

## Probable Causation, Bonus Episode 14: Joanna Schwartz

**David** [00:00:08] Hello and welcome to Probable Causation, the show about law, economics and crime. My name is David Eil and I'm your host for this special episode of the show. My guest today is Professor Joanna Schwartz. She is a professor at the UCLA School of Law, where she teaches civil procedure and public interest law. Before becoming a professor Joanna graduated from Yale Law School, clerked for two federal judges and worked at a private law firm where she specialized in police misconduct, prisoners rights and First Amendment litigation. She is the author of numerous law articles on suing the police and has just published a book on that topic titled "Shielded: How the Police Became Untouchable," which we will discuss today. Joanna, welcome and thank you for joining me.

**Joanna** [00:00:51] Well, thank you so much for having me.

**David** [00:00:53] So before we get to the contents of your book, I like to ask all the guests for our the young members of our audience how they got to where they are so how did you get to write this book. How did you first become an interested in police misconduct and suing the police?

**Joanna** [00:01:10] Well, I actually first got really interested in criminal justice issues before I went to law school. I worked in the Bronx at the Bronx Supreme Court, which is the criminal court building, working at an alternative to prison program. So I was interviewing young first time felony offenders and advocating for their release into our program as my job and that got me really focused on the criminal justice system. I actually initially thought I wanted to be a public defender, but I started working in law school in a prisoner's rights clinic, doing civil rights litigation on behalf of prisoners. And that work got me really interested into the civil side, the work of bringing cases when people's constitutional rights have been violated and seeking money and other kinds of forward looking relief and so that's what I ended up doing after I graduated from law school. And after I clerked, I worked at a small civil rights firm in New York, as you mentioned that did police misconduct and prisoners rights. And in that work as a young litigator, I started thinking a lot about how civil rights litigation actually functioned on the ground and the ways in which it's actual experience and my experience, litigating cases varied from the ways in which I had read in books about the ways in which these cases would be brought and what impact they had.

**Joanna** [00:02:41] And one powerful example of that was working in a in a class action against New York City's Department of Corrections for massive and long standing abuse by officers on Rikers Island and I was deposing officers so questioning them under their oath. And I would ask them about whether they'd been sued before and many of them said yes, but when I pressed further, they didn't have any information about what the cases alleged, what the outcomes of the cases were, who paid. And when we interviewed and deposed supervisors and even assistant wardens, they knew nothing about the litigation history of their officers. And it really stuck with me that we were bringing these cases to try to make a difference, but the officers themselves and their supervisors didn't seem to know anything about those cases. And that question and other questions that were raised for me during my practice then became the topics of studies that I undertook when I became a law professor at UCLA. And I've really spent the past 15 years studying how civil rights litigation functions on the ground and the variation with the ways in which the Supreme Court has talked about it. And those studies really form the backbone of my book, "Shielded", which I've tried to write in a way that would be understandable to people

who don't read law review articles for fun on the weekends, but would would actually share this information in an understandable way to readers to understand all of the many barriers to relief in these cases.

**David** [00:04:24] Yeah. And that the information that you gathered, you know for the Law Review articles originally and then that you've collected in this book is I think of a different kind than the information that often is brought to bear in a law review article. I mean, your experience as a litigator obviously gave you a lot of insight into how the law functions differently than appellate courts imagine, but I think many law review articles kind of make that observation based on experience and then just kind of move right along to how the appellate courts should be thinking differently about it on that basis. But you made a real huge effort to collect information systematically as a social scientist would do. And I'm interested in how you came to decide that that was an important thing to do, that your experiences, important as they are, weren't enough to make the arguments that you wanted to make. And how did you get the skills to do that? I mean, those are things that I don't think many law schools teach. I don't know where you got them.

**Joanna** [00:05:30] Well, I think that there is, of course, benefit in people's lived experiences and an anecdote, but to my view and in my experience, really as a litigator, having a more systematic understanding of what is happening on as broad a canvas as you possibly can paint is important to try to change people's minds about how things work.

**Joanna** [00:05:56] If you simply have an anecdote, then someone with a different perspective may have an opposing anecdote, and then you simply have two different people's opinions or experience, but to my view, being able to get lots and lots of information moves us beyond my story versus someone else's story to it, to a truly grounded understanding of what's happening on the ground. And I do not have empirical training beyond my experience as a law student, which certainly doesn't ground you to do most kinds of sophisticated social science research. But my experience as a law student and then as a litigator, I think that much of what I do in my empirical work is of the sort that people learn how to do as a litigator. There's some work that I have done on who pays settlements and judgments in police misconduct cases that is based on a lot of public records requests that I crafted and then filed and then followed up on with emails and phone calls of the kind that you that you do when you are a litigator, when you are researching.

**Joanna** [00:07:07] And another large research project that I did that forms the basis for a lot of studies, particularly about qualified immunity that I've done, is a 1,200 case dataset of police misconduct cases filed in five federal districts across the country, where what I did was look at the PACER filings through a service called Bloomberg Law and read the complaints and the briefs and the court's decisions in these cases to track what happened. So this is work that I was trained to do as a law student, or perhaps more directly as a young lawyer, but I'm not doing a kind of sophisticated regressions or other sophisticated analyzes of these data I really am just adding things up and counting things that haven't been collected before, and then I'm counting them up and that in itself is not so sophisticated, but I do think I have provided information that we haven't had previously that is, to my view, really important in understanding how our system works.

**David** [00:08:24] And even as as diligent has been in submitting all of these information requests, reading all these opinions, and I think this is a problem in criminal justice data generally is, you know, you don't have all the data you know, not everybody responded to your information requests, records request as persistent as you worry about them. And,

you know, even though you've I think by far assembled the most comprehensive collections of data of this type, and there might be some people who think like, well, you know, there's there's some out there that you don't have, and if you had all of it, then maybe the picture would be entirely different. Do you get that kind of objection sometimes? And how does the conversation go after that?

**Joanna** [00:09:07] Sure. And I'm the first to note that I data is incomplete. And certainly in the law review articles that I've written, I have whole methodology sections where I try to address some of those concerns. I think that that any collection of data is going to be limited by the parameters of space and time and in terms of what you have the time and space to collect and analyze. My research of 1,200 or it's really 1,183 cases filed in these federal courts in five districts across a two year period of course, you could look at more federal districts, of course, you could look at a more recent two year period, or you could look at a five year period, a ten year period.

**Joanna** [00:09:56] This is what I have been able to do at this point. I would welcome encourage more people to take on these studies, replicate them, expand them. And I'd be really interested to see, for example, whether qualified immunity analysis has shifted in very recent years from what I found. I think that there is never going to be definitive studies about any of these questions, but I do appreciate your your kind words that I do think that these studies have gone farther than most in trying to track this information. And I look forward to others taking on this similar kind of research and expanding it, expanding it in terms of jurisdictions and expanding it in terms of time. What I do feel sometimes frustrated about is when people issue those concerns, don't want to do the analysis themselves and then say, well, if it's incomplete, then what information can we draw from it I mean, I think that every data set that we compile, every study that we do begs another question, and it's important to answer those questions as well, but we do have an understanding of how the world works now based on actual data that diverges dramatically from the ways in which courts and commentators have talked about civil rights litigation and until there is more data out there that that undermines what I have found. I think that at least we need to shift our operating presumptions to take account of what I have collected and shared.

**David** [00:11:34] Yeah, let's get straight to kind of the shared wisdom of courts and litigators that finds its way into many federal opinions that you cite that then your research undermines so what are the things that are kind of assumptions that underlie a lot of holdings in civil rights cases that you've identified are just not well-founded.

**Joanna** [00:11:59] So the claims that have been used by courts and legislators, local officials to limit the ability to bring these cases sounds familiar the story that's told, and frankly it's been told in some variety since the 1960s, is that if it's too easy to sue in these cases, that frivolous lawsuits will fill the courthouses, that officers will be bankrupted for making good faith mistakes in a split second. And faced with this debilitating threat of suit, officers won't vigorously enforce their jobs, their responsibilities, and will in fact refuse to take these jobs. And that without a dedicated police force, our society will plunge into chaos and you do see versions of that story told repeatedly by the Supreme Court, the court has described the protections of qualified immunity as important to society as a whole. And the court is really referring, I believe, to the need to have this vigorous police force that is going to be jeopardized by making it too easy to sue.

**Joanna** [00:13:15] I've spent a number of years trying to analyze and assess the validity of some of these claims and have found them to be overblown, if not downright false. And to

take just a couple of those claims. The concern that's raised again and again about qualified immunity protections is that without them, officers would be bankrupted for split second mistakes. And when I looked to see who actually pays in police misconduct cases when they're successful, I found that it is almost always insurers and local governments, almost never officers and qualified immunity has nothing to do with it. Instead, states across the country have indemnification laws and local governments have indemnification policies that set out that when an officer is sued that they will be provided an attorney and that settlements or judgments will be paid by the local government, not the officer.

**Joanna** [00:14:18] And when I looked at 81 law enforcement agencies across the country over a six year period, I found that 99.98% of the dollars were paid by insurers and local governments, with 0.02% paid by officers from 2 of the 81 jurisdictions I looked at. And even in those places, in the infrequent event that officers were made to contribute, their average contribution was \$4,000, which is not the makings of a bankruptcy petition. And again, those protections have nothing to do with qualified immunity. To take the other half of this concern that's raised in defense of qualified immunity, that officers will be bankrupted for split second mistakes. It only takes looking at the Supreme Court's Fourth Amendment decisions which protect against unreasonable searches and seizures that see that officers are not going to have been found to have violated the Constitution when they make reasonable mistakes.

**Joanna** [00:15:18] If you look at the Supreme Court's Fourth Amendment decisions for unreasonable searches and seizures, courts aren't thinking about what's unreasonable to the potential victim, to the person who has been arrested or assaulted. They are looking at the reasonableness from the perspective of the officer, and the court has specifically said officers can make mistakes so long as those mistakes are reasonable, they haven't violated the Fourth Amendment. So this is just one example of many, but the animating arguments in favor of maintaining qualified immunity protections are based in clear misunderstandings, if not fabrications, about the ways in which indemnification laws work and the ways in which the Supreme Court's Fourth Amendment doctrine works.

**David** [00:16:08] I think it's super interesting and important that when you are accounting, kind of who pays you looked at know who actually paid at the end of a settlement of a lawsuit or whatever, they get that 99.98% number. There's some kind of sophisticated strategic play that I think our economists in our audience might be interested in in that. So you mentioned that, you know, a lot of places have statutes that they're always going to pay, but a lot of places don't a lot of places that are always going to end up paying don't. But upfront, they may not concede that they're going to pay and the reason is interesting. What is the reason?

**Joanna** [00:16:46] So what I have found and this is more anecdotal because you you can't get this kind of data from the dockets themselves or from public records requests, but what I have found from speaking with lawyers is that defense counsel will sometimes use the possibility that they will deny officers indemnification strategically in order to reduce the amounts of settlements, in order to get officers in on the stand during trial to testify about their child support obligations and the mortgages on their homes as justification to limit punitive damages awards against officers, which are also almost always paid by the local governments. And to argue after a jury verdict that the verdict should be reduced because it would be a financial hardship to the officers involved, even though at the end, after the judgment is reduced by the court for that reason, the local government ends up paying the entire amount. So the threat of indemnification denials are used strategically the lawyers use plaintiff's lawyers views quite often in these cases.

**Joanna** [00:18:07] There's one other aspect of the indemnification system that I think your listeners might be interested in as well, which is that there are some instances again, I've learned of anecdotally in which officers are actually denied indemnification, but in those cases they still end up not paying for a different reason, which is that most of the times these officers are essentially judgment proof and plaintiffs and their lawyers have no financial incentive to pursue claims against judgment proof officers. And so what they end up doing is negotiating a settlement with the local government, for example, or pursuing claims against an officer who is going to be indemnified. So for this alternative reason, this alternative pressure on the system, even in the rare event that officers are not indemnified, they rarely end up paying.

**David** [00:19:01] Are some of the smaller municipalities also pretty much judgment proof? I mean, I'm imagining there might be some small towns out there who don't have very professional police departments, and those officers often commit egregious violations, but, you know, they've been sued so many times and the city itself is basically bankrupt based on how much money they owe in these claims that they can't really pay anyway or are they all insured, even the small ones?

**Joanna** [00:19:30] This is a really good point. I think that most are insured. Most small jurisdictions rely on liability insurance and that insurance is where the money comes from to pay these settlements and judgments, but there are cases of really dysfunctional departments where insurers become less interested or willing to insure that the agencies. And one example I have two examples related to this. One is Vallejo, California, which which gets an entire chapter in my book. It is such a dysfunctional department. Its officers between 2010 and 2020 killed more people per capita than any of the hundred largest agencies in the country, with the exception of Saint Louis. And there are officers who have celebrated shootings by bending tips of their badges, which is something that local journalists have been able to uncover. This is a department where \$16 million was paid it's a small department of 100 officers, \$16 million paid over a ten year period. And the insurer for the city of Vallejo told the city that they were going to increase their deductible dramatically because they were eating up so much of the risk pool.

**Joanna** [00:20:55] And so the the city, you could imagine that that would be an incentive to change their practices and violate people's rights less frequently. Instead, it shifted Vallejo to move to a high risk insurer. They're now paying more than 20% of their budget toward their insurance premiums. And this is a situation that is not, I don't think, going to end well for the financial viability of the city. There's another example, a perhaps even more egregious police department, if that is possible, exists in East Cleveland, where there's a recent report that 16 of its 40 officers are currently under criminal indictments and there is a long history of extreme misconduct by officers in East Cleveland, but East Cleveland is virtually bankrupt and has basically told lawyers that they have no money to satisfy settlements and judgments. And that has ended up meaning that lawyers who practice in Cleveland, who bring civil rights cases in Cleveland, are disinclined to represent people who've had horrible things happen to them in East Cleveland. It's really created what I think you could refer to as a civil rights desert in East Cleveland, where officers can violate people's rights with impunity and there really is no money to satisfy claims in those cases.

**David** [00:22:26] That reminds me of something that I wanted to talk to you about, which is one of the ways that federal lawsuits can sometimes, you know, die. And when there's a general pattern like the one you're describing and these two places where police are just

continually acting lawlessly, you know, you might think that people could get together, maybe a bunch of people who have been harmed by these practices and have some class action suit that just tells them that they have to obey the law. But federal courts kind of beginning with O'Shea against Littleton, which is a case that you discuss in your book, have limited people's ability to bring those kinds of lawsuits. How does a federal court tell people that they can't sue on that basis?

**Joanna** [00:23:14] So. What you're referring to are limitations on plaintiff's standing or ability to bring claims for injunctive relief. So for forward looking relief orders requiring that a police department change their practices and what the Supreme Court did in a series of cases that ended with a case out of Los Angeles City of Los Angeles versus Lyons is make it increasingly difficult for plaintiffs in civil rights cases to have standing for this forward looking relief. Adolph Lyons was driving in Los Angeles when he was stopped for a minor traffic violation, and ultimately he was put in a choke hold outside his car the city of Los Angeles had killed a number of people, disproportionately black in Los Angeles by putting them in chokeholds. And Adolph Lyons brought his case with an interest in prohibiting this practice moving forward, but what the Supreme Court said in Lyons was that in order to have standing to seek this kind of forward looking relief, Lyons would have to show that he he himself was likely to be stopped and put into a chokehold in the future. And absent an ability to have a crystal ball that could prove that he he himself would be put in a chokehold again, all he could seek was damages.

**Joanna** [00:24:49] And this is a decision that has dramatically affected the ability to get forward looking relief in police misconduct cases, because it's very difficult to be able to prove that something similar will happen to you in the future unless it's a there have been some cases involving protests, for example, or cases involving patrols in a very narrow geographic area.

**David** [00:25:16] The Floyd litigation in New York City.

**Joanna** [00:25:18] Yeah, well, and that's the Floyd litigation. You know, it was a case that was able to show a pattern and practice, having looked at hundreds of thousands of records, far more information than most people have when they're challenging a practice. It's really the most extraordinary cases where you're able to show the likelihood of this kind of harm moving forward and instead, most people are limited to seeking damages. And it's an irony, I think, that that sometimes plaintiffs in civil rights cases are criticized for only wanting a payday when most many, I should say, civil rights plaintiffs really want to prevent something similar from happening again to them, to their loved ones, to anyone in their communities. But that the Supreme Court's decisions have made it so hard for people to get that kind of forward looking relief.

**David** [00:26:17] And of course, if they're seeking damages, that's when they run into qualified immunity, which doesn't apply to injunctive relief, but as we've discussed injunctive relief has all these separate problems that you run into.

**Joanna** [00:26:28] Yeah, exactly. It's just there's there's at every at every turn there are different challenges. And you're right, you don't have qualified immunity for damages, but you do agree you don't have qualified immunity for injunctive relief, but then you have the standing requirements for injunctive relief. Similarly, local governments can be sued and they're not protected by qualified immunity, but there are other challenges legal barriers to holding local governments responsible that in actuality are as challenging to get over as

qualified immunity. So there's multiple different barriers depending on which path you pursue as a litigant.

**David** [00:27:07] So all of these barriers are barriers that are creatures of federal case law statutes, the standing as a constitutional requirement, federal constitution requirements, but this is all law was developed by federal courts, and not all of our listeners are lawyers, but the federal court system is tiny compared to the court system generally in the United States, vast majority of everything that happens in courts happens in state courts. But how did this kind of litigation start to focus on federal courts and how did that cause federal courts generally to kind of change their mind about how much of this stuff they wanted to hear?

**Joanna** [00:27:44] So that's a really interesting question. And it points to a long history that I trace in "Shielded" the statute that people sue police under today actually was first enacted by Congress in 1871 after the Civil War, during Reconstruction, when the Ku Klux Klan had just recently formed and was beginning to get power and was terrorizing and killing black people across the South. And local law enforcement officials were either participating in the violence or standing idly by and state court was really no forum at all for these victims in many state courts, black people couldn't even testify. And so Congress stepped in and decided to create this federal right to sue in federal courts before federal judges who were expected to be more protective of the United States Constitution and the 14th Amendment protections, equal protections for all Americans, then we're state courts. And so there was this very considered idea that federal courts were an important place to protect people's civil rights.

**Joanna** [00:28:57] The Supreme Court quickly sort of cut off the power of bringing these suits through a variety of different court decisions that I trace in the book, but then as the civil rights movement began picking up steam in the 20th century, there became an increased recognition again by the Supreme Court of the need for federal protection of constitutional rights and there was sort of another moment the high point in the federal protection of constitutional rights in a 1961 decision called *Monroe versus Pate*, which the Supreme Court first recognized that that Reconstruction era statute could be used to sue in federal court, local law enforcement officers. And then again, the concerns of frivolous lawsuits, filling courthouses, bankrupted officers again caused the Supreme Court to begin whittling away that protection again over the next series of decades and we're here and certainly at the moment, the time that George Floyd was murdered and the and the subsequent months, people talked about this is a third reconstruction, a moment where, again, the protections, the civil rights protections for people could be reinvigorated and Congress and the Supreme Court really didn't take up that idea or they didn't take it up successfully.

**Joanna** [00:30:20] The George Floyd Justice in Policing Act failed. And actually, now what we see are state legislatures. A few of them across the country have enacted state rights to sue for constitutional violations where qualified immunity is not a defense. And so the states are tentatively and in a limited manner, coming to plug the holes that the federal system has created for people whose constitutional rights have been violated.

**David** [00:30:51] So do you think I mean, of course, it varies states and state, but, you know, you might think in plenty of states, including in California, where Vallejo is the town that you mentioned earlier, you might think that there are plenty of states that really do have a constituency for, you know, reducing the barriers to bringing these these kinds of claims. Do you think in many places, as it is now that it is now better to more favorable to

plaintiffs, to sue in state court as opposed to federal? And are we going to learn a fair amount in the next few years as states kind of embark on their different experiments?

**Joanna** [00:31:27] I do think that in some states it may be more preferable to file claims in state court. You can sue in many in many states, you can sue officers also for state law claims of assault and battery, for example, or false imprisonment that are not constitutional claims, but are state law tort claims. And I've talked to lawyers around the country who make different decisions about whether to pursue claims in state court or federal court. And sometimes there's differences of opinion among lawyers, differences of opinion based on the community that they're bringing the claim in. And it relates not only to what the causes of action are, but what the jury pools look like, for example, or what who the judges are who are sitting. These are what I've referred to as civil rights ecosystems across the country that that really vary.

**Joanna** [00:32:25] And in some parts of California, for sure, filing claims in state court is the preferred approach for some civil rights lawyers. So so, yes, absolutely, but it is very dependent state by state and jurisdiction by jurisdiction. I also think that there has been these police reform bills in places there are states like Colorado that have passed comprehensive police reform statutes and it will be really interesting to see what happens in those states. A lot of state legislative efforts to create state law courses of action without qualified immunity have failed because of these overblown, in my view, fears of officers being bankrupted for split second mistakes in courthouses being filled with frivolous lawsuits. And what we're going to have the opportunity to see is whether any of those fears come true in places like Colorado, in New Mexico that passed a police reform bill in New York City that created the right to sue without the protections of qualified immunity. So I will be looking very closely and others will as well at what has happened and what is going to continue happening in those jurisdictions. I will tell you that in Colorado, which has had their bill in place since June of 2020, there's no evidence of frivolous lawsuits, bankrupting officers and filling courthouses.

**David** [00:34:01] I guess one other fear, too, and this is, I think, not a fear that opponents would articulate at the time that they're opposing these laws, but there's at least the perception among many advocates for these laws that police will respond just by not doing their jobs as much, that not necessarily because they're afraid of being sued, but they're just mad at the law being passed, made it upset that they're facing more scrutiny and could shirk more, just not enforce public order as much, and just kind of hope that disorder increases and the public responds by just being willing to do almost anything to get the police to be more on top of their jobs again, that even if that results in some the violation of some people's rights, you know, it's worth it because the alternative is not police officers getting bankrupted, but police officers just not doing their job. How can that kind of worry be allayed? And if it is a real worry, it's something that could really happen how does a public fight back against that when, you know, police unions are very strong? It would be very hard, I think, for any city to just say like, okay, well, if that happens we'll just fire all the police officers that aren't working and replace them with ones that will it seems like that's that's a difficult option to fight through.

**Joanna** [00:35:25] Yeah, well, it's definitely a complicated issue that you describe and whether or not it's done in bad faith. I mean, I think that there is this myth, again, in my view, that officers will be bankrupted for split second mistakes if qualified immunity goes away and as I hopefully have convinced listeners, that concern doesn't reflect reality. But if that is what officers are being told, they may well think to respond to that with slowing down their their work or not, you know, not vigorously enforcing the law. To my mind, this



is this is part of the reason that I wrote this book with the hope that there could be some shared understanding of what these protections do and don't do so that we could come to some path forward, that that didn't result in the kind of scenario that you're talking about.

**Joanna** [00:36:28] If it does result in that kind of slowing down of work or failure to vigorously enforce the law, then I think it will be up to researchers to figure out what effects that has. There was a moment a handful of years ago where the NYPD's concerns with then Mayor de Blasio caused the unions to essentially instruct their officers to stop enforcing the law, too slow to slow down their their efforts unless absolutely necessary. And this natural experiment apparently produced findings that crime did not rise during that period and essentially that that perhaps officers only enforcing the law when quote unquote, necessary, was not such a bad thing after all to those who are interested in police having less involved presence in their communities lives.

**David** [00:37:32] And we've mentioned this a couple of times, but I want to go back to it. So one of the barriers to, you know, having a situation where police face a bunch of frivolous lawsuits is plaintiffs lawyers themselves. You know, they're typically not going to want to bring a suit that doesn't have much chance of success and that there might be good reasons the suit doesn't have much chance of success it's just not a very meritorious claim, but you identify a bunch of reasons, too, that are not related to the merit of the claim. We've talked about, you know, judgment proof defendants and the way that fees lawyers can get fees from defendants as well. But what they should, I think, by some role that's kind of the first screening mechanism, is can you get a plaintiff's lawyer that will take your case? How can the law kind of calibrate things so that plaintiffs lawyers are doing the good work of kind of doing some basic filtering of the claims based on merit, but not the bad work of filtering out good claims that just probably won't result in a lot of fees for the lawyer or bringing possibly bad claims just on the hope that maybe we can at least force a settlement for a little bit of money.

**Joanna** [00:38:45] Hmm. It's a very complicated issue. And right now, the way the system works is for many lawyers in these cases, essentially a contingency fee relationship, which means the lawyer wins nothing if the plaintiff loses and if they win that, the lawyer gets a percentage, usually a third of the recovery that the plaintiff recovers. This is an arrangement that you will see in in slip and fall cases, in medical malpractice cases and the arrangement is certainly imperfect in all areas of the law. A person who slipped and fell and got a small, small injury is unlikely to find a lawyer, certainly less likely than someone with a large injury, but it's particularly of concern in civil rights cases, in constitutional rights cases, because the goal of having this ability to sue is vindicating people's constitutional rights violations and also preserving the protections of the Constitution more broadly for us as a society.

**Joanna** [00:39:56] And Congress thought that that was important enough that plaintiffs lawyers should get their fees paid when they had a successful case. And that arrangement, though, has been interpreted by the Supreme Court to allow defendants when they make settlement agreements to waive plaintiffs attorneys rights to their fees. So it essentially has returned a contingency fee arrangement to most civil rights cases. In my ideal world, there would be a ability for lawyers to get their reasonable fees, even in cases that settled, because I think that it would likely create incentives for local governments to resolve cases quickly when there is wrongdoing, as opposed to dragging these cases out to the very end. And it would also give lawyers an incentive to bring these cases, even when their clients may not have suffered an enormous physical harm or compensable

harm, even as their constitutional rights have been violated, or if they're not a sympathetic victim for for one reason or another, lawyer still wouldn't receive anything if their client lost.

**Joanna** [00:41:16] And so there would still be the ability to weed out those insubstantial cases, but it would create more of a financial incentive for lawyers to take cases where people's constitutional rights were violated.

**David** [00:41:31] And particularly, as you describe in the book, if a plaintiff is seeking injunctive relief and that settles with the city or whatever, agreeing, okay, we won't do that anymore, there's nothing to take a percentage of in that case. So.

**Joanna** [00:41:46] Yes, correct.

**David** [00:41:47] Then the lawyer would just get nothing. So I agree that you have to consider the incentives that face the lawyers that bring these cases, not just the other actors. And going back to another thing you mentioned earlier about just kind of how this information kind of trickles from the court system to police actors you describe in the book some success in this regard, places that have instituted systems of kind of trying to keep track of these things, trying to make sure that officers know these things. You know, officers have a lot of they're kind of trying to keep track of and, you know, one more training every so often about the things that the courts are telling them they're supposed to do. Maybe they're not going to be able to keep track of that too well, but what's keeping officers from getting this information? Is it just lack of a really great way to present it to them to memorialize it? You know, from the get it from the court records presented it in a digestible way to officers, or is it an incentive problem at the level of police management that they would rather officers not know about these things? What's the holdup in getting officers informed about what they should and shouldn't be doing?

**Joanna** [00:43:07] So I think when you think about information from lawsuits and what is learned by officers, what should be learned by officers. There's sort of two different categories of litigation information that I think is important to take note of. One is simply court decisions, decisions by the Supreme Court or courts of appeals about various cases and rulings in those cases. And what I found when I looked at hundreds of California policies and trainings was that in those policies and trainings, they're not learning about the facts and holdings of individual cases they're learning about general principles, principles like you can't use force against a person who has surrendered, principles like the general holding in, you know, in the Supreme Court's decision in *Graham versus Connor* that the force used has to be objectively reasonable under the circumstances.

**Joanna** [00:44:12] And then they get familiarized with how to apply those standards in the course of their work. I actually don't see a huge problem in that approach focusing on these broad principles and then getting officers accustomed to applying those principles. A critique I have, though, is that the Supreme Court's qualified immunity jurisprudence assumes that officers actually read all of these hundreds and thousands of cases that could clearly establish the law, remember them, and then consider them when they're doing their work. I don't think that that bears any relationship to reality. And it's one of many reasons that I think qualified immunity doctrine is wrong in its approach, but I don't necessarily think that what local governments and police departments are doing with lawsuit information is wrong. They could spend more time looking at some of these cases or these broad principles, but I wouldn't expect them to educate their officers about every every case that comes down.

**Joanna** [00:45:17] Where I do think that there's a real missed opportunity is that most local police departments don't gather and analyze information about the lawsuits that are brought against their own officers. And what I've discovered in doing my research is that there are some jurisdictions usually who have been required to have an outside police auditor or monitor who has reviewed litigation trends within the department and has found really valuable information. This isn't necessarily more more things that the officer has to learn about these cases, but the takeaways from these patterns of cases can be very useful for police officials. So, for example, in Portland, looking at lawsuit filings and trends in those filings revealed to the Portland Police Department auditor that there was a particular department that or a particular station within the department that was hitting a bunch of people in the head during a particular period of time.

**Joanna** [00:46:19] And they looked at those cases, retrained their officers, and the problem went away. It was a similar problem in the Portland Police Department of there was a trend of cases involving officers going into homes without a warrant the city attorney gave a new training to the officers about the scope of their authority in this regard, and the problem went away. So I think that there's a great deal that can be learned from lawsuits brought against a police department, trends in the types of cases, the stations that are disproportionately involved in these cases, officers disproportionately involved in these cases, but the information in many places doesn't come through and what I've found is that there's often reluctance by the city attorney's office to turn this information over to the police department for fear that putting them essentially on notice of this trend could be a basis for liability moving forward if they don't act on that information and reduce the problem.

**David** [00:47:24] So you discuss in the book Monell Lawsuits, which we kind of covered briefly under 1983, the statute, the federal statute under which people can sue municipalities don't get qualified immunity, but it's hard to prove that they have kind of practices that implicate them and one of the ways is this lack of training. Do you think that it might actually be helpful to eliminate some of that kind of liability, potential liability, just to reduce the incentive that cities and police departments have to avoid that kind of information that demonstrates that this training is actually necessary?

**Joanna** [00:48:05] Well, I would approach the problem in a couple of alternative ways. One is to make the case to local governments that having the information about the patterns of misconduct is important to address the misconduct and if you can address the misconduct, then you're not going to be held liable for the misconduct. So it seems like there's a there's a high road and a low road to take here when there is a pattern of misconduct. One is to bury your head in the sand and pretend that you've never heard it and the other is to take the information and address the problem. And I'd much prefer the latter approach. An alternative or perhaps in addition, my choice would be to make local governments vicariously liable, directly liable for misconduct by their officers. This is what we have in other aspects of legal liability. If if you were hit by ABC Food truck, you would not sue ABC food trucks driver, you would sue the company and that is how it works in other aspects of our legal system, in part because the driver is not going to have the money to pay the settlement or judgment, and in part because the responsibility should be on ABC to make their drivers drive more safely and their and their systems work better.

**Joanna** [00:49:28] And I think the same is true for local governments. It's long been argued that the Supreme Court's decision that local governments shouldn't be vicariously liable for misconduct by their officers was based on a misunderstanding of the legislative history behind the statute that people sue under that was first enacted in 1871. It also, in

addition to arguably not being based in reality, this Monell requirement, the requirement of finding a series of prior cases amounting to a policy or custom is a whole lot of work for plaintiffs in these cases, even when municipalities so frequently indemnify their officers, essentially having direct liability vicarious liability through the indemnification process.

**Joanna** [00:50:20] So my vote would be to do away with Monell, but replace it, not do away with it meaning that local governments couldn't be sued, but do away with it, meaning that local governments should be held directly liable for misconduct by their officers.

**David** [00:50:34] So the last chapter of the book is a little more optimistic than the rest of the chapters and discusses some success stories and some ways to move forward, put it that way. And it may surprise some readers that a lot of the kind of success stories come from New York City, which is Rikers, is just legendary for the amount of abuse that goes on there. NYPD, you know, I think it's fair to say, doesn't have a great reputation among a lot of people that care about police accountability, but what has gone right in New York and why did it happen there and could it happen and work elsewhere?

**Joanna** [00:51:14] Yeah, well, so is the NYPD and the New York City Department of Corrections have a have a long and very checkered history, but it's also important to take note of the other members of the civil rights ecosystem. There is a very vibrant civil rights bar there of plaintiffs attorneys who are actively bringing these cases, who brought cases like the Floyd litigation. There are city council members who are very involved in issues of of policing and there's also the New York City comptroller's office, which handles payouts in these cases. And the New York City comptroller has historically been very interested in improving police accountability and having police take better account of information in lawsuits brought against them by their officers. And so it is true that there are a number of interesting things that New York City has done, not necessarily with the encouragement and excitement of the New York Police Department officials, but the others in the in the system who have pushed for change.

**Joanna** [00:52:24] One way in which New York City appears in the book is that the New York City comptroller's office has required on occasion that officers contribute to settlements and judgments entered against them when officers have violated policy. And so they have created a infrequently imposed and not too significant financial sanction for some officers who have violated policy. New York City Council created a Office of the Inspector General with the power to essentially oversee the New York Police Department in part two to look at how the New York Police Department evaluates information from lawsuits brought against it and its officers. And I trace in the book a series of different efforts by that Office of Inspector General to get the NYPD to pay closer attention to these suits. It's been a lot of, you know, two steps forward, one step back, one to the side, another step forward change in this area is is not easy, it's not lasting. And it's never as significant as some of us reform minded people would like, but there is really important efforts that have been made in New York City and it can be made elsewhere.

**Joanna** [00:53:50] There are important changes that are being considered in Philadelphia, for example, which just limited traffic empower police to stop people for minor traffic violations. In Memphis, they're considering similar legislation. The Memphis Police Department eliminated the Scorpion unit, and there is consideration around the country following the death of Tyree Nichols of limiting these kinds of so-called elite police forces. There's efforts in Colorado and in New Mexico, as well as New York City, to create these state law abilities to sue without qualified immunity as a defense. So there are important

changes that are happening around the country. Part of what I try to emphasize in the last chapter is that these are changes that are happening at the local level, which means that who is sitting in city council offices and who community members are pushing for and advocating for changes that that people are advocating for can really make an important difference. So my hope is that people reading this book will be energized to make similar demands of their local electeds.

**David** [00:55:02] Great. Well, last question, Joanna. Many of our audience members are not only people possibly motivated to call their elected officials, but also social scientists or aspiring social scientists. And I know they're going to be very grateful to have learned about your work and read about it in your book. And if they want to return the favor by doing some work that will help you in what you think about every day, what should they be doing?

**Joanna** [00:55:33] Boy. Well, I'm very appreciative to them as well for all of the work that they have done. I do think that right now, measuring what the impact is of these. Incremental changes that have been enacted in local governments could be extremely useful moving forward because there is so much fear about the effects the potentially negative effects of police reform on public safety, that now that we are in this moment where there are efforts around the country to limit police powers, to stop people for minor traffic violations, getting unarmed officials who are responding to people in mental health crises and changes to these state laws that eliminate qualified immunity for some pockets of cases, in some pockets of people understanding what the impact of those changes have been on constitutional rights and public safety, I think are critically important to the future of these reform efforts, because even today, even this week, in the past couple of weeks, there have been bills that have failed in state houses in New Hampshire and in Washington that would create a state law cause of action without qualified immunity for fear of the effects of this kind of statute, for fear that officers are not going to do their jobs, that recruiting and retaining officers is going to be increasingly difficult with these statutes.

**Joanna** [00:57:13] And these claims are being made without information that supports them, without data supporting them. And we need researchers to get out there and figure out what's going on in Colorado and New Hampshire and in New York City and confirm or deny what these concerns are.

**David** [00:57:33] Great. Well, the book is "Shielded" it's on sale now. And whether you're an interested citizen or a policymaker or researcher or especially if you're a law student studying for a Fed Courts exam, this book is definitely for you. So thank you, Joanna, so much for writing it and for talking with me about it.

**Joanna** [00:57:51] Oh, it's my great pleasure. Thank you so much for having me.

**David** [00:57:59] You can find links to other research we discussed on the show on our website [probablecausation.com](http://probablecausation.com). You can also subscribe to the show there or wherever you get your podcasts to make sure you don't miss a single episode. Big thanks to Emergent Ventures for supporting the show and thanks also to our Patreon subscribers and other contributors. Probable Causation is produced by Doleac Initiatives, a 501(c)3 nonprofit, so all contributions are tax deductible. We're so grateful for your support. Our sound engineer is Jon Keur with production assistance from Nefertari Elshiekh. Our music is by Werner, and our logo was designed by Carrie Throckmorton. Thanks for listening and I'll talk to you soon.