

## Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense

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## I. INTRODUCTION

Perhaps one of the most basic premises of legal liability is blameworthiness. Whether a particular act should be considered “wrong” or “blameworthy” is often the central subject of civil litigation and, in the absence of fault or blame, courts often attempt to limit a defendant’s liability. This is particularly true in the context of suits against government actors pursuant to § 1983 law,<sup>1</sup> where the Supreme Court of the United States developed the qualified-immunity defense for individual government officials and adopted stringent causation requirements for local government bodies to shield these individuals and entities from liability.

Many legal commentators have written about the Court’s current approach to municipal liability;<sup>2</sup> others have written extensively on the standard for qualified immunity.<sup>3</sup> Yet, legal scholars largely have failed to consider the relationship between municipal liability and the qualified-immunity defense.<sup>4</sup>

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<sup>1</sup> 42 U.S.C. § 1983 (2006).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

*Id.*

<sup>2</sup> See, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 68 (1998) (concluding that the “current law [of municipal liability based on fault] seems . . . basically sound”); Barbara Kritchevsky, *A Return to Owen: Depersonalizing Section 1983 Municipal Liability Litigation*, 41 VILL. L. REV. 1381, 1393–96 (1996) (praising the Court’s careful delineation of the contours of individual and municipal liability in *Owen v. City of Independence*, 445 U.S. 662 (1980)); George Rutherford, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 926 (2003) (advocating for a more thorough examination of the role of “custom” and “usage” as a source of law in § 1983 litigation); Peter Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1755 (1989) (arguing that the “principal consequence” of limiting municipal liability for officials’ illegal conduct only to that which result from official policy “is to deny citizens recoveries against local governments for damage caused by officials’ constitutional violations”).

<sup>3</sup> See, e.g., Mark R. Brown, *The Rise and Fall of the Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185 (2008) (examining the application of qualified immunity in the Eleventh Circuit); Alan Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 6–8 (1997) (arguing that the factual inquiry required by the Court’s qualified-immunity standard creates problems for lower courts and prevents decisions on summary judgment); David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 202–04 (1994) (examining the qualified-immunity defense and summary judgment).

<sup>4</sup> There are a handful of articles that discuss the relationship between qualified immunity and municipal liability. See, e.g., Barbara Kritchevsky, *Making Sense of State*

This Article attempts to fill that gap by exploring the relationship between these two doctrines. To this end, the purpose of this Article is not to criticize the Court's decisions regarding either the qualified immunity or municipal-liability doctrines. Instead, this Article accepts and analyzes § 1983 jurisprudence to determine how the imposition of municipal liability might inform or even dictate the viability of a qualified-immunity defense. On the one hand, a finding of municipal liability requires a determination that the municipality's policy or custom caused the plaintiff to be deprived of a federally protected right. On the other hand, the qualified-immunity defense shields government officials from liability when a reasonable official in the defendant's position would not have realized the illegality of his conduct. Combining these doctrines, one might argue that an individual defendant should be afforded qualified immunity when municipal liability is imposed because, due to the municipality's acts or omissions, he did not realize the illegality of his conduct. In short, if the municipality is liable then the individual defendant may blame it on "the Man" and, arguably, should be afforded qualified immunity.

From this simplistic accounting of "blameworthiness," one might argue that a finding of municipal liability is fundamentally incompatible with a finding of individual officer liability. Under this view, the individual officer should not be deemed "blameworthy" and should be granted qualified immunity unless the individual defendant pleading qualified immunity is also the final decision-making official who issued the directive.

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*of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 423–40, 456–74 (1992) (considering whether a determination that an individual defendant did not act with the state of mind necessary for a constitutional violation precludes finding that municipality liable for its own failure to train the official); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 939 (1989) (arguing that the "combination of increased official immunity and restricted government liability deprives victims of constitutional wrongs of their remedy"). See also Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 669–88 (1989) (contending that official and municipal liability are inversely related). Brown's article suggests the following relationship between qualified immunity and municipal liability:

When the two issues are analyzed together, a matrix is created whereby the liabilities of the city and its agent bear an inverse relationship. Usually, where the official is not immune (and thus is potentially liable), the city will not be held accountable. Conversely, the city will be financially responsible where the official is immune (and not liable).

*Id.* at 631. Additionally, in *Owen v. City of Independence*, the Court considered whether municipalities were entitled to some form of qualified immunity "based on the good faith of its officials." 445 U.S. 622, 624–25 (1980).

This argument has its appeal. “Street-level” government officials, such as police officers and teachers, seldom review and interpret judicial opinions. Instead, they rely on those persons charged with establishing municipal policy to promulgate rules that are consistent with statutory law and legal opinions. The failure of a municipality to adequately counsel its employees regarding changes in the law or to adopt policies necessary to effectuate the law may lead to the “comprehensive-based illegality” described by Peter Schuck as follows:

The official to whom a legal directive is addressed cannot comply unless he understands what is expected of him, what the law requires. . . .

. . . Like any impulses, however, bureaucratic messages tend to dissipate energy and strength as they pass through media. Journeying through layer after hierarchical layer, they generate friction, losing some of the power and immediacy that propelled them at their source. . . . A sweeping mandate from the courthouse to protect suspects’ rights enters the station house as just one more insertion in the patrolman’s tattered operations manual.<sup>5</sup>

In short, even when a court declares certain acts or behaviors to be unconstitutional, the message does not necessarily reach everyone charged with following its command.<sup>6</sup> Government officials may violate clearly established legal rules simply because they are following municipal policy and perhaps are unaware that their conduct is unlawful.<sup>7</sup>

Nevertheless, the Supreme Court’s current jurisprudence on qualified immunity demands a more nuanced understanding of blameworthiness. Blameworthiness, as expressed through liability, depends in part upon whether the defendant is a municipality or an official who is being sued in a personal capacity. As discussed in Part II, a municipality is to “blame” when it causes the plaintiff to be deprived of a federally protected right. In contrast, a government official should be denied qualified immunity (i.e., dubbed blameworthy) when he or she is unaware of, or disregards, an unambiguous legal rule. A simplistic accounting of blameworthiness confuses these ideas and allows causation concepts to determine qualified-immunity disputes. The central question in a qualified-immunity dispute is not whether the officer followed the official policy of his or her municipal

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<sup>5</sup> PETER SCHUCK, *SUING THE GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 4–5 (1983).

<sup>6</sup> *Id.* at 4–6.

<sup>7</sup> *Id.*

employer. Rather, the question is whether a reasonable official should have been aware of the legal rule at issue. Thus, courts must engage in a more careful inquiry when determining whether municipal liability should form the basis for an individual's qualified-immunity defense. This Article considers the relationship between municipal liability and the qualified-immunity defense. It argues that both municipal-liability determinations and qualified-immunity determinations mirror the structure of the municipal government. The closer an actor is to the top of the municipal structure, the more likely it is that his or her behavior will trigger municipal liability and the less likely it is that he or she will be granted qualified immunity.<sup>8</sup> Nevertheless, this Article concludes that when the legal rule at issue is unambiguous, neither municipal liability nor the defendant's position within the bureaucratic structure should form the basis of the defendant's qualified-immunity defense.<sup>9</sup>

Examining qualified immunity in this context helps to illuminate the qualified-immunity defense and § 1983 liability in several respects. From a doctrinal perspective, viewing qualified immunity in this context furthers our understanding of the definition of "clearly established" and how the defendant's personal knowledge affects this analysis. Furthermore, from a normative perspective, considering the availability of qualified immunity in this context furthers our understanding of the roles of blame, culpability, and individual responsibility in § 1983 law.<sup>10</sup>

Part II of this article provides a brief overview of § 1983 law. To prevail, a § 1983 plaintiff must prove that the defendant caused her to be deprived of a federally protected right. While this may be easy

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<sup>8</sup> The first half of this argument is not particularly novel. Courts and scholars often distinguish between "higher-level" and "lower-level" officials when explaining municipal liability determinations; however, scholars have not considered the use of the bureaucratic structure as a tool for understanding qualified immunity.

<sup>9</sup> I should note that I do not intend to suggest that defendants who comply with municipal policies and directives necessarily should be liable. Reasonable reliance and/or obedience may be grounds for a *good-faith* immunity defense. The good-faith immunity defense, however, is distinguishable from the qualified-immunity defense and, accordingly is beyond the scope of this article. I will address these questions in a future piece.

<sup>10</sup> As the Court explained in *Harlow v. Fitzgerald*, the qualified-immunity defense is intended to balance several competing concerns, including the need to compensate injured plaintiffs, deter future violations, and protect "innocent" government officials. 457 U.S. 800, 814, 818–20 (1982). *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469, 495 (Powell, J., dissenting) (noting that the primary reason for § 1983 liability is deterrence "so that if there is any doubt about the constitutionality of their actions, officials will 'err on the side of protecting citizens' rights" (citing *Owen v. City of Independence*, 445 U.S. 622, 652 (1980))).

to demonstrate when the defendant is an individual being sued in his personal capacity, the inquiry grows far more complex when the defendant is a municipality. This Part argues that one of the difficulties of fashioning a theory of liability when the defendant is an intangible entity rather than a natural person is that virtually all forms of liability require the defendant to engage in some act that causes the plaintiff to suffer an injury. The remainder of Part II discusses how courts have approached questions of municipal liability in the § 1983 context and concludes that “blame” and “fault” are key to our understanding of causation in municipal liability determinations.

Part III considers how the qualified-immunity defense intersects with ideas of blame and culpability and discusses the shift in the qualified-immunity defense that occurred between the Court’s decisions in *Harlow v. Fitzgerald*<sup>11</sup> and *Anderson v. Creighton*.<sup>12</sup> Part III concludes that the Court’s attempts to explain how lower courts should properly frame qualified-immunity disputes “personalizes” the qualified-immunity inquiry by considering the particular facts and circumstances surrounding the individual defendant’s decision to engage in the conduct in question, which in turn may allow fact finders to consider municipal liability as one factor affecting whether the law is clearly established.

Part IV considers whether, from a doctrinal perspective, municipal-liability determinations might be a factor in qualified-immunity analyses. Finally, Part V considers whether, from an instrumental perspective, municipal liability should be a factor in qualified-immunity determinations.

## II. SECTION 1983 AND MUNICIPAL LIABILITY

### A. Overview of § 1983

Section 1983 provides plaintiffs deprived of a federally protected right by a person acting under the color of state law with a federal remedy.<sup>13</sup> In the past, the Court has held:

By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute.

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<sup>11</sup> 457 U.S. 800 (1982).

<sup>12</sup> 483 U.S. 635, 646 (1987).

<sup>13</sup> 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .”).

First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.<sup>14</sup>

Further dissected, a finding of liability requires that (1) a person, (2) acting under the color of state law, (3) deprived or caused the plaintiff to be deprived, (4) of a federally protected right.<sup>15</sup>

### B. *Municipal Liability*

In *Monell v. Department of Social Services of New York*, the Court concluded that a municipality was a “person” as the term is used in § 1983.<sup>16</sup> Nevertheless, to prevail, the Court must conclude that the defendant was the cause of the plaintiff’s deprivation. Causation as a link between the defendant’s act and the plaintiff’s harm is fairly intuitive when the plaintiff alleges that a natural person engaged in unconstitutional conduct.<sup>17</sup> This causation inquiry grows far more com-

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<sup>14</sup> *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (citing *Monroe v. Pape*, 365 U.S. 167, 171 (1961)) (concluding that in order to state a claim for relief, the plaintiff is not required to show that the official acted in bad faith; rather, it is enough to show that the plaintiff was denied a federal right and the official who deprived the plaintiff of that right acted under the “color of state law”).

<sup>15</sup> See Teresa E. Ravenell, *Cause and Conviction: The Role of Causation in Section 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 709 (2008). In § 1983 litigation, a plaintiff seeking monetary damages must essentially prove two variations of causation: “statutory causation” and “damages causation.” See *id.* at 708. I refer to “statutory causation” as that most often thought of in § 1983 jurisprudence—that the government official or municipality being sued *caused* the plaintiff to be deprived of a constitutionally protected right. See *id.* at 709 (noting that given the basic language of the statute, this type of causation is “clearly a necessary element for liability”). The plaintiff seeking a monetary remedy must also prove “damages causation”—that the alleged constitutional deprivation caused *actual* injury. See *id.* at 709–10 (noting that damages causation is a “causal link between the constitutional deprivation and the actual injury”). Thus, the causation requirement for a § 1983 claim requires that a plaintiff prove both the causal link between the constitutional deprivation and the municipal actor and the causal link, factual and proximate, between the constitutional deprivation and the actual harm to the plaintiff. See *id.* at 709.

<sup>16</sup> 436 U.S. 658, 690 (1978). In *Monell*, the Court concluded that “the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities to be included among those persons to whom § 1983 applies.” *Id.* (emphasis omitted). As such, municipalities are proper § 1983 defendants. See *id.* at 690, 694–95.

<sup>17</sup> For example, where a plaintiff alleges that a police officer used excessive force during the course of the arrest, and therefore deprived the plaintiff of his Fourth Amendment right to be free from unreasonable searches and seizures, causation is seldom a question unless the defendant challenges the factual basis of the plaintiff’s claim (i.e., that he did not engage in the alleged conduct). In other words, the defendant is unlikely to argue that he did not *cause* the deprivation; instead his defense

plex when the plaintiff sues a municipality. In *Monell*, the Court explained this causation requirement as follows:

Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable 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.<sup>18</sup>

*Monell* makes clear that a municipality will only be liable when “official municipal policy of some nature caused a constitutional tort.”<sup>19</sup> There are two distinct elements: a § 1983 plaintiff must prove (1) municipal policy and (2) that the policy caused the plaintiff to be deprived of a federally protected right.<sup>20</sup>

Nevertheless, the Court continues to struggle with how best to determine when a municipality is legally responsible under § 1983. One of the difficulties of fashioning a theory of liability when the defendant is an intangible legal entity, like a municipality, rather than an actual person, is that virtually all forms of liability, even strict liability, require that the defendant engage in some act that causes the plaintiff to suffer an injury.<sup>21</sup> Intangible legal entities, like municipalities and corporations, at least from a practical standpoint, are incapable of action.<sup>22</sup> Instead, a person must act on their behalf.<sup>23</sup> The

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will most likely challenge the factual allegations or argue that the conduct did not amount to a constitutional violation.

<sup>18</sup> *Monell*, 436 U.S. at 691, 694 (rejecting the respondeat superior theory of liability in § 1983 actions against municipalities).

<sup>19</sup> *Id.* at 691.

<sup>20</sup> See Ravenell, *supra* note 15, at 711 (arguing that the Court's decision in *Monell* established two separate elements which a plaintiff must prove in order to establish municipal liability).

<sup>21</sup> See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 370–71 (1976) (noting “[t]he plain words of [§ 1983] impose liability . . . for conduct which ‘subjects, or causes to be subjected,’ the complainant to a deprivation of a right secured by the Constitution and laws” (quoting 42 U.S.C. § 1983 (2006))).

<sup>22</sup> See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”).

<sup>23</sup> See *Providence Bank v. Billings*, 29 U.S. 514, 562 (1830) (“The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.”); see also Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK. L. REV. 1195,

question then becomes when the act of said individual should be attributed to the corporation or municipality for purposes of legal liability.<sup>24</sup> Stated differently, municipal liability requires one to determine the circumstances under which one might properly conclude that the *municipality*, not simply a person employed by the municipality, caused a plaintiff to be deprived of a federally protected right.

The Court has held that municipalities may be liable under § 1983 in several situations. First, liability may exist when, through established procedures, the municipality (through its officers) promulgates a written policy that compels or commands municipal employees to engage in behavior that deprives another of a constitutional or federally protected right.<sup>25</sup> Additionally, a municipality may be liable when a person endowed with final policy-making authority issues a decision that compels or commands one or more municipal employees to engage in conduct that results in a constitutional deprivation.<sup>26</sup> And finally, a municipality may be liable based upon a “failure to train” theory when a municipality fails to adopt

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1199 (2003) (“The municipality is an aggregation of persons, it can act only through those persons.”).

<sup>24</sup> See Sterling P.A. Darling, Jr., Note, *Mitigating the Impressionability of the Incorporal Mind: Reassessing Unanimity Following the Obstruction of Justice Case of United States v. Arthur Andersen, L.L.P.*, 40 AM. CRIM. L. REV. 1625, 1626 (2003). The author notes the following about the creation of corporate criminal liability:

In American criminal law, and for five centuries prior in the common law, corporations have existed in ethereal suspension, at once granted life, independence, and immortality by the law, yet dependent on their agents for purpose and direction. In an early articulation of this suspended state, the Supreme Court, in *Trustees of Dartmouth College v. Woodward*, described the classic legal entity, the corporation, as “an artificial being, invisible, intangible, and existing only in contemplation of law.” The Court slowly added flesh to the body of corporate law by embracing the notion that corporations are responsible for the “knowledge and purposes of their agents.” The framework necessary to sustain these divergent myths, however, requires a legal structure that is both theoretically complex and difficult to apply to existing criminal statutes.

*Id.* (footnotes omitted).

<sup>25</sup> See, e.g., *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658, 694 (1978) (holding that a municipality is properly liable “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury”).

<sup>26</sup> See, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (holding that only decisions made by those officials who have final policy-making authority may be attributed to the municipality, thereby rendering the municipality liable for “its” conduct); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259–63 (1981) (illustrating that if a decision to adopt a particular course of action is properly made by the government’s authorized decision makers, it represents an act of official government “policy” as that term is commonly understood).

new or different policy when it is apparent that the failure to do so is likely to result in a constitutional deprivation like the one suffered by the plaintiff.<sup>27</sup>

*C. The Bureaucratic Structure & Municipal Liability*

While several scholars have noted the Court's approach to municipal liability may seem somewhat haphazard, it actually makes sense when viewed within the context of a municipal structure.<sup>28</sup> As this section argues, in many ways, the Court's approach to municipal liability in § 1983 litigation mirrors the bureaucratic structure of most towns and cities. Thus, one can better understand the Court's approach to municipal liability in § 1983 cases by understanding how municipalities are defined and structured.

A municipality, or municipal corporation, is “[a] city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state’s local affairs.”<sup>29</sup> Although municipalities have “the ability to sue or be sued . . . and do all other acts as natural persons may,”<sup>30</sup> because of their artificial nature, they must act through persons elected or appointed to act on the municipalities’ behalf.<sup>31</sup> Most municipalities assume one of the following three forms:<sup>32</sup> a mayor-council plan,<sup>33</sup> commission plan,<sup>34</sup> or

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<sup>27</sup> See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (“[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”).

<sup>28</sup> See Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1920–22 (2007) (discussing that it is sometimes easy to show constitutional deprivation pursuant to “official policy,” but at other times, it is “exceptionally difficult” such as when the alleged deprivation was pursuant to unwritten policies or “failure to train”); see also Stephen Stein Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 *B.C. L. REV.* 693, 713–19 (1993) (discussing the difficulties by lower courts in determining whether decision-making authority has been delegated); *id.* at 698–713 (discussing questions left open by *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), and *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658 (1978)).

<sup>29</sup> *BLACK’S LAW DICTIONARY* 1042 (8th ed. 2004).

<sup>30</sup> WILLIAM GLOVER, *A PRACTICAL TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* 41 (1837).

<sup>31</sup> See Bandes, *supra* note 23, at 1199 (“Municipal actions are always carried out by agents.”).

<sup>32</sup> See CHARLES S. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* § 1.6, at 7–9 (1980) (explaining the structure of local governments in a majority of American towns). Each plan employs slightly different procedures to enact legislation and to make policy. See *id.*

city-manager plan.<sup>35</sup> The procedures used to enact legislation and to make policy differ only slightly under each plan.<sup>36</sup>

One might track the dispersal of power as follows. Through a charter, a state may give municipalities within its domain the power to administer certain local affairs and activities.<sup>37</sup> This state charter may delegate certain powers to a governing body (which typically assumes one of the three aforementioned forms).<sup>38</sup> Additionally, rather than delegating decision-making powers to a governing body, a charter may delegate certain powers to a specific municipal official, such as a sheriff,<sup>39</sup> or may allow the governing body to delegate certain

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<sup>33</sup> See *id.* at 7 (noting that in a mayor-council plan, legislative functions are vested in an elected council or board of aldermen while executive and administrative functions belong to mayor). See, e.g., *City of Erie v. Dept. of Env'tl. Prot.*, 844 A.2d 586 (Pa. Commw. Ct. 2004) (describing that the role of mayor entails executing and enforcing city laws and providing the city solicitor authority to bring suit in a mayor-council plan; noting that the council lacks executive power).

<sup>34</sup> See RHYNE, *supra* note 32, at 8 (explaining that under a commission plan, a board of commissioners, which is usually, but not necessarily elected, exercises legislative as well as executive duties). Additionally, the commissioners can oversee administrative functions and operate in a judicial or quasi-judicial fashion. *Id.*

<sup>35</sup> See *id.* (describing that city-manager plan, also called the commissioner-manager plan or council-manager plan, which includes both a council or commission and a professional administrator who is selected by council or commission and occupies an executive position). Under this plan, legislation and policy typically originates with the council or commission while the city manager or administrator oversees city affairs, including managing the conduct and the operations of municipal employees. *Id.*

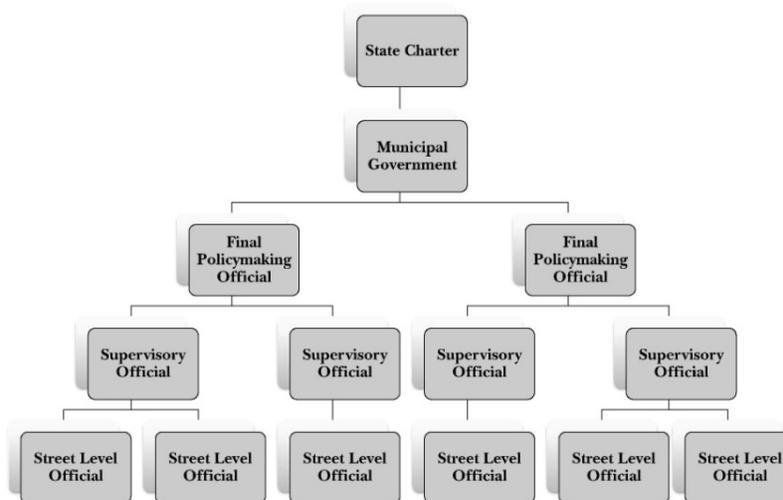
<sup>36</sup> See, e.g., *id.* at 7–9 (discussing the structure of mayor-council, commission, and city-manager plans). A governing body must conduct itself according to procedural rules that it (or a superior legislative body) defines. See also *Marquette Props. Inc. v. City of Wood Dale*, 512 N.E.2d 371 (Ill. App. Ct. 1987) (finding that a city's zoning procedure did not trump the state laws governing such procedures); *Skarbnik v. Spina*, 308 A.2d 390 (N.J. Super. 1973) (finding no showing that city council members did not conduct themselves pursuant to state law regarding election procedures); *People v. Woodworth*, 15 N.Y.S.2d 985 (N.Y. Sup. Ct. 1939), *overruled on other grounds*, 21 N.Y.S.2d 785 (N.Y. App. Div. 1940) (refusing to dismiss petitions to review the city tax assessments under state tax law). In all cases, the proceedings of the governing body are held at a corporate meeting that is generally open to the public, and certain procedural rules, such as the presence of a quorum, must be met. See RHYNE, *supra* note 32, §§ 9.1–9.3, at 135–38 (explaining that every state legislature requires local governments hold meetings open to the public).

<sup>37</sup> See RHYNE, *supra* note 32, § 3.2, at 48–49 (explaining that charters act to create and define the “rights, duties, powers, liabilities, privileges and immunities of the municipal corporation”).

<sup>38</sup> See *id.*

<sup>39</sup> See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.12 (1986) (plurality opinion) (“[D]ecisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability.”). In *Pembaur*, Ohio law authorized both the County Sheriff and the County Prosecutor to establish municipal policy under certain circumstances, and it was common practice for the She-

powers.<sup>40</sup> Finally, “low-level” municipal employees are charged with executing the policy and decisions enacted by the governing body and governing officials.<sup>41</sup> The following is a visual depiction of the various relationships:



The Court’s approach to municipal liability mirrors the spatial distance between the municipality and the municipal actor who per-

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riff to delegate his decision-making authority to the County Prosecutor. *See id.* at 484–85. For a further discussion of the power structure in *Pembaur*, see *infra* notes 49–59 and accompanying text.

By contrast, in *City of St. Louis v. Praprotnik*, the city charter delegated to the Mayor and Alderman shared decision-making authority to promulgate rules regarding personnel administration. 485 U.S. 112, 126 (1988) (citing ST. LOUIS CITY CHARTER, art. XVIII, §7(b), App. 62–63 (1941)). It also delegated authority to the Civil Service Commission by providing it with the authority to hear appeals of city employees when they believed their rights had been violated. *Id.* at 129 (citing ST. LOUIS CITY CHARTER, art. XVIII, §7(d), App. 63 (1941)). After being transferred to another city agency and later laid off, Praprotnik challenged the actions of two city agency directors as retaliatory and contended that the Commission, by upholding the decisions of the directors and failing to investigate the motives of the directors, delegated its final decision-making authority to the directors. *Id.* at 115–16. The Court disagreed and found that “[s]imply going along with discretionary decisions” of subordinates and “failure to investigate the basis of a subordinate’s discretionary decisions” was not a delegation of decision-making authority and would not give rise to municipal liability. *Id.* at 130.

<sup>40</sup> *See Pembaur*, 475 U.S. at 484 n.12 (“[For example,] if the Board [of County Commissioners] delegated its power to establish final employment policy to the Sheriff, the Sheriff’s decisions *would* represent county policy and could give rise to municipal liability.”).

<sup>41</sup> *See* Karlan, *supra* note 28, at 1920 (noting that a municipality “causes” constitutional deprivation when an injury results from an unconstitutional ordinance).

forms or orders another to perform an unconstitutional act.<sup>42</sup> The closer an actor is to the municipal government, the more likely he is to trigger municipal liability.

When the municipality's governing body enacts a formal written policy, there is little question that the municipality caused and is liable for the subsequent injury.<sup>43</sup> For example, in *Monell*, the plaintiffs, women employed by New York's Department of Social Services and the Board of Education, sued their employers alleging that their policy of requiring female employees to take unpaid maternity leave before such leave became medically necessary deprived them of Equal Protection under the Fourteenth Amendment.<sup>44</sup> The policy at issue in the case was promulgated by two different entities—New York's Board of Education and the mayor of the City of New York.<sup>45</sup> Furthermore, under New York law, both entities had the power to issue

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<sup>42</sup> The municipality is liable for an unconstitutional law or ordinance promulgated or adopted by official conduct. See *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 694–95 (1978). See also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970) (holding that a municipality may also be liable for conduct not formally adopted by proof of existence of a wide-spread practice “so permanent and well settled as to constitute ‘custom or usage’ with the force of law”). A municipality will only be liable for the unlawful conduct of an official with discretionary decision-making authority if that official has final decision-making authority. See *id.* Generally, however, the municipality will not be bound by a subordinate acting under a final decision maker unless the final decision maker retains the “authority to measure the official's conduct for conformance with *their* policies.” *Praprotnik*, 485 U.S. at 127. Thus, municipal liability runs parallel to the municipal hierarchy.

<sup>43</sup> See Barbara Kritchevsky, “*Or Causes to Be Subjected?: The Role of Causation in Section 1983 Municipal Liability Analysis*,” 35 UCLA L. REV. 1187, 1205 (1988). Kritchevsky describes the connection between municipal policy and the plaintiffs' injuries in *Monell* as follows:

The *Monell* plaintiffs, the Supreme Court said, challenged a department rule that, when implemented, necessarily caused a violation of the subjects' constitutional rights. The policy that the *Monell* defendants followed was clear. There was no dispute that implementation of the policy caused plaintiffs' injuries. The challenged action, forcing plaintiffs to take leaves of absence, “implement[ed] or execute[d]” a policy statement, ordinance, regulation or decision. The only question was whether the policy and the outcome it prescribed were constitutional.

*Id.* (discussing *Monell*, 436 U.S. at 690).

<sup>44</sup> See Brief of Petitioner at 4, *Monell*, 436 U.S. 658 (1978) (No. 75-1914) (“The gravamen of the complaint is that the defendants compelled pregnant female employees to take unpaid leaves of absence before medical reasons required them to do so. . . . [in] violat[ion of] the Fourteenth Amendment.”).

<sup>45</sup> See *id.* at 5–6 (explaining that the policy at issue, which governed the Department of Social Services but not the Board of Education, was first adopted by the City of New York and was later formally adopted by the Board of Education).

such policy.<sup>46</sup> Where, as here, the “person” determining the course of conduct has been given the power to promulgate municipal law and policy by the state charter, and has exercised that power, the municipality is the “cause” of the plaintiff’s deprivation and may be liable under § 1983.<sup>47</sup> This is most easily determined when municipal actors go through established legislative channels to enact a generally applicable policy.<sup>48</sup>

A more difficult question of municipal liability arises where, as in *Pembaur v. City of Cincinnati*, a constitutional violation is ordered by a single person whose order stems not from an application of “official policy” but from a one-time decision.<sup>49</sup> In *Pembaur*, the plaintiff filed a § 1983 suit against, inter alia, the City of Cincinnati, alleging that the municipality had violated his Fourth Amendment right to be free from unreasonable search and seizure when police officers, at the order of municipal officials, forcibly entered his work premises to arrest two of his employees.<sup>50</sup> Officials made several attempts to enter the premises but the plaintiff refused them entry.<sup>51</sup> Eventually, the depu-

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<sup>46</sup> Under New York state law, the New York Board of Education has its own corporate existence and, as such, has the power to hire persons “necessary for the efficient management of the schools and other educational, social, recreational and business activities.” N.Y. EDUC. LAW §§ 2251, 2554 (McKinney 2007). New York City operates under a mayor-council plan. The mayor is the “chief executive officer of the city” and “shall exercise all the powers vested in the city,” including “the power to determine the duties of its employees.” N.Y. CITY CHARTER 1 §§ 3, 8, 8(g) (2009). Additionally, the mayor also has the power to appoint and remove all unelected officials, such as the head of the Department of Social Services. *See id.* at 1 §§ 6(a)–(b), 24 § 601. Conversely, the council “shall be the legislative body of the city” and may “adopt local laws . . . not inconsistent with . . . the constitution or laws of the United States or [New York] state . . .” *Id.* at 2 §§ 21, 28. The Board of Education is appointed by the mayor and each borough president. *See* N.Y. EDUC. LAW § 2590-b(1)(a) (McKinney 2007) (outlining the procedure for Board appointments); *see also* Brief of Petitioner, *supra* note 44, at 27–31 (elaborating on ties between the Board of Education and local, state, and federal governments).

<sup>47</sup> *See Monell*, 436 U.S. at 694 (“[W]hen 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.”).

<sup>48</sup> *See* Barbara Kritchevsky, *supra* note 43, at 1205 (describing the connection between municipal policy and plaintiff’s injuries in *Monell*).

<sup>49</sup> *See generally* *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *id.* at 471 (“The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.”).

<sup>50</sup> *Id.* at 474. *Pembaur* also alleged that the intrusion was a violation of his Fourteenth Amendment rights. *Id.*

<sup>51</sup> *Id.* at 472–73. First, the deputy sheriff attempted to execute the arrest warrant. *Id.* at 472. When *Pembaur* refused them entry, they waited for the Cincinnati police to arrive, who *Pembaur* also denied entry. *Id.* The Cincinnati police officers then summoned their superior officer, who *Pembaur* also refused to admit. *Id.* at 472–73.

ty sheriffs sought guidance from their supervisor, who in turn advised them to call the Assistant Prosecutor on the case.<sup>52</sup> After conferring with the County Prosecutor, the Assistant Prosecutor instructed the officers to enter the premises and arrest the two employees for whom *capiases* had been issued.<sup>53</sup>

The “policy” in *Pembaur* differs from that in *Monell* in two important respects. First, although several municipal officers consulted with one another, one person seems to have made the final decision as to how to best approach the situation, and the decision-making process was rather informal—largely consisting of several phone calls—and did not result in a written decision.<sup>54</sup> Furthermore, this decision was not intended to serve as a general rule to be applied in the future to similar situations but was rather a “one time” decision.<sup>55</sup> Nevertheless, in a plurality opinion, four Justices agreed that “it is plain that municipal liability may be imposed for a single decision by municipal policymakers . . . whether or not that body had taken similar action in the past or intended to do so in the future.”<sup>56</sup>

The plurality opinions in *Pembaur* ensure that municipalities do not evade liability by making decisions through informal mechanisms rather than through formal legislative means. While the decision-making process at issue in *Pembaur* is markedly different from the policy-making process in *Monell*, based upon the spatial relationship between the municipality and the persons prescribing the course of conduct to be taken, the Court’s conclusion seems logical. In *Pembaur*, there is no dispute that the County Prosecutor ordered police

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<sup>52</sup> *Id.* at 473.

<sup>53</sup> *Id.* At trial, several defendants testified that they were not aware of any other time when officers had been denied access to a premises in order to execute an arrest warrant on a third person. *Id.* at 474. Additionally, the Sheriff testified that the department “had no written policy respecting the serving of *capiases* on the property of third persons,” but that it was the departmental practice to seek the advice of the County Prosecutor under these circumstances. *Id.* at 475. A *capias* is defined as “[a]ny of various types of writs that require an officer to take a named defendant into custody . . . often used when a respondent fails to appear.” BLACK’S LAW DICTIONARY 221 (8th ed. 2004); *see also Pembaur*, 475 U.S. at 472 n.1 (“A *capias* is a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt.”) (citing OHIO REV. CODE ANN. § 2317.21 (West 1981)).

<sup>54</sup> *See Pembaur*, 475 U.S. at 472–73 (describing that when deputy sheriffs arrived at petitioner *Pembaur*’s office to serve *capiases* upon him and were refused entry, at the direction of their supervisor, the deputy sheriffs called the County Prosecutor who instructed them to enter the premises and “‘go in and get’ the witnesses”).

<sup>55</sup> *See id.* at 475 (noting that the Sheriff sought advice from the Prosecutor on how deputy sheriffs should proceed in the present situation).

<sup>56</sup> *Id.* at 480.

officers to “go in and get” the persons for whom the capiases had been issued, nor is there any question that he had the authority to make this decision.<sup>57</sup> Thus, municipal liability is logical—vested with the authority to issue such decisions, the prosecutor, acting alone, acts as the municipality.<sup>58</sup> Liability does not turn on the formal nature of a municipality’s decision-making procedures (e.g., a group decision after careful thought); rather, it depends upon the authority of the decision maker to issue the decision.<sup>59</sup>

Nevertheless, as one might surmise, the Court’s holding in *Pembaur* raises new questions regarding the circumstances under which a person should be deemed capable of establishing policy, thereby triggering municipal liability through her decision. In *City of St. Louis v. Praprotnik*, a majority of the Justices agreed that in order to trigger municipal liability, a person must have the power to make final policy in the area in which he has legislated.<sup>60</sup> The Justices, however, were divided on how courts should determine whether a municipal employee possesses the final authority necessary to trigger municipal liability.<sup>61</sup> Four Justices would rely entirely on state law.<sup>62</sup> Three Justices,

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<sup>57</sup> See *id.* at 484–85 (agreeing with the Court of Appeals’s conclusion “that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances”).

<sup>58</sup> The prosecutor in *Pembaur* had decision-making authority pursuant to state law. See *id.* (providing that Ohio law may require county officials to seek “instructions from [the County Prosecutor] in matters connected with their official duties.”) (citing OHIO REV. CODE ANN. § 309.09(A) (West 1979)). The Court concluded this was in fact a delegation of power to the County Prosecutor, not the authorization of “mere legal advice.” See *id.* at 485.

<sup>59</sup> See, e.g., *id.* at 484–85. Pursuant to state law, it was common practice for the Sheriff to rely on the County Prosecutor for policy decisions, and deputies, at the direction of the Sheriff, followed the directions of the County Prosecutor. See *id.* In *City of St. Louis v. Praprotnik*, however, decision-making authority was vested in the Mayor, the Alderman, and the Civil Services Commission. See 485 U.S. 112, 126–28 (1988) (citing ST. LOUIS CITY CHARTER, art. XVIII, § 7(b), App. 62–63; § 2(a), App. 49 (1941)). The government officials whose actions were challenged were neither recognized by state law as final decision-makers nor were they acting pursuant to the command, authorization, or ordinance of recognized final decision makers. See *Praprotnik*, 485 U.S. at 117.

<sup>60</sup> See *Praprotnik*, 485 U.S. at 123; *id.* at 139–40 (Brennan, J., concurring).

<sup>61</sup> See *id.* at 127 (plurality opinion) (“[W]hen a subordinate’s decision is subject to review by the municipality’s authorized policymakers, they have retained the authority to measure the official’s conduct for conformance with *their* policies.”); *cf. id.* at 139 (Brennan, J., concurring) (noting that municipal liability requires that “the official in question must possess ‘final authority to establish municipal policy with respect to the [challenged] action’”) (quoting *Pembaur*, 475 U.S. at 481).

<sup>62</sup> See *Praprotnik*, 485 U.S. at 125 (plurality opinion) (“[W]e can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or set-

on the other hand, would simply treat state law as “the appropriate starting point, but ultimately [require] the fact finder [to] determine where such policy-making authority actually resides, and not simply where the applicable law purports to put it.”<sup>63</sup> *Pembaur* and *Praprotnik* expand the definition of municipal policy to include decisions rendered by a person who has final policy-making authority.<sup>64</sup>

To summarize, *Monell* makes clear that a municipality is liable for the decisions of its authorized legislative body. In essence, the governing body and the municipality may be viewed as one in the same when the governing body has the authority to act “for” the municipality.<sup>65</sup> Similarly, under *Pembaur*, a municipality is equally liable for decisions made by a single official so long as that official has the power to act unilaterally on the municipality’s behalf.<sup>66</sup> In both *Monell* and *Pembaur*, there is a direct connection between the natural person or persons ordering the action and the municipality. These cases, however, fail to account for those situations where municipalities fail to enunciate a policy or decision.

Herein lies one of the more difficult issues in § 1983 actions against municipalities—liability based upon municipal inaction. In municipal-inaction cases, the natural person determining the appropriate course of action is typically a “street-level” officer (e.g., the person who decides the amount of force to be used during the course of a particular arrest).<sup>67</sup> Viewed spatially, there is a clear disconnect be-

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ting policy in any given area of a local government’s business.”). Justice O’Connor, joined by Chief Justice Rehnquist and Justices White and Scalia, authored the plurality opinion. *See id.* at 114. Under this approach, when state law allows for review of a municipal official’s decision, the official is not the final policy maker for purposes of § 1983 municipal liability. *See id.* at 127 (“When an official’s discretionary decisions are constrained by policies not of that official’s making, those policies, rather than the subordinate’s departures from them, are the act of the municipality.”).

<sup>63</sup> *Id.* at 143 (Brennan, J., concurring) (internal quotations omitted).

<sup>64</sup> *Cf.* Barbara Rook Snyder, *The Final Authority Analysis: A Unified Approach to Municipal Liability Under Section 1983*, 1986 WIS. L. REV. 633, 650 (1986)

[W]hen a governing body empowers an official to make decisions and to take actions, and those decisions or actions are not in theory or in practice appealable . . . the municipality has authorized the official to act on its behalf, and thus . . . should be held responsible for any decisions made or actions taken by such an official within the scope of that delegated power.

*Id.*

<sup>65</sup> *See Praprotnik*, 485 U.S. at 123 (“[T]hose municipal officers who have ‘final policymaking authority’ may by their actions subject the government to § 1983 liability.” (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986))).

<sup>66</sup> *See Pembaur*, 475 U.S. at 480.

<sup>67</sup> *See generally*, *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam) (challenging force used by the arresting officer as excessive and unconstitutional);

tween the low-level officer and the municipality.<sup>68</sup> Furthermore, the Court has been adamant that municipal liability may not be based upon a theory of respondeat superior liability.<sup>69</sup> Thus, § 1983 municipal liability depends upon the plaintiff's ability and a court's willingness to attribute the plaintiff's harm to some act undertaken by a person or persons authorized to act on the municipality's behalf.<sup>70</sup> Building on this requirement, municipal liability for municipal *inaction* is premised on the idea that the municipality "acted" by deciding to adopt its chosen policy or by choosing to adopt no policy rather than a new or different policy that would have prevented the lower-

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Curley v. Village of Suffern, 268 F.3d 65 (2d Cir. 2001) (claiming, inter alia, police used excessive force when four arresting officers dragged arrestee charged with assault and disorderly conduct out of a bar to a police car); Garner v. Memphis Police Dep't, 600 F.2d 52 (6th Cir. 1979) (seeking damages for the death of a youth shot by police after allegedly escaping from the scene of a burglary); Dodd v. City of Norwich, 603 F. Supp. 514 (D. Conn. 1984) (alleging that the city was negligent in failing to adequately train officers after a burglar was accidentally shot while being handcuffed by a police officer). For an inquiry on culpability requirements of low-level officials, see Kritchevsky, *supra* note 4, at 470–73 (illustrating when municipal liability is proper for actions of low-ranking government officials).

<sup>68</sup> For an illustration of the spatial distance between low-level officials and the municipality, see diagram *supra* Part II.C.

<sup>69</sup> See *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 692 (1978) (rejecting respondeat superior liability for employees other than those who hold final authority to make policy); see also *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (rejecting theories similar to respondeat superior). The doctrine of respondeat superior "hold[s] an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment agency." BLACK'S LAW DICTIONARY 1338 (8th ed. 2004). But see *Tuttle*, 471 U.S. at 834–41 (Stevens, J., dissenting) (advocating that the text of § 1983 supports the conclusion that if an official violates the Constitution within the scope of his employment, "federal law provides the citizen with a remedy against his employer as well as a remedy against [the official] as an individual").

<sup>70</sup> This creates a perverse incentive for municipal policy makers *not* to act at all or to enact vague or ambiguous policies. See Susan Bandes, *supra* note 23, at 1204 (noting that "[c]urrent municipal liability doctrine creates even stronger incentives toward not knowing, not deliberating and ultimately, not acting"). With that said, by doing nothing, municipal policymakers do run the risk of *political* consequences. See, e.g., Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 502–03 n.9 (1993).

[A] finding of official lawlessness would likely receive public attention and result in calls for immediate change . . . . [W]hen a police force and a city engage in an unconstitutional practice, the full extent of the injury that results is incalculable . . . [and] [c]itizens may lose faith in the fairness of the legal system . . . .

*Id.* For example, the political fallout when a community believes a municipality did not provide a black defendant fair treatment in the criminal justice system can be significant. See *id.* (illustrating lawlessness following a verdict of officers charged with beating Rodney King resulting in over fifty fatalities, two thousand injuries, and almost one billion dollars in property damage).

level official from engaging in the unconstitutional conduct. This establishes a more direct connection between the plaintiff's constitutional deprivation and the municipality.<sup>71</sup>

The Supreme Court first addressed the question of municipal liability premised upon municipal inaction in *City of Oklahoma City v. Tuttle*.<sup>72</sup> In *Tuttle*, Rose Marie Tuttle, the respondent, sued the City of Oklahoma following the shooting death of her husband, Albert Tuttle.<sup>73</sup> Tuttle presented two theories of municipal liability: (1) that the municipality was liable because the shooting was authorized by official policy or (2) the municipality was liable because it caused the shooting death of respondent's husband by failing to adequately train and supervise its officers.<sup>74</sup> At trial, the judge's instruction to the jury included the following statement: "a single unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to deliberate indifference or gross negligence on the part of the officials in charge."<sup>75</sup> The jury returned a verdict against the city for

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<sup>71</sup> See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822–24 (1985) (providing that to rise to the level of "policy" when claiming municipal liability, there must be evidence that the municipality *deliberately* chose not to implement adequate training programs). In closing the gap, the Court requires "an affirmative link between the policy and the particular constitutional violation alleged." *Id.* at 823.

<sup>72</sup> *Id.* at 811 (plurality opinion).

<sup>73</sup> *Id.* Respondent also sued the officer who shot and killed her husband, Julian Rotramel, in his individual capacity. See *Tuttle v. City of Oklahoma City*, 728 F.2d 456, 457 (10th Cir. 1984), *rev'd*, 471 U.S. 808 (1985). On the date in question, Officer Rotramel responded to a report of an armed robbery at a nightclub. *Tuttle*, 471 U.S. at 811. When he arrived, there was no robbery taking place, and he encountered Tuttle and a bartender, who told him that no robbery had occurred. *Id.* When Tuttle attempted to leave, Officer Rotramel ordered him to stay, and when Tuttle failed to comply, a struggle ensued between the two. *Id.* At trial, Officer Rotramel testified that he saw Tuttle reach toward his boot where he believed Tuttle hid a gun. *Id.* The officer shot Tuttle who later died from the gunshot wound. *Id.* Rose Marie Tuttle, the decedent's wife, sued the officer in his individual capacity and the city. *Id.* at 457. The jury concluded that Officer Rotramel acted in good faith and returned a verdict in his favor. *Id.* The jury, however, found that the city was liable for failing to provide adequate training to its officers and returned a verdict of \$1,500,000 for Mrs. Tuttle. *Id.* at 459. On appeal, the Tenth Circuit concluded that though there may not be strong evidence to support the officer's good-faith defense, because there was "some evidence that [Officer Rotramel] believed that his life was threatened . . . his actions were justified." *Id.*

<sup>74</sup> *Tuttle*, 471 U.S. at 812–13.

<sup>75</sup> *Id.* at 814. Deliberate indifference "describes a state of mind more blameworthy than negligence." *Farmer v. Brennan*, 511 U.S. 825, 835–36 (1994) (noting that "acting or failing to act with deliberate indifference to a substantial risk of serious harm . . . is the equivalent of recklessly disregarding that risk"). Gross negligence is conduct that does not quite rise to the level of deliberate indifference and is practically understood to be akin to recklessness. See *id.* at 836 n.4 (citing W. PAGE KEETON

\$1,500,000.<sup>76</sup> The City appealed, arguing that “it was error to instruct the jury that a municipality could be held liable for a policy of inadequate training based merely upon evidence of a single incident of unconstitutional activity.”<sup>77</sup> Nevertheless, the Tenth Circuit Court of Appeals affirmed the jury’s verdict and held that the act was “so plainly and grossly negligent” that by failing to adequately train its officers the city acted with deliberate indifference such that liability on even a single incident was appropriate.<sup>78</sup> The Supreme Court granted certiorari to determine the “single incident” question.<sup>79</sup>

While seven of the Justices agreed that *municipal liability* based only upon evidence of a single incident of police misconduct was improper, the Court was unable to reach a majority opinion.<sup>80</sup> Justice Rehnquist’s opinion, joined by three other Justices, argued that “where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the ‘policy’ and the constitutional deprivation.”<sup>81</sup> Similarly, Justice Brennan, joined by Justices Marshall and Blackmun, concluded that the judge’s instructions to the jury were improper because “[t]he instruction in question in this case permitted the plaintiff to carry his burden of proving ‘policy or custom’ by merely introducing evidence concerning the particular

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ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984) (“[Gross negligence] permits a jury . . . to find that a defendant’s reckless misconduct bears a sufficient causal relation to a plaintiff’s harm to make him liable, although were the defendant’s conduct merely negligent, no such finding would be permissible.”).

<sup>76</sup> *Tuttle*, 471 U.S. at 813.

<sup>77</sup> *Id.* (“[Officer Rotramel’s] gross failure to successfully handle the problem clearly demonstrated his complete lack of training and also his lack of ability.”). *Cf.* Brief of Petitioner at 21, *Tuttle v. City of Oklahoma City*, 471 U.S. 808 (1985) (No. 83-1919), 1984 WL 566066, at \*8 (arguing that more than inadequate training should be required to constitute “official policy or custom” to hold municipality liable).

<sup>78</sup> *See Tuttle v. City of Oklahoma City*, 728 F.2d 456, 459–60 (10th Cir. 1984) (holding that officer’s good-faith defense was sufficient to support a jury’s finding for defendant officer and that there was sufficient evidence to support finding that the city was negligent for a single incident in failing to train officers).

<sup>79</sup> *Tuttle*, 471 U.S. at 814 (granting certiorari to determine whether “proof of a single incident of unconstitutional activity by a police officer could suffice to establish municipal liability”).

<sup>80</sup> *Id.* at 821–22 (plurality opinion); *id.* at 830–31 (Brennan, J., concurring in part) (noting that imposition of liability for a single incident by a single officer “would unduly threaten [a city’s] immunity from *respondeat superior* liability”).

<sup>81</sup> *Id.* at 824 (plurality opinion).

actions taken by [a single municipal employee].”<sup>82</sup> Although both Justice Rehnquist’s and Justice Brennan’s opinions discuss the role of fault in municipal liability § 1983 litigation, the Court’s plurality opinion in *Tuttle* simply provides another instance in which a finding of municipal liability is inappropriate and fails to adequately explain when, if ever, a municipality may be liable for its inaction.<sup>83</sup>

The Court next addressed the question of § 1983 liability based upon municipal inaction in *City of Canton v. Harris*.<sup>84</sup> Specifically, the Court granted certiorari to determine whether “a municipality can ever be liable under 42 U.S.C. § 1983 for constitutional violations resulting from its failure to train municipal employees.”<sup>85</sup> Again, *Monell* suggests that a municipality may only be liable for a constitutional violation when two different requirements are met: (1) the municipality has a policy or custom (2) through which it causes the plaintiff to be deprived of a constitutional right.<sup>86</sup> In *City of Canton*, the way in which the Court framed the question presumed that the plaintiff’s deprivation resulted from the city’s failure to train its employees.<sup>87</sup> As such, the case turned entirely on whether the requisite municipal “act” (e.g., policy or custom) could be premised on a city’s failure to

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<sup>82</sup> *Id.* at 830 (Brennan, J., concurring in part).

<sup>83</sup> *Id.* at 823 (plurality opinion). As the Court noted:  
[T]he word “policy” generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a “policy” of “inadequate training,” unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the policymakers deliberately chose a training program which would prove inadequate.

*Id.*

<sup>84</sup> 489 U.S. 378 (1989). Prior to its decision in *City of Canton*, the Court granted certiorari in *City of Springfield v. Kibbe* to determine three related issues: (1) whether “a municipality can be held liable under 42 U.S.C. § 1983 for inadequate training of its employees,” (2) “whether the ‘single incident’ rule of *Oklahoma City v. Tuttle* . . . is limited in application to one act by one officer,” and (3) “whether a policy of inadequate training may be inferred from the conduct of several police officers during a single incident absent evidence of prior misconduct in the department or a conscious decision by policymakers.” 480 U.S. 257, 258, 258 n.† (1987). The Court, however, later decided to dismiss the writ as improvidently granted. *Id.* at 260.

<sup>85</sup> *City of Canton*, 489 U.S. at 380.

<sup>86</sup> For a further discussion of *Monell*, see *supra* notes 43–48 and accompanying text.

<sup>87</sup> *City of Canton*, 489 U.S. at 380 (granting certiorari “to determine if a municipality can ever be liable under 42 U.S.C. § 1983 for constitutional violations resulting from its failure to train municipal employees”).

act.<sup>88</sup> Cognizant of *Monell's* requirement that the municipality *cause* the plaintiff's deprivation, the Court held "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."<sup>89</sup> The Court offered the following reasoning in support of its conclusion:

It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.<sup>90</sup>

In short, "no policy' can equal a policy when the failure to adopt a new or different policy reflects a deliberate indifference to the rights of citizens and inhabitants."<sup>91</sup> Thus, *City of Canton* recognizes that municipal liability under § 1983 may be based upon municipal policy that is constitutional on its face (i.e., it does not compel or command its employees to deprive others of their federally protected rights) but fails to provide officials with sufficient direction so that they might avoid or prevent constitutional violations. Importantly, when liability is premised upon municipal inaction, the liability-triggering municipal "act" is not the enactment of policy, as it was in *Monell*,<sup>92</sup> or the promulgation of a decision by a person with final policy-making authority, as was the case in *Pembaur*.<sup>93</sup> Instead, the relevant municipal "act" is the failure to act once the need for new or different training should have become apparent to the municipality (or those who exercise final policy-making authority on the municipality's behalf).<sup>94</sup>

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<sup>88</sup> See *id.* at 389–90 (noting that the heart of issue is if the training program is inadequate, "whether such inadequate training can justifiably be said to represent 'city policy'").

<sup>89</sup> *Id.* at 388.

<sup>90</sup> *Id.* at 390.

<sup>91</sup> Ravenell, *supra* note 15, at 712.

<sup>92</sup> See *supra* note 47 and accompanying text.

<sup>93</sup> See *supra*, note 57 and accompanying text.

<sup>94</sup> See *City of Canton*, 489 U.S. at 389–90, 390 n.10 (recognizing that once the need for more or adequate training is evident, failure to provide that training amounts to deliberate indifference of citizens' rights).

As the Court explained in *City of Canton*, “permitting cases against cities for their ‘failure to train’ employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities—a result we rejected in *Monell*.”<sup>95</sup>

In the end, the Court’s approach to municipal liability incorporates questions of fault and blame, which, in turn, hinge upon causation. Under *Monell*, the municipality is at fault because those charged with its administration promulgated a policy that caused its employees to deprive pregnant female employees of the rights guaranteed to them under the Equal Protection Clause of the Fourteenth Amendment.<sup>96</sup> Similarly, in *Pembaur*, the person vested with authority to make decisions on the municipality’s behalf caused police officers to deprive the petitioner of his Fourth Amendment right against unreasonable searches and seizures.<sup>97</sup> Finally, in *City of Canton*, the Court recognized that even when those acting on behalf of the municipality do not issue an unconstitutional policy or decision, they nevertheless may be sufficiently blameworthy to trigger municipal liability when they fail to adopt a new or different policy despite the apparent need for such change.<sup>98</sup> In other words, in cases of municipal inaction, the fault lies not with the unconstitutional nature of the municipality’s policy or decision but with the municipality’s deliberate indifference to the need for a new or different policy—in these cases the municipality’s inaction causes the deprivation of the right.

Regardless of the theory advanced, fault and blame are core concepts underlying municipal liability and, bluntly stated, a finding of municipal liability inherently suggests that it is the municipality’s fault that the plaintiff was deprived of a federally protected right. Furthermore, the nearer the government actor is to the top of the bureaucratic structure, the more inclined courts are to attribute his or her actions to the municipality. This raises several interrelated questions. The first of which—whether municipal liability may form the basis of an individual’s qualified-immunity defense—is addressed in Parts III and IV of this Article.

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<sup>95</sup> *Id.* at 392. See also Kritchevsky, *supra* note 4, at 459, 460–74 (suggesting that the Court’s reliance on fault in failure to train § 1983 litigation was adopted to satisfy § 1983’s causation requirements and to ensure that the plaintiff’s deprivation was the result of municipal *policy*).

<sup>96</sup> *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658, 694–95 (1978).

<sup>97</sup> *Pembaur v. City of Cincinnati*, 475 U.S. 469, 474, 484–85 (1986).

<sup>98</sup> *City of Canton*, 489 U.S. at 388.

## III. QUALIFIED IMMUNITY

As in § 1983 cases of municipal liability, fault and blame play important roles in § 1983 determinations of individual liability, particularly when a defendant claims he is entitled to qualified immunity. The qualified immunity doctrine has evolved in such a way that, arguably, it protects all but those who are truly at fault or blameworthy.<sup>99</sup> This seems to beg the question: under what circumstances may one properly conclude that it is appropriate to grant a defendant qualified immunity because the defendant is not blameworthy?

One might assume that the absence of blame and the entitlement to qualified immunity directly correlate with one another. And, consequently, if an individual defendant is not to blame, he should be granted qualified immunity, and if the individual defendant is to blame, he should be denied qualified immunity. This assumption, however, requires that courts judge qualified immunity and blame by the same criteria. Qualified immunity, arguably, is a far narrower inquiry than whether the defendant is “blameworthy.” Blame, as the term is ordinarily used, is synonymous with culpability.<sup>100</sup> Furthermore, culpability is a fluid term, which is to suggest that our understanding of what is culpable often changes according to the situation with which we are presented.<sup>101</sup> In contrast, qualified immunity is simply intended to protect government officials from damages liabili-

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<sup>99</sup> See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (concluding that, “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law”); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (finding “the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion”).

<sup>100</sup> See BLACK’S LAW DICTIONARY 407 (8th ed. 2004) (defining culpable as “[g]uilty; blameworthy”).

<sup>101</sup> For example, the Model Penal Code divides levels of culpability into four categories: (1) purposely, (2) knowingly, (3) recklessly, and (4) negligently. MODEL PENAL CODE § 2.02(2) (Official Draft 1962). A person acts purposely if “it is his conscious object to engage in conduct of that nature or to cause such a result.” *Id.* at § 2.02(2)(a)(i). A person acts knowingly if “he is aware that his conduct is of that nature or that such circumstances exist.” *Id.* at § 2.02(2)(b)(i). A person’s conduct is reckless if “he consciously disregards a substantial and unjustifiable risk” that the element material to the offense at issue exists or will result from the conduct. *Id.* at § 2.02(2)(c). A person acts negligently if “he should be aware of a substantial and unjustifiable risk” that the element material to the offense at issue exists or will result from that conduct. *Id.* at § 2.02(2)(d).

The grade or degree of an offense can depend on the culpability with which the offense was committed. See *id.* at § 2.02(10). For example, if the defendant purposely kills another person because he negligently believed it necessary for self-defense, his degree of culpability should be determined based on a person who acted negligently rather than purposely. See *id.*

ty “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>102</sup> Qualified immunity is not intended to encompass the many excuses that might be available to a particular defendant in the criminal law context; for example, “I did not intend to harm the victim,” or “the victim provoked me.”

As previously noted, courts and scholars have largely failed to consider how a finding of municipal liability should affect qualified-immunity determinations.<sup>103</sup> This Part begins with a brief discussion of qualified immunity. As explained in the proceeding pages, qualified immunity is available to a defendant when a reasonable official in his situation would not realize the unlawfulness of the defendant’s conduct.<sup>104</sup> When the Court first announced this approach, it seemed to assume that officials would be aware of the law and that if the law was plain and unambiguous at the time of the defendant’s conduct, the defendant should be denied the qualified-immunity defense.<sup>105</sup> In other words, the defense would largely depend on the state of the law when the defendant deprived the plaintiff of his or her federally protected right. Nevertheless, the wording of the qualified-immunity inquiry, “clearly established statutory or constitutional rights of which a reasonable person would have known,” adds an additional layer.<sup>106</sup> Rather than simply viewing the relevant legal rule and case law, later cases seem to suggest that courts must filter the case law through a “reasonable official’s” understanding of the law.<sup>107</sup> Thus, the inquiry is not simply whether the defendant’s conduct was illegal under the relevant legal rule at the time of the alleged incident; rather, the question is whether a *reasonable official* in the defendant’s position would understand the defendant’s conduct to be illegal.<sup>108</sup>

I suggest that the Supreme Court’s attempts to elucidate the qualified-immunity standard has the potential to shift fact finders’ attention away from the state of the law at the time of the alleged inci-

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<sup>102</sup> Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)).

<sup>103</sup> See *supra* notes 2–4 and accompanying text.

<sup>104</sup> See Anderson v. Creighton, 483 U.S. 635, 639–40 (1987).

<sup>105</sup> See Harlow, 457 U.S. at 818–19 (“If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.”).

<sup>106</sup> *Id.* at 818.

<sup>107</sup> See, e.g., Anderson, 483 U.S. at 640 (“The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”).

<sup>108</sup> *Id.*

dent and towards the state of mind of a “reasonable official.” This is especially likely when the “reasonable official” may possess the same facts, knowledge, and characteristics as the individual defendant.<sup>109</sup> This portion of the Article argues that this “personalizes” the qualified-immunity inquiry, making it more subjective and creating a space in which fact finders may consider municipal liability as a basis for qualified immunity.

A. *The Qualified Immunity Standard*

Qualified immunity is intended to protect government officials from damages liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>110</sup> The Court has explained qualified immunity in the following manner:

The judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to “know” that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.<sup>111</sup>

Since *Harlow*, legal scholars and courts, including the Supreme Court, have wrestled with how to define “clearly established law.”<sup>112</sup>

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<sup>109</sup> See *infra* notes 113–17 and accompanying text.

<sup>110</sup> *Harlow*, 457 U.S. at 818.

<sup>111</sup> *Id.* at 818–19. See also Barbara E. Armacost, *Qualified Immunity, Ignorance Excused*, 51 VAND. L. REV. 583, 624–25 (1998) (“Qualified immunity ensures that public officials will not be penalized for conduct which, given the state of the case law, even a conscientious, law-abiding official could reasonably have believed to be lawful.”).

<sup>112</sup> See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (holding that the question is not whether the present facts are fundamentally similar to those in a previous case but “whether the state of the law . . . gave respondents fair warning that their alleged treatment of [the petitioner] was unconstitutional”); *Saucier v. Katz*, 533 U.S. 194, 208 (2001) (finding that in a claim of excessive force, the question is not whether force was excessive but is “what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards”); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (finding that for a right to be “clearly established,” “[t]he contours of the right must be sufficiently clear that a reasonable offic-

In *Anderson v. Creighton*, decided five years after *Harlow*, the Court explained that “the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>113</sup> With that said, the way in which the court delineates *Harlow*’s qualified-immunity standard in *Anderson* seems to shift, ever so subtly, the focus of the qualified-immunity standard. Under *Harlow*, the relevant question to determine whether the law is “clearly established” is whether or not the legal rule at issue is explicit and unambiguous.<sup>114</sup> *Anderson*, however, seems to shift the focus away from the decisiveness of the legal rule and towards the “reasonable official’s” understanding of the legality of his conduct.<sup>115</sup> As the Court explains in *Anderson*, the qualified-immunity inquiry will often require courts to consider information the defendant possessed at the time of the alleged violation.<sup>116</sup> Nevertheless, the *Anderson* Court

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er would understand that what he is doing violates that right”); *Malley v. Briggs*, 475 U.S. 335 (1986) (applying the standard of objective reasonableness to determine whether an officer whose warrant request allegedly caused an unconstitutional arrest should be afforded qualified immunity); *Davis v. Scherer*, 468 U.S. 183, 194 (1984) (considering whether an official is entitled to qualified immunity when his conduct violates “some statutory or administrative provision”); Gary S. Gildin, *The Standard of Culpability in Section 1983 Bivens Actions: The Prima Facie Case, Qualified Immunity, and the Constitution*, 11 HOFSTRA L. REV. 557, 589–94 (1983) (discussing contradictions inherent in the Supreme Court’s subjective approach to the objective inquiry into reasonableness of a defendant’s conduct); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 605–06 n.41 (1989) (identifying questions regarding the definition of “clearly established law”).

<sup>113</sup> 483 U.S. 635, 640 (1987).

<sup>114</sup> See *Harlow*, 457 U.S. at 818 (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”). After *Harlow*, it is relatively clear that an official will be granted qualified immunity when the defendant has violated a “new” constitutional rule. *Id.*

<sup>115</sup> See *Anderson*, 483 U.S. at 640. One might argue that the opinion merely instructs courts to avoid framing the qualified-immunity inquiry in a generalized manner. Nevertheless, to achieve this, courts must consider the information the defendant possessed at the time of the alleged conduct. Thus, even if the Court’s *aim* was not to require courts to consider the clarity of the law through the eyes of defendant, this is an *effect* of the opinion.

<sup>116</sup> *Id.* at 641. The Court in *Anderson* frames the question of qualified immunity as “whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.” *Id.* (emphasis added). The defendants in *Anderson* believed that a bank robbery suspect would be found at the plaintiff’s home. *Id.* at 637. On remand, the trial court found that, “[i]f no reasonable officer, with the information Anderson possessed, could have believed that Dixon was in the Creighton home, then Anderson

warns that this “particularized” inquiry should not transform the fact finder’s objective analysis into a subjective assessment of the individual defendant’s mens rea.<sup>117</sup>

*B. Objective Versus Subjective Standards*

The *Anderson* Court mistakenly assumes there is a clear line separating objective and subjective inquiries from one another. As previously indicated in *Harlow*, the Court explicitly rejects the subjective prong of the “good faith qualified immunity analysis” in favor of an entirely objective test.<sup>118</sup> Based upon their definitions, objective standards and subjective standards seem easily distinguishable from one another.<sup>119</sup> In practice, however, the distinction between the subjective and the objective is far less clear. Thus, the Court’s admonishment to judges that qualified immunity is to remain an objective test provides little in the way of practical guidance.

Black’s Law Dictionary defines an “objective standard” as “[a] legal standard based on conduct and perceptions external to a particular person.”<sup>120</sup> In contrast, it defines a “subjective standard” as “[a] legal standard that is peculiar to a particular person and based on the

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should not be entitled to qualified immunity. *Creighton v. Anderson*, 724 F. Supp. 654, 658 (1989).

<sup>117</sup> *Anderson*, 483 U.S. at 640.

<sup>118</sup> *Harlow*, 457 U.S. 800, 816–19. The Court noted that:

[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to ‘subjective’ inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying ‘ministerial’ tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision maker’s experiences, values, and emotions. . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government. . . .

. . . We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

*Id.* at 816–18.

<sup>119</sup> *See id.* at 815 (“The objective element involves a presumptive knowledge of and respect for basic, unquestioned constitutional rights. The subjective component refers to permissible intentions.”) (internal quotations omitted).

<sup>120</sup> BLACK’S LAW DICTIONARY 671 (3d Pocket Ed. 2006).

person's individual views and experiences."<sup>121</sup> A subjective inquiry asks, for example, whether the defendant knew his conduct would deprive the plaintiff of his right to be free from an unreasonable search or seizure. In contrast, an objective inquiry asks whether a reasonable official would know that the defendant's conduct would deprive the plaintiff of his right to be free from an unreasonable search or seizure. So defined, one might place objective and subjective standards on opposite ends of a continuous spectrum. But a close examination of the Court's "reasonable official" standard for determining the availability of qualified immunity suggests that the qualified-immunity determination may not be properly categorized as either a purely objective or subjective standard.

Qualified immunity is a two-step analysis.<sup>122</sup> First, the Court must determine the applicable legal rule and, in so doing, should state the rule in "particularized," "relevant" terms.<sup>123</sup> Second, the Court must determine whether, given the established legal rule, a reasonable official would realize that the defendant's alleged conduct deprived the plaintiff of a federally protected right.<sup>124</sup> When making this second determination, a fact finder may consider "the nature of the defendant's official duties, the character of his official position, the information which was known to the defendant or not known to him, and the events which confronted him at that time."<sup>125</sup> In short, the fact finder is to determine what a reasonable official *in the defendant's situation* "would have believed about the legality of defendant's conduct."<sup>126</sup> Because the "reasonable official" analysis allows courts to

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<sup>121</sup> *Id.*

<sup>122</sup> *See Harlow*, 457 U.S. at 818 (finding that a judge may determine currently applicable law as well as whether that law was clearly established). The Court often refers to qualified immunity as a two-step inquiry. Typically, when the Court employs this language it refers to the following two questions: (1) whether the alleged conduct amounts to a constitutional violation, and (2) whether it was clearly established that this behavior was a constitutional violation. *See, e.g., Pearson v. Callahan*, 555 U.S. 223 (2009); *Saucier v. Katz*, 533 U.S. 201 (2001). This first inquiry goes to the plaintiff's case-in-chief, while the second question addresses the viability of the qualified-immunity defense. In contrast, the two-step inquiry discussed above goes solely to the viability of the qualified-immunity defense.

<sup>123</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (stating that "our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense").

<sup>124</sup> *See Harlow*, 457 U.S. at 818 (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

<sup>125</sup> *James v. Tilghman*, 194 F.R.D. 408, 430 (D. Conn. 1999).

<sup>126</sup> *Id.*

consider factors that are unique to the defendant official's situation, the test arguably has both subjective and objective elements. As Prosser and Keeton note with regards to tort law's "reasonable man:"

The conduct of the reasonable person will vary with the situation with which he is confronted. . . . Negligence is a failure to do what the reasonable person would do "under the same or similar circumstances." Under the latitude of this phrase, the courts have made allowance not only for the external facts, but sometimes for certain characteristics of the actor himself, and have applied, in some respects, a more or less subjective standard. Depending on the context, therefore, the reasonable person standard may, in fact, combine in varying measure both objective and subjective ingredients.<sup>127</sup>

The question then becomes what factors specific to the defendant's situation should be included in a qualified-immunity analysis.<sup>128</sup> More specifically, should a finding of municipal liability be a factor that courts consider when determining an individual defendant's entitlement to qualified immunity?

#### IV. KNOWLEDGE, MUNICIPAL LIABILITY, AND QUALIFIED IMMUNITY

This Part considers whether a determination that the municipality is liable may be, at least from a doctrinal perspective, a factor in courts' qualified-immunity analysis.<sup>129</sup> There are, in essence, three

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<sup>127</sup> KEETON, *supra* note 75, at § 32. The reasonable official standard employed in qualified-immunity determinations is strikingly similar to the "reasonable man" test courts often use to determine negligence.

<sup>128</sup> See Warren R. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 10 (1927) (noting the importance of ascertaining what qualities should be considered when determining whether a defendant acted reasonably or unreasonably).

Obviously, a number of factors might affect a court's qualified-immunity analysis, including whether the legal rule at issue is explicit and unambiguous. *Anderson* explains that to determine whether the legal rule is, in fact, clear, we must view the rule from the position of the defendant at the time the alleged conduct occurred. *Anderson*, 483 U.S. at 641.

Even if one rejects the argument made in the preceding paragraphs that the "clearly established law" analysis may include circumstances unique to the defendant, it is difficult to dispute that *Harlow's* qualified-immunity analysis allows consideration of "extraordinary circumstances" which tend to prove that if the defendant "neither knew nor should have known of the relevant legal standard, the defense should be sustained." *Harlow*, 457 U.S. at 818. Thus, even if courts refuse to consider facts peculiar to the defendant's situation, such as the existence of a municipal policy, which orders the conduct at issue, when determining whether the law was clearly established, these facts may still come into the qualified immunity analysis under the "extraordinary circumstances" prong. *Id.* at 818–19.

<sup>129</sup> This Part presupposes a finding that the individual defendant has deprived the plaintiff of a constitutional right. As the Court has made clear on a number of occasions, questions regarding the availability of qualified immunity should not be ad-

theories of municipal liability and, as such, three ways in which a municipality might affect an individual official's conduct. First, as in *Monell*, the municipality might promulgate a general policy that compels the official defendant to undertake illegal conduct. Second, as in *Pembaur*, a person vested with authority to make decisions on the municipality's behalf may order the defendant official to undertake illegal conduct on a single occasion. Finally, a municipality may adopt no policy or a policy that is so vague and ambiguous that an official is unsure what conduct he should undertake in a particular situation and makes a unilateral decision to engage in the conduct at issue in the case.

As noted in Part III, the primary issue in qualified-immunity determinations is whether a reasonable official would "know" that the alleged conduct was illegal. Thus, when determining whether municipal liability might form a viable basis for an individual defendant's qualified immunity, the relevant question seems to be whether the municipality's action (or inaction) affects the individual defendant's knowledge or understanding of the relevant legal rule.

This in turn would seem to depend on, among other things, the nature of the municipality's actions and the nature of the alleged constitutional deprivation. To this end, this Part considers the relationship between the basis of the municipality's liability and a reasonable official's knowledge of the illegality of the individual defendant's conduct. Section A considers the effect of formal municipal policy on the qualified-immunity defense. Section B examines whether qualified immunity is available to defendants who follow the directive of a superior when the order is not necessarily the result of formal legislative action. Finally, Section C discusses qualified-immunity determinations when the municipality has failed to train its employees and, consequently, those employees engage in conduct that deprives the plaintiff of a constitutional right.

#### A. *Qualified Immunity Based upon a General Municipal Policy*

As *Monell* makes clear, a municipality will be liable when, through a general policy, it orders municipal officials to engage in an act that deprives the plaintiff of a constitutional right.<sup>130</sup> *Dodd v. City*

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dressed until the court first determines that the alleged conduct was unlawful. See, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112, 170–71 (1988) (acknowledging that an official can bind the municipality through unconstitutional actions); *Anderson*, 483 U.S. at 640–41 (finding that the first inquiry should have been whether the defendant's search was objectively legally unreasonable).

<sup>130</sup> See *supra* notes 43–48 and accompanying text.

of *Norwich*<sup>131</sup> provides a useful example of this type of municipal liability. In *Dodd*, decedent Dwayne Dodd was shot and killed by Officer Larson during a scuffle that ensued after Officer Larson interrupted Dodd burglarizing a private residence.<sup>132</sup> The district court opinion offers the following account of the facts:

[To handcuff Dodd,] Larson ordered Dodd to place both hands in front of his head and lie with his face on the ground. . . . Dodd did not comply and remained in the position in which he had fallen [out of the window when exiting the residence]. Larson then approached [Dodd] and knelt in front of his head within one foot of him. With the gun held in his right hand, Larson placed a cuff on Dodd's left wrist. Larson then pulled the left wrist to the small of Dodd's back. Larson released the left hand and the handcuffs and reached for Dodd's right hand. Dodd then jerked forward and reached, with his right hand, for Larson's gun. Larson instinctively reacted by pulling his hand (and the gun) away from Dodd. During this scuffle,<sup>133</sup> the gun discharged and Dodd died within a few minutes.

In addition to suing Officer Larson in his individual capacity, the plaintiff, Dodd's mother, sued the City of Norwich.<sup>134</sup> She alleged that the city's policy instructed police officers "to keep [their] gun out, aimed at the suspect, while attempting to apply handcuffs, and that when Officer Larson did so here he was acting in accordance with the policy of the city's police department."<sup>135</sup>

Where, as here, there is no question that the officer was following the municipality's official policy, the dispositive issue is simply whether the use of force applied in this case violated the Fourth Amendment's reasonableness requirements.<sup>136</sup> Arguably, it was unreasonable for Officer Larson to keep his gun aimed at Dodson when attempting to handcuff him, but in so doing, Officer Larson was complying with municipal policy. As such, it would seem that the municipality caused the alleged Fourth Amendment violation.<sup>137</sup>

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<sup>131</sup> 827 F.2d 1 (2d Cir. 1987).

<sup>132</sup> *Id.* at 2–3.

<sup>133</sup> *Id.* at 3.

<sup>134</sup> *Id.* at 2.

<sup>135</sup> *Id.* at 5.

<sup>136</sup> See *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (holding that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead," and concluding that, "[t]he Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects").

<sup>137</sup> See *Dodd v. City of Norwich*, 815 F.2d 862, 6 (2d Cir. 1987), *vacated* 827 F.2d 1 (2d Cir. 1987). It is, however, useful to note that while the policy may have caused the Fourth Amendment violation, it is less clear that the policy caused Dodd's death.

Reasoning that the municipality, through its policy, may have caused the shooting, the Second Circuit remanded the case to the district court for further consideration.<sup>138</sup> In so doing, the court issued the following instructions: “In considering Larson’s possible personal liability under the Fourth Amendment, the district court should also consider whether he is entitled to a qualified good-faith immunity based on his following the policy and training of the police department in keeping his gun unholstered while attempting to place handcuffs on Dodd.”<sup>139</sup> This instruction clearly suggests that, at least in the Second Circuit, a government official may be entitled to qualified immunity when he follows municipal policy and, in so doing, deprives another of a constitutional right. Implicitly, this supports the argument made in Part III that qualified-immunity analysis does not simply concern the specificity or ambiguity of the legal rule at issue but includes those facts and circumstances unique to the individual defendant.<sup>140</sup>

The Second Circuit, however, fails to explain *why* a defendant who follows municipal policy may be entitled to qualified immunity based upon this compliance.<sup>141</sup> As discussed more extensively in Part III, the qualified-immunity inquiry asks whether the law at issue was clearly established at the time of the alleged injury or, stated slightly differently, whether a reasonable official in the defendant’s position would have known the defendant’s conduct to be illegal.<sup>142</sup> It seems presumptuous, however, to assume that an official would not realize the conduct in which he has been instructed to engage is unconstitutional simply because municipal policy tells him to do it.<sup>143</sup>

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Arguably, the Fourth Amendment violation occurred when Officer Larson unreasonably aimed his gun at Dodd when attempting to handcuff him. Nevertheless, to prevail there must be a causal connection between the defendant’s constitutional violation and the plaintiff’s injury. See, Teresa E. Ravenell, *Cause and Conviction: The Role of Causation in Section 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 709–10 (2008). An astute attorney would argue that Dodd’s decision to reach for the gun was an intervening cause, and therefore, one cannot fairly conclude that the municipal policy *caused* Dodd’s death.

<sup>138</sup> See *Dodd*, 827 F.2d at 4.

<sup>139</sup> *Id.*

<sup>140</sup> See *supra* notes 112–28 and accompanying text.

<sup>141</sup> See *Dodd*, 827 F.2d at 1. Obviously, Officer Larson’s qualified-immunity defense need not depend on his compliance with an official municipal policy. For example, absent a judicial opinion holding that behavior similar to that of the defendant constituted a violation of the Fourth Amendment, the law is not “clearly established.”

<sup>142</sup> See *supra* notes 110–26 and accompanying text.

<sup>143</sup> As every child knows, “she told me to do it” or “everyone else was doing it” is rarely an excuse for bad behavior.

One can imagine a hypothetical situation where a municipal policy might instruct an official to behave in a manner that is clearly unconstitutional—for example, where the municipal policy instructs its officers to stop only African-American motorists for speeding.<sup>144</sup> For reasons further explored in Part V, it would seem that a government official should be denied qualified immunity even if he has followed municipal policy because a reasonable official should know this conduct to be in violation of the Fourteenth Amendment Equal Protection Clause.<sup>145</sup>

*B. Qualified Immunity Based upon an Unwritten Policy or a Command from a Superior Official*

A slightly different situation emerges when a policy-making official orders another to engage in conduct that violates the Constitution. As discussed at greater length in Part II, municipal liability may be deemed the “cause” of a constitutional deprivation when a “policy-making” official issues a command or decision that, when carried out, results in a constitutional deprivation.<sup>146</sup> A separate, but related, question is whether the individual official who carries out the order is also liable for the plaintiff’s injury or whether he is entitled to qualified immunity and thus shielded from liability. The aim of this section, however, is to consider whether the qualified-immunity defense may be premised on the argument that the defendant was complying with a superior’s order.

Given the multi-tiered bureaucratic structure of most municipalities, it is exceedingly difficult to identify cases in which the defendant’s qualified-immunity defense is premised on the argument that he was obeying the commands of a *policy-making* superior. Often, when a low-level official alleges that a superior ordered him to engage in the conduct, the superior lacks the authority necessary to

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<sup>144</sup> See Armacost, *supra* note 111, at 636 (categorizing racial discrimination as “inherently wrongful conduct”).

<sup>145</sup> See *id.* Professor Armacost observes the following regarding racial discrimination and qualified immunity:

Today there is widespread legal and societal consensus that government-sanctioned, intentional racial discrimination is bad behavior. When governmental officials make invidious distinctions based on race, no one pauses to ask whether they had notice of the rules governing their conduct. . . . In Fourteenth Amendment discrimination cases, courts routinely presume knowledge of the law—and deny qualified immunity—based on precisely that reasoning.

*Id.* at 635–36.

<sup>146</sup> See *supra* notes 56–59 and accompanying text.

trigger municipal liability.<sup>147</sup> Additionally, a defendant who is in a supervisory position, but who nevertheless is without policy-making authority, may argue that he was entitled to qualified immunity because he was obeying municipal policy established by another person or persons.<sup>148</sup> As the diagram in Part II illustrates, supervisors often separate street-level officials from those who are vested with the authority to promulgate policy.<sup>149</sup> Accordingly, a supervisor may allege that he is entitled to qualified immunity because he followed the directives of a person vested with final policy-making authority.<sup>150</sup> Street-level officials, however, as a result of their position in the bureaucratic structure, will seldom allege that they are entitled to qualified immunity because they complied with a policymaker's directive.<sup>151</sup> Instead, they are more likely to allege that they are entitled to qualified immunity because they followed a *supervisor's* directive.<sup>152</sup> Again, this is simply a practical result of the distribution of power in municipal structures—when policies are unwritten, a street-level official is more likely to receive his commands from a mid-level or supervisory official than from an official with final policy-making authority.<sup>153</sup>

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<sup>147</sup> See *supra* notes 49–64 and accompanying text (discussing *Pembaur*, *Praprotnik*, and municipal liability premised upon a decision or policy promulgated by the person with final policy-making authority).

<sup>148</sup> For example, under the municipal charter the chief of police may be charged with establishing the circumstances under which non-lethal force may be used against crowds. To ensure proper enforcement of this, and other policies, the chief of police may appoint several shift supervisors, who, in turn, oversee and command many “average” officers. To take this one step further, “average” officers may be further subdivided based upon seniority with veteran officers monitoring the behavior of novice officers. See WILLIAM J. BOPP, *POLICE PERSONNEL ADMINISTRATION* 22–31 (1974).

<sup>149</sup> See diagram *supra* Part II.C.

<sup>150</sup> BOPP, *supra* note 148, at 25 (“Orthodox theory holds that the chief [of police] must articulate, publish, and disseminate throughout the agency written directives that limit the exercise of discretion by [subordinate] officers in the field.”)

<sup>151</sup> See *infra* note 148 (discussing the chain of command in police organizations).

<sup>152</sup> See *infra* note 148 (discussing the chain of command in police organizations).

<sup>153</sup> See BOPP, *supra* note 148, at 24 (explaining the chain of command in formal police structure, noting that a patrolman will rarely communicate directly with the chief regarding the department; rather, messages travel up and down the chain of command). Bopp notes:

An important element of the formal police structure is *chain of command*. Protocol dictates that normal communication, either upward or downward, pass from the originator to the next man in the hierarchical structure, where it is eventually forwarded to the appropriate party. It is rare that a patrolman will communicate directly with his chief about department business. Instead, the message will usually go to the officer's sergeant, then to the lieutenant, on to the captain, and up the py-

The qualified-immunity analysis is essentially the same regardless of whether the defendant seeking immunity is a supervisor or subordinate. In each, the relevant question is whether a reasonable official in the defendant's position would understand the defendant's alleged conduct to be illegal. If compliance with a municipal order or directive alone is to form the basis for the qualified-immunity defense, then even in those cases where a mid-level supervisor separates a street-level official from a final policy-making official, both the supervisor and the subordinate official should be entitled to qualified immunity so long as each obeys the order of its commanding officer.

Nevertheless, an examination of those scenarios just described suggests that this hypothesis is not correct. Instead, courts seem more inclined to grant lower-level officials qualified immunity than they are to grant the defense to mid-level supervisory officials.<sup>154</sup> This is despite the fact that both are following municipal policy or the commands of those who are acting on the municipalities' behalf.

*Rauen v. City of Miami* reveals how questions of municipal liability, supervisory liability, and qualified immunity might affect one another.<sup>155</sup> The plaintiffs in *Rauen* alleged that in November 2003, while peacefully protesting the Fair Trade of the Americas Agreement (FTAA), they were injured by police officers.<sup>156</sup> The named individual defendants were all police supervisors in Miami and surrounding areas who were present when the plaintiffs were allegedly deprived of their First and Fourth Amendment rights.<sup>157</sup> The plaintiffs' complaint included the following allegations: (1) the municipalities for whom the defendants worked were liable because the named individual defendants were acting in a supervisory capacity and had

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ramid, until it reaches the chief, who may draft his reply and forward it downward along the same route.

*Id.*

<sup>154</sup> See, e.g., *Hegarty v. Somerset County*, 53 F.3d 1367, 1380 (1995) (noting that "[t]he determination that a subordinate law enforcement officer is entitled to qualified immunity from suit under section 1983 is not necessarily dispositive of the supervisor's immunity claim").

<sup>155</sup> No. 06-21182-CIV, 2007 WL 686609 (S.D. Fla. March 2, 2007).

<sup>156</sup> See *id.* at \*1.

<sup>157</sup> "Rauen was caught behind the police line and was shot from point-blank range with shotgun-based projectiles and rubber bullets." *Id.* at \*2.

Hartman was engaged in a prayer vigil on the east side of Biscayne Boulevard. As the police line moved forward, it approached Hartman, who was praying in the lotus position. Hartman was shot multiple times with less lethal weapons in the head, back, and legs, and was seriously injured by a shot to the head.

*Id.* at \*3 (internal citations omitted).

final policy-making authority; (2) the individual defendants were personally liable as supervisors “for directing unlawful acts;”<sup>158</sup> and (3) the individual defendants were personally liable for “failure to intervene” to prevent the deprivation of plaintiffs’ Fourth Amendment rights.<sup>159</sup>

In response, the defendants filed a motion to dismiss arguing, *inter alia*, that they were entitled to qualified immunity because they were merely following their superiors’ orders.<sup>160</sup> The court offered the following observations regarding their qualified-immunity argument:

Officers following the orders of their superiors are entitled to qualified immunity unless they “acted unreasonably in following [their superior’s] lead, or . . . they knew or should have known that their conduct might result in a violation of the plaintiff’s rights.” Qualified immunity has been afforded to officers following superiors’ orders where, for example, an officer is ordered to search a person previously questioned by the officer’s superior (such that the officer reasonably believes that there is individualized suspicion supporting the search).

This case is not a case of that type. The Individual Defendants asserting this argument here had no reason to believe that an order from high-ranking Miami police officers to suppress legal protest on a wholesale basis with allegedly no justification would not result in a violation of clearly established federal law. Thus, the Individual Defendants who have asserted this argument are not

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<sup>158</sup> *Id.* at \*16. The court notes the following about § 1983 liability for supervisors: Government supervisors may be held liable for constitutional violations committed by their subordinates when either “the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional violation.” *Braddy v. Florida Dep’t of Labor & Empl. Sec.*, 133 F.3d 797, 802 (11th Cir. 1998) (quoting *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990)) (internal quotation marks omitted). A causal connection may be established by showing either that the supervisor “directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.” *Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir. 2003).

*Id.*

<sup>159</sup> *Id.* The plaintiffs did not allege that the defendant supervisors actually inflicted any of the injuries nor did the plaintiffs sue any “street-level” officials. *Id.* at \*4. As the court noted, however, “the officers involved in the events giving rise to Plaintiffs’ claims dressed in identical riot gear uniforms with the word ‘police’ on them, covered their faces with face shields, and failed to identify any agency or personal identification on their uniforms.” *Id.* Consequently, absent discovery, “Plaintiffs are unable to identify the specific officers who inflicted their injuries or the police force(s) of which those officers were members.” *Id.*

<sup>160</sup> *See id.* at \*20–21 (internal citations omitted).

entitled to qualified immunity on the basis that they were following orders.<sup>161</sup>

According to the court, where, as in *Rauen*, a defendant has been provided a general rule to be applied without regard to the particular circumstances of the persons who they encounter, the defendant's belief that his conduct will always be constitutional is unreasonable, and accordingly, the defendant is not entitled to qualified immunity based upon his carte blanche application of municipal policy.<sup>162</sup> Rather, the court seems to suggest that whether a reasonable officer would understand the legality of his conduct would depend upon more particularized instructions.<sup>163</sup>

*Rauen* cites to *Brent v. Ashley* as a situation in which a defendant is entitled to qualified immunity despite the illegality of his conduct because he followed a superior's orders.<sup>164</sup> In *Brent*, the plaintiff, Rhonda Brent, alleged that defendants, customs inspectors at Miami International Airport, deprived her of her Fourth Amendment right to be free from unreasonable search and seizure when they stopped her and forced her to undergo a strip search and x-ray examination.<sup>165</sup> Plaintiff sued several defendants who participated, in varying degrees, in her detention and search.<sup>166</sup> Interestingly, the court in *Brent* di-

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<sup>161</sup> *Rauen v. City of Miami*, No. 06-21182-CIV, 2007 WL 686609, at \*20–21 (S.D. Fla. March 2, 2007) (internal citations omitted).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at \*20 (citing *Brent v. Ashley* 247 F.3d 1294, 1306 (11th Cir. 2001)).

<sup>165</sup> *Brent*, 247 F.3d at 1297–98. While describing the procedures as a “strip search” and an “x-ray examination” may be accurate, it does not adequately convey the invasiveness of the defendants' actions. The Court detailed the events as follows:

The body pat-down and strip search, conducted by Blair and witnessed by Ashley and Dellane, consisted of touching Brent's crotch area, ordering her to pull down her clothes, removing and examining her sanitary napkin, squeezing her abdomen from the pubis to thorax, and monitoring her responsive reactions. The search revealed none of the typical indicators of internal drug smuggling. There was no rigid or distended abdomen, no girdle to hold up the abdomen, no synthetic lubricants, and no contraband could be seen in her body cavities. After the strip search, Brent asked if she could use the bathroom. She was allowed to use the bathroom, but was watched closely by the female agents and told not to flush the toilet. After she had gone to the bathroom, the agents examined Brent's urine for signs of contraband. None were found. . . . Although the pat-down, strip search, and electronic record search revealed nothing, Ellis and Schor nonetheless decided that an x-ray and pelvic examination at the hospital should be performed.

*Id.* at 1298.

<sup>166</sup> *See id.*

vided the defendants into two categories: (1) subordinates and (2) supervisors.<sup>167</sup> The court held that defendants occupying supervisory positions were not entitled to qualified immunity because “a reasonable customs agent at the time of the incident would have known that a strip search under the facts of this case was a violation of [plaintiff] Brent’s Fourth Amendment rights.”<sup>168</sup> And while the court noted that “following orders does not immunize government agents from civil rights liability,” it nevertheless held that those defendants who were in subordinate positions were entitled to qualified immunity because “[e]ach of these individuals acted at the order of a superior and the record reflects no reason why any of them should question the validity of that order.”<sup>169</sup>

*Brent* demonstrates how some courts have “personalized” the qualified-immunity analysis. Were qualified immunity simply dependent on the clarity of the legal rule at the time of the defendant’s alleged conduct, then it should matter little whether a particular defendant was a supervisor ordering another to engage in the conduct or a subordinate complying with those orders. This is clearly not the approach the court adopts. Instead the court considers the relative position of each defendant and whether he or she had reason to “question the validity of [the] order” based upon the facts and circumstances relative to each individual subordinate defendant.<sup>170</sup> Thus, the court might have worded the qualified-immunity inquiry as follows: “whether a reasonable official who has been instructed by his superior to conduct a strip search of a person who has been questioned and detained by said superior would realize the illegality of his conduct.” In the end, the opinion seems to suggest that none of the subordinate officials had sufficient information to realize that the search was illegal and that none of them had reason or responsibility

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<sup>167</sup> *Id.* at 1303, 1305.

<sup>168</sup> *Id.* at 1304–05.

<sup>169</sup> *Id.* at 1305–06. More specifically, the court noted that the subordinates, who were entitled to qualified immunity, had engaged in the following acts:

Grim merely inspected [another passenger] and had no contact with Brent. Pietri, under orders of Schor, asked Brent a few routine questions, obtained her documents and walked her to the secondary examination area. Dellane, on orders of Schor and Ellis, witnessed the strip search, traveled with Brent to the hospital, and returned with her to the airport. Ashley, on orders of Schor and Ellis, witnessed the strip search. Williams, on orders of Schor and Ellis, took Brent to the x-ray room, and arranged her return to the airport. Sanchez-Blair, at the direction of Schor and Ellis, conducted the strip search.

*Id.* at 1306.

<sup>170</sup> *Id.*

to question the legality of the search.<sup>171</sup> In other words, the court seems to suggest that because the subordinates' *reliance* on their superiors' orders was reasonable, they are entitled to qualified immunity.<sup>172</sup> It is, however, equally important to note that the court refused to grant qualified immunity to those defendants who were acting in a supervisory capacity.<sup>173</sup> As discussed in greater detail in Part V, the distinction courts have made between subordinates and supervisors and the effect of municipal policies or directives on qualified-immunity analyses have important implications regarding the role of responsibility in bureaucratic structures and § 1983 litigation.

C. *Qualified Immunity Based upon Municipal Inaction*

The previous two subsections consider how municipal policies or directives might factor into qualified-immunity determinations. As noted in Part III, a municipality may also be liable for failing to train its officials. This theory of municipal liability differs from the two previously discussed theories in an important respect—here, the municipality is not liable for directing its officials to engage in conduct that results in a constitutional deprivation; instead, the municipality is liable for its decision not to adopt a new or different policy. In other words, municipal liability stems from a failure to instruct officials to act differently when confronted with circumstances similar to those giving rise to the plaintiff's alleged constitutional deprivation. Consequently, a defendant cannot properly claim that he is entitled to qualified immunity because he reasonably relied upon municipal policy or orders.<sup>174</sup> Instead, the relevant inquiry would seem to be whether a reasonable official, absent additional or different instruc-

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<sup>171</sup> See *Brent v. Ashley*, 247 F.3d 1294, 1306 (11th Cir. 2001) ("Each of these individuals acted at the order of a superior and the record reflects no reason why any of them should question the validity of that order.")

<sup>172</sup> *Id.*

<sup>173</sup> See *id.* at 1305.

<sup>174</sup> Or, to use *Harlow* and *Anderson*'s analytical framework—whether a reasonable official who acts pursuant to municipal policy or the instructions of a municipal official with final policy-making authority would realize the illegality of the defendant's alleged conduct. See *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." (internal quotations omitted)); *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982) ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.")

tions or training than those the defendant received, would realize the illegality of the defendant's alleged conduct.

As mentioned at the outset of this piece, few courts have considered how a municipal liability finding might affect whether an individual defendant is entitled to qualified immunity.<sup>175</sup> Most judicial opinions that do discuss both focus on how a finding that an individual defendant is entitled to qualified immunity affects municipal liability.<sup>176</sup> This Article, however, reverses the question and asks how municipal liability should affect qualified immunity.

*Snyder v. Trepagnier* is one of the few published opinions discussing, albeit briefly, how a determination of municipal liability might affect a qualified-immunity determination.<sup>177</sup> The plaintiff, Snyder, alleged that Trepagnier, a police officer employed by the city of New Orleans, shot him in the back when he "was unarmed, stuck in the mud to his knees, and offering no resistance whatsoever."<sup>178</sup> The plaintiff also claimed that the city of New Orleans was liable because it "failed to train officers in stress management and did not put in place an 'early warning system' that would signal when stressed offic-

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<sup>175</sup> There are a number of reasons why courts might not address these two questions in a single opinion. The most apparent of which is that courts seldom find that municipalities *are* liable. See Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 564 (1993) (discussing that finding a police officer liable will rarely require the municipality to defend a policy, and noting that litigants often prefer not to implicate the municipality after an individual, because the municipality will only bring nominal damages due to the "weighty burden of proof"); see also Gerald P. Krause, *Municipal Liability: The Failure to Provide Adequate Police Protection—The Special Duty Doctrine Should Be Discarded*, 1984 WIS. L. REV. 499, 508 (1984) (explaining that courts seldom hold municipalities liable for their failure to provide adequate police protection); Eric H. Zagrans, "Under Color of" *What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 449, 577 (1985) (discussing that the result of the reinterpretation of direct municipal liability results in the city rarely being found directly liable). Consequently, they have no occasion to consider how a finding of municipal liability might affect the availability of qualified immunity.

<sup>176</sup> See, e.g., *Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997) ("[O]ur rationale here for granting qualified immunity to the officers—that the unsettled state of the law made it reasonable to believe the conduct in this case constitutional—also precludes municipal liability."); *Williamson v. City of Virginia Beach*, 786 F. Supp. 1238, 1265 (E.D. Va. 1992) ("[T]he conclusion that [constitutional rights] were not clearly established negates the proposition that the city acted with deliberate indifference."); *Watson v. Sexton*, 755 F. Supp. 583, 588 (S.D.N.Y. 1991) (finding no municipal liability where the constitutional right was not clearly established at the time of the alleged conduct—municipal liability for failure to train requires deliberate indifference to a clearly established right).

<sup>177</sup> 142 F.3d 791, 800–01 (5th Cir. 1998).

<sup>178</sup> *Id.* at 794 n.1.

ers were about to crack.”<sup>179</sup> At trial, the jury found that defendant Officer Trepagnier “had violated Snyder’s constitutional rights but was protected by qualified immunity” and found “the city liable on the ground that the constitutional deprivation was caused by a municipal custom or policy.”<sup>180</sup> The trial judge reconciled these findings as follows:

The city violated § 1983 by failing to enact a stress management program. This failure created a group of overstressed police officers, one of whom was Trepagnier. Accordingly, when Trepagnier shot Snyder, he was behaving reasonably—“as an improperly trained, over-worked and overly stressed officer would be expected to act under those circumstances.”<sup>181</sup>

This inquiry differs from those discussed in Parts A and B in an important respect. All three inquiries have a “subjective” element or tone to them. Nevertheless, in the prior examples, the facts the court considered were external to the defendant. In other words, the cases involved factual information and municipal rules known by the officers at the time of the alleged action. The inquiry in *Trepagnier* is markedly different because it considers the officer’s mental and cognitive deficiencies and grants the officer qualified immunity on that basis because, arguably, these deficiencies were the result of municipal “policy.”

#### V. QUALIFIED IMMUNITY, HIERARCHY, AND BUREAUCRACY

As Part IV demonstrates, courts have allowed municipal liability to factor into qualified-immunity determinations regardless of whether municipal liability was premised on a formal policy, a decision by a person with final policy-making authority, or municipal inaction. One explanation for this is that a finding of municipal liability necessarily means that the municipality “caused” the plaintiff to be deprived of a federally protected right. From this, one might posit that if the municipality caused the harm, then the individual defendant is not to blame and, accordingly, should be afforded qualified immunity.

This argument, however, relies upon the flawed assumption that one’s understanding of fault or blame necessarily correlates with the qualified-immunity defense. As discussed in the beginning of Part III, under the current qualified immunity standard, the defense only incorporates blame to the extent that one is blameworthy when he vi-

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<sup>179</sup> *Id.* at 794.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 795 n.3.

olates clearly established law, of which, a reasonable official would be aware. Furthermore, this argument ignores the more nuanced approach courts have taken in distinguishing between supervisory government officials and lower-level officials when making qualified-immunity determinations. If municipal liability or obedience to municipal directives alone were the basis of qualified immunity, then everyone who complied with the order (regardless of whether they received the order directly or indirectly) should be granted qualified immunity.

As suggested in Part IV.B, courts appear more willing to grant lower-level officials qualified immunity than they are to grant it to supervisory or mid-level officials. Thus, the question becomes, what explains this apparent disparity between the treatment of supervisory or higher-level officials and street-level officials? This Part offers one explanation for this disparate treatment of lower-level officials and their superiors. Up until this point, this Article has used the bureaucratic structure as a way to explain the Supreme Court's approach to assigning municipal liability. Part V, however, suggests that this structure is also useful in understanding the courts' approach to qualified immunity. More specifically, this Article asserts that the nearer a defendant is to the top of the bureaucratic structure, the less likely it is that the defendant will be granted qualified immunity. Nevertheless, this Article concludes that neither municipal liability nor the defendant's position within the bureaucratic structure should form the basis of a qualified-immunity defense when the legal rule is unambiguous.

The bureaucratic structure is a useful model for understanding the availability of the qualified-immunity defense. As indicated in the diagram in Part II.C, the municipality is at the top of the power structure. In *Owen v. City of Independence*, the Court emphatically held that municipalities are not entitled to qualified immunity.<sup>182</sup> Explaining its conclusion, the Court not only noted the importance of compensating victims and deterring constitutional violations but also the unique role of the municipality in ensuring compliance with federal constitutional standards.<sup>183</sup> Specifically, the Court stated:

How "uniquely amiss" it would be . . . if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of

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<sup>182</sup> 445 U.S. 622, 638 (1980).

<sup>183</sup> *Id.* at 651.

worthy norms and goals for social conduct”—were permitted to disavow liability for the injury it has begotten.<sup>184</sup>

The Court goes on to make clear that government officials should be afforded qualified immunity as protection against *personal* liability.<sup>185</sup>

Thus, qualified immunity jurisprudence makes a distinction between suing a municipality or a person with final policy-making authority in an official capacity, which is tantamount to suing the municipality, and suing a government official in his individual or private capacity.<sup>186</sup>

Viewed in terms of the municipal structure, when one reaches the highest echelon of municipal power—the municipal entity—the qualified-immunity defense is unavailable. Any official who is sued in an individual or personal capacity (i.e., any official who falls below this level in the municipal power structure) may *plead* the qualified-immunity defense. In both *Rauen* and *Brent*, the courts denied supervisory officials qualified immunity but suggested that lower-level officials, who were following the directives of the supervisory officials, would be entitled to the defense.<sup>187</sup> But to simply conclude that higher-level officials should be denied qualified immunity and street-level officials should be granted qualified immunity would be an oversimplification. Reliance upon municipal policy coupled with one's position within the municipal structure, however, *can* explain why courts are less willing to grant qualified immunity to supervisory officials than they are to street-level officials.

*Harlow* and *Anderson* make clear that a government official should be granted qualified immunity when a reasonable official in the defendant's position would not know that the defendant's conduct was illegal.<sup>188</sup> As Part III argues, this reasonableness standard allows courts to “personalize” the inquiry and factor circumstances unique to the defendant into the analysis to determine whether a reasonable official in the defendant's position would know the illegal nature of the defendant's conduct. Thus, just as courts may factor in municipal policies, directives, or inaction into this inquiry, they might

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<sup>184</sup> *Id.* (quoting *Adickes v. Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring in part)).

<sup>185</sup> *Id.* at 653.

<sup>186</sup> *Id.* at 653 n.37 (discussing occasions in which the Supreme Court has expressly recognized the differences between governmental liability and personal liability; for example). “The Court thus acknowledged that imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from public funds.” *Id.*

<sup>187</sup> See *supra* notes 155–69 and accompanying text.

<sup>188</sup> See *supra* note 108 and accompanying text.

also consider the defendant's position within the bureaucratic structure. Furthermore, one might argue that higher-ranking officials should "know more" than their subordinates and be better equipped to determine the legality of their behavior. So understood, "the reasonable official" standard may be viewed as a sliding scale in which higher officials are placed on one end of the scale where the expectations are higher, and lower-level officials are placed at the opposite end.

From a practical perspective, the assumption that higher-level officials are necessarily better positioned to "know more" than their subordinates seems flawed. To truly consider whether qualified immunity should depend upon compliance with municipal policy and/or a government official's position within the bureaucratic structure, it is important to consider carefully the nature of the information and our expectations of the reasonable official. There are three relevant categories of knowledge: (1) knowledge of the facts necessary to assess whether a particular action is constitutional, (2) knowledge of the relevant legal rule, and (3) the cognitive abilities of officials to apply the law to the facts with which they are confronted.

In some circumstances, the assumption that higher-ranking officials may be privy to facts that lower-level officials do not know and, accordingly, are in a better position to understand the illegal nature of the conduct or directive in question, may be warranted. For example, the court in *Brent* seems to indicate that where subordinate officials lack knowledge of all the facts surrounding a supervisor's decision to strip search the plaintiff, they had "no reason . . . [to] question the validity of the order" to know that the search was unreasonable and therefore unlawful.<sup>189</sup> In contrast, the superiors who were privy to more information than their subordinates were denied qualified immunity.<sup>190</sup>

Nevertheless, it will not always follow that positions of superiority result in superior access to factual information. Regardless of whether information begins at the bottom of the bureaucratic structure and is intended to travel to those at the top of municipal government or information begins at the top of the structure and is intended to travel to lower-level officials, information is likely to be lost in transmission. As such, from a practical standpoint, it would seem illogical to assume that a person at the top of the bureaucratic structure has the same factual information as a person at the bottom. When making

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<sup>189</sup> *Brent v. Ashley*, 247 F.3d 1294, 1306 (11th Cir. 2001).

<sup>190</sup> *Id.* at 1305.

qualified-immunity determinations, one should not simply consider a person's position within the bureaucratic structure; it is also important to consider from where the factual information originated. In some circumstances, where the information originates may be more important than one's position in the bureaucratic structure. With that said, when one's position affects his access to *factual* information, it should also affect the availability of the qualified-immunity defense.<sup>191</sup>

This outcome, however, seems more problematic when the information at issue is a legal rule or holding. As Schuck suggests, it very well may be that announcements regarding changes in the law trickle down from courts to legislators and policy makers and through the various layers of the bureaucratic structure.<sup>192</sup> It does not necessarily follow that this should factor into the qualified-immunity analysis. To apply a sliding scale in this context is to suggest that street-level officials have less of an obligation to know and properly apply the law than do their superiors.<sup>193</sup> In other words, if all officials are expected to be aware of the legal rules that govern their behavior then qualified immunity should not allow for ignorance of the law based upon one's subordinate position in the government.

## VI. CONCLUSION

Many, if not most, would agree that every government official should know the law they have assumed the responsibility of enforcing, regardless of her position within the government.<sup>194</sup> Nevertheless, to some it may seem unjust to hold an official liable when the municipality for which he works has misinformed or failed to inform him of the law and, from this, one might argue that the defendant should be granted qualified immunity. Ideally, municipalities adopt

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<sup>191</sup> Nevertheless, this does not necessarily suggest that higher-ranking officials are better positioned to "know more" than lower level officials nor does it to suggest that street-level officials are entitled qualified immunity when they intentionally avoid factual information that would indicate the unlawfulness of their conduct.

<sup>192</sup> See SCHUCK, *supra* note 5, at 4–5.

<sup>193</sup> Because street-level officials are more likely to interact with civilians one can argue it is equally, if not more, important that they are aware of the legal limits of their behavior.

<sup>194</sup> "The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'" Harlow v. Fitzgerald, 457 U.S. 800, 814 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

policies and issue directives to minimize the likelihood that their employees will violate the constitution.<sup>195</sup>

Unfortunately, some constitutional violations are inevitable and, from an instrumental perspective, qualified immunity is intended to balance competing interests in our less than ideal world.<sup>196</sup> In *Harlow*, the Court described the balance achieved by an objective qualified immunity test as follows:

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."<sup>197</sup>

Denying government officials qualified immunity when the applicable legal rule is unambiguous gives officials an incentive to know the law. To lower the objective "reasonable official" standard to account for municipal misdirection and inaction is to move the justice system further from its ideal state, one where constitutional violations do not occur.<sup>198</sup>

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<sup>195</sup> See *Malley v. Briggs*, 475 U.S. 335, 353 n.9 (1986) (Powell, J., concurring) ("It is of course true that actions by police must comport with the Constitution. Police departments and prosecutors have an obligation to instill this understanding in officers, and to discipline those found to have violated the Constitution.").

Yet, even with the best training, constitutional violations will occur because some government officials will act in bad faith and because, despite the best efforts to counsel employees regarding their constitutional obligations, officials will be faced with novel factual situations where, based upon the current case law, it is unclear whether their conduct violates the constitution. Nevertheless, if the aim of § 1983 is to prevent, and not merely to compensate or deter constitutional violations, then it may be prudent to give municipalities an incentive to provide their employees training and directives. This, however, is beyond the scope of this Article and may be addressed by the author in a future piece.

<sup>196</sup> *Harlow*, 457 U.S. at 819.

<sup>197</sup> *Id.* (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

<sup>198</sup> Seemingly, the question remains whether officials should be granted some form of *good-faith* immunity when they have relied upon municipal directives. See *Anderson v. Creighton*, 483 U.S. 635, 653 (1987) ("The strength of the reasonable good-faith defense in any specific case would, of course, vary with the trial evidence about the facts upon which the officer had relied when he made the challenged search or arrest"). See also *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir.

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1991). The circuit's standard for applying an objective-reasonableness test to a defense of qualified immunity precludes the use of a subjective good-faith determination and requires: (1) defendant public official must prove that his actions were within the scope of discretionary authority when the allegedly unconstitutional act occurred, and (2) plaintiff must then prove the lack of good faith on the part of the defendant. *Id.*; P.C. v. McLaughlin, 913 F.2d 1033, 1039 (2d Cir. 1990) (explaining qualified or good-faith immunity may still be available as a defense to the defendant official whose actions were objectively reasonable to lead to the belief that such acts did not violate plaintiff's clearly established rights); Rich v. Dollar, 841 F.2d 1558, 1563 (11th Cir. 1988) (acknowledging the good-faith defense for a § 1983 public official defendant and discussing *Harlow's* objective test as a remedy for the lower court's difficulty at summary judgment); Robinson v. City of San Bernardino Police Dep't, 992 F. Supp. 1198, 1207 (C.D. Cal. 1998) (noting that the good-faith defense is available to private persons acting under the color of state law in § 1983 actions); Armacost, *supra* note 111, at 625 (discussing that if law did not clearly prohibit defendant's conduct and a reasonable official acting in good faith would have acted in the same fashion, then the defendant is not blameworthy); Martin A. Schwartz, *Section 1983 in the Second Circuit*, 59 BROOK. L. REV. 285, 289 (1993) (explaining the failure of defendant's good-faith defense because municipalities are not generally protected simply because their employees or officers acted in good faith); John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 494 (1990) (concluding that the qualified immunity standard under *Harlow* does not "remove" the requirement that the defendant public official act in good faith, instead it "establishes a conditional presumption that he did so as long as the right involved was not clearly established"); David Lagos, Note, *Damned if You Do . . . The Supreme Court Denies Qualified Immunity to Section 1983 Private Party Defendants in Wyatt v. Cole*, 71 N.C. L. REV. 849, 866-69 (1993) (discussing the evolution of the good-faith immunity defense for public officials and private § 1983 defendants).

Allowing such a defense would seem to further a government official's obedience to the commands of his superiors, which could be an important policy interest within a bureaucratic structure. This, however, is beyond the scope of the Article.