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MUNICIPAL IMMUNITY

Joanna C. Schwartz[*]

Although qualified immunity has taken center stage in recent debates about police misconduct and paths to reform, this Article focuses on another doctrine that has been largely overlooked yet merits at least equal attention—the standard for holding local governments liable for constitutional violations of their officers (also referred to as Monell *doctrine, in reference to the Supreme Court case that first recognized the right to sue municipalities under Section 1983).*

This Article reports the findings of the largest and most comprehensive study to date examining and comparing the challenges of qualified immunity and Monell *doctrine in almost 1200 police misconduct lawsuits filed in five federal districts across the country. I find that it is far more difficult for plaintiffs to prove* Monell *claims against municipalities than it is for plaintiffs to defeat qualified immunity. In my dataset, local governments challenged* Monell *claims more often than individual defendants raised qualified immunity—at both the motion to dismiss and summary judgment stages—and, at both stages, courts dismissed* Monell *claims more often than they granted officers qualified immunity. Plaintiffs regularly abandoned their* Monell *claims against local governments during the course of litigation as well. Very few* Monell *claims made it to trial; even fewer succeeded. If popular commentary has overstated the harms of qualified immunity doctrine, it has understated the challenges of* Monell.

To ensure that people are compensated when their constitutional rights are violated, local governments should be held vicariously liable for their officers' constitutional violations. Strengthening the deterrent effect of Section 1983 suits on officers and local governments is a more complicated task, but a package of state and local reforms I outline hold promise. These proposed reforms may be even more important than ending qualified immunity to our system of constitutional remediation; they may also be more palatable to lawmakers and law enforcement officials who have thus far opposed ending qualified immunity. This may be one of those rare instances when the most pressing reform—ending Monell*—is also the most pragmatic.*

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INTRODUCTION

Qualified immunity has taken center stage in recent debates about police misconduct and paths to reform. In the weeks after George Floyd's murder in May 2020, people held handwritten signs in protests across the country, calling for the defense's abolition.[1] Eliminating qualified immunity quickly became a key component of proposed legislation introduced in Congress and state

[1] *See, e.g.*, Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (June 23, 2020); Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021, 6:00 AM).

legislatures to shore up civil rights protections.[2] Following the January 3, 2023 murder of Tyre Nichols by Memphis police officers, calls to end qualified immunity resumed with equal passion.[3]

Qualified immunity is a deserving target of criticism—it shields individual officers from civil liability, even when they have violated the Constitution, simply because there is no prior court opinion holding unconstitutional nearly identical facts.[4] And although the Supreme Court has justified qualified immunity as necessary to protect officers from the costs and burdens of litigation in "insubstantial" cases, available evidence makes clear that the doctrine is neither necessary nor well-suited to achieve these policy goals.[5] But there is another legal doctrine that has been largely overlooked[6] in current debate about civil rights enforcement yet merits comparable attention and critique—the standard for holding local governments liable for the constitutional violations of their officers.

In 1978, in *Monell v. Department of Social Services,* the Supreme Court first ruled that local governments could be sued under 42 U.S.C. § 1983 for constitutional violations by their employees.[7] But the Court held that local governments could not be held vicariously liable for their employees' constitutional

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[2] *See, e.g.*, Madeleine Carlisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here's What to Know*, TIME (June 3, 2021) (describing Congress's George Floyd Justice in Policing Act); Kindy, *supra* note 1 (describing state legislative efforts).

[3] *See, e.g.*, Rep. Justin Amash, @justinamash, Twitter (Jan. 28, 2023, 7:58 AM), https://twitter.com/justinamash/status/1619364385214066688 ("Reintroduce and pass my tripartisan legislation to end qualified immunity."); Rep. Ilhan Omar, @IlhanMN, Twitter (Jan. 27, 2023 6:12 PM), https://twitter.com/IlhanMN/status/1619156319923212288 ("End Qualified Immunity!").

[4] *See, e.g.*, Carlisle, *supra* note 2; Joanna C. Schwartz, *Suing Police for Abuse is Nearly Impossible. The Supreme Court Can Fix That*, WASH. POST (June 3, 2020, 2:17 PM).

[5] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 60-64 (2017) [hereinafter *How Qualified Immunity Fails*] (finding, based on a review of 1,183 police misconduct cases, that qualified immunity leads to the dismissal of less than 4% of civil rights cases, undermining the role of qualified immunity as a protection against the burdens of discovery and trial, and may actually increase litigation costs); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 938-43 (2014) [hereinafter *Police Indemnification*] (showing that officers are virtually always indemnified, limiting the need for qualified immunity to protect officers from financial liability).

[6] For a few exceptions, see Mark C. Niles, *Here's a More Important Reform Than Ending Qualified Immunity,* LAWFARE (May 18, 2021, 2:13 PM); Orion De Nevers, *A Dubious Legal Doctrine Protects Cities from Lawsuits Over Police Brutality*, SLATE (June 2, 2020). Municipal liability has been a more sustained focus of study and criticism among scholars and advocates. For examples of this research and commentary, see *infra* Part I.C.

[7] 436 U.S. 658 (1978).

violations—as private employers are for the torts of their employees.[8] Instead, a plaintiff must prove that the local government had an unlawful policy or custom that caused their employee to violate the Constitution.[9]

Monell, and the Supreme Court's and lower courts' decisions that have developed the contours of *Monell* doctrine over the past forty-five years, have inspired harsh critique.[10] Some argue that the Court's rejection of respondeat superior liability in its *Monell* decision was based on a misunderstanding of the legal landscape in 1871, when Section 1983 became law, as well as the statute's legislative history.[11] Commentators criticize the various theories that have emerged for proving municipal liability under *Monell* as exceedingly complex and indeterminate—a "maze," in Karen Blum's view.[12] And many contend that *Monell*'s standards are so difficult for plaintiffs to satisfy that municipal liability is "practically unavailable to litigants."[13]

Monell's historical critique is well-documented. The critique of *Monell*'s complex and indeterminate standards is self-evident. Yet, the claim that it is near-impossible to prevail on *Monell* claims is based on little more than anecdote and supposition. Over the past several years, we have come to learn a great deal about how qualified immunity works on the ground—how it influences attorneys' decisions about whether to take a case;[14] the frequency with which it

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[8] *Id.* at 691-95.

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

[10] These critiques, along with an overview of the history of *Monell* doctrine and its contours, are outlined in Part I.

[11] *See infra* notes 79 and accompanying text.

[12] Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914 (2015). *See also infra* notes 80-81 and accompanying text.

[13] Brian J. Serr, *Re-examining First Principles: Deterrence and Corrective Justice in Constitutional Torts*, 35 GA. L. REV. 881, 883 (2001). *See also infra* notes 82-86 and accompanying text.

[14] *See generally* Alexander A. Reinert, *Does Qualified Immunity Matter*?, 8 U. ST. THOMAS L.J. 477 (2011) (presenting the results of a study examining how qualified immunity influences attorneys' decisions about whether to file *Bivens* claims against federal officials); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101 (2020) (presenting the results of a study examining how qualified immunity influences attorneys' decisions about whether to file § 1983 claims against law enforcement defendants).

is raised, granted by courts, and dispositive;[15] the role that it plays at trial;[16] and the success of qualified immunity on appeal.[17] But we have comparably little understanding of how federal constitutional claims against local governments fare in court.[18] How often do plaintiffs sue local governments for the constitutional violations of their officers? How often do local governments seek to dismiss these claims before and after discovery? How often do courts grant governments' motions? How often do plaintiffs abandon their *Monell* claims?

In this Article, I begin to fill these critically important gaps. In 2017, I published a study that analyzed the federal dockets of 1,183 lawsuits filed against law enforcement defendants over a two-year period in five federal district courts across the country to better understand the role qualified immunity actually plays in police misconduct cases.[19] In this Article, I examine those same 1,183 federal case dockets to understand how *Monell* claims fared in these lawsuits.

In my 2017 study, I concluded qualified immunity doctrine had a more nuanced impact on police misconduct cases than is suggested in court opinions and critical commentary.[20] I found that qualified immunity doctrine increases the burdens and time spent on civil rights cases for plaintiffs' attorneys, and

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[15] *See generally* Schwartz, *How Qualified Immunity Fails*, *supra* note 5 (reporting these findings).

[16] *See generally* Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2063 (2018) (finding that qualified immunity is rarely left to a jury to decide, but is often granted in the rare instances in which juries are asked to answer questions related to qualified immunity).

[17] *See generally* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55 (2016) (measuring variation among circuit judges in their assessment of qualified immunity appeals); Alexander A. Reinert, *Qualified Immunity on Appeal: An Empirical Assessment* (Mar. 4, 2021), available at: https://ssrn.com/abstract=3798024 (finding that appellate courts reverse appellate decisions denying qualified immunity far more often than they reverse decisions granting qualified immunity).

[18] For important research about municipal liability claims that is a clear exception to this general observation, see Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. (forthcoming 2023) (examining at the success of failure-to-supervise claims on appeal and arguing that such claims are often overlooked by attorneys but successful in court), Nancy Leong, *How Local Governments Hire With Impunity* (draft on file with author) (examining the difficulty of proving failure-to-train claims).

[19] *See generally* Schwartz, *How Qualified Immunity Fails*, *supra* note 5.

[20] *See id.* at 9-11. *See also* Joanna C. Schwartz, *After Qualified Immunity,* 120 COLUM. L. REV. 309, 316-17 (2020) [hereinafter *After Qualified Immunity*] (offering several predictions about how constitutional litigation would function in a world without qualified immunity).

likely discourages lawyers from taking some civil rights cases.[21] But qualified immunity is raised by defendants and granted by courts less frequently than is suggested in popular critiques, and is the reason a relatively small percentage of civil rights cases are dismissed.[22]

Having reviewed these same cases to understand how constitutional claims against local governments progress in federal courts, I find that the doctrine makes it extremely difficult for plaintiffs to prevail on *Monell* claims challenging police policies and practices. If popular commentary has overstated the harms of qualified immunity doctrine, it has understated the challenges of *Monell.*

It is far more difficult for plaintiffs to prove *Monell* claims against municipalities than it is for plaintiffs to defeat qualified immunity when raised by individual government defendants.[23] In my dataset, local governments challenged municipal liability claims more often than individual defendants raised qualified immunity—at both the motion to dismiss and summary judgment stages—and, at both stages, courts dismissed *Monell* claims more often than they granted officers qualified immunity. Plaintiffs regularly abandoned their *Monell* claims against local governments during the course of litigation as well. Very few *Monell* claims made it to trial; even fewer succeeded.

Careful study of the dockets and decisions in my dataset suggests several reasons that it is so difficult to plead and prove *Monell* claims.[24] First, the plausibility standard articulated by the Supreme Court in *Iqbal* and *Twombly* makes it particularly challenging for plaintiffs to survive motions to dismiss; in many cases, plaintiffs cannot find the type of evidence that would support their *Monell* claims without formal discovery. Second, at summary judgment, plaintiffs have a heavy burden—in addition to proving that their constitutional rights were violated, they must come forth with evidence of an unconstitutional policy or a pattern of prior misconduct that suggests an unwritten policy; the policymaker's deliberate indifference to that prior misconduct; and proof that that deliberate indifference caused the constitutional violation. Even when plaintiffs managed to offer proof to support each of these elements, courts in my dataset found that the evidence was not sufficient to create a material factual dispute. Third,

[21] *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 49-50 (arguing that qualified immunity increases the costs and time necessary to litigate civil rights cases, and may discourage attorneys from accepting civil rights cases); Schwartz, *After Qualified Immunity*, *supra* note 20, at 338-51 (same).

[22] *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 48-49 (describing these findings).

[23] I outline these findings in Part II.

[24] I describe these possible explanations for my findings in Part III.

Monell claims are expensive, even at the pleadings stage, and these costs—especially if the named officers are likely to be indemnified—may lead plaintiffs to abandon their *Monell* claims. Fourth, *Monell* doctrine is unsettled; multiple open questions lead courts to apply widely varying standards, even in the same circuit, which likely encourages defendants to file more motions and creates greater uncertainties for plaintiff evaluating the costs and benefits of pursuing a *Monell* claim.

Having explored the challenges associated with bringing *Monell* claims, I next consider the extent to which these challenges frustrate our system of civil rights remediation.[25] Some commentators—myself included—have observed that the difficulty of prevailing on *Monell* claims may matter little because individual officers can be sued and are almost always indemnified by their government employers.[26] Further reflection and research has led me to reconsider this view. It is true that when a plaintiff prevails against an officer and the local government indemnifies, she effectively recovers from the city even if her *Monell* claim fails. It is also true that, as I found in a prior study, local governments—not officers—pay 99.98% of the money awarded to plaintiffs in police misconduct cases.[27] But, despite the ubiquity of indemnification, there are multiple ways in which municipal immunity enlarges the schism between right and remedy. If an officer who violated a person's constitutional rights is denied indemnification, or granted qualified immunity, or cannot be identified by name, a *Monell* claim against the local government can be the only opportunity to recover. *Monell* claims can also afford the only way to win a judgment against a local government that may create political pressure to change, and secure injunctive relief.

Section 1983 was enacted more than 150 years ago as a means to compensate people whose constitutional rights were violated and deter future misconduct. *Monell* doctrine in its current form undermines both of these values. To ensure that people are compensated when their constitutional rights are violated, local governments should be held vicariously liable when their officers violate the Constitution. Strengthening the deterrent effect of Section 1983 suits on officers and local governments is a more complicated task; but a package of state and local reforms I outline holds promise.[28]

My recommendations, although ambitious, are not merely academic musings. Indeed, these types of changes to municipal liability doctrine may actually

[25] I set out these challenges in Part IV.

[26] *See infra* note 158 and accompanying text.

[27] *See generally* Schwartz, *Police Indemnification*, *supra* note 5.

[28] These proposals are described in further detail *infra* Part V.

be more palatable than are proposals to do away with qualified immunity. Critics of qualified immunity reform rest their opposition on the (baseless) concern that officers will be bankrupted for reasonable mistakes and "leave the profession in droves";[29] vicarious liability for local governments would eliminate these concerns about officers' bank accounts and motivations.[30] Vicarious liability for local governments is an achievable goal, if energy and enthusiasm are directed toward the effort.

The injustices of qualified immunity have been an important and worthy focus of reform efforts in recent years. But *Monell*'s standard for municipal liability is both a more important target and lower-hanging fruit. Alongside handwritten signs demanding an end to qualified immunity, it is time to start raising signs reading "End *Monell*."

I. *MONELL* ON THE PAGE

Although we know little about how *Monell* claims actually fare in court, a great deal of ink has been spilled setting out how local government liability works in theory. In this Part, I describe the history of Section 1983 municipal liability claims, sketch out the various theories by which a local government can be held liable for constitutional violations by its officers under *Monell*, and canvas the critiques that have been leveled at the doctrine.

A. History

In 1961, the Supreme Court first ruled that people could sue government officials that violated their constitutional rights under 42 U.S.C. § 1983.[31] That case, *Monroe v. Pape*, is considered a watershed decision and a victory for the Monroe family, whose home was invaded and who were assaulted by Chicago detective Frank Pape and twelve other officers in the middle of the night.[32] But

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[29] *See, e.g.*, Kindy, *supra* note 1 (reporting that state legislative efforts to limit qualified immunity "failed amid multifaceted lobbying campaigns by police officers and their unions targeting legislators, many of whom feared public backlash if the dire predictions by police came true. Officers said they would go bankrupt and lose their homes. They said their colleagues would leave the profession in droves.").

[30] For bills introduced by Congress and state legislatures, and enacted in New Mexico, that would make local governments vicariously liable for constitutional violations by their officers, see *infra* notes 204-207 and accompanying text.

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

[32] For a detailed description of the circumstances of the Monroes' assault and arrest, see Myriam E. Gilles, *Police, Race, and Crime in 1950s Chicago:* Monroe v. Pape *as Legal Noir*, in CIVIL RIGHTS STORIES 41-59 (Myriam E. Gilles & Risa Goluboff, eds., 2008).

the Monroes and their lawyers at the Chicago ACLU did not get all that they had hoped for.

The Monroes had also sued the City of Chicago, and wanted the Court to rule that the city was vicariously liable for the constitutional violations of its officers.[33] Vicarious liability of employers for their employees' misconduct was—and remains—commonplace in other areas of the law and is expected both to ensure compensation from an employer's deep pockets and to encourage employers to take steps to prevent something similar from happening again. The Monroes' brief to the Supreme Court[34] argued that the City of Chicago should be held vicariously liable for its officers' constitutional violations for these same reasons: vicarious liability would ensure that the Monroes would be compensated (because Frank Pape and the other officers were unlikely to have the resources to pay any settlement or judgment) and would properly place responsibility on the City of Chicago, where assaulting suspects and holding them incommunicado was, at that time, common practice.[35]

Although the Court's decision in *Monroe v. Pape* ruled that Frank Pape and the officers could be sued under 42 U.S.C. § 1983 for violating the Monroes' constitutional rights, the Court also held that the Monroes could not pursue a Section 1983 claim against the City of Chicago.[36] In the Court's view, when Congress enacted Section 1983 in 1871, it did not intend for local governments to be named as defendants.[37]

Seventeen years later, in 1978, in *Monell v. Department of Social Services*, the Court reversed itself, ruling that the 1871 Congress would have allowed Section 1983 claims against local governments.[38] But, based on its interpretation of Section 1983's legislative history—particularly surrounding the failure of the Sherman Amendment, which would have allowed vicarious liability of local governments for misconduct by private actors—the Court ruled that local governments could not be held vicariously liable for their employees' constitutional violations.[39] Instead, the Court wrote, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose

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[33] *See* Brief for Petitioners, On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Monroe v. Pape, 1960 WL 98617, at *21 (Aug. 25, 1960).

[34] The lower courts rejected the Monroes' Section 1983 claims, ruling that the plaintiffs could seek relief under state law. The procedural history is set out briefly in *Monroe*, 365 U.S. at 170.

[35] *See* Brief for Petitioners, 1960 WL 98617, at **40-45 (setting out these arguments).

[36] *See Monroe*, 365 U.S. at 188-92.

[37] *See id.*

[38] 436 U.S. 658 (1978).

[39] *Id.* at 664.

edicts or acts may fairly be said to represent official policy, inflicts the injury that the government, as an entity, is responsible under § 1983."[40]

In *Monell*, the Court ruled that New York City could be sued for the official policy at issue in the case, which required pregnant city workers to take unpaid leaves of absence. But the Court reserved judgment about "what the full contours of municipal liability under § 1983 may be…expressly leav[ing] further development of this action to another day."[41]

Two years later, in 1980, the Court issued *Owen v. City of Independence*, ruling 5-4 that local governments were not entitled to qualified immunity.[42] For the justices in the majority, "[t]he 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," and would be particularly valuable to protect against "'systemic' injuries" caused by "the interactive behavior of several government officials, each of whom may be acting in good faith."[43] But, according to the four-justice dissent, withholding qualified immunity protections for cities would allow "excessive judicial intrusion" into local decisionmaking and would lead to "ruinous judgments" that "could imperil local governments."[44]

Fierce disagreement about the proper scope of local government liability has marked the Supreme Court's development of *Monell* doctrine ever since. As Peter Schuck observed, "[o]n at least ten occasions during the decade after *Monell*, the Court struggled to define the kinds of circumstances, relationships, and patterns of authority determinative of whether a municipality is liable for the misconduct of its employees."[45] "Indeed," Schuck wrote in 1989, "in four recent cases the Court has been unable to muster even a bare majority in favor of any particular rationale or formulation."[46] Michael Gerhardt wrote in 1989 that, "[p]erhaps with the exception of affirmative action, no area of the law has

[40] *Id.* at 694.

[41] *Monell*, 436 U.S. at 695.

[42] 445 U.S. 622 (1980).

[43] *Owen*, 445 U.S. at 652.

[44] *Owen*, 455 U.S. at 668-70 (Powell, J., dissenting).

[45] Schuck, *supra* note 12, at 1753.

[46] *Id.* at 1753-54.

divided the Supreme Court more during the past ten years than municipal liability under 42 U.S.C. Section 1983."[47]

After a series of municipal liability decisions in the late 1980s, the Supreme Court went silent about *Monell* for several years. The Court broke that silence in 1997. In one of the two *Monell* decisions it issued that year, *Bryan County, Oklahoma v. Brown*, Justice Breyer wrote a dissent, joined by Justice Ginsburg and Justice Stevens, calling for a reexamination of *Monell*.[48] Justice Breyer argued, invoking Justice Stevens's dissents in prior decisions, that Section 1983's legislative history did not support the Court's rejection of vicarious liability in *Monell*: although the 1871 Congress rejected the Sherman amendment, that amendment would have imposed vicarious liability on local governments for misconduct by private citizens.[49] In addition, Justice Breyer argued, "*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply."[50] Finally, Justice Breyer observed, "many States have statutes that appear to, in effect, mimic *respondeat superior* by authorizing indemnification of employees found liable under § 1983 for actions within the scope of employment," lessening local governments' reliance on the protections of *Monell*.[51] Justice Souter did not join Justice Breyer's dissent but penned his own that concluded with praise for "Justice Breyer's powerful call to reexamine § 1983 municipal liability afresh."[52]

Upon publication of *Bryan County, Oklahoma v. Brown*, there were four sitting justices on record with concerns with *Monell*'s foundations and justifications. *Monell*'s future seemed downright precarious. In April, 2005, David Achtenberg wrote that *Monell* liability "hangs by a thread," and that "[p]laintiffs' civil rights lawyers wait only for the right case and a single change in the Court's personnel before urging the Court to overturn *Monell*."[53] But the wait has been far longer than Achtenberg expected. There were not one but two changes in the Court's personnel in 2005—Justices Roberts and Alito replaced Justices Rehnquist and O'Connor—and neither new justice has demonstrated

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[47] Michael Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability under Section 1983*, 62 S. CAL. L. REV. 539, 539 (1989).

[48] 520 U.S. 397 (1997).

[49] *See Board of Comm'rs of Bryan Cty.*, 520 U.S. at 431-32 (Breyer, J., dissenting).

[50] *Id.* at 433 (Breyer, J., dissenting).

[51] *Id.* at 436 (Breyer, J., dissenting).

[52] *Id.* at 430 (Souter, J., dissenting).

[53] David Jacks Achtenberg, *Taking History Seriously: Municipal Liability under 42 USC §1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2184 (2005).

much in the way of sympathy for civil rights plaintiffs or appetite to reconsider *Monell*. In fact, the Roberts Court has issued only one decision since 2005 that engages squarely with *Monell* doctrine and, by all estimations, that decision, *Connick v. Thompson*,[54] issued in 2011, made it far more difficult to hold local governments responsible for constitutional violations by their employees.

In recent years, the attention paid to *Monell* doctrine has been eclipsed by controversy around another government protection of the Supreme Court's making—qualified immunity.[55] The Roberts Court has spent an outsized portion of its docket developing, applying, and defending qualified immunity doctrine.[56] And although some advocates continue to argue that local governments should be vicariously liable for the wrongs of their employees, calls for the Court to reconsider qualified immunity have largely drowned out calls to reconsider *Monell*.

B. Doctrine

In the forty-five years since the Supreme Court decided *Monell*, the Court has set out what have come to be understood as three or four different theories of local government liability, depending on how you count.[57]

The first and most straightforward theory of *Monell* liability involves claims against local governments for unconstitutional policies or laws. A prime

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[54] 563 U.S. 51 (2011). For a description of the Court's holding, see *infra* notes 73-78 and accompanying text.

[55] For a description of recent advocacy against qualified immunity before the Supreme Court, see Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018). *See also* sources cited *supra* note 1.

[56] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev.45, 85-87 (2018) (observing that qualified immunity cases are overrepresented in the Supreme Court's "shadow docket," a term coined by Baude, and that the Court considers qualified immunity cases deserving of special attention because of its importance "to society as a whole") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

[57] Some commentators break down the theories of *Monell* liability into even more categories. *See, e.g.*, Matthew J. Cron, Arash Jahanian, Qusair Mohamedbhai & Siddhartha H. Rathod, *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583 (2014) (setting out five theories of *Monell* liability: formal regulations; decisions by final policymakers; ratification; informal customs; and municipal inaction); Michael L. Wells, *The Role of Fault in Section 1983 Municipal Liability*, 71 S.C. L. Rev. 293, 312 (2019) ("The foregoing discussion shows that the *Monell* doctrine distinguishes among at least nine types of cases, including (a) formal rules of general application, (b) top-down custom, (c) single unconstitutional acts of a policymaker, (d) delegation, (e) ratification, (f) bottom-up custom, (g) inadequate training, (h) inadequate hiring, and (i) inadequate supervision" although "[t]he legally significant distinction in municipal liability cases is between situations in which a policymaker commits the constitutional violation, which include (a) through (c), and those in which a subordinate does so, which include (d) through (i).").

example of such a case is *Monell* itself, which challenged an unconstitutional policy that required female New York City employees to take maternity leave.[58]

Local governments can also be held liable under *Monell* if a policymaker violates the Constitution in an area where they have "final policymaking authority."[59] Whether a government official has "final policymaking authority" over a particular area is determined by state and municipal law. As Justice Breyer noted in his dissent in *Board of Commissioners v. Brown*, this is a complex area and courts have come to inconsistent conclusions about which officials have final policymaking authority.[60] A policymaker can also be held directly liable for the acts of their subordinates, but only if they ordered them to perform those acts[61] or ratified the conduct after the fact, meaning that they "approved [the] subordinate's decision and the basis for it."[62]

Alternatively, local governments can be held liable under Section 1983, even if their policymakers did not directly violate or order others to violate the Constitution, if they had an informal custom or policy so "persistent and widespread as to practically have the force of law" that caused the constitutional violation.[63] The Supreme Court has never explicitly endorsed the custom or practice theory, but it has been used to challenge departments' use of "overly suggestive line-ups and show-ups," mass detentions, excessive force, unlawful strip searches, and sexual abuse.[64] To prevail on such a claim, the plaintiff must show that the final policy maker knew about or had constructive knowledge of and was deliberately indifferent to the custom or informal policy.[65]

Plaintiffs can also bring *Monell* claims asserting a failure to properly hire, train, supervise, and discipline its officers.[66] Some view these "failure to" claims as a part of the custom or practice theory, and others view them as a fourth theory of *Monell* liability.[67] To prove that these types of failures amount to a municipal policy or custom, the Supreme Court wrote in *City of Canton v.*

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[58] *See generally* Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978).

[59] Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

[60] *See Board of Commissioners*, 520 U.S. at 435 (Breyer, J., dissenting).

[61] *See Pembaur,* 475 U.S. at 480-81.

[62] St. Louis v. Praprotnik, 485 U.S. 112 (1988).

[63] Connick v. Thompson, 563 U.S. 51, 61 (2011).

[64] *See* Karen M. Blum, *Making out the* Monell *Claim under Section 1983,* 25 TOURO L. REV. 829, 839-40 (2012) (describing cases advancing these types of claims).

[65] *See id.* at 841.

[66] *See* City of Canton v. Harris, 489 U.S. 378, 385 (1989).

[67] *See, e.g.*, Blum, *supra* note 12, at 915.

Harris—the case first recognizing this *Monell* theory—that the need for better hiring practices, training, supervision, or discipline must be so obvious that the government's failure to do more amounts to "deliberate indifference" to the rights of its citizens, and the government's failure was the "moving force" behind the constitutional violation.[68]

In *City of Canton v. Harris*, in a footnote, the Supreme Court offered two ways to establish deliberate indifference to the need for better training.[69] First, a person can show deliberate indifference with evidence that "the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers."[70] In the alternative, if there is not a pattern of prior constitutional violations, the need for training can be obvious given the nature of the officer's responsibilities. For example, the *City of Canton* footnote explained, officers are given guns and know "to a moral certainty" that they will have to arrest fleeing felons.[71] As a result, "the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."[72]

In 2011, in *Connick v. Thompson*, the Court interpreted that *City of Canton* footnote in a way that made both types of "failure to" claims seemingly impossible to prove.[73] According to the Court in *Connick*, a New Orleans prosecutor was not deliberately indifferent to the need to better train his attorneys about their *Brady* obligations, despite four overturned convictions for this same failure in the ten years prior, because the *Brady* evidence withheld in *Connick* was of a different type than the *Brady* evidence withheld in the other cases.[74] And although the prosecutor's office had virtually no training about prosecutors' *Brady* obligations, the Court concluded that there was no obvious need for such training since all prosecutors had gone to law school and were educated in such matters, and knew how to research areas where they were uncertain.[75]

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

[69] *City of Canton*, 489 U.S. at 390 n.10.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] 563 U.S. 51 (2011).

[74] *See id.* at 62-63.

[75] *See id.* at 66-67.

Dahlia Lithwick has called *Connick v. Thompson* "one of the meanest Supreme Court decisions ever"[76] and Justice John Paul Stevens described it as a "manifest injustice"[77]; as Susan Bandes observed, it "bodes ill for prosecutorial accountability more generally, and for failure to train liability across the board."[78]

C. Critique

Since before the ink on the *Monell* decision was dry, it seems, the decision has been harshly criticized by justices, judges, and commentators.

First, commentators have taken aim at the Supreme Court's assessment of Section 1983's legislative history. These critiques rely on evidence that Congress never intended to exclude vicarious liability for cities—which was common at the time for other types of violations, and additionally point out that Congress's failure to pass the Sherman Amendment, which would have imposed vicarious liability for misconduct by private actors, did not speak to the culpability of local governments for misconduct by its own employees.[79]

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[76] Dahlia Lithwick, *Cruel but Not Unusual: Clarence Thomas Writes One of the Meanest Supreme Court Decisions Ever*, SLATE (Apr. 1, 2011).

[77] Justice John Paul Stevens, *Letter to the Editor: Prosecutors' Misconduct*, N.Y. TIMES (Feb. 18, 2015).

[78] Susan A. Bandes, *The Lone Miscreant, The Self-Training Prosecutor, and Other Fictions: A Comment on* Connick v. Thompson, 80 FORDHAM L. REV. 715, 715 (2011).

[79] See, e.g., David Jacks Achtenberg, *Taking History Seriously: Municipal Liability under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2196 (2005) (arguing that the bases for the Supreme Court's rejection of respondeat superior in *Monell* "rest on historically inaccurate assumptions about the nineteenth-century justifications for respondeat superior."); Karen M. Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal* Courts, 51 TEMP. L.Q. 409, 413 n.15 (1978) (arguing that the rejection of vicarious liability for municipalities "may represent a sensitive response to the fiscal plight of municipal corporations today, it should not be acknowledged as a legitimate interpretation of congressional intent in 1871"), Comment, *Municipal Liability under Section 1983 for Civil Rights Violations After* Monell, 64 IOWA L. REV. 1032, 1046 (1979) ("The Court's [respondeat superior] limitation . . . is not justified by the legislative history of section 1983 or by policy considerations."); David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 CARDOZO L. REV. de novo 90, 108-14 (2022) (contesting the Supreme Court's interpretation of the legislative history of Section 1983); Note, Monell v. Department of Social Services: *One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 HOFSTRA L. REV. 893, 921 (1979) ("Analysis of the legislative history of section 1983 does not indicate that Congress intended to exclude respondeat superior from the act."). *See also* Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 431-32 (1997) (Breyer, J., dissenting) ("[T]he history on which *Monell* relied

Second, courts and commentators criticize *Monell* doctrine's complexity and indeterminacy.[80] As Justice Breyer wrote in *Board of County Commissioners*, "*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply."[81]

Third, commentators argue that *Monell* doctrine makes it nearly impossible to prevail on Section 1983 claims against local governments. Richard Fallon has described the standards for *Monell* liability as "exceedingly difficult to satisfy."[82] Pamela Karlan has written that, in many areas it is "exceptionally difficult to show that the challenged action involves an unwritten policy" that could be the basis for a *Monell* claim.[83] Peter Schuck has observed that, "[b]y imposing an 'official policy' requirement, the Court has bound itself to a doctrine whose principal consequence is to deny citizens recoveries against local governments for damage caused by officials' constitutional violations"[84] Fred Smith has commented that, "[w]hile the outcome in lower courts is more mixed

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consists almost exclusively of the fact that the Congress that enacted § 1983 rejected an amendment (called the Sherman amendment) that would have made municipalities vicariously liable for the marauding acts of *private* citizens. That fact, as Justice Stevens and others have pointed out, does not argue against vicarious liability for the act of municipal employees—particularly since municipalities, at the time, were vicariously liable for many of the acts of their employees.") (citing Oklahoma City v. Tuttle, 471 U.S. 808, 836, n.8 (1985) (Stevens, J., dissenting); Pembaur v. Cincinnati, 475 U.S. 469, 489-90 (1986) (Stevens, J., concurring in part and concurring in judgment); Vodak v. City of Chicago, 639 F.3d 738, 746 (7th Cir. 2011) ("For reasons based on what scholars agree are historical misreadings (which are not uncommon when judges play historian), the Supreme Court has held that municipalities are not liable for the torts of their employers under the strict-liability doctrine of respondeat superior, as private employers are.") (citations omitted).

[80] *See, e.g.*, Bandes, *supra* note 78, at 717 ("Since the decision in Monell, the Court has struggled to draw the line between the respondeat superior liability that it has held the statute prohibits, and the supervisory liability it has held the statute permits."); Blum, *supra* note 12, at 919-20 ("The area of municipal or entity liability has become, in the words of Justice Breyer, a 'highly complex body of interpretive law,' indeed, a maze that judges and litigants must navigate with careful attention to all the twists and turns") (quoting *Bd. Of Cnty. Comm'rs*, 520 U.S. at 431) (Breyer, J., dissenting); Peter Schuck, *Municipal Liability under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1753 (1989) ("The official policy requirement rejects a rule of respondeat superior in favor of a set of 'guiding principles' that in fact provide little or no direction for the resolution of municipal liability claims.").

[81] *Bd. Of Cnty. Comm'rs*, 520 U.S. at 433.

[82] Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 482 n.11 (2011).

[83] Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1920 (2007).

[84] Peter Schuck, *supra* note 12, at 1755.

[than in the Supreme Court], the municipal causation requirement nonetheless often inoculates local governments from accountability, including for conduct that would render them liable for violations of state law."[85] And Smith and Katherine Mims Crocker have each observed that *Monell*'s challenges, in conjunction with the challenges of overcoming qualified immunity, make it nearly impossible to succeed on civil rights claims.[86]

Other research has amply documented *Monell*'s misreading of the legislative history of Section 1983, and has ably demonstrated the complexity and indeterminacy of *Monell* doctrine. But there has been no attempt to measure just how difficult it is to succeed on *Monell* claims. Understanding how *Monell* functions on the ground is critically important to test the common concern that *Monell* doctrine forecloses municipal liability claims, to understand the role *Monell* plays in our system of constitutional remediation, and to understand whether advocates' and legislators' relative inattention to *Monell*, in favor of qualified immunity, makes sense.

II. *MONELL* IN THE COURTS

In a prior study, I examined the dockets of all of the federal lawsuits filed under Section 1983 against law enforcement officers and officials in five federal districts over a two year period; 2011-2012.[87] The focus of that study was the role qualified immunity played in the litigation of these cases, and so I hand coded several characteristics of these cases, including: the percentage of cases in which qualified immunity could be raised; the frequency with which qualified immunity was, in fact raised; the stage of litigation at which qualified immunity was raised; the number of times qualified immunity was raised; the frequency of interlocutory appeals of qualified immunity; the success of the requests for qualified immunity at each of these stages; and the ultimate disposition of these suits.[88] My goal in that study was to test judicial and scholarly assertions that qualified immunity was necessary to shield government officials

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

[86] *See* Smith, *supra* note 85, at 414-15 ("When [*Monell's*] causation requirement interacts with other immunities that governmental officials receive, survivors or governmental abuse are often left with no defendant to sue at all."); Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1737 (2022) ("[R]econsidering qualified immunity without also reconsidering sovereign immunity and related protects for government entities would fail to uproot the real-life problems plaguing the constitutional tort system.").

[87] *See generally* Schwartz, *How Qualified Immunity Fails*, *supra* note 5. Included in my analysis were counseled and *pro se* cases. For further discussion of my methodology in that study, see *id.* at 19-25.

[88] *See id.* at 25-47 (setting out these findings).

from the costs and burdens of litigation in insubstantial cases.[89] I found, instead, that qualified immunity was unnecessary and ineffective at achieving these goals; many other barriers to relief weeded out "insubstantial cases," and qualified immunity exceedingly rarely shielded officers from discovery and trial.[90] In fact, because qualified immunity is often raised and takes significant time and effort to litigate, even though it rarely leads to the dismissal of a case, the defense may in fact *increase* the costs and burdens of civil rights litigation.[91]

In this study, I aim to understand the ways in which *Monell* claims make their way through the federal district courts. I decided to code the same 1,183 cases, as it aids comparison of the effects qualified immunity and *Monell* have, comparatively, on the litigation of constitutional claims.

In the Subparts that follow, I describe which cases in the dataset included *Monell* claims that could be challenged by local government defendants; the frequency with which local government defendants raised these challenges, and the phase of litigation at which these challenges were raised; the frequency with which courts granted and denied these motions; the frequency with which plaintiffs abandoned their *Monell* claims; and the ultimate disposition of *Monell* claims. Throughout, I compare these findings to my previous findings about the role qualified immunity played in these cases. Tables setting out these findings can be found in the Appendix.

In my prior study, I described some limitations of the data; the cases are drawn from federal lawsuits filed in just five districts, over just a two-year period; the dataset does not include cases litigated in state court or information about the impact of these doctrines on litigation decisions not reflected in court filings; and the exclusive focus on police misconduct suits leaves open the distinct possibility that different types of civil rights cases might be litigated and resolved in different ways.[92] These limitations and qualifications hold true for my analysis of *Monell* claims in this Article.

In addition, it is worth emphasizing that the types of *Monell* theories plaintiffs rely upon in police misconduct suits may not be representative of theories relied upon in other areas of civil rights law. *Monell* claims in police misconduct suits are unlikely to invoke the first two theories of *Monell* liability, given the nature of policing and police policymaking. Local governments do not usually pass policing policies that are unconstitutional on their face—a policy requiring

[89] For a description of those assumptions, see *id.* at 13-15.

[90] *See id.* at 51-57 (describing these observations).

[91] *See id.* at 60-61 (describing bases to believe that "qualified immunity may actually increase the costs and delays associated with Section 1983 litigation).

[92] *See id.* at 23-25 (describing these limitations).

officers to use excessive force, for example, or requiring officers to arrest people who exercise their First Amendment free speech rights.[93] And final policy makers are unlikely to violate the Constitution themselves—police chiefs or sheriffs, who are often determined to be the final policymakers in areas relevant to Section 1983 cases, rarely are the ones arresting people or using force against them. Instead, it is usually police officers, sergeants, lieutenants, and detectives who do the arresting and assaulting complained of in Section 1983 lawsuits. As a result, *Monell* claims in police misconduct suits presumably disproportionately allege unwritten customs and policies and/or the failure to train, supervise, and discipline.[94] So, my findings may be less relevant to areas of civil rights law in which *Monell* claims more often allege unconstitutional policies or unconstitutional conduct by policymakers.

A. Cases Alleging *Monell* Claims

Before assessing how *Monell* claims fared in the five federal districts I studied, I needed first to determine which of the 1,183 cases in my dataset included municipal liability claims that could be challenged by local government defendants for failing to satisfy *Monell*'s exacting standards. Accordingly, I removed from the tally those cases that included allegations solely against individual officers and cases alleging municipal liability claims that were dismissed by the court *sua sponte* before the municipal defendant had the opportunity to answer (and potentially raise a challenge to the claim against them).[95]

Of the 1,183 cases in my dataset, 110 (9.3%) were brought solely against individual officers, and 118 (9.9%) named municipalities but were dismissed

[93] *Accord* Cron, *supra* note 57, at 584 ("Although proving municipal liability can sometimes be demonstrated fairly easily, for example when an official municipal policy directly causes a constitutional injury, such cases are rare because municipalities do not often announce and enforce policies that are facially unconstitutional.").

[94] For data consistent with this view see *infra* notes 108 and accompanying text.

[95] A few additional details about my coding approach are in order. First, in calculating the total number of cases alleging municipal liability claims, I have omitted claims alleged against states or state agencies (like California Highway Patrol) because the Eleventh Amendment bars such claims and the Supreme Court has held that states are not "persons" suable under Section 1983. *See generally* Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). Second, I have included in my count *Monell* claims alleged against law enforcement agencies, even though the jurisdiction (e.g. Philadelphia) and not the agency (e.g. the Philadelphia Police Department) is the proper defendant. I took this approach because this common mistake can be (and often is) corrected in an amended complaint. Third, I have looked closely at the complaints in cases that did not name municipalities but instead named individual officers acting in their "official capacity"; although municipal liability claims *can* be brought in this manner, I have omitted these cases from my count when there is no indication that an official capacity claim is being pursued

by the court at the outset, before the defendants could move to dismiss.[96] In the remainder—955 cases (80.7%)—plaintiffs named municipal defendants, and those municipal defendants had the opportunity to challenge the *Monell* claims alleged against them.

Nearly the same percentage of the 1,183 cases in my dataset—979 cases (82.8%)—were cases in which qualified immunity could have been raised by individual defendants; they included damages claims against individual officers, and were not dismissed *sua sponte* by the court.[97] Among the 1,183 cases in my dataset, 879 (74.3%) alleged claims against both individual officers and municipalities. In these 879 cases, both qualified immunity and *Monell* were potential barriers to relief.[98]

B. The Frequency and Timing of Motions Challenging *Monell* Claims

I next assessed how frequently, and at what stage of litigation, local government defendants challenged the municipal liability claims brought against them. Because my goal was to understand the challenges of pleading and proving *Monell* claims, I included in my assessment only motions that alleged, at least in part, that the plaintiff had not satisfied the *Monell* standard. There are other bases to seek dismissal of municipal liability claims—if, for example, the claim is barred by *Heck v. Humphrey*,[99] or if the plaintiff's constitutional rights were not violated, or if her claims are barred by the statute of limitations, or if the complaint is illegible. If a motion to dismiss or for summary judgment was based only on one or more of these types of arguments, I did not include it in my count. In my prior study, I made the same type of assessment of qualified

as a *Monell* claim. For one example, see Complaint, Draughn v. Bradford, 12-cv-7035 (E.D. Pa. Dec. 17, 2012).

[96] *See* App'x Table 1.A.

[97] *See* App'x Table 1.B.

[98] I expected to tally the *Monell* theories alleged by plaintiffs in their complaints. Yet upon review, I discovered that the complaints often included multiple different theories, and were alleged in such a general manner that it was sometimes difficult to determine the precise nature of the *Monell* claim. For more discussion of vagueness of *Monell* claims in complaints, see infra Part III.A; for further analysis of the distribution of *Monell* claims and their success at summary judgment, see infra Part II.C.

[99] 512 U.S. 477 (1994) (holding that a plaintiff cannot sue under § 1983 for a claim that, if successful, would imply the invalidity of the plaintiff's criminal conviction).

immunity motions, including in my count only those motions that squarely raised the qualified immunity defense.

I found that local government defendants challenged *Monell* claims brought against them significantly more often than individual defendants raised qualified immunity.[100] In 514 cases—more than half (53.8%) of the 955 cases in my dataset with claims against local governments—defendants argued that plaintiffs had not met the *Monell* standard. In comparison, defendants raised qualified immunity in 368 cases—just over one-third (37.6%) of the 979 cases in which that defense could be raised.

There was regional variation in the frequency with which local government defendants raised challenges to *Monell* claims and individual defendants raised qualified immunity. Local government defendants in the Eastern District of Pennsylvania moved to dismiss and/or for summary judgment on *Monell* claims in 42.8% of the cases naming local government defendants, as compared with 50.4% of the local government defendants in the Northern District of California; 56.3% of the local government defendants in the Northern District of Ohio; 68.2% of the local government defendants in the Middle District of Florida; and 71.2% of the local government defendants in the Southern District of Texas. Regional variation in qualified immunity motions followed the same pattern, with qualified immunity challenges in 23.9% of cases filed in the Eastern District of Pennsylvania, 33.8% of cases filed in the Northern District of California, 47.5% of cases in the Northern District of Ohio, 54.2% of cases filed in the Middle District of Florida, and 54.7% of cases in the Southern District of Texas. Note, though, that in every district, local government defendants challenged *Monell* claims more often than individual defendants raised qualified immunity.

I next parsed out at what stage(s) local government defendants raised challenges to the *Monell* claims against them. I found that, at the motion to dismiss stage, local government defendants raised challenges to *Monell* claims almost two-and-a-half times as often as individual defendants invoked qualified immunity.[101] Local government defendants moved to dismiss the *Monell* claims against them in 312 (60.7%) of the cases in which defendants challenged *Monell* claims, which amounts to 32.7% of the 955 cases in which they could raise the defense. In contrast, individual defendants raised qualified immunity in a motion to dismiss in 136 (36.9%) of cases in which defendants raised qualified immunity, which amounts to 14.2% of the 979 cases in which they could raise the defense.

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[100] *See* App'x Tables 2.A, 2.B. This difference is statistically significant: Pearson's Chi-square = 59.696, p-value <.001.

[101] *See* App'x Tables 3.A, 3.B.

At the summary judgment stage, local government defendants and individual defendants filed almost exactly the same number of *Monell* and qualified immunity challenges. *Monell* challenges were raised at summary judgment in 272 (28.5%) of the 955 cases in the dataset in which *Monell* claims could be challenged; qualified immunity challenges were raised at summary judgment in 274 (28%) of the 979 cases in the dataset in which qualified immunity could be raised.

This seeming parity is deceptive, however, because there were fewer cases in which local government defendants *could* raise *Monell* challenges at summary judgment.[102] I calculated how many summary judgment motions challenging *Monell* and raising qualified immunity *could* have been filed by counting those cases in which the plaintiff's claims withstood a motion to dismiss and the parties engaged in at least some formal discovery. By this metric, there were 484 cases in the dataset in which defendants could have challenged *Monell* claims at summary judgment, and they did so in 272 (56.2%) of those cases. In comparison, there were 577 cases in the dataset in which defendants could have moved for summary judgment on qualified immunity, and they did so in 274 (47.5%) of those cases.[103]

I also explored the total number of motions filed that challenged *Monell* and raised qualified immunity, respectively.[104] Sometimes defendants raise multiple motions to dismiss; when, for example, a motion to dismiss is granted with leave to amend, the motion is granted, and the defendant moves to dismiss the amended complaint. Sometimes defendants raise multiple summary judgment motions; one is denied as premature and then the defendant moves again after discovery is completed. And sometimes defendants file motions to dismiss and summary judgment on the same claim. Counting the total number of motions filed offers fuller understanding of the costs and burdens associated with defending against these challenges.

Plaintiffs often had to fight multiple *Monell* challenges and multiple qualified immunity challenges in a single case.[105] Local government defendants filed 662 *Monell* challenges in 514 cases, amounting to an average of 1.29 motions per case; individual defendants filed 440 qualified motions in 368 cases, amounting to an average of 1.2 motions per case. Among the 955 cases in my

[102] This is in part because motions to dismiss *Monell* claims were more often granted by courts, and because plaintiffs more often abandoned their *Monell* claims, topics I will address later in this Part.

[103] This difference is statistically significant: Pearson's Chi-square = 7.997, p-value <.001.

[104] *See* App'x Tables 4.A, 4.B.

[105] *See* App'x Tables 5.A, 5.B.

dataset with *Monell* claims, plaintiffs in 388 (40.6%) of the cases faced one *Monell* challenge; plaintiffs in 105 (11%) faced two; and plaintiffs in 21 (2.2%) faced three or more. Among the 979 cases in which qualified immunity could be raised, plaintiffs in 309 (31.6%) of the cases faced one motion raising qualified immunity; plaintiffs in 53 (5.4%) faced two; and plaintiffs in 7 (.7%) faced three or more. So, although qualified immunity is regularly raised by defendants in Section 1983 cases, there were more total cases in which local government defendants raised *Monell* challenges, more total cases in which local government defendants made multiple *Monell* challenges, and more total motions challenging *Monell* claims.

C. The Success of Challenges to *Monell* Claims

Having found that challenges to *Monell* claims were more frequent than were qualified immunity challenges, I then assessed how often these motions were successful.

Among the cases in my dataset, *Monell* claims infrequently survived motions to dismiss and for summary judgment.[106] Of the 382 motions to dismiss *Monell* claims in my dataset, just 62 (16.2%) were denied in whole and another 13 (3.4%) were denied in part; of the 280 motions for summary judgment against *Monell* claims, just 36 (12.9%) were denied in whole and another 6 (2.1%) were denied in part. In total, 98 (14.8%) of the 662 motions to dismiss and for summary judgment challenging *Monell* claims were denied in whole and 19 (5.5%) were denied in part—so fewer than one in five (17.7%) *Monell* claims survived these challenges. In contrast, 46 (29.9%) of the 154 motions to dismiss raising qualified immunity were denied in whole and another 7 (4.5%) were denied in part; 91 (32.2%) of the 283 summary judgment motions raising qualified immunity were denied in whole and another 19 (6.7%) were denied in part. All told, qualified immunity motions had a partial or total denial rate of 37.5%—more than twice as high as that for motions challenging *Monell* claims.

The remaining almost 82% of the motions challenging *Monell* claims in my dataset were granted or undecided. Of the 662 motions challenging *Monell* claims in my dataset, the largest portion—234 (35.3%)—were granted for failing to satisfy the *Monell* standard. Another 137 *Monell* challenges (20.7%) were granted for other reasons: 80 (12.1%) were granted in whole or part on other grounds (such as statutes of limitations violations, *Heck v. Humphrey* bars, or

[106] *See* App'x Tables 6.A, 6.B; 7.A, 7.B; 8.A, 8.B.

the failure to prove a constitutional violation);[107] 52 (7.9%) motions were granted after the plaintiff, in their opposition to the motion, either withdrew the *Monell* claim or conceded that the motion should be granted; and 5 (.8%) were granted with unclear reasoning. A total of 174 *Monell* challenges were not decided: 70 (10.6%) were denied as moot (usually because the plaintiff filed an amended complaint in response to a motion to dismiss); and 104 (15.7%) were undecided because the case was dismissed (usually because the case had settled). In comparison, just 53 of the 440 qualified immunity motions (12%) were granted in full; a success rate about one-third of that for *Monell* claims. Of the remaining qualified immunity challenges, 147 (33.4%) were granted in full or in part on other grounds, and 75 (17%) were undecided.

In my study of qualified immunity, I observed substantial regional variation in courts' decisions. As one example, courts in the Southern District of Texas granted 33.3% of defendants' qualified immunity motions in part or full, while courts in the Eastern District of Pennsylvania granted 6.1% of the qualified immunity motions in whole or part on qualified immunity grounds. There was less variation among courts' decisions on motions challenging *Monell* claims: the percentage of *Monell* challenges granted in whole or part was 40.9% in the Southern District of Texas; 42.8% in the Middle District of Florida; 40.8% in the Northern District of Ohio; 37.9% in the Northern District of California; and 33.3% in the Eastern District of Pennsylvania.

I was curious to assess whether the success of *Monell* challenges could be correlated to the type of *Monell* claim alleged by plaintiffs. I presumed that claims alleging unconstitutional policies or unconstitutional acts by police policymakers would be less frequently alleged, but easier to prove.[108] At the motion to dismiss stage, this analysis proved too difficult because plaintiffs' complaints generally contained general language that implicated multiple theories of *Monell* liability. But after discovery, when the plaintiff must put forward evidence supporting their *Monell* claims to defeat a summary judgment motion, there tended to be more clarity about the nature of plaintiffs' *Monell* allegations.

Defendants filed a total of 282 summary judgment motions challenging plaintiffs' *Monell* claims. But because my goal is to understand whether some *Monell* theories tend to be more successful than others, I limited my examination to those motions that courts decided on their merits. If a summary judgment

[107] As indicated previously, I did not include in my motion count those challenges to *Monell* claims that rested solely on these other types of arguments. In these 80 motions, defendants raised these types of arguments in conjunction with claims that plaintiffs had not met their burdens of pleading and proving their *Monell* claims, and the court decided these motions on these alternative grounds.

[108] *See supra* note 94 and accompanying text.

motion was granted for a reason unrelated to the *Monell* standard—because there was no proof of a constitutional violation, or the case fell beyond the statute of limitations—I did not include it in this assessment. I also excluded motions that were not decided because the plaintiff filed an amended complaint (thus mooting the motion), cases where the case was voluntarily withdrawn or settled before a decision, and motions that were superseded by later motions. In total, I examined 142 cases with summary judgment motions: 29 of those motions were denied, 4 motions were granted in part, and 109 motions were granted in full.

If this subset of claims is representative, it confirms my assumption that *Monell* claims alleging police misconduct infrequently concern policymakers' direct conduct: Just 12 of the 142 *Monell* claims concerned formal policies or acts of final policy makers; 116 *Monell* claims concerned informal customs and policies or claims about the failure to hire, train, and supervise appropriately; and 14 of the *Monell* claims had allegations that were unclear.[109] The data also suggest that summary judgment motions were more likely to be denied when they challenged *Monell* claims alleging misconduct by final policymakers. Of the motions for summary judgment on *Monell* claims concerning official policies and conduct by final policymakers, 41.6% were denied; a denial rate significantly higher than the 19% of summary judgment motions denied regarding *Monell* claims alleging unconstitutional customs or a failure to properly hire, train, and supervise.[110] But given the very few *Monell* claims in my dataset concerning official policies and final policymakers' conduct, it is difficult to make any broad claims based on these data about whether motions for summary judgment challenging such claims are more likely to be denied.

[109] *See* App'x Table 9. In contrast, among 108 federal appellate *Monell* cases coded and analyzed by Nancy Leong, "Thirty cases (27.8%) involved policymaker statement or action, 11 (10.2%) involved a written document or policy; 74 (68.5%) involved a widespread pattern of conduct; and 33 cases (30.6%) involved a municipal failure." Leong, *Municipal Failures*, *supra* note 18, at 122. The differences in Leong's and my findings could be attributable to the fact that Leong reviewed appellate decisions available on Westlaw, whereas I reviewed district court case dockets; the fact that Leong reviewed all types of *Monell* claims, whereas I reviewed only police misconduct claims; or some combination of the two.

[110] Leong found, as did I, that plaintiffs were significantly more likely to succeed on *Monell* claims involving final policymakers' conduct or written laws and policies than they were on claims alleging a custom or failure to hire, train, and supervise. *See* Leong, *Municipal Failures*, *supra* note 18, at 124.

D. Abandoned *Monell* Claims

Scores of *Monell* claims in my dataset met another fate; they were abandoned by plaintiffs during the course of litigation.[111] As mentioned in the previous Subpart, 52 (7.9%) of the motions challenging *Monell* claims went unopposed by the plaintiff. In these cases, in response to motions to dismiss or for summary judgment, the plaintiff failed to address the *Monell* challenge in their briefs or explicitly conceded that they did not have the evidence to support their *Monell* claim against the local government defendant.

In another 66 cases, plaintiffs abandoned their *Monell* claims during litigation. In four cases, plaintiffs voluntarily dismissed their *Monell* claim before any motion to dismiss was filed. In 15 cases, plaintiffs initially pled a claim against the local government but subsequently amended their complaints to omit the *Monell* claim—sometimes on their own accord, and sometimes after the court granted a motion to dismiss the *Monell* claim with leave to amend. In eight cases, plaintiffs abandoned all of their federal constitutional claims so that only state law claims remained, and their cases were remanded to state court. In 39 cases, plaintiffs voluntarily dismissed their *Monell* claims during discovery or leading up to trial. In total, plaintiffs abandoned their *Monell* claims in 118 (12.4%) of the 955 cases in which they were initially pled.

Plaintiffs in the Eastern District of Pennsylvania most frequently abandoned their *Monell* claims; they voluntarily dismissed or failed to defend their *Monell* claims in 72 (21.2%) of the 339 cases in which they were initially pled. Plaintiffs in the Middle District of Florida abandoned their *Monell* claims in 21 (13.4%) of the 157 cases in which they were initially pled. In the remaining districts, plaintiffs far less frequently abandoned their *Monell* claims: 19 (5.6%) of the 222 cases with *Monell* claims in the Northern District of California; 4 (3.2%) of the 126 cases with *Monell* claims in the Northern District of Ohio; and 2 (1.8%) of the 111 cases with *Monell* claims in the Southern District of Texas.

In eight of the cases in which plaintiffs abandoned their *Monell* claims, they abandoned their § 1983 claims against individual officers as well so that they could pursue their state law claims in state court. But I am aware of no case in my dataset in which a plaintiff abandoned their § 1983 claim against an individual officer and relied instead on their municipal liability claim, or conceded in response to a motion to dismiss or for summary judgment that an officer defendant was entitled to qualified immunity.

[111] *See* App'x Table 10.

E. Dispositions of *Monell* Claims

Finally, I calculated the ultimate outcomes of *Monell* claims in my dataset: the frequency with which these claims were settled; dismissed by courts at the motion to dismiss or at summary judgment stages; involuntarily dismissed at another stage of pre-trial litigation; abandoned by the plaintiff; or concluded at trial.[112] I then compared those figures with the dispositions of the cases as a whole.[113]

My findings tell a tale consistent with the tale told by prior Subparts: it is more difficult to prevail on *Monell* claims against local governments than on Section 1983 claims brought against individual officers. Of the 955 cases in the dataset in which *Monell* claims were pled and could be challenged, 32.7% of the *Monell* claims were dismissed at the motion to dismiss and summary judgment stages, whereas 20.4% of the 955 cases were dismissed in their entirety at these stages.[114] A total of 617 (64.6%) of cases settled, but only 52.6% of *Monell* claims were settled or voluntarily dismissed.[115]

Monell claims were far less likely to go to trial than were Section 1983 police misconduct cases as a whole: 82 cases went to trial, but just 22 of them included *Monell* claims.[116] There were three plaintiffs' verdicts in cases with *Monell* claims; one was reversed on appeal, and two were settled after trial.[117]

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[112] *See* App'x Table 11.A.

[113] *See* App'x Table 11.B.

[114] This difference is statistically significant: Pearson's Chi-square = 36.757, p-value <.001.

[115] This difference is statistically significant: Pearson's Chi-square = 28.538, p-value <.001.

[116] This difference is statistically significant: Pearson's Chi-square = 36.609, p-value <.001.

[117] In *Alvarez v. City of Brownsville*, the verdict reversed on appeal, the plaintiff was arrested for and pled guilty to assaulting an officer; a jury awarded the plaintiff $2.3 million because the City failed to turn over *Brady* evidence that proved his innocence. *See* Alvarez v. City of Brownsville, 904 F.3d 382, 385 (5th Cir. 2018). On appeal, the Fifth Circuit found that Alvarez could not succeed on his *Brady* claim because he had pled guilty and also found that, although the city had a policy of not turning over internal investigation information to prosecutors, no municipal policy caused the failure to turn over *Brady* evidence in this case. *See id.* at 390-94.

Both successful *Monell* trials that were settled after trial were brought in the Middle District of Florida. In one, a bench trial, the court found that a protestor's First Amendment rights were violated when he was arrested for engaging in politically protected speech. *See* Memorandum of Decision, Osmar v. City of Orlando, No. 6:12-cv-0185 (M.D. Fla. Feb. 6, 2012). The other was a case in which a mentally unstable woman died in sheriff's department's custody and the sheriff himself testified at trial that "he was aware of mentally ill and unstable individuals entering the jail 'all the time,' and conceded the jail did not meet the statutory qualifications for receiving mentally ill and unstable individuals." Order on Defendant's Motion for Judgment as a Matter of Law, Degraw v. Gualtieri, No. 8:11-cv-720, at *8 (M.D. Fla. May 20, 2014).

In each of the eight cases that ended with a plaintiffs' verdict, plaintiffs' *Monell* claims had either been dismissed or abandoned.

III. EXPLANATIONS

Part II revealed that defendants more often raise challenges to *Monell* claims than they move to dismiss or seek summary judgment on qualified immunity; that courts more often grant challenges to plaintiffs' *Monell* claims than they grant officers qualified immunity at both the motion to dismiss and summary judgment stages; that *Monell* claims against local governments are regularly abandoned by plaintiffs; and that *Monell* claims are, overall, less likely to succeed than individual liability claims. In this Part, I offer some preliminary explanations for these phenomena.

A. Why So Many *Monell* Claims Are Dismissed at the Pleadings Stage

By any measure, *Monell* challenges were more likely to be successful at the motion to dismiss stage than were challenges based on qualified immunity. In my dataset, 38.2% of motions to dismiss *Monell* claims were granted in whole or in part; in comparison, 17.8% of motions to dismiss on qualified immunity grounds were granted.[118] A total of 106 (11.1%) *Monell* claims were dismissed at the motion to dismiss stage, as compared to 64 (6.7%) claims against individual defendants.[119] The interaction between the Supreme Court's "plausibility" pleading standards and *Monell* claims likely makes it particularly difficult to get over this first hurdle.[120]

In *Bell Atlantic v. Twombly*,[121] the Supreme Court ruled that plaintiffs must allege a "plausible" entitlement to relief in their complaint to withstand a motion to dismiss and in *Ashcroft v. Iqbal*,[122] the Court made clear that a "plausible" complaint is one filled with factual allegations—legal conclusions will not suffice. In the *Iqbal* case, the Supreme Court dismissed Javaid Iqbal's claim against Attorney General John Ashcroft and FBI Director Mueller because he could not prove that they had intentionally promulgated a discriminatory policy

[118] *See* App'x Tables 7.A, 7.B.

[119] *See* App'x Tables 11.A, 11.B.

[120] Accord Blum, *supra* note 12, at 916 ("Municipal liability claims have become procedurally more difficult for plaintiffs to assert since the Court's imposition of a more stringent pleading standard in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*") (citations omitted).

[121] 550 U.S. 544 (2007).

[122] 556 U.S. 662 (2009).

to detain Arab and/or Muslim men.[123] But it was near impossible for Iqbal to have evidence of Ashcroft and Mueller's intent before discovery—indeed, that is the very type of evidence that can only possibly be unearthed during discovery.[124]

Plaintiffs pleading a *Monell* claim will often face this same challenge. A plaintiff alleging a policy unconstitutional on its face or misconduct by a final policymaker may have access to facts that support their *Monell* claim at the outset. But if a plaintiff is alleging that there is a custom of misconduct or a failure to train or supervise—which likely requires proof of past similar misconduct, or training records, or internal investigation files—facts to support the claim may only be available through discovery.

Some judges recognize this Catch-22 when evaluating the plausibility of *Monell* claims. For example, a judge in the Eastern District of Pennsylvania denied defendant's motion to dismiss plaintiff's failure-to-train claim, observing that, in order to prevail on that claim, the plaintiff would need to "prove that the Township had a pattern of engaging in constitutional violations such as those present in this case" and that the plaintiff needed "a sufficient period of discovery to adduce this evidence."[125] The court therefore concluded that the motion to dismiss was premature.[126] But other judges were less forgiving in their application of *Iqbal* to *Monell* claims.

For example, a judge in the Northern District of Ohio dismissed a *Monell* claim based on a city's failure to adequately train its officers about proper handcuffing procedures because the allegations in her complaint were "only legal conclusions": the plaintiff "failed to plead facts showing that the City of

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[123] *See id.* at 683.

[124] *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 96 Iowa L. Rev. 821, 830 (2010) ("The plaintiff who needs discovery to learn the required factual particulars is the person whom the Court has newly put in jeopardy."); Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 Lewis & Clark L. Rev. 157, 157 (2010))("[T]he greater detail demanded by the new pleading rules may be impossible in many civil rights cases, where plaintiffs cannot know or plead essential information with particularity at the outset without the benefit of discovery—discovery that *Iqbal* stands to deny to plaintiffs who fail to plead with the necessary detail.").

[125] Memorandum, Keahey v. Bethel Township, No. 11-cv-7210, at 14 (E.D. Pa. Feb. 15, 2012).

[126] *See id.* For a similar example, see Kukoleck v. Lake County Sheriff's Office, No. 1:12-cv-1379 (N.D. Ohio July 3, 2013) (denying the county's motion to dismiss plaintiff's failure-to-train claim, noting that, "it is not immediately clear what more the plaintiff could have alleged in the complaint since, without discovery, how would a plaintiff know 'whether such a custom or policy might exist, and if it does exist, what its contours might be or exactly how it effected a violation of his constitutional rights.'") (quoting Petty v. County of Franklin, 478 F.3d 341, 347 (6th Cir. 2007)).

Cleveland has a policy or custom that results in too-tight handcuffing of suspects…facts showing that the City of Cleveland had notice of abusive handcuffing by its officers," or "facts showing other instances of too-tight handcuffing besides her own."[127] Similarly, a judge in the Middle District of Florida granted Polk County's motion to dismiss a *Monell* claim against it for having "a policy and custom of not adequately verifying warrants before it arrested and detained people" because the plaintiff had not alleged in his complaint "prior instances of people being mistakenly arrested by the City's police officers under similar circumstances," and then concluded it would be futile to allow the plaintiff an opportunity to amend his complaint because he acknowledged, during a hearing, because "his situation was the only incident [of failing to verify a warrant before an arrest] of which he was aware."[128] A judge in the Southern District of Texas made explicit her lack of sympathy for the challenges of alleging "plausible" *Monell* claims when she granted a motion to dismiss, rejecting the plaintiff's assertions that "he needs a chance to conduct discovery to find out if his suspicions against the County are true."[129] In the view of this judge, "[f]ederal practice does not allow this. [Plaintiff's] 'plead first and discover if there are supporting facts later' is exactly the problem that the Supreme Court sought to remedy in *Twombly* and *Iqbal*."[130]

Qualified immunity may pose fewer challenges at the motion to dismiss stage because plaintiff are more likely to know and be able to allege with specificity and plausibility the facts relevant to an individual liability claim. While a plaintiff seeking to pursue a *Monell* claim must set out allegations about a local governments' policies, practices, misconduct history, trainings, and investigations—evidence that the plaintiff is unlikely to know—allegations relevant to qualified immunity concern the underlying constitutional claim, and a plaintiff usually (although not always) knows what happened to them at the hands of an individual defendant, especially regarding Fourth Amendment claims of unreasonable search or seizure. Indeed, courts in my dataset repeatedly expressed the view that courts are better suited to decide an officer's entitlement to qualified immunity at summary judgment, once discovery has been exchanged.[131]

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[127] Opinion & Order, Frieg v. City of Cleveland, 12-cv-2455, at 5 (N.D. Ohio June 23, 2013).

[128] Order, Chery v. Barnard, No. 8:11-cv-2538 (M.D. Fla. Feb. 10, 2012).

[129] Order, Jones v. Nueces County, 12-cv-0145 (S.D. Tex. Aug. 15, 2012).

[130] *Id.*

[131] *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 53.

B. Why So Many *Monell* Claims Are Dismissed at Summary Judgment

In my dataset, more than 40% of summary judgment motions seeking dismissal of *Monell* claims were granted, as compared with 16% percent of summary judgment motions seeking dismissal on qualified immunity grounds.[132]

The fact that qualified immunity motions are infrequently granted at summary judgment may come as a surprise. Qualified immunity sounds like a challenging standard to meet—a plaintiff must be able to identify a prior court case that clearly establishes what the defendant did was wrong. At least some courts interpret this standard to require a prior case with nearly identical facts. And there are multiple examples, that have captured public attention, of officers who have received qualified immunity even when they engage in reprehensible behavior.[133] But whether a constitutional right has been violated, and whether that right was clearly established for qualified immunity purposes, often turn on hotly disputed questions of fact. So long as it was clearly established that defendants violated clearly established law under the plaintiff's version of the facts, summary judgment should be denied. As Alan Chen has observed, this is a "central paradox" of qualified immunity doctrine; although the Court has insisted that qualified immunity be decided "at the earliest stages of litigation," these determinations "inherently entail nuanced, fact-sensitive, case-by-case determinations" that often cannot be resolved at summary judgment.[134] As Karen Blum and others have observed, courts do not always follow this rule, "usurping the role of jurors by assuming facts or drawing inferences that are not favorable to the nonmoving party and by granting summary judgments based on their own findings and assessments of facts."[135] But my review suggests that *Monell* challenges may be granted more often at summary judgment both because the evidence a plaintiff must put forward is more challenging to obtain, and because courts even more frequently conclude that plaintiffs' evidence does not create material disputes.

To prove a *Monell* claim, a plaintiff must not only put forth evidence that their constitutional rights were violated, but also evidence that that violation was caused by a municipal policy, practice, or custom. If the plaintiff is arguing that a policy is unconstitutional on its face, or that a final policymaker violated the Constitution themselves, finding evidence to support their *Monell* claim

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[132] *See* App'x Tables 8.A, 8.B.

[133] *See, e.g.*, Carlisle, *supra* note 2 (describing public outcry about qualified immunity doctrine, and some controversial qualified immunity decisions).

[134] Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006).

[135] Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1918 (2018).

may be straightforward. But if a plaintiff is alleging a custom or practice by the municipality that caused the constitutional violation, proving each element of the *Monell* claim will be a challenge. When, for example, the plaintiff alleges that the local government was deliberately indifferent to the need to better train, supervise, or discipline that officer, they must generally find a pattern of prior similar misconduct *and* evidence that that prior conduct was unconstitutional.[136] A plaintiff must then prove that a policymaker knew or was deliberately indifferent to this pattern of misconduct, and that that deliberate indifference was the cause of the constitutional violation. Cases in my dataset failed at summary judgment for failing to put forth evidence at each of these junctures.[137]

And although summary judgment should be denied when there are material factual disputes,[138] courts appear regularly to grant summary judgment motions on *Monell* claims even when evidence supports the plaintiff's *Monell* claims. Courts have granted summary judgment to defendants even when there were multiple prior instances of alleged misconduct, because that number of prior claims of misconduct was not, as a matter of law, sufficient to put policymakers on notice of a problem, and/or because the prior allegations were not sufficiently similar to the case at hand and/or because the plaintiff could not prove that each of these claims in fact involved misconduct.[139] Even when plaintiffs' experts testified that cities had inadequate policies or trainings, courts granted

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[136] For further discussions of the challenges of proving deliberate indifference, see Smith, *supra* note 85, at 433-38.

[137] *See, e.g.*, Order, Perry v. City of Houston, No. 12-cv-0580 (S.D. Tex. Aug. 24, 2012); Order, Pratt v. Harris County, No. 12-cv-1770 (S.D. Tex. Jan. 15, 2015); Order Re Summary Judgment Motions, Dunklin v. Mallinger, 11-cv-1275 (N.D. Cal. Apr. 10, 2013); Order, Fountain v. City of Lakeland, No. 8:11-cv-0052 (M.D. Fla. Sept. 26, 2013); Amended Memorandum Opinion, Abalos v. Carey, No. 3:11-cv-00122 (N.D. Ohio Mar. 11, 2013).

[138] *See* Fed. R. Civ. P. 56(a).

[139] *See, e.g.*, Order on Motions for Summary Judgment, Castillo v. City of Corpus Christi, No. 11-cv-0093 (S.D. Tex. Apr. 16, 2012) (granting summary judgment to the city, even though the plaintiff had come forward with evidence of six complaints over a three-year period, because "[t]he Plaintiff has failed to offer any statistical analysis to support a finding that these complaints indicate a pattern of any sort," and because the city showed "that all of the complaints of excessive force involve disputed issues of fact."); Order, Fountain v. City of Lakeland, No. 8:11-cv-52 (M.D. Fla. Sept. 26, 2013) (granting summary judgment to the city, despite nine prior misconduct allegations against the involved officer, because the prior complaints do not concern force or false arrest—the allegations alleged in the current case); Order, Jones v. Nueces County, No. 2:12-cv-00145 (S.D. Text.) (granting summary judgment to the county, even though the plaintiff had come forward with "a number of prior complaints brought by prisoners against the County," because he "failed to demonstrate (1) how those other complaints are sufficiently similar to those here, (2) whether the allegations in those complaints were actually proven against the County, or (3) how those complaints statistically and in context demonstrate a pattern or practice that is tantamount to an official policy of the County.").

defendants summary judgment, concluding that there was no material factual dispute.[140]

As one example, in *Alfaro v. City of Houston*, four Latina women sued a Houston police officer who had raped them in late 2010 and early 2011.[141] The women also sued the City of Houston, alleging that the city failed to properly screen, train, and supervise their officers. In opposition to the city's motion for summary judgment, the plaintiff introduced evidence showing that, in the seven years before the officer had raped the women, the city had received fifty complaints of sexual misconduct against Houston police officers, including twenty complaints involving "forcible sexual assault by an on-duty officer," and eight of those complaints were sustained by the department.[142] Yet the district court granted the motion, reasoning that, "[u]nder current case law, the list of relevant incidents in the relative period—approximately 20 sexual assault complaints, 8 of which were sustained, from 2005 to 2009, in the nation's fourth largest city—does not show a pattern or support an inference of deliberate indifference."[143]

In support of its conclusion that the City of Houston was entitled to summary judgment, despite evidence of multiple sustained sexual assault complaints, the court explained that:

> the Fifth Circuit requires more than a list of instances of misconduct to ensure that the jury has the necessary context to glean a pattern, if any. The number of incidents requires the context provided by, for example, the department's size or the number of its arrests. The incidents must also be sufficiently similar to warrant an inference of a pattern.[144]

The Fifth Circuit and district courts within its jurisdiction have been repeatedly criticized by Supreme Court justices for improperly failing to view facts in the light most favorable to the nonmoving party.[145] But courts in other districts in

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[140] *See, e.g.*, Order, Barnett v. Slater, No. 4:11-cv-01464 (S.D. Tex. Dec. 11, 2012) (denying summary judgment to the officer but granting summary judgment to the city, despite the fact that plaintiff's expert has provided an opinion that the officer "was not reasonably trained to engage in this [shooting]," because the expert "does not offer an opinion providing any evidence as to whether the City's policies constituted deliberate indifference.").

[141] *See Alfaro v. City of Houston*, 2013 WL 3457060 (S.D. Tex. 2013).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See, e.g.*, Tolan v. Cotton, 572 U.S. 650, 657 (2014) ("In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case."); Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1278-79 (2017) (Sotomayor, J., dissenting

my study also granted summary judgment to cities even after plaintiffs put forth evidence supporting their *Monell* claim.

Consider, for example, Gayle Brock's suit against the County of Napa, in Northern California, after her son committed suicide in its jail.[146] Brock argued that the county had provided inadequate training to its officers about suicide prevention and introduced the following as evidence in opposition to the county's summary judgment: 1) officers' testimony that they were "not regularly trained in suicide prevention, if . . . they were trained at all"; 2) her expert's conclusion that officers were inadequately trained because suicide training was not conducted "regularly or frequently"; and 3) evidence that "there were two suicides and three attempted suicides in one year." Yet the district court judge granted summary judgment to the county on Brock's *Monell* claim because: 1) it was unclear when the other suicides had occurred and whether they were "similar to the constitutional violation alleged in this case"; 2) the plaintiff "has not presented evidence from which a reasonable jury could conclude that Mostek's death was the 'patently obvious' consequence of the County's failure to provide specific training"; 3) "Plaintiff has not adduced evidence establishing a particular omission or deficiency in the County's suicide prevention program"; and 4) even if there was a failure to train and the county was deliberately indifferent, "Plaintiff has failed to establish that the alleged inadequate training was the moving force behind [Brock's son's] death."[147]

The Supreme Court has made clear that summary judgment is appropriate, even if the plaintiff has offered evidence to support their claim, if that evidence does not create a material factual dispute. Presumably, the judges who decided *Alfaro* and *Brock* would defend their summary judgment decisions on this ground. Yet, the critique that courts ignore plaintiffs' evidence when ruling on summary judgment motions rings true regarding *Monell* challenges equally—if not more so—than regarding qualified immunity motions.[148]

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from denial of certiorari) ("[S]ummary judgment is appropriate only where there is no genuine dispute as to any material fact. The [Fifth Circuit and district court] failed to heed that mandate. Three Terms ago, we summarily reversed the Fifth Circuit in a case 'reflect[ing] a clear misapprehension of summary judgment standards.' Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (per curiam). This case reflects the same fundamental error."). *See also* Blum, *supra* note 135, at 1917-21 (describing other Fifth Circuit decisions granting officers qualified immunity despite arguably material factual disputes).

[146] The facts of the case and the court's summary judgment analysis is detailed in Order, Brock v. County of Napa, No. 4:11-cv-00257 (N.D. Cal. Mar. 29, 2013).

[147] *Id.*

[148] *See* Blum, *supra* note 135, at 1918 (setting out this argument).

C. Why Plaintiffs Abandon So Many *Monell* Claims

Plaintiffs abandoned their *Monell* claims in 118 (12.4%) of the 955 cases in which they were initially alleged. I would need to interview plaintiffs and their attorneys to get definitive answers about why so many *Monell* claims were abandoned. But having reviewed the cases in the dataset, I have a few theories.

First, it may simply be in many instances that the plaintiff searched for but was unable to unearth evidence they needed to support their *Monell* claim.[149]

Second, a plaintiff may abandon their *Monell* claim if they conclude that it is not worth the cost of pursuing. *Monell* claims are expensive to plead and prove. Significant investigation and care in drafting is necessary to overcome the motion to dismiss stage. And in many cases in my dataset, there were multiple motions to dismiss filed—meaning that the plaintiffs had to repeatedly respond to those motions and amend and resubmit their complaints with additional detail. Finding evidence to support a *Monell* claim can also be expensive. Proving a pattern of past violations or a culture of misconduct likely requires requesting, fighting for, and reviewing voluminous information.[150] Plaintiffs' attorneys may pay thousands of dollars to retain experts who review documents and opine about training practices, the integrity of internal investigations, and the patterns evident from past misconduct. A *Monell* claim may not be worth the cost of pursuing if the plaintiff is likely to recover against the individual officers in the case. This may well be the reason that plaintiffs' attorneys abandoned so many of their *Monell* claims in the Eastern District of Pennsylvania as they were headed for trial; each of these cases named the City of Philadelphia, which has historically indemnified virtually all of their officers.

Finally, in some jurisdictions, courts regularly bifurcate trial and/or discovery of individual liability and *Monell* claims, meaning that the litigation of the

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[149] *See, e.g.*, Order Granting in Part and Denying in Part Motion for Summary Judgment, Brown v. City and County of San Francisco, No. 11-cv-2162 (N.D. Cal. Apr. 7, 2014) (noting that, in their opposition to summary judgment, "plaintiffs concede that they lack evidence" to support their *Monell* claim)

[150] *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 569 (1993) (quoting plaintiffs' attorneys describing the added costs and time associated with *Monell* claims); Cron, *supra* note 57, at 662 ("Obtaining discovery in the possession of the governmental defendant is often required to survive motions for summary judgment in municipal liability cases. Plaintiffs must establish liability theories and discovery plans early, and be prepared to overcome governmental defendants' resistance by taking discovery production deficiencies to the court early in discovery periods and as often as necessary. Attorneys who assert municipal liability claims on behalf of their clients must take the pursuit of discovery seriously and be well-versed in both discovery and municipal liability standards.").

individual liability claim precedes litigation of the *Monell* claim.[151] Bifurcation is arguably more efficient because the plaintiff cannot prevail against the municipality unless they can first show a constitutional violation by the officers. In addition, defendants argue that the evidence introduced to prove a *Monell* claim can prejudice the jury. Opponents of bifurcation argue, however, that the practice can dramatically increase the costs of litigation because it requires plaintiffs to undergo two trials, and withholds from the jury important context about how the constitutional violation arose.[152] Bifurcation can also lead plaintiffs to abandon their *Monell* claims; if a plaintiff recovers against an individual officer and the officer is indemnified, the plaintiff loses any financial incentive to proceed against the government.[153] Courts' bifurcation practices vary by jurisdiction; bifurcation is reportedly granted by judges in New York, Los Angeles, and Boston, but rarely granted by judges in Philadelphia.[154] Among the districts in my study, judges in the Northern District of California are reportedly "very eager" to bifurcate *Monell* claims at trial.[155]

D. Why Defendants File So Many *Monell* Challenges

Local government defendants in my study were far more eager to file challenges to *Monell* claims than were individual defendants to raise qualified immunity. I would need to interview defendants to appreciate why they made these choices, but a few possibilities come immediately to mind. First, challenges to *Monell* were often successful, which likely encourages defendants to invest the time to file such motions. Second, there is a great deal of uncertainty in *Monell* doctrine. There are many questions the Supreme Court has left open: how, for example, the *Iqbal* plausibility pleading standard applies to *Monell* claims, what

[151] For extensive description and critique of this practice, see generally Colbert, *supra* note 150.

[152] *See* Colbert, *supra* note 150, at 504 ("A discovery bifurcation order might substantially lengthen the process by requiring the plaintiff to conduct discovery and proceed to trial against the individual officers before commencing discovery on the *Monell* claim against the municipality. Most plaintiffs do not have the resources, fortitude, and commitment necessary to conduct discovery again and proceed to a second trial."); Cron, *supra* note 57, at 605-06.

[153] Colbert, *supra* note 150. at 536-37 ("It is unlikely that a bifurcated *Monell* claim will ever be submitted to a jury, even when the individual defendants are found liable. Following such a verdict, municipal defense attorneys usually offer attractive settlements in order to avoid indeterminate liability on the *Monell* issue.").

[154] *See* Colbert, *supra* note 150, at 559-60.

[155] Interview with N.D. Cal. Attorney G (Dec. 8, 2017) (observing that "even on legitimate *Monell* claims, the courts are very eager to bifurcate them for trial."). I found only one case, Binkovich v. Barthelmy, No. 5:11-cv-3774 (N.D. Cal. Aug. 1, 2011), in which the judge appears to have bifurcated the plaintiff's *Monell* claim for trial, although I could not find a record of the bifurcation order in the docket.

evidence creates a material factual dispute to overcome summary judgment, and how to determine whether a final policymaker is a state or local officer.[156] This uncertainty may also encourage defendants to file challenges to *Monell* claims. Third, litigating *Monell* claims is expensive for defendants as well as plaintiffs; local government defendants may move to dismiss *Monell* claims in an effort to avoid the anticipated costs of complying with plaintiffs' discovery requests. Finally, there is a common view that juries may be inclined to award more in damages against a local government than against an individual officer; dismissal of the *Monell* claim protects against this possible premium.[157]

IV. IMPLICATIONS

Having come to appreciate the challenges of pleading and proving *Monell* claims, this Part considers whether and to what extent these challenges matter to our system of constitutional remediation. Some—including myself—have observed that settlements and judgments against officers are almost always satisfied by local governments as a result of broad indemnification agreements and practices; a de facto vicarious liability that undermines the policy justifications for *Monell* but also arguably makes the doctrine's challenges less impactful on the ground.[158] Yet the difficulties of proving *Monell* claims compromises the compensation and deterrence goals of Section 1983 in at least five ways.

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[156] *See supra* Parts III.A & B (setting out uncertainties about the interaction of *Monell* with plausibility pleading and summary judgment standards); Hamilton, *supra* note 158, at 737-42 (describing the Supreme Court's decision setting out a functional approach to determining whether a policymaker is a state or local actor, and commenting that "[t]he combination of the narrow holding and lack of clear guidance in balancing competing factors (highlighted by the five to four decision in the Supreme Court) invites a great deal of new litigation.").

[157] *See* Hamilton, *supra* note 158, at 729 (explaining that plaintiffs are motivated to include *Monell* claims in their cases because of "a concern about a jury's expected reluctance to award large damages against an individual defendant"). Note, however, that local governments are not subject to punitive damages awards under Section 1983. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-71 (1981).

[158] *See, e.g.*, Blum, *supra* note 12, at 920 (observing that, "given the seemingly widespread indemnification practices, one can also argue that there is no great need to replace theories of municipal liability with respondeat superior liability."); Gans, *supra* note 11, at 108 ("Like qualified immunity, the limits on local government liability doctrine is gratuitous because widespread indemnification, in practice, means that the government pays when its agents violate constitutional rights."); The Honorable David F. Hamilton, *The Importance and Overuse of Policy and Custom Claims: A View from One Trench*, 48 DEPAUL L. REV. 723, 730 (1999) ("Indemnification laws and practices often make the search for a deep pocket unnecessary."). I have also made this observation, noting that municipalities "virtually always satisfy officers'

A. The Importance of Local Government Liability When the City Denies Indemnification

Although officers are almost always indemnified, governments do sometimes turn their backs on officers who have egregiously abused their power. Each time indemnification is withheld, claims against the local government can be a person's only hope. The challenges of proving *Monell* claims mean that victims of clear constitutional abuses may be left empty-handed.

The four Latina women who brought *Alfaro v. City of Houston* were left in just that tragic situation.[159] The officer who raped the women was criminally prosecuted, convicted, and given two life sentences.[160] When the officer did not appear to defend himself in the Section 1983 case, the judge entered a default judgment against him for $3.6 million—$900,000 to each of the four woman. But the women are unlikely ever to receive that money because the city refused to indemnify the officer. And because the court granted the *Monell* claim brought against the city, the women were unable to recover anything for the violation of their rights.

The dockets and filings in the cases in my dataset do not indicate how often officer defendants in my dataset were denied indemnification. In addition to *Alfaro v. City of Houston*, I could identify only one other such case.[161] But I

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settlements and judgments, amounting to de facto respondeat superior liability" and that "[c]omplex and taking municipal liability standards are, therefore, virtually irrelevant in determining who writes the check." Schwartz, *Police Indemnification*, *supra* note 5, at 944. Yet, I continued: "This is not to say that *Monell* doctrine is irrelevant in determining whether a check is written or how much that check is for," *id.*, and raised the same arguments I elaborate in this Article: that *Monell* claims can be important when officers receive qualified immunity; can clearly establish the law; can create political pressures for municipalities to improve; and can "have even greater impact on the litigation of civil rights damages actions when officer indemnification is not a foregone conclusion." *Id.* at 945. Ultimately, my view then, as now, was that "[r]eplacing *Monell* with vicarious liability would align doctrine with actual practice, eliminate an exceedingly complex body of case law, and streamline the litigation of these claims.").

[159] For a description of that case, see *supra* notes 141-144 and accompanying text.

[160] These and other details of the civil and criminal case are set out in JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 113 (VIKING 2023).

[161] In that case, *Pierre v. City of Philadelphia*, an off-duty officer choked Arsene Pierre and slammed his head against a wall several times outside the store where he worked. Pierre sued the officer and the city of Philadelphia, but voluntarily withdrew his *Monell* claim in response to the city's summary judgment motion. *See* Complaint, Pierre v. City of Philadelphia, No. 2:12-cv-3545 (E.D. Pa. June 22, 2012); Notice of Voluntary Dismissal by Arsene Pierre As to City of Philadelphia, Only, Pierre v. City of Philadelphia, No. 2:12-cv-3545 (E.D. Pa. May 17, 2013). After the city declined to indemnify the officer, the case went into arbitration and an award of $17,500 was entered against the officer; Pierre agreed to a settlement of $7500 after he learned that the officer had other financial troubles and had gone into bankruptcy. But Pierre

have heard anecdotally of multiple cases in which officers have been denied indemnification.[162] And attorneys report that some places—including El Paso, Texas; Memphis, Tennessee; and many places in Mississippi and Arkansas—have a policy of refusing to indemnify their officers, such that plaintiffs must have a colorable *Monell* claim in order to secure any relief.[163]

Even when a local government ultimately indemnifies an officer, it may threaten to deny officers indemnification; in such cases, the viability of the plaintiff's *Monell* claim remains critically important. In the course of my research I have learned of multiple instances in which local governments threatened that they would deny officers indemnification to negotiate a favorable settlement agreement, or used the possibility that their officers will be denied indemnification to garner sympathy from jurors deciding whether to award punitive damages or to garner sympathy from the judge when arguing to reduce jury verdicts after trial.[164]

In those cases, the local governments ultimately indemnified the officers. But because plaintiffs' lawyers typically do not know whether the officer(s) who violated their clients' rights will be indemnified, they must pursue and shoulder the costs of pursuing *Monell* clams to assure that their clients will receive compensation. I do not know how often lawyers include *Monell* claims for this reason, but lawyers I have interviewed have described doing so.[165] This type of strategic calculation can also be gleaned from hints in the case files. For example, during discovery in *Sudler v. Borough of West Chester*, the parties agreed that the plaintiff would dismiss his claims against the city, and the stipulation specifically provided that "the Borough of West Chester will indemnify

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never collected that $7500; his attorney referred him to a few attorneys who did collection work, but because of the small size of the award Pierre never convinced anyone to take his case. *See* Email from Patrick Geckle, attorney for Arsene Pierre, to author (Nov. 14, 2022, 6:13 A.M.); Email from Patrick Geckle to author (Nov. 14, 2022, 7:20 A.M.).

[162] For some examples, see Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 333 nn.159, 160 (2020).

[163] *See* Email from Chris Benoit to author (Jan. 27, 2023 9:53 AM) (reporting that the City of El Paso does not indemnify its officers); Telephone call with Andrew C. Clarke (Jan. 27, 2023) (notes on file with author) (reporting that Memphis does not indemnify its officers, and that most jurisdictions in Mississippi and Arkansas do not indemnify their officers, either).

[164] *See* Schwartz, *Police Indemnification*, *supra* note 5, at 931-36 (describing the strategic use of the threat that officers will be denied indemnification).

[165] *See, e.g.*, Email from E.D. Pa. Attorney A to author (June 7, 2019, 9:17 A.M.) (describing a case in which the plaintiff had sued the individual officer under state law but, after the city threatened to deny an officer indemnification, the plaintiff "removed the case from state court (where we had hoped for a sympathetic jury pool) to federal court so that we could proceed with our only hope: the *Monell* claim").

all individual defendant police officers in this case for any and all compensatory damages, punitive damages, counsel fees and costs that may be awarded."[166] Judge David Hamilton has argued that plaintiffs often file *Monell* claims to "find[] a deep pocket in typical police, jail, and employment cases" and that such claims are unnecessary and a waste of time and money given widespread indemnification.[167] But so long as defense counsel may threaten to deny officers indemnification, *Monell* claims remain critically important insurance for plaintiffs and their attorneys.

B. The Importance of Local Government Liability When Courts Grant Qualified Immunity

Even when local governments are willing to indemnify their officers, qualified immunity sometimes shields officers from lability. In such cases, the only way for the plaintiff to recover under Section 1983 is through a *Monell* claim. And if the plaintiff cannot meet the rigorous standards imposed by *Monell*, they will be unable to recover under Section 1983—even when their constitutional rights have been violated.

Further, in four federal circuits—the First, Fifth, Sixth, and Eighth—a grant of qualified immunity necessarily dooms a *Monell* claim for failure to train; the rationale behind what I call "backdoor municipal immunity" is that local governments cannot be held responsible for failing to train officers about law that is not clearly established.[168] Some courts have taken matters even further, concluding that all types of *Monell* claims are foreclosed when the officers receive qualified immunity.[169]

Even if a court grants individual defendants qualified immunity and dismisses any *Monell* claims, the plaintiff will likely have legal claims to pursue in state court. Most states allow plaintiffs to sue law enforcement officers for assault, battery, or other common law torts, and many hold local governments vicariously liable for the torts of their officers committed in the course and

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[166] *Sudler v. Borough of West Chester,* Stipulation, 12-cv-5084 (E.D. Pa. Feb. 15, 2013).

[167] Hamilton, *supra* note 158, at 729.

[168] *See generally* Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J. FORUM 136 (Oct. 14, 2022).

[169] Ogrod v. City of Philadelphia, 21.-cv-2499, 2002 WL 1093128 (E.D. Pa. Apr. 12, 2022) ("While the Third Circuit has not yet addressed this same issues, district courts in this District have similarly concluded that where rights are not clearly established, there can be no municipal liability under *Monell* for violations of those rights because there can be no deliberate indifference.").

scope of their employment.[170] As of 2021, sixteen states had also recognized some form of implied right of action to bring state constitutional tort claims against government officials; many with some version of qualified immunity.[171] And in Colorado, New Mexico, and New York City, recently-passed laws allow plaintiffs to pursue state constitutional claims against officers without qualified immunity as a defense.[172] But the availability and nature of these state law causes of action vary by state.[173] Certain types of constitutional harms—such as discriminatory practices, for example—do not have corollaries in state law.[174] State-law versions of qualified immunity can deny plaintiffs relief in state court.[175] And plaintiffs' recoveries are limited in various ways under state law; most states have no entitlement to attorneys' fees, and in some there are damages caps on these types of state law claims. For all of these reasons, state law claims may be far less attractive to pursue.

My research has revealed that defendants are granted qualified immunity less often than is suggested in public debate; among the 1,183 cases in my dataset, courts granted 53 qualified immunity motions in full.[176] In one of those cases, the court afforded the city backdoor municipal immunity, dismissing the *Monell* claim because the officers had received qualified immunity.[177] In just three of the other 52 cases in which courts granted officers' qualified immunity

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[170] *See* Alexander A. Reinert, Joanna C. Schwartz, and James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 760 (2021) (describing the results of a fifty-sate survey measuring the availability of state tort remedies against government officials and vicarious liability for government employers).

[171] *See id.* at 759.

[172] *See* Kindy, *supra* note 1; Nick Sibilla, *New York City Bans Qualified Immunity for Cops Who Use Excessive Force*, Forbes (Apr. 29, 2021, 10:55 A.M.).

[173] For further discussion of variation in state-law causes of action, see Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1551-52 (2020).

[174] *See* Reinert, Schwartz & Pfander, *supra* note 170, at 761.

[175] *See* Schwartz, *supra* note 173, at 1543 (describing damages caps and attorneys' fees limitations).

[176] *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 5, at 44.

[177] Two of the districts in my dataset—the Southern District of Texas and the Northern District of Ohio—are in circuits that apply backdoor municipal immunity. *Id.* But courts did not grant local governments backdoor municipal immunity in any of the cases in my dataset from those districts. Instead, the case in which a court dismissed *Monell* claims because the individual officers had received qualified immunity was from the Middle District of Florida. *See* Order Dizoglio v. Croissant, No. 8:11-cv-00528 (M.D. Fla. Nov. 5, 2012) ("The City of Tampa is entitled to summary judgment on DiZoglio's claim of false arrest/false imprisonment because Officer Croissant and Officer Harrell are both protected by qualified immunity against those claims.").

motions, *Monell* claims survived past the qualified immunity dismissal; in the remaining 49 cases, plaintiffs had not brought *Monell* claims or the *Monell* claims were dismissed or withdrawn at or before the qualified immunity grant. *Monell* claims were, therefore, highly unlikely to survive in cases where courts granted officers qualified immunity. Yet the universe of such cases—53 out of 1,183 in my dataset—was relatively small.

Even though qualified immunity grants are less frequent than expected, the possibility that a qualified immunity motion *may* be brought and successful may prompt plaintiffs' attorneys to plead a *Monell* claim as a way of hedging their bets. In this way, *Monell* claims may serve as insurance against a grant of qualified immunity, just as they may serve as insurance against a denial of indemnification.

C. The Importance of Local Government Liability with Doe Defendants

Claims against local governments are also the only avenue to relief when plaintiffs do not know the identities of the officers who violated their constitutional rights. If the plaintiff cannot learn the identity of involved officers through public records requests or discovery, a *Monell* claim can be the only federal basis for relief.

Plaintiffs can sue Doe officers with the hopes that they can discover the identities of those officers and amend their complaints to name them as defendants.[178] Among the cases in my dataset, plaintiffs in at least 47 cases named local governments and Doe officers as defendants. But at least 10 of those cases were dismissed because the plaintiffs had not been able to name the Doe officers by the time their *Monell* claims were dismissed.

One was *Brock v. County of Napa,* in which Gayle Brock sued the County of Napa after her son, Theodore Scott Mostek committed suicide in the Napa County Jail. Brock also named as defendants Does 1 through 50 and she alleged that these Does were officers who did not monitor her son, even as they knew he had attempted suicide before.[179] In another, Maisa Adams sued Upper Darby Township and John Doe officers who assaulted her while she was being detained in a holding cell at the Upper Darby police station; after pleading to use the bathroom, officers allegedly "twisted her arm behind her back, shoved her into the corner and deliberately slammed her head against a concrete wall," then "forcibly grabbed the plaintiff by her hair, dragged her several feet across the

[178] In other cases, plaintiffs may choose simply to name the local government, and amend the complaint to add individual defendants when they can identify them.

[179] *See* Notice of Removal, Brock v. County of Napa, 11-cv-0257 (N.D. Cal. Jan. 18, 2011).

cell floor and handcuffed her to a bench."[180] In both of these cases, courts granted the local government defendants' motions for summary judgment before the plaintiffs could identify the Doe defendants, and so the entirety of the plaintiffs' cases—including their claims against the Doe defendants—were dismissed.[181]

D. The Symbolic Power of an Order against a City

The challenges of proving a *Monell* claim also matter because a judgment against the government is often the most just result. As the ACLU argued in its brief in *Monroe v. Pape* to the Supreme Court, holding a city responsible for their officers' conduct may be the only way to influence high-ranking city officials best able to understand the underlying causes of these constitutional harms, and best situated to require changes that would address them.[182]

Second Circuit judge John O. Newman, a longtime critic of the *Monell* decision and supporter of vicarious liability for local governments, made this very argument the year *Monell* was decided:

> Providing for suit directly against the employing department or unit of government would accomplish more than simply informing the jury of a deeper pocket. It would enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence. Police agencies and governments should be forced to assume responsibility for minimizing instances of official misconduct. Placing the burden of damage awards for constitutional wrongs directly upon them would afford a useful incentive to monitor the performance of their employees, to insist on observance of constitutional standards, and to exercise appropriate internal discipline when misconduct occurs.[183]

Others have echoed this argument. Although it is difficult to measure the symbolic or political power of a judgment against a city, many commentators and

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[180] Amended Complaint, Adams v. Upper Darby Township, 12-cv-4382 (E.D. Pa. Sept. 6, 2012).

[181] *See* Order, Adams v. Upper Darby Township, 12-cv-4382 (E.D. Pa. June 25, 2013); Order, Brock v. County of Napa, 11-cv-0257 (N.D. Cal. Mar. 29, 2013).

[182] *See supra* note 35 and accompanying text.

[183] Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 457 (1978). Judge Newman has continued offering these and other powerful critiques of Section 1983 doctrine. *See, e.g.*, Jon O. Newman, *Here's a Better Way to Punish the Police: Sue Them For Money*, WASH. POST (June 23, 2016).

litigators do believe that these judgments wield such power.[184] Even when a *Monell* claim is unsuccessful, it may help "facilitate the development of systemic evidence of deliberate indifference to police brutality, as well as information concerning 'repeater' officers, the functioning of the policy disciplinary and counseling system, and the attitudes of police officials towards important police disciplinary issues."[185] The challenges of prevailing on *Monell* claims mean that it is exceedingly difficult to secure a judgment on these claims or the pressures to improve that might follow.

E. The Importance of Municipal Liability to Injunctive Relief

If a plaintiff wants to change local government practices moving forward, they can seek injunctive relief. The Supreme Court has held that a plaintiff only has standing to seek injunctive relief in a Section 1983 cases if they can show that they are likely to suffer a similar constitutional violation in the future.[186] The Supreme Court's standard for standing to seek injunctive relief is extremely difficult to meet and has prompted a robust literature critiquing the doctrine.[187] In addition, the plaintiff must be able to name the local government; the entity best suited to implement any injunctive relief that the plaintiff can secure.[188] In

[184] *See, e.g.,* Colbert, *supra* note 150, at 502 ("Jury verdicts holding municipalities liable for depriving citizens of their constitutional rights serve to effectively short-circuit official toleration and condonation of longstanding unconstitutional police practices."); Cron, *supra* note 57, at 607 ("When municipalities are held liable for constitutional harms, they are forced to confront their unconstitutional policies and customs and develop comprehensive responses so that the violations do not reoccur."); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 861 (2001) ("[M]unicipal liability claims serve a 'fault-fixing' function, localizing culpability in the municipality itself, and forcing municipal policymakers to consider reformative measures.").

[185] G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases,* 48 DEPAUL L. REV. 747, 748-49 (1999).

[186] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

[187] *See, e.g.*, Myriam E. Gilles, *Reinventing Structural Reform Litigation*: *Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1398-99 (2000) ("The Court's application of the "equitable standing" bar has ensured that victims of police brutality will rarely be allowed to enjoin injurious police practices"); Sunita Patel, *Jumping Hurdles to Sue Police*, 104 MINN. L. REV. 2257, 2271-76 (2020) (describing the challenges of establishing standing and critiques of the doctrine).

[188] See Cron, *supra* note 57, at 606 ("many plaintiffs request (and receive) injunctive relief in municipal liability cases").

combination, the challenges of proving standing and *Monell* make these types of injunctive cases especially difficult to bring.

V. A PATH FORWARD

In *Monell*, the Supreme Court ruled that local governments could not be held vicariously liable for the constitutional violations of its officers but, instead, could be held liable under Section 1983 only if they had a policy or custom that caused the constitutional violations to occur. As courts and scholars have long argued, *Monell* is based on a misunderstanding of the legislative history of Section 1983.[189] And the resulting doctrine, which recognizes several different theories of liability, has proven complex, confusing, and unresolved. Commentators have long claimed that the *Monell* standard is extremely difficult to meet; this Article offers evidence supporting that claim. Indeed, *Monell* doctrine is an even more formidable barrier than is qualified immunity; challenges to *Monell* claims are far more frequent, both at the motion to dismiss and summary judgment stages, and are far more often granted by courts. Although officers are usually indemnified by their employers, amounting to a *de facto* vicarious liability, there are several important categories of cases in which the challenges of pleading and proving *Monell* have dramatic and devastating consequences for plaintiffs: cases in which officers are denied indemnification; cases in which officers are granted qualified immunity; and cases in which the plaintiff does not know the identities of the involved officers. Even when officers are ultimately granted indemnification and denied qualified immunity, and plaintiffs are ultimately able to name Doe defendants, *Monell* claims serve as valuable safeguards against these threats. The challenges associated with *Monell* doctrine additionally frustrate efforts to seek injunctive relief against local governments, and to hold responsible the government entities with the greatest leverage to implement meaningful change. In this Part, I offer a package of proposed reforms that would improve our current system; consider paths to their

[189] *See supra* note 79 and accompanying text.

implementation; and explain why they may be both more feasible and more impactful than the current campaign to end qualified immunity.

A. Proposals for Reform

When considering how best to improve our system of constitutional remediation, it is important to think about reforms that will advance both the compensation and deterrence goals of Section 1983.

From a compensation perspective, respondeat superior liability would improve greatly upon *Monell*.[190] Vicarious liability would ensure that plaintiffs are compensated even when local governments refuse to indemnify officers, even when officers receive qualified immunity, and even when plaintiffs cannot identify the officers who violated their rights.

Replacing *Monell* with vicarious liability would also simplify and streamline civil rights litigation in various ways: plaintiffs would no longer have to unearth evidence of municipal policies and customs to put in their initial complaints; seek (and justify, against defendants' resistance) the disclosure of evidence about police department policies and practices; and negotiate settlements with defense attorneys threatening to deny indemnification to their officers. And courts would no longer have to parse through evidence implicating the municipality in motions to dismiss and for summary judgment. At least some of this time and money would likely be redirected to disputes about whether an officer was acting in the course and scope of their employment; disputes that already rage in states with laws that allow vicarious liability against municipalities for misconduct by their government officials.[191] But, all told, replacing *Monell* with vicarious liability would likely make these cases simpler to litigate.

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[190] Accord Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 666 (1999) ("In my view, fairness concerns as well as the policies underlying §1983 point toward a rule of vicarious liability. When a person has been injured by a violation of federal rights committed by a municipal employee in the course of employment, the municipality is responsible in the same way that private employers are responsible for the torts of their employees."); Newman, *supra* note 183, at 457; Stevens, *supra* note 77 ("The rule of respondeat superior—which requires employers to pay damages for torts committed by their employees in the ordinary course of business—should apply to state law enforcement agencies."). This is also a proposal that I have made before. *See supra* note 158. Evidence in this Article demonstrating the difficulty of overcoming *Monell* challenges offers further reason to adopt this reform.

[191] There would, for example, likely be disagreement about whether the officer in *Alfaro v. City of Houston* was acting in the course and scope of his employment. For a description of the varied analysis of vicarious liability in cases alleging sexual assault, see, for example, Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2013).

Alternatively, the litigation of Section 1983 claims against local governments could be streamlined if the plausibility pleading and summary judgment standards were interpreted in a manner more generous to plaintiffs. But this adjustment, while an improvement on the current state of affairs, does not assure the compensation of plaintiffs whose rights have been violated and, so, is a far less than satisfactory plan B.

Those who oppose replacing *Monell* with respondeat superior liability argue that holding local governments vicariously liable for their employees constitutional violations would expand liability too much, creating what is, in their view, a "strict liability standard."[192] There are cases that plaintiffs lose today but would win in a world with vicarious liability; cases where officers receive qualified immunity, or are not indemnified, and cases where individual officers cannot be identified by name. And, likely, some cases would settle on more favorable terms for plaintiffs because defendants could not withhold the threat that they will deny indemnification strategically to force bargain-basement settlements. Yet replacing *Monell* with vicarious liability is unlikely to dramatically increase the number of claims filed and judgments won because, today, officers are almost always indemnified, and rarely have claims against them dismissed on qualified immunity grounds. And, even if local governments are held strictly liable for their officers' conduct, a plaintiff seeking to prevail on a Section 1983 claim must still show that the officer violated their constitutional rights and acted with a culpable degree of fault.

Although replacing *Monell* with vicarious liability would advance the compensatory goals of Section 1983, it conceivably limits the deterrent effect of these suits on individual officers. Some may argue that the possibility that individual officers will have to contribute to settlements and judgments—no matter how remote—carries with it an important deterrent function that should be preserved. But, in my view, any benefits arising from the exceedingly remote chance that an officer will not be indemnified are outweighed by the benefits to a plaintiff in knowing that they are certain to be paid.

Additionally, there are other ways to punish officers for wrongdoing—and, thus, presumably deterring them—without threatening to undercompensate plaintiffs whose rights have been violated. Colorado came up with one novel approach; Colorado requires that local governments indemnify their officers when they are found liable for violating the state Constitution, but allows that

[192] *See, e.g.*, Jeffries, *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 240 (2013) ("Across-the-board strict liability would make damages for constitutional violations routine and would thereby heighten the disincentives for governments to engage in conduct that might result in constitutional violations."); Michael Wells, *The Role of Fault in 1983 Municipal Liability*, 71 S.C. L. REV. 293, 299 (2019) ("[T]he critics' strict liability solution goes too far in the other direction. The costs of strict liability might well outweigh its benefits.").

governments can require their officers to pay up to 5% of any settlement or judgment or $25,000—whichever is less—if they conclude that their officer acted in bad faith.[193] New York City infrequently follows a similar approach, albeit through informal means; the New York City Comptroller, responsible for paying settlements and judgments in civil rights cases from general city funds, sometimes requires officers to make a modest contribution when they have engaged in wrongdoing.[194] Replacing *Monell* with vicarious liability would not prohibit states and local governments from instituting this type of sanction for officers who have violated law or policy, or acted in bad faith.

The deterrent potential of Section 1983 suits against individual officers could also be better realized if local governments gathered and analyzed information from the lawsuits brought against them, and then used that information to discipline, retrain, or better supervise those officers.[195] Some jurisdictions use lawsuit data for these purposes, but far more could adopt this approach.[196]

Would vicarious liability increase the deterrent power of Section 1983 suits on local governments? The expectation has long been that requiring local governments to pay settlements and judgments for misconduct by their officers would inspire those local governments to better supervise and train their officers.[197] This expectation was, in fact, a motivating rationale for the Chicago ACLU to advocate for vicarious liability in *Monroe v. Pape*.[198] But local governments already pay most of these settlements and judgments through indemnification, and they do not appear to be having as much impact as they could or should. Perhaps this is because, as Daryl Levinson has argued, local

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[193] For one description of Colorado's statute, see Cary Aspinwall & Simone Seichselbaum, *Colorado Tries New Way to Punish Rogue Cops*, THE MARSHALL PROJ. (Dec. 18, 2020, 4:00 P.M.).

[194] *See* Schwartz, *Police Indemnification, supra* note 927-28.

[195] For further discussion of these types of interventions, see Reinert, Schwartz & Pfander, *supra* note 170, at 775-80.

[196] *See generally* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012) (describing what litigation-attentive police departments can learn from lawsuits brought against them, and the infrequency with which departments engage in this type of analysis).

[197] As the U.S. Supreme Court has explained, the threat of being sued should cause government officers "who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights," *Owen v. City of Independence*, 445 U.S. 622, 652 (1980), and judgments against cities should lead them to "discharge . . . offending officials," *Newport v. Fact Concerts*, 453 U.S. 247, 269 (1981), and "institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights," *Owen*, 445 U.S. at 652.

[198] *See supra* note 35 and accompanying text.

governments do not have the same financial incentives as businesses to reduce liabilities.[199] Perhaps it is because of the way that local governments budget for and pay these costs—often without any direct financial impact on the police department officials who are best situated to make harm-reducing changes.[200] Perhaps recovering directly against local governments—instead of indirectly, through indemnification—will pack a greater political punch.

Another option would be to hold local governments vicariously liable for constitutional violations by their officers and, additionally, to allow plaintiffs to pursue claims against local governments under current *Monell* theories—for unconstitutional policies, unconstitutional acts by policymakers, unwritten policies or customs, or the failure to train and supervise officers—although with, perhaps, a less stringent interpretation of those standards.[201] In this scenario, plaintiffs would not need to undertake the expenses of bringing a *Monell* claim to ensure the local government would pay their employee's liabilities—vicarious liability would, in most cases, assure the plaintiff that they would be compensated.[202] But plaintiffs could pursue a *Monell* claim if they wanted to unearth information about systemic problems in the department or enhance the political salience of a case. My guess is that, in this new world, the number of *Monell* claims alleged would decrease dramatically. But the door would be left open for challenges to cities' practice; an opening that is particularly important to maintain if current equitable standing rules remain in place.

B. How to Get It Done

I have proposed replacing *Monell* with vicarious liability; creating financial or more robust disciplinary consequences for officers who violate the Constitution; and allowing plaintiffs to bring claims directly against local governments to unearth evidence of systemic wrongdoing in claims seeking damages or

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[199] *See generally* Darryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000) (arguing that local governments are not profit maximizing, and so do not respond as rational economic actors would to the tort system).

[200] *See generally* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) (reporting the results of a study analyzing how 100 jurisdictions across the country, large and small, budget for and pay liabilities in police misconduct suits).

[201] For a similar suggestion, see Adivan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 423-25 (2018).

[202] Plaintiffs could also bring a *Monell* claim if there was concern that the officer was not acting within the course and scope of his employment; as in sexual assault cases, for example. *See supra* note 191 and accompanying text.

injunctive relief. In this Subpart, I consider how these proposed reforms might come to be.

The Supreme Court created *Monell* doctrine, and could replace the confusing muddle it has created with vicarious liability. Objectors will argue that stare decisis prevents such a drastic move. But, as Justice Breyer pointed out in *Board of Commissioners v. Brown*, the ubiquity of indemnification means that local governments may reasonably claim only limited reliance on *Monell* doctrine.[203]

Congress could enact legislation that would make local governments vicariously liable for the constitutional violations of their officers. In fact, vicarious liability for municipalities was proposed by Democratic Senators Sheldon Whitehouse and David Ciccilline,[204] and was also a part of Republic Senator Tim Scott's counterproposal to the abolition of qualified immunity in negotiations over the George Floyd Justice in Policing Act.[205]

State legislatures could also pass bills allowing people to sue for violations of the state or federal constitutions, and providing that local governments would be held vicariously liable for violations by their officers. New Mexico has passed legislation creating vicarious liability for its government employers,[206] and other states are considering comparable provisions.[207] In addition, states and local governments could enact laws to increase the deterrent effects of these suits on individual officers, even as local governments are held vicariously liable; bills, like that passed in Colorado, that require officers to contribute to a settlement or judgment when they act in bad faith.[208] State and local

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[203] 520 U.S. 397, 436 (1997) (Breyer, J., dissenting) ("To the extent [that indemnification statutes "provide for payments from the government that are similar to those that would take place in the absence of *Monell*'s limitations] municipal reliance upon the continuation of *Monell*'s "policy" limitation loses much of its significance.").

[204] *See* S.3415, Constitutional Accountability Act (2021), https://www.congress.gov/bill/117th-congress/senate-bill/3415/all-info#:~:text=A%20bill%20to%20ensure%20that,violations%20by%20law%20enforcement%20officers.; Sheldon Whitehouse Press Release, *Whitehouse, Cicilline Introduce Bill to Hold Police Departments Accountable for Officers' Constitutional Violations* (Dec. 22, 2021), https://www.whitehouse.senate.gov/news/release/whitehouse-cicilline-introduce-bill-to-hold-police-departments-accountable-for-officers-constitutional-violations.

[205] *See* Billy Binion, *Tim Scott is Proposing A Major Reform to Qualified Immunity*, Reason (Apr. 22, 2021, 12:24 PM).

[206] *See* Nick Sibilla, *New Mexico Bans Qualified Immunity For All Government Workers, Including Police*, FORBES (Apr. 78, 2021, 4:00 PM).

[207] For sample state legislation proposed by the Institute for Justice, see *A State Legislative Solution to Qualified Immunity by the Institute for Justice* (2021), at https://ij.org/wp-content/uploads/2020/11/StateSolutionQI-PECRA_IJ-for-NGA.pdf.

[208] *See supra* note 193 and accompanying text.

governments could also require local governments to gather and analyze information from lawsuits—and use that information to train, supervise, and discipline their officers—as part of budget negotiations or other oversight of local departments.[209]

C. The Practical and Political Benefits of Focusing on *Monell*

Although much recent public focus and attention has been on qualified immunity reform, advocates and scholars have long had *Monell* in their crosshairs. In 2015, Karen Blum asked a group of civil rights scholars and attorneys what legal reform they would prioritize to improve our system of constitutional remediation, and many—including Blum—put replacing *Monell* with vicarious liability at the top of their list.[210] As Blum explains, making local governments vicariously liable for the constitutional violations of their officers would not only do away with the challenges of proving *Monell* claims; it would also do away with the challenges of overcoming qualified immunity, as local governments are not entitled to its protections.[211]

Moreover, as difficult as any reforms may seem to achieve, replacing *Monell* with vicarious liability may be a change that advocates and legislators on both sides of the aisle can agree upon. Qualified immunity reform has failed in part because defenders of the doctrine fear that officers will be bankrupted for reasonable mistakes.[212] Although, as I have shown, officers are almost always indemnified, it may not feel that way to officers; local governments' practices of withholding indemnification decisions may carry strategic benefits in negotiations with plaintiffs' attorneys but they also can create anxiety for those officers who are the subjects of those indemnification decisions. Replacing *Monell* with vicarious liability would ease these concerns, even if they are phantom concerns for most.[213] This may be why Senator Tim Scott suggested that,

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[209] For further discussion of these proposals, see Reinert, Schwartz & Pfander, *supra* note 195, at 775-80.

[210] *See* Blum, *supra* note 12, at 962-63.

[211] *Id.* at 964.

[212] *See* Kindy, *supra* note 1.

[213] Accord Teressa E. Ravenell, *Vicarious Municipal Liability for Constitutional* Deprivations, ACSLAW (2020), at https://www.acslaw.org/wp-content/uploads/2020/12/Ravenell_Whats-the-Big-Idea-Book-2020-39-43.pdf ("With vicarious liability, government officials will know their employer ultimately will shoulder financial responsibility for their misconduct. Accordingly, they can act without fear of liability, which seems to be one of the primary aims of the qualified immunity defense.").

instead of removing qualified immunity, local governments be made vicariously liable for constitutional violations by their officers.

Opponents to reform would still, likely, raise concerns that replacing *Monell* with vicarious liability would open the courthouse doors to frivolous claims and threaten to bankrupt municipalities. Although these concerns are overblown—especially given the small percentage of government budgets currently spent to resolve civil rights suits[214]—they would still need to be addressed. But because vicarious liability does not threaten—even remotely—officers' bank accounts, I predict that objections to ending *Monell* would have less traction than objections to ending qualified immunity. This is so even as, from the perspective of plaintiffs trying to succeed under Section 1983, ending *Monell* would mean the end of qualified immunity.

CONCLUSION

In recent years, qualified immunity has captured public attention and inspired passionate and deserving criticism. But standards for holding local governments responsible for the constitutional violations of their employees are an equal—if not greater—impediment to a system of effective constitutional remediation. As this Article shows, claims against local governments are more often challenged, and those challenges are more often successful, than are invocations of qualified immunity. And the difficulty of pleading and proving *Monell* claims not only increases the cost and complexity of civil rights litigation, but shields local governments from responsibility for their systemic failures and can leave people without compensation or effective means of deterring future misconduct. Now, with this fuller understanding of the effects of *Monell* on the ground, municipal liability standards can and should step into the ignoble spotlight currently trained on qualified immunity doctrine and police reform efforts should take equal aim at *Monell*. Indeed, making local governments vicariously liable for their officers constitutional violations is a reform that may have better luck in statehouses and Congress than has qualified immunity reform; placing the costs of constitutional violations on local governments (instead of individual officers) is a change that both police unions and policy accountability advocates can get behind. This may be one of those rare instances when the most pressing reform—ending *Monell*—is also the most pragmatic.

[214] *See* Schwartz, *supra* note 200.

DATA APPENDIX

The following tables set out data about *Monell* challenges and qualified immunity motions in the 1,183 cases in my dataset. Each (A) table concerns *Monell* claims and challenges and is original to this Article. Each (B) table concerns qualified immunity motions and is replicated from Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2 (2017).

TABLE 1A. FREQUENCY WITH WHICH MUNICIPAL LIABILITY CLAIMS CAN BE CHALLENGED, IN FIVE DISTRICTS

	S.D.TX	M.D.FL	N.D.OH	N.D.CA	E.D.PA	Total
Cases brought solely against individual officers	12	18	20	16	44	**110 (9.3%)**
Cases brought against municipalities, but dismissed (on municipal liability claim or in whole) before defendants answer	8	50	26	10	24	**118 (9.9%)**
Cases in which municipal liability was alleged and could be challenged	111	157	126	222	339	**955 (80.7%)**
Total § 1983 cases	**131**	**225**	**172**	**248**	**407**	**1,183**

TABLE 1B. FREQUENCY WITH WHICH QUALIFIED IMMUNITY CAN BE RAISED, IN FIVE DISTRICTS

	S.D.TX	M.D.FL	N.D.OH	N.D.CA	E.D.PA	Total
Section 1983 cases against municipalities/seeking solely injunctive or declaratory relief	14	26	13	22	24	**99 (8.4%)**
Cases brought against individual defendants, seeking damages, but dismissed by court before defendants respond	11	44	20	7	23	**105 (8.9%)**
Section 1983 cases in which QI can be raised by defendants	106	155	139	219	360	**979 (82.8%)**
Total § 1983 cases	**131**	**225**	**172**	**248**	**407**	**1,183**

TABLE 2A. FREQUENCY WITH WHICH DEFENDANTS CHALLENGE MUNICIPAL LIABILITY

District	Total Cases alleging *Monell* claims	Cases with challenges to *Monell* claims
S.D. TX	111	79 (71.2%)
M.D. FL	157	107 (68.2%)
N.D. OH	126	71 (56.3%)
N.D. CA	222	112 (50.4%)
E.D. PA	339	145 (42.8%)
Total	**955**	**514 (53.8%)**

TABLE 2B. FREQUENCY WITH WHICH QUALIFIED IMMUNITY IS RAISED

District	Total cases in which QI could be raised	Total cases raising QI
S.D. TX	106	58 (54.7%)
M.D. FL	155	84 (54.2%)
N.D. OH	139	66 (47.5%)
N.D. CA	219	74 (33.8%)
E.D. PA	360	86 (23.9%)
Total	**979**	**368 (37.6%)**

TABLE 3A. TIMING OF MUNICIPAL LIABILITY CHALLENGES

District	*Monell* Challenge only at MTD/Pleadings	*Monell* Challenge only at SJ	*Monell* Challenges at both MTD & SJ	Total
S.D. TX.	27 (34.2%)	40 (50.6%)	12 (15.2%)	79
M.D. FL	68 (63.6%)	19 (17.8%)	20 (19%)	107
N.D. OH	28 (39.4%)	38 (53.6%)	5 (7%)	71
N.D. CA	50 (44.6%)	51 (45.5%)	11 (9.8%)	112
E.D. PA	69 (47.6%)	54 (37.2%)	22 (15.2%)	145
Total	**242 (47.1%)**	**202 (39.3%)**	**70 (13.6%)**	**514**

TABLE 3B. TIMING OF QUALIFIED IMMUNITY MOTIONS

District	QI raised only at MTD/Pleadings	QI raised only at SJ	QI raised only at/after trial	QI raised at both MTD & SJ	QI raised at SJ and at/after trial	Total
S.D. TX.	15 (25.9%)	37 (63.8%)	0	6 (10.3%)	0	58
M.D. FL	33 (39.3%)	32 (38.1%)	0	18 (21.4%)	1 (1.2%)	84
N.D. OH	14 (21.2%)	49 (74.2%)	0	3 (4.5%)	0	66
N.D. CA	11 (14.9%)	56 (75.7%)	0	6 (8.1%)	1 (1.4%)	74
E.D. PA	22 (25.6%)	55 (64.0%)	1 (1.2%)	8 (9.3%)	0	86
Total	**95 (25.8%)**	**231 (62.8%)**	**1 (.3%)**	**41 (11.1%)**	**2 (.5%)**	**368**

TABLE 4A. TOTAL MUNICIPAL LIABILITY CHALLENGES FILED, BY STAGE OF LITIGATION

District	Total MTDs/Pleadings Challenging Monell Claims	Total SJ Motions Challenging Monell Claims	Total motions
S.D. TX.	40 (43.0%)	53 (57.0%)	93
M.D. FL	118 (74.2%)	41 (25.8%)	159
N.D. OH	33 (43.4%)	43 (56.6%)	76
N.D. CA	77 (55.0%)	63 (45.0%)	140
E.D. PA	114 (58.8%)	80 (41.2%)	194
Total	**382 (57.7%)**	**280 (42.3%)**	**662**

TABLE 4B. TOTAL QUALIFIED IMMUNITY MOTIONS FILED, BY STAGE OF LITIGATION

District	Total MTDs/pleadings raising QI	Total SJ motions raising QI	Total QI motions at/after trial	Total motions
S.D. TX.	23 (33.3%)	46 (66.7%)	0	69
M.D. FL	59 (53.2%)	51 (45.9%)	1 (.9%)	111
N.D. OH	17 (23.9%)	54 (76.1%)	0	71
N.D. CA	23 (25.3%)	67 (73.6%)	1 (1.1%)	91
E.D. PA	32 (32.7%)	65 (66.3%)	1 (1.0%)	98
Total	**154 (35%)**	**283 (64.3%)**	**3 (.7%)**	**440**

TABLE 5A. NUMBER OF MUNICIPAL LIABILITY CHALLENGES PER CASE

District	Zero	One	Two	Three	Four+	Total cases with *Monell* claims
S.D.TX	32 (28.8%)	66 (59.5%)	12 (10.8%)	1 (.9%)	0	111
M.D.FL	50 (31.8%)	67 (42.7%)	29 (18.5%)	10 (6.4%)	1 (.6%)	157
N.D.OH	55 (43.7%)	66 (52.4%)	5 (4%)	0	0	126
N.D.CA	110 (49.5%)	88 (39.6%)	20 (9%)	4 (1.8%)	0	222
E.D.PA	194 (57.2%)	101 (29.8%)	39 (11.5%)	5 (1.5%)	0	339
Total	**441 (46.2%)**	**388 (40.6%)**	**105 (11%)**	**20 (2.1%)**	**1 (.1%)**	**955**

TABLE 5B. NUMBER OF QUALIFIED IMMUNITY MOTIONS PER CASE

District	Zero	One	Two	Three	Four+	Total cases in which QI could be raised
S.D.TX	48 (45.3%)	48 (45.3%)	9 (8.5%)	1 (.9%)	0	106
M.D.FL	71 (45.8%)	63 (40.6%)	17 (11.0%)	4 (2.6%)	0	155
N.D.OH	73 (52.5%)	61 (43.9%)	5 (3.6%)	0	0	139
N.D.CA	145 (66.2%)	61 (27.9%)	11 (5.0%)	1 (.5%)	1 (.5%)	219
E.D.PA	273 (75.8%)	76 (21.1%)	11 (3.1%)	0	0	360
Total	**610 (62.3%)**	**309 (31.6%)**	**53 (5.4%)**	**6 (.6%)**	**1 (.1%)**	**979**

TABLE 6A. SUCCESS OF MOTIONS CHALLENGING *MONELL* CLAIMS

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Denied	10 (10.8%)	14 (8.8%)	6 (7.9%)	24 (17.1%)	44 (23%)	98 (14.8%)
Granted in part	6 (6.5%)	3 (1.9%)	5 (6.6%)	4 (2.9%)	1 (1%)	19 (2.9%)
Granted in full	32 (34.4%)	65 (40.9%)	26 (34.2%)	49 (35%)	62 (32%)	234 (35.3%)
Granted (claim with-drawn/un-opposed)	1 (1.1%)	7 (4.4%)	4 (5.3%)	13 (9.3%)	27 (14%)	52 (7.9%)
Granted in full/part on other grounds	16 (17.2%)	11 (6.9%)	17 (22.4%)	27 (19.3%)	9 (4.6%)	80 (12.1%)
Granted (reasoning unclear)	2 (2.2%)	0	0	0	3 (1.5%)	5 (.8%)
Denied as moot	4 (4.3%)	29 (18.2%)	3 (3.9%)	6 (4.3%)	28 (14%)	70 (10.6%)
Not de-cided	22 (23.7%)	30 (18.9%)	15 (19.7%)	17 (12.1%)	20 (10.3%)	104 (15.7%)
Total mo-tions	**93**	**159**	**76**	**140**	**194**	**662**

TABLE 6B. SUCCESS OF MOTIONS RAISING QUALIFIED IMMUNITY

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Denied	15 (21.7%)	33 (29.7%)	27 (38.0%)	30 (33.0%)	34 (34.7%)	139 (31.6%)
Granted in part	7 (10.1%)	7 (6.3%)	6 (8.5%)	5 (5.5%)	1 (1.0%)	26 (5.9%)
Granted in full	16 (23.2%)	18 (16.2%)	3 (4.2%)	11 (12.1%)	5 (5.1%)	53 (12.0%)
Granted in full/part on other grounds	16 (23.2%)	31 (27.9%)	25 (35.2%)	30 (33%)	36 (36.7%)	138 (31.4%)
Granted (reasoning unclear)	2 (2.9%)	2 (1.8%)	0	0	5 (5.1%)	9 (2.0%)
Not de-cided	13 (18.8%)	20 (18.0%)	10 (14.1%)	15 (16.5%)	17 (17.3%)	75 (17.0%)
Total mo-tions	**69**	**111**	**71**	**91**	**98**	**440**

TABLE 7A. SUCCESS OF MOTIONS TO DISMISS CHALLENGING *MONELL* CLAIMS

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Denied	7 (17.5%)	11 (9.3%)	1 (3%)	12 (15.6%)	31 (27%)	62 (16.2%)
Granted in part	4 (10%)	3 (2.5%)	5 (15.2%)	1 (1.3%)	0	13 (3.4%)
Granted in full	9 (22.5%)	47 (39.8%)	11 (33.3%)	30 (39.0%)	29 (25.4%)	126 (33.3%)
Granted (claim with-drawn/un-opposed)	0	2 (1.7%)	1 (3%)	5 (6.5%)	11 (10%)	19 (5%)
Granted in full/part on other grounds	8 (20%)	3 (2.5%)	4 (12.1%)	17 (22.1%)	4 (3.5%)	36 (9.4%)
Granted (reasoning unclear)	0	0	0	0	2 (1.8%)	2 (.5%)
Denied as moot	4 (4.3%)	26 (22%)	3 (9.1%)	6 (7.8%)	28 (25%)	67 (17.5%)
Not de-cided	8 (20%)	26 (22%)	8 (24.2%)	6 (7.8%)	9 (8%)	57 14.9%)
Total mo-tions	**40**	**118**	**33**	**77**	**114**	**382**

TABLE 7B. SUCCESS OF MOTIONS TO DISMISS RAISING QUALIFIED IMMUNITY

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Denied	6 (26.1%)	17 (28.8%)	4 (23.5%)	7 (30.4%)	12 (37.5%)	46 (29.9%)
Granted in part	2 (8.7%)	2 (3.4%)	1 (5.9%)	2 (8.7%)	0	7 (4.5%)
Granted in full	4 (17.4%)	5 (8.5%)	0	2 (8.7%)	3 (9.4%)	14 (9.1%)
Granted in full/part on other grounds	6 (26.1%)	20 (33.9%)	8 (47.1%)	9 (39.1%)	9 (28.1%)	52 (33.8%)
Granted (reasoning unclear)	0	2 (3.4%)`	0	0	4 (12.5%)	6 (3.9%)
Not de-cided	5 (21.7%)	13 (22%)	4 (23.5%)	3 (13%)	4 (12.5%)	29 (18.8%)
Total mo-tions	**23**	**59**	**17**	**23**	**32**	**154**

TABLE 8A. SUCCESS OF SUMMARY JUDGMENT MOTIONS CHALLENGING MONELL CLAIMS

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Denied	3 (5.7%)	3 (7.3%)	5 (11.6%)	12 (19%)	13 (16.3%)	36 (12.9%)
Granted in part	2 (3.8%)	0	0	3 (4.8%)	1 (1.3%)	6 (2.1%)
Granted in full	23 (43.4%)	18 (43.9%)	15 (34.9%)	19 (30.2%)	33 (41.3%)	108 (38.6%)
Granted (claim with-drawn/un-opposed)	1 (1.9%)	5 (12.2%)	3 7%)	8 (12.7%)	11 (13.8%)	43 (15.4%)
Granted in full/part on other grounds	8 (15.1%)	8 (19.5%)	13 (30.2%)	10 (15.9%)	5 (6.3%)	44 (15.7%)
Granted (reasoning unclear)	2 (3.8%)	0	0	0	1 (1.3%)	3 (1.1%)
Denied as moot	0	3 (7.3%)	0	0	0	3 (1.1%)
Not de-cided	14 (26.4%)	4 (9.8%)	7 (16.3%)	11 (17.5%)	11 (13.8%)	47 (16.8%)
Total mo-tions	**53**	**41**	**43**	**63**	**80**	**280**

TABLE 8B. SUCCESS OF SUMMARY JUDGMENT MOTIONS RAISING QUALIFIED IMMUNITY

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Denied	9 (19.6%)	15 (29.4%)	23 (42.6%)	23 (34.3%)	21 (32.3%)	91 (32.2%)
Granted in part	5 (10.9%)	5 (9.8%)	5 (9.3%)	3 (4.5%)	1 (1.5%)	19 (6.7%)
Granted in full	12 (26.1%)	13 (25.5%)	3 (5.6%)	9 (13.4%)	2 (3.1%)	39 (13.8%)
Granted in full/part on other grounds	10 (21.7%)	11 (21.6%)	17 (31.5%)	20 (29.9%)	27 (41.5%)	85 (30%)
Granted (reasoning unclear)	2 (4.3%)	0	0	0	1 (1.5%)	3 (1.1%)
Denied as moot	0	0	0	0	0	0
Not de-cided	8 (17.4%)	7 (13.7%)	6 (11.1%)	12(17.9%)	13 (20.0%)	46 (16.3%)
Total mo-tions	**46**	**51**	**54**	**67**	**65**	**283**

TABLE 9. OUTCOME OF SUMMARY JUDGMENT MOTIONS, BY *MONELL* THEORY

	Denied	Granted in part	Granted	Total
S.D.TX	**1**	**1**	**23**	**25**
Alleged violations by policy-maker	1	0	1	2
Alleged violations by subordinates	0	1	22	22
Unclear	0	1	1	1
M.D.FL	**1**	**0**	**20**	**21**
Alleged violations by policy-maker	0	0	0	0
Alleged violations by subordinates	1	0	16	17
Unclear	0	0	4	4
N.D.OH	**5**	**0**	**15**	**20**
Alleged violations by policy-maker	0	0	1	1
Alleged violations by subordinates	5	0	13	18
Unknown	0	0	1	1
N.D.CA	**12**	**3**	**19**	**34**
Alleged violations by policy-maker	4	0	4	8
Alleged violations by subordinates	6	3	14	23
Unknown	2	0	1	3
E.D.PA	**10**	**0**	**32**	**42**
Alleged violations by policy-maker	0	0	1	1
Alleged violations by subordinates	10	0	27	37
Unknown	0	0	4	4
All districts	**29 (20.4%)**	**4 (3%)**	**109 (76.8%)**	**142**
Alleged violations by policy-maker	**5 (41.6%)**	**0**	**7 (58.3%)**	**12**
Alleged violations by subordinates	**22 (19%)**	**3 (2.6%)**	**91 (78.4%)**	**116**
Unclear	**2 (14.3%)**	**1 (7.1%)**	**11 (78.6%)**	**14**

TABLE 10. ABANDONED *MONELL* CLAIMS

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Claim voluntarily dismissed before motion to dismiss	0	3	0	1	0	4
Claim withdrawn/unopposed in response to motion	1	7	4	13	27	52
Amended complaint drops *Monell* claim	0	3	0	2	10	15
All federal claims dismissed; remanded to state court	0	6	0	1	1	8
Claim voluntarily dismissed during discovery	1	2	0	2	18	23
Claim voluntarily dismissed before trial	0	0	0	0	16	16
Total abandoned claims	2	21	4	19	72	118

TABLE 11A. DISPOSITIONS OF *MONELL* CLAIMS

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Settled/voluntarily dismissed	52 (46.8%)	70 (44.6%)	70 (55.6%)	121 (54.5%)	189 (55.8%)	502 (52.6%)
Dismissed at MTD	17 (15.3%)	29 (18.5%)	15 (11.9%)	26 (11.7%)	19 (5.6%)	106 (11.1%)
Dismissed at SJ	34 (30.6%)	30 (19.1%)	35 (27.8%)	37 (16.7%)	70 (20.6%)	206 (21.6%)
Involuntarily dismissed	1 (.9%)	7 (4.5%)	4 (3.2%)	18 (8.1%)	2 (.6%)	32 (3.3%)
Abandoned	1 (.9%)	16 (10.2%)	1 (.8%)	10 (4.5%)	50 (14.7%)	78 (8.2%)
Trial – P/split verdict	0	0	0	0	0	0
Trial – D/directed verdict	3 (2.7%)	2 (1.3%)	0	6 (2.7%)	6 (1.8%)	16 (1.7%)
Settlement during/after trial	2 (1.8%)	2 (1.3%)	0	0	1 (.3%)	5 (.5%)
P verdict reversed after trial	1 (.9%)	0	0	0	0	1 (.1%)
Other	0	1 (.6%)	1 (.8%)	4 (1.8%)	2 (.6%)	8 (.8%)
Total	**111**	**157**	**126**	**122**	**339**	**955**

TABLE 11B. CASE DISPOSITIONS

	SDTX	MDFL	NDOH	NDCA	EDPA	Total
Settled/voluntarily dismissed	65 (58.6%)	86 (54.8%)	90 (71.4%)	140 (63%)	236 (69.6%)	617 (64.6%)
Dismissed at MTD	14 (12.6%)	18 (11.5%)	10 (7.9%)	18 (8.1%)	4 (1.2%)	64 (6.7%)
Dismissed at SJ	22 (19.8%)	21 (13.4%)	17 (13.5%)	23 (10.4%)	48 (14.2%)	131 (13.7%)
Involuntarily dismissed	1 (.9%)	9 (5.7%)	6 (4.8%)	20 (9%)	7 (2.1%)	43 (4.5%)
Abandoned	0	7 (4.5%)	0	1 (.5%)	0	8 (.8%)
Trial – P/split verdict	0	1 (.6%)	1 (.8%)	2 (.9%)	4 (1.2%)	8 (.8%)
Trial – D/directed verdict	5 (4.5%)	11 (7%)	0	14 (6.3%)	33 (9.7%)	63 (6.6%)
Settlement during/after trial	3 (2.7%)	3 (1.9%)		1 (.5%)	3 (.9%)	10 (1%)
P verdict reversed after trial	1 (.9%)	0	0	0	0	1 (.1%)
Other	0	1 (.6%)	2 (1.6%)	3 (1.4%)	4 (1.2%)	10 (1%)
Total	**111**	**157**	**126**	**222**	**339**	**955**