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THE BLURRED BLUE LINE: MUNICIPAL LIABILITY, POLICE INDEMNIFICATION, AND FINANCIAL ACCOUNTABILITY IN SECTION 1983 LITIGATION

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INTRODUCTION

IN recent years, the relationship between law enforcement and the communities they serve has been at the forefront of public discourse in the media, legislative bodies, academic institutions, and the public at large.[1] Recent high-profile incidents involving police-civilian interactions in Ferguson, Missouri; Baltimore, Maryland; Staten Island, New York; Charlotte, North Carolina; and Falcon Heights, Minnesota, have invoked passionate debate from all corners of the nation.[2] The prevailing theme is that in far

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1. *See, e.g.*, David Hudson, *Building Trust Between Communities and Local Police*, WHITE HOUSE BLOG: PRESIDENT BARACK OBAMA (Dec. 1, 2014), https://obamawhitehouse.archives.gov/blog/2014/12/01/building-trust-between-communities-and-local-police [https://perma.cc/9J4Z-KJE7].

2. *See, e.g.*, Lydia Polgreen, *From Ferguson to Charleston and Beyond, Anguish About Race Keeps Building*, N.Y. TIMES (June 20, 2015), https://www.nytimes.com/2015/06/21/us/from-ferguson-to-charleston-and-beyond-anguish-about-race-keeps-building.html [https://perma.cc/V8H3-DRCD].

too many instances, law enforcement officers are not held accountable for their wrongful acts.[3]

42 U.S.C. § 1983 allows a person to bring a civil suit against a government official for depriving him or her of a constitutional right.[4] Not surprisingly, police officers are frequent defendants in § 1983 litigation.[5] Theoretically, a police official will incur substantial costs defending against a § 1983 claim.[6] Presumably, he or she must hire an attorney to provide representation and counsel and, in the event of an adverse judgment, must pay damages, costs, and perhaps attorney's fees. Yet, in practice, police officials seldom bear the costs of litigation; instead, the employing municipality does.[7]

For years, scholars have intuited that municipalities were indemnifying police officials for their misconduct.[8] Recently, Professor Schwartz evidenced this intuition through an empirical study.[9] She found that "police officers are virtually always indemnified."[10] Schwartz's piece also argues that many aspects of § 1983 jurisprudence are based upon the assumption that police officers are personally responsible for the civil judgments against them and considers the implications of these flawed assumptions.[11] However, as Schwartz acknowledges, her article does not tackle *why* so many municipalities indemnify their police officials, even when the police officer has been denied qualified immunity or engaged in wrongful

3. *See* Wesley Lowery et al., *Police Have Killed Nearly 200 People Who Were in Moving Vehicles Since 2015, Including 15-Year-Old Jordan Edwards*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/ 05/03/police-have-killed-nearly-200-people-who-were-in-moving-vehicles-since-2015-including-15-year-old-jordan-edwards/?utm_term=.5327d90da231 [https://perma.cc/U4WF-3E9K].

4. *See* 42 U.S.C. § 1983 (2012).

5. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 376 (2007) (suing police officer for alleged Fourth Amendment violation); Town of Castle Rock v. Gonzales, 545 U.S. 748, 755 (2005) (suing three police officers for Due Process violation); Chavez v. Martinez, 538 U.S. 760, 765 (2003) (alleging deprivation of Fifth Amendment rights); Graham v. Connor, 490 U.S. 386, 388 (1989) (alleging deprivation of Fourth Amendment rights); Monroe v. Pape, 365 U.S. 167, 169–70 (1961) (suing police officers and the City of Chicago).

6. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 827–28 (1982) (holding that defendants are only subject to qualified immunity, not absolute immunity).

7. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (concluding that "[p]olice officers are virtually always indemnified").

8. *See, e.g.*, Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 588 n.17 (1998); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 481 (2011); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 n.16 (1998).

9. *See* Schwartz, *supra* note 7, at 890.

10. *See id.* (finding in a recent five-year period "in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor").

11. *See id.* at 892–900 (discussing how the assumption officers are personally liable underlies doctrines of qualified immunity and municipal liability).

or criminal conduct.[12] As one might expect, the answer to this can depend on a number of different factors, including the relevant indemnification statute, the contractual agreement the police union might have with the state, and policy concerns. How these factors coalesce likely will vary from jurisdiction to jurisdiction. Nevertheless, the Authors believe a great deal may be learned by carefully examining indemnification decisions in a single municipality. To this end, this Article considers municipal decisions to indemnify police officials in § 1983 litigation in Philadelphia, Pennsylvania.[13]

We have found that indemnification decisions in Philadelphia are seldom dictated by § 1983's elements or indemnification statutes, but instead are guided by policy considerations, which overwhelmingly direct decision-makers towards indemnification. Part I considers indemnification in § 1983 cases from statutory, doctrinal, and contractual perspectives. Part II discusses the principles and policies underlying many indemnification decisions. We conclude that although indemnification undermines officers' financial accountability by blurring the line between individual and municipal liability, it furthers several policy goals and addresses multiple policy concerns and, accordingly, is an appropriate end to most § 1983 disputes.

I. INDEMNIFICATION LAW, § 1983 JURISPRUDENCE, AND THE SPACE IN BETWEEN

Section 1983 allows persons deprived of a federally protected right to bring a federal civil action against the persons responsible for that deprivation.[14] The statute was intended both to compensate plaintiffs for their injuries and to deter government officials from depriving people of their federal rights.[15] Although the Supreme Court has held that municipalities are persons for purposes of § 1983 liability, they have explicitly rejected a theory of respondeat superior liability, which would have made the municipality vicariously liable for its employees' torts when the tort occurred within the scope of employment.[16] The Court reasoned that vicarious liability was inconsistent with the statutory language.[17] Nevertheless, municipal decisions to indemnify police officials for constitutional

12. *See id.* at 917.

13. To be clear, this Article does not address municipal indemnification decisions in state law claims against police officials.

14. *See* 42 U.S.C. § 1983 (2012).

15. *See* Michael LeBoff, *A Need for Uniformity: Survivorship Under 42 U.S.C. § 1983*, 32 LOY. L.A. L. REV. 221, 237 (1998).

16. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (AM. LAW INST. 2006) ("Respondeat superior assigns responsibility to an employer for the legal consequences that result from employees' errors of judgment and lapses in attentiveness when the acts or omissions are within the scope of employment.").

17. *See Monell*, 436 U.S. at 692.

torts have a similar effect as vicarious liability—the employer, not the employee, incurs the cost of the tortious conduct.[18]

Part I of this Article considers indemnification in § 1983 suits from statutory, doctrinal, and contractual perspectives. Part I(A) analyzes indemnification law in Pennsylvania. Part I(B) considers the relationship between § 1983 jurisprudence and indemnification law. It finds that while there is some overlap between the two, in most cases the underlying § 1983 determinations will not dictate the availability of indemnification. Part I(C) considers the role of contractual agreements in indemnification decisions. Part I concludes that the ways in which indemnification law, § 1983 jurisprudence, and contractual agreements interact in Philadelphia give municipal decision-making officials an enormous amount of discretion when it comes to deciding whether or not to indemnify police officers for alleged constitutional violations.

A. *Indemnification Law*

Indemnification is "[t]he action of compensating for loss or damage sustained."[19] In the context of police indemnification, this typically refers to the practice of a municipal employer paying what the police official owes (either as a consequence of a settlement or an adverse judgment). Additionally, although not technically indemnification, many municipal employers also provide legal representation for their employees in civil suits against the employee—even when the employee is being sued in a personal capacity and the municipality is not a party to the suit. These employee benefits—indemnification and representation—usually result from a municipal agreement with a police union, or a state or municipal statute.[20] And while some surveys suggest that "indemnification under state and local law . . . varies widely among jurisdictions,"[21] Professor Schwartz's recent empirical work concludes that "police officers are virtually always indemnified."[22]

In Philadelphia, state law guides indemnification decisions.[23] Under title 42, section 8548 of the Pennsylvania Consolidated Statutes (section 8548), local agencies must indemnify their employees

18. *See* Schwartz, *supra* note 7, at 944 (noting that "municipalities virtually always satisfy officers' settlements and judgments, amounting to de facto respondeat superior liability").

19. *Indemnification*, BLACK'S LAW DICTIONARY (10th ed. 2014).

20. *See* Schwartz, *supra* note 7, at 890 (describing how indemnification policies are popular in many police departments); Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 495 (2009) (showing how municipal governments mitigate individual suits against police departments).

21. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 85 (1983).

22. *See* Schwartz, *supra* note 7, at 890.

23. The Philadelphia Police Department's contract with the City of Philadelphia is silent on the issue of indemnification.

> [w]hen an action is brought against an employee of a local agency for damages on account of an injury to a person or property . . . and it is judicially determined that an act of the employee caused the injury and such act was, or that the employee in good faith reasonably believed that such act was, within the scope of his office or duties.[24]

"The purpose of this indemnification provision 'is to permit local agency employees to perform their official duties without fear of personal liability, whether pursuant to state or federal law, so long as the conduct is performed during the course of their employment.'"[25] However, section 8550 of that same statute states that section 8548 "shall not apply" if a judge determines that the act or omission giving rise to the civil action "constituted a crime, actual fraud, actual malice or willful misconduct."[26]

Based upon the plain language of the statute, one would reasonably assume that in Philadelphia, indemnification turns on the following three criteria: (1) a judicial determination that the officer caused the injury, (2) a judicial determination that act was within the scope of officer's duties (or that the officer reasonably believed that the act was within the scope of his or her duties) and (3) a judicial determination that the officer's action constituted a crime, actual fraud, actual malice, or willful misconduct. If both of the first two criteria are met, arguably, the City must indemnify the officer. If, however, the third criterion is met, the City may not indemnify the officer.

Pennsylvania's indemnification statute raises several related questions. First, are the judicial determinations a prerequisite for indemnification? If not, is a municipality in Pennsylvania nevertheless precluded from indemnifying an official when that official has engaged in malicious or inten-

24. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8548(a) (West, Westlaw through 2017 Act 22). Additionally, subsection (b) shields a government employee from liability for any monies paid by the municipality for injuries the employee causes by an act "within the scope of his office or duties" "or which he in good faith reasonably believed to be within the scope of his office or duties." *See id.* This includes "any expenses or legal fees incurred by the local agency while defending the employee against a claim for damages on account of an injury to a person or property caused by an act of the employee." *Id.* All of the aforementioned provisions are contingent upon the employee's cooperation. *See id.* § 8548(c).

25. Pettit v. Namie, 931 A.2d 790, 798 (Pa. Commw. Ct. 2007) (quoting Wiehagen v. Borough of N. Braddock, 594 A.2d 303, 306 (Pa. 1991)).

26. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8550; *see also Pettit*, 931 A.2d at 799 (holding that "the local government agency attempting to avoid its indemnity obligation bears the burden of proving there was a judicial determination of willful misconduct" (citing Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994))).

tional conduct?[27] The Supreme Court of Pennsylvania addressed these questions, at least to some extent, in *Renk v. City of Pittsburgh*.[28]

Renk is the leading Pennsylvania case on municipalities' duty to indemnify police officials. In December of 1984, Officer Renk arrested and jailed Laney.[29] Laney then sued Officer Renk and the City of Pittsburgh, alleging that Officer Renk had committed assault and battery and falsely imprisoned him.[30] A jury found that Officer Renk was liable for the state tort law claims and "[j]udgment was entered against Renk in the amount of $7,648.08."[31] This amount included both compensatory and punitive damages.[32] Following the judgment, Renk sought indemnification from the City. The City countered that given the nature of the underlying civil action there had been a judicial determination that Renk was not acting within the scope of his duties and that Renk had engaged in willful misconduct and, consequently, the City was not required to indemnify him.[33] The Pennsylvania Supreme Court concluded that "absent a judicial determination that the officer's actions constituted willful misconduct" "a police officer *may* be indemnified for the payment of a judgment entered in a civil action."[34] However, the municipality is prohibited from indemnifying a police official when there has been a judicial determination that the he or she committed a crime, engaged in actual fraud, acted with actual malice, or engaged in willful misconduct.[35]

The law of indemnification for Philadelphia (and municipalities across Pennsylvania) may be summarized in three short phrases:

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27. A third issue, which is addressed in Part I(B), is how judicial determinations regarding the underlying civil action might affect questions of indemnification. For example, if a court determines that the police officer "acted under color of state law" for purposes of § 1983 liability, does this necessitate a conclusion that the defendant acted within the scope of his duties? Similarly, if the court determines that a § 1983 plaintiff is entitled to punitive damages, does this necessarily mean that the officer acted maliciously and intentionally, which might affect the municipality's obligation and ability to indemnify the official? *See infra* Part I(B).

28. 641 A.2d 289 (Pa. 1994).

29. *See id.* at 291.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.* (emphasis added).

35. *See* Ferber v. City of Phila., 661 A.2d 470, 476 (Pa. Commw. Ct. 1995) (holding that once "it has been judicially determined that the employees' acts were criminal in nature, under 42 Pa.C.S. § 8550 the City has no liability for those acts" and "the City's governmental immunity is nonwaivable"). Nevertheless, a finding of willful misconduct for state tort law purposes does not necessarily prohibit the municipality from indemnifying its police official. For example, a determination that an officer committed assault and battery under state tort law does not establish the officer engaged in the "willful misconduct" under section 8550 that would prohibit indemnification. *See Renk*, 641 A.2d at 289. Therefore, a municipality may indemnify a police officer even if the police officer has been found liable of an intentional tort under state law. *See infra* I(B)(3) and accompanying text describing section 8550 willful conduct standard in further detail.

(1) A municipality is required to indemnify a police officer when a judge determines that the official caused the injury while acting within the scope of his or her duties *unless*[36]
(2) A judge or jury has determined that the officer's "act[ion] constituted a crime, actual fraud, actual malice or willful misconduct," in which case the municipality is prohibited from indemnifying a police officer.[37]
(3) A municipality *MAY* indemnify a police officer when a judge has not decided that the officer caused the injury, that the officer was acting within the scope of his or her duty, or that the officer was engaged in willful misconduct, etc.[38]

Pennsylvania's indemnification statute mandates when a municipality must indemnify a municipal official and when it must not. However, most indemnification decisions fall within this third category—the municipality is neither required to nor prohibited from indemnifying its officials. This is true for two reasons. First, many civil actions are settled and, accordingly, there is never a judicial determination of liability. Furthermore, as discussed in Part I(B), even in those cases where a judicial determination is made regarding liability for the underlying civil action, it does not necessarily follow that this resolves the question of indemnification. Thus, the municipality retains the discretion to indemnify its official.

B. *The Relationship Between § 1983 Jurisprudence and Pennsylvania Indemnification Law*

Section 1983 liability and decisions to indemnify a police officer are not wholly independent of one another. Some scholars have suggested that, at least in some instances, the underlying substantive § 1983 issues will guide police indemnification decisions.[39] Part I(B) considers the relationship between § 1983 and indemnification decisions. We have found

36. Or that the officer reasonably believed that the act was within the scope of his or her duties.

37. *See Ferber*, 661 A.2d at 475 (holding that once "it has been judicially determined that the employees' acts were criminal in nature, under 42 Pa.C.S. § 8550 the City has no liability for those acts" and "the City's governmental immunity is nonwaivable").

38. *But see* City of Pittsburgh v. Fraternal Order of Police, Ft. Pitt Lodge No. 1, 938 A.2d 225, 226 (Pa. 2007) (finding that in 1983, Pittsburgh and the Fraternal Order of Police (FOP) Ft. Pitt Lodge No. 1 entered into a binding arbitration agreement); City of Pittsburgh v. Fraternal Order of Police, Ft. Pitt Lodge No. 1, 503 A.2d 995, 999 (Commw. Ct. Pa. 1986) (striking a section of FOP agreement that required the City of Pittsburgh to indemnify officer upon determination "by the City that that employee acted reasonably and in the good faith belief that his actions were lawful and proper under the circumstances" and reasoning that "The City may not elect those officers whom it chooses to indemnify" but instead must rely upon judicial interpretation).

39. *See* Joyce Frank, Comment, *Civil Practice—Indemnification Under the Massachusetts Tort Claims Act: Government as Insurer*, 92 MASS. L. REV. 37, 39 (2009) (discussing Maimaron v. Massachusetts, 865 N.E.2d 1098 (Mass. 2007)); *see also* Martin

that although, theoretically, these underlying issues might seem to dictate the decision to indemnify, this is rarely the case. A careful examination of § 1983 substantive standards as compared to Philadelphia's indemnification law demonstrates that while some § 1983 and indemnification elements closely coincide with one another, other substantive § 1983 issues are distinguishable from the dispositive indemnification issues. Consequently, § 1983 determinations rarely decide questions of indemnification. Furthermore, as briefly explored in the final section of Part I, because most § 1983 cases are settled before trial, there is rarely a "judicial determination" on the relevant indemnification issues.[40]

1. *"Under Color of Law" and "Acting Within the Scope of His or Her Duties"*

Victims of police excessive force may bring a § 1983 claim against the individual officer alleging he or she deprived them of a constitutional right to be free from an unreasonable seizure.[41] In order to prove a civil rights claim under § 1983, a plaintiff must prove, among other things, that the officer(s) acted under color of state law.[42] Similarly, Philadelphia is required to indemnify a police officer if, *inter alia*, a judge determines that the officer was acting within the scope of his or her duties.[43] If, however, there is a judicial determination that the officer was not acting within the scope of his or her duties (even if the plaintiff can prove that the officer acted under the color of state law) then the City is not required to indemnify the officer. On the other hand, if the plaintiff is unable to establish that the defendant acted under the color of state law then the § 1983 will fail and the question of indemnification is moot, at least with regards to the § 1983 claims.[44] This section considers the distinction between these two elements. It concludes that indemnification disputes in Pennsylvania are rarely decided on the "scope of employment" issue. In fact, the Authors were unable to locate or recall one case in Pennsylvania where the indemnification determination depended on whether the employee was acting within the scope of his duty or office. Nevertheless, we predict that

A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1211 (2001).

40. As discussed in Part I(B)(6), in the absence of a judicial determination, indemnification decisions largely fall within the discretion of policy-making officials. *See infra* Part I(B)(6) and accompanying notes.

41. *See, e.g.*, Soldal v. Cook Cty., Ill., 506 U.S. 56, 62 (1992); Bower v. Cty. of Inyo, 489 U.S. 593, 599 (1989); Tennessee v. Garner, 417 U.S. 1, 11 (1985).

42. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980) ("By the plain terms of § 1983, two-and only two-allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.").

43. 42 PA. STAT. AND CONS. STAT. ANN. § 8548 (West, Westlaw through 2017 Act 22). This, of course, assumes that the officer has not engaged in conduct that triggers section 8550's prohibition.

44. Section 1983 plaintiffs may also bring state tort claims based upon the same conduct. However, state tort claims are beyond the scope of this Article.

if Pennsylvania courts apply the state's respondeat superior legal rules or follow the law of other circuits who have considered this issue they would likely reach the same conclusion for both questions. If the defendant is "acting under the color of state law" for purposes of § 1983, the court should also find that he or she was acting within the scope of his or her employment for indemnification purposes.[45]

In the overwhelming majority of § 1983 cases, there is little question that the police officer was acting "under color of state law." In the vast majority of § 1983 cases involving police, the officers are in uniform; they're driving marked patrol cars, and they're wearing their badges and department issued firearms. In these instances, almost all actions taken by officers are done so under the authority granted to them by the state.[46]

However, being employed by the city is not enough to transform any action by an officer into an action under color of law.[47] The acts of officers in the ambit of their personal pursuits are plainly excluded, whereas acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.[48]

The most difficult questions of "under color of state law" occur with off-duty officers. Is an off-duty officer who decides to intervene in a bar fight involving his friends a state actor? Is an officer who gets into a domestic dispute with a family member—resulting in the use of physical force and an arrest, a state actor? In these types of instances, there is a real legal question whether the officer was acting under color of law.

Being "off duty" does not necessarily mean that the officer is not acting under the color of law. Traditionally, "acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrong-

45. Of course, section 8550 still limits the circumstances in which a municipality may indemnify a police official. For example, in *Panas v. City of Philadelphia*, the jury found the police official was acting under state law. 871 F. Supp. 2d 370 (E.D. Pa. 2012). However, the municipality refused to indemnify him because he had been convicted of murder by the time the civil proceedings occurred. See *infra* Part II(C) for a fuller discussion of the case.

46. For instance, if a patrol officer in full uniform stops an individual on the street for questioning into the report of a robbery, that officer would be a state actor, acting under the color of state law.

47. *See* Mark v. Borough of Hatboro, 51 F.3d 1137, 1150 (3d Cir. 1995) ("It is well settled that an otherwise private tort is not committed under color of law simply because the tortfeasor is an employee of the state.").

48. *See id.*; *see also* Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (alleged assault by on-duty police chief at police station did not occur under color of state law because altercation with plaintiff, defendant's sister-in-law, arose out of personal dispute and defendant neither arrested nor threatened to arrest plaintiff); Halwani v. Galli, No. Civ. A. 99-1450, 2000 WL 968219, at *3 (E.D. Pa. July 13, 2000) (on-duty, uniformed police officer did not act under color of law because the altercation arose out of a personal dispute and the officer did not arrest or threaten to arrest the plaintiff); Johnson v. Hackett, 284 F. Supp. 933, 937 (E.D. Pa. 1968) (on-duty police officer's instigation of a physical altercation and exchange of insulting names was purely "personal pursuit").

doer is clothed with the authority of state law.'"[49] A court may find that a police officer acted under color of law if (1) he depends upon the "cloak of the state's authority" as a means to commit the alleged improper acts, and (2) that authority enables the officer to do what he did.[50] An action taken under the color of law is one taken under "pretense" of law.[51] This rule applies regardless of whether a police officer is on- or off-duty.[52] For example, in *Stengel v. Belcher*,[53] an off-duty, out of uniform police officer intervened in a bar fight with a gun and shot and injured the plaintiff.[54] The Sixth Circuit held that the off-duty status of the officer is not dispositive of a § 1983 claim, and that it is the nature of the act that controls.[55]

On the other hand, "acts of officers in the ambit of their personal pursuits are plainly excluded."[56] Accordingly, the critical inquiry is whether the purported violation of a plaintiff's civil rights was committed by an officer engaged in police action and not private action. Perhaps the most difficult category of cases is where officers use their authority for their own private pursuits. In *Martinez v. Colon*,[57] an on-duty police officer used his service weapon recklessly while bullying a fellow officer and shot him.[58] The First Circuit held that such bullying was not under color of law merely because he used his service revolver.[59] In making this determination, courts consider whether the actions under review were consistent with actions taken by a police officer.[60] Specifically, courts determine whether there is evidence that the officer's actions were calculated to preserve the peace, protect life or property, arrest violators of the law, or prevent crime.[61] A police officer's purely private acts which are not furthered by any actual or purported state authority are not acts under color of state law.[62] Courts will consider an officer's motivation in making this determination.[63]

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49. West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

50. *See* Barna v. City of Perth Amboy, 42 F.3d 809, 816, 818 (3d Cir. 1994); Pryer v. City of Phila., No. Civ. A. 99-4678, 2004 WL 603377, at *3 (E.D. Pa. Feb. 19, 2004); *Johnson*, 284 F. Supp. at 937.

51. *See* Screws v. United States, 325 U.S. 91, 111 (1944).

52. *See Barna*, 42 F.3d at 816.

53. 522 F.2d 438 (6th Cir. 1975).

54. *See id.* at 440.

55. *See id.* at 441.

56. *See Screws*, 325 U.S. at 111.

57. 54 F.3d 980 (1st Cir. 1995).

58. *See id.* at 982–83.

59. *See id.* at 987–88.

60. *See* Smith v. City of Phila., No. Civ. A. 2:00 CV 03623, 2002 WL 32130107, at *3 (E.D. Pa. Sept. 23, 2002).

61. *See id.*

62. *See* Jackson-Gilmore v. Dixon, Civ. A. 04-03759, 2005 WL 3110991, at *10 (E.D. Pa. Nov. 18, 2005).

63. The Third Circuit's Model Jury Instructions lists a number of different factors that may be relevant when the jury is determining whether a police officer

Similar to § 1983's "under color of law" requirement, Pennsylvania's municipal indemnification statute, section 8548, depends, in part, on whether the employee was acting "within the scope of his office or duties." Somewhat surprisingly, it does not appear that any Pennsylvania court has considered the relationship between these two elements or has even defined "within the scope of his duties or office" within the context of indemnification. However, Pennsylvania's respondeat superior doctrine does offer some insights. In *Fitzgerald v. McCutcheon*,[64] the Superior Court of Pennsylvania explained respondeat superior liability as follows:

> A master is liable for the acts of his servant which are committed during the course of and within the scope of the servant's employment. This liability of the employer may extend even to intentional or criminal acts committed by the servant . . . . Where, however, the employee commits an act encompassing the use of force which is excessive and so dangerous as to be totally without responsibility or reason, the employer is not responsible as a matter of law. If an assault is committed for personal reasons or in an outrageous manner, it is not actuated by an intent of performing the business of the employer and is not done within the scope of employment.[65]

Relying on the Restatement (Second) of Agency, the court in *Fitzgerald* held that the City of Philadelphia could not be held liable because a

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defendant acted "under color of state law." *See* MODEL CIV. JURY. INSTR. 4.4.2 (3d Cir. 2015). These factors are:

- Whether the defendant was on duty. This factor is relevant but not determinative. . . .
- Whether police department regulations provide that officers are on duty at all times.
- Whether the defendant was acting for work-related reasons. However, the fact that a defendant acts for personal reasons does not necessarily prevent a finding that the defendant is acting under color of state law. A defendant who pursues a personal goal, but who uses governmental authority to do so, acts under color of state law.
- Whether the defendant's actions were related to his or her job as a police officer.
- Whether the events took place within the geographic area covered by the defendant's police department.
- Whether the defendant identified himself or herself as a police officer.
- Whether the defendant was wearing police clothing.
- Whether the defendant showed a badge.
- Whether the defendant used or was carrying a weapon issued by the police department.
- Whether the defendant used a police car or other police equipment.
- Whether the defendant used his or her official position to exert influence or physical control over the plaintiff.
- Whether the defendant purported to place someone under arrest.

Id. cmt. (footnotes omitted).

64. 410 A.2d 1270 (Pa. Super. Ct. 1979).

65. *Id.* at 1271–72 (internal citations omitted).

drunken off-duty police officer shot his neighbor during a personal dispute.[66] Specifically, the court noted that McCutcheon's act "was outside the scope of his employment."[67]

The employee's motives frequently are an important factor when determining whether an employee was acting within the scope of his or her employment. In *Butler v. Flo-Ron Vending Co.*,[68] the Superior Court of Pennsylvania again relied on the Restatement (Second) of Agency to define respondeat superior "within the scope of employment."[69] In *Butler*, two supervisory employees investigating a former employee for burglarizing the company planted evidence of the crime in the car of the former employee.[70] The court held that the employees were acting in the scope of their employment when they planted the false evidence because participating in an investigation was part of the nature of their employment as supervisory employees and was for the benefit of their employer.[71] Similarly, in *Kull v. Guise*,[72] the court found that members of a tenure board accused of mistreating a professor were acting within the scope of their

66. *See id.* at 1272. The Restatement (Second) of Agency says that,

> (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of the force is not unexpectable by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958).

67. *See Fitzgerald*, 410 A.2d at 1272. In reaching this conclusion, the court reasoned as follows:

> His acts were motivated by reasons personal to himself and did not further the purpose of his employment as a policeman. He was off duty and not then subject to the right of his employer's control. His act was so outrageous, so criminal, and so incapable of anticipation by his employer, that it must be held as a matter of law to exceed the scope of McCutcheon's employment. To hold a municipality liable for conduct of an off duty policeman under the circumstances of this case on a theory of respondeat superior would be unreasonable and would exceed the legitimate legal and social purposes which sustain the doctrine.

Id.

68. 557 A.2d 730 (Pa. Super. Ct. 1989).

69. *See id.* at 736. To date, this appears to be the authoritative statement of Pennsylvania law on this issue. The United States Court of Appeals for the Third Circuit has applied this aspect of *Butler* on three separate occasions. *See* CNA v. United States, 535 F.3d 132, 146 (3d Cir. 2008); Brumfield v. Sanders, 232 F.3d 376, 380–81 (3d Cir. 2000); Aliota v. Graham, 984 F.2d 1350, 1358 (3d Cir. 1993). In *Aliota*, then-Circuit Judge Samuel Alito acknowledged that the Supreme Court of Pennsylvania had not affirmed the rule from *Butler* but predicted that, given the opportunity, the Supreme Court of Pennsylvania would adopt that definition from the Restatement. *See Aliota*, 984 F.2d at 1358.

70. *See Butler*, 557 A.2d at 732.

71. *See id.* at 737.

72. 81 A.3d 148 (Pa. Commw. Ct. 2013).

employment because the actions were at least partially to advance the interests of the employer, even if personal animosity played a role.[73]

The primary point of dispute in many "scope of employment" cases is whether an employee's motivations were at least partially to serve their employer. If the employee purely was engaged personal pursuits, and not at all advancing his or her employer's interests, then a court likely will find that he or she was not acting within the scope of his or her employment. As such, Pennsylvania's respondeat superior standard and § 1983 "under color of law" seem very similar to one another—both focus heavily on the officer's motivations—and, accordingly, are likely to echo one another. If the police official did not act under color of state law, then he or she is not liable under § 1983 and the question of indemnification is moot. If, however, the officer did act under color of state law then, to the extent it relies on respondeat superior principles, the court will also likely find that the officer was acting within the scope of his or her employment for indemnification purposes.[74]

Other federal courts that have considered the relationship between their own indemnification statutes and § 1983's under color of law requirement have found that both § 1983's under color of law element and the indemnification "scope of duty" requirement have been met.[75] For example, in *Wilson v. City of Chicago*,[76] Andrew Wilson alleged that Commander Burge tortured him to obtain a confession in violation of his con-

73. *See id.* at 150; *see also Brumfield*, 232 F.3d at 378 (concluding that allegation of personal animosity alone was insufficient basis to conclude that prison employees who made for allegedly false statements were acting outside the scope of their employment because making statements about fellow employees at the request of one's employer is part of the normal course of employment, and still within the scope of employment.). *But see* DiStefano v. Macy's Retail Holdings, Inc., 616 F. App'x 478, 482 n.4 (3d Cir. 2015) (noting that, under agency law, employee who is interviewed at work about criminal conduct is not acting within the scope of her employment because it is not within the scope of her duties as a sales associate and it is not what she was employed to do).

74. Of course, indemnification is still subject to section 8550. 42 PA. STAT. AND CONS. STAT. ANN. § 8550 (West, Westlaw through 2017 Act 22).

75. *See, e.g.*, Wilson v. City of Chi., 120 F.3d 681, 683 (7th Cir. 1997); Dunton v. Suffolk Cty., 580 F. Supp. 974, 975 (E.D.N.Y. 1983); Sampson v. Kofoed, Nos. 8:07CV155, 8:08CV107, 2016 WL 7971575, at *15 (D. Neb. Mar. 30, 2016) ("The concepts of 'color of law' and scope of employment can overlap and satisfy both requirements." (citation omitted)). *But see* McDade v. West, 223 F.3d 1135, 1140 (9th Cir. 2000) (citing Screws v. United States, 325 U.S. 91 (1945)) (observing that the Supreme Court has shown that color of law can be present, even where scope of duty is not when, in *Screws* the Supreme Court concluded that police officer went beyond the scope of his duties in beating a young man to death during an arrest, but, nevertheless, they had acted under color of law); Jude v. City of Milwaukee, No. 06C1101, 2010 WL 2643383 (E.D. Wis. June 30, 2010) ("[A]n officer or employee who is found to have acted under 'color of law' for purposes of Section 1983 is not necessarily entitled to indemnification . . . [t]he 'under color of law' category is broader than the 'scope of employment' category." (citation omitted)).

76. 6 F.3d 1233 (7th Cir. 1993).

stitutional rights.[77] Wilson also sued the City of Chicago alleging "the City of Chicago had had a de facto policy authorizing its police officers physically to abuse persons suspected of having killed or injured a police officer."[78] The case against the City failed but the court determined that Burge was liable under § 1983.[79] Pursuant to an Illinois state statute, Wilson sought payment from the City.[80] Amongst its many arguments, Chicago countered that Burge was not acting "within the scope of his employment" when he tortured Wilson, and accordingly, they were not required to pay under the applicable statute.[81] Rejecting that argument, the Seventh Circuit offered the following explanation:

> This is not a case in which a police officer, while engaged on police business, commits a wrong designed to advance his purely private interests . . . . Burge . . . was not pursuing a frolic of his own. He was enforcing the criminal law of Illinois overzealously by extracting confessions from criminal suspects by improper means. He was, as it were, *too* loyal an employee. He was acting squarely within the scope of his employment.[82]

As the court explained in *Coleman v. Smith*,[83] "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objective of the employment."[84]

2. *Municipal Liability and "Acting Within the Scope of His Duty"*

In addition to suing the individual officer, a § 1983 plaintiff may also sue the municipality that employs the officer. However, the Supreme

77. *See id.* at 1236.

78. *See id.*

79. *See id.* at 1241.

80. Illinois state statute, entitled "Payment of Judgments or Settlements" requires "a local public entity . . . to pay any tort judgment or settlement for compensatory damages (and may pay any associated attorney's fees and costs) for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article." 745 ILL. COMP. STAT. ANN. 10/9-102 (West, Westlaw through 2017 Reg. Sess. P.A. 100-25).

81. *See Wilson*, 120 F.3d at 683.

82. *Id.* at 685 (internal citations omitted).

83. 814 F.2d 1142 (7th Cir. 1987).

84. *Id.* at 1149 (quoting Hibma v. Odegaard, 769 F.2d 1147, 1152 (7th Cir. 1985)); *see also* Graham v. Sauk Prairie Police Comm'n, 915 F.2d 1085, 1093 (7th Cir. 1990) (holding that action falls within the scope of employment if "it is closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that it may be regarded as a method, even though an improper one, of carrying out the objects to the employment" (citation omitted)); *Hibma*, 769 F.2d at 1152 (concluding that officers who framed the plaintiff were acting within the scope of their employment because, although there was obvious an overriding personal motive, the defendants were still acting on behalf of their employer).

Court held in *Monell v. Department of Social Services*[85] that a municipality will not be held liable on the basis of respondeat superior.[86] Rather, the plaintiff must prove that the municipality subjected, or caused the plaintiff to be subjected, to the deprivation of a constitutional right.[87] To do so, the plaintiff must demonstrate that the alleged constitutional violation was the result of a municipal policy, custom, or practice.[88] As Professor Ravenell has explained in detail elsewhere,[89] a plaintiff may prove that the municipality "caused" the deprivation through several different theories: "a written policy that commands or compels" the officer to engage in the unconstitutional behavior,[90] an unwritten policy or custom that instructs officers to behave unconstitutionally,[91] a single decision or command by a person with final policy making authority in that particular area for the officer to undertake the unconstitutional conduct,[92] and a failure to train officers regarding the unconstitutionality of their behavior.[93] "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible."[94]

Assuming a § 1983 plaintiff is able to demonstrate the police officer was acting pursuant to municipal policy when the officer deprived the plaintiff of his or her constitutional right, one might argue that it necessa-

85. 436 U.S. 658 (1978).

86. *See id.* at 691.

87. *See id.* at 692.

88. *See id.* at 691–95.

89. *See* Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 161 (2011).

90. *See id.* at 161; *see also Monell*, 436 U.S. at 694.

91. Custom can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law. *See* Andrews v. City of Phila., 895 F.2d 1469, 1480 (3d Cir. 1990); *see also* Fletcher v. O'Donnell, 867 F.2d 791, 793–94 (3d Cir. 1989) ("Custom may be established by proof of knowledge and acquiescence").

92. *See Andrews*, 895 F.2d at 1480 (3d Cir. 1990) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)).

93. *See* City of Canton v. Harris, 489 U.S. 378, 387 (1989). Under a "failure to train" theory of municipal liability, a plaintiff cannot usually prove a *Monell* claim by simply pointing to a single instance, or even a few instances, of police misconduct. Instead, a plaintiff must show that the hierarchy of a municipal police department has been deliberately indifferent to an obvious need for better training, discipline, and supervision of its police officers. One way to prove this is to obtain through the discovery process years' worth of data and investigative reports. A plaintiff must then be able to audit and summarize those reports, and be able to show a discernable pattern of police conduct that is in violation of citizen's constitutional rights. On top of the already laborious process of going through all of the data and documents, it is almost always necessary for a plaintiff to hire police practices experts who can than analyze and interpret the data. As one can imagine, this substantially adds to the already expensive process of proving a *Monell* claim.

94. *Pembaur*, 475 U.S. at 479 (emphasis in original).

rily follows that the officer was acting "within the scope of his or her duty" for indemnification purposes (or, at a minimum acted reasonably and in the good faith belief that his actions were lawful and proper under the circumstances). This seems to be a reasonable conclusion. A municipality is liable if it promulgates a policy or gives a directive that causes a person to deprive the plaintiff of a constitutional right. If a police official is following that municipal policy or directive it would seem to follow that the police official is acting within the scope of his employment for indemnification purposes, even if that directive turns out to be unconstitutional.

3. *Excessive Force and the Willful Misconduct*

Recently, the public debate on police misconduct largely has focused on the amount of physical force, including deadly force, utilized by law enforcement.[95] To establish a claim under 42 U.S.C. § 1983, the plaintiff must show a law enforcement officer, acting under color of law, deprived him of a right or privilege secured by the Constitution or laws of the United States—this includes the Fourth Amendment right to a reasonable seizure.[96] Part I(B)(3) considers the relationship between Fourth Amendment excessive force determinations and decisions to deny police officers indemnification because they engaged in willful misconduct. We conclude that the finding of a Fourth Amendment excessive force violation rarely will lead one to conclude that the officer also engaged in willful misconduct because there is a clear disconnect between these two legal standards.

All use-of-force cases, including those involving deadly force, are analyzed under the reasonableness standard of the Fourth Amendment.[97] When a plaintiff contends that his Fourth Amendment rights have been violated, the challenged conduct is scrutinized for conformity to a standard of reasonableness and the test used is an objective one. The facts to be considered include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[98] Reasonableness is to be evaluated from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hind-

95. *See, e.g.*, REGULATING POLICE USE OF FORCE: SERIES OF ESSAYS, REGULATORY REVIEW (Feb. 13, 2017), https://www.theregreview.org/2017/02/13/regulating-police-use-of-force/ [https://perma.cc/NUH3-2ULK].

96. The Fourth Amendment provides that

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

U.S. CONST. amend. IV.

97. *See* Graham v. Connor, 490 U.S. 386, 395 (1989).

98. *See id.* at 396 (citation omitted).

sight."[99] "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[100] The Supreme Court has held that in light of the totality of the circumstances, the test is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[101] The Court has emphasized that the officer's subjective intent is irrelevant to the Fourth Amendment analysis.[102]

In contrast, under Pennsylvania law, "willful misconduct" is a wholly subjective standard. As the court summarized in *Kuzel v. Krause*,[103] "[i]n effect, the Supreme Court [of Pennsylvania] found that 'willful misconduct' as used in 42 Pa C.S.A. § 8550 means 'willful misconduct aforethought.'"[104] *Pettit v. Namie*[105] offered the following description of willful misconduct:

> *Willful misconduct means that the actor desired to bring about the result that followed*, or at least that he was aware that it was substantially certain to ensue . . . . *Wanton misconduct, on the other hand, means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.*[106]

Section 8550 only prohibits indemnification when the official engages in willful misconduct.

Willful misconduct is a significantly higher standard than the Fourth Amendment objective reasonableness standard.[107] A court may find that

99. *See id.*

100. *Id.* at 396–97

101. *See id.* at 397 (citation omitted).

102. *See id.*; *see also* Scott v. United States, 436 U.S. 128, 138 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long the circumstances, viewed objectively, justify that action.").

103. 658 A.2d 856 (Pa. Commw. Ct. 1995).

104. *Id.* at 860.

105. 931 A.2d 790 (Pa. Commw Ct. 2007).

106. *Id.* at 801 (emphasis added).

107. *Compare* Robbins v. Cumberland Cty. Children and Youth Servs., 802 A.2d 1239, 1252–53 (Pa. 2002) ("Willful misconduct . . . has been defined by our Supreme Court to mean conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied. . . . To prove willful misconduct, a plaintiff must establish that the actor desired to bring about the result that followed, or at least it was substantially certain to follow, i.e., specific intent."), *with* Graham v. Connor, 490 U.S. 386, 397 (1989) (defining Fourth Amendment reasonableness as whether "the officers' actions are 'objectively reasonable' in light of the facts and

a police official has violated the Fourth Amendment if the officer's actions were unreasonable—if a reasonable official in the officer's position would not have behaved as the officer behaved.[108] Thus, a court may conclude that an officer deprived a citizen of his right to be free from an unreasonable seizure if the officer shot someone but a reasonable officer in that position would not have used that level of force.[109] In contrast, "[f]or police officers, such willful misconduct is established by showing the officer not only intentionally used force, but intentionally used *excessive* force."[110] In this example, willful misconduct would, in all intents and purposes, require that the officer intended to violate the Fourth Amendment, not simply that he intended to shoot the plaintiff. In this respect, Pennsylvania's willful conduct standard seems to dovetail with § 1983's qualified immunity defense.

4. *Qualified Immunity and Willful Misconduct*

Even assuming a § 1983 plaintiff is able to establish the necessary elements of his or her excessive force claim, the plaintiff must still contend with the qualified immunity defense in most cases. As the Court explained in *Harlow v. Fitzgerald*,[111] "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[112] In the context of a Fourth Amendment excessive force claim, this means that if a reasonable official in the officer's position would not have realized that the conduct at issue was unconstitutional, then the officer is entitled to qualified immunity. There are several reasons why an officer may not realize the illegality of his or her conduct: because the legal rule is not clear under the circumstances,[113] because the officer is not aware of the rele-

circumstances confronting them, without regard to their underlying intent or motivations" (citations omitted)).

108. *See, e.g.*, Estate of Smith, 318 F.3d 497, 515 (3d Cir. 2003) ("To state a claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a 'seizure' occurred and that it was unreasonable." (quoting Abraham v. Raso, 183 F.3d 279, 288 (3d Cir. 1999))); *see also Graham*, 490 U.S. at 396 (explaining that reasonableness of seizure is judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968))).

109. *See, e.g.*, Curley v. Klem, 298 F.3d 271, 280 (3d Cir. 2002); Johnson v. City of Phila., 105 F. Supp. 3d 474, 482 (E.D. Pa. 2015); *cf.* Royal v. Spragins, 575 F. App'x. 300, 303–04 (5th Cir. 2014).

110. *See Johnson*, 105 F. Supp. 3d at 482 (emphasis added).

111. 457 U.S. 800 (1982).

112. *Id.* at 818 (citations omitted).

113. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 229–30 (2009) (finding that officers were entitled to qualified immunity where there was a divergence of views between the courts regarding "consent-once-removed" entries and their own Federal Circuit had not yet ruled on the issue).

vant constitutional rule,[114] or because the officer makes a mistake assessing the facts and applies the wrong facts to the right legal rule.[115] Accordingly, when an officer is denied qualified immunity it is because he or she knew or should have known that the conduct would deprive the plaintiff of a constitutional right. As the Court explained in *Malley v. Briggs*,[116] qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[117]

Building on this "knew or should have known" standard, one might posit that if a police official is denied qualified immunity, he or she should also be denied indemnification because the officer engaged in willful misconduct.[118] Qualified immunity and indemnification determinations may jibe in certain circumstances. For example, if a court concluded that the defendant knew his or her conduct would violate the Fourth Amendment it would follow that the official should be denied qualified immunity and the municipality would be barred from indemnifying the official. As discussed in the previous section, indemnification is prohibited with a judicial determination of willful misconduct, which requires that the defendant knowingly violates the law.[119]

However, one may not always deduce willful misconduct from a decision to deny an official qualified immunity. A court should deny a govern-

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> 114. Professor Ravenell offers the following explanation in a previous piece: "Street-level" government officials, such as police officers and teachers, seldom review and interpret judicial opinions. Instead, they rely on those persons charged with establishing municipal policy to promulgate rules that are consistent with statutory law and legal opinions. The failure of a municipality to adequately counsel its employees regarding changes in the law or to adopt policies necessary to effectuate the law may lead to . . . "comprehensive-based illegality" . . . . Even when a court declares certain acts or behaviors to be unconstitutional, the message does not necessarily reach everyone charged with following its command. Government officials may violate clearly established legal rules simply because they are following [an outdated] municipal policy and perhaps are unaware that their conduct is unlawful.
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> Ravenell, *supra* note 89, at 156.
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> 115. *See, e.g.*, Curley v. Klem, 499 F.3d 199, 215 (3d Cir. 2007) (upholding jury verdict that officer who shot a fellow police officer was entitled to qualified immunity because it was objectively reasonable for him to mistake the officer for the armed and dangerous suspect of whom they were in pursuit).
>
> 116. 475 U.S. 335 (1986).
>
> 117. *See id.* at 341.
>
> 118. There are numerous examples of § 1983 excessive force cases where the court denies a defendant police officials summary judgment motion because there is a material dispute of facts. *See, e.g.*, Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) ("Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" (quoting FED. R. CIV. P. 56(a))). We, however, are referring only to those cases where the court actually determines the officer is not entitled to quailed immunity, not simply where the court denies defendant's motion for summary judgment because of a factual dispute. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 741 (2002) (denying prison officials qualified immunity).
>
> 119. *See supra* Part I(A).

ment official qualified immunity when the official *should have known* that the conduct was unlawful. The Court explained in *Harlow*, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."[120] In comparison, willful conduct requires actual knowledge of the unlawfulness.[121] Under Pennsylvania law, one may not establish willful misconduct by simply showing the defendant should have known the conduct would violate the law; instead he or she must demonstrate that the officer desired or was substantially certain of the outcome.[122] Ignorance of the law may be a basis for denying qualified immunity, but it is insufficient to establish willful misconduct.

5. *Punitive Damages and Willful Misconduct*

In addition to compensatory damages, a § 1983 plaintiff may also seek punitive damages against a government official if the plaintiff sues the official in his or her personal capacity.[123] The Court held in *Smith v. Wade*[124] "that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[125] First, a defendant has to be sued in his or her individual capacity in order to be eligible to have punitive damages awarded against him or her.[126] Second, a defendant's conduct has to be assessed to determine if it rises to a level of recklessness

120. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982). Even assuming the law is clearly established, the defendant still has an opportunity to show he or she entitled to the defense by claiming "extraordinary circumstances" and proving "that he neither knew nor should have known of the relevant legal standard." *See id.* at 819.

121. *See* Pettit v. Namie, 931 A.2d 790, 801 (Pa. Commw Ct. 2007).

122. *See id.*

123. *See* Smith v. Wade, 461 U.S. 30, 56 (1983). Furthermore, "[p]unitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages." *See* Alexander v. Riga, 208 F.3d 419, 430 (3d Cir. 2000).

124. 461 U.S. 30 (1983).

125. *Smith*, 461 U.S. at 56.

126. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981) (finding that "an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort."). When a plaintiff sues a government official in that person's official capacity the plaintiff is, in fact, suing the entity for which he or she works. *See* Kentucky v. Graham, 473 U.S. 159, 165 (1985). Accordingly, suing a municipal police officer in his or her official capacity is the equivalent of suing the municipality and the court should deny punitive damages. *See City of Newport*, 453 U.S. at 267 (holding that awarding punitive damages against public servants in their official capacity would actually punish innocent tax payers because these public servants are funded by the people); *see also* Brandon v. Holt, 469 U.S. 464, 472–73 (1985) (holding that because suits against public servants, like police officers in their official capacity, are in essence suing the municipality, the municipality and its official extensions are immune from punitive damages.)

described in *Smith*.[127] Finally, if punitive damages are awarded, they are accepted by the Court unless they are "so grossly excessive as to shock the judicial conscience."[128] Punitive damages are awarded under the premise that their purpose is to "punish the Defendant for his willful or malicious conduct and to deter others from similar behavior."[129]

The Third Circuit has noted that "punitive damages in general represent a limited remedy, to be reserved for special circumstances."[130] This inquiry—whether the defendant's conduct is sufficiently egregious to justify punitive damages—"ultimately focus[es] on the actor's state of mind."[131] For instance, a court may examine if the defendant's offense included "nonviolent crimes [because they] are less serious than crimes marked by violence or the threat of violence . . . [s]imilarly, trickery and deceit are more reprehensible than negligence."[132] The court in *Schall v. Vazquez*[133] explained its decision to award the plaintiff punitive damages as follows:

> Schall is entitled to punitive damages because Vazquez [defendant-police officer] acted with reckless indifference towards Schall in that he intentionally placed Schall in a position where he was at risk of death or serious injury due to proximity of the loaded gun to Schall's head. Vazquez admitted that he should not have unholstered his weapon and the court finds that his doing so was reckless with regard to Schall's safety and personal dignity.[134]

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127. *See* Savarese v. Agriss, 883 F.2d 1194, 1205 (3d Cir. 1989) ("[P]unitive damages in general represent a limited remedy, to be reserved for special circumstances." (citing Cochetti v. Desmond, 572 F.2d 102, 106 (3d Cir. 1978) ("[T]he punitive damage remedy must be reserved, we think, for cases in which the defendant's conduct amounts to something more than a bare violation justifying compensatory damages or injunctive relief.")).

128. *See* Murray v. Fairbanks Morse, 610 F.2d 149, 153 (3d Cir. 1979) (noting that if a court is considering reserving punitive damages, it must do so cautiously and "turn to the record to see if the district court was correct in concluding that the jury's award was not the product of irrational behavior").

129. *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 n.9 (1986) (citing RESTATEMENT (SECOND) OF TORTS § 908 (AM. LAW INST. 1979)).

130. *See* Michel v. Levinson, 437 F. App'x 160, 164 (3d Cir. 2011) (citing *Savarese*, 883 F.2d at 1205).

131. *See* Alexander v. Riga, 208 F.3d 419, 431 (3d Cir. 2000); *see also* Schall v. Vazquez, 322 F. Supp. 2d 594, 602 (E.D. Pa. 2004) (holding "that a defendant's state of mind and not the egregious conduct is determinative in awarding punitive damages in a civil rights case" (citation omitted)).

132. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576 (1996) (citation omitted).

133. 322 F. Supp. 2d 594 (E.D. Pa. 2004).

134. *See id.* at 603. *But see* Odato v. Vargo, 677 F. Supp. 384, 386 (W.D. Pa. 1988). In *Odato*, the plaintiff alleged that the defendant-police official had deprived him of his Fourth Amendment right to be free from an unreasonable seizure because the defendant arrested him without probable cause and used ex-

Interestingly, even in a case like *Schall*, where the police official "intentionally placed [the plaintiff] in a position where he was at risk of death or serious injury" the court only found that the defendant was reckless.[135] While recklessness is a sufficient basis for a court to award a plaintiff punitive damages,[136] it is insufficient to trigger section 8550's indemnification prohibition, which requires "actual malice or willful misconduct."[137]

In *Pettit*, the Commonwealth Court of Pennsylvania considered the relationship between a punitive damages award and section § 8550's "willful misconduct" requirement.[138] Specifically, the court held that "an award of punitive damages is not, by itself, sufficient to establish willful misconduct, because reckless conduct can be sufficient to support such an award."[139] Instead, the court should look at the specific instructions given to (or questions asked of) the jury to determine whether the punitive damages award necessarily depended upon a finding of willful misconduct. For example, to determine whether to award punitive damages, a judge may ask the jury "do you find that defendant's conduct was malicious, *wanton, or* oppressive."[140] Yet, even if the jury responds affirmatively, it is not

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cessive force in so doing. The United States District Court for the Western District of Pennsylvania denied the plaintiff punitive damages, reasoning as follows:

> (1) there is no competent evidence that either police officer engaged in this type of conduct on a previous occasion; (2) their conduct was not sufficiently callous; (3) deterrence is not an issue here, and (4) fundamental constitutional rights will not be denigrated absent an award of exemplary damages.

Id. (citation omitted).

135. *See Schall*, 322 F. Supp. 2d at 603.

136. *See* Smith v. Wade, 461 U.S. 30, 56 (1983). When a jury does award a plaintiff punitive damages, the court will still evaluate the reasonableness of a jury's decision to award a specific amount of punitive damages by assessing the following factors: "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases." Dee v. Borough of Dunmore, 474 F. App'x 85, 89 (3d Cir. 2012) (citing *Gore*, 517 U.S. 559). For example, in a Third Circuit case where police officers discriminated against a female police officer due to her sex, "[d]efendants challenged the excessiveness of the punitive damages award by arguing that it was disproportionate to other awards in similar cases." *See* Keenan v. City of Phila., 983 F.2d 459, 471 (3d Cir. 1992). Rejecting the defendant's argument, the court upheld the punitive damages award, noting "[w]e do not find that these awards, as remitted and spread over four individuals, so grossly excessive as to shock our judicial conscience." *See id.* at 472. In comparison, the United States District Court for the Middle District of Pennsylvania dismissed a punitive damages award where the plaintiff did not suffer any actual harm and the defendant's actions were actually in good faith to try to handle citizen's complaints. *See* Carroll v. Clifford Twp., 21 F. Supp. 3d 398, 402–03 (M.D. Pa. 2014), *aff'd*, 625 F. App'x 43 (3d Cir. 2015).

137. 42 PA. STAT. AND CONS. STAT. ANN. § 8550 (West, Westlaw through 2017 Act 22). Of course, if the defendant was convicted of a crime because he was reckless then § 8550 would prohibit indemnification. *Id.*

138. *See* Pettit v. Namie, 931 A.2d 790, 798 (Pa. Commw. Ct. 2007).

139. *See id.* at 801 (citing Renk v. City of Pittsburgh, 641 A.2d 289 (Pa. 1994)).

140. *See, e.g.*, *id.* at 802.

clear that section 8550's willful conduct requirement is met because the jury could have found that the defendant's conduct was malicious *or* wanton.[141] Furthermore, under Pennsylvania law wanton conduct does not reach the level of willful or malicious conduct.[142] Section 8550's indemnification prohibition only applies when there is a judicial determination that the defendant has engaged in conduct that constituted a crime, actual fraud, actual malice, or willful misconduct.[143] On the other hand, if it is clear from the jury instructions or interrogatories that the jury awarded punitive damages because it found the defendant engaged in malicious or willful conduct then, in that case, the punitive damages determination would preclude the municipality from indemnifying the police official because section 8550's elements would be met.[144] There would have been (1) a judicial determination (2) that the defendant engaged in willful or malicious conduct. In short, a punitive damages award neither necessitates nor precludes a finding of willful conduct for indemnification purposes.

Furthermore, none of the underlying § 1983 issues discussed in the preceding sections—a Fourth Amendment deprivation, a qualified immunity dispute, a punitive damages award—necessarily leads to a conclusion that the defendant engaged in willful misconduct under section 8550, which would prohibit indemnification. Section 1983 determinations simply do not dictate Philadelphia's indemnification determinations in most circumstances. Perhaps an equally—if not a more likely—reason Pennsylvania's indemnification statutes is inapplicable is the prevalence of settlement in § 1983 litigation.[145]

6. *Settlement and a "Judicial Determination"*

The City of Philadelphia settles approximately 50% of § 1983 cases against Philadelphia police officials.[146] As a general matter, a settlement does not necessarily mean that the defendant deprived the plaintiff of a

141. *See id.* at 804.

142. *See id.* at 801.

143. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8550 (West, Westlaw through 2017 Act 22).

144. *See, e.g.*, Keenan v. City of Phila., 936 A.2d 566, 569–70 (Pa. Commw Ct. 2007) ("The evidence submitted by the City, namely, the jury instructions and verdict sheet, was sufficient to prove a judicial determination that Keenan engaged in willful misconduct and was not entitled to indemnification because of the limitations set forth in Section 8550 of the Act.").

145. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDS. 459, 459 (2004) (showing percentage of federal civil cases tried dropped from 11.5% to 1.8% between 1962 and 2002); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983) (stating about 8% of civil suits filed in state and federal courts went to trial).

146. *See* E-mail from Armando Brigandi, Chief Deputy City Solicitor, City of Phila., Civil Rights Unit to Teressa E. Ravenell, Professor of Law, Villanova University Charles Widger School of Law (July 18, 2017) (on file with author).

constitutional right or that the amount negotiated accurately captures the plaintiff's harm.[147] Nevertheless, the parties may choose to settle when they consider one or more of the following "three key drivers of settlement behavior: costly adjudication, risk aversion, and divergent prior beliefs or information."[148] For example, in *Williams v. City of Philadelphia*,[149] the City of Philadelphia settled a § 1983 case for a mid-six figure number prior to trial.[150] After losing a motion for summary judgment, settlement was a sensible choice for the defendant—the outcome of the case was less certain and trial necessarily increased litigation costs. As for the plaintiff, although this matter settled for far less than what a typical wrongful death case would normally settle for, the plaintiff also faced an uncertain outcome and increased costs—not only are *Monell* claims notoriously difficult to prove but, a similar case had ended in jury finding that the city was not liable under § 1983.[151]

Regardless of why parties choose to settle a case rather than end the case through adjudication, this affects a municipality's obligation to indemnify its employee. Under section 8548, a municipality is only required to indemnify its employee when "*it is judicially determined* that an act of the employee caused the injury and such act was, or that the employee in good faith reasonably believed that such act was, within the scope of his office or duties."[152] A settlement is markedly different from a judicial adjudication. Settlement agreements are enforced "according to principles of contract law."[153] And Pennsylvania courts favor settlements, in part, because they minimize courts' involvement, thereby reducing the costs

147. Prescott and Spier explain the "benefit" of settlement as follows:

> Most people recognize that parties fully settle a dispute only if the proposed agreement is mutually beneficial. Mutual benefit, however, has a precise meaning in this context. It does not mean that the result was fair in any absolute sense. It also does not mean that the result was socially beneficial. Nor does it mean that both, or even one, of the parties will be "satisfied" with the outcome.

J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 68–69 (2016).

148. *See id.* at 71.

149. *See* Armando Brigandi, Chief Deputy City Solicitor, City of Phila., at Norman J. Shachoy Symposium: Making Policy Pay? (Oct. 28, 2016) (transcript available with the Villanova Law Review) (describing *Williams v. City of Philadelphia*).

150. *See id.* An off-duty Philadelphia police officer, Rudolph Gary, shot and killed Howard Williams during a dispute. *Id.* Specifically, Gary pointed his gun at Howard Williams and shot him point blank in the neck, then stood over top of the fallen Williams and shot him two more times. *Id.* Gary was arrested by Philadelphia Police shortly after the incident. *Id.* He was convicted of murder and is currently serving a 40-year sentence. *Id.* The City refused to indemnify Gary. *Id.*

151. *Id.*

152. 42 PA. STAT. AND CONS. STAT. ANN. § 8548 (West, Westlaw through 2017 Act 22) (emphasis added).

153. *See* Ragnar Benson, Inc. v. Hempfield Twp. Mun. Auth., 916 A.2d 1183, 1188 (Pa. Super. Ct. 2007).

and burdens litigation places.[154] Typically, a settlement is enforceable, not because a court deems it is fair or just, but because all of the elements of a contract—offer, acceptance, and consideration—are present.[155] While perhaps not the complete opposite, a settlement clearly differs from a judicial determination. A settlement is not the consequence of a judge's or a jury's deliberations but the reflection of a bargain between two parties "after due reflection of the possible consequences of his bargain."[156] Importantly, absent a judicial determination, a municipal agency is not required to indemnify its employee. This means that whenever a § 1983 claim ends in a settlement, the city is not statutorily bound to indemnify its employee.

C. *Contractually Bound—Settlements, Police Union Agreements, and Municipal Indemnification Decisions.*

As discussed in the previous sections, the way in which § 1983 and indemnification statutes intersect means that in many cases Philadelphia will not be statutorily bound to indemnify its police officials. This, however, does not necessarily mean that they are not obligated to indemnify Philadelphia police officials. The obligation, however, may come from a different source. Part I(C) considers two sources of contractual obligation: settlement agreements and collective bargaining agreements.

1. *Settlement Agreements*

As noted in the previous section, under Pennsylvania law, settlement agreements are governed by contract law. Accordingly, where there is an offer, acceptance, and consideration, the court will enforce the settlement agreement absent fraud, duress, or mutual mistake.[157] Whether indemnity matters will depend largely on whom enters into the settlement agreement—the individual officer, the city, or both—and the exact terms of the agreement. If the settlement is between the plaintiff and the individual officer, indemnification matters, especially if the defendant is unable personally to satisfy the judgment. If, however, the city is a party to the settlement agreement then, presumably the city will be responsible for the agreed-upon amount owed the plaintiff. Given their contractual nature, settlement agreements will vary from case to case. However, most savvy plaintiff's attorneys will not enter into a settlement with a defendant without some guarantee that the defendant will be able to pay the agreed upon amount, either through his employer or insurer. Accordingly, ques-

154. *See* Felix v. Giuseppe Kitchens & Baths, Inc., 848 A.2d 943, 946 (Pa. Super. Ct. 2004) ("There is a strong judicial policy in favor of voluntarily settling lawsuits . . . . [S]ettlement reduces the burden on and expense of maintaining courts." (citing Rothman v. Fillette, 469 A.2d 543, 546 (Pa. 1983))).

155. *See* Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346, 1349 (Pa. 1991).

156. *See* New Charter Coal Co. v. McKee, 191 A.2d 830, 833 (Pa. 1963).

157. *See Felix*, 848 A.2d at 946.

tions of indemnity will rarely be at issue when the parties have settled their § 1983 dispute—the parties typically will agree to how the settlement will be satisfied during their negotiations.[158]

2. *Collective Bargaining Agreements*

Collective bargaining agreements offer another plausible explanation for widespread indemnification absent statutory obligation. Although collective bargaining was unavailable to public sector employees until the 1960s, functional police unions began forming long before they were formally authorized.[159] The largest of these was, and remains, the Fraternal Order of Police (FOP), which has about 330,000 members.[160] By its own account, the FOP was created for the purpose of presenting police officers' grievances to their respective city councils.[161] Although the FOP is more than 100 years old, police departments could not legally unionize under state laws until the 1960s.[162] Like other unions, police unions are formed when members of the department seek out a union organizer, garner support for unionizing, and hold a vote or election to officially

158. One exception to this is if a police officer-defendant enters into a settlement with the plaintiff, the officer pays, and then seeks indemnification from his or her municipal employer. However, this is very unlikely because municipalities often represent their police officials in civil litigation. *See infra* Part I(C)(2).

159. Even after Congress enacted the National Labor Relations Act in 1935, police departments could not form outright unions as we know them today because the National Labor Relations Act exempted public employers. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012). Nevertheless, police departments circumvented statutory obstacles by creating "fraternal organizations." *See* Joanne Klein, *History of Police Unions*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2207, 2207 (Gerben Bruinsma & David Weisburd eds., 2014).

160. *See Frequently Asked Questions*, FRATERNAL ORDER OF POLICE, http://www.fop.net/Faq.aspx [https://perma.cc/DNK5-HPW5] (last visited June 25, 2017).

161. *See id.*

162. *See Developments in the Law—Public Employment: Collective Bargaining in the Public Sector*, 97 HARV. L. REV. 1676, 1677 (1984). For instance, in 1970, Pennsylvania passed its Public Employee Relations Act, which made it lawful for public employees, including police officers, to engage in organization and collective bargaining. *See* 43 PA. STAT. AND CONS. STAT. ANN. § 1101.401 (West, Westlaw through 2017 Act 22); *see also id.* § 217.1. Section 217.1 of Pennsylvania's statute states as follows:

> Policemen or firemen employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations or other representatives designated by fifty percent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.

43 PA. STAT. AND CONS. STAT. ANN. § 217.1. An overwhelming majority of states enacted similar statutes, and today most police departments, as well as individual officers are free to join the FOP or other existing unions, or create their own. *See* Marcia L. McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?*, 35 ST. LOUIS U. PUB. L. REV. 47, 53 (2015).

form a union.[163] If the outcome of the vote is favorable, members choose union leaders and the collective bargaining process begins.[164]

The negotiation process between a police union and its respective municipality may lead to disagreements between the two.[165] Given the numerous elements typical of a police union contract, it is not surprising that the negotiation process can be painstaking. Contracts between police unions and cities typically contain clauses regarding grievance procedures, wages, leave, holidays, and uniforms.[166] However, there are a few distinctive terms in police union agreements, such as the Law Enforcement Officers' Bill of Rights, which aims to protect officers' due process rights, and

163. *See 4 Steps to Form a Union*, AFL-CIO, https://aflcio.org/form-union/4-steps-form-union [https://perma.cc/X9EV-HBB3] (last visited June 25, 2017).

164. *See id.* Although unionizing police departments is generally a straightforward process, relationships between municipalities and police departments can become strained due, in part, to the burgeoning power of police unions. Organizations such as the FOP no longer maintain only their original, simple goals of fair working conditions and adequate pay, but have since expanded their efforts. One of the FOP's primary pursuits is now "legislative advocacy." *See Steve Young Law Enforcement Legislative Advocacy Center*, FRATERNAL ORDER OF POLICE, http://www.fop.net/CmsPage.aspx?id=34 [https://perma.cc/6J7W-HCRZ] (last visited June 25, 2017). That is, the FOP is vigorously engaged in lobbying against or in favor of legislation or reform efforts which coincide or conflict with its members' interests. *See id.* Furthermore, police unions typically have political action committees (PACs), which allow their members to exert political influence by providing monetary support to candidates running for office. *See Political Action Committee*, FRATERNAL ORDER OF POLICE, http://www.fop.net/PAC/PAC.aspx?id=206 [https://perma.cc/L64V-JBNA] (last visited June 25, 2017). The political clout garnered by these efforts contributes to the tension that arises between a union and its respective city or municipality when the two are in disagreement. *See, e.g.*, Amy Yensi, *War of Words Between City Police Union and Baltimore Police Department*, CBS BALT. (June 21, 2017, 11:21 PM), http://baltimore.cbslocal.com/ 2017/06/21/city-police-union-baltimore-police-department/ [https://perma.cc/J67G-NSR5]. This is evidenced by clashes between the police unions and city leadership. *See, e.g.*, Nisha Chittal, *NYC Mayor and Police Union Chief Clash over Garner Decision*, MSNBC (Dec. 4, 2014, 11:00 PM), http://www.msnbc.com/msnbc/garner-tensions-rise-between-nyc-mayor-and-police-union-head [https://perma.cc/QDR9-SDFZ] (describing tensions between NYPD and Mayor DeBlasio following the death of Eric Garner).

165. Although it is not the norm, negotiations can last for years and even spur litigation. *See, e.g.*, Roseann Moring, *Police Union Oks Labor Contract with City, Ending Years of Contentious Negotiations*, OMAHA WORLD HERALD (Mar. 14, 2017), http://www.omaha.com/news/crime/police-union-oks-labor-contract-with-city-ending years-of/article_7c797df3-488e-57e5-a460-9eaa5b6c8bd7.html [https://perma.cc/5488-5UBB] (describing negotiations between the city of Omaha and its police union); Rocco Parascandola & Erin Durkin, *New York City Reaches Contract Deal with Largest Police Union*, N.Y. DAILY NEWS (Jan. 31, 2017, 08:27 PM), http://www.nydailynews.com/new-york/city-reaches-contract-deal-largest-union-sources-article-1.2960734 [https://perma.cc/54Q4-MZGN] (describing negotiations between NYPD and the New York City).

166. *See, e.g.*, CONTRACT BETWEEN PHILADELPHIA AND THE FRATERNAL ORDER OF POLICE LODGE NO. 5 FOR THE TERM JULY 1, 2009 THROUGH JUNE 30, 2014 1, 47–77 (2009), https://www.muckrock.com/foi/philadelphia-211/police-union-contract-philadelphia-police-department-18497/#file-49316 [https://perma.cc/994C-TXFF] [hereinafter Philadelphia PD CBA].

no-strike clauses.[167] Additionally, some police union contracts and FOP agreements contain officer indemnification clauses.[168] While indemnification clauses are not found in every contract, they are certainly not uncommon.

Among contracts that do require the municipality to indemnify officers in the event of civil suit, the extent to which police officers must be represented or compensated varies. For instance, some agreements, such as those for police unions in Laredo, Texas, Corpus Christi, Texas, and Jacksonville, Florida, only require that the city provide and pay for legal defense for officers who are sued in connection with any of his or her actions within the scope of employment.[169] On the other hand, several contracts require that the city provide legal defense and reimburse officers for any monetary judgments against them.[170] These types of indemnification clauses are not without nuance, however. Some contracts limit compensation to actual damages and exempt punitive damages from coverage.[171] Others place a cap on the dollar amount of damages the city is obligated to pay for each employee indemnified.[172] An alternative method of limiting indemnification, used by Minneapolis, is to simply reference the same statutory limits found in state legislation.[173]

Additionally, most agreements qualify that the officer must have been acting within the scope of his or employment and in good faith in order to receive the benefit of indemnification. In Newark, New Jersey, for instance, if there is a claim for punitive damages, the city will defend and

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167. *See* Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1209–1212 (2017).

168. *See id.* at 1198.

169. *See* AGREEMENT BETWEEN THE CITY OF CORPUS CHRISTI AND THE CORPUS CHRISTI POLICE ASSOCIATION: AUG. 1, 2010 TO JULY 31, 2015 1, 55 (2010), http://www.cctexas.com/Assets/Departments/Human-Resources/Files/ExecutedCCPOAFinalContract.pdf [https://perma.cc/Q49J-QPE9]; AGREEMENT BETWEEN THE CITY OF JACKSONVILLE AND THE FRATERNAL ORDER OF POLICE: OCT. 1, 2011–SEPT. 30, 2014 1, 106 (2011), https://www.documentcloud.org/documents/3259981-Jacksonville-FL.html [https:// perma.cc/4N3S-LPL7]; COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF LAREDO AND THE LAREDO POLICE OFFICER'S ASSOCIATION: OCT. 1, 2008 TO SEPT. 30, 2016 1, 54 (2012), https://www.muckrock.com/foi/laredo-2908/police-union-contract-laredo-police-department-18914/#file-48248 [https://perma.cc/6ZV8-U26N].

170. *See, e.g.*, AGREEMENT BETWEEN THE CITY OF ST. PETERSBURG AND SUN COAST POLICE BENEVOLENT ASSOCIATION: OCT. 1, 2016 THROUGH SEPT. 30, 2019 50, 51 (2016), https://www.stpete.org/city_departments/human_resources/docs/PBA%20Contract.pdf [https://perma.cc/5XRJ-YVXF].

171. *See, e.g.*, *id.* at 1, 50.

172. *See, e.g.*, AGREEMENT BETWEEN THE CITY OF MADISON AND MADISON PROFESSIONAL POLICE OFFICERS ASSOCIATION: JAN. 1, 2016 TO DEC. 31, 2017 1, 46 (2016), https://www.cityofmadison.com/sites/default/files/city-of-madison/human-resources/documents/contracts/MPPOA-2016.pdf [https://perma.cc/7L82-EGG3].

173. *See* LABOR AGREEMENT BETWEEN THE CITY OF MINNEAPOLIS AND THE POLICE OFFICERS' FEDERATION OF MINNEAPOLIS: JAN. 1, 2017 THROUGH DEC. 31, 2019 1, 61–63 (2017), http://www.minneapolismn.gov/www/groups/public/@hr/documents/webcontent /wcmsp-200131.pdf [https://perma.cc/L96T-R92H].

defray the officer's costs only if it is determined that the officer was not acting recklessly or without the scope of employment.[174] If the officer is found to have been reckless or wanton, he or she is advised to retain separate counsel for the punitive damages claim.[175] While most contracts follow this general framework, others provide officers with an additional layer of protection by allowing and funding arbitration after the city makes its initial determination that the officer is not entitled to indemnification.[176]

Still, some police union contracts simply do not have indemnification provisions. That is, the city is not required to indemnify police officers beyond what is statutorily mandated. For example, the contract between the City of Philadelphia and the FOP does not contain an indemnification clause.[177] Accordingly, Philadelphia is not contractually bound by its police union agreement to indemnify its officers if the officer is found liable under § 1983.[178] The ways in which indemnification law, § 1983 jurisprudence, and contractual agreements interact in Philadelphia give municipal decision-making officials an enormous amount of discretion when it comes to deciding whether or not to indemnify police officers for alleged constitutional violations.

II. EXERCISING DISCRETION: POLICY CONSIDERATIONS IN § 1983 POLICE INDEMNIFICATION DECISIONS

The Philadelphia Police Department currently employs about 6,500 uniformed police officers.[179] The number of officer-civilian encounters in Philadelphia per year is over 200,000.[180] Of those encounters, about 40,000 result in actual arrests.[181] On a per-year average, approximately 200–250 federal civil rights lawsuits are filed against Philadelphia police

174. *See* AGREEMENT BETWEEN THE CITY OF NEWARK, NEW JERSEY AND THE POLICE SUPERIOR OFFICERS' ASSOCIATION OF NEWARK, NJ, INC.: JAN. 1, 2009 THROUGH DEC. 31, 2012 1, 29 (2009), https://www.documentcloud.org/documents/3259927-Newark-NJ.html [https://perma.cc/C4VX-ETAG].

175. *See id.*

176. *See, e.g.*, MASTER AGREEMENT BETWEEN THE CITY OF DETROIT AND THE DETROIT POLICE OFFICERS ASSOCIATION: 2014–2019 1, 44 (2014), https://www.documentcloud.org/documents/3259922-Detroit-MI.html [https://perma.cc/ELN5-ZZUK].

177. *See* Philadelphia PD CBA, *supra* note 166.

178. *See* City of Phila. v. Fraternal Order of Police, Lodge No. 5, Am. Arb. Ass'n No. 14, 360 L 00202 09, 21 (2009) (Jennings, Jarin & De Treux, Arbs.), http://www.lehb.org/contract.pdf [https://perma.cc/2QTW-DZ2P]. However, the contract does provide that the City will contribute 2.5 million dollars to the FOP legal services fund. *See id.*

179. *See* E-mail from Armando Brigandi, Chief Deputy City Solicitor, City of Phila., Civil Rights Unit to Teressa E. Ravenell, Professor of Law, Villanova University Charles Widger School of Law (July 18, 2017, 05:25 PM) (on file with author).

180. *See id.*

181. *See id.*

officials.[182] As discussed in Part I, decision-making officials in Philadelphia have a tremendous amount of discretion when it comes to decisions to indemnify police officials.[183] However, out of all of these 200–250 federal lawsuits, the City of Philadelphia indemnifies 99% of the officers who are liable.[184]

In the rare cases where the municipality decides to deny an officer indemnification, it is almost always because the officer engaged in criminal or willful misconduct.[185] Clearly, under section 8550, the municipality does not even have the option of indemnifying a police official when a judge or jury has determined he or she engaged in criminal conduct. Furthermore, section 8548 only requires a Pennsylvania municipality to indemnify an official when there has been a judicial determination that the official caused the injury in the scope of his or her employment (or under the good faith belief that he or she was acting within the scope of his or her employment). Although the City has a great deal of discretion regarding questions of police indemnification, the City traditionally only uses this discretion to deny indemnification when there is little question that the police official has engaged in criminal conduct.[186]

One question to consider is whether the City should limit the circumstances in which it indemnifies government officials being sued under § 1983. The decision to indemnify or not indemnify a police official has the potential to affect a number of different persons: the plaintiff, the defendant police official, and residents of the City. To this end, Part II discusses the primary policy considerations that should factor into municipal decisions to indemnify police officers as well as the dilemmas municipal officials face as they decide whether or not to indemnify police officials. Part A argues that indemnification encourages people to become police officers and for police officials to act. Part B considers how indemnification might reduce constitutional violations. Part C discusses the importance of indemnification for plaintiff compensation. Part D considers the special problem of officer recidivism. Finally, Part E discusses how indemnification shifts costs to municipal residents. Part II concludes that consideration of all of these policy concerns will generally weigh in favor

182. *See id.*

183. *See supra* Part I and accompanying notes.

184. *See* E-mail from Armando Brigandi to Teressa E. Ravenell, *supra* note 179. Currently, Philadelphia settles approximately 50% of § 1983 claims against its officers, 40% are dismissed before trial, and 10% go to trial. *See id.*

185. Similarly, when corporations refuse to indemnify an officer or director it is often because he or she engaged in a criminal act or willful misconduct. *See, e.g.*, 2 William E. Knepper & Dan A. Bailey, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS 297–98 (5th ed. 1993) ("Public policy prohibits indemnification of corporate officers for intentional illegal conduct.").

186. *See* E-mail from Armando Brigandi to Teressa E. Ravenell, *supra* note 179. For example, in *Panas v. City of Philadelphia*, the City of Philadelphia refused to indemnify Frank Tepper because Tepper, a former police official, had been convicted of murdering Panas. For additional discussion of the *Panas* case, see *infra* notes 221–26 and accompanying text.

of indemnifying police officials; however, police indemnification should correlate to adjustments in department policy, improved training, and discipline.

A. *Incentivizing Police*

Police officers in the United States play an integral role in society, both protecting and serving the public. As Chicago's Police Accountability Task Force noted in its Recommendation for Reform,

> serving as a police officer is a challenging and often dangerous job . . . . [W]e put significant pressure on them to solve and prevent crime and to address the manifestations of a number of other daunting social and economic challenges beyond their charge and capacity to manage, let alone solve.[187]

While most police officers make a decent salary, their pay scale in no way reflects the dangers and complexities of their jobs.[188] And still, Philadelphia employs more than 6,500 officers.[189] The overwhelming majority of law enforcement officers in Philadelphia care deeply about their communities, and they take their jobs seriously.

Nevertheless, many officers serving in Philadelphia will be sued at some point during their careers.[190] "[A]lthough the risk of an official losing a case is extremely small . . . the risk of being sued is far greater, and even successful defenses can exact heavy personal costs from officials."[191] The government, including police departments, needs to attract talented individuals to work for it.[192] The Court concluded in *Filarsky v. Delia*[193] that the fear of defending a civil suit, compounded with the risk of personal liability, may dissuade people from becoming government offi-

187. *See* POLICE ACCOUNTABILITY TASKFORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 2 (Apr. 2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf [https://perma.cc/BM4W-Q6EJ].

188. *See* E-mail from Armando Brigandi to Teressa E. Ravenell *supra* note 179 (estimating that the median annual salary for a Philadelphia police officer is $60,000 to $65,000).

189. *See id.*

190. As noted at the beginning of Part II, Philadelphia employs about 6,500 police officials and approximately 200 federal civil rights lawsuits are filed against Philadelphia police officials each year. Based on these numbers, about 3% of Philadelphia's police officers will have a § 1983 claim brought against them each year. Although some officers will be sued repeatedly, most of these defendants should change from year to year. This suggests that many police officials will be sued at least once during the course their careers.

191. *See* SCHUCK, *supra* note 21, at 70.

192. *See* Filarksy v. Delia, 566 U.S. 377, 390 (2012) ("The government's need to attract talented individuals is not limited to full-time public employees.").

193. 556 U.S. 377 (2012).

cials.[194] Indemnification, like immunity, shields officers from incurring the costs of litigation. Following the Supreme Court's reasoning in *Filarsky*, advanced knowledge that they will be indemnified in most circumstances reduces the likelihood that people will refuse to become police officers because of the fear of liability.

Indemnification may also have a positive effect on persons currently serving as police officials. In *Harlow*, the Supreme Court recognized that "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[195] Because indemnification shields officers from personally incurring the financial costs of litigation in most circumstances it, like immunity, should protect their ardor.[196] Similarly, the Supreme Court of Pennsylvania has reasoned that the purpose of indemnification "is to permit local agency employees to perform their official duties without fear of personal liability."[197] Additionally, by providing indemnification, the city's executive leaders send a message to law enforcement that "we have your backs", and "your work is appreciated." This, in turn, improves officer morale.

B. *Reducing Constitutional Deprivations*

One of the basic purposes of § 1983 is to deter government officials from committing constitutional torts.[198] As a general matter deterrence works by penalizing unwanted behaviors.[199] For deterrence to work, the affected parties must have advance knowledge that they will be punished

194. *See id.* at 390. In *Filarsky*, the Court considered whether to extend qualified immunity to a private defendant acting on behalf of the government. *See id.* In holding that qualified immunity should be available to the private defendant the Court reasoned, without qualified immunity, "the most talented candidates will decline public engagements" in favor of "other work— that does not expose them to liability for government actions." *See id.*; *see also* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting that one social cost of § 1983 litigation is the "deterrence of able citizens from acceptance of public office").

195. *See Harlow*, 457 U.S. at 814 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

196. *But see* Schwartz, *supra* note 7, at 941–42 ("Even if an officer believes he will be indemnified, he may not want his conduct to impose costs on taxpayers or his employer. He may fear that he will be disciplined or denied promotion if he is named in multiple suites. He may fear having to participate in future depositions or trials. And each of these concerns may 'erode [officers'] necessary confidence and willingness to act.'" (footnotes omitted)).

197. *See* Wiehagen v. Borough of N. Braddock, 594 A.2d 303, 306 (Pa. 1991).

198. *See* Owen v. City of Independence, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." (citation omitted)).

199. *See Deterrence*, BLACK'S LAW DICTIONARY (10th ed.) (defining deterrence as "the prevention of criminal behavior by fear of punishment").

for engaging in the behavior.[200] Deterrence works by not only dissuading the specific individual punished from engaging in similar conduct in the future but also by dissuading similarly situated officials from engaging in comparable conduct. Thus, if police officials are personally liable for their constitutional torts then, theoretically, they (individually and as a whole) will be less likely to engage in unconstitutional behavior. From this, some scholars argue that indemnification undermines deterrence because if police officials are not personally liable for their behaviors they have little disincentive from engaging in those behaviors in the future.[201]

Notwithstanding the power of financial liability as a deterrent, some argue that personal liability is not necessary to reduce constitutional violations. Professor Barbara Armacost has argued that "an official who is found personally liable in a § 1983 suit is, by definition, a 'wrongdoer' [and] there is significant independent value—apart from who actually pays the damages award—in attaching the label 'wrongdoer' to an individual official."[202] She goes on to suggest that there is a "stigma" that fastens to police officials who are found liable for § 1983 damages, even if the municipality indemnifies them.

The difficulty with this argument is that most § 1983 claims against police officials in Philadelphia are settled—there is no judicial determination of wrongdoing.[203] And while anecdotal evidence indicates that many police officers take it personally when they are sued,[204] it is unclear that the same type of moral blame attaches when a § 1983 case is settled rather than litigated. In fact, police officials often become very upset when they find out that the city has settled with the plaintiff precisely because they do not believe that they should be liable and settlement deprives them of the opportunity to prove this.[205] A municipality's decision to settle a § 1983 claim may be strategic rather than fault-based.[206] In some instances it will be more cost efficient and practical for the municipality to settle the claim rather than litigate it (at least in the short term), even if liability is questionable.[207] While personal liability may not be necessary to deter police

200. *See* Ellen S. Podgor, *What Kind of Mad Prosecutor Brought Us This White Collar Case*, 41 VT. L. REV. 523, 535 (2017) ("The law cannot achieve specific and general deterrence without giving fair warning that certain conduct is criminal.").

201. *See, e.g.*, Schwartz, *supra* note 7, at 953 (concluding that indemnification "frustrates § 1983's deterrence goals by limiting the impact of compensatory and punitive damages awards on individual officers").

202. *See* Armacost, *supra* note 8, at 670.

203. *See supra* Part I(B)(6).

204. *See* E-mail from Armando Brigandi to Teressa E. Ravenell, *supra* note 179.

205. *See id.*

206. *See supra* notes 146–56 and accompanying text.

207. *See id.*

misconduct, at a minimum, there needs to be some finding of misconduct. Yet, many settlements specify that there is no admission of wrongdoing.[208]

Even so, there need not be a judicial determination of wrongdoing for a municipality to take steps to reduce the number of constitutional violations that take place in its jurisdiction. One of the basic arguments in support of respondeat superior liability is that it "creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct. This incentive may reduce the incidence of tortious conduct more effectively than doctrines that impose liability solely on an individual tortfeasor."[209] As noted in Part I, indemnification acts similarly to respondeat superior in that the employer pays for the misconduct of its employee.[210] Peter Schuck has argued that "the ideal locus of liability" "is probably closer to the agency head than the individual street-level official."[211] He offers the following explanation:

> Unlike individual low-level officials, agencies control most of the resources, constraints, incentives, and conditions that actually influence officials' behaviors toward the public. They can recruit different types of personnel and train and retrain them to perform their duties in particular ways. They can reward and punish officials for conforming to and departing from those norms, and they can develop new modes of supervision and control.[212]

For example, a police department may use indemnification as leverage to change unwanted behavior amongst its police officials. When similar instances of misconduct arise, the Department may warn officers (individually or collectively) that the conduct will not be tolerated and future misconduct will not be indemnified. If an officer is provided fair warning that further unacceptable behavior will result in the withdrawal of indemnification, there is a strong likelihood that that officer will alter his course of behavior.[213] Similarly, by reviewing § 1983 settlements and judi-

208. *See* E-mail from Armando Brigandi to Teressa E. Ravenell, *supra* note 179 (noting that all settlement agreements between § 1983 plaintiffs and the City of Philadelphia contain a stipulation that there is no admission of wrongdoing).

209. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006).

210. *See supra* Part I.

211. *See* SCHUCK, *supra* note 21, at 104.

212. *Id.* at 104–05. Similarly, in *Owen v. City of Independence*, the Court noted that "the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." 445 U.S. 622, 652 (1980).

213. For example, in one police indemnification case, attorneys for the municipality offered the following argument against police indemnification: "by removing the cloak of indemnification from someone like [the defendant officer], the corporation counsel sends a message to city policemen that their own assets are at stake; and with their own assets at stake . . . policemen are less likely to engage in torture." John Conroy, *The Shocking Truth*, CHI. READER (Jan. 9, 1997),

cial determinations police departments should be able to identify problematic behaviors and determine steps to correct and reduce the number of these occurrences.[214]

On the other hand, the deterrent effect of individual liability seems far more limited. Schuck has suggested that personal liability will only deter willful misconduct and, because most constitutional violations are not the result of willful behavior, will do little to reduce the overall number of constitutional deprivations.[215] Similarly, in *Davis v. United States*[216] the Supreme Court noted that,

> [T]he deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue . . . . [W]hen the police act with an objectively "reasonable good-faith belief" that their conduct is lawful or when their conduct involves only simple, "isolated" negligence the "deterrence rationale loses much of its force."[217]

In short, placing liability costs on the municipality rather than the individual is more likely to reduce the overall number of constitutional deprivations occurring in that jurisdiction.

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https://www.chicagoreader.com/chicago/the-shocking-truth/Content?oid=892462 [https://perma.cc/NH28-WQ7G]. On the other hand, indemnification for repeated instances of similar misconduct may embolden officers—that no matter what he/she does, his or her actions will be covered by the city, without consequence.

214. *See* Schwartz, *supra* note 7, at 959 (noting that "[i]f police departments do not gather and analyze information from lawsuits and do not know how much has been spent in settlements and judgments, they cannot asses which officers and which types of police action lead to lawsuits."). This, of course, assumes that municipalities can and do review and aggregate litigation outcomes to identify trends in behavior and then take steps to remedy and reduce those problematic actions. Professor Armacost argues that this is seldom the case. She offers the following observation:

> [M]any departments do not use these materials to track broader patterns and trends that might reveal problem officers or trouble spots in the police force. In some cases, this failure results simply from disorganized or fragmented record keeping or lack of computer capability. In others, it is more deliberate, flowing out of concerns that statistics about misconduct could be used in litigation against the police department . . . . Obviously, when supervisors do not discipline officers, despite lawsuits or complaints involving police brutality, and those officers' personnel files remain exemplary, the officers have no incentive to change their behavior.

Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV 453, 474 (2004).

215. *See* SCHUCK, *supra* note 21, at 85.

216. 564 U.S. 229 (2011).

217. *Id.* at 238 (quoting Herring v. United States, 555 U.S. 135, 137, 143 (2009)).

C. *Compensating Victims of Constitutional Torts*

One of the primary aims of § 1983 is to compensate plaintiffs for the injuries inflicted upon them by government officials.[218] However, if found liable, most police officials will not be in a position to satisfy the judgment against them.[219] The decision to indemnify provides plaintiffs with a source from which to receive monetary compensation for their alleged injuries.[220] In contrast, when the city refuses to indemnify the defendant, the plaintiff will usually not be able to recover damages, even if he or she establishes the police official is liable.

For example, in *Panas v. City of Philadelphia*,[221] a jury found Frank Tepper was liable under § 1983 for depriving Billy Panas of his right to be free from an unreasonable seizure.[222] Nevertheless, Panas's family has recovered nothing.

> On November 21, 2009 then-Philadelphia Police Officer Frank Tepper . . . murdered [19-year-old] Billy Panas following a scuffle between some of Tepper's family and friends and a group of neighborhood youths in front of Tepper's house. Tepper was off-duty at the time . . . . Tepper had been drinking, and when he shot and killed Panas . . . .
>
> Prior to shooting Panas, Tepper exited the house, flashed his badge, identified himself as a police officer, and asked the

218. *See* Owen v. City of Independence, 445 U.S. 622, 651 (1980) ("A damages remedy against the offending *party* is a vital component of any scheme for vindicating cherished constitutional guarantees . . . .") As Professor Dobbs has explained "[c]ompensation of injured person is one of the generally accepted aims of tort law. Payment of compensation to injured persons is desirable. If a person has been wronged by a defendant, it is just that the defendant make compensation." DAN B. DOBBS, THE LAW OF TORTS § 10, at 17 (2000).

219. *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) ("[M]any Americans are 'judgment proof': They lack the sufficient assets (or sufficient collectible assets) to pay the judgment in full (or even in substantial part)."). The one exception to this is if the employee has obtained individual liability insurance. "Liability insurance, specifically, protects the insured in the event he is sued on a legal claim covered by the policy, at which point the insurer typically has both a right and duty to defend the suit." John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1552 (2017). Generally, "[l]iability insurance (or third party insurance) is insurance that you purchase to cover your responsibility for harms you inflict on others. Although liability insurance can cover negligent acts, it will not, and likely cannot, cover intentional (that is, criminal) acts." Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. L. REV. 721, 735 (2012). With regards to police liability insurance, the insurer typically agrees to cover losses "resulting from law enforcement wrongful act(s) which arise out of and are committed during the course and scope of law enforcement activities." Rappaport, *supra*, at 1571 (internal quotations omitted). This will include intentional acts but will exclude malicious or criminal acts. *See id.*

220. Indemnification, like respondeat superior liability, "reflects the likelihood that an employer will be more likely to satisfy a judgment." *See* RESTATEMENT (THIRD) OF AGENCY, *supra* note 209, at § 2.04.

221. 871 F. Supp. 2d 370 (E.D. Pa. 2012).

222. *See id.* at 371; *see also* Brigandi, *supra* note 149 (discussing case in detail).

> hostile crowd to disperse. When Billy Panas said, "he won't shoot anybody," Tepper replied, "oh yeah?," pointed the gun at Panas, and shot him point-blank in the chest. Later that night, doctors at Temple University Hospital pronounced Panas dead.[223]

Tepper was arrested and later convicted of murder. A § 1983 civil rights lawsuit followed. The plaintiff sued Tepper in his personal capacity and the City of Philadelphia. The complaint alleged that the City failed to supervise and discipline Tepper for repeated off-duty infractions.[224] At trial, the jury found that Tepper was personally liable under § 1983 but that the City was not.[225] The jury awarded the Panas family a verdict of $4.7 million dollars against Tepper.[226] However, the Panas family has received nothing.[227] Under section 8550, the City of Philadelphia is prohibited from indemnifying Tepper—a jury had convicted Tepper of murder. And in jail and penniless, Tepper was in no position to fulfill the judgment.

In the absence of indemnification, plaintiffs will often be left with very limited remedies—successful municipal liability claims are rare and most individual defendants will not have the personal means to satisfy a substantial judgment.[228] One of the primary purposes of § 1983—compensating

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223. *Panas*, 871 F. Supp. 2d at 372.

224. Between 1995 and 2002 Tepper had been involved in at least four off-duty altercations, most of which included him being drunk, and threatening people with guns. However, Tepper had a clean disciplinary history between 2002 and the Panas murder in 2009. *See Panas*, 871 F. Supp. 2d at 371–75.

225. At trial, the jury was asked four separate questions on the verdict slip: (1) Was Frank Tepper a state actor under color of law? The jury answered yes. (2) Did Frank Tepper use excessive force against Billy Panas? The jury answered yes. (3) Was the City deliberately indifferent to the need to supervise and discipline Frank Tepper? The jury answered yes. (4) Finally, was the City the moving force (the cause) behind Frank Tepper's excessive use of force? The jury answered no. Regarding question four, the City argued that the seven-year period between 2002 and the 2009 when Tepper had no reported disciplinary infractions broke the casual chain. The jury agreed with this argument. *See* Brigandi, *supra* note 149.

226. *See id.*

227. *See id.*

228. *But see supra* notes 149–51 and accompanying text for description of *Williams v. City of Philadelphia*. Additionally, without indemnification, it may be difficult for plaintiffs to find legal representation since plaintiffs' lawyers will rarely take a case where there is little hope of monetary recovery. *See* S. REP. NO. 94-1011, at 6 (1976) (predicting that 42 U.S.C. § 1988(b) will insure that civil rights statutes do not become "mere hollow pronouncements which the average citizen cannot enforce"). Unfortunately, § 1988(b) does little to assuage plaintiffs' attorneys' concerns that they will not be compensated for their work. Attorneys' fees are shifted at the discretion of the judge, and an early study of the effects of § 1988(b) concluded that "the fees act may have lowered settlement rates and lowered the percentage of court judgments favorable to plaintiffs." Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 760–61 (1988).

persons deprived of a constitutional right by government officials—is clearly thwarted when the city refuses to indemnify its police officials.[229]

D. *Officer Recidivism*

Despite its many benefits, indemnification raises special concern when certain officers are the subject of repeated and similar allegations of abuse year after year. There is evidence that recidivism is a problem in at least some police departments.[230] For example, the "most sued cop" in New York City, Peter Valentin, has been sued twenty-six times in the last ten years and the City has expended $884,000 to settle cases in which Valentin was a named defendant.[231] Similarly, fifty-five officers in New York City's police department have been sued ten or more times from 2006 to 2016.[232] Philadelphia, like New York, has police officials who have been sued multiple times based upon similar allegations.[233] Nevertheless, Philadelphia has not refused to indemnify a police official because of the number of times the officer has been sued.[234]

Indemnifying police officers who repeatedly are accused of misconduct may have negative effects on the individual officer, the police department as a whole, and the municipality. First, the individual officer may begin to feel invincible—that no matter what the officer does, his or her actions will be covered by the city, without consequence to the officer. As the Third Circuit recognized in *Bielevicz v. Dubinon*,[235] "it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future."[236] Furthermore, because punishment not only deters the original actor, but other actors who are similarly situated, different police officials may engage in future misconduct. Professor Armacost has argued that "if police leadership is tolerating, even sanctioning, a kind of aggressive conduct that leads to abuses and police leaders are willing to absorb the costs of liability, then the organization itself is part of the problem."[237] Finally, repeated constitutional depriva-

229. The plaintiff's interest in indemnification is further evidenced by cases where the plaintiff, not the defendant, seeks to have the city indemnify the defendant. *See, e.g.*, Wilson v. City of Chicago, 120 F.3d 681, 683 (7th Cir. 1997).

230. *See, e.g.*, Barry Paddock et al., *Detective is NYPD's Most-Sued Cop, with 28 Lawsuits Filed Against Him Since 2006*, N.Y. DAILY NEWS (Feb. 16, 2014, 02:30 AM), http://www.nydailynews.com/new-york/lawsuits-nypd-double-decade-costing-taxpayers-1b-article-1.1615919#ixzz30rpLyB00 [https://perma.cc/UFN3-ETBK].

231. *See id.*

232. *See id.*

233. *See* E-mail from Armando Brigandi to Teressa E. Ravenell, *supra* note 179.

234. *See id.*

235. 915 F.2d 845 (3d Cir. 2017).

236. *Id.* at 851–52.

237. Armacost, *supra* note 214, at 475.

tions may lead to municipal liability.[238] Specifically, the United States District Court for the Eastern District of Pennsylvania has held that "a city may be liable for its failure to discipline an officer after multiple complaints against him, particularly where the prior conduct which the officer engaged in is similar to the conduct which forms the basis for the suit."[239]

On the other hand, an alleged constitutional deprivation (particularly a meritorious one) presents a training opportunity for the police department. If the department recognizes a pattern of conduct that results in repeated lawsuits, the department needs to be proactive. The department should pull this officer aside and provide counseling. This is particularly true for officers who repeatedly are accused of misconduct. The recidivist officer needs to be warned that a continuation of the pattern of behavior that has resulted in the string allegations and civil rights lawsuits will not be tolerated. This is especially important as the public has become less tolerant of police misconduct and given the clear financial link between municipal residents and police indemnification.

E. *Cost Shifting*

When a municipality indemnifies a police official it is clear who is spared the costs associated with litigation and liability—the police official. It is not apparent who pays. Describing police indemnification, scholars often note that "the municipality" or "the city" assumes the costs of litigation and liability.[240] Yet, as Professor Ravenell has argued elsewhere, "Intangible legal entities, like municipalities and corporations, at least from a practical standpoint, are incapable of action. Instead, a person must act on their behalf."[241] Similarly, while technically a municipality may pay, it must generate its funding through others. Professor Schwartz appropriately asked, "when a plaintiff recovers damages against the government, who foots the bill?"[242] She concluded that "local governments' funding comes from multiple sources, including property taxes; sales taxes; income tax; utilities; charges for parking, parks, and other services; fines; interest;

238. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 390 (1989). The Court in *Harris* explained municipal liability for failure to train as follows:

> [If] the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need . . . [then] the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. (footnotes omitted).

239. *See* Wnek v. City of Phila., No. 05–CV–3065, 2007 WL 1410361, at *3 (E.D. Pa. May 11, 2007) (citation omitted); *see also* Beck v. City of Pittsburgh, 89 F.3d 966, 967 (3d Cir. 1996).

240. *See, e.g.*, Schwartz, *supra* note 7, at 890.

241. *See* Ravenell, *supra* note 89, at 160.

242. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1147 (2016).

and federal and state grants."[243] With the exception of the federal and state grants, government funding comes from the people living or visiting the municipality. From this, it would seem that the cost of police indemnification, at least indirectly, largely falls on municipal taxpayers and those living in the municipality and using its public services. In short, indemnification would seem to simply shift the cost from the police official to the municipal government,[244] and then, ultimately, to persons in the municipality.

Arguably, because police provide a public service which benefits the public as a whole, it is reasonable for the public to bear the cost of police liability, at least as compared to the victim of the police action. For example, in *Wegner v. Milwaukee Mututal Insurance Co.*,[245] the plaintiff's home sustained substantial damage after police officers used tear gas and flash bangs to force fugitives from her home.[246] The Minnesota Supreme Court held that the municipality should bear the cost of the plaintiff's damages.[247] In so doing, it reasoned as follows:

> We believe the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages. The policy considerations in this case center around the basic notions of fairness and justice. At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice. Therefore, the City must reimburse Wegner for the losses sustained.[248]

Additionally, the court went on to hold "that the individual police officers, who were acting in the public interest, cannot be held personally liable. Instead, the citizens of the City should all bear the cost of the benefit conferred."[249]

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243. *See id.* at 1161.

244. *See* SCHUCK, *supra* note 21, at 83.

245. 479 N.W.2d 38 (Minn. 1991).

246. *See id.* at 38–39.

247. *See id.* at 42.

248. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 196 cmt. h (AM. LAW INST. 1965)). Comment h of section 196 of the Restatement (Second) of Torts observes that "the moral obligation to compensate the person whose property has been damaged or destroyed for the public good is obviously very great, and is of the kind which should be recognized by the law." *Id.* However, comment h goes on to note that "the rules as to governmental immunity from suit have stood in the past as a barrier to any effective legal remedy." *Id.*

249. *See Wegner*, 479 N.W.2d at 42. Prosser and Keeton on Torts offers the following observation about shifting losses:

Although the municipality was not indemnifying a police official in *Wegner*, it is useful to consider the court's rationale regarding cost-shifting in cases of police indemnification. Oftentimes, when the police injure a person the cost may fall on one of three persons: the injured individual, the police officer, or the municipality and municipal residents.[250] In the context of *Wegner*—where the police damaged a person's property for the public good—courts have found that, among the three choices, the municipality (i.e., the public) is best positioned to bear the cost of the damages.

However, it is important to note that *Wegner* presented three innocent parties. In contrast, in § 1983 cases against police officials, the plaintiff is alleging that the defendant police officer engaged in some misconduct. And while it is entirely possible for a municipality to indemnify a police officer without a formal finding of wrongdoing,[251] this does seem to distinguish § 1983 cases from cases alleging government taking, like *Wegner*. A § 1983 excessive force claim against a police officer is premised on the idea that the police officer's conduct was unreasonable.[252] Thus, one of the three parties—the police official—is not entirely innocent. Yet, through police indemnification, the municipality (arguably an innocent party) ends up bearing the cost of the police officer's conduct.[253]

Requiring the municipality to bear the cost of police action benefits the plaintiff and the police officers; however, it may not be viewed favorably by those who ultimately bear the costs of officer misconduct—municipal residents. Whether true or not, there is the perception that the cost of

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> Another factor courts have considered in weighing the interests before them is the relative ability of the respective parties to bear a loss which must necessarily fall upon one or the other, at least initially. This is not so much a matter of their respective wealth . . . . Rather it is a matter of their capacity to avoid the loss or to absorb it, or to pass it along and distribute it in smaller portions among a larger group.

PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 24 (5th ed. 1984).

250. Some municipalities have insurance, in which case the insurance company will cover the cost of police liability. *See* Rappaport, *supra* note 219, at 1542 ("Municipalities nationwide purchase insurance to indemnify themselves against liability for the acts of their law enforcement officers"). However, coverage of course depends on the municipality paying insurance premiums, a cost ultimately borne by municipal residents. *See* Schwartz, *supra* note 242, at 1161.

251. *See* supra Part I(B)(6) for a discussion on settlements.

252. *See supra* Part I(B) for a discussion on the Fourth Amendment standard.

253. One might argue that the municipality is not entirely innocent because it hired the defendant police official. However, as discussed in Part I, it is clear that the municipality will not be held liable under § 1983 simply for hiring a tortfeasor. Rather, § 1983 municipal liability requires that the municipality cause the plaintiff to be deprived of a constitutional right through a policy or decision. Furthermore, in some § 1983 cases the plaintiff will have "unclean hands." For example, the plaintiff may have been engaged in criminal conduct when the police deprived him or her of a constitutional right. While this clearly does not preclude the plaintiff from recovering damages under § 1983, it further removes us from the situation in *Wegner*, where we are presented with three innocent parties. *See Wegner*, 479 N.W.2d at 42.

police liability and litigation funnels funds away from other municipal needs.[254] These resentments may be compounded in many communities within Philadelphia, particularly in the poorer sections of the City where there is a strong distrust of law enforcement. Many citizens in these neighborhoods feel that police unfairly target minority populations, are overly aggressive, and are physically abusive. In these neighborhoods, many feel that the officers will get away with anything, and that the Department and its Internal Affairs Bureau will look the other way. Thus, it follows that the act of indemnifying officers in civil rights lawsuits merely perpetuates the fears and frustrations felt by these citizens.[255]

III. CONCLUSION

Through indemnification, § 1983 cases ending in a judgment or settlement overwhelmingly result in the municipality paying these costs—even when the conclusion is that an individual officer, not the municipality is liable. In Philadelphia, decision-makers have an enormous amount of discretion when it comes to whether or not to indemnify police officials. As evidenced in Part I, Pennsylvania's statute only dictates indemnification decisions in very limited circumstances and the Philadelphia Police Department's collective bargaining agreement with the City is silent regarding indemnification. Despite having a great deal of discretion in the vast majority of § 1983 cases, the City indemnifies its police officials. Typically, Philadelphia only refuses to indemnify its police officials when the relevant behavior has resulted in a criminal conviction.

As noted in Part II, these discretionary decisions should be guided by a number of different factors: incentivizing the police, reducing constitutional violations, compensating plaintiffs, and, relatedly, spreading costs amongst community members. Police indemnification has the potential to advance each of these interests and, accordingly, consideration of these interests should typically guide municipal decision-makers to indemnify police officials. However, as noted in Part II(E), unchecked, police indemnification may also result in more instances of officer misconduct and increased tensions between police officers and the communities they serve (the same communities that ultimately fund police indemnification).

To maximize these benefits and minimize harmful effects, police indemnification must correlate to adjustments in department policy, im-

254. *See* Schwartz, *supra* note 242, at 1164 (noting that "[n]ewspaper stories and some reports by advocacy groups contend that lawsuits have significant detrimental effects on local governments, preventing them from building playgrounds, hiring teachers, and repairing roads").

255. The interests of the victim in obtaining full compensation may diverge from the interests of residents generally in disciplining errant officers. One of the challenges of deciding whether to indemnify police officers is how to balance these varying concerns. Another issue, which is beyond the scope of this paper is what, if any, recourse do citizens have when they disagree with how the municipality exercises its discretion to indemnify police officials. Of particular concern are decisions to indemnify the same officer on repeated occasions.

proved training, and discipline. Indemnification shields police officers from the costs of litigation and liability, but it need not preclude officer accountability.