

2021

Beyond Qualified Immunity

Fred O. Smith Jr.

Emory University School of Law

Follow this and additional works at: https://repository.law.umich.edu/mlr_online



Part of the [Constitutional Law Commons](#), [Law Enforcement and Corrections Commons](#), [Litigation Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Fred O. Smith Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121 (2021).

Available at: https://repository.law.umich.edu/mlr_online/vol119/iss1/9

<https://doi.org/10.36644/mlr.online.119.121.beyond>

This Commentary is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review Online by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

BEYOND QUALIFIED IMMUNITY

*Fred O. Smith, Jr.**

INTRODUCTION

I never watched the video. The descriptions themselves have always felt like enough. Traumatizing enough. Invasive enough. George Floyd, father of two, laying on the ground, as an unfazed officer kneeled on his neck for at least eight minutes and forty-six seconds.¹ He pleaded for his life and cried out to his deceased mother until he met his inevitable death.² His name should be said for the record before saying almost anything else. The recording of the chilling final minutes of his life is, in all probability, one of the impetuses for this multi-journal Reckoning and Reform Symposium.

Across the nation, across the world, Floyd's death sparked vocal cries for racial justice, especially in the realm of public safety.³ We have seen such pleas erupt before, but the cries of last summer included a broader chorus of voices.⁴ Many, including those of us who call law schools home, found ourselves questioning whether we were doing enough.⁵ Doing enough to detoxify the legal system of white supremacy, subordination, and mass incarceration. Doing enough to help exorcise the nation's persistent racial ghosts.

We might imagine that we, as lawyers and future lawyers, have a special role to play when it comes to such questions. The man who kneeled on

* Associate Professor, Emory University School of Law.

1. See Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Kneled on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported.*, N.Y. TIMES (Mar. 30, 2021, 10:24 AM), <https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html> [<https://perma.cc/JWG9-EZF8>].

2. Richard A. Oppel Jr. & Kim Barker, *New Transcripts Detail Last Moments for George Floyd*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/george-floyd-body-camera-transcripts.html> [<https://perma.cc/HX2X-C8LK>].

3. See Zak Cheney-Rice, *The New Coalition for Criminal-Justice Reform Is Multiracial and Bipartisan. It's Also Fragile.*, N.Y. MAG.: INTELLIGENCER (June 24, 2020), <https://nymag.com/intelligencer/2020/06/george-floyd-protest-coalition-is-multiracial-and-fragile.html> [<https://perma.cc/9N9H-EHMY>].

4. *Id.*

5. See *Law Firm & Law School Responses to the Black Lives Matter Movement*, VAULT: CAREER ADVICE BLOG (June 11, 2020), <https://www.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/law-firm-law-school-responses-to-the-black-lives-matter-movement> [<https://perma.cc/P26F-DBFD>]; Hannah Hayes, *Law Schools Vow to Address Structural Racism*, A.B.A.: PERSPECTIVES (Sept. 25, 2020), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2021/september/law-schools-vow-address-structural-racism> [<https://perma.cc/A8XL-L4DD>].

Floyd's neck got his power to act from law. He was purporting to enforce law. The legal system equipped him with the trappings of his office: a badge, a uniform, and the societal presumption that citizens and subjects of the State were to comply with his every command. That same societal presumption—a presumption that it is sometimes itself deadly to challenge—also likely disabled the civilians who initially witnessed Floyd's death from intervening. This killing was perhaps a local failure. It was perhaps a national failure. But it was, without a doubt, a legal failure. Per capita and in total, more Americans die at the hands of law enforcement than individuals in any other “peaceful and fully developed nation on earth.”⁶ Civil accountability is rare.⁷ Criminal liability—the conviction of George Floyd's murderer notwithstanding⁸—is rarer.⁹

Persistent questions remain both as to how to reckon with racial horrors and how to reimagine public safety. Notably, reforms to federal litigation have found an important place within some policymakers' proposed answers to those questions. No fewer than three bills have been proposed in Congress aimed at eliminating or reforming the doctrine of “qualified immunity.”¹⁰ Indeed, eliminating qualified immunity for law enforcement officials is by far the most significant judicial reform that federal lawmakers have proposed in the George Floyd Justice in Policing Act. That bill has twice passed in the House of Representatives: on a 236–181 vote last summer, and on a 220–212 vote in March of this year.¹¹

Qualified immunity operates as a defense in damages suits against government officials, including police officers.¹² Most controversially, the doctrine protects some officers even when they have violated the Constitution. Because the doctrine blocks suits unless an official has violated “clearly established” rights, cases often turn on the exact contours of precedent at the time a violation occurred.¹³ Unlawful, unreasonable force is often unaction-

6. FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 247 (2017).

7. *See id.* at 133.

8. Tami Abdollah & Kevin McCoy, *Derek Chauvin Found Guilty of Murder in George Floyd's Death. How Much Time in Prison Could He Face?*, USA TODAY (Apr. 20, 2021, 8:45 AM), <https://www.usatoday.com/story/news/nation/2021/04/20/derek-chauvin-guilty-charges-breakdown-george-floyd-death/7307746002> [<https://perma.cc/U6YL-TF9T>].

9. ZIMRING, *supra* note 6, at 133.

10. *See* George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021); Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020).

11. *All Actions H.R.7120 - 116th Congress (2019-2020)*, CONGRESS.GOV (2020) <https://www.congress.gov/bill/116th-congress/house-bill/7120/all-actions> [<https://perma.cc/WB42-G7BE>]; *All Actions H.R. 1280 - 117th Congress (2021-2022)*, CONGRESS.GOV (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1280/all-actions> [<https://perma.cc/P69F-7JBD>].

12. *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

13. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194 (2004); Plumhoff v. Rickard, 572 U.S. 765 (2014) (per curiam).

able in the absence of prior governing legal precedents involving highly similar facts.¹⁴ Further, courts often hold that officials have not violated “clearly established” rights without answering whether those officials have nonetheless violated victims’ constitutional rights.¹⁵ And in turn, because the doctrine of qualified immunity stunts the development of constitutional law, finding precedents that clearly establish the existence of a right often proves elusive.¹⁶ This area of law has faced withering critiques rooted in textualism, empirical facts, and conceptions of accountability.¹⁷

Qualified immunity, to be sure, is a troubled doctrine that calls out for scrutiny and reform. This Essay argues, however, that there are additional changes to litigation in federal courts that would more readily facilitate the types of structural, systemic changes necessary to reduce state-sanctioned violence on a mass scale. Specifically, litigation-minded policymakers and advocates should aim to lower the exceptionally high bars (1) to litigation against government *entities*, and relatedly, (2) to suits for injunctive relief.

As leading academic literature makes clear, the causes of state violence are complex, varied, and deeply structural.¹⁸ Before any individual officer is

14. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 267–268 (2013).

15. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court held that when confronted with qualified immunity defenses, lower courts must first answer whether the alleged conduct violated the Constitution, and then answer whether the violation breached a clearly established right. This mandatory sequencing proved rather controversial and faced criticism in its own right. See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009) (contending that although courts often opined about the existence of a constitutional violation, these opinions often unnecessarily restricted, rather than expanded, rights); Pierre N. Leval, Madison Lecture, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275 (2006) (calling *Saucier* a “puzzling misadventure in constitutional dictum”). In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Supreme Court reversed course, holding that lower courts have the discretion to decline to opine about whether a constitutional violation has been alleged. Today, courts vary widely with respect how they use that discretion, and rarely explain what variables are guiding that discretion in a given case. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015).

16. See Michael L. Wells, *Qualified Immunity After Ziglar v. Abbasi: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 431 (2018).

17. See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (arguing that the doctrine “lacks legal justification, and the Court’s justifications are unpersuasive”); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 70 (2017) (contending that the doctrine’s basic justifications lack empirical and logical support); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2095 (2018) (“In recent years, federal courts scholars have undermined some of the basic empirical and legal assumptions undergirding qualified immunity . . .”).

18. See ZIMRING, *supra* note 6, at 11 (observing that a police killing is often wrongly perceived “as an individual drama featuring its protagonists rather than as part of a set of larger governmental policies that apply to hundreds of different conflicts that produce attacks”); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017) (examining how stereotyping and dehumanization of Black men in culture and law facilitate violence against that group); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1789–90 (2020)

positioned to choose whether to kill or injure someone, policymakers have engaged in a wide range of decisions that encourage frequent, fraught, and unequal contact with and control over Americans. Accordingly, legal changes (including litigation-based reforms) should aim to impact the policy choices that bring officers into frequent, fraught, and unequal physical contact with Americans in the first place. Governmental policymakers can make decisions of scale in ways that individual officers simply cannot. We should aim to craft jurisdictional rules that influence *those* decisions.

Part I of this Essay demonstrates the special place that the doctrine of qualified immunity has played in congressional proposals about policing reform. The Part juxtaposes these proposals, which focus on making it easier to hold individual officers accountable, with extant legal literature about some of the causes of racially disparate police violence in the United States, relying in particular on work by Devon Carbado¹⁹ and Frank Zimring.²⁰ I argue that while reforming suits against individual officers can serve to enhance procedural justice and even reshape systemic incentives, this kind of litigation will not tend to unearth systemic, negligent patterns on the part of a city or a department. Thus, such suits would, at best, only indirectly deter systemic, troubling city policies that promote unlawful violence. Further, eradicating qualified immunity would have no effect on suits seeking to enjoin unlawful policies and practices that promote state-sanctioned violence.

Part II shifts attention to other reforms that are better tailored to systemic or structural reforms. This includes expanding litigation against municipalities by, at a minimum, lowering the standard of fault to negligence.²¹ This also includes permitting state attorneys general to sue entities with patterns or practices of constitutional violation.

I. REVISITING THE CENTRALITY OF QUALIFIED IMMUNITY

With increased urgency and volume, many Americans have engaged in or witnessed the “vociferous chants and marches that seem to erupt each

(“Police violence is (1) authorized by law, (2) takes various, interconnected forms, (3) that occur in routine and common place ways, that are (4) targeted along the dimensions of race, class, and gender, and (5) constitute and produce our political, economic, and social order.”); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1189 (2017) (assessing the role that law plays in distributing the risk of encountering police violence); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (offering a compelling set of systemic explanations for police violence against Black Americans); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014) (documenting and critiquing federal underenforcement of 42 U.S.C. § 4141, which allows the Department of Justice to sue police departments to stop patterns and practices of violations).

19. See generally Carbado, *supra* note 18.

20. See generally ZIMRING, *supra* note 6.

21. See generally Jeffries, *supra* note 14 (advocating for fault liability for government officials and entities, including municipalities).

summer in cities from Ferguson to Baltimore to Baton Rouge²² to Minneapolis. Proposals for legal reform have been copious and diverse.²³ These proposed reforms from lawmakers and activists at the federal, state and local level have aimed at reducing state-sanctioned violence, increasing accountability when unnecessary state-sanctioned violence occurs, redressing systemic racism, and combinations thereof. Because my primary expertise is the jurisdiction of federal courts, for the purposes of this short Essay I will focus on a narrow sliver of these reforms: proposals in the United States Congress that aim to reform civil litigation.

A. *The Prominence of Qualified Immunity*

To date, one feature that proposed bills have in common is their focus on opening up civil liability against individual government officials, especially by way of eliminating or reforming the doctrine of qualified immunity.²⁴ Because it has twice passed the House of Representatives, the George Floyd Justice in Policing Act has proven to be the most successful of these proposals. That bill, among other features, would eliminate qualified immunity for law enforcement officials.²⁵ Alongside that bill, federal lawmakers have filed other proposals for litigation reform as well: the Ending Qualified Immunity Act and the Reforming Qualified Immunity Act.²⁶ The Ending Qual-

22. Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2358 (2018).

23. See, e.g., Nicholas Fandos, *Democrats to Propose Broad Bill to Target Police Misconduct and Racial Bias*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/06/us/politics/democrats-police-misconduct-racial-bias.html> [<https://perma.cc/N2LU-DSB4>]; Derek Hawkins et al., *9 Minneapolis City Council Members Announce Plans to Disband Police Department*, WASH. POST (June 8, 2020, 6:17 AM), <https://www.washingtonpost.com/nation/2020/06/07/george-floyd-protests-live-updates/> [<https://perma.cc/QM79-5GKH>]; Ray Sanchez, *Police Reforms Quickly Take Hold Across America. It's Only Just Getting Started*, CNN (June 14, 2020, 7:06 PM), <https://www.cnn.com/2020/06/14/us/george-floyd-national-police-reforms/index.html> [<https://perma.cc/LGE8-ZD39>]; Sophia Ankel, *30 Days that Shook America: Since the Death of George Floyd, the Black Lives Matter Movement Has Already Changed the Country*, BUS. INSIDER (June 24, 2020, 12:58 PM), <https://www.businessinsider.com/13-concrete-changes-sparked-by-george-floyd-protests-so-far-2020-6> [<https://perma.cc/4ALR-NTPR>]; Ivan Pereira, *Cities Across US Announce Police Reform Following Mass Protests Against Brutality*, ABC NEWS (June 12, 2020, 3:08 PM), <https://abcnews.go.com/US/cities-us-announce-police-reform-mass-protests-brutality/story?id=71130499> [<https://perma.cc/7ZUV-XJSA>]; Rebecca Klar, *Atlanta Mayor Signing Orders to Reform Police Use of Force*, THE HILL (June 15, 2020, 7:57 PM), <https://thehill.com/homenews/state-watch/502861-atlanta-mayor-signing-orders-to-reform-police-use-of-force-policies> [<https://perma.cc/356F-S6PE>].

24. For an excellent forthcoming description, and critique, of the ways that qualified immunity has dominated conversations about reforming federal constitutional litigation, see Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. (forthcoming 2022).

25. See George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021).

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

ified Immunity Act, first introduced in June 2020, would have wholly “remove[d] the defense of qualified immunity” in federal constitutional suits against officials acting under color of state law.²⁷ Moreover, the proposed Reforming Qualified Immunity Act would prohibit courts from inoculating a state or local official from suit unless defendants could affirmatively show, with some particularity, that the conduct at issue was authorized by law.²⁸

Qualified immunity applies to suits that seek damages against most classes of government officials in their individual capacities. I say “most classes” because some officials receive various forms of *absolute* immunity. For example, suits may not be launched against individual prosecutors for conduct deployed in their adversarial role.²⁹ Suits against legislators for their legislative functions are impermissible as well.³⁰ Moreover, damages suits against individual judges for their judicial conduct are categorically impermissible.³¹ Other officials are generally only entitled to qualified immunity, which shields defendants from liability unless their conduct violates a clearly established right that a reasonable person would have known of at the time of the violation. That standard is traceable to the Supreme Court’s 1982 case *Harlow v. Fitzgerald*.³²

Qualified immunity is a high barrier. Consider, for example, the case *Jessop v. City of Fresno*, in which plaintiffs alleged that officers, upon executing a warrant, stole hundreds of thousands of dollars from them for their own personal use.³³ Plaintiffs contended that the theft violated their Fourth Amendment and substantive due process rights.³⁴ But the Ninth Circuit held that the officers were entitled to qualified immunity, observing that it was not clearly established that this type of theft was unconstitutional.³⁵ Remarkably, that case arose from a circuit that has been consistently warned by the Supreme Court that it apparently does not grant qualified immunity enough. In the words of the Supreme Court, it has “repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.”³⁶ Overcoming qualified immunity generally requires ei-

27. H.R. 7085.

28. S. 4036. Specifically, the proposal would seek to remove the existing doctrine of qualified immunity and instead provide that an individual defendant “shall not be liable” if the defendant reasonably believed that his or her conduct was lawful and either (1) the conduct at issue was “specifically authorized or required” by federal or state law, or (2) a federal or state court had issued a final decision holding that “the specific conduct alleged to be unlawful was consistent with the Constitution of the United States and Federal laws.” *Id.* § 4.

29. *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976).

30. *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998).

31. *Stump v. Sparkman*, 435 U.S. 349, 355 (1978).

32. 457 U.S. 800 (1982).

33. 936 F.3d 937, 940 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

34. *Jessop*, 936 F.3d at 939.

35. *Id.* at 943.

36. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015)).

ther a governing appellate case with materially similar facts, or an “obvious” violation of a previously articulated legal rule.³⁷ Cases like *Jessop* help expose the consequences this rule has for constitutional accountability. The violation in *Jessop* is one that few would condone. And yet, the victims’ constitutional rights were insufficiently clear to merit a remedy.

B. *The Merits of Individual Liability*

Increasing liability against individual officers has at least two primary benefits. First, and most notably, this move would reduce the significant gap between rights and remedies that currently exists with respect to constitutional adjudication.³⁸ Under extant doctrines, when government officials engage in illegal conduct, there is sometimes no meaningful way to hold the officers accountable.³⁹ By way of example, consider the *Jessop* case again. As noted, the aggrieved plaintiffs could not sue the individual officers to recover their stolen funds.⁴⁰ But the barriers to relief did not end there. The claims against the city were dismissed because victims may not rely on a theory of respondeat superior liability to sue employers for the unconstitutional actions of their employees.⁴¹ Attempts to achieve prospective relief—declaring such conduct illegal or enjoining such practices in the future—likely would not have been permissible either. Under tightly circumscribed readings of Article III of the Constitution, a plaintiff may only obtain such relief if he or she can demonstrate that she is very likely to experience the same type of violation again in the future.⁴² The net result: “When governmental actors offend federal rights, victims are often left with no one to hold accountable in federal courts.”⁴³

Opening any of these avenues to relief then would reduce the rights-remedies gap and, in the process, arguably help to ameliorate concerns among the public that the legal system tends to treat officers as above the law. When a community believes that the legal system is built such that accountability perpetually alludes some classes of persons, this deepens a perception that the legal system is plagued by procedural inequality and unfairness. And as I have observed elsewhere, “when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces

37. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002).

38. See Fred O. Smith, Jr., *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016).

39. *Id.* at 409.

40. *Jessop*, 936 F.3d at 940 (9th Cir. 2019).

41. *Jessop v. City of Fresno*, No. 15-cv-0036, 2017 WL 3264039, at *10 (E.D. Cal. Aug. 1, 2017), *aff'd*, 936 F.3d 937 (9th Cir. 2019).

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

43. Smith, *supra* note 38, at 409.

anomie in some groups that leaves them with a sense of statelessness.”⁴⁴ Lowering the barrier to individual immunity counters this concern, because it means that there are constitutional violations that might receive a remedy that otherwise would not receive a remedy at all. That is an improvement over the status quo.

Second, by attaching individual consequences to violating constitutional rights, legislation could potentially deter officers from violating the law. This, to be sure, is a debatable proposition. Joanna Schwartz, the nation’s leading empiricist regarding qualified immunity, demonstrated that when police officers are found liable for constitutional violations, the resultant judgments are virtually always paid by the officer’s employers through indemnification.⁴⁵ This fact surely weakens any claim that holding individual officers liable will shape individual decisions by officers, because many of this shift’s consequences will be borne out by the taxpayer rather than the individual officer. Still, to the extent that officers nonetheless prefer not to have judgments issued against them in their individual capacities,⁴⁶ lowering the bar to individual liability could theoretically have some effect.

C. *Limits of Individual Liability*

While permitting suits against individual officers improves upon a system in which constitutional violations often go wholly unremedied, this mode of accountability has significant limitations. Well before an officer interacts with a citizen, there is a substantial range of policy choices that have encouraged and influenced the interactions. For example, substantive laws have defined which behavior should be classified as criminal. Local policymakers have also made choices about where officers should focus their time and how those officers should be trained. These decisions, among others, are systemic choices that suits against individual officers are inadequately equipped to influence.

To make these points more concrete, it is useful to consider the work of Devon Carbado, who has written powerfully and clearly about six causes of what he calls “blue-on-black violence.”⁴⁷ The first is a set of social forces (including segregation, stereotyping, and permissive Fourth Amendment doctrines) that encourage frequent contact and surveillance of Black Americans.⁴⁸ Second is the frequency of “surveillance and contact” that cre-

44. Smith, *supra* note 22, at 2356. For support of this proposition, see Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 350 (2003); Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066 (2017); AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP 7-13 (2014).

45. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1806 (2018).

46. See Smith, *supra* note 17, at 2108–09.

47. Carbado, *supra* note 18, at 1483–84.

48. *Id.* at 1483.

ates more opportunities for blue-on-black violence.⁴⁹ Third, “[p]olice culture and training encourages that violence.” Fourth, legal actors and institutions interpret that violence as lawful.⁵⁰ Fifth, qualified immunity dampens opportunities for accountability.⁵¹ Sixth, the reduced accountability “diminishes the incentive for police officers to exercise care with respect to when and how they deploy violent force.”⁵²

Addressing these causes requires more than accountability for *individual* police officers. Individual officers did not invent segregation, stereotyping, and racially inflected dehumanization. Individual officers do not decide to disproportionately patrol, frisk, or question people of color. Individual officers do not decide the rules of engagement for physical contact with the citizenry: when officers may legally stop people, or what they may do when they stop them. Individual officers do not decide what we label “crime” and when we as a society decide to invoke the most violent arm of the state to solve social ills. (For that matter, individual officers did not make the policy choices that have resulted in a nation flooded with firearms, increasing the probability that the person any officer is interacting with is armed.)⁵³

Policy decisions not only help explain the unequal degree of force and control in Black communities, but also help explain the unequal degree of force and control in the United States compared to other nations.⁵⁴ As Frank Zimring explains in his meticulously researched book *When Police Kill*, “[u]ntil police departments become willing to spend time, money, and management effort on resolving conflicts without killings, nothing significant can happen.”⁵⁵ Instead, “[o]nce the value of civilian lives becomes a priority for policy planning, a significant number of changes in police protocols, training, and evaluation of critical incidents can make changes happen quickly and safely.”⁵⁶

Reforms centering qualified immunity are not tailored toward shaping these kinds of systemic incentives of policymakers. It is not readily apparent that, in suits against individual officers, the patterns and practices of the police department would be germane, admissible evidence at trial. Moreover, such reform would not make it easier for courts to enjoin cities’ unlawful practices. An injunction can, for example, require a defendant to adopt law-

49. *Id.*

50. *Id.*

51. *Id.* at 1483–84.

52. *Id.* at 1484.

53. See Christopher Ingraham, *There Are More Guns than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST (June 19, 2018, 8:31 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership> [<https://perma.cc/F4RU-KMH6>].

54. See ZIMRING, *supra* note 6, at 247.

55. *Id.* at 219.

56. *Id.* at 219–20.

ful practices, policies that can remediate past constitutional violations, and even policies that would prevent future violations.⁵⁷ Failure to comply can result in being held in contempt of court.⁵⁸ By comparison, allowing suits against individual officers would impact the incentives of local policymakers only indirectly, given that such judgments tend to be paid by local governments.⁵⁹

Relatedly, suits against individual officers would not generally force a public airing of systemic problems in police departments, and therefore would not necessarily influence democratic dialogue in ways that could encourage additional reforms. In Charles F. Sabel and William H. Simon's 2004 article in the *Harvard Law Review*, they argued that litigation against governmental institutions has increasingly moved to a model that encourages active participation by institutional defendants in shaping provisional, rolling remedies to achieve the desired outcomes.⁶⁰ Because this kind of institutional litigation "expos[es] poor performance as clearly as possible, it opens the system to general scrutiny and exposes it more readily to nonjudicial intervention."⁶¹ This approach also serves to untether defendants' decisionmaking from the political economy that allowed the harms to persist in the first place.⁶² These potent features of litigation against governmental institutions are less prevalent in cases against individual officers.

II. FEDERAL COURTS AND SYSTEMIC REFORM

Beyond altering the doctrine of qualified immunity, are there other judicial reforms that could serve to shape the incentives, knowledge, and, ultimately, actions of policymakers in ways that could meaningfully reduce injustices, inequality, and unnecessary death in the criminal legal system? Indeed, the seeds of such reforms have already appeared in two pieces of litigation legislation proposed by members of Congress. Unlike the George Floyd Justice in Policing Act and the Ending Qualified Immunity Act, the proposed Reform Qualified Immunity Act sought to make it easier for indi-

57. See generally OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); 19 FEDERAL PROCEDURE, LAWYERS EDITION § 47:1 (2019).

58. See, e.g., *Fryzel v. Mortg. Elec. Registration Sys., Inc.*, 719 F.3d 40, 43 (Souter, Circuit Justice, 1st Cir. 2013).

59. See *supra* note 46 and accompanying text.

60. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1073 (2004).

61. *Id.*

62. *Id.* at 1062 ("A public law destabilization right is a right to disentrench or unsettle a public institution when, first, it is failing to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction. In the typical pattern of the new public law suit, a finding or concession of liability triggers a process of supervised negotiation and deliberation among the parties and other stakeholders. The characteristic result of this process is a regime of rolling or provisional rules that are periodically revised in light of transparent evaluations of their implementation."); see also Fred O. Smith, Jr., *Remediating Resistance*, 71 ALA. L. REV. 641 (2020).

vidual plaintiffs to bring suits against cities under a theory of respondeat superior liability.⁶³ Moreover, the George Floyd Justice in Policing Act contains an innovative provision that would permit state attorneys general, and others authorized by State law, to bring suits against agencies that specialize in juvenile criminal justice, when such agencies have a demonstrable pattern or practice of unconstitutional violations.⁶⁴ This Part recommends that Congress take the best of both of these proposals. Congress could enact legislation that permits state attorneys general to sue *any* state or local law enforcement agencies within their jurisdiction that engages in a pattern or practice of constitutional violations. Such a reform would open the door to systemic change through litigation, while also respecting state autonomy.

A. Expanding Municipal Liability

For decades, scholars have argued that plaintiffs should be permitted to sue local governments for the actions of their employees⁶⁵ or, at a minimum, for local supervisors' negligence.⁶⁶ Typically, nongovernmental defendants may be held liable for the acts of their agents.⁶⁷ This is not the case with respect to local governments however, in light of *Monell v. Department of Social Services*. There, the Supreme Court held, for the first time, that victims could sue local governments for unconstitutional policies.⁶⁸ The Court simultaneously held, however, that victims could not rely on a theory of respondeat superior liability to sue local governments.⁶⁹ Instead, as became clear through a series of cases in the 1980s, victims may only sue cities for unconstitutional ordinances or regulations, unconstitutional deeply entrenched customs, actions directed or authorized by a final decisionmaker with final policymaking authority, or deliberate indifference exhibited by a final decisionmaker with final policymaking authority.⁷⁰

This line of jurisprudence has been widely critiqued as atextual, ahistorical, and an unnecessary exacerbation of the rights-remedies gap.⁷¹ Moreover,

63. See Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020).

64. See George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 103(d) (2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 103(d) (2021).

65. See Smith, *supra* note 38, at 418, nn.41 & 42.

66. See Jeffries, *supra* note 14.

67. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 693–94 (1978).

68. *Id.* at 663.

69. *Id.* at 694.

70. Smith, *supra* note 38, at 439.

71. See Vodak v. City of Chicago, 639 F.3d 738, 747 (7th Cir. 2011) (Posner, J.) (noting “scholars agree” heightened causation requirement is based upon “historical misreadings (which are not uncommon when judges play historian)”; David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2196 (2005) (“The Court’s conclusions rest on historically inaccurate assumptions about the nineteenth-century justifications for respondeat superior.”); see also Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions:*

permitting suits against local governments does not suffer from some of the limitations faced by reforms that center on suits against individual officers. Permitting suits against local governments on a theory of negligence, for example, *would* tend to produce evidence of illegal patterns. And such evidence could form the basis of additional policy forms. In addition, as Charles Epp has shown, in other contexts where respondeat superior liability has been permitted against cities, monetary judgments (and potential judgments) have incentivized local governments to take remedial measures in order to decrease risk of harm.⁷² Reforming municipal liability would be a welcome complement to reforming qualified immunity. And if policymakers were forced to choose between the two, reforming municipal liability would represent the more impactful reform.

Nonetheless, permitting additional damages suits against cities brings three significant limitations and costs. First, even if victims of constitutional injuries were permitted to sue for damages, this would not necessarily mean that victims could seek prospective relief under a broader range of circumstances than the extant doctrine given the Supreme Court's strict interpretation of Article III.⁷³ This is a significant limitation, because prospective relief has often proven to be an indispensable component of solutions aimed at institutional reform. In areas of American life ranging from mental-health institutions, to prisons, to local courts, prospective relief has proven particularly effective at destabilizing or reforming institutions plagued by patterns of widespread violations of the Constitution.⁷⁴

Second, suits against local governments come with, perhaps inevitable, costs to state autonomy and representative government. A judgment paid to a victim of lawless conduct is, potentially, money that will not be allocated to improving a school or fixing a dangerous sidewalk at the direction of the voters (and taxpayers).⁷⁵

A *Comment on Connick v. Thompson*, 80 *FORDHAM L. REV.* 715, 730–31 (2011) (suggesting prosecutorial “tunnel vision” and other cognitive biases that lead to unintentional *Brady* violations could be deterred but are not because of *Monell* and related cases); Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 *HARV. C.R.-C.L. L. REV.* 273, 304 (2012) (arguing there “is no reason” to apply Eighth Amendment’s stringent culpability test to § 1983 objective-deliberate-indifference cases because “subordinate’s constitutional violation has already been adjudicated” and “only remaining question is statutory”); Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 *GEO. L.J.* 1753, 1755 n.13 (1989) (“At its birth, the doctrine bore the unmistakable imprint of bastardy; its supporting rationale suggests nothing so much as a split-the-difference judicial compromise, a quid pro quo . . .”).

72. See CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* 202–13 (2009).

73. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982).

74. Sabel & Simon, *supra* note 60.

75. Cf. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. CHI. L. REV.* 345, 377 (2000) (questioning whether constitutional damages suits deter future constitutional harm or whether, instead, “rational elected officials

Third, expanding suits against cities would leave significant categories of government actors and agencies unaffected. State governments still would not be subject to suit, even for the conduct of *their* agents, such as prison guards and other state employees. In some states, even sheriffs are classified as state policymakers rather than local policymakers.⁷⁶

B. *Enlisting State Attorneys General*

The George Floyd Justice in Policing Act seeks to expand federal courts' ability to entertain cases against governmental entities that bear "responsibility for the administration of juvenile justice or the incarceration of juveniles."⁷⁷ Specifically, the Act seeks to amend 34 U.S.C. § 12601, which reads, in part:

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.⁷⁸

The Act would amend this provision by allowing "the attorney general of any State, or such other official as a State may designate" to "bring a civil action in the appropriate district court of the United States to obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."⁷⁹

This amendment would be innovative and important for four reasons. First, because individual plaintiffs often do not have standing to seek prospective relief,⁸⁰ equipping an actor that *does* have standing (i.e., the state) with the power to seek this relief is a useful intervention. Second, by permitting such legal challenges against government agencies and municipalities, this creates the possibility that relief can directly influence the policymakers who shape the criminal legal system, rather than individual officers. Third, such suits would have created opportunities for the public documentation and airing of violations beyond any single incident. Fourth, unlike an extant provision, this amendment does not simply deputize the *federal* Department

will raise revenue from the least politically costly sources, such as broad-based taxation or minimal cuts in a number of programs supported by diffuse or otherwise weak groups").

76. See, e.g., *McMillian v. Monroe Cnty.*, 520 U.S. 781, 793 (1997); *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1329 (11th Cir. 2003) (adopting a county's position that when its sheriff served law-enforcement functions, "the Sheriff was an agent of the state, not a policymaker for the county"). *But see* *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 401 (1997) (noting a county's stipulation that its sheriff was a county policymaker).

77. 34 U.S.C. § 12601(a).

78. *Id.*

79. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 103(d) (2021).

80. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982).

of Justice to file suits against policing agencies that routinely violate federal law.⁸¹ Rather, it deputizes fifty state governments, thereby increasing the capacity for such suits to be launched against more agencies, while still respecting federalism-based values like comity, local accountability, and local expertise.

The proposed amendment in the George Floyd Justice in Policing Act did, however, have a significant limitation. It only would have applied to those “with responsibility for the administration of juvenile justice or the incarceration of juveniles,”⁸² instead of applying more broadly to state and local agencies responsible for the administration of criminal enforcement and corrections. Limiting this innovation to juvenile justice, in a law named after an unjustly killed adult, is too small for this moment.

C. *A Path Forward*

Nothing in this Essay intends to suggest that altering qualified immunity should be absent from the menu of reforms. Eradicating qualified immunity for federal, state, and local law enforcement officials would be a significant improvement over the current state of the law. It would dramatically reduce the rights-remedies gap and improve perceptions of procedural fairness. Further, to the extent that employers ultimately pay judgments through indemnification, allowing suits against officers indirectly incentivizes policymakers to revisit decisions that result in disproportionate violations.

Congress should also carefully consider two reforms that have not been central to the public and policy conversations around addressing police violence. First, Congress should expand municipal liability by, at a minimum, permitting suits against cities for negligence. This will expand opportunities to serve the democratic function of producing public information about violations beyond any individual incident. As described in Part I, this kind of information production is a central feature of successful litigation against governmental institutions, as it tends to make continuing without policy intervention by nonjudicial action less tenable. Second, Congress should create a cause of action for designated state officials to seek prospective relief against state and local law enforcement entities that exhibit a pattern or practice of violations. This helps lessen the burden of the often-intractable barrier of Article III standing that victims of illegal violence often face when they seek injunctive relief as mere private litigants. This would, in turn, provide more opportunities for courts to provide relief tailored toward remedying and preventing systemic policies that facilitate police violence.

81. See 34 U.S.C. § 1260.

82. 34 U.S.C. § 12601(a).

Law alone cannot deepen our national reservoir of love and empathy. Law alone cannot teach us to see each other as humans worthy of, as Monica Bell once put it, “safety, friendship, and dreams.”⁸³ But while law cannot teach us to love, law can create forums that force us to listen. And law can open the door to remedies designed to alter and, where necessary, destabilize broken systems. Those goals guide the reforms here. While eradicating qualified immunity would open the courthouse doors to more evidence as to whether an individual officer should be held accountable for taking someone’s life, suits against cities also open the door to accounts about a city’s broader patterns, practices, and policies that frequently place officers into fraught settings. Moreover, whereas allowing plaintiffs to recover for damages would compensate injured parties, creating avenues for injunctive relief would also facilitate judicial mandates that alter those patterns, practices, and policies.

It may well be possible that legal reform should aim even higher when it comes to federal judicial reform. But simply eradicating qualified immunity is not aiming high enough.

83. Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703 (2019).

