Extra! Extra! Read All About It: What A Plaintiff “Knows Or Should Know” Based On Officials’ Statements And Media Coverage of Police Misconduct For Notice of a §1983 Municipal Liability Claim

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Abstract

The article argues that the Second Circuit’s recent decisions in Clinton v. City of New York and Monzon v. City of New York reduce the effectiveness of a §1983 claim against a municipality. The article highlights that the element of subjectivity required to determine the accrual period of a §1983 claim restricts the utility of the claim because it adopts a cultural standard at odds with a racialized societal reality. The author discusses whether consideration of plaintiffs’ testimony, statements of state and local police officials, and media coverage of municipal and state employee actions should factor into determining the accrual of a §1983 claim. The article concludes suggesting that courts adhere to a theory of notice of a §1983 claim founded on facts connecting the municipal action to the plaintiff’s injury, instead of basing notice on inferences regarding connections between individual municipal actors and the municipality.

KEYWORDS: accrual period of §1983 claim, Monnel Claims, Municipal Liability Claims, timeliness of §1983 claim
EXTRA! EXTRA! READ ALL ABOUT IT:
WHAT A PLAINTIFF "KNOWS OR SHOULD KNOW" BASED ON OFFICIALS’ STATEMENTS AND MEDIA COVERAGE OF POLICE MISCONDUCT FOR NOTICE OF A § 1983 MUNICIPAL LIABILITY CLAIM

Jenny Rivera*

Although the plaintiff’s § 1983 claim is a strong one . . . [the plaintiff’s] failure to file within the limitations period cannot be excused. The [plaintiff’s] cause of action is therefore dismissed as to the municipal defendants.1

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[When commencing a [police misconduct suit] neither the plaintiff nor [the plaintiff’s] attorney is likely to know much about the relevant internal operations of the police department, nor about the disciplinary history and record of the particular police officers involved. In view of the strong policies favoring suits protecting the constitutional rights of citizens . . . it would be inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct . . . 2

Recent revelations of police misconduct throughout the country have sparked renewed demands for improved police accountability

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2. Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986).
and supervision. As investigative committees have identified and highlighted the link between police corruption and police brutality, requests for external controls have increased. Indeed, calls for independent federal monitors in cases of police brutality reflect the dissatisfaction with, and intolerance of, police misconduct and abuse, as well as the growing recognition that local police departments do not or cannot police themselves. As citizens' disaffection from law enforcement personnel and institutions grows, so does the urgent need for change.

Unfortunately, change in the form of increased accountability and reduced police corruption has proved elusive. Litigation, a traditional vehicle for change, has had limited success in transforming law enforcement at an institutional level. The overall costs to the government and the public coffers have not stemmed police misconduct at a level commensurate with the substantial judgments

3. E.g., Bruce Shapiro, When Justice Kills; After Years of Decline Police Brutality Is on the Rise, Sparking a Reform Movement, The Nation, June 9, 1997, at 21 (stating that the emphasis of reformers is on independent review boards and special prosecutors); Elizabeth Levitan Spaid, More Civilian Watchdogs Patrol Thin Blue Line, The Christian Science Monitor, Jan. 10, 1996, at 3 (discussing civilian complaint review panels) [hereinafter More Civilian Watchdogs]


and settlements that have been paid by states and municipalities. To increase pressure for public accountability and decrease police misconduct, victims of police misconduct must have greater access to the legal system, and the availability of legal recourse through civil rights actions must be improved. This is particularly true for litigation against localities for poor or nonexistent supervision and discipline of officers for police misconduct. While these actions are the most difficult to prove, they are the most likely to bring about change because they challenge institutional actors and problems, rather than concentrating solely upon individual police officers and their bad acts.

More than two decades ago, the Supreme Court concluded in Monell v. Department of Social Services that cities are “persons” subject to suit under 42 U.S.C. § 1983 for violations of rights guaranteed under the United States Constitution and laws. Pursuant

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6. E.g., id. at 534 (noting that New York City paid $140 million in damages for alleged police abuses in fiscal years 1994-95 and 1998-99).  
7. Martin A. Schwartz, Section 1983 Claims Against Municipal Officer and Municipality, N.Y. L.J., June 20, 2000, at 3 (discussing that municipal liability § 1983 claims “can be factually and legally complex, cumbersome, and very time consuming for counsel and the court”) [hereinafter Schwartz, Section 1983 Claims].  
9. The statute reads, in relevant part:  
    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 . . . .  
to Monell and its progeny, a plaintiff can sue a municipality for its direct actions, as well as for municipal policies resulting in a constitutional tort.\footnote{Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993) (holding that municipal liability suits are not subject to heightened pleading requirement, and that immunity defense not available to municipal defendant); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 733 (1989) (noting that § 1983 is the exclusive federal remedy for violations by state actors of rights guaranteed under 42 U.S.C. § 1981); Harris, 489 U.S. at 388 (holding that local government may be liable where failure reflects "deliberate indifference to the rights of persons with whom the police come into contact") (footnote omitted); Praprotnik, 485 U.S. at 112 (holding that actions of municipal employee with decisionmaking authority, as determined by state law, may be basis for municipality's liability); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (plurality opinion) (holding that a single act by a municipal decisionmaker with final authority may constitute a municipal policy subjecting municipality to § 1983 liability); Owen v. City of Independence, 445 U.S. 622, 650 (declaring that the municipality qualified immunity since employee's good faith is no bar to damages against municipality); Monell, 436 U.S. at 690-91 (declaring that local governments are subject to suit under § 1983 for damages, and declaratory and injunctive relief).}

In the years following the watershed decision in municipal liability); [hereinafter NAHMOD, CIVIL RIGHTS] 1B MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, §§ 7.6-7.11 (3d ed. 1997 & Supp. 2000) (tracing historical development of Supreme Court's analysis of municipal liability) [hereinafter SCHWARTZ, SECTION 1983 LITIGATION].

11. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993) (holding that municipal liability suits are not subject to heightened pleading requirement, and that immunity defense not available to municipal defendant); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 733 (1989) (noting that § 1983 is the exclusive federal remedy for violations by state actors of rights guaranteed under 42 U.S.C. § 1981); Harris, 489 U.S. at 388 (holding that local government may be liable where failure reflects "deliberate indifference to the rights of persons with whom the police come into contact") (footnote omitted); Praprotnik, 485 U.S. at 112 (holding that actions of municipal employee with decisionmaking authority, as determined by state law, may be basis for municipality's liability); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (plurality opinion) (holding that a single act by a municipal decisionmaker with final authority may constitute a municipal policy subjecting municipality to § 1983 liability); Owen v. City of Independence, 445 U.S. 622, 650 (declaring that the municipality qualified immunity since employee's good faith is no bar to damages against municipality); Monell, 436 U.S. at 690-91 (declaring that local governments are subject to suit under § 1983 for damages, and declaratory and injunctive relief).

Plaintiffs do not have a § 1983 remedy against the states, however, because states are not "persons" within the meaning of § 1983. Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989). In addition, the Eleventh Amendment bars suits for damages against the states. Quern v. Jordan, 440 U.S. 332 (1979). See generally NAHMOD, CIVIL RIGHTS, supra note 10, §§ 6:67-6:69, vol. 2, §§ 9:48-9:50; SCHWARTZ, SECTION 1983 LITIGATION, supra note 10, ch. 8. Plaintiffs initially sought to reach the states' deep pockets by suing state officials in their official capacity—actions known as "official-capacity suits." The Supreme Court put an end to these efforts when it concluded that such suits must be treated as suits against the government entity the officials represent. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). As a consequence, state officials in these suits are not liable for damages. Will, 491 U.S. at 71. Plaintiffs' persistence paid off, however, when the Court subsequently held that state officials sued in their personal capacity—"personal capacity suits"—are "persons" under § 1983, and may be personally liable for damages. Hafer v. Melo, 502 U.S. 21, 27 (1991) (citing Will, 491 U.S. at 371).

To the benefit of plaintiffs, states generally indemnify individual defendants in these suits. \textit{E.g.}, Bd. of County Comm'rs, 520 U.S. at 436 (Breyer, J., dissenting) (citing states that indemnify employees for § 1983 liability, for actions within scope of their employment); \textit{see also} N.Y. GEN. MUN. LAW § 50-K (McKinney 1999) (requiring New York City pay civil damages imposed against employees); Comm. on New York City Affairs of The Ass'n of the Bar of the City of New York, \textit{The Failure of Civil Damages Claims to Modify Police Practices, and Recommendations for Change}, 55 THE RECORD 533, 540 (2000) (discussing the failure of the current New York tort system to "modify the conduct of persons and organizations found liable" in the New York Police Department, despite the millions in settlement and judgment damages paid by New York City in police abuse cases).

Moreover, plaintiffs also may affect state policy, protocols and other actions through a § 1983 suit to the extent that plaintiffs may proceed against state officials in
Monell, the Court has struggled intensely to define the parameters of § 1983 municipal liability. The result has been a series of cases that seemingly provide relief against localities, but based on a theory of direct liability, which requires a plaintiff to show more than that a municipality’s employees acted badly. This requirement of direct municipal action has proved to be a tremendous obstacle to plaintiffs. Having eschewed a respondeat superior theory of liability in actions against municipalities, the Court has given with one hand and taken with the other.

an official capacity suit for injunctive relief. In these actions state actors are treated as individuals. Will, 491 U.S. at 71, n.10 (quoting Graham, 473 U.S. at 167 n.14).

12. E.g., Bd. of County Comm’rs, 520 U.S. at 404 (holding that the conduct attributable to municipality was insufficient to establish liability because plaintiff must establish municipal culpability and “a direct causal link between the municipal action and the deprivation of federal rights”); City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam) (holding that a municipality is not liable where a jury finds the individual officer did not commit a constitutional injury); Harris, 489 U.S. at 388 (imposing a “deliberate indifference” standard in failure to train case); Praprotnik, 485 U.S. at 130 (declaring that failure to investigate “subordinate’s discretionary decisions” alone does not constitute delegation of municipal policymaking authority); Pembaur, 475 U.S. at 483 (declaring that municipal liability requires decision of those with final policymaking power is insufficient to establish municipal policy of inadequate training). But see Tuttle, 471 U.S. at 820-31 (Brennan, J., concurring) (“A single police officer may grossly, outrageously, and recklessly misbehave in ... a single incident ... attributable to various municipal policies or customs ... [that] were the ‘moving force’ ... or cause of the violation.”) (internal citation omitted). See generally SCHWARTZ, Section 1983 Litigation, supra note 10, ch. 7 (discussing municipal and supervisory liability under 42 U.S.C. § 1983). For a discussion and critique of the Court’s holdings on municipal policies and customs, see Myriam E. Gilles, Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability, 80 B.U. L. REV. 17 (2000).

13. Monell, 436 U.S. at 691 (“[A] municipality cannot be held liable under § 1983 on a respondeat superior theory.”). Members of the Court, in particular Justice Stevens, and several commentators, have questioned the wisdom of the Court’s rejection of a respondeat superior theory in § 1983 municipal liability actions. E.g., Bd. of County Comm’rs, 520 U.S. at 430-37 (Breyer, J., dissenting, joined by Stevens & Ginsburg, J.J.) (arguing for reexamination of § 1983 and questioning soundness of Monell principle rejecting vicarious municipal liability); Praprotnik, 485 U.S. at 148, n.1 (Stevens, J., dissenting) (“Like many commentators who have confronted the question, I remain convinced that Congress intended the doctrine of respondeat superior to apply in § 1983 litigation.”) (citations omitted); Pembaur, 475 U.S. at 489-90 (Stevens, J., concurring in part and in the judgment) (advocating for application of respondeat superior to municipal liability claims); Tuttle, 471 U.S. at 834-44 (Stevens, J., dissenting) (arguing that respondeat superior was historically a part of the common law doctrine that is incorporated into § 1983); Paul Hoffman, The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America, 66 S. CAL. L. REV. 1453, 1518 (1993) (arguing that respondeat superior should apply to police officers); Harold S. Lewis, Jr. & Theodore Y. Blumoff, Reshaping Section
Although a Monell-based municipal liability claim seems to provide tremendous opportunities for redress of injuries caused by municipal government actions, it is no panacea for the neophyte plaintiff who is unskilled in the intricacies of civil practice and civil rights litigation. The plaintiff seeking to assert such a claim faces myriad obstacles in filing, and eventually succeeding, against a municipality. As with all other civil actions, such a claim must satisfy general procedural and substantive requirements. Furthermore, the claimant must meet certain evidentiary requirements unique to § 1983 municipal liability claims, and must also satisfy a direct causation requirement, which is onerous both in theory and practice.

Recognition of the plaintiff’s injury and the source of that injury, matters intricately tied to these same evidentiary requirements, can have a significant impact on the viability of a municipal liability claim. Notice of the injury commences the running of the statutory time limit on the claim. As a consequence, a significant initial hurdle is determining the durational limit for the timely filing of the complaint. Should a plaintiff fail to file within the time limit, the plaintiff is generally barred from ever seeking § 1983 redress for the claimed injury, regardless of the merits of the underlying claim.

Section 1983 does not contain a federal statute of limitations. To fill this statutory lacuna, the courts turn to state law, and

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15. A § 1983 claim period, however, may be tolled pursuant to applicable state tolling provisions, allowing a plaintiff to proceed with the action. Bd. of Regents v. Tomanio, 446 U.S. 478 (1980) (applying both state statute of limitations and tolling rules to § 1983 claim); Chardon v. Soto, 462 U.S. 50 (1983) (applying Puerto Rico's tolling rules to § 1983 claims) (citing Bd. of Regents v. Tomanio, 446 U.S. 478 (1980)). Moreover, a § 1983 claim is subject to equitable tolling principles. Holmberg v. Armbrrecht, 327 U.S. 392 (1946). Hence, even a plaintiff whose action is barred by the time limitations requirement may be the beneficiary of a toll of that period for various reasons, including the existence of actions by the defendant which effectively undermine plaintiff's ability to file within the time limit. But see infra note 264, discussing the circuit courts' reconsideration of the applicability of federal equitable estoppel principles pursuant to Holmberg in § 1983 cases in light of the Court's subsequent decision in Hardin v. Straud, 490 U.S. 536 (1989).


17. Title 42 U.S.C. § 1988 permits application of state law to § 1983 actions because,

[the federal civil rights statutes] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry
"borrow" the state's limitations period. The appropriate limitations period is "the general or residual [state] statute for personal injury actions."19

Although state statutory limitation periods apply to § 1983 actions, the accrual of such actions—the point at which the statutory time commences—is governed by federal law.20 As a consequence, a determination of the timeliness of a § 1983 claim may involve consideration of both state and federal decisional and statutory law.

The Supreme Court has calculated the accrual period from that point in time when the plaintiff knew or should have known of the injury that is the basis of the legal claim.21 This standard ostensibly

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20. See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) (holding that a § 1983 claim for unlawful conviction and imprisonment accrues when the state declares such conviction or imprisonment invalid); Pauk v. Bd. of Trs., 654 F.2d 856, 859 (2d Cir. 1981) ("Federal law determines when a claim accrues under § 1983."); Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980) ("Federal law . . . establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action."); cf. Del. State Coll. v. Ricks, 449 U.S. 250 (1980) (discussing accrual under § 1981). 21. See, e.g., Hicks, 449 U.S. at 258 (holding that the Title VII action limitations period runs from when tenure decision is made and communicated to plaintiff, since that is the discriminatory act); Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (holding
appears plaintiff-friendly because it seems to consider the possibility that a plaintiff’s knowledge of events might be delayed, which would impact the plaintiff’s ability to recognize and act on a § 1983 claim. As a result, under certain circumstances, the plaintiff may have more time, cumulatively, than would appear to be provided for, chronologically, under the state’s limitation statute. Plaintiffs and their representatives may, however, have the impression—often well founded—that the triggers for determining the point of accrual are less salutary than initially suggested by the standard. In practice, plaintiffs lack the necessary legal knowledge, familiarity with the legal system, and facts about the municipality’s actions and policies to discern a legally redressable injury. In other words, plaintiffs may have insurmountable difficulty in determining that they have a claim against a municipality.

A determination of when a plaintiff knew, or should have known, that the defendant’s conduct could be the basis of a redressable § 1983 injury can be a complex inquiry. The inquiry is complicated by the factual complexities inherent in a claim based on an institutional “policy and practice” of a government entity, rather than on direct malicious conduct by some individual “bad actor.” This article argues that the courts’ rulings in two recent

that the limitations period runs from date when plaintiff received notice of termination of job appointment).

22. Cf. Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986). In Oliveri, the Second Circuit recognized the access-to-information problem faced by plaintiffs and their attorneys, and held that plaintiffs need not secure detailed information otherwise necessary to establish a pattern of actionable misconduct prior to commencement of an action.

We recognize, however, that when commencing a [police misconduct] suit . . . neither the plaintiff nor his attorney is likely to know much about the relevant internal operations of the police department, nor about the disciplinary history and record of the particular police officers involved. In view of the strong policies favoring suits protecting the constitutional rights of citizens, we think it would be inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct in the form of inadequate training, improper policies, and toleration of unconstitutional actions by individual police officers.

Id. at 1279.


The fact that a person knows (or should have known) of her injury, however, is not the same as knowing that her federally protected rights were violated. A layperson may well know that she has been injured, but it often takes a lawyer with expertise in constitutional law to evaluate whether federally protected rights were violated. Id. at 10.
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cases, decided in the Second Circuit, equating knowledge of individual officers' illegal and corrupt conduct with knowledge of an injury due to a municipality's policy, custom, or practice, are legally and factually unsupportable. The approach taken by the courts, this article argues, serves to diminish the effectiveness of § 1983 against municipalities.

This article further argues that a judge's determination of untimeliness is an inquiry based on objective facts and a judge's perceptions, influenced by the judge's individual experiences, as well as the dominant cultural norms of behavior as to what constitutes reasonable actions and knowledge on the part of a plaintiff. Thus, the limitations period calculation has an element of subjectivity, as seen through the lens of a culturally normative reality.

The standard of accrual that determines the timeliness of a § 1983 claim is extremely malleable and vulnerable to an individual judge's socially constructed cultural values. This standard of accrual essentially renders § 1983 almost useless against municipalities for police misconduct claims based on policies, practices, and/or customs because it adopts a cultural standard at odds with a racialized societal reality. Two recent Second Circuit cases are analyzed to demonstrate the difficulty potential plaintiffs and their counsel face in determining the point of accrual for Monell-based claims alleging police misconduct.

The City of New York (the "City"), the municipal defendant in these two cases, challenged the plaintiffs' municipal liability claims as untimely, arguing that they were filed after the three-year applicable statutory time period. The City argued that plaintiffs had notice of their municipal liability claims from statements made by

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25. Two commentators have asserted that § 1983 "is almost entirely a judicial construct." Reshaping Section 1983, supra note 13, at 760.


27. The author participated in the litigation of both cases in the district and circuit courts. The author drafted the plaintiffs' memoranda of law in Clinton and Monzon and the Clinton appellate brief. The author also argued the Clinton appeal before the Second Circuit.

28. Section 1983 claims filed in New York are subject to New York State's three-year statute of limitations. Owens v. Okure, 488 U.S. 235, 251 (1989); Murphy v. Lynn, 53 F.3d at 548 (2d. Cir. 1995); see also N.Y. C.P.L.R. 214(2), (5) (McKinney 1990) (state's three year limitations period applicable to general personal injury claims); see also discussion infra Part I.
state actors and the ensuing extensive media coverage underlying the police precinct scandal.29 In addition, the City claimed that the plaintiffs' participation in the investigation and prosecution of the individual police officers involved in the plaintiffs' illegal arrests, prosecutions, and incarcerations belied any claims that they did not have notice of a municipal liability claim.30 The plaintiffs responded that their municipal liability claims based on police misconduct and corruption were timely filed because accrual did not occur upon their initial arrests and prosecutions, but later, when they knew that their injuries resulted from the City's policies rather than from the individual police officers' actions.31 The plaintiffs argued that information about the corruption and the City's direct role in sustaining and furthering the corruption, was essential to their notice of the municipal liability claim.32

This article discusses the impact of the plaintiffs' testimony, officials' statements, and media coverage of the underlying events of the claim and subsequent events on the accrual period of Monell-based claims.33 Part I sets forth the applicable substantive and procedural law in determining the timeliness of a § 1983 municipal liability claim, and the rules governing summary dismissal based on untimeliness. Part II discusses the two cases filed in the Southern

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31. It was critical to the plaintiffs' actions that the limitations period be calculated from some point later than their arrests since both actions were filed more than three years after the police arrested them. Clinton filed his complaint five years and eight months after his arrest, and four years and eight months after being sentenced to four years to life in prison. Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Clinton v. City of New York, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, supra note 30, at 82-83. Monzon filed his complaint six years after his arrest, and four years and three months after a jury acquitted him of all charges. Memorandum of Law in Opposition to Motion to Dismiss, at 5-6, Monzon v. City of New York, 98 Civ 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999) (on file with author) [hereinafter Monzon's Memorandum].

32. Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Clinton v. City of New York, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, supra note 30, at 89-91; Monzon's Memorandum, supra note 31, at 10-17.

33. Portions of the discussions in Part II-IV of this article are adapted from the author's memoranda of law and appellate brief filed in these cases.
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District of New York and the subsequent Second Circuit summary order in one of these cases.

Part III considers the propriety of basing accrual of a § 1983 action upon plaintiffs' testimony, the statements of state and local law enforcement officials, and media coverage of municipal and state employee actions. This section argues that the officials' statements are insufficient as a matter of law, and that judicial reliance upon them is in direct contravention of doctrine and precedent and injects a contrarian analysis at odds with reality into § 1983 Monell-based cases.

In addition, this section argues that reliance on "mainstream" media coverage should be suspect because of its unreliability and lack of credibility within communities suspicious of law enforcement motives and actions. This section challenges the wisdom of relying on mainstream English-language media coverage of police misconduct in light of the often tortuous and hostile relationship between law enforcement officials and people of color in general, and between police and the specific communities at issue in the litigation. The culturally and linguistically constructed normative frameworks, as applied to Monell claims, are similarly discussed and dissected.

Part IV discusses the equitable tolling arguments raised by the plaintiffs and rejected by the courts. Part V recommends a standard for assessing "constructive knowledge" of § 1983 claims based on state officials' statements and newspaper and other media coverage. This part recommends that the courts adhere to a theory of notice of a municipal liability claim built upon information connecting the municipal action to the plaintiff's injury, rather than one based upon inferences about the connection between individual municipal actors and the municipality.

PART I

A. Limitations and Accrual Periods Applicable to 42 U.S.C. § 1983 Monell Claims

In Wilson v. Garcia, the Supreme Court held that, for limitations period purposes, § 1983 claims were analogous to personal injury claims and thus subject to a state's personal injury statute of limitations. Then, in Owens v. Okure, the Court held that when

35. Id. at 275-76.
there are multiple personal injury statutes of limitations, § 1983 claims are subject to the state's general personal injury limitations period.\textsuperscript{37} Owens involved New York State's statute of limitations, and the Court concluded that New York's three-year general personal injury statute of limitations applied.\textsuperscript{38} The Court further held that a § 1983 damages action on the grounds of "an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated."\textsuperscript{39} Although § 1983 claims are subject to state statutory time limitations they remain creatures of federal law and accrue pursuant to federal law.\textsuperscript{40} The Supreme Court has determined that accrual occurs when the claimant knew or "should have known of his injury."\textsuperscript{41} The circuits have uniformly adopted and applied this standard to § 1983 claims.\textsuperscript{42}

\textsuperscript{37} Id. at 249-50. For a table of state limitations periods applicable to § 1983 claims, including case citations, see Schwartz, Section 1983 Litigation, supra note 10, § 12.9, Table of Limitations Periods, & Supp. 2000.

\textsuperscript{38} 488 U.S. at 249-51; see also Murphy v. Lynn, 53 F.3d 547, 548 (2d Cir. 1995) (stating that the § 1983 statute of limitations in New York is three years); N.Y. C.P.L.R. § 214(2), (5) (McKinney 1990). While § 1983 claims are subject to state statutes of limitations, they are not subject to state notice-of-claim requirements. Felder v. Casey, 487 U.S. 131, 140-41 (1988). Notice-of-claim requirements typically impose a short time frame within which the prospective claimant must notify the government of a potential lawsuit against public officers and/or public entities. For a discussion of notice-of-claim requirements, see Schwartz, Section 1983 Litigation, supra note 10, § 12.15.

\textsuperscript{40} See supra note 20.
\textsuperscript{41} Urie v. Thompson, 337 U.S. 163, 170 (1949).
\textsuperscript{42} Morales v. City of L.A., 214 F.3d 1151, 1154 (9th Cir. 2000) (declaring the standard is when plaintiff "knew or had reason to know of the injury which is the basis of his action"); Harris v. Hegmann, 198 F.3d 153, 157 (5th Cir. 1999) ("When a plaintiff knows or has reason to know of the injury which is the basis of the action.") (citation and internal quotation marks omitted); Montgomery v. De Simone, PTL., 159 F.3d 120, 126 (3d Cir. 1998) ("[When] plaintiff knows or has reason to know of the injury which is the basis of the § 1983 action") (citation and internal quotation marks omitted); Smith v. City of Enid, 149 F.3d 1151, 1154 (10th Cir. 1998) ("When the plaintiff knows or has reason to know of the injury which is the basis of the action.") (citation and internal quotation marks omitted); Carreras-Rosa v. Alves-Cruz, 127 F.3d 172, 174 (1st Cir. 1997) ("When the plaintiff knows, or has reason to know, of the injury on which the action is based.") (citation and internal quotation marks omitted); Collyer v. Darling, 98 F.3d 211, 220 (6th Cir. 1996) (when "plaintiff knows or has reason to know of the act providing the basis of his or her injury has occurred") (citation omitted); Brooks v. City of Winston-Salem, N.C., 85 F.3d 178, 182 (4th Cir. 1996) ("[When plaintiff] knew or should have known both of the injury . . . and who was responsible for any injury."); Rozar v. Mullis, 85 F.3d 556, 561-62 (11th Cir. 1996) ("[When] the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.") (citation and internal quotation marks omitted); Sellars v. Perry, 80 F.3d 243, 245 (7th
B. Motions to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b) and Summary Judgment Motions Pursuant to Federal Rule of Civil Procedure 56 for Untimely Actions

Municipalities commonly seek summary, pre-trial dismissal of municipal liability claims. Accordingly, in Clinton v. City of New York and Monzon v. City of New York, the City moved for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and, in Clinton, succeeded in dismissing the actions against it before discovery under Rule 56.

Summary dismissal requires the defendant to satisfy a strict standard. A court may dismiss a complaint pursuant to Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set

Cir. 1996) ("[When] plaintiff knows or has reason to know of the injury that is the basis of his action.") (citation omitted); Pinaud v. County of Suffolk, 52 F.3d 1139, 1157 (2d Cir. 1995) ("When it is clear, or should be clear, that the harmful act [underlying the claim] is the consequence of a county 'policy or custom.'"); Pauk, 654 F.2d 856, 859 (2d Cir. 1981) (when the claimant "knows or had reason to know" of the injury) (quoting Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980)).

For a comprehensive discussion of § 1983 claim accrual, and a synopsis of significant recent decisions on this issue, see SCHWARTZ, SECTION 1983 LITIGATION, supra note 10, vol. 1C, § 12.4. As Professor Schwartz indicates, notice of injury and notice of a constitutional violation are not the same. Id. at 10. The Supreme Court and a majority of circuits adopted notice of injury, not notice of the violation of a right as the accrual benchmark. Id. Yet, parties and attorneys have difficulty distinguishing these two.

Basing accrual on notice of injury is problematic precisely because constitutional issues are complex and difficult to grasp. Whether an individual has been injured in the constitutional sense and the source of that injury are difficult to determine. Some problems include the herculean task of discerning municipal liability when police departments and cities deny the existence of a municipal role in the officers' "bad acts," arguing that the individuals involved are "rogue officers." Cf. newspaper articles set forth, infra notes 86-87 (referring to "rogue officers" in corruption scandals). Municipalities also withhold documentation and information that goes to the municipality's role in the individual actions. E.g., King v. Conde, 121 F.R.D. 180, 192 (E.D.N.Y. 1988) (police departments refuse disclosure of personnel and investigatory files because it inhibits collection of information from police officers, and refuse disclosure of police procedural guidelines because it compromises effectiveness of law enforcement). Another layer of complexity to the legal and factual inquiry comes from § 1983 itself which, unlike other statutes, "does not create substantive rights." City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985) (citing Baker v. McCollan, 443 U.S. 137, 140, 144 n.3 (1979)).

43. Clinton, 1999 WL 105026, at *1; Monzon, 1999 WL 1120527, at *1. In Monzon, the municipal liability claim survived a motion to dismiss, pursuant to Rule 12(b)(6), because the court could not determine, as a matter of law, the untimeliness of the plaintiff's claim. Monzon, 1999 WL 1120527 at *1.

44. In Clinton, the court summarily dismissed, pursuant to Rule 56, concluding that, on the record and under the law, the plaintiff was on notice beyond the time when he filed his complaint. See infra Part II, for a discussion of the procedural history in these cases.
of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief."\textsuperscript{45} In considering the motion, the court must treat all factual allegations as true and construe all reasonable inferences in the plaintiff's favor.\textsuperscript{46}

Summary judgment under Rule 56 is appropriate only where "there is no genuine issue as to any material fact and . . . the mov- ing party is entitled to a judgment as a matter of law."\textsuperscript{47} A party seeking dismissal based on summary judgment faces a high threshold. The moving party bears the initial burden of establishing "the absence of a genuine issue as to any material fact."\textsuperscript{48} Moreover, the movant's summary judgment materials "must be viewed in the light most favorable to the opposing party."\textsuperscript{49} Satisfaction of the moving party's burden is essential, because summary judgment cannot be granted unless such burden has been adequately satisfied, even when the opposing party does not adequately respond. "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."\textsuperscript{50}

The district court's task in considering summary judgment is narrow. The district "judge's function is not . . . to weigh the evidence


The Second Circuit has stated that this "principle is to be applied with particular strictness when the plaintiff complains of a civil rights violation." Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991).

\textsuperscript{46} Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993). See generally Moore, supra note 45, § 12.34; Wright & Miller, supra note 45, § 1357.

\textsuperscript{47} FED R. CIV. P. 56(c). In the Clinton litigation the City initially filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which the district court treated as a motion for summary judgment under Rule 56, based on the appended supporting documents submitted by both parties. Clinton, 1999 WL 105026, at *1. The parties' attachments consisted of published and unpublished judicial opinions, New York State and federal court documents in the referenced criminal matters involving the plaintiff and the former police officer defendants, and plaintiff's affidavit in opposition to the motion to dismiss. Appendix, supra note 30, 36-185.

\textsuperscript{48} Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-33 (1986) (discussing Rule 56(e)). For a general discussion of summary judgment and standards of review, see Wright & Miller, supra note 45, vol. 10A, §§ 2716, 2728, & vol. 10B, § 2732.2; Moore, supra note 45, § 56.11[5].

\textsuperscript{49} Adickes, 398 U.S. at 157 (footnote omitted).

\textsuperscript{50} FED. R. CIV. P. 56(e) advisory committee's note on 1963 amendment (quoted in Adickes, 398 U.S. at 160).
and determine the truth of the matter but to determine whether there is a genuine issue for trial.”\textsuperscript{51} Thus, the inquiry under summary judgment is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”\textsuperscript{52} To that end, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”\textsuperscript{53}

On appeal, the appellate “[c]ourt reviews the district court’s determination de novo . . . and reviews facts in the light most favorable to the losing party.”\textsuperscript{54} The court must be convinced that there is no “evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party.”\textsuperscript{55} Thus, summary judgment is limited to those cases in which there are no disputed factual issues underlying a claim that must be presented to a trier of fact.

\section*{C. Municipal Liability Claims}

\subsection*{1. Pleading and Evidentiary Burdens}

In \textit{Leatherman v. Tarrant},\textsuperscript{56} the Supreme Court rejected the application of a heightened pleading requirement to § 1983 municipal liability claims.\textsuperscript{57} The Court reiterated\textsuperscript{58} that its reading of Rule

\footnotesize{\begin{itemize}
\item \textsuperscript{51} Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); see also Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 36 (2d Cir. 1994) ("[A] court 'cannot try issues of fact; it can only determine whether there are issues to be tried.'") (citations omitted); Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994) (The court is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.").
\item \textsuperscript{52} \textit{Anderson}, 477 U.S. at 251-52.
\item \textsuperscript{53} \textit{Id.} at 255 (citing \textit{Adickes}, 398 U.S. at 158-59).
\item \textsuperscript{54} Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 492 (2d Cir. 1999) (citing D’Amico v. City of New York, 132 F.3d 145, 149 (2d Cir.), \textit{cert. denied}, 524 U.S. 911 (1998), Sullivan v. Town of Salem, 805 F.2d 81, 82-83 (2d Cir. 1986)).
\item \textsuperscript{55} \textit{Chambers}, 43 F.3d at 37 (citing Brady v. Town of Colchester, 863 F.2d 205, 211 (2d Cir. 1988)).
\item \textsuperscript{56} 507 U.S. 163 (1993).
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} The Court’s earlier reading of Rule 8(a)(2) is in Conley v. Gibson, 355 U.S. 41, 47 (1957).
\end{itemize}}
8(a)(2) requires "that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'”

However, the Court limited its decision in *Leatherman* to municipal liability claims, and specifically left open the question whether heightened pleading applies to claims against individuals.\(^{59}\) Section 1983 scholars have noted that following this decision, several lower courts have preserved pleading hurdles that increase the burden on prospective plaintiffs.\(^{60}\) For example, some lower courts have concluded that heightened pleading requirements are still applicable to qualified immunity claims and conspiracy claims.\(^{61}\)

The Supreme Court and the Second Circuit have made clear on numerous occasions that municipal liability claims are independent of individual claims and impose different evidentiary burdens on the claimant.\(^{62}\) The standard for establishing a municipal policy or custom places a significant burden on a claimant to establish that the municipality *itself* has committed some act resulting in injury to the claimant.\(^{63}\)

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60. *Id.* at 166-67; see *Schwartz, Section 1983 Litigation*, *supra* note 10, § 7.21 (discussing *Leatherman*).
61. For a comprehensive discussion of the pleading issues and court decisions post-*Leatherman*, see *Nahmod, Civil Rights*, *supra* note 10, §§ 1:44-1:46; *Schwartz, Section 1983 Litigation*, *supra* note 10, vol. 1A, §§ 1.6 -1.7.
62. *Nahmod, Civil Rights*, *supra* note 10, § 1:44 (citing cases); *Schwartz, Section 1983 Litigation*, *supra* note 10, vol. 1A, § 1.6 (citing cases).

In order to fully comprehend the Supreme Court's § 1983 case decisions, the Court's construction of § 1983 must be considered in light of its application of common law tort doctrines to the statute. The Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (quoting *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986)) (internal quotation marks omitted), and as a consequence, common law tort rules, "defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well." *Id.* (quoting *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)). However, the Court has not uniformly applied common law tort rules to § 1983, but rather has looked to such rules for guidance in construing § 1983 in light of the statute's history and legislative goals. The prime example of the Court's unwillingness to adopt whole-heartedly common law principles is its rejection of a respondeat superior theory as applied to municipal liability claims under § 1983. E.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

64. Indeed, plaintiff need not sue an individual to proceed on a municipal liability claim. Only the municipality's policy, practice, or custom, which causes the violation of the protected right, is needed to establish a municipal liability claim. *Monell*, 436 U.S. at 690; *City of Canton v. Harris*, 489 U.S. 378, 385-92 (1989); see *Schwartz, Section 1983 Claims*, *supra* note 7, at 4.
First, the plaintiff must assert a deprivation of a right protected by the United States Constitution or a federal statute because § 1983 does not create "substantive rights; it merely provides remedies for deprivations of rights established elsewhere."65 Second, the municipality must have a policy that, as executed or implemented, violates the claimant's rights.66 Such a policy may be based upon either an official pronouncement or an act or series of actions by municipal employees.67 It may include a "policy statement, ordinance, regulation or decision officially adopted and promulgated by [the municipality's] officers,"68 those "edicts or acts [that] may fairly be said to represent official policy,"69 or a "governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels."70 In his succinct summary of a plaintiff's available theo-


While the Court initially held in Maine v. Thiboutot, 448 U.S. 1, 4-8 (1979), that § 1983 "laws" encompassed all statutory violations of federal law, it later significantly limited that holding. In Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981), the Court pronounced the standard for exceptions to § 1983 "laws" claims: when a federal statute does not confer rights, privileges, or immunities enforceable pursuant to § 1983, and when Congress foreclosed a private remedy by virtue of the statute. In Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981), the Court stated that where a federal statute's remedies "are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude" § 1983 actions. See generally Nahmod, Civil Rights, supra note 10, §§ 2:27-2:37; Schwartz, Section 1983 Litigation, supra note 10, vol. 1A, § 4.2.

66. Monell, 436 U.S. at 690-91. A municipality may be liable for an actual policy, its own direct acts or failure to train, or for actions so pervasive that they rise to the level of a custom. See generally, Nahmod, Civil Rights, supra note 10, §§ 6:6-6:13, 6:33-6:34, 6:38-6:43.

67. In Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), and City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), the Court addressed the issue of which official could be considered a decision-maker whose actions may be the basis for municipal liability. The Court concluded in these two cases that only actions attributable to those persons who, under state law, have final policymaking authority could result in municipal liability. Pembaur, 475 U.S. at 481-82; Praprotnik, 485 U.S. at 124-27. See generally Schwartz, Section 1983 Litigation, supra note 10, §§ 7.8, 7.16-7.17.

68. Monell, 436 U.S. at 690.

69. Id. at 694.

70. Id. at 691.
ries for the existence of a policy in satisfaction of the Court's pronouncements, Justice Souter has stated that a policy may be demonstrated:

[W]hen the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy . . .

. . . where no rule has been announced as a "policy" but federal law has been violated by an act of the policymaker itself . . . [such that] the choice of policy and its implementation are one . . .

. . . [and] in a third situation, even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the Government "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymaker[r] . . . can reasonably be said to have been deliberately indifferent to the need."71

Third, the plaintiff must establish causation. There must be "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation."72 The plaintiff must show that the municipal policy "caused a constitutional tort."73 A municipality is liable where its deliberate action is the "moving force" behind

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71. Bd. of County Comm'rs v. Brown, 520 U.S. 397, 417-18 (1997) (Souter, J., dissenting) (citations omitted) (third alteration in original). As Justice Souter recognized, Monell is the classic example of the first theoretical matrix. The Clinton and Monzon cases are examples of the third.

The number of acts necessary to give rise to a policy or custom continues to challenge courts and plaintiffs. One legal expert has stated, "there must be more than one event to give rise to a custom or practice." Bogren, Municipal Liability Under § 1983, supra note 65, at 243. Further, "the practice must be 'longstanding' and 'pervasive.'" Id. A custom "must be persistent and well settled." NAHMOD, CIVIL RIGHTS, supra note 10, § 6:10; see Singleton v. City of New York, 632 F.2d 185, 195 (2d Cir. 1980).

72. City of Canton v. Harris, 489 U.S. 375, 385 (1989); see also City of Oklahoma City v. Tuttle, 471 U.S. 808, 829-30 (1985) (Brennan, J., concurring in part and concurring in the judgment) (finding that the causation element of a § 1983 claims requires the plaintiff to show (1) action by the city, rather than unilateral action by a non-policy making employee, and (2) that "this policy or custom 'subjected' or 'caused [plaintiff] to be subjected' to a deprivation of a constitutional right").

73. Monell, 436 U.S. at 691. The plaintiff cannot proceed under a theory of respondeat superior against the municipal defendant. Id. See generally NAHMOD, CIVIL RIGHTS, supra note 10, §§ 6:12-6:13, 6:35 (summarizing the law on causation, the constitutional violation requirement, and the need for plaintiff to show a causal relationship between the custom and the constitutional deprivation); SCHWARTZ, SECTION 1983 LITIGATION, supra note 10, §§ 7.7, 7.12 (discussing whether plaintiff has to show some level of fault in the municipality's adoption of the policy, and plaintiff's need to show that the policy caused the constitutional deprivation).
the plaintiff’s injury.74 Lastly, the plaintiff must also establish culpability of the municipality.75 Although § 1983 does not contain a state of mind requirement, “[i]n any § 1983 suit . . . the plaintiff must establish the state of mind required to prove the underlying violation.”76 Section 1983 only requires a plaintiff to establish the intent required for proof of the constitutional violation.

In asserting a claim based on inadequate training, this last criteria requires the plaintiff to establish that the municipality acted in a manner that constitutes “deliberate indifference.”77 This standard is “a judicial gloss, appearing neither in the Constitution nor in a statute,”78 and is an objective standard. Consequently, it is one of the most difficult theories under which a plaintiff may proceed. Moreover, the Supreme Court has made clear that municipal liability based on a policy of inadequate training cannot be based on a single incident of police misconduct.79 In contrast, § 1983 action against an individual requires that the plaintiff show a violation of a federal constitutional or statutory right, proximately caused by the actions of a person acting under color of law.80

2. Accrual: Question of Law, Fact, or Mixed?

The Second Circuit has stated that, in certain circumstances, the determination of when a claim accrues involves “factual issues related to statute of limitations [which] should be put before a jury.”81 Several lower courts in the Second Circuit have noted that

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75. Bd. of County Comm’rs, 520 U.S. at 405; see also Martinez v. California, 444 U.S. 277, 285 (1980) (finding no § 1983 liability where the harm to plaintiff was “too remote a consequence” of the state action). The Court has stated that a § 1983 municipal liability claim is subject to a two part analysis: “(1) whether plaintiff’s harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.” Collins, 503 U.S. at 120 (citing Tuttle, 471 U.S. at 817).

76. Bd. of County Comm’rs, 520 U.S. at 405.

77. Harris, 489 U.S. at 388; see also Bogren, Municipal Liability Under § 1983, supra note 65, at 249-53 (reviewing the deliberate indifference standard).


79. Tuttle, 471 U.S. at 821 (finding that a policy or custom of inadequate training cannot be inferred from a single isolated incident of excessive force by a police officer, because such an inference would “allow a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policy maker”).


81. Eagleston v. Guido, 41 F.3d 865, 871 (2d Cir. 1994) (citation omitted).
the moment of accrual involves some factual determinations. According to one Connecticut district court, the date when the claim accrues for statutory limitations purposes "is ordinarily a question of fact for a trier; consequently, a court cannot grant summary judgment for a defendant if there is a genuine dispute as to when the limitation period began." As stated in a decision from the Northern District of New York, the determination of when there are sufficient facts to give the claimant "reason to know . . . of defendants' actions, is a factual question that must be resolved by a jury."

**PART II**

**A. Police Corruption Within New York City's 30th Precinct**

In the early 1990s, police corruption of epic proportion enveloped the 30th Police Precinct in New York City. This corruption lasted several years and eventually led to the worst and most pervasive police corruption scandal in the history of New York City—an era marked by perjury, drug sales, extortion, and theft committed by numerous police officers. The officers involved in

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83. *West Haven Sch. Dist.*, 721 F. Supp. at 1556, n.10 (citations omitted); see also *Paige*, No. 97-CV-0455, slip op. at 11 (discussing whether certain facts provided a basis for finding plaintiff had "constructive knowledge" of defendants' actions for purposes of determining when action accrued is a factual question for the jury).


85. Attorneys of record for plaintiff in *Clinton*, Jose A. Muniz, Esq. and Rudy Velez, Esq., provided valuable assistance and feedback in developing the factual description of the 30th Police Precinct corruption scandal included in the plaintiffs' memoranda of law, which the author wrote, and upon which the text herein is based.


87. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), *reprinted in Appendix*, supra note 30, at 102-03; see also *Victim of*
the corruption acted both individually and with other members of the precinct to steal drugs and stolen goods, and then to cover up their actions by perjuring themselves before grand juries and in court.\textsuperscript{88} The victims of this corruption were predominantly African American and Latino.\textsuperscript{89}

These actions were not aberrations, but were common occurrences perpetrated by a significant number of officers within the precinct. According to one account, "one-sixth of the precinct’s officers had routinely stolen drug money, guns and cash."\textsuperscript{90} Indeed, the 30th Precinct gained the unique distinction of being known as "the Dirty Thirty."\textsuperscript{91} The corruption scandal in the 30th Precinct was so pervasive and systemic that ultimately one-third of the precinct officials were implicated in the underlying illegal acts\textsuperscript{92} and thirty-one police officials of the 30th Precinct were charged, convicted, or pleaded guilty.\textsuperscript{93}

\begin{footnotesize}
\begin{enumerate}
\item Framing, supra note 86; Bad Cop, supra note 86; George James, Officer Convicted of Perjury in a Drug Case, N.Y. TIMES, Nov. 21, 1995, at B6 [hereinafter Officer Convicted]; George James, Ex-Officer Tells Court of Protection and Pay Offs, N.Y. TIMES, Feb. 22, 1995, at B3 [hereinafter Ex-Officer Tells Court]; 14 More Officers Arrested, supra note 86; Larry Elliot, New York Police Corruption Drive Extends its Inquiries, THE GUARDIAN (London), May 9, 1994, at 12; Police Close in, supra note 86.
\item New York Pays a High Price, supra note 86; Victim of Framing, supra note 86; Bad Cop, supra note 86; Officer Convicted, supra note 87; Ex-Officer Tells Court, supra note 87; 14 More Officers Arrested, supra note 86; Police Close in, supra note 86.
\item See New York Pays a High Price, supra note 86; Victim of Framing, supra note 86; Bad Cop, supra note 86; Officer Convicted, supra note 87; Ex-Officer Tells Court, supra note 87; 14 More Officers Arrested, supra note 86; Police Close in, supra note 86.
\item New York Pays a High Price, supra note 86; Victim of Framing, supra note 86; Bad Cop, supra note 86; Officer Convicted, supra note 87; Ex-Officer Tells Court, supra note 87; 14 More Officers Arrested, supra note 86; Police Close in, supra note 86.
\item New York Pays a High Price, supra note 86; Victim of Framing, supra note 86; Bad Cop, supra note 86; Officer Convicted, supra note 87; Ex-Officer Tells Court, supra note 87; 14 More Officers Arrested, supra note 86; Police Close in, supra note 86.
\item New York Pays a High Price, supra note 86; Victim of Framing, supra note 86; Bad Cop, supra note 86; Officer Convicted, supra note 87; Ex-Officer Tells Court, supra note 87; 14 More Officers Arrested, supra note 86; Police Close in, supra note 86.
\item Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), reprinted in Appendix, supra note 30, at 103. The 30th Precinct corruption involved “every tour of duty,” and resulted in thirty-one members from the precinct being charged “for involvement in narcotics distribution, thefts of money and property, unlawful searches and seizures, the use of excessive force, extortion, income tax evasion and perjury.” Id. See generally New York Pays a High Price, supra note 86; Victim of Framing, supra note 86; Bad Cop, supra note 86; Officer Convicted, supra note 87; Ex-Officer Tells Court, supra note 87; 14 More Officers Arrested, supra note 86; Police Close in, supra note 86; Clifford Krauss, More Officers Facing Arrest in Corruption, N.Y. TIMES, Apr. 15, 1994, at B1 [hereinafter More Officers Facing Arrest].
\item Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), reprinted in Appendix, supra note 30, at 103.
\end{enumerate}
\end{footnotesize}
The corruption was entrenched and covert, necessitating the participation of several law enforcement entities in the investigation and eventual elimination of the corruption. Beginning about May 1993, the Manhattan District Attorney’s Office, along with investigators from the New York City Police Department’s Internal Affairs Bureau, the Internal Revenue Service’s Criminal Investigation Division, the Mollen Commission (a New York City commission established to investigate police corruption), and the United States Attorney’s Office, undertook a collective investigation into allegations of corruption in the 30th Precinct, including charges of rampant false arrests and perjury committed by precinct officials. Based on the revelations from their investigation, the District Attorney’s Office reviewed well over 500 criminal cases. Many cases were dismissed and vacated due to the perjury and wrongful actions of the 30th Precinct officers.

Hundreds of persons, the majority of which were African American and Latino, were wrongfully incarcerated, prosecuted, and/or convicted as a direct consequence of the officers’ unlawful actions. This compromised the social contract, seriously breached the trust of the communities most affected by the officers’ actions, namely the black and Latino communities, and undermined the trust in the New York City Police Department. It also took a heavy

94. Former Mayor David Dinkins appointed the City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department to investigate police corruption allegations in New York City. This commission, popularly known as the “Mollen Commission” after its chair, Judge Milton Mollen, issued a report that concluded there was corruption throughout New York City's Police Department. MOLLEN REPORT, supra note 4.

95. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), reprinted in Appendix, supra note 30, at 103; More Officers Facing Arrest, supra note 92.


97. Letter from New York District Attorney Robert M. Morgenthau, by Assistant District Attorney Emery E. Adoradio to United States District Judge Charles S. Haight, Jr. (Feb. 26, 1997), reprinted in Appendix, supra note 30, at 118. The case review was an enormous task, which the plaintiff in Clinton argued was incomplete. Indeed, the plaintiff argued, upon information and belief, that there were still 1000-2000 cases pending not yet dismissed by the City. Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Clinton v. City of New York, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, supra note 30, at 79.

98. See New York Pays a High Price, supra note 86; Victim of Framing, supra note 86; Bad Cop, supra note 86; Officer Convicted, supra note 87; Ex-Officer Tells Court, supra note 87; 14 More Officers Arrested, supra note 86; Police Close in, supra note 86.
toll on police resources and cost taxpayers millions of dollars in litigation costs, awards, and settlements. 99

Indeed, several victims sued officers and the City. Some filed § 1983 actions against those officers who were primary participants in the 30th Precinct corruption. Reynaldo Clinton and Robert Monzon were two of these victims. 100 They sued Edward Checke, Kevin Nannery, Joseph Walsh, and James Velez. 101 A jury convicted Velez of various criminal counts. Checke, Nannery, and Walsh pleaded guilty in both state and federal court. 102 All four were sentenced for crimes associated with their unlawful and corrupt practices during their tour at the 30th Precinct. 103 Ironically, because of their extensive participation in the police corruption and conspiracy to violate the law, the cooperation of Checke, Nannery, and Walsh was critical to the investigation and provided them with the leverage to negotiate pleas for relatively short sentences. 104

99. Victim of Framing, supra note 86 (reporting that the New York City Law Department paid more than two million dollars in settlements with fifteen civil suits still pending); New York Pays a High Price, supra note 86 (noting that awards and settlements totaled 1.3 million dollars to date, and legal experts estimated such costs could rise to ten million dollars); see also Neil MacFarquhar, Torture Case Puts Officers on Defensive, N.Y. TIMES, Aug. 27, 1997, at A1 (reporting that police credibility was “on a knife edge in New York” due to police corruption and abuse); Jennifer Maddox, Corrupt Police Taint Communities, THE STUART NEWS, Aug. 12, 1996, at C1 (explaining that police corruption “contaminate[s] relationship with communities”); Kevin Johnson, New Breed of Bad Cop Sells Badge, Public Trust, USA TODAY, Apr. 16, 1998, at A8 (discussing several police corruption cases nationally and their impact on society); MOLLEN REPORT, supra note 4, at 4 (describing that perception of prevalence of police corruption and law enforcement’s unwillingness to address this “poisons relations between the community and the police”).

100. Clinton, 1999 WL 105026, at *1; Monzon, 1999 WL 1120527, at *1.


102. Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, Clinton v. City of New York, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, supra note 30, at 80-81.

103. Checke, Nannery, and Walsh pleaded guilty in federal and state court to various counts of conspiracy to violate civil rights, tax evasion, and first degree perjury. These pleas were entered pursuant to their respective plea agreements with the prosecutors. Id. at 80-81.

104. On September 27, 1994, defendant Walsh pleaded guilty in federal court to conspiracy to violate civil rights and to tax evasion. He also pled guilty to first degree perjury in state court. Id. at 125. On November 15, 1994, defendant Nannery pled guilty in federal court to conspiracy to violate civil rights and to tax evasion. He also pled guilty in state court to first-degree perjury. Id. at 102. On February 2, 1996, defendant Checke pled guilty in state court to first degree perjury. Id. at 110. Of these defendants, Checke was the first sentenced, on April 9, 1996, in state court to a conditional discharge. Checke Sentencing Sheet, reprinted in Appendix, supra note 30, at 137. Defendant Walsh was sentenced in federal court on April 2, 1997, to nine months imprisonment and two years supervised release, and in state court to nine months
For example, as part of the sentencing phase, the federal prosecutor in Nannery's case noted that:

[D]espite serious concerns about Nannery's abuse of his position of trust and leadership within the [New York Police Department], and the devastating consequences of his actions, both [the United States Attorney's Office and the District Attorney's Office] agreed that he was a critical witness who should be signed up as a cooperator.

In sum, the gravity of the crimes committed by Kevin Nannery is clear, and no amount of cooperation can change that. Nevertheless, Kevin Nannery's willingness to cooperate with this investigation assisted in the prosecution of several additional corrupt officers for which he deserves consideration at the time of sentencing. ¹⁰⁵

The federal court sentenced Nannery to five months imprisonment and two years supervised release. ¹⁰⁶

Similarly, with respect to Walsh, who was secretly arrested and then cooperated by recording other former officers' statements that resulted in their arrests, ¹⁰⁷ the prosecutor stated:

At the time, the Government was unaware of most of Walsh's perjuries, and it is unlikely that the Government ever would have learned of them had Walsh failed to divulge them voluntarily. This information was particularly important because it enabled the District Attorney's Office, first, to immediately identify and vacate legally-flawed prosecutions and, second, to bring criminal charges against those officers who participated in the perjuries.

imprisonment, to be served concurrently. Walsh Sentencing Sheet, reprinted in Appendix, supra note 30, at 138-40; Ex-Officer Sentenced to 9-month Term, N.Y. L.J., Apr. 4, 1997, at 2. Defendant Nannery also was sentenced in 1997 in federal court to five months imprisonment and two years supervised release, and in state court to one to three years imprisonment, to be served concurrently. Nannery Sentencing Sheet, reprinted in Appendix, supra note 30, at 141-44. The court sentenced James Velez to several concurrent terms of one to three years incarceration.

In contrast, Reynaldo Clinton, the target and victim of Checke, Nannery, and Walsh's corrupt actions, served almost two years in prison, more than any of the former police officers. Amended Complaint, Clinton v. City of New York, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, supra note 30, at 5. Robert Monzon was wrongfully incarcerated and had to defend himself at trial. Monzon's Memorandum, supra note 31, at 1.

¹⁰⁵. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), reprinted in Appendix, supra note 30, at 112.

¹⁰⁶. Nannery Sentencing Sheet, reprinted in Appendix, supra note 30, at 141-44.

¹⁰⁷. Id. at 109, n.5.
The gravity of the crimes committed by Joseph Walsh is clear, and no amount of cooperation can change that. Nevertheless, Joseph Walsh's willingness to cooperate with this investigation assisted in the prosecution of several additional corrupt officers for which he deserves consideration at the time of sentencing.\textsuperscript{108}

The federal court sentenced Walsh to nine months imprisonment and two years supervised release.\textsuperscript{109}

**B. Clinton v. City of New York: Factual and Procedural Background**

1. **Reynoldo Clinton’s Wrongful Arrest and Incarceration and Participation in the Corruption Investigation**

On or about September 29, 1992, former police officer Edward Checke arrested Reynaldo Clinton.\textsuperscript{110} Later, former police officer Joseph Walsh falsely testified to the grand jury that he and former police officer Kevin Nannery joined Checke in pursuing, apprehending, and recovering drugs from Clinton.\textsuperscript{111} Clinton was subsequently indicted, convicted for possession of drugs, and sentenced, on October 19, 1993, to an indeterminate prison sentence of four years to life.\textsuperscript{112}

On November 4, 1994, pursuant to a motion for release under New York’s Criminal Procedure Law § 440.10,\textsuperscript{113} Clinton was released from prison after serving almost two years.\textsuperscript{114} The Supreme Court of the State of New York vacated Clinton’s wrongful conviction and dismissed his unlawful indictment on December 13, 1994.\textsuperscript{115}

\begin{footnotesize}  
\textsuperscript{108} Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Charles S. Haight, Jr. (Feb. 25, 1997), reprinted in Appendix, supra note 30, at 136.  
\textsuperscript{109} Walsh Sentencing Sheet, reprinted in Appendix, supra note 30, at 138-40.  
\textsuperscript{110} Brief for Plaintiff-Appellant at 4, Clinton v. City of New York, No. 99-7336 (2d Cir. Oct. 29, 1999).  
\textsuperscript{112} Brief for Plaintiff-Appellant at 4, Clinton v. City of New York, No. 99-7336 (2d Cir. Oct. 29, 1999).  
\textsuperscript{113} N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1994).  
\textsuperscript{114} Amended Complaint, Clinton v. City of New York, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, supra note 30, at 5.  
\textsuperscript{115} Id.  
\end{footnotesize}
In 1994 and 1995, representatives from the District Attorney’s Office approached Clinton regarding his arrest and the wrongful acts of the arresting officers. Assistant District Attorney Emery E. Adoradio interviewed Clinton in the presence of his attorney and confirmed information that officers involved in Clinton’s prosecution had lied to the grand jury. Clinton was later approached again by the District Attorney’s Office to recount his version of his arrest to a grand jury, which he did in March 1995.


Clinton filed his amended complaint on June 16, 1998. He charged defendants the City of New York, the New York City Police Department, and former police officers Walsh, Nannery, and Checke, with federal and state civil rights violations arising from his wrongful arrest, prosecution, and imprisonment. Clinton’s claims were based on the illegal conduct and perjured testimony of the officers, which, he alleged, were pursuant to an official custom and practice permitting and facilitating such conduct. Specifically, Clinton alleged that the City was liable for official customs, policies, and practices, and for failure to adequately select, hire, train, supervise, and discipline the offices, all of which deprived

117. Id.
118. Affidavit in Opposition to Defendant’s Motion to Dismiss (Aug. 28, 1998), reprinted in Appendix, supra note 30, at 146. The record is unclear and undeveloped regarding the exact dates of these events. It appears that Adoradio’s interview occurred before December 10, 1994 and the grand jury testimony occurred in March 1995. This information is gathered from the joint appendix as cited supra note 30, and from conversations between the author and the attorneys of record in the Clinton litigation. Thus, it appears that Adoradio interviewed Clinton just two years after his arrest and incarceration, and he testified before the grand jury on or about four months after his release from jail, and two-and-a-half years after his arrest.
120. Id. at 4-5.
121. Id. at 21-31. This article focuses solely on the municipal liability claims asserted against the City of New York and does not address the claims against the New York City Police Department, because, under the laws of the state of New York, no claims can lie directly against municipal departments, which are merely subdivisions of the municipality and have no separate legal existence. Polite v. Town of Clarks-town, 60 F. Supp. 2d 214, 216-17 (S.D.N.Y. 1999) (dismissing suit as to the town police department); Hoisington v. County of Sullivan, 55 F. Supp. 2d 212, 214-15 (S.D.N.Y. 1999) (dismissing action as to the county department of social services, and citing FED. R. CIV. P. 17(b), which directs that federal courts must look to state law to determine whether a government department may be sued).
him of his rights and liberties, as guaranteed by the United States and New York Constitutions and federal and state laws.\textsuperscript{122}

3. Procedural History

Clinton filed his action in the United States District Court for the Southern District of New York, to redress the deprivation under color of law, statute, ordinance, regulation, custom, and usage of a right, privilege, and immunity secured to plaintiffs by the First and Fourteenth Amendments of the Constitution of the United States.\textsuperscript{123} The City moved to dismiss the municipal liability claim, pursuant to \textit{Federal Rule of Civil Procedure} 12(b)(6), on the grounds that Clinton's claim was statutorily time barred.\textsuperscript{124}

The district court treated the motion as a motion for summary judgment,\textsuperscript{125} which it granted in an unreported memorandum opinion and order, dated March 1, 1999, dismissing Clinton's municipal liability claim as time barred.\textsuperscript{126} Clinton appealed,\textsuperscript{127} and the Second Circuit affirmed the district court's judgment in an unpublished summary order, filed October 29, 1999, for substantially the

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 5.

\textsuperscript{124} The City and the Police Department jointly filed the motion to dismiss and, in addition to raising the statutory time bar, argued that the entire complaint should be dismissed because the state law claims were barred for failure to file a timely notice of claim, the malicious abuse of process claim was insufficient on its face, and, with respect to the Department, that the Department was not a proper party suable in this action. Municipal Defendants' Memorandum of Law in Support of Their Motion to Dismiss, \textit{reprinted in} Appendix, \textit{supra} note 30, at 50.

With respect to these arguments, the district court held that the state law claims were barred for failure to file a notice of claim and that the claims against the individual former police defendants were statutorily time barred. \textit{Clinton}, 1999 WL 105026, at *2-3.

\textsuperscript{125} The district court concluded that both parties had submitted supporting documents to their papers on the motion to dismiss, and therefore accepted and reviewed the documents, and converted the motion to a summary judgment motion under F.R.C.P. 56. \textit{Clinton}, 1999 WL 105026, at *2.

\textsuperscript{126} Id. at *3. The district court entered judgment granting defendants summary judgment and dismissing plaintiff's claims with prejudice, on March 3, 1999.

\textsuperscript{127} Plaintiff appealed, pursuant to 28 U.S.C. § 1291, as an appeal as of right from a final decision of the United States District Court for the Southern District of New York. Plaintiff raised the following issues: (1) whether the district court improperly granted summary judgment and dismissed the 42 U.S.C. § 1983 action against The City of New York as time barred; and (2) whether the district court improperly determined the date plaintiff's action accrued, based on statements set forth in an affirmation by an assistant district attorney in plaintiff's criminal case, and based on media coverage of various actions of New York Police Department and District Attorney's Office officials. Brief for Plaintiff-Appellant, at 2, \textit{Clinton v. City of New York}, No. 99-7336 (2d Cir. Oct. 29, 1999) (on file with author).
same reasons set forth in the lower court's decision. Pursuant to the court's local rule and its pronouncement in the order, the Second Circuit's decision has no precedential authority or other effect beyond cases related to Clinton.

C. Monzon v. City of New York: Factual and Procedural Background

1. Plaintiff Robert Monzon's Wrongful Arrest and Prosecution and Participation in the Corruption Investigation

On June 19, 1992, former 30th Precinct police officers James Velez and Joseph Walsh arrested Robert Monzon. Monzon subsequently was indicted and incarcerated for drug possession based on their testimony. Velez and Walsh falsely testified to the grand jury, and at Monzon's trial, that they went to an apartment

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129. The Second Circuit's Local Rule § 0.23 states, in relevant part, that since statements appended to summary orders "do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court." In accordance with this Rule, the Court's Clinton order states that it:

will not be published in the Federal Reporter and may not be cited as precedential authority to this or any other court, but may be called to the attention of this or any other court in a subsequent stage of this case, in a related case, or in any case for purposes of collateral estoppel or res judicata.

Clinton v. City of New York, No. 99-7336, slip op. at 1 (2d Cir. Oct. 29, 1999). The Rule has a longstanding history in the Second Circuit, following its adoption in 1973. It survived a collateral attack in Furman v. United States, 720 F.2d 263, 265 (2d Cir. 1983), and recently the Court applied this rule approvingly, reasserting the no-precedential value prohibition, in Franceskin v. Credit Suisse, 214 F.3d 253, 256 n.1 (2d Cir. 2000).

For the first time, however, another circuit court recently struck down a strikingly similar local rule, declaring it unconstitutional. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). The Eight Circuit's local rule provided that:

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.

8TH CIR. R. 28A(i).

The Eighth Circuit found the rule "unconstitutional under Article III of the United States Constitution, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'" Anastasoff, 223 F.3d at 899.


131. Id. paras. 16-18.
in Manhattan in response to a call about a fight in the apartment.\textsuperscript{132} They claimed that they found Monzon, and recovered a bag of cocaine, which they falsely alleged was in plain view.\textsuperscript{133} The jury acquitted Monzon of all charges on April 19, 1993.\textsuperscript{134}

As a consequence of the 30th Precinct's investigation, Walsh was arrested on June 6, 1994, and thereafter implicated several other officers from the precinct in charges of corruption and perjury, including defendant Velez for his involvement in the wrongful arrest and prosecution of Monzon.\textsuperscript{135} Walsh admitted that he and Velez had falsely arrested and lied about Monzon.\textsuperscript{136} Walsh pled guilty as part of an agreement with prosecutors, but defendant Velez went to trial in state court where he was convicted on various counts of perjury.\textsuperscript{137}

The New York District Attorney approached Monzon and his trial attorney on April 26, 1996, regarding the need for Monzon to testify at defendant Velez's criminal trial.\textsuperscript{138} Monzon and Walsh both testified against Velez, and a jury convicted him on May 2, 1996, of numerous criminal counts. The court subsequently sentenced Velez to several concurrent terms of one to three years incarceration.\textsuperscript{139}


Robert Monzon filed a § 1983 action on July 9, 1998, against the individual officers and the City of New York.\textsuperscript{140} He alleged that the defendants were responsible for his wrongful arrest, incarceration, and his prosecution secured as a result of the illegal conduct and perjured testimony of the former police officers, now individual defendants.\textsuperscript{141} He further alleged that the City of New York was liable for official customs, policies, and practices, and for failure to select, train, supervise, and discipline officers and supervi-

\textsuperscript{132} Id. paras. 13, 18.
\textsuperscript{133} Id. paras. 11-20.
\textsuperscript{134} Id. para. 20.
\textsuperscript{135} Id. paras. 21-26.
\textsuperscript{136} Id. paras. 25-26.
\textsuperscript{137} Id. paras. 22-24, 28-29; Monzon's Memorandum, supra note 31, at 6.
\textsuperscript{138} Monzon Complaint, supra note 130 para. 28. This conversation occurred three years and ten months after Monzon's arrest, and just one week short of three years after his acquittal on all charges. Monzon filed his complaint less than three years after the district attorney approached him.
\textsuperscript{139} Id. para. 29.
\textsuperscript{140} Monzon Complaint, supra note 130. The complaint also listed as a defendant the New York City Police Department.
\textsuperscript{141} Id. para. 1.
sors, which deprived him of his rights and liberties as guaranteed by the United States and New York Constitutions and federal and state laws.\textsuperscript{142}

3. \textit{Procedural History}

Defendant City of New York moved to dismiss the complaint pursuant to \textit{Federal Rule of Civil Procedure} 12(b)(6) for failure to state a claim, on the grounds that Monzon’s § 1983 and pendant state claims were statutorily time barred.\textsuperscript{143} On December 6, 1999, the district court denied the City’s request to dismiss Monzon’s \textit{Monell} claim.\textsuperscript{144}

D. Municipal Defendant’s Motions to Dismiss

As discussed above, the City of New York filed motions to dismiss in both the \textit{Clinton} and \textit{Monzon} lawsuits.\textsuperscript{145} Both motions asserted various grounds for.dismissals of the complaints.\textsuperscript{146} With respect to the municipal liability claims, the City claimed that they were time barred, and raised two primary bases in each case: first, that the plaintiffs knew, or should have known, of their \textit{Monell}-based claims, at the latest, in Clinton’s case, upon the vacatur of his conviction,\textsuperscript{147} and in Monzon’s case, upon his acquittal;\textsuperscript{148} and second, that the 30th Precinct corruption scandal was sufficiently publicized so as to give plaintiffs notice of their alleged municipal liability claims more than three years prior to the filing of their respective complaints.\textsuperscript{149}

\begin{explanation}
\textsuperscript{142} \textit{Id.} paras. 41-44.

\textsuperscript{143} New York City Memorandum of Law in Support of Its Motion to Dismiss at 2, \textit{Monzon v. City of New York}, 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999) (on file with author) [hereinafter City’s Monzon Memorandum].

\textsuperscript{144} \textit{Monzon}, 1999 WL 1120527.

\textsuperscript{145} \textit{Clinton}, 1999 WL 105026, at *1; \textit{Monzon}, 1999 WL 1120527, at *1.

\textsuperscript{146} \textit{Clinton}, 1999 WL 105026, at *1; \textit{Monzon}, 1999 WL 1120527, at *1.

\textsuperscript{147} Municipal Defendants’ Memorandum of Law in Support of Their Motion to Dismiss, \textit{reprinted in Appendix, supra} note 30, at 52-55; Municipal Defendants’ Reply Memorandum of Law in Support of Their Motion to Dismiss, \textit{reprinted in Appendix, supra} note 30, at 190-95. The City filed its motion and supporting papers on behalf of the City of New York and the New York City Police Department. Municipal Defendants’ Memorandum of Law in Support of Their Motion to Dismiss, \textit{reprinted in Appendix, supra} note 30, at 50.

\textsuperscript{148} City’s Monzon Memorandum, \textit{supra} note 143 at 7-8.

\textsuperscript{149} Municipal Defendants’ Memorandum of Law in Support of Their Motion to Dismiss, \textit{reprinted in Appendix, supra} note 30, at 54, 192-95; City’s Monzon Memorandum, \textit{supra} note 143 at 8-9.
\end{explanation}
1. **Clinton Motion to Dismiss/Summary Judgment Motion**

In the *Clinton* case, the City argued specifically that, under the law, Clinton was on notice of his claim when the New York court vacated his conviction. The City argued that in accordance with the Supreme Court's decision in *Heck v. Humphrey*, a § 1983 claim accrues when "the prosecution terminates in [the plaintiff's] favor."\(^{151}\)

Clinton responded that because *Heck* determined accrual for § 1983 claims based on an unconstitutional conviction or sentence, it did not apply to his *Monell* claim.\(^{152}\) The *Monell* claim is based on actions of the municipal defendants, as well as those of the individual officers, *a fortiori*, he could not be aware of an official policy, custom and/or practice, at the time that his conviction was vacated.

Unlike the claims in the cases subject to the decision in *Heck*, the claims against the moving defendants are not based solely on the specific actions directly leading to the unlawful conviction, rather plaintiff has alleged various actions by the moving defendants, apart from the actions of the former police officers involved in his arrest, that support a municipal liability claim. Thus, the accrual of this claim cannot be measured by the date of his release from prison or of the vacatur of his conviction. It must be measured, as [the Second] Circuit has stated, time and time again, when the claimant "knew or had reason to know of his injury," and in the case of a *Monell* claim, this cannot be "inferred from a single incident of illegality, such as a first false arrest or excessive use of force, absent some additional circumstances."\(^{153}\)

Clinton argued alternatively that, should the court conclude that the three-year limitation period had expired prior to his filing of the complaint, the court should toll the statute of limitations under equitable tolling principles.\(^{154}\) He maintained that he was entitled to the benefit of equitable tolling because the individual defendant ex-police officers' "unlawful and fraudulent conduct concealed the basis of [his] cause of action, and the municipal defendant's custom

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\(^{151}\) Municipal Defendants' Memorandum of Law in Support of Their Motion to Dismiss, *supra* note 30, at 52.\(^{152}\)

\(^{152}\) Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Clinton v. City of New York, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *reprinted in Appendix, supra* note 30, at 87-88.

\(^{153}\) Id. at 88 (internal citations omitted).

\(^{154}\) Id.
and practice and ensuing investigation further obscured information necessary to form the requisite knowledge of the claim.155

In response, the City argued that Clinton had particular knowledge at the time of the vacatur which put him on notice.156 Specifically, the City cited to an affirmation of Assistant District Attorney Emory Adoradio, dated two years after Clinton’s arrest and filed in support of the vacatur.157 The affirmation asserted that during the course of Adoradio’s investigation into allegations of corruption in the 30th Precinct, he obtained information that Clinton’s arrest and evidence in his case were fabricated.158 The affirmation asserted that Clinton corroborated this information during the Adoradio’s interview of Clinton, in the presence of Clinton’s defense attorney.159

The City also argued that Clinton’s testimony about his arrest, presented shortly after the vacatur in a grand jury proceeding against defendant Checke, and a March 1995 news article naming Clinton, were further evidence of information which put him on notice of the precinct corruption.160

The City further cited the “well-publicized nature of the 30th Precinct scandal,”161 as an additional basis in support of its argument that Clinton should have been on notice of his Monell claim more than three years prior to the filing of his complaint.

On the equitable estoppel issue, the City argued that it had not concealed “a single relevant fact” from Clinton,162 and that regardless, he was not entitled to have the statute of limitations tolled, because any fraud by the 30th Precinct officers could not preclude discovery of Clinton’s harm.163

155. Appendix, supra note 30, at 94-96.
156. Municipal Defendants’ Reply Memorandum of Law in Support of Their Motion to Dismiss, reprinted in Appendix, supra, note 30, at 192-93.
159. Id. at 173, para. 4.
160. Municipal Defendants’ Reply Memorandum of Law in Support of Their Motion to Dismiss, reprinted in Appendix, supra, note 30, at 193.
161. Id.
162. Municipal Defendants’ Reply Memorandum of Law in Support of Their Motion to Dismiss, reprinted in Appendix, supra, note 30, at 195.
163. Id. at 196 (relying on precedent in Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982)).
a. The District Court’s Decision

The district court concluded that the municipal liability claim was untimely because it was filed more than three years after the dismissal of Clinton’s indictment. The court agreed with the City that the Assistant District Attorney’s affirmation put Clinton on notice of his claim. In support of its conclusion, the court found that the inclusion of the 30th Precinct scandal in the Mollen Commission’s Report, as well as the extensive newspaper and cable network coverage of the 30th Precinct scandal, should have put him on notice of his claim. The court was further persuaded on the notice issue by the fact that Clinton testified before the grand jury against arresting officer Checke—“a process that should have made the viability of his claim obvious.”

The court refused to toll the statute of limitations, concluding that the City was innocent of any wrongful concealment. Instead, the court concluded that any efforts to conceal the nature of the wrongdoing were conducted by the individual officers, not the City. The court noted that the City had not taken any steps to conceal the officers’ actions except those necessary to the integrity of an investigation, and had taken “affirmative steps” to inform Clinton “of the circumstances surrounding his arrest” by having him testify to a grand jury.

b. The Second Circuit Decision

On appeal, Clinton argued that the information about the individual former police officers’ actions, advanced by the City and imputed to him, could not, by itself, place him on notice of a Monell policy and practice claim as a matter of law. Clinton stressed the lack of factual information in the record presented by the City to support dismissal of the claim. In particular, Clinton challenged

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165. Id. at *2.
166. Id.
167. Id.
168. Id.
169. Id. at *2.
171. Id.
the legal and factual significance of the Adoradio affirmation, which had been central to the district court’s decision.172

In his brief to the court of appeals, Clinton argued that the affirmation did not provide any new information, other than the fact that in December 1994 an assistant district attorney was investigating allegations of police corruption in the 30th Precinct.173 Clinton vigorously argued that such information could not be the basis for notice of his Monell claim.174 First, the affirmation was dated two years after his arrest.175 Second, it did not contain any reference to the dates and timeframes of the allegations nor investigation of corruption in the 30th Precinct.176 Third, the affirmation did not reveal any new information to put Clinton on notice of his Monell claims. Clinton’s brief states:

[Plaintiff] was well aware prior to the filing of this Affirmation that the police had fabricated evidence and lied; [Plaintiff] knew he was innocent, so that this information could not alert him to anything more than he already knew. This information was about the culpability of individual officers. Such information cannot be the basis for alerting him to a municipal liability claim.177

Clinton also challenged the significance of the media coverage of the 30th Precinct scandal and the doctrinal foundation for adopting a per se rule on the sufficiency of such coverage as a matter of law.178 Clinton asserted that if news coverage of the scandal were considered in determining the moment of accrual of his § 1983 municipal liability claim, various thorny factual issues would arise.179 For example, there were questions about Clinton’s awareness of the news, including the content of articles and news announcements, that were beyond the scope of the motion and the district court’s authority.180

The Second Circuit concluded that all of Clinton’s claims were without merit.181

172. Id.
173. Id.
174. Id. at 25.
175. Id. at 23.
176. Id. at 26.
177. Id. at 24-25.
178. Id. at 27-29.
179. Id.
180. Id. at 27-28.
2. **Monzon Motion to Dismiss**

   **a. The Parties' Arguments**

In *Monzon*, the City asserted the same arguments regarding the timeliness of the *Monell* claim that it had raised in the *Clinton* case. In fact, it relied on the district court's decision in *Clinton* to support its argument that the publicity from the 30th Precinct scandal put Monzon on notice.182

Monzon asserted the same counter-arguments raised in *Clinton*.183 He argued additionally that his limited English language skills left an issue of fact for the jury concerning what he should have known based on media coverage of the scandal.184

   **b. The District Court's Decision**

On December 6, 1999, the district court denied the City's request to dismiss the municipal liability claim.185 The court concluded that it could not decide as a matter of law on a Rule 12(b)(6) motion, "that plaintiff was, or should have been, aware that he had a *Monell* claim prior to April of 1996 when he was contacted by the District Attorney's Office to testify against one of the individual defendants."186 The court further concluded that an issue of fact existed as to whether newspaper reports put Monzon on notice of this claim.187 The parties eventually settled the case.188

**PART III**

The premise of the Second Circuit and Southern District of New York decisions in *Clinton* is that Clinton's testimony in an investigation of an individual police officer, statements of an assistant district attorney, and news coverage of the 30th Precinct scandal provided Clinton with sufficient information, at the time that the

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184. *Id.*
185. *Monzon*, 1999 WL 1120527. The district court granted the motion to dismiss on the remaining claims against defendants the City of New York and the New York City Police Department.
186. *Id.*
187. *Id.*
188. The parties settled for $60,000. Letter from Jose A. Muniz to New York City Corporation Counsel (July 11, 2000) (accepting $60,000 settlement offer on plaintiff's behalf) (on file with author); Stipulation Discontinuing Action (July 11, 2000), Monzon v. City of New York, No. 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999) (on file with author).
New York courts vacated his conviction, to put him on notice of his *Monell* claims.\(^{189}\) The underlying ruling is that notice of the corruption is notice of the injury caused by the City’s policy, practice, or custom. A careful review of the case and the judicial analysis adopted by the courts reveals various legal and practical shortcomings to this approach.

While Clinton did indeed testify before a grand jury just over three years before filing his complaint, that testimony in no way implicated the municipal liability claims. As far as the court record shows, Clinton testified solely about the events surrounding his arrest. Clinton merely repeated that he was wrongfully arrested by a police officer. This testimony was used to substantiate the prosecution’s charge that the arresting officer, Edward Checke, had perjured himself when he testified against Clinton before a grand jury in Clinton’s criminal action, and that he provided a factually inaccurate account of Clinton’s arrest.\(^ {190}\)

Similarly, the Assistant District Attorney’s affirmation is legally insufficient to support summary dismissal of the complaint. The affirmation’s contents may be distilled into three essential pieces of information. First, Assistant District Attorney Adoradio was investigating allegations of police corruption in the 30th Precinct.\(^ {191}\) Second, during his investigation Adoradio learned through cooperating police officers that fabricated evidence was used in plaintiff’s arrest.\(^ {192}\) Third, that Adoradio’s interview with plaintiff, in the presence of plaintiff’s counsel, corroborated the cooperating police officers’ information.\(^ {193}\) Again, these statements do not implicate the municipality.

The news accounts focused on the individual officers in the precinct. Throughout these accounts, the law enforcement investigation and arrests are mentioned.\(^ {194}\) Some of the news articles were


\(^ {190}\) Affidavit in Opposition to Defendant’s Motion to Dismiss (Aug. 28, 1998), reprinted in Appendix, *supra*, note 30, at 146, para. 8; Indictment in People v. Clinton, reprinted in Appendix, *supra*, note 30, at 147-54.


\(^ {192}\) Id.

\(^ {193}\) Id. at 173-74.

\(^ {194}\) See *supra* notes 86-87, for newspaper coverage of the 30th Precinct scandal and investigation.
published prior to the invalidation of Clinton’s conviction and subsequent release from prison.\[195\]

While the district court in Monzon reached a different conclusion on the notice question, the court’s analysis mirrors the analyses in the Clinton decisions. The district court in Monzon determined that it could not conclude that the plaintiff received notice of his Monell claim prior to when the District Attorney’s Office contacted him to testify against one of the police officers named as a defendant in Monzon’s case.\[196\] The court concluded, a fortiori, that once the plaintiff was contacted to testify, he was on notice of his Monell claim. The court appears to have applied the same analyses as the district and Second Circuit courts in Clinton.\[197\]

Neither the law nor the facts, however, support the analytic approach adopted in these cases. The plaintiffs’ testimony before grand juries and at trial, the district attorney’s statements, and the news media accounts do not provide specific information about anything other than the respective individual police officers’ bad acts. As a consequence, they do not prompt inquiry or raise the specter of concern that would put either plaintiff on notice to consider a possible action against the City of New York, the entity that must have acted directly against the plaintiff. This is particularly relevant in police misconduct cases where target communities, specifically communities of color, are exposed daily to police abuse and intrusion. As a result, these “accounts” are of dubious value as the bases for judging the accrual period for the municipal liability claim. Moreover, in the context of a motion to dismiss or a summary judgment motion, where factual issues are beyond the purview of the trial judge, whether news coverage should have put the plaintiff on notice is solely for the jury to decide.

\[195\] In fact, the City in Clinton submitted two such articles. Appendix, supra note 30, at 176-81.

\[196\] The court concluded that:

While plaintiff may have had notice that the felony complaint and the grand jury and trial testimony against him were false more than three years prior to the filing of the present complaint, the Court cannot find as a matter of law on a Rule 12(b)(6) motion that plaintiff was, or should have been, aware that he had a Monell claim prior to April of 1996 when he was contacted by the District Attorney’s Office to testify against one of the individual defendants. Monzon, 1999 WL 1120527.

The courts' analyses and reasoning in both cases is evaluated *infra* from three different legal vistas within the courts' tri-issue framework, dividing the analyses into the plaintiffs' testimony, state officials' statements, and media coverage of the precinct scandal. I address the doctrinal limits of the courts' decisions and methodology. Specifically, I analyze the manner in which the analysis fails to comport with the theoretical engine driving the Supreme Court's decision in *Monell*. I also discuss the decisions' lack of adherence to circuit precedent on the legal standard applicable to accrual questions in municipal liability cases. I dissect the factual basis for the decisions, concluding that the facts in the record fail to support the *Clinton* courts' conclusions that he was on notice more than three years prior to filing his complaint. Lastly, I raise the issue of the courts' silence on the racialized context in which these cases arise.

### A. Plaintiff's Testimony and Law Enforcement Officials' Statements

The *Clinton* and *Monzon* courts' consideration of the plaintiffs' testimony against individual police officer defendants, and the courts' reliance in *Clinton* on the Assistant District Attorney's affirmation, does not adhere to the Supreme Court's doctrinal and theoretical interpretation of municipal liability pursuant to § 1983.

1. **Doctrinal Deficiencies and Weaknesses**

To be on notice of a municipal liability claim, the plaintiff must be on notice of the injury and that the municipality's policy, practice, or custom is the source of that injury in the legal sense.\(^{198}\) Thus, to be on notice of a municipal liability claim is to be on notice of the municipal actor's direct role in the plaintiff's injury, vis-à-vis a municipal policy, practice, or custom. After all, "*Monell* [was] a case about responsibility."\(^{199}\) This approach to the notice question is wholly consistent with the Supreme Court's interpretation of local government liability under § 1983. Simple causation based on the municipality's position as employer is insufficient because respondeat superior is not an available liability theory against a municipality.\(^{200}\) For liability to accrue, the municipality

\(^{198}\) Pinaud v. County of Suffolk, 52 F.3d 1139, 1157 (2d Cir. 1995).


must cause the injury through enforcement or implementation of its policies, practices, and/or customs.\textsuperscript{201}

Yet the court's decision in \textit{Clinton} circumvents \textit{Monell} by concluding that a plaintiff would be on notice of a legal claim when the plaintiff learns that the state is prosecuting individual officers and investigating police corruption. This analysis assumes that the plaintiff will become aware of a municipal liability claim, which must be based on institutional wrongdoing via enforcement of some policy, simply by learning that officers are being prosecuted for their actions and that the state is investigating claims of police corruption.\textsuperscript{202}

This analysis fails to consider the requirement of institutional malfeasance, which is direct municipal action that holds a municipality accountable for those policies that are "the moving force of the constitutional violation,"\textsuperscript{203} not for the mere bad acts of its employees or representatives. Nevertheless, these decisions have turned what had been a clearly understood doctrine of direct liability on its head. It appears that in the Second Circuit, a municipality is not liable for the actions of its tortfeasor employee under a theory of respondeat superior in accordance with \textit{Monell}, and a municipality may also rely on the principle of respondeat superior\textsuperscript{204} as a procedural time bar against a § 1983 municipal liability claim. Thus, a municipality has the best of both worlds. First, the doctrine is a substantive shield, because the municipality is protected from liability for police officers' acts absent some policy; second, the doctrine serves as a procedural sword, because the theory is available to the defendant in asserting the proper time for accrual of the claim and notice to the plaintiff.

Clearly, the Supreme Court did not intend, nor expect, that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents."\textsuperscript{205} Nor did it intend that a plaintiff would be responsible for determining that a municipal policy caused or allowed the employee or agent to inflict injury on

\textsuperscript{201}Id. at 690.
\textsuperscript{202}This appears counterintuitive since it would be more difficult to establish liability where the municipality is indeed responding to individual officers' illegal actions by investigating and prosecuting these "bad actors."
\textsuperscript{203}\textit{Monell}, 436 U.S. at 694.
\textsuperscript{204}"The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." \textsc{Black's Law Dictionary} 1313 (7th ed. 1999); \textit{see also} W. Page \textsc{Keeton et al., Prosser and Keeton on the Law of Torts} §§ 69-70 (5th ed. 1984 & Supp. 1988).
\textsuperscript{205}\textit{Monell}, 436 U.S. at 694.
the plaintiff, without direct information about a municipal policy and its connection to the employee's acts.

A plaintiff’s testimony about an individual police officer’s bad acts that caused the plaintiff’s injuries is merely an articulation of information the plaintiff had at the time the injury occurred. For example, testimony that the officer lied about the plaintiff does not demonstrate knowledge of an institutional policy, practice, or custom. Therefore, it cannot be sufficient notice to toll the statute. Although both Clinton and Monzon knew that they were innocent and that the officers involved in their arrests had lied, this does not establish that an individual was on notice of a possible claim. In Pinaud v. County of Suffolk, the Second Circuit recognized that such information does not necessarily place a plaintiff on notice that a municipal policy was the cause of the injuries.206

Indeed, an opposite approach ignores the reality of police misconduct victims who are disproportionately black and Latino. For these individuals, police misconduct, especially law enforcement intrusion into their daily lives, is so commonplace as to be expected. As such, the actions of the police in Clinton and Monzon, and within the 30th Precinct where police targeted African Americans and Latinos, for example, are viewed as typical of the institutional racism which pervades society. While society at large may view such actions as aberrations, and appear surprised or shocked by police misconduct, people of color this as “business as usual” by the police.

The Assistant District Attorney’s affirmation in Clinton was also legally insufficient to put a plaintiff on notice. Nothing in the affirmation suggests, or otherwise would lead Clinton to inquire about, the existence of a City policy—in the form of an official statement, a policymaker’s acts, or some custom—which caused Clinton’s injuries.207 The affirmation only states that the Assistant District At-

206. 52 F.3d 1139, 1157 (2d Cir. 1995).
207. This is particularly inappropriate with respect to New York City’s Police Department, which has been the target of numerous claims of corruption and police abuse and historically has denied institutional malfeasance and wrongdoing. E.g., MOLLEN REPORT, supra note 4, at 1-9, 51-69, 90-101, 107-09 (detailing history of corruption in New York City, police culture which minimizes and conceals corruption, and Police Department’s failure to hold police accountable, but also recognizing that the vast majority of officers are honest); City of New York Office of the Mayor, Executive Order No. 42 (July 24, 1992), 1992 N.Y. LEGIS. SERV. 330 (establishing Mollen Commission, in part, so that “the misdeeds of a few must not be allowed to sully or taint the reputations and sacrifices of the vast majority of honest and dedicated men and women who serve on the police force”); Clifford Krauss, 2-Year Corruption Inquiry Finds a ‘Willful Blindness’ in New York’s Police Dept.: Mollen Report Blames
torney was “presently investigating allegations of police corruption in the 30th Precinct in Manhattan.” 208 Indeed, a careful reading of the affirmation suggests that the affirmation could, by its own words, lead the plaintiff to believe that the Assistant District Attorney’s then-current investigation did not encompass events of the past two years. In fact, it suggests that the Assistant District Attorney’s discovery of information about Clinton’s case was an unforeseen and unrelated result of the Assistant District Attorney’s investigation. The affirmation states:

   During the course of this investigation, I learned through cooperating police officers formerly assigned to the 30th Precinct who were participants in the arrest of Reynaldo Clinton that the circumstances leading to the arrest of defendant and recovery of narcotics from his car had been fabricated.

   The City’s own historical rejection and dismissal of reports concluding that the Police Department and the City have encouraged and facilitated the very conduct that flourished in the 30th Precinct further support this interpretation, 210 which is just as likely to be accurate as the claim that this put the plaintiff on notice. On a motion to dismiss, where there is some equipoise in the possible readings of the parties’ arguments, the court should conclude that the movant has failed to satisfy the burden of showing that the plaintiff cannot prove any set of facts in support of the plaintiff’s claim.

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209. Id.

210. E.g., David Kocieniewski, Bratton Challenges Testimony, N.Y. TIMES, Jan. 12, 1996, at B4 (reporting that Police Commissioner Bratton “rebutted a rogue police officer’s court testimony that the 30th Precinct’s rampant corruption was encouraged and initiated by the precinct’s two top commanders”); cf. Mollen Report, supra note 4, at 13 (characterizing New York City Police Department approach to investigations of allegations of corruption as a narrow focus on the single corrupt cop as the “rotten apple,” rather than on patterns of wrongdoing); id. at 70-71 (“[T]he New York City Police Department had largely abandoned its responsibility to police itself and had failed to create a culture dedicated to rooting out corruption . . . [due to] a deep-seated institutional reluctance to uncover serious corruption . . . ”); Commission to Combat Police Corruption, supra note 4 (finding, based on a study of disciplinary cases in 1994-96, penalties were in many cases grossly inadequate).
2. The Legal Standard

The courts' decisions are also counter to Supreme Court and Second Circuit precedent in police misconduct cases regarding the quantum of information necessary to provide notice of municipal liability. The initial inquiry into notice of an injury caused by a municipal policy is inextricably linked to the inquiry into the level of evidence necessary to establish the necessary proof of such policy. Although the plaintiff's complaint must contain only a properly pleaded claim,\(^1\) the Second Circuit's and the Southern District's courts' decisions appear to impose an additional pre-filing burden similar to truncated discovery.

Consider the typical case of an individual who is physically injured, or whose constitutional rights are otherwise violated, by a single action of a police officer or some other municipal officer. Such a plaintiff would face a tremendous challenge and significant burden of proof in establishing that a single incident can lead to an inference of a municipal policy.\(^2\)

Supreme Court precedent in this area is convoluted. In Oklahoma City v. Tuttle,\(^3\) a plurality of the Court stated that "where the policy . . . is not . . . unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality . . . and the causal connection between the 'policy' and the constitutional deprivation."\(^4\) Yet, in Pembaur v. City of Cincinnati,\(^5\) a plurality of the Court held that a municipality could be liable where an official policy-maker's single decision results in a consti-

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\(^1\) Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).


\(^3\) 471 U.S. 808 (1985).

\(^4\) Id. at 824 (internal footnotes omitted) (emphasis added). Three other Justices agreed that a single incident of excessive use of force by a police officer would be insufficient to establish a municipal policy. Id. at 833 (Brennan, J., concurring in part and concurring in the judgment, joined by Marshall & Blackmun, JJ.). Although a majority of the Court in Tuttle could not agree as to the viability of a § 1983 claim based on inadequate training, the Court subsequently unanimously recognized such a claim, albeit subject to a higher threshold of proof. In City of Canton v. Harris, 489 U.S. 375, 388 (1989), the Court held that municipal liability may be imposed "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

tutional violation.\textsuperscript{216} This is far from recognizing that the actions of a police officer without such policy-making authority could be construed as a municipal policy, however. Only in \textit{City of Canton v. Harris},\textsuperscript{217} a failure to train case, has the Court suggested that a single incident could permit an inference of a municipal policy. In \textit{City of Canton}, the Court imposed a high threshold of misconduct for municipal liability, requiring that the municipality act with "deliberate indifference" of the rights of the individual.\textsuperscript{218}

Based on the Supreme Court's interpretation of what may constitute a municipal policy for § 1983 purposes, the individual described in the above hypothetical could not proceed on a municipal liability claim against the government. A claim based on a single action invites summary dismissal for legal insufficiency on the face of the complaint, or as factually unsubstantiated. Although a single incident may be sufficient for a failure to train claim, the plaintiff in such a case must establish deliberate indifference, a particularly onerous burden of proof. Where such a claim is against a municipality for the actions of its police, the claim almost takes on an "enhanced deliberate indifference burden" because of the police "code of silence."\textsuperscript{219} This code makes it extremely difficult for a plaintiff to procure information regarding individual police officials' actions and how they relate to police policy, customs, and/or practices because officers do not speak out about corruption. However, as one court in the Eastern District of New York has stated, the existence of such code may be the basis for a failure to train or supervise claim since adequate supervision may avoid deprivation of protected rights.\textsuperscript{220}

Initially, it may appear that the \textit{Clinton} and \textit{Monzon} cases fall within the category of claims which may proceed based on a single incidence because both complaints charged the City with liability for failure to adequately select, hire, train, supervise, and disci-

\textsuperscript{216} \textit{Id.} at 480.
\textsuperscript{217} 489 U.S. 378.
\textsuperscript{218} \textit{Id.} at 388.
\textsuperscript{220} \textit{Id.} at *5-6 (finding that, in a police officer's complaint against the New York City Police Department for a § 1983 violation of his freedom of speech, a code of silence was evidence of deliberate indifference to his constitutional right by failure to adequately train or supervise employees).
However, Clinton and Monzon involved clearly illegal acts by police officers that are not easily or directly connected to the types of municipal actions which are the basis for liability under Monell. The police officers' fabrication of evidence and perjury are not executions of an official policy, ordinance, or regulation. Nor are they actions representative of a municipal custom or practice within the "failure to train" category because they are single actions not obviously attributable to a municipality's training protocol. This is not to say that plaintiff could not prove that the actions are attributable to municipal policy, or custom, but for purposes of notice of a municipal liability claim, the individual officers' actions do not resoundingly fall within a category of conduct which should place a plaintiff on notice of a legally cognizable municipal liability claim.

The Second Circuit recently articulated the nuanced difference in this type of case in Walker v. City of New York, which involved a claim against the City of New York for failure to train and supervise officers not to commit perjury or prosecute the innocent. The court concluded that where proper conduct is so obvious, the plaintiff could not support an inference of deliberate indifference unless there is a history of conduct so that the obvious proper response is no longer likely.

To be on notice of an injury caused by a municipal policy, the Second Circuit has held that mere knowledge of an illegal arrest is

221. See Amended Complaint, Clinton v. City of New York, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, supra note 30, at 21-30; Monzon Complaint, supra note 130, paras. 41-44.

222. Cf. Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) (finding that a § 1983 claim against a police department involving perjury by the police survived summary judgment because, while an officer usually does not have to be trained not to commit perjury, plaintiff might show a pattern of perjury in the face of which the failure to train or supervise would become deliberate indifference).

223. Id.

224. Id. at 298.

225. The court states:

Where the proper response—to follow one's oath, not to commit the crime of perjury, and to avoid prosecuting the innocent—is obvious to all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise . . . .

... While it is reasonable for city policymakers to assume their employees possess common sense, where there is a history of conduct rendering this assumption untenable, city policymakers may display deliberate indifference by doing so.

Id. at 299-300.
insufficient. A claim based on a municipality’s policy or custom, “does not necessarily accrue upon the occurrence of a harmful act, but only later when it is clear, or should be clear, that the harmful act is the consequence of a [City’s] ‘policy or custom.’” The circuit court has noted that its application of this “delayed accrual theory” is appropriate because “[w]here no single act is sufficiently decisive to enable a person to realize that he has suffered a compensable injury, the cause of action may not accrue until the wrong becomes apparent.”

Thus, claims against a municipality based on a “policy or custom” accrue when the plaintiff “knew or should have known enough to claim the existence of a ‘policy or custom’ so that [the plaintiff can] sue the [municipality].”

In the Clinton and Monzon cases, however, the courts’ decisions did not sufficiently consider how information about an individual officer’s illegal actions could provide information that would put the plaintiff on notice of a municipal policy that caused the injury. Rather, the courts accepted that knowledge of one equates with notice of the other. Yet plaintiffs need more information. In Clinton and Monzon, for example, the plaintiffs needed information that would connect—in the legal sense—the officers’ misconduct with the City’s policy on how to deal with this misconduct. Since the City’s officials had historically publicly claimed to aggressively discipline corrupt officers, nothing to notify the plaintiffs of the City’s role in facilitating the corruption. The plaintiffs needed credible refutations of the City’s own denials. In Clinton and Monzon, however, the courts imposed a significant burden on the plaintiffs because they required that the plaintiffs have more knowledge and insight about the City’s actual role in the corruption than is reasonably possible in a municipal liability case, and certainly more than the Supreme Court has required in the past.

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226. Pinaud v. County of Suffolk, 52 F.3d 1139, 1157 (2d Cir. 1995)
227. Id.; see also Veal v. Geraci, 23 F.3d 722, 724 (2d Cir. 1994) (holding that a § 1983 “claim accrues when the alleged conduct has caused the claimant harm and the claimant knows or has reason to know of the allegedly impermissible conduct and the resulting harm”).
228. Singleton v. City of New York, 632 F.2d 185, 192-93 (2d Cir. 1980) (quoted in Pinaud, 52 F.3d at 1157).
229. Pinaud, 52 F.3d at 1157 n.17. In Pinaud, the Second Circuit distinguished between a § 1983 action against an individual and one against a municipality, concluding that accrual in the former does not foreclose delayed accrual in the latter. Id. (distinguishing Eaglestone v. Guido, 41 F.3d 865 (2d Cir. 1994), which involved claims against individual defendants, and the case before it which involved a county).
230. Supra note 210, and citations therein.
In *Clinton* and *Monzon* the courts concluded that information that the plaintiffs testified against individual police officers, and in *Clinton*, the Assistant District Attorney's investigation of a corruption allegation two years after Clinton's unlawful arrest and incarceration, were sufficient to put plaintiffs on notice of municipal liability claims. However, there is no obvious and direct causal connection between individual corrupt officers and a municipal policy. As already noted, the police department regularly denies any pattern of police misconduct, instead characterizing any and all bad police actions as aberrations and individual acts that are neither encouraged nor condoned by the department.\(^{231}\)

3. **Statements' Factual Insufficiency**

Assuming individual police officers' bad acts could be the basis for notice of a municipal liability claim, this would still require proof of a pattern of conduct. The pattern is the link to the municipality because, absent institutional support or inaction, such repeated action could not continue or flourish. However, the case records in *Clinton* and *Monzon* lack the factual development of such a pattern.

In both cases, the plaintiffs' testimony to juries merely involved describing what the officers did to them. It did not involve the description of a pattern, custom, or policy. Indeed, their testimony could not encompass such allegations because neither was aware of any such policy at the time of his respective testimony. The plaintiffs simply responded to the district attorney's questions regarding their unlawful arrests.\(^{232}\)

The statements contained in the affirmation in *Clinton* also fail to provide additional suggestive information about a policy of police misconduct. Neither individually nor collectively can the statements therein be considered to place Clinton on notice of a municipal claim because this information was about the culpability of individual officers. These statements do not place him on notice of the City's training, supervisory, and disciplinary polices and customs, and what role they played in the advent of his injuries. Certainly the fact that Assistant District Attorney ("ADA") Adoradio received information that officers lied in Clinton's case, and that Clinton corroborated this information is not "new" information to

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\(^{231}\) *Supra* note 210, and citations therein.

Clinton, for purposes of alerting him to his claims against the City. He was well aware prior to the filing of the affirmation that the police fabricated evidence and lied; he knew he was innocent, so that this information could not alert him to anything more than he already knew.

The only information set forth in the affirmation that could arguably be construed as information which Clinton did not have prior to the vacatur of his sentence is ADA Adoradio's assertion that the ADA was involved in an investigation of allegations of corruption in the 30th Precinct. At the time of Clinton's illegal arrest, prosecution, and sentencing, Clinton knew that the individual ex-police officers involved in his criminal case had lied. Clinton, however, did not have knowledge of the corruption in which these officers were involved, or the City's involvement in facilitating and permitting such illegal actions within the 30th Precinct. In certain situations such a statement might suffice to place a plaintiff on notice of a pattern, thus alerting the plaintiff of a municipal liability claim. However, this statement provides nothing more than information about ADA Adoradio's connection to the 30th Precinct and Clinton's criminal case.

Equally important is the information left out of the ADA's affirmation. The affirmation does not state that ADA Adoradio informed Clinton or his counsel of any substantive information concerning the corruption scandal and/or the ensuing investigation in the 30th Precinct.\footnote{233} It does not say anything about the timing or scope of the investigation, the bases of the corruption allegations, or the period covered by the investigation. These are not inconsequential matters because it could have been possible that the ADA was investigating actions that occurred after Clinton's unlawful arrest and incarceration. Alternatively, and just as likely, it could have been an investigation concerning corruption totally irrelevant to the unlawful actions that were the basis for Clinton's Monell claim.\footnote{234}

\footnote{233} This is the procedural difficulty with the lower and circuit courts' approach. Since this was a motion to dismiss converted to a summary judgment motion without the benefit of any pretrial discovery, neither plaintiff nor the City deposed ADA Adoradio, or otherwise inquired, about the information which the courts imputed to the plaintiff based on the Affirmation's statements.

\footnote{234} We can only speculate as to the reasons for this vague statement, but one possible reason is that the success of the investigation depended on maintaining secrecy in order to protect the integrity of the investigation, as well as those involved in ferreting out the corruption; see also MOLLEN REPORT (finding New York City Police Department infested with corruption and an institutional reluctance to address cor-
Neither the grand jury testimony nor the affiant’s statements can be the basis for alerting plaintiffs to a municipal liability claim since the Second Circuit has recognized that an unlawful arrest and prosecution do not, as a per se matter, put the plaintiff on notice of a possible municipal liability claim.\textsuperscript{235}

**B. Media Coverage**

In addition to the plaintiffs’ testimony, and the knowledge imputed to Clinton based on Assistant District Attorney Adoradio’s affirmation, discussed \textit{supra} Part III.A, the courts also considered the effect of news media coverage of the 30th Precinct corruption scandal. Unlike the court in \textit{Monzon}, which left these questions for the jury, the courts in \textit{Clinton} inappropriately resolved matters

\textsuperscript{235} See \textit{Singleton v. City of New York}, 632 F.2d 185, 195 (2d Cir. 1980) (affirming that a single false arrest ordinarily cannot provide notice of an official policy).
solely within the province of the jury by considering the impact of news coverage on Clinton's knowledge of the source of his injury.

One of the issues that should have been reserved for the trier of fact is whether Clinton was aware of any newspaper articles or other news coverage of the 30th Precinct scandal or the conviction and sentencing of the former officers involved in his arrest. Resolution of this issue cannot be achieved on pretrial motions because these are the very types of factual issues that are within the purview of the trier of fact, and simply cannot be resolved as a matter of law.

Moreover, the reliance on English-language, mainstream media in these cases reveals the pervasive racial and cultural influences that dominate the law. The media sources cited by the courts exhibit their adoption of a standard of knowledge based on newspapers and news programming familiar only to a segment of the New York population. This standard does not reflect the common experience of all New Yorkers, or of society generally. Not everyone reads *The New York Times*, *Newsday*, or *USA Today*, or watches the Cable News Network, the news sources cited by the district court.

People of color, who are victims of police abuse in significant and disproportionate numbers, are particularly disadvantaged by this approach because they do not constitute a majority of the

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236. *Latin Looks: Images of Latinas and Latinos in the U.S. Media* 14-16 (Clara E. Rodriguez ed. 1998) (discussing the disproportionately small amount of news coverage about Latinos and the small number of Latino correspondents, as well as the stereotypical portrayal in the news of Latinos as objects and "problem people").

237. *Clinton*, 1999 WL 105026 at *2 (citing LEXIS ALLNEWS file). The district court in *Clinton* specifically referred to the numbers of stories run in each of these publications in support of its conclusion that the 30th Precinct scandal was highly publicized. *Id.* at *2 & n.1.

238. "People of color" and "communities of color," as used in this article, refer to African Americans, Asian Americans, Asian/Pacific Islanders, Latinos, and blacks and Latin Americans of Caribbean ancestry, as well as discrete communities where they make up a majority of the population.

239. The 30th Precinct scandal is a prime example of this fact since the victims of the police corruption were black and Latino; see also *Human Rights Watch, Shielded from Justice: Police Brutality and Accountability in the United States* (1998), available at http://www.hrw.org/reports98/police/index.htm (discussing how racial and ethnic minorities are abused by police); Harvey A. Silvergate, 'Race Profiling' Inflicts Injustice on Individuals, Nat'l L.J., June 22, 1998, at A20 (discussing racial profiling in law enforcement); *New Jersey Advisory Committee to the U.S. Commission on Civil Rights, The Use and Abuse of Police Powers: Law Enforcement Practices and the Minority Community in New Jersey* (1994) (describing the use and abuse of police powers against minorities).
readers of these print media. For example, although the Clinton court relied on The New York Times to prove notice, only 8.7% of daily readers are African American, 4.5% are Asian, and 7.9% are Latinos, compared with 76.2% who are white. This low readership is a consequence of complex factors. First, mainstream media, media that is English-language and historically located outside of immigrant communities or communities of color, does not treat people of color as a target audience. Apparently this is the case because these communities are deemed unattractive to advertisers due to their low purchasing power—an assumption proved inaccurate by the significant buying strength and habits of these communities.

Second, people of color are less likely to be interested in and persuaded by the issues as covered by the mainstream media because these news services provide scant coverage of issues of particular importance to people of color, and what little coverage they do provide perpetuates racist stereotypes. Indeed, “[m]inority


241. Gilbert Cranberg, Trimming the Fringe: How Newspapers Shun Low-income readers, 35 Colum. Journalism Rev. 52 (1997) (finding that the press does not target inner-city customers, and that “database marketing relies heavily on identifying and targeting look-alikes—non-subscribers who most closely resemble existing readers in terms of residence, demographics, and life-style”). The main reason for ignoring these communities appears to be economic, with newspapers avoiding minorities and low-income readers because it is assumed they are of little interest to advertisers. This calculation has proved inaccurate and costly, since people of color have tremendous consumer buying power, as recognized by the vast number of local advertisers and telephone businesses who target these communities with focused advertisements. See The 2000 National Hispanic Media Directory, Fact Sheet (2000) (estimating that in 1999, Hispanic publication advertising sales totaled $650 million) (on file with author).

These ideas are not limited to those within the media. Advertisement agencies that have direct influence on advertisement rates and trends in ethnic and/or non-English media advise avoiding these media, based on stereotypes of the media’s clients. Terry Pristin, Ad Agency Urges Avoiding Black and Hispanic Radio, N.Y. Times, May 13, 1990, at B7 (discussing internal company document that instructed sales representatives to warn companies not to place ads with stations with black and Hispanic listeners because “advertisers should want prospects, not suspects”).

242. Supra note 241

NOTICE OF A 42 U.S.C. § 1983 CLAIM

journalists and many of their white colleagues and supervisors say the overwhelming majority of press coverage still emphasizes the pathology of minority behavior—drugs, gangs, crime, violence, poverty, illiteracy—almost to the exclusion of normal, everyday life.”

Understandably, stereotypical characterization of African Americans, Asian Americans, and Latinos as “problem people” and criminals further alienates this population from mainstream media.

According to one report based on interviews of 175 reporters, editors, and publishers from more than thirty newspapers nationwide, “no complaint about press coverage was voiced as frequently by minorities (or acknowledged as readily by many whites) as the overwhelmingly negative nature of most stories on people of color—especially blacks and Latinos—and the concomitant absence of people of color from the mainstream of daily news coverage.” Indeed, this is the general experience within the news industry:

[N]ews is what editors who assign stories and put them in the paper decide is news, and even the most conscientious editors (and reporters) are largely captives of their own experiences, in-

in the United States.”) [hereinafter Numbers Double in 7 Years]. Mark H. Willes, the Chief Executive Officer of the Times Mirror Co., stated last year that with respect to the Los Angeles Times circulation, “When we ask Latinos why they don’t read the Times, they said we were not relevant to them, we didn’t understand them or respect them, we didn’t cover the things they were most interested in, and they didn’t see themselves reflected in our paper.” Mark H. Willes, Remarks at the 1999 Convention of the American Society of Newspaper Editors (Apr. 15, 1999), in American Society of Newspaper Editors, *It's Your Future: Economic Imperatives of Changing Audiences*, 1999 Convention (1999), at http://www.asne.org/kiosk/archive/convention/conv99/economicimperatives.htm (last modified Oct. 27, 1999). He did, however, note that “[t]hose are all things we can change, and we are.” Id.


terests and perceptions. In our still largely segregated society, most whites—especially most whites old enough to be high-ranking editors—don’t have the daily experience and exposure that would enable them to automatically incorporate a minority sensibility in their own decision-making.

This means, among other things, that certain stories and issues aren’t covered (or are undercovered), certain stereotypes are perpetuated, certain errors are made, certain perceptions are missed (or misunderstood).²⁴⁷

Third, English-language media is inaccessible to many immigrants who do not read English. Consequently, this population relies on second language and ethnic media for news.²⁴⁸ This last factor is becoming increasingly important as the number of persons speaking languages other than English in the United States grows.²⁴⁹ The locus of the lawsuits discussed herein is a prime example of the influence and this trend. New York City is a multilingual city, with various enclaves of ethnic and linguistic communities that thrive, in part, due to their ability to maintain the integrity of their language and customs within these enclaves.²⁵⁰ For many New Yorkers, English is not the language in which they obtain information or generally communicate with others in the City or the world. According to the 1990 U.S. Census, 41% of New Yorkers speak a language other than English at home,²⁵¹ a fact that is not lost on news editors who recognize that the ethnic and various non-English language press are attractive to this community.²⁵²

²⁴⁷. David Shaw, What’s the News? White Editors Make the Call; Newspapers: Even the Most Conscientious are Often Captives of Their Own Experiences and Perceptions, L.A. TIMES, Dec. 13, 1990, at A1. (showing that the percentage of minorities among professionals on newsroom staff did not exceed 21%, and a majority showed less than 13% of supervisors were minorities).

²⁴⁸. Numbers Double in 7 Years, supra note 243, at A1 (reporting increase in ethnic press and newspapers in languages other than English).


²⁵⁰. See U.S. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING SUMMARY TAPÉ FILE 3 (1992) (showing that 36.8% of those living in New York City were “foreign born,” including 953,449 persons who entered the United States between 1980 and 1990; of the 41% who speak a language other than English at home, 20% do not speak English “very well”).

²⁵¹. Id.

²⁵². At the April 2000 American Society of Newspaper Editors annual convention, the outgoing president stated in his keynote address that “there is a ‘direct correlation’ between a person’s sense of community and his or her readership of a newspaper. ‘Thus, we do well to help readers and potential readers feel that they belong to the community . . . .’” Cheryl Arvidson, ASNE’s Anderson: ‘Readers Expect Us to Get
Indeed, in Monzon, the plaintiff alleged that he did not speak English.\textsuperscript{253}

Based on these factors, it is not surprising that these news sources are neither the most prominent nor the most trusted within communities of color. It is, therefore, unlikely that members of these communities would derive information about law enforcement, or perceive as unbiased news about police corruption, from these sources. Yet this is the most ironic aspect of the courts’ approach and treatment of ethnic and non-English language media. If people of color do not derive credible information from mainstream media, and ethnic and non-English language media provide coverage of police misconduct more expansively than the mainstream media because of the importance of the issue in these communities, then perhaps this type of coverage would, in the courts’ opinion, place plaintiffs on notice of a municipal injury. We will not know in Clinton or Monzon, however, precisely because of the marginalization of these media sources and their coverage of police misconduct.

What the courts have done, then, is fashion a legal doctrine that is completely normative, adopting and privileging a particular view of knowledge and information gathering, a view that is based on racial and ethnic privilege and dominance within media. This approach misinterprets the law, subverts the fact-finding role of the jury, and undermines the goals of §1983.

The courts in Clinton also impermissibly disregarded the City’s burden on summary judgment to establish that no factual disputes existed and that the City was entitled to a decision as a matter of law.\textsuperscript{254} On its motion, the City presented no evidence that Clinton actually read the cited news articles, saw the cable television coverage, or otherwise had information during his incarceration or after, garnered through the media, that would alert him, or any reasonable person, to the injury and municipal policy that would be the basis for a federal civil rights claim against the City of New York.\textsuperscript{255}


\textsuperscript{253} Monzon Complaint, \textit{supra} note 130, para. 6; Monzon’s Memorandum, \textit{supra} note 31, at 19 (citing Monzon Complaint para. 6).


\textsuperscript{255} It is unlikely that the City could present such evidence since it did not proceed with, or request, discovery to discern the plaintiff’s actual knowledge, or information supporting an allegation about what the plaintiff should have reasonably known. \textit{See Clinton Appellate Brief, supra} note 170, at 11, n.3.
This approach flies in the face of civil rights jurisprudence, the recognized social and legal significance of § 1983 and its remedial purpose, and the courts' historically broad reading and application of the law in § 1983 actions.\(^{256}\) As the United States Supreme Court stated more than two decades ago, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"\(^{257}\)

Similarly, the City's unsuccessful argument in Monzon, that discussion of police corruption in the report of the "Mollen Commission" put Monzon on notice, would have recast the pretrial motion practice inquiry, and demanded that plaintiff know about every document and report on police conduct. For example, in Monzon, the City cited the Mollen Commission's report as a basis for finding that Monzon was on notice. Such a standard is not only unsupported by the caselaw and § 1983 legislative goals and history, but is unworkable in practice. It raises questions as to access to documents and reports, and fails to resolve the more subjective problem of what type of information in these reports would place a plaintiff on notice of a municipal liability claim.

The difference in the courts' treatment of media coverage in these two cases is revealing. In the Clinton case, the lower court concluded that the precinct scandal was "a major news item,"\(^{258}\) further justifying the court's decision that Clinton was on notice more than three years before filing the complaint, and consequently time barred from bringing suit. By contrast, the district court in Monzon concluded that the impact of newspaper reports on the plaintiff's constructive knowledge was a question for the jury.\(^{259}\)

One explanation for the difference in treatment may be that the media coverage was used as additional justification, rather than the sole or even primary justification, for concluding that the plaintiff

\(^{256}\) See, e.g., Lynch v. Household Finance Corp., 405 U.S. 538, 549 (1972) (stating that § 1983 "must be given the meaning and sweep that [its] origins and [its] language dictate") (footnote omitted); Will v. Michigan Dep't. of State Police, 491 U.S. 58, 73 (1989) (Brennan, J., dissenting) ("It would be difficult to imagine a statute more clearly designed 'for the public good,' and 'to prevent injury and wrong,' than § 1983.").

\(^{257}\) Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting Ex parte Virginia, 100 U.S. 339, 346 (1879)).

\(^{258}\) Clinton, 1999 WL 105026, at *2.

was on notice in *Clinton*. In the lower and circuit *Clinton* opinions, the primary basis for concluding the plaintiff was on notice was ADA Adoradio’s affirmation and the fact that the plaintiff testified before a grand jury about the investigation of one of the named defendant ex-police officers more than three years prior to filing the complaint. Thus, both the district and circuit courts were satisfied that he was on notice based on information and events related to him specifically, rather than general news coverage of a police scandal. However, in *Monzon*, the district court determined that there was no basis for concluding, as a matter of law, that Monzon was on notice prior to contact from the District Attorney’s Office for purposes of testifying against one of the named ex-police officer defendants, such contact having occurred less than three years before the filing of the complaint.

These cases may be harmonized if they are interpreted to mean that media coverage may support a finding of constructive notice and possible untimeliness where there is another, primary, basis for a court to find that the plaintiff was on notice. As a corollary, the courts may also have been influenced by the extent and timing of plaintiff’s personal participation in the investigation and prosecution of the individual police officers. The problem with this analysis, as previously discussed, is that it fails to fully consider and account for the difference between claims against individuals and those against municipalities for policy-driven actions. They are different doctrinally and legally—the former against an individual who may claim immunity from suit for his or her own actions, while the latter is based on a causal connection between a government policy and the implementation of that policy through municipal representatives’ actions, which is not protected by § 1983 immunity defenses.

**PART IV**

Plaintiffs in *Clinton* and *Monzon* invoked the doctrine of equitable tolling as an alternative basis for the survival of their claims.

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262. Equitable tolling must be distinguished from equitable estoppel, although the two are often discussed together. Equitable tolling stops the statutory time clock for a
The *Clinton* courts contemplated the plaintiff's argument, while the *Monzon* court would not even consider the argument.263

In accordance with Supreme Court precedent, the Second Circuit applies equitable tolling to § 1983 cases where the plaintiff "submit[s] non-conclusory evidence of a conspiracy or other fraudulent wrong which precluded his possible discovery of the harms that he suffered."264 In *Keating v. Carey*,265 the Second Circuit explained that a defendant's fraudulent actions may be the basis for delaying the time of accrual until the plaintiff discovers the basis for the cause of action. The district court in *Clinton* rejected, as affirmed on appeal, Clinton's request to apply these principles to his case.266 The former police officer defendants' intentional concealment of their misconduct and the City's official policy and custom, prevented the plaintiff from learning or having reason to certain period, usually resulting in the party proceeding with the action. Black's Law Dictionary 560 (7th ed. 1999); 28 Am. Jur. 2d Estoppel and Waiver §§ 27-32, 46-47 (2000); 31 C.J.S. Estoppel and Waiver §§ 58-112 (1996 & Supp. 2000). Equitable estoppel prohibits the opposition from raising the claim of untimeliness based on actions taken by that party in misleading or misrepresenting information to the other party which resulted in some adverse consequences to the plaintiffs. Black's Law Dictionary 571 (7th ed. 1999); 51 Am. Jur. 2d Limitations of Actions §§ 146-48, 150 (1970 & Supp. May 2000); 54 C.J.S. Limitations of Actions §§ 85-86, 88-91 (1996 & Supp. 2000).


In *Holmberg v. Armbricht*, 327 U.S. 392, 397 (1946), the Supreme Court stated that equitable tolling principles based on the fraudulent concealment of information by the defendant apply to every federal statute of limitations. In *Hardin v. Straub*, 490 U.S. 536, 539 (1989), however, the Court reemphasized its prior ruling (as set forth in Board of Regents v. Tomanio, 446 U.S. 483, 483-86 (1980), and Chardon v. Soto, 462 U.S. 50 (1983)) that state tolling provisions should be borrowed along with state statute of limitations in § 1983 cases. There has been some difference of opinions among the circuits as to the effect of *Hardin* on *Holmberg*, as applied to § 1983 matters, with some courts construing these Supreme Court cases to permit only the application of the state's tolling rules, and not federal equitable tolling principles. For a comprehensive discussion of the applicability of equitable tolling to § 1983 cases, including citations to and case discussions of court opinions interpreting *Hardin* and *Holmberg*, see Nahmod, Civil Rights, supra note 10, § 9:34; Schwartz, Section 1983 Litigation, supra note 10, § 12.5.

265. 706 F.2d 377 (2d Cir. 1983) ("Under federal law, when the defendant fraudulently conceals the wrong, the time does not begin running until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action."). Although the Second Circuit in *Keating* referred to equitable estoppel, id. at 382, the Second Circuit has subsequently relied on *Keating* in its discussions of equitable tolling in § 1983 cases. E.g., Pinaud, 52 F.3d at 1157 (quoting *Keating*). I will rely on the Second Circuit's interpretation of its own precedents on this issue.

266. Supra notes 166-169 and accompanying text.
know of the information that was the basis of his municipal liability claims within the three-year statue of limitations. Thus, equitable tolling should have applied given that such a plaintiff is the quintessential litigant entitled to the benefits of equitable tolling principles.

The plaintiff's claims are precisely the type envisioned as beneficiaries of the doctrine of equitable tolling. The unlawfulness of the former police officers' conduct depended directly upon the surreptitious nature of their actions and on the complex web of lies and deceit that concealed their actions from the plaintiff and the other victims of their nefarious actions. Maintaining secrecy from the victims was essential to the success and continued existence of the fraud. The District Attorney and United States Attorney conceded as much by the very fact that the corruption investigation was secret and required cooperation of various police officers in the precinct. Concealment is the essence of the fraud in which these ex-officers participated.

The district court refused to apply equitable tolling in this case because the court concluded that the City did not "hide the rogue officers' conduct beyond that time necessary to conduct an effective investigation." However, the court failed to elucidate when the necessary time expired, and there is nothing in the record to suggest that the investigation ended more than three years prior to the filing of the plaintiff's lawsuit.

The district court also failed to consider the derivative effect of the individual defendants' fraud upon the municipal liability claim. The City's official custom facilitated, maintained, and ignored the actions of the individual defendants, resulting in the conduct giving rise to the plaintiff's claim. Thus, equitable tolling should have applied. Failing to invoke the doctrine in favor of the plaintiff rewarded the City for the actions of its employees' in successfully concealing their unlawful actions, and denied plaintiff a remedy, despite his having lost two years of his life while unlawfully incarcerated in a state prison.

PART V

A determination of whether a plaintiff has notice of a Monell-based claim—when a plaintiff knows or "should have known" that

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267. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), reprinted in Appendix, supra note 30, at 102-103.
she or he has been injured as a consequence of a municipal policy—requires assessing the importance and impact of various facts and events in a case. Yet the plaintiff may not have any actual knowledge of such information. The task of obtaining this information is particularly complex in a municipal liability case because the injury must result from the implementation of the institutional defendant’s policy.

One solution to this accrual problem is for the courts to focus solely on the specific information about the municipality and its policy that is the alleged basis for the plaintiff’s injury. In the Clinton and Monzon cases, this would have been the point in time when the plaintiffs’ arrests, incarcerations, and prosecutions resulted from the 30th Precinct corruption that occurred as a direct consequence of the City’s policy, practices, or customs. This approach accurately and fairly imposes upon the plaintiff the burden of diligently filing a complaint, based on what she or he knows or should know about the institutional actor’s policies and role related to the plaintiff’s injuries. It is directly connected to the accrual of the claim against the municipal defendant. Thus, information about the individual municipal employees, such as the information gathered from the plaintiffs’ testimony against individual police officers, as well as information contained in the assistant district attorney’s affirmation concerning his participation in an investigation of allegations of corruption, are irrelevant to accrual. Nor would this information serve as the basis for a finding of notice, absent some connection between the policy and the plaintiffs’ injuries. Otherwise, notice of the injuries resulting from the individual officer’s actions would also provide notice of a municipal liability claim, a theory which the Second Circuit rejected several years ago.269

While it may be possible in rare cases that notice of injury caused by a police officer will place a plaintiff on notice of injury caused by a municipal policy, those cases are more likely to arise where there is an official policy accessible to the general public. In contrast, cases where the City asserts that police corruption and malfeasance are aberrational and individual and where police misconduct has never linked to a City policy or practice, notice of a municipal policy for § 1983 purposes will include less direct and obvious municipal actions. In cases involving municipal practices and customs, those acts which have “not received formal approval

269. See Pinaud, 52 F.3d 1139.
through the body's official decisionmaking channels ... [and] although not authorized by written law ... could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

Courts should also consider the plaintiff's pre-discovery position. When a municipality challenges a Monell claim in a motion to dismiss or a summary judgment motion, courts should consider the obstacles the plaintiff faces in asserting a claim against a municipal entity for police misconduct. A plaintiff asserting a Monell claim may encounter unique difficulties such as defining institutional actions only discernible after the plaintiff gains access to municipal records and files that may be otherwise inaccessible because of confidentiality guarantees.271

Determinations as to whether news coverage is sufficient to place a plaintiff on notice of a § 1983 municipal liability claim should be treated as questions of fact for the jury. Courts should not make per se decisions that, as a matter of law, particular media coverage has met the accrual standard. Otherwise, the courts are likely to adopt mainstream media standards that do not take into account or reflect the experiences of § 1983 plaintiffs, or the dynamics of multilingual, multicultural communities.

Whether the news source is one of credibility and dependability within a community on a particular issue should also be a determining factor. Regardless of whether a jury or a judge resolves the question of the impact of news coverage on plaintiff's knowledge of a claim, such determinations must be based on the specifics of the actual coverage, as well as the news providers involved. The court should consider the availability and substance of coverage by highly visible information sources that are well recognized within the plaintiff's community and with a significant distribution and

271. For example, a plaintiff may only discern from a protracted and lengthy record of misconduct by individual officers that there is a practice, custom or policy at the root of this misconduct. However, the individual officers may have certain privacy rights that make access to such records difficult or impossible for a prospective plaintiff prior to filing of a lawsuit with its attendant benefit of discovery. E.g., N.Y. Civ. Rights Law § 50-a (McKinney 1992 & Supp. 2000); John M. Leventhal, Do Not Open Unless .... , 214 N.Y. L.J. 1 (1995) (discussing the purpose and application of § 50-a); see also Richard N. Winfield, Decision in Schenectady Case Denies Access To Records of Police Guilty of Misconduct, 71 N.Y. St. B. J. 37 (1999) (discussing impact of New York State Court of Appeals decision denying public disclosure of records of police misconduct incident under state's Freedom of Information Law because information is protected under § 50-a).
readership within the community. The court also should consider whether the coverage conflicted or cast doubt on the mainstream news sources' coverage.

Further, the courts should consider the racial and ethnic elements involved in police misconduct cases. For people of color who are victims of police abuse, their perceptions of that abuse differs and is at odds with the dominant norms and perceptions of police misconduct as individualized and unsupported by institutions. The role of prevalence and dominance of race in law enforcement should be a factor militating in favor of a § 1983 plaintiff.

These recommendations would have affected the outcome in the Clinton case. The court should have recognized that the plaintiff's testimony and the ADA's statement were insufficient, as a matter of law, to put the plaintiff on notice because they concerned individual officers' bad acts without any direct or obvious causal connection to a municipal policy. Additionally, there was a two-year lapse between the underlying governmental actions and the affirmation, raising unresolvable questions as to the nature and applicability to Clinton of the investigation mentioned in the affirmation.

Alternatively, the court could have determined that the sufficiency of the testimony and the ADA's affirmation were matters for the jury and inappropriate for decision by motion to dismiss or summary judgment motion. In this scenario, the plaintiff and the City could present additional evidence and arguments regarding what information was available to the plaintiff during the years prior to the filing of the lawsuit. Similarly, the evidence and arguments that the news coverage created a “news alert” environment, so as to put Clinton on notice, should have been resolved by the jury and not the judiciary, as the court in Monzon concluded.

The legislative intent and public policy behind § 1983 assumes a broad and generous reading of the statute, and is best effectuated by judicial recognition of the importance of civil rights litigation in providing a vehicle for change of state-based misconduct, such as police corruption. Still valid today is the United States Supreme Court's assessment, made a quarter century ago, that, "[Section] 1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' The high purposes of this unique
remedy make it appropriate to accord the statute 'a sweep as broad as its language.'”
