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## ACCELERATED CIVIL RIGHTS SETTLEMENTS IN THE SHADOW OF SECTION 1983

Katherine A. Macfarlane\*

### *Abstract*

*The families of Eric Garner, Laquan McDonald, Freddie Gray, and Walter Scott have obtained multimillion dollar settlements from the cities in which their family members lost their lives. This Article identifies and labels these settlements as a legal response unique to high-profile police-involved deaths: accelerated civil rights settlement. It defines accelerated civil rights settlement as a resolution strategy that uses the threat of 42 U.S.C. Section 1983 litigation rather than litigation itself to compensate police-involved shooting victims' family members. This Article explains how accelerated civil rights settlement involves no complaint or case—nothing is filed. Also, the goal of accelerated civil rights settlement is to obtain settlement by focusing on one incident as opposed to a city's practices or customs. It may not effect widespread social change. But the strategy's aim is pure: it seeks only compensation. To that end, it is successful, and has allowed some victims' families to avoid the toll prolonged litigation exacts. Accelerated civil rights settlement stands in sharp contrast to the protracted and painful Section 1983 litigation undertaken by Michael Brown's parents. Trial in that case was set for 2018, three years after filing. Discovery was brutal, requiring production of Brown's medical records from age ten onward. Accelerated civil rights settlement is an innovative alternative that shields well-known victims' families from the ordeal of federal litigation.*

*Accelerated civil rights settlement relies on Section 1983, but in a new way that differs from its previous uses. Still, this Article concludes that just as accelerated civil rights settlement represents brilliant strategy, its reliance on Section 1983 is no less meaningful than previous applications. The paper recounts Section 1983's history as a malleable statutory tool. It ties Section 1983's current role to its past incarnations, including its Reconstruction Era origin as a federal law aimed squarely at the Klan. It considers the law's purpose in 1960s Chicago when it was employed to challenge racist police practices. It looks to how it was relied upon in impact litigation concerning the 1999 shooting of Amadou Diallo.*

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\* © 2018 Katherine A. Macfarlane. Associate Professor of Law, University of Idaho College of Law, B.A., Northwestern University, J.D., Loyola Law School. Thanks to Aliza Cover, Sarah Haan, Alexandra Natapoff and Howard Wasserman for commenting on early drafts. I am indebted to Shane Bell for his research assistance, and to the UTAH LAW REVIEW editors for their editing work. Carey's patience and love helped me complete this project. Finally, though I don't presume to know their heartache, I am inspired by the families who respond to incredible loss by working to ensure that a similar loss never happens again.

*Choosing accelerated civil rights settlement can help victims' families avoid litigation's worst moments. In the wake of so many failed prosecutions of the officers involved in police shootings and custodial deaths, it may also be the only way in which the law helps to honor lost lives.*

## I. INTRODUCTION

*The outcomes in Staten Island and Ferguson and elsewhere signal, as in the time of Jim Crow, that the loss of black life at the hands of authorities does not so much as merit further inquiry and that the caste system has only mutated with the times.<sup>1</sup>*

\* \* \*

*Though nothing can replace having Walter in our lives, the city of North Charleston's historic [settlement] actions ensure that he did not die in vain. This city sent a message loud and clear that this kind of reckless behavior exhibited by members of law enforcement will not and shall not be tolerated.<sup>2</sup>*

As Isabel Wilkerson highlights, after so many deaths and so little justice, it is difficult to find proof that black lives matter to the American legal system.<sup>3</sup> The officer who shot Michael Brown in Ferguson, Missouri, was never indicted. The officer whose chokehold killed Eric Garner not only avoided indictment, but also kept his job. The list of lost lives grows, and attention shifts from Baltimore to Chicago to North Charleston to Baton Rouge.

The murder trial of the officer who shot Walter Scott in the back ended in a mistrial. But the story of Walter Scott's family does not end there. Back in North Charleston, South Carolina, soon after Walter Scott's death, his family retained legal counsel. They originally planned to sue North Charleston for civil rights violations arising out of Scott's death. But within six months, his family agreed to settle all claims related to Scott's death for \$6.5 million. No lawsuit was ever filed.

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<sup>1</sup> Isabel Wilkerson, *Where Do We Go from Here?*, in *THE FIRE THIS TIME: A NEW GENERATION SPEAKS ABOUT RACE* 59, 61 (Jesmyn Ward ed., 2016).

<sup>2</sup> Brenda Ridge, *Scott's Family to get \$6.5M from City*, *POST AND COURIER* (Oct. 7, 2015), [http://www.postandcourier.com/archives/scott-s-family-to-get-m-from-city/article\\_395433c1-3ec9-5d65-a755-a277147b7ac0.html](http://www.postandcourier.com/archives/scott-s-family-to-get-m-from-city/article_395433c1-3ec9-5d65-a755-a277147b7ac0.html) [https://perma.cc/464X-2VSE] (quoting Anthony Scott, brother of Walter Scott, after Scott's family entered into a \$6.5 million settlement with the city of North Charleston).

<sup>3</sup> See also Jin Hee Lee & Sherrilyn A. Ifill, *Do Black Lives Matter to the Courts?*, in *POLICING THE BLACK MAN* 255, 260 (Angela J. Davis ed., 2017) (describing how "despite the need for court intervention to remedy the entrenched racial discrimination within the criminal justice sphere, the American judicial system has done a poor job of protecting and vindicating the rights of people of color victimized by police").

Walter Scott's family obtained an accelerated civil rights settlement. The family's strategy was not without risk. For example, without the benefit of federal discovery, long-term fact development never occurred, perhaps forever hiding the full extent of Michael Slager's and North Charleston's unconstitutional conduct. Settling quickly, pre-filing, means that there will be no municipal liability allegations, which, if successful, can change a city's unconstitutional customs and practices. Moreover, none of the families who have chosen accelerated civil rights settlement have sought relief that approximates injunctive relief. And of course, when cases settle, there are no admissions of liability by the defendants.

But there is compensation. Even in the absence of a finding or admission of liability, a large settlement has meaning. Maybe a significant settlement brings with it enough closure to give families some relief, or a kernel of peace. This Article does not judge a grief-stricken family's choice to settle and move on.

Yet we often judge civil rights litigation based on its ability to move mountains. We herald *Monroe v. Pape*<sup>4</sup> because it revived Section 1983 and allowed victims of unreasonable searches and seizures to challenge unconstitutional state practices in federal court.<sup>5</sup> *Monroe* opened the courthouse doors to lawsuits that highlighted the unconstitutional and often racially motivated conduct undertaken by police officers. We applaud *Monell v. Department of Social Services of the City of New York*'s<sup>6</sup> use of Section 1983 to hold municipalities accountable for unconstitutional policies or customs.<sup>7</sup> The policy at issue in *Monell* forced women to take unpaid leave when pregnant, whether they wanted to or not.<sup>8</sup> Law school students study *Monroe* and *Monell* because they were momentous cases for the law and for future plaintiffs.

Section 1983 is described as a statute intended to solve large problems. Professor Myriam E. Gilles refers to it as a law "intended to combat the *widespread* practices of local officials."<sup>9</sup> Congress enacted Section 1983 to bring about "*major* changes in the structure of relationships among citizens, states, and the federal government."<sup>10</sup> The Supreme Court has described it as a law that should prevent

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<sup>4</sup> 365 U.S. 167 (1961).

<sup>5</sup> *Id.* at 169, 187; see also Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*, 7 SCHOLAR 151, 158 (2005) (stating that before *Monroe*, "victims of police and correctional officers' misconduct rarely found a remedy in this Nation's courts," but that *Monroe* "changed the landscape," creating "federal liability, enforceable in a federal court," which "broadened accountability of state and local officials") (citing *Monroe*, 365 U.S. at 191–92).

<sup>6</sup> 436 U.S. 658 (1978).

<sup>7</sup> *Id.* at 694.

<sup>8</sup> *Id.* at 660–61; see also Oscar G. Chase & Arlo Monell Chase, *Monell: The Story Behind the Landmark*, 31 URB. LAW. 491, 491 (1999) (explaining that the *Monell* litigation "grew out of the social conflict of its time").

<sup>9</sup> Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 20 (2000) (emphasis added) (citations omitted).

<sup>10</sup> *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1190 (1977) (emphasis added).

“abuses of power by those acting under color of state law.”<sup>11</sup> A finding of liability in Section 1983 actions is important. When a city is found liable, for example, a “societal interest” is served, an interest that is greater than the one obtained by an individual litigant’s “compensatory award.”<sup>12</sup> Furthermore, a finding against a city deters future constitutional violations.<sup>13</sup>

Do prelitigation settlements that do not involve findings of liability, against cities or individuals officers, violate the purpose of Section 1983? Following the \$6.4 million settlement obtained by the family of Freddie Gray, one article asked if the large settlement would “send[] the right message.”<sup>14</sup> Settlement-based deterrence was represented as a false hope. According to Kami Chavis-Simmons, “a former assistant United States attorney who now directs the criminal justice program at the Wake Forest University School of Law,” “[t]hat’s how people in a perfect world would like these settlements to work: the more you pay, the more careful you are,” but in reality, settlements are not effective tools “for widespread reform.”<sup>15</sup> What, then, was the purpose of the Freddie Gray settlement, “a payment larger than all police-brutality suits [in Baltimore] since 2011”<sup>16</sup>?

Moreover, accelerated civil rights settlement stands in sharp contrast to recent landmark federal litigation arising out of NYPD stop-and-frisk procedures, which caused the largest city in the country to change the way it conducts its police work.

Trial in the stop-and-frisk litigation occurred five years after the case was filed, and the court’s remedial order was implemented six years postfiling.<sup>17</sup> It had a measurable impact on life in New York City, but required years of discovery and fights over nearly every motion filed.<sup>18</sup> Accelerated civil rights settlements, like the one obtained by the Gray family, may not be catalysts for social or legal change in the same way the stop-and-frisk litigation was. An accelerated civil rights settlement is different. It moves quickly: the settlements studied in this Article all settled in 12 months or less. There is no discovery, no motion practice, no trial, and

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<sup>11</sup> *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978).

<sup>12</sup> Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 525 (1993) (quoting *Owen v. City of Independence, Mo.*, 445 U.S. 622, 653 (1980) (internal quotations omitted)).

<sup>13</sup> *Id.*

<sup>14</sup> Henry Gass, *The Freddie Gray \$6.4 Million Settlement is Big, but will it Send Right Message?*, C.S. MONITOR (Sept. 9, 2015), <https://www.csmonitor.com/USA/Justice/2015/0909/The-Freddie-Gray-6.4-million-settlement-is-big-but-will-it-send-right-message> [<https://perma.cc/UBG3-2XYF>].

<sup>15</sup> *Id.*

<sup>16</sup> Yvonne Wenger & Mark Puente, *Baltimore to Pay Freddie Gray’s Family \$6.4 Million to Settle Civil Claims*, BALT. SUN (Sept. 8, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-boe-20150908-story.html> [<https://perma.cc/5YUT-WQSQ>].

<sup>17</sup> Complaint at 26, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. Jan. 31, 2008) (No. 08 Civ. 01034); Order Regarding Monitor’s Final Recommendations at 1, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. Feb. 3, 2015) (No. 08 Civ. 01034).

<sup>18</sup> The New York stop-and-frisk litigation is described *infra* at Part III.

no remedial order to implement. The settlements reached are extraordinarily large. In cases involving high-profile deaths, accelerated civil rights settlement represents an important and novel use of Section 1983. This Article is the first to identify and define the phenomenon.

Following this introduction, Part II examines how the families of Eric Garner, Laquan McDonald, Freddie Gray, and Walter Scott have obtained accelerated civil rights settlements. Part III explains that accelerated civil rights settlement is unlike the heralded civil rights model known as impact litigation, but that it is a defensible and innovative strategy that avoids hurdles section 1983 plaintiffs cannot overcome, including qualified immunity and *City of Los Angeles v. Lyons*<sup>19</sup> standing issues. Part IV argues that accelerated civil rights settlement fits neatly into the history of Section 1983, a statute whose purpose adapts to different historic eras, answering each one's needs. It concludes that accelerated civil rights settlement relies on Section 1983 to respond to today's crisis: police action that results in the loss of black lives.

## II. THE PHENOMENON OF ACCELERATED CIVIL RIGHTS SETTLEMENTS

*Amadou Diallo. Manuel Loggins Jr. Ronald Madison. Kendra James. Sean Bell. Eric Garner. Michael Brown. Alton Sterling. Each was a black man or woman who died at the hands of police. Their names represent only a handful of such cases since 1999, when Diallo, an unarmed man standing in a New York City doorway, was gunned down by officers who erroneously thought he had a gun.*<sup>20</sup>

Following the deaths of Eric Garner, Laquan McDonald, Freddie Gray, and Walter Scott, there was some expectation that the officers involved in their deaths would be brought to justice—criminal justice. So far, none have been convicted of a criminal offense. The victims' families are frustrated.<sup>21</sup> Crowds of protestors around the country shared their frustration.<sup>22</sup> The details of each death became well known, but still, criminal convictions could not be obtained.

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<sup>19</sup> 461 U.S. 95 (1983).

<sup>20</sup> Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016), <http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html> [<https://perma.cc/GF3Y-RCRV>].

<sup>21</sup> See, e.g., *Eric Garner's Family: Anger, Frustration After Grand Jury Decision*, NBC NEW YORK, (Dec. 3, 2014, 7:28 PM), <http://www.nbcnewyork.com/news/local/Eric-Garner-Family-React-Grand-Jury-Declines-Indict-NYPD-Chokehold-Death-284682341.html> [<https://perma.cc/CDZ3-3QJC>]; Phil Gast, *What's Next for the Michael Brown Family?*, CNN (Nov. 25, 2014), <http://www.cnn.com/2014/11/24/us/missouri-ferguson-brown-family-next/> [<https://perma.cc/ZJ7G-GPF5>] (“When a Missouri grand jury decided not to indict Ferguson police Officer Darren Wilson in his fatal shooting, Michael Brown’s family believed they were denied justice.”).

<sup>22</sup> Soraya N. McDonald, *Protestors Across the Country React to Grand Jury's Decision Not to Indict Darren Wilson*, WASH. POST (Nov. 25, 2014), <https://www.washingtonpost.com>.

The failed prosecutions received significant press coverage, but thereafter, the families garnered less and less attention. Each family's quest for justice became a seemingly lost cause. Perhaps there were too many subsequent deaths, too little mental space left over to simultaneously track how each victim's family was coping.

But victims' families have continued on. The families of Eric Garner, Laquan McDonald, Freddie Gray, and Walter Scott reached financial settlements with the cities in which their loved ones died.<sup>23</sup> The families had viable Section 1983 claims, but chose early settlement over protracted litigation. The settlements these families obtained are large,<sup>24</sup> signaling that the families caused the cities they targeted to fear civil rights litigation. Signaling this fear, North Charleston's city attorney described the Scott settlement as "a lot of money," that helped the city avoid "the potential for a very large verdict."<sup>25</sup>

The litigation strategy employed by the victims' families is not the kind of strategy that brings about societal or even widespread change. The families' accelerated civil rights settlements do not fit neatly into the mythology of what Section 1983 purportedly represents.<sup>26</sup> The strategy focuses on a single event, not a

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com/news/morning-mix/wp/2014/11/25/protesters-across-the-country-react-to-grand-jurys-decision-not-to-indict-darren-wilson/?utm\_term=.92cbd0013259 [https://perma.cc/38CW-ZKFG] ("Thousands of protesters took to streets and highways all over the country Monday night in protest after learning that police officer Darren Wilson would not be indicted for shooting and killing an unarmed teenager, Michael Brown, in August."); J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/ny-region/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [https://perma.cc/T29P-VVX8] (describing how "hundreds of angry but generally peaceful demonstrators took to the streets in Manhattan as well as in Washington and other cities").

<sup>23</sup> See *infra* notes 24, 25, 47, 56.

<sup>24</sup> Associated Press, *Family of Walter Scott Who Was Shot Dead by Police Reach \$6.5 Million Settlement with North Charleston*, DAILY MAIL (Oct. 8, 2015), <http://www.dailymail.co.uk/news/article-3265873/South-Carolina-family-receive-6-5million-payout-black-man-fatally-shot-running-white-cop.html> [https://perma.cc/6ZQQ-BU5L] (the Scott "\$6.5 million represents the largest settlement for such a case in the state's history"); Yvonne Wenger & Mark Puente, *Baltimore to Pay Freddie Gray's Family \$6.4 Million to Settle Civil Claims*, BALT. SUN (Sept. 8, 2015, 10:01 PM), <http://www.baltimore-sun.com/news/maryland/freddie-gray/bs-md-ci-boe-20150908-story.html> [https://perma.cc/5YUT-WQSQ] ("The Gray settlement exceeds the combined total of more than 120 other lawsuits brought against Baltimore police for alleged brutality and misconduct since 2011."); Adam Chandler, *Taxpayer Funds and the Walter Scott Settlement*, ATLANTIC (Dec. 19, 2015), <https://www.theatlantic.com/national/archive/2015/12/walter-scott-settlement/421380/> [https://perma.cc/D9J3-9BG7] ("Major settlements between city governments and the families of black men killed by police are an increasingly common consequence of a horrifying trend in recent months.").

<sup>25</sup> Matt Ford, *A Settlement for Walter Scott's Family*, ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/politics/archive/2015/10/walter-scott-shooting-settlement/409834/> [https://perma.cc/4ZUP-3MA8].

<sup>26</sup> See *supra* text accompanying notes 9–16.

pattern and practice, and seeks only damages, not injunctive relief. Yet these settlements are not outliers. They are, once studied closely, evidence of a new and arguably brilliant alternative dispute resolution strategy that relies implicitly on the consequences of high profile Section 1983 lawsuits.

#### A. *The Eric Garner Settlement*

Eric Garner of Staten Island died on July 17, 2014.<sup>27</sup> He was forty-three.<sup>28</sup> Minutes before he died, police officers Justin Damico and Daniel Pantaleo “closed in” on Garner, questioning him about selling cigarettes.<sup>29</sup> A struggle ensued, and Pantaleo pushed Garner onto the sidewalk.<sup>30</sup> Pantaleo placed Garner in a chokehold.<sup>31</sup> After Pantaleo let go of his neck, Garner died.<sup>32</sup> Garner’s final words, repeated eleven times, are now an infamous refrain: “I can’t breathe.”<sup>33</sup>

New York City’s medical examiner determined that Garner’s death was a homicide caused by Pantaleo’s chokehold and “the compression of Mr. Garner’s chest by other officers who held him down.”<sup>34</sup>

A state grand jury declined to indict Pantaleo.<sup>35</sup> Though the Department of Justice is still considering whether to indict him for criminal civil rights violations, so far, no action has been taken.<sup>36</sup> A pro-law enforcement Attorney General like Jeff Sessions is unlikely to advocate for any such prosecution.<sup>37</sup>

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<sup>27</sup> Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/G7UX-JFLP>].

<sup>28</sup> Melanie Eversley, *NYPD Sergeant Charged in Eric Garner Case*, USA TODAY (Jan. 8, 2016, 10:18 PM), <http://www.usatoday.com/story/news/2016/01/08/nypd-sergeant-charged-eric-garner-case/78532476/> [<https://perma.cc/97TZ-QAAP>].

<sup>29</sup> Baker et al., *supra* note 27.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

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

<sup>33</sup> *Id.*

<sup>34</sup> J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N.Y. TIMES (July 13, 2015), <https://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html> [<https://perma.cc/AP3J-4AHT>].

<sup>35</sup> Sari Horwitz & Matt Zapposky, *Loretta Lynch Will Leave Office Without Eric Garner Case Being Resolved*, WASH. POST (Jan. 13, 2017), [https://www.washingtonpost.com/world/national-security/loretta-lynch-will-leave-office-without-eric-garner-case-being-resolved/2017/01/13/ee362f4a-d9db-11e6-b8b2-cb5164beba6b\\_story.html?utm\\_term=.1d52fedad129](https://www.washingtonpost.com/world/national-security/loretta-lynch-will-leave-office-without-eric-garner-case-being-resolved/2017/01/13/ee362f4a-d9db-11e6-b8b2-cb5164beba6b_story.html?utm_term=.1d52fedad129) [<https://perma.cc/KB8T-UKL6>].

<sup>36</sup> Will Bredderman, *NYC Mayor Laments Lack of “Speedy Justice” in Federal Eric Garner Probe*, OBSERVER (Jan. 17, 2017, 11:56 AM), <http://observer.com/2017/01/nyc-mayor-laments-lack-of-speedy-justice-in-federal-eric-garner-probe/> [<https://perma.cc/LK4S-6CHG>].

<sup>37</sup> Tom Hays, *Eric Garner Chokehold Case Rolls On, But Future Is Cloudy*, ASSOCIATED PRESS (Feb. 17, 2017), <http://bigstory.ap.org/article/8a5858bfde474341b5000>



As of March 2017, Pantaleo was still an NYPD officer assigned to desk duties.<sup>38</sup>

On September 13, 2014, Eric Garner’s mother Gwen Carr filed a notice of claim with the City of New York.<sup>39</sup> The document provided notice that she would be bringing tort claims against the City and its officers, a procedure mandated by New York law.<sup>40</sup> Section 1983 claims have no notice of claim prerequisite. However, state law claims brought as supplemental claims in a federal civil rights action cannot be heard if plaintiffs “have failed to comply with the notice of claim requirement, or [obtained] permission to file a late notice.”<sup>41</sup>

Still, a notice of claim is a state law prerequisite. Gwen Carr conformed to the procedure that would permit her to file a state wrongful death lawsuit. But her notice of claim suggests a savvy strategy with a very clear message. It provided notice that Carr was considering a federal civil rights lawsuit and previewed the Section 1983 claims her complaint might include. For example, in describing the nature of the claim at issue in the notice, Carr listed fourteen state law claims, in addition to “violation of civil rights under 42 U.S.C. § 1983.”<sup>42</sup>

The notice of claim also describes Garner’s death as a circumstance that deprived him “of his rights, privileges and immunities secured by the Constitution and laws of the United States of America by one who [acted] under color of a statute or regulation of a State.”<sup>43</sup> This language evokes Section 1983, which creates a cause of action against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be

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456a3d417d0/eric-garner-chokehold-case-rolls-future-cloudy [https://perma.cc/Q2DW-P5ND]; Radley Balko, *Jeff Sessions Dismisses DOJ Reports on Police Abuse Without Bothering to Read Them*, WASH. POST (Feb. 28, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/02/28/jeff-sessions-dismisses-doj-reports-on-police-abuse-without-bothering-to-read-them/?utm\_term=.029ee451c6b2 [https://perma.cc/5W8J-HWLN]. Though Sessions’ tenure as Attorney General may end before President Trump’s first term concludes, the Trump administration’s position on police violence will remain pro-police, and arguably anti-victim. On July 28, 2017, while addressing a group of police officers in Long Island, President Trump encouraged police officers to not worry about injuring suspects or protecting their heads during arrests. Mark Berman, *Trump Tells Police Not to Worry About Injuring Suspects During Arrests*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests/?utm\_term=.77947044ad14 [https://perma.cc/4L7L-JBDD].

<sup>38</sup> Benjamin Mueller, *Employee Accused of Records Leak in Eric Garner Case Resigns*, N.Y. TIMES (Mar. 23, 2017), https://www.nytimes.com/2017/03/23/nyregion/ccrb-nypd-daniel-pantaleo-eric-garner.html [https://perma.cc/5ZBV-KWQF].

<sup>39</sup> Notice of Claim at 4, Carr v. City of New York, (S.D.N.Y. Sept. 13, 2014), https://assets.documentcloud.org/documents/1310850/eric-garner-redacted-notice-of-claim-2.pdf [https://perma.cc/MNX9-RDQ7] [hereinafter Carr Notice of Claim].

<sup>40</sup> N.Y. GEN. MUN. LAW § 50-i(1) (2016).

<sup>41</sup> Gibson v. Comm’r of Mental Health, No. 04 Civ. 4350 (SAS), 2006 WL 1234971, at \*5 (S.D.N.Y. May 8, 2006).

<sup>42</sup> Carr Notice of Claim, *supra* note 39, at 1.

<sup>43</sup> *Id.* at 2.

subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”<sup>44</sup>

The notice of claim describes items of damage as, inter alia, “loss of civil rights,” and seeks punitive damages and attorneys’ fees.<sup>45</sup> Unlike state law tort claims, Section 1983 does “include the potential recovery of attorneys’ fees.”<sup>46</sup>

In July 2015, Eric Garner’s family “agreed to a settlement with New York City for \$5.9 million.”<sup>47</sup> The City did not admit liability, though New York City’s Comptroller, Scott Stringer, described the settlement as “in the best interests of all parties.”<sup>48</sup> One of the Garner family attorneys, Jonathan C. Moore, stated, “if no settlement was reached by [July 2015], a lawsuit would have been filed.”<sup>49</sup>

Moreover, the New York City Comptroller admitted that the settlement was intended to settle the Garner families’ civil rights claims. It followed months of negotiations, and

was among the biggest settlements reached so far as part of a strategy by Mr. Stringer, to settle major civil rights claims even before a lawsuit is filed. He has said the aim is to save taxpayers the expense, and families the pain, of a long legal process. He said five lawyers from his office were involved in the negotiations, which ended on Monday.<sup>50</sup>

Moore noted that the settlement “at least . . . brings a measure of justice to the family.”<sup>51</sup>

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<sup>44</sup> 42 U.S.C. § 1983 (2012).

<sup>45</sup> Carr Notice of Claim, *supra* note 39, at 3.

<sup>46</sup> Nancy L. Harris, *Civil Rights—Third Circuit Narrows Scope of Public School District 1983 Liability for the Sexual Abuse of Students*, 38 VILL. L. REV. 1100, 1103 (1993). “[L]awyers Jonathan Moore and the firm of Rubenstein and Rynecki, who represented the family at various times since the July 2014 incident, are asking for almost \$2.5 million in legal fees.” Mira Wassef, *Lawyers in the Eric Garner Case Want Almost \$2.5 Million of Settlement*, SILIVE (Nov. 17, 2016, 2:39 PM), [http://www.silive.com/news/index.ssf/2016/11/garner\\_lawyers\\_asking\\_for\\_almo.html](http://www.silive.com/news/index.ssf/2016/11/garner_lawyers_asking_for_almo.html) [<https://perma.cc/6NQJ-7KL6>]. Moore was hired in 2015 to replace Ryneck and Rubenstein, and sought \$750,000 in fees. *Id.*

<sup>47</sup> Mark Berman, *Eric Garner’s Family Settles with New York City for \$5.9 Million*, WASH. POST (July 13, 2015) [https://www.washingtonpost.com/news/post-nation/wp/2015/07/13/eric-garners-family-settles-with-new-york-city-for-5-9-million/?utm\\_term=.0d0cead b1618](https://www.washingtonpost.com/news/post-nation/wp/2015/07/13/eric-garners-family-settles-with-new-york-city-for-5-9-million/?utm_term=.0d0cead b1618) [<https://perma.cc/9PKS-KW39>].

<sup>48</sup> *Id.* (internal quotation marks omitted).

<sup>49</sup> *Id.*

<sup>50</sup> Goodman, *supra* note 34.

<sup>51</sup> *Id.*

Garner's mother commented that victory would be declared on her son's behalf "when we get justice."<sup>52</sup> One of Garner's children, Emerald Snipes, defined justice as the moment in which "somebody is held accountable for what they [did]."<sup>53</sup>

Though no one was held criminally accountable for his death, the city that employed the officer who used a fatal chokehold on Eric Garner had to answer to his family. They paid his family a multimillion dollar settlement. No family member had to endure cross-examination at trial about Garner's death. No family member had to submit to intrusive deposition questioning. No one had to endure emotionally and physically taxing trial preparation. Eric Garner's future earnings' potential did not need to be disclosed in discovery. Indeed, no one needed to draft, review or file a federal civil rights complaint.

When Eric Garner's mother Gwen Carr filed a notice of claim that expressly mentioned civil rights claims arising out of her son's death, along with her intention to seek attorneys' fees for the same, she accelerated settlement of her Section 1983 claims. In fact, she accelerated the settlement so effectively that her litigation began with the filing of a four-page notice of claim and ended after the parties settled out of court. There was no litigation in between.<sup>54</sup>

### B. *The Laquan McDonald Settlement*

On October 20, 2014, seventeen-year-old Laquan McDonald was shot and killed in Chicago.<sup>55</sup> Police officer Jason Van Dyke shot McDonald sixteen times.<sup>56</sup> Before he was shot, McDonald was walking in the middle of a street on the city's southwest side.<sup>57</sup> Van Dyke and other police officers who witnessed McDonald's death originally reported that McDonald, who was carrying a knife, lunged at Van

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<sup>52</sup> *Eric Garner Family Says \$5.9 Million Settlement Isn't a Victory*, CBS NEWS (July 14, 2015, 12:28 PM) (internal quotation marks omitted), <http://www.cbsnews.com/news/eric-garner-family-says-5-9-million-settlement-isnt-a-victory/> [<https://perma.cc/ZW2N-BB34>].

<sup>53</sup> *Id.* (internal quotation marks omitted).

<sup>54</sup> Tragically, Eric Garner's 27-year-old daughter Erica Garner died on December 30, 2017, after suffering a heart attack. Vivian Wang, *Erica Garner, Activist and Daughter of Eric Garner, Dies at 27*, N.Y. TIMES (Dec. 30, 2017), <https://www.nytimes.com/2017/12/30/nyregion/erica-garner-dead.html> [<https://perma.cc/ZX6Z-ERDK>]. Shortly before her death, Ms. Garner gave an interview in which she described "the frustrations and physical toll of her activism." *Id.*

<sup>55</sup> Morgan Winsor & Josh Margolin, *Chicago Police Department Moves to Fire 7 Officers in Laquan McDonald Shooting Death*, ABC NEWS (Aug. 18, 2016, 1:50 PM), <http://abcnews.go.com/US/chicago-police-department-moves-fire-officers-laquan-mcdonald/story?id=41484649> [<https://perma.cc/C795-UF99>].

<sup>56</sup> *Id.*

<sup>57</sup> Sun-Times Staff, *\$1 Million Per Shot—How Laquan McDonald Settlement Unfolded After that Initial Demand*, CHI. SUN-TIMES (June 24, 2016, 8:52 AM), <http://chicago.suntimes.com/politics/1-million-per-shot-how-laquan-mcdonald-settlement-unfolded-after-that-initial-demand/> [<https://perma.cc/M49X-693P>].

Dyke.<sup>58</sup> However, video of the shooting showed that “while Mr. McDonald had a knife, he seemed to be veering away from the police when Officer Van Dyke shot him, and the gunfire continued after the teenager collapsed to the ground.”<sup>59</sup>

Van Dyke was indicted for first-degree murder.<sup>60</sup> His criminal trial is ongoing.<sup>61</sup> He was placed on unpaid leave by the Chicago Police Department,<sup>62</sup> but in 2016 was hired as a janitor by the Fraternal Order of Police, Chicago’s police union.<sup>63</sup>

On November 7, 2014, McDonald’s mother, Tina Hunter, hired lawyers to investigate her son’s death.<sup>64</sup> On March 3, 2015, her lawyers contacted the City of Chicago and proposed settlement.<sup>65</sup> They sought to settle quickly, fearing that “Van Dyke could be indicted, and a criminal case might delay for years the settlement of any lawsuit the family might file.”<sup>66</sup>

Three days later, Hunter’s lawyers demanded \$16 million “to resolve all claims on behalf of the estate of Laquan McDonald.”<sup>67</sup> On April 8, 2015, the demand was lowered to \$5 million.<sup>68</sup>

On April 14, 2015, the Chicago City Council unanimously approved a \$5 million settlement.<sup>69</sup> On August 26, 2015, McDonald’s estate was settled; \$2.25 million was assigned to his mother, Tina Hunter, with \$900,000 going to her lawyers; McDonald’s sister was assigned \$2.75 million, with \$916,667 going to Hunter’s lawyers.<sup>70</sup>

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<sup>58</sup> See Mitch Smith & Richard A. Oppel, Jr., *7 Chicago Police Officers Face Firing over Laquan McDonald Cover-Up*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/us/laquan-mcdonald-chicago-police.html> [<https://perma.cc/6XBH-QBE4>].

<sup>59</sup> *Id.*

<sup>60</sup> Nausheen Husain, *Data: Laquan McDonald Timeline: The Shooting, the Video and the Fallout*, CHI. TRIB. (June 27, 2017, 6:13 PM), <http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html> [<https://perma.cc/F62Z-YQ3E>].

<sup>61</sup> Steve Schmadeke, *Judge’s Secrecy Shrouds Case of Chicago Cop Charged with Killing Laquan McDonald*, CHI. TRIB. (Feb. 2, 2017, 4:04 PM), <http://www.chicagotribune.com/news/laquanmcdonald/ct-laquan-mcdonald-jason-van-dyke-transparency-met-20170202-story.html> [<https://perma.cc/U3TZ-S7JU>].

<sup>62</sup> Monica Davey & Mitch Smith, *Chicago Protests Mostly Peaceful After Video of Police Shooting Is Released*, N.Y. TIMES (Nov. 24, 2015), <https://www.nytimes.com/2015/11/25/us/chicago-officer-charged-in-death-of-black-teenager-official-says.html> [<https://perma.cc/6JN2-8KUA>].

<sup>63</sup> Frank Main, *Police Union Hiring of Jason Van Dyke Sparks Outrage*, CHI. SUN-TIMES (Mar. 31, 2016, 4:06 PM), <http://chicago.suntimes.com/chicago-politics/fop-hires-jason-van-dyke-as-jack-of-all-trades-at-union-hall/> [<https://perma.cc/R39F-T96Z>].

<sup>64</sup> Sun-Times Staff, *supra* note 57.

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (internal quotation marks omitted).

<sup>68</sup> *Id.*

<sup>69</sup> Husain, *supra* note 60.

<sup>70</sup> Sun-Times Staff, *supra* note 57.

McDonald's death arguably gives rise to Section 1983 claims involving Fourth Amendment violations based on the officer's use of excessive force. McDonald's family could have brought a civil rights action based on those claims.<sup>71</sup>

However, a plaintiff-friendly outcome would have been unlikely. In a recent Fourth Amendment excessive force case, *Plumhoff v. Rickard*,<sup>72</sup> the Supreme Court found that there was no excessive force claim arising out of police officers' decision to shoot into a fleeing suspect's car fifteen times.<sup>73</sup> The shooting killed the driver and a passenger.<sup>74</sup> Nevertheless, the Court concluded that had the shooting violated the Fourth Amendment, it still would not have found Section 1983 liability.<sup>75</sup> "[T]he officers would have been entitled to qualified immunity even had there been a violation."<sup>76</sup>

If Van Dyke could have plausibly argued that he feared that McDonald would assault him, he too might have been able to argue that his use of force was reasonable. In the absence of clearly established precedent forbidding the use of deadly force when an individual is wielding a knife, Van Dyke would have likely escaped liability.<sup>77</sup>

In general, excessive force precedent is not friendly to Section 1983 plaintiffs.<sup>78</sup> The qualified immunity defense applied in *Plumhoff* has been so broadened that it excuses almost any police conduct challenged through a civil rights action.<sup>79</sup> Qualified immunity motion practice would have likely defeated Hunter's claims.

But the McDonald family never had to fight a motion to dismiss based on a qualified immunity defense. Like Eric Garner's family, Laquan McDonald's family settled without filing a federal civil rights action. Unlike the Garner family, the McDonald family avoided filing anything, even a notice of claim. Rather, the possibility of civil rights litigation lingered in the background of settlement negotiations.

There was no discovery, no expert witness reports and no trial. The City that might have been sued in a federal civil rights action was instead held responsible for

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<sup>71</sup> See, e.g., *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014).

<sup>72</sup> 134 S. Ct. 2012 (2014).

<sup>73</sup> *Id.* at 2022–24; see also Lorenzo G. Morales, Heien v. North Carolina and Police Mistakes of Law: The Supreme Court Adds Another Ingredient to Its "Freedom-Destroying Cocktail," 52 CAL. W. L. REV. 79, 93–94 (2015) (describing the *Plumhoff* holding as one of many in which the Supreme Court has eroded Fourth Amendment protections).

<sup>74</sup> Morales, *supra* note 73, at 93 (citation omitted).

<sup>75</sup> *Id.* at 93–94.

<sup>76</sup> *Id.* at 94.

<sup>77</sup> See ERWIN CHERMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 90 (2017) (describing the *Plumhoff* holding as "disturbing" because it permits police to shoot at a vehicle during a high-speed chase until the vehicle stops).

<sup>78</sup> See, e.g., Christopher L. McIlwain, *The Qualified Immunity Defense in the Eleventh Circuit and Its Application to Excessive Force Claims*, 49 ALA. L. REV. 941, 941–42 (1998); Philip Sheng, *An "Objectively Reasonable" Criticism of the Doctrine of Qualified Immunity in Excessive Force Cases Brought Under 42 U.S.C. § 1983*, 26 BYUJ. PUB. L. 99, 99 (2011).

<sup>79</sup> CHERMERINSKY, *supra* note 77, at 89.

its officers' actions through an accelerated civil rights settlement, which arguably took a minimal toll on McDonald's relatives. This accelerated path to civil rights recovery forced the City of Chicago to acknowledge the injustice of McDonald's death—albeit implicitly.

### C. *The Freddie Gray Settlement*

Freddie Gray died in Baltimore on April 19, 2015.<sup>80</sup> He was twenty-five.<sup>81</sup> Gray suffered a spinal injury one week earlier while in police custody. He died of severe neck injuries suffered in the back of a police van, which he rode in while “shackled and handcuffed, but not secured in a seat belt.”<sup>82</sup> Six officers involved in his death were charged in state proceedings for crimes ranging from murder to manslaughter.<sup>83</sup> One officer's trial ended with a hung jury, three more were acquitted after bench trials, and the charges against the remaining officers were dropped.<sup>84</sup>

In September 2015, Gray's family settled with the City of Baltimore for \$6.4 million.<sup>85</sup> Baltimore's mayor explained that the settlement was intended “to bring an important measure of closure to the Gray family, to the community and to the city.”<sup>86</sup> The mayor also added that the settlement would “avoid years and years of protracted litigation.”<sup>87</sup>

The Gray family's lawyer described the settlement as “civil justice.”<sup>88</sup> Baltimore's Department of Law recommended the settlement and was involved

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<sup>80</sup> John Bacon & Melanie Eversley, *Baltimore Cop Acquitted in Freddie Gray Death*, USA TODAY (May 23, 2016, 7:56 AM), <http://www.usatoday.com/story/news/nation/2016/05/23/verdict-freddie-gray-police-trial-due-monday/84767208/> [<https://perma.cc/QVQ8-WMCY>].

<sup>81</sup> *Id.*

<sup>82</sup> Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016, 8:57 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html> [<https://perma.cc/TZY2-CNMC>].

<sup>83</sup> Sheryl G. Stolberg & Jess Bidgood, *All Charges Dropped Against Baltimore Officers in Freddie Gray Case*, N.Y. TIMES (July 27, 2016), <https://www.nytimes.com/2016/07/28/us/charges-dropped-against-3-remaining-officers-in-freddie-gray-case.html> [<https://perma.cc/JY2R-C52X>].

<sup>84</sup> *Id.*

<sup>85</sup> John Bacon, *Freddie Gray Settlement 'Obscene,' Police Union Chief Says*, USA TODAY (Sept. 9, 2015, 11:44 AM), <http://www.usatoday.com/story/news/nation/2015/09/09/baltimore-panel-approves-freddie-gray-settlement/71928226/> [<https://perma.cc/73R6-NYX4>].

<sup>86</sup> *Id.* (internal quotation marks omitted).

<sup>87</sup> *Id.* (internal quotation marks omitted).

<sup>88</sup> *Id.* (internal quotation marks omitted).

“early” in settlement negotiation with the Gray family.<sup>89</sup> The settlement provided that Gray’s family release all claims

arising out of, or in any way related to, the detention, arrest or transport of Freddie Gray . . . including but not limited to any and all claims under the United States Constitution, under any federal civil rights statute [including 42 U.S.C. 1983], or any comparable state law . . . including attorneys’ and consultant’s fees.<sup>90</sup>

A retired federal judge mediated the settlement.<sup>91</sup>

Had the matter not settled, the Gray family would have brought suit in federal court.<sup>92</sup> This information, along with the settlement’s express provision that it settled Section 1983 claims and attorneys’ fees available under Section 1983, indicates that the mere possibility that a Section 1983 action could be filed resulted in accelerated civil rights settlement.

#### D. *The Walter Scott Settlement*

On April 4, 2015, Walter Scott of North Charleston, South Carolina, was shot in the back and killed by police officer Michael Slager.<sup>93</sup> Scott was unarmed.<sup>94</sup> He was originally pulled over for a broken taillight.<sup>95</sup> On December 5, 2016, Slager’s state murder trial ended in a mistrial.<sup>96</sup> Slager later pleaded guilty to one charge of

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<sup>89</sup> Ron Snyder, *Baltimore Approves \$6.4 Million Settlement with Freddie Gray’s Family*, WBALTV (Sept. 9, 2015, 4:17 PM), <http://www.wbalv.com/article/baltimore-approves-6-4-million-settlement-with-freddie-gray-s-family/7095865> [<https://perma.cc/6TBD-RTGN>].

<sup>90</sup> Settlement Agreement and Release at 4, *Gray v. City of Baltimore* (D. Md. Sept. 2, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bal-document-freddie-gray-settlement-agreement-20150909-htmlstory.html> [<https://perma.cc/TE43-FXJR>].

<sup>91</sup> Kevin Rector, *Settlement Keeps Gray Family, City Out of Litigation ‘Hell,’ Attorney Says*, BALT. SUN (Sept. 9, 2015, 3:21 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-murphy-presser-20150909-story.html> [<https://perma.cc/7DP3-X7KX>].

<sup>92</sup> *Id.*

<sup>93</sup> Brenda Rindge, *Scott’s Family to Get \$6.5M from City*, POST AND COURIER (Oct. 7, 2015), [http://www.postandcourier.com/archives/scott-s-family-to-get-m-from-city/article\\_395433c1-3ec9-5d65-a755-a277147b7ac0.html](http://www.postandcourier.com/archives/scott-s-family-to-get-m-from-city/article_395433c1-3ec9-5d65-a755-a277147b7ac0.html) [<https://perma.cc/464X-2VSE>].

<sup>94</sup> *Id.*

<sup>95</sup> Leon Neyfakh, *Mistrial for Cop Who Shot Walter Scott in the Back*, SLATE (Dec. 5, 2016, 5:56 PM), [http://www.slate.com/blogs/the\\_slatest/2016/12/05/mistrial\\_for\\_michael\\_slager\\_in\\_the\\_walter\\_scott\\_shooting.html](http://www.slate.com/blogs/the_slatest/2016/12/05/mistrial_for_michael_slager_in_the_walter_scott_shooting.html) [<https://perma.cc/7ZDZ-QPJX>].

<sup>96</sup> Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html> [<https://perma.cc/8WBC-MZXF>].

violating Scott's civil rights; he has yet to be sentenced, but his federal plea resulted in the dismissal of his state court murder charge.<sup>97</sup>

"Days after the Scott slaying, lawyers for the family said they planned to file suits against Slager, 33, for civil rights violation[s] and wrongful death . . . ."<sup>98</sup> However, by October 2015, Scott's family agreed to settle with the City of North Charleston for \$6.5 million.<sup>99</sup> No lawsuit was filed.<sup>100</sup>

North Charleston's city attorney admitted that the settlement amount was influenced by "[t]he Eric Garner case in New York and the Freddie Gray case in Baltimore," which "really set the tone for the range of numbers that we thought was consistent with what was going on."<sup>101</sup> That is, by the time Walter Scott's family faced settlement options, prior accelerated civil rights settlements were treated as a form of persuasive precedent.

Like Laquan McDonald's family, Scott's family could have brought a Section 1983 action for excessive force in violation of the Fourth Amendment. Like McDonald's family, the Scott family could have also sought attorneys' fees. Yet no lawsuit needed to be filed and another family was saved from the pain of prolonged litigation. Instead, accelerated civil rights settlement brought a quick resolution.

### III. ACCELERATED CIVIL RIGHTS SETTLEMENT STRATEGY

Since 1871, federal law has provided a cause of action for plaintiffs whose constitutional rights were violated by an actor acting under color of state law. But civil rights litigation brought pursuant to Section 1983 can take more than five years to reach an outcome, and plaintiffs face nearly insurmountable defenses. If no one can be sued for violating the Constitution under Section 1983 as a result of immunity defenses, then federal courts cannot remedy constitutional violations through Section 1983.<sup>102</sup>

Despite these obstacles, one group of talented plaintiffs' lawyers recently used Section 1983 to successfully challenge stop-and-frisk practices in New York City.<sup>103</sup> They benefitted from assignment to a judge who was open to their arguments, and enjoyed the support of a city tired of racist policing.<sup>104</sup> This particular example of

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<sup>97</sup> Matt Zaposky & Wesley Lowery, *Former S.C. Police Officer Pleads Guilty in Fatal Shooting Caught On Video*, WASH. POST (May 2, 2017), [https://www.washingtonpost.com/world/national-security/former-sc-police-officer-to-plead-guilty-in-fatal-shooting-caught-on-video/2017/05/02/9a235afe-2f35-11e7-9534-00e4656c22aa\\_story.html?utm\\_term=.b2091c072432/](https://www.washingtonpost.com/world/national-security/former-sc-police-officer-to-plead-guilty-in-fatal-shooting-caught-on-video/2017/05/02/9a235afe-2f35-11e7-9534-00e4656c22aa_story.html?utm_term=.b2091c072432/) [<https://perma.cc/KB8T-UKL6>].

<sup>98</sup> Rindge, *supra* note 93.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> CHEMERINSKY, *supra* note 77, at 92.

<sup>103</sup> Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 221 (2014).

<sup>104</sup> *Id.* at 226, 244.



Section 1983 litigation had an impact on the city practices it challenged. However, because the suit sought only injunctive relief, the stop-and-frisk plaintiffs recovered no damages.<sup>105</sup>

Though the Garner, McDonald, Gray, and Scott families could have also pursued impact litigation, they instead chose accelerated civil rights settlement. The ways in which their techniques differ from the impact litigation model are described below.

Impact litigation, at its best, matches motivated attorneys with sympathetic plaintiffs who are committed to bringing about changes in law and policy to benefit the plaintiffs themselves and society as a whole.<sup>106</sup> Impact litigation often involves certifying a class of plaintiffs, and may seek injunctive relief instead of damages. As a result, there may be tension between an impact litigation attorney's goal of facilitating social change and an individual plaintiff's personal litigation expectations.<sup>107</sup>

Impact litigation's objective is not neutral. Derrick Bell argued that impact litigation "can and should" gain and exploit political leverage.<sup>108</sup>

Finally, even if impact litigation is successful in obtaining a positive outcome for plaintiffs, their counsel's work often continues after judgment enters, as consent decrees must be monitored for compliance.<sup>109</sup>

The most infamous example of impact litigation is *Brown v. Board of Education*,<sup>110</sup> "the NAACP's national test case campaign to desegregate the nation's schools."<sup>111</sup> The case is regarded as "the epitome of American ideals about how to use public impact litigation to promote public interest objectives."<sup>112</sup>

In the Section 1983 context, impact litigation, which "aim[s] at systemic reform that [does] not necessarily benefit the specific plaintiff(s)," is controversial.<sup>113</sup> The New York City stop-and-frisk litigation is a recent example of successful yet controversial Section 1983 impact litigation.

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<sup>105</sup> Katherine Macfarlane, *New York City's Stop-and-Frisk Appeals Are Still Alive*, BROOK. L. SCH. PRACTICUM (2013) [hereinafter Macfarlane, *Stop-and-Frisk Appeals*].

<sup>106</sup> Kevin R. Johnson, *Lawyering for a Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 221–22 (1990).

<sup>107</sup> Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493, 503 (1996).

<sup>108</sup> Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 513 (1976).

<sup>109</sup> *Id.* at 514.

<sup>110</sup> 347 U.S. 483 (1954).

<sup>111</sup> Susan D. Carle, *Re-Envisioning Models for Pro Bono Lawyering: Some Historical Reflections*, 9 AM. U. J. GENDER SOC. POL'Y & L. 81, 82 (2001).

<sup>112</sup> *Id.*

<sup>113</sup> Sasha Samberg-Champion, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1847 n.54 (2003).

The case began in 1999, when *Daniels v. City of New York*,<sup>114</sup> filed by the Center for Constitutional Rights, used Section 1983 to allege “that the NYPD’s stop-and-frisk practices violated the Fourth Amendment.”<sup>115</sup>

The *Daniels* complaint alleged that “in high crime areas, [Street Crimes Unit] officers have been repeatedly conducting stops and frisks of individuals without the reasonable articulable suspicion required by the Fourth Amendment.” The case was spurred in part by the February 1999 death of unarmed Amadou Diallo, who was shot by four SCU officers, as well as by the release of statistics which, according to *Daniels*, demonstrated that the NYPD’s stop-and-frisk encounters disproportionately targeted Black and Latino men.<sup>116</sup>

The *Daniels* plaintiffs won class certification, and negotiated a sweeping settlement, which required the NYPD to create a written policy regarding racial profiling compliant with the United States and New York Constitutions, to train officers regarding the same, and to ensure compliance with the policy.<sup>117</sup>

The NYPD was also required to complete a written form each time they conducted a stop-and-frisk (known as ‘UF-250 Reports’), provide plaintiffs’ counsel with quarterly data regarding these reports until 2007.<sup>118</sup> Plaintiffs’ counsel recovered \$3.5 million in fees and costs, an amount that dwarfed the plaintiffs’ \$167,500 total recovery.<sup>119</sup>

In January 2008, relying on data collected as a result of *Daniels*, *Floyd v. City of New York*,<sup>120</sup> also a Section 1983 action, was filed.<sup>121</sup> The same attorneys who represented the plaintiffs in *Daniels* also represented the plaintiffs in *Floyd*.

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<sup>114</sup> 198 F.R.D. 409 (S.D.N.Y. 2001).

<sup>115</sup> Macfarlane, *supra* note 103, at 219.

<sup>116</sup> *Id.*

<sup>117</sup> See Memorandum Opinion and Order at 1, *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. July 16, 2007) (No. 99 Civ. 1695).

<sup>118</sup> *Id.*

<sup>119</sup> See *Daniels v. City of New York*, Docket No. 170, Case No. 1:99-cv-01695-SAS-HBP (S.D.N.Y.) (outlining the attorney’s fees that the City of New York agreed to pay in the Stipulation and Order of Settlement); Press Release, N.Y.C. Law Dept. Office of the Corp. Counsel, N.Y.P.D. Announces Settlement in Daniels Class-Action “Stop-And-Frisk” Lawsuit (Sept. 18, 2003) (“The damages the City has agreed to pay total \$167,500 that will be divided among 10 named plaintiffs.”).

<sup>120</sup> 283 F.R.D. 153 (S.D.N.Y. 2012).

<sup>121</sup> Li Onesto, *Stop-and-Frisk on Trial: Damning Testimony, Damning Evidence*, REVOLUTION NEWSPAPER (May 1, 2013) <http://revcom.us/a/302/stop-and-frisk-on-trial-en.html> [<https://perma.cc/DL49-5BZP>] (describing Floyd as “the culmination of more than 15 years of work by the Center for Constitutional Rights and the solid determination of a citywide movement that has made stop and frisk a central issue in New York City politics”).

like *Daniels*, alleged that the NYPD engaged in stop-and-frisk practices that violated the Fourth Amendment.<sup>122</sup> The *Floyd* plaintiffs also won class certification.<sup>123</sup>

In 2013, five and a half years after the case commenced, after a three month bench trial, the *Floyd* plaintiffs were granted a broad injunction against the NYPD, which, inter alia, appointed a monitor to oversee stop-and-frisk practices, required a “community-based joint remedial process to be conducted by a court-appointed facilitator,” and ordered that one precinct in each of New York City’s boroughs place body-worn cameras on their police officers.<sup>124</sup> The ruling received positive press coverage around the world.<sup>125</sup>

Though the case took strange procedural twists, including one that caused the removal of the judge who presided over the *Daniels*’ settlement and the *Floyd* trial,<sup>126</sup> it also had a tremendous impact in New York City. Bill de Blasio won the mayoral election in November 2013 after running a campaign in which he voiced support for the *Floyd* plaintiffs and promised to end the City’s stop-and-frisk practices.<sup>127</sup> By 2014, the plaintiffs and the City were engaged in a much less adversarial resolution of the case; as a result of their collaboration, a monitor was appointed. He provided recommendations that would help implement the 2013 remedial order.<sup>128</sup>

On January 24, 2017, the parties settled the fees, costs and expenses in *Floyd*.<sup>129</sup> Plaintiffs’ counsel will receive \$10,430,000 in fees, and \$820,000 for costs and expenses.<sup>130</sup> The plaintiffs withdrew their damage claims thirteen days before the 2013 bench trial,<sup>131</sup> so they recovered nothing.

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<sup>122</sup> Complaint at 1, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. Jan. 31, 2008) (No. 08 Civ. 01034).

<sup>123</sup> *Floyd*, 283 F.R.D. at 159–60.

<sup>124</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013).

<sup>125</sup> See, e.g., Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html?mcubz=0> [<https://perma.cc/B7MD-5CW2>].

<sup>126</sup> Order Staying Opinions and Remanding for Implementation at 2, *Ligon v. City of New York*, 736 F.3d 118 (2d Cir. 2013); *Floyd v. City of New York*, No. 13-3524 (2d Cir. Oct. 31, 2013), [https://www.gpo.gov/fdsys/pkg/USCOURTS-ca2-13-03524/pdf/USCOURT\\_S-ca2-13-03524-3.pdf](https://www.gpo.gov/fdsys/pkg/USCOURTS-ca2-13-03524/pdf/USCOURT_S-ca2-13-03524-3.pdf) [<https://perma.cc/9F7Q-83L7>].

<sup>127</sup> Benjamin Weiser, *Judges Decline to Reverse Stop-and-Frisk Ruling, All But Ending Mayor’s Fight*, N.Y. TIMES (Nov. 22, 2013), <http://www.nytimes.com/2013/11/23/nyregion/appeals-court-refuses-for-now-to-overturn-stop-and-frisk-ruling.html?mcubz=1> [<https://perma.cc/YU3V-768P>].

<sup>128</sup> See generally *Floyd v. City of New York*, Docket Nos. 473–542, Case No. 1:08-cv-01034-AT (S.D.N.Y.) (listing among other things recommendations in regards to the monitor).

<sup>129</sup> Stipulation of Settlement of Counsel Fees, Costs, Expenses and Order, *Floyd v. City of New York*, Docket No. 540, Case No. 1:08-cv-01034-AT (S.D.N.Y. Jan. 24, 2017).

<sup>130</sup> *Id.*

<sup>131</sup> Katherine Macfarlane, *In Shira Scheindlin’s Courtroom, Stop-and-Frisk Lawyers Are the Only Winners*, OBSERVER, (Nov. 13, 2013, 7:00 AM), [hereinafter Macfarlane, *Shira*

The *Floyd* litigation has its roots in a case that was filed in 1999.<sup>132</sup> A permanent injunction entered in 2013, and the remedies it ordered continue to be implemented.<sup>133</sup> However, the only claims remaining at the time of trial were for injunctive relief.<sup>134</sup> This ensured that the case would culminate in a bench trial in front of a judge who had issued several plaintiff-friendly rulings, but also meant that plaintiffs involved in the lengthy litigation would never receive compensation for the constitutional violations they suffered. Finally, the litigation was protracted and costly—the City of New York will pay over \$10 million in attorneys’ fees.<sup>135</sup> Still, there is no question that the litigation shed light on racial profiling disguised as *Terry* stops. It even influenced a mayoral election.<sup>136</sup> The change it brought about, which includes widespread use of police body cameras,<sup>137</sup> is significant and positive.

The deaths of Eric Garner, Laquan McDonald, Freddie Gray, and Walter Scott were arguably as well-known as the death of Amadou Diallo. Yet the Garner, McDonald, Gray, and Scott families each reached a settlement agreement in twelve months or less. The Garner family was able to settle approximately one year after Eric Garner’s death. McDonald’s family members obtained a settlement approximately six months after Laquan McDonald’s death. The Gray family reached a settlement approximately four months after Freddie Gray’s death. The Scott family settled about six months after Walter Scott’s death. Compared to the *Floyd* litigation, which was spurred by the police unit involved in the Diallo death, these were incredibly accelerated resolutions.<sup>138</sup>

The families’ settlements ranged from \$5 million to \$6.5 million. As a result, millions of dollars in attorneys’ fees do not appear as disproportionate as they did in *Daniels* and *Floyd*. In *Daniels*, attorneys’ fees totaled \$3.5 million, and the plaintiffs

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*Scheindlin’s Courtroom*] <http://observer.com/2013/11/stop-and-frisk-lawyers/> [https://perma.cc/DKV3-NBFU].

<sup>132</sup> Macfarlane, *supra* note 103, at 219.

<sup>133</sup> *Floyd v. City of New York*, Docket No. 270, No. 08 Civ. 01034 (S.D.N.Y. Mar. 8, 2013).

<sup>134</sup> See Macfarlane, *Stop-and-Frisk Appeals*, *supra* note 105, at 3.

<sup>135</sup> Stipulation of Settlement of Counsel Fees, Costs, Expenses and Order, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. Jan. 24, 2017) (No. 08 Civ. 01034).

<sup>136</sup> See Macfarlane, *Shira Scheindlin’s Courtroom*, *supra* note 131.

<sup>137</sup> Ashley Southall, *Do Body Cameras Help Policing? 1,200 New York Officers Aim to Find Out*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/nyregion/do-body-cameras-help-policing-1200-new-york-officers-aim-to-find-out.html?mcubz=1> [https://perma.cc/PD96-M7VB].

<sup>138</sup> Diallo’s family filed a civil lawsuit against the City and officers involved in Diallo’s death in 2000, and settled for \$3 million in 2004, nearly five years after Diallo’s death. Alan Feuer, *\$3 Million Deal in Police Killing Of Diallo in ‘99*, N.Y. TIMES (Jan. 7, 2004), <http://www.nytimes.com/2004/01/07/nyregion/3-million-deal-in-police-killing-of-diallo-in-99.html> [https://perma.cc/R78K-6EJY]. The state court wrongful death suit originally sought \$81 million in damages. Frankie Edozien, *Tragic Diallo Kin Get Record Settlement From City*, N.Y. POST (Jan. 7, 2004, 5:00 AM), <http://nypost.com/2004/01/07/tragic-diallo-kin-get-record-settlement-from-city/> [https://perma.cc/3UMR-JULR]. Unlike accelerated civil rights settlements, the Diallo settlement required prolonged litigation. *Id.*

recovered only \$167,500 total.<sup>139</sup> In *Floyd*, attorney's fees exceeded \$10 million, whereas the plaintiffs' recovered no damages.<sup>140</sup> With respect to attorney's fees, the accelerated civil rights settlement seems fairer.

Still, one of the lawsuits brought by the families highlighted above might have finally improved the law governing plaintiffs' section 1983 claims. The deaths of Eric Garner, Laquan McDonald, Freddie Gray, and Walter Scott received nationwide attention and their families might have made for sympathetic plaintiffs.

Yet, avoiding qualified immunity motion practice was a smart move. Qualified immunity is a "nearly insurmountable obstacle" that "protects 'all but the plainly incompetent [officer] or those [officers] who knowingly violate the law.'" <sup>141</sup> Avoiding a litigation scenario in which defendants can raise a qualified immunity defense is a legitimate strategic decision for plaintiffs worried about the risk of losing and walking away with no damages and no improved law.

What if the families had filed Section 1983 actions that sought injunctions against New York City, Chicago, Baltimore, or North Charleston? Would they have succeeded in ending the practices that caused the victims' deaths? Perhaps, as in *Floyd*, they too might have obtained change at a municipal level.

Yet seeking injunctive relief against a city requires proving virtual certainty of "future injury" as a result of the Supreme Court's holding in *City of Los Angeles v. Lyons*,<sup>142</sup> another hurdle most plaintiffs cannot overcome.<sup>143</sup> Avoiding *Lyons* also makes strategic sense.

Most importantly, it is not the families' responsibility to bring about social change. They are entitled to seek relief that does nothing more than affect their lives. Despite the national outcry over the deaths of Eric Garner, Laquan McDonald, Freddie Gray, and Walter Scott, these four individuals were brothers and uncles and fathers and sons before they became symbols of a national antipolice brutality movement.

#### IV. SECTION 1983'S ACCELERATED CIVIL RIGHTS SETTLEMENT CHAPTER

There are differences between the *Floyd* Section 1983 impact litigation model and the settlements obtained through accelerated civil rights settlement by the

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<sup>139</sup> Macfarlane, *supra* note 103, at 220.

<sup>140</sup> See Stipulation of Settlement of Counsel Fees, Costs, Expenses and Order, *supra* note 135.

<sup>141</sup> Katherine A. Macfarlane, *Predicting Utah v. Streiff's Civil Rights Impact*, 126 YALE L.J. F. 139, 144 (2016) (quoting *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012)); Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306, 325–26 (2015).

<sup>142</sup> 461 U.S. 95, 111–13 (1983).

<sup>143</sup> See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1453 (2000) (advocating for "plaintiff-driven structural reform" to overcome "restrictive standing jurisprudence" like *Lyons*); Brandon Garrett, Note, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1815–17 (2000) (articulating "a framework for assessing standing for injunctive relief based on case law following *Lyons*").

families of Eric Garner, Laquan McDonald, Freddie Gray, and Walter Scott. Yet neither strategy is more consistent with section 1983's purpose. Section 1983 has evolved in each era in which it has been invoked. Its malleability has ensured its relevance. Using it to quickly and efficiently obtain large settlements following high-profile deaths, without seeking any corollary social change, does not betray Section 1983. Rather, accelerated civil rights settlements represent nothing more than another chapter in the chameleon statute's history.

Many have traced Section 1983's evolution, from its promising beginning, followed by its period of dormancy, to its resurrection in the 1960s.<sup>144</sup> This Article follows a similar historical route, but does not try to divine the plain meaning, legislative intent, or policy underlying the famed statute. Section 1983's language is broad but vague.<sup>145</sup> The statute's purpose and underlying policy are flexible, used to justify different outcomes in different eras.<sup>146</sup> Professor Jack Beerman has explained that "[t]he text and history of [Section] 1983 cannot themselves establish the boundaries of the statute's enforcement."<sup>147</sup>

There is no need to mark boundaries that do not exist. Instead, this section tracks the evolving purpose Section 1983 has served in different historical eras. First, it examines the rallying cry of Section 1983's statutory predecessor, Section 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. Second, it acknowledges how this radical piece of legislation went unused for nearly one hundred years. Third, it discusses the role Section 1983 played in delegitimizing law enforcement racism in the 1960s.

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<sup>144</sup> See, e.g., Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 3–19 (1985) (describing Section 1983's role and history); Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 NW. U. L. REV. 525, 531–32 (2016) (explaining that Section 1983 lay dormant for nearly 100 years until the *Monroe v. Pape* decision); Stephen J. Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 AM. U. L. REV. 93, 95–96 (1985) (tracing Section 1983's resurrection in 1960s jurisprudence and describing how its remedies may overlap with those provided by Title VII of the Civil Rights Act); Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 1011–19 (1983) (analyzing the legislative debate underlying Section 1983 and the statute's role in achieving "systemic reform of the administration of both criminal and civil justice in the South").

<sup>145</sup> Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 51 (1989).

<sup>146</sup> See *id.* at 53. *Monroe v. Pape*, which famously construed Section 1983 to permit actions against individuals acting under color of state law, begins its discussion of legislative history by admitting that "[t]he legislation—in particular the section with which we are now concerned—had several purposes. There are threads of many thoughts running through the debates." 365 U.S. 167, 173 (1961). Even so, the *Monroe* version of legislative history "came under sharp criticism." CHEMERINSKY, *supra* note 77, at 46.

<sup>147</sup> Beermann, *supra* note 145, at 54. Beermann conceded that compensation, deterrence and vindication "are the most frequently cited purposes of [section] 1983." *Id.* at 77.

This historical investigation supports the way Section 1983 litigation has been recently used by the families of the victims of high-profile police-involved deaths. Section 1983 has multiple purposes, and all victims of constitutional wrongs can claim it as their weapon—either through classic impact litigation or as a settlement incentive.

*A. Reconstruction Era Revolution*

Section 1983 is perhaps “the most well known and commonly litigated civil rights statute.”<sup>148</sup> It came to life during reconstruction, a specific historical context that lasted “a brief span of nine years, 1866 to 1875,” during which Congress implemented legislation to protect the freedoms granted to those who were recently enslaved.<sup>149</sup> “Reconstruction . . . established a new legal order that contemplated direct federal intervention in what had been considered to be state affairs, a system in which federal courts were to enforce newly created federal constitutional rights against state officials through civil remedies and criminal sanctions.”<sup>150</sup>

If successful, reconstruction might have weakened or even eradicated the South’s “racial caste system.”<sup>151</sup> But each reconstructionist gain was met with severe backlash, including the Ku Klux Klan’s “terrorist campaign.”<sup>152</sup> The Ku Klux Klan, formed in 1866 by six white men in a Pulaski, Tennessee law office, “engaged in extreme violence against freed slaves and Republicans,” assaulting and murdering its victims and destroying their property.<sup>153</sup> The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, was a “bold effort[]” to enforce the Fourteenth Amendment,<sup>154</sup> but also represented a Congressional reaction to the Klan’s presence in Southern states.<sup>155</sup>

Section 2 of the Act seemed to have the Klan directly in mind; it created civil and criminal consequences for “conspir[ing] together, or go[ing] in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or equal privileges or immunities under the laws.”<sup>156</sup>

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<sup>148</sup> Catherine E. Smith, *(Un)Masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL’Y & L. 129, 139 n.48 (2003).

<sup>149</sup> Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952).

<sup>150</sup> Blackmun, *supra* note 144, at 7–8.

<sup>151</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 29 (2011).

<sup>152</sup> *Id.* at 30.

<sup>153</sup> Smith, *supra* note 148, at 129–30.

<sup>154</sup> Gressman, *supra* note 149, at 1333–34.

<sup>155</sup> *Id.* at 1334.

<sup>156</sup> *Id.* This section of the Ku Klux Klan Act is now codified as 42 U.S.C. § 1985(3) and remains “the only federal civil statute enacted specifically to address race-based conspiracies.” Smith, *supra* note 148, at 130–31 (citations omitted).

Section 1, now codified as 42 U.S.C. § 1983, provided a civil cause of action against an officer who should have protected an individual whose civil rights were injured, and “was specifically directed against lynching and other forms of mob violence.”<sup>157</sup> It targeted not just the Klan, but the Klan’s government and law enforcement allies.<sup>158</sup>

The Ku Klux Klan Act had a noble purpose, that of “mak[ing] secure the constitutional ideals of freedom and equality for all,” providing federal protection for civil rights.<sup>159</sup> It represented “a comprehensive congressional strategy to challenge the violent resistance to Reconstruction.”<sup>160</sup>

Generally, Section 1983 is understood “to provide a remedy for the violation of federal rights,”<sup>161</sup> even if “the specific evil at which the Civil Rights Act of 1871 (the predecessor of § 1983) was originally aimed” was “race discrimination.”<sup>162</sup> Section 1983, like other reconstruction era statutes, intended “to protect the recently freed slaves and their champions against state interference and, in some cases, from private violence.”<sup>163</sup> As a result, one view of Section 1983 is that it targeted a “limited historical problem,” that is, post-Civil War racial violence prompted by the end of slavery.<sup>164</sup> In particular, it targeted the racial violence in the South undertaken by the Klan, “and the failure of the states to cope with that violence.”<sup>165</sup>

### B. Nineteenth Century Irrelevance

In several decisions, beginning with 1873’s *Slaughter-House Cases*,<sup>166</sup> the Supreme Court limited the reach of the Fourteenth Amendment and the statutes passed pursuant to the power it granted Congress.<sup>167</sup> By 1882, the Court had voided

<sup>157</sup> Gressman, *supra* note 149, at 1334.

<sup>158</sup> Smith, *supra* note 148, at 138–39.

<sup>159</sup> Gressman, *supra* note 149, at 1336.

<sup>160</sup> Smith, *supra* note 148, at 140.

<sup>161</sup> Crawford-El v. Britton, 523 U.S. 574, 595 (1998).

<sup>162</sup> *Id.* at 595 n.16.

<sup>163</sup> Michael G. Collins, “Economic Rights,” *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1507 (1989); see also Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 460–61 (2008) (describing Section 1983 as “Reconstruction Era legislation” intended to remedy and prevent “racial injustices”).

<sup>164</sup> Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 483 (1982) [hereinafter Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*].

<sup>165</sup> *Id.* at 485. *But see* Monroe v. Pape, 365 U.S. 167, 180 (1961) (“It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.”).

<sup>166</sup> 83 U.S. 36 (1872).

<sup>167</sup> Gressman, *supra* note 149, at 1337–39.



the Ku Klux Klan Act's criminal conspiracy section, a provision "aimed at lynchings and other mob actions of an individual or private nature."<sup>168</sup>

As a result of the Court's narrowed construction of both the Fourteenth Amendment and the civil rights statutes enacted pursuant to it, the Ku Klux Klan Act's "scope and effectiveness" shrunk.<sup>169</sup> The Court never directly addressed Section 1 of the Act, but those sections of the Act left "largely forgotten."<sup>170</sup>

Civil rights protection was abandoned at the federal level.<sup>171</sup> States stepped into the legal void, drafting legislation that provided legal reinforcement for a racial caste system that endorsed different treatment based on perceived racial difference.<sup>172</sup> In 1892, newly enacted laws segregated trains, and segregation soon spread into "streetcars, restaurants, washrooms, and residential communities."<sup>173</sup> In place of civil rights protections, "[t]he South was . . . enabled to create and perpetuate its rigid rules of segregation. Lynchings, race riots and other forms of unequal treatment were permitted to abound in the South and elsewhere without power in the federal government to intercede."<sup>174</sup> During this period, reconstruction reforms died, and Jim Crow ruled,<sup>175</sup> "restrict[ing] every step an African American could make," where "[a]ny breach of the system could mean one's life."<sup>176</sup>

For fifty years, the Supreme Court exalted states' rights, "and disregarded notions of equality, . . . destroying the legal regime produced by the Civil War, except insofar as it transformed those rights into protections of gilded age corporations from government regulation."<sup>177</sup>

Though legislative progress stalled, civil rights movements coalesced. In 1887, T. Thomas Fortune founded the Afro-American League ("AAL"), which "supported reactive court battles and proactive legislative reform; establishment of equal civil and political rights and an ultimate goal of economic justice; and intrarace self-help and interracial coalition politics aimed at eliminating poverty for all persons regardless of race."<sup>178</sup> Members of the AAL helped establish the Afro-American

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<sup>168</sup> *Id.* at 1340.

<sup>169</sup> *Id.* at 1342.

<sup>170</sup> Blackmun, *supra* note 144, at 10.

<sup>171</sup> Gressman, *supra* note 149, at 1342.

<sup>172</sup> Wilkerson, *supra* note 1, at 60.

<sup>173</sup> Blackmun, *supra* note 144, at 11.

<sup>174</sup> Gressman, *supra* note 149, at 1342; *see also* Blackmun, *supra* note 144, at 11 ("One author reports records of 3,000 lynchings from 1883 to 1903, with few if any reprisals against the participants.").

<sup>175</sup> John V. White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785, 793 (2003); *see also* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 796 (2008) ("[B]y the 1880s, the restoration of white supremacy in Louisiana was well underway.").

<sup>176</sup> Wilkerson, *supra* note 1, at 60.

<sup>177</sup> White, *supra* note 175, at 793.

<sup>178</sup> Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880–1890*, 77 FORDHAM L. REV. 1479, 1482 (2009).

Council (“AAC”) in 1898.<sup>179</sup> The AAC’s objectives included fighting lynching, testing the constitutionality of oppressive laws, promoting laws that “in the individual States shall secure to all citizens the rights guaranteed them by the 13th, 14th, and 15th Amendments to the Constitution,” and both prison and educational reform.<sup>180</sup>

In 1905, a group of black intellectuals met on the Canadian side of Niagara Falls and established the “Niagara Movement,” with W.E. Du Bois as its leader.<sup>181</sup> The movement adopted a declaration of principles that, like the AAL and AAC, emphasized the need for suffrage, equal treatment in public places, and economic opportunity.<sup>182</sup> But unlike the AAL and AAC, the Niagara Movement looked to the state to provide education to all.<sup>183</sup> It also “singled out for protest the system of ‘Jim Crow’ cars,” criticizing how it forced nonwhites to “pay first-class fare for third-class accommodations, render [them] open to insults and discomfort and to crucify wantonly [their] manhood, womanhood and self-respect.”<sup>184</sup>

In 1909, a founding conference was held for the National Negro Conference, later renamed the NAACP.<sup>185</sup> The storied organization would spend decades building legal strategies to undo segregation and racial oppression through targeted legal challenges.

Southern resistance to Jim Crow also began to coalesce into organized strategic action. In 1890, a year after Louisiana first passed Jim Crow laws, New Orleans lawyer Louis A. Martinet formed the Citizens’ Committee, “to offer legal resistance to the ‘separate’ railroad car law of Louisiana.”<sup>186</sup> Homer Plessy was also a member, and his decision to test segregation laws was a planned move designed to create an

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<sup>179</sup> *Id.* at 1524–25.

<sup>180</sup> *Id.* at 1525 (quoting THE NATIONAL AFRO-AMERICAN COUNCIL 15 (Cyrus Field Adams ed., 1902)).

<sup>181</sup> Steven H. Hobbs, *An Entrepreneurial Perspective on the Business of Being in Our Profession*, 40 *FORDHAM URB. L.J.* 395, 416 (2012).

<sup>182</sup> Carle, *supra* note 178, at 1527.

<sup>183</sup> *Id.* at 1528.

<sup>184</sup> *Id.* (quoting THE NIAGARA MOVEMENT: DECLARATION OF PRINCIPLES 2 (1905)).

<sup>185</sup> *Id.* at 1529–30. Some have described the organizers of the first NAACP meeting as “concerned white leaders.” Blackmun, *supra* note 144, at 12. Though wealthy whites provided financial resources and wielded (often conflicted) power during the organization’s first decade, the

new organization’s ideas came straight from the Niagara Movement and the African American organizations that preceded it . . . [and] many of the African Americans who played significant roles in the NAACP’s organizing meetings or were on its founding committee or first board of directors had been members of the AAL, the AAC, or the Niagara Movement.

Carle, *supra* note 178, at 1530.

<sup>186</sup> Rachel L. Emanuel, *History: Black Lawyers in Louisiana Prior to 1950*, 53 *LA. B.J.* 104, 106 (2005).

Equal Protection Clause challenge.<sup>187</sup> A railroad, a policeman, and a willing passenger were all needed to test the law. Volunteers were obtained,<sup>188</sup> and Plessy's arrest went as planned.<sup>189</sup> Of course, the *Plessy v. Ferguson*<sup>190</sup> decision gave segregationist laws Supreme Court endorsement,<sup>191</sup> and helped Jim Crow laws survive for at least an additional fifty years. Yet Homer Plessy and the Citizens' Committee staged a nonviolent rebellion through which they claimed entitlement to "equal public dignity."<sup>192</sup>

*Plessy v. Ferguson*'s affirmation of separate but equal "endured for much of the twentieth century," until the Court's *Brown* holding<sup>193</sup> in 1954. However, *Brown* represented the capstone of decades of calculated legal strategy infused and energized by social science research, including Gunnar Myrdal's *An American Dilemma*,<sup>194</sup> published in 1944 and recognized as "the most comprehensive examination of black America ever produced."<sup>195</sup> The book joined the public chorus willing to acknowledge that in the wake of a separate but equal de jure system of segregation, "all American citizens were not equal."<sup>196</sup>

In 1945, the NAACP's Chicago branch published the pamphlet "Restrictive Covenants: In a Democracy They Cost Too Much."<sup>197</sup> That same year, economist Robert C. Weaver began to argue that his social science research demonstrated that there was no economic basis to support racially restrictive covenants.<sup>198</sup> The national NAACP office, led by Thurgood Marshall, attempted to unify efforts at upending racially restrictive covenants through strategic and widespread national litigation.<sup>199</sup>

In 1947, President Truman's Committee on Civil Rights held hearings about race relations,<sup>200</sup> and released a report condemning racism and racial

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<sup>187</sup> *Id.*

<sup>188</sup> Sheldon Novick, *Homer Plessy's Forgotten Plea for Inclusion: Seeing Color, Erasing Color-Lines*, 118 W. VA. L. REV. 1181, 1192–93 (2016).

<sup>189</sup> Scott, *supra* note 175, at 798 ("By careful pre-arrangement, Homer Plessy had bought a ticket on the East Louisiana Railroad from New Orleans to Covington, Louisiana, and taken a seat in the 'white' car, where he was confronted by the conductor and removed from the train . . . [and] arrested . . .").

<sup>190</sup> 163 U.S. 537 (1896).

<sup>191</sup> *Id.* at 552.

<sup>192</sup> Scott, *supra* note 175, at 801. At least one scholar has identified *Plessy v. Ferguson* as impact litigation. Steven H. Hobbs, *O'Connor's Canons: The Professional Responsibility Jurisprudence of Justice Sandra Day O'Connor*, 52 WILLAMETTE L. REV. 99, 122–23 (2015).

<sup>193</sup> Barry P. McDonald, *A Reluctant Apology for Plessy: A Response to Akhil Amar*, 39 PEPP. L. REV. 91, 91 (2011).

<sup>194</sup> GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

<sup>195</sup> Wendell E. Pritchett, *Shelley v. Kraemer: Racial Liberalism and the U.S. Supreme Court*, in *CIVIL RIGHTS STORIES* 5, 5 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

<sup>196</sup> *Id.* at 6.

<sup>197</sup> *Id.* at 9.

<sup>198</sup> *Id.* at 10–11.

<sup>199</sup> *Id.* at 12–13.

<sup>200</sup> *Id.* at 14–15.

discrimination.<sup>201</sup> In 1948, the Supreme Court held that when enforced by the judiciary, racially restrictive covenants represented state action that violated the Fourteenth Amendment.<sup>202</sup> The restrictive covenant litigation's innovative use of social science research and policy arguments "would prove crucial to civil rights cases" that followed—including *Brown*.<sup>203</sup>

But Section 1983 remained inactive.<sup>204</sup> As of the 1950s, the tremendous promise of the civil rights statutes had been whittled down to "a pitiful handful of statutory provisions, most of which [were] burdened by the dead weight of strict constructionism."<sup>205</sup>

### C. Modern Vehicle for Social Change

Civil rights activists had been organizing formally and informally for decades before the NAACP achieved victory in *Brown*. Still, the 1950s is the era fairly characterized as the period in which the civil rights movement emerged; that is, the period in which national and federal attention took note of its efforts and followed its lead.<sup>206</sup>

In 1961, Section 1983 finally caught up, roaring back to life in a case that offered a historical treatise on the legislative history of the 1871 Civil Rights Act, but also implicitly condemned racially motivated Fourth Amendment violations.

The defendant in the case that changed civil rights litigation was Frank Pape, Chicago's Chief of Detectives.<sup>207</sup> By the late 1950s, Chicago was "marred" by racial tension.<sup>208</sup> On October 27, 1958, Pape himself arrived at the scene of Peter Saisi's death; his wife Mary Saisi, a white woman, reported that two "young Negroes" had confronted her husband and fled.<sup>209</sup> While reviewing mugshots, she identified James Monroe as one of the men she saw confront her husband.<sup>210</sup> Pape and twelve additional officers raided Monroe's home, entering in the early morning hours without a warrant.<sup>211</sup> Monroe was held at a stationhouse but released after Mary Saisi failed to identify him in a lineup.<sup>212</sup> Monroe brought suit in federal court; his complaint alleged that:

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<sup>201</sup> *Id.* at 15.

<sup>202</sup> *Id.* at 20 (citing *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948)).

<sup>203</sup> *Id.* at 18.

<sup>204</sup> HOWARD M. WASSERMAN, UNDERSTANDING CIVIL RIGHTS LITIGATION 5 (2013).

<sup>205</sup> Gressman, *supra* note 149, at 1357.

<sup>206</sup> White, *supra* note 175, at 799.

<sup>207</sup> Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago: Monroe v. Pape as Legal Noir*, in CIVIL RIGHTS STORIES 41, 41 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

<sup>208</sup> *Id.* at 46.

<sup>209</sup> *Id.* at 48–49.

<sup>210</sup> *Id.* at 50.

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

<sup>212</sup> *Id.* at 51.

13 Chicago police officers broke into [Monroe's] home in the early morning, routed [Monroe and his family] from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers . . . . [T]hat Mr. Monroe was then taken to the police station and detained on 'open' charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him.<sup>213</sup>

The complaint also "alleged that the officers had no search warrant and no arrest warrant and that they acted 'under color of the statutes, ordinances, regulations, customs and usages' of Illinois and of the City of Chicago."<sup>214</sup>

The Supreme Court held that Monroe could state a claim against Chicago police detectives and other state officers, so long as they were acting under color of law when they violated his constitutional rights, even though no state law authorized the officers' actions.<sup>215</sup> Because they were clothed with the authority of state law, the defendants were acting under color of law for purposes of Section 1983.<sup>216</sup>

The *Monroe* decision is full of lengthy accounts of legislative history.<sup>217</sup> Race is implicitly present in the context of reconstruction era mob violence, not as a relevant fact to describe the forces working against James Monroe.<sup>218</sup>

But *Monroe* is a case about race—it is a case about police brutality, in which the victim was black, and the police officers white. *Monroe* demonstrates that "[t]he Supreme Court was becoming increasingly sympathetic to the use of the Civil Rights Act to remedy systemic racial discrimination and individual racism practiced by government officials," and "marked a turning point in modern civil rights litigation."<sup>219</sup> After *Monroe*, "[p]olice officers have come to understand that assaultive and racially denigrating behavior can expose them to liability in the federal courts."<sup>220</sup>

Through *Monroe*, section 1983 served as a vehicle to target racial violence in the 1960s. The racial violence the Court was concerned with was not committed by the Klan in the South, but by police officers in the Midwest.<sup>221</sup> Section 1983 had

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<sup>213</sup> *Monroe v. Pape*, 365 U.S. 167, 169 (1961).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 188.

<sup>216</sup> *Id.* at 184.

<sup>217</sup> *See, e.g., id.* at 180–83 (comparing the legislative history of Section 1 of the statute to Section 2).

<sup>218</sup> *Id.* at 175, 186.

<sup>219</sup> Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 423 (1993) [hereinafter Eisenberg, *Rethinking Prisoner Civil Rights Cases*].

<sup>220</sup> Gilles, *supra* note 207, at 58.

<sup>221</sup> *Monroe*, 365 U.S. at 169 (describing the allegations levied against "13 Chicago police officers").

evolved from a law meant to combat “[r]acial attitudes in the South, blossoming in the form of Klan and other violence, and the failure of the states to cope with that violence,”<sup>222</sup> into a “general federal remedy for violations of all constitutional rights.”<sup>223</sup>

But aside from remedying constitutional violations, Section 1983 became a way to challenge racial discrimination, so long as that racial discrimination was also constitutionally problematic.

By the early 2000s, Section 1983 had gained a symbolic value: representing legal recourse “to protect citizens from abusive state action, to ensure a broad anti-discrimination ethic, and to fix the wrongs of Jim Crow.”<sup>224</sup> In practice, modern Section 1983 litigation has focused on violations of the Fourth or Eighth Amendments.<sup>225</sup>

In recent years, it served as the cause of action used to change stop-and-frisk practices in New York. Most recently, it has acted as a warning: engage in accelerated settlement, or expensive civil rights litigation will follow.

## V. CONCLUSION

It has taken imagination and intellectual creativity to convert section 1983, a law borne of a specific historical crisis (reconstruction-era violence against freed slaves) into the most significant statutory vehicle used to combat modern law enforcement discrimination (NYPD *Terry* stops made without reasonable suspicion, to note one example). In accelerated civil rights settlements, Section 1983 is more of a threat than a weapon, looming in the background of pre-filing settlement negotiations related to police-involved shootings. It is never directly employed but is still very much present.

This begs the question of whether the settlements Walter Scott’s family and others obtained were in fact settlements under the Civil Rights Act of 1871 if there was no civil rights action attached to it. Aside from the possibility of a Section 1983 action each family could make reference to in their settlement negotiations, there are contextual similarities that merit including these settlements in the civil rights pantheon.

First, there are parallels between the violence that inspired the 1871 Act and the acts resulting in the deaths underlying the settlements studied in this Article. In 1871, freed slaves faced violence meant to preserve a status quo that robbed them of property rights and physical integrity. Whatever advancements were made postslavery were met with a violent reversal of fortune “so crushing that historians called it the Nadir.”<sup>226</sup> Now, “police assaults on black people” make it seem as

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<sup>222</sup> Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, *supra* note 164, at 485.

<sup>223</sup> *Id.* at 486–87. *But see* White, *supra* note 175, at 808 n.99 (stating that the incorporation doctrine has “restrict[ed] the constitutional rights remediable under § 1983”).

<sup>224</sup> White, *supra* note 175, at 785.

<sup>225</sup> *Id.* at 819.

<sup>226</sup> Wilkerson, *supra* note 1, at 59–60.

though “we have reentered the past and are living in a second Nadir.”<sup>227</sup> Images of white supremacists wearing KKK hoods in the streets of Charlottesville only reinforce the notion that history is repeating itself.<sup>228</sup> In 1871, Congress responded to mob violence with the Civil Rights Act. In the wake of twenty-first century police violence, the families of the victims have responded with successful requests for compensation when the criminal justice system failed to convict their loved ones’ killers.

Second, the largest settlement described in this Article, the \$6.5 million obtained by Walter Scott’s family, was influenced by the settlement amounts obtained by the families of Freddie Gray and Walter Scott. That is, just as lawyers research jury verdicts to determine whether a trial is worth the risk, cities are now taking note of accelerated civil rights settlements to determine if they should meet settlement demands. Accelerated civil rights settlements are functioning as persuasive precedent arguably as impactful as the qualified immunity precedent that keeps civil rights victims out of court.

Third, the accelerated civil rights settlements described herein stand in sharp contrast to the litigation outcome obtained by another family whose loss is perhaps the most well-known of all the recent black lives lost to police violence. With respect to time, effort and emotional investment, accelerated civil rights settlements appear to have cost much less than the litigation described below.

On August 9, 2014, eighteen-year-old Michael Brown of Ferguson, Missouri, was shot and killed by police officer Darren Wilson.<sup>229</sup> Brown was walking in the middle of the road with a friend, Dorian Johnson.<sup>230</sup> Wilson pulled his police car in front of Brown and Johnson, and a struggle between Brown and Wilson ensued through the police car’s window.<sup>231</sup> Wilson shot at Brown, Brown fled, and “[w]hen Brown stopped to face the officer, Wilson fired several shots at his front, killing him.”<sup>232</sup>

Brown’s death triggered nationwide protests, inspired the Black Lives Matter movement, and brought increased attention to police brutality, and in particular, to the way police violence affects communities of color. His death “resonated across the country—in New York City, Chicago and Oakland—because the killing of young black men by police is a common feature of African-American life and a

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<sup>227</sup> *Id.* at 60–61.

<sup>228</sup> See Hawes Spencer & Matt Stevens, *23 Arrested and Tear Gas Deployed After a K.K.K. Rally in Virginia*, N.Y. TIMES (July 8, 2017), [https://www.nytimes.com/2017/07/08/us/kkk-rally-charlottesville-robert-e-lee-statue.html?\\_r=0](https://www.nytimes.com/2017/07/08/us/kkk-rally-charlottesville-robert-e-lee-statue.html?_r=0) [https://perma.cc/A7E7-H8Y9] (explaining that “around 50 members of the Klan—some wearing hooded white robes—shouted ‘white power’ at Justice Park” in Charlottesville, Virginia).

<sup>229</sup> *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC NEWS (Aug. 10, 2015), <http://www.bbc.com/news/world-us-canada-30193354> [https://perma.cc/CXU8-XULL].

<sup>230</sup> Funke & Susman, *supra* note 20.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

source of dread for black parents from coast to coast.”<sup>233</sup> Still, Wilson was not indicted.<sup>234</sup>

On April 23, 2015, Michael Brown’s parents, Michael Brown, Sr. and Leslie McSpadden, filed a civil lawsuit arising out of their son Michael Brown’s death.<sup>235</sup> The Brown state court action was removed to the Eastern District of Missouri on May 26, 2015.<sup>236</sup> On December 9, 2015, the plaintiffs’ claim for injunctive relief was dismissed pursuant to the requirement, articulated by the Court in *City of Los Angeles v. Lyons*, that there be a “virtual certainty of future injury.”<sup>237</sup>

Following discovery-related motion practice, Brown’s parents were ordered to produce their tax returns from 2009 through 2016.<sup>238</sup> They were also ordered to produce their son’s “medical, hospital, and doctors’ reports and records for Decedent from age ten to his death.”<sup>239</sup> They had to reveal who paid for their son’s funeral.<sup>240</sup> On February 7, 2017, the court set trial for February 5, 2018.<sup>241</sup>

In June 2017, Michael Brown’s parents settled their lawsuit against Ferguson for \$1.5 million.<sup>242</sup> The settlement does not include a separate award of attorneys’ fees, which was presumably subtracted from the total recovered.<sup>243</sup> As a result, Brown’s parents will recover far less than the family of, for example, Freddie Gray.

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<sup>233</sup> The Editorial Board, *The Meaning of the Ferguson Riots*, N.Y. TIMES (Nov. 25, 2014), <https://www.nytimes.com/2014/11/26/opinion/the-meaning-of-the-ferguson-riots.html?mcubz=1> [<https://perma.cc/B2FY-ZTFV>].

<sup>234</sup> Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [<https://perma.cc/ULD7-Q3ST>]. For an account of how anomalous and arguably pro-defendant grand jury proceedings affected Darren Wilson’s prosecution, see Roger A. Fairfax, Jr., *The Grand Jury and Police Violence Against Black Men*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 209*, 214–15 (Angela J. Davis ed., 2017).

<sup>235</sup> *The Wrongful-death Lawsuit Filed by Michael Brown’s Family*, ST. LOUIS POST-DISPATCH (Apr. 23, 2015), [http://www.stltoday.com/the-wrongful-death-lawsuit-filed-by-michael-brown-s-family/pdf\\_b828a547-ed4e-5f5b-b307-229eecf07798.html](http://www.stltoday.com/the-wrongful-death-lawsuit-filed-by-michael-brown-s-family/pdf_b828a547-ed4e-5f5b-b307-229eecf07798.html) [<https://perma.cc/WCF7-4P56>]. The lawsuit was originally filed in Missouri state court. *Id.*

<sup>236</sup> Notice of Removal, *Brown v. City of Ferguson*, Docket No. 1, Case No. 4:15-cv-00831-ERW (E.D. Mo. May 26, 2015).

<sup>237</sup> *Id.* at 16.

<sup>238</sup> *Id.* at 3.

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

<sup>240</sup> *Id.* at 5.

<sup>241</sup> Second Amended Case Management Order, *Brown v. City of Ferguson*, Docket No. 186, Case No. 4:15-cv-00831-ERW (E.D. Mo. Feb. 7, 2017) at 2.

<sup>242</sup> Associated Press, *Ferguson Attorney: Michael Brown’s Family Settles with City for \$1.5 Million*, L.A. TIMES (June 23, 2017, 12:25 PM), <http://www.latimes.com/nation/nation-now/la-na-michael-brown-ferguson-settlement-20170623-story.html> [<https://perma.cc/A8LT-FCZS>].

<sup>243</sup> See Judgment, *Brown v. City of Ferguson*, Docket No. 206, Case No. 4:15-cv-00831-ERW (E.D. Mo. June 20, 2017) (“IT IS FURTHER ORDERED that the amounts recovered shall be distributed between Plaintiffs and their attorneys as outlined in the settlement agreement.”).



The Brown civil rights litigation appeared exhausting, at least emotionally. No parent wants to dig through her dead son's childhood medical records. Michael Brown's parents arguably endured litigation induced trauma that the four families highlighted above avoided.

But just as it is unfair to preference the *Floyd* model of Section 1983 litigation over the accelerated civil rights settlement model, it too is unfair to criticize the way Michael Brown's family sought civil rights justice. Giving the Brown parents some agency is paramount. Claudia Rankine has suggested that what Michael Brown's mother, Lesley McSpadden, sought to reestablish after her son's death was a sense of control. After all, the Ferguson Police Department left Michael Brown's body in the street. McSpadden

was kept away from her son's body because it was evidence. She was denied the rights of a mother, a sad fact reminiscent of pre-Civil War times, when as a slave she would have had no legal claim to her offspring. McSpadden learned of her new identity as a mother of a dead son from bystanders . . . . After Brown's corpse was finally taken away, two weeks passed before his family was able to see him. This loss of control and authority might explain why after Brown's death, McSpadden was supposedly in the precarious position of accosting vendors selling T-shirts that demanded justice for Michael Brown that used her son's name. Not only were the procedures around her son's corpse out of her hands; his name had been commoditized and assimilated into our modes of capitalism.<sup>244</sup>

If McSpadden wanted to vindicate her son's death through a civil rights action, her choice should be respected.

Still, the Brown family endured an ordeal in federal court litigation. Their Section 1983 litigation seemed to inflict new wounds. It is this visceral aspect of litigated civil rights actions that makes accelerated civil rights settlement a compelling alternative. In addition to the way the violence it responds to echoes the violence that inspired Section 1983's statutory predecessor, and how settlement after settlement is influencing city's approach to victims' families' demands, accelerated civil rights settlement is a new and noteworthy response to an age-old attack on constitutionally protected rights.

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<sup>244</sup> Claudia Rankine, *The Condition of Black Life Is One of Mourning*, in *THE FIRE THIS TIME: A NEW GENERATION SPEAKS ABOUT RACE* 145, 152–53 (Jesmyn Ward ed., 2016).