Civil Justice and Abolition: An Exercise in Dialectic

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This Essay delves into an apparent paradox that surfaced during a symposium entitled "Section 1983 and Police Use of Force." Two themes were prevalent: one advocating for reforms to legitimize America's criminal legal system and another warning against legitimizing a broken system through such reforms. This duality underscored a "legitimacy paradox": attempts to validate the criminal legal system may inadvertently deepen its illegitimacy. Reforms can entrench mass incarceration, disempower those most affected by injustices, and mask the system's inherent flaws, collectively perpetuating inequality, injustice, and illegitimacy.

While these themes are common in academic discussions on policing and prisons, they are less prevalent in federal jurisdiction and constitutional torts, where Section 1983 debates typically occur. Recent events, however, have bridged the gap between civil justice in federal courts and criminal legal reform. Section 1983 has emerged as a key tool for addressing illegal police violence and systemic constitutional issues within the criminal apparatus, making concepts like "qualified immunity" central to police reform discourse in the United States.

Drawing inspiration from Professor Henry Hart's work The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, the Essay presents a fictional conversation between two federal courts professors. This dialogue explores the implications of abolitionism and "non-reformist reform" in a legal*

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doctrinal context. The aim is not to provide definitive answers but to stimulate consideration of various perspectives. This approach underscores the complexity and interconnectedness of legal reforms, policing, and the pursuit of justice.

I.
THE LEGITIMACY PARADOX

As the symposium called "Section 1983 and Police Use of Force: Building a Civil Justice Framework" unfolded at Berkeley Law in April 2023, two potentially paradoxical themes inflected the discourse. The first theme emphasized the need for reforms that could render America's criminal legal system more legitimate by reducing its racial inequality, making it fairer, and consequently fostering greater trust within the communities that are policed. In contrast, the second theme challenged the idea of legitimizing the current system through reforms. Instead, proponents of this theme asserted that the system, from its inception, has been fundamentally flawed and beyond redemption. This perspective urged for the transformation or even abolition of the entire system, which was deemed poisonous down to its very roots. Those who emphasized this theme cautioned against adopting reforms that might sustain, bulk up, or legitimize an irredeemable system.

Regardless of whether one identifies as an abolitionist, those who care about injustice and racial inequality in the criminal legal system should take seriously abolitionists' warning that attempts to legitimate the criminal legal system can result in (or deepen) the system's illegitimacy. Three key mechanisms can potentially facilitate this grim irony: entrenchment, disempowerment, and camouflage. First, reforms can entrench the current

system by increasing resources devoted to it.[1] Second, reforms like body cameras may incidentally disempower people by way of expanded surveillance, reducing marginalized Americans' control over their own lives and communities.[2] Third, reforms may camouflage the system's flaws, creating the conditions that further entrench and expand the system.[3] The net result is a system that, even if it bears some additional trappings of fairness, actually ensnares more people and is more daunting, more devastating, and more durable than the preceding unreformed system.

Many readers will likely find these themes familiar. Over the decades, scholars and policy-makers have often offered a wide range of legal reforms to address injustices in policing, including a more diverse police force,[4] better

1. Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 131 (2021) (explaining how reforms can "obscure and entrench structural inequality enforced through criminal law"); CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS IN POLICING (2020), https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf [https://perma.cc/RH2X-J9WE] (warning against calling for a reform that "further entrenches policing as a legitimate, reformable system, with a 'community' mandate. Some boards, tasked with overseeing them, become structurally invested in their existence."); *see also* Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 HARBINGER 130, 154 n.158 (2022) (contending that "reforms instituted by progressive prosecutors are necessarily reformist because they rely on and entrench prosecution as an institution"); David Zahniser, *After Election Loss, Critics of Charter Amendment C Call for Sweeping Review of LAPD Discipline*, L.A. TIMES (May 17, 2017), https://www.latimes.com/local/lanow/la-me-ln-lapd-discipline-measure-20170517-story.html [https://perma.cc/N7ES-3AUK] (quoting Black Lives Matter advocates' observations that revised disciplining procedures in Los Angeles policing can entrench existing structures).

2. *See* Andrew Guthrie Ferguson, *Surveillance and the Tyrant Test*, 110 GEO. L.J. 205, 239 (2021) ("Abolition includes the banning of surveillance technologies because those tools empower police, disempower individuals, and solidify the unequal distribution of coercive force."); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 656 (2019) ("[T]he use of surveillance measures on released offenders often leads to social marginalization, as those under surveillance seek to avoid social institutions necessary for full reintegration and democratic participation in society.").

3. Across a range of criminal justice domains, scholars have long warned that some reforms can obscure injustices inherent within a system and make intolerable injustices appear tolerable. *See* Paul D. Butler, Essay, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013) ("Poor people lose, most of the time, because in American criminal justice, poor people are losers. Prison is designed for them. This is the real crisis of indigent defense. *Gideon* obscures this reality, and in this sense stands in the way of the political mobilization that will be required to transform criminal justice."); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1–11 (2011) (exploring how expansions of criminal legal rights help facilitate expansion of substantive criminal law).

4. *See, e.g.*, CARL F. MATTHIES, KIRSTEN M. KELLER & NELSON LIM, IDENTIFYING BARRIERS TO DIVERSITY IN LAW ENFORCEMENT AGENCIES 9 (2012), https://www.rand.org/content/dam/rand/pubs/occasional_papers/2012/RAND_OP370.pdf [https://perma.cc/9YL4-5VL4]; David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1212 (2006). For an abolitionist critique of diversity reforms in policing, see DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 68, 79 (2021) ("Having more people of color in a corrupt system [does] not mean that they would be interested in changing it. . . . Mere community knowledge and diversity cannot prevent violence in a system that is inherently violent.").

criminal procedure,[5] required body cameras,[6] and better training.[7] In part because these reforms have often been accompanied by an increase in resources for policing,[8] a growing number of criminal law scholars question the efficacy of these reforms,[9] calling instead for "transformation," "imagination," "abolition," and "non-reformist reforms."[10] According to Professor Amna Akbar, a leading

5. One well-known normative lodestar for police reform is the "procedural justice" framework. That framework is based, in part, on a considerable body of literature showing that people are more likely to comply with the law when they perceive it to be procedurally fair. *E.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 350 (2003). Other scholars have emphasized the importance of reforms that will lead to "rightful policing," in which officers treat citizens with respect. *E.g.*, Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865, 1875–79 (2013). For an important critique of the view that a chief goal of reform should be policing's enhanced sociological legitimacy, see Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2083–87, 2126–47 (2017). One frequently interrogated target is *Terry v. Ohio*, 392 U.S. 1 (1968), which allows officers to stop and frisk Americans based on "reasonable suspicion" rather than a higher standard, like probable cause. *See, e.g.*, Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 51 (2015); Frank Rudy Cooper, "*Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 676–78 (2009). A related target is *Whren v. U.S.*, 517 U.S. 806 (1996), which allows officers to pull individuals over for pretextual reasons, so long as those deceptive reasons were objectively reasonable. *See, e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 336–38, 341–42 (1998).

6. *See, e.g.*, PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 31–39 (2015).

7. *Id.* at 51–60.

8. *See*, *e.g.*, Press Release, Dep't of Just., Justice Department Awards over $23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States (Sept. 21, 2015), https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law [https://perma.cc/T89M-MCJM].

9. *See*, *e.g.*, Naomi Murakawa, *Police Reform Works — for the Police*, LEVEL (Oct. 20, 2020), https://level.medium.com/why-police-reform-is-actually-a-bailout-for-cops-ecf2dd7b8833 [https://perma.cc/5KB5-86TS]; Dylan Rodriguez, *Reformism Isn't Liberation, It's Counterinsurgency*, LEVEL (Oct. 19, 2020), https://level.medium.com/reformism-isnt-liberation-it-s-counterinsurgency-7ea0a1ce11eb [https://perma.cc/PMV2-CL6B].

10. Legal scholarship advancing "transformation," "abolition," or "non-reformist reform" is too voluminous to be listed exhaustively here. For a sampling, see generally PURNELL, *supra* note 4; Subini Ancy Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L. & SOC. CHANGE 471 (2022); Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685 (2022); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1 (2022); Zohra Ahmed, *Bargaining for Abolition*, 90 FORDHAM L. REV. 1953 (2022); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020) [hereinafter Akbar, *Abolitionist Horizon*]; Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Arnett, *supra* note 2; Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015). *See also* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 414 (2018) [hereinafter Akbar, *Radical Imagination*] ("The way to reform law, law scholarship suggests in form and substance, is to convince these legal institutions through superior argumentation and appeals to rationality. . . . Imagining with social movements creates an alternative practice of contestation and solidarity, pointing to the different vectors through which ideas are formulated, and the terrain on and means through which they are fought over."). For a sample of an influential work by a non-legal academic's critique of how traditional reforms

academic voice in this sphere, "[n]on-reformist reforms aim to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons."[11]

Academic discourse concerning Section 1983, however, is typically situated within the domains of federal jurisdiction or constitutional torts, where debates on police reform are less prominent. This paucity of abolitionist discourse within the realms of federal jurisdiction and constitutional torts, when compared to the discussions surrounding policing and criminal law, is explainable. The connection between civil justice in federal courts and police reform is somewhat distant. Many federal civil cases have no direct connection to the criminal legal system, even when accounting for Section 1983, which permits lawsuits for various violations of federal rights. Moreover, even in cases where Section 1983 is used to address illegalities in the context of policing and prisons, courts and commentators tend to focus on compensation and deterrence as primary goals rather than the nuances of police reform.[12] If these goals undermine or hinder abolitionist ambitions, the causal chain is attenuated.

The symposium demonstrated, however, that discussions concerning the future of Section 1983 and discussions on the future of the criminal legal system can no longer be isolated from one another. Section 1983 is a key vehicle for invoking federal courts in the name of curbing and redressing illegal police violence. Moreover, in the wake of high-profile deaths involving police, the elimination of qualified immunity in Section 1983 cases prominently emerged as a proposed reform.[13] For example, the proposed George Floyd Justice in Policing Act of 2021 featured the elimination of qualified immunity as one of its principal components.[14] As a result, even if scholars who focus on Section 1983 do not perceive themselves as offering direct solutions to address police violence and racial inequities, their work has immediate relevance in this sphere, as

facilitate the punitive status quo, see generally RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

11. Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2507 (2023); *see also* ANDRE GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967) (coining the term "non-reformist reform").

12. These have long been core goals in literature about Section 1983. *See* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 82–83 (1989); Susanah M. Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 1 (1986) ("The goals of the section 1983 remedies articulated by the United States Supreme Court—compensation, vindication of rights, deterrence, and loss-spreading—parallel the goals to be achieved by common law tort remedies."); *see also* Carey v. Piphus, 435 U.S. 247, 254 (1978) ("[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights . . . .").

13. For a description and critique of the ways that qualified immunity dominated conversations about reforming federal constitutional litigation, see generally Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701 (2022).

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

demonstrated by the policy attention to Section 1983 reforms during the nation's recent "racial reckoning."[15]

It is important to foster dialogue between scholars specializing in Section 1983 and those focusing on the criminal legal system due to the use of Section 1983 suits to seek injunctions to rectify systemic constitutional wrongs within America's criminal apparatus. For decades, the statute has been deployed to address unlawful conditions in American prisons.[16] More recently, the statute has increasingly been invoked to challenge systems that unjustly criminalize poverty.[17] For those aiming to diminish the footprint of America's criminal legal system, these injunctions present both promise and potential peril. On one hand, they may lead to reforms that significantly reduce constitutional violations on a large scale. By addressing the root causes of systemic injustice, these injunctions could presumably create substantial positive change. On the other hand, the very same injunctions could entrench or enlarge states' criminal apparatus or inadvertently confer sociological legitimacy upon the criminal legal system. This unintended consequence might lead to diminished public sensitivity to issues like mass incarceration and mass criminalization. In effect, well-intentioned reforms could inadvertently reinforce the status quo, making it more challenging to drive meaningful, lasting change.

What do we make of all this? The pages that follow are inspired by Professor Henry Hart's seminal work, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, which stands as a cornerstone of federal courts scholarship.[18] Within these pages, readers will encounter a conversation between two fictional federal courts professors:

15. Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 124–26 (2021), https://repository.law.umich.edu/mlr_online/vol119/iss1/9/ [https://perma.cc/GZ8F-DTL5].

16. *See generally* LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989); BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS (1989); BERT USEEM & PETER KIMBALL, STATES OF SIEGE: U.S. PRISON RIOTS, 1971–1986 (1989); REMEDIAL LAW: WHEN COURTS BECOME ADMINISTRATORS (Robert C. Wood ed., 1990).

17. *See* Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2087–88 (2022); Fred O. Smith, Jr., *Abstaining Equitably*, 97 NOTRE DAME L. REV. 2095, 2097–99 (2022) [hereinafter Smith, *Abstaining Equitably*]; Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2317–19 (2018) [hereinafter Smith, *Abstention in the Time of Ferguson*]; Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 9 (2018); *cf.* Alexandra Nickerson & Kellen Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111 CALIF. L. REV. 1763, 1769–70 (2023) (observing the role judges have historically played in remedying excessive bail).

18. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). In contrast to Hart's work, where one fictional professor posed questions and the other responded, in this Essay, both fictional professors engage on an equal basis.

Several readers have noted that the ensuing dialectical method evokes an imagined conversation between a civil rights lawyer and a law professor at a preparatory meeting for the bicentennial celebration of the American Constitution. *See generally* Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

Professor Tawanna Freeman and Professor Holden Lawstone. The two engage in genuine and sincere deliberations about the implications of abolitionism and "non-reformist reform" debates in a field inherently focused on legal doctrine. While Professor Freeman is more sympathetic to, and knowledgeable about, abolitionism than Professor Lawstone, this fictitious dialogue is not meant to be a debate; instead, it serves as an earnest and exploratory exchange where both parties diligently grapple with the meanings and consequences of their evolving, mutually informed stances.

One feature of Hart's *Exercise in Dialectic* was that it asked more questions than it answered. Hart explained: "The purpose of the discussion is not to proffer final answers but to ventilate the questions . . . . [F]ull advantage has been taken of the ambivalence of dialogue form; and beyond that, some matters have been left without the benefit even of a unilateral expression of opinion."[19] So too here. Ultimately, the pages that follow inquire as to how proposals to reform Section 1983 litigation interact with calls for abolition, transformation, or "non-reformist reform."[20]

These two fictional federal courts professors share a few normative priors. They stipulate that mass incarceration and mass criminalization are distressing and horrific. They agree that we should aim for a future in which the footprint of prisons and policing is dramatically smaller. They further agree that racial inequality is a central feature of the criminal legal system today. That is, the current state of the criminal system in the United States is both a consequence of, and a chief contributor to, racial inequality. The harder question for them, which they will wrestle with below, is what lessons these normative priors have for federal courts, Section 1983, and civil justice.

Before proceeding with the dialogue, it is important to clarify how the term "legitimacy" is employed in the ensuing discussion. Drawing on Professor Richard Fallon's work, the dialogue will implicitly reference two types of legitimacy: sociological and moral legitimacy.[21] Sociological legitimacy refers to whether "the relevant public regards [a system] as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."[22] Moral legitimacy, by contrast, exists where a system upholds democratic and fair values, deserving respect and adherence.[23] In the criminal legal system, reformers typically aim to boost sociological legitimacy,[24]

19. Hart, *supra* note 18, at 1363.

20. Throughout, these two professors will use the terms "abolitionist" reform, "non-reformist reform," and "transformational" reform interchangeably.

21. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005).

22. *Id.* at 1795.

23. *Id.* at 1796–98.

24. *See, e.g.*, PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 6, at 1 (citing "Building Trust and Legitimacy" as a core pillar and explaining that "people are more likely to obey the

while abolitionists focus on the issues of moral illegitimacy. This situation can lead to our core paradox, as sociological legitimation inadvertently results in or reinforces moral illegitimacy.

Another important aspect of legitimacy, also based on Professor Fallon's work, is the distinction between minimal and ideal legitimacy. Minimal legitimacy means a system meets the basic requirements to avoid being labeled illegitimate.[25] Ideal legitimacy, by contrast, indicates a system's adherence to the highest standards by way of metrics like democratic assent.[26] As I have discussed in previous works, however, legitimacy is not a simple binary concept; it is a continuum.[27] The shift into illegitimacy can be gradual, rather than abrupt, and the movement from ideal toward minimal legitimacy is worthy of attention and concern.[28]

This Essay proceeds as follows. Part II first explores the relationship between improved civil damages, remedies, and reforms that result in disempowerment, entrenchment, and sociological acceptance of a growing carceral state. In Part III, the dialogue then explores these themes in the context of injunctive relief. Finally, in Part IV, the dialogue acknowledges broader questions about the legitimacy of the Supreme Court, a set of questions beyond the scope of this Essay.

II.
THE LEGITIMACY PARADOX AND CONSTITUTIONAL TORTS

A. The Inquiry on Compensatory Reforms

Professor Freeman: So, I have a question for you. When recent prominent books have been published in our field that address ways to enhance accountability in policing and legal recourse, have you noticed the chorus of voices inquiring, "But what about abolition?"[29]

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law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority").

25. Fallon, *supra* note 21, at 1798.

26. *Id.* at 1797.

27. Smith, *Abstention in the Time of Ferguson*, *supra* note 17, at 2355–56.

28. *Id.*

29. Two recent important books in the field include ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS (2021) and JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023). For critiques that sound, in part, on the importance of abolition for meaningful change, see Brandon Hasbrouck, *The Untouchables and the Stakes of Abolition*, BALKINIZATION (Mar. 7, 2023), https://balkin.blogspot.com/2023/03/the-untouchables-and-stakes-of-abolition.html [https://perma.cc/2NAB-LQ56] (reviewing SCHWARTZ, *supra*); Adam A. Davidson, *The Shadow of the Law of the Police*, 122 MICH. L. REV. (forthcoming 2024) (manuscript at 27–28) (reviewing SCHWARTZ, *supra*) (on file). *See also* Fred O. Smith, Jr., *Policing Mass Incarceration*, 135 HARV. L. REV. 1853, 1854 (2022) (reviewing CHEMERINSKY, *supra*) (emphasizing how mass incarceration renders many criminal legal reforms incapable of producing meaningful change).

Professor Lawstone: Now that you mention it, yes. I actually observed this at a recent symposium at a law school about Section 1983 and police use of force. While I attended the symposium to share expertise in the field of Section 1983, I encountered multiple pleas for dismantling America's punitive carceral state altogether. But as a federal courts professor, I'm not entirely certain how to interpret those voices. Our expertise lies in reforming Section 1983 to pursue justice for those who have suffered harm. Engaging in discussions about specific police reforms, abolition, or the reduction of prisons and police appears to be beyond the typical expertise of federal courts professors.

Professor Freeman: Well, one criticism of using civil litigation reform to enhance policing is that no program of reform, however thorough, can eradicate the inherent thread of injustice and racism woven into the fabric of American policing from its inception.[30] Moreover, can't certain proposed reforms distract from efforts to address root causes of public safety problems? These possibilities seem important to consider. Can we aim to implement changes that promote accountability, justice, and equity in civil justice without unwittingly siphoning energy from efforts to transform a broken system? And what is the relationship between civil justice reform and police reforms that, in the long run, exacerbate current problems by perpetuating, bolstering, or legitimizing an irredeemable system?[31]

Professor Lawstone: Is the word "reform" in your question doing dual work? Section 1983 reform and police reform are not synonymous terms, even if the concepts are frequently in overlapping conversations. To reform Section 1983 is to reform civil litigation in ways that increase accountability. Reforming civil litigation is not the same as reforming policing or the criminal legal system itself. Those who advocate for Section 1983 reform are only striving for a *civil* legal system that is fair, democratic, and legitimate. They have proposed reforming qualified immunity,[32] cabining abstention,[33] fixing doctrine governing attorneys' fees,[34] making it easier to sue local governments,[35] and ensuring that damages awards come from police departments' funding rather than cities' general funds.[36] These reforms would make a real difference in the lives of survivors of lawless conduct. It's hard to see how such reforms could make marginalized Americans worse off.

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30. Hasbrouck, *supra* note 29.

31. *See, e.g.*, Butler, *supra* note 10, at 1466–68.

32. *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018). *See* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2113 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 70–76 (2017).

33. *See generally* Smith, *supra* note 17.

34. *See* SCHWARTZ, *supra* note 29, at 21–32.

35. *See generally* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016); Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181 (2023).

36. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1202 (2016).

Professor Freeman: Even if these kinds of civil reforms might make a real difference in people's lives in the short term, will increasing civil accountability distract from longer-term efforts to create a less violent, less punitive system? And might it even create incentives for reforms in policing that serve to legitimate, sustain, or enlarge a broken criminal legal system?

Professor Lawstone: Surely you aren't suggesting that we sacrifice victims of government lawlessness seeking accountability on the grounds that, in the long run, increased accountability might enable police reforms that legitimate a broken system.

Professor Freeman: No. Indeed, many abolitionists have emphasized the importance of standing in solidarity with victims of racism in the form of direct and structural state violence. This tenet informs some abolitionists' calls for reparations.[37] Still, it's fairly common for scholars to assess the costs and benefits of legal proposals, and so it seems important to assess whether that's one of the costs of civil justice reform here.

Professor Lawstone: Well, as to that broader point, I understand that some *police* reforms can bolster a broken system; I'm just not sure that critique applies to civil justice. Better civil justice doesn't enlarge police budgets or facilitate more surveillance. And even if our nation's approach to public safety were transformed to a less punitive model, wouldn't we still want a system of civil justice that held the government accountable when, inevitably, some officials abused their power? And isn't making governments pay for their wrongs—especially if police departments pay—at least a modest step in the right direction?

Professor Freeman: By your own terms, that reform is "modest." Doesn't that, in and of itself, show that it's not transformational? Doesn't modest, here, implicitly mean that it is not moving toward a world where the nation's approach to public safety is dramatically less punitive, less powerful, less omnipresent, and less violent?

Professor Lawstone: No. You are conflating two things in assuming that when I say "modest" I mean "reformist." Can't a "reformist reform" be drastic and bold, significantly enhancing the resources and power of the police? Conversely, can't an "abolitionist reform" involve seemingly minor adjustments that have profound impact in combination with other transformative changes, so

37. *See* ANDREA RITCHIE, DEIRDRE SMITH, JANETTA JOHNSON, JUMOKE IFETAYO, MARBRE STAHLY-BUTTS, MARIAME KABA, MONTAGUE SIMMONS, NKECHI TAIFA, RACHEL HERZING, RICHARD WALLACE & TALIBA OBUYA, MOVEMENT FOR BLACK LIVES, REPARATIONS NOW TOOLKIT 5 (Andrea Ritchie & Marbre Stahly-Butts eds., 2019), https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf [https://perma.cc/C692-2BNT]; Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1623–27 (2019); Eaglin, *supra* note 1, at 124–27. Critical Resistance, a leading abolitionist organization based in Oakland, has characterized lawsuit settlements as abolitionist, rather than reformist, in part because they siphon money away from policing and because they undermine, rather than further, the institution's perceived legitimacy. CRITICAL RESISTANCE, *supra* note 1.

long as those adjustments are moving the nation in that direction? Aren't "reformist reform" and "non-reformist reform" different in kind rather than degree?

Professor Freeman: Well, that simply takes us back to the heart of the question. Are the goals and effects of proposals to reform constitutional litigation inclined to enhance the resources and power of police?

Professor Lawstone: Perhaps the sensible thing to do is to articulate and evaluate some of the stated goals of Section 1983 reforms, as well as some specific proposals, and assess them.

Professor Freeman: That seems clearly right, but it should be acknowledged that it is a limited approach to answering that question.

Professor Lawstone: How so?

Professor Freeman: A significant body of abolitionist scholarship highlights the importance of democratic empowerment for those most affected by state violence.[38] For legal academics, acting alone, to reflect on the compatibility of federal legal solutions with abolition ideals can create tension with the work of those scholars. Right? Imaginative scholars have emphasized the crucial role of engaging organizers and hyperlocal sites of democracy.[39]

Professor Lawstone: For our purposes here, taking those concerns into account, perhaps democratic empowerment is one metric that can be used to assess the value of reforms to civil justice? We can consider whether the respective reform empowers marginalized communities who are most impacted by state violence.

Professor Freeman: That's a worthy metric, even acknowledging the democratic limitations of our methods. Some abolitionist scholars and advocates cite democracy as an important lodestar.[40]

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38. *See, e.g.*, JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 13–14 (2023); *cf.* Sameer Ashar & Annie Lai, *Access to Power*, 148 DÆDALUS 82, 83 (2019) ("Access-to-justice approaches that assume the existence of a legal system that dispenses justice obscure the structural and unequal distribution of economic, social, and political power and foreclose opportunities for people to work toward a truly just society."). *But see* John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 711–12 (2020).

39. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 711–14 (2020).

40. *See generally, e.g.*, Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261 (2007). As two scholars recently put it, "[t]he phrase 'abolition democracy,' first articulated by W. E. B. Du Bois, is meant to indicate that abolition of a system of oppression, such as slavery, necessitates positive investments that incorporate those who have been oppressed." Clair & Woog, *supra* note 10, at 26. It bears noting, however, that some abolitionists have also expressed skepticism of majoritarianism as an antidote to harms against marginalized groups. Akbar, *Abolitionist Horizon*, *supra* note 10, at 1805 ("Fundamentally, the 'more democracy' frame fails to account for the anti-democratic nature of the carceral state. Police and prisons lock people out of formal political channels. Incarceration

Guided by abolitionist scholarship and activism, we might also ask whether a given reform will, even indirectly, increase or decrease the resources devoted to the criminal system,[41] the number of people incarcerated,[42] and the sociological legitimacy of the criminal system.[43]

Professor Lawstone: I agree with those metrics, but based on how you've described the goals of abolition, shouldn't we also be aspirational? I propose also asking whether the reform reduces Americans' perceived need for a large, militarized police force in the long term.

Professor Freeman: That's a friendly amendment.[44]

B. Compensation and Democracy

Professor Freeman: Let's start with proposals aimed at enhancing compensation for victims of unconstitutional actions and deterring future wrongful conduct. Do reforms aimed at better compensating victims of lawless conduct undermine abolitionist goals? Does the goal of compensation, for example, enhance democracy? Does it empower the marginalized?

Professor Lawstone: Well, civil justice has a democratic quality to it in and of itself. Filing a complaint for redress as a way of correcting government wrongs is a democratic moment. Trials, while rare, are also ideally democratic moments,

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removes a person from their family and community and undermines their ability to engage in civic and social life.").

41. *See* Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. BOOKS (June 15, 2020), https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands [https://perma.cc/6AXQ-Y7YH].

42. "Decarceration" is not inherently abolitionist, but it has been advocated for by abolitionists, sometimes as a non-reformist reform on the road to abolition. *See* Akbar, *Radical Imagination*, *supra* note 10, at 426 (observing that the Movement for Black Lives has offered an "approach to reform . . . rooted in a decarceral agenda rooted in an abolitionist imagination"); *see also* CMTY. JUST. EXCH., COURTWATCH MA, FAMS. FOR JUST. AS HEALING, PROJECT NIA & SURVIVED AND PUNISHED NY, ABOLITIONIST PRINCIPLES & CAMPAIGN STRATEGIES FOR PROSECUTOR ORGANIZING 1, https://static1.squarespace.com/static/60db97fe88031352b829d032/t/61348c6c138bef56b46eaad0/1630833772218/CJE_AbolitionistPrinciples_FINAL.pdf [https://perma.cc/EH95-VQH6] ("As abolitionists, our job does not end with the election of any prosecutor. . . . Our organizing focuses on how a prosecuting office's policies and practice result in decriminalization, decarceration, and shrinking the resources and power of the office of the prosecutor."); ANGELA DAVIS, ARE PRISONS OBSOLETE? 73 (2011) ("[P]ositing decarceration as our overarching strategy, we would try to envision a continuum of alternatives to imprisonment—demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance."). *See generally* Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012).

43. Akbar, *supra* note 11, at 2536 ("The abolitionist organization might emphasize the fundamental violence and illegitimacy of the police, while the reformist one might emphasize the need to reestablish police legitimacy."); *cf.* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 430–31 (2002) (emphasizing the need for those who wish to abolish the death penalty to consider which reforms might make abolition more difficult though "legitimation and entrenchment").

44. Purnell has written of the goal of reducing inequality and, in so doing, eliminating the need for "managers of inequality," a role that police often serve. She urges working toward a future where, as a result of reduced inequality, police are not viewed as a necessity. PURNELL, *supra* note 4, at 5.

allowing otherwise disempowered plaintiffs to plead their case on relatively equal footing with government official defendants.[45] And open public adjudication of claims further serves democratic aims by way of transparency and accountability.[46]

Professor Freeman: But does *compensation* empower the marginalized?

Professor Lawstone: It certainly is a lot more empowering than not being compensated.

Professor Freeman: Okay, sure, but aren't there ways in which compensation can undermine democracy?

Professor Lawstone: How so?

Professor Freeman: Compensation comes from governmental coffers, either directly or by means of indemnification.[47] And putting to one side places in which damages are paid for by insurance, sometimes these damages come from government budgets.[48] That's a diversion of resources from the places that the people agreed to in a budget, or investments the people would have agreed to if a budget didn't need a large item for damages claims.[49]

Professor Lawstone: I see what you mean. But if a city is violating the Constitution so much that damages are getting in the way of its basic needs, isn't that the real problem? Aren't routine violations of the nation's highest charter a democratic problem in and of themselves?

Professor Freeman: Yes, but if money has to be diverted from a budget to pay for damages, it's not being diverted from wealthy neighborhoods. It's being

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45. *See* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1667 (2016):

> [L]itigation is a process through which individuals in the polity perform self-government. This is done in five ways. First, litigation allows individuals, even the most downtrodden, to obtain recognition from a governmental officer (a judge) of their claims. Second, litigation promotes the production of reasoned arguments about legal questions and presentation of proofs in public, subject to cross-examination and debate. Third, litigation promotes transparency by forcing the information required to develop proofs and arguments to be revealed. Fourth, litigation aids in the enforcement of the law in two ways: by requiring wrongdoers to answer for their conduct to the tribunal and by revealing information that is used by other actors to enforce or change existing regulatory regimes. Fifth, litigation enables citizens to serve as adjudicators on juries. Each of these functions of the litigation process is limited in various ways, some of recent vintage, others longstanding.

46. Judith Resnik & Dennis Curtis, *Re-Presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts*, 24 YALE J.L. & HUMANS. 19, 26 (2012) (linking public adjudication to democracy and defining democracy as "aspirations for lawmaking through egalitarian methods that foster popular input into governing norms and impose robust constraints on both public and private power"). The authors draw, in part, from Jeremy Bentham's work emphasizing the democratic values of open courts in JEREMY BENTHAM, CONSTITUTIONAL CODE, *reprinted in* 9 THE WORKS OF JEREMY BENTHAM 41 (John Bowring ed., Edinburgh, Tait 1843).

47. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 885 (2014) (examining the results of a study showing the prevalence of police indemnification and exploring its implications for civil rights litigation practice).

48. *See* Schwartz, *supra* note 36, at 1148.

49. For example, in 2015, the City of Chicago created a fund for victims of police torture, using funding from the general budget to do so. Eaglin, *supra* note 1, at 125–26.

diverted from resources for the least politically empowered citizens.[50] Might the compensation awarded to one injured individual, therefore, result in broader structural damage by impacting others who rely on the government's capacity for redistribution? Even more worrying is that this might be endemic to an individual rights model as it is practiced today in America's civil justice system.[51]

Professor Lawstone: That's concerning, but some proposed reforms aim to avoid, or at least mitigate, that. For example, one proposal encourages cities to pay damages from the budget of the department that commits the violation.[52] If it is the police department that engaged in the violation, it's the police department that would pay.

Professor Freeman: Wouldn't today's conservative courts view this requirement as a fairly intrusive federal remedy? As a matter of federalism?

Professor Lawstone: If it were federally mandated, perhaps, though I'd remind you that Section 1983 was passed pursuant to the Fourteenth Amendment, an express limitation on state power. And Congress is constitutionally permitted to enforce that amendment. That said, scholars haven't proposed that Congress mandate this. Scholars have encouraged local citizens to demand that their own cities adopt this approach to damages.

Professor Freeman: Federalism all the way down.[53]

Professor Lawstone: Democracy.

C. Compensation and Decarceration

Professor Freeman: What about our other metrics like, say, examining whether a civil justice proposal is likely to bulk up resources for the carceral state?

Professor Lawstone: Proposals for better compensation seem to pass with flying colors by that metric. More damages relief would literally divert money away from the carceral state. This is all the truer if the department that harms is the department that pays.

Professor Freeman: That seems too simplistic, no?

Professor Lawstone: How so?

Professor Freeman: If a city is forced to make large expenditures for police violence, might that incentivize them to put resources into policing as a way of

50. *See* SCHWARTZ, *supra* note 29, at 198.

51. Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26–27 (1993) (interrogating the claim that "legal rights are *essentially* individualistic, at least in the U.S. constitutional and legal culture, and that progressive change requires undermining the individualism that vindicating legal rights reinforces").

52. *See* SCHWARTZ, *supra* note 29, at 232–33.

53. *Cf.* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (describing the importance of local and hyperlocal cites of democratic participation and contestation).

stopping the violations? More officers? More training? The City of Atlanta, in conjunction with the Atlanta Police Foundation, is building a $90 million, 85-acre policing training facility in the middle of a 350-acre forest outside of the city and adjacent to a Black neighborhood.[54] And the stated reason for this investment—which has become known as Cop City— is to train officers so as to avoid future wrongdoing.[55] The mayor has framed the center as a way of responding to the 2020 protests in the aftermath of George Floyd's death.[56]

Professor Lawstone: That may be so, but that's not a consequence of compensatory damages as such. Damages make it apparent to a city that it has a policing problem. But damages don't tell a city how it should respond. Some might devote more resources to police, yes. But others might devote less. Instead of building cop cities, maybe some cities respond by tackling housing and income inequality. That is, as Professor Ruth Wilson Gilmore once encouraged, "Instead of asking whether anyone should be locked up or go free, why don't we think about why we solve problems by repeating the kind of behavior that brought us the problem in the first place?"[57]

And maybe some cities would take seriously the scholarship that shows that police violence is partially caused by frequent, fraught police stops, some portion of which will inevitably end violently.[58] If that scholarship is taken seriously, maybe some cities would choose to reduce stops or rely more on mental health professionals to address mental health crises. Or perhaps, though this might be a stretch, they might even make substantive changes to criminal law to reduce mass criminalization.[59] Would payouts from city coffers somehow make a city less likely to adopt these kinds of more transformational reforms?

Professor Freeman: It seems at least a bit far-fetched to claim that damages awards would significantly drive a city to implement major reforms of the type

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54. Sam Worley, *Next Stop, Cop City? What's Happening with the Controversial Plan for a New Police and Fire Training Center in DeKalb*, ATLANTA MAG. (Sept. 13, 2021), https://www.atlantamagazine.com/news-culture-articles/next-stop-cop-city-whats-happening-with-the-controversial-plan-for-a-new-police-and-fire-training-center-in-dekalb/ [https://perma.cc/QL9T-VAGN].

55. *See Construction Permit to Be Issued that Will Allow Police Training Facility at Center of Protests to Move Forward*, 11ALIVE (Jan. 31, 2023), http://www.11alive.com/article/news/local/cop-city-atlanta-press-conference-update-future-public-safety-training-center/85-fb3a9216-bc7e-4fe1-9ea1-07c7567630c4https://www.11alive.com/article/news/local/cop-city-atlanta-press-conference-update-future-public-safety-training-center/85-fb3a9216-bc7e-4fe1-9ea1-07c7567630c4 [https://perma.cc/FMB4-S9VX] (noting that the Mayor framed the facility "as an answer to reform demands from 2020 and criminal justice protests").

56. *Id.*

57. Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/JW2D-VHNB].

58. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485–512 (2016).

59. *See generally* STUNTZ, *supra* note 3 (discussing the rise and negative effects of mass incarceration); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing how mass incarceration is the New Jim Crow).

you suggest. In recent instances where cities have redirected police funds to alternative public safety programs, avoiding financial liabilities do not appear to be the primary motivator for these changes. The changes were a result of movements rooted in racial justice.[60]

Furthermore, there are examples of cities that have incurred substantial financial damages that continue to introduce training programs or new procedures that don't always reduce the need for or presence of policing.[61] For example, in the years following the so-called racial reckoning in 2020, local policies in Minneapolis aimed at reducing the size of policing have been abandoned even as damages liability for police violence roars on.[62] While damage payments may highlight an issue, they don't necessarily increase or decrease a city's likelihood of enacting the kinds of transformative reforms needed to ensure greater freedom for more people.

D. Compensation and Sociological Legitimation

Professor Lawstone: Lurking in the background of this conversation are our sociological metrics we promised to talk about. A community's perceptions of public safety and policing will directly inform what types of reform a community adopts when its leaders accept that it has a problem.

Professor Freeman: This seems right. That is, a community's response will depend on whether it believes that large, militarized policing will *solve* public safety problems rather than *be* a public safety problem.

Professor Lawstone: Yes, do you have views as to whether more civil accountability for constitutional torts would impact communities' perceptions of the police and prisons?

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60. *See* Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1211–12 (2022); Sam Levin, *These US Cities Defunded Police: 'We're Transferring Money to the Community*,*'* GUARDIAN (Mar. 11, 2021), https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community [https://perma.cc/2LX9-KVQA].

61. An example is Vallejo, California, which has engaged in massive damages payouts for police brutality in recent years. Scott Morris, *Ten Years Since Vallejo Police's Deadliest Year, $12.7 Million Has Been Paid to Settle Civil Rights Lawsuits*, VALLEJO SUN (Jan. 4, 2022), https://www.vallejosun.com/ten-years-since-vallejo-polices-deadliest-year-12-6-million-has-been-paid-to-settle-civil-rights-lawsuits/ [https://perma.cc/9K47-V27P]. That city recently agreed "to collaboratively reform the police department's use-of-force procedures, implement anti-bias training, and bring the department's training, policies and transparency in line with national standards and best practices." Carlos Castaneda, *Vallejo Police Department Agrees to California DOJ Oversight of Police Reforms*, CBS NEWS (Oct. 16, 2023), https://www.cbsnews.com/sanfrancisco/news/vallejo-police-consent-decree-california-attorney-general/ [https://perma.cc/Q5R9-EB2U].

62. Ernesto Londoño, *How 'Defund the Police' Failed*, N.Y. TIMES (June 16, 2023), https://www.nytimes.com/2023/06/16/us/defund-police-minneapolis.html [https://perma.cc/EPV3-Q5HC]; *Officer Payouts Dashboard*, MINNEAPOLIS DATASOURCE, https://www.minneapolismn.gov/government/government-data/datasource/officer-payouts-dashboard/ [https://perma.cc/9UC9-2AMN].

Professor Freeman: Depending on the perspectives and experiences of the public, a community's perception may vary significantly. Some communities might view large payouts to victims as a sign of a fundamentally broken system, with the police department hemorrhaging money due to the frequency of wrongs and constitutional violations. On the other hand, others might view it as evidence of a functioning and just system, where harmed individuals receive the justice they deserve.

Professor Lawstone: Is it really the case that federal courts forcing cities to pay through a system of civil justice will cause some people to think their city's system of criminal "justice" is working?

Professor Freeman: These are empirical questions, but the possibility shouldn't be discounted.

Professor Lawstone: Aren't some of these concerns mitigated, at least in part, when a community has a strong culture of transformative organizing and a healthy civil society? Won't organizers and civic leaders have a more significant impact on which reforms are adopted than lawsuits for damages relief?

Professor Freeman: Meaning that a community's perception of the carceral state and public safety will be shaped to a greater degree by democracy and the broader political economy than damages awards?

Professor Lawstone: Precisely. We talked about Atlanta's proposed "Cop City," but what we haven't talked about is the extraordinary democratic response.[63] When the proposal is discussed at city council meetings, there are hours of public comment lasting from an afternoon well into the next morning.[64] In those public comments, there are transformative visions about the future of public safety. Local leader Toni-Michelle Williams, a Black trans woman, told city officials she wanted to live in a place "where I would be able to be my free self, my most authentic self, my most visible self," adding "I can't do that with more police around."[65] Dr. Mark Spencer implored city officials to spend the funds allocated to the police training center to healthcare and affordable housing.[66] The story is still unfolding as organizers actively petition to place the issue on the ballot for voters to decide, an effort being met with strong opposition from city officials.[67] Moreover, it is important to recognize that democratic

63. *See* Akbar, *supra* note 11, at 2538–41.

64. Kristal Dixon & Thomas Wheatley, *Atlanta Council Approves Controversial "Cop City" After Heated Meeting*, AXIOS (June 6, 2023), https://www.axios.com/2023/06/06/atlanta-cop-city-final-vote [https://perma.cc/98ES-CT3E].

65. Amanda Andrews, *Hundreds Speak Against Police Training Center at City Council Meeting*, GA. PUB. BROAD. (May 16, 2023), https://www.gpb.org/news/2023/05/16/hundreds-speak-against-police-training-center-at-city-council-meeting [https://perma.cc/7UYH-HLED].

66. Sean Keenan & Rick Rojas, *Atlanta City Council Approves 'Cop City' Funding Despite Protests*, N.Y. TIMES (June 6, 2023), https://www.nytimes.com/2023/06/06/us/atlanta-cop-city-funding-vote.html [https://perma.cc/N88F-RVK8].

67. Fred Smith, Jr., Opinion, *Hear the Voices of Atlanta in Public Safety Center Debate*, ATLANTA J.-CONST. (Sept. 15, 2023), https://www.ajc.com/opinion/opinion-hear-the-voices-of-atlanta-

contestation is shaping the future of public safety across the nation.[68] The success of the transformation of public safety hinges on whether a sufficient number of voters are persuaded of this kind of transformation's merits and vote for policies aligned with that vision. Compensating victims of governmental violence may play a role in inspiring change, but ultimately, it will be the people who decide the nature and extent of that change.

Professor Freeman: At an even more fundamental level, aren't we assuming that damages lawsuits will have any kind of deterrent effect? That these kinds of suits "might inspire change," as you put it?

Professor Lawstone: That's basic economics, isn't it? If one wants to disincentivize behavior, one makes it more costly to engage in that behavior.

Professor Freeman: But does that logic work when we are discussing taxpayer money, the expenditure of which may have no bearing on a policy-maker's own bottom line? To quote one scholar, "[b]ecause government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay."[69]

Professor Lawstone: I am familiar with that argument. But there's also later work that points in the other direction, suggesting that lawsuits can deter bad actors from committing bad acts. In a 2009 book, Professor Charles R. Epp examined three distinct policy areas in both the United States and the United Kingdom: workplace sexual harassment, playground safety, and police brutality.[70] The book shows how activists and professionals employed legal liability, lawsuit-generated publicity, and innovative managerial concepts to advocate for and achieve the implementation of new practices.[71]

Professor Freeman: But isn't there even more recent research that specifically examines suits against police and indicates that payouts from these suits have little effect on governmental behavior?[72]

Professor Lawstone: Yes, that recent work proposes ways to structure payout settlements and damages awards in ways that do deter. For our purposes here, the question isn't to what extent damages awards currently deter bad conduct. The question is whether deterrence is a worthy aim when crafting civil reforms. On that score the answer is yes.

Professor Freeman: Doesn't the innocuousness of deterrence as a goal depend on its context? Deterrence is not solely a goal of civil justice; it also plays

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in-public-safety-center-debate/IHQSWBHYDBGTDGZQO4PA5SYTAE/ [https://perma.cc/D4CQ-YCF3].

68. *See* Simonson, *supra* note 40, at 1609.

69. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000).

70. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 11–12 (2009).

71. *Id.* at 3.

72. Schwartz, *supra* note 36, at 1144.

a pivotal role in the criminal legal system. In political discourse, voters are presented with the idea that imposing harsh punishments can effectively deter individuals from violating the law.[73] If a similar rhetoric is employed in the context of civil justice, could this potentially fuel a punitive culture that permeates other spheres, including the criminal legal system?[74]

Professor Lawstone: I appreciate the possibility that we should be thoughtful in our discourse about civil justice to avoid that outcome. But punitive rhetoric is not a necessary component of civil justice, with the exception perhaps of discourse surrounding punitive damages. One also should query whether there is a qualitive difference between harshly punishing civilians and harshly punishing purveyors of state violence.

Professor Freeman: That's plausible, but not at all obvious. One could make the case that harshly punishing police—just like harshly punishing anyone else—is incompatible with abolitionist goals.[75]

Professor Lawstone: I think the answer to that is outside the lane of two federal courts professors.

Professor Freeman: That hasn't always stopped us in this discussion. But yes, let's move on.

III.
THE LEGITIMACY PARADOX AND INJUNCTIONS

A. The Inquiry on Enhancing Injunctive Relief

Professor Lawstone: So far, our discussion has focused exclusively on damages. Section 1983 is not, however, limited to suits for damages relief. Litigants can and do seek prospective relief in the form of injunctions or declaratory judgments.[76] Some reform proposals focus on rendering those remedies more effective.[77]

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73. *See* Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, 3 PUNISHMENT & SOC'Y 161, 163–64 (2001).

74. For a discussion of the relationship between punitive culture and punitive policy, see David A. Green, *Feeding Wolves: Punitiveness and Culture*, 6 EUR. J. CRIMINOLOGY 517, 521–22 (2009).

75. This is a discussion point with which abolitionists have engaged. *See, e.g.*, Rachel Herzing & Isaac Ontiveros, *Responding to Police Killing: Questions and Challenges for Abolitionists*, 82 CRIM. JUST. MATTERS 38, 39–40 (2010); Benji Hart, *Seeking Justice for Laquan McDonald—Without Relying on Prisons: Locking Up Killer Cop Won't Address the Root Cause of His Violence*, IN THESE TIMES (Sept. 7, 2018) https://inthesetimes.com/article/seeking-justice-for-laquan-mcdonald-without-relying-on-prisons [https://perma.cc/XV7M-3J9S]; Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1033–35 (2021).

76. *See, e.g.*, Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 11 (2009) ("Structural reform suits pursuant to § 1983 and other statutes have provided systemic solutions to systemic problems by enabling courts to mandate specific institutional changes and to monitor ongoing agency conduct in a wide variety of public institutions.").

77. Smith, *supra* note 15, at 123 (2021) ("[L]itigation-minded policymakers and advocates should aim to lower the exceptionally high bars (1) to litigation against government entities, and relatedly, (2) to suits for injunctive relief.").

Professor Freeman: What kind of reform is possible in that sphere? Ever since *Los Angeles v. Lyons*,[78] survivors of unconstitutional violence do not have standing to obtain prospective relief unless they show that they are highly likely to experience such harm again in the future.

Professor Lawstone: First, some suits seeking injunctions against police departments meet the standard established in *Lyons*.[79] Second, courts could change standing doctrine.

Professor Freeman: How, given that Article III standing is a constitutional requirement?

Professor Lawstone: There was nothing inevitable about the result in *Lyons*. The notion that a person can have a "case" or "controversy" for the purposes of damages, but not for the purposes of prospective relief, has been criticized from its inception.[80] It might be taken as settled now, but is it impossible to imagine a future court unsettling it?

Professor Freeman: I don't know. But I do know we are straying from our central question. Does clearing the way for injunctive relief also clear the way for a more robust, enduring carceral footprint in the United States?

Professor Lawstone: That's a difficult question to answer in the abstract. But it does seem that injunctive relief holds more transformative potential than damages relief. Imagine if *Lyons* had prevailed and federal courts had enjoined the use of the chokehold against non-threatening suspects. Eric Garner might still be alive, along with countless others.[81]

Professor Freeman: Is that vision sufficiently transformative in the sense that it would reduce the carceral footprint? It's already against the law to use unreasonable force. Officers still do it. What difference would it make if there were an injunction that said, in effect, follow the law?

Professor Lawstone: The difference is the contempt power, both criminal and civil.[82] Those who violate an injunction can be held in contempt and face fines and new mandates. Incarceration for flagrant violations of an injunction is even possible in extreme cases.[83]

Professor Freeeman: We are speaking past each other a bit. Are injunctions, even those backed by contempt, ever particularly transformative given that they

78. 461 U.S. 95 (1983).

79. *See* Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2353–56 (2020).

80. For an early critique, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 24 (1984).

81. *See* J. David Goodman, *Difficult Decisions Ahead in Responding to Police Chokehold Homicide*, N.Y. TIMES (Aug. 4, 2014), https://www.nytimes.com/2014/08/05/nyregion/after-eric-garner-chokehold-prosecuting-police-is-an-option.html [https://perma.cc/L8VG-VYKV].

82. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 32 (1978).

83. *See, e.g.*, Colin Dwyer, *Ex-Sheriff Joe Arpaio Convicted of Criminal Contempt*, NPR (July 31, 2017), https://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt [https://perma.cc/7DEY-JVLV].

inherently deploy the master's tool to dismantle the master's house?[84] Injunctions are backed by the threat of criminal sanctions, an odd mode of enforcement if the goal is to reduce the state's punitive violence.

Professor Lawstone: This merits a closer look, akin to the scrutiny we gave to enhanced monetary damages.

B. Injunctions and Democracy

Professor Freeman: Do injunctions enhance or undermine democracy? There's an argument to be made that they undermine democracy. Consider the positionality of the judges that issue and essentially enforce injunctions. Judges lead insulated lives and often achieved their positions by being cautious. As a result, won't their injunctions often be undemocratic in the sense that such injunctions could amount to discretion-laden policy-making by unelected judges? And couldn't these injunctions amplify different solutions than those offered by on-the-ground movements?

Professor Lawstone: Are you sufficiently accounting for the fact that the plaintiffs seeking relief—and their lawyers—might be in conversation with movement organizers?

Professor Freeman: But even in that event, how does injunctive relief empower the people?

Professor Lawstone: For starters, when someone seeks a preliminary injunction or temporary restraining order, that motion is treated as urgent and often results in a near-immediate hearing. And witnesses testify, including those who are burdened by an unjust regime. When this happens, the most impacted individuals are literally speaking to power.

Consider the case of *Templeton v. Dotson* in St. Louis County during the protests following the death of Michael Brown in Ferguson, Missouri.[85] Protestors and would-be protestors alleged that when police saw groups gathered, those officers would surround the protestors. Officers, the suit alleged, would then command that the protestors end their "unlawful assembl[y]."[86] The core problem, though, was that by surrounding the protestors, officers would not give them space or time to disperse.[87] Instead, they would immediately begin spraying the chemical weapon generally known as tear gas.[88] The lead plaintiff, Alexis Templeton, was a protestor who was just twenty years old when she brought suit and testified as to what she had experienced.[89]

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84. *See* Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* THIS BRIDGE CALLED MY BACK 98, 99 (Cherríe Moraga & Gloria Anzaldúa eds., 1983); SIMONSON, *supra* note 38, at 13 ("The collective interventions that this book describes use the legal logic and language of the criminal system—the master's tools—against that system.").

85. Templeton v. Dotson, No. 14-cv-2019, 2015 WL 13650910, at *1 (E.D. Mo. Mar. 26, 2015).

86. Complaint at 3, *Templeton*, No. 14-cv-2019, 2014 WL 6892134.

87. *Id.*

88. *Id.*

89. *Id.* Ex. 6.

Professor Freeman: What relief did she seek?

Professor Lawstone: She pursued an injunction demanding that officers provide protestors with a reasonable means to exit the area and an adequate amount of time to disperse. The lawsuit was successful.[90] Equally noteworthy was the profound impact of protestors' testimonies in court, devoid of any respectability politics. An instance that stood out was Templeton's testimony. A Black woman, she fearlessly wore a shirt bearing the words: "I'm not your Negro."[91] When questioned about her future actions, she unhesitatingly asserted her intent to continue protesting on the federal courthouse steps immediately after the hearing concluded. These hearings represent democratic moments within the courtroom, a rarity in an era where only a limited number of cases ever reach trial.

Professor Freeman: I suppose the *Templeton* case is also a reminder that many injunctions literally support the architecture of democracy by protecting the rights to speak and vote.[92] Your example also directly implicates policing. However, I must say, my ideal vision for democracy would be much more capacious than being given a safe way to leave after being forced by police not to protest.[93] And what of the concern I raised that some injunctions require specific policy choices that are undemocratic in the most fundamental sense? That is, a single judge decides the right policy, rather than the people themselves. Is there anything to be done about that?

Professor Lawstone: That's a common concern, particularly with structural injunctions.[94] Courts have attempted to address this issue using two primary approaches. Firstly, many judges inquire how the governmental defendant plans to rectify the constitutional violation identified by the court, ensuring that elected

90. Temporary Restraining Order, *Templeton*, No. 14-cv-2019. The city settled a few months later. Order to Dismiss, *Templeton*, No. 14-cv-2019.

91. I attended and observed this hearing directly.

92. *See, e.g.*, Allen v. Milligan, 599 U.S. 1, 9–10 (2023) (upholding a preliminary injunction that prevented the State of Alabama from adopting a congressional redistricting map that "likely violated" Section 2 of the Voting Rights Act); United States v. U.S. Klans, 194 F. Supp. 897, 900–03 (M.D. Ala. 1961) (enjoining the Ku Klux Klan from threating and harming Freedom Riders).

93. In *Klans*, the federal judge ordered governmental officials to protect civil rights protestors from harm. 194 F. Supp. at 900–03.

94. For discussions, see William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) ("[P]resumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default."); Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 297 (1987) ("To the extent that consent decrees insulate today's policy decisions from review and modification by tomorrow's political processes, they violate the democratic structure of government."); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978) ("[S]eparation of powers clearly does impose limitations on the authority of federal courts to undertake executive and legislative functions when ordering relief against state officials."); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976) (acknowledging, and interrogating, concerns about structural injunctions' democratic legitimacy); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 32 (1979).

policy-makers take responsibility for developing specific remedies.[95] Secondly, some judges, like the legendary Judge Frank Johnson, for instance, have involved local civic leaders, including representatives from affected groups, when issuing orders to address important policy matters.[96] Nonetheless, it is crucial to exercise caution while crafting structural injunctions to ensure that they (1) steer clear of discretionary policy-making, (2) are strategically designed to facilitate democratic responses, and (3) empower the most marginalized groups.

C. Injunctions and Incarceration

Professor Freeman: We still haven't really considered, though, whether injunctive relief in the criminal context is likely to increase, or decrease, the number of incarcerated persons. I made the point earlier that injunctions are backed with the threat of force and criminal sanctions. Though that could be said of all law.[97]

Professor Lawstone: I suppose the answer to whether injunctions can decrease incarceration in the United States is sometimes yes. For example, in recent lawsuits challenging the criminalization of poverty, successes can literally mean that fewer people are locked up simply because they can't pay a ticket. In these suits, plaintiffs allege that some local jurisdictions have been operating de facto "debtors' prisons," where individuals who cannot afford to pay fines, court fees, or other debts are incarcerated, effectively criminalizing their poverty.[98] Suits have also been brought against rigid bail regimes in which many people who are unable to afford bail may be held in pretrial detention, even for minor offenses.[99] Successful injunctions—requiring inquiries into defendants' ability to pay—would mean fewer people in pretrial detention.

Professor Freeman: You said that "sometimes" lawsuits might decrease incarceration. And you paint a very rosy picture of the criminalization of poverty cases, at least when they aren't encumbered by federal courts doctrines like abstention and immunity. But can't "non-reformist reforms" also find a home in

95. Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1155 (1977).

96. *See* Fred O. Smith, Jr., *Remediating Resistance*, 71 ALA. L. REV. 641, 656–57 (2020); YACKLE, *supra* note 16, at 22–23, 26; *see also* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1089–95 (2004) (describing judicial approaches that include stakeholder negotiations and opportunities for transparency).

97. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretation takes place in a field of pain and death.").

98. Smith, *Abstention in the Time of Ferguson*, *supra* note 17, at 2317–19; *cf.* Colgan, *supra* note 17, at 10–13 (explaining that "the Excessive Fines Clause may provide a doctrinal intervention into the modern debtors' prison crisis"); Judith Resnik & David Marcus, *Inability to Pay: Court Debt Circa 2020*, N.C. L. REV. 361, 368 (2020) (noting that scholarship has "trace[d] the evolution of debtors' prisons and explain[ed] how, as debt obligations have mounted, constitutional protections against imprisonment for nonpayment have waned"). Local criminal courts are often sources of "predatory extraction." Clair & Woog, *supra* note 10, at 20.

99. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1101–02 (2019).

injunctions, and shouldn't we be attentive to whether that's happening even in the very cases you describe?

Professor Lawstone: The details of any injunction in the criminal legal context certainly matter. An injunction requiring more police training might be different than an injunction requiring a corps of mental health professionals to respond to people in mental health crisis, right? And for those who might be sympathetic to a smaller, less violent criminal system, as opposed to abolishing the system altogether, the details of any mandated training might matter as well. One might care about the ratio of lives saved by de-escalation training, for example, in comparison to the amount of new infrastructure and resources it will require.

Professor Freeman: Are the lawyers in those suits sufficiently in dialogue with organizers?

Professor Lawstone: That's a question for organizers.

D. Injunctions and Sociological Legitimacy

Professor Freeman: Our conversation is bumping up against another important question. Would the perceived legitimacy of prisons and policing achieve an incidental boost from federal injunctions that attempt to remedy illegal conduct in the criminal system?

Professor Lawstone: Why would the answer to that be any different than in the context of damages?

Professor Freeman: Injunctions mandate specific reforms. Damages do not. That's radically different, no?

Professor Lawstone: Perhaps, but isn't it different in ways that inure to the benefit of those who seek to create a new, more legitimate system of accountable public safety? When a citizen reads in the local newspaper that the Department of Justice has investigated a spate of deaths at a local jail or that their city has entered into a consent decree because of a rash of illegal assaults by police, it's hard to imagine that will bolster that citizen's confidence in the current system.

Professor Freeman: That answer seems to move the goal posts a bit by implicitly referencing Section 14141, which allows the federal government to seek injunctions against state and local law enforcement for illegal patterns of conduct.[100] Our discussion, so far, has been about Section 1983. A case that has the imprimatur of the U.S. government is arguably different in kind than the routine Section 1983 case, in which someone seeks justice for how the government has harmed them or their deceased family member.

But even so, it's not clear that the real risk is that, in the abstract, the mere existence of injunctions will boost incarceration's perceived legitimacy. The more significant question is whether the reforms that the injunctions mandate

100. 34 U.S.C. § 12601 (originally enacted as 42 U.S.C. § 14141).

will inspire more confidence in the current system, chilling efforts to achieve more transformative change.

Professor Lawstone: It depends on who you are looking to in assessing a community's confidence in the system. Consider the mother who, because of a federal injunction, doesn't face jail time for a debt she can't pay. She gets to hug her kid at night. She gets to earn a living. She gets to move freely through town without the haunting feeling that she might be pulled over and placed in jail. Is she less likely to question the criminal legal system's legitimacy than a person who is being used as an ATM machine for a cash-strapped city? Perhaps. But isn't that a good thing? Perhaps I'm being too sentimental for a legal discussion.

Professor Freeman: Perhaps legal discussions are not sentimental enough. Even so, that hypothetical assumes that injunctions will work and that they will actually result in fewer people incarcerated for poverty in the long run. That's unproven. The danger is that a post-injunction system will have additional superficial trappings of law, obscuring underlying lawlessness. Or worse, a system might have the superficial trappings of justice, obscuring injustices so routine we stop seeing them.[101] An injunction can literally mandate reforms that alter a community's perceptions without fundamentally altering criminal law's application.[102]

Professor Lawstone: That last question highlights the importance of distinguishing between sociological legitimacy and moral legitimacy.[103] Both reformers and transformers aim to establish a system of accountability that is morally legitimate. That is, even for those who seek a criminal system that is significantly reduced or fundamentally transformed, an objective is to create a more just and democratic system. Whether we are discussing the present criminal justice system or a reimagined public safety framework, it is crucial to avoid the toxic combination of sociological legitimacy with moral illegitimacy.

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101. *See, e.g.*, ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 6–8 (2019).

102. Many scholars have written about how attempts to reform can expand the carceral state in ironic ways. *See, e.g.*, DANIEL LACHANCE, EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES 97–101 (2016) (describing the legitimating role of honoring "last meal" requests before executions); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 3 (2014) (describing efforts to "build a better carceral state, one strong enough to control racial violence in the streets and regimented enough to control racial bias in criminal justice administration"); STUNTZ, *supra* note 3, at 1–11 (outlining the role of criminal procedural rights in facilitating substantive criminal expansion); Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 77, 92–94 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014); Butler, *supra* note 3, at 2184 n.38.

103. *See generally* Fallon, *supra* note 21 (analyzing different ideas of constitutional legitimacy).

IV.
THE LEGITIMACY PARADOX AND FEDERAL JURISDICTION

Professor Freeman: We seem to be nearing the end of what can be achieved through this dialectic method alone. But the discussion seems incomplete. How can we talk about "legitimacy" and "federal courts" without at least addressing current debates about the legitimacy of the U.S. Supreme Court?[104] Can constitutional litigation meaningfully change without institutional changes to the judiciary?[105] And are there lessons that this conversation can be applied to in those discussions?

Professor Lawstone: That is a quite different conversation, but the legitimacy paradox seems to loom there too. If the Supreme Court crosses into the abyss of substantive illegitimacy, modest reforms could lull the public and policy-makers into propping up its sociological legitimacy longer than might be wise. Those who propose court reform should be clear-eyed about that risk. What lessons do you take from this discourse that could applied there?

Professor Freeman: We can agree that as scholars of federal courts, we should be sober and careful about silver bullet promises, and that we treat modest proposals, like term limits, as what they are: modest. That's a lesson to be learned from the proposals to end qualified immunity in the aftermath of George Floyd's death, even though there is no real evidence that ending qualified immunity would stop Americans from being wrongfully killed or maimed by police.

Professor Lawstone: If the blending of conversations about Section 1983 reform and police reform had not occurred, would we be having this discussion today?

Professor Freeman: Likely not.

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104. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1703–04 (2021); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1778–79 (2020); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 148 (2019).

105. *See, e.g.*, AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 29 (2021) (describing structural, institutional threats to the independence of the judiciary).