

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty

2000

Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability

Myriam E. Gilles

Benjamin N. Cardozo School of Law, gilles@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

Recommended Citation

Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 Boston University Law Review 17 (2000).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/258>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

ARTICLES

BREAKING THE CODE OF SILENCE: REDISCOVERING “CUSTOM” IN SECTION 1983 MUNICIPAL LIABILITY

MYRIAM E. GILLES*

INTRODUCTION	18
I. MUNICIPAL LIABILITY UNDER § 1983: THE EVOLUTION OF A DOCTRINE.....	23
A. <i>Section 1983 From Monroe to Monell</i>	23
B. <i>The Rationale Behind Municipal Liability</i>	29
C. <i>Early Formulations of the “Policy” Basis for Establishing Municipal Liability</i>	32
II. THE PROBLEMS WITH “POLICY”	35
A. <i>The “Quasi-Legislative Model”</i>	35
B. <i>The “Official Action” Model</i>	37
C. <i>The “Failure to [Blank]” Model</i>	41
D. <i>The Problems With “Policy”</i>	47
III. THE LOST “CUSTOM” LANGUAGE OF § 1983.....	48
A. <i>Historical Context and Early Federal Civil Rights Legislation</i>	50
B. <i>The Ku Klux Klan Act of 1871</i>	54
C. <i>Modern “Custom” Claims</i>	60
IV. THE “CUSTOM” OF THE POLICE CODE OF SILENCE.....	63
A. <i>The Officer Whose Repeated Violence Goes Unreported</i>	67
B. <i>Officers Who Engage In Misconduct In the Presence Of Other Officers</i>	68
C. <i>Retaliation Against Officers Who Breach the Code of Silence</i>	69
D. <i>Common Threads: Injuries Result From the Police Code of Silence</i>	71
V. THE PROMISE OF “CUSTOM”	72
A. <i>The Code of Silence Causes (Colloquially) Constitutional Injury</i>	73
B. <i>The Failures of “Policy”</i>	78
C. <i>The Code of Silence Causes Constitutional Injury</i>	80

* Assistant Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. B.A., Harvard-Radcliffe Colleges, 1993; J.D., Yale Law School, 1996. My most heartfelt thanks to Stewart Sterk and Gary Friedman. I would also like to thank Jack Beermann, David Gray Carlson, E. Nathaniel Gates, Risa Goluboff, Jonathan Gutoff, Michael Herz, Melanie Leslie, David Rudenstine, Barry Scheck, Martin Schwartz, and Peter Schuck for their helpful comments and suggestions.

D. <i>The Code Is "Widespread" and Known to the Brass</i>	82
VI. THE POTENTIAL REMEDIAL EFFECTS OF "CUSTOM" CLAIMS.....	88
CONCLUSION.....	91

INTRODUCTION

Police brutality, corruption and abuse of authority have long presented American cities with some of their most pressing—and legally vexing—social problems. In 1931, President Herbert Hoover's Wickersham Commission found extensive evidence of police misconduct and violence throughout major urban departments.¹ In the 1960s, widespread police brutality sparked a series of urban riots, leading the U.S. Commission on Civil Rights to declare that "police brutality in the United States . . . is a serious and continuing problem."² In 1980, the city of Miami erupted in violent riots after a jury acquitted four police officers in the beating death of a black man.³ Again, the Commission on Civil Rights declared that "violations of the civil rights of our people by some members of police departments is a serious national problem."⁴

In 1991, the issue of police brutality exploded onto the nation's consciousness—and into the streets of Los Angeles—with the home video depicting the vicious beating of Rodney King by four police officers.⁵ More recently, the torture of Haitian-American Abner Louima by New York City police officers,⁶ and questions surrounding the shooting (or rather, the mowing

¹ See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 153-56 (1931) [hereinafter WICKERSHAM REPORT].

² UNITED STATES COMMISSION ON CIVIL RIGHTS, 1961 COMMISSION ON CIVIL RIGHTS REPORT, BOOK V: JUSTICE 26 (1961) [hereinafter 1961 U.S. COMM'N ON CIVIL RIGHTS REPORT].

³ See John Crewdson, *Fourteen Die in Miami Riot*, N.Y. TIMES, May 19, 1980, at A1 (describing the number of casualties and extent of the damage in Miami on the second day of the riot).

⁴ Letter from the U.S. Commission on Civil Rights to President James Carter (July 1980), POLICE PRACTICES AND THE PRESERVATION OF CIVIL RIGHTS: A STATEMENT BY THE UNITED STATES COMMISSION ON CIVIL RIGHTS ii-iii (1980) [hereinafter POLICE PRACTICES].

⁵ See, e.g., Martin Berg, *Chronology of the Case*, L.A. DAILY JOURNAL, Feb. 3, 1992, at 8. After the four officers were acquitted of state law charges arising from the incident, three days of riots ensued in which fifty-eight people were killed and 2283 injured. See Louis Sahagun & Carla Rivera, *Jittery L.A. Sees Rays of Hope*, L.A. TIMES, May 3, 1992, at A1 (describing the first clean-up and reconstruction efforts after "a horrific three-day nightmare"); *Toll from the Riot*, USA TODAY, Aug. 6, 1992, at 9A (listing the casualties, arrests, and property destruction from the riot). See also *infra* notes 186, 257 and accompanying text (mentioning the Rodney King beating).

⁶ Arrested after trying to break up a bar-fight, Louima was beaten by police en route to the station and taken into a station house bathroom, where officers shoved the wooden handle of toilet plunger into his rectum and mouth, causing severe damage, which required months of surgery and hospitalization. Four officers and a sergeant were indicted on federal charges ranging from sexual assault to conspiracy. See Dan Barry, *Little Help from Officers*

down) of Amadou Diallo,⁷ have heightened the public perception that police brutality and misconduct are escalating.⁸

Criminal prosecutions and administrative disciplinary proceedings against offending officers have proven largely ineffective in curbing pervasive police misconduct over the years.⁹ It is not hard to see why: the refusal of officers to report or corroborate the misconduct of their brethren,¹⁰ the reluctance of prosecutors to indict the officers upon whom they depend,¹¹ and the extraordinary protections afforded police officers under collective bargaining agreements and local laws,¹² all conspire to ensure the inefficacy of these approaches to the problems of police misconduct and brutality.

in Torture Case Inquiry, N.Y. TIMES, Sept. 5, 1997, at A22. Officer Justin Volpe pled guilty in May 1999 to civil rights charges and awaits sentencing. The other officers allegedly involved in the incident were acquitted of beating Louima and currently face charges of trying to cover up the torture of the Haitian immigrant. See Tara George, *Prosecutors: Give Volpe Life*, DAILY NEWS, Nov. 23, 1999. See also *infra* note 209 and accompanying text.

⁷ Four NYPD officers shot and killed Diallo, an unarmed 22-year old immigrant from Guinea, on February 4, 1999 outside his Bronx apartment building. The officers, who claimed they thought Diallo had a gun, fired 41 shots and hit him 19 times. See Rocco Parascandola, *Rudy Tells Rookies: Don't Forget Respect*, N.Y. POST, Feb. 19, 1999.

⁸ See, e.g., *Beating the Cops: Brutality Claims Denude City Coffers of \$98 Million*, VILLAGE VOICE, Dec. 23, 1997, at 35, 38 (reporting that in 1997, 2735 civil misconduct and brutality claims were filed against New York City police, up from 1567 in 1993).

⁹ See Recent Cases, *Constitutional Law—Searches and Seizures—Warranted Search of Party Not Suspected of Criminal Behavior is Unreasonable When Subpoena Not Shown to be Impractical*, 86 HARV. L. REV. 1317, 1327 (1973) (“Available remedies for such police misconduct—federal ‘tort’ actions, criminal prosecutions, injunctions, and internal police disciplinary measures—are generally thought to be ineffective.”).

¹⁰ The infamous police code of silence is discussed at great length in Part V. See *infra* notes 202-48 and accompanying text.

¹¹ See, e.g., David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 499 (1992) (“[P]rosecutors do not like prosecuting fellow law enforcement officers with whom they work on a day-to-day basis; evidence of such misconduct is often shielded by the code of silence; victims are more readily subject to impeachment . . . ; and juries are inclined to give the benefit of the doubt to the police.”).

¹² The so-called “Police Bill of Rights,” in effect in many cities, severely limits the ability of police administrators to suspend or dismiss an officer, even in cases where the officer is convicted of a felony. See HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY & ACCOUNTABILITY IN THE UNITED STATES* 71, n.135 (1998) [hereinafter HUMAN RIGHTS WATCH REPORT]. In many cities, even when officers are suspended for misconduct, they continue to receive salaries and other benefits. See *id.* at 71, n.135. In New York City, for example, an officer accused of misconduct is not required to speak to internal affairs investigators for 48 hours following the incident. See, e.g., Tracey Tully & Alice McQuillan, *Congress Probe of NYPD Brutality Urged*, N.Y. DAILY NEWS, March 2, 1999 (discussing the “so-called 48-hour rule, which allows cops to remain silent for two days after an incident” of alleged brutality or misconduct).

The primary vehicle afforded private citizens for addressing constitutional deprivations by local law enforcement, 42 U.S.C. § 1983, has likewise failed to live up to its promise of eradicating widespread and pernicious practices of rank and file officers.¹³ The goal of this Article is to examine the inadequacies of current civil rights jurisprudence and to suggest that, by revisiting the original language and aspirations of § 1983, we can discern a theory of civil rights liability that meaningfully addresses the forces animating much of contemporary police misconduct.

Section 1983, originally enacted as the Ku Klux Klan Act of 1871, was intended to combat the widespread practices of local officials, including rank-and-file municipal officers, that impeded implementation of the principles enshrined in the Fourteenth Amendment.¹⁴ In passing the statute, the 42nd Congress understood that, while state and local legislatures were swiftly passing laws throughout the South to conform to the mandates of the Reconstruction amendments, unwritten codes guiding the conduct of local officials in southern strongholds undermined the new constitutional and statutory edicts.¹⁵

The architects of the original Ku Klux Klan Act used the term "custom" to refer to the nefarious unwritten codes of conduct pursuant to which local officials terrorized freedmen and Republicans, and failed to enforce Reconstruction era laws against dissenters.¹⁶ The proscriptive provisions of the

¹³ Commentators have long noted the ineffectiveness of civil rights laws in addressing police brutality and misconduct. See, e.g., Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 753-54 (1993) (stating that § 1983 is ineffective because actions under that section are prohibitively expensive to poor minorities, plaintiffs have only limited ability to enjoin dangerous police techniques, and juries tend to find police officers more credible than plaintiffs); David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 182 (1996) (finding it "obvious that § 1983 does not reach the low-level police uses of force that permeate the history" of policing).

¹⁴ Civil Rights Act of 1871, Ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1996)); see also *Monroe v. Pape*, 365 U.S. 167, 174-75 (1961) ("It was . . . the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum behind" the statute); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1154 (1977) ("[T]he Act was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages."). See also *infra* notes 140-83 and accompanying text (describing the history of federal Civil Rights legislation).

¹⁵ See *Monroe*, 365 U.S. at 180 ("[B]y reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."); see also *infra* notes 157-74 and accompanying text (discussing the state of affairs that prompted the passage of the Ku Klux Klan Act).

¹⁶ See Eric Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 229 (1979) ("The unconstitutional customs with which supporters of section 1983 were

Act, which survive *verbatim* today in the text of § 1983, provide federal remedies for the unconstitutional actions of local officials acting under color of “any statute, ordinance, regulation, custom, or usage, of any State.”¹⁷

While the particular “customs” that prevailed amongst deputy sheriffs, local prosecutors and Klansmen in the postbellum South have largely subsided, other “customs,” in the form of unwritten codes of conduct among modern law enforcement officials regularly impair rights guaranteed by the Fourteenth Amendment today. Indeed, I will argue that institutionalized, unwritten “customs”—within the original meaning of the statute—underlie many, if not most, of the constitutional deprivations suffered at the hands of contemporary police officers.

A primary focus of this Article is the failure of current § 1983 municipal liability jurisprudence to address these unconstitutional “customs.”¹⁸ Beginning with its 1978 decision in *Monell v. Department of Social Services of the City of New York*,¹⁹ the Supreme Court has delineated the scope of certain types of unlawful official “policies” that may give rise to municipal liability under § 1983.²⁰ As a result, a generation of lawyers and judges has struggled to fit particular cases within the pigeonholes carved out by the handful of municipal “policy” cases the Court has fortuitously chosen to decide. But the truly animating forces of modern day police misconduct are not to be found in the “policy pigeonholes” recognized by the Court. Rather, these forces are functions of “custom,” as understood by the framers of the original Ku Klux Klan Act: pervasive unwritten codes of conduct followed by rank and file officers that regularly abridge the constitutional rights of the citizenry.

The concern here lies not merely with the proper classification of municipal liability claims brought under the statute. Rather, I will argue that by concentrating on a “policy” requirement for imposing municipal liability, the Court has turned a blind eye toward the one feature of the statute that captures the realities of modern law enforcement practices. “Custom” claims for municipal liability, I contend, have the potential to address a wide spectrum of

concerned were [not] . . . exercises of final or delegated authorities, but the widespread and persistent practices of ordinary sheriffs, judges and prosecutors.”); see generally J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 682-84 (2d ed. 1961); see also *infra* notes 175-86 and accompanying text (discussing the roots of “custom” in the statute).

¹⁷ 42 U.S.C. § 1983 (Supp. 1996).

¹⁸ As a threshold matter, I take it as true that municipal liability for police misconduct is necessary for addressing unconstitutional “customs” because individual liability against offending officers has little practical effect. See *infra* notes 52-58 and accompanying text (discussing the prevalence of state and local indemnification statutes and the problems of incentives, individual liability, and accountability).

¹⁹ 436 U.S. 658 (1978); see also *infra* notes 28-32, 59-61 and accompanying text (detailing the facts of the case and the Supreme Court’s analysis).

²⁰ See *infra* Part III (divining three models of “policy” from the Court’s post-*Monell* § 1983 jurisprudence).

recurring unconstitutional conduct on the part of low-level officials that simply go unaddressed by current law.

On one level, a proper understanding of a cause of action for an unlawful "custom" under § 1983 will enable entire categories of plaintiffs to seek meaningful compensatory relief that would otherwise be unavailable. Of at least equal significance, judicial determinations that locate municipal fault within a "custom" maintained by rank and file officers may induce local governments to focus attention and resources upon the very cultures and practices that drive constitutional violations in modern law enforcement organizations, thus reducing future violations on an institutional scale.²¹

In Part I of this article, I will review the evolution of the doctrine of municipal liability under § 1983 and consider some of the underlying rationales for imposing liability on local government entities for the constitutional violations of individual officials. In Part II, I will survey the current landscape of § 1983 jurisprudence, with particular focus on the various species of municipal "policy" that the Court has created or recognized as bases for the imposition of municipal liability. I will show that the municipal liability theories currently endorsed by the Court fail to address the most pervasive and serious unconstitutional practices among rank and file law enforcement officials.

In Part III, I will discuss the largely forgotten "custom" basis for establishing municipal liability under § 1983. Drawing on the legislative and social history surrounding the statute, I will critique the sparse treatment of "custom" by the federal courts from 1871 to the present, and lay the groundwork for a theory of "custom" that meaningfully addresses unconstitutional practices in contemporary policing.

In Part IV, I will focus on a particularly pernicious custom, the "police code of silence," as a means of illustrating how § 1983's "custom" prong can address pervasive unconstitutional police practices. In this connection, I will point out how the code of silence *causes*—in both the colloquial and tort law senses of causation—constitutional deprivations on an everyday basis. By reviewing some familiar and recurring fact patterns, I will show how the code of silence, in its various forms, is a necessary predicate for most incidents of police brutality, corruption and misconduct.

In Part V, I will outline the contours of a claim that squarely challenges the maintenance of the police code of silence as an unlawful custom within the meaning of § 1983. In doing so, I will demonstrate the power of "custom"

²¹ See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."); see also *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978) (observing that the policies underlying § 1983 include preventing abuses of power); *Carey v. Phipps*, 435 U.S. 247, 256-57 (1978) ("Congress intended that awards under § 1983 should deter the deprivation of constitutional rights . . ."); see also *infra* notes 321-31 and accompanying text (discussing the possible deterrence effects of § 1983 "custom" claims).

claims to address a broad array of constitutional deprivations that cannot be remedied by the municipal liability theories the Supreme Court has endorsed to date. Finally, in Part VI, I will briefly consider the potential remedial effects of § 1983 municipal liability claims based on unconstitutional “customs.”

I. MUNICIPAL LIABILITY UNDER § 1983: THE EVOLUTION OF A DOCTRINE

A. Section 1983 From Monroe to Monell

The text of § 1983 provides:

Every person who, under color of *any statute, ordinance, regulation, custom, or usage*, of any State . . . , subjects, or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²²

For almost a century after its passage, the statute lay dormant as the federal courts narrowly construed the “under color of” state law provision.²³ At the same time, the Supreme Court took a restrictive view of the Privileges and Immunities clause of the Fourteenth Amendment, which § 1983 was created to enforce.²⁴ Prior to the Court’s 1961 landmark decision in *Monroe v. Pape*,²⁵

²² 42 U.S.C. § 1983 (Supp. 1996) (italics added).

²³ See, e.g., *Barney v. City of New York*, 193 U.S. 430, 438-41 (1904) (holding that state officers’ conduct did not amount to state action because it was unauthorized and prohibited by state law). As Susanah Mead has noted, however, “there is some question of whether the Court ever really ‘held’ that the action of state officers in violation of state law could not constitute the state action required under the Fourteenth Amendment.” Susanah M. Mead, *Evolution of the ‘Species of Tort Liability’ Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved From Extinction?*, 55 *FORDHAM L. REV.* 1, 18, n.90 (1986). Nevertheless, by the mid-20th century, it was well-established that actions taken in violation of state law did not constitute state action for purposes of § 1983. See *Monroe v. Pape*, 365 U.S. 167, 212-17 (1961) (Frankfurter, J., dissenting in part) (citing numerous cases in discussing the court’s prior construction of the “under color of” phrase).

²⁴ See, e.g., *Butchers’ Benevolent Ass’n v. Crescent City Live-Stock Landing and Slaughter-House Co.*, 83 U.S. (16 Wall.) 367, 378 (1873) (concluding that the “Privileges and Immunities” clause of the Fourteenth Amendment did not create any new substantive rights that were not already inherent in national citizenship). The holding of the *Slaughter-House* case effectively eliminated most civil rights from the purview of the Fourteenth Amendment and severely limited the reach of § 1983. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 549-55 (1876) (finding that the Civil Rights Act of 1870 did not provide a federal remedy for deprivation of the right to assemble peaceably because that right pre-dated the Constitution and thus was not a right “granted or secured by the Constitution,” and that the Fourteenth Amendment does not address the deprivation of rights by private citizens); *The Civil Rights Cases*, 109 U.S. 3, 13-25 (1883) (applying stringent state-action requirements to a claim alleging deprivations of rights secured by the Fourteenth Amendment in holding a provision of the Civil Rights Act of 1875

plaintiffs could only invoke § 1983 when the unlawful action complained of was "taken in either strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws."²⁶ Because states would rarely authorize a local official to violate a citizen's constitutional rights, this narrow interpretation of the statute precluded federal remedies in most cases.²⁷

The plaintiffs in *Monroe*, alleging Fourteenth Amendment violations, sought damages under § 1983 against individual police officers and, under a respondeat superior theory, against the officers' employer, the city of Chicago.²⁸ The *Monroe* Court greatly expanded the scope of § 1983 by holding that the statute provides a remedy to persons deprived of constitutional

unconstitutional). The late Justice Blackmun observed that, with its rulings in the *Slaughter-House Cases* and the *Civil Rights Cases*, the Court "cut the heart out of the Civil Rights Acts." 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, 9 (1985); see also Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 204-11 (1993) (discussing the Court's narrow interpretation of Reconstruction-era amendments and legislation).

²⁵ 365 U.S. 167 (1961).

²⁶ *Id.* at 213.

²⁷ See, e.g., *Barney*, 193 U.S. at 430. Given the narrow interpretation of the statute and the difficulty of showing state authorization for unconstitutional actions, it should be of little surprise that only 21 cases were brought under § 1983 between 1871 and 1920. See Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951) (asserting that the disadvantages of § 1983, such as the narrow holdings in *The Slaughter House Cases* and *The Civil Rights Cases*, coupled with the statute's imprecise draftsmanship, explain the low volume of cases brought under the statute during this period).

²⁸ Petitioners' original complaint alleged the following: on October 29, 1958, at 5:45 a.m., thirteen Chicago police officers broke into the Monroe apartment and forced the family at gunpoint to leave their beds and stand naked in the center of the living room; one of the officers beat Mr. Monroe, calling him "nigger" and "black boy," while another officer pushed Mrs. Monroe and hit and kicked the children; the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; he was not brought before a magistrate, although numerous magistrates' courts were accessible; he was not advised of his procedural rights; he was not permitted to call his family or an attorney, and was subsequently released without criminal charges having been filed against him. In taking these actions, the officers had failed to obtain a search or arrest warrant for Monroe or anyone else. See *Monroe*, 365 U.S. at 203 (Frankfurter, J., dissenting). On the basis of these allegations, the Monroe family sought damages against the individual police officers and the City of Chicago. The District Court dismissed the complaint for failure to state a claim under § 1983, and the Court of Appeals for the Seventh Circuit affirmed. See *Monroe v. Pape*, 272 F.2d 365, 365-66 (7th Cir. 1960) (affirming the trial court's dismissal).

rights by an official's abuse of position.²⁹ The Court held that litigants could use § 1983 to remedy a constitutional injury inflicted by a local official whose "[m]isuse of power, possessed by virtue of state law [was] made possible only because the wrongdoer [was] clothed with the authority of state law."³⁰ In essence, *Monroe* opened every unconstitutional action taken in official capacity to a potential § 1983 claim against the offending officer.³¹ However, the *Monroe* Court rejected plaintiff's claim against the City of Chicago, holding that municipalities were not "persons" subject to suit within the meaning of § 1983.³²

In the seventeen years between *Monroe* and *Monell*, the federal courts confronted a number of issues resulting from the grant of absolute municipal immunity.³³ In particular, problems arose where plaintiffs were completely

²⁹ See *Monroe*, 365 U.S. at 172. The Court further expanded the breadth of § 1983 by holding that specific intent to deprive a person of a federal right is not required in order to state a claim under the statute. Rather, § 1983 claims must be read against the "background of tort liability that makes a man responsible for the natural consequences of his action." *Id.* at 187. Finally, the Court held that a § 1983 plaintiff need not first exhaust state judicial remedies before proceeding in a federal forum. *Id.* at 183.

³⁰ *Id.* at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

³¹ Writing in 1965, Professor Shapo was prescient in describing the potential impact of *Monroe*:

It thus appears that what is developing is a kind of 'constitutional tort.' It is not quite a private tort, yet contains tort elements; it is not 'constitutional law,' but employs a constitutional test It may well be argued that, given the broad language of *Monroe* construing the already broad language of the statute, every policeman's tort and every denial of a license by a state or local board will give rise to an action under § 1983.

Marshall Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 323-24 (1965).

³² See *Monroe*, 365 U.S. at 187-92. The *Monroe* Court based its interpretation of the statute on the 42nd Congress' refusal to adopt the proposed "Sherman Amendment." The Sherman Amendment would have imposed liability on municipalities for damages caused by private persons "riotously and tumultuously assembled." *Id.* at 188 (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 663 (1871)). The *Monroe* Court found that the Congressional refusal to hold municipalities liable for damages occasioned within their borders by third parties demonstrated the intent that municipalities not be considered persons subject to liability under § 1983. *Id.* at 191. For a critique of the Court's legislative history analysis in *Monroe*, see Ronald M. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1492-94 (1977) (written two years before *Monell* was decided, Levin argues that *Monroe*'s legislative history interpretation is incorrect and criticizes the municipal immunity doctrine on public policy grounds); see also Reed Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U. L. REV. 770 (1975); Note, *Developing Governmental Liability Under § 1983*, 55 MINN. L. REV. 1201, 1207 (1971) (reasoning that since the *Monroe* Court "actually faced an open choice as to whether or not municipalities could be persons under § 1983 . . . the court actually may have reached its decision on policy grounds").

³³ For example, a number of post-*Monroe* plaintiffs sought an end-run around municipal

barred from seeking a federal remedy for constitutional injuries because of the grant of absolute or qualified immunity to individual officers,³⁴ coupled with the absolute immunity of their municipal employers.³⁵ Under the then-developing doctrine of qualified immunity, an individual officer could escape liability under the statute by proving that he had acted in good faith.³⁶ Thus, if

immunity to damages by bringing actions against municipal officials in their "official capacity," seeking declaratory or injunctive relief. *See, e.g.,* *Harkless v. Sweeny* Indep. Sch. Dist., 300 F. Supp. 794, 795 (S.D. Tex. 1969), *rev'd*, 427 F.2d 319 (1970), *cert. denied*, 400 U.S. 991 (1971) (black school teachers discharged from their positions brought § 1983 action against school board members and superintendent in their official capacity, seeking equitable relief in the form of reinstatement); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 503 (1969) (plaintiffs sought equitable relief against school suspension for wearing black armbands to protest the Vietnam War). In *City of Kenosha v. Bruno*, however, the Supreme Court sealed this loophole by extending *Monroe's* holding to shield municipalities from declaratory and injunctive suits under § 1983. *See* *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973) (holding that municipalities "are outside of [§ 1983's] ambit for purposes of equitable relief as well as for damages"). *See generally*, Don B. Kates, Jr., *Suing Municipalities and Other Public Entities Under the Federal Civil Rights Act*, 4 CLEARINGHOUSE REV. 177, 177 (1970) ("One of the most irksome technical problems of litigation under 42 U.S.C. § 1983 . . . is the question of whether public entities are proper defendants, and if so, for what forms of relief.").

³⁴ Prior to *Monroe*, the Court had established absolute §1983 immunity for several types of government officials. *See, e.g.,* *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) (recognizing absolute immunity of prosecutors); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (recognizing that absolute immunity of judges for "acts committed within their judicial discretion" was preserved under § 1983); *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951) (recognizing absolute immunity of legislators from liability under § 1983). In two post-*Monroe* cases, the Court developed the doctrine of qualified immunity for certain categories of executive officers sued under § 1983. *See* *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (finding that the Governor of Ohio and other executive officials involved in the Kent State shootings had a qualified immunity from suit that varied with "the scope of the discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action"); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (holding, implicitly, that school officials were not liable for imposing disciplinary penalties so long as they could not reasonably have known that their action violated students' constitutional rights, and provided they did not act with malicious intent to cause constitutional or other injury).

³⁵ *See, e.g.,* *Bishop v. Wood*, 426 U.S. 341, 343 (1976) (applying *Monroe*, the Court held that a policeman who had been terminated from his employment without a pretermination hearing could not sue his municipal employer under § 1983 because the municipality was not a 'person' within the meaning of the statute).

³⁶ Traditionally, qualified ("good faith") immunity had both objective and subjective components. *See* *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("The objective element involves a presumptive knowledge of [constitutional rights]. . . . The subjective component refers to 'permissible intentions.'" quoting *Wood*, 420 U.S. at 322)). The *Harlow* court rejected the subjective prong of the good faith standard, however, citing the high litigation costs and resultant disruption to government that attended allegations of malice. *See*

an officer deprived a citizen of a constitutional right, but had a good faith belief that his actions were authorized by the municipality, the citizen-plaintiff was left without a remedy against either the officer (because of qualified immunity) or the municipality that authorized his unconstitutional actions (because of absolute municipal immunity under *Monroe*).

Related problems arose as plaintiffs found that individual officers—who were the only permissible defendants under *Monroe*—were often judgment-proof, or their identities were unknown.³⁷ The petitioners in *Monroe* raised this enforcement problem, but the Court did not pay it much heed.³⁸

In the mid-1970s, certain members of Congress introduced a bill for consideration which would have made municipalities suable “persons” within the meaning of § 1983.³⁹ Before the bill was considered, however, the Court decided *Monell v. Department of Social Services of the City of New York*.⁴⁰

Harlow, 457 U.S. at 816-18 (articulating a new standard wherein “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate . . . constitutional rights of which a reasonable person would have known”). *Id.* at 818 (emphasis added).

³⁷ See Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 786 (1992) (noting that even where a § 1983 plaintiff prevailed, “the officer was likely to be judgment-proof”); see also Susanah M. Mead, 42 U.S.C. § 1983 Municipal Liability: *The Monell Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 527 (1987) (“The individual actually responsible for the civil rights violation may be difficult to identify, may be judgment-proof, or may be entitled to assert a qualified or absolute immunity.”).

³⁸ As petitioners’ attorneys and amici argued unsuccessfully in *Monroe*, holding municipalities liable for constitutional torts is necessary “because private remedies against officers . . . are conspicuously ineffective, and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level.” *Monroe v. Pape*, 365 U.S. 167, 191 (1961). The *Monroe* Court, however, did not reach these considerations. See also *infra* notes 45-54 and accompanying text.

³⁹ The proposed Civil Rights Improvement Act of 1977, considered by committees in both the 95th and 96th Congresses, would have imposed liability on municipalities and their agencies when officers or employees directly responsible for the conduct of the subordinate officer or employee who committed such violation:

(A) directed, authorized, approved, or encouraged any action by such subordinate officer or employee which resulted in such violation, or (B) failed to act in any manner to remedy a pervasive pattern of unconstitutional or unlawful conduct engaged in by such subordinate officer or employee which, in the absence of remedial action, was likely to continue or recur in the future.

S. 35, 95th Cong., 123 CONG. REC. 1, 557-58 (1977).

⁴⁰ 436 U.S. 658 (1978). In *Monell*, female employees of the Department of Social Services and the Board of Education of the City of New York brought a § 1983 class action against the department, the board and its chancellor, and the city and its mayor. Plaintiffs alleged that the defendants unconstitutionally and as a matter of official policy forced pregnant employees to take unpaid leaves of absence even where such leaves were not medically necessary. The individual defendants were sued solely in their official capacities,

In *Monell*, the Court once again considered whether municipal entities should be included within the meaning of "persons" subject to liability under the statute.⁴¹ Undertaking a "fresh analysis" of the legislative history of § 1983, the Court found that "Congress, in enacting [the statute], intended to give a broad remedy for violations of federally protected civil rights."⁴² The Court also found that the framers of § 1983 had urged that the statute be construed "liberally" and with the "largest latitude" consistent with the Act's remedial purpose to "aid [in] the preservation of human liberty and human rights."⁴³ Applying this liberal construction to the language of the statute, the Court declared that "it beggars reason to suppose that Congress would have exempted municipalities from suit."⁴⁴

with the plaintiffs seeking declaratory and injunctive relief against all defendants and back pay for the periods of the allegedly unlawful forced leave. The district court held the claims for declaratory and injunctive relief moot because the City of New York and the Board of Education changed their maternity leave policies after the suit was filed. The lower court then found the prior policy unconstitutional, but denied back pay because any such reward would ultimately come from the city, thereby circumventing the absolute immunity of municipalities under *Monroe*. The Second Circuit affirmed. See *Monell v. Department of Social Services of the City of New York*, 532 F.2d 259, 263 (2d Cir. 1976).

⁴¹ *Monell*, 436 U.S. at 668. The *Monell* Court reasoned that, while the rejected Sherman Amendment would have made municipalities liable for acts in which they did not participate, nothing in the legislative history indicated that municipalities could not be held liable for their own fourteenth amendment violations. *Id.* at 683.

⁴² *Monell*, 436 U.S. at 685 (citing CONG. GLOBE, 42nd Cong., 1st Sess. 68 (1871)) ("As has been again and again decided by your own Supreme Court of the United States . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.") (statement of Rep. Shellabarger).

⁴³ *Id.* at 684.

⁴⁴ *Id.* at 687. "Since Congress intended [Section 1983] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from [its] sweep." *Id.* at 686. *Monell's* holding of local government liability applies only to compensatory damages; local governments are absolutely immune from punitive damages liability. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (reasoning that municipalities had absolute immunity from punitive damages at common law and that such immunity was compatible with both the purposes of § 1983 and general public policy). As to compensatory damages, local governments, unlike individual officials, are not protected by the affirmative defense of qualified immunity. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (stating that there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify municipal qualified immunity). Additionally, state sovereign immunity rules cannot be applied by state courts to bar § 1983 claims against local governments. See, e.g., *Howlett v. Rose*, 496 U.S. 356, 367-83 (1990) (finding that the Supremacy Clause mandates that state courts must hear § 1983 claims brought in a court otherwise competent to hear that type of claim).

The *Monell* Court also analyzed the statute's cause in fact language⁴⁵ and found that it precluded the application of respondeat superior to § 1983 liability.⁴⁶ Consequently, the Court concluded that § 1983 municipal liability would only apply when "execution of a government's *policy or custom*" inflicts the injury.⁴⁷ Through this "policy or custom" requirement, the Court purported to insulate municipalities from automatic vicarious liability under the statute and to ensure that claimants firmly establish the causal connection between municipal action and constitutional injury.⁴⁸

B. *The Rationale Behind Municipal Liability*

Monell's holding that municipalities could be held liable under § 1983 has profound implications for promoting the statute's goals of compensation and deterrence. First, municipal liability for civil rights violations is a precondition to any meaningful recovery of money damages given the development of the qualified immunity defense⁴⁹ and other well-chronicled difficulties of litigating

⁴⁵ See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978) ("[A]ny person who . . . shall subject, or cause to be subjected, any person . . . to the deprivation of any rights . . .").

⁴⁶ See *id.* at 691-92 (ruling that "a municipality cannot be held liable under § 1983 on a respondeat superior theory"). In addition, the Court considered two policy justifications for respondeat superior liability—accident reduction and loss-spreading under an insurance approach—but found that Congress had rejected both justifications during the legislative debates on §1983. See *id.* at 693-94.

⁴⁷ *Id.* at 694 (emphasis added).

⁴⁸ Specifically, the Court found that "the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort," and therefore "a municipality cannot be held liable solely because it employs a tortfeasor." *Id.* at 691. As Professor Nahmod has argued, there are sound policy reasons for not applying respondeat superior theory to § 1983 cases:

Respondeat superior in tort law is the functional equivalent of strict liability. Because strict liability focuses on risk allocation, it has been characterized as inappropriate in a § 1983 setting. Also, in a tort context, the master usually bears some responsibility for choice of servants, while a superior defending a § 1983 action frequently has not chosen his or her subordinates.

. . . Consequently, in light of *Monell* and these policy reasons, the superior does not and should not invariably have a constitutional duty, solely by reason of position, to compensate a person whose constitutional rights have been violated by subordinates. What is required in order for the superior to have such a duty is that the superior personally act unconstitutionally as well. That is, the superior must have possessed the requisite state of mind for the constitutional violation and must have played a causal role in plaintiff's constitutional deprivation.

1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 3.22, at 239 (3d ed. 1991) (footnotes omitted).

⁴⁹ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. at 818 (holding that individual officials performing discretionary functions are generally "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional

claims against individual officers.⁵⁰ The reality is that individual officers are not often forced to pay damage awards from their own pockets.⁵¹ If damage awards are levied, local and state governments often provide for indemnification,⁵² though these indemnification provisions are themselves wrought with uncertainty and difficulties.⁵³ Most significantly,

rights”).

⁵⁰ Some commentators have recognized that § 1983 suits against individual defendants rarely achieve the compensatory goal of the statute because of plaintiffs' inability to identify the particular government official who caused the harm, and the inability of individual officials to satisfy judgments against them. See Mead, *supra* note 37, at 539. Also, juries may be more sympathetic to lower-level officials and thus less inclined to return verdicts against them. See, e.g., Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 548 (1993) (“[J]urors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department policy as an obedient employee.”); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456-57 (1978) (noting that jurors are often unaware of the state's indemnification policies and therefore “understandably succumb[] easily to the argument, stated or implied, that recovery should be denied because the damages must come from the paycheck of a hard-working, underpaid police officer”); PETER SCHUCK, *SUING GOVERNMENT* 15 (1983) (apart from officials' immunities, “shallow pockets . . . are likely to make suits against individual officials unavailable as a practical matter”).

⁵¹ See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (noting that in a survey of cases where payments to victims of constitutional wrongs were recorded, “no case . . . showed that an individual official had borne the cost of an adverse constitutional tort judgment”).

⁵² See, e.g., ALA. CODE § 41-9-74 (1975); ARIZ. REV. STAT. ANN. § 41-621 (West Supp. 1989); ARK. CODE ANN. § 21-9-203 (Michie 1987); CAL. GOV'T CODE § 825 (1980); COLO. REV. STAT. § 24-10-110(1)(b)(I) (1982); CONN. GEN. STAT. ANN. §§ 4-16a, 7-465 (West Supp. 1985); DEL. CODE ANN. tit. 10, §§ 4001-4002 (Supp. 1984); FLA. STAT. ch. 111.071 (1982); GA. CODE ANN. § 45-9-60 (1982); IDAHO CODE § 6-903(b), (c) (1975); 65 ILL. COMP. STAT. ANN. 5/1-4-5 (West 1980); IOWA CODE ANN. § 669.1 *et seq.* (West 1993); KAN. STAT. ANN. §§ 75-6101-6116 (1984); LA. REV. STAT. ANN. §§ 13:5108.1-5108.2 (West Supp. 1985); ME. REV. STAT. ANN. tit. 14, § 8112 (West 1980); MD. CODE ANN., STATE GOV'T §§ 12-404, 12-405 (1984); MICH. COMP. LAWS ANN. § 691.1408 (West Supp. 1985); MISS. CODE ANN. § 25-1-47(2) (1972); MO. ANN. STAT. § 105-711 (West Supp. 1985); MONT. CODE ANN. § 2-9-305 (1985); NEV. REV. STAT. ANN. §§ 41.0349-035 (Michie 1983); N.H. REV. STAT. ANN. §§ 31:105, 31:106, 99-D:2 (1983); N.J. STAT. ANN. §§ 59:10-1 to -4 (West 1982); N.M. STAT. ANN. § 41-4-4 (Michie 1985); N.Y. GEN. MUN. LAW § 50-j (McKinney Supp. 1984); N.Y. PUB. OFF. LAW § 17(3)(a) (McKinney Supp. 1984); N.C. GEN. STAT. § 160A-167 (1983); OR. REV. STAT. § 30.285 (1983); R.I. GEN. LAWS § 9-31-12 (Supp. 1984); S.D. CODIFIED LAWS § 3-19-1 to -2 (Michie 1980); TEX. CIV. PRAC. & REM. CODE ANN. § 104.002(a)(2) () (West 1986); UTAH CODE ANN. §§ 63-30-36 to -37 (Supp. 1985); W. V.A. CODE § 8-12-7(b) (1976); WIS. STAT. ANN. § 895.46 (West 1983 & Supp. 1985); WYO. STAT. ANN. § 1-39-104(c) (Michie Supp. 1985).

⁵³ Section 1983 plaintiffs can hardly rely on state indemnification provisions as a

indemnification statutes invariably afford the municipality the unilateral option of disclaiming coverage in broad categories of cases.⁵⁴ A system of municipal liability better serves the compensatory goal of § 1983 because it affords victims of constitutional wrongs the confidence that there exists a defendant from which they may actually recover compensatory damages.

Municipal liability also serves the deterrence goal of § 1983 better than individual officer liability. Some commentators have argued that “when individual officials are held personally liable for their violations of law, they are likely to be overdeterred by their fear of suit and engage in self-protective behavior at the cost of vigorous performance of their duties.”⁵⁵ Aside from the overdeterrence of individual officers, it seems clear that where liability falls solely on individual officers, municipalities have little incentive to develop comprehensive responses to rampant unconstitutional practices. Municipalities generally write off the misconduct of an individual officer to the “bad apple theory,” under which municipal governments or their agencies attribute misconduct to aberrant behavior by a single “bad apple,” thereby deflecting attention from systemic and institutional factors contributing to recurring constitutional deprivations.⁵⁶ The “bad apple theory” is essentially an

guarantee of compensation for constitutional injuries committed by local law enforcement officers. These indemnification provisions tend to differ significantly as to the scope of coverage, extent of local autonomy over terms and conditions of reimbursement, and limits on amounts of reimbursement. See generally SCHUCK, *SUING GOVERNMENT*, *supra* note 50, at 88 (discussing the many variations among state indemnification statutes).

⁵⁴ For example, section 50-k of the New York General Municipal Law allows New York City to disclaim indemnification of officials for actions that violate any rule or regulation of the agency, or that are intentional or reckless, or that fall outside the scope of employment. See N.Y. GEN. MUN. LAW § 50-k(3). Essentially, any serious constitutional tort provides the City of New York the option of disclaiming coverage. In general, most state and local indemnification statutes provide for denial of reimbursement on similarly broad grounds, making “indemnification . . . neither certain nor universal.” SCHUCK, *SUING GOVERNMENT*, *supra* note 50, at 85; see also William C. Mathes & Robert T. Jones, *Toward a “Scope of Official Duty” Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 912 (1965) (“[I]t appears that the indemnity practice is so irregular that its function as a ‘conduit to governmental liability’ is fortuitous at best.”).

⁵⁵ Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2018 (1998); see also Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640 (1982) (arguing that the imposition of tort remedies may overdeter police officers because these officers personally pay for violations, but are not then compensated for lawful activity); SCHUCK, *supra* note 50, at 76 (arguing that the threat of suit may lead police officers to avoid conduct that they view as “close to the line” and therefore fail to discharge their duties properly).

⁵⁶ In the police context, one report found that “[t]hose who claim that each high-profile human rights abuse is an aberration, committed by a ‘rogue’ officer, are missing the point: human rights violations persist in large part because the accountability systems are so defective.” HUMAN RIGHTS WATCH REPORT, *supra* note 12, at 2. Others have noted that the tendency to latch onto the “bad apple” theory of police brutality and misconduct can prove

institutionalized belief system ensuring that fault for unconstitutional conduct—even when it results in large damage awards against individual officers or city-approved settlements—will never be localized in the culture of the municipal agency itself. Holding the municipality itself liable for injuries caused by its officials makes it more difficult to take refuge in the “bad apple theory” and more likely that the municipality will take steps to remedy the broader problems.⁵⁷ Furthermore, municipal entities “possess the resources and broad vantage point with which to identify the particular deficiencies, and . . . take appropriate corrective action,”⁵⁸ thereby furthering the deterrence goal of § 1983.

C. *Early Formulations of the “Policy” Basis for Establishing Municipal Liability*

Monell itself was a “clear case” for finding municipal liability based on a “policy.”⁵⁹ There, a written city-wide policy requiring pregnant women to take unpaid maternity leaves before such leaves were medically necessary directly caused plaintiffs’ injuries.⁶⁰ Because the existence of an unconstitutional official policy was evident, the Court left “to another day” a determination of

an intractable problem to reforming police practices. For example, Cohen and Feldberg argue that police apologists often resort to the “bad apple” theory of police immorality in response to the periodic public scrutiny occasioned by an act of police misconduct:

[I]n response to documented cases of corruption and brutality, police administrators would declare them merely isolated deeds by “bad apple” officers. Bad apples were morally corrupt individuals, rotten on the inside and hiding under a skin of respectability, and who were only out for themselves. The vast majority of officers (the remainder of the barrel), [the public was] assured, were morally upstanding and beyond temptation or excess. The rotten apples needed removal so that the barrel’s other apples would not be contaminated; police administrators and apologists never conceded that the barrel might, itself, have been contaminated, much less that it might be the source of the problem.

HOWARD S. COHEN & MICHAEL FELDBERG, *POWER AND RESTRAINT: THE MORAL DIMENSION OF POLICE WORK* 10-11 (1991).

⁵⁷ See, e.g., Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 49-50 (1980) (arguing that imposing direct liability on local governments would induce the “systemic changes” necessary to correct many constitutional injuries resulting from “‘systemic problems’ within government institutions, rather than from the specific acts of one who superficially may appear to be responsible”).

⁵⁸ Note, *supra* note 55, at 2019.

⁵⁹ See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 713 (1978) (Powell, J., concurring) (noting that although there are “substantial line-drawing problems in determining ‘when execution of a government’s policy or custom’” results in municipal liability, *Monell* is a “clear case” because it “involves formal, written *policies* of a municipal department” (emphasis added)).

⁶⁰ See *id.* at 661-62 (female employees seeking backpay for periods of forced leave under official policy).

“the full contours of municipal liability.”⁶¹

The Court has since decided ten cases implicating *Monell's* “policy or custom” requirement.⁶² The plaintiffs in all of these cases premised their claims of municipal liability on the existence of an unconstitutional “policy,”⁶³

⁶¹ *Id.* at 695. In the short run, the Court left this task not to another day, but to the lower federal courts, leading to diverse and often conflicting results. See, e.g., *infra* note 85 and accompanying text (discussing the disagreement among lower courts over what constitutes final policymaking authority for purposes of municipal liability).

⁶² See Board of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 404 (1997) (ruling that in addition to identifying conduct attributable to the municipality, “a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights”); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736-37 (1989) (remanding case to lower court to determine whether the decisions of the superintendent of a school district “represent the official policy of the local governmental unit” in the area of employee transfers); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-91 (1989) (finding that a municipality may be held liable under the statute for failing to train its employees if such failure is “deliberately indifferent” to the rights of citizens); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988) (finding that the mere failure of supervisory officials to review a subordinate’s wrongful decision to lay off plaintiff “does not amount to a delegation of policymaking authority”); *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (*per curiam*) (ruling that a jury’s finding that a police officer committed no constitutional injury precludes a finding of basis for municipal liability against the city); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (finding that only decisions of those “officials responsible for establishing final policy with respect to the subject matter in question” may form the basis for municipal liability under § 1983); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (finding that a single act of excessive force by a police officer cannot by itself establish proof of a “policy” of inadequate training for municipal liability); *Tennessee v. Garner*, 471 U.S. 1, 22 (1985) (remanding case to lower court to determine whether the policy of the police department rendered it liable under *Monell* for the unconstitutional use of deadly force by an individual police officer); *Brandon v. Holt*, 469 U.S. 464, 471-73 (1985) (ruling that plaintiffs may amend their pre-*Monell* action to add city as defendant because they had originally sued the director of the city’s police department in his official capacity); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (allegation that police engaged in high-speed chase were deliberately indifferent to passenger’s survival found insufficient to state substantive due process claim for purposes of municipal liability under § 1983).

In another case, the Court unanimously rejected the “heightened pleading standard” in cases alleging municipal liability, concluding that “[i]n the absence of . . . an amendment [to Rules 8 and 9(b)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims.” *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-69 (1993).

⁶³ Even a cursory review of the post-*Monell* cases reveals that the Court has had apparent difficulty building a majority behind a clear statement of what constitutes municipal “policy” for purposes of § 1983 liability. There was no majority opinion in *Tuttle* or *Praprotnik*, with three of the Justices writing separately in each case. Similarly, there were five separate opinions in *Pembaur*, with the Justices turning to their vast collection of

rather than "custom."⁶⁴

Many commentators have criticized the "policy" requirement as an artificial and misguided limitation on municipal liability, arguing that a respondeat superior regime is the more direct and efficient method of determining liability under § 1983.⁶⁵ But a significant line of post-*Monell* Supreme Court jurisprudence strongly suggests that "policy," however muddled and indeterminate, is here to stay.⁶⁶ This Article does not argue that the "policy" requirement should be overruled, nor that the "policy" rule of *Monell* is deficient insofar as it seeks to ensure that municipalities are only liable for injuries they directly cause. Rather, this Article contends that "policy" fails to

dictionaries in an attempt to arrive at a concise and applicable definition of "policy." See *Pembaur*, 475 U.S. at 481 n.9 (citing the various definitions of "policy" in Webster's Third New International Dictionary, Oxford English Dictionary, Webster's New Twentieth Century Dictionary, and Random House Dictionary). This confusion over the definition of "policy" is largely the result of the lack of precedent and guidance as to the meaning of the term when it was first announced in *Monell*. See Mead, *supra* note 37, at 542-43 (noting that "policy" is a complex judicial creation of the *Monell* Court that does not appear in the language of § 1983). Accordingly, the Court's rulings in this area have been widely criticized for their lack of coherence. See *id.* at 542-46 (discussing the "especially problematic" definition of "policy" in *Monell*); Robert A. Callahan, Note, "Policymaker" Identification in a Section 1983 Cause of Action: From *Monell* to *Praprotnik*; *Problems Remain*, 40 DRAKE L. REV. 149, 166 (1991) (noting the Court's incoherence in defining "policy" broadly in some cases to include "unwritten rules . . . that need not govern future situations," while using a narrow definition in other cases to limit it to "rules adopted through careful thought processes . . . intended to govern similar situations in the future").

⁶⁴ See, e.g., *Jett*, 491 U.S. at 736-37 (whether the racially motivated decision of a school principal and superintendent to reassign plaintiff to another school represented the school district's "official policy"); *Harris*, 489 U.S. at 388-91 (whether a city's failure to train police officers to determine when an injured detainee might require medical assistance constitutes actionable city "policy"); *Praprotnik*, 485 U.S. at 129-30 (whether the failure to review the propriety of a subordinate's decision to lay off plaintiff by supervisory officials with the authority to set employment policy renders the municipality liable); *Pembaur*, 475 U.S. at 484-85 (whether County Prosecutor's decision to order a forceful entry constitutes an "official policy"); *Tuttle*, 471 U.S. at 823-24 (whether a single act of excessive force by a police officer can constitute a "policy" of inadequate training); *Garner*, 471 U.S. at 15-22 (whether the policy of the police department to allow the use of deadly force to prevent the escape of any felony suspect is unconstitutional).

⁶⁵ See, e.g., Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 283-87, 294-96, 301 (arguing that the "'policy rule' of *Monell* serves no intelligible purpose" and should be "abandoned in favor of common-law agency principles, including the doctrine of respondeat superior"); Mead, *supra* note 37, at 538-42 (arguing that respondeat superior better serves the policy purposes of § 1983); Note, *supra* note 55, at 2019 ("[R]espondeat superior liability for municipalities under § 1983 would better effectuate the policy goals of vigorous decisionmaking and deterrence of violations.").

⁶⁶ See *supra* note 64 (citing cases in which the Court evaluated the claims of municipal liability on the basis of *Monell's* "policy rule").

capture the recurring, pervasive constitutional violations by low-level officials for which § 1983 was intended to provide a remedy. This Article argues that, even absent an official “policy,” § 1983 plaintiffs can establish municipal liability in the forgotten “custom” language of the statute.

II. THE PROBLEMS WITH “POLICY”

The result of the Court’s concentration on the “policy” basis for imposing municipal liability in its ten post-*Monell* cases has been the proliferation of overlapping “policy” pigeonholes. While the Court’s jurisprudence in this area “manifestly needs clarification,”⁶⁷ it is possible to tease out of this tangle three somewhat distinct models of “policy.” As this Part will demonstrate, however, all three “policy” models suffer from a common defect in that they focus exclusively and unrealistically on high-level city officials and virtually ignore the unconstitutional actions of low-level officials.

A. *The “Quasi-Legislative Model”*

The first paradigm of “policy” is what I call the “quasi-legislative model.” This model defines policy as “a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy.”⁶⁸ The quasi-legislative model is endorsed by a majority of Justices and treats as actionable under § 1983 those policies “made up of specific, concrete actions taken with some thought,” such as legislative enactments.⁶⁹ The lower federal courts have followed similar standards for determining what constitutes municipal policy under the quasi-legislative model.⁷⁰

⁶⁷ *Praprotnik*, 485 U.S. at 121.

⁶⁸ *Pembaur*, 475 U.S. at 483. See also *Tuttle*, 471 U.S. at 823 (defining policy as “a course of action consciously chosen from among various alternatives”); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 252, 253 n.7 (1981) (vote of City Council to cancel license for rock concert constitutes municipal policy); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 632-33 (1980) (decision by City Council to release investigative reports constitutes official city policy); *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 713 (1978) (Powell, J., concurring) (finding that the uncontested existence of a “formal, written polic[y]” represented a “clear case” for municipal liability).

⁶⁹ *Woodley v. Town of Nantucket*, 645 F. Supp. 1365, 1378 (D. Mass. 1986).

⁷⁰ See, e.g., *Matthias v. Bingley*, 906 F.2d 1047, 1053-55 (5th Cir. 1990) (finding that city ordinance regulating disposal of property seized during criminal investigation violates due process and constitutes city “policy” for which the city is liable); *Bateson v. Geisse*, 857 F.2d 1300, 1303-04 (9th Cir. 1988) (finding decision of the City Council, a “properly constituted legislative body,” to arbitrarily withhold issuing plaintiff’s building permit in violation of the Fourteenth Amendment an act of “official government policy”); *Little v. City of North Miami*, 805 F.2d 962, 967 (11th Cir. 1986) (per curiam) (finding that resolution adopted by City Council in violation of the First Amendment meets requirements for municipal liability); *Evers v. County of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984) (finding the declaration of a public road by a county’s governing body official policy).

Monell is the archetypal quasi-legislative case because it involved a written formal rule, which the Court found unconstitutional on its face.⁷¹ Two other post-*Monell* Supreme Court cases also fit the quasi-legislative model because in both elected city councils voted in favor of and approved the challenged conduct. In *Owen v. City of Independence, Missouri*,⁷² the City Council voted to release investigative reports involving the Chief of Police's handling of the property room, which subsequently led to his dismissal from office.⁷³ The Court left undisturbed the determination of the court of appeals that the decision of the City Council to release the reports constituted "the municipality's official policy . . . responsible for the deprivation of [the plaintiff's] constitutional rights."⁷⁴ Similarly, in *City of Newport v. Fact Concerts, Inc.*,⁷⁵ the City Council voted to cancel the entertainment license of a music promoter.⁷⁶ The Court upheld the jury's finding that the license cancellation amounted to content-based censorship in violation of the First Amendment, and the Council's vote constituted policy for purposes of municipal liability under the statute.⁷⁷

Since the early 1980s, the quasi-legislative model has played no part in Supreme Court jurisprudence, and has surfaced infrequently in lower court cases.⁷⁸ Rarely (one assumes) will modern-day policymakers be found sitting

⁷¹ See *Monell*, 436 U.S. at 713 (Powell, J., concurring) (noting that because "[t]his case . . . involves formal, written policies . . . it is the clear case" for municipal liability); see also *Praprotnik*, 485 U.S. at 122 ("In *Monell* itself, it was undisputed that there had been an official policy requiring city employees to take actions that were unconstitutional under this Court's decisions.").

⁷² 445 U.S. 622 (1980).

⁷³ See *id.* at 628-29.

⁷⁴ *Id.* at 632-33. The district court entered judgment for the city, City Manager and members of the City Council, finding that plaintiff's discharge did not deprive him of any constitutionally protected property interest or liberty interest. See *id.* at 630 n.10. The court of appeals reversed, finding that the release of the investigative reports by the City Council "had blackened [plaintiff's] name and reputation, thus depriving him of liberty without due process of law." *Id.* at 631. Nonetheless, the court of appeals found the city was entitled to qualified immunity from liability based on the good faith of its officials. See *id.* at 634. The Supreme Court left undisturbed the finding that the city had violated plaintiff's constitutional rights under the Fourteenth Amendment. See *id.* at 633 n.13. The only issue before the *Owen* Court was whether the city could rely on the good faith of its officials as a shield to § 1983 liability, to which the Court responded in the negative. See *id.* at 653-58.

⁷⁵ 453 U.S. 247 (1981).

⁷⁶ See *id.* at 251-52.

⁷⁷ See *id.* at 253 n.7. The Court addressed only the issue of whether municipalities could be held liable for punitive damages under § 1983, and found that municipalities were immune from punitive damages under the statute based on the common-law and public policy considerations. See *id.* at 258-71.

⁷⁸ See, e.g., *Kopf v. Wing*, 942 F.2d 265, 269 (4th Cir. 1991) (noting that "written policies are carefully crafted to be constitutional, and a plaintiff must usually prove the existence of some unpublished practice" to establish municipal liability under § 1983); Peter

in a smoke-filled backroom discussing whether to direct local officials to trammel the constitutional rights of the citizenry. Rather, the paradigmatic §1983 complaints of *this* era—especially amongst minority groups in urban centers—concern issues of police brutality, false arrests and other forms of official misconduct that, by their very nature, are not the subject of deliberative discussion among municipal decisionmakers.⁷⁹ It would be unduly cynical, and empirically unwarranted, to suggest that these pervasive unconstitutional practices are the product of “a deliberate choice . . . among various alternatives”⁸⁰ by municipal policymakers.

B. *The “Official Action” Model*

The second paradigm of “policy,” which I term the “official action model,” finds policy in the actions of “decisionmaker[s] possess[ing] final authority to establish municipal policy with respect to the [complained of] action.”⁸¹ Under this broader conception of municipal fault,⁸² a § 1983 plaintiff may attribute to the municipality actions of supervisory personnel whose “acts may fairly be said to represent official policy.”⁸³ As such, this model seems to

H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1772 (1989) (noting that few § 1983 municipal liability cases involving formal rules or written policies have reached the lower courts in the post-*Monell* era).

⁷⁹ As a noted civil rights attorney has stated, while *Monell* “gave police misconduct litigators a real, although circumscribed, avenue to sue the offending municipality under § 1983 . . . the vast majority of cases in the police misconduct field did not implicate a formal, written policy . . . chargeable to the municipality.” G. Flint Taylor, *Municipal Liability Litigation in Police Misconduct Cases From Monroe to Praprotnik and Beyond*, 19 CUMB. L. REV. 447, 452 (1989).

⁸⁰ *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

⁸¹ *See id.* at 481. *Pembaur* involved two deputy sheriffs who attempted to serve arrest warrants on a doctor’s employees. *See id.* at 472. When the doctor locked the door to the clinic and denied them entrance, the deputies phoned the assistant county prosecutor to ask what they should do, and the prosecutor ordered them to “go in and get” the witnesses. *See id.* at 473. After police officers chopped down the doctor’s door with an axe, the deputies entered and searched the clinic, but did not find the individuals for whom the warrants had been issued. *See id.* The doctor subsequently brought a § 1983 suit against the city, the county and various individual officials, alleging violations of his Fourth and Fourteenth Amendment rights. *See id.* at 473-74. The Supreme Court found the prosecutor had acted as the “final decisionmaker for the county” in ordering the deputies to enter the clinic, and the county could therefore be held liable for constitutional violations resulting from the prosecutor’s order. *Id.* at 484-85.

⁸² As evident in *Pembaur*, the “official action” model extends § 1983 municipal liability beyond facially unconstitutional written policies (e.g., *Monell*) or unconstitutional decisions by duly elected city councils (e.g., *Owen* and *Fact Concerts*). *See id.* at 480 (“[T]he power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level.”).

⁸³ *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694

suggest that if a high-ranking official establishes a policy that when executed by a low-level official or a subordinate leads to a constitutional violation, both the local government and the official may be held liable under § 1983, even though the municipality did not formally declare the policy itself.⁸⁴

Applying the official action model in a number of post-*Monell* municipal liability cases has proven difficult.⁸⁵ Further, the search in each case for municipal officials who possess something called "final authority to establish municipal policy"⁸⁶ has bred persistent conflicts among the lower courts and sharp divisions among the Justices themselves,⁸⁷ making the "official action" model an increasingly uncertain basis for municipal liability.⁸⁸ Therefore, while the Court has busied itself trying to flesh out the contours of the official action model,⁸⁹ cases basing municipal liability on this model are rare.⁹⁰

(1978).

⁸⁴ See, e.g., *Pembaur*, 475 U.S. at 484-85 (concluding that a municipality may incur § 1983 liability for a single decision or act by a supervisory official with "final authority to establish municipal policy with respect to the action ordered").

⁸⁵ The Court has struggled to answer a number of complex questions in its application of the official action model. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (how to identify the official with "final policymaking authority" concerning the particular action in question, and whether the trial judge or the jury should make such determination); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123-28 (1988) (what deference to give state and local law in determining who has "final policymaking authority" in a particular area of a municipality's business); *Pembaur*, 475 U.S. at 481-85 (whether a single decision in by an individual official in an isolated case may constitute policy).

⁸⁶ *Pembaur*, 475 U.S. at 481.

⁸⁷ See, e.g., *Praprotnik*, 485 U.S. at 144 (Brennan, J., concurring) (disagreeing with the plurality's ruling that the identification of officials having "final policymaking authority" is a question of state law and should not be submitted to the jury). See also Callahan, Note, *supra* note 63, at 164 (noting that "the Court has been unable to reach majority consensus as to the proper standards for determining whether a municipal official is a policymaker . . . [and a]s a result . . . the lower federal courts have been struggling to . . . determin[e] whether a municipal official is a policymaker").

⁸⁸ Even when plaintiffs base their claims of municipal liability on the "official action" model, they are rarely successful because the search for one who possesses "final policymaking authority" seems to operate as a form of municipal immunity. As Professor Shuck has argued, "[i]n the many cases in which official policy is not (as it is in *Monell*) embodied in a straightforward, published rule promulgated by a highly visible political organ such as a city council, so crabbed an inquiry [into who is a "final policymaker"] is unlikely to identify those situations in which the government should properly be held responsible for constitutional injuries to citizens." Schuck, *supra* note 78, at 1774-75.

⁸⁹ As Professor Nahmod has noted, "[a]fter *Monell*, considerable litigation has centered around the question of the standards to be used in determining which high-ranking officials make policy and under what circumstances." NAHMOD, *supra* note 48, § 6.09, at 431.

⁹⁰ Indeed, there seem only to be a handful of "official action" cases decided by the lower federal courts. See, e.g., *Brown v. Reardon*, 770 F.2d 896, 901 (10th Cir. 1985) (ruling that city is not liable to former employees who were allegedly terminated for failing to

Instead, most lower federal court cases involving claims of municipal liability are based on allegations of recurring, unconstitutional local practices by rank-and-file officers, rather than singular actions by higher ranking municipal officials.⁹¹

This inability to address constitutional misconduct by low-level officials through the "official action" model is well illustrated by *City of St. Louis v. Praprotnik*.⁹² Praprotnik, a city employee who had been demoted and finally discharged, brought a claim against his four supervisors and the city of St. Louis. He claimed that these adverse personnel decisions constituted a denial of due process and a violation of the First Amendment.⁹³ A jury exonerated the individual defendants but held the city liable. The Eighth Circuit affirmed. In a plurality opinion, the Supreme Court reversed with respect to the individual defendants, finding that petitioner's supervisors did not have policymaking authority over his demotion and discharge. Looking to language of the St. Louis city charter,⁹⁴ the Court identified the Civil Service

contribute to political fund because the alleged misconduct was attributable only to low-level employees whose actions do not constitute city policy); *McKay v. Hammock*, 730 F.2d 1367, 1374-75 (10th Cir. 1984) (ruling that sheriff's office could be held liable for constitutional violations carried out by sheriff, who is official responsible for the policies of the office); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 448 (2d Cir. 1980) (finding that city would be liable if plaintiff can prove that the mayor directed a campaign to stigmatize him because the mayor is a city official whose acts represent municipal policy).

⁹¹ See, e.g., *Jones v. City of Chicago*, 856 F.2d 985, 989-90 (7th Cir. 1988) (systematic practice of withholding exculpatory evidence from defense); *Owens v. City of Atlanta*, 780 F.2d 1564, 1566 (11th Cir. 1988) (pervasive use of potentially lethal types of restraining techniques); *Hindman v. City of Paris, Tex.*, 746 F.2d 1063, 1065-66 (5th Cir. 1984) (practice of obtaining arrest warrants without adequate probable cause).

⁹² 485 U.S. 112 (1988).

⁹³ Praprotnik was an architect employed by the city of St. Louis. By 1980, he was serving in a management-level planning position in the St. Louis Community Development Agency. Up until that point, he had received favorable annual performance evaluations. Later that year, Praprotnik received a 15-day suspension for accepting private clients without prior approval. He appealed the suspension to the Civil Service Commission, which reversed the suspension and awarded him backpay. Praprotnik's supervisors were apparently displeased with the Commission's decision and his next two annual job performance evaluations were less favorable than in previous years. He appealed both evaluations to the city's personnel department and received partial relief. In 1982, due to municipal budget cuts, the Community Development Agency downsized and transferred Praprotnik to what he considered a dead-end job. Praprotnik objected to the transfer and appealed to the Civil Service Commission once again. The Commission declined to hear the appeal because there had been no reduction in pay or grade. In December 1983, allegedly due to lack of funds, Praprotnik was laid off. See *id.* at 114-17.

⁹⁴ Justice O'Connor, writing for the plurality, noted that the identification of policymaking officials is always a question of state or local law: "[W]e can be confident that state law (which may include valid local ordinances and regulations) will always direct a

Commission as the final personnel policymaker for the city.⁹⁵ Given that the Commission had not directly acted to deny petitioner due process, the Court found no basis for imposing municipal liability.⁹⁶

The Court of Appeals in *Praprotnik* had held the city liable under § 1983 based on its finding that the Commission had accorded great deference to some lower-level personnel actions and failed to review others at all. The *Praprotnik* plurality, however, rejected this (realistic) view that municipalities govern through high-level officials delegating policymaking authority to low-level officials.⁹⁷ Instead, the plurality found that acquiescence in a subordinate's decisions is not a delegation of policymaking authority because "[i]t is equally consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them."⁹⁸

Of course, low-level officials without "final policymaking authority" take actions every day which affect the constitutional rights of the citizenry, and these actions may be acquiesced in or simply unknown to high-level officials.⁹⁹ Under *Praprotnik* and its progeny, the exercise of discretion by low-level officials does not constitute the formulation of policy sufficient to establish municipal liability. Likewise, the failure of high-level officials to investigate the basis of these discretionary decisions is also insufficient to establish municipal liability.¹⁰⁰ At its furthest extreme, this formalistic approach ensures that "even the hollowest promise of review is sufficient to divest all city

court to some official or body that has the responsibility for making law or setting policy in any given area of local government's business." *See id.* at 125-26.

⁹⁵ *See id.*

⁹⁶ *See id.* at 129-30.

⁹⁷ The *Praprotnik* plurality did note that, "[a]mong the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies." *Id.* at 124-25 (citing CHARLES S. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* §§ 1.3-1.7 (1980)). Having acknowledged the difficulties involved in determining the locus of policymaking power within different municipal organizations, the Court nevertheless found that state or local law is the final arbiter on these issues. *See id.*

⁹⁸ *Id.* at 130.

⁹⁹ In a separate concurrence, Justice Brennan argued that the plurality opinion "turns a blind eye to reality" by ignoring the possibility that "[r]eviewing officials . . . may as a matter of practice never invoke their plenary oversight authority, or their review powers may be highly circumscribed," so that "the subordinate's decision is in effect the final municipal pronouncement on the subject." *See id.* at 145-46 (Brennan, J., concurring in judgment).

¹⁰⁰ *See id.* at 129-30 ("[T]he mere failure to investigate the basis of a subordinate's discretionary decisions [in the absence of a particular decision by the subordinate that is expressly approved by a supervisory policymaker, or a series of decisions by a subordinate of which the supervisor must have been aware] does not amount to a delegation of policymaking authority . . .").

officials save the mayor and governing legislative body of final policymaking authority.”¹⁰¹

In short, while low level officials are most often the target of § 1983 litigation, the official action model fails, in most respects, to capture their unconstitutional conduct by assuming that they can only act under command of high-level officials. The latter group, meanwhile, remain either unidentified or insulated by the complexity of municipal bureaucracy and the Court’s refusal to acknowledge delegation or abdication of final policymaking authority in critical circumstances.¹⁰²

C. The “Failure to [Blank]” Model

A third view, which might be termed the “failure to [blank]”¹⁰³ model, finds policy in municipal failures to train,¹⁰⁴ supervise,¹⁰⁵ discipline,¹⁰⁶ or otherwise

¹⁰¹ *Id.* at 146. (Brennan, J., concurring in judgment) For Justice Brennan, the plurality’s opinion essentially permits “municipalities to insulate themselves from liability for the acts of all but a small minority of actual city policymakers.” *Id.* at 132. See also *Board of Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 435 (1997) (Breyer, J., dissenting) (noting that the Court’s “policymaker” cases “require[] federal courts to explore state and municipal law that distributes different state powers among different local officials and local entities That law is highly specialized; it may or may not say just where policymaking authority lies, and it can prove particularly difficult to apply”).

¹⁰² Justice Brennan, arguing that juries should be allowed to determine who was a final policymaker, criticized the *Praprotnik* plurality for its narrow view of final policymaking authority: “the law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality’s actual power structure is necessarily a factual and practical one.” See *Praprotnik*, 485 U.S. at 145. See generally George D. Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma v. Tuttle and Pembaur v. City of Cincinnati—The “Official Policy” Cases*, 27 B.C. L. REV. 883 (1986); Terrence S. Welch & Kent S. Hofmeister, *Praprotnik, Municipal Policy and Policymakers: The Supreme Court’s Constriction of Municipal Liability*, 13 S. ILL. U. L.J. 857 (1989).

¹⁰³ I use this term to indicate the malleability of this model of municipal liability: simply fill in the “blank” and you have a § 1983 municipal liability claim.

¹⁰⁴ See, e.g. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989) (“[T]here are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983.”); *Palmquist v. Selvik*, 111 F.3d 1332, 1344 (7th Cir. 1997) (“[A] municipality may, in restricted circumstances, be held liable under § 1983 for constitutional violations resulting from its failure to train its police officers.”); *Young v. City of Augusta, Georgia*, 59 F.3d 1160, 1171 (11th Cir. 1995) (holding a § 1983 claim against a municipality for failure to train valid only “if the deficiency reflects deliberate indifference by City policymakers to the rights of inmates . . .”).

¹⁰⁵ See, e.g., *Ruehman v. Village of Palos Park*, 842 F. Supp. 1043, 1058 (N.D. Ill. 1993), *aff’d*, 34 F.3d 525 (7th Cir. 1994) (noting that “deliberate indifference” of a municipality toward false arrests could only be established through a showing that the municipality is “aware that persons are being arrested on incorrectly listed warrants or, at a minimum, it is shown such arrests are so likely to occur that failure to have additional validation procedures

control individual officers. While lower federal courts have considered a variety of claims seemingly founded on the "failure to [blank]" model, the Supreme Court, thus far, has recognized the "failure to [blank]" model only in the context of police officer training.¹⁰⁷ Specifically, the Court has held that where "the need for more or different training" of municipal officers or employees is "so obvious," and this inadequacy is "so likely to result in the violation of constitutional rights," municipal policymakers can reasonably be said to have been "deliberately indifferent."¹⁰⁸ The failure to provide proper training, therefore, represents a policy for which the city may be held liable.¹⁰⁹

The "failure to [blank]" model, as developed in the lower federal courts, has provided plaintiffs' attorneys with a variety of municipal liability claims under § 1983. Under this model, plaintiffs are relieved from the difficulties of claiming that a municipal body promulgated an unconstitutional policy (quasi-legislative model). Likewise, plaintiffs need not seek the locus of formal authority somewhere within the Byzantium of city bureaucracy (official action model). Instead, to state a claim under the "failure to [blank]" model, plaintiffs

represents a substantial risk of having persons arrested on invalid warrants."); *Loggins v. Jeans*, 841 F. Supp. 1174, 1177 (N.D. Ga. 1993) (holding that a § 1983 plaintiff may establish municipal liability by showing that the municipality failed to stop or correct repeated unconstitutional conduct by police officers).

¹⁰⁶ See, e.g., *Lowe v. City of St. Louis*, 843 F.2d 1158, 1160 (8th Cir. 1988) (discussing a "progressive discipline policy" employed in dealing with misbehavior by police officers); *Baker v. McCoy*, 739 F.2d 381, 384 (8th Cir. 1984) ("This court has recognized that a local government entity may be amenable to suit under § 1983 for a continuing failure to remedy a known pattern of constitutionally offensive conduct by its subordinates.").

¹⁰⁷ In *City of Canton v. Harris*, 489 U.S. 378 (1989), the plaintiff claimed that her rights under the Due Process Clause were violated when she was denied necessary medical care while in police custody. She asserted a claim of municipal liability for this deprivation based on a theory of "grossly inadequate training." The plaintiff presented evidence of a municipal regulation which gave police shift commanders complete discretion in deciding whether prisoners were in need of medical care. The plaintiff also presented evidence that such commanders received no training or guidelines to assist them in making such judgments. See *id.* at 382. The Court found that the municipality could be held liable under § 1983 for failing to train commanders in this area because such a failure manifested a "deliberately indifferent" attitude towards plaintiff's rights. *Id.* at 390; see also *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (rejecting a § 1983 municipal liability claim based on a "failure to properly screen potential applicants"); see also *infra* notes 113-25 and accompanying text.

¹⁰⁸ *Harris*, 489 U.S. at 390.

¹⁰⁹ See *id.*

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id.

may simply point to a municipal omission, such as the failure of municipal government to provide adequate training and services to its employees and constituency.¹¹⁰ It is no wonder, then, that the “failure to [blank]” model has become the most attractive vehicle for municipal liability among civil rights lawyers.¹¹¹

Popularity has its price. The federal case reporters are awash with dubious claims of municipal liability grounded in the “failure to [blank]” model.¹¹²

¹¹⁰ It is interesting to note that in *Monell*, decided more than twenty years prior to *Harris*, the Court had determined that local governments not be held liable under § 1983 simply for their failure to act: “[W]e would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability.” See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 n.58 (1978) (citing *Rizzo v. Goode*, 423 U.S. 362 (1976)). The *Harris* Court did not refer to this earlier passage.

¹¹¹ See *Taylor*, *supra* note 79, at 452 (noting that, among civil rights lawyers, “[t]he most popular policy [under § 1983] quickly became one that was defined as encouraging the use of deadly or excessive force by one or more of the matrix of municipal failures—failure to properly hire, train, discipline, supervise, control or investigate.”).

¹¹² See, e.g., *Manarite v. Springfield*, 957 F.2d 953, 960 (1st Cir. 1992) (affirming a grant of summary judgment to the defendant in a claim by the estate of a jail suicide victim where a deliberately indifferent policy of allowing suicide could not be established in light of the fact that the city had, four years prior to incident, promulgated state-approved guidelines for supervision of suicide risks and intoxicated arrestees. The guidelines, for example, made failure to remove shoelaces of a public intoxication arrestee who exhibited no suicidal behavior at most negligent); *Vippolis v. Village of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985) (affirming the dismissal of § 1983 action brought by an arrestee against a city and its police commissioner because plaintiff was unable to show facts to support the allegation that the city failed to adequately train, discipline, and supervise its police officers. The court properly rejected the plaintiff’s assertion that he should be given the opportunity to conduct limited discovery since the defendants were in sole possession of knowledge about police department policies, because even the most minimal training (if any is necessary) obviously is sufficient to inform a police officer that a beating such as that alleged by the arrestee is impermissible); *Martinez Correa v. Lopez Feliciano*, 759 F. Supp. 947, 958 (D. P.R. 1991) (reversing a jury verdict against a municipality for failure to train where plaintiff failed to present evidence showing that the municipality’s failure to train proximately caused his injury, or that the municipality had a regular practice of hiring unqualified officers); *Elliott v. Cheshire County*, 750 F. Supp. 1146, 1156 (D.N.H. 1990) (finding that supervisory officials and the city were not liable for arrestee’s jail suicide where the jail had implemented a suicide prevention training program after prior suicides, and where nothing in arrestee’s behavior suggested need for greater care); *Roman Figueroa v. Torres Molina*, 754 F. Supp. 239, 244 (D.P.R. 1990) (finding that the police superintendent and city could not be held liable for alleged use of excessive force by an officer who arrested a minor for traffic violations. Implementation and development of extensive training programs, designed to raise professionalism and accountability of line officers, negated any inference of causal relationship between official department policy and alleged unconstitutional use of force); *Whitley v. New York*, 518 F. Supp. 1318, 1320 (S.D.N.Y. 1981) (finding that plaintiff, who had been shot by a police officer during the course of an armed robbery, had

Tempted by the promise of *Harris*, § 1983 plaintiffs now almost automatically assert that the constitutional deprivation they suffered at the hands of a law enforcement officer resulted from the municipality's failure to train, transfer, or otherwise supervise that officer. Judges share the blame for this explosion of claims based on the "failure to [blank]" model. As they perceive recurring constitutional violations perpetrated by the local officers in their communities, district judges understandably adopt the view that the municipality ought to bear liability under *Monell*. This position is not necessarily erroneous. However, having come to this view, the courts are afforded precious few boxes into which they may attempt to fit the case before them. It is inevitable, then, that the "failure to [blank]" model has become the receptacle of choice. For all its apparent breadth and elasticity, however, this model is riddled with problems.

The first problem with the "failure to [blank]" model is that, too often, it simply does not fit the plaintiff's underlying complaint. With the vast majority of constitutional wrongs, it is simply not true that additional training (or other measures, such as improved hiring or supervision practices) would have prevented the injury. This problem is evidenced by *Walker v. City of New York*: the plaintiff, who spent nineteen years in prison for a crime he did not commit, claimed the police department had shown deliberate indifference to his rights by failing to supervise and train officers "not to commit perjury or aid in the prosecution of the innocent."¹¹³ The plaintiff argued that the duty to train against committing perjury was analogous to the duty to train in the use of deadly force, such that "city policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent . . . [and that] a failure . . . to resist these opportunities will almost certainly result" in injuries to citizens.¹¹⁴

The Court of Appeals correctly rejected this claim, noting that plaintiff's argument had "misse[d] a crucial step." The "failure to [blank]" model requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Here, however, "the proper response is obvious to all without training or supervision," and the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers.¹¹⁵

failed to show that he suffered a constitutional tort due to the city's alleged inadequate training of the officer in the use of firearms).

¹¹³ 974 F.2d 293, 299 (2d Cir. 1992), cert. denied, 507 U.S. 972 (1993).

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 299-300. The plaintiff in *Walker* was successful, however, in stating a claim for municipal liability based on "a complete failure by the [District Attorney] in 1971 to train [Assistant District Attorneys] on fulfilling *Brady* obligations . . ." *Id.* at 300. To the court's mind, the *Brady* standard was not "so obvious or easy to apply as to require [no training.]" *Id.*; see also *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998). The *Barney* court noted:

Even if the [city's] courses concerning gender issues and inmates' rights were less than

The second problem with the “failure to [blank]” model is that it focuses on the promulgation of municipal policies concerning officer training, supervision, discipline and related matters, while ignoring the manner in which those policies are, or are not, implemented. Courts faced with municipal liability claims based on the “failure to [blank]” model must look first at whether the city had a training program, supervisory structure or disciplinary regime. Then the court can determine whether these were sufficiently deficient to meet the standard of deliberate indifference. Often, the mere existence of such programs and structures ends the inquiry, on the assumption that if a municipality has already instituted such programs, deliberate indifference to the need to institute such programs cannot be shown.

This problem is exemplified by the recent Eighth Circuit decision in *Liebe v. Norton*.¹¹⁶ There, the wife of a detainee who committed suicide in a holding cell brought a § 1983 suit against the county alleging a failure to supervise its jailers. The court found that the county had instituted policies intended to prevent inmate suicides, and that “[t]he existence of these policies indicate that the County was interested in preventing inmate suicides and, in fact, took affirmative steps to prevent such suicides.”¹¹⁷ Though not squarely addressing the failure to supervise claim, the court noted that “the County’s policy cannot be both an effort to prevent suicides and, at the same time, deliberately indifferent to suicides.”¹¹⁸ In other words, there can be no failure to supervise where existing policies and procedures are in place. As with the “official action” model of policy, the assumption here is that policies promulgated by high-level officials are carried out perfectly by low-level officials. This assumption renders the “failure to [blank]” model incapable of capturing much of the constitutional misconduct of low-level officials, as courts seem unwilling or unable to probe more deeply into the ways in which municipal policies are actually carried out.

adequate, we are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates. Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior.

Id. at 1308; *Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998). Similarly, the *Floyd* court opined:

Applying the reasoning of *Sewell* and *Walker* to the facts of this case, we conclude that the BOE [Board of Public Education] did not act with deliberate indifference to the training and supervision of the security department. [The offending officer’s] conduct . . . [was] clearly against the basic norms of human conduct . . . [and] the BOE was entitled to rely on the common sense of its employees not to engage in wicked and criminal conduct.

Id. at 796; *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 490 (11th Cir. 1997) (applying *Walker*’s reasoning to reject plaintiff’s claim that an officer’s sexual molestation of an arrestee resulted from municipality’s deliberate indifference in training and supervision).

¹¹⁶ 157 F.3d 574 (8th Cir. 1998).

¹¹⁷ *Id.* at 579.

¹¹⁸ *Id.*

A third problem with the "failure to [blank]" model lies in the difficulty of establishing a causal link between the deficient training, supervision or disciplinary program and the plaintiff's injury. Recently, a closely-divided Supreme Court clarified the causation requirement in § 1983 "failure to [blank]" cases. In *Board of Commissioners of Bryan County v. Brown*, the plaintiff was injured after a high-speed chase when a deputy, Burns, physically pulled her from a vehicle.¹¹⁹ She brought suit against the County for the use of excessive force, based upon the Sheriff's decision to hire Burns without adequately investigating his background.¹²⁰

The issue before the Court was whether Bryan County could be held liable for the Sheriff's decision to hire Burns.¹²¹ In ruling for the County, the Court reiterated the prohibition against vicarious municipal liability under § 1983, noting that "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."¹²² The Court held that the Sheriff's "inadequate screening" of Burns could only be deemed to have caused the plaintiff's injury if her injury was a "plainly obvious consequence" of the hiring decision. Writing for the majority, Justice O'Connor explained that any holding that the "inadequate hiring . . . policy directly caused the [p]laintiff's injury . . . must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff."¹²³

¹¹⁹ See *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 399-400 (1997).

¹²⁰ Specifically, Brown claimed that Reserve Deputy Burns had a long record of driving infractions, as well as a record of assault and battery, resisting arrest, and public drunkenness. The Sheriff stated at trial that, although he had obtained Burns' record from the National Crime Information Center, he did not carefully review it. The jury returned a verdict for the plaintiff, which was subsequently upheld by the Fifth Circuit, and the County appealed to the Supreme Court. See *id.* at 401.

¹²¹ The Justices' questions during oral argument revealed their concern with the issue of causation, or more specifically, whether municipal liability attaches where the claimed injury has resulted from a chain of events started by the single lawful act of hiring an employee. See 1996 WL 65602, at *7 (U.S. Oral Arg., Nov. 5, 1996) (95-1100). Members of the Court repeatedly questioned the attorneys about whether the jury could have based liability against the county on a finding of only "but for" causation, and one member of the Court pointed out that even if the jury found a single act of deliberate indifference on the part of a municipal policymaker, it had not been asked to decide whether that single act had actually caused the plaintiff's injuries. See *id.*, 1996 WL 65602, at *14, *30.

¹²² *Brown*, 520 U.S. at 405. The majority rejected Brown's contention that establishing an act by a proper municipal decisionmaker alone imposes municipal liability. The Court cautioned that, in such a situation, a jury may readily rely on the impermissible theory of respondeat superior while the plaintiff has failed to prove any fault on the part of the municipality. See *id.* at 410.

¹²³ *Id.* at 412.

Whatever other concerns might have motivated this ruling,¹²⁴ it appears that plaintiffs bringing a “failure to [blank]” claim must now establish that their injury was a “plainly obvious consequence” of the municipal action sufficient to “demonstrate a *direct causal link* between the municipal action and the deprivation of federal rights.”¹²⁵ This is a difficult standard, essentially requiring a plaintiff to prove that in an alternative universe, with perfect hiring or training procedures, no constitutional injury would have resulted.

D. *The Problems With “Policy”*

Through its three articulations of “policy”—the “quasi-legislative,” “official action,” and “failure to [blank]” models—the Supreme Court has demonstrated a thorough misunderstanding of municipal governance and municipal harm. In the Court’s view, municipalities govern, provide services and regulate low-level officials through a traditional pyramidal model, where carefully articulated policies flow straight down from the top to the bottom.¹²⁶ This idealized view of municipal bureaucracy, however, distorts or ignores the

¹²⁴ *Brown* was decided 5-4. Interestingly, the same 5-4 division has been present in some of the Court’s recent federalism decisions. See, e.g., *Printz v. United States*, 521 U.S. 898, 902 (1997) (Brady handgun legislation held unconstitutional); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 266 (1997) (Eleventh Amendment bars claim against State to quiet title to lands); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (Commerce Clause does not give Congress power to override Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (Federal school gun possession statute beyond Congress’ commerce power). Because *Brown* can be read as a refusal to allow federal courts to second-guess local hiring decisions, it seems appropriate to consider this case alongside these federalism decisions. See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 81 (1989) (arguing that the Court frequently adverts to federalism concerns in the context of § 1983 cases).

¹²⁵ *Brown*, 520 U.S. at 404 (emphasis added). Justice O’Connor noted the novelty of Ms. Brown’s claim that her injuries were caused by the sheriff’s hiring decision:

A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant’s background would make a violation of rights more *likely* cannot alone give rise to an inference that a policymaker’s failure to scrutinize the record of a particular applicant produced a specific constitutional violation. After all, a full screening of an applicant’s background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant’s background cannot be said to have consciously disregarded an obvious risk that the officer would subsequently inflict a particular constitutional injury.

Id. at 410-11.

¹²⁶ Applying organization theory to the Court’s § 1983 municipal liability jurisprudence, Professor Schuck has noted that the pyramid model assumes that “formal legal authority to make policy on the agency’s behalf is located at the top of the agency pyramid. That authority is deployed by officials at or near the top to develop and to issue to the officials located further down toward the base those implementing directives that will conform their behavior to the agreed-upon policies.” Schuck, *supra* note 78, at 1777.

significance of "street-level" officials.¹²⁷ Section 1983 claims are typically directed against police officers, school teachers, social workers and others. These "street-level" officials, in providing direct municipal services to citizens, possess broad autonomy and discretion, and their actions may not conform to the Court's pyramidal model of municipal policymaking.¹²⁸

This idealized view of municipal governance, therefore, has led the Court to adopt a restrictive view of municipal harm. The Court has thus far only based municipal liability on "policy," in its various forms, and local governments are not held responsible for pervasive harms caused by rank-and-file officers. Injuries caused by the police code of silence, use of excessive force, racial profiling, and other constitutional misconduct continue to occur, with few cities ever held liable for these violations.

In sum, the three existing models of "official policy" cannot adequately and honestly accommodate most claims of constitutional injury by low-level officials. Again, the concern lies not with the formal categorization schemata employed by lawyers and judges. Rather, it is that the mischaracterization of claims as "policy" has deleterious consequences. For example, potentially meritorious claims which fail to fit recognized "policy" models are often dismissed at the pleading stage, or on summary judgment.¹²⁹ As I will show in the next sections, where recurring constitutional abuses are more accurately characterized as municipal "customs," the broad goals of § 1983 may be better achieved.

III. THE LOST "CUSTOM" LANGUAGE OF § 1983

The text of § 1983 creates liability for actions taken in accordance with "any statute, ordinance, regulation, *custom*, or usage" that result in the deprivation of constitutional rights or privileges (*emphasis added*).¹³⁰ In *Monell*, the Supreme Court recognized that unconstitutional governmental "custom," even where it "has not received formal approval through the body's decisionmaking

¹²⁷ This term is borrowed from political scientist, Michael Lipsky. See generally MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: THE DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

¹²⁸ As Professor Schuck has noted, "the behavior of low-level officials in street-level agencies is significantly shaped by their operating routines, situation-specific social and emotional needs, peer subculture norms and ideologies, and the dynamics and economy of their daily interactions with the public." See Schuck, *supra* note 78, at 1778.

¹²⁹ See *supra* note 112, and accompanying text. I do not argue that all § 1983 plaintiffs would succeed on the merits in the absence of the "policy" requirement; some number of baseless suits are filed annually. Rather, I argue that the various formulations of "policy" generally fail to address claims involving pervasive constitutional misconduct by low-level law enforcement officers. As a consequence, valid § 1983 claims based on such pervasive harms do not survive.

¹³⁰ See 42 U.S.C. § 1983.

channels,"¹³¹ provides a basis, other than "policy" for municipal liability under the statute. According to the Court, "customs" include well-settled practices of government officials that are "not authorized by written law."¹³² Since this generalized pronouncement, however, the Court has all but forgotten "custom" as a separate basis for municipal liability.¹³³ Indeed, in the post-*Monell* era, the Supreme Court has not directly addressed a single § 1983 case alleging injury by an unconstitutional municipal "custom."¹³⁴

Why has the Court ignored the "custom" language in the text of § 1983, while expending great effort to define the judicially-created concept of "policy," which appears nowhere in the statute?¹³⁵ One answer may be that the Court views the statute as merely instructive, not conclusive. The Court has characterized § 1983 as "loosely and blindly drafted," perhaps signaling that the Justices view themselves as better qualified to determine the statute's meaning.¹³⁶ Another answer may lie in the Court's insistence on a strong causal connection between municipal action (or inaction) and constitutional injury. To the Justices, perhaps, a claim based on a municipal "custom" is too

¹³¹ *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 n.56 (1978) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law.") (quoting *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940)).

¹³² *Id.* at 691 (quoting *Adickes v. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

¹³³ While the Court has noted that custom remains a distinct basis for municipal liability under *Monell*, it has apparently had no occasion to discuss a claim for municipal liability alleging an unconstitutional custom. See, e.g., *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989):

[I]n addition to suggesting that the city's failure to train its officers amounted to a 'policy' that resulted in the denial of medical care to detainees, respondent also contended the city had a 'custom' of denying medical care . . . [but] this claim of an unconstitutional 'custom' appears to be little more than a restatement of her 'failure-to-train as policy' claim . . . [thus] we decline to determine whether respondent's contention that such a 'custom' existed is an alternative ground for affirmance.

Id. at 386 n.5.

¹³⁴ See *Spell v. McDaniel*, 824 F.2d 1380, 1386 n.6 (4th Cir. 1987) ("[T]he [Supreme] Court recognizes 'municipal policy' in the judicially developed sense and 'custom or usage' in the statutory sense as different legal concepts . . . though the Court has not since *Monell* had the occasion to discuss 'custom or usage' in the detail it has discussed 'policy.'").

¹³⁵ As Professor Schuck has noted, "at its birth, the doctrine [of "official policy"] bore the unmistakable imprint of bastardy; its supporting rationale suggests nothing so much as a split-the-difference judicial compromise, a quid pro quo in which the swing Justices agreed to *Monell's* first prong, which overruled *Monroe v. Pape*, in exchange for a second prong rejecting respondeat superior liability in favor of an 'official policy' requirement." See Schuck, *supra* note 78, at 1755 n.13; see also Schnapper, *supra* note 16, at 215-16 (noting that the "official policy" requirement announced in *Monell* had not even been raised, much less briefed, in the Supreme Court and had not been discussed by the courts below).

¹³⁶ See *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951).

flimsy to sustain this causation requirement.¹³⁷ A third possibility is that the Court, which has relied heavily on the legislative history of § 1983 in determining the scope of the statute, has been stymied by the elusive meaning of "custom" in the legislative debates.¹³⁸ More likely, the Court's neglect of the statutory "custom" language lies in historical accident. Having decided *Monell*, a case in which the existence of an unconstitutional "policy" seemed so clear, the Court was set upon the path of defining the various shades of "policy." In the words of Justice Breyer, the Court has been "spin[ning] ever finer distinctions as we try to apply *Monell's* basic distinction between liability that rests upon policy and liability that is vicarious . . ."¹³⁹

Whatever the reason, the "custom" language of § 1983 has indeed been lost, and the very evils that it was designed to address—the unwritten codes of conduct that permeated local officialdom—are precisely the evils that are *least* accommodated by post-*Monell* bases for imposition of municipal liability. The irony is compounded by the fact that unwritten codes of conduct among rank-and-file officers, far from having receded in the 127 years since the passage of the statute, are far and away the most pervasive force causing the deprivation of constitutional rights on the local level.

Fittingly, a very old problem will find a very old solution if the statutory reference to "custom," which the drafters aimed at the unwritten codes of their time, retains its vitality today when pointed at the codes of conduct observed by contemporary local officials. I think it does.

A. *Historical Context and Early Federal Civil Rights Legislation*

Prior to the Civil War, the United States Constitution protected civil rights only against infringement by the federal government. The first ten amendments did not provide protection from the acts of individuals or state or local governments, reflecting the Framers' fears of a powerful central government, as well as their reliance on the states as guardians of individual liberties.¹⁴⁰

The Reconstruction period following the Civil War¹⁴¹ saw the emergence of

¹³⁷ Though I will show in Part IV, *infra*, that certain unconstitutional "customs" more than meet the legal requirements of causation.

¹³⁸ See Eric H. Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499, 578 (1985) (noting that while the proper interpretation of the statutory language of "any statute, ordinance [or] regulation" is "fairly straightforward," "the meaning of 'custom or usage' is somewhat elusive"). See also *infra* notes 175-86 and accompanying text.

¹³⁹ Board of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 430 (1997) (Breyer, J., dissenting).

¹⁴⁰ See THE FEDERALIST No. 51, at 351 (James Madison) (Clinton Rossiter, ed., 1961) ("[W]hilst all authority in [the federal government] will be derived from and dependent on the society, the society itself will be broken into . . . many parts.").

¹⁴¹ In the spring of 1865, while Congress was in recess, the Confederate army conceded

a strong national government with the power to declare and protect the rights of its citizenry.¹⁴² In large part, the increasing strength and presence of the national government was necessary in the face of continuing southern resistance to the ideals for which the Civil War had been fought.¹⁴³

A primary example of southern intransigence during the postbellum period was the adoption of "Black Codes" and other legislation,¹⁴⁴ which in large

victory to the North. President Johnson initiated Reconstruction by appointing provisional governors in the fallen states. See generally ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 276 (1988).

¹⁴² See ROBERT K. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* 36 (1947) (The Civil War Amendments "gave Congress express power to provide federal protection for various rights.").

¹⁴³ James B. Browning, *The North Carolina Black Code*, 15 J. NEGRO HIST. 461, 471 (1930), reprinted in *AFRICAN AMERICAN EXPERIENCE, VOL. 2: EMANCIPATION AND RECONSTRUCTION* 103 (Paul Finkelman, ed., 1992). See CONG. GLOBE, 39th Cong., 1st Sess. 603 (1865) (stating that while it may be true that "the black codes fell with slavery," Southern statutes made the freedman "an outcast, industrially a serf, legally a separate and oppressed class").

¹⁴⁴ The Black Codes, enacted by a number of southern states in 1865 and 1866, sought to keep blacks in an inferior class by disabling them from freely seeking work, having access to the courts as a means of redressing wrongs, obtaining land, or bearing arms. See generally Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 CHI.-KENT L. REV. 439, 445-47, 453-55 (1994) (describing judicial decisions and Black Code provisions which denied southern blacks protection of occupational liberty and the right to contract). South Carolina and Florida, for example, passed laws forbidding blacks to migrate into or out of the state without posting bond. See W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 167-68 (1962). The Mississippi Black Code provided that adult blacks without employment, blacks "unlawfully assembling together," and white persons associated with blacks would be guilty of vagrancy and subject to a fifty dollar fine and ten days imprisonment if black, and two hundred dollars and six months imprisonment if white. See David F. Forte, *Spiritual Equality, The Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569 (1998); *City of Chicago v. Morales*, 119 S. Ct. 1849, 1858 n.20 (1999) (noting that "vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery"). In North Carolina, blacks were forced to sign contracts that incorporated onerous provisions mandating labor from sun-up to sundown, banning entertainment on the plantation, and enjoining blacks from leaving the plantation without permission of the master. See Browning, *supra* note 143, at 471. Louisiana, whose 1866 code was one of the most severe, authorized fines for "disobedience," which included "[f]ailing to obey reasonable orders," "impudence," "swearing," and "indecent language to or in the presence of the employer, his family or agent." *Id.* Blacks were also forbidden from serving on juries, testifying or acting as parties against whites, see KENNETH STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* (1965), or carrying firearms without licenses, see Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 344-45 (1991); see also DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL, AND INDUSTRIAL, 1865-1906 289 (Walter L. Fleming

measure re-enslaved the freedmen and threatened to undermine the tenets of the Thirteenth Amendment.¹⁴⁵

Northern Republicans, outraged by these acts and alarmed at a resurgent Democratic party in the South, responded by enacting what became known as the Civil Rights Act of 1866¹⁴⁶ over President Johnson's veto. In many respects, the legislative history of modern civil rights begins with the 1866 Act, which served as a textual model for both § 1983 and the first section of the Fourteenth Amendment.¹⁴⁷

Intended to combat the Black Codes,¹⁴⁸ § 1 of the 1866 Act gave broad protection to freedmen as citizens, guaranteeing "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by

ed., 1966) (describing the Mississippi Black Code provision that "no freedman, free Negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind . . .").

¹⁴⁵ As one commentator has noted, the Black Codes "were an attempt to restrict the Negro's labor and movements in such a way as to continue his economic dependence on the former master class, and to deprive him of the political rights by which he might enlarge his freedom of choice in economic life." MORROE BERGER, *EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS* 4-5 (1968). See also Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325 (1952) (explaining that the Black Codes' "restrictions . . . resulted in forcing Negroes to work for their former masters or other white men" and caused African Americans to remain slaves "in all but the constitutional sense").

¹⁴⁶ The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

¹⁴⁷ Compare *id.* § 2 ("any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act") with Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as 42 U.S.C. § 1983) ("every person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State") and with U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

¹⁴⁸ See, e.g., Remarks of Senator Trumbull introducing the bill:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the [Thirteenth] amendment.

CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull); see also Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 992-95 (noting that the Black Codes set the stage for Congressional action).

white citizens."¹⁴⁹ Section 2 of the 1866 Act, the direct precursor to § 1983, provided that:

any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . or by reason of his color or race . . . shall be deemed guilty of a misdemeanor.¹⁵⁰

All persons, including local officials, who deprived a citizen of civil rights under this statute could be fined or imprisoned.¹⁵¹ The bill further authorized federal district attorneys, marshals and agents of the Freedmen's Bureau to bring suit against violators in the federal courts.¹⁵²

The language of these two sections manifests the dual Congressional goals of securing certain rights for all citizens (Section 1) and punishing the deprivation of those rights taken "under color of any law, statute, ordinance, regulation or custom" (Section 2). While Section 2 met with little debate, Senator Trumbull's remarks make clear that the Act was intended to deter constitutional violations—whether in the form of discriminatory state laws such as the Black Codes or discriminatory actions such as the unequal enforcement of laws: "When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease."¹⁵³

As a direct predecessor of § 1983, the Civil Rights Act of 1866 reveals the postbellum Congresses' understanding that pervasive practices by local law enforcement threatened to undermine the ideals of equality and citizenship inherent in the Thirteenth Amendment. When many of the 1866 Act's provisions were later codified in the Fourteenth Amendment,¹⁵⁴ it became

¹⁴⁹ The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866). This provision of the 1866 Act overruled *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), which had held that descendants of those brought to the United States as slaves were not citizens and had "no rights which the white man was bound to respect."

¹⁵⁰ *Id.* § 2.

¹⁵¹ *See id.*; see also, CONG. GLOBE, 39th Cong., 1st Sess. 319 (1866).

¹⁵² *See* ch. 31 §2, 14 Stat. 27.

¹⁵³ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull).

¹⁵⁴ Congress presented the 14th Amendment for ratification in the fall of 1866. White southerners, however, refused to ratify: with the exception of Tennessee, every southern state between the last months of 1866 and the first months of 1867 rejected the Fourteenth Amendment. *See generally* James E. Bond, *The Original Understanding of the 14th Amendment*, 23 AKRON L. REV. 18 (1985). In March 1867, Congress retaliated against the South's defiant refusal to accept the 14th Amendment by imposing military Reconstruction. The South was divided into five military districts and new criteria were promulgated for

increasingly clear that federal enforcement of these rights against incursion by local officials was necessary. Congress then began to enforce "by appropriate legislation," the rights guaranteed by the Reconstruction Amendments.¹⁵⁵ The aptly-named Enforcement Acts—of which § 1983 is one—were a series of statutes intended to give bite to violations of the rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth amendments.¹⁵⁶

B. *The Ku Klux Klan Act of 1871*

The federal government's legislative struggle to realize the constitutional ideals of freedom and equality had little impact on daily life in the South.¹⁵⁷ Reports from Freedmen's Bureau¹⁵⁸ agents stationed throughout the South

restoration, including, of course, ratification of the 14th Amendment. In addition, Congress required constitutional conventions be held in every southern state to draft new constitutions that would be approved by voters and Congress; black males over the age of 21 be added to voter rolls and certain classes of white voters removed; and that elections for state offices occur only after the new constitutions had been approved and adopted. *See* Reconstruction Act of Mar. 2, 1867, ch. 152, 14 Stat. 428 (1867); Reconstruction Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (1867); *see generally* FONER, *supra* note 141, at 276. By July 28, 1868, two years after the commencement of military Reconstruction, all newly "reconstructed" southern governments had ratified the 14th Amendment. The 15th Amendment, which guaranteed that the right to vote would not be withheld on the basis of "race, color or previous condition of servitude," was ratified in March, 1870. *Id.*

¹⁵⁵ *See* U.S. Const. Amend. XIV, § 5 ("Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

¹⁵⁶ The first Enforcement Act of May 31, 1870 (16 Stat. L. 140) (1870), "a criminal code upon the subject of elections," forbade state officials to discriminate among voters on the basis of race and authorized the President to appoint election supervisors with the power to bring to federal court cases of election fraud, the bribery or intimidation of voters, and conspiracies to prevent citizens from exercising their constitutional rights. CONG. GLOBE., 41st Cong., 2d Sess. 3656 (1870). A second act strengthened enforcement powers in large cities. *See id.* The Ku Klux Klan Act of April 20, 1871 is sometimes called the "third force bill." *Id.* *See also infra* notes 174-86 and accompanying text.

¹⁵⁷ As Michael Gerhardt noted:

[The Civil War Amendments] could not end the increasing violence occurring primarily in the South against the newly freed slaves and their supporters. This violence was perpetrated both by individuals and by organized groups such as the Ku Klux Klan, which included members that were state and local officials. State officers, including state judges, contributed to the violence by participating in it themselves or by not punishing the perpetrators when given the opportunity.

Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 547 (1989); *see also* Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 975 (1987) (observing that local courts were "unable or unwilling to check the evil").

¹⁵⁸ Established by Congress in March 1865, the original purpose of the Freedmen's Bureau was to distribute clothing, food, and fuel to destitute freedmen and to oversee "all subjects" relating to their condition in the South. The Bureau was intended as a temporary expedient, with a one year life span and no budget of its own. Given the chaotic conditions

recounted terrifying episodes of violence against the freedmen and white sympathizers by the Ku Klux Klan¹⁵⁹ and other paramilitary groups. Racially-motivated beatings, lynchings and murders were common in the South during this period.¹⁶⁰

Perhaps the most disturbing aspect of these reports was that local authorities either did nothing to protect the freedmen or actively participated in the assaults.¹⁶¹ Sheriffs refused to investigate or arrest whites suspected of crimes

in the postwar South, Bureau agents "spent most of their time coping with day-to-day crises, and did so under adverse circumstances and with resources unequal to the task." FONER, *supra* note 141, at 69, 143; *see also* GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN'S BUREAU* 110 (1974).

¹⁵⁹ Established in 1866 by former members of the Confederate Army, the Ku Klux Klan became a terrifying source of organized violence in the postbellum South. Often acting with the support of local governments, the Klan focused its violence primarily on preventing blacks from gaining political or economic equality, and secondarily on whites whose sympathies were with the North. The Klan was undoubtedly responsible for numerous outrages against the freedmen and white Republicans. *See* CONG. GLOBE, 42nd Cong., 1st Sess., app. at 277 (1871) (speech of Rep. Porter); *see generally* STANLEY F. HORN, *INVISIBLE EMPIRE: THE STORY OF THE KU KLUX KLAN 1866-1871* (1973).

¹⁶⁰ A Bureau agent in Tennessee reported that between April 1865 and October 1866, thirty-three freedmen had been murdered by whites. Letter from J.R. Lewis to Commissioner Howard (Oct. 3, 1866), *quoted in* John A. Carpenter, *Atrocities in the Reconstruction Period*, in *LYNCHING, RACIAL VIOLENCE, AND LAW* 36, 48 (Paul Finkelman ed., 1992). Some Freedmen's Bureau reports also indicated the purported reason for a particular assault on a freedman: "killed because he did not take off his hat to Murphy," or "shot him as he was passing in the street to 'see him kick.'" Letter from J.B. Kiddoo to Commissioner Howard (Oct. 25, 1866), *quoted in* Carpenter, *supra* at 239. While most freedmen lived in constant fear, blacks holding public office faced particular threat of violence. At least one tenth of the black members of the 1867-68 constitutional conventions became victims of violence during Reconstruction, including seven actually murdered. Richard L. Hume, *Negro Delegates to the State Constitutional Conventions of 1867-69*, in *SOUTHERN BLACK LEADERS* (Howard N. Rabinowitz, ed., 1982). White Republicans were also persecuted by illicit groups. Klansmen murdered three "scalawag" members of the Georgia legislature and drove ten others from their homes in 1868, assassinated a prominent Republican leader in 1869, and organized nighttime gangs to sit watch outside the homes of Republicans, threatening their lives if they did not desist in their political course. OTTO H. OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGEE 160-64* (1965). *See* CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866):

The poor freedmen, who a few months ago were leaping and laughing with the joy of newfound liberty, invoking the blessings of Heaven upon the Government that had everywhere subject to indignity, insult, outrage and murder. During the past four months, in Alabama alone, fourteen hundred cases of assault upon freedmen have been brought before the Freedmen's Bureau . . . [T]he murders go unpunished.

Id., app. at 140 (statement of Sen. Wilson).

¹⁶¹ Letter from Davis Tillson, Assistant Commissioner, Georgia, to Commissioner Howard (Feb. 24, 1866), *quoted in* Carpenter, *supra* note 160, at 238. Tillson reported that he "called upon the Sheriff of Henry County and asked him to arrest certain parties charged

against blacks, district attorneys refused to prosecute, and courts refused to entertain civil cases brought by the freedmen against their white persecutors.¹⁶² A Freedmen's Bureau agent stationed in Kentucky, for example, reported that at least nineteen freedmen had been killed and 233 freedmen had been badly injured from 1865 to 1866; in none of these cases had any action toward punishing the offenders been reported by the state authorities.¹⁶³ An agent in Louisiana reported seventy murders of freedmen by whites and 210 cases of whipping, beating and stabbing.¹⁶⁴ Again, in almost every instance, the guilty parties had not been apprehended.¹⁶⁵ As one Bureau agent in New Orleans reported, most local officials were simply too prejudiced to grant the freedmen equal justice: "whenever they can grind a poor Black man down, they do it to gain popularity, 'as it is nothing but a cursed nigger,' (using their own language)."¹⁶⁶

with committing outrages on freed people." *Id.* The sheriff replied that "it would be unpopular to punish white men for anything done to a negro—it might be unsafe—that he was not going to obey the orders of any damned Yankee—and that the rebellion was not over in Henry County." *Id.* See Robert J. Kaczorowski, *To Begin in the Nation Anew: Congress, Citizenship and Civil Rights After the Civil War* in THE AFRICAN-AMERICAN EXPERIENCE: EMANCIPATION AND RECONSTRUCTION, Vol. 3, 383 (Paul Finkleman, ed.). Kaczorowski notes that

local officials in the South sanctioned and legitimized the defiant behavior of individuals, and the racial and political customs of communities dominated by white[] . . . state officers commonly failed or refused to protect the personal safety and property of blacks . . . [and when] Southern blacks and politically unpopular whites were the victims of crimes, they could not get sheriffs to arrest, courts to try, or juries to convict the perpetrators.

Id.

¹⁶² Letter from Major General Joseph B. Kiddoo, Assistant Commissioner, Texas, to Commissioner Howard (June 26, 1866), *quoted in* Carpenter, *supra* note 160, at 239. Kiddoo reported that he was unable to obtain justice for the freedmen from the civil courts; trial of these cases, he said, was "worse than a farce." *Id.* The Assistant Commissioner of South Carolina, Robert K. Scott, reported that "even under the most favorable circumstances that can be anticipated under the present system of laws, the freed people will fail to receive from the civil authorities that protection to which they are entitled both by right and by law, and without which they cannot but gradually revert back to a condition differing little from their former slavery—save in name." Letter from R.K. Scott to Commissioner Howard (Dec. 18, 1866), *quoted in* Carpenter, *supra* note 160, at 240.

¹⁶³ Letter from General Jefferson C. Davis to Commissioner Howard (Nov. 27, 1866), *quoted in* Carpenter, *supra* note 160, at 242.

¹⁶⁴ See Report of General Joseph A. Mower to Commissioner Howard (March 1867), *quoted in* Carpenter, *supra* note 160, at 242. Mower's 30-page report contained detailed information concerning the individual murders and the refusal of local authorities to investigate and prosecute offenders. According to Mower, the civil authorities "took no notice of the affair." *Id.*

¹⁶⁵ See *id.*

¹⁶⁶ Report of Lieutenant J.C. De Gress (June 24, 1867), *quoted in* Carpenter, *supra* note 160, at 242.

Some state governments tried to stem the escalating violence in towns and counties by, for example, outlawing travel in disguise, raising the penalties for assault, murder, and conspiracy, and authorizing ordinary citizens to arrest Klan members.¹⁶⁷ Yet there was no real mechanism for enforcing these laws because much Klan activity took place in Democratic counties, where local officials either belonged to the organization or systematically refused to enforce state criminal laws against members of the Ku Klux Klan and similar groups.¹⁶⁸ Further, victims of this organized violence found themselves with no recourse in the state courts.¹⁶⁹ While the Civil Rights Act of 1866 had essentially repealed the Black Codes, it had not reached the more invidious and destructive inaction of state and local governments in failing to protect the rights of the citizenry.¹⁷⁰

In response to the growing violence, President Grant sent a message to Congress bemoaning the "condition of affairs" in the South which rendered "life and property insecure" and "urgently recommend[ing] . . . legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States."¹⁷¹ The President's message, as well as testimony presented to the Joint Committee on

¹⁶⁷ See FONER, *supra* note 141, at 438.

¹⁶⁸ When southern sheriffs did arrest suspects, "witnesses proved reluctant to testify, Klansmen perjured themselves to provide one another with alibis, and, as one Florida Republican leader observed, 'if any one of these [Klans]men is on the jury . . . you cannot convict.'" FONER, *supra* note 141, at 434. As one commentator has noted, "[t]he Klan acted with the support of local governments in some areas, and in spite of the government in other[s]." Mead, *supra* note 23, at 16, n.86; see also *Developments in the Law*, *supra* note 14, at 1153 ("Southern resistance to Reconstruction continued and by early 1871 there was overwhelming evidence that through tacit complicity and deliberate inactivity, state and local officials were fostering vigilante terrorism against politically active blacks and Union sympathizers.").

¹⁶⁹ See CONG. GLOBE, 42nd Cong., 1st Sess. 244 (1871).

Of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization, not one has been punished . . . [The laws] only fail in efficiency when a man of known Union sentiments—whether black or white—invokes their aid. Then Justice closes the door of her temples; frightful murders, whippings, and robberies may occur where these are the subjects, and the arm of Justice is paralyzed.

Id. (Speech of Sen. Pratt).

¹⁷⁰ See WILLIAM S. MCFEELY, *GRANT: A BIOGRAPHY* 260 (1981) (noting that by 1867, Freedman's Bureau Commissioner Oliver Otis Howard "had dozens of carefully documented reports from his agents of murders and mutilations of freedmen all across the South").

¹⁷¹ Message of March 23, 1871, CONG. GLOBE, 42nd Cong., 1st Sess. 244 (1871); see also *Developments in the Law*, *supra* note 14, at 1153 & n.106 ("[In response to a]trocities committed by the Ku Klux Klan[,] . . . President Grant requested emergency legislation in a special message, stating that a virtual state of anarchy existed in the South and affirming that the states were powerless to control the widespread violence.").

Reconstruction,¹⁷² convinced the Forty-Second Congress that political authorities in the South would not only deny blacks their rights of citizenship, but also would willingly participate in their violent victimization.¹⁷³ In response, Congress enacted the Civil Rights Act of 1871, or the Ku Klux Klan Act, on April 20, 1871.¹⁷⁴ Section 1 of Act, now codified as 42 U.S.C. § 1983, gave any person whose rights should have been protected and were not federal cause of action against the official who should have provided the protection.

In the sparse legislative debates surrounding this section,¹⁷⁵ it was clear that Congress included the phrase "customs and usages" within its definition of law in the original Act because of the persistent and widespread discriminatory practices of state officials in some areas of the postbellum South.¹⁷⁶ Senator Davis spoke of "custom and usage" in the context of the common practice of giving whites superior public accommodations.¹⁷⁷ Senator Thurman argued that the section referred to "either statute law or 'custom or usage,' which has become common law."¹⁷⁸ Senator Trumbull referred to customs prevailing in a particular community, using the example of the Southern practice of providing harsher punishments for blacks than for whites in criminal cases.¹⁷⁹ And Representative Garfield stated, "even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them."¹⁸⁰ Indeed, many of the bill's supporters argued that

¹⁷² S. REP. NO. 42-1 (1871) (reporting investigations into Klan violence in the South against blacks and white Republicans).

¹⁷³ See EUGENE HOLLON, *FRONTIER JUSTICE: ANOTHER LOOK* 221-22 (1974) (stating that the statistics submitted to Congress on the lawlessness and violence in the South "were generally accepted as valid by both radical and conservative members").

¹⁷⁴ See 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983); CONG. GLOBE, 42nd Cong., 1st Sess., 820 (1871); see also 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 591-93 (Bernard Schwartz ed., 1970) (summarizing the social and political circumstances in which the 1871 Act was enacted).

¹⁷⁵ See, e.g., *Developments in the Law*, *supra* note 14, at 1155 (noting that Section 1 of the 1871 Act "was the least controversial portion of the bill"); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1488 n. 14 (1969) ("Section 1983's predecessor—a comparatively uncontested part of a highly controversial bill—received little attention and no amendment.").

¹⁷⁶ See, e.g., CONG. GLOBE, 42nd Cong., 1st Sess. 428 (1871) ("[T]he States made no successful effort to bring the guilty to punishment or afford protection or redress . . .") (remarks of Rep. Beatty); CONG. GLOBE, 42nd Cong., 1st Sess., app. at 71 (1871) (statement of Rep. Shellabarger).

¹⁷⁷ CONG. GLOBE, 39th Cong., 1st Sess., app. at 183 (1866) (statement of Sen. Davis).

¹⁷⁸ See CONG. GLOBE, 42nd Cong., 1st Sess., app. at 217 (1871) (statement of Sen. Thurman).

¹⁷⁹ See CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (statement of Sen. Trumbull).

¹⁸⁰ CONG. GLOBE, 42nd Cong., 1st Sess., app. at 153. (1871) (statement of Rep. Garfield).

the equal protection clause of the Fourteenth Amendment was not a mere prohibition against discrimination, but a requirement of protective enforcement.¹⁸¹ In other words, a state or locality might violate equal protection if it stood by and “permit[ted] the rights of citizens to be systematically trampled,” even where these violations occurred “without color of law.”¹⁸² Therefore, it was not the unavailability of state remedies, but rather, “the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum” behind the Act.¹⁸³

Thus, “custom” in the statutory provision that is now § 1983 was directed at the “persistent and widespread” practices of ordinary sheriffs and prosecutors in failing to protect the rights of citizens.¹⁸⁴ Custom was not limited to the direct actions of policymaking officials or the unconstitutional laws passed by state and local governments. Rather, the very purpose of the “custom” language in the statute was to target the actions of non-policymaking government officials whose misconduct was tolerated by the policymakers.¹⁸⁵ And while the “custom” provision of § 1983 was not used effectively to combat systemic problems of local law enforcement for nearly a hundred years after its enactment,¹⁸⁶ rumblings of claims based on unconstitutional customs

¹⁸¹ It is clear from the debates on the Enforcement Act of 1871 that Congress knew that law enforcement officials participated in lynchings and mob violence. See generally CONG. GLOBE, 42nd Cong., 1st Sess. (1871). One member described an incident in his district:

[S]uddenly, without provocation or warning, a policeman, or at least a man in the uniform of a policeman, drew a pistol and deliberately put a bullet through the body of a quiet and inoffensive colored man standing near him. Immediately, an indiscriminate and rapid firing commenced. . . . For at least five minutes a steady fire was poured into the retreating crowd. . . . [T]he panic was increased by the discovery that the police force was in full sympathy with the murderers, and were themselves emptying their revolvers into the terrified and struggling mass of human beings who were frantically striving to get beyond their range.

Id. at app. 184 (statement of Rep. James Platt).

¹⁸² *Id.* at 375 (statement of Rep. Lowe).

¹⁸³ *Id.*

¹⁸⁴ The Supreme Court observed in *Adickes* that “Congress included customs and usages within the definition of law in [§ 1983] because of the persistent and widespread discriminatory practices of state officials.” *Adickes v. Kress & Co.*, 398 U.S. 144, 167 (1970).

¹⁸⁵ As the Court held in *Monroe*, § 1983 was enacted, in large part, to provide a federal remedy where state law, “though adequate in theory,” was unavailable in practice. See *Monroe v. Pape*, 365 U.S. 167, 174 (1961). See also Schnapper, *supra* note 16, at 229 (“The unconstitutional customs with which supporters of § 1983 were concerned were not . . . exercises of final or delegated authorities but the widespread and persistent practices of ordinary sheriffs, judges and prosecutors.”).

¹⁸⁶ For example, local law enforcement officials condoned or even participated in lynchings and other violence against blacks in the late eighteenth and early nineteenth centuries with little fear of civil rights suits, or any other form of punishment for their unconstitutional acts. See ROBERT L. ZANGRANO, *THE NAACP CRUSADE AGAINST*

can now be heard at the lower federal court level.

C. Modern "Custom" Claims

Even though the Supreme Court has never directly addressed a claim brought under the "custom" language of § 1983, it has acknowledged that "Congress included customs and usages because of the persistent and widespread discriminatory practices of state officials Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."¹⁸⁷ Guided by this language, the lower federal courts have seen a modest number of § 1983 claims seeking to hook municipal liability squarely on the existence of an unconstitutional "custom." Only a handful of these courts have undertaken any analysis to distinguish "custom" from "policy."¹⁸⁸

LYNCHING, 1909-1950 8 (1980) (stating that "public officials . . . either cooperated with the mob or sought refuge in silence and inaction"); U.S. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 23 (1947) ("Punishment of lynchers is not accepted as the responsibility of state or local governments. . . . Frequently, state officials participate in the crime, actively or passively."); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 24 (1993) (noting that police participated in at least half of the lynchings in the 1930s); WE CHARGE GENOCIDE 10-12, 58, 59, 81, 82, 120, 225 (William L. Patterson ed., 1951) (describing numerous cases of police participation in, and even instigation of, mob attacks on African Americans up to the 1950s); Howard N. Rabinowitz, *The Conflict between Blacks and the Police in the Urban South, 1865-1900*, HISTORIAN, Nov. 1976, at 62, reprinted in RACE AND CRIMINAL JUSTICE 318, 324-26 (Paul Finkelman ed., 1992) (recounting instances of police brutality against African Americans in post-Civil War urban communities that were rarely punished). Many scholars analogize police brutality and misconduct today to the lynchings of the past. See Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACKLETTER J. 67 (1993). For example, Judge Higginbotham described the Rodney King beating as "a haunting sequel to the widespread lynching of blacks in the south." A. Leon Higginbotham, Jr. & Aderson B. Francois, *Looking for God and Racism in all the Wrong Places*, 70 DENV. U. L. REV. 191, 192 (1993).

¹⁸⁷ *Adickes*, 398 U.S. at 167. The Court has also explained:

It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.

Id. at 168 (quoting *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940) (noting the petitioner claimed that "all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years")). It should be noted, however, both *Adickes* and *Browning* were decided prior to *Monell's* extension of § 1983 liability to municipal entities.

¹⁸⁸ For example, the Ninth Circuit aptly described the purpose of municipal liability for unconstitutional customs as follows:

The existence of custom as a basis for liability under § 1983 thus serves the critical role

A number of custom claims have been brought by municipal employees alleging discriminatory "customs" that cost them their jobs. For example, a Mexican-American city employee prevailed in a § 1983 action against his municipal employer by showing evidence of a pattern of disparate treatment over a period of several years that was "both instigated and ratified by . . . subordinate supervisory personnel," culminating in plaintiff's dismissal from his position.¹⁸⁹ The Eighth Circuit held that "[t]he evidence was sufficient for the jury to conclude that the discrimination was so permanent and well-settled as to constitute a custom with the force of law."¹⁹⁰

The "custom" basis for municipal liability has also been used effectively in a handful of police-related § 1983 cases. For example, in *Jones v. City of Chicago*, an African-American man wrongly charged with rape and murder prevailed in a § 1983 suit against police officers, the department and the City.¹⁹¹ The plaintiff proved an unconstitutional custom in the maintenance of "street files," i.e., police files containing contemporaneous notes of investigations which are "withheld from the state's attorney and therefore unavailable as a source of exculpatory information that might induce the D.A.

of insuring that local government entities are held responsible for widespread abuses or practices that cannot be affirmatively attributed to the decisions or ratification of an official government policymaker but are so pervasive as to have the force of law.

Thompson v. City of Los Angeles, 885 F.2d 1439, 1444 (9th Cir. 1989). The court observed that the "county maintained a 'custom' of unconstitutional jail conditions in the form of a shortage of beds." *Id.* at 1449.

¹⁸⁹ *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987). Plaintiff introduced evidence that his supervisors engaged in the practice of distributing paychecks to non-minorities at 9:30 a.m., but not paying minorities until day's end because they believed minorities would leave after receiving their checks. *See id.* at 555. Plaintiff also showed that defendants hired a non-minorities "right off the street" for full-time positions that plaintiff, and other minorities, had been promised. *Id.* Finally, plaintiff proved that his supervisor ordered him to sign a false statement that a black employee had beaten and robbed a supervisor; apparently, plaintiff's false statement was necessary to "get rid of the nigger." *Id.* Plaintiff's refusal to obey this command led to his suspension and eventual dismissal.

¹⁹⁰ *Id.*; *see also Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1189 (7th Cir. 1986) (finding the City liable where sexual harassment of female employees was an "on-going and accepted practice at the East Chicago Fire Department," which constituted a custom for purposes of municipal liability under § 1983).

¹⁹¹ 856 F.2d 985 (7th Cir. 1988). George Jones was wrongfully arrested, jailed, and charged with murder and other crimes.

After these charges were dropped, Jones sued the City of Chicago and several Chicago police officers and a police lab technician under 42 U.S.C. § 1983 for false arrest, false imprisonment, intentional infliction of emotional distress, and malicious prosecution, as well as conspiracy to commit these wrongs. He alleged that the defendants' conduct had denied him due process of law under the Fourteenth Amendment and violated his rights under the common law of Illinois. A jury awarded him \$801,000 in compensatory and punitive damages.

Id. at 988.

not to prosecute or, failing that, would at least be available to defense counsel under *Brady*.¹⁹² Plaintiff further proved that the maintenance of street files was a department-wide practice known to police department supervisors, and that the "clandestine character of the street files" caused his injuries.¹⁹³

Similarly, in *Mathias v. Bingley*, the plaintiff brought a § 1983 suit alleging that the police department maintained an unlawful custom of failing to notify individuals with claims to property seized in criminal investigations.¹⁹⁴ Observing that officers customarily attempted to notify lawful owners "once or twice, maybe not at all," the court found the municipality liable under the "custom" prong of § 1983.¹⁹⁵

In these cases, plaintiffs pointed to the unwritten practices adhered to by rank-and-file municipal officials as the basis for establishing municipal liability. It is doubtful that these plaintiffs could have successfully argued that the offending actions constituted municipal policies under any of the three models discussed in Part II. In *Garza v. City of Omaha*, the court found "there was evidence that the disparate treatment of which Garza complained took place over a period of several years . . . The evidence was sufficient for the jury to conclude that the discrimination was so permanent and well settled as to constitute a custom with the force of law."¹⁹⁶ The plaintiff would have been unsuccessful under both the quasi-legislative model (because there was no written, unconstitutional policy) and the official action model (because the discriminatory acts involved subordinate personnel rather than final policymakers).

An important question is whether Garza would have been successful bringing a § 1983 claim under the "failure to [blank]" model, asserting that the city failed to train, supervise or discipline the low-level officials *not* to engage in discriminatory actions. But there are three problems with such a claim. First, the unconstitutionality of long-standing discriminatory actions is obvious to all without training or supervision. Thus, in the words of the Second Circuit, any "failure to train or supervise is generally not 'so likely' to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise."¹⁹⁷ Second, the city had non-discrimination policies in place when Garza and other Mexican-American employees suffered under the actions of low-level officials. It is unlikely that a

¹⁹² *Id.* at 995 (citing *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring prosecution to turn over any exculpatory evidence to the defense)). According to Judge Posner, the maintenance of police street files reveals "a frightening abuse of power by members of the Chicago police force and unlawful conduct by the City itself." *Id.* at 988.

¹⁹³ *Id.* at 995.

¹⁹⁴ *Mathias v. Bingley*, 906 F.2d 1047 (5th Cir. 1990).

¹⁹⁵ *Id.* at 1054.

¹⁹⁶ *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987).

¹⁹⁷ *Walker v. City of New York*, 974 F.2d at 293, 299-300 (2d Cir. 1992); *see also supra* notes 107-09, and accompanying text.

court would have examined whether those policies rose to the level of deliberate indifference.¹⁹⁸ Finally, the plaintiff would have difficulty showing the required causal nexus between his injury and the alleged deficient training, supervision, or failure to discipline.¹⁹⁹

Similar problems would have arisen in *Jones v. City of Chicago*, where the police had a custom of maintaining “street files” containing exculpatory evidence that were never released to the state attorney.²⁰⁰ While Jones was able to prove to the jury that this particular “custom” was “department-wide and of long standing,” it is unlikely he could have shown that the Department had a written policy authorizing street files, or that an unwritten policy had been authorized by a final policymaker.²⁰¹ Jones also would not have prevailed under a “failure to [blank]” theory, because the unconstitutionality of this clandestine system should have been, “plainly obvious” to all police officers, so any “failure to train” could not have caused the challenged deprivations.

The post-*Monell* “custom” cases provide a glimpse into the dormant power of § 1983 to attack the unwritten codes of conduct that underlie official misconduct. To appreciate the potency of the “custom” provision, it is necessary to look beyond fringe police practices, such as the use of “street files” in *Jones v. City of Chicago*. The unwritten codes of conduct addressed by the 1871 statute find their modern day equivalent in a pervasive, unwritten code adhered to by officials in contemporary law enforcement organizations—the “police code of silence.”

IV. THE “CUSTOM” OF THE POLICE CODE OF SILENCE

The police “code of silence” is a well-documented phenomenon.²⁰²

¹⁹⁸ See, e.g., *Liebe v. Norton*, 157 F.3d 574, 579 (8th. Cir. 1998) (stating that a county’s policy “cannot be both an effort to prevent suicides and, at the same time, deliberately indifferent to suicide”). See also *supra* text accompanying notes 116-18 (providing detailed analysis of *Liebe v. Norton*).

¹⁹⁹ See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (stating that, although respondent has identified a deficiency in a police training program, she “must still prove that the deficiency in training actually caused the police officers’ indifference to her medical needs”); *Board of the County Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 412 (1997) (“The connection between the background of the [officer inadequately screened] and the specific constitutional violation alleged must be strong.”). See also *supra* notes 120-25 and accompanying text (providing analysis of *Brown* under “failure to screen applicants” model).

²⁰⁰ See *Jones v. City of Chicago*, 856 F.2d 985, 989 (7th. Cir. 1988).

²⁰¹ *Id.*

²⁰² See, e.g., Joel Berger, *See-No-Evil Officers Should Pay*, N.Y. TIMES, Aug. 24, 1997, at A13 (noting documentation of New York Police Department’s failure to “adequately punish officers who blatantly lied to protect other officers charged with brutality”); Jeff Gammage, *Code of Silence: A Barrier to Truth in Investigations of Police*, PHILA. INQUIRER, May 5, 1996, at E1 (citing examples where police officers refused to report the criminal behavior of other officers); Jose Martinez, *‘Blue Wall’ Stymies Cop-Beating Probe; ‘Blue Wall’ of Silence Thwarts Probe Into Cox Beating*, BOS. HERALD, Jan. 28, 2000, at

Generally, the code of silence refers to the refusal of a police officer to "rat" on fellow officers, even if the officer has knowledge of wrongdoing or misconduct. The code of silence has existed, to varying degrees, for as long as there have been organized police forces²⁰³—from the New York Police under the notoriously corrupt Boss Tweed gang of the 1840s,²⁰⁴ to the wave of

A1 (citing U.S. Attorney's explanation that a "sustained code of Silence" among Boston police thwarted investigation into police beating of a black fellow officer and outlasted the statute of limitations for bringing federal charges); Joseph D. McNamara, *Has the Drug War Created an Officer Liars' Club?*, L.A. TIMES, Feb. 11, 1996, at M1 (noting recent perjury scandals in police departments in Los Angeles, Boston, New Orleans, San Francisco, Denver, New York, and other large U.S. cities); Joyce Purnick, *The Blue Line Between Rat and Right*, N.Y. TIMES, Oct. 10, 1996, at B1 (reporting that an officer "put herself in harms way" by "breaching the 'blue wall of silence'"); Selwyn Raab, *The Unwritten Code that Stops Police from Speaking*, N.Y. TIMES, June 16, 1985, at B4 (citing testimony of Commissioner Ward acknowledging the code of silence as "an old tradition" in all police forces).

²⁰³ See Carol Streiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 835 (1994) ("Despite widespread and frequent complaints about police corruption . . . [t]he lack of effective regulation and concomitant corruption have persisted throughout the twentieth century."); see also THOMAS J. DEAKIN, POLICE PROFESSIONALISM: THE RENAISSANCE OF AMERICAN LAW ENFORCEMENT 200-215 (1988).

²⁰⁴ See generally SEYMOUR MANDELBAUM, BOSS TWEED'S NEW YORK (1965) (detailing rampant corruption throughout New York City political structure). The New York City Police Department has been rocked by a major corruption scandal approximately every 20 years, as evidenced by the numerous commissions convened to investigate the department. See, e.g., REPORT OF THE SENATE COMMITTEE APPOINTED TO INVESTIGATE THE POLICE DEPARTMENT OF THE CITY OF NEW YORK 30 (Jan. 18, 1895) [hereinafter LEXOW COMMISSION REPORT] (Senator Clarence Lexow, Chair) (reporting that, between January 1, 1891, to May 1, 1894, twelve officers were convicted of criminal neglect of duty; twelve of oppression; one each of indecent exposure, burglary and attempt at rape; fifty-six of assault in the third degree; and forty-five of assault in the second degree); REPORT OF THE SPECIAL COMMITTEE OF THE BOARD OF ALDERMAN OF THE CITY OF NEW YORK APPOINTED AUGUST 5, 1912 TO INVESTIGATE THE POLICE DEPARTMENT (June 10, 1913) 6 [hereinafter CURRAN COMMISSION REPORT] (Henry H. Curran, Chair) (reporting that "practically all of the proprietors of gambling and disorderly houses in the City have been compelled to make regular monthly payments to certain members of the Police Department"); FINAL REPORT OF SAMUEL SEABURY, REFEREE, IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATE'S COURTS IN THE FIRST JUDICIAL DEPARTMENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS AT LAW PRACTICING IN SAID COURTS 80-96 (Mar. 28, 1932) [hereinafter SEABURY REPORT] (Samuel Seabury, Referee) (detailing police "frame-ups" and providing several examples); EDWARD S. SILVER, REPORT OF SPECIAL INVESTIGATION BY THE DISTRICT ATTORNEY OF KINGS COUNTY AND THE DECEMBER 1949 GRAND JURY, DECEMBER 1949 TO APRIL 1954 9-13 (January 8, 1955) (citing several examples of corruption, including police involvement in substantial gambling operations at Brooklyn College); REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES (Dec. 26, 1972) 83-84 [hereinafter KNAPP COMM'N REPORT] (Whitman Knapp, Chair) (describing practice of phony arrests to satisfy quotas); see also William Murphy & Leonard Levitt, *It's Blue Deja*

corruption that spread through urban police forces in the 1970s.²⁰⁵

Historically, the code of silence protected the traditional corruption racket.²⁰⁶ Today, the code of silence protects officers who violate civil rights through violence and other misconduct.²⁰⁷ The 1980s and 90s have brought to light a new and more invidious code of silence, typified by the high-profile cases of Rodney King²⁰⁸ and Abner Louima.²⁰⁹ City governments are aware of

Vu: New Scandal Reads Like Old Police Stories, N.Y. NEWSDAY, June 21, 1994 at 7 (discussing the similarities and differences between corruption scandals revealed by the various commissions from 1894 to the present).

²⁰⁵ See, e.g., *United States v. Philadelphia*, 644 F.2d 187 (3d Cir. 1980) (dismissing case where entire Philadelphia police force indicted for suppressing evidence that inculcates police officers); see also Charles R. Babcock, *Justice Accuses Philadelphia of Police Abuses*, WASH. POST, Aug. 14, 1979, at A1 (noting that the "police department's practices of abuse were directed at all persons but were especially harmful to the rights of blacks and Hispanics"); In Chicago in the 70s, a six-year investigation of the police department led to over 60 prison sentences and uncovered a long-standing relationship between the police, organized crime and city government involving bribery, extortion, conspiracy, and perjury. See CONTROL IN THE POLICE ORGANIZATION 23-4 (Maurice Punch ed., 1983). And in New York City, a major inquiry conducted by the Knapp Commission in 1972 uncovered institutionalized corruption throughout the police department, mainly involving officers taking bribes to allow gamblers, prostitutes, and others to avoid arrest. In the Commission's words, "[t]he tradition of the policeman's code of silence is so strong . . . that it was futile to expect testimony [regarding corrupt activities] from any police officer." KNAPP COMM'N REPORT, *supra* note 204, at 47.

²⁰⁶ See generally Hon. Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73, 76 (1995) ("Gambling, prostitution and other vice rackets are no longer the springboard to a career of corruption in the Police Department as they were in times gone by. Corrupt cops. . .now actively engage in criminal activity.").

²⁰⁷ See *id.*

²⁰⁸ The Rodney King incident implicates the police code of silence because it was carried out with an attitude of impunity: the officers were apparently so certain that they would suffer no recrimination for this assault that they communicated their actions to other officers via official police radios, and even bragged to medical personnel caring for King that they had inflicted the injuries he sustained. *Victim's Account of Police Beating*, L.A. TIMES, March 7, 1991, at A21. See Martin Berg, *Now, Time for the Real Thing: Trial in Rodney King Beating Set to Start*, L.A. DAILY J. (Feb. 3, 1992) (reporting that a police officer defendant in the Rodney King trial was charged as an accessory after the fact for concealing his conduct and that of other officers under his command).

²⁰⁹ See Berger, *supra* note 202 (responding to outrage over "nest of perjury" in Louima incident, Mayor Giuliani ordered all officers to spend several hours in discussion groups); see also Dan Barry, *Officers' Silence Still Thwarting Torture Inquiry*, N.Y. TIMES, Sept. 5, 1997 at A1 (noting that of 100 officers granted limited immunity in Louima torture case, approximately 12 are expected to have knowledge of the incident, and only two have provided valuable information); Claude Lewis, *Fallout From the Brooklyn Torture Case*, THE RECORD, Sept. 9, 1997 at L13 (noting that officers fear that bystanders, remembering "blue wall of silence" encountered in Louima case, will refuse to offer assistance when

this growing problem, as evidenced by the many commissions and task forces convened in major cities over the past decade to analyze the root causes of police brutality and misconduct. For example, a 1994 Report on the New York City Police Department uncovered evidence that police corruption has flourished, in part, "because of a police culture that exalts loyalty over integrity [and] the silence of honest officers who fear the consequences of 'ratting' on another cop no matter how grave the crime."²¹⁰ Similarly, the Los Angeles commission convened in the wake of the Rodney King incident identified a pervasive "officer code of silence," described by one officer as "a non-written rule that you do not roll over, tell on your partner, your companion."²¹¹ Detailed reports studying the code of silence have discussed its impact on police culture and the public perception of police officers.²¹²

Commission reports on corruption and brutality only begin to describe the

routine arrests present unforeseen trouble); *see also supra* note 6, and accompanying text (providing additional details surrounding the torture of Abner Louima by New York City police officers).

²¹⁰ REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 1 (July 7, 1994) [hereinafter MOLLEN COMMISSION REPORT] (Milton Mollen, Chair).

²¹¹ REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 169 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT].

²¹² *See, e.g.*, WICKERSHAM REPORT, *supra* note 1; 1961 U.S. COMM'N ON CIVIL RIGHTS REPORT, *supra* note 2, at 6-12 (detailing two examples of police brutality where the state's power to punish criminal behavior "may be blocked . . . by the fact that the potential defendant is the person who must start up the machinery of the criminal law"); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967) [hereinafter PRESIDENT'S COMMISSION ON LAW ENFORCEMENT]; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 162 (1968) [hereinafter 1968 KERNER COMMISSION REPORT] (arguing that one possible source of Negro hostility to police is the lack of effective complaint mechanisms evidenced by the fact "that policemen in some cities have little fear of punishment for using unnecessary force because they appear to have a degree of immunity from their departments"); U.S. COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? 50 (1981) [hereinafter 1981 U.S. COMMISSION ON CIVIL RIGHTS REPORT] (noting that citizens' complaints are valuable because the code of silence often prevents internal police command from learning about important problems); U.S. DEPARTMENT OF JUSTICE, POLICE INTEGRITY: PUBLIC SERVICE WITH HONOR (1997) [hereinafter POLICE INTEGRITY REPORT]; HUMAN RIGHTS WATCH REPORT, *supra* note 12, at 68-71 (stating that the Mollen Commission found the code of silence strongest in New York City's most dangerous neighborhoods, and that one officer, admitting to corrupt and brutal practices, never feared he would be turned in by another officer); POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 4 (Amnesty International 1996) [hereinafter AMNESTY INT'L REPORT] (citing Mollen Commission and finding that senior officers practice "a deliberate 'blindness' to corruption"); N.Y.C COMMISSION ON HUMAN RIGHTS, BREAKING THE US V. THEM BARRIER: A REPORT ON POLICE/COMMUNITY RELATIONS (1993) [hereinafter BREAKING US V. THEM BARRIER].

code of silence's role in police misconduct. In reality, police abuse continues to exist *primarily* because of the code of silence. *But for* the knowledge that misconduct will go unreported, a police officer would never mistreat a detainee in the presence of other officers, falsely arrest or harass witnesses of police misconduct, or orchestrate elaborate police cover-ups, including the destruction of evidence, drafting false reports, and perjury. And if not for the code of silence, a violent officer would not remain on a police force or carry a weapon. And *only* the code of silence can account for the retaliation suffered by law enforcement officers who dare to breach the code by reporting misconduct by fellow officers.

While it is impossible to catalogue all of the ways in which the code of silence facilitates police misconduct, the following three stories cover a spectrum of injuries attributable to the code of silence, and provide useful referents for the discussion below.

A. *The Officer Whose Repeated Violence Goes Unreported*

On a spring night in 1977, high school seniors Jim Muse and Liz Brandon parked in a secluded driveway and sat together in the front seat of the car. A truck pulled up, and a man identifying himself as Memphis police officer Robert Allen approached. Allen, who was off-duty, ordered Muse out of the car. Without provocation, Allen viciously beat the young man with his fists and cut him in the neck and ear with a knife. Allen then circled the car and attempted to grab Brandon, but she quickly locked the passenger side door. Muse used this opportunity to get back into the car and speed off. Frustrated, Allen fired at the vehicle, shattering the front window. A high speed chase terminated at a local hospital, where both Muse and Brandon were treated for serious physical injuries and emotional stress stemming from the incident.²¹³

When other officers of the Memphis police force heard about Allen's involvement in the incident, a collective groan went out over the department: "Allen had done it again."²¹⁴ Prior to this incident, the general consensus

²¹³ See *Brandon v. Allen*, 516 F. Supp. 1355, 1356-58 (W.D. Tenn. 1981) (detailing the unprovoked attack by Officer Allen on Elizabeth Brandon and James Muse, resulting in a § 1983 suit filed against Allen, the Police Chief, and the city of Memphis), *reversed*, 719 F.2d 151 (6th Cir. 1983), *rev'd sub nom.* *Brandon v. Holt*, 469 U.S. 464 (1985); see also *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975) (providing analogous § 1983 claim where off-duty police officer shot and killed two men and paralyzed another while acting under color of state law). Allen was convicted and imprisoned for the incident involving Brandon and Muse. *Brandon*, 516 F. Supp. at 1358. See also generally *Brandon v. Allen*, 645 F. Supp. 1261, 1264 (W.D. Tenn. 1986) (awarding "compensatory damages to plaintiff Elizabeth Brandon in the amount of \$10,000 and to plaintiff James Sherman Muse in the amount of \$41,310.75, jointly and severally against the defendant John D. Holt, in his official capacity, to be paid by the City of Memphis, Tennessee, and defendant Robert J. Allen in his personal capacity"); see also *infra* notes 254-57 and accompanying text (discussing *Brandon v. Allen* and the code of silence as police department custom).

²¹⁴ *Brandon*, 516 F. Supp. at 1358.

among officers had been that Allen was a “mental case” with a penchant for violence, and no officer wanted to ride in the car with him.²¹⁵ Aware of numerous violent prior acts by Allen on the job, officers expressed relief that Allen had “finally done something this time that he can’t get out of.”²¹⁶ While many officers had apparently wished that Allen be fired from the force before this incident, not one had ever filed a formal complaint against him or reported his behavior to a supervisor.²¹⁷ Over twenty citizen complaints had been filed against Allen, but not one had been corroborated by police testimony.²¹⁸

B. *Officers Who Engage In Misconduct In the Presence Of Other Officers*

On the evening of March 31, 1989, Andrew Sledd, a 23-year old African-American attending St. Xavier College on a basketball scholarship,²¹⁹ was preparing to take a shower in the Hyde Park townhouse he shared with his mother, fiancée, and six-year-old brother.²²⁰ At around 10:30 p.m., Sledd heard loud banging on the front door.²²¹ He started down the stairs wearing only a towel. He saw that the front door was hanging off its hinges, and a group of men had entered the house.²²² Believing these men were intruders, Sledd raced back up the stairs to retrieve his .22 caliber sport rifle. He told his sleeping fiancée to stay put.²²³ He turned and saw an armed African-American

²¹⁵ *Id.* (noting that Allen “was known to have bragged about killing a man in the course of duty,” and he would “ceremoniously” don his “killing gloves” when called to the scene of a crime).

²¹⁶ *Id.*

²¹⁷ *See id.* at 1361 (court notes that “due to a code of silence induced by peer pressure among the rank-and-file officers and among some police supervisors, few—if any—formal complaints were ever filed by police personnel” and found that the Police Director’s procedures “were highly conducive to ‘covering up’ officer misconduct”). The Police Director himself candidly acknowledged: “We have never, since I have been director, had the first single case where officers would really cooperate in terms of telling us on an official basis what they knew about a fellow officer.” *Id.*

²¹⁸ *See id.* at 1358-59 (noting that none of the Police Director’s new procedures encouraged or imposed any duty on officers to file formal complaints against other officers).

²¹⁹ Cam Simpson, *City Settles Lawsuit From ‘89 Cop Raid*, CHI. SUN TIMES, Feb. 4, 1998, at 23. *See Sledd v. Linsay*, 102 F.3d 282, 284 (7th Cir. 1996) (detailing the events with took place on March 31, 1989, at Sledd’s residence in the South Side of Chicago).

²²⁰ *See id.*

²²¹ *See id.* at 286 (describing the manner in which the officers entered Sledd’s residence). Sledd subsequently filed a § 1983 suit against the offending officers, the Chicago Police Department, and the City of Chicago alleging, in part, that the Department maintained a “custom” of the code of silence. The case eventually settled out of court for an undisclosed sum. Telephone Interview with Erica Thompson, Attorney for Andrew Sledd, People’s Law Office, Chicago, IL (June 1998). *See also infra* text accompanying notes 256-60.

²²² *See id.*

²²³ *See id.* (describing Sledd’s reaction to the presence of “intruders”); *see also* Steven P.

man turning from the bedroom doorway to the stairwell.²²⁴

As Sledd pursued the man down the stairwell, he walked into a storm of gunfire. Sledd was shot repeatedly and collapsed to the ground. A man immediately rolled him over, put a gun to his head, and said "We're the police, you asshole. I should blow your fucking brains out."²²⁵ The officer then struck Sledd's head with his pistol, kicked him in the groin, and walked away, ignoring his pleas for medical attention.²²⁶

The incident left Sledd paralyzed from the waist down, and facing serious criminal charges.²²⁷ Although he didn't point his rifle at the police, he was charged with attempted murder, armed violence, aggravated assault, and possession of cocaine allegedly discovered in Sledd's coat pocket during a subsequent search of the home. At trial, the officers testified that they had knocked on Sledd's door, identified themselves as police, announced they had a search warrant, and told Sledd to "freeze," but that he had responded by firing his weapon at them.²²⁸ The officers' stories were not credited and Sledd was found innocent of all charges.²²⁹

C. Retaliation Against Officers Who Breach the Code of Silence

New York City Police Officer Paula White-Ruiz had been on the job a year when she was partnered with Officer John Ward in the 66th Precinct. She and Ward were searching an apartment where a man lay dead with a large sum of cash in his pocket. Ward sent White-Ruiz out of the apartment to fetch his memo book. When she returned, the money was gone.²³⁰ She reported to her department supervisors her suspicion that Ward had stolen the money. Her allegations led to a number of interrogations of Ward, who was placed on modified duty the same day, and eventually discharged.²³¹

Garmisa, *Police Officers Granted Immunity for Shooting*, CHI. DAILY L. BULL., Oct. 13, 1994, at 6 (reiterating the contentions of the police officers regarding the events that took place on March 31, 1989).

²²⁴ See *Sledd*, 102 F.3d at 286 (According to the court's findings, the African-American man "was wearing blue jeans, a blue jacket, and white tennis shoes," but nothing bearing Chicago Police Department insignia. As he ran from Sledd, the man shouted "he's got a gun, let's get the fuck out of here.").

²²⁵ *Id.* (describing events that gave rise to Sledd's § 1983 action against the officers).

²²⁶ See *id.*

²²⁷ See Andrew Martin, *City Settles Costly Lawsuits*, CHI. TRIB., Apr. 30, 1998, at 3 (Metro-Chicago) (reporting that Sledd suffered serious nerve damage as the result of being shot and was cleared of all criminal charges).

²²⁸ See Garmisa, *supra* note 223, at 6, and accompanying text (analyzing the testimony of the police officers involved in the Sledd incident).

²²⁹ See *Sledd*, 102 F.3d at 287 (noting that Sledd was acquitted following a bench trial).

²³⁰ See Merle English, *Panel Hears of Racism, Cronyism, Nepotism, and Sexism*, NEWSDAY, June 14, 1994, at A29 (providing report of events that led to Ward's dismissal).

²³¹ See *White-Ruiz v. City of New York*, 983 F. Supp. 365, 368 (S.D.N.Y. 1997) (detailing events that led to the harassment of White-Ruiz); see also *infra* notes 254-70,

Arriving at work the next day, White-Ruiz found herself shunned by fellow officers.²³² Her report against Ward, including specific references to her, by name, had been communicated to all commands via the Department's internal teletype system.²³³ That evening, as White-Ruiz prepared to go off-duty, she found her car tires slashed.²³⁴

Within the week, White-Ruiz was called before Captain Scagnelli, the Precinct's commanding officer, who advised her to transfer to another precinct.²³⁵ White-Ruiz agreed to transfer to the 90th Precinct, where, on her first day, she found the words "Black Bitch" scrawled on her locker.²³⁶ One or more officers told her that they had been made aware of her impending arrival through the departmental grapevine, which had identified her as a "rat."²³⁷ In the weeks that followed, White-Ruiz suffered further hostility: she was called a "rat" and a "cheese-eater" during police radio transmissions;²³⁸ someone anonymously sent a copy of the order dismissing Officer Ward to her home;²³⁹ her car was vandalized;²⁴⁰ her locker in the precinct tampered with;²⁴¹ she received a series of anonymous, harassing telephone calls to her home;²⁴² graffiti appeared in the men's room of the station bearing her name and the likeness of a large rat;²⁴³ she discovered a dead rat lying next to her car;²⁴⁴ and

290-99 and accompanying text (providing analysis of the police code of silence).

²³² See *id.*

²³³ See *id.* (noting the inconsistency with the assurances of confidentiality White-Ruiz had received regarding the reporting of police misconduct).

²³⁴ See *id.*

²³⁵ See *id.* Scagnelli explained to White-Ruiz that he was being reassigned to another precinct and would be unable to shield her from future retaliation by other officers. See *id.*

²³⁶ See *id.* See also English, *supra* note 230, at A29 (noting that Ruiz found notes on her locker that said "black bitch").

²³⁷ See *White-Ruiz*, 983 F. Supp. at 368.

²³⁸ See *id.* at 369.

²³⁹ See *id.* at 370. White-Ruiz alleged that because officers' home addresses were required to be kept confidential by the Department, whoever had sent the letter—"presumably a fellow officer"—was being helped by others at the precinct, who were apparently "willing to go so far as to breach security." *Id.*

²⁴⁰ See *NYPD Blues: New York City Police Commissioner William Bratton Works To Break The Policeman's Code Of Silence And Expose Corruption, Eye to Eye With Connie Chung* (CBS television broadcast, Apr. 21, 1994) (interviews with then-New York City Police Commissioner, William Bratton, and police officers, including White-Ruiz, discussing the police code of silence).

²⁴¹ See *id.*

²⁴² See *White-Ruiz*, 983 F. Supp. at 371. See also *Eye to Eye*, *supra* note 240.

²⁴³ See *White-Ruiz*, 983 F. Supp. at 371. Apparently, the graffiti also referred to another officer, Hector Ariza, who had publicly criticized the Department's discriminatory law enforcement methods, and was therefore also viewed as a "rat" by fellow officers. *Id.*; see also *Ariza v. City of New York*, No. CV-93-5287, 1996 WL 118535, at *5 (E.D.N.Y. March 7, 1996) (discussing Ariza's allegations that "his name and the names of other

in a particularly chilling incident, officers refused her repeated requests for back-up in a dangerous situation, going so far as to jam the frequencies on the radio she was using to call headquarters for help.²⁴⁵

White-Ruiz complained to her supervisors about these incidents, but her complaints resulted only in a series of undesirable assignment changes and post-transfers.²⁴⁶ She also complained to the appropriate authorities about the harassment she had experienced, contacting the Department's Office of Employment Opportunity, individuals in the Internal Affairs Department, and then-Commissioner Raymond Kelly.²⁴⁷ Nothing worked, however, and she remained a pariah of the department, unable to do her job safely and effectively.²⁴⁸

D. *Common Threads: Injuries Result From the Police Code of Silence*

These three "stories," while vastly different, have one thing in common: the injuries they describe all resulted from the police code of silence. Even if the code of silence is defined narrowly to mean nothing more than "thou shalt not rat on a fellow officer" it is apparent from these three stories that there are innumerable and diverse ways in which devotion to this rule may cause injuries and constitutional deprivations. A proper appreciation of the implications of the code of silence is critical to understanding the custom theory of municipal liability.

officers were displayed on bathroom walls in the precinct along with the word 'rat' in reference to their speaking out against police malfeasance").

²⁴⁴ See *White-Ruiz*, 983 F. Supp. at 371. See also *NYPD Blues*, *supra* note 240. According to the MOLLEN COMMISSION REPORT, strikingly similar incidents have occurred to other officers who have reported police corruption or misconduct. MOLLEN COMMISSION REPORT, *supra* note 210, at 51-60. In one instance, a police captain who had disciplined subordinates for misconduct and reported acts of police brutality had to be transferred 38 times. *Id.* at 54. Apparently, "[i]n almost every case, on the very day he arrived to report for duty at his new command, he found evidence that his reputation had preceded him. At one command, his locker was burned; at another, his car tires were slashed; at another, he received threats of physical harm." *Id.* Similarly, a detective in the Internal Affairs Division who was transferred to a precinct detective squad testified that his colleagues "placed dead rats on his car windshield, stole or destroyed his personal property, and told him directly that he could not count on them times of danger." *Id.* at 55.

²⁴⁵ See *White-Ruiz*, 983 F. Supp. at 370.

²⁴⁶ See *White-Ruiz v. City of New York*, No. CIV-93-7233, 1996 WL 603983, at*2 (S.D.N.Y. Oct. 22, 1996) ("Plaintiff further alleges that, throughout the period from 1989 to 1991, she also suffered retaliatory assignment changes and inappropriate posts, which did not adequately reflect her seniority").

²⁴⁷ See *White-Ruiz*, 983 F. Supp. at 378-79. When White-Ruiz contacted the Department's Office of Equal Employment Opportunity to lodge a complaint, she was told that the "whistleblower" nature of her case placed it outside the jurisdiction of that office. *Id.*

²⁴⁸ See *id.*

V. THE PROMISE OF "CUSTOM"

Drawing on the pre-*Monell* standards for "custom" claims articulated by the Supreme Court,²⁴⁹ and the post-*Monell* jurisprudence of the lower federal courts,²⁵⁰ it seems relatively clear that a claimant seeking to predicate municipal liability on the existence of the code of silence as an unconstitutional "custom" would have to show that the code is a "widespread practice"²⁵¹ of which the municipality "knew or should have known,"²⁵² and

²⁴⁹ In *Monell*, the Court cited a previous case, *Adickes*, in its discussion of custom and municipal liability:

local governments . . . may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes* . . . "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . .

Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.

Monell, 436 U.S. at 691 (quoting *Adickes v. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

As previously noted, the Supreme Court had only directly addressed "custom" under § 1983 in *Adickes*, a pre-*Monell* case. While *Adickes* was decided prior to the extension of liability to municipal governments, the Court's analysis of the statutory "custom" language informs our understanding of "custom" in the post-*Monell* era. See *id.* at 166-68 (finding that custom under § 1983 "requires state involvement and is not simply a practice that reflects longstanding social habits, generally observed by the people in a locality," and that "settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements.")

²⁵⁰ A number of circuits have adopted the language of *Monell* in discussing custom-based § 1983 municipal liability claims. See *Sorlucco v. New York Police Dep't*, 971 F.2d 864, 870 (2d Cir. 1992) (noting that "the policy or custom used to anchor liability need not be contained in an explicitly adopted rule or regulation" so long as the "practices are persistent and widespread, and thus, so permanent and well-settled as to constitute 'custom and usage.'"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990) ("[A] course of conduct is considered to be a 'custom' when, though not authorized by law, 'such practices of state officials [are] so permanent and well settled as to virtually constitute law.'") (quoting *Monell*, 436 U.S. at 690).

²⁵¹ See *Praprotnik*, 485 U.S. at 127 (noting that to prove § 1983 liability based on custom, plaintiff must establish the existence of a widespread practice that, "although not authorized by written law or express municipal policy . . . is so permanent and well settled as to constitute custom or usage with the force of law").

²⁵² See *Fletcher v. O'Donnell*, 867 F.2d 791, 793-94 (3d Cir. 1989). (noting that "[c]ustom may be established by proof of knowledge and acquiescence."); *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987) (noting that "[a]ctual knowledge may be evidenced by recorded reports to or discussions by a municipal governing body . . . [and] constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of its responsibilities the governing body should have known of them") (citing *Bennet v. Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc)).

that the code itself caused the complainant's injury.²⁵³

I will address first the element of causation, which is seemingly most problematic of the three. I will then briefly outline the other elements required to establish the code of silence as an unconstitutional "custom" within the meaning of § 1983.

A. *The Code of Silence Causes (Colloquially) Constitutional Injury*

The stories recounted above in Part V reveal a cross-section of causative modalities—ways in which the code of silence causes constitutional harms. Officer Allen's brutal and unprovoked attack on two teenagers in Memphis, for example, was a function of the code of silence.²⁵⁴ The code dictated that none of Allen's fellow officers would ever give statements corroborating any of the citizen complaints against Allen,²⁵⁵ or report his violent behavior themselves.²⁵⁶ Andrew Sledd's story exemplifies the sense of confidence

²⁵³ See *Spell*, 824 F.2d at 1387 (noting that when a municipal policy or custom is unconstitutional, "the causal connection between policy and violation is manifest and does not require independent proof," but that when a policy or custom is not unconstitutional it must be shown to have caused the violation: "[p]roof merely that such a policy or custom was 'likely' to cause a particular violation is not sufficient; there must be proven at least an 'affirmative link' between policy or custom and violation. . . .") (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822-23, 833 n.9) (Brennan J., dissenting).

²⁵⁴ See *Brandon v. Allen*, 645 F. Supp. 1261, 1266 (W.D. Tenn. 1986) (finding that "there was throughout the Department a code of silence binding patrolmen and supervisors alike not to testify against or report on their colleagues That code was enforced by peer pressure, and tacitly sanctioned by the refusal of the Department to impose on its employees any obligation to disclose, even under questioning, misconduct by their fellow officers.") The *Brandon* court held that the code was "was precisely the sort of custom referred to in *Monell*." *Id.*

²⁵⁵ See generally HUMAN RIGHTS WATCH REPORT *supra* note 12, at 5 (study of 14 U.S. cities found that most police departments' internal affairs units "conducted substandard investigations, sustained few allegations of excessive force, and failed to identify and punish officers against whom repeated complaints had been filed; these units "often shielded officers who committed human rights violations from exposure and guaranteed them immunity from disciplinary sanctions or criminal prosecution" rather than investigating the alleged misconduct).

²⁵⁶ The fact that no other officer reported Allen, who was universally regarded as a "fringe" cop, a "mental case" that everyone feared, reveals just how indiscriminate the code can be. The code protects *any and all* officers from complaints, no matter how they are viewed by their colleagues. See generally, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, *supra* note 212, at 211 ("Whenever a number of dishonest officers are tolerated by other officers within a police organization, an atmosphere of mutual support and protection may develop, and eventually it may taint the entire police system."); COHEN & FELDBERG, *supra* note 56, at 7-8 (noting that police work can "drive its practitioners together in such strong fraternal bonds" that a "structural immorality" is created that causes "even those officers who will not go along with the illegalities [to] compromise their sense of integrity by looking the other way rather than revealing these abuses); SKOLNICK & FYFE,

produced by the code of silence. The officers who entered Sledd's home and shot him without identifying themselves as police knew that no matter what crimes they committed in that home, they would back one another's stories up and nothing would come of it.²⁵⁷

The Sledd case also highlights the disproportionate impact of the code of silence on poor and minority populations.²⁵⁸ Officers' confidence that their

supra note 186, at 90-92 (arguing that the "fundamental culture of policing" involves "danger, authority, and the mandate to use coercive force," and that this combination may result in "a banding together, a cover-up, a conspiracy of silence"); Gabriel J. Chin & Scott C. Wells, *The Blue Wall of Silence As Evidence of Bias And Motive To Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 252 (1998) (stating that "the closed nature of the [police] culture, the resentment of police by the public, the dangers and volatility of police work, and officers' dependence upon one another for mutual safety, spawns a strong loyalty on the part of police officers to each other").

²⁵⁷ According to David Rudovsky, similar attitudes contributed to the Rodney King incident:

The officers involved had to be fully confident of their colleagues' silence and of their department's dismissal of any complaints made by the numerous witnesses to this incident. Indeed, so sure were these officers of their immunity from punishment that they bragged about their abuses on the official police computer system and to medical personnel at the hospital where King was belatedly taken for treatment. Only officers assured by prior experience and knowledge of departmental attitudes that the department would not investigate or punish this type of abuse (regardless of the credibility of the witnesses or of their own incriminating statements) could have rationally taken the risk of engaging in this type of behavior.

Rudovsky, *supra* note 11, at 482.

²⁵⁸ See CHRISTOPHER COMMISSION REPORT, *supra* note 211, at 70 (finding that "[w]ithin minority communities of Los Angeles, there is a widely-held view that police misconduct is commonplace. The King beating refocused public attention on long-standing complaints by African-Americans, Latinos and Asians that LAPD officers frequently treat minorities differently from whites, more often using disrespectful and abusive language, employing unnecessarily intrusive practices . . . and engaging in use of excessive force when dealing with minorities"); HUMAN RIGHTS WATCH REPORT, *supra* note 12, at 39 (finding that minorities allege violations by police "more frequently than white residents, and far out of proportion to their representation in those cities" examined in the study); 1968 KERNER COMMISSION REPORT, *supra* note 212, at 5 (noting that "to some Negroes, police have come to symbolize white power, white racism, and white repression The atmosphere of hostility and cynicism is reinforced by a widespread belief among Negroes in the existence of police brutality and in a 'double standard' of justice and protection—one for Negroes and one for whites.") ST. CLAIR COMMISSION, REPORT OF THE BOSTON POLICE DEPARTMENT MANAGEMENT REVIEW COMMITTEE, 124 (1992) [hereinafter ST. CLAIR REPORT] (examining the Boston Police Department and finding that 50% of complainants in the sample group were African-American, while only 26% of Boston's population was African-American); SKOLNICK & FYFE, *supra* note 186, at 24 (the authors argue that contemporary police often brutalize members of a feared "outgroup"—some population thought to be "undesirable, undeserving and underpunished by established law"—with the result that victims of police brutality are often members of racial or ethnic minorities); Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1455, 1471-82 (1993) (arguing that: (1) the beating of

version of events will be believed depends on factors such as the race and socio-economic status of persons urging a contrary account of events. If not for the fact that Sledd himself was a college basketball star with no criminal record, it is possible that the officers' version of events—rifle-toting, drug-dealing, black male in South Side apartment fires assault rifle at cops—would have been believed. This point is certainly not lost on minority communities: disproportionately the victims of police violence,²⁵⁹ minorities are generally disinclined to stake their word against that of the police.²⁶⁰

Paula White-Ruiz suffered the injuries she did because she dared to breach the code of silence. No code can be effective without the threat of enforcement, and the White-Ruiz story illustrates the retaliation faced by officers who dare to report police misconduct. Police officers observe this sub-cultural allegiance because they are made to understand—by examples, stories, and myth—what happens to those who don't.²⁶¹ The stories of officers who

Rodney King was part of a pattern of abuse by Los Angeles police officers directed against young African American and Latino men; and (2) the police department tolerated that abuse).

²⁵⁹ See James Barron, *New York Study of Police Finds No Wide Misuse of Deadly Force*, N.Y. TIMES, May 19, 1987, at A1, B4 (noting that a New York State commission appointed by then-Governor Mario Cuomo concluded that 73% of those killed by white officers were African-American or Hispanic, while 27% of those killed by white officers were white and that 79% of those killed by non-white officers were minorities, while 21% were white. *Id.* See also Selwyn Raab, *City's Police Brutality Report Card: Complaints Down, Needs Improving*, N.Y. TIMES, Aug. 17, 1997, at 41 (reporting that in 1996, 80% of New York City police misconduct complaints were filed by Blacks, Latinos, and Asians).

²⁶⁰ See Rudovsky, *supra* note 11 ("Because police abuse is most often directed against those without political power or social status, their complaints are often dismissed or ignored."); Daniel Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988) (noting that victims of constitutional misconduct by local law enforcement are often individuals who "are in contact with the criminal justice system, generally as suspects or defendants," and are unlikely to bring suit because of "ignorance of their rights, poverty, fear of police reprisals or the burdens of incarceration.")

²⁶¹ See CHRISTOPHER COMMISSION REPORT, *supra* note 211, at 170 (finding that officers who give evidence of misconduct against fellow officers "are often ostracized and harassed, and in some instances themselves become the target of complaints."); MOLLEN COMMISSION REPORT, *supra* note 210, at 53 (noting that "[o]fficers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis This draconian enforcement of the code of silence fuels corruption because it makes corrupt cops feel protected and invulnerable."); SKOLNICK & FYFE, *supra* note 186, at 110-11 (contending that "the code . . . typically is enforced by the threat of shunning, by fear that *informing* will lead to exposure of one's own derelictions, and by fear that colleagues' assistance may be withheld in emergencies."); Maurice Possley & Andrew Martin, *'Code' is Cracking in Austin Case: Wall of Secrecy Around Corruption Begins to Crumble*, CHI. TRIB., Feb. 3, 1997, at 1 (noting officers' fear of ostracism by those considered "family").

have breached the code of silence, like White-Ruiz, are the stuff that legends (and implicit warnings) are made of.²⁶² While Al Pacino fans may recall "Serpico" for its protagonist's triumphant testimony before the Knapp Commission on police corruption,²⁶³ generations of NYPD officers will better remember Frank Serpico for the bullet he received in the back of the head during a Brooklyn drug raid—reportedly by the very same colleagues he had "ratted" on to the commission.²⁶⁴

The code of silence is at work when offending officers take actions to ensure that evidence contradicting their version of events does not become public. The code of silence is clearly a "but for" cause of injuries suffered by citizens whose rights are impaired by these cover-up operations. Efforts to undermine or cover up evidence of police misconduct may take many forms, including: the confiscation of photographic evidence;²⁶⁵ actions to undermine potential

²⁶² Former NYPD officer Bernard Cawley testified before the Mollen Commission that he never feared another officer would turn him in:

Cops don't tell on cops. And if they did tell on them, just say if a cop decided to tell on me, his career's ruined. He's going to be labeled a rat. So if he's got fifteen more years to go on the job, he's going to be miserable because it follows you wherever you go . . . he's going to have nobody to work with. And chances are, if it comes down to it, they're going to let him get hurt.

MOLLEN COMMISSION REPORT, *supra* note 210, at 53-54. Another officer explained, "[S]ee, we're all blue . . . we have to protect each other no matter what." *Id.* at 58. See also CHRISTOPHER COMMISSION REPORT, *supra* note 211, at 170 (containing the testimony of an officer who indicated that he was forced out of the police department for corroborating a suspect's report of being beaten by police and the public statement of another officer that breaking the code of silence "will mark the end of [an officer's] career"); Selwyn Raab, *The Unwritten Code that Stops Police from Speaking*, N.Y. TIMES, June 16, 1985, S4 at 6 (quoting an anonymous New York City police officer: "If they mark you as a 'rat,' you're finished on the job . . .").

²⁶³ New York City police officer Frank Serpico testified before the Knapp Commission regarding corruption within the Police Department. KNAPP COMMISSION REPORT at vii. Serpico was portrayed by actor Al Pacino in a 1973 motion picture chronicling the officer's life and involvement in anti-corruption investigations. SERPICO (Paramount Pictures 1973).

²⁶⁴ See Nat Hentoff, *Howard Safir Should Resign Says Serpico*, THE VILLAGE VOICE, June 16, 1998, at 20 (describing how Serpico was shot in the face when his back-up team failed him during a "buy and bust" operation and noting that "[n]ow as then, even honest cops are afraid to report corruption and brutality because of what happens to 'rats' in the department."); see also Chris Sturgis, *Serpico To Students: Integrity Is Crucial*, TIMES UNION, June 6, 1998, at B7, available in 1998 WL 7261323 (noting that some believe Serpico was set up by "colleagues who were angered by his speaking out against police corruption").

²⁶⁵ For example, in *Farrar v. Davis*, the plaintiff observed police officers beating a handcuffed man and videotaped the incident. *Farrar v. Davis*, No. 97C6433, 1998 WL 142368, at *1 (N.D. Ill., Mar. 19, 1998). Still filming, she approached the group of offending officers and informed one of them that she had seen him beat the man in the face and planned to report him to the United States Attorney. *Id.* When the officers ignored her, plaintiff "commented in the general direction of the remaining officers, although to no one

victim-witnesses (e.g., the planting of drugs on Andrew Sledd);²⁶⁶ destruction of evidence;²⁶⁷ filing false charges against victims of brutality (e.g., false charges of attempted murder and assault on an officer filed against Andrew Sledd);²⁶⁸ police perjury (e.g., the false testimony of police officers in Andrew Sledd's criminal trial);²⁶⁹ and concerted efforts to dissuade complainants from

in particular, that they were paid to uphold the law, not to break it." *Id.* One of the officers then grabbed the plaintiff and arrested her. *Id.* She was taken to the police station where she was detained for over ten hours. *Id.* Meanwhile, one of the officers confiscated her camera and erased the videotape. *Id.* The plaintiff brought a § 1983 suit against the city, alleging that the officers unlawfully arrested and detained her and destroyed her videotape of an incident of excessive force because of a pervasive code of silence in the police department. *Id.* at *2.

²⁶⁶ The planting of evidence on suspected felons—"frame-ups"—is a particularly common complaint. See Chin & Wells, *supra* note 256, at 246-47 (discussing "frame-ups" in the context of a recent case where New Yorker Daniel Batista was convicted of criminal possession of a weapon: "Batista's claim, supported by several civilian witnesses, was that the officers planted the gun after the keys they confiscated from him failed to open the door of apartments the officers wanted to rob . . . Batista's conviction was vacated only after he has served his prison sentence.").

²⁶⁷ In Albany, New York, six state police officers were indicted for a false-evidence scandal, which resulted in dozens of these officers' prior cases being reopened for review. See Richard Perez-Pena, *Troopers' Supervisor Faulted in Evidence Tampering Scandal*, N.Y. TIMES, Feb. 4, 1997, at B1. And in September 1999, the Los Angeles Police Department's criminal investigation into the Rampart Division—a cadre of officers charged with law enforcement in one of the toughest neighborhoods in the city—uncovered alleged unjustified shootings, beatings, drug dealing, planting of evidence, false arrests, witness intimidation and perjury by police officers. Eleven criminal convictions already have been overturned as a consequence of the investigation and, to date, 20 officers have resigned or been relieved of duty, suspended without pay or fired in connection with the scandal. See Matt Lait, *D.A. Seeks to Void 10 More Rampart Cases*, L.A. TIMES, Jan. 25, 2000, at A1.

²⁶⁸ See Chin & Wells, *supra* note 256, at 256 (noting that "[p]olice created false excessive force claims by simply adding bogus charges of resisting arrest to their arrest reports, and sticking to the stories at trial . . . [and] where more than one officer was involved in the wrongful conduct or present at the scene, the officers would agree upon a common false tale, and use that tale in complicity to justify the actions"); Rudovsky, *supra* note 11, at 481 (arguing that, when faced with charges of wrongful arrest, an officer may justify arrest through fabricating evidence of assault; because of the code of silence, "other officers would testify either that they did not observe the incident or confirm the fabrication and testify that the arresting officers acted properly in self-defense"); Alan Dershowitz, *A Police Badge is Not a License to Commit Perjury*, SAN DIEGO UNION-TRIB., Apr. 4, 1991, at B11, B11 (arguing that in cases involving allegations of police brutality or misconduct, officers will conceal or justify their malfeasance or that of a fellow officer with "boilerplate" allegations against the victim).

²⁶⁹ See MOLLEN COMMISSION REPORT, *supra* note 210, at 36 ("the practice of police falsification . . . is so common in certain precincts that it has spawned its own word: 'testilying.'"); Chin & Wells, *supra* note 256, at 256 (discussing the willingness of police to perjure themselves to protect their fellow officers as a function of the "overwhelming

reporting police abuse.²⁷⁰

B. *The Failures of "Policy"*

It is instructive to pause here to consider whether these plaintiffs could have claimed their injuries were caused by municipal "policy," in any of the various formulations described in Part II. For example, could the two teenagers attacked by Officer Brandon have alleged that his actions were the product of a formal departmental policy or a decision made by a final policymaker? Absent extraordinary circumstances, the answer would clearly be no.²⁷¹ Moreover, if the case were to arise today, in the post-*Bryan County* era, plaintiffs would not succeed on a theory that the Memphis Police Department failed adequately to screen out the "mental case" Officer Allen, unless they could show their injuries were a "plainly obvious consequence" of that singular hiring decision.²⁷²

Likewise, Sledd's injuries can hardly be laid at the feet of any municipal "policy." The police officers who illegally entered Sledd's home, shot him, and later lied about the incident were clearly not authorized to engage in these actions by any written policy or decision by a final policymaker. The plaintiff did include in his original complaint a claim for municipal liability based on the failure to "properly supervise, discipline, transfer, counsel and otherwise

pressure placed upon the officer to heed the police code of silence"); Morgan Cloud, *Judges, "Testifying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1341-44, 1387 (1996) (discussing the implications of police perjury in the search and seizure context and suggesting that judges should adopt a two-part test that examines subjective motive and objective reasonableness).

²⁷⁰ See HUMAN RIGHTS WATCH REPORT, *supra* note 12, at 50 (noting that "filing a complaint is unnecessarily difficult and often intimidating" and discussing "one of the most notorious dissuasion efforts" that occurred when Rodney King's brother tried to complain after the beating and "the sergeant on duty treated him skeptically, asked whether he had ever been in trouble, and never filled out a complaint form.") (citing CHRISTOPHER COMMISSION REPORT, *supra* note 211, at 10.)

²⁷¹ It so happens there were extraordinary circumstances at work in *Brandon v. Allen*. In particular, the district court found that the Memphis Police Department in the 1970s had a "policy never to show the [Police] Director complaints or internal reports regarding police brutality," and the Department "imposed on its supervisors no duty to discover officers who might have dangerous propensities, and no duty to report known problems. . . ." *Brandon v. Allen*, 645 F. Supp. 1261, 1266 (W.D. Tenn. 1986). Further, pursuant to the police collective bargaining agreement, it was "a policy of the Department never to reassign an officer from a position for disciplinary reasons." *Id.* at 1267. Finally, any "disciplinary action involving the dismissal of an officer . . . required approval of the City Civil Service Commission." *Id.* According to the Director, it was the policy of the Commission "never to uphold the dismissal of an officer if it were based on violent misconduct." *Id.* In the end, the plaintiffs prevailed by proving these unconstitutional policies, as well as the maintenance of an unconstitutional custom in the form of the code of silence. *see id.*

²⁷² *Board of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 412-13 (1997).

control abusive police officers.”²⁷³ The district court dismissed this claim on the grounds that Sledd had “failed to identify specific factual patterns in [departmental] complaints that are relevant to the alleged deprivation of his rights.”²⁷⁴ The district court held in essence that while the plaintiff had alleged a widespread failure to investigate and discipline officer wrongdoing on the departmental level, he failed to show that any such municipal failure *caused* his injuries.²⁷⁵

In reversing the district court’s dismissal, the circuit court essentially recast the plaintiff’s boilerplate “failure to [blank]” claim as one based on the custom of a code of silence: “Sledd did . . . specifically allege that the City and the CPD [Chicago Police Department] maintained a code of silence; that disciplinary complaints almost never resulted in official censure; and that this practice hurt him in particular, by making the officers believe their actions would never be scrutinized.”²⁷⁶ The circuit court here saw what the district court missed: while Sledd could not meet the causation element required to make out a “failure to [blank]” claim of municipal policy, he had alleged sufficiently widespread misconduct to make out a custom claim.²⁷⁷

²⁷³ See *Sledd v. Lindsay*, 780 F. Supp. 554, 557 (N.D. Ill. 1991).

²⁷⁴ *Id.* at 558. The lower court’s dismissal of Sledd’s claim highlights the evidentiary problems faced by plaintiffs who allege a municipal policy of inadequate investigation of misconduct complaints. In particular, the district court rejected plaintiff’s argument that only one to two percent of police misconduct complaints were substantiated in the departmental review process, reasoning that plaintiff was unable to show that a greater percentage of complaints were in fact meritorious. *Id.* at 559. Similarly, the court faulted plaintiff’s failure to “identif[y] structural defects in the police disciplinary system with relatively simple solutions.” *Id.* In addressing the problem of remedies, the court asked:

What should the City’s policymakers have done? Always believed the accuser in one-on-one credibility contests? Flipped a coin? Given [the investigative department] an unlimited investigation budget? Forced police officers to testify against other officers? Suspended officers facing complaints until the allegations against them are disproven? Suspended or fired officers with repeated complaints, regardless of the merits of the complaints?

Id. The court went on to acknowledge that “Sledd, of course, is not required to suggest remedies,” but noted that “a plaintiff must offer much more specificity in showing the problems which the municipality should have prevented or corrected.” *Id.*; see also *infra* note 277 and accompanying text.

²⁷⁵ See *Sledd*, 780 F. Supp. at 558 (holding that “in sum, Sledd had failed to plead facts sufficient to show a City policy or custom, or ‘deliberate indifference’ by a City policymaker to constitutional violations, that proximately caused the alleged violations of Sledd’s rights”).

²⁷⁶ *Sledd v. Lindsay*, 102 F.3d 282, 289 (7th Cir. 1996)

²⁷⁷ Sledd was able to muster some very specific evidence concerning the breadth of the code of silence within the Chicago Police Department. In particular, Sledd showed “that only one police officer . . . among the thousands who gave statements or testified in the scores of alleged misconduct complaints . . . [had ever] implicated his fellow officers in brutality or unconstitutional conduct.” *Sledd*, 780 F. Supp. at 557.

The inability of the "failure to [blank]" model of policy to capture the harms described in the stories above is nowhere clearer than in the case of Officer White-Ruiz. In fact, her complaint alleged that her fellow officers' actions in enforcing the code of silence resulted from a municipal failure to train. White-Ruiz apparently abandoned this theory at trial,²⁷⁸ perhaps recognizing that she would be unable to prove that her injuries could have been averted if the NYPD included in its academy regimen a training session admonishing recruits to cooperate in investigations of officer wrongdoing or to refrain from retaliating against officers who themselves report misconduct. Her injuries were not the product of a municipal policy of inadequate training, but rather, as the court held, of "an unwritten Departmental policy . . . that sanctioned a 'custom or usage' by lower-level officials and officers (1) to discourage reporting of corrupt acts by police officers and (2) to retaliate against officers who did bring such misconduct to the attention of Department authorities."²⁷⁹

C. *The Code of Silence Causes Constitutional Injury*

While common sense dictates that a police code of silence may be a "but for" cause of injury, a § 1983 plaintiff must also show that this custom proximately caused the complained of injury.²⁸⁰ Proximate cause requires foreseeability; traditional tort law principles of causation are satisfied if plaintiffs can show that the code of silence is reasonably likely to cause constitutional injury.²⁸¹ In analyzing the causation requirement as it applies to custom claims, lower federal courts have looked to these traditional tort law principles, and held "a sufficiently close causal link between . . . a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom."²⁸²

The question remains, however, whether custom claims will be affected by the heightened causation standard articulated by the Supreme Court in *Bryan County*, discussed earlier.²⁸³ In that case, the Court significantly raised the bar on causation, requiring plaintiffs proceeding under a failure to screen theory to show that their injuries were a "plainly obvious consequence" of municipal

²⁷⁸ See *White-Ruiz v. City of New York*, No. CIV-93-7233, 1996 WL 603983, at*10 (S.D.N.Y. Oct. 22, 1996).

²⁷⁹ *White-Ruiz v. City of New York*, 983 F. Supp. 365, 391 (S.D.N.Y. 1997) (italics added). The court, in determining that such a "custom or usage" existed, relied in part on the findings of the MOLLEN REPORT. *Id.* at 391.

²⁸⁰ See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691-92 (1978) (finding that a municipality cannot be held liable under § 1983 unless its official policy caused a "constitutional tort").

²⁸¹ See WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* 991 (5th ed. 1984).

²⁸² *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987).

²⁸³ See *supra* Part III.C.

action, and not merely a “likely” result.²⁸⁴ The Court’s decision in *Bryan County*, by its terms, has no application to custom cases, where plaintiffs are required to show widespread, pervasive constitutional misconduct. Justice O’Connor’s majority decision makes clear that the “plainly obvious consequence” standard applies only where there is no recurring pattern of violations; the heightened standard is necessary to gauge the likelihood that constitutional violations will flow from an isolated municipal hiring decision.²⁸⁵ Additionally, the *Bryan County* Court specifically distinguished cases involving an isolated, inadequate screening from general failure-to-train cases, which typically do involve recurring violations, stating that in the latter category, “the high degree of predictability may also . . . support an inference of causation.”²⁸⁶ Based on the limits the Court imposed on the use of the “plainly obvious consequence” standard, the heightened standard has no application to custom cases, as custom claims necessarily require widespread, pervasive, constitutional misconduct.²⁸⁷

Likewise, § 1983 claims based upon a code of silence that results in pervasive, unconstitutional conduct fall well outside the ambit of “isolated incident” cases. Further, it can hardly be doubted that where a police code of silence—in all of its various manifestations—exists, it is “highly predictable” that constitutional deprivations will result. The “silence” at the center of a code exists for the primary purpose of shrouding constitutional deprivations.²⁸⁸ If the code of silence was a *written* police department edict prohibiting any

²⁸⁴ Board of Comm’rs of Bryan County v. Brown, 520 U.S. 397, 412-13 (1997).

²⁸⁵ *Id.* at 408 (finding that a higher standard applies when an isolated incident is disputed; when “the [municipality’s] decision necessarily governs a single case, there can be no notice to the municipal decision maker, based on previous violations of federally protected rights, that his approach is inadequate”).

²⁸⁶ *Id.* at 409-10.

²⁸⁷ See *Adickes v. Kress*, 398 U.S. 144, 167-68 (1970) (noting that “practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law”); see also *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978) (quoting this exact passage from *Adickes* in discussing custom claims); cf. *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362 (1940). The *Browning* Court noted:

It would be a narrow conception of justice to confine the notion of ‘laws’ to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.

Id. at 369.

²⁸⁸ See, e.g., CHRISTOPHER COMMISSION REPORT, *supra* note 211, and accompanying text (finding that for the Los Angeles Police Department, the “greatest single barrier to the effective investigation and adjudication of complaints is the officers’ unwritten code of silence: an officer does not provide adverse information against a fellow officer”); see also HUMAN RIGHTS WATCH REPORT, *supra* note 12, at 68 (noting the silence of police officers when misconduct occurs).

officer from corroborating or initiating any allegation of wrongdoing against a fellow officer, no one would doubt that constitutional deprivations would be "highly" likely to result. Thus, when existence of a code of silence is established, combined with the widespread knowledge that such codes exist in order to silence and protect police officers, the requisite causal connection is clear.²⁸⁹

D. *The Code Is "Widespread" and Known to the Brass*

In addition to establishing causation, to win a custom claim in a police code of silence case, a plaintiff must show (1) that the police code is a "widespread practice;" and (2) that the relevant city officials "knew or should have known" of its existence.²⁹⁰ First, to establish a "widespread practice," custom plaintiffs must point to a pattern of conduct that violates constitutional rights.²⁹¹ Second, as a practical matter, a showing that a pervasive pattern of conduct exists, is generally sufficient to satisfy the requirement that high-ranking officials "knew of, or should have known" of the complained-of practice.²⁹²

The pervasiveness of the police code of silence is evident in the reports by various 'blue-ribbon' commissions and task forces convened in recent years to study intractable police department problems, such as the use of excessive force and police corruption.²⁹³ For example, in 1991, the Christopher

²⁸⁹ As an evidentiary matter, in many code of silence cases the plaintiff will be able to satisfy the "highly predictable consequence" standard in code of silence cases once the plaintiff has shown that the practice was "widespread" and "known to policymakers." Evidence that can be used to demonstrate that constitutional deprivations are "highly predictable consequences" of a pervasive code of silence includes commission reports, other civil rights cases, and the testimony of municipal officials and officers.

²⁹⁰ See *Spell v. McDaniel*, 824 F.2d 1380, 1390-91 (4th Cir. 1987).

²⁹¹ See *id.* at 1391 (stating that "fault for a violation resulting from condoned custom can only be ascribed when a pattern of comparable practices has become actually or constructively known to responsible policymakers"). Courts generally agree that § 1983 plaintiffs cannot simply use their own injury to prove widespread misconduct. See, e.g., *Armstead v. City of St. Petersburg*, No. 95-1548-Civ-T-17C, 1997 WL 724420, at *7 (M.D. Fla. Nov. 13, 1997) (holding that plaintiff's cause of action failed since she did not establish a citywide custom by pointing only to violative, discriminatory conduct that occurred in relation to her).

²⁹² See *Spell*, 824 F.2d at 1391 (finding that knowledge may be imputed when a widespread pattern exists, as officials have a duty to be informed of such policies); see also *Jones v. City of Chicago*, 856 F.2d 985, 995-96 (7th Cir. 1988) (finding that as police custom of keeping "street files" was long-standing and department-wide, jury was entitled "to conclude that it had been consciously approved at the highest policymaking level for decisions involving the police department").

²⁹³ See, e.g., MOLLEN COMMISSION REPORT, *supra* note 210, at 53 (finding that New York Police Department officers did not fear that other officers would testify against them due to the "Blue Wall of Silence"). Whether or not a plaintiff will be allowed to introduce such reports into evidence is another matter. In recent years, courts have disagreed regarding the

Commission, convened in the wake of the Rodney King incident, identified a pervasive "officer code of silence."²⁹⁴ The Commission described the Los Angeles Police Department code as follows: "[I]t consists of one simple rule, an officer does not provide adverse information against a fellow officer."²⁹⁵ The Christopher Commission Report found that the code made officers generally unwilling to "rat" on one other, such that they would often perjure themselves rather than be perceived as a "whistle blower."²⁹⁶ Although the Report concedes that a small but significant number of "bad cops" account for most incidents of excessive force, it does make clear that *all* cops, including "good cops," adhere to the code of silence, even where the result is to shield "bad cops" from the consequences of their actions.²⁹⁷ The Report also makes clear that high-ranking Los Angeles Police Department officials knew of the existence of the officer code of silence before the Christopher Commission began its investigation.²⁹⁸ As a result, the Christopher Commission Report

admissibility into evidence of such reports. Compare *White-Ruiz v. City of New York*, 983 F. Supp. 365, 380-382 (S.D.N.Y. 1997) (allowing plaintiff to introduce MOLLEN COMMISSION REPORT into evidence and frequently referencing the Commission's findings in the opinion), *Ariza v. City of New York*, No. CV-93-5287, 1996 WL 118535, at *5-6 (E.D.N.Y. March 7, 1996) (admitting MOLLEN COMMISSION REPORT into evidence), and *Montiel v. City of Los Angeles*, 2 F.3d 335, 341-42 (9th Cir. 1993) (finding lower court should have presumed CHRISTOPHER COMMISSION REPORT trustworthy and put burden of establishing untrustworthiness on city), with *Williams v. City of New York*, CV-94-6234, at 78-85 (S.D.N.Y. Sept. 6, 1996) (barring plaintiff's admission of MOLLEN COMMISSION REPORT findings on the "code of silence" for purposes of questioning the credibility of police officer witnesses), and *Bryant v. New York City*, CV-92-0960, slip op. at 9-10 (E.D.N.Y. Oct. 27, 1994) (excluding MOLLEN COMMISSION REPORT in case alleging excessive force by a police officer). Though the admissibility of commission reports is beyond the scope of this Article, Chin & Wells, *supra* note 241, at 284-85, discuss the practical concerns of using such reports to demonstrate the existence and effect of the code of silence as evidence against individual police officers. See also Carol Ann Humiston, *Paved With Good Intentions: The Use of Internal Evaluations of Law Enforcement Agencies in Civil Lawsuits*, 41 FED. B. NEWS & J. 364, 368 (1994) (concluding that the issue of the admissibility into evidence of a commission's findings "is a question which must soon be definitely resolved").

²⁹⁴ See CHRISTOPHER COMMISSION REPORT, *supra* note 211, at 168.

²⁹⁵ *Id.*

²⁹⁶ See *id.* at 169 (explaining that officer's explanation for lying to investigators was the "non-written rule that you do not roll over, tell on your partner, your companion").

²⁹⁷ See *id.* at ix-xii, 165-70 (stating that frequently "bad cops" were not held accountable for their actions).

²⁹⁸ See *id.* at 169. The Report concluded that high-ranking officials knew or should have known of the "officer code of silence" prior to the release of the report based largely on the testimony of Department officials, including Los Angeles Police Commissioner Darryl Gates, who testified that the existence of a police code of silence discouraged officers from reporting instances of misconduct by fellow officers, and created an environment in which officers who defied the expectation of silence suffered recrimination. See *id.*

describes the code of silence as “[p]erhaps the greatest single barrier to the effective investigation and adjudication of complaints.”²⁹⁹

The Mollen Commission reached similar conclusions in its important 1994 report, a study aimed at investigating police corruption in New York City.³⁰⁰ The Commission found a pattern of illegal behavior that had extended to many precincts targeted both line officers and high police officials, and had lasted for several decades.³⁰¹ The report found that the deeply ingrained “code of silence” was essential to the pattern of corruption exposed by the Commission, since the code “encourage[d] corruption” and “thwart[ed] efforts to control corruption,” by forcing the honest officers to protect corrupt colleagues from detection.³⁰² The Commission also noted that New York Police Department officers stringently, albeit informally, enforce the code:

Officers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis. This draconian enforcement of the code of silence fuels corruption because it makes corrupt cops feel protected and invulnerable.³⁰³

Based on the specific instances it described in the Report, the Commission concluded that enforcement of the code of silence was pervasive: it extended to virtually all precincts and targeted both line officers and higher police officials.³⁰⁴ The Report further noted that since Department officials were aware of the code’s persistence, its continuation reflected long-standing, albeit unofficial, ratification by the senior Department officials, including the Police Commissioners.³⁰⁵

²⁹⁹ *Id.* at 168.

³⁰⁰ See MOLLEN COMMISSION REPORT, *supra* note 210, at vii-viii (finding “police committed perjury in the course of their work, ‘as a means to conceal other underlying acts of corruption’”).

³⁰¹ See *id.* at 51 (noting that lack of fear on the part of dishonest officers, documented over 20 years ago during the Knapp Commission, still persisted in the New York Police Department in 1994, and that officers of every rank verified the existence of the code of silence).

³⁰² *Id.*

³⁰³ *Id.* at 53.

³⁰⁴ See *id.* at 51 (finding that officers of every rank verified the existence of a code of silence in the department).

³⁰⁵ See *id.* at 58 (warning that department’s failure to protect officers who report corruption “communicates a powerful message: that the [d]epartment is not really interested in enlisting the police in the fight against corruption). During testimony before the Mollen Commission, the Police Commissioner at the time, Raymond Kelly, along with other high-ranking Department officials, conceded that the so-called code of silence endured within the police department. See *id.* at 51-53. The Commission described the problem as follows:

The Department also has done little to attempt to penetrate the wall of silence, although it is one of the major barriers to identifying and uncovering corruption. The Department never aggressively solicited information from its members. It did not

Similarly, in Boston, following a high-profile police scandal, then-Mayor Raymond Flynn appointed a commission to review the Boston Police Department's treatment of police brutality issues.³⁰⁶ The ensuing St. Clair Report,³⁰⁷ released in the spring of 1993, noted that a number of problems stemmed from a rampant code of silence. For example, the Commission found that experienced investigators refused to volunteer for the Internal Affairs Division "because they fear[ed] retribution once they [got back on the street]."³⁰⁸ In fact, the Report found that the Internal Affairs Division ("IAD"), which is generally responsible for investigating allegations against police officers and the department, was chronically understaffed because officers did not want to be involved in investigations of their colleagues, or because they feared the consequences of an adverse determination against a colleague.³⁰⁹ Similarly, officers shunned temporary promotions to "acting sergeant" despite higher pay and prestige, because they did not want to have to discipline a fellow officer when they "might be back riding with that officer sometime in the future."³¹⁰

Likewise, in a recent study of fourteen U.S. cities, the Human Rights Watch found that the code of silence affected all levels of the police departments they studied, from "street officers who witness abuses and fail to report them," to "supervisors and ultimately police commissioners and chiefs."³¹¹ The report

reward courageous officers who came forward with valuable information; or penalize those who failed to report evidence of widespread or serious corruption about which they had personal knowledge. And it did nothing to try to educate its members as to why reporting and not tolerating corruption is essential to the Department and to them. Indeed, we found that the first time the Department's top managers made an affirmative effort to solicit any information on corruption from its members was when this Commission attempted to do so.

Id. at 107.

³⁰⁶ See HUMAN RIGHTS WATCH REPORT, *supra* note 12, at 139-40 (describing the excessive force used during Boston's Charles Stuart case as one impetus for appointment of the Commission). In the 1989 Stuart murder case, Charles Stuart, a white man, allegedly murdered his pregnant wife and then diverted suspicion from himself by claiming that the assailant had been a black man. Stuart's description of a black assailant led to round-ups and harassment of African-American men, which produced outrage in the African-American community, especially once it seemed clear that Stuart was, in fact, the killer. See Kevin Cullen & Mike Barnicle, *Probers Suspect Stuart Killed Wife to Collect Insurance, Start Restaurant*, BOSTON GLOBE, Jan. 10, 1990, at 1 (reporting that recovered murder weapon matched description of gun missing from store where Stuart was a manager); Kevin Cullen et al., *Stuart Dies in Jump Off Tobin Bridge After Police Are Told He Killed His Wife*, BOSTON GLOBE, Jan. 5, 1990, at 1 (stating that Stuart's brother admitted to helping Stuart dispose of the .38 caliber revolver used in the shooting).

³⁰⁷ See ST. CLAIR REPORT, *supra* note 258.

³⁰⁸ *Id.*

³⁰⁹ See *id.*

³¹⁰ *Id.* at 59.

³¹¹ HUMAN RIGHTS WATCH REPORT, *supra* note 12, at 71. The report also noted that the

went on to note that even if a complaint of excessive force was actually sustained, the injured party had no guarantee that the department would levy an appropriate punishment on the offending officer.³¹² The study concluded that "the code of silence all but assures impunity for officers who commit human rights violations," and that its perpetuation would allow "officers who commit abuses [to] flourish."³¹³

Other authorities also recognize the difficulties facing a plaintiff proceeding with a code of silence case. For example, in one case, former United States Attorney for the Eastern District of Pennsylvania, Edward S. G. Dennis, Jr., recognized the problem of virtual immunity for officers when he stated during a police corruption trial, that "there is a custom that has developed within the Philadelphia Police Department that Philadelphia police officers will acquiesce in the illegal and improper conduct of their fellow officers, and that when called to tell the truth . . . the Philadelphia police officer will remain silent."³¹⁴ Further, United States Attorney Dennis personally requested that the judge not impose a prison term on the corrupt police officer who broke the code of silence as he did not want to discourage other officers from coming forward.³¹⁵ In certain instances, judges have also noted the existence of a police code of silence that constrains members of the police department from reporting on their colleagues. Judge Grady's comments during the case of *United States v. Ambrose*³¹⁶ illustrate this point: during sentencing, the judge declared that "it is a fact . . . that there is a code of silence [in the Chicago Police Department],

code of silence had a particularly strong effect in police departments like New Orleans and Philadelphia, "where police abuse and corruption have been visibly rampant." *Id.*

³¹² *See id.* at 72 (citing the reluctance of ranking officers to discipline fellow officers, and the imposition of arbitrary statutes of limitation following indecisive action by the department, as two explanations for the infrequency of officer punishment).

³¹³ *Id.* at 71. Amnesty International's study of the New York City Police Department also found that in many cases "international standards as well as United States law and police guidelines prohibiting torture or other cruel, inhuman or degrading treatment appear[ed] to have been violated with impunity" and that prosecutions for excessive force were very low, due, in part, to the code of silence. AMNESTY INT'L REPORT, *supra* note 212, at 2; cf. Seth Mydans, *Era in Los Angeles Ends as Chief Quits*, N.Y. TIMES, June 27, 1992, at 6L (reporting that one of new Police Chief Willie I. Williams' responses to the release of the report criticizing the Los Angeles Police Department was that "he hoped to start a community-based approach to policing [that would end] what he called the 'paramilitary mentality' of the department under [newly-resigned] Chief [Daryl F.] Gates").

³¹⁴ Tim Weiner, *Ex-Officer Who Broke the Code of Silence Given Probation*, PHILA. INQUIRER, Feb. 13, 1985, at A1.

³¹⁵ *See id.* (reporting that the judge stated that though officer "had committed 'terrible offenses under the law' . . . he was the first indicted officer to cooperate fully with the investigation, and that the government's plea for 'extraordinary leniency' was persuasive").

³¹⁶ 740 F.2d 505, 505 (7th Cir. 1984), *abrogated by* United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1989).

and that most policemen observe it."³¹⁷

Clearly, the code of silence makes it difficult for plaintiffs suing under § 1983 to gather evidence that directly relates to police misconduct in their particular case.³¹⁸ Thus, plaintiffs seeking to establish the existence of a "widespread practice," (a required element of a custom claim), may point to previous § 1983 or other civil rights suits, and the evidence used therein, for proof of prior occurrences of police misconduct.³¹⁹ For example, Paula White-Ruiz, in her suit against her police department supervisors and the City of New York, used testimony from current and former police officers, police academy personnel, internal affairs supervisors, and the Mollen Commission Report to establish the persistence of the code of silence among New York Police Department officers.³²⁰ Thus, the admissibility of such diverse sources of

³¹⁷ See *id.* at 521, quoted in *Myatt v. City of Chicago*, No. 90-C-03991, 1991 WL 94036, at *6 (N.D. Ill. May 23, 1991) (finding plaintiff could cite Judge Grady's comments to support allegations of a code of silence); cf. CHRISTOPHER COMMISSION REPORT, *supra* note 211, at 170 (citing a judge's statement during prosecution of three Los Angeles Police Department officers that "many of the [police officer witnesses were] clearly lying" and that he could not "think of a case in [his] life . . . where [he had] seen more false testimony").

³¹⁸ See HUMAN RIGHTS WATCH REPORT, *supra* note 12, at 69 (finding that officers will give false testimony in court, or "testilie," in order to cover up police misconduct).

³¹⁹ See *Beck v. City of Pittsburgh*, 89 F.3d 966, 973 (3d Cir. 1996) (allowing plaintiff to introduce civilian complaints, similar in nature to his own, which had been "transmitted through the police department chain of command to the Chief of Police" who "[t]hus . . . had knowledge of the complaints," to establish that the Chief "knew, or should have known" of the defendant officer's customary violence when making arrests); *Kopf v. Wing*, 942 F.2d 265, 269 (4th Cir. 1991) (reversing grant of summary judgment because appellant had cited numerous instances of excessive police force such that "a fair-minded jury could find that the county has a custom or practice of letting incidents of excessive force go unpunished"); *Bielevicz v. Dubinon*, 915 F.2d 845, 852-53 (3d Cir. 1990) (finding plaintiff's introduction of a former station commander's testimony, that it was customary police conduct to charge someone with public intoxication "for reasons other than intoxication," and that during his command he allowed this custom to continue, was sufficient evidence upon which the jury could have concluded that a long-standing custom existed); *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) (holding that the trial judge erred in refusing to allow plaintiffs to use evidence of similar instances of excessive police force to establish that excessive force was a widespread custom).

³²⁰ See *White-Ruiz v. City of New York*, 983 F. Supp. 365, 378 (S.D.N.Y. 1997) ("From the outset of plaintiff's tenure at the precinct, she was made to feel like an outcast, shunned by many of her fellow officers and plainly not supported by her precinct commander. In microcosm, this series of events reproduces the pattern identified six years later by the Mollen Commission."); see also *Beck*, 89 F.3d at 973 (holding that the district court erred in granting defendants' motion for summary judgment, as plaintiff had presented a series of written complaints describing defendant officer's use of excessive force on prior occasions, along with the testimony of witnesses to some of the incidents, from which a reasonable jury could infer that a custom existed within the department); *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989) (finding that plaintiff had proven a municipal "custom" existed based on current police sergeant's testimony that the department "had a longstanding,

evidence may ease the burden a custom plaintiff has in proving that a constitutional violation stemmed from a code of silence.

VI. THE POTENTIAL REMEDIAL EFFECTS OF "CUSTOM" CLAIMS

It is also important to consider the potential remedial effects that a "custom" claim can have, beyond mere compensation to an injured plaintiff. Specifically, a "custom" claim has the potential to effect reform and promote the development of deterrent procedures within problematic municipal institutions.³²¹ In the private tort law context, commentators have argued that institutional change is induced not only by the threat of monetary penalties, but for other reasons, including a defendant's desire to avoid adverse publicity, the cost and burden of litigation, and the sting of a determination of liability.³²² Such behavior-modifying factors should have an even stronger effect in the public law sphere, where municipal liability claims based on unconstitutional customs can implicate high profile social issues, such as police brutality, corruption, or cover-ups. I do not mean to suggest that high profile custom claims are more effective tools for reform or deterrence than other claims. Successful claims for municipal liability based on any of the three "policy" models discussed in Part III may be just as likely (or unlikely) to reform and deter offending local agencies. And indeed, it may be quite difficult for plaintiffs with § 1983 claims based on *either* "custom" or "policy" to obtain any sort of equitable relief.³²³

widespread" practice of breaking down doors without a warrant and that he, himself, had been present at "20 or 30" or "50, 60" door breakdowns during his 24 years as a police officer).

³²¹ As Professor Meltzer has noted in an analogous context, "the deterrent remedy is a distinctive creature, inspired (and perhaps required) by the Constitution, and, more specifically, by an interpretation that seeks to adapt the Constitution's demands to the distinctive problems of preventing conduct by public officials in an era of large government institutions." In other words, the enforced constitutional behavior is a major goal of the federal civil rights laws. Meltzer, *supra* note 260, at 278.

³²² See Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 364-65 (1996) (arguing that publication of monetary punitive damage awards will further punitive goals); Lant B. Davis et al., *Suing the Police in Federal Court*, 88 YALE L.J. 781, 809 n.154 (1979) (stating that police misconduct suits may also have a deterrent effect on an officer due to potential "emotional stress, adverse publicity, and detrimental effects on the officer's career"); Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 10-11 (1974) (finding remedial goals of § 1983 different from the goals of tort law, as § 1983 goals include deterrence along with compensation).

³²³ The greatest obstacle facing § 1983 litigants who seek injunctive relief is the concept of "equitable standing," articulated most recently by the Supreme Court in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In *Lyons*, the Supreme Court found that respondent, a black motorist who had been injured by defendant officer's use of a chokehold, lacked standing to seek injunctive relief because he failed to "make a reasonable showing that he

Rather, I only suggest that claims based on "custom" may have a somewhat different effect (in terms of the public perception, rather than in terms of the actual legal remedy), than "policy"-based claims. Once again, *White-Ruiz v. City of New York*³²⁴ provides a useful template. In *White-Ruiz*, the district court's written decision stated that a "blue wall of silence" existed within the New York City Police Department which "constitute[d] a custom or usage of the Department and that the actions allegedly directed against plaintiff by her fellow officers were a manifestation of that practice."³²⁵ Consequently, the court denied the defendant's motion for summary judgment, as a jury question existed regarding whether "such conduct constitute[d] a custom or usage so widespread as to imply the constructive acquiescence of policymaking officials and the municipalities."³²⁶ The court further concluded that based on findings from the Mollen Commission Report, there was a triable issue of fact as to whether the "Police Commissioners and their policy-making subordinates not only shut their eyes to [the] pattern of corruption and retaliation, but actually encouraged the non-disclosure of corrupt conduct by officers."³²⁷ The court's criticism sent shock waves throughout the Police Department, and local and national organizations reported its findings in the news.³²⁸ In response to the

[would] again be subjected to the alleged illegality." *Id.* at 109. In order to establish an actual threat of future injury, respondent "would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, or (2) that the City ordered or authorized police officers to act in such manner." *Id.* at 106. Thus, after *Lyons*, the equitable standing test requires a plaintiff to show that at the time the request for equitable relief is considered, he is virtually certain to fall victim to that illegal practice in the future. Clearly, in most circumstances, this will be an impossible showing. For criticism of the *Lyons* test, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on The Jurisprudence of Lyons*, 59 N.Y.U.L. REV. 1, 7 (1984) (stating that the *Lyons* decision undermined the federal government's ability to effectively redress injury to federally protected rights); LAURENCE TRIBE, *CONSTITUTIONAL CHOICES* 99-117 (1985); Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOY. U. CHI. L.J. 1085, 1118 (1987) (concluding that "*Lyons* unnecessarily limits the remedies available to those subjected to unconstitutional conduct"). For cases involving denied pleas for equitable intervention preceding *Lyons*, see *Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (finding plaintiff's claim of future, potential injury was too "attenuated" to warrant injunctive relief); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (ruling that "past exposure to illegal conduct did not in itself show a present case or controversy [warranting] injunctive relief").

³²⁴ No. 93-CIV-7233, 1996 WL 603983, *1 (S.D.N.Y. Oct. 22, 1996).

³²⁵ *Id.* at *8.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ See English, *supra* note 230, at A29 (detailing the retribution Officer White-Ruiz faced from other officers after "ratting" on her partner's corrupt activities); *NYPD Blues, Eye to Eye*, *supra* note 240, and accompanying text (interview with White-Ruiz, Commissioner Bratton and others regarding the "blue wall of silence").

court's findings, then-Commissioner William Bratton issued public statements deriding police officers who failed to disclose corruption, or who retaliated against officers who did come forward.³²⁹ Commissioner Bratton also stated that "[t]he dent that we can make is in reducing the tolerance [of corruption]. It's a different day and age now—that this corruption is dangerous. It can cost citizens' lives and it can cost [police officers'] lives. And when [police officers] come to understand that, I think they'll be much more willing to get in the game."³³⁰ To combat the persistence of the "blue wall of silence," a special inquiry panel recommended loyalty oaths for new police officers, lie detector tests for officers under suspicion, and rewards to whistle-blowers on the force. In short, the court's holding in *White-Ruiz* that the City was liable for injuries to an officer stemming from the New York Police Department's unconstitutional custom, the "police code of silence," was a singularly effective method of calling a serious constitutional problem to the attention of city policymakers, police officers, and the public at large.

To be sure, *White-Ruiz* is just one case, and it would be unrealistic to expect a wholesale renovation of police department culture in its wake. I do believe that future repeated and focused attacks upon the code of silence as an unconstitutional "custom" can together engender meaningful institutional change, even in a culture as recalcitrant as that of the New York Police Department. A key term here is "focused": to induce the reformation of "customs" that abridge constitutional rights, it is necessary that municipal liability be grounded squarely upon the maintenance of those particular customs.³³¹ However, it is not the general imposition of municipal liability alone that spurs internal corrective action.³³² Rather, it is the additional affirmative value that stems from a judicial pronouncement that a *particular* offensive custom is responsible for *particular* injuries. The agents of institutional change lie in the attendant publicity, the fear that a floodgate may have been opened, and the knowledge that the maintenance of this particular

³²⁹ See *NYPD Blues, Eye to Eye*, *supra* note 240.

³³⁰ *Id.*

³³¹ See *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). The *Owen* Court stated that

[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. (citations omitted) The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.

Id. at 651.

³³² See, e.g., Meltzer, *supra* note 260, at 54-58; Davis et al., *supra* note 322, at 809 n.154 (noting that the verdict can deter the particular defendant-officer due to adverse publicity and the effect on the officer's career).

custom has caused, and is likely to further cause, incursions on the public fisc. Where the offensive custom is judicially identified with such particularity, there is little room for an institution to assert a “bad apple theory” to avoid responsibility for the wrongdoing, and to deflect blame onto the proverbial “bad apple” officer.³³³ In conclusion, I believe that focusing constitutional tort litigation activity upon clearly delineated, pernicious “customs” holds promise, not only for compensating the individuals directly injured by these illegal practices, but also for effecting institutional change within contemporary urban law enforcement agencies.

CONCLUSION

In this article, I have argued that § 1983’s “custom” language, largely forgotten by lawyers, courts and commentators, holds the promise of reinvigorating modern civil rights litigation. In making this argument, I have focused on the police code of silence, which I contend is so pervasive — and which causes constitutional injuries in so many different ways — that claims directly challenging the code as an unconstitutional custom have the potential to reconfigure the entire landscape of § 1983 jurisprudence. Of course, other pernicious municipal customs are equally susceptible to attack on the theory I have advanced here,³³⁴ including the widespread practice of “racial profiling,” whereby rank-and-file officers make stops and searches based upon race and other demographics.³³⁵ While the 42nd Congress might not have foreseen

³³³ Based on this blame-shifting, I am doubtful that the doctrine of respondeat superior liability would be effective to induce institutional behavior modification. The imposition of strict municipal liability by operation of a respondeat regime—or for that matter, pursuant to an indemnification statute—does nothing to locate guilt within the internal culture of the institution, and, indeed, invites the institution to deflect responsibility and eschew corrective reform measures.

³³⁴ For example, the New York Times recently reported on “[t]he hallowed police rite known as the ‘perp walk,’” a term that refers to the ritual of “walking” a recently arrested “perpetrator” in front of reporters and photographers in order to “showcas[e] the police department’s crime-fighting skills, and satiat[e] the media’s demand for a glimpse of the suspect.” Benjamin Weiser, *Judge Condemns Policy of Parading Suspects Past Cameras*, N.Y. TIMES, Feb. 26, 1999, at B1. The media has recently focused on the “perp walk” (an age-old custom dating back to Theodore Roosevelt’s tenure as New York City Police Commissioner) after a burglary suspect subjected to the “perp walk” filed a § 1983 suit claiming that this New York City Police Department custom violated his constitutional rights. See *id.* (noting that Judge Allen G. Schwartz announced that the suspect could proceed with his lawsuit against the City). See also Blaine Harden, *Parading of Suspects is Evolving Tradition*, N.Y. TIMES, Feb. 27, 1999, at B1 (reporting that police had temporarily halted “perp walk” tradition pending appeal of judge’s ruling that “perp walk” of plaintiff was an unconstitutional violation of his right to privacy).

³³⁵ See Nicholas Wishart, *Statistics Support Racial Profiling on Turnpike Lawyers Say*, PHILA. INQUIRER, July 12, 1995, at S01 (citing attorneys’ data findings that between January, 1988 and April, 1991, African-American and Latino motorists in New Jersey were

these particular customs, the § 1983 framers were acutely aware that unwritten codes of conduct, adhered to by rank and file officers, were uniquely potent forces in undermining rights guaranteed by the Fourteenth Amendment. By rediscovering the meaning and intent of "custom" under § 1983, we should be able to develop a theory of civil rights liability that meaningfully addresses common constitutional deprivations caused by police in urban America today.

"500 percent more likely to get stopped than white motorists"). A civil rights advocacy group recently filed a § 1983 suit against the New York City Police Department alleging that the elite Street Crimes Unit had engaged in unconstitutional stops and searches on the basis of race. See Benjamin Weiser, *Lawsuit Seeks to Curb Street Crimes Unit, Alleging Racially Biased Searches*, N.Y. TIMES, Mar. 9, 1999, at B3. *But cf.* Whren v. United States, 517 U.S. 806, 817-18 (1996) (finding that probable cause justified stop and searches of two black defendants). Biased or selective prosecutions may also, under certain circumstances, fall within the § 1983 "custom" model of municipal liability. See, e.g., Butler v. Cooper, 554 F.2d 645, 648-49 (4th Cir. 1977) (sustaining summary judgment against pro se defendant, even assuming the truth of defendant's contention that between 84% and 98% of all persons arrested for violations of specific liquor laws in Portsmouth, Virginia were African-American).