Accountability Matters: An Examination of Municipal Liability in § 1983 Actions

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TABLE OF CONTENTS

I. INTRODUCTION 106

II. THE DELIBERATE INDIFFERENCE STANDARD 110
- *A. The Birth of § 1983 Claims Against Municipalities and the Deliberate Indifference Standard* 111
- *B. Confirmation and Qualification of the Deliberate Indifference Standard* 113
- *C. Modern Application of the Deliberate Indifference Standard* 115
- *D. Municipal Policy or Custom* 117
- *E. The Deliberate Indifference Standard Provides Municipalities with an Unreasonable Level of Insulation from § 1983 Claims* 118

III. A NEW STANDARD IS NEEDED 119
- *A. Deterring Excessive Force* 120
- *B. Interpretation of the Deliberate Indifference Standard is Far From Uniform and Deters Plaintiffs* 121

IV. UNDERSTANDING THE NEED FOR QUALIFIED IMMUNITY, AVOIDING RESPONDEAT SUPERIOR, AND A STRINGENT STANDARD FOR IMPOSING MUNICIPAL LIABILITY IN § 1983 ACTIONS 122
- *A. Officers Need Qualified Immunity to Serve and Protect* 122
- *B. Respondeat Superior Needs to Be Avoided* 123

V. THE CONSCIOUS DISREGARD STANDARD—LESS STRINGENT THAN DELIBERATE INDIFFERENCE, BUT MORE STRINGENT THAN NEGLIGENCE .. 125
- *A. Definition and Other Uses—California & Nevada* 125
- *B. The Standard* 126
- *C. The Right Balance: A Perennial "Middle-Ground"* 127
- *D. Not a Departure from Precedent* 128
- *E. The Conscious Disregard Standard Addresses the Inconsistency of Monell* 129

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VI. HOW THE STANDARDS WOULD PLAY OUT IN THE CASES OF MICHAEL BROWN, ERIC GARNER, AND TAMIR RICE 129
A. Michael Brown 130
1. Estimation Under the Deliberate Indifference Standard 130
2. Estimation Under the Conscious Disregard Standard 131
B. Eric Garner 132
1. Estimation Under the Deliberate Indifference Standard 133
2. Estimation Under the Conscious Disregard Standard 133
C. Tamir Rice 134
1. Estimation Under the Deliberate Indifference Standard 135
2. Estimation Under the Conscious Disregard Standard 135
D. Summary and a Look to the Future 136

VII. CONCLUSION 137

I. INTRODUCTION

The deaths of Michael Brown, Eric Garner, and Tamir Rice took the nation by storm and sparked an examination of incidents involving police brutality and the use of excessive force.[1] Beyond the protests, public outrage, and media backlash, emerging investigative reports have revealed police officers disproportionately using excessive force against persons of color.[2] However, in the vast majority of American cities, those responsible for hiring and training the officers behind the acts of excessive force face a disturbing lack of accountability.[3]

1. *See* Kimberly Kindy & Carol D. Leonnig, *At Least 5 Ferguson Officers Apart from Brown Shooter have been Named in Lawsuits,* WASH. POST (Dec. 18, 2014), *available at* http://www.washingtonpost.com/politics/at-least-6-ferguson-officers-apart-from-brown-shooter-have-been-named-in-lawsuits/2014/08/30/535f7142-2c96-11e4-bb9b997ae96fad33_story.html (on file with *The University of the Pacific Law Review*) (detailing some of the examination into patterns of excessive force).

2. *See* U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (March 4, 2015) [hereinafter DOJ INVESTIGATION OF FERGUSON], *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf (on file with *The University of the Pacific Law Review*) (detailing findings of the investigation into the Ferguson Police Department's policies and practices); U.S. DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE (December 4, 2014) [hereinafter INVESTIGATION OF CDP] (on file with *The University of the Pacific Law Review*) (concluding that the CPD engages in a pattern or practice of the excessive use of force in violation of the Fourth Amendment); *see also* Jeff K. Lowenstein, *Killed by the Cops*, COLORLINES, (Nov. 4, 2007), *available at* http://www.colorlines.com/archives/2007/11/killed_by_the_cops.html (on file with *The University of the Pacific Law Review*) (observing the racial disparity towards blacks in police shootings); Ryan Gabrielson, et al., *Deadly Force, in Black and White: A ProPublica Analysis of Killings by Police Shows Outside Risk for Young Black Males* (Oct. 10, 2014, 10:07 AM), http://www.propublica.org/article/deadly-force-in-black-and-white (on file with *The University of the Pacific Law Review*) (detailing the over-representation of the African American community among victims of police shootings).

3. *See* Lowenstein, *supra* note 2, at 2 (describing the racial disparity in police shootings).

Officer Darren Wilson shot and killed Michael Brown on August 9, 2014.[4] The transcripts from the grand jury proceedings provide widely conflicting accounts of the circumstances surrounding Mr. Brown's death.[5] We know for certain there was a scuffle between Officer Wilson and Mr. Brown at the window of the officer's vehicle, after which, Mr. Brown turned and ran away.[6] We also know Officer Wilson repeatedly shot Mr. Brown, firing numerous times as Mr. Brown fell to the ground, presumably subdued by previous shots to his body.[7] Unfortunately, 2014 made many realize that situations similar to Mr. Brown's death—an African American killed during an interaction with police—are neither isolated, nor atypical, occurrences.[8]

On July 17, 2014, Officer Daniel Pantaleo killed Eric Garner by applying a chokehold.[9] The officer accosted Mr. Garner, and subsequently killed him for selling untaxed, loose cigarettes.[10] Video evidence clearly shows five other officers surrounding Mr. Garner as Officer Pantaleo placed him in a chokehold and audio includes Mr. Garner's pleas of, "I Can't Breathe, I Can't Breathe."[11] Mr. Garner's last words have become a rallying cry for protestors and advocates

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4. Transcript of Grand Jury Proceedings, Vol. 5 at 229, State v. Wilson (Sept. 16, 2014), *available at* http://apps.washingtonpost.com/g/page/national/read-darren-wilsons-full-grand-jury-testimony/1472/ (on file with *The University of the Pacific Law Review*). Grand Jury documents are not ordinarily released to the public. However, given the widely conflicting reports about the circumstances surrounding Michael Brown's death and the controversial debate on racial relations it sparked, the prosecutor made the rare decision to release the documents to the public. *Id.*

5. *See, e.g.*, *id.* at 166, 226 (conflicting testimony of Mr. Brown's location when Wilson fired shots); *see also* Transcript of Grand Jury Proceedings, Vol. 6 at 242–43, 255–59, State v. Wilson, (Sept. 23, 2014) *available at* http://apps.washingtonpost.com/g/page/national/read-darren-wilsons-full-grand-jurytestimony/ 1472/ (on file with *The University of the Pacific Law Review*) (providing different accounts of the events as perceived by different witnesses).

6. *See* Transcript of Grand Jury Proceedings, Vol. 5, *supra* note 4, at 224, 226 (providing an account of the tussle and Mr. Brown running away); *see also* Paul Caussell, *The Physical Evidence in the Michael Brown Case Supported the Officer*, WASH. POST (Nov. 28, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/ 28/the-physical-evidence-in-the-michael-brown-case-supported-the-officer/ (on file with *The University of the Pacific Law Review*) (explaining that the scuffle indisputably happened).

7. *See* Transcript of Grand Jury Proceedings, Vol. 5, *supra* note 4, at 229; *see also* Transcript of Grand Jury Proceedings Vol. 6, *supra* note 5, at 248 (describing the shots fired at Mr. Brown).

8. Grace Ji-Sun Kim, *'I Can't Breathe': Eric Garner's Last Words Symbolize Our Predicament*, HUFFINGTON POST (Dec. 18, 2014, 6:18 PM), http://www.huffingtonpost.com/grace-jisun-kim/i-cant-breathe-eric-garne_b_6341634.html (on file with *The University of the Pacific Law Review*) (arguing that the death of Mr. Eric Garner represents a broader issue in race relations).

9. *See* J. David Goodman & Michael Wilson, *Officer Told Jury He Meant No Harm*, N.Y TIMES (Dec. 3, 2014), *available at* http://www.nytimes.com/2014/12/04/nyregion/officer-told-grand-jury-he-meant-no-harm-to-eric-garner. html (on file with *The University of the Pacific Law Review*) (outlining the facts surrounding Mr. Garner's death).

10. *Id.*

11. Video, *'I Can't Breathe': Eric Garner Put in Chokehold by NYPD Officer—Video*, THE GUARDIAN (Dec. 4, 2014), http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video (on file with *The University of the Pacific Law Review*).

hoping to bring an end to the unjustified use of excessive force by police officers.[12]

Officer Timothy Loehmann shot and killed Tamir Rice on November 22, 2014.[13] Officers Loehmann and Frank Garmback responded to a call indicating a person, "probably a juvenile," was wielding a gun that was "probably fake" in the gazebo area of a neighborhood playground.[14] Officer Loehmann fired his weapon twice within two seconds of approaching Mr. Rice, fatally injuring the young boy.[15] Mr. Rice was pronounced dead the next day, at the age of twelve.[16]

These three deaths represent a deeper issue that has been bubbling beneath the surface for some time now.[17] Police departments place too many officers on the streets without the proper training to handle foreseeable and reoccurring situations.[18] Surely, each officer can be blamed for taking the final act of aggression, but plucking one bad apple will not fix a rotten tree.[19] The problem becomes institutional when police departments continually allow officers to use excessive force against one segment of society.[20]

No officer has faced criminal accountability in the highly publicized cases mentioned above, resulting in further aggravation of the public's lack of trust in the police's use of force against colored men.[21] Grand juries in Ferguson,

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12. *See* Ji-Sun Kim, *supra* note 8 (explaining the symbolism of Mr. Garner's words).

13. *See* Complaint at 3, Rice v. City of Cleveland, 2014 WL 6844524 (Dec. 5, 2014) (No. 1:14-cv-02670-SO) (detailing the facts surrounding Mr. Rice's death).

14. *Id.*

15. *Id.*; *see also* Video, *Tamir Rice: Police Release Video of 12-year-old's Fatal Shooting—Video*, THE GUARDIAN (Nov. 26, 2014) http://www.theguardian.com/us-news/video/2014/nov/26/cleveland-video-tamir-rice-shooting-police (on file with *The University of the Pacific Law Review*).

16. Complaint, Rice v. City of Cleveland, *supra* note 13, at 3.

17. *See* MICHELLE ALEXANDER, THE NEW JIM CROW 1–11 (2010) (arguing the criminal justice system functions largely along color lines).

18. *See e.g.*, INVESTIGATION OF CDP, *supra* note 2 (concluding that the CPD engages in a pattern or practice of the excessive use of force in violation of the Fourth Amendment); *see also* Sari Horwitz et al., *Justice Dept. to Probe Ferguson Police Force,* WASH. POST (Dec. 22, 2014), *available at* http://www.washingtonpost.com/world/national-security/justice-dept-to-probe-ferguson-police-force/2014/09/03/737dd928-33bc-11e4-a723-fa3895a25d02_story.html (on file with *The University of the Pacific Law Review*) (describing some of the 30 recent investigations into police departments across the nation for civil rights violations).

19. *See* ALEXANDER, *supra* note 17, at 11 (providing numerous examples of police discrimination).

20. *See* INVESTIGATION OF CDP, *supra* note 2 (outlining the CDP's practice of the excessive use of force); Eric Holder, U.S. Attorney General, Remarks at Press Conference Announcing Pattern or Practice Investigation into Ferguson Police Department (Sept. 4, 2014) *available at* http://www.justice.gov/opa/speech/ attorney-general-holder-delivers-remarks-press-conference-announcing-pattern-or-practice [hereinafter Attorney General Remarks] (on file with *The University of the Pacific Law Review*) (describing the ongoing investigation into the Ferguson Police Department's practices in the use of force); *see also* Horwitz, *supra* note 18 (describing civil rights investigations of police departments across the nation).

21. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html (*on file with The University of the Pacific Law Review*); Dana Ford, et al., *Protests*

Missouri, and Staten Island, New York, chose not to indict the officers involved in the deaths of Mr. Brown and Mr. Garner.[22] Although the respective grand jury decisions represent an obstacle to each family's ability to obtain relief for their tragic losses, there are other legal avenues the families may pursue.[23]

One possible avenue involves bringing a federal civil rights action against the municipalities responsible for hiring and training the officers who killed Mr. Brown and Mr. Garner.[24] Such a civil claim would be entirely separate from any criminal proceeding.[25] Moreover, the focus of these claims moves beyond individual officer accountability and focuses on the municipal policymakers behind acts of excessive force.[26] The family of Tamir Rice brought this type of claim against the Cleveland Division of Police.[27] However, those who follow in the Rice family's footsteps will face a substantial barrier to their claim.[28]

The current standard for imposing municipal liability under Title 42, Section 1983 of the United States Code, also known as "Civil Action for Deprivation of Rights," is quite stringent, and in most situations leaves plaintiffs without any form of relief.[29] To meet the standard, a plaintiff has the burden of proving a municipal policy or custom exhibited a deliberate indifference to his or her constitutionally protected rights.[30] Realizing the unlikelihood of proving liability under this standard, Mr. Garner's family accepted a settlement offer releasing the City of New York from liability in any civil rights claim connected with Mr. Garner's death.[31] Because the deliberate indifference standard effectively

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Erupt in Wake of Chokehold Death Decision, CNN (Dec. 8, 2014, 8:14 PM), http://www.cnn.com/2014/12/04/justice/ new-york-grand-jury-chokehold/ (on file with *The University of the Pacific Law Review*).

22. See Davey, *supra* note 21, and Ford, *supra* note 21, for a description of the lack of indictments in these cases.

23. *See* Davey, *supra* note 21 (indicating that the Ferguson Police Department may have engaged in patterns of civil rights violations); *see also* Ford, *supra* note 21 (indicating there will be a civil rights investigation).

24. 42 U.S.C. § 1983 (West 2014).

25. *See id.* (indicating that § 1983 claims are a *civil* remedy for plaintiffs who have suffered violations of their constitutionally protected rights).

26. *See* Lowenstein, *supra* note 2 (contemplating whether there is an institutional problem that leads to the unequal use of excessive force against persons of color). In any event, the officers involved will likely be entitled to qualified immunity as the actions may fall within the scope of their duty. *See* Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (indicating that protection from civil liability applies regardless of whether the government official makes a mistake of law, mistake of fact, or both).

27. Complaint, Rice. v. City of Cleveland, *supra* note 13, at 5.

28. Matthew J. Cron, et al., *Municipal Liability: Strategies, Critiques, and a Pathway toward Effective Enforcement of Civil Rights*, 91 DENVER UNIV. L. REV. 584, 585 (2014).

29. § 1983; Cron, *supra* note 28, at 585.

30. City of Canton v. Harris, 489 U.S. 378, 379, 392 (1989); *see* Teressa. E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 161 (2011).

31. *See* BUREAU OF LAW & ADJUSTMENT, NEW YORK CITY OFFICE OF THE COMPTROLLER, ERIC GARNER SETTLEMENT RELEASE (July 13, 2015), *available at* http://www.nydailynews.com/new-york/family-

insulates municipalities from liability under § 1983 claims,[32] this Comment suggests imposing municipal liability when a municipality *consciously disregards* the risk of a constitutional violation to the rights of a citizen.

Part II of this Comment discusses the legal background that gave rise to the deliberate indifference standard, and where it stands today.[33] Part III argues that a new standard is needed if § 1983 claims against municipalities are to be an effective remedy for those who suffer civil rights violations at the hands of municipal employees.[34] Part IV addresses justifications for the current standard, and endorses retention of qualified immunity for police officers in order to prevent municipal liability from collapsing into respondeat superior liability under § 1983 claims.[35] Part V promotes the imposition of a conscious disregard standard, and explains how it would afford relief to plaintiffs with colorable claims while also preserving the justifications for the current standard.[36] Part VI applies both standards to the cases of Mr. Brown, Mr. Garner, and Mr. Rice.[37]

II. THE DELIBERATE INDIFFERENCE STANDARD

This section discusses the development of the deliberate indifference standard in the context of § 1983 cases and articulates the extreme burden the Supreme Court's interpretation of this standard imposes on plaintiffs in suits against municipalities. Part A details the origins of the deliberate indifference standard in § 1983 claims against municipalities.[38] Part B discusses the confirmation and qualification of the deliberate indifference standard.[39] Part C discusses the modern articulation of the deliberate indifference standard.[40] Part D provides definitions for "policy" and "custom," terms that the Court consistently

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eric-garner-accept-5-9m-settlement-source-article-1.2291065 (on file with *The University of the Pacific Law Review*) (providing details of the settlement).

32. *See* Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978) (showing that, although *Monell* held that municipalities are not entitled to qualified immunity and complete insulation from § 1983 claims, the Supreme Court has failed to hold a municipality liable applying the deliberate indifference standard); *see also Canton*, 489 U.S. 378 (1989); Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997); Connick v. Thompson, 131 S. Ct. 1350 (2011) (all holding the municipality was not liable under the deliberate indifference standard). *See generally* Cron, et al., *supra* note 28 (describing the harshness of the deliberate indifference standard).

33. *Infra* Part II.

34. *Infra* Part III.

35. *Infra* Part IV. Respondeat superior is a legal doctrine, most commonly used in tort actions, that holds an employer or principal legally responsible for the wrongful acts of an employee or agent if such acts occur within the scope of the employment or agency. BLACK'S LAW DICTIONARY 1505 (10th ed. 2014).

36. *Infra* Part V.

37. *Infra* Part VI.

38. *nfra* Part II.A.

39. *Infra* Part II.B.

40. *Infra* Part II.C.

employs when discussing the deliberate indifference standard.[41] Part E argues that the deliberate indifference standard provides municipalities with an unreasonable level of insulation from § 1983 claims.[42]

A. *The Birth of § 1983 Claims Against Municipalities and the Deliberate Indifference Standard*

Today, anyone who has been deprived of a constitutional right by a person acting under the color of state law may bring a § 1983 claim.[43] However, § 1983 actions could not be brought against municipalities until the Supreme Court decided *Monell v. Department of Social Services of City of New York* in 1978.[44] Although *Monell* held that municipalities were subject to § 1983 claims, it did not provide a standard for determining municipal liability.[45] Moreover, the Court qualified its holding by requiring a plaintiff's injury to be the result of a municipal "policy" or "custom," and further held that municipalities could not be liable under the theory of respondeat superior liability.[46]

City of Canton v. Harris established the initial standard for municipal liability under § 1983 claims.[47] The Supreme Court acknowledged that a plaintiff may have a legal claim under § 1983 when a city's failure to provide adequate training to police officers deprives the plaintiff of a constitutional right.[48] However, the Court held that a city faces liability only where a particular policy or custom of the city—in this case, the alleged failure to train—"amounts to *deliberate indifference* to the constitutional rights of persons with whom the police come into contact."[49]

Justice O'Connor's concurring opinion detailed what must be proven in order for a municipality to be liable under the deliberate indifference standard.[50] First, the plaintiff must prove both fault and causation as to the acts or omissions of the city.[51] Second, proof of fault must be shown by events and circumstances that establish a policy of action or inaction that is parallel to a city's decision to violate the Constitution.[52]

41. *Infra* Part II.D.
42. *Infra* Part II.E.
43. U.S.C. § 1983 (West 2014). Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978).
44. *Id.*
45. *See id.* at 695 (discussing municipal liability without providing a standard).
46. *Id.* at 694.
47. City of Canton v. Harris, 489 U.S. 378, 379 (1989).
48. *Id.* at 392.
49. *Id.* at 379 (emphasis added).
50. *Id.* at 394–95.
51. *Id.* at 394.
52. *Id.* at 395.

Although the Court ultimately remanded the case for determination under the newly announced deliberate indifference standard, the majority and concurring opinions both suggested that Ms. Harris would not prevail under the standard.[53] Ms. Harris fell down several times following arrest.[54] She was asked if she required medical attention, but could not respond coherently.[55] The officers did not summon medical personnel to assist Ms. Harris.[56] Instead, the arresting officers left Ms. Harris lying on the floor of the police station for over an hour.[57] The Canton Police Department gave shift commanders discretion to determine whether an arrestee required medical assistance.[58] However, the shift commanders were not trained to make these determinations.[59] Ms. Harris was thereafter released from custody and an ambulance transported her—at her own cost—to the nearest hospital.[60] She was hospitalized for one week because of severe emotional ailments.[61] The Court suggested the city was not deliberately indifferent to Ms. Harris' constitutionally protected rights because she would be unable to prove existence of a policy of inaction among officers in providing medical aid to arrestees.[62]

As in *Monell*, the *Canton* Court was keen to establish a difficult standard for imposing municipal liability because of a strong desire to insulate municipalities from respondeat superior liability.[63] To support this stance, the Court expressly disapproved of a standard that promoted frivolous claims; the Court was wary of a standard that allowed plaintiffs to argue there was something the city "could have done" to prevent injury to plaintiff's rights.[64] The *Canton* Court provided very little reasoning for why it imposed such a harsh standard of municipal liability,[65] and it provided no reasoning for why a lesser standard than deliberate indifference would not meet the concern of preventing respondeat superior

53. *Id.* at 392–94.

54. *Id.* at 381.

55. *Id.*

56. *Id.*

57. *Id.* at 381.

58. *Id.* at 381–82.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.* at 392–95 (indicating the record was not sufficient to impose municipal liability under the deliberate indifference standard).

63. *See id.* at 378–79 (reasoning that "lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983; [it] would result in de facto respondeat superior liability, a result rejected in *Monell*").

64. *See id.* at 391–92 (arguing a lesser standard would encourage § 1983 plaintiffs to point to something the city "could have done" and engage the courts in endless second-guessing of municipal training programs).

65. *See id.* at 391. The Court also suggests avoidance of standards that would impose municipal liability due to municipal negligence or allow municipal liability for an employee's negligence. *Id.*

liability in § 1983 actions.[66] Rather, the Court asserted that the deliberate indifference standard is most consistent with the precedent of *Monell*.[67]

The *Canton* Court established a strict standard for imposing municipal liability, but also posed hypothetical situations that could serve as the basis for municipal liability:[68]

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.[69]

These hypothetical situations are discussed after analyzing whether the Brown, Garner, and Rice cases would be successful under the deliberate indifference standard.[70]

B. *Confirmation and Qualification of the Deliberate Indifference Standard*

The Court further developed the deliberate indifference standard in *Board of County Commissioners of Bryan County v. Brown*: "A plaintiff must demonstrate that a municipal decision reflects *deliberate indifference* to the risk that a violation of a *particular constitutional or statutory right* will follow the decision."[71] It would not be enough for a plaintiff to simply identify conduct that was properly attributable to the municipality.[72] Rather, the plaintiff must show that the municipality's *deliberate* conduct was the "moving force" behind plaintiff's injury.[73] Moreover, the Court held that there must ordinarily be a pattern or practice that leads to violations in order to find a municipality deliberately indifferent to the consequences of failing to train its employees.[74]

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66. *Id.* at 385–400.

67. 489 U.S. at 388–89 (referencing *Monell's* precedent that § 1983 municipality liability can only be imposed where municipal policies are the "moving force [behind] the constitutional violation.")

68. *Id*. at 390.

69. *Id.*

70. *See infra* Part VI (analyzing the three cases under both the deliberate indifference and conscious disregard standard).

71. Bd. Cty. Comm'rs Cty. v. Brown, 520 U.S. 397, 411 (1997) (emphasis added).

72. *Id.* at 404.

73. *Id.* (emphasis in original).

74. *Id.* at 407; s*ee* City of Canton v. Harris, 489 U.S. 378, 389–90 (1989).

The Court recognized the limited circumstances outlined in *Canton*, in which a municipality may be found liable for singular incidents—namely, the municipality's failure to adequately train its officers—but also emphasized that there must be a "program necessarily intended to apply over time to multiple employees" to impose liability.[75]

In *Brown*, the officer who used excessive force while arresting a young woman had a criminal history, which included resisting arrest, driving while intoxicated, public drunkenness, and multiple charges of assault and battery.[76] The officer was also related to the sheriff in charge of screening and hiring new applicants.[77]

The *Brown* Court acknowledged that the sheriff's decision to ignore the officer's background amounted to an indifference of the consequences of hiring the officer, but found that the decision did not amount to a *deliberate* indifference.[78] Apparently, ignoring the officer's criminal record and hiring him onto the police force would not "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."[79]

The Court echoed the precedents of *Monell* and *Canton*, reasoning that municipalities could not be held liable under the theory of respondeat superior, and that the plaintiff must identify a municipal policy or custom as the cause of injury.[80] The Court expressed a desire to avoid respondeat superior multiple times before announcing the holding,[81] but, like the *Canton* Court, gave no reason why

75. *Brown*, 520 U.S. at 407. *See Canton* 489 U.S. at 388–90 (describing the limited circumstances of municipal liability discussed in Part II.B of this Comment).

76. *Brown*, 520 U.S. at 401, 428. The full rap sheet listed repeated traffic violations, driving while intoxicated, driving with a suspended license, resisting arrest, and more than one charge of assault and battery. Furthermore, the officer pled guilty to assault and battery and other charges only sixteen months before being hired by the Sheriff. *Id.*

77. *Id.* at 401. Perhaps realizing that the officer was not the best hire, the Sheriff authorized Officer Burns to make arrests, but did not authorize the officer to carry a weapon. *Id.*

78. *Id.* at 411 (emphasis added). The consequences referred to were violations of Plaintiff's right to be free from the use of excessive force. *Id*.

79. *Id.*

80. *See id.* at 403–04 ("Locating a policy ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality.").

81. *Id.* at 406, 410, 414. "That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation." *Id.* at 406. "To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged." *Id.* at 410. "[Section] 1983 cases involving hiring decisions present the greatest risk that a municipality will be found liable for an injury it did not cause, therefore rigorous standards of culpability and causation must be adhered to prevent that from happening." *Id.* at 414.

a lesser standard than deliberate indifference would not address the respondeat superior liability concern.[82]

Instead, the Court provided examples of situations that would meet this high standard of liability, such as an intentional decision by municipal policymakers to deprive an individual of a federally protected liberty or an action directed by the municipality itself that violated federal law.[83] Presumably, municipalities do not *affirmatively* instruct officers to violate constitutionally protected liberties. Consequently, proving these examples would be a tall, if not impossible, hurdle for a plaintiff to overcome in order to succeed in a § 1983 action against a municipality.[84]

Brown did nothing more than muddle the definition of the deliberate indifference standard by attempting to distinguish liability for a municipal policy or custom from respondeat superior liability.[85] This distinction is far from clear and has made it difficult for courts to distinguish between the policymaking authority of the municipality and the delegated discretionary authority of individual municipal employees.[86]

C. Modern Application of the Deliberate Indifference Standard

The Supreme Court most recently applied the deliberate indifference standard to a § 1983 case in *Connick v. Thompson*.[87] In *Connick*, prosecutors failed to disclose evidence that should have been provided to the opposing counsel defending Thompson against a robbery charge.[88] As a result, Thompson was convicted.[89] Because of the conviction, Thompson did not testify in a

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82. *See id.* at 402–16 (providing no reason why a lesser standard of municipal liability would not address the concerns of the majority); City of Canton v. Harris, 489 U.S. 378, 385–400 (1989) (making no mention of why a lesser standard of municipal liability could not prevent respondeat superior liability).

83. *Id.* at 405.

84. Cron, et al., *supra* note 28 at 584, 604.

85. *See also* Auriemma v. Rice, 957 F.2d 397, 400–01 (7th Cir. 1992) (describing the lower courts' confusion in determining municipal liability). *Compare Brown*, 520 U.S. at 408, 435 (finding sheriff was a policymaker) *and* Harris v. Pagedale, 821 F.2d 499, 508 (8th Cir. 1987) (finding that municipality was deliberately indifferent to allegations of sexual assault), *with* Greensboro Prof'l Fire Fighters Ass'n. v. Greensboro, 64 F.3d 962, 965–66 (4th Cir. 1995) (determining fire chief was not a policymaker) *and* Wilson v. Chicago, 6 F.3d 1233, 1240–41 (7th Cir. 1993) (ruling municipality was not deliberately indifferent to allegations of abuse).

86. *Brown*, 520 U.S. at 434.

87. Connick v. Thompson, 131 S. Ct. 1350 (2011). Although *Connick* did not address claims of the excessive use of force, the affirmation of the deliberate indifference standard and the high burden the decision imposed upon plaintiffs will be similarly applied to municipalities that fail to train or inadequately train police officers who continually impinge upon the constitutional rights of citizens. *Id.*

88. *Id.*

89. *Id.*

subsequent jury trial for a murder charge against him.[90] Thompson was convicted of murder and spent eighteen years in prison, including thirteen on death row.[91] Shortly before his execution date, an investigator discovered the evidence that prosecutors failed to disclose during his robbery trial.[92] Both of Thompson's convictions were vacated, and this suit followed.

To succeed under the deliberate indifference standard, Thompson had to show that the District Attorney was on notice it was so predictable prosecutors would make evidence disclosure mistakes absent specific training that failure to train the prosecutors amounted to a conscious disregard of Thompson's rights.[93] The majority reasoned that failure to train the prosecutors on evidence disclosure requirements did not amount to a deliberate indifference of Thompson's rights because the prosecutors received such training while obtaining their juris doctorates.[94] By this same logic, the Court distinguished the municipal employees' violation of Thompson's rights from the *Canton* and *Brown* hypothetical rights violation that would amount to a deliberate indifference.[95]

The majority then reiterated that stringent fault standards must be adhered to prevent municipal liability under § 1983 from collapsing into respondeat superior.[96] However, the Court again failed to offer any reasoning for why these assertions must be taken as true.[97] Specifically, the Court did not mention, let alone explain, why a lesser standard than deliberate indifference would fail to accomplish the goal of preventing municipal liability from becoming respondeat superior liability.[98] All that was provided was a bare assertion with citations to the Court's past decisions.[99]

The dissenting opinion pointed out four specific reasons why the Court should have found the district attorney's office deliberately indifferent to Thompson's rights: (1) the district attorney, as the office's sole policymaker, did not understand the disclosure requirements; (2) those in the office who were

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1365.

94. *Id.* at 1361–66. The prior training consisted of taking Criminal Procedure in law school. One of the four prosecutors who violated Thompson's rights admitted he did not remember the disclosure requirements from law school. Another prosecutor admitted that his law school did not require students to take Criminal Procedure. *Id.* at 1385.

95. *See id.* at 1361–63 (arguing that the facts before the Court were sufficiently different than the *Canton* hypothetical because the municipal employees had knowledge of the constitutional implications of their actions via the training they received in preparation for entering into the profession).

96. *Id.* at 1365.

97. *See id,* at 1365 (providing no empirical or statistical support for why a standard any less stringent would result in respondeat superior liability).

98. *Id*.

99. *See id.* at 1360 (citing Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986) and City of Canton v. Harris, 489 U.S. 378, 392 (1989)).

directly responsible for training less experienced prosecutors were also uninformed; (3) prosecutors in the office did not receive any training on disclosure requirements; and (4) the office did not keep prosecutors up to date on relevant legal developments concerning disclosure requirements.[100] Moreover, several other facts supported a different outcome: the district attorney admitted that he failed to provide training even though he was aware that prosecutors would regularly face evidence disclosure decisions;[101] there were no repercussions for attorneys who violated evidence disclosures rules;[102] and, when the district attorney retired, more than half of the assistant attorneys in the office revealed that they had not received the training needed to do their jobs.[103]

It is only natural that such a widespread lack of understanding, enforcement, and accountability would lead prosecutors to violate the disclosure requirements and, in doing so, violate the constitutional right of a private citizen to receive those disclosures.[104] In spite of this evidence, the Court did not find that the prosecutor's need for training was "so obvious," or that the lack of training was "so likely" to result in constitutional violations, such that the actions amounted to a deliberate indifference to the rights of the plaintiff.[105] If the acts of the municipality in *Connick* did not amount to a deliberate indifference of the Plaintiff's constitutionally protected rights, it is hard to imagine that the facts of Mr. Brown's, Mr. Garner's, or young Mr. Rice's cases will be able to survive the Supreme Court's interpretation of the standard.[106]

D. Municipal Policy or Custom

Monell, *Canton*, *Brown*, and *Connick* all held, with slight variation, that the municipality must have a policy or custom that causes the plaintiff to suffer injury of a federally protected right in order to impose municipal liability in a § 1983 action.[107] However, the Supreme Court did not define what constitutes a

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100. *Id.* at 1378.

101. *See id.* at 1382, 1387 (Ginsburg, J., dissenting) (explaining that the district attorney admitted he was certain that prosecutors would confront issues of evidence disclosure and that he had also been indicted for suppressing evidence).

102. *See id.* (pointing out that no prosecutor was disciplined or fired for violating evidence disclosure requirements).

103. *Id.* at 1380.

104. *See id.* (arguing it was inevitable that prosecutors would misapprehend disclosure requirements due to the widespread lack of understanding of the requirements in the district attorney's office).

105. *Id.* at 1366. *See also* City of Canton v. Harris, 489 U.S. 378, 390 (1989) (noting there may be limited circumstances in which the need for training is so obvious, or the lack of training so likely to result in constitutional violations, that a municipality is deliberately indifferent to the consequences of failing to train or inadequately training municipal employees).

106. *Id.* at 1378–80 (Ginsburg, J., dissenting) (providing a multitude of reasons why the DA's office was deliberately indifferent to the rights of Thompson).

107. *Id.* at 1365; *Monell*, 436 U.S. at 694; *Canton*, 489 U.S. at 385; *Brown*, 520 U.S. at 417.

municipal policy or custom in those cases.[108] In *Bryson v. Oklahoma City*, the Tenth Circuit defined a municipal "policy" or "custom" as:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.[109]

This Comment analyzes the deliberate indifference standard under the definitions of municipal "policy" and "custom" provided in *Bryson*.

E. The Deliberate Indifference Standard Provides Municipalities with an Unreasonable Level of Insulation from § 1983 Claims

The Supreme Court decisions discussed above create so many hurdles for plaintiffs seeking to recover against a municipality that, in effect, many cases are decided before they are presented to a court.[110] As Justice Souter stated in his dissenting *Brown* opinion, the Supreme Court's skepticism of municipal liability has "gone too far."[111]

In each case where the Supreme Court affirmed the deliberate indifference standard, it expressed a desire to avoid respondeat superior liability.[112] A thorough examination of how respondeat superior liability would function in

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108. *Id*.

109. Bryson v. Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (internal quotations omitted). A full analysis of what amounts to a municipal "policy" or "custom" is outside the scope of this Comment. However, the *Bryson* court's definition is comprehensive and incorporates other court's characterizations of these terms. *Id.*

110. *See* Bd. Cty. Comm'rs Cty. v. Brown, 520 U.S. 397, 416–21 (1997) (Souter, J. dissenting) (arguing against the majority's "policy" or "custom" requirement and the requirement that the "particular" harm must be "plainly obvious").

111. *Id.* at 423.

112. *See* Connick v. Thompson, 131 S. Ct. 1350, 1365 (2011) (reasoning that *Monell* established that respondeat superior must be avoided); *Brown*, 520 U.S. at 406 (observing the Court's precedent of avoiding respondeat superior since *Monell*); City of Canton v. Harris, 489 U.S. 378, 391–92 (1989) (reasoning that the teaching of *Monell* was to avoid respondeat superior liability in § 1983 claims).

§ 1983 claims is beyond the scope of this Comment.[113] Nor does this Comment suggest respondeat superior should apply in this context.[114] However, one must wonder whether a desire to avoid respondeat superior liability is adequate justification for repeatedly refusing to impose municipal liability.[115] If respondeat superior is liability without fault, the deliberate indifference standard has been interpreted, in effect, as the opposite: a standard of no liability even when fault is present.[116]

Justice Souter's dissent accurately described the result of repeatedly adhering to the deliberate indifference standard.[117] The skepticism of respondeat superior liability has converted the deliberate indifference standard in § 1983 actions into a "virtually categorical impossibility," even in cases where the facts are seemingly sufficient to impose municipal liability.[118] A desire to avoid respondeat superior liability should not result in complete insulation of municipalities when a municipal policy or custom has caused a substantial and cognizable injury to a plaintiff.[119] A new standard—that of "conscious disregard"—would accomplish what many thought *Monell* was supposed to accomplish: namely, to make municipalities subject to liability under § 1983.[120]

III. A NEW STANDARD IS NEEDED

While supporters of the deliberate indifference standard have a legitimate basis for desiring a strict standard for imposing municipal liability,[121] municipal insulation has gone too far.[122] Currently, there is no effective deterrent to the

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113. For a complete analysis and arguments in support of imposing respondeat superior liability on municipalities see Charles A Rothfeld, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 6 U. CHI. L. REV. 935 (1979).

114. *See infra* Part V.B. (arguing against respondeat superior).

115. *See Connick*, 131 S. Ct. 1350 (finding district attorney's office was not deliberately indifferent to rights of plaintiff); *Brown*, 520 U.S. 397 (holding Sheriff's Department was not deliberately indifferent to rights of plaintiff); *Canton*, 489 U.S. 378 (affirming the deliberate indifference standard and suggesting Harris did not meet the standard); *see also* Cron et al., *supra* note 28, at 584, 608 (outlining the Court's stance in regards to municipal liability).

116. *See Connick*, 131 S. Ct. 1350 (holding deliberate indifference standard was not met); *Brown*, 520 U.S. 397 (ruling plaintiff did not meet burdens imposed by deliberate indifference standard); *Canton*, 489 U.S. 378 (suggesting municipality was not deliberately indifferent to the rights of the plaintiff).

117. *Brown*, 520 U.S. at 423 (Souter, J., dissenting).

118. *Id.* at 421.

119. *See Connick*, 131 S. Ct. 1350 (expressing a desire to avoid respondeat superior liability); *Brown*, 520 U.S. at 397 (observing Court's precedent to avoid respondeat superior liability); *Canton*, 489 U.S. 378 (reasoning that the standard of municipal liability should not mirror respondeat superior liability).

120. *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality* Cases, 44 HASTINGS L.J. 499, 521–23 (1993) (explaining the approach in *Monell* and what the case stood for at the time).

121. *See infra* Part V (discussing countervailing concerns).

122. *Supra* Part II.E.

recent patterns and practices of excessive force by police departments.[123] Instead, the inconsistent application of the deliberate indifference standard has a net deterrent effect on potential plaintiffs.[124]

A. *Deterring Excessive Force*

Courts must deter municipal patterns or practices that allow for violations of citizens' constitutionally protected rights.[125] Department of Justice (DOJ) investigations in Cleveland and Ferguson indicate that these municipalities have employed policies and customs that result in repeated constitutional rights violations.[126] But these two investigations are not anomalous—the DOJ has launched more than thirty civil rights investigations into police departments across the nation.[127] This indicates that the current standard for municipal liability is not an effective deterrent of municipal policies or customs that promote excessive use of force by police officers.[128]

Surprisingly, there is no comprehensive accounting of how many police shootings occur per year in our nation's 17,000 police departments.[129] Many police departments file shooting reports during some years, but not others, and many do not file police shooting reports at all.[130] However, studies have emerged that evidence a significant, disproportionate use of deadly force by police officers during encounters with persons of color as compared to encounters with Caucasians.[131]

Whether a municipality fails to train employees, inadequately trains employees, or employs practices that lead to a municipal employee violating a

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123. *Infra* Part III.A.

124. *Infra* Part III.B.

125. *See* INVESTIGATION OF CDP, *supra* note 2 (concluding that the Cleveland Police Department engages in a pattern or practice of the excessive use of force that must change); *see also* Horwitz, *supra* note 18 (describing the Justice Department's report of the Albuquerque Police Department, which concluded there had been repeated incidents of the use of deadly and excessive force in violation of citizens' constitutional rights when there was no imminent threat to them or the community); Larry Kramer & Alan O. Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249 (1987) (arguing that the current standard for municipal liability under § 1983 claims is economically inefficient).

126. *See* INVESTIGATION OF CDP, *supra* note 2 (describing Cleveland's pattern of excessive use of force); Attorney General Remarks, *supra* note 20 (detailing that Attorney General Holder called for "wholesale changes" in the Ferguson police department); *see also* DOJ INVESTIGATION OF FERGUSON, *supra* note 2 (detailing findings of the investigation into the Ferguson Police Department's policies and practices).

127. Horwitz, *supra* note 18 (noting that most investigations result in lawsuits by the Justice Department against the police department).

128. *See id.* (outlining the DOJ's investigations into police departments across the nation).

129. *See* Lowenstein, *supra* note 2, *and* Gabrielson, *supra* note 2 (describing the failure of police departments to statistically account for victims of police shootings).

130. *See id.* (describing the varying rates of police accounting of police shootings).

131. *See id.* (detailing the racial disparity among victims in the few police departments that do account for victims of police shootings).

citizen's rights, deterrence is the only way to stop these unsound police practices.[132] The best form of deterrence that the Courts can provide is reducing the burden of proof for imposing municipal liability.[133] The threat of substantial monetary damages against a municipality will create an economic incentive among policymakers to promote better patterns of practice and better training of municipal employees.[134] When a court holds a municipality accountable for constitutional rights violations, it forces the municipality to address unsound policies and practices in order to prevent similar violations from occurring in the future.[135] Municipal liability makes "reform of police practices an economic, as well as political imperative."[136]

B. *Interpretation of the Deliberate Indifference Standard is Far From Uniform and Deters Plaintiffs*

The judicial interpretations of the Supreme Court decisions discussed above are far from uniform, especially when defining municipal "policy" or "custom."[137] Moreover, there has been no uniformity as to what conduct does or does not amount to a deliberate indifference of private citizens' constitutionally protected rights.[138] There have been occasions when lower courts held that a municipality was deliberately indifferent to a constitutionally protected right of a plaintiff.[139] However, the Supreme Court has yet to find a municipality liable under the deliberate indifference standard in a § 1983 action.[140]

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132. *See* INVESTIGATION OF CDP, *supra* note 2 (concluding that the CPD engages in a pattern or practice of excessive use of force that must be changed). *See also* Connick v. Thompson, 131 S. Ct. 1350 (2011) (holding the DA's office was not liable); Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997) (finding no deliberate indifference on behalf of the Sheriff's department); City of Canton v. Harris, 489 U.S. 378 (1989) (suggesting lower courts should not find municipal liability on remand).

133. Kramer, *supra* note 125.

134. *Id.*

135. Cron et al., *supra* note 28, at 607.

136. Colbert, *supra* note 120, at 502.

137. *See also* Auriemma v. Rice, 957 F.2d 397, 400–401 (7th Cir. 1992) (observing confusion in courts when determining municipal liability). *Compare Brown*, 520 U.S. at 408 (sheriff was a policymaker), *with* Greensboro Prof'l Fire Fighters Ass'n. v. Greensboro, 64 F.3d 962, 965–966 (4th Cir. 1995) (fire chief not a municipal policymaker).

138. *See, e.g.*, *Brown*, 520 U.S. at 435 (finding no municipal liability under the deliberate indifference standard); *see also Auriemma*, 957 F.2d at 400–01 (explaining that courts have not applied the standard consistently).

139. *See, e.g.*, Harris v. Pagedale, 821 F.2d 499, 505–08 (8th Cir. 1987) (holding that municipality was deliberately indifferent to allegations of sexual assault).

140. *See* Connick v. Thompson, 131 S. Ct. 1350 (2011) (holding that the DA's office was not deliberately indifferent to consequences of failing to train employees); *Brown*, 520 U.S. 397 (finding that facts did not satisfy deliberate indifference standard); City of Canton v. Harris, 489 U.S. 378 (1989) (suggesting that the municipality was not deliberately indifferent to the rights of plaintiff).

Even more concerning is that there is no way to determine the true impact of the deliberate indifference standard. There is no way to quantify how many potential plaintiffs are deterred from filing § 1983 claims against municipalities because of the burdens imposed by the deliberate indifference standard.[141] There are no statistics indicating how many claims settle confidentially for a low sum when a municipality's actions are particularly egregious.[142] The legal field would be best served by leaving the varying interpretations and counterintuitive results of the deliberate indifference standard in the past and providing plaintiffs with a new standard for municipal liability in § 1983 claims.[143]

IV. UNDERSTANDING THE NEED FOR QUALIFIED IMMUNITY, AVOIDING RESPONDEAT SUPERIOR, AND A STRINGENT STANDARD FOR IMPOSING MUNICIPAL LIABILITY IN § 1983 ACTIONS

This Part deals with alternative approaches proposed by commentators to curtail the excessive use of force by police officers.[144] Section A explores the advantages of qualified immunity and argues for its retention.[145] Section B identifies the advantages of a tough standard of liability and argues that respondeat superior is not the best standard for municipal liability in § 1983 claims.[146]

A. *Officers Need Qualified Immunity to Serve and Protect*

We must not lose sight that thousands of police officers put their lives in danger every day to ensure that the rest of us are not in harm's way.[147] The vast

141. *See* Cron et al., *supra* note 28, at 604 (explaining that high standards of municipal liability have resulted in a scarcity of successful claims in the federal courts); *see also Brown*, 520 U.S. at 421 (Souter, J., dissenting) (arguing that the deliberate indifference standard of fault is a "virtually categorical impossibility" in many cases where the evidence is sufficient to support a finding of municipal liability).

142. *See, e.g.*, INVESTIGATION OF CDP, *supra* note 2, at 15 (indicating that the Cleveland Police Department has settled many allegations of excessive force on confidential terms and diminishing transparency on confidential terms, thereby calling for serious review of these cases going forward).

143. *See infra* Part V (suggesting a conscious disregard standard).

144. *See* Rothfeld, *supra* note 113 (discussing respondeat superior's role in municipal liability); see also Kramer, *supra* note 125 (arguing that the current standard for municipal liability under § 1983 claims is economically inefficient); *see also* David P. Stoelting, *Qualified Immunity for Law Enforcement Officials in Section 1983 Excessive Force Cases*, 58 U. CIN. L. REV. 243 (1990) (arguing that qualified immunity should not be applied at all).

145. *Infra* Part IV.A.

146. *Infra* Part IV.B.

147. *See* NAT'L LAW ENFORCEMENT MEM'L FUND, LAW ENFORCEMENT FACTS: KEY DATA ABOUT THE PROFESSION, http://www.nleomf.org/facts/enforcement/?print=t (last visited Dec. 19, 2014) (on file with *The University of the Pacific Law Review*) (indicating that there are more than 900,000 law enforcement officers serving in the U.S.); *see also* NAT'L LAW ENFORCEMENT MEM'L FUND, OFFICER DEATHS BY YEAR, http://www.nleomf.org/facts/officer-fatalities-data/year.html?print=t (last updated April 24, 2014) [hereinafter

majority of police officers do their best to keep the streets safe for our mothers, brothers, and children.[148] There is no denying that effective police forces are necessary for our society to function—the alternative would be chaos.[149] Yet, many take for granted the protection afforded to them by our nation's police officers and argue that officers should not be entitled to qualified immunity.[150]

Officers cannot and should not be thinking about the risks of an impending lawsuit when there is a genuine belief that their lives, or the lives of others, are in danger.[151] It would restrict the officers' ability to keep the peace if the law said otherwise.[152] Society needs police officers to keep our streets safe, and to keep our streets safe, police officers need the ability to use force.[153] The problem does not lie in the officers' ability to use force, but rather, it lies in the lack of accountability when officers in a particular municipality *continually and unreasonably* use excessive force.[154]

B. *Respondeat Superior Needs to Be Avoided*

Previous sections criticized the Supreme Court's reasoning in repeatedly affirming the deliberate indifference standard in § 1983 actions.[155] To be clear,

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"OFFICER DEATHS"] (on file with *The University of the Pacific Law Review*) (noting that there were 2,211 police officers killed in the line of duty from 2000 to 2013); *see also* Press Release, FBI, FBI Releases 2013 Statistics on Law Enforcement Officers Killed and Assaulted (Nov. 24, 2014), *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2013-statistics-on-law-enforcement-officers-killed-and-assaulted (on file with *The University of the Pacific Law Review*) (noting that 49,851 officers were assaulted in the scope of duty in 2013).

148. *See* DISASTER CTR., UNITED STATES CRIME RATES 1960–2013 (2014), *available at* http://www.disastercenter.com/crime/uscrime.htm (on file with *The University of the Pacific Law Review*) (showing a steady decline in the total number of crimes since 2002).

149. *See* George L. Kelling & James Q. Wilson, *Broken Windows*: *The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1, 1982), *available at* http://www.theatlantic.com/magazine/archive/1982/03/broken windows/304465/? single_page=true (on file with *The University of the Pacific Law Review*) (arguing that the presence of a police forces in communities has a limiting effect on the evolution of crime and community degradation).

150. *See, e.g.*, Stoelting, *supra* note 144 (arguing against qualified immunity).

151. S*ee* Harlow v. Fitzgerald, 102 S. Ct. 2727, at 2732, 2735–36 (1982) (describing the policy behind Qualified Immunity); *see also* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989) (describing the policy behind qualified immunity).

152. S*ee Harlow*, 102 S. Ct. at 2732, 2735–36 (explaining the reasoning in support of qualified immunity).

153. *See* Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (arguing that one rationale for qualified immunity is that officials need to be shielded from harassment, distraction, and liability when they perform their duties reasonably); s*ee generally Harlow*, 102 S. Ct. 2727.

154. *See, e.g.*, INVESTIGATION OF CDP, *supra* note 2 (detailing various accounts of the Cleveland division of police that exhibits a pattern of the excessive use of force); *see also* Attorney General Remarks, *supra* note 20 (describing the ongoing investigation into the Ferguson Police Department's practices in the use of force).

155. *See supra* Part III.A. (analyzing the Court's reliance on avoiding respondeat superior as a reason for affirming the deliberate indifference standard).

that criticism is not focused on the reasoning per se, but rather, on the Court's over-reliance on that reasoning.[156] Like *Monell, Canton, Brown,* and *Connick,* this Comment agrees that municipal liability should not collapse into respondeat superior liability.[157]

The first reason to avoid respondeat superior liability is that it is inconsistent with the language of § 1983.[158] Employing a plain reading of § 1983, liability attaches to any person who "subjects [another], or *causes* [another] to be subjected" to the deprivation of constitutionally protected rights.[159] The language indicates the drafters' intent to impose liability only when a municipality is responsible for an officer's violation of the constitutional rights of another.[160]

Another reason to reject municipal liability that mirrors respondeat superior liability is the economic effect it would have on already-burdened municipalities.[161] Clever counsel would be able to craft material issues of fact in an attempt to induce settlement with municipalities that fear the monetary consequences of putting a sympathetic plaintiff in front of a jury.[162] Municipalities may be crippled and face bankruptcy as a result of such lawsuits.[163] Any new standard must address these concerns to be an effective and desirable solution.

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156. *See* Connick v. Thompson, 131 S. Ct. 1350 (2011) (relying primarily on an argument against respondeat superior); Bd. of Cty. Comm'rs of Bryan Cty. Brown, 520 U.S. 397 (1997) (relying on the *Monell* and *Canton* precedent of avoiding respondeat superior); City of Canton v. Harris, 489 U.S. 378 (1989) (allowing no reasoning other than avoiding a standard of liability that mirrored respondeat superior liability).

157. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 692–94 (1978); *Connick,* 131 S. Ct. at 1365; *Brown*, 520 U.S. at 416; *Canton*, 489 U.S. at 391–92.

158. 42 U.S.C. § 1983 (West 2014).

> 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. Respondeat superior is not an imposition of liability due to a finding of fault. Rather, it is an imposition of liability based on the employer-employee relationship. BLACK'S LAW DICTIONARY (10th ed. 2014). *See also Monell*, 436 U.S. at 692 (arguing that the legislative intent cuts against the imposition of respondeat superior liability in the context of § 1983 claims).

159. 42 U.S.C. § 1983 (West 2014) (emphasis added).

160. *Monell*, 436 U.S. at 692.

161. *See* Rothfeld, *supra* note 113, at 963 (observing that the economic pressure of municipal liability forces the municipality to make difficult choices). *But see* Kramer, *supra* note 125 (explaining the economic inefficiency of the deliberate indifference standard).

162. *See* Jim Christie, *Stockton, California Files for Bankruptcy*, REUTERS, *available at* http://www.reuters.com/article/2012/06/29/us-stockton-bankruptcy-idUSBRE85S05120120629 (on file with *The University of the Pacific Law Review*) (observing the effect municipal liability has on municipalities). Stockton is only one of many notable U.S. cities (others include Vallejo, California. and Detroit, Michigan) to file for municipal bankruptcy, supporting the theory that respondeat superior liability can rack up millions of dollars in judgments against municipalities, forcing them to file for Chapter 9 bankruptcy.

163. *Id.*

V. THE CONSCIOUS DISREGARD STANDARD—LESS STRINGENT THAN DELIBERATE INDIFFERENCE, BUT MORE STRINGENT THAN NEGLIGENCE

Section A of this Part defines "conscious disregard."[164] Section B proposes a conscious disregard standard for municipal liability.[165] Section C details why conscious disregard is the proper standard for municipal liability under § 1983 claims.[166] Section D explains that the new standard would not be a great departure from precedent.[167] Section E argues that the conscious disregard standard addresses the inherent inconsistency of *Monell*.[168]

A. Definition and Other Uses—California & Nevada[169]

California has applied a conscious disregard standard in cases involving bad faith insurance, wrongful discharge of an employee, products liability, drunk driving, and gross negligence.[170] In the context of employer liability, California allows punitive damages when "[an] employer has advance knowledge of the unfitness of an employee, and employs [said employee] with a *conscious disregard* of the rights or safety of others."[171] A plaintiff may also receive punitive damages if the employer "authorized or ratified the wrongful conduct" that led to the plaintiff's damages.[172] California requires that a corporation's officer, director, or managing agent exhibit "a conscious disregard of the rights or safety of others."[173]

California's requirement that an "officer, director, or managing agent of [a] corporation" must consciously disregard the rights or safety of others in order to impose punitive damages is analogous to the requirement that a municipal "policy" or "custom" must cause the violation of the plaintiff's constitutional rights under the deliberate indifference standard.[174] In order to impose liability,

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164. *Infra* Part VI.A.

165. *Infra* Part VI.B.

166. *Infra* Part VI.C.

167. *Infra* Part VI.D.

168. *Infra* Part VI.B.

169. This Comment proposes that the conscious disregard standard be used in all states, but is only using California and Nevada as examples.

170. *See* Bruce C. Bennett, *Punitive Damages in California under the Malice Standard: Defining Conscious Disregard*, 57 S. CAL. L. REV. 1065 (1984) (examining the application of the conscious disregard standard in these areas of the law).

171. CAL. CIV. CODE § 3294 (West 2014) (emphasis and substitutions added).

172. *Id.*

173. *Id.*

174. *Compare id.*, *with* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978) *and* City of Canton v. Harris, 489 U.S. 378 (1989) *and* Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997) *and* Connick v. Thompson, 131 S. Ct. 1350 (2011).

both standards require persons in managing positions to ignore warning signs that an employee may engage in "wrongful acts" that lead to "harmful consequences" for those persons that the employee comes in contact with.[175]

The California legislature did not provide parameters as to what constitutes a "conscious disregard."[176] However, California's sister state, Nevada, codified a definition of the term.[177] Under Nevada law, a finding of conscious disregard requires proof of two elements: (1) "knowledge of probable harmful consequences of a wrongful act," and (2) "willful and deliberate failure to act to avoid those consequences."[178] Nevada's definition of "conscious disregard" provides a framework for crafting a new conscious disregard standard for municipal liability under § 1983.

B. The Standard

The Court should revisit the standard for municipal liability in § 1983 actions and provide an actual definition to prevent confusion and varying application by lower courts.[179] A standard of conscious disregard that combines the California law for imposing punitive damages with the definition from the Nevada Legislature would remedy the failings of the deliberate indifference standard.[180] This comment proposes the courts adopt the following standard for imposing municipal liability in § 1983 actions:

> (a) knowledge of probable harmful consequences of a wrongful act; and[181]
>
> (b) willful or deliberate failure to avoid those consequences;[182]
>
> (c) by a municipal policymaker, or those persons acting on behalf of a municipal policymaker.[183]

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175. *Compare* CAL. CIV. CODE § 3294 (West 2014), *with* Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 403 (1997) (arguing that locating a policy ensures a municipality is held liable only for rights deprivations resulting from decisions that "may fairly be said to be those of the municipality") *and* Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011) (arguing that the municipal policy requirement ensures a municipality is liable only for "actions for which the municipality is actually responsible").

176. *See* Bennett, *supra* note 170, at 1091 (proposing a definition for the conscious disregard standard).

177. NEV. REV. STAT. § 42.001 (West 2014).

178. *Id.*

179. *See* Auriemma v. Rice, 957 F.2d 397, 400–401 (7th Cir. 1992) (expanding on the confusion in courts).

180. *Compare* CAL. CIV. CODE § 3294 (West 2014) *and* NEV. REV. STAT. § 42.001 (West 2014) (using conscious disregard), *with* Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997) *and* Connick v. Thompson, 131 S. Ct. 1350 (2011) (upholding deliberate indifference).

181. STAT. § 42.001.

182. *Id.*

This Comment revisits these elements when analyzing the facts of the Brown, Garner, and Rice cases under both the deliberate indifference standard and the proposed conscious disregard standard.[184]

C. The Right Balance: A Perennial "Middle-Ground"

The analysis of *Canton*, *Brown*, and *Connick* indicates that the Supreme Court's application of the deliberate indifference standard has insulated municipalities from liability under § 1983 claims.[185] Although municipal liability should not collapse into respondeat superior liability, the standard employed should not completely insulate municipalities in cases where the factual record is sufficient to support a finding of liability.[186]

This standard can satisfy both sides of the debate if applied properly. The conscious disregard standard will preserve *Monell, Canton, Brown,* and *Connick*'s precedent of not imposing municipal liability under the theory of respondeat superior.[187] It will require a plaintiff to prove that there was a municipal pattern or practice that led to the violation of plaintiff's constitutional rights, thereby ensuring a municipality is liable only for "the actions for which it is actually responsible."[188]

Unlike the deliberate indifference standard, the conscious disregard standard provides an effective remedy for plaintiffs who have suffered constitutional violations at the hands of municipal employees.[189] The current standard often functions as an impossible barrier to relief.[190] Although a court may consider a particular municipal "policy" or "custom" as exhibiting an indifference to the

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183. *See* CIV. § 3294 (deleting "officer" to prevent confusion in context of excessive force claims, and deleting "director" and "managing agent" to remain as consistent as possible to the Supreme Court's precedent and to reduce unnecessary language).

184. *See infra* Part VI (applying both standards to the facts of these three cases).

185. *See Connick*, 131 S. Ct. 1350 (denying municipal liability); *Brown*, 520 U.S. 397 (holding the deliberate indifference standard was not met); *Canton*, 489 U.S. 378 (affirming the deliberate indifference standard); *see also supra* Part III (analyzing the Court's reasoning in these cases).

186. *See supra* Part II.E.

187. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978) (denying municipal liability that would come close to respondeat superior liability; City of Canton v. Harris, 489 U.S. 378 (1989) (suggesting respondeat superior must be avoided); Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997) (reasoning that the Court's precedent is to avoid respondeat superior in § 1983 claims); Connick v. Thompson, 131 S. Ct. 1350 (2011) (arguing against respondeat superior liability in § 1983 claims).

188. *See Canton*, 489 U.S. 378 (promoting the "policy" or "custom" requirement of the deliberate indifference standard); *Brown*, 520 U.S. 397 (upholding the "policy" or "custom" requirement); *Connick*, 131 S. Ct. at 1359 (2011) (arguing the "policy" or "custom" requirement is necessary to prevent respondeat superior liability in §1983 claims).

189. *See supra* Part II.E.

190. *Brown*, 520 U.S. 397.

rights of a citizen, the court will generally not interpret the policy as amounting to a deliberate indifference.[191]

The conscious disregard standard addresses this problem by reducing the burden of proving municipal liability in § 1983 actions.[192] Instead of the confusing, repetitive language of the deliberate indifference standard, the conscious disregard standard will provide a workable definition for lower courts.[193] The language is clear and the goal is straightforward: prevent municipalities from engaging in patterns or practices that violate the constitutional rights of citizens.[194]

D. Not a Departure from Precedent

City of Canton v. Harris established the deliberate indifference standard in § 1983 actions and interchangeably referred to a municipality's "deliberate" or "conscious" choice in failing to train or inadequately training a municipal employee as a basis for municipal liability.[195] Additionally, *Board of County Commissioners of Bryan County v. Brown* used the language of a "conscious disregard for the consequences of their action" in affirming the deliberate indifference standard.[196] Finally, the most recent Supreme Court case affirming the deliberate indifference standard in § 1983 actions, *Connick v. Thompson*, used the language "conscious disregard" when analyzing whether the acts of the district attorney's office amounted to deliberate indifference to the rights of the respondent.[197]

For these reasons, the conscious disregard standard would not be a great departure from Supreme Court precedent.[198] Rather, it would provide much-needed clarity to a standard that has been difficult to define and set boundaries

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191. *Id.* at 411 (arguing that the Sheriff's actions may have amounted to an indifference that the officer would violate the rights of plaintiff, but not a deliberate indifference).

192. *See* Bennett, *supra* note 170, at 1092 (indicating that conscious disregard is less stringent than actual malice and more stringent than simple negligence).

193. *See Canton*, 489 U.S. at 390 (describing municipal decisions that were "so likely" or "plainly obvious" to result in a violation of constitutional rights" as possible bases for municipal liability); *see also Connick*, 131 S. Ct. 1350 (need for training was not "so obvious" that district attorney was deliberately indifferent to need for such training).

194. *See, e.g.*, INVESTIGATION OF CDP, *supra* note 2 (explaining DOJ's finding that the Cleveland Division of police exhibited a pattern or practice of the excessive use of force); DOJ INVESTIGATION OF FERGUSON, *supra* note 2 (finding the Ferguson Police Department displayed a pattern or practice of excessive force).

195. *Canton*, 489 U.S. at 389.

196. Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 407 (1997) (referring to "their" as the municipality).

197. *Connick*, 131 S. Ct. at 1365.

198. *Canton*, 489 U.S. 378.

under.[199] This standard will deter unsound municipal practices and enhance the protection of individual civil liberties while ensuring municipalities are not liable under a theory that mirrors respondeat superior.[200]

E. The Conscious Disregard Standard Addresses the Inconsistency of Monell

If a municipality cannot be held liable for the sort of actions the sheriff's department took in *Brown* and the district attorney's office took in *Connick*, then what was the point of *Monell*?[201] There was no reason to create a right for plaintiffs to bring a civil rights claim against a municipality and then impose a standard for obtaining relief that borders on the impossible.[202] The deliberate indifference standard precludes recovery for too many who have suffered § 1983 violations at the hands of municipal employees, and the conscious disregard standard is better suited to bring relief to plaintiffs who bring these claims.[203]

VI. How the Standards Would Play Out in the Cases of Michael Brown, Eric Garner, and Tamir Rice[204]

This Part will apply both the deliberate indifference standard and the conscious disregard standard to the facts surrounding the deaths of each of these young men.[205]

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199. Auriemma v. Rice, 957 F.2d 397, 400–01 (7th Cir. 1992).

200. *See supra* Part IV.B. (arguing that many current police practices need deterring); *see also Canton*, 489 U.S. 378; *Brown*, 520 U.S. 397; *Connick*, 131 S. Ct. 1350 (arguing against respondeat superior liability in § 1983 claims).

201. Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978). *See* David J. Achtenberg, *Taking History Seriously: Municipal Liability under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2184 (2005) (tracing the history and justifications of the *Monell* Doctrine).

202. *See Monell*, 436 U.S. 658 (holding that municipalities could be sued as "persons" under 42 U.S.C. § 1983); *see also* City of Canton v. Harris, 489 U.S. 378 (1989) (establishing the deliberate indifference standard); *see further* Achtenberg, *supra* note 201 (recounting *Monell*'s history).

203. *See supra* Part II.E.

204. This Comment uses the analysis and reasoning of precedent of the Supreme Court to make an educated guess as to how the deliberate indifference standard would function if applied to the facts of the Michael Brown, Eric Garner, and Tamir Rice cases. This is not to say that the Court will not change its position in holding municipalities liable. There are always moments in history that result in changes to a Court's precedent. That being said, this Comment was written under the assumption that the Court will adhere to its current precedent. The same applies to the analysis of each case under the newly proposed conscious disregard standard.

205. *Infra* Part VII.A–D.

A. Michael Brown

A DOJ investigation into the Ferguson Police Department (FPD) found a pattern or practice of using excessive force in violation of the Fourth Amendment that was specifically targeted at African American residents.[206] At the time of Michael Brown's death, one former and five current members of the Ferguson police force faced unrelated federal lawsuits for excessive use of force.[207] The police department also conducted at least six internal investigations into the excessive use of force prior to Mr. Brown's death.[208] Despite having knowledge of their officers' use of excessive force, the Ferguson Police Department repeatedly put these officers into situations where civil rights violations were likely to occur.[209]

1. Estimation Under the Deliberate Indifference Standard

The conduct of the FPD is similar to, but more egregious than, the conduct of the sheriff's department in *Brown*.[210] Federal claims and internal investigations into the FPD included allegations that a twelve-year-old boy was "hog-tied" for checking his family's mailbox; that officers "pistol-whipped" young children; that officers killed a mentally ill man with a stun gun; and that officers used canines to injure nonviolent offenders, including children.[211]

In *Brown*, the officer who used excessive force when arresting the respondent had a recent history of violent behavior.[212] The officer's history should have alerted the sheriff, acting as a municipal policymaker, that the particular officer was likely to use excessive force in violation of citizens' rights.[213] However, the Supreme Court found that the sheriff's department was not deliberately indifferent to the likelihood that the officer would use excessive

206. *See* DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 3–5 (detailing the findings of the investigation into the Ferguson Police Department's policies and practices).

207. Horwitz, *supra* note 18.

208. *See id.* (detailing federal claims and internal investigations into the Ferguson Police Department).

209. *Id.; see also* DOJ INVESTIGATION OF FERGUSON, *supra* note 2 (indicating that the Ferguson Police Department employed a pattern or practice of the excessive use of force especially targeted toward African American residents).

210. *Compare* Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 425–30 (1997) (detailing how the Sheriff, as policymaker, hired a relative of his as an officer after ignoring his criminal record and the likelihood of rights violations), *with* Horwitz, *supra* note 18 (describing the allegations against the Ferguson Police Department).

211. Horwitz, *supra* note 18; DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 31.

212. *Brown*, 520 U.S. at 428.

213. *Id.* at 429 (Souter, J., dissenting) (arguing that the officer's use of excessive force against the respondent was a "plainly obvious consequence of hiring him as a law enforcement officer authorized to employ force in performing his duties").

force in violation of the respondent's constitutionally protected rights.[214] If Michael Brown's case is tried consistent with the Supreme Court's precedent, a similar result will follow.[215]

2. *Estimation Under the Conscious Disregard Standard*

Taken together, the first and third prongs of the conscious disregard standard require a municipal policymaker to have knowledge of the probable harmful consequences of a wrongful act.[216] In this case, the wrongful act was the disproportionality of Ferguson officers' use of excessive force against the African American community.[217] The probable harmful consequences were that an officer's excessive use of force would gravely injure an African American member of the community.[218]

The DOJ investigation into the FPD indicates knowledge among policymakers of patterns of excessive force by Ferguson police officers.[219] The investigation indicates that FPD supervisors were aware that officers consistently used excessive force against vulnerable groups of the community, such as the mentally ill, the cognitively disabled, and juveniles.[220] Furthermore, the investigation indicates that the FPD was aware that the overwhelming use of excessive force was targeted at African Americans.[221] The findings indicate municipal policymaker knowledge of the probable harmful consequences of the FPD's wrongful conduct.

The second and third prongs of the conscious disregard standard require willful failure by the municipality to avoid the probable consequences of the FPD's wrongful acts.[222] The DOJ investigation into the FPD indicates that no corrective measures were taken to remedy the practice of excessive use of force, even though the practice was evident.[223] Rather, the status quo continued at least

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214. *Id.* at 415–16.

215. Again, this is assuming that the family of Mr. Brown will pursue a civil rights action against the Ferguson Police Department.

216. *See supra* Part V.B. (providing the three prongs of the proposed conscious disregard standard).

217. DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 62.

218. *Id.*; *see also* Transcript of Grand Jury Proceedings Vol. 5, *supra* note 4, at 229 (recounting the factual circumstances of Michael Brown's death in Ferguson).

219. *See* Attorney General Remarks, *supra* note 20 (describing policymaker actions and inaction as a basis for knowledge); DOJ INVESTIGATION OF FERGUSON, *supra* note 2 (describing patterns of excessive force throughout the Ferguson police force); *see also* Horwitz, *supra* note 18 (describing some of the Ferguson Police Department's unlawful acts).

220. DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 28.

221. *See id.* (indicating that ninety percent of excessive use of force incidents were aimed at African Americans).

222. *See supra* Part V.B. (introducing the conscious disregard standard).

223. *See* DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 38 (indicating that review of the use of force is ineffectual because supervisors do little investigation and do not see patterns of abuse that are evident).

until Officer Wilson shot and killed Mr. Brown.[224] Instead of implementing practices to promote public safety and effective law enforcement, many of the FPD's practices were focused on generating revenue.[225] The investigation indicates that officers viewed African Americans in Ferguson as "potential offenders and sources of revenue," rather than viewing them as members of the community that officers are responsible to protect.[226] This amounts to a willful failure by Ferguson policymakers to avoid the probable harmful consequences of Ferguson officers' wrongful conduct, and should, under the newly proposed standard, warrant municipal liability.[227]

B. Eric Garner

Prior to killing Eric Garner, Officer Pantaleo was the subject of three separate suits for civil rights violations, all by men who, like Mr. Garner, are African American.[228] Additionally, the NYPD Patrol Guide prohibited the use of chokeholds—the maneuver that led to Mr. Garner's death—for over twenty years.[229] Furthermore, between June 2013 and July 2014, the NYPD received more than 200 complaints for the use of chokeholds.[230] During this time, the NYPD developed a pattern of failing to hold officers accountable for violating the mandates of the chokehold ban, and, in doing so, promoted the maneuver.[231]

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224. *Id*.

225. *Id.* at 22. (outlining FPD's practice of generating revenue through policing).

226. *Id.* at 2.

227. *See supra* Part V.B.

228. *See* Kevin McCoy, *Choke-hold Cop Sued in Prior Misconduct Cases*, USA TODAY (Dec. 4, 2014, 9:21 PM), *available at* http://www.usatoday.com/story/news/nation/2014/12/04/choke-hold-cop-pantaleo-sued/19899461/ (on file with *The University of the Pacific Law Review*).

229. *See* Roberto A. Ferdman, *Why Quibbling about the Cause of Eric Garner's Death Completely Misses the Point*, WASH. POST (Dec. 3, 2014), *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/03/the-nypd-banned-chokeholds-20-years-ago-but-hundreds-of-complaints-are-still-being-filed/ (on file with *The University of the Pacific Law Review*) (detailing Officer Pantaleo's history of civil rights transgressions against African American men).

230. *See id.* (explaining that the NYPD failed to take action for the reported incidents of a banned maneuver).

231. N.Y.C. CIVILIAN COMPLAINT REV. BD., AN EVALUATION OF CHOKEHOLD ALLEGATIONS AGAINST MEMBERS OF THE NYPD FROM JANUARY 2009 THROUGH JUNE 2014 (2014), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/Chokehold%20Study_20141007.pdf [hereinafter CHOKEHOLD ALLEGATIONS] (on file with *The University of the Pacific Law Review*) (arguing that the department effectively endorses officers use of the chokehold maneuver by not enforcing the ban against it).

1. Estimation Under the Deliberate Indifference Standard

To begin with, the NYPD was aware that officers continually violated the department's chokehold ban.[232] Although the municipality had knowledge of these violations, it did not hold the officers accountable for the violations.[233] Moreover, the NYPD did not take any measures to prevent officers like Officer Pantaleo from violating the chokehold ban in the future.[234]

This is analogous to *Connick*, where the city banned the particular civil rights violation the plaintiff suffered: the failure to comply with required evidence disclosures.[235] The failure had occurred in the past, the municipality had knowledge that required evidence was not disclosed in the past, and no corrective measures were taken to prevent the violation from occurring in the future.[236] However, in *Connick* the Court held that this conduct did not amount to a deliberate indifference and did not impose municipal liability, albeit by a slim 5–4 majority.[237]

Perhaps the facts surrounding Mr. Garner's death would have led to a different result.[238] Perhaps these facts are so analogous to the hypothetical situations Justice O'Connor posited in *Canton* that the Court would have changed its position on imposing municipal liability under § 1983 claims.[239] However, the Court's precedent suggests the chances of that happening were quite improbable and was likely a major consideration in the Garner family's decision to accept a settlement offer releasing the city from liability.[240]

2. Estimation Under the Conscious Disregard Standard

The first and third prongs of the conscious disregard standard require municipal policymaker knowledge of the probable harmful consequences of a

232. *Id.*

233. *Id.*; *see also* Ferdman, *supra* note 229 (pointing out the NYPD's failure to take action after repeated chokehold incidents).

234. Ferdman, *supra* note 229.

235. Connick v. Thompson, 131 S. Ct. 1350 (2011).

236. *Id.* at 1374–84.

237. *Id.* at 1369.

238. *See supra* notes 9–12 and accompanying text.

239. *See* City of Canton v. Harris, 489 U.S. 378, 390 (1989) (providing hypothetical scenarios that should give rise to municipal liability); *see also supra* Part II.B. (providing *Canton*'s hypothetical situations).

240. *Connick*, 131 S. Ct. 1350; Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997); *Canton*, 489 U.S. 378; Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978); *see* J. David Goodman, *Eric Garner Case Is Settled by New York City for $5.9 Million*, N.Y. TIMES (July 13, 2015), *available at* http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html (on file with *The University of the Pacific Law Review*) (providing some of the considerations that went into the family's decision to accept the city's settlement offer).

wrongful act.[241] The wrongful act here was allowing officers to repeatedly violate the chokehold ban.[242] The probable harmful consequences of repeatedly allowing chokeholds were that someone would be gravely injured by the maneuver.[243] The two-hundred-plus complaints about chokehold usage in the year immediately preceding Mr. Garner's death gave the NYPD policymakers adequate knowledge of the probable harmful consequences of allowing officers to violate the chokehold ban.[244]

The second and third prongs of the conscious disregard standard require willful failure by the NYPD to avoid the probable consequences of its officers' wrongful acts.[245] First, the NYPD failed to enforce the chokehold ban and failed to hold officers accountable for violating the chokehold ban.[246] Second, the NYPD failed to remove Officer Pantaleo, a repeat offender, from foot patrol while he was a defendant in three pending lawsuits.[247] These two facts indicate a willful failure to avoid the probable consequences of allowing officers to violate the chokehold ban. Therefore, the conscious disregard standard would provide Mr. Garner's family with relief.[248]

C. Tamir Rice

When Officer Loehmann shot and killed Tamir Rice, Mr. Rice was playing alone at a park, not pointing his toy gun anywhere or at anyone.[249] When the officers approached in their vehicle, Mr. Rice did not point the fake gun at the officers, nor did he direct any threats toward the officers.[250] In fact, Mr. Rice's possession of the toy gun was in accordance with Ohio law at all times of the incident.[251] Nevertheless, Officer Loehmann fired his weapon twice within two seconds of approaching Mr. Rice.[252] Just twelve days after Mr. Rice's death, the DOJ issued an investigative report finding that the Cleveland Division of Police

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241. *See supra* Part V.B. (providing the three prongs of the proposed conscious disregard standard).

242. Ferdman, *supra* note 229.

243. *Id.*

244. *Id.*

245. *See supra* Part V.B. (introducing the conscious disregard standard).

246. Ferdman, *supra* note 229.

247. *See* McCoy, *supra* note 228 (describing the past constitutional violations by Officer Pantaleo).

248. *See supra* Part V.B. (providing the conscious disregard standard).

249. Complaint, *supra* note 13, at 3.

250. *See id.* (demonstrating that Tamir Rice acted in accordance with Ohio law when in possession of the airsoft gun, and providing video surveillance footage showing that Mr. Rice did not brandish the gun at the officers when they approached and got out of their police cruiser).

251. *Id.*

252. *Id.*

(CDP) engaged in a pattern or practice of the use of excessive force.[253] The transgressions outlined include inadequate training on the use of force, and insufficient accountability for officers who had developed a pattern of using excessive force.[254]

1. Estimation Under the Deliberate Indifference Standard

Before Mr. Rice's death, there were other incidents of CDP officers using lethal force on people who did not pose an immediate threat to the officers or others.[255] Furthermore, the CDP failed to implement any system of accountability for the use of excessive or lethal force.[256] The findings of the DOJ investigation should provide the Court with the evidence needed to hold the CDP liable.[257]

The fact that unsound police practices, of which supervisors were aware, ultimately led to the death of a twelve-year-old boy may also play a role in the court's disposition of the case.[258] On the other hand, the precedent is difficult to overcome.[259] Nonetheless, until the deliberate indifference standard is reexamined and ultimately replaced by a slightly lower threshold for municipal liability, too many citizens who have suffered recognizable violations of their constitutionally protected rights will be left without any form of relief.[260]

2. Estimation Under the Conscious Disregard Standard

The first and third prongs of the conscious disregard standard require a municipal policymaker to have knowledge of the probable harmful consequences of a wrongful act.[261] The wrongful acts in this case included the CDP officers'

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253. *See* INVESTIGATION OF CDP, *supra* note 2, at 4 (concluding that the CPD engages in a pattern or practice of excessive use of force in violation of the Fourth Amendment, including, but not limited to: unnecessary and excessive use of deadly force in the form of shootings and head strikes; the excessive and unnecessary use of tasers, chemical spray, and fisticuffs; using excessive force on the mentally ill; and tactics that place officers in situations where avoidable force becomes inevitable).

254. *Id.*

255. *Id.*

256. *Id.*

257. *See id.* at 3 (outlining the Cleveland Division of Police's various constitutional violations).

258. *See* Complaint, *supra* note 13, at 2 (providing Mr. Rice's age at the time of death); *see also* INVESTIGATION OF CDP, *supra* note 2, at 3 (indicating CDP supervisors tolerated and in some cases endorsed unsound police practices).

259. *See* City of Canton v. Harris, 489 U.S. 378, 379 (1989) (suggesting the municipality was not deliberately indifferent to plaintiff's rights); Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 397 (1997) (holding that the sheriff's department was indifferent, but not deliberately indifferent to plaintiff's rights); Connick v. Thompson, 131 S. Ct. 1350, 1358 (2011) (holding that the municipality did not display a deliberate indifference to the constitutional violations suffered by plaintiff).

260. *See supra* Part II.E.

261. *See supra* Part V.B. (providing the three prongs of the proposed conscious disregard standard).

continual use of unnecessary and unreasonable force.[262] The probable harmful consequences were such that a member of the community would be seriously hurt by an officer's excessive use of force.[263] The DOJ investigation indicates that policymakers and supervisors in the CDP tolerated the use of unnecessary and unreasonable force, and, in some cases, endorsed it.[264] Furthermore, supervisor investigation of officers' use of force was designed to justify the officers' actions.[265] These findings show that municipal policymakers at the CDP knew of the probable harmful consequences of wrongful acts by municipal employees.[266]

The second and third prongs of the conscious disregard standard require willful failure by the CDP to avoid the probable consequences of CDP officers' continual use of excessive force.[267] CDP supervisors knew that officers were using excessive force, but did not take any actions to avoid the probable consequences of these officers' actions.[268] The DOJ outlined the CDP transgressions in its report as follows: failure to properly investigate the officers' use of force, failure to "objectively investigate" allegations of misconduct, and failure to respond to clear patterns of risky police behavior.[269] Under the second prong of the proposed conscious disregard standard, the CDP's repeated decision not to remedy patterns of excessive use of force amounts to a willful failure to avoid the probable harmful consequences of that use of force.[270] Therefore, the proposed conscious disregard standard would also afford relief to the family of Tamir Rice.[271]

D. Summary and a Look to the Future

The limited circumstances for imposing municipal liability under the failure to train theory that *Canton* describes foreshadow the facts and circumstances surrounding the deaths of these three young men.[272] The DOJ investigations of the Cleveland and Ferguson police departments indicate that the officers of these departments "so often violate constitutional rights that the need for further

262. INVESTIGATION OF CDP, *supra* note 2, at 3.

263. *See* Complaint, *supra* note 13, at 3 (providing the factual circumstances of Mr. Rice's death).

264. INVESTIGATION OF CDP, *supra* note 2, at 4.

265. *Id.* at 5.

266. *See id.* (outlining knowledge among high ranking officials in the Division of Fourth Amendment violations).

267. *See supra* Part V.B. (introducing the conscious disregard standard).

268. INVESTIGATION OF CDP, *supra* note 2, at 3–4.

269. *Id.*

270. *Id.*

271. *Supra* Part V.B.

272. *See* City of Canton v. Harris, 489 U.S. 378, 390 n. 10 (1989) ("It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need.").

training must have been plainly obvious to the city policymakers."[273] A review of the NYPD officers' recent practices—specifically Officer Pantaleo's practices in Staten Island—would lead to a similar conclusion regarding the NYPD.[274] The hope is that the Court will alter its staunch stance on the application of the deliberate indifference standard, but hoping is not enough.

Given the Court's precedent—even with the strong dissents in *Brown* and *Connick*—it is not likely to find that the municipalities were deliberately indifferent to the likelihood that municipal employees would violate the rights of private citizens.[275] Barring a change in approach, it is unlikely that the Court will step back from its deliberate insulation of municipalities in § 1983 claims.[276]

VII. CONCLUSION

The Court should adopt a conscious disregard standard to make municipal liability under § 1983 a genuine possibility. Although *Monell* established a right to bring § 1983 claims against municipalities, *Canton* effectively precluded that right by crafting such a staunch standard for liability.[277] Moreover, the Court's application of the standard in *Brown* and *Connick* can be taken as nothing short of deliberate indifference to the results of the deliberate indifference standard.[278]

A conscious disregard standard would serve as an appropriate middle ground between the legitimate concern of citizens for the protection of their rights, and the legitimate concern of municipalities of being exposed to respondeat superior liability for the independent actions of municipal employees.[279] The conscious disregard standard would curtail over-protection of municipalities' wrongful conduct, while preserving the Supreme Court's longstanding precedent of avoiding a standard of municipal liability in § 1983 actions that mimics respondeat superior liability.[280]

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273. *See* INVESTIGATION OF CDP, *supra* note 2, at 3 (explaining Cleveland Division of Police's pattern of excessive use of force in violation of the Fourth Amendment); Attorney General Remarks, *supra* note 20 (describing the ongoing investigation into the Ferguson Police Department's practices in the use of force); *see also Canton*, 489 U.S. at 390 (indicating that a municipality's constructive notice of repeated constitutional violations may lead to municipal liability in limited situations).

274. *See* CHOKEHOLD ALLEGATIONS, *supra* note 231 (arguing with statistical support that the department effectively endorses officers use of the chokehold maneuver by not enforcing the ban against it). *But see* McCoy, *supra* note 228 (describing the past events of alleged constitutional violations by Officer Pantaleo).

275. Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 416–38 (1997); Connick v. Thompson, 131 S. Ct. 1350, 1370–87 (2011).

276. *See Connick*, 131 S. Ct. 1350; *Brown*, 520 U.S. 397; *Canton*, 489 U.S. 378 (the Supreme Court has avoided finding municipal liability in § 1983 claims).

277. Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978); *Canton*, 489 U.S. 378.

278. *See supra* Part II.E.

279. *See supra* Part IV.B.

280. *See supra* Part II.E. (arguing municipal insulation has gone too far); *see also supra* Part II.A. (discussing the Court's stance in avoiding respondeat superior liability).

Although the conscious disregard standard cannot bring back those tragically lost due to officer's excessive use of force, it may bring some semblance of relief to the families of Michael Brown, Eric Garner, and Tamir Rice.[281] Moreover, unlike the current standard, the imposition of a conscious disregard standard will act as a deterrent against unsound municipal policies and customs by serving as a check on the hiring practices and training methods of municipalities.[282]

281. *See supra* Part VI (applying the conscious disregard standard to the facts of each anticipated case).

282. *See supra* Part III.A. (arguing that the practices of many police departments across the nation must be deterred).