SMU DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 76 | Issue 3 Article 6

2023

Challenges in Substantive Due Process Litigation

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Recommended Citation
Nancy Leong, *Challenges in Substantive Due Process Litigation*, 76 SMU L. REV. 459 (2023)

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Challenges in Substantive Due Process Litigation

*Nancy Leong**

ABSTRACT

This Article presents the results of an empirical examination of litigation involving substantive due process claims. I have compiled a dataset consisting of every case in which a federal appellate court adjudicated a substantive due process claim during the year 2019—a total of 98 cases. This census yields important information about the context in which substantive due process rights are litigated and articulated within our civil rights enforcement scheme. As a threshold matter, I show that 92% of substantive due process cases come to the federal appellate courts as actions brought under 42 U.S.C. § 1983. This information underscores that, for the most part, substantive due process litigation in the federal courts is litigation under Section 1983. As a result, substantive due process litigation is subject to the doctrinal challenges that apply to Section 1983 litigation more generally.

This Article takes stock of these challenges and develops an account of the intersection between substantive due process rights and Section 1983 litigation. It considers four challenges for civil rights plaintiffs common to many cases filed under Section 1983: standing to seek injunctive relief, the qualified immunity defense, the policy or custom requirement for municipal liability, and availability of attorneys' fees under 42 U.S.C. § 1988. Drawing on both quantitative and qualitative information from the dataset, this Article suggests that each of these areas also presents a challenge for plaintiffs seeking to vindicate substantive due process rights. Further, the vagueness and breadth of many substantive due process rights compounds the challenges presented by Section 1983 litigation in other contexts. This Article concludes by briefly considering the implications of its findings for lawyers, courts, and future researchers.

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https://doi.org/10.25172/smulr.76.3.6

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I. INTRODUCTION

MOST of the leading substantive due process cases of the past several decades—*Cruzan v. Missouri Department of Health*,[1] *Planned Parenthood v. Casey*,[2] *Obergefell v. Hodges*,[3] *and Dobbs v. Jackson Women's Health Organization*[4]—were filed under 42 U.S.C. § 1983, a Reconstruction-era statute providing individuals with a way to enforce constitutional rights by suing government officials and governmental entities.[5] Yet the Supreme Court did not explicitly acknowledge in any of these cases that Section 1983 was the mechanism that allowed the plaintiffs to file the lawsuit in the first place. The Court was so focused on the substance of these substantive due process challenges that it did not give even a perfunctory mention to the civil rights statute—Section 1983—that made the challenges possible in the first place.

A reasonable response is that none of these cases involved what we typically consider a Section 1983 issue: for example, a question as to whether someone was acting under color of law or a dispute over the availability of the qualified immunity defense.[6] Perhaps, however, another explanation is also at play: in many instances, we think of substantive due process cases purely in terms of their constitutional merits, rather than as part of the broader category of Section 1983 cases.

Existing scholarship lends support to this latter hypothesis. Much has been written about the contours of the substantive due process right and the appropriate mode of analysis for courts to recognize substantive due

1. Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265 (1990) (considering the right to remove life support).

2. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (upholding the right to abortion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

3. Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that the right to marry extends to same-sex couples).

4. *Dobbs*, 142 S. Ct. at 2242 (holding that the Constitution does not confer a right to abortion).

5. *See* 42 U.S.C. § 1983. Of course, not all substantive due process litigation occurs under Section 1983. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579 (2003) (holding, in direct criminal appeal, that a statute criminalizing same-sex intimate activity was unconstitutional).

6. *Cf.* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 293–94 (2001) (First Amendment dispute raising color of law issue); Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (Fourth Amendment dispute raising issue of qualified immunity).

process claims.[7] Similarly, a great deal of scholarship has examined the challenges of litigation under Section 1983 for civil rights plaintiffs.[8] But relatively little work has examined substantive due process cases *as* Section 1983 cases.[9] This Article aims to bring these two literatures into conversation and to add an empirical dimension to the analysis.

I present an original survey of every substantive due process claim adjudicated by the federal appellate courts during the year 2019. This survey yields a census of a full year of substantive due process litigation—a total of ninety-eight cases. While relatively modest in size, this census is sufficient to yield several pieces of information. First, my dataset reveals that, for all practical purposes, substantive due process litigation *is* Section 1983 litigation: 92% of substantive due process cases in the dataset were litigated under Section 1983.[10] Therefore, the litigation of substantive due process rights is subject to the features and challenges associated with Section 1983 litigation more generally.

I then consider how the characteristics of Section 1983 litigation map onto the contours of the substantive due process claim in particular. To examine these dynamics, this Article focuses chiefly on four important doctrines that influence Section 1983 litigation.

First, the doctrines governing justiciability—in particular, standing to seek injunctive relief—are generally regarded as challenging for plaintiffs to satisfy.[11] I suggest that this is no less true in the substantive due process context. Further, given that substantive due process claims often challenge abusive and unusual executive action, any suit for forward-looking relief will likely not satisfy the requirement of a showing of likelihood of future harm.[12]

Second, with the support of my dataset, I examine the role of qualified immunity. I find that qualified immunity sometimes preempts damages liability even when a substantive due process violation has taken place and that qualified immunity frequently provides courts with an avenue to avoid adjudicating the merits of substantive due process claims.[13] Qualified immunity plays a significant role in substantive due process litigation, directly accounting for the resolution of 11% of appellate cases, and the "clearly established" prong of qualified immunity doctrine is particularly challenging for plaintiffs bringing substantive due process claims given that

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7. *See generally, e.g.*, Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, *A Workable Substantive Due Process*, 95 Notre Dame L. Rev. 1961 (2020).

8. *See generally, e.g.*, Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 Touro L. Rev. 525 (2016).

9. Scholarship that has examined substantive due process rights in relation to Section 1983 has typically focused on one particular right or factual context, rather than on substantive due process rights as a category. *See, e.g.*, Dale Margolin Cecka, *The Civil Rights of Sexually Exploited Youth in Foster Care*, 117 W. Va. L. Rev. 1225, 1253 (2015); Michael Allan Wolf, *A Reign of Error: Property Rights and Stare Decisis*, 99 Wash. L. Rev. 449, 449 (2021).

10. One case was also litigated under *Bivens*, the analog to Section 1983 for lawsuits against federal agents.

11. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983).

12. *See infra* Part III.A.

13. *See infra* Part III.B.

the precise scope of the substantive due process right is often unclear.[14] Further, and relatedly, the diversity of subject matter litigated under the rubric of substantive due process means that plaintiffs often struggle to find any precedent that could clearly establish the law for purposes of qualified immunity.[15]

Third, I also consider government entity liability, which requires plaintiffs to prove that a municipal policy or custom caused the violation.[16] The policy-or-custom requirement is challenging for plaintiffs bringing substantive due process claims because it is often hard to argue that a municipality has a "policy" of violating a right that is notoriously ill-defined by the Supreme Court.[17] In the absence of an official municipal policy or an explicit decision by a municipal policymaker, plaintiffs generally must show a *pattern* of violations.[18] I find evidence that defendants generally succeed in showing that substantive due process violations are insufficiently dissimilar to one another to establish a pattern.[19]

Finally, the significant challenges that plaintiffs face in surmounting other aspects of Section 1983 litigation suggest that they may also struggle to find representation given the challenges to recovering attorneys' fees under the existing damages statute—42 U.S.C. § 1988.[20] Over the past several decades, the Supreme Court has made it increasingly difficult for civil rights plaintiffs to recover fees under Section 1988.[21] Although it is difficult to establish definitively the direct consequences of these decisions, I describe some evidence suggesting that plaintiffs' attorneys may be more hesitant to take cases hinging on substantive due process issues because prevailing on such claims is challenging and the outcome is uncertain.[22]

This Article concludes with a brief discussion of the implications of my dataset for lawyers and courts.[23] It also suggests ways that future empirical research can build on this initial foray.[24]

The balance of the Article proceeds in three parts. Part I describes the methodology used to collect the data and summarizes the results of the survey. Part II overlays these results against recognized features of Section 1983 litigation, offering a substantive due process gloss on common generalizations about Section 1983. Finally, Part III concludes with some overall observations about the litigation of substantive due process rights with implications for lawyers, judges, and future researchers.

14. *See infra* Part III.B.
15. *See infra* Part III.B.
16. *See* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 694 (1978).
17. *See id.* at 713.
18. *See, e.g.*, Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 407–08 (1997).
19. *See infra* Part III.C.
20. *See infra* Part III.D.
21. *See, e.g.*, Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 205–08 (2003).
22. *See infra* Part III.D.
23. *See infra* Part IV.
24. *See infra* Part IV.C.

II. METHODOLOGY AND FINDINGS

This section describes the dataset I created and the results of my analysis. Chief among these findings is confirmation that, for all practical purposes, litigation of substantive due process rights is litigation under 42 U.S.C. § 1983, with 92% of all substantive due process claims adjudicated by appellate courts falling under that statute. I focus the remainder of my analysis on those claims.

Among substantive due process claims litigated under Section 1983, I show that most arrive before an appellate court as an appeal from a ruling in favor of a defendant on a motion to dismiss or a motion for summary judgment. Further, I show that most substantive due process claims that are adjudicated on appeal are resolved in favor of the defendant: in 88% of cases, all substantive due process claims were resolved in favor of the defendant. Finally, I show that qualified immunity plays a nontrivial role in appellate adjudication of substantive due process claims, with 12% of all substantive due process claims litigated under Section 1983 resolved by a grant of qualified immunity to the defendant.

A. Methodology

To create the dataset that serves as the foundation for my analysis, I gathered every case in which a federal appellate court adjudicated a substantive due process issue during the year 2019. This was accomplished by searching for "substantive due process" in the Westlaw database of federal appellate cases for the year of 2019. That search returned 189 cases.[25] After I eliminated cases that did not adjudicate a substantive due process issue—for example, those that mentioned substantive due process only in passing and those that involved litigation of a substantive due process issue but did not culminate in adjudication of a substantive due process issue by the federal appellate court—ninety-eight federal appellate opinions remained.[26]

For each of these opinions, I coded for a number of variables. After recording the case name and citation, I also coded for the following variables:

- Circuit
- Cause of action

25. It is possible that there are other cases that could be classified as substantive due process cases but that did not use the phrase "substantive due process." For example, a case that clearly involves a substantive due process claim might nonetheless refer only to "due process" or describe a violation as a "Fourteenth Amendment" violation. However, preliminary exploration reveals that examining all cases including the phrase "due process" or "Fourteenth Amendment" would involve a prohibitive number of cases (over 3000) of which most would not be substantive due process cases. The "substantive due process" search term yields a reasonable number of cases to code, of which about half meet the criteria for inclusion in the dataset.

26. Of these cases, those involving a claim of municipal liability under 42 U.S.C. § 1983 had already been coded for a prior project examining *Monell* claims in general, and claims of failure to supervise in particular, across substantive constitutional rights. *See* Nancy Leong, *Municipal Failures*, 108 Cornell L. Rev. 345, 364 (2023). These cases were supplemented with cases involving only claims against individual officers and supplemented to include information specific to substantive due process litigation.

- Defendant (officer in personal capacity, officer in official capacity, government entity)
- Remedies sought (injunctive relief, damages)
- Procedural posture (grant of defendant motion to dismiss, jury verdict for plaintiff, etc.)
- Result on appeal for substantive due process claim (affirmed, reversed, etc.)
- Strand of substantive due process analysis (fundamental right, state created danger, shocks the conscience)
- General description of right asserted (land use, sex offender registry, car chase, etc.)

B. Findings

Of the 189 federal appellate opinions issued in 2019 that contained the phrase "substantive due process," ninety-eight involved the adjudication of a substantive due process issue. Many cases included the words *substantive due process* but did not actually adjudicate a substantive due process claim. This occurred for a number of reasons. For example, some cases included a substantive due process issue at the trial level that was not litigated on appeal, some cases involved a substantive due process issue that was raised but not adjudicated on appeal, and some cases included a citation and parenthetical to a substantive due process case but did not actually involve substantive due process issues.

Of the ninety-eight cases that included adjudication of a substantive due process issue, ninety cases involved the presentation of that issue in a lawsuit brought under 42 U.S.C. § 1983, one case involved a *Bivens* action,[27] and seven cases involved various kinds of criminal proceedings, including direct appeals, challenges to pretrial confinement, and habeas. Table 1 summarizes these results.

Table 1: Nature of lawsuit in which substantive due process claim arose.

Nature of lawsuit	Number of cases
Section 1983	90
Bivens	1
Criminal	7
Other	2

One important finding from this is that, for all practical purposes, substantive due process litigation is litigation under 42 U.S.C. § 1983. The challenges that present themselves during Section 1983 litigation are also challenges that affect litigation of substantive due process rights. For the

27. A *Bivens* action is a lawsuit claiming a constitutional violation by federal officials acting under color of federal law, parallel and largely adhering to the same parameters as litigation under Section 1983. *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

remainder of the Article, I will focus on the ninety cases that involved litigation under Section 1983, with the understanding that a few cases also involved substantive due process litigation in other contexts.

Most substantive due process lawsuits named both individual officers and government entities as defendants. Some lawsuits named individual officers in both their personal and official capacities.[28] A total of thirty-one lawsuits (35%) named one or more officers in their personal capacity, sixty-five lawsuits (72%) named one or more officers in their official capacity, and fifty-five lawsuits (61%) named one or more government entities. Table 2 presents these results.

Table 2: Identity of defendants.

Defendant Identity	Number of cases
Individual officer in personal capacity	31
Individual officer in official capacity	65
Government entity	55

Many of the appellate opinions stated expressly that they were written only for the parties. This was particularly true of unpublished opinions. In such opinions, the court did not always make clear what remedy the plaintiffs were seeking. Among the opinions in which it was clear what remedy the plaintiff was seeking, the plaintiff sought an injunction in twenty-seven cases (30%) and damages in fifty-five cases (61%). Table 3 presents these results.

Table 3: Remedy sought by plaintiff.

Remedy sought	Number of cases
Damages only	45
Injunction only	17
Both damages and injunction	10
Other/Unclear	18

I also examined the procedural posture in which cases reached the federal appellate court. Most cases were appealed from a grant of a defendant's motion to dismiss (forty-two cases) or a grant of a defendant's motion for summary judgment (twenty-six cases). Only three cases were appealed from verdicts rendered by a judge or jury (two for defendant and one for plaintiff).[29]

28. A lawsuit against a government official in their official capacity is treated as a lawsuit directly against the municipality or other government entity, and the same standard of policy or custom is applied as against a municipality. *See, e.g.*, Kentucky v. Graham, 473 U.S. 159, 166 (1985).

29. This result is not surprising given the small percentage of all federal cases that are tried either to a jury or by a judge. *See generally* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 Judicature 26 (2017). Further, some practitioners have shared with me that verdicts rarely lead to appeals due to the expense for the losing party.

As is the case in other areas of substantive litigation, plaintiffs rarely prevailed on substantive due process claims at the trial court level. Only twelve cases reached the appellate court on appeal from a plaintiff "win," defined as a favorable ruling for plaintiff at any stage of litigation (for example, a denial of a motion to dismiss filed by the defendant would be counted as a "win" for the plaintiff at the motion to dismiss stage). Only one appellate case in the dataset considered an appeal of a jury verdict for the plaintiff. Table 4 summarizes the procedural posture of the substantive due process cases adjudicated by federal appellate courts.

Table 4: Procedural posture of case on appeal.

Procedural posture[30]	Number of cases	Percentage (out of 90 total cases)
Motion to dismiss, defendant won	42	47%
Motion to dismiss, plaintiff won	4	4%
Motion for judgment on the pleadings, defendant won	4	4%
Motion for judgment on the pleadings, plaintiff won	0	0%
Motion for summary judgment, defendant won	26	29%
Motion for summary judgment, plaintiff won	7	8%
Jury verdict, defendant won	2	2%
Jury verdict, plaintiff won	1	1%
JMOL post-verdict, defendant won	1	1%
JMOL post-verdict, plaintiff won	0	0%
Other	3	3%
Total	90	100%

Defendants won on all substantive due process issues in seventy-nine out of the ninety cases in which a substantive due process claim was adjudicated. Plaintiffs won on at least one substantive due process claim in eleven cases. Two of the cases in which plaintiff won involved a result that was mixed by party: that is, plaintiffs won against some but not all defendants; I coded these as plaintiff victories.

In the cases where defendants won, I also examined the role of the qualified immunity defense. In sixty-eight cases, the defendants won on the merits of the substantive due process claim. In nine cases, the court did not resolve the merits of the substantive due process issue but rather granted qualified immunity on the ground that the law was not clearly established at the time of the alleged violation. Finally, in two cases, the court held that a substantive due process rights violation had taken place

30. Where the cases involved claims that were concluded at multiple stages of litigation—for example, some on a motion to dismiss and others on a motion for summary judgment—I coded for the claims that had proceeded furthest in litigation.

but that the law was not clearly established at the time of the violation, with the result that defendants were granted qualified immunity. Table 5A summarizes appellate success rates for plaintiffs and defendants, while Table 5B depicts the role of qualified immunity in success at the appellate level.

Table 5A: Appellate success rates.

Outcome	Number of Cases
Defendants win on all SDP issues	79
Plaintiffs win at least one SDP issue	11

Table 5B: Role of qualified immunity in appellate success.

Outcome	Number of Cases
Defendants win on all SDP issues	79
Individual or government defendants win on merits	68
Individual defendants lose on merits but win because law not clearly established	2
Merits not adjudicated; individual defendants win because law not clearly established	9

I also strove to classify each substantive due process claim within one of the major strands of analysis. This task was complicated by the fact that (perhaps to state the obvious) substantive due process jurisprudence is not a model of clarity. As I will further describe in Part III, different circuits—or even different opinions within the same circuit—were not consistent in the way that they categorized and analyzed cases.[31] Nonetheless, I endeavored to classify each claim according to which of the major strands of substantive due process jurisprudence the claim seemed most clearly to fall into: fundamental right, state-created danger, or shocks-the-conscience. Table 6 depicts the breakdown of the claims. The numbers add up to more than 100 because some claims fell into more than one category or overlapped, and I also tracked cases in which it was unclear which mode of analysis the court had applied.

Table 6: Type of substantive due process analysis.

Defendant Identity	Number of cases
Fundamental right	54
State-created danger	18
Shocks-the-conscience	34
Other/Unclear	18

Finally, I attempted to articulate a general description of the factual circumstances for the case. The primary takeaway from this endeavor is

31. *Compare* Colbruno v. Kessler, 928 F.3d 1155, 1162 (10th Cir. 2019) (majority opinion), *with id.* at 1167 (Tymkovich, C.J., dissenting).

that the types of claims brought under the rubric of substantive due process claims are exceptionally diverse. The single year for which I coded cases resulted in cases dealing with sex offender registries, storage of infant blood samples, employment issues, car chases, unlawful shootings, family unity, land use issues, academic integrity, disability benefits, and many others. Substantive due process claims appear to be viewed as an appropriate vehicle for adjudication of issues affecting nearly every aspect of human life.

C. Limitations

Like all empirical research, mine has limitations, and I flag three of those limitations here. First, my research examines only a single year of substantive due process litigation. While I selected the calendar year 2019 as the last complete calendar year prior to the pandemic, and I did so to avoid capturing disruptions to the normal flow of litigation caused by the pandemic, it is possible that some trends evident in my dataset no longer hold true. A single year sample is also limited by the possibility that something was different or unusual about that year. An alternative possibility would be to code cases in multiple years or to code a sample of cases drawn from multiple years. While for purposes of this project I was interested in conducting a complete census of a single year, future work could profitably explore other approaches.

Second, my research examines only federal appellate litigation. This approach may fail to identify important trends at the district court level. While I focused on appellate litigation because I was interested in the law-articulation function of the federal appellate courts in substantive due process cases and wanted to study that issue in detail, future research might profitably employ docket analysis or code district court opinions.

Finally, my research is limited to the things that an appellate court said explicitly in its opinion. So, for example, if a court did not make clear which strand of analysis it was using to adjudicate a particular substantive due process claim, I was not able to code for that variable. Further, some opinions were relatively cursory in their analysis while others were more detailed. For obvious reasons, I paid more attention to the latter in developing the examples I discuss in the remainder of this Article, but the former may have also had interesting features that simply were not recorded for analysis by the federal appellate court.

III. SUBSTANTIVE DUE PROCESS AND SECTION 1983

As the data in the previous section show, for all intents and purposes, substantive due process litigation is litigation under 42 U.S.C. § 1983, with all of the features and challenges of litigation under that statute more generally. This part surveys some established challenges in Section 1983 litigation and considers how they play out in the context of substantive due process in particular.

A. Justiciability

One notable challenge for civil rights plaintiffs is establishing standing to seek injunctive relief. In *City of Los Angeles v. Lyons*, the Supreme Court held that to establish standing to seek such relief a plaintiff must demonstrate a likelihood of future harm.[32] In *Lyons* itself, the plaintiff was a man who had been injured by a police officer who applied a chokehold restraint; he was unable to establish standing because he was unable to show a likelihood that he would be put in a chokehold in the future.[33] This standard is difficult to meet because of the challenge, in many instances, of showing that a particular plaintiff is more likely than anyone else to suffer the same injury in the future.

In my dataset, about 30% of plaintiffs sought injunctive relief.[34] In many instances, therefore, *Lyons* could affect the viability of these plaintiffs' lawsuits. In some instances, where the harm is ongoing, this task is not difficult: a representative example is *Guertin v. State*, in which the plaintiffs sued to protest their lack of access to safe drinking water and the lack of access continued on an ongoing basis.[35]

In other cases, however, plaintiffs had more difficulty showing that they had a substantial likelihood of future harm. In *Worthy v. City of Phenix City*, the plaintiffs were a group of motorists who challenged the use of red light cameras installed pursuant to a city ordinance on substantive due process grounds, seeking both damages and injunctive relief.[36] While the court concluded that the plaintiffs had standing to bring their claims for damages, it held that they did not have standing to seek injunctive relief because "they have not sufficiently alleged that there is a substantial likelihood that they will suffer a future injury from the ordinance."[37] The court observed that, to potentially receive another red light citation pursuant to the challenged ordinance, the plaintiffs would have to drive on a route that would take them through an intersection where a red light camera is installed, run a red light, have a Phenix City police officer decide to issue the citation, and not be shielded by any of the ordinance's affirmative defenses.[38] The court concluded that "[t]his is too much," noting that "[w]ere we to hold that Appellants sufficiently alleged a likelihood of future harm by asserting that they will again violate the ordinance, litigants would be able to sufficiently plead a threat of future harm simply by alleging that they will violate a law."[39]

Likewise, plaintiffs were able to show standing to seek damages but not injunctive relief in *Kanuszewski v. Michigan Department of Health and Human Services*, a case involving a challenge to the state's practice of

32. City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).
33. *Id.* at 108.
34. *See supra* Part II.B tbl.3.
35. Guertin v. State, 912 F.3d 907, 915 (6th Cir. 2019).
36. Worthy v. City of Phenix City, 930 F.3d 1206, 1212–13 (11th Cir. 2019).
37. *Id.* at 1215.
38. *Id.* at 1216.
39. *Id.*

sampling, retaining, and using infants' blood.[40] Since the 1960s, Michigan has collected blood samples from nearly every newborn baby in Michigan to test for more than fifty medical issues; the samples are then transferred and stored for possible future use by the state.[41] A group of children and their parents brought suit to challenge the program, alleging both Fourth Amendment and substantive due process violations.[42] With respect to both claims, the court drew a distinction between "past and ongoing or future harms," explaining that "the type of harm affects the type of relief available."[43] Plaintiffs could therefore challenge and seek injunctive relief with respect to the retention and testing of their blood, but could not seek injunctive relief with respect to the blood draw itself because it was highly unlikely that their blood would be drawn again in the future as part of the program.[44] This division between past and future harms, with injunctive relief only available for the future harms, suggests that it is impossible for anyone to seek injunctive relief to challenge the program on substantive due process grounds. Once an infant's blood is drawn, it is unlikely to be drawn again, and therefore injunctive relief is not available.[45]

In other instances, defendants did not challenge standing, and the court did not raise the issue *sua sponte*. However, under a strict application of the *Lyons* standard, it seems that such a challenge might be possible. It would be difficult for many plaintiffs to show a likelihood of future harm. Consider, for example, *Doe v. Woodard*, in which the parents of a child who had been strip searched and photographed at her preschool after an allegation of indications of abuse brought suit seeking both damages and prospective relief.[46] Under the *Lyons* standard, it would be relatively difficult for the plaintiff to show that she, in particular, would be strip searched and photographed in the future: indeed, the child subjected to the strip search seems materially similarly situated to the *Lyons* plaintiff. Although we do not know for sure whether the court thought about the standing issue or why it might have chosen to move ahead to the Fourteenth Amendment issue, the end result was an adverse decision for the plaintiffs and the articulation of adverse substantive due process precedent for future plaintiffs.[47] One possibility is that the court thought that standing would not make a difference in the ultimate outcome, or that the court's interest in examining the substantive due process issue was one reason, if only at an implicit level, that the court did not consider the standing issue.

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40. Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396, 405 (6th Cir. 2019).
41. *Id.* at 403–04.
42. *Id.* at 405.
43. *Id.* at 406.
44. *Id.* at 408 ("The completed harm from Defendants' alleged substantive due process violation affords the children standing to seek damages, but there is no allegation of a real or immediate threat that the state will do so again.").
45. I do not read existing precedent to exclude the possibility that parents could seek injunctive relief on behalf of an expected child.
46. Doe v. Woodard, 912 F.3d 1278, 1285–86 (10th Cir. 2019).
47. *See id.* at 1302.

The challenges exemplified by *Worthy*, *Kanuszewski*, and *Woodard* may impede many plaintiffs whose injury is not ongoing. While substantive due process plaintiffs are not uniquely vulnerable to the challenges of *Lyons*, the wide diversity of practices that are challenged under the substantive due process framework demonstrates the difficulty that plaintiffs across a spectrum of life activities will face in changing forward-looking practices. When substantive due process is the only claim available, plaintiffs may struggle to establish their entitlement to structural reform.

B. Qualified Immunity

Qualified immunity also poses challenges for plaintiffs in substantive due process litigation. The qualified immunity defense is available to "all but the plainly incompetent or those who knowingly violate the law."[48] The defense attaches when "an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[49] After a defendant has raised a qualified immunity defense, the plaintiff must show, first, that a constitutional violation took place, and second, that the law was clearly established so that a reasonable government officer would have been on notice.[50] Courts may choose which prong of the analysis to decide first, with the result that in some instances a court may grant qualified immunity without determining whether a constitutional violation took place.[51] Specificity in defining clearly established law is required, and courts must be careful to ensure that the law is not defined at so high a level that a reasonable officer would not have had notice that their conduct violated the Constitution.[52]

For decades, many courts and scholars viewed qualified immunity as a near-absolute defense to both liability and the burdens of trial.[53] Although recent empirical research has suggested that the defense does not have the direct effect in litigation that it has been hypothesized to have,[54] it is still a potentially powerful shield for government officials who are sued in their personal capacities for damages, and can play a role in litigation beyond an

48. Malley v. Briggs, 475 U.S. 335, 341 (1986).
49. Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citation omitted).
50. Pearson v. Callahan, 555 U.S. 223, 232 (2009).
51. *See id.* at 236.
52. *See* Mullenix v. Luna, 577 U.S. 7, 12 (2015) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).
53. *See, e.g.*, 2 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, at 741 (2021–2022 ed., 2021) ("Under [leading Supreme Court precedent], defendants on summary judgment motion frequently will be dismissed without a consideration of the merits."); Susan Bendlin, *Qualified Immunity: Protecting "All but the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. Marshall L. Rev. 1023, 1023 (2012) ("Public officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another."); John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010) ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in other words, to create immunity from trial as well as from liability—has been largely successful.").
54. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 7–8 (2017).

actual judgment by a court by providing leverage for defendants to obtain favorable settlements.[55]

With respect to substantive due process in particular, some precedent indicates that finding that the law was clearly established may be particularly challenging.[56] As one court explained in the First Amendment retaliatory discharge context, "because a rule of law determined by a balancing of interests is inevitably difficult to clearly anticipate, it follows that where *Pickering* balancing is required, the law is less likely to be well established than in other cases."[57] Substantive due process claims involve balancing of individual rights and governmental interests; thus, the way in which the balance is struck in a particular case may be difficult for a government officer to discern.[58]

In my dataset, nine cases (representing 11% of all wins by the defendant) concluded with a court holding that the defendant was entitled to qualified immunity without deciding whether a constitutional violation had taken place.[59] In several other cases, the defendant raised qualified immunity and the court described itself as undertaking a qualified immunity inquiry, but that inquiry ended at the first step—adjudication of the constitutional merits—so I did not classify it as a grant of qualified immunity.[60]

The cases in which courts granted qualified immunity demonstrate that plaintiffs face a significant hurdle in showing clearly established law. In *Romero v. Brown*, the court considered a case in which the plaintiffs alleged that the court had seized their seven children, without a court order, and placed them in foster care homes overnight.[61] After a state court hearing the following day to determine whether the warrantless removal was justified, the judge found no evidence of physical abuse, malnourishment, or medical neglect, and rebuked the social worker who had instigated the removal for "'remov[ing the] children without a Court Order in the middle of the day' even though there was enough time to obtain a court order."[62]

The court acknowledged that custody and control of one's children is a fundamental right, noting that "in a substantive due process analysis, '[t]he right to family integrity must be balanced against the state's interests in protecting the health, safety, and welfare of children.'"[63] It also explicitly acknowledged that "[a] balancing test is difficult terrain for a party having to prove a clear violation of the law."[64] The court described "a continuum between the state's clear interest in protecting children and a family's clear

55. *Id.* at 10.
56. *See, e.g.*, Cummings v. Dean, 913 F.3d 1227, 1238 (10th Cir. 2019).
57. Melton v. City of Oklahoma City, 879 F.2d 706, 729 (10th Cir. 1989) (addressing a retaliatory-discharge claim under First Amendment).
58. *See, e.g.*, *Cummings*, 913 F.3d at 1240.
59. *See supra* Part II.B tbl.5B.
60. *See, e.g.*, Muir v. Decatur County, 917 F.3d 1050, 1054 (8th Cir. 2019) (framing a decision that no constitutional violation took place as a grant of qualified immunity).
61. Romero v. Brown, 937 F.3d 514, 517 (5th Cir. 2019).
62. *Id.* at 519 (alteration in original).
63. *Id.* at 520 (alteration in original) (quoting Wooley v. City of Baton Rouge, 211 F.3d 913, 924 (5th Cir. 2000)).
64. *Id.*

interest in privacy," concluding that "[i]f the facts of the case 'place it in the center of the continuum,' meaning the state's and family's interests overlap, the right to family integrity is considered too 'nebulous' to find a clearly established violation."[65] At least insofar as a specific substantive due process inquiry involves a balancing test, then, *Romero* confirms that it will often be difficult for plaintiffs to show that the law was clearly established: "Because the substantive due process inquiry becomes a clash of two vital interests when the state removes a child as part of a domestic violence investigation, it is not surprising that we have never found a clearly established violation of the right to family integrity in that context."[66]

A total of nine opinions in the dataset granted qualified immunity without stating whether a constitutional violation had taken place.[67] These results compound the problem of substantive due process law that is not clearly established by declining to articulate whether the facts established a constitutional violation.[68] These courts simply concluded that qualified immunity protected the defendants from substantive due process liability without further analysis. While much of plaintiffs' difficulty in establishing a substantive due process violation may flow from the nebulous quality of the law itself, courts' decisions to refrain from adjudicating the constitutional issue means that the law is no less nebulous in future cases.

My research revealed just two cases—both within the Ninth Circuit—in which courts held that a constitutional violation had taken place but then went on to grant qualified immunity to the defendants on the ground that the law had not been clearly established.[69] These cases articulated law establishing a constitutional violation while absolving defendant officers of liability. In *Nicholson v. City of Los Angeles*, the Ninth Circuit concluded that a violation of substantive due process rights had occurred in a lawsuit brought by the companions of a high school boy holding an airsoft gun with an orange tip who was shot by a police officer.[70] The boy was standing close together with three friends before school, and all of them were dressed in school uniforms and wearing backpacks.[71] "[W]ithin seconds of observing the 'gun,' [and] without consulting with his partner," the officer fired at least three shots toward the group, ultimately striking the boy in the back and killing him.[72] The Ninth Circuit held the officer's use of force shocked the conscience and violated the substantive due process rights of the boys

65. *Id.* (citations omitted).
66. *Id.*
67. *See* Cummings v. Dean, 913 F.3d 1227, 1242 (10th Cir. 2019); *Romero*, 937 F.3d at 520; Donohue v. Wing, 773 F. App'x 18, 21–22 (2d Cir. 2019); Turner v. Thomas, 930 F.3d 640, 646–47 (4th Cir. 2019); Jessop v. City of Fresno, 918 F.3d 1031, 1035–36 (9th Cir. 2019); Anderson v. City of Minneapolis, 934 F.3d 876, 884 (8th Cir. 2019); Pavel v. Univ. of Or., 774 F. App'x 1022, 1024–25 (9th Cir. 2019); Muir v. Decatur County, 917 F.3d 1050, 1053–54 (8th Cir. 2019); Jessop v. City of Fresno, 936 F.3d 937, 940–43 (9th Cir. 2019).
68. *See Romero*, 937 F.3d at 520; *Cummings*, 918 F.3d at 1242.
69. *See, e.g.*, Nicholson v. City of Los Angeles, 935 F.2d 685, 695 (9th Cir. 2019); Martinez v. City of Clovis, 943 F.3d 1260, 1266 (9th Cir. 2019).
70. *Nicholson*, 935 F.3d at 689.
71. *Id.* at 691.
72. *Id.* at 693.

under the Fourteenth Amendment, but went on to grant qualified immunity.[73] The plaintiffs conceded at oral argument that it was difficult to find a case in which a court found a constitutional violation in the context of a bystander shooting, and, according to the court, cited only cases that were "too factually dissimilar to clearly establish a constitutional violation."[74]

In *Martinez v. City of Clovis*, police officers repeatedly declined to arrest a domestic abuser, who was also a police officer.[75] They disclosed to the abuser that the victim had made a complaint about the abuser while simultaneously making disparaging comments about the victim.[76] The court concluded that the state-created danger doctrine applied in that situation, and that the officers had violated the victim's substantive due process rights, but concluded that the law was not clearly established.[77] But the court also explicitly intended to articulate clearly established law, stating that "[g]oing forward, the law in this circuit will be clearly established that such conduct is unconstitutional."[78]

After *Pearson v. Callahan*, courts are free to either decide or not decide that a constitutional violation took place.[79] But as far as my data set is concerned, at least with respect to substantive due process claims, courts are mostly electing not to decide constitutional issues when they plan to grant qualified immunity.[80] And even when courts do decide constitutional issues before granting qualified immunity, it is uncertain how much guidance that law provides for future courts and other stakeholders. For instance, one might ask the extent to which the law that is articulated in *Nicholson* and *Martinez* will clearly establish the law for future plaintiffs in any practical sense. *Nicholson* does not clearly articulate a constitutional rule; rather, it describes the facts and then states that those facts could be found by a reasonable jury to violate the Constitution.[81] *Martinez* explicitly says that it is articulating a constitutional rule for future cases, and does so, but also articulates a rule that is highly fact-specific, involving a situation where the police disclosed a victim's complaint to an abuser and disparaged the victim in a way that emboldened the abuser to continue his abuse.[82] The likelihood that a future case would present precisely those facts seems relatively small. The ultimate outcome, then, is that in eleven out of the twelve federal appellate circuits there was not a single due process case in which a court both granted qualified immunity and articulated clearly established law. While in the final circuit the court did articulate law, it is unclear whether that law will have much practical significance.

73. *See id.* at 694–95.
74. *Id.* at 695.
75. *See* Martinez v. City of Clovis, 943 F.3d 1260, 1267–69 (9th Cir. 2019).
76. *See id.* at 1276–77.
77. *Id.*
78. *Id.* at 1277.
79. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).
80. *See supra* Part II.B tbl.5B.
81. *See* Nicholson v. City of Los Angeles, 935 F.2d 685, 692–94 (9th Cir. 2019).
82. *See* Martinez v. City of Clovis, 943 F.3d 1260, 1277 (9th Cir. 2019).

My research shows that the doctrine of qualified immunity plays a significant role in the outcome of substantive due process cases, the extent to which binding law is articulated in those cases, and the likelihood that that law will play a role in future cases. Particularly given the nebulous contours of the substantive due process doctrine, one can expect it will continue to do so in the future.

C. Municipal Liability

For plaintiffs seeking to establish liability against a municipality or other government entity under Section 1983, the doctrines governing municipal liability often present a significant obstacle. The Supreme Court held in *Monell v. Department of Social Services* that a municipality qualifies as a "person" within the meaning of Section 1983.[83] However, it also held that municipalities are not automatically liable for the constitutional violations of their employees under the doctrine of respondeat superior.[84] Rather, a municipality is liable only for violations caused by its own policy or custom.[85] The Supreme Court has articulated several avenues through which a plaintiff can establish that "action pursuant to official municipal policy" caused their injury,[86] including legislative or other written enactments, final decisions by officials with policymaking authority, widespread informal customs with the force of law, and a failure to take some action such as adequate training, screening, or supervision of employees.[87]

Municipal liability was adjudicated in just seventeen out of the ninety Section 1983 cases that adjudicated a substantive due process issue. Several other cases mentioned the issue as one that had been adjudicated by the district court but not pressed on appeal, as one that had been waived, or as one that was not at issue during an interlocutory appeal.

Of the seventeen cases in which a substantive due process claim against a municipality was adjudicated, in ten cases the claim was resolved on the ground that the plaintiff had not established a constitutional violation against a government actor, and therefore there could not be liability against the municipality. That is, there could not be a policy or custom resulting in a violation if there was no violation.

In four cases, the appellate court concluded that the municipality was not liable for a substantive due process violation because the plaintiff had not established the existence of a municipal policy or custom that caused the violation. Some of these claims failed because the plaintiff did not establish the requisite level of culpability,[88] while others failed because there was no

83. Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 690–91 (1978).
84. *Id.* at 691.
85. *Id.* at 694.
86. *See id.* at 691.
87. I and others have examined these theories of municipal liability. *See, e.g.*, Karen M. Blum, *Making Out the* Monell *Claim Under Section 1983*, 25 Touro L. Rev. 829, 829–30 (2012); Leong, *supra* note 26 (examining theories of failure to train, screen, and supervise); Nancy Leong, *Civil Rights Liability for Bad Hiring*, 108 Minn. L. Rev. (forthcoming 2023) (examining theory of failure to screen).
88. *See, e.g.*, Hu v. City of New York, 927 F.3d 81, 106 (2d Cir. 2019).

showing of a causal nexus between a municipal policy or custom and the alleged substantive due process violation.[89] In one case, *Perez v. City of Sweetwater*, the court overturned a $1,000,000 jury verdict for a bystander whose car was hit by a police car and who suffered serious injuries during a high speed car chase.[90] The court concluded that there was no evidence of sufficiently similar prior incidents that would establish an informal custom, nor was there evidence of a failure to train.[91]

The two cases in which plaintiffs prevailed on their municipal liability claims (for purposes of the stage of the proceedings) were both relatively unusual. One case, *Cherry Knoll, L.L.C. v. Jones*, involved extensive written documentation of land use materials and emails among various city officials.[92] The other, *Nehad v. Browder*, followed the shooting of a mentally disturbed man who was unarmed at the time of the shooting.[93] The court accepted as sufficient proof of policy or custom a study showing that 75% of shootings by the police department were avoidable and, further, that the officer who shot the victim did not face any consequences from the department.[94]

The primary obstacle to holding municipalities liable appears to be substantive due process doctrine itself rather than the municipal policy or custom requirement. Still, it is possible that the massive obstacles posed by substantive due process doctrine may deter plaintiffs from bringing municipal liability claims in the first place, or may result in such claims being rejected by the district court before the stage of trial that results in an appeal.

While the overall number of cases is too small to make any kind of conclusion, further research might also profitably examine whether the breadth and vagueness of substantive due process doctrine make it particularly difficult to show that there was a policy or custom in place on the part of a municipality. Put slightly differently, it is hard to establish a clear policy or custom when the underlying law is itself unclear.

D. Attorneys' Fees

The cases in my data set do not directly examine the availability of attorneys' fees for litigation of cases involving substantive due process claims. The low likelihood of success for plaintiffs, however, has implications for the availability of fees, and, as a result, the potential availability of counsel willing and able to litigate Section 1983 cases.

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89. *See, e.g.*, Garza v. City of Donna, 922 F.3d 626, 637 (5th Cir. 2019).
90. Perez v. City of Sweetwater, 770 F. App'x 967, 969, 976 (11th Cir. 2019).
91. *Id.* at 974.
92. *See* Cherry Knoll, L.L.C. v. Jones, 922 F.3d 309, 311–15 (5th Cir. 2019).
93. *See* S.R. Nehad v. Browder, 929 F.3d 1125, 1130–32 (9th Cir. 2019).
94. *Id.* at 1141–42. In one other case, the court held that a plaintiff who had proceeded pro se before the district court had not established a municipal policy or custom, but remanded for fact finding that might subsequently allow a showing of policy or custom. *See* Hoffmann v. Lassen County, 772 F. App'x 597, 598 (9th Cir. 2019).

Attorneys' fees for litigation under Section 1983 are available under 42 U.S.C. § 1988.[95] The purpose of Section 1988 is widely understood as creating sufficient incentives for lawyers to accept and vigorously litigate cases under Section 1983. The text of that provision provides fees to a "prevailing party" in civil rights litigation,[96] but in practice the statute has been interpreted asymmetrically to allow for fees for plaintiffs who prevail but not for defendants.[97]

Despite the underlying purpose of Section 1988 to make sufficient attorneys' fees available to create incentives for lawyers to take Section 1983 cases and other civil rights cases, the Supreme Court has gradually restricted the availability of attorneys' fees under Section 1988.[98] In *Evans v. Jeff D.*, decided just eight years after Section 1988 became law, the Court held that a court may approve a settlement condition on a waiver of attorneys' fees.[99] The Court has also excluded from eligibility for attorneys' fees under Section 1988 cases in which the plaintiffs' lawsuit catalyzes a favorable change in the defendant's conduct, limiting the availability of fees to cases in which the plaintiff secures a favorable settlement or judgment.[100]

I and others have suggested that the limitations on attorneys' fees under Section 1988 have created disincentives for many lawyers with skill and expertise in civil rights litigation under Section 1983 to take Section 1983 cases.[101] As one participant in Joanna Schwartz's study of thirty lawyers who litigate Section 1983 cases put it, "[I]s there blood on the street? Because if there isn't, why are we doing it?"[102]

This hesitation, I suggest, leads to two overlapping problems. One problem is that many plaintiffs with potentially meritorious claims cannot find lawyers at all. Another problem is that even plaintiffs who can find lawyers may not be able to entice lawyers with skill and expertise in Section 1983 litigation to take their cases because those lawyers may know from experience that such cases are very hard to win and even harder to secure fees.[103] The result may be that many plaintiffs may only be able to

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95. *See* 42 U.S.C. § 1988(b).

96. *Id.*

97. One court explains,

> [B]ecause Congress wanted to encourage individuals to seek relief for violations of their civil rights, § 1988 operates asymmetrically. A prevailing plaintiff may receive attorneys' fees as a matter of course, but a prevailing defendant may only recover fees in "exceptional circumstances" where the court finds that the plaintiff's claims are "frivolous, unreasonable, or groundless."

Braunstein v. Ariz. Dep't of Transp., 683 F.3d 1177, 1187 (9th Cir. 2012) (quoting Harris v. Maricopa Cnty. Super. Ct., 631 F.3d 963, 971 (9th Cir. 2011)).

98. *See, e.g.*, Karlan, *supra* note 21, at 205–06.

99. Evans v. Jeff D., 475 U.S. 717, 729–30 (1986).

100. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 610 (2001).

101. *See, e.g.*, Nancy Leong, Katelyn Elrod & Matthew Nilsen, *Pleading Failures in* Monell *Litigation*, 72 Emory L. Rev. (forthcoming 2024) (on file with author); Joanna C. Schwartz, *Civil Rights Without Representation*, 64 Wm. & Mary L. Rev. 641, 658–59 (2023).

102. Schwartz, *supra* note 101, at 659.

103. *See* Leong, Elrod & Nilsen, *supra* note 101.

secure representation by lawyers who are relative amateurs or who (for a variety of other reasons) may not provide skillful representation.[104]

The original empirical research I present in this Article does not allow for much generalization about the availability of attorneys' fees for substantive due process claims in particular. However, given the vagueness of substantive due process doctrine and the low success rates I found in my research, it seems reasonable to speculate that such cases are no *more* likely than other types of constitutional claims to attract skillful and expert representation. Thus, among many other challenges that plaintiffs face in substantive due process litigation, securing adequate representation may further contribute to the unlikelihood of success.

IV. IMPLICATIONS

In this section, I briefly highlight some implications of the empirical information described in this Article for lawyers, courts, and future researchers. In some instances, the lessons regarding substantive due process litigation are similar to those we would draw with respect to constitutional litigation as a whole, but I try to highlight ways in which substantive due process litigation is different or overall trends are enhanced.

A. For Lawyers

Lawyers who litigate substantive due process claims under Section 1983 should pay particular attention to their *framing* of the qualified immunity inquiry.[105] For obvious reasons, lawyers should be attentive to qualified immunity because overcoming the defense is a prerequisite to achieving a favorable judgment. Moreover, overcoming qualified immunity can also strengthen a plaintiff's settlement position.[106] The latter is particularly important given how few cases that litigate substantive due process issues are tried either by judge or jury.[107]

But lawyers should also carefully frame the qualified immunity inquiry for other reasons. Lawyers who are engaged in impact litigation or movement lawyering, in particular, may wish to urge courts to resolve the question of whether there is a constitutional violation prior to concluding whether there is qualified immunity.[108] Following the Ninth Circuit's

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104. *See id.*; *see also* Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 Emory L.J. 59, 94–95 (2013) (describing similar phenomenon for employment discrimination lawyers); Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompentence, and Possibly Animus*, 26 Geo. J. on Poverty L. & Pol'y 383, 398–402 (2019) (describing similar phenomenon for disability lawyers).

105. Given that most substantive due process cases in my dataset were resolved for the defendant on either a motion to dismiss or a motion for summary judgment, the opportunity to address qualified immunity seems likely to arise in a brief opposing one of those motions.

106. *See* Schwartz, *supra* note 54, at 63–64.

107. *See supra* Part II.B.

108. *See generally* Saucier v. Katz, 533 U.S. 194, 201 (2001) (describing advantages of merits-first adjudication); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 49 (2002) (same).

template in *Martinez v. City of Clovis*, in which the court established that the state-created danger doctrine applies when an officer reveals a confidential domestic violence complaint to an abuser while disparaging the complainant,[109] a lawyer might consider clarification of a legal principle in a way that is favorable to plaintiffs—an important victory even when an individual client does not prevail.

Lawyers should also make clear the theory of municipal liability under which they are proceeding. Courts have emphasized that plaintiffs cannot plead a generalized municipal policy or custom, but rather must make clear the theory through which they are endeavoring to show that such a policy or custom exists.[110] Research demonstrates that municipal liability claims are exceedingly difficult for plaintiffs to win.[111] Particularly with respect to single instances of executive conduct, such as behavior by child protective services, police officers, or school officials, a pattern of substantive due process violations may be more difficult to show than would be a pattern of violations of other provisions of the Constitution. With this in mind, it is particularly important for plaintiffs to clearly articulate a viable theory of municipal liability.

Finally, the number of unrepresented plaintiffs should be cause for concern among both the plaintiffs' bar and among lawyers as a whole. While a shortage of counsel is a problem throughout Section 1983 litigation, in other research, I have shown that a non-trivial number of lawyers who litigate Section 1983 cases lack expertise in civil rights litigation, which causes predictable deficiencies in the quality of litigation.[112] Medium and large law firms with relatively significant pro bono programs should consider whether assisting a plaintiff who would otherwise proceed pro se would be a good fit for the firm's pro bono program. Greater involvement by well-resourced private attorneys could lead to better litigation of cases and clearer articulation of law, regardless of whether it leads to more victories by civil rights plaintiffs.

B. For Courts

Courts likewise should be attentive to the consequences of skipping over the constitutional question when resolving a question of qualified immunity. While it may seem tempting on grounds of both efficiency and avoidance to refrain from addressing the constitutional violation when it is clear that the defendant is entitled to qualified immunity,[113] courts should recognize that this leaves plaintiffs in a particularly difficult position when it

109. Martinez v. City of Clovis, 943 F.3d 1260, 1276–77 (9th Cir. 2019).

110. *See, e.g.*, Blue v. District of Columbia, 811 F.3d 14, 20 (D.C. Cir. 2015).

111. *See generally* Joanna C. Schwartz, *Municipal Immunity*, Va. L. Rev. (forthcoming 2023).

112. *See, e.g.*, Leong, Elrod & Nilsen, *supra* note 101; Leong, *supra* note 87.

113. Both courts and commentators have expressed skepticism about constitutional-merits-first adjudication of the qualified immunity defense. *See, e.g.*, Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepp. L. Rev. 667, 676–84 (2009) (cataloging skepticism about merits-first adjudication).

comes to substantive due process. Because the doctrine is so nebulous, failure to clarify the law in either direction may result in future plaintiffs bringing lawsuits that are very similar without the benefit of clarity on the law.[114]

The regulatory function of constitutional law articulation provides another reason that courts should be particularly hesitant to skip over the question of whether a constitutional violation took place in the context of a substantive due process claim. Constitutional litigation not only compensates injured plaintiffs, but also provides important information to government actors about the constitutional parameters on their jobs.[115] If a court does not adjudicate the constitutional merits of a particular governmental action, then the official—and other similarly situated officials—do not know in the future whether that particular action is constitutional or not.[116] Given the hazy boundaries of substantive due process doctrine, governmental officials are particularly in need of guidance as to how to do their jobs, and a court that declines to adjudicate the constitutional merits of a particular issue is on some level declining to provide such guidance.

Finally, and in recognition of the many challenges of substantive due process litigation overlaid by the many challenges of Section 1983 litigation, judges should be particularly solicitous of unrepresented plaintiffs. They should consider the filings of pro se plaintiffs seriously, and should err on the side of construing them generously and seeking to appoint counsel where a plaintiff's claim seems as though it may have merit. Joanna Schwartz has shown that many pro se plaintiffs with meritorious claims were unable, through no fault of their own, to obtain counsel,[117] and judges should examine carefully the pro se filings on their docket for signs that a litigant who is unable to navigate the daunting hurdles of qualified immunity and municipal liability alone might be able to do so with the assistance of counsel.

C. For Researchers

While this Article focuses primarily on how the structural features of constitutional litigation may influence the outcome of litigation and the articulation of constitutional rights, future researchers might do well to work backwards from substance to structure. As substantive due process doctrine is reconfigured by the Supreme Court and the federal appellate courts, perhaps increasing reticence on the part of plaintiffs' attorneys to

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114. *See, e.g.*, John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 430 (1999) ("When a court bypasses the merits of the pleaded constitutional claim . . . it not only effectively awards the defendant officers one 'liability-free' violation of the Constitution . . . , but it also, by declining to 'clearly establish' the undermined right, paves the way for 'multiple bites of a constitutionally forbidden fruit.'" (quoting Garcia by Garcia v. Miera, 817 F.2d 650, 656–57 n.8 (10th Cir. 1987))).

115. *See* Leong, *supra* note 113, at 707 ("The sequencing approach is still functioning to articulate constitutional law, however unilaterally, thereby placing government officers and members of the public on notice of the relevant legal standards.").

116. *See id.* at 707–08.

117. *See* Schwartz, *supra* note 101, at 650–51.

bring certain substantive due process cases will result in a change in the composition of cases that are brought. Further, the results of qualified immunity determinations, municipal liability determinations, and ultimate outcomes may change as the overall composition of the pool of cases also changes.

Future research might also consider examining how litigation of substantive due process claims compares to litigation of other constitutional rights. The relative likelihood of success or failure for particular categories of constitutional claims can inform where plaintiffs' lawyers expend effort and allocate resources. Given that many cases involving substantive due process claims also involve other constitutional rights, such information can help lawyers decide where pleading multiple claims is valuable and where it is unlikely to make a difference.[118] Given the low rate of success for substantive due process claims, and the likelihood that such a claim may result in law that is unfavorable for plaintiffs, lawyers counseling an injured prospective client may want to focus primarily or exclusively on other types of injuries.

V. CONCLUSION

This Article, a first foray into an empirical account of the litigation of substantive due process claims, reveals that such claims share many features with other constitutional claims. Yet the challenges presented by Section 1983 litigation are also frequently amplified by the nature of substantive due process rights. Continued periodic examination of substantive due process litigation through an empirical lens will help to show how the reshaping of substantive due process doctrine that is underway at the Supreme Court affects the litigation of those claims.

118. *See* Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396, 404 (6th Cir. 2019) (bringing both Fourth Amendment and substantive due process challenges to infant blood collection program).