In Conversation with Joanna Schwartz on “Sheilded”

What is your goal in writing Shielded, and what do you hope readers will take away after reading?

I want readers to understand just how difficult it is for people whose rights have been egregiously violated by police to win in court. Filing a lawsuit is often the only way to get any measure of justice and accountability but, over the past sixty years, officials at every level of government have created so many barriers to relief in civil rights cases that the police have become all but untouchable. In Shielded, I show how these barriers have been justified and strengthened by overblown and sometimes false claims about the dangers of suing police. And I show how people who have tried to seek justice often have the courthouse doors shut in their face. I hope that this type of nuanced exploration can push past the polemics and misinformation that too often guide debates about police reform, and I end the book with concrete steps people at every level of government can take to make our system better—from Supreme Court justices down to city council members and city attorneys, and even people serving as jurors.

Why do you think it’s so important to write this book at this particular point in time?

This book is the product of more than twenty years of advocacy and research, but I first started writing it in the months after George Floyd was murdered, as questions about police reform seemed to be on everyone’s minds. At that time, and periodically before and since, when horrific stories of police violence capture public attention, commentators and politicians and people sitting around kitchen tables ask how to get justice and how to prevent something similar from happening again. Although these questions are important to ask in the wake of one of these tragedies, they may be even more important to ask in moments between these tragedies—moments when there is the opportunity for deliberation and action. I don’t know when we’ll encounter another viral video of an unjustified police killing, but we can’t sit around waiting for the next tragedy to occur.

You have participated in legislative efforts nationally and on the state level, particularly in the wake of the murder of George Floyd, to try to improve systems of police accountability. What progress have you seen? Are you hopeful additional changes can be made?

The murder of George Floyd prompted a flurry of federal, state, and local efforts to address the related problems of police violence and accountability. Some efforts—like the George Floyd Justice in Policing Act in Congress, which would have ended qualified immunity among a variety of other reforms—have failed. But since 2020 a handful of states and hundreds of law enforcement agencies across the country have constrained police power in various ways: banning or restricting chokeholds; prohibiting or limiting shooting into cars; requiring police officers to issue a warning before using deadly force; and limiting force only to circumstances where it is necessary. Colorado, New Mexico, and New York City have passed laws prohibiting qualified immunity as a defense in lawsuits brought by people whose constitutional rights were violated. Local governments, including in New York City, have experimented with ways to get police departments to learn from lawsuits that have been brought against them. And states and local governments continue to debate these and other reforms. When reform efforts fail, it is often because legislators are convinced by union leaders and other law enforcement officials that policing would suffer in a world with more accountability—even though there is no evidence to support these concerns. I am hopeful that Shielded can help foster more realistic and evidence-based conversations about reform moving forward.

Much current debate about police reform has focused on calls to “defund the police.” What is your position with regards to this debate?

The debate about whether to “defund the police” is a debate about what resources police should be given and

what they should be empowered to do. I'm of the view that police are currently being asked to do too much—for example, most police are not trained as mental health crisis counselors, and we as a society should not ask them to serve that role. Police stop millions of people each year in their cars and on the street, and many of these stops do more harm than good. But this is not a debate taken up in Shielded. I ask a different question—about how to achieve some measure of justice and accountability when officers violate people's constitutional rights by humiliating, searching, arresting, shooting, or killing them without just cause. This is a question that must be answered no matter how the "defund the police" debate is resolved. Regardless of how policing may transform in the future, there will almost certainly continue to be people authorized by the government to protect public safety, and there will almost certainly be instances in which those people abuse their authority. Shielded asks what the consequences should be when they do.

Much of the recent focus on police reform has been on qualified immunity, a defense for police officers if they have not violated "clearly established law." Shielded shows that qualified immunity is just one of many overlapping protections for police that have been put in place to make it almost impossible for people whose rights have been violated to seek justice in the courts. Can you discuss this further and give an example?

To listen to its defenders, qualified immunity is the only protection standing between police and a mountain of frivolous lawsuits that would bankrupt them if allowed to go forward. The fact of the matter is that there are multiple shields put into place by the Supreme Court and state and local governments that make it exceedingly difficult for people to get justice through the courts, even when they have been grievously wronged. For example, a person's case can be dismissed if they don't have access to enough information about their case at the outset to support a "plausible" claim. So, if a person died in police custody but his family members do not know how he died, their case can be dismissed because they have not set out enough detail in their complaint. The Supreme Court's constitutional standards also mean that people whose lives have been shattered to the core may not be entitled to relief. When a person who has done nothing wrong is stopped, searched, arrested, assaulted, or killed by police, his rights have not been violated in the eyes of the Supreme Court if what the officer did was considered "reasonable" under the "totality of the circumstances." And even when a person overcomes these and other barriers and wins in court, their case won't reliably influence the officer's or the department's decisions moving forward because most officers and departments are insulated from any financial consequences of settlements and judgments, and most departments aren't required to analyze information from lawsuits brought against them.

Protections for the police created by courts and government officials have often been justified by fears that officers and local governments would be bankrupted for good-faith mistakes if it were too easy to sue. Your research has proven that these fears, while palpable, are not grounded in fact. Could you share some of this data?

These fears simply have no basis in reality. Across the country, there are indemnification protections for officers—agreements that local governments will pay any settlement or judgment against an officer for harms they do on the job. And these indemnification protections are nearly airtight. In one study of eighty-one jurisdictions across the country, I found that 99.98% of money paid in settlements and judgments in police misconduct cases came from taxpayers, not police officers. In most cities and towns, police officers are more likely to be struck by lightning than to contribute to a settlement or judgment in their career. It is indemnification agreements, not qualified immunity, that protects officers from financial responsibility in these cases. Lawsuits don't usually threaten local governments with bankruptcy, either. In most states, cities, and counties across the country, lawsuits account for less than 1 percent of the government's budget. And when plaintiffs win, the officers have not acted in good faith—the Supreme Court's decisions have made clear that officers' good-faith mistakes do not violate the Constitution.

People who've lost loved ones or have themselves been harmed by the police often say they want the officers involved to be punished and assurance that something similar won't happen in the future. Civil lawsuits—seeking damages (usually money) or some other court-ordered reform—are among the best available ways for a person to get justice when their rights have been violated by the police. Why is this the case?

Following high-profile police killings—like the killings of George Floyd, Breonna Taylor, and too many others—nationwide attention and protest can prompt local governments to fire officers and make important policy changes. But most cases of serious misconduct don't inspire that level of attention and, when they don't, there are three basic paths toward some kind of justice: police department discipline, criminal prosecutions, and civil lawsuits. None of these paths are easy to travel. Police departments rarely discipline or fire their own. Police are even more rarely prosecuted, even when they kill; and are even less likely to be prosecuted when they harm someone in a way that doesn't end their life. In many ways, a civil lawsuit is more likely to achieve some measure of justice and accountability than internal investigations or criminal prosecutions ever could. A person who has suffered at the hands of police can bring a lawsuit themselves—they don't have to wait for a prosecutor or police department investigator to act. During litigation, they can demand documents and information from the police department about what happened—information that a prosecutor or internal affairs investigator would not be required to make public. And if the person won in court, they could get money or a court order—remedies that are not available in criminal prosecutions or internal affairs investigations. Lawsuits are far from a perfect tool for justice and accountability, but for a person wronged by police they are often the best and only hope.

A lot of criticism about the lack of police accountability is directed at the Supreme Court because they have set such a high bar for lawsuits against police. How did this come to be?

The Supreme Court actually opened the door to civil rights lawsuits against the police in 1961, when the Court recognized that these types of cases could be brought under a law that Congress had passed ninety years earlier, in 1871, during Reconstruction after the Civil War. But in the years after 1961, legislators, academics, journalists, and some judges feared that the Supreme Court had opened courthouse doors too wide to these types of cases; that lawyers would file frivolous cases that would clog up the courts, bankrupt officers and local governments, and discourage people from becoming public servants. During these same years, the composition of the Supreme Court got more conservative, and its decisions began to track these same fears. The Court continued to acknowledge that civil rights suits were, in many cases, the only way to vindicate constitutional violations. But the Court's decisions became increasingly preoccupied with the concern that the right to sue government would be abused and lead to disastrous consequences. And the Court's decisions, invoking these concerns, began to create additional protections for government officials.

You have been able to disprove several claims used by the Supreme Court and state and federal legislators to justify barriers to relief in police misconduct cases. Could you give us a few examples?

Some of the grandest claims by the Supreme Court and politicians have been about qualified immunity, a legal protection granted officers, even if they have violated the Constitution, if they have not violated what the Court calls "clearly established law." Defenders of qualified immunity argue that without it, officers will be bankrupted by frivolous lawsuits. But my research has shown that cities almost always pay settlements and judgments on behalf of officers. Defenders of qualified immunity argue that qualified immunity shields officers from the burdens of discovery and trial. But my study of almost 1200 police misconduct cases showed that qualified immunity is almost never granted before discovery, and that qualified immunity may actually make these cases take longer. The Supreme Court has said officers should get qualified immunity unless there is a prior court case with virtually identical facts because those decisions put officers on notice of the wrongfulness of their conduct. But I looked at hundreds of police policies and trainings, and found that officers are never educated about the facts and holdings of the kinds of cases that clearly establish the law for qualified immunity purposes. The list of misinformation that fuels barriers to accountability and justice in police misconduct cases unfortunately goes on and on.