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Revisionist Municipal Liability

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ARTICLES

REVISIONIST MUNICIPAL LIABILITY

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The current constitutional torts system under 42 U.S.C. § 1983 affords little relief to victims of government wrongdoing. Victims of police brutality seeking accountability and compensation from local police departments find their remedies severely limited because the municipal liability doctrine demands plaintiffs meet near-impossible standards of proof relating to policies and causation.

This Article provides a revisionist historical account of the origin of the Supreme Court's municipal liability doctrine. Most private claims for damages against cities or police departments do not implicate the doctrine's early federalism concerns over protracted federal judicial interference with local governance. Meanwhile, the federal government imposes extensive reforms on local police departments through the Violent Crime Control and Law Enforcement Act, 42 U.S.C.

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§ 14141. The resulting system of bifurcated municipal liability for police misconduct ignores history. It permits government-initiated, systemic injunctive relief claims to flow readily, but effectively bans individual victims' discrete damages claims.

This Article proposes making it easier for individuals to sue local governments for police brutality. Reducing the standard for damages relief does not offend federalism principles and realizes objectives critical to the constitutional remedial system: compensation, trust, vindication of rights, and appropriate assignment of responsibility. This Article proposes a remedial scheme authorizing civil actions for police brutality victims against local governments for (1) a pattern or practice of local government police misconduct, and (2) isolated instances where a local police department lacks a policy and there is national consensus among other local departments that the policy is necessary to prevent a particular constitutional harm. The proposal also expands potential individual officer liability to instances in which an officer ignores a specific policy of a local police department aimed at preventing wrongdoing.

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I. INTRODUCTION

Municipal liability is practically a dead letter. The Supreme Court's jurisprudence in this area is two-faced at best. In one breath, the Court invokes the availability of a remedy for holding local governments accountable for unconstitutional conduct like systemic police brutality, yet constructs standards so impossibly high that an aggrieved person rarely, if ever, can establish municipal liability. It has been almost thirty years since the Court found that a local "policy caused a constitutional violation."[1] This anemic municipal liability frustrates the Court's purported balancing of the protection of individual constitutional rights—through compensation and deterrence of misconduct—and the guardianship of local autonomy.[2] Moreover, the doctrine is part of a parsimonious constitutional tort adjudication system that, through qualified immunity, generally denies police brutality victims a remedy against government employees.[3]

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[1] Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 414 (2016).

[2] *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 657 (1980) (finding that "the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct"); *id.* (noting the "proper[ ] allocat[ion] [of] these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity").

[3] *See generally* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force,* 68 FLA. L. REV. 1773 (2016) (describing how qualified immunity doctrine and excessive force case law work together to limit § 1983 remedies). All of the various other constitutional torts doctrines favor government actors as well. Sovereign immunity insulates state governments from damages liability for constitutional violations. *See* Hans v. Louisiana, 134 U.S. 1, 10, 15 (1890) (finding that the Eleventh Amendment, which clearly "prohibits suits against a State . . . brought by the citizens of another State, or by citizens or subjects of a foreign State" is not "left open for citizens of a State to sue their own state in the federal courts"); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that "person" in § 1983 does not include states or state agencies). Additionally, judicially crafted causes of action afford meager accountability for individual federal law enforcement officers' constitutional wrongdoings. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("The Court's precedents now make clear that a *Bivens* remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.' " (quoting Carlson v. Green, 446 U.S. 14, 18 (1980) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)))); *id.* at 1866 (recognizing that federal officials are "entitled to qualified immunity with respect to 'discretionary functions' performed in their official capacities"). The Supreme Court's rigorous pleadings standards further discourage effective civil actions against government actors. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (holding that relief is not available "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct").

Because the bulk of people's encounters with law enforcement involve local officers, the limited civil remedy against local governments and their agents is particularly troubling.[4] Most members of the public have little occasion to defensively invoke constitutional protections by, for example, moving to suppress unlawfully obtained evidence.[5] People also will rarely seek prospective relief enjoining police from a particular offensive practice.[6] An expanded conception of municipal liability, which also significantly truncates the interrelated qualified immunity doctrine, is therefore required so that police brutality victims may obtain the chief constitutional civil remedy—damages.

Though proposals to reform police practices abound, there has been little focus on the singular importance of securing compensation.[7] Current municipal liability doctrine does not distinguish forms of relief, precluding damages claims based on reasoning that, I argue, draws on inapposite concerns over equitable remedies entangling federal courts in local governance.

A textbook account might draw the birth and evolution of municipal liability in linear fashion. But like any good origins story, the details are murkier. The Supreme Court first disavowed municipal liability in 1961 in *Monroe v. Pape* based on its reading

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[4] Though other forms of government misconduct may also merit changes to government immunity law, police brutality uniquely justifies expansion of local government liability because of the public's frequent, physical, and often involuntary interactions with officers that may merge into harassment, profiling, searches, seizure, and violence. *See* LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 1 (Oct. 27, 2016), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf (finding that "over 62.9 million U.S. residents age 16 or older" had at least one contact with police in 2011, and for approximately half of those people, "the most recent contact was involuntary or police-initiated").

[5] *See Bivens*, 403 U.S. at 410 (1971) (Harlan, J., concurring) ("[A]ssuming [petitioner's] innocent of the crime charged, the 'exclusionary rule' is simply irrelevant."); Michael L. Wells, *Civil Recourse, Damages-As-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1051–52 (2012) (noting that in some situations it is not possible for constitutional rights to be raised defensively).

[6] *See, e.g.*, *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

[7] *See generally*, *e.g.*, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017) (addressing important areas including the country's violent racial past, racial disparities in sentencing, policing of black males, racial profiling, implicit bias instruction, police and community relations, and prosecutorial and grand jury reforms); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, OFFICE OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), https://ric-zai-inc.com/Publications/cops-p311-pub.pdf (describing the need for changes in policies and procedures due to fatal police shootings throughout the country).

of 42 U.S.C. § 1983's legislative history.[8] Only seventeen years later, the Court reversed itself in *Monell v. Department of Social Services*, offering a wholly different reading of the legislative history.[9] Yet in breathing life into municipal liability, *Monell* reflects much ambivalence about the remedy.

Although the *Monell* Court upheld a municipal liability claim, it added the caveats that a constitutional violation must be tied to a policy or custom and that liability does not attach through respondeat superior.[10] The subsequent near-four decades have seen evolution and refinement of these caveats, which tend to limit municipal liability through stringent causation and culpability standards. In particular, plaintiffs must establish that a municipality's "*deliberate* conduct . . . [is] the 'moving force' " causing the deprivation of federal rights.[11] Plaintiffs must also demonstrate that a municipality acted with deliberate indifference to a "plainly obvious" risk that its action would violate the federal right at issue.[12]

Commentators and the Court have generally attributed *Monell*'s parsimonious municipal liability bent to a concern for federalism that is easily traced back to the *Monroe* to *Monell* to post-*Monell* progeny line.[13] In its invocation of federalism, the Court also stressed the negative financial effects that the damages from an expansive municipal liability would visit on local governments.[14]

This Article's revisionist historical approach, however, reveals that the above narrative is falsely circumscribed.[15] The prevailing

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[8] *See* Monroe v. Pape, 365 U.S. 167, 191 (1961).

[9] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

[10] *Id.*

[11] Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

[12] *Id.* at 411.

[13] *See, e.g.*, *Monell*, 436 U.S. at 664 (noting that the Court in *Monroe* concluded that Congress doubted its "constitutional power . . . to impose *civil liability* on municipalities" (emphasis added) (quoting *Monroe*, 365 U.S. at 190)).

[14] *Id.* at 664 n.9 ("Mr. Justice Douglas, the author of *Monroe*, has suggested that the municipal exclusion might more properly rest on a theory that Congress sought to prevent the financial ruin that civil rights liability might impose on municipalities." (citing City of Kenosha v. Bruno, 412 U.S. 507, 517–20 (1973))).

[15] By using the term "revisionist," I engage here in what Arthur Schlesinger simply describes as "a readiness to challenge official explanations." ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 165 (1986).

narrative ignores the Court's earlier concerns over structural reform litigation and civil rights injunctions that were at issue in the 1960s and 1970s. Under a revisionist analysis, today's municipal liability doctrine may be better explained by the Court's unspoken and sublimated anxieties over impact litigation that sought systematic reforms under federal judicial supervision.

Most lawsuits asserting municipal liability are more modest in their aims, often seeking only damages or discrete equitable relief, rather than institutional upheaval. These limited actions serve the vital purpose of compensating victims of unconstitutional municipal policies, practices, and customs. Permitting the public to bring more constitutional tort damages claims against local governments also supports principles of procedural justice[16] and civil recourse[17]—empowering community members, vindicating constitutional rights against wrongdoers, and fostering trust in courts' fairness.

It is specifically these more modest damages claims that should not be essentially barred on the same federalism grounds that are animated by systematic structural reform litigation efforts. These damages actions do not implicate the same federalism concerns.

Failing to appreciate the animating rationales of municipal liability can lead to anomalous legal remedial schemes. The current judicial and statutory framework for addressing police brutality offers a useful example. The decline of municipal liability as an avenue for limited judicial relief from police brutality led, in part, to a surge in structural reform litigation and police reform spurred by the federal executive via its congressionally created authority under 42 U.S.C. § 14141, now 34 U.S.C. § 12601.[18]

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[16] *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 292–94 (2003) (discussing people's willingness to defer to the decisions made by legal authorities and stating that "people who receive outcomes that they regard as unfavorable or unfair are more willing to accept those outcomes if they are arrived at through procedures they regard as being fair").

[17] *See* Wells, *supra* note 5, at 1011–13; *see also* Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 471–72 (discussing the importance of increasing plaintiffs' leverage and motivation for suing police and obtaining reforms through reduction of barriers to police liability) [hereinafter Schwartz, *Who Can Police the Police?*].

[18] *See* 34 U.S.C.A. § 12601 (Westlaw through Pub. L. No. 115-90) (stating that whenever the Attorney General has reason to believe that a governmental authority has engaged in a pattern or practice of conduct by law enforcement officers that deprives persons of rights,

These reforms have led to welcome and significant improvements in police training, use of force, and accountability in several police departments across the nation. But resource constraints and political considerations often limit the scope of reform. Moreover, parties involved in § 14141 litigation often fail to sufficiently engage the local community—particularly police misconduct victims—in the reform process. Finally, § 14141 is solely prospective in its remedial reach, affording no compensation to victims of police brutality.

Despite the limited ambit of § 14141 structural reform litigation, the inevitably intrusive nature of these actions stands in stark contrast to the banner of federalism that the Court has invoked for some forty years in rejecting various individual lawsuits asserting municipal liability. To be sure, Congress granted the federal executive the authority to intercede in light of the Court's skepticism of judicially authorized institutional litigation and reforms. But the authority would appear to contravene the Court's concern over federal intrusion into local law enforcement prerogatives. This Article addresses whether the principles of federalism would be less offended were individuals granted more fulsome damages remedies in the form of more expansive municipal liability.

Moreover, ensuring municipal liability's vitality is particularly necessary in any era where the federal executive is not inclined to pursue § 14141 actions. The Trump Administration has, for example, indicated that it will not pursue litigation against local police agencies for excessive force and other constitutional violations, suggesting that it may even undo consent decrees entered pursuant to § 14141.[19] Where police department

privileges, or immunities secured by the Constitution or laws of the U.S., he "may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice"). 42 U.S.C. § 14141 has been reclassified as § 12601 of Title 34 of the United States Code, *Crime Control and Law Enforcement*. This editorial reclassification was implemented in the online version of the Code on September 1, 2017, and will appear in the printed version of the Code in Supplement V of the 2012 Edition. To remain consistent with cited works and to avoid confusion, I will use § 14141 throughout this Article to refer to the provision of the Code that authorizes the Attorney General to institute a civil action against police agencies that engage in a pattern or practice of unconstitutional misconduct.

[19] Attorney General Jeff Sessions's memo to Department of Justice officials suggests that the federal government's local law enforcement reform efforts may cease with the Trump Administration, owing to some of these very federalism concerns. *See* Memorandum from

accountability may so readily become a casualty of politicization, the individual damages lawsuit should not be so easily precluded by restrictive, judicially imposed standards resting on an inapposite federalism rationale.

Adopting a more contextualized—or revisionist—history of municipal liability *should* liberate the Court to revisit its municipal liability jurisprudence. After all, this is a mess that the Court has made. But the Court has proven so wedded to fending off attempts to secure compensatory damages for government wrongdoing that any hope for a more permissive municipal liability damages standard lies with the Legislative Branch. To the Congress's credit, it did, at least, address some of the Judiciary's errors regarding equitable relief with its structural reform legislation. Now, it should finish the job concerning damages liability.

Part II of this Article charts the origins of the *Monell* standard and revisits the legitimacy of the federalism concerns that purportedly animate the restrictive causation requirement for municipal liability under § 1983. Part III addresses one legislative effort—§ 14141—to confront some of the Court's jurisprudence that limited the public and the government's efforts to secure police reforms. Part III also explores the shortcomings of § 14141, particularly from a democratic and compensatory perspective, as well as the significant federalism issues that the law raises.

Part IV argues that, because the Court's federalism concerns were motivated by the invasive nature of prospective relief, damages claims merit a diminished standard of liability. This Part lays out how the history and nature of damages relief also merit a lesser showing for municipal liability. Part IV further demonstrates that a more available damages remedy from local governments for police abuses will foster victim compensation, improve the public's

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Attorney General Jefferson B. Sessions III to Heads of Dep't Components and U.S. Attorneys on Supporting Federal, State, Local and Tribal Law Enforcement (Mar. 31, 2017) [hereinafter Sessions Memo] (on file with the United States Department of Justice), http://www.justice.gov/opa/press-release/file/954916/download (calling for a review of local law enforcement reform efforts, including "existing or contemplated consent decrees" based, in part, on the principle that "[l]ocal control and local accountability are necessary for effective local policing" and "[i]t is not the responsibility of the federal government to manage non-federal law enforcement agencies").

trust in the legal system, vindicate constitutional rights, and better affix responsibility for wrongdoing.

Finally, Part V proposes a legislative framework for assessing municipal liability claims seeking only damages relief. The remedial scheme authorizes two civil actions for police brutality victims against local governments for (1) a pattern or practice of local government police misconduct, and (2) isolated instances where a local police department lacks a policy and there is national consensus among other local departments that the policy is necessary to prevent a particular constitutional harm. The proposal also expands potential individual officer liability to instances in which an officer ignores a specific policy of a local police department aimed at preventing wrongdoing. Part V concludes by examining both the strengths and the weaknesses of the proposed framework.

II. REVISING *MONELL*

A. *MONROE V. PAPE*

At the outset of the rebirth of § 1983 as a constitutional remedy in 1961, the Supreme Court's resistance to municipal liability was distinguished by ostensible alarm over monetary damages' debilitating financial impact on local governments. In *Monroe v. Pape* the Supreme Court addressed a § 1983 lawsuit alleging the abusive treatment by Chicago police officers, which sought damages against both the officers and the city of Chicago.[20] The Court established for the first time that local government officials could be held liable for constitutional violations under § 1983.[21] Yet, the Court also held that municipalities enjoy immunity from liability, reasoning that Congress had not intended municipalities to fall within the scope of § 1983.[22]

The Court relied on the legislative history of the civil rights action precursor to § 1983. The Court construed the 42nd Congress's rejection of the Sherman Amendment to the 1871 Ku Klux Klan Act, "which would have made 'the inhabitants of the

[20] Monroe v. Pape, 365 U.S. 167, 169 (1961).

[21] *Id.* at 172.

[22] *Id.* at 187.

county, city, or parish' in which certain acts of violence occurred liable 'to pay full compensation' to the person damaged or his widow or legal representative,"[23] as "so antagonistic" to preclude a reading of "person" within § 1983 to include a municipal corporation.[24]

Monroe might have been viewed—as its author, Justice William Douglas, believed—as divining congressional intent to limit the costly and paralyzing effects of municipal liability for only damages relief.[25] But the Court eventually held in 1973 in *City of Kenosha v. Bruno* that § 1983 also prohibits claims against municipalities for declaratory and equitable relief.[26] The general bar on municipal liability would not, however, endure.

B. *MONELL V. DEPARTMENT OF SOCIAL SERVICES*

Seventeen years after *Monroe*, the Court overturned its holding as to municipal liability in *Monell v. Department of Social Services*, reinterpreting the 1871 Act's legislative history to permit lawsuits against local governments.[27] The Court held that the plaintiffs in *Monell* were entitled to monetary relief in the form of retrospective back pay based on a New York City agency's "official policy" requiring pregnant employees to take unpaid leave.[28] The Court set rigorous parameters for establishing liability, however, by requiring that a constitutional violation be tied to a policy or custom and concluding that a municipality could not be held vicariously liable for its employees' conduct.[29]

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[23] *Id.* at 188 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871)).

[24] *Id.* at 191.

[25] *See* City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Douglas, J., dissenting in part) (stating that the legislative history on which the *Monroe* Court's construction of "person" in § 1983 was based "related to the fear of mulcting municipalities with damage awards for unauthorized acts of its police officers"); *id.* app. at 517 (attributing the rejection of the Sherman Amendment to "the notion that civil liability for damages might destroy or paralyze local governments").

[26] *Id.* at 513.

[27] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

[28] *Id.* at 660–63. Though the relief sought was monetary, the plaintiffs did not bring "a damage suit against the city itself, but instead an equitable action brought against particular officials in their official capacity asking them to use their existing power to undo the wrong they had committed." David Jacks Achtenberg, *Frankfurter's Champion: Justice Powell,* Monell*, and the Meaning of "Color of Law,"* 80 FORDHAM L. REV. 681, 698–99 (2011) [hereinafter Achtenberg, *Frankfurter's Champion*].

[29] *Monell*, 436 U.S. at 691.

The Court's decision can be viewed as startling, in part because it ran counter to principles of stare decisis. *Monell* was also a product of, and a response to, the Court's contradictory patchwork of recent cases upholding and striking down civil lawsuits seeking broad institutional reforms. It was a compromise. While purporting to authorize lawsuits against local governments, the standards it imposed reflected the Court's ambivalence, if not (growing) hostility, toward federal civil rights injunctions.

Coinciding with the Warren Court era, impact litigation reaped a number of successes, particularly in reforming school segregation and prison conditions.[30] Expansive federal judicial decrees in the 1950s and 1960s required that "forward-looking, affirmative steps be taken to prevent future deprivations."[31] These cases generally involved intricate prospective remedies rather than simple damages. But over the next decade, structural reform through litigation received substantial criticism.[32] The transition to the Burger Court saw a disenchantment with federal judicial supervision of local government functions, a scaling back and undoing of desegregation decrees, and a rejection of challenges to prison conditions.[33]

It was into these crosscurrents of the law that the Court confronted *Monroe*'s prohibition on municipal liability. Justice William Brennan's majority opinion in *Monell* relied on a revised reading of legislative history to overturn the bar on municipal

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[30] *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1390–92 (2000) [hereinafter Gilles, *Reinventing Structural Reform Litigation*] ("The modern structural reform revolution began in the 1950s, when federal courts began to hear cases asserting the deprivation of rights to large groups of people by state and local institutions, such as schools and prisons." (footnote omitted)).

[31] *Id.* at 1392; *see, e.g.*, Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955) (directing district courts to follow "equitable principles" in "fashioning and effectuating" desegregation decrees).

[32] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 3–4 (2d ed. 1997) (characterizing the Warren Court's activist decision-making as a "continuing constitutional convention" in which the Court read its own libertarian convictions into the Fourteenth Amendment under the guise of interpretation); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 950 (1978) (challenging the regularization of institutional decrees and the acceptance "that judges must therefore act in a wholesale fashion to reform government to, bring about the 'cure' ").

[33] Gilles, *Reinventing Structural Reform Litigation*, *supra* note 30, at 1393–95.

liability.[34] Brennan's revisionist legislative history was prompted by the Court's irreconcilable holdings that *Monroe* and its progeny precluded municipal liability *and* that school boards could still be sued under § 1983.[35]

At stake was the Court's post-*Brown v. Board of Education* desegregation project. In addition to citing "over a score of cases"[36] in which the Court decided on school board liability and which sat uncomfortably alongside *Monroe*,[37] Brennan's majority opinion interpreted congressional actions to reflect legislative approval of federal judicial supervision of local school districts, with some costs paid by local governments.[38]

In his concurrence, Justice Lewis Powell more explicitly characterized the school board and *Monroe* line of cases as impossibly inconsistent.[39] Powell observed that the Court had not prohibited official-capacity school board cases that included damages claims, thereby implicitly recognizing municipal damages liability.[40] He also rejected proposals that would bifurcate municipal liability based on the nature of the requested relief and,

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[34] *Monell*, 436 U.S. at 690.

[35] *Id.* at 695–96 (explaining that cases decided before and after *Monroe* "holding school boards liable in § 1983 actions are inconsistent with *Monroe*").

[36] *Id.* at 663, 663 n.5.

[37] *Id.*

[38] *See id.* at 696–99 (inferring legislative approval of municipal liability from, in part, Congress's rejection of efforts to strip federal courts of jurisdiction over school boards, its provision of funds to assist school districts in complying with decrees, and its authorization of civil rights attorney's fees awards).

[39] *See id.* at 710–11 (Powell, J., concurring) ("This line of cases—from *Monroe* to *Kenosha*—is difficult to reconcile on a principled basis with a parallel series of cases in which the Court has assumed *sub silentio* that some local government entities could be sued under § 1983."); *see also id.* at 711 (warning that maintaining *Monroe*'s holding would cast "grave doubt" on the Court's § 1983 school board litigation). Both in dissent and in memorandums, Justice Rehnquist invoked stare decisis and disputed the inconsistency or "confusion" of *Monroe* and the school board cases, contending that the lines of cases have made clear the distinction. *See id.* at 714–17 (Rehnquist, J., dissenting) (noting that the Court has reaffirmed *Monroe*'s holding "on at least three separate occasions" and that "[t]oday, the Court abandons this long and consistent line of precedents"); Rough Draft of Memorandum from Justice William H. Rehnquist to the Conference regarding No. 76-1914, Monell v. Department of Social Services 7–8 (Mar. 6, 1978) (on file with the Lewis F. Powell, Jr. Archives, Washington and Lee University School of Law), http://law2.wlu.edu/deptimages/powell%20archives/75-1914_Monell_Dept.1978March.pdf ("In my opinion, the cases are in no confusion whatsoever as to whether a municipal corporation is a 'person' for purposes of § 1983.").

[40] *Monell*, 436 U.S. at 711–12 (Powell, J., concurring).

thus, permit only equitable claims under § 1983.[41] Powell noted the Court's rejection of such a dual approach in *Kenosha*.[42] Finally, Powell argued that expansion of municipal liability under § 1983 was necessary or else the Court's recent *Bivens* cause of action under the Fourteenth Amendment might have to be broadened to encompass claims against local governments.[43]

The Court's ambivalence toward municipal liability—particularly its potential for solidifying and increasing burdensome lawsuits and federal court supervision of local government agencies that had been ushered in with *Brown*—helps explain the compromised nature of *Monell* and its policy and causation requirement. Indeed, the Court foreshadowed these concerns two years earlier in its 1976 opinion, *Rizzo v. Goode*, which struck down a court order requiring extensive Philadelphia police department reforms.[44] *Rizzo* emphasized the sensitivity with which the Court regards federal injunctions against local government, and demanded a direct causal link between a plan or policy and unconstitutional conduct.[45]

Even though the *Monell* plaintiffs only sought back pay for their unconstitutional department-imposed pregnancy leaves, the Court adopted the very same rules for establishing liability articulated in *Rizzo*.[46] To better understand *Monell*, we must revisit *Rizzo*.

C. *RIZZO V. GOODE*

Rizzo is not, formally, a municipal liability case.[47] But the *Rizzo* litigation amounts to a municipal liability case in everything but name. Individuals and groups on behalf of all Philadelphia residents and black residents brought two consolidated class

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[41] *Id.* at 712.

[42] *Id.*

[43] *Id.*

[44] Rizzo v. Goode, 423 U.S. 362, 365–66 (1976).

[45] *See id.* at 377–80 (noting that "the principles of federalism . . . play such an important part in governing the relationship between federal courts and state governments").

[46] *See infra* Part II.D.

[47] To some extent *Rizzo* is simply a supervisory liability case in which the Court held that officials could not be held liable under § 1983 unless they actually directed the constitutional violation. *Rizzo*, 423 U.S. at 384 (Blackmun, J., dissenting) ("The Court today appears to assert that a state official is not subject to the strictures of 42 U.S.C. § 1983 unless he directs the deprivation of constitutional rights.").

actions against the mayor, police commissioner, and other city officials.[48] The suits sought equitable remedies based on a "pervasive pattern of illegal and unconstitutional mistreatment by police officers" targeting minorities but affecting all city residents.[49] The Court characterized the claims against the city officials as alleging "express authorization or encouragement of . . . mistreatment [and] failure to act in a manner so as to assure that it would not recur in the future."[50]

The trial concerned approximately forty incidents of alleged police misconduct and entailed twenty-one days of hearings consisting of approximately 250 witnesses.[51] As relief, the district court ordered a comprehensive program for addressing civilian complaints—subject to guidelines on revising police manuals and procedures concerning civilian interaction, including limits on racial bias, offensive language, and searches—complaint processing; forms; and adjudication of complaints.[52]

The Supreme Court's decision presaged *Monell*'s policy requirement for municipal liability. Writing for the 6–3 majority, Justice William Rehnquist held the lower courts' equitable relief improper, rejecting liability based on a pattern of misconduct by police officers because there was no showing of a causal link to the defendants' actions, i.e., policies or plans.[53] The Court distinguished the desegregation cases, *Brown* and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), in which school board members and administrators had been ordered

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[48] *Id.* at 364 n.1.

[49] *Id.* at 366–67.

[50] *Id.* at 367.

[51] *Id.*

[52] *Id.* at 369–70.

[53] *See id.* at 375 (distinguishing this case from two prior cases in which liability was founded upon a pattern of intimidation "flowing from a deliberate plan by the *named* defendants"). The Court might have dispensed with the case on just one of the grounds that it raised in its opinion. For example, the Court determined that the plaintiffs lacked standing because the relief they sought was too "attenuated" given that they sought changes in police procedures but had not named the police officers who might act unlawfully against them due to inadequate guidance. *Id.* at 372 ("[T]he individual respondents' claim to 'real and immediate' injury rests not upon what the named petitioners might do to them in the future . . . but upon what one of a small, unnamed minority of policemen might do to them in the future because of the unknown policemen's perception of departmental disciplinary procedures.").

to integrate schools because those officials had *affirmatively* denied equal protection to minority students.[54]

The case came down to concerns over federalism and the scope of the federal courts' equitable power. Indeed, the *Rizzo* opinion suggests that courts should be skeptical of claimants seeking equitable relief under § 1983.[55] The case was, in large measure, about the role that courts should have in overseeing police department operations[56] or, as the Court later phrased it, whether "[t]he scope of federal equity power . . . should be extended to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees."[57] The Court held that the injunctive relief requiring a revision of the police department's manual on procedures relating to civilians "was indisputably a sharp limitation on the department's 'latitude in the "dispatch of its own internal affairs." ' "[58] Focusing on the equitable nature of the relief, the Court stressed the need to consider federalism in weighing the propriety of the remedy.[59] The Court ultimately held that the district court's injunctive decree had "departed from these precepts" of federalism, which included restraining intrusion of federal courts' equitable powers into state administration of law.[60] Dissenting, Justice Harry Blackmun agreed with the "abstract principle" that federal judicial involvement in local police operation is "undesirable," but contended that § 1983 was intended to cover inaction leading to the violation of constitutional rights.[61]

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[54] *Id.* at 376–77.

[55] *See id.* at 378 ("Section 1983 by its terms confers authority to grant equitable relief as well as damages, but its words 'allow a suit in equity only when that is the proper proceeding for redress . . . .' " (quoting Giles v. Harris, 189 U.S. 475, 486 (1903))).

[56] *See id.* at 369 (noting that much of the argument in the proceedings below had been "directed toward the proposition that courts should not attempt to supervise the functioning of the police department" (quoting COPPAR v. Rizzo, 357 F. Supp. 1289, 1320 (1973))).

[57] *Id.* at 378.

[58] *Id.* at 379 (citation omitted).

[59] *See id.* at 378 ("Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' " (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951))); *see id.* at 379 ("[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." (citing Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975))).

[60] *Id.* at 379–80 (citing O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

[61] *Id.* at 381–82 (Blackmun, J., dissenting).

Just four years later in *United States v. City of Philadelphia*, the United States Court of Appeals for the Third Circuit rejected the federal government's efforts to secure very similar reforms of the Philadelphia police department.[62] Relying in part on federalism principles, the Third Circuit held that the United States lacked standing to pursue claims enjoining Philadelphia Police Department officials from committing systematic civil rights violations.[63] Philadelphia residents no longer had a judicial remedy to stop their own police from brutalizing them.

D. REVISITING *MONELL*

Monell's policy requirement for municipal liability, insisting on a causal relationship between the constitutional violation and a municipal policy, relied almost entirely on *Rizzo*. The Court cited *Rizzo* for the proposition that liability hinges on causation and "that Congress did not intend § 1983 liability to attach where such causation was absent."[64] Brennan's second draft of the opinion relied even more heavily on *Rizzo*, employing it to illustrate the principle that blame or fault of the local government must be demonstrated in order to fall within the scope of § 1983.[65] In a draft footnote, Brennan quoted at length the *Rizzo* Court's language distinguishing the school boards' roles in *Swann* and *Brown*, and the emphasis on the affirmatively directed

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[62] United States v. City of Philadelphia, 644 F.2d 187, 189–90 (3d Cir. 1980).

[63] *Id.* at 189–90, 223 (noting that the Executive's injunctive action compounds the threat to local authority presented by the Fourteenth Amendment and the civil rights statutes).

[64] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978) (citing *Rizzo*, 423 U.S. at 370–71); *see also id.* at 694 n.58 ("By our decision in *Rizzo v. Goode* . . . we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." (citing *Rizzo*, 423 U.S. at 370–71)); *Rizzo*, 423 U.S. at 370–71 ("The plain words of [§ 1983] impose liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws.").

[65] Monell v. Dep't of Soc. Servs., No. 75-1914, 2d Opinion Draft, Justice William J. Brennan, Jr. at 33 n.59 (U.S. June 6, 1978) (on file with the Leon E. Bloch Law Library, University of Missouri-Kansas City School of Law), http://www1.law.umkc.edu/justicepapers/monelldocs/TM/Marshall%2004%20Monell%20(CF%20200-11%20PDF%20Files)/4-21-78%20Draft%20WJB%202d%20Opinion%20TM200F110052.pdf ("For example, in *Rizzo v. Goode* . . . we recognized that fault is a crucial factor in determining whether relief may run against a party for its alleged participation in an unconstitutional tort.").

unconstitutional conduct in the desegregation cases.[66] In order to bring other Justices on board, however, Brennan sought to avoid any appearance that negligence could establish municipal liability.[67] Brennan, therefore, removed all references to "fault" throughout the opinion that would so imply, resulting in the removal of the entire footnote and quote from *Rizzo*. Though the *Rizzo* footnote was ultimately left on the cutting room floor, the opinion's imprint on *Monell* and municipal liability is unmistakable.

What has received little attention is that the *Rizzo* interpretation of § 1983, which *Monell* adopted, was predicated on a case involving systemic injunctive relief—federal court intervention in local policing efforts. In adopting the *Rizzo* test, *Monell* also adopted *Rizzo*'s reasoning, namely its federalism concerns, which are not always implicated by municipal liability claims limited to damages relief.[68]

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[66] *Id.*

[67] *See* Memorandum from William J. Brennan, Jr. to Lewis F. Powell regarding No. 75-1914, Monell v. Department of Social Services 1 (May 2, 1978) (on file with the Leon E. Block Law Library, University of Missouri-Kansas City School of Law), http://www1.law.umkc.edu/justicepapers/monelldocs/WJB/Brennan%2004%20Monell%20(CF%20I-437-7%20PDF%20Files)/5-2-78%20Memo%20WJB%20to%20LFP%20WJB437F70067.pdf ("I have also gone through Part II with care to remove the word 'fault' whenever it might, by negative implication, indicate that we are creating a negligence cause of action under § 1983."). Brennan also agreed to remove any discussion of a potential deliberate indifference standard relating to a constitutional duty to act, borrowed from *Estelle v. Gamble*, 429 U.S. 97 (1976), in order to mollify some of the Justices, in particular Justices Stewart and Powell. *See* Memorandum from Justice William J. Brennan, Jr. to Justice Potter Stewart regarding No. 75-1914, Monell v. Department of Social Services 2–3 (Apr. 25, 1978) (on file with the Leon E. Block Law Library, University of Missouri-Kansas City School of Law), http://www1.law.umkc.edu/justicepapers/MonellDocs/TM/Marshall%2004%20Monell%20(CF%20200-11%20PDF%20Files)/4-25-78%20Memo%20WJB%20to%20PS%20TM200F110096.pdf ("I feel that I must qualify the text . . . which would otherwise seem to foreclose a deliberate indifference theory. You may differ with me on whether . . . deliberate indifference is ever enough to hold a city [liable], but can't we agree not to cut off either of our views in this case?").

[68] The Court was certainly conscious, however, of the potential financial impact on local governments' treasuries caused by lifting the bar on municipal liability. Transcript of Oral Argument of Oscar G. Chase, Esq., on Behalf of Petitioners at 26–27, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (No. 75-1914) (urging the Court to "think seriously about imposing additional large substantial burden on governmental entities that are already strapped, overburdened, finding it difficult to function"). Indeed, in his dissent, Justice Rehnquist directly addresses the economic consequences on local governments' treasuries of lifting the bar on municipal liability. *Monell*, 436 U.S. at 724 (Rehnquist, J., dissenting) ("[T]he doctrine of municipal immunity enunciated in *Monroe* has protected municipalities and their limited treasuries from the consequences of their officials' failure to predict the course of this Court's

The holdings of *Rizzo* cannot be separated from the underlying facts of the case and, in particular, the relief sought. The *Rizzo* majority formulated a rigorous causation standard for § 1983 liability based on facts that, as it perceived them, involved very few allegations of misconduct, lacked authorization or approval of such misconduct by defendants, and concerned a dispute between "the entire citizenry of Philadelphia and the petitioning elected and appointed officials" over police procedures.[69] The sought-after relief amounted to an "overhaul[ ]" of police policies and practices.[70]

David Jacks Achtenberg offers an alternative explanation of the *Monell* outcome. Achtenberg contends that the Court's municipal liability doctrine was a compromise owing to Justice Powell's concern that "*Monroe* so severely imbalanced the structure of federalism that he would be willing to overrule it despite his normal concern for stare decisis."[71] *Monell* thus reifies Justice Frankfurter's seventeen-year-old dissenting viewpoint in *Monroe* that liability should only follow where "the wrongdoer's conduct was actually authorized by state or local law."[72] Whether municipal liability may be traced in part to Justice Frankfurter's "color of law" theory, *Monell*'s municipal liability holding ultimately rests on case law—*Rizzo*—addressing structural reform litigation and injunctive relief's perceived departure from "principles of federalism,"[73] the effects of which are still felt today.

Even accepting my interpretation, *Monell* did in fact overrule *Monroe*, permitting lawsuits against municipalities to go

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constitutional jurisprudence."); *see also* Achtenberg, *Frankfurter's Champion*, *supra* note 28, at 687 (describing the view that *Monell* was "an ad hoc political compromise" possibly "motivated by concern about the perilous financial condition of some cities").

[69] *Rizzo*, 423 U.S. at 371. Acknowledging the federalism concerns, Justice Blackmun sought to minimize the remedy's intrusive aspects. He contended that "[t]he remedy was one evolved with the defendant officials' assent." *Id.* at 381 (Blackmun, J., dissenting).

[70] *Id.* at 372–73 (majority opinion). The remedy, Justice Blackmun argued, was not overly burdensome, was efficient, would improve the system, and would reduce constitutional violations. *See id.* at 381 (Blackmun, J., dissenting).

[71] Achtenberg, *Frankfurter's Champion*, *supra* note 28, at 693–94. Peter Schuck less charitably observes that the municipal liability "doctrine bore the unmistakable imprint of bastardy; its supporting rationale suggests nothing so much as a split-the-difference judicial compromise." Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1755 n.13 (1989).

[72] Achtenberg, *Frankfurter's Champion*, *supra* note 28, at 682.

[73] *Rizzo*, 423 U.S. at 380.

forward.[74] Some of this may be attributable to the Court's necessary endorsement of judicially imposed desegregation. In justifying its departure from *Monroe* and its ban on municipal liability, the Court relied in part on the fact that school boards were still held liable in desegregation litigation and that Congress had continued to support this state of affairs.[75]

Monell also explicitly and implicitly embraces a municipal liability remedy that encompasses all forms of relief. The Court expressly stated that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief,"[76] and the Court's positive citation of federal school desegregation decrees reflected additional approval of injunctive relief.[77] The Court's opinion, however, is best viewed as both theoretically endorsing the school board structural reform line of cases, while also complicating future implementation of its holding by designing such demanding policy or custom and causation standards.

Justices Brennan, Marshall, and Blackmun, all of whom had dissented in *Rizzo*, might have considered relying on that opinion's high causation standard as a necessary concession for cobbling together a majority in *Monell*. But the adoption of *Rizzo* as the municipal liability standard makes *Monell* a pyrrhic civil rights victory. *Rizzo*'s skepticism of federal court intervention, sounding in federalism, looms over every municipal liability case, even when federalism concerns are not significant or necessarily implicated.

E. *CITY OF LOS ANGELES V. LYONS*

The Court made clear its concern over municipal liability and invasive equitable remedies when, in 1983, it struck down an order enjoining the Los Angeles Police Department from authorizing chokeholds.[78] *City of Los Angeles v. Lyons* does not explicitly address the contours of the causation policy standard. It is, nominally, a case concerning standing for injunctive relief. Yet,

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[74] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978).

[75] *See id.* at 696–99.

[76] *Id.* at 690.

[77] *See id.* at 696–97.

[78] City of Los Angeles v. Lyons, 461 U.S. 95, 97–100 (1983).

it elevates the pleading standard for equitable claims in contrast to damages claims and echoes the federalism concerns expressed in *Rizzo*, notwithstanding the less intrusive relief requested in *Lyons*. As a result, it has significantly impacted the development of municipal liability.

In *Lyons*, the Supreme Court addressed a suit for a preliminary injunction against Los Angeles that sought to prohibit the Los Angeles Police Department's use of chokeholds except where a suspect reasonably appeared to be an immediate and deadly threat.[79] Adolph Lyons alleged that, in connection with a traffic stop and without any provocation, Los Angeles police placed him in a chokehold that rendered him unconscious and damaged his larynx.[80] Lyons further alleged that city policy authorized chokeholds where there was no threat of deadly force and that, as a result of the application of these chokeholds, many people had been injured.[81] The Court ultimately overturned the injunction, holding that Lyons lacked standing to bring the claim because his injury did not evidence a "real and immediate threat" that he would be stopped again by police *and* that they would unlawfully choke him.[82] In denying standing, the Court narrowly read Lyons's complaint, finding that his allegation that chokeholds were authorized in less-than-deadly-force situations was not sufficient to assert a policy of chokeholds without provocation.[83]

Lyons addresses arguments about whether the nature of the relief requested should influence the Court's legal analysis, specifically its analysis of the case or controversy requirement.[84] The Court rejected the Ninth Circuit's approach to determining the existence of a federal case for equitable relief, which imposed lesser standards in cases where discrete injunctive relief was

[79] *Id.* at 98.

[80] *Id.* at 97–98.

[81] *Id.* at 98. Between the time of the complaint's filing and the Court's opinion, fifteen people had died due to the chokehold technique. *Id.* at 100. The Board of Police Commissioners then placed a six-month moratorium on the use of chokeholds except in instances involving deadly threats. *Id.*

[82] *Id.* at 105.

[83] *Id.* at 106 n.7. Strictly construing the alleged policy, the Court found the possibility of harm to Lyons remote because it would require that he be stopped by the police again and that he either (1) illegally resist arrest or (2) that police again ignore orders and choke him without instigation. *Id.* at 106.

[84] *Id.* at 108.

sought than the Court imposed in cases like *Rizzo* where massive structural reform was pursued.[85] Addressing equitable relief standards, the Court maintained that courts should exercise restraint in light of federalism concerns.[86] But the Court also applied a more exacting standing standard for equitable relief than it did for damages relief.[87]

Justice Marshall took issue with the bifurcated approach. Dissenting, he contended that the city's chokehold policy should suffice for purposes of both equitable and damages liability.[88] Similar to the Ninth Circuit, Justice Marshall also argued that the nature of the equitable relief should impact the federalism assessment. He distinguished *Lyons* as a case involving only a preliminary injunction concerning limited relief, whereas *Rizzo* involved a permanent injunction instituting comprehensive reforms.[89]

Lyons essentially closed the door on private civil lawsuits seeking structural reform.[90] Though not framed in terms of § 1983, the Court's stringent case or controversy requirement for injunctive relief could just as easily be replaced with *Monell*'s

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[85] *See id.* at 108–09.

[86] *See id.* at 112 (noting that the availability of injunctive relief under § 1983 does "not displace the normal principles of equity, comity, and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities").

[87] *Id.* at 106 n.7, 108 (conservatively construing allegations of abusive chokeholds so as not to find a policy that the Court terms "unbelievable" and questioning the "odds" that plaintiffs would be subjected to unprovoked chokeholds by police).

[88] *Id.* at 114 (Marshall, J., dissenting) ("Lyons . . . has standing to challenge the city's chokehold policy and to obtain whatever relief a court may ultimately deem appropriate. None of our prior decisions suggests that his requests for particular forms of relief raise any additional issues concerning his standing."); *id.* at 122–23 ("[B]y fragmenting a single claim into multiple claims for particular types of relief and requiring a separate showing of standing for each form of relief, the decision today departs from this Court's traditional conception of standing and of the remedial powers of the federal courts."); *id.* at 127 ("In determining whether a plaintiff has standing, we have always focused on his personal stake in the outcome of the controversy, not on the issues sought to be litigated . . . or the 'precise nature of the relief sought.' " (citations omitted)).

[89] *Id.* at 133–34 ("The modest interlocutory relief granted in this case differs markedly, however, from the intrusive injunction involved in *Rizzo*, and simply does not implicate the federalism concerns that arise when a federal court undertakes to 'supervise the functioning of the police department.' " (quoting Rizzo v. Goode, 423 U.S. 362, 380 (1976) (Blackmun, J., dissenting))).

[90] *See* Gilles, *Reinventing Structural Reform Litigation*, *supra* note 30, at 1386 ("We have lost, in the post-*Lyons* world, the powerful force of the citizenry as a direct agent in effecting meaningful social change through America's courts.").

policy-causation requirement. Justice Marshall lamented that the *Lyons* decision left victims of systematic police violence with "only an award of damages."[91] Sadly, however, the Court's subsequent municipal liability jurisprudence renders Justice Marshall's comment overly optimistic.

F. *MONELL*'S LEGACY

Over the past thirty years, *Monell*'s promise of municipal liability has proven to be a paper tiger. Since *Monell* the Court has only developed a set of stricter requirements for establishing municipal liability. David Jacks Achtenberg complains that the doctrine's exceedingly high and "idiosyncratically protective" standards exceed those prescribed for private employers, negligent selection of independent contractors, non-constitutional torts, and even punitive damages against private employers.[92] Peter Schuck similarly criticizes the Court for unfaithfully and inconsistently applying private tort law concepts to municipal liability.[93] He also takes to task the Court's "official policy" test and causation standards for failing to appreciate the invariable "causal nexus between agency and injury."[94] Moreover, terms such as "policy" and "policymaker" are so ill-defined as to "bear[ ] only a superficial resemblance to the type of public agency at which § 1983 claims are typically directed."[95]

The *Rizzo*-influenced federalism concerns pervade the Court's opinions limiting municipal liability, notwithstanding the fact that virtually all of these cases address only damages claims. In addition, many of these cases echo *Rizzo*'s lingering dispute over whether and when single instances of misconduct amount to a

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[91] *Lyons*, 461 U.S. at 137 (Marshall, J., dissenting).

[92] David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2191 (2005) [hereinafter Achtenberg, *Taking History Seriously*]. Achtenberg traces the standards to the Court's concern for the "municipal pocketbook." *Id.*

[93] *See* Schuck, *supra* note 71, at 1763 ("[W]hile relying upon some of private law's basic concepts and policy justifications, the Court uses them in ways that bear little resemblance to how they are applied in the private law settings from which they are derived.").

[94] *Id.* at 1764–65; *see also* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 236 (2013) (characterizing the legal standard for identifying official policy or custom as "radically indeterminate").

[95] Schuck, *supra* note 71, at 1775–78.

systematic problem which could evince municipal liability.[96] The federalism-influenced debate over what amounts to a sufficiently obvious or systematic problem suffuses the Court's treatment of "failure to train" and "failure to review" damages cases.[97]

In 1989, the Court held in *City of Canton v. Harris* that a local government's failure to train police officers on the use of deadly force could establish municipal liability because violent encounters are sufficiently predictable as to render a lack of training deliberately indifferent.[98] But as with *Monell*, the promise of *Harris* is illusory. Relying on both *Monell* and *Rizzo*, the *Harris* Court stressed the need for a significant standard of fault in failure-to-train claims.[99] A failure-to-train claim will only meet the § 1983 "policy or custom" standard if it amounts to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact."[100] Thus, lack of training can only be characterized as policy where 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."[101]

The *Harris* Court explained that a lesser standard would violate *Monell*'s strictures, amounting to "de facto respondeat superior liability."[102] The Court then cited *Rizzo* for its federalism argument, contending that a lesser standard "would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs"—an exercise "the federal

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[96] *See* HOWARD M. WASSERMAN, UNDERSTANDING CIVIL RIGHTS LITIGATION 135 (2013) ("The point of departure may be competing visions of whether constitutional cases typically involve a 'single incident of a lone officer's misconduct' or whether they really hide more systemic and systematic misconduct." (quoting Connick v. Thompson, 563 U.S. 51, 80 (2011) (Ginsburg, J., dissenting))).

[97] *Id.* at 134 (noting that this debate is present "especially under the failure-to-[blank] theory").

[98] City of Canton v. Harris, 489 U.S. 378, 380 (1989).

[99] *See id.* at 391–92 (establishing that failure-to-train claims "can only yield liability against a municipality where the city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants").

[100] *Id.* at 388–89.

[101] *Id.* at 390.

[102] *Id.* at 392 (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 693–94 (1978)).

courts are ill suited to undertake"—and "would implicate serious questions of federalism."[103]

Eight years later, in *Board of County Commissioners v. Brown*, the Court held that a county's alleged failure to properly review an applicant-deputy sheriff's history could not render the county liable for the deputy sheriff's excessive force.[104] The Court held that a thorough background check would not have turned up information suggesting the likelihood that he would use excessive force during his employment.[105] The lack of a causal connection meant that the county was not deliberately indifferent to the risk of a constitutional violation.[106] Though no injunctive relief was sought, the Court again adopted the mantle of protecting local government autonomy from federal judicial intrusion: "A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose."[107]

In the Court's most recent, extensive discussion of municipal liability in 2011, it held that the Orleans Parish District Attorney's Office was not liable for district attorneys' failure to disclose exculpatory evidence because of its failure to train them on the relevant constitutional requirements.[108] In *Connick v. Thompson*, the Court found that, despite at least four *Brady* violations, the risk of additional violations was not so great as to require corrective action in the form of training regarding prosecutors' disclosure obligations.[109] In his concurrence, Scalia raised the same *Monell*-respondeat superior liability and *Rizzo*-federalism

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[103] *Id.* (citing Rizzo v. Goode, 423 U.S. 362, 378–80 (1976)).

[104] Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 415–16 (1997).

[105] *See id.* at 412–14.

[106] *Id.* at 415 ("Sheriff Moore's hiring decision could not have been 'deliberately indifferent' unless in light of [respondent's] record [respondent's] use of excessive force would have been a plainly obvious consequence of the hiring decision.").

[107] *Id.*

[108] Connick v. Thompson, 563 U.S. 51, 54 (2011).

[109] *See id.* at 62–63 (explaining that four overturned convictions of prosecutors in Connick's office that resulted from *Brady* violations "could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here").

concerns over a lesser standard for holding municipalities liable for failure to train.[110]

While case law continues to justify restrictions on individuals' municipal liability claims for police abuses by invoking principles of federalism, legislation has existed for almost a quarter-century that affords the federal executive branch authority to pursue injunctive relief against the same police departments and local governments. Ironically, the latter authorities may raise greater concerns over federalism than individual municipal liability damages claims. More problematic, the statutory framework insufficiently addresses the compensatory, democratic, procedural justice, and civil recourse vacuum caused by the judicially imposed limitation on municipal liability claims.

III. FEDERAL GOVERNMENT STRUCTURAL REFORM LITIGATION

Increased concern over police brutality—in particular the beating of Rodney King and the resulting social unrest—and appreciation that the courts effectively foreclosed § 1983 litigation as a police reform tool impelled Congress to enact new legislation. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994, which, in part, authorizes the Attorney General to file a civil cause of action against local police agencies when they engage in a pattern or practice of unconstitutional misconduct.[111] Under the Act, the Justice Department may seek declaratory and equitable relief, *but not damages*, to eliminate the misconduct.[112] Private litigants, however, are afforded no such cause of action.[113]

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[110] *See id.* at 74 (Scalia, J., concurring).

[111] *See* 42 U.S.C. § 14141 (2012), *reclassified as* 34 U.S.C.A. § 12601 (Westlaw through Pub. L. No. 115-90).

[112] 34 U.S.C.A. § 12601(b) (Westlaw through Pub. L. No. 115-68) ("[T]he Attorney General . . . may in a civil action obtain appropriate equitable or declaratory relief to eliminate the pattern or practice.").

[113] Scholars have advocated analog private causes of action and Congress contemplated amendments to similar effect. *See, e.g.*, Gilles, *Reinventing Structural Reform Litigation*, *supra* note 30, at 1417–18 (proposing the authorization or deputization of private individuals to bring injunctive lawsuits under § 14141, with the Justice Department retaining authority to quash such lawsuits); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3241–43 (2014) [hereinafter Rushin, *Federal Enforcement of Police Reform*] (advocating a similar proposal); *see also* Law Enforcement Trust and Integrity Act of 2000, H.R. 3927, 106th Cong. § 502 (2000) (proposing to amend

Section 14141 advocates credit the law for important police reforms.[114] Section 14141 actions compel and foster institutional changes that local entities would not otherwise implement for political and economic reasons.[115] These changes usually include significant transparency and accountability mechanisms that lead to sustained corrections of police misconduct.[116] Reforms under § 14141 also may reduce future litigation costs related to police abuses.[117]

From a federalism perspective, however, § 14141 and its attendant systematic injunctive relief may raise more concerns than individual damages lawsuits under § 1983. Structural reform litigation under § 14141 entails significant federal influence over local law enforcement policies and practices. Stephen Rushin and Griffin Edwards characterize such federal reforms as "the single most invasive form of external legal regulation imposed on American police departments."[118] Currently, "nearly one in five Americans is served by a law enforcement agency that has been subject to a Department of

§ 14141 by adding language that would allow "[a] person who is aggrieved by a violation of subsection (a)" to bring a civil action to "obtain declaratory and injunctive relief with respect to the violation"); Law Enforcement Trust and Integrity Act of 1999, H.R. 2656, 106th Cong. § 501 (1999) (same). For a critique of the proposed private right of action as deleterious to police reform efforts, see Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 57–62 (2009) [hereinafter Harmon, *Promoting Civil Rights*] (noting, among other things, that private suits under § 14141 "are ill-suited as a means for achieving high-quality departmental reform").

[114] *See, e.g.*, Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 794–95 (2016) (discussing documentation of DOJ success in addressing police violence pursuant to § 14141); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1359–63 (2015) [hereinafter Rushin, *Structural Reform Litigation*] (discussing studies finding § 14141 to be effective at reducing police misconduct).

[115] *See* Rushin, *Structural Reform Litigation*, *supra* note 114, at 1397–1404 (explaining that structural reform litigation forces municipalities to allocate scarce resources to police reform, even when such allocation may be democratically unpopular, and uses external monitoring "to ensure that police agencies substantively comply with policy changes").

[116] *See id.* at 1404. Some research suggests, however, that reforms may falter once oversight and monitoring end under a consent decree. *See id.* at 1410–11 (noting one such example concerning the Pittsburgh Bureau of Police that "provides a cautionary tale about what can happen after external monitoring ends").

[117] *See id.* at 1410–11 (demonstrating that the number of civil rights suits brought against the Pittsburgh police fell drastically during federal oversight of the Pittsburgh Bureau of Police, but increased once federal oversight ended and a change of leadership occurred).

[118] Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 727 n.18 (2017).

Justice (DOJ) investigation via § 14141."[119] As of 2016, the DOJ has conducted sixty-one formal investigations and entered into thirty-one settlement agreements with local entities, many of which were subjected to ongoing federal oversight.[120]

The scope of § 14141 investigations, subsequent agreements, and oversight is extensive. Most agreements, for example, require reforming a range of police practices, including use-of-force policies, reporting requirements, training, and internal investigations.[121] Agreements under § 14141 also result in lengthy federal oversight of local police and high compliance standards, with monitoring spanning five to twelve years.[122]

The costs of § 14141 reforms are also significant, and it is local governments that must pay for the changes, pushing the increased costs onto local taxpayers.[123] Rushin estimates that Los Angeles, for example, paid out over $100 million during the time of its consent decree's implementation and external monitoring.[124]

Though virtually all structural reforms are undertaken through settlement agreements, § 14141 invariably entails federal coercion in the form of highly public investigations or threatened litigation.[125] Section 14141 actions thus inevitably impose federal priorities on local governmental discretion. The DOJ's impact may include requiring uniform changes that are not particularized to

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[119] Rushin, *Structural Reform Litigation*, *supra* note 114, at 1347–48.

[120] Rushin & Edwards, *supra* note 118, at 750; *see also* Rushin, *Structural Reform Litigation*, *supra* note 114, at 1377 (noting that, since 1997, "the DOJ has agreed to a total of 24 different settlements in 22 jurisdictions" and that "12 have resulted [in] full-scale SRL, supervised by the DOJ through the appointment of an external monitor").

[121] Rushin, *Structural Reform Litigation*, *supra* note 114, at 1378. A few agreements also directly address bias and race in local policing. *Id.* at 1385–86. Rushin and Edwards contend that the wide scope and oversight arsenal under § 14141 makes local police more likely to implement reforms than to respond to individual cases often addressing a discrete procedural issue. Rushin & Edwards, *supra* note 118, at 750–52 (explaining that while there is "real debate about whether police departments even make the substantive and procedural reforms demanded by court cases," DOJ intervention "seems to bring about real, procedural and substantive changes to affected police departments").

[122] Rushin, *Structural Reform Litigation*, *supra* note 114, at 1391–92, 1392 fig.5.

[123] *Id.* at 1392–93.

[124] *Id.* at 1393.

[125] *See id.* at 1399–1400 ("When local political actors are unwilling to make the necessary investments in police reform, SRL uses the threat of equitable relief under § 14141 to force the reallocation of scarce resources in a way that no other regulatory mechanism can."); Rushin & Edwards, *supra* note 118, at 728, 746 (noting the "intense public scrutiny" caused by investigations).

local needs,[126] "forc[ing] municipalities to prioritize investments into police reform over other municipal goals"—which may be at odds with the community's preferences[127]—and altering local government leadership.[128]

In addition, some scholars contend that while the § 14141 reform process may address and improve system-wide police abuses, it also disrupts local communities and their relationships with police. Rushin and Edwards argue that "public § 14141 investigations are destabilizing incidents within targeted communities that expose the affected police departments to added public distrust and negative interactions."[129] They also contend that § 14141 reforms have led to crime increases as a result of less aggressive and efficient policing.[130]

Moreover, the § 14141 "pattern or practice" liability standard appears far more capacious—at least in practice—than the § 1983 liability requirements. Indeed, the DOJ and some commentators believe § 14141 operates as a strict liability regime, requiring only the demonstration of a pattern or practice of unconstitutional conduct to justify declaratory or equitable relief from local governments and police departments.[131] As a result, state and

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[126] *See* Rushin, *Structural Reform Litigation*, *supra* note 114, at 1378 ("While each negotiated settlement should be specifically tailored to the unique needs of the individual municipality, the settlements have proven to be remarkably similar over time.").

[127] *See id.* at 1397–1400 (explaining that structural reform litigation forces municipalities to allocate scarce resources to police reform, "even when doing so may not be democratically popular").

[128] *Id.* at 1400.

[129] Rushin & Edwards, *supra* note 118, at 753.

[130] *See id.* at 758–59 (finding that the introduction of § 14141 regulation was associated with a statistically significant uptick in some crime rates relative to unaffected municipalities, but that this uptick was concentrated in the years immediately after federal intervention and diminished over time); *see also* Rushin, *Structural Reform Litigation*, *supra* note 114, at 1412–13 (noting that while various critics have claimed that federal intervention into the affairs of municipalities has led to de-policing, evidence for this hypothetical is limited).

[131] *See* United States' Brief Regarding Municipal Liability at 1-2, United States v. Town of Colorado City, No. 3:12-cv-8123-HRH, 2017 WL 1384353 (D. Ariz. Apr. 18, 2017) (arguing that the only requirement for establishing liability of a governmental authority under § 14141 is a showing of "a pattern or practice of unconstitutional conduct by law enforcement officers"); *see also* Harmon, *Promoting Civil Rights*, *supra* note 113, at 60 (noting that "Section 14141's strict liability standard . . . makes a department liable so long as a pattern or practice of misconduct exists in the department").

local governments and police departments fall easily under federal court jurisdiction and oversight.

For example, the DOJ argued in 2016 structural reform litigation against two Colorado towns that the municipalities should be found liable for their police officers' pattern or practice of unconstitutional violations "without any additional showing of municipal liability."[132] The DOJ contended that § 1983 liability standards should not apply to § 14141 actions because the latter (1) did not focus on individual conduct, but on systemic violations and (2) did not provide a damages remedy, but only declaratory and equitable relief.[133] Because virtually all local police entities have bowed to federal pressure and entered settlement agreements and consent decrees, few courts have addressed the DOJ's strict liability argument.[134] In light of the comparatively low threshold for § 14141 actions, the federal government can easily entangle itself in local policing matters affecting wide swaths of law enforcement, leadership, and municipal finances for long periods of time.

Notwithstanding the powerful and ready tool that is structural reform litigation under § 14141, resources and politics limit its more widespread application. And these constraints may diminish federalism concerns.[135] First, federal resources cannot be utilized to address all 18,000 local police agencies throughout the country.[136] While § 14141 reform efforts often focus on some of the

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[132] United States' Brief Regarding Municipal Liability, *supra* note 131, at 1.

[133] *Id.* at 2–3.

[134] The only court that reached the § 14141 liability issue rejected the DOJ's differentiated standards argument. *See* United States v. City of Columbus, No. 2:99-cv-1097, 2000 WL 1133166, at *8 (S.D. Ohio Aug. 3, 2000) (holding that the § 1983 municipal liability standard applies to § 14141 claims). Few jurisdictions have resisted entering settlement agreements under § 14141. *See, e.g.*, United States v. Johnson, 122 F. Supp. 3d 272, 354 (M.D.N.C. 2015) (holding that the DOJ failed to establish a pattern or practice of constitutional violations).

[135] John Jeffries, Jr. and George Rutherglen contend that § 14141 does not raise the same issues of "interference with state and local government" as individual-plaintiff-initiated lawsuits because federal orders "obtained by federal officials involve some degree of political accountability in the decision to sue and to seek structural relief." John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1421 (2007).

[136] Rushin, *Structural Reform Litigation*, *supra* note 114, at 1415–16 (noting that a "potential drawback of § 14141 is that the federal government simply lacks the resources necessary for aggressive enforcement" and that, "given that there are around 18,000 local and state police agencies in the United States, the likelihood that any one agency will be subject to federal intervention . . . appears to be relatively low").

largest U.S. cities, thereby impacting a substantial portion of the public,[137] the vast majority of police departments escape federal scrutiny and management.[138]

Second, federal political prerogatives dictate how frequently the DOJ employs its § 14141 authorities. The Clinton and Obama Administrations pursued far more § 14141 actions than did the Bush Administration.[139] And early in its term, the Trump Administration expressed disdain for § 14141 actions, criticizing the use of such authority as inimical to federalism principles.[140] Section 14141 police reform—and the attendant federal intrusion—will therefore fluctuate with political priorities.

Though political- and resource-driven concerns may limit federal interference in local policing, § 14141 may more squarely implicate the federalism concerns that the Supreme Court raised in *Monell* and its progeny over § 1983 municipal liability claims. Indeed, the massive police department reforms undertaken through § 14141 appear to outpace the systemic changes addressed in *Rizzo* and *United States v. Philadelphia*.[141]

While § 14141 has been an important tool in addressing police abuses, it is an imperfect solution to the municipal liability lacuna. First, the differing political agendas and resource constraints that may render § 14141 less offensive to federalism concerns limit its utility as a tool for consistently combatting pervasive police misconduct. Second, § 14141 fails to address procedural justice and local concerns that may be realized through a properly construed and applied § 1983. Section 14141's usage brings both attention and some improvement to systemic problems in local

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[137] *Id.* at 1415 (noting that the DOJ has "seemingly prioritized the investigation of major police agencies that serve large swaths of the American population" in order to compensate for its lack of resources).

[138] Rushin & Edwards, *supra* note 118, at 750, 750 n.144 ("99.7% of American law enforcement agencies have not been subject to DOJ intervention or investigation via § 14141.").

[139] *See* Rushin, *Structural Reform Litigation*, *supra* note 114, at 1371–72, 1372 fig.2 (noting that "the volume of SRL cases fell during the second Bush Administration" because of "a variety of changes in the internal policies of the DOJ that discouraged the use of federal oversight in reforming local state agencies").

[140] *See* Sessions Memo, *supra* note 19, at 1 ("It is not the responsibility of the federal government to manage non-federal law enforcement agencies.").

[141] *See supra* notes 55–63 and accompanying text.

policing, but the changes are often top-down solutions lacking community engagement and input.[142]

Several scholars have proposed amending § 14141 to authorize actions for equitable and injunctive relief by private attorneys general to address the law's lack of local representation and agency.[143] Though laudable, these statutory reforms might subject individual-initiated suits to DOJ approval and impede federal officials' own reform efforts.[144]

Finally, even if viewed as an adjunct to § 1983, § 14141 aids only § 1983's deterrence goal and provides no compensation for victims. As a result, a strange system of bifurcated municipal liability emerges when it comes to police misconduct—one that permits selective and limited government-initiated, systemic injunctive relief claims to flow readily, but practically bans individual victims' discrete damages claims.[145] The next part accordingly proposes that damages claims against municipal entities should be held to a lesser standard of proof.

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[142] *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 879 (2001) [hereinafter Gilles, *In Defense of Making Government Pay*] ("A regime that forces community leaders—particularly in minority communities—to come hat in hand to federal officials seeking protection of their civil rights is at cross purposes with a zeitgeist that encourages community empowerment and everywhere looks to roll back reliance upon government." (quoting Gilles, *Reinventing Structural Reform Litigation*, *supra* note 30, at 1425)); Gilles, *Reinventing Structural Reform Litigation*, *supra* note 30, at 1387 (noting that the primacy of § 14141 in structural reform of police practices ignores "the eyes, experiences, motivation, and resources of millions of Americans who bear witness to institutionalized wrongdoing and are willing to endure the expense of rooting it out"); Patel, *supra* note 114, at 799–800 (observing that "community engagement, with little exception, has largely fallen short of advocates' and harmed communities' expectations for reform" and describing "ways in which communities have felt marginalized in the DOJ's efforts to reform police departments").

[143] *See, e.g.*, Gilles, *Reinventing Structural Reform Litigation*, *supra* note 30, at 1417–18 (proposing an amendment allowing the Justice Department "to authorize or deputize private individuals to bring 'pattern or practice' suits where the government has declined . . . to do so itself"); Schwartz, *Who Can Police the Police?*, *supra* note 17, at 482 (endorsing Gilles's proposal and adding that she "would allow prevailing plaintiffs bringing pattern and practice claims to recover attorneys' fees under Section 1988 as an additional incentive").

[144] Rachel Harmon questions whether private suits would aid § 14141 reforms, arguing that they may be ineffective if litigated alone and may interfere with federal investigations and lawsuits. *See* Harmon, *Promoting Civil Rights*, *supra* note 113, at 57–62.

[145] Recognizing the federalism concerns that § 14141 actions trigger, John Parry proposes a more lenient injunctive relief standard under § 1983 (moving back from *Lyons*) in order to achieve institutional corrections. John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73, 116–21 (2002).

IV. A DISTINCT AND LENIENT MUNICIPAL LIABILITY DAMAGES STANDARD

Premised on the revisionist account that what initially animated the Court's stringent causation standards for municipal liability was concern over intrusive injunctive relief, I argue here that relief under § 1983 should be bifurcated; specifically, that municipal liability claims for damages relief merit a diminished standard of proof. Even if one does not accept the revisionist account of *Monell*, the functional argument is similar: the discrete and retrospective nature of damages does not raise the same federalism concerns as equitable relief's prospective and often invasive reforms. Moreover, historical skepticism of injunctive relief—independent of municipal liability—argues for distinct standards. Finally, the lesser standard should facilitate compensation to victims, buttress the public's faith in the legal system, ensure some vindication of constitutional rights, and properly affix responsibility for police misconduct.

A. THE HISTORICAL AND PRACTICAL RELATIONSHIP BETWEEN DAMAGES AND INJUNCTIVE AND EQUITABLE RELIEF

Historically, injunctions were viewed as extraordinary relief, to be used "sparingly" even in disputes between private parties.[146] Unless a remedy at law proved inadequate, an equitable remedy was not available. These general principles of equitable restraint apply with even greater force where federal courts are asked to enjoin state or local government actions.[147] Several scholars contend that, given the "historic relationship" between law and equity, "damages should be *at least* as available as injunctions, if not more."[148]

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[146] Irwin v. Dixion, 50 U.S. (9 How.) 10, 33 (1850); *see also* Rizzo v. Goode, 423 U.S. 362, 378 (1976).

[147] *Rizzo*, 423 U.S. at 379–80.

[148] *See, e.g.*, John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 3 (2013) (addressing implied constitutional actions and noting that "[t]o arrange the doctrine differently 'gets the traditional interplay between law and equity exactly backwards' " and that "[i]f the Court is to respect history, therefore, it should dramatically *increase* the availability of implied constitutional damages" (quoting Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1135 (1989))). John Preis acknowledges that the Court could—instead of extending

Law has long recognized that the mode of redress affects how to assess responsibility or blameworthiness. The distinct civil and criminal regimes, for example, with their differing methods of accountability (e.g., damages v. imprisonment) influence the burdens of proof (e.g., preponderance of the evidence v. beyond a reasonable doubt). The import of a criminal conviction—deprivation of liberty, moral opprobrium, stigma—justifies requiring greater proof of misconduct than do the trappings of civil penalties such as fines. Even in a unitary regime like § 1983, then, different remedies should reasonably dictate the standards by which courts review government actor misconduct.

By their very nature, damages do not usually entail judicial interference in government action in the same disruptive manner as equitable and injunctive relief. Damages are generally retrospective, discrete, measurable, and predictable. Equitable and injunctive remedies are frequently prospective, indefinite, indeterminate, and often wide-ranging. Unlike injunctive relief, courts may also fashion damages remedies at some point removed from emergent events, usually after obtaining significant information.[149] In determining a damages remedy, courts may therefore "exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts."[150] The current state of police misconduct litigation under § 1983 and § 14141, however, inverts the law and equity relationship, paying little heed to its historical antecedents and practical application.

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damages availability—"withdraw the easy availability of injunctive actions, thus making them *harder* to obtain than damages actions." *Id.* at 4. It could be argued that, in *Lyons*, the Court returned to a more traditional approach to address claims of relief by treating prospective remedies more skeptically than damages, albeit through the standing doctrine rather than under § 1983 causation standards. But this argument ignores the inapposite equitable relief-influenced federalism concerns that suffuse the *Monell* causation requirement to begin with, resulting in an inappropriately high causation burden as the floor. *See supra* Parts II.D, II.F.

[149] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1884 (2017) (Breyer, J., dissenting) (addressing the availability of a *Bivens* damages remedy for conditions of confinement after the September 11th terrorist attacks, Justice Breyer notes that courts are more likely to defer to government action during emergencies, making a damages remedy all the more vital in securing some accountability for government excesses).

[150] *Id.*

B. THE IMPORTANCE OF MUNICIPAL DAMAGES FOR CONSTITUTIONAL TORTS

Enabling local government and police department liability for damages for constitutional violations is critical to ensuring police accountability. A viable monetary remedy against municipalities for police brutality affords a modicum of compensation to victims, restores public trust in the law, develops legal rights, and assigns moral blame.

1. Compensation and Motivation. It is entirely possible that not enough people sue police departments. According to the Bureau of Justice Statistics, in 2002 only 7.3% of people who believed the police used improper force against them ever filed a lawsuit.[151] At the most basic level, a broadened municipal liability damages remedy should result in more lawsuits and more money in victims' pockets.[152] The potentially lacking deterrent effect should not necessarily detract from a diminished liability standard's legitimacy when it compensates a victim of a constitutional violation.[153]

While plaintiffs may have any number of reasons for suing a municipality, money may motivate them to endure the temporal, financial, and psychological costs of litigation.[154] Financial compensation is a vital element of a tort system, whether one takes a damages-as-indemnification or a damages-as-redress approach.[155]

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[151] *See* MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY 16–20 (2005).

[152] Undoubtedly, other factors explain people's reluctance to sue over excessive police force. Daniel Meltzer suggests that many victims' interactions with the police are as "suspects or defendants" and that they may not sue because of "ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration." Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988) (footnotes omitted). Other injuries may not merit litigation because they are "small, widely dispersed, and intangible." *Id.*

[153] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 408 (1971) (Harlan, J., concurring) ("Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result.").

[154] Schwartz, *Who Can Police the Police?*, *supra* note 17, at 451 (observing that plaintiffs' motivations in a damages lawsuit may involve several objectives: "to punish individual defendants, to reform law enforcement, to have their day in court, or to get paid").

[155] Wells, *supra* note 5, at 1036–37 (noting that loss allocation is integral to the Court's understanding of tort law).

And in many instances, other constitutional rights remedies—be they protective, in the form of suppression, or prospective, styled as an injunction—may not be available.[156] Lifting the constraints on municipal liability should prod more people to seek retrospective money damages for constitutional violations.

2. Trust and Procedural Justice. Police abuse and lack of accountability—civil and criminal—can easily erode people's respect for, and allegiance to, legal institutions.[157] Enabling more individual lawsuits seeking damages from local governments to proceed to trial may combat these ill effects by instilling greater public trust in the legal system. An easier municipal damages lawsuit process also achieves an important degree of public community engagement and empowerment.

Tom Tyler's procedural justice studies find that people's perceptions of the fairness of judicial proceedings significantly influence their acceptance of decisions and respect for the legal system.[158] Moreover, the influence of fair procedures does not vary based on people's racial, ethnic, and socio-economic background.[159]

Heightened municipal liability standards fail to meet a core procedural justice principle—voice. "Having an opportunity to voice their perspective has a positive effect upon people's experience with the legal system irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making their decision."[160] Simply put, a more generous standard ensures that the victim "feels heard."[161]

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[156] *See id.* at 1051–52; *see also Bivens*, 403 U.S. at 410 (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing.").

[157] *See* Mike Hough et al., *Procedural Justice, Trust, and Institutional Legitimacy*, 4 POLICING: J. POL'Y & PRAC. 203, 205 (2010) ("If the police abuse their powers and wield their authority in unfair ways, this cannot only damage people's sense of obligation to obey their directives . . . it can also damage public perceptions of their moral authority and therefore the moral right of the law to dictate appropriate behaviour."); Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 237 (2015) (noting that the legitimacy of police agencies "crumbles when civilians are treated unfairly and the public is left with the conclusion that police agencies are not accountable").

[158] Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26–27 (2007–2008).

[159] *Id.* at 28.

[160] *Id.* at 30.

[161] Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 511 n.37 (2012).

Permitting more victims to participate in damages actions against their respective governments and police departments—even if they ultimately lose—improves "perceptions of the legitimacy of the system and about the [adjudication] process."[162] Allowing more cases to extend beyond motions to dismiss and motions for summary judgment enables victims to "publicly present their stories and have them 'authenticated,' create a public record of the events, and have their cases decided by a jury."[163] These lawsuits also may become civic opportunities for public engagement and education on government misconduct and reform—regardless of the lawsuit's outcome.[164] They also may provide autonomy and agency to some of a community's most marginalized population.[165]

3. Vindicating Constitutional Rights. Increasing damages liability exposure for municipalities may be justified under civil recourse theory. As opposed to the traditional tort rationale, which emphasizes indemnification, "the civil recourse principle holds that the point of tort law should be to empower the plaintiff to exact redress for wrongs."[166] Compensation is certainly part of the tort action's objective. But along with a victim's losses, a fact-finder should consider "the character of the defendant's conduct, . . . and the power dynamic between the parties."[167]

Michael Wells argues that the constitutional tort context especially merits application of civil recourse principles.[168] Obtaining a damages remedy—or at least a hearing in court—

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[162] *Id.*; *see also* Tyler, *supra* note 158, at 26 (explaining that litigants "accept 'losing' more willingly if the court procedures used to handle their case are fair").

[163] Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989, 996 (2004).

[164] *See id.* ("Furthermore, the educating function of public litigation is reduced when claims are dismissed prematurely.").

[165] *See* Gilles, *In Defense of Making Government Pay*, *supra* note 142, at 879 (criticizing dependence on federal officials under § 14141 as being "at cross purposes with a zeitgeist that encourages community empowerment" (quoting Gilles, *Reinventing Structural Reform Litigation*, *supra* note 30, at 1425)).

[166] Wells, *supra* note 5, at 1009. Michael Wells traces the Court's animosity towards government constitutional tort liability to a tort theory focused on indemnification and allocation of losses. *See id.* at 1005–07 (discussing *Carey v. Piphus*, 435 U.S. 247, 258–59 (1978), and *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 (1986)).

[167] John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 437 (2006).

[168] *See* Wells, *supra* note 5, at 1012–13.

against a governmental entity for constitutional violations is more compelling than in the private tort context "because the rights asserted are more vital and the defendants from whom redress is sought are more powerful and more dangerous."[169] Indeed, the very purpose of the Fourteenth Amendment and Bill of Rights is to protect the people from government abuse.[170]

Civil recourse should permit more constitutional tort lawsuits to get through the courthouse doors without bankrupting local governments. The focus on vindicating constitutional rights makes it harder "to justify rules that foreclose plaintiffs from obtaining" damages at all.[171] Civil recourse theory, therefore, dictates a departure from the *Monell*-driven heightened municipal liability standards for damages.[172] But because the primary objective of civil recourse is to redress constitutional wrongs, a damages award need not always provide full compensation for actual losses.[173] Civil recourse thus affords fact-finders a good deal of flexibility in reaching damages calculations as they consider the varying equities and policy considerations often attendant to constitutional litigation.[174] Legislators might similarly consider incorporating limits on damages in connection with reduced liability standards.

Other scholars have advocated making it easier to obtain relief for certain constitutional torts through presumed or nominal damages. Jean C. Love contends that presumed damages are the only means for adequately compensating "the infringement of constitutionally protected intangible interests."[175] She proposes that victims of procedural due process violations, for example,

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[169] *Id.* at 1012.

[170] *Id.*

[171] *Id.* at 1008.

[172] *See id.* at 1052–54 (explaining how civil recourse theory helps to solve the problem of a general under-enforcement of constitutional norms that typically depend on tort suits for enforcement).

[173] *Id.* at 1036.

[174] *See id.* at 1034 (noting that the reality of constitutional litigation is that other factors beyond making the plaintiff whole have "considerable influence on remedial doctrine"); *see also id.* at 1054 ("[C]ivil recourse consistently and broadly favors at least some vindication of constitutional rights and *some* redress of constitutional wrongs.").

[175] Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1282 (1979). Love also advocates permitting punitive damages against municipalities. *See id.* at 1277–78.

should not have to prove actual damages, as is the case with dignitary torts such as defamation.[176] Under such a legislatively crafted regime, victims would be able to recover a liquidated sum, guaranteeing a minimum amount, or to recover within a range, from which the court could determine the appropriate award.[177] Love also acknowledges that a more lenient standard of proof of damages would at least facilitate better compensation for constitutional torts victims.[178]

Advocates of more readily awarding nominal damages argue that such relief will facilitate judicial vindication of constitutional rights because courts will not be deterred by concern over the remedy's financial impact.[179] As several critics have noted, however, the lack of sufficient monetary relief may fail to motivate plaintiffs to sue and, therefore, may prevent sufficient development and protection of constitutional rights.[180]

4. Affixing Responsibility. Less restrictive municipal liability standards for damages also may better approximate a local government's actual responsibility for constitutional violations. Myriam Gilles praises municipal liability principally for its "fault-fixing function."[181] Gilles, however, criticizes government

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[176] *See id.* at 1261 (contending that "the intangible constitutional interests protected by the procedural due process clause more closely resemble the dignitary interests protected by such tort actions as defamation, false imprisonment, and invasion of privacy").

[177] *Id.* at 1284.

[178] *Id.* at 1281–82.

[179] *See, e.g.*, James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1607–08 (2011) [hereinafter Pfander, *Resolving the Qualified Immunity Dilemma*] (proposing that suits for nominal damages should entitle plaintiffs to "immunity-free determination of their constitutional claims"); Smith, *supra* note 1, at 483–84 (addressing the nominal damages approach for local governments).

[180] *See, e.g.*, Love, *supra* note 175, at 1272 (contending that nominal damages do not serve the purposes of compensation, deterrence, and vindication because the one-dollar award makes it unlikely that plaintiffs will "initiate constitutional tort litigation to recover nominal damages alone"). In fact, Love argues that the small amount of an award of nominal damages may "more often have the symbolic effect of diminishing the legitimacy of the plaintiff's complaint." *Id.* at 1281. Pfander acknowledges the concerns over motivation and even suggests that nominal damages could foster greater judicial hostility toward compensatory relief and reduce the number of claims against higher officials. Pfander, *Resolving the Qualified Immunity Dilemma*, *supra* note 179, at 1634–36.

[181] Gilles, *In Defense of Making Government Pay*, *supra* note 142, at 863; *see also* Amato v. City of Saratoga Springs, 170 F.3d 311, 317–18 (2d Cir. 1999) ("The ability to promote an individual official's 'scrupulous observance' of the Constitution is important. Perhaps even

indemnification of individual officers for their constitutional violations because it fails to apportion blame or deter and reform police misconduct.[182] First, indemnification is generally a contractually-bargained benefit, predating a constitutional violation.[183] Thus, payouts are unlikely to compel local governments to seriously assess department culpability, and government leaders will regard them as the "costs of doing business."[184] Second, indemnification allows local governments to "deflect[ ] attention from systemic and institutional factors contributing to recurring constitutional deprivations" by focusing on only the bad cops.[185]

Municipal liability, on the other hand, Gilles contends, "makes it more difficult to take refuge in the 'bad apple theory' and more likely that the municipality will take steps to remedy the broader problems."[186] Apart from economic motivations, municipal liability is more likely to publicly shame local governments as well as expose information through discovery that may be beyond the scope of individual officer lawsuits.[187] Extolling municipal liability's "predictable and salutary effects" on police misconduct,[188] Gilles proposes broadening liability to encompass "customs" that local police ignore and tacitly encourage.[189]

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more important to society, however, is the ability to hold a municipality accountable where official policy or custom has resulted in the deprivation of constitutional rights.").

[182] *See* Gilles, *In Defense of Making Government Pay*, *supra* note 142, at 862–63 (noting that municipal liability incurred indirectly, through the indemnification of individual officers, does not trigger the "fault-fixing function," as it "does not necessarily force policy-makers to acknowledge municipal fault and take remedial action").

[183] *See id.* at 862 ("The determination to indemnify is made at the front end, as the product of collective bargaining arrangements . . . and not in response to any constitutional claim.").

[184] *Id.*

[185] Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 31 (2000) [hereinafter Gilles, *Breaking the Code of Silence*].

[186] Gilles, *In Defense of Making Government Pay*, *supra* note 142, at 863.

[187] *See id.* at 859–60 (arguing that municipal liability claims are "particularly well tailored to the discovery of information concerning the cultural and political forces that give rise to . . . police misconduct" and that with such discovery comes publicity that is capable of inducing institutional change).

[188] *Id.* at 867.

[189] *See id.* at 867–68 (asserting that as the true range of actionable customs that may support the imposition of municipal liability is recognized—particularly those institutionalized, unwritten customs that underlie many of the constitutional deprivations committed by police—"we will see more clearly the deterrent or behavior-altering effect of constitutional damage suits aimed at municipalities under *Monell*"); *see also* Gilles, *supra* note

Peter Schuck also would reduce standards for municipal liability to better align with private tort conceptions of responsibility and to more accurately reflect how local government causes unlawful behavior.[190] First, Schuck argues, the "local government's nexus to the violation" should often "satisfy both the cause-in-fact and proximate cause criteria, as those concepts are understood in private tort law."[191] Putting aside vicarious liability, the government's relationship to the government worker who commits the violation amounts to "plac[ing] her in a position in which the violation is possible, perhaps (on some facts) even probable."[192] Second, the local government operates a monopoly over services like policing and, thus, undertakes "special moral obligations to perform them in socially beneficial ways."[193] Finally, "risk-creating" endeavors such as policing merit liability just as would a similarly hazardous private enterprise.[194] The reduced damages standards for municipalities thus cohere with a more realistic, but moral, comprehension of local government responsibility for police abuse.

A more permissive municipal damages liability standard also should address the interdependent weaknesses of qualified immunity.[195] Victims of police officer abuse may be left with no one to hold accountable because of the government-favoring biases of both immunity doctrines. Yet, concerns over unfairly penalizing officers when a constitutional right's clarity is lacking have some

185, at 21–22 (" 'Custom' claims for municipal liability . . . have the potential to address a wide spectrum of recurring unconstitutional conduct on the part of low-level officials that simply go unaddressed by current law."). Gilles also would subject local governments to punitive damages for "systemic and widespread" constitutional violations. Gilles, *In Defense of Making Government Pay*, *supra* note 142, at 873.

190 Schuck, *supra* note 71, at 1764–65 (noting that "some causal nexus between agency and injury almost invariably exists as a factual matter").

191 *Id.* at 1779.

192 *Id.* The government has "authorized (perhaps mandated), supervised, trained, equipped, and paid the individual who causes injury." *Id.* Schuck also argues that the real question in most § 1983 cases in which the municipality's link to the injury is at issue is not whether a causal nexus exists, but whether the municipality has a legal duty—a concept that has been generally expanded in private law. *Id.* at 1764–66.

193 *Id.* at 1780.

194 *Id.*

195 *See* Smith, *supra* note 1, at 478 ("[B]ecause immunities for government agents and immunities for local entities often work in tandem to block constitutional accountability, the optimal approach to adjudicating constitutional torts should take this synergy into account.").

force. The doctrine goes too far, however, when officers may deny the clarity of a prohibition despite their own department's policy guidance banning the misconduct at issue.[196]

As I have argued elsewhere, qualified immunity doctrine should be changed to encompass local department policies as evidence of "clearly established" rights.[197] As a necessary complement to that move, I propose in Part V that municipalities should be subject to damages liability where a person suffers injury because a municipality lacks policies that, according to national consensus, are necessary to prevent constitutional violations.[198] These fixes should better approximate actual individual officer liability. The delineation of responsibility may also encourage departments to better develop and adopt appropriate police policies.

C. RESPONSES TO A BIFURCATED RELIEF-BASED REGIME

The following discussion addresses possible objections to bifurcating relief, most of which are grounded in the Court's § 1983 and immunity jurisprudence. The section also focuses on potential legislative history arguments against a bifurcated model.

1. Undifferentiated Relief-Based Approach to § 1983. The Supreme Court has not embraced a bifurcated relief-based approach to § 1983 claims. The Court has generally treated claims against municipalities the same regardless of whether the relief sought is monetary or equitable. Certainly, the language of § 1983 does not distinguish between the modes of relief: "Every person . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."[199]

Two years after *Monroe*, in *City of Kenosha v. Bruno*, the Court declined to apply differing liability standards based on the relief requested. Writing for the majority, Justice Rehnquist explained, "We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated

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[196] *See* Cover, *supra* note 3, at 1824–31 (arguing that "it should work no hardship" to hold officers accountable for violations of their own department's use of force policies that reflect the constitutional prohibition on excessive force).

[197] *Id.* at 1824.

[198] *See supra* Part V.A.

[199] 42 U.S.C. § 1983 (2012).

application to municipal corporations depending on the nature of the relief sought against them."[200]

Justice Douglas, the author of *Monroe*, contended in his partial dissent that the opinion had foreclosed only monetary relief against local government, not equitable relief.[201] Douglas's legislative historical account of § 1983—revised and overruled by *Monell*—attributed Congress's rejection of the Sherman Amendment to the destructive and paralyzing effect of damages on municipalities.[202] But *Monell*, which addressed what, in practice, were monetary claims, overruled *Monroe*'s bar on municipal liability, yet clarified that it did not disturb the *Monroe*-progeny's holding that § 1983 applied equally to both equitable and monetary claims for relief.[203]

Finally, in 2010, the Court unanimously held in *Los Angeles County v. Humphries* that *Monell*'s "causation requirement" applies, regardless of whether the plaintiffs seek damages or equitable relief.[204] The Court rejected the argument that claims for injunctive relief should not be subject to the "policy or custom" requirement of claims for damages. As the Court explained, "whether an action or omission is a municipality's 'own' has to do with the nature of the action or omission, not with the nature of the relief that is later sought in court."[205] The Court stressed that *Monell*'s causation requirement and rejection of respondeat superior were not so much motivated by economic concerns as they were by a desire to limit municipal liability to its "own wrongful conduct."[206]

As I argued earlier, I am not convinced that *Monell*'s municipal liability standards can be untethered from the Court's concerns over protracted federal judicial involvement in institutional reform

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[200] City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973).

[201] *See id.* at 516 (Douglas, J., dissenting in part) ("I have expressed my doubts in *Moor v. County of Alameda* . . . that our decision in *Monroe v. Pape* . . . bars equitable relief against a municipality." (citations omitted)).

[202] *See id.* at 519–20 ("To the extent that the Sherman Amendment was directed only at liability for damages and the devastating effect those damages might have on municipalities, it seems that the defeat of the amendment does not affect the existence *vel non* of an equitable action.").

[203] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701, 701 n.66 (1978).

[204] Los Angeles County v. Humphries, 562 U.S. 29, 37 (2010) ("*Monell*'s logic also argues against any such relief-based bifurcation.").

[205] *Id.*

[206] *Id.* at 38.

litigation. Moreover, the § 1983 liability regime is so messy that it confounds such purported analytical consistency.[207]

2. Ex parte Young. A bifurcated approach that is more lenient towards damages claims also runs counter to the underlying logic of the arrangement vis-à-vis state liability. The state constitutional torts liability regime is illogically distinct from the approach to local government. Under the Eleventh Amendment, states enjoy sovereign immunity from private litigants' damages claims.[208] In *Ex parte Young*, however, the Court held that private litigants may seek to enjoin state officials from undertaking unconstitutional actions.[209] But the relief is limited in that any funds required to provide the "equitable restitution" may not come from the state treasury.[210]

The state liability line of cases thus offers a near mirror image of the relief-based bifurcation regime that I propose—it precludes damages liability entirely, while permitting injunctive relief against the state. Given that the Eleventh Amendment does not immunize local governments from their constitutional torts, it is difficult to justify a more lenient *equitable* relief standard because an adequate alternative remedy (i.e., damages) may (*should*) be available. Damages relief may be made more feasible by not

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[207] *See* Jeffries, *supra* note 94, at 238 (observing that § 1983 doctrine "imposes diametrically opposite liability rules on governmental defendants that are functionally indistinguishable").

[208] Hans v. Louisiana, 134 U.S. 1, 15–16 (1890) (holding that the Eleventh Amendment applies to suits brought against a state by its own citizens as well as to suits brought by citizens of other states or by citizens of foreign states); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 66–67 (1989) (noting that § 1983 "does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties").

[209] *See Ex parte* Young, 209 U.S. 123, 159–60 (1908); *see also* Jeffries & Rutherglen, *supra* note 135, at 1395–96 (describing *Ex parte Young* as "[t]he case that shunted aside the traditional presumption against equitable relief," and asserting that its impact "was magnified by contemporaneous developments allowing federal courts to issue injunctions when state courts could not do so"); *id.* at 1396–98 (identifying subsequent efforts by Congress (e.g., 28 U.S.C. § 2283) and the Court (e.g., *City of Los Angeles v. Lyons*) to limit federal court injunctions).

[210] Edelman v. Jordan, 415 U.S. 651, 668 (1974) (finding that the Court of Appeals erred in holding that *Ex parte Young* did not preclude the retroactive monetary award at issue because the award could be satisfied only by a "payment of state funds" and was "in practical effect indistinguishable . . . from an award of damages against the State"). *But see id.* at 667 (acknowledging that differences between permissible and impermissible relief are difficult to discern and that prospective relief permitted under *Ex parte Young* may affect state revenues).

subjecting monetary claims to the same standards that have historically been imposed where equitable relief is sought—the very same high standards raised in *Rizzo* that permeate the reasoning of *Monell* and its progeny.

3. Legislative History. It may be argued that a bifurcated regime favoring damages claims over those seeking equitable remedies runs counter to the legislative intentions that led to the 1871 Act. One of the primary concerns that motivated the earlier version of § 1983 was inaction on the part of southern law enforcement officials in response to private acts of violence against African-Americans. Yet, as David Jacks Achtenberg persuasively argues, the 42nd Congress was not averse to expansive damages relief against local governments, including through vicarious liability and respondeat superior.[211] To be sure, injunctive relief might appear the more effective and responsive remedy to compel local law enforcement to protect victims of racist violence. But notwithstanding Justice Douglas's account in *City of Kenosha*, nothing in the Act's legislative history precludes bifurcating liability based on relief, nor should it necessarily favor equitable relief over damages relief standards.

Finally, as Michael Gerhardt argues, the Court has crafted a § 1983 jurisprudence that more closely resembles federal common law, negating the need to mine legislative history consistent with a holding.[212] Moreover, Michael Wells demonstrates that the Court's § 1983 jurisprudence—including its jurisprudence on municipal liability—frequently "rel[ies] on policy considerations."[213] The Court's emphasis on federalism concerns, therefore, justifies a bifurcated regime that affords damages remedies on a lesser showing of liability than is required for equitable relief, the latter

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[211] Achtenberg, *Taking History Seriously*, *supra* note 92, at 2203–04 (arguing that the 42nd Congress's rejection of the Sherman Amendment was compelled by rationales of respondent superior and reflected only congressional opposition to "making cities liable for damages resulting, not from the conduct of their employees, but rather from racially motivated mob violence occurring within the cities' boundaries").

[212] *See* Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 557–58 (1989); *see also* Achtenberg, *Taking History Seriously*, *supra* note 92, at 2248 (concluding that fidelity to "the common law decision-making process" requires the Court to overrule *Monell*).

[213] Wells, *supra* note 5, at 1049 (citing *Owen v. City of Independence*, 445 U.S. 662, 638–50 (1980), and *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982)).

being the greater accelerant of overstepping federal courts in areas of local concern.

D. CALCIFIED MUNICIPAL LIABILITY

Forty years of *Monell* have calcified the opinion into a hardened precedent that the Court is unlikely to budge by loosening municipal liability standards or bifurcating relief.[214] The Court has proved itself reliably opposed to expanding constitutional tort liability, shutting the door repeatedly on loosening the bounds of qualified immunity or expanding federal causes of action.[215] Taken together, these considerations, along with principles of stare decisis, separation of powers, and, of course, federalism, render it near-delusionary to expect the Court to revisit its municipal liability jurisprudence. Accordingly, any bifurcated municipal liability regime will need to usher from Congress.[216]

E. CHIEF JUSTICE BURGER'S PROGRESSIVE LEGISLATIVE PROPOSAL

While legislation may sometimes emerge from the scrapheap of judicial dicta, Chief Justice Warren Burger would appear an unlikely source for a statute affording victims of police brutality a realistically obtainable damages remedy against municipalities.

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[214] *See* Pfander, *Resolving the Qualified Immunity Dilemma*, *supra* note 179, at 1631 ("[T]he Court will hesitate to embrace any development aimed at facilitating constitutional tort litigation.").

[215] *See generally* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (finding federal officials entitled to qualified immunity in a new *Bivens* context).

[216] *See* Pfander, *Resolving the Qualified Immunity Dilemma*, *supra* note 179, at 1629 n.146 ("Immunity doctrine has been primarily the subject of judicial development, but its contours do not appear to be constitutionally compelled. Congress would thus appear to have substantial power to legislate on the question of official immunity and it has occasionally done so."). If not "near-delusional," it may strike some readers as farcical to expect anytime soon that Congress will legislate at all, let alone in the realm of police accountability. The 115th Congress appears on pace with, or maybe even a bit behind, the past few Congresses' record-breaking low number of enacted laws. *See Statistics and Historical Comparison: Bills by Final Status*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics (last visited Aug. 9, 2017); *see also* Norm Ornstein, *Is This the Worst Congress Ever?*, THE ATLANTIC (May 17, 2016), https://www.theatlantic.com/politics/archive/2016/05/is-this-the-worst-congress-ever/483075/ (documenting the unprecedented and "cringeworthy failures" of the 114th Congress and suggesting that it might be the "worst Congress ever"); Jonathan Topaz, *'Worst Congress Ever,' by the Numbers*, POLITICO (Dec. 17, 2014), http://www.politico.com/story/2014/12/congress-numbers-113658 (examining how the "singularly unproductive" 113th Congress measures up to past Congresses)).

But that is largely the framework he sketched out in his dissenting opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, where he objected to the Court's crafting of a damages remedy for a federal agent's Fourth Amendment violation that Congress had not authorized.[217] Though he proposed only a federal remedial scheme, Burger hoped that states would adopt similar statutes, all of which "would move our system toward more responsible law enforcement."[218] None of this rankled Burger's staunch federalist orientation.[219]

Writing during the interim between *Monroe* and *Monell*, Burger called on Congress to enact a "remedy against the government itself to afford compensation and restitution" to police misconduct victims.[220] Observing that lawsuits against individual officers had not proven effective at stemming police misconduct, Burger's statute would have waived sovereign immunity, adhered to respondeat superior principles, encompassed error and intentional wrongdoing by officers, and vested jurisdiction in a specialized tribunal.[221]

To be sure, Burger felt that any such remedy was outside the Court's creative power, as reflected in *Bivens*[222] and later in his joining the dissent in *Monell*. Yet, he envisioned that the judiciary would have "the ultimate responsibility for determining and articulating standards" in his remedial scheme.[223]

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[217] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 422–24 (1971) (Burger, C.J., dissenting) ("I conclude . . . that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the Court takes today.").

[218] *Id.* at 423–24.

[219] *See* James L. Volling, *Warren E. Burger: An Independent Pragmatist Remembered*, 22 WM. MITCHELL L. REV. 39, 47 (1996) (describing the "hallmark of Warren Burger's judicial philosophy" as "seeking jurisprudential equipoise through common-sense weighing of competing interests in the context of federalism").

[220] *Bivens*, 403 U.S. at 422 (Burger, C.J., dissenting). Burger's proposal also would have required that the misconduct at issue be included within the "officer's personnel file so that the need for additional training or disciplinary action could be identified or his future usefulness as a public official evaluated." *Id.* at 423.

[221] *Id.* at 421–23.

[222] *Id.* at 412 ("Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.").

[223] *Id.* at 423. Burger also preferred the damages remedy to the suppression doctrine as a limitation on police misconduct, noting its potential for affording "meaningful redress" for victims rather than letting criminals go free. *Id.* at 424. While sympathetic to the innocent victim, his proposal would have undone criminal defendants' protections established pursuant

The congressional response to Burger's proposal and *Bivens* was mixed. Congress amended the Federal Tort Claims Act to substitute the United States as "generally liable on a simple *respondeat superior* theory for the common law torts of its employees."[224] But Congress declined to enact possible United States liability for constitutional violations.[225] Today, the need for congressionally authorized local police accountability through expanded compensation is even more pronounced.

V. A NEW MUNICIPAL LIABILITY DAMAGES STANDARD

This Part sketches out the details of a new statutory provision for purposes of obtaining damages relief against local governments and entities. The proposal builds off of § 14141, § 1983 case law, and the interaction between qualified immunity and municipal liability doctrines. The proposed statutory framework would, by and large, remove the need for litigants to meet the strict definitions of "policy" and "policymaker" or demonstrate "deliberate indifference" or "moving force" causation in failure to train, prevent, and discipline claims.

A. THE STATUTORY FRAMEWORK

Under the proposed framework, municipal liability meriting damages relief for police misconduct may be demonstrated in two

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to the exclusionary rule. Burger's proposal would have required that no evidence be excluded from a criminal proceeding on the basis of a Fourth Amendment violation. *Id.* at 423.

[224] RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1081, 1090 (5th ed. 2003); *see also* 28 U.S.C. § 1346(b) (2012) (granting the U.S. district courts exclusive jurisdiction of civil actions on claims against the U.S. for injury caused by the negligent acts or omissions of its employees acting within the scope of their employment); Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (amending Title 28 of the United States Code to provide for a remedy against the U.S. based on the negligent or wrongful acts of U.S. employees). The FTCA, however, essentially immunizes individual officers from common law tort claims. *See* 28 U.S.C. § 2679(b)(1) (2012) ("The remedy against the United States . . . for injury . . . arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages.").

[225] James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 (2009).

different ways. In addition, the proposal expands individual officer liability in certain circumstances.

1. Proposed Framework for Pattern or Practice Liability. A person may in a civil action obtain appropriate damages relief from the relevant local government authority when:

> (a) the person has been subjected to a constitutional harm (deprivation of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States) by the local government's law enforcement officers; and
> (b) the constitutional harm is part of a pattern or practice of conduct by the local government's law enforcement officers.

2. Proposed Framework for Lack of Policy Liability. A person may in a civil action obtain appropriate damages relief from the relevant local government authority when:

> (a) the person has been subjected to a constitutional harm;
> (b) the local government authority has a duty to prevent the harm, as evidenced through a generally (national) accepted norm, policy, or custom aimed at preventing the harm;
> (c) the local government authority lacks a policy preventing the harm;
> (d) the harm is a foreseeable consequence of the lack of policy; and
> (e) the lack of policy caused the harm.
> The local government authority may not be held liable for damages if it shows that the lack of policy did not cause the constitutional harm.

3. Providing Notice of Constitutional Right. The existence of a local government authority policy aimed at preventing a

constitutional harm provides notice to any of the local government's law enforcement officers of the prohibition and "clearly establishes" a constitutional right against such harms for purposes of § 1983 civil actions against individual officers.

4. Pattern or Practice Liability. Section 1 of the legislative proposal largely tracks the language and reasoning of § 14141. A local government should be held responsible for a specific constitutional harm that an individual officer perpetrates when the same types of constitutional harms have been perpetrated in the past by the local government's officers. The local government's failure to prevent repeated harms amounts to—at a minimum—acquiescence or tacit approval—and should therefore constitute a "policy or custom" for purposes of securing local government liability and a damages remedy. The lack of any specific order or directive by a policymaker is immaterial. Conceiving of a pattern or practice (i.e., what actually happens) as a de facto "policy" accords with Peter Schuck's observation that "low-level, bottom-up processes" and "street-level bureaucrats" frequently determine policy.[226]

Critical questions may arise concerning this avenue for municipal damages relief. First, when does a harm rise to the frequency of a pattern or practice? Addressing § 1983 actions, the Supreme Court has held that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train."[227] In the § 14141 context, the DOJ contends that a pattern or practice requires "repeated and not isolated instances" of constitutional violations.[228] But, the DOJ qualifies, a court need not find a "specific number of incidents" or be shown "statistical evidence" to find a pattern or practice.[229] Relying on *International*

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[226] Schuck, *supra* note 71, at 1778 (emphasis omitted) (quoting Richard Weatherley & Michael Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 HARV. EDUC. REV. 171, 172 (1977)).

[227] Connick v. Thompson, 563 U.S. 51, 62 (2011) (quoting Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 409 (1997)).

[228] U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 12 (2014) [hereinafter DOJ REPORT] (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1997)), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf. The *Teamsters* opinion, however, elsewhere describes a "pattern or practice" as "standard operating procedure—the regular rather than the unusual practice." 431 U.S. at 336.

[229] DOJ REPORT, *supra* note 228, at 12.

Brotherhood of Teamsters v. United States, concerning Title VII employment discrimination, the DOJ explains that the phrase " 'was not intended as a term of art,' but should be interpreted according to its usual meaning 'consistent with the understanding of the identical words' used in other federal civil rights statutes."[230]

This broad definition in the § 14141 context has been subject to little judicial review,[231] but a capacious basis for municipal damages liability may elicit resistance. Courts have struggled in the § 1983 arena over what number of past violations would put local government officials on notice such that municipal liability should attach for the entity's inaction.[232] In *Connick v. Thompson*, four members of the Court found that four instances of *Brady* violations in the Orleans Parish District Attorney's Office resulting in overturned convictions amounted to a pattern and constituted notice for purposes of assessing foreseeability, deliberate indifference, and failure to train.[233] But the majority did not address the requisite number of violations for a pattern, treating the claim as one based on a single incident.[234] The ultimate question of how many instances amount to a pattern or practice may necessarily be left for courts to determine.

Equally challenging under the present proposal is defining the scope of constitutional harms within a pattern or practice. The Justices disagreed in *Connick* about what degree of similarity is required between the prior misconduct and the underlying constitutional harm. The majority discounted the pattern of preceding *Brady* violations because they did not involve—as was at issue in the case—"failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind."[235] In

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[230] *Id.* (quoting *Int'l Bhd. of Teamsters*, 431 U.S. at 336 n.16).

[231] *See supra* Part III (discussing cases addressing pattern or practice).

[232] *See* WASSERMAN, *supra* note 96, at 132–33 (noting that much of the litigation in this area "is over what constitutes a sufficient pattern of past violations . . . and the amount of knowledge or notice the policymaker must have of the prior incidents").

[233] *See* Connick v. Thompson, 563 U.S. 51, 104 (2011) (Ginsburg, J., dissenting) ("[T]he *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office.").

[234] *See id.* at 62–63 (majority opinion) (stating that the four prior instances of *Brady* violations could not have put Connick on notice because they were not similar to the violation at issue).

[235] *Id.*

contrast, the dissenters took a broader view of a pattern of unconstitutional conduct, contending that the fact of the prior *Brady* violations should have alerted the prosecutor's office to the foreseeability of the office's unlawful, secret retention of crime lab evidence.[236] Thus, here too, courts will need to determine the requisite degree of similarity between prior instances of unconstitutional violations and the specific harm a plaintiff alleges. Despite the proposed statute's expanded remedial intentions, courts should incline toward finding a similar relationship between constitutional harms and prior violations, departing from the currently limiting municipal liability doctrine associated with foreseeability and fault tests.[237]

Definitional concerns aside, plaintiffs also may encounter evidentiary or informational challenges in prosecuting pattern or practice claims. It may be difficult for claimants—particularly low-income individuals—to obtain sufficient documentation of prior misconduct in order to satisfy pleadings standards to establish a pattern or practice.[238] These hurdles are present, of course, in current § 1983 municipal liability litigation as well, but should be partly ameliorated by more generous interpretations of the scope and number of preceding constitutional violations. Plaintiffs may also, of course, avail themselves of § 14141-related reports and findings to support their own pattern or practice damages claims.[239]

5. Lack of Policy Liability. Under the "lack of policy liability" provision, municipalities may be liable for damages for even single instances of officer misconduct when they lack generally accepted police department policies aimed at preventing the particular

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[236] *See id.* at 103–04 (Ginsburg, J., dissenting).

[237] *See* WASSERMAN, *supra* note 96, at 132–33.

[238] Harmon, *Promoting Civil Rights*, *supra* note 113, at 62 n.190 ("[P]otential private plaintiffs are unlikely to have much exclusive information about patterns of conduct in a police department, because patterns of misconduct may be more difficult for private actors to identify . . . .").

[239] Rachel Harmon notes in her criticism of proposals according private individuals power to bring equitable claims under § 14141 that they may interfere with, or even undermine, government-initiated attempts at reform of the same police departments. Harmon, *Promoting Civil Rights*, *supra* note 113, at 60–62. A significant increase in damages claims concerning a department subject to structural reform investigation or oversight could raise some of these same concerns, though the distinct forms of relief might render the critique largely inapposite.

constitutional harm at issue. This section holds liable those police departments that do not meet the standards of most other police departments, thereby recognizing a constitutional duty to prevent certain police misconduct.[240] In addition to securing compensation, this feature is the most likely to encourage departments to adopt nationally recognized constitutional police policies and practices in order to avoid future liability.

The provision removes the high causation standard that proves so difficult for many plaintiffs to surmount when no appropriate policy is in effect. A lack of relevant policy thus amounts to a presumption of municipal liability. Though a municipality may demonstrate that the absence of a policy did not cause the plaintiff's constitutional harm, that burden is on the municipal government, not the plaintiff. Plaintiffs may still obtain damages when police departments have implemented appropriate policies, but will not benefit from the same favorable municipal liability standard of proof.

The notion of a constitutional duty to prevent police misconduct has not eluded judicial review. In *Rizzo* the Court rejected imposing a negligence standard, replete with a duty of care, on local government and police officials. The Court discounted the contention that government defendants had "a constitutional 'duty' . . . to 'eliminate' future police misconduct."[241] This legislation would rectify the Court's error.

The proposed standard accords, in part, however, with Justice Blackmun's articulation of constitutional duty. Blackmun argued in his dissent in *Rizzo* for a more expansive reading of § 1983 liability, as described in *Monroe*: "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' "[242] Even without a

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[240] *See* Cover, *supra* note 3, at 1836 (proposing that the lack of constitutionally excessive force protective policies and training should establish municipal liability).

[241] Rizzo v. Goode, 423 U.S. 362, 376 (1976) ("Such reasoning . . . blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983."). Notably, all of the cases that the Court addressed relating to a link between a pattern of misconduct involved pleas for injunctive relief. *Id.* at 373–77.

[242] *Id.* at 384 (Blackmun, J., dissenting) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)). Peter Schuck similarly argues that, in addressing municipal liability, the analysis would be better aimed at questions of duty—as to what and whom—rather than causation. Schuck, *supra* note 71, at 1765–72 (asserting that the real question in § 1983 cases is about legal duty, and examining four examples of ways in which the contemporary scope of the

specific policy ordering the constitutional violations, Blackmun insisted that "[t]here must be federal relief available against persistent deprival of federal constitutional rights."[243] As Blackmun explained, police officials may have a "duty" to prevent subordinate officers' misconduct, rendering them liable under § 1983.[244]

While Blackmun's opinion directly supports a constitutional duty to prevent police misconduct when a pattern or practice of constitutional violations exists, his reasoning indirectly supports a constitutional duty where there is a general police policy and practice to prevent particular constitutional violations. A national consensus on such policies reflects an informed belief that a police department must take specific steps and implement certain procedures to prevent constitutional violations by its officers.

Resort to a consensus of local police department practices to ascertain a constitutional standard or duty of care may be analogized to the medical malpractice national standard of care.[245] Commentators justify the trend toward a national medical standard as preventing substandard medical treatment and ensuring quality care irrespective of diverse geographic locations.[246] Adopting such national standards of police treatment may be justified on similar grounds.

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duty concept in private tort law has been "extended to impose broad, non-vicarious liability in factual situations . . . analogous to many typical § 1983 cases").

[243] *Rizzo*, 423 U.S. at 382 (Blackmun, J., dissenting). Blackmun would have held that a supervising official's conscious permission of a subordinate's constitutional violation could establish liability and lead to an equitable remedy, suggesting there was no legal difference between officials' "active encouragement and direction of" and "mere acquiescence in" police misconduct. *Id.* at 385 n.2 (quoting Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969)).

[244] *Id.* (quoting *Schnell*, 407 F.2d at 1086).

[245] *See* JAMES A. HENDERSON JR. ET AL., THE TORTS PROCESS 213 (8th ed. 2012) ("The trend in recent years has been to depart from the 'locality rule' and to turn to the country as a whole to determine medical custom, at least with respect to specialists." (citations omitted)); Michelle Huckaby Lewis, John K. Gohagan & Daniel J. Merenstein, *The Locality Rule and the Physician's Dilemma: Local Medical Practices vs the National Standard of Care*, 297 JAMA 2633, 2634 (2007) (documenting that twenty-nine states and the District of Columbia follow a national standard of care).

[246] *See* Lewis, Gohagan & Merenstein, *supra* note 245, at 2636 (noting equal informational access for rural and urban doctors and that "persistence of [the locality] rule may serve to promote the practice of substandard medicine"). *Cf.* HENDERSON ET AL., *supra* note 245, at 214 (acknowledging that "[t]he rejection of the locality rule is based on the assumption that the quality of medical care ought not vary with the geographical area in which the

6. Notice of Constitutional Right. The final section addresses the potential scenario that municipalities will escape damages liability where there is no pattern or practice of the constitutional harms at issue and the municipality has a policy in effect that meets the general standard. It may prove difficult for plaintiffs to establish municipal liability in these circumstances. The section therefore alters qualified immunity doctrine to hold that the local government's applicable policy "clearly establishes" the constitutional prohibition on a certain action. As a result, individual officers who violate that policy, which is aimed at preventing the constitutional harm, may not claim they lack notice under that prong of the clearly established test and, therefore, merit immunity.[247] The combination of the "Lack of Policy Liability" section and the instant provision's restructuring of the law may incentivize municipalities to adopt constitutionally compliant policies and more appropriately fix blame for constitutional violations.[248] Moreover, individual officers will not escape liability, ensuring accountability and compensation.[249]

B. POTENTIAL OBJECTIONS

1. Modesty. Critics may contend that the proposed statutory framework for enhanced municipal damages liability does not go far enough. Based on the revisionist account of municipal liability set forth here, a critic may rightly question why the remedy is not to overrule *Monell* and lift the ban on holding municipalities

defendant practices," the authors question whether tort law is really an effective instrument to achieve this end).

[247] *See* Cover, *supra* note 3, at 1829–30 (describing a similar proposal).

[248] This aspect of my proposal is similar to Brandon Garrett and Seth Stoughton's "safe harbor" proposal, which would eliminate municipal liability where a department "adopted sound policies" in exchange for "expanded municipal liability and a departure from *City of Canton v. Harris*, for patterns and practices of constitutional violations." Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 301 (2017).

[249] Of course, given the current state of indemnification practices, it is likely that municipalities will continue to pay for their officers' constitutional wrongs. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–13 (2014) (finding local governments pay for more than 99% of the costs connected with settlements and judgments arising from civil rights lawsuits against police officers).

vicariously liable for the acts of their agents. Numerous members of the Supreme Court and scholars have proposed just that.[250]

The proposed framework may be defended against the "too modest" remedy on several grounds. First, the proposal is likely to cover much of the same conduct as would the doctrine of respondeat superior, thereby achieving much of the same compensatory objectives. Second, the delineations of liability in the proposed framework offer a level of precision that may enable a government entity that is so inclined to better examine and diagnose its constitutional failings, including certain causation questions.[251] By contrast, a vicarious liability regime, which holds the government entity responsible for all agents' misdeeds, complicates the introspective and reform-minded route that seeks to weed out systemic problems. The prospects of police department "self-help" through litigation, however, may be overstated, despite the proposal's more detailed bases of liability.[252]

Finally, the proposed framework's more detailed bases for municipal liability in conjunction with its change to qualified immunity doctrine achieve a better balance in apportioning blameworthiness than does respondeat superior's blunter assignment of entity responsibility. The proposed framework, notwithstanding a local government's potential policy and contractual reasons for subsequently indemnifying its police officers, more fairly allocates responsibility to the wrongdoer, and may foster improved policies and practices.

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[250] *See, e.g.*, Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 431–32 (1997) (Breyer, J., dissenting) (pointing out that the fact on which *Monell* relied—that the Congress that enacted § 1983 rejected the Sherman Amendment—"does not argue against vicarious liability for the act of municipal *employees*—particularly since municipalities, at the time, were vicariously liable for many of the acts of their employees"); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 962–63 (2015) (describing general consensus that the most critical improvement to § 1983 litigation would be to permit vicarious liability); Jon O. Newman, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html?utm_term=.0edd37106e41 (proposing abolishing qualified immunity, adopting local government vicarious liability, and authorizing the federal government to sue police on victim's behalf).

[251] *See* Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1061–75 (2015) (describing possible informational benefits gleaned from defensive litigation).

[252] *Id.* at 1082, 1096–1100 (addressing reasons police departments ignore potential insights from litigation).

2. Costs. More permissive liability standards for § 1983 monetary damages claims would doubtless significantly reduce local treasuries. A first response: that is precisely the point. Too many victims of police brutality do not receive damages for the abuse they suffer due to police department action and inaction. For too long courts have manipulated government immunity doctrines to favor concerns about federalism, costs, and over-deterrence over compensating wronged individuals. Taking the costs-savings rationale to its most extreme conclusion would not only deny compensation to deserving individuals, but also erode public trust and deprive society of a clarification of constitutional rights. If the number of police brutality cases stretches judicial resources and local funds, it is no answer to preclude damages awards.[253] Rather, the solution is to diminish the underlying instances of police misconduct.

Second, while the primary purpose of the proposed framework is to ensure more compensation for police abuse victims, dramatically increased damages awards against municipalities and officers may achieve the elusive deterrent effect that also undergirds constitutional tort litigation. To the consternation of civil rights advocates—and as volumes of law reviews attest—§ 1983 litigation has not reduced police misconduct.[254] A greater financial penalty might finally make local governments and their communities take notice and insist on internal police reform.

Moreover, the current state of police misconduct litigation already visits substantial costs on local governments. Section 14141 litigation requires that local governments expend hundreds

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[253] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring) ("[W]hen we automatically close the courthouse door solely on this [judicial resources] basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests.").

[254] *See* Jeffries & Rutherglen, *supra* note 135, at 1418 ("Whatever the causes, it seems clear that damages actions are not a generally effective remedy against abusive and excessive use of force by law enforcement."); *id.* at 1400–06 (reviewing the history of damages as a constitutional remedy and suggesting that context and efficacy of damages should impact its propriety); Schwartz, *Who Can Police the Police?*, *supra* note 17, at 453–54 (observing that damages "success may not create leverage over the involved law enforcement officers and agencies" in part because "municipal budgeting practices usually insulate police department budgets from feeling any financial consequences of lawsuit payouts").

of millions of dollars on reforms.[255] While some research suggests that these costs may offset § 1983 litigation expenses by reducing police misconduct,[256] an expansion of municipal liability could theoretically lead to locally imposed reforms precluding the need for additional § 1983 lawsuits and § 14141 actions.

Finally, should damages in the aggregate prove intolerable, the proposed framework could incorporate a cap on financial awards. Several commenters have suggested that imposing a ceiling on monetary relief or categories of misconduct would realize the general objectives of widespread damages relief.[257] By ensuring that all deserving victims receive some award—albeit potentially diminished—a damages cap also would realize the procedural justice and normative objectives of constitutional torts litigation.

3. Federalism. The proposed framework's diminished municipal liability threshold will also rankle many concerned about federalism.[258] Placing more local government police departments before federal judges implicates federalism—but in the narrowest sense. As the revisionist account of municipal liability demonstrates, an increase in damages lawsuits should not arouse the protracted litigation and oversight concerns that animated the Supreme Court's original invocations of federalism.[259] And a possible cap on damages might further blunt these concerns.[260]

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[255] *See, e.g.*, Rushin, *Structural Reform Litigation*, *supra* note 114, at 1407 n.338 (noting that the total cost of structural reform litigation in Los Angeles was approximately $100 million); Eric Heisig, *Cleveland Officials Acknowledge that Tax Increase is the Only Way to Pay for Police Reform*, cleveland.com (July 13, 2016), http://www.cleveland.com/court-justice/index.ssf/2016/07/cleveland_officials_acknowledg.html#incart_m-rpt-1 (describing a likely income tax increase expected to generate more than $80 million in additional revenue in order to pay for federal consent decree police reforms); *see also* Edelman v. Jordan, 415 U.S. 651, 668 (1974) (noting the costs associated with equitable relief in the context of lawsuits against state officials).

[256] *See* Rushin, *Structural Reform Litigation*, *supra* note 114, at 1407 (recognizing that the decline in the total number of civil rights claims filed against the LAPD and the accompanying decrease in total payouts for civil rights suits suggest that structural reform litigation "may ultimately pay for itself through decreased litigation costs").

[257] *See, e.g.*, Schuck, *supra* note 71, at 1784; Smith, *supra* note 1, at 482–83.

[258] *See, e.g.*, Black v. City of Memphis, No. 98-6508, 2000 WL 687683, at *3 (6th Cir. May 19, 2000) ("To apply a less stringent standard would cause municipal liability to collapse into *respondent superior* liability, thus raising serious federalism concerns.").

[259] *See supra* Part III.

[260] *See supra* Part V.B.*2*.

In addition, as Fred Smith argues, local governments' increased authority and power since the 1870s, along with a commensurate rise in common law accountability, support changes to constitutional tort accountability.[261] The same federal-local power disparities and distinctive responsibilities are less pronounced today.[262] Reducing municipal liability standards would fall within the logical and necessary progression of rising power and attendant liability.

The proposed framework's "national standard," however, may also raise its own issues concerning federalism and local autonomy. Federally imposing—even if only legislatively—a policy on all 18,000 police departments may offend some local policing interests. Softer legislative power may instead be exercised by conditioning grant money to local governments for police activities that adopt federally identified policies, training, and standards.[263]

Yet the localized nature of policing is overstated. Most police departments face similar concerns regarding use of force, weapons training, patrol tactics, and the like.[264] The need and virtue of diverse approaches can be accommodated while arriving, in most cases, at agreed-upon best police policies and practices.[265] For example, a small, rural police department might not have reason

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[261] *See* Smith, *supra* note 1, at 485–87.

[262] *See id.* at 456–57 (noting the critical role that cities and counties play in carrying out states' residual police power).

[263] *See, e.g.*, H.R. 5221, 114th Cong. (2016) (proposing that local governments receiving grants under the Edward Byrne Memorial Justice Assistance Grant Program must train police officers in—and utilize—de-escalation techniques).

[264] *See* POLICE EXECUTIVE RESEARCH FORUM, DEFINING MOMENTS FOR POLICE CHIEFS 20 (2015), http://www.policeforum.org/assets/definingmoments.pdf ("One of the strengths of American policing is that we have so many diverse agencies. But there are some areas where we are not going to be able to maintain the luxury of agency-specific practices. [Militarization of the police] is one of them." (quoting COPS Office Director Ron Davis)).

[265] *See, e.g.*, POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 1 (2016), http://www.policeforum.org/assets/30%20guiding%20principles.pdf (grounding its report in "four national conferences; a survey of police agencies on their training of officers on force issues; field research in police agencies in the United Kingdom and here at home; and interviews of police trainers and other personnel at all ranks, as well as experts in mental health"). Determining best practices based on other state approaches is hardly uncommon. For example, courts will review and compare other jurisdictions' prison policies on religious accommodation in assessing whether a particular prison employs the least restrictive means in burdening a prisoner's religious beliefs. *See, e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 866 (2015) (construing the Religious Land Use and Institutionalized Persons Act and stating that "when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course").

to adopt the same policies followed by a large, metropolitan agency. In these circumstances, the local department could be permitted to "opt" out of that specific, national consensus policy.

Finally, some may criticize deriving a constitutional duty from various police department policies as the result of a "tender-hearted desire to tortify the Fourteenth Amendment" and an improper expansion of constitutional liability.[266] Though this provision admittedly broadens constitutional liability, that the duty emerges from a consensus of local police forces should allay some federalism concerns.

The proposal bears some hallmarks of "new federalism"—the notion that "[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[267] Here, as well, agreement between numerous local police agencies could augment federal constitutional protections. Establishing a constitutional duty on police misconduct by consensus of local police departments is likely more representative, practical, manageable, and attuned to police and local interests than establishing a duty through courts' current, infrequent opining on constitutional standards without regard to police department policies.

Ultimately, however, the Court's concern over federalism in *Monell* and subsequently is misplaced. And similar concerns elicited by this proposal are also off the mark. Critics' grief should not be over the mechanisms that enforce government and official liability. Rather, as Third Circuit Judge John Gibbons explained, "[t]he fourteenth amendment and the civil rights statutes present the threat to local authority."[268] That is, the constitutional and statutory systems are designed to limit state and local government action. Civil rights litigation, facilitated through appropriately permissive standards, "merely compounds, or perhaps makes good, that threat."[269]

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[266] Kingsley v. Hendrickson, 135 S. Ct. 2466, 2479 (2015) (Scalia, J., dissenting). Also potentially problematic is that use of force policies often are not models of clarity, and provide confusing or ambiguous guidance.

[267] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[268] United States v. City of Philadelphia, 644 F.2d 187, 223 (3d Cir. 1980) (Gibbons, J., dissenting from an order denying rehearing).

[269] *Id.*

VI. CONCLUSION

The Supreme Court long ago proclaimed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[270] This Article modestly proposes that Congress provide that civil rights protection to victims of police brutality by (1) better facilitating compensatory damages through reducing municipal liability standards for damages claims and (2) holding individual officers accountable for failing to comply with constitutionally protective police department policies. This approach will not vitiate the borders of local autonomy, but will bolster these communities' constitutional limitations and hold their governments, leaders, and officials accountable to the Nation's laws.

It may be the rare case that a damages award sufficiently compensates a victim of police brutality. But where justice and accountability for unlawful police practices so often prove elusive, it is vital that a toll be properly levied. Without some civil remedy, the public will struggle to keep faith in "a government of laws." Without some identification of wrongdoing and wrongdoer, the people will lose confidence in the protections of the Constitution.

[270] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).