CONSTITUTIONAL ACCOUNTABILITY THROUGH STATE TORT LAW

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When local governments violate the Constitution, plaintiffs traditionally seek recourse under 42 U.S.C. § 1983. But success in Section 1983 litigation against municipalities has become increasingly elusive for plaintiffs. Under *Monell v. Department of Social Services*, a plaintiff must show that a municipal "policy or custom" caused the violation of their constitutional rights. This stringent requirement, and its subsequent interpretation by the Supreme Court, has resulted in virtually complete municipal immunity.

Given the difficulty of recovering under Section 1983, commentators have recently considered whether state law mechanisms can provide an alternative avenue for constitutional enforcement. Can state law effectively substitute for Section 1983 liability by holding local governments accountable for violations of constitutional rights? Possible state law mechanisms include state constitutions, implied rights of action under state law, and state legislation creating a Section 1983 analog.

While each of these alternatives holds some promise for civil rights litigators, this Essay takes a different approach by examining state tort alternatives to *Monell* liability. As a first foray into this area, I focus on the possibility of municipal liability for negligent hiring, negligent training, and negligent supervision under state tort law. My Essay considers how such actions play out on the ground. In some states, plaintiffs cannot pursue the claims due to either a statutory immunity granted to municipalities or to a common law immunity imposed by judges. In other states, however, some plaintiffs have successfully pursued claims that might otherwise have been brought under Section 1983 against local governments. My research also indicates that plaintiffs often do not bring claims of negligent screening, training, and supervision even when they could have brought such claims, and I further suggest that in some instances this is a missed opportunity for plaintiffs. This Essay considers the implications of my findings for the enforcement of constitutional rights and offers some suggestions for future inquiry.

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INTRODUCTION

Section 1983 was enacted during Reconstruction to protect the rights of Black people in the South from infringement by government officials. The statute's purpose was twofold: it was designed to compensate injured plaintiffs for their injuries and to deter future violations of constitutional rights.[1] In the intervening years, it has become one of the nation's most important civil rights statutes, offering plaintiffs a remedy against both individual government officers and municipalities.[2]

Municipal accountability presents an important opportunity for plaintiffs.[3] Suing a municipality directly allows plaintiffs to highlight the structural dimension of constitutional violations by emphasizing that wrongful conduct can be an issue of problematic institutional practices rather than merely a matter of misconduct by a few bad apples.[4] A lawsuit directly against a municipality also offers a strategic benefits: it broadens the scope of discovery, allowing for investigation of governmental policies, personnel files, and other records. Further, suing a municipality directly may be the *only* alternative left to a plaintiff when an individual government defendant is entitled to qualified immunity or cannot be identified.[5]

Despite these important advantages, plaintiffs face considerable challenges in vindicating their constitutional rights under Section 1983, particularly against municipalities. These challenges include the pleading standards imposed by *Iqbal*,[6] stringent justiciability requirements,

1. *See Monroe v. Pape*, 365 U.S. 167, 188–91 (1961).

2. The Supreme Court uses the word "municipality" to refer to any substate government entity, including a city, county, town, village, park district, water district, or school district. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 688 & n.50 (1978).

3. Municipalities often satisfy damage awards imposed against their employees via mechanisms such as indemnification, but indemnification is not a substitute for liability directly against a municipality. *See* Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. 345, 357–58 (2023).

4. AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 94 (2021) ("Since many constitutional rights violations are best addressed through programmatic change anyway, *Monell* opened one of the few pathways to meaningful institutional reform through the courts."); Leong, *supra* note 3, at 354.

5. *See* Teressa Ravenell, *Unidentified Police Officials*, 100 TEX. L. REV. 891, 892–93 (2022). For a discussion of the advantages associated with suing municipalities, see Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1189–90 (2023). *See also infra* Section II.A.

6. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

qualified immunity, the municipal policy or custom requirement, and limitations on attorneys' fees.[7] Scholars have demonstrated empirically that plaintiffs rarely recover under Section 1983 against any party,[8] and that the requirement of showing a municipal policy or custom is nearly prohibitive to recovery by plaintiffs.[9]

Given that the Supreme Court seems unlikely to revisit its interpretation of Section 1983 in the foreseeable future, scholars who are concerned about the underenforcement of constitutional rights have considered how the landscape of constitutional litigation might be reconfigured to promote compensation for, and deterrence of, violations of constitutional rights.[10] At both the federal and state levels, scholars and advocates have promoted legislative reform to qualified immunity.[11] Other proposed revisions to federal law include replacement of the *Monell*[12] standard with respondeat superior[13] or another standard,[14] attention to potentially underused theories of liability,[15] and simultaneous revision to both qualified immunity and *Monell*.[16] At the state level, scholars have also explored the possibility of state constitutional remedies[17] and state statutory enforcement of state constitutional rights.[18]

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7. *Id.* at 678.

8. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021).

9. Schwartz, *supra* note 5, at 1199–1200.

10. Of course, reasonable minds can differ about the "correct" level of enforcement and what it means to "under-enforce" a constitutional right. For purposes of this Essay, I proceed from the premise that the correct level of enforcement is not zero, and further that it is a level that meaningfully deters constitutional violations.

11. *See, e.g.*, Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

12. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

13. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 757 (1999); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 269–70 (2013).

14. Jeffries, *supra* note 13, at 270.

15. *See, e.g.*, Leong, *supra* note 3.

16. Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 487–88 (2018) (advocating to replace policy or custom doctrine with respondeat superior liability while allowing municipalities to invoke the same qualified immunity defenses available to individual officers).

17. *See, e.g.*, Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 740–46 (2021) (describing the possibilities for civil rights enforcement by state and local officials).

18. *Id.* at 758–63.

Commentators have directed less attention to state tort law. One reason is that state tort law simply does not provide an equivalent for many constitutional rights, such as freedom of speech, freedom of religion, equal protection, or due process.[19] Yet the fact that state tort law does not provide a complete substitute does not mean that it cannot be of value in enforcing the content of constitutional rights. This is particularly true of attempts to hold municipalities liable, given that other enforcement mechanisms are precluded or severely restricted by features of Section 1983 litigation unrelated to the underlying constitutional right. Even if a state tort remedy is available for only a subset of constitutional claims and in only a subset of states, tort law might complement Section 1983 by providing compensation for, and deterrence of, conduct that violates constitutional rights.

State tort law has also escaped scholarly attention because commentators have generally argued that reform efforts should focus on vindicating constitutional rights directly.[20] Certainly the direct vindication of constitutional rights is of great importance, but the myriad obstacles to such reform counsel in favor of *also* looking beyond Section 1983, and, indeed, looking beyond constitutional rights themselves. Further, given the considerable variation in existing state legal regimes, different approaches may be appropriate in different states.[21]

Available evidence shows that plaintiffs are already making use of state tort claims to seek remedies against municipal entities. In complaints alleging constitutional violations under Section 1983, it is relatively common for plaintiffs to also allege liability under a related theory of state tort law.[22] For example, in previous work, I found that in cases where plaintiffs alleged a claim of failure to screen under 42 U.S.C. § 1983, more than thirty percent also included a claim of negligent hiring under state tort law.[23] But both the complaints themselves and interviews with civil rights lawyers indicate that, among civil rights lawyers, state tort law is more often than not an afterthought to constitutional law.[24]

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19. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723 (2008); Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1510 (2009).

20. Reinert, Schwartz & Pfander, *supra* note 17, at 739–40.

21. *See infra* Section II.C.

22. *See, e.g.*, Nancy Leong, *Civil Rights Liability for Bad Hiring*, 108 MINN. L. REV. (forthcoming 2024), https://ssrn.com/abstract=4432516 (surveying 392 dockets in which plaintiffs alleged liability).

23. *See id.*

24. *See* Leong, *supra* note 22 (manuscript at 51). *See also* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 650–52 (2023).

This Essay begins to assess whether, and to what extent, state torts can provide a remedy against local government entities for plaintiffs who would otherwise be stymied by the architecture of Section 1983. As an entry point to the issue of whether state tort law can provide an alternative to Section 1983 liability under *Monell*, I focus on claims that a municipal entity failed to screen, train, or supervise its employees ("municipal failure claims").[25] I compare these claims to the state tort law claims of negligent hiring, negligent training, and negligent supervision.[26]

Municipal failure claims are a valuable starting point for a state tort law comparison. They express important governmental obligations—the affirmative duty to hire, train, and supervise employees.[27] Yet when plaintiffs pursue claims of failure to screen, train, or supervise under *Monell*, few prevail, primarily because they must meet challenging requirements of culpability and causation.[28]

Enter state tort law. Most states recognize the torts of negligent hiring, training, and screening, and, in some states, those torts can be brought against government officials. In practice, state tort is not a magic bullet: plaintiffs still face both doctrinal and practical obstacles, including various immunities,[29] procedural hurdles to recovery,[30] and lack of provision for costs and attorneys' fees. Still, the torts are worthy of exploration for plaintiffs and other stakeholders.

The balance of this Essay is organized in two parts. Part I compares constitutional law and tort law and finds overlap between the two with respect to both individual and municipal conduct. It then lays out an affirmative case for tort law as a complement to Section 1983 actions, where possible, and addresses some potential concerns with explicitly framing the two bodies of law as complements. Part II presents a comparison between a particular theory of municipal liability—the theory that the municipality failed to screen, train, or supervise—with the analogous tort claims of negligent screening, negligent training, and negligent supervision. I suggest that, in some states, these torts offer promise for injured plaintiffs seeking to vindicate civil rights claims, and

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25. Leong, *supra* note 3, at 349.

26. *See, e.g.*, Timothy P. Glynn, *The Limited Viability of Negligent Supervision, Retention, Hiring, and Infliction of Emotional Distress Claims in Employment Discrimination Cases in Minnesota*, 24 WM. MITCHELL L. REV. 581, 583 (1998).

27. One scholar characterizes the governmental obligation to supervise as constitutional. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

28. Leong, *supra* note 3, at 359–60.

29. *See infra* Section II.C.

30. These include features such as statutes of limitation, which vary by state, and state-specific exhaustion requirements.

then consider the doctrinal and practical obstacles to expanded use of state tort law. This Essay concludes with a brief discussion of the implications of my research for lawyers and courts.

I. ASSESSING STATE TORT LAW

This Part makes the case that state tort law can play a valuable role in achieving deterrence of, and compensation for, violations of constitutional rights. Section I.A briefly discusses parallels between state tort law and federal constitutional law. Section I.B considers various reservations regarding the use of state tort alternatives, finding them cause for caution but not reason to discontinue exploration. Section I.C offers an affirmative case for pursuing state tort alternatives.

A. Analogous Doctrines

Many constitutional provisions are grounded in common law torts. It is not necessary to adopt any particular theory of the role that common law should play in delineating the scope of constitutional rights to acknowledge that common law influenced the development of many such rights.[31] Unsurprisingly, then, a government official who has violated the Constitution has also, in many instances, engaged in conduct that gives rise to common law tort liability. Consider the following examples:

- A police officer who uses a taser on a compliant civilian. The officer has likely used excessive force, in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures. They have also likely committed a battery.
- A police officer who detains a civilian without probable cause or reasonable suspicion. This unlawful detention likely violates the Fourth Amendment. It may also establish the tort of false imprisonment.[32]
- A corrections officer who denies medical treatment to a seriously ill prisoner. The conduct may establish deliberate indifference to serious medical needs in violation of the Eighth Amendment. It may also establish a tort such as negligence or malpractice.
- A public school teacher who engages in sexual conduct with a middle school student. The behavior may violate the Due Process clause of the Fourteenth Amendment. It may also establish a tort

31. *See, e.g.*, David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000); John F. Preis, *The False Promise of the Converse 1983 Action*, 87 IND. L.J. 1697, 1700 (2012).

32. *See* Preis, *supra* note 19, at 751–52.

such as battery, false imprisonment, or intentional infliction of emotional distress.[33]

In addition to these analogs to constitutional claims against individual government officials, tort law also offers possibilities for holding governmental entities liable. First, in some states, municipalities may be held liable in respondeat superior when an employee commits a tort during the course and within the scope of their employment.[34] Second, the law of some states also offers other theories of liability directly against municipalities themselves. For example, a governmental entity may be held liable for negligent training, screening, retention, or supervision.[35]

Of course, state tort law fails to capture much governmental conduct prohibited by the Constitution. Freedom of speech, free exercise, rights to marriage and family formation, procedural due process rights such as notice and the opportunity to be heard, equal protection, and some Fourth Amendment rights may not receive equivalent protections under state tort law.[36] But while tort law is not a full substitute for litigation of constitutional claims, it does offer significant analogies that provide recourse for some of the same conduct.[37]

B. Concerns with State Tort Law

Despite the similarities between federal constitutional and state tort claims, commentators have emphasized that state tort law is an inadequate substitute for constitutional rights on a number of grounds. Four major arguments have emerged. First, tort law is symbolically inadequate: a victory on a state tort law claim does not send the same signal as a victory on a constitutional law claim. Second, tort law is substantively inadequate: it does not fully compensate plaintiffs for their injuries. Third, tort law is procedurally inadequate: even where the substance of tort law appears identical to the substance of constitutional law, procedural features of state law result in tort law supplying an inadequate mechanism of compensating and deterring conduct that comprises a constitutional violation. And finally, tort law is strategically inadequate: focusing on tort law as a means of vindicating constitutional

33. *See* W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 587, 603–05, 603 n.48 (2023).

34. RESTATEMENT (SECOND) OF TORTS § 895C (AM. L. INST. 1979).

35. *See infra* Section II.C.

36. Richard Frankel, *The Failure of Analogy in Conceptualizing Private Entity Liability Under § 1983*, 78 UMKC L. REV. 967, 997 (2010).

37. *See* Reinert, Schwartz & Pfander, *supra* note 17.

rights provides insufficient payoff to justify the attention and effort involved.

The first argument is that constitutional law is different and more valuable. Richard Frankel explains that winning on a constitutional claim may have emotional content for some plaintiffs: "the Constitution carries greater normative force than the common law and a plaintiff may derive greater meeting, satisfaction, and feelings of justice from obtaining a ruling that an entity's action violated the constitution that a ruling that an entity's action constituted an ordinary tort."[38] On this account, state tort law is an inferior substitute for constitutional law.

This account may be true for many plaintiffs, particularly those who are educated about the law. But this subjective premium on vindicating constitutional rights is not true for all plaintiffs and therefore should not rule out state tort law. For many plaintiffs, the dollar amount—not the distinction between constitutional and tort law—will primarily shape their sense of victory. And from the perspective of deterring wrongful conduct, a plaintiff who imposes liability on either constitutional or tort grounds will create an incentive to avoid that conduct in the future.

Second, many commentators have directed attention away from state tort alternatives because torts are not an adequate substitute for constitutional rights from a substantive perspective.[39] I agree with other commentators that state tort alternatives are an inadequate substitute for many constitutional claims (*i.e.*, those involving race discrimination or voting rights). With that said, I think that state tort law offers more promise than they acknowledge. For some constitutional claims—for example, those alleging excessive force or unreasonable seizure under the Fourth Amendment—the state torts of battery and false imprisonment offer a reasonable alternative, if not a coextensive one.[40] Further, even if state tort law offers only a modest alternative for a few types of constitutional claims, it is worthwhile to promote this alternative as a way of providing a limited remedy. If the alternative is no recovery, then state tort law, with all its shortcomings, does not look so bad.[41]

Third, commentators have emphasized an array of procedural and other non-substantive obstacles associated with state tort recovery as a means of demonstrating its inadequacy. For example, state tort law often is subject to notice requirements, damages caps, and unavailability of

38. Frankel, *supra* note 19, at 1512–13.

39. *See, e.g.*, Reinert, Schwartz & Pfander, *supra* note 17, at 761; Frankel, *supra* note 19, at 1456.

40. Brief for Respondent at 10–11, *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397 (1997) (No. 95-1100).

41. *Cf.* Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 910 (2010).

costs and attorneys' fees,[42] limiting its utility as a remedy. While this objection is descriptively accurate, similar or even more debilitating objections are true of all the available alternatives.[43] To the extent the alternative is to enact new legislation, then this alternative is equally available for state tort law. So if one believes that abolishing qualified immunity via federal legislation or enacting a state analog to Section 1983 is possible, then it also seems possible to amend a state's draconian notice requirement or expand its fees statute.

Fourth, commentators have emphasized the strategic inadequacy of state tort reform.[44] Focusing on state tort law, this argument posits, is an insufficient strategy for vindicating constitutional rights. State tort remedies are available for only a subset of constitutional rights, and focusing on state tort law does nothing to change the conditions that make litigation challenging for rights that do not fall within this subset.

Seeking a remedy for harm caused by conduct that violates the Fourth Amendment via the alternative avenue provided by the tort of battery does not automatically open the door to a parallel avenue for conduct that violates the First Amendment right of free exercise. But it could have more attenuated strategic benefits. For example, litigating harms resulting from a municipality's indifference to Fourth Amendment rights could bring scrutiny to that municipality's indifference to other rights. This is particularly true for harms arising from the same series of events. For example, a state tort suit challenging a municipality's unlawful practices with respect to police use of force during a protest could draw attention to their unlawful practices with respect to suppressing speech during that same protest. Alternatively, drawing attention to the need to litigate one category of constitutional rights via state tort law could also draw attention to the fact that an analogous avenue does not exist for a different category of constitutional rights.

In addition to arguing that tort law is inadequate, commentators have also argued that attention to tort law is actually *counterproductive*.[45] These concerns primarily build on its substantive and strategic inadequacies described above. Attention to tort law is substantively counterproductive, the argument goes, because of the risk that the

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42. *See infra* Section II.C.

43. *See, e.g.*, Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 1 (2008) ("Today civil rights plaintiffs are treated the same as ordinary tort plaintiffs by the private bar: without high damages, civil rights plaintiffs are denied access to the courts because no one will represent them."). *See also Evans v. Jeff D.*, 475 U.S. 717, 734–36 (1986).

44. *See* Chen, *supra* note 41, at 925.

45. *See* Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661 (1997).

substance of tort law will negatively influence the substance of constitutional law.[46] And attention to tort law is strategically counterproductive because it will draw attention away from the need for constitutional reform by implying that tort law is an adequate mechanism.[47]

The argument that attention to tort law is substantively counterproductive includes the concern that overemphasizing the relationship between constitutional law and tort law will lead courts to restrict constitutional rights.[48] Another concern is that the existence of parallel tort claims may cause courts to blur the elements of those claims together with federal constitutional claims.[49] Yet another concern is that the state tort claim will exert a gravitational pull on the constitutional claim. Finally, some have framed the concern as one of federalism: not only will federal courts get state law wrong, but also in doing so they will usurp state determination of state law.[50]

These are genuine concerns. But the worry is no greater than any situation in which one body of law may unduly influence another—a condition that we habitually tolerate, and indeed are already tolerating with respect to the relationship between constitutional law and tort law.[51] Careful pleading by attorneys and mindful analysis by courts can address the concern of skewing or distortion of constitutional law. Indeed, pleading constitutional and tort law claims within the same complaint may actually *help* keep the claims separate by emphasizing that they are two entirely different causes of action, rather than one mega-doctrinal area.

Finally, commentators argue that attention to state tort law is strategically counterproductive. If state tort law provides a plausible alternative avenue for plaintiffs, then Section 1983 reform or development of state Section 1983 analogs is a less urgent project, or perhaps even an unnecessary one.[52] Alternatively, arguments that tort law

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46. *Id.* at 672–74.

47. *See id.*

48. *Id.* at 661–62.

49. Preis, *supra* note 19, at 727.

50. *Id.* at 758–59.

51. Chen, *supra* note 41, at 913.

52. The dilemma between advocating for the best-case scenario and highlighting the advantages of an imperfect alternative is not a new one. For example, the prison reform movement debates whether litigation to improve conditions of confinement is at odds with prison abolition. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2016). Likewise, some climate activists resist the adaptation movement because it takes some climate change as a given. Jan Urban, Davina Vačkářová & Tomas Badura, *Climate Adaptation and Climate Mitigation*

is strategically counterproductive focus on the limits of attention both within and beyond the legal community. It is hard enough to organize one campaign around enacting or amending legislation, let alone two or more.

While a mechanism for directly litigating constitutional rights under state law would likely provide greater benefits than state tort law alone, the advantage of the latter is that the basic architecture is already available in many states. Further, improving state tort law may be a significantly more attractive and feasible project from a messaging standpoint. Tasks such as curtailing discretionary function immunity can be framed as governmental accountability measures, and bringing municipal employers in line with private employers is likely to be more politically attractive than, say, eliminating qualified immunity to remove protections from police officers. Limited attention span is always a legitimate concern, but nothing prevents advocates from pursuing both options: indeed, depending on the state, constitutional and tort remedies could be presented as part of the same package of reforms.

C. An Affirmative Case for Complementary State Torts

From the very beginning of Section 1983's rise to prominence, the Supreme Court has emphasized the coexistence of constitutional remedies and state tort law. In *Monroe v. Pape*,[53] for example, the Court explained that Section 1983 was intended to be "supplemental" to state tort law.[54] In subsequent cases, the Court has sometimes defined the scope of Section 1983 remedy with reference to state tort law,[55] and the availability of a state tort remedy has also influenced the availability of a *Bivens*[56] remedy against federal officials.[57] But constitutional and state tort claims have generally offered distinct remedial avenues.

In a world where the Supreme Court has severely curtailed remedial avenues for constitutional violations, state tort presents an appealing avenue for constitutional enforcement. Certain behavior by government

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Do Not Undermine Each Other: A Cross-Cultural Test in Four Countries, 77 J. ENV'T PSYCH. 101658, 101658 (2021).

53. 365 U.S. 167 (1961).

54. *Id.* at 183.

55. *See, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 746 (1999) (Souter, J., concurring) ("As the concept of public liability was explained in the latter opinion, it turned not on an issue of garden variety tort law, but on whether there was a total absence or not of legal authority for a defending public officer's action with respect to the land.").

56. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

57. *Id.* at 389; Preis, *supra* note 19, at 725.

officials—unreasonable use of force by police, abusive practices by corrections officers—violates the Constitution. Yet such behavior is difficult, perhaps nearly impossible, to remedy under Section 1983 for reasons unrelated to the merits of the claims: daunting justiciability hurdles, the plausibility pleading requirement, qualified immunity, the municipal policy or custom requirement, and strict limitations on attorneys' fees that make securing counsel difficult.[58]

In the face of these obstacles, state tort law offers an alternative avenue for furthering the twin aims of Section 1983 with respect to behavior that violates the Constitution. It can compensate injured plaintiffs for the harms they have suffered and can deter such behavior in the future.[59] From the plaintiff's perspective, it may not matter very much whether they prevail on a Section 1983 claim or a tort claim. A jury verdict or a settlement on either one is money in the plaintiff's pocket—indeed, the state tort claim may offer *more* money in some circumstances.[60] Further, for a plaintiff who hopes to motivate structural reform, victory on either a Section 1983 claim or a tort claim can do so. A plaintiff who wants to create incentives for a police department to discontinue use of tasers or chokeholds can do so regardless of whether the mechanism is a Fourth Amendment claim or a state tort claim for battery.[61] A plaintiff's victory can thus further either or both of the rationales of compensation and deterrence. And for public interest lawyers trying to motivate change on the ground, for some purposes it may not matter whether they win on a Section 1983 claim or a state tort claim.[62]

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58. *See, e.g.*, Schwartz, *supra* note 5, at 1188.

59. *Monroe*, 365 U.S. at 189 n.41 ("[C]ounty, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense . . . .").

60. Preis, *supra* note 19, at 726.

61. Of course, there are many ways in which state tort law is inferior to litigation under Section 1983. One example is the availability of injunctive relief, which is well established (if difficult to obtain) under Section 1983. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111–13 (1983).

62. One commonly cited advantage to Section 1983 is that a victory under that statute allows the plaintiff to recover attorneys' fees under 42 U.S.C. § 1988. While Section 1988 does provide advantages relative to some state statutes, the Supreme Court has curtailed the reach of the statute. *See, e.g.*, *Evans v. Jeff D.*, 475 U.S. 717, 740 (1986); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 600 (2001) (limiting the reach of Section 1988). *See also* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 206 (describing incentives created by decisions under Section 1983).

At a time when success is rare for civil rights plaintiffs,[63] state tort law also offers some strategic benefits. Given that few Section 1983 claims actually reach a jury trial, settlement position is a concern of great importance to plaintiffs.[64] The addition of a plausible state tort claim to a complaint can provide additional leverage to settle and to increase the settlement amount.[65] Further, procedural differences between federal constitutional claims and state tort claims can also place the plaintiff in a better position. For example, a state court may offer notice pleading rather than *Iqbal*'s plausibility standard.

Parallel pleading of constitutional claims under Section 1983 and tort claims under state law also has potential jurisprudential benefits. A court's simultaneous consideration of such claims can help the court to differentiate such claims, clarifying the elements that are congruous and those that diverge. Case law includes many examples of federal and state courts carefully considering *both* federal constitutional and state court claims arising out of the same facts.[66] The distinct articulation of the elements of each claim in a complaint furthers this endeavor by highlighting the distinctions between the two claims.[67] Likewise, other commentators and I have previously argued that litigating constitutional rights in multiple remedial contexts can enrich our understanding of the rights.[68] Litigating both tort and constitutional claims in response to a single instance of problematic official conduct provides an opportunity to examine the implications of the behavior through two distinct lenses.

Finally, promoting state tort law as a complement to constitutional law offers the potential to improve the quality of lawyering in cases involving constitutional rights. As I have shown in other work, many civil rights cases are litigated by lawyers with little civil rights experience.[69] A significant number of these lawyers practice in areas such as personal injury.[70] The inattention to state tort claims suggests that some civil rights lawyers may also have relatively little experience litigating

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63. Leong, *supra* note 22 (manuscript at 8) (finding only one federal appellate win on a failure to screen claim since 1997 and no verdict, judgment, or settlement in plaintiff's favor in a year-long survey of dockets.).

64. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 46 tbl.12 (2017).

65. *See id.* at 68–69.

66. *See* Leong, *supra* note 22.

67. *See, e.g.*, *J.K.J. v. Polk County*, No. 15-cv-428, 2018 WL 708390 (W.D. Wis. Feb. 5, 2018).

68. Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 393–96 (2014).

69. Nancy Leong, Katelyn Elrod & Matthew Nilsen, *Pleading Failures in* Monell *Litigation*, EMORY L.J. (forthcoming 2024) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4378738.

70. *Id.* (manuscript at 36).

tort claims.[71] By encouraging parallel litigation of constitutional claims under Section 1983 and state tort claims, both civil rights and personal injury attorneys could be encouraged to think of themselves not as occupying discrete, siloed categories, but rather as a unified bar with a shared real-world goal—for example, to ensure adequate medical treatment for incarcerated people or to secure compensation for those injured by police officers. Developing expertise in both constitutional and tort law—and helping other lawyers do the same—is a key part of this reframing.

This reframing could extend to the training that lawyers receive. For example, some of the excellent continuing legal education courses on constitutional litigation could also incorporate a survey of state tort claims and their advantages.[72] Perhaps professors can help too: in my most recent constitutional litigation course, I included a full class on state tort alternatives and a graded research assignment in which students were each assigned to compare the tort law of one state with the federal appellate law in the relevant jurisdiction.

These advantages indicate that state tort law may be usefully framed as a reinforcement to federal civil rights law—a welcome addition to a civil rights lawyer's tool kit. In the next Part, I explore how tort law might be used to advance the interests of plaintiffs who likely could not recover under *Monell*.

II. STATE TORT LAW AND MUNICIPAL FAILURES

This Part considers state tort law's potential as a complement to Section 1983 in a specific context: municipal liability for the constitutional violations of municipal employees. Municipal liability is an attractive prospect for plaintiffs. Suing a municipality directly allows plaintiffs to highlight the structural dimension of constitutional violations, emphasizing that wrongful conduct is not merely a matter of a few bad apples. Strategically, suing a municipality offers an important advantage because it can broaden the scope of discovery, allowing for investigation of governmental policies, personnel files, and other records. And, suing a municipality may be the *only* alternative when an individual government defendant is entitled to qualified immunity or cannot be identified.[73]

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71. Anecdotally, several civil rights lawyers have admitted to me that they are aware of state tort claims but that they are often an afterthought.

72. Leong, *supra* note 22 (manuscript at 52) ("Perhaps more emphasis on such classes is needed during law school, both for lawyers who hope to litigate civil rights cases and for law students in general.").

73. For a summary of the advantages associated with suing municipalities, see Schwartz, *supra* note 5.

Despite these advantages, doctrinal and practical obstacles result in near-immunity for municipalities that are sued under Section 1983, particularly with respect to claims of liability that are based on a claim that the municipality failed to screen, train, or supervise its employees. Assuming that radical changes to Section 1983 are unlikely in the immediate future, this Part surveys the potential of complementary state tort remedies. Section II.A offers a primer on municipal liability structured to highlight the theories of failure to train, screen, and supervise. Section II.B compares these theories to the analogous torts of negligent training, negligent screening (sometimes called negligent hiring), and negligent supervision, finding that the torts offer advantages to litigants in some jurisdictions. Section II.C assesses current obstacles, including immunities and practical barriers, and discusses how these might be modified against the backdrop of the current legal and political landscape.

A. Municipal Liability under Section 1983

Congress's purpose in enacting Section 1983 was twofold: legislators wished to offer a means of compensating those who suffered violations of their constitutional rights, and they also wanted to deter government officials from committing further violations.[74] Despite these intentions, Section 1983 largely fell into disuse until *Monroe v. Pape*[75] was decided in 1961.[76] There, the Supreme Court opened the door to constitutional claims against individual government officials by concluding that they could be held liable under Section 1983 for official conduct even when that conduct was not directed or authorized by state law.[77]

Although the litigation of constitutional rights under Section 1983 increased substantially after *Monroe*, those whose constitutional rights were violated often remain uncompensated today.[78] Legal scholars have documented the many doctrinal and practical obstacles that injured plaintiffs face: the heightened pleading standard imposed by *Iqbal*,[79]

74. *See, e.g.*, *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978); *Valenzuela v. City of Anaheim*, 6 F.4th 1098, 1102 (9th Cir. 2021) ("Section 1983's goals include compensation for those injured by a deprivation of federal rights and deterrence to prevent future abuses of power.").

75. 365 U.S. 167 (1961).

76. *Id.*

77. *Id.* at 190–91.

78. *See, e.g.*, ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE, at x (2017).

79. Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 120–21 (2011).

increasingly onerous standing and other justiciability requirements,[80] limits on the kinds of cases federal courts can hear,[81] contraction of substantive constitutional rights,[82] prevalence of qualified immunity,[83] and limits on eligibility for many remedies.[84]

Much scholarly and popular attention has focused on individual liability—perhaps due to the perception that qualified immunity buffers individual officers from consequences for their wrongdoing—but in any event, municipal liability is equally vital.[85] In *Monell v. Department of Social Services*,[86] the Supreme Court held that municipalities may be sued directly under 42 U.S.C. § 1983.[87] The Court relied on legislative history and the general understanding, at the time of the enactment of Section 1983, that municipal corporations were susceptible to suit.[88]

Holding a municipality directly liable offers several important advantages to plaintiffs. First, a municipality offers a source of recovery when an individual officer is unable to pay.[89] Even though municipalities often satisfy judgments against their employees through indemnification,[90] prior to the conclusion of litigation it is frequently

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80. Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2271 (2020) ("Today, standing is a particularly difficult hurdle when plaintiffs seek an injunction to prevent constitutional harm resulting from an unwritten policy or to require departmental reform to prevent future injury.").

81. *See, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 933 (discussing the Supreme Court's "increasing hostility to constitutional tort claims").

82. *See id.* at 957–59 (cataloging restrictions on substantive rights).

83. *See, e.g.*, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 653–56 (2013) (describing challenges posed by the need to show "clearly established law"); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1948–51 (2018) (describing confusion about how similar a prior decision must be to satisfy the "clearly established" standard); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (summarizing critiques of qualified immunity).

84. *See, e.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1416 (2007) ("[T]he increasing conservatism of the federal bench—the usual explanation for the supposed retrenchment in structural reform litigation—is reinforced by specific doctrinal obstacles.").

85. *See, e.g.*, Fallon, *supra* note 81, at 994–96 (advocating increased attention to entity liability within constitutional litigation); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2094 (2018). *See* Schwartz, *supra* note 5, at 1226–35.

86. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

87. *Id.* at 663.

88. *Id.* at 690.

89. *See, e.g.*, Fisk & Chemerinsky, *supra* note 13, at 796.

90. In a groundbreaking empirical study, Schwartz found that police officers are indemnified for 99.98 percent of the dollars that plaintiffs recovered in lawsuits

uncertain whether a municipality will indemnify an employee, and research documents that municipalities leverage this uncertainty as a litigation tactic.[91] Moreover, a plaintiff may recover directly from a municipality even if an individual employee is not held liable for a constitutional violation.[92] As the Ninth Circuit has explained, constitutional violations sometimes occur "not . . . as a result of actions of the individual officers, but as a result of the collective inaction" of the municipal defendant.[93] So a plaintiff can recover directly from a municipality even if individual officers are not held liable "on the basis of qualified immunity, because they were merely negligent, or for other failure of proof."[94] Municipal liability therefore offers an alternative avenue for achieving Section 1983's goal of providing redress for injured plaintiffs even when no individual officer can be held liable.[95] Suing a municipality also has strategic advantages for plaintiffs because it generally opens the door to broader discovery. And the doctrine has a signaling function, emphasizing that many harms flow directly from institutional, rather than individual, shortcomings.[96]

Yet these advantages often remain unrealized because plaintiffs also face significant obstacles to recovering damages from municipalities. In contrast to private entities, which are liable for the acts of their employees on the basis of respondeat superior, "a municipality can be found liable under Section 1983 only where the municipality *itself* caused the

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alleging civil rights violations against them. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936–37 (2014). Between 2006 and 2011, Schwartz found that in forty-four of the seventy largest law enforcement agencies across the country, individual police officers paid just 0.02 percent of the dollars awarded to plaintiffs in lawsuits alleging civil rights violations by police officers, and officers in thirty-seven small and mid-size law enforcement agencies did not pay any of the dollars awarded. *Id.* Officers were indemnified even for punitive damages awards against them: in twenty lawsuits resulting in $3.9 million in punitive damages, just one officer paid a punitive damages award totaling $300. *Id.* at 918.

91. *Id.* at 931–36.

92. *See, e.g.*, *Horton v. City of Santa Maria*, 915 F.3d 592, 604 (9th Cir. 2019); *Barrett v. Orange Cnty. Hum. Rts. Comm'n*, 194 F.3d 341, 350 (2d Cir. 1999); *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994); *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985); *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985).

93. *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002).

94. *Id.* at 917 n.4. *See also Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (holding that municipalities are not entitled to qualified immunity and may not assert good faith as a defense to liability).

95. Ravenell, *supra* note 5, at 911.

96. HUQ, *supra* note 4, at 94.

Constitutional violation at issue"[97]—a standard that requires the plaintiff to show that the municipality's "policy or custom" caused the violation.[98]

The Supreme Court has established four avenues for plaintiffs to demonstrate a municipal policy or custom[99]: (1) an express municipal law or policy;[100] (2) a final decision by a policymaker;[101] (3) a "custom or usage with the force of law";[102] and (4) liability on the basis of a *failure* to take some action ("municipal failure" claims).[103] The latter category of claims are most frequently framed as a failure to train,[104] but can also appear as claims that a municipality failed to supervise, screen, investigate, discipline, or take some other action in relation to its employees.[105]

With respect to municipal failure claims, the Court has imposed "stringent" standards of fault and causation.[106] In *Bryan County Board of Commissioners v. Brown*,[107] the Court held that "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights."[108]

Under *Brown*, courts ask whether the plaintiff has shown that the municipal defendant was deliberately indifferent—a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[109] In practice, the deliberate indifference standard serves as a notice requirement: in a failure to train

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97. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). *See also Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("[U]nder §1983, local governments are responsible only for 'their *own* legal acts.'" (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986))).

98. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

99. *See, e.g.*, *Connick*, 563 U.S. at 61–62 (articulating paths to establish municipal policy or custom); *Jackson v. City of Cleveland*, 925 F.3d 793, 828 (6th Cir. 2019).

100. *Connick*, 563 U.S. at 61 ("Official municipal policy includes the decisions of a government's lawmakers . . . .").

101. *Id.* ("Official municipal policy includes . . . the acts of [government] policymaking officials . . . ."). *See also Pembaur*, 475 U.S. at 480; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

102. *Connick*, 563 U.S. at 61 ("Official municipal policy includes . . . practices so persistent and widespread as to practically have the force of law.").

103. *City of Canton v. Harris*, 489 U.S. 378, 380 (1989); *Connick*, 563 U.S. at 61–62.

104. *Canton*, 489 U.S. at 387–89.

105. *See, e.g.*, *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 406–10 (1997); *Connick*, 563 U.S. at 61–62.

106. *See, e.g.*, *Brown*, 520 U.S. at 410; *Connick*, 563 U.S. at 61–62.

107. 520 U.S. 397 (1997).

108. *Id.* at 404.

109. *Brown*, 520 U.S. at 410.

claim, for example, "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program."[110] The standard is forgiving of municipalities, precluding liability when "an otherwise sound program has occasionally been negligently administered," and acknowledging that "adequately trained officers occasionally make mistakes."[111] The deliberate indifference standard thus poses significant challenges for plaintiffs, requiring "not just negligence, or even gross negligence, but a showing that the employer was deliberately indifferent to the risk of a constitutional violation and the violation was a 'plainly obvious' consequence of the employers' actions."[112]

A plaintiff can establish deliberate indifference in two ways. The Court has held that a "pattern of injuries [is] ordinarily necessary to establish municipal culpability and causation."[113] But it has also left open the alternative possibility that a plaintiff can establish a municipal failure claim based on a single constitutional violation.[114] The Court said in *City of Canton*[115]:

> it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can reasonably have been said to have been deliberately indifferent to the need [for further action].[116]

The Court indicated that the need to train police officers on the use of deadly force is obvious because "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons" and have "armed [them] with firearms, in part to . . . accomplish

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110. *Connick*, 563 U.S. at 61.

111. *Id.* at 391.

112. Frankel, *supra* note 19, at 1483.

113. *Brown*, 520 U.S. at 409; *Connick*, 563 U.S. at 62 ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train.").

114. *See*, *e.g.*, *Brown*, 520 U.S. at 409. Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J.F. 136, 138–39 (2022), https://www.yalelawjournal.org/forum/backdoor-municipal-immunity [https://perma.cc/GZ3S-LLAM].

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

116. *Id.* at 390. *See also* Karen M. Blum, *Making Out the* Monell *Claim Under Section 1983*, 25 TOURO L.R. 829, 843–47 (2009) (discussing municipal failure to act in the face of an obvious need).

this task."[117] While the Court in *Bryan County Board of Commissioners v. Brown* questioned whether single-incident liability could apply in failure-to-screen cases,[118] and in *Connick v. Thompson*[119] held that single-incident liability predicated on a theory of failure to train was unavailable for *Brady*[120] violations,[121] the Court in those cases did not contest the viability of single-incident liability as a general matter.[122]

The Court's municipal failure cases also require the plaintiff to prove causation by showing that the inadequate hiring, training, or supervision was the "moving force" behind the constitutional violation he suffered.[123] But-for causality will not suffice;[124] rather, in considering whether a municipality's failure was the "moving force" behind a constitutional violation,[125] federal appellate courts have required a showing of proximate cause.[126] This element is challenging for plaintiffs to establish. In failure to train claims, for example, it would require plaintiffs to prove, counterfactually, that more or different training would

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117. *Canton*, 489 U.S. at 390 n.10.

118. The Court has expressed skepticism about single incident liability in the context of claims of failure to screen. In *Brown*, for example, the Supreme Court found "not persuasive" a plaintiff's attempts to extend single-incident liability from the failure to train context where it arose to the failure to screen context. *Brown*, 520 U.S. at 409.

119. 563 U.S. 51 (2011).

120. *Brady v. Maryland*, 373 U.S. 83 (1963).

121. In *Connick*, the Court announced this single-incident liability for failure to train was not available in cases involving *Brady*. *Connick*, 563 U.S. at 64 (failure to disclose *Brady* information did not "fall within the narrow range of *Canton*'s hypothesized single-incident liability."). Justice Thomas's majority opinion emphasized that lawyers already receive extensive training and indeed are required to be well versed in *Brady* in order to serve as prosecutors. *Id.* He went on to distinguish the *Brady* violation at issue in *Connick* with the deadly force example hypothesized by the court in *Canton*. *Id.*

122. *See id.* at 63–64 (reiterating that in *Canton* "the Court left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations might not be necessary to show deliberate indifference" (quoting *Brown*, 520 U.S. at 409)).

123. *Canton*, 489 U.S. at 388–89 (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) and *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)).

124. *Canton*, 489 U.S. at 392.

125. *Brown*, 520 U.S. at 404.

126. *See, e.g.*, *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 544 (1st Cir. 1996) (requiring proof that the city policy caused, or was the "moving force" behind the alleged deprivation of constitutional rights); *Cash v. County of Erie*, 654 F.3d 324, 342 (2d Cir. 2011) ("moving force" is tantamount to proximate cause); *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008) ("moving force" is tantamount to proximate cause); *Smith v. District of Columbia*, 413 F.3d 86, 102 (D.C. Cir. 2005) ("We have equated moving force with proximate cause. Proximate cause 'includes the notion of cause in fact,' . . . and requires an element of foreseeability." (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30, § 42 (5th ed. 1984))).

have produced a different outcome.[127] Consider a government official who does something that is clearly illegal—a corrections officer who abuses an incarcerated person under their supervision, or a teacher who sexually assaults a student. More training is unlikely to prevent constitutional violations when any reasonable employee would have known the behavior was wrong.[128]

My previous research demonstrates that failure to train is more frequently litigated in the federal courts than either failure to screen or failure to supervise.[129] Yet that theory has not yielded much success for plaintiffs. In recent work, I have shown that all three theories have low success rates in the federal appellate courts[130]—indeed, in the past twenty-five years, only *one* federal appellate court has ruled in favor of a plaintiff on a failure to screen claim, and success rates are similarly dismal for that claim in the district courts.[131]

The municipal failure theories therefore present a useful context to consider the possibilities presented by complementary state tort claims. Suppose that we agree, as a general matter, that deficient municipal training, screening, and supervision that results in a constitutional violation should result in liability. Are there tort claims that can also hold municipalities liable for inadequacies in their practices, resulting in the compensation and deterrence envisioned by Section 1983? The next section explores these possibilities.

B. Tort Analogs for Municipal Failures

This Section examines the use of state tort law as a supplement to claims under Section 1983 that a municipality failed to screen, train, or

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127. *Canton*, 563 U.S. at 391 ("Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder . . . .") (footnote omitted). *See also Connick*, 563 U.S. at 70 ("[P]roving that a municipality itself actually caused a constitutional violation by failing to train the offending employee presents 'difficult problems of proof,' and we must adhere to a 'stringent standard of fault,' lest municipal liability under 1983 collapse into *respondeat superior*." (quoting *Brown*, 520 U.S. at 406, 410)).

128. *See, e.g.*, *J.K.J. v. Polk County*, 960 F.3d 367, 378–89 (7th Cir. 2020) (en banc) Darryl Christensen, the guard who committed the sexual assault, knew that his actions were against policy and did it anyway.

129. Leong, *supra* note 3, at 363.

130. *Id.* at 368–69.

131. Leong, *supra* note 22 (manuscript at 27–28).

supervise its employees.[132] The Restatement (Second) of Torts and the Restatement (Third) of Agency recognize analogous state torts.[133] Most state courts acknowledge one or more of the torts of negligent hiring,[134] negligent supervision,[135] negligent training,[136] or, in some instances, other negligence torts.[137]

At the outset, these torts offer a key advantage: the ability to recover without meeting the demanding deliberate indifference standard. Because negligent hiring, training, and supervision require only that the plaintiff prove that the municipal actors acted negligently, these torts will generally be easier to satisfy than the analogous theories of liability under *Monell*.[138] Negligent hiring, for example, requires only that the plaintiff prove that it "should have been foreseeable that the hired individual posed a threat of injury to others,"[139] not that the employer was "deliberately indifferent to a risk of a constitutional violation" that was a "plainly obvious" consequence of the deficiencies in hiring practices.[140]

This distinction might result in a different outcome under state and federal law. Consider a fact pattern common in Section 1983 litigation:

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132. At the outset, some states allow municipalities to be held liable under a theory of respondeat superior for the torts of their employees. *See* RESTATEMENT (SECOND) OF TORTS § 895C (AM. L. INST. 1979). This theory is another tool for government accountability under state law and may be helpful for some plaintiffs. But because it does not hold municipalities directly liable for their own actions, it suffers from the same issues noted above with respect to indemnification.

133. *See* RESTATEMENT (SECOND) OF TORTS § 317 (AM. L. INST. 1965) (recognizing duty of master to control conduct of servant); RESTATEMENT (THIRD) OF AGENCY § 7.05(1) (AM. L. INST. 2006) ("A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.").

134. *Keith v. Health-Pro Home Care Servs., Inc.*, 873 S.E.2d 567, 585 (2022).

135. *See* RESTATEMENT (SECOND) OF TORTS § 317 (AM. L. INST. 1965); RESTATEMENT OF AGENCY § 213(b) (AM. L. INST. 1933). *See also, e.g.*, Glynn, *supra* note 26, at 585–612; KAN. STAT. ANN. § 75-6103(a) (2022).

136. *See, e.g.*, *Turner v. Pendennis Club*, 19 S.W.3d 117, 121 (Ky. Ct. App. 2000) (training as a subset of supervision).

137. *See, e.g.*, Glynn, *supra* note 26, 612–18.

138. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 407 (1997) ("[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." (citations omitted)).

139. *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983).

140. *Brown*, 520 U.S. at 411–12 ("Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'").

A public school receives an application from a prospective teacher who, in neighboring school districts, has twice had their employment terminated due to sexual misconduct involving students.[141] The public school performs a cursory background check that does not uncover the teacher's negative employment history, or, alternatively, it is aware of the negative history and hires the teacher anyway. Once hired, this teacher goes on to sexually assault a student.[142] This is, unfortunately, a common sequence of events—a sequence so common that it has acquired the nickname "passing the trash."[143]

In some instances, federal courts have concluded that a public school teacher who sexually assaulted a student has violated the Due Process Clause of the Fourteenth Amendment.[144] One might think that the school district that failed to uncover the negative employment history—or that uncovered and then disregarded that history—could be held liable under a theory that it failed to screen the teacher prior to hiring. But it is virtually impossible for a Section 1983 plaintiff to prevail on a motion to dismiss under these circumstances because the plaintiff generally cannot show that the municipal employer's cursory or deficient background check rose to the level of "deliberate indifference" to the risk of a constitutional violation, or that the shortcomings in hiring practices were the cause of the violation.[145] Further, in some instances the nature and scope of the background check, if any, cannot be alleged at the motion to dismiss stage, especially given the heightened pleading standard imposed by *Iqbal*.[146] The result is that Section 1983 plaintiffs are almost never able to prevail on such a claim against a school district or other governmental entity.

By contrast, under state tort law, plaintiffs need only show negligence in hiring practices, not deliberate indifference. The result is that, in some instances, courts seem open to inferring negligence from the decision to hire a teacher despite a past record, regardless of whether

141. I discuss variations on this fact pattern in previous work. *See* Leong, *supra* note 22 (manuscript at 4).

142. *See, e.g.*, *Blue v. District of Columbia*, 811 F.3d 14, 19–20 (D.C. Cir. 2015).

143. Leong, *supra* note 22 (manuscript at 6–7).

144. *See, e.g.*, *id.* (manuscript at 4).

145. *See, e.g.*, *Kobrick v. Stevens*, 763 F. App'x 216, 221 (3d Cir. 2019) (acknowledging that court could have conducted a "more thorough" investigation into background of band director who had a relationship with a seventeen-year-old student and had a prior record of similar misconduct, but "mere negligence does not constitute deliberate indifference to the risk of harm to students").

146. *Blue*, 811 F.3d at 19–20.

that decision is the product of a negligent failure to uncover that past record or to hire in disregard of the past record.[147]

The problem of government officers who are fired or who resign under threat of termination, and who subsequently seek reemployment in a nearby jurisdiction, surfaces among police officers and corrections officers as well.[148] Negligent hiring offers a potentially more promising avenue than failure to screen liability in these other contexts.

The torts of negligent supervision and negligent training also present an opportunity for recovery where claims of failure to supervise or failure to train would not satisfy *Monell*. Claims related to supervision are particularly helpful in contexts involving a power disparity. For example, a police officer who uses excessive force on a civilian or a corrections officer who abuses an inmate may have had the opportunity to do so because they were not adequately supervised.[149] Likewise, a police officer who misuses a taser or a corrections officer who fails to provide appropriate medical treatment may have done so because a government entity failed to train them.[150] Such claims rarely prevail under the deliberate indifference standard, but negligence may create an avenue to address the problematic individual behavior.

State tort law also offers a way to avoid the requirement that plaintiffs demonstrate a *pattern* of unconstitutional conduct as a prerequisite to recovering from a municipality.[151] Although the Supreme Court has not ruled out the possibility of recovery based on a single instance of unconstitutional conduct,[152] four federal appellate courts have imposed a requirement that plaintiffs must show more than one incident in order to demonstrate that the municipality was on notice.[153] The requirement parallels the requirement that a civil rights plaintiff must show that the law was clearly established in order to overcome a government official's qualified immunity defense.[154]

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147. *C.A. v. William S. Hart Union High Sch. Dist.*, 270 P.3d 699, 702 (Cal. 2012) (allowing case to proceed on allegation of "information and belief").

148. *See* Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1682 (2020). Leong, *supra* note 22 (manuscript at 17). *See also* Alysia Santo, Joseph Neff & Tom Meagher, *In New York Prisons, Guards Who Brutalize Prisoners Rarely Get Fired*, MARSHALL PROJECT (May 19, 2023, 5:00 AM), https://www.themarshallproject.org/2023/05/19/new-york-prison-corrections-officer-abuse-prisoners [https://perma.cc/GT34-27QZ].

149. *See, e.g.*, *J.K.J. v. Polk County*, 960 F.3d 367, 380 (7th Cir. 2020) (en banc); *Covington v. City of Madisonville*, 812 Fed. App'x 219, 227 (5th Cir. 2020).

150. *City of Canton v. Harris*, 489 U.S. 378, 388–90 (1989).

151. Schwartz, *supra* note 114, at 149.

152. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 405 (1997).

153. *See* Schwartz, *supra* note 114, at 139.

154. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

By contrast, tort law does not require a pattern to establish negligence, including for the torts of negligent hiring, negligent training, and negligent supervision. If such a pattern existed it could help to prove that a particular harm was foreseeable, but it is not a requirement.

One consequence of this circuit split is that state tort law may supply a particularly appealing avenue in the states that fall within the four circuits that require a pattern of unconstitutional conduct for municipal liability.[155] If an attorney in those states is aware of problematic screening, training, or supervision practices on the part of the municipality, state tort law may provide a comparatively promising alternative.

Finally, state tort law—at least in notice pleading states—allows plaintiffs to avoid the plausibility pleading requirement imposed by *Iqbal*.[156] Twelve states currently fall into this category: Delaware, Iowa, Kansas, Minnesota, Montana, New Mexico, New York, North Carolina, Oklahoma, Tennessee, Washington, and West Virginia.[157] Retaining the notice pleading standard would require litigating the case in state court, but structuring the strategy around this possibility may make sense for some plaintiffs.

C. Availability of State Law Analogs

Limitations apply to tort claims against municipal entities. In most states, the availability and scope of a tort claim against a government entity is governed by a state tort claims act. Such statutes vary considerably from one state to another, but in most states the tort claims act prescribes the claims that are available against individuals and municipalities, the immunities that are available, notice requirements, filing deadlines, and limitations on damages awards.[158]

From these varied tort claims acts emerge a number of commonalities relevant to claims of negligent screening, training, or supervision against a municipality. First, nearly every state recognizes some level of governmental immunity for municipalities.[159] Historically,

155. These states currently include Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Texas, Louisiana, Ohio, Michigan, Kentucky, Tennessee, Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Missouri, and Arkansas—the states that fall within the First, Fifth, Sixth, and Eighth Circuits. *See* Schwartz, *supra* note 114, at 139.

156. *See* Marcus Gadson, *Federal Pleading Standards in State Court*, 121 MICH. L. REV. 409, 455 (2022) (arguing that states have the authority to set their own pleading standards for cases interpreting state law).

157. *Id.* at 422.

158. *See, e.g.*, WIS. STAT. ch. 893 (2021–22).

159. Reinert, Schwartz & Pfander, *supra* note 17, at 758–60.

the immunity doctrine differentiates between "governmental" functions (entitled to immunity) and "proprietary" functions (not entitled to immunity), and a few states still rely on this distinction.[160]

More recently, discretionary function immunity has emerged as the dominant test. Many states imported the discretionary function rule from the Federal Tort Claims Act, which exempts from liability any act based on the exercise or performance (or the failure to exercise or perform) of a discretionary function or duty.[161] Discretionary functions are generally contrasted with ministerial functions: the former involve the exercise of judgment or policymaking; the latter involve the execution of specified tasks.[162]

States have developed different tests for determining whether a particular action involves a discretionary function. Some states, including Alaska and Utah, distinguish "planning level functions" from "operational level functions."[163] Acts that take place on a planning level are immune. Other states, including Oregon and Washington, examine whether a particular function involves policymaking (entitled to immunity) or implementation (not entitled to immunity).[164]

The viability of negligent screening, training, and supervision claims often depends on whether these functions are discretionary under the law of the specific state. Some states hold across the board that hiring, training, and supervision practices are discretionary and therefore entitled to immunity, while other states draw finer distinctions.[165] In still

160. *See, e.g.*, MICH. COMP. LAWS §§ 691.1401–.1419 (1986) (governmental/proprietary distinction); MO. REV. STAT. § 537.600 (1978) (same); TEX. CIV. PRAC. & REM. § 101.0215 (1987) (same).

161. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680.

162. Courts and legislation also variously refer to a distinction between planning functions (immune) and operational functions (not immune), or planning functions (immune) and ministerial functions (not immune). Aaron R. Baker, *Untangling the Public Duty Doctrine*, 10 ROGER WILLIAMS U. L. REV. 731, 751–52, 752 n.133 (2005).

163. *See, e.g.*, *Lane v. City & Borough of Juneau,* 421 P.3d 83, 88 (Alaska 2018) (interpreting ALASKA STAT. ANN. § 09.65.070 to mean that municipalities receive immunity for "planning" decisions (*i.e.*, policymaking) and do not receive immunity for "operational" decisions (*i.e.*, day-to-day implementation of policy)).

164. In Oregon, for example, negligent implementation of policy is not entitled to immunity. OR. REV. STAT. § 30.265(6) (2021).

165. *Compare Doe 1 v. Westport Bd. of Educ.*, No. X06UWYCV185025451, 2020 WL 3487679, at *20–21 (Conn. Super. Ct. May 27, 2020) (interpreting CONN. GEN. STAT. § 52-557n(a)(2)(B) to immunize municipalities against liability for hiring practices that involve discretion, but not for those that simply involve fulfilling a statutory mandate), *with Smith v. Carruth*, No. CV 15-4570, 2017 WL 785345, at *11 (E.D. La. Mar. 1, 2017) (finding that both state and federal courts have held that hiring, training, and supervision practices of Louisiana police entities are discretionary).

other states, such functions are discretionary for some entities but not others.[166]

While discretionary immunity is a hurdle in many states, it is not an absolute barrier to liability for negligent screening, training, and supervision. I identified thirteen states that have explicitly recognized a claim of negligent screening, training, or supervision against a municipal employer,[167] and the statutory schemes of at least twenty others appear to allow the claim in some circumstances.[168]

Other factors may deter plaintiffs from bringing negligent screening, training, and supervision claims against municipalities as a complement to analogous *Monell* claims. In some states, litigating these claims is not feasible for lawyers who rely on attorneys' fees to sustain their practices. First, many states do not have an attorneys' fees statute analogous to 42 U.S.C. § 1988, which provides both costs and fees for prevailing parties.[169] Second, many states have damages caps, which means that contingency fee agreements are of only limited utility.[170] While the effect of large damages awards against municipalities—particularly those that

166. For example, Florida courts have held that sovereign immunity is not a bar to a claim for negligent supervision in the educational context, but such claims are barred in the context of hiring, retention, training, and supervision of police officers. *See, e.g.*, *Sch. Bd. of Broward Cnty. v. McCall*, 322 So. 3d 655, 657, 660 (Fla. Dist. Ct. App. 2021).

167. *See, e.g.*, *Dobos v. Driscoll*, 537 N.E.2d 558, 564–67 (1989) (recognizing claim arising from traffic stop and arrest and withholding discretionary function immunity); *Zander v. Orlich*, 907 F.3d 956, 961 (7th Cir. 2018) (recognizing claim of negligent hiring, training, and retention); *C.C. v. Harrison Cnty. Bd. of Educ.*, 859 S.E.2d 762, 778 (W.Va. 2021) (confirming viability of actions against school for negligent hiring, supervision, and retention, and denying motion to dismiss with respect to negligent retention claim); *C.A. v. William S. Hart Union High Sch. Dist.*, 270 P.3d 699, 708 (Cal. 2012) (confirming cause of action for negligent supervision against schools).

168. *See, e.g.*, COLO REV. STAT. § 24-10-106(1)(h) (2023) (retaining municipal liability for negligent screening in education sector employment); N.M. STAT. ANN. § 41-4-12 (2020) (allowing for liability for law enforcement officers whose negligent supervision proximately causes the commission of certain major torts).

169. *See Evans v. Jeff D.*, 475 U.S. 717, 740 (1986); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 600 (2001) (even Section 1988 has been squeezed down to the point where plaintiffs may only get fees by winning a judgment or court authorized settlement).

170. *See, e.g.*, ALA. CODE. § 11-93-2 (1977) (limiting damages to $100,000 per person and $300,000 per occurrence); FLA. STAT. § 768.28(5)(a) (2023) (limiting damages to $200,000 per person and $300,00 per occurrence); KY. REV. STAT. ANN. § 44.040 (West 2021) (limiting damages to $200,000 per person and $350,000 per occurrence); MASS. GEN. LAWS ch. 258, § 2 (2023) (limiting liability to $100,000 per plaintiff); NEV. REV. STAT. § 41.035 (2019) (limiting damages against a political subdivision to $200,000, exclusive of interest); R.I. GEN. LAWS. § 9-31-3 (2023) (limiting damages to $100,000 unless political subdivision was engaged in a proprietary function).

are already under resourced—should not be understated, the concerns that led to damages caps could be addressed through insurance.[171]

CONCLUSION

In the context of municipal failure claims, this Essay offers a preliminary side-by-side comparison of recourse for constitutional harms under Section 1983 and under state tort law. One lesson of the comparison is that it must take place at a high level of specificity: different theories of both municipal and individual liability require a detailed comparison with state law. Another lesson is that the law of different states varies dramatically: a promising cause of action in one state may be a non-starter in another. Perhaps the most important lesson is that this area is ripe for future research by scholars of both constitutional and tort law. A greater understanding of the way that these areas of law relate to and complement one another will help to clarify the potential for litigants seeking to vindicate constitutional rights.

171. *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1611–12 (2017).