Notes

Remedying Police Brutality in America's Public Schools Through Private Structural Reform Under 42 U.S.C. § 1983

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Civil rights litigation under 42 U.S.C. § 1983 is currently playing a pivotal role in challenging police practices and making police brutality an issue of national concern. Like the officers patrolling our streets, officers stationed in public schools—known as school resource officers—have also received media attention for a number of high-profile excessive force cases. In this paper, I explore the limitations of the § 1983 remedy for facilitating real change in policing institutions and argue, despite the limitations placed on the availability of injunctive relief in § 1983 actions by *City of Los Angeles v. Lyons*, recent efforts to use structural injunctions suggest the possibility of a more comprehensive approach toward challenging police brutality.

I. THE PROBLEM

A. Introduction

Reports of armed police officers' brutality against students in public schools are on the rise.[1] Police officers stationed in Birmingham, Alabama, schools have pepper-sprayed and maced hundreds of high school students.[2] In one particularly horrible instance, an officer allegedly sprayed a pregnant female student with chemical spray when she would not stop crying after an incident of sexual harassment.[3] In Columbia, South Carolina, a police officer was caught on camera slamming a teen-

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[1] *See, e.g.*, Jaeah Lee, *Chokeholds, Brain Injuries, Beatings: When School Cops Go Bad*, MOTHER JONES (Jul. 14, 2015), http://www.motherjones.com/politics/2015/07/police-school-resource-officers-k-12-misconduct-violence/ [https://perma.cc/9ZF6-RYSW].

[2] Rebecca Klein, *Lawsuit Alleges Officers in Birmingham Schools Sprayed Hundreds of Students with Chemical Weapons*, THE HUFFINGTON POST (Jan. 22, 2015), https://www.huffingtonpost.com/2015/01/22/birmingham-schools-pepper-spray_n_6526162.html [https://perma.cc/42ER-XE57].

[3] Third Amended Complaint at 45–46, J.W. v. A.C. Roper, No. CV-10-B-3314-S (N.D. Ala. 2011).

age student to the ground and dragging her out of the classroom.[4] In Louisville, Kentucky, a thirteen-year-old was punched in the face by an officer for cutting a lunch line; just one week later, the same officer held a different thirteen-year-old in a chokehold, which allegedly caused brain injury after the student was rendered unconscious.[5] In Houston, Texas, a police officer struck a sixteen-year-old student at least eighteen times with a police baton, causing injury to many parts of the student's body, including the head and neck, after a discussion about the student's confiscated cell phone.[6] In Bastrop County, Texas, a police officer, attempting to break up a fight, tased a seventeen-year-old boy.[7] The boy's subsequent fall to the ground led to a medically induced coma and surgery to repair a severe brain hemorrhage.[8] In San Antonio, Texas, a police officer who witnessed a student punch another student followed the youth to a shed located behind a nearby home, and fatally shot the unarmed boy.[9]

B. History and Structure of School Policing

Officers have been utilized in K–12 schools for decades. A police officer assigned to a K–12 school is known as a school resource officer ("SRO").[10] According to the National Association of School Resource Officers (NASRO), the best example of today's SRO program can be traced to 1963 when the Tucson, Arizona, Police Department "adopted the term of School Resource Officer and realized something had to be done for the school community and the relationship between youth and law enforcement."[11] Following Tucson's lead, school districts throughout the country secured special legislation that provided for police departments managed by school districts.[12] More recently, police presence on school campuses has sharply increased.[13] In the late 1990s, the U.S. Department of Justice (DOJ) funded nearly 7,000 SROs, costing an estimated $876 million, and the number of police officers patrolling K–12 campuses more than doubled, with 20,000 officers in schools by 2006.[14]

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[4] Jacah Lee & Phil Stinson, *Cops in the Classroom: South Carolina Incident Highlights Growing Police Presence in Schools*, DEMOCRACY NOW! (Oct. 28, 2015), https://www.democracynow.org/2015/10/28/when_school_cops_go_bad_south [https://perma.cc/99DS-LEQK].

[5] Lee, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See* NAT'L ASS'N OF SCH. RES. OFFICERS, SRO MANAGEMENT SYMPOSIUM COURSE MANUAL (2006).

[11] *Id.* at 12.

[12] *Id.* at 16.

[13] *See* Lee & Stinson, *supra* note 4.

[14] *Id.*

Since 2012, the DOJ has spent an additional $67 million to provide schools with 540 more officers.[15]

Today, SROs are the most rapidly growing division of law enforcement[16]: about half of all public schools have police officers assigned to their campuses, with 60% of teachers reporting armed police officers stationed on suburban school grounds.[17] According to NASRO's SRO Management Course Manual, SROs are placed within the educational environment in a "partnership between the school district and local law enforcement agency [that allows] the SRO to work closely with the school administration to provide a safe learning environment."[18] Yet, the recent series of incidents documenting inappropriate and excessive force by SROs has both undermined the notion that increased officer presence on school campuses helps improve campus safety and prompted a dialogue on what recourse is available to students and families hoping to dismantle and transform this destructive system.

SRO misconduct is widespread and systemic. The root of SRO brutality can be traced to failures in written and unwritten departmental policies and practices regarding SRO hiring, training, and oversight.[19] According to a February 2013 survey conducted by the advocacy group Strategies for Youth (SFY), despite the large volume of police officers who are stationed in schools immediately upon graduating from police academies, just one state provided specialized training focused on working in schools.[20] Additionally, the survey notes most academies fail to teach and train recruits how to identify and handle situations where the youth has mental health or trauma-related disorders or special education needs.[21] Because of the insufficient training officers receive and the resulting lack of understanding regarding youth development and behavior, SFY found departments were ignorant of "a host of promising practices and interventions."[22]

Because officers who lack youth-specific training may escalate noncriminal offenses to criminal behavior,[23] student behaviors that pre-

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[15] *See id.*

[16] David Snyder, *A New Generation of School Safety Patrol: Officers Boost Security, Community, Connection*, WASH. POST, Dec. 11, 2003, at T8 (quoting executive director of the National Association of School Resource Officers).

[17] BARBARA RAYMOND, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. POLICING SERVS., ASSIGNING POLICE OFFICERS TO SCHOOLS 1 (2010); Paul J. Hirschfield, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 82 (2008).

[18] NAT'L ASS'N OF SCH. RES. OFFICERS, *supra* note 10, at 21.

[19] *See generally* STRATEGIES FOR YOUTH, *If Not Now, When? A Survey of Juvenile Justice Training in America's Police Academies* (Feb. 2013), http://strategiesforyouth.org/sfysite/wp-content/uploads/2013/03/SFYReport 02-2013_rev.pdf [https://perma.cc/HHL8-B2DR] (explaining issues in SRO implementation).

[20] *Id.* at 4.

[21] *Id.*

[22] *Id.*

[23] FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 47 (Office of Community Oriented Policing Services, 2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/TM5N-D7MN].

viously resulted in a detention or a visit to the principal's office are now resulting in macing, tasing, and other instances of excessive force.[24] Furthermore, SROs responding to these minor infractions are often acting pursuant to some department policy or practice sanctioning their behavior.[25] For example, the complaint filed in the *Birmingham* case, mentioned above, alleged that SROs often forcefully intervened—pursuant to a long-standing agreement[26] requiring SRO assistance in enforcing the student code of conduct—in minor, noncriminal incidents involving cell phones, swear words, tardiness, and other misbehavior traditionally handled by school personnel.[27] In fact, almost 70% of SROs report that they are regularly occupied with disciplinary matters.[28] These and other failures in departmental policies and practices regarding SRO hiring, training, and oversight not only contribute to the increasing school-to-prison pipeline by criminalizing the behaviors of young children, but also are indicative of a system that condones officer brutality and fails to prioritize student wellbeing.

II. THE SOLUTION: PRIVATE CIVIL RIGHTS LITIGATION UNDER 42 U.S.C. § 1983

With the help of lawyers and advocates, students and families across the United States are turning to legal remedies in hope of resisting the injustices of SRO brutality. Through civil rights lawsuits brought under 42 U.S.C. § 1983, victims of SRO brutality can bring claims for damages and injunctive relief for Fourth Amendment violations arising from the use of excessive force.[29] In Part II of this paper, I explain how § 1983 functions as a legal remedy. Next, I demonstrate the limitations of using § 1983 damage suits to address the roots of SRO brutality and argue the damage remedy offers a weak link to facilitating real change in policing America's public schools. In Part III, I explain the limitations on the availability of injunctive relief in § 1983 actions and consider arguments that *Los Angeles v. Lyons* largely shut the door to restructuring police institutions.[30] Through examining the Birmingham schools pepper

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[24] *See id.*; *see also* Lee & Stinson, *supra* note 4; Klein, *supra* note 2.

[25] *See* FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY, *supra* note 23, at 11 12.

[26] *See* J.W. v. Birmingham Bd. of Edu., 143 F. Supp. 3d 1118, 1163 (N.D. Ala. 2015) (noting these agreements, or Memoranda of Understanding, are between law enforcement agencies and school districts, and govern the placement of SROs in schools).

[27] *Id.*

[28] David A. Tomar, *Cops in Schools: Have we build a school-to-prison pipeline?*, THE BEST SCHOOLS MAGAZINE, [https://perma.cc/5YPR-PX3Y].

[29] *See* Mark S. Bruder, *When Police Use Excessive Force: Choosing a Constitutional Threshold of Liability in Justice v. Dennis*, 62 ST. JOHN'S L. REV. 4 (2012).

[30] *See* Barbara E. Armacost, *Organizational Culture of Police Misconduct*, 72 GEO. WASH. L. REV. 453, 522 (2003–2004) (arguing the Supreme Court has eliminated the possibility of attacking dysfunctional features of police culture through ordinary civil rights litigation).

spray case, I explain in Part IV the possibility of attacking dysfunctional SRO policies and practices through private structural reform litigation. Further, certain features of the school policing context make it more amenable to structural reform litigation than in the civilian policing context. I explore approaches and limitations to this strategy in Part V. Finally, in Part VI, I acknowledge the limitations of solely utilizing structural reform litigation for dismantling and transforming school policing, and propose communities should work collaboratively to think beyond litigation, while retaining civil rights litigation as a vital tool for addressing systemic harms.

A. Section 1983 Litigation as a Legal Remedy, Generally

A civil rights lawsuit under 42 U.S.C. § 1983 is the primary legal remedy for those hoping to change policies and practices that encourage SROs to use unlawful and excessive force on schoolchildren. Through § 1983, victims of SRO brutality can bring claims for damages and injunctive relief for Fourth Amendment violations arising from the use of excessive force.[31]

Section 1983 provides a private right of action for damages or equitable relief in circumstances where state or local government officials deprive a person of rights otherwise secured by the United States Constitution or federal law.[32] The U.S. Supreme Court has held that a local government is a "person" subject to suit under § 1983, extending § 1983 liability so private litigants may directly sue municipalities for the actions of a local government official.[33] The municipality will be found liable "where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[34] Consequently, through § 1983 litigation, students can bring claims against individual police officers, police departments, and school districts for Fourth Amendment violations arising from an SRO's use of excessive force.

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[31] *See* 42 U.S.C. § 1983 (2012).

[32] *Id.*

[33] Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 690 (1978).

[34] *Id.* at 690–91 (holding a § 1983 claim against a municipality requires the plaintiff to: (1) identify a policy or custom that deprived him of a federally protected right; (2) demonstrate that the municipality, by its deliberate conduct, acted as the "moving force" behind the alleged deprivation; and (3) establish a direct causal link between the policy or custom and the plaintiff's injury).

B. Limitations of § 1983 Damage Suits

Section 1983 damage suits on their own offer a weak solution to facilitating real change in the policing of America's public schools. Because they are ineffective at deterring future misconduct or incentivizing proactive policy changes, these suits fail to address the systemic roots of SRO brutality.

As explained above in Part II–A, private litigants can use § 1983 to sue individual police officers and hold departments and municipalities financially liable for the actions of individual officers. Section 1983 plaintiffs are entitled to recover both compensatory and punitive damages.[35] When a student is the victim of SRO brutality, § 1983 damage suits work well as a remedy, because a successful plaintiff can recover for medical bills and psychological harm, and punitive damages may give a litigant the satisfaction of holding an individual officer responsible for his misconduct.

Section 1983 damage suits might also appear attractive to lawyers and advocates hoping to change departmental policies and practices regarding SRO hiring, training, and oversight, because § 1983 damage suits ostensibly deter future constitutional violations. According to Harmon, the logic of this deterrence is that "threatening liability for money damages leads officers to comply with the law, and it leads supervisors, chiefs, and cities to influence them to do so."[36] In other words, civil litigation should encourage police departments to make improvements to escape expensive judgments.[37] Yet, because of doctrinal and practical limitations, § 1983 damage suits on their own are an ineffective tool for combating the deeply ingrained organizational roots of SRO misconduct.

The doctrine of qualified immunity is a significant limitation on § 1983 damage remedies. Qualified immunity is a defense that protects an individual acting under color of state law from liability, even if he has violated a plaintiff's constitutional rights, so long as his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[38] This defense shields government officials performing discretionary functions from liability for civil damages. When a clearly established right is violated, the proper inquiry for the court is whether "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right."[39] Therefore, "if reasonable public officials could differ on the lawfulness of the defendant's actions," the officer is entitled to qualified

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[35] Smith v. Wade, 461 U.S. 30, 35 (1983) (stating plaintiffs in § 1983 cases are entitled to recover punitive damages in certain circumstances); Carey v. Piphus, 435 U.S. 247, 264 (1978) (stating the general rule in § 1983 cases is compensatory damages are recoverable where they are proved).

[36] Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 772 (2012).

[37] *Id.*

[38] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[39] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

immunity.[40] According to the Supreme Court, the doctrine of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[41] In other words, even if a student establishes an SRO violated her Fourth Amendment rights through his use of excessive force, the officer may be able to avoid individual liability by asserting the defense of qualified immunity.

The § 1983 damage remedy is also limited by practical considerations. First, there are questions of whether § 1983 suits for damages deter unconstitutional behavior.[42] As mentioned above, the logic of § 1983 deterrence is officers, who fear financial liability, will comply with the law if threatened with money damages, and supervisors, chiefs, and cities will be incentivized to influence the officers to do so. By this logic, civil litigation should incentivize individual SROs to avoid violating students' constitutional rights, and encourage police departments to make proactive reforms to avoid costly judgments. However, empirical evidence regarding the success of private civil litigation in achieving these ends is mixed.[43] According to some scholars, civil litigation is an ineffective way to incentivize positive police behavior or reform because police departments consistently indemnify each officer.[44] Specifically,

> Widespread indemnification impacts the extent to which § 1983's goals of . . . deterrence are achieved. Indemnification . . . dampens the deterrent effect of lawsuits on officers. One might think that police misconduct lawsuits would nonetheless achieve § 1983 deterrence goals by placing financial pressure on government entities to implement systemic police reform. Yet the general consensus is that governments do not take decisive enough action to curb misconduct or manage their officers.[45]

In the end, the § 1983 damage remedy cannot force a police department to adopt costly reforms. Consequently, while § 1983 damage suits might be adequate for students and families hoping solely to recov-

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[40] Faire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992).

[41] Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887 (2014) (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[42] *See* Daryl J. Levinson, *Making the Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) ("If the goal of making government pay compensation for a constitutional tort is to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse."); *see also* Peter H. Shuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 282 ("[A] remedy designed to compensate victims and deter official illegality might in fact defeat some important social objectives and ignore others. Such a remedy might spawn new injustices less visible and thus less tractable.").

[43] Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1354 (2015).

[44] *See* Schwartz, *supra* note 41, at 890 ("Police officers are virtually always indemnified."); *see generally* Rushin, *supra* note 43 (finding equitable relief can compel police departments to transform policies and procedures to minimize misconduct).

[45] Schwartz, *supra* note 41, at 961.

er financial losses, the widespread, systemic nature of SRO brutality calls for a more systemic remedy.

C. A Better Solution: Private Structural Reform Litigation

Different from § 1983 litigation for damages, § 1983 suits for injunctive relief address patterns and systemic harms in a form that is conducive to real change. Injunctive relief, as opposed to the damage remedy, "seeks to prevent harm instead of simply compensating for harm that has already occurred."[46] Also, it has the additional goal of changing the way the government does business by "reform[ing] institutional structures . . . to reduce the future threat to constitutional rights."[47] As Armacost states, "it is clear that structural injunctions are especially well adapted to dealing with systemic harms" in Chicago.[48]

Section 1983 expressly authorizes a "suit in equity" when any state agent deprives a person of rights secured by the United States Constitution or federal law.[49] Local governments may be sued directly for injunctive relief as "persons,"[50] and local or state officials may be sued for injunctive relief in their official capacities.[51] A § 1983 plaintiff seeking injunctive relief must meet the case-or-controversy requirement of Article III of the U.S. Constitution, which requires a plaintiff to establish his standing to sue.[52] In *Mitchum v. Foster*, the Supreme Court reinforced Congress's action by explicitly providing suits in equity as a remedy, and allowed federal courts to issue injunctions in § 1983 claims.[53] These "'structural injunctions' were designed to virtually restructure entire institutions that the courts viewed as systematically violating the law."[54] Importantly, the biggest threshold issue in § 1983 damage litigation—qualified immunity—is not present in § 1983 suits for injunctive relief.[55]

In the past, civil rights lawyers used structural injunctions to challenge systemic harms in school segregation[56] and prison[57] cases.[58] Yet,

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[46] Armacost, *supra* note 30, at 493.

[47] *Id.*

[48] *Id.*

[49] 42 U.S.C. § 1983.

[50] Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 690 (1978).

[51] *Id.*

[52] O'Shea v. Littleton, 414 U.S. 488, 493 (1974).

[53] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[54] Armacost, *supra* note 30, at 490 (citing DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 257 (1994)).

[55] *See, e.g.*, Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Pope v. Chew, 521 F.2d 400 (4th Cir. 1975); Ft. Eustis Books, Inc. v Beale, 478 F.Supp. 1170 (E.D. Va. 1979) (holding, while several defendants may enjoy immunity because of their office, this immunity applies only in an action for damages under § 1983).

[56] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Santamaria v. Dallas Indep. Sch. Dist., No. 3:06-CV-692-L, 2006 U.S. Dist. LEXIS 83417 (N.D. Tex. Nov. 16, 2006).

[57] A state prisoner may request injunctive relief in a constitutional challenge to the conditions of

since the Supreme Court's decision in *Los Angeles v. Lyons*,[59] legal scholars such as Armacost and Rushin have proposed private structural reform litigation is essentially unavailable as a remedy in police brutality cases. In Part III, I explore the doctrinal hurdles to § 1983 injunctive relief erected by *Lyons* and argue that, despite these limitations, *Lyons* does not foreclose the possibility of structural injunctions in school policing cases.

III. THE SUPREME COURT'S STANDING DOCTRINE AS ARTICULATED IN *CITY OF LOS ANGELES V. LYONS*, AND ITS IMPLICATIONS FOR THE AVAILABILITY OF INJUNCTIVE RELIEF IN § 1983 ACTIONS

Despite the text of § 1983 authorizing suits in equity, a litany of Supreme Court cases in the 1970s and 1980s limited the availability of injunctive relief in § 1983 litigation.[60] In holding that private litigants generally lack standing to seek equitable relief against local police departments,[61] these cases seemed to support the proposition that, like § 1983 actions for damages, private structural reform litigation was not a viable tool for combating deeply ingrained, organizational roots of SRO misconduct and changing inadequate department policies.

A. Standing in § 1983 Suits Pre-*Lyons*

As articulated by Brandon Garrett, "[t]ypically, to satisfy the standing requirements of an Article III 'case or controversy,' a party seeking federal jurisdiction must show: (1) an injury in fact that is both (a) concrete and particularized, and (b) actual or imminent; (2) that the injury is fairly traceable to the acts of the defendant; and (3) a likelihood that the injury would be redressed by a decision favorable to the plaintiff."[62]

The Supreme Court first limited standing in § 1983 suits for injunctive relief in *O'Shea v. Littleton*[63] and *Rizzo v. Goode*,[64] concluding

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his prison life. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (alleging inadequate medical care); Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975) (alleging guard brutality); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) (alleging racial discrimination).

[58] Armacost, *supra* note 30, at 490.

[59] Los Angeles v. Lyons, 461 U.S. 95 (1983).

[60] *See* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

[61] *See, e.g.*, *Lyons*, 461 U.S. at 111 (concluding, since a § 1983 litigant was not likely to experience future harm, Lyons did not have standing to seek injunctive relief against the LAPD to prevent use of a chokehold).

[62] Brandon Garrett, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1819 (2008); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992).

[63] 414 U.S. at 493 (holding "[t]he complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege

plaintiffs could not receive relief against alleged patterns of police mistreatment of minority citizens because the threat of injury was not sufficiently real and immediate. Specifically, in *O'Shea*, although particular members of the plaintiff class claimed they had actually suffered from the defendants' alleged unconstitutional practices, the Court observed "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[65] The Court assumed, because the plaintiffs will "conduct their activities within the law and so avoid . . . exposure to the challenged course of conduct said to be followed by [the police officers]," the threat to plaintiffs was not "sufficiently real and immediate to show an existing controversy."[66] Similarly, in *Rizzo*, the Court concluded an officer's past wrongs do not in themselves amount to a real and immediate threat of injury necessary to make a case or controversy.[67] Relying on *O'Shea* and *Rizzo*, the Court elaborated its standing doctrine in *Los Angeles v. Lyons*.[68]

B. The City of Los Angeles v. Lyons Decision

To understand the implications of the *Lyons* decision on the availability of equitable relief in § 1983 suits against police departments, it is necessary to recount the facts and procedural history in some detail. Respondent Lyons filed a § 1983 lawsuit for damages, an injunction, and declaratory relief against the City of Los Angeles and four of its police officers.[69] The issue in *Lyons* was whether Lyons fulfilled the requirements to obtain injunctive relief in the federal district court.[70] According to Lyons' complaint, after the Los Angeles police officers stopped him for a traffic violation, without provocation or resistance on Lyons's part, the officers applied a chokehold to Lyons that rendered him unconscious and damaged his larynx.[71] Lyons sought preliminary and permanent injunctions against the City, barring the use of such chokeholds.[72] He alleged in support of his claim that, pursuant to an official policy or custom, Los Angeles police officers regularly and routinely utilized

> the application of the chokeholds, that Lyons and others similarly situated are threatened with irreparable injury in the form

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an actual case or controversy").

[64] 423 U.S. at 365–66.

[65] *O'Shea*, 414 U.S. at 495–96.

[66] *Id.* at 496–97.

[67] *Rizzo*, 423 U.S. at 362.

[68] Los Angeles v. Lyons, 461 U.S. 95, 102–03 (1983).

[69] *Id.* at 97.

[70] *Id.*

[71] *Id.* at 97–98.

[72] *Id.* at 98.

> of bodily injury and loss of life, and that Lyons "justifiably fears that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse."[73]

Addressing the standing issue raised in *O'Shea* and *Rizzo*, the Ninth Circuit held there was a sufficient likelihood Lyons would again be stopped and subjected to the unlawful use of force to constitute a case or controversy and warrant the issuance of an injunction.[74]

On remand, the district court found Lyons's claim that the officers used a "department-authorized chokehold which resulted in injuries" without provocation or legal justification based on evidence including affidavits, depositions, and government records.[75] The district court further found the Los Angeles Police Department approved of the chokeholds even when there was no threat of death or serious bodily harm, officers were inadequately trained to use chokeholds, there was a high risk of serious injury or death when officers used chokeholds, and its sustained use in situations like *Lyons* was "unconscionable in a civilized society."[76] The district court entered a preliminary injunction enjoining the use of the chokehold, and it also ordered an improved training program and regular reporting and recordkeeping.[77] On appeal, the Ninth Circuit affirmed.[78]

The Supreme Court reversed the Ninth Circuit, concluding Lyons had failed to demonstrate a case or controversy with the City that would justify the equitable relief sought, and, therefore, the federal courts were without jurisdiction to entertain Lyons's claim.[79] "In a departure from previous decisions, the Court concluded that plaintiffs must satisfy these standing requirements[80] for each type of relief sought and, further, that plaintiffs seeking injunctive or declaratory relief must show an additional likelihood of future injury."[81] In other words, even where a plaintiff has personally suffered harm, the plaintiff does not have standing to seek injunctive relief where it is speculative he will be similarly injured in the future. The Court found Lyons failed to allege a policy or practice extending to his situation—where the victim did not resist or provoke police.[82] Because the City's policy only authorized chokeholds to counter a suspect's resistance to an arrest, even if Lyons were arrested again, there was no evidence the arresting officer would use an illegal chokehold.[83]

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[73] *Id.*
[74] *Id.* at 99.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 100.
[78] *Id.*
[79] *Id.* at 102.
[80] *See supra* Part III A.
[81] Garrett, *supra* note 62, at 1819.
[82] *Id.*
[83] *Lyons*, 461 U.S. at 110.

Therefore, even though Lyons had been subjected to the chokehold in the past when arrested for a traffic violation, there was no evidence he would be arrested in the future, so his claim that he would again experience injury as a result of an LAPD officer's chokehold was "speculative."[84] The Court specifically stated:

> that Lyons may have been illegally choked by the police, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance of his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.[85]

The dissenters decried the decision and asserted, "The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court."[86]

C. Standing to Pursue Injunctive Relief Post-*Lyons*: Credible Threat of Future Harm

Critics argued post-*Lyons* that the Court's new standard for injunctive relief, which necessitated plaintiffs show a "virtual certainty of future injury," was an insurmountable obstacle.[87] However, federal courts have since "afforded plaintiffs standing for injunctive relief against government officials in a wide range of factual circumstances."[88] According to Garrett, these cases indicate the *Lyons* standing requirement is satisfied when a plaintiff shows she faces a "credible threat" of future injury from the application of a specific policy.[89] Garrett further explains:

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[84] *Id.* at 109.

[85] *Id.* at 105.

[86] *Id.* at 137.

[87] Garrett, *supra* note 62, at 1817.

[88] *See id.* (arguing that, properly understood, *Lyons* should not pose a significant obstacle in racial profiling cases) (citing Hernandez v. Cremer, 913 F.2d 230, 237 (5th Cir. 1990) (requiring the INS to perform procedures before attempting to exclude those presenting documentary evidence of U.S. citizenship)); LaDuke v. Nelson, 762 F.2d 1318, 1331–32 (9th Cir. 1985) (enjoining the INS from conducting warrantless farm searches); Nat'l Cong. for P.R. Rights v. City of New York, 75 F. Supp. 2d. 154, 161 (S.D.N.Y. 1999) ("Courts have not been hesitant to grant standing to sue for injunctive relief where numerous constitutional violations have resulted from a policy of unconstitutional practices by law enforcement officers.").

[89] Garrett, *supra* note 62, at 1820.

> Determination of credible threat is a flexible, individualized inquiry that is left to the discretion of the court. Specifically, a court determines credible threat by analyzing examples of prior official conduct. Courts follow a highly fact-specific inquiry and proceed by assessing whether the police follow a practice of misconduct and whether police will continue to follow this practice.[90]

Since *Lyons*, courts focus on whether a plaintiff seeking injunctive relief faces a "credible threat" of future injury by considering two factors: "(1) whether government conduct was authorized by policy, practice, or custom of official misconduct;[91] and (2) whether plaintiff was law-abiding or instead precipitated the encounter by engaging in avoidable behavior."[92]

Garrett maintains that for plaintiffs to show a credible threat, "vigilant documentation" will likely be required.[93] Regarding the first factor, documentation of authorization includes a department's written or formal policy, an implied policy or a practice of conduct, a pattern of police behavior, or evidence of insufficient training or repeated failure to respond to complaints of abuse.[94] Regarding the second factor, Garrett explains that while *Lyons* emphasized "the slim chance that Lyons would again commit a traffic violation, again be stopped by police, and again be choked in violation of police policy," most courts since *Lyons* find standing where plaintiffs do not violate the law.[95] Courts have found patterns of police misconduct particularly troubling "where police injure law-abiding citizens engaging in routine daily activity."[96]

Using the framework articulated by Garrett, I argue *Lyons* should not pose a significant obstacle to standing in SRO brutality cases, and, in fact, certain features of the school policing context make it particularly amenable to structural reform litigation.

IV. BEYOND *LYONS*: STRUCTURAL REFORM LITIGATION IN THE SCHOOL POLICING SETTING

Structural injunctions are the legal remedy most favorably suited to dealing with the systemic and institutional roots of SRO brutality. By

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[90] *Id.* at 1822.

[91] *See supra* Part II A (discussing how this factor is similar to the showing required by *Monell* for § 1983 liability on the merits. Under *Monell*, plaintiffs must show that government conduct was authorized by a final decision-maker or a pattern or practice of government conduct exists).

[92] Garrett, *supra* note 62, at 1817.

[93] *Id.* at 1825.

[94] *Id.*

[95] *Id.* at 1825–26.

[96] *Id.*

way of illustration, if Lyons's § 1983 claim for injunctive relief had been successful, an injunction would have required LAPD to formulate an adequate training plan for the use of chokeholds and provide the court with records of its use to remove a court imposed ban. This would have reduced the risk that chokeholds would be used in ways that violated constitutional limitations on the use of force. Because of the limitations inherent in the § 1983 damage remedy, and despite the limits *Lyons* placed on the availability of injunctive relief, some lawyers today are pursuing private structural reform litigation in the hopes of meaningfully changing departmental policies and practices regarding SRO hiring, training, and behavior. One such case, filed by the Southern Poverty Law Center on behalf of students in Birmingham, Alabama, particularly illustrates the features of the school policing setting, which make it amenable to § 1983 injunctive relief. Namely, student victims of SRO brutality experience a unique "credible threat" of future injury due to their distinct, involuntary status as public schoolchildren. Below, I look in detail at the *Birmingham* case, and expand upon how students seeking to challenge SRO policies and practices through § 1983 lawsuits should succeed in overcoming the obstacles of *Lyons*.

A. The Birmingham Schools Pepper Spray Case

After discovering police officers stationed in Birmingham, Alabama, public schools routinely pepper-sprayed and maced students as punishment for minor, noncriminal offenses, the Southern Poverty Law Center filed a § 1983 lawsuit "to challenge the written and unwritten policies, practices, and customs of the Birmingham Police Department ('BPD') regarding the use of mace against children in the Birmingham City Schools ('BCS') and to protect the Fourth . . . Amendment rights of these children."[97] Six named plaintiffs filed suit "on behalf of a class composed of all current and future students who are or will be enrolled in any high school in the BCS system."[98] The Third Amended Complaint alleged:

> School personnel frequently [call] upon SROs to forcefully intervene in minor incidents of childish misbehavior that schools would typically handle as internal matters without resorting to law enforcement. Instead of de-escalating these situations, SRO involvement often has the opposite effect. Officers are quick to resort to pepper spray, [and SROs fail to follow BPD decontamination procedures after each incident]. . . . As a result of the Defendants' conduct, all of which

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[97] Third Amended Complaint, *supra* note 3, at 1–2.

[98] *Id.* at 4.

> is authorized by BPD policy, practices, and customs, the Plaintiffs have suffered severe physical and psychological harm. . . . Mace is used so frequently and so indiscriminately in Birmingham's public high schools that each Class Representative—all BCS students—faces a real and substantial risk of future and repeated injury.[99]

In addition to individual damage claims, the plaintiffs sought injunctive relief to compel the BPD police chief to abandon the use of chemical weapons against schoolchildren and revise BPD's unconstitutional policies.[100]

After a twelve-day bench trial, an Alabama federal district court concluded (1) Fourth Amendment violations had occurred pursuant to BPD policy or custom, and (2) plaintiffs had met their burden and were therefore entitled to injunctive relief.[101] On the subject of standing specifically, the defendant BPD police chief made two arguments.[102] First, he claimed, pursuant to *Lyons*, that the plaintiffs[103] had failed to show a sufficient risk an SRO would again spray them with pepper spray, so their future harm was merely speculative.[104] Second, the defendant claimed "courts must generally be unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."[105] Regardless, the court concluded the plaintiff had "standing to pursue injunctive relief because . . . she had established a real and immediate threat of future injury."[106]

The court distinguished *Lyons* based on three factors.[107] First, "while *Lyons* involved a member of the general public who had an unfortunate encounter with a police officer,"[108] here, the plaintiffs were compulsory members of a specific group who had an inherently high risk of contact with the contested behavior. In support of this conclusion, the court pointed out that school attendance is compulsory under Alabama state law, SROs are stationed in all Birmingham public high schools, and SROs carry pepper spray and have "no qualms about using it."[109]

Second, while the *Lyons* Court found no evidence showing the officers' conduct was authorized by a municipal policy, the *Birmingham*

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[99] *Id.* at 3–4.

[100] *Id.* at 4.

[101] J.W. v. Birmingham Bd. Of Educ., 143 F. Supp. 3d 1118, 1126 (2015).

[102] *Id.* at 1163.

[103] Because of the number of plaintiffs, differences in the facts of their circumstances, and the variety of different legal avenues from which they sought relief, I simplify J.W. v. Roper in the explanation that follows by referencing plaintiffs generally, rather than discussing individual claims.

[104] *J.W.*, 143 F. Supp. 3d at 1126.

[105] *Id.* at 1165.

[106] *Id.* at 1163 (citing Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994)).

[107] *Id.* at 1164.

[108] *Id.*

[109] *Id.* at 1165.

Court found BPD's actions were the result of an official policy.[110] Specifically, the court heard the defendant "testify repeatedly that the SROs acted pursuant to BPD policy when they exposed plaintiffs" to chemical spray.[111] Consequently, "the challenged behavior . . . [was] the product of 'injurious policy, and different from the random act at issue in *Lyons*.'"[112] Since the officers acted pursuant to an official policy, it was significantly more likely that the plaintiffs' injuries would occur again.[113]

Finally, while the *Lyons* Court refused to assume Lyons would repeat the illegal conduct that would place him at risk of injury, the plaintiffs' behavior here was entirely lawful. According to the court, the plaintiffs' encounters with BPD officers demonstrated "a minor disturbance is the only thing necessary" to trigger the injuries feared by the students.[114] The court further found, "the circumstances under which the S.R.O.s sprayed the plaintiffs in this case . . . demonstrate that a variety of normal adolescent behavior is sufficient to result in S.R.O.s spraying students with [chemical spray.]"[115] The court concluded, based on the above factors, that the *Birmingham* plaintiffs had standing to pursue injunctive relief against the BPD police chief.[116]

B. Uniqueness of the School Policing Setting: Involuntariness and Increased Likelihood of Future Harm

The *Birmingham* Court's assessment of plaintiffs' likelihood of future harm parallels the "credible threat" framework articulated by Garrett—both emphasize official authorization of defendants' misconduct and law-abiding conduct on the part of plaintiffs.[117] But, the court in the *Birmingham* case also introduces a new factor to the *Lyons* analysis: the plaintiffs' status as involuntary members of a specific group who, by definition, had an increased risk of exposure to the challenged behavior.[118] This factor is unique to the school policing setting, because it is impracticable for students, given state compulsory attendance laws and the prevalence of SROs in public schools, to choose not to interact with the officers policing their schools.[119] Involuntariness distinguishes public school students from civilians in the wider population; while most civilians do not interact with police officers on a daily basis, students in

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[110] *Id.*
[111] *Id.*
[112] *Id.* (citing Foster Children v. Bush, 329 F.3d 1255, 1266 (11th Cir. 2003)).
[113] *Id.*
[114] *Id.* at 1166.
[115] *Id.*
[116] *Id.* at 1167.
[117] Garrett, *supra* note 62, at 1817.
[118] *J.W.*, 143 F. Supp. 3d at 1165.
[119] *Id.*

schools with SRO programs interact with police officers in hallways, classrooms, lunch lines, and play areas. Student who are victims of SRO brutality face the prospect of continuous interaction with the same SRO in the future. Accordingly, I argue it is the unique, involuntary status of public schoolchildren that makes the school policing setting particularly amenable to structural reform litigation. This factor, which significantly increases the likelihood of "future injury" for students injured by SROs, will translate to all SRO § 1983 litigation.

V. WHAT LIES AHEAD: THE NECESSITY AND DIFFICULTY OF VIGILANT DOCUMENTATION

Structural reform litigation is the legal remedy most suited to dealing with the widespread, systemic roots of SRO misconduct. Post-*Lyons*, plaintiffs seeking equitable relief must, besides meeting the Supreme Court's traditional standing requirements, show an additional likelihood of future harm.[120] This "likelihood of future harm requirement is satisfied when plaintiffs show a 'credible threat' of future harm."[121] "Specifically, a court determines a credible threat by analyzing examples of prior official conduct."[122] This inquiry is flexible and highly fact-specific: courts "proceed by assessing whether the police follow a practice of misconduct and whether police will continue to follow this practice."[123]

In the school policing setting, courts consider three factors to determine if a plaintiff requesting injunctive relief faces a credible threat of future injury: (1) whether plaintiffs were involuntary members of a specific group who, by definition, had an increased risk of exposure to the challenged behavior; (2) whether SRO conduct was authorized by government policy, practice, or custom; and (3) whether plaintiffs were law-abiding or instead precipitated the encounter by engaging in avoidable behavior.[124] Below, I will explore the documentation necessary to prove each factor, and assess difficulties plaintiffs might face in trying to do so.

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[120] Garrett, *supra* note 62, at 1817.

[121] *Id.* at 1820.

[122] *Id.*

[123] *Id.* at 1821.

[124] *See supra* Parts III C and IV A (stating factor one comes from the *Birmingham* case, and factors two and three come from the Garrett case).

A. Involuntariness and Increased Risk of Exposure to Challenged Behavior

The involuntary status of public schoolchildren is relevant to the future-harm inquiry, because students are inherently at increased risk of exposure to injuries resulting from SRO misconduct. Most states' compulsory attendance laws require children to attend school from ages six to seventeen, and courts are unlikely to find a plaintiff lacks standing because she could have avoided being injured in the future by dropping out of school.[125] For example, on the topic of the plaintiffs' status as members of an involuntary group, the *Birmingham* Court acknowledged "the obvious public policy grounds for encouraging teenagers to complete their high-school education."[126] Consequently, where SROs are prevalent in a district's schools, it is impracticable for students to choose not to interact with offending officers. Most SRO programs either require or authorize SROs to patrol common areas of the school,[127] increasing the prospect of repeated contact with the same SRO throughout the students' academic careers.

Strategically, class actions contribute to a finding that plaintiffs are involuntary members of a specific group. Class certification, generally speaking, "adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'"[128] But, in school policing cases, class certification lends credence to the fact SRO brutality affects large numbers of plaintiffs who regularly interact with these officers.

For example, the *Birmingham* case was brought on behalf of a class consisting of all current and former BCS high school students and contained two groups of class representatives—students intentionally sprayed with chemical spray, and students accidentally exposed to chemical spray.[129] In granting class certification, the court emphasized the importance of "the bystander students impacted indirectly by the use of chemical spray."[130] It stated that even where an SRO makes "an effort to restrict the chemical spray to the student in question, chemical spray is nonetheless an aerosol that knows no boundaries and makes no distinction between misbehaving and compliant students."[131] The court concluded, "[t]o the extent that Plaintiffs prevail, *all* students will benefit

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[125] *See J.W.*, 143 F. Supp. 3d at 1165 n.66.

[126] *Id.*

[127] Tomar, *supra* note 28.

[128] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976).

[129] *J.W.*, 143 F. Supp. 3d at 1158.

[130] J.W. v. Birmingham Bd. of Educ., No. 2:10-cv-03314-AKK, 2012 U.S. Dist. LEXIS 124183, at *7 (N.D. Ala. Aug. 31, 2012).

[131] *Id.*

from the implementation of revised policies and more effective training."[132]

The *Lyons* Court added the future-harm element to its standing requirements "in part because [it] was reluctant to let the 'generalized grievance' of one individual harmed in one encounter permit city-wide injunctive relief."[133] But, the school context is unique, and instances of SRO brutality are not isolated. Students are involuntary members of a group of people who have an increased risk of being exposed to harmful police policies and practices compared to the population at large.

B. Authorization by Government Policy, Practice, or Custom

Authorization is relevant to proving future harm, because it is significantly more likely that a student's injury will occur again if the SRO's misconduct was authorized or part of an official policy. This factor "requires a showing similar to that for section 1983 liability on the merits to demonstrate that officials authorized misconduct."[134] *Monell* requires plaintiffs to demonstrate a final decision-maker approved the government conduct or the existence of a pattern of the government conduct.[135] Although courts have not made an overt connection between *Monell* and *Lyons*,[136] in *Lyons*, the Court also considered police testimony, past-injury statistics, and other "evidence showing a pattern of police behavior."[137]

In the *Birmingham* case, for example, plaintiffs provided extensive documentation showing the defendants' conduct was authorized by BPD policy, practices, and customs.[138] In their Third Amended Complaint, plaintiffs included copies of BPD's written Use of Force and Chemical Restraint policies and alleged:

> The expansive language contained in . . . BPD's policy on Chemical Spray Subject Restraint: Non-Deadly Use of Force permits and encourages BPD officers, including SROs, to recklessly deploy chemical weapons against individuals, including children, in inappropriate situations and allows officers to respond disproportionately to student misbehavior. . . . BPD, through [its police chief], has adopted and encouraged

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[132] *Id.* at *11.

[133] Garrett, *supra* note 62, at 1817–18.

[134] *Id.* at 1823.

[135] *Monell*, 436 U.S. 658, 694 (1978) (holding a municipal government liable under § 1983 when injuries are caused pursuant to a policy or custom, whether caused directly "by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.").

[136] Garrett, *supra* note 62, at 1823 n.34.

[137] *Id.* at 1823.

[138] J.W. v. Birmingham Bd. Of Educ., 143 F. Supp. 3d 1118, 1126 (2015).

> widespread and persistent unconstitutional practices and customs that permit and encourage SROs to use chemical weapons against BCS students in inappropriate situations and in an abusive manner.[139]

Plaintiffs also included fact-specific sections demonstrating the SROs' conduct was consistent with BPD policy, practices, and customs, including instances where SROs used chemical spray

> (a) as a first resort, and without issuing a warning to students; (b) against students who posed no risk of injury to themselves or others; (c) against students who were restrained; (d) against students as a form of punishment; (e) without regard to others in close proximity to the intended target; and (f) as a way to intimidate and control peaceable students.[140]

Also helpful to plaintiffs was the fact that, at trial, BPD's police chief testified the SROs acted pursuant to BPD policy when they exposed plaintiffs to chemical spray.[141]

Unfortunately, it will often be the case that § 1983 plaintiffs are unable to provide the court with such comprehensive documentation. Like proving municipal liability under *Monell*, it may be difficult to prove authorization at the outset of a lawsuit, as police departments often do their best to conceal the necessary documentation until discovery. Yet, according to Garrett, showing authorization sufficient to support standing "should not be unduly burdensome."[142] To show authorization, plaintiffs can provide evidence of a department's written or formal policies, implied policies or practices of conduct, a pattern of police behavior, or proof the officers lacked adequate training or frequently failed to act following grievances of abuse.[143] Most school districts with an SRO program have a written agreement, or Memorandum of Understanding (MOU), between the district and the police department.[144] Through state open records statutes, plaintiffs should be able to request copies of MOUs, documentation of similar incidents between SROs and other students, written use of force and restraint policies, and documentation of discipline (or lack of discipline) for an SRO's past misconduct. Through this evidence, plaintiffs' counsel should be able to piece together sufficient documentation to show authorization of SRO misconduct.

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[139] Third Amended Complaint, *supra* note 3, at 22–23.

[140] *Id.*

[141] *J.W.*, 143 F. Supp. 3d at 1165.

[142] Garrett, *supra* note 62, at 1824.

[143] *Id.* at 1825.

[144] U.S. Dep't. of Justice, *Fact Sheet: Memorandum of Understanding for FY2013 School-Based Partnerships* (September 2013), https://cops.usdoj.gov/pdf/2013 MOU-FactSheet v2_091613.pdf [https://perma.cc/R5KT-PL44].

C. Law-Abiding Plaintiffs

Most courts post-*Lyons* have found standing where police injure plaintiffs who did not violate the law, because law-abiding "plaintiffs do not have to induce a police encounter before the possibility of injury can occur."[145] This factor is relevant to determine future harm because courts have found a pattern or practice of "police misconduct is a serious threat where police injure law-abiding citizens engaging in routine daily activity."[146]

Plaintiffs in SRO brutality cases are frequently acting within the confines of the law. The incidents documented in Part I of this paper are evidence of this—in those instances, SROs responded with excessive and unnecessary levels of force to students who were, for example, merely crying in a hallway or cutting a cafeteria line. Because many SROs are charged with enforcing a school's Student Code of Conduct, ordinary adolescent misbehavior—such as cell phone use, cursing, and tardiness—often results in macing, tasing, and other instances of SRO brutality.[147]

In the *Birmingham* case, the court found the plaintiffs were acting lawfully when BPD officers sprayed them with chemical spray.[148] First, the incidents alleged in the complaint—for example, the macing of a female student who was standing outside a school building and sobbing—led the court to conclude "a minor disturbance is the only thing necessary to trigger" the injuries feared by the plaintiffs.[149] The court continued, "the circumstances under which SROs sprayed the plaintiffs in this case . . . demonstrate that a variety of normal adolescent behavior is sufficient to result in SROs spraying students with [chemical spray]."[150] Furthermore, the court noted none of the plaintiffs in the case ever faced legal ramifications for the behavior that caused BPD officers to spray them.[151] Finally, at trial, two officers "seemed to suggest that they always arrest students they spray with [chemical spray] as a post-hoc justification for their use of force."[152]

Nonetheless, potential § 1983 plaintiffs will face difficulties in proving they were law-abiding. Problematically, attorneys representing SROs in § 1983 litigation often attempt to justify their clients' behavior by claiming that plaintiffs failed to comply with SRO orders, and the offending officers merely responded in a way necessary to "maintain and

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[145] Garrett, *supra* note 62, at 1826 n.48 (citing LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985)).

[146] *Id.* at 1825–26.

[147] *See* J.W. v. Birmingham Bd. Of Educ., 143 F. Supp. 3d 1118, 1125 (2015).

[148] *Id.*

[149] *Id.* at 1166.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 1167.

control discipline at the school."[153] For example, in response to the Birmingham school's litigation, a press release from the Birmingham mayor's office asserted, "[d]efendants will prove at trial that if the plaintiff students were tending to their reading, writing and arithmetic and behaving in an orderly fashion, they would not have been maced."[154] While the evidence at trial proved none of the *Birmingham* plaintiffs faced legal ramifications for their behaviors, "noncriminal offenses can escalate to criminal charges when officers are not trained in child and adolescent development."[155] Furthermore, when officers lack additional training on how to recognize and respond to youth with mental health, trauma-related, and special-education-related disorders, ordinary behaviors can take on the appearance of resistance or aggression.

If a court finds that a plaintiff was not law-abiding at the time of the incident in question, it will likely be unwilling to assume the plaintiff "will repeat the type of misconduct that would once again place him or her at risk of injury."[156] Therefore, § 1983 plaintiffs should make sure not only to compile evidence such as video footage and witness testimony, but also to include additional documentation, such as the SFY report and other similar studies; information on childhood and adolescent development; national training standards and model training programs; and data on SRO stops, frisks, searches, and arrests—with separate data for school detentions. Through this evidence, plaintiffs should be able to document SROs are not responding to criminal conduct, but are rather injuring students engaging in normal adolescent behavior.

VI. CONCLUSION

As widespread opposition to police brutality increases, private plaintiffs aided by public interest groups are challenging SRO practices in federal court with the hopes of dismantling and transforming a destructive system. Obtaining injunctive relief is a critical goal, because the § 1983 damage remedy offers a weak link to facilitating real change in the policing of America's public schools. Despite critics' concern that *Lyons* largely shut the door to restructuring police institutions, I argue litigation in the school policing context has the potential to clear the doctrinal hurdles erected by *Lyons*. Namely, the unique and involuntary status of public schoolchildren distinguishes the school policing from the civilian context, and makes it particularly amenable to structural reform litigation.

I acknowledge an advocacy strategy focusing solely on structural

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[153] *J.W.*, 143 F. Supp. 3d at 1165 (citing Honig v. Doe, 484 U.S. 305, 320 (1988)).

[154] Klein, *supra* note 2 (citing a press release from the Birmingham Mayor's Office).

[155] FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY, *supra* note 23, at 47.

[156] Honig v. Doe, 484 U.S. 305, 320 (1988).

reform litigation is incomplete. At bottom, structural reform litigation is tethered to a constitutional harm. Oftentimes, an SRO's behavior *will* be so egregious that it rises to the level of excessive force, but immoral or unethical behavior is not always unconstitutional. Many instances of SRO misconduct cannot be redressed by the Fourth Amendment, and the problem of policing is not limited to violations of constitutional rights. Accordingly, "the judiciary and the constitution can never successfully address the problem of policing without assistance."[157] Furthermore, even when plaintiffs prevail, truly successful structural reform requires continual support from school districts and municipalities, dedication by police department executives, and buy-in on the part of individual SROs. Open discussion and evaluation of progress is essential to transforming a system when its problems are so deeply rooted. In conclusion, I propose lawyers working with students and families on § 1983 cases should also work collaboratively with the various stakeholders because an engaged and organized community is central to achieving meaningful change. This is not to minimize the value in civil rights litigation--as Ebony Howard, the attorney for the plaintiffs in the *Birmingham* case, observed that § 1983 litigation "is a great way to force people to come to the table, it gives others courage, and you can't dismiss the impact of having kids and parents stand up against injustice."[158]

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[157] Harmon, *supra* note 36, at 768.

[158] Telephone Interview with Ebony Howard, Associate Legal Director, The Southern Poverty Law Center (Oct. 19, 2016).