

REPLACING *MONELL* LIABILITY WITH QUALIFIED IMMUNITY  
FOR MUNICIPAL DEFENDANTS IN 42 U.S.C. § 1983  
LITIGATION

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**Abstract**

*Under current doctrine interpreting 42 U.S.C. § 1983, local governments are not subject to respondeat superior for their officers' constitutional torts but can only be held liable for those torts if the plaintiff can show the violation was caused by the local government's policy or custom. The Supreme Court has developed complicated, stringent, and heavily criticized tests plaintiffs must meet to show the requisite policy or custom, which require plaintiffs to plead, discover, and prove facts about municipal policies, practices, and patterns of conduct well beyond the confines of the individual case. The Court has refused, however, to allow municipal defendants to invoke the qualified immunity defense available to individual officers, which allows an officer to defeat liability and escape suit if she can show that her conduct did not violate the plaintiff's clearly established constitutional rights.*

*Building on other scholars' criticisms of the doctrine, this Article proposes that § 1983 doctrine should be changed so that municipal defendants are liable in respondeat superior for their officers' torts but are allowed to invoke their officers' qualified immunity defense. This Article supports that proposal based primarily on the following policy grounds. First, it would make § 1983 litigation simpler and more efficient, by eliminating the complicated and discovery-intensive municipal*

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*liability doctrine and by focusing litigation on the narrower legal question of qualified immunity. Second, it would improve local governments' incentives under the statute. Replacing municipal-liability doctrine with respondeat superior would replace the current incentive to insulate policymakers from traceable connections to constitutional violations with an incentive to monitor and prevent violations of clearly established constitutional law, while allowing municipal qualified immunity would prevent municipal governments from being exposed to expansive new liabilities. Third, the changes would make cases against local governments easier to prove and potentially more valuable for more deserving plaintiffs, and eliminate recovery for less deserving plaintiffs. Finally, the changes would better serve the federalism policy of respect for state and local governments that underpins the Court's § 1983 jurisprudence, because they would eliminate direct federal court scrutiny into local policies, customs, and practices and so give local governments more flexibility to choose policies and practices to effectively deter constitutional violations by their officers.*

*The Article then briefly explains why the proposal is both possible and feasible. It is possible because it can be justified in terms of the statute's text, legislative history, and background in common law, in the same way as the Court's current doctrine can be so justified. And it is feasible because (1) the Court has often made major changes in its § 1983 doctrine based on policy; (2) the Court is notably enthusiastic about qualified immunity but has been more equivocal about municipal liability; and (3) the proposal has appeal as a compromise that takes from municipal defendants by expanding their responsibility while giving to them an additional, powerful affirmative defense.*

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## INTRODUCTION

Under the Supreme Court's current interpretation of 42 U.S.C. §1983, municipal defendants<sup>1</sup> are not subject to *respondeat superior* liability for their officers' constitutional torts.<sup>2</sup> Instead, cities may be held liable for the constitutional torts of their officers only when the plaintiff can show that the city is responsible for those torts under the doctrine of municipal liability, which requires connecting the violation of the plaintiff's rights to a municipal policy or custom.<sup>3</sup> This doctrine of municipal liability is convoluted<sup>4</sup> and can require difficult inquiries into which city officials are "policymakers" under state law on local government,<sup>5</sup> into whether a official was acting in a "local" or "state" capacity,<sup>6</sup> into the extent of departmental "custom" authorizing constitutional violations,<sup>7</sup> into individual cities' training and hiring processes,<sup>8</sup> and into demanding questions about causation and fault.<sup>9</sup>

While municipal defendants can only be held liable by proving municipal liability under these complicated rules, those defendants are not allowed to assert qualified immunity as a defense to liability that is available to individual officers.<sup>10</sup> The qualified immunity defense allows an officer to defeat liability (and escape suit) when the officer can show that their conduct, whether or not it was unconstitutional, did not violate clearly established rights of which a reasonable officer should have known.<sup>11</sup> The qualified immunity defense gives individual officers "breathing room" to make judgment calls that may be wrong but are

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1. This Article uses "municipal defendants" to describe government entities that can be held liable under 42 U.S.C. §1983 because they are not "arms of the state" entitled to state sovereign immunity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 691 (1978).

2. *Monell*, 436 U.S. at 691.

3. *Id.* at 694-95.

4. *See, e.g.*, *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997) (Breyer, J., dissenting).

5. *See, e.g.*, *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

6. *McMillian v. Monroe County*, 520 U.S. 781 (1997) (analyzing Alabama constitution and state law to determine whether Alabama sheriff was state or local policymaker).

7. *Monell v. Dep't of Soc. Servs. Of New York*, 436 U.S. 658, 691-92 (1978).

8. *See, e.g.*, *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).

9. *See, e.g.*, *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989).

10. *Owen v. City of Independence*, 445 U.S. 622 (1980).

11. *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982).

within a margin of error allowed by current, clearly established constitutional law,<sup>12</sup> but current doctrine does not give municipal defendants that same margin of error.

The current state of § 1983 doctrine, and in particular the doctrines of both municipal liability and qualified immunity, have been heavily criticized by a consensus of scholars,<sup>13</sup> as well as by several jurists.<sup>14</sup> Many critics call for eliminating the “policy and custom” doctrine and replacing it with simple *respondeat superior* liability for cities—that is, making a municipal defendant liable any time one of its officers violates a defendant’s constitutional rights, whether or not the right was clearly established at the time of the officer’s conduct.<sup>15</sup> Others have called for abolishing, reworking, or severely curtailing the doctrine of qualified immunity.<sup>16</sup> Finally, most closely related to this Article’s argument, in 2013, John Jeffries proposed a “unified theory of constitutional torts” under which, among other things, strict municipal liability would be abolished and a modified qualified immunity rule would become the sole liability rule for constitutional tort litigation.<sup>17</sup>

This Article proposes replacing municipal liability “policy or custom” doctrine with *respondeat superior* liability for municipal defendants, but allowing municipal defendants to invoke the same qualified immunity defense available to the individual officers whose conduct is the basis for the claims against the municipality.<sup>18</sup> Cities would thus remain defendants in § 1983 suits and become automatically liable for the constitutional torts of their officers, but cities would be liable only when the officer herself is liable because she is not entitled to qualified

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12. See *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (“Qualified immunity ‘gives government officials breathing room to make reasonable but mistaken judgments’” (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986))).

13. See, e.g., John C. Jeffries, *The Liability Rule for Constitutional Torts*, 99 VA L. REV. 207, 208 (2013) [hereinafter Jeffries, *The Liability Rule*] (“The proliferation of inconsistent policies and arbitrary distinctions renders constitutional tort law functionally unintelligible.”); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913-14 [hereinafter Blum, *The Maze*] (“There is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs.”).

14. See e.g., *Brown*, 520 U.S. at 410 (Breyer, J., dissenting); *Pembauer*, 475 U.S. at 487 (Stevens, J., concurring in part and concurring in judgment); Blum, *The Maze*, *supra* note 13 at 914; Jeffries, *The Liability Rule*, *supra* note 13, at 208 (each summarizing criticisms).

15. See, e.g., Blum, *The Maze*, *supra* note 13, at 962-63.; *Brown*, 520 U.S. at 434-37 (Breyer, J., dissenting).

16. Will Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018) [hereinafter Baude].

17. Jeffries, *The Liability Rule*, *supra* note 13, at 270.

18. See *infra* Part II.A.

immunity.<sup>19</sup>

This Article argues for these changes primarily and initially on policy grounds.<sup>20</sup> First, they would make § 1983 litigation simpler and more efficient. Litigation will be more narrowly focused on one doctrine—the qualified immunity analysis, which asks whether the officer’s conduct violated the constitution and if so whether the violation was clearly established under the law in existence at the time of the conduct.<sup>21</sup> In most cases, plaintiffs will no longer have to pursue, and cities will no longer have to manage, time consuming and expensive discovery about the city’s policies, practices, and patterns beyond the events that are the basis of a particular case.<sup>22</sup> Because municipal defendants tend to indemnify their officers,<sup>23</sup> this discovery is essentially a wasteful sideshow. As a practical matter, the qualified immunity analysis already almost always determines whether or not the city will pay out money, except in cases where a plaintiff can hold a municipal defendant strictly liable but the officer escapes liability based on qualified immunity.<sup>24</sup> Eliminating the municipal liability doctrine will eliminate that waste.<sup>25</sup> It will also improve judicial efficiency because it will extract the federal courts from having to inquire into difficult state law questions about which officials are policymakers,<sup>26</sup> or whether particular officials are “state” or “local,”<sup>27</sup> as well as from having to review the training, hiring, and discipline policies of municipal governments.<sup>28</sup> At the same time, however, plaintiffs that want to contest and challenge municipal policies

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19. If multiple officers were sued, the city’s liability would depend on the liability of each defendant officer; the city would only escape liability if all officers were either not liable or immune.

20. See *infra* Part II.

21. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

22. See, e.g., G. Flint Taylor, *A Litigator’s View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DePaul L. Rev. 747, 752-53 (1999) [hereinafter “Taylor, A Litigator’s View”] (describing discovery required in municipal liability cases).

23. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 911-913 (2014) (describing empirical study concluding that essentially all §1983 judgments and settlements are paid by governments, not officers).

24. See, e.g., Blum, *The Maze*, *supra* note 13, at 920; Jeffries, *The Liability Rule*, *supra* note 13, at 235-36.

25. See Jeffries, *The Liability Rule*, *supra* note 13, at 235-36.

26. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989); *Pembauer v. City of Cincinnati*, 475 U.S. 469, 484-85 (1986) (each considering whether particular officials were local “policymakers” whose acts could expose the municipal defendant to liability).

27. *McMillian v. Monroe County*, 520 U.S. 781, 787-88 (1997) (holding that because an Alabama sheriff was a State and not a local policymaker, the sheriff’s conduct could not expose the county to liability).

28. See, e.g., Craig B. Futterman, H. Melissa Mather, and Melanie Miles, *Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System*, 1 DePaul Journal for Social Justice 251 (2007) (describing statistical analysis performed in attempt to make out *Monell* claim against City of Chicago) [hereinafter “Futterman et al., *Chicago’s Broken System*”]; Taylor, *A Litigator’s View*, *supra* note 22, at 752-53.

and practices will still be able to do so through requests for injunctive relief and class actions.<sup>29</sup>

Second, the proposed changes will give municipal defendants better incentives to try and avoid violating citizens' rights without saddling them with broad new liabilities.<sup>30</sup> Replacing municipal liability doctrine with *respondeat superior* will replace municipal defendants' incentive under current doctrine to insulate policymakers from traceable connections to constitutional violations with an incentive to ensure that those policymakers monitor and prevent violations of clearly established constitutional law. This should happen because liability would now depend on whether the officer violated the plaintiff's clearly established rights,<sup>31</sup> and not whether the plaintiff could prove a link between the violation and the municipal defendant's executive policies or policymakers.<sup>32</sup> At the same time, expanding qualified immunity to municipal defendants will prevent exposing municipal governments to expansive new liabilities and over-detering them for robust performance of governmental functions. This is desirable both in itself and also because the Supreme Court would be very unlikely to adopt any change that massively expanded municipal liability.<sup>33</sup> The proposed changes would also eliminate strict liability for municipal defendants in circumstances where the violation was one that should not have been foreseen under the law at the time of the violation,<sup>34</sup> which will better serve the purposes of the statute by limiting municipal liability to deterrable violations (i.e., ones that could have been foreseen).<sup>35</sup> Finally, to the extent the change expands municipal liability beyond the status quo, it will tend to do so for cases of severe violations by "rogue officers," in which it is particularly unjust to leave plaintiffs with no remedy.

Third, the changes would make cases against local governments

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29. See, e.g., *Smith v. City of Chicago*, 143 F. Supp. 3d 741, 753 (N.D. Ill. 2015) (denying motion to dismiss class action claims challenging Chicago police practices).

30. *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 791-92 (7th Cir. 2014) (Posner, J) (arguing that *Monell* doctrine is best understood "as simply having crafted a compromise rule that protect the budgets of local governments from automatic liability for their employees' wrongs, driven by a concern about public budgets and the potential extent of taxpayer liability").

31. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

32. See, e.g., *Smith*, 143 F. Supp. 3d at 753 (analyzing whether violations could be traced to policymakers).

33. See, e.g., Blum, *The Maze*, *supra* note 13, at 920 (arguing that the Court seems unlikely to impose strict *respondeat superior* on municipal defendants any time soon); *Oklahoma City v. Tuttle*, 471 U.S. 808, 844 (1985), (Stevens, J., dissenting) (noting that Court's "policy" requirement under *Monell* is mainly driven by fear of municipal bankruptcies due to strict *respondeat superior* liability); *Shields*, 746 F.3d at 791-92 (*Monell* doctrine is best understood as a compromise designed to prevent excessive municipal liability).

34. *Owen v. City of Independence*, 445 U.S. 622, 666 (1980) (Powell, J., dissenting).

35. Jeffries, *The Liability Rule*, *supra* note 13, at 244-46.

easier to prove and potentially more valuable for plaintiffs whose liability cases are strong. Eliminating the need for plaintiffs to plead, discover, and prove facts about municipal policies and customs will make it easier for deserving plaintiffs to surmount the procedural hurdle of a motion to dismiss claims against municipal defendants under the heightened *Twombly/Iqbal* standard of pleading,<sup>36</sup> because those plaintiffs no longer will have to plead facts about municipal policy, practices, patterns of past violation, and training that can be difficult for plaintiffs to identify and plead without discovery. Further, the fact that municipal defendants will stay in the case so long as the case against the individual officer is viable may increase the settlement or verdict value of the case to a prevailing plaintiff. At the same time, recovery will be eliminated for plaintiffs' whose cases are least based in the fault of the defendants—plaintiffs who cannot demonstrate that the officer's conduct violated clearly established constitutional law.<sup>37</sup>

Finally, the proposal will also better serve the policy of federalism that the Court has said is an important reason for its doctrine on the limits of liability under § 1983,<sup>38</sup> by reducing federal court intrusion into local policy and giving local governments more flexibility to choose policies they believe will reduce violations of federal rights.<sup>39</sup> Because plaintiffs will no longer have to show policy or custom to hold a municipal defendant liable, federal courts will no longer be in the position of scrutinizing and second-guessing those policies. Municipal defendants, in turn, will have more flexibility to choose policies that they think will best prevent officers from violating constitutional rights; and, if they choose poorly, they will be held liable for their officers' violations of clearly established constitutional rights.

Part I of this Article gives the legal background for the proposal. It explains the origins of the current status quo under which municipal defendants can only be held liable by showing policy or custom, but may not assert the qualified immunity defense. It then reviews the evolution of the municipal liability and qualified immunity doctrines since then, with particular focus on the difficulties faced by the Court (and lower courts) in defining what must be shown for a municipal entity to be held liable for the constitutional torts of its officers. Finally, it reviews scholars' and jurists' criticisms of this status quo. In

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36. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662. (2009); see also Blum, *The Maze*, *supra* note 13, at 916 (noting that "[m]unicipal liability claims have become procedurally more difficult for plaintiffs to assert" in the wake of those two cases).

37. John C. Jeffries, Jr., *Compensation For Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 89 (1989).

38. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 392 (1989).

39. See *infra* Part II.D.

particular, it examines John Jeffries' proposal for eliminating strict municipal liability and adopting a modified qualified immunity as the default liability rule for constitutional torts,<sup>40</sup> on which this Article's arguments build and expand.

Part II explains the proposal and the policy arguments in its favor: improved efficiency, better deterrence for cities, easier and better recovery for plaintiffs with strong cases and less recovery for plaintiffs with weak cases, and furthering federalism by reducing federal courts' intrusions into state and local policy and law.

Part III then briefly explains how the proposed changes to the doctrine are both possible and feasible. The changes are possible because they can be justified by conventional<sup>41</sup> sources of statutory interpretation—text, legislative history, and common law—at least to the same extent as the Court's current doctrinal choices can be so justified. The Court's § 1983 jurisprudence has been mostly policy-driven, and only broadly constrained by conventional sources; the changes proposed by this Article can be justified to that extent.

Also, the changes are feasible in the sense that it is possible that the Court might actually make the proposed changes to the doctrine of § 1983. First, as noted, the Court has a history of making significant changes to the doctrine as a response to perceived policy problems in § 1983 litigation. Second, the Court is currently very enthusiastic about qualified immunity doctrine,<sup>42</sup> while it seems much less so about the doctrine of municipal liability. Finally, in addition to the policy arguments in its favor, the proposal also has appeal as a compromise or bargain—it takes away from municipal defendants by making them liable in *respondeat superior*, but it gives them the benefit of the powerful qualified immunity defense.

## I. ORIGINS, DEVELOPMENT, AND CRITIQUES OF THE STATUS QUO

Section 1983 allows a private individual to sue state and local government officials, as well as local governments, for officials' violations of plaintiffs' federal constitutional rights under color of state law.<sup>43</sup> Section 1983 suits are, and for decades have been, the primary

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40. Jeffries, *The Liability Rule*, *supra* note 13.

41. "Conventional" here means sources other than policy-based sources. See Baude, *supra* note 16, at 2 (describing these as "technical" sources of interpretation).

42. See, e.g., Baude, *supra* note 16, at 41; Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62, 63 (2016), [hereinafter Kinports, *Quiet Expansion of Qualified Immunity*] (each noting, and criticizing, the Court's great enthusiasm for defendant-friendly rulings on qualified immunity).

43. 42 U.S.C. §1983. The statute also allows suit for a limited set of violations of federal statutory rights, See, e.g., *Middlesex County Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981). This

vehicle for private enforcement of federal constitutional rights against state and local officials and governments.<sup>44</sup>

Section 1983 was originally enacted after the Civil War as part of the Civil Rights Act of 1871.<sup>45</sup> It allows monetary liability, as well as injunctive relief, against “persons” who deprive others of constitutional or statutory rights “under color of law.”<sup>46</sup> For nearly a century after it was passed, the statute was mostly disused,<sup>47</sup> until the Supreme Court in *Monroe v. Pape*,<sup>48</sup> revived it as a meaningful federal constraint on state and local government officials by holding that the statute could be applied to constitutional violations by officials who acted under a badge of state authority, even if their conduct was not authorized by state law.<sup>49</sup>

This holding created modern § 1983 litigation<sup>50</sup> and led, over the past half-century, to the Court’s development of a complex doctrine to govern liability and defenses under the statute.<sup>51</sup> In modern practice, § 1983 suits plead violations of many different substantive constitutional rights and arise in a wide variety of factual situations. The statute has become arguably the most important vehicle for enforcing federal constitutional rights against state and local officials and governments.<sup>52</sup>

This Article considers the intersection of two aspects of § 1983 doctrine: (1) municipal liability—the rules for whether and when municipal entities can be held liable based on constitutional violations

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article, however, focuses only on constitutional violations because they are “the most frequently litigated claims” under section 1983. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 728 (1999) (Scalia, J., concurring).

44. See, e.g., Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U.L. REV. 1473, 1502 (2013) (referring to section “1983, the principal means of enforcing constitutional rights”).

45. Enforcement Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (1871).

46. 42 U.S.C §1983.

47. See, e.g., Harry Blackmun, *Section 1983 and the Protection of Individual Rights: Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 10-17 (1985) (describing the post-Reconstruction disuse and retraction of civil-rights laws).

48. 365 U.S. 167 (1961).

49. *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (holding that government officers could be held liable under section 1983 for official conduct even when that conduct was not directed or authorized by state law).

50. See, e.g., Paul Howard Morris, *Note: The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 52 VAND. L. REV. 489, 499-500 (1999) (“In contrast to the small number of §1983 cases brought before *Monroe*, by 1977 over 20,000 §1983 suits were filed per year.”); Randolph Haines, *Reputation, Stigma, and Section 1983: The Lessons of Paul v. Davis*, 30 STAN. L. REV. 191, 191 (1977) (explaining that the “landmark” decision in *Monroe* increased the number of 1983 suits).

51. See, e.g., Howard Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 823 (2003) (noting section 1983’s “uniquely complicated (one might say Byzantine) liability scheme”).

52. Reinert & Mulligan, *supra* note 44, at 1502.

committed by their officers,<sup>53</sup> and (2) qualified immunity—a defense that allows a defendant to avoid § 1983 liability if the defendant’s conduct did not violate clearly established rights of which a reasonable officer would have known.<sup>54</sup> This Part of this Article gives an overview of the origins of each of doctrine and argues which particular rules should be changed. It then traces the two doctrines’ joint development and interaction with each other since roughly 1980. Finally, it concludes by presenting some of the critiques of each doctrine as well as how the two interact, as a background for the changes proposed in Part II.

*A. Municipal Liability—No Respondeat Superior for Cities, Plaintiffs Must Establish Municipal Liability by Showing Link to Policy or Custom*

While *Monroe v. Pape* opened the door to more § 1983 suits against individual officers, it closed the door to suits against cities—holding that cities (in that case, the City of Chicago) were not suable “persons” under § 1983.<sup>55</sup> The Court based its holding on its reading of the legislative history of § 1983. In particular, it argued that the rejection by Congress of a proposed amendment known as the Sherman Amendment showed that Congress did not intend for the statute to impose liability on cities for their officers’ violation of citizens’ constitutional rights.<sup>56</sup>

But *Monroe*’s rejection of municipal liability under §1983 lasted only about a decade. In *Monell v. Department of Social Services*, the Court reversed *Monroe* on this point, holding that municipal government entities *can* be held liable for the constitutional torts committed by their officials.<sup>57</sup> The Court limited its holding, however, by refraining from imposing blanket *respondeat superior* liability on cities for their officers’ constitutional torts.<sup>58</sup> Instead, the Court required that the violation by the individual officer be tied to a “policy” or “custom” of a municipal government entity.<sup>59</sup>

The Court sourced this “policy or custom” requirement in the language of the statute, which imposes liability on a defendant who “subjects, or causes [the plaintiff] to be subjected” to a violation of

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53. See, e.g., *Monell v. Dept. of Social Servs. of New York*, 436 U.S. 658, 692 (1978) (holding that municipal defendants can be held liable under 42 U.S.C. §1983).

54. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (establishing an objective test for assessing qualified immunity).

55. *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

56. *Id.* at 188-91.

57. *Monell v. Dept. of Social Servs. of New York*, 436 U.S. 658, 700-01 (1978).

58. *Id.* at 695.

59. *Id.* at 694.

federal rights.<sup>60</sup> The Court reasoned that the word “cause” must mean something more than mere “but-for” causation.<sup>61</sup> The Court also revisited the legislative history it had consulted in *Monroe*, concluding that that legislative history, including the rejection of the Sherman Amendment, did not show an intent to make municipal defendants completely free of liability. Rather, it showed that Congress did not intend to impose strict municipal liability on cities.<sup>62</sup>

As discussed shortly, the Court would end up spending a great deal of time and energy explaining and expounding on what must be shown to establish a policy or custom.<sup>63</sup> But the basic idea of *Monell* was that municipal defendants should only be held liable when that defendant itself was causally responsible and at fault for the constitutional violation committed by their individual officers.<sup>64</sup> This type of liability has been called and is sometimes referred to in this Article as “*Monell* liability” or the “*Monell* doctrine.”<sup>65</sup> Later cases also made clear that a municipal defendant cannot be liable unless some individual officer is found to have violated the constitution; that is, there is no such thing as a violation for which a city can be held responsible that is not attributable to the actions of some individual officer.<sup>66</sup> This means that in any viable § 1983 suit against a municipal defendant there will always be some officer whose qualified immunity defense the city will be able, under this Article’s proposal, to invoke.

*B. Qualified Immunity—Individual Officers Get It But Municipal Defendants Don’t.*

The evolution in the doctrine of municipal liability proceeded along a parallel track with the Court’s development of the doctrine of qualified immunity, which is the primary substantive defense to liability available to individual defendants under §1983. After *Monroe*, § 1983 exposed defendant officers to money damages imposed personally against

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60. 42 U.S.C. §1983.

61. *Monell*, 436 U.S. at 692.

62. *Id.* at 664.

63. *See infra* Part II.C.1.

64. *Monell*, 436 U.S. at 694-95.

65. *See, e.g.,* *McMillian v. Monroe Cty., Ala.*, 520 U.S. 781, 805, (1997) (Ginsburg, J., dissenting); *Valentino v. Vill. Of S. Chicago Heights*, 575 F.3d 664, 674 (7th Cir. 2009); Karen M. Blum, *Making out the Monell Claim under Section 1983*, 25 *TOURO L. REV.* 829 (2012); 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, 2187 (2005) [hereinafter Achtenberg, *Taking History Seriously*].

66. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (local government cannot be held liable if the plaintiff has “suffered no constitutional injury at the hands of the individual police officer”).

them.<sup>67</sup> Concerns about imposing personal liability on government officers and changes in the Court's composition then led the Court to develop immunity doctrines to protect officers.<sup>68</sup>

Specifically, the Court has developed two immunity defenses to limit the liability of individual officers sued under §1983—qualified immunity and absolute immunity.<sup>69</sup> This Article is primarily concerned with qualified immunity, which is explained at more length shortly. Absolute immunity provides total immunity from suit under § 1983 to government officers performing legislative,<sup>70</sup> judicial,<sup>71</sup> and prosecutorial<sup>72</sup> functions, no matter how blatantly unconstitutional their actions.<sup>73</sup> In interpreting the contours of absolute immunity, as in other aspects of interpreting § 1983, the Court has looked for guidance to common law, both as it stood in 1871<sup>74</sup> and also as it developed thereafter.<sup>75</sup>

Officers not entitled to absolute immunity may assert qualified immunity, a more limited defense that allows an officer to escape liability when the officer can establish that her conduct did not violate clearly established laws of which a reasonable officer would have known.<sup>76</sup> Although qualified immunity is less than absolute, it is still quite robust, protecting “all but the plainly incompetent or those who knowingly violate the law.”<sup>77</sup> Further, the trend of the Court over time has been towards strengthening the defense, both substantively and by giving qualified immunity cases a special precedence on the Court's docket.<sup>78</sup>

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67. *See, e.g.*, *Carey v. Phipus*, 435 U.S. 247, 258 (1978). In most cases, however, officers are indemnified for that liability by their government employers. Joanna C. Schwartz, *Police Indemnification*, *supra* note 23, at 911-913 (describing empirical study concluding that essentially all §1983 judgment and settlement dollars are paid by governments, not officers).

68. *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, (1974); Jeffries, *The Liability Rule*, *supra* note 13, at 244; *cf.* Christopher E. Smith, *The Impact of New Justices: The U.S. Supreme Court and Criminal Justice Policy*, 30 AKRON L. REV. 55, 65 (1996) (describing how the Court's changing composition leads to doctrinal changes).

69. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (noting and describing the difference between the two types of immunity)

70. *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951).

71. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

72. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

73. *See, e.g.*, *Stump v. Sparkman*, 435 U.S. 349, 364 (1978) (holding that a judge was entitled to absolute immunity even though judge ordered unconsented sterilization of a minor).

74. *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (stating that the Court begins by looking to “the common law as it existed when Congress passed §1983” in 1871).

75. *See, e.g.*, *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012); *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

76. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

77. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

78. *See, e.g.*, *Baude*, *supra* note 16, at 41-42; *Kinports*, *supra* note 42, at 63-64; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L. J. 229, 273-75 (2006) (arguing that Rehnquist and

The qualified immunity doctrine initially developed as a good-faith defense to the imposition of liability under §1983. Under the early doctrine, an officer could avert liability under the statute by showing that she acted with “good faith and probable cause” in engaging in the allegedly unconstitutional conduct.<sup>79</sup>

It was this version of the doctrine that the Court considered in *Owen v. City of Independence*,<sup>80</sup> which held that cities may not assert the same defense of qualified immunity that is available to individual officers. The Court based its decision in part on an examination of common-law immunities, which were the original source of the qualified immunity defense, and its conclusion that municipal governments were not entitled to such immunity under common law.<sup>81</sup> The Court also based its decision on the majority’s sense that social principles of cost-sharing argued against leaving plaintiffs empty handed, even when the violation of the plaintiffs’ rights was not clearly established at the time of the harm.<sup>82</sup>

The result of *Owen*, together with the Court’s holding in *Monell*, is that cities can only be held liable when an officer’s violation of a plaintiff’s rights has been shown to be the result of a municipal policy or custom;<sup>83</sup> but *if* the violation can be shown to be caused by policy or custom, the city will be strictly liable for it regardless of whether a reasonable officer at the time of the conduct would or should have known that the conduct was a violation of the constitution under clearly established law.<sup>84</sup>

### *C. Doctrinal Development of Monell Liability and Qualified Immunity—Complexity and Constriction*

*Monell*, which created the current regime of municipal liability, and *Owen*, which declined to allow municipal defendants to assert qualified immunity, were both decided in span of two years.<sup>85</sup> Since then, as explained in this Section, the Court has developed a complex framework of *Monell* liability rules and has made significant changes to the qualified immunity defense, both of which make recovery harder for plaintiffs. Understanding those developments gives the context for this Article’s proposal to change (and merge) the two doctrines.

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Roberts Courts are turning qualified immunity into an absolute immunity).

79. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

80. 445 U.S. 622, 638 (1980).

81. *Id.* at 644-48.

82. *Id.* at 657.

83. *Monell v. Dept. of Social Servs. Of New York*, 436 U.S. 658, 694 (1978).

84. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

85. *Monell* was decided June 6, 1978, and *Owen* was decided April 16, 1980.

### 1. Developments in *Monell* Liability

Rejecting *respondeat superior*, *Monell* required plaintiffs seeking to recover against municipal defendants to show that their injury and the conduct of the individual officer who caused that injury were both the result of a municipal “policy” or “custom.”<sup>86</sup> In later cases, the Court elaborated on this limit on municipal liability by developing a complex set of doctrines for assessing whether a plaintiff had shown the required policy or custom.<sup>87</sup> The Court has provided four different “routes” to municipal liability: (1) official policy, (2) custom, (3) inadequate training, and (4) improper hiring. Each of those requires tracing a violation to conduct by high-ranking policymakers for the municipal defendant.<sup>88</sup>

Easier cases involve an express, written municipal act or policy that itself is challenged as unconstitutional. But most cases seeking to impose municipal liability under § 1983 are harder ones where the plaintiff must establish the requisite “policy or custom” by tying it to some decision by a high official, unofficial municipal custom, or pattern or practice of inadequate supervision or training of officers.<sup>89</sup> The Court, over a series of cases, has developed rules for evaluating these paths to liability.

The Court has held that a municipal defendant might be held liable based not only on its express policies, but also on unofficial customs.<sup>90</sup> Liability also can be imposed if the violation was ordered or directed by an official with authority to make policy for the city.<sup>91</sup> Finally, liability can be imposed if the violation resulted from the city’s failure to train its officers to deal with situation that would be expected to recur as the

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86. *Monell*, 436 U.S. at 694.

87. See, e.g., *Pembauer v. City of Cincinnati*, 475 U.S. 469, 481-83 (1986) (recognizing municipal “policy” can be established by the actions or decisions of an officer who is a policymaker for the municipality); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (recognizing in limited circumstances *Monell* liability for failure to train); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736 (1989) (limiting municipal liability for employee violations under *respondeat superior* theory); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126-27 (1988) (clarifying rules on “policymaker” *Monell* liability); *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 415 (1997) (limiting municipal liability for hiring mistakes); *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) (considering whether policymaker was making policy for immune State or suable County); *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (restricting failure-to-train liability for District Attorneys’ offices).

88. Achtenberg, *Taking History Seriously*, *supra* note 65, at 2188.

89. See *Brown*, 520 U.S. at 404 (distinguishing between easier and harder “policy and custom” cases under §1983).

90. See, e.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167 (1970) (recognizing liability based on informal but pervasive local or state custom); *Webster v. City of Houston*, 689 F.2d 1220, 1226 (1982) (recognizing path to demonstrating liability by “informal acts or omissions of supervisory officials”).

91. *Pembauer*, 475 U.S. at 481-83; *Praprotnik*, 485 U.S. at 123.

officers performed their duties.<sup>92</sup> The application of these rules has led to difficulties and to confusing, if not inconsistent, results.<sup>93</sup> Lower courts have to examine state law to decide whether certain officials are or are not “policymakers” with respect to a certain government function,<sup>94</sup> and whether and when a practice amounts to a liability-justifying “custom.”<sup>95</sup> Meeting the Supreme Court’s tests requires plaintiffs to pursue discovery not only into the facts and events of the particular case, but more broadly into municipal documents and records relating to policy, custom, discipline, training, and other, similar incidents.<sup>96</sup>

Along with the application and refinement of these subtle distinctions, and probably driving them, the trend in the Court has been to increasingly constrict municipal liability through the application of these demanding fault and causation requirements.<sup>97</sup> The Court repeatedly emphasized that, since (as *Monell* held) 1983 liability must not be *respondeat superior* liability, it is necessary to carefully scrutinize cases to make sure the plaintiff establishes the requisite degree of fault on the part of the city, and that the city’s action (or inaction) was causally responsible for the actual violation complained of by the plaintiff.<sup>98</sup>

The Court also emphasized that one important reason for its strict approach,<sup>99</sup> as well as its resort to examining state law to resolve questions about which officials are policymakers and for which entities,<sup>100</sup> is to respect the federal balance created by § 1983.<sup>101</sup> The Court has said that, while § 1983 imposes liability on state and local officers for violating federal rights, that liability must be constrained and limited to prevent undue interference with the proper and efficient functioning of state and local government, and over-deterrence of local

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92. *City of Canton*, 489 U.S. at 390-91; see also *Brown*, 520 U.S. at 417-18 (Souter, J., dissenting) (summarizing three different paths to municipal liability recognized by the Court in its cases applying the *Monell* doctrine).

93. See, e.g., *Brown*, 520 U.S. at 431-36 (1997) (Breyer, J., dissenting) (explaining the uncertainties and difficulties introduced by the doctrine).

94. See, e.g., *Praprotnik*, 485 U.S. at 124 (holding courts must use state law to determine policymaking authority); see also *McMillian*, 520 U.S. at 786 (examining Alabama constitutional and statutory law to decide whether a particular policymaker was “state” or “local”).

95. See, e.g., *Webster*, 689 F.2d at 1225.

96. See, e.g., Fetterman et al, *Chicago’s Broken System*, *supra* note 28, at 258-59; Taylor, *A Litigator’s View*, *supra* note 22, at 763-70.

97. See, e.g., *Connick*, 563 U.S. at 64-67; *Brown*, 520 U.S. at 410.

98. *Brown*, 520 U.S. at 404-05; *City of Canton*, 489 U.S. at 385.

99. *City of Canton*, 489 U.S. at 391.

100. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Praprotnik*, 485 U.S. at 124.

101. *City of Canton*, 489 U.S. at 392.

officials in the performance of their duties.<sup>102</sup>

As others have observed, it seems plausible that much of this confusion and complication was introduced because of, or in reaction to, *Owen*.<sup>103</sup> After *Owen* exposed cities to strict liability for constitutional violations, and the Court's line-up became more conservative, the Court then corrected course by restricting municipal liability by making it harder<sup>104</sup> (and harder<sup>105</sup>, and harder<sup>106</sup>) to show that particular violations were attributable to the municipality.<sup>107</sup>

This Article suggests that the Court's focus on refining (and complicating) municipal liability doctrine has been misguided, and the cause of a good deal of difficulty in the application of the law of §1983. As explained in Part II, a better solution to this problem is simply to make municipalities liable in *respondeat superior* for their officers' torts, allowing the benefit of their officers' qualified immunity defense. These changes will not only make litigation more efficient but will also better serve the interest in federalism that the Court's *Monell* doctrine aims to advance.<sup>108</sup>

## 2. Developments in Qualified Immunity

Since *Owen* denied municipal defendants the opportunity to invoke the qualified immunity defense, the Court has significantly refined the doctrine to make it more favorable to the individual defendants who are entitled to raise it.<sup>109</sup> The first and seminal change was in *Harlow v. Fitzgerald*,<sup>110</sup> which abandoned the subjective component of the qualified immunity test in favor of a purely objective analysis.<sup>111</sup> The Court's stated goal in making this change was to make the issue of qualified immunity easier to resolve at summary judgment, by removing from the case subjective questions of motivation that would tend to generate fact questions for the jury.<sup>112</sup>

Next, in *Anderson v. Creighton*, the Court refined the defense by imposing a requirement: before an officer may be found to have violated

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102. *Id.*; see also *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

103. Jeffries, *The Liability Rule*, *supra* note 13, at 233.

104. *City of Canton*, 489 U.S. at 389.

105. *Brown*, 520 U.S. at 404.

106. *Connick*, 563 U.S. at 410.

107. Jeffries, *The Liability Rule*, *supra* note 13, at 233.

108. See, e.g., *Brown*, 520 U.S. at 415; *City of Canton*, 489 U.S. at 392;

109. See, e.g., See Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L. J. 229, 273-75 (2006) (discussing the strengthening of qualified immunity under the Rehnquist and Roberts Courts).

110. 457 U.S. 800, 812 (1982).

111. *Id.*

112. *Id.*

clearly established constitutional law, the constitutional violation must be defined with reference to the “appropriate level of generality.”<sup>113</sup> What this means, essentially, is that an officer can only be held liable, and the qualified immunity defense overcome, when at the time of the challenged conduct there were extant Supreme Court cases, or a consensus of circuit cases, that were sufficiently similar to the challenged conduct that it should have been clear to the officer that the conduct was unconstitutional.<sup>114</sup> The Court has been vigorous and enthusiastic about policing lower court judgments for compliance with *Anderson*’s standard; it has decided several notable argued opinions reversing lower courts on those grounds,<sup>115</sup> and it routinely issues summary reversal of circuit opinions for failure to properly apply *Anderson*.<sup>116</sup> Finally, one additional major and more recent development in qualified immunity doctrine is *Pearson v. Callahan*’s holding that a district court considering the qualified immunity issue may choose to resolve the case based on the “clearly established” prong without first deciding whether there was a constitutional violation at all.<sup>117</sup>

More broadly, uniting (and probably driving) all of these specific developments is a general trend towards making the qualified immunity defense more robust and defendant-friendly.<sup>118</sup> The Court has been very active in granting cases to consider questions relating to qualified immunity,<sup>119</sup> and almost always sides with defendant officers, holding that a particular constitutional violation was not “clearly established” at the time of the conduct.<sup>120</sup> The Court has also been particularly vigorous about using summary reversals to police the circuits’ obedience to its qualified immunity doctrine.<sup>121</sup>

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113. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

114. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 244 (2009); *Wilson v. Layne*, 526 U.S. 603, 615-17 (1999); Jeffries, *The Liability Rule*, *supra* note 13, at 263-64 (criticizing this approach and arguing for replacing it with a focus on whether the conduct was “clearly unconstitutional”).

115. See, e.g., *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023 (2014); *Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (each reversing denial of qualified immunity based on misapplication of *Anderson*’s “level of generality”).

116. See, e.g., *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam); *Taylor v. Barks*, 135 S.Ct. 2042 (2015) (per curiam); *Carroll v. Carman*, 135 S.Ct. 348 (2014) (per curiam); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); see also Baude, *supra* note 16, at 41.

117. *Pearson*, 555 U.S. at 239.

118. Baude, *supra* note 16, at 40-41; Kinports, *supra* note 42, at 63.

119. Baude, *supra* note 16, at 40.

120. See, e.g., Baude, *supra* note 16, at 47 (collecting the Court’s argued qualified immunity cases and noting that almost all have ruled in the defendant’s favor); Kinports, *supra* note 42, at 63 (noting that the Court has ruled for defendants in sixteen out of eighteen “clearly established” cases in the past fifteen years, and “has not ruled in favor of a §1983 defendant on this question in more than a decade.”).

121. Kinports, *supra* note 42, at 63 (noting that the Court has issued at least one summary reversal

### 3. The Supreme Court's Interpretation of § 1983 is Mainly Policy Driven

In interpreting § 1983, the Court has mostly purported to rely on conventional<sup>122</sup> sources of statutory interpretation, though it has also at times explicitly invoked purpose and policy arguments.<sup>123</sup> While the Court's decisions mainly purport to be driven by text,<sup>124</sup> legislative history,<sup>125</sup> and reference to the common law of torts in 1871,<sup>126</sup> many commentators have observed that the Court's choices seem to be actually driven mostly by policy<sup>127</sup> and are unsupported (or, at least, not determined) by the conventional sources on which they purport to rely.<sup>128</sup> There are many examples, but notable and particularly relevant is that various groups of justices have at times argued, each persuasively, that the legislative history of § 1983 forbids any municipal

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of a circuit court decision on qualified immunity in each of the last four years); Baude, *supra* note 16, at 4 (noting the Court's special treatment of qualified immunity on its summary-reversal docket).

122. "Conventional" here is used to mean broadly "sources other than policy arguments." Cf. Baude, *supra* note 16, at 2 (referring to reliance on these types of sources as "technical legal justification.").

123. *Pembauer v. City of Cincinnati*, 475 U.S. 469, 490 (1986) (Stevens, J., dissenting) (noting, but questioning the relevance of, the Court's consultation of "considerations of public policy" in interpreting §1983); Baude, *supra* note 16, at 2 (distinguishing between the two types of argument).

124. *See, e.g., Monell v. Dept. of Social Servs. of New York*, 436 U.S. 658, 688 (1978) (analyzing meaning of "person" in statutory text).

125. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 188-91 (1961); *Monell*, 436 U.S. at 665-90 (each analyzing legislative history to determine whether and to what extent drafters of section 1983 intended to impose liability on municipalities).

126. *See, e.g., Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (noting that the Court looks to common law to interpret section 1983); Baude, *supra* note 16, at 7 (noting that the Court claims to interpret the statute in light of the historical common law as of 1871, and not based on the modern evolution of tort law); *but see Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (justifying court's rejection of qualified immunity for municipal defendants by analogy with the development of modern strict liability doctrines in tort law).

127. *See, e.g., Smith v. Wade* (O' Connor, J) (arguing that Court should consult policy when common-law sources run out); *Oklahoma City v. Tuttle*, 471 U.S. 808, 844 (1985), (Stevens, J., dissenting) (arguing that Court's holding can be justified only based on policy concerns about municipal bankruptcies); *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 791-92 (7th Cir. 2014) (Posner, J) (arguing that *Monell* doctrine is best understood "as simply having crafted a compromise rule that protect the budgets of local governments from automatic liability for their employees' wrongs, driven by a concern about public budgets and the potential extent of taxpayer liability"); John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189, 205 (2008) ("[T]he Supreme Court has openly acknowledged its willingness to rewrite the text of section 1983 to create a regime that 'better' balances competing policy considerations than does the actual law that Congress passed."); Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 698 (1997) ("Overall, the Court's methodology . . . has been highly oriented toward legislative intent and policy, with the common law playing an important role.").

128. *See Baude, supra* note 16, at 7-17 (arguing that the Court's interpretation of the statute with respect to qualified immunity cannot actually be justified by the historical, common law sources on which the Court purports to rely).

liability,<sup>129</sup> that it allows municipal liability but only when the violation was caused by municipal policy or custom,<sup>130</sup> or that it requires full *respondeat superior* liability for municipalities.<sup>131</sup>

Some Justices themselves have at times have seemed to acknowledge that policy choices, rather than more conventional methods of statutory interpretation, drive the doctrine in this area of law. Often, dissenting Justices have leveled this criticism against the majority.<sup>132</sup> Justice O'Connor called for openly admitting that, at least sometimes, the Court has to make policy choices about what doctrine best serves the purposes of the statute, rather than pretending the rules are driven by delving into 19th century common law.<sup>133</sup> Justice Thomas, on the other hand, recently "called out" the Court for failing to ground its development of the doctrine in sound and well-researched investigation into the common law as of 1871.<sup>134</sup> Beyond the Supreme Court, Judge Posner has made a similar observation about the *Monell* doctrine, noting that it "is best understood" not in terms of the text or legislative history of the statute, but instead "as simply having crafted a compromise rule that protect the budgets of local governments from automatic liability for their employees' wrongs, driven by a concern about public budgets and the potential extent of taxpayer liability."<sup>135</sup>

Thus, in interpreting § 1983, the Court's doctrinal choices are to some degree constrained by the conventional interpretive sources but only broadly so. For this reason, this Article focuses mainly on policy arguments in favor of its proposal, and only later (and briefly) argues that the proposed changes can indeed be justified by reference to the statute's text, history, and common-law background.<sup>136</sup> Further, the fact that the Court's interpretation of § 1983 is mostly policy-driven supports the Article's concluding argument that the Supreme Court might actually make the proposed changes given that the policy arguments are appealing, and the changes are not plainly foreclosed by conventional

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129. *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *see also Monell v. Dept. of Social Servs. of New York*, 436 U.S. 658, 719-725 (1978) (Rehnquist, J., dissenting).

130. *Monell*, 436 U.S. at 691.

131. *Bd. of Cty. Cmmrs v. Brown*, 520 U.S. 397, 434-37 (1997) (Breyer, J., dissenting); *Tuttle*, 471 U.S. at 836-39 (1985) (Stevens, J., dissenting).

132. *See, e.g., Tuttle*, 471 U.S. at 844-44 (Stevens, J., dissenting); *Owen v. City of Independence*, 445 U.S. 622, 670 (1980) (Powell, J., dissenting).

133. *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting) ("Once it is established that the common law of 1871 provides us with no real guidance on this question, we should turn to the policies underlying §1983 to determine which rule best accords with those policies.").

134. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1870-71 (2017) (Thomas, J., concurring in part and concurring in judgment) (arguing that the Court's qualified immunity jurisprudence has deviated from applying common law precedents into an quasi-legislative exercise in balancing policy interests).

135. *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 791-92 (7th Cir. 2014).

136. *See infra* Part II.

interpretive sources.<sup>137</sup>

#### *D. Critiques of the Doctrinal Status Quo*

##### 1. Broader Context: Debates Over “21st Century Policing”

While not central to this Article’s specific doctrinal arguments, it is worth briefly noting the current context of intensive attention to and critiques of police use of force, racial inequities in policing, and whether local governments currently are doing well at striking the right balance between robust, effective policing and intrusive, rights-violating over policing.<sup>138</sup> High-profile police shootings and uses of force, in particular against African-American men,<sup>139</sup> as well as instances of retaliation and assassinations of police,<sup>140</sup> have led to robust public scrutiny and debate about police uses of force.

In the policing context, constitutional tort liability for officers and municipalities can be seen as a sort of backup mechanism for improving policing, and this Article’s arguments can be understood in the context of the current focus on policing as an argument for making that mechanism more effective.<sup>141</sup> This Article argues that its proposed changes to municipal liability under § 1983 will improve cities’ incentives to supervise and train their officers to prevent constitutional

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137. See *infra* Part III.

138. See, e.g., Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840 (2017); *Symposium on The President’s Task Force on 21st Century Policing: Procedural Justice, Policing and Public Health*, 40 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL 415 (2016) (collecting remarks and papers related to report of presidential task force); Julian A. Cook, III, *Police Culture in the Twenty-First Century: A Critique of the President’s Task Force’s Final Report*, 91 NOTRE DAME L. REV. 106, 107 (2016).

139. See, e.g., Haeyoun Park and Jasmine C. Lee, “Looking for Accountability in Police-Involved Shootings of Blacks,” N.Y. TIMES, May 3, 2017, available at <https://www.nytimes.com/interactive/2016/07/12/us/looking-for-accountability-in-police-involved-deaths-of-blacks.html> (noting that these cases “have fueled outrage, heightened racial tensions and instigated protests around the nation.”).

140. See National Law Enforcement Officers Memorial Fund, Preliminary 2016 Law Enforcement Officer Fatalities Report, available at <http://www.nleomf.org/assets/pdfs/reports/Preliminary-2016-EOY-Officer-Fatalities-Report.pdf> (last visited July 19, 2017) (noting spikes in 2016 of number of officers fatally shot, as well as ambush shootings and multiple-fatality shootings).

141. Cf. Lindsay de Stefan, “*No Man Is Above the Law and No Man Is Below It: How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*,” 47 SETON HALL L. REV. 543, 543-545 (2016) (situating arguments for changes to qualified immunity doctrine in context of current focus on police violence); but see Joanna Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1040 (2010); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (each questioning whether and how constitutional tort liability effectively imposes deterrence on municipal defendants).

violations,<sup>142</sup> which, in the context of policing, would mean incentivizing cities to do a better job training and regulating how their officers use force and respect constitutional rights in their interactions with citizens.

## 2. Critiques of *Monell* Doctrine

The *Monell* doctrine has drawn significant criticism and critique by both jurists and scholars. Justice Stevens was long a critic of *Monell*'s rejection of *respondeat superior* liability in favor of the "policy or custom" rule.<sup>143</sup> He argued that text, legislative history, common law, and policy all supported the imposition of *respondeat superior* liability on municipal defendants.<sup>144</sup> Justice Breyer, in *Board of County Commissioners v. Brown*, in a dissent joined by three other justices, added to Justice Stevens' critique by arguing that the Court's *Monell* doctrine, in addition to having shaky foundations, had become too confusing and complicated to apply.<sup>145</sup> He noted that the *Monell* "policy or custom" limit on municipal liability "has produced a highly complex body of interpretive law."<sup>146</sup> He argued for eliminating that limitation because the "soundness of the original principle [of limiting liability based on "policy or custom"] is doubtful," and has led to the development of "a body of interpretive law that is so complex that the law has become difficult to apply."<sup>147</sup>

Scholars, too, have frequently criticized the *Monell* doctrine as overly complicated and difficult to apply.<sup>148</sup> They have also argued that the *Monell* doctrine is too unforgiving because it makes it unnecessarily hard for plaintiffs to recover against municipal defendants.<sup>149</sup> For a time in the late 1990s and early 2000s, some commentators thought, based on the four dissenting votes in *Brown*, that the Court might be on the verge of eliminating *Monell* liability in favor of *respondeat superior*.<sup>150</sup> The promise failed to materialize, however. Instead, the Court reaffirmed

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142. See *infra* Part II.B.

143. See, e.g., *Oklahoma City v. Tuttle*, 471 U.S. 808, 834-844 (1985) (Stevens, J., dissenting); *Pembauer v. Cincinnati*, 475 U.S. 469, 489-491 (1986) (Stevens J., concurring in part and concurring in the judgment).

144. *Tuttle*, 471 U.S. at 835-844.

145. *Bd. of Cty. Cmmsrs v. Brown*, 520 U.S. 397, 434-37 (1997) (Breyer, J., dissenting).

146. *Id.* at 430.

147. *Id.* at 431.

148. See, e.g., Jeffries, *The Liability Rule*, *supra* note 13, at 233-36.

149. See, e.g., Blum, *The Maze*, *supra* note 13 at 962-63; Achtenberg, *Taking History Seriously*, *supra* note 65, at 2191 (arguing that the "idiosyncratic stinginess" of *Monell* doctrine "confines entity liability in a manner that is unique to § 1983 and exists in no other area of the law").

150. See, e.g., Achtenberg, *Taking History Seriously*, *supra* note 65, at 2184 ("The *Monell* doctrine . . . hangs by a thread").

and made stricter the rules for failure-to-train liability in *Connick v. Thompson*, though only by a 5-4 vote,<sup>151</sup> and to widespread condemnation from scholarly commentators.<sup>152</sup> Since then, the Court has shown no inclination to retreat from its adherence to the *Monell* doctrine, but neither has it displayed nearly the same enthusiasm for that doctrine as it has done for qualified immunity, as to which it has granted more cases, and decided almost all of them for defendants, often by unanimous or supermajority votes.<sup>153</sup>

Nonetheless, many scholars have argued and continue to argue that the right solution is to reverse *Monell*'s halfway holding and impose strict *respondeat superior* on municipal defendants. In 2015, for example, Karen Blum informally "polled" several experts to ask what single change to the doctrine would do the most to "fix" the law of § 1983.<sup>154</sup> The most common response, and the one with which she agreed, was to adopt *respondeat superior* liability for municipal defendants.<sup>155</sup> In contrast, there are currently no voices calling for "fixing" municipal liability by reviving *Monroe*'s holding that municipal defendants are not "persons" under § 1983.<sup>156</sup>

As for defenders of the current *Monell* doctrine beyond the Supreme Court, Judge Posner has offered a sort of defense, or at least a rationalization, of the doctrine.<sup>157</sup> He argues that *Monell*'s "policy or custom" doctrine "is best understood" not in terms of the text or legislative history of the statute, but instead "as simply having crafted a compromise rule that protect the budgets of local governments from automatic liability for their employees' wrongs, driven by a concern about public budgets and the potential extent of taxpayer liability."<sup>158</sup>

### 3. Critiques of Qualified Immunity

Qualified immunity doctrine has also been heavily criticized. One fairly common criticism is that the qualified immunity doctrine (like the

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151. *Connick v. Thompson*, 563 U.S. 51, 62 (2011) (holding that to prevail in a failure-to-train case, a plaintiff will generally need to plead and prove a pattern of other, similar violations that were already known to the municipal defendant).

152. See, e.g., Fred Smith, *Local Sovereign Immunity*, 116 Colum. L. Rev. 409, 436-37 (2016).

153. See, e.g. Baude, *supra* note 16, at 41-42; (noting privileged place of qualified immunity on Court's docket).

154. Blum, *The Maze*, *supra* note 13, at 962-63.

155. *Id.*

156. *Monroe v. Pape*, 365 U.S. 167, 187 (1961); Jeffries, *The Liability Rule*, *supra* note 13, at 238 (noting that this would be one possible way to align municipal liability with state governments' complete immunity from section 1983 suits).

157. *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 791-92 (7th Cir. 2014) (Posner, J.).

158. *Id.*

municipal liability doctrine) is too complicated and difficult to apply.<sup>159</sup> Another major line of criticism by many commentators,<sup>160</sup> as well as by Justice Sotomayor more recently,<sup>161</sup> is that the defense is too favorable to officers and unfriendly to plaintiffs. In addition, many scholars also have criticized the Court's development of the doctrine as inconsistent<sup>162</sup> or disingenuous, in the sense that it is driven ultimately by policy considerations, rather than the interpretive sources the Court purports to rely on: text, legislative history, and common law.<sup>163</sup> In that vein, most recently, Will Baude argued that the entire doctrine cannot be justified at all based on historical and doctrinal sources of statutory interpretation.<sup>164</sup>

However, with the recent and partial exceptions of Justice Sotomayor and Justice Thomas,<sup>165</sup> the Court seems mostly uninterested in these criticisms of its qualified immunity doctrine. While the Court's cases expounding municipal-liability doctrine consistently draw or drew dissents from 4 justices,<sup>166</sup> or even failed to generate majority opinions at all,<sup>167</sup> its qualified immunity cases often draw fewer<sup>168</sup> or no dissenters.<sup>169</sup> Further, the Court regularly and unanimously reverses

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159. Charles R. Wilson, "Location, Location, Location": *Recent Developments in the Qualified-immunity defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) ("Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face.").

160. See, e.g., Kinports, *supra* note 42, at 64 (2016) (arguing that "the Court has engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms . . ."); Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 664-65 (1998) (arguing that the doctrine does too much to protect officers).

161. Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1278 (2017) (Sotomayor, J., dissenting from denial of certiorari).

162. See, e.g., Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998) (arguing that Court has been inconsistent in its reliance on and application of common law rules).

163. See, e.g., John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189, 205 (2008) ("[T]he Supreme Court has openly acknowledged its willingness to rewrite the text of section 1983 to create a regime that 'better' balances competing policy considerations than does the actual law that Congress passed.").

164. Baude, *supra* note 16, at 7-17.

165. Ziglar v. Abbasi, 137 S.Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting the Justice's "growing concern with our qualified immunity jurisprudence").

166. See, e.g., Connick v. Thompson, 563 U.S. 51, 79 (2011); Bd. of Cty. Cmms v. Brown, 520 U.S. 397, 416 (1997).

167. See, e.g., City of St. Louis v. Praprotnik, 485 U.S. 112, 114 (1988) (plurality opinion of O'Connor, J.); Pembauer v. City of Cincinnati, 475 U.S. 469, 470 (1986) (partial majority and partial plurality opinion).

168. See, e.g., Scott v. Harris, 550 U.S. 372, 389 (2007) (Stevens, J., dissenting alone)

169. See, e.g., County of Los Angeles v. Mendez, 137 S.Ct. 1539 (2017); Lane v. Franks, 134 U.S. 2369 (2014); Plumhoff v. Rickard, 134 S.Ct. 2012 (2014); Pearson v. Callahan, 555 U.S. 223, 245 (2009) (each unanimously ruling in favor of the defendant on an issue related to qualified immunity).

circuit courts for misapplying its qualified immunity doctrine,<sup>170</sup> while it rarely has done the same thing for misapplication of *Monell* liability. In short, the Court seems quite enthusiastic and unhesitant to apply and broaden qualified immunity.<sup>171</sup>

While many academics have criticized the content of qualified immunity doctrine, far fewer voices have criticized *Owen*'s holding that municipal governments should not be allowed to assert the defense. The most notable proponent of that view is John Jeffries, who has argued against the *Owen* rule on the ground that *Owen*'s adoption of strict liability for municipalities wrongly divorces § 1983 liability from a grounding in fault.<sup>172</sup> Professor Jeffries also argued that strict municipal liability should be eliminated in favor of a liability scheme in which (a modified form of) the qualified immunity defense is the sole liability rule under § 1983.<sup>173</sup> The next section considers Professor Jeffries' proposal in detail, as the springboard for this Article's central argument.

#### 4. Jeffries' Proposal: One Liability Rule Based on Modified Qualified Immunity

Building on earlier work arguing that liability under § 1983 should be fault-based,<sup>174</sup> and on arguments about the right-remedy gap in constitutional litigation,<sup>175</sup> in 2013 John Jeffries argued for reworking § 1983 liability based on a "unified theory" of constitutional torts.<sup>176</sup> He proposed eliminating both absolute immunity and strict municipal liability; substituting as the sole liability rule a reworked version of the qualified immunity defense. Under this reformulation of qualified immunity, the relevant question would be whether the defendant's

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170. See, e.g., *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam); *Taylor v. Barks*, 135 S.Ct. 2042 (2015) (per curiam); *Carroll v. Carman*, 135 S.Ct. 348 (2014) (per curiam); *Stanton v. Sims*, 571 U.S. 3, 134 S.Ct. 3 (2013) (per curiam); Scott Michelman, *Taylor v. Barks: Summary reversal is part of a qualified immunity trend*, SCOTUSblog (Jun. 2, 2015, 11:17 AM), <http://www.scotusblog.com/2015/06/taylor-v-barks-summary-reversal-is-part-of-a-qualified-immunity-trend/>.

171. See Baude, *supra* note 16, at 41-42; Kinports, *supra* note 42, at 69 (each noting, and criticizing, the Court's enthusiasm).

172. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 68-71 (1998); John C. Jeffries, Jr., *Compensation For Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 89 (1989).

173. Jeffries, *The Liability Rule*, *supra* note 13, at 258-64, 270.

174. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 68-70 (1998); John C. Jeffries, *Compensation For Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 89 (1989).

175. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87-88 (1999).

176. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA L. REV. 207, 209, 259 (2013).

conduct was “clearly unconstitutional,” rather whether rights were “clearly established.”<sup>177</sup> In support of his argument for eliminating strict municipal liability, Jeffries noted the wastefulness of litigating “policy and custom,”<sup>178</sup> concerns about over-detering municipal officials into inaction,<sup>179</sup> and the desirability of maintaining a right-remedy gap in constitutional litigation in order to further the development of and innovation in constitutional law.<sup>180</sup> While arguing that qualified immunity “should be the rule,” and for redefining the qualified immunity standard, Jeffries also seemed to argue that this would require, or at least should lead to, eliminating direct liability for municipal defendants.<sup>181</sup>

This Article’s proposal builds on Jeffries’ arguments, and agrees with them in that it argues for eliminating strict municipal liability, and that qualified immunity should be the main basis of liability in § 1983 suits.<sup>182</sup> However, it differs from Jeffries’ arguments in that it argues for imposing *respondeat superior* liability on municipal defendants while making municipal qualified immunity depend on the qualified immunity of the individual officer. Thus, it draws on not only on Jeffries’ proposal for eliminating strict municipal liability and making qualified immunity “the” liability rule,<sup>183</sup> but also on the chorus of scholars who have argued for municipal *respondeat superior* liability, disagreeing with the latter group on the point that municipal liability should be based on qualified immunity and not strict liability.<sup>184</sup> This Article now turns to explaining and offering policy justifications for the proposal, and after that to arguing that the proposed changes in addition to being theoretically sound are also possible and feasible.<sup>185</sup>

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177. *Id.* at 246, 264, 270.

178. *Id.* at 234.

179. *Id.* at 243-46.

180. *Id.* at 246-50.

181. *Id.* at 240 (“[T]he zone of strict liability defined by *Monell* and *Owen* could be eliminated in favor of governmental immunity from direct liability.”); *see also id.* at 270 (“I would therefore eliminate the pocket of strict liability that exists in current law.”).

182. *Id.* at 249, 270.

183. *Id.* at 270.

184. *See, e.g.* Blum, *The Maze*, *supra* note 13, at 962-63.

185. *See infra* Part III.B.

II. PROPOSAL AND POLICY JUSTIFICATIONS: MAKE CITIES LIABLE IN  
*RESPONDEAT SUPERIOR* BUT LET THEM ASSERT THEIR OFFICERS'  
QUALIFIED IMMUNITY DEFENSE

*A. Proposal and Summary of Policy Justifications*

The law governing cities' liability under §1983 should be changed so that cities are subjected to *respondeat superior* liability but are allowed to assert the same qualified immunity defense available to their officers whose actions are the basis for the suit. The first change would reverse *Monell* and eliminate its "policy and custom" requirement for municipal liability,<sup>186</sup> along with the doctrines relating to custom, policymaking, training, and hiring that have grown out of that holding.<sup>187</sup> The second change would reverse *Owen's* holding that cities have no qualified immunity<sup>188</sup> and allow them the benefit of the qualified immunity defense available to their officers. The proposal is not that cities be entitled to assert their "own" qualified immunity defense; instead, cities' liability would turn on whether the individual officers whose conduct allegedly violated plaintiff's rights are entitled to qualified immunity.<sup>189</sup>

The rest of this Part offers policy arguments in favor of this proposal. First, the change would make § 1983 litigation significantly simpler and more efficient by eliminating the unwieldy, confusing, and largely meaningless (because of indemnification) sideshow of "policy and custom" municipal liability doctrine, and by focusing the litigation mainly on the question whether individual officers' conduct violated clearly established constitutional law. It will also improve judicial efficiency by allowing federal courts adjudicating § 1983 cases to focus more on questions of federal constitutional law, which are within their area of competence, rather than questions of state and local government law, which are less so.

In addition to improving efficiency, the proposed changes will also serve the statute's primary goals of deterrence and compensation<sup>190</sup> by improving the incentives for municipalities created by § 1983's liability scheme without exposing them to massive new *respondeat superior*

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186. *Monell v. Dept. of Social Servs. of New York*, 436 U.S. 658, 690-91 (1978).

187. *See supra* Part I.C.1.

188. *Owen v. City of Independence*, 445 U.S. 622, 657 (1980).

189. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (requiring that some individual officer must have violated the plaintiff's rights before local government can be held liable).

190. Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for Owen?*, 79 IOWA L. REV. 273, 289 (1994) ("The primary objectives behind section 1983 are deterrence and compensation.").

liability.<sup>191</sup> The combination of the changes proposed by this Article would improve deterrence for local governments by aligning their liability with the category of violations that they would actually be able to predict and prevent—ones that violate clearly established law at the time of the conduct in question.<sup>192</sup> While cities will no longer be liable for violations they could not foresee, they will now be liable for any violation of clearly established law. Cities and policymakers would, therefore, no longer have the “know nothing” incentive imparted by the current doctrine, under which a city can only be liable if the plaintiff can tie a specific violation to an official policy or pervasive custom for which the city should be deemed responsible. This will give cities stronger incentives to detect and prevent officers’ violations of clearly established law through better training, as well as internal investigation and reporting. Further, these improvements can be made without massively expanding municipal liability. The rule against *respondeat superior* was created to stave off holding municipalities liable for all of their officers’ constitutional torts;<sup>193</sup> however, empirical studies show that municipalities in fact tend to indemnify their officers for those torts.<sup>194</sup> Thus, imposing *respondeat superior* would not greatly increase their liability.

Third, the change would further the statute’s goal of compensation<sup>195</sup> by making it easier for more deserving plaintiffs to recover against cities, while also making it harder for less deserving plaintiffs to do so. Deserving plaintiffs will no longer have to plead and prove complicated assertions about municipal policy, custom, or practice in order to recover against cities, which will mean that plaintiffs’ claims against municipal defendants will be more likely to satisfy the *Twombly/ Iqbal* plausibility standard for pleading.<sup>196</sup> At the same time, the change will remove the narrow category of “strict liability” for local governments,<sup>197</sup> in which plaintiffs are arguably the least deserving of recovery, because they receive a windfall from the city’s failure to anticipate a change in constitutional law.<sup>198</sup> Liability will be focused on violations where the individual officers’ conduct violated clearly established law, and in those situations plaintiffs will be assured of recovery not only against

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191. See, e.g., *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 791-92 (7th Cir. 2014) (Posner, J).

192. Jeffries, *The Liability Rule*, *supra* note 13, at 244-46.

193. See, e.g., *Oklahoma City v. Tuttle*, 471 U.S. 808, 844 (1985) (Stevens, J., dissenting).

194. Schwartz, *Police Indemnification*, *supra* note 23, at 911-13.

195. Brown, *supra* note 190, at 289.

196. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

197. John C. Jeffries, *The Liability Rule*, *supra* note 13, at 249 (referring to the rule of strict liability for municipalities as a small “pocket”).

198. See *Owen v. City of Independence*, 445 U.S. 622, 669 (1980) (Powell, J., dissenting).

the officer but also against the municipal defendant, eliminating the (small, but real) risk that the plaintiff will be unable to collect.

Finally, the change would better serve the statutory value of federalism, which the Court has repeatedly said is a major consideration in its development of liability doctrine, and in particular the *Monell* doctrine, under § 1983.<sup>199</sup> The changes will provide local governments with the flexibility to choose their own policies and strategies to prevent and deter violations of constitutional law by their officers, but will hold them strictly accountable when they fail to prevent violations of clearly-established law. Federal courts will no longer be in the business of examining and second-guessing municipal policies, customs, and training, or each state's peculiar structure of government.

### *B. Make § 1983 Litigation Simpler and More Efficient*

The proposed changes would simplify and increase the efficiency of § 1983 litigation by eliminating the complex and costly inquiries into municipal policy, custom, government structure, training, and hiring that are required under current doctrine in order for a plaintiff to impose liability on a city in a lawsuit under § 1983.<sup>200</sup>

In developing doctrine under § 1983, the Court has sought rules that make litigation more efficient, both for efficiency's sake and to ensure that issues of officer and government liability can be resolved earlier rather than later in the litigation. In *Harlow v. Fitzgerald*, for example, the Court changed the qualified immunity test from a mixed subjective/objective test to a purely objective test so that the defense could be resolved more easily, and earlier, in the litigation.<sup>201</sup> In *Pearson v. Callahan*, the Court reversed its earlier decision in *Saucier v. Katz* and held that district courts may decide whether the law was clearly established without having to first decide whether the conduct amounted to a constitutional violation, mainly for the reason that the new approach was more efficient and gave district courts more flexibility than *Saucier's* "rigid" two-step approach.<sup>202</sup> The changes proposed by this Article would serve this interest in efficiency by eliminating the convoluted and wasteful inquiry into municipal policy and custom.

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199. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 392 (1989).

200. See, e.g., *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 434-37 (1997) (Breyer, J., dissenting); Jeffries, *The Liability Rule*, *supra* note 13, at 233-236 (criticizing the wastefulness of litigating policy and custom under *Monell*); Taylor, *supra* note 22, at 760-765 (describing what plaintiff's attorneys must do to develop such evidence).

201. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

202. *Pearson v. Callahan*, 555 U.S. 223, 240-42 (2009) (reversing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

As discussed above, the doctrine on municipal liability is complex and difficult to apply, as both judges and scholars have observed and argued.<sup>203</sup> It can require a plaintiff to investigate and second-guess a city's training regime in an attempt to show that defective training caused an individual officer to violate the plaintiff's constitutional rights, and that the city was at fault for the failure to train.<sup>204</sup> It can require complicated and subtle inquiries into whether a particular official, who gave an order or approval to "line" officers to engage in allegedly unconstitutional conduct, was in fact a "policymaker" for the city or not.<sup>205</sup> Further, because the Court has held that the "policymaker" question is a matter of state, not federal law, the doctrine requires litigants and federal courts to argue and investigate the fine points of a particular state's delegation of powers and authorities to local officials,<sup>206</sup> including whether a particular "policymaker" makes policy for the State or the locality when that policymaker acts.<sup>207</sup>

The "policy and custom" requirement, as developed by the court, can require plaintiffs to have to assemble a dossier of other examples of similar violations in order to provide support for either a "custom" or a "training" municipal liability claim.<sup>208</sup> Further, plaintiffs can get caught in a trap for the unwary if they fail to identify other, similar examples of violations, even when the violation in their particular case was willful and clearly in violation of established constitutional law.<sup>209</sup>

The discovery involved becomes more far reaching for both parties than the particular case at issue, because the current doctrine requires the plaintiff to indict the broader practices of the municipal entity in order to have a hope of holding that entity liable in the lawsuit.<sup>210</sup> This means a plaintiff must, in crafting a complaint, make sufficient allegations about the city's policies, customs, and practices to support liability under

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203. See, e.g., *Brown*, 520 U.S. at 434-37 (1997) (Breyer, J., dissenting).

204. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

205. See, e.g., *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1989).

206. See, e.g., *Praprotnik*, 485 U.S. at 124-25; *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736-37 (1989).

207. See, e.g., *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997).

208. See, e.g., *Taylor*, *supra* note 22, at 756-57 (giving examples of the sort of evidence plaintiffs must present to hold a municipal defendant liable under the *Monell* doctrine).

209. See *Connick v. Thompson*, 563 U.S. 51, 61, 72 (holding that multimillion dollar verdict in favor of plaintiff, who was victim of deliberate evidence suppression by prosecutors, against New Orleans District Attorney must be reversed because plaintiff had failed to identify a pattern of similar instances of violations in the office); see also *id.* at 108 (Ginsburg, J., dissenting) (suggesting that if plaintiffs had known about the requirement to prove a pattern, they could have identified evidence of several other, similar violations sufficient to do so).

210. See, e.g., *Futterman et al.*, *supra* note 28, at 255-57 (describing one set of litigators' efforts to gather evidence to systemically challenge Chicago policies).

current municipality rules,<sup>211</sup> at risk of having the claims dismissed if plaintiff fails to do so.<sup>212</sup> To prevail, the plaintiff must then seek discovery from the municipal defendant on each of these points.<sup>213</sup> The municipality, for its part, must respond to those requests and in each case produce documents and information relating to its policies and informal practices, as well as all similar such cases for a period of years.<sup>214</sup> If the case involves questions about municipal policy, training, or policymaking, executive officials may well have to be deposed or even testify in court about these matters, distracting them from their duties.<sup>215</sup> If, on the other hand, the focus is limited to whether the individual officer's conduct violated clearly established law of which a reasonable officer would have known, the scope of discovery and evidence will be much more limited. In addition to the intrusion of the requests themselves, removing the need to litigate "policy and custom" will also reduce the expenditure of attorney time on both sides of the litigation.<sup>216</sup> This will further mean that, in the meritorious case, the losing defendant city will not have to pay for the time plaintiffs' attorneys spent pursuing "policy" and "custom" liability.<sup>217</sup>

Even worse, all this effort is very often entirely wasted as a practical matter, because research shows that municipalities almost always will indemnify their individual officers if the individual officer is held liable.<sup>218</sup> What this means is that the litigation about municipal policy and custom is essentially a complex and wasteful sideshow in all cases except one narrow category: cases in which the municipalities policies and customs *did* cause the violation, but the violation was not clearly

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211. See, e.g., *McCauley v. City of Chicago*, 671 F.3d 611, 617 (7th Cir. 2011) (dismissing municipal liability claims for failure to meet *Twombly/Iqbal* plausibility standard).

212. See, e.g., *Saleem v. Sch. Dist. of Philadelphia*, 2013 WL 5763206, at \*2 (E.D. Pa. Oct. 24, 2013) (dismissing complaint for failure to provide "factual details regarding the existence, scope or application of the alleged School District policy, practice, procedure or custom of the School District").

213. See, e.g., Taylor, *supra* note 22, at 752-57 (providing practical advice to litigators on how to do this work).

214. See *id.* at 749 (discussing how defense lawyers' strategies can increase litigation costs) the parties incentives to pour resources into litigating these issues); Surell Brady, *Municipal Liability for Police Misconduct: Experiences in the Eighth Circuit*, 23 WM. MITCHELL L. REV. 81, 102 (1997) ("The law serves only to prolong what already are expensive suits. Litigation expenses can spiral out of control."); Taylor, *supra* note 22, at 749 ("*Monell* claims can greatly increase the costs of litigation, the attorney time expended, the effort of the opposition, and the length and complexity of the trial.").

215. See, e.g., *Bishop v. Arcuri*, 674 F.3d 456, 468 (5th Cir. 2012) (describing testimony of San Antonio police chief as "relevant law enforcement policymaker for the city" about San Antonio's police practices in lawsuit challenging failure to "knock and announce" before executing drug search warrant).

216. See Jeffries, *The Liability Rule*, *supra* note 13, at 233 (noting the parties incentives to pour resources into litigating these issues).

217. See 42 U.S.C. §1988 (allowing attorneys' fees for "prevailing party" in civil-rights actions).

218. Schwartz, *supra* note 23, at 911-13.

established under the law extant at the time of the conduct.<sup>219</sup> Because of that narrow window of opportunity for a strict-liability recovery under current doctrine, litigants will frequently devote considerable litigation resources to contesting policy and custom.<sup>220</sup> For reasons explained below, that category of cases is one in which the municipality should not be liable any more than the individual officer. But the important point is that in almost all cases, the complicated and intrusive inquiry into municipal policy and custom is wasteful and unnecessary.

Thus, as discussed, and as many jurists and commentators agree, eliminating *Monell* doctrine would improve efficiency in § 1983 litigation.<sup>221</sup> To support the proposal of this Article, then, it remains only to show that the *other* proposed change—extending the qualified immunity defense to municipal defendants—would not result in any increased complexity, time, or litigation expense. It would not because, under the change proposed by this Article, the municipal defendant would be liable in *respondeat superior* but entitled to the benefit of the officer's qualified immunity defense. Thus, the sole qualified-immunity question to be litigated would be whether the individual officers whose conduct was at issue are entitled to qualified immunity, an issue which would have been litigated anyway.<sup>222</sup> Because this Article's proposal is simply to let the city benefit from the officer's qualified immunity defense and not to adopt a municipal qualified immunity rule that independently examines whether the city itself should have known about a violation of clearly established law,<sup>223</sup> there will be no new issues to litigate.

Finally, although somewhat speculatively, adopting this proposal could make § 1983 doctrine more efficient and simpler in another way: by eventually improving qualified immunity doctrine. If, as many have suggested, qualified immunity doctrine is overly complex,<sup>224</sup> too unfair to plaintiffs,<sup>225</sup> or focused on the wrong inquiry,<sup>226</sup> the proposed change

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219. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 633 (1980).

220. Jeffries, *The Liability Rule*, *supra* note 13, at 233.

221. See, e.g., *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 434-37 (1997) (Breyer, J., dissenting).

222. Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 481 (2011) (noting that “qualified immunity is very frequently asserted as a defense” in section 1983 suits).

223. Aside from being inefficient, it is hard to imagine a coherent inquiry into whether “a reasonable city” would have known about a violation of clearly established law.

224. Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified-immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) (noting from a judge's perspective the complexity of qualified immunity law).

225. See, e.g., Kinports, *supra* note 42, at 64 (2016) (arguing that “the Court has engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms . . .”); Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 664-65 (1998) (arguing that the doctrine does too much to protect officers).

226. Jeffries, *The Liability Rule for Constitutional Torts*, *supra* note 13, at 246; Blum, *The Maze*,

will cast light on those problems by focusing almost all § 1983 litigation on the application of the qualified immunity test.<sup>227</sup> Since qualified immunity would be the major pivot point in most cases under § 1983, more attention might hopefully be paid to making sure the doctrine is functioning properly.

In response to these arguments, one might argue that eliminating *Monell*'s "policy and custom" doctrine will, in return for efficiency and less cost, prevent plaintiffs from challenging widespread patterns and practices of abuse on the part of municipal defendants.<sup>228</sup> If evidence about municipal policies, customs, training, practices, and patterns of past violations are no longer required to establish the municipality's liability, then perhaps plaintiffs would no longer be able to seek such evidence, or to pursue systemic changes in municipal policies and practices. However, the changes proposed here would not prevent plaintiffs from challenging or seeking to enjoin municipal policies, customs, or practices. Plaintiffs would simply no longer be *required* to raise such challenges to hold a municipal government liable for the violation of the plaintiff's rights by an individual officer. In particular, the class action mechanism would remain available as a vehicle for plaintiffs to challenge and enjoin municipal policies or customs that violate rights on a widespread basis.<sup>229</sup> While it is true that, under current law, it can be difficult to pursue injunctive relief against cities under § 1983,<sup>230</sup> the changes proposed by this Article would not increase that difficulty.

*B. Improve Municipal Defendants' Incentives and Deterrence without Massively Expanding Their Liability*

The next argument in favor of the proposal is that it would improve incentives and deterrence for cities by limiting liability for violations

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*supra* note 13, at 947.

227. The remaining exception would be cases involving absolute immunity for officers performing judicial, legislative, or prosecutorial functions. *Cf.* Jeffries, *The Liability Rule*, *supra* note 13, at 209-10 (arguing for replacing absolute immunity with qualified immunity).

228. *See* Blum, *supra* note 13, at 920 (arguing that "there may be some value to playing the *Monell* game" for discovery and settlement purposes); Taylor, *supra* note 22, at 749 (noting that pursuit of discovery required to make out *Monell* claims can confer advantages on plaintiffs and allow challenges to systemic abuses); Futterman et al., *supra* note 28, at 255, 259-60 (noting how statistical investigation conducted to support particular plaintiffs' claims unearthed patterns of systemic abuses in Chicago); *see also* *Obrycka v. City of Chicago*, No. 07 C 2372, 2012 WL 3903673, at \*1 (N.D. Ill. Sept. 7, 2012) (plaintiff attempted to make out *Monell* claims using statistical evidence about excessive force complaints in Chicago).

229. *See, e.g.,* *Smith v. City of Chicago*, 143 F. Supp. 3d 741, 753 (N.D. Ill. 2015) (denying motion to dismiss class action claims challenging Chicago police practices).

230. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

that cities are more able to prevent, while also removing the incentive for cities to create distance between their policies or policymakers and their “line” officers in hopes of avoiding the imposition of municipal liability.<sup>231</sup> At the same time, because cities would now be allowed to assert qualified immunity, and because cities already currently tend to indemnify their officers, there would not be the massive expansion of municipal liability about which the Court fretted in crafting its *Monell* rules.<sup>232</sup>

Under the current doctrinal status quo, cities have a sort of “know nothing” incentive when it comes to monitoring and preventing constitutional torts by their officers. A municipal defendant can avoid liability for a violation if it can show it was not attributable to a formal policy,<sup>233</sup> if it can show its executives were not aware of other similar incidents,<sup>234</sup> if it can show that its “policymakers” were not responsible for the conduct in question,<sup>235</sup> or if it can show that it was unaware of similar violation that would have put it on notice of the need to train officers to prevent them.<sup>236</sup> In each aspect, the danger for a city is that it allows itself or its policymakers to be connected to, or held responsible for, the conduct of the “line” officers. The “policy” and “custom” doctrine creates a tracing exercise that gives cities incentives to distance individual officers’ actions from official policies and upper-level decision makers.

However, under this Article’s proposal, the incentives would change.

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231. Joanna Schwartz has argued, persuasively, that it should not be presumed that civil-rights lawsuits necessarily have a deterrent effect, because not all cities track, process, or respond to lawsuits filed against officers. Joanna Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023, 1040 (2010). As Schwartz notes, however, at least some municipal governments do track that information and use it to identify problem officers, or change internal policies, and those that do have strengthened the deterrent effect of lawsuits. *Id.* at 1067-68. More broadly, Daryl Levinson has argued that cities simply are not deterred in the same way as private economic actors. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); *but see* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 866 (2001). Rather than joining this debate, this Article simply argues that to the extent lawsuits do affect cities’ incentives, or deter wrongdoing by their officers, this article’s proposal would give cities better incentives.

232. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 844 (1985) (Stevens, J., dissenting) (“The Court’s contrary conclusion can only be explained by a concern about the danger of bankrupting municipal corporations.”).

233. *City of Canton v. Harris*, 489 U.S. 378, 389-90 (1989) (making the point that when a municipal defendant has an official policy to which the violation is attributable, the fault and causation of the violation are directly established).

234. *See, e.g., id.*; *Connick v. Thompson*, 563 U.S. 51, 72 (2011) (holding that district attorney’s office could not be held liable when plaintiffs’ attorneys had failed to establish a pattern of similar violations).

235. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

236. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

Cities no longer will have to worry about a federal court retrospectively second-guessing their policy, custom, policymaking, or training as plaintiffs attempt to forge a link between an individual officer's conduct and the city itself. Further, the fact that the city did not have a policy, or cannot be charged with knowledge of a practice, will not save the city from liability. If the officer violated clearly established law, then the city will be liable. So, cities will have much greater incentives to ensure that their policies, customs, decision making, and training all operate to ensure that officers are not engaging in conduct that violates clearly established law.

At the same time, allowing municipal defendants the benefit of qualified immunity will help ensure that they are not over-deterred. The proposed change will, therefore, better align the deterrence provided by the statute. Under the current approach, cities can be held liable for offenses that are unforeseeable, and therefore difficult (if not impossible) to deter.<sup>237</sup> At the same time, cities can avoid liability even when their officers are engaging in conduct that violates clearly established law, so long as they can obscure any connection between the violation and the city's official policy, policymakers, or unofficial custom.<sup>238</sup> The proposed changes will eliminate the "know nothing" incentive and replace it with an incentive to monitor and prevent abuses.

At the same time, these changes will not unduly expand or contract municipal liability. First, these changes will not massively expand municipal liability, despite the worries expressed by the Court in choosing and adhering to *Monell* liability rather than adopting a *respondeat superior* regime.<sup>239</sup> One main reason for this is that, in cases in which officers are held liable despite their assertion of qualified immunity, cities already routinely, and indeed almost always, indemnify those officers.<sup>240</sup> That is, even in cases where an officer is held liable but the city escapes liability based on the *Monell* rules, the city is likely to pay the judgment anyway.<sup>241</sup>

Probably the only category of case to which municipal liability would be newly expanded would be cases in which an officer's intentional conduct was so egregious that a city would refuse to indemnify the officer—most notably, cases of willful and malicious violations of constitutional rights by "bad cops."<sup>242</sup> It might be argued that it is simply

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237. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 665 (1980) (Powell, J., dissenting); Jeffries, *The Liability Rule*, *supra* note 13, at 244-46.

238. See, e.g., *Connick*, 563 U.S. at 71 (defendant District Attorney's office avoided liability for *Brady* violation by prosecutors).

239. *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 791-92 (7th Cir. 2014) (Posner, J.).

240. Schwartz, *supra* note 23, at 911-13.

241. *Id.*

242. One recent example which received significant media attention was the series of sexual

unfair to impose liability on the cities for the willful bad acts of its officers that the city did not direct, encourage, or know about. A few responses can be made against this, however. First, even as to cases where the officer was disregarding policy or going around the rules, imposing liability will give cities an incentive to develop better mechanisms, practices, and reporting to catch or preemptively get rid of rule-breaking “rogue cops” that are committing willful rights violations.<sup>243</sup> Second, these types of cases are often ones in which the violation of the plaintiff’s rights is the most severe or objectionable and in which, therefore, it is most important to ensure that the plaintiff is actually compensated, rather than the proud winner of an uncollectible damages judgment against a disgraced and penniless officer.<sup>244</sup> In a case where a municipal officer willfully violated the plaintiff’s clearly established rights, as between such a plaintiff and the city that employed the “bad cop,” it is more fitting that the city bear the cost of the loss.<sup>245</sup> Moreover, under the proposed changes, this expanded liability for the “worst” violations will be balanced by ending *Owen*’s municipal strict liability for “good faith” violations that did not violate clearly established law.<sup>246</sup> Finally, municipalities can take insurance against such losses.<sup>247</sup>

The contrary concern is that the proposed changes will unduly contract municipal liability by giving municipal defendants the benefit of the very powerful qualified immunity defense. That might, in turn, make municipal defendants even less responsive to deterrence by suit under §1983. Cities like Albuquerque, Baltimore, and Chicago—all of which have been found by the Department of Justice to have engaged in systematic and widespread abusive policing—will only be further emboldened by giving them additional shelter from liability.<sup>248</sup>

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assaults perpetrated by Oklahoma City Police Officer Daniel Holtzclaw. See <http://www.nbcnews.com/news/us-news/ex-oklahoma-city-cop-daniel-holtzclaw-found-guilty-rapes-n478151> (noting Holtzclaw’s conviction and 263-year sentence for abusing his office to force arrestees into sex).

243. See, e.g., Molly Redden, “Daniel Holtzclaw: lawsuit claims police ‘covered up’ sexual assault complaint,” THE GUARDIAN, March 8, 2016, available at <https://www.theguardian.com/us-news/2016/mar/08/daniel-holtzclaw-lawsuit-sexual-assault-complaint-police-cover-up> (describing alleged cover-up by Oklahoma City police in Holtzclaw case).

244. The Holtzclaw case, again, is a good example of this scenario; the individual officer has been sentenced to over 200 years in prison and is unlikely to have funds to pay judgments against his score of victims.

245. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 654 (1980) (“Elemental notions of fairness dictate that one who causes a loss should bear the loss.”).

246. See, e.g., *id.* at 683 (Powell, J., dissenting) (calling for allowing municipal defendants a good-faith defense).

247. See, e.g., *Oklahoma City v. Tuttle*, 471 U.S. 808, 844 (1985) (Stevens, J., dissenting).

248. See, e.g., Department of Justice Investigation of the Chicago Police Department, January 13, 2017, available at <https://www.justice.gov/opa/file/925846/download>; Department of Justice

Against this several things can be said. One is that the proposal does not merely give the cities a new defense; it also makes it significantly easier to hold the cities liable by imposing *respondeat superior*. Said another way, while the qualified immunity defense is defendant friendly, so too is municipal liability doctrine. While there is no good statistical research on the question, subjective and anecdotal observations suggest that proving *Monell* liability is probably at least as difficult as overcoming qualified immunity.<sup>249</sup> The Court's own cases describe the inquiry as "rigorous."<sup>250</sup> Thus, as a practical matter, the proposed changes are not going to significantly curtail municipal liability so much as to shift it from a focus on municipal policy to a focus on cases in which there was a violation of the plaintiff's clearly established rights.

Finally, there are other remedies available in the case of the "rogue city"—the scenario where it is not merely isolated officers but entire police forces or municipal governments that engage in systemic abuses. One is the pursuit of injunctive relief, possibly in the context of class action claims.<sup>251</sup> The qualified immunity defense is a defense to damages liability only; therefore, municipal defendants would not be able to invoke it in defending against injunctive claims. The changes proposed by this Article would thus have no limiting effect on the ability of plaintiffs to seek injunctions to end systemic abusive practices. Another remedy is investigation and sanction by the Department of Justice, as happened in the cases of each of the cities mentioned above,<sup>252</sup> though admittedly the likelihood of such action will vary

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Investigation of Baltimore City Police Department, August 10, 2016, available at <https://www.justice.gov/opa/file/883366/download>;

DOJ Report of Findings--Albuquerque Police Department Investigation, April 10, 2014, available at [https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd\\_findings\\_4-10-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf) (each finding systemic violations and abuses by the city police departments investigated).

249. See, e.g., Blum, *supra* note 13, at 916-17 (noting the difficulty of pleading and proving *Monell* claims under the Court's current doctrine); Surell Brady, *Municipal Liability for Police Misconduct: Experiences in the Eighth Circuit*, 23 WM. MITCHELL L. REV. 81, 104 (1997) ("Decisional law demonstrates that cases meeting the *Monell* standard are few and far between.").

250. *Connick v. Thompson*, 563 U.S. 51, 75 (2011) (quoting *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 398 (1997)).

251. There are significant limits on the ability of an individual plaintiff to seek and receive injunctive relief. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); see also Futterman et al, *Chicago's Broken System*, *supra* note 28 (noting difficulties under *Lyons* in getting injunctions against police abuses). But in the case where the defendant city's officers are engaging in systemic violations of rights, injunctive relief should be more readily available. See, e.g., *Smith v. City of Chicago*, 143 F. Supp. 3d 741, 753 (N.D. Ill. 2015) (denying motion to dismiss class action claims challenging Chicago police practices).

252. See DOJ-Baltimore consent decree, available at <https://www.nytimes.com/interactive/2017/01/12/us/baltimore-consent-decree.html>; DOJ-Albuquerque settlement agreement, available at <http://documents.cabq.gov/justice-department/settlement-agreement.pdf>.

greatly based on the politics of the incumbent administration.<sup>253</sup>

*C. Making It Easier for Deserving Plaintiffs to Plead and Recover;  
Eliminating Strict-Liability Recoveries*

If cities are liable in *respondeat superior*, then plaintiffs with strong claims<sup>254</sup> will find it easier to prove their cases against municipal defendants, have an easier time recovering, and might also get more generous recoveries.

First, eliminating the *Monell* doctrine will make it easier for plaintiffs with strong cases to prove those cases against municipal defendants. Plaintiffs will no longer have to plead and prove “policy and custom” to hold cities liable, and it will become much easier for plaintiffs with strong substantive claims against municipal defendants to more easily survive motions to dismiss and summary judgment. Because current municipal liability doctrine requires proof about a municipal defendant’s policies, customs, practices, training, discipline, and record of past incidents,<sup>255</sup> a plaintiff pleading claims against a municipal defendant must allege facts often beyond the plaintiff’s knowledge, such as who may have given orders to the officers who violated the plaintiff’s rights, internal department policies, the content of municipal training, and records of prior incidents.<sup>256</sup> Further, the advent of the *Twombly/Iqbal* heightened standard of pleading to survive a motion to dismiss means that, before discovery even begins, a plaintiff who wishes to plead claims against a municipal defendant must plead enough facts to meet the “plausibility” standard.<sup>257</sup> Failure to do so can lead to the dismissal of municipal liability claims at the outset of the case.<sup>258</sup>

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253. See Attorney General Memorandum, March 31, 2017, available at <https://www.justice.gov/opa/press-release/file/954916/download>; Sari Horvitz, “Sessions Orders Justice Department to Review All Police Reform Agreements,” WASH. POST, April 3, 2017, available at [https://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08\\_story.html?utm\\_term=.e323a55048ef](https://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08_story.html?utm_term=.e323a55048ef)

254. By “plaintiffs with strong claims” the Article means “plaintiffs whose clearly established constitutional rights have been violated.”

255. See, e.g., *Connick v. Thompson*, 563 U.S. 51 (2011); *City of Canton v. Harris*, 489 U.S. 378 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Monell v. Dep’t. of Social Servs. of New York*, 436 U.S. 658 (1978).

256. See, e.g., Taylor, *supra* note 22, at 753-58.

257. *McCauley v. City of Chicago*, 671 F.3d 611, 617 (7th Cir. 2011).

258. See, e.g., *McCauley*, 671 F.3d at 617 (dismissing municipal liability claims for failure to meet *Twombly/Iqbal* plausibility standard); *Gonzales v. Nueces Cty., Texas*, 227 F. Supp. 3d 698, 705 (S.D. Tex. 2017) (dismissing plaintiff’s *Monell* claims for failure to meet *Twombly* standard because plaintiff failed to plead “such policies apparent from high level admissions of deficiencies in police training or any statistics showing a significant number of similar instances.”); *Saleem v. Sch. Dist. of Philadelphia*, 2013 WL 5763206, at \*2 (E.D. Pa. Oct. 24, 2013) (dismissing complaint for failure to

The changes proposed by this Article would make it much easier for plaintiffs' claims against municipal defendants to survive dismissal because, in order to keep the municipal defendant in the case, a plaintiff would only need to show that the officer was acting within the scope of employment with the municipal defendant.<sup>259</sup> The focus of summary judgment litigation would be redirected and narrowed to the question whether the individual officers conduct violated clearly established law—that is, the question of qualified immunity<sup>260</sup>—and plaintiffs' claims would no longer routinely be dismissed for failure to sufficiently plead municipal policies, customs, training, or patterns of similar incidents.<sup>261</sup>

Closely related, plaintiffs will also have an easier time recovering against municipal defendants. Because the municipal defendant will be liable in *respondeat superior*, successful plaintiffs will have direct access to recovery from the “deeper pocket” municipal defendant, rather than having to rely on collecting from an individual officer or hoping that the individual officer will be indemnified by her employer.<sup>262</sup> While it is true that municipal defendants usually indemnify their officers, changing the basis of liability to *respondeat superior* will eliminate the risk of an uncollectible judgment against an individual officer.

Finally, *respondeat superior* liability for municipal defendants may also improve the size of recoveries for victorious plaintiffs. Juries may be more willing to award significant damages to plaintiffs if the municipal defendant is still in the case.<sup>263</sup> Lawyers who represent these

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provide “factual details regarding the existence, scope or application of the alleged School District policy, practice, procedure or custom of the School District”); *Young v. City of Visalia*, 687 F. Supp. 2d 1141 (E.D. Cal. 2009) (dismissing *Monell* claims for failure to adequately plead policy and custom under *Twombly*).

259. Cf. e.g., Restatement (Third) Agency § 7.07 cmt. c. (“[C]onduct is not outside the scope of employment merely because an employee disregards the employer’s instructions.”).

260. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

261. See, e.g., Surell Brady, *Municipal Liability for Police Misconduct: Experiences in the Eighth Circuit*, 23 WM. MITCHELL L. REV. 81, 104 (1997) (noting that current doctrine makes it difficult for *Monell* plaintiffs to prevail); see also cases cited *supra* note 258.

262. The practice of widespread indemnification of officers by cities might make this advantage of more limited value. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 913 (2014) (concluding via empirical study that municipal governments indemnify individual officers for 99% of dollars paid in judgments under 42 U.S.C. §1983). However, keeping the municipal defendant actually in the case could give plaintiffs more settlement leverage, especially if plaintiffs’ attorneys or even the defendants have limited knowledge about whether the municipal defendant will indemnify the officers, see Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 583, 588 n.17 (1998) (noting that the issue of indemnification may not be settled until after the primary litigation is complete); or if the defendants know that the presence of the municipal defendant in the case will increase juries’ willingness to award significant damages if the case goes to trial.

263. Jeffries, *The Liability Rule*, *supra* note 13, at 232 (“[T]he jury (for those cases that get to the jury) might be more willing to impose liability on a government than on an individual, or to increase the

defendants seem to think that is a serious risk of exposing cities to *respondeat superior* liability.<sup>264</sup> That risk, in turn, might lead to more and more generous settlements in deserving plaintiffs' favor as municipal defendant agree to terms in order to avoid jury verdicts.

At the same time, eliminating "strict municipal liability" by allowing cities the benefit of qualified immunity will cut off recovery for less deserving plaintiffs. The plaintiff who recovers in an *Owen* scenario is in the sense the beneficiary of a windfall: at the time of the defendants' conduct, that conduct did not violate clearly established constitutional law, but the plaintiff benefits from a development in the law that subsequently clearly established the violation.<sup>265</sup> If one accepts that liability under §1983 should be fault-based, then recoveries like these are given to plaintiffs who are undeserving.

Admittedly, the question of whether recovery should be fault-based has been hotly contested. Justice Brennan, writing for the majority in *Owen*, as well as many academics, have argued that the principle of § 1983 recovery should be compensation for constitutional violations without regard to fault.<sup>266</sup> Others, most notably John Jeffries, have argued that recovery under § 1983 should be fault based.<sup>267</sup> Without repeating those arguments here, this Article agrees with and relies on Jeffries' arguments: a fault requirement aligns with ideas of corrective justice<sup>268</sup> and is also necessary to prevent over deterrence of officials as well as to promote constitutional innovation.<sup>269</sup>

In addition, whether or not liability *should be* fault-based, it in fact currently *is*, and if it is to be fault-based then liability should be based directly on the defendant's degree of fault. The Court developed the unwieldy and convoluted "policy and custom" *Monell* doctrine to build

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damages when liability is found.").

264. See Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK L. REV. 831, 846-47 (2005) (noting that municipal attorneys oppose the imposition of *respondeat superior* liability for this reason).

265. *Owen v. City of Independence*, 445 U.S. 622, 669-70 (1980) (Powell, J., dissenting).

266. See, e.g., *id.* at 654 ("Elemental notions of fairness dictate that one who causes a loss should bear the loss."), 644-46 (analogizing the Court's adoption of strict liability for municipal governments to the development of strict liability doctrines in the common law of torts); Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1505 (1999); Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1780 (1989) (arguing for strict municipal liability as a loss-spreading measure).

267. See, e.g., John C. Jeffries, *Compensation For Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 95 (1989).

268. *Id.* at 96-98 (1989) (arguing that notions of corrective justice require fault); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 53 (1998) ("[A] constitutional tort regime based on fault is wise policy.").

269. Jeffries, *The Liability Rule*, *supra* note 13, at 242-50 (arguing that a fault-based regime is necessary to prevent overdeterrence and promote constitutional innovation).

back in the fault that *Owen* removed from the analysis.<sup>270</sup> Thus, for example, the doctrine requires either direct municipal policy, or at least “deliberate indifference” on the part of policymakers, to hold the municipal defendant liable for an individual officer’s violation.<sup>271</sup> Rather than getting at fault obliquely through the convoluted and hard-to-apply *Monell* doctrine, it would be better to do so directly through the application of qualified immunity.<sup>272</sup> As between a plaintiff whose clearly established rights were violated by an individual officer but with no clear connection to municipal policy or custom, and a plaintiff whose subsequently established rights were violated by an officer acting under a clear directive from municipal policy or custom, it seems that the former is the plaintiff more deserving of recovery.<sup>273</sup> The changes proposed by this Article would shift recoveries in line with this intuition.

*D. Furthering Federalism by Reducing Direct Federal Court Scrutiny of and Interference with Municipal Policies, Practices, Customs, and Training*

The final major policy argument in favor of the proposal is that it will further the value of federalism that the Court has recognized as an important policy consideration in interpreting § 1983.<sup>274</sup> Further, as already discussed, it will do so without significantly impairing (and will in fact further) the other main, and countervailing, policy consideration behind the statute: remedying and deterring violations of citizens’ federal rights by state and local officials.<sup>275</sup>

The Court has repeatedly emphasized that, in interpreting § 1983, it must take care to avoid imposing liability in ways that unduly interfere with the powers and abilities of state and local governments to structure their own operations.<sup>276</sup> This principle is behind the doctrinal developments as the “policy and custom” requirement itself, as well as several of the refinements of that doctrine. For example, federalism considerations drove the Court’s adoption of the rule that State (not

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270. See, e.g., *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 403-06 (1997); see also Jeffries, *The Liability Rule*, *supra* note 13, at 243.

271. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

272. *Id.* at 250-54 (arguing for a modified qualified immunity standard as the best liability rule for constitutional tort litigation).

273. Cf. *Pembauer v. City of Cincinnati*, 475 U.S. 469, 490 (1986) (Stevens, J., dissenting) (“The primary responsibility for protecting the constitutional rights of the residents of Hamilton County from the officers of Hamilton County should rest on the shoulders of the county itself, rather than on the several agents who were trying to perform their jobs.”)

274. See, e.g., *McMillian v. Monroe County*, 520 U.S. 781, 785-86 (1997); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

275. See *supra* Parts II. B and C.

276. See, e.g., *McMillian*, 520 U.S. at 785-86; *Praprotnik*, 485 U.S. at 124.

federal) law governs the question whether a particular government official is a local “policymaker,” whose actions can expose a municipal defendant to liability.<sup>277</sup> Similarly, federalism considerations prompted the Court to emphasize that State law governs whether a particular policymaker is making policy for the State, which is immune from § 1983 liability, or for a local government entity, which can be held liable for the policy.<sup>278</sup>

While federalism has driven the Court’s development of its *Monell* doctrine, that doctrine is actually highly intrusive into local government affairs. The current “policy and custom” doctrine requires plaintiffs, in order to hold cities liable, to litigate broad questions about municipal policy, allocations of policymaking authority under state and local law, local custom, and a particular entity’s hiring and training practices.<sup>279</sup> All these aspects of local government, therefore, are subjected to federal review under the current doctrine. So, for example, while the Court rejected *respondeat superior* for failure-to-train claims because it did not want to “engage the federal courts in an endless exercise of second-guessing municipal employee-training programs,”<sup>280</sup> as a practical matter the Court’s doctrine requires doing just that.<sup>281</sup>

Moreover, the doctrine’s emphasis on official policy and policymaking means that federal court scrutiny in these cases is directed at the apex officials (the policymakers) of local government.<sup>282</sup> Because it is necessary to prove that policymakers made or at least knew of a certain policy or custom, it is often necessary to depose them and discover their policy-related documents.<sup>283</sup> The Court has frequently supported its immunity doctrines on the grounds that immunity is necessary to allow officials to robustly perform their official duties.<sup>284</sup> But the *Monell* doctrine promotes, and indeed requires, scrutinizing and

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277. See, e.g., *Praprotnik*, 485 U.S. at 124 (1988).

278. *McMillian*, 520 U.S. at 785-86.

279. See, e.g., *McMillian*, 520 U.S. at 791-93 (1997) (whether policymaker makes policy for State or local government); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (training practices); *Jett*, 491 U.S. at 737-38 (allocation of policymaking authority under state law); *Praprotnik*, 485 U.S. at 184 (decisions by policymakers); *Pembauer v. City of Cincinnati*, 475 U.S. 469, 484-85 (1986) (whether officials are policymakers); *Monell v. Dept. of Social Servs. of New York*, 436 U.S. 658, 662 (1978) (official policies); see also Achtenberg, *Taking History Seriously*, *supra* note 65, at 2188 (noting the separate “paths” to municipal liability under *Monell*).

280. *City of Canton*, 489 U.S. at 392.

281. See, e.g., Taylor, *supra* note 22, at 752-53 (describing extensive discovery needed to make out a failure-to-discipline case under *City of Canton*).

282. See, e.g., *McCauley v. City of Chicago*, 671 F.3d 611, 617 (7th Cir. 2011).

283. See, e.g., *Bishop v. Arcuri*, 674 F.3d 456, 468 (5th Cir. 2012) (describing testimony of San Antonio police chief as “relevant law enforcement policymaker for the city” about San Antonio’s police practices in lawsuit challenging failure to “knock and announce” before executing drug search warrant).

284. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976).

interfering with the executive officials of municipal defendants—an intrusion into State and local interests that is actually much more severe than potentially imposing liability on the local government’s low-level officers. Thus, while the intent of the doctrine is to serve federalism by preserving the discretion and policymaking freedom of local governments,<sup>285</sup> the effect above is the opposite—a confusing set of rules that requires intensive scrutiny of local policies, executive decision making, and patterns and practices of conduct.<sup>286</sup> Moreover, and importantly, the current doctrine requires that scrutiny in *all* cases in which a plaintiff wishes to hold a municipal defendant responsible, even run-of-the-mine cases in which a plaintiff mainly seeks money damages for a single incident. The doctrine is casually intrusive into local interests, as opposed to reserving such intrusion for cases in which the point of the lawsuit is to challenge or to change municipal policy at a systemic level.

In contrast, under the proposed change, federal courts will no longer be placed in the position of routinely scrutinizing local policies and policymakers. This is because a plaintiff will not have to show anything about the city’s policies or customs in order to hold the city liable; they will simply have to demonstrate that the individual officer violated the plaintiff’s rights and that the officer’s conduct was conduct that a reasonable officer should have known violated clearly established law at the time of the conduct (i.e., that the officer is not entitled to qualified immunity).<sup>287</sup> In the ordinary case where a plaintiff sues for individual recovery based on a single incident, federal courts will no longer have to engage in intrusive discovery into and examination of municipal policies and practices,<sup>288</sup> nor to make findings about structures and responsibilities created by state and local government law.<sup>289</sup> Federal courts will be mostly out of the business of reviewing and revising state and local policy,<sup>290</sup> supervising intrusive discovery into and examination of municipal training policies and practices, and investigating difficult questions about the allocation of policymaking powers and roles under

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285. See, e.g., *City of Canton*, 489 U.S. at 392 .

286. See Jeffries, *The Liability Rule*, *supra* note 13, at 234-37; *Gonzales v. Nueces Cty., Texas*, 227 F. Supp. 3d 698, 705 (S.D. Tex. 2017) (dismissing claims for failure to identify policies or patterns of violations).

287. See Jeffries, *The Liability Rule*, *supra* note 13, at 234 (explaining the proposal).

288. See, e.g., *Bishop*, 674 F.3d at 468.

289. See, e.g., *McMillian*, 520 U.S. at 790-93.

290. The exception, as noted above, would be suits in which plaintiffs attempt to bring a systemic challenge to a particular municipal defendant’s policies or institutional abuses. See *supra* notes 228-230 and accompanying text.

particular states' law.<sup>291</sup> The qualified immunity defense will protect the city from unwarranted liability, just as it does so now for individual officers, but without the added level of scrutiny into municipal policies, customs, and practices currently required by the *Monell* doctrine.

Cities, for their part, will have much greater flexibility to set policy, custom, and training for their officers, because those will no longer be subject to direct scrutiny in most § 1983 suits. However, that increased flexibility will be accompanied by the knowledge that if they fail to prevent or deter violations of clearly established constitutional rights by their officers, they will be held liable in *respondeat superior* under § 1983. Thus, the test of liability for cities will not be an evaluation of their policies, their customs, or their training, but simply an evaluation of the end results—whether their officers are violating clearly established rights, or not. With the focus of § 1983 litigation narrowed and clarified to the question of whether an individual officer's conduct violated clearly established constitutional rights,<sup>292</sup> cities will be freer to adopt policies and procedures that they think are best designed to avoid such violations. But, if poor choices by municipal defendants lead to officers violating clearly established laws, they can be held liable without the need for fine-grained inquiries into state and local government law or municipal policy and procedure.<sup>293</sup> The cities will be allowed to choose their own means, and the federal courts will stand ready to determine whether those means are effective at accomplishing federal ends—preventing local officers from violating citizens' constitutional rights. Further, to the extent plaintiffs *want* to challenge and seek to enjoin municipal policies at a systemic level, they can still do so, e.g., through multiple-plaintiff actions—but they will no longer be *required* to do so in order to recover against municipal defendants.<sup>294</sup>

### III. THE PROPOSAL IS POSSIBLE AND FEASIBLE

Part II argued that the proposed changes are good policy, and this Part aims to show that the proposal is both possible and feasible. The

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291. See, e.g., *McMillian*, 520 U.S. at 791-93 (rejecting petitioner's argument Alabama sheriffs are county officials and holding Alabama law supports the decision sheriffs represent the state of Alabama because they report directly to the state); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989) (in determining whether the Dallas Independent School District has final policymaking authority, lower courts are better equipped to interpret Texas law to decide whether the school district officials have the power to make and implement official policies).

292. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

293. See, e.g., *Gonzales v. Nueces Cty., Texas*, 227 F. Supp. 3d 698, 705 (S.D. Tex. 2017) (discussing the showing required under current doctrine to establish that a plaintiff's injuries were caused by municipal policy or custom).

294. E.g., *Smith v. City of Chicago*, 143 F. Supp. 3d 741, 753 (N.D. Ill. 2015) (class action raising broad challenge to Chicago's stop-and-frisk practices).

proposal is possible in the sense that the proposed changes can be justified in terms of the conventional sources of statutory interpretation, on which the Court purports to base its § 1983 doctrine. It is feasible in the sense that there are several reasons to think the Court might be willing to make such a change: the Court's history of making major changes to § 1983 doctrine in response to perceived policy needs; the Court's current pronounced enthusiasm for the doctrine of qualified immunity paired with its less-enthusiastic embrace of *Monell* doctrine; and finally the appealing nature of the proposal as a compromise that imposes broader liability on municipal defendants but also gives them access to the robust qualified-immunity defense.

*A. The Proposal Is Possible Because the Changes Can Be Justified as Allowed by Text, Legislative History, and Common Law*

The proposed changes are possible in the sense that they can be justified in terms of conventional sources of interpretation such as text, legislative history, and common law. The proposal is admittedly inconsistent with the Supreme Court's current doctrine—it would require reversing both *Monell's* holding that cities may not be subjected to *respondeat superior* liability,<sup>295</sup> and *Owen's* holding that cities may not invoke the qualified immunity defense.<sup>296</sup> But it can be squared with the interpretive methods the Court has relied on in developing the doctrine of §1983—textual interpretation,<sup>297</sup> consultation of the legislative history of § 1983,<sup>298</sup> and analogies to common-law tort rules.<sup>299</sup>

The claim here is not that these conventional sources require the proposed changes. It is merely the weaker point that, just as the Court has used these sources to support its largely policy-driven evolution of § 1983 doctrine in the past, so too can those sources be used to justify the changes proposed by this Article. Many scholars have argued that the Court's interpretive choices are not truly driven or constrained by these sources and are instead mostly driven by policy concerns.<sup>300</sup>

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295. *Monell v. Dept. of Social Servs. of New York*, 436 U.S. 658, 692 (1978).

296. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980).

297. *See, e.g., Monell*, 436 U.S. at 690-93 (holding that cities are suable “persons” under section 1983 but that the phrase “causes to be subjected” limits their liability more narrowly than full *respondeat superior*).

298. *See, e.g., id.* at 665-90; *Owen v. City of Independence*, 445 U.S. 622, 635-44 (1980).

299. *See, e.g., Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 67 (1989) (“[I]n enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law.”).

300. *See, e.g., Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 791-92 (7th Cir. 2014) (Posner, J) (arguing that the Court's *Monell* doctrine is best understood as a policy compromise to limit interference with local governments' budgets and protect taxpayers); Kit Kinports, *Quiet Expansion of*

Furthermore, the evidence of the Court's own decisions suggests that it is not these sources that are determining the Courts' decisions, because the Justices have read these sources contradictorily on key questions about the interpretation of § 1983. Most notably, in *Monroe*, the Court read the legislative history of § 1983 as forbidding any liability for cities,<sup>301</sup> but in *Monell*, the Court read the same history the other way.<sup>302</sup> The *Monell* majority read the same legislative history as prohibiting *respondeat superior* liability,<sup>303</sup> while Justice Stevens consistently read the same legislative history as supporting *respondeat superior*.<sup>304</sup> This author shares the view that, at least on specific doctrinal questions like the ones considered in this Article, the conventional sources are truly indeterminate; there is, for example, no one correct understanding of what the Congress's rejection of the Sherman Amendment "really meant."<sup>305</sup>

Nonetheless, the Court itself has mostly purported in its decisions to be basing its choices on conventional sources,<sup>306</sup> though some Justices have occasionally recommended that the Court should be more frank that it is basing its choices on policy,<sup>307</sup> or have criticized the Court for not actually being rigorous about its consultation of common law to

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*Qualified Immunity*, *supra* note 42, at 62-63 (arguing that the Court is substantively and surreptitiously broadening the defense and that its interpretation is not justified by legislative history); John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189, 205 (2008) ("[T]he Supreme Court has openly acknowledged its willingness to rewrite the text of section 1983 to create a regime that 'better' balances competing policy considerations than does the actual law that Congress passed."); Eric A. Harrington, *Judicial Misuse of History and §1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. 999 (2007) (arguing that Court has misread historical sources in interpreting the statute); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998) (noting that the Court's use of common law analogs to interpret section 1983 has been inconsistent in Court's use of and deviation from common law principles).

301. *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (concluding that the Congress's rejection of the proposed Sherman Amendment indicated that Congress did not intend for the statute to subject cities to liability).

302. *Monell*, 436 U.S. at 665-90 (reading the legislative history, including the rejection of the Sherman Amendment, as allowing municipal liability).

303. *Id.* at 692-93.

304. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 838-40 (1985) (Stevens, J., dissenting).

305. *Compare Monroe with Monell*; *see also* Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. PA. L. REV. 601, 605 (1985) ("[T]wo decades of excursions into the *Congressional Globe* of 1871 have convinced most observers that the legislative history of section 1983 is, in the main, unhelpful . . . [F]ew lawyers are unable to find support for their position in those turbulent debates.").

306. Baude, *supra* note 16, at 3 (noting that the Court has purported to justify its qualified immunity jurisprudence based on these sources); Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 698 (1997) ("Overall, the Court's methodology . . . has been highly oriented toward legislative intent and policy, with the common law playing an important role.").

307. *See, e.g., Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting) ("Once it is established that the common law of 1871 provides us with no real guidance on this question, we should turn to the policies underlying §1983 to determine which rule best accords with those policies.").

drive its decision making.<sup>308</sup> Thus, while critics might be right that the Court's interpretive approach in § 1983 cases is inconsistent or indefensible, for a proposed change to have a chance of being adopted by the Court, it needs to be justifiable in terms of the interpretive methods the Court has employed in its prior cases interpreting the statute. This section briefly offers those justifications.

### 1. Text

Section 1983's short text does not answer most of the questions that have arisen about how to interpret the statute to establish liability rules and defenses for suits under the statute.<sup>309</sup> On one of the questions at issue in this Article—whether cities should be allowed the benefit of the qualified immunity defense—it has literally nothing to say because the qualified immunity defense itself has no basis in the text of § 1983.<sup>310</sup> The Court decided to recognize the immunity because it (or an analogue) had been available to officers at the time of the adoption of the statute, and the Court reasoned that since Congress did not expressly eliminate that defense it must have intended to allow it in litigation under the new statute.<sup>311</sup>

There is one textual hook, however, that might argue for allowing cities to invoke the qualified immunity defense: the statute refers only to one type of defendant, i.e., “persons.”<sup>312</sup> Cities are viable defendants under § 1983 because the Court has concluded that they are “persons” under § 1983.<sup>313</sup> Since the text refers only to “persons” as defendants under § 1983, then arguably every defendant “person” should be allowed the benefit of the same defenses available to other defendants under § 1983.

As for the extent and nature of municipal liability under the statute, the text has a bit more to say, and the Court has considered the text in crafting its current rules. Initially concluding in *Monroe* that municipalities are not “persons,”<sup>314</sup> the *Monell* Court reversed this

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308. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1871-72 (2017) (Thomas, J., concurring in part and concurring in judgment) (arguing that the Court's qualified immunity jurisprudence has deviated from applying common law precedents into an quasi-legislative exercise in balancing policy interests).

309. Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 54-57 (1989) (noting the limits of the text in resolving interpretive questions about the section 1983 cause of action).

310. Baude, *supra* note 16, at 6.

311. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *but see* Baude, *supra* note 16, at 11-17 (arguing that the Court erred in its reasoning for importing the qualified immunity defense into section 1983).

312. 42 U.S.C. §1983.

313. *Monell v. Dept. of Social Servs. Of New York*, 436 U.S. 658, 690 (1978).

314. *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

holding based on a more expansive reading of “person,” as well as its revisit of the legislative history.<sup>315</sup> In doing so, however, the Court in *Monell* concluded that the statutory phrase “causes to be subjected” required something more than mere *respondeat superior* liability; it required proof of direct responsibility or causation on the part of the municipal defendant.<sup>316</sup> This, then, was the textual hook for the complicated doctrine of *Monell* liability that this Article proposes to eliminate.

The text of the statute allows for and can justify this proposed change. As several Justices have agreed, the textual “causes to be subjected” can easily be read to include *respondeat superior* liability for municipal defendants; the municipal defendant “causes” the plaintiff “to be subjected” to injury by employing the officer who, acting under color of law, violates the plaintiff’s rights.<sup>317</sup> Several Justices and scholars have agreed with this argument. The injection of an extra limits in the form of a deliberate-indifference fault standard and a more stringent requirement of causation is entirely a judicial invention. Further, as Justice Stevens repeatedly pointed out, the word “policy”—from which so much of the *Monell* doctrine has grown—appears nowhere in the text of § 1983.<sup>318</sup> It would, therefore, be more faithful to the text of § 1983 to eliminate the convoluted “policy” requirement altogether. Thus, the text itself is no bar to the imposition of *respondeat superior* liability on municipal defendants, and arguably is the better reading of the text.

## 2. Legislative History

The legislative history of § 1983 allows, at a minimum, plausible arguments that the legislative history of the statute supports both of the changes proposed by this Article. On the question of municipal liability, factions of the Court (and scholars) have delved deeply into the legislative history in an attempt to determine whether the Congress of 1871 intended that municipal governments should be liable under §1983, and if so whether that liability should be *respondeat superior* or somehow more limited to cases in which the municipal government was

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315. *Monell*, 436 U.S. at 665-90.

316. *Id.* at 692.

317. *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 432 (1997) (Breyer, J., dissenting) (“As a purely linguistic matter, a municipality, which can act only through its employees, might be said to have ‘subject[ed]’ a person or to have ‘cause[d]’ that person to have been ‘subjected’ to a loss of rights when a municipality’s employee acts within the scope of his or her employment.”).

318. *See, e.g. Pembauer v. City of Cincinnati*, 475 U.S. 469, 487 (1986) (Stevens, J., concurring in part and concurring in judgment) (“This is not a hard case. If there is any difficulty, it arises from the problem of obtaining a consensus on the meaning of the word “policy”—a word that does not appear in the text of 42 U.S.C. § 1983, the statutory provision that we are supposed to be construing.”); *Oklahoma City v. Tuttle*, 471 U.S. 808, 841-42 (1985) (Stevens, J., dissenting).

independently responsible.<sup>319</sup> Debates have raged over the significance of Congress's rejection of the Sherman Amendment, and the extent to which it suggests that Congress did not want cities to be liable under the new law.<sup>320</sup>

This Article does not attempt to repeat those debates or to independently argue that the legislative history shows that Congress "really intended" for cities to be liable in *respondeat superior* or to be able to invoke qualified immunity. The legislative history of § 1983 is indeterminate, as has been argued by several scholars<sup>321</sup> and as is attested to by the fact that at various times the Justices have persuasively argued that that history forbids any municipal liability,<sup>322</sup> allows it but only when the violation is traceable to municipal policy or custom,<sup>323</sup> or allows full *respondeat superior* liability.<sup>324</sup>

In particular, the argument that the legislative history supports imposing *respondeat superior* on cities has been developed at length by several scholars,<sup>325</sup> was advanced by Justice Stevens in a number of opinions,<sup>326</sup> and was endorsed by Justice Breyer's opinion in *Brown v. County Commissioners*.<sup>327</sup>

As for qualified immunity, it is unclear to what extent the Court has relied or currently relies on the legislative history of § 1983 in crafting

319. See, e.g., *Monell*, 436 U.S. at 665-90, 719-25; *Monroe*, 365 U.S. at 180-87; Achtenberg, *Taking History Seriously*, *supra* note 65, at 2203-13; Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L. Q. 409, 413 n. 15 (1978).

320. See, e.g. *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 434-37 (1997) (Breyer, J., dissenting) (critiquing the Court's reliance on the rejection of the Sherman Amendment as its main reason for rejecting *respondeat superior* liability for municipal defendants); Achtenberg, *Taking History Seriously*, *supra* note 65, at 2203-13 (arguing that the rejection of the Sherman Amendment was actually entirely consistent with the 19th century understanding of *respondeat superior*); Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 635 (1999) ("Given the diversity of views within Congress on the desirability of the Sherman Amendment, it is particularly dangerous to read the rejection of the Sherman Amendment as Congress rejecting anything more than the actual terms of the various versions of that amendment itself.").

321. See, e.g., Beermann, *supra* note 320, at 635; Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 54 (1986) (arguing for ending reliance on legislative intent in interpreting section 1983).

322. *Monroe*, 365 U.S. at 180-87; *Monell*, 436 U.S. at 719-725 (Rehnquist, J., dissenting).

323. *Monell*, 436 U.S. at 691-692.

324. *Pembauer v. City of Cincinnati*, 475 U.S. 469, 489-90 (1986) (Stevens, J., concurring in part and concurring in judgment); *Oklahoma City v. Tuttle*, 471 U.S. 808, 444 (1985) (Stevens, J., dissenting).

325. See, e.g., Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 635 (1999).

326. See, e.g., *Oklahoma City v. Tuttle*, 471 U.S. 808, 834-844 (1985) (Stevens, J., dissenting); *Pembauer v. Cincinnati*, 475 U.S. 469, 489-491 (1986) (Stevens, J., concurring in part and concurring in the judgment).

327. *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 434-37 (1997) (Breyer, J., dissenting).

the doctrine.<sup>328</sup> The Court relied in crafting the defense on the notion that Congress must have intended to import common-law immunities into the statute, because it did not express an intent to abolish those immunities.<sup>329</sup> However, the Court did not rely directly on legislative history to support that reasoning. Nonetheless, there is support in the legislative history of the statute for the position that municipalities should be entitled to the benefit of the qualified immunity defense. Justice Powell's dissent in *Owen* gathers the evidence, arguing that legislators' objections to the rejected Sherman Amendment "apply with equal force to strict municipal liability under §1983."<sup>330</sup> Justice Powell's reading of the legislative history, which was persuasive enough to gather four votes at the time, provides justification for extending to municipal defendants the benefit of the qualified immunity defense.

### 3. Common Law

In interpreting the sparse text of § 1983, the Court has also frequently relied on analogies to the common law of torts to answer open questions about the statute's framework for liability.<sup>331</sup> The Court has reasoned that, in drafting the statute in 1871, Congress would have been mindful of and intended to adopt the common law rules of tort law as they existed at that time.<sup>332</sup> More specifically, the Court has reasoned that Congress would have intended to import into the statute well-established common law immunities and defenses, which is the basis for the Court's creation of the doctrines of absolute and qualified immunity under the statute.<sup>333</sup> Further, in the past, the Court has occasionally expressed the

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328. Kit Kinports, *Quiet Expansion of Qualified Immunity*, *supra* note 42, at 62 ("[T]he Court no longer engages in any pretense that its qualified immunity rulings are interpreting the congressional intent underlying § 1983."); Eric A Harrington, *Judicial Misuse of History and §1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. 999 (2007) ("the Court has recently shied away from using legislative history in construing § 1983").

329. See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("Certain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them."); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989) ("[I]n enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law."). For criticisms of this logic, see, e.g., David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for Legislative Will*, 86 NW. U. L. REV. 497, 522 (1992); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 778 (1987).

330. *Owen v. City of Independence*, 445 U.S. 622, 674 (1980) (Powell, J., dissenting).

331. See, e.g., Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 644 (1999) (explaining the ways in which the Court has consulted common law "to round out the contours of the §1983 remedy").

332. See e.g. *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012) (describing how the Court examines common law analogs as reference to set the scope of immunity under section 1983).

333. See, e.g., *Buckley*, 509 U.S. at 268, (1993); *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).

view that the interpretation of § 1983 in light of tort principles should extend also to modern developments in tort law. Most notably, an analogy with the development of strict liability in tort law was one reason that the *Owen* Court decided that municipal governments should not be able to invoke the qualified immunity defense.<sup>334</sup>

The Court has certainly not modeled its doctrine upon common law unfailingly, without exception, or without modification.<sup>335</sup> Justices have noted at times, both approvingly and disapprovingly, that the Court is not really bound by common law when it interprets the statute.<sup>336</sup> Furthermore, scholars have critiqued the Court for fainthearted faithfulness to common law.<sup>337</sup> Nonetheless, justification by analogy to the common law of torts is one way the Court has and could justify changes to its § 1983 doctrine.<sup>338</sup>

Both the imposition of *respondeat superior* on municipal defendants and the extension of qualified immunity to those defendants can be justified by analogies to the common law of torts. First, as others have argued, consulting common law supports subjecting municipal defendants to *respondeat superior* liability. *Respondeat superior* was well-established as of 1871,<sup>339</sup> and there is considerable evidence that *respondeat superior* liability extended to cities at that time.<sup>340</sup>

334. *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (“Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution . . . [T]he principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.”).

335. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987) (“[W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law.”); *Burns v. Reed*, 500 U.S. 478, 493 (1991) (“[T]he precise contours of official immunity’ need not mirror the immunity at common law” (quoting *Anderson v. Creighton*, 483 U.S. 635, 645 (1987))).

336. *See, e.g., Smith v. Wade*, 461 U.S. 30, 93 (1983) (O’Connor, J., dissenting) (“Once it is established that the common law of 1871 provides us with no real guidance on this question, we should turn to the policies underlying §1983 to determine which rule best accords with those policies.”); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1870-71 (2017) (Thomas, J., concurring in part and concurring in judgment) (arguing that the Court’s qualified immunity jurisprudence has deviated from faithfully applying common law precedents).

337. *See, e.g., Michael Wells, Constitutional Remedies, Section 1983 and the Common Law*, 68 *MISS. L.J.* 157 (1998) (arguing that Court has been inconsistent in its reliance on and application of common law rules).

338. *See, e.g., Rehberg*, 566 U.S. at 363 (“Congress intended [§1983] to be construed in the light of common-law principles.”); *Filarsky v. Delia*, 566 U.S. 377, 389 (2012).

339. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 835-36 (Stevens, J., dissenting) (noting that as of 1871 “the doctrine of *respondeat superior* was well recognized” and “had specifically been applied to municipal corporations”); Achtenberg, *Taking History Seriously*, *supra* note 65, at 2196-2202 (demonstrating at length that the common law understanding of and rationales for *respondeat superior* in 1871 would have allowed for *respondeat superior* liability to be imposed on municipal defendants); Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 *DEPAUL L. REV.* 627, 645 (1999) (noting that vicarious liability was well established in tort law in 1871).

340. *Tuttle*, 471 U.S. at 836 (1985) (Stevens, J., dissenting).

Common law also supports allowing the municipal defendant to invoke the individual officer-employee's qualified immunity defense. In *Owen*, the court examined common law analogs and concluded that municipalities had no claim on an immunity defense because there was no tradition of extending to municipal corporations an immunity based on the good faith of its officers.<sup>341</sup> Justice Powell's dissent persuasively argued against that reading of the common law, demonstrating that "[t]he Court's decision also runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions."<sup>342</sup> He demonstrated that, at common law, most states recognized at least a good faith immunity for municipal defendants against liability for constitutional torts.<sup>343</sup>

Further, another common law argument can be made based on the proposal to shift the basis of municipal liability from "policy and custom" to *respondeat superior*. Since the municipality is being held liable based on the conduct of its officers,<sup>344</sup> it should, therefore, be allowed the benefit of the officer's defense. Since *Owen*, the Court has made clear that a municipal defendant may be held liable only if there was a rights violation by some individual officer.<sup>345</sup> The conduct and violation of the officer are the bases of the municipal defendant's liability.<sup>346</sup> This should mean, in turn, that the municipal defendant should get the benefit of the officer's affirmative defenses. There is support for this principle in the common law of torts because generally, in tort law, a defendant sued in *respondeat superior* is entitled to claim the benefit of affirmative defenses available to the employee whose conduct is the basis for the plaintiff's suit.<sup>347</sup> Justice Powell's dissent, together with the common-law principle that vicarious-liability defendants are entitled to the benefit of their employees' affirmative defenses, could amply justify changing the doctrine so that municipal

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341. *Owen v. City of Independence*, 445 U.S. 622, 644-45 (1980).

342. *Id.* at 677.

343. *Id.*

344. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

345. *Id.* at 799.

346. *See, e.g., Achtenberg, supra* note 65, at 2208.

347. *See, e.g.,* 53 CAUSES OF ACTION 2d 281 (2012) ("in most circumstances, the [*respondeat superior*] defendant will be able to raise any defenses that would be available to the employee in a direct action to establish his or her liability for negligence."); *Hennis v. First Transit, Inc.*, 220 P.3d 980, 988 (Colo. App. 2009) (reversed on other grounds) (employer may raise substantive defenses available to employee); *Rude v. The Dancing Crab at Washington Harbour, LP*, 245 F.R.D. 18 (D.D.C. 2007) (employer allowed to assert substantive defenses available to employee); *Lathrop v. Healthcare Partners Medical Group*, 114 Cal.App.4th 1412, 1423, 8 Cal.Rptr. 3d at 675-76 (2004) ("[b]ecause the vicarious liability of the employer is wholly dependent upon or derived from the liability of the employee, any substantive defense that is available to the employee inures to the benefit of the employer."); *Freeman v. Churchill*, L.A. 20041, 30 Cal.2d 453, 461, 183 P.2d 4 (1947) (same).

defendants are allowed to assert the qualified immunity defense.

*B. The Proposal Is Feasible Because the Court's § 1983 Doctrine Is Policy-Driven, the Court Likes Qualified Immunity, and the Proposal Is a Compromise.*

The proposed changes are not merely possible, but they are feasible, in the sense that the Court might actually make them, for three reasons. First, the Court has consistently changed and even reversed its § 1983 doctrine based on its changing views as to what rules will best further the policies of the statute; this suggests it might also make the changes proposed by this Article if the policy arguments seem compelling.<sup>348</sup> Second, the Court has been markedly enthusiastic about the doctrine of qualified immunity, while it has been much more equivocal about its *Monell* doctrine. Finally, the proposed changes are appealing because they can be understood as a compromise that improves efficiency and furthers federalism without massively expanding or contracting municipal liability—municipal defendants will be newly subjected to *respondeat superior*, but will also be newly entitled to invoke the very powerful qualified immunity defense.<sup>349</sup>

1. The Court Has Proven Willing to Make Significant Policy-Driven Changes to § 1983 Doctrine

Implementing the changes proposed in this Article would require the Court to reverse two of its precedents interpreting § 1983—*Monell* and *Owen*. But in interpreting § 1983 and in contrast to more routine statutory interpretation, the Court has proven willing to make large doctrinal changes without any Congressional amendment of the statute.<sup>350</sup> In particular, since the birth of modern § 1983 doctrine in *Monroe v. Pape*, the Court has reversed its position on a number of fundamental doctrinal points. These include reversing its position to allow liability for municipal and local governments under § 1983,<sup>351</sup> changing from a subjective to an objective approach to qualified

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348. See, e.g., *Pembauer v. City of Cincinnati*, 475 U.S. 469, 490 (1986) (Stevens, J., concurring in part and concurring in judgment) (“in construing the scope of §1983, the Court has sometimes referred to ‘considerations of public policy.’”)

349. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (stating that the qualified immunity defense should protect “all but the plainly incompetent or those who knowingly violate the law”).

350. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1537 (1987) (describing development of §1983 doctrine as an example of “statutory common law”).

351. *Monell v. Dep’t of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) (reversing *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

immunity,<sup>352</sup> and switching the qualified-immunity analysis from a rigid “order of battle” to a discretionary approach that allows courts to consider whether law was “clearly established” before deciding whether the constitution was violated.<sup>353</sup>

Because the doctrinal rules for § 1983 litigation are mostly not determined by the text of the statute,<sup>354</sup> and are underdetermined by other sources like legislative history<sup>355</sup> and common law,<sup>356</sup> the Court has proven willing to change the rules when it has thought doing so was necessary to further the policy goals of the statute. Perhaps this is because it is an older, shorter statute that does not establish a full-blown regime of liability. Perhaps it is because, while it is a statute, it is also a vehicle (probably the most important vehicle) for the enforcement of federal constitutional rights against state and local officials, and so some of the Court’s more-relaxed attitude towards *stare decisis* in constitutional cases<sup>357</sup> bleeds through to its interpretation of § 1983.

Whatever the reason, it seems fair to say that the Court’s approach to interpreting § 1983 is closer to federal common law making than to conventional statutory interpretation.<sup>358</sup> This means, among other things, that the Court may be (and has been) more willing to reverse a doctrinal interpretation of the statute if it concludes the doctrine is not working well, or can be improved.<sup>359</sup> Thus, if the policy arguments above are persuasive, the Court might be willing to change the doctrine

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352. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (dispensing with the subjective qualified-immunity inquiry of *Pierson v. Ray*, 386 U.S. 547, 557 (1967) to *Wood v. Strickland*, 420 U.S. 308, 321 (1975)).

353. *Pearson v. Callahan*, 555 U.S. 223, 235-36 (2009) (reversing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

354. Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 54-57 (1989) (noting the limits of the text in resolving interpretive questions about the section 1983 cause of action).

355. See, e.g., *Monroe*, 365 U.S. at 176-186, 224-225 (debate between majority and Justice Frankfurter in dissent over interpretation of section 1983 based on legislative history).

356. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987) (“[W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law.”); see also Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998) (arguing that Court has been inconsistent in its reliance on and application of common law rules).

357. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (noting that *stare decisis* is weaker in constitutional cases “because correction through legislative action is practically impossible”).

358. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1537 (1987) (describing development of §1983 doctrine as an example of “statutory common law”); but see Baude, *supra* note 16, at 35 (suggesting that the Court has not admitted that it interprets section 1983 as a “common law statute” in the same way as it does the Sherman Act).

359. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (switching to purely objective test for qualified immunity would further policy goal of allowing qualified immunity to be resolved earlier in the litigation); *Pearson v. Callahan*, 555 U.S. 223, 240-41 (2009) (abandoning rigid two-step approach of *Saucier* would further values of flexibility, efficiency, and discretion).

to affect them.<sup>360</sup>

## 2. The Court Is Very Enthusiastic About Qualified Immunity but Has Been Equivocal about Municipal Liability Doctrine

Another reason the Court might be willing to make the proposed changes is that eliminating *Monell* liability and replacing it with qualified immunity aligns with the Court's marked enthusiasm for qualified immunity; its more equivocal attitude towards its municipal liability cases.

The Court has demonstrated increasing enthusiasm for the qualified immunity defense. It has made it substantively more robust over time,<sup>361</sup> and has afforded qualified immunity cases an almost uniquely privileged place on its docket,<sup>362</sup> granting cases frequently and almost invariably ruling in defendants' favor,<sup>363</sup> while also consistently issuing summary reversals of plaintiff-friendly lower court rulings.<sup>364</sup> Moreover, most of the Court's defendant-friendly qualified-immunity decisions in the last ten years have not been decided by narrow 5-4 majorities. Instead, the Court has repeatedly and enthusiastically endorsed the need for a robust rule of qualified immunity, in opinions that are usually at least 7-2 decisions, and frequently unanimous,<sup>365</sup> in the defendant's favor. While several scholars have criticized this trend,<sup>366</sup> the Court has shown few signs of questioning whether its qualified-immunity jurisprudence is too defendant-friendly or in need of pruning back.<sup>367</sup> Further, *Owen* itself, which denied qualified immunity

360. This Article does not attempt to walk through the specific arguments the Court would need to make about *stare decisis*, in order to implement the proposed changes, but merely to observe that the Court seems willing to apply its *stare decisis* rules to overturn its precedents interpreting this particular statute. See, e.g., *Monell*, 436 U.S. at 693-96 (“[W]e have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes.”).

361. See Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L. J. 229, 273-75 (2006) (arguing that Rehnquist and Roberts Courts are turning qualified immunity into an absolute immunity).

362. See Baude, *supra* note 16, at 41.

363. *Id.*

364. See, e.g., *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam); *Taylor v. Barkes*, 135 S.Ct. 2042 (2015) (per curiam); *Carroll v. Carman*, 135 S.Ct. 348 (2014) (per curiam); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam).

365. See, e.g., *Lane v. Franks*, 573 U.S. 13 (2014) (unanimous); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (unanimous); *Messerschmidt v. Millender*, 565 U.S. 535 (2012) (7-2); *Pearson v. Callahan*, 555 U.S. 223, (2009) (unanimous); *Scott v. Harris*, 550 U.S. 372 (2007) (8-1).

366. Baude, *supra* note 16, at 41; Kinports, *supra* note 42, at 62.

367. *But see*, e.g., *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Sotomayor, J., dissenting from denial of certiorari) (Justices Sotomayor and Ginsburg describing the Court's frequent practice of summarily reversing plaintiff-friendly rulings on qualified immunity a “disturbing trend regarding the use of this Court's resources.”); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting the Justice's “growing concern with our qualified immunity jurisprudence”).

to municipal defendants, was a 5-4 decision, and the Court today is substantially friendlier to qualified immunity than the Court in 1980.

The Court's *Monell* doctrine, in contrast, has never garnered anything like the same enthusiasm at the Court. Several of the earlier cases establishing the convoluted "policy and custom" doctrine were plurality opinions that could not garner a majority voice;<sup>368</sup> even later decisions that solidified the doctrine by majority opinion were generally 5-4.<sup>369</sup> Four justices called for re-examining the *Monell* doctrine in *Board of County Commissioners v. Brown*, and two of them are still on the Court.

Moreover, the Court's lack of enthusiasm for the doctrine can also be seen by how few cases it grants involving *Monell* liability compared to qualified immunity. The last one, *Connick v. Thompson*, was in 2011.<sup>370</sup> It is possible that this is because the Court perceives that the doctrine is working well, but in light of the earlier explanation of how complicated and hard-to-apply that doctrine is,<sup>371</sup> it seems more likely to this author that the doctrine is such a mess that the Court is unwilling to take a case to sort it out.

It is true that in *Connick*, five justices reaffirmed and made stricter the *Monell* requirements for showing policy and causation.<sup>372</sup> However, the Court's devotion to the "strict" causation and fault requirements of *Connick*, *Canton*, and *Brown* has been seen by them as justified by the need to prevent the imposition of massive strict *respondeat superior* liability on municipal defendants.<sup>373</sup> In the quite different context of considering whether to eliminate the *Monell* doctrine while also allowing municipal defendants the benefit of the robust, and loved-by-Justices qualified immunity defense, it is possible that one or more of these Justices might change their position. This leads to the final argument that the change is feasible—its nature as a compromise.

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368. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986).

369. *See, e.g., Connick v. Thompson*, 563 U.S. 51, 53 (2011); *Bd. of Cty. Cmms v. Brown*, 520 U.S. 397, 399 (1997).

370. *Connick*, 563 U.S. 51.

371. *See, e.g., Brown*, 520 U.S. at 434-37 (Breyer, J., dissenting); Jeffries, *The Liability Rule*, *supra* note 13, at 235-36.

372. Four of those justices are still on the Court, and it seems unlikely that Justice Gorsuch would be significantly more liberal on this issue than Justice Scalia, whom he has replaced. *Cf.* Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 STAN. L. REV. ONLINE 163 (March 2017) (analyzing then-Judge Gorsuch's qualified immunity opinions and arguing that before his elevation he had a "robust—though not boundless—vision of qualified immunity").

373. *See e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 844 (1985), (Stevens, J., dissenting) (noting that Court's "policy" requirement under *Monell* is mainly driven by fear of bankrupting municipal corporations via strict *respondeat superior* liability); *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 791-92 (7th Cir. 2014) (Posner, J.). (*Monell* doctrine is best understood as a compromise designed to prevent excessive municipal liability).

### 3. The Proposal Has Appeal as A Compromise Solution

Finally, the proposal is more feasible than simply adopting *respondeat superior* for cities, which some judges and most scholars have endorsed for a long time, because this Article's proposal is more of a bargain (or compromise) that would move the doctrine in a positive direction by simplifying the litigation and offering something to both plaintiffs (no more need to prove "policy and custom" to hold cities liable; the "deep pocket" defendant is more likely to stay in the case) and defendants (cities now can invoke qualified immunity). Rather than imposing on municipal defendants strict liability in *respondeat superior*<sup>374</sup> or removing them from the litigation altogether in favor of suits against officers only,<sup>375</sup> this proposal would keep those defendants in the case but allow them the benefit of the qualified immunity defense.

Given the decades long trend of the Court making it harder for plaintiffs to recover in suits under §1983,<sup>376</sup> and the likelihood of a 5-justice conservative majority for at least the next four years, proposals to simply subject municipal defendants to strict *respondeat superior* liability are likely a nonstarter for the near term.<sup>377</sup> It is very hard to imagine the current Court reversing *Monell* and imposing *respondeat superior* liability on cities with no corresponding change to mitigate the increased exposure of cities to tort liability under § 1983. But if the imposition of *respondeat superior* were accompanied by the extension of qualified immunity, the proposal could be more appealing or attractive, especially if it becomes clear to the Court that the *Monell* doctrine is too inefficient and complicated (for all the reasons explained above). It was essentially this sort of reasoning that led the Court in *Pearson v. Callahan* to abandon the "two-step" of *Saucier v. Katz*<sup>378</sup> in favor of allowing district courts the flexibility to choose whether to resolve cases based on "clearly established" without deciding whether there was a violation of constitutional law.

There were four votes in *Owen* to afford qualified immunity to municipal defendants, and four votes in *Brown* to impose *respondeat superior* liability on those defendants. Because of the compromise nature of doing both of those things at once, a "middle coalition" might be assembled to give five votes in favor of doing them at the same time.

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374. Blum, *The Maze*, *supra* note 13, at 963-64.

375. Jeffries, *The Liability Rule*, *supra* note 13, at 240, 270.

376. *Id.* at 914; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L. J. 229, 273-75 (2006) (arguing that Rehnquist and Roberts Courts are turning qualified immunity into an absolute immunity).

377. See, e.g., Blum, *The Maze*, *supra* note 13, at 920.

378. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

If the current, much-criticized *Monell* doctrine is indeed simply a “compromise rule” crafted by the Court to accommodate competing policy concerns,<sup>379</sup> the proposed rule would be a better compromise, and so might feasibly be adopted by the Court.

#### CONCLUSION

This Article argued that it would immediately improve the law of 42 U.S.C. §1983 to replace the convoluted and hairsplitting regime of *Monell* liability for municipal defendants with a regime of *respondeat superior* accompanied by allowing municipal defendants the benefit of the same qualified immunity defense available to individual officers. Those two proposed changes would improve the efficiency of § 1983 litigation by eliminating expensive and mostly irrelevant inquiries into municipal policies and customs. They would give municipal defendants better incentives by eliminating the incentive to “know nothing” and replacing it with an incentive to monitor and prevent violations of clearly established law. They would make recovery easier for plaintiffs with strong cases by making pleading and proof of municipal liability radically easier. Finally, they would further federalism by reducing federal court scrutiny and intrusion into municipal policy without absolving municipal defendants from responsibility for violations of clearly established constitutional rights.

In addition to being sound policy, the proposed changes are both possible—because they can be justified by conventional sources of statutory interpretation—and feasible—because a middle bloc on a Court that is enthusiastic about qualified immunity and that has a history of reworking the doctrine might well see fit to accept a compromise that takes from municipal defendants by expanding their responsibility while giving to them an additional, powerful affirmative defense.

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379. *Shields*, 746 F.3d at 791-92 (Posner, J.).