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Unshielded: How the Police Can Become Touchable

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BOOK REVIEW

UNSHIELDED: HOW THE POLICE CAN BECOME TOUCHABLE

SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE. By Joanna Schwartz. New York, N.Y.: Viking. 2023. Pp. xxi, 308. \$30.00.

*Reviewed by Brandon Hasbrouck**

We're Americans.

— Red¹

INTRODUCTION

I grew up in upstate New York. My family was poor. We were one of a handful of Black families in a predominantly white trailer park. As a single mother raising four children, my mom worked tirelessly for us to survive. She would come home after working a three-to-eleven shift and pray. She would often pray that my older brother — older by two years — and I would stay the same height. Why? Because we owned two pairs of jeans. My brother would wear one pair and I wore the other. And, at nighttime, we would hand-wash those jeans so that we could switch jeans for the following day. I still have calluses on my hands from washing those jeans.

When I was twelve, on a chilly Saturday night in late summer 1998, my mom was working her regular shift. Around nine o'clock in the evening, a bunch of teenagers — all white or white-passing — wanted to play a game of hide and seek. They invited me to play. Why not? Hide and seek in a trailer park is interesting. Kids would climb up and hide on the roofs of trailers, behind the skirts of trailers, and in the sprawling green space that consisted of two trees and a couple of bushes.

The owner of one of the trailers called the police. They complained that someone was on top of their roof. The police showed up, which is to say the white police showed up. Rounded all of us into the street. There were about twenty-five of us — I was the youngest of the group,

* Associate Professor of Law and Director, Frances Lewis Law Center, Washington and Lee University School of Law. I want to thank Joanna Schwartz, Daniel Harawa, Alex Klein, and Jillian Hasbrouck for their inspiration, guidance, and feedback. Shout-out to my research assistant, Warren Buff, whose outstanding work made this Review better. I am grateful for the extraordinary support of the Frances Lewis Law Center at the Washington and Lee University School of Law. So much love to the amazing editors at the *Harvard Law Review* for superb editing and thoughtful comments that significantly advanced this Review. For my daughters. Black Lives Matter.

¹ US (Monkeypaw Productions 2019).

but cops tend to age Black kids by several years. I was the only Black kid. The cops singled me out, accused me of attempting to rob a home, and roughed me up. They threw me against their patrol car. I remember the pressure one officer put on the back of my neck as he pushed my head against the hood, yelling, “Don’t move!” My face opened up as it hit the metal of the car, with blood flowing from my nose and mouth. The other officer did a pat-down search. After they found nothing, they cuffed me and threw me in the back of a cop car. They said the most horrific things to me. Every other word out of their mouths was the N-word, usually followed by some threat — to hurt me, to imprison me, to kill me. The cops drove me around for about an hour. It felt like forever. I was bloodied up, crying, and could not stop thinking about my mom. I let her down. I should have stayed home that night. She was going to be upset with me not only because I got in trouble but also because the cops, in roughing me up, ripped my jeans. Those jeans my brother needed to wear the next day for church. Fortunately, I made it home that night. Bloodied. Beaten.

When my mom got home that night from work, she was visibly distraught. She sat me down. She gave me the talk.² She looked at my jeans and said:

Brandon do not worry about it. Your jeans are torn up and cannot be fixed. We will replace them. Sometimes, in life, that is what is required. And, boy, I am not just talking about your clothes. You tear it down. You replace it with something better. We do not have much. I know. I am trying. But we do have our imaginations to fill our hearts, our minds, and our dreams. Brandon, do you hear me?

In the following weeks and months, my mom reached out to local attorneys, discovering firsthand much of what Professor Joanna Schwartz lays out so clearly in *Shielded: How the Police Became Untouchable*. Where we lived, there weren’t any lawyers with the skills and willingness to take on a case like mine. Even if there had been, the barriers Schwartz examines — pleading standards (pp. 39–43), the sad state of Fourth Amendment jurisprudence (pp. 62–64), the potential availability of qualified immunity (pp. 107–08), the difficulty of suing municipal governments (pp. 108–09), and the biases of judges (pp. 120–24) and juries (pp. 141–46) — would have made recovery difficult, if not impossible. Even if we had managed to win a suit against those police officers or their department, the systems of indemnification and compartmentalization Schwartz describes in *Shielded* would have prevented any change to police practices (pp. 113–14). There simply was no

² See generally Pria Mahadevan et al., “The Talk” Is a Rite of Passage in Black Families. Even When the Parent Is a Police Officer, GA. PUB. BROAD. (Aug. 13, 2020, 11:28 PM), <https://www.gpb.org/news/2020/06/26/the-talk-rite-of-passage-in-black-families-even-when-the-parent-police-officer> [<https://perma.cc/R6VA-NgST>].

meaningful system for holding the police who assaulted, belittled, and terrorized me accountable.

For people without the lived experience of being scrutinized for potential criminality the instant police see you, *Shielded* can provide a glimpse into being on the business end of our brutal law enforcement system. Schwartz humanizes each of the barriers she discusses with the stories of real people from across American society. Most of them come from marginalized backgrounds, but a mental health crisis can send even a wealthy white man into the jaws of police brutality and the nightmare of trying to hold police accountable (pp. 33–35). Humanizing the victims of police brutality in this way allows the reader to empathize with them in ways that the mass media’s iconographic presentations of dead Black people fail to.³ Schwartz pairs this attention to human detail with empirical evidence on a systemic level collected over her career as a legal academic. The effect is breathtaking. *Shielded* is not merely a book on an important topic, but the right book — written both engagingly and persuasively — to spur conversation and action toward remedying the rotten system shielding law enforcement from accountability.

The system, alas, is working as it was designed.⁴ American professional policing can be traced to slave patrols in the South⁵ and efforts to suppress free labor in the North.⁶ This is nothing new; antidemocracy in American law frequently stems from fears that the masses might

³ See Endiya Griffin, Opinion, *Manufacturing Martyrdom: Calling Victims of Police Violence Martyrs Is Problematic*, DAILY TROJAN: SHE BEGAT THIS (Oct. 2, 2020), <https://dailytrojan.com/2020/10/02/she-begat-this-manufacturing-martyrdom-calling-victims-of-police-violence-martyrs-is-problematic> [<https://perma.cc/GSW5-8GLU>] (“Not only is referring to these victims as martyrs fallacious, but the implication of agency also distorts the systemic nature of these murders.”).

⁴ See The Argument, *Policing Is Not Broken. It’s “Literally Designed to Work in This Way.”* N.Y. TIMES (Apr. 28, 2021), <https://www.nytimes.com/2021/04/28/opinion/police-reform-america.html> [<https://perma.cc/6A6M-FANE>] (featuring Professor Rashawn Ray arguing that “law enforcement is asked to solve our society’s social problems with force”); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1426 (2016) (“The Court has sanctioned racially unjust criminal justice practices, creating a system where racially unjust police conduct is both lawful and how the system is supposed to work.”).

⁵ Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1114–16 (2020) (summarizing early American policing’s origins in slave patrols in the South).

⁶ See Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM), <https://time.com/4779112/police-history-origins> [<https://perma.cc/EMB3-W4XN>] (tracing the rise in professional policing along with anxiety that labor organizing threatened the public order); Sidney L. Haring & Lorraine M. McMullin, *The Buffalo Police 1872–1900: Labor Unrest, Political Power and the Creation of the Police Institution*, CRIME & SOC. JUST., Fall–Winter 1975, at 5, 13 (describing how “additional police services” in one northern city were caused by “a growing problem of labor organization and demands for economic concessions from the owners of . . . businesses”); Hasbrouck, *supra* note 5, at 1114–16 (summarizing the early history of policing in America as a means of controlling labor).

threaten entrenched wealth.⁷ Antidemocracy demands hierarchies, which both demand and foster violence.⁸

Policing is one of the state's most effective means for enforcing those hierarchies.⁹ That violence still manifests as a direct means of enforcing racial hierarchies, as Eddie Parker and Michael Jenkins experienced at the hands of six white officers in Mississippi.¹⁰ Other times, that violence is employed simply to enforce the authority of government officials to act with impunity over the citizens they govern.¹¹ These forms of hierarchy-enforcing police violence converged in the response to protests against the construction of a massive police training facility in Atlanta,

⁷ See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 13–17 (1st ed. 1913) (proposing that the concentration of support for the Constitution among the wealthy and its opposition among debtors points to an economically anti-democratic motivation for enacting the Constitution); Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 160–61 (2021) (providing examples of antidemocracy and the suppression of political equity); Matthew C. Simpson, *The Founding Fathers' Power Grab*, NEW REPUBLIC (Sept. 29, 2016), <https://newrepublic.com/article/137310/founding-fathers-power-grab> [<https://perma.cc/L6N8-Y7XW>] (discussing the view that the Constitution was a response to democratically oriented economic policies).

⁸ See Editorial, *America Can Have Democracy or Political Violence. Not Both.*, N.Y. TIMES (Nov. 3, 2022), <https://www.nytimes.com/2022/11/03/opinion/political-violence-extremism.html> [<https://perma.cc/UY9B-73S2>] (detailing the white supremacist motivation behind a recent pattern of antidemocratic violence); Frank Castro, *Gangs of the State: Police and the Hierarchy of Violence*, TRUTHOUT (July 19, 2015), <https://truthout.org/articles/gangs-of-the-state-police-and-the-hierarchy-of-violence> [<https://perma.cc/EUP8-G3RY>] (“[P]olice act as state-sanctioned gangs charged with the task of upholding the violent, racist hierarchy of white supremacist capitalism and, whenever possible, furthering a monopoly of power where all violence from/by those higher on the hierarchy upon those lower can be normalized into business as usual.”); Martin Luther King, Jr., Speech at Stanford University: The Other America (Apr. 14, 1967) (transcript available at <https://www.rev.com/blog/transcripts/the-other-america-speech-transcript-martin-luther-king-jr> [<https://perma.cc/9TQL-N8ZZ>]) (“[A] riot is the language of the unheard. . . . [America] has failed to hear that the promises of freedom and justice have not been met. And . . . that large segments of white society are more concerned about tranquility and the status quo than about justice, equality, and humanity.”).

⁹ See Jillian K. Swencionis et al., *Supporting Social Hierarchy Is Associated with White Police Officers' Use of Force*, PNAS, May 4, 2021, at 1, 2 (“The state gives police a monopoly on the right to use force, giving officers power over nonofficer residents.”); *id.* at 7 (suggesting that patrol officers from racially dominant groups with a higher degree of commitment to social hierarchies may be more likely to use force).

¹⁰ See Emma Tucker, *Tasers, Taunts, Torment: How 6 White Officers Subjected 2 Black Men to Hours of Grueling Violence, And Then Tried to Cover It Up*, CNN (Aug. 13, 2023, 7:21 PM), <https://www.cnn.com/2023/08/13/us/mississippi-white-officers-torture-black-men-federal-charge/index.html> [<https://perma.cc/M9DY-T46H>] (describing the torture and racial abuse that law enforcement officers visited upon Parker and Jenkins on January 24, 2023, for failing to respect the Pearl River as a boundary of segregated neighborhoods).

¹¹ See Sherman Smith et al., *Police Stage “Chilling” Raid on Marion County Newspaper, Seizing Computers, Records and Cellphones*, KAN. REFLECTOR (Aug. 11, 2023, 4:15 PM), <https://kansanreflector.com/2023/08/11/police-stage-chilling-raid-on-marion-county-newspaper-seizing-computers-records-and-cellphones> [<https://perma.cc/QXD3-WUG5>] (describing a police raid that effectively shut down a small-town newspaper after the paper reported on a restaurant owner who barred reporters from a meeting with a member of Congress).

known as “Cop City.”¹² The campaign of antiprotest violence escalated to the point of charging trespassers and vandals as terrorists.¹³ The state even arrested members of mutual aid organizations for providing bail support to the protestors.¹⁴ Fortunately, Atlanta voters will have the final say on the construction of Cop City, reasserting their democratic rights against a project of hierarchical control.¹⁵ The problem of police violence exemplifies the conflict between democracy and antide-mocracy. Civil rights lawsuits remain an important tool for individuals to reassert their democratic rights against hierarchical state authority.

Hierarchies and their violence form the central social critique in Jordan Peele’s film, *Us*.¹⁶ The film’s main character, Adelaide, returns to a beach where, as a child, she experienced the trauma of an encounter with her duplicate in a house of mirrors, an experience that left her unable to speak at first.¹⁷ Below the house of mirrors, a vast underground structure housed soulless doubles of people from the surface world, one of whom was able to escape during a power outage.¹⁸ The film’s twist ending reveals that the adult Adelaide was not the child who entered the house of mirrors from the surface world, but the double from below.¹⁹ The original Adelaide has engineered the doubles’ violent emergence to kill and replace the surface-dwellers, which Adelaide and her family resist in a campaign of brutal violence.²⁰ The film constructs a hierarchy between the happy surface-dwellers above and their miserable and soulless counterparts below, leading to a brutal conflict over the right to that joyful life above.²¹ The deconstruction of such hierarchies cannot be achieved on merely individual terms, though. Although Adelaide escaped her personal torment, she is willing to inflict great suffering on those who shared her former fate to defend her newfound

¹² See Amna A. Akbar, *The Fight Against Cop City*, DISSENT, Spring 2023, at 62, 63–64 (describing a campaign of carceral violence against protestors, including the shooting death of Manuel Esteban Paez Terán, who appeared to be seated in a posture of surrender).

¹³ See *id.* at 64.

¹⁴ See Jocelyn Simonson, *The Details of the Atlanta Bail Fund Arrest Are More Horrific than First Described*, SLATE (June 1, 2023, 1:33 PM), <https://slate.com/news-and-politics/2023/06/cop-city-tortuguita-atlanta-bail-fund-arrest-horror.html> [<https://perma.cc/B6F2-SG2Q>].

¹⁵ See Fred Smith Jr., Opinion, *Hear the Voices of Atlanta in Public Safety Center Debate*, ATLANTA J.-CONST. (Sept. 15, 2023), <https://www.ajc.com/opinion/opinion-hear-the-voices-of-atlanta-in-public-safety-center-debate/IHQSWBHYDBGTDGZQO4PA5SYTAE> [<https://perma.cc/WE3E-JH4S>] (discussing the petition drive, which has gathered sufficient signatures to place the construction project on the ballot).

¹⁶ See Lida Bach, *Us and the Horror of the Class System*, HORROR HOMEROOM (Sept. 10, 2020), <https://www.horrorhomeroom.com/us-the-horror-of-the-class-system> [<https://perma.cc/35WX-FWQG>] (analyzing the complex systems of hierarchy at play in *Us* and the violence they engender in both their privileged and marginalized members).

¹⁷ See *US*, *supra* note 1.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

privilege.²² Such stark hierarchies cannot be dismantled by mere incrementalism, and while I find much to agree with in Schwartz’s diagnosis of the ills facing civil rights lawsuits, I fear that while her prescription would bring some improvements, it cannot provide a complete cure.

This Review proceeds in three Parts. First, Part I examines *Shielded*’s text, highlighting Schwartz’s analysis of the problem of unaccountable police, the many barriers to holding police accountable, and her proposed solutions. Part II then critically examines Schwartz’s work, examining pieces of the problem she left undiscussed and the relative shortcomings of her discussion of possible solutions. Finally, Part III takes an abolitionist approach, delving into potential nonreformist reforms²³ and the solution of full abolition, as well as examining the most significant objection to abolitionist approaches: the problem of violence.

I. A GROUNDBREAKINGLY COMPREHENSIVE ANALYSIS OF THE SYSTEMS UNDERMINING CIVIL RIGHTS

But it is idle, utterly idle to dream of peace anywhere in this world, while any part of the human family are the victims of marked injustice and oppression.

— Frederick Douglass²⁴

A few recent criminal convictions of current and former police officers for their roles in extrajudicial killings have briefly dominated the national conversation about police accountability.²⁵ Yet criminal prosecutions — and, for less extreme abuses, internal investigations — are largely ineffective as a means of deterring police misconduct (pp. xi–xii). Schwartz instead chooses to focus on civil rights lawsuits as the primary means of holding police accountable and devotes most of *Shielded* to the barriers those suits face (pp. xiii–xv). This is ground Schwartz

²² See *id.*

²³ See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 100–01 (2020) (describing “non-reformist reforms” as a framework for activists to democratize power dynamics while materially improving the lives of ordinary people rather than fortifying capitalist interests).

²⁴ Frederick Douglass, Address at the Congregational Church on the Twenty-First Anniversary of Emancipation in the District of Columbia 6 (Apr. 16, 1883) (transcript available at <https://lccn.loc.gov/90898291> [<https://perma.cc/SRV7-Z5L7>]).

²⁵ See, e.g., Janelle Griffith, *Derek Chauvin Sentenced to 22.5 Years for the Murder of George Floyd*, NBC NEWS (June 25, 2021, 10:04 AM), <https://www.nbcnews.com/news/us-news/derek-chauvin-be-sentenced-murder-death-george-floyd-n1272332> [<https://perma.cc/4XMA-CU6W>]; Dakin Andone & Alta Spells, *McMichaels Sentenced to Life Terms, William “Roddie” Bryan Gets 35 Years for Federal Hate Crime Convictions in Ahmaud Arbery’s Killing*, CNN (Aug. 9, 2022, 2:18 AM), <https://www.cnn.com/2022/08/08/us/ahmaud-arbery-hate-crime-federal-sentencing/index.html> [<https://perma.cc/QG5Y-VH8Z>].

knows well; *Shielded* distills for a popular audience much of Schwartz's considerable body of work on civil rights lawsuits.²⁶ Schwartz's deep familiarity with empirical research into the efficacy of and barriers to civil rights lawsuits mixes seamlessly with anecdotes about how those barriers stymied civil rights plaintiffs from all walks of life.

Schwartz devotes most of her book to chapters exploring individual barriers to civil rights litigation, aside from an introductory chapter

²⁶ See generally Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641 (2023) (addressing the shortage of lawyers willing and able to handle civil rights litigation); Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J.F. 136 (2022) (exploring how barring failure-to-train claims against municipalities whose officers are granted qualified immunity effectively extends qualified immunity to municipal defendants); Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol's Fight Against Police Reform*, 97 IND. L.J. 1 (2022) (discussing the role of Lexipol, a private police training company, in resisting reforms to use-of-force standards); Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737 (2021) (examining potential state and local responses to overly permissive federal civil rights doctrines); Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based Bivens Claims*, 96 NOTRE DAME L. REV. 1835 (2021) (discussing new barriers to civil rights claims against federal defendants); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (reporting on a study showing that officers are taught not the facts of civil rights cases, but instead only general principles from watershed cases); Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305 (2020) (arguing that qualified immunity is neither necessary nor an especially strong shield and that the alternative tools available under federalism would strike a balance in its absence); Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020) (considering the determinative role of local environments of legal actors in the frequency and outcome of civil rights litigation); James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561 (2020) (reporting on a study examining the actual financial contributions of defendants to successful Bivens claims); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101 (2020) (laying out the empirical case that qualified immunity does not effectively screen out cases either in motions practice or attorneys' case selection decisions); Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020) (predicting that the end of qualified immunity would not result in a massive shift in civil rights litigation because of other doctrines and pressures already limiting recovery); Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535 (2018) (proposing that treating police violence as a systems failure, as other industries treat their accidents, is necessary to improving public safety); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (arguing that qualified immunity is unjustifiable both historically and on the basis of policy); Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891 (2018) (analyzing the role of private entities in police policymaking); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (challenging the Supreme Court's description of qualified immunity's role through empirical evidence); Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437 (discussing the necessary conditions for successful police reform and the need to improve current reform efforts); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) (examining how municipal budgeting and insurance practices render the deterrence value of civil rights lawsuits negligible); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (reporting on the near universality of the practice of indemnifying police in civil rights lawsuits); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012) (reviewing how some of the few police departments that review misconduct information generated by lawsuits utilize that information); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010) (exploring how the failure to obtain and synthesize information from civil rights lawsuits undercuts their potential deterrence).

defining the problem to be discussed and a concluding chapter discussing potential solutions. This Part proceeds in similar fashion. First, section A examines Schwartz's foundational chapter and how her definition of the problem shapes her analysis. Then, the next three sections deal with Schwartz's barriers chapters, rearranged slightly into thematic groupings. Section B discusses the failures of actors within the legal system — lawyers, judges, and juries — to meaningfully hold police accountable in civil rights lawsuits. Section C examines doctrinal barriers to recovery: pleading standards, constitutional law, qualified immunity, limitations on municipal liability, and the unavailability of injunctive relief. Section D then deals with structural barriers beyond the courthouse: indemnification, local government budgeting, and institutional failures to learn from lawsuits. Finally, section E explores Schwartz's suggestions for potential solutions.

A. Defining the Problem

Early in her introduction, Schwartz offers a succinct statement of why we should all be concerned with police accountability: “[P]olice sometimes egregiously abuse their authority” (p. xi). Whether police are ultimately a net good or a net harm to society, at least some police cause significant harm, such as the officers who killed George Floyd and Breonna Taylor (p. xi). People who endure such abusive policing often want not only punishment for the officers involved, but also an assurance that such harms won't happen again (p. xi). Schwartz offers three forms this might take. Sometimes, police misconduct is so egregious as to warrant criminal charges (pp. xi–xii). Police departments might also implement their own disciplinary processes (p. xii). But the primary method of holding American police accountable — at least according to the Supreme Court — is the civil rights lawsuit (p. xiii). Because the first two solutions lie beyond victims' and survivors' control and so infrequently result in significant change, Schwartz confines her analysis to the third (pp. i–xiii).

But justice can be difficult to obtain through a civil rights lawsuit:

Courts, legislatures, and officials at every level of government have created so many protections for police officers and other government officials, at every stage of litigation, that a person who has had their life shaken to the very core by government misconduct can have the courthouse doors shut in their face. (p. xiii)

These barriers exist because of the fear that an easy path to relief for civil rights plaintiffs would overwhelm courthouses, enrich undeserving plaintiffs, bankrupt officers, and ultimately leave lawless danger in the wake of understaffed police departments (p. xv). Schwartz challenges that narrative, both from her own experience as a civil rights lawyer and her body of research (pp. xv–xvii). The Supreme Court labors under the impression that civil rights lawsuits have the power to motivate government officials to clean house when bad actors within police

departments are uncovered.²⁷ Schwartz proposes that the barriers the Court and political actors have erected are so great that civil rights lawsuits act as neither a vehicle for individual relief nor a motivation for reform (pp. xiv–xv).

Schwartz's first chapter proper consists of a history of civil rights litigation in the United States. Beginning with 42 U.S.C. § 1983's origins in the Ku Klux Klan Act of 1871²⁸ and the Supreme Court's swift and brutal curtailment of its basis in the Fourteenth Amendment, this history highlights the relatively recent glimmer of hope that civil rights litigation could accomplish anything at all (pp. 3–6). This renewed strength only came in 1961 with *Monroe v. Pape*²⁹ (p. 10). And almost immediately, the same reactionary forces that doomed the Ku Klux Klan Act set to work curtailing the *Monroe* decision, often through Supreme Court cases (pp. 11–14). Despite this weakening, civil rights lawsuits remain a central remedy for people harmed by police (p. 15). Because of their importance, the barriers civil rights lawsuits face merit the examination that makes up the bulk of *Shielded*.

B. Failures of Legal Actors

Schwartz addresses barriers arising from three kinds of legal actors in *Shielded*: lawyers, judges, and juries. Lawyers form a barrier to civil rights lawsuits largely because of the difficulty of getting one (p. 21). Judges form a barrier because the modern rules of federal procedure provide them many opportunities to engage in gatekeeping, frequently allowing them to keep a case from going to trial if they wish (p. 120). The barriers jurors erect are harder to evaluate due to the private nature of their deliberations, but pro-police biases within the community likely carry over into the jury room (p. 138). Schwartz devotes a chapter of *Shielded* to each.

Given that plaintiffs file thousands of civil rights lawsuits each year, it might seem counterintuitive that the sheer unavailability of lawyers is a significant barrier. Yet “[l]ess than 1 percent of people who believe that their rights have been violated by the police ever file a lawsuit” (p. 21). Some of that is due to attorneys rejecting weak cases, but even more often there simply is no attorney to be found in a community — even one as large as Houston has only a handful of civil rights lawyers (pp. 20–21). Contingency fee arrangements and the unavailability of § 1988 legal fees in cases that settle can make civil rights cases without death or permanent disability economically unappealing for lawyers

²⁷ See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981) (rejecting the need for punitive damages to motivate the discharge of offending police and the removal of offending elected officials).

²⁸ Ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985–1986).

²⁹ 365 U.S. 167, 172 (1961) (“Congress, in enacting § 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.”).

(pp. 22–26). These economic barriers compound the problems of obtaining representation for those most likely to be harmed by police: “people of color, LGBTQ+ people, and people with mental illness” (pp. 27–28). Even those lawyers who take civil rights cases have proven less willing to do so lately due to the difficulties facing them (p. 29). Before a single doctrinal issue is raised, nearly every civil rights case is in jeopardy because of the unavailability of lawyers willing to take it.

The tremendous discretion granted to modern federal trial judges makes them some of the most powerful actors in the entire legal system (pp. 120–21). The assignment of trial judges — who have wildly varying views on issues central to civil rights litigation — can prove dispositive due to this discretion and the fact that they decide cases alone (pp. 121–22). Judges can shape the available evidence through discovery and motions practice, signaling their preferred outcomes even when they don’t grant final relief (pp. 132–33). This can lead to settlement, sometimes for much less than the real damages and costs plaintiffs incurred (p. 132). Even when it doesn’t, the outcome of those motions shapes the case the jury actually hears (pp. 120–21). When judges want to exercise their discretion against a civil rights plaintiff, they can become a significant barrier to relief (p. 124).

Even when civil rights claims do reach trial, juries are less likely to find for plaintiffs and award less money than they do in other types of cases (p. 137). Even those cases allegedly strong enough to attract a lawyer and survive summary judgment only succeed 15% of the time (pp. 137–38). Part of this can be attributed to public confidence in police, which historically has run high, only dipping to 48% in the wake of George Floyd’s murder (p. 138). Jurors’ politics, race, and views on authority can all shape their opinions of evidence (p. 140). Meanwhile, the methods of selecting and notifying federal juries can also shift the pool in the government’s favor by relying on a pool that systematically excludes large classes of citizens more likely to share plaintiffs’ views (pp. 141–44). Government defendants can also play to jurors’ prejudices by impeaching the plaintiff’s character through a variety of means often available against civil rights plaintiffs (pp. 145–46). Given their composition and biases, juries often provide the final shield for law enforcement (p. 155).

Schwartz uses these chapters to demonstrate how the legal system is composed of people, rather than just the mechanical application of laws and precedents. Those people come to each case with their own interests, goals, perspectives, and biases. Lawyers largely need an income, and the barriers to fee generation in civil rights litigation, along with the costs of opposing government defendants, make it a risky field of practice. Federal judges come to the bench with their own opinions of litigation — whether rooted in their experiences, politics, facts, or misconceptions — which can greatly influence their rulings. Jurors often reflect views held among society at large — including an inordinate

trust of police — which can sway their verdicts. These might be the hardest barriers to address. Unless we massively overhaul our capitalist economic system, lawyers are still going to need to get paid if they want to survive. Unless we create massive shifts in our cultural landscape, pro-police and anti-plaintiff biases in media will persist. Because these barriers are potentially so daunting, even plaintiffs with very real injuries who should prevail under existing law will often miss out on recovery.

C. Doctrinal Barriers

Even when lawyers are available and the judge and jury are at least not hostile to a civil rights plaintiff's claims, Schwartz highlights several doctrinal barriers to relief. Onerous pleading standards can keep claims out of court for lacking information that a plaintiff needs the discovery process to obtain (p. 35). The Supreme Court's interpretation of the Fourth Amendment's reasonableness requirement can be so officer-friendly that grievous injuries might not even qualify as a constitutional violation (p. 52). Qualified immunity can block plaintiffs whose cases represent slightly novel fact patterns in civil rights litigation (p. 73). Municipalities enjoy special, harsher standards to protect them from liability for the misdeeds of the officers they train and employ (pp. 93–94). And individuals have almost no access to injunctive relief to seek reforms that could prevent their injuries from recurring for others (pp. 166–72). Schwartz tackles each of these barriers in turn.

While the Supreme Court has rejected heightened pleading standards for civil rights claims, its modern pleading standards are particularly burdensome on civil rights plaintiffs (pp. 39–43). Civil rights suits against institutional defendants typically require evidence that only the defendants possess (p. 43). Yet without alleging detailed, plausible facts beyond simple conclusions, civil rights plaintiffs' suits are subject to dismissal under the *Twombly*³⁰ and *Iqbal*³¹ standards (pp. 42–43). These standards, like so many of the barriers Schwartz discusses, are rooted in misconceptions. The *Iqbal* Court, like many courts in the past half century, believed a heightened standard was necessary to prevent needless discovery costs in weak or frivolous cases (p. 41). Yet discovery costs tend to align with the stakes of the case, and many of the civil rights cases that the heightened pleading standard dismisses are the sort that resulted in settlements or plaintiff's verdicts in the decade leading up to *Iqbal* (pp. 42–43).³² Sometimes, public records lawsuits can help plaintiffs obtain necessary information for their civil rights cases, but this requires an attorney willing and able to do the additional work to obtain

³⁰ Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

³¹ Ashcroft v. Iqbal, 556 U.S. 662 (2009).

³² The author cites Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 800 (1998); and Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 166 (2011).

it (pp. 46–47). But without this information, which institutional defendants often closely guard, civil rights lawsuits can be dead on arrival (p. 47).

The Fourth Amendment supposedly protects Americans from unreasonable searches and seizures.³³ That protection governs most law enforcement interactions with the public (p. 53). Yet the Supreme Court’s extremely deferential standard of “reasonableness” often allows police to hurt and even kill “people who have done nothing wrong without violating their constitutional rights” (p. 52). By abandoning the probable cause standard to allow stops based on reasonable suspicion, the Court opened the gates for law enforcement to use myriad state and local laws to justify interfering in people’s lives (p. 56). These stops can be tense and rapidly turn violent (p. 57). Even in the home, where the Fourth Amendment is supposedly at its strongest, the Court has taken numerous opportunities to carve out exceptions for police (pp. 58–59). Since excessive force claims fall under the Fourth Amendment’s protection against unreasonable searches and seizures, the Court’s deferential reasonableness standard provides a barrier for plaintiffs here, too (p. 63). Even mistakes can justify the use of deadly force, if they can fit within the wide bounds of Fourth Amendment reasonableness (p. 66). Courts defer to police to determine what is reasonable, abrogating their interpretive responsibility.³⁴ This erects a barrier to recovery for civil rights plaintiffs who are exactly the sort of clients Schwartz says civil rights lawyers prefer to represent — law-abiding, respectable, and grievously injured.

But eviscerating the Fourth Amendment wasn’t enough for the Supreme Court, which enacted a further barrier in qualified immunity (pp. 73–74). So long as no prior case with nearly identical facts pronounced that some conduct violated the Constitution, officers are given a pass the first time the issue is litigated (pp. 75–76). Even officers acting in bad faith can receive qualified immunity’s protection (p. 74). Schwartz points to the doctrine’s potential as a barrier through the example of George Floyd’s murder; while Minneapolis settled the case rather than let the courts handle it, officers in several states — but critically, none in the Eighth Circuit — have received qualified immunity for killing people by kneeling on their backs and necks (p. 77). Even worse, the Court no longer requires lower courts to evaluate whether the behavior is constitutional before granting qualified immunity (p. 78).

³³ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

³⁴ See Brandon Hasbrouck, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239, 259 (2021) (“The separation-of-powers concerns raised by police lawmaking go beyond the comparatively simple problem of insufficient legislative guidance, as police lawmaking involves a delegation of the judicial branch’s inherent powers and responsibilities.”).

Qualified immunity denials are also immediately appealable, so officers can add years of time and litigation costs to civil rights cases before discovery even begins (p. 79). Schwartz emphasizes the central absurdity of qualified immunity: it presumes officers have an operational understanding of the facts and holdings of literally thousands of court cases (p. 85). Schwartz offers some hope that this particular shield will fall soon (pp. 86–87). But until the Supreme Court or Congress reevaluates the doctrine, it remains a barrier to civil rights plaintiffs.

When victims of police brutality want to hold officers' employers accountable, they face additional barriers. "Deeply and obviously dysfunctional police forces regularly escape liability for abuses by their officers" (p. 94). In other areas of law, vicarious liability allows plaintiffs to hold employers accountable for their employees' misbehavior (pp. 99–100). The Supreme Court did not extend anything resembling employer liability to civil rights lawsuits until 1978, in *Monell v. Department of Social Services*³⁵ (p. 101). Even then, the decision required that plaintiffs in typical cases demonstrate that the constitutional violation was caused by a "policy or custom"³⁶ within the local government (p. 101). Since then, concerns that municipalities would be restricted by the judiciary in their decisionmaking and ability to respond to their communities' needs, as well as fears that these communities would be unable to shoulder the financial burden of litigation under § 1983, led to a series of decisions curtailing vicarious liability (p. 102). This barrier becomes particularly difficult to surmount in combination with the *Iqbal* pleading standard (p. 108). Part of this stems from the difficulty of obtaining evidence that would indicate a pattern that would put a municipality on notice that its employees were likely to violate people's rights (p. 109). Tragically, cities are so readily able to escape liability that they seldom face court orders or political pressure to change unconstitutional behaviors on a systemic level (p. 115). Given the desire Schwartz identified among so many people whose rights have been violated to see meaningful change and prevent others from sharing their fates, this barrier demands change even more urgently than many others.

For many civil rights plaintiffs, a driving goal of litigation is reform (p. 177). From the late 1930s to the 1960s, this was often possible through requests for injunctive relief (pp. 161–64). But as the Supreme Court has become more conservative, its hostility to injunctive relief has increased (p. 164). The Court ignored the Reconstruction Amendments' intended shift in the federal-state relationship³⁷ and refused to allow injunctive relief against prosecutors and judges — even those engaged

³⁵ 436 U.S. 658 (1978).

³⁶ *Id.* at 694.

³⁷ Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 136–38 (2022) (describing the massive changes Congress made to the federal-state relationship through the Fourteenth Amendment).

in blatantly racist practices (p. 166). The Court later overruled an order implementing new police department policies — policies the department helped draft — as an impermissible overstep into the department's latitude in conducting its affairs (p. 168). Even a clearly unconstitutional policy of using chokeholds was beyond the scope of permissible injunctive relief (pp. 169–70). While particular distinct circumstances can permit injunctive relief, they remain cabined (p. 172). Congress responded with authorization for the Department of Justice to seek injunctions, but when the present administration is not bothered by the manner in which an individual's rights are violated, this authorization affords little relief (pp. 172–73). This barrier, among the doctrinal ones, seems especially cruel, as those abused by the police have no control over whether they have access to injunctive relief or not. Schwartz separated it from the other doctrinal barriers by addressing it after judges and juries, in closer proximity to the barriers of extrajudicial systems; the political aspect of the barrier makes that a savvy juxtaposition.

In some respects, the doctrinal barriers should be the easiest to challenge systemically. They arise not from culture, politics, or economic interests, but from the courts themselves. With the exception of injunctive relief, Schwartz addresses all doctrinal barriers before discussing judges and juries, reflecting that remedying these barriers is primarily obstructed by civil rights plaintiffs' ability to find lawyers to represent them. Good legislation or appellate decisions could easily effect a substantial change to these barriers. Yet there are several barriers at play here, and Schwartz is right to treat them as separate pieces of the puzzle, all of which must be surmounted.

D. Structural Barriers

Beyond the court system and the law, several further barriers to meaningful civil rights relief function systemically. When local governments indemnify their police officers for civil rights abuses, they ensure that those officers will never experience the financial consequences of their actions (p. 179). Local governments use insurance or general funds to ensure that police departments do not suffer those financial consequences, either (pp. 205–07). Unsurprisingly, those officers and departments seldom give enough thought to the civil rights lawsuits they face to learn from them and amend their behaviors (pp. 215–16). Schwartz saves these structural barriers for last. Even if the justice system were full of good faith actors who ensured that civil rights plaintiffs recovered to the extent the law demands, and even if the doctrinal barriers those plaintiffs face were leveled, civil rights lawsuits can do little to change the behaviors of police officers and departments insulated from and ignorant of the suits against them.

Many justifications for the barriers to civil rights lawsuits that Schwartz discusses rely on the notion that financially burdening police

officers for decisions in heated moments would be unfair. Yet, those financial burdens almost never exist because of the practice of indemnification (p. 179). “Although laws, rules, and informal practices have changed over time, the outcome — that officers rarely pay — appears always to have been true” (p. 185). Indemnification is not just the norm — it’s often a matter of state law (p. 187). Despite the logic of such statutes largely focusing on protecting officers who acted in an essentially proper manner, in practice they grant a blanket immunity even to bad faith actors (p. 188). Perversely, the attorneys for municipalities often discourage civil rights plaintiffs with the threat that they won’t indemnify their officers (p. 190). Without the city’s indemnification, officers might lack the means to pay judgments — and the city would certainly lack any incentive to change its police department’s practices. Without indemnification, plaintiffs often simply won’t file against the officer, who can likely enjoy the protections of bankruptcy (p. 193). Schwartz’s anecdote for this section is particularly poignant, as it comes from her own practice (p. 182). And while her client was ultimately compensated, the officer who abused him escaped any financial consequences and was later arrested on unrelated homicide charges (pp. 184, 194). Indemnification creates a perverse web of incentives around civil rights litigation that serves as a strong barrier to recovery and change.

The Supreme Court has shaped its civil rights jurisprudence around concerns about the effect of lawsuits on local government budgets (pp. 200–01). Yet, as Schwartz points out, local governments were paying out claims against their officers even before the Court opened up § 1983 litigation (pp. 199–200). “As a practical reality of government budgeting, that money often ends up being pulled from the crevices of local government budgets that are earmarked for the least powerful: the people whose objections will carry the least political weight; the same marginalized people disproportionately likely to be abused by police” (p. 198). Municipal budgeting practices for civil rights claims manage to disproportionately harm those who need help most while representing only a small portion of overall budgets (pp. 202–03). Smaller cities tend to handle their exposure through liability insurance for only a small percentage of their total budgets (p. 203). In either system, the money almost never comes from police departments’ bottom lines (p. 204). In the few municipalities that do pay settlements and judgments from police budgets, the departments take it as an opportunity to learn from their mistakes (p. 205). Schwartz points out that a shift in how police departments deal with civil rights liability payments could shift not just street-level practices, but the way those departments defend lawsuits (p. 206). While plaintiffs’ attorneys are often accused of seeking exorbitant fees, cities’ defense attorneys are often even more expensive (p. 207). Although these budgeting practices generally do not represent a barrier to plaintiffs’ recovery, Schwartz demonstrates how their pernicious

effects on law enforcement and litigation strategy represent a significant barrier to self-correction.

While the minority practice of making police departments budget for their civil rights liability points to a better operating philosophy, Schwartz shows that budgeting is hardly the only area of institutional failure to learn from lawsuits. Some police officers persist in violating people's rights even after a dozen or more suits (p. 211). Worse, their departments may not even know who the worst offenders are — and that they're clustered in a single unit (pp. 211–13). Even when cities' financial officials recommend analyzing civil rights claims to find patterns that could help minimize liability by disciplining and firing officers, their cities seldom do so (pp. 215–16). Even in claims pursued through alternatives to litigation, departments are unstructured in investigating and uncompelled in learning from civilian complaints (pp. 216–17). Despite the ways the other barriers Schwartz identifies push claims toward settlement, officials then use the settlement posture of those claims to challenge their reliability and oppose data collection (pp. 218–19). Even when officials are encouraged to review lawsuit and settlement data, if that data is incomplete, it can be next to useless for enacting policy changes (pp. 220–21). Schwartz closes the chapter with perhaps the most disheartening observation of the entire book: “If police officials don't gather and analyze information from lawsuits, they can't possibly learn from them” (p. 223). And if they don't learn, they are exceedingly unlikely to change for the better.

These structural barriers could prove the most difficult to remedy. Institutions persist in part because of their tendency to preserve incentives between those in power and new members.³⁸ If the institution's culture is rotten, the rot will tend to spread to new members as they grow accustomed to their environment. Without broad and concerted efforts to eradicate such issues from an institution, it is unlikely to improve. Indemnification, budgeting, and the failure to study past mistakes all further shield institutional culture. Because police violate people's civil rights as a part of their institutional culture, challenging and remedying that culture are essential to obtaining justice beyond the granularity of individual cases. After the bleak revelation that municipal institutions largely are set up to resist any improvement, Schwartz is finally prepared to begin discussing solutions in earnest.

E. Possible Solutions

Schwartz's final chapter lays out a number of solutions under the title, “A Better Way” (p. 225). None of these solutions is — or is intended

³⁸ Daron Acemoglu & James A. Robinson, *De Facto Political Power and Institutional Persistence*, 96 AM. ECON. REV. 325, 329 (2006) (“The reason for persistence is therefore not persistence of the elites, but the persistence of *incentives* of whoever is in power to distort the system for their own benefit.”).

to be — sufficient to repair either our system of civil rights lawsuits or our police departments (p. 233). Yet together, they represent a better alternative to the present status quo of unredressed abuses. They come from a vision of civil rights lawsuits reflecting:

the Supreme Court’s most optimistic descriptions of the purposes that § 1983 suits should serve. People whose rights have been violated should be able to recover money to compensate them for their losses, and these cases should lead officers and their government employers to take steps that make similar harms less likely to recur. (p. 225)

While Schwartz discusses some necessary changes and explores individual barriers to relief, it is here, once she has laid out the interactions among those barriers, that she can most fruitfully discuss remedies. Before discussing remedies in earnest, she recounts the barriers once more (pp. 225–26).

Schwartz begins her discussion of remedies with qualified immunity, in part because of its prominence in contemporary political debate (pp. 227–28). Following *Shielded*’s discussion of the network of barriers facing civil rights plaintiffs, her contention is that ending qualified immunity will neither expose officers and departments to crushing litigation costs nor “usher in a golden age of police accountability” (p. 229). Schwartz contends that ending qualified immunity is necessary, but woefully insufficient (p. 229). Focusing entirely on that political fight while ignoring other doctrinal barriers would invite failure to meaningfully hold police accountable.

Schwartz presents strengthening municipal liability as a critical step in actualizing the dual goals of § 1983 (p. 230). This could happen in multiple ways, such as ending the *Monell* standards or guaranteeing indemnification (p. 230). Mandatory indemnification increases incentives on local governments to learn from civil rights suits and manage their police departments, but also risks further isolating officers from the consequences of their actions (pp. 230–31). Schwartz sees a potential solution to this in legislation such as Colorado’s indemnification law, which requires indemnification unless officers have been convicted of a crime, while allowing municipalities to require officer contributions for bad faith acts (p. 231). Schwartz argues against the criminal conviction carve-out — after all, this leaves some of the most harmed targets of police abuse with no practical recourse (p. 231). Yet the infrequency of criminal convictions for police should make this a rather small carve-out indeed (p. 231). Cities can also adopt contribution policies without waiting for state legislatures (pp. 231–32). The combination of a guarantee that the city will pay when an officer’s behavior is found to violate the Constitution, along with financial sanctions for officers who act in bad faith, would serve to focus incentives for better policies and behavior on the appropriate actors (p. 232).

Schwartz also examines the need for change around actors in the legal system. She applauds the NAACP Legal Defense Fund’s

Marshall-Motley Scholars Program for its initiative to create a law-school-to-civil-rights-litigator pipeline in the South (p. 236). She calls for the expansion of federal jury pools beyond simply registered voters, such as the practice in some districts of including anyone with a state identification card or who has applied for unemployment benefits (p. 237). Schwartz also calls, as I have,³⁹ for the diversification of the federal bench (p. 237). These changes have the potential to expand the pool of perspectives involved in deciding contentious matters at the heart of civil rights cases (pp. 236–38).

The changes Schwartz proposes are not a panacea for the rot infecting American law enforcement. Even if they would meaningfully improve things, they depend on political will (p. 238). Even presented with clear evidence and reasoned arguments, politicians are still prone to fear (p. 240). The political momentum following George Floyd’s murder resulted in many proposed bills, but most failed, with the notable exception of Colorado’s (pp. 238–39). Schwartz’s closing meditation remarks upon an important — and harrowing — truth: courts, legislators, and local government officials are afraid of too much justice (p. 240). Our system remains unjust because too many of our fellow citizens prefer injustice. We will not achieve meaningful change without elevating the love of justice above overblown fears.

II. EVEN ANALYSIS THIS COMPLETE HAS ROOM TO GROW

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.

— Justice Sotomayor⁴⁰

Shielded is groundbreaking in its scope. While Schwartz is hardly the first scholar to examine barriers to civil rights suits — she cites to her predecessors and compatriots in this field throughout *Shielded* — the breadth of empirical research she brings to bear is extraordinary. Yet even an examination this broad and deep can leave significant territory unexplored. Schwartz gives short shrift to the roles of the political

³⁹ See Brandon Hasbrouck, Opinion, *Pack the Court with Color-Conscious Justices*, RICHMOND TIMES-DISPATCH (Oct. 8, 2020), https://richmond.com/opinion/columnists/brandon-hasbrouck-column-pack-the-court-with-color-conscious-justices/article_fbdoab39-0a70-51do-a144-a889dd96f158.html [<https://perma.cc/72HX-7X97>]; Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 696 (2022) (applauding the Biden Administration’s efforts to diversify the bench and calling for the more deliberate appointment of judges who have lived and worked in solidarity with marginalized communities).

⁴⁰ Utah v. Strieff, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).

forces⁴¹ behind the fallacious justifications for police untouchability and of police unions.⁴² Nor does she address the potential harms of over-deterrence,⁴³ which has the potential to lead to a violation of the abolitionist intent of the Fourteenth Amendment through the withdrawal of police protection.⁴⁴ Furthermore, her discussion of potential solutions, while a long chapter, is short by comparison to her analysis of the problems. Finally, the solutions she does address are left incomplete — though perhaps this leaves open the possibility of a second, more prescriptive volume in the future. This Part first discusses the missing pieces of the problem in *Shielded*. Then, it proceeds with an examination of where Schwartz’s discussion of solutions falls short.

A. *Missing Pieces of the Problem*

While Schwartz’s analysis is thorough, it leaves a few potential shields unaddressed. This section addresses in turn the political forces pushing bad faith arguments to protect abusive police and the outsized power of police unions, both of which Schwartz leaves relatively unaddressed in *Shielded*. Then, it proceeds with a more complex discussion of the problem of overdeterrence, both as an instance of the political gestalt leading to unreasonable police support and as a potential manner in which police can unaccountably violate the rights of members of the public. These critiques build on criticisms other reviewers — such as Professors Aziz Z. Huq and Peter H. Schuck — have raised elsewhere.⁴⁵

The political forces arrayed against police reform can be staggering. Conservatives treat any effort to transform American police into something other than a colonial army occupying marginalized communities as an existential threat.⁴⁶ So-called moderates balk at the notion of any

⁴¹ See Aziz Z. Huq, *A Comment on Shielded: How the Police Became Untouchable*, BALKINIZATION (Mar. 2, 2023, 9:30 AM), <https://balkin.blogspot.com/2023/02/a-comment-on-shielded-how-police-become.html> [https://perma.cc/DV83-AGY2] (“Yet for better or worse, *Shielded* offers no account of what might be called the ‘political epistemology’ of police untouchability.”).

⁴² See Peter H. Schuck, *The Absence of Police Unions and Over-Deterrence in Joanna Schwartz’s Shielded*, BALKINIZATION (Mar. 5, 2023, 9:30 AM), <https://balkin.blogspot.com/2023/03/the-absence-of-police-unions-and-over.html> [https://perma.cc/43KS-WB85] (“[Schwartz] barely mentions the role of powerful and protective police unions, which include a substantial majority of police officers in the U.S.”).

⁴³ See *id.* (describing the potential for police to avoid potentially tense interactions with the public because of the greater risk of criticism for wrong action than for inaction).

⁴⁴ See Hasbrouck, *supra* note 37, at 157 (“Yet the original, abolitionist doctrine of protection asked instead: Does the law protect all those subject to it?”).

⁴⁵ See, e.g., Huq, *supra* note 41; Schuck, *supra* note 42.

⁴⁶ See Jacob Fischler, *“Defund the Police” Slogan and Anti-cop Violence Debated at U.S. Senate Hearing*, KAN. REFLECTOR (July 26, 2022, 4:29 PM), <https://kansasreflector.com/2022/07/26/defund-the-police-slogan-and-anti-cop-violence-debated-at-u-s-senate-hearing> [https://perma.cc/6L74-9BQV] (“Republicans on the U.S. Senate Judiciary Committee and law enforcement witnesses at a Tuesday hearing blamed recent violence against officers on anti-police rhetoric . . .”).

systemic reform.⁴⁷ Even supposed liberals can be rallied to support a muscular system of carceral violence to avoid appearing soft on crime.⁴⁸ These politicians are, in some ways, responding to their constituents, whose views on the danger crime poses and the protection police afford them are shaped by the media.⁴⁹ The reason for this cultural phenomenon can be found by looking to who benefits. America's economic hierarchies emerged on the plantations, and the wealthy class that emerged at the top has sought to insulate itself with racial and economic hierarchies ever since.⁵⁰ It should perhaps be unsurprising that this class would look to maintain an institution created to control labor — free factory workers in the North and enslaved farm workers in the South.⁵¹ While Schwartz's anecdotes make clear that policing's harms fall on Americans across racial and class lines, she acknowledges that they fall disproportionately on people of color (p. xix). The disproportionate

⁴⁷ See Candice Norwood, *Democrats' Police Reform Bill Faces Opposition in the Senate — But That's Only the First Hurdle*, PBS (Mar. 5, 2021, 5:33 PM), <https://www.pbs.org/newshour/politics/democrats-police-reform-bill-faces-opposition-in-the-senate-but-thats-only-the-first-hurdle> [https://perma.cc/5C44-W4E6] (“Though advocates say the bill is long overdue after years of racial bias in policing and growing pressure to address systemic racism, it faces a tough challenge ahead from moderate Democrats and Republicans in the Senate, who argue the legislation will drain resources from law enforcement and jeopardize officer safety.”).

⁴⁸ See Udi Ofer, *Politicians' Tough-on-Crime Messaging Could Have Devastating Consequences*, TIME (Nov. 3, 2022, 10:54 AM), <https://time.com/6227704/politicians-crime-messaging-mass-incarceration> [https://perma.cc/7CVZ-864A] (“In response, many Democrats are touting their own tough-on-crime message. They're slamming Republicans as the ones who are soft on crime and not 'backing the blue,' as well as attacking parole reform, bail reform, and efforts to no longer prosecute drug possession.”).

⁴⁹ See Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37, 50 (1997) (“The media play a critical role in energizing public fear by decontextualizing crimes and publicizing certain crimes in disproportion to their actual occurrence.”); Matthew J. Dolliver et al., *Examining the Relationship Between Media Consumption, Fear of Crime, and Support for Controversial Criminal Justice Policies Using a Nationally Representative Sample*, 34 J. CONTEMP. CRIM. JUST. 399, 414 (2018) (“Those who have greater exposure to the media, as measured in this more holistic way, are more fearful of becoming victims of crime in the future and that heightened fear translates into greater support for punitive and defensive criminal justice policies.”); Abigail Weinberg, *“It Creates a Culture of Fear”: How Crime Tracking Apps Incite Unnecessary Panic*, MOTHER JONES (Aug. 9, 2019), <https://www.motherjones.com/politics/2019/08/it-creates-a-culture-of-fear-how-crime-tracking-apps-incite-unnecessary-panic> [https://perma.cc/VEJ9-4SWG] (“[E]xperts say that constant notifications about local crime, sent to thousands of city dwellers multiple times a day, can actually create a culture of fear. What's more, when people are unduly afraid of their neighborhoods, that paranoia is often misdirected at people of color.”).

⁵⁰ See generally Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html> [https://perma.cc/H5ZH-5YQS] (tracing the origins of American wealth to slavery and demonstrating the ways the inheritors of that wealth used racial and economic hierarchies to preserve their status).

⁵¹ See Hasbrouck, *supra* note 5, at 1114–17 (summarizing the origins of American policing).

power of those who would prefer this status quo creates a political milieu in which police reform approaches the status of a third rail.⁵²

The resulting taboo stifles discussion of serious reforms, creating an overarching shield for police that supports nearly all of the others Schwartz identified.⁵³ If this taboo could be lifted, though, Congress could exercise its considerable power to regulate policing.⁵⁴ Our core civil rights statutes are grounded in Congress's powers under the Reconstruction Amendments.⁵⁵ Congressional findings that the problems these statutes were drafted to remedy remain pervasive would serve as ample justification for amending those statutes to enact the sorts of changes that Schwartz's book and this Review advocate. Congress would be well within its Spending Clause authority to authorize funding for legal services attorneys to represent civil rights plaintiffs.⁵⁶ An amendment to the Rules Enabling Act⁵⁷ could potentially

⁵² See Mike Kelly, *New Jersey May Actually Lead America Toward Police Reform*, NORTHJERSEY.COM (Apr. 20, 2021, 12:54 PM), <https://www.northjersey.com/story/news/columnists/mike-kelly/2021/04/16/nj-police-reform-united-states-example-mike-kelly/7220108002> [<https://perma.cc/TD9B-YL4B>] (“Many elected officials viewed police reform as a dangerous ‘third rail’ of politics. Any political figure who demanded significant police reforms would likely be targeted for defeat at the ballot box by the powerful police unions who represent the more than 38,000 cops in New Jersey.”).

⁵³ See, e.g., Aziz Huq et al., *Governing Through Gun Crime: How Chicago Funded Police After the 2020 BLM Protests*, 135 HARV. L. REV. F. 473, 474 (2022) (“Through increased rhetoric about illegal guns and heightened enforcement of gun possession laws, Chicago’s mayor and police chief have managed to legitimize an increase in policing that widened racial inequalities at a time of unprecedented pressure from activists.”).

⁵⁴ See Hasbrouck, *supra* note 5, at 1124–25 (discussing Congress’s powers to regulate policing under the Thirteenth and Fourteenth Amendments).

⁵⁵ Compare 42 U.S.C. § 1983, with Act of April 20, 1871, Pub. L. No. 42-22, § 1, 17 Stat. 13. This example is particularly demonstrative of congressional power, as qualified immunity could be eliminated simply by restoring the phrase “any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding” to § 1983. *Id.*; see Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CALIF. L. REV. 201, 207 (2023) (“[T]he Reconstruction Congress adopted explicit text that displaced common law defenses when it enacted the original version of Section 1983.”).

⁵⁶ See Mark Seidenfeld, *The Bounds of Congress’s Spending Power*, 61 ARIZ. L. REV. 1, 3–4 (2019) (discussing the generally broad power of Congress to spend its allocated budget to promote the general welfare — so long as a willing seller exists); Madeleine O’Neill, *Maryland’s Access to Counsel in Evictions Program Readies to Launch with New Funding*, DAILY REC. (Apr. 13, 2022), <https://thedailyrecord.com/2022/04/13/marylands-access-to-counsel-in-evictions-program-readies-to-launch-with-new-funding> [<https://perma.cc/4JXZ-WUNJ>] (describing a state program providing funding for a right to counsel in civil matters where none previously existed). The Spending Clause is a likelier vehicle for providing effective representation than attempting to directly forbid settlements that prevent attorneys from recovering adequate fees for their time expenditures. See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 601 (2015) (“Unlike in 1984, it is today entirely plausible, under the iteration of originalism that currently prevails in sophisticated conservative circles, to claim that the original meaning of the Constitution embraces unenumerated economic rights.”).

⁵⁷ 28 U.S.C. § 2072.

alter the *Iqbal* standard of pleading.⁵⁸ The national will necessary for Congress to attempt some of these remedies is not so hard to imagine.⁵⁹ On the local level, though, that will appears elusive.⁶⁰ With so much police policy set at the local level, the difficulty of effecting change there is particularly damning to even the mildest reform efforts.

Shielded also gives little more than a passing mention to the power of police unions. While Schwartz discusses their rise to power in her history lesson, she does not discuss that power in detail (p. 13). Yet these unions exert powerful influence over any policymaking that might require law enforcement to act with less than complete impunity.⁶¹ Police unions insulate a violent and oppressive institution against all manner of change.⁶² It is police unions that demand and control the arbitration process that so often prevents officer discipline.⁶³ Even when city and police department officials want to get rid of abusive officers, these union-backed disciplinary procedures often prevent them from doing so.⁶⁴ Furthermore, arbitration proceedings help keep officer disciplinary

⁵⁸ See Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 364 (2016) (discussing the possibility of amending the Federal Rules through congressional legislation).

⁵⁹ See Alexandra Hutzler, *What Is the George Floyd Justice in Policing Act?*, ABC NEWS (Feb. 2, 2023, 1:49 PM), <https://abcnews.go.com/Politics/george-floyd-justice-policing-act/story?id=96851132> [<https://perma.cc/J4HC-VWWN>] (discussing political support in Congress and the Biden Administration for major police-accountability legislation).

⁶⁰ See Sarah A. Seo & Daniel Richman, Opinion, *Police Reform Won't Work Unless It Involves Federal and State Governments*, WASH. POST (July 7, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/07/07/police-reform-wont-work-unless-it-involves-federal-state-governments> [<https://perma.cc/MT73-PVTX>] (“While Americans have traditionally celebrated local governments as crucibles of democracy, localism’s dark side has been bound with the unjust racial history of policing in the United States. Minority groups’ historical lack of political power ensured that the police would neglect their needs or, worse, abuse them with impunity.”).

⁶¹ See Damali Ramirez et al., *How the Push and Pull of Unions Is Hindering Police Reform Around the Country*, NEWS21 (Dec. 18, 2022, 6:00 AM), <https://www.usatoday.com/story/news/nation/2022/12/18/police-reform-unions-role/10849108002> [<https://perma.cc/M2QG-S8ED>] (“They can negotiate protections into their contracts. They can use their money and influence to lobby legislators and support political candidates. And they can hire attorneys to fight policies — and people — they don’t like.”).

⁶² See Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1397 (2020) (summarizing the abolitionist critique of police unions not for their status quo, but because they are necessarily “committed to preserving their jobs and the institution of the police”).

⁶³ See Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1037 (2021) (“These limitations are derived from several sources, including police union contracts In many jurisdictions, [statutes permitting police officers to collectively bargain] empower[] police unions to negotiate internal disciplinary procedures.”); Editorial Board, Opinion, *To Hold Police Accountable, Ax the Arbitrators*, N.Y. TIMES (Oct. 3, 2020), <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html> [<https://perma.cc/9JTK-RJE8>] (“These cases also demoralize mayors and police chiefs who have worked hard to remove problem officers, only to face orders from unelected arbitrators to give those abusive officers their badges and guns back.”).

⁶⁴ See Kimbriell Kelly et al., *Fired/Rehired: Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired> [<https://perma.cc/928B-7BRC>] (“Thirty-seven departments complied with the request, disclosing that they had fired a combined 1,881 officers since 2006. Of those officers, 451 successfully appealed and won their jobs back.”).

records private, frustrating plaintiffs who need evidence for their civil rights claims.⁶⁵ The potent shield police unions provide to their abusive members is a glaring omission from *Shielded*'s otherwise thorough analysis.

Schuck also raises the potential problem of overdeterrence as a serious issue missing from Schwartz's analysis.⁶⁶ Schuck's concern focuses on the potential that police officers will respond to a more equitable liability regime with "high quit rates, and difficulties in recruiting new officers."⁶⁷ But if police officers are only willing to work if they have free rein to be warrior cops authorized to use force with little regard for the Constitution, is it actually a problem to lose them? The danger is not so much one of losing officers who fear accountability, but of the breakdown in the department's ability to provide any services at all as it loses bodies. If the remaining officers are not repurposed in roles that are substantially more affirming of life and liberty, those portions of police work that meaningfully contribute to public safety⁶⁸ will likely be underserved as the remaining officers continue to attempt to perform all of their current functions. The implied threat from abusive officers that they will allow public safety to suffer if anyone attempts to hold them accountable thus functions as a practical barrier to incrementalist change and accountability. This threat serves as a compelling reason to consider whether incremental change is even possible, and to favor a more radical reimagining of the role of police in American society.

*B. Relatively Little Is Said Here About Solutions,
And Those Discussed Are Incomplete*

Schwartz's analysis in *Shielded* provides perhaps the most comprehensive diagnosis to date of the problems facing civil rights lawsuits in America. The breadth of the work implies a depth of consideration over the decades that Schwartz has studied this field that makes *Shielded*'s relatively short discussion of solutions appear inadequate by comparison. This disappointment is further complicated by the problem

⁶⁵ See Nick Grube, *Police Arbitration Decisions Are Raising Concerns Throughout the Country*, HONOLULU CIV. BEAT (Nov. 15, 2021), <https://www.civilbeat.org/2021/11/police-arbitration-decisions-are-raising-concerns-throughout-the-country> [<https://perma.cc/S4WG-KYQ8>] ("Police departments and, more specifically, police unions, have gone to great lengths to keep officers' disciplinary records hidden from public view, including in Hawaii, by filing lawsuits, staging protests and threatening electoral consequences for politicians advocating for more openness.").

⁶⁶ Schuck, *supra* note 42.

⁶⁷ *Id.*

⁶⁸ For all that I would prefer to see them replaced with an institution compatible with abolition democracy, police are currently our society's method of providing protection. As I have argued before, the Fourteenth Amendment, properly understood in its original, abolitionist context, obligates state governments to provide protection to the people, and to do so in an equitable manner. See Hasbrouck, *supra* note 37, at 157 ("The right to equal protection was not so much a right of equal protection against the government, but a duty of the government to provide protection — including against private action — to the people as equals.").

that the solutions in *Shielded*'s final chapter are clearly incomplete. Even confining their scope to the incrementalist scale of the other solutions Schwartz discusses, the analysis lacks serious engagement with the doctrinal barriers that compose so much of *Shielded*'s text.

Given the presentation of the barriers as interlocking problems, Schultz should have discussed the practicalities of enacting legislation to simultaneously address several of them. While this is essentially what the Colorado legislation she discusses as a gold standard for reform does, other combinations would be possible at the federal level (p. 235). How would a federal bill eliminating qualified immunity, establishing a limited discovery procedure for civil rights lawsuits before the adjudication of a motion to dismiss, and providing funding for legal services attorneys to bring civil rights litigation⁶⁹ change the civil rights landscape? What about a bill explicitly providing for municipal liability, requiring federal courts to expand their jury pools, and allowing plaintiffs' attorneys to recover liquidated fees when cases settle after lengthy litigation? The possible combinations are perhaps too lengthy to list. Still, pointing to a better way to balance the interests of parties to civil rights lawsuits would be more meaningful with a broader array of options to consider. Congress's actual efforts to address police abuses against the public include several provisions meant to counteract pieces of the police-unaccountability machine.⁷⁰ Even the mildest reforms, though, are likely to struggle to pass on the federal level so long as the Senate maintains its antidemocratic cloture rules.⁷¹ Their prospects are dim not because such proposals are thoughtful, complex, or potentially effective — they're dim because anti-Black political forces will always oppose measures that challenge white supremacy's ostensibly neutral institutions.⁷²

Schwartz would also have done well to include solutions that address not just the processes of civil rights litigation, but the root causes of those cases. Civil rights lawsuits, even successful ones, only address those root causes if local governments can and do want to change. But

⁶⁹ Currently, Legal Services Corporation-funded organizations cannot represent prisoners or most noncitizens, severely curtailing their civil rights activities. See 42 U.S.C. §§ 2996–2996i; 45 C.F.R. §§ 1626, 1637 (2020).

⁷⁰ See Henry J. Gomez, *Here's What the George Floyd Justice in Policing Act Would Do*, NBC NEWS (Apr. 21, 2021, 1:13 PM), <https://www.nbcnews.com/politics/congress/here-s-what-george-floyd-justice-policing-act-would-do-n1264825> [<https://perma.cc/N3GH-S67U>] (discussing provisions of the Act, including the end of qualified immunity, establishment of a national police misconduct registry, and expansion of the Justice Department's powers in "pattern and practice" litigation).

⁷¹ See Ja'han Jones, *Republicans Were Never Going to Support the George Floyd Justice in Policing Act*, MSNBC: REIDOUT BLOG (Sept. 23, 2021, 1:26 PM), <https://www.msnbc.com/msnbc/republicans-never-going-support-george-floyd-justice-policing-act-rcna2215> [<https://perma.cc/3D85-NP6S>] ("Can any of us name 10 Republicans from this current class of senators who would put their names on this bill? Prospects get dim before you can even utter the 'S' in 'Susan Collins.'").

⁷² See *id.* ("The GOP, which is currently waging a virulent, racist assault on the rule of law, wasn't going to support a reform bill that uses law to protect Black lives. . . . [T]hey don't see law as legitimate when it defends nonwhite people.").

as Schwartz points out, many have no interest in learning from lawsuits. Labor and political pressures discourage such consideration and reform.⁷³ But most civil rights plaintiffs really want to see change that prevents others from suffering as they did (p. 223). Police and government intransigence are the biggest barrier to that — and will remain even if all of the other barriers Schwartz discussed are eradicated. *Shielded* suffers for not discussing how we could make civil rights lawsuits unnecessary by stopping the harms they’re meant to redress before they occur.

III. ABOLITIONIST ALTERNATIVES

[W]hen you see a police officer pressing his knee into a [B]lack man’s neck until he dies, that’s the logical result of policing in America.

— Mariame Kaba⁷⁴

As this Review’s chief criticism of *Shielded* is the work’s relatively incomplete analysis of solutions, this Part largely consists of an exploration of some of the solutions that Schwartz left too lightly discussed. Several of these solutions could be grouped together under the umbrella of “nonreformist reforms” — dramatic, systemic changes to the status quo. These include barring abusive police from working in law enforcement, dramatically curtailing patrols of marginalized communities, and disarming the police.⁷⁵ Admittedly, some of these go beyond the scope of *Shielded*; whereas Schwartz focuses on removing barriers to the success of civil rights lawsuits, these approaches look more fundamentally at removing the need for them in the first place. Going even further, this Part then explores how the problem of police abuses can be remedied entirely by simply abolishing the police. Finally, this Part concludes with a discussion of some common objections to abolition, such as the problem of how to confront violence as a society.

A. Nonreformist Reforms

Nonreformist reforms begin from an assumption that power should be allocated more democratically to allow ordinary people to develop the tools to improve their own lives and those of people in their

⁷³ See *supra* section II.A, pp. 913–17.

⁷⁴ Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/6R9P-TKQY>].

⁷⁵ In fairness to Schwartz, she does mention firing abusive police and reducing interactions with the police as part of the solution (pp. 231, 238). This suggestion is meant to expand upon her brief mention of those ideas.

communities.⁷⁶ The changes discussed here might fit within the ambit of defunding the police, but stop short of actual abolition, as they retain the assumption that there will still actually be police — just not as we know them. Even if we as a society decide we must have police, we can dramatically change what that means to make them less of a force of marginalization. We can implement mechanisms that ensure that abusive police can no longer be employed in law enforcement. We can shift the focus of policing from patrols and arrests to responding to and investigating serious crimes. We can make armed policing an exceptional response to exceptionally violent circumstances rather than the default. All of these would require radically different approaches to our relationship with policing, but have the potential to reduce the harms of policing significantly — particularly if we implement them as a package.

I. Police Can't Hurt People Again if They Stop Being Police. — Just as police officers are shielded from lawsuits, they also have shields against employment consequences. First, departments are reluctant to take any kind of disciplinary action against police officers in the first place, as Schwartz notes (p. xii). Even if they want to, officers often cooperate to protect each other in a “blue wall of silence.”⁷⁷ Worse, their officers sometimes conspire to prevent serious review of their wrongdoing — a process Schwartz documents in the example of Anthony Abbate’s off-duty assault on Karolina Obrycka, a bartender who refused to serve him after he was abusive and clearly intoxicated (pp. 195–97). An officer who breaks ranks to expose the abuses of other officers will likely face ostracism within the department.⁷⁸ Even when there is evidence of an officer’s wrongdoing, police unions go into overdrive to protect abusive officers’ jobs and reputations.⁷⁹ Those unions have also bargained for arbitration procedures that often restore fired officers’ jobs — with back pay.⁸⁰ It is almost as difficult to fire a police officer for abusive conduct as it is to convict one of a crime. And even when

⁷⁶ See Amna A. Akbar, *Non-reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2507 (2023).

⁷⁷ See James Queally, *Cleveland Officers’ Silence Frustrates Prosecutor in Police Trial*, L.A. TIMES (May 17, 2015, 5:00 AM), <https://www.latimes.com/nation/la-na-cleveland-police-20150517-story.html> [<https://perma.cc/GGW7-K6DC>] (discussing the trial of a police officer in a fatal shooting in which the prosecutor likened fellow officers’ coordinated silence to an “organized crime syndicate”).

⁷⁸ See, e.g., Jeremy Gorner, *Chicago Cop Alleges Cover-Up in Police Shooting: “I’m Going to Feel Like Serpico, Basically,”* CHI. TRIB. (Mar. 5, 2019, 7:00 AM), <https://www.chicagotribune.com/news/breaking/ct-met-chicago-cop-retaliated-lawsuit-20190304-story.html> [<https://perma.cc/MK8E-7KXL>] (describing retaliation against an officer who refused to participate in a cover-up).

⁷⁹ See, e.g., Yana Kunichoff & Sam Stecklow, *How Chicago’s “Fraternal Order of Propaganda” Shapes the Story of Fatal Police Shootings*, CHI. READER (Feb. 3, 2016), <https://chicagoreader.com/news-politics/how-chicagos-fraternal-order-of-propaganda-shapes-the-story-of-fatal-police-shootings> [<https://perma.cc/45UZ-9ANF>] (“In its dual roles of providing both information to the media and legal defense for its members, the [Fraternal Order of Police] has helped shape the narrative around police shootings, arguing consistently that the officers involved feared for their lives.”).

⁸⁰ Kelly et al., *supra* note 64.

cops lose their jobs for misconduct, they can often just go to another department.⁸¹

Interrupting that process completely would require national action. Even though a given jurisdiction could choose to require full background checks on prospective police officers, if the requirement is not universal, they can simply go elsewhere. Congress is better positioned than the states to disrupt the employment protections police officers currently enjoy, by way of its Thirteenth and Fourteenth Amendment powers.⁸² Congress could also task the Department of Justice with establishing procedures for identifying officers who violate people's constitutional rights and holding hearings to strip them of any law enforcement powers. Congress could also strengthen federal civil rights statutes to further discourage police conspiracies to cover up the misdeeds of officers and give officers a cause of action against retaliation.

Unlike the other nonreformist reforms below, this set of suggestions is largely reactive in that it would not prevent an officer's first constitutional transgression but hopefully make it the last. This would hopefully have some deterrence value, but like police themselves, its primary ability to redress harms comes only after they occur.⁸³ Yet a permanent legal disability preventing employment in law enforcement could prove a potent means of directly responding to constitutional violations. This would align the response to the original wisdom behind a phrase so often used today to excuse police misconduct: if "a few bad apples" would spoil the bunch, the lesson must be to excise them from the rest to save the whole from their rot.⁸⁴ While some cops may be beyond corruption,

⁸¹ See Timothy Williams, *Cast-Out Police Officers Are Often Hired in Other Cities*, N.Y. TIMES (Sept. 10, 2016), <https://www.nytimes.com/2016/09/11/us/whereabouts-of-cast-out-police-officers-other-cities-often-hire-them.html> [<https://perma.cc/FVW8-XXNZ>] ("[A] lack of coordination among law enforcement agencies, opposition from police executives and unions, and an absence of federal guidance have meant that in many cases police departments do not know the background of prospective officers if they fail to disclose a troubled work history.")

⁸² See Hasbrouck, *supra* note 5, at 1124–25 (arguing for the strength of Congress's Thirteenth Amendment enforcement powers to regulate racist police practices).

⁸³ See Kinjo Kiema, *Police Don't Stop Crime, But You Wouldn't Know It from the News*, PRISM (Feb. 23, 2022), <https://prismreports.org/2022/02/23/police-dont-stop-crime-but-you-wouldnt-know-it-from-the-news> [<https://perma.cc/S4Y8-BBQM>] ("Police don't stop crime that has occurred, nor do they prevent it from happening."); Aya Gruber, *Crime Rates Rise and Fall. The Police Mostly Have Nothing to Do with It.*, GARRISON PROJECT (Oct. 26, 2021), <https://thegarrisonproject.org/purpose-of-policing> [<https://perma.cc/VH7D-N2FH>] ("Police forces did not originate to fight crime, they did not expand in response to crime spikes, and it remains contested whether they fight crime at all.")

⁸⁴ See Malorie Cunningham, *"A Few Bad Apples": Phrase Describing Rotten Police Officers Used to Have a Different Meaning*, ABC NEWS (June 14, 2020, 11:12 AM), <https://abcnews.go.com/US/bad-apples-phrase-describing-rotten-police-officers-meaning/story?id=71201096> [<https://perma.cc/7BVB-C8XM>] (noting the original use as teaching that rotting apples will quickly spread their rot to their neighbors).

the risk that impressionable officers might be swayed by their violent and bigoted peers is too great to leave them in place.⁸⁵

The truly vicious members of police departments can only abuse their authority to hurt people if we allow them to remain in authority. They can only sway their impressionable peers if they remain peers to those officers. This is hardly a sufficient solution to remove all the rot from police departments and culture. American policing's racist and classist origins are too strongly connected to the present for that.⁸⁶ But it is necessary if police departments are to both exist and become something other than a violent tool for suppressing marginalized communities.

2. *The Police Can't Attack People They Don't Engage.* — For Black Americans, the relationship between police attention and violence is obvious.⁸⁷ The constant — and entirely legal — police surveillance of Black communities that so often leads to violence is itself a tool of racial subordination.⁸⁸ This is hardly surprising for an institution with its roots in slave patrols.⁸⁹ American police tactics have many of the hallmarks of an occupying army.⁹⁰ This approach fits with America's generally colonial relationship with its Black and Brown communities.⁹¹ Police patrol more aggressively, and deploy more militarized units, in

⁸⁵ See Redditt Hudson, Opinion, *I'm a Black Ex-Cop, And This Is the Real Truth About Race and Policing*, VOX (July 7, 2016, 11:22 AM), <https://www.vox.com/2015/5/28/8661977/race-police-officer> [<https://perma.cc/Z6VT-CRM4>] (“15 percent of officers will do the right thing no matter what is happening. Fifteen percent of officers will abuse their authority at every opportunity. The remaining 70 percent could go either way depending on whom they are working with.”).

⁸⁶ See Hasbrouck, *supra* note 5, at 1114–21 (tracing the throughline of racist police practices from the slave patrols to mass incarceration).

⁸⁷ Cf. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017) (“African Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures.”).

⁸⁸ See Butler, *supra* note 4, at 1425 (“The most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct.”).

⁸⁹ Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, ABA: HUM. RTS. MAG. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish [<https://perma.cc/TDJ4-5K6J>] (“Policing in southern slave-holding states . . . has roots in slave patrols of the seventeenth and eighteenth centuries and police enforcement of Jim Crow laws in the late nineteenth to mid-twentieth centuries.”).

⁹⁰ See Stuart Schrader, *Yes, American Police Act Like Occupying Armies. They Literally Studied Their Tactics*, THE GUARDIAN (June 18, 2020, 11:59 AM), <https://www.theguardian.com/commentisfree/2020/jun/08/yes-american-police-act-like-occupying-armies-they-literally-studied-their-tactics> [<https://perma.cc/582Q-F6FQ>] (“Distant lands, colonial occupations and theaters of war have served as crucibles for testing and advancing policing techniques.”).

⁹¹ See Max Rameau, *Community Control over Police: A Proposition*, NEXT SYS. PROJECT (Nov. 10, 2017), <https://thenextsystem.org/learn/stories/community-control-over-police-proposition> [<https://perma.cc/5TCJ-4VPF>] (“In form and in function, Black communities are a domestic colony inside of the United States. If Black communities are a domestic colony, then that colonial relationship of exploitation and oppression is maintained by an occupying force: the police.”).

Black neighborhoods.⁹² These tactics, predictably, lead to adversarial and often violent confrontations in marginalized communities.⁹³ Schwartz documents the ways such overpolicing leads to opportunities for abuse in her discussion of the Bronx Narcotics Unit (pp. 209–11). Racial justice advocates frequently call for an end to the overpolicing of Black communities.⁹⁴

To make Black communities — and by extension, America generally — safer, police need to change the way they engage with those communities. The two most obvious ways police could change their approach to engaging with Black communities would be to (1) shift their patterns of patrol and response to mirror those applied in white communities and (2) change their policies on the use of force.

In white communities, police primarily act by responding to calls for help as service providers.⁹⁵ Rather than using police resources primarily to harass people through investigative stops, suburban police spend more of their time investigating serious crimes.⁹⁶ That’s not to say that

⁹² See Robin Smyton, *How Racial Segregation and Policing Intersect in America*, TUFTS NOW (June 17, 2020), <https://now.tufts.edu/2020/06/17/how-racial-segregation-and-policing-intersect-america> [<https://perma.cc/ETW4-E6QQ>] (noting that police resources in marginalized communities are directed toward invasive investigatory stops at the expense of response to community calls for help); Nsikan Akpan, *Police Militarization Fails to Protect Officers and Targets Black Communities, Study Finds*, PBS (Aug. 21, 2018, 12:40 PM), <https://www.pbs.org/newshour/science/police-militarization-fails-to-protect-officers-and-targets-black-communities-study-finds> [<https://perma.cc/4Y6Y-C6A5>] (“In at least one state — Maryland — police are more likely to deploy militarized units in black neighborhoods, confirming a suspicion long held by critics, the study found.”).

⁹³ See, e.g., KIMBERLE WILLIAMS CRENSHAW ET AL., CTR. FOR INTERSECTIONALITY & SOC. POL’Y STUD., *SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN* 10–13 (2015), http://static1.squarespace.com/static/53f20d90e4bob80451158d8c/t/55a810d7e4b058f342f55873/1437077719984/AAPF_SMN_Brief_full_singles.compressed.pdf [<https://perma.cc/2PQW-G6UL>] (including several examples of Black women whose deaths resulted from otherwise typical traffic stops).

⁹⁴ See, e.g., MONIQUE DIXON ET AL., NAACP LEGAL DEF. & EDUC. FUND, “WE ARE NOT LESSER”: AN URGENT CALL TO END OVER-POLICING OF BLACK COMMUNITIES AND TRANSFORM PUBLIC SAFETY IN TULSA 29–30 (2021), https://www.naacpldf.org/wp-content/uploads/LDF_03292021_Tulsa-25.pdf [<https://perma.cc/L35G-6XVT>] (calling on the city to end the overpolicing of its Black communities); Nicole Cardoza, *The Cycle of Harm in Over-Policing Black and Brown Communities*, ANTI-RACISM DAILY (July 5, 2022), <https://the-ard.com/2022/07/05/the-cycle-of-harm-in-over-policing-black-and-brown-communities> [<https://perma.cc/6LGR-FJWS>] (“We must advocate divesting from policing in our communities. We can also do our part to invest in other community-based services and practice using them instead of calling in law enforcement.”); Brandon Hasbrouck, *Opinion, Overpolicing Breaks Black and Brown Communities. What Can We Build Instead?*, BOS. GLOBE (Dec. 6, 2022, 2:50 PM), <https://www.bostonglobe.com/2022/12/06/opinion/overpolicing-breaks-black-brown-communities-what-can-we-build-instead> [<https://perma.cc/M3PQ-YVD8>] (calling for the end of overpolicing and the institution of transformative justice and abolition democracy).

⁹⁵ Smyton, *supra* note 92.

⁹⁶ See Eddie Kim, *The Case for Defunding Police Is in Our Affluent White Suburbs*, MEL (2020), <https://melmagazine.com/en-us/story/the-case-for-defunding-police-is-in-our-white-affluent-suburbs> [<https://perma.cc/5YYQ-ZY7M>] (“White, wealthy suburbs are safe because they benefit from two world-shifting factors: 1) the police harass less and solve more serious crimes; and 2) there’s significant funding for municipal and social services, whether that’s schools or health-care facilities or simply park space.”).

suburban police lack the racism of their inner-city counterparts — when they do make quality-of-life arrests, they disproportionately target Black people.⁹⁷ Yet redirecting resources away from investigatory stops and quality-of-life arrests to the investigation of serious crimes would address not only the overpolicing problem experienced in Black communities, but the underpolicing one, too.⁹⁸ If we are to have police, responding to incidents of violence and investigating serious crimes should be their baseline function, not markers that indicate which side of the color line a community falls on.

Police use-of-force rules also require a reevaluation. The current militarization of police does little to protect officers — if it protects them at all.⁹⁹ Yet a cottage industry of police training courses teaches officers to prepare for every situation as if it were about to turn violent.¹⁰⁰ That hostile approach acts as a barrier to calm engagement with the community.¹⁰¹ These “warrior cops” don’t even show the same restraint we demand of soldiers in a war zone.¹⁰² As retired Marine Kevin Mott noted, “[n]ot every provocation requires an immediate response.”¹⁰³ Police can survive tense encounters without emptying their clips at the

⁹⁷ See Brenden Beck, *Broken Windows in the Cul-de-Sac? Race/Ethnicity and Quality-of-Life Policing in the Changing Suburbs*, 65 CRIME & DELINQ. 270, 278 (2019) (reporting study results showing that while Black people were arrested for quality-of-life crimes at 2.7 times the rate of white people in large cities, they were arrested at 4.5 times the rate of white people in the average suburb).

⁹⁸ See Jenée Desmond-Harris, *Are Black Communities Overpoliced or Underpoliced? Both.*, VOX (Apr. 14, 2015, 1:30 PM), <https://www.vox.com/2015/4/14/8411733/black-community-policing-crime> [https://perma.cc/H9FC-T6AR] (“Imagine knowing that law enforcement officials in your neighborhood ‘think you’re all scum,’ and doggedly pursue you and your friends for things like marijuana possession and loitering, but check out when it comes to holding people accountable for actual violence . . .”).

⁹⁹ See Akpan, *supra* note 92 (“The acquisition of SWAT forces had no perceptible impact on police safety — the number of officers killed or assaulted — on a national level.”).

¹⁰⁰ See Alain Stephens, *The “Warrior Cop” Is a Toxic Mentality. And a Lucrative Industry.*, THE TRACE (June 19, 2020), <https://www.thetrace.org/2020/06/warrior-cop-mentality-police-industry> [https://perma.cc/D2L6-FDUT] (“The problem with warrior-style policing, as critics and academics point out, is that it prepares officers for violence.”).

¹⁰¹ See *id.* (quoting Minneapolis Mayor Jacob Frey saying in 2019: “When you’re conditioned to believe that every person encountered poses a threat to your existence, you simply cannot be expected to build out meaningful relationships with those same people . . .”); Kevin Mott, Opinion, *What Police Can Learn from a Former Infantry Marine About De-escalation*, USA TODAY (June 18, 2020, 9:09 PM), <https://www.usatoday.com/story/opinion/policing/2020/06/18/what-police-can-learn-former-infantry-marine-deescalation-column/3206857001> [https://perma.cc/BPK4-TBSX] (“[W]here trust on both sides is low, confrontations can quickly escalate into violent conflagrations.”).

¹⁰² See Mott, *supra* note 101 (“If ‘do no harm’ is the spirit of addressing a mistrustful community, then rules of engagement should guide those with the power to end life on how to behave. Military rules of engagement establish explicit escalation criteria and require service members to exhaust all nonviolent options before resorting to force.”); ML Cavanaugh, Opinion, *To Reduce Wrongful Shootings, Police Can Learn from Our Soldiers*, GAZETTE (Mar. 17, 2019), https://gazette.com/to-reduce-wrongful-shootings-police-can-learn-from-our-soldiers/article_eoc4973e-dee8-5b66-b731-433ad2e554do.html [https://perma.cc/BYQ4-EXRZ] (referencing an engagement in Iraq when soldiers demonstrated restraint to avoid unnecessarily escalating a potentially violent situation).

¹⁰³ Mott, *supra* note 101.

first sign of danger.¹⁰⁴ More importantly, they can avoid violating the civil rights of countless ordinary, law-abiding citizens by keeping their guns holstered until they're sure they need them. If we are going to have police, we should expect them to not only exhibit self-control, but also be competent at de-escalation.¹⁰⁵

We can and should demand better from our police in their interactions with our communities. A more community-oriented approach can make both police and the general public safer. Rather than treating marginalized communities as colonized people to be occupied, our police should treat the whole public as worthy of respect and protection. And rather than treating every stranger as a potential assailant, police should practice de-escalation at every opportunity, refraining from lethal force as all but the last option.

3. *The Police Can't Shoot People if They Don't Have Guns.* — It would be utterly foolish to believe that police violence and racism would disappear simply by disarming police of guns.¹⁰⁶ The Alabama Highway Patrol demonstrated their capacity for brutality with tear gas and billy clubs when they attacked voting rights marchers on Bloody Sunday.¹⁰⁷ Baltimore police were perfectly capable of killing Freddie Gray by slamming him around unsecured in the back of a van.¹⁰⁸ New York police were up to the task of killing Eric Garner barehanded.¹⁰⁹ If we don't address the violence and racism at the root of policing in America, police will continue to find ways to hurt and kill people — disproportionately Black and Brown — no matter how we equip them.

¹⁰⁴ See *infra* notes 118–22 and accompanying text (describing how unarmed policing can make officers safer).

¹⁰⁵ See @EchoRoot, TWITTER (Aug. 7, 2020, 7:03 PM), <https://twitter.com/EchoRoot/status/1291887648483803142> [<https://perma.cc/8862-P3JR>] (suggesting that McDonald's employees are better at de-escalation than police officers because their continued employment depends on it).

¹⁰⁶ See Maryam Aziz, *Calls to Disarm the Police Won't Stop Brutality and Killings*, WASH. POST (Apr. 18, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/04/18/calls-disarm-police-wont-stop-brutality-killings> [<https://perma.cc/Q27U-CL4Y>] (“[W]hile national attention on police brutality often focuses on guns and violence by armed police, officers also use potentially lethal unarmed tactics that disproportionately target African Americans — and these matter as well.”).

¹⁰⁷ See Sydney Trent, *John Lewis Nearly Died on the Edmund Pettus Bridge. Now It May Be Renamed for Him.*, WASH. POST (July 26, 2020, 11:10 AM), <https://www.washingtonpost.com/history/2020/07/26/john-lewis-bloody-sunday-edmund-pettus-bridge> [<https://perma.cc/KCD2-UF3L>] (“The protesters crossed the county line on their march to the state capital in Montgomery, and the troopers fired tear gas as they stampeded on horseback through the demonstrators. They swung their billy clubs wildly, battering activists to the ground.”).

¹⁰⁸ See German Lopez, *The Baltimore Protests over Freddie Gray's Death, Explained*, VOX (Aug. 18, 2016, 9:38 AM), <https://www.vox.com/2016/7/27/118089352/freddie-gray-baltimore-riots-police-violence> [<https://perma.cc/MWY7-7J8A>] (“Freddie Gray suffered a fatal spinal cord injury on April 12 when he was tossed around the back of a police van. He was shackled by his hands and feet but unrestrained by a seatbelt, which meant he couldn't protect himself from the impact as he crashed into the interior of the vehicle.”).

¹⁰⁹ See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/PHT4-QBC5>] (describing the fatal chokehold police applied to Eric Garner).

But we can stop some of the most senseless police violence simply by taking guns out of police officers' arsenals.¹¹⁰ Two of Schwartz's anecdotes illustrate the need for this change well. Imagine if the deputies who banged on Andrew Scott's door were unarmed (pp. 49–51). Rather than immediately reacting to the sight of Scott's gun by firing on him, the deputies would have had to choose whether to retreat or try to reason with Scott. Either choice would likely have left everyone involved alive. Similarly, Ryan Cole, who was holding his gun to his own head when police gunned him down from behind, could potentially have been persuaded — or even forced — to drop his weapon without any shots being fired (p. 80). Perhaps a person in a clearly agitated state of mind like Cole presented more of a threat than Scott, but it should also have been clear that his primary threat was to himself. To quote Judge Martin, if cops like the ones who shot Andrew Scott can do so simply because an American has a gun, “then the Second Amendment . . . [has] little effect.”¹¹¹ Regardless of the wisdom of the Second Amendment's modern interpretation, it shouldn't apply only to allow ordinary people to hurt each other yet become dead letter when a cop wants to kill one of them. Yet armed and unaccountable police make it so.

Guns aren't essential to policing.¹¹² Several nations maintain unarmed police forces, some of them with similar legal systems, racial and ethnic diversity, and gun ownership rates to the United States.¹¹³ In those nations, police shootings are strikingly rare.¹¹⁴ The difference is not merely one of equipment, but the alternative approach to public safety that unarmed policing requires.¹¹⁵ Disarming the police is best seen not as a policy to implement in isolation, but as a necessary piece

¹¹⁰ See D.D. Guttenplan, *It's Time to Disarm the Police*, THE NATION (June 25, 2020), <https://www.thenation.com/article/society/disarm-police-nypd-slavery> [<https://perma.cc/6ETL-HQRL>] (recounting the shooting deaths of Rayshard Brooks, Breonna Taylor, Philando Castile, Walter Scott, and Tamir Rice, all of whom likely would have survived encounters with police if those officers had not been carrying guns).

¹¹¹ *Young v. Borders*, 850 F.3d 1274, 1295 (11th Cir. 2017) (Martin, J., dissenting).

¹¹² See, e.g., Guttenplan, *supra* note 110 (“Over 90 percent of London's Metropolitan Police, whose creation in 1829 is regarded as the model for America's professional forces, remains unarmed.”).

¹¹³ See Margareth Etienne, *Disarming the Police: Blue Lives, Black Lives and Guns*, DUKE CTR. FOR FIREARMS L. (Jan. 6, 2022), <https://firearmslaw.duke.edu/2022/01/disarming-the-police-blue-lives-black-lives-and-guns> [<https://perma.cc/X3MB-62FL>] (discussing unarmed policing in countries like the United Kingdom, New Zealand, and Iceland).

¹¹⁴ See, e.g., Rick Noack, *5 Countries Where Most Police Officers Do Not Carry Firearms — And It Works Well*, WASH. POST (July 8, 2016, 2:15 PM), <https://www.washingtonpost.com/news/worldviews/wp/2015/02/18/5-countries-where-police-officers-do-not-carry-firearms-and-it-works-well> [<https://perma.cc/KX84-DMUJ>] (“While there were 461 ‘justifiable homicides’ committed by U.S. police in 2013, according to the FBI's Uniform Crime Report, there was not a single one in the United Kingdom the same year.”).

¹¹⁵ See *id.* (“Since the 19th century, British officers on patrol have considered themselves to be guardians of citizens, who should be easily approachable.”).

of a broader package of reforms.¹¹⁶ By focusing on holistic policies that actually make the public as a whole safer, we can reduce our reliance on carceral violence.¹¹⁷

Disarming police can also make police officers themselves safer. Policing is not a uniquely dangerous job to begin with — while fatal injuries are more common than in typical employment, the rates are comparable to those for HVAC installation workers.¹¹⁸ Police fatalities do not even primarily result from violent encounters.¹¹⁹ While American police and their defenders might argue that this is precisely because they are armed, police in countries that routinely make use of unarmed officers perceive themselves to be safer without guns.¹²⁰ And they may well be right — armed police raise the stakes for law enforcement encounters, both incentivizing members of criminal organizations to carry guns and raising the tension for everyone involved, including law-abiding gun owners.¹²¹ Reducing tension during police encounters makes both police and the public safer.¹²²

¹¹⁶ See *id.* (recognizing the need to address inequality and lack of opportunity alongside police disarmament).

¹¹⁷ See Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 710 (2022) (“Abolitionist activists and their movement-law allies in the academy have explored methods of alleviating violence in the community as alternatives to the carceral system. So far, most of these have been implemented largely on a local scale, but the results are promising.”).

¹¹⁸ See *Census of Fatal Occupational Injuries (CFOI) — Current*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/iif/fatal-injuries-tables.htm#rates> [<https://perma.cc/2WCJ-83B8>] (download “Hours-based fatal injury rates by industry, occupation, and selected demographic characteristics, 2021”) (reporting 9.4 fatal injuries per 100,000 full-time-equivalent workers in protective services, compared to a rate of 9.6 among heating, air conditioning, and refrigeration mechanics and installers).

¹¹⁹ See NAT’L L. ENF’T MEM’L & MUSEUM, 2021 END-OF-YEAR PRELIMINARY LAW ENFORCEMENT OFFICERS FATALITIES REPORT 2–8 (2021) (reporting that in 2021, there were 84 officer deaths from acts of violence, versus 301 from COVID-19, 58 from traffic incidents, and 31 from events caused by nature or other health complications).

¹²⁰ See Jon Kelly, *Why British Police Don’t Have Guns*, BBC NEWS MAG. (Sept. 19, 2012), <https://www.bbc.com/news/magazine-19641398> [<https://perma.cc/8Z2C-WPBG>] (“A 2006 survey of 47,328 Police Federation members found 82% did not want officers to be routinely armed on duty, despite almost half saying their lives had been ‘in serious jeopardy’ during the previous three years.”).

¹²¹ See Noack, *supra* note 114 (“Arming the police would inevitably lead to an arms race with criminals and a spike in casualties.”); Melinda Wenner Moyer, *More Guns Do Not Stop More Crimes, Evidence Shows*, SCI. AM. (Oct. 1, 2017), <https://www.scientificamerican.com/article/more-guns-do-not-stop-more-crimes-evidence-shows> [<https://perma.cc/D6MS-DYJC>] (“More than 30 peer-reviewed studies, focusing on individuals as well as populations, have been published that confirm what Kellermann’s studies suggested: that guns are associated with an increased risk for violence and homicide.”); *Gun Violence*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/arms-control/gun-violence> [<https://perma.cc/U9A5-UFEW>] (“[T]he mere presence of firearms can make people feel threatened and fearful for their lives. . . . The psychological toll from rampant gun violence is often heavy, particularly for victims, their family members and those who have witnessed shootings.”).

¹²² See Harold A. Pollack & Keith Humphreys, *Reducing Violent Incidents Between Police Officers and People with Psychiatric or Substance Use Disorders*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 166, 166–68 (2020) (comparing the outcomes of situations in which police defused tension by applying time and distance principles with those in which they did not).

Disarming police does not have to mean the total disarmament of the department, but rather restricting firearms to specially trained response teams, as other countries with unarmed patrols do.¹²³ That alone would require most police officers to approach most situations with unarmed tactics, calling for armed response only when the danger to the public truly warranted it. This would require a shift in our public safety approach to treat police not as an occupying force in a warzone,¹²⁴ but as genuine protectors of the citizenry against extreme threats. If we are to have police, unarmed officers would be a significant improvement to public safety over armed ones.

*B. Full Abolition; Or, The Police Can't Hurt
Anyone if There Are No Police*

But then, nothing in our system of government requires that we have police.¹²⁵ Indeed, our system of government came about before anything resembling our system of policing existed in much of the country. Prior to the 1830s, free people in the United States were not subject to roving patrols of government agents.¹²⁶ Instead, public safety was a job for night watchmen, who were mostly volunteers, while constables acted as agents for the court by serving warrants.¹²⁷ While the watch might respond to a fire or violent incident, or public order crimes in the streets, they were not tasked with seeking out criminal activity or making arrests.¹²⁸ When it was necessary to seize a criminal, the act was often a

¹²³ See Noack, *supra* note 114 (highlighting that roughly three-quarters of Ireland's police force are not trained to use a firearm).

¹²⁴ See Etienne, *supra* note 113 (supporting a "move away from the hyper-masculine militaristic stance that characterizes many American police forces today").

¹²⁵ See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 837 (1994) (suggesting that the Founders did not prescribe or foresee "the shape of modern law enforcement").

¹²⁶ See Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 123 (2017) ("Although their duties overlapped to some extent, and although those duties included some aspects of modern policing, neither sheriffs, constables, nor the early American watch system could be clearly identified as the primary provider of law enforcement services."); Waxman, *supra* note 6 ("The first publicly funded, organized police force with officers on duty full-time was created in Boston in 1838.").

¹²⁷ See Waxman, *supra* note 6 ("Towns also commonly relied on a 'night watch' in which volunteers signed up for a certain day and time, mostly to look out for fellow colonists engaging in prostitution or gambling."); Gary Potter, *The History of Policing in the United States, Part 1*, EKU ONLINE (June 25, 2013), <https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1> [<https://perma.cc/RL2Q-UHP9>] ("Augmenting the watch system was a system of constables, official law enforcement officers, usually paid by the fee system for warrants they served.").

¹²⁸ See Steiker, *supra* note 125, at 831 ("The duties of constables and night watchmen never developed into the job of investigative 'policing' with which modern law enforcement agencies are charged."); Waxman, *supra* note 6 (noting the system's inefficiency); Larry Holzwarth, *10 Things to Know About the Evolution of the Police in the United States*, HIST. COLLECTION (Aug. 1, 2018), <https://historycollection.com/10-things-to-know-about-the-evolution-of-the-police-in-the-united-states> [<https://perma.cc/L2XP-TT4C>] (noting that watchmen carried a bell or rattle to alert other citizens to trouble and call for help).

matter of community participation through the “hue and cry” or *posse comitatus*.¹²⁹ Early American justice — particularly in the Founding era — did not contemplate modern police.¹³⁰ While the slave patrols of the South did act as roving, prying enforcers,¹³¹ their targets were not people to whom the Bill of Rights was generally understood to apply.¹³² The Reconstruction Amendments aimed to formally end the dichotomy of citizens and slaves with distinct rights and obligations, leaving only a single class of free men;¹³³ it hardly follows that the system of law enforcement built to control enslaved people should be expanded to regulate the new whole.

Since policing is neither constitutionally necessary nor a logical modernization of early American public safety practices, we should interrogate whether it serves our society well. Abolitionists have examined the harms policing and its inherent hierarchical violence bring about and found it ill-suited to our society’s needs.¹³⁴ A system born of controlling enslaved people and refined through the lessons of colonial occupations and counterinsurgency¹³⁵ is simply beyond reform, if its purpose is to promote public safety in a free society. Abolition, then, counsels that we should not only tear down that institution, but also replace it with others designed to affirm life and liberty.¹³⁶

That is not to say that there cannot be some system of law enforcement. Rather, it is an insistence that it be one conceived for the protection of free people in a generally egalitarian community. The Founding era’s systems of sheriff, constable, and watch relied upon the cooperation

¹²⁹ See Steiker, *supra* note 125, at 832.

¹³⁰ *Id.* at 837.

¹³¹ Holzwarth, *supra* note 128.

¹³² See Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 372–73 (1993) (discussing the steps George Mason and James Madison took in drafting the Bill of Rights to avoid language mandating abolition); Steiker, *supra* note 125, at 838–39 (“It was not generally questioned that ‘the People’ of ‘We the People’ were free white men.”).

¹³³ See Hasbrouck, *supra* note 37, at 136 (“In enacting the Fourteenth Amendment, Congress resolved any potential counterarguments to the abolitionist concept of birthright citizenship under the Constitution.”).

¹³⁴ See generally, e.g., Hasbrouck, *supra* note 117; Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Tiffany Yang, “Send Freedom House!”: A Study in Police Abolition, 96 WASH. L. REV. 1067 (2021); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral State*, 17 STAN. J. C.R. & C.L. 255 (2021); Samuel Dunkle, Note, “The Air Was Blue with Perjury”: Police Lies and the Case for Abolition, 96 N.Y.U. L. REV. 2048 (2021).

¹³⁵ See Potter, *supra* note 127.

¹³⁶ See Yang, *supra* note 134, at 1078 (“[T]his movement ‘embrace[s] both a negative or deconstructive project of dismantling penal systems and a positive project of world-building’ to progress ‘towards the horizon of abolition.’” (second alteration in original) (quoting Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019); Mariame Kaba & John Duda, *Towards the Horizon of Abolition: A Conversation with Mariame Kaba*, NEXT SYS. PROJECT (Nov. 9, 2017), <https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba> [<https://perma.cc/8V3A-HJEN>]).

of citizens for their mutual protection.¹³⁷ That system would surely need some modernization, but it is not without analogs in today's America. In the Brooklyn neighborhood of Brownsville, an organization called Brownsville In Violence Out regularly takes over public safety from the New York Police Department for days at a time.¹³⁸ The organization's staff and volunteers stand watch in the neighborhood, intervening to de-escalate and prevent violence — all without any arrest powers.¹³⁹ Rather than rely on the official authority of a badge and the threat of a gun, community members leverage their credibility to convince their neighbors to cool off rather than engage in violent and criminal acts.¹⁴⁰ During Brownsville In Violence Out's five-day watch, police even route all 911 calls from that area to civilians.¹⁴¹ Similar community responder models are growing across the country.¹⁴² Key to the success of such programs are "credible messengers" — community members with their own personal experience of involvement with the justice system.¹⁴³ Such programs aren't a replacement for all of the functions of police, but as part of a network of new institutions, they could be a significant piece of an abolitionist public safety model.

Such a model could still have some space for professional guardians who respond to serious violence to protect the general public. Depending on the system's model for adjudicating serious community harms, it could also have room for public officials with the power to execute warrants for searches and arrests.¹⁴⁴ Separating the roles of community watch, violence response, and investigation and arrest into different organizations also has the potential to avoid or remedy the abuses police sometimes engage in.¹⁴⁵ If a member of the watch becomes a proverbial bad apple and perpetuates the sorts of violence the model is meant to

¹³⁷ See Steiker, *supra* note 125, at 830, 832 (describing how ordinary citizens took turns serving as constables during the day, watchmen during the night, and members of the *posse comitatus* when called upon by the sheriff).

¹³⁸ Maria Cramer, *What Happened when a Brooklyn Neighborhood Policed Itself for Five Days*, N.Y. TIMES (June 12, 2023), <https://www.nytimes.com/2023/06/04/nyregion/brooklyn-brownsville-no-police.html> [<https://perma.cc/H7SJ-34F8>].

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See AMOS IRWIN & BETSY PEARL, CTR. FOR AM. PROGRESS, *THE COMMUNITY RESPONDER MODEL: HOW CITIES CAN SEND THE RIGHT RESPONDER TO EVERY 911 CALL 24–25* (2020) (detailing the efforts of several existing programs to respond to lower-risk 911 calls related to mental health, homelessness, substance use disorders, and other quality-of-life concerns).

¹⁴³ See *id.* at 10–12.

¹⁴⁴ Compare Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 183 (2019) (proposing a system of retributive punishment without prison, but with legal disabilities currently enforced as collateral consequences incorporated as a conscious and deliberate form of punishment), with M. Eve Hanan & Lydia Nussbaum, *Community Accountability*, 34 HASTINGS J. GENDER & L. 5, 8–15 (2023) (contrasting abolitionist visions of delegalization based on transformative justice and restorative justice).

¹⁴⁵ See IRWIN & PEARL, *supra* note 142, at 4–6 (describing the unnecessary escalation and damage that can ensue when police officers take on unnecessary responsibilities).

prevent, the institution tasked with investigating and remedying that member's abuses is not the watch itself. An abolitionist public safety institution has no special need to be rooted in the Founding-era institutions of the Northeast, but they can stand as an example of how community and state organizations can cooperate to promote public safety without roving, armed government agents interfering in people's daily lives.

Any abolitionist public safety institutions should also be conceived with an understanding that public safety means more than just protection from violence.¹⁴⁶ "A comprehensive approach to public safety comports with the basic program of abolition democracy: building institutions to promote the respect, education, economic security and resources, civil rights, and franchise necessary to ensure universal free, informed, and active participation in all significant aspects of public life."¹⁴⁷ Because most of the material conditions necessary for free participation in public life are also necessary to keep individuals healthy and secure, abolitionist public safety must aim to assist people in providing for their material needs. Critically, though, all of these systems would reduce incidents of police abuse by removing the rationale of enforcing economic hierarchies and by doing so greatly reduce the need for civil rights lawsuits against the police.

C. *But Who Will Intervene when Violent People Strike?*

Critics of police abolition will be quick to ask the question that provides this section's title. Abolitionists should take it seriously.¹⁴⁸ There are many answers that form part of the abolitionist vision, many of which would work in concert. Community responder models like those discussed above can work to de-escalate violence before it becomes serious.¹⁴⁹ New institutions supporting public safety through tending to the material and social needs of communities can minimize the conditions that lead to violence.¹⁵⁰ And ultimately, it might even be that, as in countries with unarmed police, a special response unit is called out to respond to the most serious violence.¹⁵¹ The possibility of using some sort of proportionate response to serious violence does not, however,

¹⁴⁶ See Hasbrouck, *supra* note 117, at 710.

¹⁴⁷ *Id.*; see also W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 182–89 (Free Press 1998) (1935).

¹⁴⁸ See Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2017–18 (2022) (discussing the substantial objection skeptics raise to prison abolition regarding what to do with truly dangerous individuals).

¹⁴⁹ See *supra* notes 137–43 and accompanying text.

¹⁵⁰ See Hasbrouck, *supra* note 117, at 715 ("When people have opportunities to provide for themselves and their families, along with dignity and community investment, their propensity to engage in violence is reduced.")

¹⁵¹ See *supra* notes 112–16, 121 and accompanying text.

justify the continued presence of roving, armed government agents throughout our allegedly free and open society.

Tragically, the same question asked of abolitionists as a gotcha could be turned around nearly seamlessly on the status quo. The police do not protect us from violence today.¹⁵² Even the most serious attacks can take minutes to draw a police response.¹⁵³ Whether those minutes are fast enough could depend entirely on the courage and initiative of the officers who respond.¹⁵⁴ Police can help, if they're in the right place and willing to.¹⁵⁵ But they often aren't, and many of the most serious crimes go unsolved even with the extraordinary resources police departments have today.¹⁵⁶

¹⁵² See Hassan Kanu, *Police Are Not Primarily Crime Fighters, According to the Data*, REUTERS (Nov. 2, 2022, 1:33 PM), <https://www.reuters.com/legal/government/police-are-not-primarily-crime-fighters-according-data-2022-11-02> [<https://perma.cc/C7DQ-YU2X>] (“Overall, sheriff patrol officers spend significantly more time on officer-initiated stops — ‘proactive policing’ in law enforcement parlance — than they do responding to community members’ calls for help, according to the report.”); Ramenda Cyrus, *Police Have No Duty to Protect the Public*, AM. PROSPECT (Apr. 18, 2022), <https://prospect.org/justice/police-have-no-duty-to-protect-the-public> [<https://perma.cc/F4MP-3WEU>] (“Lozito lost [a lawsuit alleging New York police failed to protect him from a stabbing] because of a precedent established by the U.S. Supreme Court: the cops do not have a duty to protect you, or anyone.”).

¹⁵³ See *Police Response Time to Active Shooter Attacks*, FBI L. ENF'T BULL., <https://leb.fbi.gov/image-repository/police-response-time-to-active-shooter-attacks.jpg/view> [<https://perma.cc/K8QB-7NJU>] (“This graph shows police response time for active shooter events. For the 51 cases that included the data, the median response time was three minutes — fast by law enforcement standards.”).

¹⁵⁴ See, e.g., Terri Langford, *“If There’s Kids in There, We Need to Go In”: Officers in Uvalde Were Ready with Guns, Shields and Tools — But Not Clear Orders*, TEX. TRIB. (June 20, 2022, 9:00 PM), <https://www.texastribune.org/2022/06/20/uvalde-police-shooting-response-records> [<https://perma.cc/N8VZ-U9CN>] (“The exchange happened early in the excruciating 77 minutes on May 24 that started when Salvador Ramos, who had just shot his grandmother in the face, walked through an unlocked door of Robb Elementary, encountering no interference as he wielded an AR-15 he had bought eight days earlier.”); Emily Stewart, *Multiple Armed Officers Hung Back During Florida School Shooting, Reports Say*, VOX (Feb. 25, 2018, 10:14 AM), <https://www.vox.com/policy-and-politics/2018/2/24/17048720/florida-shooting-law-enforcement-gun> [<https://perma.cc/Y24C-L9M2>] (“Several local sheriff’s deputies waited outside Marjory Stoneman Douglas High School while a shooter gunned down multiple people, killing 17, according to new reports.”).

¹⁵⁵ See, e.g., Minyvonne Burke, *Traffic Stop in Maryland Leads to Rescue of Kidnapping Victim Inside U-Haul Truck, Police Say*, NBC NEWS (May 13, 2023, 3:39 PM), <https://www.nbcnews.com/news/us-news/traffic-stop-maryland-leads-rescue-kidnapping-victim-u-haul-truck-poli-rcna84304> [<https://perma.cc/9QQT-CZKW>] (reporting on a kidnapping victim rescued after police happened to pull over the vehicle her kidnapper was driving after reports that it struck several parked cars); Kim Norvell, *Watch as Des Moines Police, Friend Save a Man from Jumping off the University Avenue Bridge*, DES MOINES REG. (May 11, 2023, 9:57 AM), <https://www.desmoinesregister.com/story/news/2023/05/11/watch-as-friend-des-moines-police-save-man-from-jumping-off-bridge-dmpd-university-avenue/70207255007> [<https://perma.cc/273M-YGPR>] (“A friend is seen talking with the man as he appears to contemplate jumping into the Des Moines River. Two police officers, Tim Morgan and Destiny McGinnis, rush to his aid when the man steps onto the bridge railing and gets one leg over.”).

¹⁵⁶ See Frampton, *supra* note 148, at 2048–49 (“‘We are accustomed’ — in part, no doubt, to depictions of policing in popular culture — ‘to believing that people get caught for committing

The question of what to do about the violent few is a serious one, but not as urgent as abolition's critics would imply. Abolition is meant to be not an overnight change whereby all harmful systems are eradicated, but a gradual process of replacing them with more just and equitable institutions.¹⁵⁷ The successes that violence interrupters and other abolitionist antiviolence programs are already seeing today can be replicated, expanded, and refined.¹⁵⁸ As we observe their successes and failures, we can improve them, eventually creating institutions that can meaningfully reduce the harms of violence in our communities.

CONCLUSION

Therefore this is what the Lord says: "I will bring on them a disaster they cannot escape. Although they cry out to me, I will not listen to them."

— Jeremiah 11:11¹⁵⁹

As long as we have police, I fear they will continue to — even if unconsciously — act as a revanchist force for the heirs of the slaveholders' hierarchy.¹⁶⁰ But I will continue to advocate for abolition and reconstruction, because I believe in building a better world. I will continue to support nonreformist reforms and community-driven solutions, because even if they stop short of full abolition, they have great potential to improve the lives of many people in our communities.

Schwartz offers a compelling diagnosis of the problems in our system of holding police accountable for civil rights violations. Her work in *Shielded* makes the topic of police liability accessible to general readers without neglecting academic rigor, hopefully educating and inspiring

crimes.' But this is not really true: despite the massive number of people we imprison, the skeptic's nightmare scenario is not far from the status quo." (footnotes omitted) (quoting Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 48 (2020)); Samantha Kummerer, *A Majority of Police Agencies Across the U.S. Increased Budgets Despite "Defund" Movement*, ABC 11 EYEWITNESS NEWS (Oct. 14, 2022), <https://abc11.com/defund-the-police-budgets-crime-safety/12324529> [<https://perma.cc/2RU6-3B2D>] ("An analysis of budgets for more than 100 law enforcement agencies across the country uncovered . . . [that n]inety percent of cities and counties increased spending for police between the fiscal years 2018–19 and 2021–22.").

¹⁵⁷ See Yang, *supra* note 134, at 1080–81 ("Abolitionist organizers understand that the process of dismantling the prison industrial complex will not be achieved overnight, and that even incremental reforms — so long as they seek to dismantle rather than maintain or strengthen policing infrastructures — can play a critical role in the struggle towards an abolitionist horizon." (footnote omitted)).

¹⁵⁸ See IRWIN & PEARL, *supra* note 142, at 10 ("In Sacramento, California, for example, researchers found that credible messengers intervened in nearly 70 instances of imminent gun violence and mediated 220 conflicts over a two-year period from July 2018 to April 2020, contributing to a 14.3 percent decline in firearm violence in the target communities.").

¹⁵⁹ *Jeremiah* 11:11 (New International Version).

¹⁶⁰ See *supra* notes 4–8 and accompanying text.

more people to join the struggle. She deftly mixes storytelling and empirical research to both humanize the issues she discusses and demonstrate that the stories she tells are not exceptional. She also offers a comprehensive set of recommendations for alleviating some of the barriers to recovery and accountability she identifies.

While I remain skeptical that her proposals would meaningfully lead to changes in police practice because of the additional barriers examined in section II.A, I do believe they could at least provide some monetary redress to people who suffer at the hands of police. That alone would be an improvement over the status quo, even if police attitudes and behaviors remained impossibly entrenched. I could accept Schwartz's program as the compromise reached during my lifetime while others carry on the work of building an abolitionist future after I'm gone. But knowing what I do about the power and motivations behind American policing, I could not in good faith advocate for Schwartz's suggestions as an opening position in negotiations. The stakes of abolition are too high for that.