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DISQUALIFYING QUALIFIED IMMUNITY

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ABSTRACT

The relationship between municipal responsibility and municipal liability in civil suits concerning local police officer misconduct is flawed. Cities have almost unlimited control over their police departments but lack almost any control over the civil litigation of their officers, aside from city attorneys representing them. In police misconduct cases, city attorneys representing police officers are required to invoke any available affirmative defenses, either common law or statutory, regardless of the moral convictions of the city attorneys, city legislators, or local citizens. To bridge the logical gap between municipal responsibility and the lack of municipal control over police misconduct litigation, this Note argues that the Ohio Revised Code should be amended to allow municipalities full control over the civil litigation of their police officers, including which affirmative defenses the city attorneys must invoke. This solution would allow municipalities the *choice* of whether to invoke defenses like qualified immunity or the statutory defenses in the Ohio Revised Code, returning the power over civil litigation to the entity that bears financial responsibility if the police officer or municipality is held liable.

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I. INTRODUCTION

Police officers in the United States have escaped accountability for their misconduct for decades.[1] This is, in large part, due to the substantial defenses afforded to them during civil litigation.[2] In Ohio, city attorneys representing local police officers in misconduct cases can invoke qualified immunity or the defenses outlined in the Ohio Revised Code.[3] In fact, city attorneys *must* invoke these defenses when they are available.[4] Because the defenses afforded to local police officers were either judicially created at the national level or codified in Ohio's statutory law, municipalities have almost no influence over the litigation of their officers. This is true even though local police departments are controlled by city budgets, settlements for police misconduct are typically paid by the city, and city councils are more directly connected, and accountable, to the people. Therefore, this Note argues that the Ohio legislature should amend the Ohio Revised Code to permit municipalities to have full

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[1] Aamra Ahmad et al., *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/.

[2] *Id.*

[3] OHIO REV. CODE ANN. § 2744.03 (West, Westlaw current through file 51 of the 134th General Assembly (2021–2022)).

[4] *Id.*; *see also* 67 OHIO JUR. 3D *Malpractice* § 14 (2021) ("The attorney-client relationship imposes a fiduciary duty on the attorney, who must conduct the client's business in good faith, solely for the benefit of the client and free of compromising influences and loyalties.").

control over any civil litigation concerning their local police departments, including which affirmative defenses city attorneys must invoke. Although there are influential arguments for why qualified immunity should be abandoned entirely, this Note is only advocating for Ohio municipalities to have the power to refuse to invoke the doctrine if they so choose.

Imagine that a young man named Teddy is walking down the street at night, listening to music through noise-cancelling headphones, when Cleveland police officers pull up to him with their guns drawn and command that he stop and put his hands up. Teddy has not done anything wrong; he was just on his way home from a friend's house. But because he was a racial minority in this neighborhood and gunfire was recently heard in his vicinity, the police concluded that he must be up to something nefarious. Teddy did not hear the officers' command because his music was too loud, but when he turned and saw the guns, he reached in his pocket to grab his phone so that he could turn off the music. The rest should be easy to infer. Teddy did not survive that encounter. Teddy's parents are devastated, and they feel they deserve redress. A few months later, a grand jury refuses to indict the officers involved, so Teddy's parents take the only other route available to them: they sue. Cleveland city attorneys are assigned to defend the police officers in this case, as they normally do in police brutality or excessive force cases. The officers expect to escape liability due to qualified immunity, an affirmative defense offering law enforcement officials immunity from civil litigation if a constitutional right was not violated, or if that right was not "clearly established" by law.[5] The city attorneys defending the officers have seen the increased public outcry against the doctrine of qualified immunity and believe wholeheartedly that it should be abolished, but they also understand that they have an ethical obligation to defend the officers to the best of their ability, so they bite the bullet and convince the judge to let the officers off the hook.

The Supreme Court established the doctrine of qualified immunity in its 1967 decision *Pierson v. Ray*.[6] The affirmative defense has changed slightly over the years and is now governed by the *Saucier v. Katz* test.[7] This test has two elements: first, whether the facts indicate that a constitutional right has been violated; and second, whether that right was clearly established at the time of the alleged conduct.[8] Unless

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[5] *Qualified Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity (last visited Oct. 7, 2020).

[6] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[7] Saucier v. Katz, 533 U.S. 194, 200 (2001).

[8] *Qualified Immunity*, *supra* note 5, at 3.

Qualified immunity is a type of legal immunity. "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." [8] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

Specifically, qualified immunity protects a government official from lawsuits alleging that the official violated a plaintiff's rights, only allowing suits where officials violated a "clearly established" statutory or constitutional right. When determining whether or not a right was "clearly established," courts consider whether a hypothetical reasonable official would have known that the defendant's conduct violated the

the officer's conduct satisfies both elements of the *Saucier* test, he is immune from civil litigation.[9]

Recently, there has been a sharp uptick in hostility towards the doctrine, as it has become "a nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights."[10] Now, sixty-nine percent of people who have heard of the doctrine believe it should be abolished for police officers.[11] Some of those people may be the city attorneys who defend these police officers, but due to the rules of professional conduct for attorneys, they have no option but to invoke the doctrine when it is available.[12] A recent Boston Review article recommended the solution that city attorneys simply refuse to invoke the defense, but to do so, a city ordinance would have to be passed mandating this refusal.[13] Because Ohio has a home rule provision in its state constitution, an ordinance of this nature in a city like Cleveland would be permissible as long as the ordinance does not directly conflict with a state statute.[14]

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plaintiff's rights. Courts conducting this analysis apply the law that was in force at the time of the alleged violation, not the law in effect when the court considers the case.

Qualified immunity is not immunity from having to pay money damages, but rather immunity from having to go through the costs of a trial at all. Accordingly, courts must resolve qualified immunity issues as early in a case as possible, preferably before discovery.

Qualified immunity only applies to suits against government officials as individuals, not suits against the government for damages caused by the officials' actions. Although qualified immunity frequently appears in cases involving police officers, it also applies to most other executive branch officials. While judges, prosecutors, legislators, and some other government officials do not receive qualified immunity, most are protected by other immunity doctrines.

[9] *Id.*

[10] Andrew Chung et al., *Special Report: For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://web.archive.org/web/20200612051417/https://www.reuters.com/article/us-usa-police-immunity-scotus-specialrep-idUSKBN22K18C.

[11] Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), https://www.cato.org/publications/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police#introduction.

[12] MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR. ASS'N 2020); *see infra* pp. 19–21.

[13] Alex Reinert, *We Can End Qualified Immunity Tomorrow*, BOS. REV. (June 23, 2020), http://bostonreview.net/law-justice/alex-reinert-we-can-end-qualified-immunity-tomorrow.

[14] Wendy H. Gridley, *Municipal Home Rule*, LSC MEMBERS ONLY BRIEF, Feb. 12, 2020, at 1, 2; OHIO CONST. art. XVIII, § 3 ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."); *see infra* p. 13.

In certain states, statutory defenses mirroring qualified immunity are codified in state statutes as defenses to tort claims. In Ohio specifically, these defenses can be found in the Ohio Revised Code section 2744.03.[15] Because these defenses are codified in state law, a municipality like Cleveland would not have the power to pass an ordinance restricting the affirmative defenses city attorneys may invoke.

To demonstrate why municipalities should have full control over the civil litigation of their police officers, a more thorough understanding of both the history and implications of the qualified immunity doctrine, as well as statutory defenses, is necessary. Part II(A) of this Note outlines the precedential history of qualified immunity, including the evolution of personal liability from the Civil Rights Act of 1871 to municipal liability and the evolution of the Supreme Court's qualified immunity test from *Pierson v. Ray* to *Saucier v. Katz*. Part II(A) also discusses the indemnification process that typically leads to municipalities paying out judgments on behalf of their police officers even if municipal liability is not found. Part II(B) analyzes the statutory defenses found in the Ohio Revised Code, as well as the Home Rule provisions in the Ohio Constitution. Part III(A) delineates why qualified immunity is a problematic doctrine – especially as it pertains to police officers – and why municipalities may choose to abandon it. For example: the doctrine lacks a proper legal foundation because the Supreme Court impermissibly narrowed the liability standard established by Congress, the "clearly established" law standard is almost impossible to meet, the doctrine has allowed almost all instances of excessive force to go unpunished, and the frequent invocation of the doctrine impedes police accountability reform. Part III(B) articulates why the refusal to invoke an available affirmative defense qualifies as incompetence under Ohio's rules of professional conduct, and how a legal malpractice suit could be the ramifications of that refusal. Therefore, for a city attorney to avoid professional responsibility consequences for refusing to invoke qualified immunity, this refusal must be mandated by a law or ordinance. Finally, Part III(C) outlines the necessity of permitting local governments to have full control over any litigation concerning their police departments and offers the solution that the Ohio state legislature must amend the Ohio Revised Code to allow this control. For the unfortunately significant number of people in Teddy's parents' position to receive the redress they rightfully deserve, this solution *must* be accomplished.

II. BACKGROUND OF COMMON LAW AND STATUTORY DEFENSES FOR POLICE OFFICERS MISCONDUCT

A. The History of Qualified Immunity and Municipal Liability

The Civil Rights Act of 1871, now codified in the United States Code, was the initial attempt to address constitutional violations by state actors. 42 U.S.C. § 1983 states:

> [e]very person who, under color of statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or

[15] OHIO REV. CODE ANN. § 2744.03 (West, current through file 51 of the 134th General Assembly (2021–2022)); *see infra* text accompanying note 43.

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.[16]

Essentially, § 1983 imposes personal liability upon state actors who deprive a citizen of a constitutional right. This statute, also known as the Ku Klux Klan Act, was passed to address violence against freed slaves, particularly by white supremacists, some of whom were police officers.[17] This is significant because white supremacy in police departments is still an extraordinarily prevalent issue, and the erosion of § 1983 protections with the judicial creation of the doctrine of qualified immunity has diminished the effectiveness of the statute.[18]

In the *Monroe v. Pape* decision in 1961, before the creation of qualified immunity, the U.S. Supreme Court applied § 1983 to police officers for the deprivation of a citizen's Fourth Amendment reasonable search and seizure rights even though the police conduct was not prohibited by a state statute. The Supreme Court also concluded that municipalities were not "persons" under § 1983 and therefore could not be held liable.[19] The latter of these holdings, that municipalities were not "persons" under § 1983, was overruled by *Monell v. Department of Social Services of New York* seventeen years later.[20]

Before *Monell*, the doctrine of qualified immunity began to take form with the Supreme Court case *Pierson v. Ray*.[21] In *Pierson*, the Court adopted the subjective common law good faith and probable cause tort defense in § 1983 cases in an effort to limit the breadth of the statute.[22] This subjective standard was later replaced by the objective standard outlined in *Harlow v. Fitzgerald* in 1982, holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would not have known."[23] This two-prong test was further elucidated in *Saucier v. Katz*, which is now current law.[24] In

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[16] 42 U.S.C. § 1983.

[17] Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NAT'L CONST. CTR.: INTERACTIVE CONST. (Apr. 20, 2021), https://constitutioncenter.org/interactive-constitution/blog/looking-back-at-the-ku-klux-klan-act; *see also* Timothy Winkle, *When Watchmen Were Klansmen*, NAT'L MUSEUM OF AM. HIST.: O SAY CAN YOU SEE? STORIES FROM THE MUSEUM (Apr. 28, 2020), https://americanhistory.si.edu/blog/watchmen.

[18] *See generally* Sam Levin, *White Supremacists and Militias Have Infiltrated Police Across US, Report Says*, THE GUARDIAN (Aug. 27, 2020), https://www.theguardian.com/us-news/2020/aug/27/white-supremacists-militias-infiltrate-us-police-report.

[19] Monroe v. Pape, 365 U.S. 167, 191 (1961).

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

[21] Pierson v. Ray, 386 U.S. 547, 554–55 (1967).

[22] *Id.*

[23] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[24] Saucier v. Katz, 533 U.S. 194, 200 (2001).

Saucier, the established two-prong test was as follows: (1) whether a constitutional right was violated, and (2) if so, whether that right was *clearly established* at the time of the alleged conduct.[25] The requirement that these elements be analyzed sequentially was overturned in 2009, but the two-prong test is still valid law.[26] This "clearly established" law standard requires that the specific factual context of the constitutional violation must be "clearly established," thereby giving the officer reasonable notice that his conduct is unlawful.[27]The "clearly established" law standard is particularly controversial and will be addressed later in this analysis.

After the doctrine of qualified immunity began to take form, *Monell* overruled *Monroe*'s conclusion that municipalities could not be held liable for officers' conduct.[28] This cleared the way for plaintiffs to recover from municipalities, but *Monell* rejected the simple test of vicarious liability.[29] Therefore, municipalities are not liable for their employees' conduct *simply* because they are employees. However, if the plaintiff can demonstrate a governmental *policy* or *custom* under which the employees were acting, the municipality can be held jointly and severally liable for the damages caused by the constitutional deprivation.[30] The test for municipal liability under *Monell* was outlined in *Thomas v. City of Chattanooga*:

> [T]he plaintiff must show: (1) the existence of a clear and persistent pattern of [illegal activity]; (2) notice or constructive notice on the part of the [defendant]; (3) the [defendant's] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and (4) that the [defendant's] custom was the "moving force" or direct causal link in the constitutional deprivation.[31]

A poignant, germane, and recent local example of this rule's application is *Black v. Hicks*, a case where the plaintiff established a custom of excessive force by the East

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[25] *Id.*; *Qualified Immunity*, *supra* note 5; *see also* Graham v. Connor, 490 U.S. 386, 388 (1989) (establishing that the standard for whether or not a constitutional right has been violated is the standard for that specific right, e.g. the "objective reasonableness" standard for excessive force under the Fourth Amendment).

[26] Pearson v. Callahan, 555 U.S. 223, 235 (2009).

[27] *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 605-06 (1999) (permitting the use of qualified immunity in a case where officers brought the media to a residence while executing an arrest warrant and holding that the conduct violated the Fourth Amendment, but because, in light of pre-existing law, it was not necessarily unreasonable for an officer to believe bringing the media during the execution of an arrest warrant was lawful, the Fourth Amendment right was not "clearly established").

[28] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978); Monroe v. Pape, 365 U.S. 167, 191 (1961).

[29] *Monell*, 436 U.S. at 692.

[30] *Id.* at 690–91.

[31] Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005).

Cleveland Police Department.[32] Specifically, the court stated that "[t]he evidence at trial demonstrated that the East Cleveland Police Department had an unwritten custom and practice of using violence and arrests to intimidate people."[33] This evidence, combined with a further demonstration of the remaining *Monell* elements, led the court to impose considerable liability on the municipality of East Cleveland.[34] *Monell* and its subsequent test is significant in the context of this analysis because although municipalities can be held liable for police misconduct, state law preempts their control over the invocation of affirmative defenses during the municipalities' litigation of these cases.

To put the amount in perspective, Cleveland taxpayers recently had to cover $13.2 million in police misconduct settlements in less than two years.[35] Qualified immunity *can* prevent a municipality from being held liable, since the doctrine requires dismissal of the case before it even begins being litigated. However, in some situations a municipality can be held liable even if the doctrine is successfully invoked.[36] This is because qualified immunity does not apply to political subdivisions (municipalities), and only protects officers from violating a constitutional right if the right was not *clearly established*.[37] Even if the right was not clearly established, it may have been violated. Thus, a municipality can be held liable for the officer's conduct if the *Monell* elements are satisfied – even if qualified immunity is successfully invoked.[38]

Additionally, even if the *Monell* test is not satisfied, municipalities typically indemnify police officers in civil rights cases. The Ohio Revised Code places

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[32] Black v. Hicks, No. 108958, 2020 WL 4544796, at *1 (Ohio Ct. App. Aug. 6, 2020).

[33] *Id.* at *7, *10.

[34] *Id.* at *11 ("The unrefuted evidence demonstrated that Black was assaulted and detained without probable cause pursuant to a longstanding policy within the East Cleveland Police Department. Therefore, there was competent, credible evidence to support Black's *Monell* claim.").

[35] Eric Heisig, *The High Cost of Police Misconduct: Cleveland Agreed to $13.2 Million in Settlements Over Two Years*, CLEVELAND.COM (May 19, 2019), https://www.cleveland.com/court-justice/2017/02/the_high_cost_of_police_miscon.html.

[36] MARTIN A. SCHWARTZ, SWORD & SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION § 1.XII.C (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 2015 ed. 2015) (citing Askins v. Doe No. 1, 727 F.3d 248, 252–54 (2d Cir. 2013) [hereinafter Schwartz Sword & Shield]; Curley v. Village of Suffern, 268 F.3d 65, 71 (2d Cir. 2001); Doe v. Sullivan County, 956 F.2d 545 (6th Cir. 1992)) ("The fact that the plaintiff's claim against the individual-officer defendant is defeated by qualified immunity should not automatically result in dismissal against the municipality, because an officer who is protected by qualified immunity may have violated the plaintiff's federally protected rights. The qualified immunity determination may mean only that the defendant did not violate the plaintiff's *clearly established* federally protected rights.").

[37] *Id.*

[38] *Id.*

limitations on indemnification,[39] but the power of police unions leads to police officers being "virtually always indemnified."[40] For example, one study determined that in the largest jurisdictions across the country, police officers financially contributed to civil rights settlements in only 0.41 percent of cases.[41] Therefore, unless the case is dismissed entirely, the city will bear financial responsibility if the *Monell* test is satisfied *or* when the city likely indemnifies any officer who is held liable. This is important in this context due to the lack of municipal influence over civil cases against cities' police officers, even though the municipality virtually always foots the bill.

B. Statutory Defenses in Ohio and the Home Rule Doctrine

The statutory defenses against civil liability for police officers in Ohio are codified in the Ohio Revised Code in section 2744.03.[42] The language of the statute precludes liability for political subdivisions and state employees in a variety of scenarios, with few exceptions.[43] Although the statutory defenses are more specific than the qualified

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[39] OHIO REV. CODE ANN. § 2744.07(B) (West, Westlaw current through file 51 of the 134th General Assembly (2021-2022)).

> (B)
>
> (1) Except as otherwise provided in division (B)(2) of this section, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function.
>
> (2) A political subdivision is not required to indemnify and hold harmless an employee under division (B)(1) of this section if any of the following apply:
>
> (a) At the time of the act or omission, the employee was not acting in good faith.
>
> (b) At the time of the act or omission, the employee was not acting within the scope of the employee's employment or official responsibilities.
>
> (c) The employee is an employee of a regional council of governments established under Chapter 167. of the Revised Code and both of the following apply:
>
> (i) The employee is not also an employee of a political subdivision that is a member of the council.
>
> (ii) The act or omission constitutes a violation of Chapter 102. or Chapter 2921. of the Revised Code.

[40] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).

[41] *Id.*

[42] OHIO REV. CODE ANN. § 2744.03 (West, Westlaw current through file 51 of the 134th General Assembly (2021-2022)).

[43] *Id.*

immunity "reasonable officer" standard, both immunity defenses hinge on the reasonableness of the officer's conduct.[44] Because plaintiffs typically bring both § 1983 and state law claims, and qualified immunity and the statutory defenses relatively mirror each other, it would be unusual for a court to determine that one of these

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2744.03 DEFENSES – IMMUNITIES.

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

. . .

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

. . .

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

[44] *See* Morrison v. Horseshoe Casino, 157 N.E.3d 406, 432 (Ohio Ct. App. 2020) ("One acts recklessly if one is aware that one's conduct 'creates an *unreasonable* risk of physical harm to another.'") (emphasis added).

immunities was proven and the other was not.[45] State courts also occasionally decide cases that include both § 1983 and state law claims.[46] Therefore, in analyzing the power of municipalities to refuse to invoke these immunities, they can be treated as identical. In fact, the only significant distinction between qualified immunity and the statutory protections is that § 2744.03 of the Ohio Revised Code also offers immunity to the municipality *itself* in certain situations.[47] This is significant in the context of a home rule analysis.

Municipalities are subject to one of two rules regarding their legislative power: Dillon's Rule or Home Rule. The former is exceedingly restrictive, only permitting municipalities to take action that is *specifically* sanctioned by the state government.[48] Essentially, if a city does anything that has not been enumerated by a state statute, that action could be ruled invalid by a state court. In contrast, Home Rule allows local self-governance and the power to adopt and enforce local police powers that are not in conflict with general state laws.[49] Ohio's state constitution, in Article XVIII, adopts the Home Rule doctrine for the state.[50] This means that municipalities may pass ordinances that concern their local police powers, as long as they do not conflict with a statute in the Ohio Revised Code. In this context, because qualified immunity is a national defense and the aforementioned statute in the Ohio Revised Code offers statutory immunity to political subdivisions and their employees, municipalities would *not* have the power to pass a local ordinance mandating that city officials refuse to invoke the immunity defenses.

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[45] *See, e.g.*, Mayer v. County, No. 1:19-cv-2620, 2021 WL 185042, at *5 (N.D. Ohio, Jan. 19, 2021) (denying a motion to dismiss both a § 1983 claim and state assault and battery claims on the grounds of qualified immunity and statutory immunity, respectively); Osberry v. Slusher, 750 F. App'x. 385, 399 (6th Cir. 2018).

[46] *See, e.g.*, *Morrison*, 157 N.E.3d at 419, 424.

[47] OHIO REV. CODE ANN. § 2744.03 (West, Westlaw current through file 51 of the 134th General Assembly (2021-2022)) (language quoted in footnote 43); *see also* Cater v. City of Cleveland, 697 N.E.2d 610, 617 (Ohio 1998); M.H. v. Cuyahoga Falls, 979 N.E.2d 1261, 1263 (Ohio 2012).

[48] *Cities 101: Delegation of Power*, NAT'L LEAGUE OF CITIES (Dec. 13, 2016), https://www.nlc.org/resource/cities-101-delegation-of-power#:~:text=Dillon's%20Rule%20is%20derived%20from,sanctioned%20by%20the%20state%20government ("Dillon's Rule is derived from the two court decisions issued by Judge John F. Dillon of Iowa in 1868. It affirms the previously held, narrow interpretation of a local government's authority, in which a substate government may engage in an activity only if it is specifically sanctioned by the state government.").

[49] *See* Gridley, *supra* note 14, at 2.

[50] *Id.*; OHIO CONST. art. XVIII, § 3.

III. ANALYSIS OF QUALIFIED IMMUNITY, RULES OF PROFESSIONAL CONDUCT, AND SOLUTION

Qualified immunity has been frequently discussed and excoriated in the legal community in the last few years by both scholars[51] and organizations.[52] There are a multitude of justifications for the doctrine's abolishment, but four common rationales are: (1) the doctrine lacks a proper legal foundation because the Supreme Court impermissibly narrowed the liability standard established by Congress, (2) the "clearly established" law standard is almost impossible to meet and is therefore overly burdensome to plaintiffs, (3) qualified immunity is an almost impenetrable barrier preventing officers from being held accountable for excessive force and police brutality, and (4) the ubiquity of its invocation hinders police accountability reform efforts.[53]

One solution offered by a recent Boston Review article is that city attorneys representing police officers in these excessive force and police brutality cases should simply refuse to invoke the doctrine.[54] However, attorneys' ethical obligation of competence would likely subject the city attorney to legal misconduct litigation for

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[51] *See, e.g.*, Avidan Y. Cover, *Reconstructing The Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1778 (2016); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798–1800 (2018) [hereinafter Schwartz Notre Dame]; Lindsey de Stefan, *"No Man is Above the Law and No Man is Below it": How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*, 47 SETON HALL L. REV. 543, 543–44 (2017); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46–49 (2018).

[52] April Rodriguez, *Lower Courts Agree – It's Time to End Qualified Immunity*, ACLU (Sept. 10, 2020), https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/ ("The Supreme Court should abolish qualified immunity and return Section 1983 to its original meaning.").

[53] Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure.

[54] Reinert, *supra* note 13, at 5 ("The courts and Congress would be irrelevant if state attorneys general and city law departments took one simple step: stop deploying the powerful weapons the Supreme Court has provided to civil rights defendants over the past five decades, qualified immunity among them . . . If progressive officials, at any level of government, are truly committed to accountability and to the Black Lives Matter movement, they can lay down these weapons and let citizens whose constitutional rights have been violated be heard in court."); *see also* Rodriguez, *supra* note 52, at 13 ("Communities must also demand that other actors—Congress, police chiefs, mayors, and prosecutors—abolish the doctrine and begin funneling resources away from law enforcement and into community services like housing, education, accessible health care, and violence prevention programs. If we truly want systemic changes to policing, these are the institutions that will help communities grow and thrive.").

failing to adequately (competently) represent her client.[55] Thus, it would be unwise for city attorneys to refuse to invoke the doctrine of their own volition.

For city attorneys to have the power to refuse to invoke the doctrine of qualified immunity without implicating their ethical obligations, this refusal must be mandated by the city. In Ohio, municipalities have powers guaranteed to them by the Home Rule provision in Article XVIII of the Ohio Constitution, giving cities the authority to regulate their police powers as long as there are no conflicts with Ohio's general laws.[56] In Ohio, as in most states, the police departments with the most citizen interaction are local police departments.[57] These local police departments are funded, operated, and overseen by local governments, and police misconduct settlements are almost always paid by city taxpayers.[58] Thus, Ohio should amend the Ohio Revised Code to allow municipalities full control over any police misconduct litigation in accordance with the Home Rule powers accorded them by the Ohio Constitution. This would permit cities to pass an ordinance abolishing qualified immunity as a defense for their police officers, if the city wanted to make that decision.

A. Why Qualified Immunity is a Problematic Doctrine

The first reason cities may choose to abolish qualified immunity as a defense for police misconduct is that the doctrine is arguably legally unfounded.[59] A leading scholar who advocates this argument is Professor William Baude from the University of Chicago Law School, who stated that "[t]he modern doctrine of qualified immunity is inconsistent with conventional principles of law applicable to federal statutes."[60] Specifically, the three flawed justifications for qualified immunity offered by the Supreme Court are: (1) the doctrine of qualified immunity derives from the common law good faith defense, (2) the doctrine compensates for an earlier mistake that broadened the statute, and (3) that the doctrine provides fair warning to government officials.[61] Baude provides an extensive analysis of why each justification is invalid, but eventually dismisses the legitimacy of all three justifications, arguing that "none of these rationales can sustain the modern doctrine of qualified immunity."[62] Baude is also not the only scholar who has advocated this argument.[63]

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[55] MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2020); *see infra* pp. 21–23.

[56] Gridley, *supra* note 14, at 2.

[57] *See Types of Law Enforcement Agencies*, DISCOVER POLICING (2018), https://www.discoverpolicing.org/explore-the-field/types-of-law-enforcement-agencies/.

[58] *Id.*

[59] *See Qualified Immunity*, AM. BAR ASS'N (2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/.

[60] Baude, *supra* note 51, at 47.

[61] *Id.* at 45, 51.

[62] *Id.* at 51.

[63] Schwartz Notre Dame, *supra* note *51*, at 1801–02.

Baude addresses the first flawed justification, that qualified immunity derives from the common law good faith defense, by arguing that the Supreme Court's reliance on the good faith defense is inconsistent with history.[64] These inconsistencies are: (1) there was no well-established good faith defense in constitutional violation suits around the time § 1983 was enacted, (2) to the extent that there *was* a good faith defense, it was a part of a common law tort, not a general immunity, and (3) qualified immunity today is "much broader" than a good faith defense.[65] The second flawed justification, the "two wrongs make a right" theory, was crafted by Justice Scalia and suffers from two legal deficiencies.[66] Justice Scalia's first mistake was his premise that *Monroe v. Pape* was wrongly decided, when it likely was decided correctly.[67] The second and more significant issue with Justice Scalia's "two wrongs make a right" philosophy is that even if *Monroe v. Pape* was wrongly decided, "the resulting immunity ought to be nearly the opposite of the immunity regime we now have."[68] Finally, the fair warning justification resembles the criminal rule of lenity.[69] There are issues with the contention that a constitutional provision resembles criminal cases in and of itself, but "even if we grant that [§] 1983 falls within the domain of lenity and fair notice, . . . [the] [q]ualified immunity doctrine has come to bear little practical resemblance to the rules applicable to criminal defendants."[70]

In fact, the Supreme Court itself has been inconsistent in recognizing the common law foundations of qualified immunity.[71] Specifically, the Supreme Court has acknowledged that "it had 'completely reformulated qualified immunity along principles not at all embodied in the common law.'" Justice Thomas argued that "qualified immunity should conform to the 'common-law backdrop against which Congress enacted the 1871 Act,'" in contrast to "'the freewheeling policy choice[s]' that [the Court has] previously disclaimed the power to make."[72] Because the legitimacy of the doctrine has been deemed feeble by both members of the Supreme Court and legal scholars, it would not be unreasonable for a municipality to decide to abandon invoking it entirely.

The second reason cities may choose to abolish qualified immunity is that the "clearly established" law standard articulated in *Saucier v. Katz* is almost impossible to demonstrate as a plaintiff and is therefore overly burdensome.[73] For the "clearly established" law element of the *Saucier* test to be satisfied, the Supreme Court has demanded that plaintiffs offer precedent with factual specificity and similarity to the

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[64] Baude, *supra* note 51, at 55.

[65] *Id.*

[66] *Id.* at 66.

[67] *Id.* at 63.

[68] *Id.* at 66.

[69] *Id.* at 51.

[70] *Id.* at 74.

[71] Schwartz Notre Dame, *supra* note 51, at 1802.

[72] *Id.* at 1802–03.

[73] Saucier v. Katz, 533 U.S. 194 (2001).

alleged misconduct by the officer.[74] This is already an exceedingly difficult task, but *Pearson* – holding that lower courts are permitted to allow the invocation of qualified immunity without *first* establishing a constitutional violation – has further perpetuated this issue.[75] Karen Blum, in her Notre Dame Law Review article, articulated this problem by stating "[t]he exercise of *Pearson* discretion in favor of *not* deciding [whether the conduct was a constitutional violation] often leaves important, recurring, and non-fact-bound constitutional questions needlessly floundering in the lower courts."[76] Essentially, both unique and recurring constitutional violations that *should* be "clearly established" still frequently fail to satisfy this element of the qualified immunity doctrine, placing an unduly burdensome requirement on plaintiffs to find factually identical precedent to overcome qualified immunity's semi-impenetrability. There are a multitude of examples of these types of situations.[77]

The third reason cities may choose to abolish qualified immunity is that the doctrine has become an almost impenetrable barrier preventing officers from being held accountable for excessive force and police brutality.[78] A recent Reuters Special Report articulated that since around 2005, courts have turned qualified immunity into "a nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights."[79] One illustration of this acceleration of impenetrability is that in this timeframe, the Supreme Court has accepted twelve appeals from police officers concerning qualified immunity, but only three from plaintiffs.[80] Professor Baude, who was interviewed for this piece about the outcome of these fifteen Supreme Court cases, stated "[y]ou get the impression that the officers are always supposed to win and the

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[74] Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1897 (2018).

[75] Pearson v. Callahan, 555 U.S. 223 (2009).

[76] Blum, *supra* note 74, at 1897.

[77] *See, e.g.*, Thompson v. Williams, 320 F. App'x 78 (9th Cir. 2009) (holding that the question of a First Amendment violation was an issue of fact, so the officials' conduct was not "clearly established," entitling them to qualified immunity when an Islamic prisoner was denied access to an Halal or Kosher diet); Chambers v. Pennycook, 641 F.3d 898 (8th Cir. 2011) (explaining that Plaintiff's constitutional rights were violated when police officers kicked him while he was restrained, choked and kicked him on the way to the hospital, and intentionally drove erratically so that the plaintiff was jerked back and forth in his seat, but officers were entitled to qualified immunity because it was not "clearly established" in the Eighth Circuit that plaintiff could recover under his Fourth Amendment claim); Schwartz Notre Dame, *supra* note 51, at 1840–901 (Appendix of cases in which the "clearly established" law standard was not met, and defendants were thus entitled to qualified immunity).

[78] Andrew Chung et al., *Special Report: For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://web.archive.org/web/20200612051417/https:/www.reuters.com/article/us-usa-police-immunity-scotus-specialrep-idUSKBN22K18C.

[79] *Id.*

[80] *Id.*

plaintiffs are supposed to lose."[81] This impenetrability is primarily caused by the impossible-to-prove "clearly established" law standard elucidated above, but the Court has found other reasons to dismiss plaintiffs' claims as well.[82] The impenetrability of the qualified immunity defense, especially in situations involving excessive force or police brutality by police officers, denies relief to plaintiffs who deserve redress.

The final reason cities may believe qualified immunity should be abolished for police officers is that it significantly impedes police accountability reform efforts, specifically regarding rebuilding trust between police officers and their communities.[83] Because qualified immunity is an almost impossible standard to overcome, it is not unreasonable for the public to believe that cops can get away with anything. Overcoming this public opinion is essential to ameliorating the relationship between police officers and their communities and making sure that victims who do not receive national attention get the rectification they deserve. Concerning the latter point, qualified immunity is not as much of an issue in cases that receive national attention.[84] This is because municipalities are put under a lot of pressure to settle, and therefore qualified immunity "rarely comes into play."[85] However, for the vast majority of cases that do not receive national attention, this pressure is lessened and qualified immunity prevents redress.[86] Public demand for reforms – such as the ubiquitous usage of body cameras – has intensified and become almost universal, which will lead to more and more cases where video footage is available for plaintiffs. But national movements can only provide attention and support for a limited number of victims at a time, so it is unlikely that these reforms will significantly reduce the frequency of qualified immunity's invocation.[87] In fact, it is possible that the consequence of more evidence of police misconduct, and more examples of officers escaping liability, will exacerbate distrust of police officers rather than improve relations.

Trust between police officers and their communities is essential to reform efforts.[88] Almost all Americans agree, with 97% of respondents in a recent poll believing that "[r]equiring officers to have good relations with the community" is integral to police

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[81] *Id.* (quoting Professor William Baude).

[82] *Id.* (e.g. disagreement on whether conduct constituted "excessive force.").

[83] Nathan Sobel, *What is Qualified Immunity, and What Does it Have to Do With Police Reform?*, LAWFARE (June 6, 2020), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform.

[84] Chung et al., *supra* note 78.

[85] *Id.*

[86] *Id.*

[87] Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes'*, GALLUP (July 22, 2020), https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx.

[88] *Id.*

reform.[89] Qualified immunity, and by extension the idea that "cops can get away with anything," significantly impedes that effort. [90] One scholar articulated that:

> allowing more civil suits to go forward will serve as an important reminder to both civilians and law enforcement that the police are not above the law, and that they are held accountable for their wrongdoings. In turn, this accountability will begin to heal the relationship between law enforcement and communities.[91]

Essentially, abolishing qualified immunity for police officers will help alleviate the unproductive public mentality that cops can "get away with anything," and will therefore remove the impediment from ameliorating trust between police officers and communities. This is essential for other valuable reforms to gain traction.[92]

B. Rules of Professional Conduct, "Competence," and Legal Malpractice

To highlight the limitations on a city attorney's ability to choose not to invoke qualified immunity for officers in police misconduct cases, this section briefly outlines attorneys' rules of professional conduct and emphasizes the competence requirement. The ABA Model Rules of Professional Conduct describe the requirements of attorney advocacy as "a lawyer zealously assert[ing] the client's position under the rules of the adversary system."[93] In the context of this analysis, section 1.1 outlining "competence" is especially relevant.[94] This section states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[95] This "competence" requirement is reflected in the Ohio Rules of Professional Conduct as well, with identical language.[96] The section 1.1 definition of competence has not been frequently litigated, but it has been generally accepted to mean that attorneys must provide their clients with representation that meets a "reasonable attorney" standard.[97] This standard requires that attorneys must have adequate knowledge of the law, comply with procedural requirements, and prepare documents and handle litigation as well as a hypothetical "reasonable attorney."[98] This competence

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[89] *Id.*

[90] Stefan, *supra* note 51, at 567.

[91] *Id.*

[92] *Id.*

[93] MODEL RULES OF PRO. CONDUCT PREAMBLE (AM. BAR ASS'N 2020).

[94] MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2020).

[95] *Id.*

[96] OHIO PROF. COND. R. 1.1.

[97] J.R. Phelps, *What Does* '*Competent Representation' Really Mean?*, THE FLA. BAR (Mar. 1, 2002), https://www.floridabar.org/the-florida-bar-news/what-does-competent-representation-really-mean/.

[98] Ronald E. Mallen, *The Parameters of Competence*, 2 LEGAL MALPRACTICE § 20:3 (2021 ed.) ("Although there are variations in characterizations of the elements of the standard of care, a precise, uniform definition is possible and need not be based on a

requirement does not leave room for attorneys' convictions about what laws or precedents are virtuous; lawyers must utilize every tool available to competently represent their client.

Failure to adhere to the rule of competence could lead to a legal malpractice suit against the attorney. Legal malpractice operates like the tort cause of action of negligence, requiring a duty of care, a breach of that duty, and a resulting injury to the client.[99] For example, if an attorney refused to invoke an available affirmative defense, the attorney would likely have breached her duty of competent representation, resulting in unnecessary liability to her client.

Whether the city or an officer is the attorney's client is a necessary distinction for this analysis. If the city is the attorney's client, the attorney still would not have the power to refuse to invoke an available affirmative defense of her own volition, but the city *itself* could make that decision. In this context, this decision by the city would operate similarly to an ordinance mandating the refusal of the invocation of an affirmative defense. However, it is extraordinarily unlikely that an *officer* would decide not to invoke qualified immunity, so if the city attorney's client is the officer himself, the attorney's hands are tied. Therefore, if a city attorney did refuse to invoke qualified immunity or any other affirmative defense in a police misconduct case where the officer is the defendant, the attorney could be subject to a legal malpractice claim. This is true even though cities almost always indemnify officers, so it is unlikely the officer would be held personally liable anyway.[100] Although personal liability (for the attorney) is rare in cases involving solely incompetence, the attorney could still be subject to serious sanctions.[101]

The issue of failing to invoke an available affirmative defense does not have any legal precedent in Ohio, but it is very likely that it would be deemed incompetence by a court, *especially* if the attorney was aware of the defense but refused to invoke it for personal reasons. Because sanctions for incompetence can range from public reprimand, to a multiple-year suspension from practice, to permanent disbarment, it is unlikely that city attorneys would refuse to invoke an affirmative defense like qualified immunity, however unpopular, without an express mandate from their municipality.[102] If a municipality did pass an ordinance mandating the local abolishment of qualified

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mathematical averaging of judicial preferences or on the act or omission involved. The starting point is the 'reasonable person,' that Platonic ideal, which defines the proper conduct for all those wanting to avoid liability. The attorney is merely a reasonable person, who has gone to law school, received a degree, been admitted to practice and who has, perhaps, gained further wisdom from experience. Thus, the 'reasonable person' is transformed into the 'reasonable attorney.'").

[99] The Honorable Blanche M. Manning, *Legal Malpractice: Is it Tort or Contract?*, 21 LOY. U. CHI. L.J. 741, 741–42 (1990).

[100] Schwartz Notre Dame, *supra* note 51, at 890.

[101] *See, e.g.*, Disciplinary Couns. v. Cheselka, 146 N.E.3d 534 (Ohio 2019) (imposing a two-year suspension from practice of law); Columbus Bar Ass'n v. Christensen, 151 N.E.3d 552 (Ohio 2020) (imposing a one-year suspension from practice of law); Disciplinary Couns. v. Peters, 142 N.E.3d 672 (Ohio 2019) (imposing a one-year suspension from practice of law).

[102] *Cheselka*, 146 N.E.3d 534; *Christensen*, 151 N.E.3d 552; *Peters*, 142 N.E.3d 672.

immunity, city attorneys would then avoid professional responsibility consequences because attorneys are also required to follow the law.[103]

C. Amend the Ohio Revised Code

For city attorneys to have authority to refuse to invoke the doctrine of qualified immunity without implicating their ethical obligations, this refusal must be mandated by the city. The Ohio legislature should amend the Ohio Revised Code to permit municipalities to pass such an ordinance for four reasons: (1) Ohio has a Home Rule provision in its constitution, (2) police departments are created and overseen independently by city governments, (3) city attorneys customarily defend police officers in excessive force and police brutality cases, and (4) the decision whether to stop invoking qualified immunity would be left in the hands of local citizens.

Ohio's Home Rule provision in Article XVIII of its constitution permits municipalities to have full control over their police powers as long as local ordinances do not conflict with Ohio general laws.[104] Police powers are defined as "the inherent power of a government to exercise reasonable control over persons and property within its jurisdiction in the interest of the general security, health, safety, morals, and welfare except where legally prohibited," and have been interpreted by the Ohio Supreme Court to mean ordinances that prohibit "the doing of something without a municipal license to do it."[105] The Home Rule provision permits municipalities to create and have full control over their police departments, but does not allow cities to regulate their departments in any way that conflicts with state law.[106] Normally this would make sense, as state laws generally provide broad requirements and protections to limit municipal overreach.[107] The inclusion of police officers in the protections provided by Ohio Revised Code section 2744.03, however, is an overreach of *state* power.[108] Police officers' conduct is primarily controlled by municipalities, not states, and should therefore be fully regulated and subjected to city ordinances without interference by the state legislature.[109]

Because the aforementioned sections of the Ohio Revised Code are inconsistent with the Ohio Constitution's Home Rule provision, a municipality could simply

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[103] MODEL RULES OF PRO. CONDUCT PREAMBLE (AM. BAR ASS'N 2020).

[104] Gridley, *supra* note 14, at 2.

[105] *Police Power*, MERRIAM-WEBSTER, (https://www.merriam-webster.com/dictionary/police%20power (last visited Oct. 28, 2020); State *ex rel.* Morrison v. Beck Energy Corp., 37 N.E.3d 128, 134 (Ohio 2015).

[106] Gridley, *supra* note 14, at 2.

[107] Sydney Goldstein, *State, Local and Municipal Laws*, LAWINFO (Oct. 14, 2020), https://www.lawinfo.com/resources/state-local-municipal-law/.

[108] OHIO REV. CODE ANN. §§ 2744.01, 2744.03 (West, Westlaw current through file 51 of the 134th General Assembly (2021-2022)) (including in the definition of "employee" anyone who is employed by a political subdivision of the state. In this context, police officers are employed by municipalities, which are subdivisions of the state).

[109] *Id.* § 737.05 (providing that a city official should have the *exclusive* authority to manage the police department and its policies).

pass the ordinance and then try to defend it in court. However, this would likely be unsuccessful. In accordance with Ohio Supreme Court jurisprudence, a municipality has exceeded its Home Rule powers when: (1) the ordinance is in conflict with the statute; (2) the ordinance is an exercise of the police power, rather than of local self-government; and (3) the statute is a general law.[110]

Concerning the first element, an ordinance mandating that city attorneys refuse to invoke an affirmative defense that is guaranteed by the Ohio Revised Code would be in direct conflict with the relevant statute. Regarding the second element, the ordinance would concern the prohibition of something, rather than regulating "the form and structure of local government," making the ordinance an exercise of police power rather than of local self-government.[111] Finally, concerning the third element, for a statute to be a general law, it must:

> (1) be part of a statewide and comprehensive legislative enactment; (2) apply to all parts of the state alike and operate uniformly throughout the state; (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to prescribe those regulations; and (4) prescribe a rule of conduct upon citizens generally.[112]

A municipality could try to make the argument that the relevant statute only applies to state employees, and therefore does not concern citizens generally, but the statute applies to *all* government employees across the state, so this argument is not likely to be successful. Therefore, the Ohio Revised Code should be amended to allow municipalities to pass an ordinance that conflicts with section 2744.03, rather than forcing municipalities to make a feeble argument in court.

Police departments in Ohio are created, overseen, and regulated primarily by their municipalities.[113] The Ohio Revised Code provides for this power and has almost no provisions interfering with local police departments, other than the civil immunities offered to police officers and municipalities in section 2744.03.[114] Thus,

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[110] Mendenhall v. Akron, 881 N.E.2d 255, 260 (Ohio 2008).

[111] State *ex rel.* Morrison v. Beck Energy Corp., 37 N.E.3d 128, 134 (Ohio 2015).

[112] *Id.*

[113] § 737.05.

[114] *Id.* §§ 737.05, 2744.03.

737.05 COMPOSITION AND CONTROL OF POLICE DEPARTMENT.

The police department of each city shall be composed of a chief of police and such other officers, patrolmen, and employees as the legislative authority thereof provides by ordinance.

The director of public safety of such city shall have the exclusive management and control of all other officers, surgeons, secretaries, clerks, and employees in the police department as provided by ordinances or resolution of such legislative authority. He may commission private policemen, who may not be in the classified list of the department, under such rules and regulations as the legislative authority prescribes.

municipalities have nearly unlimited authority to pass ordinances delineating the policies and practices that police officers must abide by in their conduct as municipal employees. In fact, the only aspect of police management that municipalities *do not* have full control over is civil litigation. This is true even though the *Monell* test frequently imposes liability on cities for police misconduct, which requires taxpayers to cover settlements made by cities on behalf of their officers.[115] This can be true *even when* the officer is granted qualified immunity.[116] And even if *Monell* does not apply, cities almost always indemnify officers if they are found personally liable.[117] There is therefore a significant gap between municipal power and municipal responsibility in the context of civil litigation involving police officers. Thus, the Ohio Revised Code should be amended to bridge that gap.

Additionally, city attorneys customarily defend police officers in cases alleging officer misconduct. This is yet another reason municipalities should have the power to control the civil litigation of their police officers, as city employees control the defenses that are invoked during the litigation. As previously mentioned, ethical obligations of attorneys prevent them from refusing to invoke an available affirmative defense of their own volition, so it would only be possible to preclude qualified immunity as a defense if the city mandated its refusal. The Ohio Revised Code should be amended to permit this mandate.

Voters also care about this issue. A significant majority of Americans believe that qualified immunity should be abolished for police officers, and that conviction is likely more firmly held by municipal citizens.[118] One example of how strongly Ohio citizens hold this conviction is the thousands of protestors that hit the streets in Cleveland during the George Floyd protests in June 2020, which eventually progressed into a riot.[119] Although the protests were not expressly about qualified immunity, the continuous lack of police accountability was unquestionably a factor that contributed to the public's rage boiling over.[120] City council members are more directly accountable to their constituents than state legislators, thereby giving people more control over the litigation of the police force that serves and protects them if their local government has the power to choose whether or not to invoke

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[115] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

[116] Cover, *supra* note 51, at 1835; *see also* Schwartz Sword & Shield, *supra* note 36, at § 1.XII.C.

[117] Schwartz Sword & Shield, *supra* note 36, at § 2.II.A.

[118] Ekins, *supra* note 11, at 1.

[119] Dave "Dino" DeNatale, *How the George Floyd Demonstration Turned into Rioting in Downtown Cleveland: A Look at the Hour-By-Hour Events*, WKYC (Dec. 3, 2020), https://www.wkyc.com/article/news/local/cleveland/george-floyd-riots-cleveland-hour-summary/95-e21b527d-4e77-4e02-8844-32ed1553c4c4#:~:text=From%20a%20protest%20to%20rioting,assembled%20at%20the%20Justice%20Center.

[120] *See* Cory Shaffer, *Cleveland's George Floyd Protests Went from an Afternoon of Peace to Volatile in Minutes: See the Timeline*, CLEVELAND.COM (June 2, 2020), https://www.cleveland.com/court-justice/2020/06/clevelands-george-floyd-protests-went-from-an-afternoon-of-peace-to-volatile-in-minutes-see-the-timeline.html.

the affirmative defenses currently available to police officers. Amending the Ohio Revised Code to allow this choice would give voters an avenue to voice their frustrations and effect actual change in their communities.

Overall, the fundamental issue that this solution would resolve is the significant gap between municipal responsibility of overseeing their police departments and municipal financial liability that results. Local police chiefs are typically either elected or appointed by *local* citizens or politicians, such as Cleveland's police chief.[121] As aforementioned, police policies and customs are created by local governments, and police officers are hired at the local level.[122] Municipalities almost always foot the bill for police misconduct cases, either through *Monell* liability or indemnification.[123] There is almost no state involvement in the affairs of local police departments, and the state does not bear any liability when police officers engage in prohibited conduct.[124] Therefore, it is apparent that local governments should also control the entirety of civil misconduct cases; they would be controlling their own liability, not creating or affecting any liability on the state. In fact, some states have recently chosen to reallocate *more* financial responsibility from the state to local entities.[125]

Finally, it must be especially emphasized that this recommendation simply *offers* municipalities the power to pass such an ordinance, but the choice to do so is *entirely optional*. This recommendation can be contrasted with the recent statute passed in Colorado abolishing qualified immunity for the entire state by creating a § 1983 claim under state law without the defense.[126] It is less likely that a law like

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[121] *See Chief of Police*, CITY OF CLEVELAND, http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/Cabinet/CWilliams (last visited Feb. 16, 2021); CLEVELAND, OHIO, CODE OF ORDINANCES ch. 25, § 116 (2021), https://codelibrary.amlegal.com/codes/cleveland/latest/cleveland_oh/0-0-0-702.

[122] OHIO REV. CODE ANN. § 737.05 (West, Westlaw current through file 51 of the 134th General Assembly (2021-2022)).

[123] Schwartz Sword & Shield, *supra* note 36, at § 2.II.A.

[124] § 737.05; Schwartz Sword & Shield, *supra* note 36, at § 2.II.A.

[125] *See, e.g.*, W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060 (2014) (recommending that California introduce fiscal policies that internalize the cost of local criminal justice decisions, reallocating the financial responsibility from the state to local entities. Although these articles address prisons and counties, rather than police officers and cities, there is a distinct parallel of aligning costs (liability) and responsibilities for local governmental entities.); W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—And Why it Should*, 28 GA. ST. U. L. REV. 987, 990 (2012).

[126] S.B. 217, 72nd Gen. Assemb., Reg. Sess. (Co. 2020); Jay Schweikert, *Colorado Passes Historic Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020), https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity ("Colorado is not the first state to enact a 'state analogue' to Section 1983, but it *is* the first state to specifically negate the availability of qualified immunity as a defense through legislation. As it turns

this would pass in Ohio due to the political nature of the doctrine's abolishment and the diversity of political opinion in Ohio.[127] Although a statewide approach could also solve this issue, the solution advocated by this Note leaves the decision to city councils, and by extension to municipal citizens. The Ohio legislature should simply defer to its municipalities.

IV. CONCLUSION

Qualified immunity as a defense for police officers has become less and less popular over the last few years, and there have been some successful attempts to limit its breadth.[128] Because it is a judicially created doctrine at the federal level, however, states and municipalities have no power to fully abolish it.[129] Police departments are created, overseen, and regulated primarily by municipal governments, and the only power municipalities lack in regard to their police departments is control over the civil litigation of police misconduct.[130] This is true even though city attorneys customarily defend police officers in these lawsuits, and municipalities frequently foot the bill of liability. This inconsistency can and should be addressed by the state legislature, as the increasing lack of popularity is felt by its constituents.

In Ohio, section 2744.03 of the Ohio Revised Code offers statutory immunities that mirror the qualified immunity doctrine to police officers and municipalities.[131] The Home Rule provision allows municipalities full control over the police powers of their jurisdiction as long as any local ordinances do not conflict with general state laws.[132] Because there are state laws that provide qualified immunity, municipalities *do not* have the power to pass an ordinance abolishing the doctrine's invocation in defense of its police officers without the ordinance likely being invalidated in court. This must change. In order for municipalities to properly exercise the Home Rule powers provided to them by the Ohio Constitution, the Ohio Revised Code must be amended to give municipalities full control over the civil litigation of their police officers. This change would accord more power to

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out, that clarification is crucial, because in nearly all of the other states that have passed similar laws, state courts have incorporated a similar or identical version of federal qualified immunity, even when the relevant statute says nothing about it.").

[127] Ekins, *supra* note 11, at 4; *Party Affiliation Among Adults in Ohio*, PEW RSCH. CTR., https://www.pewforum.org/religious-landscape-study/state/ohio/party-affiliation/ (last visited Aug. 24, 2021).

[128] Ekins, *supra* note 11, at 1; Emma Tucker, *States Tackling 'Qualified Immunity' for Police as Congress Squabbles over the Issue*, CNN POL. (Apr. 23, 2021), https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html#:~:text=Connecticut%20and%20Massachusetts%20have%20passed,that%20their%20actions%20were%20justified.

[129] Pierson v. Ray, 386 U.S. 547, 557 (1967).

[130] OHIO REV. CODE ANN. §§ 737.05, 2744.03 (West, Westlaw current through file 51 of the 134th General Assembly (2021-2022)).

[131] *Id.* § 2744.03.

[132] Gridley, *supra* note 14, at 2.

people, as city council members are more directly accountable to municipal citizens and would offer municipalities the *choice* of whether or not to abolish qualified immunity for their police officers. This solution will address the inconsistency between local oversight of police departments and the unnecessary intrusion by the state. Once this is accomplished, parents similarly situated to Teddy's would finally have an avenue to fight for the redress they rightfully deserve.