THE EROSION OF CIVIL RIGHTS AND WHAT TO DO ABOUT IT

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I want to begin by thanking the law clerks who served Seventh Circuit Judge Thomas E. Fairchild for inviting me to give the annual Fairchild Lecture.[1] It is an honor to give a lecture previously given by such distinguished figures as Justice John Paul Stevens and Professor, now Senator, Elizabeth Warren.[2] In the course of preparing for this talk, I discovered that Judge Fairchild was a great civil libertarian. As a lawyer, he represented people who had been summoned to testify before The House Un-American Activities Committee.[3] And, as Attorney General of Wisconsin, he sought to integrate a public swimming pool in Beloit when there was no requirement that his office be involved.[4] I was not surprised by this discovery, but I mention it because it leads into what I want to talk about today which is civil rights and, more specifically, civil rights as it regards the interaction between citizens, often but not always African-Americans, and government officials, often but not always police officers.

We know that in the 1950s and 1960s, great progress was made in the area of civil rights both as a result of decisions of the Warren Court such as those striking down segregation[5] and expanding habeas corpus[6] and acts of Congress such as the Civil Rights Act of 1964[7] and the

* U.S. District Judge, Eastern District of Wisconsin Judge Adelman thanks Barbara Fritschel for her help on this project.

1. *The Thomas E. Fairchild Lecture*, Univ. Wis. Law Sch., [https://perma.cc/9X3C-GCHV].

2. *The Thomas E. Fairchild Lecture, Previous Fairchild Lecturers*, Univ. Wis. Law Sch., [https://perma.cc/8KC5-NBAY].

3. Thomas E. Fairchild & Collins T. Fitzpatrick, *The Oral History of Judge Thomas E. Fairchild*, transcript of an oral history conducted 1999 by Collins T. Fitzpatrick, at 60.

4. *Id.* at 37–38.

5. *See Griffin v. Cty. Sch. Bd. of Prince Edward Cty.,* 377 U.S. 218 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

6. *See Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain,* 372 U.S. 293 (1963).

7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

Voting Rights Act of 1965.[8] That memorable burst of progress, however, was followed by a long period in which we heard very little about civil rights, a period lasting roughly from the 1960s until very recently. As one civil rights scholar put it, "[t]he struggles of the [civil rights era], the changes they wrought—'[a]ll this is ancient history.'"[9]

Recently, however, the deaths of Michael Brown in Ferguson, Missouri and Eric Garner in New York City and the police shootings of African-Americans in other places including Milwaukee and Madison triggered large-scale protests and something of a renewal of civil rights activism.[10] National civil rights organizations weighed in with proposals,[11] and President Obama created a task force that also made recommendations.[12] These organizations discussed such topics as the need for the Justice Department to pursue more investigations of police departments, whether police should wear body cameras, and the possibility of holding officers criminally liable.[13] One striking aspect of this activity, however, is how little attention was paid to what has long been the most important legal vehicle for holding police and other government officials accountable for misconduct: civil actions often referred to as constitutional tort lawsuits,[14] usually for money damages brought under § 1983 of the United States Code.[15]

In my talk today, I want to attempt to partially rectify this omission. I hope to make three basic points: (1) that lawsuits brought under § 1983 can be an important and effective mechanism for enforcing constitutional rights; (2) that the United States Supreme Court is, unfortunately, making it much harder for civil rights plaintiffs to prevail because of its interpretation of the statute and particularly its decisions on the issue of qualified immunity; and (3) that civil rights advocates and policy-makers need to pay more attention to § 1983 and

8. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

9. Lynda G. Dodd, *The Rights Revolution in the Age of Obama and Ferguson: Policing, the Rule of Law, and the Elusive Quest for Accountability*, 13 PERSPECTIVES ON POL. 657, 657 (2015), (quoting BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION I (2014)).

10. Lynda G. Dodd, *What's Missing in the Police Reform Debate (Part I)*, BALKINIZATION (Oct. 19, 2015), [https://perma.cc/EWZ6-9RE9]; Ivan Moreno, *Ex-Cop Goes on Trial in Killing that Ignited Milwaukee Riots*, CHI. TRIB. (June 11, 2017, 12:32 PM), [https://web.archive.org/web/20180225181135/http://www.chicagotribune.com/news/nationworld/midwest/ct-milwaukee-cop-sylville-smith-trial-20170611-story.html].

11. Dodd, *supra* note 10.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*; 42 U.S.C. § 1983 (2012).

to the Supreme Court's decisions, and they must also begin to think about a strategy to strengthen the law.

I. SECTION 1983 IS A CRITICALLY IMPORTANT STATUTE

First, regarding the importance of § 1983, although the statute has never received as much public recognition as the 1960s era civil rights statutes,[16] such as the Civil Rights Act of 1964, for at least fifty years it has served as the essential means of enforcing constitutional rights. The statute authorizes persons whose civil rights may have been violated to bring an action in federal court against any individual who acted under color of law.[17] Designed to compensate victims of civil rights violations and deter future violations, § 1983 enables civil rights plaintiffs to bring claims for excessive force, unlawful stop and frisk, unconstitutional conditions of confinement, wrongful convictions. and many other constitutional deprivations.[18] The Justice Department can only investigate a handful of police departments in a year,[19] assuming it is interested in the issue at all which the present Justice Department is not,[20] whereas in 2013, for example, private litigants filed over 15,000 § 1983 actions in federal courts and prisoners filed over 30,000.[21] The families of all of the victims of recent high profile police shootings, such as Michael Brown, have brought actions under § 1983.[22] And a number of substantial settlements and verdicts have recently been reached, including in Milwaukee and Madison.[23]

Section 1983 is the present version of a statute enacted in 1871[24] in the era of Reconstruction as part of what can fairly be characterized as the nation's first civil rights movement. The purpose of the statute was to enable former slaves and others to enforce the rights created by the

16. Dodd, *supra* note 9, at 659.

17. 42 U.S.C. § 1983.

18. Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, AM. CONST. SOC'Y BLOG (Jan. 12, 2018), [https://perma.cc/W9E4-Z65F].

19. Dodd, *supra* note 10.

20. Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), [https://web.archive.org/web/20180226145454/https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html].

21. Dodd, *supra* note 10.

22. *Id.*

23. Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015, 10:30 PM), [https://perma.cc/UGN2-R9ZB]. For Milwaukee and Madison, see Kevin Crowe & Ashley Luthern, *The Cost of Police Misconduct in Milwaukee: $21 Million and Growing*, J. SENTINEL (Oct. 25, 2017, 11:49 AM), [https://perma.cc/GNW9-NRJE].

24. Civil Rights Act of 1871, ch. 22, 17 Stat. 13.

Reconstruction Amendments, primarily the Fourteenth.[25] The idea was to create a remedy against state and local officials who violated or allowed others, like the Ku Klux Klan, to violate the rights conferred by the Amendment, such as the right to due process of law and to equal protection of the law.[26]

For a number of complicated reasons, including a distinctly unsympathetic judiciary, for many years after it was enacted, § 1983 was used sparingly.[27] In 1961, however, in a famous case known as *Monroe v. Pape*,[28] the Supreme Court revived the statute and turned it into an effective means of vindicating violations of constitutional rights. In *Monroe*, the plaintiff brought a claim against Chicago police officers seeking damages for a variety of constitutional violations arising out of the fact that the officers broke into his home without a warrant, threatened him and his family, and conducted a highly coercive interrogation.[29] The key to the Supreme Court's decision was its determination that the under color of law requirement applied to acts committed by officials, in this case police officers, as long as the officials were acting as officials even if the acts they committed were unauthorized by state law.[30]

II. BUT THE SUPREME COURT HAS UNDERMINED IT

The Supreme Court, however, under Chief Justices Warren Burger, William Rehnquist, and John Roberts, has been dominated by conservatives for almost half a century and, since *Monroe*, the Court has been hostile to the statute, continuously narrowing it and imposing restrictions on civil rights plaintiffs.[31] I have time to mention only a few of the ways that the Court has weakened the force of § 1983. First, it is a general principle of law that if an employee commits a tort in the course of his or her employment, the employer is liable for the damages caused by the employee's act. This doctrine is known as *respondeat superior*, and it applies in virtually all tort cases including car accidents and cases under federal statutes such as Title VII[32] and the Americans

25. *Id.*

26. Lindsey De Stefan, Student Paper, *"No Man is Above the Law and No Man is Below It:" How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*, SETON HALL L. SCH. STUDENT SCHOLARSHIP 2, 5–6 (2017), [https://perma.cc/DF9U-AZPB].

27. *Id.* at 6.

28. 365 U.S. 167 (1961).

29. *Id.* at 169.

30. Dodd, *supra* note 9, at 659.

31. *Id.* at 660.

32. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

with Disabilities Act.[33] The Supreme Court, however, has refused to apply the doctrine in § 1983 cases. Thus, if a police officer uses excessive force, the municipality that employs the officer cannot be held liable for the resulting damage unless the municipality itself, through some official policy or custom, actually caused the damage. In this respect, the Supreme Court has made § 1983 an outlier, and the Court has articulated no persuasive reason for doing so.

Moreover, the Court has made it very hard for a civil rights plaintiff to prove that a municipality itself or other governmental entity did something wrong. To do so, a plaintiff must meet a very stringent standard. To understand how difficult it is, consider the 2011 case of *Connick v. Thompson*.[34] In a 5-4 decision, the Roberts Court threw out a fourteen million dollar jury verdict in favor of a man who spent eighteen years in prison for a crime he did not commit because lawyers in the New Orleans District Attorney's office did not honor their constitutional obligation to turn over evidence favorable to him.[35] The Supreme Court held that the district attorney's office could not itself be held liable unless the plaintiff could show that its employees had committed previous violations and that it was aware of such violations.[36]

A second way in which the Supreme Court has limited the scope of the statute is that it has refused to permit a § 1983 plaintiff to sue a state or a state agency. In 1989, in another 5-4 decision,[37] the Rehnquist Court held that states and state agencies cannot be considered "persons" within § 1983 and thus are not suable under the statute.[38] The Court relied heavily on the notion that the state was a sovereign and that the word "person" in § 1983 should not be read to include a sovereign.[39] The case was a clear loss for civil rights, and a victory for the idea that state sovereignty can serve as a source of resistance to rights provided in the federal constitution. *Connick* can be seen as an example both of the Supreme Court's efforts in recent years to strengthen states' rights and of its hostility to the enforcement of constitutional rights by vulnerable individuals.

The Court has also limited the scope of § 1983 by making it virtually impossible for a civil rights plaintiff to recover from the

33. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

34. 563 U.S. 51 (2011).

35. *Id.* at 71.

36. *Id.* at 71–72.

37. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

38. *Id.* at 68.

39. *Id.* at 67–68.

supervisor of a government employee who has committed a constitutional tort. In a 2009 case, *Ashcroft v. Iqbal*,[40] involving an action brought by a prisoner of Pakistani origin against former Attorney General John Ashcroft regarding the conditions of the plaintiff's confinement, the Court shut down the possibility of supervisory liability which until then had been something of an open question.[41]

The Supreme Court's continual imposition of limitations on the rights of § 1983 plaintiffs by and large meant that a plaintiff's sole option was to seek recovery from the individual official who actually deprived him of a constitutional right as, for example, the police officer who used excessive force. Unsurprisingly, however, the Court has also created problems with suits against individuals. Further, of all the restrictions on § 1983 that the Court has created, the restriction on suits against individual government officials is rapidly becoming the most serious. This restriction is known as the doctrine of qualified immunity, and it has become a real impediment to the enforcement of civil rights. The Court's recent rulings regarding qualified immunity have been extremely harmful; I turn now to a discussion of this issue.

The doctrine of qualified immunity provides that a government official is immune from liability unless the civil rights plaintiff can show that the official violated clearly established law.[42] As a practical matter, this requirement usually means that the plaintiff must produce a precedent with facts very similar to those in his or her case. If the plaintiff cannot produce such precedent, the court will dismiss the case. Sadly from the standpoint of civil rights, this is what happens in a substantial number of cases.

The question arises as to the origin of the doctrine of qualified immunity, and as one scholar, Professor William Baude of the University of Chicago Law School explains, the simple answer is that the Supreme Court made the doctrine up.[43] While constitutional tort lawsuits against state and local officials are based on a federal statute, § 1983, qualified immunity is a limitation on the statute that is entirely a creation of the Court.[44] Nothing in the text of the statute and nothing in the statute's legislative history supports the qualified immunity doctrine. As Professor Baude further explains, members of the Court have offered three different justifications for imposing what is

40. 556 U.S. 662 (2009).

41. Dodd, *supra* note 9, at 663.

42. *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982).

43. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 104), [https://perma.cc/B7VC-3D32].

44. *See id.* at 104–06.

essentially an unwritten defense on the text of § 1983.[45] The first is that it is based on a "good faith" defense that was presumably available to officials at common law.[46] Another, proposed by Justice Scalia, is that the doctrine of qualified immunity compensates for the "mistake" that the Court made in interpreting § 1983's under color of law language in *Monroe v. Pape*.[47] Justice Scalia's idea is that the Court could and should create a new doctrine as a means of correcting a previous error.[48] Needless to say, in this instance, Scalia was not employing his famous textualism. A third proffered justification is that the doctrine of qualified immunity is a means of providing fair warning to government officials about what they are permitted to do.[49]

As Professor Baude points out, however, for a mix of historical, conceptual, and doctrinal reasons, each of these justifications is untenable. To summarize why this is so, there was no good faith defense at common law,[50] the Supreme Court's decision in *Monroe v. Pape* was not a mistake,[51] and the fair notice rule is a criminal law not a civil law concept and ought not to apply.[52] Finally, even if these justifications had merit, the doctrine of qualified immunity is not an effective way of addressing the problem. The simple truth is that there is no persuasive basis in the law for the Court's creation and expansion of qualified immunity.[53]

Members of the Court and others have also advanced several arguably practical reasons in support of the doctrine. These include a concern about government officials being subject to damage awards and the costs of litigation, a concern about officials becoming distracted from their duties, and a concern about deterring possible applicants for government employment.[54] Again, however, the evidence indicates that these concerns are unfounded. A recent comprehensive study of damage awards in § 1983 cases found that virtually all officials against whom judgments are taken are indemnified either by their employer or their employer's insurance company.[55] No government employees are

45. *Id.* at 106.

46. *Id.* at 108 (citing *Pierson v. Ray*, 380 U.S. 524, 556–57 (1967)).

47. 365 U.S. 167 (1961); Baude, *supra* note 43, at 117–18.

48. Baude, *supra* note 43, at 118–19 (citing *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting)).

49. *Id.* at 126 (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

50. *Id.* at 112–16.

51. *Id.* at 118–22.

52. *Id.* at 127–30.

53. *Id.* at 142.

54. *Harlow v. Fitzgerald*, 457 U.S. 800, 816–18 (1982).

55. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

required to satisfy damage awards out of their own pocket. The same is true of litigation expenses. Such expenses are uniformly paid by employers or insurance carriers.[56] Lawsuits, of course, may distract the officials who are sued, but this seems an insufficient reason for immunizing government officials from liability for violating people's constitutional rights. Finally, there is an utter paucity of evidence that people are deterred from seeking government employment because of a concern about liability for constitutional torts.[57]

Thus, it is fair to conclude that the justification for the qualified immunity doctrine is extremely thin. It appears to rest on nothing more substantial than an intuition by Supreme Court justices that government officials should not be held liable for constitutional violations except in very limited circumstances. Such circumstances would likely include actions that are particularly offensive or that obviously exceed official authority. As discussed, however, this view is not consistent with the language of § 1983 or with its purpose.

The most difficult problem with qualified immunity for a civil rights plaintiff is having to show that the right he or she contends was violated was clearly established. The Supreme Court has repeatedly stated that the phrase, "clearly established," must be understood concretely.[58] That is, the right that the plaintiff claims was violated must be established in a particularized sense. The fact, for example, that the Fourth Amendment is clearly established does not mean that every violation of the Fourth Amendment constitutes a violation of clearly established law. Further, the fact that it is clearly established that a police officer may not use excessive force does not mean that all arrests involving excessive force are violations of clearly established law. Rather, in order to overcome qualified immunity, the plaintiff must always demonstrate that there is a case on the books with facts very close to those in his or her case.

In recent years, the Supreme Court has dismissed cases based on the doctrine of qualified immunity more aggressively than ever before. In fact, in sixteen of its last eighteen decisions involving qualified immunity, the Court found for the defendant on the ground that the plaintiff had failed to provide a precedent with facts sufficiently similar to the case at bar.[59] The Court last ruled in a civil rights plaintiff's

56. *Id.* at 957.

57. De Stefan, *supra* note 26, at 18.

58. *See Harlow*, 457 U.S. at 818–19.

59. Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63–64 (2016), [https://perma.cc/L8EQ-NJS9].

favor on a qualified immunity issue in 2004.[60] Also, in many of the qualified immunity cases, the Court summarily reversed lower court rulings in favor of plaintiffs.[61] This is important because the Court frequently reminds us that it is not an error-correcting court, and that its job is to rule on broad issues. When the Court engages in a summary reversal, it does no more than correct an error. And in the qualified immunity cases, the only question was whether a circuit court of appeals decided the immunity issue correctly. Ironically, in the one case in which the Court's summary reversal favored a civil rights plaintiff, Justices Alito and Scalia argued that the Court should not be engaging in error-correcting.[62]

Circuit courts naturally follow the Supreme Court's lead. And like the Supreme Court, circuit courts are aggressively dismissing civil rights cases on the ground of qualified immunity. A recent survey analyzed 844 decisions of federal courts of appeals which included 1,460 claims.[63] The survey found that courts dismissed 1,055 of these claims or approximately seventy-two percent.[64] And most of the dismissals were based on a determination that the plaintiff failed to present a sufficiently similar precedent.[65]

As a result of the Supreme Court's aggressive approach in favor of government officials, trial courts find it difficult to confidently reject an assertion of qualified immunity in virtually any case. Trial courts are regularly reversed for denying requests for immunity but almost never for granting them.[66] The clear message sent by the Supreme Court is that district courts should think twice before allowing suits against government officials for violating a person's constitutional rights to proceed.

In addition to dismissing many civil rights suits on the ground of qualified immunity, the Supreme Court has created a number of procedural obstacles that civil rights plaintiffs must navigate before they can prevail in § 1983 suits. In 1985, in the case of *Mitchell v. Forsyth*,[67] the Burger Court decided that qualified immunity is not only a defense to a lawsuit but, in fact, an actual immunity from suit.[68] From that premise, the Court went on to conclude that a defendant in a civil

60. *Groh v. Ramirez*, 540 U.S. 551 (2004); Baude, *supra* note 43, at 137.

61. Kinports, *supra* note 59, at 63.

62. *Id.* at 64.

63. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 30–32 (2015).

64. *Id.* at 34.

65. *See id.* at 31–32, 38.

66. Baude, *supra* note 43, at 139.

67. 472 U.S. 511 (1985).

68. *Id.* at 526.

rights suit should not be subjected to pre-trial discovery or trial until the qualified immunity issue is finally resolved.[69] Thus, the Court held that a defendant whose application for qualified immunity is denied may immediately appeal without having to wait for final judgment as do litigants in virtually all other types of federal cases.[70] In addition, when a defendant appeals an adverse ruling on qualified immunity, the appeal brings an immediate halt to all proceedings in the trial court. The effect of this, of course, is to make it much more difficult for a civil rights plaintiff to pursue a claim.

Also, in 2009, the Supreme Court made another substantial change in the procedure governing civil rights cases, and this change has had an extremely harmful effect on the development of constitutional law. Before 2009, as the result of the 2001 case of *Saucier v. Katz*,[71] courts facing qualified immunity issues had to address the question of whether a constitutional right of the plaintiff's had been violated before determining whether the constitutional right at issue was clearly established.[72] This requirement was important because it forced courts to decide constitutional issues and thereby facilitated the development of constitutional law. As the Court explained in *Saucier*:

> This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.[73]

Unfortunately, however, eight years later in the case of *Pearson v. Callahan*,[74] the Supreme Court changed its mind and scrapped the requirement that courts decide the constitutional issue before proceeding to the clearly established issue.[75] The Court authorized lower courts to decide the issues in whatever order they wished.[76] The effect of this has been that almost all courts avoid the constitutional

69. *See id.*
70. *Id.* at 530.
71. 533 U.S. 194 (2001).
72. *Id.* at 197.
73. *Id.* at 201.
74. 555 U.S. 223 (2009).
75. *Id.* at 236.
76. *Id.*

issue and proceed directly to the clearly established issue.[77] The result, of course, is that constitutional law does not develop, and courts do not articulate constitutional rights. Fewer rights become clearly established and more § 1983 cases have to be dismissed.

Some legal scholars who study § 1983 have been extremely critical of the way that the Supreme Court has handled qualified immunity. To provide a sense of the nature of the criticism, I will list the authors and titles of a number of recent articles about qualified immunity. Dean Erwin Chemerinsky of the University of California Law School at Berkeley authored a piece entitled *How the Supreme Court Protects Bad Cops*.[78] Professor Baude's important article is entitled *Is Qualified Immunity Unlawful?*[79] Professor Karen Blum described the Supreme Court's opinions on qualified immunity in an article entitled *Section 1983 Litigation: The Maze, the Mud and the Madness*.[80] And Judge Stephen R. Reinhardt of the Ninth Circuit Court of Appeals contributed an important article entitled *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*.[81] Professor Kinports, whose work I referred to previously, contributed a piece entitled *The Supreme Court's Quiet Expansion of Qualified Immunity*,[82] and three well known constitutional law scholars, Professors Blum, Chemerinsky, and Martin A. Schwartz entitled their most recent article *Qualified Immunity: Not Much Hope Left for Plaintiffs*.[83] Four other important articles that make the same general point include: John C. Jeffries' *What's Wrong with Qualified Immunity?*,[84] Susan Bendlin's *Qualified Immunity: Protecting*

77. Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 647–48 (2013).

78. Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), [https://web.archive.org/web/20180225132540/https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html].

79. Baude, *supra* note 43.

80. Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913 (2015).

81. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015).

82. Kinports, *supra* note 59.

83. Blum, Chemerinsky & Schwartz, *supra* note 77.

84. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010).

'All But the Plainly Incompetent' (and Maybe Some of Them, Too),[85] Lindsey De Stefan's "*No Man is Above the Law and No Man is Below It:" How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*,[86] and finally, Ivan E. Bodensteiner's *Congress Needs to Repair the Court's Damage to* § *1983*.[87]

To summarize, § 1983 is a straightforward and clearly written statute that provides individuals whose constitutional rights have been violated with a remedy for redressing the harm that they have suffered. Sadly, the Supreme Court has consistently narrowed the statute and made it more difficult for plaintiffs to vindicate violations of their rights. In particular, the Court's recent qualified immunity crusade is inconsistent both with the intent of Congress and with the rule of law. Grappling with the intricacies of the Court's qualified immunity decisions consumes an enormous amount of court time, makes civil rights cases more complicated and expensive, and causes victims to lose many meritorious cases.

III. WHAT NEEDS TO BE DONE

The question naturally arises as to what, if anything, can be done. Obviously, the Supreme Court could easily solve the problem, but as discussed, the Court is extremely conservative and unsympathetic to civil rights plaintiffs. Were it inclined, however, to make § 1983 less unfriendly to plaintiffs, the Court could go a long way towards doing so by applying the *respondeat superior* principle to § 1983 claims. This would enable plaintiffs to prevail against the employers of individuals who commit constitutional torts without having to make the next to impossible showing that the employer itself did something wrong. It would also reduce enormously the significance of the qualified immunity doctrine. If plaintiffs could prevail against employing municipalities, it would matter much less whether individual employees were entitled to immunity.

As stated, however, it is unrealistic to place much hope in the Supreme Court as an agent of change on this issue. None of the Justices, even those appointed by Presidents Clinton and Obama, consistently dissent from the Court's apparent project of protecting and

85. Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023 (2012).

86. De Stefan, *supra* note 26.

87. Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to* § *1983*, 16 TEX. J. C.L. & C.R. 29 (2010).

expanding the immunity of government officials.[88] Some time ago, Justice Breyer suggested that it might be appropriate to re-evaluate the *respondeat superior* issue, but nothing came of it and at no time recently has any Justice raised the issue.[89]

The failure of the Clinton and Obama appointees to contest or, at least, rethink § 1983, in view of the problems that the Court has created, is particularly disturbing. As previously mentioned, until the recent highly publicized incidents involving African-Americans and law enforcement officers and the subsequent protests, including those by Colin Kaepernick and other professional athletes,[90] it had been a long time since we heard much about civil rights. And even since the incidents and protests, we have heard little about § 1983. The fact is that there has been little serious public discussion of the effectiveness of § 1983 and other civil rights laws since the 1960s. Moreover, since the Warren Court era, conservatives have waged a sustained attack on the idea that lawsuits can be a constructive means of vindicating constitutional rights. They have aggressively criticized litigation, invented misleading slogans such as strict construction, called for the enactment of tort reform legislation, and decried what they characterize as judicial activism.[91] And, as Professor Lynda Dodd has shown, neither the progressive legal community nor advocates of civil rights have forcefully responded.[92] It is not an exaggeration to say that since the 1960s there has been a sustained and largely uncontested attack on legal liberalism.

Private litigation as a means of enforcing civil rights needs to be strongly defended. As discussed, there really is no other effective way of protecting vulnerable people from official misconduct. Further, the initiative on this issue has to come both from the grassroots and elected officials. Neither President Clinton nor President Obama provided effective leadership on this subject. Clinton, for example, signed several harmful bills limiting the right to challenge constitutional violations in court. One of these, the misnamed Antiterrorism and

88. Email from Kit Kinports, Professor of Law, Penn State Law, to Lynn Adelman, U.S. District Judge, Eastern District of Wisconsin (Dec. 28, 2016, 9:46 AM) (on file with the author) (noting that of the sixteen recent cases in which the Supreme Court has granted qualified immunity, Justices Ginsburg and Stevens dissented three times, Justice Sotomayor dissented twice and Justice Breyer dissented once. Eight cases were decided 9-0).

89. *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 430–31 (1997) (Breyer, J., dissenting).

90. Megan Garber, *They Took a Knee*, ATLANTIC (Sept. 24, 2017), [https://perma.cc/32XS-H6MF].

91. Dodd, *supra* note 9, at 660.

92. *Id.* at 658.

Effective Death Penalty Act,[93] severely restricted the right of persons in state custody to challenge the constitutionality of their confinement by bringing petitions for habeas corpus in federal court. Another, the also misnamed Prison Litigation Reform Act,[94] made it much more difficult for prisoners to challenge the manner in which they are treated by prison guards and other institution officials. Both of these laws undermined the civil rights of the most vulnerable and least influential members of society, and in the case of the bill relating to habeas corpus, the President's counsel strongly urged a veto.[95] President Obama, similarly, placed little emphasis on litigation and the courts as a means of achieving social justice.[96]

Thus, civil rights advocates and public officials concerned about civil rights must pay more attention to the harm that the Supreme Court is doing. This is particularly so in areas like qualified immunity that on their face seem obscure but in the real world have an enormous impact. I have talked about some of the areas where the Supreme Court has harmed civil rights and there are many others that I have not mentioned. For example, in an important decision in 2001, the Rehnquist Court made it much more difficult for a plaintiff in a civil rights case to achieve "prevailing party" status and, therefore, an award of attorney's fees. In that case, *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*,[97] Justice Rehnquist announced that the "clear" meaning of the phrase, "prevailing party," was something different from what all eleven circuit courts had determined.[98] Decisions like this, individually and cumulatively, have enormous impact and cannot be allowed to remain under the radar. Ultimately, people concerned about civil rights need to begin to think about legislation to strengthen § 1983. Congress has periodically stepped in and strengthened civil rights laws that the Supreme Court has narrowed. Examples of this include the Pregnancy Discrimination Act of 1978,[99] the Civil Rights Restoration Act of

93. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

94. Pub. L. No. 104-134, Title VIII §§ 801–810, 110 Stat. 1321-66 to -77 (1996).

95. Liliana Segura, *Gutting Habeas Corpus: The Inside Story of How Bill Clinton Sacrificed Prisoners' Rights for Political Gain*, INTERCEPT (May 4, 2016, 12:54 PM), [https://perma.cc/YSN2-P2RE].

96. Dodd, *supra* note 9, at 658, 665.

97. 532 U.S. 598 (2001).

98. Dodd, *supra* note 9, at 661.

99. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

1987,[100] the Civil Rights Act of 1991,[101] and the Lilly Ledbetter Fair Pay Act of 2009.[102] To enact any law strengthening civil rights, however, increased public awareness of the problem and a strong base of public support will have to emerge. The progressive community and particularly the progressive legal community, faces a difficult and time-consuming assignment but, one that is critical to the well-being of the country.

100. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28.
101. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
102. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.