



Police Liability Reimagined: Vicarious Municipal Liability for Constitutional Deprivations

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Despite decades of reforms, policing in the United States has reached a crisis point in 2020. The rallying call to “Defund the Police” is, at its base, a demand to legislatures to overhaul our current system and reimagine policing in the United States. This essay proposes one single step Congress can take to reimagine police liability and accountability in the United States that will have five big effects. It also provides parallel state and local reform alternatives.

Logistically, police reform in the United States is challenging, in part, because of the differences amongst departments. Most policing occurs on a local level, and there are approximately 18,000 different police departments in the United States. Departments range in size, training, and regulations. These differences are further complicated by variations in state laws, police union contracts, and indemnification agreements. Accordingly, reform measures that work in one city will not necessarily work elsewhere. Nevertheless, there are some common threads connecting all police departments. Federal legislation offers an opportunity for uniform, widespread reform.

The United Constitution governs the conduct of all law enforcement officials and 42 U.S.C. § 1983 allows victims of police misconduct to bring a civil suit against government officials for constitutional deprivations.¹ As the U.S. Supreme Court recognized in 1980, “section 1983 was intended to not only provide compensation

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¹ 42 U.S.C. § 1983 states in pertinent part:

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

to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations.”² The text of § 1983 is plain, simple, and powerful. Yet, over the last sixty years, the Supreme Court’s interpretation of the statute has stripped it of much of its power.

Section 1983 allows persons deprived of a federally protected right to bring a federal civil action against the persons responsible for that deprivation. As the Court noted in *Mitchum v. Foster*, “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law.”³ Yet, under the current doctrine both municipalities and individual defendants are shielded from liability. Causation requirements protect the former and qualified immunity guards the latter. Moreover, in the few cases where an individual defendant faces liability, the municipality almost always indemnifies the official. The irony of all of this is that § 1983 has almost no deterrent effect on individual bad actors and provides municipalities with little incentive to adopt broader reform measures.

Federal Reform of 42 U.S.C. § 1983

This project poses one “big idea”: Congress should amend § 1983 to make municipalities vicariously liable. Vicarious liability and the respondeat superior doctrine make an “employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.”⁴ In the context of 42 U.S.C. § 1983, a municipality should be liable when its law enforcement officials deprive a person of a constitutional right.

This one “big idea” will have five big effects. Amending § 1983 to make municipalities vicariously liable will: (1) simplify causation requirements; (2) negate the need for qualified immunity; (3) promote reform by ensuring those best positioned to implement change—municipalities—have the financial incentive to adopt necessary reforms; (4) increase the likelihood meritorious plaintiffs are compensated for their injuries; and (5) promote transparency in municipal budgetary decisions.

Vicarious Liability Will Simplify Causation Requirements

The Supreme Court has held that municipalities are persons for purposes of § 1983 liability. Yet, the Court has held that to establish liability, § 1983 plaintiffs must prove they were deprived of a constitutional right and that the municipality caused the deprivation through its policy or custom. This is often easier said than done.

² *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

³ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

⁴ *Respondeat Superior*, BLACK’S LAW DICTIONARY (11th ed. 2019).

Section 1983 plaintiffs often struggle to identify an unconstitutional policy or custom. Occasionally, a plaintiff will be able to identify a policy or custom that directs unconstitutional conduct. Frequently, however, plaintiffs will need to show that the municipality failed to adopt a new or different policy and the failure amounted to deliberate indifference. In practice, a plaintiff can only do this if the municipality creates and retains incident reports and disciplinary records. Many municipalities do not, and current liability rules create a perverse incentive for them not to do so—if plaintiffs are unable to identify prior incidents of misconduct, the municipality often can avoid liability.

Vicarious Liability Will Make the Qualified Immunity Defense Unnecessary

Unable to establish municipal liability, § 1983 plaintiffs often sue individual police officials. Yet, qualified immunity is a judicially created doctrine that shields these same officials from monetary liability if the law was not “clearly established.”⁵ There are so many things wrong with this defense. Not only is it conceptually difficult for courts to apply the doctrine, but there are many procedural issues surrounding the doctrine. “As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁶

In *Harlow v. Fitzgerald*, the seminal case for qualified immunity, the Court reasoned that § 1983 litigation resulted in certain “social costs”—it distracted officials from their duties, inhibited their discretionary action and deterred “able people from public service.” Qualified immunity was intended to reduce these costs by resolving § 1983 claims early in the litigation process and shielding officials from liability.

Vicarious liability will achieve these very same aims and qualified immunity will be unnecessary. If the fear of personal liability distracts, inhibits, and deters government officials, vicarious liability, like qualified immunity, should alleviate all these concerns. With vicarious liability, government officials will know their employer ultimately will shoulder financial responsibility for their misconduct. Accordingly, they can act without fear of liability, which seems to be one of the primary aims of the qualified immunity defense. The drawback, of course, is that there may be instances in which one wants to hold the individual official personally liable. However, in practice, even when they are denied qualified immunity, police officials rarely pay for their misconduct.⁷

Vicarious Liability Will Promote Reform

Individual liability is a poor way of preventing future violations and is based upon flawed assumptions about how information is disseminated. The qualified immunity defense assumes that “a reasonably competent public official should know the law governing his

⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

⁶ *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

⁷ Municipalities almost always indemnify individual defendants. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014). Widespread indemnification is usually a consequence of police union agreements or state or municipal statutes.

conduct.”⁸ Yet, the very idea that, in practice, police officials are monitoring case law and interpreting judicial opinions is absurd. Rather, police officials rely on their superiors to develop and, as necessary, amend policies that reflect current legal rules. This reliance reflects the reality that municipalities, as compared to individual police officials, are far better positioned to avoid constitutional violations. As Peter Schuck has explained,

Unlike individual low-level officials, agencies control most of the resources, constraints, incentives, and conditions that actually influence officials’ behaviors toward the public. They can recruit different types of personnel and train and retrain them to perform their duties in particular ways. They can reward and punish officials for conforming to and departing from those norms, and they can develop new modes of supervision and control.⁹

Indemnification is a better choice than individual liability and a step in the right direction. Yet, municipalities may be able to “opt out” of indemnification. Even more problematic, with indemnification, municipalities routinely benefit from officers’ qualified immunity; if the officer is entitled to qualified immunity there is no need for the municipality to indemnify him or her. This allows municipalities to treat misconduct as a “one-off situation” that can be dismissed, minimized, or rationalized as cheaper than reform. Vicarious liability, however, puts an onus on municipalities to review every instance of liability. Regular assessments will increase the likelihood municipalities identify problematic behaviors and patterns and, when necessary, adopt new or different policies or offer individual officers additional training or counseling.¹⁰ This, in turn, should reduce the likelihood of recurrences in the future.

Vicarious Liability Will Better Ensure Compensation

The Supreme Court’s interpretation of § 1983 places liability primarily on individual officials. This, however, does little to advance one of § 1983’s primary goals—compensation. Police officials, like most Americans, are not in a position to satisfy a financial judgment against them. When § 1983 plaintiffs depend entirely upon individual police officials to compensate them for their injuries, they will find themselves without a remedy. Making municipalities vicariously liable will better ensure that victorious plaintiffs will be compensated for their injuries.

Promote Transparency in Municipal Budgetary Decisions

Finally, vicarious liability has the potential to make municipalities more accountable to their constituents by promoting transparency in municipal budgets. One criticism of indemnification is that it often shifts the cost of liability to taxpayers (i.e.,

⁸ *Harlow*, 457 U.S. at 818–19.

⁹ See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 104–05 (1983).

¹⁰ To the extent that police unions impede municipal efforts to hold officers accountable for their misconduct, vicarious liability gives municipalities a clear incentive to rethink their role and, where warranted remove the obstacles that stand between them and the reform measures they should undertake to reduce future liabilities.

municipal residents). The current system of liability—individual liability followed by indemnification—often obscures police misconduct. Vicarious liability may encourage municipalities to rethink how they budget and allocate costs. For example, municipalities can include police liability as a line item in municipal budgets. Doing so would lead to increased transparency and promote conversations about the true cost of misconduct and who bears these burdens, because municipal money spent on police misconduct necessarily funnels money away from other municipal projects.

State and Municipal Level Reforms

The following are steps state and local governments can take to complement and supplement federal action:

State Level Reforms

- Eliminate state immunities for police officials.
- Require municipal indemnification of police officials.
- Examine and reconsider police union contracts and police collective bargaining agreements.

Municipal Level Reforms

- Implement data collection measures to identify patterns of misconduct.
- Include police liability as line item in police department budget and invite public comment.
- Examine and reconsider police union contracts and police collective bargaining agreements.
- Coordinate civil litigation and police training and discipline.

Conclusion

Imagine a civil system where officials are responsible for the constitutional violations and municipalities are responsible for their officials. Congress imagined this system when it passed the Klu Klux Klan Act of 1871.

Yet, over the past sixty years the Supreme Court has stripped this statute of much of its power. By creating so many absolute immunities and limiting municipal liability, the Supreme Court has forced liability down the chain of command until it has fallen on the shoulders of individual executive officials. To correct this misalignment the Court created qualified immunity.

Today, we find ourselves with a with a civil rights system where victims have no remedy and officials have little accountability. Fortunately, the solution does not require that we create a new system. We simply need to strip away the elements encumbering our current system. Congress should amend § 1983 to make municipalities vicariously liable. This one big idea will have many big effects.