The Cost of Doing Business

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Berkeley Law's symposium, "Section 1983 and Police Use of Force: Building a Civil Justice Framework," asked: "How do we reform the law in light of what we know?" This Essay offers three responses. Part I provides additional historical context that reconsiders Section 1983 as one of the weakest federal government interventions during Reconstruction, particularly compared to the progressive and radical demands that various communities called for at the time. In light of this knowledge, Part II examines how the contemporary context surrounding civil litigation and ending qualified immunity in hopes of police reform might prove to be especially challenging considering the expansion of police power and the absorption of Black people as citizens post-Reconstruction. Part III offers examples of what happens when singular legal reform discourse shapes public conversation in the aftermath of high-profile police killings and what Black families, activists, lawyers, and politicians may expect to happen (or project to the public) as a consequence. This Section also asks whether eliminating qualified immunity and increasing the chances of more successful Section 1983 claims against police officers can reduce police killings and considers why political officials might absorb the costs rather than curb the violence. The Essay concludes with ideas for how we can move forward.

Introduction 1108
I. Historical Context Surrounding Section 1983 1110
II. The conditions that gave rise to the statute that produced the doctrine of qualified immunity have changed. That statute is of limited utility in the contemporary social, economic, and political moment. 1117
III. Whether Section 1983 claims and ending qualified immunity can contribute meaningfully to obtaining a free and just society 1121
Conclusion: Potential Pathways Forward.. 1126

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INTRODUCTION

Eight days before the police killed Manuel Esteban Paez "Tortuguita'' Terán, an environmental protester against the multimillion-dollar police facility that the City of Atlanta is tearing down a forest to construct, police officers killed Tyre Nichols. Nichols was a young Black man who loved to skateboard and take pictures. Memphis Police Department (MPD) officers stopped him in a vehicle on January 7, 2023. He ran—perhaps because cops routinely kill Black people and he wanted to live. Cops punish people who flee, like the police officers who took Freddie Gray on a "rough ride" for running in 2015.[1] MPD beat Nichols and took him to the hospital. He died three days later.

Legal and political commentators often argue that police reforms will save Black lives. The most popular reforms did not stop Tyre's brutal death. The department had federal oversight: MPD and the United States Department of Justice have been parties in a consent decree since 1978.[2] The police department is diverse: MPD hired its first Black officer in 1862, its first Black woman police chief in 2021, and holds Black History Knowledge Bowls to build trust with local teenagers.[3] The five cops who killed Nichols are all Black. The body cameras strapped to their chests did not deter their fists from delivering blow after blow, nor did the surveillance camera on top of the streetlight that captured the footage.[4] Memphis has about two thousand cops, and if this were a "few bad apples" in the department issue, then maybe they all happened to be working on the same shift.[5] Police officers did not shoot Nichols, but opted for a less deadly

1. A "rough ride" is a pain compliance technique that police officers deploy against civilians to force submission or punish for lack thereof. "Pain compliance" is a catch-all phrase used to categorize a variety of pain-inducing techniques available to officers to persuade an uncooperative arrestee to comply with police demands. For example, an officer may place his or her fingers firmly on a subject's pressure points; may insert his or her fingers in a subject's nose and pull up; may twist the subject's arm(s); may bend backwards a subject's finger(s); or may press the subject in a sensitive spot with the officer's baton. "Depending on the technique, the pain induced can range from mild discomfort to extreme and debilitating physical agony." Benjamin I. Whipple, *Comment, The Fourth Amendment and the Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 28 SAN DIEGO L. REV. 177, 181 (1991); *see also* Curtin Bunn, *Why Some Who Experienced Police Confrontations Say Tyre Nichols Was Right to Run*, NBC NEWS (Feb. 2, 2023), https://www.nbcnews.com/news/nbcblk/experienced-police-confrontations-say-tyre-nichols-was-right-run-rcna68194 [https://perma.cc/UEZ3-2V7H].

2. *See* Kendrick v. Chandler, No. 2:76-cv-00449 (W.D. Tenn. Sept. 10, 1976).

3. MEMPHIS POLICE DEP'T CRIME PREVENTION/CMTY. POLICING PROGRAMS OVERVIEW, https://reimagine.memphistn.gov/wp-content/uploads/sites/70/2020/07/Overview-MPD-Crime-Prevention-COP-Prevention-Programs6330-1.pdf [https://perma.cc/8HPY-H8QT].

4. *Graphic Warning: A Street Camera Recorded the Deadly Police Altercation with Tyre Nichols in Memphis*, KTIV (Jan. 27, 2023), https://www.kitv.com/video/news/graphic-warning-a-street-camera-recorded-the-deadly-police-altercation-with-tyre-nichols-in-memphis/video_5053b7de-b066-58ac-99a3-d6cd208cc9a6.html [https://perma.cc/8FHC-24K3].

5. Ian T. Adams et al., *Memphis Police Numbers Dropped by Nearly a Quarter in Recent Years*, UNIV. OF S.C., THE CONVERSATION (Feb. 7, 2023), https://sc.edu/uofsc/posts/2023/02/conversation_memphis.php [https://perma.cc/9FD7-5QDW].

force: they beat him for three minutes, shocked him, and pepper-sprayed him. In fact, MPD boasts that they have adopted every reform in Campaign Zero's #8CantWait campaign, including the advocacy group's requests for departments to require officers to intervene when other officers are using excessive force and to de-escalate encounters with civilians.[6]

When popular reforms fail, some commentators produce a new, shinier silver bullet they claim will end the vampirical cycle of police killings.[7] This happens even when legal scholars explicitly state that one particular reform is "not a silver bullet."[8] The latest round of "silver bullets" carries civil lawsuits against the police, and with them, calls to abolish qualified immunity.[9] Police officers can assert qualified immunity as a defense to claim that they are not liable to plaintiffs because their alleged actions did not violate "clearly established law."[10] Many politicians, families of police violence victims, activists, and media pundits have stated that using civil litigation and abolishing qualified immunity will yield more justice under policing and ultimately save lives.

At Berkeley Law's symposium, "Section 1983 and Police Use of Force: Building a Civil Justice Framework," legal scholars and attorneys addressed opportunities and barriers regarding civil accountability for police, including Section 1983 and qualified immunity. My contributions to the last panel, "How do we reform the law in light of what we know," did not significantly depart from the general discussion that recognized opportunities and barriers in bringing Section 1983 lawsuits against the police, and how police raise qualified immunity defenses to claims. Rather, my remarks were concerned with how "reform" discourse can overpromise and underdeliver, especially to Black families who have suffered police homicides. They may expect these legal reforms to yield "justice," and more specifically, to stop police killings. Their expectations can impact their legal pursuits, political demands, and even the political outcomes regarding police. Painfully, their hopes that singular statutes

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6. *Eight Can't Wait*, REIMAGINE POLICING IN MEMPHIS (2023), https://reimagine.memphistn.gov/eight-cant-wait/ [https://perma.cc/5AQL-GAKR].

7. Several factors inform why various actions herald particular reforms as specific solutions to police killings. These include but are not limited to the following: how non-profit organizations seek and maintain their philanthropic and governmental funding; how various communities perceive policing issues and thus purported solutions; political agendas by political parties; influential technology corporations securing state and municipal contracts to provide surveillance; advocacy for particular reforms from lawyers, legal scholars, politicians, and more.

8. *See generally* JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023). *See also* Daniel Epps, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020) https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html [https://perma.cc/XP4R-ZMMJ] ("But we should also understand that eliminating qualified immunity is no surefire solution to police misconduct. Courts interpret constitutional rights against police violence quite narrowly, and it is unlikely they will provide redress for a great deal of troubling police conduct even without qualified immunity.").

9. 42 U.S.C. § 1983.

10. Harlow v. Fitzgerald*,* 457 U.S. 800, 818 (1982).

or doctrines can stop police killings weigh on their grief, health, and livelihoods. Thus, families and communities must understand that suing the police and abolishing qualified immunity *can* decrease one mechanism of defense for police but may not end—or even deter—police killings.

In considering the Symposium panel topic, it is important to first acknowledge that a person's orientation and commitments to policing, police reform, or police abolition shape how they pursue knowledge and articulate what they know. Scholars oriented to preserving the police might seek to reform the law in light of what they know because they hope to preserve police power and legitimacy. A police-reform-oriented scholar might seek to change the law in light of what they know because they are committed to improving police behavior and practices. An abolition-oriented scholar might consider the law's role in the broader social and structural forces that maintain oppression and decide whether a reform or non-reformist reform can provide a meaningful opportunity to undermine police violence, presence, power, and legitimacy. Legal scholarship (and practice) rarely falls this neatly into categories, but these differences can make a difference in the various approaches to the Symposium panel's question.

With this framing, this Essay begins with additional context surrounding the enactment of Section 1983 through an abolitionist lens. This Essay then offers examples of the limitations in discourse when commentators emphasize Section 1983 and abolishing qualified immunity as meaningful pathways to police reform. The final Section discusses ways that Section 1983 and abolishing qualified immunity can be a meaningful part of non-reformist reform and abolitionist praxis.

I.
Historical Context Surrounding Section 1983

Politicians, lawyers, and activists invoke the history and purpose of Section 1983 in championing justice for Black victims of police killings or their families. The most prominent social justice organizations in the United States acknowledge and celebrate that Congress passed the measure to help Black Americans enforce their constitutional rights against municipal actors, like police, through private causes of action.[11] Surviving family members can find a

11. *See, e.g.*, Scott Michelman, *Happy 150th Anniversary, Section 1983!*, ACLU DC (Apr. 20, 2021) https://www.acludc.org/en/news/happy-150th-anniversary-section-1983 [https://perma.cc/KL7G-C9DY] (The American Civil Liberties Union's legal director celebrates the Act's prominence by explaining, "On April 20, 1871, President Ulysses S. Grant signed one of the most important civil rights laws in U.S. history: the Ku Klux Klan Act. Section 1 of that law – known today as 42 U.S.C. § 1983 – empowers individuals to sue state and local government officials who violate their federal constitutional rights. The law was aimed at protecting Black Americans from white supremacist violence and murder in the postbellum South."); *see also* John Guzman*, Debunking Myths about Qualified Immunity and Exposing its Dangerous Realities*, NAACP LEGAL DEF. FUND (Jan. 19, 2023), https://www.naacpldf.org/qualified-immunity-myths-and-dangers/ [https://perma.cc/RR4P-V5DN] (describing the

lawyer and start litigation against the police themselves, without waiting for a prosecutor or policy change. Families, their lawyers, and their supporters argue that when officers raise qualified immunity, it can be a specific barrier in the legal case for justice and that the entire doctrine is an impediment to the historical purpose of Section 1983.

This historical narrative bolsters the importance of Section 1983 and ending qualified immunity in public discourse as a primary tool for racial justice. While Congress' historical intent is important, the broader context surrounding Section 1983's enactment also provides great insight into how the law was insufficient to accomplish the social change that many Black people organized, fought, died, and killed for during slavery and Reconstruction. A narrow construction and celebration of Section 1983's enactment serves legal police reform: it places the problem and solution of policing within the courts and legislature. By contextualizing Section 1983's history alongside other tactics, demands, and avenues that people used for freedom and justice, an abolitionist lens might offer a different set of tactics alongside, or in lieu of, reforming the law in light of what we learn.

Section 1983 emerged out of transformational organizing interested in far more than what civil litigation pathways—and eliminating barriers to them—can possibly provide. Routine yet unimaginable violence characterized the United States after the Civil War. The Ku Klux Klan and other White supremacist actors brutalized and murdered Black people, terrorized businesses, and intimidated liberal organizations. This was before, during, and after the Reconstruction Era.[12]

Their acts of terror were racial, gendered, and political in nature. The political attacks matter because anti-union White supremacists also threatened, attacked, and killed Republicans, including Black and White people, who ran for political office or voted along those party lines.[13] Their intimidation sought to

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NAACP LDF's campaign to end to qualified immunity and that "[t]he Ku Klux Klan Act of 1871 — part of a series of Enforcement Acts established to protect Black people's rights — allows people to sue government officials for civil rights violations"); *Qualified Immunity*, EQUAL JUST. INITIATIVE https://eji.org/issues/qualified-immunity/ [https://perma.cc/8BK2-PFVH] ("The Supreme Court in 1967 limited the right to sue police officers that was provided by Congress during Reconstruction to help protect formerly enslaved Black people from rampant racial violence. During the period of Reconstruction (1865-1876) that followed the Civil War, thousands of recently emancipated Black people were menaced, lynched, and subjected to indiscriminate violence by [W]hite police officers and mobs. To help vindicate the rights of African American victims of racial terrorism, Congress passed the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), which was codified as 42 U.S.C. § 1983. This law provides a private right of action for individuals whose constitutional rights have been violated by police officers or other state or local officials.").

12. Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, 10 (Feb. 19, 1872). White supremacists beating people for voting antislavery Republican: "Sometimes they would say they voted for the republican party, and then the men would say, 'If you ever do it again, we will kill you.'"

13. *See id.* at XLVIII (discussing organization of KKK members to kill Republican for elections); 10 (discussing the KKK burning down school where White women taught Black students); 351 (sheriff explaining that KKK members attacked Republicans); *Id.* at 1012, 1015–17 (Brock Walter testimony).

keep Black people subordinate and also undermine political power and authority for the overwhelmingly White Republican political establishment. Many law enforcement officials directly participated in this violence or refused to stop it.

Civilians and politicians implored the federal government to respond to state and state-sanctioned brutality and intimidation against Black people *and* against White people (especially political actors). The federal government ultimately responded with legislation and militarism. Congress passed a set of Enforcement Acts, also known as Ku Klux Klan Acts, which encompassed Section 1983. These Acts provided citizens a private right of action to enforce their constitutional rights, privileges, and immunities against government actors like police who violated the law or failed to protect them.[14] The Ku Klux Klan Acts belonged to a broader set of government interventions via Congress that increased the scope of federal power, including a federal criminal prosecution counterpart to Section 1983, the power of the president to use military intervention to weaken White supremacist violence, and authorization for the federal government to control elections.[15]

White supremacist violence against Blacks and Whites declined temporarily, but for several reasons outside of Section 1983. For example, in 1872, Congress passed an act that granted amnesty to Whites who rebelled against the Union in support of the Confederacy.[16] Before the general amnesty provision, former Confederate rebels could only be eligible for office if they sought and received individual "removal of disabilities" from Congressmen.[17]

14. S*ee* Ku Klux Klan Act of April 20, 1871.

15. *See e.g.*, The Enforcement Acts of 1870 and 1871, also known as the "Ku Klux Klan Acts" and the "Force Acts."

16. The Amnesty Act of 1872, 42nd Cong. was a response to Fourteenth Article of the Amendments to the Constitution of the United States, sec. 3: "No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of the members of each House remove such disability." Various presidents issued or signed amnesty acts during the Civil War and Reconstruction. *See* Kenneth Stampp, *Book Review:* Pardon and Amnesty under Lincoln and Johnson, *in* THE PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY 524 (JUL. 1954) (reviewing JONATHAN TRUMAN DORRIS, THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861–1898 (1954)) ("Lincoln and Johnson sought to mediate a postwar condition of 'hateful sectionalism and punitive vindictiveness' by their broad and benevolent use of this authority. Early in the war Lincoln announced an extremely generous policy of pardon and amnesty, excepting only six classes of persons, and based on a simple oath of allegiance. Johnson pressed forward with this plan, and by December 25, 1868, had issued a proclamation of universal amnesty. Thereafter only the disabilities imposed under the Fourteenth Amendment remained to bar a group of high-ranking military and civil officers of the Confederacy, initially estimated at twenty thousand, from holding national offices unless specifically relieved by Congress. Such relief was generally granted on application.").

17. U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress,

Legislators enforced removals of those who had taken office or attempted to remain in office anyway.[18] Many illegitimate officeholders resigned or otherwise sought requests to avoid prosecution; Gerard N. Magliocca explains that the Congress passed the general Amnesty Act to respond to an overwhelming amount of private requests, and, most relevant to this Essay, to incentivize White political actors to withdraw their support for the Klan.[19] Republican legislators, Black and White, heavily debated the Amnesty Act, and several progressives unsuccessfully attempted to use the Act as a bargaining chip for broader civil rights laws toward long-lasting social equality.[20]

In addition to Section 1983, the Amnesty Act, and similar legislative provisions to partially curb racial violence, the federal government used or maintained military intervention in heavily Klan-dominated territories. Approximately one million troops occupied the South by the end of the Civil War, and that figure fluctuated between 20,000 and 270,000 during Reconstruction.[21] Their presence enabled the force of the legislative acts, as well as Congress' expansion of the federal courts as a forum for Black plaintiffs,

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or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.").

18. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L. J. 559, 583 (2015) (For example, "In 1870, the North Carolina legislature elected former Confederacy-era Governor Zebulon B. Vance as Senator. He was an avowed insurrectionist, however, and his allegiance to the Confederacy ran afoul of Section 3 of the Fourteenth Amendment. He resigned from the Senate when it appeared that Congress would not remove this disability, and Congress subsequently issued a report noting that he was not entitled to the office."); James A. Rawley, *The General Amnesty Act of 1872: A Note,* 47 THE MISS. VALLEY HIST. REV. 480–84 (Dec. 1960).

19. Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment,* 36 CONST. COMMENT. 87, 100–11, 119–20. ("The momentum for amnesty was also in reaction to a white terror campaign in the South. In 1871, Congress enacted the Second Ku Klux Klan Act and suspended the writ of habeas corpus in some portions of the former Confederacy. One could argue that the sticks being wielded to defeat this latest insurrection should be coupled with the carrot of Section Three relief to persuade white elites to stop supporting the Klan. Members of Congress argued that Section Three should be neutered because the exclusions were accomplishing nothing or were exacerbating white anger in the South.").

20. JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD, WITH A REVIEW OF THE EVENTS WHICH LED TO THE POLITICAL REVOLUTION OF 1860, 513–14 (1886) ("When the Amnesty Bill came before the House for consideration, Mr. Rainey of South Carolina, speaking for the colored race whom he represented, said: "It is not the disposition of my constituents that these disabilities should longer be retained. We are desirous of being magnanimous: it may be that we are so to a fault. Nevertheless we have open and frank hearts towards those who were our former oppressors and taskmasters. We foster no enmity now, and Ave desire to foster none, for their acts in the past to us or to the Government we love so well. But while we are willing to accord them their enfranchisement and here to-day give our votes that they may be amnestied, while we declare our hearts open and free from any vindictive feelings towards them, we would say to those gentlemen on the other side that there is another class of citizens in the country, who have certain rights and immunities which they would like you, sirs, to remember and respect . . . .We invoke you, gentlemen, to show the same kindly feeling towards us, a race long oppressed, and in demonstration of this humane and just feeling, I implore you, give support to the Civil-rights Bill, which we have been asking at your hands, lo ! these many days.'").

21. MARK L. BRADLEY, THE ARMY AND RECONSTRUCTION 1865–1877 15 (2015).

jurors, and witnesses.[22] Federal prosecutors indicted approximately five thousand people; judges and juries convicted about one thousand. In North Carolina alone, the federal government arrested almost one thousand people for Klan involvement and Black people sat in the jury boxes in many cases. Thirty-seven were ultimately convicted.[23]

This context can be useful in considering how to approach the Symposium panel's prompt, "How do we reform the law in light of what we know?" Our answers depend on what pieces of historical knowledge we find valuable regarding civil justice in the aftermath of police killings, and in this Essay's case, Section 1983 in particular. If we consider or emphasize Section 1983 as a measure intended to protect Black people from White supremacist and law enforcement violence, then we might develop an impulse to reform the law to ensure these protections. But if we consider or emphasize that Section 1983 did not (and could not) effectively curb racial violence historically, and that Black people in and outside of Congress demanded much more to save lives, then we might develop an impulse to act beyond reforming the law. So, what else do we know?

First, the Republican Congress that passed Section 1983 and other Reconstruction Acts varied in their support for full economic, social, and political equality for Black people. A few quasi-radical Republicans fought hard to pass more robust civil rights laws that guaranteed protections, land, and equal access to public spaces for freedmen.[24] Most Republicans wanted to focus on access to the polls, which facilitated more Republican political power and capitalist investments in the South.[25] Section 1983 emerged from this context as a weak intervention to White supremacist violence. Richard Biffault explains:

Although the proposed Ku Klux Klan Act was the subject of a heated

22. Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1146–50 (1977) ("The years following the outbreak of the Civil War witnessed the greatest expansion of federal court jurisdiction since 1789." In a series of enactments, Congress broadened the scope of federal judicial authority, largely at the expense of the states. Federal removal jurisdiction was expanded; the habeas corpus powers of the lower federal courts were significantly increased; and each of the major civil rights acts specifically guaranteed access to the federal courts. Finally, in the Act of 1875 the federal courts were granted jurisdiction over all federal question cases."); *see also* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875,* 13 THE AM. J. OF LEGAL HIST. 333, 338 (1969).

23. North Carolina Museum of History, *Nineteenth-Century North Carolina Timeline*, https://www.ncmuseumofhistory.org/learn/in-the-classroom/timelines/nineteenth-century-north-carolina [https://perma.cc/V7ED-DEH9].

24. W.E.B. DU BOIS, BLACK RECONSTRUCTION 387–96 (1935).

25. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 659–61 (1988) ("[Moderate Republicans] clung to the vision of a Southern coalition uniting enlightened planters, urban business interests, and black voters, with white propertied elements firmly in control" and "[t]he Springfield Republican insisted that for the government to give blacks land would be an act of 'mistaken kindness' that would prevent them from learning 'the habits of free workingmen.' More conservative Republicans denounced Stevens for adding to 'the distrust which already deters capitalists' from investing in the South. The New York Times printed alarming reports that 'fear of confiscation' had paralyzed Southern business, and that if the issue remained alive, 'neither capital nor emigration will flow this way.'").

> debate, section i—which is today codified as 42 U.S.C. § 1983—was the least controversial portion of the bill. Far greater attention was focused on the provisions imposing criminal and civil penalties for conspiracies to deprive of constitutional rights, disqualifying former Confederates from serving as jurors, and empowering the President to suspend the writ of habeas corpus and use armed forces to suppress "insurrection." Section i caused the least concern, as it only added civil remedies to the criminal penalties established by the 1866 Civil Right Act. [26]

The masses of Black people did not seek claims for relief against police officers via Reconstruction Acts statutes like Section 1983. Police had even less immunity to those claims than they do today.[27] When the Supreme Court decided *Monroe v. Pape* in 1961 and recognized the plaintiff's ability to sue the police under Section 1983, they did not address whether the police had immunity.[28] Acknowledging the decision's silence on immunity, the Court explained six years later in *Pierson v. Ray* that "the common law has never granted police officers an absolute and unqualified immunity."[29] Still, between 1877 and 1961, few police faced Section 1983 lawsuits.[30] The few number of lawsuits does not mean that police were less violent during this time; this period included the height of lynching and racial massacres that law enforcement officers participated in or neglected to stop. Scholars cite various reasons for the few suits, including a lawyer who rediscovered the statute as a means for seeking

26. Briffault, *supra* note 22, at 1155.

27. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 N. D. L. REV. 1798, 1801 (2018) ("When the Civil Rights Act of 1871 was passed, government officials could not assert a good faith defense to liability. A government official found liable could petition for indemnification and thereby escape financial liability. But if a government official engaged in illegal conduct he was liable without regard to his subjective good faith."). This is not to suggest, however, that abolishing qualified immunity would have no impact on police behavior, but rather to explain that police engaged in widespread acts of violence that were illegal yet socially acceptable during a time when they had less immunity, and this may provide insights as to whether abolishing qualified immunity could lead to more liability and less harm today. Police routinely engage in illegal yet socially tolerated behavior because it is a political tradeoff for their cost to protect society. When police are publicly shamed and condemned for engaging in this behavior, their union officials essentially argue that cops' hands will be tied if they have to second guess their criminal behavior.

28. *See* Monroe v. Pape, 365 U.S. 167 (1961).

29. Pierson v. Ray, 386 U.S. 547, 555 (1967); *see also* Malley v. Briggs, 475 U.S. 335, 340 (1986) ("Although the statute on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' . . . Thus, while we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into Section 1983 in unaltered form.").

30. *See* Briffault, *supra* note 22, at 1136 ("In 1960, only about 300 federal suits were filed under all the civil rights acts. By 1972, approximately eight thousand suits were filed under Section 1983 alone. One authority estimates that in 1976, almost one-third of the nearly 57,000 private federal question cases filed in the federal district courts were civil rights actions asserting constitutional claims against state and local officials."); *see also* Sheldon Nahmod, *Section 1983 is Born: The Interlocking Supreme Court Stories of* Tenney *and* Monroe, 17 LEWIS & CLARK L. REV. 1019, 1043 (2014) ("[Plaintiffs in Monroe] asserted that there had been only 36 reported section 1983 suits filed against police officers since 1939.").

relief; restrictive judicial construction; and Black people's lack of faith in the judicial system.[31]

Congress, historically full of privileged wealthy White men, has always had low political will and impulse to legislate transformative outcomes for the people who suffer the most in the United States. Yet this reality did not inhibit a broad chorus of community members, organizers, clergy, artists, and even some politicians to demand what is not solely politically feasible at the moment. Black people across the country, and especially in the South and West, continued to demand land, education, reparations, full enfranchisement, fair wages, and protection for their own agency and long-term security— and in some cases, they won. The long-term and temporary gains that Black people made during Reconstruction were not the fruits of their ability to sue under Section 1983, but primarily due to broader efforts of Congress and the freedmen themselves. A powerful, multiracial minority pushed the historic Republicans to use every branch of government to create and enforce a temporary dictatorship to end the Confederacy, and organized education, conferences, self-defense organizations, mutual aid, and more. William Warde explained it this way:

> While this struggle was going on in the governing circles at Washington, the masses in the South were on the move. Direct action by the insurgent people is the most salient feature of a revolution. The Negroes did not always wait for sanction or approval of any constituted authorities or laws to secure these rights, especially in regard to the land and the right to bear arms. In a number of areas they seized possession of the plantations, divided the land amongst themselves, and set up their own local forms of administration. On the Sea Islands off Georgia and South Carolina, for example, 40,000 freedmen each took 40 acres of land and worked it on their own account. When the former owners came later to claim their plantations, these new proprietors armed themselves and resisted. Similar expropriations and clashes took place elsewhere, not only between planters and Negroes, but between land-hungry freedmen and Federal troops. Land seizures would have taken place on a far larger scale if the freedmen did not have faith in Republican promises and expected that land would be handed to them as it was to the homesteaders in the West.

Many put themselves at considerable risk to challenge the racial and economic order inside and outside of the law. Instead of suing during these heights of state and state-sanctioned violence, freedmen faced White supremacist, state, and state-sanctioned violence for every other attempt to

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31. Nahmod, *supra* note 30, at 1021; *see also* Madeleine Carlisle, *The Debate Over Qualified Immunity is at the Heart of Police Reform. Here's What to Know*, TIME, (Jun. 3, 2021), https://time.com/6061624/what-is-qualified-immunity/ [https://perma.cc/Q39X-93VQ]; PETER LOW & JOHN JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS 896 (2d ed. 1989) (civil rights statutes "lay dormant" until "rediscovered and reinvigorated" in modern era); Briffault, *supra* note 22, at 1135 (describing that Section 1983 "lay dormant" for decades).

improve their economic, social, and political status and many persisted. They helped to establish or taught at the majority of Historically Black Colleges and Universities to educate ex-slaves and free Blacks during Reconstruction.[32] Many still attempted to vote or run for office in wards controlled by Whites who denied them access and promised violence in return. This era witnessed the first and largest mass social movement of Black people in the diaspora in the United Negro Improvement Association, despite all of its tragic flaws and shortcomings. Black people formally and informally created community-based and international organizations to respond to the political and economic failures of slavery and exploitation.[33] Their access to civil litigation may have been inhibited, but their broader pursuits for a just society were not.[34]

II.
THE CONDITIONS THAT GAVE RISE TO THE STATUTE THAT PRODUCED THE DOCTRINE OF QUALIFIED IMMUNITY HAVE CHANGED. THAT STATUTE IS OF LIMITED UTILITY IN THE CONTEMPORARY SOCIAL, ECONOMIC, AND POLITICAL MOMENT.

The additional historical context surrounding Section 1983 (and claims of qualified immunity) could be an important consideration regarding whether to pursue specific legal reforms but must also be considered in light of the conditions that have drastically changed since the Act's passage. Once a minor intervention in a broader effort to reassert political authority and power over the country, Section 1983 is now heralded as a prominent tool for racial justice. In contrast to the Reconstruction Era, Section 1983 litigation against state actors has drastically increased since 1961. People of all racial backgrounds sue police for constitutional violations in the course of their policing duties. These new sets of conditions also lack the militarism, minimally urgent political will, and unique court forum that Congress and the president had championed or provided during Reconstruction. The shifting conditions reflect new and evolving rights and

32. *History of HBCUs*, THURGOOD MARSHALL COLLEGE FUND (2019), https://www.tmcf.org/history-of-hbcus/#:~:text=Richard%20Humphreys%20established%20the%20African,Americans%20skills%20for%20gainful%20employment [https://perma.cc/6HZQ-54DZ].

33. W. E. B. Du Bois, *The Position of the Negro in the American Social Order: Where Do We Go From Here?*, J. NEGRO EDUC. 551, 553 (1939) ("Above all the Negro is poor: poor by heritage from two hundred and forty-four years of chattel slavery, by emancipation without land or capital, and by seventy-five years of addition- al wage exploitation and crime peonage.").

34. This point specifically responds to Eric Foner's argument that "judges and legal scholars, with some exceptions, focus too narrowly on congressional debates when they explore the context in which legislation was enacted," and to his call for "countermemory": "Moreover, in terms of the 'memory' of Reconstruction (the society's evolving understanding of the era's successes, failures, and legacies), the white narrative that invoked the era's alleged horrors as a weapon in the construction of the Jim Crow South, and that found its way into Supreme Court decisions, needs to be balanced by a 'countermemory,' an alternative historical narrative that survived in black communities and that found in Reconstruction a model for the interracial cooperation they hoped to bring to the twentieth-century south." Eric Foner, *The Supreme Court and the History of Reconstruction–And Vice-Versa*, 112 COLUM. L. REV. 1585, 1593 (2012).

freedoms that Black people secured over the last two centuries but also present new challenges.

As more Black people accessed citizenship, legislatures and courts granted police more power and resources. The increase of police power, authority, and legitimacy permitted the police to create and continue to absorb violent modes of reinforcing social order and hierarchies that stem from the racially subordinate status of Black people under slavery. Reported White supremacist attacks that law enforcement actors committed or enabled changed in character.

For covert violence, White supremacists can more effectively obscure their violence against people of color as police officers; White supremacist infiltration into policing is currently an "epidemic" in the United States.[35] Local law enforcement officials today do not routinely and openly assault or kill White and Black people who vote or seek political office. Police officials are usually not publicly in collusion with lynch mobs or political party figures to end a Black person's life because of their political affiliation. Cops do not need to be because they have the power to justify their homicides and homicides by civilians.[36]

Furthermore, police officers do not necessarily need the backing or blessing of explicitly White supremacist agendas or organizations to use physical force, deadly force, surveillance, or intimidation to do the work of White supremacy.[37] Police secure the power to use (or not use) those tactics from the state. Community members, advocacy groups, and even law enforcement officials have warned that, due to policing's nature, individual cops have more power to exact harm on vulnerable communities. Police do not need to join the Klan to intimidate, harass, or assault Black people who drive, vote, or seek public office because law enforcement officials have constructively continued or inherited these typical Klan duties.[38] White supremacists do not need to set up sundown

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35. Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 221 (2019) ("The planned infiltration suggests that some of the white supremacist officers know to keep their membership in these groups private. It seems safe to conclude that it is likely that there are far more members of white supremacist groups than those listed above or those who have been identified by the departments for which they work. Despite these warnings, police departments do not have plans in place to out these types of officers.").

36. *A License to Kill: Shoot First Laws, Also known As Stand Your Ground*, EVERYTOWN FOR GUN SAFETY (Sept. 8, 2021), https://everytownresearch.org/report/stand-your-ground-laws-are-a-license-to-kill/ [https://perma.cc/NH5W-GLNY].

37. Samuel Vincent Jones, *Law Enforcement and White Power: An F.B.I. Report Unraveled,* 41 T. MARSHALL L. REV. 103 (2015).

38. *Report of the Joint Select Committee*, *supra* note 12, at 83 ("Question. Something has been said about the origin of Ku-Klux, about its being descended from the old patrol system, as a means of guarding society from outlawry? Answer. I think that probably the Ku-Klux organization in its inception and birth—well, I do not know if it may not be considered as true; that it was intended to prevent any violent outbreaks among the colored people if any should be intended. That was so in the State of Tennessee, as I have heard it stated by Tennesseans who came to my town. But it was afterward seized hold of as a political machine, and then these great crimes and outrages were perpetrated upon the colored people in many instances without any provocation. Whatever, except to prevent them from exercising their right at the ballot-box. That is a fact that I do not think any well-disposed thinking man will attempt to controvert at all; the occurrences are too frequent and flagrant.").

towns to stop or discourage Black people from traveling; police disproportionately and routinely stop Black drivers, even when they do not suspect that any crime has been committed.[39] These traffic stops can become fatal; Tyre Nichols among others is one of the recent and most pertinent examples. Elected officials do not have to rely on the Klan to instill fear into potential voters; they gerrymander, pass restrictive laws, or use police to arrest people for voting-related issues, including registration, address changes, criminal records, and more.[40] Klansmen do not have to kidnap or arrest Black candidates in order to stop them from running for office. Overwhelmingly, state and local legislative bodies have instead used formal channels to censure, suspend, recall, or otherwise oust Black elected officials over issues regarding race and justice.[41]

Finally, both major political parties are generally supportive and sympathetic to law enforcement. Each has platforms that affirm, arm, resource, and legitimize police, despite widespread histories and records of rampant constitutional rights violations, White supremacist infiltration, and condemnation during massive protests. The courts, legislators, and municipalities have mostly increased power and protection for law enforcement authorities in response to Section 1983 lawsuits, criminal prosecutions, and protests against police. Federal courts are no longer a forum specifically concerned with ensuring access to legal routes for Black people. Rather, judges, including those on the Supreme Court, have mostly inhibited criminal and civil claims against police.

The contemporary protections by social entrenchment for police, including the perceived protection that most communities believe that police provide, can obscure the social forces that necessitate the institution of police: race, private property, ableism, borders, economic exploitation, and more. Without intention, centralizing Section 1983 litigation and qualified immunity can create further obfuscation, like missing that police primarily manage, intimidate, and arrest poor, dark, disabled, displaced, and dispossessed people in the United States. While several of the conditions have changed since Reconstruction, radical freedmen's concerns about the society that produces and reproduces these categories of exploited groups persist.

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39. *See* Trevor Gardner, *Police Violence and the African American Procedural Habitus*, 100 B. U. L. REV. 849, 872 (2020). ("[W]e know that traffic enforcement is rife with racial bias . . . A separate study found African Americans to be more than two-and a-half times as likely to be stopped by police as whites and found African American men to be four times as likely to be stopped as white women.").

40. Adam Edelman & Matt Dixon, *Florida Republicans Increase Budget for Ron DeSantis' Election Police Effort*, NBC NEWS, May 5, 2023, https://www.nbcnews.com/politics/politics-news/florida-gop-raise-budget-ron-desantis-election-police-effort-rcna82487 [https://perma.cc/E2LA-P4SB].

41. Rebecca Shabad, *Black Tennessee Lawmakers Call Expulsion of Their Two Members a 'Horrific Indictment' of the GOP*, NBC NEWS, (Apr. 7, 2023), https://www.nbcnews.com/politics/politics-news/black-tennessee-lawmakers-call-expulsion-two-members-horrific-indictme-rcna78685 [https://perma.cc/A9FH-92FF].

In a study of police shootings of unarmed Black men and women since 2015, the shooting officer was White 75 percent of the time.[42] Black people currently suffer the highest rates of hate crimes among victims and survivors in the United States and are disproportionately killed by police.[43] As legal scholars, activists, lawyers, and police researchers have explained, individual police officers do not necessarily stop, assault, or kill Black people on the explicit basis of race alone. The economic condition of Black people in the United States further induces police contact for legal and illegal activity. As W.E.B. Du Bois explained about the condition of Black people in 1937: "Above all the Negro is poor: poor by heritage from two hundred and forty-four years of chattel slavery, by emancipation without land or capital, and by seventy-five years of additional wage exploitation and crime peonage."[44] This exploitation continues and the police make ten million arrests every year, especially of people from families who have been generationally poor and exploited since slavery.[45]

Section 1983 and ending qualified immunity may offer some of those people or their families a legal route to seek damages to compensate for unconstitutional police conduct in the course of an interaction, but no congressional act repairs the economic and racial violence that often induces police contact. Eliminating barriers for these individuals to sue the police does not change their group's position in the hierarchy or threaten the hierarchy itself. It may provide relief and a sense of justice for individual families, as well as vicarious catharsis for supportive onlookers in high-profile cases. But for the police, it shuffles their dollars and makes them more efficient managers of inequality. Perversely, these payouts can turn random poor, Black families into millionaires when police kill their relatives, instead of investing in the necessary conditions that would have kept their loved ones alive.

To be sure, legal scholars and lawyers do not necessarily argue that Section 1983 litigation will curb police killings today *because* it curbed racial violence more than a century ago. However, a few compelling narratives invoke the Reconstruction's history as a gesture to reify Section 1983's prominence as a tool for racial justice today. These narratives potentially centralize litigation and courts as the primary way to obtain "justice" and may diminish the broader social

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42. Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns [https://perma.cc/GVU9-DED8].

43. *Hate Crime in the United States Incident Analysis*, FBI, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/hate-crime [https://perma.cc/B8LR-Q7WU].

44. Du Bois, *supra* note 33, at 553.

45. *Persons Arrested*, FBI: UNIFORM CRIME REPORTING, (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested#:~:text=Overview,1%2C074%2C367%20were%20for%20property%20crimes [https://perma.cc/SY24-6UZY]; Alexi Jones and Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISON POL'Y INITIATIVE (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html [https://perma.cc/7J3R-FP4W].

demands that radical freedmen and their coconspirators (and sometimes the reluctant federal government) strived for in order to save lives.

III.
WHETHER SECTION 1983 CLAIMS AND ENDING QUALIFIED IMMUNITY CAN CONTRIBUTE MEANINGFULLY TO OBTAINING A FREE AND JUST SOCIETY

Commentators' zealous support of Section 1983 and supplementary advocacy against qualified immunity has consequences. One primary consequence is that it enters public discourse as proxies for police reform, accountability, or even saving lives.[46] Tyre Nichols's funeral and its aftermath offer one example. Reverend Al Sharpton, the most prominent and popular preacher who eulogizes high-profile police homicide victims, emphasized that

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46. See various commentary by politicians, activists, scholars, and artists. *See, e.g.*, Killer Mike, *We Must End 'Qualified Immunity' For Police. It Might Save the Next George Floyd*, THE GUARDIAN (Apr. 20, 2021), https://www.theguardian.com/commentisfree/2021/apr/20/george-floyd-derek-chauvin-killer-mike-police [https://perma.cc/L3WS-Z69W] ("We have to change the culture of policing itself, to *save the next life*. We have to end qualified immunity."); Abby Vesoulis, *Rep. Karen Bass and NAACP President Derrick Johnson Discuss Police Reform on the Anniversary of George Floyd's Murder*, TIME (May 26, 2021), https://time.com/6051155/george-floyd-anniversary-congress/ [https://perma.cc/HH5Q-Z9LD] ("Johnson: 'We believe it is absolutely essential that qualified immunity reform is in this bill. It is the way to hold law enforcement officers accountable for misconduct.'"); Michael J. Steinberg, *Ending Qualified Immunity Means Police Officers Held Accountable for Wrongdoings*, UNIV. OF MICH. NEWS (May 24, 2021), https://news.umich.edu/ending-qualified-immunity-means-police-officers-held-accountable-for-wrongdoings/ [https://perma.cc/6PRX-UXS6] ("There are at least three major reasons that qualified immunity should be abolished. First, when a police officer or other government official violates the rights of Americans, the victims of government abuse should be compensated for their injuries. Second, unless the government official who violates constitutional rights is liable, there is no accountability. Third, if government officials know that they will be liable for violating the civil rights of the citizenry, they will be less likely to violate the constitution; without consequences, there is no deterrence."); John Malkin, *'Above the Law,' Author Ben Cohen Weights in on Enhancing Police Accountability*, S. CRUZ SENTINEL (Apr. 28, 2021), https://www.santacruzsentinel.com/2021/04/28/above-the-law-author-ben-cohen-weighs-in-on-enhancing-police-accountability/ [https://perma.cc/HRE9-ZDW9] ([Ben Cohen:] "Qualified immunity is essentially a get out of jail free card for bad cops . . . (It) is a judicial interpretation of a law that Congress passed and it's really a perverse irony. During Reconstruction, after the Civil War, a lot of the police force were still members of the Ku Klux Klan and were still abusing Black people. So, Congress passed a law that said if a government employee like a policeman has violated your constitutional civil rights, you can sue them in court. That passed in 1871 and came to be known as the Ku Klux Klan Act. That was the law of the land. But then in the 1960s, during the Civil Rights Movement, the Supreme Court started to create qualified immunity. Essentially it protects police officers from being sued except in very specific situations."); Ed Yohnka et al., *Ending Qualified Immunity Once and for All is the Next Step in Holding Police Accountable*, ACLU NEWS, (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable [https://perma.cc/FPZ3-JUXK] ("Under qualified immunity, lives can be taken with impunity."); *National Law Enforcement Qualified Immunity Letter*, LAW ENFORCEMENT ACTION PARTNERSHIP (Mar. 23, 2021), https://lawenforcementactionpartnership.org/qualified-immunity/ [https://perma.cc/T9K9-B4AP]; Joanna C. Schwartz, *How the Supreme Court Protects Police Officers*, THE ATLANTIC (Jan. 31, 2023), https://www.theatlantic.com/ideas/archive/2023/01/police-misconduct-consequences-qualified-immunity/672899/ [https://perma.cc/C3ZJ-F9BP] ("Just as George Floyd's murder has come to represent all that is wrong with police violence and overreach, qualified immunity has come to represent all that is wrong with our system of police accountability.").

police beat and ultimately killed Nichols because they could raise qualified immunity as a defense to litigation that challenged their behavior:

> Why do we want to see the George Floyd Justice in Policing Act passed? Because then you have to think twice before you beat Tyre Nichols. You think twice before you shoot at someone unarmed. You think twice before you chokehold Eric Garner, you think twice before you put your knee on Eric Garner's – on George Floyd's neck.
>
> Because if you don't have qualified immunity, your wife would be telling you before you leave home 'behave yourself, because we could lose the house, we could lose the car. Behave yourself because our savings can be gone.' You want to be a tough guy? Well, let's get rid of qualified immunity and see if you learn the same manners you have on the White side of town, you'll have some manners on the black side of town.[47]

At the end of Nichols's funeral, his mother, RowVaughn Wells, called on Congress to pass the George Floyd Justice in Policing Act too: "We need to take some action because there should be no other child that should suffer the way my son [did] and all the other parents here who've lost their children." Wells further expressed, "We need to get that bill passed because if we don't, that blood—the next child that dies—that blood is going to be on their hands."[48]

While eliminating qualified immunity can certainly chip away at one avenue of police protection, the data does not provide compelling evidence that the doctrine is responsible for the kind of bloodshed that Wells depicts. In a review of the largest study of cases involving qualified immunity, "officials raised qualified immunity as a defense in roughly two in five cases if they possibly could have raised it," and that out of a review of over one thousand cases, judges only disposed of thirty-eight cases on entirely qualified immunity grounds.[49] Qualified immunity's prominence as *the* defense to Section 1983 claims overshadows other common defenses that police defendants raise in the

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47. ABC24 Staff, *In Eulogy, Rev. Al Sharpton Likens Tyre Nichols to Joseph, Recalls Dr. King's Death in Memphis*, ABC 24 (Feb. 1, 2023), https://www.localmemphis.com/article/news/local/rev-al-sharpton-full-remarks-tyre-nichols-funeral/522-3f07e50a-7265-4241-8f32-f0c73efc622b#:~:text =I%20don't%20know%20when,you%20shoot%20at%20someone%20unarmed [https://perma.cc/B28 E-U4B6]. Rev. Sharpton made similar remarks before the funeral as well ("'It has to be federal law,' longtime civil rights activist the Reverend Al Sharpton said ahead of Nichols' funeral. 'Let me tell you, until police know they have skin in the game, which is why you heard them say about the George Floyd bill, you heard the sister say about the legislation here, you must get rid of qualified immunity. Where police know that they can lose their house, their car and everything else.'"). Anita Powell, *Family, Community Mourn Tyre Nichols; White House Vows Action*, VOA NEWS (Feb. 1, 2023), https://www.voanews.com/a/family-community-mourns-tyre-nichols-white-house-vows-action/6944372.html [https://perma.cc/Z2CT-E2B2].

48. Alexandra Hutzler, *What is the George Floyd Justice in Policing Act?,* ABC NEWS (Feb. 2, 2023), https://abcnews.go.com/Politics/george-floyd-justice-policing-act/story?id=96851132 [https://perma.cc/LX23-43PB].

49. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity,* 93 N.D. LAW REV. 1853 (Aug. 2018).

course of litigation. Yet Wells's words, as with the words of similarly situated surviving family members of police violence victims, emphasize it as the source of the problem.

Two months after Nichols's funeral, and on the 152nd anniversary of the passage of the Ku Klux Klan Act, Representative Ayanna Pressley and Senator Ed Markey reintroduced their bill, the "Ending Qualified Immunity Act."[50] The co-sponsors offered the bill to explicitly bar qualified immunity as a defense so that victims of police violence, and their surviving families, can sue and hold police officers financially accountable. Representative Pressley and Senator Markey's speeches offered that successful litigation can punish police officers, but qualified immunity blocks relief. Further invoking the history of Section 1983, Representative Pressley stated that she and Senator Markey introduced their bill to "fulfill the promise of Reconstruction," especially for Black families, and that the government owes victims of police violence "a day in court, an opportunity for closure, and a sense of fairness."[51]

Representative Pressley's remarks provide another example of the weighty public discourse surrounding the possibilities of Section 1983 and ending qualified immunity in order to punish police. Yet, the link between ending qualified immunity and police reform is a tenuous one. In one regard, successful Section 1983 lawsuits could punish individual police officers because they may have to pay out of pocket for damages. This effort could potentially bankrupt an officer, or as Reverend Sharpton bluntly stated at Tyre Nichols's funeral, make them lose their homes.

In another regard, police officers may not have the salary or savings to pay damages out of pocket, leaving victims' families empty-handed. For this reason, activists, lawyers, and legal scholars have called for various mechanisms to support families when individual police are unable to afford to pay, including changing public policy to force cities to pay on their employee's behalf, forcing police associations to pay from pension accounts, requiring police officers to carry insurance that covers the payouts, and mandating that police departments carry insurance on behalf of their employees to cover the damage.[52] Despite the popular public narrative that ending qualified immunity will punish individual police officers, cities or insurance companies make the payouts to ensure victims

50. Press Release, Office of Senator Ed Markey, *Markey, Pressley Announce Legislation to End Qualified Immunity* (Apr. 19, 2023), https://www.markey.senate.gov/news/press-releases/markey-pressley-announce-legislation-to-end-qualified-immunity [https://perma.cc/3KZB-T5GC].

51. Rep. Ayanna Pressley, *Rep. Ayanna Pressley & Sen. Ed Markey Unveil the Ending Qualified Immunity Act*, YOUTUBE (Apr. 19, 2023), https://www.youtube.com/watch?v=9-0cyomicTI [https://perma.cc/7BBA-RHN7].

52. Schwartz, *supra* note 27; *see also* Noel Otu, *Police Service and Liability Insurance: Responsible Policing*, 8 INTL. J. OF POLICE SCI. & MGMT. 294 (2006); Rashawn Ray, *Why Police Department Insurances are the Key to Progress on Police Reform*, BROOKINGS INST. COMMENT. (Jun. 26, 2020), https://www.brookings.edu/articles/why-police-department-insurances-are-the-key-to-progress-on-police-reform/ [https://perma.cc/F5NZ-LTF8].

or their families receive compensation. This punishment paradox can create more payouts while leaving the offending officer or practice untouched. Advocates hoping to punish the officer may have to fight for an additional round of reforms to discipline the officer via departmental policy or public policy.

A second consequence of centralizing these efforts towards police reform is that it depends primarily on a logic regarding deterrence and punishment. Civil justice advocates, commentators, legal scholars, and even some reform-minded law enforcement agents argue that bringing Section 1983 suits and ending qualified immunity will make police assaults and killings too expensive to continue. They may be weighing the costs of paying for damages, settlements, indemnification, paid leave, and more for the department or city against the cost of keeping individual offending officers on the force or continuing the behavior at issue in litigation.

Rather than making police killings financially unsustainable, lawsuits, settlements, and payouts might create new markets that absorb and benefit from the costs of the deaths.[53] An increase in successful lawsuits for damages would be favorable for plaintiffs, but instead of reducing police killings as many people would hope or expect, the damages could expand an economy built on settlements and indemnification on Black death. Insurance companies currently charge police departments premiums on payouts and, in some cases, companies increase premiums based on specific policing practices and history of previous payouts. *The Washington Post* reported that "departments with a long history of large civil rights settlements have seen their insurance rates shoot up by 200 to 400 percent over the past three years."[54] A few police departments have disbanded over their inability to obtain or pay for coverage, but, in most cases, cities paid the higher premiums.

Politicians and law enforcement authorities sometimes consider the high price tag of policing as the "cost of doing business,"[55] and cities continue to pay damages and keep the offending officers on payroll, even after multiple suits. Joanna Schwartz asks, "What explains governments' willingness to spend millions of dollars in settlements and judgments of civil rights claims on behalf of their law enforcement officers without—in many instances—any systematic study or oversight of the amount spent in these cases?" She cites various possible

53. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 955 ("My study reveals, however, that governments are already absorbing the costs of individual officer liability. Despite this significant financial outlay—over $730 million from 2006 to 2011 in forty four large jurisdictions and over $9.1 million during that same period in thirty-seven small and mid-sized jurisdictions—the general consensus is that most governments are not taking aggressive enough action to investigate and discipline their officers and do not effectively manage their law enforcement agencies.").

54. Kimberly Kindy, *Insurers force change on police departments long resistant to it*, THE WASH. POST (Sept. 14, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-insurance-settlements-reform/ [https://perma.cc/7QB6-NCBE].

55. United States Commission on Civil Rights, REVISITING *WHO IS GUARDING THE GUARDIANS* 133 (1981).

reasons, including the lack of personal financial liability, municipal indifference to police harm, political incentives rather than financial incentives influencing state actors, and others.[56]

This Essay submits another possible reason: the benefits of economic and racial subjugation via policing outweigh the hundreds of millions of dollars in government costs from policing. Payouts are cheaper for the government (or insurance companies, taxpayers, individual officers) than the costs to save lives. The point of inquiry for this calculation is not only how much New York City would have to pay to stop police officers from choking Black people to death for selling loose cigarettes, or if a police officer was sufficiently punished because he lost his house for killing a man who allegedly used a counterfeit twenty-dollar bill, but also how much it would cost to have a society where people do not live off of selling loosies or counterfeit bills.

This alternative calculation accounts for the centrality of economic and racial subjugation that underlie, and is reinforced by, policing. The data on who the police hurt and kill is revelatory. Cops overwhelmingly hurt and kill poor people. As the United States Commission on Civil Rights report offered decades ago:

> The victims of lawlessness in law enforcement are usually those whose economic and social status afford little or no protective armor—the poor and racial minorities. Members of minority races, of course, are often prevented by discrimination in general from being anything but poor. So, while almost every case of unlawful official violence or discrimination studied by the Commission involved Negro victims, it was not always clear whether the victim suffered because of his race or because of his lowly economic status. Indeed, racially patterned police misconduct and that directed against persons because they are poor and powerless are often indistinguishable. However, brutality of both types is usually a deprivation of equal protection of the laws and of direct concern to the Commission.[57]

Police operate as a disciplining force that reacts to criminalized behavior and unwanted, undesirable people. Governments, corporations, and property owners primarily derive social, political, and economic benefits through their ability to deploy police, even though it may result in fatal and illegal action. These legal and illegal police activities that result in fatal and nonfatal outcomes produce additional layers of self-policing behavior that regulate the lives of the people who want to avoid encounters with police. Police stops, assaults, and murders can dictate where people choose to drive, work, live, raise children, skateboard, and more—permitting those who are not burdened by these fears and threats to live lives with greater agency. Those seeking litigation as a strategy

56. Schwartz, *supra* note 53, at 956–57.

57. JOHN A. HANNAH ET AL., UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT: JUSTICE 2–3 (1961).

toward police reform must consider these social factors in weighing the cost of changing the behavior of individual cops and municipalities.

CONCLUSION: POTENTIAL PATHWAYS FORWARD

Section 1983 litigation and advocacy to abolish qualified immunity can be useful and meaningful tactics, especially towards non-reformist reform and abolitionist aims. Lawyers, legal scholars, and activists already have compelling reasons to pursue those avenues. Encouraging Section 1983 claims is effective because the Act already exists for families to use when they lose their relative to a police killing. Additionally, advocates might believe that police could and would harm and kill even more people without Section 1983 or with more immunity. Finally, courts routinely protect and increase police power, and advocacy surrounding Section 1983 and ending qualified immunity signal to judges and legislators that these measures matter greatly to the public and serve as a check on police power. Without committing to abolition or non-reformist reforms, commentators can forcefully make all of these arguments without promising that large payouts will send a message to police that Black lives matter, without promising that ending qualified immunity will fulfill the promise of Reconstruction, and without signaling to grieving families that litigation outcomes can stop future police killings.

Non-reformist reforms provide another possible lens to discuss and deploy advocacy around civil litigation and ending qualified immunity in the context of policing. Reform seeks to improve the police, yet improving police is not the same as reducing police killings.[58] As an example, police can theoretically become more efficient managers of inequality and kill fewer people each year; they can, more politely, maintain the racial segregation that Reverend Sharpton mentioned at Tyre Nichols's funeral; and instead increase arrests, detentions, and disabling (versus deadly) encounters. Commentators tend to default to using reforms like ending qualified immunity as a way to improve police encounters, rather than also inquiring about how to reduce or eliminate them. Non-reformist reforms present an important alternative. As Amna Akbar explains,

> The basic formulation of the non-reformist reform is twofold. First, a non-reformist reform aims to undermine the political, economic, and social system or set of relations as it gestures at a fundamentally distinct system or set of relations in relation or toward a particular ideological and material project of worldbuilding. Second, a non-reformist reform draws from and builds the popular strength, consciousness, and organization of revolutionary or agential classes or coalitions—most clearly, in doctrinaire Marxism, for example, the working class. It is part

58. India Thusi, *Policing Is Not a Good*, 110 GEO L. J ONLINE 226, 247–48 (2022) ("How can we reform an institution that is qualitatively intended to maintain white supremacy regardless of the quantities allocated to marginalized communities . . . There is no need for reform because subordinating lower status communities is consistent with preserving the property and concerns of white elites.").

of a democratic project.[59]

Theorizing and arguing for Section 1983 claims and the end of qualified immunity as non-reformist reforms can clarify that the goal of damages is not to ultimately improve police behavior as they surveil and arrest people, but to help the public seek to "unravel rather than widen" police power and legitimacy. A non-reformist reform lens affirms those who believe that policing must change and encourages them to ask broader questions about concrete efforts that will lead to more justice overall.

For instance, surviving families of police victims, communities, and movement lawyers could demand to end qualified immunity at the state and federal level while raising awareness around other demands that would have saved their loved one's life. This way, communities are not relying solely on civil lawsuits to automatically improve future police encounters and are instead building out a democratic campaign to transform society. While families and activists tend to focus on police-specific measures in the aftermath of police killings, many have specifically advocated and fought for more transformative racial and economic justice demands. For example, a jury found New York Police Department Officer Peter Liang guilty of manslaughter for killing Akai Gurley.[60] Gurley's family affirmed the decision (but not the sentencing to zero prison time) and filed a Section 1983 lawsuit. The family continued to fight for more transformative demands, issuing a statement that called to "permanently end all vertical patrols and stop using the NYPD as your security" and divert funds that they said paid for additional officers in 2016 to invest "critical resources into real affordable housing for the working-class, community centers, and after-school programs."[61]

In the case of Tyre Nichols, his family and community demanded the end of the special task force that ultimately killed him. His death and other deadly encounters sparked or renewed debates to remove police from traffic stops altogether, and other related calls to improve and expand public transit, decriminalize transit-related activity, remove police from buses and trains, and make public transportation free.[62] These are precisely the types of democratic

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59. Amna Akbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy*, 132 YALE L. J. 2497, 2527 (2023).

60. Chris Fuchs, *Peter Liang Won't See Jail Time as Manslaughter Charge Reduced*, NBC NEWS (Apr. 19, 2016), https://www.nbcnews.com/news/asian-america/peter-liang-won-t-see-jail-time-manslaughter-charge-reduced-n558326 [https://perma.cc/7TB3-8XJ8].

61. *Gurley Family Says Calls For Justice Won't End, As Peter Liang's Family Awaits Son's Sentencing*, CBS NEWS (Feb. 12, 2016), https://www.cbsnews.com/newyork/news/akai-gurley-family-speaks-out/ [https://perma.cc/CJR9-BNKU].

62. Legislators have introduced bills to remove police from traffic stops. *See, e.g.*, Investing in Safer Traffic Stops Act of 2023, H. R. 852, 118th Cong. (2023) (seeking to replace armed police with unarmed civilians and surveillance); *see also Investing in Evidence-Based Alternatives to Policing: Non-Police Responses to Traffic Safety*, VERA INST. (Aug. 2021), https://www.vera.org/downloads/publications/alternatives-to-policing-traffic-enforcement-fact-sheet.pdf [https://perma.cc/PQ8R-R5PK]; Fatima Dahir, *Civilian Traffic Enforcement in Berkeley: Is it Possible?*, STAN. CTR. FOR

projects that Akbar situates non-reformist reforms, those toward an "ideological and material project of worldbuilding." By using non-reformist reforms, families, communities, activists, and lawyers can raise political and legal consciousness about police power while moving to adopt policy stances that can actually save lives.

Beyond non-reformist reforms, broad demands and organizing campaigns to eliminate exploitation, racism, and other systems of oppression, while building and experimenting with alternatives provide hope for a more abolitionist horizon. These efforts tend to include families, community members, movement lawyers, artists, and others who operate in sharp contrast to law firms that are incentivized by large payouts to pursue litigation. The former model either loosely or tightly comprises people who range in their ideas and commitments to abolishing the prison industrial complex but have arrived at some set of shared goals that are rooted in the realities of the moment and offer a more transformative alternative for the future.

Organizations like Decarcerate Memphis provide an example. After the police killed Tyre Nichols, his family issued four demands: criminal charges for the officers involved, the names of all of the officers and public personnel that were at the scene of the killing, the files of the officers involved, and an end to the SCORPION Unit police task force that ended his life. Decarcerate Memphis, a coalition of local residents, activists, clergy, lawyers, and activists, amplified the family's demands and added a separate list of their own: "(1) Pass the Data Transparency Ordinance as a council (2) End the use of pretextual traffic stops (3) End the use of unmarked cars and plainclothes officers (4) Remove police from traffic enforcement entirely (5) Dissolve the SCORPION, OCU, and MGU–end the use of future task forces."[63] These demands can reduce police contact by minimizing police encounters with civilians, regardless of whether they occur on the White side of town or the Black side. They additionally seek information about police that departments tend to withhold from the public and expose police surveillance tactics by requiring them to be in uniforms and a marked vehicle. While these demands do not transform the economic conditions of poor, Black Memphians, they can reduce police power and presence in communities as people dream and struggle to fulfill the more radical promises of Reconstruction beyond a law of purported police accountability.

RACIAL JUST. (May 31, 2023), https://law.stanford.edu/2023/05/31/civilian-traffic-enforcement-in-berkeley-is-it-possible/ [https://perma.cc/LC8L-2RVZ]. Legal scholars have also advocated to remove police from traffic enforcement. *See* Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1499–1505 (2021); Justin Hansford & Maggie Ellinglock, *Traffic Stops Should Not Be Deadly, DC Can Lead the Way*, THE HILL (Feb. 2, 2023), https://thehill.com/opinion/criminal-justice/3841847-traffic-stops-should-not-be-deadly-dc-can-lead-the-way/ [https://perma.cc/63GD-H5LP]. While these efforts move in the right direction, they produce civilian policing and digital surveillance as alternatives, which can replicate harm in policing. Additionally, these alternatives can be coupled with long-term goals of investing in quality, clean public transportation.

63. DECARCERATE MEMPHIS, https://decarceratememphis.com/ [https://perma.cc/9MWK-X7V8].