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RESHAPING SECTION 1983's ASYMMETRY

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INTRODUCTION

In his work on "fractals,"¹ the mathematician Benoit Mandelbrot devises a language that gives structure to seemingly chaotic

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¹ See BENOIT MANDELBROT, *THE FRACTAL GEOMETRY OF NATURE* (1983); BENOIT MANDELBROT, *FRACTALS: FORM, CHANCE, AND DIMENSION* (1977); BENOIT MANDELBROT, *LES OBJETS FRACTALS* (2d ed. 1975).

natural configurations. Under magnification, fractal shapes like clouds or mountains reveal a "self-similarity" whereby a small sample displays the structural characteristics of the whole. This concept gives rise to the hope, perhaps vain but sought to be realized in this Article, that there are identifiable fractal qualities in the shards of federal civil rights jurisprudence under 42 U.S.C. § 1983² that may be recomposed to construct a coherent whole.

Two broad propositions, dependent upon the identity of the defendant, could lend such coherence through an asymmetrical approach to liability. First, when the agent of a government entity acts under the principal's express, implied, or apparent authority³ and causes a person to be deprived of a right secured by the Constitution or laws of the United States, the entity should bear civil liability for damages regardless of the agent's state of mind, status in the entity's hierarchy, or role in the formulation of its policies. Second, and in contrast, wrongful state of mind should be the sole determinative factor in assessing the liability of the individual government agent. The agent should share the entity's damage exposure if, and only if, she acts with intent to harm or knows with substantial certainty that her conduct will injure the plaintiff.⁴

These premises are derived from the late Justice Harlan's observation thirty years ago in the seminal case of *Monroe v. Pape*:⁵ the deprivation of a federally guaranteed right by government action is uniquely damaging and therefore demands remedies of

² 42 U.S.C. § 1983 (1988). This section states:

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.

Id. The statute was originally passed as § 1 of the Ku Klux Klan Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871), and titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

³ See RESTATEMENT (SECOND) OF AGENCY §§ 7-8 (1957); *infra* notes 312-13 and accompanying text.

⁴ See RESTATEMENT (SECOND) OF TORTS § 8A (1965); *infra* notes 355-59 and accompanying text.

⁵ 365 U.S. 167 (1961), *overruled in part by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

potent deterrent impact.⁶ In fact, the scheme suggested goes further, serving the additional purposes of assuring a generally available make-whole compensatory remedy and permitting the dynamic evolution of American constitutional law, without chilling the discretion necessary to the conduct of well-intentioned, vigorous government actors.

Section 1983 as interpreted today takes a strikingly different, though equally asymmetrical, shape. The statute's text simply provides for the liability of defendants who "cause [a plaintiff] to be subjected"⁷ to the loss of a federally secured right. In adumbrating this causation requirement, however, the Supreme Court places an additional obstacle in the path of a plaintiff who sues the government. An entity's liability is restricted to conduct of its agents that implements entity "policy," defined as "a deliberate choice to follow a course of action . . . from among various alternatives."⁸ In the typical case, the agent who inflicts the injury does not act pursuant to a formal ordinance or written administrative directive; yet, satisfying this requirement demands a showing that an official with "final" discretionary authority under positive state law specifically authorized or ratified the agent's injury-producing act.⁹ Alternatively, the policy element may be met by evidence that the agent's act was consistent with a settled entity custom,¹⁰ Last, if injury results from an agent's omission, policy may be found in the entity's "deliberate indifference" to a frequently recurring circumstance.¹¹ Still, if the plaintiff can satisfy any of these formidable policy hurdles, she recovers from an entity defendant even if the federal right violated had not been judicially recognized before the incident that caused the harm.¹² The case against the entity can therefore still serve as a staging ground for dialogue about the creation of new constitutional protections.

Measured against the statute's overriding purpose of restraining federally unlawful conduct "under color of . . . State" law,¹³

⁶ See *id.* at 196 (Harlan, J., concurring).

⁷ 42 U.S.C. § 1983. For the complete text of the statute, see *supra* note 2.

⁸ *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion).

⁹ See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion). *Praprotnik* commanded a majority of the Court in *Jett v. Dallas Independent School District*, 491 U.S. 701, 737-38 (1989).

¹⁰ See *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978).

¹¹ See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

¹² See *infra* text accompanying notes 194-200 & 228-33.

¹³ Here we point to the language of the statute and the systemic congressional purposes identified by Justice Douglas in *Monroe v. Pape*, 365 U.S. 167, 173-74

current entity defendant doctrine makes formal sense but in practice falls short of its animating ideal. In the abstract, the Court's reaffirmation of the statute's federal lawmaking potential has intuitive appeal. If, as the Court has acknowledged, "the public as a whole has an interest" that is served by government conduct in conformity with federal law,¹⁴ and if constraining local government conduct within federal norms is the statute's signal aim, then preserving entity litigation as a crucible for the vindication of evolving constitutional standards seems appropriate and necessary. In the concrete world of litigation, however, the "policy" barrier has proven overly protective of local government and its fisc.

By contrast, the *prima facie* case against a government official is far less exacting. Whenever an individual agent causes a recognized constitutional harm, she is *prima facie* liable even if the entity approved her conduct and she had a blameless state of mind.¹⁵ Nevertheless, the Court, prompted by concerns about litigation floodgates, federalism, and judicial interference with discretionary government decisions,¹⁶ has crafted an expansive affirmative defense that more than offsets the laxity of the *prima facie* requirements. Government agents, including those whose positions make them most likely to inflict injury on ordinary citizens, escape liability for damages by grace of qualified immunity

(1961), *overruled on a different issue by* *Monell v. Department of Social Services*, 436 U.S. 658 (1978). See also Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 280 (1965) (determining that legislative history reveals the intent to create a federal remedy where state remedies are unavailable or inadequate).

¹⁴ *Hensley v. Eckerhart*, 461 U.S. 424, 444 n.4 (1983) (Brennan, J., concurring in part and dissenting in part).

¹⁵ *Monroe* is still good law on this point. See *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527 (1981), to the extent that *Parratt* held that negligence was sufficient to state a claim for a state-caused "deprivation," but otherwise leaving undisturbed the conclusion that § 1983 contains no independent state-of-mind requirement).

¹⁶ Beginning in 1976, the Court began to take seriously its concern that absent significant restraints § 1983 would become "a font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976); see also Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 646-47 (1987) (arguing that the Court's efforts to curb procedural due process litigation are rooted in a desire to stem a flood of litigation). Eisenberg and Schwab conclude, however, that the growth in civil rights litigation has not been as explosive as commonly assumed. See *id.* at 693-95. *Paul* also evinces the fear that § 1983 litigation will become a mechanism for federal trenching on state prerogatives. See *Paul*, 424 U.S. at 700-01; see also *infra* text accompanying notes 209-14 (discussing *Paul*).

unless the right violated was previously recognized by judicial precedent of unmistakable application and clarity.¹⁷

One consequence of this broad immunity for government agents is a distinctly diluted role for claims against individual defendants; in contrast to the situation for entity actions, § 1983's potential for dynamic lawmaking in actions against individuals is virtually nonexistent.¹⁸ A second, counterintuitive consequence is that the vicious official who intends to harm a citizen is usually absolved of any § 1983 liability. This happens either if the right the plaintiff asserts is not judicially recognized to the requisite degree of specificity, or if, despite the settled nature of the right, the factfinder concludes that the defendant could not reasonably have realized that her contemplated conduct would violate it.

There is some foundation for the Court's oft-stated concern about chilling the initiative of individual government agents by saddling them with damage liability when they are guilty only of failing to predict the vagaries of constitutional doctrine.¹⁹ Additionally, it is unfair for that individual to face liability, as she does under the Court's regime, when she acts without some degree of certainty that her conduct may cause harm or when she attempts, however clumsily, to serve the best interests of her employer. Thus

¹⁷ See *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-19 (1982).

¹⁸ Except for absolute legislative immunity, which extends beyond damages to declaratory and injunctive relief, see *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 730-34 (1980), other immunities, qualified or absolute, ordinarily insulate only against damages. See *Pulliam v. Allen*, 466 U.S. 522, 541-44 (1984) (holding that judges, absolutely immune from damages, are subject to injunctive relief and attorneys' fees). We suspect, however, that relatively few plaintiffs other than institutional civil rights litigants will sue individual government officials for prospective relief alone. Those who do are likely to encounter such obstacles as standing, abstention, or comity-driven nonintervention doctrines that might preclude litigation in federal court. See, e.g., *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983) (holding that an individual had no standing to request injunctive relief from police use of chokeholds because he was not in immediate danger of sustaining another direct injury); *Rizzo v. Goode*, 423 U.S. 362, 371-73 (1976) (stating that individuals had no standing to request an injunction compelling the police to adopt new procedures where their alleged injury was too speculative to satisfy Article III's "case or controversy" requirement); *Younger v. Harris*, 401 U.S. 37, 49, 54 (1971) (holding that federal court in § 1983 action may not enjoin pending state criminal proceeding in which the federal issue could be raised as a defense, and should dismiss); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (holding that federal court § 1983 action for injunction against state-sanctioned conduct should be stayed to enable a state tribunal to interpret unsettled state law if a narrowing interpretation might obviate the need to decide a federal question).

¹⁹ See *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

the Court's immunity doctrines, first announced at a time when only the individual agent was a cognizable "person" subject to § 1983 damage liability, are at once too generous and too stingy. If the agent acts with intent to harm, the deterrence and compensation goals of § 1983 are ill-served by letting her escape liability merely because a court later concludes that the particular federal right at issue was only dimly established at the time of the violation. If, in contrast, an individual agent acting without an intent to harm impairs a right that has been "recognized" to the Court's satisfaction there is little need to use the agent as an incremental source of remedy. The goals of facilitating government restraint, deterrence, compensation, and dynamic lawmaking are better served on balance by restricting liability to the government unit.

In the pages that follow we state the case for a new asymmetry. Part I sketches a justification for dynamically reconstructing a statute that the Court itself has radically reconstructed beginning with its landmark 1961 decision in *Monroe*. As it stands today, § 1983 is almost entirely a judicial construct. Its open-textured language is as immune to self-definition as that of the Fourteenth Amendment, whose enforcement it was passed to ensure.²⁰ We suggest borrowing from contemporary tort law to flesh out not only ancillary procedural and remedial gaps but also the statute's most basic standards of liability and defense.

In Parts II and III we turn to the substance of the judicially constructed doctrine in the individual and entity cases, respectively. After the Court's most recent ministrations, this historic statute of sweeping potential application yields an odd and desiccated residue. On the one hand, there are yawning gaps in both entity and individual defendant liability. Only in a formal sense does the entity suit serve the original Reconstructors' goal of bringing local governments to heel; in practice, the difficulty of demonstrating "policy" or "custom" provides the entity an expansive exemption from liability. At the same time, the individual defendant's qualified immunity absolves him from liability for an intentionally inflicted constitutional harm not clearly foreshadowed by a prior decision. On the other hand, the Court has shown a remarkable willingness of late to expand the scope of § 1983 to redress the deprivation of rights created by federal statute.²¹ This stands as

²⁰ The title to the original Klan Act went beyond enforcement of the Fourteenth Amendment to include "other Purposes." See *supra* note 2.

²¹ See Henry P. Monaghan, *Federal Statutory Review Under Section 1983 and the APA*,

a pointed and puzzling contrast to the Court's crabbed approach to the definition and enforcement of the fundamental constitutional rights that lie at § 1983's core.

Part IV considers the consequences of the Court's asymmetry and the concerns that have animated its development. The Court's intuition in treating the entity case as a vessel for the development of constitutional law is consonant with history and apparent congressional purpose. But the particularized rules it has devised to govern those actions erode § 1983's force as a bulwark against state-sponsored conduct that lacks the formal approval of law. The current asymmetry, we conclude, cannot be explained either as a device to achieve mirror-image parity between entity and individual actions or as an expedient crafted to reduce federal calendar congestion.

Part V explores new liability configurations for actions involving each type of defendant. We begin by assaying scholarly proposals that posit the unitary legislative goals of compensation or deterrence. We then advance our own multiple premises about statutory purpose as the foundation of a competing proposal. Our suggestions are designed principally to foster entity accountability and to further the subsidiary goals of compensating victims and facilitating the dynamic declaration of federal rights.

In pursuit of these ends, we argue for a modified species of respondeat superior to govern the liability of local government entities. Acknowledging that this part of the proposal creates liability without fault, we defend it against the criticism that money damages for constitutional violations should be confined to the restrictive, Aristotelian concept of "corrective justice." This fault-based approach unduly sacrifices entity accountability, particularly given existing limits on standing to secure injunctive relief.

By contrast, we propose having fault control on the liability of § 1983 individual defendants. In our design, an individual defendant would be liable for all federally unlawful conduct undertaken with intent to harm, provided she acted with the express, implied, or apparent authorization of the governing entity. Thus the entity would be liable when the individual is, and also, frequently, when the individual is not. In theory, this aspect of the proposal cuts back on the open-ended amenability of individual officials that was approved by *Monroe*. We are thus forced to respond to the criticism

that allowing individuals to avoid liability for "faultless" unlawful conduct authorized by their entities affronts the Nuremberg principle. Our chief reply, apart from observing that the conduct at issue in most nonintentional § 1983 situations would seldom be morally reprehensible, is that our refashioned scheme of entity liability would work its own indirect but powerful deterrence of individual misbehavior.

Finally, we stress that in each of the new liability configurations, pertaining to entities and individuals alike, the settledness of the constitutional right on the eve of injury, currently the key to qualified immunity for the individual, would be irrelevant.²² Shining through the reshaped asymmetry, then, are at least two, and in practical terms three,²³ fractal roles for § 1983: a guarantor of local government restraint respecting all federally unlawful conduct, whatever the vintage of the violation; a reliable source of victim compensation; and a vehicle for dynamism in the declaration of federal rights.

I. JUDICIAL DYNAMISM AND SECTION 1983

A preliminary word about the judicial tradition of fleshing out the contours of § 1983 is in order. In recent years other commentators have proposed fundamental alterations to the statute's liability standards in a search for coherence.²⁴ Like ours, their prescriptions are largely dictated by a particular premise about some overriding statutory goal.²⁵ All such commentary, including ours,

²² As we explain later in the Article, the status of the right may be relevant to the amount of damages. See *infra* note 372.

²³ It could be argued that victim compensation is not an invariable fractal element in our scheme, since we would relieve individuals of liability for defined, unintentional federal law violations under some circumstances that would deny the plaintiff remedy from the entity as well. Such circumstances would be extremely rare, however, and would be more than counterbalanced in aggregate compensatory terms by the vastly increased range of entity liability. See *infra* text accompanying notes 310-26.

²⁴ See, e.g., Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 630 (arguing that a model of liability focusing on the conduct of the municipal agent would best serve the compensatory aims of § 1983); Larry Kramer & Alan O. Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 272 (suggesting that a negligence standard should govern determinations of municipal liability for "bad faith acts"); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 1003 (1989) (proposing entity liability for constitutional violations "when[ever] a citizen is harmed by the wrongful exercise of government").

²⁵ See *infra* text accompanying notes 272-86 (discussing the deterrence rationale

is fairly critiqued as illegitimate social engineering unless the federal courts have some warrant for realigning the terms of liability. Whether they do depends on the degree to which more sure-footed answers are supplied by statutory text, legislative history, or the Court's own recent refashioning of § 1983.

The text and legislative history are remarkably opaque on the standards governing the critical liability and defense issues with which the Court has grappled during the last thirty years. History generally fails to provide answers on most adjudicated issues that matter; it is not an instrumental device.²⁶ Despite the Court's fondness for historical answers to questions about § 1983's new applications, the statute is fairly characterized as impervious to determinate historical analysis.²⁷ The question we have asked, therefore, is not whether the legislative history demands one or another approach, but whether it forecloses an approach.

A tepid defense of our own suggestions is that they are not manifestly unfaithful to legislative intent. Although these proposals are unapologetically put forward as present-oriented,²⁸ they are firmly rooted in the phrase "under color of . . . State" law. Unable to find legislative support for any concrete application of those words, we revert to a more abstract level of intention. As Professor Alexander observes, there is no good reason, when concrete and abstract intentions diverge, for choosing one level of abstraction over another.²⁹ Conceding a priori the desirability of subscribing to the drafters' intent given some semblance of agreement as to its

of Kramer and Sykes); *infra* text accompanying notes 289-95 (discussing the compensation rationale of Brown).

²⁶ See generally Theodore Y. Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L.J. 537 (1990).

²⁷ See, e.g., PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 940 (2d ed. 1989) ("[T]he legislative history reveals no occasion for . . . focused and collective consideration of the issue. Instead, inferences must be drawn from scattered statements of individual legislators . . ."); Gene R. Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism, and Will*, 66 IND. L.J. 1, 18 (1990) ("Evidence from congressional debates preceding the enactment of § 1983 reveals little or no interest in the subject of state liability."); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396-97 (1982) ("[A]lthough courts and commentators have devoted much attention to the legislative history of section 1983, there remains considerable dispute about the intended scope of that provision." (footnotes omitted)).

²⁸ See Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 115 (1989) (condemning present-oriented interpretation as mindless and unfaithful to framers' intent).

²⁹ See Larry Alexander, *Of Two Minds About Law and Mind*, 88 MICH. L. REV. 2444, 2447 (1990).

content,³⁰ when the coalescence of text and legislative history yield no confident resolution, abstract intention is all that remains.

Finally, as will appear more clearly in this Article, one cannot reconcile the Court's contemporary reworkings of § 1983 liability standards and defenses with transparent legislative history or some static notion of the common law. Despite occasional protestations to the contrary,³¹ the Court has regularly resorted to a dynamic lawmaking methodology in devising the qualified immunity doctrine, the major limitation on the liability of individuals.³² In the most general terms, the Court tells us that § 1983 should be "read against the background of tort liability."³³ If the Court means that the 1871 Congress intended to freeze in place the then-prevailing common law rules, we could not account for its most recent expansion of official qualified immunity.³⁴ The Court

³⁰ See, e.g., Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1249 (1990) (explaining that the judicial role demands that courts act as "faithful agents of the legislature whenever possible").

³¹ See Kramer & Sykes, *supra* note 24, at 265 nn.62-63 (citing cases).

³² Although the Court has stated flatly that "[t]here is no federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), and that it would create common law in suits between individuals only when there existed "a significant conflict between some federal policy . . . and the use of state law," *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (refusing to resolve a contract dispute between claimants subject to the Mineral Leasing Act of 1920 by recourse to federal common law), in fact the Court has at times created federal common law, and done so in statutory actions sounding in tort. See *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 361 (1952) (holding that the validity of a release under the Federal Employers' Liability Act was a question of federal law); see also Kramer & Sykes, *supra* note 24, at 265-67 (citing other cases in which the Court betrayed its willingness to make federal common law).

³³ *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on a different issue by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); see also *Carey v. Phipps*, 435 U.S. 247, 258 n.13 (1978) (noting that the Court has employed tort law principles "in constructing immunities under § 1983"); *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (explaining that "§ 1983 is to be read in harmony with general principles of tort immunities and defenses"). See generally Sheldon H. Nahmod, *Section 1983 and the 'Background' of Tort Liability*, 50 IND. L.J. 5, 32 (1974) (arguing that general tort principles are relevant "by analogy" but not determinative in § 1983 cases); Charles A. Rothfeld, Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 955-62 (1979) (suggesting that common law tort concepts support a theory of respondeat superior liability for municipalities under § 1983); Peter M. Van Zante, Comment, *Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494, 507-08 (1970) (indicating that the language from *Monroe* has been construed to enable courts to fashion a federal common law of § 1983 liability based on various sources of tort law), cited in Kramer & Sykes, *supra* note 24, at 257 n.30.

³⁴ Laura Oren has traced the Court's recent departures from the nineteenth century common law of government officials' qualified immunity. She also notes how the Court, on the entity-defendant side of the equation, has overlooked the evolving

launched that effort without even purporting to locate the new rules in the common law tradition, fashioning them instead out of whole cloth in order to relieve discretion-wielding officials of the burdens of discovery and trial.³⁵

Similarly, neither the language nor legislative history of § 1983 support the Court's "policy" barrier to the liability of local entities. Rather, the requirement has its origin in a raw ipse dixit announced in dictum, seemingly a product of bench politics.³⁶ At a minimum, it is difficult to understand the cramped "policy" prerequisite as an application of common law; in the decision that announced the requirement, the justices divided sharply on the existence and nature of the nineteenth century understanding about the amenability of those entities on any terms.³⁷

The Court has explicitly rejected the notion that it is locked into the century old common law conception. When, in *Smith v. Wade*,³⁸ the Court was forced to fill a gap in text, it expressly disclaimed that the common law of 1871 "is absolutely controlling, or that current law is irrelevant. On the contrary, if the prevailing view on some point of general tort law had changed substantially in the intervening century . . . we might be highly reluctant to assume that Congress intended to perpetuate now-obsolete doctrine."³⁹ The Court specifically rejected the idea "that Congress necessarily intended to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve."⁴⁰

The proponents of the statute were apparently content to establish a general federal remedy for injuries resulting from the denial of federally protected rights under color of state law.⁴¹

relaxation in the twentieth century of state sovereign immunity doctrine. See Oren, *supra* note 24, at 947-62. David Rudovsky reminds us that the Court has several times asserted that only the common law as it stood in 1871, when § 1983's forerunner was enacted, should guide the interpretation of the statute. See David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36-37 (1989) (citing cases). Among other occasions the Court made this point in *Owen v. City of Independence*, 445 U.S. 622, 635-37 (1980), just two years before it undertook wholesale revisions of common law qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

³⁵ See *infra* text accompanying notes 107-21.

³⁶ See *infra* text accompanying notes 142-57.

³⁷ See *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

³⁸ 461 U.S. 30 (1983).

³⁹ *Id.* at 34 n.2.

⁴⁰ *Id.*

⁴¹ See *Kramer & Sykes, supra* note 24, at 257-59.

Congress conferred on the federal courts the power not only to develop such interstitial procedural matters as prerequisites to suit,⁴² limitations,⁴³ and remedies,⁴⁴ but also to fence off the basic boundaries of individual and entity liability.⁴⁵ The statute was passed during the heyday of *Swift v. Tyson*,⁴⁶ when "the existence of an evolving common law and of federal judicial power to share in its development was a given."⁴⁷ The strident disagreement among today's Justices about the scope of entity liability, even as they enlarge beyond recognition the common law immunity of individual officials, offers powerful testimony that on these fundamental issues the common law of 1871 provides no real guidance.⁴⁸

The only sound alternative is to "turn to the policies underlying § 1983 to determine which rule best accords" with them.⁴⁹ Indeed, even when the Court has examined the common law and discovered a reasonably determinate answer, it has sometimes asked the further question "whether considerations of public policy dictate a [result] contrary" to the original common law.⁵⁰ Such a question would be superfluous unless the Court had reserved for itself the power to shape rules of liability and defense as a matter of federal common law.⁵¹

⁴² See, e.g., *Felder v. Casey*, 487 U.S. 131, 153 (1988) (holding that state court may not apply state notice of claim requirement in a § 1983 action); *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982) (holding that no mandatory exhaustion of state administrative remedies is required).

⁴³ See, e.g., *Owens v. Okure*, 488 U.S. 235, 249-51 (1989) (selecting an applicable statute of limitations).

⁴⁴ See, e.g., 42 U.S.C. § 1988 (1988) (stating that "the court, in its discretion, may allow . . . a reasonable attorney's fee as part of the costs"); *Smith*, 461 U.S. at 56 (approving punitive damages against a state officer); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (disapproving punitive damages against municipalities absent highly unusual circumstances); *infra* text accompanying note 325.

⁴⁵ See *Kramer & Sykes*, *supra* note 24, at 264-65.

⁴⁶ 41 U.S. (16 Pet.) 1 (1842).

⁴⁷ See *Kramer & Sykes*, *supra* note 24, at 264.

⁴⁸ See *id.* at 266. See generally Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989) (arguing that when the Court purports to use the common law of 1871, it typically uses modern principles of tort law and effectively creates new federal common law).

⁴⁹ *Smith*, 461 U.S. at 93 (O'Connor, J., dissenting).

⁵⁰ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981); see also *Kramer & Sykes*, *supra* note 24, at 266 (characterizing the Court's questioning as "whether the considerations supporting the common law rule likewise warrant immunity under § 1983").

⁵¹ If we are wrong about this—if, for example, entity liability must be shaped as the common law had it in 1871—our argument for respondeat superior is seriously

That the statutory text and legislative history are at best impenetrable, and that the Court has at times claimed the authority to redraw § 1983 by dipping into the palette of an evolving common law, are descriptive matters that leave unanswered the basic normative question about the desirability of a dynamic interpretation. Professor Eskridge has observed that recourse to "evolutive" interpretation makes the most sense when statutory text is unclear and "original legislative expectations have been overtaken by subsequent changes in society and law."⁵² Under those conditions, courts asked to interpret a statute frequently have little other choice, notwithstanding rhetorical professions of fidelity to text.

Section 1983 fits Eskridge's description. The judicial evolution of the statute underscores the societal transformations that have necessitated the dynamic tradition. In 1978, for example, in *Monell v. Department of Social Services*,⁵³ the Court, in declaring that § 1983 reaches government entities,⁵⁴ sustained an equal protection challenge to a municipal employment rule requiring pregnant women to take a predetermined period of pregnancy leave.⁵⁵ The *Slaughter-House Cases*,⁵⁶ decided in 1873, two years after the Klan Act was passed, illustrates by contrast the sea change in constitutional thinking that occurred during the intervening years. The Court then "doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes . . . [would] ever be held to come within the purview" of the Equal Protection Clause.⁵⁷

undermined. Although the doctrine was then current and applied to municipal corporations, courts carved out a notable exception for the corporation's "governmental," as distinct from "proprietary," functions. The "vast majority of § 1983 claims" concern functions of a type that courts then considered "governmental." Kramer & Sykes, *supra* note 24, at 262-63 (citing Ronald M. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1521 n.156 (1977)).

⁵² William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1484 (1987).

⁵³ 436 U.S. 658 (1978).

⁵⁴ The *Monell* requirement that a § 1983 plaintiff who sues an entity defendant must prove the existence of a "policy" that caused the deprivation is discussed *infra* part III.

⁵⁵ See *Monell*, 436 U.S. at 660-61.

⁵⁶ 83 U.S. (16 Wall.) 36 (1873).

⁵⁷ See *id.* at 81.

Roe v. Wade,⁵⁸ brought in part under § 1983,⁵⁹ illustrates the problem more distinctly. The very constitutional right the action was brought to enforce, the newly emerging right of privacy, was one of which the Fourteenth Amendment's framers could scarcely have conceived. Similarly, *Maine v. Thiboutot*,⁶⁰ which held that the statute's "and laws" language⁶¹ permits actions for the unlawful denial of federal statutory entitlements, arose in a welfare state society that the framers would not even recognize.

These and countless other legal and social transformations of comparable magnitude suggest the necessity of an evolutive interpretation of the statute in order to afford any meaningful enforcement of underlying federal guarantees. On a canon of construction no more exotic than the imperative to give every statute some operative meaning, the Court has had no genuine alternative to dynamism.

Our proposed restructuring of § 1983 borrows from developing tort law.⁶² We think this sensible for two reasons, each implied by the Court.⁶³ First, there are few other substantive sources to consult for guidance about noncontractual civil interactions between government and its citizens. Second, the contemporary common law of torts "reflects the accumulated wisdom of incremental judicial doctrine-building in a related field."⁶⁴ The selective infusion of contemporary common tort law into § 1983 doctrine can therefore be defended not only as a necessary default, but also because tort law brings with it a valuable tradition born of the same necessities that impel dynamic interpretation.

⁵⁸ 410 U.S. 113 (1973).

⁵⁹ See *Roe v. Wade*, 314 F. Supp. 1217, 1219 n.1 (N.D. Tex. 1970), *aff'd in part and rev'd in part*, 410 U.S. 113 (1973).

⁶⁰ 448 U.S. 1 (1980).

⁶¹ For the full statute, see *supra* note 2 (stating that the statute provides redress for the loss of rights guaranteed by the "Constitution and laws" of the United States).

⁶² See *infra* part V.C.

⁶³ See *Smith v. Wade*, 461 U.S. 30, 34 (1983) (stating that where there is no legislative history concerning damages recoverable under § 1983 the Court will modify or adapt existing common law of torts).

⁶⁴ Eskridge, *supra* note 52, at 1488; see also Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. PA. L. REV. 601, 611 (1985) (noting that the Supreme Court has used modern common law in § 1983 interpretations).

II. THE CASE AGAINST INDIVIDUAL STATE ACTORS

We turn now to the residue of the Court's dynamism, the asymmetric shape of § 1983 actions against individuals and entities. In the past thirty years, the jurisprudence of this statute in its historic sphere—the redress of constitutional violations—has been molded by an almost self-canceling dialectic: bursts of expansion in scope, followed by equally striking doctrinal contractions.

A. *The Prima Facie Case*

By its terms, § 1983 liability attaches to "[e]very person" who causes the loss of rights secured by the Constitution and laws of the United States. Thus an individual state actor is unexceptionably within the statute's reach. It is not altogether surprising, therefore, that the Court in *Monroe v. Pape*⁶⁵ would carve out an expansive prima facie case in actions against such defendants.

The invasion of the Monroes' home by Chicago's finest in violation of the Fourth Amendment and the laws of Illinois furnished the occasion for the Court to construe the § 1983 requirement that the defendant inflict the injury "under color of" state law.⁶⁶ The Court linked this requirement of the statute to the long-settled interpretation of state action for purposes of the Fourteenth Amendment,⁶⁷ which § 1983 was passed to enforce.⁶⁸

⁶⁵ 365 U.S. 167 (1961), *overruled on a different issue by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

⁶⁶ Section 1983 creates an action at law or suit in equity against (1) every "person" who (2) "under color of" state legislation, custom, or usage (3) "subjects, or causes [another] to be subjected" (4) to the deprivation of rights secured by the federal "Constitution and laws." 42 U.S.C. § 1983 (1988).

⁶⁷ See *Home Tel. & Tel. Co. v. City of L.A.*, 227 U.S. 278, 287-94 (1913). The municipal defendant argued in *Home Tel.* that a claim alleging it had imposed confiscatory telephone rates in violation of due process failed for want of state action because no state court had yet sustained the rate under the state's own due process clause. Only when a state court so ruled, defendant's counsel urged, would state authorization occur, and only then would there be the state action requisite for a Fourteenth Amendment violation. See *id.* at 282; see also *The Civil Rights Cases*, 109 U.S. 3 (1883) (restricting the reach of the Fourteenth Amendment to acts under state authority). The Court held to the contrary that the Fourteenth Amendment could be violated either when the state in its sovereign capacity commits acts that conflict with the amendment, or simply when "state powers [are] abused by those who possessed them." *Home Tel.*, 227 U.S. at 288. It is now settled that Fourteenth Amendment constructions of "state action" are authoritative of § 1983's "under color of" language as well. See *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 935 (1982).

⁶⁸ See *Monroe*, 365 U.S. at 171 (holding that the purpose of the statute is, as its title states, "to enforce the Provisions of the Fourteenth Amendment").

Justice Douglas' opinion for the Court concluded that § 1983 reaches federally unlawful conduct carried out by individual defendants under the badge of or clothed in state authority, irrespective of state approval.⁶⁹ The Court reached this result despite indications that state law could provide relief at least as complete as federal law and absent any allegation that the state had discriminatorily denied such relief on other occasions.⁷⁰ The special nature of the violation also had implications for remedy and forum. "It is no answer," Justice Douglas wrote, "that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."⁷¹

The apparent availability of a remedy under Illinois law, however, casts doubt on whether any of the purposes of § 1983 identified by the majority supports the *Monroe* result. Justice Douglas wrote that the legislation had "three main aims": to override certain state laws; to provide a federal remedy not provided by state law; and to provide such a remedy "where the state remedy, though adequate in theory, was not available in practice."⁷² None of these purposes would have been advanced by upholding the legal sufficiency of *Monroe's* claim. Accordingly, on these facts, the ratio decidendi with greater explanatory power is the conclusion of Justice Harlan's concurrence, drawn from the "flavor of the legislative history." He wrote that Congress sought to provide a supplementary remedy because "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."⁷³

Justice Harlan, an ardent proponent of federalism, viewed the State and its law as the dominant regulators of "primary private

⁶⁹ See *id.* at 183-85.

⁷⁰ Justice Frankfurter pointed out that Illinois decisions had found similar police intrusions unlawful and that the complaint lacked concrete allegations of Illinois's unwillingness to enforce those decisions. See *id.* at 224-25 & nn.33-34 (Frankfurter, J., dissenting in part).

⁷¹ *Id.* at 183. The Court found support for its decision in two opinions that had examined the criminal counterpart to § 1983. See *Screws v. United States*, 325 U.S. 91, 108 (1945); *United States v. Classic*, 313 U.S. 299, 326-27 & n.10 (1941). In both cases, individuals were held criminally liable for conduct that violated not only federal law, but state law as well.

⁷² *Monroe*, 365 U.S. at 173-74.

⁷³ *Id.* at 196 (Harlan, J., concurring).

activity.⁷⁴ He fervently believed that state courts are ordinarily as competent and trustworthy as federal courts to uphold federally guaranteed constitutional rights.⁷⁵ Moreover, he located the support for this claim directly in the Constitution.⁷⁶ Nevertheless, he would not subscribe to the view of dissenting Justice Frankfurter that conduct could be considered under color of state law only upon proof that the state authorized or approved its agent's act.⁷⁷ For Justice Harlan, the mere allegation that a federal right was violated created an entitlement to a federal remedy in a federal court.⁷⁸

⁷⁴ *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring). Justice Harlan began his *Monroe* concurrence by noting that the issue was "very close indeed," but that he felt constrained, in part, by precedent construing § 1983's criminal counterpart statute. See *Monroe*, 365 U.S. at 192 (Harlan, J., concurring).

⁷⁵ For example, Justice Harlan did not insist on an independent federal forum if providing one threatened to undermine the state's ability to enforce its criminal laws. In his dissent in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), Harlan argued that no independent federal forum is necessary if a § 1983 plaintiff can raise a claim as a defendant in an ongoing state criminal proceeding. See *id.* at 498-99 (Harlan, J., dissenting). By joining Justice Stewart's concurring opinion in *Younger v. Harris*, 401 U.S. 37, 54-56 (1971), rather than subscribing to Justice Black's far broader opinion for the majority, Justice Harlan in effect reiterated that his support for a judicially crafted ban on federal injunctive interference with state judicial proceedings was limited to the case of criminal prosecutions. In Justice Stewart's words, the offense to state interests arising from a federal injunction "is likely to be less in a civil proceeding." *Id.* at 55 n.2 (Stewart, J., concurring).

⁷⁶ See *Hanna*, 380 U.S. at 474-75 (Harlan, J., concurring) (noting that the Court had already "recognized that the scheme of our Constitution envisions an allocation . . . between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers").

⁷⁷ See *Monroe*, 365 U.S. at 193-94 (Harlan, J., concurring). Frankfurter questioned whether the enacting Congress had intended to replace state tort law whenever a state actor committed a tort. See *id.* at 238-45 (Frankfurter, J., dissenting). See generally Melvin R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 736 (1979) (noting that Justice Frankfurter used federalism principles as a guide to congressional intent). Support for the Frankfurter position is provided by Eric H. Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499 (1985). But see Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 985 (1987) (concluding that § 1983 was intended to be a highly intrusive remedy for violations of limited scope).

⁷⁸ See *Monroe*, 365 U.S. at 194-98 (Harlan, J., concurring). According to Justice Frankfurter, if the state actor's behavior was authorized by the state a § 1983 action would lie; if unauthorized, a remedy lay in state law or not at all. As interpreted by Justice Frankfurter, the state approval requirement was a device for allocating jurisdiction between federal and state trial courts. See *id.* at 236-37 (Frankfurter, J., dissenting). Although he could hypothesize two legislative reasons to support Justice Frankfurter's interpretation of the statute's state action requirement, Justice Harlan found the hypotheticals unpersuasive. See *id.* at 193-94 (Harlan, J., concurring).

Justice Harlan's reminder that government-perpetrated harms are different is central, not only to the *Monroe* result but also conceptually. Organic theories describing the formation and maintenance of government characteristically posit mutual defense and protection as bedrock moving causes.⁷⁹ Laying aside the contemporary events that inspired the original Klan Act,⁸⁰ citizens have the right to expect and demand that the entity to which they turn for defense will not itself become the perpetrator of harm. Constraining government actors who violate that basic understanding, and providing meaningful redress for the victims of such activity, vindicate the very purpose of government, symbolically⁸¹

The first rested on Congress's fear that state courts would be unwilling to find that a state official had state authority to violate an individual's constitutional rights. Justice Harlan found no support in the legislative history, however, for "congressional concern about the burdens of litigation placed upon the victims of 'authorized' . . . contrasted to the victims of unauthorized violations." *Id.* at 195-96.

A second hypothesis fared no better. Justice Harlan suggested that the Reconstruction Congress might have concluded that state approved violations of constitutional rights were more offensive than unauthorized violations. *See id.* at 198. This potential explanation failed for a number of reasons. Perhaps most important, virtually no deprivation of due process could ever receive ultimate state approval because all states had their own due process clauses. One Senator speaking in the debates "indicated a complete overlap in every State." *Id.* (quoting Senator Trumbull). Justice Harlan found it impossible to believe that Congress would enact § 1983, given self-executing Fourteenth Amendment protections, but then limit its availability when states had constitutional counterparts similar to the amendment.

One could imagine, he continued, that despite the state law counterpart, state courts would still find the conduct unauthorized, *see id.* at 198-99, thus funneling the case into state court under Justice Frankfurter's reading. Such speculation created its own anomaly. If the state actor is denied a federal forum for defense through removal because the state court would find his conduct unauthorized, thereby undermining the need for a federal § 1983 forum altogether, "it is difficult to contend that it is the added harmfulness of state approval that justifies a different remedy for authorized than for unauthorized actions of state officers." *Id.* at 199. The states could be counted on to redress constitutional rights without the need for § 1983 relief. In the end, there was no legislative history to support this potential explanation. *See id.*

⁷⁹ *See, e.g.,* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 54 (Thomas P. Peardon ed., 1952) (1690); JOHN STUART MILL, ON LIBERTY 68-69 (Gertrude Himmelfarb ed., 1982) (1859); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 97-98 (1988).

⁸⁰ *See supra* note 2.

⁸¹ On the symbolic importance of a federal remedy, see Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 21-25 (1980). Justice Harlan's recognition of this symbolism is also evident from his concurring opinion in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a context analogous to § 1983 where the defendants are federal agents. *See infra* note 107. There he wrote that it would be "at least anomalous" to conclude that the federal judiciary was "powerless to accord a damages remedy to vindicate social policies which, by virtue

as well as in practice. Complaints that § 1983 actions intrude too often or too deeply into local government decision-making ring rather hollow if the statute's purpose is to assure that such entities abide by the organic law. As the Supreme Court has sometimes recalled, the Union did not fight the Civil War to vindicate state sovereignty.⁸²

The *Monroe* Court's willingness to expose individual defendants to federal damages liability for conduct punishable under state law is all the more remarkable because § 1983 claims then lay only against individual state actors, not against their employing entities. The amenability of states to damages at that time was merely assumed, and not yet decided;⁸³ in *Monroe* itself, the Court rejected the imposition of liability on municipalities,⁸⁴ a holding later understood to shield other local government entities as well.⁸⁵ Furthermore, excepting those cases in which the defendant was a legislative or judicial official,⁸⁶ individual defendants then enjoyed only the most general form of common law qualified immunity,

of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Id.* at 403-04 (Harlan, J., concurring). Accordingly, he found no impediment to the Court's implying a private right of action against federal agents for constitutional violations despite Congress's silence on the subject, a silence sharply contrasting with its express § 1983 remedy for similar violations under color of state law. *See id.* at 405.

⁸² Justice Stewart had this point firmly within his grasp when he wrote for a majority of the Court that § 1983 was an expressly authorized exception to the Anti-Injunction Act, 22 U.S.C. § 2283 (1988). Following a discussion of changes in American society wrought by the Civil War, he wrote:

Section 1983 was . . . a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of state law

....

Mitchum v. Foster, 407 U.S. 225, 242 (1972). *But see Younger v. Harris*, 401 U.S. 37, 44 (1971) (cautioning against undue interference "with the legitimate activities of the state" by the federal government even when the federal government seeks to "vindicate and protect federal rights and federal interests"); *supra* notes 18 & 75 (discussing *Younger*).

⁸³ *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that the state *qua* state is not a "person" for purposes of civil liability under § 1983).

⁸⁴ *See Monroe*, 365 U.S. at 187.

⁸⁵ *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 710 (1973) (exempting counties from the scope of § 1983); *Cullen v. New York State Civil Serv. Comm'n*, 435 F. Supp. 546, 557 (E.D.N.Y. 1977) (exempting state, county, and local civil service commissions from § 1983 jurisdiction as departments of the sponsoring government).

⁸⁶ *See, e.g., Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (granting absolute immunity to state legislative activities).

defeasible either by objectively unreasonable conduct or malicious intent.⁸⁷ Restraint of government misconduct was therefore achieved entirely through the liability of individual state actors, whom the Court placed substantially at risk for acts their government principals had authorized or ordained. Yet individual liability seemed to a majority of the *Monroe* Court the necessary price of effectuating Justice Harlan's insight: constitutional violations are qualitatively different.⁸⁸

B. Individual Defendant Immunity⁸⁹

Not long after *Monroe*'s expansive statement of individual liability, the Court began to embrace an immunity doctrine calculated to counter its generous prima facie case. The early history of immunity reflects the Court's effort to apply a transplanted common law doctrine to the particular circumstances of varied § 1983 defendants. This approach found support in the language of 42 U.S.C. § 1988,⁹⁰ which counsels courts to fill § 1983 cracks with spackle from state common law.⁹¹ The Court's early grappling with qualified immunity for individual defendants—*Tenney v.*

⁸⁷ See *infra* text accompanying notes 91-98.

⁸⁸ This is not to suggest that the Court, then or since, has ever fully realized Justice Harlan's companion suggestion that § 1983 violations warrant not just an alternative forum but also more generous remedies than a state affords at common law. See *Monroe*, 365 U.S. at 196 n.5. (Harlan, J., concurring); see also *infra* text accompanying note 221 (discussing Harlan's position, and the Court's failure to adhere to it).

⁸⁹ A comprehensive history of § 1983 immunities is well beyond the scope of this Article. As a starting point, see PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 89-93, 203-05 (1983).

⁹⁰ 42 U.S.C. § 1988 (1988).

⁹¹ Section 1988 directs in part that state common law, to the extent that it is not inconsistent with federal law, shall apply "in all cases [for the protection of civil rights] where [federal laws] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies." *Id.* Some of the interpretive difficulties with this provision are explored by Beermann, *supra* note 48, at 58-75. He also concludes that the common law to which § 1988 directs the courts is not the common law the courts have followed. See *id.* at 61-63.

Brandhove,⁹² *Pierson v. Ray*,⁹³ *Imbler v. Pachtman*,⁹⁴ and *Scheuer v. Rhodes*⁹⁵—were obedient to this task of infusing an open-textured liability standard with common law learning.⁹⁶

In *Scheuer*, for example, the Court relied on two customary rationales for executive immunity: the injustice of holding an official liable in the absence of bad faith (which we term "fairness"), and the fear of deterring and interfering with the functions of state government ("federalism").⁹⁷ Objective "reasonableness" and subjective "good faith" elements of qualified immunity were to be measured by the totality of the circumstances confronting the official at the time of the challenged conduct, considered in light of the scope of the officer's discretion.⁹⁸ A year later, however, in *Wood v. Strickland*,⁹⁹ the Court departed from this traditional approach, the first step on a march to the avowedly policy-based test it ultimately announced in *Harlow v. Fitzgerald*¹⁰⁰ and *Anderson v. Creighton*.¹⁰¹

⁹² 341 U.S. 367, 379 (1951) (creating absolute immunity for state legislators' activity).

⁹³ 386 U.S. 547, 554, 557 (1967) (establishing a "qualified" defense of "good faith and probable cause" for police officers and absolute immunity for judicial officers). A brief survey of the history of judicial immunity is contained in Peter H. Schuck, *The Civil Liability of Judges in the United States*, 37 AM. J. COMP. L. 655, 662-65 (1989).

⁹⁴ 424 U.S. 409, 427 (1976) (declaring absolute immunity for prosecutorial activity).

⁹⁵ 416 U.S. 232, 238-49 (1974) (containing Chief Justice Burger's full explanation of the "reasonable grounds" and "good-faith belief" version of qualified immunity for executive officers); see also Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 14-21 (1978) (providing a useful overview of executive immunity and its rationales).

⁹⁶ See Mashaw, *supra* note 95, at 14-16 (arguing that executive immunity, as distinguished from sovereign and probably judicial immunity, is a relatively recent development).

⁹⁷ See *Scheuer*, 416 U.S. at 240.

⁹⁸ See *id.* at 247-48. While the Court did not purport to premise its search for the existence of immunities on § 1988, it clearly did rest its finding on common law understandings. See *id.* at 238-48 & n.4. Moreover, the Court's result was consistent with contemporary common law understanding. See RESTATEMENT (SECOND) OF TORTS § 895D (1979).

⁹⁹ 420 U.S. 308 (1975), *overruled by* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

¹⁰⁰ 457 U.S. 800, 818 (1982) (holding that discovery should not be permitted until the court answers the threshold question "whether [the] law was clearly established at the time an action occurred").

¹⁰¹ 483 U.S. 635, 639-41 (1987) (applying the qualified immunity doctrine to the execution of a search warrant, and holding that *Harlow* eliminated an inquiry into the subjective intent of the official and that the trial court should test the "objective legal reasonableness" of the challenged conduct against "clearly established" law). This departure from the immunity formula received from the common law rested "solely

Wood¹⁰² introduced a new variable into the qualified immunity calculus by specifying that the "objective" prong of immunity identified in *Scheuer* required the defendant to demonstrate the reasonableness of her conduct in relation to the content of "settled, indisputable law." Immunity attached only if defendants proved two conditions: (1) that the act was objectively reasonable in light of settled law and (2) that the conduct was motivated by subjective good faith.¹⁰³

Justices Powell and Rehnquist, two of the four dissenters from this part of the opinion, would later take leading roles in forging more generous immunities. They referred to the majority's description of the objective branch as a "harsh standard, requiring [defendants to have] knowledge of what is characterized as 'settled, indisputable law' [and accordingly leaving] little substance to the doctrine of qualified immunity."¹⁰⁴ That standard, they argued, would impose damage liability even if the administrator, acting in good faith, was ignorant of the law. Under such conditions, liability would rest on "an unwarranted assumption as to what school

on the basis of policy considerations such as whether liability would have an undue chilling effect on decisionmaking." Kramer & Sykes, *supra* note 24, at 266. But cf. John C. Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 86 n.22 (1989) (suggesting that there may be some vitality left in the subjective prong if plaintiff "makes concrete and detailed allegations fairly suggestive of official bad faith"). The Court of Appeals for the District of Columbia recognizes such a remnant of the subjective test. It permits the plaintiff to defeat immunity by pleading malice with specificity and offering noncircumstantial proof of that state of mind. See *Siebert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990) (finding that "the invalidating motivation [must be] pleaded with the offer of noncircumstantial proof required to satisfy our heightened pleading standard"), *aff'd on other grounds*, 111 S. Ct. 1789 (1991).

¹⁰² The case arose when school board members expelled several high school students, arguably without sufficient procedural safeguards. Although acknowledging that under existing precedent some process was required before school children could be expelled, see *Wood*, 420 U.S. at 323 n.15, the Court did not reach the procedural due process question because it had not been decided by the Court of Appeals. See *id.* at 323. Thus, the cause was remanded. Cf. *id.* at 327 (Powell, J., concurring in part and dissenting in part) (noting that a second school board hearing may have cured defects at a prior hearing). On this point there was unanimity. See *id.*

The more difficult issue was whether the school board members were entitled to some form of immunity. Justice White treated the general question of immunity for school administrators as one of first impression. He began by noting the split in the lower courts concerning the proper standard for the context, see *id.* at 315 & n.7, and then surveyed *Tenney v. Brandhove*, *Pierson v. Ray*, and *Scheuer v. Rhodes*, see *id.* at 316-18, before resolving the issue in favor of qualified, good faith immunity for school board members from liability for damages in § 1983 actions, see *id.* at 318-22.

¹⁰³ See *id.* at 321-22.

¹⁰⁴ *Id.* at 329 (Powell, J., concurring in part and dissenting in part).

officials know or can know about the law and constitutional rights."¹⁰⁵ The problem, Justice Powell predicted, was that "[t]hese officials [would] now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken."¹⁰⁶

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Justice Powell rightly doubted that school officials would have knowledge of any but the most settled constitutional law. As a predictor of the future development of the immunity defense, however, he proved wrong in two respects.

First, it was uncertain in 1975 that doctrinal "settledness" or the reasonableness of the official's conduct would be questions for a jury. Not until *Harlow* and *Anderson*, respectively, were these questions addressed, and they were held generally to be questions for the Court. Second, as Justice Powell later realized, requiring the defendant to have knowledge of "settled, indisputable law" before subjecting her to liability in practice imposes a litigation hardship on the plaintiff rather than the defendant. See *infra* notes 107-12 and accompanying text.

Proving that law is indisputably settled appears to be a formidable task. In *Wood* itself, for example, the district court had made a specific finding, unchallenged on appeal, that the officials bore no ill will toward the students. See *Wood*, 420 U.S. at 314. Accordingly, defendants surmounted the subjective prong of the new test. The debate centered on the objective prong of the test and whether it was fair to charge the defendants with knowledge of the local status of the right to process before expulsion, or with knowledge of what constituted "settledness." The right to process as a necessary procedural incident to a ten-day suspension from public school had been decided in *Goss v. Lopez*, 419 U.S. 565 (1975), earlier in the same term. In arguing against the majority's "standard of required knowledge" in *Wood*, Justice Powell questioned whether school administrators could be expected to know that *Goss* was settled law. See *Wood*, 420 U.S. at 329 (Powell, J., concurring in part and dissenting in part).

Justice Powell's doubt, in the specific context, is problematic for a number of reasons. First, the *Wood* majority did not purport to decide whether the law was "settled," but simply remanded. Because it was not then clear whether the "settledness" issue raised a legal or factual question, the dissent's concern was somewhat premature. Second, despite Powell's claim that "most lawyers would have thought, prior to [*Goss*], that the law to the contrary was settled, indisputable and unquestioned," *id.*, the majority noted that the courts of appeals had uniformly held that process was due before dismissal from public school. See *id.* at 323 n.15. Perhaps more important, in *Goss* itself the Court listed ten lower court cases that had required process before expulsion and dozens of others requiring process before dismissals. See *Goss*, 419 U.S. at 576-78 n.8. Included within that list were district and appellate court decisions from the Eighth Circuit, which decided *Wood*.

Moreover, Justice Powell's lament was somewhat disingenuous. He dissented in *Goss*, but he went to great lengths in that opinion to distinguish the need for procedural safeguards that would accompany an expulsion—the situation in *Wood*—from the absence of need in the context of a relatively short suspension—the context of *Goss*. See *id.* at 585, 589, 590, 591, 595 (Powell, J., dissenting) (distinguishing between relatively "routine" forms of discipline and more severe forms of school dismissals and punishment). He specifically noted that both historically and under the laws of the state where *Goss* arose, a hearing was required for the "incomparably more serious matter" of expulsion. *Id.* at 585 n.2; see also *id.* at 595 & n.14 (suggesting that the Court should not and need not interfere with traditional

His prediction proved ironic in *Harlow*¹⁰⁷ when those same dissenters, now joining a majority, *confined* the inquiry to the factor they had once found illegitimate, the state of constitutional precedent on the eve of the challenged conduct.¹⁰⁸ The new majority discarded the subjective prong and in the process effected a dramatic expansion of the affirmative defense. By declaring the new immunity forfeitable solely by reference to the state of the law, the Court turned its back on the common law tradition that tied immunity to lack of culpability and, in turn, deterrability. Instead, *Harlow*'s majority justified abandoning the good faith requirement largely as a response to the practical litigation burdens encountered by government officials accused of federal law violations when they attempted to establish their immunity.¹⁰⁹

The new majority must have realized on reflection that, from the defendant's perspective, the troublesome aspect of common law qualified immunity was the subjective prong, which entailed "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government."¹¹⁰ To avoid such

disciplinary schemes used in public schools, which included no hearing for "routine" suspensions). Finally, he agreed with the majority's suggestion that any "fair-minded school principal" would impose upon himself some minimum procedural safeguards prior to expulsion. *Id.* at 596 n.15 (quoting majority opinion). In short, there was clear legal and historical precedent for the majority's position; it was "indisputably settled" in this context, and there was no "harshness" involved.

¹⁰⁷ *Harlow* and its successor, *Anderson v. Creighton*, were not under § 1983 but actions against federal agents that arose directly under the Constitution. See *Bivens v. Six Unknown Unnamed Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Court has held, however, that § 1983 and *Bivens* immunities are interchangeable. See, e.g., *Harlow*, 457 U.S. at 818 n.30; *Butz v. Economou*, 438 U.S. 478, 496-504 (1978). In *Butz*, this interchangeability worked to narrow the federal officials' immunity from the absolute immunity they were then afforded against ordinary, nonconstitutional torts under *Barr v. Matteo*, 360 U.S. 564 (1959), to the modest version of common law qualified immunity then prevalent under § 1983. See Oren, *supra* note 24, at 970-72. By contrast, in *Harlow*, the Court's reliance on the *Butz* interchangeability notion served to extend the generous qualified immunity the Court had granted federal officials in *Bivens* actions to § 1983 defendants as well.

¹⁰⁸ See *Harlow*, 457 U.S. at 818 (holding that objective reasonableness of an official's conduct is to be "measured by reference to clearly established law . . . at the time an action occurred").

¹⁰⁹ See *id.* at 806, 814-19. The new test was foreshadowed by the Court's decision in *Procunier v. Navarette*, 434 U.S. 555, 564 & n.11 (1978) (requiring a closeness between precedent and the right asserted). See also Oren, *supra* note 24, at 980-81 & n.195 (discussing *Procunier* and the fine distinctions that could make a precedent inadequate to establish an asserted right).

¹¹⁰ *Harlow*, 457 U.S. at 817 (footnotes omitted).

disruptions, the Court simply jettisoned the subjective standard, relying entirely on an inquiry into the official defendant's "presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'"¹¹¹ If, *as a matter of law*, the official could not have known about the existence of the right allegedly infringed, he escaped accountability. "Democracy in the jury box"¹¹² was abandoned. Concomitantly, the individual defendant action lost its utility as a medium for expounding new constitutional rights, because only rights well settled by earlier decisions would be actionable.

Anderson extended *Harlow's* immunity standard to a lower-level official and expanded it in substance by conferring immunity unless the alleged federal law violation was established in a highly "particularized" way. Under this formulation, a right is clearly established only if it was announced in circumstances so closely analogous that a reasonable official in the defendant's position should realize the applicability of the settled precedent.

Anderson, an FBI agent, participated in an illegal search of the Creightons' home in an effort to find Mrs. Creighton's brother, a bank robbery suspect. The agents, pleading qualified immunity, admitted knowing that warrantless searches generally violated the Fourth Amendment but asserted that they could not have realized the illegality of their conduct on the facts in question.¹¹³ Justice

¹¹¹ *Id.* at 815 (quoting *Wood*, 420 U.S. at 322).

¹¹² The phrase is borrowed from Aviam Soifer, *Moral Ambition, Formalism, and the "Free World"* of DeShaney, 57 GEO. WASH. L. REV. 1513, 1528 (1989).

¹¹³ See *Anderson*, 483 U.S. at 638-41. The Fourth Amendment setting brings to mind the Court's refusal to apply "new rules" of law in most federal habeas cases, further stifling the development of constitutional law in the realm of criminal procedure. See *Teague v. Lane*, 489 U.S. 288, 330 (1989) (Brennan, J., dissenting) (objecting to the plurality's "formidable new barrier to relief" in cases in which "a federal habeas petitioner's claim, if successful, would result in the announcement of a new rule of law"); Rudovsky, *supra* note 34, at 56 ("[T]he court has placed significant limits on the power of a federal habeas corpus court to articulate new constitutional law."). Professor Arkin believes that the potential of *Teague* to restrict the development of new rules may be overstated, principally because the majority of such claims already faced one or more of the procedural bars to habeas that the Court had erected in earlier decisions. See Marc M. Arkin, *The Prisoner's Dilemma: Life In the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 392 & n.166 (1991). Professor Rudovsky argues further that another potential arena for the development of criminal constitutional law, suppression hearings, has been largely closed off because the unlawful police conduct does not eventuate in arrest and prosecution or because of the operation of the good faith exception to the exclusionary rule. See Rudovsky, *supra* note 34, at 55-56 (citing *United States v. Leon*, 468 U.S. 897 (1984)).

Scalia, speaking for the majority, ruled that an officer could not be said to have unreasonably disregarded "clearly established" law unless authoritative constitutional precedent closely on point existed at the time of the alleged violation.¹¹⁴ This standard subtly shifts the settledness concept enunciated in *Harlow*. That opinion stripped the official of immunity whenever a court determines by an objective test that he should have been aware of the law declaring the plaintiff's right.¹¹⁵ *Anderson*, however, accords the immunity even on an official to whom awareness of the right-declaring law may fairly be imputed unless he also should reasonably understand that "what he is doing violates that right."¹¹⁶

The Court justified this more lenient version of *Harlow* immunity as necessary to ward off the disruptiveness attendant upon litigation; *Harlow* would not sufficiently enable individual defendants to escape discovery unless the trial court applied the new doctrine with reference to a narrowly drawn conception of analogous precedent.¹¹⁷ Chief Justice Burger's common law approach in *Scheuer*—positing that the scope of the qualified immunity available to executive officers should vary with the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared . . . at the time and in light of all the circumstances"¹¹⁸—was overridden by the desire of the emerging Rehnquist Court to relieve public officials of the burden of litigation.

¹¹⁴ See *Anderson*, 483 U.S. at 641.

¹¹⁵ Government officials "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.

¹¹⁶ *Anderson*, 483 U.S. at 640. Thus the immunity is not forfeited unless it is "apparent" that "an official action" is unlawful when measured against pre-existing law. See *id.*

¹¹⁷ See *id.* at 638-41; see also *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (authorizing immediate appeals from denials of qualified immunity and stating that *Harlow* is designed to enable defendants who meet its minimum requirements to be dismissed from the action "before the commencement of discovery").

¹¹⁸ *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); see also Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald To Section 1983 Actions*, 38 Emory L.J. 369, 374-79 (1989) (describing the traditional common law approach to qualified immunity and criticizing the *Harlow* Court's departure from it because "[a]fter *Harlow*, even if a federal officer intended to harm the plaintiff, he is immune if the constitutional interest in issue was not clearly established at the time of the violation"). This assertion may be slightly overstated. See *supra* note 101.

The resolution of the "settledness" question, which the Court advertises as part of an objective test, is in fact dependent at the threshold¹¹⁹ on a subjective¹²⁰ characterization of law by trial and appellate judges. Indeed, when *Harlow/Anderson* immunity is timely pleaded, the § 1983 plaintiff must demonstrate at a minimum the same probandum demanded in a *criminal* civil rights prosecution: the deprivation of a "federal right made definite by decision or other rule of law."¹²¹ As this element was applied by the

¹¹⁹ Recent decisions reflect the federal courts' renewed determination to afford defendants an early resolution of that defense. See *Siebert v. Gilley*, 111 S. Ct. 1789, 1793 (1991) (holding on immediate "collateral order" appeal that "whether the constitutional right asserted is 'clearly established' at the time the defendant acted" should be decided before plaintiff is permitted to conduct discovery of the underlying claim); *Gaines v. Davis*, 928 F.2d 705, 707 (5th Cir. 1991) (holding on immediate "collateral order" appeal that district court's order was overly broad because it failed to limit the scope of depositions to the issue of qualified immunity). The lower courts have been moving to this position, treating the issue of qualified immunity as a threshold issue to be resolved in the early stages of a case. See, e.g., *Finnegan v. Fountain*, 915 F.2d 817, 820 (2d Cir. 1990) (stating that the application of qualified immunity is a question of law for the court and not the jury to decide); *Bennett v. Parker*, 898 F.2d 1530, 1534 (11th Cir. 1990) (stating that, when "faced with a motion for summary judgment based on a defense of qualified immunity, the district courts should first focus on whether the plaintiff has established a constitutional violation before determining whether material issues of fact are present"); *Krause v. Bennett*, 887 F.2d 362, 369 (2d Cir. 1989) (holding that when qualified immunity can be shown as a matter of law, defendants motion for judgment notwithstanding the verdict should be granted); *Eng v. Coughlin*, 858 F.2d 889, 895 (2d Cir. 1988) (remanding case to district court to rule on claims of qualified immunity that were not considered when ruling on motion for summary judgment).

¹²⁰ We label the initial characterization process "subjective" for the following reason. The FBI agent who committed the alleged violation in *Anderson* knew that the provision in question, the Fourth Amendment, demanded a warrant. See *Anderson*, 483 U.S. at 641. The right was not clearly established, however, because the Court concluded that a question remained as to whether a reasonable police officer, despite the lack of probable cause, could have believed probable cause existed. See *id.* This determination, in turn, required the trial court to make an appraisal of existing precedent on the eve of the alleged injury to determine its "closeness" to the facts that faced the defendant. See *id.* at 646 n.6. The last step in the trial or reviewing court's determination, like the initial decision made by the police, is inherently subjective because ascertaining closeness requires subjective appraisal of the relationship between the conduct under scrutiny and the conduct described in prior constitutional cases.

¹²¹ *Screws v. United States*, 325 U.S. 91, 103 (1945) (construing 18 U.S.C. § 52 (codified as amended at 18 U.S.C. § 242 (1988))), the criminal counterpart to § 1983, as requiring proof of scienter, but noting that "bad purpose or evil intent alone may not be sufficient"). The "requisite bad purpose" of *Screws* has been held satisfied if the evidence shows that the criminal defendant had the purpose to deprive the citizen of the "interests protected" by the violated federal right, even absent any consciousness of the unlawfulness of his conduct. See *United States v. Ehrlichman*, 546 F.2d 910, 921 (D.C. Cir. 1976). The § 1983 plaintiff, therefore, must demonstrate little

Anderson majority, the "settled" category may virtually evaporate for want of sufficiently apposite prior cases. At the extreme advocated by *Anderson's* dissenters, on the other hand, a right is clearly established if it fits within any of the generic descriptions that compose the Constitution's catalogue of rights. The upshot is that the settledness concept, as viewed by the several Justices in *Anderson*, is zero-sum, scarcely ever satisfied or so easily satisfied as to be meaningless. A majority adopted the strict view and as a consequence qualified immunity is now routinely invoked and almost as routinely upheld.¹²²

Ironically, given the justifications for its creation, the new qualified immunity has proven difficult to administer; an increasingly complex jurisprudence of appellate jurisdiction consumes much of the same time and funds of officials that the doctrine sought to spare. In a number of contexts, circuit courts are unsure whether to accept jurisdiction over immediate appeals of pretrial orders denying qualified immunity.¹²³ If an individual defendant must

less against an individual immunity-claiming government official than the government must show in a criminal prosecution for a violation of the same rights.

¹²² See, e.g., *Johnson v. Moore*, No. 89-35867, 1991 U.S. App. LEXIS 23244, at *5 (9th Cir. Oct. 9, 1991) (holding qualified immunity applies when the right alleged to have been violated is not sufficiently clear to the state official concerned); *Johnson v. Boreani*, 946 F.2d 67, 71 (8th Cir. 1991) (concluding that, under the facts, summary judgment is appropriate and necessary to achieve purposes of qualified immunity defense established in *Anderson*); *Vaughan v. Ricketts*, 859 F.2d 736, 739 (9th Cir. 1988) (entitling defendant to summary judgment and granting him qualified immunity if he can establish that it was reasonable to believe his act comported with the Constitution).

¹²³ Compare *Krohn v. United States*, 742 F.2d 24, 28 (1st Cir. 1984) ("[T]he inhospitality [*Harlow*] evidenced towards groundless suits against officials, would best be effected by making denials of [qualified] immunity immediately appealable . . .") and *McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982) ("[A]ppellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity.") with *Peppers v. Coates*, 887 F.2d 1493, 1496-97 (11th Cir. 1989) (citing prior Eleventh Circuit authority and stating that the denial of summary judgment on the basis of qualified immunity "is reviewable after final adjudication of the case, and the collateral order doctrine cannot be invoked prematurely to confer immediate jurisdiction upon this court"). But see *Hudgins v. City of Ashburn*, 890 F.2d 396, 402-03 (11th Cir. 1989) (describing the "clearly established" test as an issue of law eligible for interlocutory decision). A recent panel decision of the Eleventh Circuit reviews in detail the contradictory holdings of its prior panels. The panel concluded that immediate appeal is available from the denial of summary judgment on the qualified immunity defense regardless of whether the decision below turns on the "legal" determination that the right at issue is clearly established or on the "factual" determination that a reasonable person in the defendant official's position should have understood that her conduct would

go to trial on a separate constitutional claim that he concedes does implicate a clearly established right,¹²⁴ or on a claim for equitable relief, which is not barred by immunity,¹²⁵ the lower appellate courts are understandably perplexed about whether the incremental burden of defending the damage claim warrants exceptional immediate review.

In the end, the test for individual immunity in § 1983 actions rests on an unnecessary fiction. The test is unnecessary because there are ways to determine immunity that are more faithful to the statute's purpose. It is fictional because the purportedly "objective" standard for determining qualified immunity rests on the fragile belief that the relatively low-level employee most likely to have actual citizen contact, the cop on the beat,¹²⁶ for example, appreciates the current state of constitutional law. The delicacy of that premise is self-evident.¹²⁷ In any event, after *Anderson*, *Monroe's*

violate that right. See *Howell v. Evans*, 922 F.2d 712, 716-18 (11th Cir.), *vacated on grant of reh'g*, 931 F.2d 711 (11th Cir. 1991).

¹²⁴ See *Green v. Brantley*, 895 F.2d 1387, 1394 (11th Cir.) (holding that the denial of a motion for partial summary judgment on the grounds of qualified immunity was not appealable if defendants would still be subject to trial on the issue of damages), *reh'g granted and opinion vacated*, 921 F.2d 1124 (11th Cir. 1990).

¹²⁵ Most circuit courts permit the defendant's immediate appeal of the immunity denial notwithstanding pendency of trial on an equitable claim. See, e.g., *DiMartini v. Ferrin*, 889 F.2d 922, 924-25 (9th Cir. 1989) (citing cases), *cert. denied*, 111 S. Ct. 2796 (1991); *Marx v. Gumbinner*, 855 F.2d 783, 787-88 (11th Cir. 1988) (stating that "a defendant may immediately appeal a denial of official immunity"). The Third Circuit, however, has departed from this trend. See *Prisco v. United States*, 851 F.2d 93, 96 (3d Cir. 1988) (holding that a defendant may not appeal the denial of summary judgment on immunity if there are prospective relief claims pending), *cert. denied*, 490 U.S. 1089 (1989). That qualified immunity sometimes does not insulate the official from discovery or trial if equitable relief is sought demonstrates that even the Court's extreme solicitude for the defense has not fully achieved the asserted goals behind its expansion. See *infra* note 242.

¹²⁶ Chief Justice Burger compared the discretionary decision-making of executive officials with that of cops on the beat. See *Scheuer v. Rhodes*, 416 U.S. 232, 246-47 (1974).

¹²⁷ Ironically, Justice Powell, dissenting in *Wood*, which first articulated the "settled" standard, gave as one of his reasons for opposing that decision the very delicacy he later helped enshrine. See *supra* note 106 and accompanying text. An acute recent example of the problems related to the counterfactual premise of "settledness" is furnished by *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482 (10th Cir.), *cert. denied*, 111 S. Ct. 295 (1990). A state environmental official conducted a warrantless search of a gas station under circumstances which, the Court acknowledged, violated a "clearly established" right of the station owner. See *id.* at 1488. Nevertheless, the Tenth Circuit concluded that the defendant deserved immunity under an "extraordinary circumstances" exception mentioned in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), available to defendants who "neither knew nor should have known of the relevant legal standard." *V-1 Oil Co.*, 902 F.2d at 1488. The Court of Appeals

broad sphere of individual defendant liability is now largely offset by a highly solicitous definition of official immunity.

III. THE CASE AGAINST ENTITY DEFENDANTS

Monroe approved a wide variety of claims against individual defendants for federal law violations their entity principals had not authorized. At the same time, however, it declared that local government entities lie wholly outside the ambit of § 1983. Although from a plain-meaning perspective everything such an entity does is surely "under color of" state law,¹²⁸ the Court concluded that it simply was not a "person" civilly liable for that conduct. This conclusion was premised upon the significance the Court attached to the rejection of an amendment to the original statute, proposed by Senator Sherman, that would have made government entities liable to citizens injured by specific acts of violence committed by private citizens.¹²⁹ The federal compulsion to monitor citizen conduct that would have been imposed on state entities under the amendment seemed to offend the prevailing theory of dual sovereignty, which forbade the national government from imposing duties or obligations on officers of the state or state instrumentalities.¹³⁰

explained that the defendant's reliance on the contemporaneous advice of a fully briefed senior state assistant attorney general made the circumstances "extraordinary" even though, as a general rule, there is nothing "inherently extraordinary" about reliance on the advice of counsel. *See id.*

There is of course a long tradition of assuming, for purposes of civil as well as criminal liability, that litigants are aware of the requirements of prior decisions. *See, e.g.,* *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (holding that defendants will be subject to a constitutionally adequate basis of personal jurisdiction if they are served with process in any state in which they are even transiently present). According to the Supreme Court, knowledge of the transient service rule was fairly imputable to potential civil defendants by virtue of a "continuing tradition," *see id.* at 2118 (plurality opinion by Scalia, J.), or a "century of judicial practice," *see id.* at 2124 (Brennan, J., concurring). Even granting that assumption, however, it may be a far greater stretch to assume that a low-level government official can identify *which* prior constitutional law decisions are sufficiently analogous to a real-life event to furnish "clearly established" precedent within the meaning of *Anderson*.

¹²⁸ *See Monell v. Department of Social Servs.*, 436 U.S. 658, 707 (1978) (Powell, J., concurring) ("No conduct of government comes more clearly within the 'under color of' state law language of § 1983.").

¹²⁹ *See Monroe v. Pape*, 365 U.S. 167, 188-92 (1961), *overruled in part by Monell*, 436 U.S. 658.

¹³⁰ *See id.* at 190; *see also Monell*, 436 U.S. at 669-83 (surveying the drafting Congress's debate over potential dual sovereignty limitations on their authority).

Seventeen years later, the Court gave a very different reading to that same history. Justice Brennan's opinion in *Monell v. Department of Social Services*¹³¹ agreed that the 1871 Congress, in rejecting the Sherman Amendment, doubted its "constitutional power to impose . . . [civil liability] upon county and town organizations."¹³² But the real vice of the Amendment, according to the revisionist view, was that the duty imposed on state polities was new; it was the federal imposition on the states of a fresh obligation that aroused the ire of the Amendment's victorious opponents. Section 1983, the *Monell* Court observed, imposed no such new obligation on any state or local government. It merely subjected local government to civil liability for violating federal constitutional obligations already a part of the organic law of the land.¹³³ This explains why several opponents of the Amendment nevertheless voted to enact § 1983 into law.¹³⁴

Having cleared away the constitutional objection stemming from the significance *Monroe* had ascribed to the rejection of the Sherman Amendment, the *Monell* majority was free to inquire whether the 1871 Congress intended to include local government entities as a species of "person" suable under § 1983. The Court relied principally on the Dictionary Act of 1871, passed only two months before the law that became § 1983. The Dictionary Act provided that "in all acts hereafter passed . . . the word "person" may extend . . . to bodies politic and corporate."¹³⁵ The majority concluded

¹³¹ 436 U.S. 658 (1978).

¹³² *Id.* at 664 (quoting *Monroe*, 365 U.S. at 190).

¹³³ See *id.* at 669-83. The *Monell* majority relied on history that illustrated how such preexisting constitutional duties were enforced civilly against municipalities during the reign of dual sovereignty. In effect, then, it drew a distinction between the legislative imposition of new obligations and the judicial declaration of rights discovered in extant text, with only the former offending dual sovereignty. The Court's attempt to reconcile opposition to the Sherman Amendment based on dual sovereignty with its application of § 1983 to local government entities encounters an additional difficulty after passage of § 1983. The statute's framers might well regard expansive constitutional constructions first announced after the statute's enactment, as well as the federal statutory obligations that now may be enforced against local government through § 1983 actions, see *infra* notes 258-70, as fresh obligations offensive to dual sovereignty. Mitigating this difficulty is the fairly rapid waning of dual sovereignty after enactment of § 1983, and the use of § 1983 to impose liability for violations of federal statutory rights is a fairly recent development. See *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980) (defining the "and laws" language of § 1983 to apply to the deprivation of statutory benefits).

¹³⁴ See *Kramer & Sykes*, *supra* note 24, at 260.

¹³⁵ *Monell*, 436 U.S. at 688 (quoting Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (1871)).

in summary fashion that corporations, including municipal corporations, were customarily treated identically with natural persons for purposes of constitutional and statutory construction.¹³⁶

The *Monell* retrospective on the 1871 Congress's doubt about its power to subject local governments to civil liability is not controversial on its merits. Even Justice Rehnquist in dissent acknowledged the probable correctness of the majority's conclusion on that point.¹³⁷ What is remarkable is that the Court would tackle the issue only seventeen years after *Monroe's* excursion through the same history, and in the same year the Senate held hearings on a bill that would have overturned the *Monroe* exclusion of municipal governments from the reach of § 1983.¹³⁸ The majority itself recognized the awkwardness of the rapid return visit.¹³⁹

Still, it is not surprising that the Court would strain so hard to sweep government entities within § 1983. The extant qualified immunity doctrine, while not yet overwhelmingly tilted in favor of the defendant, was tied to the concept of reasonableness and therefore made recovery against individual officers uncertain. Further, even if the plaintiff prevailed the officer was likely to be judgment-proof, and the practice of indemnification, although widespread, was equally uncertain and uneven. Some governments would not indemnify at all, and others only for conduct comporting with varying definitions of scope of authority.¹⁴⁰ Indemnification

¹³⁶ See *id.* at 688-89.

¹³⁷ See *id.* at 723 (Rehnquist, J., dissenting) (stating that "it may well be that on the basis of this closer analysis . . . a conclusion contrary to . . . *Monroe* . . . could have been reached . . . 17 years ago"); see also *id.* at 722 (granting that the Court was "probably correct" in its analysis of the Sherman Amendment debates).

¹³⁸ See *id.* at 719.

¹³⁹ The majority labored to explain why *stare decisis* should not preclude it from overruling this portion of *Monroe*. The *Monell* overruling of the *Monroe* entity immunity holding in such a short time span is a striking early instance of the demise of statutory *stare decisis*, so decisively reaffirmed as late as 1938 in Justice Brandeis's celebrated opinion in *Erie R.R. v. Tompkins*, 304 U.S. 64, 79-80 (1938). That demise is catalogued, almost defiantly, in the *per curiam* opinion of the Court that *sua sponte* called for rebriefing and reargument in *Patterson v. McLean Credit Union*, 485 U.S. 617, 618 (1988) (citing cases).

¹⁴⁰ The availability of indemnification then, as today, is not entirely clear. The Yale Project, sampling Connecticut district court filings from 1970-77, found that no costs were borne by police officers sued under federal statutes. See Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810-11 (1979) (noting that Connecticut required indemnification under CONN. GEN. STAT. § 7-465 (1977)). By the same token, one commentator writes that other municipalities were experiencing difficulty purchasing comprehensive liability insurance for employees and elected officials. See Martin J. Jaron, Jr., *The Threat of Personal Liability Under the Federal Civil Rights Act:*

thus did not assure the satisfaction of judgments in many cases embraced by *Monroe's* broad "under color of" umbrella.

Finally, the Court was influenced by the fundamental structural consideration that § 1983, itself constitutionally dependent upon state action, was specifically aimed at state-sponsored conduct. If local government officials and low-level employees could be reached precisely because they carried the badge of government authority, is it reasonable to suppose that the 1871 Congress intended to absolve the very governments who handed out the badges?¹⁴¹

The Court in *Monell*, however, having stretched jurisprudential convention to arrive at a result consonant with constitutional history and pre-*Monroe* precedent, strained equally far, without any compulsion to do so from the facts or posture of the case, to narrow the terms of local government liability. This limitation is contained in a separate discussion discounted by Justice Stevens as "merely advisory" and "not necessary to explain the Court's decision."¹⁴² The Court wrote that local government entities face § 1983 liability only if the conduct causing the constitutional violation is carried out "pursuant to official municipal policy of some nature."¹⁴³

How Justice Brennan derived the "policy" limitation is a source of wonder. He began the journey with the statute's text, noting that the defendant, to be liable, must "subject[], or cause[a plaintiff] to be subjected" to the deprivation of federally secured rights.¹⁴⁴ That sparse language, he concluded, "cannot be easily read to impose liability vicariously on governing bodies . . . [T]he fact that

Does It Interfere with the Performance of State and Local Government?, 13 URB. LAW. 1 (1981), reprinted in SECTION 1983: SWORD AND SHIELD 309, 327-29 (Robert H. Freilich & Richard G. Carlisle eds., 1983); see also SCHUCK, *supra* note 89, at 85 (discussing self-insurance and the purchase of insurance by states, localities, and public officials). Most observers seem to agree that some form of indemnification was and is available, although the scope varies from jurisdiction to jurisdiction. See, e.g., *id.* at 86 (explaining that "[m]ost states provide some form of indemnification or other protection against adverse judgments or settlements, but some apparently provide it only in narrowly circumscribed situations" (citation omitted)); LOW & JEFFRIES, *supra* note 27, at 924 (pointing out that although most government employers choose to protect their employees against damage liability, the availability of such protection often depends on statutes, ordinances, and practices in each jurisdiction).

¹⁴¹ Indeed, Justice Powell noted the "oddness" of imposing liability on the agent but not the principal for whom the agent worked. See *Monell*, 436 U.S. at 705 (Powell, J., concurring). We deal subsequently with the oddness in our own proposal of imposing liability on the entity principal in circumstances where we would absolve its agent. See *infra* note 316.

¹⁴² *Monell*, 436 U.S. at 714 (Stevens, J., concurring in part).

¹⁴³ *Id.* at 691.

¹⁴⁴ *Id.* at 691-92 (quoting § 1983).

Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent."¹⁴⁵ In the absence of custom, only some deliberate act labelled "official policy" would show causation and thus create municipal liability.

Ascribing such independent, greater-than-boilerplate significance to causation language in a statute remediating constitutional torts is somewhat surprising, since causation is an invariable prerequisite of liability for civil harms. Additionally, the language Justice Brennan construed is susceptible to equally plausible alternative interpretations. One way an entity may "cause" a person to be subjected to a constitutional injury, for example, is simply to charge its agents to meet specified objectives without taking reasonable steps to prevent them from trampling on federally protected rights. No deliberative act on the part of the employer is required to "cause" deprivations in this fashion. Although this interpretation is perhaps dubious as applied to those predicate violations dependent upon an element of wrongful intent,¹⁴⁶ no textual imperative extends such a limitation to the deprivation of other constitutional or statutory rights, or to the interpretation of § 1983 itself. In any case, if causation is really the issue, it is not apparent why the Court deems an injury to be caused by the entity when its agent acts pursuant to official policy, but not otherwise.¹⁴⁷ Rather, it seems equally likely that "subjects, or causes to be subjected" refers not to the authorization inherent in a requirement of official policy but simply to differing degrees of proximity between the depriver and the deprived.¹⁴⁸

¹⁴⁵ *Id.* at 692 (emphasis added).

¹⁴⁶ See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the "intent" necessary to state a claim for denial of equal protection of the laws requires plaintiff to show that the decision was made "because of," not merely "in spite of" its adverse effects"); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (holding that "deliberate indifference" is demanded to state an Eighth Amendment claim for deprivation of medical attention); see also *infra* note 362.

¹⁴⁷ See *Kramer & Sykes*, *supra* note 24, at 256.

¹⁴⁸ Virtually the same phrase first appears in § 2 of the Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified in scattered sections of 42 U.S.C.). Section 1 of that Act declared rights to contract and dispose of property free from racial discrimination. Section 2, described by Senator Trumbull, a sponsor, as "the valuable section of the bill so far as protecting the rights of freedmen is concerned," prescribes criminal punishments for any person who, under color of state law, "shall subject or cause to be subjected" any "inhabitant" to the deprivation of § 1 rights. 1 STATUTORY HISTORY OF THE UNITED STATES 112 (Bernard Schwartz ed., 1970). Senator Trumbull

No serious question of proximate causation can be resolved without recourse to extrinsic materials. Justice Brennan garnered support for his interpretation with an overinclusive argument resting on the premise that failure to require action pursuant to government "policy" would create a federal law of respondeat superior that "would have raised all the constitutional problems" implicated by the rejection of the Sherman Amendment.¹⁴⁹ He reasoned that encumbering local governments with civil liability whenever their agents violate constitutional norms would be tantamount to federal imposition of an "obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."¹⁵⁰

Many federal constitutional and statutory duties, however, are not tantamount to a "new" obligation to keep the peace. In this sense, Justice Brennan's argument proves too much. For example, the challenged requirement in *Monell*—that pregnant city employees take unpaid leaves of absence while still medically able to work¹⁵¹—violated equal protection or the then current "irrebuttable presumption" variation of due process.¹⁵² Even if an individu-

explains that ensuring the freedom of newly freed slaves requires criminal sanctions for "any person who [under color of law] shall deprive another of any right or subject him to any punishment in consequence of his . . . race." *Id.* Provided he acts under color of law, therefore, a putative defendant could himself immediately "subject" an inhabitant to the deprivation of a § 1 right, or could accomplish the same end by "causing" another to "subject" the inhabitant to the deprivation. Thus, a deputy sheriff could deny a § 1 right directly or prevail upon a fellow deputy or a private citizen to do so. Significantly, in none of these examples would the initiator-defendant be implementing any "policy" in the sense of a deliberative decision of his entity.

¹⁴⁹ *Monell*, 436 U.S. at 693.

¹⁵⁰ *Id.* The Court has continued to eschew efforts that would, in effect, obligate local governments or governmental units to keep the peace among civilians. *Cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198-203 (1989) (holding that the failure of a county department of social services to provide a minor with adequate protection against his father's violence did not violate that minor's due process rights). For an unusual and provocative discussion of the interface between "private action" and the requirement of state action, see Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 8-13 (1989) (discussing *DeShaney*).

¹⁵¹ See *Monell*, 436 U.S. at 660-61.

¹⁵² See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643-48 (1974) (stating that a school board's presumption that a woman five or more months pregnant is physically unfit to teach in a classroom is an "irrebuttable presumption" and thus suspect under the Due Process Clause); *Stanley v. Illinois*, 405 U.S. 645, 654 (1972) (ruling that an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause).

al supervisor had imposed this requirement in an ad hoc manner that fell short of city policy or custom, imposing liability on the city would certainly not have burdened it with an obligation to keep the peace or any other "new" obligation not already mandated by the Constitution.¹⁵³

Particularly unfortunate, given the mischievous consequences the "policy" requirement would soon deliver, is that the entire discussion of entity attribution in *Monell* was unnecessary to the decision. The city's pregnancy leave requirement was adopted "as a matter of official policy," and the majority admitted that "this case unquestionably involve[d] official policy as a moving force of the constitutional violation."¹⁵⁴ *Monell*, therefore, furnished no occasion to consider when unauthorized federal violations are sanctioned or tolerated by entity officials to the degree that § 1983 liability should extend beyond the agent to the entity.

Why would the Court blithely take away, with its policy requirement, so much of what it had labored mightily to give by overruling the restrictive *Monroe* definition of "person"? Despite authoring *Monell*'s majority opinion, Justice Brennan's own enthusiasm for the dictum is in serious doubt. Seeking to limit the policy argument, Justice Brennan later described the requirement as intended merely to distinguish the municipality's acts from those of its employees.¹⁵⁵ Eventually he would take sharp issue with decisions that found policy only in positive local legislation or a pattern amounting to "custom."¹⁵⁶ Only two years after *Monell*, in the course of rejecting any form of entity immunity, he endorsed the very "loss-spreading" principle that *Monell* had found inadequate to justify

¹⁵³ The obligation of state officials to obey the Constitution was not a "new" one offensive to the dual sovereignty conception of the Sherman Amendment opponents, who recognized as much in enacting § 1983. See *supra* text accompanying notes 130-33. In principle, vicarious municipal liability for the constitutional torts of a municipality's agents simply holds the municipality to the same preexisting constitutional standards incumbent on state officers. The distinction that the individual state officer need only answer for his own behavior, while the municipality must answer for that of its employee, is irrelevant to the "new obligation" objection that animated opposition to the Sherman Amendment. See *Kramer & Sykes, supra* note 24, at 259-60. Indeed respondeat superior was a well-established common law rule at the time. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 835-39 (1985) (Stevens, J., dissenting).

¹⁵⁴ *Monell*, 436 U.S. at 694.

¹⁵⁵ See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-81 (1986).

¹⁵⁶ See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 142-47 (1988) (Brennan, J., concurring); *Tuttle*, 471 U.S. at 831-33 (Brennan, J., concurring in part).

subjecting entities to respondeat superior.¹⁵⁷ The policy dictum may be the price that some Justices paid for their brethren's acquiescence in the overriding of stare decisis—the volte face from *Monroe*—that made it possible to reach entities at all.

Since first introduced in *Monell*, "policy" now embraces not only conduct formally adopted by the entity or enshrined in settled custom but also decisions of a final policy-making official who commits the federal law violation herself or ratifies the unlawful act of a delegate. The "policy" barrier thus echoes dissenting Justice Frankfurter's argument in *Monroe* that an agent's actions must have state authorization to occur "under color of" state law.¹⁵⁸ In fact, "policy" circumscribes the scope of entity liability even more sharply than Justice Frankfurter would have curbed the liability of individual defendants in *Monroe*. Not only do entities, like their agents under Justice Frankfurter's view, escape liability for conduct undertaken without "authority"; under *Monell* and its progeny, the agents' authorized acts cannot be attributed to the entity unless the authorization stems from sources sufficiently high or formal to qualify as an aspect of official policy.

The requirement of a "final" policymaker emerged, again as dictum, in a plurality opinion in *Pembaur v. City of Cincinnati*.¹⁵⁹ A county prosecutor and subordinate law enforcement officials authorized and executed, respectively, the service of capias by breaking down the door of a private physician's office. All of the Justices agreed that the conduct that gave rise to the action violated the Constitution only if a Fourth Amendment precedent, *Steagald v. United States*,¹⁶⁰ were to apply retroactively. The plurality allowed the action to proceed against the county because a state statute specifically authorized the county prosecutor to advise the local police on such matters as the lawfulness of entry.¹⁶¹

The "final policymaker" requirement appears in response to dissenting Justice Powell's charge in *Pembaur* that the plurality had re-opened the door to respondeat superior.¹⁶² Justice Powell

¹⁵⁷ See *Owen v. City of Independence*, 445 U.S. 622, 655 (1980).

¹⁵⁸ See *Monroe v. Pape*, 365 U.S. 167, 257 (1961) (Frankfurter, J., concurring in part and dissenting in part), *overruled in part* by *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

¹⁵⁹ 475 U.S. 469 (1986).

¹⁶⁰ 451 U.S. 204 (1981).

¹⁶¹ See *Pembaur*, 475 U.S. at 484-85.

¹⁶² See *id.* at 499 (Powell, J., dissenting). Within two years, Brennan attempted to disown, at least in part, the same requirement of finality. See *City of St. Louis v.*

argues convincingly that the off-hand, hasty decision of a harried assistant prosecutor, made during a telephone conversation while a horde of municipal police officers, axes poised, awaited his direction, does not amount to policy,¹⁶³ if, as the plurality insisted, "policy" requires "a deliberate choice to follow a course of action . . . made from among various alternatives."¹⁶⁴ Generally speaking, Justice Powell would have found "policy" only when a legislative body adopts a rule of universal applicability.¹⁶⁵

The underlying normative question, though, is whether absent formally or deliberately adopted "policy" the entity should be exonerated. In this regard we might speculate about the result on *Pembaur's* facts if Powell's analysis had carried the day. Exoneration of the municipal defendant would have left *no one* liable to the plaintiff for what the Court agreed was a constitutional violation. The individual defendants were absolved by *Harlow's* version of "clearly established" qualified immunity.¹⁶⁶ Because their liability was premised on applying *Steagald* retroactively, the legal question was not resolved at the time the capias was served. These defendants did not, therefore, act in violation of clearly established law.

Consider a modification of the facts. Suppose the precedent on which the individual defendants' liability turned had been decided *before* the *Pembaur* events and was deemed sufficiently clearly established to satisfy *Harlow* and *Anderson*. Further suppose that there could still be no actionable entity policy as defined by Justice Powell, because no positive legislation or government pronouncement gave the prosecutor final authority to make policy respecting the service on Dr. Pembaur. In such a case, the Court would likely visit liability not upon the entity but upon the police officers

Praprotnik, 485 U.S. 112, 144-46 (1988) (Brennan, J., concurring).

¹⁶³ See *Pembaur*, 475 U.S. at 501 (Powell, J., dissenting).

¹⁶⁴ *Id.* at 483 (plurality opinion).

¹⁶⁵ See *id.* at 499-500 (Powell, J., dissenting).

¹⁶⁶ See *id.* at 475 (plurality opinion). Whether the prosecutor, in contrast to the subordinate officers, would have been eligible for absolute immunity per *Imbler v. Pachtman*, 424 U.S. 409 (1976), turns on whether his advice concerning the capias service would be classified as intimately related to the prosecutor's role in the judicial system. Absolute immunity does not pertain to all conduct of judges, or, by extension, prosecutors, but depends on a functional characterization of the challenged conduct. See *Forrester v. White*, 484 U.S. 219, 227-29 (1988). As a recent decision of the Court illustrates, however, problems exist with a functional characterization process. See *Burns v. Reed*, 111 S. Ct. 1934, 1942-45 (1991) (holding that the prosecutor's advice to police that they could interview a suspect under hypnosis relates more to the prosecutor's investigative role and is not sufficiently connected to the judicial process to warrant absolute immunity).

alone,¹⁶⁷ even though they had followed standard departmental operating procedure by calling the assistant prosecutor for instructions. The result works at cross-purposes with one of the traditional rationales for individual immunity, fairness.

The finality requirement extends the floodgates rationale to an unacceptable extreme, virtually foreclosing the accountability of a solvent entity. In *City of St. Louis v. Praprotnik*,¹⁶⁸ the Court tightened the finality qualification by demanding ratification of delegates' decisions and rationales.¹⁶⁹ After reiterating that "the authority to make municipal policy is necessarily the authority to make *final* policy,"¹⁷⁰ the Court explained that the act of an individual that departs from the final policymaker's instructions is not the act of the municipality. Accordingly, when a policymaker delegates policymaking responsibility, entity liability attaches only if "the authorized policymakers approve a subordinate's decision and the basis for it."¹⁷¹

This demand, articulated without accompanying justification, creates a *prima facie* burden of Herculean proportions. First, it promises to have widespread application. Few citizens deal with "final policymakers" on a day-to-day basis; they deal more commonly with subordinates whose decisions require clearance. Second, the injury is seldom related to the "basis" of, or intent behind, the subordinate's policy choice, but more often results from the implementation of an earlier choice. Finally, the requirement ignores the reality that policy is made as policy is required, often with little thought about its broader implications.

The facts of *Praprotnik* illustrate the problem. Plaintiff complained that he was laid off from city employment in violation of the First Amendment because he was a whistle-blower. He was subjected to retaliation, the jury found, for appealing an adverse

¹⁶⁷ The Court expressed no opinion on the availability of qualified immunity for the *Pembaur* prosecutor. See 475 U.S. at 474 n.2. It is now apparent that the prosecutor, if not eligible for absolute immunity with respect to the giving of advice concerning service of the *capias* would be eligible for qualified immunity under *Harlow*. See *Burns*, 111 S. Ct. at 1944.

¹⁶⁸ 485 U.S. 112 (1988).

¹⁶⁹ Only a plurality reached this conclusion, but their views commanded a majority in *Jett v. Dallas Independent School District*, 491 U.S. 701, 737-38 (1989).

¹⁷⁰ *Praprotnik*, 485 U.S. at 127 (citing *Pembaur*, 475 U.S. at 481-84).

¹⁷¹ *Id.* The Court hastened to distinguish the case where "a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker." *Id.* at 130. One wonders how often that really happens.

personnel decision that, in turn, was the result of his public opposition to a controversial decision to purchase an expensive piece of sculpture.¹⁷² A majority of the Court agreed that the supervisor who discharged plaintiff lacked final personnel policy-making authority.¹⁷³ A plurality offered several interrelated reasons for its conclusion: the superior who made the decision to lay off the plaintiff possessed only discretionary implementation authority under the policymaking aegis of the city's civil service commission; the superior's control fell short of full-fledged delegated authority with respect to personnel policy; and, the possibility that an official could make a personnel decision based on a retaliatory motive was at odds with the city charter provision that specified "merit and fitness" as the sole criteria.¹⁷⁴ The Court concluded that the city had "enacted no ordinance designed to retaliate against respondent"¹⁷⁵ and that the only "final" decisions were those of the Civil Service Commission.¹⁷⁶

Praprotnik's requirements pay excessive respect to federalism and raise a substantial question about fairness to individual defendants. Federalism concerns were actually implicated only tangentially, since imposing liability on the entity would not have intruded on the legitimate exercise of discretionary government authority. Prohibiting retaliation for exercising First Amendment rights is not meddlesome interference and requires no wholesale reordering of personnel decisionmaking. From the fairness perspective, *Praprotnik* sacrifices the subordinate who in good faith inadvertently violates a clearly established constitutional right. The Court would now fasten liability on the underling alone, despite the superior's approval of the injurious decision, so long as the superior does not also approve its basis.

The Court's general insistence on entity "policy," and the finality and ratification refinements in particular, are theoretically and practically flawed. At the theoretical level, any liability imposed upon government is necessarily vicarious because governments cannot operate except through human agency. Thus the Court's search for entity advertence in the form of deliberative policy, or,

¹⁷² See *id.* at 150-55 (Stevens, J., dissenting).

¹⁷³ See *id.* at 131 (O'Connor, J., plurality opinion); *id.* at 137 (Brennan, J., concurring in judgment, writing for three Justices).

¹⁷⁴ See *id.* at 124-30.

¹⁷⁵ *Id.* at 128.

¹⁷⁶ See *id.* at 129 (quoting ST. LOUIS CITY CHARTER, art. XVIII, § 2(a)).

if the injury is caused by omission, in the form of the "deliberate indifference" demanded by *City of Canton v. Harris*,¹⁷⁷ is wholly quixotic. At the practical level, from the viewpoints of both the state actor who commits and the person who suffers the violation, the actor's authority appears complete. *Pembaur's* prosecutor and *Praprotnik's* perpetrator both assumed they had authority to do what they did, their relevant subordinates assumed the same, and the victims suffered as a result. If the goal is establishing a reasonable causal nexus between the entity's liability and its subordinates' conduct at a cost that does not overvalue the Court's concerns about fairness, federalism, and floodgates, the Court has gone too far.

Governmental liability now lingers only in the rare case where the entity broadcasts the unconstitutionality of its practice in a formal pronouncement,¹⁷⁸ acts pursuant to its legislative body¹⁷⁹ or positive state legislation,¹⁸⁰ manifestly endorses subordinates' discrete decisions through delegation or ratification at the highest administrative level,¹⁸¹ or inflicts the federal injury through an omission characterized by "deliberate indifference."¹⁸² Further, in all but the last situation, the question will be one of state law ripe for pretrial decision by the trial judge.¹⁸³

¹⁷⁷ 489 U.S. 378, 392 (1989) (remanding the question whether a city's failure adequately to train police officers to assess a detainee's need for medical assistance stemmed from "deliberate indifference"). See *infra* note 183 and accompanying text (discussing *City of Canton*).

¹⁷⁸ See *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

¹⁷⁹ See *Owen v. City of Independence*, 445 U.S. 622 (1980).

¹⁸⁰ See *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

¹⁸¹ See *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

¹⁸² See *City of Canton v. Harris*, 489 U.S. 378 (1989).

¹⁸³ It is an irony of *City of Canton* that "deliberate indifference," the Court's surrogate test for "policy" in a case of constitutional violation by omission, is at once the most substantively difficult for the plaintiff to survive and yet appears to be determinable at trial by a jury. In contrast to the other entity-defendant opinions that refined the *Monell* notion of "policy," Justice White's opinion in *City of Canton* does not assert that the "deliberate indifference" issue is a preliminary question of law for the court. Indeed, the very description of the test—whether the need for entity action was "so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent," *id.* at 390—reveals that its satisfaction is a question of degree and the ultimate question inherently one of fact. See *infra* note 200.

Justice White alludes to the jury function respecting a related aspect of the *prima facie* omissions case, causation. Deciding whether more or better training would have avoided the particular plaintiff's injury "may not be an easy task," he writes, but "judge and jury, doing their respective jobs, will be adequate to the task." *City of Canton*, 489 U.S. at 391 (adopting a strict causation standard to avoid the possibility

The debate is over the increment to respondeat superior that suffices for entity liability: What should be required beyond challengeable conduct occurring within the scope of an entity agent's employment? Justice Powell, writing separately in *Pembaur*, would apparently have limited the actionable sphere to decisions made under rules of general applicability, much like the pregnancy policy at issue in *Monell*.¹⁸⁴ Justice Brennan, for the *Pembaur* plurality, pushed the liability potential somewhat further, so that even particularized decisions may represent the entity's policy if "the decisionmaker possesses final authority to establish policy with respect to the action ordered."¹⁸⁵

The Court continues to recognize this latter version of "policy," though in somewhat more grudging terms that relegate the question of policymaking authority to the vagaries of local positive law.¹⁸⁶ As a result, Justice Brennan's "final policymaker" approach relieves the entity of liability for a wide range of its employees' conduct; Justice Powell's approach restricts entity liability even further to conduct commanded by sweeping entity proclamations. The important point, as Professors Kramer and Sykes have observed, is

of the city realizing "unprecedented liability"). Justice O'Connor dissented from this point, stating that "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell*." *Id.* at 399 (O'Connor, J., concurring in part and dissenting in part).

Plaintiffs' lawyers might, therefore, be tempted to frame their complaints against entities, when possible, as omission rather than action cases. Although complaints of omission are substantively more difficult to prove, requiring as they do a showing of deliberate indifference, *see, e.g.*, *Rellergert v. Cape Girardeau County, Mo.*, 924 F.2d 794, 797 (8th Cir. 1991) (holding that a prison guard's actions, including letting a suicidal prisoner out of his sight, did not amount to deliberate indifference); *Mateyko v. Felix*, 913 F.2d 744, 746 (9th Cir. 1990), *amended*, 924 F.2d 824, 826 (9th Cir.) (stating that municipality's failure to train long enough for use of tazer gun at best establishes mere negligence), *cert. denied*, 112 S. Ct. 65 (1991), the prospect of having a jury determine the "policy" issue may entice some plaintiffs' lawyers to brave the risks of an omissions theory. Nevertheless, a parallel procedural development may drain this theoretical prospect of practical importance. Under the Supreme Court's recent solicitous treatment of summary judgment, entities can still achieve dismissal before trial by convincing the judge that no reasonable jury could find each of the distinct, demanding elements of deliberate indifference by a preponderance of the evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (noting in a First Amendment action that, in ruling on summary judgment under Federal Rule of Civil Procedure 56, a trial judge should consider "whether a reasonable factfinder could conclude . . . the plaintiff had shown actual malice with convincing clarity").

¹⁸⁴ *See Pembaur*, 475 U.S. at 499-502 (Powell, J., dissenting).

¹⁸⁵ *Id.* at 481.

¹⁸⁶ *See Propst v. Goodyear Tire & Rubber Co.*, 485 U.S. at 124-25; *supra* text accompanying notes 172-76; *infra* note 226.

that each of these principal paths to "policy," and hence to an actionable *prima facie* claim, is strewn with obstacles not presented by *respondeat superior*.¹⁸⁷

At the same time, the Court has denied entity defendants any affirmative defense comparable to the immunity enjoyed by defendant individuals. In *Owen v. City of Independence*,¹⁸⁸ the Court denied municipalities a good faith immunity from suit under § 1983, discounting the likelihood that entity liability would chill the vigorous execution of government function. The majority questioned whether "the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties."¹⁸⁹ Denying entities immunity appears to recognize the protection they enjoy from the restrictions that *Monell* places upon the *prima facie* claim; seldom will an isolated entity act meet the rigors of "policy."¹⁹⁰ The Court has since further protected public funds by precluding punitive damages even when an entity action lies.¹⁹¹

Given the gratuitous origin of *Monell's* policy requirement and its more recent rigorous fortification, it is tempting to conclude that the Court's decision in *Owen* to eschew developing a common law of immunity for entity defendants is largely an empty gesture. But there is operative and symbolic significance in the Court's refusal to confer on government entity defendants an immunity parallel to the one that it would soon confer unrestrainedly on their agents.

First, of course, plaintiffs who surmount the "policy" hurdles erected by *Monell* and its progeny may proceed to trial, notwithstanding the possibility that the entity's policy may have been reasonable under the circumstances. These plaintiffs include those who can point to positive local law as the source of the federally violative conduct, to a pattern of entity behavior amounting to "custom," to a decision by someone having authority to make final

¹⁸⁷ See *Kramer & Sykes*, *supra* note 24, at 254.

¹⁸⁸ 445 U.S. 622 (1980).

¹⁸⁹ *Id.* at 656.

¹⁹⁰ Compare *Pembaur*, 475 U.S. at 484-85 (noting that the assistant prosecutor's advice to deputies to break down door to serve *capiases* constituted policy in violation of Fourth Amendment when state law specifically sanctioned the advice-giving function) and *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 253 (1981) (recognizing that a vote by the City Council itself to cancel contract, based on content of group's music, violated First Amendment) with *Praprotnik*, 485 U.S. at 123 (holding that a plaintiff's allegation that he was fired because he was a whistle-blower did not constitute policy if, *inter alia*, city employee who discharged plaintiff did not have final policy-making authority).

¹⁹¹ See *infra* text accompanying note 325.

policy with respect to the challenged conduct, or to circumstances so obviously posing a substantial threat to federal rights that the failure to act amounts to "deliberate indifference." Second, plaintiffs suing government entities may proceed even if the particular federal right allegedly invaded by that policy lacked prior judicial recognition, a condition that would establish immunity for an individual defendant.¹⁹²

The *Owen* dissenters may have overstated their case by asserting that the majority's rejection of immunity imposes "strict liability" on local government entities.¹⁹³ It is clear hyperbole, for example, to suggest that strict liability operates in a "failure to act" case like *City of Canton*, in which entity liability attaches only upon a showing of "deliberate indifference." The *Owen* dissenters, however, might accurately lament that the method used to deny entity immunity facilitates the imposition of civil liability for constitutional violations newly announced in the course of § 1983 litigation.

Entity liability under § 1983 for newly declared constitutional rights, recently reaffirmed in dictum by a plurality of the Court in *American Trucking Associations, Inc. v. Smith*,¹⁹⁴ was realized in *Owen* itself. The plaintiff, a former police chief, was discharged under stigmatizing circumstances and denied an opportunity publicly to clear his name. The majority agreed that a due process hearing was required and held that local governments enjoyed no § 1983 immunity.¹⁹⁵ The dissenters argued vehemently that the Court had not previously accorded employees at will a "name clearing" hearing after their discharge. Consequently, no protectable species of property or liberty existed, at least if there was no public disclosure of the reasons for discharge; the majority's denial

¹⁹² With respect to entity omissions, and thus the "deliberate indifference" standard, it may be difficult for the plaintiff to show that the need for entity action was "obvious" in the absence of settled law. See *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)); Brown, *supra* note 24, at 656; *infra* note 200.

¹⁹³ See *Owen*, 445 U.S. at 658 (Powell, J., dissenting).

¹⁹⁴ 110 S. Ct. 2323, 2334 (1990) (O'Connor, J., plurality opinion) (rejecting retroactive application of *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), against a state as a matter of judicial policy, while adhering to the view that § 1983 confers no general immunity on municipalities). Notwithstanding its apparent endorsement of *Owen*, the *Smith* decision, in tandem with recently decided *Dennis v. Higgins*, 111 S. Ct. 865, 873 (1991) (allowing suits for violation of the Commerce Clause to proceed under § 1983), contains some potential for stimulating a limited, partial entity immunity, a prospect discussed *infra* note 233.

¹⁹⁵ See *Owen*, 445 U.S. at 635-38.

of immunity thus cleared the way for the Court to declare a theretofore unsettled constitutional right.¹⁹⁶

This same willingness of the Court to use entity liability under § 1983 as a vehicle for the creation of new procedural rights has since been visible several times. In *Pembaur*, for example, three circuits, including the one in which the defendants' conduct took place, had reached conclusions contrary to *Steagald* as of the time of the events in question.¹⁹⁷ Although the individual defendant prevailed on her immunity defense for want of clearly settled applicable precedent, the possibility of entity liability was affirmed, subject to the severe prima facie stricture of "policy."

This dynamic was also at work in *Praprotnik*, in which the plaintiff lost not because the entity was relieved of the duty to anticipate developments in constitutional law but because the Court found the alleged retaliatory conduct not fairly attributable to the entity.¹⁹⁸ A suit against individual defendants, by contrast, might have been barred at the threshold because the Court had not unambiguously recognized the right of a public employee to be free from retaliation for using a state-created grievance mechanism.¹⁹⁹ And in *City of Canton*, the dissenters, explaining why they would have denied the plaintiff a remand to establish "deliberate indifference," noted disapprovingly that the predicate right of a pretrial

¹⁹⁶ See *id.* at 661-64 (Powell, J., dissenting). The durability of expanded constitutional rights declared in § 1983 actions is another matter. For example, the *Owen* dissenters' position on the predicate "name-clearing" claim now apparently commands a majority of the Court. See *Siebert v. Gilley*, 111 S. Ct. 1789, 1793 (1991) (holding insufficient to state a claim plaintiff's allegation that his former supervisor's defamatory statements violated due process by causing the loss of current and future government employment); see also *infra* notes 214 & 240. But *Siebert's* negative reprise on the type of liberty interest in reputation that *Owen* recognized does not alter the fact that the § 1983 entity action brought in *Owen* did generate new doctrine at the time.

¹⁹⁷ See *Pembaur*, 475 U.S. at 486 (White, J., concurring); *id.* at 492-93 (Powell, J., dissenting); *supra* text accompanying note 166. The new law on which the liability of all *Pembaur* defendants turned was declared by *Steagald*, not *Pembaur*. Since that law had not been established when the defendants acted, the individual defendants would have been exonerated by qualified immunity even if *Steagald* were ultimately given retroactive effect. The Court in *Pembaur* nevertheless exposed the entity to liability.

¹⁹⁸ See *Praprotnik*, 485 U.S. at 128-30.

¹⁹⁹ In *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 283-84 (1977), the Court recognized that an untenured teacher, though dismissable for any reason, could not be dismissed for exercising his First Amendment rights. The plurality in *Praprotnik*, without mentioning *Mount Healthy*, expressed no opinion on "whether the First Amendment forbade the city to retaliate . . . for having taken advantage of the [available] grievance mechanism in 1980." *Praprotnik*, 485 U.S. at 127.

detainee to medical attention for emotional injury had not been established earlier.²⁰⁰

²⁰⁰ In her dissent, Justice O'Connor confronted the majority with what appeared to be a legal requirement implicit in the "deliberate indifference" formulation—a reasonably well-settled constitutional right. See *City of Canton v. Harris*, 489 U.S. 378, 396-97 (1989) (O'Connor, J., concurring in part and dissenting in part). By the majority's own reckoning, to show that the failure to train amounts to advertent "policy" fairly attributable to the entity, a plaintiff must demonstrate that the need for such training was "obvious" from "usual and recurring situations." *Id.* at 391. Only such obviousness could illustrate that "the inadequacy [of training was] so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390.

Necessarily embedded in this standard, as Justice O'Connor seemed to perceive, are two issues, one factual and one legal. The factual issue is whether the situation confronting the entity was sufficiently recurrent that a constitutional harm resulting from inaction was "obvious." Knowledge or reasonably imputable knowledge that a failure to act would obviously violate a constitutional right necessarily also assumes that the right in question had been previously determined, a distinct legal question. Justice O'Connor concluded that this legal component "ha[d] not and could not" be met in *City of Canton*. *Id.* at 394 (O'Connor, J., concurring in part and dissenting in part). This, she argued, followed from the fact that the Court had "not yet addressed the precise nature of the obligations that . . . Due Process . . . places upon the police to seek medical care for pretrial detainees who have been *physically* injured." *Id.* at 397. A fortiori, she seemed to argue, there was no clear legal obligation with respect to the duty to prevent emotional or mental harms. There were, consequently, "no clear constitutional guideposts for the municipalities." *Id.* Absent such guideposts, the need for training could not, as a matter of simple logic, be obvious.

The majority did not confront the issue directly, noting only that "we must assume that [plaintiff's] constitutional right . . . was denied by city employees—whatever the nature of that right might be." *Id.* at 389 n.8. We are thus left to speculate whether the Court's opinion authorized the appellate court on remand to recognize a new constitutional duty on the part of municipalities to provide adequate training for the treatment of mentally disabled pretrial detainees. The majority's failure to dispel Justice O'Connor's suspicions on this point permits the inference that the city would face potential liability for what was at best a dimly sketched right. Some support for this conclusion may be drawn from Justice White's repeated generalized references to the denial of "medical attention" or "care," shorn of Justice O'Connor's distinction between care for physical and psychiatric conditions. See *id.* at 381-82, 389 n.8. If this is the case, liability may be fastened on a municipality for a violation of rights that, at the very least, would not meet the highly particularized version of the "clearly established" requirement adumbrated in *Anderson v. Creighton*, 483 U.S. 635 (1987), for the liability of individual defendants. See *supra* text accompanying notes 113-21.

We hasten to acknowledge that neither the disposition nor the discussion in *City of Canton* compels this interpretation. First, the Court did not purport to highlight the contours of the right. See *City of Canton*, 489 U.S. at 389 n.8. It might well be an open question on remand whether there was circuit authority supporting a right of pretrial detainees to psychiatric care and, if so, whether it was sufficiently settled that failure to furnish such care would "obviously" violate a constitutional right. Second, it is possible that the substantive rights issue is simply open. The Court's "whatever the nature of the right" statement can be read to suggest that it was simply dealing with the § 1983 issue (whether the *Monell* "policy" requirement could ever be satisfied

IV. POLICIES, TECHNIQUES, AND ACCOUNTS OF THE INDIVIDUAL-ENTITY ASYMMETRY

A. *Policies and Techniques*

The divergence of the *prima facie* elements and defenses in § 1983 actions against individuals and entities may be viewed as responses by the Court to three perceived²⁰¹ problems: unfairness to individual defendants, the opening of litigation floodgates, and threats to federalism resulting from intrusive interference with vigorous state administration of public functions. In this Part, we explore the varying techniques the Court has employed to address these issues, the resulting differentiation of the individual and entity cases, and the consequences for dynamic lawmaking.

In suits against individual defendants, the Court has responded to these concerns not only by fortifying the qualified immunity defense, but also by redefining certain predicate constitutional violations. The early common law immunity doctrine typified by cases such as *Scheuer v. Rhodes*²⁰² demanded a fact-based inquiry that sought to unfetter discretionary administration of the law. This qualified immunity insulated individual public officials, ineligible for absolute immunity, from liability without fault through the general defense of good faith and probable cause.²⁰³ *Scheuer* identified two bases for this qualified immunity: the injustice of punishing the officer who, in good faith, exercises discretion as a requirement of his job, and the fear that the threat of liability would chill the

by entity omission) and that it did not undertake to decide whether the particular predicate right alleged was constitutionally cognizable.

Accordingly, should a reconstituted Court (Justices Souter and Thomas having replaced Justices Brennan and Marshall) address the issue squarely, it may agree with Justice O'Connor that the § 1983 predicate right must to some degree be settled before an entity may be held liable on the basis of an agent's omission. If so, the entity in such cases would enjoy an escape from liability *prima facie* that in substance mirrors the immunity from damages enjoyed by individual officials via an affirmative defense. See *supra* notes 89-127. In this context, then, an implicit settledness requirement would render irrelevant the *Owen* Court's refusal to accord entities a formal immunity. Indeed, where the predicate right is unsettled and plaintiff accordingly fails to state any claim, the entity in an omission case would be spared liability not only from damages but also from attorneys' fees incidental to injunctive or declaratory relief. The Court in *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719 (1980), authorized attorney's fees even where injunctive relief only is obtained.

²⁰¹ The perception may be somewhat discordant with reality. See *supra* note 16.

²⁰² 416 U.S. 232 (1974).

²⁰³ See *supra* note 93; *supra* text accompanying notes 97-98.

officer's execution of his duties "with the decisiveness and judgment required by the public good."²⁰⁴

Yet in *Harlow v. Fitzgerald*²⁰⁵ and again in *Anderson v. Creighton*,²⁰⁶ the Court jettisoned this heavily fact-laden version of common law immunity. It substituted a two-part inquiry that begins—and usually ends—with the legal question of the settledness of the specific right at issue. More rarely, if the right is deemed well-settled, the test of immunity unfolds into a factual inquiry about the reasonableness of official conduct in light of that highly particularized precedent. These decisions were avowedly designed to enable defendants to obtain early dismissals before extensive (and preferably, before any) discovery. Substantively, they broaden immunity so that it is generally no longer defeasible by evidence of subjective bad faith.²⁰⁷ What had traditionally been a jury question aimed at determining the justice of excusing the officer in light of all the circumstances she confronted in the course of discretionary decision-making is now usually a question of law for the trial judge.

At the same time, the Court was closing the floodgates²⁰⁸ on these individual actions by narrowing certain predicate constitutional protections. In *Paul v. Davis*,²⁰⁹ the Court announced its determination to prevent the Fourteenth Amendment from becoming "a font of tort law"²¹⁰ through the medium of actions under § 1983. Justice Rehnquist, following a course laid out in *Board of Regents of State Colleges v. Roth*,²¹¹ constricted the circumstances under which any process was due to avoid "alter[ing] the basic relations between the States and the national govern-

²⁰⁴ *Scheuer*, 416 U.S. at 240.

²⁰⁵ 457 U.S. 800 (1982).

²⁰⁶ 483 U.S. 635 (1987).

²⁰⁷ In at least one circuit, however, specifically pleaded and proven malice may sometimes defeat the immunity. See *supra* note 101.

²⁰⁸ See Eisenberg & Schwab, *supra* note 16, at 646-47 (arguing that the *Paul* and *Parratt* lines of authority had their impetus in a desire to control the flood of litigation).

²⁰⁹ 424 U.S. 693 (1976).

²¹⁰ *Id.* at 701.

²¹¹ 408 U.S. 564, 569-79 (1972) (holding that untenured teacher had no property right and was not deprived of liberty upon nonrenewal of his contract). The significance of *Roth* in the development of Fourteenth Amendment jurisprudence occupies a central role in Henry P. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 409 (1977) (concluding that after *Roth*, "life, liberty and property" no longer "embrace the full range of state conduct having serious impact upon individual interests").

ment."²¹² The police "posted" Davis's name as an "active shop-lifter" before any adjudication on the charge. Distinguishing recent precedent,²¹³ the Court explained why there is no free-floating liberty interest in freedom from state-perpetrated defamation: "no specific constitutional guarantee" safeguards reputation, and the plaintiff could cite no source of a liberty interest in state law.²¹⁴

Concurrently, in the *Parratt*²¹⁵ line of cases that reached its apogee in *Davidson v. Cannon*,²¹⁶ the Court pared down the category of liberty or property deprivations protected by due process and afforded state actors an escape from liability for otherwise actionable deprivations. In *Davidson* the Court found no liberty deprivation, and therefore no violation of due process, when prison officials negligently failed to protect an inmate from a beating at the hands of another inmate, despite evidence that the officials had some foreknowledge of the possibility.²¹⁷ In a companion case, the Court explained that some degree of fault greater than negligence is prerequisite to an actionable "deprivation."²¹⁸ Also, *Parratt and Hudson v. Palmer*²¹⁹ dilute the process that is due for cognizable liberty or property deprivations whenever defendants' conduct is "random and unauthorized."²²⁰ In striking counter-

²¹² *Paul*, 424 U.S. at 700 (quoting *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion)). For a blistering critique of *Paul* that remains as convincing today as when it was written, see Monaghan, *supra* note 211. On Justice Rehnquist's federalism concerns see Durchslag, *supra* note 77, at 739-41. See generally Sheldon H. Nahmod, *Due Process, State Remedies, and Section 1983*, 34 KAN. L. REV. 217, 217-18 (1985) (discussing the several policies that drove the Burger Court's § 1983 jurisprudence).

²¹³ See *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (stating that "[w]here a person's good name . . . is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential").

²¹⁴ *Paul*, 424 U.S. at 700; see Monaghan, *supra* note 211, at 408 (noting that the Court was using § 1983 to define liberty and property "to place limits on the level of federal superintendence of the operations of state and local law"). The residual reputation interest that appeared to survive *Paul* and *Owen v. City of Independence*, 445 U.S. 622 (1980), see *supra* text accompanying notes 188-96, was in substance repudiated in *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991) (holding that the Fourteenth Amendment provides no redress for defamation that accompanies permanent termination from government employment). See *supra* note 196; *infra* note 240.

²¹⁵ See *Parratt v. Taylor*, 451 U.S. 527, 536-42 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986).

²¹⁶ 474 U.S. 344 (1986).

²¹⁷ See *id.* at 347-48.

²¹⁸ See *Daniels*, 474 U.S. at 330-31 (noting that "mere lack of care" is not sufficient to state a claim for a state-caused "deprivation" and overruling *Parratt* in this respect).

²¹⁹ 468 U.S. 517 (1984).

²²⁰ The Court first articulated the "random and unauthorized" rationale in *Parratt*,

point to Justice Harlan's observation in *Monroe* that Congress apparently contemplated fuller relief under § 1983 than states might afford for the same misconduct,²²¹ the Court held in *Parratt* and *Hudson* that a state remedy made available after the deprivation in such a case satisfies the obligation to provide "process." This holds even if the state remedy is more restrictive and affords lesser redress than § 1983. Thus, in this procedural due process sphere,²²² the source of the greatest concern about floodgates, § 1983 is no longer the fully supplementary remedy that the Court contemplated in *Monroe*.

For present purposes, the salient point about these familiar developments is the technique employed by the Court to implement its stingy approach to due process in cases against individual defendants. Neither the newly shrunken circumference of procedural due process nor the "clearly established rights" approach to immunity represents a broad-spectrum restriction on the scope of § 1983 itself. Rather, each doctrinal definition reduces the plaintiff's likely success in actions asserting the violation of a particular right, such as procedural due process, or of a federal guarantee not previously articulated with clarity. This selective redefinition process has a distinct consequence for the role of § 1983 in the development of constitutional law.²²³ Not only has the statute become, in the particular realm of due process, the Court's chosen instrument for crimping constitutional guarantees; more generally, the "clearly established" limitation significantly disables § 1983 individual-defendant litigation from pushing the frontiers of any protected constitutional or statutory right.²²⁴

451 U.S. at 541. In *Hudson*, the Court extended the rationale to intentional property deprivations. See *Hudson*, 468 U.S. at 533.

²²¹ See *Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring), overruled in part by *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

²²² See *infra* note 239.

²²³ We have little to add to the fifteen years of criticism asserting that the Court's stingy approach to due process does not accord with the history of the Fourteenth Amendment. See, e.g., Soifer, *supra* note 112, at 1519, 1525-26 (decrying the Court's narrow interpretation of due process requirements in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)). We focus instead on § 1983, if only because the changes proposed could be achieved by Congress should the Court adhere to its current course.

²²⁴ There are more ominous predictions. The "clearly established" barrier may affirmatively encourage constitutionally questionable conduct. Officials know their conduct is largely free from constitutional scrutiny to the extent that no specific precedent unequivocally prohibits the conduct. See Rudovsky, *supra* note 34, at 54. For example, Professor Rudovsky foresees the possibility that *Anderson's* double bite

By contrast, in actions against entity defendants the Court has addressed the same problems of fairness, federalism, and floodgates by altering the scope of § 1983 itself. In *Monell*, the Court appeared to conclude that it would be unfair to encumber entities with liability on the same terms as it had exposed individual defendants under *Monroe*—liability for any conduct carried out under the emblem of government authority, whether or not authorized in fact or enshrined in official policy. The *Monell* court addressed this issue by constricting generically the scope of § 1983 prima facie claims.²²⁵

In one respect only has the Court employed a common technique—early disposition by the court—to dampen the flow of entity and individual litigation. On the entity side, it has delegated to trial judges the function of deciding whether an entity's official has final policymaking authority, characterizing this as a question of state law.²²⁶ Similarly, an individual official's assertion of qualified immunity turns initially and usually ultimately on the legal question whether plaintiff's claimed right is clearly established as a matter of federal law. In both instances liability is determinable in a way that protects the entity official's calendar by offering a quick escape from the litigation.

The Court's policy-impelled changes on the entity side reflect more than modest tinkering with particular species of claims such as due process. Rather, in § 1983 entity litigation the Court has placed wholesale limitations on the nature of claims assertable against the government. The original architect of these restrictions, Justice Brennan, would only two years later consider it “uniquely

at reasonableness might transform the Fourth Amendment's own probable cause requirement into a subconstitutional inquiry into the reasonableness of the officer's belief, despite the absence in fact of probable cause. *See id.* at 52-53. This result would freeze the state of constitutional law. *See id.* at 53.

²²⁵ *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

²²⁶ This was a major point of contention in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Justice O'Connor, for the plurality, opined that federal courts are “not . . . justified in assuming that municipal policymaking authority lies somewhere other than where the applicable [state or local] law purports to put it.” *Id.* at 126. In contrast, Justice Brennan would have treated the issue as a question of fact; he argued unsuccessfully that denominating the issue as one of state law permitted the municipalities to escape liability “for the acts of all but a small minority of actual city policymakers” named in a statute. *Id.* at 132 (Brennan, J., concurring). Justice O'Connor's position has carried the day. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989) (remanding for a determination whether a school superintendent, who approved an allegedly racially motivated reassignment, had “final policymaking authority” over employee transfers under state law).

amiss" if the government entity, "to which all in our society look for the . . . setting of worthy norms and goals for social conduct," was to enjoy a qualified immunity to backstop the stringent *prima facie* case set out in *Monell*.²²⁷ In effect, the majority he spoke for in *Owen* found that *Monell* already provided an adequate response to fears about fairness. "Policy" ensures that the government can be held responsible only for conduct unequivocally attributable to its advertent decisions.

Nevertheless, the decision in *Owen* to deny entities an immunity defense parallel to that enjoyed by their agents preserves the theoretical possibility that § 1983 entity cases may continue to serve as a crucible for the development of federal constitutional law, provided the plaintiff can thread the policy needle of *Monell* and its progeny.²²⁸ The significance of this decision was appreciated at

²²⁷ *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring in part and dissenting in part)).

²²⁸ This statement may be somewhat overbroad. Two situations come to mind in which the entity, like the individual defendant, may enjoy some protection when the predicate right it allegedly violated is not well settled. First, the entity may enjoy immunity from damages when the decision declaring its liability breaks sharply with past precedent. See *infra* note 233 (discussing the potential impact of *American Trucking Ass'ns, Inc. v. Smith*, 110 S. Ct. 2323 (1990), and *Dennis v. Higgins*, 111 S. Ct. 865 (1991), on entity immunity). Second, when the plaintiff asserts that entity "policy" takes the form of an omission, plaintiff is required to demonstrate that it should have been obvious to the entity's agent that failure to act would violate a constitutional right. That, in turn, implies that the right in question must have been somewhat settled before the events at issue in the action. See *supra* note 200 (discussing *City of Canton v. Harris*, 489 U.S. 378 (1989)). If the Court comes to recognize this legal requirement explicitly, see *supra* note 200, entities in these omission cases would escape all liability for newly declared rights. They would be better off than similarly situated individual defendants, who are shielded only from damages liability under the "clearly established" version of qualified immunity.

Nevertheless, in other contexts the entity action remains the primary vehicle for creating new constitutional rights. An instructive example of this progenerative potential is glimpsed by comparing *Owen*, an entity action, with *Paul v. Davis*, 424 U.S. 693 (1976), an action against an individual. In *Owen*, the majority strained the record to find that the defamatory statements about the plaintiff police chief were made in the course of his discharge from public employment and thus implicated a liberty interest protected by due process under the decision in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), see *supra* note 213, and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), see *supra* text accompanying note 211. See *Owen*, 445 U.S. at 633-34 n.13. In *Paul*, by contrast, the Court labored to avoid finding a predicate liberty interest by conjuring up the thinnest imaginable distinctions to distinguish *Constantineau*, 400 U.S. 433. See Monaghan, *supra* note 211, at 423-29; David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 324-28 (1976). It may not be a coincidence that in *Owen*, unlike *Paul*, the defendant was an entity. Cf. *infra* note 245 (comparing *City of Canton* with *Danese v. Asman*, 875 F.2d

the time. Inveighing against what they foresaw as "strict liability on municipalities for constitutional violations," the dissenters accused the majority of ignoring "the vast weight of common-law precedent as well as the current state law of municipal immunity."²²⁹ The result, according to the dissent, was that the government entity, unlike its agent, would be liable if it "incorrectly—though reasonably and in good faith—forecasts the course of constitutional law."²³⁰

Justice Brennan, for the majority, acknowledged this consequence directly. First, he foresaw the possibility that by compounding the qualified immunity for individuals with a "good faith" municipal immunity the Court might "freez[e]" constitutional development.²³¹ Second, he declared that if officials prove unable to forecast some doctrinal development, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated."²³² A plurality of the Court, in dictum, recently reiterated its understanding that *Owen* allows for doctrinal development in actions against entities.²³³

1239 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990)).

²²⁹ *Owen*, 445 U.S. at 658 (Powell, J., dissenting). As we have pointed out, beginning only two years later with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court superseded the common law approach to individual immunity with its more expansive version driven by concerns for calendar congestion and effective government administration. See *supra* text accompanying notes 107-21.

²³⁰ *Owen*, 445 U.S. at 668 (Powell, J., dissenting).

²³¹ See *id.* at 651 n.33.

²³² *Id.* at 655.

²³³ See *American Trucking Ass'ns, Inc. v. Smith*, 110 S. Ct. 2323, 2334 (1990) (O'Connor, J., plurality opinion). *Smith* and *Dennis v. Higgins*, 111 S. Ct. 865 (1991), brought nominally against individuals, should be regarded functionally as actions against entities, as we explain later in this footnote. As such these decisions warrant some ink.

Although the *Smith* Court expressly endorsed *Owen* and its understanding that suits against municipalities will continue to stage the recognition of at least some new constitutional guarantees, skeptics might see *Smith* and *Dennis* as spade work for overruling or qualifying *Owen's* rejection of entity immunity. On balance, we believe that some cutting back has already occurred but that the extent of the cut back will vary depending upon whether the entity sued is a state or one of its political subdivisions.

Smith reviewed a dormant commerce clause challenge to Arkansas's flat rate highway equalization tax. The Arkansas Supreme Court initially affirmed the trial court's ruling upholding application of the tax to nonresident motorists. During the pendency of the petitioner's appeal to the United States Supreme Court, the Court struck down a similar statute in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), in a decision that the *Smith* Court described as "a clear break from"

established precedent. *Smith*, 110 S. Ct. at 2334. The *Smith* Court thereafter vacated the judgment of the Arkansas Supreme Court and remanded. The Arkansas Supreme Court subsequently held the state act unconstitutional, but concluded that, under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Scheiner* could not be applied retroactively. Accordingly, petitioners were denied a full refund. They appealed again to the United States Supreme Court.

The Supreme Court upheld the Arkansas high court in pertinent part. First, the Court held that, in light of the pre-*Scheiner* precedent that reasonably supported the state's belief that its tax was permissible, "the purpose of the Commerce Clause does not dictate retroactive application of *Scheiner*," since retroactive application would not deter future state efforts to erect trade barriers. *Smith*, 110 S. Ct. at 2332. The Court also found that equitable considerations, which constitute one prong of the retroactivity analysis required by *Chevron Oil*, supported the decision to forego retroactive application. The state legislature had relied in good faith on past precedent in passing the tax and "had good reason" to believe it was constitutional. *Id.* at 2333.

In discussing whether the equities favored retroactive application, the Court addressed petitioner's analogy to *Owen*, namely, that an entity could not "disavow liability for the injury it has begotten." *Id.* at 2334 (quoting *Owen*, 445 U.S. at 651). Petitioner argued that the state was not entitled to what was in effect a good faith immunity. The Court, however, distinguished *Owen*. Unlike the constitutional issue at bar, Justice O'Connor stated, *Owen* involved a determination of congressional intent, and thus "provide[d] little guidance for determining the fairest way to apply our own decisions." *Id.* The Court then suggested that the policy issues underlying *Owen* were distinct. *Owen* determined that a "special [municipal] immunity for violations of constitutional rights would not best serve the goals of § 1983, even if those rights had not been clearly established when the violation occurred." *Id.* *Owen*, the plurality explained, rested in some measure on a deterrence rationale; entity liability would cause the municipal official to "consider whether his decision comports with constitutional mandates and . . . weigh the risk that a violation might result in an award of damages from the public treasury." *Id.* (quoting *Owen*, 445 U.S. at 656). By contrast, Justice O'Connor wrote, when Supreme Court constitutional determinations "clearly break[] with precedent . . . which . . . public officials could not anticipate," a different analysis applies. *Id.* The Court's refusal to require the state to provide a full refund had the effect of conferring a partial, one-time immunity from damages only, and then only in a "clearly breaks" context.

It cannot be doubted that *Smith*'s express rhetorical support for *Owen* is offset in some measure by the questionable nature of the plurality's distinctions. See PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS 6-7 (Supp. 1991) (asking whether the plurality is sub silentio creating an exception to *Owen*, and if so, how such an exception differs from affording municipal government a good faith immunity). The claim that *Owen*-generated damages might deter a government official from violating the law, whereas the prospect of a state tax refund would not, is highly debatable. A break with clear precedent would a priori be no more foreseeable in one case than in the other. The Court's distinction between sources of violation—statutory versus constitutional—is not wholly convincing either. Section 1983 individual defendant immunity doctrine, after all, has sometimes been transported as a formal matter from the realm of actions arising directly under the Constitution. See *supra* note 107.

Smith could therefore be viewed as providing an opening for subsequent reappraisal of *Owen* on the good faith immunity issue. One could contend that the Court is preparing *Owen* for reversal on the good faith immunity issue, and will do

so by citing to *Smith* as a basis for reconsideration. For example, since *Owen* itself was a § 1983 case that did not “clearly break” with, but merely took a step beyond, existing precedent, *see supra* note 228, the Court has left itself room to invoke a de facto *Smith* immunity in another § 1983 entity case where the decisional rule contended for by the plaintiff does chart virgin territory. That this possibility is not far-fetched is suggested by the Court’s adoption of standards friendly to non-retroactive application of new rules in a cognate civil rights context, federal habeas corpus law. There the Court precludes retroactive application of “new constitutional rules of criminal procedure,” with new rules broadly defined to include those that merely break new ground. *Teague v. Lane*, 489 U.S. 288, 301, 310 (1989). The Court has since applied this approach to validate state court interpretations that failed to forecast constitutional developments, provided that they represented “reasonable, good-faith interpretations of existing precedents.” *Butler v. McKellar*, 110 S. Ct. 1212, 1217 (1990) (refusing to apply a “new rule” barring certain police-initiated interrogations to the defendant’s murder conviction).

The general trend in Supreme Court decisions thus supports the conclusion that under certain circumstances a partial exception to *Owen* is in the offing. Indeed, the Court’s even more recent decision in *Dennis*, by finding alleged state tax violations of the Commerce Clause actionable under § 1983, suggests that in practical effect an even broader immunity than *Smith* affords is already accomplished by a distinct § 1983 doctrinal development. Before *Dennis*, such actions were *sui generis*; it was unclear what source of law spawned them. *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2257 n.34 (1990) (suggesting that authority for the action arose because Florida had waived sovereign immunity in its own courts); *Ward v. Board of County Comm’rs*, 253 U.S. 17, 24 (1920) (explaining that “the law, independent of any statute,” provided the substantive grounds for the litigation (quoting *Marsh v. Fulton County*, 77 U.S. (10 Wall.) 676, 684 (1870))). After *Dennis*, § 1983 limitations may apply and § 1983 of its own force may turn out to absolve states of all liability for damages.

Complete absolution is a potential consequence of *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), which held that the state is not a “person” for purposes of § 1983. *See infra* text accompanying notes 301-05. As applied to states *eo nomine*, *Smith*’s limited, partial immunity pales by comparison to *Will*; the latter shields the state as a named defendant from all § 1983 liability, even where there is no clear break with existing precedent. By analogy to Eleventh Amendment jurisprudence, however, *Will* continued the fiction that permits prospective relief in suits against individual state officials sued in their official capacities for violations otherwise chargeable to their employers. *See Will*, 491 U.S. at 71 n.10. *See generally Ex parte Young*, 209 U.S. 125 (1908); *infra* notes 292 & 304. Thus in cases like *Smith*, brought against state officials in their official capacities, *Will* (now made applicable to such cases via § 1983 and *Dennis*) would preclude precisely what *Smith* precluded: retroactive relief alone. But it would do so even where the state officials could not reasonably have anticipated the unconstitutionality of their tax.

In principle, tax refund claims brought against state officials are functionally equivalent to actions against the state, regardless of the party formally named, because recovery could ultimately come from state coffers. *Cf. Edelman v. Jordan*, 415 U.S. 651, 663 (noting that “even though a State is not named a party, . . . the suit may [if the state pays] nonetheless be barred by the Eleventh Amendment”). (Of some potential import is the fact that *Edelman* relied on *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); there the Court held that a non-resident’s challenge to a state income tax could not be maintained in federal court, regardless of the identity of the party formally named.) Thus *Will*—with its analogy

Ironically, it is in a procedural due process case after *Parratt*, *Hudson*, and *Davidson*,²³⁴ the least fruitful category of predicate constitutional claim, that the Court appears to hold out the possibility that the individual action, too, may facilitate substantive

to Eleventh Amendment learning like *Edelman*—would limit the § 1983 plaintiff, in state or federal court, to injunctive relief if refunds are deemed a “retroactive” remedy.

Whether tax refunds are always precluded as “retroactive” is undecided. *But cf. Ford Motor Co.*, 323 U.S. 459. In *Edelman*, the Court had refused to permit federal welfare beneficiaries, suing in federal court, to recover benefits wrongfully withheld by state officials. The Court held that under the aegis of the Eleventh Amendment and *Ex parte Young*, a federal court could award only prospective relief against a state employee sued in her official capacity, and that the relief sought—“equitable restitution” of benefits—partook of non-recoverable, “retroactive damages.” *Edelman*, 415 U.S. 666-69.

To avoid the retroactive label, one could perhaps distinguish the payment coerced from taxpayers’ pockets, as in *Smith*, from the statutory benefits withheld through wrongful computation in *Edelman*. But it is not altogether clear why taxpayers injured by state laws are more deserving of full recovery than impecunious plaintiffs for whom Congress has created an entitlement. The equities are especially obscure because the underlying substantive constitutional law gives states special options to remedy Commerce Clause taxing violations. Subject to very niggardly due process protections, they may decline to refund entirely and instead eliminate the discriminatory trade barrier by increasing the taxes of those who benefitted under the invalid act. *See McKesson*, 110 S. Ct. at 2252. Thus the ultimate violation in the Commerce Clause context is *not* reflected in taxes wrongfully levied, but simply in the inequality of the taxing mechanism. By contrast, the problem in the entitlement context is the loss of funds that can never be recovered. The taxpayer, in short, may stand on shakier equitable footing than the welfare recipient.

The situation is somewhat different with respect to a tax refund (or other) claim against a state political subdivision, provided it does not look to state funds to bankroll an adverse judgment. Unlike the State itself, the subdivision is a “person” suable under § 1983. But where a decision against the subdivision sharply breaks with existing precedent, *Smith* may accord that entity a remedial exception to the *Owen* holding that entities lack immunity grounded in good faith. Still, there is substantial reason to conclude that *Owen* is not being set up for wholesale overruling outside the clear break context. The *Smith* plurality opinion falls in line with a conservative Court’s traditional deference to state choices. An about-face, comprehensive overruling of *Owen* in an opinion that would also necessarily be supported by conservative justices and premised on *Smith*, itself partly justified by features that distinguished it from a reaffirmed *Owen*, is probably too unseemly jurisprudentially for the Court to contemplate.

In any event, the clear break limitation of *Smith* is unlikely to portend an end to incremental, as distinct from dramatic, doctrinal development in actions against state subdivisions. In the tax context, *Scheiner* and *Smith* generated new constitutional law, a limitation on state taxing authority. Moreover, the one-time immunity created by *Smith* was, on its facts, limited to state (and not municipal) taxes received *before* the announcement of *Scheiner*. *See Smith*, 110 S. Ct. at 2335-36. Because the tax continues to toll even if full refunds are unavailable under § 1983, ample incentive remains for local taxpayers to bring suit for injunctive relief and attorneys’ fees.

²³⁴ See *supra* notes 215-22 and accompanying text.

doctrinal evolution. Nevertheless, a closer look at this decision, *Zinerman v. Burch*,²³⁵ reveals the likelihood to be minimal.

Burch attempted to have himself "voluntarily" admitted to a state mental hospital at a time he claimed he was disoriented and psychologically incompetent to give informed consent. He alleged that the staff knew or should have known that he was incompetent and, by admitting him nevertheless, wilfully or recklessly disregarded his rights to due process. The Eleventh Circuit reversed the district court's ruling that because the staff's conduct was random and unauthorized Burch had failed to state a claim under *Parratt* and *Hudson*. As framed by the Supreme Court majority, the issue was whether Florida, in delegating to mid-level state hospital employees the voluntary admission decision, owed admittees some pre-admission process to determine whether consent was in fact informed.²³⁶

A five-member Supreme Court majority affirmed, distinguishing *Parratt* and *Hudson* on the ground that the defendants' conduct was something other than "random and unauthorized." For one thing, the Court found that because the moment of deprivation and the fact that some prospective patients might lack capacity were predictable, the State, before taking Burch's liberty, could have accorded him a pre-deprivation hearing that would have guarded against an admission in violation of the statute.²³⁷ Moreover, the conduct could not be considered "unauthorized" in the *Parratt/Hudson* sense because the state had delegated authority to the hospital staff to make admissions decisions, without prescribing any particular procedure to determine the competence to consent requisite to a voluntary admission.²³⁸

²³⁵ 110 S. Ct. 975 (1990).

²³⁶ See *id.* at 977-78, 987. Florida had a complex series of procedures for use in determining the propriety of involuntary psychiatric admissions. See *id.* at 981-82. Those procedures, however, did not cover the case in which a person attempted to admit himself as a voluntary patient when there was reason to doubt his capacity to give informed consent. The statute governing voluntary admissions required "express and informed consent" to be given "voluntarily [and] in writing," but provided no process for determining voluntariness. *Id.* at 982 (quoting FLA. STAT. ch. 394.465(1)(a), 394.455(22) (1990)).

²³⁷ See *id.* at 987-88. Among the important aspects of the decision was the majority's statement that liberty as well as property interests are subject to the *Parratt/Hudson* doctrine. See *id.* at 986-87.

²³⁸ See *id.* at 990. Justice Blackmun articulated the distinction somewhat differently and perhaps less clearly. He stated that *Parratt* does not apply because (a) the state could foresee that mental patients might lack capacity, (b) providing pre-deprivation process was not literally impossible in view of the established procedure

Zinermon thus renders *Parratt* and *Hudson* inapplicable when identified government personnel with evident statutory discretion to provide appropriate process can feasibly provide a pre-deprivation hearing that will reduce the risk of an erroneous deprivation of liberty.²³⁹ By declaring new doctrine, *Zinermon* appears to refute the argument that the state of constitutional law is frozen in § 1983 damage actions against individual defendants. On remand, Burch himself may well lose out to a qualified immunity defense, for a newly defined right to process will not likely be deemed "settled." But in any subsequent action, that law will indeed be settled, and local governments are now on notice that in this context they must adopt appropriate procedures to determine voluntariness.

On examination, however, *Zinermon's* law-evolution potential looks chimerical. The practical lesson of the case may simply be that defendants should press for a decision on the affirmative defense of immunity rather than move to dismiss the complaint for legal insufficiency under *Parratt*.²⁴⁰ Had defense counsel in

for determining involuntary admissions, and (c) the conduct was not "unauthorized," since the State had delegated admissions decisions to the hospital staff. *See id.* at 989-90. Points (a) and (c) seem to be reasons that support point (b), rather than independent criteria that distinguish *Parratt* and *Hudson*.

²³⁹ The case has cleared up several questions concerning the reach of the *Parratt* doctrine. We can now conclude with confidence that the holdings of *Parratt* and *Hudson* regarding "random and unauthorized" avoidance of liability are limited to procedural due process claims involving situations in which pre-deprivation process is literally impossible. The Court has assuaged the fear, identified by Henry P. Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 985-86 (1986), that *Parratt* also restricted substantive due process claims. The *Zinermon* condition that the process plaintiff demands must have "value," *see Zinermon*, 110 S. Ct. at 988, would not even be an issue if the subject were fundamental, substantive rights. This conclusion is fortified by the lengths to which the majority and dissent went to place *Parratt* squarely within the procedural due process context created by *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Zinermon*, 110 S. Ct. at 984-86; *id.* at 995-96 (O'Connor, J., dissenting). The Court thus folded *Parratt* into a line of cases bracketed by *Zinermon* and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *Parratt* does not control when, as in *Zinermon*, the state fails to provide pre-deprivation process that it readily could have provided or, as in *Logan*, when the state formally creates an established procedure but as a practical matter makes it unavailable. *See generally* Laura Oren, *Signing Into Heaven: Zinermon v. Burch, Federal Rights, and State Remedies Thirty Years After Monroe v. Pape*, 40 EMORY L.J. 1, 67 (1991) (concluding that *Parratt* is now a narrow doctrine).

²⁴⁰ *See Danese v. Asman*, 875 F.2d 1239, 1240 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990). The plaintiff in *Danese* might well have succeeded with a procedural due process claim that could have skirted *Parratt* via *Zinermon* had not the defendant successfully pressed the qualified immunity defense first. *See id.* at 1242-44.

As a purely procedural matter, defendants are entitled to move separately on the defenses of legal insufficiency and qualified immunity, provided both defenses are

properly preserved in the responsive pleading. See FED. R. CIV. P. 12(b), 8(c), 7(b). The former defense attacks the legal adequacy of the plaintiff's claim and is resolved solely by reference to the allegations of the complaint, while the latter asserts an affirmative defense, which, if legally sufficient and factually supported, avoids liability for damages even if the elements of the claim are adequately pleaded and proven. Given the ease of deciding the legal insufficiency issue, and its ripeness at the threshold of a lawsuit, a defendant would ordinarily make that motion first.

Substantively, however, the current version of qualified immunity subsumes the question of legal sufficiency that is normally raised by a motion to dismiss for failure to state a claim. While it remains unclear how settled a right must be to meet the Court's requirements, a determination that a particular right is well settled must mean at a minimum that the right has been recognized by a court of some dignity and does state a legally sufficient claim. Rejection of the qualified immunity defense on its first, legal prong would thus doom a follow-up motion to dismiss for failure to state a claim. By the same token, however, a plaintiff's claim, although adequate to survive a motion to dismiss for legal insufficiency, may not implicate a right that is settled to the degree necessary to avoid the defense of qualified immunity. From an efficiency standpoint the individual defendant is therefore better advised to move on qualified immunity at the outset, even though the ultimate denial of that motion should spell the defeat of the legal insufficiency defense as well.

Efficiency aside, the tactical approach *Zinerman* counsels was made problematic by the Court in *Siebert v. Gilley*, 111 S. Ct. 1789 (1991). Plaintiff, a former government psychiatrist, brought a defamation action, presumably under what he perceived to be the residue of *Paul v. Davis*, 424 U.S. 693 (1976). The Court of Appeals for the District of Columbia assumed, without deciding, that plaintiff stated a claim under *Paul*, but remanded the case with instructions to dismiss because, among other things, the right was not clearly established. See *Siebert v. Gilley*, 895 F.2d 797, 803 (D.C. Cir. 1990), *aff'd*, 111 S. Ct. 1789 (1991).

The Supreme Court majority affirmed, but rejected the circuit court's analysis. Concluding that "[a] necessary concomitant to the determination of whether the constitutional right asserted . . . is 'clearly established' . . . is the determination of whether [there is] . . . a constitutional right at all," *Siebert*, 111 S. Ct. at 1793, the Court found no such right, despite *Paul*. See *supra* note 228. It also instructed lower courts to decide the "rights" or legal sufficiency challenge before turning to the defense of immunity. See *Siebert*, 111 S. Ct. at 1794. This approach, by scrutinizing a component of the defense that is identical to the "rights" element of a § 1983 plaintiff's prima facie claim, has the potential to absolve the defendant from any liability, including prospective relief and attorneys' fees; by contrast, the qualified immunity defense as such relieves the individual defendant from liability for damages alone. In this way the *Siebert* prescription for sequencing these issues promises some government officials even greater freedom from the expense and time demands of litigation than they enjoyed when trial courts turned immediately to the question whether an assumed right was clearly established. See *id.* at 1793.

The approach suggested by the Court creates some doubt about our assertion that § 1983 damage actions against individuals are dead-ends for the development of new constitutional rights. A trial court, directed to decide whether there is a right before determining whether that right is clearly established, may generate precedent declaring new rights. In many cases, of course, the trial court will find for the defendant and no new rights will arise. There is a possibility, however, that by resolving the legal insufficiency claim first, the trial court will find for the plaintiff. In that event, the *Siebert* marching orders for trial courts—do not decide whether a right was well settled at the time the defendant acted until you have first decided that

Zinerman followed that tack, the *Parratt* question would probably never have been presented. The right to newly declared procedural protections could not have been settled at the time *Burch* was admitted.²⁴¹ If this is correct, damage actions against entities remain the only sure vehicle for the creation of new constitutional protections, assuming that counsel for individual defendants are alert to litigate the qualified immunity defense initially.²⁴² This conclusion is buttressed by the extreme latitude appellate courts

such a right is currently cognizable—may work to the disadvantage of future defendants. That is, even if, in the rights-deciding case (Case 1), the qualified immunity defense ultimately prevails, the right may have been sufficiently declared there to be deemed clearly established, and thus defeat a claim of immunity in a subsequent action (Case 2).

Still, the post-*Siegert* use of § 1983 individual damage actions to create such rights may prove limited. First, if Case 1 fails to move beyond the district court, Case 2 may not accord a great deal of weight to the part of the Case 1 opinion that declares a right. *Cf. Davis v. Scherer*, 468 U.S. 183, 192 (1984) (citing circuit authority as evidencing precedent that is “clearly established”). Second, even an appellate opinion in Case 1 may have little precedential value if, after declaring a right, it nevertheless finds the defendant qualifiedly immune because the right was not well established. A court in Case 2 may reason that the Case 1 court did not need to consider the “rights” issue carefully because declaration of the right had no effect on the Case 1 result. *Cf. RESTATEMENT (SECOND) OF JUDGMENTS* §§ 17(3), 27, 28 (1982) (stating that issue preclusion is appropriate only when determination of the common issue was essential to the earlier judgment).

²⁴¹ See *P.C. v. McLaughlin*, 913 F.2d 1033, 1039-41 (2d Cir. 1990) (determining that the issue of whether officials complied with federally incorporated state statutory requirements for admitting plaintiff to residential school for retarded individuals, and thus with requirements of the Education of the Handicapped Act of 1975, 20 U.S.C. §§ 1401, 1415(b)(1)(C), (b)(2) (1988), was prepermitted by a grant of qualified immunity through the application of *Harlow*).

²⁴² A defendant's attorney, after *Siegert*, may no longer be able (or want) to follow our post-*Zinerman* advice that they press for qualified immunity before moving to dismiss for failure to allege the violation of a federal right. See *supra* note 240. Instructed by *Siegert*, trial courts may refuse to acquiesce in this tactic. See *supra* note 240. Moreover, counsel may conclude that the instant defendant (unlike potential future defendants, see *supra* note 240) is better served by litigating the “rights” issue first. After all, a determination that there is no predicate right avoids all liability, not just liability for damages. In this way a threshold determination of the rights issue, if it is favorable to defendant, fully implements the Supreme Court's recent resolve to provide a complete immunity from suit, not just from liability. See *Siegert*, 111 S. Ct. at 1793-94 (concluding that qualified immunity creates “an immunity from suit rather than a mere defense to liability” (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985))). Under previous practice, trial courts usually ruled first on the “clearly established” question: A defendant who prevailed on that question, and hence on qualified immunity, would be relieved of liability for damages only. *Cf. Pulliam v. Allen*, 466 U.S. 522 (1984) (holding that even absolute judicial immunity bars only damages, not injunctive relief or attorney's fees incident thereto). On the possibilities and perils of using suits for injunctive relief against individuals as a vehicle for creating new procedural rights, see *supra* note 18.

have granted the *Harlow/Anderson* immunity defense, by insisting on its resolution before discovery,²⁴³ by permitting immediate appeals from the denial of qualified immunity motions,²⁴⁴ and by applying zealously the "clearly established" concept.²⁴⁵ In any event, even assuming that it has some claim-expansion potential, *Zinermon* may ultimately be limited to situations where the discretion of the entity's actors to design pre-deprivation procedures is "uncircumscribed" and results from "statutory oversight."²⁴⁶

B. *Flawed Accounts of the Doctrinal Divergence*

Attempts to explain the rigorous new *prima facie* entity case and the capacious affirmative defense enjoyed by individual defendants have been notably unsatisfactory. Perhaps only a generalized hostility to the underlying constitutional claims unifies the Court's recent decisions:

Low and Jeffries have suggested, for example, that the latest formulations of *Monell* "policy" in cases such as *Praprotnik* and *City of Canton* confer a *de facto* qualified immunity on entities, and hence wreak the revenge of the *Owen* dissenters.²⁴⁷ If this were correct, the current asymmetry in form would effect a symmetry in substance, with the common feature of immunity constituting the bridge between the two types of actions. The suggestion fails, however, because the *Monell* "policy" stricture, even as rigidly applied, is still only an effort to identify liability-conducive conduct that the factfinder can fairly impute to the entity; it does not

²⁴³ See *supra* note 119 (citing cases).

²⁴⁴ See *supra* notes 117, 119 & 123.

²⁴⁵ See *Auriemma v. Rice*, 895 F.2d 338, 340, 344 (7th Cir.), *aff'd in part and rev'd in part*, 910 F.2d 1449 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2796 (1991) (holding that police superintendent qualifies for immunity when prior decisions failed to establish clearly that he could not reasonably have relied on race as a factor in reorganizing his department, even though he did not purport to be implementing an affirmative action plan when he promoted black officers and demoted only white officers); *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990) (stating that a pretrial detainee's generalized right to medical care does not clearly establish a correlative right to be screened to determine if such care is needed). The divergence of approaches to § 1983 entity and individual actions becomes evident upon comparison of *Danese* and *City of Canton*. *Danese* provides immunity although the right is arguably clearly established, but in *City of Canton*, an entity action, a majority refused to foreclose an almost identical claim despite its novelty. See *supra* note 200 and accompanying text.

²⁴⁶ See *Easter House v. Felder*, 910 F.2d 1387, 1401 (7th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 783 (1991).

²⁴⁷ See LOW & JEFFRIES, *supra* note 233, at 39.

categorically preclude novel federal claims. If the plaintiff demonstrates "policy" or its "deliberate indifference" surrogate,²⁴⁸ the entity may face liability for unsettled federal constitutional or statutory violations, despite its agents' reasonable behavior. For individual defendants, either of these characteristics—the settled nature of the predicate right or the objective reasonableness of the state actor's conduct—would provide immunity. There is no symmetry in substance.

Nor can one explain the *Parratt* doctrine as the individual defendant's counterpart to the *Monell* requirement of a policy or custom.²⁴⁹ The casuistic logic of *Parratt*, in which the state provision of remedial process *after* the deprivation of constitutionally protected liberty or property transforms a denial of due process into a denial *with* due process,²⁵⁰ pertains only to constitutional violations that turn on the denial of some sort of process.²⁵¹ Indeed, the *Parratt* opinion itself stressed that the reason certain forms of post-deprivation process sanitized apparently unlawful conduct was to prevent the Fourteenth Amendment, and that amendment only, from becoming the dreaded "font of tort law."²⁵²

In support of its rationale, the Court relied on *Paul v. Davis*,²⁵³ in which the same fear had driven it to limit the scope of constitutionally protected liberty to deprivations that included the loss of a state-defined right. Justice Rehnquist, also the author of *Parratt*, stated explicitly that the holding did not affect enforcement of interests that have their origin directly in the Bill of Rights. On the authority of *Monroe*, Rehnquist wrote that those interests may be redressed under § 1983 "independently of state law."²⁵⁴ Consequently, and especially in light of *Zinermon*,²⁵⁵ it is apparent that *Parratt* leaves unaffected the *Monroe* holding that individual

²⁴⁸ See *supra* text accompanying note 192.

²⁴⁹ See Susan Bandes, *Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101 (1986).

²⁵⁰ See Monaghan, *supra* note 239, at 985-86.

²⁵¹ See *supra* text accompanying notes 235-39 (discussing *Zinermon v. Burch*, 110 S. Ct. 975 (1990), which strongly suggests that *Parratt* now will be confined to procedural due process claims alone, as a special application of the formulation of *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976)).

²⁵² *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986).

²⁵³ 424 U.S. 693 (1976).

²⁵⁴ *Id.* at 711 n.5.

²⁵⁵ See *supra* text accompanying notes 235-39.

defendants may be liable under § 1983 for violations of constitutional rights other than procedural due process. This holds even though their conduct is entirely unauthorized by their governing principal, or, even if authorized, unassimilated into the kind of entity policy that *Monell* requires for liability. In brief, *Parratt* is simply not the comprehensive barrier to claims against individuals that the evolved version of "policy" raises to claims against entities.

Expediency does not account for these developments either. The Court has, of course, noted and apparently acted upon concerns about calendar congestion. Its responses include broadening the immunities available to individual defendants, paring down the scope of constitutionally protected "property" and "liberty," restrictively redefining "deprivations," hinging the obligation to provide process on the subsequent availability of doubtfully efficacious state remedies, and, more recently, inviting early dispositions of entity suits.²⁵⁶ Yet if stanching the dikes motivates the Court's restrictions on § 1983 as a tool for vindicating constitutional rights, what explains the Court's permissive approach to the statute as a remedy for violations of federal legislation?²⁵⁷ In *Maine v. Thiboutot*,²⁵⁸ the Court, fully cognizant of the enormous resulting potential increase of § 1983 "filings in our already overburdened courts,"²⁵⁹ nevertheless charted a course conspicuously hospitable to the assertion of these historically tangential claims.

Consider, for instance, the fate of Justice Rehnquist's attempt to limit the utility of § 1983 as a remedy for federal statutory violations. In *Pennhurst State School and Hospital v. Halderman*,²⁶⁰ he articulated a substantive rights restriction corresponding to the *Paul* or *Parratt* restrictions in due process cases, as well as a more general limitation that would oust § 1983 whenever the underlying federal statutory entitlement provided "an exclusive remedy for violations

²⁵⁶ This appears to be a natural outcome of the decision to classify "final policy-making authority" as a question of positive state law. See *supra* note 226 and accompanying text.

²⁵⁷ This trend is most recently evidenced by *Wilder v. Virginia Hospital Ass'n*, 110 S. Ct. 2510, 2517 (1990), *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989), and *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987). See Monaghan, *supra* note 21, at 247 (concluding that "section 1983's availability turns only on whether federal statutory law creates a 'primary' right, even though the federal law does not otherwise establish a 'remedial' right").

²⁵⁸ 448 U.S. 1 (1980).

²⁵⁹ *Id.* at 23 (Powell, J., dissenting).

²⁶⁰ 451 U.S. 1 (1981) [hereinafter *Pennhurst I*].

of its terms."²⁶¹ Justice White, dissenting, argued that the Court should read *Thiboutot* as erecting the "presumption that a federal statute creating federal rights may be enforced in a § 1983 action," rebuttable only by an express indication in the underlying statute that Congress considered its stated remedies to be exclusive.²⁶²

In three recent decisions that presumption has apparently carried the day.²⁶³ The Court has found § 1983 available if the predicate statute provides either no remedy, as in *Golden State Transit Corp.*, or only an administrative remedy, as in *Wilder* and *Wright*, for the kind of violation alleged. Only twice, when the entitlement statutes created their own judicial remedy,²⁶⁴ or a "carefully tailored administrative and judicial mechanism,"²⁶⁵ was § 1983 held displaced as a matter of congressional intent. The case law may therefore be read to hold that § 1983 is supplanted only when Congress has provided a carefully considered federal²⁶⁶ *judicial* remedy for the predicate statutory violation. Justice Rehnquist's second attempted limitation, a narrow definition of the "rights secured by" a federal statute, has likewise apparently failed.²⁶⁷

²⁶¹ *Id.* at 28 (quoting *Thiboutot*, 448 U.S. at 22 n.11 (Powell, J., dissenting)). Justice Powell found this standard met in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) (finding that Congress had provided "unusually elaborate [judicial] enforcement provisions" in lieu of § 1983).

²⁶² *Pennhurst I*, 451 U.S. at 51 (White, J., dissenting in part); *cf.* *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (Marshall, J., concurring in unanimous decision) (precluding *Bivens* recovery for a government employee if Congress provided a comprehensive administrative and judicial remedy that was "substantially as effective as a damages action").

²⁶³ See *supra* note 257 (citing cases).

²⁶⁴ See *Middlesex*, 453 U.S. 1.

²⁶⁵ *Smith v. Robinson*, 468 U.S. 992, 1009 (1984). But see *Handicapped Children's Protection Act of 1986*, 20 U.S.C. § 1415 (1988) (overruling *Smith* and authorizing attorneys' fees pursuant to 42 U.S.C. § 1988 in connection with successful constitutional or federal statutory claims even when the same relief, with an express fee authorization, is available under the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1485 (1988)).

²⁶⁶ *Wilder* provided support for this qualification by rejecting the argument that the availability of state judicial review of Virginia's implementation of the Medicaid amendment was relevant to the availability of relief under § 1983. See *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2525 n.20 (1990).

²⁶⁷ Justice Kennedy made the argument in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), but was joined only by Chief Justice Rehnquist and Justice O'Connor. See *id.* at 114-19 (Kennedy, J., dissenting). The Court rejected the argument again in its 1990 term. See *Wilder*, 110 S. Ct. at 2517-23 (determining that the statute imposed a "binding obligation" on the state that would be rendered "essentially meaningless" without judicial enforcement); *cf.* *Dennis v. Higgins*, 111 S.

Why would the Court assiduously nick away at § 1983 jurisdiction in its primary sphere, the vindication of constitutional rights, yet open the doors to a perceived onslaught of litigation whenever any federal statute, not just a civil rights statute, is violated under color of state law? Particularly inexplicable is this embrace of federal statutory claims under § 1983 after the Court had just announced a notably more restrictive approach to implying judicial rights of action directly under federal statutes.²⁶⁸ The Court's open-ended receptiveness to § 1983 statutory claims is even more baffling because this result is not compelled. The historical argument is certainly respectable that the addition in 1874 of the words "and laws" to § 1983 was intended merely to parallel the subject matter jurisdiction conferred by the forerunner of 28 U.S.C. § 1343(3), a section limited to claims arising under "any law providing for equal rights."²⁶⁹

We are not suggesting that the use of § 1983 to vindicate statutory entitlements is normatively undesirable or inconsistent with the Court's policy-driven changes in entity or individual actions.²⁷⁰ We do note, however, that whatever the logic of the Court's decision to entertain all manner of federal statutory claims

Ct. 865 (1991) (giving same broad meaning to the constitutional "rights" enforceable through § 1983).

²⁶⁸ See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) (holding that there is "a limited private remedy under the Investment Advisors Act of 1940" despite no express provision for a private cause of action); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-77 (1979) (refusing to find a private cause of action under § 17(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78g(a) (1988), despite having previously found one under § 14(a), 15 U.S.C. § 78n(a) (1988)). This curiosity is elaborated by Monaghan, *supra* note 21.

²⁶⁹ See *Maine v. Thiboutot*, 448 U.S. 1, 14-19 (1980) (Powell, J., dissenting) (reviewing the historical argument); cf. John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1485 n.60 (1989) (discussing the Supreme Court's efforts to except particular statutes from its general rule that § 1983 provides a private damages action for all federal statutes).

²⁷⁰ The point is that the terms under which individual and entity actions are brought in the constitutional sphere are significantly different from those in the statutory entitlement sphere. For example, because of *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), and the vapors of the Eleventh Amendment, see *infra* text accompanying notes 301-06, although the entitlement suit must take the form of an action against an individual state official, in substance it is generally a suit against a state entity charged with a violation in the implementation of a federal statute or regulation. Thus, no question of "settled law" exists for purposes of an individual defense; its settled nature exists a priori in the federal enactment. Additionally, the existence of state policy for purposes of entity liability is not a viable issue, because the policy resides in the challenged regulation.

while excluding so many based on the Constitution, it is not a logic of expediency. Why the Court defers to Congress when legislating new entitlements but defers to the states when enforcing constitutional rights is not readily apparent. It may reflect the Court's perception of itself as a jealous guardian of the values of federalism, or perhaps it is nothing more than a contingent fact of the Court's historiography.

V. SHAPING A NEW ASYMMETRY FOR ENTITY AND INDIVIDUAL ACTIONS

A. *The Drawbacks of Deterrence- and Compensation-Based Redesigns*

Section 1983's dynamic history reminds us that redefining the *prima facie* cases and defenses for individual and entity defendants cannot be undertaken sensibly without first identifying the statute's paramount objectives.²⁷¹ Professors Kramer and Sykes, for example, design a liability rule intended to "maximize the net economic value of municipal activity," and their sole yardstick for measuring the efficiency of alternative liability rules is deterrence.²⁷² They acknowledge that "economic analysis makes no allowance for purely distributional objectives."²⁷³ Contending that "the pursuit of compensation for its own sake should not play an important role in the common-law jurisprudence of § 1983,"²⁷⁴ they note that the legislative history contains "no talk of enacting this statute to provide needed compensation to victims of constitutional torts."²⁷⁵

This pure deterrence premise is doubtful. The Court has identified compensation together with deterrence as the chief remedial goals of § 1983.²⁷⁶ Moreover, compensation need not be "for its own sake." The express congressional authorization of damages through a private right of action may well be a more effective means to the ultimate end of deterrence than injunctive relief alone.²⁷⁷

²⁷¹ See *infra* part V.B.

²⁷² Kramer & Sykes, *supra* note 24, at 267.

²⁷³ *Id.* at 268.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ See *infra* text accompanying notes 335-37.

²⁷⁷ See *infra* note 365 and accompanying text.

From their premise that the exclusive remedial aim of the statute is deterrence, Kramer and Sykes urge a "direct correlation" between an individual defendant's qualified immunity and the liability of the entity: either both are liable, or neither is.²⁷⁸ This "double or nothing" stance adopts respondeat superior as the basis of entity liability, although only for "bad faith torts." Using this approach would expand the scope of entity liability well beyond the bounds of the Court's current insistence on "policy."²⁷⁹ Kramer and Sykes reason that fastening liability on the individual wrongdoer alone directly affects only his incentives, not those of his superiors.²⁸⁰ They note that because individual wrongdoers like municipal employees "are often unable to pay adverse judgments in full"²⁸¹ the ultimate task is to create incentives for supervisory personnel to take steps to prevent constitutional violations by their subordinates.

Kramer and Sykes share the Supreme Court's premise that although the prospect of liability may not deter individual officials from committing "good faith torts," that same prospect might unduly chill the vigorous execution of their duties.²⁸² They state that a "rule of individual immunity is . . . efficient for such cases

²⁷⁸ See Brown, *supra* note 24, at 680 n.351 (discussing Kramer and Sykes's treatment of the connection between official liability and municipal liability).

²⁷⁹ See Kramer & Sykes, *supra* note 24, at 284. More precisely, Kramer and Sykes believe that either of two approaches to entity liability would achieve more deterrence than the Monell "policy" rule. One is classic respondeat superior—the entity is liable whenever the federally violative conduct of the agent is carried out in the course and scope of his employment. The other imposes liability only when the agent's "bad faith" conduct was the result of negligence on the part of a superior in the administrative hierarchy. See *id.* at 283-85. Neither standard reaches the entity if the agent acted in good faith. In contrast, Monell reaches an entity whenever the agent implements formal policy or acts through a final policymaking official. Compare *supra* text accompanying note 154 (stating that Monell did not decide when official's toleration or sanctioning of agent's unauthorized federally unlawful conduct would justify extending liability beyond the agent to the entity) with *supra* text accompanying notes 170-71 (explaining the Court's later ruling in *Praprotnik* that liability extends to the entity only when the agent's conduct is approved by and carried out according to the instructions of final policymaking officials).

²⁸⁰ See Kramer & Sykes, *supra* note 24, at 284. The imposition of individual liability might, however, have an indirect effect on supervisors' incentives. Kramer and Sykes explain that because "the imposition of personal liability on an employee may lead to an exercise of caution that is excessive from the employer's perspective," the employer may have an incentive to alter the employees' incentives so as to encourage them to act less cautiously. See *id.* at 275.

²⁸¹ *Id.* at 276.

²⁸² See *id.* at 297 & n.125.

[only] if the municipality is also immune from suit."²⁸³ Allowing the entity to escape liability for good faith torts is necessary to protect low-level employees from entity-imposed penalties respecting career advancement or tenure that might produce undesirable "chilling."²⁸⁴ They contend in the alternative that even if liability were imposed upon municipal entities, it would have "little impact on the ex ante behavior of municipal employees and their supervisors" because good faith torts "involve actions which, ex ante, appear almost certainly to be legal."²⁸⁵

Consequently, an exclusive focus on deterrence suggests that entities should enjoy immunity on the same terms as their agents, and vice versa. Kramer and Sykes do acknowledge the risk-sharing benefits of liability if governments are "better risk bearers than injured parties. But risk sharing benefits alone rarely suffice to justify the imposition of civil liability, since civil litigation is ordinarily far more costly than alternative mechanisms for the redistribution of risks, such as social insurance schemes."²⁸⁶

Congress, which created a damage remedy for constitutional injuries under color of state law but chose not to require social insurance, may have had just such risk distribution in mind. More significantly, if government entity liability is limited, even on the broad plane of respondeat superior, to constitutional violations committed under circumstances that would divest its agents of *Harlow/Anderson* immunity,²⁸⁷ the entity will have little incentive to steer clear of questionable conduct. The entity need only avoid "clearly established" violations, a realm which after *Anderson* may be practically nonexistent.²⁸⁸

At the other end of the spectrum, compensation is the chief value of § 1983 for Professors Whitman and Brown; they condemn any liability matrix that could leave a plaintiff without remedy.²⁸⁹

²⁸³ *Id.* at 299.

²⁸⁴ *See id.* at 290-91. In this way Kramer and Sykes's "double or nothing" approach does recognize, albeit indirectly, that damages may deter. Their suggestion that entities enjoy the same immunity as their agents rests, in part, on the fear that an agent, facing career-threatening penalties if her principal incurs damage liability for her good faith torts, would seek refuge in inertia or other defensive postures.

²⁸⁵ *Id.* at 299.

²⁸⁶ *Id.*

²⁸⁷ *See supra* text accompanying notes 107-21.

²⁸⁸ *See supra* notes 116, 119-21 and accompanying text.

²⁸⁹ *See* Brown, *supra* note 24, at 674 (criticizing the liability matrix suggested by Justice White in *Pembaur v. Cincinnati*, 475 U.S. 469 (1985), because it led to the possibility that "[t]he victim would be deprived of a remedy because the law was both

This assumption impels Professor Brown to saddle individual government employees with liability whenever the entity can avoid it under the *Monell/Praprotnik* conception of "policy." In many circumstances, neither the culpability of the individual nor that of the entity will resemble common law fault; thus, liability may simply dispense compensation "for its own sake," even if it does not significantly serve to deter. Furthermore, and somewhat ironically given his premise, Brown's suggestion gives scant assurance of meeting its purely compensatory goal, because it is indifferent to whether a usually solvent entity or an often insolvent individual defendant will satisfy a judgment.

Professor Brown argues for an "inverse relation" between municipal liability and the liability of individual officials.²⁹⁰ Under this view, individual officials are liable, or unprotected by qualified immunity, when the entity is not liable and vice versa. The virtue of this relationship is that "the remedial purpose of section 1983 is served because liability is always present."²⁹¹ Brown derives this result from an analysis of Justice White's *Pembaur* concurrence. Justice White reasoned that if a municipality was limited by either federal or state law, its agent's act contrary to those limits could not constitute "policy." The entity could therefore not be liable, because local governments lack the authority to make policy contrary to superior law.²⁹² The entity, in other

clear and confused: clear enough to relieve the municipality of liability, but still confused enough to vindicate the official"); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 246 n.90 (1986) (criticizing the approach of Justices White and O'Connor in *Pembaur*, because were it to be "accepted by a majority of the Court, it could mean that certain cases . . . would be difficult to bring in a federal court . . . [or that] a damage action against an individual official defendant would be barred").

²⁹⁰ See Brown, *supra* note 24, at 680 n.351 (contrasting the "inverse relation" approach with Kramer and Sykes's approach).

²⁹¹ *Id.* at 680.

²⁹² *Pembaur*, 475 U.S. at 485-86 (White, J., concurring). Justice White's position is an echo of *Ex parte Young*, 209 U.S. 123 (1908), in a different context. In *Pembaur*, he concludes that "[w]here the controlling law"—federal, state, or local—limits the authority of government entity agents, "they cannot be said to have the authority to make contrary policy." *Pembaur*, 475 U.S. at 486 (White, J., concurring). Unless such policy is set forth in a legislative enactment, formal statement, or settled custom, its existence, for Justice White, depends on whether the federal violation is defined by prior judicial decision. Thus he concluded that *Pembaur* would have been a different case—the entity's agents would have violated a clear limit on their authority and therefore could not have been executing entity "policy"—if *Steagald v. United States*, 451 U.S. 204 (1981), had been decided before the events at issue. See *id.* at 486-87; *supra* note 197; *supra* text accompanying notes 160-67. By comparison, *Ex parte Young*

words, is absolved precisely when its agent is stripped of immunity because he could not reasonably believe that he had authority to act. To assure that liability is always present, Brown reverses the equation: officials who are immune from individual liability because the law is not reasonably clear should be treated as having authority to act on behalf of the entity; the entity should, therefore, be accountable.²⁹³

Apart from the merits of Justice White's foundational observations,²⁹⁴ Brown's insistence that some defendant must compensate the plaintiff creates two serious problems. First, it is not obviously fair to hold an individual liable simply because "the law is reasonably clear"²⁹⁵ that his actions are prohibited when he acts

holds that when prospective relief is sought individual state officers cannot be acting as agents of the State (and are thereby suable in federal court despite the Eleventh Amendment) whenever it is merely "alleged" that they are acting unconstitutionally, apparently without regard to whether decisional law supports the allegation. See *Ex parte Young*, 209 U.S. at 159-60.

Curiously, in another context, Justice White was willing to abandon the *Ex parte Young* fiction entirely. He joined the majority in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) [hereinafter *Pennhurst II*], which held that the Eleventh Amendment acts as a jurisdictional bar to a federal court's authority to award injunctive relief against state officials found to have violated state law. See *id.* at 100. What is curious is that Justice Powell's majority opinion in *Pennhurst II* rationalized the *Ex parte Young* fiction not by recourse to traditional common law understandings of an agent's authority, but by positing that the fiction plays an essential role in fulfilling the vindication of federal rights, a role not demanded by the facts of the case. See *id.* at 102-03. By contrast, Justice White's *Pembaur* opinion seems to rest wholly on the premise rejected in *Pennhurst II*: the common law's fictional formalism of authority. See *Pembaur*, 475 U.S. at 485-87 (White, J., concurring).

²⁹³ See Brown, *supra* note 24, at 680.

²⁹⁴ The conclusion that there can be no municipal liability because municipalities are incapable of making policy contrary to law creates conceptual tension with *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913), and *Monroe v. Pape*, 365 U.S. 167 (1961), overruled in part by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which held that individual state actors could violate the Fourteenth Amendment and § 1983, respectively, although their conduct also violated state law. See *supra* notes 66-68 and accompanying text. Furthermore, this conclusion seems unacceptably formalistic and unrealistic. Municipalities routinely make spur-of-the-moment, sweeping decisions that even Justice Powell would classify as "policy," but these policies bear few of the teethmarks of debate or deliberation. Moreover, policy may be reflected in simple custom. Cf. *Pulliam v. Allen*, 466 U.S. 522 (1984) (treating a state magistrate's practice of routinely requiring bond for nonjailable offenses as a form of policy). In any event, Brown's double liability category subjects both the individual and the municipality to liability for facially unconstitutional policies such as the one in *Monell*. See Brown, *supra* note 24, at 683. Brown's position sharply diverges from the stance of Justice White, who would hold a municipality powerless to create plainly unconstitutional policy. See *supra* note 292.

²⁹⁵ Brown, *supra* note 24, at 680.

in complete good faith. Brown's contrary proposition unrealistically assumes that the employee is knowledgeable about the nuances of local or federal law; it is therefore blind to the received wisdom that the obligations defined by adjudicatory rules are ambiguous. Second, Brown's regime would remit the plaintiff to an often judgment-proof individual defendant in the nontrivial number of cases in which the law governing the injury-producing act is well-established and the entity, in Brown's scheme, is therefore immune.

B. An Alternative Dominant Premise: Restraint of Federally Unlawful Conduct

To posit a priori one of two remedial goals as exclusive and redesign liability standards around the preferred goal overlooks the intimate link between victim compensation and deterrence. Our own principal guidepost for a dynamic federal common law of § 1983 is the congressional purpose implicit in affording a private right of action against any "person" to redress federal injuries inflicted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."²⁹⁶ The implicit purpose of § 1983 is the restraint of governmental conduct violative of any federal right, not just conduct that is the subject of distinct, unexceptionable judicial articulation. All such conduct should be restrained independent of the value of private compensation.²⁹⁷

At the same time, to exalt government restraint as the dominant concern of the enacting Reconstruction Congress does not denigrate victim compensation, which remains an important supplementary mechanism for achieving deterrence. An emphasis on restraint need not ignore either the common law's concern for fairness in subjecting individual defendants to damages or the new federalists' concern that local government be permitted to function free of needless national intrusion. These related values are accommodated, to varying degrees, in the proposal set forth in the following subsection.

Each of the historical reasons offered by Justice Douglas for the enactment of § 1983 touches issues of governmental structure: the

²⁹⁶ 42 U.S.C. § 1983 (1988).

²⁹⁷ The Court has recognized the overriding public nature of the interests served by civil rights legislation: the "public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." *Hensley v. Eckerhart*, 461 U.S. 424, 444 n.4 (1983) (Brennan, J., concurring in part and dissenting in part).

need to "override certain kinds of state laws," to "provide[] a remedy where state law was inadequate," and to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."²⁹⁸ Justice Harlan's separate views similarly point to the paramount importance of government restraint, whether directly through deterrence or indirectly through victim compensation.²⁹⁹ The culpability requirement embedded in both the Court's qualified immunity and "policy" doctrines, however, is calculated to confound fulfillment of that end.

The government restraint thesis should make us skeptical of wide-ranging judicially crafted exceptions to the liability of entities. Entity liability impacts most immediately on executive-level government officials, and it is they, not line employees, who are in a position to balance liability avoidance measures against the requirements of governing. For the statute to have significant prophylactic effect, it must enforce all constitutional norms, not just those fortuitously enmeshed in government policy.

The Court has tacitly recognized the signal importance of the entity by denying local governments the immunity it conferred on individual defendants charged with transgressing emerging constitutional rights. Indeed, the particular defendant in the action in which the Court first explicitly extended § 1983 to federal statutory violations was an entity.³⁰⁰ Consequently, a local government is now liable for federal statutory violations, which by their nature implicate policy, as soon as federal law is declared; an individual is liable for a constitutional violation only after some uncertain hiatus during which the judiciary establishes a right with clarity.

Our central premise that government entity defendants should be the chief and ultimate target of § 1983's proscriptions is virtually irreconcilable with the holding of *Will v. Michigan Department of State Police*³⁰¹ that the statute does not authorize a claim for

²⁹⁸ *Monroe*, 365 U.S. at 173-74; see *supra* part II.A; see also Shapo, *supra* note 13, at 280 (stating that the enacting Congress was concerned about "a widespread outbreak of violence" exacerbated by "the relative inaction of state and local governments . . . [creating a situation] which bordered on anarchy").

²⁹⁹ See *supra* notes 81 & 88.

³⁰⁰ See *Maine v. Thiboutot*, 448 U.S. 1, 2 (1980).

³⁰¹ 491 U.S. 58 (1989). The Court has extended the *Will* holding to exclude territories from § 1983's coverage. See *Ngiraingas v. Sanchez*, 110 S. Ct. 1737, 1743 (1990).

damages against the state.³⁰² The *Will* result is both counter-textual and counterintuitive; the statute mentions states (and territories) alone and was enacted to implement Fourteenth Amendment restrictions on state action. *Will* stands in stark contrast to Justice Powell's lament in *Owen* that the Court imposed strict damage liability on a level of government, a municipality, "least able to bear it,"³⁰³ for *Will* provides comprehensive damage immunity in all courts, state and federal, to the entity best able to offer relief, the state.³⁰⁴

Yet within *Will* there is indirect support for the government restraint thesis. By reaffirming that an individual state agent named in her official capacity remains a § 1983 "person" for purposes of prospective relief,³⁰⁵ the Court continues to nurture the root concept of the statute. Conduct fairly attributable to government that causes the deprivation of federally secured rights should be subject to judicial oversight and a federal remedy in a proceeding under federal law, and generally in a forum of the plaintiff's choice.³⁰⁶

³⁰² See *Will*, 491 U.S. at 64, 71; *supra* note 233.

³⁰³ *Owen v. City of Independence*, 445 U.S. 622, 670 (1980) (Powell, J., dissenting). Justice Powell's lament increases in poignancy after *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), restricted ad hoc "policy" to decisions by final policymakers. See *id.* at 127. Because of *Praprotnik*, the lowest levels of state government and the smallest government entities are most vulnerable to § 1983 liability. In a county or town with a one- or two-member constabulary or executive department, virtually every decision affecting a citizen may be made by a final policy-making official.

³⁰⁴ Although we are not in accord with the Court's conclusion in *Will*, and a full discussion of its soundness is beyond the bounds of this Article, we cannot resist one note. In *Will* the Court elided another interpretive difficulty foreseen by Justice Powell. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), Justice Powell described the awkwardness of importing the Eleventh Amendment fiction of *Ex parte Young*, 209 U.S. 123 (1908), into § 1983. The consequence is that a public official sued in his official capacity is a "person" only to the extent the plaintiff prays for prospective relief. See *Monell*, 436 U.S. at 712 (Powell, J., concurring). As Justice Powell observed, the decision in *Monell* to subject local government entities to liability as § 1983 "persons" avoided this bifurcation, which had no support in the text of the statute. See *id.* at 711-12. *Will* resurrects the bifurcation at the level of state government on the authority of *Ex parte Young*, making no mention of the problem Justice Powell had identified. See *Will*, 491 U.S. at 71 & n.10.

³⁰⁵ See *Will*, 491 U.S. at 71 n.10; *supra* note 233. When the plaintiff takes pains to indicate that he intends to sue the public official in her individual capacity, the official remains a full-fledged § 1983 "person" subject to damages as well as prospective relief. See *Hafer v. Melo*, 112 S. Ct. 358 (1991). Whether this bifurcated reading of the word "person" as applied to a state official sued in her official and individual capacities makes sense doctrinally is another matter entirely. See *supra* note 304.

³⁰⁶ A variety of special situations exist in which the plaintiff's federal claims must

C. *A New Asymmetry Facilitating Government Restraint, Fairness to Individual Government Agents, and Dynamic Lawmaking*

Identifying the statute's objectives in these terms leads to several related prescriptive tenets. First, although a government acts through individuals,³⁰⁷ it is ultimately the government's conduct with which we are concerned. Moreover, for the compensatory goal to be met, limitations on the liability of the agent, driven by concerns about fairness and untoward stifling of initiative, demand correlative enlargement of the liability of the entity.³⁰⁸ Consequently, if the plaintiff can demonstrate a violation of her federal rights, the only remaining question we should ask before attaching liability to the entity is whether it can fairly be charged with the conduct. This conclusion is bolstered by the widespread availability of government employee indemnification.³⁰⁹ In the common situation in which the employee meets the entity's indemnification requirements, we ignore reality if we forget that the entity pays for the liability even if the individual defendant formally suffers the adverse judgment.

The overriding need for restraint of government misconduct, the concern for fairness to individual defendants, and the need to avoid undue chilling of government initiative counsel a dual course. Entity accountability should be enhanced by discarding the *Monell* "policy" limitation; and the scope of individual liability under *Monroe* requires both widening and narrowing, with local government agents responsible for federal law violations whether settled or unsettled, but only if they intended to harm their victims.

first be presented to state judicial systems even against the plaintiff's wishes. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434 (1977) (banning federal declaratory relief that would impede prior pending state civil proceedings); *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (requiring prisoners invoking § 1983, alleging deprivation of good-behavior-time credits, to pursue exclusive remedy of federal habeas corpus relief under 28 U.S.C. § 2254 and, hence, to resort first to state court); *Younger v. Harris*, 401 U.S. 37, 54 (1971) (banning federal injunctive relief that would impede prior pending state criminal proceedings).

³⁰⁷ See, e.g., *Brown*, *supra* note 24, at 654 (stating that the problem with applying a fault standard to determine entity liability "is simple: [the entity] cannot think"); *Kramer & Sykes*, *supra* note 24, at 253 ("The problem is that municipal action is always—can only be—carried out by persons employed by the municipality.").

³⁰⁸ See *Oren*, *supra* note 24, at 1000-03 (supporting municipal liability based on respondeat superior, the inclusion of state and federal governments in the scope of the money damages remedy, and the exclusion of an action against an individual official in light of the available governmental remedy).

³⁰⁹ See *supra* note 140.

1. Entity Liability: Respondeat Superior Redux

The "policy" dictum in *Monell* reflected the concern, prompted by one of several available interpretations of statutory text, that an entity's liability should be limited to conduct fairly attributable to it. As we have argued,³¹⁰ however, the "policy" stricture, especially as elaborated through *Pembaur* and *Praprotnik*, goes beyond what is necessary to attribute fairly the actor's conduct to the entity. In fact, the Court's stated concern could be largely satisfied under respondeat superior.³¹¹ We would allow common law respondeat superior in imposing liability on the principal for the conduct of an agent who acts with the principal's authority, either express or implied³¹² or, at the edge, apparent.³¹³ Asking if the injury-producing decision or conduct occurred within the actual, implied, or apparent scope of the state actor's duties³¹⁴ should assure fair

³¹⁰ See *supra* text accompanying notes 169-87.

³¹¹ We recognize that the Supreme Court has resisted similar calls for respondeat superior. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 385, 392 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124, 125 nn.1-2 (1988); *Monell v. Department of Social Servs.*, 436 U.S. 658, 692-95 (1978).

³¹² We envision employing the definition of authority contained in the *Restatement of Agency*: "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." RESTATEMENT (SECOND) OF AGENCY § 7 (1957). This manifestation of consent can be either express or implied. See *id.* cmt. c.

The *Restatement's* drafters include "implied" authority as simply a subspecies of express authority, recognizing that no principal can describe all the details of the tasks she wants performed. The scope of consent, therefore, rests on the familiar notion of "reasonable inference." See *id.* cmt. b. As that comment indicates, "[t]he agent's conduct is authorized if he is reasonable in drawing an inference that the principal intended him so to act although that was not the principal's intent." *Id.*

³¹³ Again our prescription rests on noncontroversial, routinely applied principles in agency law. When "it is reasonable for the third person," or by extension, an injured plaintiff in a § 1983 action, "to believe that the agent is authorized" to undertake a certain act, such conduct has the trappings of apparent authority. See *id.* § 8 cmt. c. Under these circumstances vicarious liability is premised on conduct of the principal that permits the third party reasonably to believe that the authority exists, such as giving the agent a badge. See *id.* cmt. b (stating that manifestations of the principal sufficient to create apparent authority include those made "directly to a third person, or . . . to the community, by signs, . . . by authorizing the agent to state that he is authorized"); see also *id.* § 27 cmt. a (stating that the creation of apparent authority occurs through the "indicia of authority given by the principal to the agent"). A latent lesson of *Monroe v. Pape*, 365 U.S. 167 (1961), overruled in part by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), is that apparent authority is a sufficient condition for liability, although *Monroe* involved an individual defendant, not an entity. The individual actors in *Monroe*, carrying and no doubt displaying badges or other indicators of entity approval, were liable even though their conduct violated state law.

³¹⁴ No entity liability exists when an official acts wholly outside any colorable

attribution. At a minimum, a positive answer to the question means that the entity is responsible for a representation to a third person, the plaintiff, that the state actor had authority to act.³¹⁵

Assuming that the 1871 Congress sought to restrain unconstitutional government behavior, we should attend to the reality that in most cases an effective remedy lies against the entity and not its agents. *Respondeat superior* generally provides a remedy against entities even if the challenged act does not rise to the level of "policy" as defined by state law. Our proposed version of *respondeat superior* would modify the common law by reaching the entity principal under some circumstances in which its agent would be absolved.³¹⁶ *Respondeat superior* has the added virtue of afford-

actual, implied, or apparent authority. First, if the defendant is not clothed with government authority, it is hard to see how his acts can be "under color of" state law. Second, consider Professor Brown's observation, derived from Justice White's position in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), that entities may not properly be held responsible for conduct that their officials could not reasonably believe to have been authorized. Brown explains that courts define *respondeat superior* broadly so that "persons who act beyond their authority are necessarily acting unreasonably." Brown, *supra* note 24, at 683 & n.365.

³¹⁵ Liability for intentional torts undertaken with apparent authority is covered generally in RESTATEMENT (SECOND) OF AGENCY §§ 245, 254, 257, 266 (1957) (describing conditions of liability for use of force, defamation, misrepresentation, and physical harms, respectively).

³¹⁶ The version of *respondeat superior* advocated here is "modified" because, under familiar principles of *respondeat superior*, both the agent who originally causes the harm and his principal are liable, the latter vicariously. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 499 (5th ed. 1984). Moreover, the principal is liable for the agent's ordinary negligence, see *infra* note 318 (citing cases), and for intentional torts committed in furtherance of the employer's business, see KEETON ET AL., *supra*, at 505. The proposals we make for individuals, however, would free individuals from liability unless they act with intent to harm. See *infra* text accompanying notes 353-91. This leads to the result, jarring from a traditional perspective, of "vicarious" liability for a principal predicated on acts for which the agent is absolved.

We offer two justifications for this departure from standard doctrine. First, retaining entity liability even under circumstances that in fairness should relieve agents from liability is essential for fulfilling § 1983's fundamental purpose of restraining governmental misconduct. Second, there may be only negligible differences in practice between the operation of ordinary principles of *respondeat superior* and our suggested modification. The need for vicarious liability stems from the judgment-proof status of many employees. See, e.g., CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 252 (2d ed. 1980); see also SCHUCK, *supra* note 89, at 33 (noting that the doctrine was originally conceived as a surety device that was called upon if the employee was unable to pay). For satisfaction of a judgment the injured plaintiff looks to the employer, the deep pocket to whom the risk is allocated. See KEETON ET AL., *supra*, at 500; MORRIS & MORRIS, *supra*, at 252. In theory, the employer then has a claim for subrogation against the employee. The fact that the latter is judgment-proof, added to the potential problems an employer would face in

ing whatever meaningful restraint is possible against "good faith" torts by compelling higher-level officials to weigh the risk that their agents' conduct could result in an award of damages from the public treasury.³¹⁷ At the same time, if reasonably enforced, respondeat superior should serve to ensure that entities are held responsible only for conduct they actually or apparently authorize.³¹⁸

By relaxing the § 1983 notion of "policy," the proposed standard would lead to a different result in a case like *Praprotnik*, in which the supervisor who effected the plaintiff's retaliatory discharge had apparent authority to make that personnel decision. Yet it would not alter the results of cases in which the Court has circumscribed § 1983 by redefining predicate constitutional violations. For example, our approach would not disturb the result in *DeShaney v. Winnebago County Department of Social Services*,³¹⁹ because the predicate "liberty" interest would still be wanting.³²⁰ Similarly, the floodgates concern would continue to be substantially ameliorated even if respondeat superior were recognized as the appropriate

recruiting and retaining employees so threatened, however, has meant that the employer generally forgoes prosecution of this claim and instead seeks to deter employee misconduct indirectly, through discipline and discharge. See *id.* at 252; SCHUCK, *supra* note 89, at 105.

The modifications proposed are designed in part to encourage precisely such deterrence. See *infra* text accompanying notes 358-59. At the same time, to the extent they deprive government entities of their common law subrogation rights as principals, the forfeiture is not grievous in practice and may be necessary to stimulate internal checks on employee misconduct.

³¹⁷ See *Owen v. City of Independence*, 445 U.S. 622, 656 (1980) (making the same observation on the narrower assumption that entity liability would attach only for acts of policy).

³¹⁸ The doctrine of respondeat superior has, at times, known no apparent limitations, see, e.g., *Fruit v. Schreiner*, 502 P.2d 133, 142 (Alaska 1972) (holding employer liable where employee at a convention was involved in an automobile accident en route to a tavern in the early morning), a fact attributable in part to the absence of a uniform rationale. See *Rivello v. Waldron*, 391 N.E.2d 1278, 1281 (N.Y. 1979) (discussing the evolution of the rationales underlying respondeat superior).

In the § 1983 context, *Monell* discussed two justifications, deterrence and loss-spreading. See *Monell*, 436 U.S. at 693-94. *Owen* accepted the equitable "loss-spreading" purpose. See *Owen*, 445 U.S. at 655 & n.39. We would tie liability to scope of authority—what conduct did the agent have the actual, apparent, or implied authority to undertake? See *supra* notes 312-15. On the interface between deterrence and the suggestions we are about to make, see *infra* text accompanying notes 355-65.

³¹⁹ 489 U.S. 189 (1989). This is by no means an endorsement of the *DeShaney* decision on its merits. We have no occasion to inveigh against the Court's state action doctrine.

³²⁰ See *id.* at 195-96.

standard for entity liability. The *Roth/Paul*³²¹ and *Parratt*³²² lines of authority, involving individual defendants, have eliminated the greatest potential "font" of tort law by redefining restrictively the property or liberty protected by procedural due process and the nature of actionable deprivations.³²³ These limitations on liability should accrue to entities even if, as we propose, they were held generally accountable via respondeat superior for "random and unauthorized" federal law violations of their agents.³²⁴ Further, except in highly unusual circumstances pointing to direct taxpayer involvement in a violation, entities would continue to be exempt from punitive damages.³²⁵ Proof requirements surrounding causation and damages would furnish further protection of entity coffers.³²⁶

³²¹ See *supra* text accompanying notes 209-14.

³²² See *supra* text accompanying notes 215-22.

³²³ "*Parratt* cases" involve individual defendants because the *Parratt* predicate for absolution from conduct that would otherwise violate procedural due process is that the conduct be "random and unauthorized." *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), *overruled in part by* *Daniels v. Williams*, 474 U.S. 327 (1986); see also *supra* text accompanying notes 215-22 (discussing "*Parratt* cases"). To conclude that a defendant's conduct is random and unauthorized is to define a situation in which the defendant is an individual. An entity defendant would escape liability today in the same circumstances on the independent ground that such conduct could not represent an implementation of *Monell* "policy."

³²⁴ In our proposed redesign, actions against entities arising from "random and unauthorized" conduct would no longer be flatly precluded, since liability would no longer hinge on the existence of formal "policy." Nevertheless, if a particular challenge to such conduct were brought on procedural due process grounds the plaintiff would likely still encounter the restrictions raised by *Parratt*. *Parratt* reconceptualizes when process is due, as *Paul* and *Roth* reconceptualize whether it is due at all. Although *Paul* was an individual defendant action, *Roth* was brought against an entity. Thus, the doctrinal origins of the "random and unauthorized" restriction on procedural due process claims suggest that it should be available to entity defendants.

Our suggestion removes the "policy" barrier that applies to all § 1983 entity actions regardless of the nature of the predicate right. *Parratt*, by contrast, narrows the scope of a particular federal right, procedural due process. Thus, even though § 1983 would reach an entity despite the absence of entity policy, a plaintiff who sues an entity complaining that the agent's "random and unauthorized" conduct violated her procedural due process rights could still lose by virtue of *Parratt*. In the end, the plaintiff would fail to state a sufficient § 1983 claim, because no recognized predicate constitutional violation occurred.

³²⁵ See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

³²⁶ The courts do not simply give away an entity's funds. Recent decisions indicate that entities may avoid liability for conduct that clearly constitutes "policy" if the plaintiff is unable to bear the burden of proving that her federal injury was proximately caused by the implementation of that policy. See *Liggins v. Morris*, 749 F. Supp. 967, 972 (D. Minn. 1990); *Pembaur v. City of Cincinnati*, 745 F. Supp. 446,

Respondent superior does impose a species of liability without fault. Application of the doctrine assumes that compensation to victims of unconstitutional conduct is not only an important objective of § 1983, but an invariable consequence of a judgment of entity liability. That assumption was recently challenged by Professor Jeffries, who argues that the Aristotelian notion of "corrective justice" is the sole justification for money damages to victims of constitutional violations; corrective justice, in the form of a damage award, "at once annuls the wrongful gain and rectifies the wrongful loss."³²⁷ Wrongdoing, and not just the normal requirement of causation, is an indispensable prerequisite of the conception.³²⁸

Using this premise, Jeffries contends that constitutional violations that do not depend on a showing of culpability, such as a reasonably conducted search carried out in good faith under an invalid warrant, should not result in damage sanctions against the entity. He therefore takes issue with the *Owen* holding that entities enjoy no immunity corresponding to that accorded individuals under the principles set forth in *Harlow* and *Anderson*.³²⁹ The implication of *Owen*, he observes, is that "corrective justice requires restorative transfers for *all* violations of constitutional rights, without regard to fault."³³⁰ As a critical illustration of the point, Jeffries cites the situation in *Owen* itself: the only constitutional violation alleged had not been definitively declared, and so "the [city's] only apparent fault is a failure of prescience."³³¹

Further condemning the discontinuity between the *Owen* holding and the immunity conferred on individual defendants, Professor Jeffries observes that "the defense of qualified immunity precludes

457 (S.D. Ohio 1990), *aff'd*, 1991 U.S. App. LEXIS 26044 (6th Cir. Oct. 25, 1991); see also *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (rejecting a jury instruction that permitted the jury to assess the significance of the right violated in measuring damages); *Carey v. Phipps*, 435 U.S. 247, 266 (1978) (rejecting an award of substantial damages without proof of injury).

³²⁷ Jeffries, *supra* note 101, at 94.

³²⁸ See *id.* Although just what "corrective justice" entails is the subject of some dispute, the common elements of the doctrine are described by Professor Schroeder. See Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143, 147 (1990) (concluding that the common threads of corrective justice include liability based on moral principles of individual responsibility and noninstrumental, or nonmonetary, values).

³²⁹ See *supra* text accompanying notes 107-21.

³³⁰ Jeffries, *supra* note 101, at 99.

³³¹ *Id.* at 101.

compensation for many unconstitutional acts."³³² To argue for extending the *Harlow/Anderson* version of qualified immunity to entities is, therefore, simply to acknowledge, as the *Owen* Court wrote, that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense."³³³ That outcome is correct, Jeffries writes, because only fault-based constitutional injuries warrant damages. Thus, the syllogism is complete: only those acts to which we ascribe fault warrant damages; even if the acts in *Owen* were the acts of the city, the city was not at fault; damages were accordingly unwarranted.³³⁴

Jeffries's unstated premise that entities may, for purposes of fault, be equated with individual defendants overlooks or trivializes important reasons for distinguishing the cases. First, because entities do not think or act the search for entity "fault" is literally futile. Equally futile, then, is the search for an interface between moral condemnation of the entity and compensation. Second, the statute's textual authorization of damages as a customary remedy that does not vary by genre of defendant "person" supports the Court's pronouncements that compensation and deterrence are more prominent aims of the statute than punishment,³³⁵ that compensatory damages are the "traditional" personal injury

³³² *Id.* at 86.

³³³ *Id.* at 88 (quoting *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)).

³³⁴ Jeffries approaches the problem from a slightly different angle when he argues that compensation is proper if the injury alleged is within the risk created. See Jeffries, *supra* note 269, at 1471. Only if the creation of risk is wrongful and the injury lies within that risk is compensation warranted. Conversely, if the injury is not within the risk, merely finding "but for" causation "lacks moral significance." *Id.* at 1470. As a result, compensation serves an attenuated deterrence function under traditional negligence principles. See *infra* text accompanying note 358.

For our response to this argument, see *infra* text accompanying notes 335-49. Additionally, Professor Jeffries is flogging a dead horse. Questions addressed to the relationship between risk and injury converge with principles of negligence liability. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928) (concluding that the risk of injury to be perceived by the defendant defines the duty with which courts are concerned when finding negligence). Notions of "policy," requiring a deliberate choice or its "deliberate indifference" counterpart in an omission case, move far beyond negligence: both demand advertent behavior committed with knowledge or anticipation of certain consequences. Professor Jeffries's universal fault requirement also departs radically from an apparent congressional purpose of compensation. See *infra* text accompanying notes 335-37. Moreover, he fails to address the justiciability barriers to injunctive relief in suits against entities. See *infra* text accompanying notes 343-52.

³³⁵ See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-68 (1981).

remedy,³³⁶ and that a "damages remedy . . . is a vital component of any scheme for vindicating cherished constitutional guarantees."³³⁷

Individuals surely are among the "persons" subject to the statute's prohibitions. But jury sympathy, as Professor Jeffries understands, may absolve individual actors from liability concerning the same conduct for which the jury would mulct a "deep pocket" entity in damages.³³⁸ If plaintiffs cannot fairly obtain compensation from a local government official—either, as we propose, because he lacked intent to harm or, as the Court ordains, because he could reasonably believe he was not violating clearly established law—then it will be available, if at all, from the entity.

One need not resort to the *Owen* loss-spreading rationale, condemned by Professor Jeffries, to see why the fundamental purposes of the statute are served by assessing damages against the entity under circumstances that would preclude such relief from the entity's agent. His conclusion that fault is a prerequisite for individual liability is consonant with an appropriate regard for the statute's deterrence rationale and the general common law principles on which the statute draws. But insistence on fault, a concept of marginal pertinence to artificial creatures, understates the importance of § 1983 actions against the government itself, the actions that lie at the heart of congressional concern.³³⁹ After all,

³³⁶ See *Bivens v. Six Unknown Unnamed Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971).

³³⁷ *Owen*, 445 U.S. at 651; see *Carey v. Phipps*, 435 U.S. 247, 254 (1978) (explaining that our constitutional rights "protect persons for injuries to particular interests, and their contours are shaped by the interests they protect"); see also *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978) (stating that two of the policies underlying § 1983 are compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under the color of state law).

³³⁸ See LOW & JEFFRIES, *supra* note 27, at 919.

³³⁹ Professor Jeffries might respond that the state, as opposed to municipal or other local government, has escaped § 1983 sanctions by virtue of the Eleventh Amendment, see *Quern v. Jordan*, 440 U.S. 332, 343 (1979) (stating that congressional silence on the sovereign immunity matter indicates a desire not to abrogate sovereign immunity through § 1983) or, more broadly, by a narrow construction of the § 1983 defendant "person," see *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that in light of common usage, ordinary rules of statutory construction, and Congress's purpose in enacting the statute, a state is not a "person" for purposes of § 1983). It is therefore not surprising, he argues, that citizens injured by the unconstitutional acts of local government should also go without remedy. See Jeffries, *supra* note 101, at 88. *Will*, however, tells us only that no conduct of a state itself is within the liability sphere of § 1983; it does not suggest that compensatory damages

§ 1983 liability, as distinct from liability under § 1981,³⁴⁰ was predicated originally on constitutional violations alone. These violations (with rare exceptions, such as the Thirteenth Amendment's affirmative ban on any slavery, public or private) target conduct of the government entity rather than its agents. In sum, a fault requirement is troublesome both because it sometimes places the loss on either a fault-free, state-authorized actor or on an innocent victim, and because it ignores the statute's special concern with the conduct of government.

Above all, as Jeffries recognizes, his willingness to equate entity and individual defendants puts the "focus on individual responsibility [and thereby] tends to divert attention from problems of government structure and organization, as distinct from the specific acts of individual officials."³⁴¹ The importance of this point is reflected in the asymmetric shape of the *prima facie* and defensive cases of individual and entity defendants. The Court has chosen to preserve the entity action, but not the action against individuals, as a stage for dialogue over the definition of constitutional rights. Emerging issues stemming from "government structure and organization," such as property taxation to finance public education, across-the-board practices respecting zoning and public employment, and police department decisions on the use of force, are often best contested in the entity suit.³⁴² Neither the text nor history of § 1983 suggests that judges who decide these vital constitutional questions should restrict compensation to those violations that, in some uncertain way, reflect entity "fault."

This view of government structure and organization reveals a deeper, more troubling aspect of Professor Jeffries's project. He assumes that we can meaningfully discuss noninstrumental or nondeterrent rationales for § 1983's remedial scheme without

are inappropriate for conduct that does violate the statute, which includes the practices of municipal and other local government entities. *See Will*, 491 U.S. at 64; *supra* text accompanying notes 301-05.

³⁴⁰ 42 U.S.C. § 1981 (1988). *See Runyon v. McCrary*, 427 U.S. 160, 175 (1976) (stating that § 1981 reaches purely private acts of discrimination), *aff'd in relevant part*, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

³⁴¹ Jeffries, *supra* note 101, at 85.

³⁴² *See Oren*, *supra* note 24, at 1005 (remarking with irony that the Court's recent decisions allowing landowners to challenge takings in § 1983 actions, coupled with *Harlow* immunity for the individual zoning board members, means that "only in the land use area is responsibility likely to be allocated to the government rather than to the official").

considering deterrence or restructuring. Jeffries's theoretical assumption, however, must confront a practical problem.

Jeffries's proposal undermines efforts to challenge systemically caused constitutional harms, perhaps the most important and least accessible area of government conduct.³⁴³ Implicit in his proposal is the assumption that injunctive relief will be available and will deter sufficiently. Unfortunately, *City of Los Angeles v. Lyons*³⁴⁴ critically subverts that assumption with its standing requirement that a plaintiff who seeks injunctive relief demonstrate "a sufficient likelihood" that he will suffer the same injury in the future.³⁴⁵ One year before *Lyons* was decided, in *Harlow v. Fitzgerald*,³⁴⁶ the Court explicitly assumed that the plaintiff would obtain recompense in the form of damages from the individual government defendants.³⁴⁷ That assumption was soon dashed because the "clearly established" wrinkle of the qualified immunity defense barred such claims at the threshold.³⁴⁸ The Jeffries approach would thus foreclose the only remaining form of compensation, damages from the entity. Even if, as in *Lyons*, the challenged practice amounts to *Monell* policy, Jeffries would not find a compensable injury unless the practice reflects municipal fault in the sense that it violated well-settled law; in *Lyons*, use of the chokehold did not.³⁴⁹

³⁴³ Justice Douglas's historical exegesis in *Monroe* on the factors animating the enactment of § 1983 highlights systemic governing problems in the Reconstruction South. See *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), *overruled in part by Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); see also Shapo, *supra* note 13, at 280 (noting that, in the eyes of the legislators who proposed § 1983, the relative inaction of state and local governments exacerbated the widespread outbreak of violence the statute was meant to address). Professor Jeffries would preclude a damage remedy for systemic harms because, he argues, they fall outside the risk that ordinarily makes such injuries compensable in tort. See Jeffries, *supra* note 269, at 1480.

³⁴⁴ 461 U.S. 95, 105-10 (1983) (denying injunctive relief to the victim of an unlawful police chokehold because the victim could not show that he personally was likely to be subject to a future chokehold).

³⁴⁵ See *id.* at 111.

³⁴⁶ 457 U.S. 800 (1982).

³⁴⁷ See *Lyons*, 461 U.S. at 111.

³⁴⁸ Justice Marshall pointed out in his *Lyons* dissent that there had been no occasion to test the contours of Los Angeles's chokehold practice. See *id.* at 118 (Marshall, J., dissenting). The violation, if any, was thus not "clearly established" in the terms *Harlow* would lay down; individual police defendants would therefore be qualifiedly immune.

³⁴⁹ See *id.* at 111 ("The legality of the violence to which Lyons claims he was once subjected is at issue in his suit for damages and can be determined there."); see also *supra* note 348.

Since *Lyons*, the Court has demonstrated its awareness that damages against an entity can play a critical role in eradicating institutional government misconduct. In *City of Riverside v. Rivera*,³⁵⁰ a damage action against thirty members of the Riverside Police Department, the Court quoted approvingly from the trial judge's opinion that the "institutional behavior involved here . . . [harassing Chicanos because of their national origin] had to be stopped."³⁵¹ Alluding to *Lyons*-like limitations, the Court wrote that damage relief was critical to deterrence because "injunctive relief generally is unavailable."³⁵²

2. Individual Liability and the Controlling Role of Fault

This critique should not be interpreted as an assertion that notions of fault are irrelevant to § 1983. We part company with Professor Jeffries only on the application of fault concepts to government entity defendants. Because entities act through their agents³⁵³ and are therefore liable only vicariously, deterrence has its most immediate impact in relation to the conduct of individuals.³⁵⁴ Thus, despite our disagreement with Jeffries on the liability of entities, we generally concur with and even expand upon his fault-based prescription for the liability of individual defendants.

Specifically, we propose that the individual face liability when, but only when, her conduct was committed with the intent to harm, or a state of mind approaching a desire to produce harmful consequences.³⁵⁵ This standard assures direct deterrence under

³⁵⁰ 477 U.S. 561 (1986).

³⁵¹ *Id.* at 574.

³⁵² *Id.* at 575.

³⁵³ See Brown, *supra* note 24, at 653-54; see also *supra* note 307 and accompanying text.

³⁵⁴ Cf. *Owen v. City of Independence*, 445 U.S. 622, 655-66 (1980) (arguing that the risk of inhibiting an agent's decisiveness, a symptom of overdeterrence, is reduced when threat of personal liability is removed).

³⁵⁵ Throughout this Article we use the terms "intentional" and "intent" as if they represented a unitary, determinate conception. In fact, in the ordinary parlance of tort law, the conclusion that an actor's conduct was "intentional" may reflect relatively distinct levels of culpability. See, e.g., *Garratt v. Dailey*, 279 P.2d 1091, 1093-94 (Wash. 1955) (holding actor liable for the tort of battery if he intended to bring about contact with the plaintiff, even if he did not intend the contact to cause the ensuing harm). Provisionally, as it is used in this Article, "intent" conforms with two routinely used criteria: one is stated by the RESTATEMENT (SECOND) OF TORTS § 8A (1965) (describing "intent" as either "[a]) the actor desires to cause [the] consequences of his act, or [(b)] . . . believes that the consequences are substantially certain to result from it"); the other is used in suits under 42 U.S.C. § 1985(3) (1988) (attaching

the most egregious and hence necessitous circumstances: when the state actor decides to inflict harm that amounts to a constitutional injury or tort. Absent an intent to harm, this suggestion would relieve the individual of liability for all acts that the entity directed or authorized³⁵⁶ (a situation in which liability seems unfair³⁵⁷) as well as for conduct that is entirely unauthorized and as such is not under color of state law.

We appreciate that under traditional tort law conduct as low on the culpability scale as mere negligence implicates deterrence and warrants damages. The "reasonable person" fiction presupposes that the defendant did not act as a reasonable person ought to have acted under the same or similar circumstances.³⁵⁸ But transplanting a negligence standard to § 1983 would engender liability with little appreciable deterrence and with large potential for chilling officials in the execution of their duties. It is difficult to achieve a substantial incremental deterrent effect when a government official causes an unintended constitutional harm. The reasonable person standard of general tort law may be justified on the basis of wealth transfer, but it is unlikely that personal liability will significantly deter the individual defendant who acts in good faith. By contrast, if the entity would bear liability for all federal rights deprivations attributable to its agents' acts within the scope of their agency, one may predict renewed internal checks and constraints on reckless or negligent conduct by government employees.³⁵⁹

Additionally, negligence-based § 1983 liability carries with it special costs. In common law negligence actions few noncompensatory policies compete for judicial attention; costs to the defendant and compensation for the plaintiff usually comprise the universe of policy rationales.³⁶⁰ Exposing a § 1983 individual defendant to

liability for a conspiracy depriving persons of rights or privileges). *See, e.g., Griffin v. Breckenridge*, 403 U.S. 88, 102 n.10 (1971) ("The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.").

³⁵⁶ *See infra* note 367.

³⁵⁷ *See supra* text following note 176.

³⁵⁸ *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("[T]he standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."). The classic description of the interface between the negligence standard and deterrence remains that of Justice Holmes. *See* OLIVER W. HOLMES, *THE COMMON LAW* 76-78 (Mark D. Howe ed., 1963) (1881).

³⁵⁹ *See* Kramer & Sykes, *supra* note 24, at 290-91.

³⁶⁰ We acknowledge that our characterization is overbroad. In certain areas, such as drug manufacturers' liability and the development of orphan drugs, patient dumping, and dram shop liability, monetary costs alone can create significant

liability for inadvertent harms may cause an important nonmonetary consequence: chilling a government officer's inclination to act. Inertia becomes safer than action.³⁶¹ Even the Court's expansive version of individual immunity, manifested in the "clearly established" rule as refined by *Anderson*, does not fully avoid chilling. An employee engaged unintentionally in an actually or apparently authorized function cannot know whether the federal right he might have negligently³⁶² or recklessly³⁶³ violated will be deemed "clear-

additional policy considerations.

³⁶¹ See SCHUCK, *supra* note 89, at 68-69; Mashaw, *supra* note 95, at 26-27. Moreover, it is more difficult to find state action when the harm is alleged to have occurred through omission rather than commission. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 203 (1989); *id.* at 204-05 (Brennan, J., dissenting); *supra* notes 183, 192 & 200.

³⁶² Although the Court has rendered mere negligence largely obsolete for constitutional torts, we assume for the sake of discussion that simple negligence may serve as a basis for some § 1983 liability outside the procedural due process arena from which it was excluded by *Daniels v. Williams*, 474 U.S. 327 (1986). See *supra* notes 146, 217-18 and accompanying text. The *Parratt* Court, citing *Monroe*, asserted that neither the language nor legislative history of § 1983 has "been found by this Court to contain a state-of-mind requirement." See *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986). In *Daniels*, an action predicated on an alleged due process violation, the Court held that "the Due Process Clause is simply not implicated by a negligent act," since a negligent loss does not amount to a "deprivation" within the meaning of the Fourteenth Amendment. *Daniels*, 474 U.S. at 328. Accordingly, the Court overruled *Parratt* but only "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." *Id.* at 330-31 (emphasis added). It is true that the predecessor to § 1983 was enacted to enforce the Fourteenth Amendment, see *supra* note 2, by contemporaries of the amendment's drafters, and both statute and amendment include the similar requirement of a "deprivation." One might therefore conclude that § 1983, like the due process clause, is violated only when the defendant acts with more than a negligent state of mind. But see *infra* note 391 and accompanying text.

Nevertheless, it is apparent that the Court was at some pains in *Daniels* not to overturn the more general conclusion of *Monroe* and *Parratt* that § 1983, as distinct from certain predicate constitutional rights that might be vindicated in § 1983 actions (such as procedural due process), contains no general state of mind requirement. See *supra* note 15; see, e.g., the following cases all decided under § 1983: *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (holding that claims of excessive force in connection with arrest by police should be assessed under objective Fourth Amendment reasonableness standard); *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 316 n.9 (1986) (stating that even unintentional interference with property rights can constitute an unconstitutional taking); *Kolender v. Lawson*, 461 U.S. 352 (1983) (determining an ordinance to be violative of the First Amendment when it is "objectively" vague).

³⁶³ With greater confidence than we express about simple negligence, we also assume that reckless conduct continues to be a staple source of § 1983 liability, even in the procedural due process realm. See *Zinermon v. Birch*, 494 U.S. 113, 137 (1990) (holding that a claim of "willful, wanton and reckless disregard of . . . constitutional

ly established." The resultant chilling potential disappears only if liability is limited to deliberately caused harms, those rooted in intentional misconduct.³⁶⁴

Tightening the occasions for individual liability is tolerable in compensatory terms only if coupled with our companion proposal on entity liability. Vicarious entity liability relieves the action against individual officers from doing double duty as a gap-filler in the lacuna erected by *Monell's* conception of "policy." Put bluntly, emphasis on entity liability for damages will more often assure a solvent defendant and will serve more than compensation "for its own sake." It fosters deterrence, too, if, as is widely believed, damages deter more effectively than injunctive relief alone.³⁶⁵

One might object, along with Professor Jack Beermann,³⁶⁶ that permitting the individual to escape liability for most entity authorized misbehavior³⁶⁷ runs counter to the Nuremberg princi-

rights" is sufficient to state a claim under § 1983 (quoting appendix to petition for certiorari)); *supra* text accompanying notes 235-46; *see also* *Redman v. County of San Diego*, 942 F.2d 1435, 1440 (9th Cir. 1991) (gross negligence or recklessness sufficient for due process liability under *Daniels*); *Archie v. City of Racine*, 847 F.2d 1211, 1220 (7th Cir. 1988) (en banc) (recklessness sufficient for liability), *cert. denied*, 489 U.S. 1065 (1989); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (wanton or obdurate disregard or deliberate indifference sufficient for liability); *Morales v. New York State Dep't of Corrections*, 842 F.2d 27, 30 (1988) (deliberate indifference sufficient for liability); *Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir. 1988) (reckless indifference sufficient for liability), *cert. denied*, 489 U.S. 1065 (1989); *Taylor v. Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1987) (en banc) (deliberate indifference sufficient for liability), *cert. denied*, 489 U.S. 1065 (1989); *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 355-56 (5th Cir. 1987) (callous indifference sufficient for liability); *Nishiyama v. Dickson County*, 814 F.2d 277, 281-83 (6th Cir. 1987) (en banc) (reckless indifference sufficient for liability). *But see* *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) (reckless failure to act insufficient to create § 1983 liability).

³⁶⁴ "Because the [individual] employee need only refrain from deliberate misconduct to avoid liability, he or she has no incentive to become over cautious." *Kramer & Sykes, supra* note 24, at 275 n.92.

³⁶⁵ When an injunction is not obeyed, the courts customarily resort to a monetary sanction for civil contempt. *See, e.g., Spallone v. United States*, 487 U.S. 1251, 1260 (1988) (mem.) (rejecting City of Yonkers's request to stay imposition of monetary sanctions for contempt in refusing to carry out district court's housing desegregation mandate). *See generally* DAN B. DOBBS, *HANDBOOK OF THE LAW OF REMEDIES* 96-98 (1973).

³⁶⁶ We refer to comments he kindly offered us on an earlier draft.

³⁶⁷ Under our proposal, the nonintentional authorized conduct for which the individual would not be liable would include (1) gross negligence or reckless disregard, *see* DAN B. DOBBS, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 31 (1985); *RESTATEMENT (SECOND) OF TORTS* § 500 (1965), (2) simple negligence, and (3) "deliberate indifference."

ple, because we allow low-level officials to avoid liability by professing obedience to higher authority. The ordinary § 1983 action, however, contemplates not war crimes but relatively routine tortious conduct that violates federal rights in the process.³⁶⁸ Our proposals do not affect the potential for criminal liability.³⁶⁹ Second, the regime we advocate reintroduces the subjective element into the immunity calculation. The officer will not escape damages if she acts in bad faith. Third, our suggestion sketches a reasonably bright line for the submission of issues to the jury. Most important, enhanced entity liability will work its own deterrence, albeit less directly than liability on the officer. The indirectness seems a small, or even nonexistent,³⁷⁰ price for alleviating the legitimate concern of chilling.³⁷¹

The suggested framework for individual defendant cases renders irrelevant for liability purposes the degree to which the allegedly violated right was "settled" on the eve of injury.³⁷² Consequently, the framework obviates the nettlesome and subjective analogizing to prior cases that in the current judicial climate reveals a "settled"

³⁶⁸ Professor Beermann anticipated this response. *See also* *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) ("[D]eprivation of a constitutional right is significantly different from and more serious than a violation of a state right."), *overruled in part by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). *But see infra* note 392.

³⁶⁹ *See supra* note 71.

³⁷⁰ Deterring law violations of agents indirectly through their entities may inspire the same desirable measure of caution as today's direct deterrence of the agents themselves, who are often judgment-proof and enjoy an exceedingly generous form of immunity. *See supra* notes 359 & 364 and accompanying text.

³⁷¹ These proposals will in all likelihood increase filings against entities, a situation for which we offer no apology but some explanation. The recommendations make no inroads into the narrowly defined due process sphere: the *Roth/Paul/Siebert*, *Davidson/Daniels* and *Parratt/Hudson* lines remain unchanged. *See supra* text accompanying notes 321-24. Additionally, the proposals are interrelated and inseparable. Thus, we anticipate a substantial reduction in the number of filings against individuals. As suggested in the text, this accommodates fairness concerns as far as its logic will bear. Finally, we recur to the major thesis here that it is the government whose conduct the statute seeks to change. If voters find their local government units frequently sued, it may be because the conduct of those units is questionable. As a result, voters or supervising officials have the option of removing chronic or egregious constitutional tortfeasors from office. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981) (suggesting that municipal liability for compensatory damage against municipalities "may . . . induce the public to vote the wrongdoers out of office").

³⁷² The "settledness" of a right may help the factfinder assess the degree of wrongful intent and, therefore, may bear on the appropriateness and measure of punitive damages. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 908(2), 501 cmt. b (1965).

right as a highly prized rarity. Whether trammeling a settled or unsettled federal right, intentional conduct is deterrable and accordingly should be subject to the penalties of the statute.³⁷³

In this respect the proposal squares partially with *Monroe*. It conforms fully with the general proposition for which *Monroe* is best known—that individuals may be liable for “unauthorized” conduct, defined as conduct that violates or is not affirmatively warranted under state law. For several reasons, though, we would cabin the individual liability realm to intentionally harmful acts, authorized in

³⁷³ One permutation of “settledness” requires additional explanation. When an agent with apparent, but neither express nor implied authority, *see supra* notes 312-13, acts without wrongful intent, *see supra* note 355, we would impose liability on the entity alone. The argument for holding the officer liable as well is that under such circumstances the imposition of individual liability serves a deterrence function, especially if the violated right is settled. Liability may discourage state actors from disregarding their government principal’s actual or reasonably inferable instructions even if they believe, although unreasonably, that they serve its interest by violating the principal’s instructions. The fear of chilling is minimal because the assumption that the government does not wish to encourage such conduct is probably accurate. Further, employees on a frolic and detour would not be eligible for qualified immunity as it is currently conceived, because conduct wholly outside the scope of one’s actual or implied authority would be neither ministerial nor discretionary. *See infra* text accompanying note 380.

We nevertheless conclude that this individual defendant should not be subject to liability when she acts with no more than apparent authority, regardless of the status of the violated right. If the right is *not* well settled, the deterrent effect of liability is simply too attenuated. First, it taxes the imagination to hypothesize many contexts in which an agent, acting without intent to harm, will violate newly declared rights while working with only apparent authority. More importantly, it strains credulity to assume that an agent, unreasonably departing from what she herself understands her duties to be, will be deterred by the threat of liability that may arise if a judge, acting after the conduct in question, comes to one but not another subjective conclusion about the status of the legal right. Alternatively, a government employee who acts outside the bounds of any reasonable description of her job will probably not fear a potential judgment for damages contingent on the creation of later-declared rights.

Given the apparently marginal deterrence achieved by imposing liability in this situation, coupled with the fact that the compensation goal could be fulfilled by an action against the entity, it is doubtful whether liability should be recognized for this conduct at the farthest frontiers of state action. One might respond that damages may be an appropriate remedy for dealing with such a loose cannon. The context, however, is still unintentionally harmful conduct, for which a punishment rationale is usually out of place.

A more difficult case is when this apparently authorized agent violates a settled right. The case for liability is arguably stronger, but so is the reason for rejecting it. First, deterrence is unlikely for all the reasons advanced above. Second, and more important, in light of the very few contexts in which such an injury may occur, the costs of applying the clearly established test are excessive. *See supra* text accompanying notes 123-25.

this sense or not. First, in light of *Monell*, it is no longer necessary for individual defendants to carry the weight of the entity on their shoulders; compensation—and its accompanying deterrence—are now assured directly from and through the entity. Second, in all but intentional harm situations,³⁷⁴ the modest or negligible gain to deterrence won at the expense of individual liability will often be outweighed by the unfairness visited upon an individual whose only shortcoming was in following instructions or failing to predict nascent rights. Finally, the troublesome aspects of the “clearly established” version of qualified immunity,³⁷⁵ not least of which is its potential for pinching off § 1983’s potential as a conduit for the emergence of evolving constitutional standards, make the game worth far less than the candle. *Monroe* goes awry, we conclude, in continuing to subscribe to the assumption that individuals may be liable for all unintentional harms that the entity “authorizes” simply by conferring express, implied, or apparent authority on its agent. With the significantly expanded basis of entity liability proposed, it would no longer be necessary to impose liability on individuals for unintended harms.

Although we would eliminate the “settled right” aspect of immunity, we effectively reintroduce, by way of the *prima facie* element of intent to harm, a subjective aspect that the Court in *Wood* once treated as defeating the affirmative defense.³⁷⁶ By scotching the subjective element, the Court in *Harlow* discounted its potential for deterring constitutional torts by individual defendants who otherwise might act with intent to harm.³⁷⁷ Fairness concerns would dictate imposing liability on the individual defendants in *Praprotnik*³⁷⁸ who intentionally retaliated against plaintiff for appealing his suspension, even if they were unaware that in doing so they deprived him of a particular federal right.

With the scope of potential claims against individual defendants substantially reduced both by the Court’s contractions in the predicate constitutional law and by our exclusion of liability for

³⁷⁴ See *supra* note 373.

³⁷⁵ See *supra* text accompanying notes 116-27.

³⁷⁶ See *Wood v. Strickland*, 420 U.S. 308, 322 (1975), *overruled by Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982): Distinguishing between intentional and nonintentional conduct for purposes of individual liability, and thereby reintroducing the subjective prong of the qualified immunity defense, makes § 1983 something more than a mere jurisdictional allocation provision. See *supra* note 78.

³⁷⁷ See *Harlow*, 457 U.S. at 815-19; *supra* text accompanying note 107.

³⁷⁸ See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 116 (1988).

most authorized acts, the cost of taking a limited number of individual suits to trial seems worth the concomitant potential for deterrence. The latter-day, policy-driven version of qualified immunity announced by *Harlow* and expanded in *Anderson*³⁷⁹ becomes unnecessary when the primary factor that drove it, the fear of chill, is met through an intent-based formula for individual liability.

Drawing a crisp line at intent for the liability of individuals should have other salutary consequences as well. Because the prevalent version of qualified immunity is chiefly concerned with ensuring that the threat of liability will not unduly chill government agents from vigorously exercising their government functions, the immunity now attaches only to their "discretionary," as opposed to "ministerial," acts.³⁸⁰ Accordingly, courts must characterize the components of government functions as one or the other and determine what mixture of discretionary and nondiscretionary duties warrants which characterization of the entire function.³⁸¹ Our rationale respecting individual defendants is broader; to be mulcted in damages, they must have had a clearly deterrable, wrongful state of mind. This rationale applies equally to nondiscretionary as well as to discretionary functions, thus eliminating the characterization problem.

Excising the qualified immunity defense from § 1983's calculus by making intent to harm an element of the plaintiff's case-in-chief against an individual defendant will have variable effects on the policies the Court has cited in crafting that defense. The primary underlying consideration, easing a potential damper on government administration, would be substantially fortified. Government officials would no longer have to guess, at their own potential risk,

³⁷⁹ *Anderson v. Creighton*, 483 U.S. 635 (1987); see *supra* text accompanying notes 113-16.

³⁸⁰ Qualified immunity for government officials under § 1983 protects the defendant's discharge of only those functions that entail a degree of discretion. See *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984); *Harlow*, 457 U.S. at 816; *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991).

³⁸¹ See, e.g., *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989) (determining that a naval study of the environment was a discretionary act, despite its ministerial components); *Gagne v. City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986) (finding that a police officer booking a prisoner was a discretionary act, despite the violation of a nondiscretionary regulation), *cert. denied*, 483 U.S. 1021 (1987); see also *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988) (defining conduct as discretionary so long as it is pursuant to the official's performance of assigned duties and within her scope of authority).

whether a contemplated act would be deemed within their discretion or whether the constitutional right the act might violate would be deemed well settled. Officials could instead work within the scope of their authority without fear of § 1983 damage liability so long as they refrain from inflicting injury intentionally. Coincidentally, this would bring § 1983 in line with Congress's recently revised rules respecting the liability of federal employees for common law torts.³⁸²

At first blush these proposals do not meet the Court's concern about saving officials' time.³⁸³ Enhancing the likelihood of entity liability would occupy officials as witnesses; and individuals named as defendants would forfeit the possibility of early dismissal held out by *Harlow/Anderson* immunity. Indeed, in the vast majority of cases brought against individuals the official would have to submit to trial, because the key question of intent to harm is for the jury.

In the aggregate, however, the Court's time-sparing policy would be advanced. It may be anticipated that far fewer cases would be

³⁸² Language in Justice Harlan's opinion for a plurality in *Barr v. Matteo*, 360 U.S. 564 (1959), would have conferred immunity on federal officials from common law tort liability whenever the challenged act took place "within the outer perimeter" of their duties, or within the scope of their employment. *Id.* at 575. The Court later retreated from that stark position. See *Westfall v. Erwin*, 484 U.S. 292, 298 n.4 (1988) (holding that the conduct must also represent an exercise of discretion to qualify for the immunity). *Westfall* itself has in pertinent part been legislatively overruled. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (codified at 28 U.S.C. § 2679(b)(1) (1988)); *Lunsford v. Price*, 885 F.2d 236, 237 n.5 (5th Cir. 1989) (stating that law "in essence" overrules *Westfall*); *Jordan v. Hudson*, 879 F.2d 98, 99 (4th Cir. 1989) (stating that law "expressly displaces *Westfall*"); *Newman v. Saballe*, 871 F.2d 969, 971 (11th Cir. 1989) (stating that law was "enacted to negate . . . *Westfall*").

This statute, while preserving tort claims against the United States, precludes any damages action against the individual federal employee for any "negligent or wrongful act or omission" undertaken "while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1) (1988). "Wrongful" act as used in the federal employee context has long been understood to refer to conduct more egregious than simple negligence but not rising to the level of intentional harms. See *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (stating that "'wrongful' . . . [is] intended to include situations . . . which might not be considered strictly negligent"); *Dalehite v. United States*, 346 U.S. 15, 45 (1953) (same); *In re Bomb Disaster at Roseville, Cal.*, on Apr. 28, 1973, 438 F. Supp. 769, 778 & n.2 (E.D. Cal. 1977) ("Congress intended to include more than negligence and trespass in the word 'wrongful.'"). This approach appears similar to the one proposed for state actors under § 1983: the entity is accountable under modified-respondeat superior, the individual agent only for intentionally harmful acts.

³⁸³ See *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) (concluding that early resolution of the qualified immunity defense may permit the official to avoid discovery).

brought against individual government officials. In potential liability situations, the entity, with its usually deeper pocket, would be liable as well. In our intentional harm regime, punitive damages would be potentially available in all remaining cases of individual liability.³⁸⁴ Nevertheless, the number of actions brought against individual officials should sharply decline. To avoid Rule 11 sanctions, plaintiffs' allegations must be fairly well founded,³⁸⁵ and their lawyers can receive statutory attorney's fees only if the allegations are so well founded that the client prevails.³⁸⁶ The difficulty of satisfying our intent to harm standard should give considerable pause to counsel who contemplate naming individual defendants, even apart from the tactical issue of jury sympathy for an individual sued with an entity co-defendant. For the plaintiff, securing the individual official as a less hostile witness will often be worth sacrificing the doubtful possibility of punitive damages.

Saddling the entity with liability for all federal law violations its agents commit within the scope of their authority, while relieving agents of liability for all but egregious harms, admittedly takes an asymmetrical approach to state of mind. The Court's own framework suffers from the same flaw, but in reverse. The Court reaches individuals regardless of state of mind and entities if they are acting with the degree of advertence reflected in the several variations of

³⁸⁴ *Smith v. Wade*, 461 U.S. 30 (1983), authorized punitive damages for conduct that "involves reckless or callous indifference to the federally protected rights of others." *Id.* at 56. Presumably, that standard would be exceeded in each case meeting our proposed "intent" standard. See *supra* note 355.

We acknowledge an incongruity: our intent to harm standard requisite for any individual liability demands a somewhat greater showing of fault than *Smith* does for punitive damages. We offer an explanation. The additional chilling of initiative entailed by the relative lenity of *Smith* is a disadvantage that more than offsets its potential for an incremental gain in deterrence. After all, in our proposal the entity would be liable for actual damages whenever the individual would be liable, thus assuring compensation and hence indirect deterrence. Moreover, it is difficult to imagine deterring an individual defendant who was unaware of a risk that an ordinarily reasonable and prudent person should recognize.

We doubt, moreover, that the current Court would retain the *Smith* standard if the issue were revisited. Of the five member majority, Justices Brennan and Marshall have departed. They have been replaced by Justices far less favorably disposed towards plaintiffs' claims, particularly to the claims of civil rights plaintiffs. Our high standard of fault for individual liability, therefore, may prove to be no higher than the standard for punitive damages that an increasingly conservative majority may declare.

³⁸⁵ See FED. R. CIV. P. 11; EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, PRETRIAL DISCOVERY: STRATEGY & TACTICS § 13:10 n.26 (Supp. 1991).

³⁸⁶ See 42 U.S.C. § 1988 (1988).

official policy.³⁸⁷ Our proposal's aesthetic flaw, however, is of no real consequence. Redesigning § 1983 liability standards to achieve a uniform approach to state of mind strikes us as little more than Emersonian foolish consistency. If satisfying this formal qualm were to foreclose entity liability without fault, the redesign would fail, as does the Court's current formulation of "policy," to serve the statute's paramount purpose of restraining governmental misconduct.³⁸⁸

The flaw would be worse than aesthetic if the "deprivation" about which any § 1983 plaintiff must complain³⁸⁹ is the same as the more-than-negligent state of mind required by the term "deprive" in the Due Process Clause.³⁹⁰ Were that the case, the Court departs from the statutory scheme by enabling recovery against individual defendants whose only sin is ignorance of well-settled precedent. Similarly, we would depart from the statutory scheme by urging recovery against entities whose only sin is engaging agents who violate federal rights. But the Court itself has held that not every § 1983 "deprivation" need entail the same wrongful state of mind required to "deprive" a person of due process.³⁹¹ We are therefore sanguine about the prospect of holding liable an entity (which is mindless in any event) based solely on the unlawfulness of its agents' conduct.

³⁸⁷ See *supra* paragraph following note 176 (stating that individual defendants remain liable for conduct their entity authorized); *supra* paragraphs preceding notes 183 & 192 (discussing the Court's several formulations of "official policy" as the prerequisite for entity liability). Of these official policy formulations, the "deliberate indifference" element of *City of Canton v. Harris*, 489 U.S. 378 (1989), applicable in cases where the plaintiff seeks to hold the entity liable for an omission, most clearly reflects the requirement of advertence. Some degree of advertence is also evinced in the Court's other approved variations: the official policy statement (*Monell*), legislation (*Pembaur*), settled custom (*Praprotnik* and *Jett*), or delegation of final policymaking authority to an individual official (*Praprotnik* and *Jett*).

³⁸⁸ See *supra* part V.B.

³⁸⁹ See *supra* notes 2 & 66.

³⁹⁰ See *supra* text accompanying notes 217-18 & 362-63.

³⁹¹ See *supra* notes 15 & 362. Additional support for this conclusion may be found in the fact that the Ku Klux Klan Act from which § 1983 is derived was enacted not only to enforce the Fourteenth Amendment, but also "for other purposes." See *supra* note 2. That § 1983 ranges beyond Fourteenth Amendment enforcement goals is also evident from its provision of a remedy for deprivations of rights secured by "the laws," now understood to refer to federal statutes. See *supra* text accompanying notes 257-69.

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tional law. Within the sphere of intent, individual defendants would incur liability even for newly declared federal violations so that the individual case would recapture some of its lawmaking potential. In the end, redirection of the statute's enforcement efforts away from the individual defendant and toward the government entity is informed by Justice Harlan's central notion that the "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy."³⁹²

³⁹² *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring), *overruled in part* by *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). In light of the guidance we take from Justice Harlan's language, one might ask why we would limit the liability of individuals to cases in which the actor's conduct is intentional. Recall that when Justice Harlan wrote in *Monroe*, the only "person" liable for violations was the individual. By holding government entities amenable under § 1983, *Monell* recognized an alternative conduit for deterrence. As a result, new questions are presented in striking the right balance between, on one hand, the statutory goals of government restraint, compensation, and deterrence and, on the other, the fairness and chilling concerns identified by the Court. These suggestions address those questions.