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# FROM IMPUNITY TO REPARATIONS

*Current frameworks for compensating victims of police violence inadequately address collective healing and repair. Overlooked are those who suffer policing's harmful effects without direct police contact, e.g., bystanders and family members of those directly impacted. Consider 17-year-old Darnella Frazier, who documented George Floyd's murder by Minneapolis police and subsequently required her mother's comfort to sleep through the resulting trauma. While strangers far and wide rallied to support her healing through GoFundMe donations, most indirect victims receive no such widespread support. Typically, bystanders traumatized by police violence must rely solely on their families and local communities—often the same race-class subjugated circles that experience policing's worst excesses. This Article proposes a new direction: when local governments breach Fourth Amendment guarantees, liability should include damages for communal harms, or what I call "reparative" damages.*

*Section 1983 was intended to be strong medicine for the enduring problem of state-enabled racialized violence in the United States. Reconstruction lawmakers recognized that such violence left entire communities under siege, so they responded with unbounded federal power to address these harms. As the 2020 uprisings spotlighted, police violence today similarly harms entire communities, particularly Black and Brown ones. Yet current remedial schemes fail to capture these broader harms. I propose that at the damages stage of a successful Fourth Amendment suit against cities under Section 1983, courts should aim to repair policing's collective harms by considering five factors in awarding compensation: (1) the police department's overall budget; (2) evidence of historically troubling or abusive departmental practices; (3) annual frequency of excessive force litigation against the department; (4) existence of any consent decrees governing the department; (5) if applicable, the department's compliance with decree requirements. When a department demonstrates a troubling history, faces numerous constitutional claims, operates under consent decrees, and shows minimal reform progress, courts could reasonably conclude it inflicts systemic harm on the community it is supposed to serve, warranting reparative damages.*

*Rather than awarding damages to individual plaintiffs, courts would direct compensation to a community reparative fund—a hybrid model incorporating key features of both Victims Compensation Funds (VCF) and cy pres distributions. People harmed by police in that locality could thereafter apply to the program for compensation. Self-certification would enable anyone who could credibly establish that they were vicariously harmed by*

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*police to receive compensation. Embracing a dynamic approach to statutory interpretation, this approach aligns with Section 1983's sweeping remedial vision and meets the equity demands of our time. And because the judiciary has played a principal role in enabling police violence by manufacturing stringent immunity doctrines and eroding the Fourth Amendment, enlisting courts to make collective amends for policing's harms has stronger moral force than a legislative approach.*



## INTRODUCTION

In the early hours of February 1, 2017, a Black man named Tavis Crane was driving with his two-year-old daughter, Z.C., and two other passengers in Arlington, Texas.[1] At a red light, officer Elsie Bowden

[1] Crane v. City of Arlington, 50 F.4th 453, 459 (5th Cir. 2022). I mention Crane's race because the circumstances of the encounter follow established patterns of racial profiling: being stopped without clear probable cause, being subjected to excessive questioning despite compliance, and

pulled up behind them.[2] As the light turned green and the car began to move, Bowden saw something thrown from the passenger side window.[3] Believing it to be a crack pipe, rather than the candy cane wrapper that Crane's daughter had thrown away, Bowden called for backup.[4] She then activated her police car's lights, prompting Crane to pull over.[5] Despite realizing her mistake, Bowden did not end the traffic stop and instead ran a warrant check on Crane.[6] The check revealed outstanding warrants, including for possible felonies.[7] Bowden called for additional backup.[8] Crane insisted he was unaware of any warrants, and Bowden even suspected that he was sincere.[9] However, the situation escalated when another cop, Craig Roper, arrived on the scene. Without being fully briefed about the situation, Roper opened the rear driver's side door, drew his gun, and yelled for everyone to put their "f—ing hands up."[10] The passengers claim that Crane was complying with Roper's directions by reaching to turn off the car when Roper shot Crane multiple times and killed him.[11]

Crane's estate and the passengers sued Roper and the City of Arlington under 42 U.S.C. § 1983 (Section 1983) for excessive force.[12] The District Court dismissed all claims, granting Roper qualified immunity,[13] which protects officers from liability unless they violate "clearly established law."[14] The court also determined that the passengers could not pursue claims as bystanders,[15] even though they were threatened with physical harm and were, therefore, more than just passive observers.[16] The Fifth Circuit reversed the grant of qualified immunity. The court found that Roper's use of deadly force against an

facing escalated police response compared to documented interactions with white civilians in similar situations. *See* Aline Ara Santos Carvalho, Táhcita Medrado Mizael & Angelo A.S. Sampaio, *Racial Prejudice and Police Stops: A Systemic Review of the Empirical Literature*, 15 BEHAV. ANALYSIS PRAC. 1213, 1214 (2021).

2 *Crane*, 50 F.4th at 459.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at 460.

10 *Id.* at 459–60.

11 *Id.* at 460.

12 *Id.* at 459.

13 *Id.* at 468.

14 William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2018).

15 *Crane*, 50 F.4th at 459.

16 Bystander cases involve plaintiffs who are not in any physical danger themselves—claims based solely on emotional harm from witnessing a close relative seriously injured. *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 133–34 (2010).

unarmed man was unreasonable under the factors established in *Graham v. Connor*, which governs the excessive force inquiry.[17] Additionally, the law was clearly established at the time of the violation.[18] However, the appellate court upheld the dismissal of the passengers' claims.[19] It explained that "'[n]egligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing [ ] police action.'"[20] It thus held that "*bystanders* cannot recover when they *only witness* excessive force used upon another."[21] The Supreme Court's denial of review in October 2023[22] effectively foreclosed constitutional remedies for people who are harmed by police without having physical contact.

Two well-established principles govern the law of Section 1983.[23] First, Section 1983 must "be read against the background of tort liability that makes [someone] responsible for the natural consequences of [their] actions."[24] The second principle holds that Section 1983 does not transform every tortious wrong by a state actor into a federal constitutional violation,[25] as not every government misbehavior warrants a federal remedy. These precepts suggest that in *Crane*, the court could have read Section 1983 broadly to allow the passengers' emotional distress claims against Roper, drawing on tort law principles. Rather than extending federal constitutional protections, the court suggested state law remedies would suffice. Yet this approach created a significant gap in protection for Dwight Jefferson, one of the passengers who experienced the trauma of having a gun pointed at him during the fatal shooting. As Jefferson was unrelated to Crane, he would not have had a viable bystander claim for negligent infliction of emotional distress under state law because these claims generally require plaintiffs to have a close familial relationship to the victim such as being a spouse or sibling.[26] Jefferson's predicament demonstrates how courts create remedial

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17 490 U.S. 386 (1989).

18 *Crane*, 50 F.4th at 468.

19 *Id.* at 459, 468.

20 *Id.* (second alteration in original) (quoting Grandstaff v. City of Borger, 767 F.2d 161, 172 (5th Cir. 1985)).

21 *Id.* (emphasis added).

22 Roper v. Crane, 144 S. Ct. 342 (2023).

23 *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1185 (2005) (describing the doctrinal preliminaries of Section 1983 litigation).

24 Monroe v. Pape, 365 U.S. 167, 187 (1961).

25 *See, e.g.*, Paul v. Davis, 424 U.S. 693, 701 (1976) (holding that not all injuries caused by the state automatically violate federal constitutional rights).

26 *See* JOHN L. DIAMOND & DORIT R. REISS, TORTS: CASES AND MATERIALS 408 (4th ed. 2024) ("The requirement of a close relationship has been construed by most jurisdictions using the *Dillon* rule as including married spouses, parents, children and siblings."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY

dead-ends, closing federal avenues while simultaneously directing plaintiffs toward state remedies that are also unattainable.

Limiting recovery solely to victims with direct police contact ignores the reality of how police violence manifests. It generates harm extending far beyond those physically injured. It inflicts profound, lasting trauma upon entire families and communities, or what I call a "collective trauma network." Even indirect exposure to police violence can be very harmful—it "literally kills people. It causes death and disability and it shifts relationships with healthcare providers that make people less likely to seek care."[27] Former Housing Secretary Julián Castro observed similarly that "the victims of police violence also include the families of those killed,"[28] while civil rights and racial justice attorney Lee Merritt similarly characterized it as "a community killer."[29] After media attention fades from the spectacles of policing—police shootings and killings—affected families continue to experience "trauma that comes from the threat of police brutality" which "wears down the body over time."[30]

The global uprisings following George Floyd's murder embodied this collective trauma, as people worldwide mobilized against the systemic oppression that Black and Brown communities have long endured through policing.[31] Rallying cries of "We can't breathe" emphasized how police violence threatens entire communities, not merely individual victims.[32] A significant development from the 2020 uprisings has been the wider

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AND SOCIAL RESPONSIBILITY FOR INJURY 656 (9th ed. 2022) (explaining that in bystander negligent infliction of emotional distress cases, courts "usually insist upon a close relationship—usually a close family relationship . . . between the plaintiff and the injured person").

27 Jocelyn Solis-Moreira, *Police Brutality Is an Unaddressed Public Health Crisis in America*, POPULAR SCI**.** (Feb. 22, 2023), https://www.popsci.com/health/police-brutality-public-health-crisis [https://perma.cc/W4PF-5A2G].

28 Julián Castro (@JulianCastro), X (Nov. 10, 2019, 8:38 AM), https://twitter.com/JulianCastro/status/1193568731110215680 [https://perma.cc/4KB8-HK2X].

29 Lee Merritt (@leemerrittesq), INSTAGRAM (Jan. 30, 2023), https://www.instagram.com/p/CoDPsi_uTdr [https://perma.cc/RPL3-2JWE]. Lee Merritt is a well-known civil rights and racial justice attorney, particularly recognized for his representation of those affected by police brutality and racially motivated attacks. His notable clients include the families of Ahmaud Arbery, who was murdered while jogging, and Atatiana Jefferson, who was fatally shot by police during a no-knock warrant execution in her home. For more information about Lee Merritt, see LEE MERRITT, ESQ., https://leemerrittesq.com/about/ [https://perma.cc/WD4E-WLNS] (last visited June 8, 2025).

30 Solis-Moreira, *supra* note 27.

31 *See, e.g.*, Julia Dupuis, *For Protesters, Trauma Lingers Long After the Marching Ends*, VOX (Sep. 23, 2021), https://www.vox.com/the-highlight/22661181/george-floyd-protests-black-lives-trauma-police-violence [https://perma.cc/H56N-JZ8D].

32 *See, e.g.*, Marcus C. Mundy, *We Can't Breathe - An Open Letter to Community*, COAL. CMTYS. COLOR (May 29, 2020) https://www.coalitioncommunitiescolor.org/ccc-news/5-29-openletter [https://perma.cc/X5YR-J95H] (describing how George Floyd's murder sent shockwaves through the Black community and inflicted trauma on Black men in particular).

acceptance of abolitionist perspectives,[33] encouraging more transformational approaches to addressing police violence. These perspectives recognize racialized violence as an inherent feature of modern policing, with roots in settler colonialism and slavery.[34] They call for localities to acknowledge and make amends for the harms that policing and other coercive systems have disproportionately inflicted on communities of color across generations.[35] At their most ambitious, local governments adopt "reformist reforms"[36] similar to those in consent decrees,[37] which merely tinker with existing practices rather than transform them. These superficial changes "lend legitimacy to the idea that police can operate helpfully, standing outside the threat of violence, and that the issue of police violence can be reduced to the misconduct of a few 'bad apples' or to 'implicit bias.'"[38] Importantly, these remedies neither address the communal dimensions of police violence nor link current episodes to ancestors' victimization under the badge.[39]

This Article proposes a novel remedial framework for municipal Fourth Amendment violations involving excessive force. Courts should award reparative damage: extra-compensatory relief to address communal harms and provide reparations to communities historically targeted by police violence.

Contemporary social justice movements define reparations broadly as

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33 Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1783 (2020) [hereinafter Akbar, *An Abolitionist Horizon*] ("The nationwide protests catapulted prison and police abolition into the mainstream and, in the process, unsettled the intellectual foundations of liberal police reform efforts." (citation omitted)).

34 *Id.* at 1839.

35 *See* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 834–35 (2021) (discussing Chicago's recent settlement and city ordinance in which the City agreed to pay reparations to victims of police torture in a "public reckoning of the City's role in perpetuating police violence").

36 For a comprehensive discussion on reformist reforms, see Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2518–19 (2023) (explaining that reformist reforms only tinker with existing systems of domination and legitimate them and that "[t]he primary concern is that to focus on reformism is to orient action toward entrenching, rather than overthrowing or substituting, a fundamentally corrupt system, institution, or set of relations").

37 *See* ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 303–04 (2021) ("In a consent decree, the Justice Department and a city enter into an agreement requiring that specific reforms be instituted. Usually a monitor is appointed to oversee the process. The federal court . . . can impose sanctions on the government if it does not meet the terms of the agreement.").

38 Ndjuoh MehChu, *Policing as Assault*, 111 CALIF. L. REV. 865, 910 (2023).

39 *See* Sandhya Somashekha, *Why Chicago Used the Word 'Reparations'*, WASH. POST (May 8, 2015, 2:29 PM), https://www.washingtonpost.com/news/post-nation/wp/2015/05/08/why-chicago-used-the-word-reparations [https://perma.cc/T7PU-PPHY] (explaining that when Chicago created a $5.5 million fund to compensate victims of police torture in the 1970s and 1980s, the City intentionally chose the word reparations to emphasize that the harms addressed were rooted in racism and generational injustice). This terminology was significant because such payments are seldom framed as reparations, highlighting the racial and historical dimensions of the abuse. *Id.*

"making amends for a wrong."[40] Reparations aim to remedy collective harms, fostering communal healing and hope for the future.[41] In his influential 1972 book, *The Case for Black Reparations*, tax scholar Borris Bittker argued that reparations "for the injury caused by segregation in public schools and other public facilities" could be pursued through 42 U.S.C. § 1983.[42] Section 1983 was originally enacted as a bold response to widespread abuses by state and local officials undermining Reconstruction's progress and devaluing Black lives.[43] Despite opposition to the statute's scope, Congress deliberately imbued the law with comprehensive remedial authority to address the systemic breakdown of accountability in the South.[44] Bittker maintained that framing reparations as remedies analogous to those available under Section 1983 was conceptually sound, as both mechanisms aim to repair harms connected to historical injustices with racial dimensions.[45] While sharing Bittker's vision of Section 1983 as a remedy that goes beyond the common law's individualized approach,[46] my proposal positions Section 1983 specifically as a vehicle for providing reparative healing to communities affected by police violence in Fourth Amendment excessive force claims against municipalities.

To illustrate how reparative damages might operate, consider the following scenario. Officer Jane Doe responds to a reported drug transaction at a neighborhood basketball court where community members of various ages have gathered to play and socialize. Despite no apparent threat, Jane Doe approaches John Doe with their weapon drawn. Without warning or

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40 ANDREA RITCHIE ET AL., REPARATIONS NOW TOOL KIT 25 (Andrea Ritchie & Marbre Stahly-Butts eds., Movement for Black Lives 2019), https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf [https://perma.cc/YLK6-8V7T].

41 *See* Brooke Simone, Note, *Municipal Reparations: Considerations and Constitutionality*, 120 MICH. L. REV. 345, 349 (2021) ("As for their intended effects, reparations are both backward- and forward-thinking. They rectify past wrongs and also further distributive justice, the reconstruction of American society, and future peace and stability. Reparations seek to provide acknowledgment, restitution, and closure.").

42 BORIS BITTKER, THE CASE FOR BLACK REPARATIONS 68 (2003 ed. 1972).

43 *See, e.g.*, Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484 (1982) (observing that Section 1983 was enacted "to deal with widespread legal abuses and physical violence, often backed by the Ku Klux Klan, against Southern Blacks and their white supporters").

44 *See* David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 CARDOZO L. REV. DE NOVO 90, 99–100 (2022) (noting that at the time of Section 1983's enactment, "both proponents and opponents" of the Act understood that it "provided a broad remedy for constitutional violations by state and local officials unqualified by any immunities").

45 BITTKER, *supra* note 42, at 30–35.

46 Remedies under Section 1983 adopt an individualized framework, meaning that they are specifically designed to address the harm suffered by each victim. *See* Alexis Karteron, *Reparations for Police Violence*, 45 N.Y.U. REV. L. & SOC. CHANGE 405, 412–13 (2021) (identifying Section 1983 as a flawed mechanism through which to pursue police violence reparations because of its individualized remedial approach). *See also infra* note 329 and accompanying text.

provocation, Jane Doe tackles John Doe to the ground, striking him repeatedly with their baton while he offers no resistance. Several bystanders who are unrelated to John Doe—elderly residents, children, and John Doe's teenage friends—witness this violent encounter. Body camera footage later confirms John Doe matched only the vaguest description of the suspect (a "Black male in athletic clothes") and was simply tying his shoelaces when approached. John Doe files a Section 1983 suit, alleging a Fourth Amendment excessive force violation and naming Jane Doe and the city as defendants. John Doe prevails by establishing that despite a documented history of excessive force against unarmed Black males, the city failed to adequately train its officers,[47] and exhibited deliberate indifference to the possibility that its inadequate training program would result in harm.[48] The traumatized *bystanders* would have no viable recourse under current frameworks even if the emotional harm they endured was so severe that they no longer felt safe in their own neighborhood and became prisoners in their home.

Under the proposed framework, at the damages stage of *John Doe v. City*, the court would consider *sua sponte* or at Doe's urging, the law enforcement agency's policing record. This assessment would examine the department's budget, history of abusive practices, annual excessive force suits, and the status of any consent decree the city has entered. Based on these and potentially other criteria, the court would determine appropriate reparative damages. Damages would go towards funding a reparative community fund (RCF), a program that would blend elements of both Victims Compensation Funds (VCFs) and cy pres distributions. VCFs aim to assist "victims and their families in recovering from both the trauma and expense of violent crime,"[49] while cy pres distributions typically "provide unclaimed compensatory funds to a charitable interest that is in some way related to either the subject of the case or the interests of the victims, broadly defined."[50]

All states operate VCFs to provide financial support to crime victims for expenses such as funeral costs and mental health treatment.[51] However,

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47 *See* Karen M. Blum, *Making Out the Monell Claim under Section 1983*, 25 TOURO L. REV. 829, 830 (2009) ("[T]he *City of Canton* method of demonstrating liability . . . occurs when plaintiffs point to a failure to 'blank': a failure to train, a failure to supervise, a failure to discipline, a failure to adequately screen, etc.").

48 *See also* Bryan Cnty. v. Brown, 520 U.S. 397, 411 (1997) ("A plaintiff must demonstrate that a municipal decision reflects a deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.").

49 Valena E. Beety, *Compensating Victims of Police Violence*, 70 EMORY L. J. ONLINE 47, 52 (2021).

50 Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 620 (2010).

51 *See* Beety, *supra* note 49, at 53 (noting that each state has its own requirements for victims

police violence victims are typically excluded from accessing these funds due to eligibility criteria like the need to demonstrate "innocence."[52] This seemingly neutral requirement has a discriminatory effect, particularly disadvantaging Black and Brown people due to underlying biases that lead police to wrongly perceive them as inherently criminal.[53] A self-certification process for reparative damages would allow those credibly demonstrating that they were vicariously marginalized, i.e., indirectly harmed, by police violence to access compensation through the RCF, merging VCF's victim-support model with cy pres' approach of benefiting broader affected communities.

Expanding damages liability under Section 1983 as proposed serves two purposes. First, it acknowledges the collective nature of police violence's harms and attempts to repair the social fabric in communities that bear the brunt of policing while such demands are surging.[54] By recognizing communal trauma as a distinct harm worthy of legal remedy, courts can begin to close the rights-remedies gap that currently leaves many victims of police violence without meaningful redress. Second, it does so by remaining faithful to Section 1983's intended function as a penetrating federal remedial tool for race-related violations by states and localities.[55] Increasing cities' exposure to liability may also shape cities' behavior by changing their incentives to tolerate police violence.[56] Under the status quo where the Supreme Court has created an almost impenetrable shield to holding cities liable for police misconduct, police violence will continue to proliferate,[57] leaving victims trapped in a cycle of distress and grief. Given the judiciary's enormous role in enabling police violence through its Fourth Amendment

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seeking compensation, but that the requirements are often similar).

52 *Id.*

53 MehChu, *supra* note 38, at 903.

54 *See, e.g.*, Sono Motoyama, *It's Time to Pay Attention to How Police Violence Harms Community Health*, MLK50 (Jan. 25, 2024), https://mlk50.com/2024/01/25/its-time-to-pay-attention-to-how-police-violence-harms-community-health/ [https://perma.cc/V89U-DB7B] (discussing how police violence creates community-wide trauma and underscoring the need for effective responses); Karteron, *supra* note 46, at 410–11 (arguing for community-wide remedies for police violence).

55 *See* Eisenberg, *supra* note 43, at 484–85 (noting that the historical vision of Section 1983, which draws "heavily on the social forces that generated its original enactment," was centrally concerned about addressing racial problems. Moreover, there was "firm congressional resolve that the problem feel the full effect of federal power, without regard to traditional limitations.").

56 *See* CHEMERINSKY, *supra* note 37, at 298 (explaining that "[i]f cities were vicariously liable for the damages that officers inflict, they would have a much stronger financial incentive to prevent and punish police excessive force").

57 *See id.* To be clear, I do not mean to suggest that expanding cities' liability will eliminate police violence. It is not a sufficient condition. The point is merely that the "prospect of a multimillion-dollar judgment in every case in which an officer kills, maims, or wounds a member of the public" could incentivize cities to implement better policies to address police violence. *Id.* If one life is saved as a result, then it would have made a difference.

decisions and stringent immunity doctrine, courts correcting their own complicity has unique reparative value.

This Article is organized into four parts. Part I establishes the foundation by examining how the Court's Fourth Amendment jurisprudence has allowed police to inflict harm with impunity—particularly in Black and Brown communities—contributing to legal estrangement and eroding trust in legal institutions.[58] Part II examines reparations by defining the term, tracing historical periods of reparations activity throughout American history, and analyzing frameworks for successful reparations efforts. It then justifies focusing on local government reparations as an effective intervention point.

Part III outlines the proposed police violence reparations program and addresses key design questions. For example, who would make up the appropriate class of beneficiaries for reparative damages—only direct litigants, or broader affected communities? How would damages be measured and allocated? I lay out possible standards for determining eligibility criteria. For instance, I propose adapting the California Supreme Court's *Dillon* factors for bystander recovery in tort claims alleging negligent infliction of emotional distress. Derived from *Dillon v. Legg*,[59] these guidelines "focus on various forms of proximity—relational, geographical, temporal—between the plaintiff and the victim/injurious event" in determining eligible claimants.[60] Just as courts assess factors like relationship to the direct victim for bystanders to recover damages for emotional distress, similar qualifying guidelines on a claimant's proximity to the injurious events might be adapted to establish eligibility rules.

Part IV addresses potential objections to the proposal. One objection might involve Article III standing doctrine, which "requires a proper plaintiff—with a concrete and particularized injury . . . traceable to the defendant's conduct and susceptible of judicial remedy."[61] Plaintiffs must have "remedial standing"—standing to sue and pursue each specific remedy.[62] "[S]tanding is not dispensed in gross"[63] but must be established for each specific remedy sought.[64] It could be argued against this backdrop that

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58 *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2083 (2017) (describing legal estrangement as the collective social exclusion, alienation, and distrust poor Black and Brown people feel towards societal and legal institutions).

59 441 P.2d 912 (Cal. 1968).

60 JOHN C.P. GOLDBERG, LESLIE C. KENDRICK, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 860 (5th ed. 2021).

61 Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 86 (2019).

62 *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 155 (2023) (emphasizing the importance of an injury's traceability to the defendant and its redressability by the remedy as factors in finding standing for each form of relief sought).

63 *Id.* (citation omitted).

64 Town of Chester v. Laroe Estates, Inc., 581 U.S. 433, 439 (2017) (quoting Davis v. Fed.

Section 1983 plaintiffs lack standing to pursue extra-compensatory damages exceeding their specific injury. However, precedent exists for such expansive relief. For instance, federal judges issue prophylactic injunctions exceeding the scope of plaintiff's "actual injury,"[65] an approach the Court authorized in *Hutto v. Finney*[66] and *Brown v. Plata*.[67] Similarly, the Supreme Court held in *Trump v. CASA, Inc.* that injunctions may provide relief to nonparties when "complete relief" to the plaintiffs before the court requires it. [68] These examples demonstrate the potential for expanding damages in Section 1983 cases to account for broader harms caused by police violence, potentially even those affecting nonplaintiffs.

Cards on the table: under the Trump administration with rampant attacks on protections for marginalized groups,[69] such a program would likely become an immediate target of the Department of Government Efficiency (DOGE), "an outside commission to a White House office given carte blanche to upend the executive branch in the name of combating perceived waste, fraud and abuse."[70] While the proposed program would serve a vital function, its broad-reaching compensation goals would likely only become viable under a political environment that values reparative justice over bureaucratic streamlining. Critics might also contend that municipalities already face numerous pressing concerns, ranging from poverty to crime, making reparations an additional strain on limited resources. While fiscal constraints should not be ignored, we should be careful not to present budgetary constraints as an intractable problem. Instead, the focus should be on preventing the underlying abuses that necessitate large police payouts in the first place.

## I

Election Comm'n, 554 U.S. 724, 734 (2008)).

65 *See, e.g.*, Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1083 (2018) (citing Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301 (2004) (supporting prophylactic injunctions)).

66 437 U.S. 678, 687–88 (1978).

67 563 U.S. 493, 530–34 (2011).

68 Trump v. CASA, Inc., 145 S. Ct. 2540, 2590 (2025) (Sotomayor, J., dissenting) ("So too does the Court recognize that, in some cases, complete relief will require a broad remedy that necessarily benefits nonparties.").

69 *See* Bianca Flowers & Disha Raychaudhuri, *Trump's First 100 Days Target Diversity Policies, Civil Rights Protections*, REUTERS (Apr. 30, 2025), https://www.reuters.com/sustainability/society-equity/trumps-first-100-days-target-diversity-policies-civil-rights-protections-2025-04-30 [https://perma.cc/NC68-J6E4] ("Trump's first 100 days in office have featured an unapologetic assault on diversity and inclusion efforts, unraveling decades-old policies to remedy historical injustices for marginalized groups in a matter of weeks.").

70 *See, e.g.*, Stephen Fowler & Shannon Bond, *What Has DOGE Done in Trump's First 100 Days?*, NPR (Apr. 28, 2025), https://www.npr.org/2025/04/28/nx-s1-5377445/doge-musk-trump-100-days [https://perma.cc/X7SR-555R].

MENDING THE BROKEN CONTRACT: POLICE VIOLENCE AND THE FOURTH AMENDMENT

In spring 2024, pro-Palestinian demonstrations on college campuses were met with a heavy-handed police response.[71] Cops equipped with military-grade weapons and supported by sniper units were deployed to quell largely peaceful protests.[72] Social media platforms flooded with images and videos of the campus crackdowns—police using excessive force against students,[73] journalists,[74] and professors.[75] Some observers interpreted this response as confirming what abolitionist scholars have long contended is policing's organizing logic: the repression and control of marginalized groups and their allies, rather than the provision of safety and security.[76]

This Part grounds the Article's core contribution by first providing a brief overview of how policing's control and regulation of poor Black and Brown individuals and communities has created a collective trauma network. It thereafter describes how the Supreme Court's Fourth Amendment decisions and stringent immunity doctrine have enabled police violence.

### *A. Police Violence*

Police violence extends beyond the directly-harmed subjects of enforcement, reaching into broader communities. Almost sixty years ago, The Nation published James Baldwin's classic essay, "A Report from Occupied Territory," which highlighted police violence's community impact.[77] The unflinchingly honest Baldwin begins with the story of a salesman leaving a customer's apartment in Harlem. The salesman witnesses police brutalizing a Black boy. When he intervenes—asking "why are you beating [the boy] like that?"—the officers cuss at him, club him, and cuff him.[78] Baldwin observes that no one expects the cops to be held accountable, though it would be clearly warranted. Why? There is nothing to account for

71 Tim Dickinson, *College Crackdown Shines Spotlight on Violent Cops–Yet Again*, ROLLING STONE (Apr. 30, 2024), https://www.rollingstone.com/politics/politics-features/gaza-protests-colleges-violent-cops-1235012276/ [https://perma.cc/4ANU-6YYN] (discussing violent crackdowns on student-led, pro-Palestine protests across both public and private U.S. universities).

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 Pratim Sengupta, Pallavi Banerjee & Yahya El-Lahib, *Student Protests: How the University Perpetuates Colonial Violence on Campus*, THE CONVERSATION (May 30, 2024), https://theconversation.com/student-protests-how-the-university-perpetuates-colonial-violence-on-campus-230075 [https://perma.cc/6GLE-DMXJ].

77 James Baldwin, *A Report from Occupied Territory*, THE NATION (July 11, 1966), https://www.thenation.com/article/culture/report-occupied-territory [https://perma.cc/72J4-YGMA].

78 *Id.*

when cops are "simply the hired enemies" of Black and Brown people.[79] "They are present to keep the Negro in his place and to protect white business interests, and they have no other function," writes Baldwin.[80] The structural accounts of police violence Baldwin articulated in his 1966 essay are emergent.[81]

Policing frequently functions as a means for managing social tensions rooted in racial and economic inequalities, disproportionately harming poor Black and Brown people.[82] Scholars are exploring afresh "how police, with law's imprimatur, create and constitute racialized and classed pain and death through guns and physical force, tickets and arrests, segregation and gentrification, police unions, and impunity."[83] These works contest the notion of policing as a necessary institution that operates to maintain safety and security.[84] They urge recognition of policing as a "fundamentally raced, classed, and gendered project"[85] that maintains inequality by surveilling, controlling, and abusing marginalized groups with the state's authority. Importantly, structural critiques of policing draw attention to the institution as a holdover from the "racialized modes of exploitation, dispossession, and confinement" that "have existed since at least the dawn of colonialism and enslavement."[86]

From the colonial period through the Jim Crow era, policing functioned more overtly as a tool for controlling and dominating marginalized people.[87] Since the mid-twentieth century, however, this violence has been masked by the language of crime control. Narratives portraying people of color as inherently criminal are widely disseminated to justify violence and make Black and Brown lives seem disposable.[88] Today, as then, policing is "centrally concerned with the violent control of the movement, labor, land, and resistance of Black and Indigenous people."[89] Psychotherapist Resmaa

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79 *Id.*

80 *Id.*

81 *See, e.g.*, Akbar, *An Abolitionist Horizon*, *supra* note 33, at 1788 (noting that "[l]egal scholarship is undergoing a profound reckoning with the centrality of violence to policing in the United States" (citation omitted)).

82 *See* Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop-and-Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2456 (2017) (highlighting "stop, question, and frisk" tactics as an example of policing practices that perpetuate racial stigma and reinforce racial inequality).

83 Akbar, *An Abolitionist Horizon*, *supra* note 33, at 1788 (citation omitted).

84 *See, e.g.*, *id.* at 1795–96 (explaining that "[p]olice violence is not a problem of 'bad apples' or singular incidents, but central to police work").

85 Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460 (2018).

86 Akbar, *An Abolitionist Horizon*, *supra* note 33, at 1839.

87 *See* MehChu, *supra* note 38, at 918 (describing the "honest" role of police in "preserving White dominion" during that era).

88 *Id.*

89 Akbar, *An Abolitionist Horizon*, *supra* note 33, at 1838.

Menakem explains that cops see "Black bodies as often dangerous and disruptive . . . . [They] feel[] charged with controlling and subduing Black bodies by any means necessary—including extreme force."[90]

Extreme force by cops has not waned, even as social movements call attention to it.[91] Despite the heightened scrutiny, the number of civilians killed by police has climbed each year since 2020, reaching nearly 1,200 deaths in 2022.[92] Almost one out of every four victims was Black, although Black people are only thirteen percent of the U.S. population.[93] Data collected from 2013 to 2022 showed that Black people were thrice as likely to have fatal encounters with police than white people.[94] In cities like Chicago and Minneapolis, the fatality rate is more than two dozen times higher for Black people.[95] And these figures only reflect fatal encounters, where we might assume police are incentivized to exercise more restraint because fatal encounters draw heavier scrutiny.

Police in the United States are routinely armed and have wide discretion to use force, so every police interaction inherently carries the threat of violence.[96] As historian Micol Siegel notes, police violence "often need not be made manifest, because people fear it and grant it legitimacy, in direct extension of the legitimacy they grant to state violence."[97] Even those who are not themselves victimized by police violence suffer indirectly from the harm inflicted on others.[98] These indirect victims develop similar psychological responses—heightened anxiety, distrust of authority, and persistent fear—creating collective trauma networks.[99] When a video of police violence circulates, when a neighbor is wrongfully detained, or when parents must instruct their children on special precautions for police encounters, psychological harm spreads far beyond the immediate subjects of enforcement.

A growing body of research supports the claim that systemic and

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90 RESMAA MENAKEM, MY GRANDMOTHER'S HANDS, RACIALIZED TRAUMA AND THE PATHWAY TO MENDING OUR HEARTS AND BODIES 48 (2017).

91 *See, e.g.*, Osagie K. Obasogie & Anna Zaret, *Medical Professionals, Excessive Force, and the Fourth Amendment*, 109 CALIF. L. REV. 1, 1 (2021).

92 Sam Levin, *'It Never Stops': Killings by US Police Reach Record High in 2022*, THE GUARDIAN (Jan. 6, 2023), https://www.theguardian.com/us-news/2023/jan/06/us-police-killings-record-number-2022 [https://perma.cc/ZXK7-J8YE].

93 *See id.*

94 *Id.*

95 *Id.*

96 *See* MehChu, *supra* note 38, at 904 (discussing how law enforcement's near-monopoly on lethal force creates an inherent potential for violence in every police-citizen encounter, elevating routine interactions into situations where people move around in apprehension of such violence).

97 MICOL SEIGEL, VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE 9 (2018).

98 Bell, *supra* note 58, at 2057–58.

99 *See, e.g.*, Jordan DeVylder, Lisa Fedina & Bruce Link, *Impact of Police Violence on Mental Health: A Theoretical Framework*, 110 AM. J. PUB. HEALTH 1704, 1705–07 (2020).

individual acts of racism, e.g., "being racially profiled by police," is a source of stress that racial minorities contend with.[100] It suggests that race-specific stress may explain the racial disparities in health,[101] as racism's toll can reverberate through families and communities, consuming entire lineages. Indeed, "[f]or Black and Brown people, especially young people in the poorest neighborhoods across the country, the internalized belief that police are agents who are likely to inflict harm . . . is 'part of the social contract, a tax paid in exchange for the right to move in public spaces.'"[102]

### *B. Police Impunity*

The Court's Fourth Amendment jurisprudence has exacerbated the problem of pervasive police violence by legitimizing enforcement activities in Black and Brown neighborhoods and shielding law enforcement from almost any accountability. The guarantees contained in the Fourth Amendment lay the ground rules under which people have "front-end" contact with the police.[103] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[104]

The Constitution's framers intended that the Fourth Amendment would serve as a check on police overreach, safeguarding everyone's rights, including criminal suspects.[105] However since the founding era, the Court has largely failed to enforce these restrictions. With a few exceptions, the norm has been to empower cops and "legitimate[] the racialized policing that especially harms people of color."[106] The Warren Court temporarily expanded protections and reined in some police abuses during the 1960s.[107]

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100 *See* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 333 (2018) (claiming that while there is disagreement, some progressive race scholars view racism as a source of stress).

101 *Id.*

102 MehChu, *supra* note 38, at 902 (quoting JAMES FORMAN, JR. LOCKING UP OUR OWN 171 (2017)).

103 Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 127 (2017).

104 U.S. CONST. amend. IV.

105 CHEMERINSKY, *supra* note 37, at xi.

106 *Id.* at xi.

107 *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964) (holding that once an individual is taken into police custody, and asked for and been denied a lawyer, any confession made during the remainder of the interrogation is inadmissible as a constitutional violation); Miranda v. Arizona, 384 U.S. 436 (1966) (holding that without certain warnings grounded in the Fifth Amendment right against self-incrimination, statements made during interrogation are inadmissible at trial); Massiah v. United States, 377 U.S. 201 (1964) (holding that the Sixth Amendment is violated if an informant working with law enforcement elicits incriminating statements from a defendant facing charges);

But the Warren Court was an outlier—the Burger Court soon made a dramatic turn rightward, enabling later Courts that were even more conservative.[108]

The Court had a firm conservative majority for the seventeen years Justice Warren Burger was Chief Justice.[109] The conservative voting bloc routinely favored unfettered police power over safeguarding civilians' rights.[110] Meanwhile, it disregarded the racial context that informs many cases about policing. It "seemed unaware that race even existed," or indifferent to the "decisions' racial implications for policing."[111] For instance, in *Chambers v. Maroney*,[112] the Burger Court broadened the exception to the Fourth Amendment that permits warrantless searches of automobiles given only probable cause that contraband or evidence of unlawful activity might be found.[113] This gave cops broad discretion to stop and search cars, predominantly those driven by Black people,[114] as cops have come to internalize that even "if they stop and search a car illegally, they can make up a basis for probable cause, confident that the evidence is unlikely to be excluded."[115] In *Chambers*, the Court operated on the presumption that the innocent have nothing to hide and the guilty are undeserving of protection.[116] This cavalier treatment of privacy rights typified the Burger Court's broader pattern of undermining individual rights while strengthening

Katz v. United States, 389 U.S. 347 (1967) (holding that Fourth Amendment protections apply regardless of where a search or seizure takes place, and even nonphysical surveillance requires a warrant).

108 CHEMERINSKY, *supra* note 37, at 153 ("[T]he Burger Court swung sharply to the right after the liberal Warren Court, and it paved the way for even more conservative Courts that followed."). *See, e.g.*, Schneckloth v. Bustamante, 412 U.S. 218 (1973) (holding that a person may consent to a search under the Fourth Amendment even without knowing the consent was optional); Stone v. Powell, 428 U.S. 465 (1976) (holding that federal habeas corpus relief may not be granted on the grounds of illegally obtained evidence admitted at trial if there has been a full and fair review at the state level); United States v. Miller, 425 U.S. 435 (1976) (holding that there is no expectation of privacy in financial records held by a bank, therefore acquisition of those records without a warrant does not violate the Fourth Amendment).

109 CHEMERINSKY, *supra* note 37, at 153–54.

110 *Id.*

111 *Id.* at 154.

112 399 U.S. 42 (1970).

113 CHEMERINSKY, *supra* note 37, at 163.

114 *See* Carvalho, Mizael & Sampaio, *supra* note 1, at 1215 (conducting a study of whether and how racial biases shape police stops and finding that Black drivers face disproportionate stop rates); *see also* Christopher Wright Durocher, *How the Supreme Court Helped Create 'Driving While Black'*, POLITICO (Apr. 17, 2021), https://www.politico.com/news/magazine/2021/04/17/how-the-supreme-court-helped-create-driving-while-black-482530 [https://perma.cc/87B3-KXF3] (arguing that the Supreme Court has steadily broadened police power during traffic stops, leading to a pattern of disproportionate scrutiny and enforcement against people of color, particularly Black folks).

115 CHEMERINSKY, *supra* note 37, at 163.

116 *See id.* at 167 (explaining the Burger Court's reasoning that innocent people have nothing to hide and the evidence of a guilty individual's crime should be admissible regardless of how it was gained).

police power.[117] Subsequent Courts under Rehnquist and Roberts showed even more deference to police interests.[118]

However, no case enabled such unfettered discretion more than *Whren v. United States*.[119] In June 1993, Metropolitan Police Department vice squad cops were patrolling a neighborhood in Southeast D.C. in an unmarked car.[120] They became suspicious upon observing a truck with a temporary license plate occupied by two young Black men stopped at an intersection.[121] The Court described the region as a "high drug area."[122] Then, as now, Southeast D.C. is predominantly Black.[123] One of the cops noticed the driver, James Lester Brown, looking down at Michael A. Whren's lap in the passenger seat.[124] The cops began following the truck. Eventually, Brown turned without signaling and took off at an "'unreasonable' speed."[125] The cops caught up, pulled them over, and spotted drugs in two clear plastic bags after looking into the car.[126] Whren and Brown were charged with possession.[127] At their trial, they moved to suppress the evidence as unlawfully obtained, arguing the stop was pretextual and thus unreasonable under the Fourth Amendment.[128]

Vehicle stops are Fourth Amendment seizures, so the Constitution requires that they satisfy the standard of reasonableness.[129] Probable cause of traffic violations had traditionally been enough to meet this standard, and the

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117 *Id.* ("[T]he Burger Court made it easier for police to search and has limited the rights of criminal suspects. During its seventeen years, . . . [t]he Burger Court's majority emphasized the interests of law enforcement, not the privacy of individuals.").

118 *See id.* ("In the decades after the Burger Court, the Rehnquist and Roberts Courts built upon these decisions and went much further in empowering police and in lessening the protections of the Fourth Amendment.").

119 517 U.S. 806 (1996); *see* CHEMERINSKY, *supra* note 37, at 220 ("Perhaps the most dramatic change with regard to policing during the Rehnquist and Roberts Courts is how easy they have made it for the police to stop virtually anyone at any time . . . . No single decision was more responsible for expanding police power to stop individuals with impunity than *Whren* . . . .").

120 CHEMERINSKY, *supra* note 37, at 220.

121 United States v. Whren, 517 U.S. 806, 808 (1996).

122 *Id.*

123 *See* Steven Overly, Delece Smith-Barrow & Katy O'Donnell, *Washington Was an Icon of Black Political Power. Then Came Gentrification*, POLITICO (Apr. 15, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/04/15/washington-dc-gentrification-black-political-power-00024515 [https://perma.cc/4AEG-WYA5].

124 *Whren*, 517 U.S. at 808.

125 *Id.* at 808.

126 *Id.* at 809.

127 *Id.*

128 *Id.*

129 *See, e.g.*, United States v. Knights, 534 U.S. 112, 118–19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999))).

defendants acknowledged that probable cause existed to pull them over because they had broken D.C. traffic laws. But they argued that more than probable cause should be necessary given the impossibility of total compliance with traffic regulations.[130] Relying merely on probable cause, they contended, introduces the impulse for cops to use traffic stops as a pretext for general investigation absent reasonable grounds.[131] Nonetheless, the trial court denied the suppression motion and a jury convicted them on all counts.[132] A D.C. Circuit Court panel upheld the convictions,[133] as did the Supreme Court[134] Writing for a unanimous Court, Justice Antonin Scalia declared the cops' true motives irrelevant, reasoning that probable cause alone justifies traffic stops and seizures.[135] And since the cops had observed an unsignaled turn, they were legally justified in stopping Whren and Brown.[136]

*Whren* enables cops to stop anyone at any time,[137] as minor traffic violations are inevitable if a driver is followed long enough.[138] It makes actual motive irrelevant under the Fourth Amendment,[139] granting police carte blanche to stop and search civilians. Predictably, traffic stops now drive most police-civilian interactions—over 20 million yearly, with heightened targeting of Black motorists.[140] These encounters too often turn violent or even deadly, with people of color disproportionally bearing the consequences.[141] Tyre Nichols,[142] Philando Castile, Sandra Bland, Walter Scott, Daunte Wright, and tragically many more lost their lives this way.[143]

Qualified immunity fuels this crisis. The judicially-created doctrine makes it nearly impossible to hold officers liable.[144] This emboldens officers

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130 *Whren*, 517 U.S. at 810.

131 *Id.* at 809.

132 *Id.*

133 *Id.*; *see also* United States v. Whren, 53 F.3d 371, 376 (D.C. Cir. 1995).

134 *Whren*, 517 U.S. at 819.

135 *Id.*

136 CHEMERINSKY, *supra* note 37, at 221.

137 *Id.*

138 *Id.*

139 *Id.* at 222.

140 *Findings*, THE STAN. OPEN POLICING PROJECT, https://openpolicing.stanford.edu/findings/ [https://perma.cc/G2TD-AA5Q].

141 *See* Bernd Debusmann, Jr., *Why Do So Many Police Traffic Stops Turn Deadly*?, BBC NEWS (Jan. 31, 2023), https://www.bbc.com/news/world-us-canada-64458041 [https://perma.cc/FZS4-MXMQ] (discussing how traffic stops in the United States, which disproportionately impact Black Americans, can be deadly and how some cities have been implementing reforms to reduce violence).

142 N'dea Yancey-Bragg, *Tyre Nichols' Death Is the Latest Example of a Minor Traffic Stop Turning Deadly, Experts Say*, USA TODAY (Feb. 5, 2023), https://www.usatoday.com/story/news/nation/2023/02/05/tyre-nichols-experts-say-routine-traffic-stops-can-turn-deadly/11154961002 [https://perma.cc/B2KM-YVRP].

143 *Id.*

144 *See* Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity*

to act with impunity.[145] When violations occur, qualified immunity routinely denies victims and bereaved families any judicial recourse.[146] Meanwhile, police violence continues unchecked. From facilitating traffic stops to eroding remedies for police violations,[147] it would not be a stretch to say the Court has blood on its hands. As Chemerinsky summed it up: "Neither the text of the Constitution nor the Framers' intent supports these rulings."[148] Rather, we must see these rulings for what they are: "a consistent choice, throughout American history, to favor the interests of law enforcement over the rights of individuals and to ignore the enormous racism that has infected policing since the nation's first day."[149]

Many scholars have documented how the Supreme Court's Fourth Amendment jurisprudence has expanded police while eroding protections for civilians.[150] Even briefly examining one Fourth Amendment decision reveals how expanding police power compromises, rather than enhances, safety and security for vulnerable groups. This troubling history of policing has led to a widely acknowledged breakdown in trust between law enforcement and low-income communities of color.[151] Unequal treatment by police reinforces a message of exclusion, breeding cynicism about the fairness of the law itself.[152] This creates a sense of being shut out of society's promises, a phenomenon Professor Monica C. Bell calls "legal estrangement."[153] Given the Court's role in creating and perpetuating this injustice, reparations for Fourth Amendment violations offer a meaningful solution by providing financial compensation to indirect victims of police violence, recognizing that such violence harms entire communities, not merely individuals.

## II

*Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 450 (2022) ("[Q]ualified immunity shifted from its origins as an idea to protect a wide range of public officials facing liability for various types of actions to a doctrine used disproportionately to protect police from civil lawsuits and the possibility of paying damages when excessive force is alleged.").

145 *Id.* at 458.

146 *See id.* at 476–82 (reviewing the Supreme Court's post-*Saucier v. Katz* decisions to rule in favor of police under qualified immunity).

147 *See supra* text accompanying notes 129–36.

148 CHEMERINSKY, *supra* note 37, at xi.

149 *Id.*

150 *See, e.g.*, DEVON CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); CHEMERINSKY, *supra* note 37.

151 *See* Bell, *supra* note 58, at 2058 ("[P]eople of color and residents of high-poverty communities do not trust the police.").

152 *See id.* at 2066–67 (discussing the scholarly work on the phenomenon of legal cynicism in Black and poor neighborhoods).

153 *Id.*

REPARATIONS, A BRIEF OVERVIEW

The reparations discourse in the United States shines a light on the U.S.'s ignoble history of mistreating disadvantaged groups, and underscores the unequal burden still borne by some under the current social and political arrangements. Opponents claim we now live in a colorblind, post-racial society where historical injustices no longer matter.[154] However, by advocating for reparations, proponents challenge this narrative, emphasizing the importance of acknowledging both historical wrongs and ongoing racial inequities.[155] The reparations debate exposes fundamental contradictions in a country eager to celebrate its triumph over racism[156] while continuing to avoid responsibility for it.[157]

This Part begins by defining reparations. It then surveys the various periods of reparations activities in U.S. history and thereafter discusses theories that scholars have advanced to conceptualize successful reparations programs. It concludes by observing that perhaps for the first time since Reconstruction, reparations have entered the national consciousness, planting this paper's proposal on fertile soil. By interpreting Section 1983 dynamically to provide reparations for police violence, we move towards realizing the equity demands of our time.

### *A. Defining Reparations*

The American public often narrowly associates reparations with compensation for chattel slavery.[158] This focus on correcting injustices from the distant past invites objections that those who held other human beings as

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154 *See* Inae Oh, *Ta-Nehisi Coates Delivers Searing History Lesson After Mitch McConnell Rejects Reparations*, MOTHER JONES (June 19, 2019), https://www.motherjones.com/politics/2019/06/ta-nehisi-coates-mitch-mcconnell-reparations [https://perma.cc/WP8H-7N2J] (quoting Mitch McConnell's claim that no one today is responsible for slavery).

155 *See* Deborah Barfield Berry, *Juneteenth Renews Call for Reparations for African Americans, Advocates Say*, USA TODAY (June 19, 2025), https://www.usatoday.com/story/news/nation/2025/06/18/juneteenth-reparations-bills-slavery/84263142007 [https://perma.cc/M5LR-FR8Y] (discussing current reparations initiatives and motivations, including a desire that the U.S. government "provide . . . for the crime of enslavement of Africans and its lasting harm on the lives of millions of Black people in the United States").

156 *See, e.g.*, Jason L. Riley, *Trump Might Have Won the First Postracial Election*, MANHATTAN INSTITUTE (Nov. 12, 2024), https://manhattan.institute/article/trump-might-have-won-the-first-postracial-election [https://perma.cc/7HVL-YYHZ].

157 *See, e.g.*, CRAIG TRAINOR, ACTING ASSISTANT SEC'Y FOR C.R., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 2 (2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf [https://perma.cc/M52V-RJSH] ("Educational institutions have toxically indoctrinated students with the false premise that the United States is built upon 'systemic and structural racism' and advanced discriminatory policies and practices.").

158 BITTKER, *supra* note 42, at 8.

property are long dead, their profits are long gone, and modern descendants should not be morally or financially responsible.[159] But this fixation on slavery only has stulted the discussion by suggesting it is the sole issue reparations could and should address. It precludes considering reparations for systemic racism beyond slavery that still produces racial disparities and injustices today. In reality, the harms warranting redress encompass much more than the slave system.

Contemporary social movements define reparations broadly as "the act or process of making amends for a wrong."[160] While such efforts often center on "compensating nonwhite groups for generations of racist violence, exclusion, and injustice,"[161] they also include acknowledgment and formal apologies as crucial components.[162] Proponents maintain that such reparative interventions, encompassing both material and symbolic measures, are necessary to address historical injustices, promote communal healing, and advance a more equitable future.[163]

### *B. Periods of Reparations Activity*

Some legal scholars characterize the reparations movement as evolving through distinct historical stages.[164] Vincene Verdun, a prominent reparations scholar, pioneered analyzing it this way.[165] Professor Verdun outlined five periods of reparations advocacy.[166] Reconstruction was the first, when the political opening to reshape Southern politics spurred early efforts.[167] This period of reparations activity was marked by demands for land distribution. It is in this context that the unfulfilled promise of "forty acres and a mule" emerged.[168] Although Reconstruction enabled

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159 *See, e.g.*, Oh, *supra* note 154.

160 RITCHIE ET AL., *supra* note 40, at 25.

161 Cameron Beach, *The Case for City Reparations*, 110 VA. L. REV. 1707, 1711 (2024).

162 *See id.*

163 *See* Simone, *supra* note 41, at 349 (arguing that reparations addressing racial injustice is necessary for healing and progress).

164 *See* CHARLES P. HENRY, LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS 65 (2007) ("At least four legal scholars regard reparations as a movement divided into five to six historical periods or stages.").

165 *Id.*

166 *Id.*

167 *Id.*

168 After Union forces defeated the Confederacy and slavery came to an end, Union General William T. Sherman enacted Field Order 15 on January 16, 1865. Nadra Kareem Nittle, *The Short-Lived Promise of '40 Acres and a Mule'*, HISTORY (Jan. 31, 2025), https://www.history.com/articles/40-acres-mule-promise [https://perma.cc/W8BJ-2S6S] (alteration in original). The order redistributed 400,000 acres of confiscated plantation land to freed slaves, offering each family 40 acres of farmland. *Id.* Though the order didn't include livestock, some families received Army mules, creating the famous "40 acres and a mule" promise. *Id.* When President Andrew Johnson took office after Lincoln's assassination, he overturned Sherman's order and gave all 400,000 acres back to former Confederate landowners. *Id.*

unprecedented Black political participation, attempts at land redistribution ultimately failed.[169]

The second reparations movement lacks a precise timeline but appears to span from Reconstruction's end to World War I.[170] Verdun argues that this wave of reparations activity arose as Jim Crow oppression intensified in the early 1900s.[171] Freed Black Americans and their allies grew increasingly vocal about the difficult circumstances the formerly enslaved were relegated to after slavery.[172] This agitation inspired ambitious efforts like pensions for freed Black people.[173] As Walter R. Vaughan, the white businessman behind the first such pension plan insisted, "[t]he government should pension these ex-slaves . . . [who] formerly had good homes, were well fed, were provided with the best medical attention in sickness, and since their freedom, just the reverse has been their position."[174] Like prior efforts, these reparations initiatives largely fell short.[175]

The third wave is linked to Marcus Garvey's Pan Africanist[176] and Black nationalist campaign,[177] which championed Black political self-

169 *See, e.g.*, Mary Wood, *Why Land Redistribution to Former Slaves Unraveled After the Civil War*, UNIV. VA. L. (Oct. 29, 2019), https://www.law.virginia.edu/news/201910/why-land-redistribution-former-slaves-unraveled-after-civil-war [https://perma.cc/5Q2C-UKWZ] (describing how efforts to redistribute land to formerly enslaved people ultimately failed and highlighting the U.S. Revenue Act of 1862 as a key example. Under this act, the Union seized and redistributed land on South Carolina's Sea Islands, but this effort ultimately unraveled, like the broken promises of land redistribution in General Sherman's Field Order 15).

170 HENRY, *supra* note 164, at 65.

171 *Id.*

172 *See* Mishael A. Danielson & Alexis Pimentel, *Give Them Their Due: An African-American Reparations Program Based on the Native American Federal Aid Model*, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 89, 97 (2004) (describing Black Americans' voiced displeasure over their living conditions in the South and supportive white Americans' failed attempt to seek reparations).

173 Following the failed efforts to redistribute land to formerly enslaved people, the idea of providing monetary compensation emerged as an alternative in the late nineteenth century. *See* Walter B. Hill, Jr., *The Ex-Slave Pension Movement: Some Historical and Genealogical Notes*, 59 NEGRO HIST. BULL. 7, 8 (1996). Walter R. Vaughan, a white Democrat from Alabama, advocated for government pensions to formerly enslaved people as a matter of justice, arguing "that not only would it be justice to ex-slaves, who had little, but also to the taxpayers of southern states who bore the cost of supporting them and its white population." *Id.* From 1890 and 1903, Vaughan introduced nine pension bills in Congress, none of which passed. *Id.*

174 Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 602 n.12 (1993) (first alteration added) (omission in original) (quoting uncited Vaughan's 1870 letter to his wife).

175 Danielson & Pimentel, *supra* note 172, at 97.

176 For an overview of Pan-Africanism and Garvey's ideology, see Claudius Fergus, *From Prophecy to Policy: Marcus Garvey and the Evolution of Pan-African Citizenship*, 4 THE GLOBAL SOUTH 29 (2010). The article traces how the Pan-African Conference of 1900, led by Henry Sylvester Williams, initially framed the movement as fostering unity among global African diasporic communities. Over time, its focus shifted toward securing Black liberation and self-determination. Garvey later revitalized this vision, transforming international solidarity into a radicalized, race-conscious political force.

177 For a definition of Black nationalism, see, for example, Ajoa A. Aiyetoro & Adrienne D.

determination and economic independence.[178] A Jamaican immigrant and founder of the United Negro Improvement Association (UNIA),[179] Garvey articulated a vision in which Black people worldwide would achieve economic freedom from white dominance.[180] He believed "self-determination and self-sufficiency could be achieved only through organization along race lines and successful economic competition against other races."[181] This political ideology drove his call for Black repatriation to Africa, "and through his efforts, hundreds of African Americans left the U.S. and resettled in Liberia."[182] Garvey's movement is associated with the third wave of reparations advocacy,[183] and it is contended that he was "the twentieth century's greatest advocate for . . . reparations for . . . Africa" and that his advocacy provided a platform for reparations activists and functioned as an ideological training ground.[184]

The fourth stage encompasses the Civil Rights Era in the 1960s. Reparations was already being hotly debated when civil rights activist James Forman issued the "Black Manifesto,"[185] demanding $500 million in reparations from churches and synagogues.[186] While his efforts did not yield the desired results, it generated much conversation and attention. Among those who took interest was Professor Boris Bittker, who "subject[ed] the issue of [B]lack reparations to a sympathetic but lawyer-like analysis."[187] The outgrowth of that labor was his pathbreaking book, *The Case for Black Reparations*. In it, Bittker considered the harms of segregation in public schools.[188] Bittker argued that reparations for Black Americans "would serve to redress injuries suffered under a legal system that was held by *Brown v. Board of Education* to violate the Constitution," particularly advocating for

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Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'COBRA) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 725 (2010) ("In its strongest form, Black nationalism calls for sovereignty for Blacks in the United States, often in the form of a separate nation-state. We find strains of a strong-form Black nationalism in calls for repatriation to an African state; calls for a separate Black homeland within the United States[.]").

178 *Id.* at 705.

179 *Id.* (describing the UNIA as "the first wide-spread organization that embraced pan-Africanism and Black nationalism and put forth a vision of Black political self-determination and economic independence").

180 MARY G. ROLINSON, GRASSROOTS GARVEYISM: THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION IN THE RURAL SOUTH 1920-1927, at 2 (2007).

181 *Id.*

182 Danielson & Pimentel, *supra* note 172, at 98.

183 *See supra* notes 178–79.

184 *See* ALFRED L. BROPHY, REPARATIONS: PRO & CON 34 (2006).

185 BITTKER, *supra* note 42, at 3.

186 *Id.* at 4.

187 Drew S. Days III, *Foreword* to BORIS BITTKER, THE CASE FOR BLACK REPARATIONS at ix (2003 ed. 1972).

188 *Id.* at xiv.

compensation tied to state-enforced segregation.[189] Such claims would proceed on the theory of denial of educational opportunities.[190] While acknowledging the difficulty of quantifying damages,[191] Bittker suggested one potential approach: measuring disparities in outcomes by comparing the earnings of Black graduates from segregated schools to those from integrated institutions, though he noted this method would require further refinement.[192]

According to Bittker, using "Section 1983 as the base for a system of reparations . . . [was] intended to suggest that any proposal for reparations—whether narrowly or broadly conceived, whether funded by public or private agencies—must come to grips with a series of subordinate issues, one of which is the measurement of damages."[193] It also had the salutary benefit of "reduc[ing] the emotional temperature that has characterized the discussion of [B]lack reparations. Far from being a bizarre, outrageous, and unprecedented proposal, it turns out to be a concept that invites, and is susceptible to, ordinary legal analysis."[194] His influential work built an intellectual foundation for conceiving reparations through the law and highlighted Section 1983 as a tool, albeit imperfect, for translating moral claims into workable legal remedies.

Verdun identified the fifth reparations wave as beginning with the enactment of the 1988 Civil Liberties Act,[195] which provided reparations and a formal apology to surviving Japanese Americans interned during World War II.[196] Japanese Americans' achievement of reparations inspired renewed reparations advocacy by highlighting reparations' feasibility.[197] This paved the way for one of the most successful Black reparations victories to date: compensation to Florida's Black Rosewood community for the 1923 Rosewood race riots.[198] On January 1, 1923, a white woman named Fannie Taylor alleged a Black man raped her in her home, though it is disputed that this occurred. White residents including her husband were convinced that she had been sexually assaulted. They identified a Black man named Jesse Hunter as the culprit.[199] But Rosewood's Black community maintained it was

189 BITTKER, *supra* note 42, at 23.

190 *Id.* at 60.

191 *Id.* at 59–60.

192 *Id.* at 60.

193 *Id.* at 59.

194 *Id.* at 68.

195 HENRY, *supra* note 164, at 65.

196 H.R. 442, 100th Cong. (1987), https://www.congress.gov/bill/100th-congress/house-bill/442 [https://perma.cc/L4P8-R8D3].

197 *See* HENRY, *supra* note 164, at 96 (referencing the successful campaign by Japanese Americans in 1988 to obtain redress for the harms they suffered).

198 *Id.* at 68.

199 R. Thomas Dye, *The Rosewood Massacre: History and the Making of Public Policy*, 19 PUB. HISTORIAN 25, 29 (1997).

Taylor's white lover who visited that morning who was responsible.[200] Vigilantes mobilized as armed whites converged on Rosewood. They tortured and killed Sam Carter, a Black man falsely accused of helping Hunter escape.[201] These events sparked riots where white mobs destroyed every Black resident's home in Rosewood and killed dozens, with no murders ever prosecuted.[202]

In the 1990s, Rosewood descendants—supported by pro bono legal counsel—successfully lobbied Florida lawmakers for an official investigation of the 1923 massacre.[203] The groundbreaking study validated survivors' account that had been dismissed for decades.[204] Recognizing the political landscape, they framed their appeals for a remedy to conservative lawmakers around property rights rather than racial justice arguments.[205] This strategic approach culminated in 1994 with Florida's historic passage of reparations legislation, granting $2 million in compensation to nine Black survivors of the Rosewood race riots.[206] While the Rosewood victory demonstrated reparations' political viability at the state level, the broader national conversation remained stagnant until a new generation of activists and scholars reignited the movement by reframing reparations as America's unmet moral obligation.

### *C. The Resurgence of Reparations Activity in the Black Lives Matter Era*

For over a century after the broken promise of "40 acres and a mule," reparations remained absent from national political discourse.[207] As scholar Roy L. Brooks observed, "Reparations, when it was a primary issue, used to be contained only in the African American community. The larger community was opposed to even discussing racial reparations."[208] This dynamic shifted dramatically with Ta-Nehesi Coates' influential essay "The

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200 *Id.*

201 *Id.* at 30.

202 *Id.* at 31–34.

203 *See* Esther Schrader, *Rosewood Remembered: Centennial of Racist Massacre That Destroyed a Black Florida Town Spotlights Racial Injustice Past and Present*, SOUTHERN POVERTY LAW CENTER (Jan. 6, 2023), https://www.splcenter.org/resources/stories/rosewood-centennial-racist-massacre-destroyed-black-florida-town [https://perma.cc/VN2U-AR5Y] (noting that one objective of this investigation was for historians to verify survivors' accounts).

204 *Id.*

205 *Id.*

206 *Id.*

207 Harmeet Kaur, *Congress Is Again Discussing Reparations for Slavery. It's a Complex and Thorny Issue*, CNN (Feb. 18, 2021), https://www.cnn.com/2021/02/18/us/congress-slavery-reparations-effort-trnd/index.html [https://perma.cc/F5LY-ZWGC]; *see generally* Kaimpono D. Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J.C.R. & ECON. DEV. 697 (2011) (discussing the intellectual history of reparations in the U.S.).

208 HENRY, *supra* note 164, at 31.

Case for Reparations," which catalyzed a sixth wave of activism.[209] Today, reparative justice has entered the mainstream consciousness.[210] The pendulum has swung so far in the other direction that candidates vying for the White House in 2020 made it a campaign issue, a development that proceeded the consciousness-raising demonstrations of 2020.[211] In 2021, Evanston, Illinois became the first U.S. city to pay reparations for slavery.[212] San Francisco is currently considering a reparations plan that would pay eligible residents $5 million, as other cities watch closely.[213]

Indeed, California has made the most robust reparations efforts so far. Its task force undertook for two years a study of slavery's generational harms, resulting in a 1,100-page report with wide-ranging proposals it views as models for other governments.[214] The proposals span areas like health care, education, and housing.[215] Now following suit are states like New York which recently formed a commission to examine slavery's impact on the state.[216]

It is particularly noteworthy that these reparations programs are aimed at understanding and/or redressing the effects of slavery, rather than more

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209 Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 [https://perma.cc/E5P9-LKLT]. Coates' article reignited national discourse about reparations, bringing renewed attention to an issue that had long been absent from mainstream public debate. *See* Anthony Zurcher, *Ta-Nehisi Coates Starts a New Reparations Depate*, BBC NEWS: ECHO CHAMBERS (May 23, 2014), https://www.bbc.com/news/blogs-echochambers-27549568 [https://perma.cc/VKE8-MB8V].

210 *See, e.g.*, Rebekah Sager, *'An Investment Not a Debt': Why Reparations for Slavery is Back in the Mainstream and Gaining Momentum*, MASS LIVE (Oct. 25, 2023), https://www.masslive.com/reckon/2023/10/an-investment-not-a-debt-why-reparations-for-slavery-is-back-in-the-mainstream-and-gaining-momentum.html [https://perma.cc/UG23-AU2L]; *see also* Camile Garcia-Mendoza, *Debunking Misconceptions About Reparations*, CHI. LAW. COMM. FOR C.R. (Aug. 20, 2024), https://www.clccrul.org/blog/debunking-misconceptions-about-reparations [https://perma.cc/H66R-472A] (describing reparations as "recently re-popularized idea"); Danielle Kurtzleben, *2020 Democrats Wrestle with a Big Question: What Are Reparations?*, NPR (Mar. 1, 2019), https://www.npr.org/2019/03/01/698916063/2020-democrats-wrestle-with-a-big-question-what-are-reparations [https://perma.cc/RNK5-95NH] (listing several presidential candidates who have expressed some support for reparations for African Americans).

211 *Id.*

212 Char Adams, *Evanston Is the First U.S. City to Issue Slavery Reparations. Experts Say It's a Noble Start.*, NBC NEWS (Mar. 26, 2021), https://www.nbcnews.com/news/nbcblk/evanston-s-reparations-plan-noble-start-complicated-process-experts-say-n1262096 [https://perma.cc/D6YK-TSDZ].

213 Tim Arango, *Can Reparations Bring Black Residents Back to San Francisco?*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/us/san-francisco-reparations.html [https://perma.cc/WZF8-85QZ].

214 Curtis Bunn, *Reparations Gained Historic Momentum in 2023 Because of California's Efforts*, NBC NEWS (Dec. 26, 2023), https://www.nbcnews.com/news/nbcblk/reparations-momentum-2023-california-rcna127949 [https://perma.cc/3EUK-YRLV].

215 *Id.*

216 *See id.*; *see also* Beach, *supra* note 161, at 1731–33 (describing reparations efforts by state legislatures in California, New York, and Illinois).

current racial inequities like policing. As noted earlier, framing reparations solely as atonement for slavery had routinely served to invoke at best a shoulder shrug in the mainstream. After languishing as a marginalized concept, reparations now garner serious attention. That said, opposition certainly persists, as seen in a 2022 Pew poll where only 18% of white respondents supported reparations compared to 77% of Black adults.[217] Though still contentious, slavery-focused reparations now show viability after long being considered a radical non-starter. This mainstreaming represents a dramatic pendulum swing, as discussions once confined to Black communities now occupy the national stage. It suggests that expanding conceptual frameworks beyond slavery alone could further advance the cause. If reparations for slavery now gain traction, support may grow for redressing modern manifestations of racism.

### *D. Why Local Governments?*

The current landscape demonstrates local governments may be the most suitable governmental bodies to implement reparations programs.[218] This localized remedial approach is especially compelling when addressing police violence, given that cities and counties have a monopoly on the state's police power.[219] The Supreme Court held in *Gonzales v. Oregon* that federalism grants States broad latitude in exercising their police powers to protect citizens' lives, health, and well-being.[220] These powers are typically carried out by local police departments. When emergencies occur, the first responders are usually local cops rather than state employees from distant places.[221] This means that for law enforcement purposes, "[l]ocal government provides the sphere of regulation that is often closest to us in our daily lives."[222] While comprehensive data on police violence is limited,[223]

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217 Carrie Blazina & Kiana Cox, *Black and White Americans Are Far Apart in Their Views of Reparations for Slavery*, PEW RSCH. CTR. (Nov. 28, 2022), https://www.pewresearch.org/short-reads/2022/11/28/black-and-white-americans-are-far-apart-in-their-views-of-reparations-for-slavery [https://perma.cc/M27J-VB5A].

218 *See, e.g.*, Beach, *supra* note 161, at 1719 ("Local governments have an advantage over other potential reparatory venues for three normative reasons: community engagement, experimentation, and responsiveness.").

219 *See* Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1780 (1989) (discussing the moral obligation that arises from the monopoly power local governments exert over many public service violations under § 1983).

220 546 U.S. 243, 270 (2006).

221 *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 457 (2016) (emphasizing how critical local governments are in responding to emergencies).

222 *Id.* at 418.

223 *See, e.g.*, Gretchen Frazee, *Deadly Police Shootings Keep Happening. Data Could Be a Missing Piece*, PBS (Oct. 16, 2019), https://www.pbs.org/newshour/nation/deadly-police-shootings-keep-happening-data-could-be-a-missing-piece [https://perma.cc/43CJ-573A]

making it difficult to compare the frequency of Fourth Amendment violations by local, state, and federal officers, it is logical to assume that local police, due to their proximity to communities, are most likely to be involved in incidents harming civilians. Therefore, it makes sense to prioritize efforts that push local governments to make amends.

Another explanation for pursuing local government reparations is the greater political appetite at the municipal level compared to statewide or federally.[224] Events on the ground reflect this. For nearly 30 years, the late Democratic Representative John Conyers introduced H.R. 40, a federal reparations bill proposing to *study* reparations.[225] Despite its modest scope, the bill never came to a vote.[226] In contrast, localities like Evanston, Illinois[227] and Asheville, North Carolina[228] have enacted reparation programs. So too has Chicago, for police violence specifically.[229]

Chicago's reparations program is a response to decades of police brutality, specifically the torture of hundreds of people, mostly Black men, under former Chicago Police Department commander Jon Burge.[230] Directly impacted people and their allies demanded reparations, seeking amends for "the longstanding anti-Black racism in Chicago's policing."[231] They framed the demands for "reparations" to link "racialized police violence in the twentieth century to the histories of slavery, Jim Crow, residential segregation, and policing targeted at Black neighborhoods."[232] The landmark Chicago reparations ordinance established a holistic model for addressing police abuses, combining financial, educational, and symbolic initiatives.

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(discussing how the lack of a federal mandate for police departments to document lethal encounters leads to a gap in the ability to identify measures to reduce such encounters).

224 *See* Simone, *supra* note 41, at 350 (noting that "there is a political will for reparations present in municipalities that is absent at the gridlocked state and federal level").

225 Kaur, *supra* note 207 (writing that "[f]ormer Democratic Rep. John Conyers first introduced HR 40 in 1989 to create a commission to study reparations. He would do so repeatedly until he left office in 2017. Texas Democratic Rep. Sheila Jackson Lee has since taken up the HR 40 baton.").

226 *Id.*

227 *See, e.g.*, Michela Moscufo, *House Repairs, a Car, Grandkids: Where Evanston's Reparations Payments Are Going*, NBC NEWS (Dec. 23, 2024), https://www.nbcnews.com/news/nbcblk/reparations-evanston-il-transforming-lives-black-residents-rcna173534 [https://perma.cc/6A6D-6AZE] (discussing how payments were used in the country's first reparations program).

228 *See* Neil Vigdor, *North Carolina City Approves Reparations for Black Residents*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/us/reparations-asheville-nc.html [https://perma.cc/B6PL-WYNL].

229 Peter C. Baker, *In Chicago, Reparations Aren't Just an Idea. They're the Law*, THE GUARDIAN (Mar. 8, 2019), https://www.theguardian.com/news/2019/mar/08/chicago-reparations-won-police-torture-school-curriculum [https://perma.cc/VX33-EBYA].

230 *See id.* (detailing Jon Burge's termination by the Chicago Police Department in 1933 due to his involvement with the systemic torture of 118 Chicagoans).

231 Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 FORDHAM URB. L.J. 721, 740 (2021) (quotation omitted).

232 Simonson, *supra* note 35, at 83.

The legislation provided $5.5 million to survivors while guaranteeing "free access to the city's colleges for survivors and their family members, the creation of a public memorial, a mandatory curriculum on the subject in Chicago Public Schools, a formal apology, and the establishment of a justice center on Chicago's South Side dedicated to addressing the effects of torture."[233] While rare, this case demonstrates that local governments can deliver reparative justice—particularly for police violence, where municipalities exercise direct control. Progress at the local level contrasts sharply with the lack of movement at higher levels of government, suggesting that municipalities may be more responsive to calls for reparative justice.

## III
## LOCAL GOVERNMENT REPARATIONS

While slavery-focused reparations efforts are breaking new ground, framing reparations more expansively as the Chicago Police Department torture cases did could further advance the issue. Police violence and other present-day injustices show that the need for reparative justice is ongoing, not just historical. This Part urges for the expansion of Section 1983's remedial framework to incorporate modern equity demands. Part III.A draws from the work of Professor William Eskridge to show why Section 1983 is particularly well-suited to provide remedies that provide communal redress for victims of police violence. Part III.B covers municipal liability standards as currently applied. Part III.C makes the case for local government reparations in the form of a city paying reparative damages in excessive force cases.

### *A. Section 1983, An Evolutive Perspective for Reparations*

Legal scholars criticize the Supreme Court's interpretation of Section 1983 as fundamentally disconnected from both the statute's plain text and its Reconstruction-era legislative history.[234] Through a series of doctrinal innovations, the Court has systematically weakened the statute's remedial power. Most notably, it created the qualified immunity doctrine,[235] despite

233 *See* Elizabeth J. Davies, Jenn M. Jackson & David J. Knight, *Limited Scopes of Repair: Black Reparations Strategies and the Constraints of Local Redress Policy*, 10 RUSSELL SAGE FOUND. J. SOC. SCI. 162, 165 (2024) (exhibiting the plethora of ways reparations can be administered).

234 *See, e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 234–38 (2023) (arguing qualified immunity lacks historical foundation in nineteenth-century common law).

235 *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (establishing good-faith immunity for police officers); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (formalizing qualified immunity doctrine).

no such limitation appearing in the statutory text.[236] The Court has also restricted municipal liability to cases where plaintiffs can demonstrate that rights violations resulted from official "policy or custom," rather than allowing respondeat superior liability.[237] It has also read into Section 1983 a rigid causation standard.[238] And damages must be narrowly tailored to the plaintiff's own injury.[239] These judicial constraints are at odds with the Reconstruction Congress's explicit intent to use Section 1983 as a tool to combat widespread abuses like police brutality and racial terror[240]—concerns that demanded, and textual language that permitted, broad remedial flexibility.[241] This interpretation would allow courts to order reparative damages that acknowledge the full scope of police violence, including harms to indirect victims not before the court.

This interpretative approach finds strong theoretical support in Professor William Eskridge's view on statutory interpretation. Central to Eskridge's view is that enduring statutes (like Section 1983) must be construed as living instruments capable of addressing contemporary injustices.[242] He critiques the Court's Section 1983 jurisprudence for its rigid formalism that ignores "current problems and circumstances."[243] He observes a striking apparent incongruity: While federal judges interpreting the Constitution routinely consider its "text, . . . historical background, . . .

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236 *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36 (1989) (explaining that nothing in the language or legislative history of Section 1983 supports the Court's qualified immunity doctrine).

237 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) (rejecting respondeat superior liability for municipalities). Respondeat superior "is the liability of an employer ('master') for the tort of an employee ('servant') who was acting in the scope of the employment. As a general rule, one who engages an independent contractor, rather than an employee, is not subject to vicarious liability for the contractor's torts." *See also* DAVID W. ROBERTSON,WILLIAM POWERS, JR., DAVID A. ANDERSON & GUY WELLBORN III, CASES AND MATERIALS ON TORTS 337 (5th ed. 2017).

238 *See, e.g.*, Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983*, 26 CARDOZO L. REV. 9, 24 (2004) ("Local governments are not immune but can only be held liable under the Supreme Court's 'municipal liability' test, a strict standard of causation and culpability under which vicarious liability is not allowed.").

239 *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (limiting damages to "actual injuries").

240 *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 402–07 (S.D. Miss. 2020) (recounting the historical context of Section 1983's passage in response to widespread racial violence).

241 *See* Jacob Harcar, *The Original Meaning of Section 1983 and Official Immunity*, 73 U. KAN. L. REV. 357, 360–62 (2024) ("As a matter of both original intent and original public meaning, § 1983 most likely abrogated all common law immunity defenses for all state actors." In fact, "[s]ome have argued that the plain meaning of the text alone is enough to conclude that common law immunities were abrogated. In general, broader legal principles . . . can operate as default rules.").

242 *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482 (1987) (arguing that intentionalist and originalist styles of interpretation fail to meet changing circumstances).

243 *Id.*

subsequent interpretational history, related constitutional developments, and *current societal facts*,"[244] statutory interpretation is constrained to text and historical context.[245] Eskridge urges that "statutes, like the Constitution and the common law, should be interpreted dynamically."[246] This means that "when the statute is old yet still the source of litigation,"[247] like Section 1983, judges should also apply an "evolutive perspective"[248] that takes into account current demands of equity. Applying this evolutive perspective to Section 1983 supports the availability of reparations in suits against cities.

Before the Black Lives Matter (BLM) movement emerged in 2013,[249] responses to police violence were mainly about "reforming" policing. After Los Angeles Police Department (LAPD) cops brutalized Rodney King in 1991, Congress authorized the DOJ to issue consent decrees to address systemic abuses in police departments.[250] These binding agreements aimed to improve everything from use-of-force policies to officer training.[251] The idea was that these changes would make communities safer.

However, BLM has shifted the focus to the victims themselves. Now, cities are more likely to settle police brutality cases with large payouts, even before lawsuits are filed. Examples include settlements for Laquan McDonald (2015, $5 million),[252] Eric Garner (2015, $5.9 million),[253] Freddie Gray (2015, $6.4 million),[254] and Walter Scott (2015, $6.5 million).[255] These civil rights settlements were uncommon before BLM.[256] Local government's willingness today to settle rather than litigate, even when immunity doctrines have largely insulated them from liability suggests an internalization of the current moment's moral call about the importance of remedying police

244 *Id.* at 1479 (emphasis added).

245 *Id.*

246 *Id.* at 1481.

247 *Id.* at 1554.

248 *Id.* at 1483.

249 *See* Zackary O. Dunivin et al., *Black Lives Matter Protests Shift Public Discourse*, PNAS (Mar. 3, 2022), https://www.pnas.org/doi/10.1073/pnas.2117320119 [https://perma.cc/G2VY-E2PB] (exhibiting how BLM protests collectively shift public discourse).

250 *See* Shaila Dewan, *Consent Decrees Force Changes to Policing. But Do Reforms Last?*, N.Y. TIMES (June 17, 2023), https://www.nytimes.com/2023/06/17/us/consent-decrees-police-reform.html [https://perma.cc/9FJY-88SB] (discussing the shortcomings of a soup-to-nuts approach to address systemic policing issues).

251 *Id.*

252 Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, UTAH L. REV. 648–51 (2018).

253 *Id.* at 645–48.

254 *Id.* at 651–52.

255 *Id.* at 652–53.

256 *See id.* at 643–45 (discussing recent instances of police brutality where the city reached settlements with victims' families before lawsuits were filed). Notably, Macfarlane describes the development as "new," and the cases all occurred within the past decade or so, showing that the timeframe aligns with the rise of the Black Lives Matter movement. *See id.*

violence. Rethinking our current Section 1983 damages scheme is a natural fit in the changing political and social economy. If we apply Section 1983's history and text to present-day circumstances, it points in the direction of expanding the remedial scheme to be more victim-centered, such as by accounting for harms to communities impacted by police violence. As Professor John Jeffries has written, "the award of money damages to redress constitutional violations" permits judges to be creative in their approach.[257] Reparations acknowledge the shift in our society to respond to police abuses by remedying harms, not just to direct victims of police violence, but also to those who are vicariously marginalized. Before getting to the specifics of the proposal, it is important to first establish how cities can be found liable under Section 1983.

### *B. Standard for Municipal Liability*

42 U.S.C. § 1983 applies to "[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws."[258] Enacted as part of the Civil Rights Act of 1871, the Reconstruction lawmakers passed the statute to address state-backed Ku Klux Klan violence against the formerly enslaved.[259] Echoing a common sentiment, one drafter lamented that, "[s]heriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices."[260] Congress thus resolved "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law . . . ."[261]

#### *1. Rejection of Vicarious Liability*

Section 1983, despite its lofty intentions, lapsed into desuetude shortly after its passage because the Supreme Court narrowly interpreted its application to only state-authorized actions.[262] *Monroe v. Pape* later breathed new life into the statute by extending its coverage to include unauthorized

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257 John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 243 (2013).

258 42 U.S.C. § 1983.

259 *See, e.g.*, Ndjuoh MehChu, *"Specializing" Section 1983*, 14 U.C. IRVINE L. REV. 571, 597 (2024) (discussing Section 1983's purpose).

260 CONG. GLOBE, 42d Cong., 1st Sess. App. 78 (1871) (Rep. Perry).

261 Mitchum v. Foster, 407 U.S. 225, 242 (1972).

262 *See* Richard Briffault, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1160–61 (1977) ("The effect of such a narrow judicial construction of state action . . . on [S]ection 1983 was devastating. Despite continuing infringement of the civil liberties of the freedmen and their descendants, virtually no actions were brought under the statute.").

official conduct.[263] However, *Monroe* also determined that municipalities fell outside Section 1983's definition of "persons," thus immunizing them from liability.[264] This interpretation would not last long. In *Monell v. Department of Social Services*, decided just seventeen years later, the Court revisited the statute's legislative history and reversed course.[265] *Monell* established that municipalities could indeed face Section 1983 liability for constitutional violations.[266] There was an important caveat, though: Liability could not stem from merely employing an offending official.[267] Through its interpretation of the phrase "cause[s] to be subjected," the Court explicitly rejected vicarious liability under the statute.[268] This means that it is insufficient for plaintiffs to show that a rank-and-file cop employed by the defendant municipality violated their rights. Rather, they must establish that the municipality's own "policy or custom" caused the violation.[269]

### *2. Standard for Culpability and Causation*

Plaintiffs seeking to establish the required municipal policy or custom may pursue four distinct paths.[270] They might (1) identify an explicit municipal law or policy whose implementation violated their federal rights;[271] (2) demonstrate that a final policymaker's direct decision caused their injury;[272] (3) establish the existence of an informal yet deeply entrenched practice functioning essentially as law;[273] or (4) assert municipal negligence through inadequate training, screening, supervision, or employee oversight.[274]

For claims based on municipal inaction, the Supreme Court has imposed exceptionally demanding standards regarding culpability and

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263 Monroe v. Pape, 365 U.S. 167, 187 (1961).

264 *Id.* at 187–92 (excluding cities from definition of "persons" under §1983).

265 436 U.S. 658, 665 (1978).

266 *Id.* at 691.

267 *See, e.g.*, Eisenberg, *supra* note 43, at 516 (explaining how the Supreme Court's decisions in *Monroe* and *Monell* established that municipalities cannot be held liable under Section 1983 simply because their employees commit constitutional violation).

268 *Monell*, 436 U.S. at 691–92 (rejecting respondeat superior liability for cities).

269 *Id.* at 694.

270 *See* Connick v. Thompson, 563 U.S. 51, 60–62 (2011) (delineating ways to show municipal policy or custom).

271 *Id.* at 61.

272 *Id.*; *see also* Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1996).

273 City of Canton v. Harris, 489 U.S. 378, 380 (1989); *Connick*, 563 U.S. at 61–62.

274 *See, e.g.*, Bd. of Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 407–08 (1997) (explaining that inadequate training could form the basis for § 1983 liability where a plaintiff could show "the existence of a pattern of tortious conduct by inadequately trained employees . . . rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident").

causation.[275] *Board of Commissioners of Bryan County v. Brown* articulated this high threshold, requiring plaintiffs to demonstrate both that "municipal action was taken with the requisite degree of culpability" and establish "a direct causal link between the municipal action and the deprivation of federal rights."[276] Meeting the culpability standard requires evidence of deliberate indifference toward known or obvious risks,[277] while the causation requirement demands proof that such inaction served as the "moving force" behind the constitutional violation.[278] Given that plaintiffs can almost invariably identify preventative measures a city "could have done," federal appellate courts have required a showing of proximate cause to satisfy the "moving force" standard.[279]

The practical reality of these stringent requirements creates a paradoxical situation: While municipalities uniquely lack immunity protections among Section 1983 defendants,[280] these demanding liability standards function as de facto absolute immunity, with successful claims proving exceedingly rare.[281] Even when plaintiffs navigate these formidable obstacles, their recovery typically remains limited to compensatory damages,[282] as municipalities—unlike other Section 1983 defendants—enjoy exemption from punitive damages.[283] This combination of functionally immunizing standards and punitive damages exclusion effectively leaves

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275 *Connick*, 563 U.S. at 61, 70; *Brown*, 520 U.S. at 404, 410.

276 *Brown*, 520 U.S. at 404.

277 *Harris*, 489 U.S. at 390; *see also Brown*, 520 U.S. at 411 ("A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.").

278 *Harris*, 489 U.S. at 389 (alteration in original) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694).

279 *See, e.g.*, Cash v. Cnty. of Erie, 654 F.3d 324, 342 (2d Cir. 2011) (equating "moving force" with proximate cause); Smith v. District of Columbia, 413 F.3d 86, 102 (D.C. Cir. 2005) ("We have equated moving force with proximate cause. Proximate cause 'includes the notion of cause in fact,' and requires an element of foreseeability." (citations omitted)).

280 Owen v. City of Indep., 445 U.S. 622, 638 ("We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.").

281 *See* Smith, *supra* note 221, at 438. ("[a]bandoning or diluting the [stringent] deliberate indifference standard" would ultimately "'diminsh[] the autonomy of state and local governments.'" (quoting Connick v. Thompson, 563 U.S. 51, 74 (2011) (Scalia, J., concurring))).

282 Nominal damages are also sometimes available. For a definition of nominal damages, see, for example, Megan E. Cambre, *A Single Symbolic Dollar: How Nominal Damages Can Keep Lawsuits Alive*, 52 GA. L. REV. 933, 936 (2018) ("Nominal damages, by their nature, are minimal amounts awarded as monetary damages. Generally, one dollar is awarded, although higher amounts have been classified as . . . nominal . . . ."); *see id.* ("Courts award nominal damages on two occasions: (1) as 'damages recoverable where a legal right is to be vindicated against an invasion that has produced no actual, present loss of any kind' and (2) as damages awarded 'when actual loss or injury is shown,'" but the magnitude of damages was not proven. (citations omitted)).

283 *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that both the history of municipal immunity and public policy considerations require immunity from punitive damages for municipalities).

victims without meaningful remedies when municipalities violate their constitutional rights. A long-overdue correction to this imbalance would involve expanding municipal damages liability.

### *C. Reparations for Police Violence*

#### *1. How Would Damages be Assessed?*

When a city is found liable for excessive force, the proposed framework would allow courts to evaluate broader departmental conduct at the damages stage, either *sua sponte* or at the individual plaintiff's request. This assessment would examine: (1) the police department's overall budget; (2) evidence of historically troubling or abusive departmental practices; (3) the number of excessive force suits filed against the department each year; (4) whether the police department has been subject to a consent decree; and (5) if applicable, the department's compliance with decree requirements.

Inquiring into the department's budget is an effort to calibrate the impact of large police payouts on cities' local governance because cities, not law enforcement agencies, often foot the bill[284] and financial shocks could strain service provisions. The remaining factors help quantify the department's cumulative community impact. When a department demonstrates a troubling history, faces numerous constitutional claims, operates under consent decrees, and shows minimal reform progress, courts could reasonably conclude it imposes systemic harm on the community it is supposed to serve, warranting reparative damages.

These criteria admittedly require refinement. For example, what makes a police department's history "particularly troubling"? Some examples might readily come to mind: Think of the Chicago Police Department and the torture cases,[285] the killing of Laquan McDonald[286] and Rekia Boyd;[287] or Los Angeles Police Department and Rodney King,[288] and the chokehold

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284 *See infra* notes 354–56 and accompanying text (discussing how indemnification of individual officers and agencies leaves cities to pay damages claims).

285 *See* Sam Roberts, *Jon Burge, 70, Ex-Commander in Chicago Police Torture Cases, Dies*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/obituaries/jon-burge-dead.html [https://perma.cc/7Q8A-ZABS] (discussing the death of disgraced Chicago police commander Jon Burge and examining how his regime of torturing suspects throughout the 1970s-1990s persists as a defining example of Chicago's troubled policing history and abuse of authority).

286 *See* Ray Sanchez & Omar Jimenez, *16 Police Officers Participated in an Elaborate Cover-up after Laquan McDonald's Death, Report Alleges*, CNN (Oct. 10, 2019), https://www.cnn.com/2019/10/10/us/chicago-inspector-general-laquan-mcdonald-shooting/index.html [https://perma.cc/X48G-KAM9] (detailing the 2014 fatal police shooting of McDonald, a 17-year-old, at the hands of Chicago police).

287 *See* Ray Sanchez, *Chicago Officer Who Shot Rekia Boyd Resigns*, CNN (May 18, 2016), https://www.cnn.com/2016/05/18/us/rekia-boyd-shooting-officer-resigns/index.html [https://perma.cc/H4YB-4HST] (discussing the police killing of Boyd in a park near her home).

288 *See* Anjuli Sastry Krbechek & Karen Grigsby Bates, *When LA Erupted in Anger: A Look*

policies of the 1970s and 1980s;[289] or New York Police Department's long list of high-profile killings of unarmed, primarily Black and Brown civilians and NYPD's high profile racist practices, e.g., stop and frisk.[290] Baltimore, Cleveland, Minneapolis, and other cities might also come to mind as having a "particularly troubling" history.[291] In some respects, it makes sense to use the visibility of the abuses as a proxy for particularly troubling police practices. After all, it is typically police killings and brutal beatings—those that might be termed the worst excesses—that capture national headlines. But perhaps the "invisible" abuses—those that typically go undetected or without media scrutiny—are more troubling precisely *because* they are overlooked as forms of violence. Police sexual violence falls into this category, as they do not draw the ire of public condemnation although they exact a significant toll on victims.[292] In the end, this discussion should make clear that these guideposts are imperfect. They should be understood as a framework for beginning conversation about what shape the design might look like.

### *2. Who Would be Compensated?*

Courts awarding reparative relief would look beyond the direct victim, i.e., the plaintiff before the court, and consider broader interests when determining the amount. Factors detached from the specific plaintiff already inform some civil damages calculations. This is the case with punitive damages. Take New York's Pattern Jury Instructions as an example, which provides in part:

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*Back at the Rodney King Riots*, NPR (Apr. 26, 2017), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots [https://perma.cc/3SKT-26H3] (reflecting on the 25-year anniversary of the beating of Rodney King by Los Angeles police).

289 *See* City of Los Angeles v. Lyons, 461 U.S. 95, 115–16 & n.3 (1983) (Marshall, J., dissenting) (describing LAPD's practice of using deadly chokeholds, primary on Black civilians).

290 *See* Lisa Rozner & Alice Gainer, *Independent Monitor Report Says Too Many People Are Stopped, Frisked, and Searched Unlawfully by Some NYPD Neighborhood Safety Teams*, CBS NEWS (June 5, 2023) https://www.cbsnews.com/newyork/news/independent-monitor-report-says-too-many-people-are-stopped-frisked-and-searched-unlawfully-by-some-nypd-neighborhood-safety-teams [https://perma.cc/37B3-YVBY] ("Among the findings [of a 2023 report on NYPD's Neighborhood Safety Teams]: 97% of people stopped are Black or Hispanic. Additionally, officers are failing to show reasonable suspicion to conduct 1 out of every 4 stops.").

291 Baltimore, Cleveland, and Minneapolis have drawn national scrutiny over the past decade due to high-profile incidents of police killings and excessive force. The deaths of Freddie Gray, Tamir Rice, and George Floyd in these cities, respectively, ignited widespread protests and discussions about police accountability and reform. Consequently, these cities are likely to be associated with problematic law enforcement records. For more details on the above-referenced police killings, see *A Look at Big Settlements in US Police Killings*, ASSOCIATED PRESS (March 12, 2021), https://apnews.com/article/shootings-police-trials-lawsuits-police-brutality-2380f38268a504ae689ad5b64b5de2e7 [https://perma.cc/WBK4-X97R].

292 MehChu, *supra* note 38, at 917.

> In arriving at your decision as to the amount of punitive damages you should consider the nature and reprehensibility of what [the defendant] did. That would include the character of the wrongdoing, [based on factors such as the following, where applicable]: whether [the defendant's] conduct demonstrated an indifference to, or reckless disregard of, the health, safety or rights of others, whether the act(s) (was, were) done with an improper motive or vindictiveness, whether the act or acts constituted outrageous or oppressive intentional misconduct, how long the conduct went on, [the defendant's] awareness of what harm the conduct caused or was likely to cause, any concealment or covering up of the wrongdoing, how often [the defendant] had committed similar acts of this type in the past and the actual and potential harm created by [the defendant's] conduct . . . .[293]

While punitive damages typically go to the plaintiff, "[s]ome states have enacted statutes mandating that a certain percentage of any punitive damage award be taken from the plaintiff and contributed to the state's treasury, presumably to be allocated for the public good."[294] For instance, Georgia pockets 75 percent of all punitive awards in the state.[295] So courts already redirect some civil damages to non-plaintiffs. A response might be that the punitive damages analogy is inapposite here because punitive damages against cities are prohibited in Section 1983 cases. But this limitation can be overcome if courts interpret Section 1983 dynamically as they are apt to do when other centuries-old statutes are concerned.[296]

a. Damages Allocation

Instead of direct payments to individual plaintiffs, court-awarded damages for collective harms would be directed to a "reparative community fund (RCF)," a structure that would operate as a hybrid of Victims Compensation Funds (VCFs) and cy pres remedies. VCFs "aim to aid victims and their families in recovering from both the trauma and expense of violent crime."[297] Unlike "civil lawsuits against police, Victims Compensation Funds are financed by offender fines and fees, and by the federal Victims of Crime Act, rather than taxpayers."[298] Every state operates a VCF to assist crime victims and their dependents by providing

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293 GOLDBERG ET AL., *supra* note 60, at 613 (quoting NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (ASS'N OF JUSTS. OF THE SUP. CT. OF THE STATE OF N.Y., COMM. ON PATTERN JURY INSTRUCTIONS 2020)).

294 *Id.* at 617.

295 *See* GA. CODE ANN. § 51-12-5.1(e)(2) (2025) ("Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, . . . shall be paid into the treasury of the state . . . .").

296 *See* discussion *supra* Section III.A (discussing courts' inconsistent willingness to interpret long-enacted laws in a manner that meets modern societal challenges).

297 Beety, *supra* note 49, at 52.

298 *Id.* at 53.

compensation to allay the costs of things like funeral expenses and mental health treatment.[299] However, when cops victimize civilians, criteria requiring that victims cooperate with police and establish their "innocence" function to exclude them from VCF relief,[300] particularly Black and brown people who police see as inherently criminal.[301] Reparative damages could be used to fund a civil VCF to support police violence victims who seldom get relief – affording mental, emotional, or material assistance for communal healing.

A relatively recent innovation in litigation,[302] cy pres relief directs unclaimed class action settlements to charities that "benefit people like the class members, or serve some interest related to the theory of the class action, or sometimes, just do some unrelated public good chosen by class counsel or even defendant."[303] In *Powell v. Georgia-Pacific Corp.*,[304] unclaimed funds from a Black worker discrimination suit established scholarships for Black students in the relevant counties, managed by the defendant for a decade, with remaining funds going to the United Negro College Fund.[305] The basic idea behind cy pres distribution is that benefiting individuals similarly situated to plaintiffs, though not parties to the litigation, can constitute a meaningful and appropriate remedial objective. While RCFs would not originate from class action suits, they share cy pres' distributive logic of channeling resources towards the impacted community when individual compensation proves inadequate or impractical. By funding community-based healing initiatives, RCFs would embrace the logic of cy pres distributions to acknowledge and address the communal dimensions of police violence.

Putting a dollar amount on these collective harms presents challenges, but similarly difficult and inexact calculations are routine in litigation. American courts consistently address this complexity by compensating the victims of slanderous utterances, abusive tactics by bill collectors, mis-delivery of notice of death, interferences with burials, invasions of privacy, and innumerable other acts causing mental distress but no visible physical injury. A cap on awards could also be incorporated if payouts prove

299 *See id.* at 52. ("[C]rime victim compensation programs exist in every state, the District of Columbia, and U.S. territories.").

300 *Id.* at 53.

301 MehChu, *supra* note 38, at 903.

302 *See* Redish et al., *supra* note 50, at 630 (explaining the historical development of cy pres remedies and noting that the amendment of Federal Rule of Civil Procedure facilitated its adoption as an adversarial remedy).

303 DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1050 (5th ed. 2019).

304 119 F.3d 703 (8th Cir. 1997).

305 *Id.* at 705–06.

unsustainable.[306] The solution is not to dismiss the attempt as futile but to develop thoughtful methodologies drawing on best practices for quantifying intangible harms.

b. Eligibility Criteria

Vicariously marginalized police violence victims in that locality could thereafter apply to the reparative community fund for compensation. Self-certification would enable anyone who could credibly establish that they were indirectly harmed by police violence to receive compensation. There might be concerns about false claims, but there are ways to address them. As Boris Bittker observed, tax filings provide an analogy for balancing accessibility and credibility concerns: "[T]he administration of the federal income tax . . . commences with the taxpayer's own statement of his income and deductions. The return is provisionally accepted as accurate, but when it is audited by the Internal Revenue Service, the taxpayer has the burden of proving the propriety of all challenged entries."[307] Similarly, an RCF could employ conditional self-certification – claims premised on trust, with audits if applications raised red flags. The "procedure could be protected against abuse by penalizing false claims."[308] This balances access while protecting against fraud.

Still, without more formal eligibility rules, it may be administratively impractical to permit anyone in a particular locality who claims to have been indirectly harmed by police to pursue reparations for police violence. Despite these challenges, it would not be unprecedented to redress such vast harms. Consider Germany's varied forms of reparations payments to Jewish Nazi victims—to Israel for resettling refugees, to Jewish organizations aiding survivors globally, and to individuals directly.[309] Verifying individual claims required processing hundreds of thousands of applications worldwide relying on scraps of evidence like letters from those perished in camps, Gestapo logs, or neighbors' fading memories.[310] Although the monumental task of affirming eligibility and compensating a dispersed, traumatized population is within the range of possibility, formal criteria for who is eligible might well be desirable to streamline the process.

Eligibility guidelines might be modeled after tort law's *Dillon* factors, which set "'guidelines' to help lower courts determine when bystanders may recover for negligence causing emotional distress."[311] In *Dillon v. Legg*, Margery Dillon witnessed her four-year-old daughter Erin being fatally

306 Smith, *supra* note 221, at 482.
307 BITTKER, *supra* note 42, at 96.
308 *Id.*
309 *Id.* at 78.
310 *Id.* at 92.
311 GOLDBERG ET AL., *supra* note 60, at 860.

struck by David Legg's negligent driving as Erin crossed their residential street.[312] Margery sued Legg for negligence in three capacities, including for wrongfully inflicting emotional distress on her. [313] The court found that Margery's trauma was reasonably foreseeable given three "proximity" factors: (1) Plaintiff was physically near the accident scene; (2) Plaintiff contemporaneously observed the accident; (3) and Plaintiff was closely related to the victim.[314]

With all three factors present, Margery's emotional distress was treated as a foreseeable result of Legg's negligence. Given this foreseeability, recognizing Margery's claim raised no 'floodgates' concerns about limitless liability. A similar framework could be used to establish eligibility for reparations payments from the VCF.

Consider, in this context, the police killing of Philando Castille. In 2016, officer Jeronimo Yanez shot and killed Castile during a routine traffic stop in Minnesota.[315] Diamond Reynolds, Castille's girlfriend, was in the passenger seat and recorded the aftermath of the video, which helped to launch the tragic episode to the national spotlight. Also present at the time of the shooting was Castille's four-year-old daughter who was in the back seat of the car. Neither was physically harmed, though they unsurprisingly experienced emotional distress for which they sued the city seeking redress.[316] Their claims, including for false arrest, were ultimately settled for $800,000,[317] an agreement the mayor of St. Anthony described as "open[ing] the door for continued healing with our community."[318] With reparative damages, Diamond would not have to subject herself to the contentious and grinding litigation process for recourse. Being present at the time of the injury and having a close connection to the victim, Diamond could instead file a claim with the hypothetical VCF to get "[their] lives back and move forward."[319] The *Dillon* factors offer a model for crafting eligibility guidelines tailored to communities' shared trauma from police violence. This limits boundless liability while capturing the reverberating impacts on those foreseeably affected.

Although the *Dillon* factors would help to provide some internal coherence to defining eligible claimants for reparations, it would also

312 441 P.2d 912, 914–15 (Cal. 1968).

313 *Id.*

314 GOLDBERG ET AL., *supra* note 60, at 848.

315 Mitch Smith, *Philando Castile's Girlfriend, Diamond Reynolds, Reaches $800,000 Settlement*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/us/philando-castile-diamond-reynolds-settlement.html [https://perma.cc/ZVH9-GXB5].

316 *Id.*

317 *Id.*

318 *Id.*

319 *Id.*

produce inequitable results. For example, if the factors were mechanically applied, it would do nothing to materially uplift Darnella Frazier. After filming Derek Chauvin apply a "blood choke" that killed George Floyd,[320] Darnella, then-seventeen-years-old, experienced trauma so severe her "mom had to rock [her] to sleep." [321] A GoFundMe was created to support her healing,[322] but not all bystanders to police violence will gain national attention and have access to such fundraising. That's why formal channels are needed to support victims of police violence, even those who haven't had direct harmful contact with police. This would ensure broader and more reliable access to help, reducing dependence on random acts of public generosity.

Along the same lines, a rigid application of the *Dillon* factors would do nothing for Erica Garner who did not witness her father's murder. Erica Garner was the daughter of Eric Garner, an unarmed Black man who was killed by an NYPD officer after the cop placed him in a chokehold to stop his selling untaxed cigarettes.[323] "I felt the same pain that my father felt on that day when he was screaming, 'I can't breathe,'" Erica recounted.[324] Motivated by her personal loss and a desire to raise awareness for police violence, she became a prominent voice pushing for systemic change. Three years after her father's death, Erica suffered a fatal heart attack.[325] "The physiological and psychological effects of battling [police violence] and racism [became] a part of the conversation around" her untimely death, aged 27.[326] She was cognizant of the toll of her plight, as are

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320 Kim Hyatt, *Citing Emotional Distress, George Floyd Bystander Sues Minneapolis for Officers' Actions*, MINN. STAR TRIB. (May 17, 2023), https://www.startribune.com/citing-emotional-distress-george-floyd-bystander-sues-city-of-minneapolis-officers-chauvin-thao/600275605 [https://perma.cc/56PN-DU9Y].

321 Joe Hernandez, *Read This Powerful Statement From Darnella Frazier, Who Filmed George Floyd's Murder*, NPR (May 26, 2021), https://www.npr.org/2021/05/26/1000475344/read-this-powerful-statement-from-darnella-frazier-who-filmed-george-floyds-murd [https://perma.cc/7NV9-HRJG].

322 GOFUNDME, *The OFFICIAL Peace and Healing for Darnella Fund*, https://www.gofundme.com/f/peace-and-healing-for-darnella?pc=fb_social&utm_source=facebook&utm_medium=social&utm_campaign=bcgfm_fb_fund_peace-and-healing-for-darnella [https://perma.cc/V2RY-UE2E].

323 Vivian Wang, *Erica Garner, Activist and Daughter of Eric Garner, Dies at 27*, N.Y. TIMES (Dec. 30, 2017), https://www.nytimes.com/2017/12/30/nyregion/erica-garner-dead.html [https://perma.cc/9KKQ-BHCC].

324 Jeffery C. Mays, *Mourning Erica Garner: 'When Her Father Died, an Activist Was Born'*, N.Y. TIMES (Jan. 8, 2018), https://www.nytimes.com/2018/01/08/nyregion/erica-garner-funeral-black-lives-matter.html [https://perma.cc/K6QK-J97T].

325 *Id.*

326 *Id.*; *see also* Eljeer Hawkins, *Erica Garner: A Valiant Fighter Against Law Enforcement Violence*, SOCIALIST ALT. (Jan. 5, 2018), https://www.socialistalternative.org/2018/01/05/erica-garner-valiant-fighter-law-enforcement-violence [https://perma.cc/WLR6-SS57] ("Erica's premature death [was] the product of a system that grinds you to the ground and the toll it takes on one's health and spirit.").

many people in communities impacted by police violence. Before her passing, she said that she was "struggling" with stress stemming from structural violence.[327] As she put it, the "system beats you down to where you can't win."[328] She died before seeing any accountability for the cop who killed her father using a banned chokehold.

It is worth underlining the point that the *Dillon* factors are guidelines. Ideally, VCF administrators would understand the factors as such rather than as rigid requirements limiting eligibility to the proximity criteria. Perhaps the factors would be interpreted as sufficient, but not necessary, enabling people who contemporaneously witnessed the injury-producing violence but unrelated to the victim (like Dwight Jefferson or Darnella Frazier), or people closely related to the victim but who did not observe police inflict harm in real time (like Erica Garner), to still recover damages from the VCF. At the minimum, this framework would enable avenues for relief beyond direct victims, reflecting how police violence broadly impacts families and communities. The factors offer a starting point to conceive police violence harms expansively but not capriciously.

## IV
## OBJECTIONS

Critics to such a reparative damages framework will likely raise concerns about fiscal responsibility, administrative feasibility, and the expansion of liability beyond traditional limits. These are important considerations that I attempt to address below. In what follows, I explore potential responses that should be understood not as final solutions, but as starting points for how future reparations programs might thoughtfully address such inevitable challenges to move from theory to reality.

### *A. Section 1983 Only Affords Damages to Individual Plaintiffs*

At a basic level, Section 1983 litigation "requires a proper plaintiff—with a concrete and particularized injury . . . traceable to the defendant's conduct and susceptible of judicial remedy."[329] The scope of the remedy must be strictly tailored to the specific injury suffered by the plaintiff.[330] Within

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327 Hawkins, *supra* note 326.

328 *Id.*

329 Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 86 & n.89 (2019) (describing the "right plaintiff principle" as requiring that "[t]he remedy sought determines a plaintiff's standing, not just the harm alleged").

330 *See* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 524 (2016) (explaining that "Article III does not permit federal courts to grant more expansive relief 'cover[ing] additional actions that produce no concrete harm to the original

this demanding framework, one might object that reparative damages, which contemplate broader communal harms beyond the plaintiff's own injury, violate standing doctrine. The argument would run like this: Even if Jane Doe has standing to sue for damages for their own harm, they lack standing to seek a remedy benefitting non-plaintiffs. However, federal courts already issue remedies extending beyond the plaintiff's specific injury. A good example is prophylactic injunctions, which target ripple effects of harm[331] by requiring "specific precautionary measures" to stop ongoing violations.[332]

Reparative damages and prophylactic injunctions share a key characteristic: both can extend benefits beyond the individual plaintiff. Prophylactic relief focuses on "precautions ordered to address secondary facilitators of harm to provide more effective prevention."[333] Consider a Fair Housing Act case where a landlord discriminates against a potential tenant based on race.[334] The court may order the landlord to undergo comprehensive training programs and submit to third-party audits of their application review process.[335] While failure to implement such measures would not itself be unlawful without a court order,[336] the court may mandate these steps if necessary to prevent recurring violations. Such prophylactic measures naturally benefit individuals who weren't party to the original litigation by transforming the systems and practices that might lead to future harm.[337] *Brown v. Plata*[338] exemplifies this approach. In *Plata*, incarcerated plaintiffs

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plaintiff'" (quoting Salazar v. Buono, 559 U.S. 700, 734 (2010) (Scalia, J., concurring in the judgment))).

331 *See* Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 TEX. REV. LITIG. 113, 115 (2007) (explaining that prophylactic injunctions are designed to "reach[] contributing causes" of harm and "are ordered with the purpose of heading off the harm before it develops").

332 *Id.*

333 *Id.* (emphases omitted).

334 Originally enacted in 1968, the Fair Housing Act (FHA) expressly prohibits discrimination in nearly all housing transactions based on protected characteristics including race, color, national origin, and religion. *See* Pub. L. No. 90-284, 82 Stat. 73 (1968) (imposing monetary penalties and incarceration for those who discriminate on the basis of protected characteristics). One carveout to the FHA is known as the "Mrs. Murphy" exemption, which applies to owner-occupied buildings containing four or fewer units, as well as certain single-family home rentals, allowing these small-scale landlords greater discretion in their tenant selection process. 42 U.S.C. § 3603(b) (2012).

335 *See, e.g.*, WILLIAM MURRAY TABB, RACHEL M. JANUTIS & THOMAS ORIN MAIN, REMEDIES: CASES AND PROBLEMS 395 (8th ed. 2024) (describing the mechanics of prophylactic injunctions and the type of relief that courts may provide by directing the defendant to take "extra protections").

336 *Id.* ("Violation of a prophylactic injunction is not necessarily a legal wrong in itself, except that the injunction makes it so.").

337 *Id.* (describing prophylactic reliefs as intended to "minimize the chance that wrongs might recur in the future"); TRACY A. THOMAS, DAVID I. LEVINE & DAVID J. JUNG, REMEDIES: PUBLIC AND PRIVATE 131 (7th ed. 2023) (explaining that prophylactic measures in law are like those in medicine because both involve additional safeguard to "avoid future harm").

338 563 U.S. 493 (2011).

alleged constitutionally inadequate medical care in California prisons.[339] The Supreme Court upheld the three-judge panel's injunction requiring California to reduce its prison population by 13.5%.[340] This broad remedy wasn't limited to the plaintiffs' specific injury; it aimed to reform systemwide conditions that created an "extensive and ongoing constitutional violation."[341]

Then there are nationwide or universal injunctions: court orders preventing "the federal government from enforcing challenged laws and policies against all persons, not just the plaintiffs at bar or even limited to the geographic limits of the court issuing the injunction."[342] This remedy was dramatically curtailed in the Supreme Court's 6-3 decision in *Trump v. CASA*.[343] The case involved challenges to President Trump's executive order excluding U.S.-born children from birthright citizenship if their parents were not citizens or lawful residents.[344] After a panel of three district judges ruled that the order violated the Fourteenth Amendment and issued a nationwide injunction blocking its enforcement against anyone,[345] the Supreme Court held that the Judiciary Act of 1789 did not permit such broad authority.[346] However, the Court left open the possibility that injunctions could extend beyond the plaintiffs when necessary to provide "complete relief" to them.[347] This qualification acknowledges that broader injunctions benefitting non-parties may sometimes be necessary, and some commentators have even theorized they "may effectively need to function as a nationwide injunction."[348]

While standing requires a plaintiff to assert their own interests, this background demonstrates that a court's remedial power can extend beyond the plaintiff without departing from established practices.[349] They show that

339 *Id.* at 507–08.

340 *Id.* at 541, 545.

341 *Id.* at 545.

342 THOMAS ET AL, *supra* note 337, at 335.

343 *See* Nicholas Bagley, *The Supreme Court Put Nationwide Injunctions to the Torch*, THE ATLANTIC (June 28, 2025), https://www.theatlantic.com/ideas/archive/2025/06/supreme-court-trump-injunctions/683354 [https://perma.cc/8GT7-EGRH] (explaining that the decision limiting universal injunctions amounted to a "revolution in the remedial practices of lower federal courts").

344 Trump v. CASA, Inc., 145 S. Ct. 2540, 2549 (2025).

345 *Id.*

346 *Id.* at 2554 ("Because the universal injunction lacks a historical pedigree, it falls outside the bounds of a federal court's equitable authority under the Judiciary Act.").

347 *Id.* at 2557 n.12 ("There may be other injuries for which it is all but impossible for courts to craft relief that is both complete *and* benefits only the named plaintiffs.").

348 Cary Coglianese and Mathew Lee Wiener, *Judicial Remedies After CASA*, REGUL. REV. (Aug. 11, 2025), https://www.theregreview.org/2025/08/11/coglianese-wiener-judicial-remedies-after-casa [https://perma.cc/W5QR-LQ3Y].

349 *See* Hutto v. Finney, 437 U.S. 678, 687 n.9 (1978) ("Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" (quoting Milliken v. Bradley, 433 U.S. 267, 281 (1977))).

reparative damages can plausibly be structured to address more than the plaintiff's specific injury.

### *B. Local Governmental Budget Constraints*

Another objection to such a reparations framework might be that reparative damages would unduly strain local budgets. Most cities face pressing issues like poverty, a flimsy social safety net, decaying infrastructure, crime, failing schools, insufficient housing, pollution—the list could go on.[350] Given such wide-ranging needs and limited budgets, where would reparations fit as a priority? Unless purely symbolic, reparations programs would have to compete for scarce municipal funds. This reality raises important questions: Who would pay? Where would the money come from? What would happen to cash-strapped local governments without deep pockets under such a regime? Critics might charge that expanding damages liability against municipalities would generate financial shocks, disrupting budgetary decisions made through democratic processes.[351] Multimillion dollar judgments against cities would drain funds, forcing tax hikes and/or cuts to services such as policing, or lead to their outright elimination.[352] Some cities under the distress of large police payouts might even be brought to the brink of dissolution. That is, huge legal judgments against cities might portend their death.[353]

It is worth noting at the outset that reparative judgments would not introduce such budgetary concerns. They are already widely circulated under the current discourse about civil rights damages. When cops engage in abuses requiring significant monetary remedies, there is a growing recognition that the financial consequences fall on the employing city and its police department, rather than the misbehaving cop because most cops are indemnified. In other words, most police officers do not contribute financially to judgments or settlements against them.[354] Rather than

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350 *See* BITTKER, *supra* note 42, at 128 (listing various social issues impacting the United States).

351 *See* Smith, *supra* note 221, at 482 (discussing damages and execution of judgments against local governments and observing that a chief concern relates to the impact of large monetary damages on "budgetary decisions the people have collectively made").

352 *See* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1410 (2012) (summarizing findings from research into various cities that faced dissolution efforts).

353 *See id.* at 1402–03 (explaining that "singular budgetary shocks can serve as focusing events that bring a small city to a brink of distress where dissolution becomes an option" and identifying "a sizable legal judgment (as in the City of Mesa, Washington, and Half Moon Bay, California)" as illustrative).

354 *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (explaining the results of her study on police indemnification which showed that "[b]etween 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just 41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor").

defendant Jane Doe paying X dollars from their pocket, the city pays the bill, as "[g]overnments satisf[y] settlements and judgments in police misconduct cases even when indemnification [is] prohibited by statute or policy."[355] Cops are also indemnified even when they are "disciplined or terminated by the department or criminally prosecuted for their conduct."[356] In short, indemnification is almost universal. Allocating costs for the harms of policing is already contentious regardless of any reparations proposal, which would simply resurface these lingering concerns.

The Supreme Court addressed similar concerns over city budgets in *City of Newport v. Fact Concerts, Inc.*, where they disallowed punitive damages against cities.[357] Fact Concerts, Inc. sued the City of Newport and officials when the mayor and city council members canceled a license it had obtained to put on a show at a city park because it feared that one of the performers would draw an unruly crowd. Alleged was that the cancellation "amounted to content-based censorship, and that its constitutional rights to free expression and due process had been violated . . . ."[358] Fact Concerts won a jury verdict, which included $200,000 in punitive damages against the city. The Supreme Court heard the appeal on the limited "question of the availability of punitive damages against a municipality under [Section] 1983."[359] The Court did not find the traditional justifications for punitive damages—deterrence and retribution[360]—persuasive. On the former, the Court reasoned "it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive damages awards could be assessed based on the wealth of their municipality."[361] Concerning the latter, the Court acknowledged that punitive damages were treated as a kind of punishment under common law. To the extent it was (properly) imposed, it "applied only to the actual wrongdoers."[362] Misbehaving officers are actual wrongdoers, not the cities that cut their checks.[363] Thus, it concluded that "the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages."[364]

One consideration also figured prominently in the Court's analysis:

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355 *Id.*

356 *Id.*

357 453 U.S. 247, 271 (1981).

358 *Id.* at 252.

359 *Id.* at 253 n.7.

360 *See, e.g.*, Erik Encarnacion, *Resilience, Retribution, and Punitive Damages*, 100 TEX. L. REV. 1025, 1034, 1039, 1044 (2022) (describing justification for punitive damages).

361 *City of Newport*, 453 U.S. at 268.

362 *Id.* at 263.

363 *See id.* at 267 (identifying government actors who misbehave as the appropriate subjects for punishment, rather than government entities themselves).

364 *Id.* at 268.

money. Since Section 1983 is a vehicle for redress for federal constitutional and statutory violations, the Court worried that expanding liability to punitive damages for such a large swath of suits "may create a serious risk to the financial integrity of these governmental entities."[365] So while a plaintiff can win punitive damages in a judgment against an individual officer when their conduct amounts to "reckless or callous indifference to [the plaintiff's] federally protected rights,"[366] the Court announced that plaintiffs cannot recover punitive damages in part because "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers."[367] The "what will happen to city budgets?" question has long been part of the discourse about expanding cities' exposure to damages liability in Section 1983 suits.

However, the familiarity of budget concerns does not make them invalid or unworthy of consideration. Rather than rejecting these critiques as overblown given their recurrence, their merits demand examination. The argument rests in part on one of two assumptions. First, cities do not plan or budget for lawsuit payouts at all. Under this regime, there is no allocation to absorb the costs of liability. Second, cities do budget for such payouts but dramatically underestimate their exposure, resulting in significant shortfalls. These assumptions are not mutually exclusive. A city might both fail to budget for liability and dramatically miscalculate its risks. Regardless of the pathway, the outcome is the same: when large judgments or settlements are levied against police departments, municipal budgets face severe strain.

Legal scholar Joanna Schwartz's research undermines these assumptions. In a nationwide study of how large, midsized, and small law enforcement agencies arrange their budgets, Schwartz found that "settlements and judgments in suits against law enforcement agencies and officers are not always—or even usually—paid from jurisdictions' general funds,"[368] (i.e., the main pool of tax revenue used for day-to-day operations like public services).[369] In the largest agencies—those employing roughly 1,000 cops (Tampa) to more than 36,000 (New York City)[370]— "the most common practice is to satisfy settlements and judgments from central funds

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365 *Id.* at 270.

366 Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that Section 1983 plaintiffs seeking punitive damages must demonstrate defendant's reckless or callous disregard of rights, while expressly rejecting malicious intent as the governing standard).

367 *City of Newport*, 453 U.S. at 267.

368 Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1148 (2016) [hereinafter Schwartz, *How Governments Pay*].

369 *See generally* CITY OF DOVER, *How Local Government Finances Work*, https://www.dover.nh.gov/government/open-government/budget-revealed/how-local-government-finances-work [https://perma.cc/E9ET-U5HW] (describing the financial structure of local government).

370 Schwartz, *How Governments Pay*, *supra* note 368, at 1165–66.

without contribution by the law enforcement agency."[371] Some large jurisdictions "require their law enforcement agencies to pay settlements and judgments directly from their budgets."[372] But even in such cases, they "do not appear to suffer any economic consequences of these payouts . . . ."[373] This is because the agencies "receive an allocation of funds for litigation costs during the budgeting process with the city, county, or state; they cannot use those funds for other purposes if they pay less than anticipated on litigation . . . ."[374] And if they exceed their "budgeted litigation costs, they can (and do) get additional funds from the government to satisfy those claims."[375] Thus, we might expect that in the largest jurisdictions, expanding cities' exposure to damages does not usually have the effect of impinging on the involved agencies' budgets that it is typically imagined to have.

Still, when police departments offload litigation costs to local governments, funds must be redirected from somewhere. A concern is that, facing large police payouts, cities will cut other services to maintain their police budgets.[376] This is not just theoretical—take the Chicago Police Department (CPD), for example. The CPD was allocated about $16.5 million per year from 2012–2014 for lawsuit payouts involving the Department but spent an average of over $52 million in lawsuits.[377] The excess was paid out using city funds.[378] A former lawyer for the City of Chicago explained what happened next:

> [W]hen you had to budget more for [police] tort liability[,] you had less to do lead poisoning screening for the poor children of Chicago. We had a terrible lead poisoning problem and there was a direct relationship between the two. Those kids were paying those tort judgments, not the police officers.[379]

So, when police litigation expenditures exceed budgeted amounts, cities face tradeoffs if they don't vastly increase public expenditure.

Chicago shows how large police misconduct payouts can strain city budgets and compromise other pressing needs. Ultimately, budgeting reflects values.[380] In determining whether lead poisoning screening for

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371 *Id.* at 1166.

372 *Id.*

373 *Id.* at 1149.

374 *Id.*

375 *Id.* at 1177.

376 *See id.* at 1178 (describing the phenomenon of jurisdictions compromising city or county services to preserve law enforcement budgets).

377 *Id.*

378 *Id.*

379 *Id.* (quoting Lawrence Rosenthal, Panelist on *Municipal Law Symposium: Panel IV: Viewing Litigation Through Different Lenses: Gaining a Better Understanding of Municipal Liability and Immunities*, CHAP. U. SCH. L. (Feb. 27, 2015), http://ibc.chapman.edu/Mediasite/Play/96133e—335946708b3c6f053402f8a81d [https://perma.cc/39KJ-FVA7]).

380 *See* BITTKER, *supra* note 42, at 135 (explaining how budgeting is a product of the weighing

children should be given priority over funding the police, we must look to our own priorities. I know what I would do—the kids would come first. So, the key question is not simply whether reparations would squeeze budgets, but whether the moral urgency merits prioritization. My aim here is primarily to help the reader appreciate the choices that cities make when faced with payouts for police misconduct to enable thoughtful weighing of reparations claims against fiscal realities.[381]

It should be acknowledged that smaller jurisdictions with smaller law enforcement agencies handle payouts differently. Most smaller jurisdictions rely on liability insurance.[382] When litigation costs spike, some municipalities pare down their service provisions by defunding the police.[383] It might seem odd to categorize cost-cutting measures that are not designed to systemically alter police practices as "defunding the police" given how "defund the police" discourse is typically understood.[384] But as Jessica M. Eagle has noted, "[t]o 'defund' is a plastic and malleable term in the context of policing."[385] More specifically, she explains that in the U.S., "to defund colloquially refers to either a reduction in, or the elimination of, funding" for policing.[386] Defund efforts can be mapped along four terrains: "[(1)] a long-term policy aim to abolish the police, [(2)] to recalibrate what police do in society, [(3)] to create accountability measures through conditional funding, or [(4)] simply to save government resources."[387] The worry about expanding cities' damages exposure typically plays out in the fourth terrain: that is, faced with emergent fiscal constraints, cities will be forced to tighten their belts by cutting spending on "essential" services like policing. Police department budget cuts will in turn lead to fewer cops patrolling the streets, compromising the safety of our communities, or so the story goes.

Take the most dramatic interpretation of defunding the police: complete abolition as described in scenario one above. Depending on who you ask, it is not clear that defunding the police towards abolition is a social loss. Today, there is a growing recognition that modern policing is inherently violent

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of fundamental values to decide between various competing demands for public funds).

381 *See id.* ("The claim for [B]lack reparations competes with other demands for public funds.").

382 Schwartz, *How Governments Pay*, *supra* note 368, at 1149 ("The vast majority of cities and counties across the country are small and rely on liability insurance.").

383 *See id.* (describing the experiences of smaller jurisdictions relying on liability insurances facing demands to change law enforcement personnel and policies as a condition of their coverage when experiencing a spike in suits).

384 *See* Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 134 (2021) (explaining that cost-reduction "could literally defund the police," yet it doesn't "fit within the frame of grassroots activists' demand to 'defund the police' in this moment. That many would not interpret [it] as defunding the police illuminates the simple point that the meaning of 'defund the police' is socially and historically situated").

385 *Id.* at 134.

386 *Id.* at 124.

387 *Id.* at 123.

because it facilitates the maintenance of social hierarchies. As inequality deepens in social relations, "the more [police] violence is required to preserve social hierarchies, and a cycle of exacerbated inequality and correspondingly greater violence can ensue as elites attempt to keep people from leaving or revolting."[388] In this environment, directly impacted people and their allies are calling for responses to police violence that reflect the cumulative weight of such harms. This is why abolitionists urge us to reject the notion that a world without police would lead to lawlessness and social disorder.[389] They instead invite us to reimagine a world where safety and policing are decoupled.[390] A world where we reprioritize existing resources, i.e., divest from policing to create localized solutions that are informed by the needs of the community and do not expand the carceral state.[391] So, while police payouts might strain municipal budgets and perhaps lead to the shuttering of police departments, the reader will have to decide for themselves whether the means justify the ends.

Consider what is arguably the worst-case scenario from the city's perspective when a large money judgment is issued against it: The city is no longer capable of shouldering the cost of cityhood and the grinding financial distress forces the city to dissolve and return to county rule.[392] Alternatively, the city merges with another city.[393] As Professor Michelle Wilde Anderson has observed, the turn of the twenty-first century has seen unprecedented numbers of cities collapsing or considering disincorporation.[394] At the heart of these dissolutions or near-dissolutions is "economic decline and budgetary collapse,"[395] sometimes from abrupt shocks like legal judgments against cities such as those this proposal contemplates. This was the case for Half Moon Bay, a small coastal city in California south of San Francisco. Already struggling to provide services to residents, a $15 million lawsuit settlement[396]

388 SEIGEL, *supra* note 97, at 182.

389 *See, e.g.*, Akbar, *An Abolitionist Horizon*, *supra* note 33, at 1824–25 (explaining that abolitionists "are working for a world without police" and justifying the pursuit of this new horizon on the ground that policing is a racist, classist, and gendered project designed to preserve social inequalities).

390 *See* Sam Levin, *'Police Don't Produce Safety': The Black Feminist Scholars Fighting for Abolition*, THE GUARDIAN (Aug. 29, 2022), https://www.theguardian.com/us-news/2022/aug/29/police-defund-abolition-mariame-kaba-andrea-j-ritchie [https://perma.cc/CAW9-ECJQ] (describing the work of Black feminist abolitionists Mariame Kaba and Andrea J. Ritchie and reporting that they "want folks to come away with the understanding that police are not producing safety").

391 *See id.* (noting that Kaba and Ritchie envision a world where safety and security is achieved by divesting from policing and punishment and focusing on community-based strategies).

392 Anderson, *supra* note 352, at 1368.

393 *See id.* at 1367 (outlining the similarities in implications of dissolution for counties and cities).

394 *Id.* at 1390–92 (describing municipal dissolutions across geography and time).

395 *Id.* at 1368.

396 Developer Charles 'Chop' Keenan sued Half Moon Bay over a 24-acre Beachwood property

threatened the city's viability and brought it to the brink of dissolution.[397] Facing the prospect of disincorporation, the city disbanded its police department in response, handing over policing duties to the county sheriff.[398] This is hardly a satisfactory resolution, critics will charge, underlining the undesirable consequences of expanding liability against cities.

What happens to these departed cities? Professor Anderson explains that when a city dissolves by reverting its territory "to dependence on county or township government," it loses local governance structure and "reverts to unincorporated county rule alone."[399] This means that "[p]oliticians and public employees lose their jobs; an entity's revenues, assets, contracts, and debts must be reorganized; public services must be pared down or passed off; and a body of local laws, including land-use plans is nullified."[400] Some cities might wither into ghost towns, their communities depopulated.[401] Others "may retain population," even "retain markers of placehood and identity like a name used orally or recognized by the Post Office."[402] While local government collapse does create pressing challenges, it does not inevitably condemn communities to decay. Cities experience death in various ways. Some cities shed their formal governance structure, yet their communities endure.[403] These local governments die, "but all is not ruins and tumbleweeds. Life carries on, with memories mixing into the landscape of a living present" even in the absence of formal structures.[404]

I share the concerns about local government fragmentation to some degree. The ripple effects like jobs disappearing and family hardships are no trivial matter. Yet in my view, they pale in comparison to the deaths of real

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when his housing project was halted by protected wetlands discovered in 2000. A 2007 federal court ruling found the city's defective storm drainage system created the wetlands and awarded Keenan $41 million, though the parties ultimately settled. *See* Kyveli Diener, *Half Moon Bay City Council Applauds New Beachwood Deal*, EAST BAY TIMES (Aug. 15, 2016, 6:18 PM), https://www.eastbaytimes.com/2008/08/20/half-moon-bay-city-council-applauds-new-beachwood-deal [https://perma.cc/8XVH-WQL6].

397 *See* Julia Scott, *The End of Half Moon Bay?*, MERCURY NEWS (Aug. 27, 2010, 5:25 PM), https://www.mercurynews.com/2010/08/27/the-end-of-half-moon-bay [https://perma.cc/GWW5-22QY] (describing the precarious financial condition that brought Half Moon Bay on the cusp of dissolution).

398 *See* Mark Noack, *Half Moon Bay Finalizes Sheriff Takeover*, COASTSIDE NEWS (Aug. 13, 2024), https://www.coastsidenews.com/news/half-moon-bay-finalizes-sheriff-takeover/article_dbceb383-ab95-5e6e-b04f-3d920660674f.html [https://perma.cc/74GW-25P8] (describing planned transfer of policing duties pending contract approval).

399 Anderson, *supra* note 352, at 1367.

400 *Id.*

401 *Id.* at 1376 (describing the "classic ghost town scenario"—passive dissolution occurring "by operation of law for inactivity" due to failures to elect officials, "levy and collect taxes, provide services, or undertake other basic activities").

402 *Id.* at 1367.

403 *Id.* at 1368.

404 *Id.* at 1445.

persons at the hands of cops. These losses also leave gaping holes in families and communities, typically those that are systemically disadvantaged by race, class, or both. It rips through the social fabric of these communities, severing vital connections that were already strained by systemic deprivations. Indirect victims—those left behind like the relatives of the deceased—must navigate a grief so solemn it is experienced as spiritual death. Some, like Erica Garner, also die in the flesh.[405]

In summary, reparative damages would compete for limited public funds and could strain municipal budgets, forcing tradeoffs with other services.[406] But because few plaintiffs succeed in Section 1983 suits against cities, budget impacts may be overstated. Still, they should be weighed against the harm police violence exacts on families and communities. Though scarce resources prompt hard choices, fiscal constraints should not stand in the way of providing relief to victims. The solution, I contend, is to reduce or eliminate the underlying abuses, rather than denying relief. Budgets should bend to serve justice, not the other way around.

### *C. Courts or Legislatures?*

Progressive thinkers about race have long identified courts as an enabling force in anti-Black police violence. They point out that decisions like *Whren* "have created a jurisprudential landscape wherein the state is empowered to police [Black and Brown people] with few constitutional limitations."[407] Aside from a brief period in the mid-twentieth century when the Warren Court's commitment to civil rights shone through with real power,[408] courts have generally been a hostile forum for marginalized people.[409] This concern looms particularly large when, as here, Fourth Amendment violations are at issue. Many critical theorists have assessed that prevailing interpretations of the Fourth Amendment "enable the police to exist as a hostile force in disadvantaged communities of color."[410]

Courts have also been a hostile forum for reparations efforts. The claims are commonly stifled by doctrinal hurdles such as statutes of limitations and

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405 Mays, *supra* note 324.

406 *See* BITTKER, *supra* note 42, at 132 (discussing how reparations "would have to fight for room" on fiscal agendas and would compete with various forms of welfare programs).

407 BRIDGES, *supra* note 100, at 394.

408 *See* Eskridge, *supra* note 242, at 1487–88 (describing the Warren Court's interpretation of Section 1983 to include a remedy for official actions not sanctioned by state law and how the interpretation contributed to the Warren Court's commitment to civil rights).

409 *See* CHEMERINSKY, *supra* note 37, at 153–54 (identifying the Burger Court's and subsequent conservative Courts' pattern of ruling in favor of police and the issues of race undergirding such cases).

410 BRIDGES, *supra* note 100, at 394.

standing issues.[411] *Cato v. United States* is illustrative.[412] There, the Court of Appeals for the Ninth Circuit dismissed a reparations claim for slavery, reasoning that "the government had not given permission for the plaintiffs to sue and the case was being filed too long after slavery had ended."[413] As historian Charles P. Henry has observed, "[t]he common thread running through most of the approaches to reparations—both traditional and novel—is the shift from the courts to the legislature for redress. . . . Litigation is based on a confrontational model that tends to replicate the traditional individualistic structure of rights arguments."[414] Others have also argued reparations proposal should go through lawmakers, not courts, to avoid "onerous standing and . . . justiciability requirements" that "make it increasingly unlikely that a plaintiff who suffer[s]" government-inflicted harm will recover.[415] Why, then, should we use courts as a vehicle to make amends for the community harms of policing through reparations as I propose?

It may be uniquely reparative for courts to have a role in healing communities that have been devasted by police violence than going at it only through the legislature. Facilitating reparative compensation would be a way for courts to acknowledge their complicity in legitimizing police violence and make amends. With careful design, courts could offer communal recompense to police violence victims on a large scale. While judicial remedies are imperfect, legislative programs have limitations, too.[416] In the end, if legislative reparations were clearly superior, the results would be more robust. Rather than abandon courts entirely, we can think of the two as complementary. Congress could amend Section 1983 "to expand liability . . . [for] local governments" since "the Court's decisions in this area are based on a statute and not on the Constitution."[417]

Notably, Section 1983 could be revised to impose vicarious liability on cities for officers' constitutional violations, no longer requiring a municipal policy, inaction, or custom. Vicarious liability would create more robust financial incentives for cities to rein in police misconduct. [418] To name one

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411 *See* HENRY, *supra* note 164, at 22 (identifying doctrinal issues present in all jurisdictions that impact the ability to successfully present legal claims to racial reparations, as well as their exceptions).

412 70 F.3d 1103 (9th Cir. 1995).

413 HENRY, *supra* note 164, at 23; *see also Cato*, 70 F.3d at 1111 (holding that the United States had not waived its sovereign immunity and that Cato lacked standing to pursue her claims).

414 HENRY, *supra* note 164, at 26.

415 Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. 345, 356 (2023).

416 *See, e.g.*, Rachel E. Barkow, *The Wholesale Problem with Congress: The Dangerous Decline of Expertise in the Legislative Process*, 90 FORDHAM L. REV. 1029, 1031 (2021) (identifying the decline of expertise in legislative policymaking as a problem of serious concern).

417 CHEMERINSKY, *supra* note 37, at 296.

418 *Id.* at 298.

example, it could help with union bargaining. Dean Erwin Chemerinsky put it this way:

> Imagine that a police department is negotiating with a police union about discipline. Because the city rarely pays damages to victims of police violence, it makes financial sense for the city to trade smaller salary increases for greater protections against discipline. The city saves money on salary and gives up nothing economically significant by agreeing for protections for officers. But if the city faced the prospect of a multimillion-dollar judgment in every case in which an officer kills, maims, or wounds a member of the public, its cost of tolerating violence goes up enormously. The city would have a much stronger financial incentive to ensure that it doesn't hire bad cops and to fire those accused of misconduct.[419]

In the end, both the legislature and courts could be leveraged to expand remedies for victims of police violence while we continue to rethink and reimagine policing's role in our society.

## CONCLUSION

Section 1983's core aim was to confront state-enabled Ku Klux Klan violence. Klan violence did not just harm Black people in isolation. It terrorized entire communities. Recognizing the problem's scope, there was "firm congressional resolve that the problem feel the full effect of federal power."[420] Police violence similarly impacts Black and Brown communities today. Yet remedies, when available, typically do no more than compensate the person directly impacted. A mild step in living up to the Act's original aim, while meeting current problems and circumstances, is to expand Section 1983's damages liability to repair communal harm when local governments breach Fourth Amendment guarantees. To be clear, I am not suggesting that reparative damages will dismantle the police project or even deter police violence. But until we reach the abolitionist horizon, we can pursue transformations that "provide material relief . . . to people currently affected by the violence of policing," while refraining from strengthening the machinery.[421]

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419 *Id.* at 298–99.

420 Eisenberg, *supra* note 43, at 485.

421 MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE: A CASE FOR ABOLITION 132 (2022) (discussing effective liberatory responses to police violence).