THE YALE LAW JOURNAL

SARAH L. SWAN

The Plaintiff Police

ABSTRACT. In civil litigation, police officers typically occupy the role of defendant, regularly responding to allegations of excessive force, unlawful arrest, and discriminatory policing. However, police officers can also don a different litigative role: that of plaintiff. In the wake of the Black Lives Matter protests and the increased attention to police violence, for example, officers quite frequently sue the people they police. These tort suits allege all sorts of harms, including physical injuries from confrontations, emotional harms from "being forced" to inflict violence on others, and defamation and privacy harms said to flow from complaints of police misconduct.

These plaintiff police lawsuits have profound practical and political significance. They bring core and fundamental principles of justice into serious tension: on the one hand, the idea of open courts and the right to petition for redress of grievances are prized properties of the American legal system, and all who suffer wrongful injuries—including police officers—deserve to seek compensation and deterrence. On the other hand, these lawsuits inflict a plethora of harms. They exacerbate a power imbalance between the police and those who are policed; they have a demonstrable chilling effect on political participation; they add to an accountability mismatch where citizens seeking to sue police face significant procedural and doctrinal hurdles, but police can sue citizens with relative ease; and they constitute a distinct democratic harm that degrades the relationship between the citizenry and local governments in troubling ways. This Article argues that the competing values of democracy, political participation, compensation, and deterrence are best served by disallowing plaintiff police suits in all but a very narrow set of circumstances. And it offers a feasible framework for implementing reforms.

AUTHOR. Professor of Law and Dean's Civil Governance Scholar, Rutgers Law School (Newark). For helpful comments and conversations, many thanks to Anita Bernstein, Samuel Beswick, Ellen M. Bublick, Nestor M. Davidson, Rachel Harmon, Wayne A. Logan, David L. Noll, Luke Norris, Kathryn A. Sabbeth, Anthony Sangiuliano, Joanna C. Schwartz, Matthew A. Shapiro, Nadav Shoked, Zoë Sinel, G. Alex Sinha, Malcolm Thorburn, Reid Kress Weisbord, and the participants of the Tort Law and Social Equality Speaker Series, the Cardozo Law School Faculty Workshop, and the 2023 State and Local Government Law Works in Progress Conference at Northwestern Pritzker School of Law.

ARTICLE CONTENTS

INTRODUCTION 1185

I. POLICE AS PLAINTIFFS 1190

A. The Litigation Landscape 1191

1. Policing Protests 1192
2. Defamation Related to Complaints of Misconduct 1197
3. Direct Physical Injuries 1201
4. Emotional Harms 1204

B. A Brief History of Plaintiff Police Claims 1207

C. Catalysts and Context 1212

1. Racial Tensions 1212
2. Blurring of Civil and Criminal Lines 1214
3. Role Reversals in Litigation and Their Surrounding Politics 1217

II. COMPETING INTERESTS AND VALUES WITH POLICE AS PLAINTIFFS 1222

A. Justifications and Rationales 1223

1. Access to Courts 1224
2. Compensation 1225
3. Deterrence 1227
4. The Expressive Value of Tort Law 1227

B. Harms 1229

1. Exacerbating Existing Power Inequalities 1229
2. Widening an Accountability Mismatch 1232
3. Police as Private Plaintiffs and Public Defendants 1238
4. Chilling Free Speech and Political Conduct 1243
5. The Democratic Harm 1245

III. CREATING A GOVERNING FRAMEWORK 1248

A. Anti-SLAPP Laws 1250

B. The Professional-Rescuer Rule 1254

C. Workers' Compensation and Administrative Remedies 1261

D. Deterrence and Criminal Remedies 1265

CONCLUSION 1268

INTRODUCTION

On civil court dockets, police officers are common and constant defendants.[1] The injuries police inflict on the citizenry each year create a continuous deluge of claims: victims of excessive violence, unlawful arrests, and civil-rights violations regularly bring lawsuits against the police for these harms.[2]

However, police officers can also assume a different litigative role: that of plaintiff.[3] In the wake of the Black Lives Matter movement, for example, police officers quite frequently sue the individuals they police, both by bringing counterclaims in existing litigation and by initiating the first complaint in a proceeding.[4] These officers allege a wide variety of injuries and harms, including physical injuries incurred while policing, emotional harms said to arise from "being forced" to inflict police violence on others, and defamation and privacy harms related to complaints of police misconduct. As a small sampling: the police officers who conducted a botched search of rapper Afroman's residence sued him for defamation when he put recordings of their actions into his music videos;[5] multiple officers have sued Black Lives Matter protestors for physical and emotional injuries resulting from the ensuing clashes;[6] an officer who shot Breonna Taylor sued her boyfriend for shooting at the police when they burst into her apartment unannounced;[7] and an officer who shot and killed a mentally ill teenager in Chicago sued the teenager's family for creating the scenario that "forced" the officer to shoot.[8]

---

1. *See* JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 7-16 (2023).
2. Well over 5,000 lawsuits are brought against the New York City Police Department each year, for example. *See Annual Claims Report Fiscal Year 2023*, OFF. OF THE N.Y.C. COMPTROLLER 27 (Apr. 2024), https://comptroller.nyc.gov/wp-content/uploads/documents/Annual-Claims-Report-FY2023.pdf [https://perma.cc/W94B-MWTS].
3. *See, e.g.*, David A. Graham, *Why the Officer Who Killed Quintonio LeGrier Is Suing Him*, ATLANTIC (Feb. 8, 2016), https://www.theatlantic.com/national/archive/2016/02/why-the-officer-who-killed-quintonio-legrier-is-suing-him/460443 [https://perma.cc/7CEG-L9ZR].
4. Filing the first suit and acting as the plaintiff in a given matter can bring certain strategic advantages. *See, e.g.*, Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 110-11 (2018) (noting that the plaintiff selects when to begin the litigation, the pace of proceedings, and the forum for the case).
5. *See infra* notes 84-86 and accompanying text.
6. *See infra* Section I.A.1.
7. *See infra* notes 96-105 and accompanying text.
8. *See infra* notes 117-122 and accompanying text.

These suits are profoundly important, both politically and practically. They bring into tension serious and core principles of justice and democracy. On the one hand, open courts and the right to petition for redress of grievances are prized properties of the American legal system, and those who receive wrongful injuries deserve a path to compensation and deterrence. Access to courts is such an important right, in fact, that it is explicitly enshrined in the vast majority of state constitutions,[9] and the right to bring litigation and to call to account those who harm us in legally cognizable ways is often cited by scholars as a fundamental feature of any society that calls itself democratic.[10] Corrective-justice principles dictate that wrongdoers should be held accountable when they injure others, and a central purpose of the entire system of tort law is to compensate those who are wrongfully injured.[11] Further, giving police officers the option of pursuing civil damages for on-the-job injuries arguably aids society by helping to ensure that people keep choosing to become police officers, and avoids the potential unfairness of limiting the right to sue based on a person's chosen profession.[12]

On the other hand, these plaintiff police lawsuits inflict a parade of harms. First, these suits exacerbate the immense power imbalance between the police and the policed. An encounter with a police officer is an encounter with "the force"—a designated member of an armed collective with access to the massive resources of the state, who is empowered to use lethal violence and restrain and imprison individuals with little outside oversight.[13] The individuals who are usually on the receiving end of policing tend to be those who are marginalized on raced, classed, and gendered dimensions, while police officers are privileged holders of a public office, tasked with physically enforcing the law.[14] When these officers sue those whom they police, their special status heightens the structural power disparity between the parties, and they can use their proximity to the criminal law to the detriment of those they sue.[15]

9. Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 RUTGERS U. L. REV. 905, 915 (2018).

10. *See infra* notes 225-230 and accompanying text.

11. Erik Encarnacion, *Corrective Justice as Making Amends*, 62 BUFF. L. REV. 451, 451-53 (2014).

12. *See, e.g.*, Minnich v. Med-Waste, Inc., 564 S.E.2d 98, 103 (S.C. 2002); Ellen M. Bublick & Jane R. Bambauer, *Tort Liability for Physical Harm to Police Arising from Protest: Common-Law Principles for a Politicized World*, 73 DEPAUL L. REV. 263, 273 (2024).

13. *See infra* Section II.B.1.

14. *See infra* Section II.B.1.

15. *See infra* Section II.B.1.

Second, plaintiff police lawsuits create an accountability asymmetry. When citizens sue the police, they face a challenging series of procedural and doctrinal obstacles likely to torpedo their litigation.[16] Because police officers are a special kind of public actor, a complex matrix of special rules governs claims against them, and most claims fail as a result.[17] But when police officers sue citizens, their public status suddenly transforms into a more "private" one, with almost no special rules attaching.[18] Citizens, then, are left with very little ability to sue police successfully, while the police have a much greater ability to sue citizens successfully.

Third, and perhaps most importantly, plaintiff police suits constitute a distinct democratic harm that degrades the relationship between the citizenry and local governments.[19] The vast majority of police officers in the United States are local officers, employed by a municipality or other local government, and police officers are prominent representatives of those localities.[20] Contact with police officers is a highly salient way that "[c]itizens learn about how government works and whether government officials value them."[21] Police-citizen interactions are inherently and deeply political: they constitute "a moment when the citizen and the city come face to face."[22] Indeed, a comprehensive sociologi-

16. *See infra* Section II.B.2. The term "citizen" in this Article is used broadly to mean a member of a political community, and it is not meant to reference "the formal distinction delineating citizens and non-citizens under various U.S. legal regimes." Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1485 n.1 (2022).

17. *See infra* Section II.B.2.

18. *See infra* Section II.B.3.

19. *See infra* Section II.B.5.

20. *See* Nadav Shoked, *Local in a Peculiar Way: The Police Force in American Law*, 172 U. PA. L. REV. 1291, 1292-93 (2024) (noting that "[a]lmost all those writing about the police note that policing in America, unlike elsewhere, is a local affair," and "83% of all police officers in the United States work for 'local law enforcement agencies'"); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 456-57 (2016). Police officers also enforce municipal criminal laws. *See* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1413-14 (2001).

21. Amy E. Lerman & Vesla M. Weaver, *Staying Out of Sight? Concentrated Policing and Local Political Action*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 206 (2014) [hereinafter Lerman & Weaver, *Staying Out of Sight?*]; *see also* AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 125 (2014) [hereinafter LERMAN & WEAVER, ARRESTING CITIZENSHIP] (discussing the effects of custody and other criminal-justice involvement on self-perceptions of citizenship).

22. Sarah L. Swan, *Public Duties for the New City*, 122 MICH. L. REV. 315, 326 (2023); *see also* LERMAN & WEAVER, ARRESTING CITIZENSHIP, *supra* note 21, at 112-25 (recounting interviewees' comments about the dehumanization, stigma, and politicizing effects of regular encounters with the police).

cal study of citizens who have had police encounters concludes that the police and other institutions of law enforcement become "a single lens through which the [entire] political system and its actors [are] viewed."[23]

In other words, negative encounters and interactions with police officers are scaled out onto the city more broadly. Negative encounters with officers result in measurable withdrawals from an entire range of civic activity, from voting to something as mundane as using city hotlines for assistance with potholes and broken sidewalks.[24] Even a relatively minor encounter, like getting inappropriately but momentarily stopped by police while going about one's business, demonstrably deters voting and stymies "citizen engagement . . . with the local government."[25] When a citizen-officer encounter results in additional civil litigation because an officer goes on to sue that citizen, it further fractures the relationship between that citizen and their political community, exacerbating political withdrawal and destroying the potential for a vibrant, democratic polity in the city.[26]

The power and accountability asymmetries and democratic harms of plaintiff police suits suggest that these suits should, as a public-policy matter, be limited. That argument gains additional traction when it becomes clear that the main goals of tort litigation—compensation and deterrence[27]—are readily achievable by alternative, less politically corrosive means. Workers' compensation and additional administrative remedies for injured law-enforcement officers can offer appropriate compensation without the drawbacks of plaintiff police litigation.[28] And already-existing criminal-law provisions specifically governing harms to police officers offer much more deterrence than any potential threat of civil liability might.[29] Although limitations on the ability to bring litigation for wrongful injury should not be imposed lightly, in the particular context of suits initiated by police—that is, in a system where the rules are al-

23. Lerman & Weaver, Arresting Citizenship, *supra* note 21, at 140.

24. *See id.* at 201-02.

25. Vesla Weaver, Gwen Prowse & Spencer Piston, *Withdrawing and Drawing In: Political Discourse in Policed Communities*, 5 J. Race Ethnicity & Pol. 604, 606 (2020).

26. *See infra* Section II.B.5.

27. *See* Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 Seton Hall L. Rev. 85, 126 (2022) ("It is universally accepted, however, that tort law should compensate victims and deter harmful behavior."); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L.J. 513, 521-31 (2003). *But see* John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 209-31 (2020) (rejecting the "dual instrumentalism" of deterrence and compensation).

28. *See infra* Section III.C.

29. *See infra* Section III.D.

ready so protective for police defendants and where claims brought by police cause great and demonstrable harm to political participation—such limitations are justified.

Fortunately, the building blocks of a feasible framework to limit plaintiff police claims already exist: anti-SLAPP legislation, the professional-rescuer doctrine, and workers' compensation regimes themselves can all function as mechanisms to limit these claims. Anti-SLAPP legislation targets the use of "Strategic Lawsuits Against Public Participation," a term coined by two professors who recognized that lawsuits are sometimes filed for the main purpose of stifling complaints or silencing disapproving views.[30] Anti-SLAPP legislation tries to discourage these weaponized lawsuits by providing mechanisms for their early dismissal and sometimes requiring those who bring them to pay the other side's legal costs.[31] Following the scourge of defamation cases that arose in response to the #MeToo movement, a majority of states now have anti-SLAPP legislation, and this type of legislation has the power to limit plaintiff police claims.[32]

The professional-rescuer doctrine, originally known as the fireman's rule, represents the common law's first attempt to resolve the tensions that arise when people in official rescuing roles sue those they serve. Still at play in a majority of states, the rule prevents firefighters, police officers, and other safety officials from bringing negligence claims against those who created the perils requiring emergency response.[33] Although a number of courts have recently relaxed the application of this rule,[34] it should be revived at least with regard to plaintiff police suits.

Workers' compensation regimes, in addition to serving as a source of reliable compensation, could also act as an additional lever to limit plaintiff police litigation. Many workers' compensation statutes contain an "exclusive remedy" provision where, in exchange for receiving workers' compensation benefits,

30. *See* David L. Hudson, Jr., *Anti-SLAPP Coverage and the First Amendment: Hurdles to Defamation Suits in Political Campaigns*, 69 Am. U. L. Rev. 1541, 1542-43 (2019) (describing how University of Denver professors George Pring and Penelope Canan introduced the term into the "public lexicon" in the 1980s); *see also infra* Section III.A (examining anti-Strategic Lawsuit Against Public Participation (SLAPP) laws).

31. Sarah L. Swan, *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36 J. Land Use & Env't L. 57, 60-61, 82-83 (2020).

32. *See infra* Section III.A.

33. *See infra* Section III.B.

34. *See infra* Section III.B.

employees waive their right to sue their employer.[35] These could be modified to include, for police officers, a waiver of a right to sue a third party that contributed to their on-the-job injury. Such a waiver could also occur directly through the employment contract.

To make these arguments, this Article proceeds as follows. Part I describes the contours of plaintiff police lawsuits and characterizes plaintiff police litigation as occurring in four main areas: claims arising from protests, claims connected to alleged emotional harms, claims for physical injuries, and claims alleging defamation or other privacy harms flowing from complaints about police misconduct. Part I also connects this litigation to current trends and historical roots. Part II considers the arguments for and against plaintiff police litigation. It concludes that because police occupy a sui generis status as enforcers of the law and holders of a public office, the values of democracy, political participation, compensation, and deterrence are best served by disallowing plaintiff police suits in all but a very narrow set of circumstances. Building on existing legal doctrines and tools, Part III offers a viable framework for limiting these claims.

I. POLICE AS PLAINTIFFS

In litigation, police officers are most commonly thought of as defendants. But they also bring forward their own lawsuits as plaintiffs: like ordinary citizens, they sue their employers for work-related injuries,[36] they sue other drivers for non-job-related car accidents,[37] and they sue businesses and service providers for standard negligence claims.[38] Unlike ordinary citizens, however,

35. *See* 1 MODERN WORKERS COMPENSATION § 102:1 (2024).

36. *See, e.g.*, Moore v. Guthrie, 438 F.3d 1036, 1038 (10th Cir. 2006); Williams v. City of New York, 758 N.Y.S.2d 349, 351-52 (App. Div. 2003); Pahler v. City of Wilkes-Barre, 31 F. App'x 69, 70 (3d Cir. 2002).

37. *See, e.g.*, Terry v. Garcia, 134 Cal. Rptr. 2d 565, 566 (Ct. App. 2003); Peter Page, *'Black Box' in Vehicle Leads to Settlement of $10 Million*, NAT'L L.J. (Apr. 18, 2003), https://www.law.com/nationallawjournal/almID/900005385543 [https://perma.cc/A99A-C2CX].

38. *See, e.g.*, Lester Black, *Puyallup Cop Sues Five Legal Weed Companies for Allegedly Causing Lung Illness*, STRANGER (Sept. 24, 2019, 3:02 PM), https://www.thestranger.com/slog/2019/09/24/41484584/puyallup-cop-sues-five-legal-weed-companies-for-allegedly-causing-lung-illness [https://perma.cc/GDU8-UQUB] (describing a suit brought by a Puyallup Tribe police officer against companies that sold him cannabis vaporizer cartridges he alleged made him ill). Police officers and their surviving relatives also sue other public officials for decisions that they say led to their injuries. For instance, the wife of a slain officer filed suit against a district attorney, a county probation department, and a hotel after a "documented gang member with a lengthy criminal record" stabbed a person at the hotel, and then, when

police officers also sue for harms that arise while policing, and it is these suits that are the focus of this Article.[39] This Part begins by describing the current plaintiff police litigation landscape and the types of claims that police officers most often bring. It then situates this litigation both historically and within a number of contemporaneous and converging litigative and political trends.

A. The Litigation Landscape

In the current plaintiff police litigation landscape, police officers tend to bring four kinds of claims.[40] They bring claims alleging injuries related to political protests; they bring suits for reputational and dignitary harms arising from complaints of police misconduct; they allege physical injuries related to encounters with citizens; and they claim emotional injuries from "being forced" to inflict police violence on others.

---

the officer attempted a rescue, shot and killed both that person and the two officers who responded to the stabbing. *See* Scott Schwebke, *Family of Slain El Monte Police Officer Sues DA George Gascón for Not Following 'Three-Strikes' Law*, SAN GABRIEL VALLEY TRIB. (May 10, 2023, 4:46 PM), https://www.sgvtribune.com/2023/05/04/family-of-slain-el-monte-police-officer-sues-da-george-gascon-for-not-following-three-strikes-law [https://perma.cc/JTX9-X3JP]. Officers also sometimes sue officials who attempt to reprimand them. For example, five police officers sued a Baltimore prosecutor after she charged them in the death of Freddie Gray. *See* Eliott C. McLaughlin & Steve Almasy, *Freddie Gray Officers Suing Prosecutor Marilyn Mosby*, CNN (July 28, 2016, 11:52 AM EDT), https://www.cnn.com/2016/07/27/us/baltimore-marilyn-mosby-officer-lawsuits-freddie-gray/index.html [https://perma.cc/3GLY-Y8TL]. These suits may be problematic for other reasons, but they do not raise the same concerns as the suits that are the focus of this Article.

39. Also of note is the potential for police to sue civilians in small-claims court. *See* Lee S. Brenner & Hajir Ardebili, *To Protect and to Serve: Police Defamation Suits Against California Citizens Who Report Officer Misconduct*, 28 COMMC'NS LAW., no. 1, 2011, at 8, 9 (noting that in California, if a police officer sues in small-claims court, "the citizen is not entitled to a jury trial and cannot be represented by a lawyer at the trial," and the proceeding may come down to "the citizen's word against the sworn testimony of a police officer, who generally has much more experience testifying in court, and possibly exercise[s] more sway with the judge, than the average citizen" (footnotes omitted)).

40. This Article uses a methodology common to criminal-law scholarship. The Article "attempt[s] not to create a comprehensively representative sample size in the statistical sense, but instead look[s] at a large enough number of the phenomena such that one can identify patterns that make each individual case seem more than anecdotal." Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561, 2580 (2024).

1. *Policing Protests*

One common type of plaintiff police claim arises in the context of political protests.[41] The Black Lives Matter movement, which began in 2013 and developed into "the largest protest movement in American history," saw tens of millions of people take to the streets to challenge police violence and brutality.[42] Police used varying degrees of force to subdue what were "predominantly peaceful" gatherings of protestors.[43] In some instances, baton-bearing police officers kettled protestors, blasted them with tear gas, and beat them.[44] In New York City, the police response to the protests was "so aggressive and at times violent" that the mayor publicly apologized,[45] and the city agreed to pay thirteen million dollars to settle a lawsuit brought by injured protestors.[46] Other cities also negotiated hefty settlements with the protestors in their localities after inappropriate police responses.[47]

---

41. For recent scholarship discussing protestors' potential civil liability to police, see generally Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 GEO. WASH. L. REV. 233 (2021); Tasnim Motala, *"Foreseeable Violence" & Black Lives Matter: How* Mckesson *Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61 (2020); and Bublick & Bambauer, *supra* note 12.

42. Gabriel R. Sanchez, *Americans Continue to Protest for Racial Justice 60 Years After the March on Washington*, BROOKINGS (Aug. 25, 2023), https://www.brookings.edu/articles/americans-continue-to-protest-for-racial-justice-60-years-after-the-march-on-washington [https://perma.cc/F5XQ-HFF2]*; see also* Timothy Zick, *Public Protest and Governmental Immunities*, 97 S. CAL. L. REV. 1583, 1584 (2024) ("Between January 2020 and June 2021, there were more than thirty thousand public demonstrations in the United States.").

43. Zick, *supra* note 42, at 1585.

44. *Id.* "Kettling" refers to a police tactic of "boxing in protestors and then arresting them." Maria Cramer, *N.Y.P.D. Must Rewrite Rules for Policing Protests After Sweeping Deal*, N.Y. TIMES (Sept. 5, 2023), https://www.nytimes.com/2023/09/05/nyregion/nypd-settlement-protesters-penning.html [https://perma.cc/4WS7-HKZK]. In late 2023, the New York City Police Department agreed as part of a legal settlement to end this practice in the city. *Id.*

45. Jonah E. Bromwich, *Why This N.Y.P.D. Detective Is Suing a Protester*, N.Y. TIMES (Oct. 13, 2021), https://www.nytimes.com/2021/04/29/nyregion/nypd-protester-racism-lawsuit.html [https://perma.cc/Y7Z6-DZ4U].

46. This amount places this settlement "among the most expensive pay-outs ever awarded in a lawsuit over mass arrests." Jake Offenhartz, *NYC Agrees to Pay $13 Million to George Floyd Protesters Arrested, Beaten by NYPD*, NBC N.Y. (July 21, 2023, 2:13 PM), https://www.nbcnewyork.com/news/local/nyc-agrees-to-pay-13m-to-george-floyd-protesters-arrested-beaten-by-nypd [https://perma.cc/9LEJ-UG3Y].

47. *Id.*; Gloria Oladipo, *US Cities to Pay Record $80m to People Injured in 2020 Racial Justice Protests*, GUARDIAN (May 25, 2023, 6:00 AM EDT), https://www.theguardian.com/us-news/2023/may/25/us-cities-settlement-protesters-blm-racial-justice [https://perma.cc/VWA7-NLSB] (noting that nineteen cities had agreed to pay settlements to protestors totaling $80,000,000); *see also* Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mis-*

The police union in New York City, however, maintained that the persons deeply harmed by the "riotous" protests were not the protestors but the police officers.[48] Paul DiGiacomo, the president of the Detectives' Endowment Association, which represents nearly twenty thousand officers, described police officers as having been taunted, insulted, and physically accosted by protestors.[49] He accused city leadership of "demoniz[ing]" police officers and warned that the union would respond by suing protestors.[50] These lawsuits, he argued, were "not about the money";[51] instead, police were "sending a message. We're tired of being abused and assaulted. And if the looters are going to try to interfere with us and make our lives miserable, then we're going to make their lives miserable."[52]

As an example of this kind of case, one New York City detective, represented by a Detectives' Endowment Association attorney,[53] sued a protestor for the tort of intentional infliction of emotional distress after the protestor "hurl[ed] racist, anti-Asian insults at him."[54] Legal experts noted that "they could not recall a lawsuit of this type—pursuing monetary damages from a protester for language used at a demonstration"[55]—and anticipated that even if the suit were

handled Black Lives Matter Protests, N.Y. Times (June 28, 2021), https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html [https://perma.cc/39MD-978Q] (describing the police responses to protests as "a widespread failure in policing nationwide").

48. Nicole Darrah, *'Protect Our Detectives': NYC Detectives Union to Sue Violent George Floyd Protestors Who Aren't Prosecuted*, U.S. Sun (June 11, 2020, 9:00 AM ET), https://www.thesun.com/news/966513/george-floyd-protests-new-york-detectives-sue [https://perma.cc/RR76-KG26].

49. *Id.*

50. *Id.*

51. Rocco Parascandola, *NYPD Cop Sues 19-Year-Old He Says Assaulted Him When Caught Looting Manhattan CVS During George Floyd Protests*, N.Y. Daily News (June 9, 2020, 12:18 AM), https://www.nydailynews.com/2020/06/08/nypd-cop-sues-19-year-old-he-says-assaulted-him-when-caught-looting-manhattan-cvs-during-george-floyd-protests [https://perma.cc/2F2H-DDDC].

52. *Id.*

53. *See* Priscilla DeGregory, *NYC Judge Tosses Suit over 'Obscene' Racist Rant Citing Free Speech*, N.Y. Post (Feb. 28, 2022, 5:48 PM ET), https://nypost.com/2022/02/28/nyc-judge-tosses-suit-over-racist-rant-citing-free-speech [https://perma.cc/KC84-33YS].

54. Bromwich, *supra* note 45. The timing of this suit seemed symbolic: the suit was announced on the same day that the mayor's office issued new, stricter guidelines for the police to follow in managing protests. *Id.*

55. *Id.*

unsuccessful (as it ultimately was),[56] it might become "a new way for the police to confront protesters."[57]

Police officers in Baton Rouge, Louisiana, also initiated lawsuits arising out of Black Lives Matter protests.[58] In one suit, an officer sued civil-rights activist DeRay Mckesson after suffering significant injuries from projectiles thrown at him during a protest.[59] The officer—initially suing as a "John Doe" because of alleged safety fears[60]—sued in negligence, alleging that by "arranging the protest as he did," Mckesson "knew or should have known that the police would be forced to respond to the demonstration, that the protest would turn violent, and that someone might be injured as a result."[61] The Fifth Circuit initially allowed the claim to proceed, endorsing a new "negligent protest" cause of action.[62] The Supreme Court denied certiorari, but Justice Sotomayor, in an ac-

---

56. DeGregory, *supra* note 53. From the outset, commentators noted that the suit was likely to fail, given that most claims for racial insult are not cognizable in tort law, and there are clear First Amendment concerns at issue. *Id.* In *NAACP v. Claiborne Hardware Co.*, for example, the Supreme Court held that violent protest could legitimately result in civil liability, but nonviolent protest could not. 458 U.S. 886, 915-16 (1982). On February 28, 2022, the case was indeed dismissed on First Amendment grounds. DeGregory, *supra* note 53.

57. Bromwich, *supra* note 45. Eugene Volokh expressed incredulity regarding the injuries asserted, noting that the plaintiff officer was suing for "emotional injuries which incapacitated Plaintiff from Plaintiff's usual duties and/or activities and . . . will continue to incapacitate Plaintiff." Eugene Volokh, *N.Y. Police Officer Sues Protester Over Anti-Asian Insults, Alleged Spitting*, REASON: VOLOKH CONSPIRACY (Apr. 30, 2021, 12:34 PM) (quoting Amended Verified Complaint at 2, Cheung v. Harper, No. 153780/2021 (N.Y. Sup. Ct. Apr. 21, 2021)), https://reason.com/volokh/2021/04/30/n-y-police-officer-sues-protester-over-anti-asian-insults-alleged-spitting [https://perma.cc/F63B-DGNV]. In response, he wrote, "Really? An experienced [New York City Police Department (NYPD)] detective has been incapacitated by these sorts of insults, and will require medical care and attention?" *Id.*

58. Those protests were over the killing of Alton Sterling, a Black man killed by police outside a convenience store in 2016 after he was allegedly selling CDs and possessing a handgun. *See* Michael Levenson, *$4.5 Million Settlement in Police Killing of Alton Sterling, Lawyers Say*, N.Y. TIMES (June 13, 2021), https://www.nytimes.com/2021/06/13/us/alton-sterling-settlement.html [https://perma.cc/D4L5-FT8F]. That incident led to significant protests in Baton Rouge and across the nation, and ultimately resulted in a $4.5 million wrongful-death settlement from East Baton Rouge Parish to Sterling's family. *Id.*

59. *See* Doe v. Mckesson, 945 F.3d 818, 822 (5th Cir. 2019). The officer also sued Black Lives Matter as an organization, but the court dismissed those claims. *Id.* The court found that "you cannot sue an informal organization with no property, no membership, no dues, and no governing agreement. You can't sue a hashtag either." RACHEL HARMON, THE LAW OF THE POLICE 321 (2021).

60. For a discussion of when courts should allow plaintiffs to proceed pseudonymously, see generally Eugene Volokh, *The Law of Pseudonymous Litigation*, 73 HASTINGS L.J. 1353 (2022).

61. Doe v. Mckesson, 71 F.4th 278, 282 (5th Cir. 2023).

62. Zick, *supra* note 41, at 237 n.19.

companying statement, indicated that the Court's recent decision in another case, *Counterman v. Colorado*, conflicted with this Fifth Circuit holding.[63] Following this new guidance, the district court dismissed the claim,[64] agreeing with Justice Sotomayor that "the 'negligent protest theory of a leader's liability for the violent act of a rogue assailant . . . clashes head-on with constitutional fundamentals'" and "[u]nder *Counterman*, Defendant cannot be held liable in negligence for actions taken while exercising his First Amendment freedoms."[65] Still, a more stringent mental standard, like recklessness, can be enough to ground such a claim.

In another suit arising from the protests in Baton Rouge, a gunman shot and horrifically injured a sheriff's deputy a week after the protests, leaving him in a months-long vegetative state and with lingering brain trauma.[66] The deputy then sued Mckesson and other leaders in the Black Lives Matter movement for inciting the shooting.[67] The plaintiff alleged that Mckesson and others were "responsible for [the gunman's] deadly attack because they 'knew or should have known that violently mentally disturbed persons would be aroused by their call to violence and retribution to police for the death[s] of black men.'"[68] The district court dismissed the suit, holding that this pleading stated no plausible claim, and the Fifth Circuit affirmed.[69]

---

63. Mckesson v. Doe, 144 S. Ct. 913, 914 (2024) (Sotomayor, J., statement respecting the denial of certiorari). Justice Sotomayor stated that in *Counterman*, the Court "made clear that the First Amendment bars the use of 'an objective standard' like negligence for punishing speech and it read *Claiborne* and other incitement cases as 'demand[ing] a showing of intent.'" *Id.* (alteration in original) (citations omitted) (quoting Counterman v. Colorado, 600 U.S. 66, 78, 79 n.5, 81 (2023)).

64. Ford v. Mckesson, No. 16-00742, 2024 WL 3367216, at *6 (M.D. La. July 10, 2024) (granting summary judgment to defendant Mckesson on two independent grounds, including that the plaintiff's claim was barred on First Amendment grounds by *Counterman*).

65. *Id.* (alteration in original) (quoting *Mckesson,* 71 F.4th at 286, 313 (Willett, J., concurring in part and dissenting in part)).

66. *See Baton Rouge Police Officer Injured in Deadly Ambush Sues Black Lives Matter*, CBS NEWS (July 7, 2017, 1:37 PM EDT), https://www.cbsnews.com/news/black-lives-matter-sued-police-deadly-ambush-baton-rouge-deray-mckesson [https://perma.cc/7Q5S-RWGM].

67. *Id.*

68. *See* Joe Gyan, Jr., *Wounded Baton Rouge Deputy's Lawsuit Against Black Lives Matter Rightly Dismissed, Appeals Court Says*, ADVOCATE (Aug. 16, 2018) (quoting Complaint at 26, Smith v. Mckesson, No. 17-00429 (M.D. La. Oct. 27, 2017)), https://www.theadvocate.com/baton_rouge/news/courts/wounded-baton-rouge-deputys-lawsuit-against-black-lives-matter-rightly-dismissed-appeals-court-says/article_11cdb1da-a168-11e8-a51a-53e06e434a73.html [https://perma.cc/FU8E-226J].

69. Smith v. McKesson, No. 17-00429, 2017 WL 4873504, at *1 (M.D. La. Oct. 27, 2017), *aff'd*, 734 F. App'x 303 (5th Cir. 2018).

The January 6 insurrection also prompted significant plaintiff police litigation.[70] Close to 140 police officers were injured when followers of then-President Trump stormed the Capitol building and attempted to disrupt the transfer of power to then-President-elect Biden.[71] The insurrectionists caused significant damage to the building and to the officers policing it: "Many officers were brutally beaten with deadly weapons (bats, pipes, and flag poles), sprayed with chemical irritants, or crushed and trampled by the surging crowd."[72] Further, "[f]our police officers died from suicide in the months after the attack."[73] Multiple individual officers brought suits against the insurrectionists, often alleging that President Trump incited the violence and bore responsibility for their injuries as well, and many of these claims remain pending.[74]

---

70. The insurrection also led to a congressional inquiry, "the largest criminal investigation" in the history of the Department of Justice, and civil lawsuits filed by various organizations, including the NAACP. *See* Alan Feuer, *Capitol Police Officers Sue Trump and Allies Over Election Lies and Jan. 6*, N.Y. Times (Oct. 18, 2021), https://www.nytimes.com/2021/08/26/us/politics/capitol-police-jan-6-riot-lawsuit-trump.html [https://perma.cc/769S-ZAQF].

71. *See* Max Matza, *Court Rules Donald Trump Can Be Sued for Allegedly Inciting Capitol Riot*, BBC News (Dec. 1, 2023), https://www.bbc.com/news/world-us-canada-67596702 [https://perma.cc/9HWE-6DGA].

72. Brian Duignan, *January 6 U.S. Capitol Attack*, Encyc. Britannica (Aug. 8, 2024, 9:07 PM ET), https://www.britannica.com/event/January-6-U-S-Capitol-attack [https://perma.cc/2HKK-U6T9].

73. Matza, *supra* note 71.

74. *See* Colleen Long & Michael Balsamo, *Capitol Police Officers Sue Trump, Allies Over Insurrection*, AP News (Aug. 26, 2021, 7:12 PM ET), https://apnews.com/article/capitol-siege-michael-pence-4cd64aab06e0f943ca8f83fd0b65037d [https://perma.cc/A7MY-XA2X] (describing a suit brought by the Lawyers' Committee for Civil Rights Under Law on behalf of seven officers attacked and beaten during the Capitol riot); *see also* Alex Woodward, *Girlfriend of Fallen Jan 6. Police Officer Sues Trump Over 'Incendiary' Election Lies That Fuelled Mob*, Independent (Jan. 6, 2023, 11:53 AM EST), https://www.the-independent.com/news/world/americas/us-politics/brian-sicknick-jan-6-lawsuit-trump-b2257494.html [https://perma.cc/CP59-BSTV] (describing a suit brought against President Trump by the girlfriend of a U.S. Capitol Police officer who died one day after the attack). Many of the claims arising from this insurrection are pending as of this writing. *See* Tatyana Tandanpolie, *"The Last Leg Standing": Jan. 6 Civil Lawsuit Seeks to Hold Trump Responsible for Attacks on Police*, Salon (Jan. 24, 2025, 5:30 AM EST), https://www.salon.com/2025/01/24/the-last-leg-standing-jan-6-civil-seeks-to-hold-responsible-for-on-police [https://perma.cc/4WPR-35DZ]. In some ways, these civil actions echoed an earlier one brought in 2016 by a Dallas police officer against President Obama, other political leaders, and supporters of Black Lives Matter. The plaintiff officer alleged "civil rights violations, conspiracy, assault and intentional infliction of emotional distress" resulting from the defendants "'repeatedly incit[ing] their supporters and others to engage in threats of and attacks to cause serious bodily injury or death' towards police officers of all races and ethnicities," linked the incitement to Obama's "anti-

2. *Defamation Related to Complaints of Misconduct*

Defamation and privacy torts are another active category of plaintiff police litigation.[75] Indeed, the landmark case that defined the relationship between defamation and the First Amendment, *New York Times Co. v. Sullivan*, was itself a plaintiff police suit.[76] In that case, a group of civil-rights activists in the 1960s had purchased a full-page advertisement in the *New York Times* excoriating the police chief and other police officers in Montgomery, Alabama, for racist misconduct. Some of those claims had minor factual inaccuracies,[77] and L.B. Sullivan, police commissioner of Montgomery County, brought suit in libel.[78] At the time, libel law tended to impose strict liability "for any factual falsehood, however innocently made," but the Court in *Sullivan* invoked the First

police rhetoric" after the police killing of Michael Brown in Ferguson, Missouri, and sought over $500 million in damages. *See* David Lee, *Dallas Cop Sues Black Lives Matter Leaders*, COURTHOUSE NEWS SERV. (Sept. 20, 2016) (quoting Amended Complaint at 4, 46, Pennie v. Obama, 255 F. Supp. 3d 648 (N.D. Tex. 2017) (No. 16-cv-02010)), https://www.courthousenews.com/dallas-cop-sues-black-lives-matter-leaders [https://perma.cc/F66P-KFAL]. The federal court "dismissed all federal claims" on various procedural grounds, including failure to serve and a lack of standing, and "declined to exercise supplemental jurisdiction over the state law claims," dismissing them without prejudice. *Pennie*, 255 F. Supp. 3d at 676.

75. There is sometimes a criminal overlap here as well. See, for example, Rogers v. Smith, 603 F. Supp. 3d 295, 298-99 (E.D. La. 2022), *aff'd*, No. 22-30352, 2023 WL 5144472 (5th Cir. Aug. 9, 2023), where a group of police officers arrested the plaintiff for "criminal defamation" after he complained that they were investigating a homicide incompetently.

76. 376 U.S. 254, 256 (1964); *see also* Catherine M. Sharkey, *Dynamic Tort Law*, 109 VA. L. REV. 465, 471-75 (2023) (reviewing KENNETH S. ABRAHAM & G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY (2022)) (detailing the social context and legal implications of *Sullivan*). Interestingly, another landmark defamation case, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), also involved police litigation: the publisher of a newsletter alleged that a lawyer representing "the family of a man who was shot and killed by a Chicago police officer" was a communist with "a large criminal record" who "had been an architect of the framing of the police officer." Jeff Kosseff, *Private or Public? Eliminating the* Gertz *Defamation Test*, 2011 U. ILL. J.L. TECH. & POL'Y 249, 254.

77. "The ad said, for instance, that police had arrested Martin Luther King seven times; in fact, it was 'only four.' And it said police 'ringed' a campus where students were protesting; in fact, they had only 'deployed near[by].'" Daniel E. Rauch, *Defamation as Democracy Tort*, 172 U. PA. L. REV. 1453, 1484 (2024) (alteration in original) (quoting *Sullivan*, 376 U.S. at 289).

78. "This effort, in turn, was part of a concerted strategy to bankrupt Civil Rights leaders and northern papers via libel suits. . . . By the time *Sullivan* reached the Supreme Court, over '$300 million in libel claims relating to coverage of the civil rights movement were pending . . . .'" *Id.* at 1484-85 (second alteration in original) (quoting Irving R. Kaufman, *Press Privacy and Malice: Reflections on* New York Times Co. v. Sullivan, 5 CARDOZO L. REV. 867, 870 (1984)).

Amendment to readjust the parameters of the defamation tort.[79] The Court held that "public officials," a category that now includes virtually all police officers,[80] would need to establish that a defamatory statement was made with "actual malice," meaning with "knowledge that it was false or with reckless disregard of whether it was false or not," in order to establish liability.[81]

This standard is high, and police officers will generally face an uphill battle when they bring defamation claims.[82] Nevertheless, particularly in the wake of the Black Lives Matter and #MeToo movements, officers bring these cases with alarming frequency.[83] For example, police officers sued musical artist Joseph Edgar Foreman, who records under the name "Afroman," after he featured home-security footage of their unsuccessful raid on his house in his music videos for the songs *Lemon Pound Cake* and *Will You Help Me Repair My Door?*[84] Foreman also posted footage and stills of the search to social media and created merchandise, like t-shirts.[85] The officers sued him for "invasion of privacy and profiting off the unauthorized use of their 'images, likenesses, and distinctive

79. *Id.* at 1484 (emphasis omitted).

80. *Id.* at 1458 n.26 (citing WILLIAM K. JONES, INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY 43 (2003)); *see also* Bartlett v. Bradford Publ'g, 885 A.2d 562, 564 (Pa. Super. Ct. 2005) (affirming summary judgment for the defendant in a defamation suit brought by a police officer by concluding that alleged "substandard journalistic practices [did] not satisfy the actual malice standard" for a public figure).

81. *Sullivan*, 376 U.S. at 280.

82. *See The Difficulty Police Have in Suing for Defamation*, POLICE OFFICERS ASS'N MICH. (Dec. 15, 2022), https://www.poam.net/lris-defamation-lawsuits/difficulty-police-suing-defamation [https://perma.cc/W737-X6ZB]; *see also* Rauch, *supra* note 77, at 1458 (describing the actual-malice standard as "essentially unmeetable" for plaintiffs).

83. *See, e.g.*, Jules Roscoe, *Cops Are Suing a Teen for Invasion of Privacy After Allegedly False Arrest Goes Viral*, VICE (Oct. 19, 2023, 9:05 AM), https://www.vice.com/en/article/jg5a88/cops-sue-teen-invasion-of-privacy-false-arrest [https://perma.cc/95T2-L9ZX].

84. *See* C.J. Ciaramella, *Defamation Lawsuit Against Afroman Filed by Ohio Cops Will Partially Proceed*, REASON (Oct. 18, 2023, 1:56 PM), https://reason.com/2023/10/18/defamation-lawsuit-against-afroman-filed-by-ohio-cops-will-partially-proceed [https://perma.cc/95MW-RG5Y]. Afroman is best known for his humorous song from the year 2000, *Because I Got High*. *See* Arielle Pardes, *Afroman Remade His Most Famous Song, Because He Got High*, VICE (Oct. 15, 2014, 12:05 PM), https://www.vice.com/en/article/afroman-has-a-remake-of-because-i-got-high-108 [https://perma.cc/7N86-R6NM].

85. *See* Complaint for Damages and Injunctive Relief, with Jury Demand Endorsed Hereon at 5-11, Cooley v. Foreman, No. CVH 20230069 (Ohio Ct. Com. Pl. Mar. 13, 2023).

appearances,'" alleging that they suffered "humiliation, ridicule, mental distress, loss of reputation, and death threats" as a result of the exposure.[86]

In Cincinnati, Ohio, a police officer sued multiple attendees of a city-council meeting after they accused him of making a racist "OK" gesture during a discussion of the protests surrounding the murder of George Floyd.[87] The suit alleged that one attendee authored a social-media post portraying the officer as a white supremacist, which "'created a risk of harm' to the officer and his family,"[88] and that another attendee's complaint about him could "harm[] the officer's professional reputation and . . . be used as evidence of improper motive or intent in the event the officer is involved in a use-of-force or critical incident."[89] Notably, a reporter relaying the information about the lawsuit in a newspaper stated that the officer's attorney had threatened to sue the publication if it ran a story about the (publicly available) lawsuit.[90] Similar cases involving unfavorable portrayals on social media or in public forums are quite common.[91]

---

86. Aaron Terr, *Do the Cops Suing Afroman After Raiding His Home Have a Case?*, FIRE (Apr. 5, 2023), https://www.thefire.org/news/do-cops-suing-afroman-after-raiding-his-home-have-case [https://perma.cc/B8L9-YNR5].

87. Cameron Knight, *Ohio Police Officer Anonymously Sues Those Who Accused Him of Racist Gesture*, USA TODAY (Aug. 18, 2020, 8:33 PM ET), https://www.usatoday.com/story/news/nation/2020/08/18/ohio-cop-anonymously-sues-those-who-accused-him-racist-gesture/3389908001 [https://perma.cc/DV7L-X54Z]. This officer also initially tried to sue anonymously. *See* Dan Trevas, *Police Officer Cannot Anonymously Sue Protestors*, CT. NEWS OHIO (Feb. 17, 2022), https://www.courtnewsohio.gov/cases/2022/SCO/0217/210047_210169.asp [https://perma.cc/4Q49-KVX6]. The officer's case was ultimately dismissed. *See* Olthaus v. Niesen, 232 N.E.3d 932, 944 (Ohio Ct. App. 2023).

88. Knight, *supra* note 87.

89. *Id.*

90. *Id.*

91. For instance, an officer in another case sued a website called the Plain View Project. *See* Jonah Newman, *Federal Circuit Court Dismisses Defamation Lawsuit Against Injustice Watch, Plain View Project*, INJUSTICE WATCH (Mar. 16, 2021), https://www.injusticewatch.org/project/in-plain-view/2021/defamation-lawsuit-plain-view-project-dismissed [https://perma.cc/Q73N-2FEM]. The Plain View Project is "a database of public Facebook posts and comments made by current and former police officers," which presents the posts because "they could undermine public trust and confidence in our police." PLAIN VIEW PROJECT, https://www.plainviewproject.org [https://perma.cc/56LB-BZXB]. The court dismissed the suit on the ground that the plaintiff failed to allege facts that would amount to actual malice. *See* Pace v. Baker-White, 850 F. App'x 827, 828 (3d Cir. 2021).

In Seattle, Washington, two police officers sued a city-council member for defamation after she described the death of Che Taylor, a Black man recently killed by officers, as "just a blatant murder at the hands of the police." *Court Allows Police Officers to Proceed with Their Defamation Claim Based on City Councilmember's Statements*, LCW (Dec. 6, 2021), https://

Like plaintiff police claims arising from political protest, defamation claims, too, are often part of a wider legal strategy for police.[92] A leader of a police fraternal organization in Cincinnati summarized the current strategy: "[P]olice officers have been targeted for harassment, false accusations and doxxing by 'antifa and other similar Marxist organizations assisted by left-wing media,'" and the organization "must respond when its members are defamed or harassed or put in danger by those who wish to do [them] harm."[93] He acknowledged the significant First Amendment issues lurking in the background, stating that "[b]eing critical of your government, including police, is a First

www.lcwlegal.com/news/court-allows-police-officers-to-proceed-with-their-defamation-claim-based-on-city-councilmembers-statements [https://perma.cc/UAA7-SHFP]. The two officers claimed that she had defamed them in these comments, and a court found that the claim was sufficient to withstand a motion to dismiss. *Id.* However, the court later granted summary judgment to the defendant, Miller v. Sawant, 660 F. Supp. 3d 1015, 1020 (W.D. Wash. 2023), and the appellate court issued a scathing rebuke of the officer's defamation claim when they affirmed that decision. The court found that the trial judge "did not err when it concluded that [the officer plaintiffs] failed to establish that [the defendant's] statements were false." Miller v. Sawant, No. 23-35197, 2024 WL 3899244, at *2 (9th Cir. Aug. 22, 2024). The court noted that the defendant had "used the term 'murder' in her statements 'to convey that [she] believed the officers' actions were wrongful and *should* be considered criminal,'" and "nothing in the record" proved the falsity of those statements. *Id.*

In another case, a county assisted a police officer in suing a woman with a large social-media presence for defamation after she made a series of videos complaining about how the police department responded to her complaint of child abuse and identified an officer as someone who was engaging in stalking behaviors. *See* Ned Oliver, *Chesterfield Is Helping a Cop Sue a TikToker*, Axios Rich. (Apr. 19, 2023), https://www.axios.com/local/richmond/2023/04/19/chesterfield-cop-tiktoker-lawsuit [https://perma.cc/Z4RE-Y479]. She later acknowledged that she had misidentified this officer, and she apologized and deleted the posts. *Id.* The county and detective went forward with their lawsuit, and a news article reported: "Defamation lawsuits aren't unusual, but the county government's role in the case is. And that could be seen as using government resources to stifle criticism of public officials." *Id.*

Further examples abound. A Louisville police officer sued a radio host for commenting on how the officer pulled him over incorrectly for speeding. *See* Cromity v. Meiners, 494 S.W.3d 499, 505 (Ky. Ct. App. 2015) (dismissing the officer's claim). A New York City police officer sued a celebrity tennis player he mistakenly tackled and arrested, saying the officer was "the victim of discrimination based on race" because he was "cast as a racist and a goon" in the player's comments about the incident. *See* Associated Press, *Officer Who Tackled James Blake in Mistaken Arrest Sues for Defamation*, Guardian (Oct. 3, 2017, 10:10 AM EDT), https://www.theguardian.com/sport/2017/oct/03/james-blake-mistaken-arrest-defamation-case-tennis [https://perma.cc/4K36-H9GN]; *see also* Frascatore v. Blake, 344 F. Supp. 3d 481, 500 (S.D.N.Y. 2018) (dismissing the officer's claim).

92. For a discussion of using courts to achieve these sorts of broader political goals, see generally Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. Rev. 477 (2004).

93. Knight, *supra* note 87.

Amendment right that we protect," but he nevertheless insisted that civil litigation was a fair response to "slandering our members."[94]

3. Direct Physical Injuries

Police officers also bring claims for physical injuries they sustain while policing.[95] For example, after police officers shot and killed Breonna Taylor in her apartment,[96] her boyfriend, Kenneth Walker, who was present but survived the shooting, sued.[97] One of the officers, Jonathan Mattingly, brought his own claim in the form of a countersuit.[98] He argued that when Walker fired at one of the unidentified police officers assailing the apartment in the middle of the night and shot him in the thigh, Walker engaged in tortious assault, battery, and the intentional infliction of emotional distress.[99] That officer further argued that he "should be entitled to compensatory damages for the medical treatment, trauma, physical pain and mental anguish he experienced as a result of the night Ms. Taylor died."[100]

---

94. *Id.*

95. *See, e.g.*, Wiley v. Redd, 885 P.2d 592, 593-94 (Nev. 1994); Newton v. New Hanover Cnty. Bd. of Educ., 467 S.E.2d 58, 61-62 (N.C. 1996); Yamaguchi v. Harnsmut, 130 Cal. Rptr. 2d 706, 708-09 (Ct. App. 2003); Di Benedetto v. Pan Am World Serv., Inc., 359 F.3d 627, 629 (2d Cir. 2004). In a recent example, the wife of an officer who had been shot and killed at Texas Tech University in 2017 sued the officer's assailant in negligence, claiming the defendant "acted in a negligent and grossly negligent manner by failing to act as an ordinary reasonable person and acting with disregard towards human life." Amber Stegall, *Wife of Slain TTU Police Officer Sues Accused Shooter for More than $1 Million*, KCBD (Oct. 7, 2019, 4:29 PM EDT), https://www.kcbd.com/2019/10/07/wife-slain-ttu-police-officer-sues-accused-shooter-more-than-million [https://perma.cc/6J9J-TNZD].

96. The officers had entered Taylor's apartment based on an improvidently granted no-knock warrant. Emma Bowman, *4 Current and Former Officers Federally Charged in Raid That Killed Breonna Taylor*, NPR (Aug. 4, 2022, 7:18 PM ET), https://www.npr.org/2022/08/04/1115659537/breonna-taylor-police-charges-ky [https://perma.cc/ERR2-RYUP].

97. *See* Kala Kachmar, *Louisville Reaches $2 Million Settlement with Kenneth Walker, Breonna Taylor's Boyfriend*, Louisville Courier J. (Nov. 16, 2022, 2:08 PM ET), https://www.courier-journal.com/story/news/local/breonna-taylor/2022/11/16/kenneth-walker-breonna-taylor-boyfriend-lawsuit-settlement-louisville/69653477007 [https://perma.cc/27YN-TUGE].

98. *See* Jenny Gross, *Louisville Officer Who Fatally Shot Breonna Taylor Is Now Suing Her Boyfriend*, N.Y. Times (Dec. 29, 2020), https://www.nytimes.com/2020/10/30/us/jonathan-mattingly-lawsuit-breonna-taylor.html [https://perma.cc/Z6L4-RJNC]; Defendant Sergeant Mattingly's Counterclaims Against Plaintiff Kenneth Walker at 1, Walker v. Commonwealth, No. 20-CI-005086 (Ky. Cir. Ct. Oct. 29, 2020).

99. *See* Gross, *supra* note 98; Defendant Sergeant Mattingly's Counterclaims Against Plaintiff Kenneth Walker, *supra* note 98, at 4-5.

100. Gross, *supra* note 98.

As one attorney offering public comment noted, counterclaims in general "are not unusual,"[101] but the circumstances of a police officer suing someone after police killed their romantic partner were questionable.[102] Walker's attorney, for his part, described the countersuit against his client as "the latest in a cycle of police aggression, deflection of responsibility and obstruction of the facts in what is an obvious cover-up."[103] Walker's attorney also publicly stated that "[o]ne would think that breaking into the apartment, executing [Walker's] girlfriend and framing [Walker] for a crime in an effort to cover up her murder, would be enough for them. Yet this baseless attempt to further victimize and harass [Walker] indicates otherwise."[104] Officer Mattingly then responded by suing that attorney and the attorney's employer for defamation, in addition to his counterclaim suit for physical injuries.[105]

Sometimes, officers sue individuals who are only indirectly related to their physical injuries. In Harrison, New York, while stopping a car of three people on suspicion of burglary, a police officer was shot by a fellow officer in a friendly-fire incident; he then sued the suspect driver in negligence.[106] The officer's lawsuit alleged that the driver owed the injured officer "a duty not to create a condition in which [the officer] could become injured," and that the driver

---

101. Rose McBride, *Sgt. Jonathan Mattingly Sues Breonna Taylor's Boyfriend Kenneth Walker for Shooting Him During Raid*, WHAS11 (Oct. 30, 2020, 12:21 AM EDT), https://www.whas11.com/article/news/investigations/breonna-taylor-case/breonna-taylor-case-jonathan-mattingly-suing-kenneth-walker-for-shooting-him/417-5ada453b-eab6-400b-b3c3-b14020b8e96d [https://perma.cc/CTU9-3GF8].

102. *Id.* In fact, citizens sometimes file counterclaims when officers sue them first. See, for example, *Clark v. Buhring*, 761 P.2d 266, 267 (Colo. App. 1988), where officers called to a local establishment got into a physical dispute with a patron, ending with one of them shooting the patron. One of the officers, who had been knocked unconscious during the fray, sued the patron for assault and battery. *Id.* The patron counterclaimed for assault and battery and deprivation of civil rights. *Id.* The jury found in the patron's favor, awarding him nominal damages against one officer and $400,000 against the other. *Id.* The Colorado Court of Appeals upheld the jury verdict. *Id.* at 268.

103. Gross, *supra* note 98.

104. McBride, *supra* note 101.

105. Romines v. Coleman, 671 S.W.3d 269, 272-73 (Ky. 2023). Mattingly later dropped his suit and issued a public statement blaming city leaders and expressing the wish that dropping the suit could be a "first step" in Louisville's "healing process." Dustin Vogt, *Former LMPD Sgt. Jonathan Mattingly Dismisses Lawsuit Against Kenneth Walker*, WAVE News (May 23, 2023, 2:46 PM EDT), https://www.wave3.com/2023/05/23/former-lmpd-sgt-jonathan-mattingly-dismisses-lawsuit-against-kenneth-walker [https://perma.cc/KPE2-SYPM].

106. Jon Craig, *Harrison Police Officer Sues Burglar*, Exam'r News (May 22, 2014), https://www.theexaminernews.com/harrison-police-officer-sues-burglar [https://perma.cc/VR7B-VMK3].

breached the duty by acting as a getaway driver for a burglary.[107] When the defendant driver brought his own civil-rights claim against the town for the shooting, the town's attorney stated it would ask that any judgment in the case be awarded to the wounded police officer.[108]

In another case, when an officer was brutally shot and killed by a robbery suspect in Philadelphia, the officer's family sued the eighteen-year-old shooter and the shooter's family, including his mother, father, and mother's new spousal partner.[109] The family of the officer alleged that the shooter's family was aware of the shooter's "mental instability and interest in firearms before the incident" but nevertheless made firearms and ammunition readily available in the home.[110] For his part, the shooter was criminally charged with the murder of a law-enforcement officer and other related offenses.[111]

---

107. *Id.*

108. *Id.*

109. The officer was thirty-one years old and a father of five. *See 'Make Sure Justice is Served': Slain Temple Police Sergeant's Family Calls for Death Penalty for Suspect*, NBC10 PHILA. (Jan. 23, 2024, 5:37 PM), https://www.nbcphiladelphia.com/news/local/temple-christopher-fitzgerald-suspect-court [https://perma.cc/7TS5-LSC9].

110. *Family of Fallen Temple University Police Officer Sues Family of Alleged Killer*, 6 ABC PHILA. (June 1, 2023), https://6abc.com/civil-lawsuit-fallen-temple-university-police-officer-sergeant-christopher-fitzgerald-miles-pfeffer/13329832 [https://perma.cc/LY22-DQMB]. The alleged facts are particularly disturbing: surveillance video depicted the defendant "standing over Fitzgerald and shooting him several times in the head." Nicholas Malfitano, *Family of Temple University Police Officer Christopher Fitzgerald Sues Alleged Killer and His Parents*, PA. REC. (June 5, 2023), https://pennrecord.com/stories/643481450-family-of-temple-university-police-officer-christopher-fitzgerald-sues-alleged-killer-and-his-parents [https://perma.cc/Y9WV-MKL3]. Notably, the slain officer's parents were both themselves former police officers. *See* Oona Goodin-Smith, *Family of Slain Temple Police Officer Sues Suspect and Parents, Alleging the Shooting 'Could and Should Have Been Prevented*,' PHILA. INQUIRER (June 1, 2023, 4:08 PM ET), https://www.inquirer.com/news/philadelphia/temple-police-shooting-christopher-fitzgerald-miles-pfeffer-lawsuit-parents-20230601.html [https://perma.cc/WB3Q-NNXQ].

Police plaintiffs have sued family members in older cases as well, including *Tabb v. Norred*, 277 So. 2d 223, 225, 233-34 (La. Ct. App. 1973), in which an officer sued a minor's father after the minor shot him and received an award of $300,000; and *Brechtel v. Lopez*, 140 So. 2d 189, 190, 194 (La. Ct. App. 1962), in which an officer sued the father of a minor who led him on a car chase that resulted in an accident and received an award of $22,500.

111. *Family of Fallen Temple University Police Officer Sues Family of Alleged Killer*, *supra* note 110. In *Kaminski v. Town of Fairfield*, the court addressed a similar claim against allegedly negligent parents. 578 A.2d 1048 (Conn. 1990). After police killed a schizophrenic young man when he approached them with an axe, the trial court used the professional-rescuer doctrine to strike down the officer's counterclaim, which alleged that the parents had failed to warn of the son's potential for violence. *Id.* at 1050, 1053. The court noted that "[f]undamental con-

Other plaintiff police suits for physical injury are similar to run-of-the-mill negligence cases (think premises liability or vehicular accidents,[112] for example) but arise out of the performance of policing duties.[113] For instance, while responding to a call to rescue a one-year-old boy who had fallen into the family swimming pool, a police officer slipped and injured her knee.[114] The officer sued the family for leaving a puddle of water on the floor.[115] The range of physical-injury suits brought by police officers against citizens, then, ranges from the dramatic to the mundane.

4. Emotional Harms

Police officers also sue for emotional injuries, including injuries from "being forced" to inflict violence on others.[116] One prominent example occurred in Chicago. There, a white police officer, Robert Rialmo, shot and killed Quintonio LeGrier—a mentally ill Black nineteen-year-old—and his kindly neighbor, Bettie Jones.[117] The officer was responding to a domestic-disturbance call describing the teenager as holding a baseball bat and engaging in threatening be-

cepts of justice prohibit a police officer from complaining of negligence in the creation of the very occasion for his engagement." *Id.* at 1053.

112. As an example of a vehicle-related negligence claim, a police officer in Lubbock, Texas, sued a drunk driver who crashed into the officer's patrol car while he was directing traffic. *Injured LPD Officer Suing Driver Charged in Traffic Accident*, KCBD (Jan. 19, 2016), https://www.kcbd.com/story/29591278/injured-lpd-officer-suing-driver-charged-in-traffic-accident [https://perma.cc/E4C6-NV42]. The drunk driver was incarcerated while he was being sued. *Id.*

113. *See, e.g.*, *Kaminski*, 578 A.2d at 1053. These cases implicate the professional-rescuer rule, which typically functions to preclude officer suits against the individuals whose negligence had caused an incident to which they responded. *See infra* Section III.B.

114. *Police Officer Sues Grief-Stricken Family*, COLUMBUS DISPATCH (Oct. 11, 2007, 12:01 AM ET), https://www.dispatch.com/story/news/2007/10/11/police-officer-sues-grief-stricken/23798660007 [https://perma.cc/F5DG-6EC3].

115. *Id.*

116. Indeed, working as a police officer has significant mental-health consequences: "[P]olice officers experience much higher rates of [PTSD] and other psychological and emotional disorders than the general population and most other professions." Mihailis E. Diamantis, *Police Mental Health*, 109 IOWA L. REV. 2063, 2066 (2024). "[P]olice are two to ten times more likely to experience mental illness than the general population," and they experience PTSD at a rate "approximately nine times greater than the prevalence seen in the general population." *Id.* at 2079, 2084. Elevated rates of PTSD, substance abuse, and other mental-health issues among police officers appear to contribute to police violence. *See id.* at 2085-87.

117. Graham, *supra* note 3.

havior toward his father.[118] After the killings, LeGrier's father sued the city for "wrongful death, wrongful arrest, excessive use of force, and not providing prompt medical attention to his son."[119]

Officer Rialmo countersued, "asking for more than $10 million from LeGrier's estate for assault and infliction of emotional distress."[120] According to the complaint, "LeGrier knew his actions toward Officer Rialmo were extreme and outrageous, and that his conduct was atrocious, and utterly intolerable in a civilized community."[121] And by "forc[ing] Officer Rialmo to end LeGrier's life" and Jones's life as well, LeGrier caused "Rialmo to suffer extreme emotional trauma."[122]

The suit raised a stir. In commentary on the case, one legal expert noted that, despite the ubiquity of counterclaims in general,[123] "a police officer suing someone he's killed" was both unusual and detrimental to police-public relations.[124] Indeed, "social media lit up with shock at the suit," with users disturbed by the optics of an officer "demanding $10 million from the family of a college student killed by [a] police bullet."[125] The lawyer for the victim's father

---

118. *Id.*

119. *Id.*

120. *Id.*

121. Counterclaim of Robert Rialmo Against Antonio LeGrier as the Special Administrator of the Estate of Quintonio LeGrier at 7, LeGrier v. City of Chicago, No. 2015 L 12964 (Ill. Cir. Ct. Feb. 5, 2016).

122. *Id.* at 6. In the officer's countersuit, he alleged that shortly after he arrived on the scene, LeGrier attacked the officer with a baseball bat, and that "Officer Rialmo reasonably believed that if he did not use deadly force against LeGrier, that LeGrier would kill him." *Id.* at 3-5. Rialmo "fired eight shots, striking both LeGrier and Jones, whom Rialmo says he did not see." Graham, *supra* note 3.

123. *See* CHARLES E. FRIEND, POLICE RIGHTS: CIVIL REMEDIES FOR LAW ENFORCEMENT OFFICERS 180 (2d ed. 1987). Counterclaims can be highly beneficial to the defendant. *Id.* One (somewhat dated) study suggested that "while defendants are exonerated in only 35 percent of all jury cases, defendants who counterclaimed in the action obtained favorable verdicts in 68 percent of the suits in which counterclaims were filed," and, in 48 percent of those cases, defendants both avoided paying damages and were awarded their own. *Id.* (citing a 1977 study on cross complaints). Further, some evidence suggests that counterclaims reduce damage awards even when plaintiffs succeed. *Id.*

124. Graham, *supra* note 3. Four years after the incident, Rialmo was fired from the Chicago Police Department. *See* Dan Hinkel, *Chicago Police Board Fires Officer Robert Rialmo Nearly 4 Years After He Fatally Shot Quintonio LeGrier and Bettie Jones*, CHI. TRIB. (June 14, 2024, 6:44 PM CDT), https://www.chicagotribune.com/2019/10/18/chicago-police-board-fires-officer-robert-rialmo-nearly-4-years-after-he-fatally-shot-quintonio-legrier-and-bettie-jones [https://perma.cc/AS4Q-82WC].

125. Graham, *supra* note 3.

called the officer's countersuit "a new low even for the Chicago Police Department" and offered a motto for the department's policy: "First you shoot them, then you sue them."[126] Officer Rialmo's attorney, on the other hand, argued that "it was important in an atmosphere charged by police shootings to send a message that police are 'not targets for assaults' and 'suffer damage like anybody else.'"[127] At trial, the jury found in favor of the officer on his claim for intentional infliction of emotional distress, though it did not award him any damages.[128]

While Officer Rialmo's claim for emotional injury arising from being "forced" to inflict violence may be jarring, other plaintiff police suits have sought, in less attention-grabbing ways, to recover for emotional harm incurred while policing.[129] In Yamhill County, Oregon, for example, officers brought suit against a mentally ill man and his wife after a shootout.[130] Experiencing severe mental illness, the man had barricaded himself in his home, with responding officers reporting gunfire and firework explosions coming from the home.[131] Police responded with gunfire.[132] No one was physically injured, but

126. *Chicago Police Officer Sues Victim's Family Over Shooting*, BBC (Feb. 8, 2016), https://www.bbc.com/news/world-us-canada-35519757 [https://perma.cc/34NT-FB2B].

127. *Id.*

128. *Judge Reverses Jury Finding in Police Shooting Lawsuit*, AP NEWS (June 27, 2018, 8:57 PM EDT), https://apnews.com/general-news-72f83cce525446e39736acb7b493842c [https://perma.cc/E4W7-5P94] ("The jury . . . found in favor of Rialmo in his lawsuit filed against the LeGrier estate for the infliction of emotional distress. However, the jury didn't award him any money."). The jury also awarded $1.05 million to LeGrier's family for the harm suffered due to the officer's actions, but the judge reversed the award because the jurors had signed a special interrogatory finding that Rialmo "fired in reasonable fear of death or great bodily harm." *Id.*

129. *See, e.g.*, Andy Fox, *Attorney of Man Being Sued by NPD Officer Disputes Shooting Narrative*, WAVY.COM (Nov. 1, 2024, 8:00 PM EDT), https://www.wavy.com/news/local-news/norfolk/attorney-of-man-being-sued-by-npd-officer-disputes-shooting-narrative [https://perma.cc/32TC-CCU5] (describing a plaintiff police suit in which the plaintiff officer is suing for intentional infliction of emotional distress, alleging that the defendant shot twice at him and the officer suffered PTSD as a result).

130. Burt v. Cashman, No. 23-CV38010 (Or. Cir. Ct. Yamhill Cnty. Mar. 8, 2024); Jeb Bladine, *Whatchamacolumn*: *Another Chapter in Cashman Shootout*, YAMHILL CNTY.'S NEWS-REG. (Oct. 6, 2023), https://newsregister.com/article?articleTitle=whatchamacolumn-another-chapter-in-cashman-shootout--1696631725--47239 [https://perma.cc/D8LU-4C2L]; *see also Police Exchange Gunfire with Suspect During McMinnville Standoff, Nobody Hurt*, KGW8 (Aug. 1, 2022, 3:52 PM PDT), https://www.kgw.com/amp/article/news/crime/mcminnville-fireworks-gunfire-shooting-standoff/283-a325d97b-2ac1-42a6-8c43-0aa7d96e2f48 [https://perma.cc/5QA4-2SH7] (describing the initial incident that led to the suit).

131. *Police Exchange Gunfire with Suspect During McMinnville Standoff, Nobody Hurt*, *supra* note 130.

after the couple filed a notice of a pending tort claim against the police department and the county,[133] the officers "filed a $12 million lawsuit against the [couple], claiming that the shootout caused them to suffer 'anxiety, emotional distress, a sense of helplessness, loss of control, personal violation, emotional upset, anger, humiliation, embarrassment, fear, loss of reputation, and a heightened sense of vulnerability.'"[134]

Officers also sue when they witness traumatic events, as did an officer in West Deer, Pennsylvania.[135] After he witnessed a man's gruesome and prolonged death by electrocution from a downed utility wire, the officer sued the power company for negligent infliction of emotional distress and nuisance, "contending their negligence left him traumatized."[136]

B. A Brief History of Plaintiff Police Claims

These plaintiff police claims may seem surprising, but they are not really *new*. As noted earlier, the 1964 case of *New York Times v. Sullivan* began as a plaintiff police suit, and plaintiff police claims are noted as far back as 1886.[137] But while a small number of plaintiff police claims tend always to percolate in the background, there are moments when these suits are more brazenly mobilized as a particular political response to social movements and social change. For example, in the wake of the civil-rights movement in the 1970s, leaders in law enforcement encouraged plaintiff police litigation as a way to push back against a marked increase in the amount of litigation brought *against* police.[138]

---

132. *Id.*

133. *See* Nicole Montesano, *Cashmans Consider Suing Police Agencies*, YAMHILL-CNTY.'S NEWS-REG. (Aug. 4, 2023), https://newsregister.com/article?articleTitle=cashmans-consider-suing-police-agencies--1691167426--46735 [https://perma.cc/8MN5-VEKH].

134. Bladine, *supra* note 130.

135. Teghan Simonton, *West Deer Police Officer Sues Utility After Witnessing Electrocution*, TRIBLIVE (Feb. 14, 2020, 4:22 PM), https://triblive.com/local/valley-news-dispatch/west-deer-police-officer-sues-utility-after-witnessing-electrocution [https://perma.cc/H4HZ-7V26].

136. *Id.*

137. *See supra* notes 76-78 and accompanying text; FRIEND, *supra* note 123, at 132 (citing Bourreseau v. Detroit Evening J., 30 N.W. 376, 376 (Mich. 1886), in which a deputy sheriff sued a newspaper for defamation). Another early case is *Mooney v. Carter*, where the defendant injured a plainclothes police officer who had jumped on the running board of her car when she swerved her car and sped up, having mistaken him for a person meaning harm. 160 P.2d 390, 390-91 (Colo. 1945).

138. *See* FRIEND, *supra* note 123, at 10-11. Friend notes that a 1974 survey on police-misconduct litigation from the International Association of Chiefs of Police suggests that between 1967

In fact, Americans for Effective Law Enforcement, an organization that continues to advocate vociferously for increased plaintiff police litigation, formed in the late 1960s as a self-described "counterweight" to the American Civil Liberties Union, an organization that pursues (among other claims) litigation against the police for rampant (and often racist) brutality and alleged misconduct.[139]

At that time, this push for police officers to sue civilians was part of a broader organized movement for enhanced police rights, which united under the slogan "Blue Lib."[140] As part of this movement, police unions publicly advocated for plaintiff police suits, and began publishing a quarterly magazine for officers called *The Police Plaintiff*, which described current cases and offered tips to officers interested in bringing such suits.[141] The International Conference of Police Associations, representing nearly a quarter-million officers, urged officers to bring plaintiff police suits,[142] and some organizations offered financial backing for this litigation.[143]

State and federal lobbying also burgeoned in this period, as police-union lobbyists urged state and federal legislatures to enshrine enhanced plaintiff police civil-litigation rights in state and federal statutes.[144] In congressional hearings in 1978 and 1981, for example, advocates for plaintiff police suits described the recent rise of plaintiff police litigation and urged Congress to pass a federal law-enforcement bill of rights.[145] Those federal efforts were mostly unsuccess-

and 1971, there was a 230% increase in the volume of civil suits brought against police departments. *See id.* at 16 (citing WAYNE W. SCHMIDT, INT'L ASS'N OF CHIEFS OF POLICE, SURVEY OF POLICE MISCONDUCT LITIGATION, 1967–1971 (1974)).

139. *See* Stuart Auerbach, *'Blue Lib': Police Sue Abusive Citizens*, WASH. POST, Feb. 5, 1978, at A6, A6; *ACLU History: Fighting Police Misconduct*, ACLU (Sept. 1, 2010), https://www.aclu.org/documents/aclu-history-fighting-police-misconduct [https://perma.cc/DYM7-E8YU].

140. Auerbach, *supra* note 139, at A6. "Blue Lib" is presumably a wordplay on the then-emerging "women's lib" movement, which sought to advance the political rights of women. *See* Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 CALIF. L. REV. 791, 800 (2002) (explaining that by 1971, "women's lib," as a short form of the feminist Women's Liberation Movement, had "entered the vernacular").

141. Auerbach, *supra* note 139, at A6.

142. *Id.*

143. *See* FRIEND, *supra* note 123, at 26.

144. Shoked, *supra* note 20, at 1333. For a discussion of the vast power of police unions, see Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 747-59 (2017).

145. In 1981, one speaker appearing before Congress put into the record an article by Charles E. Friend estimating that the number of plaintiff police actions had doubled since 1979. 127 CONG. REC. 1901-02 (1981); *see also* Shoked, *supra* note 20, at 1333 (describing how a law-enforcement bill of rights was "introduced in Congress in the early 1970s," but failed to

ful, but some states—California and Washington among them—responded approvingly.[146] In 1982, California enacted Civil Code Section 47.5, granting police officers a right to bring defamation claims against anyone knowingly making a false complaint of "spite, hatred, or ill will" against them.[147] And in 1984, police-union lobbyists successfully convinced Washington state legislators to expand their ability to bring malicious-prosecution counterclaims in any legal action against individual officers that the officers claimed was knowingly false.[148] This statute exempted police officers from proving "a number of the usual common-law requirements for a malicious-prosecution tort claim."[149]

Buoyed and backed by such organized efforts, plaintiff police litigation expanded. Officers increasingly brought claims for assault,[150] battery,[151] emotional distress,[152] and especially defamation.[153] In some of them, the officers pre-

pass; nonetheless, "the racial and social politics of what was fast becoming a law-and-order era facilitated the movement's success on the state level," and by the end of the 1970s, law-enforcement bills of rights had been passed in Florida, Maryland, California, Rhode Island, Virginia, and Wisconsin).

146. Shoked, *supra* note 20, at 1333.

147. Act of Sept. 30, 1982, ch. 1588, 1982 Cal. Stat. 6272 (codified as amended at CAL. CIV. CODE § 47.5). The current constitutional status of this provision remains uncertain. *See, e.g.*, Brenner & Ardebili, *supra* note 39, at 9; Martin J. Mayer, *Civil Code Section 47.5 Is Alive*, JONES MAYER L. (July 9, 2003), https://jones-mayer.com/civil-code-section-47-5-is-alive [https://perma.cc/A8F9-4RD6].

148. Lynne Wilson, *Malicious Prosecution Counterclaims and the Right of Petition in Police Misconduct Suits*, 4 POLICE MISCONDUCT & C.R. L. REP. 121, 122 (1994) (discussing WASH. REV. CODE § 4.24.350 (1984)).

149. *Id.* ("The Washington statute gives a police officer defendant the automatic right to file a malicious prosecution counterclaim 'arising out of the performance or purported performance of the public duty of such officer.' Such a counterclaim can be filed even though the original proceeding has not terminated in the officer's favor, normally an essential element of the common law tort of malicious prosecution.").

150. See, for example, *Cardillo v. Dupree*, where the family of an officer killed in an alleged ambush sued the Nation of Islam. The alleged shooter was later acquitted of homicide in a criminal trial. *See* FRIEND, *supra* note 123, at 75; Leslie Maitland, *Moslem Is Acquitted in Policeman's Death*, N.Y. TIMES, Mar. 28, 1977, at 1, 1 .

151. See, for example, *Huckeby v. Spangler*, 521 S.W.2d 568, 569-70 (Tenn. 1975), where a Tennessee Bureau of Investigation officer sued a man who allegedly shot him in the face during a gambling raid.

152. See, for example, *McCart v. Morris*, 396 N.Y.S.2d 107, 107-08 (App. Div. 1977), though it was disputed in the case whether certain impugned words stated by the civilian defendant reflected on the officers in their official capacities. For a discussion of *McCart* and another similar case, see Charles Nemeth, *Psychological Injuries: A Police Remedy in Intentional Infliction of Mental Distress*, 55 POLICE J. 244, 249 (1982).

vailed.[154] In 1977, the Los Angeles Police Protective League filed approximately fifty plaintiff police suits,[155] and by 1982, New York City had begun a new policy of regularly asserting counterclaims against plaintiffs bringing claims of civil-rights abuses or assault by the police.[156] By 1989, a New York trial judge noted that "police counterclaims for intentional assault are brought as a matter of course in New York City and arrangements for formalizing this procedure have been made by the City's Corporation Counsel."[157] New York's practice, in turn, influenced how other state courts understood plaintiff police claims. In a 1986

---

153. See, for example, *NAACP v. Moody*, 350 So. 2d 1365, 1366, 1369 (Miss. 1977), where a plaintiff police officer was awarded $210,000 after suing the NAACP for derogatory statements, though the Missouri Supreme Court ultimately overturned the award because of improper jury instructions and other errors. In the years 1976 to 1977, "reported suits by law enforcement officers for defamation and false complaints exceeded reported suits for physical injuries by a margin of more than two to one." FRIEND, *supra* note 123, at 11.

154. *See* James P. Manak, *The Police Plaintiff: Making the System Work for Law Enforcement*, 56 POLICE CHIEF, no. 9, at 16, 16 (noting that "in a good number of instances, [plaintiff police] are successful in recovering," and that even the "standard of 'actual malice'" in defamation suits "is not insurmountable"). *But see* Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 5 AM. BAR FOUND. RSCH. J. 455, 479 (1980) (noting that plaintiff police officers struggled to succeed in defamation cases); Scott M. Finical, *Defamation of a Police Officer in a Citizen Complaint: Vindicating the Rights of the Blue in Arizona*, 24 ARIZ. L. REV. 611, 613 (1982) (same).

155. FRIEND, *supra* note 123, at 16.

156. On March 25, 1982, New York City's Corporation Counsel wrote to the police commissioner to justify this policy as "advantageous . . . both to highlight for the jury that the City is sinned against, and not the sinner, and to reduce, if not eliminate, any judgment for the plaintiff in those cases where there are mutual assaults." Smith v. City of New York, 611 F. Supp. 1080, 1087 (S.D.N.Y. 1985). Noting that prior to that date, there were concerns that a city counsel filing such a claim might violate ethical rules, in that "representation of an officer on an affirmative claim might be prohibited as a gift of legal services," the city attorney argued that because "asserting a counterclaim is to enhance the City's defense, and reduce any net judgment, there is no such prohibition." *Id.* The court in *Smith v. City of New York* agreed with the city counsel. *See id.* at 1087-88; *see also* Gentile v. County of Suffolk, 711 F. Supp. 724, 727 (E.D.N.Y. 1989) (rejecting the plaintiff's argument that it was improper for the county attorney of Suffolk County to represent the officer-defendant's private counterclaim). For a discussion on the procedural complexities of plaintiff police counterclaims, see MICHAEL AVERY, DAVID RUDOVSKY, KAREN M. BLUM & JENNIFER LAURIN, POLICE MISCONDUCT: LAW AND LITIGATION § 6.25 (1980).

157. Cristiano v. Marinaccio, 548 N.Y.S.2d 378, 380 (Sup. Ct. 1989); *see also* Law v. Cullen, 613 F. Supp. 259, 264 (S.D.N.Y. 1985) (denying the plaintiff's motion to dismiss the police officer's counterclaim for assault and battery on the grounds that Section 50-k(2) of the General Municipal Law required the city to, at the employee's request, "provide for the defense of an employee of any agency in any civil action"). The court concluded that the counterclaim was "compulsory under federal law" and "embraced in any practical construction of the term 'defense.'" *Law*, 613 F. Supp. at 264.

Connecticut case, *Bates v. McKeon*, the court considered whether an officer's countersuit against a plaintiff bringing an excessive-force claim was appropriate.[158] The court noted that it had not found "a single Connecticut case involving such a claim."[159] Nevertheless, the court concluded that there was no reason to prohibit the police officer from pursuing a civil remedy for the intentional assault against him, as similar claims were filed "almost as a matter of course in New York City."[160]

That same year, a "study conducted by the Libel Defense Resource Center revealed not only a national rise in tort suits brought by public officials but also showed that law enforcement personnel comprised more than one third of the plaintiffs in such cases."[161] Plaintiff police litigation continued to be popular in some jurisdictions into the 1990s. In New York City, it was a fairly popular means of disciplining protestors.[162] In Seattle, the police officers' guild sued six individuals for defamation after they had filed complaints of police misconduct that were not upheld.[163] And in California, following the Rodney King riots, there was a noticeable wave of litigation rooted in the 1982 California legislation.[164] By the early 2000s, though, plaintiff police litigation had entered a relatively calm phase, only to pick up again with the recent rise of the Black Lives Matter movement.

---

158. 650 F. Supp. 476, 480 (D. Conn. 1986).

159. *Id.*

160. *Id.*

161. Wilson, *supra* note 148, at 122. The study's authors noted: "It appears that police and their unions and representatives have for some time been consciously invoking libel as a remedy for perceived abuses in media coverage of law enforcement, as well as a means of challenging civilian oversight of police activities and more individualized arrest and complaint situations." *Id.* (quoting LIBEL RES. DEF. CTR., LDRC STUDY NO. 7, PUBLIC OFFICIAL LIBEL ACTIONS: A COMPARISON OF REPORTED CASES 1976-1979 AND 1979-1984, at 5 (1986)).

162. Darrah, *supra* note 48.

163. Allyson Collins, *Shielded from Justice: Police Brutality and Accountability in the United States*, HUM. RTS. WATCH 65 (1998), https://www.hrw.org/reports/pdfs/u/us/uspol986.pdf [https://perma.cc/C9X8-2Z4F].

164. Darrah, *supra* note 48. See also *People v. Stanistreet*, 58 P.3d 465, 467-69 (Cal. 2002), which describes how citizen-complaint procedures were revised following the Rodney King beating to allow for greater accountability. However, police officials believed these reforms led to false complaints and lobbied the legislature to make filing a false complaint a misdemeanor, which it did. *Id.* The civil litigation is described in Amici Curiae Brief of Individual Civil Rights Attorneys in Support of Plaintiff-Appellee, Gritchen v. Collier, 254 F.3d 807 (9th Cir. 2001) (No. 99-56940). The amici note two interesting features of this California plaintiff police litigation: it was rarely successful, and it was often filed in small-claims court. *Id.* at 4, 11.

C. Catalysts and Context

This Section offers three important contextualizations for plaintiff police litigation. First, as the contemporary and historical iterations of plaintiff police litigation waves suggest, issues of race and power imbue this area. Second, since the Warren Court, law-enforcement actors have increasingly turned to civil remedies alongside criminal ones. Third, a growing practice of role reversals within litigation also seeds the ground for plaintiff police claims.

1. Racial Tensions

The upticks in plaintiff police litigation, coming as they do on the heels of the civil-rights movement of the 1960s and the more recent Black Lives Matter protest movement, link these suits to broader issues of race relations.[165] Their timing connects this litigation to "a familiar backlash against African Americans who dare seek equal justice under the law."[166]

Indeed, as multiple scholars have extensively shown, police have a long history of engaging in racist practices and being receptive to white-supremacist ideology.[167] While a full accounting of this is beyond the scope of this Article, put simply, "[w]hite supremacy birthed and nurtured modern-day policing."[168] Scholars have traced the roots of modern policing to the slave patrols of the pre-Civil War era, whose "principal tasks . . . were to terrorize enslaved Blacks to deter revolts, capture and return enslaved Blacks trying to escape, and discipline those who violated any plantation rules."[169] Following the Civil War, southern policing turned to enforcing Black Codes (laws meant to mimic as

---

165. *See* Shoked, *supra* note 20, at 1333 (noting that law-enforcement bill of rights laws, which often include statutes enabling plaintiff police suits, are "mostly a product of the reactionary racial and political environment of the post-Civil Rights era").

166. Janell Ross, *Why Did Cleveland Sue Tamir Rice's Family? And Why Is a Chicago Officer Suing the Estate of a Teen He Killed?*, WASH. POST (Feb. 23, 2016, 8:00 AM EST), https://www.washingtonpost.com/news/the-fix/wp/2016/02/23/why-did-cleveland-sue-tamir-rices-family-and-why-is-a-chicago-officer-suing-the-estate-of-a-teen-he-killed [https://perma.cc/9QWK-BKB8] (quoting from an interview with Paul Butler).

167. *See, e.g.*, HARMON, *supra* note 59, at 61-62, 167; Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1113-14, 1118 (2020); *The Origins of Modern Policing*, NAACP, https://naacp.org/find-resources/history-explained/origins-modern-day-policing [https://perma.cc/3AQ5-LAY8].

168. Hasbrouck, *supra* note 167, at 1113.

169. *Id.* at 1114.

closely as possible the racial hierarchy under slavery),[170] and later "enforce[d] and exert[ed] excessive brutality on African Americans who violated any Jim Crow law."[171] During the Jim Crow era, police regularly participated and colluded in beatings, terrorization of Black Americans, and lynchings.[172] Indeed, as one California police chief acknowledged, lynchings were commonly performed under the watchful eye of police supervision, as police were present to keep things "civil," a stain that continues to mar the police badge.[173]

As history marched on and the Civil Rights Act of 1964 formally terminated Jim Crow laws, police brutality toward Black Americans persisted, and the legacies of racist policing continue today. In contemporary America, "Blacks are disproportionately stopped by police, searched by the police, and assaulted by the police, and are much more likely to be killed by police during a routine stop."[174] Indeed, records from the Chicago Police Department for the years 2000 through 2015 indicate that of the victims of police use of force, almost ninety percent were people of color.[175] A recent study indicates that in 2023, a year that saw the police kill more people than they had in over a decade, Black people were killed by police "at a rate 2.6 times higher than white people," Native Americans at a rate 2.2 times greater, and Latinos 1.3 times greater.[176] An examination of the complaints of police misconduct filed against the New York City Police Department (NYPD), where the race of the complainant was self-reported, revealed that around eighty percent of those complaints were filed by Black or Latinx persons.[177]

The persistence of such numbers a mere three years after the murder of George Floyd suggests a backlash to the reform efforts of the Black Lives Mat-

---

170. *Id.* at 1118.

171. *The Origins of Modern Policing*, *supra* note 167.

172. *See* HARMON, *supra* note 59, at 61.

173. *Id.* at 62.

174. Hasbrouck, *supra* note 167, at 1121-22.

175. *What 100 Years of Policing Tells Us About Racism in Policing*, ACLU (Dec. 11, 2020), https://www.aclu.org/news/criminal-law-reform/what-100-years-of-history-tells-us-about-racism-in-policing [https://perma.cc/JB4L-4JMD].

176. Sam Levin, *2023 Saw Record Killings by US Police. Who Is Most Affected?*, GUARDIAN (Jan. 8, 2024, 10:00 AM EST), https://www.theguardian.com/us-news/2024/jan/08/2023-us-police-violence-increase-record-deadliest-year-decade [https://perma.cc/85TY-EFVJ].

177. Thirteen percent were filed by white persons. *NYPD Misconduct Complaint Database*, NYCLU (Apr. 2023), https://www.nyclu.org/data/nypd-misconduct-database [https://perma.cc/A6BM-NQF9]. "Of all complaints naming a[n] NYPD officer since the 1980s, 60 percent are about white officers and 37 percent are about Black or Latinx officers." *Id.*

ter movement.[178] Indeed, complaints, on both a collective and individual level, have not historically been received kindly by police. The violent policing of Black Lives Matter protests reflects the ferociousness with which police have traditionally responded to challenges of their authority or legitimacy: police departments tend to respond to evidence of racist police practices and calls for reform with deflection, obfuscation, violence, and sometimes, as this Article shows, with civil litigation.[179] Plaintiff police litigation thus occurs against a backdrop of racist legacies of policing and continuing racial violence and tension.

2. *Blurring of Civil and Criminal Lines*

Plaintiff police litigation also arises within a broader law-enforcement practice of using civil tools to supplement or replace criminal ones. After the Warren Court in the 1960s decided a series of cases expanding constitutional protections for criminal defendants that advanced the cause of "political, social, and economic equality for racial minorities," law-enforcement actors began to pivot toward civil mechanisms, which would not trigger the same constitutional protections.[180] Civil remedies and ordinances, often related to the management of land and geographical spaces like housing projects, became attractive means of accomplishing criminal-law-enforcement goals,[181] evading as they did the heightened procedural protections that now applied to arrests, searches and seizures, and interrogations.[182] By the late 1990s, police were using civil injunctions to bar alleged gang members and their associates from particular

178. *See supra* notes 165-166 and accompanying text.

179. *See supra* Section I.A.

180. Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 3 (2010); *see also* Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1078 (2005) (arguing that, after the "criminal procedure revolution of the 1960s and 1970s rendered many public-order offenses unenforceable," local lawmakers turned to land-management strategies such as property regulation to maintain order); Michael E. Buerger, *The Politics of Third-Party Policing*, 9 CRIME PREVENTION STUD. 89, 89-91 (1998) (describing how police use increased enforcement of civil regulatory provisions to force nonoffending property owners and place managers to go beyond their regulatory obligations to minimize disorder caused by others).

181. *See* Sarah L. Swan, *Home Rules*, 64 DUKE L.J. 823, 834, 846, 855-56 (2015).

182. *See* Miller, *supra* note 180, at 81 (concluding that "[w]hat triumphed" in the Warren Court's jurisprudence "was a demand for policing regulated by a judicial pre-authorization regime").

streets and heavily relying on civil nuisance-abatement actions to stop criminal activities at other specific locations.[183]

"Crime-free" ordinances also proliferated in the 1990s. Blurring the line between criminal and civil mechanisms, the "crime-free program"—which was developed and distributed by a former police officer in Mesa, Arizona—harnesses the civil tool of eviction to achieve crime-control ends.[184] When a renter or someone in their family is arrested or accused of an offense, the crime-free program mandates their eviction, and police are quick to contact landlords to insist they comply.[185]

Indeed, civil mechanisms are now so popular within law enforcement that some departments have specialized civil-enforcement units. The NYPD, for example, has a Civil Enforcement Unit, which "uses civil litigation in both judicial and administrative venues to expand the NYPD's ability to respond to crimes and quality of life issues."[186]

---

183. Civil nuisance-abatement actions "target places police say are scenes of illegal activity." Sarah Ryley & Sarah Smith, *After Mayor Pledges 'Due Process,' NYPD Renews Aggressive Nuisance Abatement Enforcement*, ProPublica (Oct. 13, 2016, 3:03 PM EDT), https://www.propublica.org/article/mayor-pledges-due-process-nypd-aggressive-nuisance-abatement-enforcement [https://perma.cc/22MJ-BC8U]; *see also* Debra A. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 554-56 (1997) (describing the uptick of public-nuisance injunctions and city ordinances in the 1990s prohibiting gang activity, drug dealing, prostitution, and other public conduct); Sarah L. Swan, *Exclusion Diffusion*, 70 Emory L.J. 847, 856-57 (2021) (noting the precipitous late-1990s rise of U.S. cities' use of civil injunctions against the presence of gang members in specific areas).

184. For a detailed description of these programs and their pernicious effects, see Swan, *supra* note 181, at 844-48. *See also* Timothy L. Zehring, *The Mesa Crime-Free Multi-Housing Program*, 63 FBI L. Enf't Bull., no. 6, 1994, at 8, 8, https://www.ojp.gov/pdffiles1/Digitization/148748NCJRS.pdf [https://perma.cc/HQ4H-X2HB] (describing the Mesa program's "three-level approach to eliminate crime in apartment communities").

185. See Swan, *supra* note 181, at 885-86 for examples of landlords contesting such insistence on compliance.

186. *Civil Enforcement Unit*, NYPD, https://www.nyc.gov/site/nypd/bureaus/administrative/civil-enforcement-unit.page [https://perma.cc/NSW4-U4XA]; *see also* William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & Pol'y 447, 451-52 (1995) (describing an early "Civil Enforcement Initiative," under which the NYPD placed "sixteen lawyers in field commands through the city . . . to learn about the issues and problems of a particular precinct from the ground up" and "offer a broad range of new enforcement options, some in the civil law, some that combine criminal and civil measures and some that rely on statutes that police departments do not normally enforce").

Milwaukee police, too, have begun invoking civil public nuisance, this time to sue reckless drivers.[187] In one lawsuit, police alleged a reckless driver constituted a "public nuisance," arguing his "ongoing negligent and reckless driving affects the quality of life and safety of our community."[188] The department has "identified 20 offenders that have been ticketed more than 10 times in the last five years . . . [and] have been notified that they are subject[] to a future lawsuit if their reckless driving continues."[189] In the words of the Milwaukee police chief, "The civil litigation approach against egregious reckless drivers is intended to send a clear message to all the chronic reckless drivers in Milwaukee that we take the safety of everyone on the roadways in our community very seriously."[190]

Given this increasingly blurry line between the civil and the criminal, and given the reality that police officers, as criminal-justice actors, are often themselves on the receiving end of civil litigation, it is not surprising that the official enforcers of the criminal-law regime would see the potential in becoming "enforcers" of the civil-law regime as well. The civil and criminal systems are becoming more and more intertwined. Therein lies the problem. Once police officers are comfortable employing civil-law remedies and tools in the context of criminal-law enforcement, they increasingly turn to private litigation to pursue tort claims against the individuals they police.[191]

---

187. Madison Goldbeck, *Milwaukee Police Department Issues Civil Lawsuit Against Habitual Reckless Driver*, TMJ4 NEWS (Nov. 28, 2022, 6:32 PM), https://www.tmj4.com/news/project-drive-safer/milwaukee-police-department-issues-civil-lawsuit-against-habitual-reckless-driver [https://perma.cc/H9W6-9L5Q].

188. *Id.*

189. *Id.*

190. *Id.*

191. The blurring of criminal and civil processes in this context is yet another way in which public and private law more generally are morphing together. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469, 481-91 (2021); *see also* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 969-70 (2019) (noting the creation of personal civil liability in Oklahoma "for officials who vote for laws that conflict with the state's firearm preemption statute"); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2002-04 (2018) (detailing how local public officials are increasingly subject to private rights of action if they participate in enacting local laws that conflict with state ones).

3. Role Reversals in Litigation and Their Surrounding Politics

A broader, transsubstantive trend of role switching between plaintiff and defendant provides further context for the groundswell of plaintiff police litigation.[192] The position a party adopts during litigation has traditionally been understood to be a function of the underlying facts. The injured party brings the claim, and the party alleged to have done the injuring responds to it as the defendant.[193] This "plaintiff-defendant dichotomy is [fundamental] to the conventional understanding of litigation," and, indeed, plays a foundational role in the literature on access to justice.[194] When scholars and policymakers speak of the democratic benefits of litigation, they tend to imagine claims in which a more powerful defendant has harmed a less powerful plaintiff.[195]

But things are not so simple. In the context of commercial litigation, for example, sophisticated corporate parties have developed strategies to manipulate whether they will be a plaintiff or a defendant in a particular suit.[196] Insurers in the tort context may deny coverage to an insured person, virtually guaranteeing that they will be sued and come into the claim as defendants, or "they can grant coverage, subrogate the claim, and litigate as plaintiff against the injurer."[197] Savvy perpetrators of mass torts have engaged in this strategic manipulation. After a consortium of California city and county plaintiffs won a historic $1.15 billion award against defendant lead-paint companies, those defendants threatened to sue individual California property owners, alleging that those owners failed to maintain their properties properly.[198] Or in other words, "defendants

---

192. An early manifestation of this role switching occurred under the auspices of the Louisiana Declaratory Judgments Act, where a "party who would be a defendant in a conventional lawsuit can, at times, seek a declaration of nonliability, arguing that the existence of a claim adverse to his interest has placed him in a position of uncertainty, and thus entitles him to a declaratory judgment." Wilson R. Ramshur, Comment, *Declaratory Judgments in Louisiana*, 33 La. L. Rev. 127, 128 (1972).

193. *See* Yotam Kaplan & Ittai Paldor, *Choosing Sides: On the Manipulation of Civil Litigation*, 77 Vand. L. Rev. 1211, 1216 (2024); *see also* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 Cornell L. Rev. 1187, 1232-33 (2023) (discussing similar flips and inversions in the context of private enforcement regimes and assertions of novel "rights").

194. Kaplan & Paldor, *supra* note 193, at 1216.

195. *Id.*

196. *Id.* at 1231-39.

197. *Id.* at 1217-18; *see also id.* at 1232-34 (discussing similar dynamics among bank creditors garnishing debtors' accounts to induce them to sue).

198. Joshua Schneyer, *California Settles Decades-Long Lawsuit Over Lead Paint, but Outcome Is Bittersweet*, Reuters (July 17, 2019, 4:54 PM EDT), https://www.reuters.com/article/idUSKCN1UC2H4 [https://perma.cc/A8H8-ESQK].

turned around and said recipients of the damages should be disqualified because they are to blame."[199] The defendants' threat to turn the tables and assume the role of plaintiff was one of several factors that led the original plaintiffs to agree to a $305 million settlement—a steep decrease from the initial $1.15 billion award.[200]

The traditional binary between the plaintiff and defendant has further broken down in the wake of the #MeToo movement. This movement prompted many victims of sexual assault and abuse to bring civil suits for remedies, but "[t]hese lawsuits then spawned retaliatory defamation suits against the victim-accusers."[201] Between 2014 and 2020, an estimated one hundred retaliatory defamation suits were brought.[202] One prominent victims' rights attorney reported in 2021 that, whereas defending accusers facing defamation claims used to comprise about five percent of her practice, in recent years these cases came to comprise about half of her caseload.[203] The Time's Up Legal Defense Fund, which provides services to people bringing sexual-misconduct cases, also reports that defamation claims against complainants currently comprise about twenty percent of their cases.[204]

---

199. *Id.* (quoting Bob Rabin).

200. *Id.*

201. Jamie R. Abrams, *The Increasing Complexity of Defamation Law in #MeToo Era Lawsuits*, LOUISVILLE BAR BRIEFS, June 2021, at 22, 22, https://w.loubar.org/UserFiles/files/bar-briefs/2021/6-June/Bar%20Briefs_June'21_Defamation%20Law%20in%20MeToo_Abrams_p22.pdf [https://perma.cc/FCJ7-FBGR].

202. *Id.* ("Three-quarters of these lawsuits involved defamation suits against college students and faculty accused of sexual misconduct suing their school and their accusers for defamation.").

203. *Id.*

204. Bryce Covert, *Years After #MeToo, Defamation Cases Increasingly Target Victims Who Can't Afford to Speak Out*, INTERCEPT (July 22, 2023, 6:00 AM), https://theintercept.com/2023/07/22/metoo-defamation-lawsuits-slapp [https://perma.cc/3UCC-HATP]. Other defamation lawyers report similar increases. *Id.*

A high-profile example of a retaliatory defamation claim occurred in the suit celebrity actor Johnny Depp brought against his ex-wife, Amber Heard. *See* Bria McNeal, *Who Won the Depp v. Heard Verdict? The Trial Verdict Explained*, ESQUIRE (Aug. 21, 2023, 10:38 AM EST), https://www.esquire.com/entertainment/tv/a44866286/who-won-the-depp-vs-heard-verdict [https://perma.cc/CAU4-PWDV]. He sued after she wrote an op-ed identifying herself as someone who had experienced domestic abuse. *Id.* (citing Amber Heard, Opinion, *I Spoke Up Against Sexual Violence – And Faced Our Culture's Wrath. That Has to Change.*, WASH. POST (Dec. 18, 2018, 5:58 PM EST), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html [https://perma.cc/H7CF-637T]). A jury found Heard liable for $10 million in damages, and Depp liable for $2 million. *Id.* This lawsuit was widely understood to have a chilling effect on victims of sexual- or gender-based violence and their potential efforts to obtain legal redress. *See* Jessica Winter, *The Johnny*

Interestingly, suing one's accuser corresponds to a broader strategy used to rebuff claims of sexual abuse. As psychologists Sarah J. Harsey and Jennifer J. Freyd have shown, persons accused of interpersonal violence often resort to a technique known as "DARVO (Deny, Attack, Reverse Victim and Offender)."[205] Plaintiff police claims often utilize this strategy as well. Through a defamation suit against someone who has complained of police misconduct, for example, the plaintiff officer denies the initial conduct, challenges the person making the initial complaint, and repositions themself as the wronged party and the inappropriately policed person as the offender.[206] Indeed, turning the person complaining of misconduct into the offender is quite easy in the plaintiff police context, as the person complaining of police misconduct will often have been suspected of some underlying offense in the first place.[207]

The connection between the defamation claims arising in the #MeToo context and the suits arising in the plaintiff police context is not subtle. Indeed, in an interview about the case of Officer Rialmo, who sued the family of the mentally ill teenager he shot and killed, Professor Paul Butler noted that this case and others reminded him "of Bill Cosby suing his accusers for defamation."[208]

Depp-Amber Heard Verdict is Chilling, NEW YORKER (June 2, 2022), https://www.newyorker.com/culture/cultural-comment/the-depp-heard-verdict-is-chilling [https://perma.cc/3N54-YQZR].

205. Sarah J. Harsey & Jennifer J. Freyd, *Defamation and DARVO*, 23 J. TRAUMA & DISSOCIATION 481, 482 (2022).

206. *Cf. id.* (describing the impacts of Deny, Attack, Reverse Victim and Offender (DARVO) outside of the police plaintiff context). This strategy of reversing victim and offender also occurs with criminal charges. For example, "[i]n 2009, Ferguson police beat up a man named Henry Davis and then they charged him with four counts of destruction of property for bleeding on their uniforms." Ross, *supra* note 166 (citing Joseph Shapiro, *In Ferguson, Mo., Before Michael Brown There Was Henry Davis*, NPR (Sept. 12, 2014, 4:21 PM ET), https://www.npr.org/2014/09/12/348010247/in-ferguson-mo-before-michael-brown-there-was-henry-davis [https://perma.cc/E6DS-EV8Q]). Similarly, in Florida, police officers tried to use a law meant to protect victims of crime to avoid publicly disclosing their own names after shooting civilians in self-defense. Kayla Goggin, *Victims' Rights Law Doesn't Shield Identities of Cops Who Use Lethal Force, Florida High Court Rules*, COURTHOUSE NEWS SERV. (Nov. 30, 2023), https://www.courthousenews.com/victims-rights-law-doesnt-shield-identities-of-cops-who-use-lethal-force-florida-high-court-rules [https://perma.cc/REK8-85LP].

207. *Federal Tort Claims Act: Hearings Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 95th Cong. 52 (1978) [hereinafter *FTCA Hearings*] (statement of Frank Carrington, Executive Director, Americans for Effective Law Enforcement, Inc.) (noting that the fact that plaintiffs bringing claims against police officers "will often be criminals" may make them less sympathetic to a jury).

208. Ross, *supra* note 166. In one case, a police officer sued a rape victim after she complained to the department that he had groped her while investigating her rape case. Evette Dionne, *Cop*

These role reversals at the litigant level also reverberate up into the political world of policymakers and academics. There, they invert the usual positioning of socially progressive interests pushing for litigation *expansions* and socially conservative interests pushing for *limitations*. Simply put, the usual understanding in American public life has been that progressives "support policies that facilitate 'access to courts' by individuals," while conservatives oppose expanding access to litigation.[209] In other words, the usual policy and legal arguments see "Republicans deploring litigation, Democrats defending it."[210]

These traditional categories, however, are collapsing. It is no longer necessarily the case that the Republican stance is more anti-litigation than the Democratic one.[211] Whereas progressives once were the main political contingent pushing bills granting private rights of action and attorneys' fees, there has recently been growing Republican support for bills that grant private rights of action, particularly in new anti-abortion, anti-immigrant, anti-tax, pro-gun, and pro-religion cases.[212] As Republicans became more interested in using litigation as a means to enforce new, socially conservative statutes, progressives will likely continue to find themselves in the position of arguing against those expansions.[213]

Sues Rape Victim He Allegedly Fondled for Damaging His Reputation, COMPLEX (Jan. 17, 2016), https://www.complex.com/pop-culture/a/evette-dionne/cuddle-nypd-cop-sues-rape-victim [https://perma.cc/2WXQ-LUMH].

209. Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657, 658 (2021).

210. *Id.* (quoting Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1754 (2013)).

211. *Id.* at 660.

212. *Id.*; *see also* Jon Michaels & David Noll, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021), https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html [https://perma.cc/TE75-GKRJ] (describing S.B. 8, a Texas abortion law, which includes a private right of action for members of the public to sue those who perform or facilitate illegal abortions). An additional study looking at private rights of action after 2003 found that "private enforcement is ubiquitous at the state level." Diego A. Zambrano, Neel Guha, Austin Peters & Jeffrey Xia, *Private Enforcement in the States*, 172 U. PA. L. REV. 61, 67 (2023). Notably, the previous wave of litigation led by Democrats was largely meant to "empower individuals to challenge governmental and corporate power," whereas "more recent conservative uses are novel in that they target vulnerable individuals, like pregnant women seeking an abortion or transgender persons." Peter Coy, Opinion, *The Politics of Litigation May Be Changing*, N.Y. TIMES (July 25, 2022), https://www.nytimes.com/2022/07/25/opinion/civil-lawsuits-democrat-republican.html [https://perma.cc/ZJR2-CLZR] (quoting Sean Farhang).

213. Of course, within these broader trend lines, Republicans have used litigation in moments where it suited their purposes or could help achieve their broader goals. The change is simply one in quantity. One study's authors conclude that "both parties' posture toward private

The political milieu of plaintiff police litigation largely tracks this recent red pro-litigation wave.[214] Indeed, "[s]ince the election of Donald Trump, the politics of the police have become increasingly aligned with the Republican Party."[215] And some conservative local governments have attempted to bolster plaintiff police suits, floating legislation that would explicitly grant officers the right to sue protestors. For example, in 2021, the Republican-led legislature of Nassau County, New York, tried to pass a bill that would make "police officers and other first responders a protected class under the county's Human Rights Law," and provide officers with a corresponding private right of action.[216] In 2021, two Republican members of the Nevada Legislature introduced a bill that would have given police officers a cause of action when a civilian caused them injury.[217] Ohio Republicans supported a similar bill, which would allow any

enforcement is instrumental," and "[p]rivate enforcement is one institutional strategy for implementing rights." Burbank & Farhang, *supra* note 209, at 686. The authors argue that their evidence

> suggests that political parties do not have positions on private enforcement and access to justice as a matter of general principle, independent of the rights being implemented. They have positions on private enforcement when it is or may be deployed in the service of specific agendas—when it accrues to the advantage of some groups and the disadvantage of others.

Id. at 686-87.

214. "[O]ne of the nation's most influential law enforcement lobbies," the Fraternal Order of Police, formally endorsed Donald Trump in the 2024 election. *See* Meg Kinnard & Bill Barrow, *Trump Accepts Key Endorsement from Police Union While Celebrating Sentencing Delay on Felony Charges*, AP NEWS (Sept. 6, 2024, 11:39 PM EDT), https://apnews.com/article/trump-police-crime-law-enforcement-de5662eb889fb5dd75a893e1871b3400 [https://perma.cc/CVD5-S6CP].

215. G. Alex Sinha, *Policing's Free-Speech Problem*, 2025 UTAH L. REV. (forthcoming 2025) (manuscript at 19), https://ssrn.com/abstract=4532845 [https://perma.cc/L5FZ-MCUE].

216. Janelle Griffith, *N.Y. County Exec Vetoes Bill That Would Allow Police to Sue Protestors*, NBC NEWS (Aug. 11, 2021, 2:21 PM EDT), https://www.nbcnews.com/news/us-news/n-y-county-exec-vetoes-bill-would-allow-police-sue-n1276568 [https://perma.cc/Y6E9-T8CZ]. The penalties were listed as $25,000 per violation, which could be doubled if the violation occurred in the course of a riot. *Id.* Officers could also sue for punitive damages and be awarded legal costs and fees. Sahar Akbarzai, *A Long Island County's Legislature Will Vote on Bill that Would Allow Police to Sue Protesters and Seek Damages up to $50,000*, CNN (Aug. 2, 2021, 3:12 PM EDT), https://www.cnn.com/2021/08/02/us/nassau-county-protester-bill [https://perma.cc/Z55G-5W6L]. The bill was passed in the county legislature, but after conferring with the New York State Attorney General, the county executive determined that the proposed bill would offend First Amendment principles and declined to approve it. Griffith, *supra*.

217. *NV Lawmakers Introduce Bill Allowing Police to Sue People over Injuries*, POLICE MAG. (Feb. 5, 2021), https://www.policemag.com/patrol/news/15310951/nv-lawmakers-introduce-bill-allowing-police-to-sue-people-over-injuries [https://perma.cc/94JH-D2PK]; *see also* Mitch

officer who suffered injuries during protests to sue individuals and "any organization that provided material support or resources to the responsible party."[218] That bill also allowed officers to sue someone for filing a false complaint.[219]

* * *

Plaintiff-defendant role reversals, the blending of civil and criminal enforcement, and racial tensions all intersect in plaintiff police claims.[220] Emerging from these converging strands, plaintiff police litigation raises difficult questions of access to justice, the manipulable line between public and private, the acceptability of different accountability deficits, and the shape of sound public policy.

II. COMPETING INTERESTS AND VALUES WITH POLICE AS PLAINTIFFS

This Part articulates the arguments for and against plaintiff police litigation. It is difficult to overstate the importance of litigation as a legal and cultural dispute-resolution process in the United States.[221] Several state constitutions explicitly protect a constellation of rights associated with bringing forward civil

Smith & Michael Wines, *Across the Country, a Republican Push to Rein in Protesters*, N.Y. TIMES (Mar. 2, 2017), https://www.nytimes.com/2017/03/02/us/when-does-protest-cross-a-line-some-states-aim-to-toughen-laws.html [https://perma.cc/ULG5-AY28] (discussing the trend of Republican-backed bills targeting protests).

218. Anna Staver, *GOP Bill that Allows Police to Sue Protest Organizers Advances Despite Dems' Objections*, COLUMBUS DISPATCH (Nov. 10, 2021), https://www.yahoo.com/news/house-bill-109-gop-push-111930166.html [https://perma.cc/7PQW-SXD4] (quoting Ohio Law and Order Act, H.R. 109, 134th Gen. Assemb., Reg. Sess. (Ohio 2021)).

219. *Id.*; Greg Haas, *Republican-Sponsored Legislation Would Allow Police to Sue the Public*, 8 NEWS NOW (Feb. 4, 2021, 7:39 PM PST), https://www.8newsnow.com/news/local-news/republican-sponsored-legislation-would-allow-police-to-sue-the-public [https://perma.cc/MQ5N-KH5M].

220. In addition to bringing claims in tort, police officers have also sued for violations of their constitutional rights. In Kansas, for instance, an officer who was found not guilty of assault and battery brought a civil-rights action against the complainant, the complainant's father, the complainant's attorney, and other attorneys under 42 U.S.C. §§ 1983, 1985, 1986, and 1988. *See* Taylor v. Nichols, 409 F. Supp. 927, 930-31 (D. Kan. 1976). The court dismissed the action because the officer "fail[ed] to allege a colorable deprivation of any rights secured by the Constitution or laws of the United States." *Id.* at 934; *see* FRIEND, *supra* note 123, at 177, 190. In a separate case, "[t]wo New York police officers reportedly filed complaints with the New York State Division of Human Rights when a restaurant owner refused to serve them because they were in uniform." FRIEND, *supra* note 123, at 177, 190.

221. *See generally* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (arguing that litigation plays a valuable role in a well-functioning democracy).

litigation, including rights to jury trials, "open courts" provisions, and the like. And the important role that tort law and civil litigation play in achieving the goals of compensation for injured parties and deterrence for wrongdoers is a much-lauded one.[222] Those values—coupled with the fact that these plaintiff police claims sometimes involve highly sympathetic plaintiffs, such as family members of officers slain while protecting universities from mass shooters—push in favor of allowing plaintiff police claims. Indeed, providing those families with their day in court sounds like the very least a civilized society should do following this kind of loss.

But the unique status of police officers makes the question a more complicated one. The police are "the most visibly coercive institution in any liberal democracy," and the power police officers hold over the average citizen is unparalleled: they are distinctively empowered to use lethal force on others, and they frequently do so.[223] Because of this special status, getting sued by a police officer is a singular experience, and, as with any negative police encounter, it is likely to lead defendants to withdraw from participation in civic life.[224] This antidemocratic impact is difficult to justify, particularly when the goals of compensation and deterrence can be achieved through other, less politically corrosive means. And when one remembers the special dispensations police officers receive when they themselves are sued, applying equivalent deviations from the usual norms when those officers become plaintiffs seems necessary to ensure evenly distributed accountability.

A. Justifications and Rationales

Four main rationales weigh in favor of plaintiff police claims. First, access to courts is a prized value in American law—so much so that a majority of states have clauses in their state constitutions specifically protecting a citizen's ability to bring forward civil litigation. Second, basic fairness suggests that officers wrongfully harmed and injured in the performance of their duties should expect to be compensated for those injuries. Third, a primary purpose of tort law is to deter wrongful conduct, and allowing such claims could arguably further this goal. And fourth, plaintiff police claims, like all tort claims, can serve an expressive function.

---

222. *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1834 (1997).

223. BRANDON DEL POZO, THE POLICE AND THE STATE: SECURITY, SOCIAL COOPERATION, AND THE PUBLIC GOOD 2 (2022).

224. *See infra* Section II.B.4.

1. Access to Courts

The "nation has long viewed a person's ability to gain access to court as a fundamental element of our democracy."[225] Indeed, Chief Justice Marshall, in "the most important case in American constitutional history"[226]—*Marbury v. Madison*—acknowledged that access to civil redress strikes at the "very essence of civil liberty."[227] Scholars, too, draw important links between litigation and democracy and point to litigation's "democratic functions."[228] Alexandra Lahav, for example, in her book *In Praise of Litigation*, argues that civil litigation is not only an important "[f]orce for [d]emocracy"; it is, in fact, democratic deliberation in action.[229] Judith Resnik, Stephen B. Burbank, and Stephen N. Subrin also argue that "open courts" are "an important facet of a functioning democracy."[230]

State and federal constitutions agree.[231] Almost forty states have "open courts" or "right to remedy" provisions in their constitutions that protect the right of the citizen to seek a remedy for injury from the courts.[232] These provisions contain proclamations like "the courts shall be open to every person for redress of any injury" and "[t]he right of action to recover damages for injuries shall never be abrogated."[233] The federal constitutional right to petition also re-

225. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 557 (1999); *see also* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 563 (2005) (discussing Chief Justice Marshall's quotation on the importance of civil redress as an invocation of Blackstone).

226. Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 376 (2003).

227. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *see* Andrews, *supra* note 225, at 557, 563-64.

228. Matthew A. Shapiro, *Democracy, Civil Litigation, and the Nature of Non-Representative Institutions*, 109 CORNELL L. REV. 113, 115 (2024) (internal quotation marks omitted).

229. LAHAV, *supra* note 221, at ix, 1; *see also* Shapiro, *supra* note 228, at 115 (identifying courts as "essential democratic institutions").

230. *See, e.g.*, Shapiro, *supra* note 228, at 116 (quoting Judith Resnik, *Courts: In and Out of Sight, Site, and Cite—The Norman Shachoy Lecture*, 53 VILL. L. REV. 771, 809 (2008)); *accord* Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 414 (2011) ("Civil litigation and democracy should be, and they can be, mutually reinforcing.").

231. Williams, *supra* note 9, at 906.

232. *Id.* at 911.

233. *Id.* at 913, 929; *see, e.g.*, FLA. CONST. art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.");

flects the centrality of accessing civil redress in the United States.[234] The Petition Clause of the First Amendment confers a right "to petition the Government for a redress of grievances" and prohibits Congress from passing a law abridging that right.[235] Although a narrow reading limits the Petition Clause's reach to only the legislative branch of government, compelling arguments rooted in textualism and history indicate it extends to judicial remedies as well.[236]

These state and federal constitutional provisions, and their historical antecedents, all reveal the foundational significance of access to civil redress in the courts—a tradition that seems to support strongly the continuation of plaintiff police lawsuits. On this view, plaintiff police litigation is democracy in action: it gives each side the opportunity to present their case and trusts a jury formed by members of the political community to reach a fair determination of the controversy.

2. Compensation

When a plaintiff brings a tort claim to court, they are typically seeking compensation from the party that caused them injury. Plaintiffs access civil courts in order to vindicate their "right to have the state's assistance in holding a wrongdoer accountable, or responsible, for what he did," and that accounta-

---

ARIZ. CONST. art. XVIII, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation . . . ."); KY. CONST. § 54 ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."); Sarah L. Swan, *Courting Jural Rights: The Kentucky Constitution and the Super Common Law of Torts*, 112 KY. L.J. 639, 642 (2024); Williams, *supra* note 9, at 922 & n.95 (citing Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307, 311 n.30 (2006)). Despite the strong language in many of these provisions, courts sometimes read them down to provide very few rights beyond those provided by "the Procedural Due Process Clause or the federal statutes requiring physical access to courts." Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions*, 82 ALB. L. REV. 1449, 1492 (2018-2019).

234. Nevertheless, the Supreme Court has held that there is not a substantive-due-process right to access courts. Andrews, *supra* note 225, at 559-60, 569 n.30, 570, 589.

235. U.S. CONST. amend. I.

236. *See* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 899-901 (1997); Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 336-37 (2008); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 725-33 (2003). Courts have used the Petition Clause to restrict the tort of abuse of process, for instance. *See* Andrews, *supra* note 225, at 560.

bility is typically given monetary form.[237] In their role as agents of the state, courts consider themselves obligated, as a matter of political duty, "to empower the plaintiff to act in some manner against the defendant," and to permit the plaintiff to "exact damages or have the defendant enjoined against performing certain acts," depending on the circumstances.[238] Empowering plaintiffs in this way is "part of the state's treating individuals with respect and respecting their equality with others."[239] Moreover, intuitive principles of corrective justice insist that those who inflict losses on others should be held accountable when they do so, and a fundamental reason for the existence of tort law is to ensure that persons who are wrongfully injured receive compensation.[240] All of these commitments, and the foundational idea that people should be able to seek compensation for injuries intentionally or negligently caused by other people, militate in favor of allowing police officers to sue those they police.[241] Indeed, the current trend in courts is to remove exceptions and loopholes to this generalized liability regime, as opposed to carving out new pockets of nonliability.[242]

The compensation ideal thus seems to support plaintiff police litigation. Police officers' jobs can be dangerous: injuries and even death on the job sometimes occur.[243] Those injuries can impact officers' health and their ability to work, enjoy life, engage in recreational activities, and connect with their families.[244] Both corrective justice and commonsense notions of fairness suggest that the wrongdoer should compensate the person who suffers the negative repercussions of their actions.

---

237. Sarah Swan, *Triangulating Rape*, 37 N.Y.U. Rev. L. & Soc. Change 403, 441 (2013) (quoting John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917, 983 (2010)).

238. *Id.* (quoting John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917, 974 (2010)).

239. *Id.* (quoting John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917, 974 (2010)).

240. Swan, *supra* note 22, at 353.

241. *See* Bublick & Bambauer, *supra* note 12, at 290.

242. *See id.* at 271-72 ("[T]here is a general trend towards reasonable care as a generalized default standard in negligence cases.").

243. For statistics on officer injuries and death, see *Crime Data Explorer*, Fed. Bureau of Investigation (2023), https://cde.ucr.cjis.gov [https://perma.cc/6XBX-DSCP], which provides statistics for police-officer injuries and deaths each year; and Law Enf't Epidemiology Project, *Law Enforcement Safety*, Univ. Ill. Chi., https://policeepi.uic.edu/law-enforcement-safety [https://perma.cc/3ZSP-G5SZ].

244. *Cf. Policing and Living Well*, Coll. Policing, https://www.college.police.uk/research/projects/policing-and-living-well [https://perma.cc/W639-MDWE] (discussing a British research project exploring the health and quality-of-life effects of police work on officers).

3. Deterrence

In addition to compensation, deterrence is an important goal of tort law: a core premise underlying much of tort law is that liability can generally deter actors from engaging in certain behaviors.[245] By seeing certain acts leading to certain liabilities, potential wrongdoers are, in theory, dissuaded from engaging in those wrongful acts.[246] The potential for hefty damage awards levied on anyone who assaults or deliberately harms police officers arguably creates such deterrence, and insisting that citizens take reasonable care for anyone potentially foreseeably injured by their activities, including police officers, seems like a laudable goal. Deterrence thus also pushes in favor of allowing plaintiff police suits.

4. The Expressive Value of Tort Law

Along with compensation and deterrence, another noted purpose of tort law is expressive: tort law sends a message about wrongdoing, and in so doing, helps to rebalance offensive assertions about social standing.[247] As legal philosopher Scott Hershovitz explains, one message that tort liability sends is "[t]he defendant wronged the plaintiff," and the plaintiff must not be treated that way.[248] An unredressed tort, on the other hand, conveys a different message about social standing: "A past wrong against you, standing in your history without apology, atonement, retribution, punishment, restitution, condemnation," or any other acknowledgment of it as a wrong, "makes a claim. It says, in effect, that you can be treated this way, and that such treatment is acceptable."[249] Accordingly, plaintiffs bringing tort suits sometimes talk about their "honor," as did one officer while explaining how he intended to sue a citizen that accused him of stealing money during a search "not so much for the money as for the damage to his honor."[250] Many plaintiffs therefore attach a symbolic importance to tort law recognizing the wrong that has been done to them

---

245. Kenneth S. Abraham, The Forms and Functions of Tort Law 18 (4th ed. 2012).

246. *Id.*

247. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. Tort L. 405, 406, 445 (2017).

248. *Id.* at 406 (emphasis omitted).

249. *Id.* at 412 (quoting Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 Phil. & Phenomenological Rsch. 529, 546 (2001)).

250. *FTCA Hearings*, *supra* note 207, at 54 (statement of Frank Carrington, Executive Director, Americans for Effective Law Enforcement, Inc.).

and view this expressive role of tort as extremely valuable. Plaintiff police claims would seem to allow for this classic confrontation function and offer a kind of vindication that suing parties often find compelling.

* * *

Indeed, one might simply wonder: "Why should a policeman who get[s] hit while doing his duty be in a lesser position than a civilian?"[251] Or, as Charles E. Friend put it:

> Why, it is argued, should the police officer who is shot, or stabbed, or beaten, or defamed have fewer civil rights than any other person? Police officers suffer pain, and bleed, and die, like everyone else. They leave behind them families who grieve and suffer financial hardship, just like everyone else. Why, then, should they be denied the rights to protection and compensation that our legal system accords to every other citizen?[252]

From this perspective, singling out police officers and making them unable to claim the protections of the general rule undergirding negligence and other torts—that a person must take reasonable care to avoid physical harm to others—seems inherently unfair.[253] Indeed, in reference to the professional-rescuer rule, which would limit such suits, the South Carolina Supreme Court once stated that this kind of exception for police officers would be discriminatory,[254] and would categorically deny a group of plaintiffs access to justice based solely on their identity.[255] Voicing this same sentiment, the Arizona Supreme Court wrote, "There is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception."[256] Deviations from this basic principle, then, require significant justification.

---

251. *Id.* The bill proposed in this congressional hearing, H.R. 9219, would have "grant[ed] immunity to federal law enforcement officers from claims for civil damages for common law or constitutional torts arising from the performance of their duties. Suits against the government would be the exclusive civil remedy in such cases." FRIEND, *supra* note 123, at 51.

252. FRIEND, *supra* note 123, at 17.

253. *See* Bublick & Bambauer, *supra* note 12, at 269-82.

254. *See id.* at 273 (quoting Minnich v. Med-Waste, Inc., 564 S.E.2d 98, 103 (S.C. 2002)).

255. *See id.* at 269.

256. Stone v. Ariz. Highway Comm'n, 381 P.2d 107, 112 (Ariz. 1963).

B. Harms

The arguments outlined above in favor of plaintiff police litigation are fairly obvious and align neatly with the most basic reasons for why we have civil litigation and access to courts as fundamental values in the first place. The arguments against plaintiff police litigation, on the other hand, require more explication. But as this Section demonstrates, plaintiff police claims exacerbate existing power inequalities, create an accountability mismatch, and constitute a distinct democratic harm.[257] In fact, in the case of plaintiff police litigation, many of the arguments about the importance of litigation for democracy lose resonance, as the underlying reasons apply more squarely to suits *against* the government, not suits brought *by* public actors.[258] When surfaced, the significance of these harms outweighs the potential reasons in favor of plaintiff police claims.

1. Exacerbating Existing Power Inequalities

Police officers are "a unique kind of public official" and public officeholder.[259] Holding a public office usually means occupying a position of service to the public and receiving "a number of special rights, privileges, powers, and immunities" in order to fulfill that governmental function.[260] For police, these special rights, privileges, powers, and immunities are immense: police officers are "armed agents of the state" with a "near-monopoly on the legitimate use of

---

257. The pernicious effects of these suits might also be amplified by deeply embedded biases within tort law itself: tort law often "devalues or undervalues the lives, activities, and potential of women and people of color." Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 467 (1998).

258. It is important to remember that state and federal constitutions are mainly focused on the relationship between citizens and their governments, and these constitutional provisions were arguably not meant to protect a government's right to sue its people. For a discussion on how the purposes of courts in a democracy are more applicable to litigation against, rather than by, government actors, see Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 865-68 (2002). For discussions of litigation as "a form of expression," especially when on behalf of minorities, see Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantanamo*, 44 U.C. DAVIS L. REV. 1487, 1505-06 (2011); and Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 833 (2009).

259. Marshall S. Shapo, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. MIA. L. REV. 475, 476 (1963).

260. Malcolm Thorburn, *Policing and Public Office*, 70 U. TORONTO L.J. 248, 249, 252 (2020).

force."[261] Unlike firefighters or city-council members, police officers maintain "governmental authority to force civilians into complying with their demands under threat of arrest or even violence."[262] This places police in a singularly privileged position.[263] Simply put:

> The police are among the most powerful agents of the state. They can disrupt the daily routines of citizens more than any other public official by deciding who shall be stopped, who shall be detained, who shall be arrested, and who shall go free. Not even the President of the United States has their immediate and direct power over life and death.[264]

So, "[w]hether exercised at a traffic stop, or in a drug raid, or in response to a report of crime at one's home, police power represents the most fundamental and personal exercise of state power over citizens."[265]

But this power is often exercised in abusive ways. Indeed, one scholar has described police officers' powers as giving them the status of "street sovereigns": people who have power that "derives from law but cannot be contained by it."[266] Police have the power to "derogate from law as necessity requires," and they themselves determine what counts as necessity.[267] The state has

> invested the police with coercive power to resolve problems on the street with finality and [in a manner] based less on law than personal intuition and occupational experience. The law gives way to whatever

261. Sinha, *supra* note 215 (manuscript at 17).

262. *Id.*

263. Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1718 (2019).

264. FREDERICK A. ELLISTON & MICHAEL FELDBERG, MORAL ISSUES IN POLICE WORK 1 (1985), *quoted in* DEL POZO, *supra* note 223, at 1.

265. Press Release, ACLU of Massachusetts, Massachusetts Court Ruling Protects Citizen Critics from Police Libel Lawsuits (June 20, 2000), https://www.aclu.org/press-releases/massachusetts-court-ruling-protects-citizen-critics-police-libel-lawsuits [https://perma.cc/ZM8T-9NQN] (describing the ACLU brief in Rotkiewicz v. Sadowsky, 730 N.E.2d 282 (Mass. 2000)). In *Rotkiewicz*, the trial judge allowed a police officer to sue for defamation and intentional infliction of emotional distress as a private citizen, without having to prove malice. 730 N.E.2d at 286. On that basis, the jury awarded the officer $156,000 in damages. *Id.* The Massachusetts Supreme Judicial Court reversed, holding that the judge should have instructed the jury on the public-official standard. *Id.* at 289.

266. Sekhon, *supra* note 263, at 1711.

267. *Id.* at 1719.

> the exigency requires and it is the police's understanding of what is required that is usually dispositive.[268]

The citizen is thus subject to force whenever the officer, in his or her discretion, feels it is needed.[269]

Police officers have many ways to make these immense powers known to citizens who might otherwise consider complaining about police misconduct. For instance, if an officer uses excessive force during an arrest and an individual indicates that they may make a formal complaint, that officer might respond by criminally charging that individual with what has been referred to as "the trilogy"—the three offenses of "disorderly conduct, resisting arrest, and assaulting an officer."[270] Also called "contempt of cop,"[271] this trio of charges is brought not for a legitimate law-enforcement purpose but because the officers are "offended by citizens' demeanor."[272] Often, once these charges have been brought, an officer will offer to drop them if the individual drops their complaint in exchange.[273] This same tactic is used to dissuade litigation: if an individual who experienced police brutality tries to bring suit against an officer for violating their civil rights, that individual may then be charged with the trilogy, and the district attorney may offer to dismiss those criminal charges if the individual agrees to withdraw their civil-rights lawsuit.[274]

---

268. *Id.* (citing EGON BITTNER, THE FUNCTIONS OF POLICE IN MODERN SOCIETY 46 (1970)).

269. *Id.*

270. Collins, *supra* note 163, at 67 (citing Declaration of James J. Fyfe at 7, United States v. City of Steubenville, No. C2 97-966 (S.D. Ohio Aug. 28, 1997)).

271. Declaration of James J. Fyfe at 7, United States v. City of Steubenville, No. C2 97-966 (S.D. Ohio Aug. 28, 1997).

272. *Id.* For an example of this, see *Bates v. McKeon*, 650 F. Supp. 476 (D. Conn. 1986). In that case, Officer McKeon stopped Bates and his friend Vaclavik for a motor-vehicle infraction. *Id.* at 477. As the officer was walking away after issuing them a ticket, "Vaclavik started shouting obscenities at McKeon. . . . McKeon then walked to Vaclavik and advised him that he was under arrest for the offense of breach of the peace." *Id.*

273. Collins, *supra* note 163, at 67.

274. In *Town of Newton v. Rumery*, the Supreme Court held that such agreements do not violate the Constitution. 480 U.S. 386, 394 (1987). The state may also demand waiver of civil claims as a condition of a plea agreement on the underlying criminal charge. *Id.* at 393-94. Moreover, as a doctrinal matter, in some circumstances "[a]n outstanding criminal complaint may even formally extinguish the possibility of bringing civil suit," as is the case under abstention doctrines, which dictate that "[a] federal court must abstain from deciding any case when doing so would undermine the validity of a state criminal case." Sekhon, *supra* note 263, at 1742.

When police engage in misconduct in a police-citizen encounter, then, the deck is already weighted heavily in the officer's favor.[275] Allowing an officer to sue an individual further unbalances this already unbalanced legal relationship. The threat of an officer bringing a civil suit that could make an individual lose their home, should they have one, and wages, should they have them, can easily be used in similar ways to the "trilogy" of contempt-of-cop charges.[276] The combination of police officers' already-immense power with their ability to ruin civilians financially produces circumstances ripe for abuse. Those circumstances, in turn, are likely to stifle dissent and further exacerbate police-citizen tensions.

2. *Widening an Accountability Mismatch*

In any given year in the United States, an estimated one million civilians have encounters with the police in which officers use or threaten force.[277] An estimated 75,000 of those encounters result in nonfatal injuries that require hospital treatment, and an estimated 600 to 1,100 of those encounters result in death.[278] Race impacts how this force is dispersed: Black and Hispanic people "are twice as likely to experience threat of or use of force during police initiated contact," and Black people "are more than twice as likely to be killed and almost 5-times more likely to suffer an injury requiring medical care at a hospital compared to white non-Hispanics."[279]

---

275. Officers also generally have significant experience testifying in court and are comfortable with judicial processes. *See* Brenner & Ardebili, *supra* note 39, at 9.

276. Importantly, financial risk is one-sided, as police officers "are virtually always indemnified" for any liability they may incur while policing. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1147 (2016).

277. Law Enf't Epidemiology Project, *Facts and Figures on Injuries Caused by Law Enforcement*, UNIV. ILL. CHI., https://policeepi.uic.edu/data-civilian-injuries-law-enforcement/facts-figures-injuries-caused-law-enforcement [https://perma.cc/BH5Y-QJBL].

278. *Id.*; *Fatal Force*, WASH. POST (Dec. 31, 2024), https://www.washingtonpost.com/graphics/investigations/police-shootings-database [https://perma.cc/QL4V-GXCH] (stating that "1,128 people have been shot and killed by police" in 2024). The total number of officers killed in the line of duty in any given year tends to be around sixty. *See How Many Police Officers Die in the Line of Duty*, USA FACTS (Nov. 30, 2023), https://usafacts.org/articles/how-many-police-officers-die-in-the-line-of-duty [https://perma.cc/8UP6-F5MK].

279. Law Enf't Epidemiology Project, *supra* note 277.

Those harmed by police encounters unfortunately have few viable options for redress.[280] In the words of the political scientists Amy E. Lerman and Vesla M. Weaver, there is an "extraordinary absence of effective mechanisms for [police] accountability."[281] Of the currently available mechanisms, including formal complaint procedures, criminal prosecutions, and civil litigation under both Section 1983 and tort, all generally fail to achieve meaningful redress of harm for citizens seeking a remedy against the police. Individuals can try to launch a formal complaint in a police department. However, at the outset, legislation in multiple states "effectively discourages citizens from pursuing action against police officers by imposing criminal penalties for false complaints."[282] Even if an intrepid soul moves forward and nevertheless files a complaint, they will discover that complaint processes are typically "neither independent nor transparent. Instead, citizen complaints are frequently investigated through secret processes in which the police department plays both judge and jury."[283] Not surprisingly given this reality, complaints are generally unsuccessful: "In a study of 600 citizen complaints made about police abuse in Los Angeles," for example, "*not one* was sustained by the department."[284] Some stirrings and reforms like community complaint boards are attempting to transform formal complaint mechanisms into something resembling a viable form of redress, but current complaint procedures unfortunately do not approach a standard of meaningful accountability.[285]

Criminal law presents another possible pathway toward redress against misbehaving officers, but prosecutors rarely file criminal charges against police.[286] Several factors explain this failure, including that police officers and prosecuting attorneys typically work in concert to bring criminal charges

---

280. For a detailed discussion of issues like indemnification of officers, the possibilities of citizen-complaint boards, and why civil judgments against the police are ineffective deterrent mechanisms, see generally SCHWARTZ, *supra* note 1.

281. Amy E. Lerman & Vesla M. Weaver, *Protest Is Democracy at Work*, SLATE (Dec. 23, 2014, 12:09 PM), https://slate.com/news-and-politics/2014/12/police-brutality-protesters-history-of-civil-rights-womens-suffrage-child-labor-boston-tea-party.html [https://perma.cc/D599-YGJC].

282. LERMAN & WEAVER, ARRESTING CITIZENSHIP, *supra* note 21, at 67.

283. Lerman & Weaver, *supra* note 281.

284. *Id.*

285. *See* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 703-04 (2020).

286. *See* Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 764 (2016) (describing how "out of thousands of fatal shootings by law enforcement officers" between 2005 and 2015, "only fifty-four had been charged or indicted").

against other people, the perceived jury sympathy toward officers, the procedural protections police officers receive in some jurisdictions, and a "lack of information about cases that could be prosecuted or systems for reviewing possibly prosecutable cases."[287] Although recent data reflect a slight increase in the number of officers charged, criminal liability for police officers who engage in misconduct remains quite rare.[288]

Civil litigation, then, is often "the best available way" for citizens "to punish police when they violate the law and give police reason not to violate the law again."[289] Theoretically, harmed citizens who are victims of excessive violence or unwarranted searches and seizures can bring federal actions under Section 1983, which was originally enacted in the Civil Rights Act of 1871, to seek remedies against individual officers and their city employers.[290] However, practical and doctrinal obstacles make it unlikely that individuals will succeed on these claims.[291] First, as a practical matter, most criminal defendants cannot afford to pay a lawyer to bring a claim.[292] Second, to get in the courthouse door, plaintiffs suing in federal court will generally have to meet rigorous pleading standards and show a "plausible" claim for relief.[293] The factual realities of a plaintiff's access to information in these cases sometimes mean that they lack

287. Collins, *supra* note 163, at 116.

288. *Id.*

289. SCHWARTZ, *supra* note 1, at xiii.

290. Swan, *supra* note 22, at 329; *see* 42 U.S.C. § 1983 (2018) (providing a civil cause of action against state and local officials, including police officers, for deprivation of federally protected rights).

291. Notably, as Joanna C. Schwartz explains, "In recent years, the Court has focused increasingly on a different justification for qualified immunity: the need to protect government officials from nonfinancial burdens associated with discovery and trial. This desire has arguably shaped qualified immunity more than any other policy justification for the doctrine." Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017). Presumably, both defending and bringing litigation carry similar administrative burdens; if one distracts from the job an officer should be performing, the other should as well. This policy point, however, is rarely, if ever, raised when police sue.

292. Sekhon, *supra* note 263, at 1742. Attorneys may take claims of serious injury or death forward on a contingency basis but are unlikely to take on the most common forms of injuries from police violence, which are not as serious. *Id.*

293. *See* SCHWARTZ, *supra* note 1, at 39-43; Brandon Hasbrouck, *Unshielded: How the Police Can Become Untouchable*, 137 HARV. L. REV. 895, 905 (2024) (reviewing SCHWARTZ, *supra* note 1) ("[M]odern [federal] pleading standards are particularly burdensome on civil rights plaintiffs." (citing SCHWARTZ, *supra* note 1, at 39-43)). States, though, are able to choose their own pleading standards for state courts. For an argument that states should not follow the federal standard and, indeed, that it may violate state constitutions to do so, see generally Marcus Gadson, *Federal Pleading Standards in State Court*, 121 MICH. L. REV. 409 (2022).

evidence that meets this standard, but a decision on a motion to dismiss for failure to meet the plausibility standard occurs before a plaintiff can elicit that evidence through discovery.[294] Third, the doctrine of qualified immunity stunts Section 1983's potential to serve as a meaningful remedy.[295] Under qualified immunity, "government officials performing discretionary functions" are generally shielded from liability for damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[296] In other words, "only those officers who are 'plainly incompetent' or who 'knowingly violate the law' may be held liable,"[297] and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[298]

Indeed, as one scholar aptly put it, since qualified immunity was created, "the Court's decisions . . . have created a standard that seems virtually impossible to meet."[299] Showing that the law was "clearly established" is exceedingly difficult because "the Supreme Court has generally required plaintiffs to point to an already existing authoritative judicial decision (or perhaps multiple decisions), with substantially similar facts," and often those cases simply do not exist.[300] Further, the standard that courts employ technically refers to the conduct of a reasonable officer, but courts' deferential attitudes have switched out the

---

294. "In some kinds of cases, including those that focus on the intent of government actors or the existence of local government policies or practices, '[a] plaintiff will not likely have any evidence . . . until they get to discovery.'" Zick, *supra* note 42, at 1594 (quoting SCHWARTZ, *supra* note 1, at 43). The following is one such example:

> Texas law allowed the Dallas police department to withhold body camera video and other evidence about how Tony Timpa died. As a result, when Vicki Timpa, Tony's mother, filed her § 1983 lawsuit, she could not name the officers involved or describe with any specificity what happened to her son. Then, the City of Dallas moved to dismiss the complaint because it did not include sufficient facts to assert a 'plausible claim' under the Supreme Court's pleading standard.

Joanna C. Schwartz, *An Even Better Way*, 112 CALIF. L. REV. 1083, 1090 (2024).

295. Swan, *supra* note 22, at 329. *But see* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 326-38 (2020) (arguing that eliminating qualified immunity would not affect the vast majority of outcomes in Section 1983 litigation).

296. Swan, *supra* note 22, at 329 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

297. *Id.* at 330 (quoting HARMON, *supra* note 59, at 621).

298. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

299. Joanna Schwartz, *Qualified Immunity Is Burning a Hole in the Constitution*, POLITICO (Feb. 19, 2023, 7:00 AM EST), https://www.politico.com/news/magazine/2023/02/19/qualified-immunity-is-burning-a-hole-in-the-constitution-00083569 [https://perma.cc/SX57-UX3B].

300. Zick, *supra* note 42, at 1594.

reasonable officer for the "least informed, least reasonable" version of the reasonable officer possible.[301]

And finally, even if a plaintiff overcomes these obstacles, they must navigate one additional hurdle: defendants have a "right to immediately appeal any qualified immunity denial."[302] Normally, litigants must wait for a final judgment before they can exercise an appeal right, but for rulings on qualified immunity, interlocutory appeals are available, adding "months or years to the case and dramatically increasing the costs of litigation" for plaintiffs.[303]

These difficulties make it nearly impossible for plaintiffs to vindicate their federal rights against police officers.[304] And when officers counter potential Section 1983 claims by bringing their own claims, they exacerbate that problem. At least one federal court specifically noted this consequence in a case where an officer responded to a citizen's Section 1983 claim by suing that citizen for malicious prosecution.[305]

Still, Section 1983 is not the only possible route for a plaintiff seeking a remedy for police misconduct. An alternative avenue can be found in state tort law.[306] But tort suits for police misconduct are, like their Section 1983 counterparts, difficult for plaintiffs to win.[307] Immunities, special procedural rules, and legislatively imposed damage caps all present challenges for plaintiffs.[308] Mu-

---

301. *Id.* (emphasis omitted) (quoting Scott Michelman, *The Branch Best Qualified to Abolish Qualified Immunity*, 93 NOTRE DAME L. REV. 1999, 2004 (2018)).

302. SCHWARTZ, *supra* note 1, at 79.

303. *Id.* In essence, this right of appeal allows the defendant to get two bites at the apple, and the appeal right likely skews settlement negotiations as well.

304. Swan, *supra* note 22, at 330. For a discussion of some failed federal reformist projects, see Jay Schweikert, *Qualified Immunity*, 21 A.B.A. INSIGHTS ON L. & SOC'Y (Dec. 17, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity [https://perma.cc/K59Y-63MW].

305. *See* Sweeney v. Abramovitz, 449 F. Supp. 213, 216 (D. Conn. 1978) ("[T]he potential for using state malicious prosecution suits to deter legitimate [Section] 1983 actions implicates important federal concerns. . . . If the question of what constitutes probable cause to bring a [Section] 1983 action is determined according to state law, there is a possibility that the [probable cause] standard will be set so high in some state courts as to permit malicious prosecution suits to be brought in response to legitimate [Section] 1983 actions.") See also the discussion in Wilson, *supra* note 148, at 123, which interprets *Sweeney* as holding that the question of what counts as probable cause for a Section 1983 claim was a pivotal question of federal law.

306. Swan, *supra* note 22, at 331. Although "states cannot modify qualified immunity at the *federal* level," states can create a similar state-law cause of action to which qualified immunity does not attach, as Colorado recently did. *See* Schweikert, *supra* note 304.

307. Swan, *supra* note 22, at 331.

308. *Id.*

nicipalities sometimes choose to settle high-profile cases of police brutality, but in the usual police-misconduct scenarios, state and local governments tend to minimize, disavow, and limit any financial obligations to those injured by police, funneling these claims into court proceedings that are generally hostile to such cases.[309]

In court, police officers are experienced witnesses who receive a general presumption of expertise and trustworthiness.[310] Claims *against* officers are negatively impacted by those qualities, while claims *by* officers benefit from them: "the fact that law enforcement officers usually make excellent witnesses, the fact that juries are generally sympathetic to officers, [and] the fact that the plaintiffs will often be criminals themselves thus generating little sympathy" all work in favor of officers.[311]

Even individuals who are harmed by police activity but were never suspected of involvement in any sort of crime—like bystanders harmed in a high-speed chase or homeowners whose home a suspect happened to hide in while being pursued—have difficulty receiving a remedy for the hardship inflicted on them.[312] One study of claims in Houston determined that plaintiffs were al-

---

309. *Id.* at 334; *see also* Cassandra R. Cole & Chad Marzen, *A Review of State Sovereign Immunity Statutes and the Management of Liability Risks by States*, 32 J. INS. REGUL. 45, 49 (2013) (describing statutory obstacles to state tort claimants, including strict procedural requirements and damages caps).

310. *See* Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L.J. 475, 485-91 (2021).

311. *FTCA Hearings*, *supra* note 207, at 52 (statement of Frank Carrington, Executive Director, Americans for Effective Law Enforcement, Inc.); *see also* Auerbach, *supra* note 139, at A6 (describing numerous successful plaintiff police suits, including a Seattle case in which a policeman won $10,000 in damages "after suing a man who shot him during a routine vandalism investigation" and a Tucson case in which "a police officer was awarded a total of $3,100 in two lawsuits—one from a man who stamped on his foot and broke his toe while he was trying to break up a barroom brawl, the other from a woman who later admitted, and wrote a letter of apology as part of the court settlement, that she had falsely accused him of fondling her during a search"). Regarding the litigation brought against police between the years of 1967 and 1971, one commentator stated that "defendant/law enforcement officers won 81.5 percent of the cases while plaintiffs won only 18.5 percent of the actions brought." *FTCA Hearings*, *supra* note 207, at 52 (statement of Frank Carrington, Executive Director, Americans for Effective Law Enforcement, Inc.). Moral reasoning may also impact jurors' receptivity to plaintiff police claims. In one study, researchers found that individuals who engaged in "conventional" moral reasoning would tend to side with authority figures, while individuals who engage in "postconventional" moral reasoning would not. *See* John L. Bernard, Robert Cohen & Michael Lupfer, *The Influence of Juror's Level of Moral Reasoning and the Nature of Closing Arguments in Determining the Verdict in a Civil Case: A Report of Two Experiments*, 9 LAW & PSYCH. REV. 93, 101 (1985).

312. Often, courts rely on the "public duty doctrine" to block recovery in such cases. A handful of courts have held that police officers engaged in high-speed chases owe duties to the public

most never successful suing on either of these bases, an empirical confirmation of what many have qualitatively reported across the country.[313] The reality is that a person suing the police, whether for injuries suffered as an innocent bystander or for injuries directly inflicted through police violence and brutality, is unlikely to achieve success in the courtroom because a series of procedural, doctrinal, and substantive hurdles have made it nearly impossible to do so.[314] These hurdles reflect a "normative commitment" to the idea of "the officer as an extraordinary defendant in civil suits."[315]

3. Police as Private Plaintiffs and Public Defendants

But this is not a universally held notion. Under the common law, and in a number of Commonwealth countries, police officers are held to normal tort-liability standards: they are "generally subject to the same liabilities in tort as

---

but often apply a standard of care of reckless disregard. *See, e.g.*, Day v. State *ex rel.* Utah Dep't of Pub. Safety, 980 P.2d 1171, 1181 (Utah 1999) ("[A] police officer in pursuing another on a public high-way or street . . . owe[s] a duty of reasonable care under the circumstances to other motorists on the road."); Robbins v. City of Wichita, 172 P.3d 1187, 1195-97 (Kan. 2007) (holding drivers of emergency vehicles to a reckless-disregard standard).

313. Andrea Ball & Caroline Ghisolfi, *HPD's Loose Policy Enables Rise in High-Speed Chases That Killed Bystanders*, HOUS. CHRON. (Nov. 13, 2023, 2:47 PM), https://www.houstonchronicle.com/news/investigations/article/houston-police-chase-deaths-18329110.php [https://perma.cc/X8BJ-RCMZ]. In statistical terms, between 2018 and 2022, high-speed chases in Houston increased forty-seven percent, and 240 bystanders were injured or killed by these chases, but virtually none of those harmed were ever able to obtain a remedy. *Id.* For an example of a homeowner suit, see Hannah Ray Lambert, *Cancer Survivor Dealt New Blow After Texas Police Destroyed Her House, but Lawyers Say City Still Has to Pay*, FOX NEWS (Nov. 13, 2023, 4:30 PM EST), https://www.foxnews.com/us/cancer-survivor-dealt-new-blow-texas-police-destroyed-house-lawyers-say-city-still-pay [https://perma.cc/ZA73-62KJ].

314. SCHWARTZ, *supra* note 1, at xv (noting that the combined effect of all these police protections has rendered police officers "all but untouchable"). Even in the unlikely event that a plaintiff succeeds in their lawsuit, the officers involved often do not face discipline:

> One study examined 185 officers sued in successful civil lawsuits—the plaintiffs in these cases were collectively awarded $92 million in punitive damages—and found that only eight were actually disciplined, and a galling 17 received promotions. Other studies have found even higher rates of promotion following violations by police.

Lerman & Weaver, *supra* note 281 (first citing Collins, *supra* note 163, at 111; and then citing *Report of the Independent Commission on the Los Angeles Police Department*, INDEP. COMM'N ON THE L.A. POLICE DEP'T 140-42 (1991), https://michellawyers.com/wp-content/uploads/2010/06/Report-of-the-Independent-Commission-on-the-LAPD-re-Rodney-King_Reduced.pdf [https://perma.cc/BD7U-EVHU]).

315. Samuel Beswick, *Equality Under Ordinary Law*, SUP. CT. L. REV. (forthcoming) (manuscript at 40), https://ssrn.com/abstract=4528664 [https://perma.cc/WQL8-J67V].

private individuals and bodies,"[316] and "personally liable for torts committed in the course of their duties."[317] In the United States, however, when police officers are sued, they are treated as extraordinary defendants, "enjoying immunities and legal protections unavailable to private individuals."[318] These include qualified immunities, sovereign and governmental immunities, indemnification practices, and deference to police-officer expertise.[319] Further, certain legal and evidentiary doctrines apply differently to private citizens and police offic-

---

316. *Id.* (manuscript at 3) (quoting Robinson v. Chief Constable of West Yorkshire [2018] UKSC 4 [32]).

317. *Id.* (manuscript at 21). In fact, as Charles R. Epp wrote, "British plaintiffs against the police have long enjoyed a structural incentive that American plaintiffs can only dream about: British chief constables are vicariously liable for the actions of their officers, thereby exposing police departments' deep pockets and creating the conditions for tort lawsuits to press for institutional reform." Charles R. Epp, *The Role of Tort Lawsuits in Reconstructing the Issue of Police Abuse in the United Kingdom*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 175, 180 (David M. Engel & Michael McCann eds., 2009). Further, British plaintiffs "have a right to a jury trial in the most common types of tort claims against the police," even though there is "no right to a jury trial in most types of civil cases" in that jurisdiction. *Id.*

318. Nadia Banteka, *Police Vigilantism*, 110 VA. L. REV. 1439, 1490 (2024). As a special kind of public employee, police officers receive unique employment protections. As Catherine L. Fisk and L. Song Richardson note, police officers "enjoy significantly more procedural and substantive protections against discipline for on-the-job and off-the-job misconduct than do private sector employees," including "constitutional due process rights." Fisk & Richardson, *supra* note 144, at 718. In addition, they write:

> In at least sixteen states, police additionally have statutory rights to certain procedures in the investigation of misconduct under Law Enforcement Officers Bills of Rights ("LEOBORs") as well as civil service protections in many other states. Supplementing these constitutional and statutory protections are police union contracts, which contain additional procedural and substantive protections against discipline.

Id. at 718-19.

319. *See* Lvovsky, *supra* note 310, at 486-95. Because officers are public workers, almost all states indemnify them for damages that might be awarded against them for activities they performed in the course of their duties. SCHWARTZ, *supra* note 1, at 187. For example, Connecticut legislation provides that municipalities

> shall pay on behalf of any employee . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights . . . if the employee, at the time of the occurrence . . . was acting in the performance of his duties and within the scope of his employment, and if such occurrence . . . was not the result of any willful or wanton act of such employee in the discharge of such duty.

CONN. GEN. STAT. § 7-465(a) (2023). Connecticut will also indemnify a police officer for any economic loss sustained "in any prosecution . . . for a crime allegedly committed by [an officer] in the line of duty," as long as the case is resolved in the officer's favor. *Id.* § 53-39a.

ers, including doctrines of mistake and evidentiary rules surrounding past misconduct.[320]

The special solicitude given to officers is at least in part because police serve in a public role and "wield the state's coercive power under the color of law."[321] Yet, when police act as plaintiffs and sue those whom they police, officers purport to step into the role of an ordinary, private litigative party.[322] In doing so, they participate in what Professor Nadia Banteka has termed "strategic oscillation": shifting between the status of state actor on the one hand and private individual on the other based on whichever is more legally beneficial at a particular moment in time.[323] For example, officers may claim the protection of private-citizen arrest statutes when they would be unable to meet the constitutional standards applicable to officer arrests or claim the protection of private-citizen stand-your-ground laws when they would not be able to meet the constitutional use-of-force requirements applicable to public officers.[324]

A similar phenomenon arises in the plaintiff police context. As defendants, police officers are considered "extraordinary" public parties who require special

---

320. A mistake of law is generally not a shield to liability: citizens "are expected to know and follow the law." Wayne A. Logan, *The Harms of* Heien*: Pulling Back the Curtain on the Court's Search and Seizure Doctrine*, 77 VAND. L. REV. 1, 39 (2024). However, the Supreme Court held recently in *Heien v. North Carolina* that police officers need not meet the same standard. 574 U.S. 54, 57 (2014). Instead, police could seize individuals, without legal consequence, "on the basis of reasonable police mistakes of law." Logan*, supra*, at 3. *Heien*, then, "allows police, state actors the Court otherwise deems worthy of deference for their purported expertise, to err in their most fundamental enterprise: enforcing the law." *Id.* at 39-40 (discussing *Heien*, 574 U.S. at 57). For a discussion of the usual deference to police expertise, see Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2081 (2017).

Similarly differential treatment occurs in the evidentiary rules governing past misconduct. Under Federal Rule of Evidence 404(b), judges often exclude evidence of a police officer's past misconduct but allow evidence of "past drug use, criminal records or acts, gang affiliation, and encounters with police." James Stone, *Past-Acts Evidence in Excessive Force Litigation*, 100 WASH. U. L. REV. 569, 572-73 (2022). Similarly, "[e]xtrinsic evidence of plaintiff-witnesses' criminal records is easily admissible under Rule 609," but "contrarily, a finding that a testifying officer has falsified reports or fabricated evidence, reported by an independent civilian complaint review board . . . is not." *Id.* at 570.

321. Banteka, *supra* note 318, at 1439.

322. *See id.* at 1463 (discussing police officers' ability to "identity shop[]" to their advantage, benefiting from the protections individuals receive and the increased immunity due to state agents).

323. *Id.* at 1439.

324. *Id.* at 1442-43.

rules rendering them almost impervious to lawsuits.[325] As plaintiffs, though, police officers purport to switch into the role of a standard private party. But they are not. Their closeness to the criminal legal system and their inherently public nature grant them access to resources and powers that truly private parties cannot access.[326] For example, "[i]n nine states, police officers are permitted to double as prosecutors for misdemeanor charges,"[327] and in four of those (Rhode Island, New Hampshire, Virginia, and Delaware), police officers perform almost all the misdemeanor arraignments.[328] And in one particularly extreme example, an Illinois judge ordered that a portion of a criminal defendant's $10,000 bond be turned over to a police-officer plaintiff who brought a *civil* assault claim against him.[329] That order was eventually overturned, but it is highly unlikely it would have been rendered in the first place if the plaintiff were an ordinary private party.[330]

The law recognizes one situation where police are treated as public figures even while plaintiffs: defamation suits. The publicness of police officers is the reason they face a heavier burden when they bring such suits.[331] As the Supreme Court of Illinois has written, a police officer even at the lowest rank constitutes a "public official," because even though that officer has little ability to set police policy, he still performs duties that are "peculiarly 'governmental' in character and highly charged with public interest."[332] In fact, the court noted

---

325. This is the case even though, at least under Section 1983, officers are technically sued in their personal (not official) capacity. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that neither states nor state officials acting in their official capacities are "persons" capable of being sued for the purposes of Section 1983 liability).

326. *See* Ariel Weissberg, *Police Defamation Suits Against Citizens Complaining of Police Misconduct*, 22 ST. LOUIS U. L.J. 676, 677 (1978) (suggesting that police officers occupy the unique position of "mediators between the community and the legal system" with particular access to legal resources and powers).

327. Adam H. Johnson, *The Appeal Podcast: When Police Officers Double as Prosecutors*, APPEAL, at 00:22 (Oct. 31, 2019), https://theappeal.org/the-appeal-podcast-when-police-officers-double-as-prosecutors [https://perma.cc/9G6T-BDDK].

328. *Id.* at 00:27, 00:47. In Rhode Island, "Providence Police Department prosecutors receive three months of on-the-job training with a current police prosecutor." *Id.* at 02:57.

329. FRIEND, *supra* note 123, at 206 (discussing Knox v. Pannell, No. 1974-L-003089 (Ill. Cir. Ct. Feb. 26, 1974)).

330. *Id.* (adding that "[t]he county officials refused to comply, and another judge eventually overturned the order").

331. Notably, the state itself cannot sue for defamation. *See* Elad Peled, *Should States Have a Legal Right to Reputation? Applying the Rationales of Defamation Law to the International Arena*, 35 BROOK. J. INT'L L. 109, 113 (2010) (collecting cases supporting the proposition that "governmental entities may not file civil suits for defamation that targets them").

332. Coursey v. Greater Niles Twp. Publ'g Corp., 239 N.E.2d 837, 841 (Ill. 1968).

that since "[t]he abuse of a patrolman's office can have great potentiality for social harm," the public interest in having "public discussion and public criticism" of police officers is of paramount importance.[333] Relative to even other public officials, "the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions."[334] Libel laws were required to yield to this public interest.[335]

While courts have imbued plaintiff police officers with their public status in the defamation context, courts have generally treated police officers as essentially private plaintiffs when they bring other tort actions.[336] In jurisdictions that have rejected the professional-rescuer rule and robust anti-SLAPP legislation in particular, plaintiff police officers will generally be treated as essentially private plaintiffs, except when they bring defamation claims.[337]

This police-officer identity shifting between public and private works to the detriment of the citizenry. Police officers are shielded from suits that citizens bring but are empowered to bring suits themselves. By oscillating between their public and private statuses, officers are almost impervious to suits brought against them, but they are not particularly limited when they are the ones bringing the suits.[338] Police officers should be understood as public plain-

---

333. *Id.*

334. *Id.*

335. *See id.*

336. In addition to defamation, self-defense may sometimes present particular challenges for plaintiff police. The defendant in such a case may argue that the officer failed to identify themself, resulting in a reasonable mistake of fact as to their identity, or that the officer's attempted arrest was unlawful, meaning that the defendant may have a right to resist. *See* FRIEND, *supra* note 123, at 97-98. In a 1977 case, the Louisiana Supreme Court rebuffed a plaintiff police officer's claim for damages related to injuries suffered when a young man, resisting an unlawful arrest, punched the officer in the face. White v. Morris, 345 So. 2d 461, 463 (La. 1977). At trial, a jury had awarded $7,092.05, which the trial court subsequently denied on the basis that the defendant had reasonably resisted arrest. *Id.* at 466-67. The court of appeals held that the resistance used excessive force, and so the officer should have been entitled to damages. White v. Morris, 337 So. 2d 237, 240-41 (La. Ct. App. 1976). The Supreme Court of Louisiana reversed and held that the defendant was indeed lawfully resisting arrest. *White*, 345 So. 2d at 467. However, other states have abolished rights to resist arrest. *See* Craig Hemmens, *Resisting Unlawful Arrest in Mississippi: Resisting the Modern Trend*, 2 CAL. CRIM. L. REV. 2, ¶ 3 (2000).

337. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 289 (1964).

338. *But see* Cate v. Oldham, 450 So. 2d 224, 227 (Fla. 1984). There, Florida's highest court held that "the common law of Florida does not allow a state official who has been sued in his official capacity to maintain an action for malicious prosecution." *Id.* Interestingly, the court

tiffs, not merely public defendants: as I describe below, plaintiff police suits have specific public meaning and create specific public harm, and these qualities justify treating plaintiff police claims differently from those of private plaintiffs.

Indeed, for the average citizen, it is impossible to separate the officer-as-private-individual from the officer-as-government-agent. A legal framework in which police are treated as public defendants and private plaintiffs thus gives rise to corrosive political illegitimacy.[339] When the public feels like a segment of their public officials is unaccountable to them, and that the power imbalance is unfair, the fabric of democracy frays. Problems of fundamental fairness in litigation "can so alienate ordinary individuals that they come to lose faith in all public institutions,"[340] and the state of affairs surrounding suing or being sued by the police falls neatly into this category.[341]

4. Chilling Free Speech and Political Conduct

In addition to contributing to power and accountability asymmetries between police and the citizenry, plaintiff police claims also chill free speech and political conduct. The public has a particularly strong interest in speech that concerns the police: since the powers that police have are "the most fundamental and personal exercise of state power over citizens," "criticisms of policing fall into the hardest core of protected political speech," and "[p]ublic debates about the conditions under which the state may subject its civilians to detention and

---

here turned to the private/public actor distinction to ground its holding, declaring that "[t]here simply is no historical basis for a state officer to retaliate with a malicious prosecution action when he has been sued in his official capacity. Malicious prosecution is considered a personal tort. . . . The gravamen of the action is injury to character." *Id.* (citation omitted). In other words, because the officer had been sued as a public defendant, and then sought to sue as a private plaintiff, his action for malicious prosecution was impossible.

339. Ron Kuby, an attorney commenting on a plaintiff police suit, offered an easy solution to this asymmetry:

> If the police want to use the civil law as a tool in their policing, those of us who pay their salaries have the opportunity now to engage in some real reform, which is, stop the indemnification of cops, stop the free lawyers for the police, stop the qualified immunity for the police—and we'll see how that works out for them.

Darrah, *supra* note 48.

340. Shapiro, *supra* note 227, at 127.

341. *See also* Justin Sevier, *Qualified Illegitimacy*, 56 U.C. Davis L. Rev. 1635, 1694 (2024) (using psychological data to show that the procedural and relational deficiencies in qualified immunity render the doctrine illegitimate in the eyes of the public).

state-sanctioned violence define the most basic parameters of democratic self-governance."[342]

When police sue people who complain about police misconduct, complaints are simply not going to be made as often. A stark example of this can be seen in the example of Seattle, where in the mid-1990s, the Seattle Police Officers Guild brought defamation claims against six individuals after they had filed complaints of police misconduct.[343] Tellingly, "[i]n the six months following this retaliation, there was a drop of almost 75 percent in citizen complaints."[344] And in many judicial decisions, courts have acknowledged the clear connection between suing individuals for making complaints and the chilling effect such suits have and are intended to have.[345]

Indeed, it is ironic that at the same time speech critical of police is recognized as being of the utmost importance and deserving of protection,[346] it is police officers who are both tasked with protecting such speech and have the largest interest in suppressing it.[347] Other kinds of officials may very well "wish to insulate themselves from criticism too," but "most lack the complementary means and opportunities to implement those preferences."[348]

Not so for police. It is exceptionally easy for police to block citizens from engaging in public speech, and they are structurally set up in a way that maximizes First Amendment harms.[349] Many of the Black Lives Matter protests, for example, were focused on criticism of police behavior, and police unions have publicly and vehemently opposed that political message.[350] Nevertheless, police are the very governmental body tasked with upholding the rights to that speech, creating a conflict of interest.

Allowing police to sue protestors and complaint filers becomes another way for police officers to suppress speech that they do not like. Merely the "threat of being a defendant in such a suit can create a strong deterrent headwind" for

---

342. Sinha, *supra* note 215 (manuscript at 19).

343. Collins, *supra* note 163, at 65. The complaints were ultimately dismissed under internal complaint processes. *Id.*

344. *Id.*

345. *See, e.g.*, Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983); Cate v. Oldham, 450 So. 2d 224, 227 (Fla. 1984).

346. Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 287-89 (Mass. 2000) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964)); *see* Sinha, *supra* note 215 (manuscript at 19).

347. Sinha, *supra* note 215 (manuscript at 18-19).

348. *Id.* (manuscript at 19).

349. *Id.* (manuscript at 17-21).

350. *Id.* (manuscript at 22).

those who might otherwise criticize police conduct, making that speech less likely to occur, and thereby harming the public interest in free expression.[351] Even police actors themselves have sometimes criticized these sorts of speech-suppressing claims.[352]

5. The Democratic Harm

Plaintiff police suits also create a democratic harm. Importantly, when people talk about the police in America, what they are really talking about is *local* police officers.[353] Policing in the United States is "a fundamentally local matter, with thousands of municipal and county governments responsible for its administration."[354] The police officer that the average American "encounters on the street is almost always an employee of a local government," not a federal or state one: local police are "the agencies most visible to the public and also have the most direct contact with them."[355]

---

351. Abrams, *supra* note 201, at 22 (emphasis omitted); *see also* Weissberg, *supra* note 326, at 691 (noting that the threat of police defamation lawsuits, rather than their rate of actual success, is enough to chill speech critical of police).

352. In one example in St. Louis, after officers successfully sued an arrestee who had alleged in a complaint that officers had beat him and called him racist epithets during a traffic stop, the president of the board subsequently "publicly criticized the filing of the officers' suit, charging that it undermined the city's new citizen complaint procedure." FRIEND, *supra* note 123, at 172 (first citing Scheidle v. Washington, No. 51814F (St. Louis Cir. Ct. Oct. 2, 1975); and then citing ST. LOUIS POST DISPATCH, Sept. 9 1978, at 3, 3). Similarly, in Baltimore, when "the Baltimore Police Department's Personnel Service Board recommended that the department press *criminal* charges against citizens who make false complaints against officers," the department's top officials rejected the recommendation, noting that "the department cannot maintain the public's confidence unless it permits 'a free flow of information from the public which it serves, without fear of retribution in the form of countersuits by the agency.'" *Id.*

353. *See, e.g.*, Shoked, *supra* note 20, at 1292.

354. Swan, *supra* note 22, at 321-22, 325.

355. *Id.* at 325 & n.66 (quoting NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 49 (Wesley Skogan & Kathlee Frydl eds., 2004)). Not every city has a municipal police force. Some "smaller and distressed cities tend to outsource that responsibility to the county sheriff." Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1381 (2021). Other "townships and unincorporated communities . . . [may] fall within the jurisdiction of the county generally." *Id.* at 1382; *see also* Maria Ponomarenko, *The Small Agency Problem in American Policing*, 99 N.Y.U. L. REV. 202, 264-66 (2024) (discussing the factors that lead to police-department dissolution and the desirability of police-department consolidation, including by turning to state and county police).

A police officer encountering a civilian, then, is a paradigmatic encounter between individuals and "the city,"[356] and when police-constituent encounters go wrong, the political relationship between a citizen and a city is deeply implicated. Indeed, a growing body of research illuminates how police encounters reverberate through civic life in the city more broadly.[357] Citizens extrapolate from their police encounters to the city at large: "When police are experienced as fair and responsive, these characteristics may be generalized to the political system as a whole, encouraging civic engagement."[358] People who experience positive encounters with police are likely to apply that to their broader communities and engage in a higher level of civil service and democratic participation.[359] But the inverse is also true: "When residents instead see police as hostile, invasive, or untrustworthy, these less benign traits may become the dominant view of the state, breeding political alienation, distrust, and withdrawal."[360]

Citizens who have negative police encounters thus withdraw from political and democratic life. They become "less likely to vote"[361]: even a misdemeanor charge and a day or two in jail can measurably decrease the probability of voting in the future, particularly for Black arrestees, who turn "dramatically away from voting," with their participation falling by approximately half after such an experience.[362] Negative police encounters also make citizens "less likely to

---

356. *See* Swan, *supra* note 22, at 325; LERMAN & WEAVER, ARRESTING CITIZENSHIP, *supra* note 21, at 118.

357. *See, e.g.*, Traci R. Burch, *Effects of Imprisonment and Community Supervision on Neighborhood Political Participation in North Carolina*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 196 (2014); Hannah L. Walker, *Extending the Effects of the Carceral State: Proximal Contact, Political Participation, and Race*, 67 POL. RSCH. Q. 809, 818-19 (2014); Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. 311, 322-23 (2019).

358. Lerman & Weaver, *Staying Out of Sight?*, *supra* note 21, at 203 (citing LERMAN & WEAVER, ARRESTING CITIZENSHIP, *supra* note 21, at 23-24; Joe Soss, *Making Clients and Citizens: Welfare Policy as a Source of Status, Belief, and Action*, *in* DESERVING AND ENTITLED: SOCIAL CONSTRUCTIONS AND PUBLIC POLICY 291, 314 (Anne L. Schneider & Helen M. Ingram eds., 2005)).

359. Swan, *supra* note 22, at 369 (citing Lerman & Weaver, *Staying Out of Sight?*, *supra* note 21, at 203).

360. Lerman & Weaver, *Staying Out of Sight?*, *supra* note 21, at 203 (citing LERMAN & WEAVER, ARRESTING CITIZENSHIP, *supra* note 21, at 215-20).

361. Swan, *supra* note 22, at 368-69 (citing Jonathan Ben-Menachem & Kevin T. Morris, *Ticketing and Turnout: The Participatory Consequences of Low-Level Police Contact*, 117 AM. POL. SCI. REV. 822, 831 (2022)).

362. *Id.* (quoting Ariel White, *Even Very Short Jail Sentences Drive People Away from Voting*, WASH. POST. (Mar. 28, 2019, 11:45 AM), https://www.washingtonpost.com/outlook/2019/03

call the local government for assistance via mechanisms like New York City's general 311 telephone line, and more likely to experience a sense of alienation and exclusion from the body politic."[363] Even short inappropriate stops by police reduced political participation overall, rendering citizens less likely to engage with their local governments.[364]

When individuals have a negative encounter with a police officer, and that police officer then goes on to sue them, the problem of political withdrawal is exacerbated. This democratic injury is its own kind of harm, as "democratic participation functions as an especially valuable interest (and its wrongful destruction, especially injurious)."[365] Even ancient philosophers knew this to be true. Aristotle, for example, "believed the 'good life' required one be 'able to share in the benefits of political association.'"[366] More modern theorists, such as Hannah Arendt and Michael J. Sandel, also "assert that being a 'participator in government' is a core human good" offering a "happiness" citizens are unable to "acquire" elsewhere and that "only as participants in political association . . . can [we] realize our nature and fulfill our highest ends."[367] According to these theorists, "the destruction of democratic efficacy inflicts a deeply serious injury."[368]

/28/even-very-short-jail-sentences-drive-people-away-voting [https://perma.cc/UL7W-HTN2]).

363. *Id.* at 368 (footnote omitted) (citing Lerman & Weaver, *Staying Out of Sight?*, *supra* note 21, at 203, 210).

364. *Id.* (citing White, *supra* note 357, at 311-12). This aligns with the Court's observation in *Terry v. Ohio* that an investigative detention is "a serious intrusion upon the sanctity of a person, which may inflict great indignity and arouse strong resentment." 392 U.S. 1, 17 (1968).

365. Rauch, *supra* note 77, at 1468. Further, police misconduct on the whole creates specific moral harms. Policing creates a moral harm in that "by demanding fawning deference from the civilians they serve and by widely expressing and modeling vice, especially through their unapologetic demonstrations of bias and brutality," the current form of policing has a propensity "to make us morally worse people." *See* G. Alex Sinha, *The Thin Blue Line Between Virtue and Vice: Confronting the Moral Harms of Policing*, 84 U. PITT. L. REV. 1, 2, 48 (2022) (emphasis omitted).

366. Rauch, *supra* note 77, at 1468 (quoting ARISTOTLE, POLITICS 5-6 (Ernest Barker trans., Oxford Univ. Press ed. 1962) (c. 350 B.C.E.)).

367. *Id.* (footnote omitted) (first quoting HANNAH ARENDT, ON REVOLUTION 218, 268 (1965); then quoting *id.* at 115; and then quoting MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 7 (1996)).

368. *Id.* As Gerald E. Frug put it, "Hannah Arendt argued that no one can be truly free or happy without recapturing the meaning of freedom as active participation in public decisionmaking and the meaning of happiness as public happiness, the sharing of public power." Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1071 (1980).

When police sue people, this "democratic disempowerment," or "the destruction of political efficacy in one's community" can occur.[369] Even in less politically fraught contexts—like an officer slipping on a puddle after responding to a 911 call about a drowning child who is grievously injured—a plaintiff police suit is likely to be experienced as a difficult moment in one's relationship with the city.[370] One might think such suits would result in *more* civic engagement and mobilization by motivating impacted people to improve the system for others.[371] But in fact, the research suggests that the far more common response is disengagement from civic life generally.[372]

III. CREATING A GOVERNING FRAMEWORK

In light of their negative impacts on democratic participation, their chilling effects on political participation and freedom of speech, and their exacerbation of accountability and power-imbalance problems, plaintiff police suits should be generally disallowed.[373] Fortunately, there are doctrinal tools already in play

---

369. Rauch, *supra* note 77, at 1457.

370. *See supra* note 115 and accompanying text.

371. Family members may be motivated in this way after witnessing the negative impacts of police encounters on their loved ones. *See, e.g.*, Hannah L. Walker, *Targeted: The Mobilizing Effect of Perceptions of Unfair Policing Practices*, 83 J. POL. 119, 131 (2020).

372. Indeed, "[p]ower and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so." Frug, *supra* note 368, at 1070.

373. To be sure, some sympathetic plaintiff police claims will likely be casualties of this approach, at least initially. But, on the whole, the equities justify this limitation, and the flexibility of the common law may allow for a finer calibration over time.

Exceptions could exist for defendants that are not natural persons, as these claims do not raise the same kinds of concerns as police-versus-citizen claims and do not give rise to the same democratic defects. Suing companies for product liability should be presumptively allowed. For example, if a protective vest used by police officers turned out to be faulty in a manner that caused injury to officers, such a claim should be allowed. In a similar example, a police officer who was shot in the leg sued the website through which the gun was purchased for "enabling illegal gun trafficking by allowing users to buy and sell guns with 'essentially no rules.'" Alanna Durkin Richer, *Boston Police Officer Sues the Online Market Where the Gun Used on Him Was Sold*, WBUR (Oct. 19, 2018), https://www.wbur.org/news/2018/10/19/boston-police-officer-sues-online-market-where-the-gun-used-on-him-was-sold [https://perma.cc/8LBR-D8HW]; *see also* Ben Hall, *"I Knew Immediately I Was Shot," Says Officer Suing Business for Allowing Stolen Gun on the Street*, NEWSCHANNEL 5 (June 17, 2024, 7:12 PM), https://www.newschannel5.com/news/newschannel-5-investigates/i-knew-immediately-i-was-shot-says-officer-suing-business-for-allowing-stolen-gun-on-the-street [https://perma.cc/82EA-PF5M].

that can form the foundation for a governing framework to restrict such claims while maintaining their limited benefits. Anti-SLAPP legislation and the common-law firefighter's rule offer ready-made scaffolding that can be easily tweaked to limit plaintiff police claims. Workers' compensation regimes can achieve the goal of compensation, and existing criminal prohibitions on wrongful acts can achieve the goal of deterrence.[374]

Claims brought by third parties, like claims for wrongful death brought by family members or subrogated claims for paid benefits brought by cities or insurers, may constitute another exception, as they may not implicate the same severe political and democratic issues. These cases, however, pose a difficult situation. On the one hand, these suits can be quite sympathetic and might further some laudable public-policy goals. For example, the case in which the family members of a slain Temple University officer have sued the eighteen-year-old shooter and the members of his family appears quite sympathetic. *See Family of Fallen Temple University Police Officer Sues Family of Alleged Killer*, *supra* note 110 (alleging that the family members knew that the shooter was mentally unstable and had an "interest in firearms"); *supra* notes 110-111 and accompanying text. On the other hand, third-party liability is easily weaponized against already-marginalized groups. *See, e.g.*, Swan, *supra* note 181, at 871-75 (describing a trend of imposing vicarious liability on family members and the racial and gender disparities implicated in that liability). For an additional example of a plaintiff police suit against the parents of a wrongdoer, in which an officer sued the parents of a teenager who shot him, alleging negligence and negligent entrustment related to their failure to secure their firearm, see Ricky Turner, *Detective Gilmartin Suing Parents of Man Accused of Shooting Him*, Yahoo News (Aug. 31, 2024, 3:43 PM EDT), https://www.yahoo.com/news/detective-gilmartin-suing-parents-man-194334090.html [https://perma.cc/G2KY-WUWG].

Suits brought by retired officers are also less problematic because the plaintiff is no longer in a position of public authority. *See, e.g.*, Sarah Fitzpatrick, *Former Secret Service Agent Sues New York Post and Daily Mail over Hunter Biden Claim*, NBC News (Apr. 30, 2024, 1:22 PM EDT), https://www.nbcnews.com/investigations/former-secret-service-agent-sues-new-york-post-daily-mail-hunter-biden-rcna150010 [https://perma.cc/AC63-DAHV].

374. Citizens who have sued the police and now face counterclaims or other claims from police officers may also be able to access the abuse-of-process tort. However, abuse of process is a "disfavored" tort that is hard to establish. *See, e.g.*, Baglini v. Lauletta, 768 A.2d 825, 834 (N.J. Super. Ct. App. Div. 2001).

To succeed, a person who has been sued will generally need to show that the suit was enacted with an ulterior or improper purpose and "a willful act in the use of the process not proper in the regular conduct of the proceeding." Jordet v. Jordet, 861 N.W.2d 147, 153 (N.D. 2015). The "gist of the tort is misuse of the legal system for some personal end," and it requires an abuse of a court process above and beyond a frivolous lawsuit: "some act, threat or demand must be made after process has issued" that was injurious. Dan B. Dobbs, Torts and Compensation: Personal Accountability and Social Responsibility for Injury 1039 (1985). Additionally, some courts require those bringing abuse-of-process claims to show a "special injury," "beyond that ordinarily incurred in defending a lawsuit." *Id.*

A. Anti-SLAPP Laws

Anti-SLAPP legislation recognizes that lawsuits are sometimes filed for the purposes of intimidating or silencing others. Such "Strategic Lawsuits Against Public Participation," meaning lawsuits filed for the purpose of intimidating or silencing others,[375] rely on the classic reversal of plaintiff and defendant seen in the DARVO strategy referenced earlier: by becoming a plaintiff and bringing a lawsuit against someone who had initially complained, the new plaintiff takes the focus off their own misconduct and redirects it toward the originally wronged party.[376] In the typical SLAPP suit, the plaintiff is a well-resourced party—like a major corporation—and the defendant is someone significantly less resourced, whom the litigation is meant to intimidate.[377]

The threat that SLAPP suits pose to free speech and political participation has prompted most states to pass anti-SLAPP legislation.[378] Anti-SLAPP legislation aims to discourage these problematic suits by introducing various procedural and cost mechanisms that make them less attractive.[379] For example, anti-SLAPP legislation often enables the defendants in these suits to bring a motion to dismiss very early in the litigation process, and "[u]nlike regular motions to dismiss or requests for summary judgment at the start of other kinds of lawsuits, people fighting SLAPP suits are allowed to offer evidence not contained

---

375. *See* Swan, *supra* note 31, at 82. SLAPP suits have been around for hundreds of years; one source suggests that the earliest known SLAPP suit may be the 1802 case of *Harris v. Huntington*. Katelyn E. Saner, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After* Shady Grove, 63 DUKE L.J. 781, 789 (2013). In *Harris*, five citizens of Shaftsbury, Vermont, had petitioned the state legislature not to reappoint a county justice of the peace named Harris, claiming that he was a "quarreling, fighting, and sabbath-breaking member of society" with a "wicked heart." Harris v. Huntington, 2 Tyl. 129, 129-30 (Vt. 1802). In retaliation, Harris then sued those citizens for libel, and the court dismissed the case as an affront to the citizens' right to petition. *Id.* at 146. Anti-SLAPP legislation encourages other courts to follow this judicial lead. *See generally* Saner, *supra* (urging federal courts to apply state anti-SLAPP statutes when sitting in diversity).

376. *See supra* notes 205-206 and accompanying text (discussing the DARVO strategy).

377. Saner, *supra* note 375, at 818-19.

378. Robert T. Sherwin, *Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431, 433 (2017). New Jersey also recently passed an anti-SLAPP law called the Uniform Public Expression Protection Act. *See Murphy Signs Anti-SLAPP Legislation, Making It Harder to Stifle Free Speech*, TAPINTO (Sept. 7, 2023, 9:06 PM), https://www.tapinto.net/sections/news-around-new-jersey/articles/murphy-signs-anti-slapp-legislation-making-it-harder-to-stifle-free-speech [https://perma.cc/WSK8-VAWF].

379. Sherwin, *supra* note 378, at 433.

in the complaint against them."[380] Once these anti-SLAPP motions are brought, the burden shifts to the party who brought the SLAPP suit to show "evidence that he is likely to win."[381] Additionally, if the defendant loses the motion, anti-SLAPP statutes often empower them to appeal immediately.[382] And, if the defendant wins the anti-SLAPP motion and the suit is dismissed, most anti-SLAPP legislation requires the plaintiff to cover the defendant's legal fees and costs.[383]

The tsunami of defamation claims brought against complainants detailing accounts of sexual abuse during the #MeToo movement prompted twelve states to enact or strengthen existing anti-SLAPP legislation (joining the approximately twenty others that had previously enacted anti-SLAPP legislation).[384] For instance, California, which has one of the strongest versions of anti-SLAPP legislation in the nation,[385] recently added another layer of protection through an additional statute.[386] The new statute is meant to offer sexual-assault victims extra protections from SLAPP suits, including by raising the requirements associated with proving defamation.[387] Now, "[a] communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination is privileged," and those alleging defamation related to a sexual-assault allegation must, like public officials, therefore prove "malice."[388] Further, if a plaintiff brings this sort of SLAPP suit and fails to

380. Covert, *supra* note 204.

381. *Id.* As this suggests, anti-SLAPP legislation only stops claims that have no evidentiary basis from moving forward: claims with an evidentiary basis would still go forward with this legislation in place.

382. *Id.*

383. *Id.*

384. *Id.*; *see also* Dan Greenberg, David Keating & Helen Knowles-Gardner, *Anti-SLAPP Statutes: 2023 Report Card*, INST. FREE SPEECH (Nov. 2, 2023), https://www.ifs.org/anti-slapp-report [https://perma.cc/Z2X4-JZVF] (observing that thirty-three states and the District of Columbia have enacted anti-SLAPP legislation as of 2023).

385. Covert, *supra* note 204.

386. CAL. CIV. CODE § 47.1 (West 2024); *see also* Kim Elsesser, *California Now Protects Sexual Assault Survivors from Frivolous Defamation Suits*, FORBES (Oct. 11, 2023, 4:16 PM EDT), https://www.forbes.com/sites/kimelsesser/2023/10/10/california-now-protects-sexual-assault-survivors-from-frivolous-defamation-suits [https://perma.cc/57QG-K7VN] (describing the new statute).

387. Elsesser, *supra* note 386.

388. CAL. CIV. CODE § 47.1(a) (West 2024); John Langford, Rachel Goodman & Rebecca Lullo, *The "Actual Malice" Standard, Explained*, PROTECT DEMOCRACY (Mar. 30, 2023), https://protectdemocracy.org/work/the-actual-malice-standard-explained [https://perma.cc

meet the new burden, they will be liable to pay the defendant's legal costs and fees, in addition to treble damages and possible punitive damages.[389] Illinois, too, is considering enacting similar legislation.[390]

New York, which once had a relatively weak anti-SLAPP statute, recently strengthened it.[391] The new version "is much broader in scope" than the older iteration and "provides greater First Amendment protections."[392] The new legislation concerns two categories of statements:

> [A]ny communication in a place open to the public or a public forum in connection with an issue of public interest; or any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.[393]

The statute instructs that the term "public interest" "be construed broadly and mean any subject other than a purely private matter."[394] Further, besides requiring plaintiffs to pay defendants' costs if a plaintiff fails to establish that their claim has a "substantial basis in fact and law," the plaintiff may be required to pay "other compensatory damages" if the defendant shows that the plaintiff brought the case "for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech."[395]

Commentators have noted that this fortified version of New York's anti-SLAPP legislation would cover the intentional-infliction-of-emotional-distress suit that a New York police officer brought against a protestor who "hurl[ed]

/ZNU9-VYXN] (explaining that public officials must prove "actual malice" to win a libel case).

389. CAL. CIV. CODE § 47.1(b) (West 2024).

390. H.B. 2836, 103d Gen. Assemb., Spring Sess. (Ill. 2023); *see also* Elsesser, *supra* note 386 (reporting that advocate Victoria Burke was "in talks" with Illinois legislators after promoting similar legislation in California).

391. *See* Andrew Ramstad & Ellie Sanders, *New York's Anti-SLAPP Statute Packs a Punch*, ROMANO L. (Nov. 17, 2023), https://www.romanolaw.com/new-yorks-updated-anti-slapp-statute-packs-a-punch [https://perma.cc/46GM-C6VY].

392. *Id.*

393. N.Y. CIV. RIGHTS LAW § 76-a (McKinney 2024).

394. *Id.* Courts are still debating what qualifies as an "issue of public interest" for the purposes of the statute. For instance, "a federal court recently held that an email and letter discussing 'sexual impropriety and power dynamics in the music industry' . . . was a matter of public interest under the new law." Ramstad & Sanders, *supra* note 391 (discussing Coleman v. Grand, 523 F. Supp. 3d 244, 259 (E.D.N.Y. 2021)).

395. N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2024).

racist, anti-Asian insults at him."[396] While such speech is clearly repugnant, it is likely protected, as Supreme Court precedent indicates that even "hateful speech is protected if it involves what the court called 'matters of public concern.'"[397] One civil-rights attorney therefore thought it "quite likely" that the new legislation would apply to the officer's lawsuit and could require the officer to pay the protestor's legal fees.[398]

While states have been relatively responsive to the need for anti-SLAPP legislation, there are, to date, no anti-SLAPP protections at the federal level.[399] A bill was proposed in 2022 but failed to pass.[400] Without such a law at the federal level, federal courts have disagreed about whether state anti-SLAPP laws apply when they sit in diversity jurisdiction.[401] Given that most Section 1983 litigation takes place in federal court, this leaves many complaints about police misconduct unprotected.

---

396. Bromwich, *supra* note 45.

397. *Id.* (quoting Snyder v. Phelps, 562 U.S. 443, 456 (2011)).

398. *Id.* (quoting attorney Remy Green). In another case, the musician Afroman argued that a defamation case against him was a SLAPP suit (a position supported by the ACLU in an amicus brief filed in the case). Ciaramella, *supra* note 84. At the time, Ohio did not have specific anti-SLAPP legislation, but Afroman was still successful in having the court dismiss the "right of publicity" claims and the "unauthorized use of individual's persona" claims, though the defamation claim continued. *Id.* Ohio did eventually enact anti-SLAPP legislation on January 8, 2025. *See* Jay Adkisson, *Ohio Adopts the Uniform Public Expression Protection Act as Its First Anti-SLAPP Law*, FORBES (Jan. 9, 2025, 11:51 AM EST) https://www.forbes.com/sites/jayadkisson/2025/01/09/ohio-adopts-the-uniform-public-expression-protection-act-as-its-first-anti-slapp-law [https://perma.cc/RUU7-VSCG].

399. Shannon Jankowski & Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, A.B.A. COMMC'NS LAW. (Mar. 16, 2022), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws [https://perma.cc/M5HY-A2PL].

400. SLAPP Protection Act of 2022, H.R. 8864, 117th Cong. (2022); *see also* Joe Mullin, *It's Time for a Federal Anti-SLAPP Law to Protect Online Speakers*, ELEC. FRONTIER FOUND. (Sept. 15, 2022), https://www.eff.org/deeplinks/2022/09/its-time-federal-anti-slapp-law-protect-online-speakers [https://perma.cc/N4EH-4GV8] (describing the contents of the SLAPP Protection Act of 2022).

401. *See* Jankowski & Hogle, *supra* note 399, nn.12-13 and accompanying text. There is currently a circuit split regarding whether state anti-SLAPP provisions apply to federal courts. The First, Second, and Ninth Circuits have held in favor of applying anti-SLAPP protections, but the Fifth, Tenth, Eleventh, and D.C. Circuits have not allowed defendants to rely on these protections. *See id.* nn.13-14 and accompanying text; *see also* Caitlin E. Daday, Comment, *(Anti)-SLAPP Happy in Federal Court?: The Applicability of State Anti-SLAPP Statutes in Federal Court and the Need for Federal Protection Against SLAPPs*, 70 CATH. U. L. REV. 441, 448-54 (2021) (reviewing the circuit split in detail).

Anti-SLAPP legislation at the federal level, and increased anti-SLAPP protections at the state level, perhaps with specific regulations regarding plaintiff police claims, would therefore be a useful means of limiting plaintiff police suits.[402] But even with anti-SLAPP legislation in place, SLAPP suits are not fully neutralized, and they still have chilling effects on free speech and political participation.[403] Anti-SLAPP legislation is, in Representative Jamie Raskin's words, "not a panacea."[404] Even with costs and fee awards possible, anti-SLAPP protections are part of an intricate area of law that lies outside many attorneys' expertise and many litigants' ability to pay. Indeed, it can "cost tens of thousands of dollars to pay a lawyer to file an anti-SLAPP motion."[405] Defendants lacking these funds struggle to find representation, as "[t]here are only so many [attorneys] willing to do it pro bono" or on contingency.[406] And the "time, effort, and emotional damage" involved in facing a defamation suit are significant.[407] In fact, "there is no question that being subjected to litigation and legal process can, at least in principle, constitute a compensable harm" under certain circumstances.[408] While strong anti-SLAPP legislation is helpful, additional interventions may therefore be required.

B. The Professional-Rescuer Rule

The professional-rescuer rule provides another tool for managing plaintiff police litigation. Created over a century ago in *Gibson v. Leonard*,[409] this "no duty" rule holds that members of the public owe no duty to public-safety officers to avoid creating dangers that give rise to the need for rescue, nor to protect such officers from dangers associated with that rescue.[410] In other words, under this rule, "[w]hen firefighters, police officers, and perhaps other public-safety officers are injured by perils that they have been employed to confront, many

402. In particular, the possibility of high damage awards and the broad "public interest" language of New York's anti-SLAPP legislation would be helpful.

403. Covert, *supra* note 204.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. Carleen Zubrzycki, *Tort(?) Arms Races: Abortion and Beyond*, 73 DePaul L. Rev. 705, 720-21 (2024).

409. 32 N.E. 182, 183-84 (Ill. 1892).

410. 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 363 (2d ed. 2011).

courts hold that they ordinarily have no claim against the person who created those perils."[411] So, a police officer injured by slipping on a puddle while helping to rescue a drowning child would be unable to bring suit against the child's family for those injuries.[412] And an officer asserting that a protestor acted negligently could likewise be stymied by this rule.[413]

Initially known as the "fireman's rule," then the "firefighter's rule," the underlying rationale for the professional-rescuer rule has, like its name, evolved over time. The rule was first justified as a form of premises liability, and it tracked then-dominant rules of that form of liability by categorizing rescue workers as licensees and applying the relevant duty rules.[414] When premises liability shifted to impose instead a general duty of care on landowners and occupiers, the professional-rescuer rule's rationale also shifted, relying instead on a theory of assumption of risk.[415] As tort law once again changed and legislatures began to abolish assumption of risk in favor of a comparative-negligence approach, this rationale for the rule largely fell away as well.[416]

---

411. *Id.* The rule was originally created in the context of premises liability, but the majority of states now extend the rule beyond those original confines. *Id.*

412. *See id.*

413. *Cf.* Doe v. Mckesson, 339 So. 3d 524, 536 (La. 2022) ("[W]e conclude that the Professional Rescuer's Doctrine has likewise been abrogated in Louisiana both legislatively and jurisprudentially.").

414. Under this version of the rule, a fireman's ability to bring suit depended, like other persons suing landowners, on the status of the plaintiff when they entered the land. *See* Jack W. Fischer, Note, *The Connecticut Fireman's Rule: House Arrest for a Police Officer's Tort Rights*, 9 U. Bridgeport L. Rev. 143, 144-45 (1988). Only three statuses were possible: trespasser, licensee, or invitee. Trespassers, meaning those who were unlawfully on the property, were owed no duty of care, save that landowners could not intentionally try to harm them. *Id.* at 144-45 n.12. Licensees, meaning those who were typically social guests of the landowner, were owed a limited duty of care, in that the landowner had to warn them of hidden dangers the landlord knew about. *Id.* Invitees, meaning those who were there for business purposes, were owed a general duty of care, and the landowner had to provide reasonably safe premises. *Id.* Courts typically understood firemen to be licensees who were owed no general duty of care. *Id.* at 145.

415. Apodaca v. Willmore, 349 P.3d 481, 485 (Kan. Ct. App. 2015), *aff'd*, 392 P.3d 529, 546 (Kan. 2017); *see also* Case Comment, *The New Minnesota Fireman's Rule – An Application of the Assumption of Risk Doctrine:* Armstrong v. Mailand, 64 Minn. L. Rev. 878, 879-85 (1980) (analyzing a case that incorporated assumption-of-risk doctrine into the traditional fireman's rule); Restatement (Third) of Torts: Miscellaneous Provisions (Am. L. Inst., Tentative Draft No. 3, 2024) (manuscript at 350-51) (explaining the shift from premises liability to assumption of risk as the primary legal theory undergirding the firefighter's rule).

416. Restatement (Third) of Torts: Miscellaneous Provisions (Am. L. Inst., Tentative Draft No. 3, 2024) (manuscript at 351) (noting that the assumption-of-risk doctrine en-

Now, retention or abrogation of the professional-rescuer rule is considered to be squarely a matter of public policy.[417] The vast majority of states continue to employ some form of this rule,[418] but "a sizable minority" of eighteen states do not.[419] In general, the states that reject the rule do so because it is simply "unfair" to public workers "injured in the line of duty."[420] In this vein, courts express concern that public workers are being "singled out" and given "especially disadvantageous treatment" under the rule.[421]

This argument holds little weight with regard to police officers. When viewed in the broader legal context surrounding the work of police officers, it is clear that police officers are sui generis. In fact, it would be strange for them *not* to be treated differently, as an enormous panoply of exceptional rules governs nearly all other aspects of their relationship with law.[422] Indeed, police officers receive "more specific protections than are provided other public employees in federal, state or local civil service laws," protections that "may specifically include insulation for criminal activity and may grant significant due process for internal investigations and inquiries."[423]

Nevertheless, some states refuse to incorporate the professional-rescuer doctrine into their jurisprudence. Often assisted by significant police-union lobbying, they have turned to legislation to override or provide alternatives to

---

tirely barred a claim, whereas a comparative-negligence approach allowed juries and fact-finders to weigh the level of fault of each party).

417. *See id.* (manuscript at 361).

418. Bublick & Bambauer, *supra* note 12, at 266.

419. John R. Clark, *The Fireman's Rule*, 38 AIR MED. J. 10, 10 (2019) ("These states are Alabama, Colorado, Florida, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Vermont, West Virginia, and Wyoming.").

420. Curt Varone, *Fire Law: The Fireman's Rule: An Outdated Concept?*, FIREHOUSE (Dec. 1, 2017), https://www.firehouse.com/careers-education/article/12375886/the-firemans-rule-curt-varone-firehouse-magazine [https://perma.cc/6D42-ZNUH].

421. *See* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS (AM. L. INST., Tentative Draft No. 3, 2024) (manuscript at 363).

422. *See* Krause v. U.S. Truck Co., 787 S.W.2d 708, 713 (Mo. 1990) (noting that police officers are among those with "exceptional responsibilities . . . [and] are covered by a panoply of legal powers and duties necessary to control the people and place where rescue is required"); *see also* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS (AM. L. INST., Tentative Draft No. 3, 2024) (manuscript at 370) (discussing *Krause*).

423. Marcia M. Ziegler, *32 Shots in the Dark: How Local Governments Can Increase Police Accountability When States Refuse To*, 74 MERCER L. REV. 1155, 1170 (2023) (quoting Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 186 (2005)).

the rule.[424] New York, for instance, enacted General Municipal Law Section 205 to "ameliorate" the professional-rescuer rule.[425] This legislation provided a cause of action when a public-safety officer experienced injury or death in the line of duty as a result of any "neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state . . . or city governments or of any and all their departments."[426] Following a narrow judicial interpretation of the legislation, the legislature clarified that "the nature of modern police work in this state has exposed our police officers to an unprecedented risk of death and physical injury" and the legislation was intended to grant a broad right of action to them.[427] Other states, like Florida and New Jersey, have similar statutory rights of action.[428]

The majority of states, however, have disagreed with New York's approach and found that public policy favors retaining the professional-rescuer rule.[429] One rationale that many courts find compelling is that officers are compensated and receive appropriate training and insurance on the understanding that they are assuming the risk of injury associated with their public role, and the professional-rescuer rule "denotes worker's compensation as the best way to pay for public safety officer injuries," rather than litigation.[430] In other words, the rule

---

424. *Id.*

425. Section 205-e followed the enactment of section 205-a, which abrogated the professional-rescuer rule in relation to firemen. *See* Ruotolo v. State, 593 N.Y.S.2d 198, 199, 200-01 (App. Div. 1993).

426. N.Y. Gen. Mun. Law § 205-e (McKinney 2024). Nevertheless, the section was originally interpreted narrowly as limited to premises liability. *See Ruotolo*, 593 N.Y.S.2d at 201-02.

427. *See* Brinkerhoff v. County of St. Lawrence, 875 N.Y.S.2d 877, 881 (Sup. Ct. 2009) (quoting Act of Oct. 9, 1996, ch. 703, § 1, 1996 N.Y. Laws 3528, 3528).

428. Florida also passed a statute that "every law enforcement officer or correctional officer shall have the right to bring civil suit against any person . . . for damages . . . suffered during the performance of the officer's official duties or for abridgment of the officer's civil rights arising out of the officer's performance of official duties." Act of June 24, 1974, ch. 74-274, § 2(3), 1974 Fla. Laws 728, 729-30 (codified as amended at Fla. Stat. § 112.532(3)). The Florida Supreme Court upheld this statute in *Mesa v. Rodriguez*. 357 So. 2d 711, 713 (Fla. 1978). For New Jersey's relevant statute, see N.J. Stat. Ann. § 2A:62A-21 (West 2024).

429. *See, e.g.*, Moody v. Delta W., Inc., 38 P.3d 1139, 1143 (Alaska 2002); Fordham v. Oldroyd, 171 P.3d 411, 415 (Utah 2007); Espinoza v. Schulenburg, 129 P.3d 937, 940 (Ariz. 2006); Farmer v. B&G Food Enters., 818 So. 2d 1154, 1160 (Miss. 2002); Waggoner v. Troutman Oil Co., 894 S.W.2d 913, 915 (Ark. 1995).

430. Fischer, *supra* note 414, at 143. As one court put it, the rule "is based upon a public policy decision to meet the public's obligation to its officers collectively through tax-supported compensation rather than through individual tort recoveries." Calatayud v. State, 959 P.2d 360, 363 (Cal. 1998) (quoting Benjamin K. Riley, Comment, *The Fireman's Rule: Defining Its*

"spreads the costs of injuries to public officers among the whole community, making the public in essence a self-insurer against those wrongs that any of its members may commit."[431]

At its heart, as the court in *Apodaca v. Willmore* recognized, the professional-rescuer rule is about "the nature of the relationship" between officers "and the public they are sworn to serve."[432] Because officers perform a quintessential public function, turning to workers' compensation or other administrative remedies may better serve the needs of both officers and the public than would private tort suits.

The professional-rescuer rule helps to limit plaintiff police litigation in those jurisdictions that retain it,[433] but more could be done. In particular, the scope of the professional-rescuer rule itself could be widened. At present, almost all courts and legislatures that retain the professional-rescuer rule apply it to claims of *negligence*, but not to claims of intentional tort.[434] That is, most apply it to circumstances where a professional rescuer is harmed while attempting a rescue in the course of their duties and then tries to bring a negligence suit against an actor who was part of the reason the rescue was needed.[435] But they do not apply the rule to a situation where an actor is alleged to have committed

Scope Using the Cost-Spreading Rationale, 71 CALIF. L. REV. 218, 235-36 (1983)). Another proffered public-policy reason, which other courts contest, is that the rule might deter members of the public from calling the police when they are in need of assistance. Recently, in *Sepega v. DeLaura*, the Connecticut Supreme Court expressed doubt about this assertion. 167 A.3d 916, 929-30 (Conn. 2017). But there is evidence that attaching a negative effect to calling 911 does deter such calls. *See, e.g.*, Richard R. Johnson, *Reducing Crime and Calls for Service Through Nuisance Abatement*, DOLAN CONSULTING GRP. [3]-[4] (Sept. 18, 2018), https://www.dolanconsultinggroup.com/wp-content/uploads/2018/09/DCG-Research-Study_-Reducing-Crime-and-Calls-for-Service-through-Nuisance-Abatement.pdf [https://perma.cc/MG9H-MEAM]. In the last decade or so, many municipalities have enacted nuisance ordinances, which penalize persons who call 911 with potential eviction. As a result, 911 call volume decreased citywide. *Id.*

431. *Calatayud*, 959 P.2d at 363 (quoting Benjamin K. Riley, Comment, *The Fireman's Rule: Defining Its Scope Using the Cost-Spreading Rationale*, 71 CALIF. L. REV. 218, 236 (1983)); *see also* Juhl v. Airington, 936 S.W.2d 640, 647 (Tex. 1996) (Gonzalez, J., concurring) ("[T]he risk and cost of injuries to officers are more effectively spread by passing them on to the public as a whole through the government entities that employ them rather than by making an individual pay for the injury.").

432. 349 P.3d 481, 485 (Kan. Ct. App. 2015), *aff'd*, 392 P.3d 529 (Kan. 2017).

433. *See, e.g.*, N.H. REV. STAT. ANN. § 507:8-h (2024).

434. DOBBS ET AL., *supra* note 410, § 363.

435. *Id.*

an intentional tort.[436] Thus, even with the rule in place, police officers have generally been able to sue those who engage in intentional wrongful acts.[437]

Some courts have at times seemed amenable to expanding the professional-rescuer rule to encompass even intentional wrongdoing. In *Wawrzyniak v Sherk*, for example, a New York court held that "a suit by a police officer against a son and his parents for injuries stemming from an attempt to perform an arrest, was barred by the fireman's rule."[438] In that case, a mother deliberately threw herself at an officer arresting her son, sending them all falling over a railing.[439] The court held that the professional-rescuer rule nevertheless barred the officer's suit, since the officer suffered injuries "while performing 'a function particularly within the scope of duty of police officers.'"[440] Likewise, in *Fournier v. Battista*, a Connecticut court stated that "[t]he intent behind the fireman's rule was to prohibit *all causes of action* by the police officer that resulted while the officer was engaged in the performance of his official duties."[441] And on two occasions, the California Court of Appeals "barred recovery for a police officer's injury by application of the fireman's rule in situations where the police officer was injured by the intentional acts of the defendant."[442] Further, in *Apodaca v. Willmore*, the court rejected the officer's argument that the professional-rescuer rule could not apply when the person creating the need for rescue did so with a willful, wanton, or intentionally wrongful act.[443] Other courts in Washington

---

436. *Id.* Additionally, if the negligent harm does not relate to the reason the officer was responding to the scene, many states will allow those claims to proceed. *See, e.g.*, Ipsen v. Diamond Tree Experts, Inc., 466 P.3d 190, 193 (Utah 2020).

437. DOBBS ET AL., *supra* note 410, § 363.

438. Marjorie A. Caner, Annotation, *Application of "Fireman's Rule" to Preclude Recovery by Peace Officer for Injuries Inflicted by Defendant in Resisting Arrest*, 25 A.L.R.5th 97 Art. 2 § 3 (1994).

439. Wawrzyniak v. Sherk, 566 N.Y.S.2d 138, 139 (App. Div. 1991).

440. *Id.* (quoting Santangelo v. State, 521 N.E.2d 770, 772 (N.Y. 1988)).

441. Fournier v. Battista, No. CV 96472570S, 1996 WL 456295, at *2 (Conn. Super. Ct. July 16, 1996) (emphasis added).

442. *See* State Farm Mut. Auto. Ins. Co. v. Hill, 775 A.2d 476, 483 (Md. Ct. Spec. App. 2001) (discussing the two California cases of City of Los Angeles v. O'Brian, 201 Cal. Rptr. 561 (Ct. App. 1984), and Lenthall v. Maxwell, 188 Cal. Rptr. 260 (Ct. App. 1982)). In *City of Los Angeles v. O'Brian*, recovery against a defendant who intentionally rammed his vehicle into an officer's car was barred. *O'Brian*, 201 Cal. Rptr. at 562. In *Lenthall v. Maxwell*, the plaintiff officer was barred from recovering against a defendant who intentionally shot him. *Lenthall*, 188 Cal. Rptr. at 260-61. The Maryland court did note, however, that a subsequent legislative change would have permitted such cases, had they occurred after that change in the law. *State Farm*, 775 A.2d at 484.

443. The court noted that in the then-leading case in Kansas, *Calvert v. Garvey Elevators, Inc.*, the court listed three exceptions to the professional-rescuer rule. Apodaca v. Willmore, 392 P.3d 529, 537 (Kan. 2017) (citing Calvert v. Garvey Elevators, Inc., 694 P.2d 433, 438-39 (Kan.

State and the District of Columbia have similarly held that "the firefighter's rule insulates actors even from egregious misconduct."[444]

The professional-rescuer rule thus provides a tool that courts and legislatures could further expand to limit plaintiff police suits. Commentators, like the authors of the *Third Restatement of Torts*, suggest that the trendline is currently tipping in favor of abolishing the professional-rescuer doctrine, but this trendline is running in exactly the wrong direction insofar as it relates to police officers.[445] Other public-safety institutions may deserve different doctrinal approaches due to their different relationships with the public (one person joked in an online forum, for instance, that "[t]here's a reason nobody's ever made a song called f*** the fire department"[446]). Yet, because of the unique factors involved in the plaintiff police context, police officers should remain subject to the rule, and indeed a more robust form of the rule may be justified on public-policy grounds. Reviving the professional-rescuer rule, and potentially making it even more robust vis-à-vis the police by including intentional acts within its purview, is an easy lever with which to begin the process of limiting plaintiff police claims. Numerous states have indicated an interest in rebalancing the police-citizen relationship and, in particular, realigning some of the legal exceptions and benefits that officers have received.[447] Limiting plaintiff police suits is an important piece of this project.[448]

1985)). However, none of these exceptions encompassed the officer's argument in *Apodaca*. *Id.* at 543-46.

444. *See, e.g.*, Young v. Sherwin-Williams Co., 569 A.2d 1173, 1177-78 (D.C. 1990) (holding that the exclusion of willful, wanton, or reckless acts from the professional-rescuer doctrine would be excessively broad); Markoff v. Puget Sound Energy, Inc., 447 P.3d 577, 585 (Wash. Ct. App. 2019) (same).

445. *See* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS (AM. L. INST., Tentative Draft No. 2, 2023) (manuscript at 170-71); *see also* Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. 2165, 2204-06 (2024) (discussing the shift in courts' views on the fireman's rule).

446. @ExiledImages, *There's a Reason Nobody's Ever Made a Song Called F*** the Fire Department*, REDDIT (Aug. 14, 2022, 5:40 PM EDT), https://www.reddit.com/r/pics/comments/wohizf/theres_a_reason_nobodys_ever_made_a_song_called_f [https://perma.cc/B9V8-ZLNF].

447. *See, e.g.*, Gary S. Gildin, *Legislative Efforts to Abolish Qualified Immunity Yield Mixed Results*, STATE CT. REP. (May 30, 2024), https://statecourtreport.org/our-work/analysis-opinion/legislative-efforts-abolish-qualified-immunity-yield-mixed-results [https://perma.cc/E98F-KXH4] (describing the efforts of Colorado, New Mexico, and New York City to limit the reach of qualified immunity).

448. For a discussion of recent state efforts to pass legislation increasing police accountability, see SCHWARTZ, *supra* note 1, at 209-23.

C. Workers' Compensation and Administrative Remedies

Of course, police officers who are injured in the course of their duties deserve compensation. But as many courts applying the professional-rescuer rule have indicated, plaintiff police litigation is not necessary to accomplish this goal: such compensation is achievable through alternative means. Indeed, when upholding and applying the professional-rescuer rule, courts often note the availability of worker's compensation and the public-policy value in funneling safety officers' injuries into a public compensatory system as a compelling rationale for upholding the "no duty" rule.[449]

In virtually every state, police officers can access either a general workers' compensation regime or one specialized for police officers.[450] In Connecticut, for example, a statute provides that

> if any member of the Division of State Police . . . sustains any injury . . . while making an arrest or in the actual performance of such police duties . . . and . . . that is a direct result of the special hazards inherent in such duties, the state shall pay all necessary medical and hospital expenses . . . . All other provisions of the workers' compensation law

---

449. *Id.* Workers' compensation may sometimes try to recoup the payments they make to injured officers from the person who caused the injury. See, for example, *City of Carencro v. Faulk*, 715 So. 2d 569, 571-74 (La. Ct. App. 1998), where a police officer was injured in the course of effecting an unlawful arrest. The city brought an action against the person the officer was trying to arrest, seeking reimbursement for the workers' compensation funding it had provided to the officer. *Id.* at 571. The court held that because the arrest was unlawful, the defendant was entitled to resist it and was not liable for the worker-compensation-fund expenses. *See id.* In any event, these cases are less structurally offensive than when the police officer is a direct plaintiff.

450. *See* 1 Modern Workers Compensation § 106:40.1 (2024). New York, for example, excludes police officers from its generalized workers' compensation system, but "New York police officers, along with persons in other law enforcement categories, may qualify for 207-C benefits if their injury occurred while they were working." *See Compensation for NYC Police Officers Injured on Duty*, Terry Katz & Assocs., https://www.terrykatzandassociates.com/occupations/police-officers [https://perma.cc/9472-ZRNR]. Additionally, if officers become disabled in the course of their job-related duties,

> they are entitled to disability benefits to enable them to receive medical treatment and have their medical expenses paid for so they don't have to absorb any out-of-pocket expenses. . . . In lieu of Workers' Compensation benefits, officers who become incapacitated due to an accident that occurred while in active service through no fault of their own are eligible for Accident Disability Retirement (ADR) Benefits. These financial benefits are calculated at 50% of the officer's average final salary, minus 50% of primary Social Security Disability Benefits.

Id.

> not inconsistent with this subsection . . . shall be available to any such state employee or the dependents of such a deceased employee.[451]

Benefits are typically around two-thirds of the previous salary and are usually not taxable.[452]

In addition to state or local workers' compensation systems, additional administrative remedies may be available.[453] For example, in California, the surviving family members of an officer killed in the line of duty will usually receive a survivor's pension equal to approximately half of the officer's salary.[454] The federal government, too, offers administrative options for recovery: when officers are killed in the line of duty, the Public Safety Officers' Benefits Program offers close to $500,000 in compensation to the officer's family.[455] Many states also have crime-victim funds, which may provide an additional source of mon-

---

451. CONN. GEN. STAT. § 5-142(a) (2023).

452. *See* JOHN FABIAN WITT & KAREN M. TANI, TORTS: CASES, PRINCIPLES, AND INSTITUTIONS 134 (2022). In Connecticut, "[c]ertain rules apply for injured police officers that do not apply for other types of workers. Namely, police are covered as being on the job from the time they leave home," whereas other workers are not, and "injured police officers may receive 100 percent of the value of their wages for up to 52 weeks after a serious injury, whereas other types of workers typically receive up to 75 percent." *Getting Compensation for On-the-Job Law Enforcement Injuries*, GILLIS L. FIRM, https://www.gillislawfirm.com/workers-compensation/law-enforcement-injuries [https://perma.cc/3778-E8GH]. In California, qualifying officers are

> entitled to [California Labor Code § 4850] benefits. 4850 benefits are payable for 52 weeks and constitute 100% gross salary, tax free. After the 52 weeks of 4850 have been paid, the police officer is entitled to temporary total disability . . . paid at two-thirds the officer's wages up to the maximum state rate currently at $1074.64 per week. The temporary disability will extend for another 52 weeks.

See John A. Ferrone, *Work Comp Road Map for Police Officers*, ADAMS, FERRONE & FERRONE [2]-[3], https://longbeachpoa.org/images/workers-comp-pdfs/Workers'%20Comp%20Road%20Map.pdf [https://perma.cc/Q5RK-TT5J].

453. *Compensation for NYC Police Officers Injured on Duty*, *supra* note 450.

454. *State of California: Death Benefits*, OFFICERS DOWN MEMORIAL PAGE 5-6 (2010), https://www.odmp.org/pdfs/benefits/california.pdf [https://perma.cc/UT2T-53N9]; *see also* Ferrone, *supra* note 452, at [7] ("[T]he surviving spouse typically is entitled to a Special Death Benefit under the Retirement System, which can be 50% of the gross salary, tax-free. The surviving minor children may also be entitled to a worker's compensation death benefit. Currently, a single total dependent is entitled to $250,000.").

455. *Survivor Benefits*, CONCERNS POLICE SURVIVORS, https://www.concernsofpolicesurvivors.org/survivorbenefits [https://perma.cc/2AB7-CA4S].

ies for the injured. Connecticut officers, for example, have recovered under the state fund there.[456]

Even with these additional administrative monies, however, the amount an officer can receive through workers' compensation and other administrative systems will likely be significantly less than they theoretically might receive if successful in a plaintiff police lawsuit.[457] Workers' compensation does not offer damages for pain and suffering, for example, which are available in civil litigation.[458] But recovering any judgment awarded can be difficult in these plaintiff police scenarios.[459] The reality is that many individuals in these injurious encounters with police officers will not have any financial assets from which to recover a judgment, and there is little hope of wage garnishment in most situations.[460] As it stands, the average white American has approximately $80,000 in savings, and the average Black American has $13,000—amounts that are difficult to gather any meaningful recovery from.[461] In situations where a plaintiff police suit alleges negligence, it is possible that homeowners' insurance might provide coverage, but many plaintiff police suits involve intentional acts

456. *See* CONN. GEN. STAT. §§ 54-204 to -218 (2023) (defining a crime victim merely as "a person [who] suffers a personal injury or is killed" in certain circumstances); *see* Fischer, *supra* note 414, at 160-61.

457. This may be true in the case of permanent disability. In California, for instance, permanent disability is "capped at $290 a week" (non-taxable). *Can Police Officers Get Workers' Compensation Benefits?*, COLE, FISHER, COLE, O'KEEFE + MAHONEY, https://colefisher.com/blog/can-police-officers-get-workers-compensation-benefits [https://perma.cc/R5JP-PCWJ]. In circumstances where workers' compensation does not meet a standard of reasonable compensation for injuries incurred in the course of duties, the solution is arguably to raise such compensation.

458. One advocate for police rights quoted Charles E. Friend, author of a police litigants' guide, stating "that officers can and do obtain substantial judgments in amounts which often far exceed the limited benefits available under employers' compensation plans and in cases in which no such benefits are available." 127 CONG. REC. 1902 (1981).

459. *Id.*

460. For some of the complexities involved in collecting on a judgment, see Randa Trapp, Kathleen Schin McLeroy, Natalie Shkolnik & Mac Richard McCoy, *You Have a Judgment, Now What? Mastering the Art of Judgment Collection*, AM. BAR ASS'N BUS. L. TODAY (Sept. 15, 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-september/you-have-a-judgment [https://perma.cc/9YS6-4Q5R]; and *Can Police Officers Sue Suspects for Personal Injury?*, GGRM, https://ggrmlawfirm.com/blog/personal-injury/can-police-officers-sue-suspects-for-personal-injury [https://perma.cc/J85C-V38M].

461. Liz Knueven & Kit Pulliam, *What's the Average American Savings Account Balance? Insights & Trends*, BUS. INSIDER (July 22, 2024, 6:58 PM EDT), https://www.businessinsider.com/personal-finance/average-american-savings [https://perma.cc/RNE8-LDEH].

likely to fall within insurance exclusions.[462] Workers' compensation is an easily accessible, reliable source of funds for injured officers, able to offer quick compensation without the uncertainty and challenges of civil litigation.[463]

For those reasons, existing workers' compensation regimes could adequately accomplish the goal of compensating officers for their on-the-job injuries. But workers' compensation can be more than just a source of compensation for injured officers; these systems can also provide tools for limiting plaintiff police suits. Many workers' compensation statutes currently contain "exclusive remedy" provisions, which specify that with the receipt of workers' compensation benefits, employees give up their ability to sue their employers, but not other third parties.[464] These statutory exclusive-remedy provisions could instead specify that for police officers, the receipt of benefits would preclude suit against any actor who contributed to the injury that the officer suffered while on duty. Cities could also do so in employment contracts, which could require officers to waive their right to sue third parties who contributed to their on-the-job injuries.[465] Through these statutory or contractual changes, workers'

462. *See, e.g.*, Romano v. Altentaler, 77 So.3d 282, 285-86 (La. Ct. App. 2011). The plaintiff police officer was injured in the defendant's home when the officer responded to a domestic-dispute call. *Id.* at 283. The defendant intentionally pushed or grabbed the officer, causing them both to fall in a wet bathroom. *Id.* The court held that because the pushing or grabbing was intentional, the intentional-act exclusion in the defendant's homeowner's insurance policy barred coverage for this event. *Id.* at 285-86.

463. WITT & TANI, *supra* note 452, at 134.

464. *See* 1 MODERN WORKERS COMPENSATION § 102:1 (2024). While exclusive-remedy provisions prevent plaintiffs from suing their employer, they usually do not prevent actions against third parties. *Id.* § 103:1. However, upon a successful suit, plaintiffs are usually required to reimburse their employer using their tort damage awards, or, in some jurisdictions, the benefits received are deducted from the tort award. *Id.* § 103:62. Employers also often retain the right to sue third parties for benefits paid. 3 *id.* § 206:7. These subrogated suits do not pit officers against civilians in the same stark way as plaintiff police litigation. Indeed, a good analogy can be found in the context of the role of insurance in suits between family members. Family members were initially immune from suits amongst themselves, on the grounds that "familial 'peace and tranquility'" was of overriding concern. *See* Abraham & Sharkey, *supra* note 445, at 2197. However, as Kenneth S. Abraham and Catherine M. Sharkey note, when there is insurance at play, courts have held that liability between family members can be appropriate, as familial peace would no longer be implicated. *See id.* Workers' compensation and subrogation have a similar diffusing effect, as the insurance will mediate the otherwise direct conflict between the parties, and familial peace would no longer be implicated.

465. These clauses could include carve-outs for products-liability suits, which are currently a large source of third-party litigation in the workers' compensation context. *See* WITT & TANI, *supra* note 452, at 484. These clauses could also specifically still allow for wrongful-death actions brought by family members. To be sure, the power of police unions suggests

compensation could be another means to limit plaintiff police claims. In fact, this may be the most effective means, as it would likely deter even the initial filing of suits, thus avoiding many of the harms that flow from having to defend against plaintiff police claims, regardless of whether those claims are ultimately successful in the courtroom.[466]

In the specific circumstance of plaintiff police litigation, because of the many harms that such litigation creates, workers' compensation and administrative remedies should be the sole avenues of financial recovery. Officers harmed in performing a public duty should be recompensed quickly, reliably, and from the public purse; administrative remedies offer a clear path to do this without the many drawbacks of plaintiff police litigation.[467] Indeed, police officers generally operate on the basis of "assurances that a community will care for them and provide assistance to their families if they are injured or killed."[468] Providing a forum in which it is not necessary to go through the uncertainty and difficulties of civil litigation in order to receive compensation is part of fulfilling such promises.

D. Deterrence and Criminal Remedies

Just as workers' compensation systems can adequately provide for compensation without the need for plaintiff police suits, existing criminal law can adequately deter tortious conduct. Plaintiff police suits purport to deter wrongful conduct directed at police officers through civil liability. But civil deterrents are rarely as powerful as criminal ones,[469] and criminal deterrents are already grave in the context of harm to police.

---

this could be difficult to negotiate on a practical level. For a discussion of the role of police unions, see generally Fisk & Richardson, *supra* note 144.

466. Officers may be more aware of clauses in their own employment contracts and would be made aware of the waiver again when requesting benefits. Further, there is more room for argumentation in regard to rules like the professional-rescuer rule, which would likely still have some exceptions, whereas a waiver in a workers' compensation regime has more clarity at the outset.

467. The public purse is a reliable "deep pocket," without the precarity of awards against judgment-proof debtors leaving officers empty-handed.

468. DEL POZO, *supra* note 223, at 34. After an officer at Temple University was killed, for example, "Temple University paid for [his] funeral and promised free tuition for his children, and the school's board of trustees pledged to donate more than $450,000 to a fund for his family." Malfitano, *supra* note 110.

469. *See* W. Jonathan Cardi, Randall D. Penfield & Albert H. Yoon, *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 J. EMPIRICAL LEGAL STUD. 567, 591-92 (2012) (finding

Police officers receive heightened protections under criminal law.[470] For example, assaulting a police office is acknowledged as a "particularly egregious offense"[471] that automatically subjects the actor "to aggravated assault or aggravated homicide charges, which carry more severe punishment" than would occur if the assault were on a regular citizen.[472] In some states, killing a police officer can trigger the death penalty.[473] A new law in Iowa further illustrates the seriousness with which state legislatures take these crimes: it provides that individuals serving sentences for attempting to kill a police officer must serve their entire sentence and cannot benefit from the usual reductions in time based on good behavior in prison.[474] Multiple other states have enacted similar laws.[475]

The relatively low numbers of homicides against police officers suggest that this is already an area of high deterrence.[476] While any nonzero number is too many and represents a tragic loss of life, it is notable that in 2022, the total number of officers feloniously killed in the line of duty nationwide was sixty,

---

that the potential for criminal sanctions had a significant deterrent effect on individuals, while the potential for civil sanctions had almost none).

470. This is actually another example of asymmetry: "If a police officer unlawfully harms a citizen, the officer is subject to assault or homicide charges—no different than if the officer committed these crimes off duty," but if a citizen harms a police officer, they are subject to harsher penalties. Monu Bedi, *The Asymmetry of Crimes* By *and* Against *Police Officers*, 66 DUKE L.J. ONLINE 79, 79-80 (2017).

471. *New York Assault on a Police Officer*, STEPHEN BILKIS & ASSOCS. PLLC, https://criminaldefense.1800nynylaw.com/new-york-assault-on-a-police-officer.html [https://perma.cc/2JN8-QSPY].

472. Bedi, *supra* note 470, at 80.

473. *Id.*; *see also* Jennifer Medina, *Life Sentences Mandated for Killing Police Officers*, N.Y. TIMES (Dec. 22, 2005), https://www.nytimes.com/2005/12/22/nyregion/life-sentences-mandated-for-killing-police-officers.html [https://perma.cc/7XVR-Z5WX] (reporting on New York legislation mandating life sentences for anyone convicted of murdering a police officer).

474. IOWA CODE § 707.11(5)(c) (2025); Henry Bredemeier & Sarah Emily Baum, *Back the Blue Laws Gain Popularity, Expand Qualified Immunity and Other Rights for Police*, NONDOC (Dec. 12, 2022), https://nondoc.com/2022/12/12/back-the-blue-laws-gain-popularity-expand-qualified-immunity-and-other-rights-for-police [https://perma.cc/39MK-E7QB]. In fact, in a case where a Burger King employee spit into a police officer's burger, and the spit was discovered before the police officer ate the burger, the employee was sentenced to ninety days in jail for felony assault. *See* Complaint for Damages at 4, Bylsma v. Burger King Corp., No. CV10-403 PK (D. Or. Apr. 13, 2010).

475. *See, e.g.*, GA. CODE ANN. § 35-8-7.4 (2024); Johnathan Silver, *Texas Lawmakers Pass Bill Making Attacks on Police, Judges a Hate Crime*, TEX. TRIB. (May 27, 2017), https://www.texastribune.org/2017/05/23/texas-legislature-passes-bill-would-make-attacking-police-judges-hate-crime [https://perma.cc/69AB-U44K].

476. *How Many Police Officers Die in the Line of Duty*, *supra* note 278.

and it tends to be around this number every year.[477] In 2022, an additional fifty-eight officers were accidentally killed in the line of duty, mainly from car accidents connected to traffic stops.[478] The number of assaults that resulted in injury, however, is much higher: an estimated "16,000 officers suffer injuries after being assaulted on the job each year," though many of these are relatively minor injuries.[479] The most common injuries flowing from these assaults were injuries to the "hands and fingers . . . and lower extremities," and "[t]he most common injury diagnosis was sprains and strains."[480]

Dominant theories of criminal deterrence suggest, in fact, that crimes against a police officer are among the most strongly deterred. Although it is often assumed that the *severity* of the punishment correlates the most with deterrent effect, in fact it is the *certainty* of punishment that is most highly correlated with deterrence.[481] In other words, it is the perceived risk of getting caught, not what will happen once one is caught, that has the biggest deterrent effect. In an encounter with a police officer, the certainty of punishment is likely as high as it could possibly be, leading presumably to a high rate of deterrence present in these encounters. It is difficult to imagine the wrongdoer who

---

477. In 2021, there were seventy-three felonious deaths—a twenty-five-year high. *Id.*

478. Perhaps surprisingly, on a per capita basis, policing is not on the list of the top ten most dangerous professions in the United States. *Id.* Industries like logging, construction, hunting, fishing, and roofing are more dangerous. *Id.* ("Fishing and hunting workers had the highest fatality rate at 132.1 deaths per 100,000 workers. For police officers, that rate was about 13 deaths per 100,000 officers in 2020.").

479. Law Enf't Epidemiology Project, *supra* note 243. If the number of officers assaulted but with no injury resulting is included, the total rises to 60,105 in 2020. *FBI Releases 2020 Statistics for Law Enforcement Officers Assaulted in the Line of Duty*, Homeland Sec. Today (Oct. 20, 2021), https://www.hstoday.us/subject-matter-areas/law-enforcement-and-public-safety/fbi-releases-2020-statistics-for-law-enforcement-officers-assaulted-in-the-line-of-duty [https://perma.cc/J8QR-S3BY]. A total of 44,421 officers reported being

> assaulted with personal weapons (e.g. hands, fists, or feet); 25.8% of these officers were injured; 2,744 officers were assaulted with firearms; 6.1% of these officers were injured; 1,180 officers were assaulted with knives or other cutting instruments; 9.7% of these officers were injured. The remaining 11,760 officers were assaulted with other types of dangerous weapons; 16.8% of these officers were injured.

Id.; *see also Law Enforcement Officers Killed and Assaulted (LEOKA)*, FBI Crime Data Explorer, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/le/leoka [https://perma.cc/HMW4-YE8M] (providing the statistics for police-officer injuries and deaths each year).

480. Hope M. Tiesman, Melody Gwilliam, Srinivas Konda, Jeff Rojek & Suzanne Marsh, *Nonfatal Injuries to Law Enforcement Officers: A Rise in Assaults*, 54 Am. J. Preventative Med. 503, 505 (2018).

481. *See* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 201 (2013).

will be undeterred by near-certain criminal sanctions yet somehow deterred by the more hypothetical risk of one day owing civil damages.[482] Administrative and criminal remedies thus ensure that compensation and deterrence need not be sacrificed when limiting plaintiff police litigation.

CONCLUSION

Limitations on the ability to bring litigation for potential wrongful injury should not be undertaken lightly. Yet in the particular context of plaintiff police litigation—where the rules are already so protective for police defendants and where the demonstrated harm to political participation in the community is so great—such limitations are justified.

Ultimately, civil litigation can function to enhance democracy, but it can also undermine it.[483] In plaintiff police litigation, there are tradeoffs between the value of open courts, on the one hand, and the weaponization of litigation and its potential to be a tool of harassment and subordination, on the other.[484] Balancing these tradeoffs counsels in favor of limiting such claims. Plaintiff police lawsuits inflict profound harms, and the benefits of compensation and deterrence that they offer can be readily achieved through alternative means. The chilling effect of plaintiff police litigation on free speech and political participation, and the general civic withdrawal these suits provoke, render them incompatible with a democratic vision of the city. While limiting plaintiff police suits will not singlehandedly solve the complex problem of policing in America, it will stop one manifestation of the problem, and it may assist in slowly bringing the police and the public into right relations with each other.

482. *See id.*

483. Shapiro, *supra* note 228, at 127.

484. *See id.* at 142-43, 180-82; *see also* Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1246 (2022) ("Civil cases are often framed as voluntary disputes among private parties, yet many racially and economically marginalized litigants enter the civil legal system involuntarily, and the state plays a central role in their subordination through its judicial arm.").