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NOTE

Municipium, Absens Parens: Rectifying *Monell* and *Parens Patriae* for Institutional Liability

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ABSTRACT

The impact of the carceral system and policing on youth led to the development of a separate juvenile system recognizing the special needs of young people. However, policing-based harm remains at the forefront of legal scholarship not just for its continued prevalence in the country as a whole, but also because of the disproportionate impact on Black and Brown people. This impact is compounded when the targets of police violence are youth, who are subjected to extreme force by police at higher rates in comparison to adults and their white youth counterparts. Legal protections that purport to protect citizens' rights inhibit victims from obtaining any meaningful recourse or compensation after experiencing the most heinous forms of police misconduct or violence. Individual police officers are protected by qualified immunity, and institutional liability is an illusory concept due to the flawed and extremely high bars created by the Monell framework. States have obligations to protect children under the parens patriae doctrine but are shielded from liability both because policing falls under municipal control and because the Eleventh Amendment provides states with sovereign immunity. Municipalities responsible for police conduct and discipline lack a similar common law obligation to their vulnerable citizens. This Note explores how the existing Monell and parens patriae doctrines can be reformed and adapted to ensure that institutions not only have a duty to protect youth from policing-based harm, but also that this duty is enforced with mechanisms for finding liability. Only with a meaningful pathway to liability for harm caused to youth at the hands of police can any real police accountability or long-term reform in policing be expected and racial disparities in this harm be addressed.

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INTRODUCTION

During the summer of 2013, 17-year-old Yunek Moore was celebrating her graduation with a bonfire at her friend's home. Sitting in the backyard, she was suddenly face-to-face with a bright light shining directly in her eyes as she heard someone asking for her ID. Confused and unaware that police officers had been called to the scene, Yunek did not immediately comply. Within moments, she was violently grabbed by three officers, dragged to the front yard, slammed into a brick wall, handcuffed and thrown against the police car, unlawfully searched, and forced into the back of the car and taken to the county jail. The only words spoken to her during this ordeal were "Shut the hell up."[2] Yunek required "three surgeries, steroid injections, and physical therapy" as she recovered from the injuries inflicted upon her by these officers.[3] For years, she fought to hold someone accountable for the harms she suffered, including bringing a § 1983 claim, a state battery claim, and a *respondeat superior* claim against the city, but to no avail.[4]

From Trayvon Martin to George Floyd, the abuse of power that police forces engage in is well-documented, as is the lack of repercussions that follow the most egregious instances of police misconduct and violence. Section 1983 is a federal law designed as a remedy for constitutional violations against individuals.[5] But generally, and especially when it comes to policing, the various limitations to § 1983 claims have made relief difficult, if not impossible. Yunek's case, therefore, is the norm, rather than the exception.

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[2] Moore v. Dotson, 2017 WL 376149, Case No. 1:14–cv–01220–JES–JEH (2017); Yunek Moore, Being Black is Not a Crime: Yunek's Story of Police Brutality, American Civil Liberties Union, https://www.aclu.org/news/criminal-law-reform/being-black-not-crime-yuneks-story-police [PERMA] [hereinafter Being Black is Not a Crime].

[3] Moore, Being Black is Not a Crime, *supra* note 1.

[4] Moore v. Dotson, 2017 WL 376149, Case No. 1:14–cv–01220–JES–JEH (2017).

[5] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 727 (1999) (Scalia, J., concurring) ("[Section 1983] is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations." (citation omitted)).

Qualified immunity creates a "good faith" defense for police officers even when they violate individuals' constitutional rights, making it difficult to succeed on a § 1983 claim against an individual officer.[6] The *Monell* framework provides pathways for municipal liability but makes proving this liability a near-impossible feat.[7] And while the common law doctrine of *parens patriae* imposes an obligation on states to act in protection of vulnerable populations like children, this doctrine does not apply to municipalities;[8] police departments' status as municipal organizations under local governments coupled with state sovereign immunity under the Eleventh Amendment protect municipalities and states, respectively, from being subject to any kind of litigation under *parens patriae* when it comes to police misconduct.[9] This lack of institutional liability for wrongs at the hands of police results in little to no consequences for police officers or departments and fails to deter future misconduct, hampering essential police reform.[10] These costs are exacerbated in the juvenile context, where youth are at a greater risk of

[6] Piersen v. Ray, 386 U.S. 547, 555–57 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."); *id.* at 554 ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."). This immunity started out based on the subjective intentions of the officer in question, later being changed to require a violation of "clearly established" law to overcome qualified immunity, and defining "clearly established" as "when a prior Supreme Court or circuit court opinion has held unconstitutional virtually identical behavior." Accordingly, officers are, far more often than not, afforded qualified immunity for constitutional violations. See Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. 345, 356–57 (2023) ("The Supreme Court has described the doctrine as a robust defense that shields 'all but the plainly incompetent or those who knowingly violate the law.'" (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986))); Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 753 (2021).

[7] *See infra* Part II A; *see also*, Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1199–1200 (2023) [hereinafter *Municipal Immunity*]; Reinert, Schwartz & Pfander, *supra* note 5, at 753 ("Qualified immunity doctrine often operates in tandem with limits on municipal liability to frustrate the goals of government accountability.").

[8] *Infra* note 133.

[9] *See infra* Part II B.2.

[10] *See infra* Part II A.3; *see also*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) [hereinafter *Police Indemnification*] ("Officers across the country engage in tens of millions of civilian interactions—and use force against civilians hundreds of thousands of times—each year. Yet even people who believe the police have mistreated them rarely take legal action. And even when officers are sued, the suits have limited—if any—negative ramifications for officers' employment."); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO. L. REV. 841, 863–64 (2012) [hereinafter *What Police Learn*] (noting that only 1% of people who believe they have suffered police mistreatment file suit, as reported by the Bureau of Justice).

trauma and can face long-term impacts from any encounter with police, let alone encounters that involve misconduct and violence.[11] Police forces regularly engage in "excessive displays of force" with youth overall in comparison to adults, and especially with youth of color.[12] In fact, the disproportionate impact on youth of color further highlights concerns regarding the absence of consequences and liability available when young people experience police misconduct and violations of their constitutional rights, making reform in this area increasingly necessary.

While extensive research has investigated the impact of policing, violence, and misconduct, and, separately, the role of states as guardians of children in the context of the foster care system, this Note explores the relationship juveniles have with the city and state through policing and the duties governments have to protect children from such harm. Additionally, this Note examines current frameworks for relief after instances of police violence and misconduct, highlighting how such systems not only provide boundless immunity to individual police officers, but also structurally prevent institutional liability, leaving victims with little to no recourse. Part I discusses the role of various levels of government in litigation, from a municipality's potential liability for harm caused by public officials to a state's responsibility to its citizens—particularly children—manifested in its standing to sue as *parens patriae*. Part II identifies the illusory solutions that the municipal liability frameworks provide and details how the powers that states hold lack complementary duties and consequences when those same entities fail in their roles. Finally, Part III posits potential solutions that can be undertaken to ensure child victims of police violence can actually qualify for relief and how institutions, rather

[11] *Practices in Modern Policing: Police-Youth Engagement*, INT'L ASSOC. OF CHIEFS OF POLICE 1 (Nov. 30, 2018), https://www.theiacp.org/resources/document/practices-in-modern-policing-police-youth-engagement [https://perma.cc/9849-ELPK]; *see also*, *infra* Part II B.2.

[12] Lisa H. Thurau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. LEGAL RTS. J. 30, 31 (2009).

than individuals, can be made to take on the responsibility for the constitutional violations that occur at the hands of police, both to provide adequate compensation for victims and to ensure deterrence and long-term police reform.

I. LIABILITY, DUTY, AND STANDING TO SUE: MUNICIPALITIES AND STATES IN LITIGATION

A. Understanding the *Monell* Framework for Municipal Liability

1. 1983 Claims and the Law Before *Monell*

Section 1983, titled "Civil action for deprivation of rights," provides that,

> [E]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . 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 is liable to that individual.[13]

The provision was created with the purpose of providing a "remedy where state law was inadequate" or where a state remedy was "not available in practice."[14]

The Supreme Court had found in 1879 that the Equal Protection Clause can be enforced against public officials—such as police officers—acting in their official capacities (whether acting appropriately or misusing their powers) when they violate an individual's constitutional rights.[15] In 1961, the Court addressed whether § 1983, specifically, was intended to provide a remedy to these individuals deprived of their constitutional rights by such a public official. In *Monroe v. Pape*, the Court held that Congress did, in fact, intend for § 1983 to provide a remedy for constitutional violations by public officials but that the official could only be held

[13] 42 U.S.C.A. § 1983.

[14] Monroe v. Pape, 365 U.S. 167, 173–74 (1961).

[15] Ex Parte Virginia, 100 U.S. 339, 346 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial.").

individually liable for those actions.[16] In other words, a municipality could never be held liable for the public official's actions as the municipality would not constitute a person within the meaning of the statute.[17]

The basis of the decision in *Monroe* was Congress's rejection of the Sherman amendment, which had been a proposed addition to the Civil Rights Act of 1871 (the predecessor to § 1983).[18] The amendment suggested holding cities liable when acts of violence in the city resulted in injury or harm to a person.[19] Though it was adopted by the Senate, the amendment was expressly rejected by the House of Representatives.[20] Instead, § 1983 was adopted with no mention of municipal liability.[21] In examining this legislative history, the Court concluded in

[16] 365 U.S. 167, 191 (1961) (overruled by *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978)) ("The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them.").

A municipality is defined as a political unit that is incorporated for local self-governance, and it encompasses entities such as cities, towns, and villages. See Webster's II New College Dictionary 210 (3d ed.2005) ("[A city is] an incorporated [] municipality with definite boundaries and legal powers set forth in a charter granted by the state. . . . [A municipality is a] political unit, as a city, town, or village, incorporated for local self-government."). Municipalities are typically responsible for functions like parks and recreation, housing, emergency medical services, fire departments, and, most relevant to this Note, police departments. See State and Local Government, White House, https://obamawhitehouse.archives.gov/1600/state-and-local-government [https://perma.cc/682U-VN4F] (last accessed Apr. 14, 2025) ("Local governments generally include two tiers: counties. . . and municipalities, or cities/towns.").

[17] *Supra* note 15.

[18] Achtenberg, *infra* note 79, at 2186 n.10 (2005) ("Section 1983 is derived from section 1 of the Civil Rights Act of 1871 (also known as the "Ku Klux Act"). Act of Apr. 20, 1871, ch. 22, 1, 17 Stat. 13. The Ku Klux Act was enacted by the Forty-Second Congress."); John T. Ryan, Jr., *Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?*, 64 GEO. WASH. L. REV. 776, 781–82 (1996) ("Because the federal government was having trouble enforcing the provisions of the Fourteenth Amendment following the end of the Civil War, Congress enacted the Civil Rights Act of 1871. The first section of the Civil Rights Act was the precursor to § 1983."); Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 664 (1978) ("The sole basis for [the decision in *Monroe v. Pape*] was an inference drawn from Congress' rejection of the 'Sherman amendment to the bill which became the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983.").

[19] *Monroe*, 365 U.S., at 188 ("When the bill that became the Act of April 20, 1871, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made 'the inhabitants of the county, city, or parish' in which certain acts of violence occurred liable 'to pay full compensation' to the person damaged or his widow or legal representative."); Cong., Globe, 42d Cong., 1st Sess., p. 663.

[20] *Monroe*, 365 U.S., at 190 ("The objection to the Sherman amendment stated by Mr. Poland was that 'the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.'").

[21] 42 U.S.C.A. § 1986 ("Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do . . . shall be liable . . .").

Monroe that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]."[22] More specifically, the Court's decision meant that governments were "wholly immune from suit under § 1983."[23]

2. *Monroe* Overruled: A Limited Means of Holding Municipalities Liable in § 1983 Claims for Police Misconduct

Just under two decades after *Monroe v. Pape*, the Supreme Court reversed its decision. In 1978, female employees at the Department of Social Services and the Board of Education of the City of New York brought a class action against both the Department and Board (and their Commissioner and Chancellor) as well as against the city of New York and its Mayor, claiming that the policies of the Board and Department forced pregnant employees to take unpaid leaves of absence in violation of their constitutional rights.[24] According to the District Court, the ruling from *Monroe v. Pape* did not allow for backpay from the entities named in the suit—the Department, the Board, and the city of New York.[25] Upon grant of certiorari, the Supreme Court addressed a question it had left unanswered the previous year[26]—whether local government

[22] *Monroe*, 365 U.S., at 187–88 ("In a second conference the Sherman amendment was dropped and in its place § 6 of the Act of April 20, 1871, was substituted. This new section, which is now R.S. § 1981, 42 U.S.C. § 1986, 42 U.S.C.A. § 1986, dropped out all provision for municipal liability. . . ."); Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes A Distorted Picture*, 65 N.C. L. REV. 517, 525 (1987) ("From the negative reactions to municipal liability expressed in [the Congressional debates accompanying consideration of the Civil Rights Act of 1871], the Court inferred that Congress could not have intended the word 'person' in section 1983 to include municipalities.").

[23] Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 663 (1978).

[24] *Monell*, 436 U.S. at 660–61 ("The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.").

[25] *Id.* ("[P]laintiffs' prayers for backpay were denied because any such damages would come ultimately from the City of New York and, therefore, to hold otherwise would be to 'circumven[t]" the immunity conferred on municipalities by [*Monroe v. Pape*].'").

[26] Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977) ("The related question of whether a school district is a person for purposes of § 1983 is likewise not before us. We leave those questions for another day, and assume, without deciding, that the respondent could sue under § 1331 without regard to the limitations imposed by 42 U.S.C. § 1983.").

officials and local independent school boards are considered "persons" under § 1983. In so doing, the Court overruled *Monroe*.[27]

The Sherman amendment, which formed the basis of the *Monroe* decision, did not seek to alter any part of § 1983 but rather another section of the Civil Rights Act.[28] Yet, the Court in 1961 had reached the conclusion that the House's rejection of the amendment meant Congress had no power to *ever* impose liability on a local government or municipality under § 1983.[29] The Court's original analysis of the legislative history and Congress's reaction to the Sherman amendment was flawed.[30] First, the objection to the Sherman amendment did not preclude the creation of *any* municipal liability. Senator Sherman had introduced the amendment as a direct response to ongoing Ku Klux Klan (KKK) attacks so that those with property in a city or municipality could support the enforcement of civil rights laws when KKK violence ensued because their property would be "responsible" for damages.[31] However, unlike most state riot statutes, the Sherman amendment lacked any statute of limitations and "imposed liability on the government defendant whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exerted all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished."[32] In other

[27] *Monell*, 436 U.S. at 663 ("[W]e now overrule Monroe v. Pape, supra, insofar as it holds that local governments are wholly immune from suit under § 1983.").

[28] *Monell*, 436 U.S. at 664 ("Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the nature of the obligation created by that amendment was vastly different from that created by § 1, the Court nonetheless concluded in *Monroe* that Congress must have meant to exclude municipal corporations from the coverage of § 1."); *id.* at 665 (discussing the proposal of H.R. 320, the bill that eventually became the Civil Rights Act of 1871, and noting that Section 1 of H.R. 20 is now codified as 42 U.S.C. § 1983 and "was the subject of only limited debate and was passed without amendment" while Sections 2 through 4 . . . were the subject of almost all congressional debate and each of these sections was amended").

[29] *Supra* note 19 and accompanying text.

[30] *Supra* note 24.

[31] *Monell*, 436 U.S. at 667 ("Senator Sherman explained that the purpose of his amendment was to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property "responsible" for Ku Klux Klan damage."); Achtenberg, *supra* note 80, at 2196 (2005) (describing the Sherman amendment as "a proposal to make cities liable for injuries resulting from the depredations of the Ku Klux Klan or from similar mob violence").

[32] *Monell*, 436 U.S. at 668.

words, the problem with the Sherman amendment—and the reason for the House's rejection of it—was not a resistance to all municipality liability under § 1983, but rather the unbounded liability that the amendment seemed to propose.[33]

Second, proponents and opponents of the Sherman amendment disagreed largely on the issue of state sovereignty and federal authority. Proponents relied on *Prigg v. Pennsylvania*, in which the Court held that slaveowners had a federal right under Article IV to the possession of their slaves and, since state remedies for recovering a runaway slave could be inadequate, Congress possessed the power under the Necessary and Proper Clause to also ensure a remedy associated with this federal right.[34] Consequently, the Fourteenth Amendment also provided a federal constitutional right, making "a remedy against municipalities and counties . . . an appropriate—and hence constitutional—method for ensuring the protection[s]" guaranteed by the Equal Protection Clause.[35] On the other hand, opponents of the amendment agreed that the Fourteenth Amendment created a federal right but argued that the Federal Government still did not have the authority to require municipalities to create police forces to enforce this right, whether they did it directly by command or indirectly by allowing for municipality liability for failure to "keep[] the peace."[36]

So, why did the *Monell* Court overrule *Monroe* despite these issues of state sovereignty? The Court reasoned that imposing civil liability for damages under § 1983 did not *create* an

[33] In fact, "the same Congress that passed the Civil Rights Act also had recently defined the word 'person' so that it could include 'bodies politic and corporate,' tending toward a conclusion that this Congress intended municipalities to be liable under section 1983." *See* Mead, *supra* note 21, at 526 (1987).

[34] *See* Prigg v. Pennsylvania, 41 U.S. 539 (1842).

[35] *Monell*, 436 U.S. at 672.

[36] *Monell*, 436 U.S. at 673–79 ("[T]here was ample support for Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to 'destroy the government of the States.'" (quoting Cong. Globe, 42d Cong., 1st Sess., 795 (1871))).

obligation upon municipalities.[37] Instead, municipalities that would already have an obligation under state law to "keep the peace" would be held liable for failing to do so as their failure would constitute a violation of the Fourteenth Amendment.[38] In so abandoning the *Monroe* Court's misplaced reliance on the legislative debate behind the Sherman amendment,[39] the *Monell* Court reexamined the question of whether municipalities can constitute "persons" under the statute, finding that Congressional intent supported an answer in the affirmative.[40]

While allowing for municipal liability under § 1983, the *Monell* Court simultaneously limited the scope of this liability, noting that a governmental entity can only be held liable under § 1983 if the constitutional violation in question is a result of a policy adopted by that entity.[41] Accordingly, the Court rejected the theory of *respondeat superior* as a basis for its decision when it added that "a municipality cannot be held liable *solely* because it employs a tortfeasor."[42] Using the language of § 1983, the Court found that the statute requires proof of causation,

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[37] *Monell*, 436 U.S. at 679 ("First, opponents expressly distinguished between imposing an obligation to keep the peace and merely imposing civil liability for damages on a municipality that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment.").

[38] *Id.* ("'But the enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever.'" (quoting Cong. Globe, 42d Cong., 1st Sess., 794 (statement of Rep. Poland))).

[39] *Monell*, 436 U.S., at 683 ("[I]t is readily apparent that nothing said in debate on the Sherman amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment."

[40] *Monell*, 436 U.S. at 690 ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.").

At the time of passage of the Civil Rights Act of 1871, corporations had been recognized as persons in both constitutional and statutory analysis. See Lousville R. Co. v. Letson, 2 How. 497, 558 (1844) ("[A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person."). This *Letson* principle was then extended to include municipal corporations. See Cowles v. Mercer County, 7 Wall. 118, 121 (1869); *see also*, Act of Feb. 25, 1871, § 2, 16 Stat. 431 ("[I]n all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.").

[41] *Monell*, 436 U.S. at 690 ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.").

[42] *Monell*, 436 U.S. at 691.

precluding a vicarious imposition of liability on a municipality for the actions of its employees.[43] Under this approach, therefore, if an employee misapplies an otherwise constitutional city policy in an unconstitutional way, the municipality would not automatically be liable as that would require relying on the *respondeat superior* theory that *Monell* expressly rejected.[44]

What constitutes an official policy or custom has been a developing question since the *Monell* decision. In a series of cases since, the *Monell* doctrine has been further interpreted to include four distinct routes to getting municipal liability under § 1983, all of which uphold the case's original rejection of the theory of *respondeat superior* by requiring a deliberate choice made by the municipality as well as a causal relationship between that choice and the constitutional violation.[45]

3. The *Monell* Framework and its Four Routes for Liability

The first two avenues for *Monell* liability come from the *Monell* decision itself. The first way a municipality can be held liable for a constitutional violation by an individual employee is if that violation implements an official policy that the municipality's lawmakers have adopted.[46] The second involves custom-based liability, under which a municipality is held liable if the

[43] See *Monell*, 436 U.S. at 692–93 ("Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent."); *see also*, 42 U.S.C.A. § 1983 ("*[A]ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected,* any person . . . " (emphasis added)).

[44] City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989).

[45] See Pembaur v. Cincinnati, 475 U.S. 469, 483–84 (1986) (plurality) ("Municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the officials or officials responsible for establishing final policy with respect to the subject matter in question."); *see also*, Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 397 (1997) (requiring that "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights").

[46] *See Monell*, *supra* note 40.

employee engaging in the constitutional violation was acting pursuant to a governmental custom, even if that custom is not officially written into law.[47]

The third route to municipal liability under the *Monell* doctrine is based on inadequate training or supervision. Referring back to the example of an employee misapplying an otherwise constitutional municipal policy, a *Monell* claim would be successful against the municipality in such an instance if it is shown that the employee was not properly trained *and* that the failure to train resulted in the constitutional violation.[48] This route to *Monell* liability expands the doctrine beyond just unconstitutional policies while remaining true to the rejection of *respondeat superior* by stipulating that failure to train can only be the basis for *Monell* liability when that failure to train "amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact."[49] Liability attaches under this route after consideration of questions such as whether the training of employees is inadequate, whether the inadequacy is related to the constitutional violation, whether the training would have prevented the injury, and whether the inadequacy can be said to represent city policy.[50]

The fourth and final route to *Monell* liability is hiring-based liability; if a municipality's employee engages in a constitutional violation, the municipality can be held liable under § 1983 for failure to adequately screen the employee before hiring.[51] Achieving hiring-based liability is a

[47] See *Monell*, 436 U.S. at 690 ("[L]ocal governments, like every other § 1983 'person, by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."); *see also*, Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68 (1970) ("Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.").

[48] *City of Canton*, *supra* note 43.

[49] *Id.* at 388.

[50] *Id.* at 389–91.

[51] Board of County Com'rs of Bryan County, 520 U.S. 397, 411 (1997) ("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.").

high standard, requiring proof of more than just a generally inadequate inquiry into a potential employee's background.[52] The failure to adequately screen should show "deliberate indifference" to qualify,[53] and the basis for a claim under hiring-based liability cannot just be a probability that the employee in question would have engaged in constitutional violations, but rather that the employee was "highly likely to inflict the *particular* injury suffered by the plaintiff."[54]

The issue of municipal liability inevitably raises the question of what duties a government generally owes its citizens. This is all the more important in the case of juveniles. *Monell* examines how to achieve municipal liability when it comes to police misconduct generally, but this framework is not specifically catered to youth and is unrelated to state governments; after all, police departments fall under city jurisdiction. States, in contrast, are governed by entirely different doctrines of rights, liabilities, and duties, some of which invoke the special status and needs of youth as a vulnerable population.

B. States in *Loco Parentis*

1. *Parens Patriae* Protections and Powers

The doctrine of *parens patriae* sheds light on the responsibilities and rights of states as guardians of their citizens.[55] *Parens patriae*, Latin for "parent of the country or homeland," finds its roots in English common law, under which the King had certain powers as the "father of the country." In England, this power was used on behalf of minors and those who were incapable of

[52] *Id.* ("Sheriff Moore's own testimony indicated that he did not inquire into the underlying conduct or the disposition of any of the misdemeanor charges reflected on Burns' record before hiring him. But this showing of an instance of inadequate screening is not enough to establish 'deliberate indifference.'").

[53] *Id.* ("Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'").

[54] *Id.* at 412.

[55] *See infra* Part II B.

caring for themselves (namely the mentally disabled).[56] In the United States, the *parens patriae* role of states was first recognized in 1900 on the basis of a quasi-sovereign interest in the litigation, defined as "a set of interests that the State has in the well-being of its populace."[57]

Today, the *parens patriae* doctrine recognizes the state as a person, places certain individuals under the protection of the state, and allows the state to bring a lawsuit on behalf of those citizens.[58] This doctrine has been applied to environmental issues, interstate commerce, antitrust, and more.[59] In fact, it has also been used in police misconduct cases, recognizing the sovereign interest that arises for a state in preventing constitutional violations in policing. For instance, the state of Pennsylvania brought a § 1983 claim against the Borough of Millvale over unconstitutional conduct by its police, resulting in a finding of a "longstanding and continuing pattern of police misconduct that violated constitutional rights, threatened individual security, undermined the state's law enforcement functions, and thus directly affected the health and welfare of the state."[60]

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[56] Jack Ratliff, *Parens Patriae: An Overview*, 74 TULANE. L. REV. 1847 (2000); *see also*, *Parens Patriae*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/parens_patriae [https://perma.cc/H9G6-UQTT] (last visited Apr. 14, 2025).

[57] Alfred L. Snapp & Son. Inc. v. Puerto Rico, 458 U.S. 592, 602 (1982) (noting that a state's quasi-sovereign interest includes "interest in the health and well-being—both physical and economic—of its residents in general" but adding that "more must be alleged than injury to an identifiable group of individual residents," such as "injury to a sufficiently substantial segment of its population"); *see also*, Louisiana v. Texas, 176 U.S. 1, 19 (1900) (recognizing a state would have an interest in litigation as parens patriae when "the matters complained of affect her citizens at large."); Pennsylvania v. New Jersey, 426 U.S. 660, 666 (1976) ("[A] State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.").

[58] Black's Law Dictionary 1221 (9th Ed. 2009) (describing parens patriae as "a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen"); Black's Law Dictionary 1003 (5th ed. 1979) (noting that parens patriae recognizes the state as having a role as a sovereign and a guardian of those with legal disability).

[59] Bachynsky v. Texas, 747 S.W.2d 868, 869 (Tex. 1988) ("[V]arious causes of action may be asserted *parens patriae*—environmental pollution, public nuisance, trade barriers, antitrust violations, employment discrimination…").

[60] Amelia C. Waller, *State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae*, Note, 16 GA. L. REV. 865, 883 (1982) (discussing *Pennsylvania v. Porter* and the use of *parens patriae* power for the state to join litigation).

It is the invocation of the *parens patriae* doctrine, in fact, that justifies the creation of agencies such as Child Protective Services designed with the intention of serving vulnerable populations by assigning the state as a de facto parent with certain duties and rights that enable it to step in and override parental rights.[61] However, the quasi-sovereign interest requirement remains, even when it comes to the abuse and neglect of children. For example, while the state is assigned as a protector of children under *parens patriae*, the state has the right to take action on behalf of a child (such as by intervening and separating a child from his or her family on the basis of alleged abuse) *because of* the existence of its interests outside of protecting the child in question (separate interests like the maintenance of family autonomy and efficient use of public resources).[62] The presence of these interests justify the state's involvement and intervention on behalf of children. As these interests can sometimes be antithetical to the protection of the child, states make the choice to intervene by balancing these interests against the protection of the child.[63]

Further, *parens patriae* is not limited to the state's *rights* in taking action in protection of children—the doctrine purports to provide "not merely authority but a duty to the vulnerable."[64] Under *parens patriae*, the government has a general duty to ensure the welfare of children and

[61] Schall v. Martin, 467 U.S. 253, 265 (1984) ("Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae."); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors"); Late Corporation of the Church of Jesus Christ of Latter-Day Saints et al. v. United States, 136 U.S. 1, 57 (1890) ("This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."); Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 68 GEO. L. J. 893 (1975) ("The state acts as the primary protector of children from abuse or neglect.").

[62] Areen, *supra* note 60, at 893–94 (1975).

[63] *Id.*; *see also*, *Schall*, *supra* note 60 ("[T]he juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's 'parens patriae interest in preserving and promoting the welfare of the child.'" (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

[64] Daniel L. Hatcher, *Purpose vs. Power: Parens Patriae and Agency Self-Interest*, 42 N. M. L. REV. 159 (2012).

the obligation to intervene where necessary for the prevention of harm to a child. Under the principle of "best interests of the child," the State has both the right and the duty "to act for the protection of the individual and then only in his or her best interests."[65] Perhaps the quintessential example of *parens patriae* when it comes to children is mandatory reporting laws.[66] For example, New Jersey's "Report of abuse" statute creates an obligation that any person "having reasonable cause to believe that a child has been subjected to child abuse . . . shall report the same immediately."[67] Similarly, *parens patriae* is evident as a basis for mandatory reporting laws in several states.[68] Notably, these mandatory reporting laws identify a variety of individuals that are considered mandatory reporters, including law enforcement officials.[69]

Thus, the *parens patriae* doctrine does not only apply to intervention over parental rights. In fact, it creates a duty to act to protect children from a variety of harms, including the type of harm that can be inflicted by the police.[70] *Parens patriae* as applied to children is a particularly

[65] In re Female S., 111 Misc 2d 313, 315 (Fam. Ct., NY Cnty. 1981) (quoting Gonzaga Law Review, Brian J. and Lesly A. Bowers at vol. 13 p. 625, 638); *see also*, Application of Norman, 26 Misc.2d 700, 703 (Sup. Ct., Nassau Cnty 1960) ("[T]he court acts as *parens patriae* to do what is best for the interest of the child and puts itself in the position of a 'wise, affectionate and careful parent' . . . by virtue of the prerogative which belongs to the State as *parens patriae*.")

[66] State v. Bogan, 200 N.J. 61, 75–76 (2009) ("The community caretaking role of the police also extends to protecting the welfare of children. Indeed, that community caretaking responsibility is a reflection of the State's general parens patriae duty to safeguard children from harm.").

[67] N.J. ST 9:6–8:10.

[68] *See, e.g.*, RCW 26.44.030(1)(a) (requiring professionals in various positions, including law enforcement, school and medical personnel, and social service counselors to name a few, to report evidence of abuse or neglect); C.G.S.A. § 17a–101(a) ("The public policy of this state is: To protect children . . . and for these purposes to require the reporting of suspected child abuse or neglect . . ."); N.Y. SOC. SERV. Law § 411 ("It is the purpose of this title to encourage more complete reporting of suspected child abuse and maltreatment . . ."); N.Y. SOC. SERV. Law § 491(1)(a) ("Mandated reporters shall report allegations of reportable incidents to the vulnerable persons' central register. . . ."); Grant v. Cuomo, 130 A.D.2d 154, 188 (1987) (Rosenberger, J. dissenting) ("One aim of Social Services Law Article 6, Title 6, is to encourage reporting and investigation of suspected child abuse and maltreatment by establishing, in each county, 'a child protective service capable of investigating such reports swiftly and competently' (Social Services Law § 411).").

[69] *Supra* note 67; *see also*, N.Y. SOC. SERV. Law § 413.

[70] For instance, in cases involving the juvenile courts, it has been found that "The State is parens patriae rather than prosecuting attorney and judge" such that its objective is to rehabilitate and protect the child (and society) but not to fix criminal responsibility. See Kent v. U.S., 383 U.S. 541, 554 (1966).

necessary and salient use of the doctrine, both in general and in the context of policing, because adolescents are fundamentally different from, and more vulnerable than, adults.

2. The Vulnerability of Youth and How *Parens Patriae* Claims to Protect Juveniles

Research shows that the human brain does not fully develop until the mid- to late 20s, so adolescents are not only prone to impulsivity, risk-taking, and outside influences—traits linked to contacts with the police and justice system—but they are also vulnerable to the harmful impacts of policing, particularly when it is abusive.[71] Prior to adulthood, juveniles have been described as "vulnerable, malleable, and in need of adult guidance."[72] This reasoning was the basis of the formation of the juvenile court system, recognizing the lowered moral culpability of youth and their need for rehabilitative services, rather than punishment, in line with the goals of *parens patriae*.[73]

The justice system and policing heavily impact youth; over four million youth in the 16–17 age bracket interact face-to-face with law enforcement each year.[74] Furthermore, according to a 2020 NYC Civilian Complaint Review Board (CCRB) report of police misconduct and youth in New York, though youth rarely report police misconduct, examining only a short period of time (complaints received between January 1, 2018, and June 30, 2019, and closed by December 31, 2019) revealed 407 complaints that involved at least one youth.[75] The harms that follow police interactions that involve frisks, violence, or misconduct, include anxiety, posttraumatic

[71] *See* INT'L ASSOC. OF CHIEFS OF POLICE, *supra* note 10, at 11; Lisa H. Thurau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. LEGAL RTS. J. 3, 31 (2009).

[72] Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court,* 69 N.C. L. REV. 1083, 1095 (1991).

[73] *Id.*

[74] Lisa H. Thurau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. LEGAL RTS. J. 3, 31 (2009).

[75] See NYC Civilian Complaint Review Board, CCRB Report on Youth and Police 16 (June 2020), https://www.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/CCRB_YouthReport.pdf [https://perma.cc/HS9M-USAX].

stress disorder, physical ailments, as well as harm based on "vicarious contact" for those who witness or hear about the interactions.[76]

In light of the fundamentally different needs of youth and the foundational role the *parens patriae* doctrine plays in the existence of the juvenile court system, this doctrine both can and should govern the contours of a juvenile's relationship with the state's police powers.[77] For example, the doctrine has been discussed around juveniles' "constitutional rights against unreasonable searches under the Fourth Amendment, rights to a jury under the Sixth and Fourteenth Amendments, and due process and equal protection rights under the Fourteenth Amendment."[78] This may come up in the context of judges giving juveniles extra time to understand what rights they are waiving in court, expending greater effort in determining juvenile defendants' competency to stand trial, or even being the decisionmakers (instead of juries) in juvenile delinquency proceedings.[79] The applicability of *parens patriae* to juvenile police misconduct cases is, therefore, a natural outcome of the doctrine's relationship to juveniles' interactions with the justice system.

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[76] Amanda Geller, *Youth–Police Contact: Burdens and Inequities in an Adverse Childhood Experience*, 2014–2017, AM. J. PUBLIC HEALTH (2021) (footnotes omitted).

[77] See Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 288–89 (2020) ("In sum, in the first three eras of juvenile law, the parens patriae power infiltrated every aspect of the juvenile legal system from the creation of the juvenile courts to the interpretation of minors' constitutional rights in juvenile and criminal law."); *Juvenile Justice System Structure & Process: Organization & Administration of Delinquency Services*, OJJDP STAT. BRIEFING BOOK (Mar. 27, 2018), https://www.ojjdp.gov/ojstatbb/structure_process/qa04205.asp?qaDate=2016 [https://perma.cc/VXM7-64WZ] (noting that the purpose clauses for the statutes creating juvenile courts in a large number of states—Alabama, Arkansas, California, Delaware, Florida, Illinois, Iowa, Louisiana, Massachusetts, Maine, Maryland, Michigan, Mississippi, Missouri, New Jersey, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming—employ language reflecting the *parens patriae* doctrine). Moreover, several other states (Connecticut, Georgia, Indiana, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oregon, Tennessee, Texas, and West Virginia) use *parens patriae* language related to care and supervision of children. *See, e.g.*, Conn. Gen. Stat. § 46b-121h (2021); Ga. Code Ann. § 15-11-1 (2021); Ind. Code § 31-10-2-1 (2021); Mont. Code Ann. § 41-5-102 (West 2021); Neb. Rev. Stat. § 43-246 (2021); Neb. Rev. Stat. § 43-402 (2021); N.H. Rev. Stat. Ann. § 169-B:1 (2021); N.M. Stat. Ann. § 32A-2-2 (2021); Ohio Rev. Code Ann. § 2152.01 (West 2021); Or. Rev. Stat. § 419B.090 (2021); Tenn. Code Ann. § 37-1-101 (2021); Tex. Fam. Code Ann. § 51.01 (West 2021); W. Va. Code § 49-1-105 (2021).

[78] See Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 301 (2020).

[79] *Id.* at 301–02.

The use of the *parens patriae* doctrine in these ways aims to cater to the vulnerable status of juveniles, empowering states to act as guardians of children's rights and safety. At the municipal level, *Monell* aims to provide a pathway for institutional liability for harms against any victim of constitutional wrongs by the police. Yet, despite the existence of these frameworks at multiple levels of governance, police misconduct continues to go unchecked and attempts at securing relief for victims of misconduct are still met with countless barriers. Part II analyzes these flawed frameworks to provide insight as to why these barriers to relief exist and how they impact young victims of police misconduct individually and collectively.

II. CURRENT FRAMEWORKS FAIL TO PROVIDE ADEQUATE AVENUES FOR RELIEF, AFFORDING INSTITUTIONS WITH BOUNDLESS POWERS AND LITTLE TO NO DUTIES.

A. Cities and Municipalities Escape Liability Under *Monell*'s Exceptionally High Standard

In theory, *Monell* would have fundamentally changed the landscape of § 1983 claims by providing a mechanism for municipality liability that was barred by the *Monroe* decision. In reality, however, the possibility of municipal liability under the *Monell* doctrine proves illusory.[80]

1. *Monell*'s Rejection of *Respondeat Superior* Is Based on a Flawed Understanding of the Sherman Amendment

Ordinarily, private employer–employee relationships adhere to the theory of *respondeat superior*,[81] making an employer liable for an employee's torts. Even in the municipal context, this theory prevails for non-constitutional torts.[82] And, though *respondeat superior* explicitly

[80] *Supra* note 6.

[81] 2 Dan B. Dobbs, The Law of Torts 905 (2001); David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2191 (2005) ("Remarkably, the standard for awarding compensatory damages against cities under 1983 is even higher than the standard for awarding punitive damages against private employers.").

[82] 2 Dan B. Dobbs, The Law of Torts 905 & n.1 (2001) (identifying federal civil rights claims as the exception to *respondeat superior* in both the private and public employment context); Achtenberg, *supra* note 80, at 2191 ("Monell confines entity liability in a manner that is unique to 1983 and exists in no other area of the law. . . . The

does not apply to independent contractors, even finding liability for the one who hires an independent contractor is an easier standard than *Monell*.[83]

Respondeat superior's creation of employer liability for an employee's wrongs is based on the idea that "the wrong done by the servant is looked upon in law as the wrong of the master himself."[84] This was the understanding of the employer–employee relationship at the time that § 1983 was enacted.[85] In fact, courts have often noted that an employer has the power to control his "servants"—or rather, employees—allowing for liability to naturally flow from employee to employer; some courts additionally identify an employer's ability to select employees as creating liability.[86] Other justifications have also been posed, including the breach of a warranty of good conduct expected when an employer selects and employs an individual[87] and the reciprocal relationship between benefits the employee provides and liabilities the employee creates for the employer.[88] Interestingly enough, the pathways to liability under *Monell* seem to mimic some of

author has been unable to identify a single state that restricts its cities' liability for employees' non-constitutional torts [the way] Monell restricts municipal liability for constitutional wrongs.").

[83] Compare Restatement (Second) of Torts § 411 (1965) ("An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor."), with Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 397 (1997) (requiring that "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights").

[84] 1 William Blackstone, Commentaries 432 (1765).

[85] Shields v. Illinois Dept. of Corrections, 746 F.3d 782, 791–92 (2014) ("*Monell* failed to grapple with the fact that *respondeat superior* liability for employers was a settled feature of American law that was familiar to Congress in 1871, when § 1983 was enacted. Congress therefore enacted § 1983 against the backdrop of *respondeat superior* liability and presumably assumed that courts would apply it.").

[86] Du Pratt v. Lick, 38 Cal. 691, 692 (1870) (noting that an employer's "power of selection or direction" over its employees creates liability for the employees wrongs); Mcguire v. Grant, 25 N.J.L. 356, 371 (1856) ("A master is responsible for the tortious acts of his servant which were done in his service. This responsibility grows out of . . . his control over them. If it is his duty to control them in what they do, he is responsible for his neglect."). Some courts have even focused on the power of an employer to select employees as the foundation of liability. Kelly v. Mayor of City of N.Y., 11 N.Y. 432, 436 (1854) ("Th[e] right of selection lies at the foundation of the responsibility of a master or principal, for the acts of his servant or agent."); Pack v. City of New York, 4 Seld. 222, 225 (1853) ("The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders, should be responsible for an injury resulting from the want of skill or want of care of the person employed.").

[87] *Kelly*, *supra* note 85.

[88] Cardot v. Barney, 63 N.Y. 281, 287 (1875) ("[H]e who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain it." (quoting *Hall v. Smith*, 2 Bing. 156, 160)).

the language of these justifications for *respondeat superior*,[89] yet the Court refused to apply the *respondeat superior* theory to its development of its framework.

It is first worth noting that in its rationale for rejecting *respondeat superior*, the *Monell* Court discussed the idea of a community sharing in losses by holding those with property responsible for the damages of civil rights violations such as KKK attacks.[90] *Respondeat superior* holds *employers* liable for their employees' wrongs; community-sharing of that liability is only relevant to the extent that taxpayer dollars fund municipalities, the employers in question in *Monell* cases.[91] The Court concluded that community sharing and loss prevention were evidently not legitimate enough reasons to support the passage of the Sherman amendment but wrongly extrapolated this rejection by Congress as a complete dismissal of *respondeat superior* as a basis for municipal liability.[92] This was mistaken for two key reasons.

First, the discussion of employer liability in *Monell* lacked any true review of an employer's legal control over its employees, the reciprocal relationship between benefits and liabilities, and any other major rationale for *respondeat superior*.[93] Yet, despite this circumstantial analysis of the House's rejection of the Sherman amendment, the *Monell* Court settled on a framework that would ultimately reflect the ideals of the very approach it was

[89] *See infra* Part I A.2.

[90] *Monell*, *supra* note 30.

[91] Mead, *supra* note 21, at 540 ("[T]he cost of constitutional injury caused by municipal employees would be spread among the taxpayers who benefit from the services the municipality provides."); *id.* at 539–40 ("This approach consciously allocates the risk of loss to the enterprise creating and benefiting from the activity that creates the potential for injury. The risk of loss should fall on the entrepreneur, who is in the best position to prevent the loss and to spread the cost of the loss through either insurance or higher prices.").

[92] Achtenberg, *supra* note 80, at 2205–06 ("Congress may have rejected community-wide loss sharing as a justification for the Sherman Amendment, but community-wide loss sharing is neither the effect of respondeat superior nor the nineteenth-century justification for it. . . . Respondeat superior shifts the costs of employee negligence, not to the community as a whole (as Monell suggested)."); *see also*, *Monell*, 436 U.S., at 694 ("This justification was obviously insufficient to sustain the amendment against perceived constitutional difficulties and there is no reason to suppose that a more general liability imposed for a similar reason would have been thought less constitutionally objectionable.").

[93] *Monell,* 436 U.S. at 691–95 (1978).

rejecting while unnecessarily raising the bar created by *respondeat superior*. For instance, the third form of *Monell* liability—inadequate training—vaguely resembles the rationale for *respondeat superior* that invokes breach of warranty arguments; the fourth form of *Monell* liability—improper hiring—sounds quite similar to selection of employees as a basis for employer liability.[94] The *Monell* doctrine, however, imposes an additional requirement on plaintiffs to show "deliberate indifference" rather than assuming automatic vicarious liability on the basis of these employment relationships.

Second, the *Monell* Court's aversion to *respondeat superior* here was likely motivated by the historical context of the time, resulting in the Court engaging in circular arguments that both rejected this theory of liability and indirectly adopted it as well.[95] The Sherman amendment had nothing to do with § 1983 suits to begin with; instead, as previously discussed, it was about adding a section to the Ku Klux Act to respond to the civil rights violations being carried out by the KKK.[96] Again, the goal of the amendment was to have the community share the losses from racially motivated mob violence as a potential deterrent to this violence. *Respondeat superior* in this context obviously made no sense: the KKK was not employed by the municipality nor a "legal unit" with it, so the municipality could not be taking on either the benefits of the KKK's actions or the liabilities that flowed from them.[97] Accordingly, the 42nd Congress voted against

[94] *Supra* Part II A.3.

[95] Achtenberg, *supra* note 80, at 2202–04 ("Rejection of municipal liability for the actions of the Klan and similar organizations did not suggest that the members of the Forty-Second Congress rejected the principles underlying respondeat superior; it demonstrated their fidelity to those principles.").

[96] *See supra* notes 27–32 and accompanying text.

[97] Achtenberg, supra note 80, at 2204 ("The city and the Klan were not a 'single unity' and the actions of the Klan were not, 'in the contemplation of the law,' the actions of the city. The city in which the Klan committed its depredations did not control the Klan's conduct."); *id.* ("The city could neither be seen as having held out Klan marauders as trustworthy or as having warranted their good conduct. Because the city had not sought to benefit from the Klan's actions, there was no reciprocity justification for holding the city liable for the Klan's misdeeds.").

the Sherman amendment, not against *respondeat superior* as a doctrine for municipal liability.[98] Meanwhile, § 1983 claims against public officials appeal to employer-employee relationships that fall squarely within the definition of *respondeat superior* and are entirely unrelated from the goals of the Sherman amendment. Thus, even while attempting to correct the *Monroe* Court's improper analysis of the rejection of the Sherman amendment, the *Monell* Court engaged in its own flawed interpretation of the Congressional decision. *Respondeat superior* remains perfectly in line with the purpose and function of § 1983 claims.

2. *Monell*'s Four Approaches to Liability are an Unusually High Standard

The rejection of *respondeat superior* for municipal liability is not simply a matter of semantics. Despite the language of the pathways for liability under *Monell* mimicking some of the rationale behind *respondeat superior*, by rejecting the foundational theory, the *Monell* Court created an impossibly high standard, rendering the idea of institutional liability for wrongs illusory and subverting the entire purpose of the case's rejection of *Monroe*.[99]

Section 1983 claims already face a high burden when lodged against individual police officers due to qualified immunity protections for public officials.[100] Success rates are even lower when a *Monell* claim is made against the institution that employs that public official, leaving plaintiffs with no recourse for the constitutional violations they have suffered.[101] Liability for a

[98] *Id.* at 2204 ("[Rejection] of the Sherman Amendment does not imply that Congress rejected . . . respondeat superior. Instead, belief in those rationales . . . would logically lead nineteenth-century lawyer-legislators to vote against the Sherman Amendment and in favor of municipal respondeat superior. Each of those rationales supported respondeat superior, but not . . . the Sherman Amendment.").

[99] Mead, *supra* note 21, at 536 ("By rejecting respondeat superior in favor of the policy or custom requirement, however, the Court greatly limited, and in some cases completely eliminated, the availability of section 1983 remedies.").

[100] Schwartz, *Municipal Immunity*, *supra* note 6, at 1230 (2023) ("Indeed, police officers are entitled to absolute immunity for unconstitutional conduct when they appear as a witness. . . . If a government official is protected by qualified or absolute immunity, the only way for the plaintiff to recover under Section 1983 is through a Monell claim.").

[101] *See supra* note 98; *see also*, Katelyn Elrod, Nancy Leong, Matthew Nilsen, *Pleading Failures in Monell Litigation*, 73 EMORY L. J. 801, 823 (2024) ("[O]ur research shows that plaintiffs usually lose municipal liability

municipality is somewhat obvious and clearcut when there is a statutorily-evidenced municipal policy behind the constitutional violations that form the basis of the § 1983 claim. However, when there is no written unconstitutional policy establishing an obvious link to the municipality, plaintiffs rarely succeed to courts' satisfaction in proving governmental custom, inadequate training, or improper hiring.[102] Without the deliberate indifference requirement, for example, it could be argued that any time a city or municipality employee acts "within the scope of [his] city-vested authority . . . [he is] implementing a city's policy."[103] Instead, courts dismiss *Monell* claims for lacking evidence of "deliberate indifference" that, arguably, does not even exist. For instance, the code of silence amongst police officers (the very phenomenon that shows deliberate indifference for citizens' constitutional rights) actively prevents the collection of evidence of any pattern or practice of this behavior.[104] The code of silence, an "unspoken but inviolable rule that

claims. . . . [I]n many well-pled cases with egregious facts, courts have nonetheless ruled for the defendant."); Schwartz, *Municipal Immunity*, *supra* note 6, at 1230 (2023) ("[I]t is more difficult to prevail on *Monell* claims against local governments than on Section 1983 claims brought against individual officers. . . . *Monell* claims were far less likely to go to trial than were Section 1983 police misconduct cases as a whole.").

[102] See Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 416 (2016) (comparing the high bar for proving municipal causation for *Monell* to de facto sovereign immunity despite a municipality's lack of sovereign standing such that "the municipal causation requirement and the individual immunities that local officers receive render specific classes of governmental defendants insusceptible to suit. . . . That is what immunity *is*"); Katelyn Elrod, Nancy Leong, Matthew Nilsen, *Pleading Failures in Monell Litigation*, 73 EMORY L. J. 801, 823 (2024) ("A significant majority of plaintiffs did not satisfy all the elements of all the *Monell* theories they raised. The result is especially notable given that the standard we used for evaluating element satisfaction was more lenient than the *Iqbal* standard that plaintiffs face on a motion to dismiss."). *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 62 (2011) (finding that a pattern of *Brady* violations in a police department was not sufficient to meet the *Monell* standard because the pattern was not of the same or similar *types* of *Brady* violations); City of Canton, Ohio v. Harris, 489 U.S. 378, 390–91 (1989) ("That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city. . . . Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training."); Waller v. City & Cnt. Of Denver, 932 F.3d 1277, 1290–91 (10th Cir. 2019) (rejecting municipal liability claims after a deputy sheriff threw a defendant into a glass wall without any provocation); Perkins v. Hastings, 915 F.3d 512, 523 (8th Cir. 2019) (rejecting municipal liability claims after a police officer with several prior disciplinary records shot and killed a fifteen-year-old).

[103] Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 433 (2016).

[104] In one case involving a young man choked by a police officer in the Bronx, several police officers met in a parking lot to "fabricate[] a cover story," and an officer that did come forward to report the misconduct received no backup from her colleagues. See Barry C. Scheck, *Practising Law Institute: Section 1983 Civil Rights Litigation Symposium: Criminal Prosecution and Section 1983*, 16 TOURO L. REV. 895, 909–10 (2000) (discussing *United States v. Livoti* and the code of silence that exists amongst police officers).

obligate[s] officers to refrain from snitching on one another"[105] is a very real practice of police departments, and cases like that of the 2014 murder of a Black teenager at the hands of Chicago PD exemplify the horrific ways this code permeates policing.

In late 2014, Officer Jason Van Dyke of the Chicago PD fired sixteen shots (the maximum capacity of his semiautomatic weapon) at Laquan MacDonald, a 17-year old Black child, in 15 seconds. Laquan was hit by at least 15 of these shots, with about 9 entering his back. He was pronounced dead within an hour. According to Van Dyke, he fired at Laquan because he was "fearing for his life" after Laquan allegedly refused all commands and "continued to approach the officers while still armed with his knife."[106] This story was reiterated, confirmed, and validated by Van Dyke's fellow police officers in their tactical response reports (filled with police jargon that glazed over the facts), by the media, and even a spokesman for the city's police union,[107] justifying Van Dyke's behavior as a "permissible use of deadly force."[108] No one could disprove these claims as the "city and police officials kept dashcam and bodycam footage of the killing under lock and key" despite public outrage over Laquan's death.[109] Only when the footage was finally released a year later at the command of a county judge did the public finally have proof that the police officers' stories were a complete fabrication, from the accusation of ignored verbal commands to Laquan's alleged knife-wielding lunge towards the police—the

[105] Adam J. Smith, *Police Reform Through Section 1983*, 43 N. ILL. U. L. REV. 51, 76 (2022).

[106] See *id.* at 76; Chi. Police Dep't, Major Incident Notification Detail, Incident No. 73204 at 2 (Oct. 20, 2014), https://www.documentcloud.org/documents/2642124-Laquan-McDonald-police-report-Part-1.html [https://perma.cc/P9UL-SEZ5].

[107] Jamie Kalven, *Sixteen Shots*, SLATE (Jan. 14, 2025), https://slate.com/news-and-politics/2015/02/laquan-mcdonald-shooting-a-recently-obtained-autopsy-report-on-the-dead-teen-complicates-the-chicago-police-departments-story.html [https://perma.cc/4JWH-YS78] ("Pat Camden, a longtime Chicago Police Department press spokesman who now performs that function for the police union, later described McDonald as having had 'a strange gaze about him … he's got a 100-yard stare … he's staring blankly.'").

[108] Adam J. Smith, *Police Reform Through Section 1983*, 43 N. ILL. U. L. REV. 51, 76 (2022).

[109] *Id.*

lunge that formed Van Dyke's justification for deadly force.[110] This case exemplified the willingness of police officers, departments, and municipal organizations to band together in protection of one of their own, even when horrific constitutional violations are committed.

Not only does this code of silence violate a whole host of existing police conduct rules and regulations,[111] but when it comes into play after misconduct or violence perpetrated on children, it also violates mandatory reporting laws that require police officers to report any instances of child abuse.[112] The more cases of misconduct that go unreported or unsubstantiated, the more difficult it becomes to prove any pattern and meet the evidentiary standards for a *Monell* claim.[113] Ultimately, the aversion to *respondeat superior* arguably creates a bias in courts *against* finding liability for fear of invoking this rejected doctrine.[114] Requiring a link to policymaker action actually protects the municipality from liability based on actions by the very public-facing employees that have the most direct connection with the public and the greatest likelihood of engaging in constitutional violations in a tangible way.[115]

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[110] See *id.* at 77 ("Perhaps most importantly, the critical 'lunge' toward Van Dyke, the legally obligatory precursor to a 'justified' use of deadly force, never happened. McDonald was walking away from Van Dyke when he was shot. In fact, McDonald took the majority of Van Dyke's shots while he was already incapacitated and on the ground.").

[111] *See, e.g.*, New York City Police Department Disciplinary System Penalty Guidelines 20 (January 15, 2021), https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-compete-.pdf [https://perma.cc/7S5U-WSX5] ("Failure to intervene in the use of excessive force, report excessive force, or to request and/or ensure timely medical treatment for an individual is serious misconduct that may result in criminal and civil liability and will result in Department discipline, up to and including termination.").

[112] *Supra* note 60.

[113] *See supra* note 101 and accompanying text.

[114] *See* Mead, *supra* note 21, at 563 ("The Court's focus on the status of the decisionmaker as the determining factor in deciding whether official policy has been made highlights the difficulty of not accepting *respondeat superior* . . . in a section 1983 municipal liability case. [The] approach implicitly recognized that municipalities can act only through their employees.")

[115] *Id.* at 564 ("The municipality is deemed responsible for the acts of high level decisionmaking employees but not for the acts of low level, frontline employees. . . . It is the low level employee who has the greatest exposure to the public and, therefore, the greatest potential for committing constitutional violations.").

3. Police Officers Have Unfettered Immunity and Face No Consequences for the Most Egregious Constitutional Violations; Youth of Color Bear the Cost

The high burden that the *Monell* standard creates is particularly evident when it comes to policing, leaving victims of police violence with no viable opportunity to obtain justice. In fact, more often than not, police officers evade liability for outrageous violations as they are protected individually by qualified immunity, and their police departments and cities are protected under *Monell*'s incredibly difficult requirements. These protections are not just flawed for the lack of recourse that they provide individual complainants, but also because this level of immunity fails to deter future violations, results in insufficient disciplinary action (if any, at all), and hinders reform in policing.[116]

For instance, after a *Monell* claim was, despite all odds, successful against New York[117] for the NYPD's racial profiling in stop and frisk policies, the Court requested an in-depth report of the NYPD disciplinary process. While this Note does not delve into the investigative procedures employed by the NYPD, it is worth highlighting that when misconduct by officers is discovered, it can be met with formal or informal mechanisms for discipline, and this disciplinary decision is left to the discretion of the Police Commissioner regardless of the

[116] Amelia C. Waller, Note, *State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865, 885 (1982) ("[I]ndividual actions under section 1983 do not significantly deter police misconduct. . . . It is unlikely that individual suits will obtain injunctive relief on the scale necessary to alleviate a problem of systematic police abuse for the benefit of all citizens who might be affected.").

In New York, even when misconduct is exposed, an officer doesn't necessarily face disciplinary proceedings by the municipality that employs them, especially if the plaintiff of the misconduct litigation does not also file a complaint with the CCRB or IAB or equivalent police department investigative agency. While the civilian complaint was a mandatory precursor for CCRB investigation before, the Board can now initiate its own investigations in limited circumstances. However, internal investigations are often avoided because a misconduct finding in one of these investigations could bar the use of the qualified immunity defense in ongoing litigation against the officer. See James Yates, Report to the Court on Police Misconduct and Discipline 38, NYPD MONITOR (September 19, 2024), https://www.nypdmonitor.org/wp-content/uploads/2024/09/Discipline-Report.pdf [https://perma.cc/QT37-3Y8W].

[117] This section examines findings of policing violations and lack of discipline specific to New York, extrapolating the concerns these raise to argue for a national change in the handling of police misconduct claims.

specific recommendations the investigating agency gives for discipline.[118] Moreover, the standards for the Commissioner's explanations for deviating from recommended disciplinary action are low, at best.[119] Thus, in New York, for example, Command Discipline, a form of informal discipline that was instituted for minor violations by police officers, "has become the predominant form of proceeding, invoked for almost every kind of misbehavior."[120] More often than not, various forms of guidance, warnings, and training are provided in response to misconduct (even the stop and frisk misconduct that motivated the Floyd Monitor report) rather than any true statutorily-defined discipline (e.g. suspension, termination, etc.) per Civil Service Law § 75 and Administrative Code § 14–115.[121]

These findings are confirmed by the CCRB Report on Youth and Police from June 2020. In one of the substantiated claims, an eleven-year-old Black child was walking on the New York City Housing Authority (NYCHA) complex and stopped to greet an acquaintance when he was stopped and frisked by an officer.[122] The officer later claimed that his stop was "based upon his observation of a bulge in the Victim's pocket" even though a bulge cannot be used as a basis for

[118] Yates, *supra* note 115, at 169 ("The Police Commissioner may approve or modify the recommended findings and the penalty, if any." (citing 38 RCNY § 15-08(a))); *id.* ("The Police Commissioner may approve or modify the recommended findings and the penalty, if any." (citing N.Y.C. Admin. Code § 14-115; N.Y. City Charter § 434)); *id.* at 170 n. 756 ("After implementation of the Matrix, the Police Commissioner posted 184 Departure Letters where recommendations by CCRB for discipline were reduced or dismissed. As of Apr. 7, 2023, of 184 downward departures, dismissed cases included 1 Deputy Chief, 1 Inspector, 3 Deputy Inspectors, 2 Captains, 17 Lieutenants, and 22 Sergeants. posted letters at https://www.nyc.gov/site/ccrb/complaints/redacted-departure-letter.page.").

[119] *Id.* at 183 ("CCRB has begun to post departure letters it receives from the Police Commissioner when the Commissioner imposes a lesser penalty or level of discipline than that recommended by CCRB when it substantiates a complaint. As of March 2023, there were 181 Departures described in cases decided in 2022. Although the letters are required to explain in detail the reasons for the Police Commissioner's rejection of CCRB's recommendation, they are brief and opaque.").

[120] *Id.* at 53.

[121] *Id.* at 56. The Floyd Monitor report also finds that regardless of what discipline is imposed, enforcement raises another issue such that supervisors often fail to ensure the disciplinary activity is engaged in. This failure to monitor is also not met with any disciplinary action.

[122] NYC Civilian Complaint Review Board, *supra* note 74, at 27.

reasonable suspicion.[123] The CCRB found a violation and recommended disciplinary action,[124] but the Police Commissioner ultimately downgraded the discipline level and just imposed training requirements.[125] In fact, in nearly all the cases discussed in this report, the Police Commissioner downgraded the discipline from the CCRB's recommendation.[126]

Of special note in the CCRB report is the racial divide of these policing issues. Of the 407 police misconduct complaints involving youth that the CCRB examined, sixty-four point eight percent involved males of color (Black, Hispanic, Asian, or Indian-American) and sixty-three point nine percent specifically involved Black victims, despite the fact that "only 24% of New Yorkers self-identif[ied] as Black according to the 2017–2019 Census estimates."[127] According to the Bureau of Justice Statistics Survey, between 1998 and 2008, thirty point one percent of all police uses of force involved youth between the ages of 16 and 18, even though this demographic made up a mere seven point six percent of the population.[128] This militarization of police forces was found to be higher for youth of color, particularly "impoverished and African-American, Latino, and immigrant youth" who are subject to excessive force at disproportionate rates.[129] Black youth, in particular, experience excessive force in police interactions at such greater rates than their non-Black counterparts such that "Black adolescents develop a fear of police at a young age, and understand the potential for unnecessarily excessive

[123] *Id.* ("A bulge, such as the officer described, absent any additional factors, does not provide sufficient grounds on which to form reasonable suspicion that an individual is armed.").

[124] *Id.* ("The investigation determined by a preponderance of the evidence that the officer lacked sufficient justification to stop and frisk the Victim. The Board substantiated the abuse of authority allegation and recommended Command Discipline B.").

[125] *Id.*

[126] *Id.* at 27–35.

[127] NYC Civilian Complaint Review Board, *supra* note 74, at 16.

[128] Lisa H. Thurau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. LEGAL RTS J. 3, 30 (2009) (adding that the police initiated force in 81% of these instances).

[129] *Id.* at 31.

force during interactions with police officers."[130] A study of youth-police contact found that "in urban communities and communities of color, traumatic experiences with police begin early in life, suggesting that they warrant consideration as an [Adverse Childhood Experiences]" and even necessitate public health intervention to overcome the health disparity that inevitably results between white and non-white communities after such interactions.[131]

This is a perception that is not lost on youth, who report viewing their own race as a determining factor for police interactions, who they see as sources of harm rather than help.[132] The roles of race and other intersectional identities are always relevant to conversations about policing; they become increasingly important upon consideration of the high bars in place for relief. In fact, these racial disparities appear not just at the hands of police but also in court. For instance, The Office of Juvenile Justice and Delinquency Prevention notes that youth of color are more likely to have criminal or arrest records than their white counterparts.[133] The Floyd Monitor report on NYPD discipline and the CCRB report of youth and policing together highlights the racialization of stop-and-frisk policies, indicating that officers tend to stop people of color at higher rates, accusing them of actively engaging in crimes or under the pretense of matching descriptions of suspects of already-committed crimes.[134] And, if the complaining plaintiff in a *Monell* claim has a previous police record or was alleged to be engaged in criminal activity

[130] Devan Byrd, *Challenging Excessive Force: Why Police Officers Disproportionately Exercise Excessive Force towards Blacks and Why This Systemic Problem Must End*, 8 ALA. C.R. & C.L. L. REV. 93, 107 (2017); Yolander G. Hurst et. al., *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, POLICING: INT'L J. POLICE STRATEGIES & MGMT. 37, 37 (1997) (The police expect trouble from black youth, and in turn young black males expect to be disrespected and harmed by the police.").

[131] Geller, *supra* note 75 ("Adverse childhood experiences (ACEs) are potentially traumatic events that occur in childhood or environmental circumstances that can undermine a child's sense of safety, stability, and bonding. ACEs may contribute to toxic stress that can harm development. . . . These, in turn, influence adult health and health risk behaviors and may be transmitted intergenerationally." (footnotes omitted)).

[132] *Id.* at 35.

[133] *Racial and Ethnic Disparity in Juvenile Justice Processing Literature Review: A product of the Model Programs Guide*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity#1-0 [https://perma.cc/G4EB-BLTZ].

[134] Yates, *supra* note 115; NYC Civilian Complaint Review Board, *supra* note 74, at 27–35.

during or around the constitutional violation leading to the § 1983 claim (as is often the case when it comes to police misconduct claims), obtaining relief becomes even harder.[135]

At the risk of over-simplification, true disciplinary action is functionally non-existent for police officers that engage in misconduct, disproportionately harming juveniles and, in particular, young people of color. It is disappointing and concerning that obtaining relief and ensuring accountability in the wake of police misconduct against youth is such an elusive goal when victims of this misconduct are, most often, impoverished and/or youth of color. These victims are thus forced to pursue red herring "solutions" both in and out of court: qualified immunity, police department codes of silence, and *Monell* work together to prevent any individual or institution from taking on the responsibility for misconduct in court, and police departments investigating or addressing misconduct further shield officers from any liability or consequences outside of court.

B. *Parens Patriae* Provides a Mechanism for Enforcing Rights Through Standing to Sue, but Fails to Enforce Duties by Creating Standing to Be Sued

The failures of *Monell* have long been the subject of extensive discussion, indicating that the mechanisms for holding a municipality liable for its own law enforcement officials' constitutional violations fail to protect the constitutional rights of its citizens. The doctrine of *parens patriae* is highly relevant to this discussion, despite its inapplicability to municipalities.[136]

[135] Amelia C. Waller, Note, *State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865, 873 (1982).

[136] *See supra* Part I B.1.

1. *Parens Patriae*'s Sovereignty Requirement Allows Municipalities to Avoid Responsibility For Their Most Vulnerable Citizens

Parens patriae is based on the idea of sovereignty; states have sovereignty, but cities and municipalities do not, so they are unable to invoke this doctrine as a basis for bringing suit.[137] However, in instances of special statutory authorization, a city or municipality may be able to invoke the *parens patriae* doctrine. For instance, the Delaware court recognized the City of Wilmington's right to sue as *parens patriae* on the basis of the powers delegated to it by the Home Rule Act.[138] The Act designated Wilmington as a home rule city, granting it some of the powers of a sovereign, such as the right to create its own laws, subject to certain statutory and constitutional limitations.[139] The court found that cities typically could not assert the *parens patriae* doctrine as the Constitution only recognizes the federal and state governments as sovereigns, but, pursuant to this statutory authority, Wilmington had standing to sue as *parens patriae* on behalf of its residents, particularly on behalf of residents who were children.[140]

[137] Capital View Fire Dist. v. County of Richland, 377 S.E.2d 122, 124 (1989) ("Political subdivisions, such as cities and counties, however, lack the element of sovereignty that is a prerequisite to maintaining a suit under the doctrine of parens patriae."); Board of County Com'rs of Arapahoe County v. Denver Bd. of Water Com'rs, 718 P.2d 235, 241 (1986) ("[C]ounties . . . are political subdivisions of the state with only such powers as the state delegates to them. . . . [W]e hold that countries lack the element of sovereignty that is a necessary prerequisite for *parens patriae* standing."); Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J. L. REFORM 581, 605 (2019) ("[T]he Ninth Circuit held that "political subdivisions"–cities, counties and the like–'cannot sue as *parens patriae*.' Similarly, the Fifth Circuit has held that cities, as mere "creature[s] of the state," cannot exercise the same *parens patriae* powers as their parent states. Multiple district courts have reached the same conclusion." (quoting In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973)).

[138] 22 Del. C. § 802 ("Every municipal corporation in this State containing a population of at least 1,000 persons . . . may . . . have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute."); In re Delaware Public Schools Litigation, 239 A.3d 451, 521 (2020) ("The General Assembly chose to grant municipalities the right to assume sovereignty for themselves by declaring themselves to be 'home rule cities.'").

Home rule statutes give "local governments some control over their own political structure; some authority to adopt new laws and initiate new regulations concerning matters of local concern; and, somewhat more uncertainly, a measure of protection from state displacement when state and local measures come into conflict. See Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 257 (2004).

[139] *Id.*; Schadt v. Latchford, 843 A.2d 689, 691 (Del. 2004).

[140] In re Delaware, 239 A.3d, at 524 ("The City can also sue on behalf of its residents who are children. . . . The doctrine of *parens patriae* applies with special force when a sovereign asserts claims on behalf of children.")

In New York state, all cities are designated as home rule cities with similar authority,[141] though this is not true for every state. For instance, in California, charter cities have home rule authority while general-law cities are subject to state laws.[142] Despite the existence of this exception, Home Rule authority does not automatically confer sovereignty.[143] The Delaware court was the exception as states are resistant to such statutory authorization of municipalities. Even if states were to statutorily authorize municipalities as sovereigns in limited contexts, such as when it comes to policing harms and juveniles, *parens patriae* as it stands now would fail to live up to its own goals. After all, giving a municipality sovereign authority to sue on behalf of a plaintiff in a police violence case is meaningless when the object of the suit is the municipality itself.

2. *Parens Patriae* Provides a Mechanism for Enforcing Rights Through Standing to Sue, but Fails to Enforce Duties by Creating Standing to Be Sued

Parens patriae by definition creates both powers and duties for the state, but only the state's powers under this doctrine are enforced, and no enforcement mechanism exists for the duties that come with it. The doctrine creates a right for the state to join litigation to sue on behalf of its citizens, but holding a state liable (being able to sue the state) in litigation is an entirely different endeavor.

[141] Municipal Home Rule (MHR) CHAPTER 36-A, ARTICLE 2; *see also*, Kathy Hochul, Governor, & Water T. Mosley, Secretary of State, Adopting Local Laws in New York State, James A. Coon Local Government Technical Series, Department of State: Local Government (1998) (reprinted 2024).

[142] Georgetown Law Library, California Resources.

[143] Briffault, *Home Rule for the Twenty-First Century*, *supra* note 137 and accompanying text; *see also*, Briffault, *Home Rule for the Twenty-First Century*, *supra* note 137, at 257 ("[H]ome rule does not raise local governments to the level of sovereign entities within our system. . . . Even within state systems, home rule does not change the fact that local governments are creatures of state law. Home rule is conferred by the states and can be taken back by the states.").

Generally, the Eleventh Amendment gives states sovereign immunity, protecting them from suit.[144] In the post-*Monell* era, there has been debate on the question of whether a State is a person under § 1983, particularly as the Eleventh Amendment, which grants states sovereign status, does not apply in state courts.[145]

This question was finally answered by the Supreme Court in 1989, when it held that while § 1983 has been found to create a pathway for holding a municipality liable, a state's sovereign status prevents states from falling within the purview of § 1983 in the same way. In other words, sovereign immunity protects states from liability in a way that cannot be overcome by a § 1983 suit.[146] The Court reasoned as much based on statutory interpretation from the language of the statute and the purpose of § 1983 as a remedy. Specifically, the Court noted that § 1983 created a federal remedy for a deprivation of a civil liberty in response to the civil rights violations occurring in Southern States at a time where the states were either unable or unwilling to protect those rights or provide remedies or repercussions for the wrongdoings; however, "it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity."[147] One of the rare exceptions to this is the Ex Parte Young doctrine, under which a state official engaging in a constitutional violation is not immune from suit based on

[144] U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[145] See Will v. Michigan Dept. of State Police, 491 U.S. 58, 62–64 (1989).

[146] *Id.* ("[A] State is not a person within the meaning of § 1983." (citing Quern v. Jordan, 440 U.S. 332 (1979))).

[147] *Id.*, at 66 ("Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect . . .[A] principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims. . . . not . . . for civil rights claims against States. . . ."); Doe v. Bonath, 705 F.Supp.3d, 704 (2023) ("In order for a citizen to sue a State, the State must either waive its sovereign immunity, unequivocally express consent to the suit in federal court, or Congress validly abrogated State immunity through statute.").

Eleventh Amendment sovereign immunity, allowing for a § 1983 claim, for example, to be brought against such an official so long as the claim is for prospective, rather than retrospective, damages (i.e. it applies only to ongoing violations of federal constitutional or statutory law).[148] Again, however, this exception creates a pathway to individual liability for the constitutional violator rather than a mechanism for holding the state liable for the wrongs of the public officials it employs.

Thus, the state's *parens patriae* role as protector of its citizens (particularly children) does not mean that citizens can sue the state for constitutional violations by state officials under *parens patriae*. Moreover, because sovereignty and *parens patriae* do not apply to municipalities,[149] neither the duty nor the powers of the doctrine (if it is statutorily expanded to municipalities as discussed above) facilitate the success of a *Monell* claim for the protection of child victims of policing-based harm. Even if *parens patriae* authority is statutorily mandated for a municipality, this authorization would only come with the standing to sue on behalf of a plaintiff rather than imposing any additional means of liability upon the municipality (i.e. allowing the municipality to be sued under the doctrine).[150] Part III discusses the ways in which both the *Monell* framework and the doctrine of *parens patriae* can be adapted to fit the needs of youth that experience police misconduct.

[148] Ex parte Young, 209 U.S. 123 (1908); *see also*, Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 648 (2002) ("We also conclude that the doctrine of *Ex parte Young* permits Verizon's suit to go forward against the state commissioners in their official capacities."); Lee v. State, 874 N.W.2d 631, 638 (Iowa 2016) ("Invoking Ex parte Young permits the maintenance of suits alleging ongoing violations of federal constitutional or statutory law against state officials despite state sovereign immunity so long as they seek prospective relief. . . . [T]he Ex parte Young doctrine serves as a means or mechanism for overcoming state sovereign immunity." (internal citations omitted)).

[149] Police departments are municipal agencies that report to the city, and municipalities are not sovereigns, so they have no *parens patriae* authority to join litigation.

[150] *See supra* note 57.

III. MODERN-DAY MISCONDUCT WARRANTS A MODERN-DAY UNDERSTANDING AND EXPANSION OF INSTITUTIONAL LIABILITY FRAMEWORKS

In theory there have been a variety of mechanisms created for the protection of citizens' rights when it comes to police misconduct, from New York's CCRB and similar investigative agencies across states to § 1983 claims and the *Monell* framework for liability. Even *parens patriae* has been invoked as a protective function in these cases through recommendations for states to join litigation in police misconduct cases on behalf of citizen plaintiffs.[151] However, as demonstrated above, all these solutions send victims of police misconduct on a wild goose chase for remedies that are rarely, if ever, afforded to them. This Note suggests there has been a failure to apply existing and available legal doctrines to appropriately protect citizens' rights, particularly in the context of juveniles, who are in greater need of protection and warrant solutions that are different from, or perhaps even unavailable to, their adult counterparts.[152] Rather than offer a race-based cause of action, such as a Fourteenth Amendment violation as seen in *Floyd v. City of New York*,[153] this Note addresses the flaws in the *Monell* and *parens patriae* frameworks in order to provide a solution that can be used by young people of color that are subjected to increased harm at the hands of police.[154]

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[151] Amelia C. Waller, *State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae*, Note, 16 GA. L. REV. 865 (1982).

[152] Madison C. Jaros, *The Double-Edged Sword of Parens Patriae: Status Offenders and the Punitive Reach of the Juvenile Justice System*, 94 NOTRE DAME L. REV. 2189, 2192 (2019) ("Because the juvenile system was founded on the fundamental idea that adolescents were a distinct class with distinct needs, it was designed to deal with adolescents in a way that was completely different from the way that the justice system at large dealt with adults.").

[153] 959 F.Supp.2d 540 (2013) (bringing a *Monell* claim by pointing to a pattern or practice of racially-motivated stop-and-frisk policies in violation of the Fourteenth Amendment's Equal Protection Clause).

[154] Due to the near impossibility of proving a *Monell* claim as well as the increasing difficulty in bringing an Equal Protection claim based on disparate impact or statistical disparities, this Note seeks to address the issue of the lack of accountability for harm to children at the hands of police with solutions that are not based in race but can be used by young people of color when they experience this harm. Rather than work within the *Monell* framework as it exists today to develop a cause of action rooted in the racial disparities in police misconduct, this Note illuminates the fundamental flaws in *Monell* as well as *parens patriae* that contribute to this racial disparity and suggests modifications to these doctrines to alleviate some of these gaps.

A. Modernizing *Monell* for Minors

1. *Respondeat Superior* for Minors' Major *Monell* Claims

The flaws in *Monell* are manyfold, but so, too, are the potential areas of reform. One common solution that has been suggested before is the adoption of a vicarious liability framework (i.e. *respondeat superior*) under *Monell*.[155] Recognizing the longstanding aversion to such a theory,[156] this Note recommends a new iteration of this solution as only one of the possible areas in which police misconduct liability can be improved. Specifically, this Note recommends, at minimum, a partial adoption of the theory of *respondeat superior* in a limited context: police misconduct cases involving juveniles. Recognizing the particularly heinous and traumatic impact that policing and police misconduct can have on youth, § 1983 claims brought by or on behalf of youth require a more robust solution in the form of institutional liability.

As Part II A. suggests, *Monell*'s bar for liability is unreasonably high compared to that which is found in any other employer-employee relationship, which not only makes it hard for plaintiffs to get relief for the wrongs they suffer but also fails to deter future violations. *Respondeat superior* as a basis for municipal liability can rectify this.[157] Additionally, incorporating *respondeat superior* into the *Monell* framework would expand availability of § 1983 relief to victims of constitutional wrongs even when they cannot name a municipal employee or policy directly implicated in their very real suffering, effectively lowering some of

[155] *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & Mary Bill Rts. J. 755, 757 (1999) (suggesting the use of vicarious liability in municipal liability cases and citing cases in which such a theory was used).

[156] *Id.* at 758, 759–81 (noting the inconsistent application of the vicarious liability theory for some constitutional violations but not others).

[157] Mead, *supra* note 21, at 539 ("Moreover, forcing municipalities to be responsible for their employees' unconstitutional conduct encourages care in the hiring, training, and supervision of municipal employees. This care, in turn, should reduce the number of constitutional injuries. . . . [M]unicipal liability for acts of employees focuses attention on the problem of the unfit employee and the potential for widespread institutional abuses.").

the burden placed on plaintiffs in *Monell* claims.[158] Under such a theory, municipalities can no longer bank on willful ignorance and must instead place more emphasis on proper hiring, training, and discipline of their employees to prevent constitutional injury.[159]

Many arguments against this approach hinge on a fear of increased litigation[160] (isn't that the point?) under § 1983 or hurting the pocketbooks of municipalities[161] (arguably the most direct way of encouraging police reform?).[162] A limited application of this approach in the juvenile context alone can assuage some of these longstanding concerns of over-expansion of *Monell*. Additional criticisms of this change to *Monell* are based on indemnification, which, according to some, would not make *respondeat superior*-based liability wrong, per se, but rather ineffectual. For instance, under current police indemnification practice, while governmental liability is difficult to obtain, individual suits against police officers are not actually paid out by the officers themselves. Instead, rare is the officer that loses a lawsuit and pays the settlement, attorney's fees, or any other costs out of pocket.[163] If an institution is paying out these lawsuits against

[158] *See id.* ("The victim of constitutional injury who cannot identify the municipal employee responsible for the injury or satisfy a judgment against the actor may go uncompensated unless he or she can recover from the municipality on a *respondeat superior* theory."); *see also,* Leong, *supra* note 5, at 358 ("Second, a plaintiff who seeks redress directly from a municipality may recover regardless of whether an individual employee is held liable for a constitutional violation. . . . Municipality liability therefore offers an alternative avenue for achieving § 1983's goal of providing redress for injured plaintiffs even when no individual officer can be held liable.").

[159] *Id.* ("Municipalities are aware when hiring personnel that the nature of certain sensitive governmental jobs puts certain employees in positions having direct and special effect on the valued interests of the citizenry. These functions create or increase the risk that the governmental operatives will infringe civil liberties.").

[160] *Id.* at 540.

[161] Cong. Globe, 42d Cong., 1st Sess. 244 (1871).

[162] Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 850 (2005) ("Section 1983 was enacted by Congress to serve those seeking redress for violations of their constitutional rights committed by municipalities. Currently, the approach to municipal liability favors those committing the wrong, instead of those seeking redress for violations of their rights. This seems a contradictory result in a judicial system that aims to promote fairness and equitable solutions.").

[163] Human Rights Watch, *Shielded From Justice: Police Brutality And Accountability In The United States: New York: Civil Lawsuits* (1998) ("Officers themselves do not have to pay personally in civil lawsuits; the city almost always indemnifies the officer and pays. In the rare case in which the city has not covered the officer, the PBA [Patrolmen's Benevolent Association, a police officers' union] has done so."); Lant B. Davis, John H. Small & David J. Wohlberg, *Suing the Police in Federal Court*, 88 YALE L. J. 781, 810–12 (1979) (examining a sample of 149 case of § 1983 lawsuits in the District of Connecticut between 1970 and 1977 and finding that "individual defendants were almost always indemnified" and suffered no personal financial losses after the lawsuits); Theodore Eisenberg &

police officers anyways, adopting *respondeat superior* or facilitating municipal liability might seem like a redundant solution, as "de facto respondeat superior liability" might already exist through indemnification.[164] While the issue of police indemnification may make adoption of *respondeat superior* a less comprehensive solution, it does not render it any less important. In fact, the lack of deterrence for police misconduct that continues despite indemnification is evidence enough that the liability that indemnification creates is not nearly serious enough to encourage municipalities to pursue police discipline and/or reform.[165]

2. Nonenforcement of Mandatory Reporting and Disciplinary Policies for Policing Constitute Tolerance of Ignorance of State Law

Without adopting the theory of *respondeat superior*, *Monell*'s governmental policy requirement for municipal liability would prevail. But other adjustments to this framework and its application in courts can facilitate municipal liability.

It is evident that a variety of police policies exist that require law enforcement officials to protect the constitutional rights of citizens in general and children in particular, including, but not limited to, mandatory reporting of police misconduct by colleagues,[166] mandatory reporting of child abuse,[167] and employment consequences as recommended by investigative and disciplinary arms of police forces (i.e. CCRB, IAB, police commissioners, and their equivalents). These

Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 685 (1987) (reviewing civil rights cases in the Central District of California in 1980 and 1981 and finding no evidence of officers that have paid out-of-pocket at the conclusion of a lawsuit).

[164] Schwartz, *Police Indemnification*, *supra* note 9, at 944–46 (2014) ("[G]iven widespread indemnification, there would arguably be a less urgent need to replace Monell's municipal liability framework with respondeat superior liability.").

[165] Even with police indemnification, qualified immunity standards make § 1983 claims so difficult to bring against individual officers; vicarious liability through *respondeat superior* overcomes this barrier to recovery in a way that police indemnification does not. See *id.* at 946 ("Even if an officer violated rights that were not clearly established, and therefore could not be held personally liable due to qualified immunity, the municipality would remain vicariously liable to the plaintiff for its employee's wrongs.").

[166] *See supra* note 110 and accompanying text.

[167] *See supra* note 65–68.

kinds of policies, which can be interpreted as efforts by the municipality to prevent or avoid constitutional violations, only preclude *Monell* liability under the first form of municipal liability—implementation of an official written policy of the municipality. However, they directly invoke the other three pathways for municipal liability and even offer the opportunity to add a fifth route to liability under the *Monell* doctrine.

This Note suggests that the *Monell* doctrine can be reformed to allow plaintiffs to invoke nonenforcement as a fifth category or pathway to liability under which failure to act in accordance with written policy gives rise to a *Monell* claim. At the very least, the patterns reflecting police departments' failure to adhere to policies governing their behavior falls within the existing pathway of custom-based liability. The code of silence is one well-documented pattern or practice constituting governmental custom, as is the failure to report child abuse under mandatory reporting laws. Part II A. detailed the extent to which police officers' failure to follow the mandatory reporting requirements under both police conduct stipulations *and* mandatory reporting laws manifest in the "code of silence"; this is arguably exactly what custom-based *Monell* liability was designed to address. The Supreme Court noted in *Adickes* that "settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements."[168] In fact, Justice Frankfurter has posited,

> It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.[169]

[168] Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68 (1970).
[169] Nashville, C. & St. L.R. Co. v. Browning, 310 U.S. 362, 369 (1940).

Statements made by the chief of police and mayor of New Orleans have also been considered by the Supreme Court to "articulat[e] a custom having the force of law."[170] This understanding places the actions of the Police Commissioner of New York (i.e. failure to discipline police officers despite CCRB recommendations),[171] for instance, squarely under custom-based liability. Generally, the lack of discipline by police departments (as demonstrated by the NYPD's report post-stop and frisk) after misconduct would thus constitute a pattern or practice that invokes *Monell* liability,[172] as, despite the existence of various mechanisms of discipline, the Police Commissioner of New York engages in a repeated practice of reduced disciplinary action (if at all) that circumvents disciplinary requirements and reflects a de facto policy of allowing law enforcement officials to dodge consequences for misconduct.

Outside of the *Monell* doctrine, however, another promising avenue for institutional liability may exist for minors subject to police violence.

B. The Municipal Parent: A Twofold Approach to a Local Analog for *Parens Patriae*

Though well-intentioned, *parens patriae* as it stands today is a flawed doctrine that fails to live up to its promise of protecting children that are unable to protect themselves. All hope is not lost, however. A modern and updated application of this historic doctrine[173] can provide a much-needed remedy for the failures of municipal liability frameworks in cases of police misconduct involving youth. This Note first calls for a limited application of the *parens patriae* doctrine to municipalities and local governments when it comes to children so that these

[170] *See id.* at 168 (citing *Lombard v. Louisiana*, 373 U.S. 267 (1963)).
[171] *See supra* notes 121–125 and accompanying text.
[172] Joanna C. Schwartz, *Monell's Untapped Potential*, 125 COLUM. L. REV. (2025) (discussing police departments' failure to investigate complaints or disregard of evidence uncovered related to the complaints as a basis for *Monell* liability).
[173] Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 333 (2020) (describing *parens patriae* as "a relic of the past").

institutions can, like states, be subject to a duty and obligation to protect their citizens. Second, this Note suggests that the doctrine of *parens patriae* should be expanded to warrant enforcement mechanisms for the duties it creates—in other words, authority and standing to sue under the doctrine should also create standing to *be sued*.

As discussed in Part II B.1. of this Note, municipalities lack the sovereign status required for *parens patriae*. However, past research and literature have suggested that "[a]lthough these *parens patriae* cases concern the standing of states rather than cities, their reasoning seems applicable to local governments."[174] Municipalities are just as interested in ensuring the safety of their citizens (or at least they should be). On this basis, municipalities can and should be statutorily authorized as *parens patriae*.[175] Statutorily authorizing municipalities and local governments as *parens patriae* in the limited context of policing of minors would do more than just ensure their ability to join § 1983 litigation; more importantly, it would generate an obligation for municipalities to fulfill the goals of the doctrine and intervene in police misconduct cases in a way that ensures the protection of children under their care.

This recommendation is, of course, likely to raise concerns of municipalities' lack of sovereign status since the *parens patriae* doctrine requires sovereign interests that the governing body has independent of the interests of the affected citizens. Particularly in the case of children, municipalities arguably have the same interests in protecting the constitutional rights and

[174] David J. Barron, *Why (And When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L. J. 2218, 2243 (2006); *see also*, Laura L. Gavioli, *Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Source of Revenue*, 78 TUL. L. REV. 941, 959 (2004) ("Arguably, a city as a governmental entity has an interest in the health and welfare of its citizens. . . .").

[175] 22 Del. C. § 802 ("Every municipal corporation in this State containing a population of at least 1,000 persons . . . may . . . have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute."); In re Delaware Public Schools Litigation, 239 A.3d 451, 521 (2020) ("The General Assembly chose to grant municipalities the right to assume sovereignty for themselves by declaring themselves to be 'home rule cities.'").

physical and emotional safety of the children under its care that a state does[176]—this should be enough to justify invoking the doctrine for municipalities in just this limited instance even if the lack of sovereign status precludes a complete expansion of the doctrine to local governments.[177] Additionally, the idea of local governments joining suit despite not having sovereign status is not unheard of even without invoking an expansion of *parens patriae*.[178] With authorization as *parens patriae*, however, municipalities would simply no longer have to prove their standing for participation in litigation every time they seek to partake.

This is, of course, only step one. As detailed in this Note, *parens patriae* enforces a state's rights under the doctrine by providing standing to join litigation as a plaintiff; however it fails to enforce these *parens patriae* duties through any equally legitimate mechanism.[179] To be effective in protecting children from harm at the hands of police at any level, the doctrine of *parens patriae* must not only extend to municipalities but also be expanded to holding the *parens* liable for its failure to fulfill its protective duties over its *patriae*. Thus, under the second part of this recommendation, *parens patriae* must come with the standing to *be* sued.

First, this approach aligns with a past reading of *Monell* itself. Specifically, in *South Macomb Disposal Authority v. Washington*, the court argued that identifying an entity as a

[176] State interests that have been cited to invoke *parens patriae* authority in police violence cases include, but are not limited to, "the prevention of police lawlessness under official sanciton, and protection of the citizenry from abusive practices." *See* People of the State of New York v. The Town of Wallkill, 01-Civ-0364 (CM) (2001). For the invocation of *parens patriae* to justify state intervention for the protection of children, *see supra* note 60.

[177] Moreover, this criticism would be more accurately lodged against the exception that allows for statutory authorization of *parens patriae* standing for municipalities; the existence of this exception is not in question, so, for all intents and purposes, it can and should be employed in the policing context.

[178] Courts have found standing for municipalities to participate in litigation under § 1983 in several cases. *See, e.g.*, Santiago Collazo v. Franqui Acosta (1989, DC Puerto Rico) 721 F.Supp 385 (holding that a municipality could bring an action under § 1983 to challenge funds allocation under the Housing and Community Development Act of 1974); Pennsylvania v. Brown, 260 F.Supp. 323 (1966 ED Pa) (finding that the municipality had a stake in the case's outcome that justified standing to sue); Akron Bd. of Education v. State Bd. of Education, 490 F.2d. 1285 (1974) (holding that a board of education had standing to bring a § 1983 suit against a state board of education).

[179] *See supra* Part II B.

"person" is reciprocal when it comes to standing to sue and standing to be sued.[180] In other words, if a municipality is a "person" that can be held liable under § 1983, then it is also a "person" that can participate in § 1983 litigation as a plaintiff. This is arguably applicable to *parens patriae*—if this doctrine gives a state (and municipalities, if the doctrine is statutorily expanded to local governments, as this Note recommends) standing to participate in litigation as a plaintiff, it should simultaneously provide (or enforce) standing to partake as a defendant. Moreover, this reading of the term "person" in § 1983 can overcome one barrier that arise with giving an entity sovereign status—Eleventh Amendment immunity. Statutorily authorizing a municipality with sovereign status and *parens patriae* rights and duties in the narrow context of police harm against juveniles, therefore, should create a new path to liability for the municipality rather than an added layer of immunity from suit.

Of course, one reason this solution may not have been considered in the past is that it seems to rely on circular logic. A municipality with sovereign authority under *parens patriae* would have the ability to join suit as a plaintiff, but in a *Monell* claim based on police violence, the municipality would be the intended target of the lawsuit (and the chances of the municipality suing itself for these violations is most likely next to none). However, this Note suggests two particular ways that the expansion of sovereignty and *parens patriae* authority to municipalities can be used to facilitate finding liability in cases of policing-based harm. First, an individual plaintiff can bring a claim against a municipality for police violence and invoke a violation of the *parens patriae* doctrine (namely, the *duty* that the doctrine creates) as a cause of action.

[180] *See South Macomb*, 790 F.2d. at 502–03 ("The term 'person' appears twice in the statute, one relating to proper plaintiffs under the statute, the other relating to the proper defendants. . . . We are of the opinion that in light of Monell, it would be a strained analysis to hold, as a matter of statutory construction, that a municipal corporation was a "person" within one clause of section 1983, but not a "person" within another clause of the same statute.").

Alternatively, when states invoke their *parens patriae* authority to sue a municipality on behalf of a citizen plaintiff, the doctrine can also provide a cause of action for that lawsuit as well.

Next, if paired with the aforementioned recommendation to expand *Monell* to encompass nonenforcement of policies, this use of the *parens patriae* duty can provide further justification for municipal liability under *Monell* as a pattern or practice of failing to act in protection of youth in violation of *parens patriae* duties, as evidenced by failure to report, the code of silence, and failure to discipline, would meet the requirements of a *Monell* claim. And finally, when a municipality is statutorily authorized with *parens patriae* authority for cases of police misconduct involving minors, this expanded form of the doctrine would facilitate a finding of municipal liability outside of either the *Monell* framework or the theory of *respondeat superior* based on a failure to fulfill a *parens patriae* duty to the children in its care.

CONCLUSION

Existing frameworks fail to provide adequate pathways to relief for victims of police misconduct or violence. This Note identifies a racial disparity in the prevalence and impact of policing-based harm (excessive force, violence, and general misconduct) on youth of color compared to their white counterparts by exploring the failures of existing legal doctrines to provide meaningful paths to liability. With no institution taking true accountability for police misconduct, compensation for victims is unattainable and police reform and deterrence for this conduct are nonexistent.[181]

Children, particularly those of color, are a uniquely vulnerable population in this landscape, suffering at the hands of police with no adequate recourse. While doctrines like

[181] John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 269–70 (2013) ("And the culture of law enforcement can, I believe, be affected by the award of money damages in appropriate cases. Finally, at the very least, a judgment of civil liability serves an admirable function in recognizing that wrong was done and in providing some measure of compensation to victims and their families.").

parens patriae purport to require institutions to protect vulnerable populations like children, they cannot be invoked in this context despite the dire need for them. Meanwhile, the applicable *Monell* framework fails to consider the particular needs of children suffering police harm. Effectively, *parens patriae* and the *Monell* framework have become tools that create uninhibited powers for state and local governments but do not create parallel mechanisms for accountability.

While multiple legal doctrines are currently failing children when they face police misconduct, these same legal doctrines provide opportunities for reform that would reframe existing mechanisms so that they can be invoked for the protection of juveniles and address the racialized impact of policing on young people of color.