supp. 1318, 1327–28 (D. Conn. 1984).

74. *JW*, 904 F.3d at 1265.

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As one example of the *Lyons* barriers in operation, in *JW v. Birmingham Board of Education*, the Eleventh Circuit reversed a judgment, following a twelve-day bench trial that found six school resource officers personally liable for failing to decontaminate students subjected to chemical spraying.[75] It also reversed the district court's class-wide injunction ordering the parties to devise a plan to improve training and the policies related to the use of chemical spray in Birmingham schools.[76] The district court had determined the plaintiffs showed that the future injury was not speculative: children were at risk of concrete future harm because school was mandatory for the class of plaintiff children, and they continued to be exposed to the same officers.[77] The Eleventh Circuit reversed, evoking the innocence barrier, stating that the misbehavior that resulted in being pepper-sprayed was not mandatory.[78] Furthermore, the Eleventh Circuit reasoned that without an official policy of pepper-spraying students, all future incidences would be essentially random, making the odds of harm "speculative." Assessing the actual numbers, the Eleventh Circuit calculated there was only a 1.77% chance of being exposed to spray and improperly decontaminated, rendering the plaintiffs' injury too speculative.[79] Therefore, the plaintiff students could not overcome the *Lyons* hurdle to injunctive relief.

Civil rights scholars are critical of *Lyons* for narrowing injunction-driven policing reform.[80] According to the traditional view, following *City of Los Angeles v. Lyons*, structural police reform litigation challenging unofficial policies became a dead letter.[81] In *Lyons*, the Supreme Court incorporated the already

75. *Id.* at 1253, 1273.

76. *Id.*

77. *See id.* at 1269.

78. *Id.*

79. *Id.* at 1270.

80. *See* Jeffries & Rutherglen, *supra* note 9, at 1417–18 (stating that *Lyons* remedial standing "preclude[s] the use of systemic remedies for what are, at bottom, institutional and systemic problems"); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Limiting Remedies*, 2005 U. ILL. L. REV. 1199, 1233, 1236–37 (2005). On broader concerns regarding the review limiting role of standing doctrine, including *Lyons*, see Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1859–62 (2015).

81. *See* Fallon, *supra* note 12, at 1; Schmidtberger, *supra* note 12, at 183–84; *cf. The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 215–24 (1983) (explaining the *Lyons* holding and what it means for standing and equitable relief doctrines).

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heightened standards for obtaining injunctive relief into standing doctrine itself.[82] Thus, by creating a "precondition,"[83] or an additional high threshold before even substantive review of the merits, the Court limited future plaintiffs' abilities to seek injunctions against police departments. *Lyons* gives credence to the pessimistic view that standing to obtain injunctive relief in cases without a formal policy presents a formidable barrier to police reform litigation.[84] Despite this obstacle, however, some commentators still urge litigation, while acknowledging its difficulty.[85]

B. MUNICIPAL LIABILITY: *MONELL*

Municipal liability under section 1983 is a key component of structural reform police litigation and mirrors other sectors of public law litigation. Illegal and violent police conduct often indicates and directly flows from an infirm organizational culture in police departments.[86] Thus, to effectively address harmful policing practices through litigation, the entire police department, and the municipality with authority over its decision-making, must be party to the action. Municipal liability under section 1983, established in *Monell*, allows exactly that: a municipal

82. *See* Fallon, *supra* note 12, at 5–7; *cf.* William A. Fletcher, *Standing: Who Can Sue To Enforce a Legal Duty*, 65 ALA. L. REV. 277 (2013) (discussing his 1988 article on standing and what has changed since then); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (criticizing the current state of standing doctrine and offering a less-stringent alternative); Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477 (2018) (describing how the phenomenon of narrowing remedies against police misconduct creates tension in the doctrine and removes oversight and accountability in practice).

83. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) ("[T]he issue here is not whether that claim has become moot but whether Lyons meets the preconditions for asserting an injunctive claim in a federal forum."); *see also id.* at 127 (Marshall, J., dissenting) (denouncing the majority's decision to make entitlement to relief an issue in standing).

84. *Cf.* Honig v. Doe, 484 U.S. 305, 322–23 (1988) (distinguishing the probability of a future unconstitutional injury in *Lyons* from the probability of a future violation of a statute prohibiting the stay-put provision of a statute meant to protect children with disabilities).

85. *See* Gilles, *supra* note 9, at 1384, 1398–99, 1453; *see also* Jeffries & Rutherglen, *supra* note 9, at 1418–19 (discussing benefits of 42 U.S.C. § 14141 DOJ structural reform litigation).

86. *See, e.g.*, Floyd v. City of New York (*Floyd I*), 813 F. Supp. 2d 417, 454 (S.D.N.Y. 2011) ("Such failures [to train, supervise, monitor, and discipline adequately] . . . have caused the patterns of widespread Fourth Amendment violations and widespread Fourteenth Amendment violations.").

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body can be held liable for its employees' unconstitutional actions when taken pursuant to "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or "governmental 'custom.'"[87]

In 1978, the Supreme Court formally recognized municipal liability under section 1983 in a sometimes-celebrated opinion, *Monell v. Department of Social Services of New York*.[88] *Monell* took the doctrine two steps forward, but one step back. Reversing a prior opinion on section 1983's legislative history,[89] the Court extended liability, in certain circumstances, to municipalities and cities for civil rights violations by their employees.[90] Following *Monell*, a city and police department employing a police officer engaged in unlawful conduct could face monetary consequences under section 1983.

The Court, however, rejected a respondeat superior theory.[91] Instead municipalities would be liable for their employees' actions only where the municipality itself was responsible for the plaintiff's injuries, upon a showing that harm resulted from a "government's policy or custom" as created by "lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[92] Meaning, the Court viewed acts of employees as dis-

87. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690–91 (1978).

88. *See id.* at 695.

89. *Monell*, 436 U.S. at 659 (overturning *Monroe v. Pape*, 365 U.S. 167 (1961)). Erwin Chemerinsky discusses the lower courts' work-around of Justice Douglas's reading of section 1983. CHEMERINSKY, *supra* note 10, at 46. Lower courts circumvented *Monroe* and even created municipal liability based on other civil rights laws or inferred rights of action directly from the Constitution. *Id.* (citing Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977) (using section 1981 to create liability for racial discrimination by police officers), *cert. denied*, 438 U.S. 904 (1978)); *see, e.g.*, Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975).

90. 436 U.S. at 664–65.

91. *Id.* at 701 n.66.

92. *Id.* at 694 ("[A] local government may not be sued under [Section] 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible . . . ."); *cf.* City of Oklahoma City v. Tuttle, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting) (arguing that section 1983 supports respondeat superior liability). As even early commentators noted, the Court's rejection of respondeat superior liability imposed a substantial limitation for litigants. *See* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2187, 2192–95 (2005); Karen Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in Fed-*

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tinct from acts of the municipality.[93] In subsequent cases, the Supreme Court has elaborated that a government "policy" or "custom" is an official or unofficial action traceable to persons with "final authority" to create policy.[94] Three types of "policies or customs" have been identified by the Court: official policies "on the books" (directly implicating the person with final authority); individual actions authorized by persons who possess "final authority to establish municipal policy with respect to the action ordered";[95] and unofficial custom, defined to mean "practices so persistent and widespread as to practically have the force of law" (where actual or constructive knowledge is attributed to persons with policy making authority).[96] Examples include when formal governmental policy or custom violates the Constitution, or where a sufficiently widespread pattern of official conduct amounts to "deliberate indifference to the rights of persons."[97] This standard of proof has been extended to all suits, whether for monetary or equitable relief.[98]

For cases without a formal governmental policy or custom, the *Monell* line of cases establishes what this Article calls the "widespread practice" and the "factual parallel" requirements. The "widespread practice" requirement encompasses the deliberate indifference standard. In *City of Canton v. Harris*, the Court established that failure to train police officers could create municipal liability, where that failure reasonably caused the rights violation at issue.[99] In the same decision, however, the Court determined a government entity is liable for damages only

eral Courts, 51 TEMP. L.Q. 409, 438–39 (1978); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 236 n.43 (1986). Critics also cite the "doctrinal mess" the Court created by rejecting respondeat superior liability, as courts have delivered alternative holdings regarding municipal liability and muddled the standard. Lisa D. Hawke, Note, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 845 (2005).

93. Pembaur v. City of Cincinnati, 475 U.S. 469, 481–82 (1986).

94. *Id.* at 480–81.

95. *Id.* at 481.

96. Connick v. Thompson, 563 U.S. 51, 61 (2011).

97. City of Canton v. Harris, 489 U.S. 378, 388 (1989); *see* Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 404–05 (1997). Regardless of one's view on the logic of the Court's limits to municipal liability, *Monell* and its progeny established a high evidentiary standard in circumstances relevant to this Article. *See* Susan Bandes, *Introduction: The Emperor's New Clothes*, 48 DEPAUL L. REV. 619, 620–21 (1999).

98. Los Angeles County v. Humphries, 562 U.S. 29, 29 (2010).

99. *Harris*, 489 U.S. at 390.

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for "deliberate indifference to the rights of persons" upon a showing of a widespread practice of constitutional harm, not for all employee wrongdoing or negligence on the part of the entity.[100] To succeed, plaintiffs must show that, considering "the duties assigned to specific officers or employees[,] the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."[101] The "failure to" theory has been expanded beyond training to include supervising, hiring, disciplining, and monitoring officer activities.[102]

Subsequent decisions in cases brought under a *Monell* "failure to" theory demonstrate the "factual parallel" concept this Article utilizes. In the Supreme Court's 2011 decision in *Connick v. Thompson*, the Court further explained that in claims that plaintiffs' injuries stem from a municipality's failure to train its employees, "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference."[103] The Court required the constitutional violations in an alleged pattern be similar enough in their facts to show deliberate indifference.[104] In the criminal prosecution of Mr. Thompson, prosecutors from the Orleans Parish District Attorney's office failed to disclose a crime lab report, blood evidence, and physical and scientific evidence—clear *Brady* violations.[105] Citing four other reversals based on *Brady* violations, Mr. Thompson alleged that his *Brady* violation stemmed from "[District Attorney] Connick's deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations."[106] In a 5–4 opinion, written by Justice Clarence Thomas, the Court overturned Mr. Thompson's

100. *Id.* at 388.

101. *Id.*; *accord* Johnson v. City of Vallejo, 99 F. Supp. 3d 1212, 1220–21 (E.D. Cal. 2015) (finding that the number of police shootings in the city over an approximately two-year period did not show that the city had a policy or practice of violating citizens' rights against use of excessive force); *see* Jeffries & Rutherglen, *supra* note 9, at 1403.

102. Darrell L. Ross, *Emerging Trends in Police Failure To Train Liability*, 23 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 169, 172–73 (2000).

103. Connick v. Thompson, 563 U.S. 51, 62 (2011).

104. *Id.* at 72.

105. *Id.* at 55.

106. *Id.* at 57.

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favorable verdict and monetary award.[107] The four other reversals were deemed inadequate proof because none involved failure to disclose the same evidence (e.g. blood, crime lab reports).[108] The Court found no obvious need for training, since prosecutors presumably received appropriate training in law school to prevent *Brady* violations.[109] Despite the rigorous evidentiary requirements to establish liability for a pattern or practice of constitutional harm, *Connick* left intact the basic principle that municipal liability can "be imposed for a failure to train, supervise, or discipline."[110]

Monell, *Harris*, and *Connick* show the high burden to establish municipal liability for unlawful practices under section 1983, particularly where no official policy is at issue.[111] Lower court decisions further define the "widespread practice" and "factual parallel" requirements and commenters note the unworkable nature of precedent that has emerged from decisions interpreting *Monell*'s requirements.[112] Because municipalities typically do not write or enforce policies that are explicitly unconstitutional, plaintiffs bear the burden of "meeting 'rigorous standards of culpability and causation'" imposed by the Court.[113] Yet, as I reveal through the case studies presented in Parts II,

107. *Id.* at 72.

108. *Id.* at 62–63.

109. *Id.* at 64. In the Court's view, merely showing "that additional training would have been helpful [for prosecutors] in making difficult decisions" was not sufficient to establish municipal liability under a failure to train theory. *Id.* at 68.

110. Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in A Post*-Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273, 309 (2012).

111. *See* Karen M. Blum, *Municipal Liability Under Section 1983 Independent of Employee Liability*, 17 TOURO L. REV. 551, 573 (2001) (opposing the high burden for showing municipal liability); Matthew J. Cron et al., *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583, 584 (2014); Fallon, *supra* note 11, at 995–96 (calling for an expansion of municipal liability under section 1983); Levinson, *supra* note 110; Metzger, *supra* note 80, at 1866–69 ("[A]pplication of the deliberate indifference standard has significantly limited the viability of failure-to-train and failure-to-supervise challenges.").

112. *Cf. Connick*, 563 U.S. at 61 (describing widespread practices as "action[s] for which the municipality is actually responsible").

113. Cron, *supra* note 111, at 584 (quoting Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997)). *See generally* Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1920–21 (2007) (discussing the disadvantages that individual plaintiffs have against municipal governments).

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III, and IV, courts can still find deliberate indifference to an unwritten discriminatory police practice, for certain claims, if the right evidence is presented.

C. CLASS CERTIFICATION: *WAL-MART STORES, INC. V. DUKES*

Class action status is a common feature in structural reform litigation. The modern class action is viewed as a mechanism for remedying violations of law, particularly for those who face challenges in seeking legal redress due to lack of knowledge of legal mechanisms and/or burdensome legal costs.[114] For smaller injuries affecting a large number of individuals, many understand that the class action is an essential tool for vindicating their rights.[115] Most individuals will forgo the trouble of filing a case with small monetary damages (e.g., challenging a short, but unlawful, *Terry* stop), and attorneys are typically not willing to take such cases.[116] But as a large group, and with the goal of preventing future harm, the calculus sometimes changes in favor of litigation.[117]

Class-wide relief is particularly helpful for the police litigation in Parts II, III, and IV, where aggregating the harms more clearly expresses the extent of state-imposed harm on Black and Brown communities. This Section proceeds with a textual, or rule-based, view of the certification requirements followed by a discussion of the aspect of *Wal-Mart Stores, Inc.* raised for police litigants: the Rule 23(a)(2) requirement of commonality. It characterizes the challenge for class action commonality as an "early merits inquiry" barrier. This Section also explains the Rule 23(b)(2) requirements for obtaining class-wide injunctions.[118]

114. *See* Judith Resnick, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 142–43 (2011).

115. *See id.*

116. *Id.*

117. *Id.*

118. The defendants in the case studies in Parts II, III, and IV raised other arguments typically associated with Rule 23(b)(3) class actions that wish to obtain damages for members of the class. These arguments, while addressed by the district courts, are inapposite to class-wide injunctive relief and are not discussed in this Part. I address these other concerns—necessity and opt-out provisions—briefly in Part V in the context of how the class certification doctrine may limit the availability of other systemic litigation against police department practices.

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1. Class Certification Requirements Under Rule 23

As with standing for injunctive relief, class certification imposes a barrier even before courts review the substantive merits of plaintiffs' claims. Rule 23 of the Federal Rules of Civil Procedure provides the requirements for federal class action suits. Plaintiffs must first meet the four prerequisites in Federal Rule of Civil Procedure 23(a): numerosity (too numerous for joinder), commonality (there must be common questions of law or fact), typicality (the named plaintiffs' claims or defenses are typical of the class), and adequacy of representation (the named plaintiffs and their attorneys are able to fairly represent the interests of the entire class).[119] Although plaintiffs must meet all four Rule 23 requirements, commonality presents an across-the-board class certification problem and is the focus within the case studies.

In addition to Rule 23(a)'s requirements, plaintiffs must also satisfy Rule 23(b), which provides for three types of class actions.[120] For this Article, it is important to distinguish between class actions filed under Rule 23(b)(2) and (b)(3). Rule 23(b)(3) requires that common issues of law and fact "predominate" over questions affecting individuals, along with a determination that the class action tool is superior to other methods of adjudication.[121] This predominance issue proved a sticking point for the *Wal-Mart Stores, Inc.* class.[122] In contrast, the actions in the case studies were filed as (b)(2) class actions. Traditionally, under (b)(2) plaintiffs need only demonstrate that the defendant acted in the same manner towards the class.[123] This is usually satisfied where class members "complain of a pattern or practice that is generally applicable to the class as a whole."[124]

Rule 23(b)(2) reflects the class action's social justice roots and provides textual support for my argument that class action status has proven the most difficult hurdle for police structural reform litigants. Amended in 1966 during the Civil Rights movement, Rule 23 effectively encouraged aggregation of individual

119. FED. R. CIV. P. 23(a).

120. *Id.* 23(b).

121. *Id.*

122. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363–64 (2011).

123. Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998).

124. *Id.*; *see also* Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988) (emphasizing that although "the claims of individual class members may differ factually," certification under Rule 23(b)(2) is a proper vehicle for challenging "a common policy").

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claims brought during this period.[125] The text of Rule 23(b)(2) permits courts to utilize the class action tool where defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding relief is appropriate respecting the class as a whole."[126] The Advisory Committee's Notes for the 1966 amendment of Rule 23 explain that, at the time of its revision, (b)(2) was created to curb discrimination and foster institutional reform by facilitating challenges to widespread rights violations for certain class actions: "usually one[s] whose members are incapable of specific enumeration."[127] Indeed, the class tool was essential in major public institution reforms of segregated schools, segregated neighborhoods, and juvenile justice systems, among others.[128] It created access to court review for entire communities of harmed litigants seeking injunctive relief to end discrimination or other civil rights violations.[129] To offset the potential for abuse by litigants, decertification is available at the trial stage if class status is incorrectly granted.[130]

2. Commonality Under *Wal-Mart Stores, Inc.*

Over the several decades following Rule 23's amendment in 1966, as the number of civil rights class action suits grew, and with the Court's conservative turn, the Supreme Court began imposing constraints on the ability to bring class action suits in federal courts.[131] These cases set the groundwork for its seminal decision in *Wal-Mart Stores, Inc. v. Dukes*.[132]

125. *See* Francisco Valdes, *Procedure, Policy, and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 GA. ST. U. L. REV. 627, 642 (2008).

126. FED. R. CIV. P. 23(b)(2).

127. Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 KAN. L. REV. 325, 332–33 (2017); *see also* David Marcus, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702–08 (2011) (explaining how desegregation litigation affected the origins of Rule 23(b)).

128. *See* Sabel & Simon, *supra* note 21, at 1021–53.

129. *See id.* at 1016–21.

130. Marcus, *supra* note 127, at 715.

131. *See* Comcast Corp. v. Behrend, 569 U.S. 27 (2013); Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982). In the mass tort class action context (asbestos litigation), see generally *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

132. 564 U.S. 338 (2011). The Supreme Court's decision in *Wal-Mart Stores, Inc.* has been the subject of much civil rights scholarship. *E.g.*, Maureen Carroll,

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In an opinion authored by Justice Scalia—who was notoriously hostile to civil rights class actions[133]—the Court solidified a heightened standard to meet the commonality requirement.

What I am calling an "early merits inquiry" marks a shift in line with other procedural requirements, where plaintiffs are required to show an indicia of success based on facts and information prior to substantive review of the parties' evidence. In *Wal-Mart Stores, Inc.*, the Supreme Court pronounced that "some proof" of common questions of law and fact was not enough. Instead, Justice Scalia demanded a "common contention" that "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[134] Applying *General Telephone Co. v. Falcon*,[135] the Court was unconvinced that plaintiffs put forward "significant proof" of "a general policy of discrimination" in employment promotion decisions.[136] While acknowledging

Class Action Myopia, 65 DUKE L.J. 843 (2016); Tristin K. Green, *On Employment Discrimination and Police Misconduct: Title VII and the Mirage of the "*Monell *Analogue,"* 95 B.U. L. REV. 1077 (2015); Malveaux, *supra* note 127; David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 828–33 (2016).

133. Justice Scalia expressed this hostility in decisions over the previous decade. In *Brown v. Plata*, 563 U.S. 493 (2011), the Court reviewed decisions related to two class actions—*Coleman v. Brown*, *sub. nom Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (dealing with a class of mentally ill persons in prison) and *Plata v. Brown, sub. nom Plata v. Schwarzenegger*, No. CIV S–90–520 LKK, JFM P, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010) (dealing with a class of prisoners with serious medical conditions)—where both classes alleged that overcrowding in California prisons was the primary cause of constitutional violations of cruel and unusual punishment under the Eighth Amendment and due process under Fourteenth Amendment. In a dissenting opinion, Scalia expressed concerns with a plaintiff class being able to allege a claim of a constitutional violation based on systemwide deficiencies. *Plata*, 563 U.S. at 550–54 (Scalia, J., dissenting). In his view, the plaintiff should not qualify as a class member unless he or she could make an individualized showing of mistreatment. *Id.* at 554. His reasoning here was similar to that articulated in *Lewis v. Casey*, 518 U.S. 343 (1996), a class action in Arizona filed on behalf of adult prisoners who alleged they had been deprived of access to the courts by not being able to access the prison law library. There, Scalia noted, "[named plaintiffs who represent a class] must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Id.* at 357 (quoting Simon v. E. Ky. Welfare Rights, Org., 426 U.S. 26, 40 n.20 (1976)).

134. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

135. *Falcon*, 457 U.S. at 159 n.15.

136. *Wal-Mart Stores, Inc.*, 564 U.S. at 353.

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that Rule 23 does not establish a pleading standard, the Court applied a "rigorous analysis" of Rule 23's requirements for class certification.[137] It surmised that such a review "will entail some overlap with the . . . plaintiffs' underlying claim," and that this "cannot be helped."[138] Plaintiffs, he wrote, "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." at the pleading stage.[139] It reiterates the Court's preference to avoid discovery and limit substantive review for liberal civil rights claims.

The Court justified its commonality determination by rejecting and minimizing testimony from plaintiffs' experts. Up front, Justice Scalia determined the only evidence of a general policy of discrimination was presented through sociological expert witness testimony that linked Wal-Mart's corporate culture and personnel practices to its employees' discriminatory supervisory decision-making.[140] One of the most significant barriers to Title VII gender and race discrimination for plaintiffs today is the Court's rejection of evidence pointing to a corporate culture vulnerable to gender bias. Plaintiffs' sociological expert was unable to determine with sufficient specificity how regularly stereotypes and gender-biased culture in the workplace played a meaningful role in employment decisions at Wal-Mart.[141] Justice Scalia stated that without demonstrating uniformity in stereotyping and gender bias and decision-making, plaintiffs had not shown a centralized policy: "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question."[142] Because the expert could not answer the question of how prevalent gender discrimination at Wal-Mart was, the Court disregarded the testimony completely.[143]

Second, Justice Scalia rejected plaintiffs' statistical expert's showing of disparities in the number of women promoted to management positions as proof of a discriminatory policy. Data was

137. *Id.* at 351.

138. *Id.*

139. *Id.* at 350.

140. Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 43 (2011).

141. 564 U.S. at 354 (the expert was asked, and unable to provide an opinion, whether gender bias played a role in .05% or 95% of instances).

142. *Id.* at 352.

143. *Id.*

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collected at the regional and national level, and therefore, Justice Scalia found, could not establish the existence of disparities at individual stores or even at the district level.[144] Justice Scalia theorized that the data presented may merely indicate the availability of women who are qualified or interested in the position, rather than discriminatory employment practices.[145] Ultimately, he determined that at most, plaintiffs established a policy of discretionary decision-making at the regional or store level that did not rise to the level of a policy of discrimination common to the class. In short, *Wal-Mart Stores, Inc. v. Dukes* created a regime where "overly aggregated" statistics cannot establish commonality when the decisions at issue are made at a local level.[146]

The primary concern for future structural reform litigation rests on Justice Scalia's use of the concept of "indivisibility." He wrote that certification under Rule 23(b)(2) applies "only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant."[147] This portion of the decision related to Rule 23(b)(2) class members is generally viewed as an issue of class cohesion, but has led to some confusion and lack of uniformity in lower courts.[148] Most recently, following remand of *Jennings v. Rodriguez*,[149] a class action based on the blanket policy to refuse bond hearings to non-citizen class members detained by the government, the Court invited a *Wal-Mart Stores, Inc.* level of scrutiny for the purely Rule 23(b)(2) class action on the theory that each non-citizen seeking a bond hearing would require an individualized determination. This reasoning evokes the concern that class members' claims are divisible due to the requirements of procedural due process. For purposes of the racial profiling cases in this Article, where plaintiffs raised no procedural due process

144. *Id.* at 356.

145. *Id.* at 357.

146. Mary Dunn Baker, *Class Certification Statistical Analyses Post*-Dukes, 27 A.B.A. J. LAB. & EMP. L. 471, 475 (2012).

147. 564 U.S. at 360.

148. Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59 (2019); *cf.* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 828–33 (2016) (arguing that while there is some confusion, counterweight function provides guidance for determining a plaintiff's evidentiary burden at class certification).

149. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

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allegations, the effect on future certification decisions is likely minimal.[150]

Civil rights scholars express concern that *Wal-Mart Stores, Inc. v. Dukes* limits access to the courts and undermines the purpose of Rule 23.[151] Indeed, the decision is consistent with the Supreme Court's other procedural decisions that also created significant barriers for civil rights plaintiffs, including rulings addressing sufficiency of pleadings, standing, government immunities, jurisdiction, and summary judgment.

In summary, this Part examined the specific procedural roadblocks civil rights plaintiffs often face in police structural reform litigation. It named the *Lyons* standing hurdle as the future injury, speculative harm, and innocence requirements. The Article presents the *Monell* line of cases as the widespread practice and factual parallel barriers for municipal liability. And the *Wal-Mart Stores, Inc.* class action commonality hurdle is framed as the early merits inquiry barrier. As the next Parts show, cases at the district court level offer a rich understanding of how litigants prevail in the face of the challenging procedural and justiciability doctrines discussed in this Part. Focusing on the Supreme Court often hides these on-the-ground moves. By analyzing the evidence and litigation processes in the trial court for three significant cases, this Article reveals what has been obscured by the popular view that racial profiling structural reform injunctions are very difficult to achieve.

Parts II, III, and IV endeavor to show how plaintiffs succeeded in jumping each doctrinal hurdle discussed in this Part in three racial-profiling police-structural-reform cases: (1) *Floyd v. City of New York*, (2) *Ortega-Melendres v. Arpaio*, and (3) *Bailey v. City of Philadelphia*. Each case involves racial profiling in a stop context. Filed as class actions for injunctive relief in large urban police departments, these cases are not typical. Lawsuits seeking damages for misconduct in individual cases are more common, where plaintiffs request monetary remedies. Individual actions seeking damages may also ask for *Monell* style liability. The section 1983 cases studied in this Article seek structural

150. *See* Alexandra D. Lahay et al., *Government Class Actions After* Jennings v. Rodriguez, HARV. L. REV. BLOG (Jan. 8, 2018), https://blog.harvardlawreview.org/government-class-actions-after-jennings-v-rodriguez [https://perma.cc/DB3S-B].

151. Marcus, *supra* note 132, at 830 (noting that after *Wal-Mart Stores, Inc.*, "[s]ome courts continue to treat the Rule 23(b)(2) inquiry as a test for class 'cohesion'").

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relief from racial profiling using the class action tool, but request injunctions (not damages) for a class of plaintiffs. These types of cases are considered very difficult to pursue. What information and evidence, then, allowed the plaintiffs to satisfy standing to seek injunctions, municipal liability, and class certification? The types of evidence used to overcome the doctrine—hard data and statistical evidence; discriminatory statements by supervisors and central decision-makers; and/or proof of a history of notice and failure to remedy constitutional violation—often overlap to meet the standards. The case studies also bring to light information gathering techniques outside of formal discovery through other advocates in each local context.

II. *FLOYD V. CITY OF NEW YORK*: N.Y. STOP AND FRISK

In 2008, on behalf of a class of individuals routinely subjected to illegal stops between 2004 and 2012 (totaling 4.4 million over eight years), David Floyd, David Ourlicht, Lalit Clarkson, and Deon Dennis filed a section 1983 class action lawsuit challenging the stop and frisk practices of the New York Police Department (NYPD) as violations of the Fourth and Fourteenth Amendments.[152] Now-retired U.S. District Court Judge Shira Scheindlin presided over a nine-week bench trial from March to May 2012, and ordered the NYPD to engage in a process to develop reforms with plaintiffs and community organizations representative of the harmed class members.[153] The court's lengthy decision was a watershed in police reform and criminal procedure because it found the NYPD had engaged in widespread racial profiling in violation of the Fourth and Fourteenth Amendments.[154]

This Part dissects and summarizes the evidence put forward in this litigation to surmount the difficult doctrinal hurdles. *Floyd* is an extension of a prior class action stop and frisk lawsuit, settled as *Daniels v. City of New York*. The case study devotes space to *Daniels* for several reasons. The City's failure to correct its unlawful stop and frisk practices following the *Daniels*

152. Complaint, Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2012 WL 1031760 (S.D.N.Y. filed Mar. 28, 2012). Over 4,400,000 stops were conducted in this eight year time period. *See* Floyd v. City of New York (*Floyd V*), 959 F. Supp. 2d 540, 573 (S.D.N.Y. 2013).

153. *Id.* at 667.

154. *See id. See generally* MICHAEL D. WHITE & HENRY E. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC (2016) (chronicling the impact of N.Y. stop-and-frisk tactics and *Floyd*).

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order does much to lay a foundation for the plaintiffs' deliberative indifference theory, and to overcome the *Lyons*'s speculative harm and future injury requirements. Further, the context surrounding *Daniels* and broken windows policing shows the information-gathering that is necessary prior to filing in order to overcome the barriers discussed in Part I.

A. *DANIELS V. CITY OF NEW YORK*

Floyd v. City of New York grew out of a broader movement against the NYPD's stop and frisk policy and the violence that often ensued from the encounters.[155] With corruption and brutality pervading its history, the NYPD has long used the tactic of stopping and frisking people without suspicion.[156] The practice, which refers to brief police investigative stops and subsequent pat downs if the police suspect that the individual is armed, had been deployed by the NYPD since the 1970s and witnessed a resurgence beginning with the 1994 election of Rudolph Giuliani.[157] Giuliani, who ran on a campaign promise of law and order, directed his police commissioner William Bratton to deploy the nearly all-white and male Street Crimes Unit (SCU) officers in so-called "high crime" areas populated overwhelmingly by Black and Latinx[158] communities.[159] The officers, called "commandos" patrolled the streets of New York, often at night, in unmarked cars and in plain clothes.[160] Their mission was to

155. Joo-Hyun Kang, *Fighting Broken Windows Policing in New York City in the '90s and '00s: A Recent History with Joo-Hyun Kang*, VERSO (May 24, 2016), https://www.versobooks.com/blogs/2655-fighting-broken-windows-policing-in-new-york-city-in-the-90s-and-00s-a-recent-history-with-joo-hyun-kang [https://perma.cc/JC9J-V8Z4].

156. *See* MARILYNN S. JOHNSON, STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY 297–300 (2003); JAMES LARDNER & THOMAS REPPETTO, NYPD: A CITY AND ITS POLICE 331–34 (2000); RIMA VESELY-FLAD, *Policing Dark Bodies in Polluted Spaces: Stop and Frisk in New York City, 1993–2013*, *in* RACIAL PURITY AND DANGEROUS BODIES: MORAL POLLUTION, BLACK LIVES AND THE STRUGGLE FOR JUSTICE 119–39 (2017) (ebook); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style,* 97 MICH. L. REV. 291, 377–80 (1998).

157. JOHNSON, *supra* note 156, at 297–300.

158. When referring to the community in a general sense, Latinx will be used as an identifier. At other points in the Article, the terms Hispanic or Latino/a reflect the language used by courts or other official records.

159. LARDNER & REPPETTO, *supra* note 156, at 331–32.

160. *Id.*

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"interdict violent street crime" and remove illegal firearms from the streets of New York.[161]

Under the guise of "Broken Windows" theory,[162] which suggests that neighborhoods with a greater concentration of physical and social disorder should evince higher stop and frisk activity, SCU targeted Black and Latinx communities to "maintain order."[163] Aggressive policing strategies hailed by Giuliani and Bratton, and the violence that ensued from their implementation, spurred mobilization. In the mid-1990s, the late Richie Perez—co-founder of the National Congress for Puerto Rican Rights' Justice Committee—led much of New York's organizing against the Giuliani administration's violent police practices. He convened the Coalition Against Police Brutality (CAPB) to combat the "daily abuses" faced by those on the receiving end of broken windows and routine police violence in 1998.[164] Composed of a diverse coalition of New York City grassroots organizations, including Center for Constitutional Rights (CCR) representatives, the CAPB pursued an ensemble of varied and malleable strategies, including lawsuits, direct action, and policy campaigns.[165] Their organizing effort was invigorated by widespread media coverage of the tragic killing of Amadou Diallo in 1999 by

161. *Id.*; Damaso Reyes, *NYC Street Crimes Unit Out of Control*, PHILA. TRIB., Mar. 16, 1999, at 7A.

162. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465 [https://perma.cc/TVJ8-FBTS] (using the analogy of a broken window to describe the relationship between disorder and crime).

163. *Id.*; *see also* OFFICE OF JUVENILE & DELINQUENCY PREVENTION, POLICY STRATEGY NO. 19: GETTING GUNS OFF THE STREETS (1994) (linking disorder to violence and rationalizing the concentration of order-maintenance policing (OMP) strategies in the city's neighborhoods with the highest crime rates); GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996); ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT'S STOP AND FRISK PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 89 (1999) (showing through empirical analysis OMP was not implemented in a race-neutral manner by the NYPD).

164. Kang, *supra* note 155. *See generally* Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2429–40 (2017) (discussing patterns of routine police violence).

165. Kang, *supra* note 155.

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NYPD officers.[166] I provide these details to situate the filing of the *Daniels* litigation.

Shortly after Mr. Diallo's killing, the NYPD released numerical data it maintained: in 1997 and 1998, 35,000 of the 45,000 stop and frisks reported by the SCU did not result in arrests.[167] Advocates interpreted the numbers to mean the police officers' suspicions that criminal activity was afoot were wrong in a vast majority of cases.

On March 8, 1999, plaintiffs National Congress for Puerto Rican Rights, Kelvin Daniels, Poseidon Baskin, Djibril Toure, Hector Rivera, Victor Rodriguez, and Kahil Shkymba, represented by CCR attorneys Arthur Kinoy and Bill Goodman and a private plaintiff-side attorney, Jonathan Moore, filed *Daniels v. City of New York*,[168] a class action lawsuit in the District Court for the Southern District of New York. Plaintiffs challenged the NYPD's stop and frisk policy on two grounds: (1) NYPD officers violated the Fourth Amendment by conducting stop and frisks without reasonable suspicion of criminal activity, and (2) NYPD officers violated the Equal Protection Clause of the Fourteenth Amendment by conducting stop and frisks solely on the basis of their race and national origin.[169] The plaintiffs primarily sought a judgment and injunction declaring that the NYPD SCU's stop and frisk practices were without reasonable suspicion and based on race and/or national origin; to prevent the police from using formal or informal productivity standards (de facto quotas) in stop decisions; to improve training, monitoring, and supervision of SCU stop and frisk policies; to implement psychological testing for SCU officers; and to require documentation for the basis of every stop and frisk.[170]

Importantly for this Article's illustration of how litigants navigate procedural hurdles, the *Daniels* defendants initially moved to dismiss the case on the basis that plaintiffs lacked standing under *City of Los Angeles v. Lyons*, arguing plaintiffs

166. Telephone Interview with Kamau Franklin, Staff Attorney, Ctr. for Const. Rts. (Aug. 13, 2018).

167. *Daniels et al. v. the City of New York*, CTR. FOR CONSTITUTIONAL RIGHTS. (Oct. 1, 2012), https://ccrjustice.org/home/what-we-do/our-cases/daniels-et-al-v-city-new-york [https://perma.cc/U43B-JA22].

168. Class Action Complaint, Daniels v. City of New York, No. 99-CV-1695 (S.D.N.Y. Mar. 3, 1999); *see also Daniels et al. v. the City of New York*, *supra* note 167.

169. Daniels v. City of New York, 198 F.R.D. 409, 412 (S.D.N.Y. 2001).

170. *Id.* at 422 n.2.

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faced no realistic threat of future injury from their stop and frisk practices.[171] The court denied the motion to dismiss and distinguished *Lyons*.[172] As she did later in *Floyd*, Judge Scheindlin looked at the number of alleged constitutional violations (tens of thousands) and found the number materially different than the roughly ten incidents cited by the *Lyons* Court.[173] She also relied upon the repeated stops alleged by three of the named plaintiffs.[174] Finally, she noted that plaintiffs were engaging in "innocent" behavior when stopped, which she distinguished from the characterization of Mr. Lyons's actions leading to the LAPD officers' illegal chokehold in his case.[175] The court's treatment of *Lyons* is rarely mentioned in legal scholarship from that time.[176] I point to it here to acknowledge the need for more systematic examination of district court treatment of *Lyons*.

The NYPD disbanded the SCU due to the combination of public pressure and the *Daniels* settlement. While the case was in progress, large anti-police brutality mobilizations took place after the Diallo killing and organizers used the *Daniels* litigation as an opportunity to focus attention on the NYPD's violence.[177]

The court granted plaintiffs' request for class certification in January 2001.[178] The class consisted of all persons who had been or will be subjected to the SCU's policy and/or practices of stop and frisk in violation of the Fourth or Fourteenth Amendments.[179] Under the more relaxed interpretation of Rule 23 of the pre-*Wal-Mart Stores, Inc.* era, Judge Scheindlin found commonality under the Second Circuit's theory of certification where putative class members were harmed under a unitary course of conduct:[180] "[t]he fact that the claims of the proposed class 'stem

171. Nat'l Cong. for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 159–62 (1999).

172. *Id.*

173. *Id.* at 161.

174. *Id.*

175. *Id.*

176. *E.g.*, Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1396–99 (2000).

177. Telephone Interview with Kamau Franklin, *supra* note 166.

178. Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001).

179. *Id.*

180. *Id.* at 416 (quoting German v. Fed. Home Loan Mortgage Corp., 885 F. Supp. 537, 555 (S.D.N.Y. 1995)).

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from the same alleged unconstitutional conduct of the defendants' proves the existence of common questions of law or fact."[181] Defendants appealed and, in June 2001, the Second Circuit upheld the district court's decision, and the mandate was returned in July.[182] A pretrial conference was held in August 2001.[183]

A month later, September 11th occurred. For two years, the parties engaged in discovery disputes, settlement conferences, and requests to adjourn the trial date.[184] In the shadow of the tragic terrorist attacks of September 11, 2001, the City's outpouring of support for the NYPD eclipsed the strong outcry over police abuse only months before. Activists were silenced and lost the will for reform. Thus, the City Law Department, with more public good-will on their side than six months earlier, likely entered negotiations and pre-trial discussions with the *Daniels* attorneys emboldened.

The case settled.[185] Defendants did not admit any wrongdoing in the settlement order. No monitor was put in place.[186] Nonetheless, the City agreed in the settlement terms to collect extensive race and crime data, which plaintiffs' counsel could access; improve documentation of reasonable suspicion supporting stops and the basis for frisks; develop and conduct periodic audits of stop-and-frisk practices; and maintain its anti-racial profiling policy.[187] Judge Scheindlin approved the settlement in December 2003.[188]

Any momentum for reform or gains from the *Daniels* settlement, however, faded in the post-9/11 era. The NYPD enjoyed a

181. *Id.* at 417.

182. *Id.*

183. *See* Civil Docket, Daniels v. City of New York, No. No. 99-CV-1695 (S.D.N.Y. Mar. 3, 1999).

184. Daniels v. City of New York, 2007 WL 2077150, at *1 (S.D.N.Y. 2007) ("The parties settled this class action in September 2003, after vigorously negotiating the terms of the Stipulation of Settlement over several months.").

185. *See generally* Stipulation of Settlement, Daniels v. City of New York, No. 99-CV-1695(SAS) (S.D.N.Y. Sept. 24, 2003), https://www.clearinghouse.net/chDocs/public/PN-NY-0010-0001.pdf [https://perma.cc/EA6T-C55S].

186. The NYPD was also required to engage in public education efforts, including joint public meetings with class members and representatives on its racial profiling policy, provide workshops at approximately fifty city high schools on the legal rights of those subjected to stops and frisks and develop handouts on these issues for distribution at these and other events. Stipulation of Settlement, *supra* note 185, at 10.

187. *Id.* at 5–9.

188. *Id.* at 18.

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renewed hero status. The expansion of war on terror policies at the federal level led to a pipeline of resources for police to expand surveillance technologies.[189] It gained unprecedented financial support to expand surveillance under the guise of national security, and the mayor increased the numbers of officers and specialty units.[190] The NYPD also expanded the stops and frisks, monitoring, and surveillance of activists.[191] Police shootings continued.[192] The post-9/11 policies also hampered advocates' ability to protect the terms of the *Daniels* settlement. In response to the War on Terror, progressive foundations began shifting their priorities and portfolios away from police reform toward protecting civil liberties and combatting war on terror policies.[193] CCR, busy litigating to stem the tide against the most egregious of these policies, expended few personnel resources to monitor the *Daniels* consent decree.[194] Similarly, some police reform advocates shifted focus areas, joining efforts to prevent civil rights violations under the REAL ID Act of 2005 and to draw attention to abuses stemming from other national security measures.[195] The police reform movement that had coalesced for *Daniels* became fragmented and struggled to draw attention to police violence in the immediate years following September 11.

The landscape changed again in late 2006, following the killing of Sean Bell in November of that year.[196] A student at the

189. Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595 (2016).

190. *See, e.g.*, Craig Roush, Comment, *Quis Custodiet Ipsos Custodes? Limits on Widespread Surveillance and Intelligence Gathering by Local Law Enforcement After 9/11*, 96 MARQ. L. REV. 315, 330–34 (2012); Editorial, *The NYPD's Spies*, NATION (N.Y.), Mar. 26, 2012, at 4–5.

191. Patrick F. Gillham et al., *Strategic Incapacitation and the Policing of Occupy Wall Street Protests in New York City, 2011*, 23 POLICING & SOC'Y 81 (2013); Donna Lieberman, *Infringement on Civil Liberties After 9/11*, 56 N.Y. L. SCH. L. REV. 1121, 1124–26 (2011/12).

192. *See e.g.*, Stephen Rex Brown, *NYPD 'Executed' My Son and Then Covered Its Tracks Charge 'Outlandish, Inflammatory': City Mentally Ill Harlem Man's Mother Had Called 911*, DAILY NEWS (N.Y.), Jan. 3, 2016, at 8; Molly Jackson, *Trial Begins for New York Cop in Shooting of Unarmed Black Man*, CHRISTIAN SCI. MONITOR (Bos.), Jan. 19, 2016; Zolan Kanno-Youngs, *State to Probe NYPD Shooting: Video, 911 Calls Depict Man Who Was Shot Waving Object in Hand in Crown Heights*, WALL ST. J. (N.Y.), Apr. 6, 2018, at A9A.

193. Telephone Interview with Marc Krupanski, Legal Worker, Ctr. for Constitutional Rights (Aug. 15, 2018).

194. *Id.*

195. *Id.*

196. Telephone Interview with Kamau Franklin, *supra* note 166.

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time, Mr. Bell was shot over fifty times outside of a nightclub on the eve of his wedding.[197] Groups again convened in a coalition. Given the facts of the Bell shooting, and the temporal distance from September 11, mobilization ensued.[198] CCR also resurfaced. CCR analyzed the hard data provided by the NYPD under the terms of the *Daniels* settlement, which showed an increased racial disparity in stop and frisk encounters.[199] The annual number of stops conducted by the NYPD had increased by about 200% during those years, approximately 88% of which did not lead to evidence of a crime.[200] More importantly, approximately 85% of those stopped were Black or Latino, while only 10% were white.[201] The information was presented to the city council as part of a larger hearing for transparency with the NYPD spearheaded by the New York Civil Liberties Union (NYCLU).[202]

While campaigning, then-mayoral candidate Michael Bloomberg had pledged to continue the Guiliani administration's aggressive police practices. He was elected in 2002, ushering in the possibility of further injury to the *Daniels* class members.

197. For background on the case and responses from local officials, community activists, and N.Y. State, see N.Y. STATE TRI-LEVEL LEGISLATIVE TASK FORCE, IMPROVING PUBLIC CONFIDENCE IN LAW ENFORCEMENT AND OUR CRIMINAL JUSTICE SYSTEM (2008) https://www.nysenate.gov/sites/default/files/articles/attachments/Senator%20Smith_%20Improving%20Public%20Confidence%20in%20Law%20Enforcement%20and%20Criminal%20Justice%20System.pdf [https://perma.cc/4GBK-PM94]. Three of the five officers involved in the shooting were indicted. The NYPD's counter-narrative and response to Sean Bell's shooting and resulting mobilization relied upon crime data. Heather Mac Donald, *No the Cops Didn't Murder Sean Bell: And Here's What Decent Black Advocates Would Say*, CITY J. MAG., Winter 2007, https://www.city-journal.org/html/no-cops-didn%E2%80%99t-murder-sean-bell-12990.html [https://perma.cc/8M2C-8GDB].

198. Telephone Interview with Marc Krupanski, *supra* note 193.

199. *Id.*

200. Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Individual Damages at 26–29, *Floyd III*, 861 F. Supp. 2d 274 (S.D.N.Y. 2012) (No. 08 Civ. 01034).

201. *Id.* at 26.

202. *See NYCLU Analysis of NYPD Reports Reveals Troubling Patterns in Police Shootings, Lack of Diversity in NYPD Leadership*, N.Y. CIV. L. UNION (May 5, 2008) [hereinafter Testimony of Chris Dunn], https://www.nyclu.org/en/publications/nyclu-analysis-nypd-reports-reveals-troubling-patterns-police-shootings-lack-diversity [https://perma.cc/QU45-PRBC].

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B. ORIGINS OF *FLOYD*: CONTINUED RACIAL DISPARITIES AND PRE-LITIGATION INFORMATION GATHERING

The NYPD's noncompliance with the *Daniels* settlement and increasingly racially disparate practices galvanized New York City's police reform advocacy community and triggered the *Floyd* litigation. The principal plaintiffs' attorneys from *Daniels*, in consultation with local police accountability groups, decided to file a new suit. Attorneys filed the class action lawsuit *Floyd v. City of New York* in 2008, alleging that the NYPD deliberately targeted Black and Latinx persons for stops and frisks, without objective reasons to suspect them of criminal behavior.[203]

The actors in *Floyd* are nearly identical to those in *Daniels*. Named plaintiffs again included members of the Malcolm X Grassroots Movement, Lalit Clarkson, and David Floyd.[204] At the time of filing, plaintiffs' counsel included the same plaintiff-side police attorney Jonathan Moore, with the Center for Constitutional Rights.[205] Heidi Grossman and others from the City Law Department were again assigned as defense counsel. The litigants and Judge Scheindlin all entered the litigation understanding that the case continued *Daniels*.

The discovery process in cases alleging municipal liability for constitutional injuries uncovers and exposes information on the political and cultural forces that give rise to police misbehavior.[206] Allegations of municipal liability and class-wide relief permit wider discovery, and in particular facilitate the development of systemic evidence of deliberate indifference, repeat-offender officers, functioning internal monitoring systems, and attitudes of police towards disciplinary and supervisory concerns.

Discovery is not only essential to overcome the hurdles discussed in Part I, but also to further informal information gathering. Of the hard data turned over to plaintiffs, their attorneys

203. *Case Study:* Floyd v. City of New York, CATALYSTS FOR COLLABORATION, https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/racial-justice-lit-wkshp/case_study_-_floyd_v._city_of_ny.pdf [https://perma.cc/AV8J-JRPS].

204. Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001).

205. Demand for Jury Trial, Floyd v. City of New York (*Floyd IV*), 283 F.R.D. 153 (S.D.N.Y. 2011) (No. 08-01034), ECF No. 11.

206. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 30 GA. L. REV. 845, 859–61 (2001); G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 748 (1999).

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provided the *New York Times* portions that were not subject to a protective order. The newspaper ran a series of articles that dramatically influenced public opinion on stop and frisk.[207] With this backdrop, several videos of aggressive stops went viral.[208] The increased attention from the information generated through formal discovery and informal fact gathering, resulted in city council hearings. Local legislative advocacy, sometimes led by a city-wide coalition of police advocates, followed sporadic revelations from discovery material. The NYCLU led efforts to reform and expand authority for the Civilian Complaint Review Board.[209]

Public attention can foment gains for litigation—for example, by encouraging witnesses to come forward to support structural reform litigation.[210] This is precisely what happened in New York. In part due to the media attention around racial disparities in stop and frisk tactics, two officers came forward as whistleblowers.[211] NYPD officer Adrian Schoolcraft wore a recording device during weekly roll-calls in the infamous Bedford-Stuyvesant 81st precinct.[212] Officer Adhyl Polanco, a member of the NYPD's Black police officer organization, also recorded his supervisors instructing him to increase his numbers of UF-250s (code for increasing stops and frisks or summonses), the assumption being not to worry about individualized, articulable suspicion, as required by the Constitution. Local newspapers also exposed supervisors demanding beat cops to "clean up corners" and "take back the streets"—a prescient phrase connected to the Street Crimes Unit and the 1990s era of extreme police violence.

207. Ray Rivera conducted an in-depth analysis of stop and frisk data and ran a series of articles in the fall of 2012. *E.g.*, Ray Rivera, *Pockets of City See Higher Use of Force During Police Stops*, N.Y. TIMES (Aug. 15, 2012), https://www.nytimes.com/2012/08/16/nyregion/in-police-stop-data-pockets-where-force-is-used-more-often.html [https://perma.cc/V6GA-NRD3].

208. Nicholas K. Peart, *Why Is the NYPD After Me?* N.Y. TIMES (Dec. 17, 2011), https://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html [https://perma.cc/A7Z7-4AXX].

209. *E.g.*, Testimony of Chris Dunn, *supra* note 202.

210. *E.g.*, Schwartz, *supra* note 24, at 1151 ("[L]awsuits can create nonfinancial pressures by generating publicity about allegations of misconduct and by revealing previously unknown information about the details of that misconduct.").

211. Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE (N.Y.) (May 4, 2010), https://www.villagevoice.com/2010/05/04/the-nypd-tapes-inside-bed-stuys-81st-precinct [https://perma.cc/ZD2T-R7AQ].

212. *Id.*

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Both police officers believed the pressure they were under to increase police activity was wrong, and the public outcry against overzealous policing gave them the courage to report the abuse of authority to the media.[213] The recordings were entered into evidence during the *Floyd* trial and were important to the plaintiffs' theory of quota-driven (rather than constitutionally based) stop and frisk practices.

Plaintiffs gathered evidence from multiple sources. Formal discovery tools were essential, as were advocates and organizers who provided information before discovery became available. In addition, the public profile of the case made it possible for plaintiffs to discover critical information informally and through media revelations.

C. ADDRESSING DOCTRINAL HURDLES IN *FLOYD*

This section divides *Floyd's* pre-remedies litigation into the doctrinal hurdles discussed in Part I: standing (*Lyons*), police practice claims (*Monell* and its progeny), and class certification (*Wal-Mart Stores, Inc.*). The City of New York followed the Supreme Court's pro-defendant playbook on how to dismiss structural reform cases against police departments; and the plaintiffs, at each stage, mustered the evidence necessary to overcome the procedural and evidentiary hurdles.[214] The close examination that follows brings to light possibilities and challenges for future structural police reform litigants.

1. Standing To Obtain an Injunction: *Lyons*

As in other structural reform police actions, particularly those where plaintiffs challenge an unwritten policy, the City of New York argued plaintiffs lacked Article III standing to seek injunctive relief.[215] The issue arose as part of defendants' re-

213. *Id.*; Graham Rayman, *NYPD Tapes 5: The Corroboration*, VILLAGE VOICE (Aug. 25, 2010), https://www.villagevoice.com/2010/08/25/nypd-tapes-5-the-corroboration [https://perma.cc/J6WB-FJUD]; Nathan Tempey, *Whistleblower Cop Adrian Schoolcraft Settles Lawsuit Against City For $600K*, GOTHAMIST (Sept. 30, 2015), http://gothamist.com/2015/09/30/whistleblower_cop_adrian_schoolcraf.php [https://perma.cc/G9Y5-P9AJ].

214. Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *Floyd I*, 813 F. Supp. 2d 417 (S.D.N.Y. 2011) (No. 1:08-cv-01034), ECF No. 135; Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, *Floyd I*, 813 F. Supp. 2d 417, ECF No. 166.

215. Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification at 19–23, *Floyd III*, 861 F. Supp. 2d 274 (S.D.N.Y. 2012) (No. 1:08-cv-

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sponse to plaintiffs' class certification request. Similar to the defense's motion in *Daniels*, defendants argued that three of the four named plaintiffs lacked standing because they did not have a present real or immediate injury and could not show a risk of future harm.[216] Defendants did not, however, contest the standing of the fourth named plaintiff, David Ourlicht.[217]

The district court determined that Mr. Ourlicht overcame the repeated harm, speculative harm, and innocence barriers, thereby satisfying Article III standing on behalf of the plaintiffs' class.[218] First, unlike Mr. Lyons, "who alleged only one past instance of unconstitutional police behavior," Mr. Ourlicht had been stopped three times in 2008 and once after the lawsuit was filed in 2010.[219] As the court noted, "[t]he possibility of recurring injury ceases to be speculative when actual repeated incidents are documented."[220] Moreover, the court found that "the frequency of alleged injuries inflicted by the practices at issue here create[d] a likelihood of future injury sufficient to address any standing concerns."[221] The court distinguished the ten deaths attributed to the LAPD's chokehold policy from the NYPD's 2.8 million stops over six years, of which at least 60,000 were unconstitutional (thirty facially unconstitutional stops a day).[222] Judge Scheindlin determined the repeated nature of the harm provided an additional basis to overcome the speculative harm barrier.[223] Mr. Ourlicht's risk of future injury was "real and immediate," and "not 'conjectural' or 'hypothetical.'"[224]

01034), ECF No. 176 [hereinafter Defendant's Brief, ECF No. 176] (arguing plaintiffs were inadequate class representatives for three reasons: (1) their failure to meet the standing requirement; (2) several officers remained unidentified John Doe defendants; and (3) none of the named class representatives were Latino).

216. *Id.* at 19–21.

217. Defendants reserved the ability to raise Mr. Ourlicht's standing later. *Id.*

218. *See Floyd IV*, 283 F.R.D. 153, 169–70 (S.D.N.Y. 2012) ("The presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 53 n.2 (2006)).

219. *See id.*

220. *Id.* at 169 (citing Nicacio v. United States Immigration & Naturalization Serv., 768 F. 2d 1133, 1136 (9th Cir. 1985)).

221. *Id.* at 170.

222. *Id.*

223. *Id.*

224. *Id.* at 169 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

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Finally, the innocence barrier was satisfied. Unlike Mr. Lyons's situation, where a burned out tail light led to a stop and an officer's alleged provocation, Mr. Ourlicht's encounters did not depend on arrests for unlawful conduct.[225] The court observed that Mr. Ourlicht was stopped while engaging in everyday life—walking down the sidewalk, sitting on a bench outside a friend's home, and getting into a car.[226] His inability to avoid future harm by "following the law" distinguished the case from *Lyons*.[227] He satisfied Article III standing for the class.

2. Municipal Liability: *Monell*

Municipal liability was litigated twice, first at summary judgment and again at trial. Defendants requested summary judgment for the plaintiffs' municipal liability claims against the City of New York—failure to train, supervise, monitor or discipline police officers.[228] As in *Daniels*, the *Floyd* plaintiffs alleged, first, that the NYPD had conducted stops and frisks without reasonable suspicion in violation of the Fourth Amendment, and, second, that the NYPD had conducted stops and frisks on the basis of race in violation of the Fourteenth Amendment; defendant was liable as a municipality under *Monell* and its progeny.[229] However, the court ultimately denied summary judgment for plaintiffs' *Monell* claims based on a number of disputed factual issues, including those presented within each party's statistical expert's report, discussed later in the case study, and the specific written and unwritten policies related to training and supervision.[230]

In considering the defendants' motion for summary judgment, the district court reviewed voluminous submissions from the parties, required the parties to enter mediation, and ordered subsequent briefing to narrow the disputed material issues of fact. The City of New York had followed the Supreme Court's

225. *Id.* at 169–70.

226. *Id.* at 170.

227. *Id.*

228. *Floyd I*, 813 F. Supp. 2d 417, 429 (S.D.N.Y. 2011). Defendants also requested summary judgment for the plaintiffs' Fourth and Fourteenth Amendment claims and sought to dismiss the individual stops on the basis of qualified immunity. *Id.* at 444; *see also* Floyd v. City of New York (*Floyd II*), 813 F. Supp. 2d 457, 470 (S.D.N.Y. 2011) (reinstating Floyd's claims arising out of 2008 stop).

229. *Floyd I*, 813 F. Supp. 2d at 429.

230. *Id.* at 446–49, 453, 456.

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roadmap in seeking to dismiss plaintiffs' municipal liability (*Monell*) claims. For each of the "failure to" counts, defendants presented their written protocols and procedures and submitted declarations from high level officials as evidence of adequate training, supervision, discipline, and monitoring. In response, plaintiffs pointed to the practices on the ground to show disputed issues of fact.[231]

Judge Scheindlin thus oversaw a somewhat dizzying back-and-forth between the parties at the summary judgment stage. Each party attacked and parried with contradictory documentary and testimonial support about the NYPD's practices of training, supervising, monitoring, and disciplining its officers for stops and frisks conducted in violation of the Fourth Amendment.[232] The court aptly summarized the evidentiary battle:

> For every officer whose testimony defendants cite in support of the existence of such policies, plaintiffs respond with testimony from another officer who testified that he has never heard of, seen, or been instructed with regard to those policies. While defendants have submitted extensive written and audiovisual training materials as evidence that NYPD training is sufficient, plaintiffs have submitted written and audio evidence that there is significant pressure on commands and officers to produce stops, summonses, and arrests, whether or not they are constitutionally justified, in contravention of those training materials. Defendants describe numerous forms and layers of disciplinary procedure, while plaintiffs present evidence that little discipline is actually meted out.[233]

Take as an example the NYPD's monitoring practices under its Quality Assurance Division (QAD). In support of their motion for summary judgment against plaintiffs' failure to monitor claim, defendants put forward three existing audit protocols; plaintiffs countered by showing the insufficiency of the monitoring protocols to actually prevent unconstitutional stops and frisks. First, defendants argued the NYPD conducted audits on a random department-wide basis.[234] But plaintiffs responded that the NYPD did not actually use the audit to determine

231. *Id.* at 429 n.94 ("Defendants rely primarily on their formal written policies, and do not in any meaningful way dispute Plaintiffs' evidence regarding the *practices* of NYPD supervisors and officers with respect to training, supervision, monitoring and discipline." (quoting Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 20, *Floyd I*, 813 F. Supp. 2d 417)).

232. The evidence submitted at summary judgment is too voluminous to summarize in this Article.

233. *Floyd I*, 813 F. Supp. 2d at 429.

234. *Id.* at 431.

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whether stops were based on reasonable suspicion.[235] The stated purpose of the audits was determining the constitutionality of stops and frisks, but the NYPD commanders responsible for QAD testified at depositions that the audit only tested whether officers *completed* the stop and frisk forms (UF-250s).[236] As Judge Scheindlin ultimately found after trial, completing the form does not correlate to following the Fourth Amendment requirements for a stop and frisk.[237]

Finally, to review the constitutionality of police activity, the QAD required its inspectors to review the memobooks police officers used to document their activity.[238] Inspectors should cross-check the reported activity with the UF-250 forms.[239] By policy, however, an officer is only required to document the same information in the memobook that is reported on the UF-250 form, thereby providing auditors with little additional information to test the legal sufficiency of a stop, frisk, or use of force documented on the UF-250 form.[240] Defendants maintained that "[b]ecause the information indicated by the checkmarks on the UF250 represents substantive justification for a stop, the audit confirms that a UF250 with the required checkmarks indicates a valid stop, absent indicia to the contrary on the remainder of the form."[241] Thus, and once again, QAD's review only ensured completion of the UF-250 form, rather than determining the legality of an officer's stops and frisks.

Ultimately, Judge Scheindlin held that the plaintiffs had successfully demonstrated numerous issues of fact and denied summary judgment.[242] The lessons for other cases are generalizable. Plaintiffs must use the discovery process with vigor, determine if the policies on paper match the practices of police officers on the beat, and analyze any available hard data on police interactions with potential class members. When litigating with a department as large as the NYPD, shoring up proof that un-

235. *Id.* at 432.

236. *See id.* at 432.

237. *See Floyd V*, 959 F. Supp. 2d 540, 582–83 (S.D.N.Y. 2013).

238. *See Floyd I*, 813 F. Supp. 2d at 434.

239. *See id.*

240. *See id.*

241. Defendants' Reply Memorandum of Law in Further Support of Their Motion for Summary Judgment at 11 n.23, *Floyd I*, 813 F. Supp. 2d 417 (No. 1:08-cv-01034), ECF No. 141.

242. *See Floyd I*, 813 F. Supp. 2d. at 456.

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constitutional practices are pervasive throughout the department is also critical to overcoming the "widespread practice" barrier to municipal liability.

On the Fourteenth Amendment question of racial disparity in stops and frisks, defendants pointed to *McKleskey v. Kemp* to suggest that discretionary judgments (such as the exercise of stop authority) within the criminal justice system "demand exceptionally clear proof before we would infer that the discretion had been abused."[243] Defendants essentially suggested plaintiffs must prove all stops were discriminatory in order to substantiate an Equal Protection claim. They cited *Yick Wo v. Hopkins* and *Gomillion v. Lightfoot* to argue that the racial disparities between stops and frisks of whites, on the one hand, and Blacks and Latinos/as, on the other hand, were insufficient to prove discriminatory purpose.[244]

Defendants further argued, and Judge Scheindlin agreed, that Professor Jeffrey Fagan's statistical analysis, representing an essential piece of evidence for the plaintiffs, was insufficient on its own to prove discrimination.[245] However, Judge Scheindlin found that other evidence, beyond the expert's analysis, strongly supported plaintiffs' contentions that the NYPD knew of its officers' discriminatory practices.[246] The plaintiffs' evidence included the prior, nearly identical, *Daniels* litigation, a labor complaint filed by officers alleging they were being compelled to stop and frisk based on a quota to avoid negative performance reviews, the New York Attorney General's 1999 report demonstrating racial disparities in stops and frisks, and the NYPD's own commissioned study from the RAND Corporation.[247] Altogether they supported the theory that the NYPD had sufficient notice of a problem and had failed to correct it.[248]

In sum, Judge Scheindlin's August 17, 2011 summary judgment opinion and order determined that plaintiffs had established triable issues of fact as to whether: (i) the NYPD engaged

243. Defendants' Memorandum, ECF No. 135, *supra* note 214, at 23 (quoting McKleskey v. Kemp, 481 U.S. 279, 297 (1987)).

244. *See id.* at 24 (arguing that the case did not amount to the same level of disparity as in Gomillion v. Lightfoot, 364 U.S. 339 (1960) or Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

245. *See Floyd I*, 813 F. Supp. 2d at 452–53.

246. *See id.*

247. *See id.* at 449, 451.

248. *See id.* at 449, 453.

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in a widespread practice of suspicionless stops and frisks;[249] (ii) NYPD supervisors had a widespread custom or practice of imposing quotas on enforcement activity, and such quotas were a "moving force" behind the widespread suspicionless stops;[250] (iii) the NYPD had intentionally engaged in a widespread pattern and practice of race-based stops targeting primarily Black and Latino/a pedestrians;[251] and (iv) the NYPD's internal stop and frisk audits were so inadequate as to demonstrate a deliberate indifference to the need to monitor officers adequately to prevent a widespread pattern of suspicionless stops.[252]

At trial, the court revisited whether the plaintiffs had satisfied the requirements to establish municipal liability. The *Floyd* plaintiffs demonstrated—through data, official policy, and testimony elicited during cross-examination of high-level NYPD officials—that the "customs" or "practices" of unlawful stops and frisks were "sufficiently widespread that they had the force of law."[253] The evidence was voluminous. I provide here a few key points, including the statistical evidence presented through the testimony of Professor Jeffrey Fagan, to show the type of evidence plaintiffs marshaled to prove their claims:

- On the issue of indifference, plaintiffs chronicled a timeline of notice beginning in 1999 with the N.Y. Attorney General's scathing report uncovering racial disparities in stops and frisks and use of force.[254] For example, the NYPD failed to collect accurate data, or use data in its possession, to prevent unconstitutional stops.[255] This same failure was raised in the 2007 report by the RAND Corporation, which the New York Police Foundation had commissioned to study and make recommendations to improve its racial disparity in stops and frisks.[256]
- High-level officials were found to have deliberately maintained, and even ratcheted up, widespread Fourth Amendment violations.[257] The pressure to perform was evident from "numerous, mutually reinforcing sources of

249. *Id.* at 446–48.
250. *Id.* at 448–49.
251. *Id.* at 451–53.
252. *Id.* at 456.
253. *See Floyd V*, 959 F. Supp. 2d 540, 658 (S.D.N.Y. 2013).
254. *Id.* at 658–59.
255. *See id.*
256. *Floyd I*, 813 F. Supp. 2d 417, 434–35.
257. *Floyd V*, 959 F. Supp. 2d at 591–92.

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evidence at trial including live testimony, depositions, roll call recordings, internal NYPD documents, and survey results."[258]

- Senior NYPD officials conceded to knowing of failures in training, discipline, supervision and monitoring, but did nothing to improve them to protect class members against unconstitutional stops.[259]

Professor Fagan's expert testimony was central to proving a widespread practice of deliberate indifference to Fourth and Fourteenth Amendment constitutional violations at trial. To evaluate how often the NYPD's stops lacked reasonable suspicion under the Fourth Amendment, he analyzed a database of the NYPD's UF-250 forms.[260] The UF-250 form utilizes check boxes where officers may check off the basis for stops performed, and in a different portion of the form, the bases for frisks and searches. He categorized each stop as "apparently justified" (based on reasonable suspicion),[261] "apparently unjustified" (lacking reasonable suspicion),[262] or "ungeneralizable" (insufficient information to make a determination).[263]

According to Fagan's analysis, six percent of stops were legally unjustified.[264] While the City maintained that even if this were true, this would not "necessarily" constitute a widespread pattern requiring a remedy,[265] the court pointed out that this

258. *Id.* at 592.

259. *See id.* at 589–90, 604.

260. *Id.* at 579.

261. *Id.* For this determination, he relied on any of the following Side One boxes alone: (1) Actions Indicative Of "Casing" Victims Or Location, (2) Actions Indicative Of Engaging In Drug Transaction ("Drug Transaction"), and (3) Actions Indicative Of Engaging In Violent Crimes ("Violent Crime"). The remainder of Side One boxes (except the "Other" box) were categorized as conditionally justified: (4) Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc., (5) Suspicious Bulge/Object (Describe), (6) Actions Indicative Of Acting As A Lookout; (7) Fits Description; (8) Furtive Movements; and (9) Wearing Clothes/Disguises Commonly Used In Commission Of Crime. If "Other" is the only box checked, Fagan categorized the stop as ungeneralizable. *Id.*

262. *Id.* For this determination, Fagan looked for: (a) no Side One stop category warranting "apparently justified" treatment indicated and only one Side Two additional circumstance checked, or (b) only one Side One stop indicated and no Side Two circumstance checked. *Id.*

263. *Id.*

264. *Id.* at 580.

265. *Id.* at 659.

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figure represents 200,000 stops.[266] "Even this number of wrongful stops produces a significant human toll."[267] The figure was conservative according to Professor Fagan, and the court further reviewed combinations of justifications he did not categorize as apparently unjustified (e.g., suspicious bulge and furtive movement).[268]

For several reasons, the court agreed with his determination that the two most frequently checked stop factors on the form used to document stops and frisks—furtive movements and high crime area—were unreliable bases for suspecting criminality.[269] First, despite the frequency with which these boxes were checked and the low number of arrests following stops (only six percent), stops were more likely to result in arrest when neither stop factor was checked.[270] Coupled with deposition testimony, this conclusion supported the view that officers overused the subjective factors and were not trained on the meaning of such factors or the Fourth Amendment standard.[271] It was further used to show a failure to supervise officers in stop and frisk practices.[272] Second, the court noted—though not with any heavy reliance—psychological research indicating that unconscious racial bias may play a role in police officers' overuse of the furtive movement stop factor.[273] For all stops analyzed, "Furtive Movements," was checked as a basis for the stop 48% of the time for Black suspects, and 45% of the time for Hispanic suspects, whereas only 40% of the time for white suspects.[274] Third, "High Crime Area" had been interpreted so broadly by some officers that it did very little to justify a stop.[275] Fagan's analysis showed that regardless of the amount of crime in a precinct or census tract as measured by crime complaints, officers checked this stop basis roughly 55% of the time.[276] When questioned at trial, one

266. *Id.* at 582.

267. *Id.*

268. *Id.* at 559, 578–79.

269. *Id.* at 580–82. This is significant because similar subjective justifications are likely used in other jurisdictions and his analysis may support corollary studies elsewhere.

270. *Id.* at 582.

271. *Id.* at 582, 613–14.

272. *See id.* at 613, 617.

273. *See id.* at 580–81.

274. *Id.* at 581.

275. *See id.*

276. *See id.*

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officer explained that when checking "High Crime Area" to justify the stop of a class member witness, the area he referred to was the entire borough of Queens.[277]

In addition, Professor Fagan's expert testimony supported the plaintiffs' theory that officers develop "scripts" for checking off stop factors.[278] Officer Gonzalez engaged in a high number of stops and checked the same four boxes on 99% of his UF-250 forms.[279] And Officer Dang, among the highest stoppers in the third quarter of 2009, checked "area has high incidence of reported offense of type under investigation" in 75% of stops, even though the stop locations were widely dispersed throughout a racially and socioeconomically heterogeneous precinct.[280] Further support for the "script" theory came from testifying officers.[281]

Plaintiffs' Fourteenth Amendment claim asserted that Blacks and Hispanics are stopped more frequently than they would be if officers did not discriminate on the basis of race.[282] The question for the statistical experts was: "[I]s there statistical evidence of racial discrimination in the NYPD's stop practices?"[283] The court compared the rates of Blacks and Hispanics stopped to a standard point of reference, known as a "benchmark."[284] The court adopted Professor Fagan's benchmark analysis.[285] He used population and reported crime as benchmarks for understanding the racial distribution of police-citizen contacts.[286]

Based on Professor Fagan's benchmark analysis, the court found the NYPD carried out more stops in predominantly Black and Hispanic areas, even when controlling for other variables.[287] The strongest predictor for stops in a geographical area (precinct or census tract) was the racial make-up of that area, not the

277. *See id.* at 581 n.161.
278. *See id.* at 581.
279. *See id.* at 582.
280. *Id.*
281. *Id.*
282. *See id.* at 583.
283. *Id.*
284. *See id.*
285. *Id.* at 584. Defendants' expert relied on crime suspect data—the rates at which various races appear in suspect descriptions from crime victims—which the court found unreliable for a number of reasons. *See id.* at 584–86.
286. *Id.* at 583.
287. *Id.* at 584.

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known crime rate.[288] This same finding applied across precincts and census tracts and over time.[289] Moreover, regardless of unit of measurement, Blacks and Hispanics were more likely than whites to be stopped, even after controlling for racial make-up, crime rate, patrol strength, and socioeconomic characteristics.[290] This was true even in white areas and areas with low crime rates.[291] Blacks were 30% more likely than whites to be arrested after a stop for the same suspected crime, even after controlling for other variables.[292] Blacks were 14% more likely, and Hispanics 9% more likely, than whites to be subjected to use of force.[293] The court further found stops and frisks were significantly more frequent for Black and Hispanic residents than for whites, even after adjusting for local crime rates, race, number of officers in a particular geographic area, and other socioeconomic factors.[294] Thus, relying on statistical evidence as well as testimony from dozens of witnesses, the court held the NYPD did conduct stops and frisks in a racially discriminatory manner.

In brief, the court found that the municipality was liable under section 1983 through its indifference to unconstitutional stops, frisks, and searches. The plaintiffs presented evidence, and the court agreed, that the City was on notice of widespread racial disparities in stops since at least 1999.[295] The ongoing nature of the violations, testimony of officers up the chain of command, the history of recalcitrance despite study after study reinforcing the fact of discriminatory policing, and the settlement agreement in *Daniels* all supported a finding of deliberate indifference and a longstanding, widespread deprivation of plaintiffs' constitutional rights.

3. Class Certification: *Wal-Mart Stores, Inc.*

Only a few months after the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, *Floyd* plaintiffs requested, and were ultimately granted, class certification.[296] At the time, it was not

288. *Id.*
289. *See id.* at 588–89.
290. *Id.* at 560.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *See* Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, ECF No. 166, *supra* note 214; *see also Floyd III*, 861 F. Supp. 2d 274

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evident whether *Wal-Mart Stores, Inc.* (a Title VII employment matter for damages) would influence courts reviewing cases such as *Floyd* (a Rule 23(b)(2) structural reform litigation without class-wide damage claims).[297]

To obtain treatment as a class action, Rule 23(a) requires that "there are questions of law or fact common to the class."[298] The Supreme Court in *Wal-Mart Stores, Inc.* determined that the questions must be "apt to drive the resolution of the litigation."[299] The Court applied dicta from a footnote in *General Telephone Co. v. Falcon*[300] (another Title VII case), and decided that when challenging the disparate impact of a policy or practice involving decentralized and subjective decision-making, plaintiffs must show "[s]ignificant proof" of a general policy of discrimination to meet the commonality requirement.[301] Plaintiffs "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." at the pleading stage.[302]

The *Floyd* plaintiffs identified four common questions of law and fact that would resolve all *Monell* claims against the City on a class-wide basis:[303]

- Does the NYPD have a policy or practice of stops and frisks without reasonable suspicion?[304]

(S.D.N.Y. 2012). The plaintiff class was defined as:

> All persons who since January 31, 2005 have been, or in the future will be, subjected to the New York Police Department's policies and/or widespread customs or practices of stopping, or stopping and frisking, persons in the absence of a reasonable, articulable suspicion that criminal activity has taken, is taking, or is about to take place in violation of the Fourth Amendment, including persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment.

Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, ECF No. 166, *supra* note 214, at 1.

297. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

298. FED. R. CIV. P. 23(a).

299. *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 83 N.Y.U. L. REV. 97, 132 (2009)).

300. Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982).

301. *See Wal-Mart Stores, Inc.*, 564 U.S. at 352–53 (quoting *Falcon*, 457 US. at 159 n.15); *supra* Part I.C.

302. *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (emphasis in original).

303. *See* Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, ECF No. 166, *supra* note 214, at 12–13.

304. *Id.* at 13.

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- Does the NYPD have a policy or practice of stopping Black and Latino persons on the basis of race without reasonable suspicion?[305]
- Do the NYPD's department-wide auditing and self-inspection protocols and procedures demonstrate a deliberate indifference to the need to monitor officers adequately to prevent widespread pattern of suspicionless and race-based stops?[306]
- Is the NYPD's policy and practice of imposing productivity standards and/or quotas on stops and frisks, summons, and other enforcement activity of officers a moving force behind widespread suspicionless stops by NYPD officers?[307]

For these questions to resolve matters on a class basis at trial, however, plaintiffs must demonstrate policies, practices, or customs of suspicionless or racially discriminatory stops and frisks. In their attempt to meet the "significant proof of a general policy" standard, plaintiffs provided statistical and anecdotal evidence in the form of fourteen class member declarations, deposition testimony, expert statistical analysis, and police policies and procedures.[308]

In response, the City of New York argued that, as in *Wal-Mart Stores, Inc.*, plaintiffs' evidence failed to link various individual officer's actions with the NYPD's own policies.[309] Just as each Wal-Mart supervisor makes his or her own individual pay and promotion decisions, each officer, defendants suggested, made his or her own independent decision to stop a pedestrian.[310] One officer's bad decision had no bearing on other officers, especially for officers in different patrol units, precincts, or boroughs.[311] Thus, defendants urged, the statistical evidence from Professor Fagan's expert report submitted in support of class certification, did not demonstrate "the glue" holding to-

305. *Id.* at 12–13.

306. *Id.* at 13.

307. *Id.*

308. *Id.* at 17–20.

309. Defendant's Brief, ECF No. 176, *supra* note 215, at 7 (pointing to the NYPD's written policy against racial profiling and training regarding the Fourth Amendment standard for reasonable suspicion).

310. *Id.* at 8.

311. *Id.*

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gether the millions of individual decisions to stop and frisk pedestrians, and failed to establish that the NYPD had a written policy amounting to racial profiling.[312]

Plaintiffs, however, countered that the evidence was not as disaggregated as defendants characterized it to be. In fact, Professor Fagan's declaration "point[ed] to evidence that every precinct, regardless of racial composition or crime rate, has similar rates of racial disparity in stop rates" and "show[ed] that race-based and otherwise suspicionless stops occur in every area of the [c]ity."[313] The expert opinions thus indicated a centralized "glue" holding together officers' decisions in every precinct or borough. This argument seemed like a strong one: Even the *Floyd* defendants conceded that the NYPD employed a "hierarchical supervisory structure to effect and reinforce its department-wide policies" and adopted a "centralized source" for its policies.[314]

The City, however, also argued that the existence of a centralized policy was not detrimental to their opposition to class certification because the NYPD's policy was one of exercising discretion rather than discrimination. Even though the stop and frisk practices stem from a department-wide policy, "individual officers' decisions to make stops were analogous to the Wal-Mart policy of allowing discretion to supervisors over employment matters."[315] *Floyd*'s defendants urged the court to determine that, just as in *Wal-Mart Stores, Inc.*, the "invalidity of an individual officer's judgment about conducting a stop will do nothing to demonstrate the invalidity of another's."[316] Indeed, defendants argued that the NYPD's policy was "essentially a policy against having a uniform practice" even though the same brief acknowledged the "centralized source" for its stop and frisk policy.[317]

In a key portion of the *Floyd* class certification decision, applicable to other policing litigation, the court rejected this argument, finding Wal-Mart's policy distinguishable.[318] According to Judge Scheindlin, "the exercise of judgment in implementing a

312. *See id.* at 5.

313. Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, ECF No. 166, *supra* note 214, at 14.

314. *See* Defendant's Brief, ECF No. 176, *supra* note 215, at 8.

315. *Id.* at 8 n.9.

316. *Id.* at 8.

317. *Id.* at 8 & n.9.

318. *See Floyd IV*, 283 F.R.D. 153, 174 (S.D.N.Y. 2012).

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centralized *policy*" is clearly different than "the exercise of discretion in formulating a local store policy or practice."[319] In *Wal-Mart Stores, Inc.*, "the putative class members were subjected to an enormous array of *different* employment practices," according to the Supreme Court.[320] In *Floyd*, the same practice—stop and frisk—harmed all class members.[321]

The City's most forceful argument challenged both plaintiffs' proffer of statistical evidence and the evidence itself. On the same day as their brief in opposition to class certification, defendants filed a motion to exclude the evidence of plaintiffs' expert Professor Fagan.[322] In both the *Daubert* challenge to Professor Fagan's expertise and its class certification opposition, defendants attacked the reliability of the statistical regressions used—arguing that they failed to appropriately account for stops based on suspect descriptions—and the expert's categorization of "justified," "unjustified," and "indeterminate" stops.[323]

Concurrent challenges to expert testimony and class certification will continue to be defining features of structural reform litigation following *Wal-Mart Stores, Inc.* Interestingly, the *Monell* theories and class certification work hand-in-hand for police litigation. After *Wal-Mart Stores, Inc.*, class certification requires some proof of a central decision-maker, and municipal liability is permitted, at least under one theory, where a central decision-maker enforces an illegal practice. Thus, if the plaintiffs' expert report was excluded, defendants assumed the plaintiffs could not show centrality of decision-making to sustain class action status.

The court, following the Supreme Court's suggestion in *Wal-Mart Stores, Inc.* to look to the merits at the class certification stage,[324] held a *Daubert* hearing to review Professor Fagan's

319. Defendant's Brief, ECF No. 176, *supra* note 215, at 8 & n.9.

320. *Floyd IV*, 283 F.R.D. at 172.

321. *See id.* at 173–75.

322. Memorandum of Law in Support of Defendants' Motion To Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan, *Floyd III*, 861 F. Supp. 2d 274 (S.D.N.Y. 2012) (No. 1:08-cv-01034), ECF No. 179. The court held a *Daubert* hearing and issued an order granting, in part, defendants' motion, prior to deciding plaintiffs' request for class certification. *See Floyd III*, 861 F. Supp. 2d at 278–79.

323. Memorandum of Law in Opposition to Defendants' Motion To Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan at 2–4, *Floyd III*, 861 F. Supp. 2d 274 (No. 1:08-cv-01034), ECF No. 187.

324. *Floyd IV*, 283 F.R.D. at 160–61.

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qualifications and methodology.[325] On the Fourth Amendment analysis, Judge Scheindlin agreed with Professor Fagan that NYPD officers engaged in at least 170,000 unlawful stops between 2004 and 2009, and 62,000 stops were facially unlawful because police officers only provided "furtive movement" as a justification for the stop.[326] She deemed Fagan's methodology sound for the Fourteenth Amendment subclass, which used precinct, neighborhood, and census tracts.[327]

Defendants raised another challenge common in structural litigation and class actions: they attacked the number of individual stops plaintiffs put forward (approximately 20 out of 2.8 million) as inadequate to warrant an inference of a common practice of unlawful stops and frisks.[328] Judge Scheindlin rejected defendants' argument and agreed with plaintiffs that "a class wide proceeding here [would] 'generate common answers' to these questions that are 'apt to drive the resolution of the litigation.'"[329] Her opinion noted that the NYPD had conceded the uniformity of its stop and frisk practices.[330] Further, the court pointed to the defendants' own facts in their summary judgment motion, which indicated that the NYPD's policies were centralized and hierarchical.[331] Therefore, the statistical evidence, coupled with the deposition testimony of NYPD officials and supervisors, demonstrated, unlike *Wal-Mart Stores, Inc.*, that the stop and frisk practices occurred in all areas of New York City.

In sum, based on the evidence presented, the court found that a preponderance of the evidence showed the existence of a Fourth Amendment class and a Fourteenth Amendment subclass, and therefore granted certification. Plaintiffs demonstrated all requirements of Rule 23(a) and (b)(2). The hierarchical nature of the NYPD's stop and frisk practices, statistical evidence, and anecdotal evidence allowed plaintiffs to jump the certification hurdle.

325. *Floyd III*, 861 F. Supp. 2d at 279–90.
326. *Floyd IV*, 283 F.R.D. at 167
327. *Id.* at 167, 168.
328. Defendant's Brief, ECF No. 176, *supra* note 215, at 9.
329. *Floyd IV*, 283 F.R.D. at 175.
330. *Id.* at 174.
331. *Id.*

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4. Jumping Hurdles at Trial and Remedy

After five years of pre-trial litigation and nine weeks of trial,[332] Judge Scheindlin determined the NYPD had violated the Fourth and Fourteenth Amendments through its "unwritten policy of targeting 'the right people' for stops" and its high-level senior officials' deliberate indifference to the discriminatory use of stop and frisk.[333] The majority of stops were justified in police paperwork through specious categories such as "high crime area," "furtive movement," and "suspicious bulge"[334]—these broad, vague, and subjective categories are the type *Terry* and subsequent lower court decisions disfavor. Judge Scheindlin granted the *Floyd* plaintiffs' request for injunctive relief.[335]

The story of *Floyd* and New York's stop and frisk practices did not end, however, with the close of trial and a finding of liability. As with most structural reform litigation, the granting of injunctive relief also marked the start of another battleground: enforcement and implementation of remedies. Judge Scheindlin's order first recognized a number of reforms that required speedy implementation as part of an "Immediate Reform" process.[336] Second, the order also called for a pilot program using body cameras to increase police accountability. Officers in at least five precincts across the city would wear body cameras to record street encounters.[337] Third, the court appointed an independent monitor, Peter Zimroth, to oversee reform of the NYPD's practices and bring them into compliance with the law.[338]

In an interesting departure from remedial orders in civil rights cases, Judge Scheindlin ordered the initiation of a "Joint Remedial Process" between the parties and community members.[339] A facilitator would solicit additional solutions from impacted New Yorkers on how the NYPD should further reform its

332. I have limited the discussion of the trial testimony and evidence when compared to its significance. I made this decision because the focus of this Article is to show that police structural reform litigation can withstand the various procedural hurdles.

333. *Floyd V*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013).

334. *Id.* at 559, 575, 578, 580–83.

335. Floyd v. City of New York (*Floyd VI*), 959 F. Supp. 2d 668, 671–75 (S.D.N.Y. 2013).

336. *Id.* at 678–84.

337. *Id.* at 684–86.

338. *Id.* at 688–89.

339. *Id.* at 686–88.

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practices. The process would involve the plaintiffs' class, community stakeholders, local elected officials, law enforcement representatives, ethnic and religious organizations, academics, and NYPD officials. Judge Scheindlin highlighted the importance of community input, writing that "[n]o amount of legal or policing expertise can replace a community's understanding of the likely practical consequences of reforms in terms of both liberty and safety."[340] She then appointed the Executive Director of the Vera Institute, a reputable criminal justice research and policy organization, as a "Facilitator" to guide the joint remedial process.[341] The decision, and the remedial order including a community-oriented process for developing reforms, was considered a major victory for the broader campaign for police accountability and part of a larger process to hold the NYPD accountable.[342] Communities United for Police Reform and the Black, Latino, and Asian Caucus of the city council were active in the pre-trial phase with amicus briefs, and at trial by organizing constituent groups to watch trial every day.[343]

The 2012 election of Bill de Blasio as the next mayor of New York may have rescued the results of the litigation. De Blasio ran on rejecting the strategies of the Bloomberg and Giuliani administrations and promising to address stop and frisk.[344] Thus, the de Blasio administration agreed to drop the City's appeal of Judge Scheindlin's decisions and begin the reform and joint remedial processes immediately after he took office. The police unions, however, opposed Mayor de Blasio's decision and attempted

340. *Id.* at 686. Judge Scheindlin enlisted academics from New York area law schools to serve on an advisory committee to assist with the remedial process. *Id.* at 687.

341. *Id.* at 687–88.

342. *See Joint Remedial Process in* Floyd v. City of New York*: What You Need To Know*, CTR. FOR CONSTITUTIONAL RIGHTS (June 23, 2014), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/timeline-floyd-v-city-new-york [https://perma.cc/4FRC-2KF9] (calling the ordered relief a "landmark community input process").

343. *See* Amicus Curiae Brief of Communities United for Police Reform (CPR) at 1–2, *Floyd V*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-1034(SAS)), ECF No. 377; Brief of Amicus Curiae the Black, Latino, and Asian Caucus of the Council of the City of New York in Further Support of Plaintiffs' Request to Include the Community in a Collaborative Process Towards Reform at 1–2, *Floyd V*, 959 F. Supp. 2d 540 (No. 08-1034(SAS)), ECF No. 378; *see also* Hyun-Kang, *supra* note 155.

344. *De Blasio Drops Appeal of 'Stop and Frisk,'* NPR (Jan. 30, 2014), https://www.npr.org/2014/01/30/268964572/de-blasio-drops-appeal-of-stop-and-frisk [https://perma.cc/VA26-K448].

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to derail the process. In October 2014, the United States Court of Appeals for the Second Circuit at last allowed the City to officially withdraw its appeal,[345] and the joint reform process officially began.

What unfolded after trial—withdrawal of the city's appeal, joint remedy process, resistance from city officials even under the progressive de Blasio administration, and dissatisfaction from plaintiffs and community groups—is its own story.[346]

III. *ORTEGA-MELENDRES V. ARPAIO*: MCSO CRIME SUPPRESSION SWEEPS

The next case study, *Ortega-Melendres v. Arpaio*, examines how systemic police reform litigation, largely involving vehicle stops, succeeded in the immigration context. This Part shows how plaintiffs successfully jumped the standing, municipal liability, and class action hurdles to obtain injunctive relief against a notoriously anti-immigrant sheriff in a hostile jurisdiction. To understand the relationship between information gathering prior to discovery and overcoming doctrinal barriers, this Part begins by describing anti-immigrant events and policies in Maricopa County, Arizona and nationwide that led community members to initiate litigation. The case study then closely examines how litigants overcame the specific doctrinal hurdles imposed by *Lyons*, *Monell*, and *Wal-Mart Stores, Inc.*

A. ARIZONA IMMIGRATION ENFORCEMENT PRACTICES AND CONTEXT

For nearly a quarter of a century, former Sheriff Joe Arpaio of Maricopa County, Arizona, was known for hard-nosed, tough-on-crime tactics.[347] Largely in response to anti-immigrant sentiment among Arizona residents in the last decade—and the broader populist anti-immigrant movement—Arpaio prioritized fighting alleged border-crossing "crime."[348]

345. Floyd v. City of New York, 770 F.3d 1051, 1054 (2d Cir. 2014).

346. This Article does not address what occurred in the remedial phase of the case beyond the prior brief summary, but another project will.

347. In June of 2005, the Associated Press quoted Sheriff Arpaio as saying, "I don't expect to concentrate on some guy in a truck with six illegals. . . . I want to go after the professional smugglers who do this for money, the top people." Ryan Gabrielson & Paul Gilbin, *Reasonable Doubt: Joe Arpaio's Evolution*, EAST VALLEY TRIB. (July 9, 2008), https://www.pulitzer.org/winners/ryan-gabrielson-and-paul-giblin [https://perma.cc/KYW2-93UB].

348. This was not always the case. *See* Robert Anglen & Yvonne Wingett,

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Arpaio's nativist turn was reflected in his actions shortly following the passage of S.B. 1372, also known as the "Coyote Law."[349] The Coyote Law had established human smuggling as a crime and penalized facilitating the transportation of migrants by suspected sex traffickers and smugglers.[350] Sheriff Arpaio decided to enforce the Coyote Law not only against drivers of vehicles engaged in human smuggling, but also against any of its passengers, including trafficking victims themselves.[351] To enforce the law, Arpaio established an "Illegal Immigration and Interdiction" unit, or the "Triple I Unit," within the Maricopa County Sherriff's Office (MCSO) to focus on immigration enforcement activities.[352] The Triple I Unit engaged in "saturation patrols," involving concentrated traffic stops in one area.[353] Within Triple I, he formed the Human Smuggling Unit, whose officers stopped cars for pretextual reasons, such as darkened license plate lights or overly tinted windows, to inspect vehicle drivers and passengers.[354] If there was any evidence that passengers paid for the ride, both driver and passenger were prosecuted under S.B. 1372 for felony conspiracy to commit human smuggling of themselves.[355]

Feds Question Freeing Reservist, ARIZ. REPUBLIC, Apr. 23, 2005, at B1 (discussing motivations behind the release of a man involved in a car chase in an attempted arrest of several Latinx U.S. citizens); Alexander Provan, *The Vigilante*, GQ (Oct. 13, 2009), https://www.gq.com/story/joe-arpaio-sheriff-phoenix-mexico-border-immigration [https://perma.cc/98QW-KKMY] (providing an in-depth discussion of the events catalyzing Arpaio's nativist turn).

349. Melissa Gira Grant & Debbie Nathan, *Trump Has Turned the War on Trafficking into a War on Immigrants*, APPEAL (Jan. 9, 2019), https://theappeal.org/trump-has-turned-the-war-on-trafficking-into-a-war-on-immigrants/ [https://perma.cc/Y3BR-8LR3] (explaining how the "Coyote Law" came about and opining that it "launched the career of Joe Arpaio"). Former Arizona Governor Janet Napolitano signed S.B. 1372 into law in March of 2005, and the law went into effect in July. UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES: AN ENCYCLOPEDIA OF THEIR EXPERIENCE 126 (Anna Ochoa O'Leary ed. 2014).

350. Grant & Nathan, *supra* note 349.

351. First Amended Complaint at 17–18, Ortega-Melendres v. Arpaio (*Ortega IV*), 836 F. Supp. 2d 959 (D. Ariz. 2011) (No. CV-07-02513-PHX-GMS), ECF No. 26.

352. *Id.* at 6–7.

353. Ryan Gabrielson & Paul Giblin, *Reasonable Doubt: Sweeps Break the Rules*, EAST VALLEY TRIB. (July 11, 2008), https://www.pulitzer.org/winners/ryan-gabrielson-and-paul-giblin [https://perma.cc/KYW2-93UB].

354. Ryan Gabrielson & Paul Giblin, *Reasonable Doubt: At What Cost?*, EAST VALLEY TRIB. (July 9, 2009), https://www.pulitzer.org/winners/ryan-gabrielson-and-paul-giblin [https://perma.cc/KYW2-93UB].

355. *Id.* The practice of charging individuals with conspiracy to smuggle

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Many of the officers within the Human Smuggling Unit were certified under the controversial 287(g) agreement.[356] Since August 14, 2007, when Arpaio and the MCSO entered into an agreement with the United States Immigration and Customs Enforcement (ICE) pursuant to section 287(g) of the Immigration Nationality Act,[357] 160 MCSO personnel were authorized to perform certain federal immigration enforcement functions. The scope of duties included stopping, arresting, and detaining individuals—based upon reasonable suspicion—for violations of federal immigration and anti-trafficking laws.[358]

Important to the later expert witness report in the *Ortega-Melendres* litigation, Arpaio also instituted a telephone "hotline" to generate and pursue "tips" from the general public about suspected immigration violations.[359] The MCSO relied on these telephone "tips" to conduct raids against homes, places of employment, churches, and beyond.[360] The hotline invited racial discrimination, as it encouraged individuals to equate race with immigration status and allowed others to pursue personal grievances by way of hotline complaints. Some enforcement actions, for example, took place after the MCSO received little more than a barebones complaint that "described no criminal activity but referred to people with 'dark skin' or Spanish speakers congregating in an area."[361] Taking immigration enforcement actions based on such tips does not account for the general lack of training, knowledge, and experience among the public in the complex area of immigration law.

themselves was later found unconstitutional under the preemption doctrine in *Somos America v. Maricopa County*, 809 F. Supp. 2d 1084 (D. Ariz. 2011).

356. First Amended Complaint, ECF No. 26, *supra* note 351, at 8–9.

357. MEMORANDUM OF AGREEMENT C-50-07-058-2-00 (Feb. 24, 2007), https://www.ice.gov/doclib/287gMOA/maricopacounty.pdf [https://perma.cc/Z3W8-2MP8] [hereinafter MEMORANDUM OF AGREEMENT]; Letter from Joseph Arpaio, Sheriff, Maricopa Cty. Sheriff's Office, to Julie L. Myers, Assistant Sec'y, U.S. Immigration & Customs Enf't, Dep't of Homeland Sec. (Aug. 14, 2007), https://www.ice.gov/doclib/287gMOA/maricopacounty.pdf [https://perma.cc/Z3W8-2MP8]. *See generally* CRISTINA RODRIGUEZ ET AL., MIGRATION POLICY INSTITUTE, A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(g) (2010) (providing background and history on section 287(g)).

358. *See* MEMORANDUM OF AGREEMENT, *supra* note 357, at 3.

359. First Amended Complaint, ECF No. 26, *supra* note 351, at 16.

360. *Id.* at 12.

361. Marc Lacey, *U.S. Finds Pervasive Bias Against Latinos by Arizona Sheriff*, N.Y. TIMES (Dec. 15, 2011), http://www.nytimes.com/2011/12/16/us/arizona-sheriffs-office-unfairly-targeted-latinos-justice-department-says.html [https://perma.cc/GP2T-E87K].

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Local shop owners and business leaders initiated a number of complaints. As a result, day laborers found themselves on the receiving end of "saturation patrols" and other enforcement actions pursuant to the Coyote Law and Arizona's Employer Sanction Law.[362] Salvador Reza, a longtime organizer of day laborers and one of the founders of the local human rights organization, Tonatierra, began to mobilize the community in response.[363] Mr. Reza and members of Tonatierra began to sound the alarm in the Latinx community, many of whom were day laborers, and to protest Arpaio's actions.[364] Tonatierra included a constituency of day laborers called Puente, which would eventually become its own organization, Puente Arizona.[365] Tonatierra and Puente engaged national networks to draw attention to Arpaio's abusive tactics, often through the National Day Laborer Organizing Network (NDLON).[366]

Instead of utilizing its authority under 287(g) to prosecute serious crimes, such as narcotics smuggling, the MCSO focused on minor crimes, such as speeding and using fraudulent documents.[367] Indeed, only weeks after the ink was dry on 287(g), Arpaio and MCSO used the agreement as a mechanism to authorize and ramp up the saturation patrols. In early 2008, Arpaio began a series of high-volume "crime suppression sweeps."[368] As part of these larger-scale versions of saturation patrols, large numbers of MCSO deputies and volunteer "posse" members would overwhelm an area.[369] They were instructed to make pretextual traffic stops to find evidence of any violations of the law

362. Gabrielson & Giblin, *supra* note 353.

363. *See* JEFF BIGGERS, STATE OUT OF THE UNION: ARIZONA AND THE FINAL SHOWDOWN OVER THE AMERICAN DREAM 114 (2012) (noting the "Arrest Arpaio, Not the People" activist campaign); Lawrence Downs, *In Arpaio's Arizona, They Fought Back*, N.Y. TIMES (July 21, 2012), https://www.nytimes.com/2012/07/22/opinion/sunday/in-arpaios-arizona-they-fought-back.html [https://perma.cc/JM4B-WDX6] (discussing Reza's involvement in local organizing efforts).

364. Downs, *supra* note 363.

365. *See* Michelle Téllez, *Arizona: A Reflection and Conversation on the Migrants Rights Movement, 2015*, 42 SOC. JUST. 200, 205 (2015).

366. *See, e.g.*, *Puente Calls for Immediate Federal Action, Shut Off S-Comm in State, as DOJ Arpaio Case Heads to Court*, NDLON (May 10, 2012), https://ndlon.org/doj-scomm-az/ [https://perma.cc/F86T-KK2N].

367. *See* Gabrielson & Giblin, *supra* note 353 (providing examples of individuals stopped for minor crimes, such as speeding).

368. Gabrielson & Giblin, *supra* note 347.

369. First Amended Complaint, ECF No. 26, *supra* note 351, at 3.

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they could.[370] Supervisors instructed deputies in patrol cars to look for vehicles with unauthorized immigrants, then detectives in undercover cars would follow to establish probable cause for a traffic stop.[371] Records show broken tail lights, tires over yellow lane lines, and tinted windows often formed the basis of stops.[372] Mass arrests in the Latinx community were one standard outcome of the sweeps.

The MCSO called this practice "zero tolerance," and it paralleled broken windows policing or stop and frisk in other contexts.[373] Latinx drivers and passengers were subjected to time-consuming and sometimes harassing stops, interrogations, and arrests. This treatment was not limited to the time during which the sweeps occurred, causing substantial fear in the Latinx and Native American communities of Maricopa County.[374] Stops could result in an investigation of immigration status. Deputies often asked for identification as a proxy for investigating immigration status, even when explicit questions about status were not asked initially.[375] Investigating immigration status sometimes formed the only reason for an arrest.[376]

As collaborations between ICE and local law enforcement agencies across the country grew, and the momentum from NDLON and others grew, Sheriff Arpaio and the MCSO became targets of national advocacy to prevent local police from engaging in federal immigration enforcement functions.[377] Against

370. *See* Gabrielson & Giblin, *supra* note 353 (providing examples of pretextual stops for minor violations).

371. *Id.* (recounting how the head of the Human Smuggling Unit explained the use of undercover cars to establish probable cause).

372. First Amended Complaint, ECF No. 26, *supra* note 351, at 10–16.

373. *See* Andrew Cohen, *Federal Judge Chronicles Lawlessness of Joe Arpaio-Led Sheriff's Office*, ATLANTIC (May 25, 2013), https://www.theatlantic.com/national/archive/2013/05/federal-judge-chronicles-lawlessness-of-joe-arpaio-led-sheriffs-office/276150/ [https://perma.cc/TJR2-S26X].

374. Evelyn H. Cruz & Robert J. McWhirter, *G-Men Run Amuck*: *The 287(g) Men and Immigration Law*, ARIZ. ATT'Y, July/Aug. 2009, at 34–36.

375. *See* First Amended Complaint, ECF No. 26, *supra* note 351, at 18.

376. *Id.* at 18–20.

377. *See* Nicholas D. Michaud, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083 (2010); Letter from Marielena Hincapie, Exec. Dir. of the Nat'l Immigration Law Ctr., to President Barack Obama (Aug. 25, 2009), http://media.phoenixnewtimes.com/3790253.0.pdf [https://perma.cc/4MPW-PVBS]; Letter from Loretta King, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Sheriff Joseph Arpaio (Mar. 10, 2009), http://media

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this backdrop, the local Arizona American Civil Liberties Union (ACLU) office decided to bring a class action lawsuit in collaboration with local advocates and organizers.[378] Dan Pochoda, a New York civil rights attorney, had joined the ACLU of Arizona as its legal director in 2006. In his early months in the position, he met with local community leaders about the MCSO's practices. It became clear to him that litigation would be the only mechanism to "force a response" from the sheriff.[379] Moreover, even if "[l]itigation may do little to prevent the saturation patrols, [] community leaders were clear that something must be done."[380]

An opportunity for structural reform litigation arose in late 2007, when Mr. Ortega-Melendres filed a lawsuit against Sheriff Arpaio following a stop during a saturation patrol in late 2007.[381] He sought damages and an injunction against the sweep based on the Fourth Amendment.[382] The Somos America coalition, of which he was a member, included the ACLU of Arizona, Tonatierra, and Puente. The coalition decided to sue Sheriff Arpaio and the MCSO for their implementation of the 287(g) program and their immigration enforcement practices.[383]

.phoenixnewtimes.com/3140100.0.pdf [https://perma.cc/T7NX-MRSS] (regarding investigation of the Maricopa County Sheriff's Office); *see also* Daniel Gonzalez, *Arpaio To Be Investigated over Alleged Violations*, ARIZ. REPUBLIC (Mar. 11, 2009), https://www.azcentral.com/arizonarepublic/news/articles/2009/03/11/20090311investigation0311.html [https://perma.cc/RP9M-67D3]; Aarti Shahani & Judith Greene, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*, JUST. STRATEGIES (Feb. 27, 2009), https://justicestrategies.org/sites/default/files/publications/JS-Democracy-On-Ice-print.pdf [https://perma.cc/WB2S-2TM6]; Jessica Weisberg, *ICE Program Under Fire*, THE NATION (Oct. 14, 2009), https://www.thenation.com/article/ice-program-under-fire/ [https://perma.cc/V5DW-SGVL].

378. Telephone Interview with Dan Pochoda, Senior Lit. Counsel, ACLU of Ariz. (Aug. 15, 2018) (notes on file with author).

379. *Id.*

380. *Id.*

381. *See* Complaint, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (D. Ariz. 2011) (No. 2:07-cv-02513-GMS), ECF No. 1 [hereinafter Initial Complaint, ECF No. 1].

382. *Id.* at 19–21.

383. *See* First Amended Complaint, ECF No. 26, *supra* note 351, at 1 (amending the Initial Complaint to include Somos and ACLU).

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B. JUMPING HURDLES IN THE ORTEGA-MELENDRES LITIGATION

In July 2008, three individuals and the Somos America coalition[384] filed an amended complaint alleging violations of the Fourth and Fourteenth Amendments before Judge G. Murray Snow in the District Court of Arizona.[385] The ACLU of Arizona, ACLU Immigrants' Rights Project (IRP), Mexican American Legal Defense and Education Fund (MALDEF), and the law firm of Steptoe and Johnson also joined the case.[386] The complaint was filed as a class action on behalf of all Latinx drivers and passengers stopped, detained, questioned, or searched by MCSO officers.[387] Plaintiffs alleged the MCSO used the 287(g) agreement to racially profile the Latinx community.[388] Plaintiffs also alleged that the MCSO engaged in practices of targeting persons who appeared Latinx for stops, interrogation, and arrests without reasonable suspicion, citing Sheriff Arpaio's own statement that the sweeps were aimed to "go after illegals . . . . You go after them, and you lock them up."[389]

The amended complaint described saturation patrols and crime suppression sweeps that targeted Latino neighborhoods and day laborer sites as affecting U.S. citizens, Permanent Residents, and Native Americans.[390] For example, in one instance, a brother and sister, both U.S. citizens, were followed by MCSO officers during a sweep solely because they had pulled into a gas station while listening to a Spanish-language radio station.[391]

384. Somos America is composed of organizations and individuals whose work involves issues affecting migrant and immigrant communities. Somos America was formed in 2006 with a broad immigration reform agenda. It diverted time and resources in response to anti-immigration legislation and Sheriff Joe Arpaio's raids on businesses and the Latinx community. This formed a basis for its organizational standing. *See generally* SOMOS AMERICA, https://somosamerica.org/ [https://perma.cc/DB95-BARP].

385. First Amended Complaint, ECF No. 26, *supra* note 351, at 17–18. Mr. Ortega-Melendres first filed suit in December of 2007 in a complaint for damages and injunctive relief on behalf of himself and a class of similarly situated individuals. *See* Initial Complaint, ECF No. 1, *supra* note 381, at 19–21.

386. First Amended Complaint, ECF No. 26, *supra* note 351, at 1–2.

387. Plaintiffs' Renewed Motion for Class Certification at 1, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (No. 2:07-cv-02513-GMS), ECF No. 420.

388. *Id.* at 7.

389. First Amended Complaint, ECF No. 26, *supra* note 351, at 11.

390. *Id.* at 14.

391. *MALDEF Sues Maricopa County Sheriff for Racial Profiling and Civil Rights Violations*, MALDEF (July 25, 2008), https://mexicanexpulsions.blogspot.com/2008/07/maldef-sues-maricopa-county-sheriff-for.html [https://perma.cc/DZ8F-G4DT].

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The deputies arrived at their family's business after following the pair, and shoved the brother against one of the police cars, handcuffing him while they checked his identification.[392] Their practices and use of racial profiling thus harmed Latinx individuals, regardless of immigration or citizenship status, and compromised the public safety of the broader community.

As the parties litigated the sufficiency of plaintiffs' allegations of unconstitutional police practices and their certifiability as a class, relationships between community advocates and the attorneys, such as Pochoda and a law fellow Annie Lai, were important for several reasons, including to locate the appropriate class representatives in a climate where non-citizens feared reprisals from the sheriff's office. Prior to formal discovery, the relationships with community residents and organizers supported information gathering for facts showing policy and practice allegations and class-wide relief.

Defendants attempted to dismiss the litigation for failure to sufficiently plead discriminatory intent on multiple occasions.[393] They challenged plaintiffs' Equal Protection claims and contested the sufficiency of plaintiffs' Fourth Amendment allegations related to *Terry* stops, which require individualized, articulable, reasonable suspicion for stopping and questioning; seizures without probable cause; and investigations and prolonged investigatory stops for immigration purposes.[394] Surpris-

392. *Id.*

393. Defendants raised this same argument, with some variation, at least four times. *See* Defendants Arpaio and Maricopa County's Rule 12(b)(6) Motion To Dismiss at 2–4, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (No. 2:07-cv-02513-GMS), ECF No. 12 [hereinafter Motion To Dismiss Initial Complaint, ECF No. 12]; Defendants Arpaio and Maricopa County's Response in Opposition to Plaintiff's Motion for Leave To Amend Complaint at 11 n.2, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (No. 2:07-cv-02513-GMS), ECF No. 19 (basing argument on the futility exception to the liberal standard permitting plaintiffs to amend initial pleadings); Defendants' Rule 12(b)(6) Motion To Dismiss Plaintiffs' First Amended Complaint at 8 n.2, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (No. 2:07-cv-02513-GMS), ECF No. 32 [hereinafter Motion To Dismiss First Amended Complaint, ECF No. 32]; Defendants Arpaio and MCSO's Rule 12(c) Motion for Judgment on the Pleadings at 5–6, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (No. 2:07-cv-02513-GMS), ECF No. 90 [hereinafter Defendants' Motion for Judgment on the Pleadings, ECF No. 90].

394. The district court denied defendants' claims that Sheriff Arpaio and the MCSO were entitled to qualified immunity when addressing defendants' motion to dismiss. The determination fell squarely on well-established precedent that "qualified immunity is only an immunity from a suit for damages, and does not

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ingly, in the initial stages of litigation, though the MCSO challenged plaintiffs' ability to demonstrate their constitutional claims, they did not challenge plaintiffs' discriminatory police practice allegations as insufficient under *Monell*'s municipal liability theory.[395]

1. Standing To Seek an Injunction: *Lyons*

The court considered plaintiffs' standing based on *Lyons* in three rounds of motion practice and eventually determined MCSO engaged in an official policy of race and/or national origin discrimination.[396] During the next round of *Lyons* motion practice, the district court considered defendants' motions for judgment on the pleadings based on lack of standing for equitable relief, as well as plaintiffs' motion for class certification.[397] The

provide immunity from suit for declaratory or injunctive relief." Ortega-Melendres v. Arpaio (*Ortega-Melendres II*) 598 F. Supp. 2d 1025, 1030 n.1 (D. Ariz. 2009) (citing Hydrick v. Hunter, 500 F.3d 978, 988 (9th Cir. 2007)). As with other structural reform litigation, because plaintiffs were only seeking injunctive relief, and not damages, qualified immunity was not available as a defense. *Id.*

395. Instead, they argued plaintiffs had incorrectly named Sheriff Joe Arpaio and the MCSO as the defendants because the MCSO was not a jural entity. Rather, Maricopa County, defendants argued, was the proper entity. *See* Motion To Dismiss First Amended Complaint, ECF No. 32, *supra* note 393, at 6–12; Defendants' Motion for Judgment on the Pleadings, ECF No. 90, *supra* note 393, at 6–7. The court, however, permitted plaintiffs to continue against MCSO and decided that the Sherriff could be sued in his official capacity as the final decision-maker on county law enforcement matters. *See* Ortega-Melendres v. Arpaio (*Ortega-Melendres V*), 989 F. Supp. 2d 822, 890 (D. Ariz. 2013) (connecting Arpaio to MSCO through Arpaio's "final decisionmaking [sic] authority" on MSCO's policies).

396. Defendants initially raised standing in their motion to dismiss the first complaint. In response, plaintiffs requested, and the court permitted, amendment of the pleadings to add class claims and additional named plaintiffs. Defendants' motion was dismissed as moot. *See* Ortega-Melendres v. Arpaio (*Ortega-Melendres I*), No. CV07-2513-PHX-MHM, 2008 WL 4174918, at *6 (D. Ariz. Sept. 5, 2008); Motion To Dismiss Initial Complaint, ECF No. 12, *supra* note 393, at 6–8.

397. *See* Defendant Maricopa County's Response to Plaintiffs' Motion for Class Certification at 6–7, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (No. 2:07-cv-02513-PHX-MHM), ECF No. 100 (responding to plaintiffs' motion for class certification, which mentioned the "preliminary matter" that the class had standing to pursue equitable relief); Defendants' Motion for Summary Judgment at 14–17, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (No. 2:07-cv-02513-GMS), ECF No. 413; Defendants' Motion for Judgment on the Pleadings, ECF No. 90, *supra* note 393, at 8.

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MCSO argued that plaintiffs had failed to show standing for either the Fourth or Fourteenth Amendment claims and that it deserved judgment on the pleadings as a result.[398] First, defendants raised the speculative harm barrier: they disagreed that plaintiffs had a "'credible' and 'genuine' threat" of defendants stopping, questioning, searching or arresting them again, and because plaintiffs relied on contingent future events, they did not suffer ongoing harms.[399] The prior stops were insufficient to support an injunction for prospective future harm.[400] Second, relying on *Lyons*'s discussion of innocence, defendants argued that plaintiffs' unlawful actions, based on potential violations of state law due to immigration status, shielded defendants from liability.[401] Just as Mr. Lyons could choose to drive without a tail light, the MCSO suggested plaintiffs could avoid future harm by complying with state immigration law and driving with persons who do the same.[402]

Without a developed factual record, the court adopted a Rule 12(b)(6) standard.[403] It viewed plaintiffs' allegations as true and construed them in their favor.[404] The complaint provided concrete and sufficient allegations of a pattern, practice, or custom of unlawful police practices. Based on the complaint, the threat of future harm was not predicated on future illegal conduct by plaintiffs, so the court determined that plaintiffs had standing to pursue their equitable claims.[405] The court found plaintiffs had sufficiently alleged a real and immediate threat of future

398. Defendants' Motion for Judgment on the Pleadings, ECF No. 90, *supra* note 393, at 4–9.

399. *Id.* at 5; Defendant Maricopa County's Response to Plaintiffs' Motion for Class Certification, ECF No. 100, *supra* note 397, at 4–5.

400. Defendants' Motion for Judgment on the Pleadings, ECF No. 90, *supra* note 393, at 6–7 (citing O'Shea v. Littleton, 414 U.S. 488, 495–96 (1974); Farm Labor Organizing Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 729–30 (N.D. Ohio 2000)).

401. Defendants' Motion for Judgment on the Pleadings, ECF No. 90, *supra* note 393, at 6–7.

402. Defendant Maricopa County's Response to Plaintiffs' Motion for Class Certification, ECF No. 100, *supra* note 397, at 7.

403. Ortega-Melendres v. Maricopa County (*Ortega-Melendres III*), No. CV-07-2513-PHX-GMS, 2009 WL 2707241, at *4 (D. Ariz. Aug. 21, 2009) ("In the absence of such a record, the Court must look to the Complaint, take its allegations as true, and construe those allegations in the light most favorable to Plaintiffs.").

404. *Id.*

405. *See id.* at *5–6.

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injury, even though the plaintiffs only pled one stop each.[406] The court explained, however, that it would require an evidentiary record to determine whether a practice in fact existed to overcome the *Lyons* standing hurdle.[407] In the same motion, the court denied class certification without prejudice, relying on the approach that standing should be resolved prior to granting class certification.[408]

To review the information gathered by parties, the district court revisited standing two years later, following discovery, when deciding plaintiffs' renewed motion for class certification and each parties' motions for summary judgment.[409] Plaintiffs overcame the standing barriers by demonstrating an official policy.[410] Even so, the court analyzed the case through the lens of the speculative harm, repeated harm, and innocence requirements.[411] First, plaintiffs responded to the defendants' argument regarding speculative, future harm. Because there was nothing plaintiffs could do to avoid injury, they were likely—if not certain—to endure the MCSO's unconstitutional conduct again in the future.[412] Each individual plaintiff was subjected to unreasonable, racially motivated traffic stops. Because the MCSO took enforcement actions against both vehicle drivers and passengers, plaintiffs' only option to avoid unlawful traffic stops would be to forgo any motor vehicle travel.

Second, distinguishing the speculative harm barrier of *Lyons* specifically, plaintiffs argued there was no series of contingent events that would have to occur for plaintiffs to be subject

406. *See id.* at *1–2.

407. *Id.* at *4 (citing Fajardo v. County of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999)).

408. *Id.* at *6 (citing Easter v. Am. W. Fin., 381 F.3d 948, 962 (9th Cir. 2004), and distinguishing Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)). Courts apply different approaches to the standing and class certification question. *See generally* ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS 76–86 (William B. Rubenstein ed., 5th ed. 2011) (discussing the various ways courts have approached standing in class actions).

409. The arguments and discussion that follows is based on the 2009 and 2011 motion practice and court orders. *See, e.g.*, *Ortega-Melendres III*, 2009 WL 2707241, at *7–8.

410. *Id.* at *1.

411. *See Ortega-Melendres IV*, 836 F. Supp. 2d 959, 978–92 (D. Ariz. 2011) (analyzing Plaintiffs' claims and granting partial summary judgment to Plaintiffs on their Fourth Amendment claims); *Ortega-Melendres III*, 2009 WL 2707241, at *2–5.

412. *Ortega-Melendres III*, 2009 WL 2707241, at *3 (discussing Plaintiffs' alleged future harms).

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to racial profiling (as either drivers or passengers).[413] Plaintiffs had pled specific statements and policies of racially motivated sweeps in Latinx areas of Maricopa County. This policy and practice allegation, they argued, created the future likelihood that plaintiffs would be subjected to traffic stops based on race, without reasonable suspicion or probable cause.[414] The Supreme Court in *Lyon*s had determined the Los Angeles chokehold policy was not reasonably pled nor demonstrated through the record.[415]

With regard to the innocence barrier of *Lyons*, the court disagreed with defendants' contentions that plaintiffs had engaged in illegal behavior predicating their stops. In particular, defendants argued that two individual named plaintiffs were not innocent because they had been cited for ignoring a "road closed" sign.[416] In fact, no named plaintiffs were issued citations. The court found the facts alleged in the complaint "could plausibly be read to allege that Plaintiffs did nothing illegal to warrant the actions of MCSO officers."[417]

In both decisions where *Lyons* was substantively considered, the court found instructive a series of Ninth Circuit cases distinguishing *Lyons*, including *Hodgers-Durgin v. De La Vina*.[418] In *Hodgers-Durgin*, plaintiffs, who had been stopped by border agents on a "roving patrol,"[419] challenged this practice under the Fourth Amendment and requested injunctive relief. Plaintiffs argued they had a sufficient likelihood of future injury because they drove every day through a region in which INS agents patrolled "all over the place."[420]

On the *Lyons* question, the *Hodgers-Durgin* court found plaintiffs overcame the innocence hurdle because there was "no string of contingencies necessary to produce an injury."[421] The *Hodgers* plaintiffs "engaged in entirely innocent conduct," and

413. *Id.* at *2.

414. *Id.* at *4–5.

415. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.7 (1983); *see also supra* Part I.A.

416. *Ortega-Melendres III*, 2009 WL 2707241, at *1.

417. *Id.* at *3.

418. *Id.* at *3–4.

419. *Id.* at *3. "Roving patrols" reference border agent operations in the interior of the United States, rather than at the U.S.-Mexico border. During these roving patrols, border agents stop, and sometimes detain, individuals for immigration- or smuggling-related violations.

420. Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1039, 1044 (9th Cir. 1999) (en banc).

421. *Id.* at 1041–42.

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they were also powerless to prevent further interaction with police officers.[422] Plaintiffs "would not have to take any action, such as offering resistance, to reproduce the injury."[423] Thus, plaintiffs established that the same chain of events would likely reproduce the plaintiffs' injuries in the future and satisfied *Lyons*'s first prong.

But ultimately, the Ninth Circuit determined the facts of the case could not overcome the speculative harm or future injury barriers.[424] In ten years, the *Hodgers* named plaintiffs had experienced only one roving border patrol encounter, despite regularly driving hundreds of miles a week in close proximity to the Border Patrol.[425]

The district court in *Ortega-Melendres* distinguished *Hodgers-Durgin* and *Lyons*. First, unlike *Hodgers-Durgin*, the plaintiffs had alleged that the MCSO's practices involved more than a single stop.[426] Though plaintiffs had, as with the plaintiffs in *Hodgers-Durgin*, only endured one stop during the course of the litigation, the court held that the plaintiffs had "presented sufficient evidence aside from the stops themselves" of the MCSO's repeated unconstitutional behavior.[427]

Relatedly, and most importantly, the court held that plaintiffs sufficiently pled that the Maricopa County Sheriff's deputies had stopped plaintiffs pursuant to an officially sanctioned policy, practice, or pattern of stopping, questioning, searching, and sometimes arresting Latinx persons without probable cause

422. *Id.* at 1041.

423. *Ortega-Melendres III*, 2009 WL 2707241, at *3 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983)).

424. *See Hodgers-Durgin*, 199 F.3d at 1044. ("We hold that Mr. Lopez and Ms. Hodgers-Durgin have not demonstrated a sufficient likelihood of injury to warrant equitable relief.").

425. *Id.* In *Ortega-Melendres*, the court noted that without a developed factual record, it could not test plaintiffs' allegations. Other district courts had pointed out that after summary judgment, or at another stage after a fully developed factual record, was a more appropriate time to raise the arguments defendants had presented. *Ortega-Melendres III*, 2009 WL 2707241, at *4 (citing Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1142 (N.D. Cal. 2000); Bassette v. City of Oakland, No. C-00-1645 JCS, 2000 WL 33376593, at *6 (N.D. Cal. Aug. 11, 2000)).

426. *See Ortega-Melendres III*, 2009 WL 2707241, at *4 ("The Complaint alleges that the challenged conduct occurs not only as a general practice, but also through widespread and ongoing 'crime suppression sweeps.'").

427. *Ortega-Melendres IV*, 836 F. Supp. 2d 959, 987 (D. Ariz. 2011).

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or reasonable suspicion.[428] The *Lyons* Court had stated that victims of police misconduct could satisfy standing if department officials "ordered or authorized police officers to act" in an unlawful manner.[429] *Ortega-Melendres* presented such a case. The MCSO itself had argued "its officers [were] authorized to stop individuals based only on reasonable suspicion or probable cause that a person is not authorized to be in the United States."[430] This assertion not only demonstrated an official policy, but was "wrong as a matter of law."[431] Moreover, other Ninth Circuit cases further made clear that allegations of a widespread, ongoing, and sanctioned policy or practice "lends special weight to the likelihood of future harm."[432] Therefore, the court determined that the plaintiffs satisfied *Lyons*'s standing requirement for injunctive relief, and demonstrated a "sufficient likelihood" that their rights would be violated in the future.[433]

Importantly, the department-wide practices claim grounded in *Monell* helped the plaintiffs overcome a common and challenging issue in police injunctive suits—the single stop problem. As *Lyons* and *Hodgers-Durgin* show, courts often find that a single police encounter resulting in "injury and death unconstitutionally inflicted on the victim"—while "unfortunate"—does not demonstrate a likely future injury and thus does not confer standing for injunctive relief.[434] Yet, Judge Snow explained that the fact that individual plaintiffs were only subject to a single stop did not preclude standing to seek injunctive relief in their

428. *Id.* at 989.

429. *Id.* at 979 (emphasis omitted) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 106 (1983)).

430. *Id.* Moreover, as an incorrect assertion of law, the court determined plaintiffs were entitled to partial summary judgment for their Fourth Amendment claim. *Id.* at 980.

431. *Id.*

432. *Ortega-Melendres III*, 2009 WL 2707241, at *4 (D. Ariz. Aug. 21, 2009) (explanatory parentheticals in original) (citing Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001) (explaining that one of the ways in which plaintiffs can "demonstrate that [an] injury is likely to recur" is to "demonstrate that the harm is part of a pattern of officially sanctioned behavior"); Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1142 (N.D. Cal. 2000) (finding that plaintiffs who were seeking declaratory and injunctive relief for alleged racial profiling survived a motion to dismiss and relying on the fact that, unlike *Lyons*, the plaintiffs "allege[d] a pattern and practice of illegal law enforcement activity"); *cf.* Nelsen v. King County, 895 F.2d 1248, 1254 (9th Cir. 1990); LaDuke v. Nelson, 762 F.2d 1318, 1324 (9th Cir. 1985)).

433. *Ortega-Melendres IV*, 836 F. Supp. 2d 959, 985 (D. Ariz. 2011).

434. City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983).

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Fourth or Fourteenth Amendment claims.[435] Rather, the MCSO's official policy to illegally detain people based on their race and/or national origin necessarily exposed the named plaintiffs to an ongoing harm and evidenced that there is "sufficient likelihood" that plaintiffs' Fourth and Fourteenth Amendment rights will be violated again.[436]

Concurrent events also affected the litigation. Following considerable local and national activism, in October 2009 the federal government withdrew an aspect of its 287(g) Memorandum of Agreement with MCSO.[437] Deputies lost the authority to investigate and make arrests during street encounters based on suspected unlawful presence alone.[438] Although MCSO deputies no longer had the federal government's approval to engage in street-based sweeps, they could continue to enforce immigration law following pretextual stops, and had the authority to verify immigration status.[439] In 2010, Arizona became ground zero for the immigration debate when Governor Jan Brewer signed a law purporting to require all law enforcement agencies in the state to enforce immigration laws, among other provisions.[440] Locally, in Phoenix, demonstrations against Arpaio's Tent City and continued crime suppression sweeps mounted.[441] The Department of Justice's criminal division opened an investigation into abuse of power by the MCSO's public corruption squad, and the DOJ

435. *Ortega-Melendres IV*, 836 F. Supp. 2d at 988.

436. *Id.* at 979 (citing *Lyons*, 461 U.S. at 111).

437. Ray Stern, *Feds Pull 287(g) Authority from Maricopa County Jails Because of Civil Rights Violations*, PHX. NEW TIMES (Dec. 15, 2011), https://www.phoenixnewtimes.com/news/feds-pull-287-g-authority-from-maricopa-county-jails-because-of-civil-rights-violations-6631025 [https://perma.cc/YGN4-XCGC].

438. *See Ortega-Melendres IV*, 836 F. Supp. 2d at 969 ("MCSO officers no longer had authority to enforce federal civil immigration violations in the field, but could continue to do so in the jails.").

439. See *id.* (noting instances when officers could continue to enforce immigration law following loss of 287(g) authority).

440. *See* Ted Hesson, *3 Reasons Arizona Is Ground Zero for Immigration Policy*, ABC NEWS (Aug. 6, 2013, 2:16 PM), https://abcnews.go.com/ABC_Univision/Politics/reasons-arizona-ground-immigration-policy/story?id=19885446 [https://perma.cc/7LUR-P5KJ].

441. *See* Sadie Jo Smokey, *Dancers, Students, Families Protest Arpaio*, NE. PHX. REPUBLIC, Jan. 22, 2010, at 4 (describing the protests against Sheriff Arpaio's unjust treatment of Hispanics).

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Civil Rights Division issued a report in December 2011 finding MCSO had engaged in unconstitutional policing.[442]

2. Municipal Liability: *Monell*

The plaintiffs presented remarkable evidence of an official policy to racially profile Latinx persons to support their request for summary judgment. Consequently, the court determined plaintiffs' evidence overcame the widespread practices and factual parallel barriers associated with practice or custom allegations.[443] The evidence included Sheriff Arpaio's public statements endorsing racial profiling and the detention of people based on "their speech, what they look like, if they look like they came from another country."[444] Emails associated with the special raids that were circulated among MCSO officers compared Mexicans to dogs and portrayed them as "drunks."[445] In addition, the court found significant the MCSO's equating of day laborers with unlawful status, and that this motivated where officers conducted saturation patrols.[446]

Plaintiffs also relied upon statistical evidence demonstrating Hispanics were stopped at significantly higher rates during the saturation patrols. Dr. Ralph Taylor, a professor of criminology at Temple University and plaintiffs' statistical expert, presented findings from his study analyzing computer-aided dispatch (CAD) reports that documented vehicle stops by MCSO officers on patrol.[447] Dr. Taylor conducted a study of CAD records during large-scale saturation patrols to determine whether the patrols focused on cars with Hispanic occupants.[448] He compared the names of individuals whom MCSO officers stopped and called into central dispatch during saturation patrols to the

442. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., UNITED STATES' INVESTIGATION OF THE MARICOPA COUNTY SHERIFF'S OFFICE 2 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [https://perma.cc/W4S2-WTED].

443. *Ortega-Melendres IV*, 836 F. Supp. 2d at 986.

444. *Id.* at 986.

445. *Id.* at 987.

446. *Id.*; *see also Ortega-Melendres V*, 989 F. Supp. 2d 822, 850 (D. Ariz. 2013) ("The MCSO almost always scheduled its day labor and small-scale saturation patrols where Latino day laborers congregated; the same is true for a considerable number of its large-scale saturation patrols.").

447. *Ortega-Melendres V*, 989 F. Supp. 2d at 872. Each time an MCSO deputy asks for dispatch to run a name, the CAD database records the name of the individual and records the type of stop. *Id.*

448. *Id.*

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names called in by officers during non-saturation patrol days.[449] He also compared all names called in on saturation patrol days, regardless of whether the report was from a saturation patrol or not.[450] He concluded, among other findings, that officers were forty-six to fifty-four percent more likely to stop an individual with a Hispanic surname during saturation patrols.[451] Though defendants challenged Dr. Taylor's conclusions with their own statistical expert's testimony at trial, the court found Dr. Taylor more credible.[452] Moreover, the court found Dr. Taylor's study "probative" of plaintiffs' claim that the MCSO officers used race as a discriminatory factor in their saturation patrols despite instructions not to racially profile.[453] The plaintiffs presented evidence that anywhere from fifty-seven to ninety-seven percent of those arrested during saturation patrols were persons with Hispanic names.[454] The percentage of passengers with Hispanic surnames was even higher, ranging from eighty-one to ninety-five percent.[455]

Plaintiffs next presented evidence to show that the sheriff's office was liable for its officers' actions under a "failure to" train and supervise theory.[456] Plaintiffs pointed to the MCSO's lack of safeguards to prevent racial profiling.[457] The MCSO did not have an agency-wide anti-racial profiling policy, nor had the agency provided an adequate definition to officers.[458] The only training

449. *Id.* at 873.

450. *Id.*

451. *Id.*

452. *Id.* at 874 ("As between Dr. Taylor and Dr. Camarota in this respect, the Court credits the opinion of Dr. Taylor.").

453. *Id.* at 875–76.

454. *Id.* at 868. Dr. Taylor used U.S. census data to correlate whether the owners of a given surname identified as Hispanic. *Id.* at 873.

455. *Id.* at 869. The court decided to give more weight to Dr. Taylor than the defendants' expert, Dr. Steven Camarota. *Id.* at 874. Dr. Camarota did not take issue with Dr. Taylor's analysis or methodology. *Id.* Instead, he offered the alternative explanation that poverty rates could explain the disparate rates of stops, because "people with low incomes are going to have more difficulty . . . meeting the equipment standards." *Id.* He presented no analysis of the stop rates when corrected for income to support this view. *Id.* Ultimately, the court determined these statements were mere "speculation." *Id.*

456. Plaintiffs' Motion for Partial Summary Judgment at 28, *Ortega-Melendres IV*, 836 F. Supp. 2d 959 (D. Ariz. 2011) (No. CV-07-2513-PHX-GMS), ECF No. 421.

457. *Id.*

458. *Id.*

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material produced in the litigation—from an Arizona law enforcement board—incorrectly prohibited profiling only when conducted solely on the basis of race.[459] Indeed, officers and supervisors had testified at depositions that "apparent Mexican ancestry," "speak[ing] only Spanish," and presence in "illegal alien locale" were bases for investigatory action.[460] No in-house training was required nor provided.[461] ICE's 287(g) training had little material relevance to racial profiling.[462] No documentation on the race, ethnicity, or basis of the stop was required, let alone checked by supervisors to ensure reasonable suspicion or probable cause formed the bases for the stop, interrogation, or seizure.[463]

Furthermore, plaintiffs demonstrated that the MCSO habitually turned a blind eye to reports of discriminatory policing.[464] Plaintiffs characterized the attitudes of MCSO supervisors as "cavalier" because they "trust[ed]" their subordinates not to racially profile.[465] Moreover, the supervisors themselves initiated or spread racial bias, such as when a sergeant circulated an email about a "Mexican Yoga" or did nothing when officers distributed "Mexican Word of the Day" or derogatory jokes about Mexicans or Mexican culture.[466]

The court found that if the policy plaintiffs claimed existed was in fact a policy, then it presented "a 'sufficient likelihood' that the named Plaintiffs will suffer ongoing harm."[467] Ultimately, the court granted a preliminary injunction, finding "[i]njunctive relief is appropriate when plaintiffs show that police misconduct 'is purposefully aimed at minorities and that such misconduct was condoned and tacitly authorized by department policy makers.'"[468]

Importantly, the court noted that consideration of race need not be the "dominant or primary" purpose of a policy for it to be

459. *Id.*
460. *Id.* at 28–29 (alteration in original).
461. *Id.* at 29.
462. *See id.*
463. *Id.* at 29–30.
464. *Id.* at 29.
465. *Id.* at 29–30.
466. *Id.* at 30–31.
467. *Ortega-Melendres IV*, 836 F. Supp. 2d at 987.
468. *Id.* at 985 (quoting Thomas v. County of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992)).

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discriminatory.[469] Instead, a fact finder must decide whether discriminatory purpose was "a motivating factor" in the policy.[470] This could be shown if the policy was "based in part on reports that referred to explicit racial characteristics."[471]

Ultimately, the court denied plaintiffs' motion for summary judgment based on the Fourteenth Amendment, but it did grant summary judgment on the Fourth Amendment claim and injunctive relief "to the extent that Defendants are detaining persons without reasonable suspicion that the state human smuggling statute has been violated," and instead solely on the basis of suspected immigration status.[472] Defendants did not claim Mr. Ortega-Melendres matched a particular description of a crime suspect,[473] which is a permissible basis for a stop under the Fourth Amendment. Rather, his stop arose because he was dressed as a member of a work crew.[474] A deputy stopped him for driving thirty-four miles per hour in a twenty-five mile-per-hour zone, but called another deputy to investigate the passengers' immigration status.[475] The officers had no reasonable suspicion to believe that the church from which Mr. Ortega-Melendres had been driving was engaged in any criminal activity.[476] Based on deposition testimony, the court found the deputy relied on an "inchoate and unparticularized suspicion or 'hunch'" that did not provide objectively reasonable suspicion of smuggling.[477]

3. Class Certification: *Wal-Mart Stores, Inc.*

The *Ortega-Melendres* plaintiffs sought to certify a class, pursuant to Rule 23(b)(2), composed of "[a]ll Latino persons who, since January 2007, [had] been or [would] be in the future, stopped, detained, questioned or searched by MCSO agents

469. *Id.* at 986.

470. *Id.* (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

471. *Id.* (quoting Flores v. Pierce, 617 F.2d 1386, 1389 (9th Cir. 1980)).

472. *Id.* at 980. Plaintiffs Nieto and Meraz were ordered to leave the convenience store and back-up officers were called. *Id.* at 984. The back-up officers followed them into the parking lot of an auto repair shop owned by Nieto's father. *Id.* at 985. Nieto was removed forcibly from the car and handcuffed while the police checked his ID. *Id.* They were released without being charged. *Id.*

473. *Id.* at 981–92.

474. *Id.* at 982.

475. *Id.*

476. *Id.*

477. *Id.* (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).

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while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County, Arizona."[478] The initial motion for class certification filed in 2009 was denied without prejudice.[479] The court determined it required a developed factual record prior to determining whether plaintiffs satisfied standing to pursue equitable relief.[480] Plaintiffs renewed their motion in 2011 and defendants made several arguments, including that plaintiffs had not satisfied commonality.[481]

To satisfy commonality (and typicality), plaintiffs' renewed motion for class certification relied upon statistical and anecdotal evidence suggesting that the representative plaintiffs and class members were likely to be stopped again.[482] Anecdotal evidence included the defendants' actions based upon "constituent letters explicitly calling for racial profiling," and that Sheriff Arpaio, "endorsed such letters and passed them on to his subordinates for use in the planning and implementation of enforcement operations, including saturation patrols."[483] The plaintiffs also argued that Sheriff Arpaio and MCSO officers had "distributed offensive materials about Hispanics" within the department,

478. Plaintiffs' Renewed Motion for Class Certification, ECF No. 420, *supra* note 387, at 1.

479. *Ortega-Melendres III*, No. CV-07-2513-PHX-GMS, 2009 WL 2707241, at *7 (D. Ariz. Aug. 21, 2009).

480. *Id.*; *see also supra* text accompanying notes 403–08. The court did not resolve the issue at that stage, quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) for the position that standing should be resolved prior to class certification because "any [] Article III court must be sure of its own jurisdiction before getting to the merits." *Ortega-Melendres III*, 2009 WL 2707241, at *6. The *Fibreboard* case announced an exception to when class certification is a prerequisite to standing. *Id.* (citing *Fibreboard*, 527 U.S. at 831). The *Ortega-Melendres* court did not find this principle at odds with the rule that courts should determine whether to certify a suit as a class action "[a]t an early practicable time." *Id.* (alteration in original) (quoting FED. R. CIV. P. 23(c)(1)(A)). Additionally, the court concluded that some determinations of standing cannot be squarely resolved without the benefit of discovery. *Id.* (citing Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1313 (9th Cir. 1977)). The court denied the motion without prejudice. *Id.* at *7.

481. Defendant Maricopa County's Response to Plaintiffs' Motion for Class Certification, ECF No. 100, *supra* note 397, at 2–9.

482. *See* Plaintiffs' Renewed Motion for Class Certification, ECF No. 420, *supra* note 387, at 2–8 (detailing "how Defendants [were] engaged in a pattern and practice of discrimination against Hispanics in traffic stops" resulting in the plaintiffs being unable to do anything "to avoid a repeat of the injury").

483. *Id.* at 3. Plaintiffs first sought class certification at an earlier stage of the case, but the court denied the motion without prejudice. *See supra* notes 479–80 and accompanying text.

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which showed "that negative stereotypes about Hispanics [were] deeply and widely felt within the agency."[484] The plaintiffs also pointed to public statements by Sheriff Arpaio "equat[ing] Hispanics with illegal immigrants."[485] Specifically, the plaintiffs argued that "Sheriff Arpaio has repeatedly stated that his enforcement operations are intended to 'go after illegals,' and that they can be spotted based on 'what they look like'"; they asserted that those statements illustrate that the department used race as a motivating force to enforce immigration laws.[486]

The court found that plaintiffs had satisfied commonality and all other requirements for an injunctive class action under Rule 23(b)(2).[487] Of note, this decision occurred on plaintiffs' second request for certification, two years after the first, and following extensive expert discovery.

4. Trial and Remedy

The months preceding trial coincided with growing national attention on Sheriff Arpaio's unconstitutional practices and Arizona's anti-immigrant climate. On May 10, 2012, the U.S. Department of Justice Civil Rights Division filed suit against Maricopa County.[488]

Judge Snow presided over a three-week bench trial primarily addressing plaintiffs' Fourteenth Amendment claims.[489] The court's conclusions of law and fact pointed to an extensive evidentiary record, including Dr. Taylor's statistical findings that drivers and passengers with Hispanic names were more likely to be stopped, and stopped for longer, from which it could conclude MCSO engages in racial profiling of Latinx people.[490] The court

484. Plaintiffs' Renewed Motion for Class Certification, ECF No. 420, *supra* note 387, at 3.

485. *Id.*

486. *Id.*

487. *See Ortega-Melendres IV*, 836 F. Supp. 2d 959, 993 (D. Ariz. 2011) ("Plaintiffs have met their burden for class certification under Rule 23.").

488. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio (May 10, 2012), https://www.justice.gov/opa/pr/department-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s [https://perma.cc/H5D7-WEDV].

489. *See Ortega-Melendres V*, 989 F. Supp. 2d 822 (D. Ariz. 2013).

490. *Id.* at 872–74 (crediting Dr. Taylor's findings that on saturation patrol days, those stopped "were between 26% to 39% more likely to be Hispanic" than those on non-saturation patrol days, and that stops of Hispanics "lasted between two and three minutes longer than comparable stops" of non-Hispanics).

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reviewed Arpaio's public statements, orders to his officers, and files of letters and clippings, all of which openly espoused racial profiling.[491] The fact that his policies were in part a response to citizens' requests to target immigrants also suggested that the MCSO's special operations were conducted based on race versus evidence of a crime.[492]

Moreover, the court concluded these actions were pursuant to an official policy. The court determined that the MCSO's Law Enforcement Agency Response (LEAR) policy, which

> require[d] a deputy (1) to detain persons she or he believes only to be in the country without authorization, (2) to contact MCSO supervisors, and then (3) to await contact with ICE pending a determination how to proceed, result[ed] in an unreasonable seizure under the Fourth Amendment to the Constitution.[493]

This trial evidence substantiated that the defendants were already violating the court's December 2011 Fourth Amendment injunction.[494] Because ICE had revoked the MCSO's 287(g) authority, the court stated that the MCSO could not have a policy of "enforcing" immigration law pursuant to the 287(g) agreement.[495] The court, therefore, granted plaintiffs' permanent injunction.[496]

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491. *Id.* at 830–31 (quoting Sheriff Arpaio during a press conference as stating, "Actually, . . . ours is an operation, whether it's the state law or the federal, to go after illegals, not the crime first, that they happen to be illegals. My program, my philosophy is a pure program. You go after illegals. I'm not afraid to say that. And you go after them and you lock them up."); *see also Ortega-Melendres IV*, 836 F. Supp. 2d at 986–87 (discussing additional statements made by Sheriff Arpaio and other files of Sheriff Arpaio showing racial profiling).

492. *See Ortega-Melendres V*, 989 F. Supp. 2d at 859 (noting that several of the large-scale saturation patrols "occurred in locations for which the Sheriff had received previous complaints about the presence of Mexicans or day laborers or both").

493. *Id.* at 826–27. In the absence of additional facts that would provide reasonable suspicion that a person committed a federal criminal offense either in entering or staying in this country, it is not a violation of federal criminal law to be in this country without authorization in and of itself. *See id.* at 886 (describing the "erroneous premise that being an unauthorized alien in this country in and of itself established a criminal violation of federal immigration law").

494. *See id.* at 887–90 (concluding that "essentially, nothing ha[d] changed" following the injunction, and that the MCSO "continue[d] to arrest those it believe[d] to be unauthorized aliens").

495. *See id.*

496. *Id.* at 910. The parties engaged in extensive discussions and the court ultimately issued a broad injunction. *See* Melendres v. Arpaio (*Ortega-Melendres VI*), No. CV-07-2513-PHX-GMS, 2013 WL 5498218, at *1 (D. Ariz. Oct. 2,

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The fallout from the court's decision—when combined with on-the-ground advocacy—led to big changes in Maricopa County. Four months after the *Ortega-Melendres* trial, Sheriff Arpaio faced a tough re-election fight. Latinxs organized, using the trial to increase voter registration and drum up opposition to his candidacy.[497] Though he was re-elected as a six-time incumbent, it was only by six percentage points—his narrowest victory.[498] The case against the MCSO for racial profiling and stops, detentions, and arrests without reasonable suspicion or probable cause is ongoing. An independent monitor, Chief Robert Warsaw, was appointed[499] and the community was permitted to have direct involvement in monitoring the remedial order.[500] Yet, even under the new sheriff, Paul Penzone, racial disparities persist and the community has decried and protested his continued cooperation with ICE.[501]

IV. *BAILEY V. CITY OF PHILADELPHIA*: PHILADELPHIA STOP AND FRISK

The case study in this Part provides in-depth consideration of Philadelphia's stop and frisk practices. The case study begins with a review of years of litigation, attempts to prevent discriminatory policing in Philadelphia, and ends with the settlement of *Bailey v. City of Philadelphia*. The story here is distinct from

2013) ("Parties desired to negotiate the terms of a consent decree to ensure Defendants' compliance with the injunctions."), *aff'd in part and vacated in part by* Melendres v. Arpaio, 784 F.3d 1254 (9th Cir. 2015).

497. Daniel González, *Latino Voters Surge in Ariz.*, ARIZ. REPUBLIC, Nov. 3, 2012, at A1; E.J. Montini, *Arpaio Victory Good for Latinos?*, ARIZ. REPUBLIC, Nov. 16, 2012, at B1.

498. Ross D. Franklin, *Arizona Sheriff Arpaio Charged with Contempt*, SAN DIEGO UNION TRIB., Oct. 18, 2016, at 8.

499. *See Ortega-Melendres VI*, 2013 WL 5498218, at *30 ("The Court shall appoint an Independent Monitor to assist with implementation of, and assess compliance with, this order."). The MCSO monitoring team has a website where all monitoring reports and other updates are located. *Changing the Maricopa County Sheriff's Office*, ACLU ARIZ., http://www.changingmcso.org/resources/monitoring-reports/ [https://perma.cc/G3MW-T3WQ].

500. Community involvement has been in the form of a Community Outreach Plan, the creation of a Community Advisory Board (CAB), and even allowing community member participation in the training of police. *See Ortega-Melendres VI*, 2013 WL 5498218, at *29–30.

501. Jack Lechich, *Protesters Call on Sheriff Paul Penzone to Stop Cooperating with ICE*, ARIZ. REPUBLIC (Aug. 22, 2018), https://www.azcentral.com/story/news/local/phoenix-breaking/2018/08/22/protesters-urge-sheriff-paul-penzone-stop-cooperating-ice/1069547002/ [https://perma.cc/48DP-L2WP].

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that of New York and Maricopa County because it ended in settlement between the parties and did not require a trial to obtain a court order. The backdrop of negative publicity against the NYPD and the election of a reform-minded mayor were important to overcoming the hurdles in this instance.

A. *BAILEY*'S ORIGINS: A LONG HISTORY OF RACIALLY MOTIVATED POLICE PRACTICES

Bailey v. City of Philadelphia arose out of a decades-long struggle to address stop and frisk policing in Philadelphia. In the 1980s, the Philadelphia Police Department (PPD) engaged in high-profile and aggressive police operations that sparked a series of court injunctions and community organizing campaigns.[502] On March 27, 1985, the Philadelphia Police Commissioner initiated Operation Cold Turkey.[503] Using computerized police equipment, he located the fifty street corners with the most drug arrests and sent massive police "strike teams" to detain and search anyone in the area.[504] Officers were instructed to "clear" corners and surrounding areas to cut off the drug trade "cold turkey."[505] The local ACLU, working with the local progressive firm Kairys & Rudovsky, filed a class action a week later on behalf of 1200—primarily Black—individuals.[506] Within two weeks, the media attention and public pressure led to a consent decree to avoid violations of the Fourth Amendment rights of persons living in "high-crime" areas.[507]

502. I start this version of the story in the 1980s, but the tradition of community organizing on police issues carries back many decades. The Coalition of Organizations on Philadelphia Police Accountability and Responsibility and the Coalition Against Police Abuse operated in the 1970s. They were strong enough to pressure Ed Rendell, after winning the District Attorney race in 1977, to create a separate unit to prosecute police. This promise arose during the campaign, and both he and his Republican opponent pledged to create such a unit. *See* DAVID KAIRYS, PHILADELPHIA FREEDOM 332 (2008). For a good review of the history of police accountability efforts, including early litigation to achieve police-citizen oversight, see Richard J. Terrill, *Police Accountability in Philadelphia: Retrospects and Prospects*, 7 AM. J. POLICE 79, 81–84 (1988).

503. KAIRYS, *supra* note 502, at 318.

504. *Id.*

505. *Id.*

506. *Id.* at 319.

507. *Id.* at 320. The terms of the injunction stated the police "shall not stop, frisk, question, search, interrogate, detain, or arrest any person" based on "a person's presence in a high-crime location" or with less basis or cause than permitted under the Fourth Amendment. *Id.*

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A few months later, the Puerto Rican residents of Spring Garden were subjected to rampant illegal searches and arrests following the death of a police officer who was found shot in his patrol car.[508] One elderly man was cooking for his invalid wife when police demanded he come to the station for questioning.[509] He was not even permitted to turn off the stove or notify family to care for his wife until his return.[510] Spring Garden United Neighbors (SGUN) called the ACLU and the same Kairys & Rudovsky lawyers to its meeting to hear from residents and discuss possible action.[511] As an organization, SGUN has many priorities, including preventing gentrification from pushing out its low-income Puerto Rican membership.[512] Police sweeps were viewed as part of the city's plan to displace the community, making the events central to the group's mission and membership.[513]

Following a hearing, a federal judge granted a preliminary injunction on behalf of a class of Spring Garden residents in *SGUN v. City of Philadelphia*.[514] All those questioned were of Puerto Rican origin, none were charged with crimes, and none had information related to the officer's death.[515] The court found it important that the police engaged in such sweeps shortly after the Operation Cold Turkey injunction.[516] In his oral opinion, the judge noted,

> This . . . makes it clear to me that the defendants would conduct a 'sweep' again if they believed they could escape unscathed. To permit that would make a mockery of our constitutional right to be free from undue restraint in our daily lives, on the street, in front of our homes and inside our homes.[517]

The City settled following the court's pronouncements.[518] The temporary injunction became permanent; attorneys' fees and minimal damages were awarded.[519]

508. *Id.*
509. *Id.* at 330.
510. *Id.*
511. *Id.* at 320–21.
512. *Id.* at 321.
513. *Id.*
514. Spring Garden United Neighbors, Inc. v. City of Philadelphia, 614 F. Supp. 1350 (E.D. Pa. 1985).
515. *Id.* at 1351.
516. *Id.* at 1353.
517. *Id.*
518. KAIRYS, *supra* note 502, at 332.
519. *Id.*

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Following this activity and other operations, including the PPD's controversial bombing of MOVE activists' homes,[520] advocates convened the first Coalition of Police Accountability (CPA) in Philadelphia.[521] The coalition consisted of a range of community, civil rights, religious, and advocacy groups, including an organization of minority police officers, Tenant Action Group, Philadelphia Prison Project, and the American Friends Service Committee.[522] The coalition's formation was assisted by David Kairys, of Kairys & Rudovsky, and the ACLU.[523] As chair of the coalition, David Kairys researched and drafted a report to explain and document the state of police concerns.[524] The report included thirteen specific recommendations and was released in 1986 with much public fanfare.[525] It traced well-documented reports of police abuse from the Department of Justice and U.S. Civil Rights Commission back to the 1960s, but pointed to the current state of affairs as reaching the violence of the "Rizzo years"—a time marked with complete impunity.[526] Some of the recommendations were adopted over time, following sustained pressure.[527]

520. *See generally* Emma Eisenberg, *Three Decades After Philly Dropped a Bomb on Its Home, MOVE Org Survives*, VICE NEWS (May 19, 2017), https://www.vice.com/en_us/article/mbqkb4/three-decades-after-philly-dropped-a-bomb-on-its-home-move-org-survives [https://perma.cc/P4T7-JCQW]; *Timeline of the MOVE Organization Leading to May 13, 1985*, PHILA. TRIB. (May 9, 2015), http://www.phillytrib.com/news/timeline-of-the-move-organization-leading-to-may/article_91170189-7446-5a6b-97cc-db04660d69a6.html [https://perma.cc/FQP7-Y35E].

521. KAIRYS, *supra* note 502, at 332.

522. *Id.*

523. *Id.*

524. *Id.* at 333; *see also* Christopher Hepp, *Coalition Submits Reforms to Reduce Police Misconduct*, PHILA. INQUIRER, Apr. 22, 1986, at B6.

525. KAIRYS, *supra* note 502, at 333–34.

526. *Id.*; *see also id.* at 140–42.

527. *See* Jeff Gammage, *Hearings Begin on Police Review Panel*, PHILA. INQUIRER, Dec. 16, 1992, at B3 (discussing city council hearings on the establishment of a Police Advisory Board to independently investigate police misconduct); Christopher Hepp, *Coalition Says Police Report Lenient on Misconduct, Hiring*, PHILA. INQUIRER, Mar. 24, 1987, at B1 (discussing remedies proposed by the coalition in response to the shortcomings of a Philadelphia Police Study Task Force Report); Edward Moran, *Coalition: Police Brutality on the Rise*, PHILA. DAILY NEWS, Apr. 25, 1986, at 4 (detailing the coalition's activities in response to little reduction of police brutality cases).

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The CPA disbanded by the late 1980s, yet police department statistics showed complaints of physical abuse by officers increased by thirty-seven percent from 1989 to 1991.[528] In the early 1990s, officers in the 39th Police District in Philadelphia arrested, searched, and prosecuted hundreds of persons on false drug charges.[529] Nearly all were African-American or Latinx. A joint federal and city investigation into corruption and misconduct in the 39th District resulted in the conviction of six officers and the overturning of 150 convictions.[530]

In 1996, the Philadelphia chapter of the NAACP and North Philadelphia's Police-Barrio Relations Project filed a class action lawsuit as organizational plaintiffs against the PPD in *NAACP v. City of Philadelphia*.[531] The ACLU of Pennsylvania, Earl W. Trent of the NAACP, private counsel Alan Ytvin, David Rudovsky (of Kairys & Rudovsky), and Professor Seth Kreimer were also part of the suit.[532] The federal action chronicled the PPD's history of racism, corruption, and abuse of civil liberties, "coupled with the collapse of internal discipline."[533] It raised municipal liability claims for illegal searches and arrests under the Fourth and Fourteenth Amendments.[534] Due to enormous public pressure leading up to the lawsuit, the parties quickly settled; the district attorney's office eventually agreed to vacate hundreds of convictions and paid over six million dollars in compensation.[535]

528. BRURIA TAL, CIVILIAN OVERSIGHT OF POLICE IN PHILADELPHIA: THE FIRST 50 YEARS 8–9 (Nov. 2003), https://www.phila.gov/pac/PDF/HistoryofOversight.pdf [https://web.archive.org/web/20190608034326/http://www.phila.gov/pac/PDF/HistoryofOversight.pdf].

529. *See id.* at 10; *see also* JACK R. GREENE ET AL., POLICE INTEGRITY AND ACCOUNTABILITY IN PHILADELPHIA: PREDICTING AND ASSESSING POLICE MISCONDUCT 12–13 (2004), https://www.ncjrs.gov/pdffiles1/nij/grants/207823.pdf [https://perma.cc/5QB6-SVXE] (discussing "charges of brutality, robbery, and various procedural violations" committed by officers in the 39th District).

530. JACK R. GREENE ET AL., *supra* note 529, at 13.

531. Complaint, NAACP v. City of Philadelphia, No. 96-6045 (E.D. Pa. Sept. 4, 1996), ECF No. 1.

532. *Id.* at 6.

533. Mark Fazlollah & Richard Jones, *Suit to Seek U.S. Takeover of Police Reform*, PHILA. INQUIRER, Dec. 7, 1995, at A1.

534. *See* Complaint, ECF No. 1, *supra* note 531, at 3–4.

535. *See* Complaint at 19, Bailey v. City of Philadelphia, No. 2:10-cv-05952 (E.D. Pa. Nov. 4, 2010), ECF No. 1 (follow-up case to *NAACP v. City of Philadelphia*) (noting that as a result of the settlement in *NAACP v. City of Philadel-*

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As part of the 1996 *NAACP* settlement, defendants agreed to appoint an Integrity and Accountability Officer (IAO) to monitor compliance with the agreement.[536] The parties also agreed plaintiffs' attorneys would continue monitoring defendants' compliance with the agreement.[537] The IAO and plaintiffs' counsel received "reviews of" police incident reports (PPD Form 75-48a) that documented stops, frisks, and detentions by the PPD and the basis for probable cause or reasonable suspicion.[538] Plaintiffs' counsel reviewed the stop and arrest data and periodically submitted reports to the federal court.[539] The agreement was terminated in 2005, despite continued racial disparity in stops, frisks, and arrests.[540]

B. CONTINUED RACIAL DISPARITIES IN STOP AND FRISK AND INFORMATION GATHERING TO JUMP THE HURDLES

Once the settlement terminated, stop and frisk resumed with vigor. Responding to a 2006–07 spike in homicides in Philadelphia, Black city councilman and mayoral candidate Michael Nutter ran on an aggressive anti-crime platform centered on increasing the use of stop and frisk.[541] When Mayor Nutter was elected in 2008, he ordered the police department to increase stop and frisk activity.[542] Mayor Nutter's order had an immediate and alarming impact. Kairys & Rudovsky, the law firm responsible for monitoring the settlement in *NAACP*, saw a large

phia, "the District Attorney of Philadelphia agreed to vacate hundreds of convictions, and the City of Philadelphia agreed to pay compensation to those wrongfully accused in a total amount of over $6 million").

536. Settlement & Monitoring Agreement & Stipulations of the Parties at 4–5, NAACP v. City of Philadelphia, No. 96-6045 (E.D. Pa. Sept. 4, 1996), ECF No. 2 ("[The City] will create a new position of Integrity and Accountability Officer to be responsible for assessing, auditing, and/or reviewing Departmental policies . . . .").

537. *Id.* at 2.

538. *See id.*

539. *See, e.g.*, Plaintiffs' First Monitoring Report: Complaints Against Police, NAACP v. City of Philadelphia, No. 96-6045 (E.D. Pa. Sept. 29, 1997), ECF No. 7.

540. *See* Order, NAACP v. City of Philadelphia, No. 96-6045 (E.D. Pa. July 21, 2005), ECF No. 53 (ordering the parties shall file their views on "whether the monitoring agreement should continue" by Sept. 30, 2005, with no more entries following).

541. Telephone Interview with David Rudovsky, Partner, Kairys, Rudovsky, Messing & Feinberg (Aug. 17, 2018).

542. *Id.*

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increase in the raw numbers of stops and frisks, and began receiving calls from Black and Latinx residents.[543] Several individual actions were filed.[544] During discovery for these individual cases, officers admitted to being told to "stop Black kids hanging around corners," apparently without needing any suspicion of criminal conduct.[545] Several media stories exposed the extent of the problem, and local organizers viewed ongoing litigation as useful to broader reform efforts.[546]

When a statistical analysis of the monitoring data showed that the increase in stops surpassed police stops in New York on a per capita basis, the same individuals and organizations that were involved with the *NAACP* case—the ACLU of Pennsylvania, with Kairys & Rudovsky, and University of Pennsylvania School of Law Professor Seth Friedman—drafted a class action complaint on behalf of Karys Bailey, seeking injunctive relief.[547] In early 2011, they shared the drafted complaint with the law department of the City of Philadelphia, and after the department confirmed the allegations, the City was ready to discuss terms of settlement.[548] Following discussions between the parties, on November 4, 2010, the class action suit *Bailey v. City of Philadelphia* was filed against the City of Philadelphia by a group of eight African American and Latinx individuals, requesting injunctive and compensatory relief.[549]

The *Bailey* plaintiffs alleged that PPD implemented a policy and practice of unconstitutional stops, frisks, searches, detentions, and uses of unreasonable force in violation of the Fourth and Fourteenth Amendments.[550] They additionally alleged that the PPD conducted stops on the basis of race and/or national origin—primarily upon Black and Latino men—and that the PPD and its commissioner, Charles Ramsey, acted with deliberate indifference in failing to address the attendant harms.[551] For the purpose of obtaining injunctive relief, plaintiffs sought to certify a class of all of the people in Philadelphia who had been or would in the future be "subjected to defendants' policy, practice

543. *Id.*
544. *Id.*
545. *Id.*
546. *See supra* Part II.D.
547. Telephone Interview with David Rudovsky, *supra* note 541.
548. *Id.*
549. Complaint, ECF. No. 1, *supra* note 535.
550. *Id.* at 2.
551. *Id.*

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and/or custom of stopping, seizing, frisking, searching and detaining persons in the absence of probable cause or reasonable suspicion, or on the basis of race and/or national origin, in violation of the Fourth and Fourteenth Amendments."[552]

With regard to its *Monell* claims, the complaint directly related to the prior *NAACP* litigation. It included specific allegations of racial disparities in stops and arrests, increased use of force and abuse complaints, and evidence of failure to discipline and monitor PPD officer activity.[553] The allegations were based on the plaintiffs' personal experiences with the PPD, hard data acquired following the litigation in *NAACP v. City of Philadelphia*,[554] and internal data collected by the PPD for the years 2005 through 2009.[555] The data showed that in 2005 the PPD stopped approximately 102,000 persons.[556] Only four years later, that number increased by more than 148% to 253,000. Of the 253,333 stops conducted in Philadelphia in 2009, 72.2% (183,000) of those stops were conducted on African Americans, despite the fact that African Americans make up only 44% of the city's population.[557] In a city of 1.52 million,[558] this corresponds to a stop ratio of 1 in 6. By comparison, in the same year in New York

552. *Id.* at 5.

553. *Id.* at 19–21.

554. No. 96-6045 (E.D. Pa. 1996).

555. Settlement Agreement, Class Certification, and Consent Decree, Bailey v. City of Philadelphia, No. 10-5952 (E.D. Pa. June 21, 2011), ECF No. 16. In 1996, in the matter of *NAACP v. City of Philadelphia*, No. 96-6045 (E.D. Pa. 1996), the parties had entered a settlement agreement that compelled a mandatory review of PPD policies to ensure that the PPD was compliant according to the demands of the Fourth and Fourteenth Amendments. The Agreement required appointment of an "Integrity and Accountability Officer" (IAO) who would monitor the City's compliance. Settlement & Monitoring Agreement & Stipulations of the Parties, *supra* note 536, at 4–5. The IAO released its "report on the Philadelphia Police Department's disciplinary system," finding that the disciplinary system was "fundamentally ineffective, inadequate, and unpredictable." ELLEN GREEN-CEISLER, PHILADELPHIA POLICE DEPARTMENT INTEGRITY AND ACCOUNTABILITY OFFICE: DISCIPLINARY SYSTEM (2003), https://www.clearinghouse.net/chDocs/public/PN-PA-0002-0010.pdf [https://perma.cc/F76P-XU44].

556. Complaint, ECF No. 1, *supra* note 535, at 19–21.

557. *Id.*

558. *Philadelphia County, Pennsylvania*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/philadelphiacountypennsylvania [https://perma.cc/6HLG-9MMG] (reporting the population of Philadelphia based on the 2010 Census).

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City, police made 575,000 stops in a city of 8.2 million—a ratio of 1 in 14.[559]

The complaint also cited district court decisions denying defendants' motions for summary judgment on *Monell* municipal liability claims to demonstrate that the City was on notice of a potential practice or custom of illegal stops and frisks.[560]

The broader Philadelphia police-reform community mounted pressure, which led to additional information that unintentionally assisted the litigants. Institutional reports and investigations also evidenced the PPD's failure to address abuses. Following community pressure from advocates, in December 2003 the IAO issued a report on the PPD's disciplinary System, which concluded that the "disciplinary system in the Philadelphia Police Department remains fundamentally ineffective, inadequate, and unpredictable."[561] The Mayor's Task Force had also issued a report the previous year.[562] Both reports cited serious training, discipline, and monitoring problems.[563] From 2001 to 2010, the number of physical abuse complaints had doubled.[564]

A police practices expert's review of 1000 Internal Affairs Division (IAD) investigations further confirmed the inadequacies of the police department's disciplinary process. According to Dr. Paul McCauley, a professor of criminology at Indiana University of Pennsylvania, deficiencies the IAD had reported in 2003 continued.[565] He determined that the PPD's internal investigation process had fallen below accepted practices and was "arbitrary and inconsistent"; progressive discipline was not implemented, meaning repeat violators were not penalized in

559. *See* Al Baker, *New York Minorities More Likely to Be Frisked*, N.Y. TIMES (May 12, 2010), https://www.nytimes.com/2010/05/13/nyregion/13frisk.html [https://perma.cc/VSB9-8BAZ]; *New York City, New York*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/newyorkcitynewyork [https://perma.cc/PZY3-S4FP] (reporting the population of New York City based on the 2010 Census).

560. Complaint, ECF No. 1, *supra* note 535, at 23 (citing Tindley v. City of Philadelphia, No. 09-CV-0169 (E.D. Pa. 2009); Lyons v. City of Philadelphia, No. 06-CV-5195, 2007 WL 3018945, at *2 (E.D. Pa. Oct. 12, 2007); Henderson v. City of Philadelphia, No. 06-CV-532 (E.D. Pa. 2006)).

561. GREEN-CEISLER, *supra* note 555.

562. JOANNE EPPS ET AL., MAYOR'S TASK FORCE ON POLICE DISCIPLINE: REPORT AND RECOMMENDATIONS (2001).

563. *Id.*; GREEN-CEISLER, *supra* note 555.

564. Complaint, ECF No. 1, *supra* note 535, at 22.

565. *Id.* at 23.

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proportion to the number of violations; IAD investigators were inadequately trained and supervised when conducting investigations; a "Code of Silence" prevailed; and IAD lacked an effective early warning system.[566]

In a remarkably short timeline, on June 21, 2011, Judge Stewart Dalzell entered three orders, effectively moving the case to a remedial phase. That same date, Judge Dalzell approved the parties' Settlement Agreement and Consent Decree (Settlement Agreement).[567] Furthermore, the court granted class certification[568] and appointed JoAnne A. Epps, Dean of Temple School of Law, to serve as the court monitor.[569] The monitor was granted the authority to make recommendations to the court and the parties concerning measures necessary to ensure compliance with the court's order.[570] Although the City of Philadelphia denied any practice of unconstitutional searches and seizures, the city agreed to establish "appropriate measures that should be implemented as a matter of City policy and practice to ensure that stops and frisks by the PPD are conducted consistent with constitutional mandates."[571]

The case is an example of how a city may make a cost-benefit analysis to determine if it would be politically and financially costly to go to trial; the City of Philadelphia chose not to dispute the high numbers of stops and frisks since Mayor Nutter came into office.[572] Neither the mayor nor the police chief wanted the negative press and community pressure that occurred in New York.[573] They agreed to a settlement to avoid litigation and headlines.

The Settlement Agreement included numerous terms, which I provide in detail to demonstrate the type of information

566. *Id.* at 22–23.

567. Settlement Agreement, Class Certification, and Consent Decree, ECF No. 16, *supra* note 555. Neither the parties nor the court discussed the plaintiff's standing to seek injunctive relief under *Lyons*, *Monell* liability, or qualified immunity in the pretrial briefings.

568. Order Approving Consent Decree and Granting Class Certification, Bailey v. City of Philadelphia, No. 2:10-cv-05952 (E.D. Pa. June 21, 2011), ECF No. 14.

569. Order Appointing Monitor, Bailey v. City of Philadelphia, No. 2:10-cv-05952 (E.D. Pa. June 21, 2011), ECF No. 15.

570. Settlement Agreement, Class Certification, and Consent Decree, ECF No. 16, *supra* note 555, at 5.

571. *Id.* at 2.

572. *See supra* Part II.D.

573. See *supra* Part II.

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police may collect, or be required to collect, for oversight of remediating racial profiling. First, defendants agreed to provide plaintiffs with data and other information as remedial discovery.[574] This included, for the class period: activity forms (75-48a Forms) for two week periods; training materials governing stop and frisk practices, including codes for the 75-48a Form; audits, reports, and internal activity data analysis prepared by and for the PPD; PPD Compstat and research and planning numbers regarding arrests, reported crime, seizures of contraband (guns and/or drugs) pursuant to stops and frisks; and hard data related to PPD deployment.[575] Second, the parties agreed to discuss further disclosures necessary to monitor stop and frisk practices.[576] Third, defendants agreed to begin entering all 75-48a Forms into an electronic database with digitized information sufficient to analyze the legality of stops and frisks.[577] Fourth, the Settlement Agreement allowed plaintiffs to review current and propose additional training, supervision, and disciplinary policies to determine necessary changes to ensure constitutional stops and frisks.[578]

The court order also included Fourth and Fourteenth Amendment declaratory relief.[579] With respect to the Fourth Amendment, the court order declared that stops and frisks

> shall not be permissible, without limitation, where the officer has only anonymous information of criminal conduct, or because the person is only "loitering" or engaged in "furtive movements," or is acting "suspiciously," or for the purpose of "investigation of person," or on the basis of non-articulated "flash information," or only because the person is in a "high crime" or "high drug" area. These restrictions are not exclusive and the parties agree that stops and frisks shall not be made without the requisite reasonable suspicion under the Fourth Amendment and Pennsylvania Constitution.[580]

On the Fourteenth Amendment claims, the court order declared that defendant

574. Settlement Agreement, Class Certification, and Consent Decree, ECF No. 16, *supra* note 555, at 3.

575. *Id.*

576. *Id.* at 4.

577. *Id.* at 3.

578. *Id.* at 4. In addition, seven of the named plaintiffs in the case were each paid $115,000 as part of the agreement. Larry Miller, *Nutter Enacts 'Stop and Frisk' Reforms*, PHILA. TRIB., June 24, 2011, at 2B.

579. Settlement Agreement, Class Certification, and Consent Decree, ECF No. 16, *supra* note 555, at 6.

580. *Id.* at 4.

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> agrees to implement policies and practices to ensure that stops and frisks are not conducted on the basis of the race or ethnic origin of the suspect, except where the law permits race or ethnic origin to be considered in determining whether a person shall be stopped or frisked (e.g., where a suspect has been described by his race).[581]

For the purposes of this Article, however, it is important to note executive orders issued in direct response to the *Bailey* settlement. These executive orders represented the triangulation of three factors: new reformist Philadelphia Mayor James Kinney's platform to change policing; experimentation with civilian oversight supported by the DOJ; and the influence of statistical analysis of numerical data. The executive orders updated the procedures for citizen complaints against police officers and established new procedures to track and audit arrestees held in temporary investigative detention.

Multiple orders were signed.[582] The first order established a searchable electronic database of pedestrian stops.[583] This database would support increased monitoring and audits of investigative detentions, frisks, and searches.[584] The city also committed to public reporting for the annual internal audits.[585] The second order addressed internal processing of alleged police misconduct, including the investigation, review, and disposition of complaints.[586] Mayor Kenney reestablished a civilian oversight board through a third executive order.[587] The civilian oversight board continues to review the implementation of recommendations provided by the Final Report of the President's Task Force

581. *Id.* Additional provisions governed monitoring and compliance and the creation of audits and periodic reviews. *Id.* at 5–7.

582. *See, e.g.*, Exec. Order No. 5-17, Processing of Civilian Complaints Alleging Police Misconduct (Aug. 1, 2017), https://www.phila.gov/ExecutiveOrders/Executive%20Orders/eo6517.pdf [https://perma.cc/48Z9-DKHJ]; Exec. Order No. 2-17, Police Advisory Commission (Jan. 12, 2017), http://www.phila.gov/ExecutiveOrders/Executive%20Orders/eo3217%20Police%20Advisory%20Commission.pdf [https://perma.cc/TC46-Z3TF]; Exec. Order No. 6-11, Establishing a Procedure to Track and Audit Investigative Detentions Conducted by Police Officers (June 21, 2011), https://www.phila.gov/ExecutiveOrders/Executive%20Orders/2011_EO06-11.pdf [https://perma.cc/DN9H-EER7].

583. Exec. Order No. 6-11, *supra* note 582.

584. *Id.*

585. *Id.* at 2.

586. Exec. Order No. 5-17, *supra* note 582; Miller, *supra* note 578.

587. Exec. Order No. 2-17, *supra* note 582; Patricia Madej, *Kenney Reestablishes Police Advisory Commission, Emphasizes Goal to Strengthen Community Relations*, PHILLY VOICE (Jan. 13, 2017), http://www.phillyvoice.com/kenney-reestablishes-police-advisory-commission-emphasizes-goal-to-strengthen-community-relations/ [https://perma.cc/2VEV-VCGY].

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on 21st Century Policing, and retained its ability to subpoena and investigate within a police district.[588] The Commission also releases an annual report on its accomplishments and recommendations from the preceding year.[589]

The *Bailey* resolution, following nothing more than the filing of a complaint and discussions with the city, contrasts sharply with *Ortega-Melendres* and *Floyd*, which involved years of contested, costly discovery and federal court trials. There are some benefits to this strategy—the costs shifted to the defendants immediately and all parties moved to begin fixing the problem, rather than contesting whether the police department engaged in an unconstitutional practice.[590] In addition, Philadelphia officials avoided the negative political fallout faced by Sheriff Arpaio and former Mayor Bloomberg. The Chief of PPD, Charles Ramsey, and Mayor Nutter were rewarded nationally—Ramsey became chair of President Obama's 21st Century Policing Task Force,[591] and Nutter was appointed to several prestigious chair positions with political prospects in the Democratic party.[592]

588. Exec. Order No. 2-17, *supra* note 582.

589. *Id.*

590. *See* Gilles, *supra* note 206, at 858–67 (describing the "informational" and "fault-fixing" functions of constitutional damages actions); Margo Schlanger, *Inmate Litigation,* 116 HARV. L. REV. 1555, 1681 (2003) (describing how negative publicity regarding lawsuits "can trigger embarrassing political inquiry and even firings, resignations, or election losses"). However, another consequence of avoiding contested adversarial litigation may be decreased opportunity for community engagement or community organizers role in the litigation or remedial process. Instead, Charles Ramsey worked with the DOJ Community Oriented Police Services to start an advisory board that had no teeth and eventually stopped meeting. *See* Sean Carlin, *Mayor Michael Nutter Implements Oversight Committee on Police-Involved Shootings*, NBC PHILA. (Mar. 25, 2015), https://www.nbcphiladelphia.com/news/local/philadelphia-police-deadly-force-nutter/132448/ [https://perma.cc/8XPP-ZTLY]; Christopher Norris, *Philadelphia Police Oversight Board in Transition Amidst Dormancy*, GOOD MEN PROJECT (Aug. 16, 2016), https://goodmenproject.com/good-feed-blog/philadelphia-police-oversight-board-in-transition-amidst-dormancy-cnorris/ [https://perma.cc/2ZKG-Y3SU] (noting members of the board had apparently become disillusioned by the process and opted to withdraw participation).

591. David Gambacorta, *Obama Taps Ramsey for Policing Task Force*, MORNING CALL (Dec. 2, 2014), https://www.mcall.com/news/pennsylvania/mc-philly-obama-ramsey-ferguson-20141202-story.html [https://perma.cc/M3BF-XF53].

592. Emily Babay, *Could Former Philly Mayor Michael Nutter Be the Busiest Part Timer in America?*, PHILA. INQUIRER (Aug. 17, 2016), https://www.inquirer.com/philly/blogs/real-time/All-of-former-Philadelphia-Mayor-Michael

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In summary, Parts II, III, and IV present three examples of legal mobilization with class action challenges against municipal law enforcement departments. The in-depth consideration of litigation strategy shows how procedural hurdles act to shape the litigation process, the choices litigators make, and ultimately affect the outcome of lower court opinions. This Article does not provide a playbook for plaintiffs' success in police structural reform litigation, nor does it provide a naïvely optimistic view of obtaining merits review. Though the litigants here took doctrine seriously and satisfied the standards for structural reform injunctions, nothing is meant to suggest an overly formalistic approach. Many factors in addition to law determine the outcome of such cases. Moreover, the case examples demonstrate how *Lyons, Monell*, and *Wal-Mart Stores, Inc.* were overcome through innovative information gathering strategies, as opposed to offering what some may consider bolder suggestions to expand the the doctrine of standing to obtain injunctions against police departments or new theories to prove municipal-level culpability for harms to class members. Despite the likelihood that the Supreme Court may view the evidence provided to the district courts in Part II, III, and IV differently, these litigants won and, as with a vast number of cases at the district court level, avoided appellate review. Even if only a few cases manage to succeed and avoid the Court's review, they have assisted thousands to avoid racial profiling, the accompanying attacks on human dignity, and the potential for further harm through use of force.

-Nutters-new-jobs.html [https://perma.cc/8YWG-AL34] (noting former Mayor Nutter's numerous prestigious appointments and speculating political ambition); Brooke DiGia, *Former Phila. Mayor Michael Nutter Is Joining the School of Social Policy and Practice*, DAILY PENNSYLVANIAN (Feb. 16, 2017), https://www.thedp.com/article/2017/02/michael-nutter-returning-to-penn [https://perma.cc/539C-P8V5]. Most recently, the former mayor was tapped as campaign chairman of Bloomberg's campaign for the presidential nomination in 2020. Alicia V. Lozano, *Former Philly Mayor Nutter Joins Bloomberg Campaign*, NBC PHILA. (Dec. 20, 2019) https://www.nbcphiladelphia.com/news/local/former-philly-mayor-nutter-joins-bloomberg-campaign/2264143/ [https://perma.cc/TYS2-XDXF]; Julia Terruso, *Michael Bloomberg Just Landed His First Pa. Endorsement: Former Philly Mayor Michael Nutter*, PHILA. INQUIRER (Dec. 20, 2019), https://www.inquirer.com/news/mayor-michael-nutter-endorses-michael-bloomberg-campaign-chair-2020-democrats-20191220.html [https://perma.cc/JXA4-DRD5].

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V. OVERCOMING DOCTRINAL HURDLES IN POLICE STRUCTURAL REFORM LITIGATION

Even as one must acknowledge the limits of case studies as exemplars, the cases examined in Parts II, III, and IV reveal common themes discussed in this Part, and opportunities for further study. The case studies show that certain types of claims—those challenging racial-profiling practices, such as unlawful use of stops and frisks—have been able to match the high evidentiary standards required to establish standing, municipal liability, and class certification. In this Part, I use the case studies to examine: What evidence allowed legal advocates to overcome pre-trial barriers and achieve class-wide injunctive relief against police departments' racial profiling practices? How did the categories of evidence used to challenge unconstitutional and racially discriminatory stop practices—the claim in all three case studies—operate to satisfy the Supreme Court doctrines? And I analyze the extent to which racial profiling structural reform litigation such as *Floyd*, *Ortega-Melendres*, and *Bailey* is replicable, as well as how the examples affirm what is difficult with structural reform litigation as a tool for correcting unconstitutional police-department practices.

Section A begins by layering the doctrinal barriers discussed in Part I onto the evidence presented by the parties in the three case studies. Synthesizing the evidence used in each case shows a potential evidentiary convergence, where the same information and data overcomes multiple doctrinal barriers. Section B examines how certain types of evidence helped plaintiffs overcome the standing, municipal liability, and class certification barriers: namely, statistical evidence, statements by decision-makers, and proof of a history of failure to correct a known unconstitutional practice. Section C identifies mechanisms outside the traditional discovery process to obtain evidence in police structural reform litigation: relationships with advocates and grassroots organizers; publicity that leads to exposure of more information; and court orders requiring data tracking and disclosures following prior litigation. It mentions other methods of gathering hard data besides court orders.

A. JUMPING HURDLES IN *FLOYD*, *ORTEGA-MELENDRES*, AND *BAILEY*

This Section synthesizes the arguments and types of evidence plaintiffs used to overcome standing, municipal liability,

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and class certification hurdles in the case examples. The synthesis shows a potential doctrinal and evidentiary convergence—an overlap in the evidence needed to overcome each doctrine and an overlap in some aspects of the doctrinal requirements, the common thread being strong numerical data. The convergence claim is a soft one because it requires further consideration beyond the cases in this Article in order to understand its operation among the trial courts.

1. Standing: *Lyons*

As discussed in Section I.A, *Lyons* established three barriers to police structural reform litigation: the repeated harm, speculative harm, and innocence requirements.[593] Moreover, *Lyons* specifically distinguished claims for damages and injunctive relief against unlawful police policy or practice claims.

In *Floyd*, plaintiffs met the high repeated harm requirement in part by showing the sheer volume of potentially unlawful stops by the NYPD, using the NYPD's own documentation.[594] In addition, the named plaintiffs and trial witnesses had been subjected to multiple unlawful stops, including during the pendency of the litigation, concretizing the high likelihood of future injury.[595] Judge Scheindlin compared the NYPD's thousands of facially unjustified stops and frisks to the approximately ten deaths following the LAPD's chokehold policy cited by the Supreme Court's majority in *Lyons*.[596] Given the much greater volume of unjustified actions and repeated unlawful stops by class member witnesses at trial, she found plaintiffs would be unable to avoid a future injury while simply engaging in their everyday life activities, meeting the *Lyons* burden.[597]

Maricopa County Sherriff's Office (MCSO) utilized crime suppression sweeps for the purpose of finding Latino "illegals" to target for deportation.[598] Although the named plaintiffs were not

593. *See supra* Part I.A.

594. *Floyd IV*, 283 F.R.D. 153, 169–70 (S.D.N.Y. 2012).

595. *Id.*

596. *Id.*

597. *Id.*

598. The defendants appealed the court's order instituting a preliminary injunction against detaining persons based only on a suspicion that they are present in the U.S. without authorization in the absence of other facts. *See Ortega-Melendres IV*, 836 F. Supp. 2d 959, 986 (D. Ariz. 2011). The Ninth Circuit affirmed the injunction and reiterated that unauthorized presence in the United

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themselves stopped multiple times, the sheriff's own proclamations and his deputies' admissions revealed that they were targeting Latino areas for law enforcement operations. The MCSO's stated policy and practice, as revealed by testimony presented in depositions and trial, was to detain persons believed to be unauthorized even when they could not be arrested for state criminal charges.[599]

The speculative harm barrier requires plaintiffs to establish a likelihood of immediate injury. In *Floyd* and *Ortega-Melendres*, this requirement was overcome through evidence of repeated harms. In *Floyd*, the evidence was similar to that used to overcome the repeated harm requirement, such as multiple unlawful stops of named plaintiffs. The Maricopa sheriff's proclamations and his deputies' admissions that they target Latinos for arrest demonstrated a "real threat" of repeated and immediate injury. Because the department explicitly relied on race rather than reasonable suspicion to engage in *Terry* stops, and the policies and practices were pervasive, ongoing, and repetitive, the district courts determined plaintiffs had overcome the speculative harm requirement.[600]

The innocence obstacle was also overcome in the case studies. The *Lyons* majority found Mr. Lyons's harm speculative because events leading to the police officer's application of an illegal chokehold required Mr. Lyons to break the law—namely, a burned-out tail light and provocation of the police that precipitated the injurious chokehold.[601] By contrast, for the *Floyd* and *Bailey* plaintiffs, unlawful *Terry* stops occurred without any alleged misconduct on the plaintiffs' parts.[602]

The district courts treated the investigatory practices at issue—car or pedestrian stops, frisks, or detentions—differently

States is not a crime. *See* Ortega-Melendres v. Arpaio, 695 F.3d 990, 1000 (9th Cir. 2012).

599. *Ortega-Melendres V*, 989 F. Supp. 2d 822, 892 (D. Ariz. 2013).

600. *Id.* at 890–91 (citing LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985) (explanatory parenthetical in original) ("holding that plaintiffs 'do not have to induce a police encounter before the possibility of injury can occur' because stops are the result of an 'unconstitutional pattern of conduct'") and Thomas v. County of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992) (explanatory parenthetical in original) ("stating that injunctive relief is appropriate when plaintiffs show that police misconduct 'is purposefully aimed at minorities and that such misconduct was condoned and tacitly authorized by department policy makers'")).

601. *See supra* Part I.A.

602. *See supra* Parts II.B & IV.B.

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from the chokehold policy challenged in *Lyons* because they involved police interactions with innocent plaintiffs that often went without arrest or even documentation.[603] Mr. Floyd and his fellow plaintiffs were stopped during "everyday activities," such as going to school or work;[604] and the *Ortega-Melendres* class members were targeted in such a way that merely leaving their homes made them subject to unconstitutional sweeps.[605] Prefatory language in the *Bailey* court orders specifically cited the lack of any basis for the stops conducted by Philadelphia Police Department officers, let alone reasonable suspicion.[606] When there is no basis for stops, class members overcome the innocence barrier.[607]

As we have seen, these cases met the *Lyons* repeat harm, speculative harm, and innocence hurdles. In some respects, these kinds of successes are replicable, and in others multiple factors are at play, making the success attenuated. Showing the probability of repeated harm could be more likely because police data is increasingly available, and the innocence hurdle may be jumped if litigants can show police actions systematically have no basis or amount to an official unwritten policy. However, some evidence is very particular to the case, such as Sheriff Arpaio's blatant admissions[608] or Mayor Bloomberg's statement suggesting a targeting based on race.[609] Again, with social media and the electronic discovery requirements, such statements are likely more available than in prior decades.[610]

This Article has shown that plaintiffs may succeed in structural litigation over certain unconstitutional police practices. However, in use of force matters, there may be challenges to reaching substantive review from the *Lyons* hurdle. But all is not lost. First, use of force is viewed on a spectrum, and need not only include practices such as chokeholds or lethal force. Data

603. *See supra* Part I.A.

604. *See supra* Part II.A.

605. *See supra* Part III.A.

606. *See supra* Part IV.A.

607. I note that while I observe these distinctions in the court opinions, I do not align myself with the factual account of the majority in *Lyons*. The alleged provocation is in doubt based on the complete factual record and the district court decision. Nor do I agree with the premise that innocence should be required for a court to prevent harm against individuals.

608. *See supra* Part III.B.

609. *See supra* Part II.B.

610. *See* discussion *infra* Part V.B.2 and note 672.

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and evidence that provide context to police stops is more readily available. For example, in New York City, the form officers use to document stops and frisks includes boxes for force (e.g., drawing a gun or putting a suspect against a wall).[611] Second, with advancements in recording police interactions digitally and electronically, the data and proof necessary to overcome standing in contexts other than stops are more readily available than when *Lyons* was decided.[612] Nonetheless, plaintiffs must address whether they have engaged in any activity to "provoke or resist" the police.[613] Police officers' control over whether an arrestee is labeled as "resisting" raises concerns for the replicability of the police racial profiling wins.

2. Municipal Liability: *Monell*

Monell and its progeny established that to overcome the municipal liability hurdle, plaintiffs must demonstrate a widespread practice or deliberate indifference to changing it, as well as factual parallel between the examples used to establish an unlawful policy, practice, or custom. Plaintiffs in *Floyd* and *Ortega-Melendres* succeeded in establishing municipal liability for police practices in violation of the Fourth and Fourteenth Amendments.

To overcome the widespread practices and factual parallel requirements, these cases relied on evidence of discriminatory statements, expert analysis of hard data, and, in *Floyd* and *Bailey*, failure to reform unconstitutional practices following a settlement in a nearly identical matter. In *Floyd*, plaintiffs presented recordings obtained by two whistleblower officers demonstrating that the "brass" (command staff executives) were pressuring mid-level supervisors to obtain more stops and summons.[614] Other evidence showed the command staff as centralized and coordinated. The judge also heard unrefuted testimony that Mayor Bloomberg viewed stop and frisk as a tactic focused on Black and Latino youth.[615] Plaintiffs satisfied the widespread practice requirement by showing strong statistical evidence that race was the best predictor of stops in any precinct, and that the racial disparity of stops crossed all five boroughs.[616] In *Ortega-*

611. *See Floyd I*, 813 F. Supp. 2d 417, 425 (S.D.N.Y. 2011).
612. *See infra* Part V.B.1.
613. *See supra* Part I.A.
614. *See supra* Part II.
615. *See supra* Part II.
616. *See supra* Part II.

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Melendres, the statements and documents authorized or published by Sheriff Arpaio, down the chain of command, directing that Maricopa County Sherriff's officers to stop any car with Hispanic-looking individuals, certainly assisted the plaintiffs in proving the stop practices were implemented "with the force of law."[617] Dr. Taylor's expert statistical report also demonstrated the practice of stopping passengers, and the high rate of stops in predominately Hispanic areas.

The district courts in Parts II, III, and IV found that the structural reform litigation satisfied *Monell* and its progeny, and granted structural reform injunctions to reform stop, frisk and detention practices. In two cases, *Floyd* and *Bailey*, the prior systemic litigation failed; and in all three examples, internal investigations, external media exposure, and other civil rights investigations put police departments on notice for inadequate training, supervision, and/or oversight. The court in *Floyd* specifically looked to when defendants were given notice (at least as far back as the Attorney General's 1999 report), lack of implementation of corrective measures following the *Daniels* settlement, and the lengthy history of poor relationships between Black and Latinx communities and the NYPD. In the *Ortega-Melendres* case study, although the court had no prior litigation to rely upon, the strength of officer and supervisor statements, coupled with Dr. Taylor's statistical analysis, proved enough to demonstrate a practice of stopping and arresting Latinx-appearing drivers and passengers. The *Bailey* complaint featured the Philadelphia Police Department's history of failed attempts at reform, dating back to the 1990s. Although a product of settlement negotiations, and not trial evidence, the final court orders in Bailey reference the history and long-term challenge to stem racial disparity within the stop and frisk practices of the Philadelphia Police Department.

3. Class Certification: *Wal-Mart Stores, Inc.*

In the three case studies, plaintiffs overcame the commonality hurdle along with what I have characterized as the early merits inquiry obstacle. Class certification under Rule 23(b)(2) was ultimately granted in all three case studies, and the majority of concerns raised in *Wal-Mart Stores, Inc.*, relevant to Rule 23(b)(3), are inapplicable in these examples.

617. *See supra* Part III.

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As some commentators have noted, following *Wal-Mart Stores, Inc.*, district and circuit courts have distinguished *Wal-Mart Stores, Inc.* in two general contexts: (a) cases where supervisors exercise their discretion pursuant to an explicit nationwide company policy and (b) cases where a plaintiff class challenges upper management's discretionary decision-making as discriminatory.[618] The racial profiling actions in this Article fall under the first: each officer and mid-level supervisor exercised some discretion, at the behest of the chief decision maker in each department—Commissioner Kelly in New York, Sheriff Arpaio in Maricopa County, and Chief Ramsey in Philadelphia—along with other high level department decision-makers.

The case studies affirm the general view that a court need not adjudicate each individual class member's claim prior to certification under Rule 23(b)(2) where plaintiffs seek injunctive relief. Even before *Wal-Mart Stores, Inc.*, defendants argued (b)(2) class definitions were overly broad or that class members are unascertainable.[619] For example, the City of New York believed "mini-trial" determinations were required under *Wal-Mart Stores, Inc.*[620] As the district courts in this Article affirmed, neither precedent nor the text or history of Rule 23 requires adjudication of hundreds of thousands of individual stops in a Rule 23(b)(2) class action.[621] Judge Sheindlin did not take up the defendants' request to decide whether each class member's stop was unconstitutional prior to certifying the Rule 23(b)(2) class action.[622]

618. *See* Malveaux, *supra* note 127, at 371–75. Malveaux delineates these two categories of cases persuasively. She uses *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) as a prototype for the first category and *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 114, 119 (4th Cir. 2013) as demonstrative of the second. In *McReynolds*, although those who made the adverse discretionary decisions were local, low-level managers, their actions were tightly connected to centralized, nationwide policies created at the corporate level. 672 F.3d at 489–91. In *Scott*, those who made the adverse discretionary decisions were high-level managers, who exercised such centralized power and control that their actions were equivalent to corporate policy. 733 F.3d at 114, 119.

619. *See supra* Part I.A. (discussion of class certification in *Daniels*); *cf.* Carroll, *supra* note 132, at 893.

620. *See* Iliadis v. Wal-Mart Stores, Inc., 922 A.2d 710 (N.J. 2007).

621. *See* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013).

622. *See* Marcus, *supra* note 132, at 830–32; *cf.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

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Nonetheless, the class certification process, a once routine and standard motion practice early in the life of litigation,[623] now creates delays as federal district courts contend with defendants' arguments regarding the applicability of *Wal-Mart Stores, Inc.* to class certification decisions. The *Ortega-Melendres* plaintiffs requested certification twice before it was granted, and the court required a developed factual record to decide whether the case should proceed as a class action. Given the Court's view that "significant proof" of commonality is necessary to satisfy Rule 23(a)(2), statistical expert analysis became central to class certification in *Floyd* and *Ortega-Melendres*.[624] The *Bailey* class certification order was established without a court review of evidence, yet the parties relied on statistical reports from the Mayor's Task Force, as well as Dr. McCauley's analysis of disciplinary reports in their negotiations.[625]

In some ways, the early merits barrier raises challenges for replicability, but for some types of litigation, advancement in data collection and transparency may assist future litigants. With such a merits inquiry occurring earlier, courts may increasingly need to resolve *Daubert* disputes in conjunction with class certification, even in the (b)(2) context.[626] Relatedly, moving class certification to a later stage in the litigation can affect the plaintiffs' right to discovery and the parties' settlement postures. Early merits inquiry involving expensive statistical experts potentially drive up litigation costs prior to trial, which in turn potentially changes the opportunity for settlements.

Another limitation for the replicability of the wins analyzed in this Article may arise for class actions that seek damages, where the necessity rule, notice and opt-out provisions, and ascertainability will be required. Litigation for Rule 23(b)(2) class-wide injunctions are not loaded with many of the *Wal-Mart Stores, Inc.* hurdles that accompany claims for Rule 23(b)(3)

623. *See* Marcus, *supra* note 132, at 785–89 (describing "old era" and "new era" class action features, including the regularity of granting (b)(2) class actions where plaintiffs merely put forward an injunctive claim).

624. *Floyd V*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013); *Ortega-Melendres II*, 598 F. Supp. 2d 1025, 1038 (D. Ariz. 2009).

625. Order Approving Consent Decree and Granting Class Certification, ECF No. 14, *supra* note 568; Telephone Interview with David Rudovsky, *supra* note 541.

626. In dicta, the Supreme Court in *Wal-Mart Stores, Inc.* suggested *Daubert* may be applicable at the certification stage. It "doubted" as "true" the district court's determination that Daubert did not apply at the class certification stage. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011).

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class-wide damages for an unnamed class. First, for Rule 23(b)(3) class actions, courts have adopted a "necessity" requirement.[627] However, the overarching treatment under Rule 23(b) allowed defendants in the case examples to make an argument that (b)(2) class certification is unnecessary because injunctive relief against state officials "is the archetype of [a case] where class designation is largely a formality."[628] A successful necessity argument focuses the litigation and remedy on individuals and potentially evades structural reform.[629] Second, Rule 23(b)(3) involves requirements that courts provide notice and permit individual class members to opt out of the class action.[630] Courts sometimes cite the unwieldy or costly nature of the opt-out requirement of (b)(3) litigation as a basis to deny class certification.[631] However, Rule 23(b)(2) requires no notice or opt-out provision. Finally, in many circuits, an implicit requirement of an "ascertainable class" is read into Rule 23.[632] Ascertainability offers an administratively feasible way for the court to determine class membership when individuals are entitled to a monetary payout,[633] and it is typically reserved for class actions in the Rule 23(b)(3) context.[634] While the courts involved with the case studies presented in Parts II, III, and IV determined these (b)(3) rules to be inapplicable to the (b)(2) cases, the rules are important to understand if attempting to replicate strategies discussed in this Article for class-wide damages actions against police departments.

627. *See* Sandford v. R.L. Coleman Realty Co., 573 F.2d 173, 178 (4th Cir. 1978). *But see* Dionne v. Bouley, 757 F.2d 1344, 1355 (1st Cir. 1985).

628. Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973).

629. The necessity principal nullifies the class action tool where a defendant is willing to stipulate that an order applied to an individual plaintiff will apply writ-large. *See, e.g.*, *id.*

630. *See Wal-Mart Stores, Inc.*, 564 U.S. at 363 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.").

631. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 622 (9th Cir. 2010).

632. *See, e.g.*, Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015).

633. *See generally* JD Moore, *The Heightened Standard of Ascertainability: An Unnecessary Hurdle to Class Action Certification*, 122 PENN ST. L. REV. 247 (2017) (explaining the purpose of the "heightened" certification standard adopted by five circuits).

634. *Id.*

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4. The Doctrinal and Evidentiary Interaction Between Hurdles

The information gathered and evidence presented in police structural reform litigation work together to achieve a type of convergence, utilizing overlapping—and sometimes identical—evidentiary proof to overcome the doctrinal hurdles.[635] Aspects of the doctrine overlap as well. This is significant because where the same set of evidence provides support to overcome multiple procedural obstacles, litigants can strategically balance costs and other choices in protracted discovery disputes. It may further affect the claims development process where litigators decide whether to allege municipal liability or seek class-wide relief. The convergence described here is a preliminary and soft claim without the benefit of a broader review of trial court outcomes.

The overlap of evidence to satisfy multiple aspects of doctrinal hurdles is clearly evident with standing and municipal liability. The *Lyons* Court specified that victims of police misconduct could satisfy standing if department officials "ordered or authorized police officers to act" in an unlawful manner.[636] Evidence at the individual level may not prove officially authorized action.[637] But evidence of municipal violations against classes of plaintiffs should. Claims on behalf of a group, through the class certification tool, and challenges to municipal practices using the *Monell* doctrine, create one method of overcoming the *Lyons*

635. The idea of convergence builds on the work of others. *See* Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477 (2018) (discussing *Monell* doctrine in terms of convergence with qualified immunity and the lack of alternative remedies); *see also* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (examining the influence constitutional tort doctrines have had on Fourth Amendment exclusionary rule jurisprudence).

636. City of Los Angeles v. Lyons, 461 U.S. 95, 106 (1983).

637. An individual who seeks an injunction against a departmental practice may have an interest in raising structural claims on their own and without a class action. In this scenario, the evidence needed is not individual, but typically includes multiple instances of harm. Where there is no policy or practice, establishing municipal liability through a single incident has proven very difficult. *See, e.g.*, Thomas v. Cook Cty. Sheriff's Dept., 604 F.3d 293 (7th Cir. 2010) (finding that an inmate died after not receiving medical care despite many attempts by other inmates to get him medical help).

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standing barrier. Evidence of the official policy in *Ortega-Melendres* and "policy or custom" in *Floyd* assisted litigants to satisfy *Lyons* and commonality for class certification.[638]

Next, the case studies highlight that the evidence necessary to show municipal liability was similar, if not exactly the same, as that required by Rule 23(a)(3) to show commonality after *Wal-Mart Stores, Inc.*[639] Class claims facilitate gathering evidence through discovery, which assists plaintiffs in overcoming the exacting *Lyons* and *Monell* standards. Moreover, the evidence gathered for multiple parties can operate together, rather than on an individualized basis. When parties establish a policy, practice, or custom through *Monell* liability, the most difficult class action requirement for police litigants (commonality) is practically established. And as a class action, standing for an injunction (*Lyons*) is largely satisfied. As examples, in *Ortega-Melendres* and *Floyd,* much of the same evidence used to support class certification was also used to show a widespread practice of discriminatory conduct.[640] Likewise, showing municipal liability through either the central decision-maker or the widespread practices theory necessarily requires evidence of a centralized policy. The "glue" holding together individual decisions by officers (and sergeants, lieutenants, etc.) should be satisfied whenever plaintiffs can muster the evidence to support the practices or central decision-maker theory of municipal liability.

A similar overlap exists between standing and class certification. In the case studies, the *Lyons* repeated harm requirement looked similar to Rule 23(a)(1) numerosity. The defendants asked the courts to determine how many specific instances of unlawful conduct are necessary to grant an individual plaintiff standing to pursue an injunction against a police practice.[641] The operation of an injunctive class action mitigates this question because, where a class is certified, the plaintiffs have necessarily shown that a large enough number of individuals are likely to be subjected to a police practice to warrant certification. This, in turn, maps onto standing to avoid the *Lyons* repeated harm and speculative harm requirements. In *Ortega-Melendres*, the likelihood of future harm warranting an injunction was proven

638. *Floyd V*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

639. *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011).

640. *Floyd V*, 959 F. Supp. 2d at 558; *Ortega-Melendres II*, 598 F. Supp. 2d 1025, 1038 (D. Ariz. 2009).

641. *Lyons*, 461 U.S. at 107 n.8.

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through Dr. Taylor's statistical analysis and by evidence of orders by central decision-makers, down the chain of command, to target Latino drivers and passengers in Maricopa County for stop and possible arrest.[642] In *Bailey*, the parties did not litigate the issue; however, the court issued an order granting class certification.[643]

The three case studies successfully challenged stops violative of the Fourth Amendment, pursuant to *Terry* or *Whren*, and the Fourteenth Amendment's equal protection clause. The type of evidence used to overcome the innocence and repeated harm hurdles may be more available in stop contexts because of the sheer volume of these practices.[644] Even the Court in *Terry* acknowledged stops can be a problem in minority communities where stops are deployed to harass and discriminate, rather than to investigate crime.[645] This Article does not present a naïve view of how criminal courts deploy *Terry* and *Whren* to entrench the authority of police. It simply acknowledges that district courts may be able and willing to act in certain, albeit limited, circumstances.

The success of litigation against pedestrian and traffic stops has implications for excessive force claims. On the ground level, it encourages community groups to consider litigation as a tool for reform in particular circumstances and encourages attorneys to develop such claims. For example, in *Campbell v. City of Chicago*, a use of force class action against the Chicago Police Department was filed on behalf of Black Lives Matter–Chicago and other groups.[646] This Article has not addressed the different questions, data, or anecdotal evidence necessary to overcome the doctrinal barriers in use of force claims or litigation for class-wide damages.

642. *See supra* Part III.

643. *See supra* Part IV.

644. *See infra* Part V.C.

645. *See infra* Part V.C.

646. *See* Campbell v. City of Chicago, No. 17 C 4467, 2018 WL 4352614, at *1 (N.D. Ill. Sept. 12, 2018). *Campbell* reached a settlement agreement on March 16, 2018. *See also* Memorandum of Agreement Between the Office of the Illinois Attorney General and the City of Chicago and *Campbell v. City of Chicago* Plaintiffs and *Communities United v. City of Chicago* Plaintiffs, *Campbell*, No. 17 C 4467, 2018 WL 4352614, ECF No. 154-1.

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B. EVIDENCE USED TO JUMP THE DOCTRINAL HURDLES

This Section discusses categories of evidence used to prove the class-wide claims analyzed in Parts II, III, and IV: hard data and statistical evidence; discriminatory statements by supervisors and central decision-makers; and/or proof of a history of notice and failure to remedy a constitutional violation. This Part should not be viewed as depicting a plaintiffs' playbook for success, nor does it demonstrate unbridled optimism towards obtaining merits review with easily acquired information. Instead, it shows that standing, municipal liability for unwritten policies and practices, and class certification require rich data and evidence of the underlying claims. Plaintiffs must essentially gather enough information through discovery (and other means) to prove an unconstitutional practice prior to trial—and, at times, prior to discovery.[647]

1. Hard Data and Statistical Evidence

Statistical evidence was critical for the plaintiffs in the case studies to overcome the doctrinal hurdles and, in the case of *Bailey*, to convince an otherwise unfriendly mayor to settle and admit liability.[648] This Section summarizes how the data was used and obtained, addresses challenges with this form of evidence, and briefly discusses other methods to obtain data.

As Parts II, III, and IV suggest, statistical analysis of stops, frisks, or detentions were essential to proving deliberate indifference.[649] Judge Scheindlin and Judge Snow used data to find municipal liability was warranted and to determine that a central decision-maker authorized the targeting of individuals on the basis of race or ethnic origin.[650] Experts relied on police documentation that showed a lack of the requisite reasonable suspicion or probable cause in large numbers of individual police interactions.[651] This in turn established a policy or practice of

647. The creep of the merits into justiciability and procedural rules has been recognized by others as a general concern. *E.g.*, Fallon, *supra* note 42, at 663–76; Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663–64 (1977) ("Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim. . . . The law of standing has thus become a surrogate for decisions on the merits . . . ." (citations omitted)).

648. *See* Bailey v. City of Philadelphia, No. 2:10-cv-05952 (E.D. Pa. 2010).

649. *See supra* Parts II–IV.

650. *See supra* Parts II–IV.

651. Stipulation of Settlement, *supra* note 185.

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unlawful Fourth Amendment activity in both *Floyd* and *Ortega-Melendres*. Moreover, data was also critical to establishing the parties' "failure to" theories of municipal liability that, in turn, were important to establishing standing for injunctive relief and class certification.[652] Even though the data operated as more indirect proof of failure to train or supervise, the statistical evidence of facially invalid UF-250s and numerous failed Quality Assurance Division audits were important evidence to demonstrate a practice or custom of unconstitutional stops and frisks.[653]

The hard data was available as a result of defendants' own record keeping practices in the cases discussed in Parts II, III and IV. The data used in *Floyd* and *Bailey* was created due to the prior litigation filed by the same attorneys in *Daniels* and *NAACP* respectively.[654] Plaintiffs were able to show, in both cases, the disparity in stops and frisks between Black and Latino residents and White residents increased since the prior settlements. In *Floyd*, they were also able to show that this disparity existed throughout the city in question, even when statisticians controlled for factors such as crime rates or the volume of officers in particular neighborhoods.[655] Even without a formal requirement to create and maintain race or ethnicity data, the expert in *Ortega-Melendres* used sheriff deputies' vehicle stop reports to analyze hard data on the number of Latino drivers stopped in the county.[656]

One must acknowledge the concern with replicability of legal challenges relying upon statistical evidence due to the Supreme Court's skeptical view of proving discrimination with statistics.[657] And the current Court seems even more hostile.[658]

652. *See Floyd I*, 813 F. Supp. 2d 417, 440 (S.D.N.Y. 2011).

653. *See supra* Part II.C.2.

654. See *supra* Parts II–IV.

655. *See supra* Parts II, IV.

656. *See supra* notes 447–51 and accompanying text.

657. As seen in *McCleskey* and *Wal-Mart Stores, Inc.*, the Supreme Court shows hostility towards sociological statistical evidence to prove discrimination. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011); McCleskey v. Kemp, 481 U.S. 279 (1987). The hostility towards data applies in other areas of civil rights as well. *See* Ricci v. DeStefano, 557 U.S. 557, 583 (2009) (curtailing disparate impact in Title VII litigation).

658. *See* Mario L. Barnes & Erwin Chemerinsky, *What Can* Brown *Do for You?: Addressing* McCleskey v. Kemp *as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1301–

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The Court's hostility towards social science evidence may be distinguishable in this Article's group of cases.[659] The type of causal breakdown the Court found concerning with the statistical evidence put forward in *McCleskey v. Kemp,* and *Wal-Mart Stores, Inc.,* relied on proving bias.[660] Neither *Floyd*, *Ortega-Melendres*, nor *Bailey* relied on stereotyping or the implicit bias of officers or decision-makers in the same way. A difference is that the decisions of police officers and supervisors in New York, Philadelphia, and Maricopa County are documented, discoverable, or publicly available, and were reviewed systematically without reliance on the same inferences as in other types of cases. Nonetheless, I acknowledge statistical analysis has its limits as a mechanism of proving police misconduct. Though the district courts in Parts II, III, and IV found data supported plaintiffs' constitutional claims, certainly other courts have found that data failed to support theories of unconstitutional police conduct.[661] Further consideration is needed to make strong conclusions on this front.

Police departments may not be equipped or have the will to utilize their own department's information to monitor the constitutionality of officer actions.[662] *Floyd* and *Bailey* demonstrate

02 (2018) (comparing *Brown, McCleskey,* and *Gill* in the Supreme Court's recent term).

659. *Cf.* Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—And Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018) (focusing on the Burger and Rehnquist Courts restriction on proof of discriminatory purposes in equal protection claims); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 L. & CONTEMP. PROBS. 57, 70 (1979).

660. *See McCleskey*, 481 U.S. at 283–91 (reviewing the extensive data analysis showing racial disparities in prosecutors pursuing the death penalty).

661. *See* Sharad Goel et al., *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181, 205–11 (2017) (collecting examples where courts found data insufficient to overcome procedural or evidentiary hurdles, but noting that the district courts suggested better data may change the outcome of the cases); *cf.* Andrew Guthrie Ferguson, *The Exclusionary Rule in the Age of Blue Data*, 72 VAND. L. REV. 561 (2019); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017) (analyzing the impact internal police collection data for predictive policing has on communities of color).

662. *See* Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014) (pointing to cultural and political pressure to show a drop in crime rates and led to major urban areas removing rape complaints from crime databases). Moreover, journalists and criminal law scholars have exposed police departments "cooking the books" to show

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mere availability of raw data does little to promote internal change or executive regulation without more incentives or pressure. New York and Philadelphia agreed to maintain extensive numerical information on stops and frisks, but never used the hard data to prevent or correct constitutional harms or racial disparities until public pressure mounted.[663] The RAND corporation had provided the NYPD with an analysis of its highest stoppers, and other ways to improve internal controls, but the department did very little to implement its recommendations.[664] The Fagan Report identified numerous incomplete stop and frisk forms, and the Maricopa County Sheriff's Office failed to even maintain records of the race or ethnicity of those subject to driver checkpoints.[665]

Overcoming doctrinal barriers to police structural reform litigation may ultimately rest on the availability and type of system-wide data. Section C includes a preliminary discussion of recent improvements in police data collection and transparency that can support systemic pattern and practice claims.

2. Discriminatory Statements

As part of their anecdotal evidence, the plaintiffs in *Ortega-Melendres*—and *Floyd*, to a lesser extent—relied on direct statements from supervisors, up the chain of command, to prove the department-wide practices were motivated by race and/or national origin.[666] The admission in *Ortega-Melendres*, that officers were instructed to stop and arrest Latino residents, was hardly refuted at trial.[667] The *Floyd* plaintiffs relied on statements of sergeants and lieutenants directing officers to engage in stops and frisks without much regard to the legal requirements that were gathered through secret recordings.[668] And a New York

a reduction in crime. *See, e.g.*, Ben Poston & Joel Rubin, *Times Investigation: LAPD Misclassified Nearly 1,200 Violent Crimes as Minor Offenses*, L.A. TIMES (Aug. 9, 2014, 6:04 PM), https://www.latimes.com/local/la-me-crimestats-lapd-20140810-story.html [https://perma.cc/ZHD7-GG9R].

663. Yung, *supra* note 662.

664. *Floyd V*, 959 F. Supp. 2d 540, 624 (S.D.N.Y. 2013).

665. Report of Jeffrey Fagan, Ph.D, in support of Plaintiffs' Motion to Amend Order on Defendants' Motion for Summary Judgment, *Floyd I*, 813 F. Supp. 2d 417 (S.D.N.Y. 2011) (No. 08-01034), ECF No. 156.

666. *Floyd V*, 959 F. Supp. 2d at 558; *Ortega-Melendres II*, 598 F. Supp. 2d 1025, 1038 (D. Ariz. 2009).

667. See *supra* Parts III.B, V.A for extensive description of the statements relevant to *Ortega-Melendres*.

668. *Floyd V*, 959 F. Supp. 2d at 596.

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Senator testified to Mayor Bloomberg's statement that stop and frisk practices were used to target young Black men.[669]

While this type of evidence is not necessary to meet the deliberate indifference requirement,[670] it is notable that both cases that succeeded at trial relied on statements to support the theory that police target individuals for police activity without concern for constitutional standards.[671] With the advent of social media, racially motivated police scandals have increasingly come to light.[672] At the same time, it may still be difficult to gather evidence that racial remarks (e.g., use of the "N" word) are sufficiently widespread to show a culture of race or national origin-based targeting.

3. History of Discriminatory Policy or Practice and Failed Reforms

Proof of a history of notice and failure to remedy the constitutional violation at issue was important to the results of the litigation in Parts II, III, and IV to varying degrees. The New York and Philadelphia case studies involve prior structural reform settlements that did not achieve much change in stop and frisk practices, but which set the stage for subsequent injunctions requiring reform measures.[673] Judge Scheindlin's post-trial order in *Floyd* relied upon the failures of the NYPD to remedy its stop and frisk practices following the *Daniels* settlement.[674] For example, plaintiffs relied on failed quality assurance reports developed after the 2002 *Daniels* settlement.[675] The long history

669. *See supra* Part II.

670. *See supra* Part I.B.

671. *See Floyd V*, 959 F. Supp. 2d 540; *Ortega-Melendres II*, 598 F. Supp. 2d 1025.

672. *See* Michael Boren, *Videos Show All What Some Have Endured for Years; People of Color, Overlooked by Traditional Media, See It as a Way to Find Others with Similar Experiences*, PHILA. INQUIRER, Aug. 11, 2018, at B4; Joseph Serna & Matt Hamilton, *S.F. Police Chief Quits Amid Tumult; He Loses Confidence of Mayor After a Series of Scandals and Latest Shooting Involving an Officer Earlier in Day*, L.A. TIMES, May 20, 2016, at B1; Adrian Walker, *A Chilling, Familiar Tale,* BOSTON GLOBE, Apr. 18, 2018, at B1; Bobby Allyn, *72 Philadelphia Police Officers Placed on Desk Duty over Offensive Social Media Posts*, NPR (June 19, 2019, 10:16 PM), https://www.npr.org/2019/06/19/734241210/72-philadelphia-police-officers-placed-on-desk-duty-over-offensive-social-media [https://perma.cc/7H5V-KNQR].

673. *See supra* Parts II–IV.

674. *Floyd I*, 813 F. Supp. 2d 417, 428–34 (S.D.N.Y. 2011).

675. *Id.*

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of the NYPD's notice of discriminatory practices, dating back at least to the 1999 Attorney General's report, was important to the court's finding of deliberate indifference.[676] Similarly, the Philadelphia litigants relied on data gathered as a result of the prior *NAACP* settlement to pressure the mayor and the city to negotiate an agreement for a monitor and increased data collection requirements.[677]

In Phoenix, the public statements from Sherriff Arpaio and mid-level supervisors demonstrated a history and unwillingness to alter the department's practice of targeting Hispanics for arrest and detention.[678] The court specifically cited defendants' history of being "aggressively responsive" to local anti-immigrant sentiment when deciding the Fourteenth Amendment injunction.[679] When reviewing the appropriateness of Judge Snow's injunction, the Ninth Circuit affirmed the trial court's conclusion that the history supported the injunctive relief and monitoring of the court's orders.[680]

C. GATHERING INFORMATION TO OVERCOME PROCEDURAL HURDLES

This section provides a synthesis of how plaintiffs are able to obtain information to overcome doctrinal hurdles prior to the initiation of formal discovery: relationships with advocates and community organizations; publicity that creates leads and opportunities for further fact gathering; and data from prior court orders requiring data tracking and disclosures. It discusses briefly other methods of gathering data to support structural reform police litigation.

Each case study illuminates the role of relationship building between plaintiffs' counsel and outside advocates to gather information beyond traditional discovery. The co-location of plaintiffs' attorneys within police reform coalitions, such as Somos America and Communities United for Police Reform (CPR), allowed attorneys to learn information crucial to plaintiffs' success in litigation and to reap gains from collateral attention garnered by other advocates.

676. *Id.* at 451–53.

677. Settlement Agreement, Class Certification, and Consent Decree, ECF No. 16, *supra* note 555.

678. *Ortega-Melendres IV*, 836 F. Supp. 2d 959, 987 (D. Ariz. 2011).

679. Melendres v. Arpaio, 784 F.3d 1254 (9th Cir. 2015).

680. *Id.*

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In addition, the attention surrounding NYPD stop and frisk practices, often mounted by advocates at NYCLU and grassroots groups, coalesced in the coalition CPR, led to gains in the discovery process. Additional witnesses were discovered through media attention, whistleblower officers came forward, and more individual suits were filed (leading to further discovery).[681] The atmosphere led to more city-level scrutiny and produced more advocacy and opportunities for information or transparency relevant to the *Floyd* litigation. For example, city council hearings related to the weaknesses of the Civilian Complaint Review Board led to reports and data disclosures, which led to discovery requests related to plaintiffs' failure to monitor and discipline theories.[682] The same is true in *Bailey*, where the use of data and individual accounts of harm at the hands of Philadelphia's police officers created pressure for the City to consider a quick settlement.[683] In Maricopa County, the Somos America coalition and Puente, among other groups, continued to inform plaintiffs' attorneys when on-the-ground enforcement operations took place, which informed the discovery process.

Finally, the prior court orders in New York from the *Daniels* litigation and Philadelphia from the *NAACP* settlement, required extensive and detailed collection and disclosure of stop and frisk data.[684] Understanding the real-time basis for each officer's decision to stop, frisk, and search each person subject to a *Terry* stop was foundational evidence critical to the subsequent *Floyd* and *Bailey* litigation.[685] The fact that the evidence was maintained in a format conducive to analysis was also critical in each case.[686]

Given the centrality of data in overcoming the doctrinal hurdles in the case studies, methods other than prior litigation to obtain granular level data are worthy of consideration for future plaintiffs. Alternative avenues for developing statistical information include open records requests or state laws mandating

681. *See supra* Part II.

682. *See Floyd V*, 959 F. Supp. 2d 540, 617–20, n.394 (2013) (relying on reports on the CCRB to prove failure to discipline).

683. Settlement Agreement, Class Certification, and Consent Decree, ECF No. 16, *supra* note 555, at 3.

684. *Id.*; Stipulation of Settlement, *supra* note 185.

685. *See Floyd V*, 959 F. Supp. 2d 540; Bailey v. City of Philadelphia, No. 2:10-CV-05952 (E.D. Pa. 2010).

686. *See* sources *supra* note 685.

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data collection; voluntary collection and disclosure by police departments; or analysis by institutions obtaining police data. First, state law may expand access to police data. Courts may induce data dissemination through open records litigation. The Washington Post has filed open records requests for every police shooting since 2014, and most police departments comply in providing the requested information.[687] The ACLU affiliates in Boston[688] and Washington D.C.,[689] among others, have also successfully compelled the release of stop data. A new law in California permits the disclosure of police personnel records;[690] and a database established by the Legal Aid Society in New York visually maps individual police officer complaints.[691]

In addition, several states have begun requiring data collection related to individual police interactions, including deadly force, and the race and ethnicity of the officer and suspect.[692] At least fifteen states collect demographic information for persons whose vehicles are stopped by police.[693] Missouri, for example, requires every law enforcement agency to report, for every stop of a motor vehicle, the age, gender, race or minority group of the individual stopped, the reasons for the stop, and whether a

687. *Fatal Force: 992 People Have Been Shot and Killed by Police in 2018*, WASH. POST (Mar. 31, 2019, 9:06 PM), https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.e6378fe9eaf8 [https://perma.cc/ZUB4-VBZS].

688. *Boston Police Release More Stop-and-Frisk Data*, ACLU MASS. (Jan. 29, 2016, 8:52 PM), https://aclum.org/uncategorized/boston-police-release-more-stop-and-frisk-data [https://perma.cc/4344-3DJJ].

689. *Near Act Stop & Frisk Data Collection*, ACLU OF D.C. (Mar. 28, 2018, 10:15 AM), https://www.acludc.org/en/news/near-act-stop-frisk-data-collection [https://perma.cc/64RZ-W6XE].

690. CAL. PENAL CODE § 832.7(b) (West 2019).

691. Ali Winston, *Looking for Details on Rogue N.Y. Police Officers? This Database Might Help*, N.Y. TIMES (Mar. 6, 2019), https://www.nytimes.com/2019/03/06/nyregion/nypd-capstat-legal-aid-society.html [https://perma.cc/FQ4T-CL4V].

692. *Law Enforcement Overview* (June 19, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx#3 [https://perma.cc/RA3A-RD56]; *see* 1999 Conn. Acts 99-198 (Reg. Sess.); 2012 Conn. Acts 12-74 (Reg. Sess.); 625 ILL. COMP. STAT. 5/11-212; MINN. STAT. § 13.871 (2019); MO. REV. STAT. § 590.650 (2004), § 304.670 (1999); NEB. REV. STAT. § 20-504 (2014); NEV. REV. STAT. § 289.820 (2019); 31 R.I. GEN. LAWS §§ -21.2-6, -7, 21.1-4; TEX. CODE CRIM. PROC. ANN. art. 2.132 (West 2017); WASH. REV. CODE § 43.101.410 (2019); W. VA. CODE § 17G-2-3 (2019).

693. *Law Enforcement Overview, supra* note 692.

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search was conducted as a result of the stop.[694] Beginning in 2017, California requires every law enforcement agency to report to the Department of Justice all instances when a peace officer shoots or is shot by a civilian, or when an officer harms, kills, or is harmed or killed by a civilian.[695]

Finally, some police departments began voluntarily disclosing police data. Minneapolis provides an example. In August 2017, the Minneapolis Police Department (MPD)—responding to calls for greater transparency in police practices from groups like the ACLU and "as part of a broader department effort to improve transparency in so-called *Terry* stops"—debuted a "Mobile Digital Computer" dashboard system by which MPD officers can easily enter information about both pedestrian and motor vehicle stops.[696] Additionally, the "data will be refreshed every morning and can be exported via the city's open data portal," where it can be accessed by the public.[697] The automated input systems are lauded for addressing one common concern police officials raise with transparency and documentation—the time that completing forms takes away from fighting crime.[698]

These moves to require more information gathering and analysis have the potential to support future systemic litigation.[699] My view is not that data solves all evidentiary woes.[700]

694. MO. REV. STAT. § 590.650 (2004).

695. CAL. GOV'T. CODE § 12525.2 (West 2018).

696. *See* Libor Jany, *Public Will be Able To Track Race, Other Data on People Stopped by Minneapolis Police*, STAR TRIB. (Aug. 9, 2017, 6:23 PM), http://www.startribune.com/public-will-be-able-to-track-race-other-data-on-people-stopped-by-minneapolis-police/439413293 [https://perma.cc/3YF9-92FD].

697. *Id.*

698. *Id.*

699. *See* David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 853, 856, 871 (2013) (analyzing the survey results of fifty-six police departments inquiring about data collection on stop and frisk practices). A September 2014 NAACP special report about stop-and-frisk reported eighteen states requiring data collection for stops and searches and fifteen of the eighteen require analysis of the data. CORNELL WILLIAM BROOKS ET AL., NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA (2014), https://www.naacp.org/wp-content/uploads/2018/07/Born_Suspect_Report_final_web.pdf [https://perma.cc/V23L-ACTG].

700. In fact, some are quite skeptical of police using big data in police operations. All data is not necessarily good data for police to collect or deploy. But where information on police operations is available and used for accountability to the public, and a department or city is unable to course correct, it could be used for litigation purposes. Bias, unfair deployment, and discriminatory use of

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Rather, recent developments on the police data front can assist plaintiffs in overcoming justiciability and procedural barriers.

This Part has discussed the procedural hurdles, and categories of evidence used by plaintiffs in the case studies—hard data and statistical evidence; discriminatory statements by supervisors and central decision-makers; and/or proof of a history of notice and failure to remedy constitutional violation. It reviews a potential evidentiary convergence to overcome the standing, municipal liability, and class certification barriers to suing police departments. It shows the limits of replicability and the importance of advocates and media exposure in locating information to satisfy the doctrinal standards outside the discovery process.

CONCLUSION

This Article presents case studies of three significant district court police structural reform cases that overcame the difficult doctrinal barriers to standing, municipal liability, and class certification. Acknowledging the limits to case studies, the *Floyd*, *Ortega-Melendres*, and *Bailey* examples nevertheless illuminate ways to jump these doctrinal and procedural hurdles. They suggest that certain types of information and legal analysis satisfy exacting evidentiary standards: hard data and statistical evidence; discriminatory statements by supervisors and central decision-makers; and proof of a history of notice and failure to remedy constitutional violations. The cases show the significance of information gathering methods beyond traditional discovery, including relationships with advocates and community organizations; publicity that creates leads and opportunities for further fact gathering; and court orders requiring data tracking and disclosures following prior litigation. This Article should not be taken as presenting an easy way forward for future police structural reform litigation. The litigation accounts also affirm some of the potential boundaries surrounding *Lyons*, *Monell* and its progeny, and *Wal-Mart Stores, Inc.* Further study is needed

information collected through data driven police programs are particularly worth scrutiny. Sarah Brayne, *The Criminal Law and Law Enforcement Implications of Big Data*, 14 ANN. REV. L. & SOC. SCI. 293 (2018); *see also* Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15 (2016) (examining the discretion police use to make surveillance choices through big data and pointing to potential bias and feedback loops); Selbst, *supra* note 661 (analyzing the impact internal police collection data for predictive policing has on communities of color).

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to understand district courts as sites of resistance as police structural reform litigation progresses in this era following the Obama Administration.[701] The Civil Rights Division of the Department of Justice has changed course on police reform yet Black-led movements demand reform within law.

These cases have been able to proceed, even with some significant trouble, in their respective remedies processes. The cases have uniquely managed to avoid Supreme Court review, in part due to changes in local leadership. It may be that these examples represent the worst of the worst where doctrinal barriers operate as the Supreme Court has suggested.

701. *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT (2017).

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