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## Civil Rights Ecosystems

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# CIVIL RIGHTS ECOSYSTEMS

Joanna C. Schwartz\*

*The Philadelphia and Houston Police Departments are similarly sized, but over a recent two-year period, ten times more civil rights suits were filed against Philadelphia and its officers than were filed against Houston and its officers. Plaintiffs in cases brought against Philadelphia and its officers were awarded one hundred times more in settlements and judgments. What accounts for these differences? Although the frequency and severity of misconduct and injury may play some role, I contend that the volume and outcome of civil rights litigation against any given jurisdiction should be understood as a product of what I call its civil rights ecosystem.*

*Scientists define ecosystems as communities of living and nonliving elements that are interconnected and interactive. I define civil rights ecosystems as collections of actors (including plaintiffs' attorneys, state and federal judges, state and federal juries, and defense counsel), legal rules and remedies (including state tort law, § 1983 doctrine and defenses, and damages caps), and informal practices (including litigation, settlement, and indemnification decisions) that are similarly interconnected and interactive. Variation in different aspects of a civil rights ecosystem determines the frequency with which claims against government are brought, the frequency with which those claims are successful, and the magnitude of their success.*

*In this Article, I describe some key elements of civil rights ecosystems and the ways in which these elements interact, wide variation in civil rights ecosystems across the country, and ecosystem feedback loops that can magnify regional variation. Throughout, I illustrate aspects of this framework with examples drawn from an original dataset of almost 1,200 police misconduct cases filed in five federal districts around the country and surveys and interviews of dozens of attorneys who represented plaintiffs in these cases.*

*Finally, I consider the implications of these observations. Understanding civil rights filings and payouts as the product of civil rights ecosystems reveals sig-*

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nificant conceptual gaps in § 1983 doctrine and scholarly debate about the relationship between constitutional rights and remedies; raises important questions about the mechanics and desirability of regional variation in constitutional protections; and offers insights valuable for courts, advocates, and government officials seeking to change the scope and success of suits to enforce civil rights.

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#### INTRODUCTION

The Philadelphia Police Department and the Houston Police Department are the fourth and fifth largest in the country—Philadelphia has 6,031

sworn officers, and Houston has 5,203.<sup>1</sup> Yet, despite their relative similarity in size, ten times more federal lawsuits were filed against the Philadelphia Police Department and its officers for constitutional violations than were filed against the Houston Police Department and its officers during a recent two-year period.<sup>2</sup> Philadelphia plaintiffs recovered 100 times more than Houston plaintiffs in these cases.<sup>3</sup>

What accounts for these differences? One might assume that the number of lawsuits filed against a police department and the cost of settlements and judgments reflect the frequency and severity of harms inflicted by its officers. If so, Philadelphia police officers engage in more frequent misconduct, and far more harmful misconduct, than do Houston police officers. Although information about police uses of force and misconduct is hard to come by,<sup>4</sup> available evidence suggests the connection between civil rights violations and successful lawsuits is not so direct. There are 65% more officers per 10,000 people in Philadelphia than there are in Houston,<sup>5</sup> and a population density almost three times greater,<sup>6</sup> which might mean that police and residents interact more often. But a recent survey found that residents of Philadelphia and Houston held similar views about the relationship between their communities and the police.<sup>7</sup> And the Department of Justice has re-

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1. SHELLEY S. HYLAND & ELIZABETH DAVIS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 252835, LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 14 (2019), <https://www.bjs.gov/content/pub/pdf/lpd16p.pdf> [<https://perma.cc/6BCN-5FYJ>].

2. See *infra* notes 199–200, 203–204 and accompanying text. Two hundred and sixty-eight lawsuits were filed in federal court against the Philadelphia Police Department and its officers in 2011–2012; during the same period, just twenty-five suits were filed in federal court against the Houston Police Department and its officers. *Id.* For further discussion of these cases, see *infra* Section II.E.

3. Houston paid \$206,500 to settle five federal cases filed against its officers in 2011–2012; Philadelphia paid almost \$22 million to resolve 242 cases filed in state and federal court filed during the same two-year period. See *infra* notes 200–202, 204 and accompanying text. See *infra* Section II.E for further discussion of these settlements.

4. For a discussion of the lack of data about law enforcement uses of force and misconduct, see, for example, Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013), and Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1361–68 (2018).

5. See HYLAND & DAVIS, *supra* note 1, at 14 (reporting 38 officers per 10,000 residents in Philadelphia and 23 officers per 10,000 residents in Houston).

6. See WORLD POPULATION REVIEW, THE 200 LARGEST CITIES IN THE UNITED STATES BY POPULATION 2019 (2019), <https://worldpopulationreview.com/us-cities/> [<https://perma.cc/NMH8-Z98Y>]. Houston has a population density of 3,706/mi<sup>2</sup> and area of approximately 635mi<sup>2</sup>. See *id.* Philadelphia has a population density of 11,750/mi<sup>2</sup> and an area of approximately 135mi<sup>2</sup>. See *id.*

7. See Sun-Times Staff, *Chicagoans Have a Problem with Police*, CHI. SUN-TIMES (Oct. 18, 2018, 11:13 AM), <https://chicago.suntimes.com/news/chicago-residents-community-relationship-police-department/> [<https://perma.cc/7JWQ-DPVA>]. The study found that 76% of Houston residents believed their communities had a “very” or “somewhat” good relationship with

cently investigated several killings and allegations of excessive force by law enforcement officers in both cities.<sup>8</sup>

Some evidence suggests that Houston officers actually inflict more harm than Philadelphia officers. When *The Guardian* tracked all police killings in 2015 and 2016, it found that Houston police killed 2.5 times as many people as did Philadelphia police.<sup>9</sup> When *USA Today* collected evidence of officers who have lost law enforcement certification for misconduct, it found 3.3 times more Houston officers than Philadelphia officers have been decertified.<sup>10</sup> Differences in the frequency and severity of officer misconduct may explain some variation in lawsuit filings and payouts but do not appear to tell the whole story in Philadelphia and Houston.<sup>11</sup> And similar disparities can be seen across the country.<sup>12</sup>

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the police, as compared to 69% of Philadelphia residents, and that 16% of surveyed residents from both cities described community-police relations as “very” or “somewhat” bad. *Id.*

8. See Trymaine Lee, *DOJ Report Reveals Problem-Plagued Philadelphia Police Department*, MSNBC (Mar. 23, 2015, 5:23 PM), <http://www.msnbc.com/msnbc/doj-report-philadelphia-police-department> [<https://perma.cc/5UBD-CZXS>]; James Pinkerton, *Six HPD Cases Investigated by Justice Department*, HOUS. CHRON. (Dec. 4, 2012), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Six-HPD-cases-investigated-by-Justice-Department-4091408.php> [<https://perma.cc/K537-AAAN6>].

9. See *The Counted*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Dec. 3, 2019) (reporting that Houston officers killed twenty-eight people in 2015–2016, and Philadelphia officers killed eleven people in 2015–2016). *The Washington Post*, which has tracked fatal police shootings since January 1, 2015, reports that Houston officers fatally shot forty-six people and Philadelphia officers fatally shot fifteen people during that period. *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> [<https://perma.cc/AC9Y-TK5E>]. For an earlier report finding Houston police killed more people per year than police in larger departments including Los Angeles and Chicago, see James Pinkerton, *Bullet-proof: Part 1: Unarmed and Dangerous*, HOUS. CHRON., <https://www.chron.com/local/investigations/item/Bulletproof-Part-1-24419.php> [<https://perma.cc/7T7F-S3YT>].

10. See John Kelly & Mark Nichols, *Search the List of More than 30,000 Police Officers Banned by 44 States*, USA TODAY (Apr. 24, 2019, 9:16 PM) (updated Oct. 14, 2019, 8:26 PM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/biggest-collection-police-accountability-records-ever-assembled/2299127002/> [<https://perma.cc/636W-EE6C>]. *USA Today* found sixty-nine Houston officers and twenty-one Philadelphia officers have been decertified for misconduct. *Id.*

11. Note that killings tracked by *The Guardian* described *supra* in note 9 post-date the lawsuit payouts described *supra* in notes 2–3, and the decertifications tracked by *USA Today* described *supra* in note 10 appear to have occurred over many years. These temporal disparities are an unfortunate byproduct of the general lack of reliable data about police behavior. As a result, I cannot precisely compare the behavior of Philadelphia and Houston police officers in the years leading up to and including 2011–2012, when the civil lawsuits in my study were filed.

12. For example, the San Antonio and Boston Police Departments are similarly sized— in 2016, San Antonio had 2,244 officers and Boston had 2,099 officers. See HYLAND & DAVIS, *supra* note 1, at 14. In 2015 and 2016, San Antonio officers killed almost three times more people than Boston officers. See *The Counted*, *supra* note 9. Yet Boston paid 9.8 times more to resolve civil rights suits against its officers than did San Antonio during a six-year period from 2006 to 2011. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 963

In this Article, I contend that whether a person seeks redress for violations of their civil rights, whether they succeed, and the magnitude of their success depends in significant part upon what I call the *civil rights ecosystem* in which the claim arose. Scientists define ecosystems as communities of living and nonliving elements that are interconnected and interactive.<sup>13</sup> Civil rights ecosystems are similarly interconnected and interactive collections of people (including plaintiffs' attorneys, community organizers and activists, state and federal judges, state and federal juries, local government officials, and defense counsel), legal rules and remedies (including state tort law, § 1983 doctrine and defenses, and damages caps), and informal practices (including litigation, settlement, and indemnification decisions).

Understanding lawsuit filings and outcomes as products of civil rights ecosystems illuminates three important observations about the dynamics of civil rights litigation.<sup>14</sup> First, as in other types of ecosystems, civil rights eco-

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(2014). The Albuquerque Police Department and the Oklahoma Police Department are similarly sized—in 2016, Albuquerque had 821 officers and Oklahoma City had 1,101 officers. See HYLAND & DAVIS, *supra* note 1, at 14 (reporting size of the Oklahoma City Police Department); Elise Kaplan, *APD Added 116 Officers over Past Year*, ALBUQUERQUE J. (June 17, 2019, 7:25 PM), <https://www.abqjournal.com/1329712/apd-added-116-officers-over-past-year.html> [<https://perma.cc/KE5N-Y5RA>] (reporting size of the Albuquerque Police Department). In 2015 and 2016, Oklahoma City officers killed thirteen people, and Albuquerque officers killed five. *The Counted*, *supra* note 9. Yet Albuquerque paid 64.6 times more to resolve civil rights lawsuits against its officers than did Oklahoma City from 2006 to 2011. See Schwartz, *supra* at 964. The Atlanta Police Department and the Charlotte-Mecklenburg Police Department are similarly sized—in 2016, Atlanta had 1,730 officers and Charlotte-Mecklenburg had 1,743 officers. See HYLAND & DAVIS, *supra* note 1, at 14. In 2015 and 2016, Charlotte-Mecklenburg officers killed seven people, and Atlanta officers killed four. *The Counted*, *supra* note 9. Yet Atlanta paid 10.5 times more to resolve civil rights lawsuits against its officers than did Charlotte-Mecklenburg from 2006 to 2011. See Schwartz, *supra* at 963. I could go on, but you get the point.

13. See, e.g., KATHLEEN C. WEATHERS ET AL., FUNDAMENTALS OF ECOSYSTEM SCIENCE 3–8 (2013).

14. The ecosystem metaphor has often been used—perhaps overused—to describe complex interactions of people, rules, and practices in business, technology, and other areas. Nevertheless, I adopt the ecosystem metaphor here because it is particularly useful to advance the descriptive claims I make in this Article. For discussion of the reasons an “ecosystem” framework is more apt than a “system” framework to describe dynamics in civil rights litigation, see *infra* notes 15–17. For examples of the ecosystem metaphor used in other contexts see, for example, Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon’s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2315 (2017), for a description of “toxic judicial ecosystems where 70 percent of criminal defendants plead guilty without counsel in proceedings that often last under three minutes”; Brian Cummings, *The Changing Landscape of Intellectual Property Management as a Revenue-Generating Asset for U.S. Research Universities*, 21 GEO. MASON L. REV. 1027, 1037 (2014), for a usage of the ecosystem analogy to describe “all of the parties and procedures involved in the process of carrying an invention from initial idea to the marketplace”; Marco Iansiti & Gregory L. Richards, *The Information Technology Ecosystem: Structure, Health, and Performance*, 51 ANTITRUST BULL. 77, 77 (2006), for a description of “the IT ecosystem, by which we mean the network of organizations that drives the delivery of information technology products and services”; James F. Moore, *Predators and Prey: A New Ecology of Competition*, HARV. BUS. REV., May–June 1993, at 75, 76, for a description of businesses “as part of a *business ecosystem* that

systems are multifaceted and their component parts are interdependent.<sup>15</sup> Whether a civil rights lawsuit is filed and the outcome of the case turns in part on federal courts' application of doctrines relevant to § 1983 claims, including the scope of constitutional rights, the availability of immunities, standing, and pleading. But whether a civil rights lawsuit is filed and successful also depends on myriad people, rules, and practices far beyond the purview of federal judges, including the availability of state court remedies as a supplement or alternative to a § 1983 claim; the perspectives and practices of state judges; the sympathies of community members who may serve as state or federal jurors; the settlement and litigation practices of defense counsel; the ability to collect any settlement or judgment, which can be affected by damages caps, refusals to indemnify, or municipal budget shortfalls; and the availability of plaintiffs' attorneys willing to take civil rights cases who can skillfully navigate these complexities.

Second, just as some natural ecosystems are friendlier to plant and animal life than others, some civil rights ecosystems are friendlier to civil rights suits than others.<sup>16</sup> In some places, plaintiffs seeking to sue government officials have their choice of state and federal law claims and can bring their cases in state or federal court, consider their judges and juries to be relatively sympathetic, and are virtually assured any award will be paid in full by the jurisdiction. In other places, there are limited or no state law causes of action, judges and juries more hostile to civil rights claims, and more limited government indemnification. As a result, a lawsuit concerning a constitu-

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crosses a variety of industries"; and Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 167 (2013), for an exploration of "pertinent features of the relevant legal and political ecosystem in which [post-*Plata* prison reduction] changes are taking place" (footnote omitted).

15. See, e.g., WEATHERS ET AL., *supra* note 13, at 11 ("Unlike systems like the solar system, the dynamics of which are controlled by just a few factors, ecosystem structure and function depend on many factors."). In this way, the ecosystem framework takes account of and responds to criticisms of the criminal justice "system" framework for falsely suggesting that wide-ranging criminal justice actors are engaged in some sort of coordinated behavior. For further discussion of this critique, see Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice"*, 15 OHIO ST. J. CRIM. L. 619 (2018) (reviewing THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff eds., 2017)), and Sara Mayeux, *The Idea of "the Criminal Justice System"*, 45 AM. J. CRIM. L. 55 (2018).

16. The notion that the scope of civil rights protections is dictated in part by geography builds conceptually on related work in sociology, criminology, and other disciplines. See, e.g., Anthony E. Bottoms, *Place, Space, Crime, and Disorder*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 528 (Mike Maguire et al. eds., 4th ed. 2007); Urie Bronfenbrenner, THE ECOLOGY OF HUMAN DEVELOPMENT (1979); *Medical Geography*, THE DICTIONARY OF HUMAN GEOGRAPHY (Derek Gregory et al. eds., 5th ed. 2009); Richard Morrill, *Spatial Equity*, in 23 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 148–51 (James D. Wright ed., 2d ed. 2015). Because the ecosystem metaphor emphasizes that civil rights are "produced by specific and local histories and individuals" and "that its component and purportedly analogous parts often do not resemble or act like each other (every unhappy police department is unhappy in its own way)," it improves on the "criminal justice system" framing in this way as well. Mayeux, *supra* note 15, at 60.

tional violation that would result in a substantial plaintiff's victory in one ecosystem might never be filed in another.

Third, as in other types of ecosystems, civil rights ecosystems have feedback loops and can evolve.<sup>17</sup> Each civil rights lawsuit produces information—about defense counsel's and plaintiff's counsel's skill and success, the judge's rulings before and during trial, the jury's sympathy for the plaintiff, and the jurisdiction's willingness to indemnify. This information then informs lawyers', judges', and jurisdictions' decisions about how to approach future cases which will, in turn, influence the outcomes of those future cases. And the outcomes of those future cases will impact attorneys', judges', and jurisdictions' next decisions. Sometimes, changes to one aspect of the ecosystem will lead to a counterbalancing change to another aspect of the ecosystem—as one element in the ecosystem becomes more defendant-friendly, another element in the ecosystem becomes more plaintiff-friendly, and the environment remains relatively stable. Other times, changes to one aspect of an ecosystem can prompt changes to other aspects of the ecosystem that amplify rather than balance, dramatically shifting its friendliness or hostility to civil rights litigation over time.

Understanding civil rights filings and payouts as products of the ecosystems in which the claims arose not only helps illuminate the dynamics of constitutional litigation but also reveals important gaps in several ongoing debates. When the Supreme Court crafts constitutional rules, procedural hurdles, and immunity doctrines, it appears to believe its rulings operate in a vacuum to achieve balance between governmental and individual interests.<sup>18</sup> Scholars debating the proper scope of constitutional rights and the relationship between rights and remedies similarly focus predominantly on the work of federal judges interpreting federal law. But civil rights ecosystems are governed by a whole range of influences far beyond federal courts' control. A constitutional right may exist in the eyes of a federal judge, but if no case will be filed to vindicate that right—either because there would be no money to satisfy the judgment or because there is no active plaintiffs' bar willing to

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17. Constitutional and social movements scholars have long observed that constitutional rights evolve through feedback effects between courts and social movement actors. See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006). Complexity theory also recognizes feedback effects in complex systems that can produce substantial and dramatic change. See, e.g., Sylvia Walby, *Complexity Theory, Systems Theory, and Multiple Intersecting Social Inequalities*, 37 PHIL. SOC. SCI. 449 (2007). The "systems" framework in criminal justice has been criticized for connoting "something that is by its nature somewhat generic, dynamic only within a broadly stable structure or equilibrium rather than transforming dramatically over time, and thus, susceptible to description in ahistorical terms." Mayeux, *supra* note 15, at 60. The ecosystem metaphor, in contrast, emphasizes the existence and mechanics of change. See Moore, *supra* note 14, at 75–76 (emphasizing evolution as a key characteristic of business and natural ecosystems).

18. See *infra* note 269 and accompanying text.



take the case—it will not be meaningfully protected.<sup>19</sup> On the other hand, a plaintiff can prevail even if a federal court concludes no constitutional right exists—so long as a parallel state law claim is available, plaintiff's counsel is savvy enough to know to bring the state law claim, and there are funds available to satisfy an award. As this Article makes clear, a complete understanding of constitutional rights and remedies must take account of a whole range of interacting people, rules, and practices that have, until now, largely escaped judicial and scholarly attention.

Understanding civil rights litigation as the product of distinct ecosystems additionally illuminates the existence, cause, and scope of regional variation in protections against government violence and overreach. Although the Supreme Court has regularly described constitutional rights as consistent across the country, this Article makes clear that, in practice, the Fourth Amendment offers very different sanctuary for residents of Philadelphia and Houston. Regional variation in constitutional protections is not necessarily a bad thing. Scholars have argued that law enforcement and other government actors should be guided by community preferences and norms.<sup>20</sup> I endorse some ongoing efforts to engage community members in the tailoring of constitutional protections and rules.<sup>21</sup> But understanding localities as civil rights ecosystems, and seeing some of those ecosystems at work, also raises cause for concern. Those supportive of localism usually imagine that adjustments to constitutional protections will only expand rights above a constitutional floor.<sup>22</sup> Instead, it appears that, in some ecosystems, constitutional protections are being dramatically underenforced—and thus, as a practical matter, are virtually nonexistent.

Finally, understanding civil rights litigation as the product of distinct ecosystems offers insights for courts, legislators, and advocates about the ability to engineer changes in civil rights protections. The complexity and interconnected nature of civil rights ecosystems, and their regional variation, make it nearly impossible to design generally applicable legal rules that achieve precise policy goals or have a consistent impact. On the other hand, the ecosystem metaphor makes clear that the scope and strength of civil rights protections are not set in stone. A modest alteration to one aspect of an ecosystem can spur changes that dramatically impact a jurisdiction's amenability to civil rights litigation over time. For those attempting to engineer such a shift, it is critically important to understand the characteristics of people, rules, and practices in any given ecosystem and the ways in which they interact; to recognize that different ecosystems may respond in different

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19. See, e.g., STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* 19 (2000) (“A legal right exists, in reality, only when and if it has budgetary costs.”); Douglas Laycock, *How Remedies Became a Field: A History*, 27 *REV. LITIG.* 161, 165 (2008) (“A right with no effective remedy is unenforceable and largely illusory.”).

20. See *infra* notes 293–297 and accompanying text.

21. See *infra* note 298 and accompanying text.

22. See *infra* notes 299–300 and accompanying text.

ways to the same intervention; and to watch for feedback effects that will inevitably occur.

The remainder of this Article proceeds as follows. In the first three Parts, I describe three key characteristics of civil rights ecosystems—their multiple, interdependent features (Part I), marked variation in ecosystems across the country (Part II), and the feedback loops that can dramatically change ecosystems over time (Part III). To illustrate each of these characteristics, I draw on original research examining civil rights litigation against law enforcement across the country.<sup>23</sup> Finally, in Part IV, I consider the ways in which the existence of varied civil rights ecosystems should inform ongoing judicial and scholarly discourse about the scope of constitutional rights and the relationship between constitutional rights and remedies; the existence, magnitude, and desirability of regional variation in constitutional protections; and the ability to adjust the scope and success of civil rights litigation.

### I. CIVIL RIGHTS ECOSYSTEMS: A PROVISIONAL MODEL

Animals, plants, soil, sunlight, and water combine to form natural ecosystems around the globe. Litigation can also be understood as an ecosystem. Instead of the animals, plants, and abiotic elements that populate natural ecosystems, litigation ecosystems are made up of interconnected and interacting causes of action, substantive and procedural rules, attorneys, judges,

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23. As is described in more depth in previous work, I examined the dockets of police misconduct cases filed from 2011 to 2012 in five federal districts—the Eastern District of Pennsylvania, the Northern District of California, the Northern District of Ohio, the Middle District of Florida, and the Southern District of Texas—taking note of the number of cases filed, how frequently plaintiffs filed cases without counsel, the motions brought in each case and their resolutions, and the ultimate dispositions of the cases. For a detailed description of my methodology in this study, see Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]. I then surveyed and interviewed dozens of plaintiffs' attorneys who entered appearances in these cases to better understand the dynamics of civil rights litigation in these jurisdictions. For a detailed description of my methodology in this study, see Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101 (2020) [hereinafter Schwartz, *Qualified Immunity's Selection Effects*]. I supplemented this research with publicly available data and responses to public records requests about the jurisdictions that receive particular attention in this Article—Philadelphia, Houston, Cleveland, Oakland, and Orlando. I chose these five regions because other commentators have suggested, and my own research confirms, that they vary significantly in their receptivity to civil rights cases. See Schwartz, *How Qualified Immunity Fails*, *supra* at 19 (describing evidence of this variation). And my focus on suits against law enforcement agencies allows for direct comparisons between them. See *id.* at 22 (discussing further the rationale for this decision). But there are limitations of the study design, as there are of any empirical study. For example, I cannot prove that these five districts capture the entire range of variation in civil rights ecosystems. See *id.* at 23–25 (describing this limitation of the study). And my reliance on court filings and lawyers' perspectives offers less insight about contributors to civil rights ecosystems that do not engage directly with the legal system. See *infra* notes 25–37. Further research should explore aspects of civil rights ecosystems further removed from the courts and civil rights ecosystems in other parts of the country and the world. See *infra* notes 319–320 (describing the need for more research in these areas). Nevertheless, these data offer important initial insights about the existence of and variation in civil rights ecosystems.

and juries. Here, I focus on one type of litigation ecosystem—what I call a civil rights ecosystem—where civil rights claims against government officials are filed, litigated, and resolved. And I focus on one type of government actor—law enforcement—against whom civil rights suits are frequently brought.<sup>24</sup> In this Part, I offer an overview of some of the people, rules, and practices that make up civil rights ecosystems—including plaintiffs’ attorneys; state and federal judges; state and federal juries; defense counsel; § 1983 doctrine and defenses; state tort law; damages caps; and litigation, settlement, and indemnification decisions. I then show how the interaction of these elements may determine whether a police misconduct claim is ever filed, whether it succeeds, and the magnitude of its success.

This overview is in many ways incomplete. Many additional factors influence whether a person who believes their rights have been violated ever files a civil rights case or is successful. For example, local rules about government data collection and retention may impact plaintiffs’ abilities to unearth documents that can prove wrongdoing.<sup>25</sup> Local prosecutors’ reliance on release-dismissal agreements can prevent potential plaintiffs from pursuing their claims.<sup>26</sup> A community’s history of racial segregation, class inequality, and political mobilization may impact the willingness of potential plaintiffs to come forward, the response of the community to incidents of misconduct, and the perspectives of juries and judges who might hear a case.<sup>27</sup>

For a complete understanding of the ways in which civil rights protections are created and enforced, one would need an even broader perspective.<sup>28</sup> Police department policy, training, patrol, supervision, and disciplinary decisions may all influence the frequency with which officers vi-

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24. Schwartz, *How Qualified Immunity Fails*, *supra* note 23, at 22. For further discussion of this methodological choice, see *supra* note 23.

25. For state laws governing the disclosure of police misconduct records, see Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records/> [<https://perma.cc/Q7Z8-FTG5>]. For discussion of the ways in which state laws frustrate efforts to test police credibility in criminal cases, see Moran, *supra* note 4.

26. For a discussion of release-dismissal agreements, whereby people give up their right to sue in exchange for dismissal of criminal charges against them, and the ways in which such agreements are barriers to police accountability, see Peter A. Joy & Kevin C. McMunigal, *Police Misconduct and Release-Dismissal Agreements*, CRIM. JUST., Fall 2018, at 31.

27. For a discussion of the role of “bottom-up forms of participation” in criminal justice reform, see Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017). For a discussion of the effects of legal estrangement by poor people of color on police reform movements, see Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2069–72, 2107–08 (2017). For a discussion of the ways in which recent incidents of police violence and criminal justice activism may affect decisionmaking by judges and other political actors, see Monica C. Bell, Response, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 7–8 (2018).

28. For discussion of the many actors, agencies, and rules beyond the courts that make up the criminal process see, for example, Sharon Dolovich & Alexandra Natapoff, *Introduction to THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 15, at 1, 1–30.

olate residents' civil rights.<sup>29</sup> The conduct of police officers may be influenced by a number of other factors as well, including the power of the police officer's union, the engagement of activists around issues of government accountability, the nature of local government oversight over the police, and the funding dedicated to hiring and training officers.<sup>30</sup> Policing practices additionally turn on deeper social forces including racial bias, segregation, and gentrification that may vary by degree from place to place.<sup>31</sup> And those social forces can be fostered by any number of institutions and actors, including public school systems, housing policies, and government assistance programs.<sup>32</sup>

Civil rights litigation can play multiple roles in shaping and enforcing civil rights protections: Court decisions can guide policies and trainings,<sup>33</sup> and high-profile cases can mobilize activists who can put political pressure on local government officials who might, in response, renegotiate union agreements, create police oversight bodies, or adjust police practices.<sup>34</sup> Vari-

29. See, e.g., Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 250–52, 280–86 (2017) (exploring the relationship between police use of force policies and police behavior); Stephen Rushin & Atticus DeProspero, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 646, 671–84 (2019) (exploring procedural protections for officers facing disciplinary charges and the widespread view that these protections undermine accountability efforts).

30. For scholarship that explores some of these issues, see, for example, SAMUEL E. WALKER & CAROL A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (3d ed. 2020) (exploring various models of police oversight and their role in reform); FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 184, 243–45 (2017) (describing how political activism, funding constraints, and local government oversight can improve accountability); and Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017) (exploring the relationship between police union agreements and police misconduct).

31. See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1483–84, 1484 fig.1 (2016) (describing the effects of bias, segregation, and inequality on police violence).

32. See Dolovich & Natapoff, *supra* note 28, at 13–14 (discussing these components of the criminal justice system).

33. For a discussion of the ways in which constitutional rights are articulated in the criminal and civil justice systems, see Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405 (2012). For discussion of the ways in which courts' announcement of new rights can inform policies and trainings, see Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 358–59 (2020); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580–81 (2008); Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121, 1123–24 (2001).

34. See, e.g., Ted Alcorn, *Who Will Hold the Police Accountable?*, ATLANTIC (July 25, 2019), <https://www.theatlantic.com/politics/archive/2019/07/battle-over-police-accountability/594484/> [<https://perma.cc/RD5M-293Z>] (describing advocacy efforts following the police shooting of Jocques Clemmons in Nashville); Ben Austen, *Chicago After Laquan McDonald*, N.Y. TIMES (Apr. 20, 2016), <https://www.nytimes.com/2016/04/24/magazine/chicago-after-laquan-mcdonald.html> [<https://perma.cc/RS2M-GQ2N>] (describing political pressures and changes in Chicago following release of the video of the shooting of Laquan McDonald); John Eligon & Sheryl Gay Stolberg, *Baltimore After Freddie Gray: The 'Mind-Set Has Changed'*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/13/us/baltimore-freddie-gray.html> [<https://perma.cc/FLL5-JBTK>].

ous forces—including officer indemnification, officials’ inattention to the allegations and evidence in civil rights suits, and the insulation of law enforcement agencies from the financial consequences of their officers’ misconduct—can likewise diminish the effect of civil rights litigation on government behavior.<sup>35</sup> And cases finding constitutional violations but granting officers qualified immunity can be understood as a message condoning violence and overreach.<sup>36</sup> But courts are just one of many influences on law enforcement behavior and should be understood as just one piece of a much larger puzzle.<sup>37</sup>

This Article does not attempt to map all of the influences on civil rights and their enforcement. Its lack of engagement with these broader questions should not be understood as a suggestion that they are unimportant. But this Article has a narrower scope: it focuses on the work of the courts and offers an account of a handful of people, rules, and practices that most directly play a role in whether a person who believes their civil rights have been violated files a lawsuit and is successful. Accordingly, the Sections that follow describe the characteristics of various federal and state causes of action that may be available to plaintiffs; federal and state judges and juries that may consider a case; defendants who, with their lawyers, make consequential decisions about litigation, settlement, and indemnification; and the existence of plaintiffs’ attorneys able and willing to bring civil rights cases. A final Section explores the interaction of these elements.

### A. Causes of Action

Critically important to any civil rights ecosystem are the available causes of action. There are, generally speaking, three types of claims. First, a plaintiff can file an action against an individual officer under 28 U.S.C. § 1983 for violating her constitutional rights.<sup>38</sup> Second, a plaintiff can file a § 1983 claim against the municipality—often referred to as a *Monell* claim—alleging that a municipal custom or policy caused the violation.<sup>39</sup> If a plaintiff sues an individual officer under § 1983, she must be able to show that the officer violated the Constitution and be able to defeat qualified immunity, which protects

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35. For further discussion of the ways in which these bureaucratic arrangements can undermine government accountability, see generally Schwartz, *supra* note 33 (describing the many barriers to relief that would remain if qualified immunity were limited or abolished).

36. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (expressing concern that the Court’s decision “sends an alarming signal to law enforcement officers . . . that they can shoot first and think later”); *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (criticizing the Court’s qualified immunity decisions for “sanctioning a ‘shoot first, think later’ approach to policing”).

37. For one model of the ways in which police behavior, legal sanctions, and these other forces may interact, see Carbado, *supra* note 31, at 1484.

38. See *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

39. See *Monell*, 436 U.S. at 690–91.

government defendants from damages liability so long as defendants did not violate clearly established law.<sup>40</sup> If a plaintiff brings a *Monell* claim, she must show that an unlawful policy or a custom or practice of unconstitutional behavior led to the violation of her rights, but she need not worry about qualified immunity because municipalities are not entitled to the defense.<sup>41</sup> If a plaintiff wants injunctive relief, she must show that her constitutional rights are likely to be violated again by the defendant.<sup>42</sup> If the plaintiff prevails on her § 1983 claims against the officer and/or municipality, she can recover damages and attorneys' fees.<sup>43</sup>

Although the United States Supreme Court has issued decisions that provide guidance regarding each of these aspects of § 1983 litigation, circuit and district courts have interpreted these doctrines in different ways that lead to variation in the scope of constitutional rights, the protective power of qualified immunity, and the proof necessary to establish municipal liability.<sup>44</sup>

Third, in many jurisdictions, an officer can also be sued for state torts that arise from the same facts as constitutional claims—including assault,

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40. For an overview of the meaning of “clearly established law,” see, for example, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814–16 (2018).

41. See Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914–20 (2015) (providing overview of various *Monell* theories of liability and their challenges); *id.* at 913 n.6 (noting that municipalities cannot assert qualified immunity).

42. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). For discussion of the challenges associated with proving standing for injunctive claims, see, for example, Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. (forthcoming 2020), and David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1235–36.

43. A plaintiff can be awarded compensatory and punitive damages against an individual officer, see *Smith v. Wade*, 461 U.S. 30 (1983), but cannot recover punitive damages against a municipality, see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). For a discussion of § 1988, which authorizes fee shifting in § 1983 cases, and challenges recovering fees, see, for example, Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 1 (2008).

44. For scholarship examining variation in courts' interpretations of constitutional rights, qualified immunity, and municipal liability see, for example, Barbara Kritchevsky, *Reexamining Monell: Basing § 1983 Municipal Liability Doctrine on the Statutory Language*, 31 URB. LAW. 437, 459–72 (1999) (describing several areas of confusion and variation among circuit courts regarding *Monell* liability); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137 (2012) (describing circuit splits in Fourth Amendment doctrine); Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1 (2017) (describing circuit variation in interpretations of Fourth Amendment excessive force doctrine); and Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445 (2000) (describing circuit variation regarding the definition of “clearly established law”).

battery, false arrest, false imprisonment, and negligence.<sup>45</sup> The opportunities and challenges associated with state law claims vary from state to state. Some states allow plaintiffs to sue individual government employees; other states additionally allow plaintiffs to hold government entities vicariously liable for the torts of their employees.<sup>46</sup> Some states cap damages for state tort claims or prohibit the award of punitive damages.<sup>47</sup> Some states allow the award of attorneys' fees and others do not.<sup>48</sup> Notice of claim requirements and applicable statutes of limitations also vary from state to state.<sup>49</sup>

### B. *Decisionmakers*

Other important parts of civil rights ecosystems are the judge and jury who might be assigned to hear the case. Judges decide motions that determine whether a plaintiff can proceed. Judges can also influence a case's outcome through more managerial decisions—the schedule for mediation, what discovery is reasonable, and whether discovery will be stayed while a motion is pending. Judges also decide what evidence a jury will hear and what instructions they will receive. Juries might not seem central to civil rights ecosystems, given the infrequency with which civil rights cases go to trial.<sup>50</sup> But,

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45. See, e.g., *infra* notes 134–135 (describing state tort causes of action available under Pennsylvania law); *infra* notes 157–159 (describing the unavailability of state tort causes of action under Texas law).

46. See Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 848 (2005) (reporting the results of a survey of small, medium, and large cities in the United States and finding that “about half of the cities accept respondeat superior liability under state law for misconduct by individual police officers”).

47. For research about cities' caps on the indemnification of damages awards, see *id.* at 848 (finding that “several of the cities” capped awards and the majority of the caps ranged from \$100,000 to \$500,000). For research on indemnification prohibitions for punitive damages, see Schwartz, *supra* note 12, at 906 (describing jurisdictions that prohibit indemnification of punitive damages awards).

48. For example, California allows for the award of attorneys' fees for claims brought under its civil rights statutes. See Matthew S. McNicholas & Holly Boyer, *The Bane Act and Beyond*, ADVOCATE, Apr. 2017, at 48. For an earlier study of fee shifting statutes across the country, see Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, LAW & CONTEMP. PROBS., Winter 1984, at 321.

49. See *Wilson v. Garcia*, 471 U.S. 261 (1985) (holding that statutes of limitations for § 1983 claims should be borrowed from state personal injury law). For variation in state statutes of limitations, see MATTHIESEN, WICKERT & LEHRER, S.C., STATUTES OF LIMITATIONS FOR ALL 50 STATES (2020), <https://www.mwl-law.com/wp-content/uploads/2018/02/SOL-CHART.pdf> [<https://perma.cc/PV2A-8YPW>] (setting out statutes of limitations ranging from one to six years for personal injury claims). These statutes of limitations would apply to both § 1983 claims and state tort claims. For variation in notice of claim requirements, compare, for example, CAL. GOV'T CODE § 911.2 (West 2012 & Supp. 2020) (requiring that a notice of claim be filed within six months of occurrence), with N.Y. GEN. MUN. LAW § 50-e (McKinney 2016 & Supp. 2020) (requiring that a notice of claim be filed within ninety days of occurrence).

50. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). For the trial rate

in the rare event of a trial, juries play a critical role because they determine whether a plaintiff prevails and what they receive. Past and predicted rulings and awards may also inform settlement negotiations.<sup>51</sup>

Judges can differ considerably in their approaches to substantive and procedural questions relevant to civil rights litigation,<sup>52</sup> and local communities—from which juries are drawn—can vary considerably in their sympathies toward government defendants and civil rights plaintiffs. This variation among decisionmakers can lead to pronounced differences in courts' rulings and juries' liability findings and damages awards. In the opinion of one lawyer I interviewed who brings cases all over the United States, “[j]uries vary by personality and region” and “[t]he judges are probably the biggest variable” that distinguishes civil rights litigation practice in different parts of the country.<sup>53</sup>

Judges and juries in both federal and state court can play important roles in civil rights ecosystems. Attorneys I interviewed agreed that if a case that includes § 1983 claims is filed in state court, defendants will usually remove the case to federal court.<sup>54</sup> But if a plaintiff alleges only state law claims, the case will remain in state court. There are often substantive differences in the

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among the cases in my docket dataset, see Schwartz, *How Qualified Immunity Fails*, *supra* note 23, at 46 tbl.12.

51. For a similar observation about the role of jurors in criminal prosecutions, see Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071 (2019).

52. See *supra* note 44; see also, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 591 (2004) (“[E]vidence that the [summary judgment] termination and other activity rates vary, sometimes dramatically, among courts and case types.”). Judge characteristics may also influence litigant behavior. See Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663, 1687 (2014) (“[J]udge characteristics are likely significant determinants of whether a litigant will file a motion for summary judgment in a civil rights case . . .”).

53. Telephone Interview with N. Dist. Ohio Attorney E (Dec. 6, 2017) (on file with the *Michigan Law Review*).

54. See, e.g., Telephone Interview with E. Dist. Pa. Attorney E (May 4, 2017) (on file with the *Michigan Law Review*) (agreeing that if he filed a § 1983 case in state court it would be removed to federal court); Telephone Interview with Middle Dist. Fla. Attorney C (Nov. 13, 2017) (on file with the *Michigan Law Review*) (“If you didn’t file [§ 1983 cases] in federal court, they’d be removed anyway.”); Telephone Interview with N. Dist. Cal. Attorney B (Oct. 23, 2017) (on file with the *Michigan Law Review*) (explaining that plaintiffs who file federal claims in state court “end up getting removed to federal court . . . that’s just the typical first move by cities and counties”); Telephone Interview with N. Dist. Ohio Attorney G (Apr. 28, 2017) (on file with the *Michigan Law Review*) (reporting that “most” federal cases filed in state court “are just removed right away to federal court”); Telephone Interview with S. Dist. Tex. Attorney A (Apr. 25, 2017) (on file with the *Michigan Law Review*) (“If you allege a federal cause of action, I cannot see any defense attorney that I know ever not removing that to federal court anyway.”). The remainder of the Article contains several excerpts from attorney interviews. The transcription service for those interviews made several grammatical errors. For ease of reading, I have corrected those errors. Deviations from the transcription service will not be noted inline.



proof required for parallel state and federal claims.<sup>55</sup> There can also be marked differences in the remedies available—in some states, plaintiffs bringing state law claims can recover the same damages and attorneys' fees as they could with a § 1983 claim; in others, plaintiffs will limit the damages they can recover and their entitlement to attorneys' fees by not including § 1983 claims in their case.<sup>56</sup> In some jurisdictions, forgoing federal claims means avoiding a drawn-out fight about qualified immunity.<sup>57</sup> In other jurisdictions, qualified immunity does not pose much of a threat.<sup>58</sup> Federal and state courts can also have different rules governing pleadings, discovery, summary judgment practice, interlocutory appeals, and the like.<sup>59</sup>

The choice of state or federal court will also impact which decisionmakers hear the case. State and federal judges are chosen through different processes, have different tenures, and may have different degrees of familiarity with civil rights litigation.<sup>60</sup> State and federal juries in cases against the same government entity can also be very different; federal juries are drawn from across the federal district, whereas state juries are drawn from the geographically smaller county.<sup>61</sup> Federal and state jury pools can be drawn from dif-

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55. See, e.g., *infra* notes 92–96 and accompanying text (describing differences in the proof of parallel state and federal claims in Ohio); *infra* notes 135–139 and accompanying text (describing differences in the proof of parallel state and federal claims in Pennsylvania).

56. See, e.g., *infra* notes 94, 136, 245–246, 251–252 and accompanying text (describing differences in the availability of attorneys' fees for state law claims in Ohio, Pennsylvania, California, and Florida).

57. See *infra* notes 248–250 and accompanying text (describing Florida lawyers' decisions to file state law claims to avoid litigating qualified immunity).

58. See *infra* notes 120–127 and accompanying text (describing the limited role qualified immunity plays in the litigation of constitutional claims in Philadelphia).

59. See, e.g., Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018) (describing many states' rejection of Roberts Court pleading, summary judgment, and standing decisions); Telephone Interview with N. Dist. Cal. Attorney A (May 8, 2017) (on file with the *Michigan Law Review*) (explaining that plaintiffs have sixty-one days to respond to a summary judgment motion in California state court, instead of the twenty-one days allowed in federal court, which means that plaintiffs can conduct additional depositions while the motion is pending in state court); Telephone Interview with N. Dist. Cal. Attorney G (Dec. 8, 2017) (on file with the *Michigan Law Review*) (explaining that federal court imposes fewer fees than state court).

60. For research examining state and federal judicial selection and tenure and possible impacts of those differences on decisionmaking, see generally, for example, Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965 (2007) (explaining how the selection, tenure, and removal provisions for Article III judges relate to judicial independence); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579 (2005) (describing judicial selection processes and recommending reforms); and Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009) (analyzing the effects of elections and campaigning on judicial decisionmaking among state supreme court judges). For concerns that state court judges are less familiar with civil rights claims, see *infra* notes 161, 243 and accompanying text.

61. For an overview of these and other differences in state and federal jury pools, see Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 105–09 (2004) (“[T]he values of minority communities are

ferent sources, including voting records, department of motor vehicle records, and tax records.<sup>62</sup> There can also be variation in attorneys' participation in *voir dire*, the number of jurors seated in any given trial, and unanimity requirements.<sup>63</sup>

### C. Defendants

Other key elements of civil rights ecosystems relate to the government entity that employed the government officials who engaged in the allegedly unconstitutional behavior. Local governments and the lawyers representing them take different approaches to the litigation of constitutional claims, including their inclination to raise qualified immunity and other dispositive motions, seek stays of litigation while motions are pending, challenge discovery requests, and bring interlocutory appeals.<sup>64</sup> Defendants and their counsel also vary in the timing and attractiveness of the settlement offers they make—some are willing to pay substantial sums to resolve a case before it is ever filed; others will not make meaningful settlement offers until after their summary judgment motion has been denied.<sup>65</sup>

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more likely to be subsumed in juries drawn from larger federal districts than they would be in smaller, county-based state court juries.”), and Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2287 (2014) (“[T]he federal district always comprises a larger geographic area than the local county. Depending on the district, it can comprise anything from one city and its surrounding counties to an entire state.” (footnote omitted)).

62. See Alexander E. Preller, Note, *Jury Duty Is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1, 42–48 (2012) (describing jury pool rules across the country); see also, e.g., Telephone Interview with Middle Dist. Fla. Attorney G (Dec. 19, 2017) (on file with the *Michigan Law Review*) (explaining that, in the Middle District of Florida, a state juror need only have a driver's license, but a federal juror must be registered to vote).

63. See, e.g., LEE SMALLEY EDMON & CURTIN E.A. KARNOW, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ch. 3-E, Westlaw (database updated June 2019) (describing differences in the size of California state and federal juries); Telephone Interview with N. Dist. Cal. Attorney G, *supra* note 59 (explaining that in California state court, there are twelve jurors and juries do not need to be unanimous, whereas federal juries have between six and twelve jurors and must be unanimous); Telephone Interview with Middle Dist. Fla. Attorney D (Nov. 20, 2017) (on file with the *Michigan Law Review*) (“You have way better opportunities [in state court] as far as examining the jurors and finding out who they really are, what their attitudes are. In federal court, you basically get name, rank, and serial number and some of the judges won't even let the attorneys ask questions at all.”).

64. For differences in defense attorneys' litigation practices, see *infra* notes 176–177 (comparing defense counsel's motion practice in Philadelphia and Houston). For variation in discovery stay requests and interlocutory appeals, see Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 23, at 1123–25.

65. See *infra* notes 178–179 and accompanying text. For the possible effects of variation in defendants' settlement practices, see Rachel A. Harmon, *Evaluating and Improving Structural Reform in Police Departments*, 16 CRIMINOLOGY & PUB. POL'Y 617, 618–19 (2017) (pointing to variation in defense counsel settlement decisions as a possible reason for variation in lawsuit filings and outcomes).

Differences in litigation and settlement strategy may be partly attributable to whether the jurisdiction has liability insurance.<sup>66</sup> Some attorneys report that municipal liability insurers' attorneys litigate more aggressively than attorneys for self-insured jurisdictions.<sup>67</sup> Others report that insurers view litigation and settlement decisions through a financial lens, which means that they are more likely than self-insured jurisdictions to settle quickly if it makes business sense to do so.<sup>68</sup> Litigation and settlement decisions can also vary depending on how counsel is paid. For example, some plaintiffs' attorneys report that private attorneys who contract with local governments or insurers to defend officers may delay meaningful settlement negotiations until they have billed the maximum authorized by their retainer agreements.<sup>69</sup> And litigation and settlement decisions can sometimes depend on the skill and experience of the individual defense lawyer.<sup>70</sup> It is impossible to generalize about how insurance, attorney fee arrangements, and individu-

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66. For a discussion of municipal liability insurance, see generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017). See also Joanna C. Schwartz, *How Governments Pay*, 63 UCLA L. REV. 1144, 1188–92 (2016) (comparing self-insured jurisdictions with jurisdictions reliant on municipal liability insurance).

67. See Telephone Interview with E. Dist. Pa. Attorney F (Apr. 25, 2017) (on file with the *Michigan Law Review*) (explaining that, with insurance counsel, “there’s a little more room for experts, there’s a little more room for [a] ‘we’re going to take everybody’s deposition’ type mentality”); Telephone Interview with Middle Dist. Fla. Attorney E (Nov. 30, 2017) (on file with the *Michigan Law Review*) (“[T]here’s a risk management fund in Florida that insures Sheriff’s offices that have elected to be in the fund. And dealing with those people was like banging your head against the wall.”).

68. See Telephone Interview with N. Dist. Cal. Attorney B, *supra* note 54 (“[W]hen there’s insurance defense counsel representing the officers, they are more rational and treat it more like a business decision, and it’s less about kicking the can down the road.”); Telephone Interview with Middle Dist. Fla. Attorney F (Dec. 13, 2017) (on file with the *Michigan Law Review*) (explaining that insurance companies are “much more open to settlement and resolving issues because it’s an insurance company looking at the dollars, not the government entity”); Telephone Interview with E. Dist. Pa. Attorney A (May 4, 2017) (on file with the *Michigan Law Review*) (“[Insurance attorneys] are more like PI [personal injury] lawyers. They will size up cases earlier; [they are] more likely [than self-insured jurisdictions] . . . to resolve cases early on.”).

69. See Telephone Interview with Middle Dist. Fla. Attorney D, *supra* note 63 (“[M]any times the law enforcement agency is insured, and it seems like their insurance cut-off point is always \$50,000 for attorneys’ fees. So whoever it is who pulls the assignment runs me around until they’ve gotten themselves paid \$50,000, and then they’ll start talking about settlements.”). See also, e.g., Telephone Interview with N. Dist. Cal. Attorney A, *supra* note 59 (“[M]any of these private law firms defending these cases need to bill a lot of hours on these files in order to get paid on them.”); Telephone Interview with N. Dist. Ohio Attorney C (Nov. 10, 2017) (on file with the *Michigan Law Review*) (“[Private attorneys] want to do their 50 hours, get 50 more hours of pay by doing their motion for summary judgment and then settling.”).

70. See, e.g., Telephone Interview with E. Dist. Pa. Attorney C (May 5, 2017) (on file with the *Michigan Law Review*) (“[H]ow our cases progress with the city really depends on which solicitor we get. Some are notoriously disorganized and that’s giving them the best of it, and then we have to constantly file motions and compel discovery. Others get back to you right away and are very professional. Some tend to value our cases, others tend to undervalue our cases.”).

al attorneys' skill and experience influence litigation and settlement strategy—but important to recognize that that they can and do.

Different jurisdictions also have distinct rules and policies regarding officer indemnification. Although I have previously found that officers virtually never contribute to the satisfaction of settlements and judgments entered against them,<sup>71</sup> there is significant variation among cities' and counties' indemnification policies and practices.<sup>72</sup> Some jurisdictions indemnify their employees for all conduct within the course and scope of their employment as a matter of law, other jurisdictions assess indemnification on a case-by-case basis but virtually always indemnify, and other jurisdictions have policies against indemnification but may still pay to settle some claims against their officers in advance of trial.<sup>73</sup> Some jurisdictions also cap the amount they are willing to indemnify.<sup>74</sup>

Finally, jurisdictions vary in their ability to satisfy settlements and judgments awarded against them and their officers. In recent years, several cities and counties have been in and out of bankruptcy proceedings.<sup>75</sup> Other jurisdictions are not formally in bankruptcy but are uninsured or inadequately insured and do not have the funds to satisfy large settlements and judgments.<sup>76</sup>

#### D. Counsel

Another key element of any civil rights ecosystem is the availability of counsel to bring civil rights cases on behalf of plaintiffs. Of course, a plaintiff can choose to file a case without counsel. But pro se plaintiffs are far less likely to be successful than plaintiffs who secure legal representation.<sup>77</sup> Suc-

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71. Schwartz, *supra* note 12, at 890.

72. See Schwartz, *supra* note 40, at 1805–07 (describing variation in indemnification policies and practices, despite the practical reality that officers virtually never contribute to settlements or judgments).

73. See *id.*

74. See, e.g., *infra* note 183 and accompanying text (describing Houston's indemnification caps).

75. See Brad Plumer, *Detroit Isn't Alone. The U.S. Cities that Have Gone Bankrupt, in One Map*, WASH. POST (July 18, 2013, 6:25 PM), <https://www.washingtonpost.com/news/wonk/wp/2013/07/18/detroit-isnt-alone-the-u-s-cities-that-have-gone-bankrupt-in-one-map/> (on file with the *Michigan Law Review*).

76. See, e.g., Andrew Cockburn, *Blood Money*, HARPER'S MAG., Nov. 2018, at 61 (describing the impact of lawsuit payouts on small uninsured and underinsured jurisdictions, as well as on larger cities); see also Schwartz, *supra* note 66, at 1190–92 (describing jurisdictions that have lost insurance coverage and police departments that have closed as a result of liability exposure); *infra* notes 106–113 and accompanying text (describing financial troubles in East Cleveland).

77. Prior studies have generally defined a plaintiff as “successful” if a case results in a settlement, voluntary dismissal, plaintiff's verdict, or split verdict. See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 812 n.13 (2010) (describing the common definition of plaintiff “success” in similar studies). I use this definition of “success” for the purposes of my research

cess may also build on itself—studies have found that more experienced attorneys tend to be more successful.<sup>78</sup> When I examined two years of civil rights filings in five federal court districts across the country, I found that attorneys who entered appearances in three or more cases during the two-year period were, on average, more often successful than attorneys who entered one or two appearances during that period.<sup>79</sup>

“SUCCESS” RATE OF ALL CASES, BY DISTRICT AND BY ATTORNEY  
APPEARANCES

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Total cases	131	225	172	248	407	1183
Total “successful cases”	71 (54.2%)	97 (43.1%)	104 (60.5%)	150 (60.5%)	260 (63.9%)	682 (57.7%)
Cases by attorneys with 3+ appearances	31	52	53	84	196	416
“Successful” cases by attorneys with 3+ appearances	21 (67.7%)	25 (48.1%)	45 (84.9%)	71 (84.5%)	143 (80.0%)	305 (73.3%)
Cases by attorneys with 1–2 appearances	74	100	80	117	154	525
“Successful” cases by attorneys with 1– 2 appearances	45 (60.8%)	59 (59%)	57 (71.3%)	70 (59.8%)	110 (71.4%)	341 (65%)
Cases by pro se plaintiffs	26	73	39	47	57	242
“Successful” cases by pro se plaintiffs	5 (19.2%)	10 (13.7%)	2 (5.1%)	8 (17%)	9 (15.8%)	34 (14%)

and analysis. For studies finding represented plaintiffs succeed at a higher rate than pro se plaintiffs in civil rights cases, see, for example, *id.* at 838; Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37 (2010); and Margo Schlanger, *Inmate Litigation*, 116 *HARV. L. REV.* 1555, 1610–11 (2003).

78. See, e.g., Susan Brodie Haire et al., *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 *LAW & SOC’Y REV.* 667 (1999); Catherine T. Harris et al., *Who Are Those Guys? An Empirical Examination of Medical Malpractice Plaintiffs’ Attorneys*, 58 *SMU L. REV.* 225 (2005); Leandra Lederman & Warren B. Hrunig, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers’ Effects on Tax Court Litigation Outcomes*, 41 *WAKE FOREST L. REV.* 1235 (2006).

79. For descriptions of the methodology underlying this research, see *supra* note 23. Attorneys who entered one or two appearances over the two-year period of my study prevailed—through a settlement, judgment, or voluntary dismissal—in 65% of the cases they brought, whereas attorneys who entered three or more appearances over the two-year period prevailed in 73.3% of the cases they brought. The only exception is the Middle District of Florida, where attorneys who entered one or two appearances were more successful than attorneys who entered three or more appearances.

It may be that represented plaintiffs are more successful because their claims have more merit; plaintiffs' attorneys, who usually take civil rights cases on contingency, have strong incentives to select the cases most likely to win and decline the cases least likely to be successful.<sup>80</sup> And one might expect that the more experienced attorneys would have first pick among cases, and so select the very strongest and most likely to succeed. But plaintiffs' attorneys will tell you that civil rights litigation is an exceedingly complicated area of practice.<sup>81</sup> It would make sense, then, that lawyers with experience bringing civil rights cases—and success in those cases—would be more likely to succeed in the cases they bring.

The number of experienced plaintiffs' attorneys in a region matters in another way—because those attorneys can train and mentor less experienced lawyers in this complex and shifting area of the law.<sup>82</sup> For all of these reasons, the number of plaintiffs' lawyers willing to take civil rights cases—and the expertise of those lawyers—likely play a significant role in the number of suits filed and the ultimate success of those claims.

### E. *Interaction Effects*

Thus far, I have described several elements of civil rights ecosystems: the availability of federal and state causes of action; the characteristics of federal and state judges and juries; defendants' litigation practices, indemnification practices, and financial health; and the depth and experience of the plaintiffs' bar. As my descriptions have indicated, characteristics of any given element can make a civil rights ecosystem more or less friendly to civil rights claims. As I will show here, the interaction of various elements in an ecosystem can also create distinct challenges and opportunities.

Imagine that a police officer signals for someone to pull over for a broken taillight; the person does not pull over for several blocks; when the per-

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80. For further discussion of plaintiffs' attorneys' case-selection decisions, see Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 23.

81. For discussion of plaintiffs' attorneys' views about the complexity of qualified immunity, see *id.* See also, e.g., Clifford S. Zimmerman, *The Scholar Warrior: Visualizing the Kaleidoscope That Is Entity Liability, Negotiating the Terrain and Finding a New Paradigm*, 48 DEPAUL L. REV. 773, 773 (1999) ("The civil rights lawyer who pursues a claim under 42 U.S.C. § 1983 against a public entity must epitomize the Scholar Warrior, deftly balancing an ever splintering and multiplying framework of what constitutes public entity liability with the tact, fervor, and energy found in only the greatest of strategists and fighters.").

82. See, e.g., Telephone Interview with N. Dist. Ohio Attorney G, *supra* note 54 (explaining that if someone "start[s] wading in [to civil rights work] without really having a good colleague to guide them . . . they're going to have one case and that's going to be it because they will conclude that this work is too difficult"); Telephone Interview with N. Dist. Ohio Attorney E, *supra* note 53 ("I think, like, in Chicago, some firms started having success, and I think that bred more interest. And in some places, they just don't have a tradition of people winning these cases. And if there's not a tradition of people winning the cases, then nobody's going to try to do it.").

son does pull over, the officer approaches, opens the car door, and throws the person to the ground; the officer then shoots the person (who survives). The person contends that the officer's force was unprovoked and unjustified. The officer contends that he saw the person reaching for a gun just before the officer opened the car door. Whether a suit is filed and whether it is ultimately successful will depend in no small part on the facts of the case—the extent of the person's injuries; the reliability of the officer's testimony; whether there is a video of the interaction;<sup>83</sup> the likeability of the parties;<sup>84</sup> and perhaps the sex, race, citizenship status, education, criminal history, and mental capacity of the person shot. Whether a suit is filed, whether a finding of wrongdoing is reached, and any amount awarded to the person also depends on where the violence occurred.

In part this is because of variation in federal circuit court precedent. Circuit courts differ in many ways about the scope of the Fourth Amendment.<sup>85</sup> For example, there is a circuit split about the relevance of pre-seizure conduct in excessive force cases. Some circuits—the Second, Eighth, and Eleventh—do not consider an officer's conduct in the time leading up to the use of force, focusing only on the reasonableness of the force at the moment it was used.<sup>86</sup> Some circuits—the Fourth, Fifth, Sixth, and Seventh—apply a “segmented approach,” in which courts divide an interaction into multiple events and separately analyze the reasonableness of an officer's behavior in each segment.<sup>87</sup> And some circuits—the First, Third, and Tenth—consider an officer's behavior leading up to the use of force when determining whether the officer acted reasonably.<sup>88</sup> Accordingly, if this shooting occurred in Orlando, Florida (in the Eleventh Circuit), and the person brought a § 1983 claim against the officer, a district court would only consider the reasonableness of the officer's conduct at the moment of the shooting (when, the officer asserts, he believes he saw a gun). If this shooting happened in Houston, Texas (in the Fifth Circuit) or Cleveland, Ohio (in the Sixth Circuit), district courts would consider the reasonableness of the officer's behavior at multiple stages of the interaction. And if this shooting happened in Philadelphia (in the Third Circuit), the district court would consider the reasonableness of the shooting in the broader context of the interaction, including the officer's decisions to pursue the person for a broken taillight, pull him over, and throw him to the ground.

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83. Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 23, at 1133 & n.131.

84. *Id.* at 1134 & n.133.

85. See Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L. J. 369 (2018).

86. See, e.g., McClellan, *supra* note 44, at 9–10.

87. *Id.* at 10–16.

88. See *id.* at 16–23. Although the Supreme Court's recent decision in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), held that an officer's use of force was not unreasonable simply because “the officer intentionally or recklessly provoked a violent response,” McClellan, *supra* note 44, at 25 (quoting *Mendez*, 137 S. Ct. at 1545), it did not resolve “whether a totality of the circumstances analysis can take into account police conduct prior to the use of force that cause the need to use the excessive force at issue,” *id.*

One could reasonably conclude, given this circuit split, that the case against the Orlando officer would be least likely to succeed, the case against the Philadelphia officer would be most likely to succeed, and the chances of winning cases against the Houston and Cleveland officers would be equal, and somewhere between the chances of plaintiffs in Orlando and Philadelphia. But it would be a mistake to consider only the circuit courts' analyses of pre-seizure conduct when assessing whether the person shot by the police would file a claim or recover, or the amount of any recovery.

Imagine that the shooting occurred in Cleveland. Because the Sixth Circuit—where Ohio is located—applies a segmented approach,<sup>89</sup> the plaintiff would need to show that the officer's behavior was unreasonable at one or more moments in the interaction to prevail on a § 1983 claim. But, in Ohio, this is not the plaintiff's only path to relief—in the alternative, or in addition, the plaintiff could bring a state law claim for assault and battery against the individual officer.<sup>90</sup> Under Ohio state law, the plaintiff would have to show that the officer's actions were reckless, wanton, or malicious.<sup>91</sup> But, when making this analysis, there is no segmenting—a court could consider the reasonableness of the officer's conduct during the entire interaction—and qualified immunity is unavailable to the officer.<sup>92</sup> So, the plaintiff's § 1983 excessive force claim brought against the Cleveland officer may be dismissed if the court concludes the force was reasonable under the Sixth Circuit's segmenting approach or finds the officer is entitled to qualified immunity, but he may prevail on a state claim based on the same shooting.<sup>93</sup>

The viability of the state claim against the officer implicates other aspects of state law and practice as well. Imagine the plaintiff brings federal and state causes of action against the Cleveland officer in federal court, but the federal claims are dismissed and the state claims are remanded to state court. Although the plaintiff can proceed on the state law claims, attorneys' fees—available to a plaintiff who prevails on a cause of action under

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89. See *supra* note 87 and accompanying text; see also *Claybrook v. Birchwell*, 274 F.3d 1098, 1103–05 (6th Cir. 2001).

90. The City of Cleveland would not, however, be held vicariously liable for the torts of its officers. See *Hunt v. City of Toledo Law Dep't*, 881 F. Supp. 2d 854, 883 (N.D. Ohio 2012) (describing Ohio law immunizing municipalities from civil liability for most torts committed by their employees).

91. See, e.g., *Irvin v. City of Shaker Heights*, 809 F. Supp. 2d 719, 738 (N.D. Ohio 2011) (describing the standard of proof for state tort actions for assault and battery).

92. See Telephone Interview with N. Dist. Ohio Attorney G, *supra* note 54 (describing these differences in state and federal law).

93. There is a different, but equally contingent and regionally variable, relationship between federal constitutional rights and state law in the criminal context. See Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 146 (2009) (“[P]olice authority to search and seize individuals, regulated by the Fourth Amendment, hinges on state and local decisions to criminalize particular behaviors . . . differ[ing] within states themselves, as a result of the significant criminal lawmaking authority of local governments.”).



§ 1983—will not be available.<sup>94</sup> The consequences of pursuing a state law claim will also be shaped by other characteristics of the state court system. One civil rights attorney I interviewed who practices in Cleveland believes state judges are less friendly to civil rights cases because their appointment process is more political but prefers state court because the juries are smaller and do not have to be unanimous and because attorneys play a more active role in *voir dire*.<sup>95</sup> Other civil rights attorneys practicing in Cleveland have different views about the relative desirability of state and federal fora.<sup>96</sup> Regardless of whether an attorney prefers state or federal court, their views on the topic are based on the interaction of multiple factors, including limitations of federal law, the availability of state law claims, and the characteristics of Ohio state and federal courts.

There's more. The viability of the claim also depends on whether the plaintiff will be able to recover any settlement or judgment he is awarded. Cleveland has historically indemnified its officers, but in recent years it denied indemnification to officers in two high-profile cases after juries entered multimillion-dollar verdicts.<sup>97</sup> In both cases, Cleveland hired attorneys for the officers to help them enter bankruptcy.<sup>98</sup> Plaintiffs' attorneys in both cases are challenging Cleveland's decision to deny indemnification and the unusual step of hiring bankruptcy attorneys for these officers.<sup>99</sup> Depending upon the outcome of those legal challenges, plaintiffs' attorneys deciding whether to file a case may seriously consider the possibility that Cleveland will refuse

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94. See Telephone Interview with N. Dist. Ohio Attorney G, *supra* note 54 (reporting that attorneys' fees are not available for Ohio state law claims).

95. See Telephone Interview with N. Dist. Ohio Attorney A (May 1, 2017) (on file with the *Michigan Law Review*).

96. Compare Telephone Interview with N. Dist. Ohio Attorney F (Dec. 8, 2017) (on file with the *Michigan Law Review*) (explaining he may bring solely state law claims in state court "depending on what the client is looking at and what they want to achieve, and whether we can get in there quickly and get some resolution and want to get a quick trial"), with Telephone Interview with N. Dist. Ohio Attorney G, *supra* note 54 (explaining that he files federal claims in federal court because "the exposure on attorneys' fees is too important").

97. See Radley Balko, Opinion, *Cleveland's Vile, Embarrassing Scheme to Avoid Paying Victims of Police Abuse*, WASH. POST (Jan. 20, 2016, 11:45 AM), <https://www.washingtonpost.com/news/the-watch/wp/2016/01/20/clevelands-vile-embarrassing-scheme-to-avoid-paying-victims-of-police-abuse/> (on file with the *Michigan Law Review*); Kyle Swenson, *How Cleveland's Trying to Get Out of Paying \$18.7 Million in Judgments Against Two Cleveland Police Officers*, CLEV. SCENE (Jan. 13, 2016), <https://www.clevescene.com/cleveland/how-clevelands-trying-to-get-out-of-paying-187-million-in-judgments-against-two-cleveland-police-officers/Content?oid=4692049> [<https://perma.cc/E7F6-2CNT>].

98. See Balko, *supra* note 97; Swenson, *supra* note 97.

99. See Balko, *supra* note 97; Marianna Brown Bettman, *What's on Their Minds: Can a Judgment Creditor of a City Employee Directly Enforce Indemnification Against the City Under R.C. 2744.07(A)(2)?* David Ayers v. City of Cleveland, LEGALLY SPEAKING OHIO (June 28, 2019), <https://www.legallyspeakingohio.com/2019/06/whats-on-their-minds-can-a-judgment-creditor-of-a-city-employee-directly-enforce-indemnification-against-the-city-under-r-c-2744-07a2-david-ayers-v-city-of-cleveland/> [<https://perma.cc/K3KY-Q5QN>] (describing the oral argument in one of the cases, *Ayers v. City of Cleveland*).

to indemnify individual officers following a large jury verdict. In order to safeguard against that possibility, the plaintiff may decide to bring a *Monell* claim directly against the City of Cleveland.

The ability to successfully maneuver through the challenges of § 1983 claims against the officer and municipality and state assault and battery claims against the officer depends upon a final element of the ecosystem—experienced plaintiffs’ counsel. One attorney I interviewed who practices in Cleveland reports that he often brings both a § 1983 excessive force claim and state law assault and battery claims if he is worried about the segmenting analysis and qualified immunity.<sup>100</sup> But less seasoned attorneys, or a plaintiff proceeding pro se, would not necessarily know to plead in the alternative or to argue the differences between the requirements of § 1983 and state law. A pro se plaintiff or inexperienced attorney would also have less insight about the tradeoffs associated with state and federal court and might not know to bring a municipal liability claim to protect against the possibility that Cleveland would refuse to indemnify.

The civil rights ecosystem in Cleveland, Ohio is made up of all of these elements—the Sixth Circuit’s interpretation of various federal doctrines (including the scope of the Fourth Amendment, qualified immunity, and municipal liability), the availability of state law tort claims, the characteristics of state and federal juries, the threat that the city will not indemnify, and the number of experienced attorneys able to guide plaintiffs through these various challenges. As I have shown, these elements are inescapably connected: The limits of federal law may lead attorneys to rely on state law claims, and the reliance on state law claims may invoke the jurisdiction of state court judges and juries. The possibility that the city will refuse to indemnify its officers may cause the plaintiff to file a *Monell* claim against the municipality. And the successful navigation of these many twists and turns depends on seasoned plaintiffs’ counsel. As I will show in the next Part, the collection of elements in some civil rights ecosystems are far more hospitable to civil rights claims than in others.

## II. ECOSYSTEM VARIATION: CIVIL RIGHTS ENFORCEMENT IN PHILADELPHIA AND HOUSTON

There are a wide variety of natural ecosystems around the world. Some ecosystems are particularly welcoming to plant and animal growth. In tropical rainforests, heavy rainfall, strong sun, and humidity cause plants to grow quickly; the plants attract diverse insects, birds, and animals; bacteria and fungi in the soil quickly break down dead matter and return nutrients to the soil.<sup>101</sup> Rainforests cover less than 7% of the planet but are home to between

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100. See Telephone Interview with N. Dist. Ohio Attorney G, *supra* note 54.

101. See *Rainforest*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/rain-forest/> [https://perma.cc/6HEC-PQB4].

half and two-thirds of the earth's plant and animal species.<sup>102</sup> Deserts, in contrast, receive less than ten inches of rain each year and are difficult places for most animals and plants to live.<sup>103</sup>

There is similar variation in civil rights ecosystems. As I have shown, civil rights ecosystems are made up of various elements—federal law; state law; federal and state judges and juries; plaintiffs' attorneys; and defendants with different litigation practices, indemnification rules, and financial stability. These elements combine to create vastly different environments for civil rights litigation. In some ecosystems, plaintiffs' attorneys view state and federal causes of action, judges, juries, and government litigation and settlement practices to be fair or favorable to their clients and decide which combination of claims and court makes the most sense given the particular facts of any given case. Other ecosystems are less hospitable: federal rights have been construed narrowly, state claims are unavailable or are an unattractive option, courts and juries are unsympathetic to plaintiffs suing government officials, and indemnification is not a certainty.

Sometimes, a single distinction between two ecosystems can make a significant difference. Take, for example, Cleveland and East Cleveland. Although Cleveland is much larger than East Cleveland, the jurisdictions are in many ways the same. Cleveland and East Cleveland border one another. The federal judges and juries who hear the cases are the same. The state and federal laws are the same. The same civil rights attorneys can bring cases in both jurisdictions.<sup>104</sup> And both cities' police departments have been plagued by corruption and excessive force.<sup>105</sup>

The key difference concerns the financial health of the two cities. Although Cleveland declined to indemnify officers in two recent cases,<sup>106</sup> and is

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102. Richard O. Bierregaard Jr. et al., *The Biological Dynamics of Tropical Rainforest Fragments*, 42 *BIOSCIENCE* 859, 859 (1992).

103. See, e.g., Neil F. Hadley & Stan R. Szarek, *Productivity of Desert Ecosystems*, 31 *BIOSCIENCE* 747, 747 (1981).

104. In my two-year, five-district study, I found that twenty attorneys entered three or more appearances in the Northern District of Ohio on behalf of plaintiffs in police misconduct cases, and a dozen of those attorneys sued the Cleveland Police Department and its officers during that period. See Schwartz, *How Qualified Immunity Fails*, *supra* note 23, for further description of this study.

105. See Mayra Cuevas & Catherine E. Shoichet, *East Cleveland, Ohio, Mayor: 2 Officers Fired, Could Face Charges*, CNN (July 29, 2016), <https://www.cnn.com/2016/07/29/us/east-cleveland-police-officers-fired/index.html> [<https://perma.cc/HST9-PNCG>]. For the Department of Justice's investigation of the Cleveland Police Department, see Letter from Vanita Gupta, Acting Assistant Attorney Gen., Dep't of Justice, Civil Rights Div., and Steven M. Dettelbach, U.S. Attorney, N. Dist. of Ohio, to Frank G. Jackson, Mayor, City of Cleveland (Dec. 4, 2014), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland\\_division\\_of\\_police\\_findings\\_letter.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf) [<https://perma.cc/A99G-SPJW>]. For reports of excessive force and corruption in East Cleveland see, for example, Jon Schuppe, *Rogue East Cleveland Cops Framed Dozens of Drug Suspects*, NBC NEWS (Mar. 27, 2017, 4:08 AM), <https://www.nbcnews.com/news/us-news/rogue-east-cleveland-cops-framed-dozens-drug-suspects-n736671> [<https://perma.cc/HTR3-SKT4>].

106. See *supra* notes 97–99 and accompanying text.

struggling financially,<sup>107</sup> the city has been able to satisfy its legal liabilities.<sup>108</sup> The City of East Cleveland, in contrast, does not have the resources to pay settlements and judgments entered against it and its officers. East Cleveland is self-insured, so lawsuit payments come from its general funds.<sup>109</sup> And the city is reportedly on the verge of bankruptcy.<sup>110</sup> As a result, attorneys who regularly bring civil rights cases against Cleveland are unwilling to sue the East Cleveland Police Department and its officers.<sup>111</sup> An attorney I interviewed described East Cleveland as “an absolute swamp” where “crime is being committed against citizens” without recourse.<sup>112</sup> But because the city “is on the verge of bankruptcy . . . the financial reality is . . . most firms can’t afford to . . . risk not getting paid.”<sup>113</sup>

East Cleveland’s financial crisis creates a dramatic distinction between Cleveland’s and East Cleveland’s ecosystems, despite the many other ways in which they are the same. The variations between other civil rights ecosystems are the product of more complex interacting factors, even if the results are similarly dramatic. In the remainder of this Part, I describe the civil rights ecosystems in two cities—Philadelphia and Houston—as one example of this more complex type of differentiation.<sup>114</sup>

107. See *Cleveland Finances Earn ‘C’ Grade*, TRUTH ACCT. (Jan. 2019), <https://www.truthinaccounting.org/library/doclib/CLE-2017-2pager.pdf> [<https://perma.cc/9QY4-T9H9>].

108. See Telephone Interview with N. Dist. Ohio Attorney A, *supra* note 95.

109. See *id.* (“East Cleveland is self-insured . . . so therefore whatever assets they have in their operating funds, so to speak, or in their rainy day fund would come [in]to play to satisfy a judgment.”).

110. Alexia Fernández Campbell, *A Suburb on the Brink of Bankruptcy*, ATLANTIC (June 8, 2016), <https://www.theatlantic.com/business/archive/2016/06/a-suburb-on-the-brink-of-bankruptcy/486188/> [<https://perma.cc/EN6S-UVF9>]; Aaron Renn, *How to Save a Dying Suburb*, CITYLAB (Sept. 19, 2017), <https://www.citylab.com/equity/2017/09/suburbs-should-merge/540258/> [<https://perma.cc/6GFU-HC6Y>].

111. See, e.g., Telephone Interview with N. Dist. Ohio Attorney A, *supra* note 95 (“[L]awyers like myself don’t have an incentive to . . . spend [\$100,000 to] \$200,000 to develop the case . . . No lawyers want to take those cases where they risk losing \$200 grand over that much time and not get the money out. That’s what you find in East Cleveland . . .”); Telephone Interview with N. Dist. Ohio Attorney D (Nov. 20, 2017) (on file with the *Michigan Law Review*) (“[M]ost lawyers are deterred [from filing cases against East Cleveland] by the fact that they figure they’re not going to be paid. I think it’s an economic decision.”); Telephone Interview with N. Dist. Ohio Attorney F, *supra* note 96 (explaining that he has turned down cases against East Cleveland because it has no resources). When journalists making the *Serial* podcast interviewed eleven attorneys who practice in the Northern District of Ohio, ten of the eleven said that they would not file a case against East Cleveland: “[N]o way, they said. It’s not worth it, said one. I have a business to run, said another. We heard, there’s no reward. We heard, it’s a bitch. We heard, I turn down any case that comes from East Cleveland, and it’s heartbreaking.” *You in the Red Shirt*, SERIAL 36:05–36:18 (Oct. 18, 2018) (on file with the *Michigan Law Review*).

112. Telephone Interview with N. Dist. Ohio Attorney A, *supra* note 95.

113. *Id.*

114. I have focused here on cities, but federal districts, states, and even federal circuits could also be understood as their own civil rights ecosystems. Some aspects of civil rights eco-

Although the police departments in Philadelphia and Houston are of similar size, ten times more lawsuits were filed against Philadelphia and its officers than were filed against Houston and its officers during a recent two-year period, and Philadelphia plaintiffs recovered one hundred times more than Houston plaintiffs in these cases.<sup>115</sup> As I have explained, available evidence suggests that the dramatic difference in cases filed and dollars paid cannot be explained by officer behavior.<sup>116</sup> Instead, at least some of the variation in claims and payouts is attributable to the civil rights ecosystems in each city. This Article does not attempt to comprehensively describe all facets of each city that contribute to their distinctive ecosystems—some areas that beg further inquiry include internal police policies, trainings, supervision, and oversight; union agreements; government record keeping and transparency; criminal prosecution practices and use of release-dismissal agreements; and each community's history of racial and class inequity and political mobilization.<sup>117</sup> For now, I stick closer to the courthouse and explore how differences in state and federal law, judges, juries, litigation and settlement decisions, and the plaintiffs' bar make Philadelphia more conducive to bringing civil rights claims and allow Philadelphia plaintiffs to prevail more often and recover more when they do.

Let's return to the scenario described before—a police officer puts on his lights, pulls over a person for a traffic violation, opens his door, pulls him out of the car, and shoots him. What result if this happened in Philadelphia? What result if this happened in Houston?

#### A. Causes of Action

*Philadelphia.* There are several causes of action that could be brought against the Philadelphia police officer and the City of Philadelphia. One option would be to file a § 1983 case against the individual officer for violating the Fourth Amendment. Because Philadelphia is in the Third Circuit, the court would consider the reasonableness of the shooting in the context of the entire interaction, including the officer's decision to pull him over, open his door, and pull him from the car.<sup>118</sup>

Although qualified immunity is generally considered a significant barrier to relief, there is little reason to fear this case would be dismissed on quali-

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systems are highly localized: a city attorney's office's litigation practices and a city's indemnification policies, for example. Other aspects of civil rights ecosystems extend beyond jurisdictional boundaries: the size and sophistication of the plaintiffs' bar or jury pools, for example. Some aspects of civil rights ecosystems are consistent state-wide: the availability of state law claims, state law tort caps, and state jury rules. And although judges' interpretations of federal doctrines like qualified immunity and the scope of federal rights may vary, circuit court rulings are binding on the district judges within the circuit.

115. See *infra* Section II.E (describing filing rates and payouts in both cities).

116. See *supra* notes 7–10 and accompanying text.

117. See *supra* notes 25–37 and accompanying text.

118. See *supra* note 88 and accompanying text.

fied immunity grounds. When I studied two years of federal civil rights filings against the Philadelphia Police Department and its officers, I found 240 cases in which defendants could have raised qualified immunity.<sup>119</sup> Yet defendants did so in just twenty-nine cases—four cases at the motion to dismiss stage and twenty-five cases at summary judgment. Only two of these qualified immunity motions were granted, and neither involved an excessive force claim. Only one resulted in the dismissal of the case—the other case settled before trial.

It should, therefore, come as no surprise that lawyers practicing in Philadelphia view qualified immunity motions as more of an “annoyance” than an actual threat.<sup>120</sup> Attorneys reported that false arrest cases are vulnerable to dismissal on qualified immunity grounds so long as an officer had “arguable probable cause” to effect an arrest.<sup>121</sup> But several attorneys reported that there is essentially no qualified immunity for excessive force claims in the Eastern District of Pennsylvania.<sup>122</sup> When I followed up with one attorney, noting that the Supreme Court had reversed denials of qualified immunity in several excessive force cases in recent years, he stated: “I have never heard of a motion for qualified immunity in just excessive force here. Not just my cases but any cases.”<sup>123</sup> Another attorney reported that defendants do raise qualified immunity, but “it doesn’t work [in the Eastern District of Pennsylvania] for the most part.”<sup>124</sup> A third attorney reported: “I haven’t lost on qualified immunity for about fifteen or twenty years. And that case came back and went to trial on the *Monell* claim and we won it.”<sup>125</sup> Lawyers practicing in Philadelphia shared the view that qualified immunity motions in excessive force cases were almost certain to fail at the motion to dismiss

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119. See Schwartz, *How Qualified Immunity Fails*, *supra* note 23, and *supra* note 23 and accompanying text for a description of this study.

120. Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68.

121. See, e.g., Telephone Interview with E. Dist. Pa. Attorney D (Apr. 24, 2017) (on file with the *Michigan Law Review*) (“[T]he cases that I primarily decline are those dealing with just strictly false arrests. If I decline them at all—and I would say there is a small percentage of those that I decline, but the ones that I do decline, the false arrests if I think they going to ultimately get qualified immunity, then that claim is very difficult to prove.”); Telephone Interview with E. Dist. Pa. Attorney G (May 15, 2017) (on file with the *Michigan Law Review*) (explaining that judges will grant qualified immunity if there is “arguable probable cause or arguable reasonable suspicion”).

122. See, e.g., Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 (“[I]t’s really tough . . . to lose a case, an excessive force case, on qualified immunity grounds.”); Telephone Interview with E. Dist. Pa. Attorney D, *supra* note 121 (stating that “there is no qualified [immunity]” for excessive force cases).

123. Telephone Interview with E. Dist. Pa. Attorney D, *supra* note 121.

124. Telephone Interview with E. Dist. Pa. Attorney E, *supra* note 54.

125. Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68.

stage<sup>126</sup> and could be defeated at summary judgment if the plaintiff could create a factual dispute about the reasonableness of force used.<sup>127</sup>

A municipal liability claim may also be a viable option in Philadelphia. Although *Monell* claims are considered hard to prove,<sup>128</sup> one Philadelphia attorney I interviewed was headed to trial on a *Monell* claim in a police shooting case and had tried and won a *Monell* claim in another case.<sup>129</sup> Nevertheless, several lawyers reported that they did not need to bring *Monell* claims in damages cases because Philadelphia police officers are virtually certain to be indemnified.<sup>130</sup> Defense counsel in Philadelphia threaten not to indemnify officers as part of settlement negotiations but rarely decline to indemnify officers.<sup>131</sup> Accordingly, one lawyer explained, there is little need to bring a *Monell* claim to ensure a deep pocket—a municipal liability claim only makes sense if one is seeking systemic relief.<sup>132</sup> A *Monell* claim is also unlikely to be necessary to protect against dismissal on qualified immunity grounds, given the infrequency with which the defense is successfully raised.

In addition, or in the alternative, a plaintiff could bring state law claims against the officer.<sup>133</sup> Plaintiffs can sue Philadelphia police officers under

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126. See, e.g., Telephone Interview with E. Dist. Pa. Attorney G, *supra* note 121 (explaining that lawyers in Philadelphia's Law Department "answer much more often than they move to dismiss on qualified immunity").

127. See, e.g., Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 ("[Judges in the Eastern District of Pennsylvania] recognize that [qualified immunity] simply doesn't lie in most cases where there's a clearly established constitutional right and there are factual disputes as to whether that right was violated. And, you know, that's our formula for defeating qualified immunity in these cases."); Telephone Interview with E. Dist. Pa. Attorney F, *supra* note 67 (explaining that qualified immunity is not granted at summary judgment in excessive force cases because "the jury gets to decide whether the police officer is acting reasonably").

128. See, e.g., Telephone Interview with E. Dist. Pa. Attorney B (Apr. 25, 2017) (on file with the *Michigan Law Review*) (describing *Monell* as "a very difficult wall to climb").

129. See Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68.

130. See, e.g., Telephone Interview with E. Dist. Pa. Attorney B, *supra* note 128; Telephone Interview with E. Dist. Pa. Attorney D, *supra* note 121. For an analysis of indemnification decisions by the City of Philadelphia, see Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839 (2017).

131. See, e.g., Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 (reporting that attorneys representing Philadelphia officers threaten not to indemnify officers "all the time," though they have actually refused to indemnify "very, very rarely and only in situations where officers have been criminally charged and removed from the force"); Telephone Interview with E. Dist. Pa. Attorney F, *supra* note 67 (describing a case in which the City of Philadelphia threatened not to indemnify officers but "they end[ed] up paying out a settlement on their behalf").

132. See Telephone Interview with E. Dist. Pa. Attorney B, *supra* note 128 ("[Because of indemnification,] *Monell* issues . . . really in Philadelphia are not terribly important to an individual case. They might be important if you're trying to get some injunctive relief, if you're arguing systemic conduct. But those are really rare cases.")

133. Although the plaintiff could bring state tort claims against the officer, he could not bring state tort claims directly against the City of Philadelphia. See *Panas v. City of Philadelphia*, 871 F. Supp. 2d 370, 375–76 (E.D. Pa. 2012) (explaining that government entities have im-

state law for assault and battery, among other state law claims.<sup>134</sup> There is no qualified immunity<sup>135</sup> and no damages cap limiting recovery for willful misconduct (although there is also no entitlement to attorneys' fees).<sup>136</sup> To recover damages on state law claims, the jury must find that the officer engaged in criminal conduct, actual fraud, actual malice, or willful misconduct.<sup>137</sup> If the jury makes one of these findings, the city does not have to indemnify the officer as a matter of law,<sup>138</sup> but "as a matter of routine, they do" indemnify in these cases.<sup>139</sup>

*Houston.* If this case arose in Houston, the plaintiff would have fewer possible legal claims than would the plaintiff in Philadelphia and greater challenges when pursuing those claims. While the Third Circuit, where Philadelphia is located, considers the reasonableness of an officer's conduct given the totality of the circumstances, the Fifth Circuit, where Houston is located, applies the segmenting approach to assess pre-seizure conduct.<sup>140</sup> So, if the plaintiff filed a § 1983 claim against the Houston police officer, the district judge would consider the reasonableness of the shooting within a narrower temporal context; the officer's decision to pursue the person for a traffic violation or pull him out of the car are unlikely to figure into the Fourth Amendment assessment regarding the shooting.

Qualified immunity would also pose a more serious risk to a § 1983 claim brought against a Houston officer.<sup>141</sup> Whereas Philadelphia officers

munity under the Tort Claims Act for intentional torts by their employees, with enumerated exceptions that would not apply in this case).

134. See Telephone Interview with E. Dist. Pa. Attorney C, *supra* note 70 (describing various state torts that can be brought against Philadelphia police officers, including assault and battery, false imprisonment, and malicious prosecution).

135. See *id.*

136. See 42 PA. STAT. AND CONS. STAT. ANN. § 8550 (West 2017) (exempting cases of agency or employee willful misconduct from statutory damages caps); 42 PA. STAT. AND CONS. STAT. ANN. § 2503 (West 2004) (providing no entitlement to fee shifting for state tort claims).

137. 42 PA. STAT. AND CONS. STAT. ANN. § 8550 (West 2017).

138. See *id.*

139. *Id.*; see also Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 (explaining that, as a matter of Pennsylvania law, indemnification is not required if the plaintiff proves "willful" misconduct," but "as a practical matter . . . they end up paying anyway"). But see Telephone Interview with E. Dist. Pa. Attorney D, *supra* note 121 (describing one case in which Philadelphia did not indemnify after a jury found the officer's conduct was willful and that attorney's decision not to bring state law claims in future cases).

140. See *supra* notes 87–88 and accompanying text.

141. This difference may be attributable in part to circuit variation regarding who bears the burden of proof on qualified immunity. In the Third Circuit, the defendant bears the burden of pleading and proving they are entitled to qualified immunity. See Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2071 (2018). In the Fifth Circuit, the defendant bears only the burden of showing he was acting within his authority or acting in good faith, and then the plaintiff bears the burden of showing the defendant is not entitled to qualified immunity. See *id.* at 2072. The difference may also be attributable to variation in the judicial composition of the Third and Fifth Circuits, see Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 109–10 (2016) (demonstrating that the political



raised qualified immunity in 12.1% of the cases in which they could raise the defense during my two-year study period, Houston officers raised qualified immunity in 61.9% of the cases in which they could raise the defense.<sup>142</sup> Houston officers far more often raised qualified immunity at the motion to dismiss stage—they did so in 19.1% of cases in which they could raise the defense in my study, whereas Philadelphia officers brought motions to dismiss on qualified immunity grounds in just 1.7% of cases. And qualified immunity motions are granted far more often in favor of Houston police officers than Philadelphia police officers. Whereas district courts in the Eastern District of Pennsylvania dismissed less than 1% of cases filed against Philadelphia officers on qualified immunity grounds, district courts in the Southern District of Texas dismissed 22.7% of cases filed against Houston officers on qualified immunity grounds.

Motions to dismiss on qualified immunity raise additional problems when they are brought in the Southern District of Texas (where Houston is located). In the Fifth Circuit, a plaintiff “has the burden to negate the assertion of qualified immunity” once it is raised as a defense, and is expected to “allege facts showing that the defendants committed a constitutional violation under the current law.”<sup>143</sup> Pleading facts showing a constitutional violation can be particularly challenging because the Texas public records act makes it difficult to gather information about law enforcement absent formal discovery.<sup>144</sup> These challenges are compounded by the fact that defendants moving to dismiss on qualified immunity grounds sometimes ask the court to stay discovery.<sup>145</sup> One attorney explained how these protections interact:

[S]omeone dies in custody or gets injured or has excessive force used against them, and you ask for the records, and they just say “no.” And then they get the AG’s office to sign off on that. So, you have to file suit in federal court here without sufficient information because they won’t give it to you. Well, then the first thing they do is file a motion to dismiss and since the court will not allow discovery in a qualified—in a case where they assert qualified immunity prior to ruling on a motion to dismiss, you’re just ham-

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affiliation of the president who appointed the circuit court judges on a panel impacts rulings on qualified immunity), or to Third and Fifth Circuit judges’ relative sympathies towards civil rights plaintiffs, *see infra* Section II.B.

142. Houston police could raise qualified immunity in twenty-one cases and did so in thirteen of those cases. For further discussion of the study and methodology, *see supra* note 23 and accompanying text.

143. *Rollerson v. City of Freeport*, No. H-12-1790, 2013 WL 2189892, at \*5 (S.D. Tex. May 16, 2013).

144. TEX. GOV’T CODE ANN. § 552.108 (West 1988) (describing protections against disclosure of information about law enforcement if doing so could interfere with a city’s ability to investigate or prosecute a crime). Philadelphia attorneys have reported that there is no similar limitation on public records requests in Pennsylvania. *See* Email from E. Dist. Pa. Attorney A to author (June 18, 2019, 1:45 PM) (on file with the *Michigan Law Review*).

145. *See* Schwartz, *Qualified Immunity’s Selection Effects*, *supra* note 23, at 1124–25.

strung because you can't get the discovery before suit and you can't get the discovery once the suit is filed because of qualified immunity.<sup>146</sup>

This attorney described one case—involving a death in custody—in which she was able to overcome these barriers only because the FBI did its own investigation.<sup>147</sup> The defendant in that case refused to produce information in response to a public records request, then moved to dismiss on qualified immunity, in part because the complaint included insufficient detail about the allegations. While the motion was pending, the lawyer was able to get information about the investigation pursuant to a FOIA request to the FBI and incorporate that information into the complaint.<sup>148</sup> The lawyer reports that the FBI investigation information helped her defeat defendant's motion to dismiss, but that victory was a modest one: “[J]ust being allowed to do discovery has been a two-year battle.”<sup>149</sup>

Qualified immunity is even more frequently granted at summary judgment. Houston police defendants filed summary judgment motions raising qualified immunity in ten cases; two were granted in part, four were granted in full, and all four of those cases were dismissed. While lawyers suing Philadelphia police officers report that they can defeat qualified immunity motions at summary judgment if they can gather sufficient evidence to create a factual dispute,<sup>150</sup> attorneys litigating against Houston and in the Southern District of Texas report that courts often grant qualified immunity motions at summary judgment after improperly construing evidence against the plaintiffs.<sup>151</sup> Two cases that recently reached the Supreme Court—*Tolan v. Cotton* and *Salazar-Limon v. City of Houston*—demonstrate this approach to summary judgment motions by judges in the Southern District of Texas.<sup>152</sup> In both—cases in which police officers shot plaintiffs under hotly disputed circumstances—the district court and Fifth Circuit judges discounted or ignored evidence offered by plaintiffs.<sup>153</sup>

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146. Telephone Interview with S. Dist. Tex. Attorney B (May 17, 2017) (on file with the *Michigan Law Review*).

147. *Id.*

148. *Id.*

149. *Id.*

150. See *supra* note 127 and accompanying text.

151. See, e.g., Telephone Interview with S. Dist. Tex. Attorney F (Nov. 15, 2017) (on file with the *Michigan Law Review*) (describing an excessive force case dismissed at summary judgment).

152. See *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277 (2017), *denying cert. to* 826 F.3d 272 (5th Cir. 2016); *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) (*per curiam*).

153. The Supreme Court reversed the lower court's decisions in *Tolan* because material factual disputes were ignored. See 134 S. Ct. at 1868 (describing the lower courts' decisions as “reflect[ing] a clear misapprehension of summary judgment standards”). The Court declined to grant certiorari in *Salazar-Limon*, against a spirited dissent by Justice Sotomayor (joined by Justice Ginsberg), who observed that the Southern District of Texas and the Fifth Circuit granted summary judgment “only by disregarding basic principles of summary judgment.” 137 S. Ct. at 1281 (Sotomayor, J., dissenting). For descriptions of other summary judgment deci-

Federal cases filed against Houston and its officers are also more vulnerable to dismissal on grounds other than qualified immunity. Of the 268 federal cases filed against the Philadelphia Police Department and its officers during my two-year study, 9% (25) were dismissed at the pleadings stage or summary judgment on grounds other than qualified immunity. In contrast, of the 25 federal cases filed against the Houston Police Department and its officers during the same two-year period, 20% (5) were dismissed before trial on grounds other than qualified immunity.

Lawyers believe that *Monell* claims are not a viable option in the Southern District of Texas because they are almost always unsuccessful.<sup>154</sup> As in Philadelphia, lawyers report that the City of Houston sometimes threatens not to indemnify its officers for judgments yet generally pays settlements on their behalf.<sup>155</sup> Yet Houston will only indemnify up to \$100,000 per officer or \$300,000 per occurrence.<sup>156</sup> So if a claim is worth more than Houston will indemnify, or Houston refuses to indemnify altogether, plaintiffs must rely on municipal liability claims if they hope to recover.

In Philadelphia, plaintiffs can choose to bring state law claims against individual officers. But the Texas attorneys I interviewed agreed that there are no viable state law claims to bring against Houston or its officers in excessive force cases.<sup>157</sup> The Texas Tort Claims Act waives government immunity for state law claims in limited circumstances, but there is no waiver for assault, battery, false imprisonment, or any other intentional torts.<sup>158</sup> There is also no cause of action for a violation of the Texas Constitution.<sup>159</sup>

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sions in which the Fifth Circuit appears to have ignored its obligation to view facts in the light most favorable to the nonmoving party, see Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1918–22 (2018).

154. See, e.g., Telephone Interview with S. Dist. Tex. Attorney A, *supra* note 54 (“[A]s of late it’s almost impossible to allege *Monell* liability if you haven’t sued an entity multiple times. I mean it’s just impossible.”); Telephone Interview with S. Dist. Tex. Attorney B, *supra* note 146 (“Even if you can show a pattern, the court here in the Fifth Circuit . . . always distinguishes it somehow.”).

155. See Telephone Interview with S. Dist. Tex. Attorney B, *supra* note 146; Telephone Interview with S. Dist. Tex. Attorney F, *supra* note 151 (explaining that Houston’s attorneys say that the city will not indemnify judgments against Houston police officers but that it does satisfy settlements). For one exception, see *infra* note 199.

156. See *infra* note 183 and accompanying text.

157. See Telephone Interview with S. Dist. Tex. Attorney A, *supra* note 54 (“You don’t really have much to go after as far as the Texas Tort Claims Act, or any kind of independent torts . . . 1983 is typically your only avenue.”); Telephone Interview with S. Dist. Tex. Attorney F, *supra* note 151 (explaining that Texas police officers cannot be sued under state law for intentional torts).

158. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.057 (West 2019).

159. See *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995).

B. *Decisionmakers*

*Philadelphia.* If this case arose in Philadelphia, the plaintiff could file federal and state claims in federal court or file only state claims and remain in state court. Most attorneys view federal judges as preferable to state judges. The attorneys I interviewed repeatedly praised federal judges in the Eastern District of Pennsylvania and the Third Circuit for their fairness.<sup>160</sup> State court judges are considered to be less familiar with § 1983 cases than federal judges<sup>161</sup>—although one attorney observed that, as plaintiffs are filing more cases in state court, state judges’ familiarity with these types of cases is increasing.<sup>162</sup> On the other hand, the attorneys I interviewed consider state court juries in Philadelphia to be preferable to their federal counterparts. Federal juries in the Eastern District of Pennsylvania are more conservative than Philadelphia state juries because federal juries are drawn from both Philadelphia and the surrounding counties.<sup>163</sup>

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160. See, e.g., Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 (describing the Eastern District of Pennsylvania and the Third Circuit as “a terrific bench”); Telephone Interview with E. Dist. Pa. Attorney B, *supra* note 128 (explaining that “you’re going to get a fair trial [in] a federal court”); Telephone Interview with E. Dist. Pa. Attorney D, *supra* note 121 (“[W]e have had some judges that are from the solicitor’s office that come to the defense side of it and [are] pretty staunch Republicans. So normally you would think that they are very supportive of law enforcement or they are ready to lean that way, but I find that the judges in Philadelphia are very good. There are some that are probably more liberal than others but I think on par, they give you fair shakes . . .”); Telephone Interview with E. Dist. Pa. Attorney E, *supra* note 54 (attributing the judicial character of the Eastern District of Pennsylvania to the fact that former Senator Arlen Specter, then a Republican from Pennsylvania, worked with Democrats to nominate moderate judges for the Third Circuit); Telephone Interview with E. Dist. Pa. Attorney F, *supra* note 67 (“[F]ederal judges are pretty good by and large . . . [O]verall I find federal judges to be fair and impartial.”).

161. See, e.g., Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 (“It’s a little hard to predict what some of the state court judges will do in a given situation. This is a new area of law for them.”).

162. See Telephone Interview with E. Dist. Pa. Attorney G, *supra* note 121.

163. See, e.g., Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 (“[Federal] juries are not great. And when we win—and more often than not we do win—they give us very little.”); Telephone Interview with E. Dist. Pa. Attorney B, *supra* note 128 (“[T]he Eastern District of Pennsylvania encompasses the five counties including Philadelphia, the four suburban counties, and parts of three other counties that are not even an exurb, they’re really a lot farther away. And so on a federal jury you could have a few people from Philadelphia, a few people from the suburbs, and you could have people from Berks County and Lancaster County and parts of Lehigh County. . . . If you bring your case in the city and county of Philadelphia in the state court, your jury is going to be a majority of African Americans. If you bring it in federal court, your jury—if you have two African Americans on a jury of twelve that’s going to be a lot.”); Telephone Interview with E. Dist. Pa. Attorney D, *supra* note 121 (“[T]he federal juries are very difficult.”); Telephone Interview with E. Dist. Pa. Attorney E, *supra* note 54 (“[O]ur state court juries in Philadelphia are a lot more generous and a lot more, I wouldn’t say distrustful of the police but they call it the way they see it, they’re not going to just believe a police officer because he or she is a police officer. In federal court, you’re going to get the jury pool from a lot of different areas that are ‘law and order,’ much more conservative, and their experience with police officers is overwhelmingly positive.”).

The Philadelphia attorneys I interviewed have different views about whether to file civil rights cases against the police in federal or state court. One attorney brings the bulk of his cases in state court because he prefers state court juries and likes to avoid litigating qualified immunity.<sup>164</sup> Another attorney prefers federal court because there is less danger the city will deny indemnification, and prevailing plaintiffs can recover attorneys' fees.<sup>165</sup> Some attorneys file some cases in state court and other cases in federal court, depending on the plaintiff and the facts of the case. As one lawyer explained: "[I]f I have an African American plaintiff I don't want it in federal court if I can avoid it. On the other hand, if I have . . . a 'well-heeled,' white, middle-class plaintiff, I probably do want it in federal court."<sup>166</sup>

*Houston.* While attorneys litigating against the Philadelphia Police Department consider both state and federal court to be viable options and decide in which court to file based on various considerations about the plaintiff and the case, attorneys suing the Houston Police Department and its officers do not consider state court to be an option. Because there are no state law claims, a plaintiff must allege violations of federal law,<sup>167</sup> and if a case is filed in state court asserting federal causes of action it will almost certainly be removed to federal court.<sup>168</sup>

Attorneys practicing in Houston have a far dimmer view of the federal bench than do attorneys practicing in Philadelphia. While plaintiffs' attorneys practicing in Philadelphia consider their federal judges to be fair, attorneys practicing in Houston and the Southern District of Texas more generally consider the federal district and circuit judges to be very hostile to their claims. As one attorney explained, the Fifth Circuit is "notorious . . . [T]hey're anti-employee, or let's say they're pro-employer, and they're pro-law enforcement and that's just the way it is. . . . [T]he majority of federal judges I find just don't really desire to hear civil rights cases or employment cases or anything of that nature."<sup>169</sup>

164. See Telephone Interview with E. Dist. Pa. Attorney C, *supra* note 70 ("When we have a Philadelphia police case, we routinely will file in state court alleging only state torts, where we don't have to run up against [qualified immunity]. And we do that for a number of reasons. First and foremost is we want that Philadelphia jury . . .").

165. Telephone Interview with E. Dist. Pa. Attorney D, *supra* note 121.

166. Telephone Interview with E. Dist. Pa. Attorney B, *supra* note 128.

167. See *supra* note 157 and accompanying text.

168. See, e.g., Telephone Interview with S. Dist. Tex. Attorney A, *supra* note 54 ("If you allege a federal cause of action I cannot see any defense attorney that I know ever not removing that to federal court . . ."); Telephone Interview with S. Dist. Tex. Attorney B, *supra* note 146 (explaining that if an attorney files a § 1983 case in state court "you just get removed").

169. Telephone Interview with S. Dist. Tex. Attorney A, *supra* note 54; see also, e.g., Telephone Interview with S. Dist. Tex. Attorney B, *supra* note 146 ("[A] jury and a judge [are] always going to start out assuming that the officers did the right thing."); Telephone Interview with S. Dist. Tex. Attorney F, *supra* note 151 ("Judges are very deferential in the Fifth Circuit Court of Appeals towards police misconduct.").

Federal juries in the Southern District of Texas are also considered to be very hostile to police misconduct claims.<sup>170</sup> As one lawyer explained:

[P]articularly in excessive force cases there's always the attitude of, well, if the officers use[d] force on them, then they obviously deserved it. So, what did they—first question that the judge or jury is going to ask is what did your person do to deserve that? So, there's—they just err on the side of the officer, which is extremely difficult.<sup>171</sup>

Attorneys I surveyed from the Southern District of Texas shared this view.<sup>172</sup> To be sure, attorneys who practice in the Eastern District of Pennsylvania report that federal juries can be hostile to civil rights cases as well.<sup>173</sup> But, while four of the forty-four jury trials in the Eastern District of Pennsylvania ended in plaintiffs' or split verdicts during my two-year study period, none of the seven trials in the Southern District of Texas resulted in plaintiffs' verdicts.<sup>174</sup> Moreover, lawyers suing Philadelphia police officers have the option to bring solely state law claims in state court—an option not available to attorneys suing Houston police officers.<sup>175</sup>

### C. Defendants

*Motion Practice.* Attorneys representing Houston and its officers are far more likely than attorneys representing Philadelphia and its officers to file motions to dismiss and for summary judgment in civil rights cases. During my two-year study period, there were 21 cases in which Houston defendants could have moved to dismiss on the pleadings, and they did so in 11 (52.4%)

170. See, e.g., Telephone Interview with S. Dist. Tex. Attorney D (May 1, 2017) (on file with the *Michigan Law Review*) (“Texas citizens really respect the military branches and police authority. So you got to—you got to kind of deal with those—with those just general perceptions by the general public.”); Telephone Interview with S. Dist. Tex. Attorney F, *supra* note 151 (“[The juries in the Southern District of Texas are] very conservative and you’re going to get mostly, if you have a minority client, you’re going to get a sometimes all-white jury but most of the time at least you are gonna get one or two minorities at the most on your jury. . . . They are conservative, they are more conservative than most.”); see also *infra* note 174 and accompanying text.

171. Telephone Interview with S. Dist. Tex. Attorney B, *supra* note 146.

172. Eighteen attorneys who practice in the Southern District of Texas responded to the survey, and eight of the eighteen reported that juries were among the biggest obstacles to bringing police misconduct cases. See, e.g., S.D. Tex. Survey 5 (“If the cop doesn’t bloody the arrestee—juries are more likely to let the cop off.”); S.D. Tex. Survey 10 (“Jurors and judges trust cops more than citizens. . . .”); S.D. Tex. Survey 16 (“Public attitude is very supportive of law enforcement.”).

173. See, e.g., E.D. Pa. Survey 8 (“[J]uries are very conservative and usually very supportive of their law enforcement, especially after 9/11.”).

174. Schwartz, *How Qualified Immunity Fails*, *supra* note 23, at 46 tbl.12. Moreover, the Fifth Circuit—where Houston is located—is the only circuit that explicitly allows juries to decide officers’ entitlement to qualified immunity at trial. See Reinert, *supra* note 141, at 2072–77.

175. See *supra* notes 133–137, 157–159 and accompanying text.

of those cases.<sup>176</sup> Of the 15 cases that proceeded to discovery, defendants moved for summary judgment in 13 (86.7%). In Philadelphia, in contrast, there were 254 cases in which defendants could have moved to dismiss on the pleadings,<sup>177</sup> and they did so in 44 (17.3%) cases. Of the 134 cases in which the parties reached discovery, Philadelphia and its officers filed summary judgment motions in 57 (42.5%) cases.

*Settlement.* Cases brought against the City of Houston and its police officers are far less likely to settle than cases brought against the City of Philadelphia and its officers. Of the 25 federal cases filed against Houston and its officers during my two-year study period, 5 cases (20%) settled. No cases settled before discovery, and each of the 5 settlements was reached after courts denied defendants' summary judgment motions. In Philadelphia, in contrast, defendants appeared to pay plaintiffs to resolve their claims in 177 of the 268 (66%) federal cases filed. Philadelphia cases also settled earlier: of the 177 settlements, 106 (59.9%) were entered before discovery;<sup>178</sup> 45 (25.4%) were entered during discovery; 8 (4.5%) were entered while summary judgment motions were pending; 16 (9%) were entered after summary judgment; and 2 (1.1%) were entered during or after trial. Although the docket dataset does not reveal information about defendants' settlement offers or negotiations—or the frequency with which defense counsel made pre-filing settlement offers<sup>179</sup>—these data suggest Houston attorneys may be less willing than Philadelphia attorneys to make attractive settlement offers and less willing to make those offers until the parties have spent time and money on discovery and motion practice.

*Indemnification.* According to plaintiffs' attorneys in Philadelphia, the city's attorneys sometimes threaten not to indemnify officers but actually refuse to indemnify rarely, "and only in situations where officers have been criminally charged and removed from the force."<sup>180</sup> The City of Philadelphia estimates that it indemnifies 99% of officers who have settlements or judgments entered against them.<sup>181</sup>

Plaintiffs' attorneys practicing in Houston similarly report that the city sometimes threatens not to indemnify its officers.<sup>182</sup> Houston additionally

176. A total of 25 civil rights suits were filed during the study period, but 4 were dismissed by the court before defendants had an opportunity to answer or move to dismiss. For further discussion of this study and its methodology, see *supra* note 23 and accompanying text.

177. A total of 268 federal cases were filed against the Philadelphia Police Department and its officers, but 14 were dismissed before defendants could answer or move to dismiss.

178. Of these 106 settlements, 17 were entered before defendants answered, 85 were entered after the answer but before discovery, and 4 were entered while motions to dismiss were pending.

179. See *infra* note 204 (describing the possibility of pre-filing settlements in Houston and Philadelphia).

180. See, e.g., Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68.

181. See Ravenell & Brigandi, *supra* note 130, at 868.

182. E.g., Telephone Interview with S. Dist. Tex. Attorney F, *supra* note 151 ("[Houston attorneys] might mention, you know, 'Why are you litigating this case? We're not going to in-

refuses to indemnify for settlements and judgments over \$100,000 per officer or \$300,000 per event.<sup>183</sup> Any settlements or judgments over these amounts need to be collected from the individual officer or the union. One attorney explained that Houston's threatened refusals to indemnify and cap on indemnification makes it among his "least favorite [places] to litigate against."<sup>184</sup>

#### D. Counsel

Given that there are fewer obstacles to bringing and prevailing on a civil rights case against the Philadelphia Police Department, it should come as no surprise that more attorneys are willing to bring such cases in Philadelphia than in Houston. My docket dataset from 2011–2012 reveals that 10% of the federal suits filed against Philadelphia and its officers were litigated without counsel. In contrast, 24% of the federal suits filed against Houston and its officers were litigated pro se from beginning to end.

Suits against Philadelphia and its officers were far more often filed by experienced counsel. Fifty-seven percent (153) of cases filed against Philadelphia and its officers were filed by attorneys who had entered three or more appearances in police misconduct suits in the Eastern District of Pennsylvania during the two-year study period. In contrast, just 12.5% (3) of cases were filed against Houston and its officers by an attorney with that same level of civil rights litigation experience.

In Philadelphia, forty attorneys brought three or more federal cases against law enforcement in the two-year period of my study. Several attorneys I interviewed spend the majority of their time litigating civil rights cases and have been bringing civil rights cases against the Philadelphia Police Department and other government agencies for decades.<sup>185</sup> The most established civil rights firm in Philadelphia, Kairys, Rudovsky, Messing, Feinberg & Lin, has been bringing these cases for forty years.<sup>186</sup> Several attorneys at

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dennify this guy.'"). When I asked the City of Houston for records reflecting the frequency with which they denied officers indemnification over the past ten years, they wrote that they had no documents responsive to the request. See Email from Gen. Counsel Section, City of Hous. Legal Dep't, to author (July 30, 2019, 2:59 PM) (on file with the *Michigan Law Review*).

183. HOUS., TEX., CODE ch. 2, art. X, § 2-304 (1985) ("The city shall not pay that portion of any judgment against a covered person that awards: . . . Exemplary or punitive damages; or . . . Actual or compensatory damages arising out of a cause of action for official misconduct . . . Total payments made under this section on behalf of a covered person shall not exceed \$100,000.00 to any one person or \$300,000.00 for any single occurrence of personal injury or death or \$10,000.00 for a single occurrence of property damage."); see also Email from S. Dist. Tex. Attorney F, Indemnification in Houston (June 12, 2019, 4:59 PM) (on file with the *Michigan Law Review*) (confirming this practice).

184. Telephone Interview with S. Dist. Tex. Attorney F, *supra* note 151.

185. See Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 23, app. tbl.7 (describing the practice settings and civil rights experience of interviewed attorneys).

186. KAIRYS, RUDOVSKY, MESSING, FEINBERG & LIN, <https://www.krlawphila.com/> [<https://perma.cc/G4ES-435V>].



the firm teach trial advocacy, civil rights, and other courses at local law schools, and David Rudovsky, a founding partner, has authored multiple articles and a leading treatise about civil rights litigation.<sup>187</sup> One attorney at that firm explained that many civil rights attorneys currently practicing in Philadelphia have worked with the firm at some point in their careers.<sup>188</sup> As another attorney from the firm explained: “When we started, nobody would take [civil rights cases]. And now, years later, it’s seen as regular, traditional litigation. A number of lawyers out there [are] willing to litigate these kinds of cases.”<sup>189</sup> There are also several public interest organizations in Philadelphia that work primarily on civil rights cases.<sup>190</sup> An attorney described the Philadelphia civil rights bar overall as “very collegial and we share a lot of information” about legal strategy.<sup>191</sup>

In contrast, there is essentially no civil rights bar that regularly brings cases against officers employed by the Houston Police Department and other law enforcement agencies in the Southern District of Texas. There were only four attorneys in all of the Southern District of Texas who entered appearances in three or more police misconduct cases during my two-year study period. One—a solo practitioner with a general civil practice—filed four cases during the study period but filed no additional civil rights cases before or since; another of the four is deceased. The other two attorneys—Randall Kallinen<sup>192</sup> and Christopher Gale<sup>193</sup>—have each filed dozens of civil rights cases in the Southern District of Texas over the past several years and identify themselves on their websites as civil rights attorneys. But only Kallinen has ever filed suits against Houston and its officers—Gale is based in Corpus Christi, over 200 miles away.<sup>194</sup>

Unlike the collegial community of civil rights attorneys in Philadelphia who share information and strategy, plaintiffs’ attorneys in Houston are relatively isolated. One Houston attorney reported that she could recommend only one other lawyer who brings these cases, and he is located 240 miles away, in Dallas.<sup>195</sup> Other attorneys also reported knowing no one—or just a

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187. See *Our Attorneys*, KAIRYS, RUDOVSKY, MESSING, FEINBERG & LIN, <https://www.krlawphila.com/firm-attorneys/> [<https://perma.cc/2GER-7YXY>].

188. See Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68.

189. Telephone Interview with E. Dist. Pa. Attorney G, *supra* note 121.

190. See *id.*

191. Telephone Interview with E. Dist. Pa. Attorney C, *supra* note 70; see also Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 (“[T]here’s . . . a good number of attorneys in this district who know how to litigate 1983 cases . . .”); Telephone Interview with E. Dist. Pa. Attorney G, *supra* note 121 (describing the Philadelphia plaintiffs’ bar as “pretty cohesive”).

192. For additional information about Kallinen’s work, see KALLINEN L. PLLC, <https://kallinenlaw.com> [<https://perma.cc/58Z7-4BUD>].

193. For additional information about Gale’s work, see *Civil Rights*, GALE L. GROUP PLLC, <https://galelawgroup.com/civil-rights/> [<https://perma.cc/B99X-C5CE>].

194. See *id.*

195. See Telephone Interview with S. Dist. Tex. Attorney B, *supra* note 146.

person or two—who brings these cases.<sup>196</sup> Without an experienced plaintiffs' bar, there is little ability for less experienced lawyers to receive mentorship and advice. I asked one lawyer what she would do if she had "questions about qualified immunity or *Monell* or something like that" and she responded: "I can't think of anybody that I would pick up the phone and call. Other than [one lawyer] in Dallas."<sup>197</sup>

### E. Interaction Effects

Every aspect of Philadelphia's ecosystem is more conducive to civil rights litigation than Houston's ecosystem. In Philadelphia, there are more expansive interpretations of federal causes of action, available state law causes of action, friendlier judges and juries, defense counsel less likely to file dispositive motions and more likely to settle, and a more robust and experienced plaintiffs' civil rights bar. Philadelphia lawyers made very clear to me that police misconduct litigation is still an "uphill battle."<sup>198</sup> But all available evidence suggests that hill is significantly steeper in Houston.

One way to understand the interaction of these different ecosystem elements and their impact on civil rights enforcement is to review the number of civil rights suits filed and case outcomes in each jurisdiction. In 2011–2012, a total of twenty-five § 1983 cases were filed in federal court against Houston and its officers. Plaintiffs prevailed in five of these twenty-five cases.<sup>199</sup> The City of Houston paid a total of \$200,000 to resolve three cases in which Houston police officers used fatal force against three men (\$100,000 in one case, \$90,000 in another case, and \$10,000 in a third).<sup>200</sup> The City of Houston paid \$2,500 to settle another case, in which an off-duty Houston police officer, working as a security guard, tackled a wedding guest and

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196. See, e.g., Telephone Interview with S. Dist. Tex. Attorney E (Nov. 10, 2017) (on file with the *Michigan Law Review*); Telephone Interview with S. Dist. Tex. Attorney F, *supra* note 151.

197. See Telephone Interview with S. Dist. Tex. Attorney B, *supra* note 146.

198. Telephone Interview with E. Dist. Pa. Attorney E, *supra* note 54.

199. See Letter from Nerissa Jewett, Senior Paralegal, City of Hous., to author (Aug. 9, 2017) (on file with the *Michigan Law Review*) (providing responses to public records requests seeking information about cases filed against the Houston Police Department and its officers in 2011–2012 and the outcomes of those cases). There was one additional case, *Alfaro v. City of Houston*, No. H-11-1541, 2013 WL 3457060 (S.D. Tex. July 9, 2013), in which the court entered summary judgment in favor of the City of Houston but granted a default judgment of \$900,000 against the individual officer defendant, who failed to appear. See *Alfaro v. City of Houston*, C.A. NO. 11-ev-1541 (S.D. Tex. Sept. 16, 2013). The case alleged that the officer raped four women while on duty. *Alfaro*, 2013 WL 3457060, at \*1. The officer was also criminally prosecuted, and he is currently serving life in prison. See Jayme Fraser, *Ex-HPD Officer Sentenced to Life in Rape*, HOUS. CHRON. (Oct. 8, 2012), <https://www.chron.com/news/houston-texas/article/Ex-HPD-officer-sentenced-to-life-in-rape-3928437.php> [<https://perma.cc/4YNY-S4WJ>]. I reached out to the plaintiffs' attorneys in the case to determine whether they had ever tried to collect on the default judgment, but they did not respond to my requests for information.

200. See Letter from Nerissa Jewett, *supra* note 199.

cracked his teeth on the pavement.<sup>201</sup> And the police union paid a total of \$4,000 to settle a case in which an off-duty police officer shot two store and restaurant patrons, killing one.<sup>202</sup>

In contrast, 268 cases were brought against the Philadelphia Police Department and its officers in federal court alone, and untold others were brought in state court during that period.<sup>203</sup> A total of 242 state and federal cases resulted in payments to plaintiffs from the City of Philadelphia totaling almost \$22 million—more than 100 times what the City of Houston paid to plaintiffs during the same period.<sup>204</sup> The only cases in which plaintiffs recovered money against the City of Houston and its officers involved excessive force, and in all but two of the cases someone died.<sup>205</sup> In contrast, almost 20% of the cases settled by the City of Philadelphia were false arrest cases, and were settled for an average of almost \$55,000.<sup>206</sup> When shooting cases brought against the Philadelphia Police Department and its officers settled, they settled for an average of \$720,833 and a total of \$8.65 million.<sup>207</sup> In contrast, when excessive force cases against the Houston Police Department and its officers settled, they settled for an average of \$41,300 and a total of \$206,500.<sup>208</sup>

Another way to appreciate the interaction of ecosystem elements and their impact on civil rights enforcement in Philadelphia and Houston ecosystems is to return to the case with which we began—the person shot following a traffic stop. Such a shooting occurred in Houston. Houston Police Department Officer Brenton Green pulled over Steven Guidry, an African

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201. See *id.* For the facts of this case, see *Tribble v. Lyons*, No. 4:11-cv-02833 (S.D. Tex. Nov. 21, 2012) (order granting in part and denying in part motions for summary judgment).

202. For the facts of this case, see *Rodriguez v. City of Houston*, No. H-12-501, 2014 U.S. Dist. LEXIS 114398, at \*1–4 (S.D. Tex. Aug. 15, 2014). For the terms of the settlement, see *Motion to Deposit Money into the Registry of the Court*, *Rodriguez v. City of Houston*, No. 4:12-CV-00501 (S.D. Tex. July 2, 2015).

203. See Letter from Russell T. Crotts, Assistant City Solicitor, City of Phila., to author (Jan. 24, 2018) (on file with the *Michigan Law Review*) (providing responses to public records requests seeking information about cases filed against the Philadelphia Police Department and its officers in 2011–2012 and the outcomes of those cases). Although the City of Philadelphia provided me with information about the state court cases in which plaintiffs recovered, it did not provide information about the total number of cases filed in state court.

204. See *id.* These figures do not include potentially significant payments made in disputes settled before a lawsuit is filed. See Telephone Interview with E. Dist. Pa. Attorney G, *supra* note 121 (explaining that approximately half of his cases are settled before a lawsuit is filed but noting that his practice may be unique in this regard). Note that, when I sought information from the City of Houston about the number of disputes settled before a lawsuit is filed, they responded that they had no records responsive to the request. See Email from Gen. Counsel Section, City of Hous. Legal Dep't, *supra* note 182.

205. See Letter from Nerissa Jewett, *supra* note 199 (identifying the cases settled with payments to plaintiffs).

206. See Letter from Russell T. Crotts, *supra* note 203 (identifying the cases settled with payments to plaintiffs, and the nature of each plaintiff's claims).

207. See *id.*

208. See Letter from Nerissa Jewett, *supra* note 199.

American man, for a minor traffic violation, then pulled Guidry out of his car and shot him.<sup>209</sup> Officer Green said Guidry resisted and reached into his waistband; a passenger in the car states Guidry did not resist or struggle, and no weapon was found in Guidry's possession.<sup>210</sup> The case, *Guidry v. Houston*, was brought by an attorney with a general civil practice.<sup>211</sup> A search on PACER indicates that this is the only civil rights case the attorney of record ever filed. The suit, filed in federal court, alleged § 1983 claims against the individual officer and the City of Houston.<sup>212</sup> In a request for admission, though, the plaintiff's attorney responded that he was not pursuing a claim against the individual officer under § 1983.<sup>213</sup> The attorney told me, when I asked, that he did not recall why he declined to pursue the individual liability claim but that it "probably . . . ha[d] something to do with qualified immunity."<sup>214</sup>

The plaintiff's only remaining theory was that the City of Houston should be held liable because it ratified the shooting after the fact<sup>215</sup>—one of several theories of municipal liability, and arguably the most difficult to prove.<sup>216</sup> The plaintiff did not pursue a *Monell* claim based on Houston's failure to train or supervise Officer Green, even though a reporter from the *Houston Chronicle* found Green had ten other sustained complaints against him, "including causing automobile accidents, failing to complete training, and improper police procedure," and "us[ing] his nightstick during an unprovoked attack on ex-NBA player and University of Houston basketball standout Michael Young, who was making his way through a boisterous crowd with his two sons."<sup>217</sup> Green was suspended for twenty days without

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209. For a description of the facts of this case, see *Guidry v. Houston*, No. H-11-1589, 2013 WL 211114, at \*1 (S.D. Tex. Jan. 17, 2013), and *1,000+ Cases of Police Brutality in the United States*, GREATER HOUS. COAL. FOR JUSTICE, <http://greaterhoustoncoalitionforjustice.com/wp-content/uploads/2014/11/1000CasesOfPoliceBrutalityInTheUSA.pdf> [https://perma.cc/8NAJ-5HQD].

210. See *1000+ Cases of Police Brutality in the United States*, *supra* note 209.

211. *Firm Overview*, SYLVESTER ANDERSON, <http://www.sylandlawyer.com/> [https://perma.cc/WR4H-SA3G].

212. *Guidry*, 2013 WL 211114, at \*2.

213. Defendants City of Houston and Officer B. Green's Motion for Summary Judgment, The City of Houston, at 17–18, *Guidry*, 2013 WL 211114 (No. 4:11-cv-01589).

214. Email from Att'y for Plaintiff Steven Guidry to author (June 24, 2019, 12:51 PM) (on file with the *Michigan Law Review*).

215. *Guidry*, 2013 WL 211114, at \*3.

216. See *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009) (describing the ratification theory as "limited to 'extreme factual situations'" (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 848 (5th Cir. 2009))).

217. Pinkerton, *supra* note 8. This article was published thirteen months after plaintiff's counsel submitted his opposition to summary judgment. It is unclear from the article when these complaints occurred or were sustained, and some may have occurred after motion practice was completed. Green's assault on Michael Young occurred after he shot Guidry but before Guidry filed his case.

pay for his attack on Young.<sup>218</sup> But the plaintiff did not develop any evidence of these sustained complaints or their underlying facts to support his *Monell* claim and did not present this evidence to the judge. Instead, the plaintiff's attorney's opposition to defendant's summary judgment motion relied primarily on the department's internal affairs investigation of the shooting—which concluded that the shooting was justified—and the testimony of the plaintiff.<sup>219</sup> The plaintiff's attorney hired a ballistics expert, but did not oppose defendant's motion to exclude the expert at summary judgment.<sup>220</sup> The court found no evidence that the city ratified the shooting and dismissed Guidry's claim.<sup>221</sup>

A similar case arose in Philadelphia.<sup>222</sup> Aaron McDaniels, an African American man, was a passenger in a car that was involved in a crash. When police arrived at the scene, the driver of the car fled and McDaniels remained in the car.<sup>223</sup> A Philadelphia officer approached the car and fatally shot McDaniels. The officer asserted that McDaniels opened the passenger door and pointed a gun at the officer; an eyewitness asserted that the officer opened the door and McDaniels had nothing in his hands when he was shot.<sup>224</sup> While the Houston plaintiff was represented by a lawyer who had brought few if any civil rights cases before, the Philadelphia plaintiff was represented by an experienced civil rights attorney who had brought § 1983 cases for several decades, worked at the preeminent civil rights firm in Philadelphia, and taught trial advocacy and clinical courses at several law schools.<sup>225</sup> While the Houston attorney could only bring § 1983 claims against Houston and the officer, the Philadelphia attorney had the choice to bring federal and state claims in federal court or to bring only state law claims in state court. The Philadelphia attorney decided to file suit against the individual officer in state court because the jury pool would be more "sympathetic."<sup>226</sup> When Philadelphia declared that it would not indemnify the officer because he was being criminally charged on another matter, the plaintiff's attorney had the experience to know to amend the complaint to

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218. *Id.*

219. See Plaintiff's Response to Defendants City of Houston and Officer B. Green's Motion for Summary Judgment, *Guidry*, 2013 WL 211114 (No. 4:11-cv-01589).

220. See *id.*

221. *Guidry*, 2013 WL 211114, at \*4.

222. For a description of the facts of the case, see *McDaniels v. City of Philadelphia*, 234 F. Supp. 3d 637, 640–41 (E.D. Pa. 2017).

223. *Id.* at 640.

224. See *id.* at 640–41.

225. See *Paul Messing*, KAIRYS, RUDOVSKY, MESSING, FEINBERG & LIN, <https://www.krlawphila.com/paul-messing/> [<https://perma.cc/KG4U-HEM4>].

226. Email from Paul Messing to author (June 7, 2019, 9:17 AM) (on file with the *Michigan Law Review*).

add a municipal liability claim.<sup>227</sup> The city then removed the case to federal court.<sup>228</sup>

While the attorney in Houston limited his municipal liability claim to a single theory—ratification—that is considered especially difficult to prove, the attorney in Philadelphia pursued two different municipal liability theories: that Philadelphia failed to properly train and supervise officers about uses of deadly force, and that Philadelphia failed to maintain an effective disciplinary system.<sup>229</sup> The attorney in Houston failed to present compelling evidence of Houston’s failure to supervise or discipline the officer who shot Guidry. In the Philadelphia case, in contrast, the plaintiff’s attorney supported his municipal liability claims with voluminous evidence, including conclusions of a police practices expert who audited the Department’s internal affairs investigations and reviewed the disciplinary history of the officer involved in the shooting; an extensive report by the Department of Justice that identified multiple problems with Philadelphia’s use of force policies, trainings, and investigations; and a report by the Philadelphia Police Department’s own Integrity and Accountability Office, criticizing the quality of the Department’s internal affairs investigations.<sup>230</sup> While the judge in Houston granted the defendant’s summary judgment motion and dismissed the plaintiff’s case, the judge in Philadelphia denied the defendant’s summary judgment motion and the parties settled before trial for \$600,000.<sup>231</sup>

The starkly different litigation and resolution of *Guidry* and *McDaniels* reflect profound differences in the civil rights ecosystems in Philadelphia and Houston. It is impossible to point to a single factor that explains the divergent paths taken by these two cases. Instead, it is the interaction of multiple aspects of each ecosystem—including the availability of state law claims, the dangers of qualified immunity, and the experience of civil rights counsel—that led to these contrasting results. Differences in the litigation of *Guidry* and *McDaniels* suggest other factors may also have played a role. For example, plaintiff’s counsel in *McDaniels* was able to support his *Monell* claim with evidence from a DOJ investigation of police misconduct in Philadelphia; no comparable investigation was conducted in Houston. Plaintiff’s counsel in *McDaniels* was also able to rely on a report by the Philadelphia Police Department’s Integrity and Accountability office about use of force practic-

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227. See *id.* (explaining that, after the City threatened not to indemnify the officer, “we removed the case . . . to federal court so that we could proceed with our only hope: the *Monell* claim”).

228. Notice of Removal, *McDaniels v. City of Philadelphia*, 234 F. Supp. 3d 637 (E.D. Pa. 2017) (No. 2:15-cv-02803).

229. See Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 1, *McDaniels*, 234 F. Supp. 3d 637 (No. 2:15-cv-2803).

230. See Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment at 5–11, *McDaniels*, 234 F. Supp. 3d 637 (No. 2:15-cv-2803).

231. See *McDaniels*, 234 F. Supp. 3d 637; Email from E. Dist. Pa. Attorney A to author (June 7, 2019, 9:43 AM) (on file with the *Michigan Law Review*) (describing settlement terms).

es; no comparable office exists in Houston.<sup>232</sup> Many more characteristics of the ecosystems in the two cities likely contributed to the results in these cases and should be explored. But even this preliminary examination has made clear the ways that multiple factors—federal and state law; judges, lawyers, and defense counsel; and litigation, settlement, and indemnification practices—combine to make Houston a far less hospitable place than Philadelphia for a person who believes their civil rights have been violated.

### III. FEEDBACK LOOPS

Natural ecosystems are not static collections of animals, plants, and other matter—instead, they have feedback loops.<sup>233</sup> In a forest, water, carbon dioxide, and sunlight feed plants. Herbivores eat those plants, and carnivores eat those herbivores. Decomposing animals enrich the soil. And that soil nourishes the plants.

Changes to one aspect of a natural ecosystem can prompt changes to other aspects of the ecosystem. Sometimes, a change to one aspect of an ecosystem prompts a counterbalancing change.<sup>234</sup> For example, the Canada lynx's favorite prey is snowshoe hare. When the snowshoe hare population decreases, there is less for lynx to eat and their numbers decline.<sup>235</sup> Fewer lynx means that the snowshoe hare population can grow, and the cycle begins again. Other times, a change to one aspect of an ecosystem can prompt additional changes in the same direction. In the Amazon, increased deforestation—caused by fire, drought, and overfarming—is leading to increased drought, which is causing still more deforestation.<sup>236</sup> While the population of lynx and snowshoe hare adjust and achieve dynamic equilibrium, the cycle

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232. James Pinkerton, *Houston's Police Oversight Group Called a "Toothless Watchdog,"* HOUS. CHRON. (Sept. 17, 2016, 9:23 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-s-police-oversight-group-called-a-9229728.php> [<https://perma.cc/JU8Z-PKNA>] (describing Houston's Independent Police Oversight Board as a "toothless watchdog that isn't independent and hasn't performed any public oversight since it was created five years ago").

233. See Kathleen C. Weathers et al., *Controls on Ecosystem Structure and Function*, in FUNDAMENTALS OF ECOSYSTEM SCIENCE, *supra* note 13, at 215, 225 ("In highly connected systems such as ecosystems, interaction pathways often lead to feedbacks. That is, a change in one part of the system causes a change in another part of the system, which in turn comes back to affect the original component.").

234. See *id.* at 225 ("[F]eedback loops may be short or long, and may be negative (the response from the system opposes the initial change) or positive (the response from the system reinforces the initial change).").

235. See Charles Elton & Mary Nicholson, *The Ten-Year Cycle in Numbers of the Lynx in Canada*, 11 J. ANIMAL ECOLOGY 215, 241–42 (1942).

236. See, e.g., Daniel Nepstad et al., *Road Paving, Fire Regime Feedbacks, and the Future of Amazon Forests*, 154 FOREST ECOL. & MGMT. 395, 396–400 (2001); DANIEL NEPSTAD, WORLD WIDE FUND FOR NATURE, THE AMAZON'S VICIOUS CYCLES 8 fig.1 (2007); Delphine Clara Zemp et al., *Self-Amplified Amazon Forest Loss Due to Vegetation-Atmosphere Feedbacks*, NATURE COMM., Mar. 13, 2017, at 1, 1.

of deforestation and drought in the Amazon has created imbalance, leading to reductions in forest health, water availability, and biodiversity.<sup>237</sup>

Civil rights ecosystems, like natural ecosystems, experience feedback loops. As constitutional and social movement scholars have long observed, constitutional rights evolve through feedback between courts, activists, and other public and private actors: “[C]ourts respond to claims and visions crafted by movements, and court decisions in turn shape the claims and visions of those movements and alter the political terrain on which those movements operate.”<sup>238</sup> Here, I am focused more narrowly on the ways in which shifts in the people, rules, and practices most central to civil rights litigation can impact the ecosystem.

The way in which past civil rights cases have been filed, litigated, and resolved will almost certainly affect decisions in future cases. For example, a plaintiffs’ attorney, who often brings civil rights cases on contingency, is likely to select cases for which she believes her expected recovery will exceed her expected costs.<sup>239</sup> When making this calculation, the attorney will likely consider what happened in her past cases and cases brought by her colleagues. If an attorney is considering filing a case against an officer employed by a jurisdiction that has regularly raised qualified immunity and aggressively pursued interlocutory appeals in the past, the attorney will factor in the cost of motion practice and a possible appeal when deciding whether a case makes economic sense to take.<sup>240</sup> In these ways, past successes and failures will inform future filing decisions.

Information from prior cases may also influence case strategy. If a plaintiffs’ attorney has the option to file a case in state or federal court, prior decisions by state and federal judges and juries in civil rights cases will inform her decision. Defense counsel likely make similar strategic decisions based in part on past litigation. If a plaintiff files a § 1983 case in federal district court, and courts in the district rarely grant motions to dismiss on qualified immunity grounds, defense counsel may be reluctant to spend valuable time briefing such a motion. If juries have historically entered defense verdicts—and awarded little to plaintiffs in the rare occasion that they succeed—defendants may be less likely to make attractive settlement offers to plaintiffs before trial.

As in natural ecosystems, changes to one aspect of a civil rights ecosystem can prompt a counterbalancing change. For example, some plaintiffs’ attorneys who practice in Oakland, California report that qualified immunity

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237. See NEPSTAD, *supra* note 236, at 4–5. See generally *supra* note 236.

238. Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 877 (2013) (book review); see also *supra* note 17 and accompanying text.

239. For further discussion of this calculation and the fact that some attorneys vary in this calculation, see Schwartz, *Qualified Immunity’s Selection Effects*, *supra* note 23, at 1110–11.

240. See *id.* at 1119, 1125 n.99.



has become more of a barrier in civil rights cases in recent years.<sup>241</sup> Plaintiffs' attorneys have the option to avoid the challenges associated with qualified immunity by filing state law claims in state court.<sup>242</sup> Some attorneys I interviewed expressed concern that California state court judges are less familiar with the law relevant to civil rights cases.<sup>243</sup> But others consider state court judges—at least those in Alameda County, where Oakland is located—to be more sympathetic to plaintiffs than federal judges.<sup>244</sup> And if more civil rights cases are filed in state court, state judges will presumably become more familiar with the relevant laws. Other aspects of the ecosystem make state court an attractive alternative. There are no damages caps in California for state tort claims, and plaintiffs' attorneys can recover fees when they prevail on certain state law claims.<sup>245</sup> California's fee-shifting rules are, in fact, more generous than those applicable to § 1983 claims.<sup>246</sup> And state court juries in Oakland are considered more sympathetic to civil rights plaintiffs than their federal counterparts.<sup>247</sup> So, if qualified immunity makes § 1983 claims

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241. *E.g.*, Telephone Interview with N. Dist. Cal. Attorney B, *supra* note 54 (“[T]he law has become so much more difficult in [the qualified immunity] arena including in terms of finding a case with identical facts that has previously been decided . . .”). My data suggest that qualified immunity is not being raised very often in Oakland cases: in cases filed from 2011 to 2012, Oakland plaintiffs filed twenty-two cases in which qualified immunity could be raised, and defendants did so in only two cases, at summary judgment. *See supra* note 23 (explaining research methodology). Nevertheless, defendants may have begun raising qualified immunity more recently. And, regardless of what the data show, if plaintiffs' attorneys believe qualified immunity has become more of a challenge, it may impact their case selection and filing decisions.

242. *See* Telephone Interview with N. Dist. Cal. Attorney C (Nov. 6, 2017) (on file with the *Michigan Law Review*) (reporting that some attorneys are forgoing federal court to avoid qualified immunity, filing in state court under the Unruh Civil Rights Act or the Bane Act, and getting attorneys' fees under California law).

243. *See, e.g.*, Telephone Interview with N. Dist. Cal. Attorney E (Nov. 17, 2017) (on file with the *Michigan Law Review*) (explaining that he prefers federal court because “[t]he judges don't have the time or the knowledge in state court”); Telephone Interview with N. Dist. Cal. Attorney G, *supra* note 59 (explaining that he prefers to file cases in federal court because state court judges “are less versed on the law than federal judges are”).

244. *See, e.g.*, Telephone Interview with N. Dist. Cal. Attorney A, *supra* note 59 (explaining that there are “a lot of good judges” in Alameda County, as compared to “a lot” of the Northern District judges and magistrates who “seem to be closely aligned with law enforcement”).

245. *See supra* note 48 and accompanying text.

246. *See, e.g.*, Telephone Interview with N. Dist. Cal. Attorney G, *supra* note 59 (observing that plaintiffs' attorneys can recover a multiplier on attorneys' fees under California state law but not under federal law). Plaintiffs can also recover under a catalyst theory in California, which is not available under federal law. *See, e.g.*, *La Miranda Ave. Neighborhood Ass'n v. City of Los Angeles*, 232 Cal. Rptr. 3d 338 (Ct. App. 2018). *Cf.* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 606–10 (2001) (rejecting application of a catalyst theory for collection of attorneys' fees for civil rights claims, including § 1983 claims).

247. *See, e.g.*, Telephone Interview with N. Dist. Cal. Attorney A, *supra* note 59 (describing Alameda County as having “great jury pools as far as finding liability”); Telephone Inter-

against Oakland officers increasingly difficult for plaintiffs to bring in federal court, plaintiffs' attorneys can increasingly rely on state law claims and courts and a dynamic equilibrium will be maintained.

In other parts of the country, defendant-friendly changes to one aspect of the ecosystem may not be counterbalanced by other aspects of the ecosystem. Attorneys I interviewed who practice in Orlando, Florida share the perception that federal district courts are increasingly granting qualified immunity motions, and that defense counsel have begun raising the defense more often.<sup>248</sup> In response to the challenges posed by qualified immunity, some plaintiffs' attorneys in Florida take the same approach as attorneys in California—they file state law claims in state court. Attorneys report that a Florida state law claim is easier to prove than a § 1983 claim.<sup>249</sup> Some attorneys believe state court judges and juries are also more sympathetic.<sup>250</sup> Yet the benefits of state court come at a cost. In Florida, state law damages are statutorily capped at \$200,000, and attorneys' fees are unavailable.<sup>251</sup> While state law may provide comparable relief for certain types of cases—namely,

view with N. Dist. Cal. Attorney F (Dec. 6, 2017) (on file with the *Michigan Law Review*) (reporting that his firm is beginning to file more civil rights cases against the San Francisco Police Department in state court because they prefer the local juries). Note, though, that lawyers consider local juries in more rural parts of Northern California to be more conservative. See, e.g., Telephone Interview with N. Dist. Cal. Attorney E, *supra* note 243; Telephone Interview with N. Dist. Cal. Attorney G, *supra* note 59.

248. See, e.g., Telephone Interview with Middle Dist. Fla. Attorney B (Oct. 30, 2017) (transcript on file with the *Michigan Law Review*) (“[Qualified immunity motions are] creeping up. I remember a time when . . . qualified immunity did not appear in some motions for summary judgment. Now it’s coming up in more and more motions to dismiss.”); Telephone Interview with Middle Dist. Fla. Attorney D, *supra* note 63 (explaining that defendants raise qualified immunity “every time; even if it’s not valid they’ll take a stab at it; they’ll take a run at it”). Of the thirteen § 1983 damages actions filed against Orlando police officers from 2011 to 2012, defendants raised qualified immunity in seven—four in motions to dismiss, and three at summary judgment. In one case, summary judgment was granted and dispositive; in three the motions were granted on other grounds; and in three the cases settled while the motions were pending.

249. See, e.g., Telephone Interview with Middle Dist. Fla. Attorney A (Apr. 27, 2017) (transcript on file with the *Michigan Law Review*) (“[T]he state claim is a lot easier to prove than the civil rights claim, because the civil rights standard is so much higher. It’s, you know, basically, I [have to] show intentional quasicriminal conduct on those to prevail, and the jury instructions in the Eleventh Circuit standard jury instructions for civil rights cases are just awful. I mean, it’s almost a miracle if you get past the first question.”).

250. See, e.g., *id.* (explaining that he considers state judges less hostile to civil rights suits than federal judges); Telephone Interview with Middle Dist. Fla. Attorney C, *supra* note 54 (explaining that federal judges are more likely than state judges to dismiss civil rights suits before trial); Telephone Interview with Middle Dist. Fla. Attorney D, *supra* note 63 (explaining that the state court judges are “generally more sympathetic” to civil rights cases than federal court judges “because they don’t see as much of it”).

251. FLA. STAT. ANN. § 768.28(5) (West 2019) (providing that waiver of sovereign immunity caps damages awards by any one person at \$200,000 and a total award at \$300,000); see also Telephone Interview with Middle Dist. Fla. Attorney A, *supra* note 249 (describing the damages cap as a challenge for state law claims); Telephone Interview with Middle Dist. Fla. Attorney C, *supra* note 54 (same).

low damages cases that would settle in either court without a separate provision for attorneys' fees—state law claims do not provide a comparable alternative for higher damages cases and cases where separate attorneys' fees would be awarded had the case been brought in federal court.<sup>252</sup> So, if it becomes increasingly difficult to file § 1983 cases against Orlando officers in federal court, plaintiffs' attorneys will not be able to rely on state law to vindicate high-value claims.

When shifts to one aspect of an ecosystem are not counterbalanced by other shifts in the ecosystem, cascading changes can occur. In the Middle District of Florida, as in the Southern District of Texas, there are few attorneys who regularly bring civil rights cases. One Florida attorney recognized that when he rejected a case, "the chance of them ever finding another lawyer is zero" because "there's just a couple of us that even do this."<sup>253</sup> This attorney explained that most attorneys bring a few civil rights cases and then stop after they get "clobbered a couple of times."<sup>254</sup> As he explained, "there's only so much money you can lose before you figure out that it's not the right way to go."<sup>255</sup> As another attorney explained: "Not many people take these cases because you really don't make any money on them. Rarely, you do, but I look at it as more of a community service, quite frankly."<sup>256</sup> I spoke to one attorney who has decided to focus primarily on filing small damages cases in Florida state court.<sup>257</sup> But other attorneys consider this approach not to be worth the time, expense, or risk.<sup>258</sup>

If it becomes increasingly difficult to file § 1983 claims against Orlando officers, and state court damages remain capped at \$200,000, it makes economic sense that even fewer lawyers will be willing to accept civil rights cases

252. For example, in *Spann v. Verdoni*, a Sarasota County deputy sheriff shot and killed a twenty-year-old after he and a friend rang the deputy's doorbell late at night as a prank. *Spann v. Verdoni*, No. 8:11-cv-707-T-TBM, at \*4–5 (M.D. Fla. Nov. 27, 2012) (order granting summary judgment). The district court granted the deputy summary judgment on the federal claims (granting qualified immunity in the alternative) and remanded the state claims to state court. *Id.* at \*20–30. The decedent's family's attorney informed me that his clients "made the decision not to pursue an action in State court" because the damages cap "severely restrict[ed] potential damages." Email from W. Cort Frohlich, Attorney for Plaintiffs in *Spann v. Verdoni*, to author (Mar. 2, 2017, 10:15 AM) (on file with the *Michigan Law Review*). See also, e.g., Telephone Interview with Middle Dist. Fla. Attorney E, *supra* note 67 (explaining that he will not file in state court unless he is bringing a low damages claim).

253. Telephone Interview with Middle Dist. Fla. Attorney C, *supra* note 54. Attorneys who primarily practice in neighboring parts of the Middle District of Florida similarly reported that there are few or no other lawyers who bring civil rights cases. See, e.g., Telephone Interview with Middle Dist. Fla. Attorney D, *supra* note 63 ("I do not know anybody who's doing civil rights in Charlotte County or Lee County or DeSoto County or Manatee County or Sarasota County.").

254. Telephone Interview with Middle Dist. Fla. Attorney C, *supra* note 54.

255. *Id.*

256. Telephone Interview with Middle Dist. Fla. Attorney A, *supra* note 249.

257. See, e.g., Telephone Interview with Middle Dist. Fla. Attorney B, *supra* note 248.

258. See, e.g., Telephone Interview with Middle Dist. Fla. Attorney E, *supra* note 67.

on contingency.<sup>259</sup> As a result, the civil rights cases that are filed will be brought predominantly by lawyers who have limited expertise in this very complicated area of the law. And the scarcity of seasoned civil rights attorneys may mean that less experienced lawyers will have nowhere to go for advice.<sup>260</sup> Attorneys without experience or mentors may find it more difficult to succeed in any given case. These attorneys' losses may also result in rulings that make the legal terrain even more difficult to navigate. And these losses and legal setbacks will make it even less likely that attorneys will agree to represent civil rights plaintiffs in the future.

Cascading changes in the opposite direction can also occur. In Oakland, as in Philadelphia, there are many experienced attorneys who bring civil rights cases against the police department and its officers.<sup>261</sup> In the Northern District of California, there were twenty-two attorneys who entered three or more appearances in police misconduct cases during my two-year study period.<sup>262</sup> Seven attorneys entered ten or more appearances during this period. Several attorneys who practice in Oakland report that they have been litigating civil rights cases for decades.<sup>263</sup> Indeed, several attorneys described competing for clients in the Northern District of California.<sup>264</sup> If laws, judges, defense counsel, or juries were to become even more hospitable to civil rights claims, more lawyers would be willing to accept civil rights cases, more lawyers would dedicate a sizeable portion of their work to these cases and become experts in the area, and these lawyers would be able to mentor less experienced lawyers. As a result, more civil rights cases would be filed by lawyers with more experience, and that experience would make them more likely to succeed in any given case and more likely to cause courts to issue

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259. FLA. STAT. ANN. § 768.28 (West 2019); see Telephone Interview with Middle Dist. Fla. Attorney A, *supra* note 249; see also Telephone Interview with Middle Dist. Fla. Attorney C, *supra* note 54.

260. See *supra* notes 82, 195–197 and accompanying text.

261. Telephone Interview with N. Dist. Cal. Attorney F, *supra* note 247 (“There’s definitely a group of attorneys out here who do these cases and do them routinely, and they do them well.”).

262. Schwartz, *Qualified Immunity’s Selection Effects*, *supra* note 23, app. tbl.1.

263. See, e.g., Telephone Interview with N. Dist. Cal. Attorney A, *supra* note 59 (reporting that he has been litigating civil rights cases for twenty-five years); Telephone Interview with N. Dist. Cal. Attorney B, *supra* note 54 (reporting that she has been litigating civil rights cases for twenty-two years); Telephone Interview with N. Dist. Cal. Attorney C, *supra* note 242 (reporting that he has been litigating civil rights cases for more than forty years).

264. See, e.g., Telephone Interview with N. Dist. Cal. Attorney B, *supra* note 54 (describing another attorney practicing in the Northern District of California as “a big competitor” for her, who has brought ten times more police misconduct suits over the past ten years); Telephone Interview with N. Dist. Cal. Attorney C, *supra* note 242 (explaining that he used to bring cases in San Francisco but now brings most police misconduct cases in Sonoma County and Marin County because “if you’re black in the Bay Area, you got beat up by the police, you’re probably going to call” another lawyer); Telephone Interview with N. Dist. Cal. Attorney E, *supra* note 243 (“[T]here’s no end to the number of lawyers that are willing to take civil rights cases in Oakland.”).

rulings that would be useful to plaintiffs in future cases.<sup>265</sup> Success builds on itself—and so does failure.

#### IV. IMPLICATIONS

In this Article, I have offered a framework with which to understand civil rights filings and outcomes—as the product of jurisdictions’ civil rights ecosystems. The ecosystem analogy has advanced three descriptive claims about civil rights litigation: that litigation in this area is the product of multiple interacting people, rules, and practices; that civil rights ecosystems vary dramatically; and that civil rights ecosystems have feedback loops that can lead to shifts in their amenability to suits over time. Now, I consider the implications of these observations for courts’ and scholars’ views about the relationship between constitutional rights and remedies, the existence and desirability of geographic variation in constitutional rights, and the mechanics of change in civil rights protections.

##### A. *Contextualizing the Meaning of Lawsuit Filings and Payouts*

Understanding civil rights litigation as the product of ecosystems should caution against drawing quick conclusions about the practices of government officials based on the volume of lawsuits filed against them and payouts in those cases. Commentators regularly assume that filed suits and payouts reflect the extent and severity of police misconduct. For example, in a recent study, scholars attempted to assess the effectiveness of Department of Justice consent decrees in curbing police misconduct by examining the frequency of § 1983 lawsuit filings, reasoning that “[s]ection 1983 lawsuits filed against a law enforcement agency should provide a rough proxy for the public’s satisfaction of its policing practices.”<sup>266</sup> Another study tested the theory that police departments can learn from lawsuits brought against them by tracking the number of § 1983 cases against some departments that ignore lawsuit data and other departments that regularly gather and analyze lawsuit data.<sup>267</sup> But if the volume of lawsuits and the amount of payouts is defined in significant part by the state of the law, judges, juries, indemnification practices, and the plaintiffs’ bar, lawsuits should not be understood as a metric of misconduct.<sup>268</sup> Indeed, jurisdictions in which very few cases are

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265. For evidence that more experienced lawyers are more likely to succeed, see *supra* notes 77–79 and accompanying text.

266. See Zachary A. Powell et al., *Police Consent Decrees and Section 1983 Civil Rights Litigation*, 16 CRIMINOLOGY & PUB. POL’Y 575, 584 (2017).

267. See Randall K. Johnson, *Do Police Learn from Lawsuit Data?*, 40 RUTGERS L. REC. 30 (2012–2013). It appears that Johnson relied only on “published Section 1983 cases” in his assessment, instead of all cases filed—an approach that has separate reliability problems. *Id.* at 33. For a discussion of those reliability problems, see Schwartz, *How Qualified Immunity Fails*, *supra* note 23, at 20–21.

268. See Harmon, *supra* note 65, at 618 (“Section 1983 suits are a poor proxy for constitutional violations (much less for misconduct more generally) because the incidence of civil

brought may merit even closer inspection—particularly if other available evidence suggests incidents of government violence and overreach are not being contested in the courts.

### B. *Contextualizing the Role of Federal Courts and Federal Law*

When the Supreme Court crafts constitutional rules, procedural hurdles, and immunity doctrines, it appears to believe that its rulings operate in a vacuum to achieve a balance between government and individual interests.<sup>269</sup> Scholarly debate about the scope of constitutional rights and the relationship between constitutional rights and remedies similarly focuses primarily on the work of federal courts applying federal law. The Court’s substantive, justiciability, and remedial rulings undoubtedly influence the scope of constitutional protections in multiple ways. But this Article makes clear that federal courts are not acting in isolation: a wide-ranging and interactive collection of other people, rules, and practices play a meaningful role in whether and to what extent civil rights are vindicated.

For example, the Supreme Court has explained that its qualified immunity jurisprudence is intended to balance “two important interests—the need to hold public officials accountable when they exercise power irresponsibly

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suits rises and falls for reasons that are uncorrelated with police conduct.”). Lawsuits are also poor indications of police behavior because they do not take account of claims filed and resolved without resort to litigation. See Aurélie Ouss & John Rappaport, *Is Police Behavior Getting Worse? The Importance of Data Selection in Evaluating the Police* (Univ. of Chi. Pub. Law Working Paper No. 693, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3325382](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3325382) [<https://perma.cc/ZZ7M-G3KU>]; see also *supra* note 198 and accompanying text.

269. See, e.g., Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1945 (2018) (“[C]onstitutional doctrine is usually articulated in the form of balancing tests.”); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006) (“[C]ourts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies. When facing an outcome or pattern of outcomes that it regards as practically intolerable or disturbingly sub-optimal, the Court will adjust or manipulate the applicable law.” (footnote omitted)); Michael J. Gerhardt, *Institutional Analysis of Municipal Liability Under Section 1983*, 48 DEPAUL L. REV. 669, 670 (1999) (“[T]he balance at the heart of *Monell* [is] between protecting the basic autonomy and financial integrity of city governments and vindicating the federal rights of citizens injured in some fashion by some official municipal action . . . .”); Mayeux, *supra* note 15, at 90–91 (“By selecting criminal cases at random from any recent docket, one can encounter Supreme Court justices writing about the need to balance the ‘social costs’ of enforcing the Fourth Amendment against the ‘benefits’ and to weigh ‘law enforcement interests’ against the interests of individuals.” (quoting *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016), and *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016))); James E. Pfander et al., *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561 (2020) (describing the Court’s *Bivens* doctrine, which attempts to balance the benefits of deterring official misconduct with concern about the costs of imposing individual liability on federal officials); Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1668–1677 (2013) (describing efforts by the Supreme Court in its pleadings, class certification, and summary judgment decisions to balance plaintiffs’ interests in vindicating their rights with interests in avoiding discovery and trial in insubstantial cases).

and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>270</sup> Scholars have argued that qualified immunity can create this type of balance by encouraging the filing of claims seeking prospective relief and allowing judges to expand constitutional rights without imposing damages liability on individual officers.<sup>271</sup> Qualified immunity undoubtedly influences civil rights litigation in multiple ways and affects the extent to which suits can hold public officials accountable.<sup>272</sup> But the Supreme Court’s qualified immunity jurisprudence appears not to take account of the ways in which the doctrine interacts with other elements of civil rights ecosystems—including the availability of state law remedies, the financial stability of the jurisdiction, and the strength and sophistication of the plaintiffs’ bar—that influence the degree to which qualified immunity achieves its intended goal.<sup>273</sup> In a recent qualified immunity decision, the Court stated that “[w]hatever contractual obligations” the city that employed the officers “may (or may not) have to represent and indemnify the officers are not our concern.”<sup>274</sup> But a municipal defendant’s indemnification policies are unquestionably relevant to how qualified immunity balances government and individual interests, and whether qualified immunity is, in fact, so important “to society as a whole” that the Court should take the extraordinary step of “correct[ing] lower courts when they wrongly subject individual officers to liability.”<sup>275</sup>

The Court’s qualified immunity jurisprudence also fails to recognize that the impact of qualified immunity on civil rights litigation can vary by region. As we have seen, qualified immunity doctrine plays a more significant role in § 1983 suits filed in Houston than it does in § 1983 suits filed in Philadelphia.<sup>276</sup> This difference has partially to do with distinctions among the federal

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270. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

271. See, e.g., Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 *FORDHAM L. REV.* 479, 480 (2011); John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 *YALE L.J.* 87, 99–100 (1999).

272. For discussions of the impact of qualified immunity on case filings and dispositions, see Schwartz, *How Qualified Immunity Fails*, *supra* note 23, and Schwartz, *Qualified Immunity’s Selection Effects*, *supra* note 23. For discussion of the effects of qualified immunity doctrine on police accountability, see Schwartz, *supra* note 40, at 1814–20.

273. The Court’s qualified immunity decisions also appear not to take account of the doctrine’s interaction with other rules of the Court’s own creation, including pleading and summary judgment standards and the unavailability of qualified immunity for *Monell* claims and cases seeking injunctive relief. See Alan K. Chen, *The Facts About Qualified Immunity*, 55 *EMORY L.J.* 229, 231 (2006) (“[T]he Court either consciously ignores or fails to comprehend the unavoidable tension between early termination of civil rights suits and the inherently fact-based nature of the reasonableness inquiry that lies at the heart of qualified immunity’s analytical framework.”); Schwartz, *supra* note 40, at 1810–11 (discussing the relationship between qualified immunity doctrine and summary judgment standards).

274. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015).

275. *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

276. See *supra* notes 141–142 and accompanying text.

judges in both jurisdictions who interpret and apply qualified immunity.<sup>277</sup> This difference may also have to do with distinctions in the ways in which qualified immunity doctrine has developed in the circuits.<sup>278</sup> And this difference may have to do with the way federal courts in Houston and Philadelphia interpret other legal rules governing pleadings, the entitlement to discovery, how to treat disputed issues of fact at summary judgment, and the scope of constitutional rights.<sup>279</sup> But qualified immunity also plays less of a role in Philadelphia than in Houston because defense counsel in Philadelphia are less likely to raise qualified immunity—particularly in motions to dismiss—knowing that the motion will almost certainly be denied and are more likely to settle before summary judgment. Qualified immunity likely plays less of a role in Philadelphia because Philadelphia has more experienced civil rights attorneys who know how to defeat qualified immunity motions when they arise. And qualified immunity almost certainly plays less of a role in Philadelphia than in Houston because Philadelphia plaintiffs can file state law claims, and Houston plaintiffs cannot. As a result, qualified immunity doctrine currently serves very different functions in Houston’s and Philadelphia’s ecosystems. The Court’s qualified immunity decisions—intended to balance interests in official accountability with interests in protecting officials against insubstantial claims—produce a different type of balance depending on where one lives.

A similar critique can be made of other doctrines.<sup>280</sup> The Court repeatedly assumes that the scope of constitutional rights and the relationship between rights and remedies are direct results of federal judges’ application of federal law.<sup>281</sup> In reality, federal doctrine is but one component in an expansive collection of people, rules, and practices that interact. Because the Court overlooks the other components of civil rights ecosystems, it cannot appreciate how its doctrines operate within the broader civil rights landscape.

### C. *Understanding the Scope and Causes of Constitutional Variation*

The United States Supreme Court has repeatedly and confidently asserted that the protections in the Bill of Rights apply consistently across the country. Justice Jackson wrote that “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>282</sup> Although the Court has recognized that “[c]ommunities vary . . . in many respects,” it has concluded that “such variances have never been considered to require or justify a vary-

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277. See *supra* notes 160, 169 and accompanying text.

278. See *supra* note 141 and accompanying text.

279. See *supra* notes 143–144, 151–154 and accompanying text.

280. See *supra* note 269.

281. See *infra* notes 282–284 and accompanying text.

282. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).



ing standard for application of the Federal Constitution. . . . It is, after all, a national Constitution we are expounding.”<sup>283</sup> Most recently, in *Nieves v. Bartlett*, the Court explained that its Fourth Amendment jurisprudence focuses on objective evidence instead of an officer’s subjective state of mind in part because to do otherwise would “compromise evenhanded application of the law by making the constitutionality of an arrest ‘vary from place to place and from time to time’ depending on the personal motives of individual officers.”<sup>284</sup>

Contrary to the Supreme Court’s assumptions, the protections offered by the Constitution do vary significantly from place to place and from time to time. This variation is not simply the product of circuit splits about how to assess the reasonableness of force and other doctrines that could be resolved by the Court if it so chose. It is also the product of multiple fluid, subtle, largely unnoticed, interacting factors far beyond the Court’s purview. This variation has important consequences for the individuals and government officials directly involved in any given interaction: allegations of police violence that might result in a six-figure settlement in Philadelphia might never be brought as a lawsuit in Houston.<sup>285</sup> It can also have important consequences for the development of the law in each jurisdiction. As Pam Karlan has observed, “[t]he kinds of cases that *can* or are *likely* to be litigated . . . powerfully affect which areas of constitutional law get full elaboration and which are left only loosely construed.”<sup>286</sup> This Article reveals that the kinds of cases likely to be litigated, and the areas of constitutional law likely to be fully elaborated, depend upon jurisdiction and region.

To some, the fact of regional variation in constitutional protections will be old news. As Mark Rosen has explained, “geographical nonuniformity of constitutional requirements and proscriptions is a mainstay of American constitutionalism.”<sup>287</sup> Regional variation is attributable to the nature of judicial review: the Supreme Court’s small docket means that circuit differences in the interpretations of constitutional principles can persist for decades.<sup>288</sup> Other regional variation results from the structure of constitutional protections. Certain constitutional protections, like the First Amendment’s protection of speech and expression, are lessened in certain areas—including

283. *Jacobellis v. Ohio*, 378 U.S. 184, 194–95 (1964); *see also* *Smith v. United States*, 431 U.S. 291, 312–13 n.5 (1977) (Stevens, J., dissenting) (quoting *Jacobellis*, 431 U.S. at 194–95).

284. 139 S. Ct. 1715, 1719 (2019) (quoting *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004)).

285. *See supra* Section II.E (describing the different outcomes of the *Guidry* and *McDaniels* cases, and the cases filed in Houston and Philadelphia).

286. Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1915 (2007).

287. Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 *TEX. L. REV.* 1129, 1133 (1999).

288. *See* Logan, *supra* note 44.

military bases, airports, schools, and territorial borders.<sup>289</sup> The interpretation of other constitutional provisions requires courts to apply local norms and state laws, essentially mandating local variation.<sup>290</sup> Geographic variation in constitutional protections has also been attributed to nonjudicial actors, including, in the criminal context, the priorities of local prosecutors<sup>291</sup> and funding levels for local public defenders' offices.<sup>292</sup> This Article offers another example of regional variation—in the relationship between civil rights and remedies—and explication of the ways in which that regional variation is produced—through the interaction of wide-ranging factors that coexist in civil rights ecosystems.

Regional variation in the nature and scope of constitutional protections is not necessarily a bad thing. Although the shadow of slavery and Jim Crow long made federalism seem at odds with civil rights protections, there is a growing belief that localism can advance civil rights.<sup>293</sup> Some have focused on the ways in which the judicial interpretation of constitutional protections can be tailored to community interests and priorities.<sup>294</sup> Others have focused on the articulation of community interests through administrative rulemak-

289. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 127 (2013); Logan, *supra* note 85, at 379–80 (describing limitations on Fourth Amendment rights at the nation's borders, in "high crime area[s]," schools, military bases, and tribal lands); Rosen, *supra* note 287, at 1152–61 (describing variation in constitutional protections on military bases, tribal lands, and schools).

290. See, e.g., Blocher, *supra* note 289, at 125–26 (observing that the definition of obscenity incorporates local community standards, and the meaning of property protected by the Due Process and Takings clauses depends on state law); Logan, *supra* note 93 (observing that federal criminal procedure rights depend upon the content of state and local criminal laws); Rosen, *supra* note 287, at 1149–52 (describing the community standards doctrine in First Amendment obscenity cases).

291. See, e.g., G. Ben Cohen, *McCleskey's Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65 (2012).

292. For a study demonstrating varying funding levels for public defenders' offices and the links between funding and constitutional protections, see Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010).

293. See, e.g., Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 46 (2010) ("[Nationalists' concerns about federalism include] a worry that local power is a threat to minority rights . . . [and a] fear that state decisions that fly in the face of deeply held national norms will be insulated from reversal. Both find their strongest examples in the tragic history of slavery and Jim Crow.").

294. For scholarship applauding localism in constitutional interpretation, see Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1418 (2017) ("Democratic localism is essential for the proper functioning of the criminal system because the criminal justice principles embodying substantive constitutional norms can only be defined through community interactions at the local level."); Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998) (asserting that constitutional regulation of policing should reflect "the values and insights of the communities in which such policing is taking place"); and Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 279 (2010) ("Fourth Amendment law should vary based on geographic concerns.").

ing.<sup>295</sup> Whether through the courts or rulemaking, scholars have increasingly viewed constitutional localism as a means to empower minority groups<sup>296</sup> and advance community interests.<sup>297</sup> I favor some ongoing efforts to engage community members in the tailoring of constitutional protections and rules.<sup>298</sup> But understanding localities as civil rights ecosystems, and seeing some of those ecosystems at work, also raises cause for concern.

Scholars appear to believe that modern-day localism will protect against the evisceration of constitutional protections<sup>299</sup>—and that “local decisions that ‘fly in the face’ of national or state norms can be reversed.”<sup>300</sup> I am skeptical. I do not claim to know precisely where the constitutional floor lies. But civil rights ecosystems in parts of the country appear to leave some constitutional rights completely unprotected.<sup>301</sup> Lack of data makes it impossible to

295. For scholarship focused on community norms expressed through administrative rulemaking processes, see Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1167 (2000) (“By expounding guidelines in an open forum, subject to public commentary and debate, law enforcement . . . empowers the citizenry through sharing information and collaborating on appropriate policing principles.”); and Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016) (recommending that police policies be crafted through administrative rulemaking processes and assessed by courts for compliance with those processes).

296. See, e.g., Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY J., Spring 2012, at 37, 41 (“Minority rule can promote both the economic and political integration of racial minorities.”).

297. See, e.g., David J. Barron, Commentary, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 382 (2001) (“There is a value in ensuring that local jurisdictions have the discretion to make the decisions that their residents wish them to make . . . includ[ing] more participatory and responsive government; more diversity of policy experimentation; more flexibility in responding to changing circumstances; and more diffusion of governmental power, which in turn checks tyranny.”); see also David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).

298. See Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 947–49 (2018) (describing various efforts by local governments to engage communities in police policymaking and oversight).

299. See, e.g., David J. Barron, Essay, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2234 (2006) (explaining that “there is little risk that a city will remain a scofflaw for long” because residents can bring taxpayer actions against cities for violating the law); Gerken, *supra* note 297, at 46–47 (“Federalism of old involved states’ rights, a trump card to protect instances of local oppression. Today’s federalism involves a muscular national government that makes policy in virtually every area that was once relegated to state and local governments. The states’ rights trump card has all but disappeared, which means that the national government can protect racial minorities and dissenters when it needs to while allowing local forms of power to flourish.”).

300. Blocher, *supra* note 289, at 130.

301. Some might believe that plaintiffs in other parts of the country are being overcompensated—paid substantial sums for insubstantial allegations. In some cities, city attorneys’ offices have perennially pledged to be more aggressive in court and settle fewer civil rights cases as a means of discouraging lawyers from filing weak claims. See, e.g., Alan Feuer, *The Law-*

know how often Houston police officers search or arrest someone without probable cause, and how often they use nondeadly force. But if the lawsuit filings during the course of my two-year study are representative of litigation trends in Houston more generally, these violations are not being redressed by the civil justice system. Over those two years, in a city with more than 2.2 million residents and 5,200 sworn law enforcement officers, a total of 25 suits alleging constitutional violations by Houston officers were filed, no plaintiffs who alleged false arrests or wrongful searches received any compensation, and only one person was compensated for nondeadly force.

Some might take the position that residents of Houston can decide to eviscerate constitutional protections against unlawful search and seizure and nondeadly force to advance other community goals.<sup>302</sup> Before endorsing the elimination of federally protected rights in Houston, however, we should have clear evidence that that is, in fact, what the community has intended to do.<sup>303</sup> Yet, the confluence of factors that cuts off remedies for people whose rights have been violated does not appear to be the product of deliberate community engagement. Indeed, residents of Houston appear to be calling for more police accountability, not less.<sup>304</sup>

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yers *Protecting N.Y.P.D. Play Hardball. Judges Are Calling Them Out.*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/nyregion/nypd-lawyers.html> [<https://perma.cc/UJF7-SP22>] (quoting the attorney running the Special Federal Litigation Unit of the New York City Law Department as saying that the “days are done” where plaintiffs’ attorneys can “hang up a shingle, file a lawsuit [against the city’s police officers] and get a few bucks”); Telephone Interview with E. Dist. Pa. Attorney A, *supra* note 68 (“[T]here was a time when the city [of Philadelphia] was more interested in early and even presuit resolution of claims. . . . [T]hey’re no longer that interested in doing that . . . because there’s a lot of claims brought and a lot of them are pro se or brought by lawyers who are bringing frivolous claims, and they’re overwhelmed by them.”).

302. See, e.g., Rosen, *supra* note 287, at 1192 (arguing that communities should be able to constrain their constitutional rights when doing so would advance that community’s goals).

303. For more general concerns about the ability of local governments to reflect community interests, see Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1005 (2003) (“[E]very community, however defined, has its outsiders ‘whose complaints are least likely to be heard by the rest of the community.’”); David Cole, Foreword, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1087 (1999) (“[T]o defer to ‘the community’ means simply to favor the majority’s interests over the minority’s within that community, hardly a principled way to resolve a constitutional dispute.”); and Logan, *supra* note 85, at 375 (“The benefits of experimentalism . . . hinge on the wherewithal of policy makers and the subject matter in question. Local governments number in the tens of thousands and vary significantly in their capabilities and resources.” (footnote omitted)).

304. See, e.g., Editorial, *As Houston Police Scandal Widens, the Stakes Couldn’t Be Higher*, HOUS. CHRON. (Mar. 9, 2019), <https://www.houstonchronicle.com/opinion/editorials/article/As-Houston-police-scandal-widens-the-stakes-13675018.php> [<https://perma.cc/B68Q-UUQY>]; St. John Banned-Smith & Keri Blakinger, *Protestors Demand Murder Charge Against Cop Involved in Pecan Park Drug Bust*, HOUS. CHRON. (Feb. 18, 2019), <https://www.chron.com/news/houston-texas/houston/article/Protesters-to-demand-murder-charge-against-cop-13625260.php> [<https://perma.cc/T5SR-YBK3>].

Scholars imagine that Houston's underenforcement of constitutional rights might be remedied any number of ways—individuals could bring taxpayer actions, the federal government could step in, or dissatisfied residents could decide to leave.<sup>305</sup> But safeguards imagined by proponents of localism do not appear to be working. I have already shown that civil litigation is not meaningfully protecting federal constitutional rights. Even when the federal government is its most engaged in the enforcement of civil rights, it only has resources to investigate a small handful of jurisdictions.<sup>306</sup> And the notion that dissatisfied residents would leave Houston is unrealistic—particularly given that moving to another jurisdiction in the Southern District of Texas will not change the jury pool, judges, or limits on state court relief. Moving farther away will not necessarily work either: the civil rights ecosystem in the Northern District of Texas is, reputedly, even more hostile to civil rights.<sup>307</sup>

#### D. *Moving Forward*

Finally, this Article offers insights about the ability to effectuate changes in civil rights protections. When designing substantive, procedural, and remedial rules, courts, legislators, and scholars must reckon with the fact that the balance between individual and government interests is influenced by multiple factors and cannot be controlled by any one participant in the civil rights ecosystem.<sup>308</sup> Changes to legal rules can undoubtedly impact the volume and success of civil rights litigation. But those changes may trigger unexpected adjustments to other aspects of civil rights ecosystems and will likely have different impacts in different ecosystems.

My point is not that courts should stop interpreting the law, legislators should stop making law, or scholars should stop imagining how the law could be improved. But each should recognize their decisions and proposals will not operate in a vacuum and should be skeptical of their ability to craft generally applicable rules that achieve particular policy ends. Some Supreme Court justices have observed that the Court should not adjust immunities to reflect “freewheeling policy choice[s]” because immunity doctrines should reflect common-law principles.<sup>309</sup> This Article offers another reason to cau-

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305. See *supra* note 299.

306. See Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 448 (describing resources limitations in the Department of Justice's Civil Rights Division during the Obama Administration).

307. See Telephone Interview with S. Dist. Tex. Attorney B, *supra* note 146 (describing the Northern District of Texas as a “nightmare”—“[w]ay worse” than the Southern District of Texas).

308. See *Mayeux*, *supra* note 15, at 91 (“Judges who make decisions on the basis (even subconsciously) of some imagined responsibility to the police, mediated through the imagined systemic effects of their rulings, are likely to estimate those effects wrongly and to err in one direction or another.”).

309. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–71 (2017) (Thomas, J., concurring in part and in the judgment) (alteration added by Court) (quoting *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012)).

tion against the Court's efforts to adjust immunities and other doctrines to achieve what the justices consider to be the appropriate balance between government and individual interests—such adjustments are unlikely to succeed with any precision and will not have a consistent impact.

Understanding civil rights litigation as the product of civil rights ecosystems also makes clear that the ecosystems in Philadelphia and Houston, and in other parts of the country, are not set in stone. Just as feedback loops in natural ecosystems can be exploited to promote biodiversity and conservation, advocates and government officials can endeavor to change their civil rights ecosystems by adjusting various components—indemnification rules, damages caps, community engagement around police accountability, or the strength of the plaintiffs' bar.

One civil rights attorney I interviewed is bringing civil rights cases in parts of the country without an active plaintiffs' bar as part of an effort to create this type of positive feedback loop. He described bringing a multimillion-dollar wrongful conviction case in a jurisdiction that had not previously had large judgments in civil rights cases:

[T]hey were telling us that in that federal courthouse nobody had ever won more than a couple million dollars in any civil rights case. Now that we just got a big verdict, maybe some people are going to say, "Hmm, I should look at this case a little harder," once these cases come across their desk.<sup>310</sup>

With more attorneys willing to take civil rights cases, that jurisdiction may develop a more experienced civil rights bar; with a more experienced civil rights bar, there may be more civil rights victories; and those civil rights victories may lead to changes in other aspects of the ecosystem—defense counsel's litigation practices, state and federal judges' decisions, and legal rules governing these cases. Remember, forty years ago no one was bringing civil rights cases in Philadelphia and now "it's seen as regular, traditional litigation."<sup>311</sup>

Although a multimillion-dollar jury verdict in a wrongful conviction case may be the first step toward making a civil rights ecosystem more conducive to claims against government actors—as this civil rights attorney hopes—such a verdict might also inspire further limitations on plaintiffs' rights that endeavor to maintain the status quo. The impact of any given adjustment to a civil rights ecosystem will depend on its interaction with other aspects of that ecosystem.

Take indemnification limits, for example. In Houston, indemnification limits of \$100,000 per officer and \$300,000 per event are among many factors—including unsympathetic federal judges and juries, the unavailability of state law causes of action, and various substantive and procedural barriers to relief—that appear to have dampened Houston attorneys' appetites for bringing civil rights cases. But if Philadelphia's city council considered pass-

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310. Telephone Interview with N. Dist. Ohio Attorney E, *supra* note 53.

311. Telephone Interview with E. Dist. Pa. Attorney G, *supra* note 121.

ing a resolution similarly limiting indemnification, its robust plaintiffs' bar would likely take aggressive action in opposition to the proposed resolution. Philadelphia's police officials and union representatives would also likely resist such a measure. Why? Because multiple aspects of Philadelphia's ecosystem—judges, juries, state and federal laws, and defendants' litigation and settlement decisions—make Philadelphia more amenable than Houston to civil rights cases. Ten times more lawsuits were filed against Philadelphia and its officers than were filed against Houston and its officers during my two-year study, and plaintiffs received one hundred times more than Houston plaintiffs in these cases<sup>312</sup>—regularly in settlements and judgments that exceed Houston's indemnification limits. If Philadelphia adopted Houston's indemnification limits, some Philadelphia plaintiffs' attorneys might be discouraged from pursuing high-damages civil rights cases.<sup>313</sup> But Philadelphia officers and their union representatives would have good cause to fear that some members of Philadelphia's sizable and experienced plaintiffs' bar would continue bringing civil rights cases, that Philadelphia's sympathetic juries would continue to render verdicts above the indemnification limits, and that Philadelphia attorneys might pursue satisfaction of some of those awards against individual officers.<sup>314</sup>

Key to any effort to change a civil rights ecosystem, therefore, should be examining its various component parts and the ways in which they interact, recognizing that different ecosystems will respond to the same reform in different ways, and watching for the feedback effects that will almost inevitably occur. Scientists have studied the reduction of deforestation in the Brazilian Amazon to understand which strategies should be credited for environmental improvements and how those strategies can be used to reduce deforestation in other parts of the world.<sup>315</sup> This same type of examination is necessary to better understand the mechanics of civil rights ecosystems across the country and the levers of change.<sup>316</sup>

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312. See *supra* notes 199–200, 203–204 and accompanying text.

313. See *supra* notes 111–113 and accompanying text (describing Cleveland attorneys' reluctance to file suits against East Cleveland and its officers because the city does not have resources to satisfy settlements and judgments).

314. For further discussion of plaintiffs' attorneys and law enforcement representatives' shared interest in broad indemnification of officers, see Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. (forthcoming 2020) (on file with the *Michigan Law Review*).

315. See Doug Boucher et al., *Brazil's Success in Reducing Deforestation*, TROPICAL CONSERVATION SCI. (Aug. 1, 2013), <https://journals.sagepub.com/doi/full/10.1177/194008291300600308> [<https://perma.cc/2HCA-GBQN>]; see also WEATHERS ET AL., *supra* note 13, at 11 (explaining that understanding the mechanics of change in natural ecosystems is “a major part of contemporary ecosystem science”).

316. For a similar observation, see Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 15, at 246, 267 (“[R]eform activities benefit from sociological investigation . . . not only careful documentation of the space between law on the books and law in action but also attentive analysis of the precise factors that shape how front-

## CONCLUSION

Each year, tens of millions of people interact with the police; more than a thousand are killed;<sup>317</sup> hundreds of thousands believe that officers use excessive force; and millions believe they have been treated improperly while being stopped, searched, or arrested.<sup>318</sup> Whether people seek redress for violations of their civil rights and whether they succeed surely depends in part on the nature and context of their interaction with the police. But whether people seek redress for violations of their rights and whether they succeed also depends in significant part on the civil rights ecosystem in which the claims arose.

Plenty more can and should be done to understand other factors that help determine whether civil rights claims are ever filed or successful. More can be done to understand what causes police violence and misconduct and how police behavior influences and is influenced by courts, local governments, and activists.<sup>319</sup> Much more can also be done to explore variation in civil rights ecosystems around the country and around the world.<sup>320</sup> In the meantime, judicial and scholarly discussion about the relationship between constitutional rights and remedies, and the promise of constitutional localism, should recognize that a multitude of people, rules, and practices interact to constrain and enhance civil rights protections. Although it is difficult to study these factors, and nearly impossible to generalize about them, they play critically important roles in shaping the terrain.

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line legal actors come to understand law on the books in the first instance. If we fail to account for what they are doing with the legal rules and tools at their disposal, then reform activities will be plagued by unintended consequences . . .”).

317. *The Counted*, *supra* note 9.

318. In their most recent survey of police-public contacts, the Bureau of Justice Statistics found that 30.2 million people had police-initiated contact within the past year, that 3.3% (996,465) of those people experienced nonfatal force, and that 48.4% (482,289) considered that force to be excessive. ELIZABETH DAVIS & ANTHONY WHYDE, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ251145, CONTRACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 16 (2018). (Because the study focused only on nonfatal uses of force, these figures exclude people shot by the police, and those who were killed by the police.) The study also found that of the 19.2 million residents who had been stopped while a driver of a vehicle over the past year, more than 3.1 million believed the police acted improperly. *Id.* at 4, 11. The study additionally found that of the 2.5 million residents who had been stopped on the street, approximately 40% (one million) believed the stops were illegitimate and 19% (475,000) believed the officers behaved improperly. *Id.* at 4, 14.

319. See *supra* notes 27–37 and accompanying text for important areas of further inquiry.

320. For exploration of some of these types of questions in the international context, see Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501 (2005) (examining legal spatiality in the international justice system).



