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THE FAILURE OF FAULT UNDER § 1983: MUNICIPAL LIABILITY FOR STATE LAW ENFORCEMENT

Mark R. Brown†

INTRODUCTION

Fault has long been trumpeted as a cure for the woes of constitutional litigation. Notwithstanding the absence of textual support, fault requirements have infused virtually all constitutional rights.¹ Constitutional definitions of fault range from gross negligence² to deliberate indifference³ to conscious purpose,⁴ depending on the constitutional right at issue. Similarly, scienter requirements have added burdens to statutory remedies that say nothing about mens rea. Section 1983⁵ has particularly suffered at the hands of fault. In 1981, the Supreme Court wrote that “section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found . . . to contain a state-of-mind requirement.”⁶ It was not long, however, before the Court held that § 1983 liability requires institutional fault⁷ and official

† Visiting Professor of Law, Ohio State University; Professor of Law, Stetson University. I thank Jack Beermann for his helpful comments on this paper.

¹ See Mark R. Brown, *Individual Immunity Under Section 1983: Absolute Is Constant but Qualified Is Divisive*, in NATIONAL LAWYERS GUILD CIVIL LIBERTIES COMM., 14 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 4-1, 4-14 (Steven Saltzman ed., 1999) (“Outside the Fourth Amendment excessive force context, officials’ intent and motive are frequently at issue, if for no other reason than that scienter limits the scope of the constitutional guarantee (and hence § 1983).” (footnote omitted)). Even under the Fourth Amendment, courts require an intent to search or seize. See *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (“[A] Fourth Amendment seizure . . . only [occurs] when there is a governmental termination of freedom of movement through means intentionally applied.”) (emphasis omitted); Brown, *supra*, at 4-14 n.83.

² See, e.g., *Daniels v. Williams*, 474 U.S. 327 (1986) (holding that a successful due process claim requires more than the simple negligence of a state official).

³ See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (holding that determination of a prison official’s liability under the Eighth Amendment’s cruel-and-unusual-punishment provision requires a subjective test of “deliberate indifference”).

⁴ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (asserting that a violation of the Equal Protection Clause requires a discriminatory racial purpose).

⁵ 42 U.S.C. § 1983 (1994).

⁶ *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), *overruled in part by Daniels*, 474 U.S. at 329-30.

⁷ See *Board of the County Comm’rs v. Brown*, 520 U.S. 397, 404 (1997) (holding that § 1983 liability attaches to a municipality only upon a showing of “deliberate conduct” giving rise to injury); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (interpreting *Monell* to require institutional deliberate indifference); *Monell v. Department of Soc.*

fault.⁸ In 1998, only a bare five-to-four majority of the Court rejected a heightened evidentiary standard for § 1983 plaintiffs who allege wrongful intent.⁹

Proponents of fault-based regimes under § 1983 cite numerous, ostensibly benign, justifications for this result. For example, Professor John Jeffries has long argued that a fault requirement is theoretically wholesome for § 1983.¹⁰ He has argued that requiring fault correlates with common notions of corrective justice,¹¹ minimizes overdeterrence,¹² and supports a robust judicial interpretation of constitutional rights.¹³

Professor Jeffries's most recent argument is that the Eleventh Amendment supports a fault-based regime for constitutional litigation.¹⁴ Jeffries praises the current regime in which the Eleventh Amendment insulates states from liability and leaves their executive officials exposed.¹⁵ Because of the qualified immunity that *Harlow v. Fitzgerald*¹⁶ provides, these officials are liable only if they are at fault.¹⁷ Notwithstanding the Eleventh Amendment, states routinely defend their officials and pay any adverse judgments against them.¹⁸ Thus,

Servs., 436 U.S. 658, 690-91 (1978) (holding that a local government can be liable under § 1983 for its policies and customs, but not on a respondeat superior theory).

⁸ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that executive officials are immune from liability unless they could have reasonably known they were violating clearly established rights).

⁹ See *Crawford-El v. Britton*, 523 U.S. 574, 593-94 (1998) (refusing to require a heightened evidentiary standard in a § 1983 action alleging improper motive under the First Amendment).

¹⁰ See John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 95-96 (1989) [hereinafter Jeffries, *Constitutional Torts*] (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) [hereinafter Jeffries, *In Praise of the Eleventh Amendment*] (“[A] constitutional tort regime based on fault is wise policy.”).

¹¹ See Jeffries, *Constitutional Torts*, *supra* note 10, at 93-96.

¹² See Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 73-78.

¹³ See *id.* at 78-81.

¹⁴ See *id.* at 59.

¹⁵ See *id.* at 68-71.

¹⁶ 457 U.S. 800 (1982).

¹⁷ See *id.* at 818 (predicating the liability of government officials on whether a reasonable person would have known the official's conduct violated a “clearly established statutory or constitutional right”); Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 53. Regardless of whether a fault-based regime is a good idea, commentators have criticized Jeffries's definition of fault in terms of *Harlow* immunity. See Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for Owen?*, 79 IOWA L. REV. 273, 296-98 (1994); Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1003 n.41 (1990).

¹⁸ See Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 49-50. Jeffries writes: “So far as can be assessed, this is true not occasionally and haphazardly but pervasively and dependably. In most jurisdictions, the state's readiness to defend and indemnify constitutional tort claims is a policy rather than a statutory requirement, but it is nonetheless routine.” *Id.* at 50.

sovereign immunity, *Harlow*, and government indemnity combine to make state liability a function of fault. Moreover, because “the area where Eleventh Amendment immunity actually bars all relief (functionally) against states is vanishingly small,”¹⁹ sovereign immunity’s proxy for fault is virtually cost-free. According to Jeffries, § 1983 almost always stands as a “side door[]” to governmental accountability in general and to the state treasury in particular.²⁰ Consequently, Eleventh Amendment immunity “almost never matters.”²¹

Professor Jeffries’s thesis is troubling for several reasons, not the least of which is its apparent rejection of the history and text of the Eleventh Amendment. Whether we like it or not, sovereign immunity hardly results from a natural interpretation of the Eleventh Amendment’s terms.²² However, this Article challenges Jeffries on only two grounds: First, this Article questions whether sovereign immunity under the Eleventh Amendment proffers a workable surrogate for a true fault-based system. Second, and more important, this Article examines whether the elusive search for institutional fault is consistent with the policies that undergird § 1983.

Part I of this Article assesses the remedial impact of sovereign immunity on constitutional litigation. Sovereign immunity, when combined with doctrinal devices such as qualified immunity and the policy or custom requirement of municipal liability, routinely leaves constitutional victims without redress. Therefore, Professor Jeffries’s suggestion that sovereign immunity “functionally” bars only a small ratio of damage actions is quite suspect.²³ While this fact alone does not defeat Jeffries’s thesis, it suggests that the impact of sovereign immunity is less benign than Jeffries claims. Rather than being a fault-based and neutral ordering device, Jeffries’s state indemnification model is more akin to outright immunity.

¹⁹ *Id.* at 81.

²⁰ *Id.* at 51.

²¹ *Id.* at 49.

²² As Justice Souter explains in his dissenting opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), “[t]he history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses,” and was not meant to codify sovereign immunity. *Id.* at 110 (Souter, J., dissenting). See, e.g., James E. Pfander, *History and State Suitability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998). Because the text of the Eleventh Amendment is not supportive of its interpretation, the Court in *Alden v. Maine*, 119 S. Ct. 2240, 2243 (1999), turned to “the Constitution’s structure, and its history, and [its own] authoritative interpretations” to support its constitutional codification of state sovereign immunity. While I use “sovereign immunity” and “Eleventh Amendment immunity” interchangeably in this Article, the more appropriate phraseology now appears to be simply “constitutional sovereign immunity.” The Court’s change in textual focus does not affect the discussion and conclusions in this Article.

²³ Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 81.

Even if I am empirically wrong, Professor Jeffries's argument that state indemnity agreements offer an adequate surrogate for fault still fails as a theoretical undertaking. Fault-based doctrinal devices, such as qualified immunity and the policy requirements of *Monell v. Department of Social Services of New York*,²⁴ direct immunity for officials and cities, respectively, who enforce state laws and policies. Consequently, the more blameworthy the state, the less likely that state officials and municipalities will be liable and the less likely that the state will have to indemnify anyone. Rather than providing a proxy for a proper fault-based system, Jeffries's indemnity solution rewards the most blameworthy conduct of the state.

Part II of this Article uses the local enforcement model that Part I describes to analyze the normative wisdom behind the rules and doctrines that motivate governmental fault requirements. Lower courts today uniformly hold that local governmental units, like their officials, are not liable under § 1983 when enforcing state law. The basis for this conclusion rests ostensibly on fault; cities are not liable because they did not "choose" the policy at issue. Far from solving the problem, however, this fault-based approach only masks courts' true reasons for denying municipal liability. Whether a constitutional or statutory question, fault is simply a shorthand method of implementing less-than-neutral policies. This Article concludes that these latent policies fail to adequately justify limited governmental liability for constitutional wrongs.

I

THE REALITY OF CONSTITUTIONAL LITIGATION

Because constitutional litigation comes in various shapes and sizes, this Article refrains from ambitiously attempting a universal proof of remediless governmental wrongdoing.²⁵ Still, a simple model illustrates the myriad remedial obstacles that § 1983 plaintiffs face.

²⁴ 436 U.S. 658 (1978).

²⁵ Data that Professors Theodore Eisenberg and Stewart Schwab collected in the early 1980s portray § 1983 litigation as one of the least successful areas of practice. See THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS* 186-87 (4th ed. 1996). See generally Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (reporting the results of an empirical study which suggests that constitutional tort litigation is not exploding); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989) [hereinafter Eisenberg & Schwab, *What Shapes Perceptions of the Federal Court System?*] (suggesting that observers of published appellate opinions have exaggerated the success of the plaintiffs in constitutional tort cases more than observers of trial court cases); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988) (finding a low number of true constitutional tort cases and low plaintiff success rate in an expanded empirical study). However, this conclusion could be as much a function of poor facts as bad law.

Consider a state law that either specifically²⁶ or generally²⁷ authorizes unconstitutional conduct by a local governmental agent. For example, a state law may criminalize the use of “profanity” in public (specifically condemning cursing), or, as occurs more frequently, may criminalize “disorderly conduct” (only generally prohibiting cursing). Assume that a citizen who uses the word “shit” in the presence of a police officer is arrested. After the victim spends several hours in jail and thousands of dollars in costs and attorneys’ fees, the state finally drops or dismisses the charges. Everyone agrees that criminally sanctioning a person for saying “shit” is wrong, and recognizing that the victim has suffered tangible harm as a result of sanctions is easy. Does the victim have a constitutional remedy?²⁸

Because the Eleventh Amendment grants sovereign immunity to state governments,²⁹ any action for damages will proceed only against the errant police officer and perhaps her local employer. However, qualified immunity protects the police officer from damages at least if she reasonably could not have foreseen that her conduct was unconstitutional.³⁰ When state law specifically directs or authorizes an official’s conduct—say, by criminalizing the use of profanity in public—

²⁶ Under a specific authorization, the law directs every relevant detail of the official’s unconstitutional actions so that the law is subject to a facial constitutional challenge.

²⁷ Under a general authorization, the law neither precludes the official’s unconstitutional action nor mandates it. It leaves the official with discretion, and at best might be subject to an “as applied” challenge.

²⁸ Some may view this example as trite. Who cares if someone is arrested and spends a few hours in jail? This question, however, relates only to the amount of damages suffered, and not to whether a cause of action exists in the first place.

²⁹ See *Hans v. Louisiana*, 134 U.S. 1 (1890) (establishing the state sovereign immunity doctrine). The Supreme Court has not interpreted § 1983 to affirmatively lift Eleventh Amendment protections from the states. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979) (noting that “§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States”); *Edelman v. Jordan*, 415 U.S. 651, 675-77 (1974) (noting the same). Section 1983 also protects states from damages in their own courts because they are not “persons” within the meaning of § 1983. See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989). Because of *Will*, the Court’s recent holding in *Alden v. Maine*, 119 S. Ct. 2240 (1999) (extending *Hans* to actions filed against a state in its own courts), is largely irrelevant for purposes of § 1983. Notwithstanding *Alden*, moreover, Congress is free to subject states to suit in both federal and state courts using its Fourteenth Amendment enforcement powers. See *Alden*, 119 S. Ct. at 2267 (“Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.”); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2223 (1999) (“Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance.”).

³⁰ See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); cf. Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 117-18 (1991) (“Most state officials . . . defending section 1983 suits are entitled to raise the affirmative defense of qualified immunity. . . . [P]ublic officials are entitled to immunity even if they acted unconstitutionally, so long as the constitutional rule they breached was not clearly established at the time of the violation.” (footnotes omitted)).

immunity is a virtual certainty.³¹ Officials never are asked to second-guess state laws that in no uncertain terms direct their actions.

If, as is more common, an official is without specific orders, the availability of qualified immunity is less clear. A state law that criminalizes disorderly conduct and allows police officers to fill in the gaps is not necessarily a blank check for official wrongdoing. A police officer might be liable if the officer's action was patently unconstitutional. In practice, however, state laws that even vaguely authorize official action are sufficient to support qualified immunity.³²

The Eleventh Circuit's recent decision in *Gold v. City of Miami*³³ illustrates the broad nature of qualified immunity. Florida law criminalizes disorderly conduct.³⁴ Michael Gold, a local attorney in Miami, drove into a bank's parking lot to use its ATM.³⁵ Upon noticing an apparently nonhandicapped woman walk to her car which she had parked in a handicapped space, Gold shouted to a nearby police officer: "'[A.]ren't you supposed to give them a ticket for parking in a handicapped spot?'"³⁶ When the officer did not respond, Gold remarked, "Miami police don't do shit."³⁷ After repeating the remark to a plainclothes officer standing in line for the ATM, both officers and another plainclothes officer arrested Gold for disorderly conduct.³⁸

³¹ See *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir. 1991) ("Rarely will a state official who simply enforces a presumptively valid state statute thereby lose her immunity from suit."); 18 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 9.19, at 370 (3d ed. 1997) ("[A]n officer who acts in reliance on a duly enacted statute or ordinance is ordinarily entitled to qualified immunity." (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994))). Professor Barbara Armacost notes that "[a]uthorization by the entity does not automatically immunize the individual from liability." Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 664 n.377 (1998). Although qualified immunity theoretically could dissolve when an official violates a patently unconstitutional policy, the cited instances of this happening are rare.

³² See generally Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 675 n.323 (citing cases holding that "[a]n official's reliance on local law authorizing the conduct at issue is generally relevant to the question of immunity").

³³ 121 F.3d 1442 (11th Cir. 1997).

³⁴ See *id.* at 1645. "Disorderly conduct" is defined as "acts [that] . . . are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or . . . brawling or fighting, or . . . conduct [that] constitute[s] a breach of the peace or disorderly conduct." *Id.* (quoting FLA. STAT. ANN. § 877.03 (West 1994) (alteration in original)).

³⁵ See *Gold*, 121 F.3d at 1444.

³⁶ *Id.* (quoting *Gold*).

³⁷ *Id.* (quoting *Gold*).

³⁸ See *id.*

Gold's § 1983 claim against the arresting officers, partly premised on the First Amendment,³⁹ was strong if not ironclad.⁴⁰ No one disputed that arresting Gold for cursing violated his civil rights.⁴¹ Yet the Eleventh Circuit concluded that "a reasonable officer in the same circumstances and possessing the same knowledge as the officers in this case could have reasonably believed that probable cause existed to arrest Gold for disorderly conduct."⁴² "The fact-intensive nature of the constitutional inquiry," coupled with a lack of "cases clearly establish[ing] that [the suspect's] actions did not constitute legally proscribed disorderly conduct," sufficiently blurred the First Amendment question to absolve the officers of liability.⁴³ The court reached this conclusion despite the fact that the Florida Supreme Court had on two occasions set aside disorderly conduct convictions that hinged on profanity.⁴⁴

³⁹ See *id.* at 1445. Gold also relied on the Fourth and Fourteenth Amendments. See *id.* Gold presumably used the Fourteenth Amendment, which incorporates the First and Fourth and applies them to the states, only in its incorporative sense. As for the Fourth Amendment, Gold claimed that because the state could not properly apply the statute to his conduct, there was no probable cause to believe he committed a criminal offense. See *id.* The court concluded that the officers did not have "actual probable cause" to make the arrest, but had only "arguable probable cause." *Id.* at 1445-46.

This unfortunate and redundant term of art, "arguable probable cause," has a contradictory meaning, and legal discourse should avoid it. It raises enough problems in the Fourth Amendment context and courts should not use it to infect other areas. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 661 (1987) (Stevens, J., dissenting) ("[T]he probable-cause standard itself recognizes the fair leeway that law enforcement officers must have in carrying out their dangerous work. The concept of probable cause leaves room for mistakes, provided always that they are mistakes that could have been made by a reasonable officer."). The real question focuses on the interpretation of the substantive criminal statute, not on the probable inferences to be drawn from the facts. See, e.g., *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (holding an arrest valid because the arresting officer had probable cause and satisfied the Fourth Amendment, even if the ordinance which the plaintiff violated was subsequently found unconstitutional).

Gold was more a First Amendment than Fourth Amendment case. The immunity question was whether the officer reasonably could have foreseen that the suspect's speech was either constitutionally protected or fell outside the terms of the statute. See *Gold*, 121 F.3d at 1445.

⁴⁰ Cf. *City of Houston v. Hill*, 482 U.S. 451 (1987) (holding a city ordinance that criminalized the willful interruption of a police officer unconstitutional).

⁴¹ On previous occasions, federal courts had declared the statute in *Gold* unconstitutional, using federal habeas corpus jurisdiction. See, e.g., *Wiegand v. Seaver*, 504 F.2d 303 (5th Cir. 1974) (holding § 877.03 unconstitutional absent a limiting construction by state courts); *Severson v. Duff*, 322 F. Supp. 4, 10 (M.D. Fla. 1970) (declaring § 877.03 unconstitutional "because it violates the [F]irst, [F]ifth, and [F]ourteenth [A]mendments").

⁴² *Gold*, 121 F.3d at 1446.

⁴³ *Id.*

⁴⁴ See *id.* at 1445 (observing that the Florida Supreme Court had "reversed convictions for disorderly conduct where a defendant merely directed profane language at police officers in the presence of others, . . . and where defendants made threatening comments to and voiced intemperate expletives near police officers" (citation omitted) (internal quotation marks omitted)).

Gold illustrates the lengths to which courts will go to absolve state governments and their officials of responsibility under § 1983.⁴⁵ There are dozens of cases (some reported, others not) no less frustrating than *Gold*.⁴⁶ The Middle District of Florida has even used qualified immunity with the Eleventh Circuit's blessing to dismiss § 1983 injunctive actions.⁴⁷

One might complain that this assessment of qualified immunity is overly pessimistic. For instance, Professor Jeffries suggests that the availability of qualified immunity varies with the constitutional right at issue,⁴⁸ leaving a broad range of government action unprotected. Pro-

⁴⁵ Judge Barkett offered a spirited criticism of *Gold* in her dissent from the denial of a rehearing en banc. See *Gold v. City of Miami*, 138 F.3d 886 (11th Cir. 1998) (per curiam) (Barkett, J., dissenting from denial of rehearing en banc). Her principal complaint was that *Gold* contradicts the Supreme Court's recent decision in *United States v. Lanier*, 520 U.S. 259 (1997). See *Gold*, 138 F.3d at 887 (Barkett, J., dissenting from denial of rehearing en banc). The *Lanier* Court held that in the criminal context, due process's proscription against vagueness only requires that government officials be given fair warning of what is prohibited. See *Lanier*, 520 U.S. at 265. Something less than a prior decision on point satisfies this for § 1983's criminal counterparts: 18 U.S.C. §§ 241-242 (1994). Drawing a parallel to qualified immunity, the Court stated:

[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

Lanier, 520 U.S. at 270-71.

⁴⁶ See, e.g., *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (not disturbing the First Circuit's decision to absolve city of liability for passing an ordinance eliminating plaintiff's position allegedly in violation of the First Amendment, notwithstanding unconstitutional animus of two council members); *Edwards v. Baer*, 863 F.2d 606, 608-09 (8th Cir. 1988) (holding official immune from liability for allegedly unlawful arrest, notwithstanding his ignoring specific directives not to act as he did).

⁴⁷ See *Owen v. Singletary*, No. 91-509-Civ-J-16 (M.D. Fla. 1994), *aff'd*, 70 F.3d 126 (11th Cir. 1995).

⁴⁸ See Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 81. Professor Jeffries correctly asserts that "qualified immunity is an issue chiefly with respect to certain rights and . . . its content varies significantly from right to right." *Id.* However, his suggestion that qualified immunity is irrelevant outside the context of a few, narrowly defined rights is wrong. See *id.* at 68. Instead, courts have applied qualified immunity to virtually every constitutional claim imaginable and have refused to grant it only in a small, finite number of instances. For instance, qualified immunity typically fails in cases of race and gender discrimination. See, e.g., *Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997) ("[I]t has been clearly established for many years that the Equal Protection Clause prohibits a State, when acting as employer, 'from invidiously discriminating between individuals or groups' based upon race." (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976))); *Alexander v. Estep*, 95 F.3d 312, 318 (4th Cir. 1996) (providing no qualified immunity to county officials for the implementation of an illegal affirmative action hiring plan). Courts also have refused to grant immunity in cases involving cruel and unusual punishment and police brutality. See, e.g., *Frazell v. Flanigan*, 102 F.3d 877, 887 (7th Cir. 1996) (holding that an officer's objectively unreasonable force precluded qualified immunity); *Munz v. Michael*, 28 F.3d 795, 800 (8th Cir. 1994) (refusing to grant officials qualified immunity for beating in prison cell). *But see Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998) (holding that qualified immunity applies to excessive-force claims and that a jury can return a verdict

fessor Barbara Armacost argues with some force that qualified immunity ought to parallel the related doctrine of constructive notice, thereby limiting the availability of such immunity.⁴⁹ While there is a measure of truth to Jeffries's observation, and promise in Professor Armacost's thesis, I am not optimistic enough to believe that the common application of qualified immunity will mature beyond a predisposed protection of government officials.⁵⁰ Regardless of how courts fashion the language of qualified immunity, they consistently will use this doctrine to block § 1983 claims.⁵¹ Currently, courts do not expect officials to deduce, extrapolate, or analogize, and no promising developments are on the horizon.⁵² One need only read the dissenting opinions of four Justices in *Crawford-El v. Britton*⁵³ to understand this pessimism.

finding both a Fourth Amendment violation and qualified immunity); Armacost, *supra* note 31, at 661 ("The prevailing view . . . is that qualified immunity may be asserted against Fourth Amendment excessive force claims.").

⁴⁹ See Armacost, *supra* note 31, at 589 (arguing that "the approaches to notice in section 1983 law and criminal law are more similar than they first appear").

⁵⁰ Mixed signals from the Supreme Court have fueled the confusion over the true meaning of qualified immunity. The Court has cast qualified immunity as an affirmative defense, but allows parties to raise it under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996) (stating that an official may raise a qualified-immunity defense in both a motion to dismiss and a motion for summary judgment). The Court speaks of qualified immunity as a defense to damages, but admonishes lower courts to dismiss a case before discovery to avoid the costs of litigation if qualified immunity applies. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (observing that courts should determine the applicability of immunity before allowing discovery). Most recently, the Court unanimously likened qualified immunity to the easily satisfied requirement of constructive notice in criminal law. See *Lanier*, 520 U.S. at 270-71. The very next term it split divisively in *Crawford-El v. Britton*, 523 U.S. 574 (1998), over whether qualified immunity requires heightened proof in motive-based constitutional cases. The position of the four-Justice dissent in *Crawford-El* would, if accepted, bar most § 1983 litigation that seeks damages over equitable relief. See *Brown*, *supra* note 1, at 4-12 (explaining the scope of the dissent). I think this dissent reflects how a large portion of federal judges views § 1983 litigation. While the majority's approach in *Lanier* is desirable, I suspect that widespread acceptance of it will take years to achieve in practice.

⁵¹ See Kinports, *supra* note 30, at 140-57 (discussing cases which illustrate the difficulty for § 1983 plaintiffs of demonstrating that case law has clearly established a constitutional norm required to defeat qualified immunity). Professor Kinports notes that "[s]ome courts go even further, immunizing defendants on the theory that disagreement between the parties or their attorneys indicates that the right is not clearly established." *Id.* at 146.

⁵² One might argue that the problem of too much immunity is peculiar to the Eleventh Circuit. There may be some truth to this observation. The Eleventh Circuit has applied qualified immunity to injunctive actions, see *supra* note 47 and accompanying text, to excessive-force claims, see *Gold v. City of Miami*, 121 F.3d 1442, 1446-47 (11th Cir. 1997), and, remarkably, even to claims based on race and gender discrimination, see *Mencer v. Hammonds*, 134 F.3d 1066, 1070-71 (11th Cir. 1998). See also *Jolinson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997) (applying qualified immunity to defeat §§ 1981 and 1983 claims of race discrimination).

⁵³ 523 U.S. 574 (1998). The issue in *Crawford-El* was whether the Court should apply heightened evidentiary and pleading standards to § 1983 actions against officials in their personal capacities. See *id.* at 577. The five-Justice majority, per Justice Stevens, rejected the argument that qualified immunity justified placing greater burdens of pleading and

This situation leaves the problem of potential municipal liability. The Supreme Court has denied cities and counties both Eleventh Amendment⁵⁴ and qualified immunities.⁵⁵ Instead, local governments may be liable under § 1983 when a local "policy or custom" causes the victim's harm.⁵⁶ Thus, local fault is necessary to establish liability on behalf of the institution.⁵⁷

proof on § 1983 plaintiffs than on other civil plaintiffs. See *id.* at 601. The Chief Justice, joined by Justice O'Connor, protested in dissent that in motive-based suits, § 1983 plaintiffs ought to meet more stringent standards of proof in order to accommodate qualified immunity. See *id.* at 601-02 (Rehnquist, C.J., dissenting). The Chief Justice would prevent discovery and have the action dismissed before trial unless the plaintiff could "establish, by reliance on objective evidence, that the offered reason is actually a pretext." *Id.* at 602 (Rehnquist, C.J., dissenting). Justices Scalia and Thomas argued in dissent that motive-based constitutional torts are altogether inconsistent with § 1983. See *id.* at 1611 (Scalia, J., dissenting). They would prefer to return to the days before *Monroe v. Pape*, 365 U.S. 167 (1961). See *id.* at 611-12 (Scalia, J., dissenting).

⁵⁴ See *Lincoln County v. Luning*, 133 U.S. 529 (1890) (holding that the Eleventh Amendment does not protect counties from suit in federal court). See also *Alden v. Maine*, 119 S. Ct. 2240 (1999) (holding that constitutional sovereign immunity does not protect municipalities and other local entities that are not arms of the state).

⁵⁵ See *Owen v. City of Independence*, 445 U.S. 622 (1980) (holding that municipalities are not entitled to qualified immunity under § 1983).

⁵⁶ *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978).

⁵⁷ The plaintiff can establish municipal fault in three different ways. First, a municipality might codify or otherwise adopt a facially illegal policy. In *Monell*, for example, New York City formally adopted a directive requiring pregnant city employees to take maternity leave. See *id.* at 661. Because of the clear intent behind the policy and its direct causal link to the harm, *Monell* was an easy case.

Second, a plaintiff can establish municipal fault in the absence of a codified policy by demonstrating that the local government tolerated the illegal action. Because facially unconstitutional ordinances and directives are infrequent, this is a common theory of liability. Under *City of Canton v. Harris*, 489 U.S. 378 (1989), plaintiffs must predicate this theory on municipal indifference to the act or practice. See *id.* at 389. This indifference must be at least objectively "deliberate." *Id.* at 389. Hence, a conscious disregard of known risks or unknown, but obvious, risks will suffice. Cf. *Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (distinguishing the subjective indifference required for liability under the Eighth Amendment from the objective indifference required in the criminal context). Negligence, gross negligence, and even recklessness, however, are not enough to establish municipal liability under § 1983. See, e.g., *Board of County Comm'rs v. Brown*, 520 U.S. 397, 415 (1997). While a single wrongful act theoretically can give rise to liability under *Harris*, the Court's recent decision in *Brown* makes this an unlikely possibility. In *Brown*, a five-Justice majority found insufficient evidence to hold a county liable for a single improper hiring decision. See *id.* at 415-16. Lower courts have interpreted *Brown* to be indicative of the difficulty of proving deliberate indifference, especially in cases involving only one illegality. See, e.g., *Reitz v. County of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997) ("Establishing municipal liability on a failure to train claim under § 1983 is difficult. . . . [Plaintiffs] have presented no evidence that similar conduct has occurred in the past. . . ."); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1416 (5th Cir. 1997) ("[T]he *Brown* Court warned that liability in [isolated-event] cases will necessarily be rare. . . .").

Third, a plaintiff can establish municipal liability based on the act or decision of a municipal liability official under the final-policy-making-authority analysis. See, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Liability under the final-policy-making-authority analysis also has proven difficult. High-ranking officials seldom are directly implicated in unconstitutional conduct, and do not always bind the city when they are. See, e.g., *Scott-Harris v. City of Fall River*, 134 F.3d 427, 440 (1st Cir. 1997) (holding that unconstitu-

While far from clear in theory and practice, fault is predicated on conscious choice: did the local entity "choose"⁵⁸ to harm the plaintiff by a select policy maker, deliberately indifferent practice, or formal law? For example, if under the *Gold* facts a local ordinance prohibits disorderly conduct, one could make a credible argument for municipal liability.⁵⁹ Moreover, if the ordinance specifically authorizes the arrest of persons using vulgar language, municipal liability would be more certain.⁶⁰

tional actions of two council members did not support municipal liability when the city council had nine members), *rev'd on other grounds sub nom.* *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

⁵⁸ The term "choose" is in quotation marks because it is not a subjective term, as commonly understood. Instead, it is a legal term of art that objectively evaluates whether the government should be held liable. See *Brennan*, 511 U.S. at 825 (determining that, unlike the deliberate-indifference test in the context of the Eighth Amendment, the deliberate-indifference test in the context of *Harris* is objective).

⁵⁹ Although the *Gold* plaintiff made a claim for municipal liability, the Eleventh Circuit did not address it in its qualified immunity opinion. See *Gold v. City of Miami*, 121 F.3d 1442, 1444 n.2 (11th Cir. 1997). Following a subsequent jury verdict in favor of Gold against the city, see *Gold v. City of Miami*, No. 92-1673-CV-JWK (S.D. Fla. 1998), the Eleventh Circuit reversed because Gold failed to present sufficient evidence to justify a finding of municipal liability. See *Gold v. City of Miami*, 151 F.3d 1346, 1354 (11th Cir. 1998). Hence, when neither state nor local law specifically authorizes the arresting officer's conduct, local liability is quite difficult to establish.

⁶⁰ A facially unconstitutional policy is a rare but clear predicate for *Monell* liability. However, municipal liability is not certain even for a facially unconstitutional policy. The Eleventh Circuit again offers an example of how far courts will go to avoid municipal liability. In *Adler v. Duval County School Board*, 112 F.3d 1475 (11th Cir. 1997), several high school students, along with their parents, sought money damages and declaratory and injunctive relief against a local school board for its policy permitting "student-initiated prayer at high school graduation ceremonies." *Id.* at 1476. The district court held in favor of the school board after finding that its policy did not violate the First Amendment. See *id.* at 1477. After entry of judgment and while an appeal was pending in the Eleventh Circuit, all the student-plaintiffs graduated from high school. See *id.* Rejecting the argument that the students' claims were "capable of repetition, yet evading review," the Eleventh Circuit (Judges Tjoflat and Cox) held that plaintiffs' injunctive claims were moot. *Id.* at 1477-78 (citation omitted). The court then turned to the plaintiffs' claims for damages. In an astonishing opinion, the court ruled that because the students had not specifically appealed the district court's refusal to award them damages, they had waived their damages claim. See *id.* at 1480-81. The court found the fact that the district court had never addressed damages irrelevant. See *id.* at 1479-80. The court thus penalized the students for not appealing an issue that the district court never addressed. Bending logic even further, the Eleventh Circuit concluded that it would be unfair to the school district not to bar the students' damages claim: "For us to rule on this issue would deny the [school district] the opportunity to argue that [it was] not legally responsible for the prayer delivered at the appellants' graduation." *Id.* at 1480.

Dissenting, Judge Vining argued that because "[t]he district court [had] neither discussed nor analyzed the appellants' claim for money damages," and because the appellants had "adequately briefed and argued on appeal the only issue actually addressed and decided by the district court, i.e., the constitutionality of the instant policy," the appellants did not waive their damages claim. *Id.* at 1482 (Vining, J., dissenting). He explained: "I am not aware of any legal theories, principles of equity, or appellate rules, including those cited by the majority, that support the majority's waiver position." *Id.* at 1483 (Vining, J., dissenting).

What is the result in the more common situation, like that in *Gold*, when local officials enforce state law?⁶¹ Should the local enforcement agency be liable, or should the law allow the agency to shift blame to the state?⁶² While the Supreme Court has not addressed this problem, lower courts uniformly absolve cities and counties of liability for enforcing unconstitutional state laws, regardless of the laws' specificity.⁶³ Hence, whether state law authorizes arrests specifically for

⁶¹ The same problem arises when a city enforces a county ordinance or policy. See, e.g., *National People's Democratic Uhuru Movement v. Stephens*, No. 96-2558-CIV-T-23C (M.D. Fla. filed Dec. 20, 1997) (challenging a city's enforcement of a county policy prohibiting the distribution of leaflets to motorists).

⁶² The question is whether enforcement of an existing state policy, by itself, is sufficient to support liability. Lower courts sometimes have recognized liability when local governments redundantly codify the state policy, see, e.g., *Florida Pawnbrokers & Secondhand Dealers Ass'n v. City of Fort Lauderdale*, 699 F. Supp. 888 (S.D. Fla. 1988) (enjoining the city from enforcing an unconstitutional statute it incorporated into the municipal code), or when municipalities adopt a more restrictive version of state law, see, e.g., *McKusick v. City of Melbourne*, 96 F.3d 478, 484 (11th Cir. 1996) ("[T]he development and implementation of an administrative enforcement procedure, going beyond the terms of the [state court] injunction itself, leading to the arrest of . . . persons not named in the injunction nor shown . . . to be acting in concert with named parties, would amount to a cognizable policy choice."); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (holding the city liable when its deadly-force policy was more restrictive than state policy). See generally *Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998) (pointing to the distinction "between the state's command (which insulates the local government from liability) and the state's authorization (which does not) in the context of § 1983 liability"); *Caminero v. Rand*, 882 F. Supp. 1319, 1325 (S.D.N.Y. 1995) (recognizing the same distinction). *Caminero* suggests "a reasoned distinction between":

(1) cases in which a plaintiff alleges that a municipality inflicted a constitutional deprivation by adopting an unconstitutional policy that was in some way authorized or mandated by state law and (2) cases in which a plaintiff alleges that a municipality, which adopted no specific policy in the area at issue, caused a constitutional deprivation by simply enforcing state law. While allegations of the former type have been found to provide a basis for Section 1983 liability, allegations of the latter variety *may not* provide a remedy against the municipality.

Id. (citations and footnote omitted).

⁶³ See *Bethesda Lutheran Homes*, 154 F.3d at 718-19 (finding the county not liable for enforcing state policies); *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) ("City prosecutors are responsible for prosecuting state criminal charges. Clearly, state criminal laws and state victim impact laws represent the policy of the state. Thus, a city official pursues her duties as a state agent when enforcing state law or policy." (citation omitted)); *ACLU of Maryland v. Wicomico County*, 999 F.2d 780, 782 (4th Cir. 1993) (holding that a local board is not accountable for enforcing state policies); *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir. 1991) ("It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law."); *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) ("A county official pursues his duties as a state agent when he is enforcing state law or policy."); *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988) (holding the county not liable for "implement[ing] . . . a facially unconstitutional state statute" because the action was "more fairly . . . characterized as the effectuation of the policy of the State" (footnote omitted)). But see *Garner*, 8 F.3d at 364 (holding the city liable for unconstitutionally excessive force even though state law authorized force).

cursing or more generally for disorderly conduct,⁶⁴ courts rarely hold local enforcement agencies financially accountable.⁶⁵

Granted, local enforcement of state law offers only one paradigm. Local officials also enforce facially unconstitutional ordinances and engage in blatantly illegal conduct, either of which might result in institutional liability under *Monell v. Department of Social Services of New York*⁶⁶ or a state indemnification policy. Nevertheless, the permutations of *Monell*, Eleventh Amendment protection, and qualified immunity defeat recovery often enough that one can hardly claim that they do not "matter."⁶⁷ At a minimum, one must recognize that many constitutional victims are left without redress, a result due in large part to sovereign immunity's codification in the Eleventh Amendment and § 1983.

Even if this were not the case, there is a debilitating theoretical flaw in using state indemnification as a surrogate for fault. The assumption is that, through indemnification, state liability follows official liability; because official liability requires *Harlow*⁶⁸ fault, state liability requires it too. The error in this argument rests largely on the assumption that *Harlow* immunity allows institutional blame to mirror the fault of an errant official. It does not. As the previous illustrations demonstrate, an official's immunity turns in part on the state's instructions. An official who relies on a state's instructions will often be blameless; one who ignores instructions, on the other hand, might be liable under *Harlow*. Because state authorization more often than not creates *Harlow* immunity,⁶⁹ defining state fault in *Harlow* terms leads to the rather absurd conclusion that a state can immunize its actions by authorizing them ex ante. Common sense suggests that this cannot be correct in a principled legal system.⁷⁰

⁶⁴ In *Gold*, for example, the Eleventh Circuit absolved the city from liability for the actions of the city's arresting officers. See *Gold*, 151 F.3d at 1354. The Eleventh Circuit reversed a jury finding in favor of *Gold* based on insufficient evidence: "Gold has not presented any evidence from which the jury could find that the existence of a municipal policy or custom caused or was the moving force behind the violation of Gold's constitutional rights. No facts to sustain the jury's verdict were offered." *Id.*

⁶⁵ Of course, alternative remedies such as injunctions and evidentiary exclusions may exist, but courts rarely grant these remedies. See *infra* Part II.G.

⁶⁶ 436 U.S. 658 (1978).

⁶⁷ Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 49.

⁶⁸ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁶⁹ See *supra* note 22.

⁷⁰ The Westfall Act, 28 U.S.C. § 2679(d)(1) (1994), works in a similar illogical fashion. Under the Westfall Act, the Attorney General may authorize the conduct of a federal employee ex post by certifying that the employee's conduct was within the scope of his or her employment, thereby immunizing the employee. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). Following certification, the United States is substituted as a defendant, and the action proceeds under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-80 (1994). See *id.* The United States, then, might also be immune. For example, if as in *Lamagno*, the action were to arise outside the United States or involve an

This Article does not propose the many revisions to Eleventh Amendment jurisprudence that are necessary to construct a consistent and workable fault-based approach to state liability. Instead, this Article focuses on the problem of local liability. After all, a four-Justice dissent in *Board of the County Commissioners v. Brown*⁷¹ casts doubt on the viability of the current fault-based approach under *Monell*. And even if the Court does not reconsider *Monell*, many of its applications remain novel and relatively unexplored. The Court has yet to consider the effect of state instructions on local government liability. Can local government be held financially accountable for enforcing state law? Lower courts, of course, tend to lean toward local absolutism.⁷² They fail to explain, however, why local government should escape liability. With officials, the reliance associated with *Harlow* immunity offers a plausible reason. But with local government, the Court rejected a reliance-based approach in *Owen v. City of Independence*.⁷³

The question of whether local governments should be liable for enforcing state law provides the ideal backdrop for exploring the policies behind § 1983. The answer to this question, like so many under § 1983, is not located in the language of the statute, in history, or, as illustrated above, in some simple understanding of fault. Instead, one

exempted tort, both the official and the government would be immune. See *Operation Rescue Nat'l v. United States*, 147 F.3d 68 (1st Cir. 1998) (holding that a Senator is immune if the Attorney General certifies that he or she acted within the scope of employment and the defamation action is exempt under the FTCA). However, I have never heard anyone claim that FTCA liability, as amended by the Westfall Act, is fault-based.

⁷¹ 520 U.S. 397, 431 (1997) (Breyer, J., dissenting) (urging a reexamination of "the legal soundness of that basic distinction [found in *Monell*] itself"); *id.* at 430 (Souter, J., dissenting) (noting that "Justice Breyer's powerful call to reexamine § 1983 municipal liability afresh finds support in the Court's own readiness to rethink the matter" (typeface altered)). Justice Stevens joined both Justices Souter and Breyer in dissent. See *id.* at 416 (Souter, J., dissenting); *id.* at 430 (Breyer, J., dissenting). Justice Ginsburg joined Justice Breyer in dissent. See *id.* at 430 (Breyer, J., dissenting).

⁷² See *ACLU of Maryland v. Wicomico County*, 999 F.2d 780, 782 (4th Cir. 1993) (holding that a local board is not accountable for enforcing state policies); *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir. 1991) ("It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law."); *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988) (holding the county not liable for "implement[ing] . . . a facially unconstitutional state statute" because the action was "more fairly . . . characterized as the effectuation of the policy of the State" (footnote omitted)). But see *McKusick v. City of Melbourne*, 96 F.3d 478, 484 (11th Cir. 1996) ("[T]he development and implementation of an administrative enforcement procedure, going beyond the terms of the [state court] injunction itself, leading to the arrest of . . . persons not named in the injunction nor shown to be acting in concert with named parties, would amount to a cognizable policy choice."); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (holding the city liable when its deadly-force policy was more restrictive than state policy); *Florida Pawmbrokers & Secondhand Dealers Ass'n v. City of Fort Lauderdale*, 699 F. Supp. 888, 890 (S.D. Fla. 1988) (enjoining the city from enforcing an unconstitutional statute it incorporated into the municipal code).

⁷³ 445 U.S. 622 (1980).

must find the answer to whether local government should be liable for enforcing state-initiated rules in the policies that surround § 1983.

II

LOCAL LIABILITY FOR STATE POLICIES: A NORMATIVE ANALYSIS

Common responses to imposing liability on local government for enforcing state policies include: “[I]f municipalities were to be held liable every time they enforced a state law, the consequences would be horrendous,”⁷⁴ and “[i]f the language and standards from *Monell* are not to become a dead letter, such a ‘policy’ simply cannot be sufficient to ground liability against a municipality.”⁷⁵ Even Judge Richard Posner, ordinarily quite savvy about the principles that motivate liability, has offered only a curt, unsatisfying explanation: “When the municipality is acting under compulsion of state . . . law, it is the policy contained in that state . . . law, rather than anything devised or adopted by the municipality, that is responsible for the injury.”⁷⁶ Exactly why liability would be “horrendous,” or why it would somehow unravel *Monell* or why it would slift “responsibility,” is less than clear. One can just as easily argue, for example, that municipal liability under these circumstances is consistent with *Monell* because it flows from a municipal decision to enforce state law. Even if state law commands local government or, in the words of Judge Posner, “puts local government at war with state government,”⁷⁷ the Supremacy Clause still provides local government an excuse not to enforce the measure. States can-

⁷⁴ *Minnesota Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 906 (Minn. Ct. App. 1996) (refusing to shift attorneys’ fees under 42 U.S.C. § 1988 to the city when the city had enforced an unconstitutional state law).

⁷⁵ *Surplus Store*, 928 F.2d at 791-92 (holding the city not liable for enforcing state law).

⁷⁶ *Bethesda Lutheran Homes & Servs., Inc. v. LEEAN*, 154 F.3d 716, 718 (7th Cir. 1998). One senses that Judge Posner is not satisfied with this explanation either: “Our position admittedly is anomalous from the standpoint of conventional tort law, in which obedience to a superior’s orders is not a defense to liability.” *Id.* In a related context involving voting rights, the Supreme Court recently rejected the notion that counties are only accountable for their own policy choices and not those of the state. *See Lopez v. Monterey County*, 119 S. Ct. 693 (1999). The question in *Lopez* was whether counties must preclear uncovered state governmental changes in state voting laws under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (1994). *See id.* at 695. Section 5 does not require preclearance from California, which altered its voting laws. *See id.* This forced Monterey County, a covered jurisdiction, to implement these changes within the geographical limits of the county. *See id.* When Hispanic voters sued the county because it did not seek federal preclearance, the state argued that the court could not hold the county accountable under § 5 for policy choices mandated by the state. *See id.* at 700. The Supreme Court, however, disagreed, holding that covered counties are responsible under § 5 regardless of whether they exercise discretion implementing the law; that the policy is the state’s is no defense. *See id.* at 705. Although *Lopez*’s logic is dependent on the language of the Voting Rights Act, which is different from the language of § 1983, both are ambiguous enough to tolerate such a construction.

⁷⁷ *Bethesda Lutheran Homes*, 154 F.3d at 718.

not force cities to apply unconstitutional state laws, whether they command it or not.⁷⁸ Instead, local decisions to enforce state laws always include some measure of choice.

One should not be shy about criticizing either conclusion. Because institutional choice is artificial and § 1983 is devoid of guidance, legal rhetoric offers little assistance. A more thorough policy analysis or, in Jeffries's words, a "what the world would look like"⁷⁹ dialogue is needed. Turning away from institutional fault, a frank assessment of government liability presents at least seven different reasons for excusing local governments from financial liability. As explained more thoroughly below, some of these reasons are more credible than others. Still, singularly or combined, these reasons do not convincingly rationalize immunizing local government.

A. More Liability Means More Cases: The Approaching Breaking Point of the Federal Docket

Both legal⁸⁰ and popular⁸¹ presses have widely reported on the modern "litigation explosion." While bulging dockets have caused debilitating congestion in both state and federal courts, the problem is particularly acute with federal courts because of their limited number.⁸² Some commentators even have suggested that civil rights litigation,⁸³ which they claim too often includes frivolous claims, exacerbates the problem.⁸⁴

⁷⁸ See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 122 (1997) (arguing that the Supremacy Clause insures a defense to an unconstitutional state law).

⁷⁹ Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 81.

⁸⁰ See, e.g., Eric Harbrook Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 72 N.C. L. REV. 1085, 1085 (1994) ("During the last several years, a 'litigation explosion' of civil rights actions has occurred in the federal courts. Civil rights suits have increased steadily in proportion to other types of cases and now occupy a substantial portion of the federal docket.").

⁸¹ Op-ed cartoons often feature this topic. For example, a recent cartoon printed in the *St. Petersburg Times* depicts two frigates which obviously have engaged in battle. See Don Addis, *ST. PETERSBURG TIMES*, July 6, 1998, at 11A (cartoon). Under a banner reading, "If Then Were Now," a sailor on the more battered frigate shouts, "Surrender, Hell! We'll SUE!" *Id.*

⁸² See Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System: Thinking the Unthinkable*, 14 MISS. C. L. REV. 349 (1994) (discussing the problems created by expanding dockets and the limited number of federal judges).

⁸³ See, e.g., Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 2-3 (1985) (arguing that recent Supreme Court opinions "reflect a growing uneasiness with the heretofore pronounced breadth of [§ 1983] and, in my view, a tendency to strain otherwise sound doctrines").

⁸⁴ See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 554 n.30 (1984) (Stevens, J., concurring in part and dissenting in part) ("I cannot help but think that the Court's holding is influ-

The argument is a red herring for several reasons, only three of which require discussion in this Article. First, the litigation explosion is not a proper matter for judicial scrutiny. The Constitution entrusts federal court jurisdiction to Congress.⁸⁵ Notwithstanding various procedural devices which the judiciary has crafted to help manage the federal docket, federal jurisdiction that Congress clearly confers is not optional.⁸⁶ Courts should not fashion substantive law in any area to minimize federal jurisdiction.

Despite this constitutional restriction, the federal courts are free to complain about the problem and petition Congress for change. The Judicial Conference of the United States and the Administrative Office (AO) of the Courts routinely collect data suggesting that § 1983 litigation occupies too large a portion of the federal docket.⁸⁷ However, because no one knows what is an acceptable percentage, the AO's figures are not very helpful. Moreover, commentators have criticized the AO for lumping "all nonprisoner civil rights cases into a single category"⁸⁸ and inflating the impact of § 1983 litigation on federal courts.⁸⁹

Second, statistics aside, limiting cities' financial liability seems to be a convoluted way of reducing the federal docket. After all, § 1983 claims are actionable in state court.⁹⁰ A jurisdictional problem should be addressed in a jurisdictional, not substantive, way. Even if Congress had limited § 1983 claims to federal court, state and local governments would be subject to declaratory and injunctive relief. Thus, the conclusion that limiting liability will reduce the federal docket is nothing more than speculation.⁹¹

enced by an unstated fear that if it recognizes that prisoners have any Fourth Amendment protection this will lead to a flood of frivolous lawsuits.").

⁸⁵ See *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) ("[T]he undisputed constitutional principle [is] that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." (citing *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922))).

⁸⁶ See *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress.").

⁸⁷ See EISENBERG, *supra* note 25, at 151-62.

⁸⁸ *Id.* at 153 ("[C]ommentators and Supreme Court Justices repeatedly group all non-prisoner civil rights cases into a single category. They then tend to categorize all of these cases as section 1983 cases, bemoan their large numbers and growth, and ignore data that might explain increased filings.").

⁸⁹ See Schwab & Eisenberg, *supra* note 25, at 780-81.

⁹⁰ See *Howlett v. Rose*, 496 U.S. 356 (1990) (holding that state courts of general jurisdiction must hear § 1983 claims).

⁹¹ And why single out § 1983 when other statutes cause at least as much federal congestion? Although courts and commentators suggest that § 1983 litigation is more likely to be frivolous, no empirical studies exist that prove this conjecture. If any truth exists to this claim, prisoner filings apparently are the primary culprit. The Prison Litigation Reform Act, Pub. L. 104-134, 110 Stat. 1321 (1996), should provide a solution. See Crawford-El v.

Third, and more to the point, the litigation-explosion premise is suspect, both generally and when applied to civil rights. "Explosion" suggests a sudden, surprising event. Latent and even sinister defects cause inexplicable occurrences. For example, investigation of the space shuttle explosion took months before authorities uncovered defective gaskets.⁹² Similarly, the argument continues, something sinister must have caused the explosion in federal litigation. This sinister cause may involve lawyers, an increased willingness to sue, or the liberal Congress and activist courts which have created too many rights.

Elementary data ostensibly support these hypotheses. For example, in its 1995 Long Range Plan for the Federal Courts, the Judicial Conference of the United States reported that, while the "population has increased slightly more than 200% since 1904, annual civil case filings have increased 1424%, with most of that growth in the period since 1960."⁹³ The five-fold difference between the rates of docket and population growth proves that people today are five times more willing to litigate (at least in federal court), they have five times more rights now than before, or society has five-times too many lawyers. The reference to 1960 implies that much of this is due to *Monroe v. Pape*,⁹⁴ which reinvigorated § 1983 litigation the following year.

These statistics, however, are misleading, especially given how rudimentary the comparisons are. Comparing the population and docket of the last century with those of today is like comparing apples and orchards. It is premised on the false assumption that the population and case filings should grow at the same rate: if the population triples, so should the docket. A docket increase five times larger than population growth proves that something is amiss.

One might suspect that the flaw in this assumption lies in the innumerable sociological and technological changes that have occurred along with population growth. These changes include profound developments in both the communication and transportation industries, as well as in the closing of the American frontier. Commercial⁹⁵ and human⁹⁶ interaction today dwarf the intercourse of 1904. Whatever the increase in population, an increased frequency in

Britton, 523 U.S. 574, 596 (1998) (asserting that the Prison Litigation Reform Act will discourage frivolous claims).

⁹² See NASA Kennedy Space Ctr., *Report of the Presidential Commission on the Space Shuttle* (visited May 7, 1999) <<http://www.ksc.nasa.gov/shuttle/missions/51-I/docs/rogers-commission/table-of-contents.html>>.

⁹³ JUDICIAL CONFERENCE OF THE U.S. LONG RANGE PLAN FOR THE FEDERAL COURTS 9-10 (Dec. 1995) [hereinafter LONG RANGE PLAN].

⁹⁴ 365 U.S. 167 (1961), *overruled in part* by *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

⁹⁵ The gross domestic product, for instance, has increased almost 80-fold between 1929 and the end of 1997.

⁹⁶ See *infra* notes 98-99 and accompanying text.

societal interaction and friction (separate and apart from legal developments or people's willingness to sue) partially or entirely explains the disparate increase in case filings. If the population had continued living in agrarian, rural areas, riding horses, and only occasionally communicating by telegraph, perhaps the increase in filings would have paralleled that of the population.

Simple math impeaches the credibility of comparing population growth with the number of case filings. Because any given case involves more than one party,⁹⁷ a better comparison is between cases and combinations. A population that increases in a linear fashion will not generate a parallel increase in the interaction of its individual members. Rather, interaction, measured by the number of possible binary combinations (or "selections" of two), increases at a factorial rate. A population of three, for example, has three binary combinations. When doubled to six, fifteen binary combinations result, which represents a five-fold increase. Tripling the population to nine causes thirty-six potential combinations, a twelve-fold increase.⁹⁸ Quadrupling the population causes an even greater increase, and so on.

Thus a fifteen-fold increase in the number of federal cases since 1904 is not surprising when simple computation is the guide. Controlling for all other variables, including law, technology, and people's litigiousness, a nine-fold increase in federal filings should result.⁹⁹ Although one should not dismiss this increase as trivial, a proper un-

⁹⁷ The case-or-controversy requirement mandates this for the most part. See U.S. CONST. art. III, § 2.

⁹⁸ See CHRISTOPHER CLAPHAM, *THE CONCISE OXFORD DICTIONARY OF MATHEMATICS* 254 (2d ed. 1996) ("The number of selections of n objects taken r at a time (that is, the number of ways of selecting r objects out of n) is . . . equal to $n! + r!(n-r)!$ "). The multiple increase in binary combinations converges between 9 and 10 when the population is tripled. Consider a population of 10 litigious foxes. Forty-five different combinations of two exist in this fox society; hence, 45 potentially different fights or binary cases exist. If the population triples to 30, the number of binary combinations increases to 435. Controlling for all other variables, the number of fights in this fox society should increase over 800%. In response to this increase, the fox society could choose to either complain about increased aggressiveness or instead develop ways to deal with the existing number of fights.

⁹⁹ Granted, this is not 1500%, but cases often involve more than two parties. A model based on all possible combinations—binary, ternary, etc.—predicts an increase in cases 12 times more than the 1424% experienced between 1904 and 1994. In a population of 10, for example, tripling the population to 30 increases the total number of combinations (groups of 2, 3, 4, 5, etc.) from 957 to 205,811, a 215-fold increase. A mathematician might therefore be surprised at how small the increase in federal filings has been since 1904. Of course, this does not mean that civil filings will forever increase in a factorial fashion. Like biological reproduction, which initially tends toward exponential growth, the increase will eventually "flatten out." See CARL SAGAN, *BILLIONS AND BILLIONS: THOUGHTS ON LIFE AND DEATH AT THE BRINK OF THE MILLENNIUM* 17 (1997) ("[E]xponential growth of this sort always bumps into some natural obstacle. . . . Exponentials can't go on forever, because they will gobble up everything. Long before then they encounter some impediment. The exponential curve flattens out."). Population growth and the litigation rate, however, need not flatten out at the same time nor at the same rate.

derstanding of the numbers indicates that this increase is not alarming.

I suspect that people are no more innately litigious today than in the past century. They file more lawsuits, but this may result from the greater likelihood of interaction and friction rather than from disposition. Similarly, the suggestion that too many federal rights (or lawyers) exist does not adequately explain the increase in filings. Even if the number of federal rights remained constant, one would expect a factorial increase in federal filings.

B. The Overdeterrence of Local Government and the Skewing of Local Policy Making When Liability Is Based on the Enforcement of State Law

Jeffries describes the problem of "overdeterrence" as the "unintended deterrence of socially desirable conduct."¹⁰⁰ He explains that "[in] the language of tort, the problem is that strict liability would force government to 'internalize' all accident costs, potentially depressing the activity level of government."¹⁰¹ While courts often express the argument in terms of potential individual liability,¹⁰² they can and do translate this into a problem of governmental liability.¹⁰³ Moreover, when the local government must enforce state law, the argument has even greater force. After all, if local government risks liability, it might choose not to enforce state law.¹⁰⁴

According to Jeffries, this phenomenon is primarily the consequence of "skewed incentives and constitutional indeterminacy."¹⁰⁵ Skewed incentives are pronounced because of the tendency of risk-averse government officials to choose inaction.¹⁰⁶ Three factors exaggerate this inaction: civil service protections that encourage govern-

¹⁰⁰ Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10 at 73.

¹⁰¹ *Id.*

¹⁰² See, e.g., *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (suggesting that fear of a trial and an adverse outcome "dampen[s] the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties").

¹⁰³ See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 668-69 (1980) (Powell, J., dissenting) (arguing that judicial intervention under § 1983 has a potential to "distort municipal decisionmaking" and force local government officials to worry "about potential judgments against their municipalities for alleged constitutional torts"); see also Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 298-300 (arguing for municipal immunity insofar as it prevents cities from engaging in "self-protective behavior" with "potentially adverse effects on the quality of municipal services").

¹⁰⁴ See, e.g., *Minnesota Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 906 (Minn. Ct. App. 1995) ("[I]n order to protect itself, a municipality would have to examine every statute passed by the legislature and then decide whether to enforce it").

¹⁰⁵ Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10 at 78. But see *Armacost*, *supra* note 31, at 586 (agreeing that overdeterrence may skew incentives, but arguing that it is only part of the story).

¹⁰⁶ See Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10 at 76.

ment workers to avoid risks, government self-selection that saturates the civil service with under-achievers, and the political costs of higher taxes that accompany proactive government.¹⁰⁷

Unlike Jeffries, I see overdeterrence generally as a societal good. As with common, everyday torts, overdeterrence discourages risky conduct that might harm others in an unconstitutional fashion. Although the deterred conduct might not cause tangible harm, forever eliminating the potential benefits of that conduct, the good achieved by avoiding the risk still outweighs the loss of socially desirable conduct. Of course, overdeterrence is a part of mainstream law in the private sector. Jeffries argues, however, that the law should be different for political actors¹⁰⁸ because incentives specific to public service encourage inertia.¹⁰⁹ Jeffries fears that local politicians will likely choose "inaction, passivity, and defensive behavior"¹¹⁰ because of the risk of adverse judgments, higher taxes, and electoral disapproval.¹¹¹

Passive political behavior, however, might also produce negative reactions at the polls. People dislike crime as well as taxes.¹¹² Guessing at political incentives is always speculative because it assumes a preexisting, neutral political system. In the language of critics of the law and economics school of thought, it assumes an initial assignment of rights.¹¹³ Jeffries's assumed political arena is free from government liability. Not surprisingly, the risk of an adverse monetary judgment corrupts this world view. One could just as easily assume a natural political system that incorporates government liability into the political equation. Denying liability for government harms would then skew political decision making by abrogating an important check on government power.¹¹⁴ The legal literature would criticize qualified immunity as underdetering government policymakers and officials.

¹⁰⁷ See *id.* at 75-77.

¹⁰⁸ See *id.* I will not address the problem of inactive bureaucrats. My concern is whether cities should be liable for enforcing state policy. Presumably, a policy exists, so I need not worry about the incentives of bureaucrats. The question is whether the incentives of politicians justify absolving local government.

¹⁰⁹ See *id.* at 75.

¹¹⁰ *Id.* at 75.

¹¹¹ See *id.* at 75-77.

¹¹² Cf. EISENBERG, *supra* note 25, at 159 (asserting that damages resulting from civil rights liability constitute less than 0.02% of cities' budgets). This figure weakens the argument that the risk of liability and of increased taxation skews the political process.

¹¹³ See, e.g., CHARLES FRIED, *RIGHT AND WRONG* 81-107 (1978); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387 (1981).

¹¹⁴ This was not foreign to the authors of the Bill of Rights, the Fourteenth Amendment, or § 1983, all of whom were comfortable with the socialization of costs under the Takings Clause of the Fifth Amendment. See *U.S. CONST. amend. V* ("[N]or shall private property be taken for public use, without just compensation."); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 *U.S.* 226, 241 (1897) (holding that states must pay just compensation for taking private property); Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 *B.U. L. REV.* 277, 310 (1988)

Determining what "skews" political decision making is impossible because one can never know what the political equation ideally should be. Should politicians worry about the financial and political costs of their decisions? Should they worry about these same costs if they do nothing at all? I think the answer to both questions is yes. Overdeterrence is not a problem; it is a variable in the political equation. Removing this variable changes the political result. Whether that change is for better or for worse depends on an imagined, initial assignment of rights and responsibilities.

Jeffries laments that "[t]hese problems would be manageable, or at any rate less acute, if constitutional law were precise and rule-like."¹¹⁵ He claims that "[i]t is the combination of skewed incentives and constitutional indeterminacy that makes the risk of unintended deterrence so severe."¹¹⁶ Constitutional law is no more indeterminate than any other legal field.¹¹⁷ It is sufficiently puzzling to make it interesting¹¹⁸ and is sometimes frustrating because of the patent and latent politics that infect opinions. Yet both the legal logic and politics of constitutional decision making are fairly predictable.¹¹⁹ (At the very least, they are no more unpredictable than anything else.)¹²⁰ Legal indeterminacy is unfortunate, but is an insoluble constant that plagues the American legal system.¹²¹ Excusing governmental viola-

("[T]he taking clause's fairness concern [is] that the costs of government be socialized."). The Supreme Court has also recognized the importance of this check on government power; since the time of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court has grafted judicial remedies into the political process. See generally Woolhandler, *supra* note 78 (discussing constitutional remedial developments since *Marbury*).

¹¹⁵ Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 77.

¹¹⁶ *Id.* at 78.

¹¹⁷ My tax colleagues often jokingly scoff at me for teaching constitutional law, which they claim is "too easy." Though I may disagree that it is easy, I find it about as manageable as any other subject.

¹¹⁸ Cf. Armacost, *supra* note 31, at 623 (observing that while "[s]ome constitutional rules are less intuitive, less accessible, and regulate behavior that is less obviously blameworthy than much of traditional criminal law[,] others . . . look very much like traditional criminal prohibitions" (emphasis omitted)).

¹¹⁹ I know no way to prove this. I have taught constitutional law for 13 years. I also have taught basic criminal law and various upper-level electives, including criminal procedure. I find constitutional law no more difficult than any other first, second, or third-year subject.

¹²⁰ If courts are coming to unpredictable constitutional conclusions, then something should be done about the judges who interpret the Constitution. Any given decision is either predictable or not. A predictable decision is one that more likely than not flows from precedent, legal logic and analogy. According to Jeffries, unpredictable decisions do not justify liability. See Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 78. Judges, however, should reach decisions that more likely than not flow from precedent, legal logic and analogy. Working backwards, any court that thinks immunity is appropriate ought to decide the case the other way on the merits.

¹²¹ See Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics*, 43 HASTINGS L.J. 1439 (1992).

tions may be wise policy for some other reason, but it does not flow from any unique concern over intractable constitutional decision making.¹²²

C. The States As the Primary Cause of Injury to Victims and the Unfairness of Subsequently Imputing Liability to Local Government

Fairness is both an instrumental and noninstrumental concern. As an instrumental concern, fairness is an instrument of reliance. Holding X liable for the advice or direction of Y, a superior, is not fair because X should be able to rely on his superior.¹²³ If anyone is liable, it should be Y. Separate and apart from any concern over reliance, some see it as simply unfair to hold the government¹²⁴ or its officials¹²⁵ responsible for rules in the absence of prior notice.

Under § 1983, these variations on the fairness argument manifest themselves as qualified immunity, which protects errant officials who rely on state or local law.¹²⁶ The law typically immunizes state and

¹²² Consequently, I see nothing peculiar about forcing local governments to assess the political and financial risks of state policy. If a local government determines that the risk of liability is high, it need only advise the state that the law is likely unconstitutional and refuse to enforce it. A state policy that contravenes the United States Constitution is void, or at least voidable, and local government cannot be legally accountable for refusing to enforce it. See Woolhandler, *supra* note 78, at 122 (noting that the Supremacy Clause provides a defense to the enforcement of unconstitutional state law). If the risk of liability is low, then a local government might choose enforcement. The reality is that local governments are always making these choices. They cannot enforce all state policies, so they pick and choose. If the concern is "conscious choice," this is about as close as an institution can get.

¹²³ See, e.g., 1B SCHWARTZ, *supra* note 31, § 9.19, at 368. Professor Schwartz argues: [I]t seems unfair to hold subordinate employees liable for simply following orders they are obligated to obey, even when there is good reason to believe that an order is unlawful. After all, a subordinate employee who disobeys an order may well be placing his job in serious jeopardy. On the other hand, it may be equally unfair to hold officials liable for carrying out their obligations to enforce legislative mandates that are constitutionally suspect

....

Id. Cf. *American Trucking Ass'n v. Smith*, 496 U.S. 167, 182 (1990) ("[B]ecause the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent.").

¹²⁴ See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 669 (1980) (Powell, J., dissenting) ("[L]iability should not attach unless there was notice that a constitutional right was at risk. This idea applies to governmental entities and individual officials alike.").

¹²⁵ See, e.g., *Armocost*, *supra* note 31, at 588-89 ("Another important rationale for qualified immunity, described by the Supreme Court as independent from the instrumental one, is that it would be unfair to hold governmental officials to constitutional rules they could not reasonably have known." (emphasis omitted)).

¹²⁶ See Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 3 (1997) ("[T]he Court established the qualified immunity doctrine to limit officials' exposure to such litigation in order to advance three policy considerations. First, the Court fears that it would be unfair to require

local officials who rely on official policy, whether local or state.¹²⁷ Liability contradicts reliance and is unfair. Even an unconstitutional policy can sufficiently muddy the legal waters to deny notice to the wrongdoer.

Both instrumental fairness and notice fairness are troubling concerns when government expressly authorizes its agents' actions.¹²⁸ They are troubling because holding agents accountable for the sins of their employer, especially when the employer is the government, seems inherently unfair.¹²⁹ The same equitable concerns that motivate sympathy for government officials, however, do not readily translate into the realm of institutional liability. Justice Brennan said it best in *Owen v. City of Independence*,¹³⁰ which denied qualified immunity to local government:

[E]ven where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.¹³¹

Likewise, even when the state has ordered the municipal action, allocating the cost of the illegality to the public rather than forcing it on the victim is fairer.¹³² Liability cannot be shifted to the state because of the Eleventh Amendment, whether the facts are analogous to those

public officials to compensate plaintiffs for all constitutional violations, given the sometimes unclear nature of constitutional law.”).

¹²⁷ See *supra* notes 25-45 and accompanying text.

¹²⁸ See *Brown*, *supra* note 17, at 293 (“Holding an official liable for unforeseeable wrongs is unfair . . . because of the official’s justifiable reliance on the instructions of her governmental employer . . .”).

¹²⁹ I am sympathetic to this position. Anytime government instructs a citizen to act, holding the citizen accountable for that act is potentially unfair. Whether in a criminal case or a civil rights case, the government is in a much better position to absorb the mistake than misinformed wrongdoers. See John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 71 (1997) (“Allowing a defense [based on erroneous government advice] ensures fair warning and gives courts and legislatures an incentive to be specific when interpreting or writing criminal statutes.”).

¹³⁰ 445 U.S. 622 (1980). In *Owen*, the city discharged an employee without affording him the process the Court later declared due in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972). See *Owen*, 445 U.S. at 629, 634. The *Owen* Court held the city accountable even though the city could not have foreseen that the discharge was illegal. See *id.* at 655. According to the Court, fairness was not a problem. See *id.*

¹³¹ *Owen*, 445 U.S. at 655.

¹³² See *id.* at 651, 657 (asserting that “many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense” and that the Court’s decision “properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity”); see also Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court’s Historical Analysis*, 40 ARK. L. REV. 741, 763 (1987) (“[F]ailure to compensate innocent third parties is as unfair as punishing officials who erroneously act in ‘good faith.’”).

in *Owen* or to those in *Gold*.¹³³ Although fairness is a serious concern in matters of individual liability, it is diluted when damages are spread across a large tax base. Reliance and fairness are at their lowest ebb when government liability is at stake.¹³⁴

D. Contradicting Common Notions of Corrective Justice by Imposing Liability on Cities That Implement Their State's Policies

Corrective justice teaches that loss follows wrong.¹³⁵ Wrongdoers should compensate victims. The law ties compensation to fault to maintain the moral relationship between the victim and the wrongdoer.¹³⁶ Compensation without fault is inconsistent with corrective justice and is perhaps amoral.¹³⁷ In terms of the current debate, cities that obey orders are not at fault and cannot, consistent with corrective justice, be required to compensate the victim. After all, the true wrongdoer is not the city; it is the state. Forcing the city to pay is akin to imposing strict, vicarious liability.¹³⁸

This argument's principal flaw is the assumption that fault is an exclusive commodity which wrongdoers cannot share. Both criminal law and tort law have traditionally held to the contrary. Wrongdoers often share fault, and, in particular, the law does not absolve those who follow another's orders. The law does not hold them vicariously

¹³³ *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997).

¹³⁴ See, e.g., *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (holding that equity or fairness does not require the selective prospective application of constitutional rules).

¹³⁵ See, e.g., Jeffries, *Constitutional Torts*, *supra* note 10, at 93-96 (discussing corrective justice).

¹³⁶ See *id.* at 94 ("The award of damages from government to victim at once annuls the wrongful gain and rectifies the wrongful loss. The payment from wrongdoer to victim retraces the moral relationship between them. To the extent possible, it undoes the wrong."). Cf. George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1668 (1993) (reviewing JULES COLEMAN, *RISKS AND WRONGS* (1992)) (criticizing the use of corrective justice in modern tort law). Professor Fletcher states:

[T]he problem we moderns face . . . is a matter of shifting the loss from one party to the other. The loss is a sunk cost. It cannot be "corrected" and thus be made to disappear.

The central problem of modern tort law, therefore, is, Who should be richer and who should be poorer? Put this way, the problem is one of distributive rather than corrective justice.

Fletcher, *supra*, at 1668 (footnote omitted). Professor Fletcher makes a sound point. Corrective justice, as Jeffries and others define it, assumes a capitalist assignment of rights. There is nothing natural or moral about this.

¹³⁷ See Brown, *supra* note 17, at 294 ("Compensation follows fault and is only justified in these terms. When compensation follows fault it maintains 'moral relationships' among people. Requiring compensation in the absence of fault is therefore amoral.").

¹³⁸ See, e.g., *Carbalan v. Vaughn*, 760 F.2d 662, 665 (5th Cir. 1985) (noting that forcing the city to pay for the "enforcement of an unconstitutional state statute" would "subvert the message of *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), that municipalities cannot be vicariously liable under § 1983").

liable either, rather, they are responsible for their own fault and are blamed accordingly. Criminal law, for example, holds both parties equally responsible by way of complicity theory.¹³⁹ If the Constitution were a criminal statute, a city would clearly be responsible for violating it as a principal in the first degree. Moreover, the state would be responsible as an accomplice.¹⁴⁰

On the other hand, tort law has historically refused to recognize a defense or setoff for agents acting at the behest of their principal.¹⁴¹ Joint torts—those achieved through concerted action—result in the liability of all participants.¹⁴² Moreover, because the common law denied contribution among joint tortfeasors, it was not uncommon for one wrongdoer to be held liable and the others not.¹⁴³ This rule persisted well into postbellum America¹⁴⁴ and could not have been lost on the Forty-Second Congress. Holding a city, but not the state, accountable would not have struck members of the Forty-Second Congress as particularly objectionable.¹⁴⁵ It certainly would not have proven inconsistent with their perception of corrective justice.¹⁴⁶ Re-

¹³⁹ See, e.g., MODEL PENAL CODE § 2.06(1) (1985) (“A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.”). While criminal law does not recognize compensation, the concept of blame exists under both criminal law and tort law. The comparison is therefore instructive.

¹⁴⁰ The more difficult question for criminal law is how to hold the instructing party (the accomplice) accountable, see *id.* § 2.06(3), not the person who performs the act (the principal), see *id.* § 2.06(1). See generally 2 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 6.6, at 125-35 (2d ed. 1986) (discussing the parties to a crime).

¹⁴¹ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §46, at 323 (5th ed. 1984) (noting that persons “who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer’s acts done for their benefit, are equally liable” (footnotes omitted)).

¹⁴² See *Bethesda Lutheran Homes & Servs., Inc. v. Lekan*, 154 F.3d 716, 718 (7th Cir. 1998) (observing that under “conventional tort law . . . obedience to a superior’s orders is not a defense to liability” (citing RESTATEMENT (SECOND) OF TORTS § 888 (1979))).

¹⁴³ See KEETON ET AL., *supra* note 141, § 50, at 336-37.

¹⁴⁴ See *id.* § 50, at 337 (“Until the 1970s—for a period of more than a century—only nine American jurisdictions came to the contrary conclusion, allowing contribution without legislation.” (footnote omitted)).

¹⁴⁵ See *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment shields states from monetary judgments in federal courts); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (holding that counties are not entitled to Eleventh Amendment immunity).

¹⁴⁶ Today, many states order indemnity for “one who is directed or employed by another to do an act not manifestly wrong, or is induced to act by the misrepresentations of the other.” KEETON ET AL., *supra* note 141, § 51, at 342 (footnotes omitted). Regardless of whether equitable indemnity would apply in the state-city context, it cannot be judicially implemented under § 1983. The Eleventh Amendment provides states immunity from monetary damages, which includes indemnification actions brought in federal court. See, e.g., *In re Secretary of Dep’t of Crime Control & Pub. Safety*, 7 F.3d 1140 (4th Cir. 1993) (rejecting an indemnification action against the state in federal court). Nonetheless, tort law historically has had little difficulty holding one accountable in spite of orders from his

ardless of whether one views the state as the more blameworthy party, and although the Eleventh Amendment forces damages only on the local government, holding local governments accountable for enforcing state law does not offend historical notions of corrective justice.

E. The Fiscal Burdens That Liability Imposes on a City's Ability To Serve Its Inhabitants

Money is the principal stumbling block to constitutional litigation. Anecdotal evidence of multimillion dollar judgments against cities and counties for constitutional wrongs,¹⁴⁷ as well as garden variety torts, fuel fiscal concerns. Even in the absence of damage awards, shifted attorneys' fees under § 1988¹⁴⁸ can cost the government hundreds of thousands of dollars.¹⁴⁹ No one disputes that constitutional litigation can be expensive.

The public, however, is not throwing its tax dollars to the wind. It gets something in return: more responsible government. The private attorneys general that § 1983 created are an important check on state and local government.¹⁵⁰ The Department of Justice does not have the resources to investigate and prosecute every constitutional violation. Even assuming that the Department of Justice could procure sufficient federal funds to mirror the effects of § 1983, forcing the taxpayers of Champaign, Illinois to pay for prosecuting the constitutional wrongs of Louisville, Kentucky seems unfair. Extracting the

or her superior. Indeed, tort law found this consistent with corrective justice even when the superior escaped liability altogether.

¹⁴⁷ See Brown, *supra* note 17, at 298 n.183 (collecting news reports on the effect of § 1983 on government finances).

¹⁴⁸ 42 U.S.C. § 1988(b) (1997).

¹⁴⁹ Section 1988 allows prevailing plaintiffs in § 1983 actions to collect reasonable attorneys' fees from defendants. See generally PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 554-622 (2d ed. 1994) (discussing awards of attorneys' fees that dwarf judgments).

¹⁵⁰ See *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). The *Rivera* Court stated: [W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.

Id. See also *Alden v. Maine*, 119 S. Ct. 2240, 2293 (1999) (Souter, J., dissenting). The *Alden* Court noted:

[W]here Congress has created a private right to damages, it is implausible to claim that enforcement by a public authority without any incentive beyond its general enforcement power will ever afford the private right a traditional adequate remedy. No one would think the remedy adequate if private tort claims against a State could only be brought by the National Government: the tradition of private enforcement, as old as the common law itself, is the benchmark.

Id.

necessary tax dollars from those in the offending locale who have a greater chance of controlling their government and correcting its deficiencies is more equitable.

Moreover, empirical data from the early 1980s should alleviate the general fear that § 1983 is driving municipalities into bankruptcy. In 1988, Professors Schwab and Eisenberg concluded that "new legislative or judicial restrictions on constitutional tort litigation in the name of reducing the federal docket or decreasing the fiscal drain on state and local defendants" are unnecessary.¹⁵¹ Although this study is more than a decade old, it impeaches contemporaneous concerns about municipal bankruptcy and casts doubt on their continuing credibility.

The fear of local bankruptcy also ignores the likelihood that cities and counties will choose not to enforce state laws that risk civil liability. Armed with a knowledge of risked monetary judgments, a city would be wise to forego implementing questionable state policies. Better yet, cities could negotiate indemnity agreements with their states in exchange for enforcement so that cities could avoid foreseeable ex post costs ex ante. Even in states that demand local enforcement without indemnity, cities can ignore unconstitutional state laws.¹⁵² Although cities are at some risk when state law is mandatory and not demonstrably unconstitutional, forcing this choice on local governments appears reasonable without convincing proof that § 1983 causes cities to experience financial distress.¹⁵³

F. Federalism Prohibits Federal Courts from Imposing Liability on Cities That Implement State Law

The Tenth and Eleventh Amendments' vertical checks on federal power caution against an expansive interpretation of institutional liability under § 1983.¹⁵⁴ Recent cases, such as *Printz v. United States*¹⁵⁵ and *McMillian v. Monroe County*,¹⁵⁶ prove that judicially enforceable Tenth and Eleventh Amendment protections extend to cities as well as states.

¹⁵¹ Schwab & Eisenberg, *supra* note 25, at 780-81.

¹⁵² See U.S. CONST. art. VI (Supremacy Clause).

¹⁵³ Even with convincing proof, courts are ill-suited to assess financial policy concerns. If § 1983 liability is financially debilitating for cities, the political process should offer sufficient protection. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹⁵⁴ See, e.g., Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992) ("Much of sovereign immunity . . . derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule.").

¹⁵⁵ 521 U.S. 898 (1997).

¹⁵⁶ 520 U.S. 781 (1997).

While Tenth and Eleventh Amendment jurisprudence is experiencing a renaissance in the Supreme Court, neither amendment wholly protects cities and states from financial liability for constitutional wrongs. Congress can force state and local governments to pay for their constitutional violations notwithstanding the Tenth and Eleventh Amendments.¹⁵⁷ The fact that Congress has not extended financial liability to states under § 1983 does not mean that it cannot.

This leaves open the questions of whether and how Congress has resolved the matter. Of course, the Court has not interpreted § 1983 to override Eleventh Amendment immunities.¹⁵⁸ States remain immune from § 1983 actions seeking damages, while local government units, which the Eleventh Amendment does not protect,¹⁵⁹ are not. A tedious problem thus emerges: What is local and what is state government? Arguably, by directing their actions, a state converts its cities into state actors for purposes of the Eleventh Amendment. Because state law governs the question of who acts for local, as opposed to state, government,¹⁶⁰ the argument is credible under § 1983. In *McMillian*, for example, the Court addressed this problem in the context of sheriffs in Monroe County, Alabama.¹⁶¹ Like many states, Alabama provides for local election and remuneration of sheriffs.¹⁶² Because Alabama law also provides that sheriffs are removable by the state, are subject to state officials' orders, and must "enforce the state

¹⁵⁷ Although the Tenth Amendment in some sense restricts Congress's Article I powers, *see, e.g.*, *New York v. United States*, 505 U.S. 144 (1992), Congress can use its Fourteenth Amendment powers to regulate the states. The only question is whether the congressional action falls under the terms of section 5 of the Fourteenth Amendment. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (determining that the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994), is unconstitutional because it exceeds the scope of the Fourteenth Amendment). Holding states financially accountable for constitutional wrongs certainly falls within Congress's Fourteenth Amendment powers. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978) (recognizing no Tenth Amendment problem in holding local government accountable).

¹⁵⁸ *See Edelman v. Jordan*, 415 U.S. 651, 675-77 (1974) (holding that Congress did not intend § 1983 to render states financially accountable in federal court and abrogate Eleventh Amendment immunity).

¹⁵⁹ *See Lincoln County v. Luning*, 133 U.S. 529 (1890).

¹⁶⁰ *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

¹⁶¹ *See McMillian*, 520 U.S. at 783.

¹⁶² *See id.* at 787. Most lower courts have held that sheriffs are local government actors. *See Dotson v. Chester*, 937 F.2d 920, 926-28 (4th Cir. 1991) (holding that a Maryland sheriff is a local actor relative to jail conditions); *Turner v. Upton County*, 915 F.2d 133, 136-37 (5th Cir. 1990) (finding that a Texas sheriff is a city actor for law enforcement purposes); *Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987) (providing that a Florida sheriff is a government actor relative to employment decisions); *Weber v. Dell*, 804 F.2d 796, 803 (2d Cir. 1986) (finding that a New York sheriff is a government actor in setting jail policies). Prior to *McMillian*, limited authority to the contrary existed. *See, e.g.*, *Strickler v. Waters*, 989 F.2d 1375, 1390 (4th Cir. 1993) (finding that the acts of a sheriff "in the administration of [the city's] jail" do not constitute an "official policy" of the city); *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (finding that an Illinois sheriff does not act as a government actor in setting policies for jails).

criminal law in their counties," the Court found that sheriffs are state actors for purposes of § 1983.¹⁶³ Thus, a sheriff's enforcement of state law in Alabama does not give rise to local liability under § 1983.¹⁶⁴

Extending this argument to the whole of local government is possible. State law might formally make all local government officials accountable to the state when enforcing state law and vest concurrent removal power over local officials in a state agency.¹⁶⁵ Alternatively, state law might simply make local government, rather than its officials, accountable to the state.¹⁶⁶

This argument, however, ultimately proves too much. Cities can only be creatures of the state and are always enforcing state law in some sense. Long ago, in *Lincoln County v. Luning*,¹⁶⁷ the Court concluded that the Eleventh Amendment does not protect local government.¹⁶⁸ An extreme *McMillian* argument can succeed only if the Court wishes to overrule *Luning*. The majority in *McMillian* obviously suspected as much, because it disavowed states' attempts at circumventing § 1983 liability.¹⁶⁹ It observed that the Alabama law at stake was long-standing, antedating *Monroe* and *Monell*, and was not intended to subvert § 1983 jurisprudence.¹⁷⁰ Attempts at "manipulat[ing] the titles of local officials in a blatant effort to shield the local governments from liability" can be ferreted out by their timing.¹⁷¹ "[S]imply labeling as a state official an official who clearly makes county policy"¹⁷² likewise is insufficient. These caveats convinced the dissent that the holding was "of limited reach."¹⁷³

Regardless of the direction taken following *McMillian*, structural arguments based on the Tenth and Eleventh Amendments are not normative (nor even truly constitutional) concerns, but are only statutory conclusions. The city and its officials act for the state because the state says so, and because Congress has not said otherwise. This fact says nothing about whether the law *ought* to treat officials as local agents. Moreover, because Congress is free to extend or retract liabil-

¹⁶³ *McMillian*, 520 U.S. at 790.

¹⁶⁴ *See id.* at 793.

¹⁶⁵ This often has been the case with municipal judges, who are typically deemed state, and not local, officials when enforcing state law. *See, e.g., Eggar v. City of Livingston*, 40 F.3d 312, 316 (9th Cir. 1994) (holding that a municipal judge is a state agent as opposed to a local agent).

¹⁶⁶ While I foresee more legal difficulties with this approach, I do not see that it differs much from simply making the relevant enforcement officials state agents.

¹⁶⁷ 133 U.S. 529 (1890).

¹⁶⁸ *See id.*

¹⁶⁹ *See* 520 U.S. at 793.

¹⁷⁰ *See id.* at 796 ("[T]he Alabama provisions that cut most strongly against petitioner's position predate our decision in *Monell* by some time.").

¹⁷¹ *Id.*

¹⁷² *Id.* at 786.

¹⁷³ *Id.* at 804 (Ginsburg, J., dissenting).

ity as it sees fit, I see no particularly compelling constitutional complaint behind the argument. Unless one is willing to argue that Congress *cannot* impose liability on cities and states for constitutional violations, which would require unraveling years of precedent, vertical constitutional checks only beg a question that must be answered elsewhere.

G. Government Liability and the Dilution of Constitutional Law:
Efforts To Avoid Burdening Local Treasuries

Professor Jeffries argues that "strict liability in money damages (plus attorney's fees) for all constitutional violations would exert a baleful influence on the definition of rights," resulting in a "risk . . . that constitutional rights would be defined with one eye on damages liability" and a consequential "dilution of rights."¹⁷⁴ Holding cities liable for enforcing state laws may have the same results. Because states and errant local officials are ordinarily immune, municipal liability in damages might be all that stands between good and bad constitutional law. If Jeffries is correct, courts might choose bad constitutional doctrine to avoid subjecting local governments to financial liability.

Jeffries cites to the criminal case of *Miranda v. Arizona*¹⁷⁵ as "[a]n important example" of how "nonretroactivity facilitated the creation of new rights by reducing the costs of innovation."¹⁷⁶ He argues that "[i]t is hard to imagine that *Miranda v. Arizona* would ever have been decided if every confessed criminal then in custody had to be set free," adding that "[t]he Court's ability to avoid that result was simultaneously a curtailment of the *Miranda* right and a necessary precondition of its birth."¹⁷⁷

Jeffries is likely correct about nonretroactivity's impact on the Warren Court's development of constitutional rules of criminal procedure. The Court would have been more careful about implementing reforms that necessarily forced open the prison gates. However, one must be careful when borrowing criminal models to bolster conclusions about civil litigation. The criminal arena is unique in that federal habeas corpus may upset *res judicata* and overcome temporal constraints. At the time of *Miranda*, future remedial concerns were paramount because all prisoners, regardless of the dates of their convictions, might take advantage of changes in constitutional law.

The same is not true of civil litigation. Claim and issue preclusion, as well as statutes of limitations, limit suits to a finite window of opportunity. Under § 1983, courts will not hear previously unsuccessful

¹⁷⁴ Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10 at 78.

¹⁷⁵ 384 U.S. 436 (1966).

¹⁷⁶ Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 79.

¹⁷⁷ *Id.* at 79-80.

ful claims and claims arising outside a fixed temporal period. Therefore, the Court should be less skeptical about liability in civil constitutional litigation than in criminal litigation.¹⁷⁸

Nonetheless, Jeffries raises a serious concern when he cites to cases like *Paul v. Davis*,¹⁷⁹ in which the Court openly decried § 1983 as a "font of tort law"¹⁸⁰ and redefined the underlying constitutional right.¹⁸¹ The frequent attacks on § 1983 raise the question of whether too much § 1983 liability is a good idea. For those who favor an active Court, extensive civil liability might not be a wise policy. Less law could result in less relief in the long run.

The assumption behind Jeffries's concern, of course, is that courts should define, enlarge and retract constitutional rights. One who disfavors judicial legislation would not frown as much on the dilution of rights Jeffries poses. While the federal courts have occasionally filled voids in America's development of civil rights, their overall impact seems overstated. Indeed, with generational caveats, our nation's history teaches that federal courts, including the Supreme Court, have done more harm than good for civil rights.¹⁸² Therefore, a more limited judiciary may benefit civil rights.

More importantly, encouraging courts to make unpredictable leaps in constitutional law is a bad idea in the first place. The natural tendency to aggrandize power should be sufficient incentive for the Court to make constitutional law. Allowing the judiciary the luxury of remediless, prospective decision making cedes too much government

¹⁷⁸ Note that in the criminal sector, *Teague v. Lane*, 489 U.S. 288 (1989) and *Griffith v. Kentucky*, 479 U.S. 314 (1987) to a large extent "corrected" the remedial problem. Under *Teague* and *Griffith*, the Court applies new constitutional rules on direct appeal, but generally not in collateral proceedings. See Kinports, *supra* note 30, at 173-74 & n.289. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217 (1996), has further limited habeas corpus. See *Felker v. Turpin*, 518 U.S. 651 (1996) (discussing the Act).

¹⁷⁹ 424 U.S. 693 (1976).

¹⁸⁰ *Id.* at 701.

¹⁸¹ See Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10 at 78-79.

¹⁸² See, e.g., Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 Sup. Cr. Rev. 199, 243. Beermann argues:

It is a strength of the separation of powers and judicial independence in the United States that allows a century-long pattern in the Supreme Court of resistance to civil rights to continue. It is a political reality, however, that judicial independence at the Supreme Court has not overall served the cause of civil rights well. I do not mean to suggest that the Court has never acted as a progressive force on civil rights or that all of its recent decisions have gone against civil rights plaintiffs or others asserting constitutional rights. But there is a pattern of unwillingness on the part of the Court to reach out to protect unpopular rights, and the Court seems to be at its most active when the rights of white men are at stake. Rather than be part of the Reconstruction-era and later Congress's solution to the problem of civil rights, the Court has been part of the problem.

authority. Forcing courts to remedy the rights they create is more consistent with the spirit of separated powers.¹⁸³

Still, remedies need not take the form of money damages. Jeffries observes that "the older and more basic function of constitutional rights [was] as a defensive shield against government illegality."¹⁸⁴ And at least since *Ex parte Young*,¹⁸⁵ the victims of constitutional wrongdoing have been able to enjoin the enforcement of unconstitutional laws and practices. These remedies exist separate and apart from damages. Thus, limiting actions for damages need not remove the natural chains of judicial restraint.

This argument has some force. Damages liability could unduly restrict other forms of relief, including defensive rights and injunctive relief. School desegregation, for example, might have taken a different course in the 1960s and 1970s, were school districts subject to monetary damages under § 1983 on top of the affirmative relief that federal courts ordered. Monetary remedies could hurt victims. If Jeffries is correct, arguing for damages might not be worth the candle.

Although some truth exists in Jeffries's argument, historical and empirical flaws exist in his reasoning. First, the premise is that monetary relief plays only a secondary role in constitutional litigation. Section 1983, in particular, is viewed as an unwanted stepchild of constitutional law whose presence threatens the more immediate family. Professor Ann Woolhandler's historical study of constitutional remedies, however, reveals that this is not necessarily true:

¹⁸³ Forcing courts to remedy the rights they create, moreover, ought to make constitutional law more determinate. And if this happens, the need for affirmative defenses, like qualified immunity, might vanish. As it is, qualified immunity is justified because constitutional decisions are unpredictable. Yet constitutional decisions are unpredictable because, as Jeffries explains, courts need not fully assess the consequences of their actions; instead, they can immunize governmental actors. See Jeffries, *In Praise of the Eleventh Amendment*, *supra* note 10, at 80.

¹⁸⁴ *Id.* See also Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1826 (1991) (noting that judicial remedies are less imperative when the government does not use the court system to achieve its goal).

¹⁸⁵ 209 U.S. 123 (1908). *Ex parte Young* lifted the veil of Eleventh Amendment immunity enjoyed by the state and allowed a plaintiff to sue a state attorney general, often the state's chief law enforcement officer. See *id.* at 167. The action in reality is one against the state, not the official, because it prevents enforcement of the law. See LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER 772 (1994). Professor Weinberg notes:

[I]n *Ex parte Young*, note that Attorney General Young was in no sense the real defendant in interest. The federal injunction restraining Young was in truth an order restraining the state's own law-enforcement process. The point of *Young* is to approve the use of federal injunctive power against a state officer for the purpose of forcing the state itself to conform to the Constitution.

[M]uch of the Supreme Court's development of independent federal rights and remedies took place without reliance on either federal question jurisdiction or statutes such as § 1983, but rather under the rubric of diversity jurisdiction. . . . The modern emphasis on the development of federal question jurisdiction and § 1983 can therefore be seen as a version of winners' history that attributes exaggerated historical significance to legislation that is now the dominant means for raising constitutional issues.¹⁸⁶

Thus, § 1983's historical impact on constitutional litigation is questionable, as is the risk that courts will alter constitutional law to avoid its reach. Regardless of available remedial devices, Professor Woolhandler's research suggests that federal courts manipulate law and jurisdiction to develop the rights and remedies they find suitable.¹⁸⁷ The existence (or nonexistence) of any particular remedial statute, like § 1983, may not tilt the constitutional balance one way or the other.

Second, constitutional remedial decisions over the past two decades suggest that few alternative remedies exist for the have-nots in American society. Because we have decided to "get tough on crime," suspects today have little recourse against those who violate constitutional standards.¹⁸⁸ The same is true of affirmative equitable relief. Injunctive relief has always been exceptional; in the universe of constitutional wrongs, it is granted in only a fraction of cases. Nevertheless, the Rehnquist Court has raised existing hurdles to make prospective relief even more difficult to win.

¹⁸⁶ Woolhandler, *supra* note 78, at 80 (footnotes omitted).

¹⁸⁷ See Woolhandler, *supra* note 78, at 81. Woolhandler argues:

[T]he landmarks in the study of constitutional remedies, such as the 1875 Act and *Ex parte Young*, did not fundamentally alter the role of the federal courts so much as they gradually changed the labels under which litigants continued to do what they had done in the past. This continuity arguably reinforces the legitimacy of "activist" Supreme Courts' expanding the use of federal question jurisdiction and § 1983

Id.

¹⁸⁸ The good faith exception, for example, has softened much of the exclusionary rule's bite. See *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (holding that the exclusionary rule does not apply when the arrest is based on erroneous computer information resulting from clerical errors of court employees); *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (determining that evidence obtained pursuant to an unconstitutional statute is admissible unless the statute is clearly invalid); *Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984) (holding that the court need not suppress evidence illegally seized in violation of the Fourth Amendment if officers relied on a warrant); *United States v. Leon*, 468 U.S. 897, 922-23 (1984) (same); see also *Pennsylvania Bd. of Probation & Parole v. Scott*, 118 S. Ct. 2014, 2020 (1998) (holding that the federal exclusionary rule does not apply in parole revocation proceedings). Granted, courts recognize constitutional defenses challenging the substance of state law, and courts might be more willing to allow these defenses than to award constitutional damages. Yet the cumulative risk to constitutional law appears small.

The classical illustration is *City of Los Angeles v. Lyons*,¹⁸⁹ in which police stopped and choked a motorist (Lyons) in violation of the Fourth Amendment.¹⁹⁰ The Supreme Court concluded that Lyons lacked standing for injunctive relief because he could not show that the police would arrest him and choke him again.¹⁹¹ If all arrests required choke-holds, Lyons would have had a better case.¹⁹² But the government rarely writes such a specific policy. Instead, ad hoc, street-level decision making undermines prospective relief.¹⁹³

The *Lyons* line of reasoning effectively ties injunctive relief to government policy in about the same way that damages are knotted with municipal fault. In a case like *Gold*,¹⁹⁴ in which the plaintiff challenged a facially valid policy because of its unconstitutional applications, obtaining injunctive relief is as difficult as recovering damages under *Monell*.¹⁹⁵ Both forms of relief require a concrete

¹⁸⁹ 461 U.S. 95 (1983). Cf. *Rizzo v. Goode*, 423 U.S. 362, 377, 380 (1976) (finding no standing to pursue equitable action challenging police practices).

¹⁹⁰ See *Lyons*, 461 U.S. at 97-98.

¹⁹¹ See *id.* at 105-106. Cf. *Rizzo*, 423 U.S. at 377, 380 (determining that plaintiffs lacked standing to challenge police practices); *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974) (holding that plaintiffs lacked standing to challenge racial discrimination in administration of criminal justice system).

¹⁹² Compare *Allen v. Wright*, 468 U.S. 737 (1984), with *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). In *Allen* the Court concluded that the parents of black public-school children lacked standing to challenge the Internal Revenue Service's (IRS) nonenforcement of its rule denying tax-exempt status to racially discriminatory schools. See *Allen*, 468 U.S. at 739. In *Green* the district court found that the parents of black public-school children had standing to challenge an IRS policy of granting tax exemptions to racially discriminatory schools. See *Green v. Connally*, 330 F. Supp. at 1164. Challenges to substantive policy decisions thus are different from complaints about how policies are implemented.

¹⁹³ Standing requirements are often relaxed in First Amendment cases, but as-applied challenges still remain problematic. See, e.g., *Phelps v. Hamilton*, 122 F.3d 1309, 1325-29 (10th Cir. 1997) (determining that protesters had no standing to challenge the application of a state telephone harassment statute).

¹⁹⁴ See *supra* notes 33-45 and accompanying text.

¹⁹⁵ See, e.g., *South Fla. Free Beaches, Inc. v. City of Miami*, 734 F.2d 608, 609 n.4 (11th Cir. 1984) (noting that "Florida argues that because the plaintiffs were not directly threatened with prosecution under Fla. Stat. § 877.03 they have no standing to challenge it," but refusing to address the issue because the case was disposed of on other grounds). This is not to say that a *Monell* policy is needed for injunctive relief. Causation and a likelihood of redress are necessary, as opposed to a municipal policy or fault. This distinction is important because injunctive relief requires only that a defendant be an enforcement agency, not a policymaker. See, e.g., *Diamond v. Charles*, 476 U.S. 54, 64 (1986) ("The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III."); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 966 (S.D. Miss. 1995) (noting that "[t]he municipal defendants . . . were merely enforcing a state statutory scheme which they believed to be unambiguous on its face and which reflected state, rather than county, policy," and "while the Eleventh Amendment shields the municipal defendants from liability for monetary damages, these defendants remain subject to the declaratory and injunctive powers of the court"). Hence, when local authorities enforce a facially invalid state

policy,¹⁹⁶ which more often than not leaves the victim of constitutional wrongdoing without relief of any sort.

Disincentives also flow from the risk of litigation. Incidentals such as time, costs, and government attorneys' fees might deter unconstitutional action even in the absence of likely success under § 1983. Even if the government's chances of losing are relatively small, shifted attorneys' fees under § 1988, which accompany equitable as well as legal actions, might make government think twice about questionable laws and practices. These disincentives, however, commonly do not reach the most relevant law enforcement agency: local government. Many lower courts require a *Monell*¹⁹⁷ policy for both damages liability and injunctive relief.¹⁹⁸ They then conclude that because local government enforced state policy, as opposed to its own, it is not accountable at all under § 1983.¹⁹⁹ Cities in these jurisdictions suffer no risk and can enforce even patently illegal state laws with impunity.²⁰⁰

statute, no problem obtaining injunctive relief against the local enforcement authority should exist, notwithstanding *Monell*.

¹⁹⁶ Granted, equitable relief is broader than *Monell* liability in the sense that one can attack state policies as well as local policies. Yet a concrete policy is still necessary. For example, in *Caldwell v. LeFaver*, 928 F.2d 331 (9th Cir. 1991), social workers removed the children from a custodial parent and sent the child outside the state to the other parent without affording the custodial parent due process. *See id.* at 332. The court found that *Monell* protected the county, that the state was immune under the Eleventh Amendment, and that qualified immunity protected the officials because state law plausibly authorized their actions. *See id.* at 332, 334. The court then held that because the victim "ha[d] not demonstrated any likelihood of repetition of the events that gave rise to this litigation," he lacked standing to seek injunctive relief. *Id.* at 335.

¹⁹⁷ *Monell v. Dep't of Soc. Servcs.*, 436 U.S. 658 (1978).

¹⁹⁸ *See, e.g., Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 n.12 (5th Cir. 1992) ("Because substantial evidence supports the district court's finding that the officers' conduct in this case was pursuant to a city policy we express no opinion on whether a plaintiff must establish a municipal policy or custom to obtain declaratory relief against a municipality."); *Nix v. Norman*, 879 F.2d 429, 433 (8th Cir. 1989) (requiring a plaintiff seeking injunctive relief against official to allege and prove unconstitutional policy or custom); *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495 (8th Cir. 1988) (concluding that a city must have a policy or custom for § 1983 liability to exist); *Minnesota Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 906 (Minn. Ct. App. 1996) (concluding that a city's "policy" of enforcing state law is insufficient and that a city "must make a deliberate choice to follow a course of action from among various alternatives to sustain section 1983 liability" (internal quotation marks omitted) (footnotes omitted)).

¹⁹⁹ *See, e.g., Minnesota Council of Dog Clubs*, 540 N.W.2d at 906.

²⁰⁰ *But see Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993) ("[A] city [can be] subject to prospective injunctive relief even if the constitutional violation was not the result of an official custom or policy."); *Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989) (determining that a policy is not necessary to obtain prospective injunctive relief against local government); *Santiago v. Miles*, 774 F. Supp. 775, 792-93 (W.D.N.Y. 1991) (concluding that an injunctive action under *Ex parte Young* is not an action against the state, thereby leaving cities more vulnerable to liability).

While these cases obviously misconstrue the intersection between *Ex parte Young*²⁰¹ and *Monell*,²⁰² they demonstrate the tendency of gaps and anomalies to converge on government immunity. Currently, equitable remedies are elusive in constitutional litigation. Because few meaningful remedies exist today, there is little beneficial constitutional law to dilute, at least for those unlucky enough to fall into unpopular (or unpowered) quarters. While Jeffries's abstract concern that constitutional law may bend under the weight of damages liability is justified, the experiment would do little harm in practice. Because offending governments probably will not volunteer relief, and because the present posture of defensive and prospective actions is unsatisfactory, damages liability seems more appropriate. Justice Harlan said it best: for most victims of government lawlessness, "it is damages or nothing."²⁰³

CONCLUSION

Professor Jeffries deserves praise for his frank discussion of the politics that motivate § 1983. As Professor Jack Beermann has ob-

²⁰¹ 209 U.S. 123 (1908).

²⁰² Following *Monroe v. Pape*, 365 U.S. 167 (1961), cities and counties were not subject to § 1983 actions for damages or injunctive relief. See *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973) ("We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.") Still, injunctive actions against local officials premised on *Ex parte Young* were commonplace, even though their impact ran against the local employer. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (issuing an injunction against local school officials); *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (issuing an injunction against municipal officials); *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281, 288 (6th Cir. 1974) ("A federal court may, however, award equitable relief against local officials . . ." (emphasis omitted)); *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 707 n.7 (1st Cir. 1973) ("We need not decide [whether the action could proceed against the city] since a declaration and injunction against the relevant supervising hospital officials will fully satisfy appellant's claim."). See also Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 637 (1999) (discussing *Bruno* and concluding that "the reasoning [in *Bruno*] amounted to a holding that restrictions inherent in § 1983 actions might be avoided by pleading a *Bivens* action directly under the Fourteenth Amendment."). *Monell* lifted the veil of *Monroe* immunity and left cities subject to direct actions for damages. See *Monell*, 436 U.S. at 700-01. *Monell*, however, did not purport to overrule *Ex parte Young*. Requiring a *Monell* policy for enforcement actions brought against local governmental agents misreads *Monell*. See, e.g., *Gates*, 995 F.2d at 1472 ("[T]he City can be subject to prospective injunctive relief even if the constitutional violation was not the result of an 'official custom or policy.'" (citation omitted)); *Miles*, 774 F. Supp. at 792 (holding officials subject to injunctive relief regardless of policy or custom). It also grants local government more protection than state government enjoys—a result that the *Monell* Court surely did not intend.

²⁰³ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Moreover, some semblance of fairness, gamesmanship and leadership exists in a system of rules, diluted or not, that applies to all. One cannot make a similar claim about a legal system that protects some players but not others.

served, most of the modern discussion surrounding § 1983 jurisprudence is empty rhetoric.²⁰⁴ Arguing about “conscious choice” in the context of institutional actors is particularly marginal.²⁰⁵ Understanding § 1983 requires knowledge of its relevant policies.²⁰⁶ Whether normative discussion focuses on § 1983 or the Eleventh Amendment, it is a welcome endeavor.

I differ from Jeffries over the proper balance to strike between governance and government responsibility. Like its citizens, government should be held accountable for the harms it causes. Citizens, after all, are held accountable for the wrongs they inflict on government and others. Immunities and exceptions that protect government and its officials in situations in which citizens would be held accountable send a poor message to the people. They snack of license and privilege. Although not alone, Eleventh Amendment immunity produces the same result. Because it often defeats recovery, it certainly matters.

I would like to see the Eleventh Amendment buried, not praised. Short of this, and in the absence of rewriting qualified immunity, solutions lie in the law of local liability. Enforcement often is at the hands

²⁰⁴ See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 53 (1989). Professor Beermann notes:

We do not have a developed language for addressing the political questions that lurk behind legalistic discussions of § 1983; instead we apply history that can be manipulated to justify any result, statutory “constructions” that are never quite convincing, and policy arguments that are more like incantations of magic formulae than descriptions of consequences in the real world.

Id.

²⁰⁵ The current debate over choice disregards the fact that local government often is able to enforce some laws but not others. The debate’s focus on discreet parts of an institution’s decision ignores a broader temporal picture—one in which many choices are made antecedent to the constitutional harm. Most importantly, it equates institutional choice with human choice and assumes each can be similarly understood. Collectives, whether governmental, business, or social, have no consciousness, at least not in the same way humans do. Collective thought, deliberation, and choice are legal concepts rather than factual conclusions. Hence, while the law comfortably deals with scientist for individual liability, leaving gaps to jury instructions, psychiatrists and psychologists, it struggles with liability for institutions. The incentives and complexities that drive human thought may or may not operate with artificial entities. Perhaps this is why tort law and criminal law have generally turned to respondeat superior for institutional accountability.

²⁰⁶ Jeffries also is right to call for a broader conceptual understanding of governmental liability. Justice Breyer recently asked for a reexamination of “*Monell’s* distinction between vicarious municipal liability and municipal liability based upon policy and custom.” *Board of the County Comm’rs v. Brown*, 520 U.S. 397, 437 (1997) (Breyer, J., dissenting). My sense is that Justices Breyer, Souter, Stevens, and Ginsburg do not see the logic behind the distinction. Justices Ginsburg and Stevens joined Justice Breyer. See *id.* at 430 (Breyer, J., dissenting). Justice Souter added, in his own dissenting opinion, that “Justice Breyer’s powerful call to reexamine § 1983 municipal liability afresh finds support in the Court’s own readiness to rethink the matter.” *Id.* at 430 (Souter, J., dissenting) (typeface altered). I suspect the majority, on the other hand, would return to *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled by Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978), if given the chance.

of local institutions, which enjoy neither Eleventh Amendment nor qualified immunities. Holding local government liable for enforcing unconstitutional laws, regardless of the source of those laws, is a step in the right direction.