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In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies

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

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*Myriam E. Gilles**

INTRODUCTION

Legal economists are concerned with setting optimal deterrence levels. Armed with information concerning the public and private costs and benefits of a particular harmful activity, the legal economist seeks to set a "price" for the activity which, to some socially optimal extent, minimizes external costs while retaining external benefits. If the economist's information is perfect, he can predict precisely how an economically rational actor will respond to a particular price and achieve optimal deterrence of activities whose costs outweigh their benefits.

In his article, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*,[1] Professor Levinson despairs of performing this sort of optimal deterrence analysis in the area of constitutional tort litigation. First, he questions whether government actors—paradigmatically police officers—internalize the benefits of their actions, including actions which violate constitutional rights.[2] And even if they did, Levinson observes, we have no way of measuring those benefits.[3] According to Levinson, our

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* Assistant Professor, Cardozo Law School; B.A. Harvard 1993; J.D. Yale 1996. My thanks to Tom Eaton, who organized the American Association of Law Schools (AALS) Civil Rights Panel, January 5, 2001, for which this Essay was prepared, and to the Georgia Law Review for publishing this Symposium. My gratitude to my husband and best critic/editor, Gary Friedman, for helping me think through the issues presented in Daryl Levinson's provocative article, and to David Gray Carlson, Michael Herz, Richard Schragger, and Stewart Sterk for helpful comments on earlier drafts.

[1] Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). Although Professor Levinson's article also focuses on government compensation for takings under the eminent domain clause of the Fifth Amendment, this Essay is limited to a discussion of constitutional tort damages imposed against government entities and officials under civil rights statutes, such as 42 U.S.C. § 1983.

[2] *Id.* at 350-52.

[3] *Id.* at 356.

inability to quantify the value that an individual police officer might derive from aggressive (and sometimes unconstitutional) police work means we cannot possibly assign a "price" that optimally balances the external costs and benefits of constitutional violations.[4]

It gets worse. According to Professor Levinson, even the manner in which costs are internalized by governmental entities, through the imposition of constitutional tort liability, is beyond our understanding.[5] The value and meaning of money—which is the primary currency of constitutional tort remedies[6]—is very different to a bureaucrat than it is to the managers of a private firm. While Levinson acknowledges that, under most circumstances,[7] government managers would prefer to avoid incursions into their discretionary budgets,[8] he stresses that the true "coin of the realm" in government is not money, but some other unit of political capital.[9]

Not only does Levinson abandon all hope of discovering an "exchange mechanism" for translating political capital into measurable economic currency,[10] but he argues that—even if political incentives *could* be predicted or measured—agency costs unique to local government prevent the alignment of employee incentives that might otherwise allow for the establishment of optimal deterrents.[11] In other words, even if we could be confident that the imposition of constitutional tort judgments were perceived as a cost by policy level

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[4] *Id.* at 386.

[5] *Id.* at 373.

[6] *But see generally* Myriam Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (arguing that structural reform injunctions may provide more effective deterrence regime than money damages). For a discussion of the deterrent effect of non-monetary remedies for constitutional torts, see *infra* text accompanying notes 121-40.

[7] Levinson, *supra* note 1, at 382.

[8] *Id.* at 381 (citing WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971)).

[9] *Id.* at 347 ("Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay.").

[10] *Id.* (noting that "[t]he only way to predict the effects of constitutional cost remedies is to convert the financial costs they impose into political costs," but any model of government decisionmaking that may be capable of such an exchange "will be highly contextual, complex, and controversial").

[11] *Id.* at 352 (noting that "agency costs are higher in the public employment context than in the private sector, because constitutional and civil service rules constrain the discretion of policymakers to create incentives for lower level officials").

officials,[12] Levinson doubts that the conduct of street level officers could be predictably altered.[13]

The utter inapplicability of traditional law and economic models of optimal deterrence to the area of constitutional tort litigation leads Professor Levinson to conclude that "the deterrence effects of compensation on government behavior seem as likely to be perverse as beneficial."[14] In the absence of a reliable, economic understanding of the public and private costs and benefits associated with constitutionally infringing police activity, and in the further absence of a model of governmental decisionmaking that allows us to "exchang[e] economic costs and benefits into political currency,"[15] Professor Levinson concludes that the imposition of constitutional tort remedies is like throwing darts in the dark. In imposing any given damages-based remedy or remedial rule, according to Professor Levinson, we have no idea whether we are overdeterring, underdeterring or failing to deter altogether.[16] In short, we can have no confidence that government will "respond to forced financial outflows in any socially desirable, or even predictable, way."[17]

From all of his lucid and thoughtful observations concerning the inapplicability of economic modeling in the area of constitutional torts litigation, Professor Levinson draws precisely the wrong conclusion. In fact, there are tangible and salutary effects to a

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[12] *Id.* at 352-53.

> If the policymaking officials of the municipality that employs the police officer did fully internalize the social welfare gains from effective policing, then presumably they could use employment rewards and punishments . . . to bring their employees' interests in line with their own, [but] the argument that officers subject to full damages will engage in personal risk minimization strategies must ultimately rest on the assumption that municipalities *themselves* fail to capture the full benefits of aggressive police work and for that reason lack the motivation to realign the incentives of their agents.

Id.

[13] *Id.* at 353 (asking whether government managers "are drastically disabled from designing incentives for street-level officials that offset the deterrence effects of constitutional tort damages," and noting that if they are not, then these managers themselves "fail to capture the full benefits of aggressive police work and for that reason lack the motivation to realign the incentives of their agents").

[14] *Id.* at 415.

[15] *Id.* at 347.

[16] *Id.* at 373.

[17] *Id.* at 348.

constitutional damages regime, including deterrence, for which Professor Levinson's analysis fails to account. While his arguments seek to cast doubt upon the ability of a damages regime to optimally deter future constitutional violations, Professor Levinson fails to acknowledge that optimal deterrence is very different from simple deterrence. As I will argue in this Essay, there are a number of reasons to expect that the imposition of constitutional tort damage awards against individual officers or their municipal employers does have a deterrent effect on the behavior of these governmental actors and entities.

In Part I, I will focus on the ways in which the imposition of constitutional tort remedies against an individual officer does deter. While Professor Levinson decries the inability of the law and economics paradigm to explain government actors' response to constitutional tort damages, he fails to meaningfully account for the role of the qualified immunity doctrine, the most important difference between the private and public sector in this context.[18] The modern standard for qualified immunity ensures that socially beneficial infringements of constitutional rights are immunized and thus removed from the cost-benefit calculus. As I will show, the socially optimal level of police activity which is so egregious and devoid of social utility that it fails the qualified immunity test is zero. Therefore, we are liberated from the traditional concern that the imposition of constitutional tort damage remedies will overdeter desirable police activity, and are left only with the question of whether these remedies serve to deter police misconduct at all. As

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[18] The Supreme Court acknowledged the distinction between the public and private sectors when it held that private prison guards are not entitled to qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983 (1994). Richardson v. McKnight, 521 U.S. 399, 412 (1997). The Court reasoned that competitive marketplace pressures are a sufficient check on private entities: "[A] firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement... [and] a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job." *Id.* at 409. Public entities, on the other hand, are generally insulated from market pressure. *Id.* As such, the Court reasoned, qualified immunity is necessary to protect "government's ability to perform its traditional functions." *Id.* at 407-08 (quoting Wyatt v. Cole, 504 U.S. 158, 167 (1992)); *see also* Alyssa Van Duizend, Note, *Should Qualified Immunity Be Privatized?: The Effect of* Richardson v. McKnight *on Prison Privatization and the Applicability of Qualified Immunity Under 42 U.S.C. § 1983*, 30 CONN. L. REV. 1481, 1482 (1998) (arguing Court's decision in *Richardson* overstated distinction between public and privately employed correctional officers).

I will argue, there are several reasons to expect that the imposition of damages liability for non-immunized conduct serves an important deterrence function.

In Part II, I will show that constitutional tort damage remedies levied against municipalities do, in fact, alter the behavior of government policymakers in desirable ways. Just as Professor Levinson observes that government actors respond to political (rather than purely economic) incentives, I will argue that municipal liability claims are uniquely aimed at a political (rather than purely economic) pocket. In particular, non-economic informational and "fault-fixing" functions of municipal liability claims can reasonably be expected to put pressure on municipal managers to engage in reformative or preventative policy changes.

Notwithstanding my disagreement with Professor Levinson's assessment that constitutional tort remedies serve no predictable deterrent effect, I concur with the broader lesson that the current constitutional damage regime is inefficient. In this vein, I will argue in Part III that the full deterrent force of municipal liability claims remains largely untapped, for several reasons, and I will suggest ways in which this force might be unleashed. Finally, in Part IV, I will briefly discuss an important alternative or complement to constitutional tort damage remedies: structural reform injunctions. In this regard, I will explore the potential costs and benefits of such a regime, and contemplate briefly the necessary doctrinal and theoretical foundations upon which structural reform may be based.

I. THE BOUNDARIES OF QUALIFIED IMMUNITY: DETERRING "OVER-THE-LINE" POLICE MISCONDUCT

The qualified immunity doctrine shields government officials performing discretionary functions from liability for civil damages where their conduct does not violate "constitutional rights of which a reasonable person would have known."[19] In applying the doctrine of qualified immunity, courts are essentially engaged in the project of drawing a line that separates (i) police conduct which, although

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[19] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981).

possibly violative of constitutional rights, is either socially useful,[20] not terribly egregious, or both; from (ii) police misconduct which very clearly violates constitutional rights and which, at least implicitly, courts recognize as being devoid of social utility. In asking whether police actions are objectively reasonable in light of the unclear nature of the relevant constitutional law,[21] courts are measuring the challenged action against a line that is plotted on axes of egregiousness and usefulness.

When judges consider unconstitutional police actions that do not strike them as being "over-the-line"—for instance, actions that do not appear egregious, or which seem to serve important law enforcement interests—then the judges will avail themselves of the open-ended qualified immunity standard. In such situations, courts perceive a danger of overdeterring vigorous police activity[22] and, to protect against that danger, they typically find that the relevant constitutional rule, identified at a high level of specificity,[23] was not

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[20] Some scholars would take issue with the notion that any constitutionally infringing conduct may have social utility. *See, e.g.*, Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000) (condemning Court's choice "to expand the range of government immunity from suit for wrongdoing").

[21] "[G]overnment 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." *Harlow*, 457 U.S. at 818.

[22] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (arguing that qualified immunity doctrine for government officials is necessary to avoid over-deterring official action and to allow room for development and evolution of legal standards governing their conduct).

[23] Doctrinally, the qualified immunity standard asks courts to first consider whether the particular constitutional right was "clearly established" at the time the alleged violation took place. Under the current law of most circuits, the right alleged to have been violated must be identified at a high level of specificity. As the Supreme Court stated in *Anderson v. Creighton*, 483 U.S. 635 (1987), "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. Under *Anderson*, the "clearly established" standard is highly fact-specific and qualified immunity is correspondingly broad. *See also* Lassiter v. Ala. A & M Univ., 28 F.3d 1146, 1150 (1994) (noting that for law to be clearly established to point that qualified immunity does not protect government official, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances"); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 982

"clearly established" at the time of the challenged action, or that the action was "objectively reasonable" in light of the totality of circumstances.

Conversely, where courts are confronted with actions that they apprehend as egregious and largely devoid of social utility, *e.g.*, blatant cases of police brutality, corruption and perjury, then the open-ended "reasonableness" standard tends to be applied so as to withhold immunity.[24] In these cases, courts perceive no danger of overdeterring vigorous, legitimate police activity, because the challenged action is, by definition, one which any reasonable officer will clearly understand to violate the most basic constitutional norms.

Importantly, the line separating immunized from exposed activity is drawn at a significant distance from the line separating constitutional from unconstitutional activity. In recent years, courts have tended to draw the qualified immunity line liberally, in a fashion that insulates government officials from liability for most unconstitutional acts[25] and extends to these defendants' attendant proce-

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(1989) ("If clearly-established is narrowly defined . . . it becomes nearly impossible to overcome qualified official immunity.").

[24] An interesting case in point is *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998), where two San Antonio officers arrested a naked man who appeared to have overdosed on cocaine. The officers "hogtied" him—tying his hands and feet behind his back with a rope looped around his neck—and placed him face down in the back of their cruiser, where he died while the officers transported him at a leisurely, non-emergent pace to a local hospital. In a § 1983 action, the officers argued for qualified immunity, claiming there was no clearly established law in the Fifth Circuit specifically ruling that hog-tying an arrestee in need of medical attention was unconstitutional. The trial court denied qualified immunity, and the Fifth Circuit affirmed, finding that hog-tying was unreasonable under the circumstances. The panel went to great lengths to justify the denial of qualified immunity in this context, ruling that the officers should have been on notice that hog-tying was illegal because of a 1991 San Diego task force study that was allegedly forwarded to the San Antonio police in 1994. *Id.* at 452.

What is interesting about *Gutierrez* is that it could easily have gone the other way, based upon the black-letter articulation of the qualified immunity standard. Most likely, the officers were correct that the relevant constitutional rule—identified specifically as a proscription against hog-tying an overdose victim—was not "clearly established" at the time of the challenged action. And most likely, the ruling would have gone the other way if the officers' actions were not socially useless and fairly shocking. Were the violation at issue less egregious or more socially useful—such as in the case of most investigative searches—it appears doubtful that the court would have found "clearly established" illegality based on a three-year old memorandum from another police department.

[25] *See, e.g.*, Gomez v. Pellicone, 986 F. Supp. 220, 226 (S.D.N.Y. 1997) (finding that "a public official must not simply violate plaintiff's rights; rather the violation of plaintiff's rights

dural advantages.[26] In fact, according to a recent study of all federal court cases over two years, qualified immunity motions were granted in approximately eighty percent of the cases where the defense was asserted.[27] As the Eleventh Circuit has observed, "qualified immunity for government officials is the rule, liability and trials for liability the exception."[28]

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must be so clear that no reasonable public official could have believed that his actions did not violate plaintiff's rights").

[26] For example, individual defendants may assert qualified immunity at different procedural stages of a case and take an interlocutory appeal from any order denying immunity. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.... The entitlement is an *immunity from suit* rather than a mere defense to liability."); *see also* Behrens v. Pelletier, 516 U.S. 299 (1996) (rejecting Ninth Circuit's one-interlocutory-appeal rule). *But see* Johnson v. Jones, 515 U.S. 304, 313-17 (1995) (holding that exception to final judgment rule does not apply where qualified immunity is denied based on existence of disputed factual issue). Relatedly, most circuits have adopted heightened pleading standards for intent-based constitutional tort claims. According to the Ninth Circuit, "a plaintiff must put forward nonconclusory allegations of subjective motivation, supported either by direct *or* circumstantial evidence, before discovery may be had." Branch v. Tunnell, 937 F.2d 1382, 1387 (9th Cir. 1991); *see also* Siegert v. Gilley, 500 U.S. 226, 236 (1991) (stating that plaintiffs must make "specific, nonconclusory factual allegations which establish [the necessary state of mind], or face dismissal"); Dunbar Corp. v. Lindsey, 905 F.2d 754, 764 (4th Cir. 1990) ("We agree ... that a 'heightened pleading standard' is highly appropriate in actions against government officials.").

[27] Diana Hassel's recent study of the qualified immunity doctrine found that courts sustained the defense of qualified immunity in eighty percent of the cases. Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123 (1999). Her conclusions are echoed by many other scholars. *See, e.g.*, Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 68 (1997) ("[Q]ualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through."); Alfredo Garcia, *The Scope of Police Immunity from Civil Suit Under Title 42 Section 1983 and* Bivens*: A Realistic Appraisal*, 11 WHITTIER L. REV. 511, 534 (1989) ("[T]he individual citizen who seeks redress for a ... violation [of federal law] faces a formidable obstacle [:] the doctrine of qualified immunity ...."); William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1143 (1996) ("Since the 1980s, it has become very difficult for plaintiffs ... to win a *Bivens* case.").

[28] Alexander v. Univ. of N. Fla., 39 F.3d 290, 291 (11th Cir. 1994). In the Eleventh Circuit, qualified immunity can be overcome only by precedent in that circuit "developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." Lassitor v. Ala. A & M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). One would expect few denials of qualified immunity where a court applies such an understanding of the doctrine.

Reasonable people may differ over where to draw the line in qualified immunity cases. Critics of broad grants of immunity argue that the line is drawn too high and evinces a pro-police bias.[29] Others may argue that immunity for police actions taken in the line of duty should be broader yet. But the basic idea here is this: we seek to identify police conduct that may be socially useful and, even if that conduct is (non-egregiously) unconstitutional, we accord it immunity from suit. At the same time, we identify conduct that we are not worried about overdeterring—conduct that is lacking in social utility, or shocking and egregious—and we label it "over-the-line" and expose it to liability. The optimal level of "over-the-line" unconstitutional activity is zero. This is not a normative, but a descriptive statement: the line itself *defines* conduct which we are not worried about overdeterring.[30]

Having determined that the imposition of constitutional tort damages for over-the-line activities does not, by definition, implicate overdeterrence concerns, I am unconvinced that we are playing darts in the dark, as Professor Levinson would have it, when we assign damages liability for constitutional misconduct. Having eliminated the concern of overdeterrence, our only question should be whether damages remedies deter actionable (non-immunized) conduct at all. In this connection, we should consider Professor Levinson's argument that, under a system of majoritarian rule, most

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[29] Indeed, the Supreme Court's qualified immunity jurisprudence reveals the disagreement amongst the Justices as to where to draw the line. For example, after *Harlow*, dissenters in *Davis v. Scherer*, 468 U.S. 183, 198 (1984), unsuccessfully urged that the qualified immunity standard should consider all circumstances which might "have given a reasonable official cause to know, at the time of the relevant events, that [his] acts or omissions violated the plaintiff's rights." For the majority, however, the relevant inquiry was legal and not factual: whether or not there was controlling, clearly established federal law at the time of the incident. *Id.* at 191.

[30] It should be noted that overdeterring and overpunishing are not the same thing. Shoplifting has zero social utility, and we do not worry about overdeterring shoplifting. But we would be overpunishing shoplifters if we imposed automatic ten-year prison terms. Our concern is not that potential shoplifters will be "too deterred" by our penalties; the deterrence is a good thing. Rather, our discomfort stems from a belief that we are exacting too much retribution for a relatively minor offense. Likewise, there is no such thing as "overdeterring" such police misconduct as corruption, brutality, perjury and racial or other discrimination. This is not to say that any particular penalty is or is not appropriate, but only that the optimal level of such activity is zero and that any penalty—no matter how severe—is not unwarranted on optimal deterrence grounds.

constitutional violations cannot be deterred through the imposition of constitutional cost remedies.[31]

A. DETERRING NON-IMMUNIZED CONDUCT

The question of whether constitutional tort remedies serve any deterrent effect is, I think, easily answered in the affirmative. No police officer wants to be sued,[32] particularly where there is no absolute guarantee that his municipal employer will pay for his defense and indemnify him for damages.[33] Indeed, the substantive and procedural elements of the qualified immunity doctrine are largely premised on the undesirability of dragging public officials through a difficult legal process, taking their time and energies away from their official duties, and exposing them to potentially ruinous liability.[34] And even where officers are indemnified, it is reasonable to suppose that there are immense political costs (in the

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[31] Levinson, *supra* note 1, at 367.

[32] Professor Levinson also notes the obvious and human "residual aversion to being sued for constitutional torts." *Id.* at 386; *see also* Lant B. Davis et al., Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 809 n.154 (1979) (stating that police misconduct suits may also have deterrent effect on officer due to potential "emotional stress, adverse publicity, and detrimental effects on the officer's career").

[33] *See* Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 31 n.54 (2000) (quoting PETER SCHUCK, SUING GOVERNMENT 85 (1983)):

> Section 50-k of the New York General Municipal Law allows New York City to disclaim indemnification of officials for actions that violate any rule or regulation of the agency, or that are intentional or reckless, or that fall outside the scope of employment. Essentially, any serious constitutional tort provides the City of New York the option of disclaiming coverage. In general, most state and local indemnification statutes provide for denial of reimbursement on similarly broad grounds, making 'indemnification. . . neither certain nor universal.'

(citation omitted); *see also id.* at 30 n.53 (noting that § 1983 plaintiffs can hardly rely on state indemnification provisions, as these "provisions tend to differ significantly as to the scope of coverage, extent of local autonomy over terms and conditions of reimbursement, and limits on amounts of reimbursement"); William C. Mathes & Robert T. Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 912 (1965) ("[I]t appears that the indemnity practice is so irregular that its function as a 'conduit to governmental liability' is fortuitous at best.").

[34] In *Harlow*, the Court emphasized that the aim of qualified immunity is to avoid litigation and the "driving force" behind eliminating the subjective good faith standard was the concern that "insubstantial claims" against government officials be resolved as quickly as possible. Harlow v. Fitzgerald, 457 U.S. 800, 815-18 (1982).

sense of everyday workplace politics) associated with a finding of liability and exposing the municipal employer to budgetary pay-outs. Common sense supports this view that constitutional damages deter police misconduct to some appreciable degree. Every day across the country, there are obviously situations in which officers are tempted to abuse a defenseless suspect in order to gain information during an interrogation, or for some other purpose. It would be foolhardy to assume that the knowledge that a suspect might sue for damages has no inhibitory effect.[35]

B. MAJORITARIAN RULE

Professor Levinson takes a different approach to the question of whether constitutional damage remedies deter at all. In analyzing the effects of these remedies on government actors under a system of majority rule, Professor Levinson proceeds from the following premise: "If every constitutional violation is 'efficient,' in the sense that the benefits to society outweigh the immediate costs to the victim, then spreading these costs through compensation will not hinder majoritarian support for violations."[36] According to Professor Levinson, the "only scenario in which constitutional tort damages could conceivably deter—let alone *over*deter—a majoritarian

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[35] None of this is to say that constitutional tort damage remedies against individual officers *sufficiently* deter actionable misconduct. *See infra* text accompanying notes 90-119 (discussing inefficiencies of current constitutional tort remedial regimes and suggesting ways to improve deterrent effects). As Professor Levinson points out, we lack, among other things, the information to accurately measure the extent to which individual officers internalize the benefits of constitutionally infringing conduct. Levinson, *supra* note 1, at 350-52. Without this data, we cannot ascertain what level of penalty is the minimum necessary and sufficient to deter actionable conduct in the future. But we do know this: we have identified actionable conduct as conduct for which the optimal level of activity is zero. *See supra* text accompanying notes 20-30. Accordingly, we have no need—from a deterrence point of view—to ascertain the minimum penalty necessary to effect deterrence. As far as optimal deterrence is concerned, we are well advised to maximize the penalty for non-immunized police misconduct.

To be sure, there will be other forces that cause us to temper the penalties we might impose for over-the-line police misconduct. As in the case of shoplifting, *supra* note 30, certain penalties might over-punish from a moral or corrective justice perspective, or they might otherwise lead to perverse results. For reasons having nothing to do with deterrence, we might well be discomforted by penalties levied against public servants that result in financial ruin, or cause otherwise hardworking—albeit flawed—officers to leave the police department.

[36] Levinson, *supra* note 1, at 367-68.

government from violating constitutional rights would be one in which the compensated costs of the violation exceeded the social benefits."[37]

The compensated costs of constitutional violations will generally not exceed the social benefits, according to Professor Levinson, except in a relatively minor category of cases that he likens to "intentional torts or crimes."[38] This category of activity, for Professor Levinson, is defined by low compliance and opportunity costs: compliance with a prohibition against such activities is "costless,"[39] and government forgoes no important benefits in avoiding these activities.[40] Accordingly, whatever benefits there may be to such activity are easily outweighed by virtually any compensated cost arising out of that activity.

Conversely, according to Professor Levinson, the vast majority of cases are those where the avoidance of the constitutional violation would entail substantial compliance and opportunity costs.[41] Levinson uses Fourth Amendment search and seizure claims as the paradigm for this category of constitutional violations, which he likens to "negligence torts," rather than intentional torts or crimes.[42] Here, the benefits of infringing activity are not easily outweighed by compensated costs.[43]

Overlooked in this analysis is the role of the qualified immunity doctrine in demarcating the boundary between police misconduct

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[37] *Id.* at 370.

[38] *Id.* at 368-69.

[39] *Id.* at 368.

[40] To be fair, Professor Levinson points out that, at least theoretically, there is always *some* opportunity cost to avoiding unconstitutional conduct, even in the context of blatant race discrimination, an example he discusses. Nevertheless, Professor Levinson appears to recognize that, for largely deontological reasons, there exists a consensus view that these opportunity costs do not "count." *Id.*

[41] *Id.* at 369.

[42] *Id.* As Professor Jeffries has recently noted, investigative searches provide the most compelling case for qualified immunity because the threat of damages in this area would, more than elsewhere, "seriously inhibit the legitimate activities of government." John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 269 (2000). Overdeterrence concerns are at their zenith here, because searches are typically conducted by street-level officers who have complete discretion *not* to act, and who are unlikely to incur liability as a result of inaction. *Id.* If every error—every unconstitutional search—resulted in an award of money damages, police officers would be expected to refrain from engaging in a great deal of productive activity for fear of liability. *Id.* at 269 & n.44.

[43] Levinson, *supra* note 1, at 369.

that resembles "negligence torts" and police misconduct that resembles "intentional torts or crimes." By immunizing conduct which they apprehend as having some significant social utility and as not being terribly egregious, judges are in fact distinguishing between Levinson's "negligence torts," which carry high opportunity and compliance costs, and conduct akin to "intentional torts or crimes," which are avoided at low cost.

If we accept that the qualified immunity analysis entails an evaluation of the social utility of the challenged conduct, as I have argued here, then it is clear that the opportunity costs of avoiding conduct that does not qualify for immunity are negligible. That is, courts only withhold immunity from actions that have no significant utility. We forego no valuable opportunity by avoiding these "over-the-line" actions. And where there is significant utility to constitutionally infringing conduct, we immunize it. It is irrelevant that constitutional cost remedies "will not hinder majoritarian support"[44] for these negligence-type violations, as they are simply immunized from liability.

The qualified immunity doctrine holds no less sweeping implications for the compliance costs discussed by Professor Levinson. The avoidance of "over-the-line" actions does not entail substantial compliance costs, as Professor Levinson recognizes when he writes these types of "intentional torts or crimes . . . can be avoided with minimal effort or precaution-taking . . . ."[45] By exposing to liability only conduct that is "objectively reasonable in light of the unclear nature of the relevant constitutional law,"[46] the qualified immunity doctrine avoids the compliance costs that inevitably come into play where, in Professor Levinson's words, "socially valuable activity runs up against uncertain standards of constitutional liability."[47] This conclusion is buttressed by the liberality with which qualified immunity is dispensed: far from having their feet held to the fire for debatable judgment calls made in the field, individual officers are

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[44] *Id.* at 368.
[45] *Id.*
[46] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981).
[47] Levinson, *supra* note 1, at 369.

accorded wide latitude, as reflected in the statistic that eighty percent of qualified immunity motions are granted.[48]

In the end, Professor Levinson may be right that the deterrence of constitutional violations, under a majoritarian model of government, is only possible where the compensable costs of constitutional violations exceed the social benefits they produce. The qualified immunity doctrine, however, ensures that liability will only attach under the circumstances where deterrence is possible. Far from throwing darts in the dark, we can take comfort that we are imposing constitutional tort remedies against individual officers only where the necessary preconditions for achieving deterrence have been met.

II. MUNICIPAL LIABILITY FOR CONSTITUTIONAL VIOLATIONS: INFORMATIONAL AND "FAULT-FIXING" FUNCTIONS

Professor Levinson also argues that the imposition of constitutional cost remedies upon municipalities cannot be counted on to produce socially optimal deterrence.[49] As in the context of private actors, Levinson asserts that deterrence occurs "only [where] the government agency saddled with liability internalize[s] the social benefits of its actions,"[50] and he argues that the workings of government are far too opaque to allow us to assume that the forced internalization of social costs will produce optimally deterrent effects in this area.[51]

I disagree. I believe we can reasonably postulate that government, when exposed to constitutional tort damages, is induced to take affirmative remedial steps to eliminate socially undesirable activity. Professor Levinson may be right that it is difficult or even impossible to explain why the mere act of *paying* settlements and judgments would cause governments to take reformative or preventative steps, given that we cannot view governmental units the way we view wealth-maximizing firms.[52] But there are other

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[48] *See supra* text accompanying notes 27-28.
[49] Levinson, *supra* note 1, at 347-48.
[50] *Id.* at 353.
[51] *Id.* at 373.
[52] *Id.*

important reasons why we should reasonably expect government to respond to the imposition of constitutional tort damage remedies. Indeed, there are non-economic, deterrence-producing values to municipal liability which the law and economics paradigm, itself, seems incapable of internalizing.

A. THE INFORMATIONAL FUNCTIONS OF MUNICIPAL LIABILITY SUITS

I contend that the imposition of constitutional tort remedies at the municipal level serves important informational functions.[53] When constitutional tort victims pursue litigation, motivated by the availability of compensatory damages, valuable information is unearthed and exposed.[54] Claims asserted under *Monell v. Dept. of Social Services*,[55] which requires plaintiffs to prove that a municipal policy or custom caused constitutional injury before liability may be imposed against a municipality,[56] are particularly well tailored to the discovery of information concerning the cultural and political forces that give rise to or countenance police misconduct. As a noted civil rights attorney has observed:

> [*Monell*] claims also facilitate the development of systemic evidence of deliberate indifference to police brutality, as well as information concerning "repeater" officers, the functioning of the police disciplinary and counseling system, and the attitudes of police officials towards important police disciplinary issues. . . . A *Monell* claim also permits wider discovery, broadens the scope of admissibility at trial. . . . In some instances, aggressive discovery and litigation of such claims can also positively affect pertinent police policies and practices. . . .[57]

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[53] *See also* G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 748 (1999) (arguing there are additional reasons to bring claims other than reaching municipality's deep pocket).

[54] *Id.*

[55] 436 U.S. 658 (1978).

[56] *Id.* at 694.

[57] Taylor, *supra* note 53, at 748-49.

With exposure comes publicity. In the private tort law context, commentators have argued that institutional change is induced not only by the threat of monetary penalties, but also for other reasons, including a defendant's desire to avoid adverse publicity, the cost and burden of litigation, and the sting of a determination of liability.[58] Such behavior-modifying factors should have an even stronger effect in the public law sphere, where municipal liability claims can implicate high profile social issues, such as police brutality, corruption, or cover-ups.[59] Unlike many other areas of governmental activity, the otherwise subterranean forces that are exposed in constitutional tort litigation against municipalities tend to draw a great deal of media attention, as evidenced by the "above-the-fold" coverage of the New Jersey State Troopers in the recent racial profiling cases, and the NYPD in the Amadou Diallo case, to name but two prominent examples.[60]

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[58] *See* Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 364-65 (1996) (arguing that publication of monetary punitive damage awards will further punitive goals).

[59] Gilles, *supra* note 33, at 89-90 (discussing impact of judicial finding of municipal fault).

[60] The "New Jersey Four" were young black and Hispanic men who were on their way to try-out for basketball scholarships at North Carolina Central College. On April 23, 1998, while riding down the interstate in New Jersey, they were shot eleven times by two New Jersey State Troopers. Two of the young men died. The troopers maintained that they had opened fire because the driver tried to back up over them. They say they had initially pulled the van over for speeding, but the police department later admitted the officers didn't even have radar in their patrol car. This incident began a state-wide investigation into the practice of racial profiling by the New Jersey State Troopers, which resulted in indictments against the two officers involved. *See* David Glovin, *Injured Men Seek Speedy Trial*, BERGEN REC., Sept. 9, 1999, at A1 (detailing the story of the "New Jersey Four"); David Kocieniewski, *Trenton Charges 2 Troopers with Falsifying Drivers' Race*, N.Y. TIMES, Aug. 3, 2000, at B1; Michael Raphael, *One Piece at a Time This Much is Clear. Two Troopers Fired 11 Shots Into a Minivan That They Stopped; but a Painstaking Probe has Undercut Their Explanation*, THE STAR LEDGER (Newark, N.J.) Sept. 10, 1999; Ronald Smothers, *New Jersey State Troopers Indicted in Turnpike Shootings*, N.Y. TIMES, Sept. 8, 1999, at B1, B5.

Amadou Diallo, a twenty-two year old West African, was walking in front of his home in New York City on February 4, 1999, when four police officers from the Street Crimes Unit drove past in search of a serial rapist. When Diallo was spotted, two of the officers approached him for questioning. Diallo reached into his back pocket just as one of the officers tripped and fell; another officer then yelled "gun" as Diallo produced a black object from his pocket. This led to the explosion of forty-one nine millimeter rounds, nineteen of which hit and killed the West African. Diallo proved to be unarmed at the time. The black object in his pocket was his wallet. The officers were tried and acquitted of the shooting by a jury in Albany, New York. *See* Tom Morganthau, *Cops in the Crossfire; A Jury Acquits Four New York Officers who Gunned Down an Unarmed Man Outside His Home; Tougher Tactics are Helping Reduce Crime Rates in America's Big Cities, but They can Also Lead to Tragic*

It is precisely this sort of information and publicity—more than anything else—that induces municipal policymakers to take remedial actions.[61] "Good" municipal managers may respond to previously unknown information concerning the departments over which they have jurisdiction; "bad" managers may be responding only to the publicity that attends the exposure of this information. But either way, it is the informational function of damages-driven constitutional tort remedies that inspires reform, in large measure.

The costs that are internalized here are political, and not economic in nature. As Professor Levinson would observe, we may well be unable to quantify "political currency units" so as to achieve optimal deterrence. Nevertheless, constitutional damage remedies, although denominated in dollars, clearly translate into the political currency that moves political actors.[62]

B. THE "FAULT-FIXING" FUNCTION OF MUNICIPAL LIABILITY CLAIMS

In addition to serving an informational function, municipal liability claims serve a "fault-fixing" function, localizing culpability in the municipality itself, and forcing municipal policymakers to consider reformative measures. To understand how this fault-fixing function operates, it is important to distinguish between the liability a municipality incurs indirectly, through the indemnification of its officers, and the direct liability it may incur under *Monell*.

Mistakes, NEWSWEEK, Mar. 6, 2000, at 22. Criminal prosecutions against police officers may also serve effective informational functions. However, the dearth of criminal prosecutions limits the informational potential of such suits. *See* Gilles, *supra* note 33, at 19 (noting that refusal of police officers to report or corroborate *misconduct* of their brethren, reluctance of prosecutors to indict officers upon whom they depend, and extraordinary protections afforded police officers under collective bargaining agreements and local laws ensure inefficacy of criminal prosecutions to problems of police misconduct).

[61] *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 413 (arguing that public sentiment can strongly influence police departments in variety of ways).

[62] Indeed, Professor Levinson suggests that a "promising approach to constitutional [tort] remedies might be to leverage the political effects of disseminating information about government action." Levinson, *supra* note 1, at 418. He recommends that courts use disclosure requirements to regulate constitutional misconduct, on the theory that publicizing socially suboptimal government behavior might be more effective than monetary damages. *Id.* at 419. This suggestion is based, at some level, on the understanding that claims against municipalities have an independent informational function. *Id.*

Indirect liability does not trigger the fault-fixing function. The municipal indemnification of an individual officer for constitutional damage awards levied against him[63] does not necessarily force policy-makers to acknowledge municipal fault and take remedial action, for two reasons. First, indemnification is an *ex ante* benefit given to individual officers as a form of insurance. The determination to indemnify is made at the front end, as the product of collective bargaining arrangements and political lobbying, and not in response to any constitutional claim.[64] The act of indemnifying is largely a ministerial one, and indemnification expenses are easily justified as costs of doing business, along with salaries and other items of overhead.[65]

Second, where municipalities indemnify officers, they "generally write off the misconduct of an individual officer to the 'bad apple theory,' under which municipal governments or their agencies attribute misconduct to aberrant behavior by a single 'bad apple.'"[66] This "deflect[s] attention from systemic and institutional factors contributing to recurring constitutional deprivations."[67] As I have

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[63] *See* Davis et al., *supra* note 32, at 810-12 (reporting government defense and indemnification of police officers in Connecticut); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (finding no cases in which "an individual official had borne the cost of an adverse constitutional tort judgment"); Gilles, *supra* note 33, at 30-31 (noting "[t]he reality is that individual officers are not often forced to pay damage awards from their own pockets"); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49-50 (1998) (asserting that, "[s]o far as can be assessed," governments defend their officers against constitutional tort claims and indemnify them for adverse judgments).

[64] Gilles, *supra* note 33, at 30 n.52 (cataloguing state indemnification provisions).

[65] Professor Levinson acknowledges that indemnification of individual officers is likely viewed by the municipal entity as merely a cost of doing business, rather than an acknowledgment of fault. Levinson, *supra* note 1, at 369.

[66] Gilles, *supra* note 33, at 31 & n.56.

[67] *Id.* In the police context, one report found that "[t]hose who claim that each high-profile human rights abuse is an aberration, committed by a 'rogue' officer, are missing the point: human rights violations persist in large part because the accountability systems are so defective." HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY & ACCOUNTABILITY IN THE UNITED STATES 2 (1998). Others have noted that the tendency to latch onto the "bad apple" theory of police brutality and misconduct can prove an intractable problem to reforming police practices. For example, Cohen and Feldberg argue that police apologists often resort to the "bad apple" theory of police immorality in response to the periodic public scrutiny occasioned by an act of police misconduct:

> [I]n response to documented cases of corruption and brutality, police administrators would declare them merely isolated deeds by 'bad apple' officers. Bad apples were morally corrupt individuals, rotten on the inside

argued elsewhere, "the 'bad apple theory' is essentially an institutionalized belief system ensuring that fault for unconstitutional conduct—even when it results in large damage awards against individual officers or city-approved settlements—will never be localized in the culture of the municipal agency itself,"[68] with the result that little or no remedial actions are taken.[69]

Direct liability, on the other hand, does serve a fault-fixing function. Under the Supreme Court's landmark decision in *Monell v. Department of Social Services*,[70] municipal liability cannot be based upon principles of vicarious liability; rather, municipal liability will attach only where an identifiable "policy or custom" of the municipality caused plaintiff's constitutional injury.[71] A finding of *Monell* liability, therefore, fixes the fault of constitutional violations directly on the municipal entity, which "possess[es] the resources and broad vantage point with which to identify the particular deficiencies, and . . . take appropriate corrective action,"[72] thereby furthering the deterrence goal of § 1983. Holding the municipality itself liable for injuries caused by its own unconstitutional policies and customs makes it more difficult to take refuge in the "bad apple theory" and more likely that the municipality will take steps to remedy the broader problems.[73]

> and hiding under a skin of respectability, and who were only out for themselves. The vast majority of officers (the remainder of the barrel), [the public was] assured, were morally upstanding and beyond temptation or excess. The rotten apples needed removal so that the barrel's other apples would not be contaminated; police administrators and apologists never conceded that the barrel might, itself, have been contaminated, much less that it might be the source of the problem.

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

[68] Gilles, *supra* note 33, at 31-32.

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

[70] 436 U.S. 658 (1978).

[71] *Id.* at 691; *see also* Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of *respondeat superior*.").

[72] Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2019 (1998).

[73] *Gilles, supra* note 33, at 32. Indeed, Professor Levinson seems to agree with the fault-

A recent Second Circuit opinion highlights the importance of the fault-fixing function of municipal liability claims. In *Amato v. City of Saratoga Springs*,[74] an injured arrestee brought a § 1983 action against two police officers and the municipality. Following a four-day trial on plaintiff's claims against the individual officers,[75] the jury found one liable for use of excessive force and the other liable for his failure to intervene in the altercation.[76] The jury awarded the plaintiff nominal damages in the amount of one dollar, finding no compensable injury, and assessed punitive damages against one officer.[77] After entering judgment, the district court refused to allow the plaintiff to continue his action against the municipality.[78]

The Second Circuit reversed the dismissal of plaintiff's claim against the city.[79] While acknowledging that plaintiff, in a second trial, could not relitigate the issue of compensable injury and would thus be able to collect at most one dollar,[80] the panel nonetheless found that plaintiff had the right to have his claims against the city heard:

> The City and the Police Department argue, however, that [plaintiff] has already "scored his victory" by obtaining nominal damages against [the individual officers]. The ability to promote an individual official's "scrupulous observance" of the Constitution is important. Perhaps even more important to society, however, is the ability to hold a municipality account-

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fixing function of municipal liability claims: "Singling out the government official closest to the harm as the constitutional 'wrongdoer' will be arbitrary from a moral point of view if that officer is merely responding to bureaucratic incentives or carrying through the inevitable results of lack of training or resources." Levinson, *supra* note 1, at 408.

[74] 170 F.3d 311 (2d Cir. 1999).

[75] Plaintiff's claims against the individual officers and the municipality were bifurcated. *See* Amato v. City of Saratoga Springs, 972 F. Supp. 120, 123-24 (N.D.N.Y. 1997) (granting order allowing bifurcation of claims); *see also infra* text accompanying notes 97-102 (discussing procedure and effect of bifurcating civil rights suits).

[76] *Amato*, 170 F.3d at 313.

[77] *Id.*

[78] *Id.* (noting that dismissal of plaintiff's claim against city and police department were made "from the bench without any recorded explanation").

[79] *Id.* at 321.

[80] *Id.* at 317.

> able where official policy or custom has resulted in the deprivation of constitutional rights. A judgment against a municipality not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue. In short, a finding against officers in their individual capacities does not serve all the purposes of, and is not the equivalent of, a judgment against the municipality.[81]

The ruling in *Amato* and other cases[82] stands for the proposition that plaintiffs are entitled to seek symbolic vindication from the municipality as well as the individual official for violations of constitutional rights. This symbolic vindication is at the very core of the fault-fixing function of municipal liability claims, and, together with the information function of such claims, can reasonably be expected to have a deterrent effect on municipal policymakers.

C. MUNICIPAL LIABILITY CLAIMS IN A BUREAUCRATIC WORLD

Professor Levinson asserts that the imposition of constitutional tort remedies against the municipality will not have any predictable effect, as a result of agency costs endemic to government bureaucracy.[83] Bureaucratic managers, according to Levinson, have

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[81] *Id.* at 317-18.

[82] *See, e.g.*, George v. City of Long Beach, 973 F.2d 706 (9th Cir. 1992) (emphasizing need for "symbolic vindication" of violations of constitutional rights); Larez v. City of Los Angeles, 946 F.2d 630, 640 & n.4 (9th Cir. 1991) (discussing importance of vindicating constitutional rights, even through symbolic awards).

[83] *See* Levinson, *supra* note 1, at 385 (citing examples such as civil service laws that "limit the discretion of bureaucratic managers over wages, benefits, promotions, and terminations of employees"); *see also* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 265 (1992). Professor Cohen states:

> Agency costs are all the costs that arise where the agent acts, and the principal expects him to act, out of the agent's self-interest in the secure knowledge that: (1) the principal cannot be fully aware of everything that the agent does and fails to do; and (2) that the principal cannot make the

at their disposal only the bluntest of instruments with which to align the incentives of street-level officials with the municipality's interests in avoiding constitutional tort liability while maintaining effective law enforcement policies.[84] Among other things, civil service rules make it largely impossible to establish meaningful penalties for infringing conduct, and the nature of policing does not lend itself to performance-based rewards for aggressive police work, as productivity is not readily measured.[85]

Professor Levinson's discussion of agency costs, however, overlooks the rules that govern municipal liability. Under *Monell*, a municipality may only incur liability where a municipal policy or custom is the moving force behind the constitutional injury.[86] The bureaucrat's inability to optimally align the incentives of rank and file officers is largely beside the point, where liability rests squarely upon policies or customs that are promulgated or maintained by municipal policymakers. Let's say, for example, a municipality incurs liability where its policy concerning the delivery of medical services to arrestees is found to be constitutionally deficient.[87] In response, the municipality will establish a constitutionally adequate policy. The avoidance of liability, under this example, does not depend upon the ability of bureaucrats to align officer incentives, and is not impacted by the agency costs discussed by Professor Levinson.[88]

The fundamental point that is missed by Professor Levinson's discussion of agency costs is that municipal liability for constitutional torts does not attach vicariously under *Monell*. It is only where the discretionary acts of individual officers in the field give rise to constitutional tort liability that we are properly concerned with agency costs that impede managers from influencing

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> agent pay the full cost of his failure to faithfully serve the principal. The central and most prominent agency cost is shirking, i.e., merely not being as attentive to one's task as one would if one were serving one's own interests rather than the principal's.

Id.

[84] Levinson, *supra* note 1, at 386.

[85] *Id.* at 384-85.

[86] *See supra* notes 53-55 and accompanying text.

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

[88] *See supra* note 11 and accompanying text.

the manner in which officer discretion is exercised. Where liability attaches only for the unconstitutional policies or customs of the municipality itself, however, agency costs should not lead us to doubt that the imposition of constitutional tort remedies against the municipality will have predictable and salutary effects.[89]

III. BROADENING MUNICIPAL LIABILITY TO ACHIEVE GREATER DETERRENCE

As I have argued, the imposition of constitutional tort damage remedies against municipalities can reasonably be expected to cause municipal policymakers to alter their behavior in socially desirable ways. However, the full deterrent potential of *Monell* claims remains limited, under contemporary practice, for several reasons which warrant inspection.

A. "POLICY AND CUSTOM"

First, as I have argued elsewhere, too many courts and practitioners have failed to apprehend the broad spectrum of policies or customs that may support the imposition of *Monell* liability under 42 U.S.C. § 1983.[90] Specifically, greater focus upon the "custom" language of § 1983 holds promise for reinvigorating modern civil rights litigation.

Originally enacted as the Ku Klux Act of 1871,[91] 42 U.S.C. § 1983 was intended to combat the widespread practices of local officials, including rank-and-file municipal officers, that impeded implementation of the principles enshrined in the Fourteenth Amendment.[92]

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[89] Of course, indemnification is a form of vicarious liability. And to the extent the municipality pays judgments on behalf of its officers, municipal managers might be concerned by their inability, due to agency cost issues, to properly align officer incentives. However, the imposition of liability against individual officers can reasonably be expected to deter violations, not because the municipal indemnifier will align officer incentives, but rather because the officer will independently regard the threat of a civil rights suit as a deterrent, even where he is likely to be indemnified. *See supra* text accompanying notes 32-35.

[90] Gilles, *supra* note 33, at 21-22 (arguing for recognition of "custom" claims under Section 1983).

[91] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1994)).

[92] *See also* Monroe v. Pape, 365 U.S. 167, 174-75 (1961) ("It was . . . the failure of certain

In passing the statute, the 42nd Congress understood that, while state and local legislatures were swiftly passing laws throughout the South to conform to the mandates of the Reconstruction amendments, unwritten codes guiding the conduct of local officials in Southern strongholds undermined the new constitutional and statutory edicts.[93] The architects of the original Ku Klux Act used the term "custom" to refer to the nefarious unwritten codes of conduct pursuant to which local officials terrorized freedmen and Republicans, and failed to enforce Reconstruction era laws against dissenters.[94]

While the particular "customs" that prevailed amongst deputy sheriffs, local prosecutors and Klansmen in the post-bellum South have largely subsided, other "customs" in the form of unwritten codes of conduct among modern law enforcement officials regularly impair rights guaranteed by the Fourteenth Amendment today. Indeed, I have argued that institutionalized, unwritten "customs"—most particularly the police code of silence—underlie many of the constitutional deprivations suffered at the hands of contemporary police officers.[95] As the true range of actionable customs is recognized by more plaintiffs' lawyers and judges, we will see more clearly the deterrent or behavior-altering effect of constitutional damage suits aimed at municipalities under *Monell*.[96]

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states to enforce the laws with an equal hand that furnished the powerful momentum behind [the statute]."), *overruled by* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978); *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1137, 1154 (1977) ("[T]he Act was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages.").

[93] *See Monroe*, 365 U.S. at 180 ("[B]y reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.").

[94] *See* Eric Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 229 (1979) ("The unconstitutional customs with which the supporters of section 1983 were concerned were [not] . . . exercises of final or delegated authorities, but the widespread and persistent practices of ordinary sheriffs, judges and prosecutors."); *see generally* J.G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION 682-84 (2d ed. 1961) (describing rise and fall of Ku Klux Klan, whose activities aimed to destroy radical political organizations by "intimidation and terrorization").

[95] Gilles, *supra* note 33, at 64-72 (discussing and illustrating various ways in which police code of silence causes constitutional violations).

[96] It is important not to confuse, on the one hand, efforts that would be required to eradicate unconstitutional customs such as the police code of silence, with, on the other, the

B. THE BIFURCATION PROBLEM

Second, the common practice of bifurcation serves to limit the efficacy of municipal liability claims.[97] Many courts reflexively bifurcate the trial of individual and municipal liability claims under Rule 42(b) of the Federal Rules of Civil Procedure,[98] staying all *Monell* proceedings, including discovery on *Monell* issues,[99] until after the resolution of claims against individual officers.[100]

I have a theorem: bifurcation + indemnification = elimination of *Monell*. Once a case is bifurcated and the plaintiff proceeds against the individual officer, the plaintiff either wins or loses. If plaintiff wins and the officer is indemnified, the plaintiff is made whole. End of case. Plaintiff cannot proceed against the municipality, having

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efforts that would be required for municipal managers to optimally align the incentives of their officers with those of the municipality. No doubt, municipal managers may encounter some difficulties in eliminating unconstitutional practices amongst the rank-and-file, just as they encounter some difficulties in eliminating drug use, excessive tardiness, and other problems. But these are not problems driven by agency costs. And there is no reason to doubt that municipal managers will be capable of proscribing conduct that undermines the law enforcement enterprise.

[97] *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 569-73, 575 (1993) (explaining how bifurcation becomes barrier to plaintiffs in § 1983 cases because of lack of "resources, fortitude and commitment" to proceed through second trial).

[98] Rule 42(b) allows a federal trial court to order a separate trial of any claim or issue when it finds such an order appropriate "in furtherance of convenience or to avoid prejudice [to each party], or when separate trials will be conducive to expedition and economy . . ., always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution . . . ." FED. R. CIV. P. 42(b).

[99] Colbert, *supra* note 97, at 531-32 (arguing that discovery bifurcation orders "delay and often preclude litigants from establishing a municipality's 'deliberate indifference' to unlawful police practices [and] bifurcated trials are likely to prevent a jury from apportioning damages between an individual and municipal defendant"); *see, e.g.*, Fisher v. City of New York, No. 90 Civ. 8163, 1992 WL 77606, at *2, *3 (S.D.N.Y. Mar. 23, 1992) (ordering bifurcation and stay of discovery for municipal liability claims); Ricciuti v. N.Y. City Transit Auth., 796 F. Supp. 84, 86 (S.D.N.Y. 1992) (same).

[100] *See, e.g.*, Grier v. City of Albany, No. 89-CV-1213, slip op. (N.D.N.Y. 1993) (ordering bifurcated trials on *Monell* and individual § 1983 claims); Myatt v. City of Chicago, 816 F. Supp. 1259, 1263-64 (N.D. Ill. 1992) (bifurcating individual liability and *Monell* policy § 1983 claims); Marryshow v. Town of Bladensberg, 139 F.R.D. 318, 319 (D. Md. 1991) (same); Ismail v. Cohen, 706 F. Supp. 243 (S.D.N.Y. 1989) (ordering separate trials for claims against defendant and § 1983 claims against city in order to further convenience), *aff'd in part and rev'd in part*, 899 F.2d 183 (2d Cir. 1990); Balough v. Fairbanks N. Star Borough, 995 P.2d 245, 256 (Alaska 2000) (upholding lower court's decision to bifurcate administrative appeal and § 1983 civil suit).

been made whole in the first trial against the individual officer. If plaintiff loses against the individual officer, he likely cannot proceed against the municipality. End of case. Having failed to show he suffered any constitutional injury, plaintiff may not then claim that a municipal policy or custom caused him constitutional injury.[101] Either way, the *Monell* claim never sees the light of day, and the informational and fault-fixing functions of municipal liability lie inert.[102]

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[101] *See* Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (holding municipality cannot be held liable under § 1983 unless municipal official or officials violated plaintiff's federally protected rights).

[102] This theorem is not absolute. First, as noted above, indemnification of officers is neither universal nor guaranteed. *See supra* note 33 (discussing variations among state indemnification provisions). Where plaintiff succeeds in the first trial against the individual officer, and that officer is not indemnified, the plaintiff may proceed against the municipality. *But see* Colbert, *supra* note 97, at 536-37. Professor Colbert states:

> It is unlikely that a bifurcated *Monell* claim will ever be submitted to a jury, even when the individual defendants are found liable. Following such a verdict, municipal defense attorneys usually offer attractive settlements in order to avoid indeterminate liability on the *Monell* issue. Most plaintiffs and their counsel find such offers difficult to refuse. Of course, those plaintiffs who are unwilling to settle may pursue their *Monell* claims through trial. Overall, bifurcation will substantially extend the length and expense of the proceedings, even for these successful litigants.

Id.

Second, there may be cases where the individual officer is granted qualified immunity, but the plaintiff can still show that the officer was following an unconstitutional municipal policy or custom. Basically, the officer would use a "Nuremburg" defense to argue that he was "just following orders," and plaintiff could then proceed against the municipality claiming that those "orders" were themselves an unconstitutional policy or custom. *See, e.g.*, Larez v. City of Los Angeles, 946 F.2d 630, 640 (9th Cir. 1991) (holding it was proper to proceed to second phase of trial because plaintiff alleged that City of Los Angeles and police chief had committed separate and distinct constitutional violations from those committed by individual officers).

Furthermore, in *Amato v. City of Saratoga*, 170 F.3d 311 (2d Cir. 1999), Judge Sand noted other possible scenarios resulting from the bifurcation of individual and municipal claims:

> Where trial of a *Monell* claim has been deferred to follow a trial against an individual official, three scenarios are likely to result: the jury finds that the officer is liable and awards actual damages; the jury finds that the officer is liable and awards nominal damages; or the jury finds that the officer is not liable. Were we to adopt the City defendants' position on *Monell* claims and nominal damages[,] then each scenario would result in dismissal of the *Monell* claims where the plaintiff's allegations against the individual official formed the sole basis for the "policy and custom" cause of action against the municipality. For example, if a jury were to find the officer liable and award damages that would fully compensate the

C. THE PUNITIVE DAMAGES DEBATE

A third factor blunting the potential deterrent impact of *Monell* is the 20-year old rule, announced in *City of Newport v. Fact Concerts, Inc.*,[103] that punitive damages for constitutional violations may not be assessed against a municipality. The *Newport* rule impedes the deterrent function of municipal liability claims in two critical respects: (1) it ensures that municipalities will not be forced to internalize the full costs of their constitutional violations;[104] and (2) it leaves plaintiffs without an incentive (or even a right) to pursue a *Monell* claim after prevailing against an individual defendant in a bifurcated action.

1. Forcing Municipalities to Internalize the Full Costs of Violations. Focusing on the first impediment, Judge Guido Calabresi of the Second Circuit recently took the extraordinary step of urging the Supreme Court to overrule *Newport*.[105] Observing that compensa-

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> plaintiff, the principle barring duplicative awards would prevent the litigant from thereafter seeking compensatory damages against the municipality, and, therefore, only nominal damages would be stake [sic]. If, alternatively, a jury were to award nominal damages against the officer, once again the most the plaintiff could obtain against the municipality would be one dollar, and the appellees would have us dismiss. Finally, if the jury were to determine in the first phase that no constitutional injury occurred, then the municipality could not be held liable, so the *Monell* claims would be dismissed.

Id. at 320-21; *see also* text accompanying notes 74-82.

[103] 453 U.S. 247 (1981). The *Newport* Court noted that "considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials." *Id.* at 271.

[104] *See, e.g.*, Williams v. City of Oakland, 915 F. Supp. 1074, 1078 (N.D. Cal. 1996) (noting that possibility of qualified immunity from punitive damages when officer is merely following municipal policy further frustrates deterrence-producing function of such punitive awards).

[105] Ciraolo v. City of New York, 216 F.3d 236 (2d Cir. 2000) (Calabresi, J., concurring), *cert. denied*, 121 S. Ct. 484 (2000). Debra Ciraolo was arrested in January 1997 for second-degree aggravated harassment, and pursuant to then newly promulgated New York City Corrections Department guidelines requiring that "[a]ll police prisoners received . . . be strip search[ed]," two corrections employees forced Ciraolo to disrobe and to submit to a visual body-cavity inspection "despite the conceded lack of any reasonable suspicion for the intrusive and demeaning search." *Id.* at 237-38. Ciraolo filed suit against the city, the police department, and several individual police officers under § 1983, alleging that she had been falsely arrested, that she had been the victim of excessive force during her arrest, and that the strip search and body-cavity examination violated her Fourth Amendment rights. *Id.* The district court held that strip searching arrestees without suspicion violated the Fourth Amendment and clearly contradicted the Second Circuit's precedent in *Weber v. Dell*, 804 F.2d

tory awards will not force a municipality to internalize the full costs of the injuries caused by its unconstitutional policies[106]—an argument that Professor Levinson himself seems to make[107]—Judge Calabresi identified *Newport* as an impediment to an effective deterrence regime.[108] In concluding that *Newport*'s prohibition on awarding punitive damages against municipalities frustrates the prevention of constitutional violations,[109] Judge Calabresi reasoned that punitive damage awards will generate greater incentives for voters to discipline city officials, and that finite city resources will magnify the deterrence gains.[110] Judge Calabresi further noted that punitive damage awards against individual officers have marginal deterrent effect at the municipal level,[111] because the limited wealth of these individuals results in smaller awards from juries who are unaware that the municipal employer generally indemnifies for punitive damages.[112]

796, 802 (2d Cir. 1986).

Moreover, because the jury found that the city had wantonly disregarded Ciraolo's rights by defying *Weber*, the district court determined that the jury's assessment of $5,000,000 in punitive damages, in addition to a compensatory award of $19,645, was appropriate. *Ciraolo*, 216 F.3d at 238.

Reviewing the propriety of the punitive damage award, the Second Circuit reversed and remanded. *Id.* at 242. Writing for a unanimous panel, Judge Calabresi concluded that *Newport* controlled, and "ordinarily, municipalities are immune from punitive damages under § 1983." *Id.* at 238; *see also* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

[106] *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring). Judge Calabresi noted, for example, that victims of constitutional violations may not be able to identify the source of their injuries, injurers may successfully conceal the existence of harm, or the costs of a suit in terms of time, money, and energy may greatly exceed potential damages. *Id.* at 243-44.

[107] Levinson, *supra* note 1, at 368 (noting that "longer-term costs of breaking down rule-utilitarian norms or the moral costs of ignoring deontological prohibitions . . . are not reflected in the amount of compensation that is awarded to the immediate victim" of constitutional violation).

[108] *Ciraolo*, 216 F.3d at 242-50 (Calabresi, J., concurring). Judge Katzmann, also concurring, declined to express a view on the scope of the punitive damages immunity exception, noting that the issue was not squarely presented. *Id.* at 250 (Katzmann, J., concurring).

[109] *See, e.g.*, Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841 (1996).

[110] *Ciraolo*, 216 F.3d at 249.

[111] *Id.*

[112] *Id.*; *see also* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981) ("[A]llowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources . . . directly advances the public's interest in preventing repeated constitutional deprivations."); Lee v. Edwards, 101 F.3d 805, 813 (2d Cir. 1996) ("[O]ne purpose of punitive damages is deterrence, and . . .

I think Judge Calabresi is exactly right. I find it difficult to dispute that the availability of punitive damages in *Monell* claims will place unconstitutional policies and customs squarely on the radar screens of responsible officials.[113] Full internalization of the costs of constitutional violations via punitive damages seems particularly appropriate in the context of *Monell* claims: an unconstitutional policy or custom is likely to have external costs that are far greater than those borne by the individual victim who brings an individual suit. Put differently, the payment of compensatory damages to a victim-plaintiff is particularly unlikely, in the context of a *Monell* suit, to cause the municipality to internalize the full social costs of its unconstitutional policy or custom.

Further, while the *Newport* rule is grounded largely in a concern for municipal finances,[114] the *Monell* rule would ensure that awards of punitive damages pose a serious risk to the financial integrity of municipal government only if government employees and agents regularly engage in serious violations of civil rights pursuant to policies and customs of the municipality.[115] Where constitutional violations are systemic and widespread—where they are enshrined in a municipal "policy or custom"—municipal fiscs should be vulnerable to punitive damage awards.

2. Solving the Bifurcation Problem. Overruling *Newport* would also add to the deterrent effect of municipal liability claims, in that the availability of punitive damages would give plaintiffs the incentive and ability to pursue a *Monell* claim after prevailing against an individual defendant in a bifurcated action.[116] As

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deterrence is directly related to what people can afford to pay."); Maxwell v. Aetna Life Ins. Co., 693 P.2d 348, 362 (Ariz. Ct. App. 1984) (observing that "generally the wealthier the defendant the larger the award should be" in order to "deter others in similar circumstances").

[113] Ivan E. Bodensteiner, *Limiting Federal Restrictions on State and Local Government*, 33 VAL. U. L. REV. 33, 40-41 (1998) (noting that while municipal liability for punitive damages is "less crucial than liability for compensatory damages, . . . it is still important as a deterrent" because "[a]wards of punitive damages would cause elected officials to take civil rights violations seriously").

[114] *See supra* note 103 and accompanying text.

[115] *See supra* note 55 and accompanying text.

[116] Some commentators have suggested that, instead of allowing punitive damages against municipalities, Congress should proscribe indemnity by municipalities for punitive damages against individual police officers. *See, e.g.*, Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination*

described above, the current practice of bifurcation virtually ensures that potentially meritorious *Monell* claims will die on the vine, because an award of compensatory damages against an individual officer makes the plaintiff whole, and there is nothing left to pursue against the municipality.[117] The availability of punitive damages against a municipality, of course, would dramatically alter this equation.

3. Potential Objections. I can imagine law and economics scholars responding that the imposition of punitive damages on municipalities is likely to result in overdeterrence of effective law enforcement activities.[118] Unlike a private business, which may be able to pass the costs of increased liability to its consumers in the form of increased prices, a police department generally has little control over its pricing input (the government-determined budget) and thus may compensate for punitive damages liability by reducing production output (its commitment to law enforcement). This decrease in law enforcement, moreover, could adversely affect the communities where police presence is most needed.

I think any such objections would be far fetched. When we speak of overdeterring a police officer, we are voicing the concern that he will tone down his activity level to the point where he becomes

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to the U.S. Criminal Justice System, 40 HOW. L.J. 641, 682 (1997) ("If punitive damages are to deter, the individual officer should be required to pay the cost.") (citation omitted).

[117] *See supra* notes 97-102 and accompanying text (noting limitations bifurcation imposes on municipal liability claims).

[118] However the law and economics orthodoxy might view the matter, I am not at all sure what Professor Levinson would think of the effects of imposing punitive damages against municipalities. He might well argue that, given our limited understanding of the deterrent effects of compensatory damages, the addition of punitive damages to this unknowable equation would only exacerbate the incoherence of the constitutional tort remedial regime. *See also* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443 (1997). Stuntz noted that:

> Most police work for local governments, and most local governments operate under serious budget constraints. . . . Because crime tends to be concentrated in poor neighborhoods, the people who get the biggest benefits from police work do not pay the biggest tax bills. . . . Just as a government faced with large damages liability for running a municipal pool, which serves poor residents but is paid for by rich ones, may simply close the pool, a government faced with large damages liability for the police may simply reduce the police presence in areas likeliest to give rise to lawsuits. This is overdeterrence writ large.

Id. at 446.

ineffective. But can we similarly speak of overdeterring a municipality's tolerance for unconstitutional policies and customs? What would it even mean to be overly intolerant of unconstitutional policies and customs?

In any event, decreased law enforcement output strikes me as a singularly unlikely result of overruling *Newport* for the very reasons Professor Levinson has articulated: namely, that government decisionmakers respond to political stimuli. And voters and their elected representatives judge police decisionmakers by their output, rather than how many of their discretionary budget dollars remain intact at the end of the fiscal year. In sum, the penalty for inaction would seem to be at least as high as the penalty for incurring liabilities.

I would be only slightly more concerned that police departments might respond to punitive damage exposure by localizing their law enforcement output into areas where they are unlikely to incur such liability.[119] But even here, if a police department were perceived as abandoning high-crime neighborhoods to reduce its exposure to punitive damage awards, I would take comfort in the fairly reliable assumption that the political process would exert a countervailing pressure on municipal governments and their departments. Rather than retreat from high-crime, high-potential-liability neighborhoods, I think police departments would likely respond to punitive damage awards with increased vigilance in the elimination of unconstitutional policies and practices.

IV. NON-MONETARY FORMS OF ACHIEVING DETERRENCE: STRUCTURAL REFORM INJUNCTIONS

Professor Levinson concludes his analysis by suggesting several alternatives to constitutional tort damage remedies for achieving deterrence in the public sector.[120] In particular, he urges courts to rely more heavily on injunctions: "[c]omplex injunctions or struc-

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[119] *See id.* (noting that "a government faced with large damages liability for the police may simply reduce the police presence in areas likeliest to give rise to lawsuits.").

[120] *See* Levinson, *supra* note 1, at 416-20 (suggesting several alternative remedies, including injunctions and disclosure requirements).

tural reform might well be the best hope for preventing constitutional violations where a majority is willing to bear the costs of paying compensation or where a powerful interest group benefits from the unconstitutional activity."[121] However, Professor Levinson frets that these sorts of remedies may bring their own "enormous difficulties and costs," and therefore "may only be worthwhile in circumstances of severe and pervasive government wrongdoing."[122]

Professor Levinson is right to look to structural reform injunctions as a uniquely appropriate remedial regime in the public sector. After all, scores of landmark constitutional cases—*Brown v. Board of Education*,[123] *Roe v. Wade*,[124] *Regents of the University of California v. Bakke*[125]—were brought by plaintiffs who sought not only redress for themselves, but protection for society at large against the harms they had personally suffered. All plaintiffs in these cases sought to reform the institutions, laws, or customs that had injured them.[126] As such, structural reform injunctions have long served an important remedial function in public law litigation.

Indeed, in response to concerns over systemic police misconduct and the perceived inability of local departments to institute reformative policies, Congress enacted a statute, 42 U.S.C. § 14141,[127] which specifically empowers the Attorney General to uncover and enjoin unconstitutional police "pattern[s] or practice[s]."[128] However, this legislation has thus far proved ineffective, as only three pattern or practice cases have been instituted over the past six years.[129] And given the political will

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[121] *Id.* at 416-17.

[122] *Id.* at 417.

[123] 347 U.S. 483 (1954).

[124] 410 U.S. 113 (1973).

[125] 438 U.S. 265 (1978).

[126] At least since *Ex parte Young*, 209 U.S. 123 (1908), the victims of constitutional wrongdoing have been able to enjoin the enforcement of unconstitutional laws and practices. These remedies exist separate and apart from damages.

[127] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2071 (codified at 42 U.S.C. § 14141 (1994 & Supp. 1998)).

[128] *Id.*

[129] Gilles, *supra* note 6, at 1404 (noting that "the Justice Department has brought only three 'pattern or practice' suits under this legislation, two of which resulted in complex decrees requiring the defendant police departments to take certain affirmative steps to deter future constitutional violations and fix existing structural problems"); *see also* Myriam Gilles, *Representational Standing*: United States ex rel. Stevens *and the Future of Public Law*

upon which enforcement of such a statute depends, one can only imagine the dust that will collect on this legislation over the next four years.[130]

I have argued in response to the ineffectiveness of the current regime that "pattern or practice" litigation aimed at achieving structural reform of problematic police departments should be achieved through enforcement actions initiated and financed by private litigants.[131] Specifically, I have suggested a scheme which would allow the Justice Department, in circumstances it deems appropriate, to authorize private individuals to maintain "pattern or practice" suits where the government has declined, for whatever reason, to do so itself.[132] Under this model, which is loosely based upon rules governing qui tam suits under the False Claims Act,[133] the government has the right to pursue enforcement actions itself,

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Litigation, 89 CAL. L. REV. (forthcoming March 2001) [hereinafter Gilles, *Representational Standing*].

[130] *See* Gilles, *supra* note 6, at 1411 (noting that "the current § 14141 regime subjects 'pattern or practice' enforcement to the shifting sands of political will"); *see also id.* at 1411-12, where the author states that:

> [T]he distortive influence of politics in federal executive enforcement of civil rights, was the failure of the Reagan Administration to vigorously enforce the Civil Rights of Institutionalized Persons Act ("CRIPA")—a law authorizing the Attorney General to pursue injunctive relief to remedy unconstitutional patterns and practices in prisons. As more than one commentator has noted, "[t]he failure of the Civil Rights Division to enforce [CRIPA] during the Reagan/Bush years underscores the fact that giving the Justice Department such authority will not ensure meaningful federal enforcement."

(quoting Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuses in Urban America*, 66 S. CAL. L. REV. 1455, 1524 n.279 (1993)) (citations omitted).

[131] *Id.* at 1412.

[132] The issue of the Article III standing of private citizens to seek such injunctive relief is not uncomplicated. In a line of cases culminating in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Supreme Court established an "equitable standing bar," whereby plaintiffs are precluded from seeking injunctive relief against constitutional or other injury unless the plaintiff can show to a "substantial certainty" that she will again suffer the precise same harm in the future. *Id.* at 111. I have argued elsewhere that the equitable standing bar does not preclude the government from allowing individuals to maintain equitable actions on the government's behalf, in the fashion of qui tam actions. Gilles, *supra* note 6, at 1421-24. Subsequently, the Supreme Court has endorsed a doctrine of "representational standing" that would allow private individuals to maintain such actions as the agents or assignees of the government. *See* Gilles, *Representational Standing*, *supra* note 129.

[133] 31 U.S.C. § 3730 (1994); *see* Gilles, *supra* note 6, at 1421-24 (describing process under False Claims Act).

to allow an individual petitioner to do so or to quash, at any stage, a petition or suit seeking equitable redress against allegedly unconstitutional practices.[134]

The deputation model (or agency model) that I have proposed[135]—and to which the Supreme Court recently opened the door in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*:[136]

> aligns public and private interests in a fashion that encourages coordinated litigation strategies aimed at developing national standards for police conduct; contains powerful checks against frivolous claims; places implementation and enforcement of reformist remedies in the hands of the executive, rather than federal judges; and empowers and enfranchises affected communities to seize the initiative in curbing ongoing unconstitutional police patterns and practices.[137]

The deputation model has the additional virtue of being constitutionally sound.[138]

The deputation model thus stands in contrast to a "regime in which private litigants [might be granted] standing on their own to pursue actions seeking forward-looking reformist remedies."[139] First, most such actions would be precluded by the equitable standing bar.[140] Second, while such a direct standing regime would, like the deputation model:

> tap the experiential and financial resources of the citizenry, [this approach is] highly inefficient[:] . . . [it] necessarily fosters a patchwork of uncoordinated

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[134] *See* Gilles, *supra* note 6, at 1417-18 (listing government's options).
[135] *See id.* at 1424-32 (describing deputation model).
[136] 529 U.S. 1858 (2000).
[137] Gilles, *supra* note 6, at 1425.
[138] *See generally id.* at 1433-49 (defending constitutionality of deputation model).
[139] *Id.* at 1424.
[140] *See* Gilles, *Representational Standing*, *supra* note 129; *see also supra* text accompanying note 132.

> litigation efforts, [it] contains no check against frivolous claims, and [it] imposes upon the federal courts enforcement obligations that they may be ill-equipped to handle. Nor would a helter-skelter rash of private litigation do much to promote the evolution of national standards or procedures designed to measure and ensure the constitutionality of police patterns and practices.[141]

Even less effective, however, is the current regime in which the "government alone is empowered to seek reform of unconstitutional police patterns and practices."[142] The federal executive can ill-afford—politically and economically—to uncover, challenge, and seek to remedy unconstitutional policies and practices wherever they may be maintained in police departments around the country. In addition, this centralized regime

> fosters an unhealthy reliance in affected communities on the benevolent paternalism of the federal government. A regime that forces community leaders —particularly in minority communities—to come hat in hand to federal officials seeking protection of their civil rights is at cross purposes with a zeitgeist that encourages community empowerment and everywhere looks to roll back reliance upon government.[143]

V. CONCLUSION

Professor Levinson's argument stresses that optimal deterrence on the standard law and economics model is not achieved by the imposition of constitutional tort remedies. I agree. We lack the necessary information to "price" constitutionally infringing conduct by government officials in order to achieve optimal deterrence against future violations. But as I have argued, constitutional tort

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[141] Gilles, *supra* note 6, at 1424-25.
[142] *Id.* at 1425.
[143] *Id.*

remedies nonetheless serve a vital—if not "optimal"—deterrence function.

In the context of suits against individual officers, an objective of constitutional tort law is to identify and refine that line above which the optimal level of activity is zero, and to allow or deny qualified immunity accordingly. So, rather than setting optimal prices for each type of violative activity, we draw a line above which all violative activity is subject to penalty. Individual officers can reasonably be expected to avoid "over-the-line" unconstitutional actions, and yet the line is drawn high enough that effective policing is not sacrificed for the sake of liability avoidance.

In the context of municipal liability, deterrence is achieved by important informational and fault-fixing functions of *Monell* claims. The true deterrent potential of *Monell* remains untapped, however, as courts and practitioners have failed to fully recognize the types of policies and customs that are actionable under § 1983, and as judges reflexively bifurcate individual and municipal liability claims. Effective deterrence, I believe, further requires a rethinking of the rule that punitive damages may not be assessed against governmental entities in civil rights actions.

Nevertheless, Professor Levinson's arguments are provocative and challenge constitutional tort scholars to rethink some of our basic assumptions about the effect of damages remedies. In this vein, I agree with Professor Levinson that scholars, lawyers, and legislators should carefully consider non-monetary remedies to constitutional tort violations. In particular, structural reform injunctions hold great potential for identifying and reforming problematic police departments. In sum, making governments pay may not prove optimal, but this regime does effectuate deterrence against future constitutional violations.