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ABSTRACTS

ARTICLE

The home is the most protected space in constitutional law. But family regulation investigators conduct millions of home searches a year. Under pressure, parents nearly always consent to these state agents' entry into the most private areas of their lives.

This Article identifies the coercive forces—not least the threat of family separation—that drive parents to consent to home searches. Drawing on primary sources and case law examining consent in criminal cases, it shows that common family regulation investigation tactics render consent involuntary and the ensuing searches unconstitutional. And yet, it argues, the Constitution is not enough. Though constitutional litigation could lead to tangible improvements in privacy for families, the Constitution offers thin protection from government surveillance for race–class subjugated communities. Instead, reformers ought to reject the consent paradigm and focus on state legislation cabining searches in family regulation investigations.

This Article makes three central contributions. First, it describes the underexamined role that consent searches play in the family regulation apparatus. Second, it establishes the unconstitutionality of routine family regulation investigative practices, building out the Fourth Amendment framework for family regulation investigations. Finally, this Article distinguishes between reforms aimed at limiting consent *as a legal justification for searches and reforms aimed at limiting* searches*, no matter their justification. Consent-focused reforms legitimize and leave intact the search apparatus. Thus, reform must contend squarely with searches and not merely consent, within the family regulation system and across the carceral state.*

NOTES

Most states have laws prohibiting corporations from owning healthcare practices or employing physicians, collectively forming the corporate practice of medicine doctrine (CPOM). CPOM laws were designed to ensure that licensed professionals, not corporate laymen, decide patient treatment.

Among the most powerful barriers to relief under § 1983 is Monell v. Department of Social Services*—the Supreme Court decision recognizing that municipalities can be liable for constitutional violations by their officers but setting an exceedingly high standard for such claims. This Essay suggests a litigation strategy that sidesteps several challenges posed by* Monell*: Plaintiffs should pursue* Monell *claims based on police departments' disregard of lawsuits brought against them and their officers.*

Every circuit recognizes a police department's failure to investigate citizen complaints as a basis for municipal liability. Although lawsuits—like citizen complaints—allege officer wrongdoing, many departments do not investigate their allegations. If failing to investigate citizen complaints is a sufficient basis for Monell *liability, failing to investigate lawsuit allegations should be as well.*

Police departments' disregard of information unearthed during litigation should also be a basis for municipal liability. If internal affairs investigators fail to interview witnesses or gather relevant information, the municipality can be held liable under Monell*. Litigation files contain depositions and evidence about officers' conduct that departments routinely ignore. If failing to interview witnesses or consider relevant information during internal affairs investigations is a sufficient basis for* Monell *liability, disregarding litigation information that would fill gaps in internal affairs investigations should be as well.*

In the short term, pursuing Monell *claims based on departments' inattention to lawsuits should make it easier to plead and prove municipal liability. Longer term, effectively requiring police officials to take account of litigation information may improve police departments' internal investigations and supervision of their officers.*

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ARTICLE

FAMILY REGULATION'S CONSENT PROBLEM

*Anna Arons**

The home is the most protected space in constitutional law. But family regulation investigators conduct millions of home searches a year. Under pressure, parents nearly always consent to these state agents' entry into the most private areas of their lives.

This Article identifies the coercive forces—not least the threat of family separation—that drive parents to consent to home searches. Drawing on primary sources and case law examining consent in criminal cases, it shows that common family regulation investigation tactics render consent involuntary and the ensuing searches unconstitutional. And yet, it argues, the Constitution is not enough. Though constitutional litigation could lead to tangible improvements in privacy for families, the Constitution offers thin protection from government surveillance for race–class subjugated communities. Instead, reformers ought to reject the consent paradigm and focus on state legislation cabining searches in family regulation investigations.

This Article makes three central contributions. First, it describes the underexamined role that consent searches play in the family regulation apparatus. Second, it establishes the unconstitutionality of routine family regulation investigative practices, building out the Fourth Amendment framework for family regulation investigations. Finally, this Article distinguishes between reforms aimed at limiting consent *as a legal justification for searches and reforms aimed at limiting* searches*, no matter their justification. Consent-focused reforms legitimize and leave intact the search apparatus. Thus, reform must contend squarely with*

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searches and not merely consent, within the family regulation system and across the carceral state.

"*At the back of everyone's mind as they're going through an investigation is, 'I have a caseworker in my house, asking me questions about my parenting of my children. And it can go either way. I know this could end up with my kids being removed, not even for anything I've done. This person has the legal power to separate my children from me.' No matter how flowery we talk, that is in the back of everyone's mind.*"

— Official, Connecticut Department of Children and Family Services [1]

INTRODUCTION

Family regulation investigators subject more than three million American children to home searches each year.[2] Though home searches have proven ineffectual for rooting out child maltreatment,[3] states require these searches for almost every family regulation investigation, regardless of the underlying allegations.[4] As a result, investigations routinely bring state agents into the home, the most protected space in Fourth Amendment jurisprudence.[5] Under the Fourth Amendment, home searches are presumptively unreasonable unless state agents have a

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1. Telephone Interview with Michael C. Williams, Deputy Comm'r, Conn. Dep't of Child. & Fams. (May 31, 2024) (notes on file with the *Columbia Law Review*) [hereinafter Conn. D.C.F. Interview].

2. Child.'s Bureau, HHS, Child Maltreatment 2022, at xv (2024) [hereinafter Child.'s Bureau, Child Maltreatment 2022], https://acf.gov/sites/default/files/documents/cb/cm2022.pdf [https://perma.cc/CT8L-YHWS] (noting that 3,096,101 children "received [e]ither an investigation or alternative response"). This Article uses "family regulation" to describe the system commonly called the "child welfare" system. See Emma Ruth, Opinion, 'Family Regulation,' Not 'Child Welfare': Abolition Starts With Changing Our Language, The Imprint (July 28, 2020), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586 [https://perma.cc/5FLT-5WEN]. See generally Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World (2022) [hereinafter Roberts, Torn Apart] (describing the terror and violence accompanying the family regulation system and advocating for its abolition). This Article describes a unified "family regulation system" as an oversimplified stand-in for the many local, state, and federal institutions that comprise it. Cf. Emma Kaufman, The Prisoner Trade, 133 Harv. L. Rev. 1815, 1826 n.50 (2020) (noting of the criminal legal system that "[s]ome resist calling it a 'system' at all").

3. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 20 (reporting that more than 80% of investigations close without substantiating allegations); David Finkelhor, Trends in Adverse Childhood Experiences (ACEs) in the United States, Child Abuse & Neglect, Oct. 2020, at 1, 4–5 (noting that the rate of child neglect has remained steady for more than two decades, a time period in which surveillance has been near-constant); Robert Sege & Allison Stephens, Child Physical Abuse Did Not Increase During the Pandemic, 176 JAMA Pediatrics 339, 339 (2022) (finding no increase in child abuse during a period that saw a dramatic decrease in family surveillance). On the use of "child maltreatment," see infra note 82 and accompanying text.

4. Tarek Z. Ismail, Family Policing and the Fourth Amendment, 111 Calif. L. Rev. 1485, 1497 (2023) [hereinafter Ismail, Family Policing] ("In all screened-in cases, CPS conducts a home search."); Eli Hager, Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One., ProPublica (Oct. 13, 2022), https://www.propublica.org/article/child-welfare-search-seizure-without-warrants [https://perma.cc/XF2U-MY3L] [hereinafter Hager, Police Need Warrants] ("With rare exceptions, all of these investigations include at least one home visit, and often multiple, according to a review of all 50 states' child welfare statutes and agency investigative manuals.").

5. See Florida v. Jardines, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.").

warrant, avail themselves of a recognized exception to the warrant requirement like exigency, or gain the consent of the home's residents.[6]

Consent is, in practice, the default response to this constitutional hurdle. Though data is sparse, one scholar estimated that more than 90% of home searches are conducted with the nominal consent of parents.[7] The number of searches authorized by warrants or court orders is vanishingly small. In both New York City and Los Angeles, for example, searches authorized by warrant occur in fewer than 1% of investigations.[8] Perhaps more surprisingly, the number of searches justified by exigency is also low.[9] Exigency allows state agents to enter a home without a warrant if they believe a person inside is hurt or about to be hurt.[10] But most family regulation investigations focus on allegations of neglect, rather than physical or sexual abuse,[11] reducing the likelihood of exigency in most cases. Further, only 5% of children whose families are investigated are ultimately taken from their parents' care.[12] Since the state must make a showing similar to exigency to justify many of these separations,[13] the

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6. See Anna Arons, The Empty Promise of the Fourth Amendment in the Family Regulation System, 100 Wash. U. L. Rev. 1057, 1088 (2023) [hereinafter Arons, Empty Promise] (collecting circuit decisions holding that the Fourth Amendment's warrant requirement applies to family regulation home searches); Ismail, Family Policing, supra note 4, at 1529 ("The majority of circuits affirmatively ruling on the question—five—have in fact held that CPS agents must obtain a warrant to enter a home during a CPS investigation in the absence of exigency or consent.").

7. Doriane Lambelet Coleman, Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment, 47 Wm. & Mary L. Rev. 413, 430–31 (2005). Throughout, this Article uses "parents" as shorthand for the persons named as the subjects of family regulation investigations.

8. Compare Dep't of Child. and Fam. Servs., Cnty. of L.A., Child Welfare Services Data Fact Sheet: Calendar Year 2022 (2022), https://dcfs.lacounty.gov/wp-content/uploads/2023/02/Factsheet-CY-2022.pdf [https://perma.cc/KEH5-97UD] (reporting that 47,309 cases received an "in-person response"), with N.Y.C. Admin. for Child.'s Servs., Child Welfare Indicators Annual Report CY 2024, at 9, 16 (2025), https://www.nyc.gov/assets/acs/pdf/data-analysis/2024/CityCouncilReportCY2024.pdf [https://perma.cc/4KE2-6PPZ] (reporting 219 entry orders, compared to 36,988 investigations), and Email from Aldo Marin, Bd. Liason, DCFS Bd. & Comm'n, L.A. Cnty., to author (June 26, 2024) (on file with the *Columbia Law Review*) (reporting that a total of 287 investigations included warrants of any kind and 240 included investigative search warrants).

9. See infra section I.C.

10. Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 6.6(a) (6th ed. 2021).

11. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 23 (categorizing allegations).

12. Id. at xv (comparing the number of children who received foster care with the number who received investigations or alternative responses).

13. See Josh Gupta-Kagan, America's Hidden Foster Care System, 72 Stan. L. Rev. 841, 860 (2020) [hereinafter Gupta-Kagan, Hidden Foster Care] (describing the standard for emergency removal before parents are adjudicated as unfit as requiring a "substantial and imminent" risk to the child). Not all children placed in foster care are placed there under this emergency removal standard, as some are not placed until after their parents are adjudicated responsible. See Paul Chill, Burden of Proof Begone: The Pernicious Effect of

removal rate is a rough proxy showing the relative rarity of exigencies in family regulation investigations.[14]

That leaves consent. Yet the consent extracted from families is rarely the product of free choice. The vast majority of family regulation investigations target poor families, and a disproportionate number target Black, Native, and Latine families.[15] Investigators arrive on families' doorsteps unannounced.[16] They say they need to come in—that a home evaluation is required.[17] They tell parents that they are there to help.[18] They neither inform parents of their rights[19] nor warn parents that the information they gather can be used against parents to support the government's case against parents in court, including attempts to sever

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Emergency Removal in Child Protective Proceedings, 41 Fam. Ct. Rev. 457, 466 n.15 (2003) (acknowledging the difficulty of estimating the rate at which children are removed on this basis but estimating it to be "a very large percentage").

14. See infra section I.C.

15. See, e.g., Child.'s Bureau, HHS, Child Welfare Practice to Address Racial Disproportionality and Disparity 2–3 (2021), https://cwlibrary.childwelfare.gov/discovery/delivery/01CWIG_INST:01CWIG/1218693270007651 [https://perma.cc/RF5U-ZDKY] [hereinafter Child.'s Bureau, HHS, Child Welfare Practice] (documenting racial disparities); Kelley Fong, Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services, 72 Child. & Youth Servs. Rev. 5, 5–6 (2017) [hereinafter Fong, Contexts of Poverty] (offering a meta-analysis and concluding that children from poor families and communities are highly overrepresented in the child welfare system).

16. See, e.g., Fla. Dep't of Child. & Fams., Child Protection: Your Rights and Responsibilities 2, https://www.myflfamilies.com/sites/default/files/2023-05/CPI_RightsResponsibilitiesMar2015.pdf [https://perma.cc/L2WG-PF32] ("Florida law specifically directs visits and interviews with the child and family to be unannounced whenever possible . . . ." (emphasis omitted)); Hum. Rts. Watch, "If I Wasn't Poor, I Wouldn't Be Unfit": The Family Separation Crisis in the US Child Welfare System 1–2 (2022), https://www.hrw.org/sites/default/files/media_2022/11/us_crd1122web_3.pdf [https://perma.cc/KJN4-C7JA] (recounting one Los Angeles parent's experience with unannounced searches); Cynthia Godsoe, Just Intervention: Differential Response in Child Protection, 21 J.L. & Pol'y 73, 87–88 (2012) (contrasting the "[t]raditional CPS practice [which] entails a worker making an unannounced visit to the home to 'catch the parent off guard'" with noninvestigative responses in which initial visits are announced); A Parent's Guide to a Child Abuse or Maltreatment Investigation, N.Y.C. Admin. for Child.'s Servs., https://www.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page [https://perma.cc/4NHC-SNWQ] (last visited Mar. 3, 2025) ("During the [i]nvestigation . . . CPS will make an unannounced visit to your home within 24–48 hours of the report.").

17. See, e.g., Class Action Complaint and Jury Demand at 1–2, Gould v. City of New York, No. 1:24-cv-01263-CLP (E.D.N.Y. filed Feb. 20, 2024), 2024 WL 693712 [hereinafter *Gould* Complaint] ("You have to let us in. We need to look in your home. We don't need a warrant. We're going to get the police here if you refuse. We're not leaving until we come inside. If you don't let us in, we're going to take your children." (emphasis omitted)); Ismail, Family Policing, supra note 4, at 1539.

18. See Arons, Empty Promise, supra note 6, at 1097 (describing how family regulation agencies cast the family regulation system as "collaborative and helpful" and encourage cooperation by parents).

19. See id. ("They rarely inform parents of statutory or constitutional rights."); infra section III.A.

parents' rights to their children permanently.[20] If parents question or resist investigators' entry, they threaten to call law enforcement.[21] An even larger threat looms over this entire interaction, sometimes explicit, sometimes implicit: If the parents do not cooperate, investigators can take their children.[22] It is no wonder that so many parents acquiesce to searches, despite the harms that searches inflict on parents, children, and communities.[23]

In the criminal law context, it is hardly a novel observation that consent is often—perhaps always—a legal fiction. Under the Supreme Court's Fourth Amendment jurisprudence, consent must be voluntary to be valid.[24] But generations of criminal law scholars have argued that the Court's standard for voluntary consent does not sufficiently account for the coercion inherent in any request from an official to an individual.[25]

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20. See Anna Arons, Prosecuting Families, 173 U. Pa. L. Rev. 1029, 1049–50 (2025) (describing trajectories of family regulation cases). This total absence of warnings presents an obvious contrast to criminal investigations. See Miranda v. Arizona, 384 U.S. 436, 479 (1966) (requiring police to give prophylactic warnings to people in custody in criminal cases that their words can be used against them in a court of law).

21. See, e.g., Lowther v. Child. Youth & Fams. Dep't, No. 1:18-cv-00868 KWR/JFR, 2020 WL 5802039, at *13 (D.N.M. Sept. 29, 2020) (describing plaintiff's allegation that "[s]he was immediately and repeatedly informed that she could be arrested or detained for denying access to the children" (quoting Lowther v. Child. Youth & Fams. Dep't, No. 1:18-cv-00686KWR-JRF, 2020 WL 4192591, at *10 (D.N.M. July 21, 2020))); Cayla Bamberger, ACS Routinely Violates NYC Families' Rights During Child Welfare Investigations: Lawsuit, N.Y. Daily News (Feb. 20, 2024), https://www.nydailynews.com/2024/02/20/acs-routinely-violates-nyc-families-rights-during-child-welfare-investigations-lawsuit/ [https://perma.cc/L24N-WAV5] (recounting an agency's threat to call the police upon a mother's refusal to allow entry).

22. See, e.g., Clark v. Stone, 998 F.3d 287, 302 n.6 (6th Cir. 2021) (describing an investigator's explicit threat of removal); Kelley Fong, Investigating Families: Motherhood in the Shadow of Child Protective Services 81, 87 (2023) [hereinafter Fong, Investigating Families] (describing parents' experiences with the implicit threat of family separation); Conn. D.C.F. Interview, supra note 1 (acknowledging that there is an implicit fear of family separation throughout investigations).

23. See Hum. Rts. Watch, supra note 16, at 63–65 (describing the harms of investigations on families and communities); see also infra section I.B.

24. See Schneckloth v. Bustamonte, 412 U.S. 218, 227–30 (1973) ("[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

25. See, e.g., Roseanna Sommers & Vanessa K. Bohns, The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance, 128 Yale L.J. 1962, 2009–10 (2019) ("Some commentators have taken high compliance rates as an indication that consent is all but impossible. '[P]eople consent so often that it undermines . . . the meaningfulness of the consent.'" (alterations in original) (quoting Oren Bar-Gill & Barry Friedman, Taking Warrants Seriously, 106 Nw. U. L. Rev. 1609, 1662 (2012))); see also I. Bennett Capers, Criminal Procedure and the Good Citizen, 118 Colum. L. Rev. 653, 655 (2018) [hereinafter Capers, The Good Citizen] (describing the categorically compliant "good citizen" who aids police, waives his rights, and consents to searches); Ric Simmons, Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine, 80 Ind. L.J. 773, 774 (2005) (rejecting a binary conception of voluntariness in favor of an analysis of the degree of compulsion applied); Marcy Strauss,

Nor, they argue, does it account for imbalances in information and power or for the dimensions of identity—including race, class, gender, disability, immigration status, and language—that necessarily shape interactions between the state and individuals.[26] Others critique consent for expanding surveillance and insulating searches from review: Consent, they say, allows the state to conduct searches even when it has no particularized suspicion, shields searches from judicial scrutiny, and offers courts an alternative basis on which to approve of searches that might otherwise be constitutionally infirm.[27]

Though these critiques of consent searches are common in criminal law scholarship, they have received limited attention in family regulation scholarship.[28] In this field, explorations of consent and voluntariness tend to focus on the voluntariness of parents' decisions to separate from their children or to accept ongoing restrictions on their parental rights.[29] Those

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Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 221 (2001) (criticizing the voluntariness test for being vague, failing to acknowledge the reality of coercion, and fostering distrust of the police and judicial system).

26. See, e.g., Raquel Aldana, Of *Katz* and "Aliens": Privacy Expectations and the Immigration Raids, 41 U.C. Davis L. Rev. 1081, 1085 (2008) ("[T]he application of the consent doctrine in immigration enforcement under the most coercive circumstances increasingly defies the fictional premise that reasonable people feel free to walk away from law enforcement encounters."); Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946, 1013–14 (2002) [hereinafter Carbado, (E)racing the Fourth Amendment] (arguing that "racial vulnerability" to coerced consent derives from "the relationship between race and knowledge about constitutional rights" and from "the nexus between race and social behavior in the context of police encounters"); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val. U. L. Rev. 243, 271–72 (1991) (positing that "for most black men, the typical police confrontation is not a consensual encounter"); Jamelia Morgan, Disability's Fourth Amendment, 122 Colum. L. Rev. 489, 515–20 (2022) (arguing that the consent standard's normative construction fails to acknowledge race and disability as factors in the test for coercion); Strauss, supra note 25, at 213 (arguing that "members of certain racial and cultural groups" experience heightened "feelings of compulsion" in police encounters).

27. See, e.g., Carbado, (E)racing the Fourth Amendment, supra note 26, at 970 (describing how consent "doctrinally masks" race's role in searches); Kate Weisburd, Criminal Procedure Without Consent, 113 Calif. L. Rev. (forthcoming 2025) (manuscript at 31–32) [hereinafter Weisburd, Criminal Procedure Without Consent] (on file with the *Columbia Law Review*).

28. Scholars studying Fourth Amendment constraints on family regulation home searches have noted that consent is a popular pathway around the warrant requirement, but consent has not been their central concern. See Coleman, supra note 7, at 461–63 (describing the consent and exigent circumstances exceptions); Ismail, Family Policing, supra note 4, at 1541 (exploring voluntary consent in the family regulation context).

29. See, e.g., Gupta-Kagan, Hidden Foster Care, supra note 13, at 849–50 (examining the pressures on parents in family regulation investigations to agree to changes in custody); Soledad A. McGrath, Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness, 42 U. Mem. L. Rev. 629, 635 (2012) ("A family's decision to participate in assessment and services in lieu of a [traditional] child protection investigation may seem to be a relatively simple, proactive choice, but it is a choice that can lead to severe consequences for a family and is, in fact, no choice at all."); Katherine C. Pearson, Cooperate

explorations are vital but leave untouched the millions of cases every year where state agents investigate a report of child maltreatment, extract consent to search a home, and close the case after the search finds no evidence to support further state intervention.[30] This is by far the most common kind of contact families have with the family regulation system.[31] Even when searches do not lead to further state intervention, they still disrupt the privacy, dignity, and security of individual families and race–class subjugated communities[32]—thus feeding families' legal estrangement from the state and the body politic.[33]

This Article contends squarely with the central role of consent searches in the family regulation system. In doing so, it makes three central contributions.

First, it offers an initial descriptive account of how consent powers the family regulation home search apparatus, surveying the sorts of pressures that the state exerts on families to extract consent for searches. Statistical

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or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change, 65 Tenn. L. Rev. 835, 837–38 (1998) ("Careful examination of the pressures the state imposes upon parents to enter into a separation agreement reveals the often fictional nature of the voluntary label and the consequent need for concern."); Clare Ryan, Children as Bargaining Chips, 68 UCLA L. Rev. 410, 426-45 (2021) (examining how state actors use threats of family separation to extract consent to deportation in immigration proceedings, to extract statements during criminal interrogations, and to extract consent to safety plans during family regulation investigations).

30. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv (reporting that around 80% of investigations are closed without substantiating the allegations and around 70% of investigations are closed without post-investigation involvement for the family). For an explanation of why investigations sometimes result in referrals for services even though they do not reveal evidence to substantiate the underlying allegations, see Arons, Prosecuting Families, supra note 20, at 1045.

31. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv.

32. See Khiara M. Bridges, The Poverty of Privacy Rights 112–17 (2017) (arguing that poor parents "feel themselves to be in an antagonistic relationship with the government" because of omnipresent state surveillance); Fong, Investigating Families, supra note 22, at 12–14 (2023) (noting that "lower-level investigative contacts are increasingly the face of CPS" and arguing that the ubiquity of these contacts increases "precarity" for mothers); Hum. Rts. Watch, supra note 16, at 9–11 ("[T]he [family regulation] system's interventions too often undercut its goals—failing to adequately address the needs of the family, and in some cases exacerbating the problems it intended to remedy."); Daniella Rohr & Melissa Friedman, Overreporting and Investigation in the New York City Child Welfare System: A Child's Perspective (forthcoming 2025) (manuscript at 13–14, 20) (on file with the *Columbia Law Review*) ("[F]ear of CPS oversight leads parents to limit their children's access to mandatory reporters, resulting in decreased access to medical, welfare, legal, labor market, or educational institutions."); Joe Soss & Vesla Weaver, Police Are Our Government: Politics, Political Science, and the Policing of Race–Class Subjugated Communities, 20 Ann. Rev. Pol. Sci. 565, 567 (2017) (explaining choice of the term "race–class subjugated").

33. Cf. Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2057, 2067 (2017) (describing how police practices "leave[] large swaths of American society to see themselves as anomic, subject only to the brute force of the state while excluded from its protection" and defining "legal estrangement" as the banishing, "at . . . an interactional and structural level," of "whole communities from the body politic").

data on the frequency of home searches and what legal authority the state asserts to justify home searches is hard to come by—a problem that itself hints at the casualness of agencies' home intrusions.[34] Thus, this Article draws on primary sources including interviews, agency materials, legal filings, and court decisions to sketch out the role of consent searches and identify some of the tactics and pressures that agencies around the country rely on to gain consent.[35] Given the fractured nature of the family regulation system[36] and limits on data, this Article does not purport to provide a definitive or unified national account. But it does reveal consent to be the default justification for family regulation home searches[37] and yield a taxonomy of three recurring tactics agencies rely on to gain consent. All three tactics play out against a backdrop of parental fear and family regulation norms of compliance: (1) misrepresentations of investigators' legal authority to conduct searches; (2) threats to arrest parents if parents refuse to consent; and (3) threats to remove children if parents refuse to consent.[38]

Second, following from this descriptive account, this Article advances a constitutional claim.[39] Under current consent doctrine, consent is involuntary if a reasonable person would not feel free to refuse a state actor's request for consent.[40] This Article reviews state and federal case law considering the voluntariness of consent searches in criminal investigations where criminal investigators extracted consent through tactics akin to routine family regulation tactics. That review shows that courts have found such tactics to be so coercive as to render consent involuntary under the existing standard.[41] Under current law, searches

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34. See infra Part I (recounting public records request responses from ten jurisdictions reflecting agencies' failures to track the rate of or justifications for home searches and arguing that the lack of data reflects agencies' inattention to constitutional constraints on searches); see also Email from Virginia Pickel, Tex. Dep't of Fam. & Protective Servs., to author (June 17, 2024) (on file with the *Columbia Law Review*) [hereinafter Pickel June 17 Email] (estimating a cost of $485,559 to report two years of data on the number of home searches and the justifications for them).

35. For a more complete description of sources, see infra Part I.

36. See Emilie Stoltzfus, Cong. Rsch. Serv., IF10590, Child Welfare: Purposes, Federal Programs, and Funding 1 (2025) (describing the allocation of responsibility for family regulation operations between local, state, and federal agencies).

37. See infra Part I.

38. See infra section II.A.

39. This Article analyzes the constitutionality of search tactics under the Fourth Amendment. It is plausible that certain agency policies and practices—such as policies classifying parents' assertions of their Fourth Amendment rights as "safety risks" to their children, see infra section I.A—also violate the Unconstitutional Conditions Doctrine. See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, The Unconstitutional Conditions Vacuum in Criminal Procedure, 133 Yale L.J. 1401, 1430–37 (2024) (arguing that waivers of Fourth Amendment rights should be subject to the Unconstitutional Conditions Doctrine). Analyzing those constraints is for another day.

40. United States v. Drayton, 536 U.S. 194, 202 (2002).

41. See infra section II.B.

authorized by such coerced consent are as unconstitutional in the family regulation system as in the criminal legal system.[42]

This Article explains how systemic challenges to the constitutionality of agencies' coercive tactics could knock down a central pillar of the family regulation system's constitutional evasion and spur changes in agency practices through the legal process and public pressure.[43] But, it acknowledges, constitutional litigation is not a cure-all. Even when a constitutional violation can be established, remedies may be ineffective or nonexistent.[44] More fundamentally, the constitutional argument itself is limited. As criminal law scholars point out, the voluntariness standard does little to protect against implicit, rather than explicit, coercion.[45] Consent works no better in the family regulation domain than in other domains where it has failed.

Third, this Article takes up reforms that could fill the gaps left by constitutional consent doctrine and demonstrates the necessity of distinguishing between reforms seeking to limit or abolish consent ("consent reforms") and reforms seeking to limit or abolish searches ("search reforms").[46] Jurisdictions across the country have begun enacting consent reforms in the family regulation and criminal legal systems.[47] This Article surfaces a fundamental limit of consent reforms: They leave intact a vast search apparatus fueled by an altered consent doctrine or by warrants.[48] Thus, this Article reframes the consent search problem. Are we opposed to consent in its current form serving as a justification for searches? Or are we opposed to the searches themselves, regardless their justification? This Article points to a clear answer: Mitigating the harms of family regulation consent searches—and consent searches across the carceral state—requires recognizing surveillance itself as the problem.[49]

Through these contributions, this Article brings the rich criminal law literature critiquing consent searches into conversation with the growing body of family law scholarship positioning the family regulation system as one strand of a larger carceral net.[50] Family law scholars continue to puzzle

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42. See infra section II.B.

43. See infra section II.C.

44. See infra section II.D.

45. See infra section II.D.

46. See infra Part III.

47. Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 8) (identifying reforms in the criminal legal system); see also infra section III.A (describing reforms in the family regulation system).

48. See infra section III.B.

49. See infra section III.B.

50. See, e.g., Cynthia Godsoe, Disrupting Carceral Logic in Family Policing, 121 Mich. L. Rev. 939, 942 (2023) [hereinafter Godsoe, Disrupting Carceral Logic] (explaining how the family regulation system is driven by and perpetuates carceral logic); Lisa Kelly, Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State, 17 Stan. J. C.R. & C.L. 255, 262 (2021) (highlighting parallels between policing and family regulation); Sarah H. Lorr, Disabling Families, 76 Stan. L. Rev. 1255,

through how the family regulation system comports with, or fails to comport with, the Fourth Amendment.[51] As recent scholarship highlights, the warrant requirement applies to home searches.[52] This Article builds out the next dimension of Fourth Amendment analysis, explaining how consent intersects with coercion and absolves the state of justifying searches. At the same time, it situates family regulation searches as a source of harm distinct from family separations.[53] Through focused description of the harms of home searches, it complements the work of scholars who describe more broadly the harms of family regulation to parents, children, and communities.[54] Though this Article's descriptions and critiques focus most sharply on searches and their harms in the child *neglect* investigations that form the majority of family regulation investigations, this narrower focus does not mean searches are warranted or harmless in *abuse* investigations; rather, this focus is a capitulation to limited data and space.

This Article's examination of reforms to consent searches in the family regulation system also provides new insights into the utility of such reforms in the criminal legal system. In this sense, it is a practical

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1285 (2024) (arguing that the family regulation system produces parental disability); Nancy D. Polikoff & Jane M. Spinak, Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being, 11 Colum. J. Race & L. 427, 430 (2021) (introducing a symposium considering how to provide for child well-being without the family regulation system); S. Lisa Washington, Pathology Logics, 117 Nw. U. L. Rev. 1523, 1533–34 (2023) [hereinafter Washington, Pathology Logics] (describing systemic processes and structures pathologizing parents); see also Clare Huntington, The Institutions of Family Law, 102 B.U. L. Rev. 393, 401 (2022) (calling for closer study of the institutions of family law). See generally Roberts, Torn Apart, supra note 2 (documenting the family regulation system's racialized harms and arguing for its abolition).

51. See, e.g., Coleman, supra note 7, at 415–19 (describing the absence of judicial scrutiny of Fourth Amendment issues in family regulation investigations); Josh Gupta-Kagan, Beyond Law Enforcement: *Camreta v. Greene*, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine, 87 Tul. L. Rev. 353, 377–79 (2012) [hereinafter Gupta-Kagan, Beyond Law Enforcement] (arguing that the Fourth Amendment's special needs doctrine doesn't neatly explain family regulation search and seizure cases); Ismail, Family Policing, supra note 4, at 1490–91 (proposing a new analytical framework that would treat family regulation investigations as equivalent to any other targeted investigation conducted by government agents).

52. See Arons, Empty Promise, supra note 6, at 1060; Ismail, Family Policing, supra note 4, at 1539; see also infra note 122 (collecting circuit court cases finding that family regulation home searches must be justified by warrants, a warrant exception, or consent).

53. See infra section I.B.

54. See generally Friedman & Rohr, supra note 32, at 2 (arguing that high rates of overreporting in family regulation cases divert resources from cases that warrant intervention); Shanta Trivedi, The Harm of Child Removal, 43 N.Y.U. Rev. L. & Soc. Change 523 (2019) [hereinafter Trivedi, The Harm of Child Removal] (describing removal's harms to children and arguing that such harms should be taken into account when ordering removal); Shanta Trivedi, The Hidden Pain of Family Policing, N.Y.U. Rev. L. & Soc. Change (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4715550 [https://perma.cc/Z2DY-N2PA] [hereinafter Trivedi, Hidden Pain of Family Policing] (cataloging the social, emotional, and physical harms parents endure in the course of family regulation proceedings).

companion to recent criminal law scholarship advocating for limiting or abolishing consent.[55] It also stands for a larger theoretical point. Family law scholars point out that the family regulation system is one strand of a larger carceral web, not collateral to the criminal legal system but interwoven with it and other systems of control.[56] Yet too often, family and criminal law scholars default to the criminal legal system as a descriptive and normative baseline.[57] This Article shows how taking a wider view of the carceral state—one that de-centers the criminal legal system—can reveal dynamics and paradigms that a narrower focus on criminal law obscures.

This Article proceeds in three parts. Part I describes the role of searches in family regulation investigations. It then situates those searches within a constitutional framework, explaining how the Fourth Amendment incentivizes reliance on consent searches and reviewing common critiques of consent.

Part II contends that routine family regulation investigative practices violate even the lax standard for voluntariness that governs in consent search jurisprudence. After describing some of those practices, it draws on case law stretching back more than sixty years—and reaching up to the Supreme Court—to show how these practices vitiate consent. Turning to practical implications, this Part describes the promise and limits of constitutional principles as a mechanism for increasing the privacy, dignity, and security of race–class subjugated families.

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55. See, e.g., Alafair S. Burke, Consent Searches and Fourth Amendment Reasonableness, 67 Fla. L. Rev. 509, 516 (2015) (arguing that courts should consider the reasonableness of requests for consent in determining the voluntariness of compliance); Stephen E. Henderson & Guha Krishnamurthi, A Wolf in Sheep's Attire: How Consent Enfeebles Our Fourth Amendment, 85 Ohio St. L.J. 33, 65–66 (2024) (arguing for narrowing the circumstances in which consent can serve as legal authorization for a search); Christopher Slobogin & Kate Weisburd, Illegitimate Choices: A Minimalist(?) Approach to Consent and Waiver In Criminal Cases, 101 Wash. U. L. Rev. 1913, 1916 (2024) (arguing that consent should be irrelevant as a legal justification for searches in certain circumstances); Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 8) (documenting efforts in thirty-eight jurisdictions to limit consent as a justification for searches and arguing for limits on consent as a legal justification across criminal procedure).

56. See, e.g., Roberts, Torn Apart, supra note 2, at 162 (describing the "giant carceral web"); Godsoe, Disrupting Carceral Logic, supra note 50, at 941 ("Like the criminal system, the family-policing system is driven by, and in turn perpetuates, carceral logic . . . ."); Kelly, supra note 50, at 263 ("'[C]hild welfare' and policing are not just parallel, mirrored realities. The two systems are connected and feed one another."); S. Lisa Washington, Fammigration Web, 103 B.U. L. Rev. 117, 123 (2023) [hereinafter Washington, Fammigration Web] ("The interplay between the family regulation and immigration systems produces intersystemic harms through the marking and subordination of noncitizen and mixed-status families.").

57. I thank Lisa Washington for generative conversations on this point. For another scholar who makes a similar point, see Benjamin Levin, Criminal Law Exceptionalism, 108 Va. L. Rev. 1381, 1387 (2022) ("The move to see punitive logics embedded in a host of U.S. institutions, from housing policy to employment law, strikes me as important in and of itself.").

Part III shifts focus to state-law reforms aimed at remedying constitutional consent search deficiencies. It does not offer a conclusive set of policy recommendations. Instead, it outlines the stakes of how "the consent search problem" is framed. Different reforms flow from framing consent doctrine as the problem versus framing the searches themselves as the problem. This distinction raises a more fundamental point: Protecting race–class subjugated families from state overreach requires grappling with surveillance itself, not just legal justifications for it.

I. CONSENT SEARCHES IN THE FAMILY SURVEILLANCE APPARATUS

This Part begins by describing the use of home searches in family regulation investigations and positioning searches as one manifestation of the carceral logics driving the family regulation system. It then surveys the damage this search scheme inflicts on families and communities. The Part closes by explaining why the Fourth Amendment's constraints on home searches make consent an appealing avenue to agencies and reviewing critiques of consent search doctrine.

At the outset, it is necessary to note the limits of available information and thus the limits of the account offered here. Part I and section II.A describe the family surveillance apparatus. To gain a rough picture of the frequency and legal justification for family regulation home searches, I sought information from the entities responsible for investigations in the ten largest cities in the country.[58] I requested agency data on the number of investigations in which the agency entered families' homes as part of its initial investigations for a two-year period and the number of those home entries justified by consent. Every jurisdiction reported that its family regulation agency does not, as a matter of course, collect that data.[59] Only one agency, Texas's Department of Children and Family Services, responded that it could generate that information—though it estimated a cost of nearly half a million dollars to do so on a statewide basis.[60]

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58. See Email from Carl W. Gilmore, FOIA Officer, Ill. Dep't of Child. & Fam. Servs., to author (June 21, 2024) (on file with the *Columbia Law Review*) (responding to a records request involving investigations in Chicago); Katherine N. Hodge, Dep't of Child & Fam. Well-Being, Cnty. of San Diego, Response to Records Request (June 3, 2024) (on file with the *Columbia Law Review*) (San Diego); Email from Aldo Marin, Bd. Liaison, DCFS Bd. & Comm'n, L.A. Cnty., to author, supra note 8 (Los Angeles); Email from Off. of Correspondence, Ariz. Dep't Child Safety, to author (May 30, 2024) (on file with the *Columbia Law Review*) (Phoenix); Email from Off. of Gen. Counsel, Fla. Dep't of Child. & Fams., to author (July 12, 2024) (on file with the *Columbia Law Review*) (Jacksonville); Pickel June 17 Email, supra note 34 (Dallas, Houston, and San Antonio); Email from Shea Skinner, Deputy City Solic., Right-to-Know, Law Dep't, City of Phila., to author (July 11, 2024) (on file with the *Columbia Law Review*) (Philadelphia). Data for New York City comes from the Administration for Children's Services's response to a reporter's request for this same information. See Hager, Police Need Warrants, supra note 4.

59. See supra note 58 for agency responses discussed.

60. Pickel June 17 Email, supra note 34. Rather than proceed with that request, I requested data from a more limited sample of 400 cases in Harris County, Texas, and

The absence of data quantifying searches does not mean searches do not happen. Instead, it suggests that agencies do not anticipate having to defend their search practices or their justifications for searches in particular cases.[61] And it hints, too, that agencies take surveillance and consent as defaults, rather than as remarkable. More fundamentally, this lacuna reflects the power differential between those who search and those who are searched.[62] Thus, in this Part and in section II.A, in addition to agency data, this Article relies on a review of agencies' public-facing materials (including policies and regulations); state statutes; legal filings and decisions; interviews with practitioners, agency personnel, and parents impacted by the family regulation system; prior accounts by reporters, legal scholars, and researchers in other disciplines; and my own experience representing parents in family regulation proceedings and participating in civil litigation against family regulation agencies.

A. *"Eyes in the Home"*

"Getting eyes in the home" could be taken as the motto of the family regulation system.[63] The phrase exemplifies the carceral logics organizing

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received the lower price estimate of $600. Email from Virginia Pickel, Tex. Dep't of Fam. & Protective Servs., to author (July 26, 2024) (on file with the *Columbia Law Review*). I describe the information received via this records request below, infra notes 95, 134, and 373.

61. See infra section II.D (describing barriers to obtaining review of searches).

62. Cf. Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2413 (1989) ("Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.").

63. See Child.'s Bureau, HHS, Massachusetts Statewide Assessment 230 (2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/ma-cfsr-r4-swa.pdf [https://perma.cc/7QD4-EF8J] (acknowledging that "eyes in the home" has a negative connotation but instructing service providers that "'another set of eyes in the home' is part of a strengths-based framework" (internal quotation marks omitted)); Fla. Dep't of Child. & Fams., Module 3: Commencement of the Investigation: Initial Contact and Present Danger 56 (2015), https://www.myflfamilies.com/sites/default/files/2023-10/Module%203%20Commencement%20of%20the%20Investigation%20Initial%20Contact%20and%20Present%20Danger_TG_03202015.pdf [https://perma.cc/ZHG7-T95U] (instructing investigators, "You are the first eyes in the home . . . ."); Naomi Schaefer Riley, Portland's Encampment Kids, City J. (Jan. 21, 2024), https://www.city-journal.org/article/portlands-encampment-kids [https://perma.cc/4PP4-DGWZ] ("[H]aving eyes in the home is much more effective in identifying risk." (internal quotation marks omitted) (quoting Amber Kinney, former attorney, Multnomah Cnty. Dist. Att'y's Off.)); Zach Crenshaw, 'A Failure of the System': Kids Told DCS and Police About Prior 'Youtube Mom' Abuse, ABC15 Ariz. (May 14, 2021), https://www.abc15.com/news/region-central-southern-az/maricopa/a-failure-of-the-system-kids-told-dcs-and-police-about-prior-youtube-mom-abuse [https://perma.cc/3Z62-GWVH] (last updated May 15, 2021) ("If there was more money in the system, we could provide more actual eyes in the home . . . ." (internal quotation marks omitted) (quoting Kent Volkmer, Pinal Cnty. Att'y)). See generally Kelley Fong, Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life, 85 Am. Socio. Rev. 610, 618 (2020) (finding expansive and unequal surveillance of marginalized families).

the system. As scholars and activists have observed,[64] these carceral logics demand the maintenance of social order through the subjugation of marginalized groups.[65] Thus, within the family regulation system, the state uses "surveillance, coercion, and punishment, instead of support, to achieve the purported goal of child safety."[66] By focusing on moral deficiencies of individual parents, the system obscures the societal policy choices that create the conditions under which subjugated families live.[67]

These carceral logics drive surveillance of already-marginalized parents—including poor parents, racialized parents, disabled parents, and immigrant parents.[68] As Professor Dorothy Roberts explains, the family regulation system draws on and perpetuates stereotypes of these parents as dangerous to their children.[69] Thus, the thinking goes, they must be surveilled under the "benevolent veneer" of family regulation.[70] As explained at greater length below, surveillance, even if well-intended, neither aids families nor makes children safer.[71]

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64. See, e.g., Roberts, Torn Apart, supra note 2, at 23 (describing the family regulation system as a "powerful mechanism for reinforcing racial capitalism—the US system of wealth accumulation grounded in racist hierarchy and ideology"); Emma Peyton Williams, UpEnd, The Carceral Logic of the Family Policing System 4 (2022), https://upendmovement.org/wp-content/uploads/2022/06/upEND-Carceral-Logic.pdf [https://perma.cc/M4FV-LXVF] ("[B]y framing child maltreatment as a series of isolated incidents as opposed to a public health issue, the family policing system obscures the reality that child maltreatment cannot be meaningfully ameliorated without overarching system and societal-level change."); Godsoe, Disrupting Carceral Logic, supra note 50, at 941 ("[T]he family-policing system is driven by, and in turn perpetuates, carceral logic—an array of legal practices that operate to police, discipline, and most importantly, subordinate a given population in the name of safety or protection."); Roberto Sirvent, Abolishing the Family Policing System: An Interview With Joyce McMillian, Black Agenda Rep. (July 6, 2022), https://blackagendareport.com/abolishing-family-policing-system-interview-joyce-mcmillan [https://perma.cc/2HDN-GH9K] ("What is so important to understand about family policing is its position as a system in which *all* the forms of policing and oppression come together . . . ." (quoting Joyce McMillan)).

65. See Washington, Fammigration Web, supra note 56, at 131 ("'[C]arceral logics' refers to the ways the family regulation system not only intersects with the criminal legal system but mirrors the ways it subordinates marginalized groups to maintain social order.").

66. Id.

67. Id.; see also Bridges, supra note 32, at 122–23, 128–29.

68. See, e.g., Child.'s Bureau, HHS, Child Welfare Practice 2–3 (documenting racial disproportionality in family regulation investigations); Fong, Contexts of Poverty, supra note 15, at 5–6 (summarizing research documenting the family regulation system's disproportionate focus on poor families); Lorr, supra note 50, at 1275–78 (summarizing the family regulation system's disproportionate focus on disabled parents).

69. Roberts, Torn Apart, supra note 2, at 211 (describing the family regulation system's reinforcement of and reliance on the "mythology" that Black mothers are prone to "neglect[ing] their children" and on "[s]tereotypes of maternal irresponsibility").

70. Id. at 27; see also Trivedi, Hidden Pain of Family Policing, supra note 54, at 33–46 (explaining how narratives that some people are undeserving of parenthood and that certain children need to be saved from their parents drive family regulation interventions).

71. Roberts, Torn Apart, supra note 2, at 167 (describing how surveillance with "benign" intentions does not translate to "beneficial" results).

Home searches are just one instance of the near-constant surveillance under which race–class marginalized parents live.[72] Most relevant here, an array of mandated reporters—individuals required by law to report suspected child neglect or abuse to the state—watch poor families in their schools, doctors' offices, shelters, and neighborhoods.[73] Once a reporter (mandated or otherwise) lodges an allegation of child maltreatment with a state's central register, the state conducts a cursory screening of the report.[74] After this initial screening, about half of reports are referred for investigation.[75] Those investigations almost always involve a home search.[76]

Following an investigation, investigators must decide whether to "substantiate[]" the allegations against the parent.[77] While standards of proof for this determination vary by jurisdictions, most jurisdictions maintain *lower* standards of proof for these administrative determinations

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72. See, e.g., Bridges, supra note 32, at 86 (describing the state's invasion of mothers' privacy rights in providing welfare); John Gilliom, Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy 17–20 (2001) (offering three examples of welfare surveillance); Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 226 (1997) ("Public relief for single mothers is structured to permit bureaucratic supervision of clients in order to determine their eligibility . . . ."); see also Wyman v. James, 400 U.S. 309, 324 (1971) (holding that a requirement that welfare recipients submit to "home visitation" to receive aid is constitutional).

73. See Fong, Contexts of Poverty, supra note 15, at 6 ("Poor parents' overrepresentation in the child welfare system may result from biased reporting systems or increased visibility to authorities." (citations omitted)); Katie Louras, The Runaway Train of Mandated Reporting, 61 San Diego L. Rev. 137, 143–50 (2024) (describing the history and growth of mandated reporting laws); see also Kent P. Hymel, Antoinette L. Laskey, Kathryn R. Crowell, Ming Wang, Veronica Armijo-Garcia, Terra N. Frazier, Kelly S. Tieves, Robin Foster & Kerri Weeks, Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma, 198 J. Pediatrics 137, 142 (2018) (finding statistically significant racial disparities in abusive head trauma evaluation and reporting and suggesting that they exemplify "ascertainment bias"); Marian Jarlenski, Jay Shroff, Mishka Terplan, Sarah C. M. Roberts, Brittany Brown-Podgorski & Elizabeth E. Krans, Association of Race With Urine Toxicology Testing Among Pregnant Patients During Labor and Delivery, JAMA Health F., Apr. 14, 2023, at 1, 3 (noting that Black patients "had a greater probability of receiving a [urine test] at delivery compared with White patients and other racial groups" but "did not have a higher probability of a positive test result than other racial groups").

74. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 6–7 (reporting the national average rates of rejecting and accepting reports). States vary in the rate at which they reject ("screen out") reports based on this cursory review. Id. at 7 ("For those 47 states [that reported data], . . . the percentages of screened-out referrals ranged from 1.3 to 83.1.") Explanations for that wide variation are beyond the scope of this Article, but for one exploration, see N.Y.C. Fam. Pol'y Project, No Filter (Mar. 5, 2024), https://familypolicynyc.org/report/scr/ [https://perma.cc/9LJR-N3WE] (considering why New York refers more cases for investigation than other jurisdictions).

75. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 6–7 ("For 2022, 47 states . . . screened-in 49.5 percent . . . of referrals.").

76. Ismail, Family Policing, supra note 4, at 1497 ("In all screened-in cases, CPS conducts a home search.").

77. Amanda S. Sen, Stephanie K. Glaberson & Aubrey Rose, Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries, 77 Wash. & Lee L. Rev. 857, 864 (2020).

than for in-court determinations of liability against parents.[78] This is so even though administrative determinations carry weighty consequences, ranging from "marking" the parent as particularly risky in any future investigations to serving as bars to employment and acting as a caretaker to other children.[79] Whether the agency elects to substantiate the allegation or not, at the close of an investigation, they may refer families to "voluntary" ongoing programming and surveillance or seek "voluntary" family separations.[80] Alternately, the agency may initiate a case against the family in court, seeking court orders to separate the family or to require that the family comply with programming or surveillance—or ultimately, to permanently sever the family's legal relationship.[81] Agencies use the information collected through home searches against parents in and outside of court.[82]

Before describing family regulation home searches, two points bear emphasizing. First, parents may be investigated for neglecting or abusing their children[83]—two legal categories referred to collectively in this Article as "child maltreatment." The vast majority of parents investigated are alleged to have neglected their children, not to have abused them.[84] States define "neglect" vaguely and capaciously—it can capture anything from

78. Nicholas Kahn, Josh Gupta-Kagan & Mary Eschelbach Hansen, The Standard of Proof in the Substantiation of Child Abuse and Neglect, 14 J. Empirical Legal Stud. 333, 334 (2017).

79. Sen et al., supra note 77, at 867–69; How to Remedy Harm Caused by State Child Abuse Registries, The Annie E. Casey Found. (Nov. 10, 2023), https://www.aecf.org/blog/how-to-remedy-harm-caused-by-state-child-abuse-registries [https://perma.cc/C343-JB3Y].

80. It is beyond the scope of this Article to trace the full legal process for a family regulation case. For a longer description of this process, see Arons, Prosecuting Families, supra note 20, at 1056–58.

81. Id.

82. Id.; see also infra notes 282–283 (discussing how the absence of the exclusionary rule in family regulation cases allows for even illegally obtained evidence to be used against parents in court proceedings).

83. While definitions of "abuse" and "neglect" vary by state, "abuse" generally refers to sexual abuse or "any nonaccidental physical injury to the child," in addition to "acts or circumstances that threaten the child with harm or create a substantial risk of harm." Child.'s Bureau, HHS, Definitions of Child Abuse and Neglect 2 (2022), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/define.pdf?VersionId=P2GBlQKK7w_ohrCN3oV2TiD6QIkkEjIP [https://perma.cc/JY6X-XTVM] (internal quotation marks omitted). Corporal punishment may be classified as neglect or abuse and is classified as abuse more often when it causes serious injury to a child. See Doriane Lambelet Coleman, Kenneth A. Dodge & Sarah Keeton Campbell, Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse, 73 Law & Contemp. Probs. 107, 114–19 (2010) (surveying states' definitions of abuse and statutory allowances for "reasonable corporal punishment").

84. Among children who are determined to be maltreated, 74% were deemed neglected, 17% physically abused, and 11% sexually abused. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 23. Because children may be counted in more than one category, this does not mean that 27% of children experienced some sort of abuse, as one child may have experienced more than one type of abuse. Id. at 22. In jurisdictions that track categories of allegations rather than categories of *substantiated reports*, it appears that allegations of neglect outpace allegations of abuse at a similar rate. Arons, Empty Promise, supra note 6, at 1069 n.48.

substandard housing conditions to school tardiness to lack of access to physical or mental healthcare to use of corporal punishment not resulting in serious injury to children.[85] Unsurprisingly, neglect is difficult to distinguish from poverty.[86] Second, searches are an ineffectual means of securing child safety. In individual cases, searches rarely turn up evidence supporting maltreatment allegations: States close more than 80% of investigations without substantiating any allegations of maltreatment.[87] In cases where states do substantiate allegations, states even more rarely pursue court action against parents, a necessary step to separate children from their parents.[88]

In the aggregate, the growth of the family regulation surveillance apparatus has not brought about an increase in child well-being. Studies show that rates of child neglect have remained static for decades,[89] and rates of child abuse and child neglect do not climb when surveillance recedes.[90] Even accepting carceral logics linking surveillance and safety,[91]

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85. See Josh Gupta-Kagan, Confronting Indeterminacy and Bias in Child Protection Law, 33 Stan. L. & Pol'y Rev. 217, 273 (2022) (describing calls to define "neglect more narrowly" and to limit neglect to situations causing significant harm); Colleen Henry & Vicki Lens, Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment, 24 CUNY L. Rev. 1, 24 & n.138 (2021) (surveying states' statutory definitions of neglect).

86. See Josh Gupta-Kagan, Distinguishing Family Poverty From Child Neglect, 109 Iowa L. Rev. 1541, 1546 (2024) (tackling the "enormously difficult challenge" of "disentangling poverty from neglect").

87. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 32–33.

88. See Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that the government must establish that a parent is unfit before it can impinge on parental rights). As a proxy for court filings, approximately 187,000 children entered foster care in 2022. Child.'s Bureau, HHS, The AFCARS Report 1 (2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf [https://perma.cc/3T66-Y2RN] [hereinafter Child.'s Bureau, AFCARS Report]; see also Child.'s Bureau, HHS, Child Maltreatment 2019, at 18, 91 (2021), https://acf.gov/sites/default/files/documents/cb/cm2019.pdf [https://perma.cc/Q2FS-35U8] (reporting that, per 41 states' reports from 2019, out of more than 3.4 million children who received either an investigation or alternative response, 133,582 victims of child maltreatment had "court action"). Some jurisdictions also provide for filing in court when the state does not seek to separate a family but instead seeks to require the parents to comply with requirements like ongoing surveillance or participation in services as conditions for their children staying home. See N.Y.C. Admin. Child. Servs., What Should You Know About Court-Ordered Supervision?, https://www.nyc.gov/assets/acs/pdf/immigrant_services/translations/dps/COS.pdf [https://perma.cc/43KP6U7Z] (last visited Jan. 19, 2025).

89. See, e.g., Finkelhor, supra note 3, at 4–5 ("Neglect substantiations by child protection authorities have fluctuated but remained relatively stable since the late 1990s at around 75 per 10 K . . . .").

90. Sege & Stephens, supra note 3, at 338 (describing the absence of evidence of an increase in child maltreatment during the pullback of family regulation agencies early in the COVID-19 pandemic); see also Anna Arons, An Unintended Abolition: Family Regulation During the COVID-19 Crisis, 12 Colum. J. Race & L. 1, 3 (2022) [hereinafter Arons, Unintended Abolition] (same).

91. For examples of arguments that more surveillance increases safety for children, see supra note 63.

the scale of family surveillance can reduce child safety: When agencies must investigate more reports, they are spread thinner, leaving them spending unnecessary time investigating more families where children are already safe and less time protecting vulnerable children.[92]

Despite those caveats, family regulation investigators are required by statute or regulation to conduct at least one home search for virtually every investigation.[93] A handful of states have more targeted requirements that mandate home searches only for certain sorts of cases or certain ages of children, or they leave home searches to investigators' discretion.[94] However, even in jurisdictions with these narrower requirements, the commitment to getting "eyes in the home" can remain strong. In Harris County (Houston), Texas, for example, though investigators operate under a narrower mandate, in a small sample of cases, investigators still reported entering homes in 75% of investigations.[95]

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92. A study of large counties around the country that expanded reporting requirements (i.e., making more individuals mandated reporters of child maltreatment) showed that these changes were associated with an increase in the total number of reports but no increase in the rate at which reports were substantiated. See Vincent J. Palusci, Frank E. Vandervort & Jessica M. Lewis, Does Changing Mandated Reporting Laws Improve Child Maltreatment Reporting in Large U.S. Counties?, 66 Child. & Youth Servs. Rev. 170, 176 (2016). Elsewhere, after Pennsylvania expanded its mandated reporting laws, the rate of child fatalities and near fatalities almost doubled. Mical Raz, Abusive Policies: How the American Child Welfare System Lost Its Way 69–72 (2020). Mical Raz, a public health scholar, posits that "increased reporting depletes resources that are already spread thin and diverts attention away from children who need it the most." Mical Raz, Unintended Consequences of Expanded Mandatory Reporting Laws, Pediatrics Persps., Apr. 2017, at 1, 1–2 [hereinafter Raz, Unintended Consequences].

93. Ismail, Family Policing, supra note 4, at 1497 ("In all screened-in cases, CPS conducts a home search."); Hager, Police Need Warrants, supra note 4 ("With rare exceptions, all of these investigations include at least one home visit, and often multiple, according to a review of all 50 states' child welfare statutes and agency investigative manuals.").

94. See, e.g., Tex. Fam. Code Ann. § 261.302(a)(1) (West 2023) ("The investigation may include . . . a visit to the child's home, unless the alleged abuse or neglect can be confirmed or clearly ruled out without a home visit . . . ."); Ill. Dep't of Child. & Fam. Servs., Reports of Child Abuse and Neglect § 300.50 (2022), https://dcfs.illinois.gov/content/dam/soi/en/web/dcfs/documents/about-us/policy-rules-and-forms/documents/procedures/procedures-300.pdf [https://perma.cc/HM3H-MLWV] [hereinafter Ill. Dep't of Child & Fam. Servs., Reports of Child Abuse and Neglect] (requiring home searches only for reports of inadequate shelter or environmental neglect); Tex. Dep't of Fam. & Protective Servs., Child Protective Services Handbook § 2250 (2024), https://www.dfps.texas.gov/handbooks/CPS/Files/CPS_pg_2200.asp#CPS_2200 [https://perma.cc/2SA2-R82R] (requiring home searches when the child is age five or younger, "[t]he allegations involve the condition of the home," or "[o]ther circumstances in the case make a home visit necessary to ensure child safety").

95. See Tex. Dep't of Fam. & Protective Servs., List of First 400 CPI INV Cases/Stages in Harris County that Started in FY 2024 YTD: September 1, 2023 to July 31, 2024 (2024) (on file with the *Columbia Law Review*) [hereinafter Tex. Dep't of Fam. & Protective Servs., Fiscal Year 2024 Data].

Once investigators enter families' homes, the scope of their searches is rarely bound by the nature of the allegations.[96] Whether a report alleges neglect or abuse and whether it relates to activities inside or outside the home, the same sort of unconstrained home search follows. Investigators seek out information on the physical condition of the home, the quantity and quality of provisions in the home, and the "climate" of the neighborhood in which the home is located.[97] To gather this information, investigators often enter every room of the home, opening refrigerators, drawers, cupboards, and medicine cabinets.[98] Investigators may use the evidence they gather to substantiate a case against a parent administratively, or, if they elect to file a case against a parent, to prove the allegations in court.[99]

The number of American families searched in this manner is staggering. By one estimate, 37% of all American children—and 53% of Black American children—experience a family regulation investigation (and a concomitant home search by state agents) during their childhood.[100] Before returning to why consent is so often used to justify these searches, the next section reviews the harms that these searches can wreak.

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96. Arons, Empty Promise, supra note 6, at 1094 (surveying state policies and statutes regarding blanket search requirements).

97. Id. at 1072 (surveying state policies and statutes regarding search directives to investigators).

98. Id. at 1088 (describing typical home searches nationally); Coleman, supra note 7, at 431, 436 (same); Ismail, Family Policing, supra note 4, at 1486 (same); see also Jennifer A. Reich, Fixing Families: Parents, Power, and the Child Welfare System 87, 100 (2005) (describing California's approach to home searches); Michelle Burrell, What Can the Child Welfare System Learn in the Wake of the *Floyd* Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations, 22 CUNY L. Rev. 124, 131 (2019) ("It is a common practice for an investigator to visit the home of the family under investigation unannounced, even late at night."); Dorothy E. Roberts, I Have Studied Child Protective Services for Decades. It Needs to Be Abolished., Mother Jones (Apr. 5, 2022), https://www.motherjones.com/criminal-justice/2022/04/abolish-child-protective-servicestorn-apart-dorothy-roberts-book-excerpt/ [https://perma.cc/N7CS-372D] (describing Colorado's procedures for home searches); Eli Hager, Agnel Philip & Hannah Rappleye, For Black Families in Phoenix, Child Welfare Investigations Are a Constant Threat, NBC News (Dec. 8, 2022), https://www.nbcnews.com/news/us-news/phoenix-arizona-child-welfare-black-parents-rcna60446 [https://perma.cc/9SDF-VH54] (describing Arizona's home search policy); What Does CPS Look for in a Home Visit in California?, Quora, https://www.quora.com/What-does-CPSlook-for-in-a-home-visit-in-California [https://perma.cc/Q5NF-FTX4] (last visited Jan. 19, 2025) (collecting parents' experiences with California home searches).

99. See supra notes 75–80 and accompanying text.

100. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, Lifetime Prevalence of Investigating Child Maltreatment Among US Children, 107 Am. J. Pub. Health 274, 278 (2017).

B. *The Harms of Family Regulation Home Searches*

The harms of family separation to children and to parents are extensive and well-documented. Children suffer from anxiety and attachment disorders, from grief and confusion surrounding removal itself, from high rates of abuse in the foster care system, and from the loss of connection with their community and with others who share their identity.[101] Parents whose children are taken experience a constellation of psychological symptoms akin to those brought about by the death of a child—only state-instigated family separation adds on additional uncertainty and stigma.[102]

Less discussed are the harms that in-home surveillance exacts on parents, children, and whole communities even when it *does not* lead to further state intervention—the lion's share of cases, or the more than 90% of family regulation investigations that close with families intact.[103] This section briefly highlights those harms.

First, there are the immediate harms to parents and children whose homes are searched. Parents describe searches as "nerve-wracking," "invasive," and "humiliating."[104] As Professor Shanta Trivedi explains, many parents feel that investigators treat them as "guilty until proven innocent," stereotyping them and presuming them "bad," "sick," or abnormal.[105] Throughout investigations, parents may feel utterly

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101. See Trivedi, The Harm of Child Removal, supra note 54, at 546 ("[T]he likelihood of abuse has been shown to increase every time a child is moved to a new home."); see also Vivek Sankaran, Christopher Church & Monique Mitchell, A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families, 102 Marq. L. Rev. 1161, 1163 (2019) (examining how the removal process itself inflicts trauma on children).

102. Trivedi, Hidden Pain of Family Policing, supra note 54, at 15–16 ("It's as if the three of them died." (quoting Kendra L. Nixon, H. L. Radtke & Leslie M. Tutty, "Every Day It Takes a Piece of You Away": Experiences of Grief and Loss Among Abused Mothers Involved With Child Protective Services, 7 J. Pub. Child Welfare 172, 180–31 (2013))).

103. Id. at 3–4 ("To date, most of the scholarly focus, including my own, has been on the harms that children experience when they are involved in the system and ultimately removed from their parents."); see also Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv (reporting that of the 3,096,101 children who were subjects of investigations or alternative responses in 2022, 145,449 received foster care). It is likely that a roughly equivalent number entered "hidden foster care" without court involvement. Gupta-Kagan, Hidden Foster Care, supra note 13, at 844–47 (describing how "state agencies effectuate a change of custody for thousands of children with little, if any, meaningful due process" through an unreported, hidden foster care system).

104. Hum. Rts. Watch, supra note 16, at 4 (internal quotation marks omitted); see also In re Autumn A., No. NN-XXXXX-XX/24, 2024 WL 5265294, at *6 (N.Y. Fam. Ct. Dec. 23, 2024) ("This is the same agency that entered the sanctity of a family home for the purpose of investigating allegations of inadequate parenting. No parent welcomes this type of intrusion and examination nor the anxiety for the entire family . . . that it brings.").

105. Trivedi, Hidden Pain of Family Policing, supra note 54, at 12–13 (internal quotation marks omitted) (quoting Sabrina Luza & Enrique Ortiz, The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse, 3 IPT (1991), http://www.ipt-forensics.com/journal/volume3/j3_2_5.htm [https://perma.cc/6MXR-7ZXS]).

powerless: "[I]f they cooperate with the investigation, they risk having their children removed from their home; if they do not cooperate, the same thing might happen."[106]

The harms persist after investigations end. In an ethnographic study of poor mothers' experiences with family regulation, sociologist Kelley Fong documented how family regulation surveillance increased mothers' "precarity"—their sense that "[s]tate agents can take their children, and there isn't much they can do to stop it."[107] Fong found that precarity fuels parental stress, anxiety, and fear.[108] Precarity also spurs parents to withdraw socially and to be wary of government supports and services due to fear of future surveillance.[109]

Parental stress increases the risk of adverse child outcomes, so children are affected by harms inflicted on their parents.[110] But children also suffer their own distinct harms from home searches. Searches undermine children's sense of security and trust in their parents' protective capacity.[111] Younger children in particular "react with anxiety even to temporary infringements of parental autonomy."[112] Parents I have represented report that for months or even years after investigations end their children respond to knocks on the front door—by delivery drivers, neighbors,

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106. Ndjuoh MehChu, Neither Cops nor Caseworkers: Transforming Family Policing Through Participatory Budgeting, 104 B.U. L. Rev. 73, 104–05 (2024).

107. Fong, Investigating Families, supra note 22, at 13–14.

108. Id. at 188 ("By repeatedly silencing and dismissing mothers, CPS and related authorities conveyed the system's power over them—a tactic effective in chilling mothers' potential mobilization and maintaining the status quo.").

109. Id. at 37–45 ("Ultimately, mothers' risk-averse approach—a rational response to CPS vulnerability—perpetuates marginality by reinforcing a sense of constraint and distancing families from assistance."). For a more extensive discussion of the harms of investigations to parents, see Trivedi, Hidden Pain of Family Policing, supra note 54, at 10–13.

110. Parental stress is a "well-established risk factor for adverse child outcomes, including the development of aggression and disruptive behavior, internalizing problems/anxiety, compromised emotional coping, and impaired social cognition and competence." Kathleen I. Crum & Angela D. Moreland, Parental Stress and Children's Social and Behavioral Outcomes: The Role of Abuse Potential Over Time, 26 J. Child & Fam. Stud. 3067, 3067 (2017) (citations omitted).

111. Joseph Goldstein, Albert J. Solnit, Sonja Goldstein & Anna Freud, The Best Interests of the Child: The Least Detrimental Alternative 97 (paperback ed. 1998) ("Children, on their part, react with anxiety even to temporary infringements of parental autonomy."); see also Casey Fam. Programs, How Can Investigation, Removal, and Placement Processes Be More Trauma-Informed? 1 (2018), https://www.casey.org/media/SC_Trauma-informed-investigation-removal-placement_fnl.pdf [https://perma.cc/KY9D-HGY4] ("The processes of investigation, removal, and placement into out-of-home care . . . are in and of themselves traumatic events for children and families."); Fong, Investigating Families, supra note 22, at 146 ("Investigations can be stressful for children . . . .").

112. Goldstein et al., supra note 111, at 97.

anyone—with a flurry of anxious questions.[113] Others report that their children developed new behavioral struggles at home and at school in the wake of the uncertainty and loss of security brought on by investigations.[114] Summing up their clients' experiences, one group of attorneys for children wrote, "Ironically, the very home visits designed to ensure children's safety at the hands of their caregivers can cause them great harm."[115]

The harms of searches extend beyond individuals and families into whole communities. Subjugated families' loss of privacy in their individual homes can rupture communities' sense of cohesion and security in the aggregate. Privacy and dignity are closely linked.[116] When the state encroaches on one family's privacy, even briefly, it interferes with that family's ability to embrace and act out their chosen values.[117] When the state encroaches on the homes of a substantial proportion—perhaps more than half—of families in a particular neighborhood or demographic group,[118] it conveys a clear message about what sorts of values are acceptable and what sorts of families deserve privacy.[119] It conveys a

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113. For an account in this vein, see the testimony of New York parent Desseray Wright regarding her five-year-old's anxiety about investigators' knocks on the front door after an investigation. Family Involvement in the Child Welfare System: Hearing Before the Assemb. Standing Comm. on Child. & Fams., 2021 Assemb., 10-21-21 Sess. (N.Y. 2021) [hereinafter N.Y. Assembly Hearing on Family Involvement in the Child Welfare System] (statement of Desseray Wright), https://nystateassembly.granicus.com/MediaPlayer.php?view_id=8&clip_id=6408 (on file with the *Columbia Law Review*).

114. For an account in this vein, see Jonah E. Bromwich & Andy Newman, Child Abuse Investigators Traumatize Families, Lawsuit Charges, N.Y. Times (Feb. 20, 2024), https://www.nytimes.com/2024/02/20/nyregion/acs-nyc-family-trauma-lawsuit.html (on file with the *Columbia Law Review*) ("Their daughter, once outgoing and cheerful, has been in therapy, her parents said, and blames herself for the investigations.").

115. Brief for the Child at 25, In re Sapphire W. v. Kenneth L., 227 N.Y.S.3d 624 (N.Y. App. Div. 2025) (No. NN-17879/23); see also *In re Sapphire W.*, 227 N.Y.S.3d at 633 ("[A] child protective agency's involvement with a family may itself have a negative impact on the parent or the child, even if it may be necessary in some circumstances to prevent or repair the effects of abuse or neglect.").

116. Bridges, supra note 32, at 107 (describing the view that privacy ought to be protected "because, insofar as it protects dignity, it is good in and of itself").

117. Peggy Cooper Davis, Contested Images of Family Values: The Role of the State, 107 Harv. L. Rev. 1348, 1371 (1994).

118. See, e.g., Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildeman, Contact With Child Protective Services Is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties, PNAS, July 19, 2021, at 1, 1 (documenting rates of investigation by race in twenty of the largest United States counties and finding that, in eleven of twenty counties, Black children have risks of investigation exceeding 50%); Angela Butel, Data Brief: Child Welfare Investigations and New York City Neighborhoods, Ctr. for N.Y.C. Affs. (June 2019), http://www.centernyc.org/data-brief-child-welfare-investigations [https://perma.cc/NQ9H-9LEW] (mapping the disparate rate of family regulation investigations in New York City by neighborhood, income, and race).

119. See Bridges, supra note 32, at 107–10 ("By depriving poor mothers of . . . family privacy rights, law and society contend that we ought not to assume that poor mothers should be trusted to raise their children expertly."); Dorothy E. Roberts, The Racial Geography of Child Welfare: Toward a New Research Paradigm, 87 Child Welfare 125, 131–

message, too, that race–class subjugated parents must be careful in how they parent from the time of their children's birth, lest they invite intrusion.[120] The regularity of state intrusion can lead to community-wide legal estrangement, as the family regulation system perpetuates the idea that race–class subjugated families do not share in the same rights and freedoms as other Americans.[121]

C. *Consent as a Fourth Amendment Solution*

The carceral logics of family regulation prioritize getting eyes in the home. The Fourth Amendment presents a potential obstacle to that project. Consent allows the state to overcome that obstacle.

In Fourth Amendment jurisprudence, "the home is first among equals."[122] Home searches by state agents are presumptively unreasonable[123] and are only lawful if justified by a warrant supported by probable cause and particularity, consent, or a recognized exception to the warrant requirement.[124] Circuit courts around the country have held that these same constraints apply to home searches conducted by family regulation investigators.[125] In doing so, they have rejected the notion that

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47 (2008) ("The study found that all but one of the respondents were aware of intense DCFS involvement with families in their neighborhood.").

120. See Fong, Investigating Families, supra note 22, at 37–39 ("Even for mothers never reported to CPS, the *possibility* of reports creates trade-offs that foster a sense of constraint and make it risky to disclose difficulties to people who might help.").

121. Bell, supra note 33, at 2066–67 (defining legal estrangement).

122. Florida v. Jardines, 569 U.S. 1, 6 (2013).

123. See Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021) ("To be sure, the Fourth Amendment does not prohibit all unwelcome intrusions 'on private property,'—only 'unreasonable' ones." (quoting *Jardines*, 569 U.S. at 6)).

124. U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched . . . ."); *Caniglia*, 141 S. Ct. at 1599 ("We have thus recognized a few permissible invasions of the home and its curtilage. Perhaps most familiar, for example, are searches and seizures pursuant to a valid warrant.").

125. See, e.g., Andrews v. Hickman County, 700 F.3d 845, 859 (6th Cir. 2012) ("Given the presumption that state actors are governed by the Fourth Amendment and the sanctity of the home under the Fourth Amendment, we agree that a social worker, like other state officers, is governed by the Fourth Amendment's warrant requirement."); Gates v. Tex. Dep't of Protective & Regul. Servs., 537 F.3d 404, 419–20 (5th Cir. 2008) ("We begin by noting that it is well established in this circuit that the Fourth Amendment regulates social workers' civil investigations." (citing Roe v. Tex. Dep't of Protective & Regul. Servs., 299 F.3d 395, 401 (5th Cir. 2002))); Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1240 (10th Cir. 2003) ("It is well-established that a warrantless search is presumptively unreasonable under the Fourth Amendment and therefore invalid unless it falls within a specific exception to the warrant requirement." (citing United States v. Zubia-Melendez, 263 F.3d 1155, 1162 (10th Cir. 2001))); Calabretta v. Floyd, 189 F.3d 808, 813 (9th Cir. 1999) ("Any government official can be held to know that their office does not give them an unrestricted right to enter peoples' homes at will."); J.C. v. District of Columbia, 199 A.3d 192, 200, 200–01 (D.C. 2018) ("Accordingly, under the Fourth Amendment, a lawful seizure of children from their parents' custody requires a court order, e.g., a warrant, probable cause, or exigent

these searches are administrative or special needs searches subject to relaxed requirements.[126] Thus, for home searches to be constitutional, agencies must have a warrant, assert a warrant exception, or claim consent.

At first blush, the long-recognized exigency exception to the warrant requirement[127] might seem to create a legal path into the home for family regulation investigators. This exception allows state actors to enter homes without a warrant to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[128] Though the popular imagination might envision family regulation investigators bursting through doors to save children from immediate danger,[129] such occurrences are rare. In reality, most investigations concern allegations of neglect, not abuse.[130] And only 5% of children in investigations are ultimately removed from their parents' care.[131] Even assuming there are some instances in which investigators initially and reasonably believe that a child needs emergency assistance but ultimately decline to remove the child from their home, it is unlikely that such instances account for most of the remaining 95% of investigations.[132]

Thus, in order to fulfill their statutory obligation to carry out their home searches without violating the Constitution, family regulation investigators must usually get a warrant or get consent. Less than 1% of the

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circumstances."). But see Wildauer v. Frederick County, 993 F.2d 369, 372 (4th Cir. 1993) (holding that "investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context" (citing Wyman v. James, 400 U.S. 309, 318 (1971))). For more extensive explanations of circuit court decisions applying the warrant requirement to family regulation investigations, see Arons, Empty Promise, supra note 6, at 1086–90; Ismail, Family Policing, supra note 4, at 1529–30.

126. For a descriptive account of why courts have rejected the special needs exception for family regulation investigations, see Arons, Empty Promise, supra note 6, at 1088–89. For normative arguments for why courts should reject the special needs exception, see Coleman, supra note 7, at 508–31; Ismail, Family Policing, supra note 4, at 1530–38.

127. Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) ("For this reason, warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (quoting McDonald v. United States, 335 U.S. 451, 456 (1948))).

128. Kentucky v. King, 563 U.S. 452, 460, 470 (2011) (internal quotation marks omitted) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

129. See Matthew I. Fraidin, Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare, 63 Me. L. Rev. 1, 8–21 (2010) ("[Child abuse stories] are episodic and dramatic, with easily-identifiable heroes and villains, and easy to investigate via willing, authoritative government sources." (footnote omitted)).

130. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 23 ("The FFY 2022 data shows three-quarters (74.3%) of victims experience neglect, 17.0 percent are physically abused, 10.6 percent are sexually abused, and 0.2 percent are sex trafficked.").

131. Id. at xv.

132. Ismail, Family Policing, supra note 4, at 1540 (explaining why "the need for invoking exigent circumstances is relatively low" in investigations).

time, they get a warrant.[133] More than 90% of the time, investigators claim to get consent.[134] The tactics by which investigators gain consent are discussed in Part II.[135] For now, we turn to the legal standard for consent.

The Supreme Court has long recognized consent as a path around the warrant requirement. If a person consents to a search, the state need not obtain a warrant or avail itself of any exception.[136] Consent does not need to be knowing[137]—so, for instance, family regulation investigators are not constitutionally required to inform parents that they have the right to refuse a home search. But the consent must be voluntary, meaning it cannot be "coerced, by explicit or implicit means."[138]

The Court's initial description of the voluntariness standard was a subjective one focused on "all the surrounding circumstances" and individualized to the person's state of mind, intelligence, and education.[139] But over time, the Court has increasingly endorsed objective voluntariness standards, focused not on whether the searched person in fact felt free to refuse the search but instead on whether "a reasonable person would understand that he or she is free to refuse."[140] This objective standard, in

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133. This Article uses "warrant" to include court orders issued by family courts that comply with warrant requirements. See Gates v. Tex. Dep't of Protective & Regul. Servs., 537 F.3d 404, 420 n.10 (5th Cir. 2008) (describing a family court order to enter the home as "the equivalent of a warrant in this situation"); Hager, Police Need Warrants, supra note 4 (describing the phenomenon of social workers entering without a warrant or other legal equivalent of a court order).

134. Coleman, supra note 7, at 430–31; see also Conn. D.C.F. Interview, supra note 1. Information reported by the Texas Department of Family and Protective Services about investigations in Harris County, Texas, also reflects a high rate of claimed consent. See Tex. Dep't of Fam. & Protective Servs., Fiscal Year 2024 Data, supra note 95 (reporting that, of 376 investigations about which information was available, 275 included home entries by investigators, 273 of which parents consented to; out of all 376 investigations, only 14 parents did not consent to a home entry; in 89 investigations, there was no data on parents' consent). Note that the reported data is from investigations that began in September 2023, immediately prior to Texas's implementation of a requirement that investigators tell parents of their right to refuse consent to home searches. See Annie Sciacca, You Have the Right to Refuse CPS Entry: Texas Launches *Miranda*-Style Warnings to Parents Under Investigation for Child Maltreatment, The Imprint (Oct. 11, 2023), https://imprintnews.org/top-stories/you-have-the-right-to-refuse-cps-entry-texas-launches-miranda-style-warnings-to-parents-under-investigation-for-child-maltreatment/245334 [https://perma.cc/SVY2NYYS] (noting that the requirements took effect in October 2023).

135. See infra section II.A.

136. See Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) ("In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.").

137. See id. at 227 ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.").

138. Id. at 228.

139. Id. at 229, 248.

140. United States v. Drayton, 536 U.S. 194, 197 (2002) (citing Florida v. Bostick, 501 U.S. 429 (1991)).

turn, focuses courts on the apparent reasonableness of the state actor's conduct in seeking consent.[141]

A thorough review of critiques of consent doctrine would fill several volumes. Instead, these are synopses of some recurring critiques:

First, consent searches are inevitably coercive, as even the most gently phrased request from a state actor is bound to intimidate most people into compliance.[142] This is all the more true in a carceral state that tends to view noncompliance as a grounds for suspicion or even punishment.[143] Second, consent searches have an especially pernicious effect on subjugated groups, for two reasons. Groups that are more policed are more likely to be asked to consent to state intrusion in the first place. Further, identity shapes how people experience and react to interactions with state actors.[144] The lack of a requirement that consent be "knowing" exacerbates those power imbalances.[145] Third, the "murky and ill-defined"

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141. See Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup. Ct. Rev. 153, 214 ("The reasoning employed to effectuate the nominal standard, by now familiar, goes something like this: The police officer asked permission. The citizen granted it. A reasonable person in the situation would have felt free to not grant permission. Therefore encounter and subsequent search were consensual.").

142. See, e.g., Sommers & Bohns, supra note 25, at 1974 ("If we are right, then even if the voluntariness test is not a legal fiction—even if judges have only a desire to assess as accurately as possible the quality of the citizen's consent—the doctrine would still skew in favor of police and against citizens."); Strauss, supra note 25, at 268 ("Indeed, the arguments against the doctrine—the existence of inherent coercion—suggest that it is almost impossible to separate out those situations in which a person 'truly' wants to consent from those situations in which a person feels compelled to acquiesce.").

143. See Capers, The Good Citizen, supra note 25, at 665 ("The Court, in short, starts from a baseline that the good citizen has an interest in consenting because it reinforces the rule of law.").

144. See, e.g., Carbado, (E)racing the Fourth Amendment, supra note 26, at 1029 ("A black person trapped in this position is likely to experience an officer's request for permission to conduct a search as 'racial interrogation'—that is, as an inquiry that is reasonably likely to produce a privacy deprivation."); Maclin, supra note 26, at 271–72 (discussing how the Court promotes instability by ignoring the mistrust and hostility between the police and Black men); Strauss, supra note 25, at 213 ("[C]urrent caselaw fails to consider the reality that most people will feel compelled to allow the police to search, no matter how politely the request is phrased. Such feelings of compulsion are particularly experienced by members of certain racial and cultural groups who fear confrontation with the police."); see also Sommers & Bohns, supra note 25, at 2009 ("The problem . . . is not necessarily that racial minorities are more likely to comply with an officer's request to search but that they are more likely to be asked, and nearly everyone who is asked complies. This results in racial disparities in who is ultimately searched pursuant to consent." (footnote omitted)); Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 23–24) ("A shared critique of the various forms of consent, waiver and voluntariness throughout criminal procedure is that they directly facilitate and sanction racialized policing and prosecution. In particular, the pressure to comply is inherently shaped by race.").

145. See Sommers & Bohns, supra note 25, at 1967 (describing this as the most prominent critique of voluntariness doctrine and collecting scholarship making this argument).

voluntariness standard gives courts ample room to find consent voluntary, so long as state actors do not use overt, egregious tactics.[146] Relatedly, the shift from a quasi-subjective standard to an objective standard absolves courts of considering the particular (and at times implicit) pressures to consent felt by individuals and focuses courts exclusively on overt police conduct.[147] Fourth, the aggregate effect of a system of state surveillance powered by consent is to legitimize and sanitize state overreach, as the prevalence of consent allows judges to avoid tough constitutional questions and allows state actors to conduct searches absent any suspicion or justification.[148]

Part III returns to these critiques.[149] But focusing only on the thinness of consent doctrine risks obscuring that the tactics family regulation investigators deploy to gain consent commonly violate even this doctrine. The next Part demonstrates how.

II. THE UNCONSTITUTIONALITY OF FAMILY REGULATION CONSENT SEARCHES

"[T]he velvet glove over the steel fist": This is how one family regulation system investigator described the tactics he used to gain parents' consent to home searches.[150] This Part provides a descriptive account of the pressures, implicit and explicit, that agencies exert upon parents to extract consent for searches. Then, it demonstrates that common tactics that agencies use are explicitly coercive in ways that violate established constitutional constraints on consent. After explaining how strategic civil litigation advancing this constitutional argument could

146. Id. at 1969; see also David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 32 (1999) (reviewing studies of courts' consent decisions); Gerard E. Lynch, Why Not a *Miranda* for Searches?, 5 Ohio St. J. Crim. L. 233, 235 (2007) ("Often these consents are given by people unquestionably in police custody, and even when they are not, they often occur under circumstances in which a claim of coercive conduct is quite plausible.").

147. See Sommers & Bohns, supra note 25, at 1968–69 (summarizing courts' shift to focusing almost exclusively on police conduct).

148. See Oren Bar-Gill & Barry Friedman, Taking Warrants Seriously, 106 Nw. U. L. Rev. 1609, 1666–67 (2012) ("If police officials must obtain warrants before searching and seizing, there is a likelihood that they will not search or seize in the first place."); Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 30–32) ("Not only does consent bestow legitimacy and unburden system actors of responsibility, it has the practical effect of allowing judges to sidestep thorny constitutional questions. Consent permits judicial avoidance.").

149. See infra Part III.

150. Unprotected: An Inside Look at NYC's Administration for Children's Services Searches, NBC News, at 3:06–3:13 (Oct. 13, 2022), https://www.nbcnews.com/nightly-news/video/unprotected-an-inside-look-at-nyc-s-administration-for-children-s-services-searches-150608453758 (on file with the *Columbia Law Review*) (statement of an anonymous ACS employee).

reduce coercion and reduce home searches, this Part concedes the practical limits of this constitutional argument as a mechanism for change.

A. *Tactics to Secure Parents' Consent*

When family regulation investigators arrive on families' doorsteps, they have at their disposal an arsenal of tools with which they can pressure parents to consent to home searches. These tools draw their power from the purported benevolence of the family regulation system, its close connections to other carceral systems, and many parents' greatest fear: that state agents will take their children away.

As Part I acknowledges, this Article does not quantify the frequency of the use of tools described here. Accounts from parents and system stakeholders around the country demonstrate that the tactics described are not anomalous. Even if such tactics are used in only five percent of investigations, that means they are used on tens of thousands of families annually.[151] Further, the list compiled from these sources is only a starting point. By drawing attention to these tactics, this Article seeks to spur more careful tracking of them and of other tactics not described here.[152]

1. *Family Regulation's Culture of Compliance.* — Though critics describe the family regulation system as carceral,[153] family regulation agencies represent themselves as social-working, collaborative institutions.[154] The problem-solving culture of the family regulation system writ large emphasizes collaboration and informality and casts adversarialism and the assertion of rights as deviant.[155]

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151. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv (reporting that nationally, over three million children received either an investigation or alternative response in 2022).

152. For instance, a New York investigator reported that she would "up the pressure" by "us[ing] lines like 'I don't want to discuss your business out here in the hallway.'" Hager, Police Need Warrants, supra note 4.

153. See supra section I.A.

154. Cf. Child.'s Bureau, HHS, How the Child Welfare System Works 2 (2020), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/cpswork.pdf?VersionId=1OJwA2lAGsRB.0WoXB_CW9a6Hw1MbGpy [https://perma.cc/KGK4-N6FR] ("The Children's Bureau works with State and local agencies to develop programs that focus on preventing child abuse and neglect by strengthening families, protecting children from further maltreatment, reuniting children safely with their families, and finding permanent families for children who cannot safely return home.").

155. See Jane M. Spinak, The End of Family Court: How Abolishing the Court Brings Justice to Children and Families 171–73 (2023) ("The federal government strengthened and consolidated more authority over dependent and maltreated children by state and local governments' child protection agencies through the provision of AFDC for foster care, mandated reporting requirements, and eventually CAPTA."); Arons, Empty Promise, supra note 6, at 1110–11 ("A judge will not only likely sign off on the entry order, but may also hold the mother's initial noncompliance against her—even though she was never the subject of the initial report of child maltreatment." (footnote omitted)); see also Eli Hager, NYC Child Welfare Agency Says It Supports "*Miranda* Warning" Bill for Parents. But It's

This orientation is apparent from investigators' first encounters with families. Around the country, public-facing agency materials instruct parents that they should "participate and cooperate" with investigations to "tell their side of the story,"[156] to "help the investigator" by "giving them the information they ask for,"[157] and to "work together" with the investigator to resolve the case "sooner."[158] Only a handful of states require investigators to inform parents that they have any rights during an investigation, let alone the right not to consent to a home search.[159] The idea of "rights" may hold no salience to investigators themselves.[160] What's more, investigators in some jurisdictions are instructed to code a parent's assertion of their rights—such as a refusal to allow a home search—as a safety risk to their children.[161] This culture of coerced compliance sets the stage for the more specific threats that investigators invoke.

2. *Presenting Searches as Mandatory.* — In addition to representing "cooperation" writ large as an expectation, investigators may represent a

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Quietly Lobbying to Weaken It., ProPublica (June 5, 2023), https://www.propublica.org/article/new-york-families-child-welfare-miranda-warning [https://perma.cc/9VTB-5DR3] [hereinafter Hager, Agency Quietly Lobbying] (reporting on efforts by New York's family regulation agency to remove the word "rights" from proposed legislation regarding parents' rights in investigations).

156. Mass. Dep't of Child. & Fams., A Family's Guide to Protective Services for Children 2, https://www.mass.gov/doc/a-familys-guide-to-protective-services-for-children-english-1/download (on file with the *Columbia Law Review*) ("DCF encourages parents to participate and cooperate with the investigation, as it provides an opportunity for parents to tell their side of the story.").

157. Fla. Dep't of Child. & Fams., Child Protection, supra note 16, at 2.

158. Child.'s Protective Servs. Program, Mich. Dep't of Hum. Servs., A Parent's Guide to Working With Children's Protective Services 9 (2006), https://www.michigan.gov/documents/mdhhs/A_Parents_Guide_to_working_with_Childrens_Protective_Services_507536_7.pdf [https://perma.cc/R7LS-RAGS].

159. Anna Belle Newport, Note, Civil *Miranda* Warnings: The Fight for Parents to Know Their Rights During a Child Protective Services Investigation, 54 Colum. Hum. Rts. L. Rev. 854, 891–900 (2023); Eli Hager, Texas, New York Diverge on Requiring *Miranda*-Style Warnings in Child Welfare Cases, ProPublica (July 5, 2023), https://www.propublica.org/article/texas-new-york-diverge-miranda-warning-bill [https://perma.cc/32TJ-GJ5D] [hereinafter Hager, Texas, New York Diverge].

160. See Hager, Police Need Warrants, supra note 4 ("Rights—no, we never did that. I didn't even know that was a thing." (internal quotation marks omitted) (quoting Natasha Walden, a former child protective specialist in Queens, New York)); Tarek Z. Ismail, Family Policing as Security Theatre 10 (Mar. 26, 2025) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Ismail, Security Theatre] (demonstrating how mutual unawareness of rights leads to their functional erasure).

161. See, e.g., Off. of Child. & Adult Servs., W. Va. Dep't of Health & Hum. Res., Child Protective Services Policy 76–77, 79 (2019), https://dhhr.wv.gov/bcf/policy/Documents/CPS_Policy.pdf [https://perma.cc/YL94-QV38] (classifying situations in which a parent "refuses access to the home" as a sign of "present danger"); see also Fong, Investigating Families, supra note 22, at 104 (noting that a mother's "case escalated" because she invoked her rights); Reich, supra note 98, at 89–91 ("Parents who do not act with deference . . . are perceived to be either in denial or beyond rehabilitation. They are seen as unable to protect or care for their children, which usually results in their children's placement in protective custody.").

home search itself as a mandatory component of an investigation. Parents report that when investigators first arrive at their homes, they say things like, "I need to come in," "I'm required to do this," "I have to look around," or "This is a part of the investigation."[162] Agency materials contain similar statements, presenting home searches as a compulsory component of investigations.[163] Few of these materials acknowledge that even if a state requires a home search for every investigation, the state does not require a *voluntary* home search for every investigation.[164]

3. *Invoking Law Enforcement.* — Family regulation investigators may threaten or actually involve law enforcement to increase the likelihood of parents consenting to home searches. In some investigations, law enforcement personnel are present at the initial point of contact.[165] In

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162. Similar representations abound. See, e.g., *Gould* Complaint, supra note 17, at 6, 32–33, 35–36 ("ACS used the Coercive Tactics to gain entry into the Taylor Family home and conduct the warrantless, non-exigent searches, including . . . deceptively stating that the searches were required by law[] [and claiming] that ACS 'needed to' check the apartment and that Ms. Taylor had no choice but to comply . . . ."); Fong, Investigating Families, supra note 22, at 103 ("Alison, looking apologetic, said that she needed to talk to everyone and see the children within twenty-four hours. (Per policy, she just had to *attempt* a visit within this time frame, which she was presently doing.)"); Interview with Family Member in Alabama Investigation (June 19, 2024) (on file with the Columbia Law Review) (noting that CPS presented the home search as mandatory); Interview with Parent Defense Attorney in North Carolina (June 17, 2024) (on file with the Columbia Law Review) (same).

163. See, e.g., Child Protective Servs., Va. Dep't of Soc. Servs., A Guide to Investigative Procedures 6 (2024), https://www.dss.virginia.gov/files/division/dfs/cps/intro_page/publications/investigation/B032-01-0974-14-eng-2-24.pdf [https://perma.cc/Q9KG-UMD4] ("[T]he CPS worker will . . . observe the home environment . . . ."); Child Welfare, Or. Dep't Hum. Servs., What You Need to Know About a Child Protective Services Assessment 2 (2021), https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/de1536.pdf (on file with the *Columbia Law Review*) ("The CPS worker will visit your home as part of the CPS assessment."); Div. of Child & Fam. Servs., Nev. Dep't of Health & Hum. Servs., Parents Guide to Child Protective Services (CPS) 2, https://dcfs.nv.gov/uploadedFiles/dcfsnvgov/content/Programs/CWS/CPS/Guide_to_CPS.pdf [https://perma.cc/AD8Z-SAEW] (last visited Jan. 18, 2025) (noting that "[t]he social worker's job is to . . . [o]bserve the family home"); Douglas Cnty. Dep't of Health & Hum. Servs., Parents' Guide to Child Protective Service Assessments 2, https://www.douglascountywi.gov/DocumentCenter/View/423/CPS-Assessments-brochure?bidId= [https://perma.cc/2HYV-C2ND] (last visited Apr. 3, 2025) (same).

164. See Fong, Investigating Families, supra note 22, at 103 (describing how an investigator responded to a parent refusing entry by claiming that she "needed" to talk to everyone within twenty-four hours of the investigation beginning when actually "[p]er policy, she just had to *attempt* a visit within this time frame"); Reich, supra note 98, at 94 (recounting an investigator's remark that "it helped that [a mother] wasn't 'system wise' about her rights and how the system works.").

165. See, e.g., Clark v. Stone, 998 F.3d 287, 302 (6th Cir. 2021) ("[A]t their first home visit [the investigators] were accompanied by a police officer."); Reich, supra note 98, at 95 (describing an investigation in which police accompanied the family regulation investigators for their initial trip to a family's home and noting that despite the mother's initial resistance to their entry into her home, "At the police officers' insistence, we entered"); Kerry Breen, Baby Taken From Texas Couple After Home Birth Will Be Returned by Dallas Court, CBS News, https://www.cbsnews.com/news/temecia-rodney-mila-jackson-returned-home-birth-jaundice-texas/ [https://perma.cc/N28Q-9UG3] (last updated Apr. 20, 2023) (describing

others, family regulation investigators invoke law enforcement after parents express hesitation about consenting to a home search. Investigators may threaten to call law enforcement to the home or threaten parents with arrest,[166] or may leave and return with law enforcement, then try again to demand consent to search the family's home.[167]

4. *Threatening Family Separation.* — Finally, investigators may make explicit the implicit threat at the core of family regulation investigations: the possibility of the state taking children. This threat is "at the back of everyone's mind" during investigations.[168] Particularly in communities that are heavily policed by family regulation agencies, separation is a threat that is in the air from the first knock at the door (if not before).[169] Agencies appear to be aware of the potency and immediacy of this threat. Many address it in brochures for parents with bolded questions, like, "Will My Child be Taken Away?",[170] "Will you take my children away from me?",[171] or "WILL MY CHILD BE REMOVED?"[172]

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how "[family regulation investigators] and police arrived" at a family's home at about 4:00 a.m. on their initial trip to a home, in response to concerns that a Black newborn was jaundiced).

166. See, e.g., N.Y. Off. of Child. & Fam. Servs., New York State Child Protective Services Manual F-12 (2023), https://ocfs.ny.gov/programs/cps/manual/2023/2023-CPS-Manual-2023Oct.pdf [https://perma.cc/R2HK-5ALF] ("When a CPS worker conducting an investigation is denied access to . . . the home of a child named in a report, . . . CPS should . . . [i]mmediately notify the adult who has denied access that law enforcement may be called to the site . . . ." (emphasis omitted)); see also N.M. Stat. Ann. § 30-6-4 (2025) (defining the criminal offense of "obstructing, delaying, interfering with or denying access to" investigators or officers conducting investigations).

167. See, e.g., Julia Hernandez & Tarek Z. Ismail, Radical Early Defense Against Family Policing, 132 Yale L.J. Forum 659, 679 (2022), https://www.yalelawjournal.org/pdf/F7.HernandezIsmailFinalDraftWEB_xddjejca.pdf [https://perma.cc/KUM4-PVKQ] ("CPS agents can further intimidate families by calling upon criminal police to compel consent."); Larissa MacFarquhar, When Should a Child Be Taken From His Parents?, New Yorker (July 31, 2017), https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents [https://perma.cc/BM7W-3RP8] (noting that refusal to open the door may lead to an investigator coming back with police).

168. Conn. D.C.F. Interview, supra note 1; see also Reich, supra note 98, at 94 (connecting a mother under investigation's "willingness to do anything" to "her fear of losing her children, who she sa[id] are 'the most important thing in the world'" (quoting Dana Brooks)); Bromwich & Newman, supra note 114 ("When investigators showed up . . . [a father] said he panicked. *They're going to take my daughter away*, he thought.").

169. Fong, Investigating Families, supra note 22, at 78–84 (describing parents' anxieties based on their prior observations of the family regulation system in their communities, regardless of their own experiences); Reich, supra note 98, at 104 ("Unsure of what to expect, [the mother] called her cousin, herself a CPS worker in another county, to ask for advice. She advised [the mother] that 'they're going to take your kids.'").

170. See, e.g., Child Protective Servs., Va. Dep't Soc. Servs., supra note 163, at 1; Douglas Cnty. Dep't of Health & Hum. Servs., supra note 163, at 1; N.J. Dep't of Child. & Fams., Parents' Handbook 2 (2017), https://www.nj.gov/dcf/families/dcpp/ParentsHandbook_English.pdf.

171. When Child Welfare Investigates Your Family, D.C. Child & Fam. Servs. Agency, https://cfsa.dc.gov/page/when-child-welfare-investigates-your-family#gsc.tab=0 [https://perma.cc/DC7J-NEEW] (last visited Jan. 18, 2025).

172. Div. of Child & Fam. Servs., Nev. Dep't of Health & Hum. Servs., supra note 163, at 1.

Investigators may make that threat more explicit and more immediate if parents refuse to consent to home searches. One parent, for instance, recalled investigators arriving at her home in the middle of the night to investigate a report that was duplicative of another that investigators had already investigated and found unsubstantiated.[173] When the parent declined to open the door for the investigators, they told her through the closed door that she "was at risk of having her children taken away."[174] Her experience is not isolated. Investigators reportedly make similar threats around the country.[175]

B. *The Unconstitutionality of Common Tactics*

Consent must be voluntary to satisfy the Fourth Amendment.[176] Voluntariness is judged by whether "a reasonable person would understand that he or she is free to refuse" the request to search.[177] Even under this state-friendly standard,[178] the types of threats that family regulation investigators make have been found to vitiate consent in

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173. See Bromwich & Newman, supra note 114.

174. Id.

175. See, e.g., Loftus v. Clark-Moore, 690 F.3d 1200, 1203 (11th Cir. 2012) (recounting a caseworker's threats to remove a father's children after he expressed reservations about an investigation); Hearing Before the N.Y.C. Council Comm. on Gen. Welfare 117–20 (N.Y.C. 2022) https://legistar.council.nyc.gov/View.ashx?M=F&ID=11077223&GUID=BD1C079D-6239-40F5-B0F0-014177ECC17A [https://perma.cc/E4SN-AKXK] (statement of Shalonda Curtis-Hackett) ("After several phone calls [from investigators] I consented [to a home inspection] because I was threatened with the police and possible removal if I refuse[d]. With both evils being presented, I consented to what I thought was the lesser."); *Gould* Complaint, supra note 17, at 32 (alleging that ACS threatened to return with police and a court order to remove children from the plaintiff's home if the plaintiff did not consent to a search); Conn. Dep't of Child. & Fams., Q & A for Parents About Protective Services 2 (2021), https://portal.ct.gov/-/media/dcf/brochures/prtkenglish-2019.pdf [https://perma.cc/CU7M-7S8P] (informing parents that they are not required to allow investigators into their home but noting "that choosing not to communicate with a DCF employee may have serious consequences, which may include DCF filing a petition to remove your child from your home"); see also Reich, supra note 98, at 95 (describing a home entry in which "[the investigator] calmly explained to [the mother] that one factor in whether her kids were removed was how cooperative she was" after the mother initially refused to allow entry); id. at 104 (describing a different investigation in which a mother refused to give a statement and a law enforcement officer accompanying a family regulation investigator "grew frustrated and demanded a statement from her, yelling, 'I'm going to take your kids'"); Darcey H. Merritt, Documenting Experiences and Interactions With Child Protective Services, Focus on Poverty, Sept. 2021, at 3, 3 ("Family participation is usually compulsory or, at best, strongly encouraged through the explicit or implicit threat of negative consequences, including a child's removal from the home.").

176. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) ("[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." (internal quotation marks omitted) (quoting Bumper v. North Carolina, 391 U.S. 543, 549 (1968))).

177. United States v. Drayton, 536 U.S. 194, 197 (2002) (citing Florida v. Bostick, 501 U.S. 429 (1991)).

178. See supra section I.C.

criminal cases, with courts casting a particularly wary eye on threats to the parent–child relationship. This section begins by describing the more studied area of threats to children in involuntary *confession* cases, then turns to the law surrounding the coerciveness of the specific tactics described above in consent search cases.[179]

1. *Threats to the Parent–Child Relationship in Confession Cases.* — Though the Supreme Court has never considered the voluntariness of consent to a search extracted through threats to the parent–child relationship, it has considered the voluntariness of a confession extracted through such tactics.[180] The voluntariness standard for confessions, like that for consent searches, focuses on the objective coerciveness of state actors' tactics.[181] Thus, this case law is an informative starting point.

In *Lynumn v. Illinois*, the Court considered the voluntariness of the confession of Beatrice Lynumn, a young widow and mother of a three-year-old and a four-year-old, who was accused of selling marijuana to a police informant.[182] Three police officers interrogated Lynumn in her home.[183] During the interrogation, an officer told her that she could receive a sentence of ten years, "and the children could be taken away, and after [she] got out they would be taken away and strangers would have them, and if [she] could cooperate he would see they weren't."[184] Officers also told her that if she was charged, she would likely lose her welfare benefits for her children.[185] The Court found that Lynumn's "will was overborne," writing that it was "abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'"[186]

As Professor Clare Ryan notes, the *Lynumn* decision was "hardly a model of clarity."[187] Since voluntariness turns on a totality of the

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179. Given the paucity of case law surrounding the voluntariness of consent in family regulation cases, most cases discussed address consent to search in criminal legal investigations. For a discussion of why consent is rarely litigated in family regulation cases, see infra section II.D.

180. See Lynumn v. Illinois, 372 U.S. 528, 534 (1963) ("We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced.").

181. See Colorado v. Connelly, 479 U.S. 157, 170–71 (1986) (holding that there must be *state* coercion sufficient to overcome the free will of an individual for a violation of the Fifth Amendment right against self-incrimination to accrue); Scott E. Sundby, The Court and the Suspect: Human Frailty, the Calculating Criminal, and the Penitent in the Interrogation Room, 98 Wash. U. L. Rev. 123, 126–31 (2020) (tracing the confusion of the voluntariness standard's application in confession cases).

182. 372 U.S. at 531.

183. Id. at 529, 531.

184. Id. at 531 (internal quotation marks omitted) (quoting trial testimony of Beatrice Lynumn).

185. Id. at 533.

186. Id. at 534.

187. Ryan, supra note 29, at 431.

circumstances, it is near-impossible to say which factors the court found decisive among the invocation of a long prison sentence, the presence of three officers and another man in her apartment late at night, her lack of experience with the criminal legal system, and the threats to her children.[188] But that the Court listed the threats to Lynumn's children first in its list of considerations gives some indication of the Court's serious concern with this category of police conduct.

Subsequent applications of *Lynumn* have been inconsistent.[189] A Ninth Circuit case, *United States v. Tingle*,[190] may represent a high-water mark of judicial recognition of the coercive effect of threats to the parent–child relationship.[191] That case, too, involved a young mother who confessed to police officers, this time after they told her she could be reunited more quickly with her child if she "cooperate[d]."[192] The Ninth Circuit found her confession involuntary, writing that the "relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit 'cooperation,' they exert the 'improper influence.'"[193] Similarly, the Seventh Circuit held that "explicit threats to a suspect's custody of a young child are presumed to be coercive" when weighing the voluntariness of a confession.[194]

But even these cases do not establish a bright-line rule that any mention of individuals' children overbears their will in confession cases.[195] Courts have found confessions voluntary when state actors make vague statements like "think of your kids."[196] They are more troubled by statements that invoke the state's power to separate children from their parents—for instance, a threat to separate a parent from a child via arrest or call a local family regulation agency.[197] (That invocation is, of course, more direct when family regulation investigators are present and

188. Id. at 431–32.

189. Id. at 432.

190. 658 F.2d 1332 (9th Cir. 1981).

191. See Ryan, supra note 29, at 432 (describing *Tingle* as a "broader interpretation" of *Lynumn* and noting that *Tingle*'s interpretation has not been consistently adopted by other circuits).

192. *Tingle*, 658 F.2d at 1336.

193. Id.

194. Lentz v. Kennedy, 967 F.3d 675, 691 (7th Cir. 2020) (citing Janusiak v. Cooper, 937 F.3d 880, 891 (7th Cir. 2019)).

195. See Ryan, supra note 29, at 432 (collecting cases in which threats to children did not necessarily overcome a parent's will); see also Kate Levine, Police Suspects, 116 Colum. L. Rev. 1197, 1215–16 (2016) (collecting cases in support of the proposition that courts have "routinely held" that "threats to family members' welfare . . . do not render confessions involuntary").

196. Ryan, supra note 29, at 433–34 (internal quotation marks omitted).

197. Id.

conducting the investigation.[198]) Even then, courts may tolerate statements that they deem to accurately convey to the parent possible consequences related to child custody—for instance, a statement by police that a parent may lose custody of a child if the parent is found to have harmed the child,[199] or that the police may call the family regulation agency if no one else is available to take custody of the child upon the parent's arrest.[200] These principles regarding the voluntariness of *confessions* inform courts' analysis of the voluntariness of consent *searches*[201]—the subject of the remainder of this section.

2. *Submission to Claims of Lawful Authority.* — Perhaps the most straightforward examples of unlawful coercion in family regulation home searches are investigators' claims of lawful authority to carry out searches.

As the Supreme Court has explained, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."[202] Such a situation, the Court has said, "is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."[203] These principles apply whenever a state actor claims lawful authority to carry out a search, not just when a state actor claims to have a warrant.[204] Accordingly, state and federal courts across the country have held state actions coercive when they "imply an individual has no right to refuse consent"[205] or explicitly convey as much.[206]

Assertions of lawful authority can take several forms. Police might claim that they have a search warrant when no warrant exists[207] or that they can and will get a warrant in the absence of consent.[208] Or police might

198. See infra section II.B.4.

199. See, e.g., *Janusiak*, 937 F.3d at 892 ("The questioners spoke the truth when they said that *if* [the subject of interrogation] had harmed [her child], then she might lose custody of her children, and that if she did no harm, she could remain with them.").

200. Id. at 890–91.

201. For instance, a district court in Illinois considering the voluntariness of a parent's consent to a *search* in a criminal investigation relied on a Seventh Circuit case holding that, in the context of involuntary *confessions*, "explicit threats to a suspect's custody of a young child are presumed to be coercive." United States v. Bailey, No. 18-CR-00336-2, 2021 WL 3129314, at *6 (N.D. Ill. July 23, 2021) (internal quotation marks omitted) (quoting Lentz v. Kennedy, 967 F.3d 675, 691 (7th Cir. 2020)).

202. Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

203. Id.

204. See Schneckloth v. Bustamonte, 412 U.S. 218, 233 (1973) (noting that consent is involuntary if it is "granted only in submission to a claim of lawful authority").

205. See e.g., United States v. Harrison, 639 F.3d 1273, 1279 (10th Cir. 2011).

206. See e.g., State v. Valenzuela, 371 P.3d 627, 634 (Ariz. 2016) (holding that proof of consent is insufficient when given in response to an admonition that a search is "required").

207. See *Bumper*, 391 U.S. at 550.

208. See, e.g., Eidson v. Owens, 515 F.3d 1139, 1146 (10th Cir. 2008) ("An officer's threat to obtain a warrant may invalidate the suspect's eventual consent if the officers lack the probable cause necessary for a search warrant."); United States v. Kaplan, 895 F.2d 618, 622 (9th Cir. 1990) ("Courts have drawn distinctions where, on one hand, an officer merely

claim that they do not need a warrant to carry out the search lawfully.[209] Outside the language of warrants, police can point to other laws, like implied consent laws for chemical or blood tests for drivers, and present searches as "required."[210] Or, police can imply their lawful authority by beginning to undertake the search prior to receiving consent.[211] Consent extracted after claims like these is involuntary because any reasonable person from whom consent is sought would not believe they had an actual choice. Either they consent and the police carry out the search or they refuse to consent and the police carry out the search anyway under their asserted lawful authority.[212]

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says that he will attempt to obtain a search warrant or whether, on the other hand, he says he can obtain the search warrant, as if it were a foregone conclusion."); State v. Barker, 739 N.E.2d 192, 193 (Ind. Ct. App. 2000) (finding that consent was involuntary when officers told the subject that they would get a warrant if she refused their entry).

209. See, e.g., United States v. Molt, 589 F.2d 1247, 1251–52 (3d Cir. 1978) (holding that consent was involuntary when customs agents asserted the legal authority to conduct a warrantless search of a business's records); Lobania v. State, 959 S.W.2d 72, 73–74 (Ark. Ct. App. 1998) (holding that consent was involuntary when a police translator mistranslated an officer's request to search as the officer claiming authority to search); Lavigne v. Forshee, 861 N.W.2d 635, 639 (Mich. Ct. App. 2014) (per curiam) (holding that consent was involuntary when police officers told the subject that "they did not need a warrant to enter and search the home").

210. See, e.g., *Valenzuela*, 371 P.3d at 629 (holding that consent was involuntary when it was premised on misrepresenting implied consent law); People v. Mason, 214 Cal. Rptr. 3d 685, 703 (Cal. App. Dep't Super. Ct. 2016) (same); Cooper v. State, 587 S.E.2d 605, 612–13 (Ga. 2003) (same); see also United States v. Vázquez, 724 F.3d 15, 23 (1st Cir. 2013) (finding that consent was involuntary when federal agents told the subject that her state's probation and parole agency had the authority to search her and planned to do so); State v. McCants, 854 S.E.2d 415, 435 (N.C. Ct. App. 2020) ("This logic applies equally when law enforcement officers[,] [regardless of agency,] claim authority to search a home under a condition of [probation or parole] requiring the supervisee to submit to the search.").

211. See Watson v. State, 691 S.E.2d 378, 383 (Ga. Ct. App. 2010) (finding that consent was involuntary when it was in submission to an officer's display of legal authority, asserted by illegally entering the suspect's home); see also United States v. Tovar-Rico, 61 F.3d 1529, 1536 (11th Cir. 1995) (finding that consent was involuntary when it was obtained after officers had already entered every room of a home); State v. Marino, No. 2-01-474-CR, 2003 WL 851953, at *2 (Tex. App. Mar. 6, 2003) (finding that consent to a dog sniff was involuntary when it was obtained after an officer had directed the occupant on how to prepare his car for the dog sniff); Green v. State, 594 S.W.2d 72, 74 (Tex. Crim. App. 1980) (finding that an occupant's consent to a search of their hotel room was involuntary when consent was not obtained until after officers had used a hotel manager's key to unlock the hotel door and begun to open the door).

212. See State v. Lovato, 478 P.3d 927, 932–33 (N.M. 2020) (describing the two choices given by the officer as conveying that search was "inevitable" and explaining that "[w]hen an officer unequivocally asserts that he will be able to obtain a warrant, a defendant's belief that refusal to consent would be futile demonstrates involuntary consent" (alteration in original) (internal quotation marks omitted) (quoting State v. Davis, 304 P.3d 10, 15 (N.M. 2013))).

That mere acquiescence to an assertion of state authority is not valid consent may seem so obvious as to be unremarkable.[213] Yet parents and advocates in family regulation investigations report that such assertions are made every day.[214] To understand the implications of representations of lawful authority for searches in family regulation investigations, consider three cases:

In the first, the family regulation investigator seeks entry to a home by telling a parent, "This is not a criminal case, I don't need a warrant"—a representation that agency personnel once put in writing via text message to a parent I represented.[215] In the second, the investigator tells the parent, "I have to come in to complete the investigation. It's required."[216] In the third, the investigator works with shelter staff to gain access to a family's shelter unit, then once inside, tells the parent, "I'm going to look around, okay?"[217] In each, the parent ultimately acquiesces.

In all of these scenarios, under established case law, the parent's consent would be involuntary. In the first, the investigator has explicitly misstated the scope of their search authority, as in cases where police claim to have a warrant or claim that they do not need a warrant.[218] In the second, the investigator has presented the search as legally mandated, as in driving under the influence cases where police assert that a medical test is required by state law.[219] And in the third, the investigator has implied their authority by beginning the search prior to seeking consent, as where a police officer opens the door and steps inside a home before seeking

213. See Simmons, supra note 25, at 806 (stating that it is beyond question that consent would be involuntary "if a police officer told a suspect, 'The law requires that you allow me to search'").

214. See supra section II.A.2.

215. Officials with the same agency made a similar, broader claim to a reporter. Hager, Police Need Warrants, supra note 4 ("[New York City family regulation] officials drew a distinction between their work and what police do, saying that the Fourth Amendment applies only to the criminal justice system . . . .").

216. This language draws from Phillips v. County of Orange, 894 F. Supp. 2d 345, 371 (S.D.N.Y. 2012) ("Plaintiffs also have alleged that [the investigator] told them that the home visit was 'required' as part of the investigation. This allegation cuts against a finding of voluntariness because Plaintiffs' recounting of events suggests that [they] were told that they had no choice but to allow the home inspection." (citation omitted) (citing Third Amended Complaint ¶¶ 256, 412)); see also Fong, Investigating Families, supra note 22, at 103 (recounting one social worker's framing of an optional home visit as compulsory).

217. This account reflects the increased likelihood that families with insecure housing will be reported for child maltreatment. Casey Fam. Programs, What Do We Know About the Impact of Homelessness and Housing Instability on Child Welfare-Involved Families? 1 (2019), https://www.casey.org/media/TS_Impact-homelessness-housing-instability_2021.pdf [https://perma.cc/GE3J-3BST]; see also Kelley Fong (@kelley_fong), X (Oct. 14, 2022), https://x.com/kelley_fong/status/1580949234425004032 [https://perma.cc/XS9F-4FNN] (recounting one mother's experience with an investigator who said, "I'm going to take a look" after having already entered her home (internal quotation marks omitted) (quoting a mother)).

218. See supra notes 205–208 and accompanying text.

219. See supra note 209 and accompanying text.

consent.[220] In these scenarios, the parent's eventual acquiescence is not consent. Rather, they have given in to a show of unlawful state authority by a family regulation investigator.

3. *Threats to Arrest or to Escalate Punitive Consequences.* — State actors' threats of arrest or other "punitive ramifications"[221] for refusal to consent may also render consent involuntary, particularly where the state actors do not have legal authority to carry out their threat.

As a baseline, a person's refusal to consent to a search does not, on its own, furnish a legal basis to detain or arrest that person.[222] But state actors seeking consent may still have reasonable suspicion or probable cause for some defined offense separate from refusal to cooperate.[223] Thus, courts distinguish between two scenarios.[224] On one hand, courts typically consider threats by state actors to detain or arrest a person who is refusing consent unduly coercive where the state actor does not have a legal basis to detain or arrest the person.[225] On the other hand, when the same threat

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220. See supra note 210 and accompanying text.

221. Other "punitive ramifications" might include, for example, a period of detention. See Eidson v. Owens, 515 F.3d 1139, 1146–47 (10th Cir. 2008) ("[A threat of detention] is coercive, as it indicates that there are punitive ramifications to the exercise of the constitutional right to refuse consent.").

222. See Florida v. Bostick, 501 U.S. 429, 437 (1991) ("[A]n individual may decline an officer's request without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." (citation omitted)); see also United States v. Boyce, 351 F.3d 1102, 1111 (11th Cir. 2003) ("Because the tape shows that [the officer] did unlawfully base his decision on [the subject's] refusal to consent, the detention and search were unconstitutional."); United States v. Williams, 271 F.3d 1262, 1271 (10th Cir. 2001) (noting that a search subsequent to a seizure would "of course" be unconstitutional if the seizure were based "solely on [the subject's] refusal to consent to the officer's request to search the vehicle").

223. See William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 539 (2001) ("In both instances, the operative word is 'crime.' If that word includes enough behavior, if crime is defined broadly enough, police can stop or arrest whomever they wish.").

224. See, e.g., Feldman v. State, No. A-8605, 2005 WL 121866, at *2 (Alaska Ct. App. Jan. 19, 2005) ("[I]f police have the right to make that threat—in other words, if police are simply advising the defendant about what they have a legal right to do—that statement, standing alone, will not normally make the ensuing consent involuntary."); State v. Brunner, 507 P.2d 233, 239 (Kan. 1973) ("Where consent is obtained by threat of consequences without justification in law, such consent cannot be said to be voluntary.").

225. See, e.g., United States v. Tillman, 963 F.2d 137, 144 (6th Cir. 1992) (finding that consent was involuntary when police threatened to detain a subject for several hours without probable cause unless he consented to a search); United States v. Bohannan, No. 13-CR-229(JCH), 2017 WL 1536391, at *2–5, *9, *11 (D. Conn. Apr. 28, 2017) (finding that consent was involuntary when the government had no legal right to arrest the subject and noting that "the degree to which the officers' statements had a detrimental effect on the voluntariness of [her] consent depends, at least in part, on whether the statements were true" (internal quotation marks omitted) (quoting United States v. Bohannon, 67 F. Supp. 3d 536, 552 (D. Conn. 2014), rev'd, *Bohannon*, 2017 WL 1536391)); Anderson v. Moore, No. 5:15-CV-26-OC-30PRL, 2016 WL 4369543, at *6 (M.D. Fla. Aug. 16, 2016) ("[A] reasonable

is made by an actor *with* the legal basis to carry out that threat, courts are far less likely to find this sort of threat coercive.[226]

Recall that family regulation investigators carry out home searches for virtually every investigation, regardless the underlying allegation.[227] This means that any sort of allegation can give rise to an investigator threatening a parent with arrest explicitly ("Police will arrest you") or implicitly ("We will call law enforcement") if the parent declines to consent to a home search.[228] Whether such a threat vitiates consent turns on whether state actors have the necessary level of suspicion to carry out the threatened action lawfully.

In criminal investigations, this inquiry may resolve easily in the state's favor, given the wealth of possible criminal charges.[229] But in family regulation investigations, probable cause to arrest the parent for a *criminal* offense may be more difficult to assert. A parent's refusal to allow a search cannot alone furnish the requisite suspicion.[230] Further, child

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officer would know that a threat of unlawful detention would render consent involuntary."); State v. Childs, 64 P.3d 389, 394 (Kan. 2003) (suppressing the fruits of a search and agreeing with the search's subject that "consent was coerced . . . based . . . on the officer's threat to arrest him when arrest was not a possibility"); State v. Ortega, 202 P.3d 912, 912 (Or. Ct. App. 2009) (per curiam) (approving of the state's concession that consent was involuntary when an officer threatened to arrest the subject without probable cause).

226. See, e.g., *Eidson*, 515 F.3d at 1146–47 (finding that consent was voluntary when police threatened to detain the subject for three days but there was probable cause for her arrest); United States v. Green, No. 16 CR. 281 (PGG), 2018 WL 6413485, at *24 n.14 (S.D.N.Y. Dec. 6, 2018) (noting that "[w]here officers obtain consent to search through threats of arrest, courts' voluntariness analysis often turns on whether officers misrepresented the risk of arrest" and finding that consent was voluntary), aff'd sub nom. United States v. Johnson, Nos. 21-1896 (L), 21-1923 (con), 21-2244, 2024 WL 254118 (2d Cir. Jan. 24, 2024); People v. Walton, 990 N.E.2d 861, 866–67 (Ill. App. Ct. 2013) (finding that consent was voluntary when police threatened to arrest the subject but there was probable cause for her arrest); People v. Arriaga, 765 N.Y.S.2d 314, 315 (N.Y. App. Div. 2003) (finding that consent was voluntary when the subject was threatened with arrest but police "would have had a legitimate basis upon which to arrest her" (citing N.Y. Penal Law § 205.60 (McKinney 2003))); Jensen v. State, No. 08-15-00029-CR, 2016 WL 4379445, at *4 (Tex. App. Aug. 17, 2016) (noting that "an unfounded threat to arrest a person, or those close to him, raises the specter of coercion" but that the threat in the case was not unfounded). Courts may also find consent involuntary when arrest is threatened, even if probable cause to arrest exists, under a totality of the circumstances analysis. State v. Ormosen, No. 2022AP1962-CR, 2024 WL 1787134, at *6 (Wis. Ct. App. Apr. 25, 2024) (rejecting the state's argument that the court could not consider threats to arrest when there was probable cause and finding consent involuntary).

227. See supra section I.A.

228. See supra notes 167–169 and accompanying text.

229. Burke, supra note 55, at 526 (describing police officers' breadth of discretion over classifying transgressions).

230. See supra note 219 and accompanying text; see also Payne v. Wilder, No. CIV 16-0312 JB/GJF, 2017 WL 2257390, at *41 (D.N.M. Jan. 3, 2017) (construing a state statute criminalizing parents' failure to cooperate with family regulation investigations to be constitutional because "law enforcement officers still have to comply with the federal and

maltreatment investigations can concern allegations that do not constitute criminal conduct.[231] Because "neglect" is defined so broadly, it may be that even if a parent has engaged in conduct that constitutes child neglect under *civil* statutes, that same conduct does not furnish probable cause to *arrest* the parent for any *criminal* offense.[232] Finally, investigations may be based on anonymous tips or other evidence that would be too speculative to support probable cause to arrest.[233] Thus, adequate suspicion to arrest or detain a parent in a family regulation investigation may not exist.

Take the experience of Shalonda Curtis-Hackett, a Black mother in New York.[234] Curtis-Hackett became the subject of a family regulation investigation in 2021 after an anonymous caller alleged that her children looked undernourished.[235] She initially resisted an investigator's request for consent to a home search.[236] Curtis-Hackett relented, however, after the investigator threatened to call the police.[237] At the time of the threat, the investigator lacked probable cause to arrest Curtis-Hackett: Being a parent of an undernourished child is not, ipso facto, a crime.[238] Even if it were, an anonymous, uncorroborated tip cannot furnish probable cause to support arrest in a criminal matter under New York law.[239] (The investigation never turned up evidence that Curtis-Hackett's children were undernourished—indeed, her husband is a professional chef.[240] Curtis-

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state Constitutions and must conduct a search pursuant to a warrant unless [it] falls within [a] narrow exception[]").

231. Gupta-Kagan, Beyond Law Enforcement, supra note 51, at 358, 368.

232. See Tolulope Adetayo, Rafaela Rodrigues, Monica Bates & Leslye E. Orloff, Nat'l Immigrant Women's Advoc. Project, Appendix O: State Definitions of Child Endangerment as More Severe Than Neglect (2017), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-O-Endangerment-Chart.pdf [https://perma.cc/7S9UWF7M].

233. See Lafave, supra note 10, § 3.3(a) n. 26 (describing federal and state courts' approaches to weighing whether anonymous tips furnish probable cause); Dale Margolin Cecka, Abolish Anonymous Reporting to Child Abuse Hotlines, 64 Cath. U. L. Rev. 51, 54 (2014) (noting that one-sixth of reports in family regulation cases are anonymous).

234. N.Y. Assembly Hearing on Family Involvement in the Child Welfare System, supra note 113, at 72 (statement of Shalonda Curtis-Hackett).

235. Id. at 69.

236. Id. at 72–73.

237. Id. at 69.

238. New York criminalizes endangering the welfare of a child only if a person "*knowingly* acts in a manner likely to be injurious to the physical, mental or moral welfare of a child" or "fails . . . to exercise *reasonable diligence* . . . to prevent [their] child from becoming . . . a 'neglected child,'" and does so without "the intent that the child be safe from physical injury and cared for in an appropriate manner." N.Y. Penal Law § 260.10 (McKinney 2025) (emphasis added).

239. See People v. Johnson, 488 N.E.2d 439, 442 (N.Y. 1985) ("A police officer may arrest a person without a warrant when he has probable cause to believe that such person has committed a crime . . . before probable cause based on hearsay is found it must appear . . . that the informant has some basis of knowledge for the information he transmitted to the police and that the information is reliable." (citations omitted)).

240. N.Y. Assembly Hearing on Family Involvement in the Child Welfare System, supra note 113, at 74 (statement of Shalonda Curtis-Hackett). The Curtis-Hackett family

Hackett is now suing the City of New York as part of a lawsuit described in section II.C.) Thus, the investigators' implied threat of arrest as a consequence for Curtis-Hackett's initial refusal rendered her consent involuntary.[241]

4. *Threats to the Parent–Child Relationship.* — Finally, threats by family regulation investigators to remove children bear on a "primordial and fundamental value of our society."[242] If these threats do more than convey accurate information regarding possible consequences to parents, they are likely to render any consent involuntary.

Courts have considered threats to intervene in the parent–child relationship ranging from threats to lock children out of the family home until a warrant is obtained,[243] to threats to arrest all caretakers of children and necessitate the state taking the child into custody,[244] to threats to call the local family regulation agency if parents refuse consent.[245] These are powerful threats, as the Supreme Court long ago recognized.[246] In the

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subsequently sued the City of New York. See Gould v. City of New York, No. 1:24-cv-01263-CLP (E.D.N.Y. docketed Feb. 20, 2024).

241. See supra notes 224–226, 229–232 and accompanying text.

242. United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981).

243. See, e.g., United States v. Eggers, 21 F. Supp. 2d 261, 270 (S.D.N.Y. 1998) ("The agents made clear that the children would be allowed in promptly if the Miremadis consented to a search but otherwise would not be allowed back inside until after a search warrant was obtained and executed, which might take a day or two."); Flores v. State, 172 S.W.3d 742, 752 (Tex. App. 2005) ("[W]hile appellant was handcuffed in the back of the patrol car, the officers told him that if he did not consent, his mother and young son would be required to vacate the house while the officers secured the residence, despite the officers having no basis for doing so.").

244. See, e.g., United States v. Santiago, 428 F.3d 699, 705 (7th Cir. 2005) (holding that consent was voluntary in the absence of an explicit threat by police); United States v. Ivy, 165 F.3d 397, 404 (6th Cir. 1998) ("This Court now finds that such hostile police action against a suspect's family is a factor which significantly undermines the voluntariness of any subsequent consent given by the suspect."); State v. Walmsley, 344 N.W.2d 450, 454 (Neb. 1984) (holding that consent was coerced when the sheriff threatened to arrest Walmsley's wife if he did not consent to a search).

245. See, e.g., United States v. Spates, 777 F. App'x 826, 829 (7th Cir. 2019) (finding that consent was voluntary when the officer merely admitted a mandate to report to DCFS); United States v. Bailey, No. 18-CR-00336-2, 2021 WL 3129314, at *6–7 (N.D. Ill. July 23, 2021) (finding that consent was voluntary when officers merely mentioned DCFS in the defendant's presence); United States v. Almonte, 454 F. Supp. 3d 146, 154 (D.R.I. 2020) (finding that with "the Court's new understanding that Det. Fuoroli's statements to Pimentel were at odds with what DCYF actually told him, . . . Pimentel's will was overborne by Det. Fuoroli's coercive tactics and thus her consent to search was not voluntarily given"); McIlquham v. State, 10 N.E.3d 506, 513 (Ind. 2014) (finding that consent was voluntary when the police gave a balanced picture of potential child welfare outcomes); State v. Wyche, No. 40493-8-I, 1998 WL 346874, at *1 (Wash. Ct. App. June 29, 1998) (per curiam) ("The officers also told him that they would have to call Child Protective Services (CPS) for Wyche's five-year-old daughter because there was no other adult at home.").

246. See Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (finding that a confession was coerced when it was made after police threatened to cut off financial aid for and remove the petitioner's children); see also supra section II.B.1.

assessment of one court, when police told a mother "that her child would be taken away if she did not consent" to a search, police said "perhaps the one thing guaranteed to secure her consent."[247]

As with confessions,[248] not all invocations of children render a consent to search involuntary. And there are no bright-line rules to separate permissible from impermissible invocations of children.[249] But case law yields some general principles. Most notably, the more explicit and the more specious a threat, the more likely it is to render consent involuntary.[250] Thus, a police officer's statement that the state *will* take a child into custody even though other caretakers are available is more likely to vitiate consent than officers' statements that the state *may* take the child into custody if no other caretaker is available or that the family regulation agency will decide appropriate outcomes.[251] Less explicit threats may still make consent involuntary if coupled with other coercive factors—such as prolonged detention, middle-of-the-night encounters, language barriers, or threats of immigration consequences.[252] But implicit threats alone—

247. United States v. Tibbs, 49 F. Supp. 2d 47, 53 (D. Mass. 1999).

248. See supra section II.B.1.

249. Ohio v. Robinette, 519 U.S. 33, 39 (1996) (favoring a "traditional contextual approach" and "eschew[ing] bright-line rules" for consent analysis (internal quotation marks omitted) (quoting Michigan v. Chesternut, 486 U.S. 567, 572–73 (1988))).

250. Compare, e.g., United States v. Hatley, 15 F.3d 856, 858 (9th Cir. 1994) (finding that consent was involuntary when it followed the sheriff's "inappropriate[]" threat to remove a child), and *Almonte*, 454 F. Supp. 3d at 154 (finding that consent was involuntary when it followed an officer's inaccurate claim that the family regulation agency would not permit a parent to return home with their child), with Hatfield v. Berube, 714 F. App'x 99, 104 (3d Cir. 2017) (finding that consent was voluntary when the "reference to the removal of the children was grounded in proper legal authority"), and Loudermilk v. Danner, 449 F. App'x 693, 695 (9th Cir. 2011), as amended on denial of reh'g and reh'g en banc (Oct. 21, 2011) ("[T]his is not a case in which officers use a *baseless* threat of the loss of one's children to obtain a result entirely unrelated to the children.").

251. See, e.g., United States v. Ivy, 165 F.3d 397, 403 (6th Cir. 1998) (finding that consent was involuntary when the officer threatened to take the child into custody but "there were supervision alternatives to state custody"); McIlquham v. State, 10 N.E.3d 506, 513 (Ind. 2014) (finding that consent was voluntary when the officers referenced the family regulation agency but made no representations about what decision those authorities might make); People v. Rodriguez, 935 N.W.2d 51, 59 (Mich. Ct. App. 2019) (finding that consent was voluntary when the officer told the parent that he would have to call the family regulation agency if no one else was available to look after the children); Hernandez v. State, 205 S.W.3d 555, 560 (Tex. App. 2006) (finding that consent was voluntary when officers truthfully told a parent that they were mandated reporters to the family regulation agency).

252. See, e.g., United States v. Marchi, No. 3:17-CR-00055-3 (VLB), 2018 WL 1409819, at *8 (D. Conn. Mar. 21, 2018) (finding that consent was involuntary based on the parent's "concern that she would be deported and her child taken into state custody," together with other factors including her lack of English proficiency and the overbearing law enforcement presence); United States v. Santos, 340 F. Supp. 2d 527, 537–38 (D.N.J. 2004) (finding that consent was involuntary when officers threatened to take the subject's child into custody in the middle of the night while her child slept in an adjoining room and threatened to bring drug charges against her if she did not cooperate).

cases where parents point to generalized fears of family separation—are unlikely to vitiate voluntariness.[253]

Applying these principles to family regulation investigations suggests that family regulation investigators unlawfully coerce consent regularly by explicitly raising the baseless specter of family separation. As an initial note, a reasonable person would likely experience a threat from family regulation investigators to take their children into state custody as a plausible and immediate threat. Courts already recognize that such threats uttered by *police* can overbear the will of a parent. When the threats are uttered by family regulation investigators, they are all the more direct, as they come from state actors with the ostensible power to remove children.[254]

Further, a statement like "If you don't cooperate, we can remove your children" more often than not conveys *in*accurate information about possible consequences.[255] Such a statement presents a family separation as lawful and inevitable—but to lawfully separate a family during the investigation phase, the state must establish that a parent's treatment of the child presents a risk "so substantial and imminent that emergency action is necessary."[256] Most family regulation investigations do not involve such risk: Of the more than three million children involved in investigations in 2022, approximately 145,500 were ultimately placed in foster care.[257] That number may not account for every case where the state had reasonable concerns that a child would be at imminent risk if they remained in their parent's care, as the state may resolve those concerns through means other than the formal foster system.[258] But even if we double the number of children placed in foster care to generously (albeit speculatively) account for cases where such concerns existed and were resolved via other means, that leaves ninety percent of investigations where investigators never had a lawful basis for family separation and thus never

253. See, e.g., United States v. Santiago, 428 F.3d 699, 705 (7th Cir. 2005) (finding that consent was voluntary and distinguishing from an earlier case "in several crucial respects, not the least of which is the absence of any explicit finding of a threat by the police"); United States v. Bailey, No. 18-CR-00336-2, 2021 WL 3129314, at *6–7 (N.D. Ill. July 23, 2021) (finding that consent was voluntary when there was "no evidence that [any officer] made any explicit threat regarding [subject's] custody of her daughter").

254. See, e.g., DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 208 (1989) (Brennan, J., dissenting) ("[State] law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse.").

255. For examples of such threats, see supra section II.A.4.

256. Gupta-Kagan, Hidden Foster Care, supra note 13, at 860; see also, e.g., N.J. Stat. Ann. § 9:6-8.32 (West 2025); N.Y. Fam. Ct. Act § 1027(b)(i)–(ii) (McKinney 2025); Va. Code § 16.1-251(A)(1) (2024).

257. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv.

258. For instance, the state may arrange for children to be placed in informal foster care, Gupta-Kagan, Hidden Foster Care, supra note 13, at 847, or further investigation may resolve the state's concerns.

had a lawful basis to threaten it.[259] Add in other factors, like family regulation investigators threatening to remove children during unannounced, middle-of-the-night visits[260] or speaking to parents in English when they lack fluency,[261] and the rate of unduly coercive threats ticks higher still.

Take an investigation into a teacher's report that a child does not have weather-appropriate clothing. This sort of report is common in the family regulation system.[262] It is likely to trigger an investigator to attempt a comprehensive home search,[263] but unlikely to provide a basis for removal on its own.[264] If an investigator raises removal as a realistic possibility to a parent who refuses a home search (for example, an investigator might say "Your child will be removed if we can't get access"), they are making that threat absent any lawful basis. That explicit and specious threat is unconstitutionally coercive.[265]

C. *The Promise of a Constitutional Argument*

The previous section outlined the unconstitutionality of three common tactics used by family regulation investigators to extract consent for home searches. More than abstract legal principles, that section offers a theory that could help pave a path to increased privacy protections for race–class subjugated families.

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259. See supra notes 249–250 and accompanying text.

260. See Complaint at 26, L.B. v. City of New York, No. 1:23-cv-08501-NRM-JRC (E.D.N.Y. filed Nov. 15, 2023) (describing how a family court judge admonished the family regulation agency that "showing up in the middle of the night is traumatic; taking off kids' clothes is traumatic" (internal quotation marks omitted) (quoting the family court judge in L.B.'s case)); Conn. D.C.F. Interview, supra note 1 (noting that parents' perception of the agency became less tense after investigators began announcing their visits).

261. In practice, I represented a parent whose first language was Mixteco, an indigenous Central American language. Her children's school had called the state's child maltreatment hotline over concerns that she was not addressing one of the children's mental health needs. The school's initial call included a note that she did not know any English and had only limited proficiency in Spanish, and school personnel speculated that she was either intellectually disabled or unable to understand the school's communications. Despite these many warnings, the family regulation investigators who went to her home attempted to speak with her only in English and Spanish, then sought an order to remove her children because of her failure to "cooperate" with their demands. I was assigned to represent the parent when the agency sought that order; the judge declined to grant it.

262. See N.Y.C. Admin. for Child.'s Servs., Flash Report: Monthly Indicators 32 (2024), https://www.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2024/05.pdf [https://perma.cc/VHT4-STTF] (noting that investigations may include allegations of "inadequate . . . clothing").

263. See supra section I.A.

264. See Nicholson v. Scoppetta, 820 N.E.2d 840, 849 (N.Y. 2004) (setting a high bar for removal and noting that "in many instances removal may do more harm to the child than good").

265. See supra notes 177–180 and accompanying text.

Scholars and advocates have long pointed out the gap between abstract constitutional protections and on-the-ground reality for families enmeshed in the family regulation system.[266] This gap can be daunting and difficult to close.[267] One difficulty has been consent, as agencies lean heavily on consent to evade Fourth Amendment constraints on home searches.[268] But consent is only valid if it is constitutionally obtained. A claim that consent is invalid may be difficult to advance in individual cases.[269] Strategic litigation systemically challenging the constitutionality of agencies' coercive tactics, however, could chip away at the family regulation system's constitutional evasion and spur changes in agency practices through the legal process and public pressure.

A recent class action in New York City exemplifies this approach.[270] The lawsuit alleges that the city's family regulation agency has a policy and practice of using unconstitutionally coercive tactics—including misrepresenting its authority, threatening to call law enforcement, and threatening family separation—to effectuate its search scheme in violation of the Fourth Amendment.[271] The suit primarily seeks injunctive relief and avoids the quagmire of qualified immunity by eschewing claims against individual employees of the family regulation agency.[272] It seeks to reshape the agency's search practices—by, for example, banning certain coercive tactics, training investigators on the constraints of the Fourth Amendment, and requiring tracking and documentation of consent.[273]

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266. See, e.g., Bridges, supra note 32, at 11 ("[P]oor mothers have no *effective* privacy rights."); Spinak, supra note 155, at 192 ("Even in states that provided a right to counsel . . . states and counties have consistently underfunded these mandates, leaving parents without counsel at all or with counsel so overwhelmed and underpaid that provision of counsel becomes a 'hollow right.'"); Washington, Pathology Logics, supra note 50, at 1578 ("The myopic focus on deficiency erases the knowledge that marginalized parents hold. Individuals are experts on their own lived experience, just as parents are intimately familiar with their own children's needs. From a constitutional perspective, this is in no way controversial."); Joyce McMillan (@JMacForFamilies), X (Oct. 26, 2021), https://x.com/JMacForFamilies/status/1453049049301532675 (on file with the *Columbia Law Review*) (sharing a video featuring several New Yorkers voicing their disapproval of ACS).

267. See infra section II.D and Part III.

268. Coleman, supra note 7, at 465; Hager, Agency Quietly Lobbying, supra note 152 (describing New York City ACS's attempts to undermine legislation that would require consent to be knowing).

269. See infra section II.D.

270. Gould v. City of New York, No. 1:24-cv-01263-CLP (E.D.N.Y. docketed Feb. 20, 2024). In the interest of transparency, this lawsuit was brought by the NYU School of Law Family Defense Clinic and the Family Justice Law Center—both firms with which this author is affiliated—in addition to two other law firms.

271. *Gould* Complaint, supra note 17, at 5.

272. Id. at 45, 48; see also Pearson v. Callahan, 555 U.S. 223, 242 (2009) (noting that qualified immunity is inapplicable in "§ 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages").

273. *Gould* Complaint, supra note 17, at 27, 30; see also Arya Sundaram, NYC Child Welfare Investigators Coerce, Traumatize Families, Class-Action Lawsuit Claims, Gothamist

Though still in discovery, the suit has received extensive coverage in local and national press.[274] Since the suit's filing, the agency has updated its public-facing materials to provide parents slightly more information regarding their right to refuse consent to home searches.[275] And there is renewed interest in state legislation that would require family regulation agencies across New York to inform parents of their rights.[276] It is too early to say whether the suit will secure sweeping changes in agency search practices through the legal process—though scattered decisions show that courts have some appetite for recognizing coercive consent searches in family regulation investigations.[277] But it is clear already that such a suit

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(Feb. 21, 2024), https://gothamist.com/news/nyc-child-welfare-investigators-coerce-traumatize-families-class-action-lawsuit-claims [https://perma.cc/J7ZV-SBQQ] (interviewing *Gould*'s lead litigator).

274. See, e.g., Bromwich & Newman, supra note 114 ("If successful, the lawsuit would require A.C.S. to fundamentally re-envision how it investigates reports of abuse and neglect."); Julia Lurie, Parents Are Suing New York City Over Coercive, Traumatizing Home Searches, Mother Jones (Feb. 21, 2024), https://www.motherjones.com/politics/2024/02/class-action-lawsuit-new-york-city-acs-home-searches-families-children/ [https://perma.cc/6RRE-CBW6] ("Over the next two years, the Goulds were subject to at least a dozen investigations . . . all of which proved to be baseless . . . ."); The Brian Lehrer Show, Lawsuit Over ACS Practices, WNYC (Feb. 22, 2024), https://www.wnyc.org/story/lawsuit-over-acs-practices/ [https://perma.cc/9PS8-P2YK] ("This case is all about making New York City a more just and more safe place for children, for parents, and for family units." (statement of David Shalleck-Klein, Exec. Dir. & Founder, Fam. J. L. Ctr.)).

275. Compare N.Y.C. Admin. for Child.'s Servs., Child Protection, https://www.nyc.gov/assets/acs/pdf/child_welfare/investigation/Important-Information-for-Families-Translations.pdf [https://perma.cc/S59T-GWU2] (last visited Jan. 18, 2024) (clarifying that families can refuse to allow ACS into their homes), with N.Y.C. Admin. for Child.'s Servs., A Parent's Guide to Child Protective Services in New York City 2 (2022), https://web.archive.org/web/20221108134053/https://www.nyc.gov/assets/acs/pdf/child_welfare/investigation/guide/ParentsGuide.pdf [https://perma.cc/9MUN-J9W7] ("CPS may make an unannounced visit to your home and will meet with you, your child, and other people in your household.").

276. See, e.g., Susan Arbetter, 'Family *Miranda*' Bills Regarding CPS Are Again in the Mix in Albany, Spectrum News 1 (Apr. 9, 2024), https://spectrumlocalnews.com/nys/central-ny/politics/2024/04/09/-family-miranda–bills-are-again-in-the-mix-in-albany [https://perma.cc/X9WQ-P27S] (discussing two proposed bills, one that would "require that parents be informed of their legal rights before the start of any CPS investigation" and another that would change anonymous reporting to confidential reporting); Dawne Mitchell, Melissa Friedman & Daniella Rohr, Opinion: The Harmful Impact of Invasive Child Welfare Investigations, City Limits (Mar. 18, 2024), https://citylimits.org/2024/03/18/opinion-the-harmful-impact-of-invasive-child-welfare-investigations/ [https://perma.cc/TJS5-YBXU] (advocating for ending anonymous reporting, eliminating mandated reporting, and requiring investigators to advise parents of their legal rights).

277. See, e.g., Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth, 891 F.2d 1087, 1093 (3d Cir. 1989) ("[T]he consent required must be freely given. It is ineffective if extracted by the state under threat of force or under claim of government authority."); L.B. v. City of New York, No. 23-CV-8501 (RPK) (JRC), 2025 WL 788662, at *3 (E.D.N.Y. Mar. 12, 2025) (declining to dismiss a parent's Fourth Amendment search claim where the parent "nominally gave her consent" to investigators but alleged she did so "only because the investigators to her that she was 'required' to permit such access and threatened to initiate legal action if she did not comply" (citing Memorandum of Law in Support of Plaintiffs'

can be, at least, a magnet for public attention and a driver for institutional and political change.

Changes in search practices can increase family privacy and security by reducing how many parents consent to invasive searches. As the following sections explain, the reduction in parents' rate of consent may be modest.[278] It is possible, too, that if agencies cannot obtain consent, they will instead apply for more warrants to search homes and still gain access.[279] But resource constraints are likely to prevent agencies from seeking court orders in every case in which they currently obtain consent.[280] Given the huge volume of investigations each year, even a small decrease in the number of total searches would annually spare thousands of families the harms of home searches.[281]

D. *The Limits of a Constitutional Argument*

There are limits to the practical usefulness and reach of a constitutional argument. The careful framing of the previous section reveals as much: This Article does not suggest that many individual families could successfully deploy such an argument to protect themselves from imminent encroachments on their homes, to suppress evidence collected

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Opposition to Defendants' Partial Motion to Dismiss the Amended Complaint at 19–21, *L.B.*, 2025 WL 788662)); Phillips v. County of Orange, 894 F. Supp. 2d 345, 371–72 (S.D.N.Y. 2012) ("Where state officials have 'claimed official authority to conduct [a] search,' an individual 'should not be found to have consented' to the search, because he or she is merely acquiescing to a 'show of authority.'" (alteration in original) (quoting United States v. Milligan, No. 3:09-CR-246-RNC, 2011 WL 3930284, at *5 (D. Conn. May 4, 2011))).

278. See infra section IV.A.

279. See Child Welfare Indicators Report, supra note 8, at 16 (noting that 219 of 226 (95.6%) court orders to enter families' homes were granted). This also assumes marginal or no change in the rate at which agencies could credibly claim exigent circumstances. See Ismail, Family Policing, supra note 4, at 1540 ("[B]ecause there is no opportunity to address an unconstitutional search through the exclusionary rule, the likelihood of unredressed improper searches conducted via exigent circumstances is higher in CPS searches than in, say, the criminal context.").

280. See, e.g., N.Y. Senate Comm. on Judiciary & N.Y. Senate Comm. on Child. & Fams., The Crisis in New York's Family Courts 3 (2024), https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-02/2.12-family-court-hearing-report-w-graphics-1.pdf [https://perma.cc/TU5P-3W8N] ("Despite the supreme importance of these matters, New York's Family Courts are overburdened and under-resourced . . . ."); Ctr. for Fams., Child. & the Cts., Jud. Council of Cal., Unified Courts for Families: Improving Coordination of Cases Involving Families and Children 2 (2008), https://courts.ca.gov/sites/default/files/courts/default/2024-08/improvingcoordination.pdf [https://perma.cc/ZT4Z-PLKY] (describing family courts as under-resourced).

281. See, e.g., Lindsey Palmer, Sarah Font, Andrea Lane Eastman, Lillie Guo & Emily Putnam-Hornstein, What Does Child Protective Services Investigate as Neglect? A Population-Based Study, 29 Child Maltreatment 96, 98 (2024) (noting that there were 231,728 family regulation investigations in California in 2017); N.Y.C. Admin. for Child.'s Servs., About ACS, https://www.nyc.gov/site/acs/about/about.page [https://perma.cc/WWW2-AL3Q] (last visited Jan. 18, 2025) ("Each year, the agency's Division of Child Protection conducts more than 55,000 investigations of suspected child abuse or neglect.").

via unconstitutional home searches, or to win damages in civil suits. Nor does this Article suggest that an argument rooted in the limited understanding of voluntariness that controls in Fourth Amendment jurisprudence gets at all—or even most—state coercion in family regulation investigations.

First, though parents suffer a constitutional injury when investigators use unlawfully coercive tactics to extract consent, few parents find redress for that injury. Parallels to criminal law point toward an established remedy: an exclusionary rule to suppress the fruits of unconstitutional searches and deter unlawful agency search practices.[282] But state courts around the country have declined to adopt an exclusionary rule in family regulation proceedings, so even if a judge were to agree that an investigator obtained consent through unconstitutional concern, the state could still introduce the evidence collected during the search against the parent.[283] A parent might attempt to convince a judge to exclude the fruits of a search under other evidentiary rules,[284] but in doing so the parent would be fighting against the culture of compliance that pervades family court.[285] Judges, like investigators, emphasize cooperation and de-emphasize rights, discouraging parents from litigating Fourth Amendment violations.[286]

Further, few families subjected to searches end up in family court.[287] For most families, this leaves civil litigation as the only avenue for relief.

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282. See Mapp v. Ohio, 367 U.S. 643, 656–60 (1961) ("[T]he exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . .").

283. See, e.g., In re Christopher B., 147 Cal. Rptr. 390, 394 (Cal. Ct. App. 1978) (holding the exclusionary rule to be inapplicable to family regulation proceedings); In re Robert P., 132 Cal. Rptr. 5, 12 (Cal. Ct. App. 1976) (same); People ex rel. A.E.L., 181 P.3d 1186, 1192 (Colo. App. 2008) (same); In re Nicholas R., 884 A.2d 1059, 1062 (Conn. App. Ct. 2005) (same); Idaho Dep't of Health & Welfare v. Doe, 244 P.3d 247, 257 (Idaho Ct. App. 2010) (same); In re Corey P., 697 N.W.2d 647, 655 (Neb. 2005) (same); State ex rel. Child., Youth & Fams. Dep't v. Michael T., 172 P.3d 1287, 1290 (N.M. Ct. App. 2007) (same); In re Diane P., 494 N.Y.S.2d 881, 882 (N.Y. App. Div. 1985) (same); State ex rel. Dep't of Hum. Servs. v. W.P., 202 P.3d 167, 173 (Or. 2009) (en banc) (same); State ex rel. A.R. v. C.R., 982 P.2d 73, 78–79 (Utah 1999) (same). Texas recently enacted a statute that excludes evidence collected if the worker has not informed parents of their rights. Tex. Fam. Code Ann. § 261.307(e) (West 2023) (providing that evidence obtained without the subject receiving a "verbal notification and written summary" of their legal rights is inadmissible in civil proceedings).

284. See, e.g., Tex. R. Evid. 403 (allowing for exclusion of "relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice").

285. See Arons, Empty Promise, supra note 6, at 1076–80 (outlining the orientation of family court judges).

286. See, e.g., Clark v. Stone, 998 F.3d 287, 292 (6th Cir. 2021) (recounting a state circuit court judge's claim to a father that there was no Fourth Amendment right to stop home visits by the Kentucky Cabinet for Health and Family Services).

287. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv (reporting that 2,537,202 of 3,096,101 investigations (82%) closed without substantiating allegations against parents and 145,449 investigations (5%) led to foster care placements, which necessitate court involvement).

While coordinated civil litigation holds promise,[288] civil litigation is inaccessible for many individual plaintiffs.[289] It is hardly probable that millions of parents will pursue it. Further, plaintiffs seeking money damages have to overcome qualified immunity to prevail, which can be difficult, since that requires parents to establish that they were subject to a coercive tactic that violated "clearly established" rights of which a reasonable investigator would have known.[290] Finally, challenges to search tactics in family court or in civil litigation often pit parents' accounts against state actors', and parents may struggle to win that credibility contest.[291]

Second, and more fundamentally, the voluntariness standard enunciated by the Supreme Court fails to reach the forms of coercion present in virtually every family regulation investigation—indeed, present in virtually every encounter between individuals and the state. As it has embraced an increasingly objective standard for consent, the Court has shifted its focus from the subjective experiences of individuals from whom consent is sought, to the overt actions of state actors.[292] This move protects

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288. See supra section II.C.

289. See Lisa V. Martin, No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22, 71 Fla. L. Rev. 831, 857 (2019) ("[L]egal aid organizations are only able to take on fewer than half of the legal problems that individuals who qualify for services ask them to resolve." (citing Legal Servs. Corp., The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans 13 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/5VXH-MDKG])).

290. See White v. Pauly, 580 U. S. 73, 78–79 (2017) (per curiam) ("Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam))); see also *Clark*, 998 F.3d at 302 ("Because [of] the presence of the court order . . . a reasonable social worker in the position of the defendants would not have understood that he was violating the Clarks' Fourth Amendment rights."); Andrews v. Hickman County, 700 F.3d 845, 859–63 (6th Cir. 2012) (holding that social workers who relied on police instructions to enter a home without a warrant were immune); Loftus v. Clark-Moore, 690 F.3d 1200, 1205 (11th Cir. 2012) (holding that questioning a child at school without a warrant did not violate a well-established right and was therefore covered by qualified immunity); Gates v. Tex. Dep't of Protective & Regul. Servs., 537 F.3d 404, 424–27 (5th Cir. 2008) (finding that the defendants were entitled to qualified immunity due to the uncertain place of child abuse investigations in the special needs doctrine at the time of the search); Tenenbaum v. Williams, 193 F.3d 581, 601–06 (2d Cir. 1999) (finding that removing a child from school and conducting a medical examination without a warrant was shielded by qualified immunity because of the Fourth Amendment's ambiguous applicability to child abuse investigations).

291. See, e.g., United States v. Williams, Criminal Action No. 12-100, 2012 WL 3550467, at *4 (E.D. Pa. Aug. 17, 2012) ("To the extent that the testimony of the police officers conflict with that of Ms. Williams, we believe the police officers."); United States v. Groves, No. 3:04-CR-76, 2007 WL 171916, at *8 (N.D. Ind. Jan. 17, 2007) (accepting the police officers' claims that they did not threaten the parent's custody of their child over the parent's claim that such a threat was made), aff'd, 530 F.3d 506 (7th Cir. 2008); United States v. Gomez, No. S 92 CR. 584 (CSH), 1992 WL 315633, at *2 (S.D.N.Y. Oct. 21, 1992) (same).

292. Nadler, supra note 141, at 214.

and legitimizes implicit forms of coercion, like the inherent power imbalance between state actors and the subjugated individuals from whom they seek consent or parents' well-placed fears that state actors who *can* take their children *will* take their children.[293]

As a result, courts set aside parents' fears of family separation when those fears are not, in the courts' estimation, based on explicit threats by state actors.[294] While accounts by parents, advocates, and agencies reveal explicit threats and misrepresentations to be common features of family regulation home searches, investigators need not resort to such tactics in many—perhaps most—investigations. The mere presence of an investigator can make parents feel unable to refuse the investigator entry to their home.[295] A search conducted under consent extracted through implicit pressure still inflicts harm on families and communities.[296] But such a search is likely to fall within the bounds of constitutionally permissible consent.[297] Thus, even if the litigation outlined in section II.C succeeds, it will leave intact a family surveillance apparatus that puts eyes in the homes of hundreds of thousands of families annually.

As an illustration of the limits of constitutional litigation, consider the example of stop-and-frisk in New York City. After landmark litigation established that the New York City Police Department (NYPD) used a widespread practice of conducting unconstitutional suspicionless stop-and-frisks of Black and Latine New Yorkers, the rate of unconstitutional stops fell dramatically, as did the overall (reported) number of stops.[298] Yet

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293. See supra section II.A.

294. See United States v. Bailey, No. 18-CR-00336-2, 2021 WL 3129314, at *6–7 (N.D. Ill. July 23, 2021) (finding that consent was voluntary because there was no evidence that a state actor had made an explicit threat to child custody); Zimmer v. New Jersey Div. of Child Prot. & Permanency, Civ. Action No. 15-2524 (FLW) (DEA), 2017 WL 4838843, at *10 (D.N.J. Oct. 26, 2017) (concluding that a father's "unvoiced, subjective belief that [his child] would be removed from their house if they did not comply with the search, without more, is insufficient for this Court to find that [the state actors'] belief that Plaintiffs consented to the search was unreasonable"), aff'd, 741 F. App'x 875 (3d Cir. 2018); State v. Cromer, 186 S.W.3d 333, 348 (Mo. Ct. App. 2005) ("[The mother's] fear alone, without more, is not enough to render her consent involuntary to an objective observer.").

295. See supra section II.A.

296. See supra section I.B.

297. Cf. United States v. Drayton, 536 U.S. 194, 206 (2002) (emphasizing that an officer did not "command" the subject to consent and finding that consent was voluntary).

298. For the rate of legally valid stops, compare Sixteenth Report of the Independent Monitor at 5, Floyd v. City of New York, No. 1:08-cv-01034-AT (S.D.N.Y. filed May 6, 2022), ECF No. 885 (reporting the results of an audit showing that more than 50% of stops performed in 2016 were unconstitutional), with End of Year Monitor Update at 6–7, *Floyd* (S.D.N.Y. filed Feb. 22, 2024), ECF No. 923 (reporting the results of an audit showing that 11.3% of stops performed in 2022 were unconstitutional). For the overall number of stops, see A Closer Look at Stop-and-Frisk in NYC, NYCLU (Dec. 12, 2022), https://www.nyclu.org/data/closer-look-stop-and-frisk-nyc [https://perma.cc/593D-Y8F4] (showing trends in NYPD's stop-and-frisk practices from 2003 to 2023); see also End of Year Monitor Update at 7, supra (reporting the results of an audit showing that police did not document 31% of stops in 2022).

the NYPD still reports more than fifteen thousand stops a year, continuing to impact almost exclusively Black and Latine New Yorkers by exposing them to police violence and eroding their trust in police, though the practice rarely reveals evidence of illegal behavior.[299] The problem with stop-and-frisk now is less often that the police lack a constitutional basis for stops and more often that still-constitutional stops harm race–class subjugated communities.[300]

The next Part explores whether there are interventions outside constitutional law that can offer families, particularly families in race-subjugated communities, more fulsome protection from coercion, surveillance, or both.

III. DISENTANGLING CONSENT REFORMS AND SEARCH REFORMS

This Article has shown that family regulation home searches are pervasive and violent intrusions, that consent serves as justification for many of these searches, and that investigators extract parents' consent through implicit and explicit coercion, with few checks. This single (long) sentence points to at least three problems. First, even when parents are subjected to unconstitutionally coercive tactics, they rarely receive relief. Second, consent doctrine does not protect parents from implicit but still overbearing coercion. And third, regardless of their legality or justification, searches harm families. The third of these problems is the most fundamental: Consent fuels the family surveillance apparatus. No matter its fuel, the apparatus itself hurts families and communities,[301] even as it fails to increase child safety.[302]

In considering solutions to these problems, consent can function as a smokescreen. By focusing on consent doctrine, we lose sight of the surveillance for which consent provides cover. Across hundreds of pages in dozens of articles, scholars have carefully explicated the outlines of a concept of consent that they can live with.[303] But this approach centers

299. See A Closer Look at Stop-and-Frisk in NYC, supra note 298 (reporting that 91% of stops in 2023 were of Black or Latine New Yorkers, though these groups comprise only 52% of the city's population).

300. See Johanna Miller & Simon McCormack, NYCLU, Shattered: The Continuing, Damaging, and Disparate Legacy of Broken Windows Policing in New York City 4–6 (2018), https://www.nyclu.org/uploads/2018/10/nyclu_20180919_shattered_web.pdf [https://perma.cc/2TZM-D4MM] (describing the effects of disparate police presence and enforcement on race–class subjugated communities); Samantha Max, Stop and Frisk in NYC a Decade After Historic Court Ruling, Gothamist (Aug. 12, 2023), https://gothamist.com/news/stop-and-frisk-in-nyc-a-decade-after-historic-court-ruling [https://perma.cc/N8WJ-4RBT] (summarizing recent critiques of stop-and-frisk).

301. See supra section I.B.

302. See supra notes 85–90 and accompanying text.

303. This Article does not describe its own formulation of consent, for the reasons set forth in this paragraph. That said, this Article's views on the subject have been shaped by the work of scholars doing the creative work of describing visions of consent that reduce the state's ability to overbear individuals' will while still maintaining public safety and preserving

consent as the problem to be solved, as if, once we have found the right formula for consent and erected the right guardrails to ensure that formula is enforced, consent *searches* will no longer be a problem. These sorts of discussions risk legitimizing the searches that consent fuels by focusing on the procedure of searches rather than on their substance.[304] Further, reforms aimed at consent may do nothing to reduce the scale or scope of state surveillance.[305] That is, a solution to the problem of consent may not be a solution to the problem of searches.[306]

Thus, this Part demonstrates the importance of carefully considering how we frame "the problem of consent searches"—whether as a problem of remedies, of consent, or of searches. The framing fundamentally shapes the reforms that follow. Likewise, how we measure the success of those reforms turns on the problem to which they respond. To that end, this Part describes how distinct sets of reforms flow from conceptualizing *consent doctrine* as the problem versus *searches* as the problem. Rather than offering a definitive set of policy recommendations, this Part outlines the stakes of framing the problem. This examination makes one fact abundantly clear: Consent reforms alone cannot protect race–class subjugated communities from state surveillance. This insight is just as salient in the criminal legal

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individuals' ability to exercise free will and benefit from the efficiencies of consent. For just a few recent examples, see Burke, supra note 55, at 551–55 (arguing that courts must examine the reasonableness of the government's request for consent and the scope of the consent requested); Henderson & Krishnamurthi, supra note 55, at 41–42 (arguing that consent should only serve as a legal justification for state action in limited emergency situations); Slobogin & Weisburd, supra note 55, at 1915–16 (arguing that the voluntariness of an individual's choice should be legally irrelevant when the choice that the government has put to an individual is an "illegitimate" one under one of three theories).

304. See Shawn E. Fields, The Procedural Justice Industrial Complex, 99 Ind. L.J. 563, 608 (2024) ("Procedural justice does not merely stunt reform by presenting a false narrative of substantive change; it actively works in conflict with transformative police reform."); Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1315 (2012) (describing how an increased attention to process "embod[ies] basic legitimizing features of the criminal process"); Jocelyn Simonson, The Place of "The People" in Criminal Procedure, 119 Colum. L. Rev. 249, 255–56 (2019) (arguing that "the reigning assumptions structuring how we think about the criminal adjudicatory process legitimize inequitable practices and limit how we design procedures and approach reform"); Critical Perspectives on Rights, The Bridge, http://cyber.law.harvard.edu/bridge/CriticalTheory/rights.htm [https://perma.cc/3VC8-NDUW] (last visited Jan. 19, 2025) ("Rights discourse can actually impede progressive movement for genuine democracy and justice.").

305. See infra notes 310–324 and accompanying text (providing examples of such reforms).

306. Kate Weisburd makes a similar point regarding the difference between eliminating consent as a basis for electronic surveillance and eliminating electronic surveillance itself. See Kate Weisburd, Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring, 98 N.C. L. Rev. 717, 774 (2020) [hereinafter Weisburd, Sentenced to Surveillance] ("Requiring a warrant, or at least some level of suspicion, is a necessary but insufficient solution to the problems inherent with electronic surveillance. The other half of the solution involves . . . a shift away from relying on intensive surveillance as a necessary component of community supervision.").

system and across the carceral state as it is in the family regulation system.[307]

Two final notes: First, this Article does not discuss reforms that flow from conceptualizing *access to remedies* as the problem for a simple reason.[308] That framing starts from the position that current consent doctrine is adequate to reach all forms of coercion with which we should be concerned, and that position has already been heavily assailed in and outside of the academy.[309] Second, this Article focuses on reforms of state law, imposed by state legislatures or state courts, rather than federal constitutional reforms. This is because, though the Supreme Court has shown little interest in changing its course on consent,[310] states and local governments around the country have shown a greater appetite for solving the consent search problem.[311] Now more than ever, the question of framing is an urgent one.

A. *Framing Consent as the Problem*

This section describes two examples of state-level reforms that respond to the problem of consent searches by seeking to correct overly narrow consent doctrine. It then explains how this framing—that is, centering *consent* as the problem with consent searches—dictates the measure of success for these reforms and illustrates how the framing can give rise to reforms that leave the family surveillance apparatus intact.

1. *Examples of Consent Reforms.* — The first category of reforms requires that state actors inform individuals of their right to refuse consent. In a recent fifty-state survey, Professor Kate Weisburd found that such reforms are the most common type of consent search reforms in the

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307. Cf. Washington, Fammigration Web, supra note 56, at 129 (describing the family regulation and criminal legal systems as enmeshed strands of a carceral web rather than in a hierarchical relationship); Weisburd, Criminal Procedure Without Consent, supra note 27, at 8 (reviewing efforts to limit or ban consent in the criminal legal system).

308. One example of a reform that responds to this problem would be the adoption of an exclusionary rule in family court. For an argument for the adoption of the exclusionary rule in family regulation proceedings, see Nicole E. Imperatore, Note, Parents Under Pressure: Why CPS Needs to Tell Parents Their Rights Before Walking in the Door, 51 Hofstra L. Rev. 541, 568 (2023).

309. See supra notes 142–148 (collecting critiques of the consent doctrine).

310. The most recent Supreme Court case to contend with consent doctrine was decided more than twenty years ago. United States v. Drayton, 536 U.S. 194 (2002). That case marked the Court's most decisive embrace of an objective (more state-friendly) standard for deciding voluntariness. See id. at 206 (framing the inquiry of whether consent to a search was voluntary as whether it would be clear to a "reasonable person that he or she was free to refuse"). More generally, the Court has not taken up any Fourth Amendment questions in several terms. See Orin Kerr (@OrinKerr), X (June 20, 2024), https://x.com/OrinKerr/status/1803806297432678677 [https://perma.cc/4VY9-KV3V] ("[T]here have been no 4A cases at SCOTUS for a few Terms . . . .").

311. See infra section III.A.

criminal legal system.[312] Efforts in the family regulation system are nascent, but at least seven jurisdictions have considered or adopted measures requiring family regulation investigators to inform parents of their right to refuse consent to home searches.[313] For example, in Texas investigators must now provide written and verbal notification of the right to "refuse to allow the investigator to enter the home or interview the child without a court order,"[314] and in Connecticut investigators must provide a brochure that includes a notice that parents are "not required to permit [an agency employee] to enter [their] residence."[315]

These reforms respond to one of the most common critiques of constitutional consent doctrine: that the doctrine does not require consent to be knowing.[316] This intervention, the thinking goes, rebalances power between individuals and the state, giving individuals greater knowledge of their rights and reducing implicit coercion that might still fall within the bounds of constitutionality.[317]

Despite that thinking, early data from jurisdictions requiring knowing consent in criminal investigations shows that almost everyone consents to searches even after they are told they can refuse.[318] Anecdotal data shows the same for family regulation investigations.[319] These reports from the field reinforce academic accounts predicting that most individuals will consent to searches regardless of whether they are told of their right to

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312. See Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 9) ("In 29 jurisdictions, police are now required to tell people that they can refuse consent and (or) obtain written or recorded consent.").

313. See Ariz. Rev. Stat. Ann. § 8-809.01(A)(3) (2025) (requiring investigators to inform parents under investigation of their right to deny the investigator entry into the home absent a court order); Conn. Gen. Stat. Ann. § 17a-103d (West 2025) (requiring investigators to provide notice that parents are not required to permit an investigator to enter their residence); Mont. Code Ann. § 41-3-216(2)(b) (2024) (requiring investigators to give "a clear written description" during the initial investigation that, absent a court order, parents are not required to allow investigators to enter their residence); Tex. Fam. Code Ann. § 261.307(a) (West 2023) (requiring that investigators give oral and written notice of the right to refuse investigators entry absent a court order); H.B. 644, 446th Gen. Assemb., Reg. Sess. (Md. 2024) (proposing legislation requiring investigators to give oral and written notice that, except as otherwise provided by law, the parent or caretaker is not required to allow the investigator to enter their residence); Hager, Texas, New York Diverge, supra note 159 (discussing efforts in Texas and New York); see also Newport, supra note 159, at 891–900 (arguing for "civil *Miranda*" legislation that would require CPS to inform parents of their rights to refuse entry and seek counsel and comparing the effects of similar legislation in Connecticut, New York, and Texas).

314. Tex. Fam. Code § 261.307(a)(2)(E).

315. Conn. Gen. Stat. § 17a-103d(a)(1)(A).

316. Sommers & Bohns, supra note 25, at 1967.

317. Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 11).

318. Id. at 13 (summarizing data from New York City).

319. Hager, Police Need Warrants, supra note 4 (describing how a Connecticut agency official reported that parents' cooperation with investigations increased after warnings were instituted).

refuse.[320] All of this echoes lessons from the land of *Miranda* warnings. There, decades of experience show that telling people their rights rarely means that people will exercise their rights.[321]

A second category of reforms forbids state actors from relying on consent as the (sole) justification for searches. In some jurisdictions, police must now have an "articulable reason," "reasonable suspicion," or "probable cause" before they seek consent.[322] A handful of jurisdictions impose categorical bans on consent as a justification for law enforcement searches of pedestrians or vehicles—rendering consent legally irrelevant.[323] As an important caveat, Fourth Amendment doctrine still allows law enforcement officers to search vehicles absent consent or court order so long as they have probable cause or reasonable suspicion.[324]

To date, there are no proposals for similar limits in family regulation investigations. But given the recent popularity of reforms requiring that

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320. See, e.g., Susan A. Bandes, Police Accountability and the Problem of Regulating Consent Searches, 2018 U. Ill. L. Rev. 1759, 1766–67 ("In short, warnings are not a panacea. They may not effectively transmit their legal message that acquiescence is voluntary, and even if they do, they may not convince civilians that they are in fact free to decline."); Burke, supra note 55, at 553 ("[E]mpirical evidence demonstrates that, just as most people waive their *Miranda* rights, consent-search warnings have very little effect, most likely because of the inherent social authority that comes with police interactions."); Nancy Leong & Kira Suyeishi, Consent Forms and Consent Formalism, 2013 Wis. L. Rev. 751 (arguing consent forms "do relatively little to improve a suspect's understanding of her rights"); Sommers & Bohns, supra note 25, at 1974 ("The voluntariness test is subject to a *systematic bias*, we hypothesize, whereby pressures to comply are underappreciated and consent is overstated.").

321. See Yale Kamisar, On the Fortieth Anniversary of the *Miranda* Case: Why We Needed It, How We Got It—And What Happened to It, 5 Ohio St. J. Crim. L. 163, 177 (2007) (noting that "there is wide agreement that *Miranda* has had a negligible impact on the confession rate"); Laura Smalarz, Kyle C. Scherr & Saul M. Kassin, *Miranda* at 50: A Psychological Analysis, Current Directions Psych. Sci., Dec. 2016, at 1, 1 ("[L]arge numbers of innocent individuals have been prosecuted and wrongfully convicted on the basis of false confessions given to police following Miranda waivers.").

322. Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 46–50) (internal quotation marks omitted) (cataloguing reforms); see also, e.g., Brown v. State, 182 P.3d 624, 626 (Alaska Ct. App. 2008) (banning consent searches of cars absent reasonable articulable suspicion or probable cause); Austin Police Dep't, Gen. Ord. 306.5 (2023), https://www.austintexas.gov/sites/default/files/files/Police/General%20Orders/G.O.%2011.28.22/306.5%20Consent.pdf [https://perma.cc/5WZF-G9LB] (requiring officers to have "an articulable reason" before asking for consent to a search); Fayetteville Police Dep't, Fayetteville Police Department Policy Manual, sect. 3.5.2(B) (2023), http://www.fayettevillenc.gov/home/showpublisheddocument/24107/638309737923800000 (on file with the *Columbia Law Review*) (requiring officers to "articulate at least one reasonable factor").

323. Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 10); see also, e.g., Terms and Conditions of Settlement Agreement at 5–6, Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (banning consent searches on cars by California Highway Patrol).

324. Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (per curiam); Michigan v. Long, 463 U.S. 1032, 1034–35 (1983).

police have some measure of suspicion before they seek consent for a search, such proposals may soon arise in the family regulation system. Following criminal consent reform templates, one example would be legislation forbidding family regulation investigators from seeking parents' consent to search their home unless they also have reasonable suspicion or probable cause to believe that evidence of maltreatment will be found in a family's home.[325] A more dramatic example would be legislation forbidding investigators from justifying searches with consent under any circumstance—a ban that would likely operate more completely in the home context than in the vehicular context, given the home's exalted status in Fourth Amendment jurisprudence.[326]

By limiting either the circumstances under which consent may be sought or the legal relevance of consent as a justification, these bans respond to concerns that consent provides cover for suspicionless searches and that consent doctrine may incentivize police to make racially motivated pretextual stops in order to seek consent for suspicionless searches.[327] More simply, these reforms may check states' abilities to coerce consent by reducing the number of opportunities for the state to seek consent. Indeed, in some jurisdictions, these limits have reduced the number of consent searches in criminal investigations.[328]

That same decrease may not by duplicated in family regulation investigations. Unlike police making pretextual stops, family regulation investigators almost always have *some* individualized suspicion when they seek parents' consent to a search. Their investigations stem from reports to states' central registers.[329] Though reports may not furnish probable cause,[330] they may furnish a lower quantum of individualized suspicion of child maltreatment. Add in narratives assuming the deficiency of race–class subjugated parents,[331] family regulation system norms labeling noncompliance as evidence of risk,[332] and broad, vague definitions of

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325. See supra note 320 and accompanying text (collecting similar criminal investigation reforms).

326. See Florida v. Jardines, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))).

327. See Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 11–12) (discussing how concerns about coercion and racial profiling have motivated reform efforts).

328. See id. (manuscript at 12–14) (summarizing data from California, New Jersey, New Orleans, North Carolina, and Rhode Island).

329. See supra section I.A (describing the trajectory of family regulation investigations).

330. See supra note 231 and accompanying text.

331. See Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. Rev. 1474, 1486 (2012) (arguing that the regulation of race–class subjugated parents is powered by the state's distrust of marginalized parents).

332. See supra section II.A.1 (describing pressures to comply with investigations).

"neglect,"[333] and it is plausible that family regulation investigators could almost always claim individualized suspicion to believe there is evidence of maltreatment in a family's home.[334] This would authorize investigators to seek consent, then search, in virtually all investigations.

2. *Measuring the Success of Consent Reforms.* — The question, then, is how we measure the success of these reforms—and here the framing of the problem matters. If we conceive of the problem with consent searches to be the failure of constitutional consent doctrine to reach all forms of coercion, then success should be measured by whether the reforms reduce the number of searches justified by consent extracted through coercion. Within this framing, the measure of success is not whether reforms reduce the total number of searches. Thus, a reform that maintains the current scale and scope of surveillance could still be considered a success.

To illustrate, consider a jurisdiction that requires a home search for every investigation, as most do.[335] Now, imagine that jurisdiction enacts a reform requiring investigators to inform all parents of their right to refuse consent. Experience teaches that upwards of 90% of parents under investigation will consent to a search, even after they are informed of that right to refuse.[336] In this scenario, 90% of families will still be subjected to home searches. But so long as warnings adequately correct for coercion, then the still-high number of home searches is no longer a problem. Granted, this is an unlikely premise, as there are plenty of reasons to believe that warnings do not effectively correct for coercion.[337] But the point is this: If the problem is that consent is too often coerced, then the solution is to make warnings more effective or to find other ways to shift the power dynamic between state actors and individuals, *not* to reduce the rate of searches. In a similar vein, in this framing, the success of reforms requiring individualized suspicion does not depend on whether they reduce the number of home searches but on whether they reduce the number of parents subjected to coercive requests for consent.

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333. See supra notes 86, 231 and accompanying text.

334. This is not the only formulation of *what* investigators would need to have individual suspicion of, see, e.g., N.Y. Fam. Ct. Act § 1034 (McKinney 2025) (requiring probable cause that a maltreated child is in the home for a court order authorizing home entry), but this is used as a stand-in for the general point that hotline reports may furnish individualized suspicion regardless of the precise formulation.

335. See supra note 93 (describing blanket search requirements).

336. See Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 13) (noting that in criminal investigations in New York City, "[d]espite being told that they had the right to refuse a consent search," 90% of Black people and 94% of white people complied with consent search requests).

337. See, e.g., Leong & Suyeishi, supra note 320, at 781 (collecting cases that found signed consent forms insufficient); Nila Bala, Fulfilling the Promise of Civil *Miranda* 3 (2024) (unpublished manuscript) (on file with the *Columbia Law Review*) (presenting "a taxonomy of three distinct categories of shortcomings associated with civil Miranda warnings: (1) inherent limitations of such warnings, (2) doctrinal deficiencies, and (3) shortcomings arising from the multiple interests implicated by a single warning").

To take one more example, imagine that a jurisdiction outright bans consent as a justification for family regulation searches. In this world, if investigators wanted to search homes, they would need to claim exigent circumstances or obtain a warrant.[338] In a world with limitless resources, investigators might seek a warrant for every investigation for which there is no exigency.[339] Judges would likely issue warrants in almost all cases.[340] The number of total searches would hardly change. But the number of *consent* searches—and more specifically, searches where consent was extracted through coercion outside the reach of constitutional consent doctrine—would be zero. Under a consent paradigm, such an outcome to this reform would constitute a success.

This outcome is plainly unsatisfying. Many critics of consent searches object to any regime that allows for mass state surveillance of race–class subjugated families, whether that surveillance is justified by consent or some other means.[341] And needless oversurveillance hurts children, regardless of its legality.[342] Framing solutions around consent, though,

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338. See Florida v. Jardines, 569 U.S. 1, 6 (2013); Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (per curiam) ("[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.").

339. But see supra note 279 and accompanying text (describing resource constraints that would likely serve to limit requests for warrants in family regulation investigations).

340. See William J. Stuntz, Local Policing After the Terror, 111 Yale L.J. 2137, 2183 n.142 (2002) (recounting the "rubber-stamp[ing]" of warrants in criminal cases).

341. See, e.g., Devon W. Carbado, Unreasonable: Black Lives, Police Power, and the Fourth Amendment 32 (2022) ("Black people experience the Fourth Amendment as a system of surveillance, social control, and violence."); Carbado, (E)racing the Fourth Amendment, supra note 26, at 969 ("[P]eople of color are more likely than whites to experience the Fourth Amendment as a technology of surveillance rather than as a constitutional guardian of property, liberty, and privacy."); Morgan, Disability's Fourth Amendment, supra note 26, at 495 ("Fourth Amendment doctrine both fails to adequately protect disabled people and reinforces a 'normative bodymind' by rendering vulnerable to police surveillance, suspicion, and force those persons whose physical and psychological conditions, abilities, appearances, behaviors, and responses do not conform to the dominant norm." (footnote omitted)); Jamelia Morgan, Responding to Abolition Anxieties: A Roadmap for Legal Analysis, 120 Mich. L. Rev. 1199, 1224 (2022) (book review) (describing a vision that is "radically committed to addressing the harms stemming from entrenched systems of surveillance, policing, and punishment"); Weisburd, Sentenced to Surveillance, supra note 306, at 774 (calling for limits to both consent as a legal basis for electronic surveillance and to the use of electronic surveillance as a standard condition of supervision). This position is, of course, not universal. See Capers, The Good Citizen, supra note 25, at 653 (explaining that the Supreme Court's criminal procedure jurisprudence has developed the concept of a "good citizen" as one who is willing to aid the police, waives their right to silence, and welcomes police surveillance); I. Bennett Capers, Crime, Surveillance, and Communities, 40 Fordham Urb. L.J. 959, 960 (2013) ("Although my argument is one for regulation, I am in fact in favor of more surveillance, not less.").

342. See supra section I.A (noting that the current scope of surveillance does not seem to increase child safety in the aggregate); supra section I.B (describing harms to children from searches).

risks focusing on reforms that shore up process—and legitimize carceral systems—without reducing surveillance.[343]

That does not mean that reforms aimed at consent are pointless. First, they might yet reduce the total number of home searches. Some parents advised of their right to refuse will exercise it;[344] investigators will not always have sufficient individualized suspicion to seek consent; and if a sweeping ban on consent as a legal justification were enacted, real-world resource constraints would prevent investigators from seeking a warrant for every investigation.[345]

Second, campaigns to implement such reforms can be powerful organizing tools for parent-advocates and can increase awareness of family regulation as a carceral system. That is, consent reforms may be non-reformist reforms that bridge short-term goals and long-term horizons for change.[346] In New York City, for example, the campaign for a "Family *Miranda*"—a law requiring family regulation agencies to advise parents of their rights at the outset of investigations—has galvanized parents' rights activists and energized a nascent movement that is also organizing for other legislative change.[347] Perhaps the practical impact of the Family *Miranda* movement is not immediately reducing family surveillance so much as it is building capacity for a sustained movement re-envisioning

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343. See supra note 302 (collecting critiques linking process-oriented reforms to legitimization).

344. See Sommers & Bohns, supra note 25, at 1994 (indicating that the provision of a prior notification explaining that one's failure to comply with a specific request will have no negative consequences resulted in slightly decreased compliance, but not to a statistically significant degree).

345. See supra note 279 and accompanying text.

346. See Amna A. Akbar, Non-Reformist Reforms and Struggles Over Life, Death, and Democracy, 132 Yale L.J. 2497, 2510 (2023) (arguing that using non-reformist reforms as a heuristic "requires engaging with systems as they are, allows one to hold in view bold and radical horizons, and facilitates the identification of strategic battles that might serve as a bridge through popular agitation").

347. See Press Release, Brooklyn Def. Servs., Parents, Advocates, and Elected Officials Call on New York Lawmakers to Enact Policies Rooted in Equity, Support, and Empowerment for Families (May 15, 2024), https://bds.org/assets/files/5_15-Family-Advocacy-Day-Press-Release.pdf [https://perma.cc/2XPF-LGU8] (discussing advocacy efforts for four pieces of legislation "that aim to shrink the pathways through which families are funneled into the family policing system . . . and ensure that families currently navigating this system are treated with dignity and respect"); see also Zach Williams, Outraged NY Parent Advocates Demand Albany Pass a '*Miranda* Rights' Bill for Child Protective Services Before Questioning, N.Y. Post (May 26, 2023), https://nypost.com/2023/05/26/parent-advocates-call-for-albany-to-pass-miranda-rights-bill-for-child-welfare-cases/ [https://perma.cc/TUX7-PZCU] ("Outraged parents are calling on state lawmakers to do something about New York City targeting their families without informing them of their rights during child welfare investigations."); Parent Legislative Action Network (@plan.coalition), Instagram, https://www.instagram.com/plan.coalition/ [https://perma.cc/JR2G-88D6] (last visited Jan. 19, 2025) (describing the Parent Legislative Action Network as "[a] coalition engaging in legislative, judicial, and media advocacy to end the harms of the family policing system").

how society provisions for child welfare without relying on carceral logics. It is not for me, as a legal academic, to direct this movement or to critique it. Instead, this Article aims to "describ[e] the stakes and co-constitute the terrain of the struggle" with "those who are transforming their own political and legal consciousness through participation in grassroots social movement organizations."[348]

That raises the third and perhaps most important point. Family regulation home searches are unlikely to disappear entirely in the near future, and efforts to reduce the frequency and potency of coerced consent to searches will redound to the immediate benefit of families affected by family regulation.[349] That may be particularly so if *consent* reforms are coupled with *search* reforms.[350]

These benefits aside, if we frame the problem with family regulation home searches not around the nature or validity of consent but around the searches themselves, then reforms making consent more knowing or making consent less powerful will not solve it.

B. *Framing Searches as the Problem*

Once we frame the problem around searches, the question becomes how to reduce surveillance in families' homes: how to get eyes out of the home. After briefly describing the political viability of reforms disrupting family surveillance, this section describes at a high level two categories of reforms that legislatures could enact to limit family surveillance. Such interventions are described in detail elsewhere.[351] Any effort to fully abolish family surveillance is a generations-long project, one that requires increasing family support alongside decreasing family surveillance, and one that requires confronting racial capitalism and the carceral logics it engenders.[352] Here, the intent is to show that reforms can reduce family surveillance on a shorter timeline and that reforms to reduce family surveillance are distinct from reforms to limit or ban consent.

1. *Disrupting the Surveillance–Safety Link.* — The project of limiting home searches implicates the carceral logics at the heart of family surveillance. These logics link surveillance and child safety, positioning the watchful eye of the state as a necessary tool to protect race–class subjugated children from their own untrustworthy parents, and obscuring the role of

348. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 843–46 (2021).

349. See supra section II.C (describing how, given the scale of the family regulation system, constitutional litigation that affects only some families will still benefit thousands of families).

350. See infra notes 371–373 and accompanying text.

351. See Arons, Empty Promise, supra note 6, at 1121–34.

352. See Arons, Unintended Abolition, supra note 90, at 3 ("Abolition, writ large, is a decentralized, collectivist project. This grounding gives abolitionist movements strength, vitality, and flexibility, but can also make the meaning of 'abolition' feel opaque or ephemeral.").

the state itself in creating the conditions that harm child well-being.[353] Crucially, though, searches are more likely to harm children and their families than they are to help them.[354] This is true whether searches are justified by consent or by court order.[355] As Professor Tarek Ismail puts it, most family regulation home searches are "security theatre": Most family regulation home searches are searches for searches' sake, not searches for safety's sake.[356]

Reckoning with the carceral logics at the center of family regulation is neither a small nor granular task. But it is already underway in the academy, in the media, and in courts and legislatures around the country.[357] This reckoning is not, however, a necessary precondition to limiting family surveillance. Reduced workloads for family regulation investigators improve their capacity to identify and address child maltreatment.[358] Thus, less surveillance can also be sold as better surveillance.

Lastly, an expansive coalition of interest groups may agree that in-home surveillance of families is a problem.[359] Conservative and libertarian groups have seized on parents' rights as a cause in recent years.[360] Many of their projects—for example, limiting schools' ability to recognize children's gender identities or barring schools from teaching critical race theory[361]—hurt subjugated communities. But conservative parents' rights activists also support efforts to limit the reach of the family regulation

353. See supra section I.A.

354. See supra section I.B.

355. In listing here legal pathways for agencies into homes, searches justified by exigency are purposefully excluded, as these may in fact remove children from immediately dangerous situations. However, such searches occur in only a small percentage of investigations. See supra notes 126–131 and accompanying text.

356. See Ismail, Security Theatre, supra note 160, at 8–9.

357. See supra notes 64–65 (collecting sources describing the family regulation system's carceral logics).

358. Raz, Unintended Consequences, supra note 92, at 2 ("Most saliently, mechanisms to increase reporting do not necessarily include increased funding or additional personnel dedicated to children's services. Accordingly, increased reporting depletes resources that are already spread thin and diverts attention away from children who need it the most.").

359. Cynthia Godsoe offers a longer exploration, using an interest-convergence lens, of the surprising alliances pushing to reform the family regulation system. See Cynthia Godsoe, Racing and Erasing Parental Rights, 104 B.U. L. Rev. 2061, 2109–27 (2024) [hereinafter Godsoe, Racing and Erasing Parental Rights].

360. See Mary Ziegler, Maxine Eichner & Naomi Cahn, The New Law and Politics of Parental Rights, 123 Mich. L. Rev. (forthcoming 2025) (manuscript at 20–25), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4552363 (on file with the *Columbia Law Review*) (describing the contemporary use of parental rights rhetoric to oppose issues such as critical race theory and LGBTQ+ recognition in schools).

361. Id. (manuscript at 3–4).

system.[362] In that project, their interests may converge with those of race–class subjugated communities most often subjected to home searches.[363]

2. *Examples of Search Reforms.* — This section describes two categories of reforms to illustrate how reforms can take aim at surveillance, not consent. The first set reduces the total number of investigations. A growing number of stakeholders—including family regulation agency personnel—have called upon jurisdictions to narrow the front door to the family regulation system and reduce the number of reports referred for investigation.[364] The specific mechanisms proposed vary, from narrowing legal definitions of neglect,[365] to reforming or abolishing mandated

362. One study found that most Republicans and independents believe that "when balancing the government's interest in the well-being of children and parental authority that parental authority should be favored" and that "more religious and libertarian respondents[] lean more toward parental rights because of a skepticism of government intervention, [as] do a number of progressive Democrats." Naomi Schaefer Riley, Political Affiliation Has Limited Impact on Public's Perceptions of Child Welfare, Bipartisan Pol'y Ctr. (Jan. 24, 2024), https://bipartisanpolicy.org/blog/political-affiliation-has-limited-impact-on-publics-perceptions-of-child-welfare/ [https://perma.cc/49Y3-JUFR]; see also Robert T. Garrett, House Advances Bill Making It Harder for CPS to Remove Texas Youth From Their Families, Dall. Morning News (Mar. 31, 2021), https://www.dallasnews.com/news/politics/2021/03/31/house-advances-bill-making-it-harder-for-cps-to-remove-texas-youth-from-their-families/ [https://perma.cc/2ZLS-9LBW] (reporting the passage of a bill narrowing the definition of neglect by a margin of 143–4 in the Republican-controlled Texas House).

363. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524 (1980) (arguing that change is possible when elite interests converge with those of advocacy groups seeking change); Raymond H. Brescia, Aligning the Stars: Institutional Convergence as Social Change, 92 Fordham L. Rev. 1243, 1251 (2024) (urging a model focused on convergence of *institutions*, rather than convergence of *interests*). Reforms grounded in interest convergence can also present serious risks to race–class subjugated communities, including "the obscuration of racialized and other harms, internal and external cooptation, and 'reformist reforms' which can re-entrench and legitimate harmful systems." Godsoe, Racing and Erasing Parental Rights, supra note 359, at 2114–15. For a longer discussion of those risks in the family regulation context, see id.

364. See Casey Fam. Programs Ariz., Safe Strong Supportive 16, http://goyff.az.gov/sites/default/files/meeting-documents/materials/casey_family_programs.pdf [https://perma.cc/S838-8TNL] (last visited Jan. 18, 2025) (using the phrase "[n]arrowing the [f]ront [d]oor" to describe decreasing family separation and shrinking the family regulation system's footprint); Brenda Donald, Leading Under a Cloud, *in* 1 Collaboration, Innovation, & Best Practices: Lessons and Advice From Leaders in Child Welfare 47, 50 (Christine James-Brown & Julie Springwater eds., 2019) (same); Narrowing the Front Door to NYC's Child Welfare System, N.Y.C. Narrowing the Front Door Work Grp., https://www.narrowingthefrontdoor.org/ [https://perma.cc/S2RY-6CJM] (last visited Mar. 2, 2025) (same).

365. Child Prot. Ombudsman of Colo., Interim Report: Mandatory Reporting Task Force 11 (2024), https://coloradocpo.org/wp-content/uploads/2024/01/Mandatory-Reporting-Task-Force-Interim-Report-2024.pdf [https://perma.cc/WWQ2-DSYV] ("Colorado's current definition of abuse and neglect is too broad and conflates several circumstances—such as poverty—with child abuse."); Mandated Reporting to Cmty. Supporting Task Force, Mandated Reporting to Community Supporting Task Force Subcommittees, https://www.chhs.ca.gov/wp-content/uploads/2023/10/MRCS-Task-Force-

reporting laws,[366] to increasing screening requirements for reports so that more are screened out.[367]

The second set modifies states' requirements for home searches within cases that are referred for investigations. Though most jurisdictions require home searches for every investigation—no matter the sort of allegation—a few jurisdictions eschew such blanket requirements.[368] These jurisdictions require home searches for certain categories of allegation—for instance, those that concern the condition of the home—or certain ages of children[369] or grant discretion to investigators in individual investigations to decide if a home search is necessary.[370]

If the problem of consent searches is *searches*, then the measure for success of these reforms is quite simple: Do they reduce the number of families subjected to home searches?[371] By this measure, reforms in both

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Subcommittees.pdf [https://perma.cc/2RSS-4A9Y] (listing "[n]arrowing the [l]egal [d]efinition of [n]eglect" as a subcommittee); Annie Sciacca, In Texas, New Laws and Policies Have Resulted in Far Fewer Children Removed by CPS From Their Homes, The Imprint (Apr. 23, 2024), https://imprintnews.org/top-stories/texas-policies-fewer-foster-care-removals/248935 [https://perma.cc/B63K-7VBM] (summarizing the dramatic drop in the number of Texas children placed in foster care after Texas narrowed of its definition of child neglect).

366. See, e.g., Kristin Jones, States Find a Downside to Mandatory Reporting Laws Meant to Protect Children, NPR (Apr. 25, 2024), https://www.npr.org/sections/health-shots/2024/04/25/1247021109/states-find-a-downside-to-mandatory-reporting-laws-meant-to-protect-children [https://perma.cc/L3WC-4NVT]; Mandatory Reporting Is Not Neutral, https://www.mandatoryreportingisnotneutral.com/ [https://perma.cc/7QLP-R4DP] (last visited Mar. 2, 2025).

367. See Jeremy Loudenback, More States Seek to Curb Anonymous CPS Reports Against Parents, The Imprint (Nov. 7, 2023), https://imprintnews.org/top-stories/more-states-seek-to-curb-anonymous-cps-reports-against-parents/245884 [https://perma.cc/K5Y2-HJSR] (describing successful efforts to ban anonymous reports in California and Texas and nascent efforts to do the same in Colorado, Kentucky, Mississippi, Montana, New Hampshire, and New York).

368. See supra note 94 and accompanying text (summarizing state requirements for searches).

369. Ill. Dep't of Child & Fam. Servs., Reports of Child Abuse and Neglect, supra note 94 at 5–8 (outlining procedures for Ill. Admin Code. tit. 89, § 300.50 that require home searches only for reports of inadequate shelter or environmental neglect); Tex. Dep't of Fam. & Protective Servs., Child Protective Services Handbook, supra note 94 (requiring a home search under section 2250 when the child in the report is age five or younger or the allegations involve the home's conditions).

370. Tex. Dep't of Fam. & Protective Servs., Child Protective Services Handbook, supra note 94 (requiring a home search under section 2250 in any case in which "[o]ther circumstances in the case make a home visit necessary").

371. This Article's thinking about how to measure the success of reforms is shaped and inspired by the heuristic of nonreformist reforms—and particularly by grassroots organizers' deployment of this heuristic to take measure of reforms inside and outside the prison abolition context. For instance, Critical Resistance, a grassroots group working to abolish prisons, publishes a one-page handout that asks straightforward clarifying questions like, "Does this [reform] reduce the number of people imprisoned, under surveillance, or under other forms of state control?" Critical Resistance, Reformist Reforms vs. Abolitionist Steps to End Imprisonment (2021), https://criticalresistance.org/wp-content/uploads/

categories described above succeed. Reducing the number of investigations would limit the number of home searches, even if legislatures leave intact requirements that each investigation includes a home search and leave consent requirements unchanged. If there are fewer investigations, then investigators will knock on fewer front doors and seek to search fewer homes.[372] Removing blanket requirements for home searches within investigations could likewise reduce the number of times investigators seek to enter homes—though here, the devil is in the details, as the removal of a categorical requirement accompanied by an increase in investigator discretion could result in maintenance of the status quo.[373]

Search reforms need not be exclusive of consent reforms. Instead, the two can work in tandem to link short-term and long-term goals and to amplify one another.[374] If, for example, jurisdictions narrow definitions of neglect *and* require that investigators have reasonable suspicion that evidence of neglect will be found in the home before seeking consent, then fewer reports will give rise to that suspicion.[375] More subtly, these

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2021/08/CR_abolitionistssteps_antiexpansion_2021_eng.pdf [https://perma.cc/YMW6-XXCJ]; see also Detention Watch Network, Ending Immigration Detention: Abolitionist Steps vs. Reformist Reforms P2 (2022), https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022.pdf [https://perma.cc/X7EB-H4YG] (asking, in the context of the movement to end immigration detention, whether reforms "[r]educe the scale of detention and surveillance").

372. See supra sections I.A, I.C (describing mandates for searches in every investigation and the prevalence of consent as a justification for searches).

373. For instance, Texas requires home searches for all investigations involving children ages five or under, when the allegations involve the condition of the home, or when "[o]ther circumstances" make a home search "necessary." Tex. Dep't of Fam. & Protective, Child Protective Services Handbook, supra note 95. In Harris County, Texas, more than 40% of investigations involved children aged five or under. See CPI Completed Investigations: Victims, Tex. Dep't of Fam. & Protective Servs., https://www.dfps.texas.gov/About_DFPS/Data_Book/Child_Protective_Investigations/Investigations/Victims.asp [https://perma.cc/N5L8-V2AW] (last visited Feb. 22, 2025) (showing a total of 14,779 confirmed and unconfirmed victims within Harris County with ages 5 or below, compared to a total of 33,419 victims within Harris County across all ages). It is harder to quantify the number of investigations with allegations involving the condition of the home, and harder still to quantify "other circumstances." But the number of investigations involving young children, standing alone, helps to explain why in a county *without* a blanket search requirement, 75% of investigations include a home entry. Tex. Dep't of Fam. & Protective Servs., Fiscal Year 2024 Data, supra note 95 (containing data for cases within Harris County initiated between September 1, 2023, and July 31, 2024, and including data on whether each case involved a home entry); see also Jack Glaser, Disrupting the Effects of Implicit Bias: The Case of Discretion & Policing, 153 Dædalus, 151, 160 (2024) (describing how actions allowing for higher discretion are more likely to be subject to bias-driven errors).

374. See Nick Pinto, Bailing Out, New Republic (Apr. 6, 2020), https://newrepublic.com/article/156823/limits-money-bail-fund-criminal-justice-reform [https://perma.cc/SSV9-UWCJ] (explaining Mariame Kaba's argument that short-term goals like ending cash bail must be coupled with the long-term goal of ending pretrial detention in order to avoid unintended consequences that increase incarceration in the aggregate).

375. See supra section III.A (describing reforms requiring suspicion in addition to consent).

reforms could also address the problem of consent itself. For instance, one of the tools that investigators use to coerce consent is the claim that searches are "required"—a claim that finds power in the fact that so many jurisdictions *do* require that investigators conduct a home search for every investigation.[376] What investigators do not share, of course, is that there is no requirement for parents to *consent* to a home search in every investigation.[377] By removing requirements for home searches, jurisdictions would reduce the frequency of these kinds of elisions. Reforms that roll back blanket requirements for searches could render those kinds of misrepresentations less likely and less powerful, thus reducing coercion.

Most fundamentally, reforms that limit or remove search requirements call on us to question the carceral logics of the family regulation system. They disrupt the presumption that we need "eyes in the home" to keep children safe.[378] And they disrupt the presumption that we need eyes on race–class subjugated parents to keep their children safe from them, thus maintaining these families' precarity and our society's current racial capitalist structures.[379]

This Part does not present an exhaustive set of solutions to reduce home searches or to rectify the coercive forces that lead to consent. Rather, it explicates the sorts of reforms that flow from two possible frames for the problem of family regulation consent searches—one focused on consent, one focused on searches. In doing so, it shows that consent reforms risk leaving the family surveillance apparatus intact and legitimizing it. In the family regulation system, the criminal legal system, and across the carceral web, to reduce surveillance of race–class subjugated communities, we should frame the consent search problem as one of searches, not one of consent.

CONCLUSION

Every minute of every day, state agents are searching a family's home somewhere in the United States. Often, parents consent to these searches. Often, their consent to the search is extracted through coercion. Sometimes, the coercion is so overt as to render the search unconstitutional. Other times, the coercion is of the sort that the Supreme Court has blessed. Rarely do these searches make children safer. But the state continues on in its project of searching—and controlling and

376. See Ismail, Security Theatre, supra note 160, at 5 (noting that investigators often believe the false representations they make to parents regarding their legal authority are true); supra section I.A (describing statutory requirements).

377. See supra note 164.

378. See supra section I.A (describing the "eyes in the home" mentality).

379. See supra section I.A (describing how carceral logics focus on the individual failings of race–class subjugated parents and obscure societal responsibility for the structures driving these parents' struggles).

subjugating—poor, Black, and brown families. Searches, not safety, are the point.

This Article has shown how searches harm families and communities, and it has shown that the unconstitutionality of these searches is ripe for litigation. Above all, it has shown that just as searches are the point, searches are the problem. Consent matters, inasmuch as it justifies searches. But substitute any other legal justification for consent—a stricter form of consent, consent plus suspicion, a warrant or warrant exception in place of consent—and the search problem persists. This Article reveals that across the carceral state this problem will not be solved by reforming or limiting consent; rather, it is necessary to reform and limit searches.

NOTES

ENFORCING THE CORPORATE PRACTICE OF MEDICINE DOCTRINE THROUGH FALSE CLAIM LIABILITY

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Most states have laws prohibiting corporations from owning healthcare practices or employing physicians, collectively forming the corporate practice of medicine doctrine (CPOM). CPOM laws were designed to ensure that licensed professionals, not corporate laymen, decide patient treatment.

Large corporations and private equity firms routinely circumvent CPOM laws by creating subsidiary companies that ostensibly "manage" healthcare practices. These managing subsidiaries can set staffing levels, choose medical supplies, and dictate the course of patient treatment—effectively giving their corporate owners control over the practice without owning it on paper. Courts have consistently found these arrangements illegal when corporate owners assume too much control over their managed healthcare practices.

The False Claims Act imposes liability on parties that submit false claims to the government or receive money from the government under fraudulent circumstances. For a healthcare practice to bill the government, it must comply with applicable federal and state regulations, including CPOM laws. This Note argues that billing the government for healthcare services without complying with CPOM laws constitutes fraud under the False Claims Act.

Attaching false claim liability to CPOM violations will prevent corporations from unlawfully controlling healthcare practices and protect patients from the predatory abuses of corporate actors.

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INTRODUCTION

EmCare, a publicly traded company on the New York Stock Exchange, was the nation's largest physician management company, hiring almost 16,000 clinicians to staff over 4,600 hospitals and healthcare facilities, including Overland Park Regional Medical Center.[1] When physicians at Overland Park grew concerned with dangerously low staffing levels in the emergency room, they organized under their director, Dr. Raymond Brovont, to communicate their concerns to management.[2] Dr. Brovont held a meeting articulating the doctors' concerns with the staffing policy, which required a single doctor to work in the emergency room while on call for emergencies in other units of the 343-bed hospital.[3] An EmCare executive responded by circulating an email with links to EmCare's stock and financial information, stating: "[S]taffing decisions are financially motivated. . . . Profits are in everyone's best interest."[4] Dr. Brovont was subsequently fired and reprimanded by the EmCare executive, who told him: "[Y]ou cash the check every month to be a corporate representative,

1. Brovont v. KS-I Med. Servs., P.A., 622 S.W.3d 671, 678–79 (Mo. Ct. App. 2020).

2. See id. at 680 (describing how increased demands on physicians led to periods when the emergency room was unstaffed by a physician, leading the physicians to approach Dr. Brovont with their concerns).

3. See id. at 680–81 ("[Dr. Brovont] specifically brought up the physicians' concerns about being responsible for responding to Code Blue patients throughout the hospital, requiring them to be in potentially three places at once . . . .").

4. Id. at 681 (internal quotation marks omitted) (quoting email from Dr. Patrick McHugh, Exec. Vice President, EmCare, to EmCare Emergency Department Physicians).

and there is a responsibility as the corporate representative to support the corporation's objectives."[5]

The EmCare episode highlights the danger of corporate influence in healthcare: Decisionmaking prioritizes profit over the concerns and expertise of licensed professionals.

In theory, however, a corporation like EmCare should have been prohibited from staffing physicians in the first place. In Kansas, where Overland Park is located, "[a] general corporation is prohibited from providing medical services or acting through licensed practitioners."[6] To provide medical services in Kansas, a corporation must be specially registered, and only licensed physicians and other qualified persons can hold equity interests in it.[7] These rules combine to prevent for-profit, publicly traded corporations like EmCare from controlling healthcare services.

Every state has its own regulations and court decisions prohibiting corporations from practicing medicine or employing physicians, which collectively form the corporate practice of medicine doctrine (CPOM).[8] The public policy underlying CPOM is rooted in the dual fears that, first, "a corporation's obligation to its shareholders may not align with a physician's obligation to [their] patients," and, second, that corporate management may interfere with a physician's medical judgment.[9]

Over the last three decades, corporate investors have found ways to bypass CPOM by forming corporate structures through which they can control healthcare groups indirectly.[10] For example, EmCare created separate subsidiary corporations in each state in which it employed physicians and then made physicians the owners of those subsidiaries.[11] Under this structure, the subsidiaries could facially comply with CPOM while the parent company retained control.

This model of corporate ownership has grown increasingly popular, opening the floodgates to corporatization in healthcare, especially through large, publicly traded companies and private equity firms. For

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5. Id. at 682 (internal quotation marks omitted) (quoting Dr. McHugh).

6. Early Detection Ctr., Inc. v. Wilson, 811 P.2d 860, 868 (Kan. 1991).

7. See Kan. Stat. Ann. § 17-2712(a) (West 2025) ("No shares may be . . . issued by the professional corporation until there is . . . a certificate by the regulating board stating that the person . . . is duly licensed to render the same type of professional services as that for which the corporation was organized.").

8. See AMA, Issue Brief: Corporate Practice of Medicine 1 (2015), https://www.ama-assn.org/media/7661/download (on file with the *Columbia Law Review*) ("The corporate practice of medicine doctrine prohibits corporations from practicing medicine or employing a physician to provide professional medical services.").

9. Id.

10. See infra notes 63–76 and accompanying text (describing how corporate managers circumvent CPOM).

11. Brovont v. KS-I Med. Servs., P.A., 622 S.W.3d 671, 678 (Mo. Ct. App. 2020).

instance, in July 2022, Amazon announced a deal to purchase One Medical, a primary care organization.[12] A year later, CVS closed on its acquisitions of Oak Street and Signify Health, a primary care provider and a home healthcare company.[13] Today, four of the Fortune 10 companies have acquired physician groups.[14] One report showed that in 2021, a single private equity firm owned more than 30% of specialty medical practices in over a quarter of local markets.[15] This trend is especially concerning as more studies indicate that corporate ownership of healthcare groups correlates with problems such as understaffing and poor patient outcomes.[16]

One study found that rates of hospital-acquired complications, like infections and falls, increased by an average of 25% at hospitals that were

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12. Press Release, Amazon, Amazon and One Medical Sign an Agreement for Amazon to Acquire One Medical (July 21, 2022), https://press.aboutamazon.com/2022/7/amazon-and-one-medical-sign-an-agreement-for-amazon-to-acquire-one-medical [https://perma.cc/5NGB-UDE6].

13. See Press Release, CVS Health, CVS Health Completes Acquisition of Oak Street Health (May 2, 2023), https://www.cvshealth.com/news/company-news/cvs-health-completes-acquisition-of-oak-street-health.html [https://perma.cc/3DXP-X4AZ] (announcing CVS's 2023 acquisition of Oak Street Health); Press Release, Signify Health, CVS Health Completes Acquisition of Signify Health (Mar. 29, 2023), https://www.signifyhealth.com/news/cvs-health-completes-acquisition-of-signify-health [https:// perma.cc/5L5E-AXGV] (announcing CVS's 2023 acquisition of Signify Health).

14. The other two companies are UnitedHealth Group and Walmart. UnitedHealth Group has been acquiring physician groups for years. See, e.g., Bob Herman, UnitedHealth's Physician Buying Spree Continues With Takeover of Crystal Run, STAT (Apr. 10, 2023), https://www.statnews.com/2023/04/10/unitedhealth-crystal-run-physician-acquisition/ (on file with the *Columbia Law Review*) (discussing UnitedHealth Group's 2023 acquisition of Crystal Run Healthcare). Walmart has opened nearly two dozen health centers across Florida. See Press Release, Walmart, Walmart Health Grows in Florida With 16 New Health Centers Opening in 2023 (Oct. 26, 2022), https://corporate.walmart.com/news/2022/10/26/walmart-health-grows-in-florida-with-16-new-health-centers-opening-in-2023 [https://perma.cc/3XTE-3ABV] (announcing plans to bring Walmart Health's presence in Florida up to twenty-two locations).

15. Richard M. Scheffler, Laura Alexander, Brent D. Fulton, Daniel R. Arnold & Ola A. Abdelhadi, Am. Antitrust Inst., Petris Ctr. & Wash. Ctr. for Equitable Growth, Monetizing Medicine: Private Equity and Competition in Physician Practice Markets 20 (2023), https://www.antitrustinstitute.org/wp-content/uploads/2023/07/AAI-UCB-EG_Private-Equity-I-Physician-Practice-Report_FINAL.pdf [https://perma.cc/BJL3-X6UN].

16. See, e.g., Physicians Advoc. Inst., The Impact of Practice Acquisitions and Employment on Physician Experience and Care Delivery 5 (2023), https://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/PAI-Research/NORC-Employed-Physician-Survey-Report-Final.pdf [https://perma.cc/2BK3-Q5P4] (finding that physicians reported that ownership changes led to reduced autonomy and strained patient relationships); Alexander Borsa, Geronimo Bejarano, Moriah Ellen & Joseph Dov Bruch, Evaluating Trends in Private Equity Ownership and Impacts on Health Outcomes, Costs, and Quality: Systematic Review, BMJ, July 19, 2023, at 1, 7–10 (finding that private equity ownership of healthcare facilities is often associated with increased costs, mixed-to-harmful impacts on quality, and reduced nurse staffing levels); Sneha Kannan, Joseph Dov Bruch & Zirui Song, Changes in Hospital Adverse Events and Patient Outcomes Associated With Private Equity Acquisition, 330 JAMA 2365, 2366 (2023) (finding that, on average, private equity acquisition of hospitals led to increased hospital-acquired adverse events).

purchased by private equity firms.[17] In a survey of a thousand physicians across the country, more than half stated that changes to corporate ownership resulted in reduced quality of patient care, due to "an erosion in clinical autonomy and a greater focus on financial incentives."[18]

CPOM was designed to prevent these problems and protect patients by giving their physicians, rather than profit-motivated laymen, agency to make appropriate clinical decisions.[19] But in the 1970s, CPOM became increasingly underenforced as corporate entities began to take control of the healthcare sector.[20] Today, corporate actors dominate the healthcare market, and many states choose not to enforce CPOM without expressly rejecting it.[21]

Fortunately, CPOM laws still exist, despite the preponderance of corporate arrangements that blatantly violate their spirit. Penalties for CPOM violations vary by state but generally involve fines, revocation of licenses, and even criminal penalties.[22] There is an area of active litigation challenging the legality of corporate control of healthcare groups;[23] however, in some states, private citizens lack a cause of action to enforce CPOM.[24] Furthermore, it is not typical for courts to award monetary damages to plaintiffs in CPOM cases.[25] These limitations exacerbate the underenforcement of CPOM.

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17. See Kannan et al., supra note 16, at 2368 (finding that private equity hospitals experienced an additional 4.6 hospital-acquired conditions per ten thousand hospitalizations, equaling a 25.4% increase from the private equity hospitals' mean preacquisition levels).

18. Physicians Advoc. Inst., supra note 16, at 2.

19. See Allegra Kim, Cal. Rsch. Bureau, CRB 07-011, The Corporate Practice of Medicine Doctrine 4 (2007), https://www.compcom.co.za/wp-content/uploads/2015/05/Mediclinic-Annexure-20-CRB-Paper-dated-October-2007.pdf [https://perma.cc/5FEP-Y3ER] ("The policy rational for the CPM Doctrine can be summarized as follows: A profit motive will lead to commercial exploitation of physicians and lower professional standards.").

20. See infra notes 50–52 and accompanying text (discussing the effects of the 1973 Health Maintenance Organization Act).

21. See Michele Gustavson & Nick Taylor, At Death's Door—Idaho's Corporate Practice of Medicine Doctrine, 47 Idaho L. Rev. 479, 481 (2011) ("Many states, although not always expressly rejecting the corporate practice of medicine doctrine, have adopted, or otherwise chosen not to enforce the doctrine . . . .").

22. Michael F. Schaff & Glenn P. Prives, The Corporate Practice of Medicine Doctrine: Still Alive and Kicking, Bloomberg L. (Oct. 6. 2011), https://www. bloomberglaw.com/bloomberglawnews/health-law-and-business/XFOQUIKS000000?bna_news_filter=health-law-and-business#jcite (on file with the *Columbia Law Review*).

23. See infra section II.C.

24. See, e.g., Treiber v. Aspen Dental Mgmt., Inc., 94 F. Supp. 3d 352, 363 (N.D.N.Y. 2015) ("[I]t is undisputed that New York's licensing and business laws which prevent corporations from practicing dentistry do not confer a private right of action.").

25. See Christopher Anderson & Loreli Wright, BLOG: Corporate Practice of Medicine Prohibitions, Healio (July 11, 2023), https://www.healio.com/news/ophthalmology/20230711/blog-corporate-practice-of-medicine-prohibitions [https://perma.cc/7WYH-APMW] (noting that rescission of the contract is a more common remedy).

This Note proposes that false claim liability should attach to corporations that bill government health plans while violating CPOM. The Centers for Medicare and Medicaid Services (CMS) coordinates government health plans, and its conditions for participation include compliance with "all applicable Federal, State, and local laws and regulations related to the health and safety of patients,"[26] which presumably include CPOM laws. Therefore, to participate in CMS programs, a healthcare practice must comply with CPOM regulations.

Under the "implied false certification" doctrine, submitting a reimbursement claim to a government program without complying with the underlying preconditions to payment constitutes a false claim.[27] Under this theory, a corporation that bills a government health plan while violating CPOM would be submitting false claims and therefore subject to hefty fines. Because most healthcare groups rely on government reimbursement,[28] this approach would implicate virtually any healthcare group in violation of CPOM.

Furthermore, through its qui tam/whistleblower provisions, the False Claims Act enables private citizens with evidence of fraud to file suit on behalf of the government.[29] These provisions provide private citizens a cause of action to enforce CPOM in states where they would otherwise lack standing to sue.

States also have their own false claims and insurance fraud acts that CPOM plaintiffs can invoke.[30] Based on their legislative and judicial constructions, these laws may be more permissive to certain CPOM complaints than the Federal False Claims Act.[31]

Attaching false claim liability to CPOM violations would incentivize plaintiffs to enforce CPOM through litigation and encourage

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26. 42 C.F.R. § 418.116 (2025).

27. See Universal Health Servs., Inc. v. United States, 579 U.S. 176, 180 (2016) (internal quotation marks omitted) ("This case concerns a theory of False Claims Act liability commonly referred to as 'implied false certification.' According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment.").

28. Ctrs. for Medicare & Medicaid Servs., CMS Roadmaps Overview 1, https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/Downloads/RoadmapOverview_OEA_1-16.pdf [https://perma.cc/7BVD-A3RQ] ("Nearly 90 million Americans rely on health care benefits through Medicare, Medicaid, and the State Children's Health Insurance Program (SCHIP).").

29. 31 U.S.C. § 3730(b)(1) (2018).

30. See State and Local False Claims Acts, Constantine Cannon, https://constantinecannon.com/practice/whistleblower/whistleblower-types/whistleblower-reward-laws/state-local-false-claims-acts/ [https://perma.cc/EDD9-U25T] (last visited Jan. 25, 2025) (listing thirty states whose False Claims Acts contain qui tam provisions, though seven states limit qui tam suits to health care fraud cases).

31. See infra section IV.E.

whistleblowers to expose corporate arrangements that give laymen undue influence over physicians.

I. BACKGROUND

CPOM has been shaped over the decades by statutes, court decisions, attorney general opinions, and actions by state medical licensing boards.[32] The doctrine prohibits laymen-run corporations from providing healthcare services, but it fell out of favor in the 1980s.[33] Although CPOM is no longer strongly enforced, a study of its history and contemporary application illustrates how it can be used to combat the predatory practices of corporations in healthcare.

A. *The Origins of CPOM*

CPOM originated during the nineteenth century in a time when quack doctors ran rampant while trained physicians struggled to compete with them in the services market.[34] In 1847, a group of physicians formed the American Medical Association (AMA), a professional association that advocated for medical licensure requirements among the states to improve the quality of medical service and decrease competition from untrained physicians.[35]

As corporate presence in the medical marketplace increased during the early twentieth century, "the AMA became concerned that corporations were threatening physician autonomy."[36] In some cases, nonphysicians dictated the length of hospital stays and determined pre-set salaries and fees for the services of their contracted physicians.[37] The AMA spoke against such arrangements, charging them with introducing too much of a "spirit of trade" into the profession.[38]

State medical practice acts, the laws that dictate medical licensing requirements, incorporate these concerns. At first, these acts did not explicitly prohibit the corporate practice of medicine, but they prohibited

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32. AMA, supra note 8, at 163.

33. See infra notes 50–53 and accompanying text.

34. See Donald E. Konold, A History of American Medical Ethics 1847–1912, at 198 (1962).

35. AMA History, AMA, https://www.ama-assn.org/about/ama-history/ama-history [https://perma.cc/FFE2-QMTX] (last visited Feb. 11, 2025).

36. Kathrine Marous, The Corporate Practice of Medicine Doctrine: An Anchor Holding America Back in the Modern and Evolving Healthcare Marketplace, 70 DePaul L. Rev. 157, 161 (2020).

37. Adam M. Freiman, Comment, The Abandonment of the Antiquated Corporate Practice of Medicine Doctrine: Injecting a Dose of Efficiency Into the Modern Health Care Environment, 47 Emory L.J. 697, 701 (1998).

38. In re AMA, 94 F.T.C. 701, 898 (1979) (final order) (internal quotation marks omitted) (quoting internal AMA report).

the practice of medicine by a "person" without a valid license.[39] Courts constructed CPOM by finding in the medical practice acts a legislative intent to prohibit corporations from qualifying for a medical license and providing medical services.[40]

B. *Early Case Law*

In *Parker v. Board of Dental Examiners*, the California Supreme Court interpreted the state's Dental Act as prohibiting the corporate practice of dentistry.[41] The court explained that the Act "authorizes persons only to engage in the practice of dentistry" and that a licensee must possess "consciousness, learning, skill, and good moral character," none of which can be attributed to a corporation.[42]

The court also rejected defendants' assertion that they merely managed the "business side" of the dental practice and therefore did not violate the statute which governed the practical side of dentistry.[43] "The law does not assume to divide the practice of dentistry into [those] kind[s] of departments," it explained, since "[e]ither one may extend into the domain of the other in respects that would make such a division impractical if not impossible."[44] The court furthered that to distinguish between the "business" side and the practical side of medicine would "render the [Dental] act impotent . . . , and it would defeat the object of legislation."[45]

Soon thereafter in *People v. United Medical Service*, the Illinois Supreme Court similarly interpreted its state's medical practice act as prohibiting a corporation from providing service through a medical clinic, concluding that "[t]he legislative intent . . . is that only individuals may obtain a

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39. Alanson W. Willcox, Hospitals and the Corporate Practice of Medicine, 45 Cornell L. Rev. 432, 438 (1960).

40. See infra notes 41–46 and accompanying text.

41. See 14 P.2d 67, 73 (Cal. 1932).

42. Id. at 71 (emphasis omitted).

43. Id. at 71–72.

44. Id. at 72.

45. Id. This holding has been affirmed by more recent California court decisions. See People ex rel. Allstate Ins. Co. v. Discovery Radiology Physicians, P.C., 311 Cal. Rptr. 3d 901, 911 (Cal. Ct. App. 2023) ("The unlicensed practitioner in . . . *Parker* was a corporation, but it has long been 'well settled' that 'any other unlicensed person or entity' is subject to the same sanctions for unlawful practice as an unlicensed corporation."); see also Steinsmith v. Med. Bd., 102 Cal. Rptr. 2d 115, 120 (Cal. Ct. App. 2000). In *Steinsmith*, a corporate manager of a healthcare clinic, Steinsmith, also claimed that he was managing business affairs without violating CPOM regulations. See id. at 119. The court responded that: "A similar argument was rejected long ago in . . . *Parker* . . . . Accordingly, the . . . *Parker* case disposes of Steinsmith's argument that there was no unlicensed practice he could have aided." Id. at 120 (citing *Parker*, 14 P.2d at 72).

license" and "[n]o corporation can meet the requirements of the statute essential to the issuance of a license."[46]

Since then, states have expanded their CPOM laws by passing legislation that explicitly prohibits corporations from providing healthcare services.[47] Most states define the scope of prohibited corporate activities through their case law.[48] Some states offer specific guidance regarding prohibited services and business arrangements through their medical boards, the licensing agencies that govern healthcare providers.[49]

II. THE CONTEMPORARY CPOM LANDSCAPE

In 1973, Congress passed the Health Maintenance Organization (HMO) Act, creating a new type of healthcare organization in which networks of physicians are directly employed by an insurance company, the HMO.[50] Prior to the HMO Act, insurance companies could not hire physicians in most states, but the Act preempted any state laws that would frustrate the formation of HMOs,[51] specifically CPOM laws.[52] Industry advocates subsequently began advocating for the repeal of CPOM laws to make way for new forms of integrated corporate healthcare systems, leading to underenforcement.[53]

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46. 200 N.E. 157, 162–63 (Ill. 1936).

47. See Cal. Bus. & Prof. Code § 2400 (2024) ("Corporations and other artificial legal entities shall have no professional rights, privileges, or powers."); see also infra notes 56–64 and accompanying text for a discussion of corporations' authority to provide professional services.

48. See infra section IV.D for an analysis of case law surrounding prohibited acts.

49. The New Jersey Board of Examiners has addressed the permissible forms of professional practices, such as solo practices and partnerships, which are codified in N.J. Admin. Code § 13:35-6.16 (2025). Similarly, the Medical Board of California (MBC) has also issued guidance regarding prohibited business structures and corporate activities. See infra notes 97–98 and accompanying text for a more detailed analysis of MBC guidance.

50. HMO Act of 1973, Pub. L. No. 93-222, 87 Stat. 914 (codified at 43 U.S.C. § 300e (2018)).

51. Id. at 931 ("No State may establish or enforce any law which prevents a health maintenance organization . . . from soliciting members through advertising its services, charges, or other nonprofessional aspects of its operation.").

52. The CPOM "doctrine was part of the impetus for Congress to create the HMO Act." Nicole Huberfeld, Be Not Afraid of Change: Time to Eliminate the Corporate Practice of Medicine Doctrine, 14 Health Matrix: J.L.-Med. 243, 277 (2004).

53. See, e.g., Jeffrey F. Chase-Lubitz, The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry, 40 Vand. L. Rev. 445, 447 (1987) ("Many of the reasons that once existed for limiting corporate involvement in medicine no longer apply. Accordingly, both courts and state legislatures should clarify the doctrine's scope and modify the doctrine to reflect current practices in the health care market."); James Flannery, Time to Rethink the Illinois Corporate Practice of Medicine Doctrine in the PPACA Healthcare Market Era, 24 Annals Health L. Advance Directive 64, 65 (2015), https://www.luc.edu/media/lucedu/law/centers/healthlaw/pdfs/advancedirective/pdfs/issue14/Flannery%20formatted.pdf [https://perma.cc/S45S-PRUJ] ("In an era of greater need for clinical integration, the corporate practice of medicine doctrine in Illinois should be relaxed."); Freiman, supra note 37, at 697 ("Today's health care industry is dominated by . . . large corporations which operate in the era of

Currently, state CPOM laws vary widely in scope and strictness. Most states have weak prohibitions that allow corporate entities to hire physicians so long as the employment contracts clarify that the corporate entity cannot interfere with clinical decisionmaking.[54] For example, in a Statement of Position, the Louisiana Board of Medical Examiners announced that "a physician's employment by a business corporation does not per se violate the Medical Practice Act."[55]

States with stronger forms of prohibition will find a per se violation when physicians are hired by a corporation unless that corporation is registered as a "professional corporation."[56] Professional corporations (PCs) are registered to provide a specific professional service and subject to the relevant regulations.[57]

States have different laws regarding how a PC is to be structured, who can participate as shareholders, and who can serve on the board of directors.[58] Some states, like Kansas, require all shareholders of a PC to be licensed in the relevant profession,[59] while others require at least half of shareholders to be licensed.[60] Some states have fee-splitting prohibitions which prohibit medical professionals from sharing their revenue with individuals or entities not licensed to provide healthcare services.[61] Additionally, in states like New Jersey, practitioners with plenary licenses

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'managed care.' . . . [T]he corporate practice of medicine doctrine not only fails to reflect the evolution of the health care industry but also threatens to impede this evolution towards efficiency."); Lisa Rediger Hayward, Revising Washington's Corporate Practice of Medicine Doctrine, 71 Wash. L. Rev. 403, 404–05 (1996) ("Regrettably, the corporate practice of medicine laws have failed to keep pace with the rapidly changing health care environment. The trend is clearly moving toward more integrated delivery systems, yet many of these organizations violate the fundamental terms of the corporate practice of medicine doctrine."); Sara Mars, The Corporate Practice of Medicine: A Call for Action, 7 Health Matrix: J.L-Med. 241, 243 (1997) ("[T]he justification behind barring corporations from practicing medicine appears to overlook the realities of the current health care market place.").

54. See Marous, supra note 36, at 166 (explaining that "there is often a corporate practice of medicine exception for hospitals that hire physicians").

55. La. State Bd. of Med. Exam'rs, Statement of Position: Employment of Physician by Corporation Other Than a Professional Medical Corporation 4 (1992), https://a.storyblok.com/f/150540/0db19327a3/employmentofphysician.pdf [https://perma.cc/N35L-DHZ3] (emphasis omitted).

56. Marous, supra note 36, at 164–65.

57. See Professional Corporation, Cornell L. Sch., https://www.law.cornell.edu/wex/professional_corporation [https://perma.cc/VWZ6-HG9U] (last visited Jan. 25, 2025) (defining professional corporations as entities created by state statutes governing professional services).

58. AMA, supra note 8, at 1.

59. Kan. Stat. Ann. § 17-2712(a) (West 2025).

60. Are There Special Requirements for Professional Corporations?, BizCounsel (Jan. 14, 2020), https://bizcounsel.com/articles/Special-Requirements-for-Professional-Corporations [https://perma.cc/7B4J-QV4K].

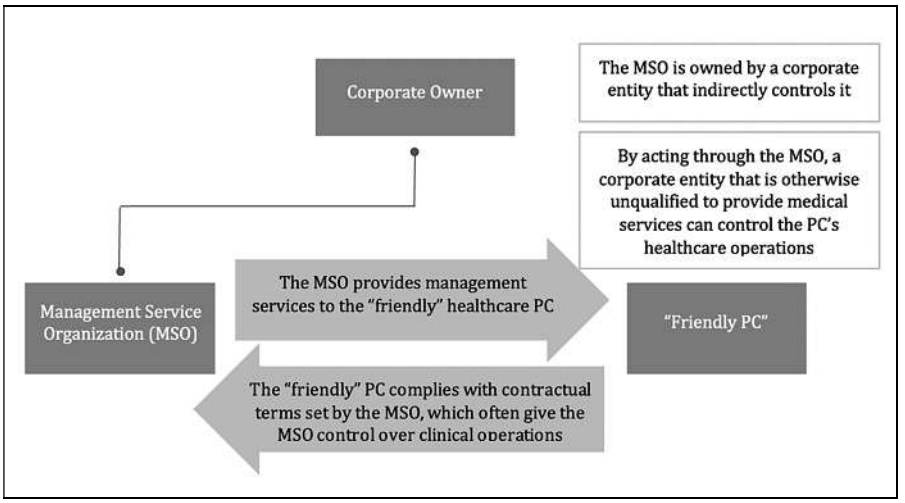
61. See, e.g., Cal. Bus. & Prof. Code § 650(a) (2024); N.Y. Educ. Law § 6509-a (McKinney 2025); N.J. Admin. Code § 13:42-10.14 (2025).

like M.D.s and D.O.s cannot be employed by practitioners with limited licenses like podiatrists, chiropractors, or midwives.[62] The purpose of these rules is to prevent unqualified individuals from exerting influence over physicians and other healthcare providers.

A. *The "Friendly PC" Model*

Corporate managers circumvent these regulations through the "[f]riendly PC" model.[63] Under this arrangement, a laymen corporation operates through its subsidiary to control a healthcare practice. The subsidiary, a management service organization (MSO), contracts with a PC to provide administrative services, setting contractual terms that oftentimes give the MSO meaningful control of clinical operations.[64] The parent corporation is unqualified to provide medical services, but by "managing" the friendly PC through its MSO, it can effectively practice medicine.

FIGURE 1. THE "FRIENDLY PC" CORPORATE STRUCTURE



62. N.J. Admin. Code § 13:35–6.16 (2025).

63. Michael Gawley, A Friendly Reminder: Friendly PC Arrangements Are Subject to Scrutiny, JD Supra (June 20, 2022), https://www.jdsupra.com/legalnews/a-friendly-reminder-friendly-pc-9552891/ [https://perma.cc/2CPE-9SY4].

64. See Daniel C. Fundakowski, Corporate Practice of Medicine: The Unseen Hurdle in Telehealth, Health L. Advisor (Feb. 6. 2013), https://www.healthlawadvisor.com/corporate-practice-of-medicine-the-unseen-hurdle-in-telehealth [https://perma.cc/M86E-J7FC] (explaining that stock transfer restriction agreements are used to set the contractual terms); see also Gawley, supra note 62 (explaining how many companies employ the friendly PC model to avoid violating state CPOM regulations).

An MSO's involvement often goes beyond basic administrative oversight.[65] MSOs can set staffing levels,[66] choose medical supplies,[67] and, in extreme cases, dictate the course of patient treatment against the recommendation of clinicians.[68]

When a private equity firm bought the dermatology chain Advanced Dermatology and Cosmetic Surgery, it "limited the purchase of basic supplies," leaving offices "without gauze, antiseptic solution, or even toilet paper."[69] At another private equity-owned dermatology office, corporate management procured cheap needles without consulting the medical staff.[70] According to one doctor, the needles often broke off into patients' bodies.[71]

Friendly PCs are kept "friendly" through stock transfer agreements, contracts that prevent physicians from transferring their equity in the PC without permission from the MSO.[72] Because the physician owners are often paid in equity,[73] their livelihoods are conditioned upon acquiescence to the MSO's policies. MSOs can subject physicians to other restrictions, including restrictive covenants that prevent them from working at other firms and nondisclosure agreements that prevent them from speaking publicly about the terms of their arrangement.[74]

On paper, the PC is owned by a physician, but the physician is selected by and bound to the oversight of corporate management through what some courts have referred to as the "Doc-in-the-Box" structure.[75] A single physician can be appointed to oversee several PCs, and in one reported

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65. See Fundakowski, supra note 64 ("The combination of business management control and the threat of exercising its rights under the transfer agreement allow the MSO to maintain control over the administrative and management side of the entity without infringing on the professional judgment of the physicians.").

66. See Brovont v. KS-I Med. Servs, P.A., 622 S.W.3d 671, 678 (Mo. Ct. App. 2020) (explaining that corporate managers set emergency room staffing levels).

67. See infra notes 69–71 and accompanying text.

68. See Treiber v. Aspen Dental Mgmt., 94 F. Supp. 3d 352, 357 (N.D.N.Y. 2015) (explaining that some MSOs automatically add unsuggested treatments to patients' plans, even if not explicitly recommended by dental professionals).

69. Brendan Ballou, Plunder: Private Equity's Plan to Pillage America 101 (2023) [hereinafter Ballou, Plunder].

70. Heather Perlberg, How Private Equity Is Ruining American Health Care, Bloomberg (May 20, 2020), https://www.bloomberg.com/news/features/2020-05-20/private-equity-is-ruining-health-care-covid-is-making-it-worse?embedded-checkout=true (on file with the *Columbia Law Review*).

71. Id.

72. See Fundakowski, supra note 64 (explaining how restrictive stock transfer agreements prevent PC owners from transferring their shares without the MSO's consent).

73. Perlberg, supra note 70.

74. Id.

75. See, e.g., Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 159 A.3d 412, 424 (N.J. 2017) (internal quotation marks omitted); see also Perlberg, supra note 70.

case, a single physician was appointed as an officer for over a hundred medical groups.[76] These physician "owners" cannot possibly provide meaningful clinical supervision over so many facilities; they effectively serve as strawmen that allow the PC to comply with CPOM laws while being controlled by corporate managers.

As the court in *Parker v. Board of Dental Examiners*[77] forewarned almost a century ago, the division of healthcare practice into business management and clinical practice has frustrated the intention of CPOM laws.

B. *Prominent Examples*

Many large corporations make use of the "friendly PC model." Oak Street, the physician group that CVS recently acquired, disclosed in an SEC filing that "[i]n markets where the corporate practice of medicine is prohibited, we have historically operated by maintaining long-term management contracts with multiple associated professional organizations which, in turn, employ or contract with physicians."[78]

Signify Health, another physician group that CVS acquired recently, made similar disclosures in its 2021 annual report.[79] Signify Health described "[t]he 'captive' or 'friendly' professional corporation model" as a legal structure "developed to comply with various state corporate practice of medicine and fee splitting laws."[80]

One Medical, which was acquired by Amazon, also operates through a "friendly PC" arrangement and acknowledged that CPOM laws may "circumscribe [its] business operations."[81]

The corporate structure of these "friendly PC" arrangements can be very complex. In *Treiber v. Aspen Dental Management*, the private equity firm

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76. See Am. Acad. of Emergency Med. Physician Grp., Inc. v. Envision Healthcare Corp., No. 22-CV-00421-CRB, 2022 WL 2037950, at *6 (N.D. Cal. May 27, 2022).

77. 14 P.2d 67 (Cal. 1932).

78. Oak Street Health, Inc., Registration Statement (Form S-1) 50 (July 10, 2020), https://www.sec.gov/Archives/edgar/data/1564406/000119312520191163/d918845ds1.htm [https://perma.cc/5R2P-CG9B] [hereinafter Oak Street S-1].

79. See Signify Health, Inc., Annual Report (Form 10-K) 22 (Dec. 31, 2022), https://www.sec.gov/Archives/edgar/data/1828182/000182818223000004/sgfy-20221231.htm [https://perma.cc/BS9G-DB6J] [hereinafter Signify Health 10-K] (explaining how the friendly PC model was developed to comply with state CPOM laws).

80. Id. at 23.

81. 1Life Healthcare, Inc., Registration Statement (Form S-1) 26 (Jan. 3, 2020), https://www.sec.gov/Archives/edgar/data/1404123/000119312520001429/d806726ds1.htm [https://perma.cc/Q5WA-F44Y] [hereinafter One Medical S-1] (explaining that in states that recognize the corporate practice of medicine doctrine, "we do not own the One Medical PCs and contract for healthcare provider services for our members . . . with such entities"). One Medical also notes that CPOM laws are "subject to change and to evolving interpretations by medical boards and state attorneys general, among others, each of which has broad discretion." Id.

Green & Partners "manage[d][] but d[id] not own" three firms that had a majority interest in a holding company that owned a holding company that owned a dental practice: Aspen.[82]

Aspen's dental treatment plans were tightly controlled by management and "operated in such a way as to automatically pad treatment plans whether or not the treating hygienist or dentist actually recommended . . . treatment."[83] Managers often added services to patient plans that their dentists did not find necessary.[84]

In this case, the court did not rule on whether the arrangement violated CPOM because the plaintiffs were a class of former patients, and in New York, only the Attorney General has a cause of action to enforce CPOM.[85]

The underenforcement of CPOM has opened the floodgates to arrangements that egregiously violate the spirit of the laws and subject patients to the profit-motivated whims of laymen managers.

C. *Recent Legislation*

On February 19, 2021, then-State Senator Sydney Kamlager-Dove of California put forward a bill, SB 642, to crack down on the "friendly PC" model.[86] The bill proposed to add a section to the California Business and Professions Code requiring that owners of medical corporations have "ultimate control over the[ir] assets and business operations . . . and shall not be replaced, removed, or otherwise controlled by any lay entity or individual, including, without limitation, through stock transfer restriction agreements or other contractual agreements and arrangements."[87]

Such legislation would authorize state regulators to scrutinize the terms of stock transfer agreements, which corporate managers go to great lengths to keep secret.[88] Although SB 642 failed to advance, despite generating significant attention, New York recently passed similar legislation that impacts corporate ownership in healthcare.[89]

On August 1, 2023, new sections of the New York Public Health Law went into effect, requiring healthcare entities to disclose mergers, acquisitions, affiliation agreements, and partnership formations to the New York Attorney General.[90] Healthcare entities must disclose "[c]opies

82. 94 F. Supp. 3d 352, 355 (N.D.N.Y. 2015).

83. Id. at 357.

84. Id.

85. See id. at 363 (emphasizing that New York's CPOM law does not create a private right of action and that violations are prosecuted by the state Attorney General).

86. See S.B. 642, 2021 Leg., Reg. Sess. (Cal. 2021).

87. Id. § 4.

88. See Perlberg, supra note 70.

89. See N.Y. Pub. Health Law § 4550 (McKinney 2025); id. § 4552.

90. See id. § 4552(1).

of any definitive agreements governing the terms of the material transaction, including pre- and post-closing conditions."[91] This legislation subjects the terms of stock transfer agreements to the attorney general, who can determine if the entity cedes too much control to corporate management.

The new disclosure requirements provide increased transparency to corporate arrangements, which can be valuable for plaintiffs in CPOM suits.[92]

Massachusetts has also recently passed an array of regulations that target corporate ownership of healthcare practices. House Bill 5159 was signed into law by Governor Maura Healey on January 8, 2025.[93] The new law imposes requirements on healthcare investors, mandating reporting of "[m]aterial changes" in ownership and disclosure of financial information.[94] The law also amends the Massachusetts False Claims Act to impose liability on any entity with an "ownership or investment interest" that "knows about" a false claim.[95] This regulations shows that states are beginning to consider false claim liability as a tool in enforcing CPOM.

D. *Recent Litigation*

In *American Academy of Emergency Medicine Physician Group v. Envision Healthcare Corp.*,[96] a physician trade group sued for a declaration that Envision, a friendly PC entity that contracted with a private equity-owned firm, violated California CPOM laws.

The legal analysis in this case was simplified by the fact that California offers specific guidance as to what activities constitute unlicensed medical practice.[97] For example, an unlicensed person cannot, among other things, determine "what diagnostic exams are appropriate for a particular condition," "the need for referrals . . . or consultation[s]," or "how many

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91. Id. § 4552(1)(b).

92. See infra note 234 and accompanying text.

93. 2024 Mass. Legis. Serv. 343 (West) (codified in scattered chapters of the Mass. Gen. Laws).

94. Id. § 24. Section 24 requires the submission of notice at least sixty days before the date of proposed material changes, which are defined as (1) expansions in organizational capacity (2) mergers and acquisitions and (3) transactions involving a "significant *equity* investor which result in a change of ownership or *control* of a provider." Id. (emphasis added). Section 24 provides that the Massachusetts Health Policy Commission may require the submission of information regarding a "significant equity investor's capital structure, general financial condition, ownership and management structure and audited financial statements." Id.

95. Id. § 29. For a more detailed analysis of the amendments to Massachusetts's False Claims Act, see infra section IV.E.

96. No. 22-CV-00421-CRB, 2022 WL 2037950 (N.D. Cal. May 27, 2022).

97. See Physicians and Surgeons: Corporate Practice of Medicine, Med. Bd. of Cal., https://www.mbc.ca.gov/Licensing/Physicians-and-Surgeons/Practice-Information [https://perma.cc/D9UB-6SRK] (last visited Jan. 27, 2025).

patients a physician must see in a given period."[98] If a corporate entity is found to be engaging in any of these activities, there is a per se violation.

In its order denying Envision's motion to dismiss, the court noted that there is enough regulatory guidance for the "court to competently determine whether such statutory guidance is being followed."[99]

Importantly, California laws do not award monetary damages to plaintiffs that enforce CPOM, and the plaintiff in Envision only sued for a declaration that the defendant's arrangement was illegal.[100] The case ended after being stayed pending Envision's bankruptcy proceeding in Texas when Envision withdrew its operations from California.[101] Private equity companies frequently enter strategic bankruptcies to dodge liability and, in the case of Envision, delay rulings that could potentially compromise their business models.[102]

Because of the steep costs of litigation and the lack of standing in certain states,[103] plaintiffs seldom pursue CPOM suits.

III. THE DANGER OF CORPORATE CONTROL IN HEALTHCARE

CPOM exists for good reason. Doctors' obligations to their patients do not align with the demands of investors. As one doctor put it: "You can't serve two masters. You can't serve patients and investors."[104]

For decades, CPOM served as a force that protected patients from predatory, financially motivated market tactics. After the passage of the HMO Act and the subsequent underenforcement of CPOM laws, publicly traded corporations and private equity firms have taken control of American healthcare. Congress passed the HMO Act under the

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98. Id.

99. *Am. Acad. of Emergency Med. Physician Grp., Inc.*, 2022 WL 2037950, at *6 (internal quotation marks omitted) (quoting Shuts v. Covenant Holdco LLC, 145 Cal. Rptr. 3d 709, 718 (Cal. Ct. App. 2012)).

100. Lawsuit Updates, Am. Acad. Emergency Med. (May 15, 2023), https://www.aaem.org/envision-lawsuit/ [https://perma.cc/S9NU-B6BY].

101. Envision Lawsuit, Am. Acad. Emergency Med., https://www.aaem.org/envision-lawsuit/ [https://perma.cc/SCK7-KNVL] (last visited Mar. 30, 2025).

102. See Brendan Ballou, When Private-Equity Firms Bankrupt Their Own Companies, The Atlantic (May 1, 2023), https://www.theatlantic.com/ideas/archive/2023/05/private-equity-firms-bankruptcies-plunder-book/673896/ (on file with the *Columbia Law Review*) (explaining how private equity firms routinely profit off the bankruptcy of their companies). The Envision CPOM lawsuit was automatically stayed during Envision's bankruptcy proceedings. Mary Mitchell, [Case Brief] AAEM-PG v. Envision Healthcare: Corporate Practice of Medicine Challenges Private Equity Acquisition in Health Care, The Source on Healthcare Price & Competition (Aug. 15, 2023), https://sourceonhealthcare.org/case-brief-aaem-pg-v-envision-healthcare-corporate-practice-of-medicine-challenges-private-equity-acquisition-in-health-care/ [https://perma.cc/342M-YD6L].

103. See Treiber v. Aspen Dental Mgmt., Inc., 94 F. Supp. 3d 352, 363 (N.D.N.Y. 2015) (noting that, in New York, only the Attorney General has standing to enforce CPOM).

104. Perlberg, supra note 70 (internal quotation marks omitted) (quoting one doctor).

assumption that corporations would contain healthcare spending costs.[105] Decades of hindsight have shown that corporate influence has had the opposite effect. One out of four Americans has delayed or skipped medical treatments due to financial concerns,[106] while healthcare costs "almost always outpace[]" the rate of inflation.[107]

A. *Private Equity*

Over the last decade, private equity firms have invested approximately $750 billion in healthcare, acquiring almost 1,000 physician practices and staffing roughly 40% of emergency departments[108] and 5–11% of nursing homes.[109] The private equity model's emphasis on short-term returns, strategic bankruptcies, and insulation from regulation threatens to undermine the core values of healthcare service. One study shows that when private equity owns more than 30% of a healthcare market, costs of ambulance care increase by double digits.[110] Another study found that

105. Samuel R. Falkson & Vijay N. Srinivasan, Health Maintenance Organization, Nat'l Libr. of Med. (Jan. 2023), https://www.ncbi.nlm.nih.gov/books/NBK554454/ [https://perma.cc/366L-42H5] (explaining that decreasing health care costs was a principle aim of the HMO Act).

106. Lunna Lopes, Alex Montero, Marley Presiado & Liz Hamel, Americans' Challenges With Health Care Costs, KFF, https://www.kff.org/health-costs/issue-brief/americans-challenges-with-health-care-costs/ [https://perma.cc/DFX3-8NNW] (last updated Mar. 1, 2024).

107. Charlotte Morabito, Why Health-Care Costs Are Rising in the U.S. More Than Anywhere Else, CNBC (Feb. 28, 2022), https://www.cnbc.com/2022/02/28/why-health-care-costs-are-rising-in-the-us-more-than-anywhere-else-.html [https://perma.cc/8Z9G-TADD] (internal quotation marks omitted) (quoting Cynthia Cox, Vice President, Kaiser Fam. Found.).

108. Ballou, Plunder, supra note 69, at 102 (stating that private equity firms have acquired over 1,200 clinics in the last decade); Erin C. Fuse Brown & Mark A. Hall, Private Equity and the Corporatization of Healthcare, 76 Stan. L. Rev. 527, 536 (2024) (estimating that private equity firms have invested more than $750 billion in health care over the past decade); Lina M. Khan, Chair, FTC, Remarks at the Private Capital, Public Impact Workshop on Private Equity in Healthcare (Mar. 5, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.05-chair-khan-remarks-at-the-private-capital-public-impact-workshop-on-private-equity-in-healthcare.pdf [https://perma.cc/PUS6-26EL] (stating that 40% of American emergency departments are staffed by companies owned by private equity firms).

109. Victoria Knight, Private Equity Ownership of Nursing Homes Triggers Capitol Hill Questions—And a GAO Probe, KFF Health News (Apr. 13, 2022), https://kffhealthnews.org/news/article/private-equity-ownership-of-nursing-homes-triggers-federal-probe/ [https://perma.cc/Y24C-BKA4].

110. Richard M. Scheffler, Laura M. Alexander & James R. Godwin, Am. Antitrust Inst., Petris Ctr., Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk 41 (2021), https://www.antitrustinstitute.org/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL-1.pdf [https://perma.cc/ZH2Q-376Z].

private equity ownership of nursing homes increases mortality rates by 10%.[111]

In previously mentioned examples, private equity firms dangerously understaffed an emergency room,[112] designed padded treatment plans that ignored the input of licensed professionals,[113] and acquired low-quality supplies that compromised patient care.[114] These examples unfortunately do not run the gamut of the private equity playbook. Private equity's strategy revolves around buying companies, cutting costs, and making short-term profits. Their goal is, usually, to make an annualized return of 20% to 30% within three to five years.[115]

The "sale-leaseback" is a common practice in which a private equity firm buys a company and forces it to sell most of its real estate property.[116] The private equity firm can then recoup a good percentage of its investment immediately, but things bode poorly in the long term for the acquired company that now must pay rent for property it once owned.

When the hospital chain Steward Health Care was purchased by a private equity firm, Steward sold its property as part of a sale-leaseback.[117] Afterwards, the hospital chain sat "on a financial knife's edge."[118] The private equity firm proceeded to fire hundreds of employees, leaving the hospitals understaffed and unprepared for the pandemic, while corporate investors profited.[119]

Private equity firms also engage in "roll-ups," in which they acquire a large physician practice and then consolidate smaller groups in the same practice area to develop a strong market share and exert monopolistic

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111. Atul Gupta, Sabrina T. Howell, Constantine Yannelis & Abhinav Gupta, Does Private Equity Investment in Healthcare Benefit Patients? Evidence From Nursing Homes (Becker Friedman Inst. for Econs., Working Paper No. 2021-20, 2021), https://bfi.uchicago.edu/wp-content/uploads/2021/02/BFI_WP_2021-20.pdf [https://perma.cc/XZ4V-JYHE].

112. See supra notes 1–3 and accompanying text.

113. See Treiber v. Aspen Dental Mgmt., Inc., 94 F. Supp. 3d 352, 357 (N.D.N.Y. 2015) (noting that dental treatments were controlled by corporate managers that padded "treatment plans whether or not the treating hygienist or dentist actually recommended the treatment").

114. See supra notes 69–71 and accompanying text.

115. Perlberg, supra note 70.

116. Todd Throckmorton, How Sale-Leasebacks Help Support PE Success in a Tight Financial Market, https://bridgepointconsulting.com/insights/sale-leaseback-support-pe-success-growth-benefits-tips-examples/ [https://perma.cc/9V6W-7PWP] (last visited Jan. 26, 2025).

117. Ballou, Plunder, supra note 69, at 103.

118. Id.

119. John Hechinger & Sabrina Willmer, Life and Debt at a Private Equity Hospital, Bloomberg (Aug. 6, 2020), https://www.bloomberg.com/news/features/2020-08-06/cerberus-backed-hospitals-face-life-and-debt-as-virus-rages (on file with the *Columbia Law Review*).

pricing.[120] Studies have found that the consolidation of physician groups leads to higher prices[121] and worse patient outcomes.[122]

Finally, there is strategic bankruptcy. The convoluted corporate structure of private equity ownership allows firms to shuffle their assets among shell companies, making certain portfolio companies look poorer than they actually are.[123] This way, when a portfolio company goes bankrupt, its creditors are left empty handed.

When Juanita Jackson's family brought a wrongful death suit against a private equity-owned nursing home, the nursing home shifted its assets, preventing Jackson's family from collecting on a $110 million verdict.[124] Jackson was a seventy-six-year-old great-grandmother.[125] She suffered

120. John Pavlus, Investors Are Gobbling Up Smaller Medical Practices. Should Regulators Be Concerned?, KelloggInsight (Mar. 1, 2025), https://insight.kellogg.northwestern.edu/article/investors-are-gobbling-up-smaller-medical-practices-should-regulators-be-concerned [https://perma.cc/98Z8-NJZW] (detailing how private equity firms rolled up anesthesiology practices and raised prices after).

121. See Daniel R. Austin & Laurence C. Baker, Less Physician Practice Competition Is Associated With Higher Prices Paid for Common Procedures, 34 Health Affs. 1753, 1753–59 (2015) (finding that for fifteen common high-cost procedures, counties with the highest average physician concentrations had prices 8–26% higher than prices in counties with the lowest concentrations); Laurence C. Baker, M. Kate Bundorf, Anne B. Royalty & Zachary Levin, Physician Practice Competition and Prices Paid by Private Insurers for Office Visits, 312 JAMA 1653, 1654–61 (2014) (finding that less competition among physician practices is statistically significantly associated with substantially higher prices paid by private PPOs to physicians in ten large specialties for office visits); Thomas Koch & Shawn W. Ulrick, Price Effects of a Merger: Evidence From a Physicians' Market, 59 Econ. Inquiry 790, 790–91 (2021) (finding that the merger of six orthopedic groups in southeastern Pennsylvania led to an anticompetitive price increase without any demonstrated increase in quality); Eric Sun & Laurence C. Baker, Concentration in Orthopedic Markets Was Associated With a 7 Percent Increase in Physician Fees for Total Knee Replacements, 34 Health Affs. 916, 916–920 (2015) (finding that between 2001 and 2010, orthopedic markets that moved from the bottom quartile of concentration to the top quartile saw an increase in physician fees of 7% per procedure).

122. See Christopher S. Brunt, Joshua R. Hendrickson & John R. Bowblis, Primary Care Competition and Quality of Care: Empirical Evidence From Medicare, 29 Health Econs. 1048, 1048–49 (2020) (finding that concentration in physician markets is associated with lower-quality screenings for blood pressure, body weight, medication documentation, and tobacco use); Thomas Koch, Brett Wendling & Nathan E. Wilson, Physician Market Structure, Patient Outcomes, and Spending: An Examination of Medicare Beneficiaries, 53 Health Servs. Rsch. 3549, 3550–51, 3562 (2018) (finding that higher concentrations in local cardiology markets is associated with higher total expenditures and worse health outcomes).

123. Ballou, Plunder, supra note 69, at 92.

124. Margaret Cronin Frisk, Nursing Home Neglect Trial Fights Shell Company Transfers, Bloomberg (Sept. 22, 2014), https://www.bloomberg.com/news/articles/2014-09-22/nursing-home-neglect-trial-fights-shell-company-transfers (on file with the *Columbia Law Review*).

125. Id.

malnutrition, dehydration, overmedication, bedsores, infections, head trauma, and a fractured arm during her time in the nursing home.[126]

Another private equity-managed nursing home, HCR ManorCare, declared bankruptcy in 2018 with over $7 billion in debt.[127] The family of a resident, Annie Salley, brought a wrongful death suit against ManorCare after she died in an understaffed facility.[128] When Salley fell and hit her head, the staff neglected to perform a head scan even though she was confused and vomiting afterwards.[129] Because the private equity firm managed but "did not technically own" the nursing home, the court dismissed the suit against them.[130]

Strategic bankruptcies and liability dodging are a natural consequence of a business strategy that is hyperfixated on short-term profits. By circumventing CPOM laws through friendly PC arrangements, private equity firms can launch these predatory business tactics on patients.

B. *Publicly Traded Companies*

Publicly traded companies are subject to tighter regulation than private equity firms, and managers of publicly traded companies are typically involved for longer periods.[131] Still, publicly traded companies pose similar threats to the quality of healthcare, especially through understaffing.

HCA Healthcare is the largest health system in the country, with 219 hospitals in its network.[132] HCA is publicly traded on the New York Stock Exchange, and between 2011 and 2021 HCA paid $4.9 billion in dividends to shareholders.[133]

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126. Researching Multimillion-Dollar Awards in Nursing Home Cases, LexisNexis, https://www.lexisnexis.com/en-us/real-law/researching-nursing-home-cases.page [https://perma.cc/VXM5-GQ34] (last visited Mar. 30, 2025).

127. Brendan Ballou, Opinion, Private Equity Is Gutting America—And Getting Away With It, N.Y. Times (Apr. 28, 2023), https://www.nytimes.com/2023/04/28/opinion/private-equity.html (on file with the *Columbia Law Review*) [hereinafter Ballou, Getting Away With It].

128. Salley v. Heartland-Charleston, No. 2:10-CV-00791, 2010 WL 5136211 (D.S.C. Dec. 10, 2010).

129. Ballou, Getting Away With It, supra note 127.

130. Id.

131. Fuse Brown & Hall, supra note 108, at 539.

132. Ethan Evers, Top 10 Largest Health Systems in the U.S., Definitive Healthcare (Jan. 10, 2024), https://www.definitivehc.com/blog/top-10-largest-health-systems [https://perma.cc/N9ZH-J4CM].

133. Michael Sainato, As US Hospital Profits, Health Workers Struggle With Chronic Understaffing, The Guardian (Feb. 22, 2023), https://www.theguardian.com/global-development/2023/feb/22/hca-union-hospital-understaffing [https://perma.cc/7LVC-RX97].

In a survey of 1,500 HCA hospital nurses, 80% believed that understaffing was compromising patient care.[134] 47% of those surveyed in Florida reported wanting to leave their job due to burnout.[135] HCA allowed these conditions to persist despite reporting a profit of $7 billion and spending $8 billion on stock buybacks in 2021.[136] Understaffing saves HCA and its investors billions of dollars a year,[137] but that cost is internalized by patients and healthcare staff.

CVS, which is poised to increase its presence in the physician group market, infamously understaffs its pharmacies.[138] District and regional managers at CVS reportedly receive bonuses for limiting employee hours,[139] creating worker shortages in their stores. The poor working conditions in CVS pharmacies have led to numerous problems, including dispensing errors, prescription delays, dirty workspaces, expired medication remaining on shelves, poor drug security, and failure to report losses of controlled substances.[140]

In one inspection at an Ohio CVS store, regulators found that 1,800 doses of controlled substances were not accounted for.[141] CVS ended up reaching a $1.5 million dollar settlement with the Ohio Board of Pharmacy to resolve penalties for understaffing related problems.[142]

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134. Press Release, SEIU, New National Survey of Nurses and Healthcare Workers at HCA Hospitals Sounds Alarm Bells: Nearly 80 Percent of Respondents Report Short Staffing Is Jeopardizing Patient Care at America's Largest For-Profit Hospital Corporation (Jan. 13, 2022), https://seiu.org/2022/01/new-national-survey-of-nurses-and-healthcare-workers-at-hca-hospitals-sounds-alarm-bells-nearly-80-percent-of-respondents-report-short-staffing-is-jeopardizing-patient-care-at-americas-largest-for-profit-hospital-corporation (on file with the *Columbia Law Review*).

135. Joseph H. Saunders, Florida HCA Hospitals Woefully Understaffed Endangering Patients, Legal Exam'r (May 11, 2023), https://affiliates.legalexaminer.com/legal/florida-hca-hospitals-woefully-understaffed-endangering-patients [https://perma.cc/8R5K-Z7S7].

136. Finegan, supra note 134.

137. Id.

138. See Thomas Lee, CVS Pharmacists Are at a Breaking Point, Imperiling Company's Reinvention Plans, Bos. Globe, https://www.bostonglobe.com/2023/11/19/business/cvs-pharmacists-breaking-point/ (on file with the *Columbia Law Review*) (last updated Nov. 19, 2023) (describing how CVS faces staffing shortages after closing stores and cutting staff hours).

139. Marty Schladen, Problems at Understaffed CVS Pharmacies Are Said to Be Widespread. The Ohio AG Is Taking a Look, Ohio Cap. J. (Aug. 3, 2023), https://ohiocapitaljournal.com/2023/08/03/problems-at-understaffed-cvs-pharmacies-are-said-to-be-widespread-the-ohio-ag-is-taking-a-look/ [https://perma.cc/7WHU-269D].

140. Id.; see also Adiel Kaplan, CVS to Pay Ohio $1.5 Million in Penalties Over Understaffing and Other Safety Issues at Pharmacies, NBC News (Mar. 1, 2024), https://www.nbcnews.com/news/us-news/cvs-pay-ohio-15-million-penalties-understaffing-safety-issues-pharmaci-rcna141245 [https://perma.cc/CC6Y-L76P].

141. Schladen, supra note 139.

142. Kaplan, supra note 140.

The Virginia Board of Pharmacy fined CVS $470,000 over understaffing issues.[143] Its investigation reported unsafe working conditions, noting that "staffing levels contributed to errors" such as accidentally giving patients extra opioids and providing incorrect instructions on prescription labels.[144] A pharmacist in Virginia reported that as prescription volume increased in her CVS store, management decreased employee hours, telling her that "there's a clear message to stay under hours week to week."[145] The restricted hours increased the burden for the limited staff who worked on site, with some employees working for twenty-four hours straight and going entire shifts without taking bathroom breaks.[146] A pharmacist reported to the Texas State Board of Pharmacy: "I am a danger to the public working for CVS."[147]

When Ashleigh Anderson, a pharmacist from Indiana, felt ill behind a CVS pharmacy counter, she contacted her supervisor, who allegedly threatened to fire her if she did not stay another two hours.[148] Anderson died of a heart attack in the arms of a coworker after a patient tried to perform CPR on her.[149] Weeks later, CVS reported quarterly revenues of $73.8 billion.[150] As CVS begins to take over more primary care offices, more patients and healthcare staff will be subject to its dangerous conditions.

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143. Bill Chappell, Have a Complaint About CVS? So Do Pharmacists: Many Just Walked Out, NPR (Sept. 29, 2023), https://www.npr.org/2023/09/29/1202365487/cvs-pharmacists-walkout-protest [https://perma.cc/R4CA-N9N4].

144. CVS/Pharmacy #8302, Case No. 203229, at para. 2(b)(vi) (Va. Bd. of Pharmacy Oct. 7, 2021) (order) (internal quotation marks omitted) (quoting a pharmacist), https://www.virginiamercury.com/wp-content/uploads/2021/10/CVS-8302_Board-Order_10-5-21.pdf [https://perma.cc/WWH2-S3CJ].

145. Catherine Dunn, What's Gone Wrong at Pharmacies? A CVS Store in Virginia Beach Holds the Answer., Barron's (Feb. 9, 2024), https://www.barrons.com/articles/pharmacies-medication-mistakes-cvs-e405367a?mod=bol-social-tw (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Victoria Ward, Pharmacist, CVS Health).

146. Id.

147. Daniel A. Hussar, "I Believe I Am a Danger to the Public Working for CVS.", Pharmacist Activist, May 2019, at 1, https://www.pharmacistactivist.com/2019/PDFs/May_2019.pdf [https://perma.cc/U5KK-KDG6] (internal quotation marks omitted) (quoting an anonymous CVS pharmacist).

148. Grace Dean, A CVS Pharmacist at an Understaffed Store Knew She Was Having a Heart Attack but Stayed at Work Until She Died, Her Family Says, Bus. Insider (Feb. 9, 2024), https://www.businessinsider.com/cvs-pharmacist-heart-attack-understaffed-store-pandemic-ashleigh-anderson-indiana-2024-2 (on file with the *Columbia Law Review*).

149. Matt Stoller, #PizzaIsNotWorking: Inside the Pharmacist Rebellion at CVS and Walgreens, BIG (Nov. 5, 2021), https://www.thebignewsletter.com/p/pizzaisnotworking-inside-the-pharmacist [https://perma.cc/WP78-QRK9].

150. Press Release, CVS, CVS Health Reports Strong Third Quarter Results (Nov. 3, 2021), https://www.cvshealth.com/news/community/cvs-health-reports-results-2021-q3.html [https://perma.cc/V79F-C8ZV].

Amazon and Walmart have not been in the healthcare space for long, but they have their own history of understaffing and poor working conditions outside the healthcare context.[151] The problem with HCA, CVS, Amazon, and other publicly traded companies is that they must maximize value for their shareholders.

In the famous case of *Dodge v. Ford Motor Co.*, the Ford Motor Company planned to reappropriate dividends from shareholders to invest in manufacturing infrastructure.[152] Henry Ford explained: "My ambition . . . is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business."[153] Shareholders brought suit and the court ultimately held that the board of directors lacked discretion to reduce profits for shareholders.[154] In other words, a corporation cannot legally serve the public interest at the expense of its shareholders.

This is precisely why corporations are unfit to operate healthcare practices. The shareholder supremacy principle comes at the expense of vulnerable patients and their providers.

CPOM laws were passed to protect patients and healthcare workers. The underenforcement of CPOM over the last few decades has allowed corporate actors to ceaselessly exploit the sick and those working to care for them.

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151. See Press Release, DOL, US Department of Labor Finds Amazon Exposed Workers to Unsafe Conditions, Ergonomic Hazards at Three More Warehouses in Colorado, Idaho, New York, (Feb. 1, 2023), https://www.dol.gov/newsroom/releases/osha/osha20230201-0 [https://perma.cc/5ZWY-2YBJ] (describing how workers in Amazon warehouses are exposed to ergonomic hazards that "lead[] to serious worker injuries" (internal quotation marks omitted) (quoting Doug Parker, Assistant Sec'y for Occupational Safety & Health, DOL)); see also Annie Palmer, Amazon Broke Federal Labor Law by Calling Staten Island Union Organizers 'Thugs,' Interrogating Workers, CNBC (Dec. 1, 2023), https://www.cnbc.com/2023/12/01/amazon-broke-federal-labor-law-by-racially-disparaging-union-leaders.html [https://perma.cc/4AK3-6RFE] (summarizing a ruling that Amazon illegally retaliated against union activities); Jonathan Stempel, Walmart Faces Second U.S. Lawsuit This Week Over Treatment of Workers, Reuters (Mar. 30, 2023), https://www.reuters.com/legal/walmart-faces-second-us-lawsuit-this-week-over-treatment-workers-2023-03-30/ (on file with the *Columbia Law Review*) (reporting on a lawsuit against Walmart over the firing of Adrian Tucker for taking too many unauthorized absences related to her Crohn's disease, an inflammatory bowel condition).

152. 170 N.W. 668, 671 (Mich. 1919).

153. Id. at 683 (internal quotation marks omitted) (quoting Ford).

154. See id. at 684 ("The discretion of directors . . . does not extend to . . . the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.").

IV. ATTACHING FALSE CLAIM LIABILITY

Attaching false claim liability to violations of CPOM would increase enforcement and potentially compromise the friendly PC model.

The False Claims Act imposes liability on parties that submit false claims to the government, make false statements when facilitating claims, or receive money from the government under fraudulent circumstances.[155] Originally enacted in 1863 to curtail fraud in government military contracts during the civil war, the False Claims Act has evolved to address fraud in all sectors that the government contracts in.[156]

The Act charges anyone guilty of government fraud with "a civil penalty of not less than $5,000 . . . plus 3 times the amount of damages."[157] This fine applies to each false claim that is issued.[158] Healthcare groups often issue thousands of claims over the course of their operation.[159] If the claims are found to be fraudulent, those groups face gargantuan damages. Some of the largest settlements in history resulted from healthcare companies' false claims.[160]

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155. 31 U.S.C. § 3729(a) (2018); see also United States ex rel. Bain v. Georgia Gulf Corp., 386 F.3d 648, 652–53 (5th Cir. 2004) ("Under the reverse False Claims Act subsection, a plaintiff may recover against 'any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.'" (alteration in original) (quoting 31 U.S.C. § 3729(a)(7) (2002))).

156. See United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) ("The Civil False Claims Act was born in 1863 to a nation engulfed in a civil war. . . . Based on the record of widespread fraud by contractors, Congress, at the urging of President Lincoln, enacted the False Claims Act.").

157. 31 U.S.C. § 3729(a)(1)(G).

158. Id.

159. In one case, over a five-year period, one dentist filed 3,683 false claims, resulting in a fine of $18,415,000 even though the government was only defrauded of $130,719. See United States v. Lorenzo, 768 F. Supp. 1127, 1133 (E.D. Pa. 1991).

160. See, e.g., Press Release, DOJ, GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report [https://perma.cc/LLW5-PXVN] (describing what was at the time "the largest health care fraud settlement in U.S. history and the largest payment ever by a drug company"); Press Release, DOJ, Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013), https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations [https://perma.cc/KS26-FQ8E] (announcing that, in addition to paying $485 million in criminal fines and $1.72 billion in civil settlements, Johnson & Johnson was entered into a "Corporate Integrity Agreement" with the HHS Inspector General); Press Release, DOJ, Justice Department Announces Largest Health Care Fraud Settlement in Its History, (Sept. 2, 2009), https://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history [https://perma.cc/5FUE-NJQA] (noting that Pfizer agreed to pay $2.3 billion to settle criminal and civil claims related to its misbranding of Bextra, an anti-inflammatory drug).

Furthermore, through the qui tam provisions of the False Claims Act, private citizens can bring suit on behalf of the government.[161] The qui tam provision enables whistleblowers to expose fraudulent operations and keeps companies diligent under threat of being exposed by their own employees.

In order to establish a False Claims Act violation, a plaintiff must establish (1) a false claim; (2) materiality; (3) causation; and (4) scienter or knowledge that the claim was false.[162] The following sections will outline how a plaintiff can establish these requirements in a CPOM suit.

A. *False Claim*

Claims may trigger false claim liability if they are factually false or legally false. Factually false claims involve billing for goods or services that are incorrectly described or not provided at all.[163] A claim is legally false if it is predicated on a misrepresentation of compliance with material, contractual terms.[164] In other words, if an entity bills the government without complying with the government's conditions of payment, it has submitted a false claim. The concept of legal falsity is also known as "implied false certification."[165]

The Supreme Court endorsed implied certification theory in *Universal Health Services v. United States ex rel. Escobar*, holding that false claim liability will attach when a defendant submits a claim to the government while knowingly failing to disclose noncompliance with "statutory, regulatory, or contractual requirements."[166]

In *Escobar*, employees at a Massachusetts mental health facility misrepresented their qualifications and licensing status when submitting reimbursement claims to Medicare.[167] One nurse claimed to be a psychiatrist and prescribed medications without authority to do so.[168] Another practitioner represented herself as a psychologist without disclosing that she was not licensed.[169]

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161. 31 U.S.C. § 3730(b).

162. Molly Ruberg, False Claims Act Fundamentals: Elements of the False Claims Act, Bass, Berry & Sims (Apr. 5, 2022), https://www.insidethefalseclaimsact.com/false-claims-act-fundamentals-elements-of-the-false-claims-act/ [https://perma.cc/TVU5-7D8F].

163. See United States ex rel. Wilkins v. United Health Grp., Inc., No. 08-3425 (RBK/JS), 2010 WL 1931134, at *3 (D.N.J. May 13, 2010), aff'd in part, rev'd in part, 659 F.3d 295 (3d Cir. 2011).

164. Id.

165. Id.

166. 579 U.S. 176, 181, 187 (2016).

167. Id. at 184.

168. Id. at 183.

169. Id.

When a patient died from an adverse reaction to a medication fraudulently prescribed by the facility, her family subsequently learned that most employees at the facility were not properly licensed and brought a qui tam action.[170]

The Massachusetts Medicaid program sets forth licensing requirements for healthcare positions.[171] The Supreme Court found that Universal Health violated these requirements by employing unqualified staff and thereby submitted false claims to the government regarding their services.[172]

The CMS conditions for participation include compliance with "all applicable Federal, State, and local laws and regulations related to the health and safety of patients."[173] By billing Medicare or Medicaid, a healthcare organization implies compliance with state CPOM laws. Plaintiffs should therefore invoke implied certification theory to establish false claim liability in prospective CPOM cases.

Furthermore, several cases have held that violations of CPOM can serve as the basis of a false claim in the context of state insurance fraud laws.[174] For example, in *People ex rel. Monterey Mushrooms, Inc. v. Thompson*, the court held that a corporate management company's scheme to control a medical clinic violated California CPOM laws and resulted in fraudulent claims to insurers that covered the clinic's services.[175]

B. *Materiality and Causation*

For liability to attach, compliance with CPOM laws must be material to reimbursement. The Court in *Escobar* clarified that a payment condition can be material "even if the Government does not expressly call it a condition of payment."[176] In the context of fraud, an undisclosed fact is material if "[n]o one can say with reason that the plaintiff would have signed the contract if informed of the likelihood" of the misrepresentation.[177] Therefore, the materiality of a CPOM false claim

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170. Id. at 183–84.

171. See 130 Mass. Code Regs. §§ 429.422–.424, .429, .439 (2025).

172. See *Escobar*, 579 U.S. at 196.

173. 42 C.F.R. § 418.116 (2025).

174. See, e.g., People ex rel. Allstate Ins. Co. v. Discovery Radiology Physicians, P.C., 311 Cal. Rptr. 3d 901, 917 (Cal. Ct. App. 2023) ("The unlicensed practice of medicine may give rise to claims under the [Insurance Fraud Protection Act] . . . ."); Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 159 A.3d 412, 429 (N.J. 2017) ("[Defendants] promoted a practice scheme specifically designed to circumvent [CPOM] requirements while appearing compliant, and therefore knowingly assisted in the provision of services, the foreseeable result of which was the submission of invalid and misleading claims . . . .").

175. 38 Cal. Rptr. 3d 677, 687–88 (Cal. Ct. App. 2006).

176. *Escobar*, 579 U.S. at 178.

177. Junius Const. Co. v. Cohen, 178 N.E. 672, 674 (N.Y. 1931).

revolves around whether the government would have knowingly reimbursed a claim from an entity that violates CPOM.

To better understand what the government would do in this position, a court should consider how private insurance companies handle similar situations.

In *Andrew Carothers, M.D., P.C. v. Progressive Insurance Co.*, several private insurance companies stopped paying a radiology group, Andrew Carothers, when they discovered that it violated New York CPOM laws.[178] Carothers subsequently filed suit.[179] Carothers was a friendly PC to an entity run by nonphysicians.[180] The court found the terms of their business arrangement ceded too much control to the MSO and that insurers are not required to reimburse healthcare providers "if the provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York."[181]

Interestingly, if Progressive Insurance had sued Carothers for a declaration that its MSO arrangement violated New York CPOM laws, it would have lacked standing to do so.[182] But, in the context of a fraud defense to Carothers's suit for missing payments, Progressive was able to invoke CPOM.

In both *Allstate Insurance Co. v. Northfield Medical Center, P.C.* and *Allstate Insurance Co. v. Schick*, fraud investigators at Allstate Insurance discovered it had reimbursed claims from medical corporations that were in violation of New Jersey CPOM laws.[183] Allstate subsequently brought a suit under the New Jersey Insurance Fraud Prevention Act, a law similar to the False Claims Act that imposes fines on entities that submit false claims to insurance companies, and recovered over four million dollars.[184]

In the Allstate cases, an insurance company plaintiff invoked CPOM under state fraud laws. The cases serve as a blueprint for how the government can use federal fraud laws to invoke CPOM.

If private insurance companies withhold payments from improperly licensed healthcare providers, there is no reason why the government would not do so as well. When people pay for medical services, they expect their treatment to be provided and decided by qualified professionals, not laymen. Government programs like Medicare and Medicaid are funded by

178. 128 N.E.3d 153, 156–57 (N.Y. 2019).

179. Id. at 157.

180. Id. at 156 (stating that Carothers subleased the facilities and associated equipment from a nonphysician who owned and controlled two other companies).

181. Id. at 157 (internal quotation marks omitted) (quoting N.Y. Comp. Codes R. & Regs. tit 11, § 65-3.16(a)(12) (2021)).

182. See supra note 85 and accompanying text.

183. See 159 A.3d 412 (N.J. 2017); 746 A.2d 546 (N.J. Super. Ct. Law Div. 1999).

184. Allstate Ins. Co. v. Northfield Med. Ctr., PC, No. A-0964-12T4, 2019 WL 1119664, at *1 (N.J. Super. Ct. App. Div. Mar. 11, 2019).

the public for the public.[185] It would be absurd for these programs to use taxpayer money to fund institutions that defraud taxpayers.

In *Ebeid ex rel. United States v. Lungwitz*, a pre-*Escobar* case, the government brought a Federal False Claims Act case against a healthcare clinic for violating California CPOM law.[186] The complaint did not "refer to any statute, rule, regulation, or contract that condition[ed] payment on compliance with state law governing the corporate practice of medicine."[187] The Ninth Circuit dismissed the case for failing to plead with particularity.[188]

The California Courts of Appeal have since clarified that *Ebeid* does not stand for the proposition that the unlicensed practice of medicine can never support a False Claims case.[189] In fact, since *Ebeid*, courts have found false claims in many instances of unauthorized healthcare practice, including when: a hospital submitted claims through an unlicensed physician,[190] a private equity-managed mental health center provided services through unlicensed social workers,[191] and a pharmaceutical company billed the government for drugs manufactured in an unapproved facility.[192] *Escobar* itself revolves around the premise that unlicensed medical practice can form the basis of false claims.[193]

It is therefore critical for prospective plaintiffs to include CMS participation requirements in their complaints to establish that government reimbursement is conditioned upon compliance with CPOM laws. In

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185. See How Is Medicare Funded?, Medicare.gov, https://www.medicare.gov/about-us/how-is-medicare-funded [https://perma.cc/X885-NX74] (last visited Jan. 27, 2025) (explaining that Medicare is paid for by various types of taxes).

186. 616 F.3d 993, 995 (9th Cir. 2010).

187. Id. at 1000.

188. Id. at 1001.

189. People ex rel. Allstate Ins. Co. v. Discovery Radiology Physicians, P.C., 311 Cal. Rptr. 3d 901, 921 (Cal. Ct. App. 2023) ("[*Ebeid*] does not hold that the unlicensed practice of medicine could *never* support a claim under the False Claims Act, but only that the operative complaint had not pled such a claim with the requisite specificity." (citing *Ebeid*, 616 F.3d at 1000)).

190. See United States ex rel. Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370, 379 (5th Cir. 2004) (holding that a hospital had submitted false claims by knowingly submitting medical claims for services provided by unlicensed physicians).

191. See United States ex rel. Martino-Fleming v. S. Bay Mental Health Ctrs., 540 F. Supp. 3d 103, 119 (D. Mass. 2021) (concerning obscure corporate ownership in which a private equity firm owned a subsidiary, which was the majority shareholder of a holding company, which indirectly owned another holding company that owned a mental health center).

192. See United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 902 (9th Cir. 2017) (holding that Gilead had submitted false claims by manufacturing pharmaceutical ingredients from unapproved facilities).

193. See Universal Health Servs., Inc. v. United States ex rel. Escobar, 579 U.S. 176, 185 (2016) (summarizing plaintiff's allegations that the defendant violated federal law by billing "for mental health services that were performed by unlicensed and unsupervised staff").

addition to the general terms of CMS participation, there are specific participation terms for different types of healthcare organizations.[194]

For example, CMS will only reimburse a Home Health Agency (HHA) if "its branches, and all persons furnishing services to patients [are] licensed, certified, or registered as applicable, in accordance with the state licensing authority as meeting those requirements."[195] CPOM laws are clearly within the scope of state licensing and registration requirements; therefore, compliance with CPOM is material to CMS reimbursements for HHAs.

There are similar requirements for clinics,[196] long term care facilities,[197] ambulatory surgical centers,[198] and more. Some CMS requirements resemble CPOM regulations insofar as they require the involvement of licensed professionals in clinical operations.[199] Plaintiffs should familiarize themselves with the relevant CMS rules to establish materiality.

Closely associated with the concept of materiality is causation. The False Claims Act requires a causal relationship between fraud and payment.[200] Under the implied certification theory developed in *Escobar*, failure to disclose noncompliance with a material condition of payment causes the government to pay.[201]

C. *Scienter*

In light of *United States ex rel. Schutte v. Supervalu Inc.*, false claim scienter turns on whether a defendant subjectively knew its claim was false,

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194. Conditions for Coverage (CfCs) & Conditions of Participation (CoPs), CMS.gov, https://www.cms.gov/medicare/health-safety-standards/conditions-coverage-participation [https://perma.cc/DT8W-LHAS] (last modified Sept. 10, 2024).

195. 42 C.F.R. § 484.100(b) (2025).

196. See id. § 485.705(a) ("[A]ll personnel who are involved . . . must be legally authorized (licensed or, if applicable, certified or registered) to practice by the State in which they perform the functions or actions, and must act only within the scope of their State license or State certification or registration.").

197. See id. § 483.24(c)(2) (requiring that clinics be directed by a licensed professional).

198. See id. § 416.246 (requiring that a registered nurse be available for emergency treatment).

199. See, e.g., id. § 418.62(b) ("Licensed professionals must actively participate in the coordination of all aspects of the patient's hospice care, in accordance with current professional standards and practice, including participating in ongoing interdisciplinary comprehensive assessments, developing and evaluating the plan of care, and contributing to patient and family counseling and education . . . .").

200. See Ruberg, supra note 162.

201. See Universal Health Servs., Inc. v. United States ex rel. Escobar, 579 U.S. 176, 186–87 (2016) ("When, as here, a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided.").

not whether a hypothetical "objectively reasonable person" would have concluded the claim was false.[202] This framework makes it difficult to establish scienter in the context of a CPOM false claim because a plaintiff must show not only that an arrangement was improper but also that the defendant knew it was improper.

Fortunately, in their SEC shareholder disclosures, many physician groups acknowledge that their operations may be prohibited by CPOM. For example, Signify Health discloses in its 10-K filing that "although we have endeavored to structure our operations to comply with all applicable state corporate practice of medicine and fee splitting rules, there remains some risk that we may be found in violation of those state laws."[203] It goes on to disclose that any determination that Signify Health is acting in the capacity of, exercising undue influence over, or impermissibly splitting fees with a healthcare provider will "result in significant sanctions against us and our providers, including civil and criminal penalties and fines."[204]

Fines for violating CPOM generally do not exceed one hundred thousand dollars. In California, violations are "punishable by a fine not exceeding ten thousand dollars."[205] In Pennsylvania, any person that violates CPOM "commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine of not more than $2,000."[206] For a corporation like Signify Health to acknowledge that CPOM violations may lead to "significant sanctions" suggests that it is likely aware of sanctions outside of state fines, like false claim liability.

It would be difficult for a company like CVS to claim it was not aware of such legal liability before purchasing Signify. HCA and One Medical also acknowledge the risk of violating CPOM laws in their 10-K filings.[207]

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202. 143 S. Ct. 1391, 1399 (2023).

203. See Signify Health 10-K, supra note 79, at 55 (emphasis added). Oak Street also discloses that "[r]egulatory authorities and other parties may assert that, despite the management agreements and other arrangements through which we operate, we are engaged in the prohibited corporate practice of medicine." See Oak Street S-1, supra note 78, at 50.

204. See Signify Health 10-K, supra note 79, at 55.

205. Cal. Bus & Prof. Code § 2052(a) (2024).

206. 63 Pa. Stat. and Cons. Stat. Ann. § 422.39(a) (2025).

207. See HCA Inc., Annual Report (Form 10-K) 16–17 (Dec. 31, 2005), https://www.sec.gov/Archives/edgar/data/860730/000095014406002233/g99681e10vk.htm (on file with the Columbia Law Review) ("Some of the states in which we operate have laws that prohibit corporations and other entities from employing physicians and practicing medicine . . . . Possible sanctions for violation of these restrictions include loss of license and civil and criminal penalties."); One Medical S-1, supra note 81, at 26 ("[W]e cannot guarantee that subsequent interpretation of the corporate practice of medicine and fee splitting laws will not circumscribe our business operations. . . . If a successful legal challenge or an adverse change in relevant laws were to occur . . . our operations in affected jurisdictions would be disrupted . . . .").

These disclosures, in combination with other internal communications, can help establish scienter.

Furthermore, as more case law develops in this area, it will be difficult for larger commercial actors to claim ignorance of CPOM laws.

In *Northfield Medical*, the Supreme Court of New Jersey analyzed whether defendants "knowingly" violated a CPOM law that prohibits physicians from being employed by chiropractors.[208] In a 1995 letter-opinion, the New Jersey Board of Medical Examiners clarified that a chiropractor cannot be a majority shareholder in a corporation that employs physicians because of the "potential for override of [a] physician's professional judgment."[209]

The defendants ran a chiropractor-owned management company that contracted with a medical PC. They essentially coordinated a friendly PC operation in which the nominal doctor-owner of the PC was bound by contract terms—including provisions that the doctor could be removed and fined at the management company's discretion—that prevented the doctor from "seizing control of the practice."[210] Prior to starting their management company, defendants attended a lecture for medical professionals where they learned of the relevant law prohibiting chiropractors from employing physicians.[211]

The appellate court found that in light of existing case law and informal guidance, the defendant had a "reasonable basis to believe that the [business] model he advocated was not illegal in New Jersey" and that the corporate arrangement in question "was similar to others used in business."[212]

The Supreme Court of New Jersey reversed, holding that the defendants "promoted a practice scheme specifically designed to circumvent . . . requirements while appearing compliant, and therefore knowingly assisted in the provision of services, the foreseeable result of which was the submission of invalid and misleading claims."[213] Based on the plain language of the regulation and the clarity of the Board's

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208. Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 159 A.3d 412, 422, 428 (N.J. 2017) ("N.J.A.C. 13:35–6.16 establishes the proper structure of a medical practice and incorporates the manner in which the corporate practice of medicine may be employed."); see also N.J. Admin. Code 13:35–6.16(3)(i) (2025) (explaining that doctors cannot be hired by healthcare providers with "limited license[s]" like chiropractors).

209. See *Northfield Med. Ctr.*, 159 A.3d at 416.

210. Id. at 419.

211. Id. at 418.

212. Allstate Ins. Co. v. Northfield Med. Ctr., P.C., No. A-0636-12T4, 2014 WL 8764091, at *12–13 (N.J. Super. Ct. App. Div. May 4, 2015), rev'd, 159 A.3d 412 (N.J. 2017).

213. *Northfield Med. Ctr.*, 159 A.3d at 429.

guidance, the court found "no basis" to hold that the defendants did not know that their structure violated the Board's regulatory guidance.[214]

Northfield Medical demonstrates that, at least in New Jersey, designing a corporate structure that clearly exists to circumvent CPOM laws can, by itself, demonstrate knowledge of fraud. Showing that the defendant had awareness of CPOM laws is critical to showing that they deliberately circumvented them; in *Northfield Medical*, the court assigned weight to the fact that the defendants' legal counsel was aware of the relevant regulations, evidenced by a trade article the counsel wrote discussing them.[215] The level of awareness and sophistication of a defendant's legal counsel can be crucial in proving the defendant's scienter.

D. *Establishing the Underlying CPOM Violation*

Before a court can assess any of these elements, it must first determine whether there is an underlying violation of CPOM. In states like California, where prohibited acts are clearly outlined in regulatory guidance,[216] the inquiry is a simple matter of fact of whether the defendant engaged in any of the prohibited activities.

In states like New York, where the laws do not explicitly state which activities constitute a violation of CPOM,[217] courts must scrutinize the specific terms of agreement between a friendly PC and MSO. The legality of these agreements turns on whether a nonlicensed entity retains the right to exercise "control over" a medical practitioner's decisions.[218]

In *Andrew Carothers*, the court found it suspect that the terms of the agreement between Carothers and its MSO disproportionately benefited the latter.[219] Specifically, the MSO charged equipment leases to the friendly PC that were far above fair market value, and the MSO had an exclusive right to terminate its contracts without cause.[220] Furthermore, the "owner" of the PC had virtually no involvement in patient care or business arrangement.[221]

In *State Farm Mutual Automobile Insurance Co. v. Mallela*, an unlicensed individual controlled a medical corporation under the guise of providing

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214. Id. Earlier, the court stated that "professionals engaged in the provision of health care . . . are on notice of the legal requirements applicable to their practice and operations." Id. at 428 (citing Material Damage Adjustment Corp. v. Open MRI, 799 A.2d 731 (N.J. Super. Ct. Law Div. 2002)).

215. See id. at 419.

216. See supra notes 97–99 and accompanying text.

217. See infra notes 218–224 and accompanying text for an application of New York CPOM laws.

218. Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 128 N.E.3d 153, 162 (N.Y. 2019).

219. See id. at 155–56.

220. See id. at 156–57.

221. Id.

management services.[222] The court found it suspect that the management services were billed at grossly inflated rates and held that the arrangement violated CPOM.[223] When a corporate entity sets management fees grossly above fair market value, it takes impermissible control of the professional corporation's revenue and compromises the independence of the healthcare staff it manages.[224]

In *Allstate Indemnity Co. v. Twin Cities Diagnostic Center, LLC*, Allstate sued for a declaration that bills from a laymen-controlled radiology company, Twin Cities, were noncompensable because Twin Cities violated Minnesota CPOM laws.[225] The lower court held that, because Twin Cities only performed a technical component of MRI scans, it was not subject to CPOM.[226] The court of appeals refused to accept this theory, noting that state regulations do not "bifurcate" MRI practice into "technical" and "professional" components.[227] An MSO may similarly attempt to exempt its services from CPOM regulation by claiming that they are purely "technical." Plaintiffs should look to the relevant state regulations and case law to determine whether such a classification is tenable.

Many other insurance companies have invoked CPOM to refuse payments to violating entities.[228] The factual analysis in these cases provide the groundwork for assessing unauthorized medical practice within a given state.

The instruction of medical boards can be critical to establishing a violation of CPOM. In *Northfield Medical*, the court relied on an opinion from the New Jersey Board of Medical Examiners to interpret state CPOM laws.[229]

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222. 827 N.E. 2d 758, 759 (N.Y. 2005).

223. Id. at 759.

224. See Three Ways Your Healthcare MSO May Be Violating the Prohibition Against the Corporate Practice of Medicine (CPOM), Hendershot Cowart P.C. (Sept. 8, 2020), https://www.hchlawyers.com/blog/2020/september/three-ways-your-healthcare-mso-may-be-violating-/ [https://perma.cc/7S3W-7JM2].

225. 974 N.W.2d 842, 843–44 (Minn. Ct. App. 2022).

226. Id. at 845.

227. Id.

228. See, e.g., State Farm Mut. Auto. Ins. Co. v. Mobile Diagnostic Imagine, Inc., 7 F. Supp. 3d 934, 936–37 (D. Minn. 2014) (summarizing State Farm Insurance's argument that it was not required to reimburse radiologists who violated CPOM laws); Allstate Ins. Co. v. Linea Latina De Accidentes, Inc., 781 F. Supp. 2d 837, 851 (D. Minn. 2011) (holding that Allstate adequately alleged that a lay person indirectly owned a chiropractor clinic); Isles Wellness, Inc. v. Progressive N. Ins. Co., 703 N.W.2d 513, 515 (Minn. 2005) (summarizing Progressive Insurance's argument that it was not required to reimburse chiropractors that violated CPOM laws).

229. Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 159 A.3d 412, 416–18 (N.J. 2017) (examining letters from the Board of Medical Examiners for guidance on New Jersey's corporate practice of medicine regulations).

Attorneys' General Opinions can also be instructive.[230] For example, in 1982, the California Attorney General stated that, as a general rule, a corporation "may neither engage in the practice of medicine directly, nor may it do so indirectly by 'engaging [physicians] to perform professional services.'"[231] Decades later, Californian courts still defer to this opinion in CPOM decisions.[232]

In egregious cases of unlicensed medical practice, like in *Aspen*,[233] the nature of a health care organization's clinical operations may be enough to establish a violation. For example, if patient treatment decisions are decided by laymen managers over the advice of clinicians, there is a blatant case of unlicensed medical practice.

Plaintiffs can help build their cases from the corpus of insurance cases disputing corporate control in healthcare. Furthermore, as states like California, New York, and Massachusetts increase their scrutiny of corporate healthcare arrangements,[234] the government will have increasing access to the terms of stock transfer agreements between MSOs and friendly PCs. Government enforcers can use this information to investigate potential violations of CPOM and initiate or intervene in false claim litigation.

E. *State False Claims Acts*

CPOM plaintiffs are not limited to suing under the Federal False Claims Act. Most states have their own false claims acts and other laws targeting insurance fraud. As mentioned previously, the plaintiffs in *Northfield Medical* brought suit under the New Jersey Insurance Fraud Prevention Act (IFPA).[235] According to the statute, "[a] person or a practitioner violates this act if he . . . [p]resents or causes to be presented any written or oral statement . . . knowing that the statement contains any

230. See, e.g., People ex rel. Allstate Ins. Co. v. Discovery Radiology Physicians, P.C., 311 Cal. Rptr. 3d 901, 914 n.7 (Cal. Ct. App. 2023) ("In the absence of controlling authority, [Attorney General] opinions are persuasive [because] . . . we presume the [Attorney General's] interpretation 'has come to the attention of the Legislature, and if it were contrary to the legislative intent that some corrective measure would have been adopted . . . .'" (quoting Cal. Ass'n of Psych. Providers v. Rank, 793 P.2d 2, 11 (Cal. 1990))).

231. 65 Ops. Cal. Atty. Gen. 223 (1982) (emphasis omitted) (alteration in original) (quoting Pac. Emps. Ins. Co. v. Carpenter, 52 P.2d 992, 994 (Cal. Dist. Ct. App. 1935)).

232. See *Discovery Radiology*, 311 Cal. Rptr. 3d at 914 n.7 ("Opinions of the Attorney General, while not binding, are entitled to great weight.").

233. See Treiber v. Aspen Dental Mgmt., Inc., 94 F. Supp. 3d 352, 357 (N.D.N.Y. 2015) (stating that corporate management "pad[ded] treatment plans whether or not the treating hygienist or dentist actually recommended . . . treatment").

234. See supra notes 86–87, 90–95 and accompanying text.

235. See supra note 184.

false or misleading information concerning any fact or thing material to the claim."[236]

Baked into this language are the same elements of falsity, causation, scienter, and materiality present in the Federal False Claims Act. Unlike the Federal False Claims Act, the IFPA does not have a qui tam provision, and therefore private citizens do not have standing to bring actions on behalf of the state.[237] In addition to the IFPA, New Jersey has its own state False Claims Act (NJFCA) which has a qui tam provision.[238] If the PC in *Northfield Medical* had billed government insurance programs, a whistleblower could have presumably brought a qui tam action under the NJFCA.

Most state false claims acts tend to be very similar and "require substantially identical proofs to the Federal [Act.]"[239] There is still variation between states regarding the liability of investors. As discussed in section II.C, Massachusetts amended its False Claims Act to impose liability on any investors who know of false claim violations and fail to report them to the commonwealth within sixty days.[240] Such provisions can be crucial to CPOM plaintiffs when they collect on favorable judgments and settlements, especially when a defendant's investors attempt to shuffle their assets to avoid liability.

Every state false claims act has unique features. By researching these laws, CPOM plaintiffs can potentially find statutes that are more permissive to their claims than the Federal False Claims Act.

CONCLUSION

Corporate influence in healthcare poses serious risks to patient safety and quality of care. Over the last decade, the friendly PC model has been abused to give laymen corporations increasing control over healthcare, creating degrading conditions for healthcare workers and dangerous conditions for patients. Attaching false claim liability to corporate managers that engage in the practice of medicine will incentivize whistleblowers and plaintiffs to expose illegal relationships.

At a medical conference in 2019, a managing director at BlueMountain Capital, a private equity firm, spoke about the relationship between healthcare groups and their corporate investors, saying: "When we partner with you, it's a marriage . . . . We have to believe it. You have to

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236. N.J. Stat. Ann. § 17:33A–4(a)(1) (West 2025).

237. See id.

238. See N.J. Stat. Ann. §§ 2A:32C-1, -7 (West 2025).

239. United States ex rel. Schieber v. Holy Redeemer Healthcare Sys., Inc., No. 19-12675, 2024 WL 1928357, at *8 (D.N.J. Apr. 30, 2024).

240. 2024 Mass. Legis. Serv. Ch. 343, § 29.

believe it. It's not going to be something where clinical is completely not touched."[241]

Unfortunately for these newly wed corporate couples, their love is forbidden. By attaching false claim liability to the corporate practice of medicine, healthcare providers can focus on putting patients over profit.

241. Perlberg, supra note 70 (internal quotation marks omitted) (quoting Matt Jameson, Managing Dir., BlueMountain Cap.).

PLATFORM LIABILITY FOR PLATFORM MANIPULATION

*Sabriyya Pate**

Platform manipulation is a growing phenomenon affecting billions of internet users globally. Malicious actors leverage the functions and features of online platforms to deceive users, secure financial gain, inflict material harms, and erode the public's trust. Although social media companies benefit from a safe harbor for their content policies, no state or federal law clearly ascribes liability to platforms complicit in deception by their designs. Existing frameworks fail to accommodate for the unique role design choices play in enabling, amplifying, and monitoring platform manipulation. As a result, platform manipulation continues to grow with few meaningful legal avenues of recourse available to victims.

This Note introduces a paradigm of corporate liability for social media platforms that facilitate platform manipulation. It argues that courts must appreciate platform design as a dimension of corporate conduct by explicating the extension of common law tort liability to platform design. This Platform Design Negligence (PDN) paradigm crucially clarifies the bounds of accountability for the design choices of social media companies and is well-suited to respond to the law's systemic discounting of platform design. Existing legal frameworks fail to account for the unique and content-agnostic enmeshment between platforms and those who manipulate platforms to abuse users. PDN in turn offers a constitutive baseline for a society with less rampant technology-enabled deception.

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INTRODUCTION

Platform manipulation refers to the activity of malicious actors[1] who use social media platforms to deceive users.[2] It is implicated in a wide range of online activities—from online romance scams involving celebrity impersonators[3] to elder abuse whereby victims lose their life savings by "investing" with fraudsters.[4] Much to the chagrin of social media executives,[5] malicious actors identify and communicate with victims

1. For those who suspect that they are being targeted by a scam, know there are resources available for support. The AARP Fraud Watch Network Helpline is (877) 908-3360. A trained fraud specialist is available to provide free counseling and guidance between 8:00 AM and 8:00 PM ET, Monday through Friday.

2. "Manipulation" offers three meanings in the context of liability for social media companies. In this Note, "manipulation" in "platform manipulation" primarily refers to the practices of malicious actors, such as scammers, who exploit the design of platforms to achieve their desired outcomes. These manipulators largely seek to deceive platform users to secure financial gain. In this way, "platform manipulation" is a triple entendre; it refers to malicious actors' manipulation of the design of social media platforms, malicious actors' manipulation of social media users, and platforms' own manipulation of their users by way of their platform design.

3. See infra note 54.

4. See, e.g., Ann Pistone & Jason Knowles, Lombard Woman Loses Nearly $1 Million Life Savings in 'Pig Butchering' Scam, ABC7 Chi. (Sept. 4, 2024), https://abc7chicago.com/post/lombard-woman-loses-1-million-life-savings-pig-butchering-scam-forced-sell-home-belongings/15267382 [https://perma.cc/5LZP-XCTQ].

5. When pressed on the widespread romance scams on his platform, the then-Match Group Chief Executive Officer replied, "[T]hings happen in life." Jim Axelrod, Sheena

through reputable social media platforms like Facebook, Instagram, and Match.com, as well as non-social media platforms like Amazon and Cash App.[6] In doing so, these actors exploit the functions and features that make online platforms attractive digital spaces to begin with.

Platform manipulation creates irreparable harm to individuals from all walks of life. For starters, it creates tremendous financial harm. Platform manipulation is part of a booming multibillion-dollar industry in the United States.[7] In 2022, fraudsters stole over $137 billion from Americans,[8] and those over age sixty lose approximately $28.3 billion from scams each year.[9] Successful scams that involve "deepfakes," such as artificial intelligence (AI)-generated nude images of minors, can also create long-lasting reputational and psychological harm to victims.[10] In some

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Samu, Andy Bast & Matthew Mosk, As Romance Scammers Turn Dating Apps Into "Hunting Grounds," Critics Look to Match Group to Do More, CBS News (Apr. 24, 2024), https://www.cbsnews.com/news/romance-scams-dating-apps-investigators-match-group [https://perma.cc/DJ2U-FC63] (internal quotation marks omitted) (quoting Bernard Kim) (describing the death of Laura Kowal after she matched with a scammer on Match.com).

6. See Edward C. Baig, 8 Warning Flags to Help You Find Fraudulent Apps, AARP (Sept. 10, 2021), https://www.aarp.org/home-family/personal-technology/info-2021/warning-signs-of-fraudulent-apps.html [https://perma.cc/75C4-9BT4] (last updated Feb. 13, 2024) ("Nearly 2 percent of the 1,000 highest-grossing apps on the App Store are scams . . . .").

7. See Emma Fletcher, Social Media: A Golden Goose for Scammers, FTC (Oct. 6, 2023), https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2023/10/social-media-golden-goose-scammers [https://perma.cc/NL5T-SFW7] [hereinafter Fletcher, Golden Goose] ("Scammers are hiding in plain sight on social media platforms and reports to the FTC's Consumer Sentinel Network point to huge profits."). Today, more than half of Americans have a friend or family member who has been scammed, and Americans receive approximately thirty-three million robocalls each day. Alana Semuels, The Government Finally Did Something About Robocalls, TIME Mag. (Dec. 15, 2023), https://time.com/6513036/robocalls-government-action/ [https://perma.cc/2H58-YR4X]; Survey: Most Americans Know Someone Targeted by Scam, ABA Banking J. (Nov. 15, 2024), https://bankingjournal.aba.com/2024/11/survey-most-americans-know-someone-targeted-by-scam/ [https://perma.cc/G5UU-8STL].

8. FTC, Protecting Older Consumers 2022–2023, at 40 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p144400olderadultsreportoct2023.pdf [https://perma.cc/8EC3-4AFW].

9. Michael Rubinkam, Scammers Are Swiping Billions From Americans Every Year. Worse, Most Crooks Are Getting Away With It, AP News (July 7, 2024), https://apnews.com/article/scammers-billions-elder-fraud-aarp-ai-f9530303e10b998720414e88430bcf6b (on file with the *Columbia Law Review*) (citing Jilenne Gunther, The Scope of Elder Financial Exploitation: What It Costs Victims, AARP BankSafe Initiative 1 (2023), https://www.aarp.org/content/dam/aarp/money/scams-and-fraud/2023/true-cost-elder-financial-exploitation.doi.10.26419-2Fppi.00194.001.pdf [https://perma.cc/U93E-UJLP]).

10. See Dana Nickel, AI Is Shockingly Good at Making Fake Nudes—And Causing Havoc in Schools, Politico (May 29, 2024), https://www.politico.com/news/2024/05/28/ai-deepfake-nudes-schools-states-00160183 (on file with the *Columbia Law Review*) ("Students in New Jersey, Florida, California and Washington state have reported embarrassing deepfake experiences that can result in arrests or nothing at all, a gap in laws that can leave victims feeling unprotected.").

instances, victims have attempted to rob banks for their scammers.[11] One man in Ohio killed an Uber driver who he wrongfully suspected of involvement with a scam.[12] At a meta level, platform manipulation poses many implications for a global society: Democratic discourse necessitates the kind of trust that online scammers extract from public spheres.[13]

Platform manipulators rely on the core fabric of social media platforms—their user interfaces (UI) and user experiences (UX)—to operationalize and scale their exploitation.[14] These actors use platforms to identify and initiate communication with their targets.[15] They also leverage platforms to expand their operations, test new tactics, and hone their craft, often flying under the radar of platforms' content detection systems.[16]

Platform designs take many forms and can serve discrete goals. For example, platforms make design choices on how to display features; hiding the "reply all" feature can reduce accidental mass replies, while hiding the number of digits in passcodes can provide additional security. Though some social media companies have adopted platform designs that mitigate harms like cyberbullying and misinformation,[17] broadly, social media

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11. See 74-Year-Old Ohio Woman Charged in Armed Robbery of Credit Union Was Scam Victim, Family Says, AP News (Apr. 24, 2024), https://apnews.com/article/ohio-credit-union-robbery-scam-arrest-23fe2c0a7f839d23c8796f04313ca522 (on file with the *Columbia Law Review*) (stating that relatives of a seventy-four-year-old woman claimed she was an online scam victim who was driven to commit armed robbery in order to "solve her financial problems").

12. See Ben Finley, What We Know About the Shooting of an Uber Driver in Ohio and the Scam Surrounding It, AP News (Apr. 19, 2024), https://apnews.com/article/uber-driver-killed-scam-4998a42b2e59aed3dda95f983b2f9b52 (on file with the *Columbia Law Review*) (describing how an Ohio man "fatally shot an Uber driver" because he mistakenly believed she was part of a scheme to extort $12,000 dollars, though she was also a scam victim sent by scammers to the shooter's house to pick up a supposed package).

13. See Evelyn Douek, Content Moderation as Systems Thinking, 136 Harv. L. Rev. 526, 540 (2022) (describing the impact of trust and transparency on social media consumers).

14. What Is the Difference Between UI and UX?, Figma, https://www.figma.com/resource-library/difference-between-ui-and-ux/ [https://perma.cc/9E22-33FW] (last visited Jan. 24, 2025) (describing user interface as the "interactivity, look, and feel of a product . . . while user experience (UX) covers a user's overall experience with the product or website").

15. See, e.g., Cordelia Lynch, SCAM: Inside Asia's Criminal Network, Sky News (Oct. 18, 2024), https://news.sky.com/story/they-fall-in-love-with-me-inside-the-fraud-factories-driving-the-online-scam-boom-13234505 [https://perma.cc/2HLV-X5W4] ("Based in highly secretive, heavily guarded compounds, fraud factories—similar to the ones Poom-Jai worked in—are spread across South East Asia, where the online scam industry has exploded.").

16. See, e.g., Isabelle Qian, 7 Months Inside an Online Scam Labor Camp, N.Y. Times (Dec. 17, 2023), https://www.nytimes.com/interactive/2023/12/17/world/asia/myanmar-cyber-scam.htm (on file with the *Columbia Law Review*) ("The workers spent their days using the WeChat accounts, swiping over social media feeds on each device to mimic normal use and get past the app's fraud detection system.").

17. See Amer Owaida, Instagram Rolls Out New Features to Help Prevent Cyberbullying, We Live Sec. (Apr. 23, 2021), https://www.welivesecurity.com/2021/04/23/

companies offer limited features to address scams and other kinds of platform-based deception.[18]

Meanwhile, it is exceedingly difficult for scam victims to get in touch with customer service personnel who could be positioned to assist them.[19] Payment provider platforms used by malicious actors to receive money from victims have been woefully unable to curb this problem, which often originates on social media platforms.[20] In recognition of the complexities of platform manipulation, some companies have begun to initiate voluntary commitments to "shar[e] insights and knowledge about the lifecycle of scams" with the goal of educating users on what to look out for.[21] While these efforts are positive developments, they at best indicate a growing recognition that social media companies lack direction when looking to design their platforms in ways that limit harm caused by the

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instagram-new-features-curb-cyberbullying/ [https://perma.cc/T8ZF-XRLB] (explaining Instagram's new "abusive Direct Messages" filter and "a tool to stop someone a user has blocked from contacting them from another account," both designed to combat cyberbullying and abusive behavior on the platform).

18. See Kristina Radivojevic, Christopher McAleer, Catrell Conley, Cormac Kennedy & Paul Brenner, Social Media Bot Policies: Evaluating Passive and Active Enforcement 5 (Sept. 27, 2024) (unpublished manuscript), https://arxiv.org/pdf/2409.18931 [https://perma.cc/SS43-R7L9] (testing the social media platforms Facebook, Instagram, LinkedIn, Mastodon, Reddit, Threads, TikTok, and X and finding that all fail to sufficiently identify and respond to platform manipulation).

19. See, e.g., Steven John & Alexander Johnson, How to Contact Facebook Support and Get Help for Issues With Your Account, Bus. Insider (Sept. 19, 2023), https://www.businessinsider.com/guides/tech/how-to-contact-facebook-problems-with-account-other-issues [https://perma.cc/L6R7-BEBL] ("Don't bother trying to call Facebook.").

20. Social media companies are thus the "first responders" for many scams and fraudulent activities. Federal agencies have already sued major banking platforms, such as Zelle, for "for failing to protect consumers from widespread fraud." Laurel Wamsley, In a Lawsuit, CFPB Says 3 Top U.S. Banks Failed to Protect Consumers From Zelle Fraud, Or. Pub. Broad. (Dec. 24, 2024), https://www.opb.org/article/2024/12/24/cfpb-alleges-3-banks-failed-to-protect-consumers-from-zelle-fraud/ [https://perma.cc/T7J7-UWAU] (internal quotation marks omitted) (quoting Press Release, CFPB, CFPB Sues JPMorgan Chase, Bank of America, and Wells Fargo for Allowing Fraud to Fester on Zelle (Dec. 20, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-jpmorgan-chase-bank-of-america-and-wells-fargo-for-allowing-fraud-to-fester-on-zelle [https://perma.cc/9698-XPSB]).

21. See, e.g., Announcing the Tech Against Scams Coalition, Coinbase (May 21, 2024), https://www.coinbase.com/blog/announcing-the-tech-against-scams-coalition (on file with the *Columbia Law Review*) ("This partnership aims to protect and educate users, emphasizing that scams are a tech-wide issue, not limited to social media, crypto, or finance." (emphasis omitted)); Press Release, Aspen Inst., Aspen Institute Financial Security Program Launches National Task Force for Fraud & Scam Prevention (July 18, 2024), https://www.aspeninstitute.org/news/task-force-on-fraud-and-scams [https://perma.cc/UQC2-RSRX] ("The task force formalizes a network of stakeholders who have a vested interest in making sure that consumers are protected and can restore trust in our financial system.").

ballooning scam economy.[22] At worst, social media companies' short-term profit incentives directly converge with those of the malicious actors on their platforms.[23] It is also worth noting that social media users are better able to participate in the economy and generate advertising revenue when their funds are not siphoned into scammers' accounts.

As major platforms cobble together written policies to address platform manipulation,[24] companies face few legal restrictions on the

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22. See Heather Kelly, The Nonstop Scam Economy Is Costing Us More Than Just Money, Wash. Post (July 13, 2022), https://www.washingtonpost.com/technology/2022/07/13/scam-fraud-fatigue/ (on file with the *Columbia Law Review*) ("Constant scam attempts can increase stress levels and strain relationships. Their negative impact on mental health is even worse when the scammers target people based on perceived weaknesses, like advanced age, loneliness or[,] . . . an ongoing illness.").

23. Social media companies profit off users' engagement on their platforms, including engagement with scammers. This engagement is packaged and sold to data brokers and advertisers. See Kalev Leetaru, What Does It Mean for Social Media Platforms to "Sell" Our Data?, Forbes (Dec. 15, 2018), https://www.forbes.com/sites/kalevleetaru/2018/12/15/what-does-it-mean-for-social-media-platforms-to-sell-our-data/ (on file with the *Columbia Law Review*) (describing how social media companies profit by selling user data to data brokers, developers, and advertisers).

24. See, e.g., Andrew Hutchinson, Meta Highlights Key Platform Manipulation Trends in Latest 'Adversarial Threat Report', Soc. Media Today (Nov. 30, 2023), https://www.socialmediatoday.com/news/meta-platform-manipulation-trends-adversarial-threat/701230/ [https://perma.cc/QGL7-VYUE] [hereinafter Hutchinson, Meta Highlights Key Platform Manipulation Trends] (discussing Meta's Q3 2023 "Adversarial Threat Report"); Community Standards, Meta, https://transparency.meta.com/policies/community-standards/ (on file with the *Columbia Law Review*) (last visited Jan. 24, 2025) ("Meta recognizes how important it is for Facebook, Instagram, Messenger and Threads to be places where people feel empowered to communicate, and we take our role seriously in keeping abuse off the service. That's why we developed standards for what is and isn't allowed on these services."); Countering Influence Operations, TikTok, https://www.tiktok.com/transparency/en-us/countering-influence-operations/ (on file with the *Columbia Law Review*) (last visited Jan. 24, 2025) ("This post explains how we continuously work to detect and disrupt covert influence operations that try to undermine the integrity of our platform, so that millions can continue to enjoy a safe, creative, and trusted TikTok experience."); Fake Engagement Policy, Google, https://support.google.com/youtube/answer/3399767?hl=en [https://perma.cc/RX74-NVYV] (last visited Jan. 24, 2025) ("YouTube doesn't allow anything that artificially increases the number of views, likes, comments, or other metrics either by using automatic systems or serving up videos to unsuspecting viewers. Also, content that solely exists to incentivize viewers for engagement (views, likes, comments, etc[.]) is prohibited."); How Does YouTube Address Misinformation, YouTube, https://www.youtube.com/howyoutubeworks/our-commitments/fighting-misinformation/ [https://perma.cc/YE84-RXHL] (last visited Jan. 24, 2025) ("YouTube does not allow misleading or deceptive content that poses a serious risk of egregious harm."); How We Prevent the Spread of False Information on Snapchat, Snap (Sept. 8, 2022), https://values.snap.com/news/how-we-prevent-the-spread-of-false-information-on-snapchat [https://perma.cc/3XUU-F9PF] ("[Snapchat's] policies have long prohibited the spread of false information."); Misinformation, Meta, https://transparency.fb.com/policies/community-standards/misinformation (on file with the *Columbia Law Review*) (last visited Jan. 24, 2025) (explaining Meta's policies against misinformation); Platform Manipulation and Spam Policy, X (Mar. 2023), https://web.archive.org/web/20231216113944/https://help.twitter.com/en/rules-and-

design choices that render their platforms attractive breeding grounds for scammers.[25] In the absence of binding legal obligations on social media companies, malicious actors are free to play platforms like instruments of manipulation.

Existing legal frameworks constitute a patchwork of schemes that provide state and federal enforcers and citizens few chances to have their injuries heard, let alone to vindicate their rights and pursue remedies.[26] Innovative litigation strategies, such as the application of false advertising claims by private plaintiffs and the Federal Trade Commission (FTC), are stopgap solutions that have not steadied the problem.[27] The cornerstone of social media law, Section 230 of the Communications Decency Act of 1996, as well as First Amendment law and consumer law frameworks, all either fail to provide recourse to social media scam victims or fail to explain legislative inaction in the face of the causal relationship between platforms' design choices and the scams that transpire on those very same platforms.[28] Furthermore, maladaptation of § 230's immunity for platforms has created an inaccurate presumption of immunity for all choices, including design choices, made by social media companies.[29]

This Note is the first to argue for a social media liability paradigm that centers platform design choices: a Platform Design Negligence (PDN) paradigm that establishes the circumstances for a clear assumption of liability in this digital environment. It offers a roadmap for an evolution in law and society towards coherent parlance on the impacts of twenty-first century platform technologies. Social media companies should face liability when their design choices contribute to the deception of their users. When companies are aware of these deception risks and fail to take reasonable precautions, they cease to function as reasonable platforms and should become liable for injuries that follow. Through a full-throated

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policies/platform-manipulation (on file with the *Columbia Law Review*) ("We want X to be a place where people can make human connections, find reliable information, and express themselves freely and safely. To make that possible, we do not allow spam or other types of platform manipulation.").

25. See Caleb N. Griffin, Systematically Important Platforms, 107 Cornell L. Rev. 445, 514 (2022) ("[C]ompanies that utilize manipulative technologies have no clear corporate law duties to rein in their behavior and protect their users from exploitation and other harms.").

26. See id. at 489–99 (discussing various state and federal regulatory efforts and noting that "few proposed regulations have successfully been made into law, and those few that are operative apply only in narrow contexts").

27. See, e.g., Forrest v. Meta Platforms, Inc., 737 F. Supp. 3d 808, 820–21 (N.D. Cal. 2024) (involving a man whose Facebook profile was used by scammers to create fake profiles); Press Release, L.A. Cnty. Dist. Att'y's Off., NGL Labs Charged in Consumer Protection Lawsuit (July 9, 2024), https://da.lacounty.gov/media/news/ngl-labs-charged-consumer-protection-lawsuit [https://perma.cc/KT5H-LHQW] (involving a social messaging app that deceptively marketed its platform to users); see also infra section II.B (describing U.S. consumer law's systemic discounting of social media platform users' rights).

28. See infra section II.B.

29. See infra section II.B; infra notes 236–239.

adoption of this paradigm, victims and law enforcers could hold social media companies accountable for harms caused by manipulation conducted on, by, and through their platforms. Both federal and state courts, without the mandate of a statute, can actualize this paradigm by applying and building upon existing common law tort doctrine.[30]

In Part I, this Note surveys the landscape of platform manipulation, discussing the harms caused by platform-based deception as well as the design choices that enable platform manipulation in practice. It also explores how social media companies profit from the scam economy. Part II turns to the absence of legal frameworks that apply to social media companies' design choices in the context of platform manipulation. It underscores the relationship between platform design and platform manipulation. It also delineates the pitfalls of the prevailing voluntary self-governance paradigm for platform manipulation. Finally, Part III introduces the PDN paradigm that can serve social media companies, lawmakers, and victims as they pursue legal remedies and design interventions that curb the growing challenge of platform manipulation.

I. PLATFORM MANIPULATION AND EXISTING FRAMEWORKS

Platform manipulation is a type of activity on social media[31] whereby malicious actors use platforms to manipulate users.[32] Platform manipulators are inherently rulebreakers: bad faith actors logged onto social media to purposefully manipulate social media users. Platform manipulation, as all forms of manipulation, is difficult to police due to the complexity of the dignity and autonomy rights at issue.[33] Yet many if not all social media companies are attuned to platform manipulation. For example, X defines platform manipulation as interactions with the social media platform that are done to "mislead others and/or disrupt their experience by engaging in bulk, aggressive, or deceptive activity."[34]

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30. See infra Part III.

31. See Michael S. Rosenwald, Before Twitter and Facebook, There Was Morse Code: Remembering Social Media's True Inventor, Wash. Post (May 24, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/05/24/before-there-was-twitter-there-was-morse-code-remembering-social-medias-true-inventor/ (on file with the *Columbia Law Review*) (describing the genesis of contemporary platform-based social media).

32. For one example of a discussion of platform manipulation within platform governance legal scholarship, see generally Daphne Keller, Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard, 1 J. Free Speech L. 227 (2021) (explaining the difficulties in regulating platform manipulation).

33. Id. at 265; see also Cass R. Sunstein, Fifty Shades of Manipulation, 1 J. Mktg. Behav. 213, 219 (2015) (addressing why manipulation is rarely addressed both legally and politically).

34. Platform Manipulation, X (July 28, 2022), https://transparency.x.com/en/reports/platform-manipulation#2021-jul-dec [https://perma.cc/7W55-3WF5] (defining X's platform manipulation policy and highlighting a 2% global increase in "global anti-spam challenges" and a 6% increase in "global spam reports" since its last reporting period).

Platform manipulators use an array of tactics and maintain several objectives.[35] Those tactics include "social media bots," or coordinated fake accounts that aim to influence opinions.[36] Bots can pose as "real" users from one country and prolifically post propaganda praising or defending the actions of a different country, with the objective of portraying global support for a particular political posture.[37] Platform manipulators may also use social media to "giv[e] a false impression that there is genuine grass-roots support or opposition for a particular group or policy."[38] This is often referred to as misinformation or disinformation, depending on its intent.[39] Such platform manipulation schemes have contributed to real-world violence,[40] led ordinary people to attend and participate in manufactured in-person protests,[41] and more.[42] Most commonly, however, platform

35. See, e.g., Tim Wu, Is the First Amendment Obsolete?, 117 Mich. L. Rev. 547, 565–68 (2018) (describing disinformation campaigns as a form of "reverse" censorship that drowns out the truth or accurate depictions).

36. See Hutchinson, Meta Highlights Key Platform Manipulation Trends, supra note 24 (describing Meta's efforts to take down accounts that "aimed to sway discussion around both U.S. and China policy by both sharing news stories, and engaging with posts related to specific issues").

37. Id.

38. Franziska Keller, David Schoch, Sebastian Stier & JungHwan Yang, It's Not Easy to Spot Disinformation on Twitter. Here's What We Learned From 8 Political 'Astroturfing' Campaigns., Wash. Post (Oct. 28, 2019), https://www.washingtonpost.com/politics/2019/10/28/its-not-easy-spot-disinformation-twitter-heres-what-we-learned-political-astroturfing-campaigns/ (on file with the *Columbia Law Review*) (explaining the operations of social media disinformation campaigns).

39. Misinformation campaigns involve the dissemination of false information, regardless of intention to deceive, whereas disinformation campaigns involve the dissemination of misleading or biased information with the intent to manipulate. See Dean Jackson, How Disinformation Impacts Politics and Publics, Nat'l Endowment for Democracy, https://www.ned.org/wp-content/uploads/2018/06/How-Disinformation-Impacts-Politics-and-Publics.pdf [https://perma.cc/85K2-B5LH] (last visited Jan. 24, 2025) ("In the long-term, disinformation can be part of a strategy to shape the information environment in which individuals, governments, and other actors form beliefs and make decisions.").

40. See id. (discussing the communal violence sparked by the spread of false claims in India).

41. See id. (discussing manufactured protests in Germany).

42. One notable example of platform manipulation was the case of a Russia-linked company that posted content—posing as American users—aimed at driving wedges within the ideological spectrum in advance of the 2016 and 2020 U.S. presidential elections. See Young Mie Kim, New Evidence Shows How Russia's Election Interference Has Gotten More Brazen, Brennan Ctr. for Just. (Mar. 5, 2020), https://www.brennancenter.org/our-work/analysis-opinion/new-evidence-shows-how-russias-election-interference-has-gotten-more [https://perma.cc/ZB89-GZME] (finding "that social media accounts linked to the Internet Research Agency (IRA), the Kremlin-linked company behind an influence campaign that targeted the 2016 elections, have indeed already begun their digital campaign to interfere in the 2020 presidential election").

manipulation takes place in monotonous direct and group messaging features—hidden from public view.[43]

Platform manipulation is rooted in a centuries-old practice: "[C]ommon and 'enduring psychological [consumer] vulnerabilities' and 'cognitive and emotional susceptibilities' have forced 'industrialized and industrializing societies on every continent . . . [to] confront[] . . . commercial misrepresentation.'"[44] As human behaviors and cognition have changed in relation to social media,[45] the sophistication of consumer scams has similarly evolved. The FTC has reported on new and sophisticated dark patterns designed to deceive consumers.[46] Industry experts have identified troubling trends in the scam industry,[47] and a survey of fraud and risk professionals found widespread concern over the applications of AI to create even more complex scams.[48]

Platform manipulation is a difficult problem to define in the legal liability context because of the challenges with discerning the actors, intentions, and potential chilling effects of enforcement.[49] These

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43. Accurate reporting on the scale of social media scams is difficult to ascertain given the conflict of interest. See supra note 23. Publicly available reports indicate that the cost of these scams is in the billions. See Fletcher, Golden Goose, supra note 7 ("Reported losses to scams on social media [between 2021 and October 2023] hit a staggering $2.7 billion, far higher than any other method of contact.").

44. David Adam Friedman, Imposter Scams, 54 U. Mich. J.L. Reform 611, 616 (2021) [hereinafter Friedman, Imposter Scams] (second, third, fourth, fifth, and sixth alterations in original) (quoting Edward Balleisen, Fraud: An American History From Barnum to Madoff 5 (2017)).

45. See Chantal Line Carpentier, UN Economist Network, New Economics for Sustainable Development: Attention Economy 1 (2025), https://www.un.org/sites/un2.un.org/files/attention_economy_feb.pdf [https://perma.cc/R66T-MPH2] ("To address the scarcity of people's attention, these technologies have been increasingly aimed at strategic capture of private attention aided by systematic collection and analysis of personal data, which has become a very profitable business model.").

46. See Press Release, FTC, FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers (Sept. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers [https://perma.cc/LVM4-UTJ6] ("As more commerce has moved online, dark patterns have grown in scale and sophistication, allowing companies to develop complex analytical techniques, collect more personal data, and experiment with dark patterns to exploit the most effective ones.").

47. See Quinn Owen, How AI Can Fuel Financial Scams Online, According to Industry Experts, ABC News (Oct. 11, 2023), https://abcnews.go.com/Technology/ai-fuel-financial-scams-online-industry-experts/story?id=103732051 [https://perma.cc/MWB7-5MMJ] (discussing how "[g]enerative AI tools can make scams faster and more sophisticated").

48. Id. ("There is growing fraud online in which scammers manufacture other identities to dupe financial institutions or their customers out of money—and the crimes are only expected to grow more frequent with the increasing prevalence of artificial intelligence, experts say.").

49. See Jason Pielemeier, Disentangling Disinformation: What Makes Regulating Disinformation So Difficult?, 2020 Utah L. Rev. 917, 923–26 (describing difficulties in

conceptual challenges carry over to platform operations, as platforms must first define platform manipulation in order to act upon it. In individual instances of platform manipulation, it is hard for social media companies "to objectively establish and measure harm."[50] Additionally, because "individuals or entities . . . targeted for enforcement . . . will often be able to justifiably complain about selective enforcement," platforms are incentivized to avoid taking adverse actions against their users, including platform manipulators.[51]

A. *Platform Manipulation Harms*

Platform manipulation consistently creates financial, reputational, psychological, and other harms for victims and their communities. Similar to victims harmed by poorly designed car safety systems or exercise equipment, those affected by platform manipulation carry a burden into their lives for extended periods.[52]

1. *Financial Effects.* — Platform manipulation is predicated on a requisite degree of human manipulation, and malicious actors frequently manipulate unsuspecting consumers for financial gain. Success is contingent on a scammer's ability to understand the "target's" personality, affectation, motivations, and desires.[53] There is a wide range of scam types, including phishing scams, romance scams,[54] impersonation scams, and

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ascertaining "blame" in large-scale disinformation efforts due to inauthentic dissemination and organic amplification, as well as the potential for chilling economic activity).

50. Id. at 923–24.

51. Id. at 924; see also Mike Isaac & Theodore Schleifer, Meta Says It Will End Its Fact-Checking Program on Social Media Posts, N.Y. Times (Jan. 7, 2025), https://www.nytimes.com/live/2025/01/07/business/meta-fact-checking (on file with the *Columbia Law Review*) (last updated Feb. 3, 2025) ("Social media companies are increasingly relying on fact-checks written by their users, allowing companies to step back from politically loaded decisions about what content to take down.").

52. See Martina Barash, Toyota Settles Hybrid Owners' Individual Brake-Defect Claims, Bloomberg L. (Mar. 29, 2022), https://news.bloomberglaw.com/product-liability-and-toxics-law/toyota-settles-hybrid-owners-individual-brake-defect-claims (on file with the *Columbia Law Review*) (describing the resolution of a case in which car owners experienced several car crashes as a result of a brake defect); Sacramento Kings Reach Settlement With Sporting Goods Companies in Francisco Garcia Case, Sports Litig. Alert (Nov. 16, 2012), https://sportslitigationalert.com/sacramento-kings-reach-settlement-with-sporting-goods-companies-in-francisco-garcia-case/ [https://perma.cc/L6SQ-LLLG] (describing the resolution of a case in which an athlete suffered "significant injuries" due to use of gym equipment sold without a warning describing its risks).

53. See Kristy Holtfreter, Michael D. Reisig & Travis C. Pratt, Low Self-Control, Routine Activities, and Fraud Victimization, 46 Criminology 189, 209 (2008) (finding that self-control and remote purchasing play a role in fraud victimization).

54. See Jeannine Mancini, A Woman Loses $50,000 Thinking Elon Musk Was Telling Her 'I Love You' and Wanted to Make Her Rich—But It Was an Elaborate Deepfake Scam, Yahoo Fin. (Apr. 29, 2024), https://finance.yahoo.com/news/woman-loses-50-000-thinking-155924192.html (on file with the *Columbia Law Review*) (describing how a South Korean woman was scammed into sending $50,000 dollars to an Elon Musk impersonator through a romance scam that originated on Instagram).

even foreclosure relief scams.[55] For example, some scams have targeted student loan borrowers on social media; the scammers offer fake debt relief payment programs and pocket the entire amounts intended as student loan payments.[56] Scammers operating on platforms such as Indeed, ZipRecruiter, and Facebook can garner trust and exploit consumers through convoluted schemes that ask for money in return for hypothetical jobs.[57]

Americans lose billions of dollars from scams that are facilitated on social media.[58] Often times platform manipulators engage in a practice known as "pig butchering," in which users are "fatten[ed]"—or coerced into making greater contributions—over time before the ultimate "slaughter" leaves the victim penniless.[59] Such operations targeting social media users are global and complex.[60] In Myanmar, a single criminal network used "an army of modern-day slaves" to scam social media

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55. What Are Some Common Types of Scams?, CFPB, https://www.consumerfinance.gov/ask-cfpb/what-are-some-common-types-of-scams-en-2092/ [https://perma.cc/427C-CZKF] (last visited Jan. 24, 2025) (defining blackmail scams, charity scams, debt collection scams, foreclosure relief scams, grandparent scams, impostor scams, lottery or prize scams, money mule scams, and sale-of-nonexistent-goods scams); Scam Glossary, FCC, https://www.fcc.gov/scam-glossary [https://perma.cc/9Z34-6EDE] (last visited Jan. 24, 2024) (providing a comprehensive glossary of scams with links to resources for all types of scams). For an example of a recent scam, see Meghan Bragg, A New Scam Is Making the Rounds on Facebook. How to Spot It: VERIFY, WCNC Charlotte (Aug. 15, 2023), https://www.wcnc.com/article/news/verify/verify-facebook-scam-warning-red-flags-to-avoid-becoming-victim/275-0cff86b5-a453-45a9-8cd2-02308bd51074 [https://perma.cc/R7X5-2PSB] (describing account verification scams on Facebook).

56. See Annie Nova, Student Loan Borrowers Should Be Aware of Debt Relief Scams, CNBC (Nov. 29, 2023), https://www.cnbc.com/2023/11/29/student-loan-borrowers-should-be-aware-of-debt-relief-scams.html [https://perma.cc/383C-Z9BW] ("Some scammers may falsely claim to be affiliated with the Department of Education or your servicer. Borrowers should be extra careful that they're actually speaking to someone at their servicer and might want to ask to call their lender back directly if they're having doubts."); Warning: Student Debt Relief Scam Circulating on Social Media, Charter Coll., https://chartercollege.edu/news-hub/warning-student-debt-relief-scam-circulating-social-media/ [https://perma.cc/8EDE-ZUGF] (last visited Jan. 24, 2025) (describing a student debt relief scam).

57. See What Are Some Common Types of Scams, supra note 55 ("Money mules may be recruited through online job or social media posts that promise easy money for little effort.")

58. See Fletcher, Golden Goose, supra note 7 (noting reports of nearly $3 billion in social media scam losses reported to the FTC in a two-year period).

59. See Cezary Podkul, What's a Pig Butchering Scam? Here's How to Avoid Falling Victim to One., ProPublica (Sept. 19, 2022), https://www.propublica.org/article/whats-a-pig-butchering-scam-heres-how-to-avoid-falling-victim-to-one [https://perma.cc/HMX6-XHH5].

60. See, e.g., Qian, supra note 16 ("Increasingly, people from India, the Philippines and more than a dozen other countries have also been trafficked [due to pig butchering] to work for scam gangs, prompting Interpol to declare the trend a global security threat.").

consumers out of $1 billion from their life savings.[61] Scammers do not tend to discriminate when choosing their targets.[62] Men and women, young people and elderly people, citizens and immigrants, among many others, are all targeted.[63]

2. *Reputational Effects*. — Platform manipulation, particularly disinformation and misinformation, creates reputational harm to victims, from the most vulnerable children to the highest-profile politicians, journalists, and celebrities. Teenagers and convicted predators alike have used AI-deepfake technology to manufacture nude images of individuals, including children.[64] Deepfakes can even convince people that their political leaders are dead.[65] Once these manipulated images are

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61. See Teele Rebane, Ivan Watson, Tom Booth, Carlotta Dotto, Marco Chacon & Mark Oliver, Billion-Dollar Scam, CNN (Dec. 27, 2023), https://edition.cnn.com/interactive/2023/12/asia/chinese-scam-operations-american-victims-intl-hnk-dst/ (on file with the *Columbia Law Review*) (highlighting one scam operation "assembled by what the UN has called one of the largest human trafficking events in Asia in recent history").

62. A look at platform-enabled consumer scams like these serves the function of "looking to the bottom," in which victims are most disconnected from the social media companies and lawmakers in positions to address the problem. See Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 324–25 (1987) (explaining the need to adopt the perspective of the least advantaged).

63. See, e.g., Juan Manuel Pedroza, Anne Schaufele, Viviana Jimenez, Melissa Garcia Carrillo & Dennise Onchi-Molin, Insurgent Citizenship: How Consumer Complaints on Immigration Scams Inform Justice and Prevention Efforts, 37 Geo. Immigr. L.J. 369, 372 (2023) (describing the range of scams targeting noncitizens in the U.S. and the obstacles faced by noncitizen victims of immigration scams); Anthony Hill, In-Depth: Top Scams That Are Targeted Against the Black Community; How to Avoid Falling Victim, ABC Action News (Aug. 12, 2021), https://www.abcactionnews.com/news/in-depth/in-depth-top-scams-that-are-targeted-against-the-black-community-how-to-avoid-falling-victim [https://perma.cc/CP2T-7ZN8] (stating that government imposter scams are more common within the Black community); Tom Huddleston Jr., Americans Are Being Scammed Out of Billions on Social Media—Look for These 7 Red Flags, CNBC (Oct. 12, 2023), https://www.cnbc.com/2023/10/12/americans-lose-billions-to-social-media-scams-red-flags-to-spot.html [https://perma.cc/MGL9-TV7V] (last updated Nov. 14, 2023) (describing how "[y]ounger [social media] users are especially at risk" for scams because they may be "overly trusting of the technology they're using" (internal quotation marks omitted) (quoting David McClellan, CEO, Soc. Catfish)); Matthew Rodriguez, Fake ICE Agent Indicted for Offering Green Cards to Undocumented Immigrants, CBS News (May 25, 2023), https://www.cbsnews.com/losangeles/news/fake-ice-agent-indicted-for-offering-green-cards-to-undocumented-immigrants/ [https://perma.cc/VJ5Z-KA85] (describing an ICE agent impersonator who charged up to $20,000 for immigration services).

64. See Lexi Lonas Cochran, From Deepfake Nudes to Incriminating Audio, School Bullying is Going AI, The Hill (June 6, 2024), https://thehill.com/homenews/education/4703396-deepfake-nudes-school-bullying-ai-cyberbullying/mlite/ (on file with the *Columbia Law Review*) (describing how teenagers have weaponized deepfakes against their classmates).

65. See Ali Swenson & Christine Fernando, As Social Media Guardrails Fade and AI Deepfakes Go Mainstream, Experts Warn of Impact on Elections, PBS News (Dec. 27, 2023), https://www.pbs.org/newshour/politics/as-social-media-guardrails-fade-and-ai-deepfakes-go-mainstream-experts-warn-of-impact-on-elections (on file with the *Columbia Law Review*)

introduced onto the internet, it becomes impossible to easily delete content that may have been downloaded or shared across platforms. This content can also be forwarded to traffickers, pedophiles, and others who abuse individuals offline.[66]

Platform manipulation also creates reputational harm in the traditional sense—victims who are deceived through social media are highly unlikely to report platform-enabled consumer scams due to embarrassment and shame.[67] As almost 40% of Americans do not understand that gullibility is not the cause of victimization, perceived reputational harms are amplified by general lack of information on the form and function of these scams.[68]

3. *Psychological Effects*. — When individuals are deceived through social media, there is also a mental and emotional component to the harm. In the most tragic cases, scam victims lose their lives. Ryan Last, a high-achieving high school student, succumbed to a "sextortion" scam in which a romance scammer solicited an explicit image of Last.[69] The scammers repeatedly asked Last for more money and added more pressure.[70] Last later died by suicide, leaving a note that detailed the embarrassment he felt for himself and his family.[71] Psychological consequences of scams include fear, shame, difficulty forming trusting relationships, difficulty engaging in digital interactions altogether, depression, anxiety, post-traumatic stress disorder, and other behavioral changes.[72] Platform

(explaining how deepfakes showing a president being rushed to a hospital could "spread without labels and fool people days before an election").

66. See Charles Toutant, An AI Took Her Clothes Off. Now a New Lawsuit Will Test Rules for Deepfake Porn, N.J. L.J. (Feb. 5, 2024), https://www.law.com/njlawjournal/2024/02/05/an-ai-took-her-clothes-off-now-a-new-lawsuit-will-test-rules-for-deepfake-porn/ [https://perma.cc/AH49-R4D3] (describing how photos from an Instagram page can be downloaded and manipulated into a doctored nude image).

67. Christina Ianzito, Many Victims Struggle With Mental Health in Scams' Aftermath, AARP (Dec. 15, 2022), https://www.aarp.org/money/scams-fraud/mental-health-impact/ [https://perma.cc/Q3V4-LL7Z] (explaining the negative mental health consequences faced by scam victims).

68. See Press Release, AARP, AARP Report: Americans Agree That Fraud is at a Crisis Level (May 17, 2023), https://press.aarp.org/2023-5-17-AARP-Report-Americans-Agree-Fraud-is-at-Crisis-Level [https://perma.cc/VX5Y-9CHS] ("Fraud is a severely under-reported crime, even as nearly nine in 10 adults feel people should report incidents. Nearly 40% of Americans still don't understand that victims do not lose money to scams because they are gullible. Victimization from a scam can happen to anyone.").

69. Josh Campbell & Jason Kravarik, Teen Boy's Death Hours After Scam Is Part of Troubling Increase in 'Sextortion' Cases, FBI Says, ABC 7 Chi. (May 21, 2022), https://abc7chicago.com/ryan-last-death-san-jose-ca-sextortion-scam/11877764/ [https://perma.cc/RZ98-P4KZ].

70. Id.

71. See id. ("'He really, truly thought in that time that there wasn't a way to get by if those pictures were actually posted online,' [Ryan's mother] Pauline said. 'His note showed he was absolutely terrified. No child should have to be that scared.'").

72. The Psychological Impact of Being Scammed: Safeguarding and Healing in the Digital Age, Sec. Everywhere (Dec. 28, 2023), https://www.security-everywhere.com/the-

manipulation is also a vector for race- and gender-based discrimination and harassment because actors are able to exploit platform designs to propagate harmful ideologies and target users based on their identities.[73]

International criminal networks rely on platform manipulation to commit direct physical violence as well. These criminal networks have been known to post fake jobs to recruit individuals to show up at distant locations; once they arrive, the scammers force the now-human trafficking victims to work at scam centers where they must pay off their "debt" through cybercrime.[74] In this way, platform manipulation schemes can psychologically damage both the victims and the perpetrators of online scams.

B. *Platform Design in Practice*

Platform design refers to the choices made to create the visual experience of interacting with platforms. This is often referred to as UI or UX design.[75] Platforms functionally facilitate introductions between scammers and their targets, and they recommend scammer content to consumers.[76] Platforms also play an important role in monitoring the prevalence of these scams, including by choosing how to design and implement "reporting flows" for such activity on their platforms.[77]

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psychological-impact-of-being-scammed-safeguarding-and-healing-in-the-digital-age/ [https://perma.cc/D64B-NCJJ].

73. See, e.g., Spencer Overton & Catherine Powell, The Implications of Section 230 for Black Communities, 66 Wm. & Mary L. Rev. 107, 127–41 (2024) (describing how platforms facilitate anti-Black harassment and intimidation, "create online havens for white supremacists," enable advertisers to promote discriminatory services, and spread election misinformation that targets Black voters).

74. Juliana Kim, Online Scamming Industry Includes More Human Trafficking Victims, Interpol Says, NPR (Dec. 10, 2023), https://www.npr.org/2023/12/10/1218401565/online-scamming-human-trafficking-interpol [https://perma.cc/F27Q-ZLUA].

75. See Hany Farid & Brandie M. Nonnecke, The Case for Regulating Platform Design, Wired (Mar. 13, 2023), https://www.wired.com/story/make-platforms-safer-regulate-design-section-230-gonzalez-google/ [https://perma.cc/JNJ5-H2JP] ("Holding platforms accountable for negligent design choices that encourage and monetize the creation and proliferation of harmful content is the key to addressing many of the dangers that persist online.").

76. See Rohit Chopra & Samuel A.A. Levine, The Case for Resurrecting the FTC Act's Penalty Offense Authority, 170 U. Pa. L. Rev. 71, 117–18 (2021) ("[P]latforms earn almost all of their revenue by building detailed dossiers on users that can then be deployed to target advertising to individual consumers. . . . 'Targeted' or 'behavioral' advertising raises a host of consumer protection and competition concerns, including privacy, discrimination, fraud, and unfair competition." (footnotes omitted)).

77. See Twitter's New Reporting Process Centers on a Human-First Design, X (Dec. 7, 2021), https://blog.twitter.com/common-thread/en/topics/stories/2021/twitters-new-reporting-process-centers-on-a-human-first-design (on file with the *Columbia Law Review*).

Social media companies admit to struggling to design platforms in ways that dampen pervasive platform manipulation.[78] In turn, design choices about the interfaces that direct individuals to separate websites or downloads can play a major role in enabling social media scams.[79] Moreover, social media companies design their platforms to retain users.[80] They complicate reporting so that scam victims are not able to seek help from the platforms.[81] They fail to deploy labels and alerts in ways that could nudge victims and hinder scammers.[82] And information about these harmful platform designs is often buried in Terms of Service (ToS) agreements that are systematically unfair, imbalanced, and coercive.[83]

While some platforms have deployed "pre-bunking" measures,[84] major social media companies have not created dedicated scam prevention teams that rival their anti–political misinformation teams for platform manipulation more broadly.[85] As such, scam victims may receive limited assistance when engaging in drawn-out conversations with scammers that the platforms are privy to.[86]

Social media companies similarly fail to design UIs that provide embedded and aptly timed information on their policies. For example, while securities enforcement laws govern the practices of financial advisors on social media and fraudulent financial services are "prohibited" by platforms themselves, platforms are still hotbeds for investment-related scams, and the law is evolving to neglect the role of platform design in securities fraudsters' schemes to defraud.[87] The Financial Industry

78. See Coinbase, supra note 21 (describing scams as "a pervasive issue across the entire tech landscape" and a "challenge" that "requires a collective effort").

79. Such "drive-by downloads" account for 48% of cyberattacks on platforms. Michael McGuire, Social Media Platforms and the Cybercrime Economy 2 (2019), https://itcafe.hu/dl/cnt/2019-02/151108/bromium.pdf [https://perma.cc/8QJG-2GFP].

80. See infra section I.B.1.

81. See infra section I.B.2.

82. See infra section I.B.4.

83. See Michael L. Rustad & Thomas H. Koenig, Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices, 49 Wake Forest L. Rev. 1431, 1436 (2014) (asserting that ToS are "systematically unfair and imbalanced" and proposing reforms "to expand the readability and standardiz[ation]" of disclosures).

84. See infra section I.B.5.

85. See Shannon Bond, False Information Is Everywhere. 'Pre-Bunking' Tries to Head It off Early, NPR (Oct. 28, 2022), https://www.npr.org/2022/10/28/1132021770/false-information-is-everywhere-pre-bunking-tries-to-head-it-off-early (on file with the *Columbia Law Review*) (describing efforts by Google and Twitter to test "pre-bunking," a strategy that "show[s] people the tactics and tropes of misleading information before they encounter it in the wild—so they're better equipped to recognize and resist it").

86. Cf. Lizzie O'Leary, Meta's Laid-Back Approach to User Hacking, Slate (Jan. 29, 2023), https://slate.com/technology/2023/01/instagram-facebook-meta-hacking-customer-support.html [https://perma.cc/98H7-XWT2] (describing difficulties with getting in touch with Meta customer support when user accounts are hacked).

87. See FINRA Staff, Investor Alert: Social Media "Investment Group" Imposter Scams on the Rise, Yahoo Fin. (Jan. 17, 2024), https://finance.yahoo.com/news/investor-

Regulatory Authority (FINRA) has even sent out an investor alert about actors posing as "registered investment advisors" that claim to be brokers and steal billions from consumers.[88] Social media companies nonetheless fail both to enforce their policies and to display the relevant terms anywhere near the areas where these scams are promoted.[89] By designing their UX to obfuscate the ToS,[90] social media platforms can readily gain ill-informed user consent, while pervasive mandatory arbitration clauses within agreements further preclude user action in response to deceptive design practices.[91]

Moreover, in the United States, social media companies are not required to use meaningful age-verification procedures, let alone profile-verification procedures.[92] As a result, malicious actors can create a universe of fake friends or followers that can create a strong impression that a fake account is real and allow scammers to scale their operations.[93] For

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alert-social-media-investment-100000532.html (on file with the *Columbia Law Review*); Prohibited Financial Products and Services, Meta, https://transparency.meta.com/policies/ad-standards/deceptive-content/prohibited-financial-products-and-services (on file with the *Columbia Law Review*) (last visited Jan. 24, 2025) ("Advertisers can't run ads for financial products and services that are frequently associated with misleading or deceptive promotional practices.").

88. FINRA Staff, supra note 87.

89. See id. ("FINRA has seen a recent significant spike in investor complaints resulting from recommendations made by fraudulent 'investment groups' promoted through social media channels."); see also Przemysław Pałka, Terms of Service of Social Media Platforms, *in* Research Handbook on Social Media and the Law (Thaddeus Hoffmeister & Marilyn Bromberg eds., forthcoming 2025) (manuscript at 20) ("Put simply: it is in the platforms' direct interest to 'addict' people to their services. Further, it is in their interest for the law not to notice or regulate the potential externalities of such an addiction." (footnote omitted)).

90. See Johnathan Yerby & Ian Vaughn, Deliberately Confusing Language in Terms of Service and Privacy Policy Agreements, 23 Issues Info. Sys. 138, 146 (2022) (describing how social media platforms confuse or hide policies and controls from users).

91. See Kavya Jha & Ananya Singh, The Use of Arbitration Clauses by Social Media Websites: A Critique, 23 Pepp. Disp. Resol. L.J. 303, 306–09 (2023) (explaining how 40% of notable social media platforms have mandatory arbitration clauses); Caroline Marshall & Sarah Reynolds, Schillings, With 'Legal But Harmful' Gone, Will Terms of Service Protect Social Media Users?, Lexology (Feb. 23, 2023), https://www.lexology.com/library/detail.aspx?g=856c1650-3680-4ac7-87d1-d0f7b9cb47ac [https://perma.cc/WUW3-7YB3] (describing the lack of transparency around ToS and challenges with ToS being written vaguely); Cadie Thompson, What You Really Sign Up for When You Use Social Media, CNBC (May 20, 2015), https://www.cnbc.com/2015/05/20/what-you-really-sign-up-for-when-you-use-social-media.html [https://perma.cc/U7TX-QUVU] (last updated May 27, 2015) ("Social media giants not only have a license to use content that you post, but they are also constantly collecting data on you that you may not realize you are sharing.").

92. See Andrew Chung & John Kruzel, US Supreme Court Grapples With Texas Online Porn Age-Verification Law, Reuters (Jan. 15, 2025), https://www.reuters.com/legal/texas-online-porn-age-verification-law-goes-us-supreme-court-2025-01-15/ (on file with the *Columbia Law Review*) (describing the forthcoming Supreme Court case in which the Roberts Court is expected to rule on, among other items, whether online age verification "stifles the free speech rights of adults").

93. See infra section I.B.7.

example, in July 2024, Meta removed over 63,000 accounts on its platform that were operating sextortion scams; one network of 20 criminals was operating 2,500 fake accounts.[94] Celebrity imposter scams—in which scammers create accounts that purport to be well-known figures, develop relationships over social media, and then use those relationships to extort money—similarly rely on social media platforms permitting duplicate fake accounts that share the same names, photos, and other details.[95] One study of platform manipulation tactics has found that scammers commonly share accounts that are used to communicate with victims.[96] Scammers can also evade scam-detection mechanisms by "utilizing visually similar symbols to obfuscate their text, abusing account names, and splitting text into multiple comments posted by multiple accounts."[97]

Some platform design choices that bear less heavily but still significantly on platform manipulation include the "infinite scroll," the decision to allow consumers to view metrics (i.e., "likes" and "retweets") directly on posts, the decision to make all new accounts public by default, and the decision to impose word or character limits.[98] Aware of platform manipulation at its present scope, social media companies have various tools at their disposal when designing platforms in ways that are more (or less) conducive to deceptive conduct. Not all these platform design choices are presently permissible under the prevailing platform liability paradigm.[99] These capacities are inherent to the genesis of platform-based

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94. Olivia Carville, Meta Removes 63,000 Accounts Linked to Sextortion Scammers, Bloomberg (July 24, 2024), https://www.bloomberg.com/news/articles/2024-07-24/meta-removes-63-000-accounts-linked-to-sextortion-scammers (on file with the *Columbia Law Review*).

95. See, e.g., 'National Geographic' Photographer Paul Nicklen Warns About Social Media Impostors, Part 2, AARP (Dec. 15, 2023), https://www.aarp.org/podcasts/the-perfect-scam/info-2023/paul-nicklen-part-2.html [https://perma.cc/UA8N-XYSP] ("Paul Nicklen is a world-famous wildlife photographer with a massive Instagram following . . . . He faces a near constant stream of impostors and he just can't seem to get social media companies interested in fixing the problem.").

96. See Xigao Li, Amir Rahmati & Nick Nikiforakis, Like, Comment, Get Scammed: Characterizing Comment Scams on Media Platforms 12 (2024) (unpublished manuscript), https://www.ndss-symposium.org/wp-content/uploads/2024-60-paper.pdf [https://perma.cc/V3KL-GHYH] (describing indicators that scammers share account details, that "multiple scammers [exist] inside a single campaign," and that those scammers exchange information about targets' identities).

97. Id. at 1.

98. See, e.g., Dayna Tortorici, Infinite Scroll: Life Under Instagram, The Guardian (Jan. 31, 2020), https://www.theguardian.com/technology/2020/jan/31/infinite-scroll-life-under-instagram [https://perma.cc/Z87Y-PLEE] (offering one account of the impacts of the infinite scroll design feature).

99. Often, these design elements are subject to "A/B testing" to "track the effect of design changes" and ultimately increase user "time on the platform." Maya Konstantino, Note, The Tort of Moving Fast and Breaking Things: A/B Testing's Crucial Role in Social Media Litigation, 99 N.Y.U. L. Rev. Online Features 178, 189–90, 202 (2024), https://nyulawreview.org/wp-content/uploads/2024/08/99-NYU-LRev-Online-178-1.pdf

digital technologies, and companies can leverage them to satisfy their burden of responsibility to users.

1. *Retention Features.* — Features that incentivize social media users, both scammers and victims, to continue to engage in dangerous activities on platforms are one potential avenue for ascribing liability for platform manipulation. "Retention features" include the infinite scroll, reward systems for repeat or sustained use of platforms, and other features that make it easier to conduct exchanges of money, images, or content.[100] The Ninth Circuit has recognized liability for a retention feature when a Snapchat filter allegedly encouraged dangerous driving.[101] Such features involve choices that only the platform and the individual user are privy to.[102] Consequently, platforms could deploy different retention features for different demographics, all the way down to the individual user basis. For example, platform designs that abandon the infinite scroll feature could limit the unique toll the infinite scroll takes on individuals who are predisposed to fraud online: those with poor mental health or memory.[103] Through retention design, platforms make active choices to retain users, including those who violate their policies and manipulate others on the platform."

2. *"Flows."* — Social media companies design their platforms in ways that affect usability and accessibility, and thus platform manipulation, through the number and sequencing of steps required in order for a user to effect a change to their UX. For example, a "reporting flow" refers to the steps required for a user to report an account for suspected deceptive activity: By designing more streamlined ways to submit and visualize reports on the user end, social media companies can create intuitive

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[https://perma.cc/Y99B-398P] (discussing applications of a product liability framework to social media platforms).

100. See id. at 214 ("[TikTok] capitalize[s] on reward-based learning, infinite scroll, videos that consume the entire screen, and algorithmic manipulation, among other factors.").

101. See Lemmon v. Snap, Inc., 995 F.3d 1085, 1092 (9th Cir. 2021) (describing how "the duty that Snap allegedly violated 'springs from' its distinct capacity as a product designer" (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1107 (9th Cir. 2009))).

102. See id.; Kathleen Walch, How Generative AI Is Driving Hyperpersonalization, Forbes (July 15, 2024), https://www.forbes.com/sites/kathleenwalch/2024/07/15/how-generative-ai-is-driving-hyperpersonalization/ [https://perma.cc/N8YJ-HYD6] ("The idea of these uniquely personalized experiences is transforming how businesses interact with their customers and how people are living their daily lives.")

103. See Health Plays a Role in Older Adults' Vulnerability to Scams, Poll Suggests, Univ. of Mich. Inst. for Healthcare Pol'y & Innovation (Nov. 14, 2023), https://ihpi.umich.edu/news/health-plays-role-older-adults-vulnerability-scams-poll-suggests [https://perma.cc/SV5S-QVSR] ("'Our findings of a strong connection between scam vulnerability and health adds important new data to ongoing efforts to reduce the devastating toll of scams on older adults' finances and well-being,' said poll director Jeffrey Kullgreen . . . .").

reporting mechanisms.[104] These protocols can leverage evidence-based interventions to lighten the cognitive burden on users who are considering whether and how to report other users.[105] Another example of a "flow" is the steps that platforms impose on users who seek to change their UX to enhance their privacy. For example, today, in order to turn off Apple's AI capabilities—through which the company hones its AI technology by monitoring phone owners' activity on the applications in their phones—users must navigate through "Settings," identify "Apple Intelligence and Siri," select "Apps," and individually toggle off "Learn from this App" for each application.[106] A more intuitive "privacy flow" would allow users to disable Apple's AI monitoring of their devices in one toggle.

3. *Silencing Features.* — When users open their favorite social media platforms each day, they have the potential to interact with users from around the world. Yet those billions of profiles and pieces of content do not bombard their interfaces—the platform takes measures to moderate profile and content exposure. Similarly, platforms make design choices that impact users' own ability to regulate the profiles and content to which they are exposed. For example, "block" and "mute" design features on platforms permit users to reclaim and exercise autonomy over their UX.[107]

4. *Labels and Alerts.* — Social media companies can choose to create labels and alerts on various components of their UIs to draw users' attention to pertinent information. If users knew they were engaging with suspected scam content, they would be better equipped to avoid such schemes altogether. Due to the impact of disinformation and misinformation schemes on elites, social media companies have already taken strides to tackle political platform manipulation through platform design, including through the introduction of labels and "community

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104. See Andrew Hutchinson, X Improves Content Reporting Flow, Making It Easier to Submit Rule-Breaking Content, Soc. Media Today (Sept. 24, 2023), https://www.socialmediatoday.com/news/x-improves-content-reporting-flow-making-easier-submit-rule-breaking/694568/ [https://perma.cc/P3CH-JYGN] ("[T]he new X reporting flow now gives you more specific violations to choose from when reporting a post. . . . Once your report is logged, you'll then be shown [a] screen highlighting possible actions you could take to limit any further harm.").

105. See Tom Muha, Opinion, Bye Bye, Blocking, Mich. Daily (Oct. 8, 2024), https://www.michigandaily.com/opinion/columns/bye-bye-blocking/ [https://perma.cc/LSP4-BVNC] (discussing statements by X's owner, who proclaimed a desire to eliminate the blocking feature from the social media platform).

106. Austin Williams, Apple's iOS 18.1 Brings AI Advancements: Privacy Tips You Need, Live Now Fox (Nov. 20, 2024), https://www.livenowfox.com/news/ios-18-1-ai-privacy [https://perma.cc/X4X9-42BP] (internal quotation marks omitted) (describing the steps users can take to ensure their "privacy remains intact" by disabling Apple's access to personal data).

107. Block, Mute, Restrict, Report—What's the Difference?, Instagram (Nov. 22, 2024), https://about.instagram.com/blog/tips-and-tricks/restrict-mute-block-report-guide (on file with the *Columbia Law Review*).

notes" on potentially misleading content.[108] Labels on content fall within the range of "publisher or speaker of third-party content" by the social media company that is protected by statutory immunity.[109] But labels are not limited to content. Platforms can design account labels, such as profile "verification" systems, that provide useful information to users. Research has also shown that scammers often send the same message to dozens or hundreds of targets at once; using signals like these, companies could detect suspected repeat offenders and create corresponding account labels.[110]

By monitoring suspected scam activity on their platforms and designing warning systems, social media companies can mitigate against platform-enabled deception. Warning messages that indicate whether a user has been previously reported for scams could put the community of social media users on notice of potential danger. Social media companies have this data; they routinely monitor online activity for groups suspected of dangerous activity.[111] Platforms can identify when individuals migrate communications off to third-party platforms and even identify AI-generated content.[112] Facebook notably created an image labeling system for AI-generated content in an effort to curb platform manipulation that could influence users' votes ahead of the 2024 U.S. presidential election; yet the platform offers no labeling system for similarly manufactured content that influences users to succumb to scammers.[113] Caution alerts on AI-generated content shared in direct messages could similarly put users on notice that they are dealing with scammers and reduce the psychological and reputational effects of this activity. For example, after

108. See Samantha Bradshaw, Shelby Grossman & Miles McCain, An Investigation of Social Media Labeling Decisions Preceding the 2020 U.S. Elections, PLOS ONE, Nov. 15, 2023, at 1, 7–9, 16, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0289683 [https://perma.cc/K2FJ-G4QY] (examining the impacts of labeling on Facebook and X and highlighting the need for platforms to permit Application Programming Interface access to allow researchers to further investigate platform dynamics).

109. Calise v. Meta Platforms, Inc., 103 F.4th 732, 740 (9th Cir. 2024) (internal quotation marks omitted) (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009)).

110. Noelle Toumey Reetz, Researchers Identify How Scammers Target Victims on Dating Apps, PHYS (Feb. 10, 2023), https://phys.org/news/2023-02-scammers-victims-dating-apps.html [https://perma.cc/AQC4-XJAS].

111. See Issie Lapowsky, Tech Companies Have the Tools to Confront White Supremacy, Wired (Aug. 14, 2017), https://www.wired.com/story/charlottesville-social-media-hate-speech-online/ (on file with the *Columbia Law Review*) (describing efforts by social media companies to combat white supremacist content and organizing on their platforms).

112. See Meta Identifies Networks Pushing Deceptive Content Likely Generated by AI, Reuters (May 29, 2024), https://www.reuters.com/technology/meta-identifies-networks-pushing-deceptive-content-likely-generated-by-ai-2024-05-29/ (on file with the *Columbia Law Review*) (finding that a Tel Aviv-based political marketing firm was behind a "covert influence operation[]" that weaponized generative AI).

113. Id.

the events of January 6th at the U.S. Capitol, Twitter (now X) deployed machine learning software to extricate violence-inducing content in record time.[114] Subsequent studies have verified the core proposition: Platforms could remove "habitual spreaders" of scam content in a heartbeat.[115]

5. *Pre-Bunking*. — "Pre-bunking," or "nudging," is a term that refers to the social media company practice of "inoculati[ng]" social media users from verified or suspected scam content.[116] This strategy "pre-emptively exposes people to tropes at the root of malicious [content], so they can better identify online falsehoods regardless of subject matter."[117] In turn, platform manipulators may be deterred from posting manipulative content; conversely, social media companies could point to this as conduct that satisfies their burdens of liability should negligence claims arise.

As another example, content algorithms curate the content that appears on users' timelines, but the *timing* of when that content is delivered is not a content decision. Rather, it is a platform design. Researchers have studied the optimal delivery of "pre-bunks" and have proposed new models for content delivery that can minimize users' likelihood of internalizing deceitful content, including messages.[118] By choosing when to show certain content, social media companies can design platforms that are less conducive to exploitation and deceit.

6. *Terms of Service Design*. — Beyond platforms themselves, several environmental and structural factors contribute to the industry of platform-enabled scams. Research has shown that consumers fell victim to more scams during the COVID-19 pandemic than in previous periods.[119]

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114. Will Oremus, After Jan. 6, Twitter Banned 70,000 Right-Wing Accounts. Lies Plummeted., Wash. Post, https://www.washingtonpost.com/technology/2024/06/06/twitter-jan-6-deplatforming-misinfo-nature-study/ (on file with the *Columbia Law Review*) (last updated June 6, 2024).

115. Id.

116. Fred Lewsey, Social Media Experiment Reveals Potential to 'Inoculate' Millions of Users Against Misinformation, Univ. of Cambridge, https://www.cam.ac.uk/stories/inoculateexperiment [https://perma.cc/7AVA-4RCN] (last visited Jan. 24, 2025).

117. Id.; see also Tobias Rose-Stockwell, Facebook's Problems Can Be Solved With Design, Quartz (Apr. 30, 2018), https://qz.com/1264547/facebooks-problems-can-be-solved-with-design [https://perma.cc/YU6P-LM43] (describing four design choices for improving UX: "[g]iv[ing] [h]umanizing [p]rompts," "[p]icking out unhealthy content with better metrics," "[f]ilter[ing] unhealthy content by default," and "[g]iv[ing] users feed control").

118. See Yigit Ege Bayiz & Ufuk Topcu, Prebunking Design as a Defense Mechanism Against Misinformation Propagation on Social Networks 9 (Nov. 23, 2023) (unpublished manuscript), https://arxiv.org/pdf/2311.14200 [https://perma.cc/GF6B-HQUM] (finding an ideal algorithm for "optimally delivering prebunks").

119. See Monica T. Whitty, The Human Element of Online Consumer Scams Arising From the Coronavirus Pandemic, *in* Cybercrime in the Pandemic Digital Age and Beyond 57, 58 (Russel G. Smith, Rick Sarre, Lennon Yao-Chung Chang & Laurie Yiu-Chung Lau eds., 2023) ("[I]t is argued that the social and psychological conditions were, during the

Due to consumer psychology, consumers are falling prey to scams even when they agree to the terms and sign on dotted lines.[120] Social media companies that design their ToS to offer clear instructions for users can stifle platform manipulation by (re)alerting users of their rights and obligations. Importantly, ToS design does not refer to the content of the terms themselves—rather, it refers to how users interface with those terms.[121]

7. Account Verification Design. — Social media companies can also affect platform manipulation through their account verification policies. Through verification "badges" and other account badges, platforms introduce embellishments that can be exploited to the benefit of malicious actors.[122] Platforms engage in account verification design through the decisions they make concerning who can create an account[123] and how many accounts (and profiles) an individual or organization can create.[124] This is particularly relevant in the scam context, since scammers may share accounts, impersonate real accounts, and operate several accounts. One

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height of the pandemic, very different to pre-COVID-19 times. It is most likely that these conditions account for some of the increase in the number of consumer scam[s] . . . .").

120. See Meirav Furth-Matzkin & Roseanna Sommers, Consumer Psychology and the Problem of Fine-Print Fraud, 72 Stan. L. Rev. 503, 510 (2020) ("[F]ine print may *disempower* consumers who read their contracts ex post . . . because consumers may become demoralized by contractual language and are likely to blame *themselves* for failing to read at the time of signing.").

121. See Designing the Terms and Conditions Page—Does It Really Matter? Yes It Does!, Encora (Sept. 25, 2019), https://insights.encora.com/insights/designing-the-terms-and-conditions-page [https://perma.cc/GF9S-JVC3] (describing ToS designs such as "[i]nformation grouping and structuring," summary sections with translations, "information popups," "icons and imagery," "[f]onts and spacing," Help sections, and FAQ formatting); Railslove, Terms of Service—An Opportunity in UX Design?, Medium (Nov. 15, 2018), https://medium.com/railslove/terms-of-service-an-opportunity-in-ux-design-2849e5fcea4e [https://perma.cc/4UT9-5QJD] (visualizing ToS designs that provide a poor user experience).

122. See, e.g., Craig Silverman and Bianca Fortis, Real Money, Fake Musicians: Inside a Million-Dollar Instagram Verification Scheme, ProPublica (Aug. 31, 2022), https://www.propublica.org/article/instagram-spotify-verified-fake-musicians [https://perma.cc/MWR9-32TU] ("[T]he operation transformed hundreds of clients into musical artists in an attempt to trick Meta . . . into verifying their accounts and hopefully paving the way to lucrative endorsements and a coveted social status.").

123. For example, platforms decide what age demographics can make an account. Many state legislatures have passed or are exploring age verification laws for social media companies. See Jenna Zhang, Lindsey Tonsager, Diana Lee, Madeline Salinas & Priya Leeds, State, Federal, and Global Developments in Children's Privacy, Q1 2023, Covington (Apr. 2, 2023), https://www.insideprivacy.com/childrens-privacy/state-federal-and-global-developments-in-childrens-privacy-q1-2023/ [https://perma.cc/9QFL-MUVA] (describing Utah's law "requiring social media companies to verify the age of all users to determine which are under eighteen").

124. See, e.g., FE Tech Desk, Facebook Testing Feature to Allow Users to Have Up to Five Profiles, Fin. Express (July 15, 2022), https://www.financialexpress.com/life/technology-facebook-additional-profiles-feature-test-meta-platforms-2595469 [https://perma.cc/3DPU-SQPF].

platform that allows users to video chat with strangers, Omegle, was sued for negligent design choices that matched an eleven-year-old girl with a thirty-year-old man who would come to sexually abuse her for years.[125] The platform's decision not to verify accounts before making connections between adults and minors is an example of a design choice that works to the advantage of malicious actors. Similarly, Grindr, a dating application, has faced lawsuits over its negligent design of an age verification process that promoted grooming.[126] But courts thus far have held that, for claims related to account verification processes, courts cannot treat social media companies like "publishers" of account data, which invokes immunity for platforms and forecloses liability.[127]

C. *The Platform Manipulation Economy*

Platforms often generate revenue from advertising and selling user data, which incentivizes them to respond to user expectations insofar as those responses lead users to spend more time on, and engage with, their platforms.[128] Scams and other platform manipulation corollaries disrupt the notion that companies design platforms to "match[] users' expectations, [so that] users will spend more time on the site and advertising revenue will increase."[129] This logic presumes that companies are able to accurately meet user expectations, and it neglects the core misalignment that scammers and malicious actors capitalize on: Sometimes companies' perceptions of users' expectations are distorted (and users' self-perceptions can be distorted). The platform economy, as robust and multidimensional as it has become,[130] continues to thrive on platform designers' limited constructions of user expectations. Even while designing UXs, social media companies tend to experiment with large groups,[131] which can neglect the experiences of minorities and other marginalized communities online.

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125. See A.M. v. Omegle.com, LLC, 614 F. Supp. 3d 814, 817 (D. Or. 2022).

126. See, e.g., Doe v. Grindr Inc., 709 F. Supp. 3d. 1047, 1050–51 (C.D. Cal. 2023); Nazgole Hashemi & Tannaz H. Hashemi, Don't Let Them Fool Ya: An Examination of Regulation Crowdfunding as a Framework for Federal Protection Against Online Dating Risks, 53 U.S.F. L. Rev. 421, 423 (2019) ("Negligence cases against online dating platforms are subject to dismissal because the law currently imposes no duty on them to conduct criminal background checks or otherwise take steps to ensure the safety of users.").

127. See Hashemi & Hashemi, supra note 126, at 422–23.

128. Engagement can include everything from opening the platform's webpage to clicking on links to exchanging messages with a scammer. See Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harv. L. Rev. 1598, 1627 (2018) [hereinafter Klonick, New Governors] (describing the engagement-based platform economy).

129. Id.

130. See infra notes 187, 189 and accompanying text.

131. See Konstantino, supra note 99, at 189 n.56 ("Traditionally, companies segment users into two groups at random and show each group one of two versions of the app. Recently, testing has gotten more complex to account for confounding variables . . . .").

Platform manipulators' interests converge[132] with platforms' interests in a way that leads to devastating effects for victims of online scams, disinformation and misinformation campaigns, and other kinds of platform-based deception. These actors need users to spend more time interacting with them on platforms in order to develop stronger deception-based relationships.[133] Thus, social media companies can profit immensely from platform manipulation: When users spend more *time* on the platform, the company can "sell" those numbers to advertisers in order to generate revenue.[134] These companies may also be able to profit politically from remaining silent or refusing to raise the alarm on issues that impact their reputation and standing with stakeholders, including lawmakers.[135] Moreover, the status quo laissez-faire approach to social media regulation "invites the worst abuses by the state."[136] In addition to earning revenue from social media scams through metrics sold to advertisers, social media companies save money by not addressing platform manipulation in the short-term;[137] tackling this issue requires hard-to-find, multifaceted expertise in UX design and scams, disinformation, and other areas.[138]

Social media companies play a crucial and foundational role in the platform economy. Due to the global nature of these schemes and the ability to hide identities online, it is extremely difficult to go after

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132. See generally Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980) ("[T]his principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

133. See Pistone & Knowles, supra note 4 (describing "pig-butchering" scams predicated on the duration of time for their efficacy).

134. See Leetaru, supra note 23 ("Facebook is in reality renting access to data. Its sole value proposition to developers is access to its two billion users.").

135. See Michael L. Rustad & Thomas H. Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 345 (2005) ("Corporate stakeholders use their lobbying influence to expand their online rights and to avoid liability."); David Greene, In These Five Social Media Speech Cases, Supreme Court Set Foundational Rules for the Future, Elec. Frontiers Found. (Aug. 14, 2024), https://www.eff.org/deeplinks/2024/08/through-line-suprme-courts-social-media-cases-same-first-amendment-rules-apply [https://perma.cc/4ZUH-DT2P] (describing several high-profile Supreme Court cases involving social media companies, including cases concerning the interdependence between lawmakers and social media companies).

136. See Kyle Langvardt, Regulating Online Content Moderation, 106 Geo. L.J. 1353, 1386 (2018) ("[The social media system] mediates a dominant and growing share of all online communication, and its private owners are few enough in number to operate as convenient 'choke points' under pressure.").

137. See supra note 23 and accompanying text (discussing the long-term value proposition for platforms that combat scams).

138. See Rob Rashotte, Why Closing the Cyber Skills Gap Requires a Collaborative Approach, World Econ. F. (July 23, 2024), https://www.weforum.org/stories/2024/07/why-closing-the-cyber-skills-gap-requires-a-collaborative-approach/ (on file with the *Columbia Law Review*) (describing the global cybersecurity labor shortage).

deceptive actors themselves.[139] The lack of adequate remedies against these primary violators leaves social media companies at the leading edge of both harm perpetration and potential recourse for victims. In the next Part, this Note analyzes the shortcomings of the existing liability frameworks available to the individuals and groups on the other end of platform manipulation.

II. THE SHORTCOMINGS OF EXISTING LIABILITY FRAMEWORKS

Platform manipulation takes several forms and thrives on many aspects of platforms, including platform design. Often, platform manipulators leverage platform design elements to implement their schemes. Considering this development—made possible by the innovation of network-effects and social media–platform technologies in the past three decades—§ 230 (discussed in section II.A), consumer law (section II.B), and voluntary self-regulation (section II.C) are woefully maladapted to confront platform manipulation.

A. *Platform Design as Content-Agnostic Corporate Conduct: The § 230 Immunity Myth*

The centerpiece of social media law, § 230 of the Communications Decency Act of 1996,[140] persists as the bulwark against social media–company liability for the harms their platforms cause to users by way of content moderation decisions.[141] This does not mean, however, that social media companies cannot be held liable for other harms caused to their

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139. See Teele et al., supra note 61.

140. Section 230 broadly provides "internet service providers" (i.e., social media companies) with broad immunity over their decisions to keep, promote, downgrade, and remove content, as well as their decisions to suspend or ban users.

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. . . .
>
> No provider or user of an interactive computer service shall be held liable on account of—
>
> > (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . objectionable, whether or not such material is constitutionally protected . . . .

47 U.S.C. § 230(c) (2018).

141. In the early days of website hosting, two New York cases played exceedingly influential roles in shaping the contours of "social media law." For an overview of "social media law," see generally Social Media Law Bulletin, Norton Rose Fulbright LLP, https://www.socialmedialawbulletin.com/glossary-of-us-laws/ [https://perma.cc/S5BD-YHVT] (last visited Jan. 28, 2025); see also Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (holding that an online messaging board was not liable for content it was not aware of); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 23, 1995) (holding that a separate online messaging board was liable for content on its site because it had attempted to moderate *some* posts).

consumers. Countless law enforcers and private plaintiffs have sued social media companies in relation to platform-based deception.[142] Unfortunately, due to misunderstandings of § 230 and applications of the First Amendment to technology platforms, some scholars have continued to portray that social media platforms are entirely immune for their non-content-related decisions—including their platform design choices.

At the same time, courts are increasingly recognizing that § 230's safe harbor does not shield all platform conduct from liability. The Third Circuit recently held that "TikTok's recommendations via its ["For You Page" timeline] algorithm . . . [was] TikTok's own expressive activity," subject to liability under § 230.[143] The case surrounded a ten-year-old girl, Nylah Anderson, who died after participating in a "Blackout Challenge" algorithmically advertised to her by TikTok.[144] The construction of algorithms that recommend content invokes numerous platform design levers, namely those that permit users to play a role in "boosting" or "suppressing" content in the algorithm.[145] Ultimately, it is extremely difficult for outsiders to determine whether social media companies are taking content-neutral or content-responsive decisions when developing or editing their algorithms, as has been the case with accusations of platform censorship for politically divisive topics.[146]

In effect, § 230 is quite vague; the law provides no definitions for "good faith" content moderation or "objectionable" material, despite mentioning the former and policing the latter.[147] Critics in both the Democratic and Republican parties have unsuccessfully sought to both expand and curtail the reach of the statute, while simultaneously

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142. See Lemmon v. Snap, Inc., 995 F.3d 1085, 1092 (9th Cir. 2021) ("[T]he Parents' amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer . . . negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter)."); Doe v. Grindr Inc., 709 F. Supp. 3d 1047, 1050 (C.D. Cal. 2023) ("Doe brings this lawsuit against Grindr for child sex trafficking and a defective product, asserting claims of strict product liability, negligence, negligent misrepresentation, and violation of the Trafficking Victims Protection Reauthorization Act . . . .").

143. Anderson v. TikTok, Inc., 116 F.4th 180, 184 (3d Cir. 2024).

144. Id. at 181.

145. See Danielle Draper, Demystifying Social Media Algorithms, Bipartisan Pol'y Ctr. (Aug. 2, 2023), https://bipartisanpolicy.org/blog/demystifying-social-media-algorithms (on file with the *Columbia Law Review*) (describing design levers such as the use of "viewing history, likes, shares, comments, accounts followed, demographics, geographic location, preferences, and search history" to control the kind of content displayed to users).

146. See Priyanka Shankar, Pranav Dixit & Usaid Siddiqui, Are Social Media Giants Censoring Pro-Palestine Voices Amid Israel's War?, Al Jazeera (Oct. 24, 2023), https://www.aljazeera.com/features/2023/10/24/shadowbanning-are-social-media-giants-censoring-pro-palestine-voices [https://perma.cc/9FQN-57N9] (describing a "bug" that led Meta to decrease exposure of social media posts that included mentions of Palestine).

147. Edward Lee, Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance, 70 Am. U. L. Rev. 913, 925 (2021) (internal quotation marks omitted).

expressing a desire for greater accountability for social media companies.[148] Above all, § 230 does not prevent public and private parties from ascribing liability to social media companies for their platform design choices. The statute's clear aim at "action voluntarily taken in good faith to restrict access to or availability of material,"[149] or protection for content-based restrictions, is wholly detached from platforms' *design* decisions.

Platform design choices that enable platform manipulation fall outside § 230's purview for one principal reason.[150] The conduct at issue in such cases[151]—platform design choices—does *not* serve the purpose of restricting the availability of objectionable material. Rather, these platform design choices are made in order to connect users to one another, retain user attention to the platform, and contribute to the overall UX, which are all not forms of "content." Courts have stated as much when the platform design choice to provide verification badges to hijacked YouTube channels fell outside the scope of § 230.[152] Nonetheless, scholars have continued to

148. In 2021, Democratic lawmakers introduced the "Health Misinformation Act of 2021," seeking to hold companies liable when they allow "health misinformation" to proliferate on their platforms. S. 2448, 117th Cong. (2021). Republican bills include the "Online Freedom and Viewpoint Discrimination Act," which would modify § 230 to limit protections for platforms. S. 4534, 116th Cong. (2020). For a more comprehensive list of all § 230-related bills, see All the Bills on Section 230, Civic Genius (Feb. 9, 2022), https://www.ourcivicgenius.org/learn/all-the-bills-on-section-230/ [https://perma.cc/MSA6-2KEV]; Chris Riley & David Morar, Legislative Efforts and Policy Frameworks Within the Section 230 Debate, Brookings Inst. (Sept. 21, 2021), https://www.brookings.edu/articles/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/ [https://perma.cc/AHZ4-HBZK]. For a critique of Democratic and Republican approaches, see Tim Wu, Liberals and Conservatives Are Both Totally Wrong About Platform Immunity, Medium (Dec. 3, 2020), https://superwuster.medium.com/liberals-and-conservatives-are-both-totally-wrong-about-section-230-11faacc4b117 [https://perma.cc/N5CM-RQ8K] (describing the challenges associated with an all-or-nothing approach to Section 230 reform).

149. 47 U.S.C. § 230(c)(2)(A) (2018).

150. See, e.g., Danielle Keats Citron, Section 230's Challenge to Civil Rights and Civil Liberties, Knight First Amend. Inst. (Apr. 6, 2018), https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties [https://perma.cc/KT46-U3FG] ("Platforms disadvantage the vulnerable not just through their encouragement of cyber mobs and individual abusers but also through their design choices. . . . Section 230 should not be read to immunize platforms from liability related to user interface or design."). Such critiques of § 230's disassociation from design choices have centered around discrimination, harassment, and illegal behaviors facilitated by platforms, as opposed to consumer scams and other platform-based manipulation. See id. ("When code enables invidious discrimination, law should be allowed to intervene."); Olivier Sylvain, Discriminatory Designs on User Data, Knight First Amend. Inst. (Apr. 1, 2018), https://knightcolumbia.org/content/discriminatory-designs-user-data [https://perma.cc/AT2Z-PK2U] (arguing that "courts should account for the specific ways in which intermediaries' designs do or do not enable or cause harm to the predictable targets of discrimination and harassment").

151. See infra notes 236–243 and accompanying text.

152. The court could not rule on this issue because the plaintiffs had not pleaded this argument. See Wozniak v. YouTube, LLC, 319 Cal. Rptr. 3d 597, 603 (Cal. Ct. App. 2024) ("[W]e also conclude that one of plaintiffs' claims—that defendants created their own

ascribe a broader meaning to § 230 than exists within the text of the statute.[153]

The legislative history of § 230 demonstrates that the law at its inception was not designed to apply to platform design choices. Passed by a margin of 420-4, § 230 was intended for two purposes: to "encourage the unfettered and unregulated development of free speech on the Internet" and to empower platforms to police their content and address child safety on the internet.[154] Importantly, § 230 was *not* intended to apply to the architecture of platforms, their context-agnostic presentation of content, their capacity to detect malicious actors, their responsibilities in relation to the information that they adduce from their platforms, or anything of the like. Representative Christopher Cox, co-author of § 230 alongside Representative Ron Wyden, wrote in an amicus brief for the 2022 case of *NetChoice, LLC v. Florida* that "the plain meaning of the words in Section 230 is exactly what Congress intended."[155] It was intended to "establish[] clear rules of liability tailored to the essential characteristics of the Internet in order to expand opportunities for users to create and publish their own content."[156] According to Representative Cox, the law was intended to apply to platforms acting "as arbiters of content moderation" that could help cultivate a "broad range of interests, each with its own community standards."[157]

Section 230 was also written with a particular bent on preserving the safety of children on the internet. Considering copious evidence illustrating the widespread nature of platform-enabled scams, which disproportionately target elderly individuals, it is difficult to imagine the architects of § 230 would have meant to remove liability for when reporting flows contribute to elder abuse scams. Unfortunately, in limited instances, scholars have adopted an atextual interpretation of § 230 to foreclose liability over platform design.[158] Meanwhile, § 230 may continue

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content and materially contributed to the unlawfulness of the scam by providing verification badges to hijacked YouTube channels—includes allegations which potentially could fall outside the scope of section 230 immunity.").

153. See Hashemi & Hashemi, supra note 125, at 422 ("Holding dating platforms liable for third-party misconduct is virtually impossible at this time, although they are responsible for facilitating connections.").

154. Section 230: Legislative History, Elec. Frontiers Found., https://www.eff.org/issues/cda230/legislative-history [https://perma.cc/EN58-TGT2] (last visited Jan. 25, 2025) (internal quotation marks omitted) (quoting Bratzel v. Smith, 333 F.3d 1018, 1033 (9th Cir. 2003)).

155. Brief of Former U.S. Representative Christopher Cox, Co-Author of Section 230, as Amicus Curiae in Support of Conditional Cross-Petitioners at 2, NetChoice, LLC v. Moody, 114 S. Ct. 69 (mem.) (2023) (No. 22–393), 2022 WL 17338954, cert denied.

156. Id. at 3.

157. Id.

158. See Allison M. Clay, Comment, Blissful Unaccountability: The Nonregulation of Precarious Network Marketing Schemes on Social Media, 47 Del. J. Corp. L. 595, 605 (2023) (claiming that, because of Section 230, "regardless of the role of social networking platforms

to cost the public access to public spheres.[159] Though platforms' scam monitoring activities fall outside the bounds of their statutory immunity, to date, no plaintiffs have advanced a theory of liability that argues that platforms owe users a responsibility to inform them when they use the platform to maintain a relationship with an individual previously reported for fraudulent or scam activity.

B. *Platform Design as a Duty: U.S. Consumer Law's Neglect of User Rights*

Broadly speaking, U.S. consumer law fails to protect users' rights, including their rights in private litigation involving platform manipulation.[160] Today, there is no statutorily enshrined right of action available to plaintiffs at the state or federal level that appreciates a consumer's right to reasonable, safe, or protective platform designs.[161] Rather, a patchwork of laws governs platform manipulation. The main sources of law are the Federal Trade Commission Act (FTCA), the Consumer Review Fairness Act, and cyber exploitation-focused laws like the Children's Online Privacy Protection Act (COPPA). The primary enforcers are the FTC and Consumer Financial Protection Bureau (CFPB). By and large, current enforcement efforts have fallen short in the task of ascertaining platform liability for platform manipulation.

Through its authorities under § 5 of the FTCA, the FTC is responsible for pursuing relief for consumer-victims of "injurious conduct."[162] In its

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in facilitating MLMs and pyramid schemes, they cannot be held accountable under the law for the harm that these schemes cause their users").

159. See David Pozen, Intermediary Immunity and Discriminatory Designs, Knight First Amend. Inst. (Apr. 6, 2018), https://knightcolumbia.org/content/intermediary-immunity-and-discriminatory-designs [https://perma.cc/97HZ-VLC9] ("[Section 230] has arguably shaped the development of the public sphere in problematic ways—subsidizing digital platforms over analog ones, rewarding reliance on user-generated rather than employee-generated content, and allowing website operators to avoid internalizing many of the social costs of the materials they disseminate.").

160. See Roger Allan Ford, Data Scams, 57 Hous. L. Rev. 111, 142 (2019) ("Although many scams violate the law, there are enough that are legal, or that are not clearly illegal, that existing law is not a reliable solution to the problem of targeted scams.").

161. See infra Part III.

162. Katherine Waitz, Comment, A Shift in the Tides? The Welcomed Proposal of Harshened FTC Guidelines for Social Media Reviews and Advertising, 51 S.U. L. Rev. 129, 132 (2023). The FTCA governs platform manipulation that involves commercial transactions. Under the FTCA, the FTC must act by:

> (a) preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce; (b) seeking monetary redress or other relief for injurious conduct to consumers; (c) prescribing rules defining acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; and (d) gathering and compiling information and conducting investigations relating to such practices, organizations, businesses, and management of entities engaged in commerce.

Id; see also 15 U.S.C. § 45 (2018).

focus on the social media space, the FTC has largely targeted social media influencers, advertisers, and companies that engage in deceptive marketing practices,[163] though lay consumers are the prototypical victims of platform manipulation.[164] Historically the FTC viewed social media harms through the lens of privacy and security,[165] which often accompany and may be ancillary to the financial, reputational, and psychological harms caused by deceptive online conduct.[166]

Contemporary legal framing of platform manipulation nascently posits platform manipulation and platform design as "deceptive acts" and "unfair methods" under the FTCA[167] and similar state laws, pursuant to the FTC's authority to seek relief for injuries arising from platform manipulation and platform design insofar as users are social media consumers.[168] The CFPB is another federal agency with a similar mission of ensuring "that markets for consumer financial products and services are fair, transparent, and competitive,"[169] though its ability to respond to deceptive practices has been weakened; notably, the agency has previously taken action to subvert efforts to undermine student loan scams operating on social media.[170]

Through the Consumer Review Fairness Act, which was passed in 2016,[171] Congress has taken action to curb platform designs that exclude negative product reviews, and the FTC has used its enforcement power to

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163. See, e.g., Press Release, FTC, Fashion Nova Will Pay $4.2 Million as Part of Settlement of FTC Allegations It Blocked Negative Reviews of Products (Jan. 25, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/fashion-nova-will-pay-42-million-part-settlement-ftc-allegations-it-blocked-negative-reviews [https://perma.cc/U4HS-TPDC].

164. See Julie Brill, Privacy & Consumer Protection in Social Media, 90 N.C. L. Rev. 1295, 1296 (2012) (discussing consumer protection issues caused by the way social media has "changed the way companies do business and the way they interact with consumers").

165. See id. at 1299 ("We continue to monitor the social media space for practices that impact the privacy and security of the personal information about consumers.").

166. See supra section I.A.

167. See 15 U.S.C. § 45.

168. For example, in July 2024, the U.S. Department of Justice filed a complaint against global software company Adobe, Inc. for, among other things, obscuring the terms of its "'Annual, Paid Monthly' subscription plan" using an "onerous and complicated cancellation process" and "optional textboxes and hyperlinks, providing disclosures that are designed to go unnoticed and that most consumers never see." Complaint for Permanent Injunction, Monetary Judgment, Civil Penalty, and Other Relief at 2, United States v. Adobe Inc., No. 5:24-cv-03630-BLF (N.D. Cal. filed July 23, 2024), 2024 WL 3680811 (internal quotation marks omitted).

169. 12 U.S.C. § 5511(a) (2018); see also id. § 5491(a) (establishing the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal comsumer financial laws").

170. See Creola Johnson, Relief for Student Loan Borrowers Victimized by "Relief" Companies Masquerading as Legitimate Help, 11 U.C. Irvine L. Rev. 105, 144–51 (2020) (explaining how CFPB leadership under acting director Mick Mulvaney "implemented several changes deemed harmful to student loan borrowers").

171. Consumer Review Fairness Act of 2016, Pub. L. No. 114–258, 130 Stat. 1355 (codified at 15 U.S.C. § 46(b)).

curb similar conduct involving fake reviews.[172] The FTC has also taken action to limit the selling of fraudulent or deceptive products, but has not yet posited consumer time spend as a transaction that elicits liability for platform design.[173] Importantly, FTC and state laws on deceptive advertising fail to conceptually account for a robust definition of platform manipulation because they are generally limited to conduct "affecting commerce."[174] While platform manipulation victims are often deceived about the purpose for engaging in commercial transactions, in romance and other scams, victims transfer money directly into scammers' bank accounts. In addition, FTC enforcement is hampered by the difficulties associated with identifying perpetrators due to the frequently transnational, subtle, and hard-to-detect nature of platform manipulation.[175]

As understood by legal actors and consumers, consumer protection law cannot regulate the "false speech of private citizens in non-commercial settings."[176] While scammers and other platform manipulators engage in "false speech," platform manipulation, platform design, and platforms themselves are not yet widely understood as commercial settings.[177] Unfortunately, the conditions for this reality are well-documented—both "the United States and other jurisdictions have not undertaken systemic reviews of their consumer protection regimes to ensure they are fit for the challenges . . . in online markets."[178] Efforts to revamp consumer protec-

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172. See Andrea M. Matwyshyn & Miranda Mowbray, Fake, 43 Cardozo L. Rev. 643, 659 (2021) (describing the application of the Consumer Review Fairness Act to delicately navigate the "complex" legal questions behind "intent and quantification of harm" in the fake reviews context).

173. See Nicole Dunn, Note, A Dupe or Just Duped? An Analysis of the History and Policy Behind Counterfeit Cosmetics and Social Media's Role in Perpetuating Its Sales, 20 J. Health & Biomedical L. 92, 100–04 (2024) (describing the FTC's authority to police fraudulent business practices that transpire online).

174. See, e.g., 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); Cal. Bus. & Prof. Code § 17508 (2024) ("It shall be unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading *advertising* claim . . . ." (emphasis added)); Iowa Code § 714.16(2)(a) (2025) (prohibiting deception "in connection with the lease, sale, or advertisement of any merchandise or the solicitation of contributions for charitable purposes"); N.Y. Penal. Law § 190.20 (McKinney 2025) ("A person is guilty of false advertising when, with intent to promote the sale or to increase the consumption of property or services, he makes or causes to be made a false or misleading statement in any advertisement . . . .").

175. See Ford, supra note 160, at 168–72 ("A key challenge in implementing law-enforcement tools, then, will be overcoming that lack of technical expertise.").

176. Ira Rubinstein & Tomer Kenneth, Taming Online Public Health Misinformation, 60 Harv. J. on Legis. 219, 245 (2023).

177. See supra section I.C. (offering the platform economy as a commercial setting); infra Part III (introducing the Platform Design Negligence paradigm).

178. Amelia Fletcher et al., Consumer Protection for Online Markets and Large Digital Platforms, 40 Yale J. on Regul. 875, 879 (2023) ("The failure to update consumer-protection law is concerning in part because we rely on it to advance a broad range of interests in addition [to] the purely economic interests of market participants.").

tion laws for the platform economy have been unsuccessful,[179] potentially due to outmoded conceptions of contemporary scams and frauds.[180]

Identity theft protection laws, such as the Identity Theft and Assumption Deterrence Act of 1998,[181] are hard to apply given the difficulties with identifying perpetrators who are often located outside the U.S. While these laws are helpful in cases of celebrity impersonations, most consumer scams do not involve impersonation of the victim. For celebrity impersonator scams, celebrities are neither necessarily incentivized nor able to sue on the victims' behalf. In cases involving lay individuals, the FTC has pursued enforcement action against companies like Match.com for presenting fake profiles to entice users as a form of UX design for user recruitment and retention.[182] The Match.com case, which has been pending for over five years, offers one opportunity for the U.S. District Court for the Northern District of Texas to recognize platform liability for platform manipulation.[183]

Cyber exploitation—including both instances when intimate partners share sexually explicit images and other content without consent from the individuals depicted in the content and AI-generated sexually explicit content of real individuals—is an area in which the FTC and state enforcers have tried to act.[184] Similarly, law enforcers have focused on the impact of social media on children, strengthening enforcement of laws like COPPA.[185]

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179. See David Adam Friedman, Reinventing Consumer Protection, 57 DePaul L. Rev. 45, 46 (2007) ("Policymakers can neither transform the entire consumer protection system overnight nor allocate more resources to the problem.").

180. See Friedman, Impostor Scams, supra note 44, at 58 ("As technology evolves, new, corporate-driven products and services become increasingly difficult to understand. As stand-alone swindlers develop new schemes, regulators will constantly fail to think ahead of the perpetrators.")

181. 18 U.S.C. § 1028 (2018).

182. Press Release, FTC, FTC Sues Owner of Online Dating Service Match.com for Using Fake Love Interest Ads to Trick Consumers Into Paying for a Match.com Subscription (Sept. 25, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/ftc-sues-owner-online-dating-service-matchcom-using-fake-love [https://perma.cc/BLV9-W7VM].

183. Match Group, Inc., FTC, https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3013-match-group-inc [https://perma.cc/9552-ARM2] (last updated Sept. 25, 2019).

184. See Nonconsensual Distribution of Intimate Images: What to Know, FTC (Nov. 2024), https://consumer.ftc.gov/articles/nonconsensual-distribution-intimate-images-what-know [https://perma.cc/DF6A-ZSDZ] (sharing a resource with information about state laws and requesting that victims report incidents of nonconsensual image sharing to the FTC).

185. See Brill, supra note 164, at 1299–304 ("The implications of COPPA in the social media context are significant. Social media operators subject to COPPA must obtain parental consent prior to the collection, use, or disclosure of information about children."); Cole F. Watson, Protecting Children in the Frontier of Surveillance Capitalism, 27 Rich. J.L. & Tech. at 1, 5 (2021) (arguing for COPPA reforms that are responsive to the "unprecedented acceleration of the digital frontier").

C. *Platform Design as Governance: Deconstructing Voluntary Self-Governance*

Many factors play into the failure of the law to meaningfully grapple with social media companies' complicity in platform manipulation. These dynamics are reproduced by the logic of self-governance that can muddy the clear lines between content-based and platform-design decisions

Social media companies have evolved into sophisticated entities capable of operating full-scale marketplaces,[186] even enabling organized criminal organizations to launder money[187] and creators to monetize adult content.[188] The internet behavior of social media users has also changed.[189] New wholesale models for social, economic, and cultural ordering, also known as the "platform economy," provide platforms with endless possibilities for framing their own social obligations.[190]

Against that backdrop, "platform governance" has emerged as a prevailing paradigm for conceiving of the relationship between social media companies and the actors that abuse their platforms.[191] It "refers to the policy, technical, and design decisions impacting a global network of internet users."[192] It portrays social media companies as counterparts to

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186. See How Marketplace Works, Facebook, https://www.facebook.com/help/1889067784738765 [https://perma.cc/SGV4-TV83] (last visited Jan. 25, 2025) (describing how Meta users can post "listings" through the "Marketplace" platform).

187. See Rohena Rajbhandari, Note, (Ven)mo Money, (Ven)mo Problems? How Money Laundering Permeates Peer-to-Peer Payment Platforms, 63 B.C. L. Rev. 669, 671 (2022) ("Despite the United States' robust anti-money laundering laws, concerns regarding money laundering still permeate the P2P market, as existing state and federal laws lack clarity and do not fully address emerging concerns.").

188. "Creators," often referred to as "influencers," are defined as individuals who generate content that they can monetize in the platform economy. Bernhard Rieder, Erika Borra, Òscar Coromina & Ariadna Matamoros-Fernández, Making a Living in the Creator Economy: A Large-Scale Study of Linking on YouTube, 9 Soc. Media + Soc'y, Apr.–June 2023, at 1, 1.

189. See Mary Aiken, The Cyber Effect 18 (2016) (applying the discipline of cyberpsychology to shine a light on how "behavior mutates in cyberspace").

190. Lucy Colback, The Rise of the Platform Economy, Fin. Times (Mar. 13, 2023), https://www.ft.com/content/e5f5e5b9-3aec-439a-b917-7267a08d320f [https://perma.cc/6CHL-L4FK].

191. Platform governance was the subject of *The New Governors*, a 2018 *Harvard Law Review* article that provided a conception of how social media platforms adapt and operate in a rapidly changing internet ecosystem. Klonick, New Governors, supra note 128, at 1602, 1662. While the term has been applied to non-social media platform-based businesses, this Note uses "platform governance" to specifically refer to social media platforms. See Susan Etlinger, The Next Wave of Platform Governance, Ctr. for Int'l Governance Innovation (May 14, 2021), https://www.cigionline.org/articles/next-wave-platform-governance/ [https://perma.cc/7X3R-ZTNW] ("Because each platform type—advertising, cloud, industrial, product, lean—has a distinct set of characteristics, products, services, ways of making money and relative risk, each carries a distinct set of governance implications as well.").

192. Introducing an ISP-WIII Essay Series Exploring the Terms and Concepts that Constitute Platform Governance., Yale L. Sch. Info. Soc'y Project, https://law.yale.edu/isp/publications/platform-governance-terminologies [https://perma.cc/V9VF-JRZT]

government agencies that borrow principles from administrative law and further "democratic culture."[193] The paradigm propagates an assumption about a collective good that obscures the nature of the individualized relationship between platforms and users.

Platform governance is a popular—if not "existential"[194]—container for legal scholars to espouse interpretations of and proposals relating to the power of platforms.[195] Though the term "governance" accompanies conventional narratives of platform capitalism that further prevailing neoliberal economic accounts of platforms,[196] legal scholarship in this area

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[hereinafter Terms and Concepts that Constitute Platform Governance] (last visited Jan. 26, 2025).

193. Klonick, New Governors, supra note 128, at 1663.

194. See Charilaos Papaevangelou, The Existential Stakes of Platform Governance: A Critical Literature Review 4 (July 1, 2021) (unpublished manuscript), https://doi.org/10.12688/openreseurope.13358.2 [https://perma.cc/FV39-TB7W] (using the paper "to surface an existential risk that lies with the way that current scholarship approaches platform regulation and governance: that of conflating the internet with large social media platforms").

195. The concept of platforms as "governors" was coined by Kate Klonick in her seminal 2018 article *The New Governors: The People, Rules, and Processes Governing Online Speech*. Klonick, New Governors, supra note 128 at 1603. The article was the first of its kind to provide an in-depth legal analysis of social media companies, which Klonick achieved through original interviews with current and former employees of X and Meta (formerly Facebook), as well as "internal documents" she was directly provided by Meta. Id. at 1602. Such access may have contributed to the article's explosive success. Cf. Brenda Dvoskin, The Illusion of Inclusion: The False Promise of the New Governance Project for Content Moderation, 93 Fordham L. Rev. 1315, 1325 (2025) (calling *The New Governors* an "influential piece" that "was the beginning of an explosion of legal scholarship in the content moderation field"). The article also advances a generous claim that "platforms play no significant role—yet—in determining whether content is true or false." Klonick, New Governors, supra note 128, at 1660 (footnote omitted). While platforms may not play an explicit role in determining whether content is true or false, platforms do play a significant and explicit role in determining what content to flag as "misleading content." See, e.g., Community Notes: A Collaborative Way to Add Helpful Context to Posts and Keep People Better Informed, X, https://communitynotes.x.com/guide/en/about/introduction [https://perma.cc/G3XH-4R9D] (last visited Jan. 25, 2025) (explaining that while community users are the ones flagging content as misleading, X maintains control over which of those flags appears to other users). In *The New Governors*, Klonick provided a curated look into how social media companies make decisions about the environment on their platforms. See Klonick, New Governors, supra note 128, at 1669 ("Through interviews with former platform architects and archived materials, this Article argued that platforms moderate content partly because of American free speech norms and corporate responsibility, but most importantly, because of the economic necessity of creating an environment that reflects the expectations of their users."). She argued their approach was informed by well-intentioned lawyers who crafted platforms' content moderation policies in reliance on the First Amendment and free speech principles. Id. at 1660.

196. See, e.g., Frank Pasquale, Two Narratives of Platform Capitalism, 35 Yale. L. & Pol'y Rev. 309, 311–15 (2016). One example of a conventional narrative is that "[l]arge digital platforms have gained massive market share because of the quality of their service," whereas the counternarrative proposed by Pasquale says, "[l]arge digital platforms have gained massive market share because of luck, first-mover advantage, network effects,

has generally embraced the "governance" framework for conceiving of *how* platforms' decisions are made.[197] Thus, the platform governance framework sits directly at odds with the tort framework provided by the Platform Design Negligence paradigm.[198]

In the product liability context, plaintiffs in defective product cases have used tort law to seek damages from platforms like Amazon.[199] Such actions involved re-tinkering the conception of platforms in a way that imposes liability on them because of their "capacity to situate themselves as a novel form of gatekeeper between third-party suppliers and customers."[200] Despite this, platform governance would rather target the behavior of governed scammers alone—"convenient prox[ies]" that take focus away from the material harms caused by platforms in their expansively designed systems.[201]

Platform governance, or voluntary self-governance, fails to deliver a framework deattenuated from the construct of pseudo-democratically functioning platforms that "do their best" to eliminate platform manipulation. In other words, the platform governance paradigm's core assumption—that social media companies owe a responsibility to "a global network of internet users"—obfuscates the responsibility that platforms owe to their individual users.[202] As a result, platform governance is a hugely unsatisfying paradigm for confronting platform manipulation.

III. PLATFORM DESIGN NEGLIGENCE: A NEW PARADIGM FOR PLATFORM LIABILITY

No present legal paradigm accounts for the deception-related harms that platforms enable against their users. In the wake of this absence, victims and local, state, federal, and even international law enforcers have

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lobbying, strategic lawlessness, and the unusually low cost of investment capital due to quantitative easing." Id.

197. According to the Yale Law School Information Society Project, "[t]he terms constituting Platform Governance engage with power dynamics and cultural interpretations to create and perpetuate certain technical, political, and legal approaches." Terms and Concepts That Constitute Platform Governance, supra note 192.

198. See infra section III.B (describing the standard of reasonableness that social media companies should meet when designing platforms). The external expectation of reasonableness contravenes the internal self-disciplining expectations that exist within self-governing social media companies.

199. See Catherine M. Sharkey, Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders", 73 Hastings L.J. 1327, 1329 (2022) ("Judge John Wiley of the California Court of Appeals provocatively described *Loomis*, in which Amazon was held strictly liable for burn injuries caused by a hoverboard listed on its online platform that burst into flames . . . ." (footnote omitted)).

200. Id. at 1344.

201. Id.

202. Terms and Concepts That Constitute Platform Governance, supra note 192.

drawn on an array of methods to address platform manipulation.[203] There is presently no designated civil or criminal enforcement tool that addresses social media companies' liability when malicious actors manipulate their design, resulting in preventable scams and other harms.

Contemporary platform manipulators have managed to evade established American scam policing systems.[204] District attorney's offices and other law enforcement officials are ill-equipped to thread together the large ecosystem of platform-enabled consumer scams.[205] While federal law enforcement has taken action against several platform manipulation schemes, they have thus far been unable to dismantle the multibillion-dollar industry.[206] Time will tell what success, if any, legislative interventions on the table could have on this issue if implemented.[207]

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203. See Inside the FBI Podcast: Fighting Fraud, FBI, at 3:22 (Aug. 16, 2024), https://www.fbi.gov/news/podcasts/inside-the-fbi-podcast-fighting-fraud (on file with the *Columbia Law Review*) (detailing the FBI's public education methods to combat online scams and the Economic Crimes Unit's role investigating scams by going after wire fraud and mail fraud laws and relying on tips from banks and other information sources); supra sections II.A.–.B.

204. See Lesley Fair, FTC Crunches the 2022 Numbers. See Where Scammers Continue to Crunch Consumers, FTC (Feb. 23, 2023), https://www.ftc.gov/business-guidance/blog/2023/02/ftc-crunches-2022-numbers-see-where-scammers-continue-crunch-consumers [https://perma.cc/5JSZ-L5FM] (describing a thirty percent increase in fraud between 2021 and 2022).; see also Emma Fletcher, Reports of Romance Scams Hit Record Highs in 2021, FTC (Feb. 10, 2022), https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/02/reports-romance-scams-hit-record-highs-2021 [https://perma.cc/WF4M-JDDG] (explaining how "romance scammers are masters of disguise" and that "[m]ore than a third of people who said they lost money to an online romance scam in 2021 said it began on Facebook or Instagram").

205. See Press Release, DOJ, Justice Department Takes Action Against COVID-19 Fraud (Mar. 26, 2021), https://www.justice.gov/opa/pr/justice-department-takes-action-against-covid-19-fraud [https://perma.cc/62ZL-QYTY] (discussing historic enforcement actions against COVID-19-related scammers).

206. See Phil Helsel, Florida Woman Sentenced to 4 Years in Romance Scam that Stole Holocaust Survivor's Savings, NBC News (July 27, 2023), https://www.nbcnews.com/news/us-news/florida-woman-sentenced-4-years-romance-scam-stole-holocaust-survivors-rcna96784 [https://perma.cc/YDC8-FT7G] (describing a scam that targeted the life savings of an eighty-seven-year-old Holocaust survivor); Faith Karimi & Sabrina Souza, Instagram Influencer Scammed Over $2 Million From Older, Lonely Americans, Federal Prosecutors Say, CNN (May 16, 2023), https://www.cnn.com/2023/05/16/us/mona-montrage-alleged-romance-scammer-cec/index.html [https://perma.cc/N9A7-JVYN] (quoting a FBI director as stating that "[r]omance scams . . . are of major concern" (internal quotation marks omitted) (quoting Michael J. Driscoll, Assistant Dir., N.Y. Off., FBI)).

207. See, e.g., Fraud and Scam Reduction Act of 2022, H.R. 1215, 117th Cong. (2022). This bill would have increased governmental efforts to combat and prevent scams that affect seniors, including through the creation of an Office for the Prevention of Fraud Targeting Seniors within the Bureau of Consumer Protection. Id. § 202. Another challenge for legislators is drafting legislation itself; existing fraud statutes are often written too broadly, overly centering the presence of "online hacktivist group[s]" that publish illicitly obtained personal information to the internet. See Philip F. DiSanto, Note, Blurred Lines of Identity Crimes: Intersection of the First Amendment and Federal Identity Fraud, 115 Colum. L. Rev. 941, 950–52 (2015). Importantly, unlike these interventions that would require

Appreciation for the often tacit and menial ways that social media companies design (or fail to design) platforms is essential for imagining a legal regime that begins to impose liability for negligent choices in this burgeoning industry of digital platforms. This Part responds to this challenge by introducing a new paradigm of platform liability, Platform Design Negligence (III.A). This paradigm should inform efforts to combat the novel legal issue of platform manipulation (III.B) and would complement existing legislative and industry reform efforts (III.C).

A. *Platform Design Negligence in Theory*

1. *Overview.* — Legal paradigms reflect images of society that are interpreted by activists, citizens, courts, scholars, and lawyers.[208] The Platform Design Negligence (PDN) paradigm offers a view of law as a system that recognizes the relationship between the holistic design of social media platforms, their architects, and the harms caused by on-platform activity.[209] This paradigm invokes the common law norm of negligence that necessitates four fundamental elements; under this paradigm, victims of platform manipulation can bring a negligence claim if they can establish the following:

> (1) The platform-based company owed them (the platform user) a duty of care;
>
> (2) The company breached that duty;
>
> (3) The breach of that duty caused them some harm; and,
>
> (4) They suffered injuries or damages as a result of that breach.[210]

Applied to platform design, this paradigm tells us that social media companies maintain some degree of liability when they design their platforms in ways that breach their duty to combat platform manipulation. For example, romance scam victims who are extorted by scammers could recover some damages from online dating platforms that recommend scammers as "suggested friends" despite the fact that the online dating platforms knew that the scammers actively maintained multiple profiles,

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affirmative steps from lawmakers, the Platform Design Negligence paradigm invites courts to apply preexisting negligence principles without the need for legislation. See infra section III.A.

208. See Jürgen Habermas, Paradigms of Law, *in* Habermas on Law and Democracy: Critical Exchanges 13, 13 (Michel Rosenfeld & Andrew Arato eds., 1998) (referring to paradigms as "the background for an interpretation of the system of basic rights").

209. See supra section I.A.

210. According to the foregrounding tort law treatise:

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

Restatement (Third) of Torts § 3 (Am. L. Inst. 2010).

and had been repeatedly reported for scamming, and yet took no action in response.[211] In this way, the negligence framework resurrects[212] a theory that generates timely consideration of the reputational effects of platform manipulation and produces what law scholars have called "a positive externality in the form of quality information."[213]

Resolving platform manipulation requires moving away from a paradigm of platforms as governors and toward a paradigm of platforms as demystified private actors. While these platforms may have immunity from speech-based torts, they are still liable for how negligently or recklessly designed features create foreseeable and reasonably avoidable injuries.[214] Embracing this new paradigm of PDN requires abandoning the notion of social media platforms as sovereigns, governors, or private "Supreme Courts" with "Oversight Boards,"[215] and instead recognizing platforms as akin to any other company that peddles a product with a design that contributes to harm. Above all, it reflects the current social media landscape, in which new technologies are able to create unprecedented levels of consumer risk "without a corresponding increase in corporate liability."[216] PDN provides recognition for the public rights implicated in social media platforms, which have functionally become digital town squares. To analogize to public nuisance law, PDN embodies the stabilizing effects of tort-based legal liability theories that acknowledge "duties not to interfere with public rights."[217]

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211. See, e.g., Jim Walsh, Love Hurts: Romance Scam Steals Millions, Sends Burlington County Pair to Prison, Courier Post (Sept. 20, 2024), https://www.courierpostonline.com/story/news/local/south-jersey/2024/09/20/martins-inalegwu-and-steincy-mathieu-get-prison-for-romance-scam/75281131007/ [https://perma.cc/ZD5K-J2G6] (describing how two "[s]cammers struck up relationships on dating websites" and ultimately stole $4.5 million).

212. See Saul Levmore, Richard Posner, the Decline of the Common Law, and the Negligence Principle, 86 U. Chi. L. Rev. 1137, 1155 (2019) (describing the courage of Judge Richard Posner's approach to negligence, which came "a bit too early").

213. Assaf Jacob & Roy Shapira, An Information-Production Theory of Liability Rules, 89 U. Chi. L. Rev. 1113, 1115–18 (2022).

214. See supra section I.B.

215. See Kate Klonick, The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression, 129 Yale L.J. 2418, 2425 (2020) ("Zuckerberg stated in an interview that one could 'imagine some sort of structure, almost like a Supreme Court . . . who ultimately make the final judgment call on what should be acceptable speech in a community that reflects the social norms and values of people all around the world.'" (quoting Ezra Klein, Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next, Vox (Apr. 2, 2018), https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge [https://perma.cc/W4DR-BDGH])).

216. Rebecca Crootof, The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference, 69 Duke L.J. 583, 589 (2019) (describing how "[internet of things] companies are creating, monitoring, and enforcing contractual-governance regimes with few legal incentives to ensure foreseeable harms are avoided").

217. See Leslie Kendrick, The Perils and Promise of Public Nuisance, 132 Yale L.J. 702, 787 (2023) (arguing for a conception of public nuisance law that recognizes "that we have

PDN is strongly supported by and rooted in the commercial negligence liability paradigm that has evolved within U.S. common law over the past several centuries. Tort law views commercial negligence generally as a function of the corporation's foresight on the harm at issue,[218] with some jurisdictions offering greater deference to public policy considerations.[219] Tort law allows recovery from corporations when they act in this injury-facilitator role by failing to maintain a safe commercial environment or otherwise creating harm-conducive conditions.[220] Thus, PDN calls for an application of this responsibility to the platform economy in a conceptual container for industry, law scholars, and rightsholders alike. It also seeks to provide a structure for defining the duty to exercise reasonable care, which is best assumed by lawmakers.[221]

To illustrate this paradigm, take the hypothetical example of a McDonald's restaurant that opens a brick-and-mortar store that sells coffee. A customer accidentally spills coffee, and the beverage causes third-degree burns on over a fifth of their body, leading to a week-long hospitalization and two years of medical treatment involving skin grafts.[222] Now imagine that a law exists granting restaurants full discretion over the *types* of beverages they sell, but not how they make, sell, and deliver the beverages. Courts proceed to interpret this law to give restaurants like McDonald's full immunity over any harms caused by the temperature of their beverages, what kinds of materials they use for dispensing beverages,

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duties not to interfere with public rights," what the author calls "a familiar [idea] that has been stigmatized, and at times defanged, in the context of public nuisance through doctrines such as control requirements").

218. Corporate directors and officers are liable to nonshareholder third parties based on their "inadequate management or failure to supervise corporate affairs and subordinates." Martin Petrin, The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law, 59 Am. U. L. Rev. 1661, 1662 (2010); see also In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (holding that boards, regardless of notice, have a duty to ensure reasonable reporting systems).

219. See, e.g., Strauss v. Belle Realty Co., 482 N.E.2d 34, 36 (N.Y. 1985) (finding that it is courts' responsibility "'to limit the legal consequences of wrongs to a controllable degree' . . . and to protect against crushing exposure to liability" (quoting Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969))).

220. See Alex Stein, The Domain of Torts, 117 Colum. L. Rev. 535, 549 (2017) (describing how tort law promotes fairness and corrective justice by "allocat[ing] the risks and the costs of accidents").

221. See Mark A. Geistfeld, The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability, 121 Yale L.J. 142, 149 (2011) (describing the importance of aligning duty in the negligence context to the *class* of cases, categories of actors, patterns of conduct, and other segmenting that allows precise responsiveness to the harms at issue).

222. See, e.g., Retro Report, The Misunderstood McDonald's Hot Coffee Lawsuit, YouTube (Oct. 28, 2019), https://youtu.be/ENTaHxjN4xI?si=M_s0voT1puz_iF0 [https://perma.cc/N8Y3-BQ6Q] (explaining the often misunderstood story of one seventy-nine-year-old woman, one of hundreds burned in that period, who suffered third-degree burns and accrued over $10,000 in medical costs after spilling an extremely hot cup of McDonald's coffee on herself).

the container for dispensing the beverages, and what ingredients they use in their beverages. This interpretation would mark an expansive and illogical extension of the law, obfuscating the nuances of the incremental decisions that restaurants make to create positive experiences for their customers.

In the hypothetical above, now imagine that the customer's injury was directly caused by the actions of a different customer. This malicious customer purposefully stands at the McDonald's "Pick Up" station and shoves customers as they pick up their beverage, causing constant coffee spills and burns for innocent customers. If this incident occurred inside the McDonald's store, and the company agents knew of this issue of actors harming customers as they picked up drinks, and even made it easier for those actors to mistreat customers, McDonald's would be held liable for knowingly and recklessly failing to maintain a safe environment for its customers.

These factors are analogous to the real-world case of McDonald's coffee, in which hundreds of customers were burned by hot coffee and the company refused to act.[223] Eventually a plaintiff sued the company for its negligence and earned a large settlement.[224] The restaurant, like social media companies with internal reporting systems for customers to report suspected platform manipulation, kept an internal log of the incidents but nonetheless failed to act.[225] Social media companies should be similarly liable for platform manipulation harms facilitated by their platform designs.[226]

Applied to social media companies, PDN suggests that social media companies are exposed to tort liability when they (1) design their platforms in ways that they either know or should have reasonably foreseen would create injury and (2) fail to take reasonable action to mediate against the risk created by their platform design. PDN operates the same way as ordinary tort negligence in the context of product liability. When a company creates a heightened risk of harm and fails to act in a reasonable way to address the problem, they are exposed to some degree of liability.[227]

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223. Id.

224. See Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. CV-93-02419, 1995 WL 360309, at *1 (Dist. Ct. N.M. Aug. 18, 1994) (ordering an award against McDonald's to the Plaintiff "in the amount of $160,000.00 for compensatory damages, and $2,700,000.00 to Plaintiff for punitive damages"), vacated No. CV-93-02419, 1994 WL 16777704, at *1 (Dist. Ct. N.M. Nov. 28, 1994).

225. See Allison Torres Burtka, *Liebeck v. McDonald's*: The Hot Coffee Case, Am. Mus. of Tort L., https://www.tortmuseum.org/liebeck-v-mcdonalds/ [https://perma.cc/QT7L-KGW2] (last visited Feb. 13, 2025) ("The jury learned that 700 other people . . . had been burned before, yet the company did not change its policy of keeping coffee at between 180 and 190 degrees. The company . . . decided that, with billions of cups served annually, this number of burns was not significant.").

226. See Lemmon v. Snap, Inc., 995 F.3d 1085, 1092 (9th Cir. 2021) (finding Snapchat liable for its filter design).

227. See Restatement (Third) of Torts § 3 (Am. L. Inst. 2010).

Section 230, the pinnacle of social media law, does not afford platforms carte blanche over their design choices.[228] The PDN paradigm offers a compatible image of society that strengthens the basis for claims against platform designers by victims of platform designs.

PDN is well supported by state and federal tort law theories of liability. Professor Howard Klemme has offered a "theory of enterprise liability" that is "based on the conviction that underlying the evolutionary development of the common law is an intuitive logic which . . . does exist and is worthy of articulation if possible."[229] PDN carries forth this call by underscoring the conduct social media companies engage in when they *design* their platforms. Other scholars, exploring liability in the design of buildings, have similarly disrupted entity-based theories of liability against building developers by arguing for a liability theory that centers obligations vis-à-vis individual residents.[230] As Judge Guido Calabresi has described, "[T]here is no need for a rigid relation between losses and the scope of the enterprise."[231] Platforms should satisfy their obligations to users to the extent they admit and onboard users to their platforms.

Under PDN, society may begin to appreciate the tremendous magnitude of harms caused by platform manipulation. Victims of platform manipulation may start to understand the multiple vectors through which the social media platforms they use are able to define their experiences. Platforms are well aware of the risk that their products and features can contribute to deception and financial, reputational, and psychological harms. They have the platform design tools to mitigate these harms. Their failure to design their platforms to reasonably address platform manipulation must be scrutinized accordingly. In that analysis, actors—from courts applying common law doctrine to legislators—can begin to fill the gaps of a robust social media platform liability regime.

2. *Platform Design and the First Amendment.* — Similar to § 230, the First Amendment[232] constrains the government's ability to legislate what platforms do, but it does not inoculate platform design from the realm of

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228. See supra section II.A.

229. Howard C. Klemme, The Enterprise Liability Theory of Torts, 47 U. Colo. L. Rev. 153, 156–57 (1976).

230. See Eric T. Freyfogle, A Comprehensive Theory of Condominium Tort Liability, 39 U. Fla. L. Rev. 877, 879–80 (1987).

231. Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L. J. 499, 514 (1961).

232. Notably, the First Amendment "permits tailored regulations on employer and employee speech to protect the efficacy of the employment environment and the contrasting rights and dignity of those in it." Francesca Procaccini, Social Network as Work: A Labor Paradigm for Regulating Speech on Social Media, 110 Cornell L. Rev. (forthcoming 2025) (manuscript at 46), https://ssrn.com/abstract=4717216 [https://perma.cc/6LWW-D5AM]. For this reason, a labor paradigm for regulating social media companies may offer a more appropriate application of the First Amendment to social media technology regulation; users provide "labor" to platforms insofar as they input their data. Id.

liability.[233] The First Amendment prohibits Congressional efforts to "abridg[e] the freedom of speech,"[234] meaning that legislative efforts to ascribe liability to social media companies for enabling platform manipulation would only violate the First Amendment if they infringed upon free speech.[235] In 2024, the Supreme Court drew on case law protecting expressive rights of publishers,[236] private utilities,[237] and cable operators[238] to affirm social media companies' ability to exercise discretion over their "prioritization of content," imposition of content labels, and other content moderation practices.[239] Crucially, the Court's extension of First Amendment protection for "how [platform] display[s] [are] ordered and organized"[240] stops at social media "feeds"[241] like Facebook's News Feed tab and YouTube's homepage.[242] While some platform design choices—such as the design of a "feed"—fall under this ill-fated protection, the platform design choices most implicated in platform manipulation do not appear in feeds. Malicious actors can target users by making their own accounts and falsely curating images of legitimacy, accessing the profile pages of other users, direct messaging with targets, and assembling other non-feed displays. Platform design does not necessarily concern itself with users' speech or even the platform's own

233. See Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299, 2381 (2021) (describing the contamination of free speech discourse by capacious and departmentalist frameworks).

234. U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

235. The Supreme Court has explicitly held that the First Amendment protects "commercial speech" from companies. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566–72 (1980). In *Packingham v. North Carolina*, the Supreme Court stated that "the most important place[] . . . for the exchange of views . . . is cyberspace—the 'vast democratic forums of the internet' in general, and social media in particular." 137 S. Ct. 1730, 1735 (2017) (citation omitted) (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).

236. See Moody v. NetChoice, LLC., 144 S. Ct. 2383, 2400 (2024) (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

237. See id. (citing Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 12 (1986)).

238. See id. at 2400–01 (citing Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 636 (1994)).

239. See id. at 2391 ("Beyond ranking content, platforms may add labels, to give users additional context. And they also remove posts entirely that contain prohibited subjects or messages, such as pornography, hate speech, and misinformation on certain topics. The platforms thus unabashedly control the content that will appear to users.").

240. Id. at 2406.

241. See Klonick, New Governors, supra note 128, at 1660 (describing how content is displayed specifically on "newsfeed[s], homepage[s], or stream[s]").

242. See *NetChoice*, 144 S. Ct. at 2406 ("The current record suggests the opposite as to Facebook's News Feed and YouTube's homepage. When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, . . . they are making expressive choices. And because that is true, they receive First Amendment protection.").

speech.[243] Definitionally, platform design choices function as ruled lines on a sheet of paper—they certainly inform the users' speech experience but do not necessarily cross the threshold of abridging the freedom of speech.

B. *The Platform Design Negligence Paradigm in Practice*

The PDN paradigm stands for the proposition that social media companies are directly responsible to each individual user, and when those companies make design choices that facilitate deception through their platforms, they may be negligent. A number of courts have recognized that platform design decisions do not receive § 230 immunity.[244] At the same time, courts, law enforcers, and plaintiffs alike struggle to point to common law or statutory bases for their arguments linking their harms to the platform design choices.[245] PDN represents an entry point for lawmakers and industry professionals seeking to curb platform manipulation on their platforms.[246] It operates on a dual track, first drawing on background presumptions of tort liability under federal and state common law to bring PDN claims, and, second, guiding lawmakers to pass legislation that prescribes social media liability for platform manipulation and shields PDN claims from arbitration agreements, among other measures.[247]

Tort law is a powerful tool for holding corporate actors accountable when they themselves do not engage in the primary conduct that causes injury to customers, but they nonetheless contribute to the injury.[248]

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243. Even if so, commercial speech doctrine would fail to shield social media companies from regulation targeting platforms' misleading or deceptive designs because the "speech-design" that exposes users to heightened risk of scam and other deception falls squarely within Congress' jurisdiction. See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (outlining a four-step test that asks whether commercial speech "concern[s] lawful activity and [is] misleading").

244. See Forrest v. Meta Platforms, Inc., 737 F. Supp. 3d 808, 818 (N.D. Cal. 2024) (denying Meta's § 230 affirmative defense when Meta contributed to the appearance of scam ads).

245. See, e.g., Roland v. Letgo, Inc., 644 F. Supp. 3d 907, 917 (D. Colo. 2022) ("Plaintiffs have not cited a single case in which a court held an internet platform potentially liable for violent criminal acts perpetrated by a platform user who lured an innocent consumer into a scheme through means of misrepresentations made by the criminal.").

246. For a discussion on entry points for lawmakers, see infra section III.C.3.

247. See supra note 91. Arbitration agreements increasingly play dangerous roles in consumer law, and PDN requires the exact litigation pathway that arbitration agreements have been interpreted to foreclose. See David Horton, Arbitration About Arbitration, 70 Stan. L. Rev. 363, 377–99 (2018) (discussing the modest ambitions of the Federal Arbitration Act, which "abrogated hundreds of years of common law").

248. While tort law offers a helpful framework for discussing platform design, it is not a be-all and end-all solution. Tort law is inadequate at addressing nonfinancial injuries such as the economic and information-based injuries at the heart of platform manipulation. See Rustad & Koenig, supra note 83, at 1482 ("Since the enactment of section 230, no U.S. court has recognized or upheld a judgment against a social media provider arising out of third-

Though tort law has failed to rein in harmful corporate conduct in industries it clearly applies to, including the automotive, aerospace, and consumer chemical industries, PDN circumvents those shortcomings associated with undocumented relational lines between the harm at issue and effects.[249] Because platform manipulation exists directly on platforms and platform designs are visible to the lay user, platform manipulation's contours are more readily visible under PDN; platforms are privy to the ways their designs are exploited.[250] Though central regulation that prevents manipulation before it occurs would maximize consumer protectionism, PDN's construction of platform design presents a baseline for realizing a comprehensive regulatory regime to effectively regulate social media. Moreover, PDN is practical because judges can apply it under existing principles, meaning that it is available immediately, and federal legislation has thus far failed to materialize on this issue.

Individual social media users could prove harm under PDN in a variety of ways. Scam victims can argue that platforms failed to take reasonable measures against designing the platforms in ways that augment, accelerate, and accredit scammers. For investment, job, romance, and similar scams involving fund transfers, the financial harm will involve a complex inquiry that apportions loss pursuant to the time-tested joint and several liability common law doctrines.[251] Under PDN, plaintiffs could also pursue remedies for emotional harm, psychological harm, lost time, lost political power, and communal harms, through personal testimony, expert testimony, scam experts, psychologists, witness statements, research and data on scam impacts, and more.

Liability for platform design also provides deterrent effects for the industry, incentivizing improved platform design and the development of rigorous investments in anti-scam features, as have been adopted in the disinformation, misinformation, and AI-generated deepfake contexts.[252]

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party publication torts on a social network."); see also Leonard J. Feldman & Julia Doherty, The Class of Injuries Test: A Unifying Proposal to Determining Duty, Proximate Cause, and Superseding Cause in Negligence Claims, 47 Seattle U. L. Rev. 1613, 1621 (2024) (discussing difficulties with applying foreseeability principles in third-party contexts).

249. See generally Bryan H. Choi, Crashworthy Code, 94 Wash. L. Rev. 39 (2019) (describing how the "crashworthy" liability doctrine, which holds corporations liable for their unsafe designs that lead to harm, was developed in response to automobile accidents but is better applied in the software context).

250. Under a consumer protectionist lens, "burdens caused by new technologies should not be forced upon hapless victims, but should be borne instead by those best situated to account for those risks." Id. at 50.

251. See Nancy C. Marcus, Phantom Parties and Other Practical Problems With the Attempted Abolition of Joint and Several Liability, 60 Ark. L. Rev. 437, 438–44, 484–86 (2007) (describing the challenges with fault allocation systems and arguing that pure joint and several liability paired with contribution can best serve the aims of tort law).

252. See Hayden Field, Tech Layoffs Ravage the Teams that Fight Online Misinformation and Hate Speech, CNBC (May 26, 2023), https://www.cnbc.com/2023/05/26/tech-companies-are-laying-off-their-ethics-and-safety-teams-.html [https://perma.cc

Platforms have already developed extensive tools for monitoring, detecting, and combating disinformation and misinformation: They track malicious actors, label them, and remove them from the platform.

PDN also speaks to the ambiguity left in the wake of *Twitter, Inc. v. Taamneh*, in which the Supreme Court determined that plaintiffs failed to show that a social media platform's algorithmic choices rose to the level of impermissible conduct under the Justice Against Sponsors of Terrorism Act (JASTA).[253] There, the conduct at issue was highly attenuated insofar as the plaintiffs could not connect the real-world terrorist attack with the terrorist group's use of social media.[254] On the other hand, in platform manipulation, individual social media users are victimized by the on-platform conduct that serves as the basis of the PDN claim.[255] Platform design operates as customer service—the principal business relationship that the Supreme Court in *TransUnion LLC v. Ramirez* found that concrete injuries in fact arose from.[256] Specifically, the Supreme Court affirmed the presence of concrete injuries when customers' platforms were tainted by misleading statements (i.e., labels) imposed on the customer's profile and exported to third parties.[257] Platform manipulation more clearly creates real-world harms to victims than did the credit check company's wrongful labeling of customers as "terrorists" in *TransUnion*; the harm to customers in platform manipulation bears "a 'close relationship' to the harm" that is already recognized in tort liability for consumer product designs.[258] Thus PDN claims are ripe for success under the current standard for proving standing with monetary and nonmonetary injuries—claims that when properly brought under the "typical limits on tort liability" could affect industry incentives.[259]

Platforms can enhance disclaimers or notifications in messaging features to advise users when they are messaging with other users who have been repeatedly reported for consumer scams. They can monitor users who are sending hundreds of messages to strangers a day. They can use metadata to flag and isolate spam actors. Platforms can also engage in anti-addiction platform design that limits the harms caused by addictive design

/2MYM-JD79] (discussing how several platforms conducted layoffs in 2023 on teams that worked on platform manipulation).

253. 143 S. Ct. 1206, 1230–31 (2023).

254. Id. at 1227–28 ("Plaintiffs do not claim that defendants intentionally associated themselves with ISIS' operations or affirmatively gave aid that would assist each of ISIS' terrorist acts. Nor have they alleged that defendants and ISIS formed a near-common enterprise of the kind that could establish such broad liability.").

255. Cf. id. at 1228 ("These allegations are thus a far cry from the type of pervasive, systemic, and culpable assistance to a series of terrorist activities that could be described as aiding and abetting each terrorist act.").

256. 141 S. Ct. 2190, 2208–09 (2021).

257. Id.

258. Id. at 2209.

259. *Taamneh*, 143 S. Ct. at 1228–29.

features;[260] they can also use notification systems as a dimension for policy interventions. These processes could be replicated to combat platform-enabled consumer scams. Platforms could also develop proactive detection mechanisms that actively discover helpful signals for identifying accounts that pursue platform-enabled scams. This detection could transfer to labels.

With the PDN paradigm in practice, platforms would better understand when they face liability: when they understand the risk, fail to act, and reasonably could design their platforms alternatively. Federal and state lawmakers can provide legislation that describes "reasonable platforms." The paradigm could also incentivize or require platforms to invest in content moderation systems that provide protections for those most vulnerable to online scams[261] and build capacity in a wider range of demographics, dialects, and regions. For example, the lack of investment in content moderation systems that address a wide range of demographics has been linked to the proliferation of violent and extremist content.[262] Similar investments in monitoring capacities for scam content could assist efforts to identify worldwide networks of scammers on social media platforms.

Unlike the platform governance paradigm that treats platforms like government entities, the PDN paradigm situates platforms like private corporations. When they decide to design their platforms to invite abuse and deception, they operate like an amusement park that uses poor architecture to design unsafe rides. This concept can help clarify the bounds of reasonable and unreasonable behavior on the part of lawmakers, social media companies, and legal thinkers alike.

Red team exercises, a type of alternative analysis or stress testing[263] that is increasingly prevalent in the AI governance field, could be

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260. See Press Release, Eur. Parliament, New EU Rules Needed to Make Digital Platforms Less Addictive (Oct. 25, 2023), https://www.europarl.europa.eu/news/en/press-room/20231023IPR08161/new-eu-rules-needed-to-make-digital-platforms-less-addictive [https://perma.cc/L32Y-QFLC] (describing the European Parliament's demand for nonaddictive platform designs such as "turning off notifications by default; chronological feeds; greyscale mode; warnings or automatic locks after a pre-set time use," and more).

261. See Ctr. for Countering Digit. Hate, Deadly By Design 24 (2022), https://counterhate.com/wp-content/uploads/2022/12/CCDH-Deadly-by-Design_120922.pdf [https://perma.cc/8QLA-EMS4] (describing how some users are more vulnerable to certain kinds of platform manipulation than others).

262. See, e.g., Faiza Patel & Laura Hecht-Felella, Facebook's Content Moderation Rules Are a Mess, Brennan Ctr. for Just. (Feb. 22, 2021), https://www.brennancenter.org/our-work/analysis-opinion/facebooks-content-moderation-rules-are-mess [https://perma.cc/6KJD-4VND] (linking Facebook's content moderation decisions to conflict in the Nagorno-Karabakh region, among other cases in which Facebook tools "fail to adequately account for context or pollical, cultural, linguistic, and social differences").

263. See Rory Van Loo, Stress Testing Governance, 75 Vand. L. Rev. 553, 557 (2022) (arguing that "well-designed stress tests can provide Congress with a mechanism to supervise agencies' readiness to safeguard society").

exceptionally fruitful both for platforms and legal scholars[264] looking for guidance.[265] In one case, red team exercises exposed X's neglect of the potential for child sexual exploitation that would result from a design choice—creating a new account type that would be permitted to monetize adult content.[266]

For courts, victims, and law enforcers, this paradigm presents the opportunity to revisit and shine new light on previous cases in which legal frameworks failed to account for the exceptional role of platform design in platform manipulation. For example, in the case of *Doe v. Grindr Inc.*, when a district court rejected negligence and product liability claims brought by a fifteen-year-old who was sexually assaulted by sexual predators he met on the online dating platform Grindr, an eye towards platform design could have yielded a different result for the victim.[267] There, the District Court for the Central District of California determined that the platform's decisions to create "matches" and offer minimal age-verification procedures failed to implicate § 230.[268] Under PDN, the plaintiff may have considered an alternative series of claims to vindicate his rights against the platform for its role in his victimization. Claims of actions against Grindr for its negligence in failing to design controls that could have limited the age groups with which the fifteen-year-old could have been matched with would have likely survived scrutiny under the paradigm and existing laws.

C. *Legislative Reforms and Industry Solutions*

One way to actuate the PDN paradigm is for states to effectuate their own existing or forthcoming tort laws to clarify the bounds of reasonableness in platform design. Judges can interpret existing tort laws

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264. See Miles Brundage et al., Toward Trustworthy AI Development: Mechanisms for Supporting Verifiable Claims 2 (Apr. 2020) (unpublished manuscript), https://arxiv.org/pdf/2004.07213 [https://perma.cc/P46L-S9QN] (detailing evidence-backed mechanisms for enhancing safety in AI systems).

265. See Stacy-Ann Elvy, Paying for Privacy and the Personal Data Economy, 117 Colum. L. Rev. 1369, 1376–77, 1459 (2017) (explaining the complexity associated with tackling digital harms in power-imbalanced relationships with platforms).

266. See Zoë Schiffer & Casey Newton, How Twitter's Child Porn Problem Ruined Its Plans for an OnlyFans Competitor, The Verge (Aug. 30, 2022), https://www.theverge.com/23327809/twitter-onlyfans-child-sexual-content-problem-elon-musk [https://perma.cc/9N63-8BTK] (describing the effects of red team exercises on mitigating online harms).

267. See Doe v. Grindr Inc., 709 F. Supp. 3d 1047, 1050–51, 1054–55 (C.D. Cal. 2023) (finding that the defective product design claims, among others, were barred by § 230 immunity).

268. Id. at 1057 (stating that "Section 230 immunizes Grindr from Doe's claims" particularly because "[Doe's] allegations suggest only that [Grindr] 'turned a blind eye' to the unlawful content posted on its platform, not that it actively participated in sex trafficking" (alterations in original) (internal quotation marks omitted) (quoting Does 1–6 v. Reddit, Inc., 51 F.4th 1137, 1145 (9th Cir. 2022))).

to apply to platform design without touching § 230.[269] Congress should also enact a tort law statute on the matter. Congress has previously enacted tort law statutes, like the Alien Tort Statute that applies to private defendants[270] and the Federal Tort Claims Act that allows plaintiffs compensation from the U.S. government.[271] Crucially, a federal platform design statute must exempt these claims from arbitration agreements in cases when the network effects and power imbalance create distressing social harm in the form of successful scams.[272]

Tort law is a logical choice for victims of scams on social media. Its focus on harm lends itself to applications in the context of harm inflicted through the internet. Corporate liability jurisprudence seems to be headed in this direction; notably, personal injury attorneys specializing in tort law have been able to achieve historic wins in the gun product liability context.[273] Platforms already have a duty to warn when they hold information obtained from an outside source about a scheme on their platforms.[274] Tort case law on platform manipulation issues is highly sparse and ripe for innovation. For example, banks are unlikely allies insofar as they can bring PDN claims against the social media companies that act as "first responders" for many scams and other fraudulent activity.[275]

State lawmakers have an instrumental role to play as well. Some proposals call for slowing down transfers to mitigate the financial harm of scams.[276] One legislator has introduced a multifaceted plan to confront

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269. See supra section II.A.

270. 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

271. See Michael D. Contino & Andreas Kuersten, Cong. Rsch. Serv., R45732, The Federal Tort Claims Act (FTCA): A Legal Overview 1 (2023), https://crsreports.congress.gov/product/pdf/R/R45732 [https://perma.cc/FD64-LUWA] (explaining broadly written statutes that permit tort claims by non-U.S. citizens and torts committed by U.S. employees).

272. See Horton, supra note 247, at 440 (highlighting that "companies are attempting to privatize [the courts'] gatekeeping function"); supra note 91 and accompanying text (highlighting the vulnerabilities of social media ToS agreements).

273. See Michael Steinberger, The Lawyer Trying to Hold Gunmakers Responsible for Mass Shootings, N.Y. Times (Sept. 29, 2023), https://www.nytimes.com/2023/09/29/magazine/the-lawyer-trying-to-hold-gunmakers-responsible-for-mass-shootings.html (on file with the *Columbia Law Review*) (describing the wrongful death tort lawsuit that pierced perceived statutory immunity for gun manufactures to hold accountable a gun company that dangerously marketed its goods).

274. See Doe v. Internet Brands, Inc., 824 F.3d 846, 850–51 (9th Cir. 2016) ("California law imposes a duty to warn a potential victim of third-party harm when a person has a 'special relationship to either the person whose conduct needs to be controlled or . . . to the foreseeable victim of that conduct.'" (quoting Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976), superseded by statute, Cal. Civ. Code § 43.92 (2013))).

275. See supra note 20.

276. Ryan Sabalow, A California Senior Lost $700k to Scammers. Newsom Rejected Bill to Slow Bank Transfers, Cal Matters (June 19, 2024), https://calmatters.org/digital-democracy/2024/06/california-senior-fraud-scam/ [https://perma.cc/RS48-CJ93] (last updated Sept. 28, 2024).

platform manipulation that targets elders in New Jersey, including through the Empowering States to Protect Seniors Against Bad Actors Act, which would potentially build anti-scam enforcement capacity.[277]

In the meantime, Congress is occupied with a narrower set of issues. A handful of lawmakers "are now looking to defamation law as a social fix for systemic problems rather than a remedy for harm to individual reputation."[278] In 2023, the Preventing Deepfakes of Intimate Images Act was introduced to criminalize the sharing of nonconsensual images and sexually explicit AI-generated content.[279] Later, in 2024, the Disrupt Explicit Forged Images and Non-Consensual Edits Act was introduced to provide a cause of action for the creation and distribution of "digital forgery" when the victim had not given consent.[280] Proposed legislative interventions face an unknown fate. While deepfakes, sextortion, and similar crimes garner attention, they do not account for vast majority of platform-enabled scams at play in the United States.[281]

U.S. federal lawmakers have offered a few other legislative solutions to the issue of platform manipulation, though none of these address platform design. The Fraud and Scam Reduction Act would hone in on scams targeting elders by establishing a new advisory group and office within the FTC.[282] This Act would create a system of voluntary agreements and partnerships with social media companies[283] even though behavioral remedies such as platform design enhancements could play a superior role. Importantly, these voluntary public–private coalitions fail to create anything proximate to a private right of action or civil enforcement vessel for victims of platform manipulation.

CONCLUSION

As platform manipulators develop increasingly sophisticated methods for exploiting social media to serve their malicious objectives, victims of

277. Press Release, Josh Gottheimer, As Part of Senior Security Strategy, Gottheimer Announces New Action to Combat Senior Scams on Social Media and More (May 6, 2024), https://gottheimer.house.gov/posts/release-as-part-of-senior-security-strategy-gottheimer-announces-new-action-to-combat-senior-scams-on-social-media-and-more [https://perma.cc/JT5F-CP4C].

278. Lili Levi, Disinformation and the Defamation Renaissance: A Misleading Promise of "Truth", 57 U. Rich. L. Rev. 1235, 1240 (2023).

279. Preventing Deepfakes of Intimate Images Act of 2023, H.R. 3106, 118th Cong. § 1 (2023).

280. Disrupt Explicit Forged Images and Non-Consensual Edits Act of 2024, H.R. 7569, 118th Cong. § 1 (2024).

281. See supra Part I.

282. Fraud and Scam Reduction Act of 2022, H.R. 1215, 117th Cong. § 102 (2022). The bill would have increased governmental efforts to combat and prevent scams that affect seniors, including through the creation of an Office for the Prevention of Fraud Targeting Seniors within the Bureau of Consumer Protection. See supra note 207.

283. Id.

this activity, legal actors, and social media companies will continue to pursue measures that prevent and respond to these harms. Victims will continue to seek justice, as plaintiffs and law enforcers pursue action on their behalf. The current frameworks for confronting the harms perpetuated by platform manipulation fail to adequately account for platform design as a vector of chargeable conduct.

Platform Design Negligence is a container for articulating future possibilities at the crossroad between private power and the law. In this universe, the public does not view platform executives as mere governors of social media. Rather, the public recognizes the platform's duties to users. Social media companies that take steps to enable platform manipulation through their tacit and understated toolkit—platform design—must begin to face the music whenever their choices contribute to real-world harm.

ESSAY

MONELL'S UNTAPPED POTENTIAL

*Joanna C. Schwartz**

Among the most powerful barriers to relief under § 1983 is Monell v. Department of Social Services*—the Supreme Court decision recognizing that municipalities can be liable for constitutional violations by their officers but setting an exceedingly high standard for such claims. This Essay suggests a litigation strategy that sidesteps several challenges posed by* Monell*: Plaintiffs should pursue* Monell *claims based on police departments' disregard of lawsuits brought against them and their officers.*

Every circuit recognizes a police department's failure to investigate citizen complaints as a basis for municipal liability. Although lawsuits—like citizen complaints—allege officer wrongdoing, many departments do not investigate their allegations. If failing to investigate citizen complaints is a sufficient basis for Monell *liability, failing to investigate lawsuit allegations should be as well.*

Police departments' disregard of information unearthed during litigation should also be a basis for municipal liability. If internal affairs investigators fail to interview witnesses or gather relevant information, the municipality can be held liable under Monell*. Litigation files contain depositions and evidence about officers' conduct that departments routinely ignore. If failing to interview witnesses or consider relevant information during internal affairs investigations is a sufficient basis for* Monell *liability, disregarding litigation information that would fill gaps in internal affairs investigations should be as well.*

In the short term, pursuing Monell *claims based on departments' inattention to lawsuits should make it easier to plead and prove municipal liability. Longer term, effectively requiring police officials to take*

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account of litigation information may improve police departments' internal investigations and supervision of their officers.

INTRODUCTION

Among the most difficult hurdles to overcome in § 1983 litigation is the Supreme Court's standard for holding municipalities liable for the constitutional violations of their officers.[1] This Essay proposes a novel legal

1. By "§ 1983 litigation," this Essay refers to lawsuits filed under 42 U.S.C. § 1983 against government officers and local governments. For a discussion of the passage of 42 U.S.C. § 1983 during the Reconstruction following the Civil War, the development of § 1983 doctrine in recent decades, and the many challenges associated with bringing such claims today, see Joanna Schwartz, Shielded: How the Police Became Untouchable, at xvii–xx, 3–7, 10–16 (2023) [hereinafter Schwartz, Shielded].

theory—requiring only a modest extension of existing law—that will make it easier to prove municipal liability claims in the short term and may also encourage more profound and long-lasting improvements to the ways government agencies investigate and supervise their officers.

In *Monell v. Department of Social Services*, the Supreme Court first recognized that local governments can be sued for constitutional violations by their employees under 42 U.S.C. § 1983.[2] Although private businesses can be held vicariously liable for the wrongdoing of their employees, the Supreme Court held in *Monell* that local governments are only liable for their officers' constitutional violations if municipal policies or customs caused those violations to occur.[3] The evidence necessary to meet the requirements imposed by *Monell* and its progeny has proven extremely challenging to find.[4] Indeed, it is significantly more difficult to plead and prove a *Monell* claim than it is to overcome the qualified immunity defense.[5]

Many have called on courts and legislators to replace *Monell* with vicarious liability for local governments.[6] Doing so would be consistent with common understandings of the intent of those who drafted § 1983, would greatly simplify the litigation of § 1983 claims, and would improve our system of constitutional remediation in multiple ways.[7] Replacing *Monell* with vicarious liability for local governments may also be among the most politically palatable possible reforms; since 2020, Republican senators opposed to ending qualified immunity have periodically offered imposing vicarious liability for municipalities as a counterproposal.[8] Yet replacing *Monell* with vicarious liability has still proven a steep hill to climb: Only one state has enacted legislation along these lines, and neither Congress nor the Supreme Court has indicated recent interest in revisiting *Monell*.[9]

This Essay offers an alternative path around the barriers of *Monell* that does not require convincing courts or legislatures to change the law: Plaintiffs should pursue *Monell* claims based on local governments' disregard of allegations and information in lawsuits brought against them and

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2. See 436 U.S. 658, 663 (1978).

3. See id. at 691–95.

4. See infra section I.B.

5. See Joanna C. Schwartz, Municipal Immunity, 109 Va. L. Rev. 1181, 1200–13 (2023) [hereinafter Schwartz, Municipal Immunity] (examining almost 1,200 police misconduct lawsuits filed in five federal districts and finding that local governments challenged municipal liability claims more often than individual defendants raised qualified immunity and that courts dismissed *Monell* claims more often than they granted officers qualified immunity); see also infra notes 42–49 and accompanying text (detailing these findings).

6. See infra note 110 and accompanying text.

7. See infra notes 99–109 and accompanying text.

8. See infra note 111 and accompanying text.

9. See infra note 112 and accompanying text.

their employees. This Essay develops this theory in the context of suits alleging law enforcement misconduct, because I have studied police departments' inattention to lawsuits brought against them,[10] but this theory could support *Monell* claims challenging the conduct of other types of government agencies as well.

Police departments are unquestionably obligated to investigate citizen complaints alleging officer misconduct; every circuit has recognized that the failure to do so can be the basis for *Monell* liability.[11] Lawsuits, like citizen complaints, allege officer wrongdoing; as police auditors have commented, a lawsuit is, in essence, a "civilian complaint plus a demand for money."[12] Studies have found that many allegations made in lawsuits are not asserted in citizen complaints or otherwise brought to police departments' attention.[13] And even when they are, experts have found that lawsuit complaints—when drafted by lawyers—are often clearer and more comprehensive than complaints called into police departments or filled in on complaint forms.[14] Yet many police departments do not investigate allegations in lawsuits brought against them and their officers as they would allegations in citizen complaints.[15] If failing to investigate citizen complaints is sufficient basis for *Monell* liability, failing to investigate allegations in lawsuits should be as well.

Police departments' disregard of information unearthed during litigation should be an additional basis for *Monell* liability. Litigation files are chock-full of deposition testimony, audio and/or video recordings, and other evidence about officers' conduct.[16] Those who have compared litigation files with internal affairs investigations files of the same allegations have found the litigation files to be far more complete.[17] Yet many police departments do not review information from lawsuits either as part of their internal affairs investigations of officers' conduct or to inform supervision

10. See infra notes 12, 15; see also infra section II.A.

11. See infra note 147 (describing these cases).

12. See Joanna C. Schwartz, What Police Learn From Lawsuits, 33 Cardozo L. Rev. 841, 856 & n.88 (2012) [hereinafter Schwartz, What Police Learn] (internal quotation marks omitted) (quoting Michael Gennaco, Chief Att'y, Off. of Indep. Rev., L.A. Sheriff's Dep't).

13. See infra note 122 and accompanying text (describing these studies).

14. See infra note 123 and accompanying text (describing these studies).

15. See Joanna C. Schwartz, Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking, 57 UCLA L. Rev. 1023, 1058–59 (2010) [hereinafter Schwartz, Myths and Mechanics] (describing available evidence suggesting many departments do not investigate allegations made in lawsuits); see also infra section II.A.

16. See infra notes 120–121 and accompanying text (describing the evidence generated in litigation).

17. See infra note 124 and accompanying text (describing experts' perspectives about the differences between internal investigations files and litigation files).

and training decisions.[18] Courts have ruled that perfunctory internal affairs investigations—in which investigators fail to interview available witnesses or take account of available information—can be a basis for *Monell* liability.[19] If a department systematically ignores litigation information that would fill gaps in their internal affairs investigations, that failure should be a basis for *Monell* liability as well.

These novel claims would not overcome every barrier currently posed by *Monell*.[20] They could not be employed to address all types of government wrongdoing, do not ease all challenges of *Monell* litigation, and would not prove successful in places without lawyers willing or able to bring civil rights suits. But, in jurisdictions that do not investigate lawsuit allegations or review information revealed during litigation, these claims may be easier to plead and prove than other types of *Monell* claims and so could meaningfully expand the scope of municipal liability.

These claims have an added benefit: If successful, they could prompt improvements to the way police departments investigate and supervise their officers. For decades, investigations of police departments' internal affairs processes have revealed the same shortcomings: People are discouraged from filing citizen complaints; the complaints that are filed are inadequately investigated, if they are investigated at all; discipline is rarely imposed; and those rare disciplinary decisions are often overturned in arbitration or on appeal.[21] If police departments were effectively forced by the threat of *Monell* liability to investigate lawsuit allegations and review information unearthed during litigation, those litigation materials could fill gaps in police departments' current practices without renegotiating union agreements or somehow forcing internal affairs investigators to do a better job.

Profound improvement is by no means guaranteed. It is certainly possible that, in response to the threat of municipal liability for ignoring litigation information, police departments will institute bare-bones policies to investigate lawsuit allegations and review lawsuit data, which courts will use to conclude that departments are satisfying their obligations under *Monell*, and little will change. Departments will still fail to carefully supervise their officers, and municipal liability will remain exceedingly difficult to prove. Given courts' tendencies to dismiss *Monell* claims and police departments' tendencies to ignore lawsuits brought against them, there are good reasons to adopt this pessimistic view.

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18. See Schwartz, Myths and Mechanics, supra note 15, at 1058–59 (describing evidence of police departments' disregard of information generated during litigation); see also infra section II.A.

19. See infra notes 176–179 (describing these cases).

20. For further discussion of these limitations, see infra notes 270–275 and accompanying text.

21. See infra notes 277–284 and accompanying text.

This Essay nevertheless finds cause for cautious optimism—both regarding the viability of these claims and their potential impact on police department practices—in the newfound role litigation information would play in the investigation and supervision of police. Plaintiffs and their attorneys have strong motivations to uncover evidence of misconduct and have powerful discovery tools at their disposal.[22] If police departments are effectively required to take account of the robust information about officers' alleged misconduct that is generated during litigation, plaintiffs and their attorneys will have added incentive to unearth evidence of misconduct and put it into the record. That information could either lead departments to better investigate, discipline, and supervise their officers (achieving an intended deterrent effect of municipal liability claims) or could convince courts that departments are deliberately indifferent when they fail to take more decisive action (securing municipal liability for plaintiffs). If plaintiffs and their attorneys capitalize on police departments' newfound attention to lawsuits, they can use those suits to notify police officials of misconduct and failures in supervision that they cannot afford to ignore.

The remainder of this Essay proceeds as follows. Part I describes the *Monell* doctrine, the many challenges of pleading and proof it poses, and the impact of those challenges on the system of civil rights remediation. Then, Part II proposes a novel *Monell* theory based on departments' inattention to information in lawsuits brought against them and their officers. It describes evidence that police departments disregard litigation information; sets out two different *Monell* claims that could be alleged; addresses counterarguments municipalities might raise in response; and offers an example of how litigation of these claims might play out. Part III explores the possible impact of these novel claims on plaintiffs' ability to establish municipal liability and on departments' supervision and investigation of their officers.

I. THE CHALLENGES OF *MONELL*

In *Monell v. Department of Social Services*, the Supreme Court authorized people to sue cities and counties for violations of 42 U.S.C. § 1983.[23] Yet the standard articulated by *Monell* and its progeny has made it exceedingly difficult to succeed in these claims. This Part describes the various theories of *Monell* liability that plaintiffs can pursue, the evidence that *Monell* claims rarely succeed, and the ways in which the challenges of pleading and proving these types of claims contribute to their dismal success rate. It also describes common criticisms of *Monell* doctrine, calls for reform, and challenges thus far of turning those calls into action.

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22. See infra notes 285–287 and accompanying text (describing how litigation information can fill gaps in internal affairs investigation processes).

23. See 436 U.S. 658, 690–702 (1978).

A. *Theories of* Monell *Liability*

When the employee of a private business harms someone, the law allows that person to sue the employer under a theory of vicarious liability.[24] After all, the employee was doing their job when they caused the harm and is unlikely to have the money to pay for injuries they inflicted.[25] But in 1978, in *Monell*, the Supreme Court held that there is no vicarious liability for local governments under § 1983.[26] Instead, a person seeking to hold a local government responsible for constitutional violations by its officers must show that the municipality had a policy or custom that caused the constitutional violation to occur.[27]

Supreme Court and lower court decisions have set out four broad theories of municipal liability.[28] A municipality can be held liable under § 1983 if it adopted an unconstitutional policy; if a final policymaker violated the Constitution; if the municipality had informal policies or customs that caused the constitutional violation; or if the municipality failed to act—failed to adequately screen, train, supervise, or investigate its officers—and that failure caused the plaintiff's rights to be violated.[29]

The most straightforward *Monell* claims to prove are those challenging unconstitutional misconduct at the highest levels: unconstitutional poli-

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24. See, e.g., Restatement (Third) of Agency § 7.03(2)(b) (Am. L. Inst. 2006) ("A principal is subject to vicarious liability to a third party harmed by an agent's conduct when . . . the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal.").

25. See, e.g., id. § 2.04 cmt. b ("Respondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct. . . . Respondeat superior also reflects the likelihood that an employer will be more likely to satisfy a judgment.").

26. 436 U.S. at 691–95.

27. Id. at 694.

28. Some courts and commentators consider "failure to" claims to be a species of "custom" claims; according to this view, there are three theories of *Monell* liability instead of four. See, e.g., Connick v. Thompson, 563 U.S. 51, 61 (2011) (describing three theories of *Monell* liability—"decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law"—but also noting that a "decision not to train" can give rise to *Monell* liability). Other commentators have broken down the *Monell* doctrine into more than four theories. See, e.g., Matthew J. Cron, Arash Jahanian, Qusair Mohamedbhai & Siddhartha H. Rathod, Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights, 91 Denv. U. L. Rev. 583, 588–99 (2014) (setting out five theories of *Monell* liability); Michael L. Wells, The Role of Fault in § 1983 Municipal Liability, 71 S.C. L. Rev. 293, 312–13 (2019) (describing nine types of cases that could be brought under *Monell*).

29. See, e.g., Starbuck v. Williamsburg James City Cnty. Sch. Bd., 28 F.4th 529, 532–33 (4th Cir. 2022) (setting out four theories of *Monell* liability based on (1) "an express policy"; (2) the acts of a final policymaker; (3) a failure to act that amounts to "deliberate indifference"; or (4) a widespread custom (internal quotation marks omitted) (quoting Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003))); Jackson v. City of Cleveland, 925 F.3d 793, 828 (6th Cir. 2019) (setting out the same four theories of *Monell* liability (citing Burgess v. Fischer, 735 F.3d 462, 478 (6th Cir. 2013))).

cies formally adopted by the government or actions taken by final policymakers—police chiefs, mayors, and city managers, for example. Separate studies have found that plaintiffs have the most success bringing these types of *Monell* claims.[30] Yet those studies have also found that *Monell* claims alleging unconstitutional policies or constitutional violations by policymakers are less common than those alleging informal policies or customs, or "failure to" claims.[31] It makes logical sense that these types of *Monell* violations are less frequently alleged. Presumably, police departments do not regularly adopt policies that are unconstitutional on their face, and police chiefs less frequently arrest and assault people than do officers on patrol. As a result, *Monell* claims most commonly seek to hold local governments responsible for the misconduct of their officers by arguing that the municipality had an informal policy or custom, or that policymakers failed to properly screen, train, supervise, or investigate their officers.[32]

The Supreme Court first recognized the viability of a "failure to" claim in 1989, in *City of Canton v. Harris*.[33] There, the Court explained that a plaintiff seeking to prove a failure-to-train claim must show that (1) policymakers were on notice of the need to train, either because the need for that training was "obvious" given the nature of the officers' obligations or because officers "so often violate constitutional rights that the need for further training must have been plainly obvious"; (2) the policymaker's failure to act amounted to deliberate indifference to the rights of the municipality's citizens; and (3) deliberate indifference caused the constitutional violation of the plaintiff's rights, meaning that "the injury [would] have been avoided had the employee been trained under a

30. One study examined 108 appeals cases with *Monell* claims in all types of § 1983 cases and found that "[p]laintiffs won on nine out of thirty claims involving policymaker statements (30.0%); five out of eleven claims involving a written policy (45.5%); twelve out of seventy-four claims involving a widespread pattern of conduct (16.2%), and four out of thirty-three claims involving a municipal failure (12.1%)." Nancy Leong, Municipal Failures, 108 Cornell L. Rev. 345, 366 (2023) [hereinafter Leong, Municipal Failures]. Another study examined 142 summary judgment motions involving *Monell* claims in police misconduct cases and found that 50% of the motions concerning official policies and conduct by final policymakers were denied, "a denial rate much higher than the 20.2% of summary judgment motions denied regarding *Monell* claims alleging only misconduct by lower-level officers, including ratification, unconstitutional customs, or a failure to properly hire, train, and supervise." Schwartz, Municipal Immunity, supra note 5, at 1210.

31. See Leong, Municipal Failures, supra note 30, at 365 (examining 108 appeals that litigated one or more *Monell* claims and finding that "[t]hirty cases (27.8%) involved policymaker statement or action, eleven (10.2%) involved a written document or policy; seventy-four (68.5%) involved a widespread pattern of conduct; and thirty-three cases (30.6%) involved a municipal failure"); Schwartz, Municipal Immunity, supra note 5, at 1210 (examining 142 summary judgment motions involving *Monell* claims and finding that 14 concerned formal policies or acts of policymakers, while 114 concerned informal policies or customs and "failure to" claims).

32. See supra note 31.

33. 489 U.S. 378, 388 (1989).

program that was not deficient."[34] The Supreme Court has yet to confront a *Monell* claim based on the failure to supervise or investigate, but lower courts have allowed these types of claims to go forward if plaintiffs produce proof of the three requirements set out in *City of Canton*: notice, deliberate indifference, and causation.[35]

In 1997, the Supreme Court made clear that the *City of Canton*'s notice, deliberate indifference, and causation requirements can also be used to prove a *Monell* claim based on a failure to screen a job applicant properly before hiring them.[36] But when such claims are based on a single faulty hiring decision, the Supreme Court has explained that the standard for deliberate indifference is particularly strenuous; it will be met only by "a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff."[37]

Professor Nancy Leong has examined how various "failure to" claims fare in federal appeals and district courts.[38] Leong concluded, after reviewing hundreds of appellate and district court *Monell* decisions, that failure-to-screen claims were nearly impossible to bring; just three out of several hundred district court decisions ruled in favor of a plaintiff bringing a failure-to-screen claim.[39] Leong attributed these claims' low success rate to their heightened deliberate indifference and causation

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34. See id. at 389–91 & 390 n.10.

35. See, e.g., S.M. v. Lincoln County, 874 F.3d 581, 585 (8th Cir. 2017) (explaining that in both failure-to-train and -supervise claims, plaintiffs must establish that the policymakers were deliberately indifferent to the need for more or better training or supervision); Cash v. County of Erie, 654 F.3d 324, 338 (2d Cir. 2011) (explaining that the deliberate indifference standard in failure-to-train claims "applies with no less force to a supervision claim"); Cox v. District of Columbia, No. 93-7103, 1994 WL 609522, at *1–2 (D.C. Cir. Oct. 28, 1994) (affirming the district court's entry of judgment in favor of plaintiffs on their *Monell* claim based on evidence of (1) a constitutional violation; (2) "a 'custom or practice' of maintaining 'a patently inadequate system of investigation of excessive force complaints'"; (3) deliberate indifference; and (4) causation (quoting Cox v. District of Columbia, 821 F. Supp. 1, 13 (D.D.C. 1993))); see also Hazel Glenn Beh, Municipal Liability for Failure to Investigate Citizen Complaints Against Police, 25 Fordham Urb. L.J. 209, 225–26 (1998) (reporting that "[l]ower courts instantly extended *Canton* beyond failure-to-train claims to claims based upon a municipality's inadequate system of hiring, supervising, or reviewing police misconduct," including claims "challenging the adequacy of citizen complaint procedures"); Leong, Municipal Failures, supra note 30, at 372 ("Courts have indicated that some of the standards the Supreme Court has articulated in relation to the failure-to-train theory translate directly to the failure-to-supervise theory.").

36. See Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 407–11 (1997).

37. See id. at 412.

38. See, e.g., Nancy Leong, Civil Rights Liability for Bad Hiring, 108 Minn. L. Rev. 1, 29–46 (2023) (discussing patterns identified in every federal appellate and district court opinion that adjudicated a failure-to-screen claim in 2019) [hereinafter Leong, Civil Rights Liability]; Leong, Municipal Failures, supra note 30, at 364–65 (discussing patterns identified in every federal appellate case decided in 2019 that cited *Monell*).

39. See Leong, Civil Rights Liability, supra note 38, at 42 ("[T]he plaintiff 'won' in just 3 failure-to-screen adjudications in cases initiated during the year 2019.").

standards.[40] In contrast, Leong found that failure-to-supervise claims fared far better and held unrealized promise for plaintiffs seeking to hold local governments responsible under *Monell*.[41] Yet, as the next section makes clear, even failure-to-supervise claims are challenging to plead and prove.

B. *Challenges of Pleading and Proof*

Monell claims are challenged far more often and successful far less often than are claims against individual officers.[42] A study of 1,183 police misconduct cases in five federal districts across the country found that local governments moved to dismiss almost one-third of the *Monell* claims at the pleadings stage and moved for summary judgment on *Monell* claims in more than half of the cases in which a *Monell* claim remained at that stage of the litigation; in total, municipal defendants challenged *Monell* claims in 53.8% of the cases brought against them and only 17.4% of *Monell* claims survived these challenges.[43] In contrast, individual defendants raised qualified immunity in 37.6% of the cases in which the defense could be raised,[44] and these motions were denied more than twice as often as were motions challenging *Monell* claims.[45] *Monell* claims settled less frequently than other types of claims, as well: 64.3% of the 1,183 cases in the dataset settled or were voluntarily dismissed as compared to 51.4% of the *Monell* claims.[46] *Monell* claims also less frequently made it to trial; eighty-four cases in the dataset went to trial, but just nineteen included *Monell* claims.[47] Juries found for plaintiffs in three of those nineteen trials, but one was reversed on appeal and the other two settled after trial.[48] Nine of the eighty-four trials ended in a plaintiff's verdict; in each, the *Monell* claims had previously been dismissed or abandoned by the plaintiff.[49]

This section describes why it can be so difficult to plead and prove *Monell* claims. It focuses on "failure to" claims both because they are

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40. See id. at 48–50 ("In my appellate data set, I found that the deliberate indifference standard was the most common reason that courts dismissed a complaint, resolved a motion for summary judgment in defendants' favor, or reversed a jury verdict against a municipality.").

41. See Leong, Municipal Failures, supra note 30, at 371–80 (underscoring the underdeveloped promise of failure-to-supervise claims, which are viable and firmly established in all twelve circuits).

42. See Schwartz, Municipal Immunity, supra note 5, at 1207 ("[T]here were more total cases in which local government defendants raised *Monell* challenges . . . and more total motions challenging *Monell* claims. . . . *Monell* claims infrequently survived motions to dismiss and for summary judgment.").

43. Id. at 1204–05, 1207–08.

44. Id. at 1205.

45. See id. at 1208 ("[Q]ualified immunity motions had a partial or total denial rate of 37.5%—more than twice as high as that for motions challenging *Monell* claims.").

46. Id. at 1212.

47. Id.

48. Id. at 1212–13.

49. Id. at 1213.

commonly relied upon by plaintiffs and because the solutions proposed in Part II are failure-to-supervise or failure-to-investigate claims that address several of these challenges.

1. *Proof of "Notice."*— To establish a "failure to" claim, a plaintiff must first show that the policymaker was on notice of a need to do something—more closely supervise their officers, for example, or provide better or different training.[50] To establish notice of this type of need, a plaintiff must generally point to evidence that the policymaker was aware of prior, similar constitutional violations.[51] The problem is that evidence of prior, similar constitutional violations can be hard to come by.

Lawsuits are one possible source of information about prior misconduct that can put policymakers on notice of the need for better training or supervision. But courts have repeatedly concluded that lawsuit allegations and settlements do not put a policymaker on notice of a need for different training or supervision because they are not proof of wrongdoing; only adjudications against officers suffice.[52] Some courts have

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50. See City of Canton v. Harris, 489 U.S. 378, 390 (1989) (explaining "failure to provide proper training may . . . represent a policy" if "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need").

51. The Supreme Court has ruled that a pattern of prior constitutional violations is not always needed. For example, in *City of Canton*, the Court held that an obvious need for training can be enough. 489 U.S. at 390 n.10 ("It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need."). The Court reaffirmed, though very narrowly interpreted, this exception in Connick v. Thompson, 563 U.S 51, 68 (2011) (holding that "the absence of any *formal* training sessions about *Brady* [doctrine]" is not "equivalent to the complete absence of legal training that the Court imagined in *Canton*"). And when the *Monell* claim is based on a municipality's failure to investigate allegations of misconduct, courts have held that plaintiffs do not need to establish that those allegations were proven meritorious. See infra notes 256–261 and accompanying text.

52. See, e.g., Pharaoh v. Dewees, No. 14-3116, 2016 WL 2593842, at *4 (E.D. Pa. May 4, 2016) (concluding that "five settled or dismissed lawsuits contain no finding that [the officer] used excessive force and thus are insufficient to demonstrate that [the officer] had a history of using excessive force or that the City was on notice of such a history"); Hernandez v. Nielson, No. 00-c-50113, 2002 WL 31804788, at *1 (N.D. Ill. Dec. 13, 2002) (finding that prior lawsuits did not support plaintiff's *Monell* claim because they were settled); Amann v. Prince George's County, No. CIV.A. DKC99-3759, 2001 WL 706031, at *2 (D. Md. June 15, 2001) (arguing that pending lawsuits contained only "mere allegations rather than notice of actual unconstitutional behavior"); Peters v. City of Biloxi, 57 F. Supp. 2d 366, 378 ("The mere fact that other lawsuits have been filed against the City of Meridian does not provide a basis for municipal liability. The complaints do no more than suggest that the City was on notice of various civil rights abuses that had been alleged." (citations omitted) (citing Singleton v. City of Newburgh, 1 F. Supp. 2d 306, 311 (S.D.N.Y. 1998))); *Singleton*, 1 F. Supp. 2d at 311–12 ("The mere fact of other lawsuits against the City does not provide a basis for liability. The complaints do no more than suggest that the City was on notice of various civil rights abuses that had been alleged." (citation omitted) (citing Mendoza v. City of Rome, 872 F. Supp. 1110, 1118 (N.D.N.Y. 1994))); Singleton v.

allowed plaintiffs to use prior lawsuits to establish notice of the need for better supervision or training at the pleadings stage but have ruled lawsuit allegations insufficient evidence to overcome a summary judgment motion.[53] For example, in *Buckler v. Israel*, the Eleventh Circuit affirmed the district court's dismissal of plaintiffs' *Monell* claim at summary judgment.[54] The plaintiffs had pointed to eight prior excessive force lawsuits filed against sheriff's deputies as proof that the sheriff was on notice of the need for better supervision and discipline.[55] Yet the Eleventh Circuit ruled that because six of the eight lawsuits were settled or voluntarily dismissed, they could not, "without admissions of liability, put the [sheriff's office] on notice of any pattern of constitutional violations."[56]

Courts' disregard of lawsuit allegations and settlements significantly heightens the challenge of using prior lawsuits to put policymakers on notice of the need for better training or supervision. The vast majority of successful cases settle, with very few resulting in jury verdicts or any judicial finding of wrongdoing. Among the 1,183 police misconduct cases in the aforementioned study, plaintiffs succeeded in 682 (57.7%), measuring "success" as jury verdicts, settlements, and voluntary or stipulated dismissals.[57] But juries entered verdicts for plaintiffs in just twelve of those 682 successful cases; just 1.8% of all cases in which plaintiffs succeeded, and 1% of all 1,183 cases.[58] Perhaps it makes sense that lawsuit allegations ruled by a court to be meritless would not be expected to notify policymakers of a problem—although such suits may nonetheless reveal

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McDougall, 932 F. Supp. 1386, 1389 (M.D. Fla. 1996) (granting the defendants summary judgment on plaintiff's *Monell* claim, despite two prior excessive force lawsuits against the named defendants because plaintiff had "not identif[ied] a single case in which it was determined that a clearly established right had been violated").

53. See, e.g., Bagos v. City of Vallejo, No. 2:20-cv-00185-KJM-AC, 2020 WL 6043949, at *5 (E.D. Cal. Oct. 13, 2020) ("Prior incidents involving lawsuits alone, even those which do not result in a finding or admission of wrongdoing, can be sufficient for *Monell* liability purposes in the face of a motion to dismiss." (citing McCoy v. City of Vallejo, No. 2:19-cv-001191-JAM-CKD, 2020 WL 374356, at *3 (E.D. Cal. Jan. 23, 2020))); Lopez v. City of Fontana, No. EDCV19-1727-JGB(SPx), 2020 WL 6694337, at *3–4 (C.D. Cal. Sept. 17, 2020) (allowing prior lawsuits to serve as evidence of notice in a *Monell* claim at the motion to dismiss stage). But see Buari v. City of New York, 530 F. Supp. 3d 356, 398–99 (S.D.N.Y. 2021) (holding that a plaintiff can plead a custom or practice "by citing to complaints in other cases that contain similar allegations" but "[s]uch complaints must involve factually similar misconduct, be contemporaneous to the misconduct at issue in the plaintiff's case, and result in an adjudication of liability" (internal quotation marks omitted) (quoting Gaston v. Ruiz, No. 17-cv-1252 (NGG) (CLP), 2018 WL 3336448, at *6 (E.D.N.Y. July 6, 2018))).

54. 680 F. App'x 831, 832 (11th Cir. 2017).

55. Id. at 836.

56. Id.

57. See Joanna C. Schwartz, After Qualified Immunity, 120 Colum. L. Rev. 309, 328 (2020).

58. See Schwartz, Shielded, supra note 1, at 137.

information valuable to policymakers.[59] But when cases settle—and particularly when they settle for significant sums—it seems safe to assume that they indicate possible misconduct and policymakers should take note. Courts assessing *Monell* claims for failure to train or supervise do not, however, appear to share this view.

Courts have recognized that relying only on adjudicated plaintiffs' victories as evidence of wrongdoing makes it difficult for plaintiffs to succeed in their *Monell* claims. For example, in *Johnson v. City of Vallejo*, the district court granted summary judgment to Vallejo on plaintiffs' failure-to-train claim—despite the fact that Vallejo police officers had shot and killed four people within a three-month span and the police chief had taken no action in response—because none of the shootings had been ruled unconstitutional.[60] The judge recognized "the difficult task facing Plaintiffs who wish to bring a claim for failure to train" because "the constitutionality of police conduct is often not determined by an unbiased entity until years after the conduct has occurred."[61] "Nevertheless," the judge wrote, "some evidence of constitutional violations is required to maintain the *Monell* claim in this case."[62]

Citizen complaints can also put policymakers on notice of the need for better supervision or training. Yet courts do not consider unsubstantiated citizen complaints to be evidence of wrongdoing; only substantiated citizen complaints can put policymakers on notice that anything is amiss.[63] The challenge of this standard is that citizens' complaints are very rarely substantiated; recent studies of internal affairs investigations in Baltimore, Chicago, Houston, Newark, and San Diego found that fewer than 3% of citizen complaints were substantiated.[64] Complaints may be deemed unfounded because they are, in fact, without basis. But police departments' internal affairs divisions' practices suggest that low rates of substantiated complaints are at least partially the product of flawed investigations.

Over the past several decades, scores of police departments' internal affairs processes have been evaluated by blue ribbon commissions,

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59. For a discussion of the values of meritless litigation, see Alexander A. Reinert, Screening Out Innovation: The Merits of Meritless Litigation, 89 Ind. L.J. 1191, 1225–31 (2014) (illustrating how meritless litigation can develop and clarify the law, encourage legislative changes, and promote stability).

60. 99 F. Supp. 3d 1212, 1222 (E.D. Cal. 2015).

61. Id.

62. Id.

63. See, e.g., Perkins v. Hastings, 915 F.3d 512, 523 (8th Cir. 2019) (affirming district court's grant of summary judgment on plaintiff's claim of "facade investigations" because the plaintiff "has not shown a pattern of underlying constitutional violations"); Strauss v. City of Chicago, 760 F.2d 765, 768–69 (7th Cir. 1985) (ruling that unsubstantiated citizen complaints do not support a *Monell* claim because "the number of complaints filed, without more, indicates nothing" and complaints do not "indicate that the policies [a plaintiff] alleges do in fact exist and did contribute to his injury").

64. See infra note 288 and accompanying text.

journalists, civil rights attorneys, and the DOJ.[65] Again and again, these evaluations have revealed the same set of problems: People are discouraged from filing citizen complaints; the complaints that are filed are inadequately investigated, if they are investigated at all; discipline is rarely imposed; and those rare disciplinary decisions are often overturned in byzantine arbitration or appeals processes.[66]

The deficiencies in a police department's internal affairs investigations can, paradoxically, make it more difficult to prove that the department inadequately supervised its officers. Take, for example, *Stanfield v. City of Lima*.[67] On October 4, 2013, three officers assaulted William Stanfield after following his car and approaching him when he came to a stop.[68] The district court dismissed his *Monell* claim at summary judgment.[69] On appeal, Stanfield argued that the city failed to properly screen and supervise officers, amounting to a "custom of tolerance for officers who violated the constitutional rights of others."[70] In support of this claim, Stanfield pointed to eight prior citizen complaints against one of the officers for "verbally aggressive or physically violent conduct" as proof of a "clear and persistent pattern of illegal activity."[71] But the Sixth Circuit ruled that these complaints did not put the city on notice of a pattern of aggressive and violent conduct because the officer was exonerated after investigations of each of these complaints.[72] In his brief to the Sixth Circuit, Stanfield argued that the citizen complaint allegations—rather than the investigations' outcomes—were most relevant because his *Monell* claim concerned inadequate supervision.[73] He wrote:

> Logically, if the municipality is actually ignoring the problem of repeated constitutional violations, there will be no record of repeated constitutional violations. Any investigation will find no wrongdoing, since the municipality will be deliberately ignoring any wrongdoing. Thus, the only evidence of a pattern . . . in a situation like this is the complaints themselves.[74]

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65. For a description of a handful of these investigations and their findings, see infra notes 277–287 and accompanying text.

66. See infra notes 277–287 and accompanying text; see also Schwartz, What Police Learn, supra note 12, at 862–70 (describing many reasons alleged wrongdoing might not be brought to police officials' attention through citizen complaints and use-of-force reports).

67. 727 F. App'x 841 (6th Cir. 2018).

68. Id. at 843–44.

69. Id. at 843.

70. Id. at 851.

71. Id. at 851–52.

72. See id. (finding that it would be impossible for the city to have "ignored a pattern" of illegal activity because the pattern itself was never established, as the officer was exonerated of each allegation).

73. Id. at 852.

74. Id. (internal quotation marks omitted) (quoting appellant's brief).

The Sixth Circuit was unmoved. "While Stanfield's point is well taken," the Sixth Circuit wrote, "[t]he mere existence of complaints, without more, is not sufficient evidence to allow a reasonable jury to find the existence of a clear and persistent pattern of illegal activity."[75]

Even if plaintiffs put forth evidence of prior constitutional violations, their *Monell* claims may be dismissed if those prior violations are not numerous enough or similar enough to put policymakers on notice of the need for more robust supervision or different training. In *Peterson v. City of Fort Worth*, for example, the Fifth Circuit found that twenty-seven allegations of excessive force over a four-year period against a department with more than 1,500 officers were insufficient to put policymakers on notice of the need for better supervision, even if those allegations were presumed true.[76] Additionally, in *Connick v. Thompson*, the Supreme Court ruled that *Brady* violations resulting in four overturned convictions over the ten years preceding Thompson's trial did not put the district attorney on notice of the need for better supervision or training because the prior *Brady* violations were insufficiently similar to the *Brady* violation at issue in Thompson's case.[77] Given the challenges of finding numerous similar allegations of misconduct that have been found unlawful by courts or internal affairs investigators, it should come as no surprise that notice is a substantial challenge in *Monell* "failure to" claims.

2. *Proof of "Deliberate Indifference."* — Even when a plaintiff can show a pattern of proven prior misconduct that is sufficiently numerous and similar to establish notice of wrongdoing, it can be difficult to show that policymakers' response to that evidence of misconduct was constitutionally deficient. The Supreme Court has explained that failure to act is an insufficient basis for liability under *Monell* unless it reflects "deliberate indifference"—an intentional choice, not merely an unintentional negligent oversight.[78] Courts have found evidence of

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75. Id.

76. See 588 F.3d 838, 852 (5th Cir. 2009); see also, e.g., Alfaro v. City of Houston, No. H-11-1541, 2013 WL 3457060, at *14–17 (S.D. Tex. July 9, 2013) (finding that fifty complaints of sexual assault against Houston officers over a seven-year period, with eight allegations substantiated by the department, did not show a pattern of misconduct sufficient for *Monell* liability).

77. See 563 U.S. 51, 62–63 (2011). In another case, the Fifth Circuit found an insufficient pattern of prior excessive force violations despite (1) evidence that the defendant officer previously slammed someone to the ground while they were having an epileptic seizure; (2) evidence that a different officer shot an unarmed male and assaulted an inmate; and (3) two instances in which an officer shot at a moving vehicle because "[t]hese examples lack 'similarity and specificity,' and therefore they do not 'point to the specific violation in question,'" which concerned an officer shooting into a moving car. Edwards v. City of Balch Springs, 70 F.4th 302, 313 (5th Cir. 2023) (quoting *Peterson*, 588 F.3d at 851).

78. See City of Canton v. Harris, 489 U.S. 378, 389 (1989) ("'[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." (alteration in original) (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483–84 (1986) (plurality

deliberate indifference when basic forms of supervision and training are altogether absent: when, for example, a department never conducts performance evaluations or investigates allegations of misconduct, or when a department offers no training at all about the type of conduct that is the subject of the suit.[79] But courts appear more reluctant to find deliberate indifference if a department is following protocols to supervise and train its officers, even if those protocols are highly flawed.

Courts have granted summary judgment and affirmed dismissals of *Monell* "failure-to" claims, even when experts have identified widespread problems with investigations, investigative findings, or trainings, because the failures were not, in the courts' views, deliberately inadequate. For example, in *Blair v. City of Cleveland*, the plaintiffs' expert reviewed dozens of internal investigations files and found most files had one or more "investigatory deficiencies" including "(1) unexplained delay of six months or longer; (2) deficient interviews; (3) failure in witness search/contact; (4) failure to use reasonable evidence; (5) disposition accepts officers' version of events over citizens' version; (6) disposition contrary to investigation; and (7) failure to address force issues."[80] After cataloguing the expert's findings, the court granted the city's motion for summary judgment, reasoning:

> [W]hile the City's "complaint handling procedures . . . may fall some distance from the ideal . . . they do not spell a deliberate 'see no evil' policy." . . . It may even be said that in some of the cases cited by [the expert] the investigations were conducted in a negligent manner. Negligence is not enough. Random flaws in the administrative process, albeit sometimes serious, may indicate an inconsistent or imperfect system, but do not rise to the level of deliberate indifference to citizens' constitutional rights.[81]

In another case, *Berry v. City of Detroit*, the plaintiff's expert analyzed reports of 161 police shootings and found seventy-eight shootings were unjustifiable but only fifteen officers had been disciplined.[82] The Sixth

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opinion))); see also Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997) ("'[D]eliberate indifference' . . . requir[es] proof that a municipal actor disregarded a known or obvious consequence of his action.").

79. See, e.g., Ouza v. City of Dearborn Heights, 969 F.3d 265, 289 (6th Cir. 2020) (reversing the district court's grant of summary judgment on *Monell* failure-to-train and failure-to-supervise claims based on evidence that the city provided no training about probable cause or the use of force and did not conduct performance evaluations of its officers or "otherwise review or monitor the officers' conduct"); Vann v. City of New York, 72 F.3d 1040, 1050 (2d Cir. 1995) (finding evidence of deliberate indifference when officials did not investigate complaints filed against problem police officers who had recently been returned to active duty); see also infra notes 147–169 and accompanying text (describing cases where departments failed altogether to investigate allegations of misconduct).

80. 148 F. Supp. 2d 894, 913–14 (N.D. Ohio 2000).

81. Id. at 914 (second and third alterations in original) (quoting Carter v. District of Columbia, 795 F.2d 116, 124 (D.C. Cir. 1986)) .

82. 25 F.3d 1342, 1352–53 (6th Cir. 1994).

Circuit found that this evidence showed, "at best . . . that discipline was not as frequent or as severe as [*the expert*] would have liked"; it did "not show a consistent pattern of ignoring constitutional violations."[83]

Courts also appear reluctant to find deliberate indifference when departments offer trainings regarding the subject at issue, regardless of whether those trainings have proven effective. For example, in *Meirs v. Ottawa County*, the plaintiffs argued that the county had inadequately trained its officers about suicide prevention, pointing to the fact that "[s]everal of the officers admitted to having little-to-no memory of the suicide-prevention-training materials, either because they might have been 'skimmed through,' because the training lasted about two hours once a year, or simply because of an inability to remember details."[84] The court nevertheless affirmed the dismissal of plaintiff's failure-to-train claim, reasoning that, although "[i]t may be clear to the County now, after the trial, that alternative teaching methods should be employed to increase information retention among the officers . . . . the County's approach to training on suicide prevention cannot be said to amount to 'purposeful nonfeasance' that would result in a substantial likelihood that suicide would occur."[85]

To be sure, some courts have allowed *Monell* failure-to-supervise and failure-to-train claims to go forward when supervision and training protocols existed but were egregiously flawed—when, for example, a police department chief investigated citizen complaints without interviewing complaining witnesses or officers,[86] or when a police department's use-of-force training included materials that were inappropriate and offensive.[87] Yet the deliberate indifference requirement can foreclose relief on *Monell* claims, despite widespread problems, if those problems are understood to be the result of negligence rather than deliberate indifference.

3. *Proof of Causation.* — Causation is the third challenge for plaintiffs in "failure to" claims. In *Monell*, the Supreme Court explained that the policymaker's policy or custom must be the "moving force" behind the violation.[88] If the municipality has an unconstitutional policy, or a

83. Id. at 1354.

84. 821 F. App'x. 445, 454 (6th Cir. 2020).

85. Id. at 455 (quoting Hays v. Jefferson County, 668 F.2d 869, 873 (6th Cir. 1982)).

86. See, e.g., infra notes 176–179 and accompanying text (describing cases in which police departments did not question witnesses or officers during internal affairs investigations).

87. See, e.g., Wright v. City of Euclid, 962 F.3d 852, 860 (6th Cir. 2020) (finding that use-of-force trainings that relied on a Chris Rock video including "highly inappropriate" comments about Rodney King and police misconduct, and "an offensive cartoon in the City's police-training manual that portrays an officer in riot gear beating a prone and unarmed civilian" sufficiently supported a *Monell* failure-to-train claim).

88. 436 U.S. 658, 694 (1978).

policymaker has violated the Constitution, "causation is straightforward."[89] But in the case of a failure-to-train claim, as the Court wrote in *City of Canton*, the causation question is, "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect[s]?"[90] Leong has observed that causation is easier to establish in failure-to-supervise claims, as courts have presumed that a lack of accountability "lead[s] to a culture in which officers 'kn[o]w there would be no professional consequences for their action[s].'"[91] Yet some courts have required plaintiffs to show that officers actually knew that their department's system of accountability was ineffective,[92] or that the very officer accused of misconduct in the instant case would have previously been disciplined or fired had there been an effective system of investigation and supervision.[93]

4. *Challenges at Pleading*. — Beyond the challenges of finding proof of notice, deliberate indifference, and causation that could defeat a summary judgment motion or prevail at trial on a *Monell* claim, it can also be difficult for plaintiffs to get past a motion to dismiss the initial complaint.[94]

The Supreme Court requires that a plaintiff "plausibly" plead allegations in their complaint based on facts, not legal conclusions.[95] But to the extent that evidence of notice, deliberate indifference, and causation exists in police departments' investigation files and other internal documents, this information may only become available to

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89. Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

90. City of Canton v. Harris, 489 U.S. 378, 391 (1989).

91. See Leong, Municipal Failures, supra note 30, at 379 (third alteration in original) (quoting Estate of Roman v. City of Newark, 914 F.3d 789, 800–01 (3d Cir. 2010)); see also, e.g., Bielevicz v. Dubinon, 915 F.2d 845, 851 (3d Cir. 1990) ("If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individual officers' decision to arrest the plaintiffs unlawfully in this instance is a question of fact for the jury."); Spell v. McDaniel, 824 F.2d 1380, 1391 (4th Cir. 1987) ("A sufficiently close causal link between . . . a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom.").

92. See Blair v. City of Cleveland, 148 F. Supp. 2d 894, 915 (N.D. Ohio 2000) (finding inadequate proof of causation when the officers were unaware of investigative deficiencies and there was no evidence that officers "tailor their actions according to the supposition that they would not be disciplined").

93. See Cox v. District of Columbia, 821 F. Supp. 1, 18–19 (D.D.C. 1993) (accepting plaintiffs' theories of causation, including that, had the District possessed a functional system of discipline, the officer would have been removed from service), aff'd, No. 93-7103, 1994 WL 609522 (D.C. Cir. Oct. 28, 1994).

94. See Karen M. Blum, Section 1983 Litigation: The Maze, the Mud, and the Madness, 23 Wm. & Mary Bill Rts. J. 913, 916 (2015) [hereinafter Blum, Section 1983 Litigation] ("Municipal liability claims have become procedurally more difficult for plaintiffs to assert since the Court's imposition of a more stringent pleading standard in *Bell Atlantic Corp v. Twombly* and *Ashcroft v. Iqbal* . . . ." (footnotes omitted)).

95. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

plaintiffs during discovery.[96] Some courts, sympathetic to these challenges, deny motions to dismiss *Monell* claims on the ground that plaintiffs do not have access to key evidence of notice and deliberate indifference at the pleading stage.[97] Other courts have recognized these pleading challenges but granted motions to dismiss *Monell* claims nevertheless.[98]

C. *Critiques of* Monell

There is a lot to dislike about *Monell*. Commentators and courts have observed that the Supreme Court's decision to reject vicarious liability for local governments in *Monell* was based on a misinterpretation of the legislative history of § 1983.[99] Some have also criticized *Monell* doctrine as

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96. See Rosalie Berger Levinson, The Many Faces of *Iqbal*, 43 Urb. Law. 529, 534 (2011) ("Because civil rights cases often turn upon the defendant's state of mind, and because of the well-recognized informational asymmetry between plaintiffs and defendants, it is not surprising that civil rights litigants have been the big losers in the post-*Iqbal* world." (footnote omitted)); Alexander A. Reinert, The Costs of Heightened Pleading, 86 Ind. L.J. 119, 123 (2011) ("Particular attention has been paid to the impact of the *Iqbal* and *Twombly* rules on civil rights litigation, where informational asymmetry is often at its highest point but where federal courts and federal law have played an important historical role in developing and adjudicating substantive rights."); Howard M. Wasserman, *Iqbal*, Procedural Mismatches, and Civil Rights Litigation, 14 Lewis & Clark L. Rev. 157, 161 (2010) ("The predictable result [from *Iqbal*] will be a significant decrease in enforcement and vindication of federal constitutional and civil rights . . . [from] imposing on plaintiffs an obligation to present substantial factual detail at the outset of litigation, even detail they do not and cannot know without discovery . . . .").

97. See, e.g., Report & Recommendation at 19, Kukoleck v. Lake Cnty. Sheriff's Off., No. 1-12-cv-1379 (N.D. Ohio July 3, 2013) (denying the county's motion to dismiss plaintiff's failure-to-train claim, noting that "it is not immediately clear what more the plaintiff could have alleged in the complaint since, without discovery, how would a plaintiff know" whether a custom or policy existed or its effect on plaintiff's rights); Keahey v. Bethel Twp., No. 11-7210, 2012 WL 478936, at *7 (E.D. Pa. Feb. 15, 2012) (denying a motion to dismiss a *Monell* claim because the plaintiff needed discovery to "prove that the Township had a pattern of engaging in constitutional violations such as those present in this case" (citing Carswell v. Borough of Homestead, 381 F.3d 235, 244 (3d Cir. 2004))); see also supra note 53 (describing cases in which courts have ruled that prior lawsuit complaints are sufficient to establish notice at the pleadings stage).

98. See, e.g., Jones v. Nueces County, No. C-12-145, 2012 WL 3528049, at *4 (S.D. Tex. Aug. 15, 2012) (dismissing a *Monell* claim and rejecting the argument that the plaintiff needed discovery to find prior similar allegations of misconduct because plaintiff's "'plead first and discover if there are supporting facts later' [strategy] is exactly the problem that the Supreme Court sought to remedy in *Twombly* and *Iqbal*"); Chery v. Barnard, No. 8:11-cv-2538-T-24 TGW, 2012 WL 439129, at *4 (M.D. Fla. Feb. 10, 2012) (dismissing *Monell* claim because the plaintiff had not alleged prior similar wrongdoing in his complaint).

99. For a sample of these critiques, 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, 2196 (2005) (arguing that the bases for the Supreme Court's rejection of respondeat superior in *Monell* "rest on historically inaccurate assumptions about the nineteenth-century justifications for respondeat superior"); Karen M. Blum, From *Monroe* to *Monell*: Defining the Scope of Municipal Liability in Federal Courts, 51 Temp. L.Q. 409, 413 n.15 (1978) (arguing that, while the rejection of vicarious liability for municipalities "may represent a sensitive response to the fiscal plight of

highly complex and uncertain.[100] It is, in Professor Karen Blum's words, "a maze that judges and litigants must navigate with careful attention to all the twists and turns."[101] Commentators have observed that *Monell* makes it nearly impossible to succeed in claims against local governments. Proving a *Monell* claim is "exceedingly difficult" in Professor Richard Fallon, Jr.'s words,[102] and it is "exceptionally difficult" according to Professor Pamela Karlan;[103] in Professor Fred Smith's view, *Monell* "often inoculates local governments from accountability."[104] Evidence of *Monell* claims' dismissal success rate supports Fallon's, Karlan's, and Smith's concerns.[105]

The difficulty of proving *Monell* claims compromises our system of constitutional remediation in a variety of ways. Even without a viable *Monell* claim, plaintiffs can pursue § 1983 claims against individual officers; if the claims are successful and the local governments indemnify their officers,

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municipal corporations today, it should not be acknowledged as a legitimate interpretation of congressional intent in 1871"); David H. Gans, Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983, 2022 Cardozo L. Rev. De Novo 90, 108–14, https://cardozolawreview.com/repairing-our-system-of-constitutional-accountability-reflections-on-the-150th-anniversary-of-section-1983/ [https://perma.cc/BZ7T-2CUY] (contesting the Supreme Court's interpretation of the legislative history of § 1983); Randall R. Steichen, Comment, Municipal Liability Under Section 1983 for Civil Rights Violations After *Monell*, 64 Iowa L. Rev. 1032, 1045 (1979) ("The Court's [respondeat superior] limitation . . . is not justified by the legislative history of section 1983 or by policy considerations."). Supreme Court Justices and lower courts have leveled this critique as well. See, e.g., Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 431–32 (1997) (Breyer, J., dissenting) (arguing that the legislative history of § 1983 does not support the *Monell* Court's rejection of vicarious liability, "particularly since municipalities, at the time, were vicariously liable for many of the acts of their employees"); Pembaur v. City of Cincinnati, 475 U.S. 469, 489 (1986) (Stevens, J., concurring in part and concurring in the judgment) ("The legislative history indicating that Congress did not intend to impose civil liability on municipalities for the conduct of third parties . . . confirms the view that it did intend to impose liability for the governments' own illegal acts—including . . . acts performed by their agents in the course of their employment."); Vodak v. City of Chicago, 639 F.3d 738, 747 (7th Cir. 2011) ("For reasons based on what scholars agree are historical misreadings (which are not uncommon when judges play historian) . . . the Supreme Court has held that municipalities are not liable for the torts of their employees under the strict-liability doctrine of respondeat superior, as private employers are." (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978))).

100. See Susan A. Bandes, The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on *Connick v. Thompson*, 80 Fordham L. Rev. 715, 717 (2011) ("Since the decision in *Monell*, the Court has struggled to draw the line between the *respondeat superior* liability that it has held the statute prohibits, and the supervisory liability it has held the statute permits."); see also *Brown*, 520 U.S. at 430 (Breyer, J., dissenting) (describing *Monell* as "a highly complex body of interpretive law").

101. Blum, Section 1983 Litigation, supra note 94, at 919–20.

102. Richard H. Fallon, Jr., Asking the Right Questions About Officer Immunity, 80 Fordham L. Rev. 479, 482 n.11 (2011).

103. Pamela S. Karlan, The Paradoxical Structure of Constitutional Litigation, 75 Fordham L. Rev. 1913, 1920 (2007).

104. Fred Smith, Local Sovereign Immunity, 116 Colum. L. Rev. 409, 414 (2016).

105. See Schwartz, Municipal Immunity, supra note 5, at 1207–08 (finding only 17.4% of *Monell* claims survived motions to dismiss and motions for summary judgment).

plaintiffs will at least get paid.[106] But a *Monell* claim may be the only avenue to success in the event that the municipality declines to indemnify its officer, or the officer is granted qualified immunity, or the plaintiff does not know the identity of the officers who violated their rights.[107] A plaintiff can only seek injunctive relief to change city practices if they can mount a successful *Monell* claim.[108] *Monell* claims also serve an important "fault-fixing function," in Professor Myriam Gilles's words, because they assign fault to the municipality and thereby encourage it to better supervise, train, and discipline its officers.[109]

Many have called on courts and legislators to replace *Monell* with vicarious liability for local governments.[110] But, despite the many reasons to criticize *Monell*, it is a doctrine that has, thus far, proven difficult to change. Members of Congress on both sides of the aisle have proposed federal legislation that would impose vicarious liability on municipalities, but such bills have not gained much traction.[111] In 2021, New Mexico

106. See Joanna C. Schwartz, Qualified Immunity and Federalism All the Way Down, 109 Geo. L.J. 305, 330–33 (2020) (describing local governments' indemnification decisions).

107. See Schwartz, Municipal Immunity, supra note 5, at 1227–33 (describing the purposes that *Monell* claims may serve, despite widespread indemnification).

108. See id. at 1189 ("*Monell* claims can also afford the only way to win a judgment against a local government that may create political pressure to change, and secure injunctive relief.").

109. Myriam E. Gilles, In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies, 35 Ga. L. Rev. 845, 861 (2001).

110. For a small sample of calls for vicarious liability, see Jack M. Beermann, Municipal Responsibility for Constitutional Torts, 48 DePaul L. Rev. 627, 666 (1999) ("In my view, fairness concerns as well as the policies underlying § 1983, point toward a rule of vicarious liability."); 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, 758 (1999) (arguing that the Court has considered the applicability of vicarious liability inconsistently and that the Court should have found vicarious liability through a purposive analysis of civil rights statutes); Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 457 (1978) ("Providing for suit directly against the . . . government would accomplish more than simply informing the jury of a deeper pocket. It would enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence."); Schwartz, Municipal Immunity, supra note 5, at 1235–40 (asserting that respondeat superior liability would improve upon *Monell* from a compensation, discovery, and political perspective); John Paul Stevens, Letter to the Editor, Prosecutors' Misconduct, N.Y. Times (Feb. 18, 2015), https://www.nytimes.com/2015/02/18/opinion/prosecutors-misconduct.html (on file with the *Columbia Law Review*) ("The rule of respondeat superior . . . should apply to state law enforcement agencies.").

111. See, e.g., Billy Binion, Tim Scott Is Proposing a Major Reform to Qualified Immunity, Reason (Apr. 22, 2021), https://reason.com/2021/04/22/tim-scott-is-proposing-a-major-reform-to-qualified-immunity/ [https://perma.cc/9ALZ-ZN5V] (describing Senator Tim Scott's proposal to create vicarious liability for municipalities as an alternative to ending qualified immunity during negotiations over the George Floyd Justice in Policing Act); Janice Hisle, In Wake of Tyre Nichols' Death, Sen. Lindsey Graham Suggests Policing Reform Compromise, Epoch Times (Jan. 31, 2023),

enacted a law creating vicarious liability for local governments when their employees violate the state constitution, but legislators in other states have been slow to introduce similar bills and none have been enacted thus far.[112] Although the Supreme Court seemed primed to replace *Monell* with vicarious liability twenty years ago,[113] it has not taken up a *Monell* case since 2011, when it issued a decision that made *Monell* harder, not easier, to overcome.[114] Given the current composition of the Court, and the likelihood of a conservative supermajority on the Court for decades to come, the chances of judicial reconsideration of *Monell* anytime soon seem vanishingly small.[115]

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https://www.gopusa.com/in-wake-of-tyre-nichols-death-sen-lindsey-graham-suggests-policing-reform-compromise/ (on file with the *Columbia Law Review*) (describing Senator Lindsey Graham's proposal that municipalities be held vicariously liable); Press Release, Sheldon Whitehouse, Whitehouse, Cicilline Introduce Bill to Hold Police Departments Accountable for Officers' Constitutional Violations (Dec. 23, 2021), https://www.whitehouse.senate.gov/news/release/whitehouse-cicilline-introduce-bill-to-hold-police-departments-accountable-for-officers-constitutional-violations/ [https://perma.cc/FHC8-KFG5] (describing legislation introduced by Senator Sheldon Whitehouse and Representative David Cicilline to make municipalities vicariously liable for misconduct by their officers).

112. For a description of New Mexico's law, see Nick Sibilla, New Mexico Bans Qualified Immunity for All Government Workers, Including Police, Forbes (Apr. 7, 2021), https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/ (on file with the *Columbia Law Review*) (last updated Apr. 8, 2021) (describing the New Mexico Civil Rights Act, which bars government employees from using qualified immunity as a legal defense and allows agencies to be held vicariously liable). For sample state legislation proposed by the Institute for Justice, see Inst. for Just., Protecting Everyone's Constitutional Rights Act 1–3 (Feb. 11, 2023), https://ij.org/wp-content/uploads/2023/02/02-11-2023-Protecting-Everyones-Constitutional-Rights-Act.pdf [https://perma.cc/485N-RCX8]. Similar legislation has been introduced in New Hampshire, Rhode Island, and Minnesota, but has yet to be enacted. See H.B. 1640, 2024 Leg., Reg. Sess. (N.H. 2024); H. 7636, 2024 Gen. Assemb., Reg. Sess. (R.I. 2024); S.F. 3346, 93d Leg., Reg. Sess. (Minn. 2023).

113. See Achtenberg, supra note 99, at 2184–85 (observing, in 2005, that *Monell* "hangs by a thread" and that "[p]laintiffs' civil rights lawyers wait only for the right case and a single change in the Court's personnel before urging the Court to overturn *Monell*").

114. See Connick v. Thompson, 563 U.S. 51, 62–63 (2011) (emphasizing the high standard of fault for a sufficient failure-to-train claim).

115. See Adam A. Davidson, Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity, 99 Wash. U. L. Rev. 1459, 1492–504 (2022) (describing the conservatism and hostility to civil rights of judges and Justices appointed by President Donald Trump in his first term); Brandon Hasbrouck, Movement Judges, 97 N.Y.U. L. Rev. 631, 639–52 (2022) (describing the judiciary's current antidemocratic and rights-hostile jurisprudence and inclinations); David Gans, From Qualified Immunity to Voting Rights, the Supreme Court Guts Civil Rights Laws, Am. Prospect (July 16, 2021), https://prospect.org/justice/qualified-immunity-voting-rights-supreme-court-guts-civil-rights-laws/ [https://perma.cc/8QS9-2FSW] (describing the Roberts Court's "eviscerat[ion]" of civil rights doctrines).

II. A NOVEL *MONELL* THEORY: MUNICIPAL LIABILITY FOR DISREGARDING LAWSUIT ALLEGATIONS AND INFORMATION

Monell's challenges are significant and set fast. The most common *Monell* claims—"failure to" claims—are some of the most difficult to advance, as they typically require proof that policymakers were on notice of prior constitutional violations; that their failure to take action was deliberate and intentional, not negligent; and that their deliberate indifference caused the violation of a plaintiff's rights.[116] Even getting to discovery on these types of *Monell* claims is difficult because plaintiffs often do not have access to evidence that would support allegations of notice and deliberate indifference at the pleading stage.[117] Many have called on courts and legislatures to replace *Monell* with vicarious liability but, as of yet, just one state has changed its law.[118]

This Part offers an expedient solution to problems posed by *Monell*: Police departments' disregard of lawsuit allegations and the information unearthed during litigation should be considered an adequate basis for a *Monell* claim for failure to supervise or investigate. Available evidence suggests that this theory could be pursued against many police departments across the country: Departments often do not investigate allegations in lawsuits as they would citizen complaints or review depositions and evidence unearthed during discovery and trial.[119] And although this theory of municipal liability is novel, it rests on well-established precedent and should make it easier for plaintiffs in many jurisdictions to succeed.

This Part describes available evidence of police departments' disregard of lawsuits, sets out this novel *Monell* theory, addresses counterarguments municipal defendants will likely try to advance, and considers how this theory might play out in the litigation of a case.

A. *Police Departments' Practices*

For a police department interested in learning about possible misconduct by their officers, lawsuits contain a wealth of information.[120] Lawsuit complaints detail allegations of wrongdoing; discovery unearths evidence that supports or undermines those claims; subject matter experts evaluate the evidence and draw conclusions based on that evaluation; summary judgment briefs curate and organize the available evidence; and trial offers a proving ground for documents, video, witness testimony, and

116. See supra notes 50–77 and accompanying text.

117. See supra notes 78–87 and accompanying text.

118. See supra note 112.

119. See infra notes 126–146 and accompanying text.

120. See, e.g., Alexandra Lahav, In Praise of Litigation 56–83 (2017) (describing the value of information and transparency generated during litigation); Joanna C. Schwartz, Introspection Through Litigation, 90 Notre Dame L. Rev. 1055, 1059–79 (2015) (describing the types of information lawsuits can reveal to organizations about their behavior).

competing theories of the case.[121] When police overseers and other experts have compared lawsuit filings with internal affairs investigations, they have found that lawsuits often include allegations that were neither submitted as citizen complaints nor reported by officers—and, so, never investigated by the department.[122] Even when a department is already on notice of a misconduct allegation, a lawsuit complaint—particularly when drafted by a lawyer—may more comprehensively and clearly set out the involved parties, the relevant facts, and the causes of action.[123] Among those claims that are investigated both by the department and during litigation, experts have found that the closed litigation files are far more comprehensive.[124]

In 2009, a report issued by the DOJ's Community Oriented Policing Services (COPS) program and the National Internal Affairs Community of Practice group—comprised of the Los Angeles Police Department and eleven major city and county law enforcement agencies—recommended that departments investigate lawsuit allegations as they do citizen complaints and review information unearthed during discovery and trial to complement internal affairs investigations.[125] Yet in a study published in

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121. See supra note 120.

122. See Schwartz, What Police Learn, supra note 12, at 864 (reporting that, in 2004, Portland's police auditor found that two-thirds of the suits filed against the department and its officers had not been brought as citizen complaints); id. (reporting that the Kolts Commission investigating the Los Angeles Sheriff's Department in the 1990s found that fewer of half of the allegations in lawsuits were investigated by the department). In Denver, approximately fifty percent of notices of claim concern uses of force that are known to the department before the claim is filed; the remainder generally concern other types of allegations—unlawful searches, discourtesy, and the like—that the department would not know about absent the notice of claim. See Telephone Interview With Wendy Shea, Special Couns., Denver City Att'y's Off., Dep't of Pub. Safety (June 14, 2024) (on file with the *Columbia Law Review*).

123. See Schwartz, What Police Learn, supra note 12, at 865 (describing observations by the Seattle Office of Police Accountability's Director and the Los Angeles Sheriff's Department's Risk Manager that lawsuit complaints are often more comprehensive than citizen complaints, which are often submitted over the phone or by filling out a form without the assistance of counsel).

124. See id. at 872 (reporting that Seattle's police auditor believed the "chances of getting new information [through the litigation process] are likely" (alteration in original) (internal quotation marks omitted) (quoting Kathryn Olson, Dir., Seattle Off. of Pro. Accountability)); id. at 872–73 (reporting that Los Angeles County's auditor believed that litigation provided "the fullest record" of police misconduct claims (internal quotation marks omitted) (quoting L.A. Cnty. Sheriff's Dep't, Fifteenth Semiannual Report 85 (2002)); id. at 873 (reporting that the Denver auditor believed the outcomes of internal investigations might have been different had they relied on litigation information); id. at 873–74 (describing the investigation into an in-custody death in Portland in which the plaintiff's attorney unearthed key evidence overlooked by internal affairs investigators).

125. See Off. of Cmty. Oriented Policing Servs., DOJ, Standards and Guidelines for Internal Affairs: Recommendations From a Community of Practice 19 (2009), https://portal.cops.usdoj.gov/resourcecenter/RIC/Publications/cops-p164-pub.pdf [https://perma.cc/G5G7-LQ5N] [hereinafter Standards and Guidelines for Internal Affairs] ("Any civil lawsuit or civil claim filed against a municipality, agency, or law

2010, I concluded that departments regularly fail to investigate lawsuit allegations or review information discovered during litigation.

That study examined the practices of twenty-six law enforcement agencies; each had been subject to a court-monitored consent decree or some form of external oversight, allowing greater access to information about their policies and practices.[126] Six of those departments—New York, Philadelphia, Nashville, San Jose, Sacramento, and New Orleans—appeared to make no effort to learn from lawsuits brought against them and their officers.[127] Instead, in these departments, when lawsuits were filed they were typically defended by the city attorney's office or outside attorneys; money to satisfy settlements and judgments was paid by insurers or taken from the central budget; and department officials did not investigate the underlying claims or review litigation files for lessons.[128]

The other twenty departments were required by consent decree or a civilian overseer's authority to gather and analyze lawsuit information in some form or another.[129] Among them, fourteen had policies or mandates to investigate allegations in lawsuits, and three had policies or mandates to review the information in closed litigation files.[130] When departments actually followed these policies, lawsuit information proved to be useful; by reviewing lawsuit allegations and information, departments were able to identify policy, training, and supervision problems and respond in ways

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enforcement personnel for misconduct on duty or off duty under color of authority should be handled as a complaint."); id. at 45 ("Civil discovery and trial may create a fuller and more complete record than typical administrative investigations. Agencies should review, and consider reopening, an internal investigation if the result of litigation contains new information indicating misconduct.").

126. See Schwartz, Myths and Mechanics, supra note 15, at 1041–45 (describing the twenty-six agencies and their various forms of oversight). Civilian oversight of law enforcement agencies takes different forms, including civilian review boards (that typically review police department investigations) and police auditors (that typically can conduct their own investigations and/or evaluations of police department practices). The power structure and authority of each entity differs by jurisdiction. For an overview of these forms of external oversight, see Samuel Walker & Carol A. Archbold, The New World of Police Accountability 179–84 (2d ed. 2014) (arguing that the police auditor model is more likely to be an effective form of external oversight than the traditional civilian review board). In contrast, a court monitor is appointed for a limited period of time to assess compliance with the terms of a consent decree. See id. at 180 (defining court monitors as "an agent of the court, [whose] investigating authority is limited to the specific terms of the consent decree, and . . . [with] a fixed life span as set by the consent decree").

127. See Schwartz, Myths and Mechanics, supra note 15, at 1045–52 (finding that these departments "do not gather or analyze information from lawsuits filed against them and their officers in any comprehensive or systemic way").

128. See id. at 1039, 1045.

129. See id. at 1052–56 (describing how twenty jurisdictions were required to incorporate lawsuit information into their early intervention systems to identify problem officers, problematic trends in claims, investigations of misconduct allegations, and disciplinary decisions).

130. See id. at 1091.

that reduced lawsuit filings and litigation expenses.[131] Yet, implementation of those policies and mandates was often frustrated by a combination of technological challenges, human error, and intentional efforts by government employees to subvert departments' obligations.[132] As a result, departments with policies to review litigation complaints and discovery often failed to follow those policies.

Although just six of the twenty-six departments regularly investigated lawsuit allegations and/or reviewed litigation information, the sample likely overrepresented the frequency with which departments engaged in this type of review. Even when departments were under consent decree or some form of external oversight, it took years to implement even the most basic systems to track litigation data.[133] One would expect that in the vast majority of jurisdictions not under court monitors' or external overseers' supervision, such policies would be adopted less frequently and followed even less often.[134] Nationwide experts confirmed that police policies to investigate lawsuit allegations and review information generated during litigation were exceedingly rare.[135]

Fifteen years later, there has been some increased recognition of the value of lawsuits as a source of information. In 2015, New York's Office of the Inspector General called on the New York Police Department to begin reviewing information from lawsuits.[136] Similar reports were issued by

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131. For example, the Los Angeles Sheriff's Department's review of lawsuits revealed clusters of claims involving prisoners being injured after they were improperly assigned to top bunks; deputies' failure to go to the correct address in response to a call; and injuries during transportation, searches, and vehicle pursuits—once identified, the department's auditor recommended policy changes and enhanced supervision to address each problem. See Schwartz, What Police Learn, supra note 12, at 853–54. Review of lawsuits filed against Portland police officers revealed several excessive force claims involving blows to the head by officers on the night shift at one station and a cluster of claims alleging officers were entering homes without a warrant; officers were retrained on both issues, and both types of allegations declined. See id. at 854.

132. See Schwartz, Myths and Mechanics, supra note 15, at 1060–66 (describing years-long efforts to implement obligations to gather and analyze litigation information).

133. See id. at 1062 ("Even departments under court order have spent several years developing their systems. For those departments without the pressures of a court order, it may take even longer." (footnote omitted)).

134. See id. at 1057–58 ("Most of the twenty jurisdictions in my study that gather information from suits do so involuntarily.").

135. Officials at the Police Assessment Resource Center, which regularly reviewed the policies and practices of police departments, were of the view that departments without consent decrees or civilian overseers rarely investigated lawsuit allegations, and only a subset of the departments subject to civilian oversight or under court supervision reviewed closed litigation files or the results of cases. See id. at 1059 (reporting that beyond departments subject to consent decrees or police auditors, most departments do not engage in information analysis).

136. See Mark G. Peters & Philip K. Eure, N.Y.C. Dep't of Investigation, Using Data From Lawsuits and Legal Claims Involving NYPD to Improve Policing 1 (2015), https://www.nyc.gov/assets/doi/reports/pdf/2015/2015-04-20-Litigation-Data-Report.pdf [https://perma.cc/99Z6-CFVP] [hereinafter Peters & Eure, Using Data] (calling for the

Washington D.C.'s Office of Police Complaints and the advisory committee overseeing New Orleans's Office of the Independent Police Monitor in 2019,[137] and by Chicago's Office of Inspector General in 2022.[138] But efforts in New York, Chicago, Washington, and New Orleans to implement these recommendations have been slow, halting, contentious, and, thus far, incomplete.[139] Moreover, in Chicago, this progress might more accurately be categorized as backsliding given that, in 2010, the city's police auditor was among the small handful of public officials that regularly paid attention to lawsuits brought against the department and its officers.[140]

Overall, the landscape in 2025 appears much as it did in 2010. I was able to gather updated information about twenty of the twenty-six jurisdictions studied in 2010. Nine of those twenty jurisdictions report regularly investigating lawsuit allegations and/or reviewing closed litigation files, although there is no proof that these practices are actually being followed and there are reports from officials in some jurisdictions that they are not.[141] In the four jurisdictions described above—Chicago,

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use of high-volume litigation data to assist the New York Police Department in taking corrective action).

137. See Off. of Police Complaints, Police Complaints Bd., PCB Policy Report #19-1: Using Litigation Data to Improve Policing 6 (2019), https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Using%20Litigation%20Data%20to%20Improve%20Policing.FINAL__0.pdf [https://perma.cc/LM7Q-MR7Z] (recommending that the D.C. Metropolitan Police Department systematically review litigation data and publish reports for the beneficial reasons experienced by other jurisdiction's police departments); see also Off. of the Indep. Police Monitor, City of New Orleans, Report on Claims for Damages in 2019 and 2020, at 7 (2021), https://nolaipm.gov/wp-content/uploads/2022/03/OIPM-2020-Annual-Report-Claims-for-Damages.pdf [https://perma.cc/Z53J-YBG3] [hereinafter New Orleans Report on Claims for Damages) ("[R]eviewing claims information is an economical way to learn about the NOPD's behavior and this information produced from the claims process ought to be utilized to shape future policing policy and practice.").

138. See Deborah Witzburg & Megan Carlson, City of Chi. Off. of Inspector Gen., Use of Litigation Data in Risk Management Strategies for the Chicago Police Department 2 (2022), https://igchicago.org/wp-content/uploads/2023/08/Use-of-Litigation-Data-in-Risk-Management-Strategies-for-the-Chicago-Police-Department.pdf [https://perma.cc/VM7R-JSS2] (identifying "shortcomings related to the collection and management of litigation data involving CPD . . . [that] limit the City's ability to understand areas of litigation risk to the City and to implement responsive improvements to CPD's operations and policies").

139. For a description of ongoing efforts in Chicago, New Orleans, New York City, and Washington, D.C., see infra Appendix A: Law Enforcement Policies and Practices Regarding Litigation Data [hereinafter Appendix A].

140. See Schwartz, What Police Learn, supra note 12, at 852 (describing Chicago's practices in 2010).

141. These nine jurisdictions include: Denver, Colorado; Detroit, Michigan; Farmington, New Mexico; Los Angeles, California; Los Angeles County, California; Nashville, Tennessee; Portland, Oregon; Seattle, Washington; and Wallkill, New York. See infra Appendix A. But see Email from Jill Fitcheard, Exec. Dir., Nashville Cmty. Rev. Bd., to the author (Jan. 22, 2024) (on file with the *Columbia Law Review*) (reporting that the

New Orleans, New York, and Washington, D.C.—the police department and/or their auditor is being pushed to institute policies to investigate allegations in lawsuits and review litigation files, but those practices are not yet being followed.[142] The remaining seven jurisdictions report that their internal affairs division and/or oversight agency does not typically investigate allegations of misconduct made in lawsuits, nor do they typically review depositions and other litigation data for lessons.[143]

To supplement these findings, I sought information from police oversight officials in fifty-seven additional jurisdictions about the extent to which they and/or their police departments investigated lawsuit allegations and included information from lawsuits in their investigations. These police oversight officials are all members of the National Association for Civilian Oversight of Law Enforcement (NACOLE), and the executive director of NACOLE provided me with their contact information.[144] I heard back from officials in thirty-six agencies: Seventeen reported investigating lawsuit allegations or reviewing litigation information;[145] nineteen reported that they did neither.[146]

Nashville Community Review Board, which reviews the police department's internal affairs investigations, has not seen litigation documents—lawsuit complaints, deposition transcripts, expert reports, or other discovery—in the files they review); Email from Max Huntsman, Inspector Gen., L.A. Cnty., to the author (Jan. 21, 2024) (on file with the *Columbia Law Review*) (reporting that the Los Angeles Sheriff's Department "generally does not respond in an evidence based way to allegations or evidence produced in civil lawsuits . . . [and] [w]hen evidence is produced in civil litigation it is almost never meaningfully examined"). For descriptions of these departments' policies, see infra Appendix A.

142. See supra notes 136–139 and accompanying text.

143. These seven jurisdictions include: Albuquerque, New Mexico; Cincinnati, Ohio; Oakland, California; Philadelphia, Pennsylvania; Prince George's County, Maryland; Sacramento, California; and San Jose, California. For descriptions of these departments' policies, see infra Appendix A.

144. See Email from Cameron McEllhiney, Exec. Dir., NACOLE, to the author (Jan. 19, 2024) (on file with the *Columbia Law Review*). This Essay does not contend that these departments' practices are representative of practices nationwide. Indeed, there is reason to believe that these departments are more likely to be attentive to litigation information because they have some form of police oversight. See supra notes 133–135.

145. These seventeen jurisdictions include: Anaheim, California; Baltimore, Maryland; Berkeley, California; Boston, Massachusetts; Davis, California; Dayton, Ohio; Eugene, Oregon; Fairfax County, Virginia; Knoxville, Tennessee; La Mesa, California; Long Beach, California; Louisville, Kentucky; Pasadena, California; Richmond, California; Riverside, California; Rochester, New York; and Sonoma County, California. For descriptions of these departments' policies, see infra Appendix A.

146. These nineteen jurisdictions include: Albany, New York; Alexandria, Virginia; Ann Arbor, Michigan; Austin, Texas; Boulder, Colorado; Charlottesville, Virginia; Columbus, Indiana; Fort Worth, Texas; Fresno, California; Indianapolis, Indiana; King County, Washington; Miami, Florida; Miami-Dade, Florida; Sacramento County, California; Salt Lake City, Utah; San Diego, California; Spokane, Washington; St. Paul, Minnesota; and Syracuse, New York. Of the nineteen, six—Ann Arbor, Charlottesville, Miami, Miami-Dade, Sacramento County, and San Diego—represented that their oversight agency did not investigate lawsuit allegations or review litigation information but did not know the practices

This discussion should not be considered a comprehensive or definitive study of the frequency with which police departments across the country investigate lawsuit allegations or review information unearthed in litigation. It does reveal, though, that many police departments—including those in Albuquerque, Austin, Chicago, Cincinnati, Fort Worth, Indianapolis, New York City, Philadelphia, Sacramento, Salt Lake City, San Jose, and Washington, D.C., among other places—do not have functioning policies to investigate lawsuit allegations and review litigation information and that departments with such policies may not adhere to them.

B. *Two Possible Claims*

Police departments' disregard of lawsuit complaints and the information unearthed during discovery and trial should be considered a sufficient basis for a *Monell* claim that policymakers have failed to adequately supervise or investigate their officers. This novel *Monell* theory actually encompasses two types of claims: a failure to investigate lawsuit allegations and a failure to review information unearthed during litigation in the course of internal affairs investigations and supervision of officers.

1. *Failure to Investigate Lawsuit Allegations.* — Every circuit has recognized that a police department's failure to investigate citizen complaints made against them and their officers can support a *Monell* claim.[147] As the Ninth Circuit explained in *Hunter v. County of Sacramento*, "for purposes of proving a *Monell* claim, a custom or practice can be supported by evidence of repeated constitutional violations which went

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of their police departments' internal affairs divisions in this regard. For descriptions of these departments' policies, see infra Appendix A.

147. See Baez v. Town of Brookline, 44 F.4th 79, 83 (1st Cir. 2022) ("'[D]eliberate indifference may be inferred' if a municipality receives 'repeated complaints of civil rights violations . . . followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents.'" (second alteration in original) (quoting Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995))); Cordova v. Aragon, 569 F.3d 1183, 1194 (10th Cir. 2009) ("A failure to investigate or reprimand might . . . cause a future violation by sending a message to officers that such behavior is tolerated."); Parrish v. Luckie, 963 F.2d 201, 205 (8th Cir. 1992) (finding a police department "discouraged, ignored, or covered up" misconduct allegations based on evidence that the department only investigated citizen complaints that were in writing and submitted under oath and did not notify the chief of uses of force unless a lieutenant or sergeant determined the force was unwarranted); Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991) ("The inference that a policy existed may . . . be drawn from circumstantial proof, such as . . . evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had used excessive force in violation of the complainants' civil rights." (citation omitted)); Vukadinovich v. McCarthy, 901 F.2d 1439, 1444 (7th Cir. 1990) (recognizing a *Monell* claim for failure to investigate citizen complaints but finding no proof of such a claim in that case); Spell v. McDaniel, 824 F.2d 1380, 1394 (4th Cir. 1987) (affirming a jury verdict against the municipality based on voluminous evidence, including "that specific instances of police brutality during the relevant time period were frequent but that complaints about them were consistently dismissed or disregarded, frequently with but cursory investigation"); see also infra notes 148–157.

uninvestigated and for which the errant municipal officers went unpunished."[148] The failure to investigate citizen complaints has been used as evidence supportive of different theories of *Monell* liability, including an unconstitutional custom, a failure to supervise, a failure to investigate, a failure to discipline, and policymakers' ratification of illegal conduct.[149]

Consider, as just one example, *Cox v. District of Columbia*.[150] James Cox was pulled over by D.C. police officer Barry Goodwin and assaulted by Officer Goodwin and other officers on the side of the road.[151] Cox sued Goodwin and another officer for excessive force and the District of Columbia for failing to effectively investigate and discipline its officers.[152] In support of his *Monell* claim, Cox introduced evidence that the city's newly created Civilian Complaint Review Board (CCRB), responsible for investigating citizen complaints, was so underfunded and understaffed that it had a backlog of approximately 1,000 cases out of the 1,742 complaints it had received.[153] One of those uninvestigated complaints,

148. 652 F.3d 1225, 1236 (9th Cir. 2011).

149. See, e.g., Stewart v. City of Memphis, 788 F. App'x. 341, 344 (6th Cir. 2019) ("To establish that a municipality has ratified illegal actions, a plaintiff may prove that the municipality has a pattern of inadequately investigating similar claims. Importantly, there must be multiple earlier inadequate investigations and they must concern comparable claims." (citations omitted) (citing Burgess v. Fischer, 735 F.3d 462, 478–79 (6th Cir. 2013); Leach v. Shelby Cnty. Sheriff, 891 F.2d 1241, 1248 (6th Cir. 1989))); Estate of Roman v. City of Newark, 914 F.3d 789, 800 (3d Cir. 2019) (denying a motion to dismiss a failure-to-supervise claim because the complaint included allegations that policymakers refused to create a well-run Internal Affairs Department and inadequately investigated citizens' complaints); Piotrowski v. City of Houston, 237 F.3d 567, 581–82 (5th Cir. 2001) ("Self-evidently, a City policy of inadequate officer discipline could be unconstitutional if it was pursued with deliberate indifference toward the constitutional rights of citizens. . . . One indication might be a purely formalistic investigation in which little evidence was taken, the file was bare, and the conclusions of the investigator were perfunctory."); *Vann*, 72 F.3d at 1049 (2d Cir. 1995) ("An obvious need [for more or better supervision] may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents."); Vineyard v. County of Murray, 990 F.2d 1207, 1212 (11th Cir. 1993) (finding proof of a failure to supervise and discipline based on evidence that the sheriff's department did not log complaints, that the sheriff sent two officers who were the subjects of a citizen complaint to investigate that complaint, and that no police report was filed regarding the incident); Harris v. City of Pagedale, 821 F.2d 499, 501–05 (8th Cir. 1987) (finding evidence of "a municipal custom of failing to receive, investigate and act on citizen complaints" of sexual misconduct because the city received many such allegations but "did not investigate or respond to citizen complaints of sexual misconduct by police officers in any meaningful way").

150. 821 F. Supp. 1 (D.D.C. 1993), aff'd, No. 93-7103, 1994 WL 609522 (D.C. Cir. Oct. 28, 1994).

151. Id. at 4.

152. Id. at 3.

153. Id. at 7.

filed when Officer Goodwin was still a probationary employee, alleged that Goodwin had used excessive force.[154]

The district court found that the city's failure to investigate so many citizen complaints was a "patently inadequate system of investigation of excessive force complaints" amounting to "a custom or practice of deliberate indifference."[155] The district court also concluded that the city's unconstitutional practice or custom caused Cox's injuries, both because Goodwin might not have remained on the force had the city investigated the citizen complaint filed against him when he was a probationary employee and because the backlog of uninvestigated citizen complaints "permit[ted] serious misconduct to go unchecked."[156] The court of appeals affirmed, finding no fault in the district court's conclusions.[157]

A police department's systematic failure to investigate allegations in lawsuits is comparable to a police department's systematic failure to investigate allegations in citizen complaints. The D.C. Circuit concluded in *Cox* that a "pattern of uninvestigated complaints of excessive force" "necessarily show[s] a custom or practice of deliberate indifference" that "would predictably result . . . in further incidents of excessive force."[158] This same conclusion should hold whether the uninvestigated allegations of excessive force are alleged in citizen complaints or lawsuits. In other words, if Cox had been able to show that the D.C. police department did not investigate excessive force allegations in lawsuits as a matter of policy or that, as a matter of practice, most lawsuit allegations went uninvestigated, that evidence would reflect a deliberate indifference that would predictably lead to the constitutional violation of Cox's rights.

Indeed, several courts have recognized that a police department's failure to investigate lawsuit allegations can support a *Monell* claim for failure to investigate or supervise. *Fiacco v. City of Rensselaer*, a Second Circuit decision, appears to be the earliest to rule in a plaintiff's favor on this type of claim.[159] Mary Fiacco was assaulted during the course of her arrest, and she sued the officers for excessive force and the city for failure to supervise.[160] Like the plaintiff in *Cox*, Fiacco argued that the police department's failure to investigate allegations of police brutality amounted to deliberate indifference.[161] Notably, the prior allegations Fiacco alleged

154. Id. at 9–10.

155. Id. at 13.

156. Id. at 19.

157. See Cox v. District of Columbia, No. 93-7103, 1994 WL 609522, at *2 (D.C. Cir. Oct. 28, 1994).

158. Id. at *1–2.

159. 783 F.2d 319, 326–27 (2d Cir. 1986); see also Beh, supra note 35, at 230 ("*Fiacco v. Rensselaer* was one of the first cases to hold that a failure to investigate prior complaints may evidence deliberate indifference." (footnote omitted)).

160. *Fiacco*, 783 F.2d at 321.

161. See Beh, supra note 35, at 231 ("Fiacco advanced the theory that the failure to exercise reasonable care in investigating prior complaints demonstrated deliberate

went uninvestigated were not citizen complaints but, instead, "consisted principally of notices of claims that had been filed against the City alleging police brutality"—in other words, the legal notices of claims that were prerequisites for civil suits.[162] Fiacco introduced evidence of five notices of claims that had been filed in the twenty-two months before her arrest, testimony of the five claimants, and the chief's testimony that he "had conducted as much investigation as he thought necessary" with regards to these notices of claims—which in some cases amounted to speaking with the accused officer but never involved taking written statements from the claimants or adding notations in the officers' files that the claims were made.[163]

A jury ruled in Fiacco's favor on the § 1983 claims against the officers and the city; the Second Circuit affirmed the district court's denial of a directed verdict against Fiacco, concluding that a jury could reasonably have found both that the officers violated her constitutional rights and that there was "a policy of negligent supervision that rose to the level of deliberate indifference to the use by City police officers of excessive force in violation of constitutional rights."[164] In upholding the jury's verdict against the city, the Second Circuit concluded that the failure to investigate these notices of claims "would have been viewed by the officers, and should be viewed by an objective observer, as reflecting an indifference by the City to the use of excessive force."[165]

A district court in Pennsylvania similarly concluded that a police department's failure to investigate lawsuit allegations could support a *Monell* claim. In that case, Exeter Borough Police Sergeant Leonard Galli entered the plaintiff's home without permission or a warrant.[166] In support of her claim that "the municipality had a custom of allowing officers to perform illegal searches,"[167] the plaintiff introduced evidence that Sergeant Galli had been sued four times before, and that police officials did not investigate the allegations in those suits or track lawsuits filed against officers.[168] This evidence—in conjunction with evidence that the

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indifference to police brutality and the municipality's responsibility to supervise its officers.").

162. *Fiacco*, 783 F.2d at 323. New York's law requiring people to file notices of claim before filing suit can be found at N.Y. Gen. Mun. Law § 50-e (McKinney 2025).

163. *Fiacco*, 783 F.2d, at 330–31.

164. Id. at 323.

165. Id. at 331.

166. See Salerno v. Galli, No. 3:07-cv-2100, 2009 WL 3245532, at *1–2 (M.D. Pa. Oct. 7, 2009).

167. Id. at *8.

168. See Plaintiff's Counter Statement of Facts in Opposition to the Defendants' Statement of Material Facts as to Which No Genuine Issue Remains to Be Tried ¶¶ 20–22, *Salerno*, No. 3:07-cv-2100 (on file with the *Columbia Law Review*). The six people named in Plaintiff's Counter Statement of Facts previously sued Sergeant Galli in four different suits. See Complaint at para. 5, Slavoski v. Fernandes, No. 3:05-cv-00646-TIV (M.D. Pa. filed Mar. 31, 2005), 2005 WL 917187; Complaint at para. 5, Esposito v. Galli, No. 4:04-cv-0475-JEJ

department did not have policies setting out how to obtain a warrant, when a warrantless entry might be justified, or how to accept citizen complaints against officers—was enough in the court's mind to support a finding that the chief and municipality "had constructive knowledge that constitutional violations were being committed, but admittedly took no action to prevent or deter such actions from occurring."[169] Accordingly, the court denied the municipality's motion for summary judgment on the *Monell* claim.[170]

Other courts have ruled against plaintiffs on *Monell* claims alleging the failure to investigate lawsuit allegations but have suggested that such claims are viable if properly supported. For example, in *Outlaw v. City of Hartford*, Tylon Outlaw sued two Hartford police officers for using excessive force against him and sued the City of Hartford for failing to supervise its officers regarding the use of force.[171] Among the evidence Outlaw used to support his *Monell* claim was a list of sixty-six lawsuits filed against the city and its officers between 1998 and 2005, and eighty-seven legal claims submitted to the city's insurer.[172] The district court granted summary judgment to the city on the *Monell* claim and the court of appeals affirmed. The Second Circuit explained that the filed lawsuits and claims "might have led to evidence from which an inference of deliberate indifference to excessive force could properly be drawn, but as noted by the district court, there was no evidence as to the facts underlying those claims or how thoroughly they were investigated by the City."[173] Although the plaintiff lost his *Monell* claim in *Outlaw*, the Second Circuit's analysis suggests that, had he been able to show that the prior lawsuits included similar allegations of excessive force and that those allegations were not investigated by the police department, that evidence could have established a failure to investigate or supervise.

A case from the Southern District of Mississippi also suggests the viability of this type of *Monell* claim if properly supported. In *Peters v. City of Biloxi*, the plaintiff's failure-to-train claim relied on evidence of at least twelve lawsuits alleging assault, false arrest, or brutality.[174] The court concluded that the lawsuit allegations were insufficient to establish policymakers' deliberate indifference, observing that "[a]bsent additional evidence that [the city's] efforts to evaluate the claims 'were so superficial as to suggest that its official attitude was one of indifference to the truth of

(M.D. Pa. Mar. 9, 2007), 2004 WL 2277624; Defendants' Reply to Plaintiffs' Brief in Opposition to Their Motion for Summary Judgment at 3–4, Yochem v. Exeter Borough, No. CV-00-1494 (M.D. Pa. filed Nov. 6, 2002); see also Morrison v. Galli, No. 3:96-cv-00931-TIV (M.D. Pa. dismissed Nov. 26, 1996).

169. *Salerno*, 2009 WL 3245532, at *9.

170. See id.

171. 884 F.3d 351, 356–57 (2d Cir. 2018).

172. Id. at 375.

173. Id. at 379–80.

174. See 57 F. Supp. 2d 366, 378 (S.D. Miss 1999).

the claim,' plaintiffs cannot survive summary judgment simply with evidence of prior lawsuits."[175] Although the district court dismissed the plaintiff's claim at summary judgment, its analysis—like the analysis in *Outlaw*—suggests the *Monell* claim could have succeeded with evidence that the city made no effort to investigate the allegations in those twelve lawsuits.

2. *Failure to Review Litigation Information.* — Even if a department investigates allegations in lawsuits brought against it and its officers in the same manner as it investigates citizen complaints, a plaintiff may still have a viable *Monell* claim if the department does not review available information unearthed during the course of litigation—depositions and affidavits of the parties and witnesses, documents, video evidence, expert reports, and trial transcripts—that would fill meaningful gaps in its internal affairs investigations or inform supervision of officers.

Courts have ruled that perfunctory internal affairs investigations—in which investigators fail to interview available witnesses or take account of relevant information—can be a basis for *Monell* liability. For example, in *Caldwell v. City of San Francisco*, the district court ruled that a jury could find a custom or practice of failing to adequately investigate and act on citizen complaints based on evidence that investigators did not contact witnesses and credited police officer statements over the statements of the complainants without justification.[176] In *Forrest v. Parry*, the Third Circuit found sufficient evidence to support failure-to-supervise and -discipline claims against the City of Camden because the police department's internal affairs division had a backlog of hundreds of uninvestigated claims; sustained only about 1% of complaints brought against its officers; and conducted "seriously deficient" investigations in which "the investigator did not interview witnesses, but rather solely based the determination on the incident reports authored by the officers involved."[177] In *Noble v. City of Camden*, evidence that excessive force complaints were rarely sustained and that internal investigators were not impartial and did not conduct thorough investigations led the district court to conclude that a reasonable jury could find the city had a custom or policy of inadequate investigations that amounted to deliberate indifference.[178] In *Hogan v. Franco*, a district court in the Northern District of New York found "a lack of supervision and a deliberate indifference to the truth" when, in response to an excessive force complaint, the investigation consisted of asking the involved officer to submit a written

175. Id. (citation omitted) (quoting Fiacco v. City of Rensselaer, 783 F.2d 319, 328 (2d Cir. 1986)).

176. No. 12-cv-01892-DMR, 2020 WL 7643124, at *16–17 (N.D. Cal. Dec. 23, 2020).

177. 930 F.3d 93, 102 (3d Cir. 2019).

178. 112 F. Supp. 3d 208, 223 (D.N.J. 2015).

statement; investigators never questioned the plaintiff, witnesses, or other officers.[179]

If systematically ignoring witnesses and other information during an internal affairs investigation is sufficient evidence of a failure to adequately investigate or supervise, then ignoring sworn depositions, affidavits, and other evidence in litigation files should be, as well. Admittedly, this type of *Monell* claim will not likely be successful in jurisdictions where internal affairs investigators are conducting rigorous investigations of their own—interviewing the complainant and witnesses and examining video and other evidence. Under such circumstances, litigation files might still "create a fuller and more complete record"[180] worthy of review, but failing to do so likely would not amount to deliberate indifference.[181] Yet, in a jurisdiction where investigators regularly fail to interview—or conduct cursory interviews of—complainants and key witnesses while disregarding transcripts of seven-hour, sworn depositions of those complainants and witnesses available in litigation files, that disregard should support a claim for failure to supervise or investigate. Under such circumstances, ignoring readily available information that would fill the gaps in internal affairs investigations or assist in officer supervision amounts to a "deliberate indifference to the truth."[182]

3. *Possible Counterarguments.* — Municipal defendants will likely oppose these types of *Monell* claims. Following are three possible arguments defendants might raise and reasons these arguments should not carry the day.

First, officials might argue that they do not need to investigate allegations made in lawsuits or review information unearthed during litigation because the attorneys defending the officers and city and/or their insurers are already doing this work.[183] Note that this same argument is not employed by police departments to absolve themselves of the obligation to investigate citizen complaints. In other words, police departments have not regularly or successfully argued that their failure to investigate a citizen complaint is justified by the fact that the city's attorneys defended against a lawsuit containing the same allegation. This is likely because city attorneys and insurers have different perspectives and priorities than police department internal affairs investigators. City attorneys and insurers have reason to approach lawsuit allegations with an

179. 896 F. Supp. 1313, 1320–21 (N.D.N.Y. 1995).

180. Standards and Guidelines for Internal Affairs, supra note 125, at 45.

181. See supra notes 80–83 and accompanying text (describing court decisions finding deficiencies in internal affairs investigations but ruling that the municipalities were not deliberately indifferent to their citizens' rights).

182. *Hogan*, 896 F. Supp. at 1320–21.

183. In 2004, Portland's police chief raised this objection—unsuccessfully—when the city's police auditor proposed investigating lawsuit allegations for policy violations. See Schwartz, What Police Learn, supra note 12, at 851 ("The [Portland] chief of police argued it was the job of the city attorney, not the police auditor, to investigate lawsuits.").

eye toward minimizing legal liability in a case, not with an eye toward identifying policy violations that merit retraining, increased supervision, or discipline.[184] Thus, city attorneys' investigations are no substitute for a police department's assessment of alleged wrongdoing.

If a court was nevertheless hospitable to the notion that a police department's obligations to investigate and supervise its officers can be satisfied if a city attorney or insurer examines lawsuit allegations and evidence in the course of their legal defense and passes along any relevant information to the police department, then such an argument should open up the nature of those communications to review. Relevant communications could include which lawsuit allegations the city attorney or insurer passed along for internal affairs to investigate; which litigation files the city attorney or insurer passed along for the police department to consider; and what police department policymakers did with this information.[185] A cursory review of policy violations or supervision implications in the course of defending a lawsuit should be insufficient to defeat a failure-to-supervise or failure-to-investigate claim.[186]

Second, police officials might argue that their failure to investigate lawsuit allegations or review information unearthed during discovery is an insufficient basis for a *Monell* claim if the department does investigate citizen complaints. The success of this argument should depend on the number and type of lawsuits and citizen complaints filed against the department and its officers, and the quality of the department's internal affairs investigations.

Imagine, for example, that a person was beaten by a police officer and brought a *Monell* claim against the city for failure to supervise. Imagine that only one officer from that department had been sued in the prior ten years, and that suit alleged false arrest. Imagine also that, during that same decade, one hundred citizen complaints had been filed against the

184. E.g., James G. Kolts et al., The Los Angeles County Sheriff's Department 193–94 (1992), https://assets-us-01.kc-usercontent.com/0234f496-d2b7-00b6-17a4-b43e949b70a2/d0440b59-d911-4ce1-9355-d22c6bd240c9/KoltsOriginal.pdf [https://perma.cc/96TB-QC3E] ("We wonder at times if County Counsel, representing the LASD, can strongly advocate terminating an officer for misconduct knowing at the same time that the fact of termination may increase the exposure of the County in litigation arising from that misconduct.").

185. Discovery on this topic might raise objections on the ground that those communications are protected by the attorney–client privilege. Yet information about which lawsuit claims and discovery documents were referred to the police department should not be understood as privileged communications—discovery would concern the prior discovery and filed litigation materials, not counsel's advice or work product regarding those cases. Moreover, if a court found this information was protected by attorney–client privilege, the privilege should be waived if the police department relied on this evidence to show it adequately investigated lawsuit allegations.

186. See, e.g., Fiacco v. City of Rensselaer, 783 F.2d 319, 331 (2d Cir. 1986) (finding that the police chief's "uninterested and superficial" treatment of citizen complaints "would have been viewed by the officers, and should be viewed by an objective observer, as reflecting an indifference by the City to the use of excessive force").

department's officers, including several allegations of excessive force, and that each of those allegations had been exhaustively investigated by internal affairs. Under these circumstances, the plaintiff presumably could not establish that the department's failure to investigate the allegations in that one false arrest lawsuit amounted to deliberate indifference or caused the constitutional violation at issue in the instant case.

Yet adjusting this scenario in one or more respects should make this novel *Monell* theory more likely to succeed. Imagine, instead, that thirty lawsuits had been filed against the department and its officers over the past decade and that several of those lawsuits included excessive force allegations and/or named the officer who was a defendant in the instant case. Imagine, also, that only fifteen citizen complaints had been filed over that decade and that few of those complaints concerned excessive force allegations. Finally, imagine that the police department's internal affairs investigations were often cursory and did not involve interviewing the complainant or other eyewitnesses, and that information unearthed during litigation was far more complete. Under these circumstances, the department's failure to investigate lawsuit allegations or review litigation data should not be cured by the internal affairs investigations they did conduct—both because the department did not investigate wrongdoing directly relevant to the plaintiff's claims and because their investigations were deficient.

Ultimately, policymakers' disregard of lawsuits will be assessed by courts in conjunction with other evidence of deliberate indifference and causation, and the viability of any *Monell* claim should turn on the strength of all the relevant evidence. The fact that a department investigates citizen complaints should not immunize it from *Monell* liability when relevant information was available in lawsuits and litigation files but was ignored by policymakers and the plaintiff can show that the oversight caused the constitutional violation in question.

Third, municipal defendants might argue that internal affairs investigators do not have the capacity to do the extra work of investigating lawsuit allegations or reviewing information unearthed during discovery. How much of a burden it would actually be for internal affairs investigators to do this type of investigation and review is up for debate and would depend on how many investigators are employed by any given department and how many lawsuits are filed against that department and its officers each year.[187] Yet, even if many lawsuits were filed that needed to be investigated, police departments generally have protocols to distinguish between citizen complaint allegations that need to be fully investigated

187. A recent survey of more than two hundred large law enforcement agencies found that, on average, departments' internal affairs units had three to four full-time sworn officers and processed one hundred complaints annually. See Chris Harris & Sean Perry, Nat'l Internal Affs. Investigators Ass'n, Internal Affairs Survey Report 2 (2022), https://www.niaia.org/assets/docs/2022/Internal%20Affairs%20Survey%20Report%202022.pdf [https://perma.cc/MC4F-CMMT].

and those that allow for more perfunctory investigations, and investigators could presumably apply those same protocols to lawsuit allegations.[188] Reviewing evidence unearthed during discovery and deposition and trial transcripts would admittedly create an additional obligation but would presumably be less time-consuming for investigators than tracking down evidence and finding and interviewing witnesses. As one indication of the feasibility of such practices, multiple police departments of all sizes already have policies to investigate lawsuit allegations and/or review information unearthed in litigation.[189] Ultimately, though, departments cannot shirk their obligation to investigate citizen complaints on the ground that they have too many complaints to review;[190] this argument should be equally unavailing with regard to lawsuits.

C. *An Illustrative Example:* Glasper v. City of Chicago

To imagine how these *Monell* theories might play out in a lawsuit, consider the case filed by Antonie Glasper against the City of Chicago and nine Chicago police officers on August 1, 2016.[191]

Almost one year earlier, on August 19, 2015, Antonie Glasper was spending a quiet afternoon in his apartment on the South Side of Chicago with his eleven-year-old son, his fiancée's twenty-one-year-old autistic son, and his dog, Rozay.[192] Around 2:30 p.m., Glasper was resting and his son and his fiancée's son were playing video games when he heard a loud boom.[193] Several Chicago police officers had broken through Glasper's front door and were swarming into his apartment.[194] Glasper immediately

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188. See id. at 11 (reporting that 75% of more than two hundred large law enforcement agencies surveyed reported having a process to resolve complaints informally). For a discussion of internal affairs investigators' treatment of different types of complaints, see, e.g., Standards and Guidelines for Internal Affairs, supra note 125, at 29–33 (distinguishing between preliminary and complete investigations of citizen complaints).

189. Jurisdictions that report investigating lawsuit allegations or reviewing litigation information include: Anaheim, California; Baltimore, Maryland; Boston, Massachusetts; Davis, California; Dayton, Ohio; Denver, Colorado; Detroit, Michigan; Fairfax County, Virginia; Farmington, New Mexico; Knoxville, Tennessee; Los Angeles, California; Los Angeles County, California; Louisville, Kentucky; Nashville, Tennessee; Pasadena, California; Portland, Oregon; Richmond, California; Riverside, California; Seattle, Washington; Sonoma County, California; and Wallkill, New York. For a description of their practices, see infra Appendix A.

190. See, e.g., Cox v. District of Columbia, 821 F. Supp. 1, 7, 13 (D.D.C. 1993) (finding that the city's underfunded and understaffed Civilian Complaint Review Board, which investigated approximately 1,000 out of the 1,742 citizen complaints it had received, amounted to a "patently inadequate system of investigation of excessive force complaints"), aff'd, No. 93-7103, 1994 WL 609522 (D.C. Cir. Oct. 28, 1994) .

191. For a complete description of the allegations in this case, see Complaint, Glasper v. City of Chicago, No. 1:16-cv-07752 (N.D. Ill. filed Aug. 1, 2016), 2016 WL 317779.

192. Id. at paras 7–9.

193. Id. at para 10.

194. Id. at paras 11–15.

ran into the kitchen and grabbed Rozay.[195] When officers entered the kitchen, guns pointed at Glasper, he begged the officers not to hurt Rozay and asked for permission to put him in his cage or lock him in the bathroom.[196] The officers refused Glasper's requests and ordered him to get on the ground and let go of the dog.[197] When Glasper complied, an officer shot and killed Rozay.[198] Glasper's son and his fiancée's son were standing less than ten feet from Rozay when he died.[199] The officers then handcuffed Glasper, his son, and his fiancée's son.[200] One officer took Glasper into a front bedroom and demanded to know where his drugs were.[201] When Glasper said he did not have any drugs, the officer pulled Glasper's pants to his ankles and subjected him to an anal cavity search.[202] Although the officers did not find anything after searching Glasper's home and body, they charged him with felony possession of a controlled substance.[203] Glasper had to spend several days in jail until he could post bond.[204] Two months later, all charges against Glasper were dismissed.[205]

Glasper retained a lawyer and sued the nine officers who entered his home, shot the family dog, strip searched him, arrested him, and jailed him.[206] The suit alleged that the officers violated his Fourth Amendment rights and that the officers and the city violated Illinois state law.[207] Glasper did not include a *Monell* claim in his complaint. Yet this Essay contends that Glasper could have sued the City of Chicago under *Monell*, arguing that the Chicago Police Department's failure to investigate allegations made in lawsuits and failure to consider information unearthed during litigation amount to deliberate indifference to the constitutional rights of its citizens.

If Glasper had pursued a *Monell* claim along these lines, his attorney could have—even before filing suit—searched through publicly available records for all lawsuits filed against the officers involved in the raid of Glasper's home.[208] Court records available on Bloomberg Law and a

195. Id. at para 13.
196. Id. at paras 18–19.
197. Id. at paras 20–21.
198. Id. at para 23.
199. Id. at para 24.
200. Id. at para 25.
201. Id. at para 26.
202. Id. at paras 27–28.
203. Id. at paras 30, 35–36.
204. Id. at para 37.
205. Id. at para 41.
206. Id. at paras 43–44, 46, 52–54, 57, 60–61, 66.
207. Id. at paras 43, 68.
208. Publicly available information about lawsuits can be found on sites including Westlaw, LexisNexis, PACER, and Bloomberg Law—although these sites are incomplete and are costly to access. See Zachary D. Clopton & Aziz Z. Huq, The Necessary and Proper Stewardship of Judicial Data, 76 Stan. L. Rev. 893, 925–26, 949–51 (2024) (describing the limitations of available litigation data and proposing public disclosure of judicial data).

database of settlements compiled by the *Chicago Reporter* reveal thirty lawsuits naming one or more of the nine officers involved in the raid of Glasper's apartment filed before August 19, 2015, when the raid occurred.[209] Some of the officers involved in the search of Glasper's apartment had been sued multiple times: Officer Armando Ugarte was named in twelve suits filed before August 19, 2015; Officer Anthony Bruno was named in nine; Officer Brian Schnier was named in five; Officer William Lepine was named in four.[210] These thirty complaints tell similar stories of people being unreasonably searched and assaulted while in their homes or driving or walking down the street.[211] Some were thrown against cars or the ground; some were strip searched; some were assaulted if they did not tell the officers where they could find guns or drugs; some were arrested and held for hours or days.[212]

Glasper's attorney could also have searched through public records for information unearthed during the litigation of these thirty cases. The dockets indicate that the parties exchanged discovery in eighteen of the cases.[213] Six of the cases went to trial, where officers, plaintiffs, and witnesses testified and documents, video, and other evidence were almost certainly entered into the record.[214] Much of this testimony and evidence is not available on Bloomberg Law or other databases; discovery is not generally filed with the court, and trial transcripts are not generally printed unless one side appeals.[215] To the extent that discovery and trial materials exist but are not publicly available, Glasper's attorney could seek these materials from plaintiffs' counsel. Glasper's attorney could also access discovery materials that were filed with the court in support of summary judgment motions and oppositions. Among the thirty cases previously filed against the defendants in *Glasper*, five include summary judgment briefings with hundreds of pages of deposition excerpts and discovery appended as exhibits that are available on Bloomberg Law.[216]

Glasper's attorney could have additionally reviewed the courts' decisions. In one of the five cases with summary judgment briefing, *Foltin*

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209. For an overview of these lawsuits' allegations, litigation, and dispositions, see infra Appendix B: *Glasper* Defendants' Past Litigation [hereinafter Appendix B]. The Chicago Reporter database of settlements can be found at Settling for Misconduct: Police Lawsuits in Chicago, Chi. Reporter, https://projects.chicagoreporter.com/settlements [https://perma.cc/28TA-QKF8] [hereinafter Settling for Misconduct] (last visited Jan. 24, 2025).

210. See infra Appendix B.

211. See infra Appendix B.

212. See infra Appendix B.

213. See infra Appendix B.

214. See infra Appendix B.

215. See Clopton & Huq, supra note 208, at 915–18 (describing types of judicial data that are never recorded or made accessible); id. at 918–21 (describing the limitations of judicial data accessible on PACER); id. at 923–25 (describing the limitations of judicial data accessible on commercial databases like Westlaw, LexisNexis, and Bloomberg Law).

216. See infra Appendix B.

v. Ugarte, the district court awarded summary judgment to the plaintiffs.[217] In that case, Foltin alleged that she was the passenger in a car that was pulled over by two officers, including Armando Ugarte, one of the defendants in *Glasper*.[218] The officers told Foltin and the driver to get out of the car and began searching the car.[219] Although Foltin was wearing a lightweight summer dress, and there was no bulge suggesting she had a weapon, the officers called a female officer to come to the scene to search her "just in case."[220] A female officer arrived, instructed Foltin to put her hands on the hood of the police car, then put her hands up Foltin's dress, pulled on her bra, and subjected her to a body cavity search.[221] The officers found nothing illegal in their search of Foltin, the driver, and the vehicle, and released them without charges.[222] At summary judgment, the court ruled that the search of Foltin was unconstitutional: "Although this was a dynamic situation, the officers essentially have admitted that they had no articulable suspicion that Foltin was armed and dangerous . . . ."[223] Of the other four summary judgment motions filed in these thirty cases, one was denied in part, with the district courts concluding that reasonable factfinders could rule for either side, and three, filed by defendants against pro se plaintiffs, were granted.[224]

Finally, Glasper's attorney could have tracked down information about these cases' outcomes. Two of the thirty cases resulted in plaintiffs' verdicts against Ugarte.[225] One was *Foltin*; after the court granted summary judgment to the plaintiffs on liability, a jury awarded Foltin $11,000 in damages.[226] The total paid to Foltin and her attorneys was $162,795.[227] In the other, *McLin v. City of Chicago*, Ugarte and another officer were sued; plaintiffs alleged the officers drove up behind a man named William Hope Jr., and Ugarte's partner shot Hope when he tried to drive away.[228] The jury awarded plaintiffs more than $4.5 million in compensatory damages, and additionally awarded $10,000 in punitive damages against Ugarte and $10,000 in punitive damages against the other officer.[229] Two other cases

217. See No. 09-cv-5237, 2013 WL 3754019, at *1 (N.D. Ill. July 16, 2013).

218. Id.

219. Id. at *2.

220. Id. at *2, *4.

221. Id. at *2.

222. Id.

223. Id. at *4.

224. See infra Appendix B.

225. See infra Appendix B.

226. See Judgement in a Civil Action, *Foltin*, No. 09-cv-5237, 2014 WL 3753246.

227. See Case 09-CV-5237, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/09-cv-5237/ [https://perma.cc/7529-9EA5] (last visited Jan. 24, 2025) (detailing the facts and payment in *Foltin*).

228. See Complaint, McLin v. City of Chicago, No. 1:10-cv-5076 (N.D. Ill. Jan. 30, 2013).

229. The jury intended the $10,000 punitive damages awards to punish the officers for overaggressive policing and encourage them to "stop and think before being active with a

ended in split verdicts, with plaintiffs recovering against defendants not named in *Glasper*.[230] Nineteen cases settled before trial.[231] $6,645,503 was awarded to the plaintiffs in twenty-three cases.[232] Of the seven cases that did not resolve in plaintiffs' favor, two were defense verdicts at trial and five were litigated by pro se plaintiffs and dismissed at summary judgment or for failure to prosecute.[233]

Before Glasper's home was raided, other lawsuits were filed that alleged similar misconduct involving other Chicago police officers. Because it is challenging to search PACER or Bloomberg Law for cases that share similar characteristics—unlawful searches and arrests during warrantless searches of apartments in Chicago, for example—these cases will often be more difficult to find. As a result, lawyers may need to seek out information about factually similar cases from other plaintiffs' attorneys or news stories. But in Chicago, this task is made easier by the *Chicago Reporter*'s database of settlements, which is searchable by case type.[234] That database reveals that—between January 1, 2011, and August 19, 2015, the day Glasper's home was raided—Chicago's officers engaged in conduct that resulted in 155 settlements, totaling more than $8.5 million, in cases alleging its police officers unlawfully searched peoples' homes; sixteen settlements, totaling more than $1.3 million, in cases alleging its police officers hurt or killed family pets; and thirty-nine settlements, totaling more than $1.9 million, alleging its officers unlawfully strip searched people.[235] These prior, factually similar lawsuits could also have supported Glasper's *Monell* claims against Chicago for failure to supervise and investigate.[236]

During discovery, Glasper's attorney could have sought information about Chicago's policies and practices with regards to the investigation of

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gun." Angela Caputo, Cops Rarely Pay Punitive Damages, Chi. Trib., https://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=70a40233-a7f3-41f1-a6ae-13a2dbe8680a [https://perma.cc/7AG8-7CS7] (last visited Jan. 25, 2025) (internal quotation marks omitted) (quoting Robert Mugnaini, juror). But neither Ugarte nor his codefendant paid these punitive damages awards: Following the jury's award, the City of Chicago agreed to resolve *McLin* with a universal settlement that eliminated the punitive damages awards. See id.; Agreed Judgment Order, *McLin*, No. 1:10-cv-5076 ("It is ordered that defendant, City of Chicago, will pay $4,567,828 to plaintiff Jennifer McLin . . . . This total sum to be paid and the additional terms of the stipulation represent full satisfaction of the entire judgment in this matter against all defendants, including attorneys' fees and costs.").

230. See infra Appendix B.

231. See infra Appendix B.

232. See infra Appendix B.

233. See infra Appendix B.

234. See Settling for Misconduct, supra note 209. A similar database tracks lawsuits and other allegations of misconduct against New York City police officers. See Law Enforcement Lookup, The Legal Aid Soc'y, https://legalaidnyc.org/law-enforcement-look-up/ [https://perma.cc/M6YC-G8MV] (last visited Jan. 24, 2025).

235. See Settling for Misconduct, supra note 209.

236. See supra note 173 and accompanying text.

lawsuit allegations and the review of litigation files. Available evidence suggests that Chicago was ignoring information from lawsuits at that time. One year after Glasper filed his case, the DOJ issued a 164-page report finding widespread excessive force and inadequate investigations, accountability, and transparency.[237] One of the DOJ's many findings was that the Chicago police department did not investigate lawsuit allegations or review information unearthed during discovery.

> [I]n excessive force cases, it is not uncommon for the same conduct that [the Independent Police Review Authority (IPRA), the civilian oversight agency at the time] or [the Bureau of Internal Affairs (BIA)] has jurisdiction to investigate to be litigated in a Section 1983 civil rights lawsuit. Where there is an open IPRA or BIA investigation that is also the subject of a parallel civil case, investigators do not appropriately review and incorporate information from that parallel case into their administrative investigation. Moreover, there is no dependable procedure in which new civil lawsuits alleging police misconduct trigger investigations by IPRA or BIA. Indeed, many such complaints never make it to BIA or IPRA for consideration, and even when they do, no disciplinary investigation is automatically opened since a lawsuit is not deemed to satisfy the complainant affidavit requirement[,] [a requirement that a complainant submit an affidavit before any BIA investigation begins]. Though IPRA has the authority to override the affidavit requirement, it rarely exercises it in these circumstances.[238]

Presumably, if Glasper had litigated this *Monell* theory, he would have received information consistent with the DOJ's findings in response to document requests, requests for admission, or depositions.

During discovery, Glasper's attorney could have requested any documentation of internal affairs or civilian oversight investigations of the allegations in the thirty lawsuits against the defendants named in Glasper's case, as well as investigations of claims in all other lawsuits alleging similar misconduct. Glasper's attorney could also have sought discovery reflecting whether the police department reviewed the depositions, discovery, and trial transcripts from those cases and, if so, what actions the department took in response. The DOJ's report suggests that these investigations files would have been woefully incomplete. When the DOJ reviewed Chicago's investigations of misconduct allegations, it found that "the City fails to conduct any investigation of nearly half of police misconduct complaints,"[239] and that, among the misconduct allegations that *were*

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237. DOJ C.R. Div. & U.S. Att'y's Off. N. Dist. of Ill., Investigation of the Chicago Police Department (2017), https://www.justice.gov/d9/chicago_police_department_findings.pdf [https://perma.cc/MUG5-EG5Q] [hereinafter DOJ Investigation of Chicago].

238. Id. at 65–66. As of August 2024, the Chicago Police Department still does not have a functioning system to track lawsuits filed against officers, and the Chicago Law Department does not have a system to track and analyze litigation data. See infra Appendix A.

239. DOJ Investigation of Chicago, supra note 237, at 47.

investigated, "[i]nvestigators frequently failed to collect basic evidence needed for the investigations by failing to interview important witnesses—including the accused officer—and failing to collect information from other court proceedings involving the same incident."[240]

If, as the DOJ's report suggests, the city did not internally investigate the allegations in many or most of these prior lawsuits, Glasper could argue that Chicago's systematic failure to investigate these allegations amounted to deliberate indifference to the constitutional rights of its citizens, akin to the claims in *Cox*,[241] *Fiacco*,[242] and *Salerno*.[243] If the city did investigate some misconduct allegations in these prior lawsuits but systematically ignored information unearthed during the litigation of those cases that would have filled gaps in their internal affairs investigations, Glasper could use this evidence to support failure-to-investigate or -supervise claims, akin to those in *Caldwell*,[244] *Forrest*,[245] *Noble*,[246] and *Hogan*.[247]

Glasper would still need to show causation. In the view of some courts, the failure to systematically investigate allegations of misconduct is enough to survive summary judgment.[248] In the view of other courts, Glasper would need to show that the defendant officers knew that misconduct allegations would not result in any negative employment consequences.[249] Glasper could depose the named officers about how often they had been sued, the outcomes of those cases, and the consequences of those cases for their employment, discipline, and supervision. If the officers testified that they were not aware of the facts or outcomes of those cases, and that lawsuits did not impact their supervision or employment—as New York City police officers have testified[250]—this evidence could support causation.

Glasper might have been able to make an even stronger causation argument; at least one of the officer defendants, Ugarte, might not have remained on the force had the city properly taken account of litigation

240. Id. at 56.

241. See supra notes 150–157 and accompanying text.

242. See supra notes 159–165 and accompanying text.

243. See supra notes 166–169 and accompanying text.

244. See supra note 176 and accompanying text.

245. See supra note 177 and accompanying text.

246. See supra note 178 and accompanying text.

247. See supra note 179 and accompanying text.

248. See supra note 91.

249. See supra note 92.

250. In New York City, police officers have repeatedly testified during depositions that they are unaware of the outcome of lawsuits filed against them. See Schwartz, Shielded, supra note 1, at 212 (describing the deposition of one officer who testified he "did not know how many times he had been sued or details about any of the twenty-two lawsuits that had been filed against him"); see also 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) ("We have deposed many officers who had been sued one, two, three times before, yet had no idea how any of those cases were resolved.").

information. Ten years after the 2012 verdict in *McLin*,[251] the Chicago police superintendent filed disciplinary charges against Ugarte and his partner for repeatedly lying before and during the *McLin* trial about the circumstances of the shooting, and recommended that both officers be fired.[252] Although five members of the Police Commission found Ugarte and the other officer not guilty, three members of the Commission penned a strong dissent, concluding that Ugarte made a knowingly false report after the shooting.[253] The Commission's report suggests the quality of its assessment was impaired by the passage of time in a number of ways: key witnesses who had testified at trial did not testify at the disciplinary hearing; video evidence available at trial was not available at the disciplinary hearing; and the truthfulness of the officers' testimony at trial turned on their statements in an unrecorded interview with a sergeant thirteen years before.[254] For these reasons, the result of the Commission's deliberations might well have been different if the superintendent had filed disciplinary charges immediately after the trial instead of ten years later. If the Chicago Police Department reviewed information from lawsuits filed against its officers, any assessment about whether to discipline or terminate Ugarte would not have turned on the *McLin* case alone. It would also have been informed by evidence that supported the district court's conclusion in *Foltin* that Ugarte and his partner conducted an unconstitutional stop and search, and the allegations pled and discovery unearthed in the ten additional cases filed against Ugarte in the years before the raid of Glasper's apartment. Had Glasper pursued a *Monell* failure-to-supervise or failure-to-investigate claim based on Chicago's disregard of all of this litigation information regarding Ugarte, as well as voluminous information from other lawsuits, a court could have had ample factual and legal basis to deny the city's motion to dismiss or for summary judgment.

III. THE REACH OF *MONELL*'S UNTAPPED POTENTIAL

If courts recognize *Monell* claims based on police departments' disregard of litigation allegations and information, such claims will make

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251. See Jury Verdict, McLin v. City of Chicago, No. 1:10-cv-5076 (N.D. Ill. Jan. 30, 2013).

252. See Tom Schuba, Two Chicago Cops Face Dismissal for Allegedly Lying About 2010 Fatal Shooting, Chi. Sun-Times (Nov. 3, 2022), https://chicago.suntimes.com/2022/11/3/23439411/chicago-police-shooting-officers-fire-dismissal-lie-lying (on file with the *Columbia Law Review*).

253. Armando Ugarte, Case No. 22-PB-3009-1, at 26–27 (Police Bd. of the City of Chi. Oct. 19, 2023) (findings and decisions), https://www.chicago.gov/content/dam/city/depts/cpb/PoliceDiscipline/22PB3009.pdf [https://perma.cc/LG65-VBUV] ("First, we believe that Respondent Ugarte willfully and falsely reported to Detective Johnson that Ugarte stopped or pulled over before entering the parking lot, as reflected on [surveillance footage].").

254. See id. at 5, 10.

it easier to plead and prove municipal liability in the short run. In the longer run, if the threat of such claims inspire police departments to begin investigating lawsuit allegations and reviewing litigation information, police departments could markedly improve the way they supervise and investigate their officers. This Part describes the potential impact of these novel *Monell* theories on municipal liability rulings and on police departments' practices. It then offers reasons to be cautiously optimistic that this *Monell* theory can both expand municipal liability and improve police departments' supervision and investigations of their officers.

A. *Expanding* Monell *Liability*

Crafting a *Monell* claim based on the failure to investigate allegations in lawsuits and/or review litigation information avoids several of the challenges of municipal liability litigation described in Part I.

First, courts considering *Monell* claims for failure to investigate or supervise often discount prior lawsuits if there has not been a judgment in the plaintiffs' favor.[255] Courts have reasoned that settled cases cannot put police officials on notice of the need for better supervision or training about the types of misconduct alleged in the suits because the settlements were entered without acknowledgement of wrongdoing.[256] Yet the outcome of a lawsuit should not be determinative when the *Monell* claim rests on police officials' failure to investigate allegations made in that suit. Instead, this sort of *Monell* claim alleges that policymakers' disregard of lawsuit allegations is, in itself, deliberate indifference to the need to investigate and supervise officers.

Relying on this logic, courts have held that the failure to investigate citizen complaints can be proof of an unconstitutional policy or custom regardless of the complaints' outcomes.[257] This same logic has also been

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255. See supra notes 52–56 and accompanying text.

256. See supra notes 52–56 and accompanying text.

257. See, e.g., Seward v. Antonini, No. 20-cv-9251 (KMK), 2023 WL 6387180, at *27–28 (S.D.N.Y. Sept. 29, 2023) (concluding that a need for more or better supervision can be demonstrated through repeated citizen complaints and lawsuits, regardless of their outcome); Miehle-Kellogg v. Doe, No. 19-cv-4943(GRB)(JMW), 2023 WL 2632452, at *9 (E.D.N.Y. Mar. 24, 2023) (concluding that a reasonable jury could find the municipality was deliberately indifferent because repeated complaints against an officer were "followed by no meaningful attempt . . . to investigate or to forestall further incidents" even though "many of the complaints [against the officer] were deemed not substantiated" (alteration in original) (internal quotation marks omitted) (quoting Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995)) (citing *Vann*, 72 F.3d at 1042–45)); H.H. v. City of New York, No. 11-cv-4905 (NG) (ST), 2017 WL 3396434, at *8 (E.D.N.Y. Aug. 7, 2017) ("Unsubstantiated allegations may form the basis of a deliberate indifference claim where there is evidence to suggest that the investigation into the allegations was inadequate."); Camberdella v. Palm Beach Cnty. Sheriff's Off., No. 14-81258-CIV-MIDDLEBROOKS/BRANNON, 2016 WL 8200464, at *2 (S.D. Fla. Oct. 17, 2016) ("[E]vidence of superficial investigations into claims of police misconduct may establish municipal liability, even when the claims have yet to be adjudicated."); Noble v. City of Camden, 112 F. Supp. 3d 208, 223 (D.N.J. 2015) ("To

applied to *Monell* claims resting on the failure to investigate allegations in notices of claims and lawsuits. In *Fiacco*, for example, the Second Circuit rejected the city's argument that uninvestigated notices of claims did not prove deliberate indifference because none had been adjudicated in favor of the claimants, explaining:

> Whether or not the claims had validity, the very assertion of a number of such claims put the City on notice that there was a possibility that its police officers had used excessive force. . . . The fact that none of the claims had yet been adjudicated in favor of the claimant was not material; if the City's efforts to evaluate the claims were so superficial as to suggest that its official attitude was one of indifference to the truth of the claim, such an attitude would bespeak an indifference to the rights asserted in those claims.[258]

In *Salerno v. Galli*, the district court reached the same conclusion: The chief's failure to investigate allegations in prior lawsuits brought against the defendant sergeant demonstrated deliberate indifference, regardless of the outcome of the suits.[259]

Based on current interpretations of *Monell*, if the plaintiff in *Glasper* pursued a standard failure-to-train or -supervise claim, a court would likely rule that the thirty suits filed against the defendants in *Glasper* did not put the city on notice of a pattern of unconstitutional searches and seizures because only two of the thirty resulted in plaintiffs' verdicts at trial.[260] But if Glasper's failure-to-supervise claim turned on the fact that internal affairs did not investigate the allegations in any of these thirty lawsuits—or the allegations in hundreds of lawsuits filed against other Chicago officers asserting improper searches of homes, unjustified strip searches, and excessive force against family pets—then Glasper should be able to argue that the failure to conduct those investigations amounts to an "official attitude . . . of indifference to the truth of the claim[s]," regardless of the outcome of the suits.[261]

A similar argument should hold regarding Chicago's failure to review information unearthed during discovery and trial. Courts have ruled that settlements are not proof of wrongdoing because a case may be settled for reasons having nothing to do with its merits.[262] But deposition testimony and other evidence exchanged during discovery may be relevant to an internal affairs investigation or the supervision of a department's officers

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demonstrate the City's knowledge and acceptance of police misconduct . . . Plaintiff need only present sufficient evidence that there were numerous allegations of abuse which Defendants knew about and failed to properly investigate.").

258. 783 F.2d 319, 328 (2d Cir. 1986).

259. See No. 3:cv-07-2100, 2009 WL 3245532, at *8 (M.D. Pa. Oct. 7, 2009).

260. See supra notes 54–56 (describing this type of analysis in Buckler v. Israel, 680 F. App'x 831 (11th Cir. 2017)).

261. See *Fiacco*, 783 F.2d at 328.

262. See supra note 52 and accompanying text.

regardless of the ultimate disposition of the case. The systematic failure to review evidence exchanged during litigation that would fill gaps in internal affairs investigations should amount to a failure to investigate or supervise, regardless of the suits' outcomes.

Basing a *Monell* claim on departments' failures to investigate allegations made in lawsuits or review litigation information also avoids common challenges in proving deliberate indifference. When it comes to *Monell* claims for failure to supervise or investigate, subpar or negligent internal affairs investigations do not meet the bar.[263] Instead, *Monell* requires deliberate indifference—as one court put it, "a showing that the official made a conscious choice, and was not merely negligent."[264] Statements made by representatives of many jurisdictions that do not investigate allegations in lawsuits and/or review closed litigation files make clear that these policies and practices are conscious and deliberate.[265] In

263. See supra notes 80–83 and accompanying text.

264. Miehle-Kellogg v. Doe, No. 19-cv-4943(GRB)(JMW), 2023 WL 2632452, at *8 (E.D.N.Y. Mar. 24, 2023) (quoting Jones v. Town of East Haven, 691 F.3d 72, 81–82 (2d Cir. 2012)).

265. See infra Appendix A. For some illustrative examples, see Email from Candee Allred, GRAMA Coordinator/Paralegal, Salt Lake City Police Dep't, to the author (Feb. 20, 2024) (on file with the *Columbia Law Review*) (stating that the Salt Lake City Police Department "does not monitor lawsuits involving officers"); Email from Dena Brown, Div. Manager, Citizen Complaint Auth., City of Cincinnati, to the author (Apr. 24, 2024) (on file with the *Columbia Law Review*) [hereinafter Brown, April 24th Email] ("Per [t]he Cincinnati Police Department, their Internal Investigation Section does not investigate lawsuits. The City of Cincinnati Law Department would handle that."); Email from Beth Commers, Deputy Dir., Hum. Rts. & Lab. Standards, St. Paul Dep't of Hum. Rts. & Equal Econ. Opportunity, to the author (Jan. 22, 2024) (on file with the *Columbia Law Review*) ("Per our City Attorney's office, our police department does not investigate civil lawsuit allegations against the department when we receive a complaint or based on specifics in discovery."); Email from Ann E. Koshy, Legal Advisor, Prince George's Cnty. Police Dep't, to the author (Aug. 21, 2024) (on file with the *Columbia Law Review*) ("Currently, the Internal Affairs Division does not investigate allegations in new lawsuits . . . ."); Email from Diane McDermott, Interim Exec. Dir./Lead Investigator, Albuquerque Civilian Police Oversight Agency, to the author (Jan. 23, 2024) (on file with the *Columbia Law Review*) ("[Internal Affairs] does not seek out information gleaned from litigation; they develop their own information."); Email from Luvimae Omana, Deputy Police Ombudsman, Spokane Off. of Police Ombudsman, to the author (Feb. 13, 2024) (on file with the *Columbia Law Review*) ("Any litigation is handled by the City Attorney's Office or the Prosecutor's Office. . . . [N]either our office nor Internal Affairs reviews information generated during litigation discovery. Internal Affairs may review those materials as needed on a case-by-case basis but not as a general practice."); Email from Richard Riddle, Deputy Chief, Pro. Standards, Indianapolis Metro. Police Dep't, to the author (May 2, 2024) (on file with the *Columbia Law Review*) ("[Internal Affairs] investigates potential departmental policy violations. An investigation by [Internal Affairs] is not dependent on the existence or pendency of a lawsuit[.] . . . We normally do not follow up on internal investigations [with information unearthed in litigation]."); Email from Anne B. Taylor, Chief Deputy City Solic., C.R. Unit, L. Dep't, City of Phila., to the author (Feb. 5, 2024) (on file with the *Columbia Law Review*) ("We certainly have some litigations that are associated with investigated complaints against police, but in terms of all litigations automatically triggering an [Internal Affairs] investigation that does not happen."); Email from LaTesha Watson, Dir., Off. of Pub. Safety

these jurisdictions, establishing deliberate indifference should be relatively straightforward.

Finally, a *Monell* claim based on the failure to investigate lawsuit allegations or review closed litigation files may be more straightforward for plaintiffs to plead and prove than other types of *Monell* claims. Plaintiffs may struggle to plead a standard failure-to-train or failure-to-supervise *Monell* claim that can overcome the Supreme Court's plausibility pleading standard because they do not have access to the department's internal affairs investigations or training materials during the complaint-drafting process.[266] But plaintiffs can track down potential defendants' litigation histories before filing a lawsuit, as was done for the defendants in *Glasper*.[267] Many pleadings, discovery documents, briefs, and decisions will be publicly available on PACER, Bloomberg Law, Westlaw, and LexisNexis, and plaintiffs can seek out the remainder from attorneys who represented the plaintiffs in those prior cases or from news sources.[268] Plaintiffs can depose police officials about whether their department investigates lawsuit allegations or reviews litigation files as a matter of policy or practice.[269] Alternatively or in addition, plaintiffs can submit requests for admission to confirm that the jurisdiction in question does not do so. Plaintiffs can also ask targeted questions during discovery about whether internal affairs investigations were opened regarding the allegations in prior lawsuits against the defendant officers or lawsuits with similar allegations, what those investigative files contained, and whether information generated during the litigation of those cases was incorporated into the department's investigations or supervision.

Although *Monell* claims based on the failure to investigate lawsuit allegations or review litigation information avoid some common challenges with *Monell* liability, they are incapable of addressing others. First, this novel theory should ease the burdens of pleading and proving *Monell* claims for failure to supervise or investigate, but it is unlikely to advance other types of *Monell* claims. Whether this limitation matters will depend on a plaintiff's goals in pursuing a *Monell* claim. Some plaintiffs pursue *Monell* claims to ensure that they will be compensated; a *Monell* claim may be the only avenue for recovery when the involved officers are

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Accountability, City of Sacramento, to the author (Jan. 25, 2024) (on file with the *Columbia Law Review*) ("[W]e do not look into anything involving lawsuits pertaining to public safety personnel. This would fall into the wheelhouse of the City of Sacramento City Attorney's Office.").

266. See Schwartz, Municipal Immunity, supra note 5, at 1213–17 (describing the challenges of pleading *Monell* claims); see also supra notes 94–98 and accompanying text.

267. See supra notes 208–216 and accompanying text.

268. See supra notes 208, 215.

269. Such depositions would likely be noticed under Federal Rule of Civil Procedure 30(b)(6), which would require the municipality to designate a person to "testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6).

unknown, will not be indemnified, or will receive qualified immunity.[270] If a plaintiff's primary goal is recovering against the municipality, it may not matter which *Monell* theory succeeds so long as one of them does. But plaintiffs also pursue *Monell* claims to challenge particular department policies and practices, uncover evidence about those policies and practices, and secure injunctions mandating change.[271] If a plaintiff's primary goal is an order requiring a police department to change its use-of-force policies and trainings, proof of the department's failure to investigate lawsuits or review litigation information may not achieve those goals.

Second, these *Monell* claims may be more difficult to pursue in civil rights ecosystems with fewer plaintiffs' attorneys and less favorable interpretations of § 1983 doctrine.[272] In such jurisdictions, lawsuits may never be filed, or they may be filed pro se and dismissed quickly, or they may be filed by inexperienced attorneys and prosecuted ineffectively. This is not to say that this theory should be reserved for cities like Chicago, which has a robust plaintiffs' civil rights bar, pays tens of millions of dollars to settle police misconduct lawsuits each year, and employs scores of officers who have been sued repeatedly.[273] Courts have found that small departments' failures to investigate misconduct allegations can be the basis for a *Monell* claim. In *Fiacco*, for example, the Second Circuit concluded that five uninvestigated notices of claims against a department that numbered around thirty officers was sufficient to establish deliberate indifference.[274] In *Salerno*, the district court found that a reasonable fact-finder could conclude the police chief was deliberately indifferent based on four uninvestigated lawsuits brought against a sergeant in a three-

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270. See supra note 107 and accompanying text.

271. See supra notes 108–109 and accompanying text.

272. For a discussion of civil rights ecosystems and their impact on whether lawsuits are brought and successful, see Joanna C. Schwartz, Civil Rights Ecosystems, 118 Mich. L. Rev. 1539, 1598–600 (2020) (recognizing that factors including the local jurisdiction's case law and bars to recovery can limit how many successful suits are brought).

273. See Heather Cherone & Jared Rutecki, Repeated Police Misconduct by 141 Officers Cost Chicago Taxpayers $142.8M Over 4 Years, WTTW (Jan. 22, 2024), https://news.wttw.com/2024/01/22/repeated-police-misconduct-141-officers-cost-chicago-taxpayers-1428m-over-4-years (on file with the *Columbia Law Review*) (reporting that of the $295 million paid to resolve lawsuits between 2019 and 2022, nearly $143 million (60%) was paid in cases that named officers whose alleged misconduct led to multiple payouts during that period). For a profile of one prominent member of Chicago's civil rights bar, see Mark Caro, What's the Price of Justice?, Chicago (Oct. 16, 2018), https://www.chicagomag.com/chicago-magazine/november-2018/jon-loevy/ [https://perma.cc/R97S-GPPY] (describing how Jon Loevy, of Loevy & Loevy, has won over $100 million in civil verdicts related to police misconduct and wrongful conviction).

274. See Fiacco v. City of Rensselaer, 783 F.2d 319, 331–32 (2d Cir. 1986). For the size of the Rensselaer Police Department in the 1980s, when *Fiacco* was litigated, see History, City of Rensselaer, https://rensselaerny.gov/police-department/history [https://perma.cc/K5RT-7D7G] (last visited Jan. 23, 2025) ("With summer help in the 1980's the force[] was believed to have peaked at thirty three officers.").

person department and a lack of relevant policies or citizen complaint procedures.[275] But in a smaller jurisdiction, or a jurisdiction with fewer civil rights attorneys, fewer lawsuits filed, and fewer lawsuits that proceed to discovery, there will be less litigation information for police officials to ignore.

Finally, although this *Monell* theory may be easier to plead and prove than other types of *Monell* claims, plaintiffs may still struggle to prove causation—particularly if the municipality receives and investigates many citizen complaints. It would be difficult to prove that a department's failure to investigate lawsuit allegations or review litigation information caused a constitutional violation if the department vigorously investigated other similar claims alleged through the citizen complaint process.

For each of these reasons, a *Monell* claim based on the failure to investigate lawsuit allegations and review litigation information will not circumvent every challenge posed by *Monell*. These theories could not be employed to address all types of government wrongdoing, would not prove successful in every jurisdiction, and do not ease every challenge of municipal liability litigation. Yet for plaintiffs whose primary goal is to establish municipal liability, these theories may prove to be a winning approach.

B. *Improving Internal Investigations and Supervision*

If courts recognize this novel *Monell* theory and begin holding local governments liable for failing to investigate lawsuit allegations or review information unearthed during litigation, police departments would, presumably, adopt policies to investigate lawsuit allegations and review litigation information. If departments were to follow such policies in earnest, this approach could have another profound benefit: Lawsuit allegations and litigation files would put information in the hands of police officials in ways that would effectively override the inadequacies of police departments' processes for investigating and supervising their own officers.[276]

Scores of investigations of police departments' internal affairs processes have uncovered many ways that departments discourage people

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275. No. 3:cv-07-2100, 2009 WL 3245532, at *9 (M.D. Pa. Oct. 7, 2009). For evidence of the size of the Exeter Borough Police Department around 2006, when the incident at issue in the case occurred, see Bureau of Just. Stats., DOJ, Census of State and Local Law Enforcement Agencies (CSLLEA), 2008, Nat'l Archive Crim. Just. Data (2008) (Aug. 3, 2011) (ICPSR 27681), http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681 (on file with the *Columbia Law Review*) (indicating that the Exeter Borough Police Department employed only three individuals at the time).

276. See Rachel Moran, Ending the Internal Affairs Farce, 64 Buff. L. Rev. 837, 853–68 (2016) (describing inadequacies at every stage of internal affairs investigations).

from filing citizens' complaints.[277] In some departments, complaint forms are not available in languages other than English or are difficult to access or submit.[278] In some departments, rules require that citizen complaints be accompanied by a sworn affidavit and prohibit the submission of anonymous complaints.[279] In some departments, officers harass people attempting to file complaints, tell people their complaints are not worth bringing, or refuse to accept complaints altogether.[280]

Requiring police departments to investigate allegations in lawsuits essentially allows people to submit citizen complaints through the courts. To be sure, many people who believe their rights have been violated do

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277. See Schwartz, What Police Learn, supra note 12, at 862–70 (describing the many reasons alleged wrongdoing may not be brought to police officials' attention through citizen complaints or police department reports).

278. See id. at 865 n.143 (describing several Technical Assistance letters from the DOJ to local government officials recommending that civilian complaint processes be made more accessible).

279. See C.R. Div., DOJ, Investigation of the Baltimore City Police Department 140 (2016), https://www.justice.gov/d9/bpd_findings_8-10-16.pdf [https://perma.cc/AZD4-MNKR] [hereinafter DOJ Investigation of Baltimore] ("[The Department] requires complaints alleging many common types of misconduct—including excessive force, abusive language, harassment, false arrest and imprisonment—to be signed, notarized, and filed in person at one of just a few locations throughout the City. . . . [C]omplaints alleging excessive force must be sworn under penalty of perjury."); DOJ Investigation of Chicago, supra note 237, at 47 ("There are provisions in the City's agreements with the unions that impede the investigative process, such as the general requirement that a complainant sign a sworn affidavit and limitations on investigating anonymous complaints . . . ."); DOJ C.R. Div. & U.S. Att'y's Off. W. Dist. of Ky. Civ. Div., Investigation of the Louisville Metro Police Department and Louisville Metro Government 75 (2023), https://www.justice.gov/opa/press-release/file/1573011/dl [https://perma.cc/P6Q5-HY7P] [hereinafter DOJ Investigation of Louisville] ("In the absence of a sworn civilian complaint, only the police chief may initiate an administrative investigation.").

280. See Schwartz, What Police Learn, supra note 12, at 866 n.144; see also, e.g., DOJ Investigation of Baltimore, supra note 279, at 140–41 ("[W]e found examples of BPD officers expressly discouraging civilians from filing complaints, sometimes mocking or humiliating them in the process. Some civilians wishing to alert BPD to officer misconduct had to endure verbal abuse and contact BPD multiple times before investigators would move forward with any investigation."); DOJ Investigation of Louisville, supra note 279, at 77 (finding that "LMPD's complaint intake process discourages reports of misconduct and departs from best practices"); DOJ C.R. Div. & U.S. Att'y's Off. Dist. of Minn. Civ. Div., Investigation of the City of Minneapolis and the Minneapolis Police Department 70 (2023), https://www.justice.gov/d9/2023-06/minneapolis_findings_report.pdf [https://perma.cc/KMQ9-5J6Z] [hereinafter DOJ Investigation of Minneapolis] (describing a case in which a man did not pursue the misconduct complaint he filed because the sergeant assigned to investigate said "the process would take a lot of time, he would have to show up in court, and there would likely not be a consequence for the officer"); DOJ C.R. Div. & U.S. Att'y's Off. Dist. of Mass., Investigation of the Springfield, Massachusetts Police Department's Narcotics Bureau 23 (2020), https://www.justice.gov/opa/press-release/file/1292901/dl [https://perma.cc/4FP6-WRXF] [hereinafter DOJ Investigation of Springfield] (reporting that "members of the public complain that the Department fails to provide residents with clear guidance on how and where they can obtain a complaint form," with one community member reporting having to wait five hours to file a complaint).

not file lawsuits, and those who do face their own challenges.[281] But at least the protocols for filing lawsuits are not determined by police departments' internal affairs divisions and collective bargaining agreements.

The information revealed during litigation also does not suffer from the limitations of internal affairs investigations. The DOJ and other outsiders have found that internal affairs investigators regularly fail to interview key witnesses, probe officers' suspicious or incomplete police reports, or examine all available evidence.[282] As just one example, the DOJ found that Louisville Police Department Internal Affairs investigators often "wait weeks or even months before interviewing involved officers," "often ask leading questions, priming officers to give certain answers," "fail to run down leads, including neglecting to interview potential witnesses," "fail to look into" evidence of other policy violations uncovered during their investigations, and "draw inferences in favor of officers or against civilians that are not supported by the evidence, seeking to justify officers' actions."[283] Officers often enjoy union-negotiated procedural protections that limit investigators' ability to effectively interview officers suspected of misconduct, such as rules that delay any interview for hours or days; allow officers to review body camera footage and other evidence before being questioned; allow officers to take breaks during their interviews; limit the amount of time the interview can last; and limit the amount of time an investigation can take.[284]

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281. See Schwartz, What Police Learn, supra note 12, at 863–64.

282. See, e.g., DOJ Investigation of Baltimore, supra note 279, at 144 ("[I]nvestigators fail to adequately consider evidence and statements from witnesses or other officers that contradict explanations provided by officers accused of misconduct. . . . BPD investigators compromise officer interviews by failing to probe beyond reports the accused officer already provided, and performing unrecorded 'pre-interviews' with accused officers."); DOJ Investigation of Minneapolis, supra note 280, at 75–76 (finding "several files in which it appears there was no investigation at all" and that investigations often "often omit[] obvious and essential steps"); DOJ C.R. Div. & U.S. Att'y's Off. Dist. of N.J., Investigation of the Newark Police Department 38 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [https://perma.cc/E2LE-NCCB] [hereinafter DOJ Investigation of Newark] ("[C]ommunity members reported filing complaints with IA and receiving little or no subsequent contact from investigators. . . . Even minor conflicts between complainant and witness accounts have often been deemed fatal to a complainant's credibility, whereas IA investigators have not similarly probed conflicts between officers' statements or Force Reports."); DOJ Investigation of Springfield, supra note 280, at 24 ("[Internal affairs] investigators are not using basic investigative techniques needed to accurately determine if an allegation of excessive force should be sustained. . . . Often the IIU investigator does not attempt to clarify inconsistencies between or among witness statements, or between oral interviews and officer reports.").

283. DOJ Investigation of Louisville, supra note 280, at 77.

284. For descriptions of these protections, written into Law Enforcement Officers' Bills of Rights and Collective Bargaining Agreements, see Aziz Z. Huq & Richard H. McAdams, Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation, 2016 U. Chi. Legal F. 213, 221–26; Kevin M. Keenan & Samuel Walker, An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers'

Depositions and other discovery conducted by plaintiffs' attorneys who are motivated to unearth relevant details and exploit inconsistencies can fill the gaps in internal affairs divisions' interviews and investigations. Merrick Bobb, former special counsel to the Los Angeles Sheriff's Department (LASD), who regularly compared litigation files with internal affairs investigations during the course of his work, offered this explanation for why it was so important for the Sheriff's Department to review litigation files for lessons:

> Often, with regard to an instance or allegation of police misconduct, it is litigation that produces the fullest record. Until a matter gets to court, all other ways of looking at and making judgments about an incident—the citizen's complaint, the claim, the force review, the administrative investigation—are substantially, if not in effect entirely, internal to the LASD . . . .Without suggesting that bias necessarily creeps in, we nonetheless recognize that objectivity is harder to achieve and repeat, case after case, in a closed environment where information is evaluated only by LASD personnel themselves.
>
> Litigation, on the other hand, introduces new players with very different motivations. There is a strong incentive, certainly on the part of the plaintiff, to dig deeply and generate more detailed and critical information. The civil discovery process, including the taking of depositions and the production of documents, provides even more opportunity for factual development. Cross-examination, heralded as the greatest engine for ascertaining the truth yet devised, is available in deposition as well as trial settings. If information exists, litigation is the likeliest vehicle to ferret it out.[285]

If departments begin reviewing litigation files as part of their investigation and supervision of officers, the weaknesses of internal affairs investigations will become far less consequential.

Jurisdictions that investigate lawsuit allegations and review information unearthed in lawsuits have found that lawsuits fill these very gaps in internal affairs complaints and investigations. Litigation-attentive departments learn valuable information about weaknesses in personnel, policies, training and supervision; take steps to address these weaknesses; and reduce lawsuits, payouts, and harms to community members as a result.[286] The threat of *Monell* liability could cause many more departments to begin learning these types of valuable lessons.

Bills of Rights, 14 B.U. Pub. Int. L.J. 185, 185 (2005); Stephen Rushin, Police Union Contracts, 66 Duke L.J. 1191, 1224–28 (2017).

285. L.A. Cnty. Sheriff's Dep't, Fifteenth Semiannual Report 85–86 (2002), https://assets-us-01.kc-usercontent.com/0234f496-d2b7-00b6-17a4-b43e949b70a2/142e5b3f-c23f-4fb7-8fa9-f8d348b01948/15th%20Semiannual%20Report.pdf [https://perma.cc/WRW3-C2ZU] (footnote omitted).

286. See Schwartz, What Police Learn, supra note 12, at 859–61.

Requiring departments to review lawsuit data may also sidestep union-imposed limits on supervision and discipline. For example, some union agreements impose strict time limits within which an internal affairs investigation must be completed.[287] No such time limits apply to litigation as it is making its way through the courts. If the union-imposed window of time to investigate a claim for disciplinary purposes has elapsed, an officer presumably cannot be disciplined for conduct that emerged during the course of that litigation. But there is no limit on the amount of time that a department can take to review information about officers' conduct relevant to the supervision of that officer or the department more generally.

If the threat of *Monell* liability leads police officials to begin reviewing information unearthed during litigation, those practices could also impact departments' disciplinary decisions. In many cities, discipline is rare; recent studies have found that police departments in Baltimore, Chicago, Houston, Newark, and San Diego sustain fewer than 3% of citizen complaints.[288] Low rates of discipline may be partially attributable to the lack of information that comes out during the course of internal affairs investigations. If evidence is unearthed during litigation that supports complainants' stories or undermines officers' stories, the rate of sustained complaints could very well increase.

Monell claims based on the novel theories proposed in this Essay would not succeed against the police departments that pay attention to information unearthed in lawsuits and act on that information. Yet, in these departments, the threat of *Monell* liability would have encouraged caretaking measures that achieved the doctrine's intended deterrent effect.

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287. See Rushin, supra note 284, at 1258–65 (setting out jurisdictions whose collective bargaining agreements impose time limitations on investigations).

288. See DOJ Investigation of Baltimore, supra note 279, at 146 (finding that the Baltimore Police Department sustained just 2.2% of excessive force allegations and 2.6% of discourtesy complaints); DOJ Investigation of Newark, supra note 282, at 35 (finding that, between 2007 and 2012, Newark Police Department's Internal Affairs Division only sustained one excessive force complaint against its more than one thousand officers); Jo Deprang, The Horror Every Day: Police Brutality in Houston Goes Unpunished, Tex. Observer (Sept. 4, 2013), https://www.texasobserver.org/horror-every-day-police-brutality-houston-goes-unpunished/ [https://perma.cc/NDC6-NJN5] (reporting that, between 2008 and 2013, in Houston, "Internal Affairs sustained just 15—or 2 percent—of the 706 police abuse complaints"); Claire Trageser, Rarely Are San Diego County Police Officers Disciplined After They Injure or Kill, Records Show, KPBS (July 19, 2022), https://www.kpbs.org/news/public-safety/2022/07/19/san-diego-county-police-officers-rarely-disciplined-injure-kill-records-show [https://perma.cc/U3GH-UWCX] (finding that fewer than 3% of officers are disciplined for use-of-force incidents); Officer/Civilian, Civic Police Data Project, http://cpdb.co/findings (on file with the *Columbia Law Review*) (last visited Jan. 25, 2025) (finding that, between 1988 and 2023, just around 2% of 126,781 citizen complaints filed against Chicago Police Department officers were sustained).

C. *The Case for Cautious Optimism*

Having described the full breadth of *Monell*'s untapped potential, this section now considers the impact this novel *Monell* theory will likely have on municipal liability and police departments' practices.

At the outset, it is important to recognize the not-insignificant possibility that, despite its potential, this novel *Monell* theory would have little to no effect on municipal liability or departments' practices. Of course, courts could reject this *Monell* theory altogether. And even if courts recognized the viability of this legal theory, police departments could institute policies to investigate lawsuit allegations and review information that comes out during discovery but fail to follow them with any regularity. These policies could nevertheless be sufficient in courts' views to defeat *Monell* failure-to-investigate and failure-to-supervise claims; courts would find departments' attention to lawsuits suboptimal or even negligent, but not deliberately indifferent; and many police departments would continue to learn little from lawsuits brought against them. In this pessimistic future, plaintiffs would infrequently succeed on these types of *Monell* claims, and police departments would not change their investigation and supervision practices in any meaningful way.

Given many courts' apparent disinclination to find that even highly dysfunctional internal affairs investigation systems amount to deliberate indifference, it is easy to imagine this pessimistic view coming to pass.[289] Yet this Essay finds cause for cautious optimism in the fact that this novel *Monell* theory upends typical information asymmetries in civil rights litigation.[290] Although proof of standard municipal liability theories often resides only in police departments' files, plaintiffs' attorneys can find evidence to support this *Monell* claim by searching on Bloomberg Law or other public sites and by gathering information from other plaintiffs' attorneys. If and when this *Monell* theory is recognized by courts, it may encourage plaintiffs' attorneys, journalists, and other advocacy organizations to collect more litigation data and make it more easily accessible to plaintiffs' attorneys pursuing these types of claims—by, for example, including deposition transcripts and other materials as exhibits in motions submitted with the court (and, thus, available via Bloomberg Law or PACER) or by publishing litigation materials on websites (like that maintained by the *Chicago Reporter*).[291]

There is also cause for optimism in the newfound role litigation information would play in the investigation and supervision of police. Departments will be obligated to investigate detailed allegations of wrongdoing set out in plaintiffs' lawsuits. Police officials will also be forced to take account of information unearthed during discovery by plaintiffs'

289. See supra notes 80–83 and accompanying text.

290. For discussion of these information asymmetries, see supra note 96 and accompanying text.

291. See supra notes 208–209 and accompanying text.

attorneys with "a strong incentive . . . to dig deeply and generate more detailed and critical information" than what emerges during internal affairs investigations.[292] The notion that information unearthed during litigation may serve the plaintiff in the individual case while also educating police officials about policy or training failures should only strengthen plaintiffs' attorneys' incentives to dig deeply. Information revealed to police department officials through litigation should either lead to more thorough investigations and robust supervision of officers (thus achieving the intended deterrent effect of municipal liability claims) or more court findings that departments are deliberately indifferent when they fail to take more decisive action (thus securing municipal liability for the plaintiff).

Ultimately, the influence of this *Monell* theory will depend on the motivations and decisions of courts, police department officials, and plaintiffs' attorneys in any given jurisdiction: whether courts interpret this novel *Monell* claim to demand meaningful review of litigation by police departments; whether police department officials are willing to learn from lawsuits brought against them; and the extent to which plaintiffs and their attorneys take advantage of police departments' newfound attention to lawsuits. But in places and cases where plaintiffs and their attorneys can capitalize on police departments' newfound obligations to review lawsuits, they can use those suits to notify police officials of misconduct and failures in supervision that they cannot afford to ignore.

CONCLUSION

The *Washington Post* found that, between 2010 and 2020, more than $3.2 billion was spent to settle police misconduct claims against twenty-five of the nation's largest law enforcement agencies.[293] Almost half of that amount—more than $1.5 billion—was spent to settle lawsuits against officers named in multiple lawsuits.[294] More than 1,200 officers in these twenty-five jurisdictions had been named in five or more lawsuits. More than 200 officers had been named in ten or more. But, the *Post* found, "[d]espite the repetition and cost, few cities or counties track claims by the names of the officers involved."[295]

This Essay offers a litigation strategy that aims to change this state of affairs. In the short term, pursuing *Monell* claims for failing to investigate lawsuits or review litigation files could make *Monell* claims more feasible to bring in the many jurisdictions that systematically ignore information in

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292. Bobb, supra note 285, at 85.

293. See Keith L. Alexander, Steven Rich & Hannah Thacker, The Hidden Billion-Dollar Cost of Repeated Police Misconduct, Wash. Post (Mar. 9, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/ (on file with the *Columbia Law Review*).

294. Id.

295. Id.

lawsuits brought against them. This litigation strategy may also prompt longer-lasting and more fundamental improvements in police departments' supervision and investigation of their officers by bolstering anemic internal affairs investigations, circumventing union-enforced investigations limits, and putting valuable information into the hands of police department officials.

Perhaps most importantly, this *Monell* theory could achieve these benefits without having to convince courts, city councils, police departments, or union representatives to change their laws, policies, or views. Although the murder of George Floyd in May 2020 inspired police chiefs, elected officials, and judges to proclaim the need for greater police accountability, most efforts to change the law failed in the face of fierce opposition by union officials and law enforcement representatives.[296] The federal government and more than half the states introduced bills to end qualified immunity, but almost all failed.[297] Even efforts to replace *Monell* with vicarious liability—a possibility viewed by Republican senators as preferable to eliminating qualified immunity—have thus far resulted in only one state changing its law.[298] This *Monell* theory may not usher in the type of transformative change that advocates have called for, but it is an incremental, meaningful step that can be taken today. Given the current challenges of succeeding on *Monell* claims, the sorry state of many police departments' internal affairs processes, the desperate need for more government accountability, and the hostility of the Supreme Court, Congress, and state and local legislatures to reform, such incremental steps are critically important to pursue if we are ever to restore the promise of § 1983.

296. See Joanna C. Schwartz, An Even Better Way, 112 Calif. L. Rev. 1083, 1098–99 (2024) (describing the difficulty of changing the law of police accountability in the current political climate).

297. Kimberly Kindy, Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill, Wash. Post (Oct. 7, 2021), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html (on file with the *Columbia Law Review*).

298. See supra notes 111–112 and accompanying text.

APPENDIX A: LAW ENFORCEMENT POLICIES AND PRACTICES REGARDING LITIGATION DATA

The following chart sets out police departments' and auditors' policies and practices with regard to investigating claims in lawsuits and reviewing information generated during litigation. The chart is organized alphabetically by jurisdiction. A star (*) indicates the jurisdiction is one of the twenty-six studied in 2010. All emails to and interviews conducted by the author cited in this Appendix are on file with the *Columbia Law Review*.

Albany, N.Y. "To the best of my knowledge, neither my agency, the Albany Community Police Review Board (CPRB), nor my police department's internal affairs division, the Albany Police Department's Office of Professional Standards, conduct investigations into allegations raised in lawsuits. Nevertheless, the CPRB may utilize information obtained during litigation discovery to supplement investigations of officers or to identify policy and training concerns in the future." Email from Michele Andre, Program Manager, Albany Cmty. Police Rev. Bd., to the author (Jan. 22, 2024).
*Albuquerque, N.M. "When it comes to lawsuits, the director of the [Civilian Police Oversight Agency] sits in on police-related claims reviews to be aware of issues that may relate to training or policy changes. I utilize the information I learn in those meetings to see if any changes need to be made. However, in order for our agency to open an investigation, it does need to come as a result of a citizen complaint; we are unable to self-initiate investigations. Internal Affairs has at times received a referral from City Legal concerning lawsuits that require investigation, but it is relatively uncommon. . . . IA does not seek out information gleaned from litigation; they develop their own information." McDermott, supra note 265.
Alexandria, Va. The "Alexandria, Virginia PD does not" investigate allegations in lawsuits as it would citizen complaints or review information generated during litigation discovery—depositions, expert reports, etc.—to supplement investigations of the officers, or to identify policy and training concerns. Email from Kim Neal, Indep. Policing Auditor, Off. of the Indep. Policing Auditor, City of Alexandria, to the author (Jan. 24, 2024).
Anaheim, Cal. "[Anaheim Police Department (APD)] reports that the [Internal Affairs (IA)] lieutenant is notified whenever a claim or lawsuit comes in. If it happens to be an issue that has not already been on the review protocol radar screen (as, for example, a traffic accident would be), IA will gather information and determine whether a formal investigation is warranted. In short, they do appear to treat these as they would a citizen complaint. APD also reports that IA has a regular feedback loop with a counterpart in both the District Attorney's and City

Attorney's Offices. The folks meet monthly or so, and they will call each other (in both directions) if something (like a shaky testimony problem in court) comes on to the radar screen." Email from Michael Gennaco, Indep. Police Auditor, OIR Grp., to the author (May 2, 2024).

Ann Arbor, Mich. "The Ann Arbor Independent Community Police Oversight Commission generally plays no role in the investigation of incidents involved in litigation. While it is certainly possible that one of our complaints could lead to litigation, we would have no part in the discovery or other litigation processes." Email from Stefani A. Carter, Chair, Ann Arbor Indep. Cmty. Police Oversight Comm'n, to the author (Apr. 23, 2024).

Austin, Tex. "The Office of Police Oversight participates in investigations of administrative policy violations that it receives from members of the public. It does not investigate allegations in lawsuits. . . . The Office of Police Oversight does not review information generated during the discovery process. Our office considers only information provided by Complainants and witnesses and information generated during the administrative investigation process." Email from Gail McCant, Dir., Off. of Police Oversight, City of Austin, to the author (Jan. 26, 2024). The police department does not investigate lawsuit allegations or review information from lawsuits as part of its internal affairs investigations: "[A]ccording to City Legal it would be very uncommon for a new investigation to stem from a lawsuit, simply due to the timing. Per Texas Civil Service Law, we have a 180 day time limit to investigate and administer any potential discipline. Most lawsuits play out beyond this deadline." Email from Jeremy Compton, Commander, Pro. Standards, Austin Police Dep't, to the author (May 21, 2024).

Balt., Md. "Lawsuits regarding police misconduct involving a member of the public are investigated the same as a citizen complaint. If a lawsuit is sent directly to the police department, the lawsuit would be attached to a citizen complaint form and go through the disciplinary process that involves the [Administrative Charging Committee]." Email from Samuela Ansah, Police Accountability Bd. Liaison, Off. of Equity & C.R., City of Balt., to the author (May 7, 2024).

Berkeley, Cal. "We are complaint-driven . . . so when it relates to personnel complaints that may yield to discipline, we cannot simply use a lawsuit (without a complaint) to further investigate it. When there are active hearings (whether civil or criminal) we may have to toll the investigation. We would, however, utilize whatever relevant information there may be from the allegations in lawsuits or any other records there. For policy/procedures/practices reviews, we have more wiggle room and can self-initiate." Email from Hansel Alejandro Aguilar, Dir. of Police Accountability, City of Berkeley, to the author (Jan. 30, 2024).

Bos., Mass. Boston Police Department's Internal Affairs Division "generally" investigates allegations in lawsuits; a lawsuit "is usually viewed as a type of complaint, just in a different way." Email from David Fredette, Legal Advisor, Bos. Police Dep't, to the author (May 10, 2024). "[T]he Office of Police Accountability and Transparency (OPAT) is a civilian police oversight agency that investigates allegations of misconduct regarding [Boston Police Department (BPD)] personnel that have been filed with our office by Complainants . . . . [O]ur office does not have any in-house lawyers that review lawsuit allegations or review information unearthed during litigation, but we can review information generated during litigation discovery such as depositions or expert reports if it has been provided to us by the Complainant once the legal matters have concluded. Anything else related to ongoing lawsuits or litigation would be handled by the City of Boston Law Department. We do, however, make note of any policy/training recommendations made by Complainants and work with BPD leadership to try to implement those recommendations." Email from Andrew Cherry, Interim Chief of Staff, Off. of Police Accountability & Transparency, City of Bos., to the author (Apr. 30, 2024).
Boulder, Colo. "Civil litigation against the actions of Boulder Police Department members does not automatically trigger an investigation of police misconduct." Email from Sherry Daun, Indep. Police Monitor, City of Boulder, to the author (Apr. 24, 2024) (on file with the *Columbia Law Review*). Daun also responded "no" to "whether your agency, or your police department's internal affairs division, reviews information generated during litigation discovery—depositions, expert reports, etc.—to supplement investigations of the officers, or to identify policy/training concerns." Id.
Charlottesville, Va. "The [Police Civilian Oversight Board] is prohibited by city ordinance from investigating any matters involving civil lawsuits or that have the potential for becoming part of a civil lawsuit. I do not know if the police department does." Email from Inez M. Gonzalez, Exec. Dir., Police Civilian Oversight Bd., City of Charlottesville, to the author (Apr. 23, 2024). Emails to the Commander of Professional Standards went unanswered.
*Chi., Ill. In 2017, the DOJ found that the Chicago Police Department (CPD) did not investigate lawsuit allegations or review information unearthed during discovery. DOJ Investigation of Chicago, supra note 237, at 65–66. That same year, the city council created an Office of Inspector General and granted it the authority to review lawsuit settlements and judgments as part of its oversight. See Chi., Ill., Mun. Code § 2-56-230(e) (2024) (authorizing the Office of the Inspector General to "review, audit and analyze civil judgments and settlements of claims against members of the Police Department, and to issue recommendations based on its findings to inform and improve or

correct deficiencies in the conduct, or operation of the Police Department"). Two years later, in 2019, in a settlement with the state attorney general, Chicago agreed to "produce and publish an annual report describing certain legal activity involving CPD" and to "analyze the data and trends collected, and include a risk analysis and resulting recommendations." Consent Decree at paras 548–549, Illinois v. City of Chicago, No. 17-cv-6260 (N.D. Ill. Jan. 31, 2019), 2019 WL 398703. But when Chicago's inspector general attempted to analyze litigation data in 2022, she found that "the insufficiency and poor quality of collected litigation data" made it impossible "to readily identify risk areas and conduct in-depth analyses as recommended by subject matter experts." Witzburg & Carlson, supra note 138, at 14. In 2022, the Chicago Police Department, Law Department, and Mayor all issued statements agreeing with the Chicago OIG's analysis. Id. at 19–21. But, as of August 2024, the Law Department had yet to update its litigation tracking system and the Police Department had yet to implement an early warning system that tracks complaints and lawsuits filed against officers. See Cherone & Rutecki, supra note 273.

An independent agency charged with investigating misconduct allegations against CPD members, the Civilian Office of Police Accountability (COPA), also "ha[s] the authority to initiate misconduct investigations based on lawsuits that are filed against the police department and/or Chicago" and "the ability to review and incorporate discovery materials in our investigations, which can be used to prove or disprove allegations of misconduct and/or make policy or training recommendations to the police department." Email from Andrea Kersten, Chief Adm'r, Civilian Off. of Police Accountability (COPA), City of Chi., to the author (Jan. 22, 2024). The Office of Inspector General is examining the extent to which COPA is fulfilling these and other obligations. See Deborah Witzburg & Tobara Richardson, City of Chi., Public Safety 2024 Outlook on Police Oversight and Accountability 9–10 (2024), https://igchicago.org/wp-content/uploads/2024/01/2024-Public-Safety-Outlook-on-Police-Oversight-and-Accountability.pdf [https://perma.cc/LEG8-XS78]. Chicago's Community Commission for Public Safety and Accountability and District Councils—additional police oversight bodies established by the Chicago City Council in 2021—"have neither the authority nor the resources to investigate allegations in individual lawsuits." Email from Adam Gross, Exec. Dir., Cmty. Comm'n for Pub. Safety & Accountability, City of Chi., to the author (Jan. 22, 2024).

*Cincinnati, Ohio. The Cincinnati Citizen Complaint Authority "does not investigate allegations in lawsuits, nor do[es] [it] review information generated during litigation discovery—depositions, expert reports, etc.—to supplement investigations of the officers, or to identify policy/training concerns." Email from Dena Brown, Div. Manager, Citizen Complaint Auth., City of Cincinnati, to the author (Apr. 23,

2024). "Per The Cincinnati Police Department, their Internal Investigation Section does not investigate lawsuits. The City of Cincinnati Law Department would handle that." Brown, April 24th Email, supra note 265.
Columbus, Ind. "When there are lawsuits against the police department, they are handled exclusively by our insurance company in conjunction with legal. . . . I am unaware of any process, formal or otherwise for discovery, etc. review by the police department staff and I can say with certainty that in the last ten (10) years that I have been with the City, I have never been privy to such information." Email from Aida Ramírez, Dir., Hum. Rts., City of Columbus, to the author (Jan. 22, 2024).
Davis, Cal. "With regard to Davis, it is a small enough agency that I believe that any claim/lawsuit would trigger at least a review by [Davis Police Department] and potentially an investigation." Email from Michael Gennaco, Indep. Police Auditor, OIR Grp., to the author (Apr. 22, 2024).
Dayton, Ohio. When a lawsuit is filed against an officer or the department, it goes to the general counsel for the police department, who then forwards the lawsuit to the city attorney's office along with any investigative materials the department has about the allegations. The general counsel and lieutenant in charge of professional standards have not learned of any allegations of wrongdoing through litigation—they are already made aware of such allegations through officers' self-reporting and through citizen complaints. If information was unearthed in litigation not previously known to the department it would be incorporated into investigations, but the lieutenant responsible for professional standards was unaware of any instances in which new information came out during litigation. Time limits on internal affairs investigations likely mean that information that came out in litigation could not be used for disciplinary purposes. Zoom Interview with Andrew Sexton, Gen. Couns., Dayton Police Dep't, and Lieutenant Eric Sheldon, Pro. Standards Div., Dayton Police Dep't (May 2, 2024).
*Denver, Colo. When Denver's City Attorney receives a notice of claim they send that to the Office of the Independent Monitor (OIM) at the Police Department; if the allegations have not previously been investigated, Internal Affairs will decide whether to open an investigation with input from the Special Counsel and from OIM. When no notice of claim is filed, the lawsuit will be reviewed by this same group to decide whether an internal affairs investigation should be opened. All use-of-force allegations are internally reviewed, so public safety officials usually do not learn about uses of force through notices of claim or lawsuits. But other types of matters—including illegal searches or

discourtesy—often appear only in notices of claim or lawsuits. Approximately 50% of notices of claim concern uses of force, but the other 50% concern these other types of claims. Sometimes there are use-of-force allegations in notices of claim or lawsuits that have previously been investigated, but additional related allegations that are in the notice of claim or lawsuit that were not previously investigated. Closed litigation files are also reviewed; if there is information that arose during litigation that had not emerged during an internal affairs investigation, the investigation can be reopened. Denver public safety leaders also hold a quarterly trends meeting, in which they review notices of claim, lawsuits, complaints, and other information to identify any patterns that suggest policies or trainings that need to be adjusted. See Shea, supra note 122.

*Detroit, Mich. In response to a public records request, the Detroit Police Department (DPD) Office of Internal Affairs (IA) reported "IA investigates allegations of misconduct that derive from lawsuits . . . . When DPD IA receives information from the City Law Department regarding possible misconduct, it will review all relevant information to assess if there is a need for policy or training adjustments." Letter from Monique Smith, Senior Assistant Corp. Couns., Freedom of Info. Act Section, City of Detroit, to the author (Mar. 6, 2024). This appears to be a relatively recent change in policy at least partially inspired by *Washington Post* coverage of lawsuits against the department and its officers. "In Detroit, after receiving questions from The Post about the repeated payments involving [one officer] and [one incident], police officials said they have begun to use the city's claims data to monitor which officers are repeatedly named in lawsuits, to determine if they need additional training or should be reassigned or removed from the force. Christopher Graveline, director of the professional standards unit for Detroit police, said his department as of September is working closely with the city's legal department to identify officers with more than two lawsuits or claims and make sure they are 'flagged' in the department's risk management system. Since The Post started asking the city about its repeat officers in September, 13 officers have been 'flagged' for being sued multiple times and have been subject to 'risk assessments,' according to a department spokesman. 'There wasn't a good communication between the city law and police department. We weren't being aware of settlements and potential judicial findings touching upon our officers,' Graveline said. Graveline, who oversees internal affairs, said the department was often unaware of findings in civil cases, including determinations that officers had withheld evidence." Alexander, Rich & Thacker, supra note 293.

Eugene, Or. "[P]er city code, our office is supposed to receive a copy of any risk claim received by the City, so that we can appropriately follow up on any allegations therein. In practice, all risk claims that

involve police employees are entered into a database shared between our office and [the Eugene Police Department], so that is how we tend to view those allegations; if we see something that we believe requires a full IA investigation, then we can open it based on the information received in the lawsuit. Information generated during discovery is a little more difficult—typically, if the department is subject to a civil lawsuit, that is handled by the City Attorney's office or outside counsel, and we are not brought in. However, we have a very good working relationship with the City Attorney, and our office is sufficiently well-established, that I believe if any new information came up during discovery that that office believed constituted a new complaint or new policy violation (not one that our office had previously investigated), they would let us know." Email from Leia K. Pitcher, Indep. Police Auditor, City of Eugene, to the author (May 3, 2024).
Fairfax County, Va. "It is the policy of the Fairfax County Police Department (FCPD) that all [investigations of] allegations of employee misconduct be performed in a complete, thorough, and objective manner . . . . Alleged or suspected acts of employee misconduct, notices of civil claims filed against the Department or its member(s) as a result of actions performed in their official capacity, violations of Department rules or regulations, and expressions of dissatisfaction with policy, procedure, or practice shall be impartially and thoroughly investigated and documented by all investigating and reviewing authorities." Fairfax Cnty. Police Dep't, General Order: Internal Investigations 1 (2022).
*Farmington, N.M. Farmington Police Department policy provides: "Internal affairs investigations will be conducted on all tort claim notices filed with the City of Farmington related to police action. To preserve the integrity of the investigatory process in tort claim cases, the internal affairs investigation will be conducted separate from any investigation conducted by the City's legal department for claims defenses. In all tort claim cases, a reasonable effort will be made to interview the claimant or the claimant's attorney to obtain sufficient information to make an informed determination of what occurred. When necessary, tort claim investigations may be suspended until a thorough exposition of the facts is obtainable through the discovery or trial process. Tort claim investigations may also be closed, with the ongoing claim or lawsuit continuing to be monitored to determine whether pertinent new information becomes available that merits re-opening the investigation." Farmington Police Dep't, Policy Number 152–01, at 4–5 (2022).

Fort Worth, Tex. "The short answer is no" to questions about whether the oversight agency or police department investigates allegations in lawsuits to supplement investigations or supervision more generally, as they would do for citizen complaints or information unearthed in litigation. "[Fort Worth Police Department] operates with a 180 day time frame to complete an investigation from the date of INCIDENT. This timeline would significantly reduce the likelihood of involvement in civil litigation." Email from Bonycle Sokunbi, Dir., Off. of the Police Oversight Monitor, City of Fort Worth, to the author (Apr. 25, 2024).

Fresno, Cal. "Our office is limited to the review of community complaints, or department identified issues, which result in an internal affairs investigation. I believe anything related to lawsuits or litigation would be addressed by the City Attorney's Office (CAO)." Email from John A. Gliatta, Indep. Reviewer, Off. of Indep. Rev., City of Fresno, to the author (Apr. 22, 2024). "I am not part of the police department, so I am unable to comment on how they address lawsuits. I can say when I review a completed internal affairs investigation, I am able to see all evidence obtained and reviewed by the investigators when arriving at a decision. I should point out the investigation is strictly an administrative investigation in respects to potential department policy violations. The internal affairs file does not contain any material related to a pending lawsuit or civil action." Email from Gliatta, to the author (Apr. 23, 2024).

Indianapolis, Ind. "[Internal Affairs (IA)] investigates potential departmental policy violations. An investigation by IA is not dependent on the existence or pendency of a lawsuit . . . . We normally do not follow up on internal investigations [with information unearthed in litigation]. We have not always been privy to the information during the deposition phase unless there are admissions by the officer under oath." Email from Richard Riddle, Deputy Chief, Pro. Standards, Indianapolis Metro. Police Dep't, to the author (May 2, 2024).

King Cnty., Wash. "[O]ur ordinance [creating the King County Office of Law Enforcement Oversight (OLEO)] states that, as far as OLEO's powers go, only cases that involve use of force can be investigated without a complaint; otherwise, a complaint is required, whether from the community or within the Sheriff's Office. For now, that means we will require a complaint and that lawsuit allegations will not suffice." Email from Tamer Y. Abouzeid, Dir., King Cnty. Off. of L. Enf't Oversight, to the author (May 13, 2024). In response to a question about whether the sheriff's department investigates lawsuit allegations or reviews litigation information, Abouzeid replied: "In practice, I don't really recall seeing them do either; however, I would recommend asking them." Id. Emails to the sheriff's office went unanswered.

Knoxville, Tenn. "With regard to [the Knoxville Police Department], what was once called Internal Affairs has been subsumed under the Office of Professional Standards (OPS). . . . With regard to civil lawsuits, OPS reviews factual allegations made therein to determine if any new, or additional, internal investigation should be done in a particular case. OPS coordinates with the City of Knoxville Law Department in order to do this. . . . OPS reviews information generated during litigation discovery, as provided to it by counsel or the parties." Email from Bruce Guyton, Deputy Chief, Pro. Standards, Knoxville Police Dep't, to the author (May 10, 2024).
La Mesa, Cal. "Allegations that have risen to the level of a lawsuit are not investigated by the Police Department. These matters would be handled by the City Attorney's office and/or an outsourced law firm, if any. . . . [In] a situation where there is an investigation of an officer in progress, with concurrent litigation against the City regarding the same allegation(s)[,] . . . Police Department command staff would be working closely with the City Attorney's Office and/or their outsourced law firm and there would be a two-way sharing of information. Anything obtained or learned as a result pertinent to the investigation of the officer would be provided to Internal Affairs." Email from Ray Sweeney, Chief of Police, La Mesa Police Dep't, to the author (May 6, 2024).
Long Beach, Cal. The City of Long Beach's Office of Police Oversight "does not review or consider lawsuit information as part of [its] review process." Email from Francine Tournour Kerridge, Dir., Off. of Police Oversight, City of Long Beach, to the author (May 1, 2024). According to the commander of the Professional Standards Division of the Long Beach Police Department (LBPD), the LBPD is "made aware of lawsuits via the city attorney's office and if it contains misconduct allegations they will investigate it. They would use depositions and other investigatory documents if it would be helpful to the admin investigation." Email from Tournour Kerridge, to the author (May 6, 2024).
*L.A., Cal. "The [Los Angeles Police Department] does investigate allegations raised in lawsuits as they would citizen complaints . . . . If it's misconduct that's prohibited according to Department policy, then they will investigate that, even if it means re-opening old complaint investigations if new allegations come to light, or if new evidence is discovered that was not available to Internal Affairs (IA) investigators at the time." Email from Florence E. Yu, Assistant Inspector Gen., Complaints Section, Off of the Inspector Gen., L.A. Police Comm'n, to the author (Jan. 22, 2024).

*L.A. Cnty., Cal. "Civil law suits are an invaluable tool for an Inspector General to discharge their duties . . . . Civil law suits both before and after [an] incident were important in the work I have done on [deputy gangs in the Sheriff's Department] and the work done by the Civilian Oversight Commission. If you asked [the Los Angeles Sheriff's Department (LASD)] the same question they would also say [that they evaluate lawsuits for lessons]. However, I believe their answer should be no. LASD charges its 'Constitutional Policing Office' with producing corrective action plans in response to settled lawsuits and monitoring of ongoing lawsuits. This is done through a group under them called 'Risk Management.' Based on my monitoring, I have come to the conclusion that both are Orwellian in that their names do not describe their conduct and their primary function is denying misconduct. Apart from shootings, which are routinely investigated independently from civil matters in a manner that seems to substantially ignore the results and evidence from civil lawsuits, LASD generally does not respond in an evidence-based way to allegations or evidence produced in civil law suits. Their corrective action plans seem generated mainly to reduce future liability by convincing a court they are taking action when no transformative action is taken. When evidence is produced in civil litigation it is almost never meaningfully examined." Huntsman, supra note 141.

Louisville, Ky. "The Special Investigations Division reviews all lawsuits involving [the Louisville Metropolitan Police Department (LMPD)] to determine whether an investigation has been opened regarding the incident. If no investigation has yet been opened, the Major will review to determine whether a request should be made to the Chief of Police requesting that she initiate an administrative investigation. . . . [Whether the department reviews litigation information] would depend on whether the information was provided to LMPD by the attorney handling the litigation. The determination as to who would review any information provided by the attorney would depend on the type [of] information being provided." Email from Lisa Schweickart Jarrett, Assistant Cnty. Att'y, Liason—LMPD Legal Advisor's Off., to the author (May 10, 2024). "We have not used civil litigation as a source." Email from Edward W. Harness, Inspector Gen., Louisville Off. of Inspector Gen., to the author (May 6, 2024).

Mia., Fla. Adam Saper, Assistant Dir., City of Miami Civilian Investigative Panel, reports that their office has a 180–day statute of limitations to complete investigations, so it would be rare that they would receive any information about litigation or the discovery process. Telephone Interview with Adam Saper, Assistant Dir., City of Mia. Civilian Investigative Panel (May 6, 2024). A request for information from Miami police Internal Affairs went unanswered.

Mia.-Dade Cnty., Fla. The Miami-Dade Independent County Independent Civilian Panel has "only been operating about a year and, although civil liability and risk management is an area we plan to review, we do not, as yet, have any data." Email from Ursula Price, Exec. Dir., Mia.-Dade Cnty. Indep. Civilian Panel, to the author (Jan. 22, 2024).

*Nashville, Tenn. "[T]he police department reviews the allegations in lawsuits against the department or individual officers. The police department is involved in the discovery process with our attorneys, and the police department reviews the information generated during the litigation. The nature of the allegation/information would determine the nature and extent of the related 'investigation.'" Email from Cynthia E. Gross, Chief of Staff, Dep't of L., Metro. Gov. of Nashville & Davidson Cnty., to the author (June 12, 2024). The Nashville Community Review Board "currently does not review cases that are involved in litigation." Fitcheard, supra note 141.

*New Orleans, La. The New Orleans city ordinance creating the Office of Independent Police Monitor (OIPM) in 2009 provides that the monitor "shall review patterns relating to civil claims and lawsuits alleging New Orleans Police Department misconduct, payout amounts over time, units disproportionately represented as subjects of claims and lawsuits, related training, and other issues" and "shall review the investigation of the underlying incidents described in such claims and lawsuits, whether those investigations predated the filing of a claim or lawsuit or the investigations were initiated following such filings." New Orleans, La., Code § 2-1121(9) (2024). Yet, in 2019, an advisory committee overseeing OIPM noted that OIPM was not fulfilling these responsibilities and recommended that it "consider keeping in one place a database on individual officers, coordinating information from use of force, complaints, discipline, and civil suits so that it can make recommendations as to particular officers." Quality Assurance Review Advisory Comm. for the Off. of Indep. Police Monitor, Annual Review 14 (2018), https://nola.gov/nola/media/Ethics-Review-Board/Files/2019-08-26-ERB-Minutes.pdf [https://perma.cc/QG5B-TER4]. OIPM did issue a 2021 report reviewing lawsuits that had been filed against the department and its officers in 2019 and 2020. New Orleans Report on Claims for Damages, supra note 137. In its 2023 Annual report, OIPM expressed an intention to "releas[e] more informational reports on the status of force, misconduct and discipline, and lawsuits and claims." Off. of the Indep. Police Monitor, Annual Report 93 (2023), https://nolaipm.gov/wp-content/uploads/2024/06/OIPM-2023-Annual-Report.pdf [https://perma.cc/5WGJ-8Y3U]. But OIPM has not issued any reports that take account of lawsuits since 2021, and there is no indication that it has created the database recommended by the advisory committee in 2018. When I filed a public records request with the New Orleans City Attorney, seeking information about whether the

police department investigated lawsuit allegations or reviewed information unearthed in discovery and trial, the request was denied on the grounds that it would "disrupt required government operations." See Email from Pub. Recs., City of New Orleans, to the author (May 27, 2024). Emails to the OIPM went unanswered.

*N.Y.C., N.Y. For decades, the New York City Police Department (NYPD) rejected suggestions from the city's comptroller to review information from lawsuits brought against them. See Schwartz, Myths and Mechanics, supra note 15, at 1045–48. Since 2010, the calls for the NYPD to review litigation information have gotten more insistent. In 2015, the New York City Police Department Office of Inspector General (OIG) issued a report calling on the NYPD to gather and analyze information from lawsuits brought against it. See Peters & Eure, Using Data, supra note 136, at 1. In 2017, the New York City Council amended the New York City Charter to require that the Inspector General, "working with the law department, the comptroller, the police department, the civilian complaint review board" and others to identify "patterns or trends identified by analyzing actions, claims, complaints, and investigations," to compare closed Internal Affairs investigations "with information concerning any incidents alleged to have given rise to such civil actions contained in other closed actions, claims, complaints, and investigations," and to review "steps taken by the police department in response to actions, claims, complaints, and investigations." N.Y.C., N.Y., Charter ch. 34, § 808 (2025). In furtherance of these obligations, the OIG issued a report in 2018 recommending that NYPD analyze department-wide litigation trends and patterns by precinct and unit and create internal reports regarding these findings. See Mark G. Peters & Philip K. Eure, NYC Dep't of Investigation's Inspector Gen. for the NYPD, Ongoing Examination of Litigation Data Involving NYPD 3–4 (2018), https://www.nyc.gov/assets/doi/reports/pdf/2018/April/21NYPDLitData_Report_43018.pdf [https://perma.cc/FKA6-U9SJ] [hereinafter Peters & Eure, Ongoing Examination]. In 2022, the Office of Inspector General reported that the NYPD was partially complying with this recommendation, but was not tracking claims it considered to be "meritless." Jocelyn Strauber & Jeanene Barrett, Off. of the Inspector Gen. for the NYPD, Eighth Annual Report 25–26 (2022), https://www.nyc.gov/assets/doi/press-releases/2022/March/08OIGNYPDAnnualRpt_Release_3312022.pdf [https://perma.cc/9SLJ-ZZPC] (internal quotation marks omitted). In 2023, the Office of Inspector General reported that NYPD had previously been in partial compliance with this recommendation but has since rejected it altogether as unnecessary and too expensive. See Jocelyn Strauber & Jeanene Barrett, Off. of the Inspector Gen. for the NYPD, Ninth Annual Report 30–31 (2023), https://www.nyc.gov/

assets/doi/reports/pdf/2023/13OIGNYPDRpt.Release.03.30.2023.pdf [https://perma.cc/4LSK-PBNQ].

Available evidence suggests that the NYPD continues not to review lawsuit information with an eye to preventing future lawsuits or harms. In 2018, a representative for the City of New York repeatedly testified during a deposition that the NYPD does not make changes to NYPD policy based on the allegations or information in lawsuits brought against it and its officers. See Deposition of Lieutenant Dennis Glannon at 75, 151, 152, 188, Packard v. City of New York, No. 1:15-cv-07130 (AT) (SDA) (S.D.N.Y. filed Sept. 7, 2018).

Other New York City Police Department oversight agencies do not review litigation information, either. In 2017, the New York City Council gave the OIG for the NYPD authority to review patterns in lawsuits against the NYPD and make its own recommendations about the training and discipline of officers. In 2018, it conducted this type of analysis for six police department precincts as a "roadmap for more in-depth areas of inquiry that NYPD could analyze further." Peters & Eure, Ongoing Examination, supra, at 17. But, in 2024, the Office of Inspector General reported that they "would not investigate allegations contained in lawsuits, except for in instances as noted in our 2015, 2018, and 2019 where we're looking at systemic issues. Generally, we do not review depositions or other documents related to lawsuits." Email from Claire Fleischer, Dir. of Outreach, Off. of the Inspector Gen., NYPD, to the author (Feb. 14, 2024). OIG has not issued any report on this topic since 2019. See id.

The Civilian Complaint Review Board (CCRB), an independent agency that investigates misconduct allegations "does not investigate 'allegations in lawsuits as they would citizen complaints.'" Email from Jonathan Darche, Exec. Dir., N.Y.C. CCRB, to the author (Jan. 20, 2024). In 2022, the City Charter was amended to require that CCRB be notified when there is a "final adjudication that a member of the NYPD engaged in an act of bias," but the CCRB had yet to conduct such an investigation as of January 2024. Id. The CCRB will, however, use information from lawsuits if it "opens an investigation and discovers that there is parallel civil litigation." Id.

*Oakland, Cal. The Community Police Review Agency (CPRA) is not notified of lawsuits when they are filed but might separately find out about a case. See Interview with Mac Muir, Exec. Dir., Cmty. Police Rev. Agency, City of Oakland (Jan. 29, 2024). The Executive Director of CPRA does not believe that Oakland Police Department's Internal Affairs Division investigates lawsuits. See id. When CPRA has asked Internal Affairs for records from civil litigation they will "look around." Id. A public records request to the Oakland Police Department went unanswered.

Pasadena, Cal. "[T]he Pasadena Police Department does investigate allegations of misconduct made in civil complaints. . . . I have not yet discussed with the Department the need to review litigation discovery to supplement investigations—unfortunately any such supplemental investigation would likely be untimely, and in my mind there would need to be significant new information disclosed to warrant reopening or initiating an untimely investigation. . . . I will be suggesting to the Department, however, that they ensure that a Professional Standards Unit supervisor reviews all lawsuits on their conclusion (particularly where there is a significant payout) for both discipline and risk management purposes." Email from Richard Rosenthal, Indep. Police Auditor, City of Pasadena, to the author (Feb. 2, 2024).
*Phila., Pa. "We certainly have some litigations that are associated with investigated complaints against police, but in terms of all litigations automatically triggering an [Internal Affairs] investigation that does not happen." Taylor, supra note 265. "[T]he Police Commissioner and senior leadership from the Police Department meet with the Law Department on a quarterly basis to discuss any litigation trends that may be developing, which meetings supplement the routine communication between the two Departments. Further, the City of Philadelphia Law Department, during the last mayoral administration, instituted a policy by which cases subject to the policy are assessed by the litigating attorney to determine if the matter warrants an after action review, and, upon that review, whether there is policy guidance that should be counseled to the client as a result of the litigation." Id.
*Portland, Or. There are weekly reviews of tort claims and lawsuit filings with the Independent Police Review (IPR), Internal Affairs, and the City Attorney's office. See Telephone Interview with Ross Caldwell, Dir., Indep. Police Rev. (Jan. 25, 2024). Claims that indicate misconduct are investigated. See id. If the IPR sees a trend in lawsuits, it will let the Police Department know. See id. IPR also reviews closed litigation files. See id. When cases settle, there is little information in the file. See id. But IPR will review depositions, and Portland's settlement agreement with the DOJ requires that if a case goes to trial and there is a finding of liability, there must be an administrative review with the assumption that there was wrongful conduct. See id.
*Prince George's Cnty., Md. "The Internal Affairs Division investigat[es] allegations of police officer misconduct generated by both internal and external complaints. Those investigations may relate to allegations contained in a subsequent lawsuit. Currently, the Internal Affairs Division does not investigate allegations in new lawsuits, but may assist with researching and compiling relevant information." Koshy, supra note 265. In response to a question about whether the police department's Internal Affairs Division reviews information generated

during litigation discovery, the legal advisor for the police department replied: "Typically an internal investigation has been completed prior to the lawsuit being filed and served." Id. An oversight agency, the Administrative Charging Committee (ACC) for Prince George's County "reviews internal affairs investigations and conducts citizen-led deliberations to determine punishment" but does not conduct its own investigations of misconduct allegations. Email from Isabel Williams, Program Adm'r, Admin. Charging Comm., Prince George's Cnty., to the author (May 15, 2024).

Richmond, Cal. "The City Attorney shares all litigation with the police department and [Office of Professional Accountability]," which is run by a civilian who replaced the Department's Internal Affairs Division and oversees operations. Email with Eddie Aubrey, Manager, Off. of Pro. Accountability, Richmond Police Dep't, to the author (May 1, 2024). "We request any evidence as the litigations proceed[] and the City Attorney determines what within their purview and strategy they can release to us to use in our investigation." Id.

Riverside, Cal. When a lawsuit is filed against an officer or the department, the city attorney's office refers it to the police department's Internal Affairs division. Telephone Interview with Eric Detmer, Lieutenant, Off. of Internal Affs., Riverside Police Dep't, (May 6, 2024). If a lawsuit or claim refers to any of the categories listed in California's Senate Bill 2 (dishonesty related to reporting or investigation of a crime; abuse of power; physical abuse; bias; gang association; failure to cooperate with an investigation; or failure to intercede when another officer uses excessive force), Internal Affairs will start an investigation if there hasn't already been one conducted. See id.; see also S.B. 2, 2021 Leg., Reg. Sess. (Cal. 2021). Internal Affairs investigations are usually completed before a lawsuit ever goes to court. See Detmer, supra. Internal Affairs is updated about cases by the city attorney's office but does not review litigation materials. See id.

Rochester, N.Y. "[The Police Accountability Board (PAB)] does not have any system for tracking lawsuits to trigger a PAB investigation based on a lawsuit. PAB investigations are generally triggered by reporters referring misconduct to us. We are able to internally generate complaints, so it is theoretically possible that PAB could become aware of a lawsuit and generate a PAB investigation based on information contained in the lawsuit. As far as internal affairs, they function the same way. Reporters can refer them misconduct, as can the PAB, and they have the ability to investigate. I am not aware of whether they investigate based on lawsuits they become aware of . . . . [I]f we are investigating a case and know that there is civil litigation going on, we will review any publicly available discovery and consider it in our investigations. We do this by checking databases where the filings are contained such as PACER. I do believe that internal affairs would do the same thing."

Email from Benjamin J. Wittwer, Gen. Couns., Rochester Police Accountability Bd., to the author (May 13, 2024).
*Sacramento, Cal. "The Office of Public Safety Accountability has oversight of the Sacramento Police Department and the Sacramento Fire Department personnel, but we do not look into anything involving lawsuits pertaining to public safety personnel. That would fall into the wheelhouse of the City of Sacramento City Attorney's Office." Watson, supra note 265.
Sacramento Cnty., Cal. "The Office of the Inspector General, for Sacramento County, reviews completed investigations of the Sacramento County Sheriff's Office, Internal Affairs Bureau. If the report generated by the Sheriff's Office referenced litigation materials, such as those mentioned in your request, the [Inspector General (IG)] would review those materials. Also, if such materials otherwise came to the attention of the IG and would have made the Sheriff's Office investigation more thorough had they been considered, the IG would recommend that the material be considered. Again, the IG function, at least as constructed in Sacramento County, only 'reviews and makes recommendations.' Primary investigations are conducted by the Sheriff's Office." Email from Kevin Gardner, Inspector Gen., Off. of the Inspector Gen. for Sacramento Cnty., to the author (May 22, 2024). Emails to Internal Affairs went unanswered.
Salt Lake City, Utah. The Salt Lake City Police Department "does not monitor lawsuits involving officers." Allred, supra note 265.
San Diego, Cal. The Commission on Police Practices was formed in 2020 and granted the authority to review internal affairs investigations; conduct its own investigations of deaths in custody, officer-involved shootings, and deaths resulting from interactions with police; and make policy recommendations. See Telephone Interview with Olga Golub, Chief Investigator, Off. of the Comm'n on Police Pracs. (May 9, 2024). The Commission does not have the authority to investigate allegations made in lawsuits. See id.
*San Jose, Cal. "The City Attorney handles the lawsuits against the San Jose Police Department. Obviously the Police Chief is kept abreast of those cases. However the Police Department does not necessarily initiate internal investigations in all situations in which a lawsuit ensues. In the City of San Jose, internal investigations are started when one of three things happened: (1) a person complains about police conduct to the City's employee relations and/or internal affairs; (2) a person complains to this office about police conduct; or (3) the Department, through the Chief's Office, initiates an internal investigation." Email from Karyn Sinunu-Towery, Acting Indep. Police Auditor, City of San Jose, to the author (Jan. 17, 2024).

*Seattle, Wash. The Seattle Office of Police Accountability (OPA) has the authority to initiate an investigation based on a lawsuit filing. Seattle Off. of Police Accountability, Internal Operations and Training Manual § 5.1B (2021), https://www.seattle.gov/documents/Departments/OPA/Policy/2022-OPA-Manual-Final.pdf [https://perma.cc/47EP-SAQ8]. Seattle's Department of Finance is obligated to notify OPA when there has been a notice of claim filed concerning possible police officer misconduct, and Seattle's City Attorney's office is obligated to notify OPA when there has been a lawsuit filed alleging possible police officer misconduct. See Seattle Dep't of Fin. & Admin. Servs. & Off. of Police Accountability, Case Notification Joint Protocol 1 (2022) (on file with the *Columbia Law Review*); Seattle City Att'y's Off. & Off. of Police Accountability, Case Notification Joint Protocol 1 (2022) (on file with the *Columbia Law Review*).
Sonoma Cnty., Cal. "[T]he Sonoma County Sheriff's Office does an investigation akin to an [Internal Affairs] investigation of alleged misconduct [when a lawsuit is filed]. Although it does appear to me that they only do so if a suit is filed, as opposed to a [California] Tort Claim Act form being filed. In the case of a tort claim only, they seem to do a shorter/shallower look. . . . Our agency [reviews information generated during litigation discovery] in our independent investigations. Historically, it appears that our Sheriff's Office has not. There does not seem to have been a policy or established practice on this issue in the past, but of the past cases I have seen, none seem to have reviewed the depositions. They seem to [b]e reconsidering doing so in the future now that we have suggested it, but haven't yet that I know of." Email from John Alden, Dir., Sonoma Cnty. Indep. Off. of L. Enf't Rev. & Outreach, to the author (Jan. 20, 2024).
Spokane, Wash. "Internal Affairs conducts all investigations into complaints filed with both our office, the Office of the Police Ombudsman, and directly with the police. Our office's role is to monitor their investigations and then certify whether it was completed in a timely, thorough, and objective manner. Under our city charter, we can conduct independent investigations but union contract restrictions limit how and what we can independently investigate. . . . Internal Affairs investigates administrative complaints only. We can receive any and all complaints but if it is determined that there is an ongoing criminal proceeding, civil suit, or a claim filed against the city, then the complaint will be administratively suspended until the conclusion of the proceeding, suit, or claim. Any litigation is handled by the City Attorney's Office or the Prosecutor's Office. . . . [N]either our office nor Internal Affairs reviews information generated during litigation discovery. Internal Affairs may review those materials as needed on a case-by-case basis but not as a general practice." Omana, supra note 265.

St. Paul, Minn. "Per our City Attorney's office, our police department does not investigate civil lawsuit allegations against the department when we receive a complaint or based on specifics in discovery. Generally, civil cases have come from known incidents which were already investigated and considered for any adverse employment action or criminal charges." Commers, supra note 265.
Syracuse, N.Y. "Lawsuits filed against the City related to interactions with [the Syracuse Police Department] can be by those who have already filed a complaint with us or internal affairs. However, some Petitioners do not file complaints first. . . . I am not aware of either of us[,] [the Board or the police department,] seeking out information obtained during discovery phase of litigation to investigate as a complaint." Email from Ranette L. Releford, Adm'r, Syracuse Citizen Rev. Bd., to the author (May 14, 2024).
*Washington, D.C. In 2019, Washington, D.C.'s Office of Police Complaints issued a call for the Metropolitan Police Department to begin investigating lawsuit allegations and reviewing closed litigation files for trends. See Police Complaints Bd., supra note 137, at 6. According to the Executive Director of that office, four years later, the Department "says that they are 'looking at' settled cases and verdicts but there is no formal system or evidence that this is actually done." Email from Michael G. Tobin, Exec. Dir., Off. of Police Complaints, Washington, D.C., to the author (Jan. 22, 2024).
*Wallkill, N.Y. "[T]he Town of Wallkill Police Department accepts all complaints relative to the officer(s) and does take appropriate disciplinary action in all cases where an investigation substantiates a violation of law(s), order(s), rule(s), regulation(s), policy(ies), or procedure(s). The Police Department also investigations allegations in lawsuits as they would civilian complaints. However, the Police Department generally awaits for the completion of the civil litigation to ensure that . . . all pertinent information developed at the completion of the civil case is reviewed for any possible training and policy recommendations as well as any comments and/or actions concerning the officer(s) involved." Letter from Louisa M. Ingrassia, Town Clerk/Registrar, Town of Wallkill, to the author (May 14, 2024).

APPENDIX B: *GLASPER* DEFENDANTS' PAST LITIGATION

The following chart sets out the facts and outcomes of thirty lawsuits that were filed before the Glasper raid and that name one or more of the defendants in *Glasper*. This information was compiled from information available on Bloomberg Law, the website of the Clerk of the Circuit Court of Cook County, settlement information compiled by *The Chicago Reporter*, and correspondence with plaintiffs' attorneys. Defendants named in *Glasper* are in bold.

Case	Facts and Complaint Date	Discovery	Summary Judgment Motion	Trial	Case Outcome and Date
Woods v. Emanual, No. 1:15-cv-08521 (N.D. Ill. dismissed Oct. 3, 2017)	On January 14, 2014, Woods was at his apartment when plainclothes officers knocked on the door. When Woods opened his door, **Bruno** forcibly grabbed Woods, pulling him outside, and other officers searched the apartment, finding nothing. When Woods asked for medical attention, **Bruno** threatened to charge Woods with a felony if they had to take him to the hospital. Woods repeated his request to go to the hospital. The officers took Woods to the hospital and charged Woods with felony possession of a controlled substance. Woods spent approximately a month behind bars	Yes	No	No	Settled for $50,000 and dismissed by Stipulation. Minute Order (Oct. 2, 2017); Case 15-CV-8521, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/15-cv-8521/ [https://perm

	before charges were dropped. Complaint at 1–9 (Sept. 25, 2015).				a.cc/NFC2-9XTB].
Garner v. Lee, No. 1:15-cv-03721 (N.D. Ill. dismissed Feb. 16, 2016)	On July 15, 2014, Garner was standing by his car when officers, including **Schnier** and **Ugarte**, pulled up and punched, choked, and strip-searched him. "**Schnier** through [sic] me against a gray or silver looking car with great force and put a small bump on the back of my head and officer **Ugarte** start pulling my hair and smacking me and talking about give him a gun or tell us where a dope house at that got some guns in it[.] I told them I don't know[.] That's when they frame me[.]" Complaint at 4 (Apr. 27, 2015).	No	No	No	Dismissed for lack of prosecution. Minute Order (Feb. 16, 2016).
Collins v. Bond, No. 1:14-cv-05500 (N.D. Ill. dismissed Oct. 1, 2014)	On July 30, 2012, Officer **Ugarte** and other officers drove up to Collins, who was on foot. The officers got out of their car, threw Collins to the ground face first, punched him in the face, struck and kicked his body, and handcuffed him. They transported him to a police station, where he was charged with battery, resisting arrest, assault and criminal trespass. All charges were terminated in Collins's favor. Complaint at 4–7 (July 18, 2014).	No	No	No	Settled for $40,000 and dismissed by stipulation. Minute Order (Oct. 1, 2014); Case 14-CV-5500, Settling for Misconduct, https://projects.chicagoreporter.com/settlem

					ents/case/14-cv-5500/ [https://perma.cc/M3DZ-AJYG].
Jennings v. City of Chicago, No. 1:13-cv-08811 (N.D. Ill. dismissed Nov. 24, 2014)	On June 2, 2010, Jennings was waiting in line to get his car washed when unmarked squad cars pulled up. One officer pulled Jennings out of his car and handcuffed him. Officer **Ugarte** told Jennings he would "make things much easier" on him if he revealed the location of contraband. When Jennings said he didn't know about any, **Ugarte** pulled an unknown substance out of his pocket and then arrested Jennings and charged him with possession of a controlled substance. Jennings filed a complaint against **Ugarte** that "was determined to be unfounded." On October 11, 2010, a few blocks away from the car wash, Jennings was in his car when **Ugarte** and another officer drove up, pulled him out of his car, and handcuffed him. **Ugarte** said he had been looking for Jennings ever since he filed the complaint against him. The officers arrested Jennings and charged him with possession of a controlled substance with intent to	Unknown	No	No	Rule 68 Judgment accepted for $30,000. Minute Order (Nov. 24, 2014).

	distribute. Officer **Ugarte** testified falsely at trial. Jennings was acquitted in 2013. Complaint at 3–5 (Dec. 10, 2013) (internal quotation marks omitted) (quoting Ugarte).				
Dantzler v. Lee, No. 1:13-cv-08447 (N.D. Ill. dismissed Nov. 4, 2014)	On August 8, 2013, officers including **Lee** and **Schnier** executed a search warrant in Dantzler's apartment, broke into the house, and held Dantzler at gunpoint. Officers screamed at Dantzler and his step-daughter and ordered them to the ground. One officer asked Dantzler where the drugs were and when he said there weren't any he struck Dantzler in the face several times. Complaint at 2–3 (Nov. 22, 2013).	Unknown	No	No	Dismissed for lack of prosecution. Minute Order (Nov. 4, 2014).
Gordon v. City of Chicago, No. 1:13-cv-07926 (N.D. Ill. dismissed Jan. 23, 2015)	On August 12, 2013, Drake Gordon was visiting Kenneth Gordon and Andrea Gordon at their home. **Bruno** and other officers entered and searched them without a warrant. Complaint at 2 (Nov. 5, 2013).	Yes	No	No	Settled for $12,500 and case dismissed by stipulation. Minute Order (Jan. 23, 2015); Case 13-CV-7926, Settling for Misconduct, https://projects.chicagoreporter.com/settlem

					ents/case/13-cv-7926/ [https://perma.cc/AUF4-NAZD].
Jackson v. P.O. John Doe 1-2, No. 1:13-cv-04043 (N.D. Ill. dismissed Jan. 29, 2015)	On November 2, 2012, Jackson was walking home when he was stopped by Officer **Papke**, who was allegedly looking for someone else in the neighborhood. **Papke** slammed Jackson into a fence and onto the ground. Complaint at 2 (May 31, 2013).	Yes	No	No	Settled for $20,000. Order of Dismissal (Jan. 29, 2015); Case 13-CV-4043, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/13-cv-4043/ [https://perma.cc/2R3A-8X24].
McDaniels v. Vivianco, No. 1:12-cv-03608 (N.D. Ill. dismissed Nov. 25, 2014)	On January 18, 2011, McDaniels was parked in front of his home when officers parked behind him, got out of their vehicle and surrounded his car with their guns drawn. McDaniels was arrested, placed in what officers referred to as "slave cuffs," then repeatedly hit and verbally abused McDaniels as **Ugarte** and other	Yes	No	No	Settled for $10,000 and dismissed by stipulation. Minute Order (Nov. 25, 2014); Case 12-CV-3608, Settling for

	officers searched him and his car. Police released McDaniels without charging him with a crime. Complaint at 2–3 (May 10, 2012) (internal quotation marks omitted) (quoting a defendant).				Misconduct, https://projects.chicagoreporter.com/settlements/case/12-cv-3608/ [https://perma.cc/H2CK-PT3E].
Henry v. Slege, No. 1:12-cv-02487 (N.D. Ill. dismissed Apr. 9, 2013)	On April 6, 2011, Henry and a friend were sitting on the front porch of a home when officers **Schnier** and **Bruno** came inside the fenced yard and handcuffed Henry to his friend. **Schnier** began to interrogate Henry and his friend about drug sales on the block. Meanwhile, Bynum was sitting inside her parked van in front of the same residence when she was detained by officers and her vehicle was searched. Henry was charged with delivery of a controlled substance, even though the officers did not recover any drugs from him or proceeds from drug sales, and was held for about 20 days. Complaint at 2–4 (Apr. 4, 2012).	No	No	No	Settled for $50,000 and dismissed by stipulation. Minute Order (Apr. 9, 2013); Case 12-CV-2487, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/12-cv-2487/ [https://perma.cc/YR94-QXQ3].

Harper v. Bruno, No. 12-L-13135 (Ill. Cir. Ct. dismissed Oct. 24, 2014)	On November 20, 2011, Harper was arrested by Officer **Bruno** and other officers, who tased and beat him. Harper suffered a facial fracture that required surgery, among other injuries. Case 12-L-13135, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/12-l-13135/ [https://perma.cc/E49T-KNWJ]; Complaint (Nov. 20, 2012).	Yes	No	No	Settled for $75,000 and dismissed by stipulation. Stipulation to Dismiss (Oct. 24, 2014); Case 12-L-13135, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/12-l-13135/ [https://perma.cc/E49T-KNWJ].
Williams v. City of Chicago, No. 1:11-cv-06284 (N.D. Ill. dismissed June 28, 2012)	On December 22, 2010, Williams was on his front porch when he saw a police officer grabbing a man through the window of his unmarked police car and dragging him down the street. When Williams took a photo of the assault with his phone, the officer stopped his car and let go of the man. The officer told Williams it was illegal to record him. Then he and another officer pushed Williams against his house, grabbed him by the throat, and handcuffed him. Williams	Yes	No	No	Unknown settlement. Plaintiff's motion to dismiss granted. Minute Order (June 28, 2012).

	was held for half an hour, then was released. Complaint 2–5 (Sept. 9, 2011).				
Reed v. Chicago, No. 1:10-cv-07094 (N.D. Ill. dismissed Feb. 8, 2013)	Reed was arrested and detained twice under a widespread police practice in which officers conducted field interrogations in known narcotics-trafficking areas, then falsely arrested people with prior drug arrests for drug possession. First, on November 3, 2008, two officers detained Reed and falsely arrested him for drug possession. On December 10, 2008, **Ugarte** and another officer detained Reed and falsely arrested him again. Each time, Reed was in custody for three weeks. Complaint at 1–4 (Nov. 3, 2010).	Yes	No	No	Settled for $3,000 and dismissed by stipulation. Minute Order (Feb. 8, 2013); Case 10-CV-7094, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/10-cv-7094/ [https://perma.cc/N3JJ-PXMF].
Sims v. City of Chicago, No. 1:10-cv-06468 (N.D. Ill. dismissed May 18, 2011)	On August 21, 2010, officers entered Sims's apartment's gated courtyard and threatened to arrest her for holding an open container of beer. When Sims responded that it was her property, officers—including **Ugarte**—assaulted her and her husband. Sims and her husband were arrested and held in a paddy wagon	Unknown	No	No	Settled for $18,000 and dismissed by stipulation. Minute Order (May 18, 2011); Case 10-CV-6468, Settling for

	for more than two hours as the officers made other stops. Sims and her husband were charged with obstruction of justice and held overnight. The charges against the couple were later dismissed. Complaint at 2–6 (Oct. 8, 2010).				Misconduct https://projects.chicagoreporter.com/settlements/case/10-cv-6468/ [https://perma.cc/7PN9-RE7W].
McLin v. City of Chicago, No. 1:10-cv-05076 (N.D. Ill. Jan. 30, 2013)	On July 8, 2010, Hope was sitting in a car when Officers **Ugarte** and St. Clair confronted him. When Hope tried to drive away, the officers physically prevented him from leaving, and St. Clair shot Hope multiple times, killing him. Complaint at 3 (Aug. 12, 2010).	Yes	No	Yes	Plaintiff's verdict: $4,573,700 plus $10,000 in punitive damages each against Ugarte and St. Clair. Total award with attorneys' fees: $4,567,828. Order (Jan. 30, 2013).
Johnson v. Bruno, No. 1:10-cv-02606 (N.D. Ill. dismissed June 9, 2011)	On April 27, 2009, Officer **Bruno** and another officer arrested Johnson, then hit and kicked him and carried him to an unmarked patrol car. While handcuffed in the backseat, **Bruno** hit Johnson again. Johnson was charged with possession of cocaine. All	Unknown	No	No	Dismissed for failure to prosecute. Minute Order (June 9, 2011).

	charges were dismissed after one month. Complaint at 2 (Apr. 27, 2010).				
Adams v. Bruno, No. 1:10-cv-02068 (N.D. Ill. Dec. 15, 2011)	On February 12, 2010, officers, including **Bruno** and **Schnier**, entered and searched Adams Sr.'s restaurant, a Harold's Chicken franchise, without a warrant. The officers lied to employees and patrons, telling them that drugs were being sold out of the restaurant and that police were going to shut it down. Complaint 2–3 (Apr. 2, 2010).	Yes	Yes; denied. Minute Order (Oct. 6, 2011).	Yes	Mistrial as to Bruno, defense verdict as to Schnier. Minute Order (Dec. 15, 2011). Plaintiff's verdict against one defendant; judgment entered for $85,000 inclusive of attorneys' fees. Minute Order (Feb. 24, 2012).
Horton v. Rubald, No. 1:09-cv-07043 (N.D. Ill. dismissed July 17, 2012)	On October 18, 2008, Horton was walking when Officer **Ugarte** and other officers stopped and searched him without a warrant or probable cause, then arrested him and charged him with public drinking, having no firearms owner identification card, and unlawful use of a weapon. Complaint at 2 (Nov. 10, 2009).	Yes	No	No	Settled for $5,000 and dismissed by stipulation (July 17, 2012); Case 09-CV-7043, Settling for Misconduct,

					https://projects.chicagoreporter.com/settlements/case/09-cv-7043/ [https://perma.cc/98LP-ZP9C].
Guydon v. City of Chicago, No. 1:09-cv-05497 (N.D. Ill. dismissed Feb. 8, 2013)	On July 1, 2009, Officers **Ugarte** and Johnson, in plainclothes, approached Guydon while he was fueling his car. The officers searched Guydon and found crack cocaine in his possession. They arrested Guydon, charged him with possession, and impounded his car. All charges against Guydon were later dismissed for lack of probable cause. Complaint at 4 (Sept. 3, 2009).	Yes	Yes; granted with leave to amend (and plaintiff amended). Order (Apr. 2, 2012); Order (June 14, 2012); Amended Complaint (June 26, 2012).	No	Settled for $7,500. Minute Order (Jan. 31, 2013); Case 09-CV-5497, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/09-cv-5497/ [https://perma.cc/9B53-MXAN].
Foltin v. Ugarte, No. 1:09-cv-05237 (N.D. Ill. Feb. 14, 2014)	On August 14, 2009, Foltin was a passenger in a vehicle pulled over by Officers **Ugarte** and Candelario. Officers told Foltin and the driver to get out of the car and began	Yes	Yes; conditionally granted and *Monell*	Yes	Plaintiff's verdict: $11,000. Jury Verdict (Feb. 14, 2014).

	searching them and the vehicle. A female officer arrived and instructed her to conduct a search on Foltin, who was wearing a tight-fitting summer dress. The female officer instructed Foltin to put her hands on the hood of the police car, put her hands up Foltin's dress, pulled on her bra, and subjected her to a body cavity search. Officers found nothing illegal during their search of Foltin, the driver and the vehicle and released them without filing charges. Complaint at 1–4 (Aug. 25, 2009).		claim bifurcated. Minute Order, (Dec. 7, 2011); Opinion and Order (July 16, 2013).		Total settlement, including attorneys' fees, plaintiffs' verdict, and sanctions against the city negotiated by the parties: $162,795. Id.; Minute Order (Jan. 18, 2012); Agreed Order (June 2, 2014); Case 09-CV-5237, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/09-cv-5237/ [https://perma.cc/49SY-5258].
Jackson v. Ugarte, No. 1:09-cv-04188 (N.D. Ill. dismissed Sept. 7, 2010)	On April 20, 2009, Jackson was in the vicinity of 9300 South Lafayette Avenue. Officers **Ugarte** and Vivanco came upon him, threw him against a	Yes	No	No	Dismissed for lack of prosecution.

	fence, handcuffed him to the fence, and took him into custody. He was held in jail for approximately twenty-four days. Complaint at 2–3 (July 13, 2009).				Minute Order (Sept. 7, 2010).
Willis v. Lepine, No. 1:09-cv-04208 (N.D. Ill. Jan. 13, 2011)	On February 26, 2006, Willis and Owen were standing outside their home when Officer **Lepine** and other officers drove up, "threw plaintiffs on the hood of the car, cuffed, searched, and arrested plaintiffs" without a warrant or probable cause, kept Willis and Owens in the police car for almost an hour, and then took them to the station where they were publicly strip searched. Charges against them were filed and later dismissed. Complaint at 2–3 (July 13, 2009).	Yes	No	Yes	Defense verdict. Judgment (Jan. 13, 2011).
Sroga v. Decero, No. 1:09-cv-03286 (N.D. Ill. Mar. 23, 2012)	Several officers, including **Papke**, falsely arrested, used excessive force against, and/or illegally seized the property of Sroga several times in 2006, 2007, and 2009. Complaint at 2–3 (July 8, 2009).	Yes	Yes; granted.	No	Summary judgment for defendant. Judgment (Mar. 23, 2012).

McNeal v. Bruno, No. 1:09-cv-01500 (N.D. Ill. Dec. 11, 2012)	Officers, including **Barroso** and **Bruno**, entered McNeal's apartment without a search warrant, then threw him to the ground, stomped on his knee, and struck him on the left side of this head with a blunt object. McNeal, his son, and his wife were handcuffed and taken outside. Officers then searched the apartment without permission. When McNeal's wife threatened to complain about the officers' treatment, **Barroso** responded, "[Y]ou think we give a f[**]k . . . [?] Keep talking and we'll lock your f[**]king [*]ss up." McNeal was arrested and charged with a felony offense of unlawful use of a weapon. Complaint at 2–4 (Mar. 10, 2009) (internal quotation marks omitted) (quoting Barroso).	Yes	Yes; granted in part. Opinion and Order (Apr. 24, 2012).	Yes	Plaintiffs' verdict against Barroso and Bruno on some claims. Judgment (Dec. 11, 2012). Post-trial settlement: $473,630. Case 09-CV-1500, Settling for Misconduct, https://projects.chicagoreporter.com/settlements/case/09-cv-1500/ [https://perma.cc/RJQ6-YCDG].
Stevens v. City of Chicago, No. 1:08-cv-06037 (N.D. Ill. dismissed Feb. 19, 2009)	On May 3, 2008, Officers **Ugarte** and Bankus arrested Perry Stevens without lawful basis and prepared a false police report against him. Complaint at 1–2 (Oct. 22, 2008).	No	No	No	Settled for $5,000 and dismissed by Stipulation. Minute Order (Feb. 19, 2009); Email from Kenneth N. Flaxman, to

					the author (Nov. 29, 2024) (on file with the *Columbia Law Review*).
Thompson v. City of Chicago, No. 1:07-cv-06189 (N.D. Ill. dismissed Feb. 20, 2008)	On November 5, 2006, officers, including **Lepine**, stopped Thompson, drew their guns, and searched him and his car. The officers then "informed the Plaintiff that they would let him go if he provided them with information about criminal activity." When Thompson refused, he was arrested. All charges were later dropped. Complaint at 2–3 (Nov. 1, 2007).	No	No	No	Unknown settlement. Dismissed by stipulation. Agreed Order of Dismissal (Feb. 20, 2008).
Safford v. Janik, No. 1:07-cv-05276 (N.D. Ill. dismissed July 15, 2008)	On July 17, 2007, Safford was arrested. When he was brought to the police station "he was struck . . . with a rubber hose, a telephone book, and a plastic bottle" by Anthony **Bruno** and other officers. Complaint at 2–3 (Sept. 18, 2007).	Yes	No	No	Unknown settlement. Dismissed by stipulation. Minute Order (July 15, 2008).
Bowman v. Lepine, No. 07-cv-4802 (N.D. Ill. dismissed Feb. 14, 2008)	On August 25, 2006, Bowman was standing near his car with two friends when an unmarked police car drove up. Officers, including **Lepine**, ordered Bowman and his friends to put their hands on his car. Officers searched his car and handcuffed the	No	No	No	Unknown settlement. Dismissed by stipulation. Minute Order (Feb. 14, 2008).

	men, then arrested Bowman and impounded his car. After approximately two days in jail, the charges against Bowman were dismissed. Complaint at 2–3 (Aug. 24, 2007).				
Morris v. City of Chicago, No. 1:07-cv-03409 (N.D. Ill. May 26, 2011)	On July 1, 2005, defendant officers (including **Lepine**) were pursuing a car driven by decedent Tommy Morris, with Stanley Morris as a passenger. They stopped the car and ran in different directions. The officers shot Tommy Morris in the back. Complaint at 8–9 (June 18, 2007).	Yes	No	Yes	Defense verdict. Judgment (May 26, 2011).
Long v. City of Chicago, No. 1:06-cv-01960 (N.D. Ill. dismissed Feb. 8, 2007)	On December 12, 2004, Long was walking down the street when approached by officers, including **Bruno**, who grabbed the Plaintiff, placed him in handcuffs, and put him into a squad car. Complaint at 2–3 (Apr. 7, 2006).	No	No	No	Settled for $6,750. Release and Settlement Agreement (Jan. 24, 2007).
Akins v. Olson, No. 1:03-cv-03334 (N.D. Ill. dismissed Feb. 10. 2004)	On October 10, 2001, Akins was exiting his car when he was grabbed by an officer and taken into custody. He was then beaten by several officers, including Officer **Schnier**. Complaint at 2 (May 20, 2003).	No	No	No	Settled for $36,000. Release and Settlement Agreement (Feb. 9, 2004).

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