Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases

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Bifurcation of Civil Rights Defendants: Undermining *Monell* in Police Brutality Cases

by

DOUGLAS L. COLBERT*

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Introduction

When a jury in Ventura County, California acquitted the four Los Angeles police officers charged with beating Rodney King, it reaffirmed that victims of police brutality must look beyond the criminal process to secure their rights of personal safety. Successful government prosecutions would hold police accountable for unlawful violence and, as a result, would effectively deter it. It would be foolhardy to place much faith in local prosecutors' capabilities in such cases, however, until substantial reforms are instituted. In addition, federal prosecutors, though empowered...
police brutality can only secure effective redress through civil rights remedies. See infra notes 5-9 and accompanying text. Federal prosecutors, for example, have the independence that is needed to effectively investigate and prosecute the perpetrators of police brutality—a role that was reinforced by the federal convictions of two of the four officers who beat Rodney King—but they have thus far failed to use their powers in this area on any significant level. See infra note 4.


4. During the 25-year period following the Supreme Court’s decision in United States v. Price, 383 U.S. 787 (1966) (holding that state authorization is not required for law enforcement defendant to have acted under color of law), the Department of Justice rarely elected to prosecute law enforcement officials accused of using excessive force against citizens. Stephanie Saul, Not a Federal Case, NEWSDAY, Mar. 31, 1991, at 5 (reporting that of approximately 88,000 police misconduct complaints filed with the U.S. Department of Justice from 1981 to 1990, about half of which involved allegations of brutality, only 537 were presented to a grand jury). Successful federal prosecutions are also “extremely rare.” See Stolberg, supra note 3, at A1 (9800 brutality complaints to the Justice Department in 1991 led to over 3500 investigations, 129 prosecutions, and 108 convictions.). It is significant in this regard that the Justice Department is frequently criticized for following “a longstanding policy of not pressing a federal case,” and maintains no data on the extent of police violence nationally. Paul Chevigny, Let’s Make It a Federal Case, 254 NATION 371, 371 (1992); see also Jason DeParle, To Criticism, U.S. Unveils Report on Police Brutality, N.Y. TIMES, May 20, 1992, at A18 (describing a Justice Department study of police brutality complaints compiled in wake of Rodney King’s beating; congressional critics charged that the report, which reached no conclusions, showed the Department’s indifference to the problem); Ted Gest, Making a Federal Case of It, U.S. NEWS & WORLD REP., May 11, 1992, at 22 (noting that even though the Justice Department decided to prosecute the officers who beat Rodney King, “its record on police brutality will remain clouded”). The former U.S. Assistant Attorney General for Civil Rights, John Dunne, recently acknowledged the Department’s unaggressive criminal prosecution policy, remarking: “We are not the ‘front-line’ troops in combatting instances of police abuse.” Chevigny, supra at 371. Consequently, the Justice Department’s decision to invoke jurisdiction against the Los Angeles police officers accused of assaulting Rodney King, see Robert Reinhold, U.S. Jury Indicts 4 Police Officers in King Beating, N.Y. TIMES, Aug. 6, 1992, at A1, was unusual. Its decision was vindicated when a federal jury convicted Officer Powell, who delivered the most blows, and Sergeant Koon, the supervisor on the scene, of criminal civil rights violations, while acquitting Officer Briseno, who apparently tried to stop the beating, and rookie Officer Wind. Seth Mydans, 2 of 4 Officers Found Guilty in Los Angeles Beating, N.Y. TIMES, Apr. 18, 1993,
Because of prosecutors' abysmal records, the greatest hope for curbing the excessive use of force by police officers lies in section 1983 civil rights actions against municipalities under Monell v. Department of Social Services. Jury verdicts holding municipalities liable for depriving citizens of their constitutional rights serve to effectively short-circuit official toleration and condonation of longstanding unconstitutional police practices. Such verdicts expose municipalities to costly, indeterminate liability during these times of fiscal austerity, making reform of police practices an economic, as well as a political, imperative.

§ 1, at 1, 18. The federal prosecutors' aggressive courtroom tactics played an important role in convincing the jury to deliver two guilty verdicts, as did the fact that the federal jury was multiracial. See id.; Seth Mydans, Points of Evidence, Not Emotion, N.Y. TIMES, Apr. 18, 1993, § 1, at 19; infra notes 259, 266 (discussing the importance of multiracial juries in race-sensitive cases). The Justice Department's decision to intervene here may signal a more active federal role in safeguarding citizens' civil rights. See Jeff Gerth, Clinton Satisfied by Jury's Decision, N.Y. TIMES, Apr. 18, 1993, § 1, at 18 (quoting Attorney General Janet Reno: "the 'Department of Justice is going to do everything it can to continue to bring prosecutions to insure that the civil rights of all citizens across the country are protected.'").


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


7. Section 1983 protects all persons, citizens and noncitizens alike, who are within the nation's jurisdiction. See supra note 5. The term "citizens" is used in a nontechnical sense in this Article and is meant to signify all people that are under the statute's protection.

8. When a jury determines that a municipal policy or custom caused a constitutional injury under section 1983, the municipality not only faces liability to the named plaintiff, but also becomes vulnerable to undetermined financial responsibility for the damages of all other citizens who suffer similar injuries as a result of the unlawful police practice. In these potential cases, municipalities would encounter serious collateral estoppel problems in attempting to defend on the issue of liability. MICHAEL AVERY & DAVID RUDOVSKY, POLICE MISCONDUCT: LAW AND LITIGATION § 14.2(g) (2d ed. 1992); see infra note 338 and accompanying text. Moreover, failing to reform unconstitutional police practices may have lasting political consequences and lead to substantial indirect economic costs. See infra note 9.

9. When a municipality permits unconstitutional violations to continue unabated, the political consequences can be more serious than the potential exposure to damage awards. A jury verdict that holds the municipality responsible is much more difficult to defend than a finding of liability against individual officers. A city can justify allocating part of its budget to pay money judgments for the few "bad apples" in its police department, but it would be hard-pressed to explain a Monell violation because it suggests systematic police abuses. Such a finding of official lawlessness would likely receive public attention and result in calls for immediate change in the police practice. Moreover, when a police force and a city engage in an unconstitutional practice, the full extent of the injury that results is incalculable. Citizens may
Despite the importance of Monell-type relief in persuading municipalities to abolish unconstitutional police practices, it is now in danger of being circumvented by an increasingly popular, yet underreported, pretrial procedure known as bifurcation. Relying on Federal Rule of Civil Procedure 42(b), trial judges and defense attorneys in several jurisdictions are moving before trial, and sometimes before discovery, to sever civil rights claims against municipalities from those aimed at individual officers. When bifurcating for trial, many judges are relying on a per curiam Supreme Court decision, City of Los Angeles v. Heller, to require the plaintiff to prove that individual officers violated her constitutional rights before she can sue the municipality. The difficulty of establishing an officer's liability at the first trial, frequently due to sufficiency of proof problems and jurors' pro-police bias, may cause a jury to find in the officer's favor despite believing that the plaintiff has sustained a constitutional injury. Many trial judges are dismissing Monell claims in these situations pursuant to their overly broad reading of Heller.


10. Rule 42(b) provides:
The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

11. 475 U.S. 796 (1986) (per curiam); see infra Part IV.A.
12. See infra Part IV.B.
without first inquiring whether the jury found that the plaintiff had been deprived of a constitutional right. Consequently, a Rule 42(b) trial bifurcation order may be extremely prejudicial to a litigant seeking to establish an unlawful police practice. At best, the plaintiff must assume the expense and inconvenience of carrying forward two separate trials seriatim. Even when the plaintiff succeeds in the first trial, bifurcated trials allow the municipality to place great pressure on the plaintiff to settle and forego the second trial altogether. Although it often furthers the plaintiff's individual interests, settlement prevents a jury from hearing evidence and ruling on the municipality's challenged practice, thus undermining the reformatory purpose and effect of section 1983 litigation.

The bifurcation of Monell claims also precludes juries from engaging in "equitable loss-spreading"—they cannot allocate the costs of official wrongdoing between the individual officer's unlawful acts and the municipal custom or policy upon which the officer relied. In a single trial, the jury can divide the costs of a section 1983 violation "among the three principals[...]: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity." The harm is most serious when Monell claims are bifurcated for discovery purposes. Discovery bifurcation makes it virtually certain that neither a jury nor a judge will ever consider whether the municipality's custom or policy was responsible for violating a citizen's constitutional rights. A discovery bifurcation order might substantially lengthen the process by requiring the plaintiff to conduct discovery and proceed to trial against the individual officers before commencing discovery on the Monell claim against the municipality. Most plaintiffs do not have the resources, fortitude, and commitment necessary to conduct discovery again and proceed to a second trial.

13. It is clear from conversations with municipal defense attorneys and plaintiffs' attorneys that municipalities have a strong policy in favor of settling Monell claims in order to avoid the potential damage, both economic and political, that would result if a jury held them liable for a section 1983 violation. See supra notes 8-9 and infra notes 326, 330-338 and accompanying text. While plaintiffs' attorneys may use the leverage of bifurcated trials to force a more favorable settlement after establishing individual liability, see infra text accompanying note 382, the evidence presented at a single trial would allow the jury to determine whether the Monell claim was meritorious, resulting in a more just verdict.


15. Id.

16. Discovery bifurcation consists of an order for separate trials (trial bifurcation) combined with a stay on all discovery related to the Monell claim until the final resolution of the section 1983 claims against individual officers. This more intrusive form of bifurcation is common in New York City. See infra text accompanying notes 279-280.
This Article argues that automatic bifurcation of civil rights claims against a municipality from those against individual police officers is an abuse of the courts’ discretion under Rule 42(b). By effectively barring litigants’ claims that municipalities are responsible for unconstitutional police practices, bifurcation rulings forestall litigation that could otherwise curb future constitutional violations by police. Today, public awareness of excessive use of force by police is high,17 but the likelihood of successful criminal prosecutions of those responsible for such force remains woefully slim. Foreclosing civil rights remedies for systemic police abuses thus calls into question the essential legitimacy of the rule of law. Current bifurcation practices not only offend public policy; they also ignore settled civil rights law. Trial courts that routinely bifurcate Monell claims misapply current Supreme Court precedent on municipal liability, and thus contravene the historic purpose of section 1983 itself. Courts should instead decide bifurcation motions after performing a case-by-case analysis, granting it only as an exception to the general presumption favoring a single trial for the resolution of disputes.

Part I of this Article reviews the legislative history of section 1983 and Congress’s motivation for creating a federal civil rights remedy against police lawlessness. This Part begins by describing the white terrorist campaign against the newly freed African-Americans and their abolitionist allies after the Civil War. State officials routinely refused to protect the citizenship rights and personal safety of victims of this mob violence; indeed, local law enforcement officials frequently fortified the ranks of white mobs.18 In response to this campaign of officially sanctioned violence, consecutive Reconstruction Congresses introduced two

17. In 1967, a national poll indicated that only 6% of adults believed that police brutality existed in the areas where they lived. Gallup Poll, Aug. 8, 1967, para. 16, available in Westlaw, Poll Library. By 1991, following the videotaped beating of Rodney King, this number had risen to 39%. Gallup Poll, Aug. 1991, para. 14, available in Westlaw, Poll Library. In another recent survey, more than two out of three people were either “very” (22%) or “fairly” (46%) likely to believe that charges of police brutality were well founded, CBS/New York Times Poll, Apr. 4, 1991, para. 14, available in Westlaw, Poll Library, compared to only 36% of respondents who felt that way in 1970, see Gallup/Newsweek Poll, Nov. 1970, para. 19 (9% “very” and 27% “fairly” likely), available in Westlaw, Poll Library. Finally, 63% of respondents in 1991 thought that police brutality was particularly likely to be directed against people of color. See Gallup/Newsweek Poll, Mar. 18, 1991, para. 13 (21% said a “very great” and 41% said “considerable” brutality), available in Westlaw, Poll Library. The chief criminal prosecutor of Los Angeles suggested that “[i]n the wake of Rodney King and the Christopher Commission, there may be a heightened public and government awareness” of police brutality. Leslie Berger, D.A. Sends Police Assault Case to L.A. City Attorney, L.A. TIMES, Sept. 6, 1991, at B3.

18. See infra notes 53-60, 65-71 and accompanying text.
constitutional amendments and a series of civil rights laws between 1866 and 1871. Among these laws was the Enforcement Act of 1871, which contained in its first section the language now found in section 1983. The historical imperative behind this legislation clearly demonstrates that Congress intended section 1983 to offer victims of official violence a complete legal remedy.

As Part II explains, however, the Supreme Court's early interpretation of section 1983 radically departed from the law's original intent, thus preventing its use to remedy constitutional wrongs until it was resurrected by the Court's decisions in the 1960s and 1970s. Shortly after the 1871 statute became law, and for the next ninety years, the Court's opinions immobilized section 1983, rendering it ineffective against both an individual officer's constitutional abuses and a municipality's role as a "moving force" in causing those constitutional violations. After describing section 1983's resuscitation in Monroe v. Pape and Monell v. Department of Social Services, Part II reviews the Court's rulings on municipal liability during the fifteen years since it decided Monell. The Court's recent holding in City of Canton v. Harris confirmed that victims of police violence may proceed with Monell claims against a municipality that has shown "deliberate indifference" to the proper training and supervision of its police officers. Other post-Monell decisions have recognized the distinct and important respective roles served by separate civil rights remedies against municipalities and against individual of-

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19. See U.S. Const. amend. XIV (ratified in 1868); U.S. Const. amend. XV (ratified in 1870).
20. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (protecting all persons' civil rights and providing means for their vindication); Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (dividing certain Southern states into military districts to be governed by the Union Army); Enforcement Act of 1870, ch. 114, 16 Stat. 140 (enforcing voting rights provisions of Fifteenth Amendment); Enforcement (Ku Klux) Act of 1871, ch. 22, 17 Stat. 13 (enforcing Fourteenth Amendment).
22. In 1961, the Supreme Court's ruling in Monroe v. Pape, 365 U.S. 167 (1961), revived section 1983 as a remedy against individual police officers. See infra Part II.A. The Court declined to recognize the statute's applicability against municipalities, however, until 17 years later, when it decided Monell v. Department of Social Services, 436 U.S. 658 (1978). See infra Part II.B.
23. Monell, 436 U.S. at 694.
26. See infra Part II.C-D.
28. See id. at 388 ("We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.").
BIFURCATION IN CIVIL RIGHTS CASES

More than a decade ago, the Court explained in Owen v. City of Independence\(^\text{30}\) that the purpose of municipal claims went beyond providing “compensation to the victims of past abuses”; they are necessary “as a deterrent against future constitutional deprivations,”\(^\text{31}\) as “an incentive for officials . . . to err on the side of protecting citizens’ constitutional rights,” and to “encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.”\(^\text{32}\) These and other post-Monell cases have firmly established section 1983 as a federal remedy against a municipality that follows a custom or practice of deliberate indifference to constitutional abuses by members of its police force.

Parts III and IV explain the mechanics of the bifurcation procedure and argue that it represents an “end-around” method for avoiding Supreme Court law upholding section 1983 municipal liability. Part III describes the specifications of Federal Rule of Civil Procedure 42(b), which require courts to consider—before deciding to bifurcate any case—whether the procedure will further convenience while preventing prejudice and economic hardship to any party. Routine bifurcation of civil rights cases violates the principle that judicial discretion under Rule 42(b) must be informed by reasoned judgment and contravenes the general policy in favor of unified trials.

Part IV analyzes the bifurcation barrier to a civil rights litigant’s recovery against a municipal defendant. It begins with a review of the Supreme Court’s 1986 decision in City of Los Angeles v. Heller,\(^\text{33}\) the primary legal authority used to justify bifurcation, and criticizes lower courts’ misplaced reliance on that decision’s dicta.\(^\text{34}\) Although the case has been overlooked by most scholars,\(^\text{35}\) Justice Stevens’s dissent fore-

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29. See infra Part II.C-D; see also infra note 335 and note 384 and accompanying text.
31. Id. at 651.
32. Id. at 652.
33. 475 U.S. 796 (1986).
34. See infra notes 243-257 and accompanying text.
35. Since the Supreme Court decided Heller in 1986, section 1983 has generated over 100 law review articles concerning municipal liability. Search of Westlaw, JLR Library (Mar. 19, 1993). Only a scant few of these, however, have analyzed Heller’s potential importance. Professor Barbara Kritchevsky provided an extensive analysis of Heller, criticizing the decision for the confusion it engendered in establishing section 1983’s state of mind requirement. See Barbara Kritchevsky, Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation, 60 GEO. WASH. L. REV. 417, 422 (1992). She argued in favor of “premising liability on objective criteria for all situations,” id., and concluded that Heller does not preclude municipal liability whenever the individual officer is exonerated, id. at 454-59. Martin Schwartz and John Kirklin also criticized an absolute reading of Heller that would require dismissal of claims against the municipality whenever the individual officer is not
warned that a literal reading of the Court's per curiam opinion in *Heller* might lead to an "unprecedented, ill-considered, and far reaching" ruling, one that would become "a tactical weapon of great value" for municipal defendants.\(^{36}\) Since *Heller* was decided, an increasing number of trial courts are improperly accepting municipalities' arguments that *Heller* supports routine bifurcation of civil rights claims and bars a *Monell* claim unless a jury first determines that a police officer is individually liable.\(^{37}\) This barrier is augmented by a trend in some federal courts of applying Rule 42(b) to the discovery stage.\(^{38}\) The resulting inability to conduct discovery on the *Monell* claim severely hampers a plaintiff's capacity to vigorously oppose dismissal of that claim should the individual officer be vindicated. When such discovery produces evidence that a municipality's unconstitutional practice caused a plaintiff's injury, on the other hand, the plaintiff is likely to succeed in arguing that the *Monell* claim must proceed for redress of that practice, notwithstanding the absolution of individual officers.

Part IV goes on to explain that the separate, conditional consideration of municipal and individual claims relating to police violence presents a formidable barrier to plaintiffs' recoveries for constitutional violations. Regardless of whether *Monell* discovery is permitted, claims against individual officers remain difficult to prove. Most police violence is witnessed only by other officers, who are unwilling to testify for plaintiffs.\(^{39}\) In addition, most jurors favor the police.\(^{40}\) This pro-police bias not only bestows automatic credibility upon defendant officers' testimony; it also favors absolving individual police officers, especially those

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37. This Article criticizes lower courts' interpretation of *Heller* as requiring dismissal of *Monell* claims when individual liability is not established. The "*Heller* problem" exists independently of the bifurcation problem. *Heller* requires dismissal of a *Monell* claim when the jury's verdict indicates that the plaintiff did not suffer a constitutional injury. A trial court can make this determination only by submitting a special jury interrogatory seeking this information. Trial courts improperly construe *Heller* when they believe dismissal is required based solely on a jury's general verdict in the officer's favor. *See infra* notes 230-257 and accompanying text.
38. *See infra* notes 297-304 and accompanying text.
40. *See infra* Part IV.B.1.
who were simply following department (i.e., municipal) policy. When courts adopt an expansive view of *Heller* and fail to inquire whether the jury found a constitutional injury, the likely jury verdict for the individual officer becomes a complete defense to the *Monell* claims that follow. Bifurcation of civil rights claims is thus a nearly infallible defense strategy.

Presenting interviews with judges and attorneys throughout the country who are familiar with the bifurcation trend, Part V provides evidence of this practice in several urban jurisdictions and describes its impact on civil rights plaintiffs. Despite its importance to civil rights plaintiffs and defendants, scholars have not written about bifurcation in these cases, and evidence of its occurrence is rarely reflected in published opinions. This Part presents the relatively few written decisions because trial and discovery bifurcation rulings are generally delivered orally and are usually not published. The interviews document the trend's prevalence in New York, Los Angeles, and Boston.

This Article concludes that bifurcation rulings will remain a troubling and highly sensitive issue in section 1983 litigation until the Supreme Court revisits *Heller* and clarifies the law. While the circumstances may occasionally call for separate proceedings against individual and municipal defendants, the routine granting of bifurcation undermines civil rights claimants' challenges to unconstitutional practices maintained by municipalities. Bifurcation rulings often preclude civil rights litigants from presenting evidence that a municipality's failure to train, supervise, or discipline its police force caused a deprivation of constitutional rights. Moreover, when a court's bifurcation order defers discovery on a *Monell* claim, the municipality's unconstitutional practices may never face judicial and public scrutiny.

Consequently, under either bifurcation practice, municipalities that fail to train, supervise, or discipline their police forces have less incentive to implement reforms, and are likely to continue their illegal practices. Because *Monell* claims provide the opportunity to eliminate a municipality's perceived or real condonation of police violence, they must not be obstructed by such artificial barriers as bifurcation. Permitting *Monell* claims to be discovered by plaintiffs and evaluated by juries fulfills the

41. Part V contains interviews with practicing attorneys who are familiar with bifurcation of *Monell* claims for trial (in Los Angeles and Boston) and discovery (in New York), interviews with attorneys who have not faced bifurcation motions, and interviews with federal judges who have decided such motions.
42. See *infra* notes 276, 289-302 and accompanying text.
43. See *infra* note 385 and accompanying text.
original intent behind section 1983, as Congress articulated almost one hundred and twenty-five years ago.

I. The Historical Imperative Behind Section 1983

The significance of a court’s bifurcation order severing a section 1983 Monell claim against a municipality from a civil rights claim against an individual law enforcement official is best understood upon consideration of section 1983’s historical purposes and the legislative intent behind the provision. Congress included the language of today’s section 1983 in the Enforcement Act of 1871, providing citizens a federal civil rights remedy against local officials that deprived them of a constitutional right, because “the state remedy, though adequate in theory, was not available in practice.” More specifically, this “Ku Klux” legislation targeted state and local law enforcement officials that members of Congress believed to be either participating directly in violence against African-Americans and other citizens who supported Reconstruction policy or failing to protect these citizens’ constitutional rights from attacks by white supremacy groups. This history illuminates both the modern law of section 1983 liability and the Supreme Court’s application of that law in Monell. Because the Reconstruction Congress wanted to provide a complete federal remedy against local law enforcement’s involvement in racist violence, it would certainly have approved the use of section 1983 to target not only the individual officers that directed unlawful violence against citizens, but also any municipality that showed “deliberate indifference” to whether its officials engaged in such an illegal practice.

The post-Civil War Reconstruction period marked a fundamental shift in the federal government’s role in protecting African-Americans’ newly won rights of freedom and citizenship. Before the War, traditional concepts of federalism prevented the federal government from interfering with the judgments of states and localities as to what legal rights, if any, African-Americans enjoyed. Consequently, in virtually every jurisdiction throughout the United States, and most prominently in those states

45. See infra Part I.B.
46. See infra notes 170-177 and accompanying text (discussing City of Canton v. Harris, 489 U.S. 378 (1989)).
47. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (denying African-Americans the right to sue as state citizens and holding, inter alia, that states were not empowered to grant African-Americans national citizenship rights or any other right considered national in scope); see also Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (striking down a Pennsylvania kidnapping law aimed at prosecuting those engaged in “slave-stealing” and the recap-
where slavery still existed, the states rights doctrine had legitimated the treatment of African-Americans as "a subordinate and inferior class of beings, who . . . had no rights . . . but such as those who held the power and the Government might choose to grant them." 48 State and local laws and practices withheld from African-Americans the most fundamental freedoms, including "a status in court," where they might "complain of wrong" against those who deprived them of personal and property rights. 49

As the South's wartime defeat became imminent, Congress sought to abolish slavery and to grant African-Americans the right of "universal freedom." 50 The South's violent resistance to the passage of the Thirteenth Amendment provided Congress with the legal impetus and moral determination to introduce further legislation for the purpose of giving "practical effect, life, vigor, and enforcement" 51 to the Amendment's "declar[ation] that all persons in the United States should be free." 52

A. The Civil Rights Act of 1866

Upon returning to session in December 1865, legislators reviewed overwhelming evidence that returning soldiers and former slaveowners in the South were engaging in a pattern of brutal assaults and killings of African-Americans celebrating their post-War emancipation. 53 Despite
the blatant violence, most local law enforcement officials simply refused to arrest or prosecute white offenders for their racially motivated crimes; they shared a belief that African-Americans had no right to legal protection from whites' violence.\(^5^4\) One historian characterized the post-War violence as "reflect[ing] whites' determination to define in their own way the meaning of freedom and their determined resistance to blacks' efforts to establish their autonomy."\(^5^5\) Congress responded by proposing and enacting, over President Andrew Johnson's veto,\(^5^6\) the Civil Rights Act of 1866.\(^5^7\) This statute guaranteed African-Americans the status of citizenship and federal enforcement of "the same [civil] right[s] . . . as [were] enjoyed by white citizens"\(^5^8\) by empowering the federal government to criminally prosecute any person who deprived a citizen of her civil rights by actions "under color of any law."\(^5^9\) In creating this "under color of law" federal remedy, Congress also intended to punish the elected officials that had enacted a series of "Black Codes" in every former Confederate state, the purpose of which was to saddle African-Americans with "onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value."\(^6^0\)

The passage of the Civil Rights Act of 1866 marked the beginning of the new federalism.\(^6^1\) The Act empowered the federal government to

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54. CONG. JOINT COMM. ON RECONSTRUCTION, REPORT, 39th Cong., 1st Sess. (1866) (reporting the post-War failure of local and state officials in the South to enforce the criminal laws when the victim was African-American or was viewed as a unionist). Foner explained that law enforcement officials refused to prosecute white offenders because to do so would have been "unpopular and dangerous." FONER, supra note 53, at 204. Donald Nieman stated that "because Southern whites viewed violence as an acceptable means of labor and race control, white sheriffs, magistrates, judges, and jurors often proved unwilling to mete out justice to whites who committed acts of violence against freedmen." DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868, at 25 (1979). In some instances, southern law enforcement officials joined in white mob violence against African-Americans. George Rable described an incident in 1866 in which New Orleans police, "instead of restoring order, . . . joined their colleagues and the white mob in assaulting blacks. The police . . . bec[a]me an indistinguishable part of the mob . . . . [T]hey chased, beat and shot any black in sight . . . and then stood by while citizens beat the wounded men." RABLE, supra note 53, at 52.

55. FONER, supra note 53, at 120.
56. CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866) (Johnson's veto message); id. at 1809, 1861 (Senate and House votes overriding Johnson's veto).
57. Ch. 31, 14 Stat. 27.
58. Id. § 1, 14 Stat. at 27.
59. Id. § 2, 14 Stat. at 27; see also id. § 4, 14 Stat. at 28 (requiring federal prosecutors and courts to enforce the Act).
60. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873).
61. During the nine years that followed the passage of the 1866 Act, Congress introduced and presided over the ratification of the Fourteenth and Fifteenth Amendments and passed major civil rights legislation, thereby establishing and reinforcing the federal government's role
protect citizens’ rights whenever a state’s law enforcement officials and legal apparatus proved unwilling or incapable of doing so. As one supportive senator aptly described it: “I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of revolution?”

B. The Enforcement Act of 1871

Five years later, in response to testimonial evidence of different and in some ways more extreme southern violence and official lawlessness, the forty-second Congress passed the predecessor to section 1983 as part of the Enforcement Act of 1871, also known as the “Ku Klux” Act. Although the post-War brutality of individual whites and returning Confederate soldiers had largely been spontaneous, the ratification of the Fourteenth Amendment in 1868 sparked civilian and government officials to join in concerted violent activity directed at African-American organizations and prominent African-American and white supporters of Reconstruction policy.

as the ultimate protector of citizens’ civil rights. See statutes cited supra note 20; Reconstruction Act of 1867, ch. 6, 15 Stat. 2 (defining the process by which Southern states were required to draw up and ratify new state constitutions); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (forbidding racial discrimination in the use of public accommodations).

62. Sections 2 and 4 of the 1866 Act empowered and required federal prosecutors to bring criminal charges against those who violated the rights created in the Act by actions under color of law. Civil Rights Act of 1866, § 2, 14 Stat. at 27, 28. Moreover, section 3 allowed citizens “who [were] denied or [could not] enforce in the courts or judicial tribunals of the State or locality . . . the rights secured to them by the first section” of the Act to bring their cases in or remove them to federal district court. Id. § 3, 14 Stat. at 27. Federal courts retain original jurisdiction in civil rights cases today under 28 U.S.C. § 1343(a)(3)-(4) (1988).


65. Dr. Du Bois described the lawlessness between 1868 and 1871 as “the rise of a new doctrine of race hatred.” Du Bois, supra note 53, at 670. The white supremacists’ systematic violence differed from the post-War terror: “A lawlessness which, in 1865-1868, was still spasmodic and episodic, now became organized, and its real underlying industrial causes obscured by political excuses and racial hatred. Using a technique of mass and midnight murder, the South began widely organized aggression upon the Negroes.” Id. at 674.

66. As Professor Foner described, African-Americans’ political activity in 1867 included membership in political groups such as the Union League, “the political voice of impoverished freedmen.” FONER, supra note 53, at 283. The Union League’s main function consisted of political education, which included teaching African-Americans about their new rights to vote, to receive a public education, to serve on juries, and to seek legal protection from whites’ violence. Id. at 284. In 1867 and 1868, African-American and white Republican officials were specifically targeted for white mobs’ violence, as were African-Americans who exercised their voting rights. Id. at 425-27. White supremacy groups like the Ku Klux Klan also focused on African-Americans that had achieved “a modicum of economic success,” id. at 429, and those who were viewed as “impudent negroes” because they refused to act like they had as slaves, id. at 430.
During the next three years, white supremacy groups such as the Ku Klux Klan, the Knights of the White Camilia, and the White Brotherhood engaged in an unparalleled "wave of counterrevolutionary terror . . . over large parts of the South." Though these groups did not possess a "well-organized structure," they shared a "unity of purpose and common tactics." As Professor Eric Foner explained, "The violence of 1869-71 etched the Klan permanently in the folk memory of the black community." President Ulysses S. Grant responded to the ensuing national crisis by urging Congress to draft legislation that would provide a federal remedy to protect those whose "life and property [was] insecure." In his message to Congress opening the debate on the 1871 Act, the President recognized state and local law enforcement's failure to protect the citizenry: "That the power to correct these evils is beyond the control of the State authorities I do not doubt . . . . I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty and property, and the enforcement of law in all parts of the United States."

The bill's proponents modeled its civil rights remedy after the language of the 1866 Civil Rights Act's criminal provision. Little contro-

67. Id. at 425.
68. Id.; see also supra note 54 and accompanying text. Dr. Du Bois described the formation of the Ku Klux Klan as having "provided a new unity [for white supremacists] through emphasizing the importance of race." Du Bois, supra note 53, at 680.
69. FONER, supra note 53, at 443. "In effect, the Klan was a military force serving the interests of the Democratic Party, the planter class, and all those who desired the restoration of white supremacy." Id. at 425. Professor Foner noted that the Klan's leadership included the "very best citizens" living in the South, id. at 433, including "planters, merchants, lawyers and even ministers," id. at 432. Local Klan groups targeted African-American educational and religious institutions for destruction and attacked individual office holders, voters, property owners, and other respected members of African-American communities. Id. at 425-33.

70. CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871).
71. Id. (noting that existing statutes provided the executive branch with insufficient power to address the crisis).
72. Congressman Samuel Shellabarger explained the origins of the 1871 Act's remedy: The model for it will be found in the second section of the act of April 9, 1866, known as the "civil rights act." . . . This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights . . . .

CONG. GLOBE, 42d Cong., 1st Sess. app. at 68 (1871).
versy accompanied passage of this civil remedy, undoubtedly because the legislators recognized it served the same purpose as its criminal counterpart. Each sought to provide federal protection for those who had been deprived of a constitutional right by a "person" acting under color of law. Moreover, each was passed as a direct response to law enforcement officials' failure to curb the violent Southern response to the recently ratified constitutional amendments.

As evidenced by Congress's debate on the 1871 Act, the legislators were fully aware of the pervasive official lawlessness accompanying the white supremacists' violence, which by 1871 had spread throughout most of the South. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. at 78 (1871) (statement of Rep. Perry) ("Sheriffs, having eyes to see, see not . . ."); see also Monroe v. Pape, 365 U.S. 167, 174 (1961) (describing and quoting from a 600-page report "dealing with the activities of the Klan and the failure of certain Southern states to enforce laws against them compiled by a Joint Select Committee of Congress).

73. Senator George Edmunds, the Chairman of the Senate Judiciary Committee at the time, expressed a commonly held belief about the proposed civil remedy:

[It] is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [of 1866], which have since become a part of the Constitution. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871); see also id. app. at 68 (statement of Rep. Shellabarger) (defending the Act as clearly constitutional).

74. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. at 78 (1871) (statement of Rep. Perry) ("Sheriffs, having eyes to see, see not . . ."); see also Monroe v. Pape, 365 U.S. 167, 174 (1961) (describing and quoting from a 600-page report "dealing with the activities of the Klan and the failure of certain Southern states to enforce laws against them compiled by a Joint Select Committee of Congress).

75. CONG. GLOBE, 42d Cong., 1st Sess. app. at 190 (1871).

76. Id.

77. Id. at 428. Similarly, Missouri Representative Harrison Havens denounced the "startling crimes and cruel barbarisms" that "proceed[ed] without molestation or interference" and "occur[ed] every hour, carrying fear and terror to the homes of thousands." Id. app. at 271. He concluded that there was neither "hope nor pretense of protection from the local governments." Id. A Congressman from Kansas also used powerful language to describe the official lawlessness:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrators have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.

Id. at 374 (statement of Rep. Lowe). Instead of vigorously enforcing local criminal laws, local administrations gave immunity to criminals; "the records of the public tribunals are searched in vain for any evidence of effective redress." Id.; see also id. app. at 166-67 (statement of Rep.
Some Members of Congress condemned state law enforcement officials for more than mere passivity in the face of white supremacists' violence; they charged that some had initiated and participated in brutal attacks upon both Black and white Republican Party officials and voters. One of the earliest such attacks occurred in 1868 in Camilla, Georgia, where the local sheriff led a force of 400 armed whites against a Black election parade, killing twelve of the marchers. 78 Congressman James Platt of Virginia described police-led brutality during a Republican campaign rally held in his district, “one of the quietest and best reconstructed in the South”: 79

[S]uddenly, without provocation or warning, a policeman, or at least a man in the uniform of a policeman, drew a pistol and deliberately put a bullet through the body of a quiet and inoffensive colored man standing near him. Immediately an indiscriminate and rapid firing commenced . . . . For at least five minutes a steady fire was poured into the retreating crowd . . . . [T]he panic was increased by the discovery that the police force was in full sympathy with the murderers, and were themselves emptying their revolvers into the terrified and struggling mass of human beings who were frantically striving to get beyond their range. 80

Legislators recognized the need for a federal civil rights remedy to deter white terrorism. Southern Governors and other prominent whites remained silent, helpless to protect citizens’ rights, because “the most respectable citizens”81 belonged to white hate groups. 82 Congressman Horace Maynard referred to Tennessee Governor Senter’s charge “that the men who by their official position were clothed with power to prevent and repress these troubles were in complicity with the organized, armed, and disguised authors of them.”83 Missouri Senator Havens similarly explained local authorities’ inability or unwillingness to protect citizens:

In many cases the local officers are in sympathy with the marauders, and in others they are themselves members of their organization; and

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78. DU BOIS, supra note 53, at 677; FONER, supra note 53, at 342.
79. CONG. GLOBE, 42d Cong., 1st Sess. app. at 184 (1871).
80. Id. app. at 184-85. Representative Platt also reported that “from that day to this no steps have been taken to punish or even discover the murderers . . . . No investigation was ever ordered by the Democratic city authorities, who are charged with the maintenance of peace and the enforcement of the laws in that city . . . .” Id. app. at 185.
81. FONER, supra note 53, at 432 (quoting a Bureau of Freedmen agent’s description of the Ku Klux Klan’s leadership).
82. Id. at 433. For additional sources regarding the Klan’s leadership, see id. at 432-33 nn.36-37.
83. CONG. GLOBE, 42d Cong., 1st Sess. app. at 309 (1871).
so, for all the many hundred acts of violence and outrage committed by these bands, not a single man has been brought to punishment, and the evil is growing and spreading every hour.\textsuperscript{84}

Until Congress passed the Enforcement Act of 1871, therefore, white offenders had little fear of prosecution for their crimes\textsuperscript{85} because “[m]uch Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it.”\textsuperscript{86} Congressman Austin Blair emphasized the near impossibility of punishing white offenders due to the close connection between state law enforcement officials and the Klan: “The Klans are powerful enough to defy the State authorities. In many instances they are the State authorities . . . To wait until the State calls for assistance to suppress the disorders is to wait . . . for a voice from the grave.”\textsuperscript{87}

The historical context, the debate in Congress, and the statements of the President and other interested parties reviewed here all clearly demonstrate that the motivation for enacting section 1983’s federal civil rights remedy against persons acting under color of law or custom was identical to that which drove the passage of previous civil rights laws and constitutional amendments during the short-lived Reconstruction period: federal action was necessary to counter the officially condoned and perpetrated white “reign of terror” that sought to reverse the legal gains of African-Americans from post-War federal policy.

\textsuperscript{84} Id. app. at 271.

\textsuperscript{85} In 1870, Congress passed federal criminal legislation and authorized the creation of a Department of Justice to prosecute cases in which citizens’ civil and political rights had been violated. Enforcement Act of 1870, ch. 114, §§ 2, 9, 12, 16 Stat. 140, 140, 142, 143. Beginning in 1871, the Justice Department pursued a vigorous and highly successful policy of prosecuting Klan violence. For a thorough review of federal prosecutors’ successes in the South between 1871 and 1873, see Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, at 81-112 (1985).

\textsuperscript{86} Foner, supra note 53, at 434; see also Kaczorowski, supra note 85, at 55 (explaining that law enforcement officials failed to respond either because they were afraid or because they were “members of the Klan and participated in their crimes”).

\textsuperscript{87} Cong. Globe, 42d Cong., 1st Sess. app. at 72 (1871). Senator Wilson of Massachusetts quoted General Thomas K. Smith, Commander of the Southern District of Alabama, as stating that “the ministers of the law themselves were too often desperadoes and engaged in the perpetration of the very crime they are sent forth to prohibit or punish.” Id. app. at 255; see also id. app. at 312 (statement of Rep. Burchard) (“The civil authorities are unable or unwilling to repress these outrages. Lawless violence and widespread terrorism prevent the maintenance of order and interrupt the administration of impartial justice through the courts.”); id. app. at 147 (statement of Rep. Shanks) (describing the political effects of Klan violence in Kentucky: “This Legislature is palsied because the men who compose that Legislature are held in subjection by [the Klan].”).
II. Judicial Construction of Section 1983

Following swiftly on the heels of Reconstruction, southern whites regained political power.88 Supreme Court decisions quickly reinstated the “states rights” doctrine by striking down or diluting most of the recently passed civil rights protections.89 The Court’s narrow interpretations forestalled section 1983’s capacity as an effective civil rights remedy for nearly ninety years. In 1961, however, as the groundswell of the Second Reconstruction period was gathering force,90 the Court partially revived section 1983 in Monroe v. Pape.91

88. Professor Foner defines the Reconstruction period as lasting from 1863 until 1877. FONER, supra note 53, at xxvii. Foner noted, however, that the Southern Democratic Party had regained political control of all but three Southern states by the time of the 1876 presidential election. Id. at 511. Southern Democrats achieved full power the following year after President Hayes ordered federal troops to leave the South. Id. at 569. The judicial rollback also began some years earlier than 1877, as the Supreme Court began to eviscerate the substantial legislative accomplishments of Reconstruction in 1872. See infra note 89.

89. The Court’s assault on the new civil rights legislation began with the case of Blyew v. United States, 80 U.S. (13 Wall.) 581, 593 (1872) (narrowly interpreting the 1866 Act’s federal jurisdiction provisions in situations in which a state failed to prosecute the alleged offenders), and continued in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873) (limiting federal protection under the Fourteenth Amendment’s Privileges and Immunities Clause to national citizenship rights), United States v. Cruikshank, 92 U.S. 542, 559 (1876) (affirming the reversal of white defendants’ convictions for racially motivated violence under the 1866 and 1870 Civil Rights Acts), Virginia v. Rives, 100 U.S. 313, 313-14 (1880) (severely restricting use of federal jurisdiction provisions), Neal v. Delaware, 103 U.S. 370, 392-93 (1881) (establishing a presumption that state courts treat as inoperative any state laws and state constitutional provisions that are inconsistent with and predate the Fourteenth Amendment, thereby saddling plaintiffs with a heavy burden to prove equal protection violation), United States v. Harris, 106 U.S. 629, 644 (1883) (ruling criminal section of 1871 Act unconstitutional), and The Civil Rights Cases, 109 U.S. 3, 25 (1883) (ruling that the 1875 Act’s public accommodations antidiscrimination provision was unconstitutional). For a discussion of these cases, see Colbert, Challenging the Challenge, supra note 49, at 56-61, 66-74.


A. *Monroe v. Pape*

The Supreme Court's decision in *Monroe* revitalized section 1983's role as a federal civil remedy against individual police officers that deprive citizens of their constitutional rights. Prior to *Monroe*, and during most of section 1983's statutory life, the Court had narrowly circumscribed when a police officer acted "under color of any . . . statute, . . . custom or usage." Consequently, the Court's "under color of law" rulings had required a litigant to establish that the state had *authorized* an official's unlawful act under state law, state custom, or state usage. Absent evidence of state authorization, the courts considered a police officer's unconstitutional actions to be irrelevant to section 1983 liability. Since a state would rarely authorize a police officer to engage in the unlawful use of excessive force or to illegally violate a citizen's constitutional rights, however, the Supreme Court's interpretation precluded section 1983 remedies for victims of constitutional injuries; the injured parties' only recourse was to rely upon the states' common-law remedies.

The *Monroe* Court relied heavily on the nearly century-old legislative history of section 1983, detailing "the activities of the Klan and the

92. 42 U.S.C. § 1983 (1988). Justice Frankfurter described the statute's history in the courts in his dissenting opinion in *Monroe*: "During the seventy years which followed [section 1983's passage]... the 'under color' provisions... uniformly involved action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws." 365 U.S. at 212-13 (Frankfurter, J., dissenting) (footnote omitted). This limited interpretation of the "under color" language meant that police officers and other officials were not subject to federal jurisdiction for actions that deprived citizens of their constitutional rights. Beginning with the Court's opinion in United States v. *Classic*, 313 U.S. 299 (1941), however, judicial interpretation of the "under color" clause began to change. In *Classic*, the Court held that a state official's alteration of voting ballots was an act committed "under color" of state law even though it was not authorized by any state statute or executive command. *Id.* at 325; see also *Screws* v. United States, 325 U.S. 91, 107 (1945) (allowing prosecution under predecessor to 18 U.S.C. § 242 of state officers who beat an African-American prisoner to death, so long as the prosecution proved specific intent to deprive a citizen of a federal right); *Williams* v. United States, 341 U.S. 97, 99-100 (1951) (holding that a "special" police officer cloaked with state authority was acting under color of law pursuant to 18 U.S.C. § 242 when he forcibly obtained confessions from larceny suspects). Courts interpret the "under color of law" requirement identically for section 1983 and 18 U.S.C. § 242. See, e.g., *Monroe*, 365 U.S. at 184-85; *Dandridge* v. Police Dep't, 566 F. Supp. 152, 154 (E.D. Va. 1983); United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 346 (E.D. La. 1965).

93. From 1871 until *Classic* in 1941, the Court's decisions limited the meaning of "under color of law" in cases involving state agents other than law enforcement officials. See, e.g., *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 244-46 (1931) (holding that actions of state auditor and treasurer may be state action when they are done on behalf of and benefit the state); *Barney* v. *City of New York*, 193 U.S. 430 (1904) (holding unauthorized acts of state construction officials are not state action within the meaning of the Fourteenth Amendment).
inability of the State governments to cope with it." 94 The Court identified law enforcement officials' failure to protect citizens and enforce the law as "the nub of the difficulty" addressed by the post-War legislation, 95 and highlighted Congress's rationale for passing section 1983: though state common-law remedies were available "in theory," a federal remedy was necessary for those situations in which "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 96

The Supreme Court decided in Monroe to reject the narrow definition of the term "under color of law" that had rendered section 1983 ineffective for the preceding ninety years. Following Monroe, litigants could use section 1983 to remedy a constitutional injury inflicted by a police officer whose "[m]isuse of power possessed by virtue of state law [was] made possible only because the wrongdoer [was] clothed with the authority of state law." 97

Nevertheless, the Monroe Court refused to allow litigants to pursue civil rights actions against a municipality whose custom or usage caused the constitutional abuse. After reviewing the forty-second Congress's "vigorous debate" over the drafting and passage of the 1871 Act, the Court concluded that Congress had not intended municipalities to be considered "persons" within the meaning of section 1983. 98 The Court ascribed great significance to Congress's rejection of a proposed addition to the Act that had been introduced by Senator Sherman of Ohio: the first version of the amendment would have imposed civil liability upon "the inhabitants of the county, city, or parish" for acts committed to deprive citizens of their civil rights; 99 in the revised amendment, liability would have shifted to the municipality whenever a judgment against the individuals that committed the violence went unsatisfied. 100 Congress's rejection of the "Sherman Amendment," combined with its decision to exclude any reference to municipal liability in the final version of the statute, 101 convinced the Court that Congress's "response . . . to ma[king]

95. Id. at 176.
96. Id. at 180.
97. Id. at 184 (quoting Classic, 313 U.S. at 326).
98. Id. at 191.
99. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871).
100. See id. at 749.
101. Although no part of the 1871 Act refers to municipalities, section 6 provides for the liability of "any person or persons, having knowledge that any" of the wrongs named in sec-
municipalities liable . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."102

In deciding Monroe, the Court expressly declined to address the "policy considerations" of immunizing municipalities from liability even when their policies or customs were responsible for causing a constitutional injury.103 Almost two decades would pass before the Court would be persuaded to consider these policy implications and to revisit the legislative record left by the forty-second Congress concerning municipalities' liability under section 1983.

B. Monell v. Department of Social Services

In the 1978 case of Monell v. Department of Social Services,104 the Supreme Court overruled Monroe's finding that Congress had sought to exclude municipalities from section 1983 liability and held that Congress did in fact intend local governments to be treated as "persons" within the statute's coverage.105

The Court's reversal followed from a careful review of the "inference" that it had "drawn [in Monroe] from Congress' rejection of the 'Sherman Amendment'" to the 1871 Act.106 The Court began its historical analysis by noting that the Sherman Amendment had been proposed not as an amendment to the uncontroversial section 1983, but "was to be added as section 7 at the end of the bill."107 Senator Sherman's original amendment was undoubtedly aimed at holding supporters and leaders of the Klan, who were "men of property,"108 personally and directly "responsible for Ku Klux Klan damage."109 When the House objected to holding private property owners accountable for Klan violence, members of a conference committee suggested placing liability on the public "county, city, or parish" for damage caused by persons "riot-
ously and tumultuously assembled."

110 Congress rejected the committee's revised Sherman Amendment, reasoned the Monell Court, because the legislators were unwilling to impose such general liability on a municipality without regard for "whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exerted all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished."111 Legislators vigorously opposed extending the federal government's power to affirmatively require that local municipalities protect the general public; such an extension would have exposed municipalities to potential liability for every breach of public safety.112 The Monell Court concluded that Congress rejected the Sherman Amendment because it had opposed empowering the federal government to impose a new legal duty on municipalities. As such, the Court found that the amendment's rejection failed to resolve whether municipalities could be liable under section 1983 for constitutional injuries.113

The Court accordingly considered whether section 1983's reference to "persons" covered municipalities as well as natural persons and found that "Congress, in enacting . . . [the statute], intended to give a broad remedy for violations of federally protected civil rights."114 Reconstruction legislators had urged that section 1983 be construed "liberally" and with "the largest latitude" that would be consistent with the Act's remedial purpose to "aid [in] the preservation of human liberty and human rights."115 Applying this liberal construction to the language of section 1983, the Court declared that "it beggars reason to suppose that Congress would have exempted municipalities from suit."116

111. Id. at 668.
112. See, e.g., Cong. Globe, 42d Cong., 1st Sess. 795 (1871) (statement of Rep. Blair); id. at 804 (statement of Rep. Poland), quoted in Monroe, 365 U.S. at 190. Declaring that this inference formed the "sole basis" for the Monroe Court's decision, the Monell Court distinguished Congress's disapproval of the Sherman Amendment. The Court concluded that Congress rejected the Sherman Amendment because it would have imposed a legal duty upon municipalities to "keep the peace [even] if those corporations were neither so obligated nor so authorized by their state charters." Monell, 436 U.S. at 668. Such a view, said the Court, was not inconsistent with "congressional creation of a civil remedy against state municipal corporations that infringed federal rights." Id. at 669.
113. Monell, 436 U.S. at 669.
114. Id. at 685.
116. Monell, 436 U.S. at 687 (discussing the illogic of an analogous interpretation of the Takings Clause to exempt takings by municipalities).
The Supreme Court's holding in *Monell* did not condition a local
government's possible liability upon any initial determination that a
municipal official or agent had deprived the litigant of a constitutional
right.117 Instead, the Court stressed that the "touchstone" for exposing a
municipality to section 1983 liability was "an allegation that official pol-
icy [or custom]"118 had "cause[d] an employee to violate another's con-
stitutional rights."119 Though it did not delineate "the full contours of
municipal liability,"120 the Court's opinion left little doubt that when the
"execution of a government's policy or custom . . . inflicts the injury . . .
the government as an entity is responsible under section 1983."121

While *Monell* established a litigant's right to sue a municipality for a
civil rights violation under section 1983, the Court chose to "leave fur-
ther development of this action to another day."122 Two years later, in *Owen v. City of Independence*,123 the Court elaborated on the public pol-
icy considerations underlying municipal liability.

**C. Owen v. City of Independence**

In *Owen*, the Court addressed one of the unanswered questions left
by its decision in *Monell*: whether a municipality was entitled to use the
defense of official immunity in litigating a section 1983 suit. Ruling that
municipalities are not immune from section 1983 liability,124 the Court
further elaborated on the Reconstruction Congress's motivations in pass-
ing the statute.125 Even more importantly, the Court analyzed the strong
public policy rationales for ensuring that municipalities not escape legal
accountability when their policies or customs have been found to cause

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117. Indeed, the Court rejected the argument that a municipality could be held liable
under section 1983 on a theory of respondeat superior—the mere fact that an employee de-
prived a citizen of a constitutional right does not make the municipality liable under section
1983. *Id.* at 691.

118. *Id.* at 690.

119. *Id.* at 692.

120. *Id.* at 695.

121. *Id.* at 694.

122. *Id.* at 695.


124. *Id.* at 638. By contrast, the Court refused to extend section 1983 liability to states or
state officials acting in their official capacities in *Will v. Michigan Dep't of State Police*, 491
U.S. 58, 71 (1989). Although the *Will* Court declined to rely on the public policy considera-
tions underlying *Monell* and *Owen*, its decision turned on issues of common-law immunity,
federalism, and the Eleventh Amendment—considerations that do not apply to *Monell* ac-
tions—and the Court insisted that its decision was consistent with *Monell* and its progeny. See
*id*.

125. See *id.* at 642-44.
violations of a citizen’s constitutional rights. This policy analysis supports a litigant’s right to pursue a civil rights claim jointly against a municipality and against the offending police officer, and is particularly relevant to this Article’s focus on the permissibility of bifurcation in this context.

The Supreme Court’s review in Owen of the legislative debate over the 1871 Act revealed that for a significant period of time prior to the Act’s passage, municipal corporations had not enjoyed a “tradition of immunity.” To the contrary, municipal governments were then liable for damages in tort for a variety of wrongs, and had been “treated as natural persons for virtually all purposes of constitutional and statutory analysis.” The Owen Court rejected the defendant’s claim that it should be immune from civil rights liability because it engaged in a governmental function, stating that Congress “abolished whatever vestige of the State’s sovereign immunity the municipality possessed” when it passed section 1983. The Court similarly ridiculed the defendant’s assertion that it should have “good-faith immunity” because it engages in “discretionary” activities, declaring: “[A] municipality has no ‘discretion’ to violate the Federal Constitution; its dictates are absolute and imperative.”

Compelling public policy considerations supplied much of the impetus for the Court’s holding that municipalities have no immunity from liability for the constitutional violations that they cause. “How ‘uniquely amiss’ it would be,” reasoned the Court, “if the government itself—the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct”—were permitted to disavow liability for the injury it has begotten.” The Court recognized that the “importance” of section 1983’s damages remedy becomes “accentuated when the wrong-doer is the institution that has been established to protect the very rights it has transgressed,” and warned that if municipalities could assert a good-faith defense, “many victims of municipal malfeasance would be
left remediless."  

"[T]he injustice of such a result," the Court held, "should not be tolerated."  

The Owen Court emphasized that a verdict against a municipality furthers a significant "societal interest" beyond that vindicated by a compensatory award for the individual litigant. For example, it explained that a finding of municipal liability would "serve as a deterrent against future constitutional deprivations." The Court was particularly attuned to the beneficial impact that a successful Monell action would have in encouraging municipalities to modify any "systemic" practices that result in constitutional injuries. A municipality seeking to minimize its risk of liability for the actions of a poorly trained or supervised employee, for instance, might initiate a program designed to "increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates." The Court further suggested that a municipality's indeterminate exposure to large damage awards under section 1983 might lead it "to institute system-wide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights," a matter that becomes "particularly acute where the frontline officers are judgment-proof in their individual capacities."  

The Supreme Court's decisions in Monroe, Monell, and Owen thus resurrected section 1983's historic purpose to create a federal civil rights remedy in response to unparalleled official lawlessness and organized, racially motivated violence. Before turning to a thorough analysis of the bifurcation procedure, however, we should review the most recent chapter of judicial construction of section 1983. The following discussion demonstrates that a litigant's right to pursue Monell relief has been reaffirmed by post-Owen Supreme Court decisions.

D. Recent Supreme Court Decisions

Since deciding Monell and Owen, the Supreme Court has worked to clarify "the full contours" of municipal liability under section 1983. From Monell through the Court's opinion in the 1989 case of City of Canton v. Harris, the Court's decisions reflected an awareness that

133. Id.
134. Id.
135. Id. at 653.
136. Id. at 651.
137. See id. at 652 & n.36.
138. Id. at 652 n.36.
139. Id.
"those contours were . . . in a state of evolving definition and uncertainty." The Court has curtailed municipalities' exposure to punitive damages, limited injunctive relief, and, through some of its rulings, made weightier the burden of proof that litigants must bear to establish municipal liability. The Court has never retreated, however, from Monell's fundamental holding that section 1983 subjects municipalities to liability for the civil rights violations that they cause. In fact, it rejected a municipality's call to impose heightened pleading requirements on civil rights litigants pressing Monell claims in the recent case of Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit. The Court's decisions have reinforced the statute's availability to victims of official misconduct by allowing them to proceed against municipalities, regardless of whether they can prove a claim against individual actors, when the evidence establishes that a municipality's policy or custom was responsible for depriving them of a constitutional right. Indeed, in deciding Canton, the Court significantly expanded the potential breadth of municipal liability by ruling that a city may be liable for following a "policy of inaction" in failing to train its police officers adequately.

The Court's first post-Owen decision, in the 1981 case of City of Newport v. Fact Concerts, Inc., immunized municipalities from awards of punitive damages under section 1983. As a matter of public policy, the Court was concerned that "this expanded liability . . . may create a serious risk to the financial integrity of these governmental entities."

142. See id. at 258-71.
146. See Praprotnik, 485 U.S. at 112; infra notes 166-169 and accompanying text; Canton, 489 U.S. at 378; infra notes 170-177 and accompanying text.
147. Canton, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part); see id. at 389 (establishing a plaintiff's burden of showing that a 'municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants').
149. Id. at 271.
150. Id. at 270. Several Justices have expressed a desire to limit Monell remedies in order
Balancing this concern against the adequacy of section 1983's compensatory remedies, the Court found no need for punitive damages because Monell's compensatory relief alone constituted "an obligation properly shared by the municipality itself"151 and sufficed to accomplish the "important purpose" of "deter[ring] . . . future abuses of [police] power."152

In Polk County v. Dodson,153 decided the same year, the Court narrowed the list of state officials whose actions could subject a municipality to liability,154 but reaffirmed Monell's applicability when a municipal policy was "the moving force of the Constitutional violation."155 In City of Los Angeles v. Lyons,156 the Court justified its ruling that a litigant had no standing to seek injunctive relief against a municipality by suggesting that section 1983's damages remedy was "presumably" available to challenge police practices.157 Though these decisions declined to extend the deterrent rationale of Monell and Owen, they reinforced Monell's application against municipalities' unlawful policies and customs.

The Court's 1985 decision in City of Oklahoma City v. Tuttle158 began to define the "contours" of section 1983 liability for cases in which a

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151. Fact Concerts, 453 U.S. at 263.
152. Id. at 268.
154. In rejecting the plaintiff's section 1983 suit against his former public defender, the Dodson Court explained that every court-appointed attorney "owes a duty of undivided loyalty to his client." Consequently, she does not act under color of law when exercising independent professional judgment on behalf of an accused, and cannot be sued as an agent of the state. Id. at 315.
155. Id. at 326 (quoting Monell, 436 U.S. at 694).
156. 461 U.S. 95 (1983). The plaintiff in Lyons had been stopped and choked until he lost consciousness by Los Angeles police officers for vehicle and traffic violations. Mr. Lyons sought damages for his injuries and injunctive relief to prohibit all Los Angeles police officers from using the chokehold in the future. Id. at 98. While it assumed without deciding that Lyons could proceed with his claims for damages against the individual officers and the city, the Court rejected his prayer for an injunction because it believed that Lyons had done "nothing to establish a real and immediate threat that he would again be stopped for a traffic violation . . . by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." Id. at 105. In his dissent, Justice Marshall reasoned that Lyons, an African-American, had standing to seek an injunction, in part because his past injury gave him a personal stake, and in part because Los Angeles police officers had killed at least 16 people, 12 of whom were African-Americans, and injured almost 1000 more through the use of the chokehold during the preceding five years. See id. at 115-17, 124 (Marshall, J., dissenting).
157. Id. at 105.
158. 471 U.S. 808 (1985). Then-Justice Rehnquist, writing for a plurality of four Justices,
municipality’s policy of inaction results in a poorly trained, ill-supervised, or undisciplined police force. Though Justice Rehnquist’s plurality opinion criticized the general uncertainties surrounding possible municipal liability for a “nebulous ‘policy’ of ‘inadequate training,’” it recognized Monell’s applicability to situations in which there was “an affirmative link between the policy [of inadequate training] and the particular constitutional violation alleged.”159 While the Tuttle Court rejected the notion that a policy of inadequate training in the use of force might be established from “the isolated misconduct of a single, low-level officer,”160 it relied extensively on the teachings of Monell in noting that it would uphold such a claim against a municipality when “the deprivation was the result of municipal ‘custom or policy.’”161

The Court’s 1986 decision in Pembaur v. City of Cincinnati162 clarified Tuttle’s meaning by establishing that a municipality may be liable for the single act of an employee when the actor is found to have final policymaking authority as to the action taken.163 Emphasizing that “Monell is a case about responsibility,”164 the Court distinguished a low-level employee’s actions from those of a municipal policymaker; the latter’s decisions represent “official municipal policy” when they “cause[ ] a constitutional tort.”165

rejected a jury instruction that permitted an inference that a single, unusually excessive act of force could subject a municipality to liability based on its deliberate indifference to the training, supervision, and discipline of its officers. Id. at 821 (plurality opinion of Rehnquist, J.).
159. Id. at 823 (plurality opinion of Rehnquist, J.).
160. Id. at 831 (Brennan, J., concurring in part and concurring in judgment). The Justices who joined either Brennan’s concurrence or the plurality opinion agreed that “[w]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish the requisite fault on the part of the municipality, and the causal connection between the ‘policy’ and the constitutional deprivation.” Id. at 824 (plurality opinion of Rehnquist, J.). These seven Justices agreed that a municipality’s liability should not be inferred from an individual officer’s act because it “would amount to permitting precisely the theory of strict respondeat-superior rejected in Monell.” Id. at 832 (Brennan, J., concurring in part and concurring in judgment).
161. Id. at 817 (plurality opinion of Rehnquist, J.).
163. Id. at 483 (plurality opinion of Brennan, J.). In Pembaur, the Court held that a municipality was liable for a county prosecutor’s decision to order deputy sheriffs to forcibly enter a doctor’s medical clinic. See id. at 485 (plurality opinion of Brennan, J.).
164. Id. at 478 (plurality opinion of Brennan, J.).
165. Id. at 477 (plurality opinion of Brennan, J.) (quoting Monell, 436 U.S. at 691). The Pembaur Court disagreed on the definition of a policymaker for section 1983 purposes: the plurality suggested that a “policymaker” should be a person who, under state law, “possesses final authority to establish municipal policy with respect to the action ordered.” Id. at 481 (plurality opinion of Brennan, J.). Two other Justices questioned the breadth of this definition. See id. at 486 (White, J., concurring); id. at 491 (O’Connor, J., concurring in part and concurring in judgment).
Two years later, in *Praprotnik v. City of St. Louis*, the Court reversed an Eighth Circuit panel's ruling that had found a municipality liable under section 1983 for a supervisory official's decision to lay off a city employee. Concluding that the plaintiff had failed to establish the existence of a municipal policy, the Court again reinforced *Monell*'s application when a municipal policymaker deprives a citizen of a constitutional right.

The Court's most recent significant decision on the matter broadened the definition of an unconstitutional municipal policy. In *City of Canton v. Harris*, building on prior "inaction" cases, the Court confirmed the applicability of section 1983 when a municipality acts with "deliberate indifference" in failing to properly train its police officer em-

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169. The Justices could not agree on whether the determination of who possesses "final authority" to make municipal policy is a question of fact or law.Compare *id.* at 124 (plurality opinion of O'Connor, J.) (arguing that "whether an official had policy making authority is a question of state law") with *id.* at 144 (Brennan, J., concurring in judgment) ("The identification of municipal policymakers is an essentially factual determination, . . . and is therefore rightly entrusted to a . . . jury."). The plurality concluded that a city's liability for a subordinate's decision was limited to decisions approved by the city's policymakers. *Id.* at 127 (plurality opinion of O'Connor, J.).
170. 489 U.S. 378 (1989). The plaintiff in Canton based her Monell claim on the municipality's failure to properly train police officers to provide necessary medical care for persons in police custody. *Id.* at 382.
171. The Court began to define a municipality's liability for failing to train its officers in *Tuttle*, when it held that section 1983 required more than an isolated incident to establish a municipal policy. 471 U.S. at 824 (plurality opinion of Rehnquist, J.); *see supra* notes 158-161 and accompanying text. Two years later, in City of Springfield v. Kibbe, 480 U.S. 257 (1987), the Court decided not to decide whether a municipality might be subjected to liability for failing to train its police officers and, if so, what evidentiary standard would be applied. *Id.* at 257 (dismissing writ of certiorari as improvidently granted). Justice O'Connor's dissenting opinion in Kibbe (joined by three other Justices) previewed the Court's majority decision two years later in City of Canton v. Harris, 489 U.S. 378 (1989). *Canton* established a "deliberate indifference" standard for proof of municipal liability in "inaction" cases. *See infra* notes 172-177 and accompanying text. Although both Kibbe and Canton involved only claims of failure to train and failure to supervise, the same analysis has been applied to municipalities' failure to discipline police officers and to investigate citizens' allegations of police misconduct. In one of the first reported cases, Batista v. Rodriguez, 702 F.2d 393 (2d Cir. 1983), the court stated that "municipal inaction such as the persistent failure to discipline subordinates who violate civil rights could give rise to an inference of an unlawful municipal policy of ratification of unconstitutional conduct within the meaning of Monell." *Id.* at 397; *see also* Depew v. City of St. Mary's, 787 F.2d 1496, 1497-98 (11th Cir. 1986) (addressing mayor and city council members' failure to investigate citizens' complaints of police brutality despite having knowledge of the allegations); Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986) (addressing failure to investigate previous complaints of police misconduct), *cert. denied*, 480 U.S. 922 (1987).
ployees. Vacating the jury's verdict against the municipality and remanding the case for a new trial, the Court declared that its "first inquiry in any case alleging municipal liability under section 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." The Court held that a municipality's policy of inaction may expose it to section 1983 liability when the evidence establishes that "the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train." In thus applying Monell's fundamental principles, the Canton Court upheld section 1983 liability when the municipality is the "moving force [behind] the constitutional violation" and shows "deliberate indifference to the rights of persons with whom the police come into contact."

Finally, in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, the Court held that civil rights claimants need not meet a "heightened pleading" standard in alleging Monell claims. In disapproving the rule followed by the Fifth Circuit (and several other circuits) that Monell causes of action must be pleaded in greater factual detail than other civil claims, the Court reaffirmed in dicta the continuing viability of the Monell-Owen line of cases: municipalities should be held liable for their own policies or practices that cause constitutional injuries.

172. Canton, 489 U.S. at 388-89; id. at 392 (O'Connor, J., concurring in part and dissenting in part). As Justice O'Connor observed, the "deliberate indifference" standard had previously been applied by numerous lower courts in other "inaction" cases. See, e.g., Fiacco, 783 F.2d at 327; Languirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983) (applying a "conscious indifference" standard), cert denied, 467 U.S. 1215 (1984); Wellington v. Daniels, 717 F.2d 932, 935-36 (4th Cir. 1983).

173. In vacating the jury's verdict against the municipality and in favor of the individual defendants, the Canton Court "assume[d] that respondent's constitutional right to receive medical care was denied by city employees—whatever the nature of that right might be." 489 U.S. at 389 n.8. Because Canton established a new standard of proof for municipal liability for failure to train police officers, requiring "deliberate indifference" (whereas the trial court had instructed the jury to consider recklessness or gross negligence), the Court remanded the case in order to give the plaintiff an opportunity to meet this standard. See id. at 392.

174. Id. at 385.

175. Id. at 387. The Court specifically rejected the city's "contention that only unconstitutional policies are actionable under the statute," id. at 387, but it required plaintiffs to show that the need for training was "so obvious" and so likely to result in a constitutional deprivation that the city policymakers were "deliberately indifferent to the need." Id. at 390.

176. Id. at 389 (quoting Monell, 436 U.S. at 694).

177. Id. at 388.


179. Id. at 1162-63.

180. See id. at 1162. Even though it narrowly based its holding on the rules of pleading and interpretation of the Federal Rules of Civil Procedure, see id. at 1162-63, the Leatherman
In sum, a series of Supreme Court decisions since *Monell* have consistently reaffirmed that section 1983 provides for liability on the part of municipalities. The use of any procedural mechanisms to preclude or hinder the establishment of such liability would thus contravene the overwhelming weight of Supreme Court authority. As described in the following Parts, however, a procedural mechanism—bifurcation—is being used in precisely this manner.

**III. Federal Rule of Civil Procedure 42(b)**

Rule 42(b) of the Federal Rules of Civil Procedure\(^{181}\) is most commonly used in personal injury trials and other civil matters to separate issues of liability from those of damages.\(^{182}\) Growing numbers of federal trial courts, however, are using bifurcation in section 1983 civil rights cases to sever a plaintiff's claim against an individual police officer from that against a municipal defendant for trial,\(^{183}\) and sometimes to defer discovery on the *Monell* claim until after the trial of the claim against the individual officer.\(^{184}\) As described below, when a trial court grants a defendant municipality's Rule 42(b) motion to bifurcate, it typically imposes a substantial new burden on civil rights litigants who seek to establish municipal liability for constitutional violations.\(^{185}\) Discovery bifurcation orders delay and often preclude litigants from establishing a municipality's "deliberate indifference" to unlawful police practices; decision signifies the Court's rejection of lower courts' use of procedural tools to hinder *Monell* claims.

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181. For the complete text of Rule 42(b), see *supra* note 10.

182. According to Professors Charles Wright and Arthur Miller, "an obvious use" for bifurcation is to divide these issues for trial in tort cases, in which "[l]ogically liability must be resolved before damages are considered. Often the evidence pertinent to the two issues is wholly unrelated. Thus it is not surprising that courts, in many kinds of litigation, have ordered this separation, though this has not been done routinely . . . ." *CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE* § 2390, at 296-97 (1972) (footnote omitted). Wright and Miller summarized the court's reasons for bifurcating the issues of damages and liability for trial in a case that involved a plane crash: the "issues are substantially separate and distinct, bifurcation reduces burden of preparation for trial on damage issues if determination proves unnecessary, separate determination of liability may resolve various issues frustrating settlement of cases and prevent need for damage trials, and bifurcation permits efficient consolidation of identical issues [for] resolution at one time." *Ibid.* at 103 (Supp. 1992) (citing *In re Air Crash Disaster*, 720 F. Supp. 1455 (D. Colo. 1988)).

183. *See infra* Part V.


185. *See infra* Part IV.
furcated trials are likely to prevent a jury from apportioning damages between an individual and municipal defendant. The Rule and its underlying principles, however, neither dictate nor support such an application.

Rule 42(b) allows a federal trial court to order a separate trial of any claim or issue when it finds such an order appropriate “in furtherance of convenience or to avoid prejudice [to each party], or when separate trials will be conducive to expedition and economy . . . , always preserving inviolate the right of trial by jury as declared by the Seventh Amendment of the Constitution.”\(^{186}\) When a court orders bifurcation for trial, the Rule also gives it the discretion to defer discovery of any issue that will be tried separately.\(^{187}\)

Several principles control the courts' consideration of Rule 42(b) motions. First, bifurcation is the exception, not the rule, for conducting a trial.\(^{188}\) A single trial is the preferred method for the adjudication of competing claims and issues because it “tends to lessen the delay, expense and inconvenience to all parties.”\(^{189}\) Although the bifurcation procedure has been used with “great success” when employed on a limited

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\(^{186}\) FED. R. CIV. P. 42(b). Prior to 1966, Rule 42(b) permitted bifurcation only “in furtherance of convenience or to avoid prejudice.” 9 WRIGHT & MILLER, supra note 182, § 2388, at 279. The 1966 Amendment added language permitting separate trials when they would be “conducive to expedition and economy.” 9 id. at 280. Professors Wright and Miller suggested that courts had already been relying on this factor prior to the amendment, and that the Rule's new language was necessary only to maintain separate trials for liability and damage issues in certain admiralty suits. 9 id. at 279-80; see also Note, Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure, 39 MINN. L. REV. 743, 743-44 (1955) (suggesting that Rule 42(b) was needed to provide a “safeguard” against inappropriate use of the “extraordinarily liberal” joinder rules to create unwieldy actions).

\(^{187}\) “[I]f a possibly dispositive issue is to be tried separately the court may, though it need not, limit discovery to that issue for the time being.” 9 WRIGHT & MILLER, supra note 182, § 2387, at 278 (citing Ellingson Timber Co. v. Great N. Ry., 424 F.2d 497 (9th Cir. 1970)).

\(^{188}\) Upon amending Rule 42 in 1966, the Advisory Committee on Civil Rules stated:

While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth.

In cases . . . in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

FED. R. CIV. P. 42 advisory committee's note (citations omitted). Observing that the Committee's note is "cryptic," Wright and Miller reasoned that it was "intended to give rather delphic encouragement to trial of liability issues separately from those of damages, while warning against routine bifurcation of the ordinary negligence case." 9 WRIGHT & MILLER, supra note 182, § 2388, at 280.

\(^{189}\) McCrae v. Pittsburgh Corning Corp., 97 F.R.D. 490, 492 (E.D. Pa. 1983); see also Wolens v. F.W. Woolworth Co., 29 Fed. R. Serv. 2d (Callaghan) 1521, 1521 (N.D. Ill. 1980) ("[S]eparate trials should not be ordered unless such a disposition is clearly necessary.").
basis, particularly in negligence cases, the Advisory Committee on Civil Rules, which promulgated Rule 42(b), cautioned against its overuse. Professors Charles Wright and Arthur Miller, leading commentators on federal civil procedure, emphasized that “[t]he piecemeal trial of separate issues in a single suit is not to be the usual course,” and that a court should order bifurcation only when it “believes that separation will achieve the purposes of the rule.” Consequently, a court must exercise its discretionary power under the Rule based on informed judgment; it must avoid granting bifurcation as a matter of policy. As with other discretionary decisions, trial courts must evaluate bifurcation


191. See 9 Wright & Miller, supra note 182, § 2390.

192. See supra note 188.

193. 9 Wright & Miller, supra note 182, § 2388, at 279; see also Dun & Bradstreet Corp. Found. v. National Seminars, Inc., No. Civ.A.89-2388-0, 1990 WL 182338, at *3 (D. Kan. Oct. 23, 1990) (denying defense bifurcation motion because it would create “piecemeal” litigation); United States v. Mottolo, 107 F.R.D. 267, 270 (D.N.H. 1985) (denying plaintiff's motion for bifurcated trials on past and future damages in an environmental clean-up action); Compagnie Francaise D’Assurance, 105 F.R.D. at 36-39 (denying plaintiff’s motion to bifurcate based on overlap between liability and damage issues and finding that bifurcation would not promote judicial economy but would allow defendant to evade discovery responsibilities and cause undue prejudice to defendant); R.E. Linder Steel Erection Co. v. Wedemeyer, Cernik, Corrubia, Inc., 585 F. Supp. 1530, 1534 (D. Md. 1984) (denying defense bifurcation motion, stating that “any prejudice which defendants may encounter . . . can be cured with instructions to the jury”); United States v. IBM Corp., 60 F.R.D. 654, 656-57 (S.D.N.Y. 1973) (denying defense bifurcation motion, stating that the evidence at a single trial would not “contaminate” the mind of the finder of fact in a bench trial and that lack of overlap is not a sufficient reason to bifurcate absent showing that separate trials would produce affirmative movement toward disposing of the litigation); infra note 201 (listing the factors that should guide a court’s bifurcation decision); cf. Katsaros v. Cody, 744 F.2d 270, 278 (2d Cir.) (affirming trial court’s discretion to bifurcate liability and damages), cert. denied, 469 U.S. 1072 (1984).

194. Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3d Cir.), cert. denied, 439 U.S. 955 (1978). In Lis, the Third Circuit strongly criticized the practice of routine bifurcation; the trial court had explained that it summarily bifurcated the liability and damages issues in that case “because we bifurcate all negligence cases, and I think everybody is more fairly treated that way.” Id. at 823 (quoting the district court’s order). The Third Circuit stated that the “routine order of bifurcation in all negligence cases is a practice at odds with our requirement that discretion be exercised and seems to run counter to the intention of the rule drafters.” Id. at 824. Accordingly, the court expressly “disapprove[d] of a general practice of bifurcating all negligence cases.” Id. Nevertheless, because the trial court’s failure “to exercise discretion” had not prejudiced the appellants, the court denied a new trial. Id. The Lis court reiterated the principle to be followed in resolving a bifurcation motion: “The decision to bifurcate vel non is a matter to be decided on a case-by-case basis and must be subject to an informed discretion by the trial judge in each instance.” Id. (citing Idzojtic v. Pennsylvania R.R., 456 F.2d 1228, 1230 (3d Cir. 1971)).
motions on an individual, case-by-case basis and refrain from routinely approving such motions.\textsuperscript{195}

Second, because of the general presumption favoring a single trial, the party seeking bifurcation has the burden of persuading the trial court that severance is appropriate in the matter at hand.\textsuperscript{196} The moving party’s arguments should demonstrate that separate trials are necessary to protect her from undue prejudice or inconvenience, and that the procedure would not cause her adversary any such prejudice or inconvenience.\textsuperscript{197} Alternatively, the movant may attempt to convince the court that bifurcation “will be conducive to expedition and economy.”\textsuperscript{198} Addressing each of these factors, the moving party must persuade the court that bifurcated discovery or trials would satisfy Rule 42(b)’s “paramount” consideration: to ensure “a fair and impartial trial [and process] to all litigants through a balance of benefit and prejudice.”\textsuperscript{199}

Third, in ruling on a Rule 42(b) motion, a court may consider other factors to determine whether bifurcation would avoid prejudice and further convenience, expedition, and economy. For example, a court may decide that bifurcation would be inappropriate in a case in which there is an overlap in the probable evidentiary proof of the issues sought to be tried separately,\textsuperscript{200} or when it believes that the moving party would gain an unfair advantage from separate trials.\textsuperscript{201} On the other hand, a court

\textsuperscript{195} Franklin Music Co. v. American Broadcasting Cos., 616 F.2d 528, 538 (3d Cir. 1979); Kushner v. Hendon Constr., Inc., 81 F.R.D. 93, 98 (M.D. Pa.), aff’d mem., 609 F.2d 502 (3d Cir. 1979); see supra notes 188, 194.

\textsuperscript{196} McCrae v. Pittsburgh Corning Corp., 97 F.R.D. 490, 492 (E.D. Pa. 1983) (“A defendant seeking bifurcation has the burden of presenting evidence that a separate trial is proper in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience to all parties.”).

\textsuperscript{197} See FED. R. CIV. P. 42(b).

\textsuperscript{198} Id. Wright and Miller noted that while either party may move for separate trials, a court may order bifurcation on its own motion because “[i]t is the interest of efficient judicial administration that is to be controlling, rather than the wishes of the parties.” 9 WRIGHT & MILLER, supra note 182, § 2388, at 279.


\textsuperscript{201} In Kimberly-Clark, the court set forth Rule 42(b)’s four general factors—convenience, prejudice, expedition, and economy—and discussed seven other considerations upon which a court may properly rely in deciding whether to bifurcate:

(5) whether the issues sought to be tried separately are significantly different; (6) whether they are triable by jury or the court; (7) whether discovery has been directed to a single trial of all issues; (8) whether the evidence required for each issue is substantially different; (9) whether one party would gain some unfair advantage from
might grant bifurcation when it appears that a single issue "could be
dispositive of the case, and resolution of it might make it unnecessary to
try the other issues,"202 or when it believes that "a single trial of all issues
would create the potential for jury bias or confusion."203 Professors
Wright and Miller advised courts to bifurcate only in the infrequent case
in which limiting instructions to the jury would not suffice to avoid preju-
dice to a co-defendant, such as "where evidence admissible only on a
certain issue may prejudice a party in the minds of the jury on other
issues."204

Finally, Rule 42(b)'s mandate to "always preserv[e] inviolate the
right of trial by jury"205 requires a court to remain mindful that bifurca-
tion may prevent the trial jury from fulfilling its role as the fact-finder.206

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and Gonzalez-Marin v. Equitable Life Assurance Soc'y, 845 F.2d 1140, 1145-47 (1st Cir.
1988) (denying bifurcation)); see also Reading Indus. v. Kenncott Copper Corp., 61 F.R.D.
662, 664-65 (S.D.N.Y. 1974) (granting bifurcation upon consideration of the enumerated
factors).

202. 9 WRIGHT & MILLER, supra note 182, § 2388, at 280. "If, however, the preliminary
and separate trial of an issue will involve extensive proof and substantially the same facts as the
other issues, . . . a separate trial will be denied." 9 id. at 281. In Barnell v. Paine Webber
Jackson & Curtis Inc., 577 F. Supp. 976 (S.D.N.Y. 1984), the court granted defendant's motion
for a separate trial on the issue of the plaintiff's timeliness in filing a discrimination com-
plaint with the EEOC, stating:

Since the trial of this issue may obviate the need for any further proceedings herein,
a significant saving of time and money may follow from a separate trial on this issue.
Severance under rule 42(b) is an appropriate tool with which the Court can expedite
resolution of statute of limitations issues.

Id. at 978; see also Payne v. A.O. Smith Corp., 99 F.R.D. 534, 536 (S.D. Ohio 1983) (noting
that the "factors to be balanced against [the] convenience and economy of one trial include
complexity of legal theories and factual proof, risk of jury confusion, and whether advanced
disposition of issues in [the] first trial will dispose of or simplify issues to be raised in [a] second
trial").

203. Kimberly-Clark, 131 F.R.D. at 609; see supra note 201.

204. 9 WRIGHT & MILLER, supra note 182, § 2388, at 281, 282. For example, Wright and
Miller noted the possibility of prejudice to a party when a jury learns that she is insured. Id.
Nevertheless, separate trials would be justified in such instances only when "the issues are so
unrelated that there is no advantage in trying them together." Id. A single trial would not
create prejudice when the issues of liability and damages are related, Wright and Miller sug-
gested, because most jurors assume that the party is insured. Id.; cf. infra notes 349-355 and
accompanying text (discussing possible prejudice to civil rights defendants from unified trials).

205. FED. R. CIV. P. 42(b); see also FED. R. CIV. P. 38(a) ("The right of trial by jury as
declared by the Seventh Amendment to the Constitution or as given by a statute of the United
States shall be preserved to the parties inviolate.").

206. Bifurcation of individual and municipal defendants in section 1983 lawsuits, for ex-
ample, may prevent the jury from engaging in the "equitable loss-spreading," Owen v. City of
Independence, 445 U.S. 622, 657 (1980), that Monell liability is intended to promote, because
One district court highlighted the importance of the jury’s role in making “an ultimate determination on the basis of a case presented in its entirety[.]. Because bifurcation works an infringement on such an important aspect of the judicial process, courts are ‘cautioned that [it] is not the usual course that should be followed.’”

Professors Wright and Miller expressed alarm that trial bifurcation may have a severe prejudicial impact upon a plaintiff: “[I]n a forced separation,” she may “be put to the hazard of two juries, each believing the absent tort-feasor the wrongdoer.”

Rule 42(b) was amended in 1966 in an effort to provide trial courts “broad discretion” in managing their case dockets “with expedition and economy while providing justice to the parties.” When courts follow the principles explained above in ruling on bifurcation motions, it is likely that the amendment’s objectives will be met. When they fail to do so, as appears to be increasingly the case in section 1983 actions, justice is often denied to civil rights litigants who wish to challenge a municipality’s unlawful police policy or custom.

IV. Bifurcation as a Barrier to a Plaintiff’s Recovery

Viewed in isolation, bifurcation of civil rights claims increases the expense and inconvenience faced by plaintiffs seeking redress of constitutional wrongs. Especially in jurisdictions that routinely bifurcate Monell claims for discovery as well as for trial, most plaintiffs lack the resources and fortitude to persevere through prolonged and complex discovery and to proceed through a second trial after completing a first. It is unlikely that a bifurcated Monell claim will ever be submitted to a jury, even when the individual defendants are found liable. Following such a

it cannot properly apportion fault between the defendants. Moreover, the inherent difficulty of proving a section 1983 claim against an individual police officer, especially when accompanied by a judge’s misunderstanding of the applicable law, can work to deny a jury trial on a viable Monell claim. See infra Part IV.

207. Kimberly-Clark, 131 F.R.D. at 608 (quoting Response to Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1323-24 (5th Cir. 1976) (quoting Swofford v. B & W, Inc., 336 F.2d 406, 415 (5th Cir. 1964))) (alteration by court); see also 9 WRIGHT & MILLER, supra note 182, § 2390, at 300 (noting that the parties’ right to a jury trial indicates that “separation of this kind should be sparingly used”).

208. 9 WRIGHT & MILLER, supra note 182, § 2389, at 290-92; see 9 id. at 292-93 n.39 (citing cases).

209. 9 id. § 2381, at 253.

210. See infra notes 356-357, 371, 374, 386 and accompanying text.
verdict, municipal defense attorneys usually offer attractive settlements in order to avoid indeterminate liability on the *Monell* issue. Most plaintiffs and their counsel find such offers difficult to refuse. Of course, those plaintiffs who are unwilling to settle may pursue their *Monell* claims through trial. Overall, bifurcation will substantially extend the length and expense of the proceedings, even for these successful litigants.

Bifurcation becomes an insurmountable bar, however, when trial courts misconstrue the dicta of the Supreme Court's per curiam opinion in *City of Los Angeles v. Heller* as requiring them to automatically dismiss the *Monell* claim whenever the plaintiff fails to persuade a jury that the individual officer defendant is liable. Under this extreme interpretation of *Heller*, bifurcation provides ultimate immunity to a municipality able to persuade a jury that the officer should not be held accountable. Moreover, as described below, the circumstances of many section 1983 cases may lead a jury to find for an officer even when there is convincing evidence that the plaintiff suffered a constitutional injury. Consequently, in jurisdictions that construe *Heller* broadly, the vitality of the federal civil rights remedy against municipalities engaging in unconstitutional practices is in serious question. To preserve this remedy, lower courts must use common sense in reading *Heller*, and must look for guidance from other Supreme Court cases treating municipal liability both before and after *Heller* was decided.

A. *City of Los Angeles v. Heller*

The facts of *Heller* follow an all-too-familiar pattern: Los Angeles police officers apprehend an African-American motorist whom they suspect of violating a motor vehicles law, and they inflict serious injury on the motorist. Believing that Mr. Heller was driving while intoxicated,
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officers stopped his car and administered a field sobriety test. Heller passed these tests, but the officers arrested him nonetheless, apparently because they were "dissatisfied with the results."\textsuperscript{216} Police testified that Mr. Heller became "belligerent" while being handcuffed and an "altercation ensued."\textsuperscript{217} The Court's opinion states that Mr. Heller's injury occurred during "the course of the struggle," when he "fell through a plate glass window."\textsuperscript{218} Justice Stevens' dissent offers a more complete picture of the injury: "Heller's flight through the window resulted from [the officer's] attempt to impose . . . the notorious 'chokehold.'"\textsuperscript{219}

On the day before trial was scheduled, the trial court bifurcated Heller's civil rights claim against the municipality,\textsuperscript{220} which charged that it followed a policy of condoning the excessive use of force by police in making arrests, from his claim against the individual officers.\textsuperscript{221} No explanation for the trial bifurcation ruling appeared in the record.\textsuperscript{222} The Supreme Court's per curiam decision did not discuss or comment upon the propriety of the trial court's pretrial ruling. In fact, the Court never requested legal briefs or oral arguments regarding any aspect of the case.\textsuperscript{223}

The Court's abbreviated opinion affirmed the trial judge's decision to dismiss Heller's Monell claims after the jury exonerated the sole remaining individual defendant.\textsuperscript{224} The trial court inferred from the trial jury's general verdict in the officer's favor that Mr. Heller had not been

\textsuperscript{216} Heller, 475 U.S. at 797 (quoting the Ninth Circuit's opinion). The Supreme Court accepted the factual findings recited in the Ninth Circuit's opinion in the case. \textit{Id.; see} Heller v. Bushey, 759 F.2d 1371, 1372-73 (9th Cir. 1985), rev'd per curiam sub nom. City of Los Angeles v. Heller, 475 U.S. 796 (1986).

\textsuperscript{217} Heller, 475 U.S. at 797 (quoting the Ninth Circuit's opinion).

\textsuperscript{218} Id. (quoting the Ninth Circuit's opinion).

\textsuperscript{219} Id. at 802 (Stevens, J., dissenting).

\textsuperscript{220} Id. at 801 (Stevens, J., dissenting). Mr. Heller's attorney, Steven Yagman, recalled that the trial judge entered a sua sponte bifurcation order on the day trial was scheduled:

It was the first time I had ever encountered such a motion. I had flown in an expert who was ready to testify on the Monell issue. Though the judge rejected my argument that bifurcation deprived Mr. Heller a complete remedy, he surprisingly allowed the expert to testify before the jury.

Telephone Interview with Steven Yagman (Aug. 13, 1992).

\textsuperscript{221} Heller, 475 U.S. at 801 (Stevens, J., dissenting).

\textsuperscript{222} Id at 801 & n.3. (Stevens, J., dissenting).

\textsuperscript{223} Justice Stevens criticized the Court for not requiring the parties to brief and argue the bifurcation issues raised in \textit{Heller}: "Whenever the Court decides a case without the benefit of briefs or argument on the merits, there is a danger that it will issue an opinion without the careful deliberation and explication that the issues require." \textit{Id.} at 800 (Stevens, J., dissenting).

\textsuperscript{224} Id. at 799.
deprived of any constitutional right. Relying on this inference, the Supreme Court did not address the Ninth Circuit's concern that such a "general verdict does not foreclose a finding that Heller suffered a constitutional deprivation." Instead, the Court noted very generally that "neither Monell... nor any other of our cases" provided legal authority for an "award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." Without any supporting caselaw or legal analysis, the Court simply stated that because the police officer had "inflicted no constitutional injury on [Heller], it is inconceivable that [the municipal defendants] could be liable to [Heller]." “If a person has suffered no constitutional injury at the hands of the individual police officer,” the Court concluded, “the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.”

Following the jury's verdict in the officer's favor, the district judge declared that the Monell claim had "become moot." Id. at 800 n.1 (Stevens, J., dissenting) (quoting the record). The judge refused to submit a special interrogatory that would have allowed the jury to indicate whether it believed that Heller had sustained a constitutional injury for which the individual officer was not liable. See id. at 803 (Stevens, J., dissenting); infra text following note 254.

Heller v. Bushey, 759 F.2d 1371, 1374 (9th Cir. 1985), rev'd per curiam sub nom. City of Los Angeles v. Heller, 475 U.S. 796 (1986). The Ninth Circuit had reversed the trial court's dismissal of Heller's section 1983 claims against the municipal defendants and remanded the case for further proceedings. Id. at 1376. In reaching this decision, the court of appeals found it significant that the officer's defense was substantially based on the fact that he had been following the Los Angeles Police Department's "escalating force" policy, which endorsed the use of the chokehold. The jury's verdict in favor of the officer, the court reasoned, signified "that Heller was arrested for reasonable cause and that the amount of force used was not unreasonable or excessive." Id. But this finding was insufficient to warrant dismissal of the Monell claims: "[T]he conclusion that the force was reasonable could have been derived either from Police Department regulations, which incorporate a theory of 'escalating force,' or from a constitutional standard entirely independent of such regulations. We cannot say which with assurance." Id. The Ninth Circuit concluded that the Monell claims should survive because a jury "could have considered Officer Bushey's compliance with the policy as an indication of either the reasonableness of Bushey's use of force or the existence of immunity based on good faith." Id.

The Supreme Court did not discuss the Ninth Circuit's reasons for reversing the dismissal of the Monell claim. See supra note 226. The Court reaffirmed the trial court's ruling, emphasizing that the jury was not instructed on a defense of qualified immunity. Members of a jury act "in accordance with the instructions given them," the Court reasoned; they neither consider nor "base their decisions on legal questions with respect to which they are not charged." Heller, 475 U.S. at 798.

The defendant officer in Heller did not assert a defense of qualified immunity; he claimed that he was only following the orders of and training given by the Los Angeles Police Department. See infra note 241. A successful qualified immunity defense absolves the individual officer of liability, even though a constitutional injury may have occurred, when the officer's conduct did "not violate clearly established statutory or constitutional rights of which a
Taken literally, the *Heller* opinion’s language could dramatically alter a municipality’s potential liability under section 1983. A civil rights claimant might be required to prove liability against an individual police officer first in order to preserve and eventually prevail on a civil rights cause of action against a municipality. The Court’s pre-*Heller* decisions, as well as lower court decisions, however, do not support this reading of *Heller*. Such a literal application of *Heller* would result in a near-

reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Karen M. Blum, *Qualified Immunity: A User’s Manual*, 26 IND. L. REV. 187 (1993); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989). When a qualified immunity defense succeeds, most courts agree that *Heller* does not preclude recovery against the municipality. See, e.g., Doe v. Sullivan County, 956 F.2d 545, 554 (6th Cir. 1992) (“To read *Heller* as implying that a municipality is immune from liability regardless of whether the plaintiff suffered a constitutional deprivation simply because an officer was entitled to qualified immunity would ... represent a misconstruction of its holding and rationale.”); Deagle v. City of New York, No. 90 Civ. 8203, 1992 WL 116368, at *1 (S.D.N.Y. May 24, 1992) (refusing to dismiss *Monell* claim after granting officer summary judgment on a qualified immunity defense: “[I]t is still an open question whether a constitutional violation occurred and whether a municipal policy or custom ‘caused’ that violation.”); Munz v. Ryan, 752 F. Supp. 1537, 1551 (D. Kan. 1990) (finding no inherent inconsistency in holding that official is entitled to qualified immunity but municipality is liable for official’s constitutional torts caused by “the actions of those persons with final authority on the challenged matter”); cf infra note 302 (discussion of *Ray v. Catone*).

230. Professor Kritchevsky pointed out that though “the *Heller* problem had been debated in the lower courts in the years before the Supreme Court’s decision,” the Supreme Court failed to discuss any of those earlier cases in its decision. Kritchevsky, supra note 35, at 443 n.139. In fact, the overwhelming majority of pre-*Heller* decisions in the lower courts supports a narrow reading that would condition municipal liability along the same lines as *Monell*—requiring the plaintiff to establish that a municipal policy or custom was the “moving force” in causing her constitutional injury. Once these factors were established, the courts upheld *Monell* liability regardless of the jury’s determination as to the liability of the individual defendants. See, e.g., Anderson v. City of Atlanta, 778 F.2d 678, 686-87 (11th Cir. 1985) (upholding verdict against municipality despite jury’s exoneration of individual defendants); Garcia v. Salt Lake County, 768 F.2d 303, 309 (10th Cir. 1985) (rejecting argument that a finding of unconstitutional conduct by individual defendant is a prerequisite to holding a municipal defendant liable), cert. denied, 485 U.S. 991 (1988); Vippolis v. Village of Haverstraw, 768 F.2d 40, 44 (2d Cir. 1985) (reversing jury’s verdict against municipality because of lack of proof that a municipal policy caused the injuries), cert. denied, 480 U.S. 916 (1987); Tresevant v. City of Tampa, 741 F.2d 336, 338, 340 (11th Cir. 1984) (holding municipality liable for policy resulting in unlawful incarceration, even though individual defendants absolved); Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983) (noting that municipal and individual claims are not necessarily dependent but affirming dismissal of *Monell* claim because there was insufficient evidence to establish a municipal policy); Langurand v. Hayden, 717 F.2d 220, 228-29 (5th Cir. 1983) (reversing verdict against municipality because there was insufficient evidence to prove municipal policy or custom); Batista v. Rodriguez, 702 F.2d 393, 398 (2d Cir. 1983) (dismissing *Monell* claim for failure to prove that municipal policy of inaction caused the constitutional deprivation); Smith v. City of Oklahoma City, 696 F.2d 784, 787 (10th Cir. 1983) (upholding municipal liability in cases in which a policy or custom is the cause of a constitutional deprivation); Murray v. City of Chicago, 634 F.2d 365, 367 (7th Cir. 1981)
complete evisceration of civil rights remedies against municipalities and contravene the settled precedent described in Part II, which places great emphasis on municipal liability as a means of instigating police reform.231

When the Court’s per curiam opinion in Heller is read narrowly, however, its holding is unremarkable.232 It merely reaffirms that establishing section 1983 liability requires, first, proof that the plaintiff suffered a constitutional injury, regardless of whether it was caused by an individual's actions or by a municipality's custom or policy, and second, proof that a named defendant caused the deprivation. When understood


( barley that municipal liability can be established independent of liability against individual officer, cert. dismissed, 456 U.S. 604 (1982); Boren v. City of Colorado Springs, 624 F. Supp. 474, 480-81 (D. Colo. 1985) (granting motion to dismiss municipal claim because facts alleged did not establish a policy or custom of tacit authorization or deliberate indifference); Horning v. County of Washoe, 622 F. Supp. 762, 785 (D. Nev. 1985) (considering municipal liability issue despite jury's exoneration of individual defendants, but finding insufficient evidence to establish independent unlawful conduct); Rogers v. Lincoln Towing Serv., 596 F. Supp. 13, 20 (N.D. Ill. 1984) (dismissing claim against municipality because plaintiff failed to allege a pattern of illegal conduct going beyond a single incident), aff'd, 771 F.2d 194 (7th Cir. 1985); McKenna v. County of Nassau, 538 F. Supp. 737, 739-40 (E.D.N.Y.) (upholding liability against municipality after plaintiff withdrew claim against individual defendant), affd, 714 F.2d 115 (2d Cir. 1982).

Though most pre-Heller decisions upheld Monell claims whenever the plaintiff's proof established that a municipal policy or custom caused the constitutional injury, a few courts dismissed such claims when a jury did not find individual liability. See, e.g., Wing v. Britton, 748 F.2d 494, 498 (8th Cir. 1984) ("[T]he city could not be liable ... unless [the arresting officer] caused [plaintiff's] injuries by using excessive force. . . . [A] verdict [in favor of the arresting officer] made a verdict in favor of the city inevitable."); see also Sanchez v. City of Riverside, 596 F. Supp. 193, 195 (C.D. Cal. 1984) (holding Monell claims rendered moot when the municipality agreed to indemnify the individual officer).


As recently enunciated by the Supreme Court, the doctrine of stare decisis requires either a national consensus that the law was unworkable or a finding that related principles of law or factual reality had changed so completely "as to have robbed the old rule of significant application or justification" before the courts may permissibly institute such a radical shift in municipality liability law. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809 (1992); see id. at 2808-16. Neither of these conditions preceded Heller.

232. As commentators explain, the cursory nature of the Court's decision in Heller mitigates against an expansive interpretation. "The fact that the Supreme Court's decision is a per curiam summary reversal, rendered without full briefing and oral argument, argues for a narrow reading." 1 SCHWARTZ & KIRKLIN, supra note 35, § 7.6, at 346. Such a reading would mean that "the establishment of a municipal officer's individual liability is not a prerequisite to the imposition of municipal entity liability." 1 id. at 344. Schwartz and Kirklin therefore concluded that "Heller . . . should not be read as announcing a broad rule requiring dismissal of the claim against the municipality in every case in which it is found that the defendant officer was not a constitutional violator." 1 id. at 346; see also Kritchevsky, supra note 35, at 454 (same).
from this perspective, the Supreme Court merely construed the jury's verdict against Heller to signify that on the facts presented, Heller had suffered no constitutional injury—either from the officer's actions or from an alleged unconstitutional municipal policy.\textsuperscript{233}

The ambiguity in \textit{Heller} led Justice Stevens, joined by Justice Marshall, to record a strong dissent to the majority's dismissal of the civil rights claim against the municipality. He asserted that no “necessary inconsistency” would have resulted had the jury returned verdicts in favor of the officer and against the municipality,\textsuperscript{234} and that even if such an inconsistency existed, the trial court could have reconciled the verdicts and avoided dismissing the \textit{Monell} claim by any one of several methods.\textsuperscript{235} The dissent begins and ends with sharp criticism for the majority's choice to decide the case “without the benefit of briefs or argument on the merits,”\textsuperscript{236} and to rely “on an anonymous author to explain what it ha[d] done.”\textsuperscript{237}

Justice Stevens labeled the decision “unprecedented, ill-considered, and far-reaching” in its potential implications.\textsuperscript{238} He presciently ex-

\textsuperscript{233} The trial record in \textit{Heller} contained some testimony concerning the municipality's potential section 1983 liability. \textit{See} 475 U.S. at 802 & nn.4-6 (Stevens, J., dissenting). It is conceivable that the Supreme Court concluded from that trial record that the municipal policy did not cause plaintiff's constitutional injury. The trial court's dismissal order, however, was premature: it should not have concluded from the jury's general verdict that Mr. Heller had suffered no constitutional injury without first requiring the jury to answer a special interrogatory. \textit{See infra} text following note 254.

\textsuperscript{234} \textit{Id.} at 803 (Stevens, J., dissenting). The dissenters characterized the majority's dismissal of the \textit{Monell} claim as “simply inexplicable.” \textit{Id.} at 801 (Stevens J., dissenting). They viewed the trial testimony as establishing that a municipal policy or custom existed pursuant to which police officers were trained in the use of “escalating force,” namely the chokehold procedure. \textit{See supra} note 226. Based on the trial court's instruction that the jury should consider the permissibility of the police officer's use of force “in light of all the surrounding circumstances,” \textit{Heller}, 475 U.S. at 803 n.8 (Stevens, J., dissenting), the dissenters believed that a jury might well have concluded the officer's conduct was not unreasonable because he was “merely obeying orders and following established Police Department policy,” \textit{id.} at 803. Consequently, the dissent concluded that the jury's “general verdict rejecting the excessive force claim against Officer Bushey did not necessarily determine the constitutionality of the city's 'escalating force' policy.” \textit{Id.} (Stevens, J., dissenting).

\textsuperscript{235} \textit{See id.} at 804-06 (Stevens, J., dissenting). In criticizing the majority's dismissal of the \textit{Monell} claim, Justice Stevens suggested that “normal devices for addressing an apparently inconsistent verdict” should have been invoked. \textit{Id.} at 807 (Stevens, J., dissenting). A trial court, explained the Justice, has various options, including “construing the verdict in a manner that resolves the inconsistency; resubmitting the case to the jury for it to resolve the inconsistency; or even ordering a new trial.” \textit{Id.} (Stevens, J., dissenting).

\textsuperscript{236} \textit{Id.} at 801 (Stevens, J., dissenting).

\textsuperscript{237} \textit{Id.} at 808 (Stevens, J., dissenting).

\textsuperscript{238} \textit{Id.} at 807 (Stevens, J., dissenting). Describing bifurcation as a “tactical weapon of great value,” Justice Stevens reflected upon the enormous benefit it represented for municipal defendants. Henceforth, such defendants would “obtain the benefit of whatever intangible fac-
plained that defense attorneys could use a bifurcation ruling to construct a virtually unassailable defense for both the individual officer and the municipality charged with civil rights violations.\textsuperscript{239} Noting that Heller's counsel had objected to the trial court's bifurcation order, Justice Stevens described the defense strategy when a qualified immunity defense\textsuperscript{240} is unavailable: first concede the officer's "wrongdoing" (i.e., that he had used the chokehold), and then argue he was only following police department regulations.\textsuperscript{241} Thus the blame and responsibility for the plaintiff's injuries would be placed squarely in the empty chair of the municipal defendant.\textsuperscript{242} In this situation, a jury that believes that the plaintiff suffered a constitutional injury would likely sympathize with the plight of the individual officer and find in her favor, believing that the municipality would be held accountable for the unlawful practice it maintained. The jurors would not know that the defense strategy would absolve not only the individual officer, but quite likely the municipality as well.

Though some trial courts have validated the defense strategy outlined in Stevens' dissent,\textsuperscript{243} such an expansive reading of Heller is incor-
rect. In the only two post-\textit{Heller} Supreme Court decisions on municipal liability under section 1983, the Court affirmed jury verdicts against municipalities despite the exoneration of individual defendants. In \textit{Praprotnik v. City of St. Louis},\textsuperscript{244} the Court purposefully avoided deciding the case before it on the basis of \textit{Heller}, stating: "[W]e do not address [the municipality's] contention that the jury verdict exonerating the individual defendants cannot be reconciled with the verdict against the city."\textsuperscript{245} The following year in \textit{City of Canton v. Harris},\textsuperscript{246} the Court again upheld a jury's finding of municipal but not individual liability. The \textit{Canton} Court relied on \textit{Monell}'s precepts in extending municipalities' exposure to liability for deliberate indifference to the proper training of their police officers.\textsuperscript{247} The Court did not discuss \textit{Heller}, and cited the case but once—for the proposition that section 1983 requires proof that a municipal policy caused the constitutional violation, noting that this requirement had "deeply divided" the Justices since \textit{Monell}.

Had the Court intended that \textit{Heller} require a finding of individual liability as a condition precedent to municipal liability, it surely would have highlighted and relied upon the earlier opinion, or at least discussed its potential applicability, in deciding both \textit{Praprotnik} and \textit{Canton}. Instead, it did neither; indeed, both later cases are incompatible with a broad construction of \textit{Heller}. As one commentator concluded: "If municipal liability was proper in \textit{Canton}, \textit{Heller} cannot mean that exoneration of individual defendants precludes municipal liability."\textsuperscript{249}

Not only do Supreme Court decisions, both before and after \textit{Heller}, preclude application of that decision to require dismissal of \textit{Monell} claims when individual defendants are absolved; common sense does too. Proof that an officer's use of force complied with the training he received or with a customary police practice should not relieve the municipality

\textsuperscript{244} 485 U.S. 112 (1988); see \textit{supra} notes 166-169 and accompanying text.

\textsuperscript{245} \textit{Praprotnik}, 485 U.S. at 128. The Eighth Circuit had distinguished \textit{Heller} and reconciled the jury's verdict against the municipality with that in the individual defendant's favor by finding that the individual defendants did not directly cause the layoff from which the damages arose. \textit{Praprotnik} v. City of St. Louis, 798 F.2d 1168, 1173 n.3 (8th Cir. 1986), rev'd, 485 U.S. 112 (1988). The Supreme Court made its lone reference to \textit{Heller} in simply noting the fact that the lower court had distinguished that case. \textit{See} \textit{Praprotnik}, 485 U.S. at 117-18.

\textsuperscript{246} 489 U.S. 378 (1989).

\textsuperscript{247} \textit{See} \textit{supra} notes 170-177 and accompanying text.

\textsuperscript{248} \textit{Canton}, 489 U.S. at 385-86, 386 n.4 (plurality opinion of O'Connor, J.) (citing \textit{Heller}, as one of four cases since \textit{Monell} in which the Court had been deeply divided over the proper causal connection between municipal policy and injury).

\textsuperscript{249} Kritchevsky, \textit{supra} note 35, at 440-41; \textit{see also} \textit{supra} note 232.
from potential liability unless it is first determined that the "force" policy is within constitutional limits. Should its policy exceed constitutional limits, the municipality would be held responsible "for its own" actions that caused a constitutional injury, unless saved by a court's expansive view of *Heller*.\(^{250}\) Likewise, dismissal of a *Monell* claim would not be warranted when a jury concludes that it was not a named defendant, but rather an unidentified officer, who caused a constitutional injury attributable to a municipality's policy of inadequate training or supervision, for example. Similarly, when a plaintiff establishes that a constitutional injury resulted from a municipal policy or custom, the municipality would not avoid accountability solely because the named police defendants were no longer parties to the action.

Proper reliance on *Heller* will lead trial courts to dismiss municipal claims in limited instances. For example, a municipal defendant should obtain dismissal of a *Monell* claim through a motion for summary judgment\(^{251}\) when a court decides as a matter of law that there has been no constitutional violation.\(^{252}\) If the court concludes as a matter of law that the plaintiff did not suffer a recognizable injury, she would lack standing

\(^{250}\) *Monell*, 436 U.S. at 683. For instances in which courts upheld a jury's verdict against the municipality despite finding no liability on the part of the individual officer, see Parrish v. Luckie, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under section 1983, even though no government individuals were personally liable.")., and Simmons v. City of Philadelphia, 947 F.2d 1042, 1058-65 (3d Cir. 1991) (finding no inconsistency between jury's determination that police officer's actions did not amount to constitutional violation and its decision that city was liable under section 1983 for its policy of deliberate indifference to serious medical needs of intoxicated and potentially suicidal detainees and failure to train officers to detect and meet such needs), cert. denied, 112 S. Ct. 1671 (1992).

\(^{251}\) Under Rule 56(c), a court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56*(c). In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Supreme Court reaffirmed that in deciding a motion for summary judgement, the nonmoving party's evidence must "be believed and all justifiable inferences [must] be drawn in [the nonmovant's] favor." *Id.* at 255.

\(^{252}\) See, e.g., Apodaca v. Rio Arriba County Sheriff's Dep't, 905 F.2d 1445, 1447 (10th Cir. 1990) (affirming grant of summary judgment upon finding that officer's negligence did not give rise to a constitutional violation and hence that there was no *Monell* action for failing to train or supervise the officer); Belcher v. Oliver, 898 F.2d 32, 36 (4th Cir. 1990) (reversing denial of summary judgment upon finding as a matter of law that no constitutional violation resulted from a jail suicide and thus there was no need to address whether a municipal policy was responsible for the officers' action); Roach v. City of Fredericktown, 882 F.2d 294, 297, 298 (8th Cir. 1989) (affirming dismissal of *Monell* action for failure to state a claim upon finding that no Fourth Amendment or due process violation resulted from a high speed chase); Fulkerson v. City of Lancaster, 801 F. Supp. 1476, 1484 (E.D. Pa. 1992) (granting summary judgment because "no reasonable jury could find that the municipality acted with deliberate indifference to plaintiff's rights"); infra note 314 (discussion of *Fulkerson*).
to sue the municipality. In such instances, *Heller* mandates dismissal because the plaintiff "has suffered no constitutional injury at the hands of the individual police officer, [and] the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."254

Courts may also properly apply *Heller*, although only with extreme care, to dismiss a *Monell* claim when a jury's verdict clearly reflects its finding that the plaintiff did not suffer a constitutional injury. To obtain this information, trial courts should instruct the jurors to answer the following during their deliberations: "Do you believe the plaintiff was deprived of a constitutional right?" The use of this special interrogatory would avoid improper dismissal of *Monell* claims when the jury absolves the individual officer. It would also allow trial courts to determine whether a verdict absolving the individual should also absolve the municipality.

When trial courts condition a municipality's liability under section 1983 on an initial finding that an officer is also liable, they establish "a reverse respondeat superior principle."255 Such a principle is contrary to the policy considerations underlying municipal liability. The Supreme Court's consistent reliance on *Monell*'s basic principles, as well as its limited use of *Heller*, makes clear that a municipality should remain subject to liability when a litigant establishes "a direct causal link between a municipal policy and the alleged constitutional deprivation."256 When trial courts apply *Heller* broadly and dismiss *Monell* claims upon a litigant's failure to prove an officer's individual liability, municipal defendants will rarely be held accountable for their unconstitutional policies or customs.257 Municipalities receive what amounts to immunity from section

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255. *Dodd v. City of Norwich*, 827 F.2d 1, 9 (2d Cir. 1987) (Pratt, J., dissenting), *cert. denied*, 484 U.S. 1007 (1988). Although the court of appeals in *Dodd* found (on reargument) that the individual officer was entitled to qualified immunity, Judge Pratt argued persuasively that the city could still be held liable because such liability would be "based on different principles than the liability of its police officer." *Id.* (Pratt, J., dissenting). To prove his *Monell* claim, the plaintiff would have to establish that a municipal policy was causally connected to his constitutional injury. *Id.* at 10 (Pratt, J., dissenting).


257. Schwartz and Kirklin have suggested an alternative approach for litigants seeking to establish that a municipality's policy or custom is responsible for causing a constitutional injury: by suing only the municipality, and not the individual officer, a litigant may avoid a court's expansive reading of *Heller*. 1 SCHWARTZ & KIRKLIN, *supra* note 35, § 7.6, at 347.
1983 liability because, as the next section explains, jurors tend to find in favor of individual police defendants.

B. The Difficulty of Overcoming a Jury's Pro-Police Officer Bias

In jurisdictions that apply *Heller* expansively, the individual officer's defense is readily predictable once the trial court orders bifurcation: step one is to select a sympathetic trial jury, preferably one that is predominantly white or excludes African-Americans; step two is to convince this jury that the plaintiff's proof falls short of establishing that

They warned, however, that “[n]aming only the entity as a party defendant is risky business when there is uncertainty as to whether the violation of the plaintiff's federally protected rights resulted from enforcement of a municipal policy or practice.” 1 id. at 348.

258. Most states and municipalities indemnify police officers charged with section 1983 liability when their actions occur in the line of duty and are not grossly inconsistent with their training. For example, state law requires New York City to “indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court.” N.Y. GEN. MUN. LAW § 50(k)(3) (McKinney 1986). Under the law of Massachusetts, Boston must indemnify each of its police officers for up to one million dollars of liability for actions “within the scope of his [or her] official duties.” MASS. ANN. LAWS, ch. 258, § 9 (Law. Co-op. 1992). California's indemnification statute also protects police officers from liability for any “act or omission occurring within the scope of [their] employment,” so long as “the employee . . . reasonably cooperates in good faith in defense of the claim.” CAL. GOV'T CODE § 825(a) (West Supp. 1993); see also CONN. GEN. STAT. § 29-8a (1990) (indemnifying state police against civil rights liability when “acting in the discharge of [their] duties,” so long as the officer's actions were not “wanton, reckless, or malicious” and did not lead a jury to assess punitive damages); ILL. REV. STAT. ch. 24, para. 1-4-5 (1990) (requiring municipalities having a population over 500,000 to indemnify police officers for actions “in the performance of his or her duties, . . . except where the injury results from the willful misconduct of the police officer”). When indemnification occurs, the municipality's attorneys will usually represent the individual defendants at the first bifurcated trial. If they succeed in persuading the jury that the officers are not liable, the municipality gains an enormous benefit: it can argue pursuant to *Heller* that the court should dismiss the section 1983 *Monell* claim against it. For discussion of the possible conflict of interest in this dual representation, see infra notes 349-355 and accompanying text.

259. In a previous article, this author detailed the historic role of predominantly white juries in absolving law enforcement officials and white defendants accused of violence against persons of color and in convicting African-Americans in race-sensitive cases. See Colbert, *Challenging the Challenge, supra* note 49. Jurists and scholars have also recognized the importance of a jury's racial composition in these cases. See, e.g., Georgia v. McCollum, 112 S. Ct. 2348, 2364 (1992) (O'Connor, J. dissenting) (“It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.”); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625-35 (1985) (describing nine mock jury studies showing that white juries had higher conviction rates for African-American and Latino-American defendants, and concluding that a minimum of three racially similar jurors is necessary to withstand white majority group pressure); *Developments in The Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1559-60 (1988) (discussing the harm of racial minorities' underrepresentation on juries). See generally Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*. (1977).
the officer violated the plaintiff's constitutional rights. While certainly not a novel defense strategy, this combination has consistently foiled efforts to hold police officers accountable for uses of excessive force in the rare instances in which criminal prosecutions have been pursued; it is likely to work in civil rights actions as well.

(1) Jury Sympathy

As Justice Stevens indicated in his Heller dissent, juror sympathy for individual officers is often decisive when civil rights claims are bifurcated. First, jurors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department policy as an obedient employee. Second, most jurors are predisposed to credit police officers' testimony. They see the officer's job as difficult and dangerous; police officers protect them and other law-abiding citizens from dangerous people. Jurors are receptive to suggestions that the officer had insufficient time to reflect or deliberate in the face of a life-threatening situation. The officer, they are told, must react instinctively when his own (or someone else's) life and safety is at

260. This discussion contemplates that like the officer-defendant in Heller, individual defendants are unable to rely on a qualified immunity defense and will attempt to persuade a jury that their actions were not unreasonable considering the overall surrounding circumstances. Heller, of course, does not foreclose section 1983 relief against a municipality following an individual officer's successful qualified immunity defense. See supra note 229.

261. In New York City, there have been only ten cases during the past ten years in which police officers were indicted for killing civilians. Of the seventeen officers indicted, only one was convicted, and that was for manslaughter arising out of a drunk driving incident. At The Hands of Police: The Court Record, NEWSDAY, Mar. 10, 1991, at 4. In two of the more publicized cases, three transit police officers were acquitted of criminally negligent homicide in the killing of Michael Stewart, id., and a New York City police officer was acquitted in a bench trial for killing Eleanor Bumpurs, a 66-year-old grandmother, while evicting her from her apartment, Frank J. Prial, Judge Acquits Sullivan in Shotgun Slaying Of Bumpurs, N.Y. TIMES, Feb. 27, 1987, at B1.

262. See Heller, 475 U.S. at 807 (Stevens, J., dissenting); see also Murphy, supra note 3, at 25.

263. In discussing the "troublesome aspects of prosecuting a police brutality matter," former prosecuting attorneys explained that "juries may accord greater credence to the testimony of an arresting officer than to a suspect" in these cases. Daniel Wise, Brutality Cases Tough to Prosecute, N.Y. L.J., May 29, 1992, at 1, 2. The former chief of the district attorney's trial division in Manhattan added that "many jurors are reluctant to believe that officers would perjure themselves." Id. As Jon Van Dyke noted, the few reported studies of the racial composition of juries found that the inclusion of African-Americans on a panel made the new, racially integrated jury more likely to scrutinize and to challenge a police officer's testimony. VAN DYKE, supra note 259, at 34-35.

264. When prosecuting a charge involving a police officer's use of excessive force, former prosecutors acknowledged that trial juries represent a significant "stumbling block" that provides a built-in "advantage . . . to police officers charged with stepping over the line in handling volatile, difficult-to-call situations." Wise, supra note 263, at 2.
risk. When possible, the defense portrays the civil rights litigant as a feared criminal. Many jurors will be receptive to depictions of the litigant as personally threatening and will view his behavior as justifying the officer’s actions. During deliberations, whether consciously or not, most jurors prefer to reach a verdict that supports the police officer; they do not want to be labeled “pro-criminal.”

(2) Sufficiency of Proof

Civil rights litigants confront a difficult burden in attempting to establish an individual officer’s section 1983 liability. They must present evidence sufficient to overcome not only the burden of proving specific intent, but also the jury’s pro-police bias. In most situations involving the use of excessive force by police, few if any civilian witnesses are available to corroborate the plaintiff’s version of how the injury occurred. Even when civilian witnesses come forward, they are frequently vulnerable to impeachment by traditional cross-examination methods. They are

265. The California jury in People v. Powell viewed a videotape of the defendant police officers striking Rodney King 56 times with their batons. After they voted to acquit the four police officers of using excessive force, some jurors explained their belief that Rodney King’s threatening behavior had justified the police action. Retta Kossow, who gave several anonymous television interviews immediately after the verdict, stated: “I am thoroughly convinced, as were the others I believe, that Mr. King was in full control of the whole situation at all times. He was not writhing in pain. He was moving to get away from the officers and he gave every indication that he was under PCP.” Nina Bernstein, Bitter Division in Jury Room: How 12 Ordinary Citizens Met for 7 Days to Produce the Verdict That Shook L.A., NEWSDAY, May 14, 1992, at 5, 116. Although juror Charles Sheehan, described as adamant for acquittal, declined to be interviewed, his wife explained the basis for the jury’s verdict: “If Rodney King had just submitted to arrest, none of this would have happened.” Id. at 116; see also Seth Mydans, Defense Lawyer at Beating Trial Asserts Driver Prompted Violence, N.Y. TIMES, Apr. 22, 1992, at A16. Forewoman Dorothy Bailey recently explained that the jury’s verdict was based on “undisputed, unrefuted testimony” showing that the officers’ conduct was appropriate. Nightline: First King Trial Jury Foreman Speaks (ABC television broadcast, Mar. 8, 1993).

266. Obviously, not every juror conclusively or consciously favors the police. A jury’s ability to be fair and impartial in race-sensitive cases, however, depends to a substantial extent on the jury’s racial composition, particularly when the victim is African-American. Colbert, Challenging the Challenge, supra note 49, at 122-24. In such cases, significant representation of African-Americans on the jury is necessary to assure that the panel’s verdict is based on the evidence presented, rather than the victim’s race or the police officer’s status. Multiracial juries are essential for “overcoming one legacy of slavery: the conclusive presumption that black persons’ testimony is not worthy of belief.” Id. at 114; see Johnson, supra note 259, at 1623-35 (reviewing sociological research that establishes the importance of a jury’s racial composition for the impartiality of its verdict in cases involving African-American crime victims); see also Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (“When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.”).

267. See Murphy, supra note 3, at 25; Stolberg, supra note 3, at A1.
likely to come from the same community as the plaintiff and to be susceptible to the same defense stereotyping.\textsuperscript{268} Moreover, even if jurors find these witnesses credible, the jury is likely to conclude that the plaintiff's evidence is not sufficiently persuasive to outweigh the credibility of defense witnesses' testimony, particularly when the defendant officer testifies. Because most confrontations between police officers and citizens are neither recorded nor photographed, juries frequently cannot resolve factual inconsistencies and, consequently, give police the benefit of any doubt. The fact of pro-police bias was most dramatically demonstrated by the defense verdicts in the state criminal prosecution of the Los Angeles police officers who beat Rodney King: even when a videotape reveals what appears to be overwhelming evidence of the police using excessive force, there is no assurance that a jury will credit the picture shown.\textsuperscript{269}

When there are no civilian witnesses, a civil rights litigant could look for corroboration from the other police officers who were present. She could expect little help from the defendant officers, whose version of events would obviously tend to justify their conduct. But other police officers present would be equally unlikely to serve as plaintiffs' witnesses. Police officers follow a strictly enforced custom of refusing to offer testimony that would adversely affect another officer. "[E]nforced by peer pressure, and tacitly sanctioned by the refusal of [Police] Department[s] to impose on [their] employees any obligation to disclose, even under questioning, misconduct by their fellow officers,"\textsuperscript{270} the code of silence makes it virtually impossible for police officers who witness a fellow officer engaging in unlawful violence against a citizen to testify about it.\textsuperscript{271}

\textsuperscript{268} When a witness is a relation or close friend of the plaintiff, the defense will suggest that the witness is biased. Should the witness appear hostile to police, or have had any prior unpleasant experiences, the defense would attempt to expose the witness's hostility on cross-examination. David Rudovsky described some of the "burdens" that civil rights plaintiffs face—burdens that adversely affect them before a jury: "They are often poor, or members of racial minorities, or uneducated or inarticulate; some have criminal records. Jurors tend to dismiss their allegations..." David Rudovsky, \textit{Police Abuse: Can The Violence Be Contained?}, 27 \textit{HARV. C.R.-C.L. L. REV.} 465, 490 (1992). When, as is often the case, a plaintiff's witness shares these characteristics, the defense would attempt to expose them during cross-examination in order to damage the witness's credibility.

\textsuperscript{269} See \textit{ supra} notes 263-266 and accompanying text.

\textsuperscript{270} Brandon v. Allen, 645 F. Supp. 1261, 1266-67 (W.D. Tenn. 1986). The district court in \textit{Brandon} found that there was "a code of silence binding patrolmen and supervisors alike not to testify against or report on their colleagues," and that it "pervaded the Department and was tolerated and effectively sanctioned by its highest officials." \textit{Id.} at 1266-67; see \textit{also} Brandon v. Holt, 469 U.S. 464, 467 n.6 (1985) (describing how officers' and citizens' complaints were discouraged and squelched (quoting Brandon v. Allen, 516 F. Supp. 1355, 1361 (W.D. Tenn. 1981))).

\textsuperscript{271} The police code of silence is an unwritten but widely recognized practice under which police officers refuse to testify against fellow officers and, if necessary, engage in cover-ups in
Civil rights litigants face other, related proof problems in suits against individual police officers. The circumstances in which police use excessive force commonly make it difficult for the plaintiff, or any civilian bystanders, to provide a positive and convincing identification of the culpable officer. A common defense strategy is to concede that the plaintiff was deprived of her constitutional rights, but argue that the wrong

order to protect other officers. Albert J. Reiss, Jr., The Police and The Public 213-14 (1971); Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 58, 249 (2d ed. 1975). Law enforcement officials recognize the code's existence. A Washington, D.C. police officer recently sued two police unions, charging that they defamed him and caused him emotional distress by systematically harassing him after he broke the code of silence. See John Murawski, A Cap Shatters the Code of Blue, Legal Times, Jan. 18, 1993, at 1, 6; see also Letta Taylor & Alvin E. Bessent, Police and the Use of Force, Newsday, June 3, 1991, at 7 (describing a police officer in Suffolk County, New York who quit the force and moved to Florida, "complaining bitterly that he was ostracized and refused police backup for speaking out about police misconduct"). In New York City, senior police officials were recently accused of hindering an internal investigation of six officers charged with drug trafficking. George James, 2d Police Inquiry Begins into Drug-Dealing Charge, N.Y. Times, June 16, 1992, at B3. Several years earlier, New York's Police Commissioner advocated prison sentences for police officers who were obstructing a criminal investigation into the use of stun guns, saying it was the only means of shattering "the blue wall of silence." Selwyn Raab, Five Police Officers Indicted by Jury in Torture Case, N.Y. Times, May 3, 1985, at A1, B5; see also Tim Weiner, Ex-Officer Who Broke Code of Silence Given Probation, Phila. Inquirer, Feb. 13, 1985, at A1 (quoting U.S. Attorney Edward S.G. Dennis, Jr.: "There is a custom that has developed within the Philadelphia Police Department that Philadelphia police officers will acquiesce in the illegal and improper conduct of their fellow officers, and that when called to tell the truth . . . the Philadelphia police officer will remain silent."); Brian McGrory, Across US, Public's Confidence in Police Officers Takes a Plunge, Bonds of Brotherhood Enforce Code of Silence, Boston Globe, July 15, 1991, at A1; Wis, supra note 263, at 1 (describing problems for prosecutors resulting from code of silence). Interestingly, prosecutors in the federal trial of the Los Angeles officers charged with beating Rodney King appeared ready to challenge the credibility of defense witnesses based on the code of silence. Tactic Unchanged in Beating Trial, N.Y. Times, Mar. 19, 1993, at A18.

Courts too have recognized the pervasiveness of the code of silence. See, e.g., Sorlucco v. New York City Police Dep't, 971 F.2d 864, 872-73 (2d Cir. 1992) (discussing evidence of police officers' reluctance to report misconduct for fear of retaliation); Spell v. McDaniel, 824 F.2d 1380, 1392 (4th Cir. 1987) (admitting evidence demonstrating that officials engaged in cover-up of police abuses), cert. denied, 472 U.S. 1017 (1988); United States v. Ambrose, 740 F.2d 505 app. at 521 (7th Cir. 1984) (district court's oral remarks at sentencing hearing) ("[t]his is a fact, and it was even admitted from the witness stand, that there is a code of silence, and that most policemen observe it."); Thomas v. City of New Orleans, 687 F.2d 80, 83 (5th Cir. 1982) (finding that a police conspiracy to arrange the wrongful discharge of an officer was part of a code of silence designed to discourage policemen from testifying against one another); Bonsignore v. City of New York, 521 F. Supp. 394, 398-99 (S.D.N.Y. 1981) (noting that code of silence was impressed upon new recruits at police academy), aff'd, 683 F.2d 635 (2d Cir. 1982). Moreover, Chicago civil rights attorneys have successfully prosecuted section 1983 causes of action against municipalities based on the code of silence. See, e.g., Myatt v. City of Chicago, No. 90-C-3991, 1992 WL 447832, at *4 (N.D. Ill. Nov. 24, 1992); McLin v. City of Chicago, 742 F. Supp. 994, 1001-02 (N.D. Ill. 1990); Burton v. Drakulich, No. 90-C-6808, 1991 WL 38701, at *1 (N.D. Ill. Mar. 21, 1991); Williams v. City of Chicago, 658 F. Supp. 147, 149-50 (N.D. Ill. 1987).
officer is on trial. Traditional cross-examination techniques will frequently establish that the plaintiff's witnesses had an insufficient opportunity to view the officer who actually committed an unlawful assault. In cases in which the plaintiff is the only person who can testify to identification, it is unlikely that she will ever prevail over the officer in a one-on-one credibility contest on this issue.\(^{272}\)

Trial courts that construe *Heller* broadly overlook these practical and substantial proof problems facing civil rights litigants when they routinely dismiss *Monell* claims after a jury fails to find an individual officer liable. To guard against the possibility of an unjust outcome when *Monell* claims are bifurcated, a trial court's jury charge should include a special interrogatory requiring the jury to find whether the plaintiff sustained a constitutional injury.\(^{273}\) When a jury then indicates that such an injury has occurred, trial courts must permit the plaintiff to present evidence of the municipality's section 1983 liability.

The following Part presents evidence of federal courts' growing reliance on Rule 42(b) to bifurcate *Monell* claims from those against individual officers in section 1983 litigation. These rulings deviate from the principles used to decide bifurcation motions in ordinary civil cases. More significantly, they often create a forum hostile to plaintiffs, in which a court's case management concerns triumph over civil rights litigants' efforts to vindicate constitutional rights violated by individual and municipal actors.

V. The Current Trend Toward Bifurcation in Section 1983 Cases

The first reported instance of a trial judge ordering bifurcation of the claim against a municipal defendant from that against an individual officer in a section 1983 case occurred in *City of Los Angeles v. Heller*.\(^{274}\) Relying on the Supreme Court's abbreviated 1986 *Heller* opinion,\(^{275}\) federal district judges sitting in Los Angeles, New York, and Boston have begun to bifurcate *Monell* claims in section 1983 cases. Because there are few published decisions treating the issue of *Monell* bifurcation,\(^{276}\) the

\(^{272}\) See REISS, *supra* note 271, at 212; SKOLNICK, *supra* note 271, at 231-43.

\(^{273}\) See *supra* text following note 254; see also *supra* notes 37, 233.

\(^{274}\) 475 U.S. 796 (1986) (per curiam); see *infra* Part IV.A.

\(^{275}\) See *supra* notes 225-226 and accompanying text.

\(^{276}\) For a review of the reported decisions, see *infra* notes 278, 289-297, 302 and accompanying text. There are no reported federal court of appeals decisions. Second Circuit Court of Appeals Judge George Pratt explained that "appellate courts have had nothing to say about bifurcation because it is discretionary with the trial judge." Judge George Pratt, Address at the Practicing Law Institute Conference on Section 1983 (Oct. 31, 1992).
following discussion relies on conversations with practicing attorneys, representing both plaintiffs and defendants, to provide an indication of the extent to which courts in these jurisdictions are bifurcating such claims.\textsuperscript{277} Apparently, the practice is commonplace in these localities, and there is some evidence that it is employed in other jurisdictions as well.\textsuperscript{278}

Attorneys surveyed indicate that regional differences exist in the breadth and meaning of bifurcation orders. Courts in Los Angeles and Boston normally issue bifurcation orders only after the parties complete discovery on the Monell claim; they require the municipal claim to be tried separately, after the trial of the individual claim (trial bifurcation).\textsuperscript{279} If the jury finds the individual officer liable in such a bifurcated...
trail, a trial on the Monell claim usually follows immediately, before that same jury. In New York City, plaintiffs’ attorneys face more intrusive bifurcation orders that prevent them from conducting discovery on Monell claims until, and permit it only after, a jury first finds the officer liable at a bifurcated trial (discovery bifurcation).280

Since the Supreme Court’s decision in Heller, Los Angeles civil rights attorneys have faced trial bifurcation of Monell claims and expansive applications of Heller on a regular basis. Steven Yagman, who represented Mr. Heller, encounters bifurcation motions in virtually all the cases on his busy section 1983 docket.281 He estimated that federal judges in the Central District of California order bifurcation in “ninety-five percent of section 1983 trials.”282 Moreover, when combined with a misreading of Heller, Yagman agreed that bifurcation can be lethal to a plaintiff’s case: “If you don’t win the first trial, there is no trial against the municipality.”283 Tom Beck, whose Los Angeles practice deals exclusively with section 1983 claims, reported that “trial bifurcation is now entrenched in federal court, with only one or two exceptions.”284 Because the “bifurcation practices of some judges are well-known,” Beck added, “I have stopped arguing against separate trials in most instances.”285 Michael Lightfoot, another Los Angeles civil rights attorney, stated: “During the past several years, judges have followed Heller and consistently bifurcated [the trials of] every section 1983 case I’ve handled.”286 Los Angeles attorney Barry Litt agreed that trial bifurcation “is a typical judicial practice in a section 1983 case.”287

During the same approximate period, federal judges in New York City also began bifurcating Monell claims at trial. Many are now extending the practice to prevent plaintiffs from proceeding with discovery on their civil rights claims against the municipality.288 Judge Peter Lei-

280. See infra notes 288-306 and accompanying text. Discovery bifurcation necessarily includes trial bifurcation, and is more intrusive because it also prohibits discovery on the Monell claim until after trial or other disposal of the individual claims. Another significant difference between the two forms of bifurcation is that bifurcated trials normally take place before the same jury, while cases bifurcated for discovery are completely severed; if the second case comes to trial, it will be before a new jury.
281. Telephone Interview with Steven Yagman, supra note 220.
282. Id.
283. Id. Attorneys in New York and Boston have had similar experiences. See infra notes 302, 308 and accompanying text.
285. Id.
288. See infra note 297 and accompanying text.
sure’s opinion in the 1989 southern district case of Ismail v. Cohen\textsuperscript{289} became the first published decision by a New York federal court ordering trial bifurcation of Monell claims in section 1983 litigation. Ismail is frequently cited to support the current defense practice.\textsuperscript{290}

Interestingly, Ismail involved a motion by the plaintiff (not the defense), who sought bifurcation of the Monell claim in order to avoid “the jury becoming confused and distracted.”\textsuperscript{291} Viewing the bifurcation issue from the plaintiff’s perspective, Judge Leisure ordered separate trials because he feared that the Monell evidence would “‘contaminate’ the mind of the finder of fact in its consideration of the liability of the other defendant.”\textsuperscript{292} Judge Leisure expressed concern that a single trial would prejudice the jury’s fair evaluation of the plaintiff’s evidence against both defendants.\textsuperscript{293} Moreover, because separate trials would “be determinative” on the issue of the city’s vicarious liability, the judge believed that bifurcation would “promote[ ] ease of adjudication.”\textsuperscript{294}

In Ismail, the court ordered bifurcation at the plaintiff’s request after discovery on the Monell claim was concluded. The court exercised its discretion to bifurcate only after making an informed judgment based on the facts of the case. For example, it considered whether bifurcated trials


\textsuperscript{291} Telephone Interview with Robert Herbst, Counsel for Labib Ismail (Aug. 31, 1992). In Ismail, Herbst thought that the Monell claim was weak, and for this reason moved to bifurcate and to try the section 1983 action against the officer first, along with state law claims. Id.

\textsuperscript{292} Ismail, 706 F. Supp. at 251.

\textsuperscript{293} The Court stated its concern that evidence concerning a de facto policy encouraging discrimination of the City, or that the City failed to train adequately its officers, could prejudice the jury in its determination of the culpability of [the individual officer] . . . . Likewise, if the jury determines that Officer Cohen is culpable this might unfairly influence its determination of whether the City had a de facto policy leading to discriminatory treatment [of the plaintiff].

\textsuperscript{294} Id. The plaintiff’s state law and other federal civil rights claims were based on vicarious liability theories. The trial court concluded that these issues could properly be resolved in a separate trial because their proof would not overlap with the Monell issue, which “involve[d] a great deal of evidence . . . entirely unnecessary to the resolution of . . . the other claims in the case.” Id.
“would greatly expand the length and scope of the trial and add to the expense of the parties.”

The decision contemplated that the Monell claim would be heard by the same jury that was to determine the individual officer’s section 1983 liability. Most significantly, Judge Leisure’s order did not condition Monell relief on a jury finding of individual liability.

Currently, judges in the Southern and Eastern Districts of New York are commonly granting defense motions to bifurcate Monell claims at the discovery and trial stages of section 1983 cases. They appear to do so as a matter of routine practice and over the objection of plaintiffs’ counsel. Most New York City-area judges rarely analyze the rationale for bifurcation in reasoned, written opinions. Nor do their written or-

295. Id. at 252.
296. See id.


298. See cases cited supra note 297; see also infra text accompanying notes 364-369 (describing the difficulties that bifurcation creates for plaintiffs). On the other hand, New York City supervising attorneys have observed that some plaintiff’s attorneys are consenting to defense bifurcation motions. Lawrence S. Kahn, Chief Litigation Assistant, New York City Corporation Counsel, Address at the Practicing Law Institute Conference on Section 1983 (Oct. 31, 1992); Joint Interview, supra note 278 (statement of Second Supervising Attorney).

299. In Kohn, No. 90 Civ. 5730, for example, Judge John Martin ordered discovery and trial bifurcation at the initial case conference. Telephone Interview with Daniel Alterman, Counsel for Frederic Kohn (Oct. 13, 1991). Judge Martin also ordered bifurcation before discovery in Quick, No. 87 Civ. 0695, 1990 WL 422418, at *1, and Hernandez, No. 87 Civ. 8774, slip op. at 2 (Bernikow, Mag., assigned by Martin, J.). Other trial courts have also ruled on defendants' bifurcation motions without significant argument or submission of legal briefs. See, e.g., Transcript of Motion at 2, Campbell (No. 88 Civ. 3730); Form Brief, supra note 290, at 16-17 (describing grant of discovery bifurcation on oral motion in Hood (No. 86 Civ. 7656), and sua sponte in Figueroa (No. 88 Civ. 0807)). Plaintiffs' attorneys James Meyerson and Jonathan Moore indicated that they became familiar with judges' bifurcation orders in the Fall
ders consider whether separate trials will prejudice a litigant or cause economic hardship or inconvenience. Unlike the judge in *Ismail*, many judges enter sua sponte discovery bifurcation orders during the initial stages of a case, precluding discovery on the *Monell* claim until the individual officer's civil rights liability is determined. These orders usually rely on *Heller* to support both discovery bifurcation and the dismissal of *Monell* claims should individual liability not be proved. When a jury finds no individual liability, these judges dismiss the *Monell* claim; only in the event that the jury finds against the officer is the


300. See, e.g., *Kohn*, No. 90 Civ. 5730, slip op.; Transcript of Motion, *Ray* (No. 89 Civ. 0836); Transcript of Motion, *Campbell* (No. 88 Civ. 3730); *Quick*, No. 87 Civ. 0695, slip op.; *Hernandez*, No. 87 Civ. 8774, slip op.

301. See cases cited *supra* note 297.

302. For example, in *Campbell*, No. 88 Civ. 3730, Judge I. Leo Glasser granted the defendant's motion to bifurcate discovery on the *Monell* claim. During oral argument, Judge Glasser construed *Heller* expansively: "If the officers are found to be not liable, then the city would not be liable." Transcript of Motion at 3, *Campbell* (No. 88 Civ. 3730). The judge believed bifurcation was appropriate because "if the jury returned a verdict for the defendant police officer we never have to concern ourselves with all of that testimony and evidence regarding the City of New York." *Id.* at 5. He never considered the obvious alternative—submitting a special interrogatory to the jury in order to ascertain whether it believed that the plaintiff had been deprived of a constitutional right. For similar rulings, see *Quick*, No. 87 Civ. 0695, 1990 WL 422418, at *1 (Martin, J.) ("If plaintiff is unsuccessful in his action against the individual defendants there will be no need for a further trial against the municipal defendants . . . "). *Hernandez*, No. 88 Civ. 3730, slip op. at 2 (same (quoting *Quick*)), and Form Brief, *supra* note 290, at 17 (describing *Figueroa*, No. 88 Civ. 0807: "Judge Mukasey directed that discovery pertaining to plaintiff's pattern and practice claim be permitted only if plaintiff prevailed at the trial of the underlying incident.").

In *Ray*, No. 89 Civ. 0836, Judge Glasser applied his interpretation of *Heller* to preclude *Monell* discovery until after trial of the claims against the individual officer, even though the defendant prison guard based his defense on qualified immunity. Transcript of Motion at 6-7, *Ray* (No. 89 Civ. 0836); *cf. supra* note 229. Responding to the plaintiff's contention that a good faith defense does not foreclose municipal liability, Judge Glasser stated:

And if the jury finds that the force used against the plaintiff was not excessive and was justified for whatever reason may appear, either self-defense or for the purpose, legitimate purpose of maintaining the security or discipline of the institution or what have you, that would be the end of the matter. Wouldn't it?

*Id.* at 7. Judge Glasser concluded: "If the jury returns a verdict for the defendant in this case, I think this case would be at an end. I don't believe that you could thereafter claim that the City of New York is responsible for conduct which the jury found was not actionable or tortious." *Id.* at 7-8. Similarly, Judge Louis Freeh granted discovery bifurcation in *Deagle* in the belief that it would promote judicial economy: "If Deagle is unsuccessful in his claim against [the officer], he will no longer have a cause of action against the municipal defendants." No.
plaintiff eligible to begin discovery and proceed to trial on the municipal claim.

According to New York City Corporation Counsel attorneys, the issue of bifurcation had become a "hot topic" by the Spring of 1990, primarily because the city was "spending enormous amounts of time answering Monell discovery motions. Large plaintiffs' firms were running up astronomical attorneys fees." Beginning in the Fall of that year, many New York judges became receptive to the idea of bifurcating Monell claims for discovery and trial. New York City civil rights lawyers soon discovered that some judges ordered bifurcation sua sponte and without formal argument, while others acted only on defense motions and with more deliberation. Currently, according to a city supervising attorney, "just about every judge grants these motions routinely or bifurcates sua sponte."

In Boston, most federal judges follow the Los Angeles model of routinely bifurcating Monell claims for trial after the parties conclude discovery. Attorney Howard Friedman, one of a handful of Boston lawyers who specialize in section 1983 claims, estimated that "of the twelve sitting district court judges, only one or possibly two have refused to grant bifurcation motions." As a result, Friedman explained, Monell claims are rarely heard: "If you lose the first trial against the individual officer, there will not be a second trial; if you win, the city will indemnify and settle the case."

90 Civ. 8203, 1991 WL 267765, at *1. After exonerating the officer on a defense of qualified immunity, however, Judge Freeh declined to follow his earlier statement and correctly refused to dismiss the plaintiff's Monell claims. Deagle v. City of New York, No. 90 Civ. 8203, 1992 WL 116368, at *1 (S.D.N.Y. May 24, 1992) ("[I]t is still an open question whether a constitutional violation occurred and whether a municipal policy or custom 'caused' that violation.").

303. Interview with Trial Attorney Who Requested Anonymity, New York City Corporation Counsel, in New York, N.Y. (Aug. 10, 1992) [hereinafter Interview with Anonymous Trial Attorney]; see also infra notes 329-331.

304. At the time, New York's federal judges had just returned from a Second Circuit Judicial Conference. Although bifurcation of Monell claims was not included in the conference's program, Telephone Interview with Steven Flanders, Executive Director, Second Circuit Judicial Conference (Aug. 17, 1992), it is likely that judges informally discussed the "problem" of section 1983 claims against the City of New York. See infra note 320. According to attorneys for New York City, judges were well aware that plaintiffs' discovery demands on Monell claims were generating substantial opposition from city attorneys at the time of the conference. Joint Interview, supra note 278; Telephone Interview with Blanche Greenfield, Trial Attorney, New York City Corporation Counsel (Nov. 5, 1992).

305. See supra note 299.

306. Joint Interview, supra note 278 (statement of Second Supervising Attorney).


308. Id. Friedman recalled that Boston's former corporation counsel, Joseph Mulligan, emphasized at his retirement that "there had never been a section 1983 judgment against the
text\textsuperscript{309} and Boston civil rights attorney, is also familiar with defense motions for trial bifurcation: “Defendants began filing these motions maybe ten years ago, but it is only within the past few years that federal judges are granting the applications.”\textsuperscript{310} In western Massachusetts, civil rights attorney Chuck DiMare related that “attorneys for the city routinely ask to bifurcate, but until recently, these motions were always denied.”\textsuperscript{311} DiMare predicted: “There will be a shift following a recent jury verdict in which the trial magistrate’s frustration with the Monell claim led to his stating that he intended to bifurcate all future cases.”\textsuperscript{312}

Not all federal judges and city attorneys are following the trend toward bifurcation.\textsuperscript{313} David Rudovsky, coauthor of Police Misconduct and Philadelphia attorney, stated: “Apparently, Philadelphia is an exception to the general bifurcation trend. It is rare that defendants move to bifurcate, and rarer still for judges to grant the motion.”\textsuperscript{314} His colleague Jules Epstein said: “I have never had a case where a judge bifurcation.”

\textsuperscript{309} AVERY \& RUDOVSKY, supra note 8.

\textsuperscript{310} Telephone Interview with Michael Avery (July 28, 1992).

\textsuperscript{311} Telephone Interview with Chuck DiMare (Aug. 5, 1992).

\textsuperscript{312} Id.

\textsuperscript{313} Telephone Interview with Howard Friedman (Mar. 19, 1993).

\textsuperscript{314} Telephone Interview with David Rudovsky (Aug. 10, 1992). The Court of Appeals for the Third Circuit has maintained a consistently strong policy against routine bifurcation in any type of case. See cases cited supra notes 194-196. It has also rejected an expansive interpretation of City of Los Angeles v. Heller. In Simmons v. City of Philadelphia, 947 F.2d 1042 (3d Cir. 1991), cert. denied, 112 S. Ct. 1671 (1992), the Third Circuit upheld a jury's verdict that exonerated the individual defendants while holding the municipality liable for “its own policy, custom or training procedures, [which] directly—and with deliberate indifference—violated Simmons's constitutional rights.” Id. at 1058. The Simmons Court reaffirmed Monell's holding that “local governing bodies, although not subject to respondeat superior liability, may be sued directly under section 1983 for constitutional injuries arising from the implementation of municipal policies or customs.” Id. (citing Monell, 436 U.S. at 694). Simmons also offers a lucid explanation of how a plaintiff may prove a municipality's policy or custom of deliberate indifference, see id. at 1059-63, and the evidence needed to establish the requisite state of mind, see id. at 1062-63. In Fulkerson v. City of Lancaster, 801 F. Supp. 1476 (E.D. Pa. 1992), a district judge reiterated that Heller does not mandate dismissal of Monell claims simply because the individual officer is absolved of liability.

In Simmons, and in the case at bar, the individual officer is found not liable based on the lack of the requisite mental state—gross negligence or recklessness—rather than based on a lack of any constitutional injury. Therefore, we cannot absolve the City of Lancaster based solely on our decision that Sergeant Deck was not liable.  

\textit{Id.} at 1485.
cated the Monell claim. . . . As far as I know, the judges in Philadelphia are upholding the idea of a single trial in such cases.\textsuperscript{315} Alan Yatvin, another Philadelphia civil rights attorney, added that “city attorneys have not attempted to bifurcate Monell claims, but the issue arose recently when a judge granted a defense attorney’s motion in a pending section 1983 case in which Amtrak was the defendant.”\textsuperscript{316} In Detroit, civil rights attorney Richard Soble indicated that he too was “unaware that bifurcation is being utilized in section 1983 cases heard in the Eastern District [of Michigan],” and described the practice as “extremely rare.”\textsuperscript{317}

Despite the paucity of published authority, practical experience indicates that bifurcation of Monell claims is firmly entrenched in Los Angeles, New York, and Boston. Federal judges in Los Angeles and Boston generally use trial bifurcation, while those sitting in New York employ the more drastic discovery bifurcation model. The remainder of this Part presents the perspectives of federal judges and practicing defense and plaintiffs’ attorneys on bifurcation in civil rights litigation. The following discussion demonstrates that unless checked, bifurcation can be expected to spread to other jurisdictions with heavy section 1983 dockets.

A. Judges

It is easy to see why trial courts welcome bifurcation as a means to manage a busy calendar and to avoid what they view as prolonged and unnecessary Monell litigation. Courts’ burgeoning caseloads remain a matter of serious administrative concern, and measures aimed at economizing scarce judicial resources are indispensable.\textsuperscript{318} At an orientation

\textsuperscript{315} Telephone Interview with Jules Epstein (Aug. 3, 1992).
\textsuperscript{316} Telephone Interview with Alan Yatvin (Aug. 3, 1992).
\textsuperscript{317} Telephone Interview with Richard Soble (Aug. 4, 1992). Similarly, a judge sitting in the less urban Western District of Michigan reported that he had never heard of the issue of bifurcation being raised in excessive force cases. Telephone Interview with Judge Richard A. Enslen, U.S. District Court for the Western District of Michigan (Apr. 14, 1992) (conducted by research assistant Bethany Conybeare).
\textsuperscript{318} The federal judiciary sought an increase of $440 million in its fiscal 1993 budget “to help it cope with a rising work load.” More Work, More Money, 24 Nat’l J. 524, 524 (1992). Congress rejected the request, despite evidence that civil filings increased 9% and criminal cases jumped 6% during the past year. Eva M. Rodriguez, Federal Courts Face Year of Living Frugally, Legal Times, Oct. 5, 1992, at 1. The resulting fiscal strain has forced many courts to suspend all civil jury trials, including section 1983 cases, until Congress provides more money. Stephen Labaton, Federal Judges Blame Money Woes for Slowdown, N.Y. Times, Apr. 9, 1993 (reporting that the Administrative Office of the United States Courts ordered a halt to all civil jury trials, to take effect May 12, 1993); see also Deborah Pines, District Court Backlogs Up Slightly: Federal Case Filings, Dispositions Increase, N.Y. L.J. Aug. 13, 1992, at 1 (discussing the nature of and possible reasons for increasing caseload); Robert D. Raven, Don’t
for newly appointed federal judges, for example, more experienced colleagues devoted an entire day to explaining methods for controlling court dockets. While there is no indication that speakers at these seminars specifically advise judges to consider bifurcation in section 1983 cases, they likely cite Rule 42(b) as a valuable procedure for judges interested in better managing their caseloads and avoiding trials of complex issues.

One veteran Circuit Judge described his colleagues' attitude when faced with a section 1983 claim against a municipal defendant: "Most judges shudder at the prospect of trying a Monell-type case because they are so complicated."

Bifurcation also appeals to judges who are unsympathetic to civil rights claims generally, and particularly to causes of action that allege a municipality's wrongdoing. Most federal judges now reflect the conservative philosophy of former Presidents Reagan and Bush. To those hostile to civil rights, bifurcation represents an effective procedure for preventing litigants from introducing evidence that would establish a municipality's "deliberate indifference" to systemic police abuses that deprive citizens of their constitutional rights.

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Wage War on Crime in Federal Courts, Recorder, Aug. 11, 1992, at 8 (arguing that increasing reliance on the federal government to wage war on criminals has resulted in "an overburdened federal court system and a serious threat to the principles of federalism").


320. Circuit Judge George Pratt and two other federal judges recalled that bifurcation was frequently discussed at judges' seminars during the past several years. Interview with Judge George Pratt, U.S. Court of Appeals for the Second Circuit, in New York, N.Y. (Oct. 21, 1992); Telephone Interview with Judge Who Requested Anonymity, U.S. District Court for the Eastern District of New York (Oct. 19, 1992); Telephone Interview with Judge Who Requested Anonymity, U.S. District Court for the Southern District of New York (Apr. 6, 1992). Because courts can invoke Rule 42(b) sua sponte, it represents a valuable procedure for controlling a party's pretrial discovery and presentation of evidence, particularly in civil cases that appear complicated or lengthy.

321. Interview with Judge George Pratt, supra note 320. According to an attorney for the City of New York, one federal judge hopes that these cases never reach trial because "no one knows how to try a Monell claim." Interview with Anonymous Trial Attorney, supra note 303.

322. Overall, former Presidents Reagan and Bush appointed more than 60% of sitting federal judges. They selected nearly 70% of all appellate judges, and their nominees represent a majority on 10 of the 13 courts of appeals. Neil A. Lewis, Selection of Conservative Judges Insures a President's Legacy, N.Y. Times, July 1, 1992, at A13. While Bush Administration officials denied the existence of a political "litmus test" for judicial appointments, one former official stated: "It's very hard to get named to an appellate court post by this Administration unless you pass the political smell test . . . . It's not even very subtle." Id. Presidents Reagan and Bush consistently named conservative appointees who were generally white, wealthy, male, and, in President Bush's case, relatively young. Id.
One district judge in the Second Circuit, who sought anonymity, admitted that he enthusiastically endorses bifurcating defendants in section 1983 cases because “it is a waste of time to try Monell claims” when municipalities stipulate to indemnify officers found liable on a common-law respondeat superior claim. Judge Edward Korman agreed that in such situations, a successful litigant “gets what he wants—the money to make him or her whole again, and trial on the Monell issue would be superfluous.” Judge Korman reported that he favors bifurcation because it “disposes of the case more easily and efficiently, while being fair and serving justice for a litigant.” A colleague from the same circuit, Judge Michael Mukasey, explained that he has a “tendency to bifurcate” in two basic situations: First, when he is unsure whether the plaintiff will be able to establish an individual claim at all, bifurcation might make a second trial unnecessary; second, when he believes that settlement is likely on the claims against individual officers. Recognizing that bifurcation in the second instance could be “detrimental” to plaintiffs who want to sue the municipality, Judge Mukasey noted that he might make an exception in a case in which “a long-standing police practice” was indicated, but reiterated that he usually bifurcates in order to “see if it happened to you first, and then we'll see if the municipality was involved.”

**B. Defense Attorneys**

Municipal defense attorneys in New York City find that discovery bifurcation of Monell claims provides relief from their heavy caseloads and busy court responsibilities as well. Several defended the city’s re-

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323. Telephone Interview with Federal District Judge Who Requested Anonymity, Second Judicial Circuit (Nov. 5, 1992). The judge explained that when the municipality agrees to compensate, the litigant’s right to recovery is protected. Id.

324. Telephone Interview with Judge Edward Korman, U.S. District Court for the Eastern District of New York (Apr. 15, 1992) (conducted by research assistant Bethany Conybeare); cf. supra notes 8-9 and Part II.C (discussing deterrent purpose of Monell actions).

325. Telephone Interview with Judge Edward Korman, supra note 324.


327. Id.

328. Defense attorneys in Boston and Los Angeles do not find that bifurcation lessens their workloads since the trial bifurcation model prevalent in those jurisdictions requires them to prepare a Monell defense for the possibility that any given trial will proceed to the second stage. Telephone Interview with Boston Attorney Active in Civil Rights Defense Who Requested Anonymity (Mar. 24, 1993) [hereinafter Telephone Interview with Anonymous Boston Attorney]; Telephone Interview with Mary House, Deputy Los Angeles City Attorney (Mar. 25, 1993); Telephone Interview with Jim Pfeffer (Mar. 24, 1993) (private Los Angeles defense attorney).
cent reliance on bifurcation as necessary because Monell claims "were being used to extort. We were getting crucified by the large Wall Street firms."329 A colleague added that bifurcation is an "appropriate response to the outrageous discovery demands by some plaintiffs' attorneys."330 Tom Bergdall, a senior supervising attorney for the city who is affectionately called the "father" of bifurcation, explained, "Many of the big firms were submitting Monell motions for discovery, which required lots of our attorneys' time. I thought the motions were unnecessary, duplicative, and very expensive."331

Those municipalities that favor trial bifurcation do so for an even more important reason: It limits, and frequently avoids, their exposure to Monell liability. When bifurcated, a plaintiff's Monell claim is "frozen" until a jury decides whether an individual officer is liable. In courts that broadly construe Heller, a jury finding for the officer will block a plaintiff's efforts to prove that a municipal practice or custom deprived her (and other persons) of a constitutional right.332 Even when a jury finds that the individual officer is liable, the municipality will rarely be required to defend a police policy or custom at a second trial. Many litigants apparently prefer not to proceed against a municipality after trying the individual claim in order to avoid reliving an unpleasant, costly, and inconvenient experience.333 Unless she expects to satisfy the weighty

329. Interview with Peter J. Cahill, Staff Attorney, New York City Corporation Counsel (Aug. 14, 1992); see infra note 330.
330. Telephone Interview with Blanche Greenfield, Trial Attorney, New York City Corporation Counsel (Feb. 7, 1992). It is difficult to ascertain the extent to which plaintiffs' attorneys may have engaged in "outrageous discovery demands." Attorneys for the city specifically referred to the "large Wall Street firms" that provided pro bono representation and accumulated "huge" attorney's fees in Monell actions as a major reason for their reliance on bifurcation. E.g., Joint Interview, supra note 278 (statement of Second Supervising Attorney) (attributing the threat of large fee awards to "certain Wall Street firms who don't know what else to do but conduct discovery"). Under 42 U.S.C. § 1988 (1988), defendants must almost always pay a "prevailing" section 1983 claimant's attorney's fees, even when the case settles. Maher v. Gagne, 448 U.S. 122 (1980). Clearly, these attorneys felt overwhelmed by discovery requests that they viewed as burdensome, unnecessary, and attempts to "hold the attorney's fees issue over our head for settlement purposes." Telephone Interview with Blanche Greenfield, supra note 304.
331. Joint Interview, supra note 278 (statement of Tom Bergdall). Bergdall explained that he introduced the bifurcation procedure to the New York City Corporation Counsel and recommended that staff attorneys consider using it in section 1983 cases after learning of its value for municipal defendants at a civil rights conference at Georgetown Law School in May 1990. Id.
332. See supra Part IV.A.
333. Telephone Interview with Ellen Yaroshefsky (Dec. 12, 1992); Interview with James Meyerson, supra note 299; Interview with Jonathan Moore, supra note 299. One litigant, Joseph Skorupski, related that he brought suit against a local police department after its officers, mistaking him for a robbery suspect, handcuffed, kicked, and beat him and forced a pistol into
burden of proof to obtain punitive damages against individual city officials,\footnote{334} a municipal claim will at most bring only nominal damages to the successful plaintiff.\footnote{335} For these reasons, plaintiffs’ attorneys describe most clients as willing to waive their \textit{Monell} claims when a negotiated settlement adequately compensates them for their injuries.\footnote{336} When settlement seems near, most city attorneys are receptive to “sweetening the settlement pot” in order to avoid a trial on \textit{Monell} issues\footnote{337} and to spare the municipality from exposure to indeterminate liability in future cases.\footnote{338}

his mouth. After three years of litigation, Mr. Skorupski settled the case because “the emotional strain of continuing litigation was putting him ‘through hell’ and ... he wanted to get on with his life.” Tayler & Bessent, \textit{supra} note 271, at 7. Similarly, the plaintiff’s counsel in Ray \textit{v}. Catone, No. 89 Civ. 0836 (E.D.N.Y. Sept. 20, 1991), opposed the city’s bifurcation motion because he felt that “a bifurcation of issues would cause delay and added expense and prejudice the plaintiff.” Transcript of Motion at 5, \textit{Ray} (No. 89 Civ. 0836).

334. While punitive damages are not available against municipalities, see City of Newport \textit{v}. Fact Concerts, Inc., 453 U.S. 247, 271 (1981); \textit{infra} notes 148-152 and accompanying text, a section 1983 litigant may obtain such an award against individual defendants upon a showing that they acted with recklessness or callous indifference to her rights, see \textit{Smith v. Wade}, 461 U.S. 30, 34-38 (1983).

335. In \textit{Larez v. City of Los Angeles}, 946 F.2d 630 (9th Cir. 1991), for example, the defendant municipality and police chief moved to dismiss a \textit{Monell} claim after individual police officers were found liable at a bifurcated trial. The district court denied the motion, allowing the \textit{Monell} action to proceed. \textit{Id}. at 635. On appeal, the Ninth Circuit held that the second trial was proper to adjudicate plaintiff’s claim for punitive damages against Los Angeles Police Chief Darryl Gates in his personal capacity, and recognized that the municipal defendants had allegedly “committed constitutional violations distinct from those committed by the individual officers.” \textit{Id}. at 640. The court also reaffirmed “the importance to organized society that [constitutional] rights remain scrupulously observed.” \textit{Id}. (quoting \textit{Carey v. Piphus}, 435 U.S. 247, 266 (1978)). Though reinforcing the plaintiff’s right to sue “for the purpose of vindicating those constitutional rights,” the court limited the compensatory portion of the jury’s award to “nominal, yet symbolic damages” since the plaintiff had already been made whole by the award against the individual officers. \textit{Id.}; cf. \textit{George v. City of Long Beach}, 973 F.2d 706, 709 (9th Cir. 1992) (affirming dismissal of \textit{Monell} claim because the plaintiff sought only nominal damages against the officer), \textit{cert. denied}, 113 S. Ct. 1269 (1993).

336. Telephone Interview with Howard Friedman, \textit{supra} note 308; Telephone Interview with Michael Lightfoot, \textit{supra} note 286; Telephone Interview with James Meyerson (Mar. 23, 1993).

337. Interview with James Meyerson, \textit{supra} note 299.

338. \textit{See AVERY & RUDOVSKY, supra} note 8, § 14.2(f). For example, suppose that a plaintiff’s \textit{Monell} claim is based on a municipality’s failure to investigate citizens’ complaints about the use of excessive force by police. At trial, plaintiff’s expert witness testifies that the police department had no mechanism for investigating citizens’ complaints at the time of the plaintiff’s injury, and that most complaints were simply ignored. The city’s attorney then cross-examines the expert witness. Should the jury find the municipality liable on the \textit{Monell} claim, the city could not relitigate the same issue in a subsequent trial—the municipality would be estopped from denying that the policy of failure to investigate existed during the same period to which the expert testified. A more difficult issue arises when new plaintiffs plead the same \textit{Monell} claim relative to a different time period. In such instances, the city would likely be
Defense attorneys justify their bifurcation practice on four grounds. First, attorneys for the City of New York suggest that when a police officer's section 1983 liability is proved, the plaintiff is compensated more quickly and at less personal expense. Tom Bergdall argued that "the practice is sound and reasonable. Before bifurcation, plaintiffs' cases were languishing for years because of Monell discovery alone." In cases in which a police officer is found liable, Bergdall characterized Monell as a "distraction." "Bifurcation," said Bergdall, "protects a plaintiff against the additional expense of voluminous discovery, while providing for 'make-whole' relief." A supervisor colleague added that the practice "moves cases along for everyone's benefit, including plaintiffs'. In fact, more and more plaintiffs' attorneys are stipulating to bifurcating Monell.

Second, city attorneys in Boston and New York assert that they do not seek bifurcation as a matter of policy in section 1983 litigation, but only after making a case-by-case determination. An attorney for the city of Boston emphasized that he moves to bifurcate "only when necessary to prevent a jury from considering evidence showing prior complaints against the defendant officer. If there are no such complaints, there is no reason for bifurcation." While a New York City counterpart justified bifurcation as necessary to overcome some plaintiffs' attorneys' "blackmail" discovery demands, he too stressed that discovery bifurcation is requested selectively and "only after evaluating the plaintiff's specific Monell claim to determine if it is appropriate."

339. Joint Interview, supra note 278 (statement of Tom Bergdall). Bergdall's colleague Lawrence Kahn and Los Angeles city attorney Mary House also argue that bifurcation avoids unnecessary delays. Kahn, supra note 298; Telephone Interview with Mary House, supra note 328. No one doubts that a trial (or discovery) process involving only a single defendant would require less time; left unresolved is whether the practice is consistent with the underlying purposes of Monell actions and Rule 42(b)'s general principles for deciding bifurcation motions.

340. Joint Interview, supra note 278 (statement of Tom Bergdall). Other defense attorneys have also suggested that Monell claims tend to confuse a jury when there is a unified trial. Telephone Interview with Lawrence Kahn, Chief Litigation Assistant, New York City Corporation Counsel (Mar. 21, 1993) (noting the "complications of Monell claims"); Telephone Interview with Jim Pfeffer, supra note 328.

341. Joint Interview, supra note 278 (statement of Tom Bergdall).

342. Joint Interview, supra note 278 (statement of Second Supervising Attorney); see also supra note 291 and accompanying text; cf. infra note 385.

343. Telephone Interview with Anonymous Boston Attorney, supra note 328. Specifically, the attorney feared that evidence of an officer's "history of internal affairs"—evidence that would probably be relevant only to the Monell claim—might taint the jury's view of the claim against the individual officer. Id.

344. Interview with Anonymous Trial Attorney, supra note 303.
Third, city attorneys generally minimize the policy considerations underlying Monell claims, and do not believe that municipal liability is necessary to deter and to abolish systemic police abuses that result in constitutional deprivations. Most believe that an adequate remedy lies within the city's legal powers: "If police officers are engaged in such a practice, we will sit on the Police Department to make sure it is changed."345

Finally, New York and Los Angeles city attorneys reject the suggestion that they face a conflict of interest when they represent both individual and municipal defendants.346 The attorneys recognize that bifurcation permits a municipal defendant to take advantage of this "weapon of great tactical value"347 and pursue a defense theory intended to gain the jury's sympathy for the officer "doing his job."348 They also acknowledge that bifurcation combined with a successful defense of the officer would likely immunize the municipality from section 1983 liability in courts that apply Heller expansively, and admit that even if an officer's "authorized force" defense fails, it is only the officer, and not the city, that is found liable.349 Yet they are reluctant to see any inherent conflict

345. Joint Interview, supra note 278 (statement of Tom Bergdall). New York City staff attorney Blanche Greenfield stated that whenever it encounters an unlawful police practice, the Corporation Counsel will communicate directly with an appropriate police official and recommend changes in police procedure. Telephone Interview with Blanche Greenfield, supra note 304. A Boston defense attorney added that "the police department is amenable to changing their practices. . . . I'm not sure that Monell is the best way to deal with institutional problems." Telephone Interview with Anonymous Boston Attorney, supra note 328. Los Angeles defense attorney Mary House also felt that Monell actions may be unnecessary, explaining that "there are sufficient safety checks in the system to deal with any unlawful practice." House recalled: "I have changed policies which I thought would lead to constitutional abuses." Telephone Interview with Mary House, supra note 328.

346. In jurisdictions that agree to indemnify police officers against liability for civil rights violations, such as New York City and the City of Los Angeles, the municipality's attorneys almost always represent the individual officers at the same time as they defend the municipality against claims that it was deliberately indifferent to police practices that deprived citizens of constitutional rights. See infra notes 349-355 and accompanying text. David Rudovsky noted that "[i]n some jurisdictions, insurance carriers will provide counsel, while in others, the department may retain outside counsel to represent the officer or provide funds for the officer to do so." Rudovsky, supra note 268, at 491 n.106. When the municipality does not provide independent counsel for the individual officer, it may encounter a conflict of interest. See infra note 351.

347. Heller, 475 U.S. at 807-08 (Stevens, J., dissenting).

348. Id. at 803 n.7 (Stevens, J., dissenting) (quoting defense counsel's remarks from the record).

349. Surprisingly, some city attorneys were uncertain whether an officer who is indemnified suffers any real injury when she is found personally liable. Joint Interview, supra note 278. Such judgments may, for example, adversely affect her prospects for promotion or other types of advancement. Surely, a supervising officer should consider a verdict against an officer when considering such an application. Paul Schneider, defense attorney for the city of Albuquerque,
in defending a police officer who asserts that her actions were reasonable based on accepted police practice\textsuperscript{350} while simultaneously representing the city's interests against a charge that the practice tolerated or implemented was unlawful.\textsuperscript{351} Acknowledging that they "grapple with these

New Mexico, confirmed that an officer found liable for a constitutional violation is "resented by everyone" and "is less likely to be given advancement." Interview with Paul Schneider, in New York, N.Y. (Oct. 30, 1992). New York City supervising attorney Kahn also saw the likelihood that "a stigma will attach in the eyes of fellow officers and supervisors." Telephone Interview with Lawrence Kahn, supra note 340. The use of independent counsel whose sole responsibility is to absolve the officer regardless of the outcome for the municipality would likely reduce the potential for such damage to the officers.

\textsuperscript{350} In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court held that the officer's conduct in excessive force cases should be decided by a Fourth Amendment standard of reasonableness—an inquiry into whether the officer conducted herself reasonably based on an objective consideration of all the surrounding facts. See Connuck, supra note 35, at 748-64.

\textsuperscript{351} City attorneys' trial bifurcation strategies on behalf of individual officers are often similar to that raised in City of Los Angeles v. Heller—they argue that the officer was conducting herself reasonably under the circumstances because she was following a customary police policy, and should accordingly be relieved of individual responsibility. See supra note 349 and note 241 and accompanying text. Such a defense may suggest that a city policy was responsible for the plaintiff's constitutional injury. In order to successfully defend against the Monell claim at a second trial, however, the city may be required to refute evidence that such a policy existed or argue that the officer acted outside the scope of proper city policy. Thus, city attorneys' representation of both the individual officer and the municipal defendant creates serious potential for an ethical bind. In particular, bifurcation permits the defense attorneys to pursue incompatible theories in two separate trials. As some commentators have concluded, "[t]he conflict is obvious." Avery & Rudovsky, supra note 8, \S 14.2(f); cf. Model Rules of Professional Conduct Rule 1.7 cmt., para. 7 (1991) (discussing conflicts in dual representation: "An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question."). If the officer had independent counsel, it is not clear that bifurcation would further her individual interest: her most effective trial strategy might be to place the blame on a visible municipal defendant. E.g., Telephone Interview with Linda Cronin (Mar. 22, 1993) (private New York City defense attorney who represents individual officers) ("As a general rule, I want the municipality sitting next to me."). Of course, when a municipality agrees to indemnify and to represent the officer, it controls the trial strategy and will move to bifurcate in order to preclude the plaintiff's Monell claim pursuant to Heller.

It appears that few courts have considered the ethical conflict that may arise in bifurcated trials. In Ricciuti v. New York City Transit Authority, 796 F. Supp. 84 (S.D.N.Y. 1992), the court found "a potential conflict" to exist when the city's attorneys represented both the municipality and an individual officer who was asserting a qualified immunity defense: The individual defendant "can shift liability to the municipality . . . by establishing a good faith, qualified immunity defense"—a defense "that may be good for the officer but bad for the City." Id. at 88. Should such a defense succeed, stated the court, "the municipality may still be liable." Id. at 86. The city could avoid liability, however, by arguing that the officers acted outside the scope of their employment and were thus not entitled to partial or complete immunity. The court resolved this problem by ordering the city to provide the individual defendant with independent counsel in the absence of a waiver: "When multiple representation by counsel for a public body creates a potential conflict of interest, the proper course is for the public
ethical issues all the time,\textsuperscript{352} New York City supervisors thought that "this problem does not occur as a practical matter because the officers agree to the city's policy of indemnification in exchange for legal representation."\textsuperscript{353} When asked whether their dual representation compromises a police officer defendant's right to zealous representation, the attorneys contended that "it is usually in the officer's best interests to sever the city defendant."\textsuperscript{354} City attorneys strongly defend trial bifurcation by arguing that it protects each defendant against the "substantial risk of prejudice" that arises from the possibility that evidence of one defendant's constitutional culpability will "spill over" into the jury's determination of the other's liability.\textsuperscript{355} In sum, municipal defense attorneys believe that bifurcated civil rights proceedings promote justice for the defendants, and fairly and adequately compensate plaintiffs who sustain constitutional injuries.

employer to offer its officer employee separate counsel." \textit{Id.} at 87 (citing Suffolk County Patrolmen's Benevolent Ass'n v. County of Suffolk, 751 F.2d 550, 551 (2d Cir. 1985)).

352. Joint Interview, \textit{supra} note 278 (statement of Second Supervising Attorney). Los Angeles city attorney Mary House explained that she has sometimes felt personally "uncomfortable" because of conflict of interest problems, but is satisfied that current case law supports her representation of both the individual and municipal defendants. Telephone Interview with Mary House, \textit{supra} note 328.

353. Joint Interview, \textit{supra} note 278 (statement of Tom Bergdall).

354. Joint Interview, \textit{supra} note 278. It is easy to understand why some officers would not raise the issue of an ethical conflict. As a practical matter, indemnification is an offer too good to refuse. Private defense attorney Linda Cronin believes that New York City's policy of indemnification frequently compromises the legal representation that police officers receive from the city. Telephone Interview with Linda Cronin, \textit{supra} note 351.

355. Kahn, \textit{supra} note 298. It is doubtful that a unified trial prejudices a municipality that agrees to indemnify (and therefore represents) its police officers. In such cases, the municipality must compensate a victorious plaintiff regardless of which defendant the trier finds to be liable. Lawrence Kahn and Jim Pfeffer probably spoke for many other defense attorneys when they expressed fear that unless the trials are bifurcated, juries will become confused and be unable to follow a court's instructions on the admissibility of particular evidence against only one defendant. \textit{Id.;} Telephone Interview with Jim Pfeffer, \textit{supra} note 328. Although this concern arises in many multiple-defendant cases, it is an exception to Rule 42(b)'s general policy against bifurcation only when the prejudice resulting from such evidence would be so severe as to be incurable by limiting instructions. \textit{See supra} notes 203-204 and accompanying text. Section 1983 defendants should be treated the same as other defendants in other civil cases. \textit{See} Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160, 1162-63 (1993) (rejecting the idea of special judge-made procedures for \textit{Monell} claims). Jurors are capable of deciding whether each defendant is liable in section 1983 cases and, if so, the extent of damages to be awarded. \textit{See}, e.g., Gentile v. County of Suffolk, 129 F.R.D. 435 (E.D.N.Y. 1990) (affirming jury finding both defendants liable but requiring only municipal defendant to pay money damages), \textit{aff'd}, 926 F.2d 142 (2d Cir. 1991).
C. Plaintiffs' Attorneys

Experienced civil rights litigators contend that they include *Monell* claims in section 1983 suits not as a pro forma practice, but only selectively, after considering the client's interests and the factual circumstances of the case. New York City civil rights attorney James Meyerson stated: "In a lot of my cases, I do not raise *Monell* because it is not what my client wants. When *Monell* is included, the case becomes a much more complicated litigation, which may not advance the client's desire." Chicago civil rights attorney Flint Taylor explained that "policy and practice claims . . . entail a substantial involvement of time, effort, and resources and can sometimes unnecessarily complicate the case, detract from the impact of the incident itself, and confuse or distract the jury." New Haven civil rights attorney John Williams explained that he too looks to avoid "the extra work in cases where a municipality indemnifies and you can prove the officer's liability." Many plaintiffs' attorneys also agree with Taylor's observation that because "[m]any trial judges simply do not understand, or are hostile to, *Monell* claims, . . . litigators should be aware of these sobering realities before filing or pursuing a *Monell* claim in a police misconduct case."

Once the decision is made to include a *Monell* claim, many (but not all) litigators are alarmed and express outrage at the increasing tendency of city attorneys and judges to routinely use bifurcation as a means of preventing municipal claims from ever reaching trial or even stopping them before discovery. In the appropriate case, they argue, *Monell* claims provide the opportunity for a plaintiff "to discover, expose, try, judicially determine, and, thereby, to deter systemic abuses and failures within police departments." Los Angeles attorney Barry Litt spoke for many when he recognized the "substantial difference between whether an individual officer violates a person's constitutional rights and whether a municipality's policy caused the injury." Most plaintiffs' attorneys agree that *Monell* claims are important "because they permit[ ]

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356. Interview with James Meyerson, supra note 299.
357. G. Flint Taylor, *Municipal Liability Litigation in Police Misconduct Cases from Monroe to Fraprotnik and Beyond*, 19 CUMB. L. REV. 447, 464 (1989); see also infra text accompanying note 379 (noting that *Monell* claims may be unnecessary when the government indemnifies and recovery is had from individual officers).
358. Interview with John Williams, supra note 278.
359. Taylor, supra note 357, at 464-65; Telephone Interview with Michael Avery (Mar. 19, 1993); Telephone Interview with Howard Friedman, supra note 308; Telephone Interview with James Meyerson (Mar. 24, 1993).
360. *See infra* notes 373-382 and accompanying text.
361. Taylor, supra note 357, at 464.
362. Telephone Interview with Barry Litt, supra note 287.
the plaintiff[s] to present a more complete and accurate case to the jury, and to offer the alternative of finding the municipality liable where individual culpability is murky or otherwise questionable."

These attorneys react most strongly to bifurcation orders that defer discovery on Monell claims until after a trial on claims against the individual officers. They perceive these judicial directives as barring them from ascertaining the extent to which police officers are engaging in an unlawful practice. New York City plaintiffs' attorney Jonathan Moore asserted that "bifurcation of Monell discovery is often a roadblock to a plaintiff gaining vindication for a violation of constitutional rights and having a meaningful day in court." His colleague James Meyerson conceded that "there may be Monell claims which are so convoluted, so complicated, and so distracting as to require separate trials." Nevertheless, said Meyerson, "in the normal police misconduct case, it is never reasonable to prevent a plaintiff from gaining information that either supports or refutes a Monell cause of action." To support his contention, Meyerson described a recent case in which he persuaded a trial court to grant Monell discovery and then withdrew the Monell claim based on the materials unearthed and depositions taken.

"Because bifurcation is so facially appealing," Moore suggested, "the real fight in New York is to avoid bifurcation of discovery. Having the same jury hear both trials is very important for proper apportionment of damages." But his colleagues in Los Angeles, who are generally permitted to conduct discovery on municipal claims, face a different problem. Tom Beck expressed a common frustration when he discussed

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363. Taylor, supra note 357, at 464; Telephone Interview with Michael Avery, supra note 359; Telephone Interview with Tom Beck (Mar. 23, 1993); Telephone Interview with David Rudovsky (Mar. 19, 1993). Flint Taylor successfully opposed bifurcation in one case by arguing, among other things, that "the plaintiff must be given wide deference to present his case in the manner he chooses" and that bifurcation would rob the plaintiff of his "right to present his strongest case." Plaintiff's Response to Defendant City's Motion to Bifurcate at 1, 2, Myatt v. City of Chicago, No. 90-C-3991 (N.D. Ill. response filed Aug. 7, 1991). Later in the case, however, the judge granted another trial bifurcation motion made by a different organizational defendant. See Myatt v. City of Chicago, No. 90-C-3991, 1992 WL 447832, at *2-*3 (N.D. Ill. Nov. 24, 1992).

364. Interview with Jonathan Moore, supra note 299.

365. Interview with James Meyerson, supra note 299.

366. Id.

367. Id. (referring to Gibson v. Carmody, No. 89 Civ. 5358, 1990 WL 52272 (S.D.N.Y. Apr. 19, 1990)).

368. Interview with Jonathan Moore, supra note 299. To accomplish these objectives, Moore recently considered proposing a trifurcated trial: a single jury would first hear evidence against the individual officer; the second stage (assuming the jury found that the plaintiff suffered a constitutional injury) would consist of the plaintiff's claims against the municipality. During the third stage, the jury would award and apportion damages. Id.
plaintiffs' difficulties in suits alleging an unconstitutional municipal practice: "We get the dirt, but then the judges do not want a jury to hear it so they bifurcate. Unless the individual officer is found liable, we can never present the evidence to a jury."369

Civil rights attorneys oppose trial bifurcation orders for other reasons as well. Detroit attorney Richard Soble found the practice to have "horrendous" and "costly" consequences for a plaintiff interested in pursuing a Monell claim: "When defense attorneys are provided three opportunities to cross-examine a witness, at a pretrial deposition and at two trials, it becomes much easier to attack a plaintiff witness's credibility."

New York attorney Ellen Yaroshefsky addressed the economics of financing a section 1983 case: "Most clients are simply without funds to begin with, and bifurcation doubles the cost and the lawyer's financial burden in this type of litigation."370 Finally, Jim Meyerson expressed another common concern in speaking of bifurcation's "potential to disempower a jury's ability to apportion damages equitably between the individual officer and the city defendant."371

While many plaintiffs' trial attorneys see great dangers in bifurcation and argue strenuously against the procedure, others do not oppose it. Some civil rights attorneys suggest that members of a jury are more likely to hold a lone officer liable than to subject the municipality in which many of them reside to uncertain financial exposure.372 They cite the difficulty of proving, and of financing, a section 1983 suit that alleges police brutality against a municipality.373 Some also believe that a recov-

369. Telephone Interview with Tom Beck, supra note 284.
370. Telephone Interview with Richard Soble, supra note 317.
371. Telephone Interview with Ellen Yaroshefsky (Dec. 12, 1992). Florida attorney Barbara Heyer agreed: "A well-financed law firm is necessary to afford the five-year costs which are incurred to subsidize police brutality claims." Interview with Barbara A. Heyer, in New York, N.Y. (Oct. 31, 1992). New Mexico defense attorney Paul Schneider also recognized that "the average practitioner cannot handle these cases because of the cost." Interview with Paul Schneider, supra note 349. In most jurisdictions, the civil rights bar is limited to a small number of attorneys. David Rudovsky explained that "most lawyers would not be interested in a contingent fee case against the police or the city, even with the possibility of court-awarded attorney's fees if the suit is successful." Rudovsky, supra note 268, at 490. Tony Amsterdam identified another nonfinancial burden that limits the size of the civil rights bar: "[M]any who might otherwise be available to [plaintiffs] cannot afford to tangle with the police because these lawyers depend on the goodwill of the police in other cases." Anthony G. Amsterdam, The Supreme Court and The Rights of Suspects in Criminal Cases, 45 N.Y.U. L. REV. 785, 787 (1970); see also Nancy Rutter, Blood Money, CAL. LAW., Nov. 1992, at 34, 37 ("Police brutality work draws a kind of thick-skinned, cause-oriented lawyer who is unfazed by criticism and undaunted by loss . . . .").
372. Interview with James Meyerson, supra note 299.
373. E.g., Telephone Interview with Robert Herbst, supra note 291.
374. Telephone Interview with Michael Shen (Oct. 23, 1992). Shen, a New York City
ery is more likely to result when a municipality is sued on a respondeat
superior tort theory, and suggest that their clients care little whether
the eventual damage award reflects the municipality's civil rights viola-
tion or its responsibility for the actions of its employees. Los Angeles
attorney Michael Lightfoot referred to the "enormous time involved"
and reasoned that "most of our clients just want to get something out of
what happened to them." Boston civil rights attorney Howard Fried-
man echoed New York City defense attorney Bergdoll, quoted above, in
explaining that bifurcation is not a problem in the typical section 1983
case: "Where there is government indemnification, Monell claims are
not usually necessary once individual liability has been established."

The mixture of opinions among plaintiff attorneys also manifests it-
self in the "Bible" for lawyers trying section 1983 claims, Police Miscon-
duct: Law and Litigation. In their brief section on bifurcation,
authors Michael Avery and David Rudovsky urged lawyers trying sec-
tion 1983 claims to oppose separate trials, encouraging them to "make as
strong an argument as possible that justice will be served by a single
trial." But immediately thereafter, they suggested that bifurcation
may benefit the litigant by placing her "in a superior [negotiating] posi-

plaintiffs' attorney, also remarked: "We have to be very, very selective in these kind of cases
before agreeing to assume the representation." "Id. Leonard Bein, a New York City solo prac-
titioner, added: "You have to worry about the financing costs when you engage in the exten-
sive discovery necessary to establish a municipality's pattern and practice." Telephone
Interview with Leonard Bein (Dec. 2, 1992). One Los Angeles attorney estimated that the
average police brutality case requires $10,000 to $20,000 to finance. Rutter, supra note 371, at
94 (quoting plaintiffs' attorney R. Samuel Paz). Karol Heppe, the executive director of a lawyer
referral service for police misconduct cases, said: "Attorneys can't just take these cases on
principle. We have to make an economic determination." "Id.

375. Typical common-law claims include negligence claims against the municipality or
causes of action based on false arrest, assault, and malicious prosecution. Although such
claims derive from state law, plaintiffs may bring them in federal court when accompanied by
section 1983 claims. See 28 U.S.C. § 1367(a) (Supp. II 1990) (giving federal courts "supple-
mental jurisdiction over all other claims that are so related to claims in the action within [the
court's] original jurisdiction that they form part of the same case or controversy under Article
III of the United States Constitution").

376. Telephone Interview with Robert Herbst, supra note 291; see supra text accompanying
note 336.

377. Telephone Interview with Michael Lightfoot, supra note 286.

378. See supra text accompanying notes 329-330, 353.

379. Telephone Interview with Howard Friedman, supra note 307.

380. AVERY & RUDOVSKY, supra note 8.

381. Id. § 14.2(g). Avery and Rudovsky continued:

Plaintiffs will generally benefit from a joint trial of all issues and should make as
strong an argument as possible that justice will be served by a single trial. The factor
of judicial economy will, for the most part, be in the plaintiff's favor in this regard.
The inclination of courts to rely upon limiting instructions rather than bifurcated or
severed trials will also run in the plaintiff's favor. Moreover, much of the evidence
tion with regard to the eventual settlement of the case” once individual liability has been established:

The City may be loath to go to trial on the question of its liability. Apart from the question of the expense and effort of further proceedings, the city may face substantial political embarrassment in the event of a verdict against it. Moreover, [such] a verdict . . . may create serious collateral estoppel problems for the city in other litigation.382

Plaintiffs' lawyers must judge when it serves their clients' interests to settle a civil rights claim and forgo a trial against the municipality. Unquestionably, civil rights attorneys will use a jury's bifurcated verdict against an individual officer to gain leverage in negotiations with a municipality reluctant to expose itself to greater liability at trial. There is an obvious danger, however, in a bifurcation order that precludes Monell issues from being tried or discovered: the unlawful police practice may continue.383 In the absence of judicial scrutiny and jury review, municipalities have little incentive to acknowledge, challenge, and reform established police practices; impervious to legal and financial responsibility for the harms that Monell violations cause, cities may decide to ignore them with impunity.384 It is much easier for the municipality to focus instead on the unusual, rogue officer whose liability is established at trial.

which plaintiff intends to offer against the municipality may be admissible against individual defendants on one or another theory.

Id. 382. Id.

383. In some cases, unfavorable publicity and political pressure may persuade a municipality to change its practices. The Los Angeles Police Department, for example, only reversed its policy regarding officers' use of chokeholds after it had become “a symbol of police oppression” by causing fifteen well-publicized deaths, and after Los Angeles Police Chief Daryl Gates aggravated the situation by remarking that “blacks might be more likely to die from choke holds because their arteries do not open as fast as arteries do on 'normal people.'” Los Angeles Police Reconsider Using Choke Hold, N.Y. Times, Sept. 3, 1991, at A18; see City of Los Angeles v. Lyons, 461 U.S. 95, 100 (1983). In the wake of Rodney King's beating, however, the Los Angeles Police Department considered reintroducing the chokehold, reportedly because it "is less dangerous in subduing unruly suspects than blows with a club." Los Angeles Police Reconslder Using Choke Hold, supra at A18.

384. Municipalities will, of course, assume financial responsibility when they either indemnify police officers against section 1983 liability or are found liable for negligence through state law respondeat superior claims. Municipalities have paid substantial sums for damages arising from their police officers' violations of citizens' constitutional rights. In 1990, New York City paid a record $13.3 million to the victims of police misconduct (this figure does not include claims against the housing or transit police). Edward A. Adams, Brutality Claims, Payment at Record Highs, N.Y. L.J., Mar. 26, 1991, at 1. The City of Los Angeles also paid significant money damages for police abuses that same year. John L. Mitchell, $11.3 Million Paid in 1990 to Resolve Police Abuse Cases, L.A. Times, Mar. 29, 1991, at A3; see also Rutter, supra note 371, at 36 (noting that the City of Los Angeles paid nearly $15 million in brutality cases in 1991). While these liabilities ought to convince a municipality to reform its police practices, they may have become simply an assumed cost for operating a police force. It is much easier
Conclusion: The Cost of Bifurcation—Denying Justice to Civil Rights Litigants

A trial judge properly applies Rule 42(b) in a section 1983 action by deciding whether bifurcation in the case at hand would further the Rule's objectives of avoiding undue prejudice, delay, expense, and inconvenience for either party. Although bifurcation of Monell claims for trial, and even for discovery, may be appropriate in some limited instances, for a municipality to attribute such costs to a few bad cops than to admit its own responsibility for condoning police conduct that deprives citizens of their constitutional rights. As a political matter, Monell liability is indefensible—a city would find it difficult to continue with police practices that are imposing substantial present and indeterminate future costs upon its taxpayers. See supra note 9. As Rule 42(b) requires, bifurcation should be the exception rather than the rule for conducting a trial on section 1983 issues. See supra notes 188-195 and accompanying text. Courts should not order bifurcation at the discovery stage except under the most exceptional circumstances and after carefully considering the matter. Courts are capable of monitoring plaintiffs' discovery requests, defining the scope of discovery, and setting time deadlines to ensure that the process is not abused as suggested by some defense attorneys. See supra notes 329-331 and accompanying text; see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160, 1163 (1993) (directing courts to "rely on summary judgment and control of discovery to weed out unmeritorious claims" against municipalities under section 1983). Moreover, the modern trend toward managerial judging strongly supports such judicial control of discovery. Judges have a variety of legal tools with which to do so. See, e.g., FED. R. Civ. P. 26(f), (g) (discovery conferences and sanctions); see also Edward F. Sherman, The Judge's Role in Discovery, 3 REV. LITIGATION 89 (1982); Robert H. Peckham, The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CAL. L. REV. 770 (1981). Especially in section 1983 litigation, the overriding public interest at stake dictates that judges become involved in "organizing and guiding the case" to protect that interest and ensure "the vindication of constitutional or statutory policies." Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1284 (1976). Moreover, Congress expressly encouraged this trend in the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)). The Act requires every federal district court to develop a "cost and delay reduction program," and endorses "early involvement of a judicial officer in planning the progress of a case [and] controlling the discovery process." Id. § 102(5)(B), 104 Stat. at 5089.

Of course, trial bifurcation itself is an example of judicial case management, and may be appropriate in some circumstances. Cf. id. sec. 103(a), § 473(a)(3)(B), 104 Stat. at 5091 (codified at 28 U.S.C. § 473(a)(3)(B) (Supp. II 1990)) (directing district courts to consider the "principle" of bifurcation in appropriate complex cases). There may be circumstances in which trial bifurcation would avoid prejudice to the individual officer, particularly when the municipality and the officer present antagonistic defenses. Such situations arise when the municipality chooses not to indemnify the individual officer and the officer retains independent counsel. Cf. supra notes 349-355 and accompanying text. In such situations, the individual defendant may seek to sever the municipal defendant for fear that the plaintiff will introduce extrinsic evidence to prove an unlawful police policy or custom. Though some defendants might welcome such evidence as proof that the officer was only doing what she was trained to do, others would be concerned with the possible prejudicial effect of the jury considering evidence involving numerous citizens alleging police brutality—especially when that evidence consists of prior incidents involving the officer defendants. Telephone Interview with Jim Pfef-fer, supra note 328; Telephone Interview with Anonymous Boston Attorney, supra note 328.
a court that routinely orders separate trials or habitually severs and defers discovery on the matter of municipal liability severely frustrates civil rights litigants' attempts to secure redress for constitutional wrongs committed by municipalities. Most litigants lack the resources, fortitude, and commitment necessary to proceed to a second trial on the Monell claim; they are even less able to continue litigation when a court's bifurcation order precludes discovery until after the first trial on individual liability has been concluded. The prejudice to civil rights plaintiffs multiplies when, as they frequently do, trial courts misapply Heller and automatically dismiss Monell claims upon the exoneration of individual defendants in a bifurcated trial. In the jurisdictions that follow this practice, even the most resourceful and persevering plaintiffs usually cannot pursue their Monell claims to trial.

In each of these situations, bifurcation prevents litigants from establishing a municipality's responsibility for tolerating or condoning unlawful police practices and simultaneously bars juries from considering evidence of police wrongdoing that could otherwise lead to municipal reform. Congress originally passed the precursor to section 1983 in response to local law enforcement officials' acts of violence and refusals to recognize and protect citizens' constitutional rights. Whenever today's officers engage in similar conduct, judges and defense attorneys

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386. David Rudovsky described the "institutional obstacles" that make recovery difficult for litigants in section 1983 cases: "They are often poor, or members of racial minorities, or uneducated or inarticulate; some have criminal records." Rudovsky, supra note 268, at 490. Because of these characteristics, most juries are likely to view civil rights plaintiffs unsympathetically, see id. ("Jurors tend to dismiss their allegations, often awarding them less than a full measure of compensation."); see also supra Part IV.B.2, and plaintiffs are especially vulnerable to a city's settlement offer. Moreover, the length of the typical civil rights proceeding alone is enough to weaken the resolve of most litigants. See, e.g., supra note 335 and infra notes 388-394 and accompanying text. Chicago attorney Flint Taylor successfully opposed one trial bifurcation motion by arguing that it would have prejudiced his client in this manner. Plaintiff's Response to Defendant City's Motion to Bifurcate, Myatt v. City of Chicago, No. 90-C-3991 (N.D. Ill. response filed Aug. 7, 1991) ("[P]laintiff, a poor and working person, cannot afford the added expense of conducting what in essence would be two trials, which would no doubt . . . take much longer than one unified trial."); see supra note 363.

387. See supra Part I.
should be aware that bifurcation can deny a federal remedy for constitutional injuries—frustrating the historic purpose of the Enforcement Act of 1871.

Consider a recent section 1983 case in which a middle-aged businessman was seriously injured by New York City police officers while he was peacefully protesting the Catholic Church’s positions on AIDS education and reproductive choice. His interest in pursuing a civil rights claim against the municipality went far beyond his desire for compensatory relief. As an activist, he sought to establish the city’s deliberate indifference to unlawful police practices because he believed that this would deter the police from engaging in similar misconduct and brutality against other demonstrators.

The circumstances leading to the plaintiff’s injury made it difficult for anyone but police officers to have witnessed the incident. Not surprisingly, each officer who was in the vicinity of the incident testified that she or he had no knowledge concerning the injury and had neither seen nor heard any officer act improperly. Plaintiff’s section 1983 cause of action, originally based on the city’s failure to adequately train its officers in crowd control, was amended to include an additional cause of action. As revised, it alleged that the municipality should be held responsible for being deliberately indifferent to police officers’ maintenance of a code of silence by refusing to testify adversely to other officers. Plaintiff claimed that the code was instrumental in causing the individual officers to believe that they could deprive him of his constitutional rights without fear that a fellow officer would offer damaging evidence. Absent such police corroboration, he argued, officers know they are unlikely to be found liable for unconstitutional conduct.

At the initial pretrial conference, and without requesting argument or legal briefs, the trial judge bifurcated the *Monell* claim sua sponte. During the requested reargument, the court conceded that cross-examination of the defendant officers on the code of silence would probably be a proper impeachment technique in the initial trial. It also acknowledged that this line of questioning would likely overlap with the evidence necessary to establish the municipality’s awareness of and indifference to the practice at the second trial. Nevertheless, the court held firm to its bifurcation order.

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388. *Kohn v. City of New York*, No. 90 Civ. 5730, slip op. (S.D.N.Y. Dec. 21, 1992). Approximately one year after the filing of this lawsuit, plaintiff’s counsel asked this author to serve as a consultant regarding the individual and *Monell* civil rights claims in the case.

389. *See supra* notes 270-271 and accompanying text.
Because of the order, the plaintiff faces a serious risk that a jury might not find any officer liable for having violated his civil rights.\textsuperscript{390} The jury might well conclude, for instance, that the plaintiff's proof was not sufficiently convincing to identify the actual officers who caused his injury.\textsuperscript{391} Without instructions from the court explaining a municipality's potential liability for tolerating a "blue wall of silence,"\textsuperscript{392} the jury could also find that the officers should not be held liable even if they are stonewalling to protect one another, and even if their silence is ultimately the legal cause of plaintiff's constitutional injury. If the trial court follows the New York trend and broadly construes \textit{Heller},\textsuperscript{393} it would dismiss the \textit{Monell} claims following a jury verdict in the officers' favor and preclude plaintiff from conducting \textit{Monell} discovery regarding the code of silence.

Suppose that the jury's verdict establishes the officers' liability. Though the plaintiff is dedicated to proving his case, three years have already passed since his injury. Following the ordeal of the first trial, he may find it more and more difficult to remain committed to proceed through discovery and trial on the \textit{Monell} claims. The plaintiff is aware that \textit{Monell} discovery involves substantial costs, inconvenience and delay; he is also aware that despite the burdens of continuing, he can hope to obtain only nominal additional damages on the \textit{Monell} claims, with a small possibility of recovering punitive damages against the responsible police officials.\textsuperscript{394} Consequently, he might be reluctant to endure the personal hardships of a second trial. The city attorneys, however, might also be uneager to defend against a \textit{Monell} claim, although for different reasons. They would want to avoid the potential adverse consequences, both economic and political, that would follow if the jury finds the municipality liable for having tolerated the police code of silence or improper training of its officers. The city would likely offer to settle the \textit{Monell} claim, and the plaintiff would likely accept—despite knowing that the city's responsibility for tolerating the police practices will not be directly challenged, and may well continue unabated.

Routine bifurcation of \textit{Monell} claims in section 1983 actions misapplies Rule 42(b) and undermines the statute's deterrent purpose. Deter-
Deterrence is curtailed when a jury absolves the individual officer and the municipality thereby obtains what amounts to immunity from *Monell* liability through plaintiff attrition or judicial misapplication of *Heller*. Deterrence is even more severely diminished in jurisdictions that preclude discovery on bifurcated *Monell* claims pending the outcome of trials against individual officers, because litigants are effectively barred from investigating whether municipalities have tolerated police abuses and should therefore be held accountable. Even when plaintiffs succeed in a bifurcated trial against individual officers, deterrence is diminished. Though bifurcation will not relieve the municipality of its financial obligation in instances in which it agrees to indemnify individual officers, or when it is found negligent under common-law theories, a municipality's own constitutional violations will rarely be subjected to judicial scrutiny and condemnation.

Consequently, bifurcation prevents juries from striking just apportionments of damages between individual officers and the municipalities. Although municipalities that indemnify their officers will only partially escape financial responsibility, bifurcation allows all municipalities to escape their share of the blame. One might argue that liability for these individual claims acts as a sufficient incentive for municipalities to reform unconstitutional police practices, but common sense and, indeed, Supreme Court decisions from *Monell* to *Canton* indicate otherwise. Bifurcation thus places litigants in a pre-*Monell* situation—they may pursue section 1983 relief against the individual officers but not the municipality, and municipalities are free to continue their systemic indifference to citizens' constitutional rights.

Courts must refrain from routinely bifurcating *Monell* claims, at either the discovery or trial stages. Rule 42(b) must be applied, as intended, on a case-by-case basis, with attention paid to the impact of bifurcation on the civil rights claimant. Rather than furthering the objectives of Rule 42(b), bifurcation of section 1983 claims frequently creates substantial practical burdens that few plaintiffs or their attorneys can overcome. Most importantly, police abuses of citizens' constitutional rights are likely to continue as long as they remain outside judicial or jury review. When police believe they are immune from public accountability, we can expect that some will continue to engage in official lawlessness, like that used against Rodney King.