

## NEW FEDERALISM AND CIVIL RIGHTS ENFORCEMENT

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**ABSTRACT**—Calls for change to the infrastructure of civil rights enforcement have grown more insistent in the past several years, attracting support from a wide range of advocates, scholars, and federal, state, and local officials. Much of the attention has focused on federal-level reforms, including proposals to overrule Supreme Court doctrines that stop many civil rights lawsuits in their tracks. But state and local officials share responsibility for the enforcement of civil rights and have underappreciated powers to adopt reforms of their own. This Article evaluates a range of state and local interventions, including the adoption of state law causes of action for constitutional violations, improved local budgeting and indemnification practices, and new litigation strategies that encourage government attorneys charged with defending civil rights litigation to take better account of the significant public interest in enforcing constitutional norms. Rather than await federal reforms that may never come, the many state and local officials who have advocated for change can promptly translate their professed commitments into law and policy.

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INTRODUCTION

If the moment to rethink civil rights enforcement has arrived, it comes too late for Michael Brown, Philando Castile, Stephon Clark, George Floyd, Eric Garner, Tamir Rice, Walter Scott, Alton Sterling, Breonna Taylor, and

many others.<sup>1</sup> Understandably, much attention has focused on reforms at the federal level to the many doctrines that now restrict the effectiveness of suits brought against state and local officials under 42 U.S.C. § 1983.<sup>2</sup> We have joined scholars from around the country in supporting such a national reform agenda, urging changes to the doctrine of qualified immunity<sup>3</sup> and other improvements in the effectiveness of constitutional remediation.<sup>4</sup> We share

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<sup>1</sup> Of the many heartbreaking accounts of the senseless death of George Floyd in May 2020, we found news of the indifference of the Civil Rights Division under Attorney General William Barr unfathomable and yet entirely predictable. See Christy Lopez, *The Civil Rights Division: The Crown Jewel of the Justice Department*, 130 YALE L.J.F. 462, 468 (2021). The most recent wave of high-profile police killings began with Eric Garner, Michael Brown, and Tamir Rice in 2014. See *George Floyd: Timeline of Black Deaths and Protests*, BBC NEWS (Apr. 22, 2021), <https://www.bbc.com/news/world-us-canada-52905408> [<https://perma.cc/E8GD-YMM4>]. But the history of police abuse and the need for more robust oversight and accountability is as old as policing itself. See, e.g., Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 7–10 (2001) (summarizing the history of police brutality).

<sup>2</sup> Section 1983 provides that

[e]very person who, under color of [state law] . . . , 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.

42 U.S.C. § 1983. Since 1961 in *Monroe v. Pape*, 365 U.S. 167 (1961), this Reconstruction-era statute has served as the primary vehicle for the vindication of federal constitutional rights through litigation directed at state and local officials. For a discussion of the history of Section 1983 and its role in federal civil rights enforcement authored soon after the Supreme Court’s 1961 decision in *Monroe*, see, for example, Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 278 (1965) (tracing the “prior nine decades of legislative and judicial history of [the] statute” and the “explosion of actions in the lower federal courts” since *Monroe*). Federal actors cannot be sued under Section 1983; instead, the Supreme Court recognized a limited right to sue federal officials for constitutional violations in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). For a discussion of the Court’s subsequent limitation of the right to sue under *Bivens*, see James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 569–78 (2020) [hereinafter Pfander et al., *The Myth of Personal Liability*]; Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Going Rogue: The Supreme Court’s Newfound Hostility to Policy-Based Bivens Claims*, 96 NOTRE DAME L. REV. 1835, 1836–39 (2021).

<sup>3</sup> Qualified immunity is a defense that shields police officers and other government officials from damages liability in Section 1983 suits unless they violated “clearly established law”—a standard that the Supreme Court has indicated can only be met with a prior court decision from the Supreme Court or a court of appeals holding unconstitutional nearly identical facts. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (“[P]olice officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.” (internal quotation marks omitted)). For further description of qualified immunity, see *infra* Section I.A.

<sup>4</sup> Since May 2020, the authors have consulted with policymakers in the U.S. House of Representatives; the U.S. Senate; the states of California, Illinois, Louisiana, Mississippi, New Mexico, Texas, and Washington; and New York City about how to improve civil rights litigation. We have drawn reform proposals from this consultative work and from our scholarly work in the field. See, e.g., Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 315–17 (2020) [hereinafter Schwartz, *After Qualified Immunity*] (describing predictions about constitutional litigation if qualified immunity

the widespread view that such changes can foster a healthier ecosystem of civil rights enforcement that can better ensure victim compensation, deter unconstitutional conduct, and encourage forward-looking changes in government practices.<sup>5</sup> Yet there are substantial barriers to transforming federal law. The Supreme Court has shown little inclination to simplify the byzantine world of civil rights enforcement it has created, and Congress remains closely divided and, thus far, unable to enact a comprehensive reform agenda.<sup>6</sup>

Rather than await national-level reforms that may never become reality, many policymakers have begun to chart a reform agenda at the state and local levels.<sup>7</sup> Colorado has created a state law cause of action against police

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were eliminated); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1147–50, 1165 (2016) [hereinafter Schwartz, *How Governments Pay*] (reporting results from a nationwide study on how jurisdictions budget for and pay settlements and judgments against law enforcement); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 891 (2014) [hereinafter Schwartz, *Police Indemnification*] (reporting that police officers almost never contribute anything to settlements and judgments entered against them and proposing reforms to improve lawsuits' deterrence signals); Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 488–91 (2011) [hereinafter Reinert, *Does Qualified Immunity Matter?*] (examining the impact of qualified immunity on plaintiffs' attorneys' case-selection decisions in *Bivens* actions); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 936 (2010) [hereinafter Reinert, *Procedural Barriers to Civil Rights Litigation*] (arguing that the Supreme Court's civil rights jurisprudence prioritizes equitable over damages remedies, while simultaneously increasing barriers to equitable relief); Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2068 (2018) [hereinafter Reinert, *Qualified Immunity at Trial*] (presenting data on how qualified immunity functions at trial); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1606–11 (2011) [hereinafter Pfander, *Resolving the Qualified Immunity Dilemma*] (suggesting that constitutional tort claimants should be permitted to avoid a qualified immunity defense by pursuing nominal damages alone); Pfander et al., *The Myth of Personal Liability*, *supra* note 2, at 596 (suggesting that the hostility to *Bivens* rests on a perceived threat of personal liability that is "more theoretical than real").

<sup>5</sup> For a description and discussion of civil rights ecosystems, see generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1547–63 (2020) [hereinafter Schwartz, *Civil Rights Ecosystems*] (describing civil rights ecosystems as a collection of people, legal rules and remedies, and informal practices that determine the frequency with which claims against governments are brought, the frequency with which those claims are successful, and the magnitude of their success).

<sup>6</sup> For an account of the Supreme Court's refusal to reconsider qualified immunity in June 2020, see Robert Barnes & Ann E. Marimow, *Supreme Court Refuses to Reconsider Immunity that Shields Police Accused of Brutality*, WASH. POST (June 15, 2020, 10:58 AM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-refuses-to-reconsider-immunity-that-shields-police-accused-of-brutality/2020/06/15/1cfc444c-ae7f-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-refuses-to-reconsider-immunity-that-shields-police-accused-of-brutality/2020/06/15/1cfc444c-ae7f-11ea-8f56-63f38c990077_story.html) [<https://perma.cc/RZ9V-78LW>]. For a description of gridlock in Congress over policing reforms, see Nicholas Fandos & Catie Edmondson, *Policing Reform Negotiations Sputter in Congress Amid Partisan Bickering*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/06/10/us/politics/policing-reform-congress.html> [<https://perma.cc/KAH2-UG65>].

<sup>7</sup> For a useful collection of state practices and statutes in the civil and criminal jurisdiction arenas, see NAT'L CONF. OF STATE LEGISLATURES, LAW ENFORCEMENT STATUTORY DATABASE, <https://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement-statutory-database.aspx> [<https://perma.cc/F3H2-DCRB>].

officers for violations of the state constitution, providing that officers do not enjoy a qualified immunity from such claims, and adjusting indemnification rules in ways intended to improve the deterrent effect of litigation.<sup>8</sup> A similar bill has been signed into law in New Mexico.<sup>9</sup> Efforts have been undertaken in several other states as well, including California, Connecticut, Illinois, Maine, Massachusetts, New York, Rhode Island, Washington, Wyoming, and Virginia.<sup>10</sup> State law enforcement officials have brought structural-

<sup>8</sup> See COLO. REV. STAT. § 13-21-131 (2021).

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

<sup>10</sup> For a sample of recent efforts to enact or expand state law causes of action for violations of constitutional rights without a qualified immunity defense, see Amy Russo, *Lawmakers Introduce Policing Bill Banning Chokeholds, Requiring Body Cameras*, PROVIDENCE J. (Mar. 30, 2021, 4:09 PM), <https://www.providencejournal.com/story/news/2021/03/30/lawmakers-introduce-police-reform-bill-chokeholds-body-cameras/7061233002/> [<https://perma.cc/7A54-F6LL>] (describing a bill introduced in Rhode Island); Kendall Polidori, *State Legislators Renew Push for Qualified Immunity*, CHI. REP. (Apr. 23, 2021), <https://www.chicagoreporter.com/state-legislators-renew-push-for-qualified-immunity/#:~:text=Qualified%20immunity%20is%20a%20federal,federal%20constitutional%20rights%20were%20violated> [<https://perma.cc/JN4D-6G2V>] (describing a bill introduced in Illinois); Emma Tucker, *States Tackling 'Qualified Immunity' for Police as Congress Squabbles Over the Issue*, CNN (Apr. 23, 2021, 7:45 AM), <https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html> [<https://perma.cc/4F62-9XWK>] (describing bills passed in Connecticut and Massachusetts); Nick Cahill, *Bill to Decertify Bad Cops and Limit Immunity Advances in California Senate*, COURTHOUSE NEWS SERV. (Apr. 27, 2021), <https://www.courthousenews.com/bill-to-decertify-bad-cops-and-limit-immunity-advances-in-california-senate-committee/> [<https://perma.cc/ND9W-DYKM>] (describing ongoing efforts to pass legislation in California); Nick Reisman, *Calls to End Qualified Immunity Grow at New York State Capitol*, SPECTRUM NEWS 1 (June 2, 2021, 5:45 PM), <https://spectrumlocalnews.com/nys/rochester/ny-state-of-politics/2021/06/02/calls-for-qualified-immunity-grow-at-state-capitol> [<https://perma.cc/3LM8-EULW>] (describing efforts to pass bill in New York State); Erin Keller, Don Carrigan & Zach Blanchard, *Legislative Committee Strikes Down Bill to End Qualified Immunity for Police Officers*, NEWS CTR. ME. (May 28, 2021, 6:08 AM), <https://www.newscentermaine.com/article/news/politics/maine-politics/maine-lawmakers-strike-down-bill-to-end-qualified-immunity-for-police-officers/97-faa982a6-249e-41ae-beb1-0ac2f56e8110> [<https://perma.cc/LQJ3-J7EK>] (describing failure to advance Maine bill); Melissa Santos, *Police Accountability Agenda Loses Some Teeth in WA Legislature*, CROSSCUT (Mar. 22, 2021), <https://crosscut.com/politics/2021/03/police-accountability-agenda-loses-some-teeth-wa-legislature> [<https://perma.cc/2R8N-DNUR>] (describing struggles to pass legislation in Washington State); Ellen Gerst, *Effort to Prevent Federal Restrictions on Gun Rights in Wyoming Advances out of Senate*, CASPER STAR TRIB. (Apr. 29, 2021), [https://trib.com/news/state-and-regional/effort-to-prevent-federal-restrictions-on-gun-rights-in-wyoming-advances-out-of-senate/article\\_edc5f4b5-c336-5514-81b9-4c90e1a993e7.html](https://trib.com/news/state-and-regional/effort-to-prevent-federal-restrictions-on-gun-rights-in-wyoming-advances-out-of-senate/article_edc5f4b5-c336-5514-81b9-4c90e1a993e7.html) [<https://perma.cc/6E9P-SFC9>] (describing a proposed Wyoming bill); Jackie DeFusco, *Virginia House Kills Bill to End Qualified Immunity for Police Officers, Scaled-Back Senate Proposal Lives On*, ABC8NEWS (Jan. 29, 2021, 7:33 PM), <https://www.wric.com/news/virginia-house-kills-bill-to-end-qualified-immunity-for-police-officers-scaled-back-senate-proposal-lives-on/> [<https://perma.cc/RXR6-GFBV>] (describing failed efforts in Virginia).

reform litigation seeking to modify police practices,<sup>11</sup> and local government officials, too, have called for reforms to better ensure justice for victims of police violence.<sup>12</sup> Indeed, in 2021, New York City became the first city to enact legislation that creates a cause of action for excessive force and unlawful searches and seizures and bars assertion of a qualified immunity defense for these claims.<sup>13</sup>

In offering this account and analysis of reform measures at the state and local levels, we have two goals. First, by drawing attention to the possibility of reform outside Washington, D.C., we hope to encourage policymakers to take responsibility for the quality of their own state and local civil rights ecosystems. In pursuit of this goal, we describe a rash of missed opportunities at the state and local levels to advance constitutional protections. Although state and local governments have been sources of rights expansion and innovation in multiple areas,<sup>14</sup> we believe that, too

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<sup>11</sup> See, e.g., Complaint for Declaratory and Injunctive Relief, *People v. City of New York*, No. 21-cv-322 (S.D.N.Y. Jan. 14, 2021) (asserting claim regarding pervasive use of excessive force and false arrests by NYPD); Complaint, *State v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Aug. 29, 2017) (bringing claim to reform the Chicago Police Department).

<sup>12</sup> See, e.g., Kristi Gross, *Stockton Mayor Tubbs Addresses Police Reform in Juneteenth Livestream*, FOX40 (June 19, 2020, 5:47 P.M.), <https://fox40.com/news/local-news/stockton-mayor-tubbs-addresses-police-reform-in-juneteenth-livestream/> [<https://perma.cc/R8UC-YDYP>] (reporting Stockton Mayor Michael Tubbs's support for ending qualified immunity); Ken Haddad, *Michigan Gov. Whitmer Supports 'Spirit' of 'Defunding Police,' Open to Ending Qualified Immunity*, CLICKONDETROIT (June 9, 2020, 8:24 PM), <https://www.clickondetroit.com/news/local/2020/06/09/michigan-gov-whitmer-supports-spirit-of-defunding-police-open-to-ending-qualified-immunity/> [<https://perma.cc/U5FZ-NA8X>] (“[Qualified immunity] is something we need to look at. This blanket immunity feeds into the notion that there aren't consequences.”); Alex Morris, *An Interview from Birmingham City Hall: Mayor Randall Woodfin on Toppling Racist Monuments*, ROLLING STONE (July 9, 2020, 2:52 PM), <https://www.rollingstone.com/politics/politics-features/birmingham-alabama-mayor-randall-woodfin-confederate-statues-racism-1026205/> [<https://perma.cc/Q4FH-7DR9>] (“It's not enough to just tear down a [statue]. That's symbolism. It's not enough to just paint 'Black Lives Matter.' That's symbolism. You want to fight systemic racism . . .”); Press Release, Office of Governor Ned Lamont, Governor Lamont Signs Policing Reform Legislation (July 31, 2020), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/07-2020/Governor-Lamont-Signs-Policing-Reform-Legislation> [<https://perma.cc/NX4Q-XUPP>] (“[Qualified immunity reform and other reforms] are focused on bringing real change to end the systemic discrimination that exists in our criminal justice and policing systems that have impacted minority communities for far too long . . . Our nation and our state has been having a conversation on this topic for decades, and these reforms are long overdue.”); CITY OF NEWARK, MAYOR RAS J. BARAKA'S STATEMENT ON BREONNA TAYLOR (Sept. 24, 2020), <https://www.newarknj.gov/news/mayor-ras-j-barakas-statement-on-breonna-taylor> [<https://perma.cc/63FG-K4KD>] (“We need real police reform that includes the abolishment of qualified immunity for once and for all.”).

<sup>13</sup> See N.Y.C. ADMIN. CODE §§ 8-802–803 (2021).

<sup>14</sup> See, e.g., Megan Haberle & Philip Tegeler, *Coordinated Action on School and Housing Integration: The Role of State Government*, 53 U. RICH. L. REV. 949, 951–52 (2019) (summarizing literature on state-level intervention to further school and housing integration); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA

often, state and local officials regard constitutional enforcement as an alien force, imposed on their governments by the heavy hand of the federal government.<sup>15</sup> That conception of constitutional law as an outside force to be resisted may help to explain the surprising results of our survey of state laws as reported in Appendix A. Most states have taken *no* measures to secure the enforcement of constitutional rights through constitutional tort litigation.<sup>16</sup> True, many states allow the litigation of garden-variety tort claims, but only a small group authorizes constitutional litigation, either by statute or by judicial decision.<sup>17</sup> And even these state constitutional enforcement regimes have been weighed down by the same doctrines of immunity that defeat claims brought under Section 1983.<sup>18</sup> Scholars rightly criticize these barriers to effective enforcement at the national level.<sup>19</sup> We extend that critique, arguing that state and local governments can do more to ensure an effective system of civil rights enforcement at the local level.

Our description of state and local practices reveals another flaw. Too often, local practices in the midst and aftermath of constitutional tort litigation fail to send proper signals to those responsible for constitutional compliance.<sup>20</sup> To be sure, some constitutional violations go without remedy altogether because of qualified immunity—which insulates officers from

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L. REV. 758, 822–23 (2020) (discussing city- and state-level innovation in “civil rights of health”); Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115, 118–30 (2016) (describing innovative state and local legislation to broaden antidiscrimination protections and further inclusion); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148–50 (2005) (providing examples of municipal action to further recognition of same-sex marriage); Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 199, 207 (2013) (“State legislatures, executives, and courts may be more receptive to progressive arguments than their federal counterparts . . .”).

<sup>15</sup> For example, Department of Justice initiatives to address systemic problems in local police departments often encounter at least an initial wave of hostility. See Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1416–18 (2015) (describing local opposition to some structural-reform initiatives and emphasizing the importance of local cooperation to long-term success).

<sup>16</sup> See *infra* Section II.A (describing these findings).

<sup>17</sup> For further discussion about the relative merits of state remediation through tort and constitutional claims and why we prefer the latter, see *infra* Section IV.D.

<sup>18</sup> For a description of Section 1983 and its history, see *supra* note 2.

<sup>19</sup> For our criticisms of qualified immunity doctrine and our proposed adjustments to the doctrine, see generally Schwartz, *After Qualified Immunity*, *supra* note 4; Reinert, *Does Qualified Immunity Matter?*, *supra* note 4; Reinert, *Qualified Immunity at Trial*, *supra* note 4; and Pfander, *Resolving the Qualified Immunity Dilemma*, *supra* note 4. For broader concerns about federal laws governing civil rights enforcement, see, for example, Reinert, *Procedural Barriers to Civil Rights Litigation*, *supra* note 4, at 943–46; Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913–14 (2015); and Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1913–15 (2007).

<sup>20</sup> See *infra* Section II.B (describing these findings).

liability even when they have violated the Constitution—and other doctrines that limit consequences for unlawful conduct by supervisors and cities. But even when constitutional litigation is successful, we find that state and local governments do a poor job of processing the information that these suits should convey to local policymakers. Partly, these flaws stem from the way local governments budget and pay for the judgments that emerge from constitutional tort litigation. Viewing the judgments as an inescapable financial burden, local governments fail to think creatively about how to lessen that burden or how to assign liability to the officers and agencies that bear responsibility for the unconstitutional practices in question. Colorado’s reforms illustrate the possibility of constructing a regime that assigns agencies and officers a measure of financial responsibility for the harms they inflict.<sup>21</sup> Such risk-management and budgeting schemes can help better achieve the deterrence goals that all agree should play a central role in civil rights enforcement.

We also identify some local litigation practices as inconsistent with the goal of effective civil rights enforcement.<sup>22</sup> Put simply, state and local governments have a responsibility, when caught up in the litigation of constitutional claims, to ensure just results. By invoking all the defensive measures that federal law makes available, state and local government attorneys often work to defeat well-grounded claims and impose burdens and costs on deserving civil rights plaintiffs—sometimes expending significant governmental resources to defend against these meritorious claims.<sup>23</sup> We do not advocate for unilateral disarmament: city attorneys need not capitulate to every demand for relief issued by plaintiffs under the auspices of Section 1983. But just as district attorneys labeling themselves “progressive prosecutors” have committed to using their power and discretion to pursue justice in various forms,<sup>24</sup> local governments can contribute to a culture of

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<sup>21</sup> See *infra* note 149 and accompanying text (describing Colorado’s statutory requirement that officers contribute to settlements and judgments when found to have acted in bad faith).

<sup>22</sup> See *infra* Section II.C (describing these findings).

<sup>23</sup> See, e.g., Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: \$213 Million to Private Lawyers Since 2004*, CHI. TRIB. (Sept. 12, 2019), <https://www.chicagotribune.com/investigations/ct-met-chicago-legal-spending-20190912-sky5euto4jbcdenjfi4datpni-story.html> [<https://perma.cc/2ZST-YR7H>] (reporting that the City of Chicago has “rung up especially large bills defending officers with long records of misconduct” and litigating cases that “the city could have settled for less before spending heavily on attorneys”).

<sup>24</sup> For discussion on progressive prosecutors, see generally Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1418–19 (2021) (describing four types of progressive prosecutors and the ways in which their differences reveal different understandings of what is wrong with the criminal justice system), and David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 27 (2017) (describing the priorities new progressive prosecutors should pursue).

law compliance by engaging more thoughtfully in their defense against constitutional tort litigation. Sometimes that may require a local government to accept responsibility for a serious constitutional claim that it might defeat or wear down through use of tools that are too commonly deployed today.

Having identified flaws in local civil rights ecosystems, we take up our second goal: to describe and defend reform measures that state and local policymakers can adopt to improve the culture of civil rights enforcement and compliance.<sup>25</sup> One such measure involves enacting analogues to Section 1983 that would establish a state law right to sue for violations of the state or federal constitutions that eschews some of the barriers erected by the Supreme Court that frustrate these claims when brought under federal law.<sup>26</sup> We also describe a series of more granular changes in the practice of budgeting for and litigating constitutional tort claims that can achieve important gains in the effectiveness of the enforcement regime. Equally important, we consider the predictable arguments against the reforms we propose, explaining why policymakers on both sides of the aisle should find these critiques unpersuasive.<sup>27</sup> In the end, then, we offer a platform of local reforms to improve civil rights enforcement and to plug many of the gaps that have arisen at the national level. We thus join such jurists as William Brennan<sup>28</sup> and Jeffrey Sutton<sup>29</sup> in urging a reinvigorated constitutionalism at the state and local levels, a constitutionalism aimed specifically at the enforcement of civil rights.

Our work situates the measures we propose in the school of federalism to which Heather Gerken, Jessica Bulman-Pozen, and Abbe Gluck have made notable contributions.<sup>30</sup> Seeking to transcend the debate between

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<sup>25</sup> See *infra* Part III (describing these recommendations).

<sup>26</sup> For further discussion of these barriers erected by the Supreme Court, see *infra* Part I.

<sup>27</sup> See *infra* Part IV (describing these criticisms and our responses).

<sup>28</sup> Justice Brennan's well-known piece sought to encourage the states to recognize, as adequate and independent grounds of decision, new state criminal procedure protections founded in state constitutions. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–502 (1977). For criticism of state constitutionalism, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 823–27 (1992), and Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 391–95 (1998).

<sup>29</sup> See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2–4 (2018) (urging broader and deeper development of state constitutional doctrines).

<sup>30</sup> See Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1350–51 (2013) [hereinafter Gerken, *Disloyalty*]; Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1551–52 (2012); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44–73 (2010) [hereinafter Gerken, *Foreword*]; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009) [hereinafter Bulman-Pozen & Gerken, *Uncooperative Federalism*]; Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation*:

nationalists (who urge unbridled national control) and federalists (who urge the preservation of state sovereignty and autonomy), this school offers a conception of federalism that begins with the recognition that state and local governments play a variety of roles in our system of governance. On any day of the week in the arena of civil rights enforcement, for example, state and local governments may find themselves targeted as the objects of national regulation and enforcement; may act as federal servants in carrying out federal enforcement programs; and may compete as local centers of policymaking authority, criticizing and resisting national initiatives either because they go too far or do not go far enough.<sup>31</sup>

We combine the nuanced understanding of federalism in these accounts with a refined version of the traditional argument that state and local governments can provide a potential counterweight to federal tyranny.<sup>32</sup> In the traditional story, state and local governments were seen as focal points of resistance to a federal occupying army, issuing literal and figurative calls to arms.<sup>33</sup> Based on the Trump Administration's deployment of federal forces to Portland, Oregon and Washington, D.C. during the summer of 2020 against the wishes of state and local leaders,<sup>34</sup> we acknowledge that local

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*State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 539–42 (2011); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 570–73 (2008); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–82 (2014).

<sup>31</sup> On the many roles that state and local government actors play in the enforcement of constitutional rights, see Schwartz, *Civil Rights Ecosystems*, *supra* note 5, at 1555–59.

<sup>32</sup> Prevention of tyranny features prominently in accounts of the value of federal systems. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1450, 1493–94, 1506–09 (1987) (suggesting that states can prevent federal tyranny by targeting unconstitutional federal action); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 358–60.

<sup>33</sup> See THE FEDERALIST NO. 26, at 169 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[T]he state Legislature . . . will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if any thing improper appears, to sound the alarm to the people and not only to be the VOICE but if necessary the ARM of their discontent.”). Armed resistance, despite its appeal to Second Amendment enthusiasts, no longer lies within the choice set of local policymakers. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 928–29 (1994).

<sup>34</sup> For a description of federal troops' assaults of protestors in Washington, D.C. and Portland, see Rebecca Tan, Samantha Schmidt, Derek Hawkins, Fredrick Kunkle & Jessica Contrera, *Before Trump Vows to End 'Lawlessness,' Federal Officers Confront Protestors Outside White House*, WASH. POST (June 2, 2020, 12:30 AM), [https://www.washingtonpost.com/local/washington-dc-protest-white-house-george-floyd/2020/06/01/6b193d1c-a3c9-11ea-bb20-ebf0921f3bbd\\_story.html](https://www.washingtonpost.com/local/washington-dc-protest-white-house-george-floyd/2020/06/01/6b193d1c-a3c9-11ea-bb20-ebf0921f3bbd_story.html) [https://perma.cc/A792-N3AY], and Chris McGreal, *Federal Agents Show Stronger Force at Portland Protests Despite Order to Withdraw*, GUARDIAN (July 30, 2020, 9:23 AM), <https://www.theguardian.com/us-news/2020/jul/30/>

governments continue to need tools to respond to federal occupying forces.<sup>35</sup> But we also see a more subtle potential for federal tyranny in the enormous concentration of power in the President of the United States to enforce civil rights protections. Emboldened by discretionary control of law enforcement priorities and unitarian theories of presidential power, presidents today play an outsized role in deciding which laws to enforce, which groups to target for investigation, and which to let slide.<sup>36</sup> By recalibrating enforcement priorities, particularly in an area where private enforcement has been crippled by standing law and other restrictions on private enforcement,<sup>37</sup> presidents and the agency heads they direct can recalibrate and even abandon essential law enforcement initiatives.

The Trump Administration's approach to the oversight of police departments illustrates these problems of concentrated power. Breaking sharply with the Obama Administration's use of the Department of Justice's power under 42 U.S.C. § 14141 (now 34 U.S.C. § 12601) to investigate and remedy systemic racism in policing, the Trump Department of Justice ended

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federal-agents-portland-oregon-trump-troops [<https://perma.cc/X2BY-KY3J>]. For a discussion of state and local leaders' calls for the federal government to withdraw their troops, see Amanda Macias, *DC Mayor Tells Trump to Remove Federal Law Enforcement and Military from the City as George Floyd Protests Continue*, CNBC (June 5, 2020, 2:34 PM), <https://www.cnbc.com/2020/06/05/george-floyd-protests-dc-mayor-tells-trump-to-remove-federal-officers-military-from-city.html> [<https://perma.cc/G7CS-8P95>], and McGreal, *supra*.

<sup>35</sup> See Joanna Schwartz, James Pfander & Alexander Reinert, *The Simple Way Congress Can Stop Federal Officials from Abusing Protesters*, POLITICO (June 10, 2020, 11:58 AM), <https://www.politico.com/news/magazine/2020/06/10/the-simple-way-congress-can-stop-federal-officials-from-abusing-protesters-309959> [<https://perma.cc/U7VR-LETB>] (highlighting the need for a revived *Bivens* action to check federal enforcement activities in Portland and Washington, D.C.).

<sup>36</sup> For accounts of the pre-Trump state of presidential power, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–46 (2001) (describing and assessing the rise of White House control of policy through presidential administration). For constitutional arguments favoring expanded presidential control over the hiring, firing, and direction of federal officials, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593–99 (1994); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 713 (arguing that only the President can control law execution and must have the authority to execute the laws or to direct subordinates to do so); and compare Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1867 (2016) (characterizing as delphic the Take Care Clause and its grant of presidential powers and duties). *But see* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 182–85 (2021) (questioning the unitary executive theory by showing that British legal history did not invest the executive with broad removal powers but instead presumed legislative control of tenure in office).

<sup>37</sup> On the important role of private enforcement in the American system of law enforcement and regulation, see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 3–4 (2017), and Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1583–87 (2014). Burbank and Farhang document a concerted effort by politicians, jurists, and business groups to curtail private rights enforcement through a wide range of procedural doctrines. *See id.* at 1551–80.

such oversight.<sup>38</sup> Well-known Article III standing law also limits the ability of private individuals to bring such pattern-or-practice suits.<sup>39</sup> With concentrated enforcement authority, the Trump Administration accomplished much by doing nothing, both in response to George Floyd's killing and to white-supremacist violence in Charlottesville in 2017.<sup>40</sup> To be sure, the Biden Administration appears far more interested than its predecessor in advancing civil rights.<sup>41</sup> But the scope of civil rights protections need not and should not depend on the proclivities of the person who happens to hold the nation's highest office.

We see many benefits that accrue from shifting the balance of civil rights enforcement so that it is more equally shared by federal, state, local, and private actors. Although state and local civil rights enforcement schemes may be encouraged and supported by the federal government through state–federal executive agreements and other initiatives,<sup>42</sup> they can also provide an important counterweight when federal rights enforcement is in retreat. Further, by recognizing that individuals have a right to institute suits to enforce their own constitutional rights, private enforcement puts the tools of law enforcement in the hands of a diffuse citizenry, in keeping with the idea that federalism serves to diffuse power.<sup>43</sup> Enforcement thus would depend on private initiative, rather than on the say-so of the Department of Justice. Coupling private enforcement with the support of a regime of fee-shifting can help to ensure that private individuals have the financial wherewithal to

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<sup>38</sup> Section 14141 (now codified at 34 U.S.C. § 12601) was enacted by Congress in 1994 and authorizes the Department of Justice to investigate and seek equitable relief against state and local law enforcement agencies that are engaging in patterns of unconstitutional conduct. For a description of the statute and the Trump Administration's announcement that it would no longer oversee local police departments and would reconsider structural reforms put in place by prior administrations, see Stephen Rushin, *Police Reform During the Trump Administration*, 2017 U. ILL. L. REV. ONLINE 1, 1.

<sup>39</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (refusing to grant standing to plaintiff injured by a police chokehold who sought to enjoin the city's chokehold policy).

<sup>40</sup> For a discussion of the Charlottesville rally and its repercussions, see *A Year Ago, the Charlottesville Rally Shined a Light on White Supremacists and Sparked Overdue Conversations*, PBS NEWSHOUR (Aug. 10, 2018, 6:35 PM), <https://www.pbs.org/newshour/show/a-year-ago-the-charlottesville-rally-shined-a-light-on-white-supremacists-and-sparked-overdue-conversations> [https://perma.cc/P2CQ-MVZP].

<sup>41</sup> See Jacob Schulz & Tia Sewell, *Pattern-or-Practice Investigations and Police Reform*, LAWFARE (Apr. 30, 2021, 9:48 AM), <https://www.lawfareblog.com/pattern-or-practice-investigations-and-police-reform> [https://perma.cc/ND4V-CZ22] (describing the Biden Administration's intention to more actively pursue Section 14141 investigations).

<sup>42</sup> See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 971–93 (2016) (describing the way federal and state executive actors negotiate over the implementation of many policy initiatives, often without legislative engagement).

<sup>43</sup> On the role of federalism in diffusing power, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987).

mount effective litigation.<sup>44</sup> In addition, by writing provisions for such litigation into the laws of state and local governments, policymakers can place them largely beyond the power of federal Executive Branch actors.<sup>45</sup> Effective enforcement will thus survive a change in DOJ enforcement priorities. Without abandoning our call for national reforms, this Article aims to provide a set of tools that state and local governments can implement to secure the project of civil rights enforcement at the local level.

Offering both legislative and administrative solutions, we set forth and defend our proposed platform for state and local reform in five Parts. Part I describes the many things that have gone wrong with civil rights enforcement at the national level and uses these well-known problems as a framework for evaluating local institutions. Reporting on our survey of state law and practice, Part II explains that most states have so far refrained from developing an independent framework for the enforcement of constitutional norms. Yet even in the states that may see their role as one of cooperation with the enforcement regime of Section 1983, we find that those goals are undermined by the ways in which state and local government officials budget for and manage the risks attendant to civil rights enforcement. Building on this close study of what states have done and might yet do, Part III offers a menu of reform options and describes a model state statutory analogue to Section 1983. Part III also proposes administrative changes designed to improve the way local governments respond to civil rights enforcement through budgeting, oversight, litigation, and risk-management decisions. Part IV raises and addresses predictable concerns about these proposals.

Part V explains how the adoption of our reform agenda would improve the ecosystems of civil rights enforcement. First, and most directly, reforms would better ensure compensation of the victims of constitutional violations and encourage steps by governments to prevent future violations. Second, even if only some jurisdictions acted, such reforms would eliminate qualified immunity and other first-order barriers to the articulation and development of legal norms. In those jurisdictions, rights would no longer be trapped in the amber of prior “clearly established” law, allowing constitutional law to develop and become established for future cases. Third, the changes we propose might restore some faith in the law as a tool for addressing systemic racism and the brutality that permeates the criminal legal system. Fourth, the implementation of these reforms in some jurisdictions would allow others to learn from their experience, fostering fruitful cross-pollination across states

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<sup>44</sup> See *infra* note 191 and accompanying text.

<sup>45</sup> In general, the federal government does not administer or enforce state and local law. One can, of course, imagine federal legislation adopted to preempt the field of federal constitutional rights enforcement, but such legislation would not displace state court enforcement of state constitutional rights.

and localities. Fifth, and perhaps most importantly, unlike changes proposed through national legislation or attempts to convince the Supreme Court to revisit doctrine, those we canvass in this Article can be accomplished at the state or local level without delay.

### I. EVALUATING THE FEDERAL CHALLENGES TO CIVIL RIGHTS ENFORCEMENT

Civil rights enforcement nicely illustrates the pluralistic view of federalism offered by Heather Gerken and others, whereby national, state, and local government actors can work independently and in concert in various ways either to encourage or undermine the project of defining and enforcing constitutional rights.<sup>46</sup> For much of the Early Republic, states took the lead in providing common law remedies for the victims of government wrongdoing, with occasional assists from federal courts and some oversight from the Supreme Court.<sup>47</sup> During the First Reconstruction, in response to the grievous failure of Southern courts to secure the rights of people made free by the Thirteenth Amendment, Congress adopted Section 1983.<sup>48</sup> But Section 1983 lay dormant for nearly a century until the Warren Court revived it as a tool of civil rights litigation during the Second Reconstruction.<sup>49</sup> That resuscitation made the federal government the primary enforcer of civil

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<sup>46</sup> Gerken's federalism envisions minority groups gaining influence through their powers of "voice" (exercising free-speech rights or participating in national elections, for example), "exit" (focusing on state elections or private associations), and "agency" (which includes the ability to contest federal priorities by "exercising control over the administration of national policy"). Gerken, *Disloyalty*, *supra* note 30, at 1349–51, 1350 n.3. When the federal government conscripts states into cooperative federalism programs—foreclosing exit—states use their voice to adjust the program to accommodate local needs. *Id.* at 1363–64. As policymaking takes root at the state level, the states' status as servants, insiders, and allies can also lead to dissent, rivalry, and challenge. Bulman-Pozen & Gerken, *Uncooperative Federalism*, *supra* note 30, at 1261–64. On the role of states as sites for decisions to contest or extend federal initiatives, see Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 *YALE L.J.* 1564, 1627–33 (2006).

<sup>47</sup> On the nineteenth-century framework for the enforcement of rights through state court common law litigation, see James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 *CALIF. L. REV.* 737, 748, 754, 762 (2019). The Supreme Court would ensure the effectiveness of the enforcement regime by exercising appellate jurisdiction over common law suits against federal officials. *See, e.g.*, *Crowell v. McFadon*, 12 U.S. (8 Cranch) 94, 98 (1814) (reviewing the state court's use of common law remedies to secure federal-official compliance with law); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9–10 (1817) (reviewing Rhode Island state court's use of common law remedies against a federal officer). Congress would occasionally assign jurisdiction over such matters to lower federal courts. *See, e.g.*, *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 29–32 (1835) (giving effect to a statute that authorized lower federal courts to entertain suits to enjoin federal debt-collection efforts).

<sup>48</sup> *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 174–75 (1961) (reviewing the history of Section 1983).

<sup>49</sup> *Id.* at 187. On the importance of *Monroe* in defining Section 1983 as a Warren Court tool for civil rights enforcement, see Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago: Monroe v. Pape as Legal Noir*, in *CIVIL RIGHTS STORIES* 41, 53–54 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

rights protections—and state and local governments the primary targets of that civil enforcement—for the past sixty years.<sup>50</sup>

State and local governments have taken relatively few steps to foster an independent local culture of rights recognition and enforcement. But that may be about to change. Unprecedented critical attention has recently been paid to the current scheme of federal constitutional enforcement, particularly to a series of hurdles created by the Supreme Court that civil rights litigants must overcome to hold state and local actors accountable. Those restrictions at the national level create an opportunity for state and local governments to play a more constructive role. We do not expect that all states and localities will take up this reform agenda. But the public outcry over systemic racism in policing and other public institutions may usher in a new phase of civil rights federalism. And we see evidence that these proposals can appeal not only to typically “progressive” local government officials but also to conservative and libertarian officials as well.<sup>51</sup>

We set the stage for a discussion of prospects for state-level reforms by briefly describing the many barriers to enforcement that have arisen at the national level. We focus on Section 1983, the foundation for the enforcement of federal constitutional rights against state actors. By general agreement, the statute seeks to compensate people whose constitutional rights have been violated, to deter individual officers and policymakers alike through threatened liability for these awards, and to articulate legal norms to shape the policy choices of well-meaning government actors.<sup>52</sup> Yet over time,

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<sup>50</sup> As the Supreme Court explained in 1972, “The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights.” *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

<sup>51</sup> See, e.g., Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1890–91 (2018) (describing the libertarian Cato Institute’s “assault” on qualified immunity); David Deerson, *The Case Against Qualified Immunity*, NAT’L REV. (July 13, 2020, 3:50 PM), <https://www.nationalreview.com/bench-memos/the-case-against-qualified-immunity/> [<https://perma.cc/WD27-Y2B5>] (discussing a Congressional bill to end qualified immunity introduced by then-Congressman and Libertarian Justin Amash); Press Release, Ayanna Pressley, Member, House of Representatives, Reps. Pressley, Amash Introduce Bipartisan Legislation to End Qualified Immunity (June 4, 2020), <https://pressley.house.gov/media/press-releases/rep-pressley-amash-introduce-bipartisan-legislation-end-qualified-immunity> [<https://perma.cc/MFH2-G2CR>] (quoting Justin Amash saying “[q]ualified immunity protects police and other officials from consequences even for horrific rights abuses”). For further discussion of the benefits of these proposals to government officials across the ideological spectrum, see *infra* Part V.

<sup>52</sup> See, e.g., *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”); *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (“[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future . . . particularly . . . in the area of individual police misconduct, where injunctive relief generally is unavailable.”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and*

whether by inadvertence or design, the Supreme Court has limited the ability of plaintiffs to succeed in Section 1983 suits, even when their constitutional rights have been violated, and has thus limited the intended power of the statute to compensate, deter, and articulate rights.<sup>53</sup> We begin with the two areas that have deservedly received the most attention and criticism—qualified immunity and municipal liability—and then survey a host of additional barriers that the Court has put in place.

### A. *Qualified Immunity*

Among its most notorious limitations on Section 1983, the Supreme Court’s judge-made doctrine of qualified immunity protects law enforcement officers from damages liability—even when they violate the U.S. Constitution—if the law was not “clearly established.”<sup>54</sup> When it created qualified immunity in 1967, the Supreme Court described the defense as a “good faith” immunity to shield officers from damages liability when they believed they were acting constitutionally.<sup>55</sup> But the Court remade the doctrine in 1982 such that officers’ subjective intent was no longer relevant—the key question became whether officers had violated “clearly established” law.<sup>56</sup> In subsequent years, the Court has increasingly broadened the protections of qualified immunity, suggesting that the law is clearly established only when a prior Supreme Court or circuit court opinion has held unconstitutional virtually identical behavior. In the words of the Supreme Court, qualified immunity now protects all but “the plainly

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*Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991) (arguing that a damages award against a city police force “does not require discontinuation of [unconstitutional] practices” but “exerts significant pressure on government and its officials to respect constitutional bounds”); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1918 (2007) (arguing that the threat of suit can “induce the government to change its policies”).

<sup>53</sup> The barriers we discuss here include qualified immunity, rigorous municipal liability standards, higher pleading requirements (particularly for claims against supervisory defendants), Article III standing limitations for injunctive relief, and the narrowing of plaintiffs’ entitlement to attorneys’ fees. *See infra* Sections I.A–I.C. Other obstacles exist as well, such as sovereign immunity and absolute immunity defenses, but these are beyond the scope of this Article. *See, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 957 (2019) (summarizing barriers); Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1314–15 (2001) (summarizing the implications of sovereign immunity jurisprudence).

<sup>54</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>55</sup> *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967) (recognizing a good faith immunity for police officers who arrested civil rights activists under an unconstitutional statute).

<sup>56</sup> *Harlow*, 457 U.S. at 816–18 (eliminating the subjective prong of the qualified immunity analysis and holding instead that “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

incompetent or those who knowingly violate the law.”<sup>57</sup> Indeed, over the past twenty years, in nearly every Supreme Court case heard by the Court, including many involving the use of deadly force by police officers, a majority of Justices have found that officers should have been granted qualified immunity.<sup>58</sup>

Cases in which officers have searched, arrested, shot, and killed people but have been shielded from liability simply because there was not a prior court decision with sufficiently similar facts have prompted widespread outcry about qualified immunity doctrine.<sup>59</sup> But qualified immunity causes more insidious harms as well. Because the Supreme Court allows courts to grant qualified immunity without ruling on whether an officer violated the Constitution,<sup>60</sup> qualified immunity stunts the development of constitutional law. In granting qualified immunity without ruling on the merits of the constitutional claim, a court creates no new clearly established law. Rights become frozen, leaving citizens unprotected from future constitutional violations until a court chooses to rule on the constitutional question. Hindering the development of constitutional law in this manner not only harms the individual plaintiffs in these cases but also makes it more difficult for government agencies to craft policies and formulate training that comply with the law.

Qualified immunity has another underappreciated vice: it increases the cost, time, and complexity of civil rights litigation. Understanding the intricacies of qualified immunity doctrine is difficult and time-consuming, briefing qualified immunity motions requires searching for court decisions with sufficiently similar facts, and the availability of interlocutory appeal of qualified immunity denials means that cases can be stopped in their tracks for a year or more as motions to dismiss and summary judgment motions are

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<sup>57</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (refusing to confer absolute immunity on officers seeking warrants but recognizing the scope of protection that qualified immunity confers); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

<sup>58</sup> See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018) (summarizing cases decided by the Supreme Court since it recognized the qualified immunity defense).

<sup>59</sup> See, e.g., Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html> [<https://perma.cc/86R3-GTLC>] (“Once a little-known rule, qualified immunity has emerged as a flash point in the protests spurred by Mr. Floyd’s killing and galvanized calls for police reform.”); Madison Pauly, *Limiting Qualified Immunity for Cops Was a Bipartisan Issue After George Floyd’s Murder. What Happened?*, MOTHER JONES (May 25, 2021), <https://www.motherjones.com/crime-justice/2021/05/qualified-immunity-police-george-floyd/> [<https://perma.cc/L3K9-U6EU>] (“In the weeks after Floyd was killed, limiting qualified immunity became the closest thing there was to a consensus issue in police reform.”).

<sup>60</sup> See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

considered on appeal.<sup>61</sup> For each of these reasons, two of us have found that the costs and challenges of qualified immunity discourages attorneys from accepting civil rights cases with lower damages or without prior factually similar precedent and may discourage attorneys from bringing any civil rights case at all.<sup>62</sup>

### B. *Municipal Liability*

Qualified immunity doctrine often operates in tandem with limits on municipal liability to frustrate the goals of government accountability. In 1978, in a decision called *Monell v. Department of Social Services of New York*, the Supreme Court held that Section 1983 claims could be brought against local government entities—cities, counties, and other local governments.<sup>63</sup> But while these entities cannot invoke a qualified immunity defense against such claims, they can be subject to liability only when they have adopted a policy, custom, practice, or usage that violates the Constitution.<sup>64</sup>

When the Supreme Court decided *Monell*, they rejected a notion common in other areas of the law that employers would be vicariously liable for misconduct by their employees.<sup>65</sup> Instead, the Court embraced rigorous standards of proof for claims brought under *Monell* and its progeny in order to “ensure[] that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality.”<sup>66</sup>

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<sup>61</sup> In general, the federal system requires that a district court enter a final judgment before any appeal, see 28 U.S.C. § 1291, but the Supreme Court permits interlocutory appeals for a narrow category of decisions, including denials of qualified immunity, see *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985).

<sup>62</sup> See Reinert, *Does Qualified Immunity Matter?*, *supra* note 4, at 494–95 (reporting the impact of qualified immunity on attorneys’ decisions to accept civil rights cases against federal actors); Joanna C. Schwartz, *Qualified Immunity’s Selection Effects*, 114 NW. U. L. REV. 1101, 1131–38 (2020) [hereinafter Schwartz, *Qualified Immunity’s Selection Effects*] (reporting the impact of qualified immunity on attorneys’ decisions to accept civil rights cases against state and local law enforcement officers).

<sup>63</sup> 436 U.S. 658, 690 (1978). States and state agencies, in contrast, may not be sued for civil rights violations via Section 1983. *Quern v. Jordan*, 440 U.S. 332, 338 (1979) (ruling that Section 1983 was not intended to sweep away the Eleventh Amendment sovereign immunity of the states); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (ruling that state officials cannot be sued in their “official” capacities under Section 1983).

<sup>64</sup> See *Monell*, 436 U.S. at 693–94 (holding that respondeat superior does not apply in Section 1983 actions against municipal entities).

<sup>65</sup> *Id.* at 694–95 (explaining why the Court rejected respondeat superior liability for Section 1983 claims).

<sup>66</sup> *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 403–05 (1997) (ruling that a local government cannot be held liable under Section 1983 for improperly hiring an officer unless the government knew that the officer was highly likely to inflict the particular injury at issue in the case).

If the plaintiff alleges that the constitutional violation was caused by a municipality's omission—say, the failure to train or properly supervise line officers—the plaintiff must meet a high standard by showing that the municipality should have known “to a moral certainty” that their failure to act would result in constitutional violations.<sup>67</sup> In most cases, proof of such knowledge requires evidence of past similar constitutional violations that would have put officials on notice of the need for better training or supervision, and the Supreme Court has decided that those prior instances must closely resemble the allegations at hand.<sup>68</sup> Under this liability standard, courts and commentators agree that, except for claims based on a facially unconstitutional formal policy, it is very difficult to obtain damages directly against a municipality for constitutional violations.<sup>69</sup> Indeed, Fred Smith has described *Monell* as a form of sovereign immunity for municipalities.<sup>70</sup> Thus, even without the qualified immunity provided to individual officers, the Supreme Court's limitation on municipal liability operates as a significant barrier to relief for those injured by unconstitutional conduct.

### C. Other Barriers

Qualified immunity and *Monell* only begin to scratch the surface of the barriers that the Court has erected to make it more difficult for plaintiffs whose constitutional rights have been violated to succeed in court. For example, the Court has also made it exceedingly difficult to prevail in constitutional claims against supervisors. Courts long assumed that supervisors could be held liable under Section 1983 if they failed to supervise or train their subordinate, if that failure amounted to gross negligence or recklessness, and if that failure to supervise or train led to the constitutional

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<sup>67</sup> *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (explaining that the failure to train officers can amount to an unconstitutional “policy” if policymakers “know to a moral certainty” that officers need training in an area but fail to provide it to them or if “the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are ‘deliberately indifferent’ to the need”).

<sup>68</sup> *See Connick v. Thompson*, 563 U.S. 51, 62–63 (2011) (ruling that the plaintiff had not met his burden of showing that the district attorney's office had a pattern of failing to produce exculpatory evidence, despite the fact that there had been four prior overturned convictions for failing to turn over exculpatory evidence, because those four convictions did not involve the same type of blood evidence at issue in Thompson's case).

<sup>69</sup> *See id.* at 61 (“A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.”); *Brown*, 520 U.S. at 406 (describing the “much more difficult problems of proof” for *Monell* claims not based on formal policies or direct municipal authorization); *J.K.J. v. Polk County*, 960 F.3d 367, 377–78 (7th Cir. 2020) (en banc) (contrasting *Monell* claims based on formal policies with claims based on inaction), *cert. denied*, 141 S. Ct. 1125 (2021).

<sup>70</sup> *See Fred Smith, Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 462–65 (2016).

violation.<sup>71</sup> But in 2009, in *Ashcroft v. Iqbal*, the Supreme Court rejected this longstanding formulation, holding instead that “each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.”<sup>72</sup> Lower courts have struggled to apply this aspect of *Iqbal*, with particular difficulty in determining what degree of intent is necessary to establish supervisory liability and whether the intent requirements differ depending upon the constitutional right at stake.<sup>73</sup> *Iqbal*’s supervisory liability standard has, as Karen Blum noted, “left a sea of uncertainty, confusion, and disagreement among the lower courts as to when, if ever, supervisory liability may attach for claims based on inaction, rather than affirmative acts.”<sup>74</sup>

The Supreme Court has also made it difficult to seek forward-looking relief for civil rights violations. In 1983, in *City of Los Angeles v. Lyons*, the Supreme Court ruled that plaintiffs do not have standing to sue under Section 1983 for injunctive relief unless they can show “a real and immediate threat” of a future constitutional violation.<sup>75</sup> In *Lyons* itself, this meant that the plaintiff, who had been subjected to a chokehold with no provocation by a Los Angeles police officer, could not obtain an injunction prohibiting the future use of chokeholds by the department because he could not show a sufficient likelihood that he would be subjected to a chokehold again.<sup>76</sup> This doctrine forecloses many claims for injunctive relief against law enforcement.<sup>77</sup>

The Court has also made it more difficult for plaintiffs who prevail on their Section 1983 claims to recover fees for their attorneys. In 1976, Congress passed Section 1988, a statute that allows plaintiffs who prevail in Section 1983 litigation to recover their reasonable attorneys’ fees from the government.<sup>78</sup> When Congress passed Section 1988, the legislative history made clear the view that, in order for Section 1983 to serve as an effective civil rights enforcement mechanism, attorneys needed financial incentives to bring cases on behalf of plaintiffs whose constitutional rights were violated.<sup>79</sup>

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<sup>71</sup> See Patrick Boynton, *Supervisory Liability in the Circuit Courts After Iqbal*, 21 U. PA. J. CONST. L. 639, 642–43 (2018).

<sup>72</sup> 556 U.S. 662, 677 (2009).

<sup>73</sup> Boynton, *supra* note 71, at 639–40.

<sup>74</sup> Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 921 (2015).

<sup>75</sup> 461 U.S. 95, 105 (1983).

<sup>76</sup> *Id.* at 105–06.

<sup>77</sup> Reinert, *Procedural Barriers to Civil Rights Litigation*, *supra* note 4, at 943–44.

<sup>78</sup> Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988).

<sup>79</sup> S. REP. NO. 1011, at 2 (1976).

The entitlement to attorneys' fees when plaintiffs prevail was understood as "the fuel that drives the private attorney general engine."<sup>80</sup> But two Supreme Court decisions interpreting Section 1988 greatly limited the power of the statute to encourage attorneys to bring Section 1983 cases on plaintiffs' behalf. The first, *Evans v. Jeff D.*, held that defendants can condition settlement agreements on the waiver of attorneys' fees.<sup>81</sup> The second, *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, held that plaintiffs' attorneys are not viewed as prevailing—and, therefore, are not entitled to their fees—if the suit was a catalyst for a change in defendants' behavior without a formal court ruling.<sup>82</sup> These two decisions, together, have been described as sounding a "requiem for Section 1983."<sup>83</sup>

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In 1961, the Supreme Court's landmark decision in *Monroe v. Pape* opened the door for people to bring Section 1983 claims against state and local government officials who violated their constitutional rights. Since *Monroe*, as this Part has shown, the Court has limited the potential power of Section 1983 in multiple ways. Its creation of qualified immunity, rigorous municipal liability standards, pleading requirements, limitations on injunctive relief, and caveats for plaintiffs' attorneys' entitlement to fees have combined to make it exceedingly difficult for plaintiffs to use Section 1983 in its intended manner—as a federal tool to seek redress against state and local officials for constitutional violations.

## II. STATE AND LOCAL ALTERNATIVES TO FEDERAL CIVIL RIGHTS ENFORCEMENT UNDER SECTION 1983

Part I's catalog of problems at the national level sets the stage for civil rights reform at the state and local level. As a first step in that reform project, this Part reports on our examination of the legal and institutional frameworks that states have put in place to redress government wrongdoing. We focus on three different state and local practices: (1) state law causes of action for constitutional violations, (2) state and local budgeting and indemnification

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<sup>80</sup> Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205.

<sup>81</sup> 475 U.S. 717, 737–38 (1986).

<sup>82</sup> 532 U.S. 598, 605 (2001).

<sup>83</sup> Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 31–32 (2008) (describing the ways in which *Buckhannon* and *Evans* have made it difficult for lawyers to accept the very cases that Congress intended Section 1988 to encourage—cases involving important rights but limited or no damages).

practices, and (3) approaches to defending against Section 1983 claims brought against government defendants. For reasons we explain, all of these are subjects of state and local control that have an important but underappreciated impact on civil rights enforcement.

Perhaps unsurprisingly, we find that state and local governments vary widely in how they approach civil rights enforcement. But apart from the recent reform measures that we noted in the introduction, we see only modest evidence of state experimentation. Despite evidence that state and local governments have innovated in other areas,<sup>84</sup> we find that states do not often establish independent institutional frameworks to enforce constitutional rights and sometimes adopt measures that actively undermine effective enforcement.<sup>85</sup> We also find that much can be done to improve the manner in which local governments budget for and pay successful civil rights claimants. Or to put the matter in more hopeful terms, we conclude that policymakers can dramatically improve civil rights enforcement by implementing the reform agenda we outline in Part III.

#### A. State Statutory Frameworks to Vindicate Claims of Government Wrongdoing

Invoking the principle of federal supremacy articulated in *Testa v. Katt*,<sup>86</sup> the Supreme Court has consistently held that state courts must provide a forum for the assertion of Section 1983 claims against local governments and state and local officials.<sup>87</sup> States thus have an obligation to play a role as conscripts in the cooperative federalism program that the Court has erected.<sup>88</sup>

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<sup>84</sup> See, e.g., Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 93–103 (2013) (describing local laws regarding gun control); Johnson, *supra* note 14, at 119–22 (describing innovative state and local legislation to prohibit discrimination and advance equality); Schragger, *supra* note 14, at 148–50 (describing variation in cities' approach to same-sex marriage).

<sup>85</sup> See *infra* Sections II.B–II.C.

<sup>86</sup> 330 U.S. 386, 394 (1947).

<sup>87</sup> See *Haywood v. Drown*, 556 U.S. 729, 740 n.6 (2009) (citing *Testa*, 330 U.S. at 388, 394). While the Court has sometimes suggested a willingness to defer to state refusals to hear federal claims on the basis of a valid excuse, the *Testa* principle has been applied fairly stringently to Section 1983 claims, narrowing the range of valid excuses. See *Felder v. Casey*, 487 U.S. 131, 152 (1988) (holding that a failure to comply with a state notice of claim provision was not a valid excuse to refuse to hear a Section 1983 claim). The only exception has been the one recognized for suits against the states themselves. See *Alden v. Maine*, 527 U.S. 706, 759–60 (1999) (rejecting argument that the *Testa* principle obliged the states to entertain suits against themselves to enforce rights conferred pursuant to Congress's commerce power); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) (concluding that states were not persons within the coverage of Section 1983 and thus avoiding the question as to state's obligation to entertain suit against itself).

<sup>88</sup> See *Haywood*, 556 U.S. at 740; *Felder*, 487 U.S. at 152; *Howlett v. Rose*, 496 U.S. 356, 380 (1990) (holding that a local school cannot invoke state law immunity to block suit brought in state court under Section 1983).

But what affirmative steps have the states taken to furnish an *alternative* state law framework for the assertion of similar claims? Appendix A collects the results of our survey of state legislative and judicial practice. As this Section explains, we found that only eight states have conferred a statutory right analogous to Section 1983 to pursue constitutional tort litigation. Of the states without a statutory cause of action, sixteen have recognized an implied cause of action for some constitutional violations.<sup>89</sup> The remainder, twenty-six states in all, appear to rely on garden-variety tort liability to secure government accountability.

Briefly summarized, our findings are as follows:

- States typically allow victims to pursue state law tort claims, for such common law torts as assault and battery, but often impose limits on and immunities from such liability to protect official defendants.
- The majority of states (twenty-six) make no provision, by statute or judicial decision, for the litigation of constitutional tort claims against state and local officials.<sup>90</sup>
- Of the remaining twenty-four states, courts in sixteen have adopted only some form of implied right of action (IROA) to allow constitutional tort claims, at least in some situations, to proceed.<sup>91</sup>
- Many of these sixteen IROA states have incorporated versions of the doctrine of qualified immunity as a defense to the implied

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<sup>89</sup> Connecticut recently enacted legislation creating a limited state law cause of action analogous to Section 1983. *See infra* Appendix A, Table A2. Thus, even though Connecticut courts also had recognized an implied cause of action for some constitutional torts, we categorize it here as a state with a Section 1983 analogue.

<sup>90</sup> There are twenty-three states in which courts have explicitly rejected an implied cause of action under their constitutions: Alabama, Alaska, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Washington, and Wyoming. In an additional three states, no cause of action has been recognized, but courts consider it an open question whether it is appropriate to do so: Arizona, Nevada, and South Dakota. *See infra* Appendix A, Table A1.

<sup>91</sup> These states are Iowa, Louisiana, Maryland, Michigan, Mississippi, Montana, New York, North Carolina, Oklahoma, Rhode Island, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin. Connecticut courts had recognized an implied cause of action limited to search and seizure and false arrest, with qualified immunity, but it recently adopted a statute creating a cause of action for constitutional violations, so we do not include it in our count here. Other than North Carolina, all these states have significantly limited the reach of the implied cause of action. For example, Rhode Island, Texas, and Utah generally limit any implied cause of action to provisions that are self-executing, which tends to exclude Bill of Rights-type provisions. And Louisiana, Maryland, Michigan, Mississippi, Oklahoma, Virginia, West Virginia, and Wisconsin have recognized implied cause of action solely to enforce due process, excessive force, and/or search and seizure violations. *See infra* Appendix A, Table A2.

right of action and make no provision for the payment of attorneys' fees.<sup>92</sup>

- Eight states have adopted statutes (Section 1983 analogues) that authorize at least some constitutional tort claims to proceed as a matter of state law.<sup>93</sup> Of these eight Section 1983 analogue states, most make provisions for the payment of attorneys' fees to prevailing plaintiffs. But most also incorporate some form of qualified immunity and have other limitations on the scope of their statutory rights of action.
- California, which has adopted an analogue to Section 1983 that provides a limited cause of action for some constitutional violations, has declined to adopt the Supreme Court's qualified immunity defense to the limited constitutional tort liability it allows (although there is an applicable state law immunity). Colorado and New Mexico recently joined this very exclusive club.<sup>94</sup>

In evaluating the effectiveness of these alternative regimes of government accountability, we first consider the most common form of redress: the state tort claim against the responsible official. Most (but not all) states allow government officials to be sued for state torts—assault, battery, false imprisonment, and the like.<sup>95</sup> Many of the state tort regimes in our survey impose respondeat superior liability on government entities.<sup>96</sup>

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<sup>92</sup> Montana is one exception, given that the state supreme court has held that qualified immunity is not appropriate for implied causes of action under the Montana constitution. *Dorwart v. Caraway*, 58 P.3d 128, 136 (Mont. 2002). And in Michigan, there is no sovereign immunity for the state where a constitutional violation was caused by custom or policy. *Mays v. Governor of Mich.*, 954 N.W.2d 139, 155 (Mich. 2020). Along similar lines, the Utah Governmental Immunity Act does not apply to claims alleging state constitutional violations. *See Spackman v. Bd. of Educ.*, 16 P.3d 533, 537 n.7 (Utah 2000).

<sup>93</sup> These are Arkansas, California, Colorado, Connecticut, Maine, Massachusetts, New Jersey, and New Mexico.

<sup>94</sup> *See supra* notes 7–9 and accompanying text.

<sup>95</sup> *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 805–09 (2007). For an overview of these state tort claims and associated immunities, see *State Sovereign Immunity and Tort Liability in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (Jan. 5, 2021), <https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART.pdf> [<https://perma.cc/BLC7-33J7>].

<sup>96</sup> *See, e.g.*, ALA. CODE § 11-47-190 (2021) (permitting action against municipality for negligent conduct by employees); FLA. STAT. § 768.28 (2021) (establishing liability of state and municipalities for tortious conduct of employees); *Brown v. King*, 767 N.E.2d 357, 360 (Ill. App. Ct. 2001) (“[A]s a general rule, a municipality may be held liable for the tortious acts of police officers acting in the scope of their employment.”); *Wilson v. Isaacs*, 929 N.E.2d 200, 203 (Ind. 2010) (holding a municipality liable under respondeat superior for police excessive force); KAN. STAT. ANN. § 75-6103 (2021) (establishing governmental liability, subject to exceptions, for wrongful acts of employees); *City of Lexington v. Yank*, 431 S.W.2d 892, 894–95 (Ky. 1968) (establishing that a municipality could be held liable under

Yet however well it works as to claims that sound in negligence, the state tort option offers little practical recourse for constitutional harms. For starters, the interests protected by state tort law, although they often overlap to some degree, do not always align well with constitutional interests. Nineteenth-century common law did not, for example, bar racially discriminatory practices. What's more, states may narrowly define the course and scope of an officer's employment for purposes of respondeat superior liability.<sup>97</sup> Finally, state immunities for state tort liability, even though calibrated in terms of good faith rather than in terms of legal clarity, further narrow the ability to prevail, playing a role similar to qualified immunity.<sup>98</sup> Couple these limits with the absence of any provision for attorneys' fees to support litigation of common law tort claims, and one can quickly see why they do not offer an effective alternative source of remediation for constitutional violations.<sup>99</sup>

In the minority of states that make some provision for constitutional tort claims under the state or federal constitutions, similar barriers complicate effective remediation.<sup>100</sup> In the sixteen states with implied rights of action (and no statutory analogues to Section 1983), the right to sue extends to only

respondeat superior for excessive force by police officer); *Yang v. Nutter*, No. A07-232, 2008 WL 186182, at \*3 (Minn. Ct. App. Jan. 22, 2008) (noting that municipalities are generally liable for employees' torts unless official immunity attaches); MINN. STAT. § 466.02 (2021) (establishing respondeat superior liability for municipalities, subject to exceptions); *Wagstaff v. City of Maplewood*, 615 S.W.2d 608, 610 (Mo. Ct. App. 1981) (applying common law respondeat superior liability to a municipality).

<sup>97</sup> Such narrow definitions of respondeat superior liability most frequently occur in litigation of intentional torts, the most likely predicate for constitutional tort claims. *See, e.g.*, *Davis v. Devereux Found.*, 37 A.3d 469, 490 (N.J. 2012) ("Only rarely will [an employee's] intentional torts fall within the scope of employment."); *Zsigo v. Hurley Med. Ctr.*, 716 N.W.2d 220, 229 (Mich. 2006) (holding that the employee of a medical center was not acting within the scope of his employment when he engaged in acts of sexual misconduct with a patient, and thus medical center was not vicariously liable); *Hamed v. Wayne County*, 803 N.W.2d 237, 247 (Mich. 2011) (finding no vicarious liability for an employee's sexual misconduct directed toward a prisoner).

<sup>98</sup> *See* Kyle Johnson, *A New Frontier for Ending Qualified Immunity: State Civil Rights Acts*, 26 PUB. INT. L. REP. 55, 62-64 (2020) (discussing immunities available to police officers in defense against state tort claims); Rosenthal, *supra* note 95, at 805-09 (containing comprehensive summary of state waivers of immunity for tort suits). As one example, some states offer "official immunity" in tort cases brought against government officials, which protects against liability so long as the officer acts within the scope of their duties and without actual malice. *Reed v. DeKalb County*, 589 S.E.2d 584, 587-88 (Ga. Ct. App. 2003).

<sup>99</sup> *See* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 749-60 (2008) (reviewing reasons why state tort law should not be seen as capable of vindicating constitutional interests); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 686 (1997) (describing state tort law as "particularly ineffective in dealing with precisely the sorts of interests and injuries that are at the center of constitutional law"); *see also* Schwartz, *Civil Rights Ecosystems*, *supra* note 5, at 1587-88 (describing how the unavailability of attorneys' fees for state tort claims discourages lawyers from relying on such claims).

<sup>100</sup> *See infra* Appendix A, Table A2.

specific sets of rights, often very narrow.<sup>101</sup> Many of these states have incorporated federal qualified immunity doctrine as a limit on relief and make no provision for the award of attorneys' fees to successful plaintiffs. That leaves only eight states in which a statutory cause of action exists for violation of at least some state (and sometimes federal) constitutional rights.<sup>102</sup> Each of these states has an attorneys' fees provision that provides for the possibility of fee-shifting for prevailing plaintiffs—a state law analogue to Section 1988.<sup>103</sup> But many courts in those states have also imported the same federal law barriers that stand in the way of Section 1983 litigation.<sup>104</sup> In Arkansas, for example, a state statute creating a cause of action for violation of the state constitution contains a provision directing courts to interpret the statute in light of federal decisions interpreting Section 1983.<sup>105</sup> The Arkansas Supreme Court has interpreted this provision to require that it apply federal qualified immunity doctrine to these state law claims.<sup>106</sup> Courts in Maine,<sup>107</sup> Massachusetts,<sup>108</sup> and New Jersey<sup>109</sup> have interpreted their state analogues to Section 1983 along similar lines. Until

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<sup>101</sup> Of the sixteen jurisdictions in which courts have implied a cause of action from the constitution, fifteen have limited the right to sue to enforce specific constitutional provisions.

<sup>102</sup> Arkansas, California, Colorado, Connecticut, Maine, Massachusetts, New Mexico, and New Jersey. Of these, California, Maine, Massachusetts, and New Jersey all provide a cause of action for violations of both the state and federal constitutions. But the majority of these states impose limitations on the kinds of constitutional claims that can be brought.

<sup>103</sup> Unlike federal Section 1988, some of the state statutes only permit prevailing plaintiffs to seek fees and costs. ARK. CODE ANN. § 16-123-105(b) (2021) (making possible an award of fees and costs where a plaintiff prevails); CAL. CIV. CODE § 52.1(i) (West 2021); MASS. GEN. LAWS ch. 12, § 111 (2021) (permitting fee-shifting for any “aggrieved person” who prevails); *City of Little Rock v. Nelson*, 592 S.W.3d 666, 669 (Ark. 2020) (describing the standard used to determine entitlement to fees under state law); *Rodriguez v. County of Los Angeles*, 96 F. Supp. 3d 1012, 1016 (C.D. Cal. 2014) (applying the California state law standard for fees under the Bane Act), *aff’d*, 891 F.3d 776 (9th Cir. 2018); *Norris v. Murphy*, 287 F. Supp. 2d 111, 116 (D. Mass. 2003) (stating that the standard under state law is the same as under Section 1988). Others use the more general “prevailing party” language, which permits fee awards for defendants or plaintiffs. *See* ME. STAT. tit. 5, § 4683 (2021) (permitting fee awards for any prevailing party other than the State); N.J. STAT. ANN. § 10:6-2 (2021); *Szczepanski v. Newcomb Med. Ctr., Inc.*, 661 A.2d 1232, 1236–37 (N.J. 1995) (stating that New Jersey courts follow federal standards in assessing entitlement to fees).

<sup>104</sup> *See infra* Appendix A, Table A2.

<sup>105</sup> ARK. CODE ANN. § 16-123-105(c) (2021).

<sup>106</sup> *See Robinson v. Langdon*, 970 S.W.2d 292, 296 (Ark. 1998); *see also Faughn v. Kennedy*, 590 S.W.3d 188, 194 (Ark. Ct. App. 2019).

<sup>107</sup> *Clifford v. MaineGeneral Med. Ctr.*, 91 A.3d 567, 588–89 (Me. 2014). Maine’s Civil Rights Statute permits private actions for violations of the federal or state constitutions. ME. STAT. tit. 5, § 4682(1-A) (2021) (limiting the cause of action to intentional interference with constitutional rights by physical force or violence or threats of physical force or violence).

<sup>108</sup> *Duarte v. Healy*, 537 N.E.2d 1230, 1232 (Mass. 1989).

<sup>109</sup> *Lapolla v. County of Union*, 157 A.3d 458, 467 (N.J. Super. Ct. App. Div. 2017). New Jersey’s Civil Rights Act provides for damages for violations of the federal or state constitutions. N.J. STAT. ANN. § 10:6-2(c) (2021).

recently (when Colorado and New Mexico enacted their statutes), California alone provided a private right of action against state and local officials—but its cause of action is significantly narrower than Colorado’s and New Mexico’s, only allowing claims against those who interfere with constitutional rights through violence or the threat of violence.<sup>110</sup> California state courts have not recognized a qualified immunity defense to liability under the Act, although California law does include a state law immunity that covers most actions taken in the course of investigation.<sup>111</sup>

Our survey thus suggests a somewhat dispiriting conclusion. While state and local governments have the affirmative power, through their legislatures, to enact their own tools of civil rights enforcement, this power has lain largely dormant at both the state and local levels.<sup>112</sup> Most states have failed to enact workable and effective state law analogues to Section 1983 and thus have failed to authorize people to sue as a matter of state law for the violation of state and federal constitutional rights. And to our knowledge, only one city (New York City) has created a local analogue to Section 1983.<sup>113</sup> One comes away from this summary of state and local developments with the clear sense that much of the potential for transformative change in civil rights enforcement at the local level has been as yet unrealized.

#### *B. The Budgetary Institutions of Civil Rights Enforcement*

State and local governments can advance—or hinder—civil rights enforcement not only through independent causes of action but also through the manner in which they facilitate relief through the budgeting and payment of awards in these cases. Though seemingly mundane, budgeting and indemnification rules and decisions often determine whether successful claimants get paid, where the money to pay them comes from, and in what

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<sup>110</sup> CAL. CIV. CODE § 52.1(c) (West 2021). Note that the Bane Act has been interpreted to require officers have specific intent to violate constitutional rights. *See* *Cornell v. City of San Francisco*, 17 Cal. App. 5th 766, 801–02 (Cal. Ct. App. 2017) (holding that an unlawful arrest is actionable under Section 52.1(c) only if an officer had “a specific intent to violate the arrestee’s right to freedom from unreasonable seizure”); *Reese v. County of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) (interpreting California case law to the same effect).

<sup>111</sup> *See* *Venegas v. County of Los Angeles*, 63 Cal. Rptr. 3d 741, 753 (Cal. Ct. App. 2007) (holding no qualified immunity for state law claims). *But see* CAL. GOV’T CODE § 821.6 (West 2021).

<sup>112</sup> The scope of municipal power to regulate itself and its actors by creating private rights of action will vary between states, in large part based on the extent of home rule authority granted to municipalities under state law. *See generally* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1129–30 (2012) (describing nine states as skeptical toward the power of cities to fashion rights of action, twenty-four states as ambiguous, and nine more as permissive). In Michigan, for example, although the City of Detroit has broad power to enact positive law, the state supreme court held that it could not create an antidiscrimination cause of action against itself because of state governmental immunity law. *Mack v. City of Detroit*, 649 N.W.2d 47, 52–53 (Mich. 2002).

<sup>113</sup> *See* N.Y.C. ADMIN. CODE § 8-803 (2021).

manner those dollars directly or indirectly impact government behavior and thereby discourage unlawful conduct in the future. In this Section, we offer an overview of current budgetary and indemnification arrangements and the ways in which these arrangements can undermine, or support, the compensation and deterrence goals that animate civil rights litigation.

Every state has a statute that sets out governments' defense and indemnification obligations—their obligations to provide officers with attorneys when they are sued and pay any settlement or judgment entered against them.<sup>114</sup> But these state statutes vary widely: some mandate that governments indemnify state and/or local government officers, while others give local governments discretion to decide whether to indemnify.<sup>115</sup> And even state statutes that mandate indemnification as a general rule recognize exceptions for intentional, willful, or wanton conduct; criminal conduct; and punitive damages awards.<sup>116</sup> State statutes also may limit indemnification obligations, with state caps ranging from \$25,000 to \$5,000,000.<sup>117</sup> Local governments craft their own indemnification policies that are consistent with their state's statutes.<sup>118</sup> Then, when an officer is sued, local government officials—city attorneys, usually—determine whether an officer will be indemnified.<sup>119</sup> If, for example, the jurisdiction prohibits indemnification of willful or wanton misconduct, an official must determine whether the allegations against the officer meet those criteria.

The state law framework for indemnification has a direct impact on the compensatory aims of civil rights litigation. Local jurisdictions often satisfy their officers' legal liabilities—even when they have discretion to deny officers indemnification under the terms of their statutes and even, sometimes, when law or policy prohibits indemnification.<sup>120</sup> Nevertheless, local government attorneys do sometimes exercise their discretion not to indemnify in ways that leave plaintiffs undercompensated. Local government officials sometimes threaten not to indemnify their officers for strategic gain—to reduce potential settlements, reduce potential damages

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<sup>114</sup> See generally Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 268–82 (2020) (describing these indemnification statutes).

<sup>115</sup> See *id.* at 269.

<sup>116</sup> See *id.* at 236. This ban on indemnification matches in some respects the refusal of common law jurisdictions to impose respondeat superior liability for intentional torts. See *supra* note 97.

<sup>117</sup> See Nielson & Walker, *supra* note 114, at 278 n.282.

<sup>118</sup> See generally Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 331–32 (2020) [hereinafter Schwartz, *Qualified Immunity and Federalism All the Way Down*] (describing the latitude that local governments have to craft indemnification policies and the many governmental and nongovernmental actors who may play a role in that process).

<sup>119</sup> See *id.* at 331.

<sup>120</sup> These findings are described in detail in Schwartz, *Police Indemnification*, *supra* note 4, at 889–90.

awards during trial, or reduce jury verdicts after trial.<sup>121</sup> And defense counsel may leverage the possibility that their clients will not be indemnified to influence the instructions a jury receives or the evidence it hears.<sup>122</sup>

Local governments sometimes make good on their threats and refuse to indemnify their officers—meaning that the officer is made personally responsible to satisfy the entirety of a settlement or judgment entered against them.<sup>123</sup> But even when this occurs, individual defendants rarely need to pull out their checkbooks. If it becomes obvious that the municipality will not indemnify, plaintiffs’ attorneys are likely to look elsewhere for deeper pockets or forgo pursuing litigation further, leaving the plaintiff without compensation.<sup>124</sup>

Available evidence from the policing context also suggests that local government budgeting and indemnification arrangements mute the second goal of civil rights enforcement: deterrence. Payouts in these cases virtually never carry a financial sanction for individual officers. And in the case of constitutional violations committed by local police officers, they rarely carry much in the way of financial consequences for law enforcement agencies, either. Agencies are sometimes required to contribute in some manner to the payment of settlements and judgments against their officers.<sup>125</sup> But these budgeting arrangements do not predictably translate into tangible financial effects.<sup>126</sup>

Even though payments in civil rights suits rarely have a direct financial effect on the officers named in the cases or the police departments that employ them, they could nevertheless impact officer and department behavior if the information in these suits was gathered and analyzed for personnel and policy lessons that would reduce the likelihood of future harms.<sup>127</sup> Municipal liability insurers appear to perform this type of analysis—smaller jurisdictions that purchase insurance or participate in government risk pools report that the insurers and pools may demand changes in personnel and policies as a condition of continued coverage;

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<sup>121</sup> See *id.* at 931–36.

<sup>122</sup> See *id.* at 933–34.

<sup>123</sup> See Schwartz, *Qualified Immunity and Federalism All the Way Down*, *supra* note 118, at 333–34.

<sup>124</sup> See *id.* at 334.

<sup>125</sup> See generally Schwartz, *How Governments Pay*, *supra* note 4, at 1184–87 (discussing “jurisdictions that require their law enforcement agencies to contribute to jurisdiction-wide risk management funds”).

<sup>126</sup> See *id.* at 1193.

<sup>127</sup> See generally Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* 841, 860–61 (2012) [hereinafter Schwartz, *What Police Learn from Lawsuits*] (explaining that law enforcement agencies that gather and analyze litigation data have used these data to inform personnel and policy decisions and improve officer behavior).

departments that do not comply have lost coverage and ceased to exist.<sup>128</sup> But law enforcement agencies in self-insured jurisdictions rarely make efforts to learn from the lawsuits brought against them and their officers.<sup>129</sup> When lawsuits are filed, the city or county attorney will defend the case, the money to satisfy any settlement or judgment will be paid out of the city's general budget, and the vast majority of departments will not keep track of which officers were named, what claims were alleged, what evidence was unearthed during discovery, what resolution was reached in the case, or what amount was paid.<sup>130</sup> As a result, law enforcement agencies do not typically rely on information about case filings or the information revealed in the course of litigation when making policy choices, or when deciding whether to discipline their officers.<sup>131</sup>

### C. *The Litigation Practices of Local Law Departments*

As we saw with the efforts of some local governments to leverage their indemnity authority to secure concessions or settlements, the manner in which local governments choose to mount legal defenses to liability has a significant impact on the success of civil rights litigation. Many of the doctrines that the Supreme Court has developed to qualify or restrict recovery operate as profound barriers to just outcomes. Yet these barriers to effective remediation enter litigation only when the local government defendants present them to the courts for consideration.<sup>132</sup> Government lawyers sometimes avail themselves of these defenses, arguing against municipal or individual liability or mounting interlocutory appeals, even in defense of substantial claims.<sup>133</sup> In this Section, we sketch the role legal representation plays in the ecosystems of local civil rights enforcement.

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<sup>128</sup> See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1573–91 (2017); Schwartz, *How Governments Pay*, *supra* note 4, at 1189–92.

<sup>129</sup> These findings are described in detail in Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1057–60 (2010) [hereinafter Schwartz, *Myths and Mechanics of Deterrence*].

<sup>130</sup> See *id.* at 1028.

<sup>131</sup> See *id.* at 1064–66.

<sup>132</sup> Immunities, both qualified and absolute, are affirmative defenses that have to be raised by defendants to be considered by courts. See Reinert, *Qualified Immunity at Trial*, *supra* note 4, at 2069–72 (describing qualified immunity as affirmative defense and varying approaches to allocating burdens); *Chestnut v. City of Lowell*, 305 F.3d 18, 22 (1st Cir. 2002) (Torruella, J., concurring) (collecting cases from courts of appeals for the proposition that absolute and qualified immunity can be forfeited or waived if not presented).

<sup>133</sup> Much has been written about the role of affirmative litigators in city, state, and federal law departments. This is an important area of focus, especially as the priorities of affirmative litigation bureaus shifts with changes in administration. See, e.g., Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 973–74 (2017)

When individual officers are sued under Section 1983, they are routinely represented by attorneys in city law departments or state attorney general offices.<sup>134</sup> These attorneys also represent government agencies and entities, and the same attorney often will represent both individual defendants and municipalities in Section 1983 litigation.<sup>135</sup> These attorneys regularly use both qualified immunity and *Monell* standards to defend against Section 1983 claims. Empirical evidence is sparse, but one of us found that qualified immunity was raised in about one-third of a large sample of Section 1983 cases brought against law enforcement officers, and is sometimes raised multiple times in motions to dismiss, for summary judgment, and for directed verdict.<sup>136</sup> To our knowledge, there has been no empirical study of the frequency that attorneys make arguments based on

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(describing the partisan swings that accompany state-sponsored litigation). But other than work regarding high-visibility decisions to defend (or not) particular laws from constitutional challenge, the role of defensive bureaus and the lawyers who staff them has been underexamined. *See, e.g.*, Sanford Levinson, *Identifying the Compelling State Interest: On “Due Process of Lawmaking” and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035, 1052 (1994) (providing the example of the U.S. Department of Justice’s decision not to defend the constitutionality of the Public Broadcasting Act of 1967); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1187 (2012) (questioning “a regime in which each administration views itself as having significant latitude to refuse to enforce and defend acts of Congress”); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 215–16 (2014) (contrasting “robust scholarly debate” about role of federal Executive in declining to defend statutes it deems unconstitutional with lack of scholarly attention to similar decisions by state executives); *see also* Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 77 n.1 (2011) (providing examples of the federal government’s refusal to defend laws the Executive Branch deemed unconstitutional); Charles Fried, *The Solicitor General’s Office, Tradition, and Conviction*, 81 FORDHAM L. REV. 549, 549 (2012) (criticizing the Obama Administration’s decision to abandon the defense of the Defense of Marriage Act (DOMA)). One of us has written about defensive agenda setting in the context of the federal government. *See* Alexander A. Reinert, *The Influence of Government Defenders on Affirmative Civil Rights Enforcement*, 86 FORDHAM L. REV. 2181, 2183–88 (2018).

<sup>134</sup> Where conflicts arise, this representation is often contracted out to members of the private bar at public expense. *See, e.g.*, GA. CODE ANN. § 45-9-21(e)(2) (2021) (“[T]he county officer shall be authorized to employ individual legal counsel to represent such county officer . . . .”); ME. STAT. tit.14, § 8112(2-A) (2021) (“If the defense of its employee creates a conflict of interest between the governmental entity and the employee, the governmental entity shall pay the reasonable attorneys’ fees . . . .”); N.Y. PUB. OFF. LAW § 18(3)(b) (McKinney 2021) (“[T]he employee shall be entitled to be represented by private counsel . . . whenever the chief legal officer of the public entity . . . determines that a conflict of interest exists . . . .”).

<sup>135</sup> Some conflicts of interest can arise if there is tension between the municipality’s *Monell* arguments and the individual defendant’s qualified immunity defense. *See* Dina Mishra, *When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in § 1983 Litigation*, 119 YALE L.J. 86, 109–17 (2009); Nicole G. Tell, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2827–28 (1997).

<sup>136</sup> *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 27–33 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*].

*Monell's* limits on entity liability, but anecdotal experience suggests that attorneys frequently invoke them.

Government defense attorneys can also elect to immediately appeal from a decision rejecting a proffered qualified immunity defense, delaying proceedings for a year or more.<sup>137</sup> There is no barrier to taking multiple appeals of a qualified immunity denial, once at the motion to dismiss stage, again at summary judgment, and once again in the rare event of a trial that results in a judgment for the plaintiff.<sup>138</sup> Indeed, even if a defendant prevails on the question of qualified immunity, they may take an appeal if the district court also found that the defendant's conduct violated the Constitution but did not violate clearly established law.<sup>139</sup>

By all available accounts, defendants make regular use of their power to take interlocutory appeals. One of us found that defendants immediately appealed more than one in five qualified immunity motions that were denied in whole or part.<sup>140</sup> Another of us has shown that, of all appellate decisions involving qualified immunity between 2005 and 2015, about 40% were from denials of qualified immunity at the motion to dismiss or summary judgment stage.<sup>141</sup>

### III. A PROPOSAL FOR ENHANCED STATE AND LOCAL CIVIL RIGHTS ENFORCEMENT

As described in Part II, state and local governments have taken only modest steps to provide statutory alternatives to the troubled framework of Section 1983. In addition, local officials contribute actively to an ecosystem of civil rights enforcement that can either undermine or further the compensatory and deterrence goals of civil rights litigation. For state and local governments interested in restoring the promise of civil rights enforcement, we offer three strategies. First, state and local legislatures can enact a statutory analogue to Section 1983 that does not allow a qualified immunity defense, imposes vicarious liability, and mandates indemnification. A recently passed Colorado statute, which we describe, offers a blueprint for this type of law. We also offer model statutory language—drawn from several proposed state statutes—in Appendix B.

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<sup>137</sup> See Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 62, at 1121–22.

<sup>138</sup> For the approval of serial appeals from the denial of qualified immunity defenses, see *Behrens v. Pelletier*, 516 U.S. 299, 311–13 (1996).

<sup>139</sup> *Camreta v. Greene*, 563 U.S. 692, 706–08 (2011).

<sup>140</sup> See Schwartz, *How Qualified Immunity Fails*, *supra* note 136, at 40.

<sup>141</sup> Alexander A. Reinert, *Qualified Immunity on Appeal: An Empirical Assessment* 22 tbl.1 (Cardozo L. Jacob Burns Inst. for Advanced Legal Stud., Faculty Research Paper No. 634, 2021), <https://papers.ssrn.com/a=3798024> [<https://perma.cc/HSD3-BUZZ>].

Second, state and local governments can structure budgeting, oversight, and risk management in ways that encourage local governments to learn from lawsuits brought against them and thereby better advance the deterrence goals of civil rights litigation. Third, city and county attorneys can also advance the goals of civil rights litigation by making more thoughtful use of qualified immunity and municipal liability protections in litigation.

#### A. *A State Law Analogue to Section 1983*

Whatever steps are taken at the federal level to reform or eliminate the doctrines of qualified immunity and the limitations on municipal liability, any state can enact a state law analogue to Section 1983 that allows people to bring an action under state law for the violation of their state or federal constitutional rights, forgoes the limitations on relief created by the Supreme Court, and additionally ensures that people whose rights were violated in fact recover for their losses.<sup>142</sup> Such a statute would have several components. In addition to a state law cause of action, the statute should make clear that qualified immunity is not a defense to liability.<sup>143</sup> The statute should also impose vicarious liability on local governments for wrongs committed by their officers, instead of requiring plaintiffs to meet the challenging *Monell* standard. In our view, a model state statute would additionally include an

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<sup>142</sup> Our proposal is different from prior suggestions that plaintiffs should pursue Section 1983 litigation in state courts as an avoidance mechanism for the hostility of federal courts. Such actions, even when heard in state court, are subject to the same common law immunities and defenses that would apply in federal court. See Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1079 (1989). Our proposal is also distinct from Akhil Reed Amar's suggestion, long ago, that states create "converse" Section 1983 statutes that would provide a damages remedy where federal actors violate the Constitution. See, e.g., Amar, *supra* note 32, at 1428 n.15 (using "converse-1983" to refer to any statute that would invert Section 1983); Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 160 (1993) (labeling laws designed to provide a remedy for violations of federal constitutional rights committed by federal officials "converse-1983"); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1230 (1994) [hereinafter Amar, *Five Views of Federalism*] (advocating for adoption of "converse-1983" statutes). We focus on what state and local officials can do to enhance accountability of their own actors and entities, not how they can enhance accountability of federal officials.

<sup>143</sup> Some legislators have crafted statutes that limit, instead of eliminate, qualified immunity. For example, Washington's proposed statute, House Bill 1202, provided:

A peace officer has a defense against an action . . . if, when the injury occurred, the officer substantially complied with a regulation, practice, procedure, or policy that was established by the employer or approved or condoned by superior officers. If the peace officer proves this defense, the employer is independently liable for the injury if the injury was proximately caused by a regulation, custom, usage, practice, procedure, or policy approved or condoned by the employer.

H.B. 1202, 67th Leg., 2021 Reg. Sess. § 3(3) (Wash. 2021). Those interested in modifying qualified immunity without eliminating it outright could adopt this type of language.

analogue to Section 1988, allowing fee-shifting for prevailing plaintiffs, to encourage attorneys to bring these cases.

Finally, a model statute would mandate that officers are indemnified, so that plaintiffs can be assured compensation for their losses. California's statute—along with statutes in several other states—has this type of broad indemnification provision and could be emulated by states with farther-reaching limitations on indemnification.<sup>144</sup> By adopting the California model, states would foreclose the argument that individual officers have acted so egregiously as to fall within an exception in indemnification coverage.<sup>145</sup> Mandating indemnification would also prevent government attorneys from using the threat that they will deny indemnification strategically, to reduce plaintiffs' awards. State statutes should also prohibit indemnification caps if they wish to ensure plaintiffs are fully compensated.

In the months after George Floyd's killing, several state legislatures considered draft statutes that included some or all of these components.<sup>146</sup> While most have not adopted legislation, Colorado enacted a law in 2020 that achieves almost all of these goals. It provides a private right of action for violations of state constitutional law by Colorado law enforcement officers and specifically prohibits the use of qualified immunity and state statutory immunities as defenses to claims brought under the section.<sup>147</sup> The statute provides attorneys' fees for prevailing plaintiffs.<sup>148</sup> The statute requires that local governments indemnify their officers unless they are convicted of a crime and also requires that local governments require their officers to contribute the lesser of 5% of the settlement or judgment or \$25,000 if they are found by their employer to have acted in bad faith.<sup>149</sup> No other state legislatures seem to have considered this type of indemnification clause with a contribution requirement for bad faith actors. But other states—including California, Kansas, Massachusetts, New Mexico, New York, Rhode Island, Texas, Virginia, and Washington—have considered creating

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<sup>144</sup> Note that California's statute does require that an employee cooperate in the defense of the case as a condition of indemnification and allows but does not require indemnification of punitive damages awards. CAL. GOV'T CODE § 825(a) (West 2021). For a discussion of the states with no indemnification exceptions, see Nielson & Walker, *supra* note 114, at 272–74 & nn.248–49.

<sup>145</sup> See, e.g., *Ott v. City of Mobile*, 169 F. Supp. 2d 1301, 1316 (S.D. Ala. 2001) (addressing the city's argument that it should not be liable for officer's conduct because it was "intentional or wanton").

<sup>146</sup> See *supra* notes 9–10 (describing some of these state legislative proposals).

<sup>147</sup> COLO. REV. STAT. § 13-21-131 (2021). The statute only applies to a "peace officer" employed by a "local government," thereby excluding state law enforcement personnel and many other categories of state and local officials. *Id.*

<sup>148</sup> *Id.* § 13-21-131(3) (permitting plaintiffs to recover fees as prevailing parties, including if they are a "catalyst" for change, and defendants to recover for defending against any claim deemed "frivolous").

<sup>149</sup> If the officer shows that they do not have the resources to make this payment, the city will bear the entirety of the financial obligation. *Id.* § 13-21-131(4).

a state law cause of action for constitutional violations that require the employer to indemnify.<sup>150</sup>

Overall, we endorse Colorado’s approach but offer a few design choices for state legislatures to consider. The first choice is a question of *which* officials any such law would cover. Colorado’s statute is limited to unconstitutional conduct by law enforcement officials. But Section 1983 has no such limitation, and states could decide to expand liability to other types of government officials as well. Most states that have created a statutory cause of action have provided broader coverage, encompassing all persons acting under color of state law.<sup>151</sup> Limiting the reach of such a statute to law enforcement might be considered responsive to the social movements that have focused attention on policing.<sup>152</sup> But in our view, broader coverage is more consistent with the overall goals of civil rights enforcement and eliminates difficult interpretive questions regarding who is a law enforcement officer.<sup>153</sup>

A second choice relates to which rights to enforce. The Colorado statute is limited to violations of state constitutional law. Some other statutes are limited to vindicating constitutional rights in specific contexts.<sup>154</sup> But we see no reason why state lawmakers cannot create a cause of action for the

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<sup>150</sup> See *supra* note 10. Note that California is among the states that already provides a state law cause of action for some constitutional violations—the statute proposed and defeated in California would have expanded the cause of action to include all violations of state constitutional law.

<sup>151</sup> See, e.g., ARK. CODE ANN. § 16-123-105(a) (2021) (“*Every person* who, under color of any statute . . . shall be liable . . .” (emphasis added)); CAL. CIV. CODE § 52.1(b) (West 2021) (asserting that injunctive relief is available when a “person” threatens another individual’s rights secured by the U.S. or California Constitution); ME. STAT. tit. 5, § 4682(1-A) (2021) (asserting that private action can be taken “[w]hensoever any person” interferes with another’s constitutional rights); MASS. GEN. LAWS Ch. 12, § 11H (2021) (asserting that civil action for injunctive relief can be taken “[w]hensoever any person” interferes with another’s constitutional rights); N.J. STAT. ANN. § 10:6-2(a) (asserting that civil action for injunctive relief can be taken when “a person” interferes with another’s constitutional rights); New Mexico Civil Rights Act, H.B. 4, 55th Leg., 2021 Reg. Sess. § 3 (N.M. 2021) (asserting that civil action for injunctive relief can be taken when “[a] public body or person” interferes with another’s constitutional rights).

<sup>152</sup> Limitations on which government officials can be named as defendants—or an incremental approach, by which the statute can be amended to add additional government officials as possible defendants over time—might also be more palatable to those concerned that expanding liability for all constitutional violations would have severe fiscal consequences, an objection we discuss below. See *infra* Section IV.A.

<sup>153</sup> For example, depending on how the term is defined, corrections officers may be excluded. The meaning of the “law enforcement” proviso to the intentional tort provisions of the Federal Tort Claims Act has been anything but self-evident. See, e.g., *Iverson v. United States*, 973 F.3d 843, 849–50 (8th Cir. 2020) (discussing whether TSA screeners qualify as law enforcement officers for purposes of triggering government’s vicarious liability for intentional torts under the FTCA).

<sup>154</sup> See, e.g., CAL. CIV. CODE § 52.1(b) (West 2021) (limiting the cause of action to interference with constitutional rights through “threat, intimidation, or coercion”); ME. STAT. tit. 5, § 4682(1-A) (2021) (limiting the cause of action to intentional interference with constitutional rights by physical force or violence or threats of physical force or violence).

violation of state *and* federal constitutional rights. As a matter of federalism, states and state courts have long been responsible for enforcing federal norms.<sup>155</sup> State legislative power is presumptively broad, so long as they do not transgress constitutional boundaries, and states already adopt laws that facilitate the effectuation of federal law.<sup>156</sup> And while only a few states have enacted statutes akin to the one we propose here, most provide for enforcement of both federal and state constitutional rights.<sup>157</sup> There is no sound federalism-based reason that would bar states from enforcing federal constitutional guarantees more stringently than Congress has.

We also believe there are several overlapping reasons for supporting a state-created affirmative right to sue for violations of both the state and federal constitutions. First, doing so would likely give litigants the option of litigating such claims in state or federal court because such claims could “arise under” federal law within the meaning of 28 U.S.C. § 1331.<sup>158</sup> Second, a state law cause of action for violations of the federal Constitution—and no qualified immunity defense—would increase the opportunities for federal

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<sup>155</sup> Indeed, the Judiciary Act of 1789 did not confer general federal question subject matter jurisdiction on lower federal courts, giving state courts primary jurisdiction over many original disputes arising out of federal law until the precursor to 28 U.S.C. § 1331 was enacted in 1875. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 22, 28 (7th ed. 2015).

<sup>156</sup> Thus, the National Conference of State Legislatures reports that some twenty states have adopted state laws that helped to secure the enforcement of Affordable Care Act (ACA) provisions. *See* NAT’L CONF. STATE LEGISLATURES, LEGAL CASES AND STATE LEGISLATIVE ACTIONS RELATED TO THE ACA (June 29, 2021), <https://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx> [<https://perma.cc/7A8V-BXCC>] (reporting that twenty states have codified ACA consumer protections by guaranteeing health coverage for individuals with preexisting conditions, prohibiting insurers from varying premium rates based on an enrollee’s health-status and requiring coverage for the ten essential health benefits).

<sup>157</sup> Of the eight states that have enacted causes of action to enforce constitutional rights, four have authorized enforcement of both the state and federal constitutions. *See infra* Appendix A, Table A2.

<sup>158</sup> We base this conclusion on *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 313–14 (2005), which holds that state-created causes of action can “arise under” federal law within the meaning of 28 U.S.C. § 1331 where the cause of action requires resolution of a disputed and substantial federal issue, without departing from the congressionally approved balance of power between state and federal courts. Some federal courts have exercised original jurisdiction on this theory over state law claims for violations of the federal constitution. *See, e.g.*, *Warren v. Mgmt. & Training Corp.*, No. 16-cv-849, 2016 WL 8730711, at \*4 (E.D. Cal. Aug. 5, 2016) (finding that a federal court had subject matter jurisdiction over a state law Bane Act claim because it alleged violations of the federal Constitution and so was “arising under” the Constitution within the meaning of 28 U.S.C. § 1331); *Ortiz v. Univ. of Med. & Dentistry of N.J.*, No. 08-2669, 2009 WL 737046, \*9–10 (D.N.J. Mar. 18, 2009) (holding that removal under New Jersey Civil Rights Act was proper because the cause of action arose under federal law by seeking relief for violations of the federal Constitution); *Therrien v. Hamilton*, 881 F. Supp. 76, 79 (D. Mass. 1995) (same in context of Massachusetts Civil Rights Act). The fact that Congress has already authorized suits for federal constitutional violations under Section 1983 suggests that allowing federal jurisdiction over similar claims brought under state law analogues would not disrupt Congress’s allocation of power between state and federal courts.

and state courts to announce clear interpretations of federal constitutional rights.<sup>159</sup> This would help solve the constitutional stagnation problem caused by the Supreme Court's current Section 1983 jurisprudence. And finally, because as a historical matter there has been very little elaboration of state constitutional law in the context of affirmative civil rights claims,<sup>160</sup> state courts interpreting the new statute could benefit from having a body of familiar federal law to apply in tandem with less developed state constitutional law.

A third design choice relates to how to allocate financial liability for constitutional violations—should the statute institute both vicarious liability and certain indemnification, or just one of the two? Colorado's statute takes a novel approach, described above. It requires indemnification in all cases unless the defendants are convicted of a crime.<sup>161</sup> Certain indemnification ensures that injured parties are fully compensated and that the threat of indemnification denials cannot be used strategically. Another way to ensure compensation, either as an alternative or in tandem with certain indemnification, is to provide for vicarious entity liability for states and municipalities whose employees violate the state or federal constitution. To do this, state legislatures would do well to make respondeat superior liability explicit in any statute, thereby precluding courts from importing Section 1983's *Monell* construct into state law. In so doing, state legislatures also would have to make clear any intent to waive sovereign immunity of state entities for this liability.<sup>162</sup> As a functional matter this will have the same

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<sup>159</sup> See, e.g., Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1505 n.116 (1987) (discussing the value that “unauthoritative” state court decisions can play in informing federal law); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1467 (1999) (noting that “territorial or systemic boundaries need not disqualify a court from making a valuable contribution to the ongoing interpretive exercise”); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 325 (1977) (surveying federal diversity cases and noting their “arguably useful contributions” to development of state law).

<sup>160</sup> To be clear, we would welcome state development of distinct interpretations of their constitutional protections. But, other than for interpretations of state constitutional analogues to the Fourth Amendment, state courts have generally been guided by federal law when interpreting their own constitutions. See generally James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 796–98 (1992) (discussing state constitution jurisprudence around Fourth Amendment analogues).

<sup>161</sup> If an officer acted in bad faith, they must contribute the lesser of 5% of any judgment or settlement or \$25,000 and will be indemnified for the rest. COLO. REV. STAT. § 13-21-131(4) (2021).

<sup>162</sup> States would have to specifically waive sovereign immunity for actions brought in both federal and state court; a waiver for state court purposes does not ordinarily waive immunity in federal courts. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242–43 (1985); *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 955 (9th Cir. 2000). Municipalities cannot claim the benefit of sovereign immunity in federal court. See, e.g., *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (holding that

effect as certain indemnification. But making clear the entity's responsibility for the tortious conduct of its employees might simplify litigation and also help shift discourse away from a "bad apples" narrative toward an appreciation of the systemic nature of unconstitutional conduct.

Rather than bar indemnification whenever an officer is found criminally liable, we endorse Colorado's provision that officers found to have acted in bad faith must pay 5% or \$25,000 toward any settlement or judgment—whichever is less—unless they do not have the financial means to make the payment (in which case the jurisdiction will pay the entirety of the award). Barring indemnification entirely for officials who are convicted of a crime may prevent compensation in some of the most egregious cases of official misconduct and also may create perverse incentives not to report or prosecute crimes. Nonetheless, we endorse the creation of some means of financial or other pressure on police officers and departments when litigation reveals wrongdoing. Colorado's limited indemnification for bad faith conduct is one way of mandating this type of sanction. As we describe in the next Section, local governments can also achieve similar results through local indemnification policies and rules and practices that facilitate learning from litigation.

State lawmakers seeking to craft a state law analogue to Section 1983 will face a range of additional questions. For those who wish to provide victims with access to counsel by the payment of attorneys' fees to successful claimants, lawmakers must define what it means to prevail. Some may choose to follow Colorado in making clear that the Supreme Court's restrictive definition of prevailing parties in *Buckhannon* would not apply.<sup>163</sup>

States may also wish to consider, as part of a package of statutory reforms, the inclusion of a state analogue to the federal statute that authorizes the Department of Justice to institute litigation to address systemic problems in local police departments.<sup>164</sup> Hampered by limited budgets and political will, the DOJ's structural reform program under 42 U.S.C. § 14141 had fully investigated only some fifty-five departments nationwide (out of about

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Eleventh Amendment limits on suits against states do not extend to counties). But in some states it might be necessary to take specific steps to overcome local governmental immunity for claims brought in state court.

<sup>163</sup> The attorneys' fees provision includes entitlement to fees for plaintiffs who, via litigation, are a "catalyst" for change. COLO. REV. STAT. § 13-21-131(3) (2021). Adoption of the catalyst theory is in contrast to the Supreme Court's rejection of that theory in federal civil rights litigation. *See* *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 610 (2001).

<sup>164</sup> *See* 34 U.S.C. § 12601. Washington State's proposed statute, House Bill 1202, included this type of provision, and we have incorporated its language into our model statute. *See* H.B. 1202, 67th Leg., 2021 Reg. Sess. § 5 (Wash. 2021); *infra* Appendix B.

18,000) by 2013.<sup>165</sup> Some of these investigations resulted in court-supervised consent decrees with the potential to effect significant systemic change.<sup>166</sup> Such reform efforts disappeared entirely under the Trump Administration.<sup>167</sup> In an effort to fill the gap, state attorneys general in Illinois and New York have instituted reform measures of their own, modeled to some extent on past federal practice.<sup>168</sup> But doubts have been expressed as to the wisdom and viability of such litigation, especially in the absence of any formal statutory authorization.<sup>169</sup> States may wish more explicitly to grant their statewide law enforcement officers the authority to conduct these types of investigations, perhaps in cooperation with the DOJ.<sup>170</sup> Such statutes would enable states to counter partisan swings in federal administrative oversight.

Lawmakers interested in creating a state cause of action will need to consider whether and how to address each of these components of state law. Legislators will also need to consider how, precisely, to craft statutory language to achieve each of these goals. In Appendix B, we offer a model state statute that includes proposed language addressing each of these components.

### B. Budgeting, Accountability, and Risk Management

Creating new causes of action and determining what limitations to apply to those causes of action will undoubtedly impact the frequency and success of constitutional litigation. But no matter how significantly state and local legislatures expand rights to sue under state law, the damages awarded

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<sup>165</sup> See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3232 (2014) (reporting that the DOJ conducted fifty-five investigations from the statute's inception through 2013, resulting in twenty-two negotiated settlements and only twelve appointed monitors).

<sup>166</sup> In New Orleans, for instance, a 2013 consent decree has been credited with reducing police excessive use of force and improving community relations without undermining criminal law enforcement. See Patrik Jonsson, *How New Orleans Police Went from 'Most Corrupt' to Model Force*, *CHRISTIAN SCI. MONITOR* (Feb. 26, 2019), <https://www.csmonitor.com/USA/Justice/2019/0226/How-New-Orleans-police-went-from-most-corrupt-to-model-force> [<https://perma.cc/68JS-SHJX>].

<sup>167</sup> See Rushin, *supra* note 38, at 1.

<sup>168</sup> For an account of the Illinois initiative and a somewhat skeptical assessment of the role of state officials in initiating such efforts, see Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 *DUKE L.J.* 999, 1030–33 (2020). On the initiation of such an effort in New York, see Ashley Southall, *N.Y. Attorney General Sues N.Y.P.D. over Protests and Demands Monitor*, *N.Y. TIMES* (June 28, 2021), <https://www.nytimes.com/2021/01/14/nyregion/nypd-police-protest-lawsuit.html> [<https://perma.cc/GAZA-7REN>].

<sup>169</sup> See Mazzone & Rushin, *supra* note 168, at 1044–67 (expressing doubts as to the viability of state attorney general reliance on common law modes of police-department oversight and urging the adoption of statutory authorization).

<sup>170</sup> See Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 *GEO. MASON U. C.R.L.J.* 479, 481–82 (2009) (making such a proposal).

in these cases are only the first step. Mandating indemnification via statute will ensure that damages are ultimately paid, but these payments can deter future violations only if there is an infrastructure that will translate governmental liability into consequences for officers and local government policymakers. In this Section, we sketch out several possible ways to create financial or nonfinancial pressures on officers and departments to improve, and we offer some tentative thoughts about their prospects for success.

*1. Financial Sanctions for Officers*

Paying plaintiffs from local government coffers does not preclude officers from being financially sanctioned when they engage in wrongdoing. Colorado's recently enacted law, described above, offers one template: it creates a limited contribution obligation for officers who act in bad faith while simultaneously ensuring that people whose rights have been violated will be compensated for their losses.<sup>171</sup> This imposes some financial consequence on an officer who has engaged in intentional wrongdoing, while also addressing the concern that officers will be financially sanctioned for settlements and judgments when they have done nothing wrong. It does so without exposing officers to debilitating degrees of personal liability because it excuses officers from any obligation to contribute to a settlement or judgment if they do not have the financial means to make the payment. In these ways, the Colorado statute is a better alternative to the all-or-nothing indemnification approach adopted by most states. The indemnification provision in Colorado's statute is a novel approach to imposing some—but not overwhelming—costs on officers if they have acted in bad faith.

Even without a formal change in state indemnification laws, local government officials can require officers to contribute to settlements and judgments entered against them as a condition of indemnification for the remainder of the award. For example, a study of police indemnification practices by one of us revealed two agencies—Cleveland and New York City—that required officers to personally contribute to settlements or judgments during the six-year study period: thirty-four cases (out of 6,887) in New York City and two (out of thirty-five) in Cleveland. These officers were not denied indemnification entirely. Instead, they were required to make limited contributions to settlements in cases in which the department found that the officers violated policy.<sup>172</sup> It is debatable whether officers in these jurisdictions should have been required to contribute more money, or contribute more often. But this type of required contribution ensures that

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<sup>171</sup> See *supra* notes 147–149 and accompanying text.

<sup>172</sup> Their contributions ranged from \$250 to \$25,000, with a median contribution of \$2,000. See Schwartz, *Police Indemnification*, *supra* note 4, at 912–15.

plaintiffs whose rights have been violated will be made whole, while creating a financial sanction for officers found to have violated policy.

A final approach that has been considered but has yet to be adopted is a requirement that police officers carry professional liability insurance. A Minneapolis group called the Committee for Professional Policing pushed for a ballot measure that would have required police officers to carry professional liability insurance, but it did not go on the ballot because it was found to conflict with the state's indemnification statute.<sup>173</sup> Deborah Ramirez has advocated that more state and local governments adopt this approach, which would allow plaintiffs to recover damages (from the insurer) when their rights have been violated and would create financial consequences for the officer (in the form of increased premiums) moving forward.<sup>174</sup>

## 2. *Financial Sanctions for Departments*

Local governments could also endeavor to place the financial consequences of civil rights lawsuits more squarely on the agency employer—requiring departments to pay settlements and judgments or insurance premiums directly from their budgets—as a way of encouraging better behavior. As described above, some local governments already require that police departments pay these costs from their budgets.<sup>175</sup> But the complexities of local government budgeting suggest that even when dollars paid to resolve settlements and judgments are formally taken from police department budgets, those dollars paid may not actually have much impact on the department's bottom line—more money can simply be moved by the local government into the police department's budget to address any shortfall. And it is uncertain how much deterrent effect these payments can realistically have, given that they are usually just a small fraction of the department's resources.

Nevertheless, requiring police departments to pay settlements and judgments from their budgets may focus policymaking officials on the

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<sup>173</sup> Emma Nelson, *Minnesota Supreme Court Upholds Minneapolis Decision on Police Insurance Ballot Measure*, STAR TRIB. (Mar. 15, 2017, 10:08 PM), <https://www.startribune.com/minnesota-supreme-court-upholds-minneapolis-decision-on-police-insurance-ballot-measure/416277194/> [https://perma.cc/J5CB-7ACH].

<sup>174</sup> See, e.g., *Liability Insurance Could Hold 'Reckless' Police Officers Accountable*, NPR (June 7, 2020, 5:57 PM), <https://www.npr.org/2020/06/07/871751070/liability-insurance-could-hold-reckless-police-officers-accountable> [https://perma.cc/KW55-6A3F] (interviewing Ramirez on her belief that personal liability insurance could be mandatory for police officers); Deborah Ramirez, Marcus Wraight, Lauren Kilmister & Carly Perkins, *Policing the Police: Could Mandatory Professional Liability Insurance for Officers Provide a New Accountability Model?*, 45 AM. J. CRIM. L. 407, 436–38 (2019) (detailing the belief that mandatory professional liability insurance can be a potential solution). For an earlier iteration of this idea, see Noel Otu, *The Police Service and Liability Insurance: Responsible Policing*, 8 INT'L J. POLICE SCI. & MGMT. 294, 309–10 (2006).

<sup>175</sup> See *supra* notes 125–126 and accompanying text.

financial consequences of their policy, procedure, supervision, and staffing choices. When one of us interviewed officials in departments where lawsuit payouts impact their budgets, several reported that those payouts influence their behavior and that of other supervisory personnel. As an official at the California Highway Patrol explained: “We are always getting feedback on what happens on the street and we know that we are going to feel it in our budget if we don’t.”<sup>176</sup> None of the officials indicated that imposing these types of financial pressures on law enforcement agencies negatively impacted their work. More local governments could experiment with this approach and assess its impact.

In smaller jurisdictions reliant on municipal liability insurance, insurers already create financial incentives for local governments to reduce the frequency and severity of constitutional claims. But municipal liability insurers could play an even more significant role in creating financial incentives for police departments and local governments to reduce misconduct. John Rappaport has suggested, for example, that insurance regulators require insurers to impose a deductible on cities so that they bear some financial responsibility for their losses.<sup>177</sup> Cities could require that those deductibles be paid from police department budgets to create the kinds of financial pressures for departments described above.

### 3. *Nonfinancial Effects of Lawsuits*

There are other possible avenues to increase the relationship between civil rights lawsuits and governmental conduct that do not involve financial sanctions. For example, police departments could be required, as a condition of payment of settlements and judgments from central funds, to gather information from each lawsuit and analyze that information for lessons. Los Angeles County requires that the sheriff’s department submit a Corrective Action Plan when asking the County Board of Supervisors to approve a settlement.<sup>178</sup> That Corrective Action Plan identifies whether any policy changes should be made based on the facts of the case.

Local governments could additionally, or in the alternative, require that police departments and other agencies periodically analyze information in all of the lawsuits brought against them and assess trends across cases for

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<sup>176</sup> See Schwartz, *How Governments Pay*, *supra* note 4, at 1199–1200.

<sup>177</sup> John Rappaport, *Cops Can Ignore Black Lives Matter Protestors. They Can’t Ignore Their Insurers*, WASH. POST (May 4, 2016), [https://www.washingtonpost.com/opinions/cops-can-ignore-black-lives-matter-protestors-they-cant-ignore-their-insurers/2016/05/04/c823334a-01cb-11e6-9d36-33d198ea26c5\\_story.html](https://www.washingtonpost.com/opinions/cops-can-ignore-black-lives-matter-protestors-they-cant-ignore-their-insurers/2016/05/04/c823334a-01cb-11e6-9d36-33d198ea26c5_story.html) [https://perma.cc/4MP5-YGBY].

<sup>178</sup> See, e.g., COUNTY OF LOS ANGELES, SUMMARY CORRECTIVE ACTION PLAN (2016), <http://file.lacounty.gov/SDSInter/bos/supdocs/103624.pdf> [https://perma.cc/N9QY-XUHN] (providing an example of a corrective action plan response).

risk-management lessons. One of us has found that police departments rarely engage in this exercise but that a handful of cities have hired auditors to review litigation trends among other types of risk assessment.<sup>179</sup> This type of analysis has revealed personnel and policy weaknesses unapparent through other forms of review, and the rich data available in litigation files have not only helped to identify problems but also pinpoint possible solutions that can reduce liability risk.<sup>180</sup>

Information about settlements and judgments in civil rights cases can also be made publicly available. In New York City, there has been a longstanding struggle between the police department and other arms of city government about whether and to what extent the department should be required to learn more from lawsuits brought against it and its officers.<sup>181</sup> The comptroller—which pays settlements and judgments from central funds—has repeatedly called on the NYPD to review lawsuits for lessons.<sup>182</sup> When the police department did not embrace this recommendation, the comptroller’s office created ClaimStat—a mechanism by which the public could see aggregated data about lawsuit payouts against city employees.<sup>183</sup> A recently introduced bill in the New York State Assembly seeks to make data about individual lawsuits against police officers publicly available, so that taxpayers and researchers can analyze trends in cases.<sup>184</sup> A similar bill was introduced in the California State Assembly.<sup>185</sup> Police departments could also be required to affirmatively engage in public-facing presentations about the lawsuits brought against them to community groups and other stakeholders.

Finally, we note that lawsuits, and the information gleaned from them, need not only be relied upon to impose sanctions. They might also be the

<sup>179</sup> Schwartz, *What Police Learn from Lawsuits*, *supra* note 127, at 847.

<sup>180</sup> *Id.* at 877. For example, an auditor for the Portland police department examined its lawsuits and found a troubling trend of cases involving blows to the head by officers on the night shift at one police station. The department retrained and more closely supervised those officers, and the allegations of head strikes declined. When the Portland auditor found a cluster of claims suggesting officers did not understand their constitutional authority to enter homes without a warrant, officers were retrained and the unlawful entries ended. *See id.* at 854. Similarly, a Seattle police auditor compared closed litigation files with internal-affairs investigation files to reveal weaknesses in the internal-affairs investigation process. *See id.* at 858–59.

<sup>181</sup> *Id.* at 874 n.184.

<sup>182</sup> *See* Schwartz, *Myths and Mechanics of Deterrence*, *supra* note 129, at 1047–48.

<sup>183</sup> *See Claimstat Overview*, N.Y.C. COMPTROLLER, <https://comptroller.nyc.gov/reports/claimstat/overview/> [https://perma.cc/Q4UT-JSUK].

<sup>184</sup> *See* Denis Slattery, *State Senate Bill Would Require NYC to Disclose Details of NYPD Settlements*, N.Y. DAILY NEWS (Dec. 7, 2020, 5:00 AM), <https://www.nydailynews.com/news/politics/new-york-elections-government/ny-brian-benjamin-nypd-settlements-20201207-zb2toeznz5bujf34e5tpm7ktgy-story.html> [https://perma.cc/9KJK-ZV3D].

<sup>185</sup> A.B. 603, 2021–2022 Reg. Sess. (Cal. 2021), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220AB603](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB603) [https://perma.cc/MEX9-7N33].

basis for rewarding departments, supervisors, or individual officers whose efforts and interventions minimize constitutional violations. New Orleans, for example, developed a peer-intervention program that has garnered widespread praise and has been credited with helping to transform the city's police department while it has operated under a federal consent decree.<sup>186</sup> One can imagine system-level interventions that foster a culture of accountability from within, incorporating information from lawsuits and less formal reports of potential misconduct.

### C. Changes to Granular-Level Representation

When local governments and their officials are sued under Section 1983, qualified immunity doctrine and limitations on municipal liability are tools that are deployed in litigation, usually by government lawyers in state attorney general offices or city or county law departments. The decision to deploy these tools need not be made reflexively, however, nor need be left to the case-by-case discretion of individual line attorneys. Just as we expect city and state law offices to set affirmative enforcement agendas, they also can set defensive litigation agendas.<sup>187</sup> State and local executive officers concerned about civil rights could, therefore, set policies intended to limit or eliminate the use of these tools.<sup>188</sup> In this Section, we explore different examples of how this could be accomplished. We should note at the outset that although the forgoing proposals would require less coordinated action than our other two proposals, some of them would also raise more difficult ethical issues that we will describe.

Most noncontroversially, the decision whether to appeal an adverse decision on, say, qualified immunity, is already a matter subject to the discretion of public officials.<sup>189</sup> This embraces a government attorney's decision to seek certiorari or to take an interlocutory appeal from an adverse district court decision. States and municipalities could and should exercise judgment in areas where the public has an interest in (1) the development of

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<sup>186</sup> See *EPIC: Ethical Policing Is Courageous*, CITY OF NEW ORLEANS, <http://epic.nola.gov/home/> [<https://perma.cc/7HA9-H85L>].

<sup>187</sup> As discussed in *supra* note 133, there is ample literature addressing agenda setting in the affirmative enforcement space but hardly any that speaks to defensive agenda setting.

<sup>188</sup> In some jurisdictions, the state attorney general is an independently elected political actor who might also take steps to limit the use of defenses such as qualified immunity. We expect, however, that any such decision would of necessity involve consultation with the chief executive.

<sup>189</sup> The preamble to the *Model Rules of Professional Conduct* states that “[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.” MODEL RULES OF PRO. CONDUCT, Preamble & Scope ¶ 18 (AM. BAR ASS'N 2018). Two examples highlighted by the preamble are the decisions whether to settle a case or to appeal an adverse judgment. *Id.*

the law, (2) compliance with constitutional obligations, and (3) compensation for injured parties. State and local governments could take the position that they will never pursue such appeals, or that they will only do so when it advances some public-facing objective.<sup>190</sup> We recognize, of course, that the fiscal well-being of municipalities and state governments is one public-facing justification that might favor seeking an appeal.<sup>191</sup> But there are other aspects of the public interest—including the public’s trust—potentially affected by decisions to pursue these defenses, particularly in cases of clear misconduct. All of these interests and considerations should be taken into account.

Putting aside the discretionary decisions to take an appeal, state and local governments could constrain choices government attorneys make when defending cases at the trial court level. We focus here on one innovation specific to municipalities—local governments could instruct their attorneys to decline to insist that plaintiffs meet *Monell*’s stringent custom, policy, and practice standards for Section 1983 liability.<sup>192</sup> That is, municipalities could determine, as a matter of policy, that they will accept respondeat superior liability when a line officer violates the Constitution while acting in the course and scope of their employment. Taking this position would be consistent with the professional responsibility literature we canvass below as well as with a client-centered-lawyering approach. After all, where the municipality is the defendant, it need not let its attorneys decide when and where to invoke the *Monell* defense—as the client, it should decide for itself.<sup>193</sup>

Were municipalities to take this step, constitutional litigation would be greatly simplified. Individual officers could still, where appropriate, raise qualified immunity as a defense. But even if they were entitled to that

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<sup>190</sup> When representing individual defendants, retainer agreements should specify that they do not cover appellate proceedings absent specific agreement. *See id.* r. 1.2(c) (permitting limited representation with the client’s consent, so long as it is reasonable under the circumstances).

<sup>191</sup> This will not always be the case, as the fees expended by the plaintiff will be subject to fee-shifting if the government’s appeal is unsuccessful. *See, e.g.,* Hines v. City of Albany, 862 F.3d 215, 223 (2d Cir. 2017) (concluding that prevailing parties are entitled to recover a reasonable fee for preparing and defending a fee application).

<sup>192</sup> Such a policy might read as follows: “It is the policy of the [City or County] of [] to accept vicarious liability for compensable losses suffered as a result of the commission of constitutional wrong by the [City’s or County’s] officers even where such officers may escape personal liability through the assertion of a good faith or qualified immunity defense.”

<sup>193</sup> We recognize that the municipality is a legal construct and that as a practical matter its own attorneys, or at least the head of its legal department, would be intimately involved in making this decision. *See* Ryan D. Budhu, *Beyond Efficiency and Equity: Exploring the Role of the Corporation Counsel to Seek Justice*, 12 ALB. GOV’T L. REV. 149, 172 (2019) (recounting the debate between Corporation Counsel and former Mayor of New York City Ed Koch regarding whether to appeal an adverse decision in landmark jail-conditions case).

immunity, municipalities could accept liability if a constitutional violation were proved. This would enable courts to determine the content of constitutional law, avoiding the dilemma posed by *Pearson v. Callahan*.<sup>194</sup> And although injured individuals would receive compensation for their injuries, municipal entities need not take on the burden of punitive damages that are currently only available against individuals.<sup>195</sup> And it would mean that the parties could forgo the often-taxing costs of discovery and proof in *Monell* claims.

To be clear, we are not proposing that state and local governments should concede liability in civil rights cases. Declining to take an immediate appeal on the issue of qualified immunity does not prevent attorneys from continuing to press the issue at summary judgment or trial. And if a city stipulated that municipal liability could flow from the unconstitutional conduct of a line officer, it could still argue that the officer's conduct was legal. We propose, simply, that if a plaintiff can prove that their constitutional rights were violated, mayors, governors, and other officials could decide to accept responsibility for the costs of that violation.

#### IV. OBJECTIONS AND RESPONSES

In this Part, we consider predictable objections to our proposals and explain why we do not find them persuasive. Opponents may first raise the concern that reforms will increase the incidence of litigation and impose a significant financial burden on local communities. They may also question our suggestion that better budgeting and risk management can provide useful information for purposes of reforming local institutions. Third, critics may question whether government attorneys charged with defending Section 1983 suits can ethically refrain from asserting certain defenses. Finally, some may support the general goal of increasing accountability for rights violations but argue that our method—enhancing state law enforcement of *constitutional* rights—is not the proper course. We take up these questions in turn.

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<sup>194</sup> 555 U.S. 223, 227, 242 (2009); *see supra* note 56 and accompanying text.

<sup>195</sup> One of us has argued that state and local governments could go further, by more directly limiting the use of the qualified immunity defense when representing individual defendants. *See* Alex Reinert, *We Can End Qualified Immunity Tomorrow*, BOS. REV. (June 23, 2020), <https://bostonreview.net/law-justice/alex-reinert-we-can-end-qualified-immunity-tomorrow> [<https://perma.cc/CJN8-5EX5>]. While we believe there is merit to this proposal, it raises discrete and difficult professional responsibility concerns that are beyond the scope of this Article.

### A. *The Fear of Increased Litigation and Liability*

Each of our proposals will have some impact on the amount of litigation faced by state and local governments, as well as the outcome of that litigation. New state law causes of action against individuals and entities, without the protection of qualified immunity or *Monell*, will reduce barriers to meritorious civil rights claims. The same goes if state and local governments adopt the changes we suggest to their defensive litigation strategies in Section 1983 litigation. Add in the prospect of certain indemnification, and lawyers and litigants can be more confident that successful litigation will result in more complete compensation. By reducing barriers and increasing tools for securing compensation, our proposals will likely increase filings and payouts to some degree.<sup>196</sup> These types of financial concerns led to the failure of a bill in Maryland that would have increased indemnification caps<sup>197</sup> and played a leading role in opposition to the creation of state law causes of action and the elimination of federal qualified immunity protections.<sup>198</sup>

In addressing these fiscal concerns, we begin with the straightforward point that officials should welcome some changes in how the system handles civil rights litigation. If one agrees that the current model of Section 1983 litigation erects too many unjustifiable barriers to successful constitutional tort litigation, then the elimination of those barriers will produce more just outcomes, greater official accountability, and the many other benefits we catalog in Part V. Tort law proceeds on the assumption that the victims of wrongful conduct deserve compensation for the losses they have suffered. If the system of litigation fails to compensate victims, that does not make their losses disappear—instead, the losses fall on the victims, rather than being

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<sup>196</sup> Even if other doctrinal barriers such as qualified immunity are incorporated into the new state law causes of action, state statutes that expand state and municipal liability will have fiscal implications. For example, expanded municipal and governmental liability will ensure that plaintiffs can recover against individual officers who are denied indemnification. And expanding municipal liability will ensure that plaintiffs can recover even if qualified immunity protections for individual officers remain in place. In these ways, expanding municipal and supervisory liability could increase government liability.

<sup>197</sup> See Bryan Renbaum, *Senate Hearing on Police Misconduct Sees Contentious Debate over Liability Caps*, MD. REP. (Sept. 23, 2020), <https://marylandreporter.com/2020/09/23/senate-hearing-on-police-misconduct-sees-contentious-debate-over-liability-caps/> [<https://perma.cc/FVR4-XNF4>].

<sup>198</sup> See, e.g., N.M. CIV. RTS. COMM'N, *supra* note 9, at 46–47 (describing objections by dissenting members to increased costs and overdeterrence); Billy Binion, *Virginia Democrats Declined to End Qualified Immunity. Police Unions Are Alive and Well.*, REASON (Sept. 16, 2020, 1:35 PM), <https://reason.com/2020/09/16/virginia-democrats-declined-to-end-qualified-immunity-police-unions-are-alive-and-well/> [<https://perma.cc/R8DE-9F86>] (describing financial concerns about ending qualified immunity raised by police-union officials); Pauly, *supra* note 59 (describing opposition to state and federal qualified immunity reforms by the Fraternal Order of Police, whose representatives argue “that abolishing the doctrine would hurt police recruitment and bankrupt individual officers for doing their jobs”).

shifted to the tortfeasors. Put differently, the current system requires victims to subsidize local governments and the public by bearing the financial losses inflicted by police-involved violence and other constitutional torts. State and local officials should readily acknowledge the unfairness of requiring vulnerable communities to bear these losses and the wisdom of assigning the losses to the local government agencies responsible.

Basic tort theory provides a second response to the worry about the financial threat posed by new, more expansive constitutional tort liability. It is a canon of tort law that structuring liability to fall on the cheapest cost avoider will be most conducive to an overall reduction in the losses associated with wrongful conduct.<sup>199</sup> Having local governments and their police departments bear the costs of their officers' unconstitutional conduct should encourage adoption of policies and practices to reduce the frequency of such events in the future—particularly if they adopt the types of risk-management and budgeting approaches we describe above. Thus, over time, we would expect that increased financial exposure for governments will ultimately lead to reduced liability costs.<sup>200</sup> In other words, officials can embrace the new liability rules on the theory that such liability will achieve the goal of securing greater compliance with constitutional norms and, as a result, reduced costs litigating claims of unconstitutional conduct.

Other factors should moderate the perceived threat of ruinous fiscal consequences. Plaintiffs can recover only once for their injuries—the recoverable damages resulting from a constitutional violation will not be greater simply because local governments eschew the protections of *Monell* or face vicarious liability as a matter of state law. Moreover, as described in Section II.A, state laws allowing government officials to be sued for common law torts often include vicarious liability, and there is no evidence that these causes of action have resulted in devastating government liability.<sup>201</sup> Instead, in these states—as in the others—government liability costs amount to less than 1% of most governments' budgets.<sup>202</sup> Smaller

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<sup>199</sup> On the construct of cost avoidance in tort, see RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.15 (8th ed. 2014).

<sup>200</sup> Accord Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1406 (2015) (finding that structural reform of police departments can save money by putting systems in place that reduce the number of constitutionally dubious police practices and thereby reduce the tort liability burden of litigation).

<sup>201</sup> Admittedly, there are barriers to suit for state law tort claims as well, see Rosenthal, *supra* note 95, at 805–09, but the substantive standard for common law tort liability is usually lower than for constitutional claims, see, e.g., *Minneci v. Pollard*, 565 U.S. 118, 130 (2012) (comparing liability standards for Eighth Amendment and state tort law). For discussion on the longstanding myth that vicarious liability will bankrupt local governments, see *Riss v. City of New York*, 22 N.Y.2d 579, 585 (1968) (Keating, J., dissenting) (“The fear of financial disaster is a myth.”).

<sup>202</sup> See Schwartz, *How Governments Pay*, *supra* note 4, at 1164–65.

jurisdictions, those that insure against such liability, similarly report that insurance consumes less than 1% of their budgets.<sup>203</sup>

Objections might also be raised that expanded governmental liability will result in increased litigation and, with the possibility of attorneys' fees being awarded, small-value claims might become more common subjects of litigation. On this account, even if governmental entities are responding appropriately to the risks of liability by fostering compliance with constitutional norms, litigation and the costs attendant to it may increase because of the reduced barriers to recovery and the increased incentives for attorney-driven claims. While we cannot rule this possibility out, we doubt that it will have significant fiscal consequences. First, low-value claims, if meritorious, should be amenable to early settlement that will reduce any potential fee recovery.<sup>204</sup> Second, the high substantive bar necessary to prove many constitutional claims will still deter many attorneys from taking small-value or frivolous claims. Because plaintiffs' civil rights attorneys tend not to receive attorneys' fees under Section 1988 when cases settle and instead are paid from a portion of their clients' proceeds if they win, a practice of bringing a case with limited damages or questionable liability is simply not financially sustainable for most attorneys.<sup>205</sup>

The prospect of increased litigation against state and local officials raises more than just fiscal concerns, however. Some may also fear that exposing individual officers to additional litigation (whether with full or limited indemnification) will overdeter, limiting the effectiveness of current employees and making it harder for state and local governments and their law enforcement agencies to attract new employees.<sup>206</sup> Concerns that civil rights damages awards will lead to financial ruin and overdeterrence have been the primary arguments against reforms to civil rights enforcement, including recent calls to end qualified immunity.<sup>207</sup> We acknowledge—for reforms that would eliminate indemnification limits and require officer

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<sup>203</sup> See *id.*

<sup>204</sup> In jurisdictions that retain the *Buckhannon* rule for fees, a settlement will not trigger any basis for seeking fees unless it is court ordered. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 604 n.7 (2001).

<sup>205</sup> See generally Reingold, *supra* note 83, at 12–16 (illustrating how, in the absence of fee-shifting, plaintiffs' lawyers are unlikely to bring claims other than those with strong evidence of liability and significant damages).

<sup>206</sup> *Accord* *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (“[T]he danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))).

<sup>207</sup> See, e.g., Jay Schweikert, *The Most Common Defenses of Qualified Immunity, and Why They're Wrong*, CATO INST. (June 19, 2020, 2:17 PM), <https://www.cato.org/blog/most-common-defenses-qualified-immunity-why-theyre-wrong> [<https://perma.cc/CW6A-LS5N>] (rebutting the most common arguments in favor of qualified immunity).

contribution to settlements and judgments—that there is an absence of good data on what, if any, downstream effects these changes would have on local government budgets and officer conduct, recruiting, and retention.<sup>208</sup> But we note that deterring behavior associated with the stereotypical “tough cop,” in recruiting, training, and on the beat, may produce a workforce better able to de-escalate violent situations and reduce the likelihood of constitutional violations.<sup>209</sup> Without evidence, we see no reason to predict that eliminating indemnification caps or requiring officers sometimes to contribute to settlements will have the dire effects critics suggest.

A final objection—one associated with John C. Jeffries, Jr.—holds that changes in the remedial framework may lead courts to adjust their definition of the underlying constitutional rights.<sup>210</sup> On this hydraulic conception of the relationship between constitutional right and remedy, courts may respond to a reduction in nonsubstantive barriers to remedy by limiting the substantive constitutional right, thereby keeping the status quo remedial regime intact. While we find much to admire about Jeffries’s theory, we are not convinced it accurately describes the process by which federal courts have engaged in common law constitutional adjudication.<sup>211</sup> Moreover, even if Jeffries’s account accurately describes the work of federal courts, it does not follow that it would apply in the interpretation and application of a state law statutory regime such as the one we propose. Indeed, if anything the turn towards textualism suggests that, provided the new statutes were clear enough, both federal and state courts would apply them to expand constitutional remedies as the relevant state legislature intended.<sup>212</sup> Alternatively, if state and local governments adopt the changes we propose to their defensive litigation agenda in Section 1983 litigation, one might have a Jeffries-inspired concern that courts adjudicating those claims would

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<sup>208</sup> We would welcome additional research into the role of indemnification caps and officer contributions in such jurisdictions as Cleveland and New York City—which have required officers to contribute to settlements on occasion—and the effects of Colorado’s new law. For predictions about how civil rights litigation would function without qualified immunity, see Schwartz, *After Qualified Immunity*, *supra* note 4, at 361–63.

<sup>209</sup> In contrast to the tough cop, studies suggest that de-escalation strategies can reduce the use of deadly force. See Kevin Davis, *Defusing Deadly Force*, 107 ABA J. 44 (2021) (reporting on de-escalation training and its impact on reduced levels of police violence).

<sup>210</sup> See generally John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (suggesting that denial of money damages for constitutional violations fosters the development of constitutional law).

<sup>211</sup> See Schwartz, *After Qualified Immunity*, *supra* note 4, at 320.

<sup>212</sup> For example, even though the Religious Land Use and Institutionalized Persons Act (RLUIPA) provides statutory rights that go beyond the First Amendment, courts seem to have little difficulty fully enforcing those statutes. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 355–56 (2015) (holding that a prison grooming policy prohibiting beards substantially burdened a Muslim inmate’s religious practice under RLUIPA).

reflexively incorporate those barriers into their substantive constitutional rulings. This would require mental gymnastics on the part of courts that would be challenging—after all, if some jurisdictions adopt the changes we propose and others do not, courts can hardly create different constitutional rules to cover similar cases. And we see no evidence that, in comparable situations, a similar dynamic has emerged. For example, where *Monell* claims are brought challenging formal policy, we are aware of no evidence that courts have applied a more stringent substantive constitutional standard simply because there is no qualified immunity defense.

*B. Objections to Proposed Budgeting and Risk-Management Changes*

All of our proposals operate on the assumption that civil rights damages awards should both compensate and deter. This leads to the proposition that governments should find ways to shape budgeting and indemnification rules and risk-management practices to increase lawsuits' ability to achieve these goals. But putting aside the fiscal concerns we address above, some may be skeptical of the notion that outcomes in lawsuits should have a greater impact on state and local institutions such as police departments, prisons, and jails. Some may fear that budgeting and indemnification rules that result in financial or other sanctions for officers are misguided because lawsuits are weak signals of impropriety. And, relatedly, some may object that lawsuit data are too flawed to serve much use to state and local officials seeking to improve policies and practices.

These objections may be informed by the view that civil rights suits should not be a basis for sanctions, financial or otherwise, because the outcomes of these cases are not accurate reflections of the extent of officer or department misconduct. This is surely true—payments in civil rights suits do not necessarily reflect the extent and severity of wrongs for multiple reasons. Lawsuit payouts likely underestimate the totality of misconduct. As one example, only about 1% of people who believe police used improper force against them ever sue.<sup>213</sup> And multiple barriers to relief—including pleading requirements, challenges getting discovery, qualified immunity, and jurors' skepticism of plaintiffs' claims—may mean that plaintiffs lose even when their rights have been violated. But payouts in certain cases may also overstate misconduct. Some people may sue even though their claims

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<sup>213</sup> MATTHEW R. DUROSE, ERICA L. SCHMITT & PATRICK A. LANGAN, U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY 16–20 (2005) (finding that the police had used force against an estimated 664,458 people, 87.3% of whom believed that the police acted improperly, and only approximately 7,416 (1.1%) of whom filed a lawsuit regarding the alleged misconduct).

are weak. And governments may agree to settle for strategic reasons, even if the department or officer did not engage in misconduct.

For all of these reasons, governments should not blindly sanction officers or departments for every award entered against them. But officers' contributions to settlements and judgments can be conditioned on findings that settlements were not entered into purely for strategic reasons. The Colorado statute, for example, conditions officers' financial contributions on a finding by the local government that the officer acted in bad faith.<sup>214</sup>

The imperfections of lawsuit data, moreover, do not deprive them of potential utility when assessing personnel and policy weaknesses. Information generated during litigation is, undeniably, flawed: the adversarial process produces biased and sometimes-irrelevant information about a relatively small number of misconduct allegations, and the slow pace of litigation means that a case may not be resolved until several years after the underlying event. But in cooperation with such groups as the NAACP, the Department of Justice has drawn on lawsuit data to help identify problems at the local level.<sup>215</sup> Local departments have found analysis of information from lawsuits useful in revealing incidents that did not otherwise come to light and in supplying more comprehensive accounts than those gathered during internal-affairs investigations.<sup>216</sup> Moreover, departments are able to mitigate the flaws of lawsuit data by gathering information from each stage of litigation, reviewing data in context with other available information, and using independent auditors to consider what the data may show.

### *C. The Professional Responsibility Objections to Forgoing Valid Defenses in Section 1983 Litigation*

Our third proposal—revising the way local governments and their attorneys defend against Section 1983 claims—raises discrete concerns related to the ethical implications of forgoing available defenses to liability. Of course, a lawyer must make colorable arguments that are in the client's best interest.<sup>217</sup> But for two reasons, we do not think this foundational principle undermines our proposal that local governments may direct their

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<sup>214</sup> See COLO. REV. STAT. § 13-21-131(4) (2021).

<sup>215</sup> See Rushin, *supra* note 165, at 3219–20 (identifying discussions with civil rights litigators as a source of information for DOJ officials considering structural reform initiatives).

<sup>216</sup> See generally Schwartz, *What Police Learn from Lawsuits*, *supra* note 127, at 858–59, 870–74 (explaining the benefits of closed litigation files as compared to less comprehensive internal affairs investigations).

<sup>217</sup> See MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2018).

attorneys to concede municipal liability for constitutional wrongs and thereby forgo available *Monell* defenses.<sup>218</sup>

First, where a municipality is the client, its own decision not to invoke *Monell* standards should be respected and effectuated by its lawyers. Even if local government attorneys might typically consider municipal fiscal interests as they litigate on behalf of their clients, any decisions about how to balance such concerns against greater accountability for official misconduct would necessarily fall to the client. Indeed, it would be a departure from standards of professional responsibility for a municipality's lawyers to refrain from following their client's policy as to such decisions.<sup>219</sup> And because *Monell* standards are not jurisdictional in any sense, courts could not *sua sponte* apply the *Monell* liability rule and reject plaintiffs' claims. Just as parties routinely stipulate that a particular defendant was acting under color of law,<sup>220</sup> an element of a Section 1983 violation, so could the parties in cases against municipalities stipulate that the *Monell* standards have been met.

This proposal is also consistent with literature that identifies the ethical obligations of government attorneys, particularly when representing entities or sovereigns, to go beyond winning in court and include the vindication of public-regarding values. Notwithstanding that much of this work and commentary has revolved around the role of public prosecutors in criminal matters,<sup>221</sup> government attorneys in civil enforcement proceedings, and defensive litigation in the injunctive context,<sup>222</sup> we find much in the literature

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<sup>218</sup> See *supra* Section I.B (discussing the standards for *Monell* liability).

<sup>219</sup> See, e.g., MODEL RULES OF PRO. CONDUCT r. 1.2(a) cmt. 1 (providing that the client has the "ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations").

<sup>220</sup> See, e.g., *Martinez v. Cui*, 608 F.3d 54, 58 n.3 (1st Cir. 2010) (noting stipulation).

<sup>221</sup> Government prosecutors are expected to adhere to heightened ethical obligations that require them to "do justice." See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

<sup>222</sup> In Bruce Green's seminal work, for example, he focuses on habeas cases, civil enforcement actions, and civil defense actions in which an agency or the government itself is the real party in interest. Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 243–55 (2000); see also Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 835 (2000) (focusing on criminal prosecutions, agency enforcement actions, and defense of agency actions in injunctive cases); Budhu, *supra* note 193, at 172 (recounting the debate between Corporation Counsel and former New York City Mayor Ed Koch regarding whether to appeal an adverse decision in a landmark jail-conditions case); Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 219 (2000) (illustrating the complexity of ethical issues faced by lawyers appointed in child custody proceedings in understanding who their clients are); Daniel S. Jacobs, *The Role of the Federal Government in Defending Public Interest Litigation*, 44 SANTA CLARA L. REV. 1, 1–2 (2003) (discussing the federal government's litigating position in defending a public interest case);

that bears generally on the problem we present here.<sup>223</sup> Some disagree, to be sure,<sup>224</sup> but the weight of commentary supports the view that government attorneys must consider ethical issues in addition to the narrow forms of zealous advocacy that we expect of members of the private bar.<sup>225</sup> Thus, where in private litigation the client has the ultimate decision on pursuing certain goals, in government, litigation attorneys have the authority “to determine what ‘seeking justice’ means and how to reconcile this objective with other relevant government objectives.”<sup>226</sup> Judge Jack Weinstein summed up his question for government attorneys defending civil cases: “Is opposing this claim just, is it fair, is there a reasonable basis for believing that the government can prevail on both the law and facts?”<sup>227</sup>

One might read this literature to support the decision of an *individual* government attorney to effectuate the public interest by advancing a litigation position that functionally results in respondeat superior liability for municipalities in Section 1983 litigation, but we think the far better course is for municipalities to come to this position as a matter of policy.<sup>228</sup> For those

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Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1296–97 (1987) (focusing only on role of government attorneys in defending agency actions); Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 311, 315–16 (2003) (arguing that government attorneys should have a right, free of retaliation, to decline to make certain arguments in certain circumstances, even when their agency client demands it); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 274–77 (1999) (focusing on the role of agency lawyers in assisting in the development and implementation of government regulations).

<sup>223</sup> On the rare occasions when scholars have discussed damages claims, they have limited their consideration to suits that run directly against the government, via statutes such as the Federal Tort Claims Act. See, e.g., Paul Figley, *Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 357–59 (2011) (analyzing the duty of government attorneys to zealously advocate for their client in the context of FTCA claims).

<sup>224</sup> See generally Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 957–58 (1991) (arguing that ethical constraints on government lawyers are no different than those which regulate attorneys for private parties); *Lybbert v. Grant County*, 1 P.3d 1124, 1129 (Wash. 2000) (en banc) (holding that government attorneys have no duty “to maintain a standard of conduct that is higher than that expected of an attorney for a private party”).

<sup>225</sup> Green, *supra* note 222, at 269–70 (“This may mean, at the very least, that there is a duty to refuse to assist the client in violating its fiduciary duty to the public or in otherwise acting lawlessly. This may also mean that government lawyers should take the public interest into account when making decisions entrusted to them.”).

<sup>226</sup> *Id.* at 277–79 (“Following the direction of government officials who do not have authority to chart the course of litigation would result in an abdication of the government lawyer’s responsibility. It would be no less an abdication to proceed as if the job is to win a lawsuit, and to do anything possible to win, thereby ignoring other government objectives that may be paramount.”).

<sup>227</sup> *Zimmerman v. Schweiker*, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983).

<sup>228</sup> Permitting an individual attorney to decide whether to raise a valid defense on behalf of the client, without the client’s consent, raises difficult professional responsibility questions that are beyond the scope

who recoil at the prospect of a government entity forgoing a valid defense such as the standards for *Monell* liability, we note that decisions not to defend against certain litigation have a long provenance, even though they are controversial. The Obama Administration's decision not to defend against a constitutional challenge to the Defense of Marriage Act has been criticized, but it clearly had authority to do so.<sup>229</sup> Even in more traditional damages litigation, the federal government has sometimes expressed its determination that it will forgo certain arguments that it *could* make in defense against claims. In 2014, for example, Attorney General Eric Holder issued a memorandum stating that in any litigation that came before it, the Department of Justice would take the position that the protections afforded by Title VII would be extended to include a person's gender identity, including transgender status.<sup>230</sup> The memo was based on Attorney General Holder's "best reading" of the statute, and he issued the guidance to DOJ lawyers to ensure "consistent treatment of [Title VII] claimants throughout the government."<sup>231</sup> We see no barrier to local governments making similar determinations regarding municipal liability under Section 1983.

We also, however, have proposed that government attorneys significantly restrict their use of the right to interlocutory appeal afforded in cases involving qualified immunity. Inasmuch as this proposal addresses a defense applicable to *individual* defendants, the ethical considerations are arguably thornier. After all, when representing individual officers, government attorneys are expected to behave no differently from any attorney in the private bar—vindicating their clients' interests by raising colorable defenses to liability, including defenses such as qualified immunity.<sup>232</sup> But the decision as to whether to take advantage of the right to an interlocutory appeal of an adverse qualified immunity ruling is one that arguably rests within the province of the government attorney.<sup>233</sup> This would

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of this Article. Here, however, we propose that the client affirmatively consent to accepting vicarious liability for constitutional violations and direct its attorneys to effectuate that goal.

<sup>229</sup> See Ball, *supra* note 133, at 77 n.1; Fried, *supra* note 133, at 549 (criticizing the Obama Administration's decision to abandon defense of DOMA).

<sup>230</sup> See Memorandum from Eric Holder, Att'y Gen., to U.S. Att'ys (Dec. 15, 2014), <https://www.justice.gov/file/188671/download> [<https://perma.cc/JW2T-GLEH>].

<sup>231</sup> *Id.*

<sup>232</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 (AM. L. INST. 2000) (suggesting that defining the client for a government lawyer depends on the context of litigation, but that government attorneys representing a "specific individual" in their personal capacity should be considered to be representing the individual and not any government entity).

<sup>233</sup> The *Model Rules of Professional Conduct* provide examples of authority vested in government lawyers, including the decision whether to appeal an adverse judgment. See *supra* note 189. And attorneys may specify the scope of representation in their retainer agreements, including by carving out appellate representation from the contracts. See MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2018).

certainly be the case where the grounds for seeking interlocutory appeal are not present—as in when a judge’s rejection of the qualified immunity defense turns on disputed questions of fact.<sup>234</sup> Moreover, where an interlocutory appeal would not protect an individual defendant from the burdens of ongoing litigation, government attorneys should be able to exercise their discretion not to seek one.<sup>235</sup>

Whether government attorneys could decline to seek an interlocutory appeal in cases in which the only claims pending in the suit are amenable to dismissal on qualified immunity grounds is a different matter. On one hand, the government has an interest in how appeals are prosecuted that goes beyond the individual liability of the defendant. Even if the state or local government has not determined that qualified immunity undermines the public interest, it may have an interest in preventing delay, avoiding the development of negative precedent, or reducing the plaintiffs’ expenses in a fee-shifting action.<sup>236</sup> On the other hand, the individual defendant has a concrete interest in bringing an appeal that could immediately terminate the pending litigation. Seen in this light, if the state and local governments themselves have determined as a matter of policy that interlocutory appeals on qualified immunity grounds undermine the public interest, there is a potential conflict of interest for government attorneys who on one hand should advance meritorious defenses for their individual clients and on the other hand should act in the public interest. How these potential conflicts should be managed, we maintain, will depend in part on existing laws and local agreements regarding the defense and indemnification of state and local officials.<sup>237</sup>

#### *D. The State Role in Fostering Constitutional Rights Enforcement*

Two more questions might arise from our proposals to bolster the enforcement of state and federal constitutional rights. First, critics of such enforcement might point to the availability of state tort remedies and urge

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<sup>234</sup> *Johnson v. Jones*, 515 U.S. 304, 314 (1995).

<sup>235</sup> The justification for permitting an interlocutory appeal in qualified immunity cases is to protect individual defendants from the burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 525–27 (1985). If injunctive or *Monell* claims will remain viable regardless of the resolution of qualified immunity, then seeking an interlocutory appeal will not protect those interests, for the individual defendant will still face the burdens of litigation even if they will not face any direct financial liability.

<sup>236</sup> This is one reason why offensive, nonmutual collateral estoppel does not apply to government entities. See *United States v. Mendoza*, 464 U.S. 154, 158–64 (1984) (rejecting the doctrine’s application to litigation with the government).

<sup>237</sup> In some jurisdictions, for example, it may be possible to condition representation on an agreement not to take an interlocutory appeal on qualified immunity grounds. In other jurisdictions, perhaps private counsel could be permitted to represent the individual defendant in their interlocutory appeal.

statutory improvements directed at making such tort remedies more effective, rather than statutory attention to constitutional remediation. Second, some observers may doubt the constitutional authority of state legislatures to adopt statutes aimed at making the enforcement of *federal* constitutional rights more effective.

As to the first question, we place great value on the remedial tradition represented by state common law tort litigation, and we acknowledge the link between constitutional torts and common law torts. As others have cogently argued, state tort law and constitutional litigation share much in common.<sup>238</sup> Both involve invasions of serious, often overlapping, interests, and both have a place in creating accountability and ensuring compensation for rights invasions. But we see a real virtue in focusing reform efforts on *constitutional* rights. Perhaps most importantly, constitutional rights protect different, and broader, interests than state torts. While there are clear state analogues to excessive force or wrongful detention claims, it is far more difficult to find state law torts that protect rights to free expression, to freedom from discrimination, to due process, and to privacy, just to name a few. State tort law can help address abusive policing, but we would suggest that enforcement of equality norms—norms that are not the subject of state tort law—is a significant concern that should be the subject of any reform proposal.

Our focus on constitutional rights has two other dimensions. For starters, such rights have a distinct salience and potency. Whether state or federal, they are supreme to common law or statutory rights, and constitutional rights specifically bind government actors. We believe that respect for the rule of law will grow as states implement enforcement regimes that provide opportunities to secure constitutional guidance in the regulation of government action. In addition, we believe that a state role in the enforcement of federal constitutional rights, as we propose here, creates positive externalities that would not accompany recourse to state tort law. It will facilitate the development of federal constitutional norms across multiple jurisdictions, even those which may not adopt the measures we recommend. And it will encourage states to see themselves as partners in the implementation of federal constitutional norms, not just the subject of adversarial litigation in which government actors are targets of enforcement.

This conception of states as partners in the creation of state causes of action to vindicate federal constitutional rights raises two questions that we think have relatively straightforward answers. First, we think states have

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<sup>238</sup> See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 939 (2010) (describing the category of “constitutional torts”).

ample authority under the state and federal constitutions to adopt legislation to carry federal norms into effect.<sup>239</sup> State legislatures have presumptive authority to impose duties and obligations on the state and local officials of the state in question. By creating a new state law cause of action, state legislatures would carry into effect a set of legal obligations that already bind state and local officials by virtue of the U.S. Constitution's Supremacy Clause.<sup>240</sup> States today frequently adopt state laws to facilitate the effectuation of federal norms; the Affordable Care Act contemplated a legislative role for the states in setting up the exchanges and other elements needed to support the health insurance market.<sup>241</sup> Legislation to effectuate the federal bill of rights seems equally uncontroversial.

Second, we do not believe that federal remedies for constitutional violations by state actors under Section 1983 have so occupied the field as to preempt state efforts to provide more effective remedies. Congress can set a floor for the enforcement of constitutional rights without necessarily specifying a ceiling that would preempt state supplementation.<sup>242</sup> Consider, for illustrative purposes, the Court's decision in *Danforth v. Minnesota*.<sup>243</sup> There, a post-conviction petitioner sought to challenge his conviction through the invocation of a new rule of criminal procedure that was unavailable to federal habeas petitioners under the rule of *Teague v. Lane*.<sup>244</sup> Despite the absence of a *federal* remedy, however, the *Danforth* Court squarely ruled that the state had the power to afford the petitioner broader

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<sup>239</sup> See THE FEDERALIST NO. 17, at 107 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing the "ordinary administration of criminal and civil justice" as "belonging to the province of the State governments"); *accord id.* NO. 45, at 313 (James Madison) ("The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people . . .").

<sup>240</sup> See U.S. CONST. art. VI (declaring federal law to be the supreme law of the land, binding on state judges notwithstanding contrary state law). In many cases, the provisions of the federal Constitution track those in state charters. See Robert A. Shapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 692 (2000) (confirming that "[m]any state constitutions contain individual rights provisions that mirror those in the federal Bill of Rights").

<sup>241</sup> According to the National Conference of State Legislatures, twenty states have adopted state laws that helped to secure the enforcement of ACA provisions. See NAT'L CONF. OF STATE LEGISLATURES, *supra* note 156 (collecting state laws as of July 2021 that codified some ACA consumer protections).

<sup>242</sup> See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1261 (1978) (defending a role for states in extending the enforcement of some federal constitutional norms).

<sup>243</sup> 552 U.S. 264 (2008).

<sup>244</sup> See 489 U.S. 288, 310–11 (1989) (holding that new rules of constitutional law cannot provide the basis for federal habeas relief unless they fall within one of two narrow exceptions).

relief as a matter of *state* post-conviction review.<sup>245</sup> States, in short, are free to provide supplemental constitutional protections as a matter of state law that may be unavailable as a matter of federal law.

Free to act to bolster civil rights enforcement and to rethink their litigation priorities when defending constitutional tort claims, state and local governments can exercise the more nimble and multifaceted form of federalism that we described earlier.<sup>246</sup> State and local governments need not await reforms at the federal level—reforms that may never emerge from a gridlocked Congress and complacent Supreme Court. Nor need the states sit back content to defer to the existing dispensation. Instead, states and localities can take a leadership role in providing important support for civil rights enforcement. By asserting an independent role in ensuring remedial options that the federal government has failed to secure, states and localities can help redefine what we mean by remedial adequacy and the rule of law and lessen the incidence and costs of constitutional violations. The next Part describes in greater detail the range of benefits that might flow from these state and local efforts.

#### V. ASSESSING THE BENEFITS OF STATE AND LOCAL CONSTITUTIONAL REMEDIATION

The Supreme Court, increasingly suspicious of civil rights litigation, has created a web of doctrines that makes it difficult for individuals to secure redress for the unconstitutional actions of government officials, even in egregious cases.<sup>247</sup> Failed litigation, in turn, may convey the message to police departments and other government agencies that they need not implement policies to reduce the incidence and cost of constitutional violations and that they may continue to violate the rights of individuals without consequence.<sup>248</sup>

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<sup>245</sup> See 552 U.S. at 291; *cf.* *Arizona v. United States*, 567 U.S. 387, 416 (2012) (holding that Congress’s enforcement scheme for undocumented immigrants displaced the state’s powers to impose more stringent enforcement and punishment). For an account of *Arizona*, see Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1 (2013).

<sup>246</sup> See *supra* notes 30, 46 and accompanying text (describing the work of Gerken, Bulman-Pozen, and Gluck as occupying a middle ground between nationalists and federalists and as emphasizing the range of roles states play in our complex federal system).

<sup>247</sup> See, e.g., Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public’s Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Baxter v. Bracey*, No. 18-1287 (U.S. May 31, 2019), 2019 WL 2370285 (collecting examples).

<sup>248</sup> See *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (“By sanctioning a ‘shoot first, think later’ approach to policing, the Court renders the protections of the Fourth Amendment hollow.”).

Our proposed reforms aim to disrupt this maladjusted system. We harbor no illusions that streamlining judicial enforcement of constitutional rights will alone usher in a more just society. Civil litigation aimed at securing redress for constitutional violations represents only one piece of a complex mosaic of reforms needed to address systemic racism in police departments and in other walks of life. Nonetheless, the implementation of civil litigation reforms at the state and local levels can make several important contributions. First, and most directly, these reforms would enable victims of constitutional violations to secure compensation and in some cases forward-looking relief that would prevent future violations. Second, even if only some jurisdictions adopted these changes, it would allow for the articulation and development of legal norms, a process that has been stilted by first-order barriers such as qualified immunity. By freeing rights enforcement from the required showing of prior “clearly established” law, reforms would allow constitutional law to develop and become established for future cases. Third, state and local reform might restore some faith in the law as a tool for addressing the systemic racism and brutality that permeates the criminal legal system. Fourth, and perhaps most importantly, unlike changes proposed through national legislation or attempts to convince the Supreme Court to revisit doctrine, state and local leaders can implement some elements of this reform program as early as tomorrow.

*A. The Importance of Concrete Remedies*

The suggested reform agenda should help furnish remedies for many of the constitutional violations blocked by restrictive doctrines such as qualified immunity. Of course, improved remediation is no panacea, but it can make a number of well-known contributions to the efficacy of the law. An award of damages can provide compensation to the victims of constitutional wrongs. Such awards attempt, however inadequately, to make victims whole for the losses they have suffered.<sup>249</sup> At the same time, an award of damages confronts the relevant government entity with the economic consequences of constitutional wrongdoing, encouraging that entity to internalize a portion of the cost of its activities and take appropriate steps to reduce the likelihood of future violations.<sup>250</sup> From a corrective justice perspective, the award of

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<sup>249</sup> See, e.g., *Carey v. Phipps*, 435 U.S. 247, 264–66 (1978) (articulating a make-whole standard for the compensation of constitutional tort victims).

<sup>250</sup> On the standard law-and-economics account of deterrence, the obligation to pay damages for unlawful conduct will encourage tortfeasors to adopt cost-effective measures to reduce the cost of accidents (and constitutional torts). Yet some scholars argue that government officials do not respond well to price signals, attending more closely to the desires of the voters and their own prospects for reelection than to municipal bottom lines. For a discussion, see Pfander et al., *The Myth of Personal*

damages may also restore community faith in the system of law, providing redress and righting a wrong.<sup>251</sup> Civil recourse theory further explains that tort liability helps mend the community by allowing the individual victim of a wrong to pursue redress. On this view, governments owe a basic duty to provide victims with access to tribunals in which they can pursue vindication for the wrongs they have suffered.<sup>252</sup> Fair process and a right to be heard can do much to persuade people of the system's legitimacy and legitimacy in turn fosters compliance with law.<sup>253</sup>

To be sure, the creation of a more just system of redress will cost money. Budget-conscious city managers, and their insurance carriers, will confront these costs with understandable concern. In theory, at least, police departments and other government agencies can take appropriate steps to minimize the likelihood of a constitutional violation through proactive measures that will reduce the cost and incidence of violations. But institutions and the individuals who run them may have a bias toward the preservation of the status quo, a tendency to think that problems will solve themselves through exhortation, and a sense of inertia compounded by labor agreements and politically powerful employee unions, especially in the world of urban policing.<sup>254</sup> Local officials should, we think, use the potential threat of liability to justify reforms in local government institutions along the lines of the budgeting and risk-management initiatives we have described that will ward off future constitutional violations and the costs associated with them.

To see the prospects for moderating any increased liability that reforms might threaten, consider the structural reforms that the Department of Justice implements as part of its oversight of local police departments.<sup>255</sup> These reforms consistently include a change in training practices, an improvement

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*Liability*, *supra* note 2, at 602–03 (collecting references). We add only that we regard the impact of money claims on municipal budgets as a politically salient factor in the calculus of responsible officials.

<sup>251</sup> For an effective restatement of corrective justice theory in light of the civil recourse critique of Goldberg and Zipursky, see Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 273–76 (2011).

<sup>252</sup> See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 25–51 (2020).

<sup>253</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 57 (1990) (reporting on a survey of law compliance and concluding that systemic legitimacy plays an important role in individual willingness to comply with law); see also Jonathan Jackson, Ben Bradford, Mike Hough, Andy Myhill, Paul Quinton & Tom R. Tyler, *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIM. 1051, 1051–71 (2012) (concluding that people have greater faith in and are more likely to comply with a criminal justice system that has “a shared moral purpose with [its] citizens”).

<sup>254</sup> On the difficulty of instituting changes in police practices, see Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 747–56 (2017), and Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1222–39 (2017) (describing the barriers to police accountability established through the police union's role in collective bargaining).

<sup>255</sup> See *supra* note 38.

in the way citizen complaints are processed and investigated, and the appointment of an external monitor to oversee department practices and compliance.<sup>256</sup> Risk management plays an important role in the process. One detailed study reports that local governments that implemented such reforms experienced a notable decrease in liability payments. Thus, in Los Angeles, the amount of liability payouts dropped from some \$17 million in 2001 to a more moderate amount of approximately \$627,000 in 2009.<sup>257</sup> Comprehensive structural reform may thus pay for itself if properly implemented.<sup>258</sup> Here, we emphasize again the importance of a local commitment to compliance with governing law as a first step in creating structural systems that can reduce the incidence of constitutional violations.

### *B. The Value of an Improved Signal*

A substantial literature explores the relative value of rules and standards in the regulation of human behavior.<sup>259</sup> Many find that rules have an advantage over standards in that they can be applied by lower courts with a fair degree of predictability. That, in turn, often allows the parties to prospective litigation to apply the rules themselves and determine likely outcomes without having to submit their claims to a court. Perhaps more importantly, rules can more clearly shape private behavior, enabling the parties to conform their actions to the law. Rules thus enjoy some support across the ideological spectrum.<sup>260</sup>

Constitutional litigation suffers from a dearth of rules. The Fourth Amendment prohibits unreasonable searches and seizures but offers little guidance on the line that separates the reasonable from the unreasonable in

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<sup>256</sup> See Rushin, *supra* note 200, at 1378–96 (describing the content of the negotiated settlements achieved in DOJ pattern-or-practice proceedings).

<sup>257</sup> See *id.* at 1407 n.339.

<sup>258</sup> See *id.* at 1406 (quoting a Detroit official who asserted that “the amount of money that we have saved on lawsuits that we had endured for years . . . have paid for the cost of implementation of the monitoring two or three times”).

<sup>259</sup> See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 135–67 (1991) (identifying fairness, reliance, efficiency, stability, and coordination as reasons for rules); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 app. at 281–86 (1974) (discussing the economics of rules versus standards); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 596–620 (1992) (exploring circumstances in which rules and standards are likely to be preferable); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–69 (1992) (summarizing arguments favoring rules based on equality, utility, liberty, and democracy).

<sup>260</sup> See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184–86 (1989) (explaining that rules allow for more precision and that it is “possible to establish general rules, no matter what theory of interpretation or construction one employs”).

calibrating the use of force.<sup>261</sup> Supreme Court decisions do little to make this standard more rule-like, asking if the officers' conduct was "objectively reasonable' in light of the facts and circumstances confronting them," including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>262</sup> One might have supposed that all this talk of reasonableness would have led the Court to assign responsibility for the decision to a jury, properly charged as to the various considerations that inform the reasonableness of the officer's conduct. But instead of relying on the jury, the Court has transferred the decision to courts, making judgments about the clarity of established law through the qualified immunity doctrine.<sup>263</sup>

Although judges applying qualified immunity set out in search of legal clarity, the application of the doctrine has a well-known tendency to obscure more than it enlightens.<sup>264</sup> Courts do not have any obligation to specify controlling legal rules in the qualified immunity cases they adjudicate; they can instead dismiss the claim on the basis that existing law does not clearly establish that the officer's actions were unlawful.<sup>265</sup> Increasingly, courts take this easy way out, ruling that the law, whatever it might be, lacks the clarity to overcome a proffered immunity defense.<sup>266</sup> That, in turn, prevents the

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<sup>261</sup> See U.S. CONST. amend. IV. On the notoriously standard-like quality of the reasonableness test, see Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 654–55 (characterizing the Court's excessive force cases as setting forth a standard that offers little guidance). For doubts that the Court's turn to eighteenth-century practice has infused its Fourth Amendment law with greater clarity or predictability, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1809–13 (2000).

<sup>262</sup> *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014); *Tennessee v. Garner*, 471 U.S. 1, 7–11 (1985). On the way qualified immunity adds a second layer of discretion to that already conferred by the prevailing constitutional standard, see Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 139–40 (2009). On the result, essentially rendering Fourth Amendment excessive force protections illusory, see Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465, 1497–1500 (2018) (basing its futility finding on an empirical assessment of the success of excessive force claims).

<sup>263</sup> See *Pearson v. Callahan*, 555 U.S. 223, 232–34 (2009).

<sup>264</sup> See John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854 (2010) (describing the standards for identifying clear law as a "cumulation of debatability").

<sup>265</sup> *Pearson*, 555 U.S. at 234–36. For a more deferential restatement of the standard, see *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (noting that the doctrine protects "all but the plainly incompetent or those who knowingly violate the law").

<sup>266</sup> See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009) (finding that judicial avoidance decreased when courts were required to follow the two-step approach of *Saucier*); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 49 (2015) (finding that judges are less likely to decide constitutional questions when the rights at issue are not clearly established).

courts from actually giving articulate voice to the rules governing official conduct and prevents juries from awarding damages to the victims of unreasonable conduct.<sup>267</sup> Officials, victims, government agencies, and lower courts all operate in a shadow world where the content of the law recedes in clarity and importance and the phantom construct of clearly established law becomes the de facto liability rule.<sup>268</sup> The more closely courts attend to immunity, the less work they do to clarify the law. Thus, scholars have discussed the “degradation” of constitutional law that reduces “constitutional protections to the least-common-denominator understanding of their meaning.”<sup>269</sup>

Adoption of the type of state causes of action we propose can eliminate qualified immunity from the calculus and restore the role of courts in deciding cases by reference to the law rather than hiding behind, and encouraging the growth of, a profound absence of clear law. By restoring the law-saying capacity of the courts, both state and federal, adoption of reforms will foster judicial articulation of rules to govern official conduct. The resulting rules should offer the panoply of benefits that we have come to associate with rule-based approaches to the regulation of behavior: greater compliance with the law and more ready resolution of the claims that arise when the government violates the rules. By facilitating litigation of claims that might have failed under the immunity regime for want of established law, moreover, these state law causes of action will encourage litigation in new areas where the information-forcing value of discovery can help to improve the performance of local governments.

A second benefit will accrue from the clarification of legal standards that the elimination of qualified immunity for state law claims will foster. By giving voice to the importance of compliance with the Constitution itself, rather than with the increasingly nebulous construct of “clearly established law,” reformers can help to encourage a culture of law compliance in the relevant community.<sup>270</sup> Scholars recognize that the simple articulation of a new standard of legality may not achieve instantaneous or perfect

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<sup>267</sup> See Nielson & Walker, *supra* note 266, at 37–38 (finding, based on several studies that examine qualified immunity decisions over time, that courts decided fewer constitutional questions after *Pearson* overruled *Saucier*).

<sup>268</sup> On the threat to constitutional values, see Jeffries, *supra* note 264, at 858 (maintaining that restrictive approaches reduce the search for clearly established law “to something like a snipe hunt” where immunity crowds out any damages liability for constitutional violations).

<sup>269</sup> See John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120–21.

<sup>270</sup> For an account of the value of expressive law, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 36–37 (2000) (commenting on the communicative function of rules in property law).

compliance.<sup>271</sup> But a skeptical, deterrence-inflected account seems too simplistic, slighting both the expected operation of existing remedies (through which any newly articulated legal rule will be made effective) and the expressive value of law. Expressive theorists maintain that law can induce compliance by offering information about community expectations and by establishing a focal point around which people with disparate values might coordinate their behavior.<sup>272</sup> For expressive theorists, compliance does not entail a simplistic cost–benefit calculus as in the standard law-and-economics account of deterrence.<sup>273</sup> Nor does it result alone from law’s perceived legitimacy and its moral claim on popular compliance. Instead, on this view law induces compliance as people use legal norms as a way to maximize their own interests through strategies of coordination.<sup>274</sup> Law also provides information about community values and standards.<sup>275</sup> The powerful symbolism that surrounds expressive legislation and other legal norms can have a profound impact on individual compliance with law that simple deterrence theory cannot explain.

### C. *The Value of Taking Action*

We need not reiterate here the value of government responsiveness to the demands of constituents for a more just society. Political and social scientists alike tell us that when people perceive public institutions as open, transparent, and responsive, they tend to view those institutions more favorably and provide diffuse support to government actors, thereby enhancing general compliance with law.<sup>276</sup> Justice Brandeis explained the dynamic almost one hundred years ago, noting that “[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to

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<sup>271</sup> One such skeptic, dubious about arguments favoring the consideration of the benefits of litigation and broad discovery, views legal rules as functionally effective only to the extent they have been given enforcement teeth. See Paul Stancil, *Discovery and the Social Benefits of Private Litigation*, 71 VAND. L. REV. 2171, 2185 (2018) (arguing that Congress must not have “truly” meant to end discrimination, given its failure to assign greater enforcement resources than proceedings before the EEOC).

<sup>272</sup> See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2030–32 (1996); RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* 5–7, 30–42 (2015).

<sup>273</sup> See MCADAMS, *supra* note 272, at 2–4 (describing the deterrence theory and explaining how an expressive theory “plausibly causes more of the compliance we observe than deterrence or legitimacy” (emphasis omitted)).

<sup>274</sup> See *id.* at 5–7.

<sup>275</sup> See Sunstein, *supra* note 272, at 2032–33, 2043–44 (finding evidence that laws against discrimination weakened the norm of racial discrimination even in the absence of enforcement). For Sunstein, then, the passage of a prohibition against race-based discrimination may help to induce compliance by letting the community know that members of Congress, reflecting the desires of their constituents, have expressed the community’s disapproval of such behavior. See *id.* at 2043–44.

<sup>276</sup> See Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 378–79 (2001).

become a law unto himself; it invites anarchy.”<sup>277</sup> Monica Bell has argued that this “legitimacy deficit” offers an incomplete description of the harms that befall overpoliced communities and proposes instead that “[t]he theory of legal estrangement provides a rounder, more contextualized understanding of this relationship that examines the more general disappointment and disillusionment felt by many African Americans and residents of high-poverty urban communities with respect to law enforcement.”<sup>278</sup> Legal estrangement results in an “anomie about law”: a sense that one’s rights do not matter.<sup>279</sup> The remedy is a legal system that is well designed and properly enforced, which will “reassure community members that society has not abandoned them, that they are engaged in a collective project of making the social world.”<sup>280</sup>

Reformers understand the need to act quickly to secure important changes. Over the summer of 2020, upwards of 450 bills were introduced across the country, ranging from legislation to ban chokeholds to more ambitious overhauls of police departments.<sup>281</sup> Members of Congress considered many reform measures as well, including changes to Section 1983 that would have eliminated qualified immunity and authorized suits against federal officials.<sup>282</sup> But apart from some important accomplishments,

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<sup>277</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

<sup>278</sup> Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2058, 2066 (2017).

<sup>279</sup> *Id.* at 2085.

<sup>280</sup> *Id.*

<sup>281</sup> For example, for an account of Black Lives Matter (BLM) proposals in the District of Columbia, see Martin Austerhuhle, *Here’s What Black Lives Matter D.C. Is Calling For, and Where the City Stands*, NPR (June 9, 2020), <https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands> [<https://perma.cc/N5TK-KXN8>] (identifying such reforms as defunding the police, banning chokeholds, a ban on stop and frisk, an end to police in schools, and the elimination of money bail). A number of states adopted chokehold limits of various kinds after the death of George Floyd. For an account, see Harmeet Kaur & Janine Mack, *The Cities, States and Countries Finally Putting an End to Police Restraints*, CNN (June 16, 2020, 6:24 AM), <https://www.cnn.com/2020/06/10/world/police-policies-neck-restraints-trnd/index.html> [<https://perma.cc/E9BF-AU2E>]. For an account of the nationwide trends in the months after George Floyd was murdered, see Amber Widgery, *One Year After George Floyd’s Death, Work Continues on Policing Policy*, NAT’L CONF. OF STATE LEGISLATURES (May 20, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/a-year-after-death-of-george-floyd-work-continues-on-policing-policy-magazine2021.aspx> [<https://perma.cc/2J8H-HUPS>] (reporting that more than 3,000 bills had been proposed in state legislatures); *States Race to Pass Policing Reforms After Floyd’s Death*, CNBC (Aug. 8, 2020, 10:58 AM), <https://www.cnbc.com/2020/08/08/states-race-to-pass-policing-reforms-after-floyds-death.html> [<https://perma.cc/3927-TJK8>] (reporting on the 450 bills introduced in the months following Floyd’s death according to a survey of state laws conducted by the National Center on State Law).

<sup>282</sup> See Catie Edmondson, *House Passes Sweeping Policing Bill Targeting Racial Bias and Use of Force*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/us/politics/house-police-overhaul-bill.html> [<https://perma.cc/L7ET-UAD3>] (noting the passage of the George Floyd Justice in

particularly the legislation in Colorado and New Mexico, reform movements have slowed or stalled.<sup>283</sup> A *New York Times* article recalled that calls for reform sounded loudly after Michael Brown's death in Ferguson, Missouri but led to little by way of concrete change.<sup>284</sup> One senses a growing worry that the moment for decisive political action may have slipped away.<sup>285</sup> Politicians and officials can help to allay those concerns, as the legislative process continues, by taking action to bring about some of the changes that we sketch here. Changes to the power to sue government officials are some of the many avenues of reform that should be pursued. These changes might restore some faith in the law as a tool for addressing systemic racism and brutality that permeates the criminal legal system.

#### D. Experimentation and Evidence

If our federal system of government was designed in the eighteenth century to preserve local control over the institutions of slavery, and if it has often been used throughout our history to impede change at the federal level, new options have become available at the local level in an era of partisan division.<sup>286</sup> One long and somewhat hackneyed version of federalism holds

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Policing Act of 2020, which would eliminate qualified immunity, ban chokeholds, and reform other aspects of local policing).

<sup>283</sup> Reform efforts remain ongoing in a number of jurisdictions, including Oregon and Washington. Major reform efforts in California, New York, and Texas stalled in the past year. *See supra* notes 7–11 and accompanying text.

<sup>284</sup> *See* Shaila Dewan & Mike Baker, *Rage and Promises Followed Ferguson, but Little Changed*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/13/us/unrest-ferguson-police-reform.html> [<https://perma.cc/VUW9-VWD9>].

<sup>285</sup> *See id.* (reporting that Valerie Castile, mother of police-shooting victim Philando Castile, lamented at a panel after Floyd's death that "we've covered everything you could possibly imagine about what we should do and what we could do, but nothing is being implemented"). Yet even as the legislative process grinds along, some see hope in the growing influence of BLM activists. *See* Kayla Reed & Blake Strode, *George Floyd and the Seeds of a New Kind of Activism*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/opinion/george-floyd-protests-blm-movement.html> [<https://perma.cc/7QLW-KDGF>]; Maya King, *Black Lives Matter Power Grab Sets Off Internal Revolt*, POLITICO (Dec. 10, 2020, 1:11 PM), <https://www.politico.com/news/2020/12/10/black-lives-matter-organization-biden-444097> [<https://perma.cc/Y6CC-AFQT>] (describing growing power of and internal tensions within the BLM movement).

<sup>286</sup> On slavery and constitutionalism, see Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1137–38 (2012) (quoting the convention speeches of Madison and Ellsworth in favor of regarding slavery as a local matter rather than one of national concern). For an account of what he terms the "federal consensus" of the Founding Era, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 94–95 (1977) (quoting the statement of South Carolina Senator William Loughton Smith, made in response to the abolition petitions that flooded Congress in 1790, that "the toleration of slavery in the several States was a matter of internal regulation and policy, in which each State had a right to do as she pleases, and no other State had any right to intermeddle with her policy or laws"). For the possibility that

up the states as laboratories (or petri dishes) of democracy, where reform-minded politicians can experiment with new approaches to social problems.<sup>287</sup> In favor of such experimentation, political theorists have argued that the trial of reforms at the state level can provide evidence of the reform's success (or failure), without committing the whole nation to its untested adoption. One might see workers' compensation laws as one example among many of reforms that proved their worth at the state level.<sup>288</sup>

State and local changes in the ecosystem of civil right enforcement can provide the foundation for a similar assessment of the wisdom and financial workability of the package of reforms offered above. Critics worry that reforms to curtail qualified immunity will trigger an upsurge in successful excessive force and other constitutional litigation, threatening the budgets of local governments. We have explained that a proper package of systemic changes can forestall some of the anticipated litigation by limiting the number of constitutionally dubious police interactions with local citizens and using what litigation does occur as a way to bring attention (and change) to problematic practices. With the implementation of reforms in some jurisdictions, more reticent governments and officials in other parts of the country might monitor their impact and evaluate their suitability for adoption more widely. We expect that they will find that these adjustments do not create the devastating outcomes critics fear—and that these changes will, in fact, improve accountability and restore faith in government.

### *E. Feasibility*

Perhaps most importantly, the changes we propose here do not depend on the ability of reformers to surmount the long and familiar list of barriers to the enactment of national legislation. Nor do they turn on the ability of litigants to persuade members of the Supreme Court to revisit a set of doctrines that they may regard as settled. The Colorado reforms were

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a new federalism might create space for progressive policy initiatives, see Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY (2017), <https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/> [<https://perma.cc/B833-4U2N>].

<sup>287</sup> The oft-quoted reference to the states as laboratories of democracy in *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting), exerts a powerful ongoing influence on legal scholars. For an account of federalism that encompasses its many faces, see generally Amar, *Five Views of Federalism*, *supra* note 142 (describing the “converse-1983” model and competing conceptions of federalism).

<sup>288</sup> On the coalition of workers, employers, and social reformers who supported workers' compensation at the state level during the progressive era, see Price v. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 319 (1998) (quoting a student of workers' compensation to the effect that “[n]o other kind of labor legislation gained such general acceptance in so brief a period in this country”).

speedily adopted with near unanimous support in both chambers.<sup>289</sup> Similarly sweeping changes have run into headwinds here and there, but legislation can move through state and local assemblies without necessarily confronting the threat of a filibuster or presidential veto. Many of the other changes we identify do not require state legislative support but can be adopted at the local level through ordinance or executive changes in policy. Such local reforms have one clear-cut advantage over national proposals—they can be accomplished now, without waiting on Congress or the Supreme Court to act.

### CONCLUSION

Arguments for reform of local institutions, including police departments, have taken on new urgency. Much work must be done at the departmental level to rethink the role of the police in modern city life and reduce the level of violence. But the reform of local institutions should include changes in the system of civil rights enforcement, changes that would eliminate qualified immunity, ensure compensation for the victims of government wrongdoing, and guarantee that the rules of law enunciated in such litigation are more effectively communicated to responsible officers and departments through appropriate budgeting and indemnification practices. Rather than waiting on federal actors to implement such reforms, and thereby effectively acquiescing in the gridlock of a divided government, officials at the state and local levels should take responsibility for improving the institutions they manage. Progress may be slow and incremental. But steps to clarify and enforce constitutional norms, long overdue, must be a part of the reform agenda of officials at every level of government who believe in building a more just society.

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<sup>289</sup> See Jesse Paul & Jennifer Brown, *Colorado Governor Signs Sweeping Police Accountability Bill into Law. Here's How It Will Change Law Enforcement.*, COLO. SUN (June 19, 2020, 9:53 AM), <https://coloradosun.com/2020/06/19/colorado-police-accountability-bill-becomes-law/> [<https://perma.cc/7ENP-TQK5>] (explaining that the bill was passed two weeks after being introduced); Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020, 11:31 AM), <https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity> [<https://perma.cc/FQ73-UF7K>] (reporting that the Colorado bill was approved by the house by a vote of 52–13 and the senate by a vote of 32–1).

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APPENDIX A: SURVEY OF STATE LAW REGARDING CAUSES OF ACTION FOR  
CONSTITUTIONAL VIOLATIONS

TABLE A1: STATES WITH NEITHER A STATUTORY NOR A JUDICIALLY IMPLIED  
CAUSE OF ACTION

State	Status	Sources and Comments
Alabama	No cause of action	Mathews v. Ala. Agric. & Mech. Univ., 787 So. 2d 691, 698 (Ala. 2000).
Alaska	No cause of action	Alaska courts have held that they will not imply a cause of action if alternative remedies exist and also have found that Section 1983 is an alternative remedy that precludes finding an implied right of action under the state constitution. <i>See</i> State Dep't of Corr. v. Heisey, 271 P.3d 1082, 1096–97 (Alaska 2012); Lowell v. Hayes, 117 P.3d 745, 753 (Alaska 2005).
Arizona	Open question	Although courts in Arizona have stated that it is an open question, no court has ever found an implied cause of action under the state constitution. <i>See</i> Fred Nackard Land Co. v. City of Flagstaff, 238 P.3d 149, 160–61 (Ariz. Ct. App. 2010) (depublished).
Delaware	No cause of action	Schueller v. Cordrey, No. N14C–10–201 EMD, 2017 WL 568344, at *2 (Del. Super. Ct. Feb. 13, 2017).
Florida	No cause of action	Fernez v. Calabrese, 760 So. 2d 1144, 1146 (Fla. Dist. Ct. App. 2000); Garcia v. Reyes, 697 So. 2d 549, 549–50 (Fla. Dist. Ct. App. 1997) (per curiam); Pinto v. Collier County, No. 2:19-cv-551-FtM-60MRM, 2020 WL 2219185, at *7 (M.D. Fla. May 7, 2020).
Georgia	No cause of action	Lathrop v. Deal, 801 S.E.2d 867, 881 (Ga. 2017).
Hawaii	No cause of action	Figueroa <i>ex rel.</i> Figueroa v. State, 604 P.2d 1198, 1206–07 (Haw. 1979); Browne v. City of Honolulu, No. 19-cv-00460-DKW-KJM, 2019 WL 5088737, at *2 (D. Haw. Oct. 10, 2019).
Idaho	No cause of action	Dreyer v. Idaho Dep't of Health & Welfare, 455 F. Supp. 3d 938, 944 (D. Idaho 2020); Johnson v. City of Caldwell, No. 1:13–CV–00492–EJL–CWD, 2015 WL 5319012, at *17 (D. Idaho Sept. 11, 2015) (citing cases).
Illinois	No cause of action	Although one intermediate appellate court in Illinois suggested the existence of a <i>Bivens</i> -type action for search and seizure, <i>see</i> Newell v. City of Elgin, 340 N.E.2d 344, 348–49 (Ill. App. Ct. 1976), no Illinois courts appear to have ever squarely held that a private right of action exists under the state constitution, <i>see</i> White v. Madison County, No. 07–CV–716–MJR, 2008 WL 539230, at *6 (S.D. Ill. Feb. 26, 2008) (collecting cases).
Indiana	No cause of Action	Smith v. Ind. Dep't of Corr., 871 N.E.2d 975, 985–86 (Ind. Ct. App. 2007); Orr v. Ferebee, No. 1:16-cv-02610-RLY-DML, 2017 WL 1509309, at *2 (S.D. Ind. Apr. 27, 2017).

State	Status	Sources and Comments
Kansas	No cause of action	Prager v. State Dep't of Revenue, 20 P.3d 39, 63–64 (Kan. 2001); Youngblood v. Qualls, 308 F. Supp. 3d 1184, 1203 (D. Kan. 2018).
Kentucky	No cause of action	St. Luke Hosp., Inc. v. Straub, 354 S.W.3d 529, 536–38 (Ky. 2011).
Minnesota	No cause of action	Danforth v. Eling, No. A10-130, 2010 WL 4068791, at *6 (Minn. Ct. App. Oct. 19, 2010); Haynes v. Iten, No. 17-cv-5217 (DSD/HB), 2019 WL 5149818, at *8 (D. Minn. July 19, 2019), <i>report and recommendation adopted by</i> No. 17-5217 (DSD/HB), 2019 WL 4746513 (D. Minn. Sept. 30).
Missouri	No cause of action	Collins–Camden P'ship, v. County of Jefferson, 425 S.W.3d 210, 213–14 (Mo. Ct. App. 2014).
Nebraska	No cause of action	NEB. REV. STAT. § 20-148 (2021) authorizes suits for the “deprivation of any rights, privileges or immunities secured by the United States Constitution or the Constitution . . . of the State of Nebraska,” but courts have uniformly interpreted it to be a “procedural” statute that does not confer a right of action. <i>See</i> Potter v. Bd. of Regents of the Univ. of Neb., 844 N.W.2d 741, 749–50 (Neb. 2014).
Nevada	Open question	No court has ever held that there is an implied right of action under the Nevada constitution, but it has not been completely foreclosed. <i>Compare</i> Janda v. City of Henderson, No. 2:05-cv-00841-LDG (LRL), 2006 WL 8442837, at *2 (D. Nev. Sept. 28, 2006) (granting motion to dismiss because plaintiffs offered no argument for whether a private right of action existed under the Nevada constitution), <i>with</i> Lopez v. Homan, No. 3:19-cv-00098-RJ-WGC, 2020 WL 3949260, at *9 (D. Nev. May 11, 2020) (“[T]here does not seem to be authority that an inmate cannot argue a conditions of confinement claim under Nevada’s Constitution.”), <i>report and recommendation adopted by</i> No. 3:19-CV-00098-RJ-CLB, 2020 WL 3956297 (D. Nev. July 9).
New Hampshire	No cause of action	Marquay v. Eno, 662 A.2d 272, 282–83 (N.H. 1995); Rockhouse Mountain Prop. Owners Ass'n v. Town of Conway, 503 A.2d 1385, 1387–88 (N.H. 1986); Ali v. N. NH Corr. Facility, No. 12-cv-364-SM, 2013 WL 3367098, at *4 (D.N.H. July 3, 2013).
North Dakota	No cause of action	Although the North Dakota Supreme Court has recognized that courts may imply a damages action for constitutional violations, no court has every held that such a remedy exists. <i>See</i> Kristensen v. Strinden, 343 N.W.2d 67, 70 (N.D. 1983); Nagel v. City of Jamestown, 952 F.3d 923, 935 (8th Cir. 2020).
Ohio	No cause of action	Provens v. Stark Cnty. Bd. of Mental Retardation & Developmental Disabilities, 594 N.E.2d 959, 961 (Ohio 1992); Williams v. Nice, 58 F. Supp. 3d 833, 839–40 (N.D. Ohio 2014), <i>aff'd sub nom.</i> Williams v. Morgan, 652 F. App'x 365 (6th Cir. 2016).

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State	Status	Sources and Comments
Oregon	No cause of action	Barcik v. Kubiaczyk, 895 P.2d 765, 775 (Or. 1995) (en banc); Hunter v. City of Eugene, 787 P.2d 881, 882–83 (Or. 1990); Gooding v. Zuercher, No. 3:18-cv-00015-YY, 2018 WL 4658710, at *4 (D. Or. July 23, 2018), <i>report and recommendation adopted by</i> No. 3:18-cv-00015-YY, 2018 WL 4658828 (D. Or. Sept. 27).
Pennsylvania	No cause of action	Jones v. City of Philadelphia, 890 A.2d 1188, 1208 (Pa. Commw. Ct. 2006); Hamilton v. Spriggle, 965 F. Supp. 2d 550, 576–77 (M.D. Pa. 2013).
South Carolina	No cause of action	Palmer v. State, 829 S.E.2d 255, 261 (S.C. Ct. App. 2019); Shuler v. Orangeburg Cnty. Sheriff’s Dep’t, No. 5:19-88-MGL-PLG, 2019 WL 9341416, at *5 (D.S.C. July 8, 2019), <i>report and recommendation adopted by</i> No. 5:19-00088-MGL, 2020 WL 1933781 (D.S.C. Apr. 22, 2020), <i>appeal filed sub nom.</i> Shuler v. Orangeburg Cnty. Sheriff, No. 20-6778 (4th Cir. May 28).
South Dakota	Open question	South Dakota courts have not addressed the existence of the underlying cause of action because of the state’s far reaching immunity doctrines. <i>See</i> Est. of Johnson v. Weber, 898 N.W.2d 718, 732–34 (S.D. 2017) (declining to find cause of action for violation of state due process clause under facts of case, but appearing to contemplate damages actions for state constitutional provisions that are “self-executing”).
Tennessee	No cause of action	Odom v. Claiborne County, 498 S.W. 3d 882, 887–89 (Tenn. Ct. App. 2016).
Washington	No cause of action	In general, if common law provides an adequate remedy for an injury, the Washington Supreme Court has declined to extend a private right of action unless there is some augmentative legislation creating such a right. <i>See</i> Blinka v. Wash. State Bar Ass’n, 36 P.3d 1094, 1102 (Wash. Ct. App. 2001); Dormaier v. City of Soap Lake, No. 2:19-CV-00354-SAB, 2020 WL 6687356, at *7 (E.D. Wash. Nov. 12, 2020) (“The Washington Supreme Court has held repeatedly that the Washington State Constitution does not automatically create an implied private right of action for constitutional violations.” (citing Reid v. Pierce County, 961 P.2d 333 (Wash. 1998) (en banc))), <i>appeal dismissed</i> , No. 20-36012, 2021 WL 650784 (9th Cir. Feb. 12, 2021).
Wyoming	No cause of action	Cooney v. Park County, 792 P.2d 1287, 1299–1301 (Wyo. 1990), <i>vacated on other grounds sub nom.</i> Cooney v. White, 501 U.S. 1201 (1991) (mem.).

TABLE A2: STATES WITH A STATUTORY OR JUDICIALLY IMPLIED CAUSE OF ACTION

State	Status	Sources and Comments
Arkansas	Statutory cause of action for violation of state constitutional rights, with attorneys' fees and qualified immunity defense	ARK. CODE ANN. § 16-123-105 (2021); <i>Robinson v. Langdon</i> , 970 S.W.2d 292, 296 (Ark. 1998) (requiring courts to apply federal qualified immunity doctrine).
California	Statutory cause of action for violations of federal or state constitutional rights (limited), with attorneys' fees and no qualified immunity	CAL. CIV. CODE § 52.1(c) (West 2021) (creating cause of action for interference with constitutional rights through violence or the threat of violence). Section 52.1(c) has been interpreted to require officers have a specific intent to violate constitutional rights. <i>See Reese v. County of Sacramento</i> , 888 F.3d 1030, 1043 (9th Cir. 2018). But no qualified immunity defense has been recognized. <i>See Venegas v. County of Los Angeles</i> , 63 Cal. Rptr. 3d 741, 752–53 (Ct. App. 2007). We note that the Supreme Court of California has recognized the possibility of an implied right of action for constitutional violations that fall outside of Section 52.1 <i>See Katzberg v. Regents of the Univ. of Cal.</i> , 58 P.3d 339, 350 (Cal. 2002) (setting forth framework for determining whether damages action should be implied from state constitution).
Colorado	Statutory cause of action for violation of state constitutional rights (limited), with attorneys' fees and no qualified immunity	COLO. REV. STAT. § 13-21-131 (2021) (applying only to a "peace officer" employed by a "local government").
Connecticut	Implied cause of action limited to search and seizure and false arrest, with qualified immunity; statutory cause of action for violations of state constitution (limited), with qualified immunity and limited right to attorneys' fees	Connecticut courts have recognized an implied cause of action for constitutional claims involving search and seizure and arrest. <i>See Binette v Sabo</i> , 710 A.2d 688, 693–94 (Conn. 1998). Connecticut also recently created a statutory cause of action for violations of the state constitution by police officers, with immunity where officer held an "objectively good faith belief" that conduct did not violate the law. CONN. GEN. STAT. § 52-571k (2021). Attorneys' fees may be awarded if the conduct was deliberate or reckless, and indemnification will be denied if officer acted with malice. <i>Id.</i>
Iowa	Implied cause of action for searches and seizures, due process, and equal protection, with qualified immunity	<i>Godfrey v. State</i> , 898 N.W.2d 844, 846–47 (Iowa 2017) (due process and equal protection violations); <i>Baldwin v. City of Estherville</i> , 915 N.W.2d 259, 260–61 (Iowa 2018).

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State	Status	Sources and Comments
Louisiana	Implied cause of action limited to right to privacy (including unreasonable searches and seizures), with qualified immunity	LA. CONST art. I, § 5; <i>Moresi v. State ex rel. Dep't of Wildlife &amp; Fisheries</i> , 567 So. 2d 1081, 1093 (La. 1990); <i>Miller v. Village of Hornbeck</i> , 65 So. 3d 784, 787–88 (La. Ct. App. 2011).
Maine	Statutory cause of action for violations of state and federal constitutions (limited), with attorneys' fees and qualified immunity	ME. STAT. tit. 5, § 4682(1)(A) (2021) (limiting cause of action to intentional interference with constitutional rights, by physical force or violence or threats of physical force or violence); <i>id.</i> § 4683 (providing for attorneys' fees); <i>Clifford v. Maine General Med. Ctr.</i> , 91 A.3d 567, 588–89 (Me. 2014) (applying qualified immunity).
Maryland	Implied right of action for violations of equal protection, due process and search and seizure, with qualified immunity for discretionary acts	<i>D'Aoust v. Diamond</i> , 36 A.3d 941, 962 (Md. 2012) (qualified immunity); <i>Manikhi v. Mass Transit Admin.</i> , 758 A.2d 95, 110–11 (Md. 2000) (equal protection); <i>Widgeon v. E. Shore Hosp. Ctr.</i> , 479 A.2d 921, 929–30 (Md. 1984) (due process and search and seizure).
Massachusetts	Statutory cause of action for violation of federal or state constitution (limited), with attorneys' fees and qualified immunity	MASS. GEN. LAWS ANN. ch. 12, §§ 11H–11I (2020) (providing a cause of action for violation of constitutional right through threats, intimidation, or coercion); <i>Duarte v. Healy</i> , 537 N.E.2d 1230, 1232 (Mass. 1989) (applying qualified immunity).
Michigan	Implied right of action against the state, limited to due process violations	<i>Mays v. Governor</i> , 954 N.W.2d 139, 161–62 (Mich. 2020) (en banc) (holding state and state officials may be liable for state substantive due process violation because the Flint water poisoning victims had no alternative remedy and the state's actions were shocking to the conscience); <i>Jones v. Powell</i> , 612 N.W.2d 423, 426–27 (Mich. 2000) (per curiam) (concluding there is no inferred damages remedy for a violation of the state constitution against a municipality or individual government employee because Section 1983 provides an adequate remedy); <i>Smith v. Dep't of Pub. Health</i> , 410 N.W.2d 749, 787–90 (Mich. 1987) (declining to recognize a damages remedy for equal protection and due process violations), <i>aff'd sub nom. Will v. Mich. Dep't of State Police</i> , 491 U.S. 58 (1989).
Mississippi	Implied cause of action limited to search and seizure	<i>Mayes v. Till</i> , 266 So. 2d 578, 580–81 (Miss. 1972) (allowing suit for nominal and actual damages to property arising from an unlawful search).

State	Status	Sources and Comments
Montana	Implied cause of action limited to due process violations, privacy, and search and seizure, with no qualified immunity	Dorwart v. Caraway, 58 P.3d 128, 137 (Mont. 2002).
New Jersey	Statutory cause of action for violations of federal and state constitutions, with attorneys' fees and qualified immunity	N.J. STAT. ANN. § 10:6-2 (2021); Morillo v. Torres, 117 A.3d 1206, 1215 (N.J. 2015) (applying federal qualified immunity standard to claims brought under the statute); <i>see also</i> Harz v. Borough of Spring Lake, 191 A. 3d 547, 555 (N.J. 2018) (holding the statute only provides a remedy for violation of substantive, not procedural, rights).
New Mexico	Statutory cause of action, with discretionary attorneys' fees and no qualified immunity	The New Mexico Civil Rights Act creates a cause of action for violations of the state constitution, with discretionary attorneys' fees, no qualified immunity, and guaranteed indemnification. <i>See</i> H.B. 4, 55th Leg., 2021 Reg. Sess. § 3 (N.M. 2021).
New York	Implied cause of action limited to equal protection and search and seizure	Brown v. State, 674 N.E.2d 1129, 1138–39 (1996) (authorizing civil action to recover damages against the state for violation of the Equal Protection and Search and Seizure Clauses of the State Constitution).
North Carolina	Implied cause of action, with qualified immunity an open question	Craig <i>ex rel.</i> Craig v. New Hanover Cnty. Bd. of Educ., 678 S.E.2d 351, 354 (N.C. 2009) (recognizing cause of action for violation of right to education); Corum v. Univ. of N.C. <i>ex rel.</i> Bd. of Governors, 413 S.E.2d 276, 289–90 (N.C. 1992) (recognizing cause of action for free speech); Midgett v. N.C. State Highway Comm'n, 132 S.E.2d 599, 608 (N.C. 1963) (“[W]here the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance.”), <i>overruled on other grounds</i> by Lea Co. v. N.C. Bd. of Transp., 304 S.E.2d 164 (N.C. 1983); Sale v. State Highway & Pub. Works Comm'n, 89 S.E.2d 290, 295–98 (N.C. 1955) (recognizing a cause of action under the state due process clause). Qualified immunity is an open question. <i>See</i> Matthew R. Gauthier, <i>Kicking and Screaming: Dragging North Carolina's Direct Constitutional Claims into the Twenty-First Century</i> , 95 N.C. L. REV. 1735, 1747–48 (2017).

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State	Status	Sources and Comments
Oklahoma	Implied right of action for excessive force and for detention beyond the expiration of one's sentence (limited to claims arising prior to April 21, 2014)	<i>Payne v. Kerns</i> , 2020 OK 31, ¶ 14, 467 P.3d 659, 665–66 (finding limited implied private right of action for claims based on excessive force or unlawful detention). Oklahoma's legislature abrogated the implied cause of action for any claims accruing on or after April 21, 2014. <i>See id.</i>
Rhode Island	Implied cause of action limited to self-executing provisions	<i>Bandoni v. State</i> , 715 A.2d 580, 594–95 (R.I. 1998); <i>Pellegrino v. R.I. Ethics Comm'n</i> , 788 A.2d 1119, 1128 (R.I. 2002) (Flanders, J., concurring) (citing <i>Bandoni</i> and arguing that the takings clause "is a self-executing provision of our Constitution that needs no supplemental legislation to create a private cause of action for damages").
Texas	Implied cause of action limited to self-enacting provisions that provide textual entitlement to compensation	<i>City of Beaumont v. Bouillion</i> , 896 S.W.2d 143, 147 (Tex. 1995) (rejecting implied cause of action for free speech and free assembly sections of the Texas constitution); <i>Frasier v. Yanes</i> , 9 S.W.3d 422, 425–26 (Tex. App. 1999) (recognizing cause of action for certain self-enacting provisions that provide specific textual entitlement to compensation, such as the takings clause).
Utah	Implied right of action limited to rights that are self-executing and where the constitutional violation is flagrant, existing remedies do not redress the injury, and equitable relief will not redress the injuries	For a violation to be "flagrant," "a defendant must have violated 'clearly established' constitutional rights 'of which a reasonable person would have known.'" <i>Spackman ex rel. Spackman v. Bd. of Educ.</i> , 16 P.3d 533, 538 (Utah 2000) (quoting <i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 818 (1982)).
Vermont	Implied right of action limited to common benefits, search and seizure, freedom of speech and of the press	<i>Zullo v. State</i> , 205 A.3d 466, 484 (Vt. 2019) (holding private right of action for money damages is available for violations of the search and seizure provision); <i>Shields v. Gerhart</i> , 658 A.2d 924, 928–30 (Vt. 1995) (holding that a general provision guaranteeing a right to enjoy life was not self-executing but that the specific guarantee of right to free speech was self-executing).

State	Status	Sources and Comments
Virginia	Implied cause of action for due process, specifically property deprivation	Kitchen v. City of Newport News, 657 S.E.2d 132, 140 (Va. 2008) (recognizing damages action for violation of Article I, Section 11 of the Virginia Constitution, a “self-executing” protection against the taking of private property without just compensation); Graham v. Mitchell, 529 F. Supp. 622, 625 (E.D. Va. 1982) (summarizing case law providing right of action for deprivation of property without due process).
West Virginia	Implied cause of action for due process violations, with qualified immunity	Hutchison v. City of Huntington, 479 S.E.2d 649, 660 (W. Va. 1996); <i>see also</i> Fields v. Mellinger, 851 S.E.2d 789, 791–99 (W. Va. 2020) (reviewing jurisprudence and rejecting implied cause of action for violation of search and seizure provisions of state constitution); W. Va. Bd. of Educ. v. Marple, 783 S.E.2d 75, 84–85 (W. Va. 2015) (holding that qualified immunity is available as defense against due process claim brought under the state constitution).
Wisconsin	Implied cause of action limited to due process	Old Tuckaway Assocs. Ltd. P’ship v. City of Greenfield, 509 N.W.2d 323, 328 n.4 (Wis. Ct. App. 1993).

APPENDIX B: PROPOSED MODEL STATE STATUTE CREATING A CAUSE OF ACTION FOR CONSTITUTIONAL VIOLATIONS

- a. Private right of action.
  1. Every person who, under color of any statute, ordinance, regulation, custom, or usage of the [State, County, or City] of [], subjects any person to the deprivation of any rights, privileges, or immunities secured by the federal or state Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>290</sup>
  2. Qualified immunity and other state statutory or judicially created immunities do not apply to claims brought pursuant to this section.<sup>291</sup> It is not an immunity or defense to an action brought under this section that:
    - A. the rights, privileges, or immunities sued upon were not clearly established at the time of the act, omission, or decision by the person or public entity; or
    - B. at such time, the state of the law was such that the person or public entity could not reasonably have been expected to know whether such act, omission, or decision was lawful.<sup>292</sup>
  3. In an action under this section, the state itself as well as arms of the state, state subdivisions, counties, cities, and other public-entity employers shall be liable as persons for violations of subsection (1). Such public-entity persons shall be:
    - A. vicariously liable if the unlawful conduct causing the injury was within the scope of a natural person's employment; and<sup>293</sup>

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<sup>290</sup> This language tracks Colorado's Senate Bill 20-217. *See* 73rd Gen. Assemb., 2d Reg. Sess. § 3 (Colo. 2020) (codified at COLO. REV. STAT. § 13-21-131(1) (2021)). There are two notable differences: Colorado's statute applies only to peace officers and concerns violations only of the state constitution. Our proposed model statute applies to all people acting under color of state law and concerns violations of the state and federal constitutions.

<sup>291</sup> This language tracks Colorado's Senate Bill 20-217. *See* COLO. REV. STAT. § 13-21-131(2)(b).

<sup>292</sup> The language tracks Washington's proposed bill. *See* H.B. 1202, 67th Leg., 2021 Reg. Sess. § 3(5) (Wash. 2021).

<sup>293</sup> Washington's proposed House Bill 1202 has alternative language: "In an action . . . under [this] section, the plaintiff may also name the officer's employer as a defendant. The employer is vicariously liable if the unlawful conduct causing the injury was within the scope of the . . . officer's employment." *Id.* § 3(2).

B. liable for any violations of this section caused by a regulation, custom, usage, practice, procedure, or policy approved or condoned by such entity or by such entity's failure to use reasonable care in hiring, training, retaining, supervising, or disciplining its employees.<sup>294</sup> Upon a finding of liability on the part of such public-entity persons, a natural person named as a defendant under subsection (1) of this section shall not be personally liable for actions in substantial compliance with a regulation, practice, procedure, or policy that was established by the employer or approved or condoned by superior officers.<sup>295</sup>

b. Attorney general investigation and cause of action.

The attorney general may investigate municipalities and public entities and their employees suspected of engaging in a pattern or practice of violations of the federal and state Constitutions or laws and bring an action in the name of the State, or as *parens patriae* on behalf of persons residing in the state, to restrain and prevent this pattern or practice of unconstitutional or illegal conduct.<sup>296</sup>

c. Attorneys' fees.

In any action or proceeding to enforce this section, a prevailing plaintiff shall be entitled to reasonable attorneys' fees as part of the costs, and the court, in its discretion, may include expert fees as part of the attorneys' fees.<sup>297</sup> For the purposes of this subsection, the term "prevailing" includes a plaintiff whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, implemented as a result of a settlement, or implemented as a result of a judgment in such plaintiff's favor. If the defendant prevails in such an action, the court may award reasonable attorney fees and costs if the court finds the action to have been frivolous.

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<sup>294</sup> This language tracks Washington's proposed House Bill 1202, *see id.* § 3(3), and is also drawn from a proposed Virginia bill, *see* H.B. 2045, 2021 Sess. (Va. 2021).

<sup>295</sup> This language tracks Washington's proposed bill. *See* Wash. H.B. 1202 § 3(3).

<sup>296</sup> This language is drawn from Washington's proposed statute. *See id.* § 5.

<sup>297</sup> This language is drawn from Washington's proposed statute, *see id.* § 4, as well as a statute that was proposed in Virginia, *see* Va. H.B. 2045.

d. Indemnification.

A state, county, municipality, or other public entity shall indemnify its employees for any liability incurred and for any judgment or settlement entered against them for claims arising pursuant to this section; except that, if the employer determines that the employee did not act upon a good faith and reasonable belief that the action was lawful, then the employee is personally liable and shall not be indemnified by the employer for 5% of the judgment or settlement or twenty-five thousand dollars, whichever is less. Notwithstanding any provision of this section to the contrary, if the employee's portion of the judgment is uncollectible from the employee, the employer or insurer shall satisfy the full amount of the judgment or settlement.<sup>298</sup>

e. Preservation of rights.

This section shall be in addition to all rights, procedures, and remedies available under the United States Constitution; Section 1983 of Title 42 of the United States Code; the Constitution of the State of []; and all other federal law, state law, law of the City of [], or the [] Administrative Code; and all preexisting civil remedies, including monetary damages, created by statute, ordinance, regulation, or common law.

f. Jurisdiction; waiver of sovereign immunity.

An action brought to enforce the provisions of this section may be brought in any court of competent jurisdiction. The state itself as well as arms of the state, political subdivisions, counties, cities, and other public entities shall be subject to suit and to the imposition of liability as a person or public entity under this section, notwithstanding any immunities from suit conferred by state or federal law.

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<sup>298</sup> This language is drawn from Colorado Senate Bill 20-217. We have omitted the final sentence of Colorado's indemnification provision, which provides that "[a] public entity does not have to indemnify a[n] employee if the [employee] was convicted of a criminal violation for the conduct from which the claim arises." COLO. REV. STAT. § 13-21-131 (2021). In our view, indemnification should be mandated so long as the employee was acting in the course and scope of the employment.