Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability under Section 1983

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MONELL v. DEPARTMENT OF
SOCIAL SERVICES: ONE STEP FORWARD
AND A HALF STEP BACK FOR
MUNICIPAL LIABILITY UNDER SECTION 1983

Municipal liability for unconstitutional acts by municipal employees has been a subject of controversy since the Supreme Court first addressed the issue in Monroe v. Pape.¹ That decision and a heightened awareness of individual liberties has produced a dramatic increase in the number of suits against local governments and their employees that seek² to redress violations of constitutional rights. This litigation sharpened the debate over municipal liability under section 1 of the Civil Rights Act of 1871, currently section 1983 of Title 42,³ which provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.⁴


² “From 1961 to 1977, the number of cases brought in the federal courts under civil rights statutes increased from 296 to 13,113.” Butz v. Economou, 438 U.S. 478, 526 (1978) (Rehnquist, J., concurring in part and dissenting in part) (citing DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, ANN. REP. 189, Table 11 (1977); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, ANN. REP. 173, Table 17 (1976)). It has been estimated that in fiscal 1976 almost one-third of all the private federal cases filed were civil-rights suits against state and local officials. P. BATOR, P. MISHEKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149 (2d ed. Supp. 1977).


⁴ 42 U.S.C. § 1983 (1976) (emphasis added). The statute imposes liability only on a “person” who deprives another of his or her constitutional rights. Courts have thus been called upon to determine the “person” status of a wide variety of public entities. See, e.g., Muzquiz v. City of San Antonio, 528 F.2d 499, 500 (5th Cir. 1976) (board of trustees of municipal pension fund not person), vacated and remanded, 438 U.S. 901 (1978) (remanded for further consideration in light of Monell v. Department
The controversy has focused on whether a municipality is a "person" within the meaning of the statute. While in other contexts the term "person" has been construed to include municipalities and other governmental or corporate entities, the legislative history of section 1983 was interpreted prior to the Supreme Court's decision in Monell v. Department of Social Services as precluding any construction of this term that included municipal corporations.

The Court in Monell paved the way for municipal liability under section 1983 by holding that municipalities are indeed persons. The scope of this liability was limited, however, by statements in dicta that Congress did not intend municipalities to be liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." The Court indicated that it will therefore not recognize municipal liability under section 1983 if recovery is premised on a theory of respondeat superior.

This Note traces the background of municipal liability under section 1983 through the Supreme Court's decision in Monell. It concludes that the holding in Monell excluding respondeat superior
as a source of liability under the statute is not justified by either the legislative history relied on by the Court or general principles of statutory construction. In addition, this Note argues that the policies underlying respondeat superior further support the application of this doctrine in section 1983 actions.

THE HISTORY OF MUNICIPAL LIABILITY UNDER SECTION 1983

Subsequent to the ratification of the fourteenth amendment in 1868, Congress and the judiciary embarked on a century-long endeavor to transform the amendment into an instrument of protection for those injured by unconstitutional actions. Congress acted first by enacting the Civil Rights Act of 1871; the courts have proceeded slowly, yet deliberately, in effectuating the congressional and constitutional design.

The issue of municipal liability under what is now section 1983 first arose in Monroe v. Pape. James Monroe alleged that early one morning thirteen Chicago police officers broke into his home and routed him and his family from bed. While making the family stand naked in their living room, the officers ransacked every room of the house. Mr. Monroe was then taken into custody and detained on “open” charges for ten hours without access to an available magistrate and without permission to call his family or at-

13. U.S. CONST. amend. XIV, which provides in part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.


15. “Municipality” and “municipal corporation” are generic terms that overlap in some respects, but are distinct in others. However, the distinctions between the two are irrelevant in this context and no attempt is made in this Note to differentiate between them. As used hereinafter, the terms are synonymous and refer to cities, villages, counties, and towns.

18. Id. at 169.
torney. He was eventually released without being charged. Writing for the Court, Justice Douglas declared that while the individual officers were liable, the city of Chicago could not be held accountable because "Congress did not undertake to bring municipal corporations within the ambit of [section 1983]."

The Court in *Monroe* based its theory of municipal immunity from section 1983 liability on the legislative history of the 1871 Civil Rights Act. In its analysis the Court stressed the congressional debates surrounding the Sherman amendment. This amendment, as originally proposed, would have held a municipal corporation liable for damages to the person or property of its inhabitants by private persons "riotously and tumultuously assembled." Although the proposed Sherman amendment did not

19. Id.
20. Id.
21. Id. at 187.
23. As proposed, the Sherman amendment provided:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs, and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871) [hereinafter cited as GLOBE].
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amend section 1 of the 1871 Act, it was the only place where municipal liability was expressly raised. Thus Justice Douglas concluded in his opinion for the Court that "[t]he response of the Congress to the proposal to make municipalities liable for certain actions . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."

The decision in Monroe left the scope of its holding unclear and generated considerable criticism. The Court held only that cities are not "persons" under the statute. However, the Court's interpretation of congressional intent was equally applicable to counties and parishes since both would have been subject to liability under the Sherman amendment. The issue was left unresolved and lower courts were given no indication of which governmental entities were effected.

A number of federal courts sought to limit Monroe by holding that municipalities can be liable if they have no immunity under state law or if a plaintiff seeks equitable relief rather than damages. However, these theories were rejected by the Supreme Court soon after their inception.

In Moor v. County of Alameda, plaintiffs sought actual and punitive damages from Alameda County, California, for injuries resulting from the wrongful discharge of a shotgun by a deputy sheriff during a civil disturbance. Section 1988 of Title 42 authorizes

27. Id. at 191.
28. The Court held that the motion to dismiss the complaint against the city of Chicago was properly granted. Id. at 192.
29. GLOBE, supra note 23, at 663.
30. See, e.g., Carter v. Carlson, 447 F.2d 358, 368-69 (D.C. Cir. 1971) (intent of Congress was not to create municipal immunity, but to defer to immunity that existed under local law), rev'd on other grounds sub nom. District of Columbia v. Carter, 409 U.S. 418 (1973).
32. City of Kenosha v. Bruno, 412 U.S. 507, 512-13 (1973) (§ 1983 cannot support action for injunction against city); Moor v. County of Alameda, 411 U.S. 693, 716-17 (1973) (§ 1983 cannot be used in conjunction with § 1988 to sustain damage action against county that could be held liable under state law).
34. Id. at 695.
federal courts to apply state law in all cases where the civil rights statutes are inapplicable or provide insufficient remedies.\(^{35}\) Plaintiff sought to narrow *Monroe v. Pape* by reading section 1988\(^ {36}\) and California law together. California law arguably imposed vicarious liability on Alameda County for the acts of its deputies and sheriff. Plaintiff argued that when state law creates a cause of action, section 1988 permits the type of liability rejected in *Monroe v. Pape*. In rejecting plaintiff’s argument, the Court observed that the remedies under section 1988 should be “restricted to those contexts in which Congress has in fact authorized resort to state and common law.”\(^ {37}\)

Soon after the decision in *Moor*, the Supreme Court reviewed a decision that sought to limit the holding in *Monroe* to actions seeking monetary relief. The plaintiff in *City of Kenosha v. Bruno*,\(^ {38}\) relying on a strict reading of *Monroe* and the legislative history of section 1983, argued that Congress objected only to awarding damages against municipalities; thus, equitable relief should not be foreclosed. Justice Rehnquist’s opinion for the Court rejected this contention:

> We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word “person” in § 1983 was intended to have a bifurcated application to municipal corporations depending on the na-

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35. Section 1988 was enacted “to explain the source of law to be applied in actions brought to enforce the substantive provisions of the [1871] Act, including [§ 1983].” 411 U.S. at 705.


> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title “CIVIL RIGHTS” and of Title “CRIMES,” for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

37. 411 U.S. at 701. Some of the examples cited by the Court were the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1976), and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (1976). 411 U.S. at 701 n.11.

ture of the relief sought against them. Since, as the Court held in *Monroe*, "Congress did not undertake to bring municipal corporations within the ambit of" § 1983, they are outside of its ambit for purposes of equitable relief as well as for damages.39

*Monroe*, *Moor*, and *Kenosha* effectively foreclosed municipal liability under section 1983. Therefore, individuals seeking relief from municipalities for deprivations of their civil rights often invoked the fourteenth amendment directly, relying on *Bivens v. Six Unknown Named Agents*.40 *Bivens* held that, in the absence of a statutory remedy, courts have inherent power to fashion common law remedies for constitutional wrongs.41 The facts of *Bivens* precluded application of section 1983. Plaintiff claimed injuries resulting from his arrest without probable cause and the use of unreasonable force by six agents of the Federal Bureau of Narcotics. Even if the agents’ conduct were found to violate the fourth amendment, no statutory remedy was available. Section 1983 cannot provide relief against a federal agency, because it applies, by its terms, only to the unconstitutional actions of states. The Federal Torts Claims Act,42 which permits suits against the United States, was also unavailable because, at that time, it exempted intentional torts.43

Defendants argued that, in the absence of a federal statutory remedy, only state remedies should apply. Justice Brennan’s opinion for the Court rejected this argument: “[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to


grant the necessary relief." 44 In Bivens, such federal relief could only be based directly on the fourth amendment. Thus, the Court concluded: One who "can demonstrate an injury consequent upon the violation . . . of his [constitutional] rights, is entitled to redress his injury through [a claim for damages, which is a] remedial mechanism normally available in the federal courts." 45 This holding has been applied to deprivations of a number of constitutional rights. 46 Significantly, the Bivens rationale has been relied on by federal courts as a basis for sustaining jurisdiction on federal question grounds 47 in actions against municipalities; thus circumventing the "person" limitation in section 1983. 48 Bivens, therefore, offers a viable alternative to those unable to obtain redress under section 1983. The significance of this alternative, however, must be reassessed in light of the Supreme Court's decision in Monell v. Department of Social Services. 49 While the Court in Monell expressly overruled the holding in Monroe v. Pape that municipalities are immune from liability under section 1983, 50 it indicated that municipalities are not proper defendants in 1983 actions premised on respondeat superior. 51 The Supreme Court has yet to rule

44. 403 U.S. at 392 (citations omitted) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
45. Id. at 397 (citations omitted). The essence of Justice Brennan's approach is that a damage action is a "remedial mechanism normally available in the federal courts." Therefore, where Congress has not provided the victims of unconstitutional conduct with a remedy, a damage action should be permitted directly under the Constitution. Id. at 396-97. Bivens, therefore, allows an action for damages whenever there are no "special factors" militating against this remedy.
50. Id. at 664-89.
51. See id. at 690-95.
on the extent to which Congress' limitation of a remedy precludes Bivens-type actions. Thus, it is unclear if a federal court can impose liability in those situations where relief is precluded by a federal statutory scheme.52

**Monell v. Department of Social Services**

At issue in Monell was an official policy of the New York City Department of Social Services and the Board of Education of the City of New York that compelled pregnant employees to take unpaid leaves of absence regardless of whether such leaves are required for medical reasons.53 A class action suit was filed under section 1983 by female employees of the social services department and the board of education against the department and its commissioner, the board and its chancellor, and the city of New York and its mayor. Plaintiffs sought to have the statute declared unconstitutional, to enjoin enforcement of the policy, and to recover back pay for periods when they were capable of working but were forced to take leaves of absence. The individual defendants were sued as official representatives of their respective entities, not in their individual capacities.

The district court concluded that the policy is unconstitutional.54 However, because the board and city changed their policy after suit was filed, the claims for injunctive and declaratory relief

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52. See generally Davis v. Passman, 99 S. Ct. 2264, 2277-78 (1979) (indicating that initial test is whether Congress intended to preclude alternative remedies).

53. Defendants admitted that the city of New York had a policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of the employee's agency permitted up to an additional two months of work. However, the board of education denied the allegation that its policy was to require teachers to take maternity leave after the seventh month of pregnancy unless that month was the last month of the school year, in which case the teacher could remain through the end of the school term. 436 U.S. at 661 n.2.

54. Monell v. Department of Social Servs., 394 F. Supp. 853, 855 (S.D.N.Y.), aff'd, 532 F.2d 259 (2d Cir. 1976), rev'd, 436 U.S. 658 (1978). The court relied on Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974). In La Fleur, pregnant public school teachers brought suit under § 1983 challenging the constitutionality of mandatory maternity leaves required by the Cleveland and Chesterfield County school boards. Cleveland required unpaid maternity leaves five months before the expected childbirth; Chesterfield County required an unpaid maternity leave at least four months prior to the anticipated childbirth. The Supreme Court, in a 7-2 decision, decided that the mandatory termination provisions of both maternity rules violate the due process clause of the fourteenth amendment because the arbitrary cut-off dates had no valid relationship to the state's interest in preserving continuity of instruction, and the challenged provisions created an invalid conclusive presumption that every teacher who is four to five months pregnant is physically incapable of continuing her duties. Id. at 634-48.
were dismissed as moot. The court only considered whether plaintiffs were entitled to back pay for the periods when they were able to work, but were forced to take leaves of absence. This relief was denied because "[a]ny award that would be made would, in the last analysis, be paid by the City of New York," thus circumventing the immunity conferred on municipalities by *Monroe v. Pape*.

On appeal to the Court of Appeals for the Second Circuit, plaintiffs conceded that the department of social services is immune under *Monroe*. However, they renewed their argument that the board of education is not a "municipality" within the meaning of *Monroe v. Pape*, because it is an independent body "not merely an arm of the city like the Department of Social Services." In addition, plaintiffs argued that the district court erred in dismissing the complaint against the individual defendants because city officials are "persons" within the meaning of section 1983.

The Second Circuit rejected both contentions. The court concluded that the board of education is so intimately connected with the city that it falls "outside the purview of § 1983." The court based this conclusion on the board's government-like functions and its receipt of public funds "appropriated [to it] . . . as if it were a department of the city government." In addition, the court noted that even though the individual defendants sued in their official capacities were "persons" within the meaning of section 1983, the damages sought would "have to be paid by a city that was held not to be amenable to such an action in *Monroe v. Pape*."  

The Court's "Fresh Analysis" of the Legislative History: One Step Forward

Writing for a seven-member majority, Justice Brennan over-
ruled *Monroe v. Pape* and held that municipalities are liable under section 1983.65 This rejection of a holding that had withstood two decades of challenge was based on an exhaustive re-examination of the legislative history underlying the Civil Rights Act of 1871.66

opinion (Parts II and IV) that were “merely advisory and are not necessary to explain the court’s decision.” 436 U.S. at 714 (Stevens, J., concurring). Justice Rehnquist filed a dissenting opinion, in which Chief Justice Burger joined, arguing that the Court’s abandonment of a “long and consistent line” of precedent is unjustified. Id. at 714-18 (Rehnquist, J., dissenting). Moreover, Justice Rehnquist is convinced that the legislative history of § 1983 indicates that Congress intended the word “person” to be used in a more limited sense. Id. at 719-24 (Rehnquist, J., dissenting).

65. Id. at 664, 690.

66. Justice Brennan first laid the foundation for the Court’s “fresh analysis” of the debates underlying the 1871 Act, and the resulting reversal of *Monroe*, by presenting an overview of the “three distinct stages in the legislative consideration of the bill which became the Civil Rights Act of 1871.” Id. at 665.

The original bill contained six sections, four of which were directed at the suppression of Ku Klux Klan violence in the South, H.R. 320, 42d Cong., 1st Sess. (1871), and was reported out of committee on March 28, 1871, GLOBE, supra note 23, at 317. Section 1, now codified at 42 U.S.C. § 1983 (1976), was passed as introduced with little debate. The remaining sections were heavily debated before finally being approved with several amendments. Immediately prior to the Senate’s vote on H.R. 320, Senator Sherman introduced an amendment to be added as § 7 of the bill. In its initial form, the amendment made any inhabitant of a municipality liable for damage inflicted by persons “riotously or tumultuously assembled.” See note 23 supra. This amendment was approved by the Senate. GLOBE, supra note 23, at 704-05. The House of Representatives refused to concur in the Senate amendments and a conference committee was appointed. Since the Senate and House versions of § 1 were identical, it was not a subject of this conference. As a result of the first conference report, the Sherman amendment was amended to make the action against the “county, city, or parish” in which the wrongdoing had occurred. See note 23 supra and accompanying text. In addition, the municipality would be liable on the judgment of any individual defendant returned unsatisfied within two months of the award.

The complete text of the first conference substitute for the Sherman amendment is:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damned by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said
Monell concluded, after examining the legislative history surrounding the Sherman amendment,\(^{67}\) that Monroe was wrong in extrapolating a rejection of all municipal liability from the amendment's defeat.\(^{68}\) The amendment was rejected, not because its opponents doubted Congress' power to impose liability on local governments, but because a majority of Congress doubted whether the

county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment.

Globe, supra note 23, at 749.

The House refused to concur in the conference report, largely because it "thought the Federal government could not, consistent with the Constitution, obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters." Id. at 668. A second conference committee was called, which watered down the provision to provide liability only for persons who knew of a conspiracy to violate civil rights and who could have prevented it. This second conference report was concurred in by both Houses and is now codified at 42 U.S.C. § 1986 (1976).

The relevant text of the second conference substitute for the Sherman amendment is as follows:

[any person or persons having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives.

Globe, supra note 23, at 804.

67. See note 66 supra.

68. 436 U.S. at 664-65; see 365 U.S. at 190. Monroe relied heavily on the remarks of Representative Poland, speaking for the House conferees about the Sherman proposal to make municipalities liable. Poland objected that "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." Globe, supra note 23, at 804 (remarks of Rep. Poland), quoted in Monroe v. Pape, 365 U.S. 167, 190 (1961).
Constitution gave them the power to require municipalities to keep the peace. However, no one questioned Congress' ability under the fourteenth amendment to impose liability on municipalities when the municipality itself violated the Constitution. The Court noted that many of the members of the Forty-second Congress who opposed the Sherman amendment voted for section 1 of the act, confirming "that the liability imposed by § 1 was something very different from that imposed by the amendment": Section 1983 imposes liability on a municipality that violates a person's constitutional rights, whereas the Sherman amendment obligated a municipality to prevent violations of constitutional rights.

A second consideration of the Monroe Court was whether the general language describing those liable under section 1983—"any person"—can be read to include municipalities. Two months before the Civil Rights Act was passed, Congress approved the Dictionary Act, which defined generally used statutory terms. This act defined person as "bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." The Monroe court concluded, however, that since the Dictionary Act's definitions are "allowable, not mandatory," Congress' animosity to municipal liability, evident in its rejection of the Sherman amendment, indicates that the word "person" in the Civil Rights Act did not include municipalities.

In Monell, Justice Brennan overruled this determination by concluding that "municipalities through their official acts could, equally with natural persons create the harms intended to be remedied by [section 1983], and, further, since Congress intended [section 1983] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded." The majority in Monell was therefore convinced that a detailed

69. See 436 U.S. at 669.
70. See note 66 supra.
71. 436 U.S. at 682.
73. Id. § 2.
74. 365 U.S. at 191.
75. 436 U.S. at 685-86 (citations omitted). In addition, the Monell Court noted that by 1871, corporations (including municipal corporations) were treated like natural persons for almost all purposes of constitutional and statutory analysis. Id. at 687-88.
reading of the legislative history supports the conclusion "that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies."76

Respondeat Superior Excluded: One Half Step Back

In overruling Monroe v. Pape to permit actions under section 1983 against local governmental bodies, the Court in Monell confronted one of the most challenging civil-rights litigation issues in recent years: Whether the doctrine of respondeat superior applies to actions brought under section 1983. Despite the overwhelming weight of authority holding that respondeat superior is unavailable,77 virtually every case that alleges a constitutional deprivation resulting from acts of a municipal employee includes at least one claim against the municipal employer based on this common law doctrine.78

The respondeat superior doctrine is well settled: An employer is liable for negligent and intentional torts committed by his or her employees within the scope of their employment.79 This rule is based on rationales other than the traditional negligence doctrine of fault. Although there has been considerable debate about the origins and reasons for the rule,80 a modern justification is that it properly allocates the tort's costs.81 To establish vicarious liability under this common law doctrine, it must be proved that an employment relationship exists between the employer and the person who committed the tortious act,82 and that this act was within the "scope of the employment."83 The employer-employee relationship is easily established in most cases. The more difficult question of whether an activity is within the scope of employment is deter-

76. Id. at 690 (emphasis in original) (footnote omitted).
81. See W. PROSSER, supra note 79, § 69, at 459.
82. Id. § 70, at 460-61.
83. Id at 460.
mined by applying a three part test: Whether the act was committed during the usual time of employment; 64 whether the act was committed at the usual place of employment; 65 and whether the purpose of the act, in whole or in part, was to serve the employer's business. 66 The underlying consideration in all three factors is the degree of control that the employer is capable of exercising. 67

Municipal liability under respondeat superior is ordinarily based on the same rules that govern the liability of any other corporation or individual. 68 Thus, tortious conduct committed by an agent or servant of a municipality during the course of employment generally results in vicarious liability for the municipality. In Monell, however, the Court in dicta refused to recognize the doctrine of respondeat superior when recovery is sought under section 1983. 69

To understand Monell's reasoning, it is useful to divide section 1983 cases into two categories: "political" cases 90 and "constitutional tort" cases. 91 Political cases, such as Monell, 92 are suits based on injury caused by the official policy of a governmental entity. Constitutional tort cases, such as Monroe, 93 are suits based

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84. RESTATEMENT (SECOND) OF AGENCY § 233 (1958).
85. Id. § 234.
86. Id. §§ 235-236. Other factors often considered are the extent to which the act in question is different from acts authorized by the employer, id. § 229(2)(g); the extent to which the act is a departure from the normal methods used by the employer, id. § 229(2)(i); and the extent to which the employer might have expected that such an act would be committed, id. § 229(2)(f).
87. See W. Prosser, supra note 79, § 70, at 460; James, supra note 80, at 165; Stevens, The Test of the Employment Relation, 38 Mich. L. Rev. 188, 189 (1939).
89. 436 U.S. at 691.
92. Most of the recent cases have dealt with intentional torts by policemen and prison officials. See, e.g., Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975) (alleged unprovoked assault and battery by prison guard); Collum v. Yurkovich, 409 F. Supp. 557 (N.D. Ill. 1975) (plaintiff beaten by police while in custody).
93. Monell differs from other political suits only in that the official policy that formed the basis for liability was not formally embodied in a statute or regulation.
on injury caused by an individual official who, acting "under color" of state law but contrary to official policy,⁹⁴ deprived the plaintiff of a constitutional right. Since these actions are contrary to official policy, municipal liability in these cases can only be based on respondeat superior.

In exposing municipalities to liability, the Monell Court was expansive in its ruling: "Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."⁹⁵ Moreover, the Court indicated that local governments "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."⁹⁶

Although Monell expanded municipal liability for political actions, it refused to subject municipal corporations to constitutional-tort liability under section 1983. In its discussion of respondeat superior, the Court emphasized the language of the statute:⁹⁷ After reiterating that, by its terms, section 1983 "imposes liability on a government that . . . 'causes' an employee to violate another's constitutional rights,"⁹⁸ by enacting an official policy, the Court concluded that the same language "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor."⁹⁹ Justice Brennan also relied on Congress' rejection of the Sherman amendment to support his reading of the statute:

[T]he fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees. Nonetheless, when Congress' rejection of the only form of vicarious liability presented to it [the Sherman Amendment] is combined with the

⁹⁴. The Supreme Court has determined that an official's unconstitutional conduct can be "under color" of state law even though it does not reflect policy. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913).
⁹⁵. 436 U.S. at 690 (footnotes omitted).
⁹⁶. Id. at 690-91.
⁹⁷. See text accompanying note 4 supra for the complete text of § 1983.
⁹⁸. 436 U.S. at 692 (emphasis added).
⁹⁹. Id.
absence of any language of § 1983 which can easily be construed to create respondeat superior liability, the inference that Congress did not intend to impose such liability is quite strong.\footnote{Id. at 692 n.57 (italics in original).}

Finally, the Court in Monell noted that policy justifications\footnote{Noting that there is disagreement about the basis for the doctrine of vicarious liability, the Court nonetheless set forth two justifications: Liability should be imposed when it will most effectively provide incentive to prevent future harm; and "the cost of accidents should be spread to the community as a whole on an insurance theory." Id. at 693-94.} for the doctrine of respondeat superior were offered in support of the Sherman amendment but were found unpersuasive in the face of perceived constitutional limitations on Congress' powers.\footnote{Id. at 694. The Forty-second Congress felt that there were constitutional limitations on their ability to impose obligations on municipalities to keep the peace.} The Court added, "There is no reason to suppose that a more general liability imposed for a similar reason would have been thought less constitutionally objectionable."\footnote{Id. at 187. "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Id.}

A CRITICAL ANALYSIS OF MONELL: MISCONSTRUCTION OR MISGIVING?

Justice Douglas, writing for the majority in Monroe, found that three of section 1983's original purposes have contemporary significance: Overriding state laws that deny citizens their constitutional rights;\footnote{436 U.S. at 694.} providing a remedy where state law is inadequate;\footnote{365 U.S. at 173.} and providing a remedy where state law, while theoretically adequate, actually fails to protect constitutional rights in practice.\footnote{Id.} Justice Douglas added that section 1983 should be interpreted with reference to ordinary tort principles.\footnote{Id. at 174.} Yet Monell refused to recognize respondeat superior, restricting the statute's scope and narrowing the class of potential civil rights litigants under section 1983. By precluding constitutional-tort victims from collecting damages from a city or municipality, the Court made it impossible or impractical for many potential plaintiffs to bring suit.\footnote{See text accompanying notes 156-161 infra.} An analysis of the Court's reasoning reveals that a contrary
holding recognizing respondeat superior liability under section 1983 is justified. It is generally accepted that the civil rights statutes are remedial and therefore should be construed liberally.\footnote{109} The remedial purposes of the civil rights statutes require a more expansive remedy than permitted by the Court in \textit{Monell}.

\textit{The Legislative History}

It has long been established that the literal interpretation of the words of an act should not prevail if they dictate a result contrary to the legislature’s intent in enacting the statute and if they are sufficiently flexible to reasonably support a construction that will effectuate that intent.\footnote{110} Despite legislative history to the contrary, the Court in \textit{Monell} read the language of section 1983 restrictively to exclude the doctrine of respondeat superior. An examination of congressional intent reveals that a more expansive, remedial reading is necessary.

The Court in \textit{Monell} inferred from the rejection of a conference committee draft of the Sherman amendment that the Forty-second Congress did not intend to permit respondeat superior liability under section 1983.\footnote{111} However, the debates on the 1871 Act demonstrate that the amendment was not defeated on the basis of respondeat superior.

The Civil Rights Act of 1871 and the Sherman amendment were introduced primarily to curb organized violence in the South by the Ku Klux Klan and other private groups.\footnote{112} However, section 1983 is “cast in general language”\footnote{113} that imposes civil liability on persons acting under color of state law who fail to prevent private violence.\footnote{114} The Sherman amendment proposed a more

\begin{itemize}
  \item 110. “While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words.” Peirce v. Van Dusen, 78 F. 693, 696 (6th Cir. 1897). \textit{See generally} Frankfurter, \textit{Some Reflections on the Reading of Statutes}, 47 COLUM. L. REV. 527, 543-44 (1947); Jones, \textit{Extrinsic Aids in the Federal Courts}, 25 IOWA L. REV. 737 (1940); \textit{Note, A Re-evaluation of the Use of Legislative History in Federal Courts}, 52 COLUM. L. REV. 125 (1952).
  \item 111. 436 U.S. at 692-93 n.57.
  \item 113. \textit{Id.} at 183.
  \item 114. “While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were \textit{unable or unwilling} to
drastic remedy: Subjecting municipal corporations to liability for
damage inflicted by persons "riotously or tumultuously assem-
bled." The amendment allowed injured persons, or their legal
representatives, to recover compensation in federal court from the
county, city, or parish in which the riot occurred. While the
Senate passed the Sherman amendment, the House refused to ac-
quiesce and a conference committee was appointed.

The first conference committee modified the amendment to
require that the injured party attempt to collect from the riotous
wrongdoers before turning to the municipality as a guarantor.
Even in its revised form the amendment remained unacceptable to
the House, a majority of which believed that the federal govern-
ment lacked the authority to impose a duty on municipal corpora-
tions to keep the peace.

A second conference abandoned entirely the expansive liability
of the Sherman amendment. Instead, the conference committee
recommended imposing liability on any person who has knowledge
of a conspiracy to violate another's civil rights and who has the
power to prevent it but fails or refuses to do so. In this form,
the amendment was passed by both Houses and is now codified

Opponents of Senator Sherman's proposal feared that innocent
taxpayers would be unjustly punished for the wrongful acts of oth-
ers over which neither they nor their officials had any control.
For example, Representative John F. Farnsworth posited a series
of hypotheticals to explain his opposition to the report of the first
conference committee:

What have we now presented to us for our action? We have
a section which authorizes suits to be brought against counties

enforce a state law." Id. at 175-76 (emphasis in original) (footnote omitted).
115. GLOBE, supra note 23, at 663.
116. Id.
117. Id. at 725.
118. Id. at 751, 755-56.
119. Id. at 800-01.
120. See text accompanying notes 126-128 infra.
121. GLOBE, supra note 23, at 804.
122. Id. at 808, 831.
123. See Civil Rights Act of 1871, ch. 22, § 6 (current version at 42 U.S.C. §

124. See, e.g., GLOBE, supra note 23, at 791 (remarks of Rep. Willard); id. at
787-88 (remarks of Rep. Kerr); id. at 776-77 (remarks of Sen. Frelinghuysen); id. at
771 (remarks of Sen. Thurman); id. at 762 (remarks of Sen. Stevenson).
and cities in every case of destruction of property or injury of the person by two or more persons in a riotous or tumultuous manner, when it is done in derogation of the exercise of some constitutional right of the person, or done on account of color, or race, or previous condition of servitude; such, for instance, Mr. Speaker, as this: if a Chinaman should be mobbed by three or four miners in California or Nevada on account of being a Chinaman, he may sue the county in the United States courts and recover damages. Or, to take another case of a man mobbed in Illinois on account of race, or color, suppose a colored and a white person get married, and some of the young men of the village get up a charivari, not for the purpose of preventing any right to vote, but because of color, then the person claiming that he is injured may sue the county and recover damages.\textsuperscript{125}

Of even greater concern to the Forty-second Congress were the perceived constitutional difficulties inherent in obligating municipalities to keep the peace. For example, Representative Charles W. Willard argued:

\begin{quote}
[W]e have not by the Constitution imposed, any duty upon a county, city, or parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges and immunities. The Constitution has declared that to be the duty of the State. The Constitution, in effect, says that no State shall deny to its citizens the equal protection of the laws, and I understand that the declaration, that prohibition, applies only to the States, so far as political or municipal action is concerned. . . . The city and the county have no power except the power that is given them by the State. They cannot keep violence away from me; they cannot protect me in my rights, except as the State has clothed them with the power to do so; and for the enforcement of the laws of the State they get no aid, no authority, no power whatever from the United States.\textsuperscript{126}
\end{quote}

Representative Willard reasoned that since counties and cities have no law enforcement powers other than those delegated by the state, Congress cannot impose the duty of protection on them. Moreover, without a duty to protect, it is unfair to hold a municipality liable for wrongs it did not commit and had no duty to prevent. Representative Willard concluded that if any government

\textsuperscript{125} Id. at 798-99 (remarks of Rep. Farnsworth).
\textsuperscript{126} Id. at 781 (remarks of Rep. Willard).
could be required under the fourteenth amendment to compensate victims of mob violence, it would be the states. 127

Representative Luke P. Poland's remarks in introducing the second conference report to the House of Representatives are more conclusive:

I did understand from the action and vote of the House that the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law. . . . At the same time we said . . . there was a disposition on the part of the House . . . to reach everybody who was connected, either directly or indirectly, positively or negatively, with the commission of any of these offenses, and wrongs, and we would go as far as they chose to go in inflicting any punishment or imposing any liability upon any man who shall fail to do his duty in relation to the suppression of those wrongs. 128

It is evident from these passages that the Forty-second Congress found it unfair to impose liability for failing to keep the peace on any person or entity not bound by an affirmative duty to do so. Fearing that it was unconstitutional to impose such a duty on municipalities, Congress rejected the first conference substitute for the Sherman amendment, but retained its underlying purpose: It imposes "liability upon any man who shall fail to do his duty in relation to the suppression of those wrongs." 129

The court in Monell noted that Congress "rejected those elements of vicarious liability contained in the first conference substitute." 130 The Court inferred from Congress' "rejection of the only form of vicarious liability presented to it" 131 that Congress did not intend to impose respondeat superior liability under section 1983. 132

There is, however, a better explanation for the absence of vicarious liability from the second conference substitute. Congress

128. Id. at 804 (remarks of Rep. Poland).
129. Id. (remarks of Rep. Poland).
130. 436 U.S. at 692 n.57.
131. Id. The municipal liability considered under the first conference substitute was not punitive or penal, but remedial in nature. There was no requirement that the wrongdoer be either arrested, tried, or convicted. An injured party need only establish that a crime had been committed to recover from the municipality. See, e.g., Globe, supra note 23, at 792 (remarks of Rep. Butler); id. at 788-89 (remarks of Rep. Kerr).
132. 436 U.S. at 692 n.57.
believed it could protect victims of organized violence by imposing a duty to police directly on every citizen. Senator George F. Edmunds explained:

Every citizen in the vicinity where any such outrages as are mentioned in the second section of this bill . . . are likely to be perpetrated, he having knowledge of any such intention or organization, is made a peace officer, and it is made his bounden duty as a citizen of the United States to render positive and affirmative assistance in protecting the life and property of his fellow citizens in that neighborhood against unlawful aggression; and if, having this knowledge and having power to assist by any reasonable means in preventing it or putting it down or resisting it, he fails to do so, he makes himself an accessory, or rather a principal in the outrage itself.

Congress was certain it had the constitutional power to impose such a duty. Since any money received from a municipality under respondeat superior would ultimately come from the citizens, the proposal finally adopted achieved a similar result by imposing the widespread liability necessary to redress deprivations of constitutional rights. Thus, analysis of the debates reveals that it was not Congress' rejection of vicarious liability as a doctrine that prompted the exclusion of such liability from the Sherman amendment. Rather, it was Congress' desire to impose liability only on those connected "either directly or indirectly, positively or negatively, with the commission of any . . . offenses, and wrongs." Thus, if municipal corporations had been under a duty to provide protection against organized violence in the South and had failed to fulfill this duty, it is likely that the vicarious liability proposed in the Sherman amendment would have been accepted by the Forty-second Congress.

The Monell Court's misinterpretation of the legislative history of the Sherman amendment does not end the criticism of its use of legislative history to determine the viability of respondeat superior. Since the liability that the Sherman amendment would have im-

134. Id. (remarks of Sen. Edmunds).
135. Id. (remarks of Sen. Edmunds).
136. Id. at 804 (remarks of Rep. Poland). The person whose civil rights were injured, or his or her legal representative, was given a civil cause of action against every citizen who could have, but did not, protect him or her. This provision was specifically directed against lynching and other forms of mob violence. Gressman, supra note 14, at 1394.
posed on municipalities is radically different from that imposed by respondeat superior, the Monell Court was incorrect in giving any weight to the legislative history of that amendment.

The Sherman amendment proposed a drastic remedy: It would have made every city, county, and parish vicariously liable for all unconstitutional acts committed against its citizens by any persons riotously assembled, \(^{138}\) "even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it." \(^{139}\) Thus, liability would be imposed by the Sherman amendment even in the absence of intentional or negligent misconduct by state or local officials. \(^{140}\) Moreover, there was no requirement that any relationship exist between the wrongdoer and the municipality. Respondeat superior, on the other hand, requires an employer-employee relationship between the wrongdoer and the municipality. \(^{141}\) Furthermore, additional safeguards would be provided by the scope-of-employment test. \(^{142}\) The liability imposed by respondeat superior thus scarcely resembles the sweeping liability for failing to prevent acts of private violence that proponents of the Sherman amendment envisioned.

**Linguistic Construction**

In addition to legislative history, the language of section 1983 supports a finding that respondeat superior is applicable to the civil rights statutes. In precluding vicarious liability, \(^{143}\) the Monell Court relied on the provision in section 1983, as passed, that "'any person who . . . shall subject or cause to be subjected, any person . . . to the deprivation of any rights . . . secured by the Constitution of the United States.'" \(^{144}\) For example, Justice Brennan rea-

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138. See note 23 supra.
139. Monell v. Department of Social Servs., 436 U.S. at 692 n.57.
140. Representative Willard stated: "We make, in fact, no provision whatever in this bill for proving in court that there has been any default, any denial, any neglect on the part of the county, city, town, or parish to give citizens the full protection of the laws." GLOBE, supra note 23, at 791 (remarks of Rep. Willard).
141. See notes 79-87 supra and accompanying text.
142. See notes 83-87 supra and accompanying text.
143. 436 U.S. at 691 (emphasis in original) (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13). In discussing vicarious liability, the Monell Court stated that [t]he italicized language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.
144. Id.
soned: "The fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent."145 The Court proceeded on the assumption that a governmental entity can successfully distinguish between itself and its employees for purposes of constitutional analysis. Based on this assumption, the Court concluded that the actions of a municipal employee are not those of the municipality, and the municipality did not "cause" the constitutional deprivation. However, in drawing this conclusion, the Court overlooked a doctrine dating back to the original enactment of the Civil Rights Act.

It has long been settled that governing bodies, like corporations, are merely abstractions in the absence of the officers and agents that give them life.146 In Ex parte Virginia,147 the Supreme Court relied on this rationale in giving substance to the fourteenth amendment.

A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.148

Shortly thereafter, the reasoning of Ex parte Virginia was extended to include unauthorized acts of governmental agencies149 and off-

147. 100 U.S. 339 (1879).
148. Id. at 347 (emphasis added). For recent cases following the Ex parte Virginia doctrine, see Cooper v. Aaron, 358 U.S. 1, 16-17 (1958); Kimbrough v. O'Neil, 523 F.2d 1057, 1060 n.1 (7th Cir. 1975), aff'd on rehearing, 545 F.2d 1059 (7th Cir. 1976) (en banc); Hall v. Carson, 468 F.2d 845, 848 (5th Cir. 1972).
149. See Raymond v. Chicago Union Traction Co., 207 U.S. 20, 35 (1907). In this case, which concerned a reassessment made by a state board of equalization, the Court asserted:

The state board of equalization is one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation.
The legal principle that a corporate body exists only through its agents has, since early common law, been one of the doctrines on which the concept of vicarious liability rests. Even today, many courts use little more than the simple phrase, "he who does a thing through another does it himself" to hold a defendant vicariously liable for the wrongful act of his or her agent.

This common law principle expands the causation requirement of section 1983 to include respondeat superior. An official's acts are those of the municipal employer; the acts "caused" by the official, so long as they fall within the scope of employment, are "caused" by the municipality. Therefore, the language of section 1983 supports the conclusion that Congress intended to impose liability on municipalities for the unconstitutional torts of their employees, as well as for their unconstitutional policy decisions.

Public Policy

We cannot run a human world on the principles of formal logic. The test of our rule's worth must, in fact, be purely empirical in character. We have to study the social consequences of its application, and deduce therefrom its logic. We have to research for the mechanism of our law in life as it actually is, rather than fit the life we live to a priori rules of a rigid legal system.

The Court in Monell expressly declined to consider policy considerations in reaching its conclusion. However, properly consid-
ered, policy militates against excluding respondeat superior from the civil rights statutes.

In enacting section 1983, Congress created a federal cause of action for traditional common law torts involving a deprivation of constitutional rights by one acting under color of state law. However, Monroe’s construction of section 1983 leaves the remedy emasculated. While section 1983 provides a federal cause of action against municipal officials, practical and legal obstacles often frustrate injured plaintiffs. The first problem a plaintiff may face is the inability to identify the individual officials responsible for the constitutional deprivations. In such a case the injured party will have no recourse. However, even if the plaintiff is able to identify the responsible officials, the officials are often unable to pay substantial damages. The hierarchy of governmental agencies is such that those who have the most extensive contact with the public, and the greatest opportunity to deprive citizens of constitutional rights, are those most likely to be at the bottom of the organization’s pay scale. Furthermore, governmental officers and employees sued under section 1983 are usually entitled to either absolute or qualified immunity. Absolute immunity has been accorded to judges, legislators, and prosecutors. Qualified immunity is available to other governmental employees in the form of a good faith defense. Municipal or state employees are not liable in damages for constitutionally prohibited conduct if they act with a reasonable, good faith belief that they are not violating the

155. See 365 U.S. at 196 (Harlan, J., concurring).
156. See Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974) (court upheld jury verdict for all 44 defendant police officers on ground that burden was on plaintiffs to establish which individual policeman had fired allegedly fatal and wounding shots); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972) (affirming directed verdict for two police officers alleged to have brutally beaten plaintiff, on ground that plaintiff had failed to prove whether defendants had actually administered beating).
158. See Pierson v. Ray, 386 U.S. 547, 553-54 (1967). Accord, Stump v. Sparkman, 435 U.S. 349 (1978). “A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the ‘clear absence of all jurisdiction.’” Id. at 356-57 (footnote omitted).
plaintiff's constitutional rights. The consensus among the circuits, however, appears to be that a municipality is not entitled to a good faith defense.\textsuperscript{162}

Additional policy arguments for applying respondeat superior are derived from considerations underlying the common law doctrine. The doctrine is often justified on notions of fault—the employer's failure to train and screen the employees—and fairness, often framed in terms of cost spreading. The municipality hired and trained the official, and placed him or her in a position to violate another's civil rights. Common notions of fairness dictate that one wronged by an employee's acts should be able to obtain compensation from the employer. In addition, a municipality can spread the cost of compensating victims of unconstitutional behavior. It is more desirable for the loss to be spread among the taxpayers, who are potential victims themselves, than for the victim to bear it alone. Furthermore, a municipality can insure itself against tort liability more effectively than the individual citizen. Finally, holding municipalities liable for the unconstitutional conduct of their employees may motivate them to institute more comprehensive screening techniques and better training procedures.

An argument against adopting respondeat superior in a section 1983 context is the overbearing drain it might place on municipal treasuries. Those opposed to the adoption of respondeat superior in section 1983 actions concede that allowing recovery for unconstitutional behavior that results from an official municipal policy is both fair and reasonable; but they argue that an expansion of liability to encompass respondeat superior would place an intolerable burden on already overburdened taxpayers\textsuperscript{163} and cities already verging on bankruptcy. However, the financial stability of municipalities has never been a consideration of a majority of the Court in determining whether to impose municipal liability under section 1983 in nonrespondeat superior contexts.\textsuperscript{164} The Court noted that the debates of the Forty-second Congress show a similar disdain


\textsuperscript{164} See Monell v. Department of Social Servs., 436 U.S. at 664 n.9.
for this argument. At least one commentator has suggested that to safeguard local finances, a limited immunity could be granted to municipalities faced with actions of such extraordinary dimensions that they significantly threaten a municipality’s solvency. In addition, Congress can place a ceiling on recovery under respondeat superior if such liability proves too burdensome.

In other contexts, federal courts have been influenced by the social policy underlying tort actions in determining whether the doctrine of respondeat superior should apply. In Santiago v. City of Philadelphia, the Eastern District Court of Pennsylvania found traditional tort doctrine concerning respondeat superior particularly compelling in fourteenth amendment cases:

We conclude that the policy of justifying respondeat superior in tort law has equal force in an action under the Fourteenth Amendment. As Professor Prosser has noted, respondeat superior is a deliberate allocation of risk by which the costs, arising from anticipated harm to innocent individuals caused by actions of employees, are borne by the employer. This is reasonable since the employer, rather than the injured party, is in a better position to absorb the costs, insure against them and distribute the costs to society. A governmental entity can only act through its employees and therefore the official acts of such employees are rightfully attributed to that employer-entity.

The need for respondeat superior in a Fourteenth Amendment claim is particularly compelling because that provision is

165. See id.
166. See Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 958 (1976). The commentator states:

The theory for declining to entertain such a suit might be that the Constitution does not mandate judges to undertake vast redistributions of wealth to attack pervasive social ills, even where such ills may be traceable in some degree to violations of constitutional rights. . . . The national legislature, by virtue of its responsibility to the electorate, can better legitimate such massive social adjustments than can the judiciary.

Id. (footnotes omitted).

168. See, e.g., Sinkler v. Missouri Pac. R.R., 356 U.S. 326, 328-30 (1958); Jamison v. Encarnacion, 281 U.S. 635, 639-40 (1930); Ira S. Bushey & Sons v. United States, 398 F.2d 167 (2d Cir. 1968). The Court of Appeals for the Second Circuit in Ira S. Bushey referred to the “deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.” Id. at 171. It could be argued that the occasional unconstitutional acts of governmental officials are similarly “characteristic” of the government’s activities.
intended by its terms to protect individual rights from abuse by municipalities and other repositories of state power. 170

Thus, policy justifications for allowing plaintiffs to recover against municipalities under section 1983 for unconstitutional torts vastly outweigh arguments that might be invoked to oppose such liability. Had the Court in Monell properly considered the policy elements underlying respondeat superior and their relationship to section 1983 claims, it is doubtful that it would have reached such an unjust conclusion.

CONCLUSION

Monell temporarily ended the debate about the standards for municipal liability under section 1983. After reevaluating the legislative history pertaining to section 1983, the Court determined that local governments, municipal corporations, and school boards are “persons” subject to liability under section 1983. As “persons,” these entities are susceptible to suit if the unconstitutional action implements a policy statement, ordinance, regulation, or decision officially adopted by the local governing body, or if the constitutional deprivation occurs pursuant to a governmental custom not formally adopted. In addition, the Court ruled that municipalities cannot be held liable on the basis of respondeat superior. The Monell Court could have rendered its holding on the facts without ruling on the viability of respondeat superior; yet, in dicta, the court unnecessarily limited the scope of municipal liability.

Analysis of the legislative history of section 1983 does not indicate that Congress intended to exclude respondeat superior from the act. The language of the statute similarly offers no such proof. Since both were relied on by the Court in Monell, the dicta in that decision is, at best, poorly reasoned authority for the proposition that a municipality is not liable for the unauthorized acts of its employees.

The impact of Monell is uncertain and may depend on whether a Bivens-type action171 brought directly under the fourteenth amendment remains a viable alternative for an injured party unable to recover under section 1983.172 Although Monell ef-

170. Id. at 148-49 (italics in original) (footnotes omitted).
171. See note 45 supra and accompanying text.
172. The future of Bivens is equally uncertain. It may be that Monell was intended to be a retreat from Bivens insofar as Bivens offers an alternative vehicle for
fectively precludes respondeat superior liability under the statute, victims of unconstitutional governmental activity can still argue that the *Bivens* rationale should incorporate the doctrine of respondeat superior. Thus, as long as a *Bivens* theory is available to plaintiffs, *Monell*'s dicta may have no effect except to limit the possibility of multiple theories of recovery for the same wrong.

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