DELIBERATE INDIFFERENCE: RESPONDEAT SUPERIOR LIABILITY FOR MUNICIPALITIES IN CIVIL RIGHTS CASES AS AN ALTERNATIVE TO QUALIFIED IMMUNITY REFORM

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The police killing of George Floyd in Minneapolis, Minnesota, has resulted in a renewed focus on adjudication of civil rights claims against government officials and the perceived inadequacy of the legal resolution of these claims. Calls for reform or complete removal of the defense of qualified immunity for government officials have been central to these discussions.

This Article argues that while arguments for qualified immunity reform are convincing and vital, the exclusive focus on this aspect of civil rights adjudication is misplaced and serves as a distraction from a more basic and consequential flaw in the constitutional tort jurisprudence: the severe limitation on municipal liability for violations of constitutional rights, in the form of a preclusion of respondeat superior liability, imposed by the Supreme Court since Monell v. Department of Social Services *in 1978. Part I provides a summary of the development of legal analysis of Section 1983 claims and of the scope of municipal liability in those claims. Part II summarizes the extensive judicial and scholarly critique of the* Monell *approach to municipal liability in Section 1983 claims. Part III addresses some of the practical impacts of this approach on the actual litigation of constitutional tort claims, including reducing incentives for governments to prevent future constitutional violations and restricting the strategic options for civil rights plaintiffs. Part IV argues that application of respondeat superior doctrine to local governments in Section 1983 constitutional tort claims would focus the litigation of these claims on the entities most capable of providing sufficient compensation; incentivize implementation of training, hiring, and other policies that could prevent injuries before they occur; and simplify an adjudication procedure that erects unnecessary complications for those seeking relief for serious injuries caused by the very governments that they rely on for their protection.*

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Introduction

"Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct."[1]

"How 'uniquely amiss' it would be, therefore, if the government itself—'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct'—were permitted to disavow liability for the injury it has begotten."[2]

The video of the police killing of George Floyd in Minneapolis, Minnesota, on May 25, 2020, had an unprecedented impact across the political, legal, and social spectrum in the United States and the

1. Owen v. City of Indep., 445 U.S. 622, 657 (1980).
2. *Id.* at 651.

world.[3] One specific consequence has been a renewed focus on adjudication of civil rights claims against government officials (particularly police officers and other law enforcement officials); including, the limitations on potential liability for these officials and the limitations on potential relief for injured plaintiffs. Each of these is a product of our judicial system's approach to these claims. The primary focus of this discussion has been the barrier to relief for civil rights plaintiffs imposed by the defense of qualified immunity for government officials accused of violating Constitutional rights,[4] and the fed-

3. Allison R. Ferraris, *"The Right to Protest for Right": Reaffirming the First Amendment Principle That Limits the Tort Liability of Protest Organizers*, 63 B.C. L. REV. 1093, 1102–03 (2022) ("[T]he swift and pivotal impact of the George Floyd protests manifests the indispensable nature of protests to American democracy, which is why the Court held in *Claiborne Hardware* that the First Amendment affords organizers limited liability protection in the first place."); Jim Hilbert, *Improving Police Officer Accountability in Minnesota: Three Proposed Legislative Reforms*, 47 MITCHELL HAMLINE L. REV. 222, 224 (2020) (finding increased pressure on lawmakers to push for police reform legislation).

4. Stacy M. Allen, *Law Enforcement: "Daddy Changed the World": How the Death of George Floyd May Impact the Law*, 58 HOUS. LAW. 18, 18–19 (2020) (discussing federal legislative initiatives to amend or remove the qualified immunity defense in response to civil rights claims including the George Floyd Justice in Policing Act); Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 483 (2022) (discussing the Ending Qualified Immunity Act proposed in June 2020 which would "eliminate qualified immunity in any federal civil lawsuit that alleges a deprivation of rights."), Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 126 (2021) (discussing the Reforming Qualified Immunity Act proposed June 2020 which would "prohibit courts from inoculating a state or local official from suit unless defendants could affirmatively show . . . that the conduct at issue was unauthorized by law.").

eral,[5] state, and local[6] legislative proposals for altering or eliminating this defense.[7]

The qualified immunity defense protects local government officials from liability in claims pursuant to 42 U.S.C. Section 1983 ("Section 1983")[8] unless an official under the same circumstances *should have known* that their actions were violating a *clearly established* constitutional right.[9] The doctrine has evolved and strengthened

5. Federal legislative initiatives to amend or remove the qualified immunity defense for civil rights claims include the George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. (proposed on Feb. 24, 2021), the Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (proposed on Mar. 1, 2021), and the Reforming Qualified Immunity Act, S. 4036, 116th Cong. (proposed on June 23, 2020).

6. States and local governments enacting legislation purporting to reform or remove the qualified immunity defense for claims under State law include: New York City (added a new chapter to the NYC Administrative code that establishes a local right to be free from excessive force and unreasonable searches and seizures; and allows citizens to sue police for the deprivation of that right, while explicitly providing that "qualified immunity or any other substantially equivalent immunity" will not shield officers from responsibility), N.Y.C. Admin. Code §§ 8-801 to 8-808 (2021); Colorado (enacted the Law Enforcement Integrity and Accountability Act which created a civil action against law enforcement officers who violate people's constitutional rights and expressly provides that "qualified immunity is not a defense to liability."), COLO. REV. STAT. § 24-31-9 (2020); California (created a process by which law enforcement officers charged with wrongdoing are stripped of their badges), CAL. GOV'T CODE § 1029(a)(11) (West 2023); New Mexico (enacted the New Mexico Civil Rights Act that guarantees that no public official "shall enjoy the defense of qualified immunity for causing the deprivation of any rights, privileges or immunities secured by the bill of rights of the constitution of New Mexico."), N.M. STAT. ANN. § 41-4A-4 (2023).

7. Debra Cassens Weiss, *Death of George Floyd Brings Debate on Qualified Immunity for Police Misconduct*, ABA J. (June 2, 2020, 12:18 PM), https://www.abajournal.com/news/article/death-of-george-floyd-brings-debate-on-qualified-immunity [https://perma.cc/29GL-UWGV] ("George Floyd's death while taking a knee to his neck by a Minneapolis police officer has raised debate on qualified immunity for police misconduct. The doctrine allows police to escape civil liability for violating a person's rights under Section 1983 of the Civil Rights Act when those rights are not 'clearly established.' The concept of qualified immunity has come under attack in libertarian legal circles, Fox News reports. The New York Times has also criticized the doctrine, saying it shields police in virtually every lawsuit.").

8. 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

9. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982) (laying out the "knew or should have known" and "clearly established statutory or constitutional right" prongs of the qualified immunity test); *see also* Lisa D. Hawke, *Municipal Liability*

in the United States over the last few decades.[10] Many argue convincingly that this version of the qualified immunity defense imposes undue restrictions on liability in civil rights cases. Qualified immunity immunizes a wide range of objectionable conduct that courts too often consider to be "reasonable" and restrictively defines constitutional rights with the requirement that they be "clearly established," which prevents relief for deserving injured parties and provides insufficient incentives to prevent future constitutional violations by governmental officials.[11] Professor Joanna Schwartz has provided a range of arguments for abandoning or severely limiting the qualified immunity de-

and Respondeat Superior: An Empirical Study and Analysis, 38 SUFFOLK U. L. REV. 831, 831 (2005) ("[Section 1983] is the primary source of law for obtaining damages and equitable relief against state and local officials, and through them, municipalities who violate the constitution. The statute provides remedies for violations of federal law by state and local officials, and also allows for certain types of relief against government entities themselves. Section 1983 is the most frequently used basis for federal police misconduct actions against state or local officers. Under current jurisprudence, however, holding municipalities accountable for the unconstitutional acts of one of its officials remains difficult in actions for damages." (internal citations omitted)).

10. *See* Obasogie & Zaret, *supra* note 4, at 414 ("It is largely assumed that the development of qualified immunity for excessive force cases tracks the history of qualified immunity doctrine itself. In the traditional story, the Supreme Court first created qualified immunity in the 1967 case *Pierson v. Ray*, then modified the doctrine in the 1982 case *Harlow v. Fitzgerald*, giving us its modern version. It is widely thought that qualified immunity began to significantly limit civil lawsuits against police in use of force cases since the doctrine's inception. But this is not the case. Although qualified immunity has, in contemporary times, played a pivotal role in nearly every excessive force lawsuit, it was not until 2001 in the case *Saucier v. Katz* that the Supreme Court explicitly stated that qualified immunity could apply to excessive force claims." (internal citations omitted)); Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between Section 1983 Municipal Liability and Qualified Immunity*, 41 SETON HALL L. REV. 153, 178–79 (2011) (discussing how qualified immunity is "intended to protect government officials from damages liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'" and that, in light of the Supreme Court's doctrine, "the relevant question to determine whether the law is 'clearly established' is whether or not the legal rule at issue is explicit and unambiguous . . . [and] the 'reasonable official's understanding of the legality of his conduct.'" (internal citations omitted)).

11. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1839 (2018) (arguing that elimination of qualified immunity would "clarify the law, reduce the costs and complexity of litigation, and shift the focus of Section 1983 litigation to what should be the critical question at issue in these cases—whether government officials exceeded their constitutional authority."); Marcus R. Nemeth, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 1020–21 (2019) (arguing for reverting back to the original qualified immunity analysis and its focus on evidence of police officer's malice in §1983 claims); Obasogie & Zaret, *supra* note 4, at 482 (stating that qualified immunity takes power away from plaintiffs in §1983 claims and the Court can "reclaim the original intent of § 1983 by

fense in constitutional tort claims. She argues that qualified immunity has no basis in the common law,[12] that the defense does not achieve its intended policy goals,[13] and that qualified immunity undermines the force of constitutional protections.[14]

These and other arguments for removal of qualified immunity for defendants in constitutional tort claims are compelling, particularly in light of the persistent phenomena of police violence and prosecutorial misconduct. However, qualified immunity, properly modulated, can be a vital component of an effective and responsive government as it provides some reasonable protection from liability (and potential liability) for discretionary acts of some government officials short of absolute immunity.[15]

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overturning the holding in *Saucier v. Katz* that definitively brought qualified immunity to Fourth Amendment excessive force cases.").

12. Schwartz, *supra* note 11, at 1801 ("Despite the Court's repeated invocation of the common law, several scholars have shown that history does not support the Court's claims about qualified immunity's common-law foundations. When the Civil Rights Act of 1871 was passed, government officials could not assert a good faith defense to liability. A government official found liable could petition for indemnification and thereby escape financial liability. But if a government official engaged in illegal conduct he was liable without regard to his subjective good faith.").

13. *Id.* at 1803–4 ("I have found, contrary to the Court's assertions, that qualified immunity is unnecessary to shield law enforcement officers from the financial burdens of being sued because they are virtually never required to contribute to settlements and judgments entered against them. I have additionally found that qualified immunity is unnecessary and ill-suited to shield government officials from burdens of discovery and trial, as it is very rarely the reason that suits against law enforcement officers are dismissed. Finally, available evidence suggests that the threat of being sued does not play a meaningful role in job application decisions or officers' decisions on the street.").

14. *Id.* at 1814 ("The Supreme Court might alternatively decide to eliminate or limit qualified immunity doctrine because, in Justice Sotomayor's words, it 'renders the protections' of the Constitution 'hollow.' . . . Although qualified immunity is the reason few Section 1983 cases against law enforcement are dismissed, the Court's qualified immunity decisions have nevertheless made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law, and increasingly easy for courts to avoid defining the contours of constitutional rights.").

15. Mark C. Niles, *A New Balance of Evils: Prosecutorial Misconduct,* Iqbal *and the End of Absolute Immunity*, 13 STAN. J. C.R. & C.L. 137, 145–46 (2017) ("The complex nuisance concern cannot provide a justification for absolute immunity for willful or reckless prosecutorial misconduct. The strong societal interest in discouraging such conduct and the availability of an alternative defense—qualified immunity . . . protects prosecutors from the kind of perverse incentives that would distract them from the vigorous performance of their duties. . . . [The modern version of the] defense has removed the common law's focus on the "subjective" mental state of the government actor in question and instead addresses the objective reasonableness of the action itself. In light of . . . new procedural sufficiency standard set out in *Iqbal*, the social harms that currently result from prosecutorial misconduct can be diminished by replacing absolute immunity protection with qualified immunity.").

The all but exclusive focus on the qualified immunity defense as the primary barrier to effective adjudication of civil rights claims—particularly those alleging constitutional violations by law enforcement officials—distracts from a more basic and consequential flaw in the constitutional tort jurisprudence: the severe limitation on municipal liability for violations of constitutional rights by municipal officials. This shields governments that employ officials who cause constitutional harm from liability for those actions in all but the rarest of circumstances.

In *Monroe v. Pape*,[16] the United States Supreme Court ushered in the modern era of civil rights litigation by allowing the victim of alleged police misconduct to bring an action against government officials pursuant to Section 1983. However, the Court precluded the plaintiff (and similarly situated parties) from bringing a claim against the local government that employed the officials who caused his injury. The Court based this prohibition on its conclusion that a government could not be seen as a "person" as defined in Section 1983.

A decade later, the Court revisited the question of municipal liability in civil right claims. In *Monell v. Department of Social Services*,[17] the Court provided for such liability after concluding that the 1871 Congress that enacted the legislation codified as Section 1983 intended to hold local governments liable for injuries resulting from violations of constitutional rights.[18]

But at the same time, Justice Brennan's majority opinion in *Monell* articulated a dramatically limited scope of municipal liability, allowing for payment of damages only for what could be considered "official" government acts.[19] The opinion prohibited liability for the governments based on a respondeat superior liability theory, the theory that is habitually applied to private employers and public employers in non-constitutional cases. Respondeat superior is a form of

16. Monroe v. Pape, 365 U.S. 167, 191–92 (1961) (holding that a Section 1983 cause of action affords a plaintiff redress against a government official but not against a municipality).

17. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

18. *Id*. at 688–89 ("Municipal corporations in 1871 were included within the phrase 'bodies politic and corporate' and, accordingly, the 'plain meaning' of section 1 is that local government bodies were to be included within the ambit of the person who could be sued under section 1 of the Civil Rights Act.").

19. *Id*. at 690 ("Local governing bodies, therefore, can be sued directly under section 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance regulation, or decision officially adopted and promulgated by the body's officers.").

vicarious liability that makes employers liable for the damages caused by their employees or officers.[20]

This article argues for the application of respondeat superior liability for municipal defendants in constitutional tort claims filed pursuant to Section 1983.[21] It begins in Part I with a summary of the development of constitutional tort law as applied to local governments (in addition to, and as distinct from, the individual officers directly responsible for their injuries). The doctrine has three significant developments. First, *Monroe v. Pape* created the modern federal civil rights cause of action but precluded municipal liability in those claims. Second, *Monell v. Department of Social Services* articulated a basis for municipal liability in constitutional tort claims, but severely restricted the basis in its opinion. Finally, *Monroe* and *Monell* progeny continued to develop the doctrine of municipal liability in subsequent Supreme Court cases.[22]

Part II summarizes the extensive judicial and scholarly critique of the *Monell* approach to municipal liability in Section 1983 claims, focusing on the "official policy" requirement and the development of the complex and unworkable "deliberate indifference" standard in later cases.[23] These arguments focus on the ways that the approach limits the obligation of governments to take responsibility, financial or oth-

20. *Id*. at 694 ("We conclude, therefore, that a local government may not be sued under section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict injury that the government as an entity is responsible . . . .").

21. For arguments in favor of municipal respondeat superior liability, *see* Kevin R. Vodak, *A Plainly Obvious Need for New-Fashioned Municipal Liability: The Deliberate Indifference Standard and* Board of County Commissioners of Bryan County v. Brown, 48 DEPAUL L. REV. 785 (1999); Karen M. Blum, *Section 1983 Litigation, the Maze, the Mud and the Madness*, 23 WM. & MARY BILL RTS. J. 913 (2015) ("I cast my vote with those who think it is time to revisit *Monell* and the Court's mistaken rejection of respondeat superior liability. Adopting respondeat superior liability would not eliminate the need for plaintiffs to plead and prove an underlying constitutional violation. The challenges of *Iqbal* and the need to prove whatever level of culpability is required for the constitutional tort, as well as the need to prove causation, would still present formidable roadblocks to success in these suits. But, adopting respondeat superior would eliminate the enormous amount of time and resources spent litigating and adjudicating the qualified immunity defense, as well as the hours that presently go into establishing or defeating *Monell* claims. Thirty-seven years after first criticizing the Court's interpretation of the statute, I have come full circle to say it again."); Hawke, *supra* note 9, at 846–47 (arguing that respondeat superior is a more beneficial test for determining remedies for civil rights violations).

22. *See infra* Part I.

23. Ronald M. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L. J. 1483 (1977); Don B. Kates, Jr. & J. Anthony Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972); David

erwise, for the injuries caused by their employees, particularly when those harms violate constitutionally protected rights. Moreover, the approach provides little, if any, incentive for local governments to implement policies that will avoid constitutional harm before it occurs.

Part III of the article discusses some of the practical impacts of the *Monell* municipal liability approach. First, it creates incentives for governments to settle multiple claims filed against the same official without taking responsibility or implementing systematic change. Second, the combination of the qualified immunity defense and restrictions on municipal liability imposes strategic limitations upon constitutional tort plaintiffs.

Part IV argues for application of respondeat superior to local governments in Section 1983 constitutional tort claims. Exposing governments to respondeat superior liability in claims alleging constitutional torts would provide for an array of benefits. These benefits include extending financial resources available to those injured by government constitutional violations, particularly those associated with law enforcement activities; and further incentivizing governments to employ policy and training initiatives to prevent constitutional harms instead of either avoiding responsibility or simply compensating injured parties.[24]

Application of respondeat superior liability in these cases would bring their adjudication in line with claims against private employers in analogous circumstances. This includes constitutional torts committed by their employees as well as the legal resolution of non-constitutional claims against local governments that allow for respondeat superior liability.[25] Municipal governments, often referred to as municipal "corporations," share a range of similarities with private corpo-

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Rittgers, Connick v. Thompson*: An Immunity That Admits of (Almost) No Liabilities*, 2010-2011 CATO SUP. CT. REV., 203.

24. *Id*. at 223 ("A plain reading of Section 1983 and the legislative history of the Civil Rights Act of 1871 does not support the "policy or custom" threshold for municipal liability created by the Court in *Monell*."); Niles, *supra* note 15.

25. David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. Section 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2192 (2005) ("Private employers are, of course, routinely held liable on a pure respondeat superior basis for their employees' torts. Moreover, where municipalities are subject to state law liability for non-constitutional torts, that liability is uniformly premised on the same principles of respondeat superior liability that apply to other employers. The California Supreme Court's statement in *Mary M. v. City of Los Angeles* is typical: 'The doctrine of respondeat superior applies to public and private employers alike.' The author has been unable to identify a single state that restricts its cities' liability for employees' non-constitutional torts in a manner similar to the way *Monell* restricts municipal liability for constitutional wrongs.").

rations, both in their historical development and their current functions and responsibilities.[26]

The current adjudication of constitutional tort claims focuses on the misconduct of individual officials and employees. This focus is misplaced for a range of reasons. First, it places the onus of compensation on those least capable of providing renumeration. Moreover, it addresses the harms caused by past constitutional violations as opposed to incentivizing the prevention of future harms. Ultimately, it places civil rights plaintiffs in a strategic vice, with qualified immunity for individual officers on one side and limited municipal liability on the other, leaving injured parties without any compensation in far too many cases.

Imposition of respondeat superior liability for local governments would focus resolution of claims on the entities most capable of providing sufficient compensation; incentivize implementation of training, hiring, and other policies that could prevent injuries before they occur; and simplify an adjudication procedure that erects unnecessary complications for those seeking relief for serious injuries caused by the very governments that they rely on for their protection.

I. Municipal Liability in Constitutional Tort claims under 42 U.S.C. Section 1983

A. Monroe v. Pape*: Modern Civil Rights Litigation without Municipal Liability*

The provision currently codified as 42 U.S.C. 1983 provides that:

> *Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[27]

Congress's inclusion of this provision in the 1871 Civil Rights Act shows that they intended to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with

26. *Id.* at 2240-41 (argues that *Monell* should be overturned based on the flawed framework by which the Supreme Court made its decision: it was expected that the Supreme Court would "apply the fundamental principles behind respondeat superior to the realities of twenty-first-century municipal employee relationships.").

27. 42 U.S.C. § 1983 (emphasis added).

their authority or misuse it."[28] For almost one hundred years, the provision was not used as the basis for civil rights claims against state,[29] local governmental entities, or their officials. This anomaly stemmed from the difficulties parties faced in demonstrating that actions of government officials that violated their rights were taken "under color of state law," if those actions were not expressly authorized by the relevant government or if there was a remedy under state law to seek relief for the alleged injury.[30]

In 1961, the Supreme Court christened the modern era of civil rights litigation with its decision in *Monroe v. Pape*.[31] The case involved the execution of a warrant, extensive search of the home, and arrest of the wrong criminal suspect by thirteen Chicago police officers. After an extensive textual analysis of the Civil Rights Act, the Court concluded that language of Section 1983 provided: 1) the actions of government officials in their official capacity could constitute action "under color of state law" even if they were contrary to state law, and 2) those who suffered injury as a result of such government action were entitled to a federal cause of action even if a state law remedy was available.[32] However, the Court also held that plaintiffs in this and similar cases could not seek compensation from the governmental entities that employed the officials who violated their rights (here, the City of Chicago) because those governments did not fit the definition of "persons" in Section 1983.[33]

Justice Douglas, writing for the Court, rejected the decades-old doctrine that actions by state officials that violated both State and Federal law could not provide the basis for a Section 1983 claim. He identified "three main aims" of Section 1983: "[f]irst, it might, of

28. Monroe v. Pape, 365 U.S. 167, 172 (1961).

29. *See* Quern v. Jordan, 440 U.S. 332 (1979) ("Section 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.").

30. Alan W. Clarke, The *Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*, 7 The Scholar 151, 156-58 (discussing how not many Section 1983 actions were filed between 1871–1961 due in part to the Court's restrictive interpretation of the reconstruction era's constitutional initiatives, and before the 1960s, state and local officials were essentially immune from liability and victims had little access to court).

31. *Monroe*, 365 U.S. at 167.

32. Martin A. Schwartz, Section 1983 Litigation 2 (Kris Markarian ed., 3rd ed. 2014).

33. *Monroe*, 365 U.S. at 190.

course, override certain kinds of state laws. . . .[34] Second, it provided a remedy where state law was inadequate.[35] [Third, its] aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[36] Further, the legislative history of the Civil Rights Act demonstrated that it "was not the unavailability of state remedies but the failure of certain [s]tates to enforce the laws with an equal hand that furnished the powerful momentum" to pass the Act.[37] Accordingly, the Court held that it "is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy."[38]

But the plaintiff did not just sue the police officers who invaded his home—he also sued the City of Chicago which employed them. Affirming dismissal of the claim against the City, the Court held that in the Civil Rights Act "Congress did not undertake to bring municipal corporations within the ambit of [Section 1983]."[39] The majority relied on legislative history, particularly the fate of an amendment offered by Senator Sherman of Ohio regarding municipal liability which was rejected by the House of Representatives and left out of the final version of the Act. The majority concluded that the amendment failed based in large part on the widely held belief among its members that Congress did not have the constitutional authority to authorize legal actions against local governments.[40] Referencing this and other evidence of congressional intent, the majority concluded that the "response of the Congress to the proposal to make municipalities liable for certain actions . . . was so antagonistic that we cannot believe that the word 'person' . . . in this particular Act . . . include[s] them."[41]

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34. *Id*. at 173 ("Mr. Sloss of Alabama, in opposition, spoke of that object and emphasized that it was irrelevant because there were no such laws.").

35. *Id*. at 173-74 ("That aspect of the legislation was summed up as follows by Senator Sherman of Ohio: 'it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States Courts, because the United States court enforce the United States laws by which negroes may testify.'").

36. *Id*. at 174.

37. *Id*. at 174-75.

38. *Id*. at 183.

39. *Id*. at 187.

40. *Id*. at 190 ("The objection of the Sherman amendment stated by Mr. Poland was that 'the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.' The question of constitutional power of Congress to impose civil liability on municipalities was vigorously debated with powerful arguments advanced in the affirmative.").

41. *Id*. at 191.

B. Monell *and (Severely Restricted) Municipal Liability in Civil Rights Claims*

In 1978, the Supreme Court reconsidered the question of municipal liability in Section 1983 claims. *Monell v. Department of Social Services of the City of New York*[42] involved a claim against the City of New York by a group of pregnant city employees who alleged that the requirement that they take medical leave from their jobs violated their constitutional rights.[43] The Supreme Court granted certiorari to reconsider the question of municipal liability for constitutional torts addressed in *Monroe*.[44] The Court expressly overturned *Monroe* "insofar as it holds that local governments are wholly immune from suit under [Section 1983]" but imposed significant limitations on the scope of municipal liability pursuant to such claims.[45] It relied on a new analysis of the legislative history of the 1871 Civil Rights Act, and specifically, on Congress' rejection of the Sherman Amendment, for both the grant of municipal liability and the severe restriction of its scope.

Writing for the majority, Justice Brennan noted that the Sherman Amendment was not intended to amend the portion of the Civil Rights Act that became Section 1983, and further, that the *Monroe* majority misinterpreted Congress' concern, which, according to Brennan's "fresh analysis" did not extend to seeking to preclude civil liability for municipal governments.[46]

Justice Brennan provided a detailed description of the debate of the various provisions that would become the Civil Rights Act of 1871. He noted that the portion of the act that would ultimately be

42. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

43. *Id*. at 661-62. The district court denied the plaintiffs' requests for backpay because the damages would have come from a municipality which was held unconstitutional by *Monroe*. On appeal, the Second Circuit reject the plaintiffs' arguments and held that "the Board of Education was not a 'person' under §1983." The damages awarded on part of the individuals were also denied because that award would have been paid by the city and having a city pay a damages award would go against *Monroe*. *Id*.

44. *Id*. at 662.

45. *Id*. at 663 ("Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the nature of the obligation created by that amendment was vastly different from that created by § 1, the Court nonetheless concluded in *Monroe* that Congress must have meant to exclude municipal corporations from the coverage of § 1 because 'the House [in voting against the Sherman amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.").

46. *Id*. at 665 ("A fresh analysis of the debate on the Civil Rights Act of 1871 . . . shows, however, that *Monroe* incorrectly equated the "obligation" of which Representative Poland spoke with "civil liability.").

codified as 42 U.S.C. Section 1983 was subject to only limited debate as compared to portions of the Act that sought to address the negative impact of the Ku Klux Klan.[47] The ultimately-rejected Sherman Amendment, proposed as an additional section, was not intended to assert civil liability against municipalities, "but made any inhabitant of a municipality liable for damage inflicted by persons 'riotously and tumultuously assembled.'"[48] Opponents of the first version of the amendment "were unwilling to impose damages liability for nonperformance of a duty (to 'keep the peace') which Congress could not [constitutionally] require municipalities to perform."[49] The central concerns that led to the amendment's rejection were that it would give municipalities "the Hobson's choice of keeping the peace or paying civil damages" and would impose peace keeping obligations on local governments that Congress did not have the power to enforce.[50]

The Court rejected this characterization, however, noting that opponents of the Sherman Amendment, including Representative Poland (whose reasoning for rejecting the Sherman amendment was heavily relied upon by the Court in *Monroe*[51]) "distinguished between *imposing an obligation to keep the peace* and *merely imposing civil liability*," concluding that Congress had the authority to create a cause of action in federal court for constitutional tort claims against municipal governments.[52]

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47. *Id*. at 665.

48. *Id*. at 666-67 ("In the . . .first debate of any kind of the Sherman [A]mendment, Senator Sherman explained that the purpose of his amendment was to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property 'responsible' for Ku Klux Klan damage.").

49. *Id*. at 668, 675. ("There are certain rights and duties that belong to the States, there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, where will its power stop and what obligations might it not lay upon a municipality. . .").

50. *Id*. at 679.

51. Monroe v. Pape, 365 U.S. 167, 190 (1961) (Mr. Poland objected to the amendment because "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations").

52. *Monell*, 436 U.S. at 680 ("I presume . . . that where a State had imposed a duty [to keep the peace] upon [a] municipality . . . an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction. But the enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever." (emphasis added)).

Brennan noted that since Section 1983 "simply conferred jurisdiction on the federal courts to enforce Section 1 of the Fourteenth Amendment," there was "no reason to suppose that opponents of the Sherman Amendment would have found any constitutional barrier to Section 1 suits against municipalities."[53] He added that since Congress clearly intended the statute to be "broadly construed," there was no reason to believe that the provision would not have allowed for claims against municipalities.[54] By the time of the passage of the Civil Rights Act, "it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis,"[55] and that the usual meaning of the term "person" included corporations, and therefore, the intention to extend the definition to municipal corporations was also demonstrated by "an Act of Congress which had been passed only months before the Civil Rights Act."[56]

But the scope of municipal immunity that Justice Brennan defined (essentially in dicta)[57] was severely limited. Referring again to the legislative history of Section 1983, the Court concluded "that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort,"[58] and therefore "a municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under Section 1983 on a respondeat superior theory."[59]

To support this interpretation, Justice Brennan pointed to the language of Section 1983, and its imposition of liability for actions taken "under color of some official policy" to conclude that the statute could not be read to impose respondeat superior liability on governing bodies based "solely on the basis of the existence of an employer-em-

53. *Id*. at 681-82.

54. *Id*. at 686.

55. *Id*. at 687.

56. *Id*. at 688-89. ("Municipal corporations in 1871 were included within the phrase 'bodies politic and corporate' and, accordingly, the 'plain meaning' of [Section 1983] is that local government bodies were to be included within the ambit of the persons who could be sued under the provision.").

57. *See* Barbara Kritchevsky, *Reexamining* Monell*: Basing Section 1983 Municipal Liability Doctrine on the Statutory Language*, 31 URB. LAW. 437 (1999) (discussing how Justice Stevens refused to join Justice Brennan's opinion in *Monell* and argued that Justice Brennan's characterization of municipal liability under Section 1983 was "merely advisory . . . and not necessary to the Court's decision.").

58. *Monell*, 436 U.S. at 690.

59. *Id*. at 691 (defining "respondeat superior" as liability where a municipality becomes liable solely because it employs a tortfeasor).

ployee relationship with the tortfeasor."[60] In the absence of respondeat superior liability, the Court held that local government will only be liable in a Section 1983 action "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict the injury." The Court added that the allowance of such liability "would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."[61]

But the Court did not stop at its doctrinal rejection of municipal vicarious liability for constitutional harms. Justice Brennan also expressed hostility to the broader doctrine of vicarious liability (of which respondeat superior is a subset, focused on liability for employers for torts committed by their employees).[62] In general, he noted that "to this day, there is disagreement about the basis for imposing liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship."[63] Justice Brennan identified what he considered to be the most convincing justifications for vicarious liability: these were the justifications that motivated the Sherman Amendment and were "obviously insufficient to sustain the [A]mendment against perceived constitutional difficulties."[64]

*C. Post-*Monell *Development of Municipal Liability in Section 1983 Claims*

In the years after *Monell*, the Supreme Court and other federal courts developed a jurisprudence for determining what kinds of governmental actions could be classified as involving "official policy," and, therefore, what circumstances might give rise to municipal liability for constitutional torts committed by government officials and employees. The range of actions that have been found to generate official policy has contracted significantly in the past few decades with only

60. *Id*. at 692.

61. *Id*. at 693.

62. The Latin term, *respondeat superior*, translates to "let the master answer." It refers to the legal doctrine where an employer may be held responsible for the actions of his employees, if: (1) actions are performed in the course of employment; and (2) a clear employee-employer relationship is established (excluding independent contractors). *See also Respondeat superior*, Black's Law Dictionary (11th ed. 2019).

63. *Monell*, 436 U.S. at 693 (citing WILLIAM L. PROSSER, LAW OF TORTS 459 (West ed., 4th ed. 1971)).

64. *Id*. at 694.

the highest level and most formal of governmental functions qualifying. This development has left parties few, if any, realistic opportunities to seek compensation for their injuries from the governmental entities whose employees caused their harm.

Two years after *Monell*, in *Owen v. City of Independence, Missouri*,[65] the Supreme Court reversed a lower court decision which held that in a lawsuit alleging violation of the due process rights of a city employee, the defendant City was entitled to qualified immunity from liability based on the good faith of its officials. Rather, the defendant City was "entitled to qualified immunity from liability based on the good faith of its officials."[66] The majority opinion, again from Justice Brennan, held that Section 1983 "creates a species of tort liability that on its face admits of no immunities."[67] Unlike the history of common law immunities for government officials, "there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of Section 1983 that would justify the qualified immunity according the City of Independence by the Court of Appeals," and thus, no support for the Court of Appeals' conclusion that a municipality "may not assert the good faith of its officers or agents as a defense to liability under [Section] 1983."[68]

The majority noted that it would be wrong for a municipality to avoid responsibility for the injury it caused.[69] This was because those injured would not have access to any relief if not from the city[70] and the application of qualified immunity for municipalities would undermine the deterrence impact of monetary liability in civil rights claims against those who cause harm to their own constituents.[71]

Later, the Supreme Court clarified the kinds of municipal activities that could be considered to represent "official policy," and thereby subject the government to Section 1983 liability, in *Pembaur v. City of*

65. Owen v. City of Indep., 445 U.S. 622 (1980).

66. *Id*. at 624-25.

67. *Id*. at 635 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

68. *Id*. at 638, 650 ("In sum, we can discern no 'tradition so well grounded in history and reason' that would warrant the conclusion that in enacting the Civil Rights Act, the 42nd Congress sub silentio extended to municipalities a qualified immunity based on good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute expressly designed to provide a 'broad remedy for violation of federal protected civil rights', we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.").

69. *Id*. at 651.

70. *Id*.

71. *Id*. at 651-52.

Cincinnati.[72] The case involved a one-time decision by official policymakers of the municipality that the Court of Appeals had concluded "cannot establish the kind of 'official policy' required by *Monell* as a predicate to municipal liability under Section 1983."[73]

In an opinion authored by Justice Brennan again, the Court reversed. Brennan began by noting *Monell*'s holding that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort"[74] because it is the policy that differentiates municipal actions from those of its employees. Further, only when the injury is caused by the policy is the government (and not the employee) actually responsible for the harm.[75] Municipal liability could still arise from a single decision as long as it was made by an official government policymaker,[76] including a legislative body, because its actions are by definition expressions of official policy.[77] But legislatures and their staff are not the only municipal actors who have the authority to make official policy. *Monell* "expressly envisioned other officials 'whose acts or edicts may fairly be said to represent official policy', and whose decisions therefore may give rise to municipal liability under Section 1983."[78] The majority also noted that official policy can arise from single action of authorized officials as long as the action was the product of a decision to follow one course of action as opposed to other available options.[79]

Two years after the *Pembaur* decision, a different line-up of Justices issued a majority opinion in *City of St. Louis v. Praprotnik*,[80] addressing the same question raised in *Pembaur*—the circumstances when actions of government employees could give rise to municipal liability. In an opinion authored by Justice O'Connor, the Court acknowledged the possibility that such liability could arise from isolated actions of the employees, but they noted that one allegedly unjustified shooting by a police officer did not qualify.[81] The majority held that

72. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).
73. *Id.* at 478.
74. *Id.* at 477 (quoting *Monell*, 436 U.S. at 691).
75. *Id.* at 479-80.
76. *Id.* at 480.
77. *Id.*
78. *Id.* at 480 (quoting *Monell*, 436 U.S. at 694).
79. *Id.* at 483.
80. City of St. Louis v. Praprotnik, 485 U.S. 112 (1988).
81. *Id.* at 123 ("Although the Court was unable to settle on a general formulation, Justice Brennan's plurality [in *Pembaur*] opinion articulated several guiding principles. First, a majority of the Court agreed that municipalities may be held liable under Section 1983 only for acts for which the municipalities itself is actually responsible. . . . Second, only those municipal officials who have 'final decision[-]making

municipal liability arising from the discretionary action of one employee would be "indistinguishable" from respondeat superior liability.[82] It concluded that when an injury is caused not by the application of official policy, but by the employee's divergence from that policy, the government cannot be held liable under Section 1983.[83] Since there was no indication that anyone authorized to make official governmental policy had delegated that authority, and instead they had simply failed to intervene in decisions made by subordinates, the *Praprotnik* Court rejected Justice Brennan's argument in his dissent for the development of a "de facto final policymaking authority," noting that it would too closely resemble respondeat superior liability.[84]

In *City of Canton, Ohio v. Harris*,[85] the Court advanced its Section 1983 municipal liability jurisprudence, addressing the question of whether "a municipality can ever be liable under Section 1983 for constitutional violations resulting from its failure to train municipal employees." The Court answered that it could, but only under severely limited circumstances.

The District Court in *Harris* had denied a motion to dismiss filed by Canton in response to a claim from a plaintiff who alleged that she had suffered injuries as a result of the failure of police officers to provide her with a reasonable level of medical care while in custody.[86] The trial court concluded that the plaintiff could state a cause of action if she could prove that 1) the city had a custom or policy of granting authority to police supervisors to determine when prisoners should be given medical treatment, 2) that it had made this delegation without providing adequate training for these supervisors to make these decisions, and finally 3) that the supervisor's decision in the instant case

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authority' may by their actions subject the government to Section 1983 liability. Third, whether a particular official has 'final policymaking authority' is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business.").

82. *Id.* at 126-27 ("If, however, a city's policymakers could insulate the government from liability simply by delegating their policymaking authority to others, Section 1983 could not serve its intended purpose. It may be possible to draw an elegant line that will resolve this conundrum, but certain principles should provide useful guidance.").

83. *Id.* at 127 ("Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct from conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipalities because their decision is final.").

84. *Id.* at 131.

85. City of Canton v. Harris, 489 U.S. 378 (1989).

86. *Id.* at 381.

was so grossly negligent "that future police misconduct was almost inevitable."[87] The Court of Appeals affirmed the decision, holding that a municipality will be found liable for failure to train when a plaintiff proves that it acted recklessly or with gross negligence and that the negligence was so severe that the constitutional violation was all but certain to recur.[88] But the Court of Appeals remanded this case for a new trial based on what it saw as confusing jury instructions that it believed would have allowed the jury to find the government liable based solely on a respondeat superior theory.[89]

The Supreme Court identified the relevant policy at issue in the case as "the city jailer shall have a person needing medical care taken to a hospital for medical treatment" and that it could not find how this policy threatened constitutionally protected interests.[90] Acknowledging the availability of municipal liability for "failure to train," the majority limited the scope of this window of liability to situations "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[91]

Applied to the claim in the *Harris* case, the Court identified the issue as whether the training program was so inadequate that it could properly be considered official governmental policy.[92] And, consistent with the Court's treatment of one time actions by authorized city officials, the Court held that the insufficient training of a single government employee could not justify finding of municipal liability,[93] again warning that the analysis of Section 1983 claims must avoid descent into the fallacy of respondeat superior liability rejected in *Monell* and its progeny.[94]

Two decades later, in *Connick v. Thompson*, the Supreme Court addressed a Section 1983 claim filed by a criminal defendant later

87. *Id.* at 382.

88. *Id.* at 382-83.

89. *Id.* at 383.

90. *Id.* at 386-87 (internal citations omitted).

91. *Id.* at 388-89 ("This rule is most consistent with our admonition in *Monell* . . . that a municipality can be liable under Section 1983 only where its policies are the 'moving force behind the constitutional violation.'").

92. *Id.* at 390 ("But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.").

93. *Id.* at 390-91 ("[A]dequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.").

94. *Id.* at 392.

exonerated as a result of misconduct by the prosecutors in his case.[95] The defendant filed civil claims against the Office of the District Attorney for Orleans Parish, the former District Attorney Connick, and several former assistant district attorneys, among others.[96] Specifically, the plaintiff noted the failure of prosecutors to disclose exculpatory evidence in his case in violation of *Brady v. Maryland*,[97] supporting his claim against Orleans Parish (in addition to the individual prosecutors) with evidence of habitual instances of similar violations by lawyers in the same office.[98] At trial, the jury found in favor of the plaintiff in his claim against the individual officials and the government who employed them, awarding him $14 million and holding that his injuries were the result of the District Attorney's (and therefore the local government's) "deliberate indifferent failure to establish policies or procedures" for proper training of the attorneys in his office.[99] While the Court of Appeals affirmed, the Supreme Court reversed. The Court agreed with Connick that "Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training."[100]

After noting that "a pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train," the Court rejected the notion that the record of Brady violations met this standard, saying that these overturned convictions "could not have put Connick on notice that the office's Brady training was inadequate with respect to the constitutional violation at issue here," as the prior cases did not involve the same kinds of evidence withheld in the prior prosecutions.[101]

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95. Connick v. Thompson, 563 U.S. 51 (2011).

96. Thompson v. Connick, 553 F.3d 836, 846 (5th Cir. 2008).

97. *Id*. (citing Brady v. Maryland, 373 U.S. 83 (1963)).

98. *Connick*, 563 U.S. at 62 (noting that "during the ten years preceding [plaintiff's] armed robbery trial, Louisiana courts had overturned four convictions because of Brady violations in Connick's office.").

99. *Thompson*, 553 F.3d at 847 ("The court had originally instructed the jury that to find liability for deliberate indifference [based on failure to train] it had to conclude that 'the district attorney's failure to adequately train, monitor, or supervise amounted to deliberate indifference to the fact that inaction would obviously result in a constitutional violation.'").

100. *Connick*, 563 U.S. at 59.

101. *Id.* at 62-63 ("None of those cases involved a failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.").

The Supreme Court's approach to Section 1983 claims against municipal governments, built from the foundation of *Monell*'s rejection of respondeat superior liability, has in turn, crafted increasingly complex and arduous avenues for plaintiffs seeking compensation for injuries caused by constitutional torts, in order to avoid even a suggestion that local governments would be held vicariously liable for injuries caused their employees and officers.

II. Judicial and Scholarly Critiques of Limitations on Municipal Liability

A. Judicial Critiques

The limitation on municipal liability in Section 1983 claims, particularly the preclusion of respondeat superior liability for municipalities first imposed in *Monell*, has garnered consistent judicial criticism.[102] Justices and judges have rejected *Monell*'s conclusion that the language and legislative history of Section 1983 preclude municipal vicarious liability for constitutional torts and argue that vicarious liability would allow for an appropriate scope of municipal liability by avoiding the unduly restrictive requirements for what amounts to "official policy" by a government applied by the post-*Monell* municipal liability jurisprudence. An early and notable example comes from *Monell*'s author, Justice Brennan, and his defense of a slightly different kind of vicarious liability for municipalities in actions similar to those filed pursuant to Section 1983.

In Justice Brennan's dissent in *Jett v. Dalla Independent School District* (1989), he distinguishes the possibility of respondeat superior liability in claims under 42 U.S.C. Section 1981 (which prohibits any racial discrimination in the performance and enforcement of contracts), from claims under § 1983, noting that the legislative history of the former does not foreclose vicarious liability for governments.[103]

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102. Hawke, *supra* note 9, at 842 ("The Supreme Court's rejection of respondeat superior liability under section 1983 has not gone without opposition. Justice Stevens, in a dissenting opinion, interpreted the legislative history of the Act to find that municipalities can be held liable on a respondeat superior basis. Specifically, Justice Stevens stated that the *Monell* Court should have allowed municipal liability on a respondeat superior basis when unconstitutional acts of employees are 'performed in the course of their official duties.' Justice Breyer has also expressed uncertainty with the majority's holding in *Monell*." (internal citations omitted)).

103. Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701, 751 (1989) ("The Court of Appeals placed heavy reliance on Congress' rejection of the Sherman amendment, which would have imposed a dramatic form of vicarious liability on municipalities, five years after passage of the 1866 Act.").

Further, in his dissent in *City of Oklahoma City v. Tuttle*,[104] Justice Stevens provided the first direct judicial rejection of the *Monell* municipal liability limits. In a case involving a fatal shooting by a police officer, Justice Stevens argued that a police officer performing his official duties is entrusted with the highest level of official authority, and thus, if he violates the federal constitution, then "federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual."[105]

Justice Stevens also casts doubt on Justice Brennan's analysis in *Monell*, arguing that exposure to municipal vicarious liability is supported by the text, legislative history, and prior judicial interpretation of Section 1983.[106] Stevens noted that the Ku Klux Clan Act of 1871 was intended to be a "remedial measure" with expansive language and a broad case of potential defendants ("every person"), and that Congress clearly intended at least some exposure to liability for governments for harm caused by their employees.[107] Given the fact that respondeat superior liability was a common feature of the common law as applied at the time, it is appropriate to conclude, absent some contrary indication, that the authors of the Act would have expected that it would apply to the new causes of action created by the statute. Justice Stevens noted that the word "policy" does not appear in the text of Section 1983 and that there is no indication in the text or legislative history that Congress intended to impose the kind of limitations on municipal liability asserted in the *Monell* and by the plurality in this case.[108]

Justice Stevens closed his dissent by noting that the policy benefits that justify respondeat superior in normal tort litigation against municipal corporations apply with "special force" in claims alleging constitutional torts.[109] His list of policy justifications for such liability

104. City of Okla. City v. Tuttle, 471 U.S. 808 (1985) (Stevens, J., dissenting).
105. *Id.* at 808 (Stevens, J., dissenting).
106. *Id.* at 834.
107. *Id.* at 834-35.
108. *Id.* at 841-42 ("The commentary on respondeat superior in *Monell* was not responsive to any argument advanced by either party and was not even relevant to the Court's actual holding. Moreover, in the Court's earlier decision in *Monroe v. Pape*, although the petitioners had explained why it would be appropriate to apply the doctrine of respondeat superior in Section 1983 litigation, no contrary argument had been advanced by the city. Thus, the views expressed in Part II of *Monell* constitute judicial legislation of the most blatant kind. Having overruled its earlier—and, ironically also volunteered—misconstruction of the word 'person' in *Monroe v. Pape*, in my opinion, the Court in *Monell* should simply have held that municipalities are liable for the unconstitutional activities of their agents that are performed in the course of their official duties.").
109. *Id.* at 843.

includes compensation for victims, deterrence of future violations by promoting development of more efficacious municipal policy, and providing better support for employees "performing difficult and dangerous work."[110]

Lastly, in a dissent in *Board of County Commissioners of Bryan, Oklahoma v. Brown*,[111] Justice Breyer offered a similarly stark critique of *Monell*'s municipal liability limitations, specifically its express preclusion of respondeat superior liability. He noted the complex and confusing doctrine that *Monell* created, including the difficulty in identifying the relevant official or officials with "policymaking authority" for the municipality, and the requirement that courts must decide whether failure to make policy was "deliberately indifferent" as opposed to merely "grossly negligent." The doctrine also requires courts to decide whether it matters that an action producing a constitutional injury occurred as part of officer-training, as opposed to officer-hiring activities.[112] Justice Breyer says that the only reason these picayune distinctions are necessary is that without them, governments could be subject to respondeat superior liability, and if these gymnastics are required to prop up the *Monell* approach, it might not be worth the ongoing effort.[113] Justice Breyer further added a new policy-based critique of the *Monell* rule, noting how the complex adjudication of constitutional tort claims against governments fosters uncertainty for local governments seeking to plan for future liability exposure based on "policy or custom,"[114] and there will be additional financial exposure for municipalities in the absence of the qualified immunity defense.

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110. *Id.* at 843-44 ("The Court's contrary conclusion can only be explained by a concern about the danger of bankrupting municipal corporations. That concern is surely legitimate, but it is one that should be addressed by Congress—perhaps by imposing maximum limitations on the size of any potential recovery or by requiring the purchase of appropriate liability insurance—rather than by this Court. Moreover, it is a concern that is relevant to the law of damages rather than to the rules defining the substantive liability of 'every person' covered by § 1983. The injection into [Section 1983] litigation of the kind of debate over policy that today's decision will engender can only complicate the litigation process. My rather old-fashioned and simple approach to the statute would eliminate from this class of civil-rights litigation the time consuming 'policy' issues that *Monell* gratuitously engrafted onto the statute. Of greatest importance, it would serve the administration of justice and effectuate the intent of Congress.").

111. Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997).

112. *Id.* at 435.

113. *Id.*

114. *Id.* at 436.

B. Scholarly Critiques

The *Monell* municipal liability doctrine has also been subject to a wide array of scholarly critique focused on both its flawed textual and historical analysis and problematic policy implications.[115] In a characteristic and comprehensive example, Professor David Achtenberg argues that Brennan's approach to municipal liability in *Monell* (and the Supreme Court's similar approach in subsequent cases) is unduly protective of "the municipal pocketbook."[116] He discusses how the standard of liability is not only more restrictive than that applied to private employers, but also it is "higher than the standard for municipal liability for non-constitutional torts"[117] and more restrictive than that allowed for punitive damages against private employers.[118]

Achtenberg notes that the scope of municipal liability identified in *Monell* is based in significant part on a mistaken assessment of the approach to respondeat superior in the nineteenth century.[119] He argues that the doctrine was contemporaneously justified by a four rationales: 1) liability should be based on the defendant's power to control the direct tortfeasor, 2) there is legal unity between the tortfeasor and his employer, 3) government has an implied warranty of the servant's fitness, and 4) there is a need for reciprocity between benefits to and responsibilities of the local governments. He adds that the 42nd Congress's rejection of the Sherman Amendment was not merely consistent with, but actually compelled by, these rationales.[120]

Practical litigation concerns have also provided a basis for critique of *Monell*'s model for municipal liability in Section 1983 claims,

115. Achtenberg, *supra* note 25 at 2240-41 (arguing that *Monell* should be overturned based on the flawed framework by which the Supreme Court made its decision; it was expected that the Supreme Court would "apply the fundamental principles behind respondeat superior to the realities of twenty-first-century municipal employee relationships"); Rittgers, *supra* note 23, at 223 ("A plain reading of Section 1983 . . . does not support the 'policy or custom' threshold for municipal liability created by the Court in *Monell*").

116. Achtenberg, *supra* note 25 at 2191.

117. *Id*. at 2192 ("[W]here municipalities are subject to state law liability for non-constitutional torts, that liability is uniformly premised on the same principles of respondeat superior liability that apply to other employers. The California Supreme Court's statement *** is typical: 'The doctrine of respondeat superior applies to public and private employers alike.'").

118. *Id*. at 2192.

119. *Id*. at 2196.

120. *Id*. at 2204. For additional discussion of the flaws in Justice Brennan's historical justification for the rejection of respondeat superior in Section 1983 claims, see James F. Basile, Pauline M. Lavelle & Steven M. Richard, *Constitutional Law* – Jett v. Dallas Independent School District*: The Applicability of Municipal Vicarious Liability Under 42 USC Section 1981*, 63 NOTRE DAME L. REV. 233, 236-242 (1988).

including broad fairness concerns and extensive litigation expenses for plaintiffs, providing an additional justification for "a more efficient and effective system of municipal liability."[121] The rule fosters the anomaly that private employers are vicariously liable when their employees commit a constitutional tort in the course of their employment, but municipalities are not.[122]

These and other basic fairness concerns call for an acknowledgement of the role that municipalities play in creating and preserving the conditions to foster constitutional abuse by their officials. They support the idea that governments should bear the direct financial burden for compensating any injuries that these actions produce and should be incentivized to implement policies and procedures that prevent, or at least reduce the frequency of, constitutional torts.[123] Government employers are in a position to both properly staff and train law enforcement and other public-facing employees, and to deploy those employees with in ways that minimize the potential for violations of the constitutional rights of residents. A focus on holding these governments liable when residents are injured would increase incentives to make the proper decisions ex ante instead of seeking to avoid or diminish any governmental liability post hoc.

III.
Litigation of Section 1983 Claims against Municipalities

A. Resolution of Section 1983 Claims

Plaintiffs in Section 1983 claims commonly sue both the individual officials who allegedly violated their rights as well as the local

121. Hawke, *supra* note 9, at 844.

122. *Id.*; *see also*, Blum, *supra* note 21, at 963-64 ("I cast my vote with those who think it is time to revisit Monell and the Court's mistaken rejection of respondeat superior liability. Adopting respondeat superior liability would not eliminate the need for plaintiffs to plead and prove an underlying constitutional violation. The challenges of Iqbal and the need to prove whatever level of culpability is required for the constitutional tort, as well as the need to prove causation, would still present formidable roadblocks to success in these suits. But, adopting respondeat superior would eliminate the enormous amount of time and resources spent litigating and adjudicating the qualified immunity defense, as well as the hours that presently go into establishing or defeating *Monell* claims.").

123. Vodak, *supra* note 21 at 821 ("Because the municipality has 'clothed the employee with the governmental authority necessary for a constitutional abuse to take place,' fairness requires holding the municipality responsible. Without the legitimacy of the municipality, officers' powerful interactions with the public could not occur. This legitimacy also creates the structure of police departments and the way officers interact with the public that deliberate indifference fails to address. As a result, a victim has the right to obtain compensation from the entity contributing to a system of abuse by failing to adequately address their officers' actions.").

governments that employ those officials. Reform or removal of the qualified immunity defense for individual officers would potentially facilitate successful claims against them. This development would shift focus from the governments and the policies they create, which constitute the central cause of constitutional injury inflicted by government and also command sufficient resources to compensate injured parties, to the individuals responsible for implementing policies who have little if any ability to pay damages in a successful legal action. Implementation of respondeat superior liability for local governments in these cases would foster the same kind of preemptive action (identifying qualified personnel and effective training of that personnel) that exposure to this liability generates for private employers.

Some recent studies illuminate how Section 1983 claims against government officers and their governments are resolved. Local governments generally handle the legal defense for their law enforcement officers who are accused of civil rights violations in addition to the defense for the local government itself as a result of obligations agreed to in collective bargaining agreements made between the government and police unions.[124] Repeated litigation involving the same officials, or alleging the same or similar kinds of constitutional violations, suggests that the current scope of municipal liability exposure has not motivated local governments to implement effective preemptive mechanisms to prevent or reduce constitutional harm before it occurs.

A March 2020 report published in The Washington Post indicated that local governments in the United States have paid more than $3 billion to settle lawsuits filed with almost half of that amount paid in lawsuits against police officers who had already been the subject of lawsuits and for which the government previously paid settlements.[125]

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124. *See, e.g.*, Jake Pearson, *A Police Union Contract Puts Taxpayers on the Hook to Defend Officers When the City Won't*, PROPUBLICA (Mar. 26, 2021, 5:00AM), https://www.propublica.org/article/a-police-union-contract-puts-taxpayers-on-the-hook-to-defend-officers-when-the-city-wont [https://perma.cc/68YU-G26Q] (describing New York City's policy of usually representing police officers in civil suits itself and paying for a third-party law firm to represent officers in the rare cases when the City will not).

125. Keith Alexander, Steven Rich & Hannah Thacker, *The Hidden Billion-Dollar Cost of Repeated Police Misconduct*, WASH. POST (Mar. 9, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/ [https://perma.cc/4PAT-Q2BF] ("In some cities, officers repeatedly named in misconduct claims accounted for an even larger share. For example, in Chicago, officers who were subject to more than one paid claim accounted for more than $380 million of the nearly $528 million in payments. The Post analysis found that the typical payout for cases involving officers with multiple claims—ranging from illegal search and seizure to use of excessive force—was $10,000 higher than those involving other officers. . . . New York, Chicago and Los Angeles alone ac-

Government officials reported that "settling claims is often more cost-efficient than fighting them in court."[126] One of the problems with the current practice of municipal settlements of these kinds of claims is that the "settlements rarely involve an admission or finding of wrongdoing" on the part of the officers or the police departments.[127] In addition, the "details of settlements are hidden behind confidentiality agreements" and ultimately save the city money in reduced litigation costs and potential monetary damages,[128] thus, reducing any incentives that might otherwise exist to change the existing policies that lead to repeat and systematic constitutional violations, and that lead to sums of money paid by local government, large and small, throughout the country.[129]

Theoretically, the absence of respondeat superior liability should shield municipalities from a significant amount of monetary liability in constitutional tort claims. This would appear to be the major motivation for the limitation.[130] But this conclusion is belied by two im-

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counted for the bulk of the overall payments documented by The Post—more than $2.5 billion. In New York, more than 5,000 officers were named in two or more claims, accounting for 45 percent of the money the city spent on misconduct cases. In New York, four attorneys who have secured the highest number of payments for clients separately said the high rate of claims is because of poor training, questionable arrests and a legal department overwhelmed by lawsuits.").

126. *Id.*

127. *Id.*

128. Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NAT'L PUB. RADIO (Sept. 19, 2020, 7:00 AM), https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers [https://perma.cc/AK7U-8MFY] ("Insurance policies and city and county budgets usually pay for judgments and claims. Jurisdictions hurting for cash may borrow money and issue bonds to spread out payments. Add bank fees, plus the interest paid to investors and the costs pile up with taxpayers footing the bill for police misconduct. As COVID-19 devastates budgets nationwide, that could be a more frequent scenario.").

129. *Id*. ("High-profile cases garner the most attention. The family of Michael Brown—the unarmed Black teenager killed by a police officer in 2014, reached a $1.5 million settlement with Ferguson, M[issouri]. In Chicago, the city agreed to pay the family of LaQuan McDonald $5 million. His death was captured on video and the police officer who fatally shot him was convicted of second-degree murder. In 2017, the mother of Philando Castile, a Black motorist killed by a suburban Minneapolis police officer a year earlier, reached a $3 million settlement with city officials. The financial award for Castile's girlfriend, who live-streamed the aftermath of the shooting on Facebook, was $800,000.").

130. Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 755 (2021) (stating a particular difficulty in plaintiffs being able to obtain damages against a municipality because of the *Monell* standard; describing the standard as "a form of sovereign immunity for municipalities."); Hawke, *supra* note 9, at 849 (regarding whether *Monell* or respondeat superior liability is preferred for police misconduct claims, "[o]ne city attorney even commented that these cases are 'always dismissed under *Monell*,' indicating

portant conclusions reached by Professor Joanna C. Schwartz: first, even when individual officers are found liable for constitutional torts, the governments that employ them end up paying the damage awards, and, second, when cities do pay damages arising from misconduct of their officers (either after a judgment at the end of a civil case or in a pre-judgment settlement) the payments rarely come from the general budgets of the municipalities.

In support of the first contention—that police officers rarely, if ever, pay out of pocket for claims or judgments arising from their actions—Professor Schwartz conducted a national study of civil rights claims against local law enforcement officers.[131] The study, which looked at dozens of large, mid-sized, and small law enforcement agencies across the country, found that absolute and qualified immunity, combined with the absence of respondeat superior liability for municipalities, are all based on the assumption that "officers are financially responsible for satisfying settlements and judgments in police misconduct cases."[132]

The study found that between 2006 and 2011 in the forty-four large jurisdictions studied, 9,225 civil rights cases were resolved with payments to plaintiffs. Of those, officers financially contributed to settlements or judgments in only 0.41% of the time.[133] She similarly found that the chances that an officer would, over the course of his or her career, have to contribute to a settlement or judgment were remarkably low. For example, an NYPD officer has a 1 in 308 chance of financially contributing to a settlement during a twenty-two-year career, and a Cleveland police officer has a 1 in 242 chance during the same career span. In Cook County (Chicago), San Francisco, Baltimore, Phoenix, Miami, Atlanta, and Boston, an officer is more likely to be struck by lightning than to have to contribute to a settlement or judgment in a police misconduct case.[134] In addition, officers are almost always provided with defense counsel at no cost to them when sued.[135]

Based on these findings, Professor Schwartz concludes that qualified immunity "can no longer be justified as a means of protecting officers from the financial burdens of personal liability" because of-

satisfaction with the barriers plaintiffs face in bringing claims against municipalities.").

131. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).

132. *Id.* at 899.

133. *Id.* at 890.

134. *Id*. at 913–914.

135. *Id*. at 915.

ficers are not in fact financially burdened in most cases.[136] This conclusion also indicates that qualified immunity reform will not likely have a measurable impact on instances of police and other law enforcement misconduct.

Second, the assumption central to Justice Brennan's rejection of respondeat superior liability for municipalities—that broad exposure to such liability would be financially debilitating for these governments—is severely undermined by the evidence of where the money comes from that municipalities use to pay for victims of civil rights violations. After noting that "individual police officers virtually never pay anything toward settlements and judgments against them," Professor Schwartz addresses the question of, "[w]here does that money come from, if not from individual officers?"[137] She concludes that "settlements and judgments are not always—or even usually—paid from jurisdictions' general funds," and that governments rely on "a wide range of budgetary arrangements" to make payments, including contributions from the law enforcement agencies most directly responsible for the claims.[138] But these payments by the law enforcement entities are "neither necessary [n]or sufficient to impose a financial burden on that department" as "particularities of their jurisdictions' budgeting arrangements" serve to "lessen or eliminate altogether the financial impact of these payments on these agencies."[139]

So, even when misconduct by law enforcement officials does result in financial liability for the governments they work for, there is little incentive for the implementation of new policies and procedures to avoid such liability. When governments (and specifically police departments) are essentially limited to compensating parties for claims against their officers, as opposed to claims against them based on respondeat superior liability, the potential financial exposure is drastically limited by the powerful qualified immunity defense that shields these individuals. Some sort of alteration of this defense would expand the potential for liability, and therefore tend to increase incentives for genuine institutional change, allowing claimants to avoid the qualified immunity barrier altogether and file claims directly against governments based on a clean and simple respondeat superior theory. The likely explosion of successful and potentially successful claims would give governments, for the first time, a compelling reason to consider

136. *Id.* at 939.

137. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1144 (2016).

138. *Id.*

139. *Id.*

drastic alterations to the way they provide public safety services, and to the myriad harms that these approaches can produce for their citizens.

B. Rock and a Hard Place – How Qualified Immunity and Limits on Municipal Liability Squeeze Section 1983 Plaintiffs

Successful reform of the qualified immunity defense would fail to address another dynamic that negatively impacts the actual litigation of Section 1983 claims—the strategic bind that the combination of qualified immunity and drastic limits on municipal liability poses for constitutional tort plaintiffs. The holdings in *Monell* and *City of Independence*, precluding respondeat superior liability against governments in the former and precluding application of qualified immunity for these governments in the latter, create a conundrum for Section 1983 claimants who allege that their rights were violated by the actions of local government officials.

Imagine a hypothetical plaintiff who believes that she is the victim of police misconduct based on an authorized traffic stop and arrest by a county deputy sheriff. The plaintiff must decide whether to sue the county, the deputy, or both. The vast majority of plaintiffs in this situation sue both available defendants. Yet, strategic complications often arise immediately. A claim against the county based on the actions of the deputy would require proof that his actions were the proximate cause of an official governmental policy. The decades-long development of the judicial doctrine on resolution of municipal liability claims discussed in Part I, above, demonstrates the difficulties in showing that anything short of an official proclamation of a designated legislature meets the standard for an "official policy." Even when a policy can be identified, showing that there is a causal connection between the official policy and the harm is difficult.

But even if the plaintiff were able to beat the high odds against showing the existence of an official governmental policy, she would likely lose her claim against the deputy. In light of such a policy, the official could assert a strong qualified immunity defense: a defense that is steadily evolving into an all but complete barrier to recovery.[140]

140. Niles, *supra* note 15, at 173 ("The new standard, which relied on the Court's prior decision in *Bell Atlantic Corp. v. Twombly*, was expressly designed to make it easier to dismiss claims against prosecutors and high level law enforcement officials with a low probability of ultimate success prior to discovery."); Blum, *supra* note 21, at 916-17 ("Municipal liability claims have become procedurally more difficult for plaintiffs to assert since the Court's imposition of a more stringent pleading standard *in Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, and even more challenging to ultimately prove after the Court's decision in *Connick v. Thompson*.").

By showing that he acted "reasonably" in following official policy, the deputy could successfully argue that he did not violate any "clearly established" constitutional right.[141]

Based on the combination of qualified immunity and limited municipal liability, the hypothetical plaintiff will be forced, as a practical matter, to choose one or the other avenue for her legal claim— either focusing on the government or on the official as the defendant in her case. This forced choice is unheard of in tort claims against private parties and belies the reality that in most instances of harm caused by private or public parties, fault for the harm is likely to be shared between both supervisory and operational personnel. This strategic vice, and the impact that it has on the plaintiff's likelihood of success against either defendant, saps the potential of civil rights litigation to foster incentives to implement policies that might prevent constitutional harm before it occurs, as opposed to a scheme where liability resulted in simply compensating victims of that harm.

An empirical study of Section 1983 claims details policies employed by cities of different sizes when defending against these claims.[142] Some of the significant conclusions of the study include that: 1) governments are almost always named by plaintiffs as defendants in police misconduct claims,[143] 2) approximately half of these governments accept respondeat superior liability under state law for such misconduct, 3) a majority of these state laws impose caps on monetary awards allowed in these cases ranging from $100,000 to $500,000, and 4) litigation costs for these cities are often significantly higher than the cap on monetary damages. All these factors support the conclusion that "cities could minimize or eliminate a significant portion of the litigation and legal expenses by accepting respondeat superior liability."[144]

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141. Benjamin S. Levine, *"Obvious Injustice" and Qualified Immunity: The Legacy of Hope v. Pelzer*, 68 UCLA L. REV. 842, 845-47 (2021) (explaining how, first defined in 1975, the "clearly established" standard was defined by requiring the plaintiff to show that the "right has already been recognized in prior decisions in order to prevail."). The Court determined "what precise showing was required" in *Hope v. Pelzer*, where Alabama prison guards tied an inmate to a pole outside in the grueling heat and did not provide him with adequate water, the Court found there was an "*obvious* cruelty inherent in this practice." This liberalized the standard and made it easier for plaintiffs to bypass the qualified immunity defense. However, post-*Hope*, the Court tightened the standard and now requires the plaintiff to "point to factually similar precedent in order to show that the conduct at issue had already been deemed unconstitutional." Lower courts are not required to make a showing that a constitutional violation occurred. *Id*.

142. Hawke, *supra* note 9, at 847.

143. *Id.* at 847–48.

144. *Id.* at 848.

The preclusion of respondeat superior also limits access to fully compensatory financial relief for Section 1983 plaintiffs by limiting ultimate liability only in those cases where the powerful qualified immunity defense does not apply; and therefore, ultimately undermining the central remedial motivation for the statute.[145] Barriers to fair compensation for plaintiffs include: difficulties in identifying and/or obtaining full compensation from the proper municipal employees and, related, difficulties in finding attorneys to represent them in bringing these claims.[146]

IV. Respondeat Superior Liability for Municipalities in Section 1983 Claims

A. Respondeat Superior Liability in Tort

The central argument in favor of the application of respondeat superior liability for local governments in Section 1983 claims is that the same motivations that justify application of the theory and its liability to private employers apply at least as much, if not more, to governmental employers.

Section 2.04 of the Restatement (Third) of Agency states that "[a]n employer is subject to liability for torts committed by employees while acting within the scope their employment."[147] Commentary on Section 2.04 provides that "respondeat superior is fundamental to the operation of the tort system in the United States."[148] William Paley, in the first Agency treatise published in the United States, stated that a master is responsible for the negligence of its servants when performing their official duties even absent direct supervisory control.[149] The commentary for Section 2.04 also notes that the doctrine applies both to acts specifically directed by an employer and to consequences from "inattentiveness or poor judgment" by employees.[150]

The Restatement also notes that respondeat superior incentivizes principals to hire employees, plan activities, and develop procedures that will reduce the likelihood of tortious injury and likely be more effective at reducing this harm than doctrines that limit liability to the individual actor. In addition, the employer is significantly more likely to be in a position to satisfy any judgment awarded to the plaintiff than his employee based both on available financial resources and on the

145. Vodak, *supra* note 123, at 817.
146. *Id*. at 817.
147. Restatement (Third) of Agency §2.04 (Am. L. Inst. 2006).
148. Restatement (Third) of Agency §2.04 cmt. b (Am. L. Inst. 2006).
149. *Id.*
150. *Id.*

ability to spread the cost of injury by way of insurance coverage which governments will be in a better position to secure on reasonable terms than an individual employee.[151]

Justice Brennan noted these justifications for respondeat superior in his opinion in *Monell* but concluded (based on his subsequently, extensively criticized statutory analysis) that they were not enough to motivate Congress to impose the kind of general liability that he says was proposed in the ultimately unsuccessful Sherman Amendment.[152] He rejected the justification in large part because of the concern that Congress did not have the constitutional authority to impose this kind of liability on local governments.[153]

But notwithstanding his rejection of application of the doctrine to local government (based on the flawed statutory interpretation discussed above), these justifications apply with significantly *more force* to public as opposed to private employers. A large and deep-pocketed private employer, along with its even larger and deeper-pocketed insurance provider, plays the role of the "community" as the defendant in a respondeat superior claim, but the government is the *actual* representative of the community and is far better situated to spread the cost of injuries caused by the official acts of their employees than any private party could be.

Also, the nature and scope of injuries that governments and their employees can cause are larger than any individual private employer or combination of employers in any community, enhancing the importance of the role that respondeat superior can have in encouraging preventative action to avoid injury before it occurs. Blanket liability for the actions of all their employees would motivate local governments to commit resources to better screening of potential employees and enhanced training of those employees once hired. And, in regard to specific issues arising out of law enforcement actions by local governments, respondeat superior liability would incentivize local government not only to be more careful in recruiting police officers, but to provide more extensive and effective training of those officers and government prosecutors that could be expected to avoid the harm

151. *Id.*
152. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).
153. *Id*.

caused by government misconduct in *Connick v. Thompson*[154] and many similar cases.[155]

B. Municipal Corporation as "Corporations"

Another reason justifying application of respondeat superior liability to municipal corporations is their historic and structural similarity to private corporations that have been subject to this form of liability for centuries. Every local government in the United States is either a municipal corporation or a quasi-corporation. A municipal corporation is a city or other local political entity that is created pursuant to a charter by the state and voluntarily organized by residents. Counties are different from cities and other municipal governments in that they "are created by the state and not by the consent of the people who they govern."[156]

Cities and counties in the United States are subject to the authority of the State in which they reside, and their authority has traditionally been limited by what is referred to as Dillon's Rule, a common law rule granting local governments powers: 1) expressly granted to them, 2) necessarily for the execution of the express powers, and 3) essential to the achievement of the purposes of the corporation.[157] These limitations have been consistently challenged over time, and in order to allow for more flexibility, states have enacted laws granting

154. Connick v. Thompson, 563 U.S. 51, 79-80 (2011) (Ginsberg, J., dissenting) ("From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived Brady's compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to Brady was standard operating procedure at the District Attorney's Office. What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of Brady's disclosure requirements were pervasive in Orleans Parish.").

155. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (Oxford Univ. Press 2007); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415 (2010).

156. Pekham Pal, *History, Governmental Structure, and Politics: Defining the Scope of Local Board of Health Power*, 84 FORDHAM L. REV. 770, 789 (2015).

157. *Id.* at 777-78.

localities broad powers even in the absence of specific state authorization.[158]

In the Anglo-American tradition, cities and local governments were often independent of any measurable outside control. Instead, they were influenced by the private interests that benefited from municipal organization. During the English medieval era and later, a "borough system" dominated where extensive authority to regulate trade and commerce was granted to local governments that were generally led by "self-perpetuating oligarchies" of local merchants. The all-but-exclusive objective of these governments was the promotion of commercial interests to achieve the highest sustainable financial gain.[159] The notion that the central mission of local governments would include maximizing the public good through provision of public and social services arose later.[160]

Cities were established in the British colonies in North America consistent with these developments. In the late 17th and early 18th centuries, approximately twenty-four municipalities were authorized to foster commercial growth in the New World. Early residents of these communities were concerned that they would be dominated by tradesmen and merchants like similar settlements in England.[161] These concerns proved to be well-founded as the new municipalities invariably focused on commercial development at the expense of attention to health, safety, and public welfare.

But this limited focus began to expand, as it had over time in Britain, as cities in the newly independent United States evolved to focus more attention on the concerns of the broader community. Starting in the early 19th century in New England, "the city would morph into an institution that was chiefly concerned not just with the flourishing of commerce and industry, but also with the provision of health, safety, and the welfare of its people."[162] Over time, cities in-

158. *Id.* at 778 ("Certain states also provide for county home rule: if a county decides to implement home rule, they may adopt a county home rule charter that dictates how to resolve local county matters. Thus, these counties are more autonomous than a traditional county that is a "mere instrumentality of the state" subject to complete state legislative control.").

159. Christopher K. Odinet, *Fairness, Equality, and a Level Playing Field: Development Goals for the Resilient City,* 50 IDAHO L. REV. 217, 224-25 (2014).

160. *Id.* at 225 ("Alongside these advances came political changes, which heralded greater individual freedoms, more access to rights in land, and the consolidation of governmental power and decision-making within city centers. And lastly, the desire of the populace to enjoy the higher standards of living and the opportunities for entertainment, amusement, and learning caused people to flock to cities.").

161. *Id.*

162. *Id.*

creasingly expanded their services including municipal police forces in a shift from the previously dominant mode of private prosecution of criminal conduct.[163]

While cities and other local governments in the United States have evolved to increasingly address the public as opposed to private commercial concerns and interests, the basic "corporate" structure defining these entities has not changed. A municipal corporation is organized with a supervisory structure essentially identical to private corporations, with public officials given similar duties to their private counterparts: mayors are comparable to Chief Executive Officers; city or county councils are similar to boards of directors (both accountable to constituents—voters for governments and shareholders for private corporations). If our legal structure enforces respondeat superior liability for the private version of this corporate structure, there is no sufficient reason for not applying the same scope of liability to the public version when its authorized officials violate the constitutional rights of their citizens. If anything, the argument for respondeat superior for public corporations is stronger than for private given the relationship between the government and its community who all stand to benefit and suffer from the proper or improper performance of governmental duties. Broad community accountability for governmental disfunction, and potential political consequences thereof, could be another impetus for positive change that has otherwise remained elusive.

C. Municipal Respondeat Superior Liability for Other Torts

Application of respondeat superior liability to local governments does not require any entirely novel doctrine—local governments are already subject to respondeat superior liability as a general matter in a wide array of circumstances outside of Section 1983 litigation.

In a 1910 note on "recent cases," the Yale Law Journal referenced a decision from the Supreme Court of Kentucky in *Schwalk's Admiralty v. City of Louisville*[164] which held that "a municipal corporation, acting in furtherance of 'the public good' is not liable for damages caused by the torts of its officers[165] because the officers of such a

163. *Id.* at 226 ("A simple list of urban functions and the date when they first began to be performed illustrates this problem-solving approach: provision of a municipal water system (1822); sewage and sanitary works (1823); street railways (1832); public education (1840); municipal police force (1844); public parks (1840's); tax-supported public libraries (1854); bridges financed by municipal funds (1863); public health boards (1866); outdoor lighting (1880's).").

164. Schwalk's Adm'r v. City of Louisville, 122 S.W. 860 (KY 1909).

165. *Id.* (quoting Parks v. City Council of Greenville, 44 S.C. 168 (1895)).

government are personally liable for malfeasance or non-feasance in office and the government is "responsible for neither."[166] But the Journal clarified that this was not the universal rule across the United States, noting that New York courts held that the doctrine *does* apply in the case of injuries resulting from the negligence of persons employed by municipal officers in repairing the public sewers, and that in Wisconsin, a city government was held liable for injuries sustained by reason of a defective drawbridge.[167] The article cites an additional case where a city was held liable for negligence of its employee in repairing damages to a cemetery.[168]

Several courts in more recent cases have applied respondeat superior liability to municipalities in non-constitutional cases.[169] For example, in *Jesik v. Maricopa County*, a decedent's father filed a claim against campus security at Maricopa County Community College based on the alleged failure of officers to follow up on a report of a violent threat.[170] The Court of Appeals reversed summary judgment in favor of the College and concluded that "Maricopa County Community College District will be held liable for any breach of duty by its employee, the security guard, if he was acting within the scope of employment."[171]

In *St. John Town Board v. Lambert*, two plaintiffs left their grandmother's house after consuming alcoholic beverages on a rainy night.[172] One plaintiff drove his car into a ditch and sued the town board for failure to provide sufficient warnings that the road ended in the cul-de-sac. The court ruled in favor of the plaintiffs, holding that all "[g]overnmental units were bound by this duty, directly and deriva-

166. Recent Cases, 19 YALE L. J. 589 (1910).

167. *Id.* (quoting Lloyd v. City of New York, 5 N. Y. 369 and Stephani v. City of Manitowac, 89 Wis. 467 (1895) (emphasis added)).

168. *Id.* (citing 2 DILL. MUN. CORP. § 985; Deane v. Inhabitants of Randolph, 132 Mass. 475 (1882)).

169. *See, e.g*. City of Lanett v. Tomlinson, 659 So. 2d 68 (Ala. 1995) (finding city liable under respondeat superior theory when motorist was injured at intersection where stop sign had fallen); Scott v. Dist. of Columbia, 493 A.2d 319 (1995) (finding city liable under respondeat superior for intentional torts of its employees committed within the scope of their employment); Gilbert v. Richardson, 264 Ga. 744, 754 (1994) ("The rationale [for municipal respondeat superior liability] is that the government should be liable for the "inevitable mishaps which will occur when its employees perform their functions without fear of liability, particularly when government has waived its immunity as a sovereign"); Jones v. Kearns, 120 N.C. App. 301 (1995) (finding city liable for damages caused when horse ridden by officer assigned to patrol fairgrounds steps on plaintiff's foot).

170. Jesik v. Maricopa Cnty, 611 P.2d 547 (Ariz. 1980).

171. *Id.* at 551.

172. St. John Town Bd. v. Lambert, 725 N.E.2d 507 (Ind. Ct. App. 2000).

tively, under a theory of respondeat superior" because the local government owes a duty of care to private individuals.[173]

And in *Wichser v. Major*,[174] a police officer entered into a contract with a construction company to do work on his home. The officer disputed the payment owed to the construction company and eventually engaged in a physical fight with a company employee, later placing the employee under arrest. The employee sued the officer and the city for false arrest. The court rendered judgment against the officer, as well as against the city based on a respondeat superior theory, holding that the officer was acting within the scope of his employment when he engaged in the relevant actions.[175]

The arguments for application of respondeat superior for municipal governments discussed above are reinforced by the existence of extensive respondeat superior liability for those same governments in essentially all other areas of tort liability. There is no convincing justification to impose this kind of liability in standard tort claims and not in constitutional cases.

CONCLUSION

The current judicial mechanism for resolution claims pursuant to 42 U.S.C. Section 1983 imposes severe limits on the liability of the governments that employ the violators of constitutional rights by precluding application of respondeat superior liability. A reversal of this limitation would improve legal resolution of these claims by allowing reasonable access to resources to compensate injured parties. Additionally, it would focus the attention of the litigation not only on the entities best able to pay for the harm caused by their employees, but also on the only potential defendants in a position to prevent a meaningful portion of this harm before it happens.

173. *Id.* at 515.
174. Wichser v. Major, 694 So. 2d 924 (La. Ct. App. 1995).
175. *Id.* at 927.