

# POLICE INDEMNIFICATION

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*This Article empirically examines an issue central to judicial and scholarly debate about civil rights damages actions: whether law enforcement officials are financially responsible for settlements and judgments in police misconduct cases. The Supreme Court has long assumed that law enforcement officers must personally satisfy settlements and judgments, and has limited individual and government liability in civil rights damages actions—through qualified immunity doctrine, municipal liability standards, and limitations on punitive damages—based in part on this assumption. Scholars disagree about the prevalence of indemnification: Some believe officers almost always satisfy settlements and judgments against them, and others contend indemnification is not a certainty.*

*In this Article, I report the findings of a national study of police indemnification. Through public records requests, interviews, and other sources, I have collected information about indemnification practices in forty-four of the largest law enforcement agencies across the country, and in thirty-seven small and mid-sized agencies. My study reveals that police officers are virtually always indemnified: During the study period, governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement. Law enforcement officers in my study never satisfied a punitive damages award entered against them and almost never contributed anything to settlements or judgments—even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted for their conduct. After describing my findings, this Article considers the implications of widespread indemnification for qualified immunity, municipal liability, and punitive damages doctrines; civil rights litigation practice; and the deterrence and compensation goals of 42 U.S.C. § 1983.*

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## INTRODUCTION

This Article empirically examines an issue central to judicial and scholarly debate about civil rights damages actions: whether law enforcement officials are financially responsible for settlements and judgments in police misconduct cases.<sup>1</sup>

Civil rights doctrine<sup>2</sup> relies heavily on the assumption that police officers pay settlements and judgments out of their own pockets. Qualified immunity protects a law enforcement officer from liability, even if he has violated the plaintiff's constitutional rights, if he did not violate "clearly established law"<sup>3</sup>—a standard that, according to the Supreme Court, protects "all but the plainly incompetent or those who knowingly violate the law."<sup>4</sup> The Supreme Court's qualified immunity doctrine is designed to protect against overdeterrence because, the Court has assumed, the "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials] in the unflinching discharge of their duties.'"<sup>5</sup>

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<sup>1</sup> By "police misconduct cases," I refer to cases brought against law enforcement agents and agencies under 42 U.S.C. § 1983 and, additionally or in the alternative, cases brought alleging corresponding state law torts of assault, battery, false imprisonment, intentional infliction of emotional distress, and the like. This study does not focus on other types of litigation, including automobile accidents and internal employment actions brought by officers, although my data suggests that the findings would be the same for all types of cases in which law enforcement officers are named as defendants. *See infra* notes 129–30 and accompanying text (finding that officers almost never contribute to settlements in any type of case); Appendix B (setting out the amount paid to plaintiffs in all types of cases, not only civil rights cases, and the amount contributed by officers to those settlements and judgments in large jurisdictions that provided such information); *see also* note 131 and accompanying text (finding that officers did not contribute to settlements or judgments in any type of case in the small and mid-sized jurisdictions in my study).

<sup>2</sup> By "civil rights doctrine," I refer to the doctrine that governs claims brought under 42 U.S.C. § 1983. This Article does not address claims brought against federal actors, although the Supreme Court also assumes that federal agents—like local law enforcement officers—are financially responsible for settlements and judgments entered against them. *See generally* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65 (1999) (describing the "legal fiction" of individual accountability that underlies Supreme Court jurisprudence and concluding that most federal officers are indemnified).

<sup>3</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>4</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>5</sup> *Harlow*, 457 U.S. at 814 (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). Officers may fear both financial liability and other, nonfinancial effects of being named a defendant. *See infra* notes 267–82 and accompanying text (discussing the nonfinancial effects of civil litigation on officers).

There is no vicarious liability against municipalities when their officers violate the law; instead, to recover against a city, plaintiffs must show their rights were violated as the result of the city's unconstitutional policy, practice, or custom.<sup>6</sup> Although the Court has concluded that there is no *respondeat superior* liability for § 1983 claims based primarily on the statute's legislative history,<sup>7</sup> the resulting complex and rigorous municipal liability standards make less sense if governments, in practice, assume financial responsibility for their employees' legal liabilities.

Punitive damages doctrine also relies in part on the assumption that officers personally satisfy judgments against them. Although a plaintiff can recover punitive damages against a law enforcement officer if he acted with "reckless or callous indifference to [the plaintiff's] federally protected rights,"<sup>8</sup> she cannot seek punitive damages against the city for civil rights violations.<sup>9</sup> Punitive damages against municipalities are prohibited in part because, the Court has reasoned, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers."<sup>10</sup>

Even though key civil rights doctrines rely on the assumption that officers personally satisfy settlements and judgments entered against them, we have little information about whether this assumption has any basis in reality. Two decades-old studies of civil rights actions litigated in two districts found few instances in which officers were not indemnified.<sup>11</sup> Professor John Jeffries informally polled police officers he trained at the FBI Academy for over twenty years, and none reported knowing anyone who had been denied indemnification.<sup>12</sup> But Peter Schuck and others have pointed to variation in state indemnification statutes as evidence that indemnification is "neither certain

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<sup>6</sup> See David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2187-91 (2005) (describing municipal liability theories).

<sup>7</sup> See *infra* notes 47-50 and accompanying text (discussing the Court's reliance on the legislative history of § 1983 in this context).

<sup>8</sup> *Smith v. Wade*, 461 U.S. 30, 56 (1983).

<sup>9</sup> *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

<sup>10</sup> *Id.* at 267.

<sup>11</sup> See Lant B. Davis, John H. Small & David J. Wohlberg, *Suing the Police in Federal Court*, 88 *YALE L.J.* 781, 810-12 (1979) (finding, in a 149-case sample of § 1983 lawsuits brought in the District of Connecticut from 1970 to 1977, that "[t]he individual defendants were almost always indemnified" and, "in almost every case, the individual defendant suffered no financial loss because of the suits"); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 *CORNELL L. REV.* 641, 686 (1987) (finding no evidence of officers paying directly for a judgment in the court records of civil rights cases filed in the Central District of California in 1980 and 1981).

<sup>12</sup> John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 *V.A. L. REV.* 47, 50 & n.16 (1998).

nor universal.”<sup>13</sup> And some have suggested that officers disciplined, terminated, or criminally prosecuted would likely have to pay settlements and judgments in lawsuits arising from their misdeeds.<sup>14</sup>

A number of scholars have noted the lack of definitive information about police indemnification and called for more study of the issue.<sup>15</sup> Richard Fallon has observed that, “roughly thirty years after *Harlow*”—a decision that extended qualified immunity to police officers based in part on the assumption that they were personally responsible for settlements and judgments against them—“no good empirical study has sought to establish the pervasiveness and scope of government indemnification.”<sup>16</sup> As Professor Fallon has written, “[t]his gap in empirical knowledge crucially handicaps instrumental analysis” of the law.<sup>17</sup>

This Article aims to fill this gap. It reports the results of a study of police indemnification practices across the country. I sent public records requests to the nation’s seventy largest law enforcement agencies and to seventy small and mid-sized agencies, seeking information about the amount spent in settlements and judgments over the six-year period from 2006 to 2011, as well as information about any instances in which officers were required to financially contribute to any of these payments. I supplemented responses to these requests with telephone interviews and e-mails with dozens of government officials and attorneys in the responding jurisdictions.

After pursuing responses to these requests for over a year, I was able to gather information about litigation payments and indemnification decisions in forty-four of the seventy large departments and thirty-seven of the small and mid-sized departments I queried. These jurisdictions include twelve of the twenty largest departments nationwide (as well as significantly smaller departments) and employ approximately 20% of law enforcement officers across the country. The number of sworn officers employed by the responsive departments ranges from 1 to over 36,000. The responsive departments are

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<sup>13</sup> PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 85 (1983); see also *infra* notes 75–76 and accompanying text.

<sup>14</sup> See *infra* note 77 and accompanying text (describing this hypothesis).

<sup>15</sup> See, e.g., Jeffries, *supra* note 12, at 50 n.14 (citing Davis, Small & Wohlberg, *supra* note 11, and noting that “[a]side from this useful but dated work, there is a dearth of scholarly attention to the question of who actually pays § 1983 claims”); Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 *BUFF. L. REV.* 757, 760 (2004) (“[T]he most important and revealing features of litigation against the police [are] hidden in the dark: who pays, and who is held accountable for the payments?”).

<sup>16</sup> Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 *FORDHAM L. REV.* 479, 496 (2011).

<sup>17</sup> *Id.*

located in cities, counties, and states that span the political spectrum. And they vary significantly in their formal policies regarding officer indemnification.

Although my data has some arguably inevitable limitations, it resoundingly answers the question posed: Police officers are virtually always indemnified. Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over \$3.9 million awarded in punitive damages. And officers in the thirty-seven small and mid-sized jurisdictions in my study never contributed to settlements or judgments in lawsuits brought against them. Governments satisfied settlements and judgments in police misconduct cases even when indemnification was prohibited by statute or policy. And governments satisfied settlements and judgments in full even when officers were disciplined or terminated by the department or criminally prosecuted for their conduct.

My findings of widespread indemnification undermine assumptions of financial responsibility relied upon in civil rights doctrine. Although the Court's stringent qualified immunity standard rests in part on the concern that individual officers will be overdeterred by the threat of financial liability, actual practice suggests that these officers have nothing reasonably to fear, at least where payouts are concerned.<sup>18</sup> Although the Court's municipal liability doctrine rests on the notion that there should not be respondeat superior liability for constitutional claims, blanket indemnification practices are functionally indistinguishable from respondeat superior. And although the Court's prohibition of punitive damages against municipalities is rooted in a sense that imposition of punitive damages awards on taxpayers would be unjust, my study reveals that taxpayers almost always satisfy both compensatory and punitive damages awards entered against their sworn servants.

In this Article, I do not endorse new standards for qualified immunity, municipal liability, or punitive damages: Before redesigning

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<sup>18</sup> Available evidence indicates that lawsuits also have limited nonfinancial effects on officers. See generally Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010) (finding that law enforcement agencies rarely gather and analyze information from lawsuits brought against them and their officers); see also *infra* notes 279–82 and accompanying text (describing studies indicating that the threat of being sued has little effect on officers' behavior).

civil rights doctrine to best achieve the compensatory and deterrence goals of § 1983, one would need to resolve empirical and normative questions beyond the scope of this Article.<sup>19</sup> But even without resolving those foundational questions, it seems clear that civil rights doctrine should not rely on counterfactual assumptions about officers' liability exposure. This Article, therefore, suggests some adjustments that would better align civil rights doctrine with evidence of widespread police indemnification.

The widespread indemnification of police officers also has implications for civil rights litigation practice. Through my research, I found multiple instances in which government attorneys used the possibility that they would deny officers indemnification to gain settlement leverage, limit punitive damages verdicts, and reduce punitive damages awards after trial, only to indemnify officers when the cases were resolved.<sup>20</sup> Civil rights litigation practice—like civil rights doctrine—should not rely on flawed empirical assumptions about the likelihood of indemnification. Accordingly, litigants should be allowed to counter the tactical use of possible indemnification denials with evidence of widespread indemnification.<sup>21</sup>

Widespread indemnification also impacts the extent to which § 1983's goals of compensation and deterrence are achieved. Indemnification ensures that plaintiffs are compensated, but dampens the deterrent effect of lawsuits on officers. One might think that police misconduct lawsuits would nonetheless achieve § 1983's deterrence goals by placing financial pressure on government entities to implement systemic police reform. Yet the general consensus is that governments do not take decisive enough action to curb misconduct or manage their officers.<sup>22</sup> This Article offers suggestions to tighten the link between lawsuits and law enforcement decisionmaking in a world of near certain and universal police indemnification.<sup>23</sup>

The remainder of this Article proceeds as follows. Part I describes doctrinal and scholarly assumptions about the prevalence of indemnification. Part II describes the methodology and findings of the study. And Part III considers the implications of these findings for civil rights doctrine and practice, and the deterrence and compensation goals of § 1983.

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<sup>19</sup> See *infra* notes 134–37 and accompanying text, notes 254–57 and accompanying text, and the Conclusion for discussion of some of these open questions.

<sup>20</sup> For a description of these practices, see *infra* Part II.G.

<sup>21</sup> For a discussion of these suggestions, see *infra* Part III.B.

<sup>22</sup> See *infra* note 337 and accompanying text.

<sup>23</sup> For a discussion of these suggestions, see *infra* Part III.C.

# I ASSUMPTIONS

## A. *Doctrine*

The assumption that law enforcement officers are personally responsible for settlements and judgments in police misconduct cases underlies several judicial doctrines key to the litigation of civil rights damages actions.<sup>24</sup>

### 1. *Qualified Immunity*

The Supreme Court expects compensatory damages to deter wrongdoing by government employees.<sup>25</sup> Indeed, the Court believes that the threat of financial liability may overdeter: “When officials are threatened with personal liability . . . they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.”<sup>26</sup> A police officer should not, the Court has explained, be forced to “choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”<sup>27</sup> Accordingly, the Court crafted qualified immunity “to shield [officers] from undue interference with their duties and from potentially disabling

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<sup>24</sup> This Article does not answer *why* civil rights doctrine relies on this assumption. One possible explanation is that few states had indemnification statutes in 1961, when the Supreme Court made clear in *Monroe v. Pape*, 365 U.S. 167, 192 (1961), that individuals could sue government officials under § 1983. See John P. Taddei, Note, *Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits*, 106 Nw. U. L. REV. 1883, 1914–15 (2012) (describing the increasing number of indemnification statutes since 1976). Fewer indemnification statutes does not necessarily mean, however, that indemnification was less frequent during this period—governments may have indemnified their officers as a matter of local policy or custom. There is, in fact, a long history of indemnification of government actors. See *infra* note 266 (describing a study by James Pfander and Jonathan Hunt examining indemnification of federal agents in the late-18th and early- to mid-19th centuries).

<sup>25</sup> See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (“[Section 1983] is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations.” (citation omitted)); *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (“[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future.”); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“Deterrence . . . operates through the mechanism of damages that are *compensatory*.”); *Smith v. Wade*, 461 U.S. 30, 50 (1983) (“[W]e assume, and hope, that most officials are guided primarily by the underlying standards of federal substantive law—both out of devotion to duty, and in the interest of avoiding liability for compensatory damages.”).

<sup>26</sup> *Forrester v. White*, 484 U.S. 219, 223 (1988).

<sup>27</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 245 (1974) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)).



threats of liability.”<sup>28</sup> The Supreme Court has explained that qualified immunity balances “the importance of a damages remedy to protect the rights of citizens” and “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.”<sup>29</sup>

The Court first balanced these competing interests by allowing dismissal on qualified immunity grounds—even if a defendant had violated the plaintiff’s constitutional rights—if the defendant could show both that his conduct was objectively reasonable and that he held a “good-faith” belief that his conduct was proper.<sup>30</sup> The Court later eliminated the subjective element for fear that a defendant’s good faith could not be resolved without discovery.<sup>31</sup> Now, a defendant is entitled to qualified immunity unless his conduct violates “clearly established law.”<sup>32</sup> A law is “clearly established” if there is controlling precedent or a consensus of cases with similar holdings,<sup>33</sup> or, in limited circumstances, if the conduct is obviously unconstitutional.<sup>34</sup>

Qualified immunity decisions have been described as “one of the most morally and conceptually challenging tasks federal appellate judges routinely face.”<sup>35</sup> The law is not clear about how factually similar a prior decision must be to the instant case in order for the law to be “clearly established.”<sup>36</sup> There is no clear guidance about whether and when judges should decide the merits of a plaintiff’s claim before assessing whether the defendant is entitled to qualified immunity.<sup>37</sup>

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<sup>28</sup> Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

<sup>29</sup> *Id.* at 807 (quoting Butz v. Economou, 438 U.S. 478, 504–06 (1978)).

<sup>30</sup> Scheuer, 416 U.S. at 247–48.

<sup>31</sup> See Harlow, 457 U.S. at 817 (“Judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.”).

<sup>32</sup> *Id.* at 818.

<sup>33</sup> Wilson v. Layne, 526 U.S. 603, 617 (1999).

<sup>34</sup> See Hope v. Pelzer, 536 U.S. 730, 741 (2002) (finding the application of a law to similar facts is not required for a law to be “clearly established” when Supreme Court precedent “gave respondents fair warning that their conduct violated the Constitution”).

<sup>35</sup> Charles R. Wilson, “Location, Location, Location”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000).

<sup>36</sup> See *id.* at 447–48 (explaining that there is “remarkably little consensus” on how courts should determine when the law is “clearly established”).

<sup>37</sup> The Court, in *Saucier v. Katz*, required judges to decide whether an officer’s conduct was unconstitutional before deciding whether the unconstitutionality of his conduct was clearly established. This was, the Court explained, “the process for the law’s elaboration from case to case.” 533 U.S. 194, 201 (2001). Eight years later, the Court held that this two-step rule was not mandatory. *Pearson v. Callahan*, 555 U.S. 223 (2009). Now, it is unclear under what circumstances judges should decide the constitutional question first. See, e.g., Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity*

Some argue that it does not make sense to have qualified immunity depend on whether a prior case has held the conduct unconstitutional.<sup>38</sup> And some scholars contend that qualified immunity decisions cannot be made without considering the facts of the case, frustrating the Court's goal of having the issue resolved at an early stage of litigation.<sup>39</sup>

Another critique of qualified immunity doctrine is that it rests on an unfounded premise—that defendants are financially responsible for settlements and judgments entered against them. The Supreme Court has taken what it calls a “functional approach to immunity questions,” in that the Justices purport to “examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and [they] seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.”<sup>40</sup> Yet the Justices appear to have relied on little more than their own intuitions when concluding that the threat of personal liability would have a debilitating effect on law enforcement officers' decisionmaking.<sup>41</sup>

Evidence that officers are virtually always indemnified would contradict one of the foundational assumptions underlying the Court's qualified immunity doctrine. The Court has even obliquely suggested

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*and the Elaboration of Constitutional Rights from Saucier to Camreta (and Beyond)*, 80 FORDHAM L. REV. 643, 669–76 (2011) (describing the confusion in qualified immunity doctrine post-*Pearson*).

<sup>38</sup> See, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013) (“It makes sense . . . to assess the reasonableness of constitutional error *in light of* clearly established law. But it does not make sense to bar liability for conduct that is both unconstitutional *and* unreasonable, simply because it has not specifically been declared so in a prior decision.”).

<sup>39</sup> See, e.g., Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 3 (1997) (arguing that the Supreme Court has a “paradoxical approach to crafting qualified immunity law, which simultaneously encourages resolution of the defense on summary judgment and shapes the doctrine to ensure an almost inevitable factual inquiry that precludes pretrial termination of civil rights claims”); Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 155 (1999) (“[Qualified immunity] is supposed to protect government actors not only from liability but also from entanglement with litigation. The promise is often not kept because the qualified immunity defense presents a combination of fact and law questions that cannot be quickly disposed of prior to trial.”).

<sup>40</sup> *Forrester v. White*, 484 U.S. 219, 224 (1988) (internal quotation marks omitted).

<sup>41</sup> The Supreme Court has offered no empirical evidence to support its assertions about the effects of the threat of liability on officers. In *Anderson, Forrester, Harlow, Hope, Del Monte Dunes, Pearson, Rivera, Scheuer, Smith, Stachura, and Wilson*, discussed earlier and below in note 42, the Court cites other Supreme Court decisions, opinions from other courts, treatises on torts and damages, and law review articles in support of the notion that lawsuits deter officers—or makes the assertion without citation to a supporting source. None of the cited sources are empirical studies or cite empirical studies that support the Court's assumptions about the effects of lawsuits on officers' behavior.

that evidence of “sufficiently certain and generally available” indemnification might “justify reconsideration of the balance struck in *Harlow* and subsequent cases.”<sup>42</sup> Of course, nonfinancial burdens associated with being named in a lawsuit may influence officers’ behavior.<sup>43</sup> But if officers do not personally satisfy payouts, the Court’s current, stringent qualified immunity standards—already criticized as “complicated, unstable, and overprotective of government officers”<sup>44</sup>—have significantly weaker justification.<sup>45</sup>

## 2. *Municipal Liability*

Municipal liability doctrine is also premised in part on the assumption that officers—not their employers—are financially responsible for settlements and judgments in police misconduct cases. In *Monell*, the Court decided that municipalities could be held liable for constitutional violations under § 1983, but rejected respondeat superior liability for the actions of municipal employees.<sup>46</sup> The Court largely based its conclusion on the legislative history of the statute and its plain language.<sup>47</sup> The Court additionally rejected deterrence and insurance justifications for respondeat superior liability—the notions that “accidents might . . . be reduced if employers had to bear the cost of accidents” and that “the cost of accidents should be spread to the community as a whole.”<sup>48</sup> Members of Congress discussed both justifi-

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<sup>42</sup> *Anderson v. Creighton*, 483 U.S. 635, 641–42 & 642 n.3 (1987) (rejecting the plaintiffs’ argument that widespread indemnification made qualified immunity unnecessary in part because the plaintiffs “do not and could not reasonably contend that the programs to which they refer make reimbursements sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases”).

<sup>43</sup> For a discussion of the nonfinancial effects of being named in a lawsuit, see *infra* notes 267–82 and accompanying text.

<sup>44</sup> Jeffries, *supra* note 38, at 250.

<sup>45</sup> For arguments that widespread indemnification—if empirically proven—would limit the justification for qualified immunity doctrine, see, e.g., Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 587 (1998) (“[G]iven indemnification and absent some systemic bias, incentives might be balanced such that officials will, in fact, consider all the societal costs and benefits of their actions. If so, governmental liability would present little or no risk of over-deterrence, making qualified immunity unnecessary.” (citations omitted)); Fallon, *supra* note 16, at 497 (“[I]t might be desirable to reconsider current doctrines that largely shield governments from direct liability for their officials’ wrongs, especially if empirical studies were to establish that government employers routinely indemnify their officials anyway.”).

<sup>46</sup> See *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (“[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.”).

<sup>47</sup> *Id.* at 691 (“[T]he language of § 1983, read against the background of [its] legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.”).

<sup>48</sup> *Id.* at 693–94.

cations for vicarious liability during debate about an amendment to the bill that later became the Civil Rights Act of 1871 and neither justification convinced Congress to include a provision that would allow suits directly against governments for failure to protect citizens against violence by private actors. As a result, the Court concluded that these justifications were insufficient bases to impose respondeat superior liability for municipal employees' civil rights violations.<sup>49</sup> Instead, the Court held, a plaintiff must show that the municipality itself "caused" the plaintiff's constitutional violation.<sup>50</sup>

In subsequent cases interpreting *Monell*, the Court created what Justice Breyer has called a "highly complex body of interpretive law."<sup>51</sup> A plaintiff seeking to establish municipal liability must show that the municipality had an unconstitutional policy or custom of unconstitutional violations, or that it failed to properly hire, train, or supervise its employees.<sup>52</sup> A plaintiff must also show that these acts were taken with the knowledge or deliberate indifference of a "final policymaker."<sup>53</sup> Current standards are exceedingly difficult to satisfy: David Achtenberg has observed that "the standard for awarding compensatory damages against cities under § 1983 is even higher than the standard for awarding punitive damages against private employers. *Monell* confines entity liability in a manner that is unique to § 1983 and exists in no other area of the law."<sup>54</sup>

Justices and scholars have called for reconsideration of *Monell's* prohibition of respondeat superior liability. Some challenge the Court's conclusion in *Monell* that the drafters of the Civil Rights Act of 1871 did not contemplate vicarious liability for municipalities.<sup>55</sup> Some raise policy arguments in favor of imposing liability on munici-

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<sup>49</sup> *Id.* at 692–94. The Court acknowledged that "[s]trictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees," but found the inference "quite strong." *Id.* at 692–93 n.57.

<sup>50</sup> *Id.* at 692 & n.57 (internal quotation marks omitted).

<sup>51</sup> *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 430 (1997) (Breyer, J., dissenting).

<sup>52</sup> *See Achtenberg, supra* note 6, at 2187–91 (describing routes to municipal liability under the *Monell* doctrine).

<sup>53</sup> *Pembaur v. City of Cincinnati*, 475 U.S. 469, 486 (1986). As just one example of the complexity of *Monell* doctrine, a municipal policy can be established when an official has exercised "policymaking authority" but not when the official has exercised "delegated discretionary policy-implementing authority." *Brown*, 520 U.S. at 434 (Breyer, J., dissenting) (emphasis omitted) (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 126–27 (1988) (plurality opinion)).

<sup>54</sup> Achtenberg, *supra* note 6, at 2191.

<sup>55</sup> *See, e.g., City of Okla. City v. Tuttle*, 471 U.S. 808, 835–42 (1985) (Stevens, J., dissenting) (arguing that legislators would have assumed the applicability of the common law tort doctrine of respondeat superior, barring specific provisions to the contrary);

palties instead of individual officers.<sup>56</sup> And some have argued that indemnification, if prevalent, obviates the need for *Monell's* heightened standard. For example, in *Bryan County v. Brown*, Justice Breyer, writing for himself and Justices Ginsburg and Stevens, observed that states' indemnification statutes "mimic *respondeat superior* by authorizing indemnification of employees found liable under § 1983 for actions within the scope of their employment."<sup>57</sup> Justice Breyer concluded that, to the extent indemnification statutes "provide for payments from the government that are similar to those that would take place in the absence of *Monell's* limitations . . . municipal reliance upon the continuation of *Monell's* 'policy' limitation loses much of its significance."<sup>58</sup>

### 3. Punitive Damages

The Supreme Court's conclusion that punitive damages should not be assessed against municipalities in § 1983 cases similarly rests in part on the assumption that officers are financially responsible for damages entered against them. In *Smith v. Wade*, the Court held that a plaintiff could recover punitive damages against an individual government official if the official's conduct was "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."<sup>59</sup> In explaining this conclusion, the majority wrote that they saw "no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action."<sup>60</sup>

Yet, when deciding whether punitive damages could be awarded against municipalities in § 1983 cases, the Court granted a more restrictive remedy than is available in the private law context.<sup>61</sup> In

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Achtenberg, *supra* note 6, at 2196–212 (explaining why the historical arguments against municipal *respondeat superior* are unfounded).

<sup>56</sup> See, e.g., Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 796 (1999) (arguing that respondeat superior liability for municipalities would simplify the law, impose costs on deeper-pocketed municipalities, and create incentives for municipalities to prevent future harms).

<sup>57</sup> *Brown*, 520 U.S. at 436 (Breyer, J., dissenting).

<sup>58</sup> *Id.*

<sup>59</sup> *Smith v. Wade*, 461 U.S. 30, 56 (1983).

<sup>60</sup> *Id.* at 48–49.

<sup>61</sup> *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (holding that municipalities are immune from punitive damages in § 1983 cases). The majority of states have also restricted or prohibited punitive damages awards against government entities in all cases. See Megan K. Bannigan, *Judgment Day for Public Entity Punitive Damages? Reexamining the Law and Policy of Awarding Punitive Damages Against New Jersey Public*

reaching its conclusion that punitive damages cannot be awarded against a municipality in § 1983 actions, the Court relied in part on municipalities' historical immunity from punitive damages.<sup>62</sup> The Court also reasoned that it made no sense to impose punitive damages against a municipality. Punitive damages against municipalities would not have their intended deterrent effect because "it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of the municipality."<sup>63</sup> Punitive damages against an individual officer, "based on his personal financial resources," are better suited to deter the "offending official," the Court reasoned.<sup>64</sup>

Moreover, according to the Court, requiring taxpayers to satisfy punitive damages awards would be unjust. The awards would be "likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers."<sup>65</sup>

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Although the Supreme Court cases setting out the standards for qualified immunity, municipal liability, and punitive damages awards rely on the assumption that officers are financially responsible for settlements and judgments entered against them, a few Justices—in a few concurrences and dissents—have observed that the world may work differently than the Court's precedential decisions assume. In *Monell*, which recognized a claim against municipalities under § 1983 for constitutional violations, Justice Powell, concurring, responded to the concern that the Court's decision exposed cities to retroactive liability by noting that "it reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting

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*Entities*, 38 RUTGERS L.J. 191, 245–46 (2006) ("The federal government and at least thirty-five states, as well as the District of Columbia, have enacted statutes that completely bar or significantly limit the possibility of recovering punitive damages against public entities."); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 217 (1997) ("At least thirty-seven states and the District of Columbia have statutes fully or partially immunizing public entities from punitive damages.")

<sup>62</sup> See *City of Newport*, 453 U.S. at 263 ("[M]unicipal immunity from punitive damages was well established at common law by 1871 . . .").

<sup>63</sup> *Id.* at 268.

<sup>64</sup> *Id.* at 269.

<sup>65</sup> *Id.* at 267.

and retaining competent officers, board members, and employees.”<sup>66</sup> In *Briscoe v. LaHue*, Justice Marshall dissented from the majority decision—which granted absolute immunity to a police officer who had given perjured testimony during the plaintiff’s criminal trial—arguing that there was no public policy justification for granting police officers absolute immunity because “police officials are usually insulated from any economic hardship associated with lawsuits based on conduct within the scope of their authority.”<sup>67</sup> And Justice Souter, concurring in a decision regarding a § 1983 action for malicious prosecution, noted in passing that “mounting damages against the defendant-officials for unlawful confinement (damages almost certainly to be paid by state indemnification) would, practically, compel the State to release the prisoner.”<sup>68</sup> But the Court’s majority holdings in cases interpreting § 1983 uniformly assume that officers are financially responsible for satisfying settlements and judgments in police misconduct cases.

### B. Scholarship

Despite the central role it plays in Supreme Court doctrine, there has been limited effort to empirically examine police indemnification. Theodore Eisenberg and Stewart Schwab studied court records of civil rights cases filed in the Central District of California in 1980 and 1981 and “found no case in which court records showed that an individual official had borne the cost of an adverse constitutional tort judgment.”<sup>69</sup> The *Yale Law Journal* studied 149 lawsuits alleging police misconduct filed between 1970 and 1977 in Connecticut federal courts and found that officers were indemnified in all but two cases: In one case, an officer was required to pay \$25, and the other case, concerning an officer’s off-duty conduct, was still pending at the conclusion of the study period.<sup>70</sup> In 1998, John Jeffries, who had taught police officers at the FBI Academy for nearly twenty years at that time, reported “routinely” asking his classes of police officers if they “know personally of any cases where an officer sued under § 1983 was not defended and indemnified by his or her agency,” that the answer was always “no,” and that “[i]f there were any real risk that police officers would be left to defend § 1983 actions on their own, this population would know it.”<sup>71</sup> I am aware of no studies of police indemnifi-

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<sup>66</sup> *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 713 n.9 (1978) (Powell, J., concurring).

<sup>67</sup> 460 U.S. 325, 366 (1983) (Marshall, J., dissenting).

<sup>68</sup> *Heck v. Humphrey*, 512 U.S. 477, 498 (1994) (Souter, J., concurring).

<sup>69</sup> Eisenberg & Schwab, *supra* note 11, at 686.

<sup>70</sup> Davis, Small & Wohlberg, *supra* note 11, at 810–12.

<sup>71</sup> Jeffries, *supra* note 12, at 50 n.16.

cation beyond these two decades-old studies and Professor Jeffries's informal polls of FBI academy students.

Perhaps unsurprisingly, given the scant available evidence, scholars have reached different conclusions about the prevalence of police indemnification. Many—often relying on the Eisenberg and Schwab study and the *Yale Law Journal* study, as well as Professor Jeffries's information from FBI academy students—assert that government indemnification is widespread.<sup>72</sup> Professors Oren Bar-Gill and Barry Friedman summed up the state of affairs nicely when they observed that evidence of indemnification practices is “remarkably difficult to come by, but those involved with the issue seem confident that police commonly are indemnified for constitutional torts that occur while on the job.”<sup>73</sup>

Others contend that indemnification is, as Peter Schuck has written, “neither certain nor universal.”<sup>74</sup> Scholars skeptical of the

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<sup>72</sup> See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 473 (2004) (“Individual officials, however, almost never reap the financial consequences of § 1983 suits that are brought against them because the government handles their legal defense and indemnifies them for any damages assessed against them.”); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 590 (2000) (“[P]olice officers almost never pay anything out of their own pockets to settle civil lawsuits. Nor do they pay for judgments rendered after jury verdicts for plaintiffs.”); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 353 (2000) (describing indemnification as “near-universal”); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1019 (2000) (writing that indemnification is “generally thought to be widespread,” though suggesting that it is not universal); Miller & Wright, *supra* note 15, at 782 (“Municipalities indemnify officers in many cases.”); Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer’s § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1217 (2001) (“States and municipalities often indemnify officers found personally liable for compensatory damages under § 1983.”). I have relied on this assumption as well. See Schwartz, *supra* note 18, at 1032 (“Even when plaintiffs win, some believe that judgments and settlements will not reliably deter because officers are regularly indemnified.”).

<sup>73</sup> Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1630 (2012).

<sup>74</sup> SCHUCK, *supra* note 13, at 85; see also Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 841, 854 (2001) (“No police officer wants to be sued, particularly where there is no absolute guarantee that his municipal employer will pay for his defense and indemnify him for damages.”); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983’s Asymmetry*, 140 U. PA. L. REV. 755, 786 (1992) (“[T]he practice of indemnification, although widespread, [is] equally uncertain and uneven. Some governments [will] not indemnify at all, and others only for conduct comporting with varying definitions of scope of authority.”); William C. Mathes & Robert T. Jones, *Toward a “Scope of Official Duty” Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 912 (1965) (“[I]t appears that the indemnity practice is so irregular that its function as a ‘conduit to



certainty and universality of indemnification point to wide variation in state indemnification laws.<sup>75</sup> Professor Schuck, in a comprehensive review of indemnification statutes as they existed in the early 1980s, observed:

Most states provide some form of indemnification or other protection against adverse judgments or settlements, but some apparently provide it only in narrowly circumscribed situations. Indemnification laws differ with respect to local autonomy, coverage, and other features. . . . Significantly, most laws preclude government liability for “bad faith” conduct, and some condition indemnification on good faith cooperation by the official in the defense of the case. . . . Some states limit the amount of the indemnity, leaving officials to satisfy excess claims. . . . State laws also vary in the procedures by which protection is obtained. . . . Virtually every indemnity statute precludes reimbursement for actions committed in bad faith, variously defined by statutes and variously construed by courts. . . . Federal, state, and local laws, then, restrict indemnification in many ways.<sup>76</sup>

Some have also hypothesized that indemnification may be denied when officers are disciplined, fired, or criminally charged as a result of their conduct.<sup>77</sup>

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governmental liability’ is fortuitous at best.”) (quoting Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 216–17 (1963)).

<sup>75</sup> See, e.g., Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1455–56 (2009) (observing that officers are not certain to be indemnified because “indemnification clauses often do not cover bad faith behavior” and “exclude intentional, reckless, or malicious conduct”); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 30–31 (2000) (observing that indemnification provisions are “wrought with uncertainty and difficulties” and “invariably afford the municipality the unilateral option of disclaiming coverage in broad categories of cases”); Meltzer, *supra* note 72, at 1019–20 (arguing that government employees are not always indemnified because “employees or agencies may (advertently or otherwise) be excluded; indemnification may be permissive rather than mandatory (though admittedly a routine practice of permissive indemnification may blunt any distinction); some states impose monetary limits on indemnification; and many indemnification provisions exclude conduct that is criminal, egregious, willful, or the like” (citations omitted)).

<sup>76</sup> SCHUCK, *supra* note 13, at 86–87.

<sup>77</sup> See Howard Friedman, *To Protect and Serve?*, 47 TRIAL 14, 16 (Dec. 2011) (“[Indemnification] is unlikely . . . where the officer was found guilty of criminal conduct against a plaintiff. Many insurance policies and state statutes [*sic*] prohibit indemnification . . . for criminal conduct. Similarly, if a department terminates an officer for his or her actions toward a plaintiff, the department may refuse indemnification.”); Jeffries, *supra* note 12, at 50 (hypothesizing that, although state officers are usually indemnified, those “who become targets of criminal prosecution are unlikely to receive financial subvention for civil liability”); Barry C. Scheck, *Criminal Prosecution and Section 1983*, 16 Touro L. REV. 895, 902–03 (2000) (“You can almost certainly be assured indemnification will not occur in most of these instances where a police officer is

When scholars do not directly consider the indemnification question, they—like the Supreme Court—generally assume that officers are financially responsible for settlements and judgments entered against them. For example, scholars have argued that supervisory liability is an important claim for plaintiffs to be able to allege because “[s]upervisors are more likely to have resources to satisfy judgments than low-level officials who commit wrongdoing.”<sup>78</sup> Scholars have also asserted that vicarious liability for municipalities would better compensate plaintiffs because officers “are unlikely to have the resources to pay a judgment.”<sup>79</sup>

The Supreme Court has long assumed that law enforcement officers personally satisfy settlements and judgments, and has limited individual defendant and government liability in civil rights damages actions based in part on this assumption. Scholars disagree about the prevalence of indemnification: Some believe indemnification is widespread, some contend that indemnification is not a certainty, and others appear to assume that officers regularly satisfy settlements and judgments against them. Despite the centrality of police indemnification to civil rights doctrine and scholarship, there has been no effort—apart from two decades-old studies and informal polls of FBI academy students—to examine the prevalence or scope of police indemnification.

## II STUDY

### A. *Methodology*

In order to test judicial and scholarly assumptions about indemnification, my study examined how frequently officers financially contribute to settlements and judgments in police misconduct suits.

Prior studies of police indemnification have gathered information primarily through review of court documents.<sup>80</sup> As a result, their findings are limited to cases that result in judgments after trial or to publicly recorded settlement agreements. I focused, instead, primarily on records produced by cities, counties, and states. Although this approach has its own limitations—which I will describe—it does pro-

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convicted. . . . If there is an acquittal, there may be administrative sanctions against the officer, but indemnification is unlikely.”).

<sup>78</sup> Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 HARV. C.R.-C.L. L. REV. 273, 276 (2012).

<sup>79</sup> Fisk & Chemerinsky, *supra* note 56, at 796.

<sup>80</sup> See *supra* notes 11, 69–70 and accompanying text (describing other studies).

vide information about settlement payouts that would not otherwise appear in court documents and are, often, kept confidential.<sup>81</sup>

I first sought information about police indemnification from the fifty largest municipal police departments and the fifty largest law enforcement agencies across the country (which include not only municipal departments but also county and state agencies).<sup>82</sup> The two lists overlap, resulting in a total of seventy departments. I sent public records requests to each of these seventy departments, requesting documents that reflect<sup>83</sup> (1) the total number of cases resolved between January 1, 2006 and December 31, 2011 in which one or more of the defendants was an employee of the agency;<sup>84</sup> (2) the total dollar amount paid to plaintiffs in these cases; (3) the number of instances in which defendant employees were required to contribute to settlements and judgments, and the amount the defendant employees were required to pay in these instances; (4) the amount of punitive damages awarded against officers during the study period; and (5) the number of instances in which officers were required to satisfy punitive damages awards, and the amount officers were required to pay.

These initial records requests were, in most instances, the first step in an extended series of exchanges—by letter, e-mail, and phone—to several individuals at multiple agencies. My requests were repeatedly lost or disregarded. Interestingly, when I did get responses from law enforcement agencies, many reported that they did not keep information about litigation payments or indemnification decisions. Just twelve of the seventy large law enforcement agencies queried were able to provide information about payouts and indemnification

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<sup>81</sup> See Miller & Wright, *supra* note 15, at 775 (“[M]any civil claims against police are resolved either before a case is filed, or through secret settlements and judgments sealed by courts. Police departments, cities and counties are settling strong cases, and perhaps even less strong cases, but they are requiring (and probably paying for) sealed agreements.”).

<sup>82</sup> For lists of the 50 largest police departments and 50 largest law enforcement agencies, see Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies (CSLLEA)*, NAT’L ARCHIVE CRIMINAL JUSTICE DATA (2008), <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681> (download “Delimited” and refer to the variable Q6\_TOT for total number of sworn law enforcement officers) [hereinafter BJS LAW ENFORCEMENT CENSUS DATA]; BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 14, 17 (2011) [hereinafter BJS LAW ENFORCEMENT CENSUS REPORT], available at <http://bjs.gov/content/pub/pdf/csle08.pdf>.

<sup>83</sup> Although all requests sought this information, the precise language of the requests was modified in some instances to respond to jurisdictions’ questions or to comply with jurisdictions’ public records provisions.

<sup>84</sup> I eliminated from jurisdictions’ responses those cases that were still pending as of December 31, 2011. If a jury had awarded damages but the case was on appeal—or, in one case, the indemnification decision was still being litigated—I excluded it from the data set.

decisions based on their own records.<sup>85</sup> Many forwarded the public records request (or required me to send a new request) to another entity, usually the city or county attorney, clerk, or council. I then endeavored to get responsive information from these entities.

After over a year of letters, telephone calls, and e-mails, forty-four of the seventy jurisdictions queried provided me with some information both about settlements and judgments paid between 2006 and 2011, and about their indemnification decisions during the study period.<sup>86</sup> I supplemented these responses with telephone interviews and e-mail exchanges with risk managers, city attorneys, city council staff, city clerk employees, plaintiffs' attorneys, and others, seeking additional information about indemnification practices in these forty-four jurisdictions. I reviewed minutes of city council meetings in which settlements and judgments were approved to supplement incomplete settlement and judgment information. I searched for additional case information on Westlaw, Bloomberg Law, and state-specific court websites.

Then, to ensure that my findings were not reflective only of practices in the largest departments,<sup>87</sup> I sent a second round of public records requests to seventy randomly selected small and mid-sized departments, ranging from 1 to 747 sworn officers. I received responses from thirty-seven of those seventy jurisdictions.<sup>88</sup>

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<sup>85</sup> Those twelve departments were: California Highway Patrol, New York State Police, Texas Department of Public Safety, Baltimore Police, Las Vegas Metro Police, Massachusetts State Police, Illinois State Police, North Carolina State Highway Patrol, Michigan State Police, Broward County Sheriff, Florida Highway Patrol, and Kansas City Police. Four additional departments—the Charlotte-Mecklenberg Police Department, Chicago Police Department, Pennsylvania State Police Department, and Miami-Dade Police Department—had information in their own records about the amount paid in lawsuits, and one—the Boston Police Department—had information about indemnification decisions. Note that eight of the twelve agencies with the most complete information were state law enforcement agencies, and just three of the eleven large state law enforcement agencies in my study did not possess information about litigation costs and indemnification decisions. Note also that the Riverside Sheriff provided me with responsive information, but made clear that the Sheriff was not the custodian of the records; the Sheriff had received the information from the County's Risk Management Division. Accordingly, I do not include Riverside in this list.

<sup>86</sup> Appendix A has a list of responsive jurisdictions; Appendix G catalogues responses from the jurisdictions that did not have information about indemnification decisions and/or settlements and judgments during the study period; and Appendices I and J set out the data sources for responsive and nonresponsive larger jurisdictions, respectively.

<sup>87</sup> The vast majority of law enforcement agencies across the country are small. Just eighty-three of the 17,985 law enforcement agencies have 1000 or more officers. BJS LAW ENFORCEMENT CENSUS REPORT, *supra* note 82, at 2. Forty-nine percent of all law enforcement agencies employ fewer than ten full-time sworn officers. *Id.*

<sup>88</sup> Appendix E has a list of responsive small and mid-sized jurisdictions, and Appendix K sets out data sources for both responsive and nonresponsive small and mid-sized jurisdictions.

The eighty-one jurisdictions in my study are widely representative in several respects. Responding departments vary significantly in size: The largest department in the study, the New York City Police Department, employs over 36,000 officers; the smallest department in the study, the Waterloo Police Department, in Nebraska, employs just one.<sup>89</sup> The eighty-one departments in my study are located in thirty-two states and every region of the country.<sup>90</sup> The responsive departments are located in cities, counties, and states that span the political spectrum.<sup>91</sup> The departments in my study are involved in a wide range of law enforcement activities: Fifty of the agencies in the study are municipal police departments; sixteen are sheriff's departments, fifteen of which staff county jails in addition to the other law enforcement services they provide;<sup>92</sup> eleven are state police departments, four of which are primarily responsible for patrolling state highways; and four are county police departments.

These eighty-one jurisdictions also have a wide range of indemnification statutes and policies. Some mandate indemnification for suits arising out of the course and scope of employment,<sup>93</sup> some allow

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<sup>89</sup> See BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82 (providing the sizes of law enforcement agencies).

<sup>90</sup> Responsive jurisdictions are located in the West (including Alaska, California, Colorado, Hawaii, Idaho, Montana, Nevada, Utah, and Washington); the Midwest (including Illinois, Indiana, Kansas, Michigan, Missouri, Nebraska, Ohio, and Wisconsin); the Southwest (including Arizona, New Mexico, Oklahoma, and Texas); the Southeast (including Alabama, Florida, Georgia, Kentucky, and North Carolina); and the Northeast (including New Hampshire, New Jersey, New York, Maryland, Massachusetts, and Pennsylvania).

<sup>91</sup> There are, for example, reliably "blue" states (California, Illinois, Maryland, New York, and Washington); reliably "red" states (Georgia, Texas, and Oklahoma); and "purple" states (Florida and North Carolina). The study also includes some of the most liberal and conservative cities in the country. See BAY AREA CENTER FOR VOTING RESEARCH, THE MOST CONSERVATIVE AND LIBERAL CITIES IN THE UNITED STATES 8, 10 (2005) (reporting that the twenty-five most liberal cities in the United States include San Francisco, Seattle, New York, and Boston, and that the twenty-five most conservative cities in the United States include Oklahoma City and City of Orange, California, which is located in a responsive jurisdiction—Orange County).

<sup>92</sup> One of the sixteen sheriff's departments—Oldham County, Kentucky—appears not to provide correctional services. See *OCSO Responsibilities*, OLDHAM COUNTY SHERIFF'S OFFICE, [http://www.oldhamsheriff.com/?page\\_id=26](http://www.oldhamsheriff.com/?page_id=26) (last visited Apr. 29, 2014) (describing the sheriff's office's responsibilities).

<sup>93</sup> See, e.g., OHIO REV. CODE ANN. § 2744.07 (West 2006) (“[A] political subdivision shall indemnify . . . an employee in the amount of any judgment, other than . . . for punitive or exemplary damages, . . . for damages . . . caused by an act or omission in connection with a governmental or proprietary function, if . . . the employee was acting in good faith and within the scope of employment or official responsibilities.”); PHX., ARIZ., CITY CODE § 42-16 (2014), available at <http://www.codepublishing.com/az/phoenix/> (search “42-16” and click on the “42-16 Representation and indemnification of the City, City employees, covered corporations, covered City entities and other persons, corporations or entities” hyperlink) (“[The City] shall provide legal defense and indemnification for any covered

indemnification under limited circumstances,<sup>94</sup> and at least one reports that it prohibits indemnification altogether.<sup>95</sup> Some jurisdictions rely on state law when making their indemnification decisions, some follow local or department-specific policies, and some have no written policy and make indemnification decisions case by case.<sup>96</sup> Some jurisdictions prohibit indemnification of punitive damages awards and others allow indemnification of punitive damages awards in limited circumstances.<sup>97</sup> There are also differences across jurisdictions in my study regarding indemnification procedures: Some jurisdictions make indemnification decisions at the outset of litigation and

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individual subject to a liability claim . . . where a reasonable and good faith argument can be made that the civil liability of such individual arises from acts or omissions within the course and scope of the individual's employment with the City."); DALL., TEX., CITY ORDINANCE § 31A-5 (2013), available at <http://www.dallascityhall.com/html/codes.html> (search for "31A"; then follow "Chapter 31A Officers and Employees" hyperlink; then follow "Sec. 31A-5. Coverage" hyperlink) (providing a liability plan for city officers and employees under which "[t]he city shall indemnify and defend [an individual] . . . against a loss arising out of any claim, suit, or judgment resulting from an act or omission of the plan member during the discharge of his duties and within the scope of his office, employment, or assigned volunteer work with the city").

<sup>94</sup> See, e.g., MO. REV. STAT. § 105.711 (2000) (providing funds to pay any claim or judgment against "[a]ny officer or employee of the state of Missouri or any agency of the state . . . upon conduct of such officer or employee arising out of and performed in connection with his or her official duties on behalf of the state"); Austin City Council Res. 870409-02 (Austin 1987) (authorizing indemnification of city officials and employees where the individual "shall become legally obligated to pay by reason of the errors, omissions, negligent acts or violations of legal rights under color of law . . . [only where] [t]he damages assessed [are] based on an act . . . in the course and scope of [the individual's] position or employment for the City," but reserving "the right to refuse such indemnification depending on the factual circumstances from which damages have arisen").

<sup>95</sup> Telephone Interview with Laura Gordon, Deputy City Attorney, City of El Paso (June 19, 2012) (describing city practice of providing all officers with a lawyer but reporting that "in no case do we indemnify").

<sup>96</sup> See, e.g., E-mail from Kristen Denius, Senior Assistant City Attorney, Atlanta City Attorney's Office, to Brian Cardile, Student, UCLA School of Law (Feb. 1, 2013, 13:20 PST) (on file with the *New York University Law Review*) (reporting that the city does not have a written indemnification policy, but "make[s] a case-by-case determination about whether to represent individual [defendants] who are named in lawsuits"); Telephone Interview with Laura Gordon, *supra* note 95 (reporting that El Paso has no formal indemnification policy, but does not indemnify its officers as a matter of practice); E-mail from Bob Sanguinetti, Div. of Law Records Custodian, N.J. State Police, to author (Mar. 6, 2013, 13:08 PST) (on file with the *New York University Law Review*) ("The Division of Law has no written indemnification policy and relies on N.J.S.A. Title 59."); Letter from Jamar B. Herry, Assoc. Cnty. Attorney, Prince George's Cnty. Gov't Office of Law, to author (Sept. 12, 2012) (on file with the *New York University Law Review*) (providing a section of the "Prince George's County's Risk Management Committee Policy and Procedures" in response to a request for the county's indemnification policy).

<sup>97</sup> Compare *infra* note 149 (describing California's statute, which allows indemnification of punitive damages), with *infra* notes 153–56 (describing statutes and policies in effect in Prince George's County, Oklahoma City, Las Vegas, and New York City that prohibit indemnification of punitive damages expressly or by implication).

others wait until the conclusion of a case to decide whether to indemnify.<sup>98</sup> Finally, there are differences across jurisdictions in who makes indemnification decisions: In some jurisdictions, the city or county attorney decides whether an officer should be indemnified; in other jurisdictions, the decision is left to the board of police commissioners or city council.<sup>99</sup>

The broad representativeness of departments in my study should lessen concerns that the responding jurisdictions are systematically different from jurisdictions that did not respond to the public records requests and jurisdictions that were not queried. But even if there were some manner of selection bias, and my findings were not reliably reflective of jurisdictions outside the study, the study offers valuable, previously unknown information about indemnification practices across a significant portion of law enforcement agencies and officers. Twelve of the nation's twenty largest law enforcement agencies are included in my study, and the eighty-one departments in my study employ almost 20% of the country's approximately 765,000 sworn law enforcement personnel.<sup>100</sup>

I took several steps to create consistency in the data about lawsuit payments provided by the forty-four largest jurisdictions in my study.<sup>101</sup> Jurisdictions provided responsive data about the amount paid in lawsuits in different formats: Some provided detailed spread-

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<sup>98</sup> See, e.g., DALL., TEX., CITY ORDINANCE § 31A-5 (2013), available at <http://www.dalascityhall.com/html/codes.html> (search for "31A," then follow "Chapter 31A Officers and Employees" hyperlink, then follow "Sec. 31A-5. Coverage" hyperlink) (conditioning indemnification on defendant's cooperation with the lawsuit's defense); Telephone Interview with Lisa Freitag, Rules Coordinator, Legal Office, Ill. State Police (July 12, 2012) (on file with the *New York University Law Review*) (reporting that the Illinois Attorney General reviews the allegations in the complaint and, at that time, decides whether to provide representation and indemnification); Telephone Interview with Mia Obciana, Deputy Corp. Counsel, City of Honolulu (Dec. 4, 2012) (on file with the *New York University Law Review*) (reporting that if the Police Commission decides the officer was acting within the course and scope of his employment after receiving the complaint, the officer will receive representation and indemnification); *infra* note 221 and accompanying text (describing New York City's practice of waiting until the conclusion of a case to decide whether to indemnify).

<sup>99</sup> See, e.g., PHX., ARIZ., CITY CODE § 42-16 (2014), available at <http://www.codepublishing.com/az/phoenix/> (authorizing the city attorney to make indemnification decisions); *supra* note 98 (noting that the Illinois Attorney General makes indemnification decisions for the Illinois State Police and the Honolulu Police Commission makes indemnification decisions for the Honolulu Police Department).

<sup>100</sup> See BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82 (providing the number of sworn law enforcement personnel nationwide and by agency); *infra* Appendix A (listing responsive large jurisdictions); *infra* Appendix E (listing responsive small and mid-sized jurisdictions).

<sup>101</sup> I did not take these same steps for the small and mid-sized departments I queried because my primary goal regarding these smaller departments was to confirm that their indemnification decisions were similar to those in larger departments, and because several

sheets that set out the parties, nature of the claims, and disposition; some provided lists of what they categorized as civil rights cases; some provided lists that set out litigation payments but did not identify the nature of the underlying claims; some provided information about payments in certain categories of constitutional claims but not others; and some did not track lawsuit payouts but directed me to city and county council websites that contained information about settlements that these entities had approved.<sup>102</sup>

Because my research suggests that officers are virtually always indemnified for both civil rights and non-civil rights cases, there is no reason to believe that inconsistencies in the types of cases reported by jurisdictions would significantly affect my conclusions about the number of cases in which officers were not indemnified.<sup>103</sup> These inconsistencies would, however, skew findings about the amount paid by each jurisdiction: A jurisdiction that provided information only about civil rights cases would appear to have comparatively fewer payouts than a jurisdiction that provided information about all cases involving its officers. Accordingly, I endeavored to create uniformity in the types of cases counted for each jurisdiction.

Because this study aims to test assumptions about indemnification underlying civil rights doctrine, I eliminated, when possible, cases that clearly did not involve § 1983 claims alleging police misconduct, including cases involving automobile accidents, employment discrimination or other internal employment actions, and off-duty conduct unrelated to law enforcement activities.<sup>104</sup> But ten of the forty-four

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of the smaller departments did not provide information about payouts in their jurisdictions.

<sup>102</sup> Appendix I describes the types of information provided by each of the forty-four large responsive jurisdictions.

<sup>103</sup> See *infra* notes 129–30 and accompanying text (describing findings of virtually universal indemnification for non-civil rights claims); Appendix B (providing indemnification statistics for the twenty-eight larger responsive jurisdictions that provided information about non-civil rights claims).

<sup>104</sup> I removed two cases that involved off-duty conduct unrelated to law enforcement activities. See *Owens v. Feigin*, 394 N.J. Super. Ct. App. Div. 85, 87 (2007) (reciting allegations in a Notice of Tort Claim alleging a teenager died at the home of his friend, whose father was a state trooper); Philip Messing, *Bar Bat Shooter Was Off-Duty Cop*, N.Y. POST, Oct. 10, 2002, at 2 (describing a dispute between Derick Bonner and Earl Rozier, an off-duty New York City police officer, at a nightclub, which presumably underlies the case of *Bonner v. Rozier*). I also removed a case in which an officer was sued for conduct while assigned to another law enforcement agency. See Telephone Interview with Lisa Freitag, *supra* note 98. I kept five cases in the data set that involve off-duty conduct, however, because off-duty conduct can still be the basis for a § 1983 claim if the officer “purport[s] to exercise the authority” of a law enforcement officer by identifying him or herself as such or displaying a badge. *Griffin v. Maryland*, 378 U.S. 130, 135 (1964). For example, *Ferreri v. Cleveland* involved a shooting by an off-duty Cleveland police officer who was serving as a security guard in an apartment complex at the time. Although



largest jurisdictions provided me with information about payouts in all cases involving police officers, and so I could not isolate payments in civil rights claims.<sup>105</sup> In order to estimate the dollars spent on civil rights cases in these ten jurisdictions I relied on the median percentage (76.3%) of total dollars spent on civil rights cases in the nineteen large jurisdictions that provided detailed responses about payouts in both civil rights and non-civil rights claims.<sup>106</sup> Similarly, I estimated the number of civil rights cases resolved in plaintiffs' favor in the eleven large jurisdictions<sup>107</sup> that did not provide me with this information based on the median percentage (52.7%) of total cases with payments to plaintiffs that involved civil rights claims in the eighteen jurisdictions that provided detailed responses.<sup>108</sup>

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the officer was off-duty, he identified himself as a police officer before shooting the victim. Defendant's Memorandum in Support of Summary Judgment 2–3, *Ferreri v. City of Cleveland*, No. 09-CV-00621, at \*3 (D. Ohio Oct. 23, 2009). In another case, an off-duty officer assaulted the plaintiff and then provided false information that led to plaintiff's arrest. *McNamara v. City of New York*, No. 06 Civ. 5585(LTS)(FM), 2009 WL 735135, at \*1–2 (S.D.N.Y. Mar. 20, 2009). The court dismissed all but one of plaintiff's constitutional claims against the officer on the ground that he was not acting under color of state law, but did not dismiss a false arrest claim based on the off-duty officer's statements to the police that led to the plaintiff's arrest. *Id.* at \*8. The defendant subsequently paid \$16,500 to settle the case. Stipulation and Order of Settlement and Dismissal, *McNamara v. City of New York*, No. 06-CV-05585 (S.D.N.Y. Sept. 1, 2009) (setting out the terms of the settlement). In *Massey v. City of New York*, an off-duty detective assaulted the plaintiff during a dispute regarding the detective's girlfriend, and then called the police and had the plaintiff arrested. Complaint at 3–4, *Massey v. City of New York*, No. 05-CV-8718, 2005 WL 3655618 (S.D.N.Y. Oct. 14, 2005). In two other cases—*Baird* and *Oliveras*—off-duty officers allegedly engaged in sexual misconduct with people accessed through their employment. See Lawrence Goodman & John Marzulli, *Cop Eyed in Kinky Calls*, N.Y. DAILY NEWS, Oct. 1, 1997, at 51, available at <http://www.nydailynews.com/archives/news/eyed-kinky-calls-article-1.782234> (reporting that a police officer—charged with endangering the welfare of a child—contacted the minor through information filed in a complaint at the officer's precinct); *If You Dare Complain About Police Abuse . . . : The Record of New York's Civilian Complaint Review Board*, REVOLUTION (Nov. 15, 1998), <http://www.revcom.us/a/v20/980-89/982/ccrb.htm> (discussing the facts of *Baird*); Complaint at 3, *Oliveras v. City of New York*, No. 105193/08 (S.D.N.Y. Oct. 14, 2005); Telephone Interview by Brian Cardile with Plaintiff's Attorney in *Oliveras* (Feb. 8, 2013) (describing the facts of the case). In an abundance of caution, I have kept all five cases in the data set. See Appendix H for additional detail about these cases.

<sup>105</sup> These ten jurisdictions are New York State Police, New Jersey State Police, Las Vegas Metro Police, Riverside County Sheriff, Illinois State Police, San Antonio Police, San Bernardino Sheriff, Cleveland Police, Florida Highway Patrol, and Kansas City Police.

<sup>106</sup> See Appendix C, which provides relevant data from these nineteen jurisdictions.

<sup>107</sup> These eleven jurisdictions include the ten jurisdictions listed *supra* note 105 and the California Highway Patrol.

<sup>108</sup> See Appendix D, which provides relevant data from these eighteen jurisdictions. In some instances, I had information only about the number of cases resolved—by settlement, judgment, or dismissal—in the jurisdiction. In these instances, I made similar calculations based on the median percentage (20.6%) of total cases closed—by settlement, judgment, or dismissal—between 2006 and 2011 that involved civil rights claims with payments to plaintiffs in the eleven jurisdictions that provided sufficiently detailed information. See *id.*

Two large departments—Denver and Atlanta—did not have information about the amount paid before 2008. Accordingly, I estimated the total amount paid by these jurisdictions between 2006 and 2011 by prorating their average monthly payouts based on the information I was provided.

One of the forty-four large jurisdictions—Cook County—reported that it represented and indemnified all officers found by the jurisdiction to have acted within the course and scope of their employment, but did not represent or indemnify officers if they were found to have acted outside the course and scope. The County reported that it had no details about such cases. Because Illinois broadly defines conduct within the course and scope of employment, it is unlikely—though certainly possible—that excluded cases include conduct actionable under § 1983.<sup>109</sup> One would imagine that officers would contest denials of representation or indemnification in close cases.<sup>110</sup> Yet Westlaw searches reveal no challenges to indemnification denials in Cook County during the study period.

Another limitation of the data is that—unlike studies that rely on court records—I am unable to verify much of the information provided by these jurisdictions. Although I have no basis to believe that government officials were responding to my requests in bad faith, I do not know whether jurisdictions keep—or have provided me with—accurate information about settlements, judgments, and indemnification decisions.<sup>111</sup> In several jurisdictions, I have identified through other sources information that should have been included in jurisdictions' responses but was not. In these instances, I have added that information to the data set.<sup>112</sup> Similarly, I removed information pro-

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<sup>109</sup> Illinois courts have held that police conduct is within the course and scope of employment so long as the “relevant acts are shown to be a natural part of or incident to the service of employment,” and the defendants were “not acting [solely] as private individuals.” *Coleman v. Smith*, 814 F.2d 1142, 1149–50 (7th Cir. 1987). Acts found to have been within the course and scope of police officers' employment in Illinois include: falsely arresting a plaintiff to “hamper an investigation into police corruption”; a “severe post-arrest beating”; “framing [a] plaintiff for three burglaries”; and “wrongful shooting of the plaintiff.” *Wilson v. Chicago*, 900 F. Supp. 1015, 1029–30 (N.D. Ill. 1995).

<sup>110</sup> See, e.g., *infra* notes 212–20 and accompanying text (describing legal challenges to Los Angeles County's decisions to deny indemnification to deputies in two cases).

<sup>111</sup> See Mark Iris, *Illegal Searches in Chicago: The Outcomes of 42 U.S.C. § 1983 Litigation*, 32 ST. LOUIS U. PUB. L. REV. 123, 125–26 (2012) (reporting that the City of Chicago's list of lawsuits filed against its officers in federal court in 2009, produced in response to a public records request, “did not include approximately forty cases” found on Westlaw, Bloomberg, and PACER—approximately 8.7% of the total cases filed in federal court against Chicago police officers in 2009).

<sup>112</sup> For example, Prince George's County, Las Vegas, and San Bernardino County did not disclose punitive damages judgments in cases found on Westlaw—presumably because

vided by jurisdictions from the data set when it fell outside the scope of my study.<sup>113</sup>

Moreover, at least nineteen of the forty-four large jurisdictions in the study did not keep formal records of indemnification decisions but responded to my request for information based on the recollections of personnel working in the government attorneys' or risk management offices.<sup>114</sup> Because officers were so infrequently required to contribute to settlements and judgments, respondents likely remembered these exceptional cases. They sometimes had difficulty, however, remembering what year these cases were resolved. When people reported a denial of indemnification that may have occurred between 2006 and 2011, I included that information in my calculations. When departments did not know for certain whether officers were ever denied indemnification but I came up with convincing circumstantial or direct evidence on this point through interviews or docket research, I included that information in my calculations.<sup>115</sup>

There may be other instances in which the jurisdictions in my study provided inaccurate information. There may be additional

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the cases settled postjudgment and so there was, technically, no punitive damages judgment imposed. See *infra* Part II.D.2 for a discussion of the resolutions of these cases.

<sup>113</sup> See, e.g., *supra* note 104 (describing the removal of cases in which officers were sued for off-duty conduct unrelated to their law enforcement responsibilities). Additionally, the list of police misconduct cases produced by New York City includes at least sixteen cases that were improperly included in the data set. See *infra* Appendix I (describing the sources for New York City's data). I have removed these cases from my calculations, but there may well be additional non-civil rights cases in the figures provided by New York City and other jurisdictions.

<sup>114</sup> The nineteen large departments that reported they did not keep track of indemnification information but responded based on institutional memory are: Riverside; Illinois State Police; San Antonio; Milwaukee; San Francisco; Columbus; Charlotte-Mecklenburg; Broward County; Albuquerque; Miami; Jacksonville; Cleveland; Florida Highway Patrol; Michigan State Police; Atlanta; Prince George's County; Denver; El Paso; and Tampa. Twenty-four departments responded to my request for indemnification information without specifying whether their responses were based on records or institutional memory. I learned about New York City's indemnification decisions in federal court cases by reviewing individual dockets and settlement agreements, and by consulting with plaintiffs' attorneys. See Appendix I (describing data collection for New York City on the indemnification issue). For the twenty-six large jurisdictions that did not keep track of indemnification decisions and would not respond based on institutional memory or review of relevant records, see Appendix G (listing nonresponsive large jurisdictions) and Appendix J (describing my correspondence with nonresponsive jurisdictions).

<sup>115</sup> One jurisdiction reported that one officer was not provided representation by the city during the study period. The City of Austin reported paying \$2500 to resolve claims against it in the case, but "do[es] not know what happened to the claims against the individual officer." E-mail from Meghan Riley, Div. Chief, Litig., City of Austin, Tex., to author (Mar. 14, 2014, 09:54 PDT) (on file with the *New York University Law Review*). Calls to plaintiffs' counsel and the defendant officer's counsel went unreturned. Because I have no evidence indicating that this officer contributed to a settlement in this case, I have not included it in my calculations.

instances in which officers were required to contribute to settlements or judgments against them. Yet, given the starkness of my findings, my study results would need to be inaccurate by an order of magnitude or more to undermine in any significant regard the conclusion that police indemnification is a near certainty in police misconduct lawsuits.

### B. *The Prevalence of Indemnification*

In stark contrast to assumptions underlying civil rights doctrine, law enforcement officers employed by the eighty-one jurisdictions in my study almost never contributed to settlements and judgments in police misconduct lawsuits during the study period. Between 2006 and 2011, officers were required to contribute to settlements or judgments in three to five of the forty-four large jurisdictions in my study.<sup>116</sup> Thirty-five officers employed by the New York City Police Department were required to contribute between \$250 and \$16,500—with a median payment of \$2125—in thirty-four cases. Two officers employed by the Cleveland Police Department were required to contribute to settlements in two cases: One officer contributed \$12,000 and the other contributed \$25,000. One officer from the Los Angeles Police Department was not indemnified for a \$300 punitive damages award. An official from the Jacksonville City Attorney's Office recalled one use-of-force case in which a Jacksonville Sheriff's deputy *may* have been required to contribute between \$5000 and \$20,000 during the relevant time period. And an official from the legal office of the Illinois State Police reported that there may have been one case resolved during the study period in which an officer was required to contribute, but had no information about the facts of the case or the amount the officer was required to pay.

Officers contributed to a miniscule proportion of lawsuits resolved in plaintiffs' favor during this six-year period. Approximately 9225 civil rights cases were resolved with payments to plaintiffs between 2006 and 2011 in the forty-four largest jurisdictions in my study.<sup>117</sup> Officers financially contributed to settlements or judgments in approximately .41% of those cases.<sup>118</sup> Officers were also responsible for a miniscule percentage of the settlements and judgments as

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<sup>116</sup> See *infra* Part II.F and Appendix H for further description of these cases.

<sup>117</sup> See Appendix A, which describes the number of civil rights cases resulting in a payment to the plaintiff during the study period. As described in Part II.A and detailed in Appendix I, some of these numbers are estimations based on incomplete data provided by the jurisdictions.

<sup>118</sup> If officers contributed to thirty-seven of these cases, they would have contributed to .401% of the cases. If officers contributed to thirty-nine of these cases, they would have contributed to .423% of these cases. The average is .412%.

measured in dollars. The forty-four jurisdictions paid an estimated \$735,270,772 in settlements and judgments involving civil rights claims on behalf of their law enforcement officers between 2006 and 2011. Officers were financially responsible for \$151,300 to \$171,300 during this period;<sup>119</sup> approximately .02% of the total dollars paid.

Even in the jurisdictions that required officers to contribute to settlements and judgments, officers' financial contributions were minimal. New York City Police Department officers were required to contribute to just .49% of the civil rights cases in which plaintiffs received payment.<sup>120</sup> The \$114,000 paid by NYPD officers in these cases amounts to 3.69% of the total paid to plaintiffs in these thirty-four cases,<sup>121</sup> and .03% of the total dollars paid to plaintiffs in New York City Police Department civil rights actions during this six-year period.<sup>122</sup> The \$300 in punitive damages not indemnified by the City of Los Angeles in one case amounts to .19% of the total awarded to the plaintiff in that case and .0008% of total payments to plaintiffs in Los Angeles during the study period.<sup>123</sup> Cleveland is, in comparison to New York and Los Angeles, an outlier: Cleveland required officers to contribute to two (5.7%) of the estimated thirty-five civil rights cases resolved in plaintiffs' favor, and the officers were required to contribute 40.2% of the total settlement amounts in these two cases.<sup>124</sup> But, even in Cleveland, officers paid just approximately 1% of total dollars awarded to plaintiffs in civil rights cases during the study period.<sup>125</sup>

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<sup>119</sup> The \$20,000 difference depends on whether the Jacksonville Sheriff's deputy was denied indemnification during the study period and paid a total of \$20,000—the maximum in the range remembered by the Chief Deputy Counsel for the City of Jacksonville. Depending on whether or not a deputy was required to pay this additional \$20,000, law enforcement officers personally satisfied between .020% and .023% of the money paid to plaintiffs during this period. The Illinois State Police case, if within the study period, would potentially raise the amount further but would have minimal impact in percentage terms on these findings.

<sup>120</sup> See Appendix A (providing summary statistics for larger jurisdictions).

<sup>121</sup> See Appendix H (reporting \$114,000 paid by New York City Police Department officers, out of a total of \$3,086,505 paid to plaintiffs in those cases).

<sup>122</sup> Compare Appendix A (reporting \$348,274,595.81 paid by the New York City Police Department for civil rights settlements and judgments), with Appendix H (reporting \$114,000 paid by officers).

<sup>123</sup> See Appendix A (reporting payment of \$38,734,282.27 to plaintiffs in civil rights judgments and settlements in Los Angeles); Appendix H (reporting \$160,300 awarded to plaintiff in *Taylor-Ewing v. City of Los Angeles*, with \$300 not indemnified by Los Angeles).

<sup>124</sup> See Appendix H (reporting \$37,000 paid by Cleveland officers and \$92,000 paid to plaintiffs in two cases).

<sup>125</sup> See Appendix A (reporting \$3,474,253.87 in civil rights payments to all Cleveland plaintiffs); Appendix H (reporting \$37,000 paid by Cleveland officers).

The likelihood that an officer would have to contribute to a settlement or judgment over the course of his career is also exceedingly remote. Extrapolating from the study data, an officer employed by the NYPD has a 1 in 308 chance of contributing to a settlement during a twenty-year career.<sup>126</sup> In Cleveland, an officer has 1 in 242 chance of being required to contribute to a settlement during a twenty-year career.<sup>127</sup> And in the other jurisdictions in my study—Cook County, San Francisco, Baltimore, Phoenix, Miami, Atlanta, and Boston among them—officers are more likely to be struck by lightning than they are to contribute to a settlement or judgment in a police misconduct suit.<sup>128</sup>

Although this study focuses on the indemnification of officers in civil rights cases, my data indicates that officers are as likely—if not more likely—to be indemnified for settlements and judgments in cases that do not allege civil rights violations. Twenty-seven of the forty-four largest jurisdictions that responded to my public records requests did not limit their responses to payouts and indemnification decisions in civil rights cases, and so included cases involving employment discrimination, motor vehicle accidents, and the like. In these twenty-seven jurisdictions, no officer was required to contribute to a non-civil rights case.<sup>129</sup> Officers were responsible for contributing to settlements and

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<sup>126</sup> If thirty-five NYPD officers financially contributed to settlements and judgments during the six-year period of this study, then approximately 117 officers out of over 36,000 would contribute to settlements and judgments over a period of twenty years, which is the length of time officers typically serve before retirement or promotion. See Joseph Berger, *Still on Patrol After Two Decades, Valued but Rare*, N.Y. TIMES, Dec. 14, 2011, at A30 (noting that in New York City, “[a]ccording to the Patrolmen’s Benevolent Association, only 863 of the city’s 34,805 officers still hold the rank of police officer after 20 years,” with the vast majority of officers retiring or moving up the ranks).

<sup>127</sup> If two Cleveland Police Department officers financially contributed to settlements and judgments during the six-year period of this study, then approximately 6.67 officers out of over 1600 would contribute to settlements and judgments over a twenty-year period.

<sup>128</sup> None of the approximately 93,313 officers in the other thirty-nine larger agencies (excluding the New York City Police Department, Los Angeles Police Department, Cleveland Police Department, Illinois State Police Department, and Jacksonville Sheriff’s Office) were required to contribute to a settlement or judgment during the study period. In comparison, “[f]or an average person in the U.S., the lifetime risk is roughly one in 3000 of being struck and one in 35,000 of being killed by lightning.” Amber E. Ritenouret al., *Lightning Injury: A Review*, 34 BURNS 585, 586 (2008) (internal citation omitted).

<sup>129</sup> Three of the three to five jurisdictions that required officers to contribute in § 1983 cases—Los Angeles, Cleveland, and the Illinois State Police—are included in this group of twenty-eight jurisdictions. Although New York City did not provide information about payouts in cases not alleging civil rights violations, my research revealed a few instances in which New York police officers were required to contribute to non-civil rights cases. See E-mail from Andrea Fastenberg, Records Access Officer, N.Y.C. Law Dep’t, to author (July 12, 2013, 10:43 PDT) (on file with the *New York University Law Review*) (reporting that an individual officer contributed \$2500 to a \$52,500 settlement in *Kane v. City of New York*); Docket, *Kane v. City of New York*, No. 0402519/2006 (N.Y. Gen. Term Dec. 1, 2006) (on

judgments in less than .13% of the approximately 3074 civil rights and non-civil rights cases resolved in these twenty-seven jurisdictions during the study period, and officers contributed just .01% of the over \$296 million paid in settlements and judgments in these cases.<sup>130</sup>

Indemnification practices in the thirty-seven small and mid-sized jurisdictions in my study are consistent with practices in the larger departments.<sup>131</sup> None of the 8141 officers employed by these thirty-seven jurisdictions contributed to a settlement or judgment in any type of civil claim resolved from 2006 to 2011. Nine of the thirty-seven responding smaller departments did not know how many cases there were in which plaintiffs had recovered money or how much plaintiffs had been paid. Respondents in each jurisdiction were confident, however, that officers had not contributed. Based on available evidence, these thirty-seven departments paid at least \$9,387,611 in at least 183 cases.

Available evidence indicates that law enforcement officers are also almost always provided with defense counsel free of charge when they are sued. Many statutes appear to require governments to provide officers with legal representation for claims brought under § 1983 or conduct within the scope of officers' employment, regardless of whether the department ultimately indemnifies the officer.<sup>132</sup> And although my public records requests did not seek information about who bears the cost of defense counsel, several government employees and plaintiffs' attorneys noted in their responses that officers are

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file with the *New York University Law Review*) (categorizing the case as a "motor vehicles" case); *see also* Docket & Settlement Agreement, *Kwiatkowski v. City of New York*, No. 05-CV-01893 (E.D.N.Y., Dec. 16, 2006) (on file with the *New York University Law Review*) (employment discrimination case in which a defendant contributed \$5000 to a \$245,000 settlement). Although I do not know how often NYPD officers have contributed to non-civil rights cases during the study period, I have no reason to believe that their contributions to these types of cases are any more frequent than their contributions to § 1983 cases.

<sup>130</sup> *See* Appendix B (setting out payments and indemnification decisions in these twenty-seven jurisdictions).

<sup>131</sup> *See* Appendix E (setting out the amount paid by small and mid-sized jurisdictions); Appendix K (setting out data sources for responsive and nonresponsive small and mid-sized jurisdictions).

<sup>132</sup> *See, e.g.,* N.Y. PUB. OFF. LAW § 17 (Consol. 2005) (providing that police officers employed in New York State are entitled to a legal defense for any claim arising under 42 U.S.C. § 1983); OHIO REV. CODE ANN. § 2744.07 (West 2013) (providing that Ohio municipalities must represent officers for suits arising from acts taken in good faith and in the course and scope of their employment); LAS VEGAS POLICE POLICIES AND PROCEDURES MANUAL, § 5/105.03 (2007) (on file with the *New York University Law Review*) (providing that Las Vegas police officers have a right to representation and indemnification unless the employee "fails to submit a timely request for defense," does not cooperate in the defense, acts outside the scope of his authority, or engages in wanton or malicious conduct).

almost always represented by the city's or county's attorneys, or by attorneys hired by union representatives.<sup>133</sup>

The fact that law enforcement officers almost never contribute to settlements and judgments in lawsuits brought against them should not lead one to conclude that indemnification plays a consistent role in the litigation of police misconduct cases across these jurisdictions. Anecdotal evidence uncovered during this study suggests the opposite. In some jurisdictions, the indemnification issue is decided during the first weeks of a case; in other jurisdictions, who will satisfy the judgment remains an open question until after a jury's verdict.<sup>134</sup> In some cases, the indemnification issue is hotly contested by the parties; in other cases the issue never arises.<sup>135</sup> Some jurisdictions refuse to indemnify their officers outright but will agree to satisfy the entirety of a settlement so long as the individual officer is dismissed from the

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<sup>133</sup> See, e.g., E-mail from Joel Berger, Plaintiff's Attorney and Former N.Y.C. Law Dep't Exec., to author (Sept. 13, 2012, 18:57 PDT) (on file with the *New York University Law Review*) (explaining that the officers' union provides representation for those officers that New York City's Corporation Counsel declines to represent); E-mail from Sean W. Farrell, Assoc. Chief Legal Counsel, Mass. State Police, to author (July 30, 2012, 14:24 PDT) (on file with the *New York University Law Review*) (reporting that when a police officer is individually sued under § 1983 "he or she is statutorily entitled to be indemnified pursuant to G.L.c. [sic] 258, sec. 9A for attorney's fees and judgments up to \$1 million"); Telephone Interview with Lisa Freitag, *supra* note 98 (reporting that the Illinois Attorney General decides whether to provide representation and indemnification at the outset of the case and almost always provides both); Telephone Interview with Laura Gordon, *supra* note 95 (reporting that the policy of El Paso, Texas is to provide all officers who have been sued with representation, but never to indemnify); Telephone Interview with Howard Maltz, Chief Deputy Gen. Counsel, City of Jacksonville (July 10, 2012) (on file with the *New York University Law Review*) (reporting that officers are represented by the city or, if there is a conflict, by union lawyers to whom the city pays \$60,000 per year to provide officers with representation); Telephone Interview with Mia Obciana, *supra* note 98 (reporting that if the Honolulu Police Commission decides an officer was acting within the course and scope of his employment after receiving the complaint, the officer will receive representation and indemnification); Telephone Interview with Nicole Taub, Office of Legal Advisor, Bos. Police Dep't (June 26, 2012) (on file with the *New York University Law Review*) (reporting that City Hall is responsible for providing legal counsel for Boston Police Department officers in civil rights cases).

<sup>134</sup> For example, New Jersey and Honolulu decide whether to indemnify their officers at the beginning of the case—at the same time that they decide whether to provide the officers with representation. See Appendix I (describing indemnification decisions for the New Jersey State Police and the Honolulu Police Department). In other jurisdictions, including New York City, indemnification decisions are not made until the conclusion of litigation. See *infra* note 221 and accompanying text (describing indemnification decisions regarding New York City Police Department officers).

<sup>135</sup> For an example of a case in which the indemnification issue was hotly contested, see *infra* notes 203–08 and accompanying text (describing a case in which the Massachusetts State Police declined to indemnify an officer but the state ultimately satisfied the judgment against the officer).



case.<sup>136</sup> Other jurisdictions appear to have no qualms about writing a check on an officer's behalf.

This Article does not systematically explore these differences, although they are likely meaningful. Variation in government indemnification practices—and other variations across jurisdictions in judges' application of qualified immunity and other doctrines, the strength of the plaintiffs' bar, city attorney practices, and community norms<sup>137</sup>—may well impact whether cases are filed, how plaintiffs' lawyers frame their clients' claims, the frequency with which plaintiffs recover, and the amount plaintiffs receive. Future research should examine these distinctions to better understand regional variations in civil rights litigation practice and the extent to which § 1983 doctrine achieves its deterrence and compensation goals in different parts of the country. This Article, however, focuses primarily on indemnification outcomes. Despite any variation in the litigation of police misconduct suits, there is almost no variation in who ultimately pays.

### C. *Indemnification of Punitive Damages Awards*

Although civil rights doctrine and most scholarship considering the question assume that individual officers are personally responsible for punitive damages, no officer in my study actually satisfied a punitive damages award entered against him. Among the eighty-one responsive jurisdictions, there were twenty § 1983 police misconduct cases in which a jury awarded punitive damages against one or more defendants.<sup>138</sup> Juries awarded a total of \$9,312,422 in punitive dam-

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<sup>136</sup> See, e.g., Telephone Interview with Ursula Richardson, Assistant City Attorney, City of Tampa (July 31, 2012) (reporting that when Tampa settles cases it will ask that the individual officer be dismissed so that the settlement is with the city); E-mail from Richard C. Smith, Litig. Div. Head, Mun. Counselor's Office, City of Okla. City (July 17, 2012, 05:58 PDT) (on file with the *New York University Law Review*) (describing Oklahoma City's practice of requiring that individual defendants be dismissed before the city will pay a judgment); Telephone Interview with Nicole Taub, *supra* note 133 (reporting that, when a case is settled in Boston, the individual officer is generally dismissed from the case and the city will then satisfy the settlement).

<sup>137</sup> Compare Telephone Interview with Sam Snoddy, Plaintiff's Attorney (July 12, 2013) (on file with the *New York University Law Review*) (reporting that many lawyers in El Paso, Texas, will not take police misconduct claims because federal district court judges and the Fifth Circuit are so hostile to the cases, that officers sued in state court are not going to be indemnified, and that the only cases worth taking are those in which the plaintiff has a clean background and in which there are outrageous facts), with Telephone Interview with Kim E. Richman, Plaintiff's Attorney (Mar. 11, 2013) (on file with the *New York University Law Review*) (reporting that police misconduct litigation in New York is a "volume practice" and that the City pays on average between \$5000 and \$15,000 for a night in jail depending on the circumstances of the case).

<sup>138</sup> I am aware of one employment discrimination case from the responsive jurisdictions in which punitive damages were awarded. See E-mail from Kevin Gillen, Yellowstone Cnty. Attorney, Civil Div., to author (Nov. 14, 2013, 11:39 PST) (on file with the *New York*

ages in these twenty cases; trial and appellate courts reduced several of these judgments such that the total upheld in punitive damages was \$3,991,900. Of the over \$3.9 million in punitive damages judgments entered in those twenty cases, just one officer—an employee of the Los Angeles Police Department—was required to pay a punitive damages award, and that award totaled \$300.<sup>139</sup>

As I describe in Part II.D, in some instances jurisdictions satisfied punitive damages awards directly. In other instances, the parties entered into settlements after the punitive damages verdicts were rendered and, in some cases, affirmed (in whole or part) on appeal.<sup>140</sup> But, regardless of the precise manner in which jurisdictions resolved cases in which punitive damages were awarded, officers were responsible for paying just .008% of the punitive damages awards upheld during this six-year period. Moreover, for reasons I describe in Part II.F, the one Los Angeles Police Department officer not indemnified has never paid the \$300 punitive damages judgment entered against him.<sup>141</sup> So, in eighty-one jurisdictions, over a six-year period, no officer paid a nickel to satisfy punitive damages awards in § 1983 cases.

#### D. *The Practical Irrelevance of Indemnification Prohibitions*

Indemnification policies vary widely: Some jurisdictions are statutorily committed to indemnifying officers for suits arising out of their employment, some limit indemnification to cases in which the officer was not acting maliciously or in violation of policy, and one jurisdiction in my study prohibits indemnification under any circumstance.<sup>142</sup> Jurisdictions also vary in their policies regarding punitive damages: Some prohibit indemnification of punitive damages; some prohibit indemnification if an officer's conduct was "wanton or malicious" or "intentional . . . or reckless[ ]," which are standards sufficient for punitive damages awards; and some allow indemnification of punitive

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*University Law Review*) (reporting one \$145,000 punitive damages judgment against three members of the Yellowstone County Sheriff's Office in favor of three employee plaintiffs who had brought employment discrimination and retaliation claims against their supervisors and employer). Note that the defendants did not contribute to the satisfaction of this jury award. *See id.* I am aware of no other non-civil rights case in which punitive damages were awarded in the responsive jurisdictions during the study period.

<sup>139</sup> *See* Appendix F (setting out the punitive damages awards against officers in civil rights cases in the eighty-one jurisdictions studied).

<sup>140</sup> *See infra* Part II.D.2 (describing these practices in more detail).

<sup>141</sup> *See infra* notes 197–202 and accompanying text (describing the case in which a Los Angeles Police Department officer was not indemnified for a \$300 punitive damages judgment).

<sup>142</sup> *See supra* notes 93–99 and accompanying text (describing variation in indemnification statutes and policies across jurisdictions in my study).

damages awards under limited circumstances.<sup>143</sup> Some scholars have concluded that indemnification is uncertain based on these statutory and policy variations.<sup>144</sup> My data shows that this conclusion, while reasonable, is wrong. Despite the wide variation in indemnification statutes, there is little variation in outcome—officers almost never pay.

On its own, the public records response data I collected offers scant information about *how* it is that officers almost never personally satisfy settlements and judgments in police misconduct suits—particularly in jurisdictions that seemingly prohibit indemnification. Accordingly, I endeavored to learn more about indemnification practices in the jurisdictions that responded to my records requests. Although I do not have comprehensive information about how jurisdictions with statutory limitations on officer indemnification nevertheless indemnify most or all of their officers, I did learn of instances in which government attorneys crafted settlements that they believed sidestepped indemnification prohibitions, and of instances in which governments indemnified officers in violation of governing law.

### 1. *Settlement in Lieu of Indemnification*

Only one jurisdiction in my study—El Paso, Texas—reported a practice of never indemnifying police officers.<sup>145</sup> Yet no El Paso officer personally satisfied settlements or judgments against him during the study period.<sup>146</sup> The city of El Paso did, however, pay \$279,000 to settle sixteen civil rights cases against its officers between 2006 and 2011. The deputy city attorney in El Paso explained that, because the city is responsible for paying officers' attorneys' fees, it sometimes settles claims against officers because it would be less expensive to pay a small settlement than to continue to pay for the defense of the case.<sup>147</sup> From the deputy city attorney's perspective, paying a settlement on behalf of an officer to avoid the cost of further litigation should not be understood as equivalent to indemnifying that officer.<sup>148</sup>

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<sup>143</sup> N.Y. GEN. MUN. LAW § 50-k(3) (McKinney 2007); *see also supra* note 97 and accompanying text (describing variations in indemnification statutes regarding punitive damages across jurisdictions in my study).

<sup>144</sup> *See supra* notes 74–76 and accompanying text.

<sup>145</sup> Telephone Interview with Laura Gordon, *supra* note 95.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *See id.*

## 2. *Indemnification of Punitive Damages After Trial*

Twenty times between 2006 and 2011, juries awarded punitive damages in § 1983 cases brought against officers employed by the New York City Police Department, the Los Angeles Police Department, the Los Angeles Sheriff's Department, the California Highway Patrol, the Las Vegas Metropolitan Police Department, the San Bernardino Sheriff's Department, the Prince George's County Police Department, the Oklahoma City Police Department, and the Albuquerque Police Department. In nineteen of those twenty cases, individual officers were not required to satisfy the punitive damages awards entered against them.

California allows indemnification of punitive damages if the “governing body of that public entity” finds that “[p]ayment . . . would be in the best interests of the public entity.”<sup>149</sup> Presumably, the indemnification of punitive damages awards entered against employees of the Los Angeles Sheriff's Department, the California Highway Patrol, and the San Bernardino Sheriff's Department were justified under this provision.<sup>150</sup> Albuquerque requires indemnification of its officers for punitive damages if the officer is found to be acting within the course and scope of his employment.<sup>151</sup> The Albuquerque Police Department's decision to settle a case after the jury awarded \$873,500 in punitive damages against an officer was presumably considered consistent with the governing indemnification provision.<sup>152</sup>

But four jurisdictions in which punitive damages were awarded—Las Vegas, New York, Oklahoma City, and Prince George's County—appear to prohibit indemnification of punitive damages. Laws governing Prince George's County<sup>153</sup> and Oklahoma City<sup>154</sup> explicitly

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<sup>149</sup> CAL. GOV'T CODE § 825(b) (West 2012).

<sup>150</sup> Note that, in some instances, instead of satisfying the punitive damages judgment directly, the case was settled after trial or appeal. *See, e.g.*, E-mail from Kim Hunter, Gen. Counsel, Dep't of the Cal. Highway Patrol, to author (Apr. 22, 2013, 15:21 PDT) (on file with the *New York University Law Review*) (reporting that, after the court of appeals affirmed the \$55,000 punitive damages judgment entered against two California Highway Patrol officers, the parties went into mediation and settled the case for \$2 million—with the officers paying nothing).

<sup>151</sup> *See* N.M. STAT. ANN. § 41-4-4.C (2013) (“A governmental entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico . . . if the public employee was acting within the scope of his duty.”).

<sup>152</sup> For additional information about this case, see *infra* notes 181–86 and accompanying text.

<sup>153</sup> *See* Letter from Jamar B. Herry, to author, *supra* note 96, at 2 (attaching Prince George's County risk management policy stating that “[a]ll payments and settlements for liability claims shall be limited to compensatory damages”).

prohibit indemnification of punitive damages. Las Vegas prohibits indemnification when “the employee’s actions . . . [are] wanton and malicious”<sup>155</sup> and New York City law provides that indemnification “shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee”<sup>156</sup>—definitions that would, presumably, be satisfied by a jury’s finding that punitive damages were appropriate.<sup>157</sup>

Despite these prohibitions, officers in these four jurisdictions avoided satisfying punitive damages judgments entered against them. How can this be so? Some jurisdictions appear to have indemnified officers in violation of governing law. Although Prince George’s County prohibits the indemnification of punitive damages awards, the county indemnified a \$50,000 punitive damages judgment entered against one of its officers.<sup>158</sup> Juries have awarded punitive damages against New York City Police Department officers six times between 2006 and 2011, with punitive damages awards totaling over \$2.8 million.<sup>159</sup> Although New York City cannot legally indemnify employees for damages arising from intentional or reckless conduct, it did not require its officers to satisfy the punitive damages awarded in these six cases.<sup>160</sup>

Jurisdictions may sidestep prohibitions against indemnification of punitive damages by vacating the punitive damages verdict as part of a post-trial settlement. One such example can be found in Las Vegas. A plaintiff, alleging excessive force by Las Vegas police officers, won a jury verdict of \$175,000 in compensatory damages and \$5000 in puni-

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<sup>154</sup> See OKLA. STAT. tit. 51, § 162.D (2011) (“The state or a political subdivision shall not, under any circumstances, be responsible to pay or indemnify any employee for any punitive or exemplary damages rendered against the employee.”).

<sup>155</sup> Letter from Charlotte M. Bible, Assistant Gen. Counsel, Las Vegas Metro. Police Dep’t, to author (Oct. 9, 2012) (on file with the *New York University Law Review*) (providing the Las Vegas Metropolitan Police Department’s official indemnification policy).

<sup>156</sup> N.Y. GEN. MUN. LAW § 50-k(3) (McKinney 2007).

<sup>157</sup> In *Smith v. Wade*, 461 U.S. 30, 51 (1983), the Supreme Court held that punitive damages could be awarded against a defendant in a § 1983 case if the plaintiff proved that the defendant acted with “reckless or callous disregard for the plaintiff’s rights” or intentionally violated the law.

<sup>158</sup> See Prince George’s Cnty. v. Longtin, 988 A.2d 20, 26–27 (2010) (affirming a modified judgment of \$50,000 in punitive damages); E-mail from Jamar B. Herry, Legal Advisor, Prince George’s Cnty. Police Dep’t, to author (May 9, 2013, 6:36 PDT) (on file with the *New York University Law Review*) (“Prince George’s County did indemnify the officer in Prince George’s County Maryland v. Longtin, 190 Md. App. 97 (2010).”).

<sup>159</sup> See Appendix F.

<sup>160</sup> In three cases, the city directly satisfied the punitive damages judgments; in the other three cases, the parties vacated the punitive damages judgment as part of a post-trial settlement. The details of these cases are set out in Appendix I, in the source data for the New York City Police Department.

tive damages against one officer.<sup>161</sup> After the compensatory and punitive damages verdicts were affirmed on appeal, the case was remanded to the district court to enter judgment.<sup>162</sup> Two months later, the parties settled the case for \$400,000.<sup>163</sup> The entirety of the settlement was paid by Las Vegas.<sup>164</sup>

The Oklahoma City Office of the Municipal Counsel reported a similar incident. One case resolved between 2006 and 2011 resulted in a jury verdict against two officers for \$22,000 in compensatory damages and \$2000 in punitive damages, along with an award of \$79,223.78 for attorneys' fees.<sup>165</sup> The office's litigation division head wrote:

The officers filed a claim for indemnification under 51 O.S. § 162(B). Because it is arguable under Oklahoma law that a municipality cannot indemnify any employee in which punitive damages are awarded (because they would not be acting in good faith), the parties agreed to vacate the Judgment against the officers; the City and the plaintiffs agreed to vacate the City's award of summary judgment, and the plaintiffs agreed to dismiss any claim for punitive damages in exchange for an entry of Judgment against the City in the amount of \$101,223.78.<sup>166</sup>

It also violates Ohio law for political subdivisions to indemnify employees for punitive damages.<sup>167</sup> An assistant Columbus city attorney, responding to my request for public records, reported that there was one instance, approximately twenty years ago, when a case went to trial and the jury returned a punitive damages verdict against the officer. Yet the officer did not pay this judgment. The attorney wrote: "Every one in the City Attorney's Office felt it was completely unwarranted and we settled the case as a claim while the matter was being appealed, since we cannot, by law, pay a judgment for punitive damages."<sup>168</sup>

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<sup>161</sup> Tortu v. Las Vegas Metro. Police Dep't, 556 F.3d 1075, 1080 (9th Cir. 2009).

<sup>162</sup> *Id.* at 1087.

<sup>163</sup> See Letter from Charlotte M. Bible, Assistant Gen. Counsel, Las Vegas Metro. Police Dep't, to author (Sept. 13, 2012) (on file with the *New York University Law Review*) (reporting a \$400,000 settlement paid by Las Vegas to Christopher Tortu on May 7, 2009).

<sup>164</sup> *Id.* (reporting that Las Vegas has not declined to indemnify an employee).

<sup>165</sup> Letter from Richard C. Smith, Litig. Div. Head, Mun. Counselor's Office, City of Okla. City, to author, at 2 (July 13, 2012) (on file with the *New York University Law Review*) (providing case information).

<sup>166</sup> *Id.* at 3.

<sup>167</sup> OHIO REV. CODE ANN. § 2744.07(2) (West 2006).

<sup>168</sup> Letter from Glenn B. Redick, Chief Litig. Attorney, City Attorney's Office, Columbus, Ohio, to author at 2 (June 20, 2012) (on file with the *New York University Law Review*).

*E. Indemnification of Officers Disciplined, Terminated, and Prosecuted*

Some scholars have hypothesized that indemnification, even if widespread, would likely be denied to officers who are disciplined or terminated by their department or criminally prosecuted.<sup>169</sup> There are several instances in my study in which officers who were disciplined or fired by their agency or criminally prosecuted were also required to contribute to settlements.<sup>170</sup> Yet available evidence suggests that many officers who engage in egregious misconduct do not contribute to settlements and judgments—even if they are disciplined or terminated by their department, criminally prosecuted, or even imprisoned. There are several high-profile cases between 2006 and 2011 in which officers were disciplined, terminated, or criminally prosecuted, but paid nothing toward the settlements of civil rights lawsuits brought against them.

Take, for example, the civil case brought by sixteen-year-old Juan Vasquez, who was beaten after being chased by three Denver police officers. An officer stomped on the boy's back while using a fence for leverage, breaking his ribs and causing him to suffer kidney damage and a lacerated liver. Three officers were fired and one was criminally charged with—though acquitted of—first-degree felony assault.<sup>171</sup> The City of Denver paid \$885,000 to settle Vasquez's civil suit.<sup>172</sup> No officer contributed to the settlement.<sup>173</sup>

Another example concerns the case brought by the estate of Kathryn Johnston, a 92-year-old Atlanta woman who was shot and killed by Atlanta police officers after they illegally raided her home.<sup>174</sup>

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<sup>169</sup> See *supra* note 77 and accompanying text (describing the hypothesis that officers terminated, disciplined, or criminally prosecuted will not be indemnified).

<sup>170</sup> See, e.g., Appendix H (describing cases of nonindemnification, including several in which officers are known to have been disciplined or criminally punished); see also *infra* notes 203–20 (describing cases in which the Massachusetts State Police and the Los Angeles Sheriff's Department have declined to indemnify officers who were criminally punished and disciplined or fired by their employers).

<sup>171</sup> Christopher N. Osher, *LaCabe Fires 3 Officers in Stomping of Teen: As Denver's Safety Manager Retires, He Is Assailed for the Dismissals by the President of the Police Union*, DENVER POST, July 1, 2010, at A1.

<sup>172</sup> *Three Denver Cops Fired for Excessive Force Against Hispanic Teen*, EXAMINER.COM (June 30, 2010), <http://www.examiner.com/article/three-denver-cops-fired-for-excessive-force-against-hispanic-teen> (reporting that Denver paid \$885,000 to settle the lawsuit in late 2008).

<sup>173</sup> E-mail from David V. Cooke, Assistant Dir. of Litig., Denver Dep't of Law, to author (Oct. 9, 2012, 19:54 PDT) (on file with the *New York University Law Review*) (stating that it is his understanding that officers were indemnified for all of the settlements and judgments paid between September 2008 and December 2011).

<sup>174</sup> Shaila Dewan & Brenda Goodman, *Prosecutors Say Corruption in Atlanta Police Department Is Widespread*, N.Y. TIMES, Apr. 27, 2007, at A18.

Officers involved in the shooting later admitted that they planted marijuana in Johnston's home after her death and submitted as evidence cocaine that they falsely alleged had been purchased at her home.<sup>175</sup> Three officers pleaded guilty to offenses related to the shooting and coverup.<sup>176</sup> They were sentenced to between five and ten years in federal prison and were ordered to pay \$8180 restitution—the cost to bury Johnston.<sup>177</sup> Another nine officers were fired or disciplined, or resigned, following the incident.<sup>178</sup> The City of Atlanta paid \$4.9 million to settle the civil suit brought by Johnston's estate.<sup>179</sup> No officers contributed to the settlement.<sup>180</sup>

A final example concerns the civil case brought by Cynthia Seeley against Albuquerque police officer Christopher Chase. Chase responded to a call for assistance at the apartment of Cynthia Seeley's girlfriend following a domestic dispute, and then raped Seeley in his patrol car.<sup>181</sup> Chase was criminally indicted for sexually assaulting Seeley; he was additionally charged with sexually assaulting four other women and girls, physically abusing two additional women, and kidnapping or falsely imprisoning five men and boys.<sup>182</sup> Chase was fired from his job and sentenced to fifteen years in prison.<sup>183</sup> In Seeley's civil case, a jury awarded her \$69,880 in compensatory damages and \$873,500 in punitive damages against Chase.<sup>184</sup> The case settled after trial for \$1,000,000.<sup>185</sup> Chase did not contribute to the settlement.<sup>186</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Bill Rankin, *Ex-Cops Get 5–10 Years for Drug Raid: Judge Agrees Atlanta Police Quotas Influenced Officers*, ATLANTA JOURNAL-CONSTITUTION, Feb. 25, 2009, at C1.

<sup>178</sup> Ernie Suggs, *Firings End Botched Raid Case*, ATLANTA JOURNAL-CONSTITUTION, June 10, 2010, at A1.

<sup>179</sup> *City of Atlanta and Kathryn Johnston's Family Settle Wrongful Death Lawsuit for \$4.9 Million*, 11 ALIVE (Aug. 17, 2010, 11:41 PM), <http://www.11alive.com/news/local/story.aspx?storyid=150325>.

<sup>180</sup> See E-mail from Kristen Denius, Assistant City Attorney, City of Atlanta, to Brian Cardile, Student, UCLA School of Law (Feb. 1, 2013, 13:20 PST) (on file with the *New York University Law Review*) (“I am not aware of any circumstances in the period covered by this report in which individual officers contributed to any payment of claims or damage awards.”); E-mail from Kristen Denius, Assistant City Attorney, City of Atlanta, to author (Jan. 13, 2014, 08:40 PST) (on file with the *New York University Law Review*) (confirming that officers did not contribute to the Johnston settlement).

<sup>181</sup> Seeley v. Chase, 443 F.3d 1290, 1292 (10th Cir. 2006).

<sup>182</sup> *Id.*

<sup>183</sup> Joline Gutierrez Krueger, *Ex-APD Officer Gets 15 Years in Prison*, ALBUQUERQUE TRIB., Mar. 30, 2006, at A2.

<sup>184</sup> Seeley, 443 F.3d at 1292 (describing the jury's verdict).

<sup>185</sup> See Letter from Roberta Duran, Fiscal Officer, Legal Dep't Records Custodian, Office of the City Attorney, City of Albuquerque, to author, at 4 (July 2, 2012) (on file with the *New York University Law Review*) (appending spreadsheet of cases closed between 2001 and 2011 and their settlement or judgment amounts).



Many more officers were likely disciplined, terminated, or criminally prosecuted—yet still indemnified—during my study’s six-year period. Although evidence of criminal prosecutions of police officers is hard to come by, the Cato Institute’s National Police Misconduct Reporting Project has been tracking civilian complaints of police misconduct and resulting prosecutions. The Project tracked over 8300 “credible reports involving allegations of police misconduct” across the country, involving nearly 11,000 officers, from April 2009 to December 2010.<sup>187</sup> During those twenty-one months, the Project reports, criminal charges were brought against 3238 officers related to these charges of police misconduct, and 1063 were convicted.<sup>188</sup> Based on these figures, there may have been approximately 11,100 criminal prosecutions with a third ending in convictions across the country during the six-year period of my study. If the jurisdictions in my study—which employ approximately 20% of the officers in the country—employed 20% of the officers criminally charged and convicted, there may have been approximately 2220 prosecutions with one-third ending in convictions in these jurisdictions during the study period.

These figures are, admittedly, very rough estimations. There may well have been many instances in which officers were criminally prosecuted but no civil suit was filed. Nevertheless, these figures suggest that over 2000 officers may have been criminally charged in the jurisdictions in my study between 2006 and 2011. Even if every officer who contributed to settlements and judgments in my study were among the approximately 2200 officers criminally prosecuted—and there is no reason to believe this is so—only approximately 1.6% of the officers estimated to have been charged in these jurisdictions would have contributed to settlements in civil suits.

#### *F. Exceptions to the Rule*

Officers are almost always indemnified, despite differences in indemnification statutes and, in some instances, prohibitions on indemnification. Officers are virtually always indemnified even if they have been disciplined, terminated, or criminally prosecuted as a result

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<sup>186</sup> See Telephone Interview with Kathryn Levy, Deputy City Attorney, City of Albuquerque (June 13, 2013) (reporting that the applicable indemnification statute does not clearly obligate Albuquerque to indemnify for punitive damages but that they have considered each award on a case-by-case basis and have not had an instance in which they declined to indemnify a punitive damages award).

<sup>187</sup> See David Packman, *The Problem with Prosecuting Police in Washington State*, CATO INST. (Feb. 27, 2011, 12:55 AM), <http://www.policemisconduct.net/the-problem-with-prosecuting-police-in-washington-state/>.

<sup>188</sup> *Id.*

of their conduct. Yet, there are between thirty-seven and thirty-nine cases—in New York City, Cleveland, Los Angeles, and, possibly, Jacksonville and Illinois—in which officers have been required to contribute to settlements and judgments entered against them. This Part examines those cases.

In five of the thirty-seven to thirty-nine cases, officers allegedly engaged in misconduct while off duty. I have kept these cases in the data set, however, because the officers appear to have asserted their law enforcement authority in some manner during the engagement.<sup>189</sup> In seven of the thirty-seven to thirty-nine cases, officers were alleged to have engaged in sexual misconduct.<sup>190</sup> Four cases involved allegations of abuse of process (discouraging the plaintiff from filing a civilian complaint, coercing a false affidavit from another officer, and fabricating evidence against the plaintiff). Twenty-three of the cases involved more typical § 1983 claims, including false arrest, unreasonable search, and excessive force. I have no details about the facts of two of the cases.

Just one officer—who was off duty when his dog attacked the plaintiff—was personally responsible for satisfying a settlement in full, totaling \$16,500, after all claims against the city and other defendant-officers were dismissed.<sup>191</sup> The other thirty-eight to forty officers<sup>192</sup> were required to contribute between \$250 and \$25,000 to larger settlements and judgments. As Figure 1 illustrates, ten officers were required to contribute \$1000; nine officers were required to contribute \$5000; four officers were required to contribute \$500; three officers were required to contribute \$2500; two officers were required to contribute \$250; and the remaining officers were required to contribute between \$300 and \$25,000 toward settlements and judgments.<sup>193</sup> The

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<sup>189</sup> See *supra* note 104 and Appendix H for a description of the details of these cases.

<sup>190</sup> In two of these cases, *Baird* and *Oliveras*, the officers were also off duty. See Appendix H for additional details about these cases.

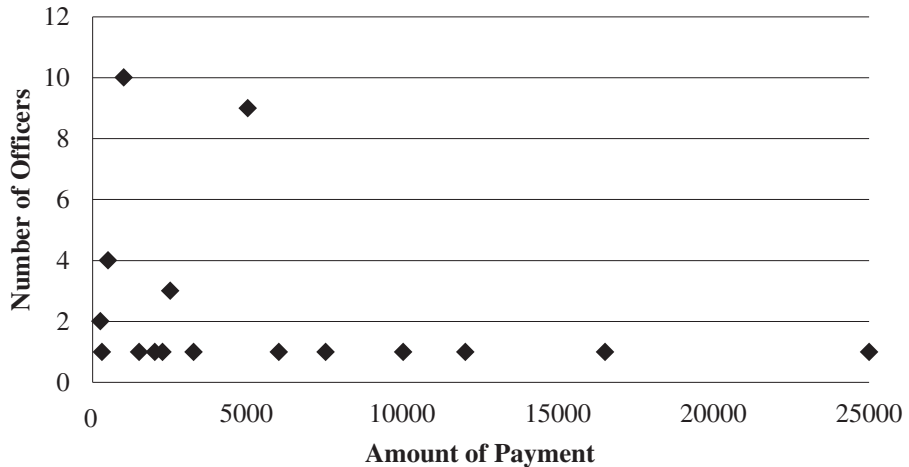
<sup>191</sup> See *McNamara v. City of New York*, No. 06-CV-5585, 2009 WL 735135, at \*7–8 (S.D.N.Y. Mar. 20, 2009) (dismissing all claims against New York City and other defendant-officers).

<sup>192</sup> Thirty-five New York City Police Department officers were required to contribute to a total of thirty-four cases. Two officers contributed to settlements in two of those cases—*Wells* and *Sellers*—but one of the officers, who contributed to the settlement in *Sellers*, was also required to contribute to the settlement in *Lipka*. In the remaining three-to-five cases from the other two-to-four jurisdictions, only one officer was required to contribute per case.

<sup>193</sup> Figure 1 does not include the two possibly relevant cases from Jacksonville and Illinois, as there is no definitive information about the amount contributed by officers in either case. In addition, although officers were “required to contribute” these amounts, I do not have proof that these contributions were ever made, and, in at least one case, I have proof that the officer did not satisfy the punitive damages judgment for which he was personally responsible. See *infra* notes 196–201.

median contribution was \$5000 for officers alleged to have engaged in misconduct while off-duty; \$3750 for officers alleged to have engaged in sexual misconduct; \$1625 for those alleged to have abused process; and \$1000 for officers named as defendants in cases alleging false arrest, unreasonable search, and excessive force.

FIGURE 1  
DISTRIBUTION OF OFFICER PAYMENTS



The indemnification policies in effect in these jurisdictions cannot explain why these jurisdictions, but not others, have required officers to contribute: Ohio law appears to require municipalities to indemnify their officers for all actions taken in good faith and within the course and scope of their employment,<sup>194</sup> yet Cleveland police officers were required to contribute to settlements and judgments proportionally more often than any other jurisdiction in my study. New York’s statute is more limited, entitling officers to indemnification only when their actions were in the course and scope of employment, did not violate any department rule or regulation, and did not involve intentional wrongdoing or recklessness.<sup>195</sup> Yet, even with these limitations, New York has paid all but .03% of the dollars spent in settlements and judgments during my study period. Other jurisdictions, with similarly restrictive indemnification provisions, completely indemnified all of their officers during the study period.

Officials in this small handful of jurisdictions did not comment about why they required officers to contribute to settlements in police

<sup>194</sup> See *supra* note 93 (describing the Ohio indemnification statute).

<sup>195</sup> N.Y. GEN. MUN. LAW § 50-k (McKinney 2013).

misconduct suits, nor did they explain why these officers (but not others) were required to contribute. It may be that officials in the Cleveland Police Department and the New York Police Department—and possibly the Jacksonville Sheriff’s Office and the Illinois State Police—required officers to contribute to settlements as some form of punishment. Consistent with this hypothesis, plaintiffs’ attorneys practicing in New York report that when the New York City Police Department’s Internal Affairs Bureau or Civilian Complaint Review Board substantiates an allegation of misconduct, the City’s Comptroller (who approves settlements) pushes for a contribution from the officer in order to punish the officer and send a message to others.<sup>196</sup>

The decision by the City of Los Angeles not to indemnify its officer for a \$300 punitive damages judgment does not appear to have been a form of punishment; instead, it appears the denial was a matter of administrative convenience. In the case, the plaintiff alleged that a Los Angeles police officer handcuffed her too tightly and refused to loosen the cuffs, causing nerve damage.<sup>197</sup> The jury returned a verdict of \$160,000 in compensatory damages and \$300 in punitive damages.<sup>198</sup> The city paid the \$160,000 award, and attorneys’ fees, but did not indemnify the officer for the \$300 in punitive damages.<sup>199</sup> The defense attorney in the case reportedly asked plaintiff’s counsel to agree to dismiss the punitive damages judgment, stating that he did not want to have to petition city council to have punitive damages paid by the city.<sup>200</sup> Plaintiff’s counsel replied that he would agree to dismiss the punitive damages judgment if the Los Angeles Police Department agreed to implement better training regarding hand-

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<sup>196</sup> See E-mail from Joel Berger, Plaintiff’s Attorney and Former N.Y.C. Law Dep’t Exec., to author (Sept. 27, 2012, 16:16 PDT) (on file with the *New York University Law Review*) (noting that there have been some cases in which “the City didn’t represent the officer,” but “it settled on behalf of the City, and the officer whom it didn’t represent had to kick in some nominal amount as part of the final settlement,” and adding, “in my day [as a New York City Law Department executive from 1988–1996], the Comptroller’s office (Holtzman, then Hevesi) occasionally would insist on such an arrangement as a precondition to approving the City’s share of the settlement, the Law Department would resist, but in the end the Comptroller’s office would prevail because the Law Department can’t settle without the Comptroller’s approval”); Telephone Interview with Brett Klein, Plaintiff’s Attorney (July 16, 2013) (reporting that the current comptroller also pushes for contributions from officers against whom charges of misconduct have been substantiated).

<sup>197</sup> *Taylor-Ewing v. City of Los Angeles*, No. 07-CV-05556, 2010 WL 6344200 (C.D. Cal. 2012).

<sup>198</sup> *Id.*

<sup>199</sup> See Telephone Interview with V. James DeSimone, Plaintiff’s Attorney (Apr. 25, 2013) (describing DeSimone’s failed efforts to get the city to pay the punitive damages award).

<sup>200</sup> *Id.*

cuffing arrestees.<sup>201</sup> Defense counsel would not agree to this condition, but never petitioned the city council to indemnify the officer for the punitive damages judgment. Plaintiff's counsel reported that he never sought to collect the \$300.<sup>202</sup>

There is one additional case resolved during the study period in which a law enforcement agency made the formal decision to deny an officer's request for indemnification; notably, though, the officer did not ultimately contribute to the settlement in the case. David Oxner, an off-duty Massachusetts State Police officer, assaulted Mark Maimaron in a parking lot outside a bar.<sup>203</sup> Maimaron sued Oxner and the Massachusetts State Police. The Commonwealth of Massachusetts refused to indemnify Oxner, who had pleaded guilty to assaulting Maimaron, was found guilty of numerous administrative violations, and was suspended without pay for four months.<sup>204</sup> The Commonwealth settled all of Maimaron's claims (except those against Oxner) for \$55,000; then, in binding arbitration between Maimaron and Oxner, Maimaron was awarded over \$400,000 in damages and attorneys' fees.<sup>205</sup> After the arbitration, Oxner assigned his right to seek indemnification from the Massachusetts State Police to Maimaron in exchange for a release from the arbitration award.<sup>206</sup> Maimaron then sued the Commonwealth to recover the arbitration award and his attorneys' fees.<sup>207</sup> Ultimately, the case settled for \$580,000; the Commonwealth satisfied the settlement in full.<sup>208</sup>

In the private law context, scholars have observed that plaintiffs and uninsured or underinsured defendants may work together to target the defendants with the deepest pockets.<sup>209</sup> *Maimaron v. Oxner* offers isolated evidence of this same litigation dynamic in the civil

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<sup>201</sup> *Id.*

<sup>202</sup> *See id.* (“[T]hat issue got dropped . . .”).

<sup>203</sup> Defendant-Appellant's Brief at 7, *Maimaron v. Commonwealth*, 865 N.E.2d 1098 (Mass. May 3, 2006) (No. SJC-09728) (on file with the *New York University Law Review*).

<sup>204</sup> *Id.* at 10–11.

<sup>205</sup> *Id.* at 2–3.

<sup>206</sup> *Id.* at 3.

<sup>207</sup> *Id.* at 4.

<sup>208</sup> *See* E-mail from Sean W. Farrell, Assoc. Chief Legal Counsel, Mass. State Police, to author (Aug. 26, 2013, 08:47 PDT) (on file with the *New York University Law Review*) (reporting that the case settled after the Massachusetts Supreme Court ruled that the Department “should have sought declaratory judgment before denying the indemnification request”); E-mail from Max D. Stern, Plaintiff's Attorney, to author (Aug. 25, 2013, 14:59 PDT) (on file with the *New York University Law Review*) (confirming that Oxner did not contribute to the settlement).

<sup>209</sup> *See, e.g.,* Tom Baker, *Transforming Punishment Into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211, 222 (“The plaintiff's lawyer is not unassisted in constructing the case to target the best coverage or the deepest pocket. The uninsured (or underinsured) defendant helps out.”).

rights context: When the Commonwealth of Massachusetts denied its officer indemnification, the plaintiff and the unindemnified defendant worked together to ensure the deep-pocketed Commonwealth remained responsible for compensating the plaintiff.

A final, important exception to common practice concerns Los Angeles County. The Los Angeles County Sheriff's Department historically indemnified its deputies.<sup>210</sup> Seven or eight years ago, the Department's risk manager began agitating against "blanket indemnification."<sup>211</sup> In recent years, the county board of commissioners declined to indemnify four officers for verdicts entered in two cases. Although these cases were still pending at the end of 2011—and, therefore, do not fall within the study period—they merit discussion because they deviate significantly from the norm.

In one case, three L.A. County Sheriff's deputies were sued for assaulting an inmate at the L.A. County Jail.<sup>212</sup> The jury awarded the plaintiff \$255,000 in compensatory damages and \$150,000 in punitive damages—\$50,000 against each of the three deputies.<sup>213</sup> The County of Los Angeles did not indemnify the three deputies for any of the compensatory and punitive damages judgments, nor did they indemnify the deputies for the attorneys' fees awarded to plaintiffs.<sup>214</sup> The defendants in the case have sued the County of Los Angeles for violating the terms of its defense and representation agreement. The sheriff's deputies contend that they were denied indemnification because they declined to testify at trial for fear that their testimony could be used against them in a criminal prosecution.<sup>215</sup>

The case is scheduled to go to trial in December 2014.<sup>216</sup> Unlike other indemnification denials, these three deputies would be denied indemnification for the entirety of the judgment and attorneys' fees if the county's decision is upheld. The amount at stake is also more than the total amount that officers across all eighty-one jurisdictions were required to pay during the study period.

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<sup>210</sup> See Telephone Interview with Captain Shaun Mathers, Risk Manager, Los Angeles Sheriff's Department (Apr. 23, 2013) (explaining that the Department was "indemnifying everyone" until a few years ago).

<sup>211</sup> *Id.*

<sup>212</sup> See Robert Faturechi, *Inmate Wins \$405,000 in Jail Attack; A Federal Jury Finds He Was Pepper-Sprayed by Three L.A. County Sheriff's Deputies*, L.A. TIMES, Sept. 10, 2010, at AA4 (describing the facts of the case); Verdict and Settlement Summary, *Franco v. Gennaco*, No. 09-cv-00893, 2010 WL 4079740 (C.D. Cal. 2010) (describing the jury's verdict).

<sup>213</sup> Verdict and Settlement Summary, *supra* note 212.

<sup>214</sup> Telephone Interview with Arnolando Casillas, Plaintiff's Attorney (Apr. 23, 2013).

<sup>215</sup> *Id.*

<sup>216</sup> Docket in *Chang v. Cnty. of Los Angeles*, No. BC479858 (Cal. Super. Ct. May 13, 2013) (on file with the *New York University Law Review*).

In a second case, also brought by a jail inmate against the County of Los Angeles and its Sheriff's deputies, the plaintiff accused ten deputies of assaulting him four times over the course of three days. The jury found four defendants liable and awarded the plaintiff \$365,001 in compensatory and punitive damages.<sup>217</sup> Included in this award was a \$150,000 punitive damages award against one deputy, Gabriel Gonzalez, who was in prison for an unrelated charge at the time of the jury verdict.<sup>218</sup> The County paid the \$100,000 compensatory damages award against Gonzalez and the compensatory and punitive damages awards against the other three deputies. But it represented to the district court judge that it would not indemnify Gonzalez for his punitive damages award because, "in the County's view, he [was] in prison and [was] judgment proof."<sup>219</sup> The district court dismissed the plaintiff's suit against the county challenging its decision to deny Gonzalez indemnification on the punitive damages judgment.<sup>220</sup>

Based on these two cases, both pending at the end of the study period, it is too early to predict the path Los Angeles County's future indemnification decisions will take. It is possible that these two indemnification denials are *sui generis*: One made because deputies refused to testify and the other made because the deputy was incarcerated and judgment proof. It is also possible that these cases reflect the county's increasing reluctance to indemnify.

### G. *Tactical Benefits of Withholding Indemnification Decisions*

My e-mail exchanges and telephone calls with government officials and plaintiffs' lawyers, and briefs and opinions from cases in these jurisdictions, revealed another litigation dynamic at play: Although my study shows that officers almost never contribute to settlements and judgments, I found anecdotal evidence that some government attorneys affirmatively use the possibility that they will deny officers indemnification to gain settlement leverage, limit punitive damages verdicts, and reduce punitive damages verdicts after trial—only to indemnify their officers once the cases are ultimately resolved.

To be sure, government attorneys may have legitimate reasons for delaying indemnification decisions until the conclusion of litigation. As a senior lawyer for New York City's Corporation Counsel explained in 1994, even if it indemnifies officers in 99% of the cases,

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<sup>217</sup> *Jimenez v. Franklin*, 680 F.3d 1096, 1098 (9th Cir. 2012).

<sup>218</sup> *Jimenez v. Cnty. of Los Angeles*, No. CV 12-5691-RGK, 2013 WL 2155222, at \*2 (C.D. Cal. 2013) (noting that Gonzalez was incarcerated for sexually assaulting women in his squad car at the time of the jury verdict).

<sup>219</sup> *Jimenez v. Franklin*, 680 F.3d at 1098.

<sup>220</sup> *Jimenez v. Cnty. of Los Angeles*, No. CV 12-5691-RGK, 2013 WL 2155222, at \*1.

the City “reserve[s] the right to assess all of the evidence in the case. We do not in advance pledge the taxpayers’ money to indemnify an individual if it turns out that the officer engaged in conduct under which indemnification is not permitted.”<sup>221</sup> I do not offer any opinion about whether, or how often, government attorneys decide to indemnify and then withhold that decision to gain strategic advantage, and how often government attorneys truly do not make a final indemnification decision until the conclusion of a case. Regardless of the reason for delay, the failure to make a final indemnification decision carries with it tactical litigation benefits for defendants.

During litigation, the threat that a city will deny indemnification may discourage plaintiffs from proceeding with claims against individual officers. In El Paso, Texas, for example, a deputy city attorney reported that officers are never indemnified: Officers are required to satisfy any judgment against them.<sup>222</sup> As a matter of practice, however, no officers in El Paso contributed to any settlement or judgment during the study period. This is in part because, the deputy city attorney believes, plaintiffs’ attorneys are less likely to pursue cases against individual officers, knowing that they are judgment proof. If the plaintiff’s *Monell* claim against the city is dismissed because the plaintiff cannot prove that the city has a policy, practice, or custom that caused the alleged constitutional violation,<sup>223</sup> the plaintiff’s attorney may decide not to proceed further with the case.<sup>224</sup>

Government attorneys may also withhold indemnification decisions to gain leverage during settlement negotiations. One risk manager reported that, when a lawsuit is filed, the county makes an initial decision about whether to indemnify the officer but does not finalize the decision until the end of the case because indemnification can be a factor in settlement negotiations with the plaintiff’s attorney.<sup>225</sup> The risk manager reported regularly sending officers a reservation-of-rights letter at the beginning of the case—stating that the county has decided to represent and indemnify the officer but that it reserves the right to reverse their decision. Sometimes, an officer will call after

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<sup>221</sup> Joel Berger, *New York City Corporation Counsel’s Viewpoint*, 9 J. SUFFOLK ACAD. L. 69, 74–75 (1994); see also Ilann M. Maazel, *Punitive Damages and Indemnification: What Should Juries Be Told?*, N.Y. L.J., Mar. 20, 2012, at 3 (“Many municipalities, including the City of New York, take the litigation position that indemnification decisions are not made until after trial.”).

<sup>222</sup> Telephone Interview with Laura Gordon, *supra* note 95.

<sup>223</sup> See *supra* Part I.A.2 (outlining the doctrine governing *Monell* claims).

<sup>224</sup> Telephone Interview with Laura Gordon, *supra* note 95.

<sup>225</sup> Telephone Interview with Steven T. Robles, Dir. of Risk Mgmt., Cnty. of San Bernardino (July 17, 2012).



receiving the letter, anxious that he may not be indemnified.<sup>226</sup> The risk manager reported that he calms officers by explaining that the reservation-of-rights letter is part of the process that benefits both officers and the department, and that they will be indemnified in the end.<sup>227</sup>

Government attorneys may also gain tactical advantage during trial by withholding indemnification decisions. The City of New York has indemnified every punitive damages judgment entered against officers represented by the city from 1996 until at least 2011.<sup>228</sup> Yet the city maintains that indemnification decisions are not made until after trial.<sup>229</sup> During trial, government attorneys use the possibility that they will refuse to indemnify their officers as reason to “ask [ ] courts to give jury instructions implying that officers will have to pay,” “ask courts to hold hearings on officers’ ability to pay,” and “ask [ ] officers on the witness stand about their salaries, numbers of children, and anything else that might convey to the jury the impression that the officers’ personal finances are in play.”<sup>230</sup>

In one case, *Scherer v. City of New York*, plaintiff’s counsel requested a jury instruction stating that the City of New York has the authority to indemnify officers for punitive damages entered against them.<sup>231</sup> Defense counsel objected to the instruction:

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See Defendant’s Supplemental Response to Plaintiff’s Second Set of Interrogatories at 5–6, *Gyasi v. City of New York*, No. 05-CV-9453 (S.D.N.Y. Nov. 27, 2006) (reporting that the City of New York indemnified every punitive and compensatory damages judgment entered against NYPD officers it represented between 1996 and 2006); see also Appendix F (reporting indemnification of all punitive damages judgments entered between 2006 and 2011); Appendix I (describing sources of data about punitive damages awards during study period, including punitive damages awards against two defendants the City did not represent).

<sup>229</sup> See *supra* note 221 (describing New York City’s practice of waiting until the close of litigation to decide whether to indemnify); see also *infra* notes 230–37 (describing several cases in which defense counsel argued that New York City might decide not to indemnify an officer after trial).

<sup>230</sup> Letter from Joel Berger, Plaintiff’s Attorney, in *Gordon v. City of New York*, to Judge Shira A. Scheindlin, (Jan. 27, 2009) (on file with the *New York University Law Review*) (seeking information about defendants’ indemnification decisions from 2006 to 2009, and explaining defendants’ practices that justify the disclosure of this information). In a discovery conference in another case, *Gyasi v. City of New York*, Joel Berger sought discovery of the city’s past indemnification decisions, arguing “in every case I have been involved in, and I have consulted with many colleagues in civil rights cases, the city always wants the jury to be told, Oh you can only award punitives against the officer individually, not the city.” Pretrial Transcript at 4, *Gyasi v. City of New York*, No. 05-CV-09453 (S.D.N.Y. June 29, 2006).

<sup>231</sup> *Scherer v. City of New York*, No. 03 Civ. 8445, 2007 WL 2710100, at \*1 (S.D.N.Y. Sept. 7, 2007).

Section 50-k(3) of the General Municipal Law limits the City's duty to indemnify its employees by providing that "the duty to indemnify and save harmless . . . shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee." Punitive damages, in turn, can only be awarded where the individual acts intentionally and maliciously, and under such circumstances the City cannot be liable to indemnify.<sup>232</sup>

At the jury charge conference, defense counsel reasserted its objection stating: "The city is never liable for punitive damages."<sup>233</sup> The court did not give the jury any instruction regarding indemnification, and told the jury that, when determining the proper amount of punitive damages to award, they could "consider the financial ability of the defendants to pay such damages."<sup>234</sup> At trial, the jury awarded \$500 in compensatory damages and \$1000 in punitive damages.<sup>235</sup> Nine months after judgment was entered, plaintiff's counsel moved to set aside the court's judgment and order a new trial on the ground that defense counsel had improperly suggested to the court that the city would not indemnify a punitive damages award. In his brief, plaintiff's counsel relied on recently-produced discovery in another case showing that the City of New York had indemnified officers it represented in every case in which punitive damages had been awarded over the prior ten years, including the defendant against whom punitive damages were awarded in *Scherer*.<sup>236</sup>

The district court denied plaintiff's request to set aside the judgment and order a new trial on punitive damages. In its decision, the court took note of the fact that defense counsel had "selectively inform[ed]" the court about the applicable municipal code without "simultaneously inform[ing] the Court of the City's actual indemnification practice, which is to regularly indemnify individual officers for both punitive and compensatory damages when those officers are granted legal representation by the City," but the court concluded that this omission "did not rise to the level of outright misrepresentation or misconduct."<sup>237</sup>

Government attorneys may also strategically use the possible denial of indemnification in an effort to reduce a jury's verdict after trial. The plaintiff in *Prince George's County v. Longtin* was wrongfully charged with the rape and murder of his wife, incarcerated for

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<sup>232</sup> *Id.* at \*2 (quoting N.Y. GEN. MUN. LAW § 50-k (McKinney 2013)).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at \*2-3.

<sup>235</sup> *Id.* at \*1.

<sup>236</sup> *Id.* at \*3.

<sup>237</sup> *Id.* at \*6.

eight months, and then released when another man was charged with the crimes.<sup>238</sup> Longtin sued the county, its chief of police, and five members of the criminal investigation division of the police department alleging false imprisonment, false arrest, unconstitutional and unlawful detention, and excessive force. At trial, the jury awarded the plaintiff \$5.2 million in compensatory damages against the county and \$1.175 million in punitive damages against four defendants.<sup>239</sup> The trial court dismissed the punitive damages verdicts against three of the defendants, and reduced the punitive damages verdict against a fourth defendant from \$350,000 to \$50,000.<sup>240</sup> The judge dismissed the punitive damages verdicts against the three defendants because the court found insufficient evidence of malice, and reduced the punitive damages award against the fourth defendant—even though he agreed with the jury that the defendant had acted with malice—based on factors including “the appellant’s ability to pay, the size of the award, and his belief that deterrent value could still be achieved with a lower award.”<sup>241</sup> The court’s decisions to dismiss and reduce the jury’s punitive damages verdicts were affirmed on appeal.<sup>242</sup> Prince George’s County subsequently paid the entirety of the \$50,000 punitive damages judgment that had been upheld against the officer.<sup>243</sup>

The California Highway Patrol also appears to have used the possibility that its officers would not be indemnified to its benefit. In *Grassilli v. Barr*, the plaintiff sued several California Highway Patrol officers for unlawfully arresting him and otherwise retaliating against him after complaining about an officer’s conduct.<sup>244</sup> At trial, the jury awarded \$500,000 in compensatory damages.<sup>245</sup> During the punitive damages phase of trial, each defendant testified about his limited financial resources—an indication that the defendants would personally satisfy any punitive damages verdict.<sup>246</sup> Defense counsel even suggested, during closing argument at the punitive damages phase of the trial, that defendants were going to be personally responsible for the \$500,000 in compensatory damages that had already been awarded

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<sup>238</sup> Prince George’s Cnty. v. Longtin, 988 A.2d 20, 27–30 (Md. Ct. Spec. App. 2010).

<sup>239</sup> *Id.* at 25.

<sup>240</sup> *Id.* at 26.

<sup>241</sup> *Id.* at 47 n.60.

<sup>242</sup> *Id.* at 48.

<sup>243</sup> E-mail from Jamar B. Herry, *supra* note 158.

<sup>244</sup> *Grassilli v. Barr*, 48 Cal. Rptr. 3d 715, 720–26 (Ct. App. 2006).

<sup>245</sup> *See id.* at 720 (reporting that the jury “found the retaliation caused Grassilli to suffer \$210,000 in economic damages and \$290,000 in noneconomic damages”).

<sup>246</sup> *Id.* at 734–35. The court denied plaintiff’s counsel’s request to introduce evidence that the California Highway Patrol could, as a matter of California law, indemnify the officers. *Id.*

against them.<sup>247</sup> Ultimately, the jury awarded \$3 million in punitive damages against one officer and approximately \$1 million in punitive damages against a second officer.<sup>248</sup>

Several months after the trial, defense counsel told plaintiff's counsel that the California Highway Patrol had decided to indemnify the defendants for the punitive damages awards.<sup>249</sup> Yet on appeal, the defendants challenged the punitive damages awards in part because the judge did not instruct the jury that the officers' financial condition was relevant to the jury's assessment of what punitive damages should be awarded.<sup>250</sup> The appellate court reduced defendants' punitive damages awards from over \$4 million to \$55,000, based in part on the conclusion that the "punitive damages awards constitute a disproportionately large percentage of each defendant's wealth and would result in defendants' financial ruin."<sup>251</sup> The appellate court disregarded evidence introduced by the plaintiff that defense counsel had stated the California Highway Patrol would indemnify the defendants for the punitive damages awards, noting that the state legislature would also have to agree to indemnify the officers and there was no reason to believe the legislature would do so.<sup>252</sup> After the case was decided on appeal, the parties settled the case during mediation for \$2 million; the California Highway Patrol paid the entire settlement.<sup>253</sup>

I do not know how frequently such tactics are used across the jurisdictions in my study—this evidence is, admittedly, anecdotal. But, as the procedural history of *Scherer*, *Longtin*, and *Grassilli*—and my study data more generally—make clear, even if government attorneys threaten that they may decline to indemnify an officer before, during, and after trial, they virtually always satisfy settlements and judgments in full.

### H. Conclusion

Between 2006 and 2011, in forty-four of the seventy largest law enforcement agencies across the country, officers paid just .02% of the dollars awarded to plaintiffs in police misconduct suits. In thirty-seven

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<sup>247</sup> See *id.* at 735–36 (“In an apparent attempt to suggest the officers were responsible for paying the compensatory damage award, defense counsel also stated the officers ‘are going to be punished handsomely with having to write a check . . .’”). Grassilli’s counsel objected on the basis of misstatement of the law. The court sustained the objection. *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 741 n.11.

<sup>250</sup> *Id.* at 736.

<sup>251</sup> *Id.* at 740.

<sup>252</sup> *Id.* at 741 n.11.

<sup>253</sup> See E-mail from Kim Hunter, *supra* note 150 (describing the mediation and settlement).

small and mid-sized law enforcement agencies, officers never contributed to settlements or judgments. No officer in any of the eighty-one jurisdictions satisfied a punitive damages judgment entered against him. Officers did not contribute to settlements and judgments even when indemnification was prohibited by statute or policy. And officers were indemnified even when they were disciplined, terminated, or prosecuted for their misconduct. Although government attorneys may strategically employ the threat that officers will be denied indemnification, governments almost always satisfy settlements and judgments in full.

Although I do not know for certain whether my findings are consistent with the practices in all jurisdictions nationwide, the eighty-one jurisdictions in my study are broadly representative in size, location, agency type, indemnification policy, and indemnification procedure. My findings therefore at least support the presumption that officers across the country, in departments large and small, are virtually always indemnified.

### III IMPLICATIONS

In this Part, I consider the extent to which widespread indemnification is inconsistent with civil rights doctrine and practice and the impact of widespread indemnification on the compensation and deterrence goals of § 1983. I also suggest some adjustments that would better align civil rights doctrine and practice with evidence of near certain indemnification.

The prevalence of indemnification is a critical—and previously unknown—factor relevant to the design of civil rights doctrine. I do not, however, endorse a set of new rules to govern civil rights damages actions. There are several additional considerations that should be taken into account before advancing new doctrinal standards, including the relative importance of § 1983's compensation and deterrence goals and the optimal way to achieve these goals given the various tools available—liability rules, immunity doctrines, rules governing remedies, rules of pleading and proof, and rules governing who satisfies settlements and judgments.<sup>254</sup> Prescriptions should also be made with the understanding that the compensatory and deterrent effects of § 1983 claims may vary from region to region, depending on

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<sup>254</sup> For scholarship that engages with these questions, see Fallon, *supra* note 16, at 480 (describing his “Equilibration Thesis,” in which “substantive rights, causes of action to enforce rights, rules of pleading and proof, and immunity doctrines all are flexible and potentially adjustable components of a package of rights and enforcement mechanisms that should be viewed, and assessed for desirability, as a whole”).

the manner in which attorneys litigate—and courts adjudicate—these claims.<sup>255</sup>

Any prescriptions should also be made with the understanding that modifications to one area of the law will likely have secondary effects.<sup>256</sup> If, for example, it became more difficult for a defendant to win a motion to dismiss on qualified immunity grounds,<sup>257</sup> courts might create more stringent liability rules to reduce the number of successful claims; Congress might impose damages caps to reduce payouts; cities might settle fewer claims in an effort to discourage weak suits or indemnify fewer officers to reduce costs.

In this Article, I do not attempt to resolve these important empirical and normative questions. I do, however, offer suggestions that would better align doctrine and practice with evidence of widespread indemnification. These suggestions are guided by the premise that judicial doctrines governing civil rights damages actions—particularly those limiting plaintiffs' entitlement to relief—should not rely on counterfactual assumptions about officers' financial exposure in police misconduct suits. In Part III.A, I consider the implications of widespread indemnification for qualified immunity doctrine, municipal liability standards, and the prohibition of punitive damages awards against municipalities. In Part III.B, I consider how evidence of widespread indemnification should influence litigation practice. In Part III.C, I consider how widespread indemnification affects the compensation and deterrence goals of § 1983.

## A. *Doctrine*

### 1. *Qualified Immunity*

In a world in which police officers are almost always indemnified in full, how should we think about the best way to balance competing interests in compensating plaintiffs when their rights have been violated and preserving “the ability of government officials ‘to serve the

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<sup>255</sup> See *supra* notes 134–37 and accompanying text (discussing this possibility).

<sup>256</sup> See Fallon, *supra* note 16, at 489 (“[I]f courts and other decisionmakers were deprived of official immunity as an equilibrating device, they would at least sometimes turn to other tools in an effort to reduce the overall social costs of packages of rights and surrounding doctrines.”).

<sup>257</sup> See, e.g., Hassel, *supra* note 39, at 136 n.65, 145 n.106 (1999) (studying published cases and finding that qualified immunity defenses were denied only about 20% of the time). But see Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 843 (2010) (studying *Bivens* actions and finding that “the qualified immunity defense is of minimal importance in regulating *Bivens*, at least in filed cases”).

public good or to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service’”<sup>258</sup>

Given that law enforcement officers in my study only rarely—and only in a few jurisdictions—contributed to settlements or judgments, their median contribution was \$2250, and no officer paid more than \$25,000,<sup>259</sup> qualified immunity can no longer be justified as a means of protecting officers from the financial burdens of personal liability.<sup>260</sup> Supreme Court doctrine supports the conclusion that there is less—if any—need for qualified immunity if police officers are not financially responsible for settlements and judgments entered against them. The Court has held that private prison guards are not entitled to qualified immunity in part because private actors’ insurance “increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face.”<sup>261</sup> The Court has also held that municipalities are not entitled to qualified immunity in part because concerns about the “injustice . . . of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion”<sup>262</sup> are “simply not implicated when the damages award comes not from the official’s pocket, but from the public treasury.”<sup>263</sup>

The logic of these decisions translates convincingly to the police indemnification context. Just as insurance “reduces the employment-discouraging fear of unwarranted liability”<sup>264</sup> for those seeking jobs as private prison guards, near-certain indemnification should reduce the employment-discouraging fear of unwarranted liability for those seeking jobs as law enforcement officers. When officers are indemnified and settlements and judgments are paid from the “public treasury,” there is less injustice in “subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion.”<sup>265</sup> Moreover, current indemnification practices seem in themselves to achieve the stated goals of qualified immunity doctrine:

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<sup>258</sup> *Richardson v. McKnight*, 521 U.S. 399, 408 (1997) (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)).

<sup>259</sup> See Appendix H (detailing cases where officers were required to contribute to judgments and settlements).

<sup>260</sup> See *supra* note 45 and accompanying text (describing other scholars’ similar arguments that evidence of widespread indemnification would undermine current justifications for qualified immunity).

<sup>261</sup> *Richardson*, 521 U.S. at 411.

<sup>262</sup> *Owen v. City of Independence*, 445 U.S. 622, 654 (1980) (internal quotation marks omitted) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974)).

<sup>263</sup> *Id.* at 654.

<sup>264</sup> *Richardson*, 521 U.S. at 411.

<sup>265</sup> *Owen*, 445 U.S. at 654.

Indemnification allows for compensation of wronged plaintiffs while lessening the impact of damages actions on officers.<sup>266</sup>

Indeed, some will contend that widespread indemnification, in combination with other characteristics of policing and police misconduct litigation, reduces the deterrent effect of lawsuits nearly to zero. Officers across the country engage in tens of millions of civilian interactions—and use force against civilians hundreds of thousands of times—each year.<sup>267</sup> Yet even people who believe the police have mistreated them rarely take legal action.<sup>268</sup> And even when officers are sued, the suits have limited—if any—negative ramifications for officers’ employment.<sup>269</sup> Moreover, as Daniel Meltzer has observed, there are limited regulatory and other external influences “reinforcing the incentive, created by potential tort liability, to avoid harm-causing activities.”<sup>270</sup>

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<sup>266</sup> See David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 74 (1989) (“Indemnification . . . protect[s] valid government interests and at the same time . . . provide[s] for the vindication of constitutional rights through compensation of the victim of the constitutional tort.”).

A recent study by James Pfander and Jonathan Hunt of the history of indemnification in the United States indicates that the early Republic also balanced interests in compensating plaintiffs who had been wronged and avoiding overdeterrence of government actors through indemnification. Pfander and Hunt found that, beginning in the late eighteenth century, federal agents who had been sued for wrongdoing began petitioning Congress for the adoption of private bills of indemnity and, by 1828, the practice of government indemnification was “settled and routine.” James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1867–68 (2010). Indemnification through these private bills was relied upon to “stri[k]e the right balance between the compensation of victims and the protection of officers who acted in good faith.” *Id.* at 1925. Indemnification was the sole means of striking this balance: As Pfander and Hunt explain, “the courts—state and federal—did not take responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability. These were matters for Congress to adjust through indemnification and other modes of calibrating official zeal.” *Id.* at 1924.

<sup>267</sup> See CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 1 (2011) (reporting that an estimated forty million people had contact with police in 2008); *id.* at 11 (reporting that approximately 776,000 people “experienced force or the threat of force by police at least once in 2008”).

<sup>268</sup> See Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863–64 (2012) (citing a Bureau of Justice statistics report in support of the conclusion that people who believe they have been mistreated by the police sue only approximately 1% of the time, and offering reasons why this might be the case).

<sup>269</sup> See Schwartz, *supra* note 18, at 1076–77 (describing evidence that police misconduct suits have limited negative effects on officers’ employment).

<sup>270</sup> Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 286 (1988).



Others will argue that, despite indemnification, police officers are still in danger of being overdeterred by the threat of liability. An officer who has never been sued may overestimate the likelihood that he will be held financially responsible for a settlement or judgment.<sup>271</sup> He may overestimate the likelihood that he will have to pay an attorney to defend him in a civil suit.<sup>272</sup> He may fear that being sued will make it more difficult to get a loan or sell his home.<sup>273</sup> He may fear negative employment ramifications associated with being named a defendant.<sup>274</sup> And he may fear the harassment and distraction associated with document requests, depositions, and court appearances.<sup>275</sup>

An officer who has previously been sued is extremely unlikely to have borne the costs of an attorney or contributed to a settlement or judgment, but may still fear future financial liability—especially if he is employed by a city that waits until the end of litigation to decide whether to indemnify or withholds indemnification decisions for some tactical advantage.<sup>276</sup> Even if an officer believes he will be indemnified, he may not want his conduct to impose costs on taxpayers or his employer.<sup>277</sup> He may fear that he will be disciplined or denied promotion if he is named in multiple suits. He may fear having to participate

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<sup>271</sup> See Schwartz, *supra* note 18, at 1026–27 (observing that boundedly rational officers cannot engage in the rational cost-benefit analyses assumed by standard economic models of deterrence).

<sup>272</sup> See *supra* notes 132–33 and accompanying text (describing the frequency with which law enforcement officers are provided with defense counsel free of charge).

<sup>273</sup> See, e.g., Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1675 n.389 (2003) (“For correctional officers, probably the most significant consequence of being sued is the need to give explanations to would-be creditors.” (citation omitted)); H. Allen Black, Note, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733, 752 (1991) (arguing that being named a defendant may “hamper defendants’ efforts to obtain loans” and “keep defendants from disposing of certain real property”).

<sup>274</sup> See Schwartz, *supra* note 18, at 1034 n.58 (describing concerns about the effects of lawsuits on officers’ jobs). Note, however, that my previous study of the role of lawsuit information in law enforcement decisionmaking makes clear that police departments know little about the suits brought against their officers. See *id.* at 1076 (finding that, in many jurisdictions, “[u]nless allegations in a suit are separately brought to the attention of policymakers, the conduct will not be investigated, and the involved officers will not be disciplined, counseled, or retrained following the incident”).

<sup>275</sup> See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (observing that qualified immunity protects officers from the “harassment” and “distraction” of suit).

<sup>276</sup> See *Armacost, supra* note 45, at 588 n.17 (observing that when indemnification decisions are made at the conclusion of the litigation, “officials face significant uncertainty about their individual situations”).

<sup>277</sup> See *Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (1987) (raising the possibility that conscientious officials are concerned with imposing liability on their employers).

in future depositions or trials. And each of these concerns may “erode [officers’] necessary confidence and willingness to act.”<sup>278</sup>

A critical question, then, in determining whether qualified immunity is necessary to protect against officer overdeterrence is the extent to which officers’ behavior is influenced by the threat of being sued despite the near certainty that they will be indemnified. John Jeffries commented, regarding his conversations with police officer trainees at the FBI, that he was “struck by [officers’] aversion to being sued, even when they were confident that no judgment would be satisfied from their personal resources.”<sup>279</sup> Other studies have found law enforcement officers and administrators “only worry moderately about work-related lawsuits filed by citizens.”<sup>280</sup> And even officers who worry about being sued may not change their behavior as a result.

Studies have found that “the prospect of civil liability has a deterrent effect in the abstract survey environment but that it does not have a major impact on field practices.”<sup>281</sup> One study, which involved both surveys and the observation of thousands of encounters between officers and members of the public, concluded that officers who “initiated aggressive behaviors . . . do not seem to be deterred to any substantial extent by concerns about liability” and that, contrary to assumptions about lawsuits’ deterrent effects, officers who had previ-

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<sup>278</sup> Brief for National Association of Police Organizations and National Law Enforcement Officers’ Rights Center as Amicus Curiae Supporting Petitioner at 5, *Saucier v. Katz*, 533 U.S. 194 (2001) (No. 99-1977).

<sup>279</sup> Jeffries, *supra* note 12, at 51 n.17.

<sup>280</sup> Carol A. Archbold & Edward R. Maguire, *Studying Civil Suits Against the Police: A Serendipitous Finding of Sample Selection Bias*, 5 *POLICE Q.* 222, 226 (2002) (describing studies of the levels of “litigaphobia” experienced by police officers and chiefs).

<sup>281</sup> VICTOR E. KAPPELER, *CRITICAL ISSUES IN POLICE CIVIL LIABILITY* 7 (4th ed. 2006) (citing several studies); see also Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 *POLICE STUD. INT’L REV. POLICE DEV.* 19, 26 (1995) (finding that 62% of a sample of fifty officers from state, municipal, and university law enforcement agencies in Pennsylvania believed that civil suits deter police officers, but 87% of state police officers surveyed, 95% of municipal police officers surveyed, and 100% of university police officers surveyed did not consider the threat of a lawsuit among their “top ten thoughts” when stopping a vehicle or engaging in a personal interaction); Daniel E. Hall et al., *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 *POLICING: INT’L J. POLICE STRATEGIES & MGMT.* 529, 545 (2003) (surveying sheriff’s deputies, corrections officers, and municipal police officers in a southern state and concluding that “most public safety officers are not impacted on a day-to-day basis by the threat of civil liability”); Tom “Tad” Hughes, *Police Officers and Civil Liability: “The Ties that Bind”?*, 24 *POLICING: INT’L J. POLICE STRATEGIES & MGMT.* 240, 253 (2001) (reporting that a survey of Cincinnati police officers revealed that most officers “think civil liability impedes effective law enforcement” but that most do not “consider liability concerns when stopping a citizen”).

ously been sued were more aggressive than officers who had not.<sup>282</sup> Some may argue that these studies show qualified immunity to be performing its intended function—lessening the impact of the threat of liability on officer behavior. But if officers' mindsets regarding the prospect of being sued can be attributed to qualified immunity, the doctrine is overperforming: Although qualified immunity is intended to protect against *overdeterrence*, available studies indicate that officers' behavior is currently not influenced to any substantial extent by the threat of litigation.

Evidence that police officers almost never financially contribute to settlements and judgments, evidence that lawsuits have little negative impact on police officers' employment, and evidence that officers' behavior is not influenced to any substantial extent by the threat of being sued all undermine the Supreme Court's current rationales for qualified immunity.<sup>283</sup> Even if one believes that police officers need some manner of protection against the ill effects of litigation, there is no doctrinal, empirical, or logical basis for current stringent qualified immunity standards, which are designed to "provide[ ] ample protection to all but the plainly incompetent or those who knowingly violate the law."<sup>284</sup> Qualified immunity should be eliminated or restricted to comport with this evidence unless and until an alternative, empirically grounded justification can be offered for the defense.<sup>285</sup>

## 2. *Municipal Liability*

Municipal liability doctrine is premised on the notion that there is no respondeat superior liability—a municipality can only be held liable for a constitutional violation if its policies or customs caused that violation. In thousands of cases, courts have struggled to identify what municipal conduct satisfies the "policy and custom" require-

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<sup>282</sup> See Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 352, 360, 363 (2003) (surveying and observing Cincinnati police officers).

<sup>283</sup> For a description of the justifications for qualified immunity doctrine, see *supra* Part I.A.1.

<sup>284</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>285</sup> Qualified immunity could be justified on other grounds. One alternate justification would be to limit payments by governments (and, by implication, their taxpayers). See, e.g., Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 856 (2007) (noting that widespread indemnification undermines "the stated justification for qualified immunity," but "[w]hen qualified immunity is viewed from the standpoint of a public employer—the party that bears the economic burden of liability—this doctrine has a compelling justification"). This Article does not attempt to guess whether the Supreme Court would adjust its justification for qualified immunity in this manner, nor does it assess the merits of such a justification were it offered.

ments.<sup>286</sup> Scores of law review articles have puzzled over the limits of these standards and challenged their logic.<sup>287</sup> Yet municipalities virtually always satisfy officers' settlements and judgments, amounting to de facto respondeat superior liability. Complex and taxing municipal liability standards are, therefore, virtually irrelevant in determining who writes the check.

This is not to say that *Monell* doctrine<sup>288</sup> is irrelevant in determining whether a check is written or how much that check is for. For plaintiffs, a successful *Monell* claim can be an antidote to the constraints of qualified immunity. Because municipalities cannot assert a qualified immunity defense, plaintiffs can prevail on a *Monell* claim even if the underlying constitutional rights were not clearly established, so long as they can establish that a municipal policy or custom—or a failure to properly hire, train, or supervise its employees—caused the constitutional violation.<sup>289</sup> Moreover, *Monell* claims can be used to “clearly establish” the law and prevent future claims against individual officers from being dismissed on qualified immunity grounds.<sup>290</sup>

*Monell* claims may have other benefits for plaintiffs. Naming the government entity can have what Myriam Gilles has referred to as a “‘fault-fixing’ function, localizing culpability in the municipality itself, and forcing municipal policymakers to consider reformatory measures.”<sup>291</sup> Juries may award higher damages against a municipality, believing (falsely) that an individual officer might have to pay a judgment out of his own pocket.<sup>292</sup> *Monell* claims can also lead to broader discovery, which has several benefits for plaintiffs: Broad discovery

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<sup>286</sup> See Fisk & Chemerinsky, *supra* note 56, at 791 (describing municipal liability standards as a “doctrinal disarray involving literally thousands of decisions trying to define when cities can be held liable”).

<sup>287</sup> See *supra* notes 54–56 and accompanying text (describing some of these scholarly critiques).

<sup>288</sup> “*Monell* doctrine” refers to *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978), which held that cities could be held directly liable (under limited circumstances) but not vicariously liable for § 1983 claims brought against their employees, and subsequent cases interpreting *Monell*’s scope. For a more detailed description of the doctrine, see *supra* Part I.A.2.

<sup>289</sup> For a discussion of the limitations of this approach, see *infra* notes 298–99 and accompanying text.

<sup>290</sup> See *infra* notes 32–34 and accompanying text (describing the plaintiff’s need to show a violation of “clearly established law” to defeat a defendant’s motion to dismiss on qualified immunity grounds).

<sup>291</sup> Gilles, *supra* note 74, at 861.

<sup>292</sup> See, e.g., Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 667 (1999) (“Indemnification is a poor substitute for vicarious liability because . . . to a jury it may still appear that any damages may be paid out of the employee’s own pocket.”).

can create settlement pressure, reveal information about other claims, and unearth information about the ways in which the municipality functions that can be used in other lawsuits or in nonlitigation advocacy efforts.

*Monell* claims likely have even greater impact on the litigation of civil rights damages actions when officer indemnification is not a foregone conclusion. Some jurisdictions, for example, do not directly indemnify their officers but instead require plaintiffs to dismiss individual defendants before settling on behalf of the city.<sup>293</sup> In such a jurisdiction, the plaintiff must allege a *Monell* claim so that the city is a named party and can satisfy a subsequent settlement. In a jurisdiction like El Paso that has a policy of not indemnifying its officers,<sup>294</sup> naming the municipality—and defeating defendants’ motion to dismiss or for summary judgment—may create leverage for a larger settlement. And for a defendant employed by El Paso, getting the *Monell* claim dismissed may convince the plaintiff to drop her claim or accept a greatly reduced settlement. For all of these reasons, *Monell* doctrine plays a significant role in the litigation of civil rights damages actions even if it does not determine who pays prevailing plaintiffs.

Reasonable people could disagree about whether to replace *Monell* doctrine with vicarious liability in a world with nearly universal indemnification. Were qualified immunity eliminated or significantly restricted, I would be largely agnostic about which standard should apply. To be sure, *Monell*’s framework for municipal liability is unnecessary and formalistic because cities are, ultimately, footing the bills in these cases. Replacing *Monell* with vicarious liability would align doctrine with actual practice, eliminate an exceedingly complex body of case law, and streamline the litigation of these claims.<sup>295</sup> This adjustment would also be, many believe, consistent with the language and legislative history of § 1983.<sup>296</sup> On the other hand, given widespread indemnification, there would arguably be a less urgent need to replace *Monell*’s municipal liability framework with respondeat superior liability. Plaintiffs and defendants could continue to use *Monell* claims strategically during litigation—for settlement leverage, fault fixing, and information gathering—while dispensing with the illusion

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<sup>293</sup> See *supra* note 136 and accompanying text (describing jurisdictions that enter settlements conditioned upon the individual officer being dismissed from the case).

<sup>294</sup> See *supra* notes 145–48 and accompanying text (describing El Paso’s policy of denying officers indemnification as a formal matter, but nevertheless paying settlements on officers’ behalf).

<sup>295</sup> See Fisk & Chemerinsky, *supra* note 56, at 791 (“A clear and simple vicarious liability rule would be preferable to the current doctrinal disarray . . .”).

<sup>296</sup> See *supra* note 55 and accompanying text (describing the view that the language and legislative history of § 1983 is not inconsistent with respondeat superior liability).

that the success of a plaintiff's *Monell* claim determines whether she will recover from the municipality.

The choice between the two standards is starker if current qualified immunity standards endure. Vicarious liability would eliminate qualified immunity as a barrier to relief, assuming that governments would remain unable to assert the qualified immunity defense: Even if an officer violated rights that were not clearly established, and therefore could not be held personally liable due to qualified immunity, the municipality would remain vicariously liable to the plaintiff for its employee's wrongs.<sup>297</sup> Under *Monell*, in contrast, some plaintiffs whose constitutional rights have been violated cannot recover. Plaintiffs can bring *Monell* claims to avoid having their case dismissed on qualified immunity grounds.<sup>298</sup> But *Monell* is a faulty workaround: A plaintiff whose constitutional rights were violated can be denied relief if the rights were not clearly established (so the defendant officer is entitled to dismissal on qualified immunity grounds) and the municipality did not engage in an unconstitutional policy or custom or fail to hire, train, or supervise its employees in a way that led to the violation (leading to dismissal of the *Monell* claim). Indeed, some courts have held that a finding that the law was not clearly established in the qualified immunity context can defeat some types of *Monell* claims because the "plaintiff cannot show that the City was deliberately indifferent to rights that were not clearly established."<sup>299</sup>

I have argued that evidence of near universal indemnification and the lack of evidence that officers' decisionmaking is substantially impacted by the threat of litigation undermine the Supreme Court's

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<sup>297</sup> See Fisk & Chemerinsky, *supra* note 56, at 796 (advocating for vicarious liability in § 1983 cases to circumvent qualified immunity).

<sup>298</sup> See, e.g., *Askins v. Doe*, 727 F.3d 248, 254 (2d Cir. 2013) (holding that the plaintiff can proceed on his *Monell* claim even if claims against individual defendants have been dismissed on qualified immunity grounds, and reasoning that qualified immunity protections have "no bearing on the liability of municipalities"); *Mason v. Stock*, 955 F. Supp. 1293, 1304 n.9 (D. Kan. 1997) ("[W]hen qualified immunity is predicated on the basis that the law is not clearly established, the corresponding claim against a municipality may proceed.").

<sup>299</sup> *Watson v. Sexton*, 755 F. Supp. 583, 588 (S.D.N.Y. 1991); see also, e.g., *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 394 (8th Cir. 2007) (en banc) ("[T]he lack of clarity in the law precludes a finding that the municipality had an unconstitutional policy at all, because its policymakers cannot properly be said to have exhibited a policy of deliberate indifference to constitutional rights that were not clearly established."). But see *Askins*, 727 F.3d at 254 (concluding that municipal liability claims must be allowed to proceed despite a finding that the law was not clearly established, because to do otherwise would "effectively extend the defense of qualified immunity to municipalities, contravening the Supreme Court's holding in *Owen*").

justifications for current stringent qualified immunity standards.<sup>300</sup> If qualified immunity doctrine is not modified, plaintiffs whose rights have been violated will continue to have their claims against individual officers dismissed on qualified immunity grounds—despite the lack of evidence supporting current justifications for the doctrine—and *Monell* claims will not always provide plaintiffs an alternate avenue for relief. If the qualified immunity defense is not significantly restricted or eliminated, replacing *Monell* with vicarious liability is one means of limiting the effects of qualified immunity on plaintiffs' claims against individual officers and the municipalities that employ them.

### 3. Punitive Damages

The prohibition of punitive damages against municipalities in § 1983 actions is also based on an assumption—now proven false—that law enforcement officers personally satisfy punitive damages judgments entered against them.<sup>301</sup> The Supreme Court has held that punitive damages should not be awarded against municipalities in § 1983 cases because there is no reason to believe that “municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of the municipality.”<sup>302</sup> The Court also prohibited punitive damages awards against municipalities because it would be unfair to impose punitive damages judgments on taxpayers.<sup>303</sup> Yet, state and local governments have repeatedly used taxpayer dollars to satisfy punitive damages judgments awarded against law enforcement officers in § 1983 cases.

There are at least three ways of squaring punitive damages doctrine with evidence of widespread indemnification. Municipalities could be prohibited from indemnifying punitive damages awards, courts could allow juries to award punitive damages against municipi-

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<sup>300</sup> See *supra* Part III.A.1 (describing the effects of widespread indemnification on justifications for qualified immunity).

<sup>301</sup> To the extent that state statutes prohibiting or restricting punitive damages awards against public entities in non-civil rights cases (described *supra* note 61) are based on the assumptions underlying *City of Newport* (discussed *supra* notes 61–65 and accompanying text), such statutes should also be reconsidered. These statutes may, however, have little practical effect in law enforcement litigation: I am aware of only one punitive damages award against individual officers in a non-civil rights case in the eighty-one jurisdictions in my study during the six-year study period. See *supra* note 138 (describing the non-civil rights case in which punitive damages were awarded).

<sup>302</sup> *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981).

<sup>303</sup> See *id.* at 267 (“Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.”).

palities, or courts could prohibit juries from awarding punitive damages against law enforcement officers.

Prohibiting municipalities from indemnifying punitive damages awarded against individual officers in § 1983 cases makes sense in theory. In the private context, insuring for punitive damages is generally considered against public policy because insurance undermines punitive damages' punishment and deterrence goals.<sup>304</sup> Indemnifying government employees for punitive damages awards frustrates these same purposes and imposes costs on taxpayers. Yet, there is reason to believe that city, county, and state governments will not comply with a rule prohibiting indemnification of punitive damages. Although several jurisdictions in my study already prohibit indemnification of punitive damages, government attorneys have sidestepped the prohibitions by entering into postjudgment settlement agreements or satisfying judgments in violation of governing law.<sup>305</sup>

The other two options—prohibiting § 1983 punitive damages awards against law enforcement officers and allowing § 1983 punitive damages awards against municipalities—could each align doctrine and indemnification practice. Prohibiting punitive damages awards against law enforcement officers in § 1983 cases would further the Court's stated interest in protecting blameless and unknowing taxpayers from satisfying punitive damages judgments. Allowing punitive damages awards against municipalities in § 1983 cases would shift doctrine in recognition of the fact that taxpayers are already paying punitive damages judgments awarded against their officers.

Each choice would also significantly impact the role of punitive damages awards in civil rights cases. Prohibiting juries from awarding punitive damages against officers would eliminate any chance for punitive damages to serve their intended role as a source of punishment and deterrence in § 1983 cases.<sup>306</sup> Allowing punitive damages awards against municipalities would presumably increase the fre-

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<sup>304</sup> See Schwartz, *supra* note 72, at 1220–21 (describing insuring punitive damages awards in private law and indemnifying punitive damages awards in § 1983 cases as against public policy). *But see* ELLIOTT M. KROLL & JAMES M. WESTERLIND, ARENT FOX LLP, ARENT FOX LLP SURVEY OF DAMAGE LAWS OF THE 50 STATES INCLUDING THE DISTRICT OF COLUMBIA AND PUERTO RICO (2012) (reporting that punitive damages awards are insurable in some states).

<sup>305</sup> See *supra* notes 158–68 and accompanying text (describing these practices).

<sup>306</sup> See David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374–80 (1994) (describing the functions of punitive damages); Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473, 485–86 (2012) (describing the deterrence, punishment, education, and compensation goals of punitive damages).



quency and magnitude of awards<sup>307</sup> and could, some have argued, increase lawsuits' deterrent effect.<sup>308</sup> Yet, because I am skeptical that municipalities and police departments currently pay much attention to lawsuit payouts,<sup>309</sup> I am not convinced that the behavior of today's municipalities would be much influenced by punitive damages awards entered against them.

The optimal role of punitive damages in civil rights litigation—and the effects of these possible doctrinal modifications—is beyond the scope of this Article. Assuming, however, that doctrine should not rest on empirically unsupported assumptions about how the world works, reform is necessary to align punitive damages doctrine and indemnification practices.

### B. Practice

Evidence of widespread indemnification also has implications for the litigation of civil rights damages actions. Anecdotal evidence suggests that government attorneys may use the possibility that officers will not be indemnified to their advantage during settlement negotiations, trial, and post-trial proceedings. Civil rights litigation practice—like civil rights doctrine—should not rely on flawed assumptions about the likelihood of indemnification. Accordingly, plaintiffs should be allowed to counter the strategic use of possible indemnification denials with evidence of widespread indemnification.

For example, assuming punitive damages doctrine does not change,<sup>310</sup> evidence of indemnification practices should play a larger role in trial and post-trial decisions in ways that would prevent government attorneys from misleading judges and jurors about who will satisfy punitive damages awards.<sup>311</sup> Current law prevents plaintiffs'

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<sup>307</sup> Cf. *Larez v. Holcomb*, 16 F.3d 1513, 1525 (9th Cir. 1994) (Pregerson, J., concurring in part and dissenting in part) (observing that juries might impose punitive damages against municipalities less frequently, knowing that taxpayers will be satisfying the judgments).

<sup>308</sup> See, e.g., *Ciraolo v. City of New York*, 216 F.3d 236, 247 & n.9, 248 (2d Cir. 2000) (Calabresi, J., concurring) (arguing that punitive damages should be awarded against municipalities as a means of “remedying underdeterrence” and suggesting that extracompensatory damages against municipalities be paid into a “specific fund whose purpose, at least in theory, would be to attenuate the harm borne by those victims who did not receive compensatory damages”); Gilles, *supra* note 74, at 873 (“[T]he availability of punitive damages in *Monell* claims will place unconstitutional policies and customs squarely on the radar screens of responsible officials.”).

<sup>309</sup> For a discussion of the current effect of litigation costs on governments, see *infra* Part III.C.

<sup>310</sup> But see *supra* Part III.A.3 for suggestions about ways to shift punitive damages doctrine in light of evidence of widespread indemnification.

<sup>311</sup> I am not addressing the question of whether juries should be informed that officers are indemnified for compensatory damages awards, although this is also a subject of debate. See Schwartz, *supra* note 72, at 1212 (“Although it is a close question, the jury

attorneys from unilaterally introducing evidence of governments' indemnification practices.<sup>312</sup> Yet courts have also concluded that if a defendant seeks to introduce information about his financial resources—as though to suggest that he will be responsible for the judgment—the door is opened to discovery and possible admission at trial of evidence about indemnification practices.<sup>313</sup> As Judge Posner explained in a Seventh Circuit decision: “The defendant should not be allowed to plead poverty if his employer or an insurance company is going to pick up the tab.”<sup>314</sup>

At each stage of litigation, courts have allowed evidence of indemnification to counter evidence suggesting that an officer will personally satisfy a punitive damages judgment. In one civil rights action brought against a New York City police officer, the City objected to the plaintiff's request for discovery about the City's prior decisions to indemnify punitive damages judgments. The court found that discovery about indemnification practices was relevant to whether the defendant could testify about his finances during the punitive damages phase of trial. As Judge Shira A. Scheindlin explained:

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should know about indemnification of compensatory damages [in civil rights actions] so that it is not misled into believing that the officer will satisfy a monetary judgment out of personal finances.”). *But see id.* at 1229–30 (“The weight of authority in the federal courts of appeals treats government indemnification of employee—§ 1983 liability [for compensatory damages] in the same manner as private liability insurance, and thus generally excludes this information from the jury.”).

<sup>312</sup> *See id.* at 1242 (“[T]he great weight of circuit court authority supports the conclusion that, normally, the jury should not be informed about governmental indemnification of an official's personal monetary liability for both compensatory and punitive damages.”); *see also id.* at 1237–42 (describing cases preventing evidence of indemnification); *cf.* *Perrin v. Anderson*, 784 F.2d 1040, 1047–48 (10th Cir. 1986) (finding no error when defense counsel told the jury that an officer would be personally responsible for any punitive damages award). In some jurisdictions, including California, the fact that a public entity might indemnify its employees for punitive damages cannot be disclosed during trial as a matter of statute; such a disclosure, if it occurs, is grounds for a mistrial. CAL. GOV'T CODE § 825(b)(3) (West 2012). The Ninth Circuit stated that, even without relying on CAL. GOV'T CODE § 825(b)(3), federal common law supports the conclusion that it is error to inform a jury that the government may indemnify an official for any punitive damages award. *Larez v. Holcomb*, 16 F.3d 1513, 1521 n.8 (9th Cir. 1994).

<sup>313</sup> For scholarship in agreement with this practice, see Gerald Reading Powell & Cynthia A. Leiferman, *Results Most Embarrassing: Discovery and Admissibility of Net Worth of the Defendant*, 40 BAYLOR L. REV. 527, 533 (1988) (“On pure relevance grounds . . . if the court admits net worth evidence in a case in which liability coverage exists, then the court should also admit evidence of liability insurance coverage.”); Schwartz, *supra* note 72, at 1247–48 (“If a defendant introduces evidence of personal financial circumstances in order to persuade the jury to award low punitive damages, when in fact the defendant's punitive damages will be indemnified, failure to inform the jury about indemnification seriously misleads the jury.”).

<sup>314</sup> *Kemezy v. Peters*, 79 F.3d 33, 37 (7th Cir. 1996).

If this case goes to trial, if there is a liability finding, if the jury then gets punitive damages as an issue, I am not going to mislead them, thinking that it comes out of the poor officer's pocket and have the poor officer say, I have a wife and three kids and a mortgage, I can barely afford the payments, and I earn only [\$]38,000, whatever. I am not going to have all of that. If in fact the reality is that in the last 100 punitive damages awards the city has always indemnified, I am not going to have the testimony at all about his wife, kids, and poor salary, because it's all irrelevant.<sup>315</sup>

Courts have also found that ordinarily inadmissible evidence about a jurisdiction's indemnification practices may become admissible if the defense introduces testimony at trial about the officer's finances.<sup>316</sup> And the Second Circuit has held that a fact finder "can properly consider the existence of [an indemnification] agreement as obviating the need to determine whether a defendant's limited financial resources justifies some reduction in the amount that would otherwise be awarded."<sup>317</sup>

For plaintiffs attempting to counter defendants' testimony suggesting they will be personally responsible for punitive damages awards, the most probative evidence will concern indemnification outcomes, not indemnification policies. Based on their policies, one could confidently conclude that officers would never be indemnified for punitive damages awards in Las Vegas, New York, Prince George's County, or Oklahoma City. Yet these jurisdictions have satisfied punitive damages judgments entered against their officers and settled cases after a punitive damages judgment without a financial contribution by the officer.<sup>318</sup> Because indemnification policies offer a skewed portrait of indemnification practices, key to the success of this approach is relying on—and continuing to unearth—systematic evidence about indemnification outcomes.

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<sup>315</sup> Transcript of Pretrial Conference at 6, *Gyasi v. City of New York*, No. 05-CV-9453 (S.D.N.Y. June 29, 2006) (on file with the *New York University Law Review*).

<sup>316</sup> See, e.g., *Obyrcka v. City of Chicago*, No. 07C2372, 2012 WL 4060293, at \*2 (N.D. Ill. Sept. 14, 2012) (holding that plaintiffs cannot introduce information about Chicago's decision to indemnify the defendant police officer, but observing that "[i]f [d]efendants open the door by presenting evidence or argument of [the officer's] financial condition," evidence of indemnification may be allowed). For similar holdings, see, for example, *Cooper v. Dailey*, No. 07C2144, 2012 WL 1748150, at \*6 (N.D. Ill. May 16, 2012); *Engman v. City of Ontario*, No. EDCV 10-284 CAS, 2011 WL 2463178, at \*10 (C.D. Cal. June 20, 2011); *Schaefer v. Ready*, 3 P.3d 56, 59 (Idaho Ct. App. 2000).

<sup>317</sup> *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997).

<sup>318</sup> For further discussion of the indemnification of punitive damages judgments in these jurisdictions, see *supra* Part II.D.2.

### C. *Compensation and Deterrence*

A final question concerns the implications of current indemnification practices for the compensation and deterrence goals of § 1983. Civil rights damages actions are “designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations.”<sup>319</sup> How does widespread indemnification of officers sued for civil rights violations affect the extent to which these goals are being met?

Widespread indemnification facilitates § 1983’s goal of compensating plaintiffs after a settlement or judgment in their favor. If officers were not indemnified, they would be personally responsible for satisfying six- and seven-figure settlements and judgments from their relatively modest annual salaries. Because many law enforcement officers could not pay the settlements and judgments entered against them, many plaintiffs would go uncompensated even after a fact finder concluded that their rights were violated. Indemnification ensures that judgments and settlements will be satisfied from governments’ deep pockets.<sup>320</sup> This fact may explain why plaintiffs have vigorously contested governments’ rare decisions to refuse officers’ requests for indemnification.<sup>321</sup> This fact may also explain why some plaintiffs agree to dismiss punitive damages judgments in exchange for postjudgment settlements satisfied by the government entity; although a postjudgment settlement may not achieve punitive damages’ deterrence function, it will ensure that the award is paid.<sup>322</sup>

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<sup>319</sup> *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (citation omitted).

<sup>320</sup> For scholarship supportive of vicarious liability for this reason, see, for example, SCHUCK, *supra* note 13, at 101 (“Governmental liability would clearly maximize the probability that officially inflicted harms would be adequately compensated.”).

<sup>321</sup> See, e.g., *supra* notes 203–08 and accompanying text (describing the *Maimaron* case, in which the plaintiff and officer defendant jointly sued the Commonwealth of Massachusetts so that it would indemnify the officer); *supra* notes 217–20 and accompanying text (describing the *Jimenez* case, in which the plaintiff sued Los Angeles County after it refused to satisfy a punitive damages judgment entered against one of its officers). I am unaware of plaintiffs’ attorneys contesting more limited contributions to settlements, as in the thirty-seven to thirty-nine cases described in Part II.F.

<sup>322</sup> See *supra* notes 160–68 and accompanying text (describing instances in which plaintiffs agreed to settlements paid entirely by the government entity after juries awarded punitive damages against individual officers). Additional research is necessary to fully understand the impact of indemnification policies and practices on litigant behavior in police misconduct cases. For illuminating research about how the source of settlement and judgment dollars influences litigant behavior in other contexts, see Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC’Y REV. 275, 284–85 (2001) (studying plaintiff attorneys in Connecticut and finding that plaintiffs in “ordinary negligence case[s]—such as a routine auto accident, a doctor who made an understandable mistake, or a ‘slip and fall’”—prefer to recover against insurance

Although indemnification furthers § 1983's compensation goals, it frustrates § 1983's deterrence goals by limiting the impact of compensatory and punitive damages awards on individual officers. In most jurisdictions, officers can have no reasonable expectation that their misconduct will lead to financial sanctions.<sup>323</sup> Lawsuits appear infrequently to have negative ramifications for officers' employment.<sup>324</sup> And available evidence suggests that the threat of being sued does not significantly influence officer behavior.<sup>325</sup>

Yet the obvious alternative—eliminating indemnification and imposing the full force of financial liability for civil rights damages actions on individual officers—also seems to be the wrong tool for deterrence. Even with the protections of qualified immunity, officers in my study would have been personally responsible for over \$730 million in payouts over six years. In New York, the median payout for plaintiffs during my six-year study period was \$20,000, a significant but payable sum given officers' salaries.<sup>326</sup> But in twenty-six civil rights damages cases resolved in New York between 2006 and 2011, plaintiffs received over \$1 million, and plaintiffs' recoveries in another 595 cases were in the six figures. Given the inevitable inaccuracies of litigation outcomes,<sup>327</sup> an officer could be bankrupted if he committed a relatively minor error that resulted in significant injuries to the plaintiff.<sup>328</sup> Although widespread indemnification likely lessens the

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companies than to seek money directly from defendants, but that plaintiffs seek "blood money" against defendants who have engaged in what is considered moral wrongdoing).

<sup>323</sup> Boundedly rational officers could still, of course, have unreasonable expectations that they will be held financially responsible for settlements and judgments. *See supra* notes 271–78 and accompanying text (describing officers' possible concerns).

<sup>324</sup> *See* Schwartz, *supra* note 18, at 1076–77 (describing evidence that police misconduct suits do not have significant negative effects on officers' employment).

<sup>325</sup> *See supra* notes 280–82 and accompanying text (describing studies of lawsuits' deterrent effects on officers).

<sup>326</sup> *See Benefits and Salary Overview*, NYPD, <http://www.nypdrecruit.com/benefits-salary/overview> (last visited Feb. 5, 2014) (reporting that officer candidates earn almost \$45,000 in total pay in the police academy and over \$76,000 per year in base pay after five and a half years as officers).

<sup>327</sup> *See* Schwartz, *supra* note 268, at 880–81 (describing many ways in which litigation outcomes may not reflect the strength or merits of plaintiffs' claims).

<sup>328</sup> *See* Emery & Maazel, *supra* note 72, at 592 ("If our society is to encourage public service and attract qualified public servants, public officials cannot face financial ruin for every careless mistake that causes someone damage. Society must bear that cost."). On the other hand, officers who are judgment proof—like the Los Angeles County Sheriff's Department deputy who was in prison when he was found liable for assaulting an inmate at the Los Angeles County Jail—are unlikely to be much deterred by the imposition of personal liability. For a description of the case against the imprisoned Los Angeles County Sheriff's Department's deputy, see *supra* notes 217–20. *See also* Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45, 54 (1986) (observing that one problem created by injurers' lack of assets is that injurers may tend "to engage excessively in risky activities and to fail to exercise adequate care when so doing").

deterrent effect of lawsuits on individual officers, it does spread risk in a way that makes some sense.<sup>329</sup>

The practices in place in New York City and Cleveland offer a promising middle ground. In New York and Cleveland, officers paid between \$250 and \$25,000 in thirty-six cases during the study period.<sup>330</sup> One might believe that the financial sanctions on officers should be higher (or lower), or that they should be imposed more (or less) frequently. But the general idea—imposing financial sanctions on officers as part of settlements and judgments—could, in theory, accommodate § 1983's somewhat conflicting compensation and deterrence goals. Requiring officers to pay thousands, or even tens of thousands, of dollars (calculated, ideally, based on their culpability and resources)<sup>331</sup> could punish the involved officers and send a message to others.<sup>332</sup> Yet, because the government would pay the bulk of any award, wronged plaintiffs would still be compensated for the violations of their constitutional rights. Refusing to indemnify officers' punitive damages awards is another way to punish officers found to have engaged in reckless or malicious conduct.<sup>333</sup> This adjustment would not, however, punish officer wrongdoing in the vast majority of cases that are resolved before trial.

The deterrence goals of § 1983 could also be met, despite widespread indemnification, if the costs of satisfying settlements and judgments placed pressure on government entities to implement systemic

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<sup>329</sup> Another alternative would be for law enforcement officers to purchase professional liability insurance individually or through their unions. It is unclear whether and to what extent personal liability insurance is available for law enforcement officers. Virginia law requires that state troopers enter into a bond or purchase personal liability insurance (with the premiums paid by the state). See VA. CODE ANN. § 52-7 (2013). But police officers discussing this issue at an online bulletin board reported that there is no professional liability insurance available for nonfederal law enforcement officers. See kingcop36, Comment to *Professional Liability Insurance*, OFFICER.COM (July 31, 2009, 5:55 AM), <http://forums.officer.com/t121675/> ("You will find that no one offers professional liability insurance for police officers (except on the federal level). . . . If you purchase an umbrella policy, that will NOT cover you for your job as a law enforcement officer."); see also SCHUCK, *supra* note 13, at 85 (discussing the unlikelihood that law enforcement officers can purchase private insurance for their on-duty conduct). The availability and sensibility of professional liability insurance for law enforcement officers as a means of risk spreading are topics worthy of further research and consideration.

<sup>330</sup> See *supra* Part II.F & Appendix H (describing these cases).

<sup>331</sup> In particularly egregious cases, officers' resources could be completely depleted before their employers would be required to contribute.

<sup>332</sup> See *supra* note 196 and accompanying text (describing this possible explanation for New York City's requirement that some officers contribute).

<sup>333</sup> See *supra* notes 304–05 and accompanying text (discussing this possibility and noting the tendency of jurisdictions to indemnify punitive damages regardless of official policy).

police reform.<sup>334</sup> Peter Schuck has argued that police departments are better suited than individual officers to bear the costs of liability because departments “can better identify and evaluate different strategies for deterring illegal arrests and can also better predict the likely effects of alternative deployments of police officers, training methods, or arrest guidelines upon both deterrence and vigorous decision-making.”<sup>335</sup> Payouts can also encourage departments to retrain, discipline, and fire officers when they engage in wrongdoing. With these powers, departments can reduce the risk of future officer misconduct despite widespread indemnification.

That municipalities *can* take these steps does not, however, mean that they *do*. Many have argued that when municipalities pay settlements and judgments for the civil rights violations of their officers—whether through indemnification, *Monell*, or vicarious liability—they will be encouraged to better train, discipline, and supervise their officers.<sup>336</sup> My study reveals, however, that governments are already absorbing the costs of individual officer liability. Despite this significant financial outlay—over \$730 million from 2006 to 2011 in forty-four large jurisdictions and over \$9.1 million during that same period in thirty-seven small and mid-sized jurisdictions—the general consensus is that most governments are not taking aggressive enough action to investigate and discipline their officers and do not effectively manage their law enforcement agencies.<sup>337</sup>

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<sup>334</sup> This same assumption operates in tort law. Private firms are expected to improve accountability and behavior if they are forced to internalize litigation costs through enterprise liability. See, e.g., Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 143–44, 160–61 (1990) (arguing that manufacturers and consumers will make optimal investments in accident prevention when they have internalized total accident costs, which include litigation costs).

<sup>335</sup> SCHUCK, *supra* note 13, at 104.

<sup>336</sup> See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 652 (1980) (“[T]he threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.”); Fallon, *supra* note 16, at 496 (“If government entities routinely indemnify their officials, they would certainly have an incentive to provide those officials with training regarding applicable law.”); Fisk & Chemerinsky, *supra* note 56, at 796 (arguing that vicarious liability “gives municipalities a greater incentive to monitor, supervise, and control the acts of their employees,” and that “[l]ocal governments, with inherently scarce resources, obviously want to minimize the amount of their budget that is lost to paying damages”).

<sup>337</sup> See, e.g., Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 38 (2012) (“While data on police conduct and misconduct is difficult to obtain, most participants in *Saint Louis University Public Law Review’s* Symposium, and elsewhere, take for granted the need for additional efforts by police departments to promote civil rights through departmental reform because civil rights violations continue to occur.”); Schwartz, *supra* note 268, at 870 (“[I]nternal affairs

Moreover, governments do not appear to be collecting enough information about lawsuits to make educated decisions about whether or how to reduce the police activities that prompt these suits. In previous work, I showed that few police departments gather and analyze information about lawsuits brought against them and their officers; departments do not keep track of which officers have been named as defendants, the nature of the allegations made against them, the information developed during litigation, or cases' outcomes.<sup>338</sup> This study of police indemnification shows that law enforcement agencies also have little information about the volume and costs of lawsuits brought against them and their officers. Few police departments had ready access to information about the number of lawsuits filed against their department and their officers, the amount paid in settlements and judgments, whether punitive damages were awarded, and whether their officers were indemnified for all or some of these financial penalties.<sup>339</sup> Ignorance about litigation costs and indemnification decisions was not limited to law enforcement agencies: Twenty-six of the largest government entities across the country—including New York, Chicago, Philadelphia, and Houston—reported that they did not know whether or when their officers had contributed to settlements or judgments. Furthermore, eighteen of the largest cities and counties—including Harris County, San Diego, Baltimore County, and New Orleans—reported that they keep no records in any government agency or office reflecting how much they spend in lawsuits involving the police in any given year.<sup>340</sup>

What explains governments' willingness to spend millions of dollars in settlements and judgments of civil rights claims on behalf of

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investigations have long been found to be inadequate and incomplete. Indeed, no outside reviewer has 'found the operations of internal affairs divisions in any of the major U.S. cities satisfactory.'" (quoting HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 65 (1998)). This is not to say that lawsuits have *no* effect on law enforcement agencies. As I have previously observed, "high-profile cases and large damages awards may inspire behavior change" even if "deterrence does not function as expected when it comes to run-of-the-mill damages actions." Schwartz, *supra* note 268, at 846. The fear of litigation more generally may also cause departments to hire personnel and create recordkeeping and other procedures that can lead to a reduction of harms. See generally Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1 (2008) (observing the ways in which efforts to reduce liability risk can lead to performance improvements in three organizational settings).

<sup>338</sup> See generally Schwartz, *supra* note 18 (demonstrating this lack of information tracking by law enforcement agencies).

<sup>339</sup> See *supra* note 85 and accompanying text (describing the law enforcement agencies that collected this information).

<sup>340</sup> See Appendix G (listing jurisdictions without responsive data about litigation payouts).



their law enforcement officers without—in many instances—any systematic study or oversight of the amount spent in these cases? One explanation for police departments' indifference to lawsuits is that they are not financially responsible for satisfying settlements and judgments against their officers. Although this study did not aim to determine which entities within municipal governments satisfied settlements and judgments against the police—a topic worthy of future research—anecdotal evidence suggests that police litigation costs are often paid from a city's general budget or insurer with limited or no direct impact on the finances of the police department.<sup>341</sup> So, in many departments, there is not just indemnification, but double indemnification—the individual officers are indemnified and the police department itself is indemnified by the city, which pays settlements and judgments against officers out of a general fund.

What, then, explains municipalities' indifference to these costs? Perhaps, as others have argued, governments do not respond to financial incentives as do actors in the private sector.<sup>342</sup> If government actors aim to maximize political capital, not dollars, they will not pay attention to lawsuits unless it is in their political interest to do so. And, for any number of reasons—including pressure by police unions,<sup>343</sup> public apathy,<sup>344</sup> or an interest in appearing tough on crime<sup>345</sup>—even millions of dollars paid to resolve police misconduct suits may not

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<sup>341</sup> See, e.g., HUMAN RIGHTS WATCH, *supra* note 337, at 80 (“[I]n most cities . . . civil settlements paid by the city on behalf of an officer usually are not taken from the police budget but are paid from general city funds.”); Miller & Wright, *supra* note 15 at 781–82 (“[T]he monetary cost of judgments against police are not always fully or directly borne by police departments or by individual officers. Civil judgments come out of city or county funds, or perhaps from insurance policies that the local government purchases—i.e., from taxpayers.”); Schwartz, *supra* note 18, at 1047–48 (describing New York City’s practice of satisfying settlements and judgments out of the city’s general budget).

<sup>342</sup> See, e.g., Harmon, *supra* note 337, at 46 (“[Governmental budgetary outlays] do not translate easily into political and financial costs for police chiefs and the political actors that shape their incentives and budgets . . . .”); Levinson, *supra* note 72, at 347 (“Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay.”).

<sup>343</sup> See, e.g., Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012) (“Collective bargaining rights deter department-wide changes intended to prevent constitutional violations . . . .”); Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 71 (2012) (“[I]t seems that virtually everyone with an interest in policing—citizens, civic leaders, reform activists, and scholars—believes that police unions are extremely powerful, have a major influence on police practices, and are a principal obstacle to change.”).

<sup>344</sup> See Harmon, *supra* note 343, at 811–12 (observing that “the harms of policing are unevenly distributed” and “those who suffer the extra burdens of policing frequently lack the cohesiveness and organization necessary for . . . advocacy success”). The costs of settlements and judgments are more evenly distributed, but individual taxpayers may not be sufficiently motivated to organize around the costs of police misconduct suits.

have significant enough political ramifications to lead government officials to pay sustained attention to these suits. Or, perhaps, governments *do* respond to financial incentives, but the money spent on police misconduct suits is a relatively small portion of most jurisdictions' budgets and so does not prompt reform.<sup>346</sup>

This Article does not endeavor definitively to diagnose the cause of widespread inattention to lawsuit costs and information, nor does it offer a definitive solution to strengthen the link between police misconduct litigation and police accountability efforts. There are several possible measures to consider, including: requiring police departments to bear more financial responsibility for litigation costs,<sup>347</sup> allowing

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<sup>345</sup> See, e.g., *id.* at 811 (“[C]hiefs are usually better rewarded for maintaining order and reducing crime than protecting civil rights.”); Miller & Wright, *supra* note 15, at 782 (observing that lawsuit payouts may cause government officials to “reward police with larger budgets, since the political returns for higher police funding and appearing tough on crime may be worth the budgetary cost”).

<sup>346</sup> For example, the approximately \$8.9 million paid to plaintiffs in civil rights cases brought against the Los Angeles Sheriff's Department and its deputies each year is just .30% of the Sheriff's Department's \$2.9 billion budget, and just .04% of the county's \$26 billion budget in 2013–14. See COUNTY OF LOS ANGELES 2013–14 FINAL BUDGET 63 (2013), available at <http://ceo.lacounty.gov/pdf/portal/2013-14%20Final%20Budget%20112713.pdf> (describing the Sheriff's Department's budget); COUNTY OF LOS ANGELES FINAL ADOPTED BUDGET CHARTS 2013–14, at 2, available at <http://ceo.lacounty.gov/pdf/budget/2014/2013-14%20Final%20Adopted%20Budget%20Charts.pdf> (describing the county's budget). The approximately \$176,000 paid to plaintiffs in civil rights cases brought against the Montgomery County Police Department and its officers each year is less than .07% of the police department's over \$260 million budget and less than .004% of the county's \$4.81 billion budget in fiscal year 2014. See MONTGOMERY CNTY. POLICE DEP'T, FY14 OPERATING BUDGET AND PUBLIC SERVICES PROGRAM FY14–15, at 1, available at [http://www.montgomerycountymd.gov/OMB/Resources/Files/omb/pdfs/fy14/psp\\_pdf/pol.pdf](http://www.montgomerycountymd.gov/OMB/Resources/Files/omb/pdfs/fy14/psp_pdf/pol.pdf) (describing the police department budget); Memorandum from Jennifer A. Hughes, Dir., Off. of Mgmt. & Budget, to Interested Readers (July 1, 2013), available at [http://www.montgomerycountymd.gov/OMB/Resources/Files/omb/pdfs/fy14/psp\\_pdf/message.pdf](http://www.montgomerycountymd.gov/OMB/Resources/Files/omb/pdfs/fy14/psp_pdf/message.pdf) (describing the Montgomery County budget for fiscal year 2014). The approximately \$2.2 million paid to plaintiffs in civil rights cases brought against the Albuquerque Police Department and its officers each year is just 1.37% of the police department's over \$162 million budget and .26% of the city's \$870 million budget in 2013–14. See CITY OF ALBUQUERQUE FY14 APPROVED BUDGET 1, 22 (2013), available at <http://documents.cabq.gov/budget/fy-14-approved-budget.pdf> (describing the city and police department budgets).

<sup>347</sup> This is a recommendation I have previously made regarding lawsuits against the New York City Police Department. See Joanna C. Schwartz, *Watching the Detectives*, N.Y. TIMES, June 16, 2011, at A35 (“[T]he city could require the Police Department to settle lawsuits out of its own budget, instead of the city's general coffers. Perhaps if the department held its own purse strings, it would find more to learn from litigation.”). This is also a recommendation made previously by the New York City Comptroller, who observed that the City's Health and Hospitals Corporation instituted risk management efforts and reduced litigation costs after becoming financially responsible for claims. See JOHN C. LIU, CITY OF NEW YORK OFFICE OF THE COMPTROLLER, CLAIMS REPORT FISCAL YEAR 2011, at 8 (2012) (“[T]he Comptroller's Office again recommends that the City implement a process whereby agencies bear some financial accountability for claim activity.”).

city or county councils to oversee police litigation expenditures more closely,<sup>348</sup> hiring outside auditors to review litigation,<sup>349</sup> and improving policies to integrate litigation data into police risk management.<sup>350</sup> If *Monell* were replaced with respondeat superior, some manner of defense from vicarious liability could incentivize strong training, supervision, and disciplinary policies and practices.<sup>351</sup> Federal or state governments could award grants to chiefs who take proactive approaches to improve police accountability.<sup>352</sup>

Regardless of the means used to tighten the link between lawsuits and police decisionmaking, police misconduct suits will not have their intended deterrent effect on law enforcement officials until governments pay closer attention to the costs and information associated with these suits. If police departments do not gather and analyze information from lawsuits and do not know how much has been spent in settlements and judgments, they cannot assess which officers and which types of police action lead to lawsuits. And if large cities and counties do not keep track of how many taxpayer dollars are spent satisfying settlements and judgments against their law enforcement officers, they are likely doing little to oversee police department litigation finances or to encourage steps that would reduce payouts. Proposed doctrinal reforms to strengthen lawsuits' deterrent effects will

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<sup>348</sup> The New York City Council has attempted to get additional access to police lawsuits and payouts. For a description of these efforts, see Schwartz, *supra* note 268, at 874 n.184.

<sup>349</sup> See Schwartz, *supra* note 268, at 849–52 (describing outsiders' review of police misconduct cases in the Los Angeles County Sheriff's Department and police departments in Seattle, Portland, Denver, and Chicago); Walker, *supra* note 343, at 84 (arguing that "the police auditor form of citizen oversight" is the best available means of maintaining police accountability reforms over the long term).

<sup>350</sup> See Schwartz, *supra* note 268 (describing policies to gather and analyze litigation data in five litigation-attentive law enforcement agencies).

<sup>351</sup> The Supreme Court created an analogous affirmative defense to liability in the Title VII context by allowing an employer to defend against hostile work environment claims by showing that it took reasonable care to protect against or remedy a hostile working environment, and that the employee did not take advantage of measures adopted by the employer to address workplace harassment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Scholars have, however, criticized lower courts' application of the defense. See, e.g., Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 677 (2000) ("As applied, the affirmative defense undermines Title VII's goal of compensating victims of discrimination while not serving its deterrence rationale."); Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 461 (2002) (observing that federal courts "are interpreting 'reasonable care' in the first prong of the new affirmative defense to require only minimal prevention efforts by the employer" and are requiring plaintiffs "to produce hard-to-find evidence of specific facts justifying any failure on their part to complain to employers").

<sup>352</sup> See Harmon, *supra* note 337, at 55 (describing ways in which the federal government could encourage police accountability through grants and other incentives).

also fail. Reforms that increase the costs of police misconduct litigation (whether by doing away with qualified immunity and *Monell* or by allowing punitive damages against municipalities) will not lead to improvements in policing unless governments and police departments pay closer attention to the costs and information associated with these suits.

### CONCLUSION

The assumption that law enforcement officers are personally responsible for settlements and judgments entered against them underlies several judicial doctrines that limit plaintiffs' ability to recover compensatory and punitive damages in civil rights damages actions. Defense attorneys also use the assumption that police officers will be held personally liable to their strategic benefit in the litigation of police misconduct cases. Yet, this Article reveals that officers almost never contribute anything to settlements and judgments in police misconduct suits. Law enforcement officers employed by the forty-four largest jurisdictions in my study were personally responsible for just .02% of the over \$730 million paid to plaintiffs in police misconduct suits between 2006 and 2011. Law enforcement officers employed by the thirty-seven small and mid-sized departments in my study paid nothing towards settlements and judgments entered against them during this period. Officers did not contribute to settlements and judgments even when they were disciplined, terminated, or criminally prosecuted for their misconduct. And officers were not required to contribute to settlements and judgments even when applicable law prohibited indemnification.

For several decades, the Supreme Court has crafted civil rights doctrines—including qualified immunity and limitations on municipal liability and punitive damages—based on unfounded assumptions, and many times has done so in ways that make it more difficult for plaintiffs to prevail. This Article rebuts one of those assumptions: that law enforcement officers are personally responsible for settlements and judgments entered against them. In so doing, it raises related questions, including how the threat of suit influences officer behavior, the role of municipal liability claims in the litigation of police misconduct cases, how regional variations in civil rights litigation practice may influence the frequency with which officers are sued and the likelihood that plaintiffs prevail, and the budgetary impact of widespread indemnification on law enforcement agencies.

This study additionally prompts questions about the empirical foundations for related doctrines. As just one example, prosecutors

enjoy absolute immunity from suit in part because “[t]he public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.”<sup>353</sup> The absolute immunity granted to prosecutors makes it exceedingly difficult for plaintiffs to civilly challenge wrongful convictions and other constitutional violations.<sup>354</sup> Yet, assuming that prosecutors would be indemnified as frequently as police officers currently are, absolute immunity may be an unduly strong protection. Judges and legislators also have absolute immunity,<sup>355</sup> but are as likely—if not more likely—than police officers to be indemnified.

Only with a grounded understanding of the realities of § 1983 litigation can it be possible to craft doctrines that effectively balance “the importance of a damages remedy to protect the rights of citizens” and “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.”<sup>356</sup> Scholars should endeavor to answer the remaining, pressing empirical questions about the realities of civil rights litigation. Courts should then modify civil rights doctrines to the extent that they are inconsistent with these realities.

In an ideal world, all the pressing empirical questions about the realities of civil rights litigation would be answered at once, allowing civil rights doctrine and practice to be comprehensively and cohesively reconfigured. But the perfect should not be the enemy of the good. This Article reveals that officers are virtually always indemnified. Courts should now adjust civil rights doctrines so that they no longer rely on counterfactual assumptions about officers’ liability exposure.

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<sup>353</sup> *Imbler v. Pachtman*, 424 U.S. 409, 424–25 (1976).

<sup>354</sup> For a description of the pervasiveness of prosecutorial misconduct and limited safeguards and remedies to protect against prosecutorial misconduct, see Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 *FORDHAM L. REV.* 509, 512–22 (2011).

<sup>355</sup> See *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (holding that local legislators have absolute immunity when acting in their legislative capacity); *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (holding that judges are absolutely immune from liability so long as they do not act in “clear absence of all jurisdiction”).

<sup>356</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

APPENDIX A: INDEMNIFICATION OF SETTLEMENTS AND JUDGMENTS IN CIVIL RIGHTS CASES (2006–2011)

The following table provides detailed information regarding the indemnification of settlements and judgments in the forty-four largest jurisdictions in my study from 2006–2011. By column, the table shows (1) the police agency and state, (2) the number of sworn officers in each jurisdiction, (3) the amount awarded in settlements and judgments, (4) the number of cases in which plaintiffs received payment, (5) the total number of cases in which officers were not indemnified for part or all of a settlement or judgment, (6) the total number of officers who were not indemnified for part or all of a settlement or judgment, and (7) the total amount officers were required to pay. Departments are listed in order of department size by number of sworn officers, according to BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82. See Appendix I for the data sources for each jurisdiction.

Agency	Sworn Officers	Total Amount Awarded in Civil Rights Settlements and Judgments	Civil Rights Cases in which Plaintiffs Received Payment	Cases in which Officers Were Not Fully Indemnified	Officers Who Were Not Fully Indemnified	Amount Officers Were Required to Pay
New York City Police Dep't (NY)	36,023	\$348,274,595.81	6887	34	35	\$114,000
Los Angeles Police Dep't (CA)	9727	\$38,734,282.27	147	1	1	\$300
Los Angeles Cnty. Sheriff's Dep't (CA)	9461	\$53,657,726.19	248	0	0	\$0
California Highway Patrol (CA)	7202	\$19,114,022.52	79	0	0	\$0
Cook Cnty. Sheriff's Office (IL)	5655	\$58,278,267.11	313	0	0	\$0
New York State Police (NY)	4847	\$11,411,922.72	105	0	0	\$0
Texas Dep't of Public Safety (TX)	3529	\$188,900.00	10	0	0	\$0
Dallas Police Dep't (TX)	3389	\$637,500	5	0	0	\$0
Phoenix Police Dep't (AZ)	3388	\$11,894,824.00	65	0	0	\$0
New Jersey State Police (NJ)	3053	\$12,231,825.22	64	0	0	\$0
Baltimore Police Dep't (MD)	2990	\$11,647,127	128	0	0	\$0

Agency	Sworn Officers	Total Amount Awarded in Civil Rights Settlements and Judgements	Civil Rights Cases in which Plaintiffs Received Payment	Cases in which Officers Were Not Fully Indemnified	Officers Who Were Not Fully Indemnified	Amount Officers Were Required to Pay
Las Vegas Metro. Police Dep't (NV)	2942	\$5,062,541.92	74	0	0	\$0
Massachusetts State Police (MA)	2310	\$2,576,748.00	32	0	0	\$0
Boston Police Dep't (MA)	2181	\$16,394,990.95	30	0	0	\$0
Riverside Cnty. Sheriff's Dep't (CA)	2147	\$9,464,370.02	24	0	0	\$0
Illinois State Police (IL)	2105	\$13,608,772.27.00	93	0 or 1	0 or 1	Unknown
San Antonio Police Dep't (TX)	2020	\$1,664,848.17	54	0	0	\$0
Milwaukee Police Dep't (WI)	1987	\$4,878,070.00	19	0	0	\$0
San Francisco Police Dep't (CA)	1940	\$11,049,735.00	44	0	0	\$0
Honolulu Police Dep't (HI)	1934	\$904,351.85	19	0	0	\$0
Columbus Police Dep't (OH)	1886	\$901,100.00	12	0	0	\$0
North Carolina State Highway Patrol (NC)	1827	\$30,000	1	0	0	\$0
San Bernardino Cnty. Sheriff's Dep't (CA)	1797	\$6,162,831.20	36	0	0	\$0
Orange Cnty. Sheriff's Dep't (CA)	1794	\$9,835,069.87	44	0	0	\$0
Michigan State Police (MI)	1732	\$2,682,627.25	41	0	0	\$0
Atlanta Police Dep't (GA)	1719	\$10,466,172.00	29	0	0	\$0
Charlotte-Mecklenburg Police Dep't (NC)	1672	\$1,000,673.31	14	0	0	\$0
Jacksonville Sheriff's Office (FL)	1662	\$1,208,300.00	15	0 or 1	0 or 1	\$0-20,000
Broward Cnty. Sheriff's Office (FL)	1624	\$7,266,670.67	148	0	0	\$0
Cleveland Police Dep't (OH)	1616	\$3,474,253.87	35	2	2	\$37,000
Florida Highway Patrol (FL)	1606	\$295,079.80	8	0	0	\$0
Prince George's Cnty. Police Dep't (MD)	1578	\$17,285,895.66	85	0	0	\$0

Agency	Sworn Officers	Total Amount Awarded in Civil Rights Settlements and Judgements	Civil Rights Cases in which Plaintiffs Received Payment	Cases in which Officers Were Not Fully Indemnified	Officers Who Were Not Fully Indemnified	Amount Officers Were Required to Pay
Denver Police Dep't (CO)	1525	\$3,231,999.06	39	0	0	\$0
Austin Police Dep't (TX)	1515	\$3,166,501.00	16	0	0	\$0
Fort Worth Police Dep't (TX)	1489	\$2,189,200.00	11	0	0	\$0
Kansas City Police Dep't (MO)	1421	\$2,656,467.86	15	0	0	\$0
San Jose Police Dep't (CA)	1382	\$4,814,861.99	26	0	0	\$0
Seattle Police Dep't (WA)	1283	\$3,936,205.98	39	0	0	\$0
Montgomery Cnty. Police Dep't (MD)	1206	\$1,055,210.06	23	0	0	\$0
El Paso Police Dep't (TX)	1132	\$279,000.00	16	0	0	\$0
Miami Police Dep't (FL)	1104	\$4,235,787.50	27	0	0	\$0
Oklahoma City Police Dep't (OK)	1046	\$207,250.00	9	0	0	\$0
Albuquerque Police Dep't (NM)	1020	\$13,394,194.01	85	0	0	\$0
Tampa Police Dep't (FL)	980	\$3,820,000.00	11	0	0	\$0
<b>Total</b>	<b>144,446</b>	<b>\$735,270,772.11</b>	<b>9225</b>	<b>37-39</b>	<b>38-40</b>	<b>\$151,300-\$171,300</b>



**APPENDIX B: INDEMNIFICATION OF SETTLEMENTS AND JUDGMENTS IN ALL TYPES OF CASES (2006–2011)**

The following table provides detailed information regarding the total payouts and indemnification decisions for all cases, not solely civil rights cases, from 2006-2011, for the largest agencies in my study that provided information for all types of cases. By column, the table shows (1) the police agency and state, (2) the number of sworn officers in each jurisdiction, (3) the total awarded in settlements and judgments in all types of cases, (4) the total number of cases in which plaintiffs received payment, (5) the total number of cases in which officers were not indemnified for part or all of a settlement or judgment, (6) the total number of officers who were not indemnified for part or all of a settlement or judgment, and (7) the total amount officers were required to pay. Departments are listed in order of department size by number of sworn officers, according to BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82. See Appendix I for the data sources for each jurisdiction.

Agency	Sworn Officers	Total Amount Awarded in Settlements and Judgments	Cases in which Plaintiffs Received Payment	Cases in which Officers Were Not Fully Indemnified	Officers Who Were Not Fully Indemnified	Amount Officers Were Required to Pay
Los Angeles Police Dep't (CA)	9727	\$96,094,138.08	514	1	1	\$300
New York State Police (NY)	4847	\$14,956,648.39	235	0	0	\$0
Texas Dep't of Public Safety (TX)	3529	\$2,216,572.80	56	0	0	\$0
New Jersey State Police (NJ)	3053	\$16,031,225.71	142	0	0	\$0
Las Vegas Metro. Police Dep't (NV)	2942	\$6,635,048.39	140	0	0	\$0
Riverside Cnty. Sheriff's Dep't (CA)	2147	\$12,404,155.00	53	0	0	\$0
Illinois State Police (IL)	2105	\$17,835,874.54	176	0 or 1	0 or 1	Unknown
San Antonio Police Dep't (TX)	2020	\$2,181,976.63	103	0	0	\$0
San Francisco Police Dep't (CA)	1940	\$17,681,128.57	83	0	0	\$0
Honolulu Police Dep't (HI)	1934	\$1,185,258.00	37	0	0	\$0

Agency	Sworn Officers	Total Amount Awarded in Settlements and Judgments	Cases in which Plaintiffs Received Payment	Cases in which Officers Were Not Fully Indemnified	Officers Who Were Not Fully Indemnified	Amount Officers Were Required to Pay
Columbus Police Dep't (OH)	1886	\$2,165,600.00	31	0	0	\$0
North Carolina State Highway Patrol (NC)	1827	\$30,000.00	1	0	0	\$0
San Bernardino Cnty. Sheriff's Dep't (CA)	1797	\$8,077,105.11	68	0	0	\$0
Michigan State Police (MI)	1732	\$4,882,184.85	58	0	0	\$0
Atlanta Police Dep't (GA)	1719	\$13,075,959.86	431	0	0	\$0
Charlotte-Mecklenburg Police Dep't (NC)	1672	\$2,371,780.34	28	0	0	\$0
Broward Cnty. Sheriff's Office (FL)	1624	\$12,459,931.55	303	0	0	\$0
Cleveland Police Dep't (OH)	1616	\$4,541,919.88	67	2	2	\$37,000
Florida Highway Patrol (FL)	1606	\$386,736.30	15	0	0	\$0
Prince George's Cnty. Police Dep't (MD)	1578	\$20,410,188.36	164	0	0	\$0
Denver Police Dep't (CO)	1525	\$4,235,909.65	87	0	0	\$0
Fort Worth Police Dep't (TX)	1489	\$2,869,227.01	21	0	0	\$0
Kansas City Police Dep't (MO)	1421	\$3,481,609.25	34	0	0	\$0
San Jose Police Dep't (CA)	1382	\$5,325,491.24	49	0	0	\$0
Montgomery Cnty. Police Dep't (MD)	1206	\$5,536,154.30	56	0	0	\$0
Albuquerque Police Dep't (NM)	1020	\$15,138,589.91	109	0	0	\$0
Tampa Police Dep't (FL)	980	\$3,845,000.00	13	0	0	\$0
<b>Total</b>	<b>60,324</b>	<b>\$296,055,413.72</b>	<b>3074</b>	<b>3 or 4</b>	<b>3 or 4</b>	<b>\$37,300</b>

**APPENDIX C: PERCENTAGE OF TOTAL LITIGATION COSTS SPENT ON CIVIL RIGHTS CASES (2006–2011)**

The following table provides detailed information regarding the total payouts and payouts in civil rights cases for the nineteen large jurisdictions that provided detailed information about all types of cases. By column, the table shows (1) the police agency and state, (2) the total amount paid to plaintiffs in all cases, (3) the total amount paid to plaintiffs in civil rights cases, and (4) the percentage of total dollars paid to plaintiffs in civil rights cases. Jurisdictions are listed from the lowest to highest percentage of dollars paid to plaintiffs in civil rights cases. The median percentage of total dollars spent on civil rights claims (76.3%) is used to estimate the percentage of dollars spent in civil rights cases in jurisdictions that did not provide detailed information.

Agency	Total Payouts	Civil Rights Payouts	Percentage of Total Dollars Paid to Plaintiffs in Civil Rights Cases
Texas Dep't of Public Safety (TX)	\$2,216,572.80	\$188,900.00	8.5%
Montgomery Cnty. Police Dep't (MD)	\$5,536,154.30	\$1,055,210.06	19.1%
Los Angeles Police Dep't (CA)	\$96,094,138.08	\$38,734,282.27	40.3%
Charlotte-Mecklenburg Police Dep't (NC)	\$2,371,780.34	\$1,000,673.31	42.2%
California Highway Patrol (CA)	\$38,613,837.00	\$19,114,022.52	49.5%
Michigan State Police (MI)	\$4,882,184.88	\$2,682,627.25	54.9%
Broward Cnty. Sheriff's Office (FL)	\$12,459,931.55	\$7,266,670.67	58.3%
Philadelphia Police Dep't (PA)	\$61,959,183.15	\$38,741,707.62	62.5%
San Francisco Police Dep't (CA)	\$17,681,128.57	\$11,049,735.00	62.5%
Fort Worth Police Dep't (TX)	\$2,869,227.01	\$2,189,200.00	76.3%
Miami Police Dep't (FL)	\$5,539,144.64	\$4,235,787.50	76.5%
Chicago Police Dep't (IL)	\$257,560,266.00	\$201,444,893.00	78.2%
Atlanta Police Dep't (GA)	\$13,075,959.86	\$10,466,172.00	80.0%

Agency	Total Payouts	Civil Rights Payouts	Percentage of Total Dollars Paid to Plaintiffs in Civil Rights Cases
Prince George's Cnty. Police Dep't (MD)	\$20,410,188.36	\$17,285,895.66	84.7%
Metro. Police Dep't (DC)	\$60,863,207.39	\$52,875,616.18	86.9%
Albuquerque Police Dep't (NM)	\$15,138,589.91	\$13,394,194.01	88.5%
San Jose Police Dep't (CA)	\$5,325,491.24	\$4,814,861.99	90.4%
Austin Police Dep't (TX)	\$3,190,664.24	\$3,166,501.00	99.2%
Tampa Police Dep't (FL)	\$3,845,000.00	\$3,820,000.00	99.3%

**APPENDIX D: PERCENTAGE OF CIVIL RIGHTS CASES RESOLVED IN PLAINTIFFS' FAVOR (2006–2011)**

The following table provides detailed information regarding the resolution of civil rights cases for the eighteen large departments that provided detailed information about all types of cases. By column, the table shows (1) the police agency and state, (2) the total number of all types of cases resolved (by dismissal, settlement, or judgment), (3) the total number of all types of cases resolved with payment to plaintiffs, (4) the total number of civil rights cases resolved with payment to plaintiffs, (5) the percentage of all cases resolved with payment to plaintiffs, (6) the percentage of civil rights cases resolved with payment to plaintiffs, and (7) the percentage of all cases resolved with payment to plaintiffs that are civil rights cases. Jurisdictions are listed from the lowest to highest percentage of cases resolved with payment to plaintiffs that are civil rights cases. Where information from an agency was unknown, the median value of the data presented in columns (5: median = 46.0%), (6: median = 20.6%), and (7: median = 52.7%) is used to provide an estimate.

Agency	Total Cases Resolved	Total Cases Resolved with Payment	Total Civil Rights Cases Resolved with Payment	Percentage of Total Cases Resolved with Payment	Percentage of Civil Rights Cases Resolved with Payment	Percentage of Total Cases Resolved with Payment That Are Civil Rights Cases
Atlanta Police Dep't (GA)	Unknown	431	29	Unknown	Unknown	6.7%
Texas Dep't of Public Safety (TX)	222	56	10	25.2%	4.5%	17.9%
Los Angeles Police Dep't (CA)	1079	514	147	47.6%	13.6%	28.6%
Miami Police Dep't (FL)	160	71	27	44.4%	16.9%	38.0%
Montgomery Cnty. Police Dep't (MD)	130	56	23	43.1%	17.7%	41.1%
Broward Cnty. Sheriff's Office (FL)	Unknown	304	148	Unknown	Unknown	48.7%
Charlotte-Mecklenburg Police Dep't (NC)	52	28	14	53.8%	26.9%	50.0
Prince George's Cnty. Police Dep't (MD)	333	164	85	49.2%	25.5%	51.8%
Fort Worth Police Dep't (TX)	39	21	11	53.8%	28.2%	52.4%

Agency	Total Cases Resolved	Total Cases Resolved with Payment	Total Civil Rights Cases Resolved with Payment	Percentage of Total Cases Resolved with Payment	Percentage of Civil Rights Cases Resolved with Payment	Percentage of Total Cases Resolved with Payment That Are Civil Rights Cases
San Francisco Police Dep't (CA)	317	83	44	26.2%	13.9%	53.0%
San Jose Police Dep't (CA)	163	49	26	30.1%	16.0%	53.1%
Metro. Police Dep't (DC)	Unknown	173	95	Unknown	Unknown	54.9%
Philadelphia Police Dep't (PA)	1392	1043	585	74.9%	42.0%	56.1%
Chicago Police Dep't (IL)	Unknown	2536	1461	Unknown	Unknown	57.6%
Michigan State Police (MI)	121	58	41	47.9%	33.9%	70.7%
Albuquerque Police Dep't (NM)	Unknown	109	85	Unknown	Unknown	78.0%
Austin Police Dep't (TX)	68	20	16	29.4	23.5%	80.0%
Tampa Police Dep't (FL)	Unknown	13	11	Unknown	Unknown	84.6%

APPENDIX E: INDEMNIFICATION OF SETTLEMENTS AND JUDGMENTS IN SMALLER DEPARTMENTS  
IN ALL TYPES OF CASES (2006–2011)

The following table provides detailed information regarding settlements and judgments for the small and mid-sized agencies in my study from 2006-2011. By column, the table shows (1) the police agency and state, (2) the number of sworn officers in each jurisdiction, (3) the total awarded in settlements and judgments, (4) the total number of cases in which plaintiffs received payment, (5) the total number of cases in which officers were not indemnified for part or all of a settlement or judgment, (6) the total number of officers who were not indemnified for part or all of a settlement or judgment, and (7) the total amount officers were required to pay. Departments are listed in order of department size by number of sworn officers, according to BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82. Jurisdictions with an asterisk (\*) are those that only provided information about civil rights cases; in the remainder, the information provided concerns all types of cases. See Appendix K for a complete list of small and mid-sized departments queried and the data sources for each responsive jurisdiction.

Agency	Sworn Officers	Amount Awarded in Settlements and Judgments	Cases in which Plaintiffs Received Payment	Cases in which Officers Were Not Fully Indemnified	Officers Who Were Not Fully Indemnified	Amount Officers Were Required to Pay
Raleigh Police Dep't (NC)	702	Unknown	Unknown	0	0	\$0
Contra Costa Cnty. Sheriff's Office (CA)	679	\$304,100.00	9	0	0	\$0
Cobb Cnty. Police Dep't (GA)	590	\$493,412.00	11	0	0	\$0
Minnesota State Patrol (MN)	530	Unknown	Unknown	0	0	\$0
Manatee Cnty. Sheriff's Office (FL)	476	\$216,000.00	11	0	0	\$0
Fort Wayne Police Dep't (IN)	447	\$1,017,760.78	76	0	0	\$0
Howard Cnty. Police Dep't (MD)	424	Unknown	Unknown	0	0	\$0
Summit Cnty. Sheriff's Office (OH)	393	\$867,500.00 (plus two confidential settlements)	3	0	0	\$0

Agency	Sworn Officers	Amount Awarded in Settlements and Judgments	Cases in which Plaintiffs Received Payment	Cases in which Officers Were Not Fully Indemnified	Officers Who Were Not Fully Indemnified	Amount Officers Were Required to Pay
Anchorage Police Dep't (AK)	372	Unknown	Unknown	0	0	\$0
New Hampshire State Police (NH)	350	\$62,3,227.10	9	0	0	\$0
Boise Police Dep't (ID)	306	\$61,924.62 (plus two confidential settlements)	4	0	0	\$0
New Bedford Police Dep't (MA)	288	Unknown	Unknown	0	0	\$0
Springfield Police Dep't (IL)	273	\$146,957.25 (plus two confidential settlements)	5	0	0	\$0
Overland Park Police Dep't (KS)	258	\$51,000.00	3	0	0	\$0
Waco Police Dep't (TX)	246	\$14,806.00 (plus two confidential settlements)	4	0	0	\$0
Tulsa Cnty. Sheriff's Office (OK)	237	Unknown	At least 2	0	0	\$0
Quincy Police Dep't (MA)	205	\$0	0	0	0	\$0
Naperville Police Dep't (IL)	184	\$165,750.00 (plus two confidential settlements)	8	0	0	\$0
Pueblo Cnty. Sherriff's Office (CO)	155	\$186,000.00	7	0	0	\$0
Decatur Police Dep't (AL)	133	Unknown	Unknown	0	0	\$0
Schaumburg Police Dep't (IL)*	130	\$125,000.00	1	0	0	\$0
St. Mary's Cnty. Sheriff's Office (MD)	120	\$0	0	0	0	\$0
Sandy Police Dep't (UT)	110	Unknown	Unknown	0	0	\$0
Avondale Police Dep't (AZ)	101	\$178,322.39	4	0	0	\$0
Pocattello Police Dep't (ID)	88	\$48,700.00	2	0	0	\$0



Agency	Sworn Officers	Amount Awarded in Settlements and Judgments	Cases in which Plaintiffs Received Payment	Cases in which Officers Were Not Fully Indemnified	Officers Who Were Not Fully Indemnified	Amount Officers Were Required to Pay
Hemet Police Dep't (CA)	82	\$2,572,500.00	6	0	0	\$0
Eden Prairie Police Dep't (MN)	65	Unknown	1	0	0	\$0
Yellowstone Cnty. Sheriff's Office (MT)	55	\$1,632,100.00	7	0	0	\$0
Town and Country Police Dep't (MI)	34	\$0	0	0	0	\$0
Lincolnton Police Dep't (NC)	31	\$0	0	0	0	\$0
Phelps Cnty. Sheriff's Office (MI)	29	\$25,000.00	1	0	0	\$0
Oldham Cnty. Sherriff's Dep't (KY)	15	\$0	0	0	0	\$0
Edgewood Police Dep't (FL)	10	\$0	0	0	0	\$0
Evansville Police Dep't (WI)	9	\$337,500.00	1	0	0	\$0
Fruitland Police Dep't (ID)	8	\$100,000.00	2	0	0	\$0
Jackson Twp. Police Dep't (OH)	5	\$220,051.14		0	0	\$0
Waterloo Police Dep't (NE)	1	\$0	0	0	0	\$0
<b>Total</b>	<b>8141</b>	<b>\$9,387,611.28+</b>	<b>183+</b>	<b>0</b>	<b>0</b>	<b>\$0</b>

APPENDIX F: INDEMNIFICATION OF PUNITIVE DAMAGES IN CIVIL RIGHTS CASES (2006–2011)

The following table sets out the jurisdictions in which I found proof that juries awarded punitive damages during the study period, the amount ultimately awarded to plaintiffs (after reductions by the trial or appellate court), and indemnification decisions regarding these punitive damages awards. By column, the table shows: (1) the police agency and state, (2) the total awarded in punitive damages, (3) the total number of cases in which punitive damages were awarded, (4) the number of cases in which officers were not indemnified for punitive damages awards, (5) the total number of officers not indemnified for punitive damages awards, and (6) the total amount officers were required to pay to satisfy punitive damages awards. Because many of these punitive damages awards were ultimately vacated and the cases settled separately, it was impossible to isolate these punitive damages awards from overall payments by each jurisdiction. Accordingly, the totals awarded in these cases are also included in Appendix A. See Appendix I for the data sources for each jurisdiction.

Agency	Punitive Damages Awarded by Juries from 2006 to 2011	Cases in which Punitive Damages Were Awarded	Cases in which Officers Were Not Indemnified for Punitive Damages Awards	Officers Not Indemnified for Punitive Damages Awards	Total Amount Officers Were Required to Pay to Satisfy Punitive Damages Awards
New York City Police Dept' (NY)	\$2,860,100	6	0	0	\$0
Los Angeles Police Dept' (CA)	\$300	1	1	1	\$300 (though this was never paid, as discussed <i>supra</i> notes 197–202 and accompanying text)
Los Angeles Cnty. Sheriff's Dept' (CA)	\$126,500	5	0	0	\$0
California Highway Patrol (CA)	\$4,005,522 (reduced to \$55,000 by the trial court, in a decision affirmed on appeal)	1	0	0	\$0

Agency	Punitive Damages Awarded by Juries from 2006 to 2011	Cases in which Punitive Damages Were Awarded	Cases in which Officers Were Not Indemnified for Punitive Damages Awards	Officers Not Indemnified for Punitive Damages Awards	Total Amount Officers Were Required to Pay to Satisfy Punitive Damages Awards
Las Vegas Metro. Police Dep't (NV)	\$5000 (affirmed on appeal)	1	0	0	\$0
San Bernardino Cnty. Sheriff's Dep't (CA)	\$264,500 (reduced to \$19,500 on appeal)	3	0	0	\$0
Prince George's Cnty. Police Dep't (MD)	\$1,175,000 (reduced to \$50,000 by the trial judge, in a decision affirmed on appeal)	1	0	0	\$0
Oklahoma City Police Dep't (OK)	\$2000	1	0	0	\$0
Albuquerque Police Dep't (NM)	\$873,500	1	0	0	\$0
<b>Total</b>	<b>\$9,312,422</b> (reduced to \$3,991,900)	<b>20</b>	<b>1</b>	<b>1</b>	<b>\$300</b>

## APPENDIX G: JURISDICTIONS WITH INCOMPLETE DATA

The following table sets out the twenty-six largest jurisdictions that did not completely respond to my public records requests. By column, the table shows: (1) the police agency and state; (2) the number of sworn officers in each jurisdiction; (3) the total awarded in settlements and judgments in civil rights actions from 2006 to 2011; and (4) the total number of cases in which officers were not indemnified for part or all of a settlement or judgment. Jurisdictions are listed in order of department size by number of sworn officers, according to BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82. Details of these exchanges are set out in Appendix J.

Agency	Sworn Officers	Amount Awarded in Settlements and Judgments in Civil Rights Actions	Number of Times an Officer Was Not Indemnified
Chicago Police Dep't (IL)	13,354	\$201,444,893	Unknown (believed to have occurred rarely, if ever)
Philadelphia Police Dep't (PA)	6642	\$38,726,707.62	Unknown
Houston Police Dep't (TX)	5053	\$2,403,497.00	Unknown
Pennsylvania State Police (PA)	4458	\$25,701,233.19	Unknown
Metro. Police Dep't (DC)	3742	\$52,875,616.18	Unknown
Miami-Dade Police Dep't (FL)	3093	\$5,060,773.29	Unknown
Nassau Cnty. Police Dep't (NY)	2732	Unknown	Unknown
Suffolk Cnty. Police Dep't (NY)	2622	Unknown	Unknown
Harris Cnty. Sheriff's Office (TX)	2558	Unknown	Unknown (believed to have occurred rarely, if ever)
Detroit Police Dep't (MI)	2250	Unknown	Unknown (believed to have occurred rarely, if ever)
San Diego Police Dep't (CA)	1951	Unknown	Unknown
Baltimore Police Dep't (MD)	1910	Unknown	Unknown (believed to have occurred rarely, if ever)
Virginia State Police (VA)	1873	Unknown	Unknown
Port Authority of NY/NJ	1667	Unknown	Unknown
Indianapolis Metro. Police Dep't (IN)	1582	Unknown	Unknown
Ohio State Highway Patrol (OH)	1560	Unknown	Unknown
Memphis Police Dep't (TN)	1549	Unknown	Unknown

<b>Agency</b>	<b>Sworn Officers</b>	<b>Amount Awarded in Settlements and Judgments in Civil Rights Actions</b>	<b>Number of Times an Officer Was Not Indemnified</b>
New Orleans Police Dep't (LA)	1425	Unknown	Unknown
Fairfax Cnty. Police Dep't (VA)	1419	Unknown	Unknown
St. Louis Police Dep't (MO)	1351	\$2,693,195.93	Unknown
Nashville-Davidson Cnty. Police Dep't (TN)	1315	Unknown	Unknown
Newark Police Dep't (NJ)	1310	Unknown	Unknown
Louisville Metro Police Dep't (KY)	1197	\$5,003,702.66	Unknown
Cincinnati Police Dep't (OH)	1082	Unknown	Unknown
DeKalb Cnty. Police Dep't (GA)	1074	Unknown	Unknown
Tucson Police Dep't (AZ)	1032	Unknown	Unknown

## APPENDIX H: CASES IN WHICH OFFICERS WERE REQUIRED TO CONTRIBUTE (2006–2011)

Agency	Case Name	Officers' Financial Contribution	Total Payout in Case	Claim Details
New York (NY)	McNamara v. City of New York, No. 06-CV-5585	\$16,500	\$16,500	Off-duty officer assaulted plaintiff and then provided false information that led to plaintiff's arrest.
New York (NY)	Angulo v. City of New York, No. 251346/08	\$10,000	\$250,000	Officer coerced a false affidavit from another officer.
New York (NY)	Sellers v. City of New York, No. 05-CV-1396	\$8,000 by one officer; \$500 by another	\$70,000	Two officers took naked photographs of the plaintiff during a criminal investigation; one officer was fired and tried (but acquitted) on criminal charges. One of these officers was also not fully indemnified in the <i>Lipka</i> case, <i>infra</i> .
New York (NY)	Nolan-Fine v. City of New York, No. 05-CV-1055	\$6,000	\$31,000	Officer had plaintiff (officer's sister) falsely arrested following family inheritance dispute.
New York (NY)	Gonzalez v. City of New York, No. 01-CV-5584	\$5,000	\$200,000	Officers unlawfully searched plaintiffs' home and assaulted plaintiffs.
New York (NY)	Kukiqi v. City of New York, No. 09-CV-0627	\$5,000	\$42,000	Officer falsely arrested plaintiffs and used pepper spray against them.
New York (NY)	Santiago v. City of New York, No. 07-CV-6257	\$5,000	\$305,000	Motorcyclist was killed after crashing while being chased by two officers. NYPD surveillance video showed that the officers drove off without getting help for the victim. Departmental charges were filed against the officers.
New York (NY)	Massey v. City of New York, No. 05-CV-8718	\$5,000	\$50,000	Off-duty detective assaulted the plaintiff over a conflict concerning a girlfriend, and then called the police and had the plaintiff arrested.
New York (NY)	McKnight v. City of New York, No. 06-CV-3220	\$5,000	\$45,000	Officers unreasonably searched and arrested plaintiff.
New York (NY)	Nandalall v. City of New York, No. 07-CV-6257	\$5,000	\$25,000	Officer sexually assaulted a minor as she was leaving school.

Agency	Case Name	Officers' Financial Contribution	Total Payout in Case	Claim Details
New York City Police Dept (NY)	Baird v. City of New York, No. 4840/00	\$5000	\$25,000	Off-duty officer made obscene telephone calls to a teenaged boy after his mother tried to file a civilian complaint against two other officers in the precinct; the officer was arrested on child endangerment charges.
New York City Police Dept (NY)	Oliveras v. City of New York, No. 04-1879/08	\$5000	\$15,000	Off-duty officer sexually assaulted another officer.
New York City Police Dept (NY)	Doe v. Del Rio, No. 06-CV-3761	\$5000	\$200,002	Officers arrested and assaulted one plaintiff and sexually assaulted another.
New York City Police Dept (NY)	Hassan v. Cornetta, No. 05-CV-6547	\$3250	\$15,000	Officer assaulted and falsely arrested plaintiff while plaintiff was driving a taxicab.
New York City Police Dept (NY)	Lugo v. Gallagher, No. 05-CV-2327	\$2,500	\$90,000	Plain-clothed officers assaulted plaintiff outside a diner.
New York City Police Dept (NY)	Santiago v. City of New York, No. 04-CV-3554	\$2,500	\$330,001	Officers assaulted plaintiff, rupturing his spleen.
New York City Police Dept (NY)	Lipka v. City of New York, No. 05-CV-0333	\$2,500	\$80,000	Officer took improper photographs of the plaintiff as part of an alleged crime investigation and made sexual advances. This officer was also not fully indemnified in the <i>Sellers</i> case, <i>supra</i> .
New York City Police Dept (NY)	Taylor-Mickens v. City of New York, No. 09-CV-7923	\$2,250	\$10,000	Plaintiff went to the 24th Precinct to file a CCRB complaint; the lieutenant on duty discouraged her from filing and then instructed officer to issue plaintiff a summons.
New York City Police Dept (NY)	Chen v. City of New York, No. 06-CV-0315	\$2,000	\$36,000	Unknown.
New York City Police Dept (NY)	Saeteros v. City of New York, No. 05-CV-6883	\$1,500	\$50,000	Officer assaulted and arrested plaintiff, a parking control specialist, following a verbal argument.
New York City Police Dept (NY)	Wells v. City of New York, No. 05-CV-10009	(\$1000 by one officer; \$250 by another)	\$35,000	Officers stopped plaintiffs' car and assaulted and arrested plaintiffs.

Agency	Case Name	Officers' Financial Contribution	Total Payout in Case	Claim Details
New York City Police Dept (NY)	Roberson v. City of New York, No. 06-CV-0213	\$1000	\$18,500	Officer used a racially derogatory term during a traffic stop. Roberson's civilian complaint was substantiated, the officer was found guilty by the trial commissioner, and the Police Commissioner overturned the verdict.
New York City Police Dept (NY)	Dobson v. City of New York, No. 05-CV-4352	\$1000	\$15,000	Plaintiff was assaulted when he went to the 77th Precinct to visit a friend who had been arrested.
New York City Police Dept (NY)	Kudashvili v. City of New York, 10-CV-0774	\$1000	\$350,000	Officers assaulted and falsely arrested plaintiff in a jewelry store.
New York City Police Dept (NY)	Nelson v. City of New York, No. 05-CV-10776	\$1000	\$10,001	Plaintiff was unreasonably stopped and frisked.
New York City Police Dept (NY)	Hasan v. Valentino, No. 03-CV-3590	\$1000	\$45,000	Officers illegally searched plaintiff's home, arrested her, and illegally held her for over five hours.
New York City Police Dept (NY)	Kivetski v. City of New York, No. 04-CV-7402	\$1000	\$193,500	Officer placed unlicensed handgun in plaintiff's car and falsely arrested plaintiff.
New York City Police Dept (NY)	Boyd v. City of New York, 11-CV-4899	\$1000	\$37,000	Officers searched plaintiffs' vehicle without a warrant, used excessive force, and fabricated evidence against the plaintiffs.
New York City Police Dept (NY)	Grullon v. City of New York, No. 06-CV-0969	\$1000	\$401,000	Officer molested plaintiff after stopping her for an alleged traffic violation.
New York City Police Dept (NY)	Jean-Baptiste v. Morales, No. 09-CV-0299	\$1000	\$20,000	Officer falsely arrested and assaulted plaintiff.
New York City Police Dept (NY)	Varella v. City of New York, No. 09-CV-4668	\$500	\$26,001	Officer arrested and assaulted teenaged plaintiff at a bus depot.
New York City Police Dept (NY)	Van Duyne v. City of New York, 10-CV-0925	\$500	\$20,000	Officer falsely arrested plaintiff and used excessive force.
New York City Police Dept (NY)	Fogle v. City of New York, 10-CV-1398	\$500	\$15,000	Officer falsely arrested and imprisoned plaintiff and used excessive force.
New York City Police Dept (NY)	Fagan v. City of New York, No. 06-CV-0408	\$250	\$15,000	Officers unlawfully searched plaintiff and his car.



Agency	Case Name	Officers' Financial Contribution	Total Payout in Case	Claim Details
Cleveland Police Dep't (OH)	Spratt v. Cleveland, No. 08-CV-2237	\$25,000	\$45,000	Officers assaulted plaintiff following a crash incident to an unrelated police chase; one officer was criminally charged with assault.
Cleveland Police Dep't (OH)	Ferreri v. City of Cleveland, No. 09-CV-00621	\$12,000	\$47,000	Off-duty officer shot and killed someone at a housing complex where the officer served as a security guard; officer assigned \$12,000 owed to him by the housing complex to the decedent's estate.
Los Angeles Police Dep't (CA)	Taylor-Ewing v. City of Los Angeles	\$300	\$160,300	Officer was sued for false arrest and excessively tight handcuffs.
Illinois State Police (IL)	Unknown	Unknown	Unknown	Officer contributed to a settlement, although it may have been before 2006. The officer was disciplined following the incident.
Jacksonville Sheriff's Office (FL)	Unknown	\$5000-\$20,000	Unknown	Officer contributed to a settlement in a use of force case, although it may have been before 2006. The officer had assets from a family business.
<b>TOTAL</b>	<b>37-39 cases</b>	<b>\$151,300-\$171,300</b>	<b>At least \$3,338,805</b>	

## APPENDIX I: SOURCE TABLE FOR RESPONSIVE LARGER JURISDICTIONS

The following describes the data sources for information about the forty-four largest jurisdictions in my study that provided responsive information about payouts and indemnification decisions, organized from largest to smallest jurisdiction as measured by full-time sworn personnel, according to BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82.

**New York City Police Department (NY).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Andrea Fastenberg, Records Access Officer, N.Y.C. Law Dep't, to Mariann Meier Wang, Partner, Cuti Hecker Wang LLP (Nov. 9, 2012) (on file with the *New York University Law Review*) (including attachment listing lawsuits concluded between 2006 and 2011). We agreed prior to production that Fastenberg would only produce information about cases alleging § 1983 claims or state law claims for battery or assault. Telephone Interview with Andrea Fastenberg, Records Access Officer, N.Y.C. Law Dep't (Sept. 13, 2012). To calculate the total paid to plaintiffs by New York City in police misconduct cases, I added the \$114,000 contributed by individual officers (see below) to the \$348,160,595.81 paid directly by New York City in § 1983 cases (this number comes from subtracting sixteen cases that should not have been in the data set, as discussed below, from Fastenberg's reported number).

New York City does not keep information about indemnification decisions. See Telephone Interview with Andrea Fastenberg, *supra* (reporting that the City does not collect information about indemnification denials). The City did, however, agree to provide me with a spreadsheet of fifty-six cases in which it did not pay the total amount awarded to the plaintiff—suggesting the possibility that individual officers may have contributed to settlements or judgments in one or more of these cases. See E-mail from Andrea Fastenberg, Records Access Officer, N.Y.C. Law Dep't, to author (Nov. 9, 2012, 12:29 PST) (on file with the *New York University Law Review*). I then attempted to learn details of the outcome of each case by (1) contacting the plaintiffs' attorneys (and, in some instances, the parties) in each case; (2) searching for information about the cases on Westlaw, Bloomberg, and the New York State courts site; and (3) searching for news coverage about the cases. Based on this research, I found three cases in which officers had to contribute to settlements in cases that fell within the study parameters. In twenty-one of those fifty-six cases, I found evidence that third parties paid the difference; in another eight, the dockets indicate that no individual police officer was a defendant at the time the case was resolved (but there were third parties who could have paid the difference). In three cases, plaintiff's attorneys confirmed that no officer contributed to the settlement and in a fourth, the docket indicated that the city satisfied the settlement. It appears that sixteen of the cases I reviewed should not have been included in New York City's data: Twelve involved motor vehicle accidents or other non-civil rights claims, three were resolved outside the study period or overturned on appeal, and one concerned an off-duty incident. I have removed the \$1,436,000 paid by the City in these sixteen cases from the total amount of § 1983 payments, and subtracted sixteen from the number of cases. This raises some concern about the integrity of New York City's data; there may well be many other cases in the records provided by New York City that are not responsive to my request. No definitive information was available for the remaining four cases, but I did confirm that New York City's Corporation Counsel represented the officer defendants in each of these cases, and learned from sources knowledgeable about Corporation Counsel practices that the City indemnifies those officers it decides to represent as a matter of practice. See E-mail from Joel Berger, Plaintiff's Attorney and Former N.Y.C. Law Dep't Exec., to author (Feb. 28, 2013, 17:00 PST) (on file with the *New York University Law Review*); Telephone Interview with Attorney, Corp. Counsel, N.Y.C. Law Dep't (July 3, 2013) (on file with the *New York University Law Review*). The City has also reported, in response to interrogatory requests in a lawsuit, that it satisfied every compensatory and punitive damages award entered against officers it represented between 1996 and 2006. See Defendants' Supplemental Responses to Plaintiff's Second Set of Interrogatory Requests at 5–6, *Gyasi v. City of New York*, No. 05-CV-9453 (S.D.N.Y. Nov. 27, 2006).

Over a year after beginning this research, I learned that the City's spreadsheet of fifty-six possible nonindemnification cases only included state court cases in which the City did not pay the entire settlement or judgment to the plaintiff, and that the City did not have a list of federal court cases in which it satisfied only part of the payments to plaintiffs. See E-mail from Andrea Fastenberg, Records Access Officer, N.Y.C. Law Dep't, to author (July 12, 2013, 10:43 AM PDT) (on file with the *New York University Law Review*). Accordingly, I manually searched Bloomberg Law for all cases filed between January 1, 2000, and December 31, 2011, in which New York City's Corporation Counsel did not represent officer defendants. Through PACER searches, e-mails to plaintiffs' attorneys, and review of parties' filings and courts' opinions, I identified thirty-one additional instances in which officers contributed to settlements in

civil rights cases. For details of these cases, see Appendix H. The total paid by officers in these thirty-four cases was \$114,000. (Note that there is no reason to believe that there are similar problems of underinclusiveness in responses by other jurisdictions. New York City is unique in that it did not provide me with information about indemnification, but instead provided me with case information from which I deduced the indemnification decisions. In all other instances (except Cook County, described *supra* note 109 and accompanying text), the responsive jurisdictions directly provided me with information about indemnification decisions. The data may certainly have other inaccuracies, described *supra* Part II.A, but will not suffer from New York City's particular underinclusivity issue.)

New York City did not provide information about punitive damages awards. A broad Westlaw search of “‘new york’/s police & punitive!” in all state and federal cases in New York between 2005 and 2012 revealed three cases in which punitive damages were awarded against NYPD officers. See *Manganiello v. City of New York*, 612 F.3d 149, 154 (2d Cir. 2010) (affirming \$1,426,261 in compensatory damages, \$75,000 in punitive damages, and \$215,037.50 in attorneys’ fees); *Ellis v. La Vecchia*, 567 F. Supp. 2d 601 (S.D.N.Y. 2008) (denying motion to set aside \$2600 punitive damages award); *Ferguson v. City of New York*, 901 N.Y.S.2d 609, 610 (App. Div. 1st Dep’t 2010) (affirming \$2.7 million punitive damages award). Interrogatory responses by the City of New York in the case of *Gyasi v. City of New York* identified a fourth instance between 2006 and 2011 when a jury awarded punitive damages against an NYPD officer. *Scherer v. City of New York*, No. 03-CV-8445 (RWS), 2007 WL 2710100 (S.D.N.Y. Sept. 7, 2007) (reporting a jury verdict of \$1000 in punitive damages on May 1, 2006). A fifth case in which punitive damages were awarded, brought to my attention by a practitioner in New York, is *Cameron v. City of New York*. In that case, the jury awarded plaintiffs punitive damages totaling \$52,500 against one officer and \$27,500 against another. See Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial at 8, *Cameron v. City of New York*, No. 06 CV 07798, 2010 WL 5885985 (S.D.N.Y. Dec. 29, 2010). I found a sixth case, *Matthews v. City of New York*, during reviews of the dockets in all cases in which officers had non-Corporation Counsel representation. In *Matthews*, \$1000 in punitive damages was awarded against one officer, and \$500 in punitive damages was awarded against another officer. See Memorandum of Law in Opposition to Defendants’ Post-Trial Motions, *Matthews v. City of New York*, No. 02-CV-00715 (E.D.N.Y. Aug. 8, 2005). I then confirmed with the plaintiffs’ attorneys in each case that none of the involved officers satisfied the punitive damages awards entered against them. See Defendants’ Supplemental Responses to Plaintiff’s Second Set of Interrogatory Requests at 4, *Gyasi v. City of New York*, No. 05-CV-9453 (S.D.N.Y. Nov. 27, 2006) (confirming that the City of New York satisfied the \$1000 punitive damages award in *Scherer*); Stipulation of Settlement and Discontinuance at 2, *Matthews v. City of New York*, No. 02-CV-00715 (E.D.N.Y. June 23, 2006) (settling the case for \$80,000 to be paid by the City of New York); E-mail from Richard Cardinale, Plaintiff’s Attorney, to author (July 11, 2013, 15:46 PDT) (on file with the *New York University Law Review*) (“The officer [in the *Ellis* case] was indemnified and did not have to pay out of his own pocket. The city settled the case after their motion was denied to avoid a judgment being entered against the officer.”); E-mail from Brian Isaac, Plaintiff’s Attorney, to Joel Berger, Plaintiff’s Attorney and Former N.Y.C. Law Dep’t Exec. (Feb. 28, 2013, 09:15 PST) (on file with the *New York University Law Review*) (“It is my understanding that the City paid the punitive damage award [in *Ferguson*].”); E-mail from Michael Joseph, Plaintiff’s Attorney, to author (July 11, 2013, 18:00 PDT) (on file with the *New York University Law Review*) (“The officer did not contribute [in *Manganiello*]. Although there is no vicarious liability under [§] 1983, the officers receive indemnification under their collective bargaining agreement. The City didn’t settle, they paid after the Second Circuit affirmed the verdict[.]”); E-mail from Michael L. Spiegel, Plaintiff’s Attorney, to author (Apr. 22, 2013, 16:41 PDT) (on file with the *New York University Law Review*) (reporting that, after defendants’ motions were denied in *Cameron*, the case was settled for a lump sum during posttrial negotiations over attorneys’ fees). Note that the defendants had outside counsel in both the *Ellis* and *Matthews* cases, but the city nonetheless paid the entirety of the settlement.

**Los Angeles Police Department (CA).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Mike Dundas, Deputy City Attorney, City of L.A., to author (Sept. 17, 2012, 16:19 PDT) (on file with the *New York University Law Review*) (including spreadsheet of concluded litigation between 2006 and 2011). I removed several duplicates based on information from Mr. Dundas. See E-mail from Mike Dundas, Deputy City Attorney, City of L.A., to author (Mar. 7, 2014, 11:04 PDT) (on file with the *New York University Law Review*). I removed several categories of cases from the calculation of civil rights cases, including: (1) employment, (2) dangerous condition, (3) traffic accident, (4) labor relations, (5) FLSA, and (6) cases categorized as “miscellaneous” or “other.” For information about indemnification decisions, see E-mail from Mike Dundas, Deputy City Attorney, City of L.A., to Brian Cardile, Student, UCLA School of Law (Jan. 25, 2013, 13:52 PST) (on file with the *New York University Law Review*) (“[T]here was only one instance where our staff determined that the City declined to indemnify an employee of the LAPD in litigation. The name of the case was *Tesha Taylor-Ewing v. City of Los Angeles* . . . .”); E-mail from Mike Dundas, Deputy City Attorney, City of L.A., to author (Feb. 6, 2013, 10:13 PST) (confirming that the involved officer in *Taylor-Ewing v. City of Los Angeles* was only declined indemnification for the punitive damages judgment). Note, however, that while the city’s records reflect that *Taylor-Ewing* was awarded \$200 in punitive damages, the judgment entered in the case reflects that the punitive damages judgment

was \$300. I have relied on the \$300 figure from the court record in my calculations. See Judgment on the Verdict for the Plaintiff(s), *Taylor-Ewing v. City of Los Angeles*, No. 07-CV-05556, 2010 WL 5620883 (C.D. Cal. Nov. 5, 2010). For data about punitive damages awards, see E-mail from Mike Dundas (Feb. 6, 2013), *supra* (“The only case involving punitive damages is the one case already mentioned, *Tesha Taylor-Ewing v. City of Los Angeles*.”).

**Los Angeles County Sheriff’s Department (CA).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs’ favor, punitive damages awards, and indemnification decisions, see Letter from Jonathan McCaverty, Senior Deputy Cnty. Counsel, Law Enforcement Servs. Div., Cnty. of L.A., to author (Sept. 25, 2012) (on file with the *New York University Law Review*) (appending “a spreadsheet identifying all Sheriff’s Department lawsuits pertaining to general police misconduct (excluding medical, automobile and employment cases) from 2006–2011”). I have removed one case from the data set in which officers were denied indemnification but their challenge to that denial is still pending. See *supra* notes 212–16 (describing the *Franco* case); see also Voicemail from Jonathan McCaverty, Senior Deputy Cnty. Counsel, Law Enforcement Servs. Div., Cnty. of L.A., to author (Oct. 2, 2012) (confirming that the county satisfied all punitive damages awards in cases resolved during the study period) (on file with the *New York University Law Review*).

**California Highway Patrol (CA).** For data about the amount paid to plaintiffs in police misconduct suits, see E-mail from Kim Hunter, Gen. Counsel, Dep’t of the Cal. Highway Patrol, to author (Mar. 5, 2013, 09:21 PST) (on file with the *New York University Law Review*) (providing information about the total amount awarded in cases resolved between 2006 and 2011, excluding automobile accidents). For data about the number of cases resolved in plaintiffs’ favor, see Letter from Kim Hunter, Gen. Counsel, Dep’t of the Cal. Highway Patrol, to author (July 26, 2012) (on file with the *New York University Law Review*) (reporting the total number of cases resolved—by settlement, judgment, or dismissal—between 2006 and 2011 to be 384). To estimate the number of civil rights actions resulting in payments to plaintiffs, I calculated 20.6% of the 384 total resolved cases during this period—the median percentage of total cases resolved by settlement, judgment, or dismissal between 2006 and 2011 that involved civil rights cases with payments to plaintiffs in the jurisdictions that provided detailed data. See Appendix D. For information about indemnification decisions, see Letter from Kim Hunter, *supra*.

Although there have been no instances in which a California Highway Patrol (CHP) officer has had to contribute to a settlement or judgment during this period, there was one suit—resolved in 2012, outside the study period—in which the department informed the two officer defendants that they would not be indemnified. Hunter identified the two employees not indemnified as Thomas O’Donnell and Aaron Reich, Jr. E-mail from Kim Hunter, Gen. Counsel, Cal. Highway Patrol, to author (Mar. 1, 2013, 11:09 PST) (on file with the *New York University Law Review*). The employees were dispatch officers sued for publicly disseminating crime scene photographs of a young woman decapitated in a motor vehicle accident; the two officers were dismissed from the case by the trial court. On appeal the appellate court upheld the dismissal of the federal claims on qualified immunity grounds but held that the officers could be sued for state law claims of negligence and intentional infliction of emotional distress. See *Catsouras v. Dep’t of the Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 358 (Ct. App. 2010). In 2012, CHP settled with the plaintiff for \$2.37 million. See Rick Rojas, *CHP Settles over Leaked Photos; The Family of Car Crash Victim Whose Photos Were Posted Online Receives About 2.37 Million*, L.A. TIMES, Jan. 31, 2012, at AA.1. The plaintiff’s attorney in the case reports that plaintiffs voluntarily withdrew their claims against the officers before settling with CHP, as the officers did not have assets and had provided deposition testimony that supported plaintiffs’ claims against CHP. See Telephone Interview with Keith Bremer, Plaintiff’s Attorney (Oct. 7, 2013).

The one case in which plaintiffs were awarded punitive damages during the study period is *Grassilli v. Barr*, 48 Cal. Rptr. 3d 715 (Ct. App. 2006) (affirming jury verdict of \$210,000 in economic damages, \$290,000 in noneconomic damages, and reducing punitive damages awards from \$1,005,522 against one defendant and \$3,000,000 against another defendant to \$35,000 and \$20,000, respectively). After the appellate decision, the parties went into mediation and settled the case for \$2 million. E-mail from Kim Hunter, Gen. Counsel, Dep’t of the Cal. Highway Patrol, to author (Apr. 22, 2013, 15:21 PDT) (on file with the *New York University Law Review*). CHP officers did not contribute to that settlement. See Letter from Kim Hunter, *supra*.

**Cook County Sheriff’s Department (IL).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Jeff Fronczak, Assistant to Special Legal Counsel, Office of the President, Cook Cnty. Board of Comm’rs, to author (Apr. 19, 2013, 10:40 PDT) (on file with the *New York University Law Review*) (providing a spreadsheet detailing 394 settlements for claims occurring at the Cook County Jail totaling \$54,203,318.62 between 2006 and 2011). The spreadsheet does not indicate the types of jail cases, and so may include some medical malpractice and other non-civil rights cases. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$54,203,318.62 total paid in jail cases during the study period. See Appendix C. I estimated the number of jail civil rights cases involving payments to plaintiffs by calculating 52.7% of the 394 total jail cases resolved with payments to plaintiffs during this period—the median percentage of total cases resolved in plaintiffs’ favor between 2006 and 2011 that involved civil rights claims in the

jurisdictions that provided detailed data. *See* Appendix D.

Information about nonjail settlements and judgments involving the Cook County Sheriff's Department is available in the Cook County Finance Committee's reports. *Office of the Secretary of the Board, COOK COUNTY BOARD OF COMMISSIONERS*, <http://legacy.cookcountygov.com/secretary/committees/finance.html> (last visited Apr. 23, 2014). A review of these reports from 2006 to 2011 revealed ninety-six additional civil rights cases and \$16,744,785 in additional settlements and judgments in which the Sheriff's Department was clearly identified as the defendant. An additional thirty-two cases were mentioned in the reports as involving civil rights violations, but it was not clear whether the Sheriff's Department was involved. I then searched for these cases on Westlaw and found nine in which the Sheriff's Department and/or one of its employees was named as a defendant, totaling an additional \$176,350. I did not include in my calculations those cases I found in my search of the Cook County Finance Committee Minutes that involved medical malpractice claims, claims brought by employees of the sheriff's department, claims of lost property, and motor vehicle claims. For information about indemnification decisions, see E-mail from Paul A. Castiglione, Exec. Assistant State's Attorney for Policy, Cook Cnty., Ill., to author (Apr. 5, 2013, 14:20 PDT) (on file with the *New York University Law Review*) ("[I]f a deputy sheriff is acting within the scope of his employment (as Illinois law defines that principle), then the county will be liable for any judgment or settlement of compensatory damages entered against that deputy sheriff in a Section 1983 action."). Cook County did not provide responsive information about punitive damages awards. A broad Westlaw search of "'cook county' /s sheriff /p punitive!" in all state and federal cases in the Seventh Circuit between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**New York State Police (NY).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs' favor, and indemnification decisions, see Letter from Glenn R. Miner, Acting Records Access Officer, Cent. Records Bureau, N.Y. State Police, to author (July 24, 2012) (on file with the *New York University Law Review*) (attaching spreadsheet including the number of cases that were resolved by settlement, judgment, or dismissal during the period 2006 to 2011 for officers "acting in their on-duty capacity" and showing that officers were never required to contribute). Note that the nature of cases could not be determined from the response, and so could include non-civil rights claims. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$14,956,648.39 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. *See* Appendix C. To estimate the number of civil rights actions resulting in payments to plaintiff, I calculated 20.6% of the 510 total resolved cases during this period—the median percentage of total cases resolved by settlement, judgment, or dismissal between 2006 and 2011 that involved civil rights cases with payments to plaintiffs in the jurisdictions that provided detailed data. *See* Appendix D. To estimate the number of all types of actions resulting in payments to plaintiffs during the study period, I calculated 46.0% of the 510 total cases during the period—the median percentage of total cases resolved with payments to plaintiffs in jurisdictions that provided detailed data. *See id.* The New York State Police did not provide responsive information about punitive damages awards. A broad Westlaw search of "'new york' /s police & punitive!" in all state and federal cases in New York between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Texas Department of Public Safety (TX).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see E-mail from Michele Freeland, Legal Assistant, Office of Gen. Counsel, Tex. Dep't of Pub. Safety, to author (June 26, 2012, 13:25 PDT) (on file with the *New York University Law Review*) (attaching spreadsheet of cases resolved between 2006 and 2011). I eliminated motor vehicle, employment, and miscellaneous cases from the calculation of the total paid in civil rights cases. For data about indemnification decisions, see E-mail from Michele Freeland, Legal Assistant, Office of Gen. Counsel, Tex. Dep't of Pub. Safety, to author (June 27, 2012, 06:40 PDT) (on file with the *New York University Law Review*) ("None of the settlements were [sic] paid by the officers individually."). The Texas Department of Public Safety did not provide responsive information about punitive damages awards. A broad Westlaw search of "'department of public safety' & punitive!" in all state and federal cases in Texas published between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Dallas Police Department (TX).** Dallas reported that the city fully satisfied settlements and judgments on behalf of its officers during the study period, but did not collect information about the amount paid in settlements and judgments. *See* Letter from Warren M. S. Ernst, Chief of the Gen. Counsel Div., Office of the City Attorney, City of Dall., to author (June 27, 2012) (on file with the *New York University Law Review*). Mr. Ernst suggested that I inspect City Council agendas, which contain information about settlements approved by the City Council. *See* Letter from Warren M. S. Ernst, Chief of the Gen. Counsel Div., Office of the City Attorney, City of Dall., to author (Mar. 14, 2013) (on file with the *New York University Law Review*). Accordingly, I reviewed minutes from every meeting held between 2006 and 2011, available at *Agendas, Minutes & Digital Audio Recordings*, CITY OF DALLAS CITY SEC'Y'S OFFICE, <http://www.ci.dallas.tx.us/cso/cMeetings.html> (last visited Mar. 7, 2014); collected information about all settlements and attorneys' fees awarded during that period; and then searched for those cases on

Westlaw to determine whether they involved the police department. I found a total of five cases in the minutes that I could identify as § 1983 cases involving police officers. A separate search on the Bloomberg Law database of all case dockets in Texas state and federal court with the words “dallas” and “police” yielded 365 results; two involved cases against Dallas police officers that were settled but had not been reported in the City Council minutes. I sought information about both cases from plaintiffs’ attorneys of record but neither attorney responded to my request for information. For information about punitive damages awards, see Letter from Warren M. S. Ernst (June 27, 2012), *supra*.

**Phoenix Police Department (AZ).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs’ favor, and indemnification decisions, see Letter from Dane Traines, Risk Mgmt. Coordinator, Risk Mgmt. Div., City of Phx. Fin. Dep’t, to author (July 6, 2012) (on file with the *New York University Law Review*). Mr. Traines removed auto collision cases from his response, but it is possible that other types of non-civil rights claims may have been included. See also E-mail from Dane Traines, Risk Mgmt. Coordinator, Risk Mgmt. Div., City of Phx. Fin. Dep’t, to author (June 14, 2012, 14:37 PDT) (on file with the *New York University Law Review*) (confirming that vehicle collision cases are not included in the calculation). For information that no officer paid punitive damages, see Letter from Dane Traines, *supra*.

**New Jersey State Police (NJ).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Robert Sanguinetti, Div. of Law Records Custodian, State of N.J., to author (Aug. 1, 2012) (on file with the *New York University Law Review*) (containing a spreadsheet of dispositions paid from 2006 to 2011 in cases in which the New Jersey State Police was named as a defendant). It is possible that individual officers were not named in some of these suits; it is also possible that individual officers may have been named in some suits not included in this list (because the State Police was not also named as a defendant). To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$16,031,225.71 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. See Appendix C. For Appendix B, to estimate the number of all types of actions resulting in payments to plaintiffs during the study period, I calculated 46.0% of the 309 total cases during the period—the median percentage of total cases resolved with payments to plaintiffs in jurisdictions that provided detailed data. See Appendix D. To estimate the number of civil rights actions resulting in payments to plaintiffs, I calculated 20.6% of the 309 total resolved cases during this period—the median percentage of total cases resolved by settlement, judgment, or dismissal between 2006 and 2011 that involved civil rights cases with payments to plaintiffs in the jurisdictions that provided detailed data. See Appendix D.

The State of New Jersey did not affirmatively state that it had never declined to indemnify a law enforcement employee. I was told, however, that the State relies on N.J.S.A. Title 59, the laws addressing representation and indemnification of state employees. E-mail from Robert Sanguinetti, Div. of Law Records Custodian, State of N.J., to author (Mar. 6, 2013, 13:08 PST) (on file with the *New York University Law Review*). Section 59:10-1 provides that if “the Attorney General provides for the defense of an employee or former employee, the State shall provide indemnification for the State employee.” N.J. STAT. ANN. § 59:10-1 (West 2006). Mr. Sanguinetti provided a list of the eight cases during the period 2006 to 2011 in which the state declined to represent an officer. See E-mail from Robert Sanguinetti, *supra*. Six of those cases are still pending according to the Bloomberg docket system, and one is a criminal matter. The last of those cases was a civil action brought by the family of a thirteen-year-old who died at the home of his friend. The friend’s father, a New Jersey State Trooper, who was at home at the time, was also named in the complaint. *Owens v. Feigin*, 925 A.2d 106 (N.J. Super. Ct. App. Div. 2007). Because this case concerns a trooper’s off-duty activities unrelated to his law enforcement responsibilities, I have excluded it from the data set.

The New Jersey State Police response to my public records request did not include information about any instances in which punitive damages were awarded against a New Jersey State Police officer. See Letter from Robert Sanguinetti, *supra*. A Westlaw search of “state police” /p punitive!” in state and federal cases in New Jersey published between 2005 and 2012 revealed one case in which punitive damages were awarded and affirmed on appeal. See *Wade v. Colaner*, No. 06-3715-FLW, 2010 WL 5479629 (D.N.J. Dec. 28, 2010). The jury in this excessive force case awarded the plaintiff \$500,000 in compensatory damages and \$4.5 million in punitive damages; the award was reduced to \$2 million on appeal. See *id.* at \*1, \*32. The records officer informed me, however, that the case was on appeal when it was settled in 2012, with the state paying the entirety of the settlement. See E-mail from Robert Sanguinetti, Div. of Law Records Custodian, State of N.J., to author (May 23, 2013, 10:27 PDT) (on file with the *New York University Law Review*). Because this case was still pending at the end of the study period, this punitive damages judgment is not included in the data set.

**Baltimore Police Department (MD).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Christopher R. Lundy, Assoc. Legal Counsel, Balt. Police Dep’t Legal Affairs Div., to author (Sept. 5, 2012) (on file with the *New York University Law Review*) (providing information about the total paid in “civil rights litigation” between 2006 and 2011). For information about indemnification decisions, see Telephone

Interview with Christopher R. Lundy, Assoc. Legal Counsel, Balt. Police Dep't Legal Affairs Div. (Aug. 31, 2012). Baltimore did not provide responsive information about punitive damages awards. *Id.* A broad Westlaw search of "Baltimore /s police /p punitive!" in all state and federal cases in Maryland between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Las Vegas Metropolitan Police Department (NV).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs' favor, and indemnification decisions, see Letter from Charlotte M. Bible, Assistant Gen. Counsel, Las Vegas Metro. Police Dep't, to author (Sept. 13, 2012) (on file with the *New York University Law Review*) (providing reports of cases from 2006 to 2011). Note that the nature of cases cannot be determined from the response, and so may include non-civil rights claims. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$6,635,048.39 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. See Appendix C. Because it is impossible to tell which of the 140 cases with payments to plaintiffs involved § 1983 claims, I estimated the number of civil rights actions resulting in payments to plaintiffs by calculating 52.7% of the 140 total cases resolved with payments to plaintiffs during this period—the median percentage of total cases resolved in plaintiffs' favor between 2006 and 2011 that involved civil rights claims in the jurisdictions that provided detailed data. See Appendix D.

Las Vegas stated that there were no cases in which punitive damages were awarded from 2006 to 2011. Letter from Charlotte M. Bible, Assistant Gen. Counsel, Las Vegas Metro. Police Dep't, to author (Sept. 13, 2012) (on file with the *New York University Law Review*). A broad Westlaw search of "Las Vegas' /s police /p punitive!" in all state and federal cases in Nevada between 2005 and 2012 revealed one case in which punitive damages were awarded against a Las Vegas Metropolitan police officer. See *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1080, 1087 (9th Cir. 2009) (affirming jury verdict of \$5000 in punitive damages against Las Vegas Metropolitan police officer). However, after the \$175,000 in compensatory damages and \$5000 punitive damages awarded by the jury were affirmed on appeal, see *id.*, the case was remanded to the district court. See Docket, *Tortu v. Las Vegas Metro. Police Dep't*, 2:03-CV-00783-RCJ (D. Nev. June 15, 2009). The defendants settled the case for \$400,000 inclusive of attorneys' fees. Letter from Charlotte M. Bible, *supra*, at 5 (listing the \$400,000 settlement in *Tortu*).

**Massachusetts State Police (MA).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs' favor, punitive damages awards, and indemnification decisions, see Letter from Sean W. Farrell, Deputy Chief Legal Counsel, Mass. State Police, to author (Oct. 15, 2012) (on file with the *New York University Law Review*) (appending spreadsheet of settlements and judgments in § 1983 cases from 2006 to 2011). During this period, there was one officer, David Oxner, who was not indemnified for an assault while off-duty. See *Maimaron v. Commonwealth*, 865 N.E.2d 1098 (Mass. 2007). The Commonwealth settled with the plaintiff, then in binding arbitration Oxner was found liable and plaintiff was awarded over \$400,000 in damages and attorneys' fees. See Defendant-Appellant's Brief at 3, *Maimaron v. Commonwealth*, 865 N.E.2d 1098 (Mass. 2007) (No. SJC-09728) (on file with the *New York University Law Review*). After the arbitration award, Oxner assigned his right to seek indemnification to Maimaron in exchange for release from the judgment. See *id.* Maimaron then sued the Commonwealth to recover the arbitration award and attorneys' fees. See *id.* at 4. The Massachusetts Supreme Judicial Court reversed the grant of summary judgment to Maimaron (as Oxner's assignee) and remanded for further proceedings because the question of whether Oxner was acting within the course and scope of his employment and was thus entitled to indemnification was a triable question of fact. See *Maimaron*, 865 N.E.2d at 1101. Following remand, the case settled for \$580,000 paid by the Commonwealth. E-mail from Sean W. Farrell, Deputy Chief Legal Counsel, Mass. State Police, to author (Aug. 26, 2013, 08:47 PDT) (on file with the *New York University Law Review*).

**Boston Police Department (MA).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see E-mail from Susan M. Weise, First Assistant Corp. Counsel, City of Bos., to author (July 18, 2013) (on file with the *New York University Law Review*) (attaching spreadsheet of "City of Boston police misconduct cases" that resulted in settlements or judgments between 2006 and 2011). For data about indemnification decisions, see Telephone Interview with Nicole Taub, Office of the Legal Advisor, Bos. Police Dep't (July 13, 2012) (reporting that there has not been a case from 2006 to 2011 in which an officer was not indemnified). For information about punitive damages awards, see *id.* (reporting that the City's attorneys estimate that there has not been a punitive damages verdict against a Boston police officer in over twenty years).

**Riverside County Sheriff's Department (CA).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Mark Bostrom, Prof'l Standards Bureau, Riverside Cnty. Sheriff (June 14, 2012) (on file with the *New York University Law Review*) (providing responsive data about "civil lawsuits"). Note that the nature of cases cannot be determined from the response, and so may include non-civil rights claims. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$12,404,154.68 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. See Appendix C. Note that the

response includes all cases resolved by settlement, judgment, or dismissal between 2006 and 2011. To estimate the number of civil rights actions resulting in payments to plaintiffs during this period, I calculated 20.6% of the 115 total resolved cases during this period—the median percentage of total cases resolved by settlement, judgment, or dismissal between 2006 and 2011 that involved civil rights cases with payments to plaintiffs in the jurisdictions that provided detailed data. *See* Appendix D. For Appendix B, to estimate the number of all types of actions resulting in payments to plaintiffs during the study period, I calculated 46.0% of the 115 total cases resolved during the period—the median percentage of total cases resolved with payments to plaintiffs in jurisdictions that provided detailed data. *See* Appendix D. For information about indemnification decisions, see E-mail from Michael Hatfield, Riverside Sheriff's Dep't, to author (July 11, 2012) (on file with the *New York University Law Review*) ("I spoke with risk management and unfortunately learned they do not track any of the information you seek [about the number of times the department declined to indemnify a sheriff's deputy]. However, to their knowledge there has not been a case in which the County refused indemnification."). For information about punitive damages awards, see *id.* (reporting that risk management does not keep track of this information, but "they are not permitted to pay punitive damages without board approval and do not recall a case in the time frame [2006–2011] you cited in which that had been done").

**Illinois State Police (IL).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Steve Lyddon, FOIA Officer, Ill. State Police, to author (June 19, 2012) (on file with the *New York University Law Review*) (providing the total amount spent in settlements and judgments between 2006 and 2011 in all cases in which a member of the Illinois State Police was sued as a defendant). Note that the nature of cases cannot be determined from the response, and so may include non-civil rights claims. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$17,835,874.54 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. *See* Appendix C. Lt. Lyddon reported that there were a total of 176 settlements and judgments between 2006 and 2011, but did not indicate which of these cases involved civil rights claims. I estimated the number of civil rights actions resulting in payments to plaintiffs by calculating 52.7% of the 176 total cases resolved with payments to plaintiffs during this period—the median percentage of total cases resolved in plaintiffs' favor between 2006 and 2011 that involved civil rights claims in the jurisdictions that provided detailed data. *See* Appendix D.

For information about indemnification decisions, see Telephone Interview with Lisa Freitag, Rules Coordinator, Legal Office, Ill. State Police (July 12, 2012) (reporting that the Illinois State Police does not keep information about indemnification decisions but that the Illinois Attorney General agrees to provide representation and indemnification if, after reviewing the allegations in the complaint, he concludes that the officer was acting within the course and scope of employment). Freitag could remember only two situations in which an officer was not indemnified, but did not remember whether they were between 2006 and 2011. In one situation officers were assigned to a drug task force and so were not acting in their capacity as Illinois State Police officers, and in the other the officer was disciplined for the incident. *Id.* The first case is excluded from the dataset because the involved officer was acting under the authority of another law enforcement agency.

The Illinois State Police did not provide responsive information about punitive damages awards. *See* Letter from Steve Lyddon, *supra* ("[T]he Illinois state police does not track the kind of information you are requesting."). A broad Westlaw search of "Illinois state police' /p punitive!" in all state and federal cases in Illinois between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**San Antonio Police Department (TX).** For data about the amount paid to plaintiffs in police misconduct suits, see E-mail from Brandis Davis, Human Res. Dep't, City of San Antonio, to author (Aug. 20, 2012, 13:38 PDT) (on file with the *New York University Law Review*). Note that the nature of cases cannot be determined from the response, and so may include non-civil rights claims. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$2,181,976.63 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. *See* Appendix C. Ms. Davis reported that there were 103 claims during this period that resulted in a payout and twenty-one cases that did not result in a payout. I estimated the number of civil rights actions resulting in payments to plaintiffs by calculating 52.7% of the 103 total cases resolved with payments to plaintiffs during this period—the median percentage of total cases resolved in plaintiffs' favor between 2006 and 2011 that involved civil rights claims in the jurisdictions that provided detailed data. For information about indemnification decisions, see Telephone Interview with Brandis Davis, Human Res. Dep't, City of San Antonio (Aug. 31, 2012) (reporting that she believes the payouts were fulfilled entirely by the city); Voicemail from Brandis Davis, Human Res. Dep't, City of San Antonio, to Brian Cardile, Student, UCLA School of Law (Sept. 27, 2012) (confirming that there were no payments by officers). The City of San Antonio did not provide responsive information about punitive damages awards. A broad Westlaw search of "san antonio' /s police & punitive!" in all state and federal cases in Texas between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Milwaukee Police Department (WI).** For data about the amount paid to plaintiffs in police



misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Grant F. Langley, City Attorney, City of Milwaukee, to author (July 30, 2012) (on file with the *New York University Law Review*) (including a spreadsheet of excessive force cases, but not cases alleging other types of constitutional claims). For information about indemnification decisions, see *id.* at 2 (reporting, after searching records and asking all the attorneys in the City Attorney's Office "whether they recall any cases in which the City did not indemnify a defendant employee" that "[i]t appears that there are three [such] instances," each of which is a case that "remains on-going"). The Milwaukee Police Department did not provide responsive information about punitive damages awards. A broad Westlaw search of "Milwaukee /s police' & punitive!" in all state and federal cases in Wisconsin published between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**San Francisco Police Department (CA).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Jack Song, Pub. Info. Officer, S.F. Office of the City Attorney, to author (Oct. 10, 2012) (on file with the *New York University Law Review*) (providing a spreadsheet of claims against the San Francisco Police Department or its employees from 2006 to 2011, including settlement or judgment amounts). I removed claims for vehicle accidents and claims by employees against the department from the spreadsheet provided. For information about indemnification decisions, see Telephone Interview with Jack Song, Public Information Officer, Office of the City Attorney, (Mar. 5, 2013) (reporting that there are no documents responsive to the request for information about incidents in which officers were not indemnified, but that they reviewed cases from 2006 to 2011 in response to our request and they did not identify any cases where the officer or other employee of the city was not indemnified). San Francisco did not provide responsive information about punitive damages awards. A broad Westlaw search of "'San Francisco police' /p punitive!" in all state and federal cases in California published between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Honolulu Police Department (HI).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see E-mail from Mia Obciana, Deputy Corp. Counsel, City of Honolulu, to author (Dec. 4, 2012, 11:32 PST) (on file with *New York University Law Review*) (providing a spreadsheet of lawsuits resolved between 2006 and 2011 in which Corporation Counsel represented Hawaii police officers, and associated payments). Note that the nature of cases cannot be determined from the spreadsheet, and so may include non-civil rights claims. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$1,185,258 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. See Appendix C. Ms. Obciana's spreadsheet indicates that there were a total of thirty-seven settlements and judgments between 2006 and 2011, but did not indicate which of these cases involved civil rights claims. I estimated the number of civil rights actions resulting in payments to plaintiffs by calculating 52.7% of the thirty-seven total cases resolved with payments to plaintiffs during this period—the median percentage of total cases resolved in plaintiffs' favor between 2006 and 2011 that involved civil rights claims in the jurisdictions that provided detailed data. See Appendix D. For information about indemnification decisions, see Telephone Interview with Mia Obciana, Deputy Corp. Counsel, City of Honolulu (Dec. 4, 2012) (reporting that, based on her discussions with others following up on these requests, if Corporation Counsel represents an officer it is because the Honolulu Police Commission has found that the officer was acting in the course and scope of his or her employment, and will not only provide representation but also will satisfy any settlement or judgment against the officer). The Honolulu Police Commission declined just ten of the 203 requests for officer indemnification that were approved or denied from 2006 to 2011. See Letter from George P. Ashak, Acting Exec. Officer, City and Cnty. of Honolulu Police Comm'n, to author (July 11, 2012) (on file with the *New York University Law Review*) (enclosing relevant pages from the Commission's annual reports). The current Police Commissioner reports that "the cases in recent history that were not provided representation all involved way outside the scope of their duties such as DUI while driving off duty, and domestic violence cases while off duty." Telephone Interview with Gregory Gilmartin, Honolulu Police Comm'n. Exec. Dir. (Feb. 25, 2014). The Commissioner additionally offered that it will "always represent" officers charged with excessive force. Telephone Interview with Gregory Gilmartin, Honolulu Police Comm'n. Exec. Dir. (Feb. 24, 2014).

The Honolulu Police Department did not provide responsive information about punitive damages awards. A broad Westlaw search of "Honolulu /s police /p punitive!" in all state and federal cases in Hawaii published between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Columbus Police Department (OH).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs' favor, punitive damages awards, and indemnification decisions, see Letter from Glenn B. Redick, Chief Litig. Attorney, City Attorney's Office, Columbus, Ohio, to author (June 20, 2012) (on file with the *New York University Law Review*) (providing a list of all lawsuits resolved between 2006 and 2011 in which any city employee was named as a defendant). Thirty-one cases resulted in payments to plaintiffs, see *id.*; review of the provided docket numbers on Westlaw and Bloomberg confirmed that there were twelve § 1983 (or other police misconduct) cases in which Columbus Police officers were named as defendants. The remaining nineteen

were confirmed not to involve civil right claims or not to involve the police department, or else there was no additional information about them. The total payments to plaintiffs in the twelve police misconduct cases was \$901,100.

**North Carolina State Highway Patrol (NC).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs' favor, and indemnification decisions, see Letter from Cheryl L. Walker, Program Assistant V, N.C. Dep't of Pub. Safety, State Highway Patrol, to author (Sept. 13, 2012) (on file with the *New York University Law Review*) (including spreadsheet of lawsuits and outcomes); Telephone Interview with Cheryl L. Walker, Program Assistant V, N.C. Dep't of Pub. Safety, N.C. State Highway Patrol (Sept. 27, 2012) (confirming that the \$30,000 settlement was the only payout during the relevant period and that the officer was indemnified); Voicemail from Cheryl L. Walker, Program Assistant V, N.C. Dep't of Pub. Safety, N.C. State Highway Patrol, to author (June 3, 2013) (on file with the *New York University Law Review*) (explaining that, in the case with the \$30,000 settlement, the plaintiff alleged that a state trooper stopped him for a traffic violation and "the allegation was a fight ensued").

**San Bernardino County Sheriff's Department (CA).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Steven T. Robles, Dir. of Risk Mgmt., Dep't of Risk Mgmt., Cnty. of San Bernardino, Cal., to author (July 26, 2012) (on file with the *New York University Law Review*) (attaching spreadsheet of responsive cases). The spreadsheet, however, does not identify whether these are all civil rights cases. *See id.* To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$8,077,105.11 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. *See* Appendix C. I estimated the number of civil rights actions resulting in payments to plaintiffs by calculating 52.7% of the sixty-eight total cases resolved with payments to plaintiffs from 2006 to 2011—the median percentage of total cases resolved in plaintiffs' favor during this period that involved civil rights claims in the jurisdictions that provided detailed data. *See* Appendix D. For information about indemnification decisions, see Letter from Steven T. Robles, *supra*, at 1–2 (stating that "[w]e are aware of no . . . instances" in which an officer was required to contribute to a settlement or judgment).

San Bernardino did not provide responsive information about punitive damages awards. A Westlaw search for "San Bernardino & punitive!" in all California state and federal cases from 2005 to 2012 produced three cases in which punitive damages were awarded against San Bernardino sheriff's deputies. *See* *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1116, 1120–23 (9th Cir. 2008) (affirming the district court's decision to remit the punitive damage jury verdict from \$250,000 to \$5000 in a case in which police officers unlawfully detained the plaintiffs, searched their property with fraudulently obtained consent, and did not inform them that their family member had been shot and killed); *Alvarez v. Iniguez*, No. CV 04-6383 (MLGx), 2008 WL 4382753, at \*1 (C.D. Cal. Sept. 5, 2008) (awarding \$2000 in punitive damages and \$3000 in compensatory damages for excessive force employed when plaintiff's penis piercing was ripped out during strip search by defendants); *J.R. v. City of San Bernardino*, No. EDCV 05-1045-JWJ, 2007 WL 5030309, at \*2, \*7 (C.D. Cal. Aug. 6, 2007) (upholding jury verdict against officers who tackled two minor females for use of excessive force in a false arrest), *aff'd sub nom.* *J.R. ex. rel. Dickson v. City of San Bernardino*, 374 F. App'x 755 (9th Cir. 2010); Docket at 94, *J.R. v. City of San Bernardino*, No. EDCV 05-1045-JWJ, 2007 WL 5030309 (C.D. Cal. Aug. 6, 2007) (No. 5:05-CV-01045) (reflecting a jury award of \$12,500 total in punitive damages and \$3500 total in compensatory damages).

**Orange County Sheriff's Department (CA).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see E-mail from Laurie A. Shade, Senior Deputy, Office of the Orange Cnty. Counsel, to author (July 18, 2012, 16:46 PDT) (on file with the *New York University Law Review*) (attaching spreadsheet of settlements and judgments paid between 2006 and 2011); Letter from Laurie A. Shade, Senior Deputy, Office of the Orange Cnty. Counsel, to author (July 9, 2012) (on file with the *New York University Law Review*) (describing the aforementioned spreadsheet). There were no motor vehicle accidents or employment actions listed on the spreadsheet, and I excluded the one "slip and fall" case reported during that period. For information about indemnification decisions, see Letter from Laurie A. Shade, Senior Deputy, Office of the Orange Cnty. Counsel, to author, at 1 (July 3, 2012) (on file with the *New York University Law Review*) ("[T]here have been no instances where the County has declined to indemnify a defendant employee in the Sheriff's Department . . ."). Orange County did not provide responsive information about punitive damages awards. *See* Letter from Laurie A. Shade (July 9, 2012), *supra*, at 1 ("Risk Management's database does not . . . specify whether the damages paid were compensatory or punitive."). A broad Westlaw search of "Orange County sheriff /p punitive!" in all state and federal cases in California published between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Michigan State Police (MI).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Judy Fox, Assistant FOIA Coordinator, Mich. State Police, to author (Aug. 28, 2012) (on file with the *New York University Law Review*) (attaching spreadsheet of responsive cases). I omitted cases involving freedom of information act

requests, internal employment actions, and automobile collisions from the calculations of civil rights claims. For information about indemnification decisions, see Telephone Interview with Judy Fox, Assistant FOIA Coordinator, Michigan State Police, (Sept. 4, 2012) (explaining that the Michigan State Police did not decline to indemnify an employee during the period 2006–2011). The Michigan State Police did not provide responsive information about punitive damages awards. A broad Westlaw search of “Michigan state police’ /p punitive!” in all state and federal cases in Michigan between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Atlanta Police Department (GA).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Kristen Denius, Assistant City Attorney, City of Atlanta, to Brian Cardile, Student, UCLA School of Law (Feb. 1, 2013, 13:20 PST) (on file with the *New York University Law Review*) (attaching spreadsheet of lawsuits from 2008 through 2012). I removed all cases that were not police department cases, and all police department cases except those designated “civil rights violation[s]” when determining the total of civil rights cases. See *id.* Note, however, that this spreadsheet reflects settlements and judgments from 2008 to 2011. The City of Atlanta does not have information about settlements and judgments prior to 2008. See *id.* Atlanta reported paying \$6,977,448 for nineteen civil rights violations between January 2008 and December 2011; \$1,744,362 in 4.75 cases per year. Based on this data, I estimated that Atlanta would have paid \$3,488,724 in 2006 and 2007 in civil rights violations, and a total of \$10,466,172 in twenty-nine cases between 2006 and 2011. The total spent by Atlanta for all cases during the period 2008–2011 was \$8,717,306.57 in 287 cases. Based on the same types of calculations, the estimated total spent by Atlanta for all types of police claims would be \$13,075,959.86 in 431 cases between 2006 and 2011. For information about indemnification decisions, see *id.* (“I am not aware of any circumstances in the period covered by this report in which individual officers contributed to any payment of claims or damage awards.”). Atlanta did not provide responsive information about punitive damages awards. A broad Westlaw search of “Atlanta /s police /p punitive!” in all state and federal cases in Georgia between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Charlotte-Mecklenburg Police Department (NC).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Charles Freiman, Police Paralegal, Police Attorney’s Office, Charlotte-Mecklenburg Police Dep’t, to author (Feb. 25, 2013, 07:48 PST) (attaching spreadsheets of lawsuits against the Department). I removed cases involving motor vehicle accidents and employment disputes. Two cases on the spreadsheet were categorized as “procedural error,” *id.* at 1. I e-mailed the department to find out more information about these cases, but received no response. Because I found a newspaper story indicating that one of the two cases involved a shooting by police, I counted both cases as civil rights cases. See *Police Stand by Their Decision to Shoot Suspected Drug Dealer in East Charlotte*, WSOC-TV.COM (May 7, 2008, 5:38 PM), <http://www.wsoc.tv.com/news/news/police-stand-by-decision-to-shoot-suspected-drug-d/nGzFk/> (describing the shooting of Brian Howie in 2008). Howie was paid \$173,540.67 by Charlotte-Mecklenburg for a suit that presumably resulted from the shooting. See E-mail from Charles Freiman, *supra*. For information about indemnification decisions, see E-mail from Judy Emken, Senior Assistant City Attorney, Charlotte-Mecklenburg Police Dep’t (Feb. 25, 2013, 10:37 PST) (“I have checked with the City’s Division of Risk Management, and we are not aware of any matter where indemnification did not occur . . .”). For information about punitive damages awards, see *id.* (reporting that there have not been any punitive damages assessed during the time period).

**Jacksonville Sheriff’s Office (FL).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Howard M. Maltz, Chief Deputy Gen. Counsel, City of Jacksonville, to author (July 23, 2012, 07:05 PDT) (on file with the *New York University Law Review*) (attaching a list of “civil rights” cases resolved between 2005 and 2012; cases before 2006 or after 2011 were removed). For information about indemnification decisions, see Telephone Interview with Howard M. Maltz, Chief Deputy Gen. Counsel, City of Jacksonville (July 10, 2012) (recalling a use-of-force case resolved within the last ten years in which the officer paid between \$5000 and \$20,000, but remembering no details of the case beyond the fact that the defendant had financial resources from a family business used to pay the contribution). Jacksonville did not provide responsive information about punitive damages awards. A broad Westlaw search of “Jacksonville /s sheriff & punitive!” in all state and federal cases in Florida between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Broward County Sheriff’s Office (FL).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Lee Futch, Sworn Assistant Gen. Counsel, Office of the Gen. Counsel, Broward Cnty. Sheriff’s Office, to author (June 12, 2013) (on file with the *New York University Law Review*) (providing a spreadsheet of cases closed between 2006 and 2011). I removed auto liability, medical malpractice, and miscellaneous cases from the dataset. For information about indemnification decisions, see E-mail from John Greene, Claims Manager, Risk Mgmt. Div., Broward Cnty. Sheriff’s Office, to author (June 17, 2013, 10:02 PDT) (on file with the *New York University Law Review*) (“To the best of my knowledge and our database, no deputies have

contributed financially to a settlement.”). Broward County did not provide responsive information about punitive damages awards. A broad Westlaw search of “Broward /p punitive!” in all state and federal cases in Georgia between 2005 and 2012 revealed no cases in which punitive damages were awarded against a Broward County sheriff’s deputy.

**Cleveland Police Department (OH).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Thomas J. Kaiser, Chief Trial Counsel, Dep’t of Law, City of Cleveland, to author (July 25, 2012) (on file with the *New York University Law Review*) (attaching spreadsheets of judgments and settlements against the City). See also E-mail from Thomas J. Kaiser, Chief Trial Counsel, Dep’t of Law, City of Cleveland, to author (Sept. 24, 2013, 12:27 PDT) (on file with the *New York University Law Review*) (providing a corrected spreadsheet for 2006). Kaiser provided spreadsheets of settlements and judgments paid for all city agencies; I removed all claims not categorized as “safety.” I then sought out information about these sixty-nine “safety” cases to confirm that these cases concern the police department, not other safety entities. I was able to confirm that one case involved a city firefighter and two cases involved city corrections officers, and so excluded them from the dataset. It is, however, possible that there are additional cases included in the “safety” categorization that concern nonpolice city employees. In addition, other cases may be missing. I manually added to the dataset one case, *Spratt v. City of Cleveland*, that was mentioned by Kaiser in his letter but absent from his attached spreadsheets.

The spreadsheets also do not indicate the nature of the claims in these cases and so could include non-civil rights cases. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$4,504,919.88 total awarded to plaintiffs in the sixty-seven “safety” cases that did not clearly involve nonpolice employees—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. See Appendix C (calculating the median). I then added \$37,000 to this total (the amount contributed by officers in two settlements described below) in Appendix A to reflect the total amount that plaintiffs received during this period. Because it is impossible to tell which cases with payments to plaintiffs involved § 1983 claims, I estimated the number of civil rights actions resulting in payments to plaintiffs by calculating 52.7% of the sixty-seven total cases resolved with payments to plaintiffs during this period—the median percentage of total cases resolved in plaintiffs’ favor between 2006 and 2011 that involved civil rights claims in the jurisdictions that provided detailed data. See Appendix D.

For information about indemnification decisions, see Letter from Thomas J. Kaiser, Chief Trial Counsel, Dep’t of Law, City of Cleveland, to author, *supra* at 1. Kaiser identified two officers who were required to contribute to settlements. In one case, *Spratt v. Cleveland*, the plaintiff alleged that officers beat him after a police chase. Plaintiff’s First Amended Complaint at 1–2, *Spratt v. City of Cleveland*, 08-cv-2237 (N.D. Ohio, Feb. 24, 2009). One defendant agreed to pay approximately \$25,000 to the settlement in this case. *Id.* at 1. In a second case, an off-duty officer who worked security for a housing complex shot and killed someone; he agreed that money he was owed by the housing complex could be paid to the estate to resolve the wrongful death case. See *id.* at 1; Voicemail from Thomas J. Kaiser to author (May 31, 2013) (reporting that the city attorney who handled the case believes the officer assigned \$12,000 that he was owed). Kaiser described two additional cases that do not fall within the data set—one case involved jail guards not employed by the Cleveland Police Department and one case is still pending. Letter from Thomas J. Kaiser, *supra*, at 1.

For information about punitive damages awards, see Telephone Interview with Thomas J. Kaiser (June 18, 2012) (reporting that there are no documents responsive to this request but he has been at the City Attorney’s Office for the period in question and based on his and others’ recollections, there has been no award of punitive damages in the years 2006–2011).

**Florida Highway Patrol (FL).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Judson M. Chapman, Senior Assistant Gen. Counsel, Fla. Dep’t of Highway Safety & Motor Vehicles, to author (June 29, 2012, 14:08 PDT) (on file with the *New York University Law Review*) (attaching list of cases resolved between 2006 and 2011, but not indicating the types of cases resolved). To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$386,736.30 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. See Appendix C. Mr. Chapman’s spreadsheet indicates that fifteen cases resolved between 2006 and 2011 resulted in payments to plaintiffs, but the spreadsheet does not indicate which of the cases involved civil rights claims. I estimated the number of civil rights actions resulting in payments to plaintiffs by calculating 52.7% of the fifteen total cases resolved with payments to plaintiffs during this period—the median percentage of total cases resolved in plaintiffs’ favor between 2006 and 2011 that involved civil rights claims in the jurisdictions that provided detailed data. See Appendix D. For information about indemnification decisions, see E-mail from Wanda E. Brazell, Admin. Assistant, Fla. Dep’t of Fin. Serv., to author (Aug. 22, 2012, 13:50 PDT) (on file with the *New York University Law Review*) (“We are not aware of any situation in these cases where we declined to indemnify a DHSMV employee.”); E-mail from Judson M. Chapman, *supra* (on file with the *New York University Law Review*) (“I have been an attorney here for over 33 years and I am not aware of a single instance in which the State, through DFS/Risk Management has declined coverage of a Trooper.”). For

information about punitive damages awards, see E-mail from Wanda E. Brazell, Admin. Assistant, Fla. Dep't of Fin. Servs., to author (Aug. 24, 2012, 13:29 PDT) (on file with the *New York University Law Review*) (forwarding E-mail from Ray Williams, Chief of State Liability and Property Claims, confirming there were no jury verdicts between 2006 and 2011).

**Prince George's County Police Department (MD).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Jamar B. Herry, Assoc. Cnty. Attorney, Office of Law, Prince George's Cnty. Gov't (Sept. 25, 2012) (on file with the *New York University Law Review*) (providing a spreadsheet of cases resolved between 2006 and 2011). There are two case categories on the spreadsheet—"vehicle liability" and "professional liability"—and I removed "vehicle liability" claims for the calculation of civil rights cases. For information about indemnification decisions, see Letter from Jamar B. Herry, Assoc. Cnty. Attorney, Office of Law, Prince George's Cnty. Gov't (Sept. 12, 2012) (on file with the *New York University Law Review*) ("From institutional memory, there are no instances from the time period of 2006 to 2011 that an officer was not indemnified.").

For information about punitive damages awards, see Telephone Interview with Jamar B. Herry, Assoc. Cnty. Attorney, Prince George's Cnty. Gov't, Office of Law (Aug. 7, 2012) (reporting that their office does not distinguish, in its records, between punitive damages awards and compensatory damages awards). A broad Westlaw search of "prince george's /s police /p punitive!" in all state and federal cases in Maryland published between 2005 and 2012 revealed one case in which punitive damages were awarded and affirmed. See *Prince George's Cnty. v. Longtin*, 988 A.2d 20, 48 (Md. App. 2010) (affirming \$50,000 punitive damages judgment against an individual defendant and \$5,025,000 in compensatory damages judgment against the county). Prince George's County indemnified the officer. See E-mail from Jamar B. Herry, Assoc. Cnty. Attorney, Prince George's Cnty. Police Dep't, to author (May 9, 2013, 06:36 PDT) (on file with the *New York University Law Review*) ("In response to your MPIA request listed below, Prince George's County did indemnify the officer in Prince George's County Maryland v. Longtin, 190 Md. App. 97 (2010).").

**Denver Police Department (CO).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see E-mail from David V. Cooke, Denver Dep't of Law, to author (Oct. 9, 2012, 16:02 PDT) (on file with the *New York University Law Review*) (providing a total of settlements and judgments paid between September 2008 and December 2011); E-mail from David V. Cooke, Denver Dep't of Law, to author (Oct. 9, 2012, 19:54 PDT) (confirming that the settlement and judgment total concerned only cases resolved between September 2008 and December 2011); E-mail from David V. Cooke, Denver Dep't of Law, to author (Oct. 11, 2012, 13:21 PDT) (stating that the Department did not have information about settlements and judgments paid before September 2008). Denver reported paying \$2,353,283.14 in settlements and judgments between September 2008 and December 2011, approximately \$58,832.07 per month. Based on this data, I estimated that Denver would have paid \$1,882,624.51 in the thirty-two months from January 2006 to September 2008. Based on this estimate the total spent by Denver would be \$4,235,909.65. Note that the nature of cases cannot be determined from the response, and so may include non-civil rights claims. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$4,235,909.65 estimated to have been awarded to plaintiffs in this jurisdiction—the median percentage of all payments that were civil rights payments made during the study period. See Appendix C. Mr. Cooke's response indicates that there were 189 cases between 2006 and 2011 resolved by settlement, judgment, or dismissal. E-mail from David V. Cooke, Denver Dep't of Law, to author (Oct. 5, 2012, 14:54 PDT) (on file with the *New York University Law Review*). To estimate the number of civil rights actions resulting in payments to plaintiffs during this period, I calculated 20.6% of the 189 total resolved cases during this period—the median percentage of total cases resolved by settlement, judgment, or dismissal between 2006 and 2011 that involved civil rights cases with payments to plaintiffs in the jurisdictions that provided detailed data. See Appendix D. For Appendix B, to estimate the number of all types of actions resulting in payments to plaintiffs during the study period, I calculated 46.0% of the 189 total cases during the period—the median percentage of total cases resolved with payments to plaintiffs in jurisdictions that provided detailed data. See Appendix D. For information about indemnification decisions, see E-mail from David V. Cooke (Oct. 9, 2012, 19:54 PDT), *supra* (responding that it is his understanding that officers were indemnified for all the settlements and judgments paid between September 2008 and December 2011). For information about punitive damages awards, see E-mail from David V. Cooke (Oct. 5, 2012, 14:54 PDT), *supra* (reporting that punitive damages were not awarded against individual officers during the study period).

**Austin Police Department (TX).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see E-mail from Meghan Riley, Div. Chief, Litig., City of Austin, Tex., to author (July 26, 2012, 10:08 PDT) (on file with the *New York University Law Review*) (providing a list of "solely civil rights cases involving either the City or the City and individual officers"). I removed two cases where I learned that the noted settlement dollars were actually dollars collected by the city. E-mail from Meghan Riley, Div. Chief, Litig., City of Austin, Tex., to author (Mar. 14, 2014, 09:54 PDT) (on file with the *New York University Law Review*). For information about all types of cases involving Austin Police officers resolved between 2006 and 2011, see E-mail from Nelly M.

Soriano, Paralegal, City of Austin Law Dep't (June 27, 2012, 13:21 PDT) (providing a list of all cases involving city police officers). For information about indemnification decisions, see E-mail from Meghan Riley (July 26, 2012, 10:08 PDT), *supra* ("Any settlement amounts identified were paid by the City."); E-mail from Meghan Riley, *supra* ("[T]here were no employee contributions to satisfy judgments or settlements . . ."). Ms. Riley identified one case resolved during this period in which an individual officer was not provided representation; she does not know "what happened to the claims against the individual officer." *Id.* My calls to the plaintiffs' counsel and the defendant officer's counsel went unreturned. For information about punitive damages awards, see E-mail from Meghan Riley (July 26, 2012, 10:08 PDT), *supra* (attaching a spreadsheet of cases, none of which included jury awards to plaintiffs, from 2006 to 2011).

**Fort Worth Police Department (TX).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Cheryl K. Byles, Assist. City Attorney, City of Fort Worth (June 26, 2012) (on file with the *New York University Law Review*) (providing spreadsheet of cases resolved between 2006 and 2011). I removed cases involving motor vehicle accidents. Because all payments were the result of settlements, there could have been no punitive damages awards. For information about indemnification decisions, see *id.* Ms. Byles reported that the "only occurrence during the applicable time period where the City declined to indemnify an employee" is still pending. *Id.* The officer in question was sued for driving the plaintiffs to remote locations in his patrol car and sexually assaulting them. See *Davidson v. City of Fort Worth*, No. 4:11-CV-713-A, 2012 WL 3778832 (N.D. Tex. Aug. 30, 2012) (granting motion for summary judgment in favor of the City).

**Kansas City Police Department (MO).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see Letter from Jamie L. Cook, Assoc. Gen. Counsel, Kan. City, Mo., Police Dep't (June 27, 2012) (on file with the *New York University Law Review*) (providing a list of cases resolved between 2006 and 2011 and the amount paid). Note that the nature of cases cannot be determined from the response, and so may include non-civil rights claims. To estimate the amount spent in civil rights actions, I calculated 76.3% of the \$3,481,609.25 total awarded to plaintiffs in this jurisdiction—the median percentage of civil rights payments made in the jurisdictions that provided detailed data about both civil rights and non-civil rights payments. See Appendix C. Mr. Cook's response reports that a total of seventy-four cases in which Kansas City officers were named as defendants were closed through settlement, judgment, or dismissal between 2006 and 2011. To estimate the number of civil rights actions resulting in payments to plaintiffs during this period, I calculated 20.6% of the seventy-four total resolved cases during this period—the median percentage of total cases resolved by settlement, judgment, or dismissal between 2006 and 2011 that involved civil rights cases with payments to plaintiffs in the jurisdictions that provided detailed data. See Appendix D. For Appendix B, to estimate the number of all types of cases resulting in payment to plaintiff, I calculated 46.0% of the seventy-four total cases resolved during this period—the median percentage of total cases resolved that involved payments to plaintiffs in the jurisdictions that provided detailed data. See Appendix D. For information about indemnification decisions, see E-mail from Jamie L. Cook, Assoc. Gen. Counsel, Kan. City, Mo., Police Dep't, to author (Mar. 6, 2014, 12:58 PST) ("To the best of our knowledge, no officers financially contributed to settlements or payments of judgments in the past 5 years."); E-mail from Jamie L. Cook, Assoc. Gen. Counsel, Kan. City, Mo., Police Dep't, to author (Mar. 6, 2014, 13:07 PST) ("To the best of our knowledge, the same is true for 2006–2009.")

The Kansas City Police Department did not provide responsive information about punitive damages awards. A broad Westlaw search of "Kansas City' /s police /p punitive!" in all state and federal cases in Missouri between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**San Jose Police Department (CA).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs' favor, see E-mail from Lisa Herrick, Senior Deputy City Attorney, Office of the City Attorney, City of San Jose, to author (June 14, 2012, 16:57 PDT) (on file with the *New York University Law Review*) (attaching spreadsheets of cases resolved between 2006 and 2011, with motor vehicle accident cases highlighted). I consolidated spreadsheet entries for the same parties that appeared to reflect the same cases, to avoid overcounting cases. For information about indemnification decisions and punitive damages awards, see E-mail from Lisa Herrick, Senior Deputy City Attorney, Office of the City Attorney, City of San Jose, to author (Dec. 20, 2011, 09:00 PST) (on file with the *New York University Law Review*) ("The City does not have any cases responsive to your request numbers 3, 4, and 5.").

**Seattle Police Department (WA).** For data about the number of police misconduct cases resolved in plaintiffs' favor between 2006 and 2011, see Letter from Peter S. Holmes, Seattle City Attorney, to author (Aug. 16, 2012) (on file with the *New York University Law Review*). For data about the amount paid to plaintiffs in police misconduct suits, see Letter from Peter S. Holmes, Seattle City Attorney, to author (July 31, 2012) (on file with the *New York University Law Review*) (attaching responses that exclude "negligence" and "employment" cases). I included a \$1.5 million settlement identified by Mr. Holmes that occurred in 2011 before a lawsuit was actually filed. See *id.* For information about

indemnification decisions, see Letter from Peter S. Holmes, Seattle City Attorney, to author (July 3, 2012) (on file with the *New York University Law Review*) (“[T]here are no cases where the City of Seattle has declined to indemnify a defendant employee of the Seattle Police Department for compensatory damages or punitive damages.”). The Seattle Police Department did not provide responsive information about punitive damages awards. A broad Westlaw search of “seattle /s police & punitive!” in all state and federal cases in Washington published between 2005 and 2012 revealed no cases in which punitive damages were awarded.

**Montgomery County Police Department (MD).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs’ favor, and indemnification decisions, see Letter from Patricia P. Via, Chief, Litig. Div.—Self Insurance, Office of the Cnty. Attorney, Montgomery Cnty., to author (July 13, 2012) (on file with the *New York University Law Review*) (providing detailed list of cases closed between 2006 and 2011 and reporting that there were no cases in which an officer was denied indemnification). I removed motor vehicle accidents—the only non-civil rights claims with payments to plaintiffs reported during the study period—to identify the subset of civil rights claims. For information about punitive damages awards, see *id.* at 2 (reporting that there was one punitive damages judgment during this period, but that it is currently on appeal).

**El Paso Police Department (TX).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Laura P. Gordon, Deputy City Attorney, City of El Paso, to author (July 5, 2012) (on file with the *New York University Law Review*) (attaching spreadsheet of “civil rights” cases resolved against police officers). For information about indemnification decisions, see Telephone Interview with Laura P. Gordon, Deputy City Attorney, City of El Paso (July 5, 2012). There was one instance in recent memory in which a jury entered a judgment on behalf of a plaintiff and the officer contributed \$2500–\$3000 to satisfy part of the judgment, but this case did not occur between 2006 and 2011, as there was no judgment entered during the study period. See *id.* El Paso did not provide responsive information about punitive damages awards. A broad Westlaw search of “el paso’ /s police /p punitive!” in state and federal courts in Texas published between 2005 and 2012 identified no cases in which punitive damages were awarded against El Paso police officers.

**Miami Police Department (FL).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Julie O. Bru, City Attorney, City of Miami, to author (Apr. 15, 2013) (on file with the *New York University Law Review*) (providing a spreadsheet of lawsuits closed between January 1, 2006 and December 31, 2011). Note that, in calculating the total settlements and judgments, I counted only cases designated as “civil rights” cases and excluded those designated as “torts” cases. These were the only two case-type designations on the spreadsheet. For information about indemnification decisions, see Letter from Julie O. Bru, City Attorney, City of Miami, to author (June 5, 2013) (on file with the *New York University Law Review*) (reporting that—in response to my letter requesting indemnification information about the twenty-seven civil rights cases with payments to plaintiffs between 2006 and 2011, and suggesting that Ms. Bru ask the four attorneys who represented defendants in these cases whether they recalled any instance in which an officer was denied indemnification or financially contributed to settlements—the four attorneys “do not recall any on this list”). Miami did not provide responsive information about punitive damages awards. A broad Westlaw search of “miami /s police & punitive!” in all state and federal cases in Florida published between 2005 and 2012 revealed no cases in which punitive damages were awarded against Miami police officers.

**Oklahoma City Police Department (OK).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs’ favor, and indemnification decisions, see Letter from Richard C. Smith, Litig. Div. Head, Office of Mun. Counsel, City of Okla., to author (June 21, 2012) (on file with the *New York University Law Review*); E-mail from Richard C. Smith, Litig. Div. Head, Office of Mun. Counsel, City of Okla., to author (July 17, 2012, 05:58 PDT) (on file with the *New York University Law Review*). Smith reported a total of \$4,207,250 in settlements and judgments paid during the period 2006–2011 for the ten cases involving “police misconduct” litigation, but noted that \$4 million—the vast majority paid—was paid in a single case of wrongful conviction and false imprisonment based on improper conduct by the city’s forensic chemist, not a police officer. E-mail from Richard C. Smith, *supra*; Letter from Richard C. Smith, *supra*. The city declined to indemnify the chemist, but did pay over \$23,000 of her attorneys’ fees. See Letter from Richard C. Smith, *supra* (identifying the ten cases as “police misconduct” cases). Because it does not involve an Oklahoma police officer, I have not counted the \$4 million judgment. For information about punitive damages cases and indemnification of punitive damage awards, see *id.*

**Albuquerque Police Department (NM).** For data about the amount paid to plaintiffs in police misconduct suits, the number of cases resolved in plaintiffs’ favor, and indemnification decisions, see Letter from Roberta Duran, Fiscal Officer, Legal Dep’t Records Custodian, Office of the City Attorney, City of Albuquerque, to author (July 2, 2012) (on file with the *New York University Law Review*) (appending spreadsheet of cases closed between 2001 and 2011). I excluded cases resolved before 2006. For those cases that were not clearly civil rights cases on the basis of the limited description provided in the spreadsheet, I attempted to retrieve dockets, court documents, and press accounts to determine the

nature of the claims. I excluded from the civil rights data set all cases that clearly did not involve civil rights claims and those cases about which I could find no conclusive information. For information about indemnification decisions, see Telephone Interview with Kathryn Levy, Deputy City Attorney, Office of the City Attorney, City of Albuquerque (June 13, 2013) (confirming that no police officer contributed to a settlement or judgment between 2006 and 2011).

Albuquerque did not provide responsive information about punitive damages awards. A Westlaw search of “Albuquerque /s police & punitiv!” in New Mexico state and federal courts published between 2005 and 2012 revealed one instance in which punitive damages were awarded. See *Seeley v. Chase*, 443 F.3d 1290, 1291 (10th Cir. 2006) (describing a case in which the plaintiff filed a § 1983 action for sexual assault against the defendant officer and received a jury verdict of \$69,880 in compensatory damages and \$873,500 in punitive damages). The appellate court remanded the case to the district court for a more articulated ruling under Federal Rule of Evidence Rule 403. *Id.* at 1297. The docket indicates that the issue was decided on remand on May 1, 2006; an appeal was dismissed on August 25, 2006; and the case was dismissed with prejudice (presumably following settlement) on September 29, 2006. Docket, *Seeley v. Chase*, No. 1:04-CV-00118 (Nov. 18, 2008). The spreadsheet provided by the Office of the City Attorney indicates that \$1 million was paid to the plaintiff on August 31, 2006. Letter from Roberta Duran, *supra*, at 4 (showing payments of \$460,000 and \$540,000 on August 31, 2006). The City Attorney’s Office confirms that no officers contributed to settlements or judgments during the time period. Telephone Interview with Kathryn Levy, *supra*.

**Tampa Police Department (FL).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Ursula D. Richardson, Assistant City Attorney, City of Tampa, to author (Nov. 13, 2012) (on file with the *New York University Law Review*) (providing a list of cases resolved between 2000 and 2012). Ms. Richardson included cases that were resolved before 2006 and after 2011, and cases involving motor vehicle accidents; I removed these cases from the dataset. She also did not provide the dates that two motor vehicle accident cases were resolved. I have included them in the calculation of total payouts, although it is possible that they were resolved outside the study period. For information about indemnification decisions, see Telephone Interview with Ursula D. Richardson, Assistant City Attorney, City of Tampa (July 31, 2012) (reporting that she has worked in the City Attorney’s Office for eight years and has been responsible for police cases, and that they have not refused to indemnify an officer for a settlement or judgment during that period, except in an instance in which an officer fell asleep while driving home from work and hit another car). For information about punitive damages awards, see Letter from Ursula D. Richardson, Assistant City Attorney, City of Tampa, to author (July 30, 2012) (on file with the *New York University Law Review*) (“[T]o the best of my knowledge there have been no punitive damage awards against a Tampa Police Department employee from 2006–2011.”).



APPENDIX J: SOURCE TABLE FOR LARGER JURISDICTIONS THAT DID NOT PROVIDE RESPONSIVE INFORMATION

The following describes the data sources for information about the twenty-six jurisdictions in the study that did not provide responsive information about both payouts and indemnification decisions, organized from largest to smallest jurisdiction measured by full-time sworn personnel, according to BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82.

<p><b>Chicago Police Department (IL).</b> For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Roderick Drew, Freedom of Info. Officer, City of Chi. Law Dep’t, to author (July 27, 2012, 12:47 PDT) (on file with the <i>New York University Law Review</i>) (providing a spreadsheet of settlements and judgments from 2006 and 2007, and referencing settlements and judgments posted by the Law Department from 2008 to 2011), available at <a href="http://www.cityofchicago.org/city/en/depts/dol.html">http://www.cityofchicago.org/city/en/depts/dol.html</a>. Note that I removed cases involving motor vehicle incidents, malicious prosecution, and false conviction claims to identify the subset of civil rights claims. Chicago did not provide indemnification information. See E-mail from Roderick Drew, Freedom of Info. Officer, City of Chi. Law Dep’t, to author (Sept. 18, 2012, 10:47 PDT) (on file with the <i>New York University Law Review</i>) (stating that “[t]he only way we would know” whether an officer was indemnified “is to review cases individually, which we couldn’t do”); E-mail from Roderick Drew, Freedom of Info. Officer, City of Chi. Law Dep’t, to author (Sept. 18, 2012, 11:10 PDT) (on file with the <i>New York University Law Review</i>) (reporting that he did not “know of any” instances in which an officer was denied indemnification for acts in the course and scope of his employment “off hand”); see also Steve Mills, <i>Police Officers Sometimes Must Pay Too</i>, CHICAGO TRIBUNE, Apr. 15, 2012, at 1.4 (citing Roderick Drew as stating that settlements requiring officers to contribute are “rare”).</p>
<p><b>Philadelphia Police Department (PA).</b> For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Ellen Berkowitz, Deputy City Solicitor, City of Phila. Law Dep’t, to author (May 1, 2013) (on file with the <i>New York University Law Review</i>) (attaching spreadsheet of settlements and judgments paid between 2006 and 2011). I removed motor vehicle (including police chase), labor and employment, and “miscellaneous” claims to identify the subset of civil rights claims. Philadelphia did not produce responsive information regarding indemnification decisions. See <i>id.</i> (objecting to request for information about indemnification); Letter from Ellen Berkowitz, Deputy City Solicitor, City of Phila. Law Dep’t, to Kyle Applegate, Commonwealth of Pa. Office of Open Records (May 20, 2013) (on file with the <i>New York University Law Review</i>) (responding to an appeal of Philadelphia’s objection to the request for indemnification information and explaining that the city “do[es] not track cases in which officers were required to financially contribute” and “because [the city does] not track it, there is no data”).</p>
<p><b>Houston Police Department (TX).</b> For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Tiffany Evans, City of Hous. Legal Dep’t, to author (July 20, 2012, 10:15 PDT) (on file with the <i>New York University Law Review</i>) (attaching spreadsheet with civil rights settlement and judgment amounts between 2006 and 2011). Houston did not provide responsive information about indemnification decisions. See E-mail from City of Hous. Legal Dep’t, to author (Feb. 28, 2013, 13:06 PST) (on file with the <i>New York University Law Review</i>) (“No responsive information exists . . . because the City does not maintain that type of data.”).</p>
<p><b>Pennsylvania State Police (PA).</b> For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from William A. Rozier, Agency Open Records Officer, Bureau of Records and Identification, Pa. State Police, to author (July 19, 2012) (on file with the <i>New York University Law Review</i>) (providing spreadsheet of cases with payments). The spreadsheet does not identify the nature of cases, and so non-civil rights claims may be included in their tally. The Pennsylvania State Police did not provide responsive information about indemnification decisions. See <i>id.</i> (denying request for records regarding indemnification on the grounds that “the PSP does not maintain records responsive to these requests” and “would have to examine each resolved case and compile, format and organize the information to create a record”).</p>
<p><b>District of Columbia Metropolitan Police (DC).</b> For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Victor Bonett, Legislative Affairs and FOIA Officer, Office of the Attorney Gen. for D.C., to author (Dec. 7, 2012, 14:15 PST) (on file with the <i>New York University Law Review</i>) (providing a spreadsheet of litigation closed from fiscal year 2005 through fiscal year 2011). Note that this response does not include data from</p>

July 1 to December 31, 2011. The D.C. Metro Police did not provide responsive information about indemnification decisions. *See* E-mail from Victor Bonett, Legislative Affairs and FOIA Officer, Office of the Attorney Gen. for D.C., to author (June 20, 2012, 12:20 PDT) (on file with the *New York University Law Review*) (“OAG does not retain documents [about indemnification practices] in a way that would provide the information.”).

**Miami-Dade Police Department (FL).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Brenda G. Williams, Police Legal Bureau, Miami-Dade Police Dep’t, to author (July 10, 2012, 12:08 PDT) (on file with the *New York University Law Review*) (attaching a spreadsheet of closed police lawsuits). Miami-Dade did not provide responsive information about indemnification decisions. *See* E-mail from Angelica Cruz, Liab. Claims Coordinator, Miami Dade Cnty. Internal Servs. Dep’t Risk Mgmt. Div., to author (July 27, 2012, 13:00 PDT) (on file with the *New York University Law Review*) (reporting that the amount of money paid in settlements and judgments was “the only information available at our end”).

**Nassau County Police Department (NY).** Nassau County provided no information responsive to my request. *See* Letter from John M. Donnelly, Counsel to the Nassau Cnty. Police Indemnification Bd., to author (Mar. 25, 2013) (on file with the *New York University Law Review*) (reporting that documentation responsive to the requests “does not exist” and “would require the review and analysis of all such lawsuits and determinations during the period in question”).

**Suffolk County Police Department (NY).** Suffolk County provided no information responsive to my request. *See* Letter from Dennis M. Cohen, Suffolk Cnty. Attorney, to author (Oct. 18, 2012) (on file with the *New York University Law Review*) (“[T]he records requested are not maintained in a manner which would enable the County to identify them in response to this request.”).

**Harris County Sheriff’s Department (TX).** Harris County provided no information responsive to my request. *See* Telephone Interview with Cheryl Thornton, Harris Cnty. Sheriff’s Legal Dep’t (Feb. 28, 2013) (reporting that the Harris County Sheriff’s Department does not keep the data requested, but that Thornton asked attorneys in a “short poll” around the office and found no instance in which an officer was not indemnified).

**Detroit Police Department (MI).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see Letter from Ellen Ha, Senior Assistant Corp. Counsel, Governmental Affairs Div., City of Detroit, to author (Mar. 8, 2013) (on file with the *New York University Law Review*) (reporting that the department has records of lawsuit payouts from July 1, 2009 to February 1, 2013, but does not have records of payouts before July 1, 2009). Ms. Ha did not respond to my requests for production of these records. Detroit did not provide responsive information about indemnification decisions. *See* Letter from Ellen Ha, Senior Assistant Corp. Counsel, Governmental Affairs Div., City of Detroit, to author (May 7, 2013) (on file with the *New York University Law Review*) (“Neither the Law Department nor the Police Department keeps track of which Detroit police officers are indemnified.”). A supervising attorney in the Detroit City Attorney’s Office did say, however, that officers are represented and indemnified 99.8% of the time. Telephone Interview with Dennis Mazurek, Supervising Attorney, Detroit City Attorney’s Office (Feb. 27, 2013).

**San Diego Police Department (CA).** San Diego provided no information responsive to my request. *See* Letter from William Gersten, Deputy City Attorney, City of San Diego (Mar. 8, 2013) (on file with the *New York University Law Review*) (“To uncover the information you seek would require the City to search through each and every individual lawsuit filed against it during the five years requested, undergo considerable historical case analysis in order to extract information, and then compile statistical data.”).

**Baltimore County Police Department (MD).** Baltimore County provided no information responsive to my request. *See* Telephone Interview with Greg Gaskins, Balt. Cnty. Attorney’s Office (July 26, 2012) (“In other words, we don’t say we had 10 police cases in 2011 and 7 were settled for this amount. We just do not do that.”). Even so, Mr. Gaskins reported that officers rarely contributed to settlements and judgments. *See id.* (“Generally, as long as the PO is acting within the scope of the employment, we will indemnify. . . . There can’t be that many where we actually refused. . . . I think I could probably count on one hand, at most, if we had done so. Maybe one or two instances. It’s not something that has happened a lot.”).

**Virginia State Police (VA).** The Virginia State Police provided no documents responsive to my request. *See* Letter from Sara N. Poole, Legal Office, Bureau of Admin. & Support Servs., Dep’t of State Police, Commonwealth of Va., to Jeffrey E. Fogel, Attorney (Sept. 25, 2012) (on file with the *New York University Law Review*) (stating that no responsive documents exist). Note that the Virginia public records law requires that a resident of Virginia file the requests. VA. CODE ANN. § 2.2-3704(A) (2011). Mr. Fogel, a Virginia resident, submitted my request to the Virginia State Police.

**Port Authority of New York & New Jersey Police (NY/NJ).** The Port Authority provided no documents responsive to my request. *See* E-mail from Ann L. Qureshi, Freedom of Info. Admin’t, Office

of the Sec'y, Port Auth. of N.Y. & N.J., to author (July 8, 2013, 06:24 PDT) (on file with the *New York University Law Review*) (reporting that the indemnification policies produced on July 5, 2013 “are the entirety of the available records responsive to your request” and that she is “unaware if another governmental entity might possess the records and/or information you request”).

**Indianapolis Metropolitan Police (IN).** Indianapolis provided no information responsive to my requests. The first records request was sent to the Clerk of Marion Circuit Court at the suggestion of the Indianapolis Metropolitan Police Department; the Clerk’s Office responded that it did not have responsive information and directed me to send a new request to the Indianapolis Corporation Counsel’s office. Letter from Scott Hohl, Chief of Staff, Marion Cnty. Clerk, to author (June 20, 2012) (on file with the *New York University Law Review*). I sent an updated records request to Corporation Counsel on June 28, 2012; after eight unreturned calls to the office over a period of nine months, I was able to reach a paralegal who reported that the office had no record of my request. Telephone Interview with Zaida Maldonado-Prather (Apr. 17, 2013) (on file with the *New York University Law Review*). I sent an updated request on April 18, 2013; the Office of Corporation Counsel for Indianapolis responded that the office “does not have a record summarizing the information requested,” and that “[i]dentifying responsive records . . . requires searching a voluminous amount of records already in storage.” Letter from Zaida Maldonado-Prather, Paralegal, Indianapolis Office of Corp. Counsel, to author (Apr. 30, 2013) (on file with the *New York University Law Review*).

**Ohio State Highway Patrol (OH).** Ohio Highway Patrol provided limited information responsive to my requests. After receiving my public records request, the Ohio State Highway Patrol forwarded the request to the Office of Legal Services in the Ohio Department of Public Safety; a paralegal responded with a copy of the state indemnification statute and a spreadsheet reflecting \$144,500 paid in settlements during fiscal years 2010–2012 in cases involving named officers. Letter from Ashleigh R. Henry, Legal Intern, Office of Legal Servs., Ohio Dep’t of Pub. Safety, to author (Sept. 21, 2012) (on file with the *New York University Law Review*). An assistant chief legal counsel later confirmed that the office did not have additional responsive records. See E-mail from Heather R. Frient, Assistant Chief Legal Counsel, Ohio Dep’t of Pub. Safety, to Brian Cardile, Student, UCLA School of Law (Sept. 28, 2012, 13:52 PDT). The Ohio State Highway Patrol policy provides that the state “shall indemnify an officer or employee from liability incurred in the performance of official duties . . . ,” Representation, Indemnification & Immunity of Sworn Officers, Ohio State Highway Patrol Policy No. OSP-905.01 (2010) (internal quotation and citation omitted) (on file with the *New York University Law Review*), but this provision does not apply if “the actions of the employee are deemed to be manifestly outside the scope of employment or official responsibilities, or the employee is deemed to have acted with malicious purpose, in bad faith, or in a wanton or reckless manner.” *id.* The Office of Legal Services did not provide information about whether an employee of the Ohio State Highway Patrol had ever been declined indemnification.

**Memphis Police Department (TN).** The City of Memphis Law Division refused to respond to my records request because I am not a Tennessee resident. E-mail from Chandell Ryan, Pub. Records Officer, Senior Assistant City Attorney, Law Div., City of Memphis (July 10, 2012, 14:15 PDT) (on file with the *New York University Law Review*) (reporting that municipal records will “be open for personal inspection by any citizen of this state” (citing TENN. CODE ANN. § 10-7-503(a)(2)(A) (2012)). I was unable to locate a Tennessee attorney who would pursue my public records request.

**New Orleans Police Department (LA).** New Orleans provided no information responsive to my request. See Letter from Anita B. Curran, Assistant City Attorney, Law Dep’t, City of New Orleans (June 15, 2012) (on file with the *New York University Law Review*) (“Neither the New Orleans Police Department nor the City Attorney’s Office maintains a record responsive to your request and the custodial department would have to research its files and create a document to satisfy your request.”).

**Fairfax County Police Department (VA).** Fairfax County provided no information responsive to my request. See Letter from Karen L. Gibbons, Senior Assistant Cnty. Attorney, Cnty. of Fairfax, Va., to Jeffrey E. Fogel, Attorney (Sept. 21, 2012) (on file with the *New York University Law Review*) (stating that no responsive documents exist). Note that the Virginia public records law requires that a resident of Virginia file the requests. VA. CODE ANN. § 2.2-3704(A) (2011). Mr. Fogel, a Virginia resident, submitted my request to the Fairfax County Police Department.

**St. Louis Police Department (MO).** For data about the amount paid to plaintiffs in police misconduct suits, see Letter from Bridget R. Yates, Senior Paralegal, St. Louis Bd. of Police Comm’rs, to author (Sept. 27, 2012) (on file with the *New York University Law Review*) (providing the “[t]otal dollars awarded” and number of lawsuits resolved per year). St. Louis did not provide information about indemnification decisions. See *id.* (reporting that information about instances in which indemnification requests were denied is “[n]ot specifically tracked”).

**Nashville-Davidson County Police Department (TN).** My request was denied on the grounds that I am not a Tennessee resident (and the Tennessee Open Records Act only authorizes citizens of the state to seek information under the Act), but the respondent also wrote that “no documents exist that provide a

list of information that is responsive to your request. To provide the information that you have requested, a manual review would be needed of all litigation files involving the Metropolitan Nashville Police Department between 2006 and 2011.” Letter from Wm. Michael Safley, Deputy Dir. of Law, Dep’t of Law, Metro. Gov’t of Nashville and Davidson County (June 18, 2012) (on file with the *New York University Law Review*).

**Newark Police Department (NJ).** The search for information about the Newark Police Department was long and fruitless. I sent a request to the City Clerk’s office in June 2012. The request was denied on the ground that the request did not seek specific records. See Letter from Robert P. Marasco, City Clerk, City of Newark, to author (June 21, 2012) (on file with the *New York University Law Review*). Following a conversation with the deputy city clerk, I made five separate, restyled requests to the Clerk’s Office. The City Clerk’s office then referred me to the Law Department. Gunther Waldow, Assistant Corporation Counsel, reported that, after speaking with people in the office of the Corporation Counsel and in the city’s Business Affairs Office, it appeared that no one had a chart or database that includes the requested information. See Telephone Interview with Gunther Waldow, Assistant Corp. Counsel, City of Newark (July 27, 2012). Subsequent calls and e-mails to the Clerk’s Office, the Business Administration Office, and the Finance Department produced no additional information.

**Louisville Metro Police Department (KY).** For data about the amount paid to plaintiffs in police misconduct suits and the number of cases resolved in plaintiffs’ favor, see E-mail from Dee Q Allen, Open Records Coordinator, Louisville Metro Office of Mgmt. and Budget, to author (June 20, 2012, 11:03 PDT) (on file with the *New York University Law Review*) (providing information about “[l]itigated [n]on-auto cases for LMPD paid since 2006”). Louisville did not provide information about indemnification decisions. See *id.* (responding that “Risk Management does not track” information related to indemnification). A subsequent request to the Louisville City Attorney’s Office was denied on the ground that “[n]either Louisville Metro Government or our office as legal representative for Metro Government possess a record, report or data-base that would provide the information concerning instances in which Metro declined to indemnify a defendant employee of Louisville Metro Police Department (LMPD) for compensatory or punitive damages.” Letter from Michael J. O’Connell, Jefferson Cnty. Attorney, to author (Aug. 2, 2012) (on file with the *New York University Law Review*).

**Cincinnati Police Department (OH).** Cincinnati produced no information responsive to my request. See E-mail from Roshani D. Hardin, Chief Counsel, City Solicitor’s Office, to author (July 26, 2012, 14:18 PDT) (on file with the *New York University Law Review*) (reporting “[t]he Law Department doesn’t maintain any specific document or series of documents which would list every litigation case involving the Cincinnati Police Department that would fall within the parameters of Professor Schwartz’s public records request[,]” nor is there a “single document or series of documents” reflecting the Law Department’s decisions on the subject of indemnification).

**DeKalb County Police Department (GA).** DeKalb County produced no information responsive to my request. See Letter from Sonya D. Davis, Admin. Assistant of Open Records, Office of the Chief of Police, DeKalb Cnty. Police, to author (June 14, 2012) (on file with the *New York University Law Review*) (reporting that “the DeKalb County Police Department does not have any documents that are responsive to your request” and “we believe that the County has no documents that are responsive to your request”).

**Tucson Police Department (AZ).** Tucson produced no information responsive to my request. The initial public records request was sent in June 2012 to the Tucson Police Department; the request was then referred to the legal advisors for the Tucson Police Department, who reported that they were not the custodians for the records sought and suggested I send a request to the City Clerk’s Office. In October 2012, I sent a public records request to the City Clerk’s Office; the office assigned the request a log number and then forwarded it to the Tucson City Attorney’s Office. After months of e-mails, letters, and telephone calls to an employee of the Tucson City Attorney’s Office, I received a letter stating that the city does not collect responsive information. Letter from Dennis P. McLaughlin, Principal Assistant City Attorney, City of Tucson, to author (Sept. 20, 2013) (on file with the *New York University Law Review*) (“[Tucson] does not maintain any responsive records or statistics (or generate reports) that are broken down in the manner you have requested, or that use the categorizations that you are focused on. This is true at all stages of our process: intake, administrative processing, litigation, settlement, trial, and post-trial.”).

## APPENDIX K: SOURCE TABLE FOR SMALLER JURISDICTIONS

The following describes the responses (or lack thereof) from the seventy small and mid-sized jurisdictions I queried, organized from largest to smallest jurisdiction measured by full-time sworn personnel. For each jurisdiction, the total number of sworn officers is from BJS LAW ENFORCEMENT CENSUS DATA, *supra* note 82.

<p><b>Omaha Police Department (NE).</b> Omaha did not respond to my public records request.</p>
<p><b>Raleigh Police Department (NC).</b> For responsive information, see E-mail from Dorothy K. Leapley, Deputy City Attorney, City of Raleigh, to author (Oct. 7, 2013, 09:46 PDT) (on file with the <i>New York University Law Review</i>) (responding that “the City has had lawsuits against RPD officers resolved during the period you identify and payments have been made on some of those cases” but “[n]o officers have been required to contribute to any settlement or judgment”).</p>
<p><b>Contra Costa County Sheriff’s Office (CA).</b> For responsive information, see E-mail from Sharon Hymes-Offord, Risk Manager, Contra Costa Cnty., to author (Oct. 10, 2013) (on file with the <i>New York University Law Review</i>) (reporting nine cases with payments to plaintiffs and no officer contributions).</p>
<p><b>Delaware State Police (DE).</b> The Delaware State Police denied my public records request and directed me to search for responsive information at Delaware courthouses. See E-mail from Kimberly H. Chandler, Media and Cmty. Relations, Del. Dep’t of Safety and Homeland Sec., to author (Nov. 14, 2013, 08:17 PST) (on file with the <i>New York University Law Review</i>).</p>
<p><b>Polk County Sheriff’s Office (FL).</b> Polk County did not provide information responsive to my public records request.</p>
<p><b>Cobb County Police Department (GA).</b> For responsive information, see E-mail from Robert Quigley, Dir. of Commc’ns, Cobb Cnty. Gov’t, to author (Oct. 7, 2013, 11:30 PDT) (on file with the <i>New York University Law Review</i>) (listing eleven cases with payments to plaintiffs); E-mail from Robert Quigley, Dir. of Commc’ns, Cobb Cnty. Gov’t, to author (Oct. 7, 2013, 11:28 PDT) (on file with the <i>New York University Law Review</i>) (reporting no officer contributions).</p>
<p><b>Minnesota State Patrol (MN).</b> For responsive information, see Telephone Interview with Matt Langer, Minn. State Patrol (Oct. 25, 2013) (on file with the <i>New York University Law Review</i>) (reporting that responsive files might be with the Attorney General’s office, although they would likely not produce the information, but that he would “bet [his] next paycheck we didn’t have any troopers contribute to the settlements during that period”).</p>
<p><b>Mobile Police Department (AL).</b> Mobile did not provide information responsive to my public records request.</p>
<p><b>Johnson County Sheriff’s Office (KS).</b> Johnson County reported that it did not have information responsive to my request. See Letter from Sheila Wacker, Records Supervisor and Custodian, Johnson Cnty. Sheriff’s Office, to author (Oct. 9, 2013) (on file with the <i>New York University Law Review</i>).</p>
<p><b>Manatee County Sheriff’s Office (FL).</b> For responsive information, see E-mail from Charla Eberly, Legal Affairs Div., Manatee Cnty. Sheriff’s Office, to author (Oct. 30, 2013, 07:14 PDT) (on file with the <i>New York University Law Review</i>) (providing a spreadsheet of lawsuits closed during the study period and reporting that no officers were required to contribute during the study period).</p>
<p><b>Fort Wayne Police Department (IN).</b> For responsive information, see Letter from Carol Helton, City Attorney, Fort Wayne, to author (Oct. 24, 2013) (on file with the <i>New York University Law Review</i>) (attaching a spreadsheet of lawsuits resolved during the study period and reporting that no officer contributed to any settlement or judgment). I removed duplicate entries after asking Fort Wayne for clarification.</p>
<p><b>Howard County Police Department (MD).</b> For responsive information, see Letter from Alexandra Bresani, Office of Pub. Info., Howard Cnty. Dep’t of Cnty. Admin., to author (Oct. 8, 2013) (on file with the <i>New York University Law Review</i>) (reporting that it does not maintain a database with responsive information, but that no officer has contributed to a settlement or judgment “during the Office of Law’s thirty-three years of collective experience (including the 2006–2011 timeframe referred to in your email) handling police cases on behalf of Howard County’s Risk Management program”).</p>
<p><b>Washoe County Sheriff’s Office (NV).</b> Washoe County did not provide information responsive to</p>

<p>my public records request.</p>
<p><b>Summit County Sheriff's Office (OH).</b> For responsive information about payments, see E-mail from Linda Murphy, Cnty. of Summit Exec.'s Office, to author (Oct. 29, 2013, 16:11 PDT) (on file with the <i>New York University Law Review</i>) (attaching a list of lawsuits closed during the study period and the amounts paid to plaintiffs in each case); E-mail from Linda Murphy, Cnty. of Summit Exec.'s Office, to author (Nov. 4, 2013, 12:41 PST) (on file with the <i>New York University Law Review</i>) (including information regarding two additional cases). For responsive information about indemnification decisions, see E-mail from Linda Murphy, Cnty. of Summit Exec.'s Office, to author (Oct. 25, 2013 4:08 PDT) (on file with the <i>New York University Law Review</i>) ("No deputy has ever paid part of any settlement.").</p>
<p><b>Anchorage Police Department (AK).</b> For responsive information, see E-mail from Steve Hebbe, Deputy Chief, Anchorage Police Dep't, to author (Oct. 13, 2013, 16:10 PDT) (on file with the <i>New York University Law Review</i>) (reporting that he did not have information about the amount spent in settlements and judgments during the study period but, "[t]o my knowledge, we have not had any officers required to pay into a settlement or judgment" with the exception of one case, currently pending). The pending case to which Deputy Chief Hebbe referred concerns an officer who sexually assaulted five women and was sentenced to eighty-seven years in prison. See Chris Klint, <i>Anchorage Settles 11 Anthony Rollins Lawsuits for \$5.5 Million</i>, KTUU.COM (Sept. 4, 2012), <a href="http://articles.ktuu.com/2012-09-04/sexual-assaults_33588082">http://articles.ktuu.com/2012-09-04/sexual-assaults_33588082</a>.</p>
<p><b>New Hampshire State Police (NH).</b> For responsive information see Letter from Mary Ann Dempsey, Senior Assistant Attorney Gen., Civil Bureau, N.H. Dep't of Justice, to author (Nov. 22, 2013) (on file with the <i>New York University Law Review</i>) (enclosing settlement agreements and court orders regarding cases resolved during the study period and reporting that "[n]o officers were required to contribute to any settlement or judgment").</p>
<p><b>Hamilton County Sheriff's Office (OH).</b> Hamilton County provided a spreadsheet of lawsuits involving the Sheriff's Office but did not have information about whether deputies had ever contributed to these cases. See E-mail from Jessica Jones, Admin. Sec'y, Hamilton Cnty. Sheriff's Office, to author (Oct. 21, 2013, 10:58 PDT) (on file with the <i>New York University Law Review</i>) (attaching a spreadsheet of all cases involving the sheriff's office during the study period); E-mail from Jessica Jones, Admin. Sec'y, Hamilton Cnty. Sheriff's Office, to author (Oct. 21, 2013, 11:23 PDT) (on file with the <i>New York University Law Review</i>) (reporting that the office does not maintain records about deputy contributions).</p>
<p><b>Boise Police Department (ID).</b> For responsive information, see Letter from Ralph R. Blount, Assistant City Attorney, Boise City Attorney's Office, to author (Oct. 7, 2013) (on file with the <i>New York University Law Review</i>) (listing four cases with payments to plaintiffs, two of which are confidential, and reporting that there were no officer contributions).</p>
<p><b>New Bedford Police Department (MA).</b> For responsive information, see E-mail from Lisa A. Presby, Compliance Officer, City of New Bedford, to author (Oct. 23, 2013, 07:03 PDT) (on file with the <i>New York University Law Review</i>) (reporting that determining the amount paid in settlements and judgments during the study period "would require some research," but that no officer was required to contribute to a settlement or judgment during the study period).</p>
<p><b>Springfield Police Department (IL).</b> For responsive information, see E-mail from Rex Range, Clerk's Office, City of Springfield, to author (Oct. 23, 2013, 14:06 PDT) (on file with the <i>New York University Law Review</i>) (attaching settlement agreements in cases resolved during the study period, each of which released the city and all its employees from liability in exchange for payments by the city, and none of which referenced contributions by individual officers).</p>
<p><b>Overland Park Police Department (KS).</b> For responsive information, see E-mail from John J. Knoll, Senior Assistant City Attorney, Law Dep't, City of Overland Park, to author (Oct. 14, 2013, 10:56 PDT) (on file with the <i>New York University Law Review</i>) (reporting the number of cases resolved from 2006 to 2011 and the amount paid to plaintiffs, and reporting that no officers contributed to any settlement or judgment during the study period).</p>
<p><b>Waco Police Department (TX).</b> For responsive information about payments, see Letter from Jennifer Richie, City Attorney, City of Waco, to author (Oct. 29, 2013) (on file with the <i>New York University Law Review</i>) (enclosing settlement agreements and court orders regarding cases resolved during the study period). For responsive information about indemnification decisions, see E-mail from Jennifer Richie, City Attorney, City of Waco, to author (Nov. 6, 2013, 14:39 PST) (on file with the <i>New York University Law Review</i>) ("I have been told that we have not had officers contribute to settlements.").</p>
<p><b>Tulsa County Sheriff's Office (OK).</b> For responsive information, see E-mail from Josh Turley, Risk Mgmt., Tulsa Cnty. Sheriff's Office, to author (Oct. 15, 2013, 07:42 PDT) (on file with the <i>New York University Law Review</i>) (reporting that no officers contributed to settlements or judgments during the study period).</p>
<p><b>Henry County Police Department (GA).</b> Henry County did not respond to my public records</p>

request.
<b>Bayonne Police Department (NJ).</b> The City of Bayonne Law Division objected to my public records request as overly broad. See Letter from William P. Opel, Assistant Corp. Counsel, City of Bayonne Law Div., to author (Oct. 7, 2013) (on file with the <i>New York University Law Review</i> ). The Law Division did not respond to my amended public records request.
<b>Quincy Police Department (MA).</b> For responsive information, see E-mail from Michelle E. Clark, Exec. Sec’y, Office of the Chief of Police, Quincy Police Dep’t, to author (Oct. 7, 2013, 08:31 PDT) (on file with the <i>New York University Law Review</i> ) (reporting that there were no cases in which plaintiffs received payment during the study period).
<b>Allentown Police Department (PA).</b> Allentown did not respond to my public records request.
<b>Killeen Police Department (TX).</b> Killeen did not respond to my public records request.
<b>Naperville Police Department (IL).</b> For responsive information, see Letter from Jill Pelka-Wilger, Assistant Legal Dir., City of Naperville, to author (Oct. 10, 2013) (on file with the <i>New York University Law Review</i> ) (attaching settlement agreements entered into during the study period and reporting that “[n]o officers were required to contribute to any of the settlements or judgments”). Ms. Pelka-Wilger did not have information about the amount of one of the eight settlements entered into during the study period.
<b>Pueblo County Sheriff’s Office (CO).</b> For responsive information, see Letter from Cynthia Mitchell, Assistant Cnty. Attorney, Pueblo Cnty. Attorney’s Office, to author (Dec. 12, 2013) (on file with the <i>New York University Law Review</i> ) (appending spreadsheet of cases resolved during the study period and reporting that “no officers were required to contribute to any settlement or judgment”).
<b>Decatur Police Department (AL).</b> For responsive information, see E-mail from Wayne K. Alexander, Jr., Assistant City Attorney, City of Decatur, to author (Oct. 17, 2013, 13:52 PDT) (on file with the <i>New York University Law Review</i> ) (“We are absolutely certain that no such [officer] contribution has been required in the time frame you specified.”).
<b>Schaumburg Police Department (IL).</b> For responsive information, see E-mail from Rita Elsner, Assistant Vill. Attorney, Vill. of Schaumburg, to author (Oct. 11, 2013, 09:15 PDT) (on file with the <i>New York University Law Review</i> ) (reporting that one plaintiff received payment during that time period and that no officer was required to contribute to the settlement).
<b>St. Mary’s County Sheriff’s Office (MD).</b> For responsive information, see E-mail from Michael H. Gardiner, Supervisor, Office of Prof’l Responsibilities, St. Mary’s Police Dep’t, to author (Oct. 7, 2013, 08:14 PDT) (on file with the <i>New York University Law Review</i> ) (reporting that there were no cases in which plaintiffs received payment during the study period).
<b>Sandy City Police Department (UT).</b> For responsive information, see E-mail from Chase Parker, Sandy City Risk Manager, to author (Oct. 15, 2013, 14:13 PDT) (on file with the <i>New York University Law Review</i> ) (reporting that no officer was required to contribute to settlements or judgments during the study period).
<b>Milford Police Department (CT).</b> Milford did not respond to my public records request.
<b>Avondale Police Department (AZ).</b> For responsive information, see E-mail from Sandra Tomsic, City Clerk Assistant II, City of Avondale, to author (Oct. 14, 2013, 17:30 PDT) (on file with the <i>New York University Law Review</i> ) (listing four cases with payments to plaintiffs and no officer contributions).
<b>Livermore Police Department (CA).</b> Livermore did not respond to my public records request.
<b>Pocatello Police Department (ID).</b> For information about payments, see E-mail from Tiffany Olsen, Paralegal/Assistant to the City Attorney, City of Pocatello, to author (Nov. 8, 2013, 08:30 PST) (on file with the <i>New York University Law Review</i> ) (describing two cases in which plaintiffs received payment during the study period). For information about indemnification decisions, see E-mail from Tiffany Olsen, Paralegal/Assistant to the City Attorney, City of Pocatello, to author (Oct. 15, 2013, 10:26 PDT) (on file with the <i>New York University Law Review</i> ) (reporting that officers did not contribute to settlements in either case).
<b>Hemet Police Department (CA).</b> For information about payments, see E-mail from Stephen A. McEwen, Assistant City Attorney, to author (Oct. 31, 2013, 14:41 PDT) (on file with the <i>New York University Law Review</i> ) (reporting six cases resolved with payments to plaintiffs during the study period). For information about indemnification decisions, see E-mail from Stephen A. McEwen, Assistant City Attorney, to author (Oct. 30, 2013, 14:56 PDT) (on file with the <i>New York University Law Review</i> ) (reporting that officers did not contribute to any settlement during the study period).

<b>Santa Fe Sheriff's Office (NM).</b> Santa Fe did not respond to my public records request.
<b>Hillside Police Department (NJ).</b> Hillside did not respond to my public records request.
<b>Pelham Police Department (AL).</b> Pelham did not respond to my public records request.
<b>Eden Prairie Police Department (MN).</b> For responsive information, see Letter from Jenna Spaulding, Admin. Assistant, Eden Prairie Police Dep't, to author (Oct. 7, 2013) (on file with the <i>New York University Law Review</i> ) (reporting that there was one case involving payment to a plaintiff during the time period, and no officers contributed to the settlement).
<b>Campbell County Sheriff's Office (WY).</b> Campbell County did not respond to my public records request.
<b>Yellowstone County Sheriff's Office (MT).</b> For responsive information, see E-mail from Kevin Gillen, Deputy Attorney, Yellowstone County., to author (Nov. 14, 2013, 11:39 PST) (on file with the <i>New York University Law Review</i> ) (describing cases in which plaintiffs received payment during the study period, and reporting that no officers contributed to the settlements and judgments in these cases).
<b>North Kingstown Police Department (RI).</b> North Kingstown did not respond to my public records request.
<b>Plattsburgh Police Department (NY).</b> Plattsburgh did not respond to my public records request.
<b>Eustis Police Department (FL).</b> Eustis did not respond to my public records request.
<b>Tomball Police Department (TX).</b> Tomball did not respond to my public records request.
<b>Town and Country Police Department (MO).</b> For responsive information, see Letter from Steven W. Garrett, Principal, Curtis, Heinz, Garrett & O'Keefe, to author (Oct. 9, 2013) (on file with the <i>New York University Law Review</i> ) (reporting that Garrett has "been the City Attorney in the City of Town and Country for almost twenty years and do[es] not ever recall any lawsuits against police officers where any settlement was made").
<b>Lincolnton Police Department (NC).</b> For responsive information, see E-mail from Rodney Jordan, Chief of Police, City of Lincolnton, to author (Oct. 7, 2013, 6:55 PDT) (on file with the <i>New York University Law Review</i> ) (reporting that there were no cases in which plaintiffs received payment during the study period).
<b>Phelps County Sheriff's Office (MO).</b> For responsive information, see E-mail from Carol Bennett, Phelps Cnty. Clerk, to author (Dec. 9, 2013, 09:51 PST) (on file with the <i>New York University Law Review</i> ) (reporting that there was one case during the study period in which a plaintiff received payment, and that no officer contributed to that settlement).
<b>Montezuma County Sheriff's Office (CO).</b> Montezuma County did not respond to my public records request.
<b>Jonesboro Police Department (GA).</b> Jonesboro did not respond to my public records request.
<b>Marshall County Sheriff's Office (IN).</b> Marshall County did not respond to my public records request.
<b>Ironton Police Department (OH).</b> Ironton did not respond to my public records request.
<b>Cadillac Police Department (MI).</b> Cadillac did not respond to my public records request.
<b>Oldham County Sheriff's Office (KY).</b> For responsive information, see Letter from Robert C. Noble, Chief Deputy, Oldham Cnty. Sheriff's Office, to author (Oct. 16, 2013) (on file with the <i>New York University Law Review</i> ) (reporting that Oldham County was involved in only one lawsuit during the study period, and that the jury found in favor of the sheriff's office).
<b>Williamsburg Police Department (NM).</b> Williamsburg closed its police department and did not have responsive records. E-mail from Linda S. Bauer, Clerk/Treasurer, Vill. of Williamsburg, to author (Oct. 11, 2013, 08:26 PDT) (on file with the <i>New York University Law Review</i> ).
<b>Cloverdale Police Department (CA).</b> Cloverdale did not respond to my public records request.
<b>Moulton Police Department (AL).</b> Moulton did not respond to my public records request.
<b>Edgewood Police Department (FL).</b> For responsive information, see E-mail from Pete Marcus, Chief of Police, Edgewood Police Dep't, to author (Oct. 22, 2013, 10:13 PDT) (on file with the <i>New York University Law Review</i> ) (reporting that no plaintiff received a payment during the study period).
<b>Evansville Police Department (WI).</b> For responsive information, see E-mail from Dan Wietecha,



<p>City Adm'r, City of Evansville, to author (Oct. 8, 2013, 07:30 PDT) (on file with the <i>New York University Law Review</i>) (reporting that there was one lawsuit settled with a payment to the plaintiff during the study period, and no officer contribution).</p>
<p><b>Fruitland Police Department (ID).</b> For information about payments, see E-mail from Jerry Mason, Counsel for Idaho Cntys. Risk Mgmt. Program Bd. of Trs., to author (Oct. 31, 2013, 12:21 PDT) (on file with the <i>New York University Law Review</i>) (identifying two cases settled with payments to plaintiffs during the study period). For information about indemnification decisions, see E-mail from J.D. Huff, Police Chief, Fruitland Police Dep't, to author (Oct. 7, 2013, 09:16 PDT) (on file with the <i>New York University Law Review</i>) (“[W]e have never had an officer contribute monetarily or otherwise to satisfy a court settlement or judgment.”).</p>
<p><b>Prentiss Police Department (MS).</b> Prentiss did not respond to my public records request.</p>
<p><b>Nettleton Police Department (MS).</b> Nettleton did not respond to my public records request.</p>
<p><b>Jackson Township Police Department (OH).</b> For responsive information, see Letter from Gregory A. Beck, Baker Dublikar Beck Wiley &amp; Mathews, to author (Oct. 9, 2013) (on file with the <i>New York University Law Review</i>) (providing a list of claims and reporting that “[n]o involved officers were required to contribute to any settlement or judgment”).</p>
<p><b>Lennox Police Department (SD).</b> Lennox did not respond to my public records request.</p>
<p><b>Sutton Police Department (NH).</b> Sutton did not respond to my public records request.</p>
<p><b>Waterloo Police Department (NE).</b> For responsive information, see E-mail from Tim Donahue, Chief, Waterloo Police Dep't, to author (Sept. 25, 2013, 19:47 PDT) (on file with the <i>New York University Law Review</i>) (reporting that there were no lawsuits brought against the department during the study period).</p>