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42 U.S.C. 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture

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42 U.S.C. § 1983 MUNICIPAL LIABILITY: THE *MONELL* SKETCH BECOMES A DISTORTED PICTURE

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The forty-second United States Congress enacted the Civil Rights Act of 1871, now codified at Title 42, section 1983 of the United States Code. Section 1983 provides broad remedies for persons deprived of their constitutional rights "under color of state law." The United States Supreme Court consistently has been divided in its approach toward section 1983. This division has resulted in uneven enforcement of the statute and uncertainty about governmental accountability for invasions of civil rights.

Confusion over the interpretation of section 1983 has been most apparent in the area of section 1983 municipal liability. The Court has gone from holding that section 1983 "persons" do not include municipalities to holding the exact opposite. Although holding that section 1983 "persons" do include municipalities, the Court rejected a respondeat superior *theory of causation and held that municipalities could be liable only if the deprivation of constitutional rights was caused by a municipal employee carrying out a governmental policy or custom.*

In this Article Professor Mead traces the confusing history of municipal liability under section 1983, including the Supreme Court's rejection of respondeat superior. *Professor Mead argues that the Court's rejection of* respondeat superior *in favor of a policy or custom causation requirement has erected a significant barrier to section 1983 municipal liability. She suggests that the Supreme Court's acceptance of* respondeat superior *would more fully carry out the broad vision of civil rights protection envisioned by the forty-second Congress. Professor Mead argues that, at the very least, the Court should not interpret the policy or custom causation requirement in a way that would undermine the broad remedial purpose of section 1983.*

I. INTRODUCTION

The ratification of the thirteenth, fourteenth, and fifteenth amendments[1] to

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1. The amendments read, in relevant part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 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,

the United States Constitution in the aftermath of the Civil War[2] revealed a national vision that the Constitution guarantee the personal liberties of all citizens. In the Civil Rights Act of 1871[3] the forty-second Congress of the United States created the tools necessary to transform that vision into a concrete embodiment of civil rights protection. Section 1 of the Act, now codified at United States Code Title 42, section 1983, provides federal remedies of tremendous scope, granting equitable and monetary relief against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution . . . ."[4] The particular focus of section 1 was the abuse, especially against blacks, perpetrated by state government representatives under discriminatory laws extant in many southern states[5] and the failure of southern law officials to enforce existing laws against the Ku Klux Klan.[6] An examination of the extensive debates at the time of section 1's enactment, however, indicates that Congress intended it to reach beyond the immediate crisis situation in the South and to extend its broad remedies to all persons

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without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

2. The thirteenth amendment abolishing slavery was ratified in 1865. The fourteenth and fifteenth amendments were ratified in 1868 and 1870 respectively.

3. ch. 22, 17 Stat. 13 (1871).

4. *Id.* at 13 (codified as amended at 42 U.S.C. § 1983 (1982)).

5. After the Civil War, southern states passed "Black Codes" limiting the rights of freedom. *See* P. PALUDAN, A COVENANT WITH DEATH 51, 215 (1975). *But see* Monroe v. Pape, 365 U.S. 167, 173 (1961) (Justice Douglas noting that although § 1983 might override discriminatory state laws, at least one opponent of § 1983 considered that purpose to be irrelevant because no such laws existed), *overruled in part*, Monell v. Department of Social Services, 436 U.S. 658 (1978).

6. Established in 1866 in Tennessee by former members of the Confederate Army, the Ku Klux Klan became a terrifying source of organized violence in the post-bellum South. Often acting with the support of—or in spite of—local governments, the Klan gained tremendous power. Although it focused its violence primarily on blacks to prevent them from gaining political or economic equality, it also visited its unspeakable atrocities on whites whose sympathies were with the North. In response to the growing violence, President Grant sent this message to Congress:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871) [hereinafter GLOBE].

The legislation was introduced "[t]o enforce the provisions of the fourteenth amendment to the Constitution of the United States." GLOBE, *supra*, at XXIII (H.R. 320, 42d Cong., 1st Sess. (1871)). It was hotly debated in both House and Senate but ultimately was enacted. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1982)).

For information on the Ku Klux Klan era and the events leading to passage of the Civil Rights Act of 1871, see C. BOWERS, THE TRAGIC ERA—THE REVOLUTION AFTER LINCOLN 306-12 (1929); M. COULTER, THE SOUTH DURING RECONSTRUCTION 165-71 (1947); J. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 682-84 (2d ed. 1961).

deprived of federally protected rights under color of state law.[7]

Despite Congress' expansive intent and the breadth of the language used in section 1983, the section has had a history of uneven enforcement. Since the enactment of section 1983, the United States Supreme Court has demonstrated an irresolute attitude toward the section and its remedies. This attitude has resulted in the emergence of a blurred picture of governmental accountability for invasions of civil rights. In fact, nearly a century passed before the Court began to approach section 1983 in a way that revealed the breadth of protection Congress had intended.[8] However, despite the monumental decision of *Monroe v. Pape*,[9] which made section 1983 remedies widely available against individual government actors, confusion and inconsistency has continued to mark the Court's treatment of the statute. This confusion appears in both the methods used and the results reached in cases construing the statute. The Court consistently has glossed trends toward expansive interpretations resulting in enlargement of section 1983 protection[10] with restrictive readings that narrow its scope.[11] In addition, the rationales offered to justify the results reached often

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7. Representative Shellabarger of Ohio, who introduced the Act in Congress, explained that § 1 (now § 1983)

> not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

GLOBE, *supra* note 6, app. at 68.

8. The Reconstruction era marked a shift from the antebellum focus on state autonomy to an emphasis on nationalism. However, courts remained hesitant to expand the powers of the federal government. Reconstruction legislation therefore was approached cautiously. Thus, despite the breadth of the language used in § 1 of the Civil Rights Act of 1871, early interpretations narrowed its scope. For example, the Supreme Court determined early that unauthorized conduct of state officers was not "state action." *See, e.g.*, Barney v. City of New York, 193 U.S. 430, 438-41 (1904). In addition, in the *Slaughter-House Cases* the Supreme Court interpreted the "rights, privileges and immunities" clause in the fourteenth amendment to include only rights correlative to the existence of national government. *See* Butchers' Benevolent Ass'n v. Crescent City Live-Stock Landing and Slaughter-House Co., 83 U.S. (16 Wall.) 36 (1873). This holding effectively eliminated most civil rights from the purview of the fourteenth amendment. Because the Civil Rights Act of 1871 was created to enforce the provisions of the fourteenth amendment, this conclusion severely limited the Act's reach. For discussions of the early case law interpreting the Act, see Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Note, *Section 1983 And Federalism*, 90 HARV. L. REV. 1133, 1156-59 (1977).

9. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Services, 436 U.S. 658 (1978).

10. The prime example is, of course, *Monroe*, in which the Court reinvigorated the statute by concluding that abusive behavior of government officers is still under color of state law. *See infra* notes 33-41 and accompanying text. Other examples include the municipal immunity holding in Monell v. Department of Social Services, 436 U.S. 658 (1978), discussed *infra* notes 79-98 and accompanying text; the immunity holding in Owen v. City of Independence, 445 U.S. 622, 657 (1980), discussed *infra* notes 197-229 and accompanying text; the interpretation of the phrase "and laws" and construction of the Civil Rights Attorneys Fees Awards Act of 1976 in Maine v. Thiboutot, 448 U.S. 1, 11 (1980); and the interpretation of "official policy" in Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1298 (1986), discussed *infra* notes 285-308 and accompanying text.

11. Examples of the Court's restrictive approach to § 1983 include its municipal liability holding in *Monroe*, 365 U.S. at 191-92, discussed *infra* notes 42-78 and accompanying text; its conclusion that municipalities cannot be liable based on *respondeat superior*, *Monell*, 436 U.S. at 694, discussed *infra* notes 94-98 and accompanying text; its limitations on damages, *see* Carey v. Piphus, 435 U.S. 247 (1978); Pierson v. Ray, 386 U.S. 547 (1967); its conclusion that municipalities are immune from the payment of punitive damages, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), discussed *infra* notes 231-46 and accompanying text; and its limitations on what kinds of interests

have varied unpredictably. The Court generally has treated section 1983 cases as problems of statutory construction,[12] but the techniques for determining the section's content have been far from consistent. For example, the Court sometimes has looked to the legislative history of the Civil Rights Act, the language of the statute, and the background of tort liability; at other times the Court has fallen back on statements of policy.[13] The Court in some cases has focused on a single consideration;[14] in others it has relied on more than one consideration in diverse combinations.[15] The use of these various decisionmaking criteria has created random blots on the canvas of constitutional tort liability. No recurring pattern or overall design is discernible. Thus, it is difficult to predict the Court's probable approach to a section 1983 issue.

In large part, this use of different criteria in approaching section 1983 cases has been the result of a deep disagreement among members of the Court about the proper approach to and the scope of the statute.[16] It is a rare section 1983 case that does not contain multiple opinions.[17] The Court's expansive attitude toward the statute that facilitated the Civil Rights movement in the 1960s has given way to a far more restrictive approach to the protection of civil liberties in the 1970s.[18] Clearly, the change in the membership of the Supreme Court partly accounts for this restrictive trend.[19] In addition, courts and commentators have

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are constitutionally protected, *see* Daniels v. Williams 106 S. Ct. 662 (1986); Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part*, Daniels v. Williams, 106 S. Ct. 662 (1986); Estelle v. Gamble, 429 U.S. 97 (1976); Paul v. Davis, 424 U.S. 693 (1976).

12. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Owen v. City of Independence, 445 U.S. 622 (1980); Carey v. Piphus, 435 U.S. 247 (1978); Pierson v. Ray, 386 U.S 547 (1967); *Monroe*, 365 U.S. 167.

13. A discussion of how to determine legislative intent properly is well beyond the scope of this Article. Schools of thought differ on the relevancy of legislative history in determining legislative intent and whether or when a court should resort to factors outside the statutory language itself. This Article focuses on the Court's various approaches to determining legislative intent primarily to illustrate the confusion this inconsistency can cause. For a general discussion of statutory interpretation, see C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION (4th ed. 1985).

14. *See, e.g.*, *Monroe*, 365 U.S. 167 (focus only on legislative history).

15. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980) (focus on legislative history, background of tort law, and policy); Monell v. Department of Social Services, 436 U.S. 658 (1978) (focus on legislative history and statutory language).

16. Currently the chief opponents on § 1983 issues are Chief Justice Rehnquist, who often speaks for the majority in cases restricting the statute, *see, e.g.*, Daniels v. Williams, 106 S. Ct. 662 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985); Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part*, Daniels v. Williams, 106 S. Ct. 667 (1986), and Justice Brennan, who frequently speaks for the majority in cases expanding the scope of the statute, *see, e.g.*, Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986); Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Services, 436 U.S. 658 (1978).

17. *See* Aldinger v. Howard, 427 U.S. 1, 19 (1976) (Brennan, J., joined by Marshall, and Blackmun, J.J., in dissent); Moor v. County of Alameda, 411 U.S. 693, 722 (1973) (Douglas, J., dissenting); Adickes v. Kress & Co., 398 U.S. 144, 175, 178, 188 (1970) (Black, J., concurring; Douglas, J., dissenting in part; Brennan, J., concurring in part and dissenting in part); McNeese v. Board of Educ., 373 U.S. 668, 676 (1963) (Harlan, J., dissenting).

18. For discussions of the contrast, see Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977); Neuborne, *The Procedural Assault on the Warren Legacy: A Study of Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977).

19. The activism of the Warren Court has given way to a far more restrictive approach. The Nixon and Reagan appointees have demonstrated a strong desire to reverse the trend established in

voiced concern over the direction of section 1983 litigation.[20] Since the Court's decision in *Monroe*, the number of section 1983 cases has increased dramatically.[21] Courts and scholars alike have perceived that the federal courts are overwhelmed by section 1983 cases, many of which trivialize the concept of constitutional protection that the statute provides.[22] Furthermore, the proliferation of cases has brought to a head the already existing fear that the section 1983 action has a negative impact on federalism.[23] Despite these concerns there is still strong sentiment among some members of the Court that section 1983 should be construed to provide the broad scope of protection Congress intended.[24] Unfortunately, the natural result of the tension on the Court with respect to section 1983 has been to create an indistinct image of the section 1983 action.

Nowhere has the Supreme Court's persistent inability to present a clear picture of the section 1983 action appeared more starkly than on the issue of section 1983 municipal liability. The Court has done a complete about-face on the question whether municipalities can be sued under section 1983. In the landmark *Monroe* decision the Court concluded that Congress did not intend municipalities to be section 1983 "person[s]."[25] However, the Court overruled

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the Warren era of using the federal courts to protect federal rights. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 375, 376 (1976) (Burger, C.J., dissenting, and Powell, J., dissenting).

20. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 544 (1981), *overruled in part*, Daniels v. Williams, 106 S. Ct. 662 (1986); Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 574-82; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections* (pt. 1), 60 VA. L. REV. 1 (1974); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978); Shapo, *supra* note 8; Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

21. In Patsy v. Board of Regents, 457 U.S. 496 (1982), Justice Powell noted in his dissent the significant increase in § 1983 suits brought by state prisoners. *Id.* at 534 (Powell, J., dissenting). In 1961, the year *Monroe* was decided, only 270 civil rights cases were filed in federal district courts. *Id.* at 533 (Powell, J., dissenting). In 1981 over 30,000 civil rights cases were filed. *Id.*

22. Cases causing the greatest concern have been the prisoner property deprivation cases that have proliferated in the past two decades. Cases have been filed in federal court claiming constitutional injury for a lost hobby kit worth $22.50, Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part*, Daniels v. Williams, 106 S. Ct. 662 (1986); confiscated cigarettes, Weddle v. Director, Patuxent Inst., 436 F.2d 342 (4th Cir. 1970); and for confiscated tennis shoes, Almond v. Kent, 321 F. Supp. 1225 (W.D. Va. 1970). For a discussion of prisoner property deprivation and § 1983, see Note, *Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment*, 52 IND. L.J. 257 (1976). These cases do indeed seem trivial when compared to the civil rights cases of the 1960s in which § 1983 was used in the fight for racial equality. *See* Pierson v. Ray, 386 U.S. 547 (1967).

23. Federalism has been described as

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971). That the balance between the power of the states and the power of the federal government might be upset by § 1983 has been a matter of legitimate concern. *See* Patsy v. Board of Regents, 457 U.S. 496, 535-36 (1982) (Powell, J., dissenting); *Monroe*, 365 U.S. at 237-40 (Frankfurter, J., dissenting); Aldisert, *supra* note 20, at 562-63; McCormack, *supra* note 20, at 1 *passim*.

24. *See, e.g.*, City of Oklahoma City v. Tuttle, 471 U.S. 808, 834-44 (1985) (Stevens, J., dissenting) (if doctrine of *respondeat superior* would impose liability on a city in a normal tort action for police misconduct, the doctrine should apply in a § 1983 case).

25. *Monroe*, 365 U.S. at 191.

the *Monroe* municipal liability holding in *Monell v. Department of Social Services*[26] and found that Congress had intended municipalities to be "person[s]" within the meaning of section 1983.[27] Having determined that municipalities could be sued under section 1983, the Court had to decide how to impose liability on a party that was not the one whose acts brought about the constitutional deprivation.[28] In *Monell* the majority concluded that municipalities may not be held liable for the torts of their employees based on *respondeat superior*.[29] Rather, municipalities may be held liable only "when execution of a government's policy or custom . . . inflicts the injury."[30] Although the majority in *Monell* purported "only to sketch . . . the section 1983 cause of action against a local government" and specifically left further refinements of the action "to another day,"[31] its gratuitous introduction of the "policy or custom" causation requirement[32] created an error in perspective. This perspective, in turn, has set up a significant barrier to the development of a clear understanding of section 1983 municipal liability. The Court's recent attempts to give substance to the *Monell* section 1983 municipal liability sketch amply illustrate that the distortion produced by the policy or custom causation requirement, together with the mixed criteria used in section 1983 cases, have resulted in a picture of section 1983 municipal liability so blurred that the lower courts will continue to be confused and confounded.

This Article examines the section 1983 municipal liability "sketch" drawn in *Monell* and the recent additions the Court has made to it to demonstrate the difficulties created by the Court's rejection of *respondeat superior* in favor of the policy or custom causation requirement. Part II examines the background of section 1983 municipal liability from the Supreme Court's rejection of it in *Monroe* to its reconsideration of that issue in *Monell*. In addition, part II focuses on the Court's interpretation of the legislative history in *Monroe* to reject section 1983 municipal liability, its reinterpretation of that same history in *Monell*, and its use of the history to conclude that municipal liability cannot be based on a theory of *respondeat superior*. Part III examines the rejection of *respondeat superior* and concludes that the Court erred in rejecting that concept in

26. 436 U.S. 658 (1978).

27. *Id.* at 688-89.

28. Although the Court had not dealt with a § 1983 municipal defendant before *Monell*, it had considered the problem of third party liability in a § 1983 context. In Rizzo v. Goode, 423 U.S. 362 (1976), the Court considered the liability of supervisory personnel for the constitutional violations of frontline employees. In *Rizzo* the Court held that equitable relief could not be granted against supervisory personnel if no affirmative link existed between any plan or policy of defendants and the occurrences of police misconduct. *Id.* at 371. The Court found the only causal connection between defendants and the injury was the absence of a change in police procedure that led to the continuation of the claimed lack of training and supervision. *Id.*

29. *Monell*, 436 U.S. at 691.

30. *Id.* at 694.

31. *Id.* at 695.

32. *Monell* involved a formal municipal policy that the Court found clearly unconstitutional. *Id.* at 694-95. There was no unconstitutional behavior of a municipal employee alleged that might have raised the issue of the basis of municipal liability. Therefore, the Court's conclusion that Congress did not intend municipalities to be liable based on *respondeat superior* was not essential to the holding and was dictum. *See id.* at 714 (Stevens, J., concurring in part).

favor of the policy or custom causation requirement. Part IV analyzes the Supreme Court's recent attempts to clarify the picture of municipal liability sketched in *Monell*. In particular, part IV looks to the Court's approach to municipal immunity. Part IV also examines the requirement that a party must establish that a governmental policy or custom has inflicted a section 1983 harm and concludes that lower federal courts and the Supreme Court itself have misunderstood this requirement. The Article concludes that the Court's erroneous decision in *Monell* to exclude *respondeat superior* as a basis for imposing liability on municipalities distorted the picture of section 1983 municipal liability. This distortion in perspective also may threaten the overall section 1983 picture. This Article suggests that the Court should reconsider its rejection of *respondeat superior*. At the very least, the Court should take great care that the policy or custom requirement not be interpreted in a way that subverts the expansive intent of Congress to provide remedies of great scope in section 1983 for the protection of personal freedom.

II. SECTION 1983 MUNICIPAL LIABILITY FROM *MONROE* TO *MONELL*—A DISTORTED SKETCH ON A BLANK CANVAS

A. Monroe v. Pape—*A Misinterpretation of Congressional Intent*

The starting point for any discussion of section 1983 municipal liability must be the Supreme Court's decision to reject such liability in *Monroe v. Pape*.[33] Plaintiffs in *Monroe*, members of a black family, were victimized by Chicago police officers who broke into their home without a warrant in the middle of the night, made them stand naked while their house was searched, and took the father to the police station where he was held incommunicado for many hours. Plaintiffs sued the city of Chicago and the police officers involved claiming violations of their constitutional rights.[34] The case presented the Court with an opportunity to settle several recurring questions that long had impeded the application of section 1983. After extensive investigation of the statute's legislative history, the Court held that actions taken by government officials in excess of their authority still are taken under color of state law[35] and that the federal remedy provided by section 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[36] Furthermore, the Court addressed the state of mind issue and set the stage for its ultimate conclusion that a section 1983 prima facie case requires only a showing that action taken under color of state law caused a constitutional violation.[37]

33. *Monroe*, 365 U.S. at 191-92.

34. *Id.* at 169.

35. *Id.* at 184, 187.

36. *Id.* at 183.

37. *Id.* at 187. In Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part*, Daniels v. Williams, 106 S. Ct. 662 (1986), the Court addressed whether mere negligence would support a claim for relief under § 1983. It stated unequivocally that the two elements of a § 1983 claim are: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.* at 535. Thus, the action contains no state of mind or culpability

Finally, the Court instructed that section 1983 should "be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[38] Although this admonition has been the subject of much debate,[39] it is a directive that has helped establish the concept of "constitutional tort"[40] and has guided the Court on many occasions in interpreting section 1983.[41] By settling these major issues the Court made great strides toward realizing the statute's tremendous potential for providing redress to persons deprived of individual liberties at the hands of government officials.

Unfortunately, despite the steps the Court took in *Monroe* to restore to its intended brilliance the Congressional vision of protecting civil liberties and individual rights, the Court seriously impaired the full development of the section 1983 picture by rejecting a remedy against municipalities for invasions of civil rights.[42] The *Monroe* Court found that Congress' rejection of the Sherman Amendment[43] indicated Congressional intent to exclude municipalities from the meaning of "person" as used in section 1983.[44] The Sherman Amendment would have imposed municipal liability for acts of violence perpetrated within the municipality by citizens "riotously and tumultuously assembled together."[45] Looking to the Congressional debates accompanying consideration of the Civil Rights Act of 1871, the Court noted that one reason advanced against the adoption of the Sherman Amendment was doubt about the constitutional power of

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requirement. The Court reiterated this position in Daniels v. Williams, 106 S. Ct. 662, 664 (1986) (holding, however, that due process is not violated by a negligent act causing injury). For discussions of the state of mind requirement in § 1983, see Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 U. CIN. L. REV. 45 (1977); Mead, *Evolution of the "Species of Tort Liability" Created by 42 USC § 1983: Can Constitutional Tort Be Saved From Extinction?*, 55 FORDHAM L. REV. 301 (1986); Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1 (1982); Comment, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870 (1973); Note, *supra* note 8, at 1204-07 (1977); Note, *Basis of Liability in a Section 1983 Suit: When is the State-of-Mind Analysis Relevant?*, 57 IND. L.J. 459 (1982); Note, *A Theory of Negligence for Constitutional Torts*, 92 YALE L.J. 683 (1983).

38. *Monroe*, 365 U.S. at 187.

39. *See, e.g.*, Kirkpatrick, *supra* note 37, at 45 *passim*; Nahmod, *supra* note 20, at 5 *passim*.

40. "Constitutional tort" has become the descriptive term used to characterize the kind of conduct that gives rise to liability under § 1983. It was coined by Professor Marshall Shapo in his article, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*. *See* Shapo, *supra* note 8, at 323-24.

41. It is not clear what circumstances in a § 1983 case prompt the Supreme Court to look to the background of tort liability. However, it appears the Court is especially apt to look to the background of tort liability when it finds no guidance in the statute itself. For example, the Court has examined existing tort principles in the area of immunities. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 638 (1980) (no tradition of immunity for municipal corporations); Scheuer v. Rhodes, 416 U.S. 232, 242 (1974) (the concept of qualified immunity for government officials assumes officials may err, but it is better to risk some error than not to act at all); Pierson v. Ray, 386 U.S. 547, 554 (1967) (common-law immunity of judges allows for decisions based on reasoning rather than fear of charged corruptions). The Court also has looked to the background of tort law to determine whether municipalities should be immune from punitive damages. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

42. *Monroe*, 365 U.S. at 187. The plaintiffs in *Monroe* had sued not only the individual police officers responsible for the atrocities, but also the city of Chicago.

43. *See infra* note 53.

44. *Monroe*, 365 U.S. at 191.

45. GLOBE, *supra* note 6, at 663.

Congress to impose civil liability on municipal corporations.[46] From the negative reactions to municipal liability expressed in these debates, the Court inferred that Congress could not have intended the word "person" in section 1983 to include municipalities. The Court's conclusion was unaffected by the fact Congress, only months before passage of the Civil Rights legislation, had passed a set of definitions to aid statutory construction which stated that the word person "may extend . . . to bodies politic and corporate."[47] The Court justified its exclusion of municipalities from the meaning of "person" by noting that "this definition is merely an allowable, not a mandatory one"[48] and that the rejection of the Sherman Amendment indicated such an antagonistic view of municipal liability in this context that Congress could not have intended the word "person" to include municipalities.[49]

Although certain aspects of the *Monroe* decision were praised as advancing the cause of personal liberty,[50] the rejection of municipal liability was soundly criticized.[51] Scholars argued that the Court's reliance on legislative history was misplaced.[52] The Sherman Amendment would have imposed municipal liability for acts of ordinary citizens against other citizens.[53] Thus, it was not directed to the problem of abuse of governmental power addressed in section 1983. Rather,

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46. *Monroe*, 365 U.S. at 190.

47. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (repealed 1939). This Act was titled "An Act Prescribing the Form of the Enacting and Resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof." *Id.* at 431.

48. *Monroe*, 365 U.S. at 191.

49. *Id.*

50. *See, e.g.*, Shapo, *supra* note 8, at 294-96; Whitman, *supra* note 20, at 12-14.

51. *See, e.g.*, Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U.L. REV. 770 (1975); Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1203-09 (1971); *see also* Comment, *Municipal Liability for Constitutional Violations: Can You Fight City Hall? A Survey of the Circuits*, 16 DUQ. L. REV. 373, 374 (1977-78) (noting such criticism).

52. *See, e.g.*, Kates & Kouba, *supra* note 51, at 132-36; Comment, *supra* note 51, at 374; Note, *supra* note 51, at 1205-07.

53. The original version of 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 interests, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

GLOBE, *supra* note 6, at 663. Thus, the amendment would have imposed liability on the individual

the Sherman Amendment was aimed toward preventing and compensating citizens for damage caused by riots. The House debates so important to the *Monroe* Court's municipal liability holding questioned Congress' power to impose vicarious liability on cities for acts of private citizens over whom the cities had no control. During the extensive debates the House did not consider the issue of municipal liability under section 1983 or the meaning of the word "person" in section 1983. Furthermore, the same Congress that passed the Civil Rights Act also had recently defined the word "person" so that it could include "bodies politic and corporate,"[54] tending toward a conclusion that this Congress intended municipalities to be liable under section 1983.[55]

In rejecting municipal liability, the *Monroe* Court failed to heed its own admonition that section 1983 "should be read against the background of tort liability."[56] Examined in the context of common-law tort liability, municipal liability should be an integral part of the complete section 1983 picture. Although it is unclear what the Court intended the phrase "background of tort liability" to include,[57] the Court has interpreted this phrase as applying common-law principles in existence at the time of the Act's passage,[58] as well as current approaches to tort law.[59] Municipal tort liability was not an unknown

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citizens of a county, city, or parish for constitutional deprivations that occurred within its borders. It was passed by the Senate, but rejected in the House. *Id.* at 704-05, 725, 749, 800-01.

The amendment then was referred to a conference committee, which modified it to provide:

> 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.

Id. at 749. The second version thus differed significantly from the first. It placed liability directly on the municipality rather than on the citizens of the municipality. The municipality's liability was limited, however, to the amount that could not be satisfied by those actually responsible for the deprivation. It too was ultimately rejected. *Id.* at 800-01. *But see* Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1527-31 (arguing that Sherman Amendment debates reveal that Congress wanted to impose liability on a city only for the "city's" torts, not for those of its employees).

54. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (repealed 1939).

55. This conclusion would not necessarily clash with the interpretation of the Act in *Monroe*. Justice Douglas in *Monroe* simply concluded that the definition in the Dictionary Act was "merely an allowable, not a mandatory one." *Monroe*, 365 U.S. at 191.

56. *Id.* at 187.

57. *See generally* Nahmod, *supra* note 20 (discussing the different goals and considerations involved in tort and § 1983 actions).

58. *See supra* note 41 and cases cited therein.

59. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court specifically noted the change in recent tort law from a focus on fault to a focus on accident reduction and loss spreading. The Court cited this change as a justification for denying qualified immunities to municipalities. *Id.* at 652-53.

concept at the time the Act became law.[60] In fact, most jurisdictions held municipalities liable for torts committed by their employees on a theory of *respondeat superior*.[61] Certainly, the lawmakers of the forty-second Congress, well versed in the law of their time, must have been aware of this fact.[62] Furthermore, municipal tort liability has survived and was therefore alive and well at the time the Supreme Court decided *Monroe*.[63]

Although the *Monroe* Court expressly declined to consider policy issues in reaching its conclusion on municipal liability,[64] the case nevertheless gave mixed policy messages. On the one hand, in determining Congressional intent, the *Monroe* Court greatly expanded the scope of section 1983 by defining the "under color of state law" language to include abuses of authority, by clarifying the state of mind issue, and by making clear that the federal remedy provided in section 1983 is supplemental to any other right of action.[65] At the same time, however, *Monroe* provided an ineffective method of enforcement. Without municipal liability, the section 1983 remedies, though expansive in theory, are often grossly inadequate in practice. The individual actually responsible for the civil rights violation may be difficult to identify, may be judgment proof, or may be entitled to assert a qualified or absolute immunity.[66] Preclusion of the employ-

60. Ample authority exists to support a conclusion that municipal liability was a well-accepted concept in most American jurisdictions in the nineteenth century. *See* Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 939-40 (1979); *see also* City of Oklahoma City v. Tuttle, 471 U.S. 808, 835-38 & 835 n.6 (1985) (Stevens, J., dissenting) (citing 1 W. BLACKSTONE COMMENTARIES 429-30) (doctrine of *respondeat superior* had been applied to municipal corporations at the time § 1983 was enacted); Hooe v. Alexandria, 12 F. Cas. 461 (C.C.D.C. 1802) (No. 6,667) (corporation of Alexandria answerable for conduct of street commissioners); Tallahassee v. Fortune, 3 Fla. 19 (1850) (city liable for special damages in trespass action); Wallace v. City of Muscatine, 4 Greene 373 (Iowa 1854) (defendant city not exempt from liability for negligent construction of drainage system); Hutson v. Mayor of New York, 9 N.Y. 163 (1853) (city has duty to maintain roadways and is liable for negligence resulting in personal injury). *But see Tuttle*, 471 U.S. at 818 n.5 (complicated municipal tort immunities existed at the time).

61. *See* J. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 722, at 730-31 (1872); *see, e.g.*, Allen v. City of Decatur, 23 Ill. 272, 275 (1860) (city found liable for actions of city supervisor who trespassed on plaintiff's land to construct roadway pursuant to an ordinance); Johnson v. Municipality No. One, 5 La. Ann. 100 (1850) (municipality held liable for damages to slave owner when jail keeper's lack of due care resulted in death of slave); Thayer v. City of Boston, 36 Mass. (19 Pick.) 511, 516-17 (1837) (city liable for official's tortious destruction of public roadway when act was done under authority of the city corporation); *see also* City of Oklahoma v. Tuttle, 471 U.S. 808, 835-38 (Stevens, J., dissenting) (municipal liability based on *respondeat superior* was well-recognized when § 1983 enacted). *But see id.* at 818 n.5 (municipal liability was not that broad when § 1983 was enacted because "rather complicated municipal tort immunities" existed at the time).

62. In City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Court refined its directive from *Monroe* that § 1983 be read "against the background of tort liability." *Monroe*, 365 U.S. at 187. The Court in *Fact Concerts* stated that "[o]ne important assumption underlying the Court's decisions in this area is that members of the 42nd Congress were familiar with common-law principles . . . previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Id.* at 258.

63. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1051-55 (W. Keeton 5th ed. 1984) [hereinafter PROSSER & KEETON]. *But see* Shapo, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. MIAMI L. REV. 475, 478-79 (1963) (discussing general municipal immunity from liability for actions of police officers).

64. *Monroe*, 365 U.S. at 191.

65. *See supra* text accompanying notes 33-38.

66. The Supreme Court has recognized both qualified and absolute immunities from § 1983 liability on a number of occasions. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (recognizing absolute immunity of prosecuting attorney); Wood v. Strickland, 420 U.S. 308, 322 (1975)

ing municipality as a defendant in these situations defeats recovery altogether, and the great potential for deterrence of unconstitutional behavior and recompense for violations of civil rights is effectively frustrated. Furthermore, by rejecting municipal liability, the Court obliterated section 1983 remedies for the most dangerous threat to individual liberties—the potential for widespread institutional abuses of power.[67] The *Monroe* Court failed to recognize the need to focus responsibility for the unconstitutional conduct of those representing the municipality on the municipality itself.

The reinvigoration of section 1983 after *Monroe* caused a tremendous increase in litigation under the statute.[68] However, the restrictive interpretation of "person" as excluding municipalities so limited the potential for recovery that litigants sought ways to circumvent the *Monroe* holding. Despite the specificity of the language in *Monroe* denying municipal liability, consistent efforts were made to narrow the language's application. For example, questions arose regarding whether *Monroe* precluded section 1983 actions against municipal defendants who would not have been immune under state law[69] and whether *Monroe* applied to plaintiffs seeking equitable relief rather than damages.[70] For more than a decade after *Monroe*, the Court maintained a resolute silence on the issue of municipal liability, leaving lower courts and litigants to draw their own conclusions about the reach of the holding. In the face of this silence, efforts at avoiding the municipal liability holding went unimpeded. It seemed the Court had become content with allowing lower courts to draw on the blank canvas of municipal liability left after *Monroe*.

In 1973, however, the Court broke its silence. In *Moor v. County of Alameda*[71] and *City of Kenosha v. Bruno*[72] the Court rebuffed efforts to narrow the scope of the *Monroe* municipal liability holding. In *Moor* plaintiffs argued that the conduct of county law enforcement officers during a political demonstration was unconstitutional. The Court held that *Monroe* applied even though defend-

(recognizing qualified immunity of school boards); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (recognizing qualified executive immunity); Pierson v. Ray, 386 U.S. 547, 553-54, 557 (1967) (recognizing absolute judicial immunity and qualified immunity of police officers based on good faith); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (recognizing absolute legislative immunity).

67. *See* Whitman, *supra* note 20, at 33 n.144; *see also id.* at 49-50 (institutional responsibility for constitutional harm is a more pervasive problem than individual deprivations).

68. *See* sources cited *supra* note 20.

69. Some § 1983 plaintiffs argued that § 1983 provided an inadequate remedy because it denied recovery against municipal defendants. Thus, these plaintiffs could resort to state law under § 1988, which allows resort to state law if the laws of the United States do not provide a suitable remedy. *See* 42 U.S.C. § 1988 (1982). Under this theory, if the municipality was not immune under state law, the plaintiff should recover. *See, e.g.*, Carter v. Carlson, 447 F.2d 358, 369 (D.C. Cir. 1971); *see also* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 525 (1980) (Although federal courts generally look to state law when a gap exists in the federal law, § 1988 does not mandate that result.).

70. Plaintiffs attempting to limit *Monroe* in this way argued that plaintiffs in *Monroe* sought monetary damages and not equitable relief. They argued that the *Monroe* municipal liability holding should not extend to cases in which equitable relief was sought. *See, e.g.*, Garren v. City of Winston-Salem, 439 F.2d 140, 141 (4th Cir. 1971).

71. 411 U.S. 693 (1973).

72. 412 U.S. 507 (1973).

ants were not immune under state law.[73] In *Kenosha*, in which plaintiffs sought equitable relief against municipal enforcement of a licensing statute, the Court flatly stated that municipalities could not be defendants in a section 1983 suit regardless of what type of relief plaintiffs sought.[74]

Although the Court rejected efforts to limit the reach of the *Monroe* municipal liability holding and resisted the pressure to reconsider its conclusion on that issue, it created considerable confusion by deciding a number of cases that imposed liability on school boards[75] and on officials acting in their official capacities[76] that arguably were inconsistent with *Monroe*.[77] These cases against school boards as arms of local government and against officials acting in official capacities as representatives of local government were for all practical purposes suits against the municipality itself because judgments generally were paid with government funds or from government provided insurance.[78] Thus, the need for reconsideration of the section 1983 municipal liability issue became more and more apparent.

B. Monell v. Department of Social Services—*A Reinterpretation of Legislative History Creates A Distorted Sketch*

In *Monell v. Department of Social Services*,[79] less than two decades after the Supreme Court had determined in *Monroe* that municipalities were not "persons" within the meaning of section 1983, the Court reversed its position and decided that Congress had not intended municipalities to enjoy absolute immunity from section 1983 liability.[80] To reach this conclusion the Court engaged in a searching reexamination of the legislative history of the Civil Rights Act of 1871. Plaintiffs in *Monell* were pregnant employees compelled to take unpaid leaves of absence before the leaves were medically necessary pursuant to an official policy of the Department of Social Services and the New York City Board of

73. *Moor*, 411 U.S. at 710.

74. *Kenosha*, 412 U.S. at 513. However, the Court in *Kenosha* left open the possibility that plaintiffs might reach municipalities by suing municipal employees in their official capacities. *See id.* at 514.

75. *See* Milliken v. Bradley, 433 U.S. 267 (1977); Bradley v. Richmond School Bd., 416 U.S. 696 (1974); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

76. *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 341-50 (1976) (suit allowed against police chief acting in his official capacity); City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 284 n.1 (1976) (individual city council members acting in official capacity amenable to suit, but not city or city council).

77. For a pre-*Monell* discussion of inconsistencies raised by the *Kenosha* official capacity loophole, see Levin, *supra* note 53, at 1496-1504.

78. Although the type and adequacy of protection varies considerably, many jurisdictions have statutes providing protection to government officials sued in their official capacities. These statutes range from legal defense statutes providing attorneys with reimbursement for legal expenses and court costs, to statutes requiring local governments to provide insurance coverage or indemnification for officials sued in their official capacities. For a discussion of the various approaches, see Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1383-92 (1976).

79. 436 U.S. 658 (1978).

80. *See id.* at 690.

Education.[81] Plaintiffs sought equitable relief in the form of back pay. The district court denied relief because the awards would "in the last analysis, be paid by the City of New York,"[82] and the United States Court of Appeals for the Second Circuit affirmed.[83]

In overruling *Monroe* and concluding that Congress intended section 1983 "persons" to include municipalities, the Court undertook a "fresh analysis"[84] of the legislative history leading to passage of the Civil Rights Act. In particular, the Court focused on its prior interpretation of the House's rejection of the Sherman Amendment as an indication that Congress believed it had no power to impose civil liability on municipalities.[85] A reexamination of the debates convinced Justice Brennan, writing for a majority of seven, that Congress' concern had been with imposing on municipalities obligations to keep the peace that Congress had no constitutional power to impose,[86] rather than with its power to create civil remedies against municipalities.[87] In addition, the majority noted that the Sherman Amendment was intended neither to amend nor to address the same problem addressed by section 1 of the Act.[88] From its extensive reexamination of the debates on the Sherman Amendment, the Court concluded that nothing "would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment."[89]

The Court focused on the debates surrounding section 1 of the Act to discern what Congress intended to include in the language "any person." The Court noted Congress' intent to create a remedy of great scope for violations of civil rights under color of state law.[90] Therefore, it concluded "since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1."[91] As further support for its conclusion that municipalities are section 1983 "persons," the Court recognized that in 1871 corporations, including municipal corporations,

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81. *Id.* at 660-61.

82. *Monell*, 394 F. Supp. 853, 855 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 259 (2d Cir. 1976), *rev'd*, 436 U.S. 658 (1978).

83. *Monell*, 532 F.2d 259, 268 (2d Cir. 1976), *rev'd*, 436 U.S. 658 (1978).

84. *Monell*, 436 U.S. at 665.

85. *Id.* at 664.

86. *Id.* at 668.

87. *Id.* at 669.

88. *Id.* at 664.

89. *Id.* at 683.

90. The Court quoted Representative Shellabarger, who explained the function of the statute:

> [Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

Id. at 683 (quoting GLOBE, *supra* note 6, app. at 68).

In describing how the courts should interpret § 1, the Court noted that Shellabarger stated: " 'This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule on interpretation.' " *Id.* at 684 (quoting GLOBE, *supra* note 6, app. at 68).

91. *Id.* at 686.

were considered natural persons for legal purposes.[92] The Court had ignored this fact in its earlier decision in *Monroe*. Finally, the Court looked again to the 1871 statutory definition of "person" and this time concluded "[m]unicipal corporations in 1871 were included within the phrase 'bodies politic and corporate' and, accordingly, the 'plain meaning' of § 1 is that local government bodies were to be included within the ambit of the persons who could be sued under § 1 of the Civil Rights Act."[93]

The reinterpretation of "person" to include municipalities had the potential to expand greatly the section 1983 remedies, but the Court stopped short of realizing the full scope of municipal liability. Although the Court purported to create only a "sketchy" picture of section 1983 municipal liability, it went beyond what was necessary for its resolution of the problem presented in *Monell*[94] by commenting on the basis of municipal liability. The Court concluded that although Congress had intended municipalities to be considered section 1983 "persons," Congress had not intended municipalities to be held liable based on a theory of *respondeat superior* for civil rights violations committed by their employees.

The Court reasoned that municipalities incur liability under section 1983 only for injuries caused by "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[95] To support its conclusion, the Court looked first to the language of the statute itself. It inferred from Congress' use of the phrase "subject or cause to be subjected" an intent to impose liability on a municipality only for harms it has actually caused[96] and then concluded that a municipality inflicts harm only through its official policies or customs.[97]

The Court was not content with interpreting the words of the statute, however. It looked again to the legislative history and interpreted Congress' rejection of the Sherman Amendment as an indication that Congress intended to exclude *respondeat superior* as a basis of section 1983 municipal liability. The Court believed that imposing liability based on *respondeat superior* would run afoul of the Constitution by imposing on municipalities an obligation to keep the peace—the very problem Congress had addressed in choosing to defeat the Sherman Amendment.[98] By rejecting *respondeat superior*, the Court failed to render a complete and comprehensible sketch of municipal liability.

92. *Id.* at 687.
93. *Id.* at 689-90.
94. *See supra* note 32.
95. *Monell*, 436 U.S. at 694.
96. *Id.* at 692.
97. *Id.* at 694.
98. *Id.* at 693.

III. DISTORTION RESULTS FROM AN ERROR IN PERSPECTIVE

A. *Rejection of* Respondeat Superior—*A Second Misinterpretation of Congressional Intent*

Despite the Court's contrary conclusion in *Monell*, it can be argued that Congress intended to impose municipal liability based on *respondeat superior*. Thus, the Court's interpretation of both the language of the statute and its legislative history arguably was flawed.[99] Justice Brennan concluded that a municipality cannot be held liable "*solely* because it employs a tort feasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."[100] He decided that the language "shall subject or cause to be subjected" in the statute "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 tort feasor."[101] Justice Brennan also noted, "[T]he 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."[102] In the context of municipal liability, the proper question is how can A, the one who suffered a constitutional injury, establish that the injury was *caused* by B, the municipality. Justice Brennan concluded that such causation exists only if "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict[s] the injury."[103]

A construction of the causation language that rejects *respondeat superior* is erroneous for several reasons. First, the language "subject or cause to be subjected" suggests that Congress envisioned at least two scenarios. One situation would be a section 1983 "person" acting to subject another to a constitutional harm. In such a case the defendant actively causes the harm. The language "cause to be subjected," however, suggests a very different situation. The use of passive voice indicates that Congress also intended to impose liability for constitutional harm on those who have not themselves done the "subjecting," but rather are responsible for those who have.[104] In such cases the defendant need

99. *See, e.g.*, City of Oklahoma City v. Tuttle, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting); Levin, *supra* note 53, at 1519; Note, Monell v. Department of Social Services: *One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 HOFSTRA L. REV. 893, 894-95 (1979); Note, *supra* note 60, at 970. *But see* Nahmod, *supra* note 37, at 32 (government liability properly depends on unconstitutional conduct of local government itself).

100. *Monell*, 436 U.S. at 691.

101. *Id.* at 691-92.

102. *Id.* at 692.

103. *Id.* at 694.

104. In one sense, the word "subject" and the phrase "cause to be subjected" can be understood as having identical meanings. The latter phrase is simply a more ponderous expression of the first. That is, in the sense of bringing one under the influence or control of something, it is possible to subject one to something or cause one to be subjected to something, and the two expressions carry the same meaning. However, if "subject" and "cause to be subjected" are not merely redundant, ill-constructed phrases (something not to be presumed of Congress), the two elements must have some alternative meanings. That "subject" means directly affect and "cause to be subjected" means indirectly affect are the probable alternative meanings.

not have actively caused the harm to fall within the causation language. Thus, Congress took into account that responsibility for constitutional harm exists in the absence of actual participation in the events giving rise to the constitutional deprivation.[105]

Moreover, Justice Brennan's interpretation of the language ignored the fact that municipalities are legal entities that can act only through the conduct of employees or agents.[106] All municipal torts are caused by the conduct of municipal representatives[107] and *any* liability imposed on the municipal entity necessarily is vicarious. The Court's focus on governmental policy that causes constitutional harm is artificial, unfair, and illogical. The policy or custom requirement singles out a particular kind of conduct by a particular category of municipal employee. Under this approach municipalities must take responsibility for the acts of high level policy making employees for the creation of policy or custom that results in constitutional harm, but not for the acts of low level, frontline employees whose conduct in carrying out their responsibilities as municipal employees results in constitutional harm. This distinction does not comport with the sweeping impact Congress intended for section 1983. If Congress intended municipalities to be section 1983 "persons," it is unlikely that it intended them to be insulated from liability for the tortious acts of its employees or agents. These municipal employees or agents have day-to-day contact with the public. This contact exposes the public to a tremendous risk of invasions of civil rights.

In addition, Justice Brennan erroneously assumed that imposing liability based on *respondeat superior* and the statute's actual causation requirement are mutually exclusive.[108] Actual causation is an element that the plaintiff must prove in any tort case regardless of the legal theory of liability.[109] To recover in any case based on *respondeat superior*, the plaintiff must prove that a servant acting within the scope of employment caused the harm.[110] If a municipality can act *only* through the conduct of its agents, and if a municipality is a "person" for purposes of section 1983, then the municipality can "subject or cause to

105. *But see* Nahmod, *supra* note 37, at 17-22 (arguing that the § 1983 defendant's conduct must itself violate the fourteenth amendment and cause the plaintiff's constitutional deprivation).

106. This obvious fact has not gone unrecognized by courts. For example, the court in Adekalu v. New York City, 431 F. Supp. 812 (S.D.N.Y. 1977), noted that "*all* municipal actions are performed for the municipality by its human agents. . . . All municipal liability is, in a sense, 'vicarious . . . .'" *Id.* at 819. In a case involving the fourteenth amendment, the Supreme Court recognized: "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way." *Ex Parte* Virginia, 100 U.S. 339, 347 (1879); *see* Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 217 (1979).

107. This fact has been recognized by at least one member of the Supreme Court. Justice Stevens in his dissenting opinion in City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), noted, "It is now settled that the word 'person' encompasses municipal corporations, and, of course, it was true in 1871 as it is today, that corporate entities can only act through their human agents." *Id.* at 834-35 (Stevens, J., dissenting).

108. *See* Seavey, *Speculations as to "Respondeat Superior,"* in HARVARD LEGAL ESSAYS 433, 435-37 (1934).

109. 1 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS lvii-lviii (2d ed. 1986) [hereinafter HARPER, JAMES & GRAY]; PROSSER & KEETON, *supra* note 63, § 41, at 263.

110. 5 HARPER, JAMES, & GRAY, *supra* note 109, § 26.7, at 24; PROSSER & KEETON, *supra* note 63, § 69, at 500; RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

be subjected" another to constitutional harm only if its agent's conduct causes that harm. This proposition is true regardless of whether that representative is a high level policymaking employee or a low level employee.

Furthermore, to impose municipal liability based on *respondeat superior* is not to impose liability "*solely* because [the municipality] employs a tortfeasor."[111] The very existence of the employer-employee relationship gives rise to the risk section 1983 was created to address—that a constitutional violation will occur "under color of state law." Those who act within the scope of their employment for a municipality necessarily are acting "under color of state law." Municipal employees, especially law enforcement personnel, regularly engage in transactions having a high potential for constitutional harm.[112] They are entrusted with dangerous weapons; they often subject citizens to confinement; they make bodily contact with citizens; and they undertake searches of private property. Because of the employer's governmental status, such violations necessarily are under color of state law, even if in the particular situation the employee has exceeded or acted contrary to his or her authority.[113] When the particular risk created by the governmental employment situation arises, then the employing municipality is the effective cause of the harm and should take responsibility for it.[114] If the municipal employment situation creates a risk of constitutional injury and a municipal employee in fact causes constitutional harm, the municipality should be liable.[115]

The *respondeat superior* requirement that acts must be "in the scope of employment" to establish liability is analogous to the "under color of state law" requirement necessary to establish section 1983 liability. To hold employers lia-

111. *Monell*, 436 U.S. at 691.

112. Law enforcement personnel certainly are not the only municipal employees able to perpetrate constitutional violations on citizens. Those entrusted with the responsibility of implementing zoning or licensing ordinances are also in positions to enforce those ordinances in ways that result in deprivations of civil rights. *See, e.g.*, Bennett v. City of Slidell, 697 F.2d 657 (5th Cir. 1983), *aff'd in part and rev'd in part*, 728 F.2d 762 (5th Cir. 1984) (en banc), *reh'g denied*, 735 F.2d 861 (5th Cir. 1984) (per curiam) (en banc), *cert. denied*, 105 S. Ct. 3476 (1985); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982).

113. *Monroe*, 365 U.S. at 184.

114. Professor Seavey, in an essay on the subject of *respondeat superior*, stated:

> [A]s to the legalistic objection that a master is not in any sense a cause of the harm which results from conduct of a servant within the scope of the employment which the master neither commanded nor intended: It may be admitted that frequently he is no more a direct cause of the resulting harm than is a bailor or one employing an independent contractor; but it may be questioned whether such persons are not usually effective causes of the harm which results from the use of the things bailed or the work done by the contractor. If there is an absence of liability, it is because of the lack of elements other than causation . . . . [B]y entrusting an instrumentality to a servant who causes an injury by its use, a master has caused, in a reasonably direct sense, the resulting harm.

Seavey, *supra* note 108, at 435 (citations omitted).

115. One noted § 1983 scholar has cast this notion in terms of whether a fourteenth amendment duty exists. *See* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION §§ 3.13, 6.06 (1979); Nahmod, *supra* note 37, at 22-32. Professor Nahmod's position is that because the duty concept is so tied to the concept of negligence, a focus on duty tends to lead to the erroneous notion that fault is an element of a § 1983 action. A focus on responsibility for the creation of a risk, however, reduces the danger that extraneous fault considerations will be injected. *See infra* notes 264-81 and accompanying text; *see also* Mead, *supra* note 37, at 360 (risk analysis approach suggested as a way to avoid focus on fault).

ble under a *respondeat superior* theory for the tortious conduct of their employees, the employees must have acted within the scope of their employment.[116] Although interpretations of the "scope of employment" concept vary,[117] this concept does include conduct not actually authorized by the employer, or even conduct forbidden by the employer.[118] The Supreme Court's interpretation of the meaning of "under color of state law" in *Monroe* to include unauthorized conduct of government employees is strikingly similar.[119] Thus, if action taken by a municipal employee resulting in constitutional harm fulfills the "under color of state law" requirement, it almost certainly would be within the "scope of employment." The compatibility of these two concepts makes the application of *respondeat superior* especially appropriate for section 1983 municipal liability.

To justify his interpretation of the statutory causation language, Justice Brennan looked again to the legislative history of the Civil Rights Act. He noted that when Congress rejected the Sherman Amendment it rejected "the only form of vicarious liability presented to it."[120] Justice Brennan recognized that this rejection did not "conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees."[121] However, he inferred from Congress' rejection of the Sherman Amendment and the absence of language in section 1983 creating liability based on *respondeat superior* "that Congress did not intend to impose such liability."[122]

Justice Brennan's analysis is faulty. To infer from Congress' rejection of the vicarious liability in the Sherman Amendment an intent to reject *respondeat superior* in section 1983 overlooks the very distinction between the Sherman Amendment and section 1983 that the Court had specifically recognized in the

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116. 5 HARPER, JAMES, & GRAY, *supra* note 109, § 26.7, at 24; PROSSER & KEETON, *supra* note 63, § 69, at 500; RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

117. At one time it was reasonably well-settled that servants acted within the scope of their employment only if they acted with a purpose to serve the master. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958). Under this approach unauthorized activities of employees would not fall within the scope of employment. Masters escaped liability for such things as injuries caused by intentional tort or during a "frolic" or "detour." The motive test has largely given way to a focus on the responsibility an enterprise should take for injuries that "may fairly be said to be characteristic of its activities." Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968).

For early recognition of this "enterprise liability" approach, see 5 HARPER, JAMES & GRAY, *supra* note 109, § 26.5, at 19-20; PROSSER & KEETON, *supra* note 63, § 70, at 502-07; Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 112-13 (1916); Smith, *Frolic and Detour*, 23 COLUM. L. REV. 716, 718 (1923).

118. *See, e.g.*, Wood v. Central Arkansas Milk Producers Ass'n, 233 Ark. 958, 959, 349 S.W.2d 811, 812 (1961) (Defendant's employee caused injury in a truck he was forbidden to use, and the court held that "[w]hen an employee is acting in furtherance of his employer's business the latter is liable for the employee's negligence although the particular act is unauthorized or even contrary to express instructions."); Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 623, 124 Cal. Rptr. 143, 151 (1975) (When plaintiff was assaulted by defendant's employee, the court held that "[i]t was manifestly an outgrowth of the employment relationship and a risk which may fairly be considered as typical of, or incidental to, the employment.").

119. This interpretation is not at odds with the *Monroe* municipal liability holding. The reason the *Monroe* Court denied municipal liability was its conclusion that Congress did not intend to include municipalities within the meaning of "person" as used in the statute. *See supra* notes 42-78 and accompanying text.

120. *Monell*, 436 U.S. at 692-93 n.57.

121. *Id.*

122. *Id.*

first part of its opinion.[123] The vicarious liability proposed in the Sherman Amendment would have made municipalities liable for actions of *private citizens* over which the municipality had no control.[124] Section 1983, however, was aimed at unconstitutional activity under color of state law. The very fact of the employment relationship between the tortfeasor and the governmental body was the focus of section 1983. Thus, it is unlikely that Congress' rejection of a broad form of vicarious liability was also a rejection of *respondeat superior*, which is a narrow type of vicarious liability for tortious acts of employees.[125] Moreover, although justifications for imposing *respondeat superior* have varied over the years,[126] limitations on the doctrine always have existed.[127] Thus, rejection of one type of vicarious liability does not justify an inference that Congress intended to reject all forms of vicarious liability. The purpose of section 1983 and the broad scope of its protection indicate that Congress expected municipalities to be liable based on *respondeat superior*. Another criticism of the *Monell* Court's use of legislative history is that the Court selectively read the debates that make up much of the legislative history of section 1983. For instance, the Court failed to take into account the references in the debates to the intended scope of section 1983. Although section 1 of the Act was not the subject of much discussion in the forty-second Congress, portions of the debates show that Congress intended the statute to be broadly remedial and construed liberally.[128] By rejecting *respondeat superior* in favor of the policy or custom requirement, however, the Court greatly limited, and in some cases completely eliminated, the availability of section 1983 remedies. Thus, the restrictions on recovery imposed

123. *See id.* at 664.

124. *See supra* note 53.

125. *See* Seavey, *supra* note 108, at 433.

126. Early justifications for imposing liability on employers for the tortious conduct of their employees included the employer's right to control the behavior of the employee, the employer's opportunity to choose the employee, and the employer's privilege to employ another. For general discussion of vicarious liability justifications, see T. BATY, VICARIOUS LIABILITY 146-54 (1916); Baty, *The Basis of Responsibility*, 32 JURID. REV. 159 (1920); James, *Vicarious Liability*, 28 TUL. L. REV. 161 (1954); Smith, *supra* note 117. These justifications have never been particularly effective at hiding the main rationale, which is the search for a deep pocket from which to satisfy an innocent injured plaintiff. Modern approaches to *respondeat superior* have been more realistic in recognizing a deliberate decision to allocate the risk of injuries occasioned by an employer's enterprise to the enterprise itself. The justifications range from economic theory to a recognition that injuries occasioned by the enterprise are inevitable and in fairness should be borne by those who choose to engage in the enterprise for their own benefit. *See* Douglas, *Vicarious Liability and Administration of Risk* (pts. 1 & 2), 38 YALE L.J. 584, 720 (1929); Laski, *supra* note 117, at 112; Seavey, supra note 108, at 445-51; Smith, *supra* note 117, at 718; *see also* 5 HARPER, JAMES & GRAY, *supra* note 109, § 26.5, at 19-20 (enterprise liability provides effective means of distributing losses among beneficiaries of risk-creating enterprise); PROSSER & KEETON, *supra* note 63, § 69, at 500 (modern justification for enterprise liability is deliberate allocation of risk).

127. The major limitation on the kind of vicarious liability imposed by *respondeat superior* is that it is restricted to an employer's responsibility for the tortious acts of employees. Even with a modern enterprise liability approach, the tortfeasor must have been an employee, or in certain special circumstances an independent contractor, and the injury must have occurred under circumstances characteristic of the enterprise's activities. *See* Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968).

128. Senator Thurman remarked, in objecting to the Act, that "there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." *Globe*, *supra* note 6, app. at 216-17; *see also supra* note 7 (Representative Shellabarger pointed out that the Act is not limited to protection of former slaves but extends to all citizens).

by the Court's rejection of *respondeat superior* conflict with the expansive remedies Congress intended.

Furthermore, the Court's focus on the constitutional implications of Congressional rejection of the Sherman Amendment also is misplaced. The Court labored under the erroneous impression that imposing municipal liability based on *respondeat superior* suffered from the same constitutional infirmities as the Sherman Amendment.[129] However, the Court successfully demonstrated in the first part of its *Monell* opinion that the Amendment offered a radically different solution to the problems addressed by the Civil Rights Act than the solution proposed by section 1983.[130] Congress questioned the constitutionality of the Sherman Amendment because it imposed on municipalities a responsibility to keep the peace by imposing liability for the acts of private citizens. Section 1983 liability based on *respondeat superior*, on the other hand, would impose liability only for unconstitutional acts of municipal employees. Thus, *respondeat superior* would not impose on municipalities a responsibility to maintain police forces to keep the peace.

Also, although the Court read "the language of § 1983 . . . against the background of . . . legislative history,"[131] it failed to follow its own directive from *Monroe* that section 1983 should be "read against the background of *tort liability*."[132] The Court specifically noted the absence of language in the statute creating liability based on *respondeat superior*.[133] Yet the Court was satisfied with drawing negative inferences from that silence. This reasoning conflicts with the Court's approach in other section 1983 situations in which it has faced statutory silence.[134] In the face of silence the Court has looked to the background of tort liability to help it determine the historical context in which the forty-second Congress worked. The Court has drawn the conclusion that if Congress had wanted to deviate from well-established tort principles it would have said so.[135] At the time *Monell* was decided it was well-established that in the absence of guidance in the statute, the Court would look to the background of tort liability.[136] Had the Court looked to the background of municipal tort liability that existed in 1871,[137] it would have found strong reason to base section 1983 mu-

129. *See Monell*, 436 U.S. at 693-94.

130. *Id.* at 665-83.

131. *Id.* at 691.

132. *Monroe*, 365 U.S. at 187 (emphasis added).

133. *Monell*, 436 U.S. at 692 n.57.

134. A prime example of the Court's resort to the background of tort liability is the area of § 1983 immunities. The Court regularly has stated that if the forty-second Congress had intended to abrogate well-established immunities of particular types of state actors, it would have said so in the statute. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 316-18 (1975); Scheuer v. Rhodes, 416 U.S. 232, 242-49 (1974); Pierson v. Ray, 386 U.S. 547, 554-55 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

135. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-59 (1981).

136. The Court refined this idea further in City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), when it made absolutely clear that in the absence of a provision in the statute, an assumption is made that the forty-second Congress was familiar with established common-law tort principles. *Id.* at 258.

137. *See supra* note 60.

nicipal liability on *respondeat superior.*[138] Although its sources are not altogether clear, the legal doctrine of *respondeat superior* is several centuries old.[139] Certainly in 1871 when Congress enacted the Civil Rights Act, *respondeat superior* was well recognized as a theory for imposing liability on employers for the tortious activity of employees.[140] Moreover, it was regularly applied to municipalities.[141] Because of the common-law tort background and the well-established tradition of construing section 1983 to incorporate common-law principles,[142] the Court unjustifiably relied on statutory silence to support its rejection of *respondeat superior.*

B. *Policies Favoring the Inclusion of* Respondeat Superior *in the Section 1983 Picture*

This Article already has suggested that the legislative history of section 1983, the language of the statute, and the background of tort liability all support a conclusion that *respondeat superior* is the appropriate basis for section 1983 municipal liability. The strongest arguments in favor of *respondeat superior* as the appropriate basis for section 1983 municipal liability, however, are policy arguments. The Court failed to consider policy in *Monell,* even though the Court has found policy relevant in other section 1983 cases.[143] In fact, the Court has even suggested that policy considerations might be determinative in some cases.[144] Thus, if the Court were to acknowledge its error in the interpretation of congressional intent in *Monell,* policy considerations would warrant a reconsideration of the *respondeat superior* issue.[145]

An obvious similarity exists between the policy rationales posited to justify *respondeat superior* generally and the justifications underlying the passage of section 1983. Although the reasons for imposing liability on employers based on *respondeat superior* vary,[146] those propounded most frequently are the need to compensate innocent victims of tortious conduct and the desire to prevent future accidents.[147] Similarly, the Court frequently has stated that the goals of the

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138. *See supra* note 61.

139. *See* 5 HARPER, JAMES & GRAY, *supra* note 109, § 26.2, at 8-10; PROSSER & KEETON, *supra* note 63, § 69, at 500. *But see* Laski, *supra* note 117, at 106 (claiming to find no reference to vicarious liability until 1688).

140. *See supra* note 61.

141. *See supra* note 60.

142. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-59 (1981).

143. *See, e.g., id.* at 263 (punitive damages are an effective deterrent when assessed against public officials, but public policy precludes assessment against innocent taxpayers); Owen v. City of Independence, 445 U.S. 622, 652-53 (1980) (reasons for extending qualified immunity to public officials are less compelling when liability of municipality is at issue).

144. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266 (1981).

145. Unfortunately, although at least one member of the Court favors reconsideration of the *respondeat superior* conclusion reached in *Monell,* City of Oklahoma City v. Tuttle, 471 U.S. 808, 834-44 (1985) (Stevens, J., dissenting), it seems unlikely that the Court will address that issue again. Justice (now Chief Justice) Rehnquist in a footnote in *Tuttle* indicated that the plurality saw no reason to deviate from the well-established principle of stare decisis. *Id.* at 818 n.5.

146. *See supra* note 126.

147. 5 HARPER, JAMES & GRAY, *supra* note 109, § 26.5, at 21; PROSSER & KEETON, *supra* note 63, § 69, at 500-01.

section 1983 remedies include compensation to injured victims, the prevention of future injury, and the vindication of important constitutional rights.[148] That the goals of section 1983 may best be achieved by imposing liability on the municipality based on a loss spreading rationale coincides with modern justifications for *respondeat superior*.[149]

This compatibility of goals makes *respondeat superior* uniquely well suited to further the policies of the statute. Compensation and deterrence considerations would be advanced consistently if *respondeat superior* were the basis of section 1983 municipal liability. The victim of constitutional injury who cannot identify the municipal employee responsible for the injury or satisfy a judgment against the actor may go uncompensated unless he or she can recover from the municipality on a *respondeat superior* theory. Moreover, forcing municipalities to be responsible for their employees' unconstitutional conduct encourages care in the hiring, training, and supervision of municipal employees. This care, in turn, should reduce the number of constitutional injuries. Although imposing liability on the individual actually responsible for the harm may deter that individual,[150] municipal liability for acts of employees focuses attention on the problem of the unfit employee and the potential for widespread institutional abuses. *Respondeat superior* liability occasionally may cause the municipality to pay for an employee's aberrational behavior that it could neither predict nor prevent. However, in light of the statute's goals, this possibility is preferable to the possibility that victims of constitutional harm will not be compensated. Municipalities are aware when hiring personnel that the nature of certain sensitive governmental jobs puts certain employees in positions having direct and special effect on the valued interests of the citizenry. These functions create or increase the risk that the governmental operatives will infringe civil liberties. If the risk of constitutional injury thus created or increased is realized, the municipality should take responsibility.

An emphasis on compensation and deterrence accords with the modern enterprise liability approach to both *respondeat superior*[151] and section 1983 municipal liability.[152] This approach consciously allocates the risk of loss to the enterprise creating and benefiting from the activity that creates the potential for injury. The risk of loss should fall on the entrepreneur, who is in the best position to prevent the loss and to spread the cost of the loss through either insur-

148. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 500-07 (1982) (vindication of rights); Gomez v. Toledo, 446 U.S. 635, 638-41 (1980) (vindication of rights); Carlson v. Green, 446 U.S. 14, 20-25 (1980) (compensation and deterrence); Owen v. City of Independence, 445 U.S. 622, 650-52 (1980) (preservation of human liberty and human rights); Robertson v. Wegmann, 436 U.S. 584, 592-93 (1978) (deterrence).

149. *See* 5 HARPER, JAMES & GRAY, *supra* note 109, § 26.5, at 20-23; PROSSER & KEETON, *supra* note 63, § 69, at 500-01.

150. Of course, even if *respondeat superior* were accepted as the basis of § 1983 municipal liability, the individual tortfeasor would still be personally liable. *Respondeat superior* simply gives the victim a deep pocket to fall back on in the not unusual event that the tortfeasor is unable to satisfy a judgment. *See* T. BATY, *supra* note 126, at 154; 3 HARPER, JAMES & GRAY, *supra* note 109, § 12.4, at 120-24.

151. *See* cases cited *supra* note 148.

152. *See* Owen v. City of Independence, 445 U.S. 622, 657 (1980).

ance or higher prices.[153] Although enterprise liability usually is justified on an economic efficiency rationale,[154] considerations of fairness are also important.[155] Employers are in a better position to appreciate the inevitability of harm that the enterprise will cause, to take measures to prevent as much harm as possible, and to insure against harm that actually occurs.

Similarly, an enterprise liability approach addresses the proper concerns of section 1983 municipal liability. Certainly the municipality is in a far better position than the victim to prevent constitutional harm. Furthermore, the cost of constitutional injury caused by municipal employees would be spread among the taxpayers who benefit from the services the municipality provides. Compensation for constitutional harm would constitute a cost of doing government business that the community as a whole would bear. If the cost of constitutional injury became too high, the municipal officials would be pressured through the political process to take measures to prevent injury and thus reduce the cost. In *Monell* the Court specifically noted that the need for accident reduction and cost spreading "to the community as a whole on an insurance theory"[156] justifies imposing *respondeat superior* liability. The Court, however, rejected both rationales because Congress had found them insufficient to overcome the constitutional objections to the Sherman Amendment.[157] It is impossible to know whether the Court would have found these rationales more persuasive in the absence of the perceived constitutional impediments to embracing *respondeat superior*. Since *Monell* the Court has approved the accident reduction rationale, the cost spreading rationale, and the fairness rationale as reasons for imposing strict liability on municipalities.[158] This approval suggests that, but for the constitutional problems, the Court would have acknowledged the benefits attainable from basing section 1983 municipal liability on *respondeat superior*.

Possible objections to *respondeat superior* in section 1983 municipal liability cases mirror the Court's current negative attitude toward the section 1983 action generally. A likely objection might be that liability based on *respondeat superior* would increase the number of section 1983 municipal liability cases, adding even more cases to federal dockets already overcrowded with section 1983 cases. A related problem of particular interest today in the era of the "insurance crisis" is that this increase in cases would have a negative impact on municipal treasuries. Protection of the municipal fisc has always been a concern in the context of the Civil Rights Act. Opponents of the Sherman Amendment expressed concern that the liability suggested there would "prove utterly destructive of the State

153. *See, e.g.*, Fruit v. Schreiner, 502 P.2d 133, 141 (Alaska 1972); Rodgers v. Kemper Constr. Co., 50 Cal. App. 2d 608, 618, 124 Cal. Rptr. 143, 148 (1975); *see also* G. CALABRESI, THE COSTS OF ACCIDENTS 50-54 (1970) (summarizing meaning of enterprise liability); Klemme, *The Enterprise Liability Theory of Torts*, 47 COLO. L. REV. 153 (1976) (summarizing purpose and meaning of enterprise liability).

154. G. CALABRESI, *supra* note 153, at 53; Klemme, *supra* note 153, at 175-78.

155. *See, e.g.*, Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968).

156. *Monell*, 436 U.S. at 694.

157. *Id.*

158. Owen v. City of Independence, 445 U.S. 622, 652-56 (1980); *see infra* text accompanying notes 219-26.

municipalities!"[159] The cost to municipalities of section 1983 cases has been perceived as a potential problem even without *respondeat superior*.[160] Although a majority of the Court has never cited this difficulty to justify denying section 1983 municipal liability, this difficulty has prompted some of the Court's members to express concern.[161] Certainly ample evidence exists that municipalities are finding it more and more difficult to obtain insurance against ordinary tort liability and have begun to withdraw from activities likely to expose them to liability.[162] Municipalities are unable, however, to withdraw from the kinds of activities that expose them to section 1983 liability.

The potential problems associated with imposing municipal liability based on *respondeat superior* are serious ones. If policy is to be considered a factor in the Court's approach to a section 1983 municipal liability case, competing policies must be compared and evaluated. However, in other section 1983 cases the Court has already addressed and largely solved the problems that might arise in a section 1983 municipal liability setting. The Court has dealt with the flood of section 1983 cases and its related concern—frivolous claims—by redefining the proof needed to establish the violation of a constitutional right.[163] If a potential section 1983 plaintiff cannot establish a constitutional harm, he or she cannot state a claim under the statute, because a constitutional violation is a necessary element of the section 1983 prima facie case.[164] In addition, the Court has seriously limited the impact of section 1983 cases on municipal treasuries by its approach to damages. Not only has the Court limited damages in all section

159. GLOBE, *supra* note 6, at 762.

160. *But see* Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?*, 13 URB. LAW. 1, 2-3 (1981) (There is "no cause for alarm."); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 809-18 (1978-79) (finding costs to police departments insubstantial).

161. *Monell*, 436 U.S. at 664 n.9. Current publicity surrounding the difficulty in obtaining insurance supports this objection. *See, e.g.*, Lynch, *The Insurance Panic for Lawyers*, A.B.A. J., July 1, 1986, at 43; *Sorry America, Your Policy is Canceled*, TIME, Mar. 24, 1986, at 16, 16-26; *Sky-High Damage Suits*, U.S. NEWS & WORLD REP., Jan. 27, 1986, at 35; Reid, *Liability And the Insurance Shortage*, Washington Post, Mar. 24, 1986, at 6 (national weekly ed.).

162. Blodgett, *Premium Hikes Stun Municipalities*, A.B.A. J., July 1, 1986, at 48-51; Hunter & Borzelleri, *The Liability Insurance Crisis*, 22 TRIAL, Apr. 1986, at 42, 42-46; *Jaron*, *supra* note 160, at 19-21; Page & Stephens, *The Products Liability Insurance "Crisis": Causes, Nostrums and Cures*, 13 CAP. U.L. REV. 387, 387-404 (1984); Szabo, *No Relief From The Liability Crisis*, NATION'S BUS., Oct. 1986, at 69, 69-72.

163. Although the Court has held that § 1983 itself contains no intent or state of mind requirement, the Court recently has focused attention on the nature of the § 1983 defendant's behavior to determine whether a constitutional right has been violated. For example, in a case in which a prisoner claimed medical malpractice constituted an eighth amendment violation, the Court determined that the prisoner must establish deliberate indifference to establish a constitutional violation. Estelle v. Gamble, 429 U.S. 97, 105 (1976). In Paul v. Davis, 424 U.S. 693 (1976), the Court held that injury to the reputation by a state actor is not a deprivation of liberty or property protected by the fourteenth amendment. *Id.* at 701-10. The Court recently concluded that conduct of state officials which was merely negligent cannot form the basis of a claim that a § 1983 plaintiff's fourteenth amendment due process rights have been violated. Davidson v. Cannon, 106 S. Ct. 668, 670-71 (1986); Daniels v. Williams, 106 S. Ct. 662, 663 (1986). These cases should have a dramatic effect on the number of § 1983 cases. For a discussion of the Court's reinterpretation of the Constitution as a device to control § 1983 litigation, see Mead, *supra* note 37.

164. Daniels v. Williams, 106 S. Ct. 662, 664 (1986); Parratt v. Taylor, 451 U.S. 527, 536-37 (1981), *overruled in part*, Daniels v. Williams, 106 S. Ct. 662 (1986).

1983 cases to actual economic losses,[165] it has held that municipalities are immune from punitive damage awards.[166] These constraints considerably mitigate the potentially negative impact of section 1983 liability. In weighing the advantages of *respondeat superior* as the basis of section 1983 municipal liability against the possible disadvantages, the importance of the policies to be furthered by its application clearly tips the scale in favor of including it in the section 1983 picture.

C. *The Policy or Custom Requirement—An Error in Perspective Leads to Confusion*

The most problematic aspect of the Court's rejection of *respondeat superior* is the basis of municipal liability the Court offered in its place. As an alternative to *respondeat superior*, the *Monell* majority required a showing that the municipality itself actually had caused the injury. Thus, section 1983 plaintiffs must establish that their harm was "inflicted" by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[167] The rejection of *respondeat superior* in favor of the policy or custom causation requirement has created an unclear depiction of section 1983 municipal liability.[168] Because plaintiffs' injuries in *Monell* resulted from patently unconstitutional official policy,[169] the Court, although Justice Powell recognized a future of "substantial line drawing problems,"[170] was satisfied to leave section 1983 municipal liability in this incomplete stage. Thus, the lower courts have been forced to reach their own conclusions about how the policy or custom requirement functions in a section 1983 municipal liability case. Prompted in large measure by the potential for tapping a defendant with a deep pocket, section 1983 plaintiffs often have joined municipalities in their section 1983 cases, raising issues of the type of employee conduct that should be attributed to the municipality.[171] The diverse and often conflicting results courts have reached in these cases illustrate the confusion and uncertainty caused by the *Monell* Court's choice of the policy or custom causation requirement.[172]

The Court's failure to define either "policy" or "custom," or to explain how a plaintiff proves that a policy or custom has caused harm created the initial confusion. The term "policy" is especially problematic because it does not ap-

165. *See* Carey v. Piphus, 435 U.S. 247, 248 (1978).

166. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-71 (1981).

167. *Monell*, 436 U.S. at 694.

168. *See infra* notes 173-89 and accompanying text.

169. *Monell*, 436 U.S. at 694.

170. *Id.* at 713 (Powell, J., concurring).

171. *See, e.g.*, Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981).

172. *See, e.g.*, Murray v. City of Chicago, 634 F.2d 365 (7th Cir. 1980) (summary judgment against plaintiff is inappropriate on issue of policy or custom in suit for arrest without valid warrant); Tyler v. Woodson, 597 F.2d 643 (8th Cir. 1979) (dismissal of plaintiff's claim appropriate when complaint fails to allege that confiscation of legal papers was done pursuant to policy or custom); Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979) (plaintiff's complaint alleging maladministration resulting in deplorable living conditions at jail adequately describes a custom).

pear in the statute. Rather, it is a judicial creation. In its explanation of the concept of policy, the Court merely stated that for municipal liability to attach, the act must "[implement or execute] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[173] Although the Court recognized that policy is something that must be "made by [either] lawmakers or by those whose edicts or acts may fairly be said to represent official policy,"[174] the Court made no effort to explain what kind of municipal employee is in a position to make policy. Furthermore, the Court failed to note the distinctions that might exist between the creation of policy and the implementation of policy, or between policy that is in itself unconstitutional and policy not in itself unconstitutional, but implemented in a way that results in constitutional harm. Nor did the Court address the problem of a policy that merely creates a risk that a municipal representative will cause constitutional harm.

Unlike the word "policy," the word "custom" actually appears in the statute. The *Monell* Court acknowledged that section 1983 is implicated if constitutional harm is "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."[175] The Court noted that it had earlier recognized that unconstitutional governmental custom and usages "could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."[176] However, the Court did not look to legislative history or the background of tort liability to clarify this notion of custom.

Not only did the Court fail to explain how to determine whether a policy or custom exists, it also did not demonstrate how to establish that a policy or custom has *caused* the harm. An image of a policy or custom causing harm is difficult, if not impossible, to conceptualize. The issue of actual causation in the common law of torts generally involves a "but for" or "substantial factor" test. However, despite the admonition from *Monroe v. Pape*[177] that section 1983 be "read against the background of tort liability,"[178] the *Monell* Court declined to rely on tort law for its approach to causation. In fact, except to say that the policy must "[inflict] the injury"[179] and that it must be "the moving force of the constitutional violation,"[180] the Court did not address the causation issue.[181] Policy and custom as forces, moving or otherwise, defy mental imagery except in the vaguest and most abstract ways when contemplating liability for an entity that acts only through its employees and agents.

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173. *Monell*, 436 U.S. at 690.

174. *Id.* at 694.

175. *Id.* at 691.

176. *Id.* (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 168 (1970)).

177. 365 U.S. 167 (1961), *overruled on other grounds*, Monell v. Department of Social Services, 436 U.S. 658 (1978). *Monroe* is discussed *supra* text accompanying notes 33-67.

178. *Monroe*, 365 U.S. at 187.

179. *Monell*, 436 U.S. at 694.

180. *Id.*

181. For a discussion of causation problems in § 1983 litigation, see Eaton, *Causation in Constitutional Tort*, 67 IOWA L. REV. 443 (1982).

The confusion created by the Court's failure to explain the policy or custom requirement in a way that provided guidance to the lower federal courts has been magnified by the tremendous diversity in factual patterns giving rise to section 1983 municipal liability issues. Courts have dealt with varying situations, including decisions to license,[182] decisions to grant zoning variances,[183] decisions to dismiss from employment,[184] and the frequently recurring problem of police misconduct.[185]

The cases tend to fall into two categories. One category involves challenges to an official policy, custom, or the implementation of a policy or custom. Under this category a plaintiff maintains that a policy or custom is unconstitutional, or has the potential for unconstitutional implementation. Licensing, zoning, and employment cases fall into this category. In these cases courts must look to the challenged policy itself to determine whether it is in fact an official policy or custom. To reach a conclusion on this question, the courts often have scrutinized the authority of the person or group making the decisions to determine whether they are among those whose "edicts or acts may fairly be said to represent official policy."[186] If the court determines that a policy or custom is at work, the issue may arise whether the policy or custom is itself unconstitutional, or whether it has been implemented in an unconstitutional manner. The federal circuit courts of appeals have reached far from uniform decisions on these issues.[187]

The second category of cases involves official misconduct by municipal employees, typically law enforcement personnel, that results in constitutional violations. These cases raise more complex problems for plaintiffs. To fulfill the *Monell* policy or custom causation requirement, the section 1983 plaintiff must establish that the employee's objectionable conduct resulted from an official policy or custom. In effect, a dual causation requirement is imposed. The miscon-

182. *See, e.g.*, Bennett v. City of Slidell, 697 F.2d 657 (5th Cir. 1983), *aff'd in part and rev'd in part*, 728 F.2d 762 (5th Cir. 1984) (en banc), *reh'g denied*, 735 F.2d 861 (5th Cir. 1984) (per curiam) (en banc), *cert. denied*, 472 U.S. 1016 (1985).

183. *See* Shelton v. City of College Station, 754 F.2d 1251 (5th Cir. 1985); Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981).

184. *See* Bartholomew v. Fischl, 782 F.2d 1148 (3d Cir. 1986); Brown v. Reardon, 770 F.2d 896 (10th Cir. 1985); Williams v. Butler, 746 F.2d 431 (8th Cir. 1984).

185. *See* Zanghi v. Incorporated Village of Old Brookville, 752 F.2d 42 (2d Cir. 1985); Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981); Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980); McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979).

186. *Monell*, 426 U.S. at 694; *see, e.g.*, Brown v. Reardon, 770 F.2d 896 (10th Cir. 1985) (if alleged coercion on city employees did occur it was attributable to lower echelon employees and did not reflect policy or custom); McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984) (sheriff's office is liable for acts of constitutional deprivation carried out by sheriff who is the official responsible for the policies of the office); Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) (school board is liable for requesting implementation of state statute, but county not liable for county judge's enforcement of state law); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980) (mayor is the one city official whose edicts and acts represent municipal policy).

187. *See, e.g.*, Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985) (subsequent actions of city officials deemed to establish unconstitutional policy); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) (plaintiff's failure to establish police pattern of excessive force was fatal to claim); Dunn v. Tennessee, 697 F.2d 121 (6th Cir. 1982) (police officers found to be proper defendants in § 1983 action where no custom or policy governed), *cert. denied*, 460 U.S. 1086 (1983).

duct must have caused a constitutional violation, and the official policy or custom must have been responsible for the misconduct. The most frequently recurring example of this category is the police misconduct case, in which the challenged policy or custom is inadequate training, supervision, or discipline. In these cases the controlling issue frequently is whether and to what extent proof of the particular incident of misconduct may be considered to establish the policy or custom of inadequate training, supervision, or discipline.[188] In addition to the problems of proof and the complex causation questions raised, the inadequate supervision or training cases have presented the issue whether a municipality's failure to train or supervise can form the basis of section 1983 municipal liability as actionable nonfeasance.[189]

Disparate results in policy or custom causation cases demonstrate that the policy or custom requirement threatens the underlying purposes of section 1983. Courts faced with police misconduct problems of inadequate training or supervision have looked to whether the inadequacy amounted to recklessness or gross negligence,[190] or whether the municipality demonstrated deliberate indifference to the constitutional rights of its citizens.[191] This focus on fault has serious implications for the future of civil rights protection provided by section 1983. The focus on fault clearly is at odds with the Supreme Court's consistent stance that a section 1983 prima facie case requires the plaintiff to show only a constitutional violation by a person acting under color of state law. The Court never has interpreted the statute to require a showing of fault; nor has it ever given any indication that the case against a municipality differs in any essential respect from the case against an individual actor. The addition of a requirement that the plaintiff must plead and prove fault in certain types of section 1983 cases creates unnecessary inconsistency and confusion. Worse, it has the potential for frustrating the noble purpose of the statute's drafters—providing those deprived

188. *See, e.g.*, Brown v. Reardon, 770 F.2d 896 (10th Cir. 1985) (plaintiff was unable to establish pattern of official policy because he was the only employee who was terminated); Lopez v. City of Austin, 710 F.2d 196 (5th Cir. 1983) (employee failed to show denial of his merit increase was based on custom because it was an isolated incident); Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980) (when complaint is silent, court will not infer that single act of slander constitutes city policy or custom).

189. In Rizzo v. Goode, 423 U.S. 362 (1976), a case involving the liability of supervisory personnel, the Court rather obliquely suggested that a failure to act cannot give rise to liability under § 1983. *Id.* at 371. However, the *Monell* Court's comment on *Rizzo* indicates that nonfeasance had nothing to do with the conclusion. In a footnote in *Monell* the Court said, "By our decision in *Rizzo v. Goode*, we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." *Monell*, 436 U.S. at 694 n.58 (citation omitted). It can be inferred from this statement that if a failure to supervise had been established, defendants in *Rizzo* would have been liable. Nevertheless, lower courts have continued to puzzle over whether a failure to train or supervise can satisfy the policy or custom requirement. *See* Powe v. City of Chicago, 664 F.2d 639 (7th Cir. 1981); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982); Withers v. Levine, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); *see also* Note, *Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy"*, 29 WAYNE L. REV. 1225 (1983) (discussing circumstances under which official inaction may rise to level of official policy or custom).

190. *See, e.g.*, Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986); Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985); Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982); Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980).

191. *See, e.g.*, Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985); Doe v. New York City Dept. of Social Services, 649 F.2d 134 (2d Cir. 1980).

of civil liberties at the hands of government with an unobstructed path to redress.

IV. THE COURT ADDS DETAIL TO THE MUNICIPAL LIABILITY CANVAS

Since *Monell* the Court has addressed section 1983 municipal liability issues in four significant cases.[192] Two of these cases dealt with the extent of municipal immunity[193] and two dealt with the policy or custom requirement. Although the Court has attempted to draw lines and add dimension to the sketch of section 1983 municipal liability begun in *Monell*, the picture of municipal liability is still far from clear. The approach to judicial decisionmaking in the two municipal immunity cases differs significantly from the approach taken in *Monell* and the two cases addressing the policy or custom requirement. Although the Court in *Monell* specifically refused to base section 1983 municipal liability on *respondeat superior*, the immunity cases illustrate the Court's recognition of concerns that would justify applying this theory in section 1983 municipal liability cases.[194] However, the cases attempting to clarify the meaning of the policy or custom requirement reassert that section 1983 municipal liability cannot rest on *respondeat superior*.[195] The confusion and doubt these cases have created amply illustrate the difficulty the Court has had in conceptualizing its picture of section 1983 municipal liability. The result has been a distorted image of this aspect of the section 1983 action that could ultimately affect the grand picture of constitutional protection envisioned by the drafters of the Civil Rights Act of 1871.[196]

A. *Municipal Immunity—The Court Uses Both Broad Brush And Narrowing Techniques*

The Court made its first major addition to the section 1983 municipal liability picture in *Owen v. City of Independence*,[197] in which it addressed the extent of municipal immunity.[198] A comparison of the Court's approaches in *Monell* and *Owen* reveals the inconsistency and confusion that have plagued section 1983 municipal liability. In *Owen* the chief of police brought a section 1983 action claiming that his dismissal without notice and an opportunity to be heard violated his fourteenth amendment due process rights. Although the United States Court of Appeals for the Eighth Circuit agreed that the police chief's constitutional rights had been violated, it concluded that all defendants, includ-

192. Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Owen v. City of Independence, 445 U.S. 622 (1980).

193. Because the question whether municipalities should enjoy some kind of qualified immunity was not presented in *Monell*, the Court specifically declined to address the scope of municipal immunity. *Monell*, 436 U.S. at 701.

194. *See infra* notes 197-247 and accompanying text.

195. *See infra* notes 248-312 and accompanying text.

196. *See infra* notes 263-312 and accompanying text.

197. 445 U.S. 622 (1980).

198. *Id.* at 635-38.

ing the city, were entitled to a qualified immunity.[199]

The Supreme Court reversed and held that municipalities cannot assert qualified immunity based on the good faith of their employees.[200] In reaching this conclusion the Court used the full range of available section 1983 judicial decisionmaking criteria. The Court looked to the language of the statute,[201] its legislative history,[202] the background of both historic and current tort law,[203] and public policy.[204] Recognizing the scope of immunity issue as a problem of statutory construction, Justice Brennan, writing for the majority, began with an examination of the statute itself. Finding no mention of "any privileges, immunities, or defenses that may be asserted,"[205] he turned to the legislative history of the Act in determining whether Congress intended municipalities to enjoy qualified immunity. Justice Brennan focused on those portions of the debates discussing the statute's broad scope and remedial character.[206]

Although a consideration of the background of tort law was conspicuously absent from the Court's *respondeat superior* holding in *Monell*, Justice Brennan in *Owen* gave serious consideration to the common-law background of immunity from tort liability.[207] He noted that the Court on several occasions had considered the immunity of state officials and had "found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' "[208] After examining carefully the history of municipal tort liability,[209] however, the majority found that "there is no tradition of immu-

199. Owen v. City of Independence, 589 F.2d 335, 338 (8th Cir.), *rev'd*, 445 U.S. 622 (1980). The court of appeals denied plaintiff relief against the city because the Supreme Court's decisions in Perry v. Sindermann, 408 U.S. 593 (1972), and Board of Regents v. Roth, 408 U.S. 564 (1972), which established the right to a name clearing hearing, had not been handed down at the time the incident in *Owen* occurred. The court of appeals concluded that the city should not be charged "with predicting the future course of constitutional law" and extended the qualified immunity of the individual defendants based on their good faith to the city as well. *Owen*, 589 F.2d at 338.

200. *Owen*, 445 U.S. at 638.

201. *Id.* at 635.

202. *Id.* at 650.

203. *Id.* at 637-38.

204. *Id.* at 651-52.

205. *Id.* at 635.

206. *Id.* at 636, 650.

207. *See supra* note 134. The Court traditionally had looked to the history of various immunities in tort law in § 1983 immunity cases. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967).

208. *Owen*, 445 U.S. at 637 (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)).

209. *Id.* at 638-50. The Court indicated that at the time Congress enacted § 1983, good faith immunity did not exist for the actions contemplated by the statute. *Id.* at 640. Municipalities were subject, as persons, to suits at common law just like corporations. The Court described the concerns that were expressed during Congressional debates about the proposed Civil Rights Act of 1871. Although some feared that immunity for individual actors would be abolished, there was no such concern about municipalities. Thus, the Court reasoned: "Had there been a similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the specter of its destruction, as well." *Id.* at 643-44. The opinion next discussed the protection afforded a municipality performing governmental functions. This protection was an extension of sovereign immunity by which States are protected from suit. This immunity arose only if a state extended it to the municipality. However, "by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality . . . the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligation." *Id.* at 646. Courts also attacked the final protection for municipalities—immunity from suit for the exercise of discretionary functions. This

nity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city."[210] Finally, the majority concluded that policy considerations militated in favor of denying municipalities the right to assert qualified immunities. The Court noted that the reasons for affording state officers qualified immunity do not apply to municipalities because payment is not made by the individual officer, but from the public treasury.[211] As a final justification, Justice Brennan specifically noted the significant changes in tort law in the past century and stated that "notions of governmental responsibility should properly reflect that evolution."[212] In particular, the Court recognized that notions of blameworthiness are no longer the only consideration. Rather, "the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct."[213]

The holding in *Owen* that municipalities may not assert the good faith immunities of their officers clarified an important section 1983 municipal liability issue and greatly broadened the statute's scope. The holding reiterated the Court's position that fault is not part of a section 1983 prima facie case.[214] The

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immunity was limited by a distinction "that had the effect of subjecting the city to liability for much of its tortious conduct." *Id.* at 649. Thus, "[w]hile the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment." *Id.* The discretionary immunity kept courts from infringing on the coequal rights of another branch of government. However, the Supreme Court concluded that "a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative." *Id.*

210. *Id.* at 638.

211. *Id.* at 652-54.

The Court earlier embraced qualified good faith immunity for individual government officials, reasoning that "[s]uch an allocation would not only be 'manifestly unfair,' but would '[defy] this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to "exercise their discretion with undue timidity."'" *Id.* at 653 n.37 (quoting Hutto v. Finney, 437 U.S. 678, 699 n.32 (1978)). In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court identified two reasons for the doctrine of official immunity:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Id. at 240 (quoted in *Owen*, 445 U.S. at 654). A third consideration for extending immunity to individuals was that the threat of personal liability would deter the most qualified citizens from serving in public office. *Owen*, 445 U.S. at 654 n.38 (citing Wood v. Strickland, 420 U.S. 308, 320 (1975)). These considerations are not relevant to a municipality because damages must be paid from public funds. The Court finds it necessary, therefore, to balance individual rights with preservation of the public funds. It is more important that an individual be free to serve in a public capacity, so that the most qualified will come forward without fear of personal loss, than to compensate the victim of a tort resulting from the good faith actions of a public official. Conversely, the Court has concluded, compensation to an innocent victim takes priority over the concern that tax revenues will benefit an individual or discrete group. *Id.* at 654-55.

212. *Owen*, 445 U.S. at 657.

213. *Id.*

214. In *Monroe* the Court distinguished § 1983 from its criminal counterpart that contains the word "willfully." The Court earlier had interpreted "willfully" to mean doing an act with "a specific intent to deprive a person of a federal right," Screws v. United States, 325 U.S. 91, 103 (1945), but declined to put that gloss on § 1983 because it provided for civil rather than criminal liability. *Monroe*, 365 U.S. at 187. The Court clarified its position on the state of mind requirement in Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part*, Daniels v. Williams, 106 S. Ct. 662 (1986), in which it found that the § 1983 prima facie case requires only a showing of "(1) whether the conduct com-

existence of the right claimed by plaintiff in *Owen* was unknown at the time of his discharge, so it could not be said that any government official intentionally deprived plaintiff of his right or that those responsible for its invasion knew or should have known that their conduct would invade that right. Thus, no issue of fault existed with respect to the city or its employees. In fact, as the dissent noted, after *Owen* municipalities are strictly liable under section 1983.[215] However, despite the breadth of the Court's holding on the immunity issue in *Owen*, that decision's impact is unlikely to be as great as critics and proponents have predicted. Although the absence of immunity theoretically makes municipalities more vulnerable to suit, the restrictive policy or custom requirement from *Monell* continues to limit greatly the potential for success.[216]

In *Owen* the Court addressed only the immunity issue and had no occasion to fill in the details of the actual causation requirement established in *Monell*.[217] In fact, the Court's only reference to the actual causation requirement was its reaffirmation of the conclusion that a municipality is liable under section 1983 only for the execution of a government policy or custom that inflicts injury.[218] However, despite the fact the Court addressed different issues in the two cases, a comparison of the reasoning used reveals inconsistencies. Nothing in Justice Brennan's reasoning in *Owen* is inconsistent with a notion that section 1983 municipal liability should be based on *respondeat superior*. In fact, much of Justice Brennan's opinion in favor of denying municipalities qualified immunity in *Owen* could be used as a justification for basing liability on *respondeat superior*. For example, Justice Brennan quoted a treatise on municipal corporations for the proposition that " '*municipal corporations proper* . . . are liable for acts of *misfeasance* positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties.' "[219] Justice Brennan's point was that a strong tradition of municipal liability existed, but that no such history supported a qualified municipal immunity.[220] Although Justice Brennan did not intend to comment on municipal liability based on *respondeat superior*, his language clearly demonstrates a recognition that the municipal corporation was liable for the tortious conduct of its agents or employees based on *respondeat superior*.

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plained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.* at 535. Thus, the Court has specifically concluded that the statute contains no independent state of mind requirement. The Court recently reaffirmed this position in Daniels v. Williams, 106 S. Ct. 662, 663 (1986). For an argument that § 1983 imposes strict liability on those causing constitutional invasions under color of state law, see Mead, *supra* note 37.

215. *Owen*, 445 U.S. at 658 (Powell, J., dissenting).

216. *See supra* text accompanying notes 95-97.

217. The court of appeals had determined that the constitutional harm was caused by the official conduct of the city's lawmakers and that the conduct amounted to official policy resulting in an infringement of the petitioners' constitutional rights. *Owen*, 589 F.2d at 337. The Supreme Court accepted that determination. *Owen*, 445 U.S. at 633.

218. *Owen*, 445 U.S. at 633.

219. *Id.* at 640 (quoting 2 J. DILLON, LAW OF MUNICIPAL CORPORATIONS § 764, at 875 (2d ed. 1873)).

220. *Id.* at 640-41.

In addition, certain aspects of the approach to the immunity issue sound a great deal like modern justifications for imposing vicarious liability on municipalities based on *respondeat superior*. The *Owen* Court noted, for example, that denying municipalities the right to assert qualified immunities based on the good faith of their officials creates incentives in officials "to err on the side of protecting citizens' constitutional rights . . . [and encourages] those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[221] This logic is strikingly similar to the accident reduction rationale posited for imposing liability on employers for the tortious activities of their employees.[222] Thus, it would have been persuasive in the section 1983 context as reason to impose municipal liability based on *respondeat superior*.

The Court in *Owen* specifically approved the idea of "equitable loss spreading" as a justification for denying municipal immunity, finding "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated."[223] Like the accident reduction rationale, the equitable loss spreading theory has been used persuasively as a justification for holding a blameless employer liable for the tortious acts of employees.[224] Justice Brennan's recognition in *Owen* of the fairness rationale and the accident reduction rationale might have been used just as effectively in *Monell* to justify liability based on *respondeat superior*. Justice Brennan rejected both rationales in *Monell*, however, simply because the Court concluded that Congress had intended to reject all forms of vicarious liability in section 1983.[225] Justice Brennan attempted to justify the apparent conflict between the two decisions on causation grounds, stating in a footnote that "when it is the local government itself that is responsible for the constitutional deprivation . . . it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government."[226]

The merit of this distinction is questionable. It has already been suggested that the *Monell* Court's conclusion based on its interpretation of the legislative history was erroneous.[227] If the Court misinterpreted Congressional intent to reject *respondeat superior* from Congress' rejection of the Sherman Amendment, then the accident reduction and equitable loss spreading rationales should have carried more weight. The *Owen* Court's recognition of the goal of compensating "[t]he innocent individual who is harmed by an abuse of governmental authority"[228] has the ring of a policy argument in favor of a *respondeat superior* the-

221. *Id.* at 652.

222. *See* PROSSER & KEETON, *supra* note 63, § 69, at 500-01; RESTATEMENT (SECOND) OF AGENCY § 216 comment a, § 1 comment on subsection (1)a (1958).

223. *Owen*, 445 U.S. at 655.

224. *See, e.g.*, Fruit v. Schreiner, 502 P.2d 133, 139-41 (Alaska 1972); Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 618, 124 Cal. Rptr. 143, 148 (1975).

225. *See supra* text accompanying notes 95-98.

226. *Owen*, 445 U.S. at 655 n.39.

227. *See supra* text accompanying notes 99-103.

228. *Owen*, 445 U.S. at 657.

ory.[229] If compensation to innocent victims is a primary goal of section 1983,[230] it is specious to distinguish between an innocent injured plaintiff who cannot recover because the municipal actor responsible for the harm has a good faith defense and the plaintiff who cannot recover because the municipal actor cannot be identified or is judgment proof. In both situations an abuse of governmental authority has harmed the plaintiff and in both situations the governmental unit should accept responsibility for compensating the victim. A contrary result conflicts with section 1983's broad remedial purpose and threatens to restrict unnecessarily the section 1983 action against municipalities.

Any thought that the municipal immunity holdings in *Monell* and *Owen* evidenced a general trend toward an expansive judicial approach to section 1983 municipal liability was soon laid to rest in *City of Newport v. Fact Concerts, Inc.*,[231] decided the year after *Owen*. Plaintiffs in *Fact Concerts* sued for compensatory and punitive damages for invasions of their first amendment rights when the city cancelled a license to present a concert.[232] At trial the court gave an instruction permitting the jury to award punitive damages against the city and the jury returned a verdict that included an award of punitive damages. The United States Court of Appeals for the First Circuit affirmed.[233]

The Supreme Court granted certiorari to consider whether a municipality may be held liable for punitive damages under section 1983.[234] In reaching its conclusion that municipalities should be immune from punitive damages, the

229. *See supra* note 126.

230. The Supreme Court has specifically stated that compensation for constitutional injury is a primary goal of § 1983. *See, e.g.*, Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978).

231. 453 U.S. 247 (1981).

232. Fact Concerts, Inc., was a Rhode Island corporation that promoted musical concerts. During 1975 Fact Concerts contracted with the City of Newport to present a series of jazz concerts. After a cancellation by one performer, Fact Concerts hired Blood, Sweat, and Tears to appear in concerts scheduled for August 30 and 31. The city objected, calling Blood, Sweat, and Tears a "rock" group and expressed concern that a "rowdy" crowd would attend those concerts. Fact Concerts was told to drop Blood, Sweat, and Tears from the concert. When they did not, the city council voted to revoke the license and prohibit the concert on the grounds that Fact Concerts had failed to live up to all parts of the agreement, alleging that spectator seats had not been wired together and an auxiliary generator was not in place. The city's revocation and cancellation were widely announced in the local media. Fact Concerts obtained a restraining order in state court and the concerts took place although fewer than half of the available tickets were sold. *Fact Concerts*, 453 U.S. at 249-52.

233. Fact Concerts brought suit in federal court seeking compensatory and punitive damages based on § 1983 and state tort law grounds. At the end of the trial the jury was charged with an instruction that included its ability to levy punitive damages. The city did not object to the instruction. The jury returned a verdict for Fact Concerts and assessed both compensatory and punitive damages against the city and seven officials. The city moved for a new trial and raised for the first time an objection to the punitive damages award. The district court noted that the challenge was untimely under FED. R. CIV. P. 51, but nevertheless rendered a decision on the merits of the challenge, approving the assessment of punitive damages against a municipality. *Fact Concerts*, 453 U.S. at 252-54. The United States Court of Appeals for the First Circuit affirmed, noting that the city's challenge was "flawed" by its failure to object at trial and that the failure would not be overlooked because there was no "plain error" present that would have affected the result of the trial. Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060, 1067 (1st Cir. 1980), *rev'd*, 453 U.S. 247 (1981). The court of appeals also indicated that punitive damages might be appropriate against municipalities. *Id.* The Supreme Court granted certiorari and declined to be bound by the application of rule 51's "plain error" rule on the basis that the district court had reached the merits of the challenge and a review of that decision was properly before the Court. *Fact Concerts*, 453 U.S. at 255-57.

234. *Fact Concerts*, 453 U.S. at 249.

Court focused on considerations of history and policy.[235] Noting its assumption that the members of the forty-second Congress were familiar with common-law tort principles existing at the time and intended them to obtain unless specifically stated otherwise,[236] the Court looked to whether municipalities traditionally had been immune from punitive damages. Thus, to determine legislative intent on this issue, the Court looked once again to the historical context of the Act.[237] It found in its examination of the precedents a strong common-law tradition of "[j]udicial disinclination to award punitive damages against a municipality."[238] As additional support for its conclusion, the Court pointed out that the Sherman Amendment would have required municipalities found liable *"to pay full compensation."*[239] From this historical fact, the Court inferred that Congress had not intended municipalities found liable under section 1983 to pay punitive damages.[240] In addition, the Court found evidence in the legislative history that at least some members of Congress were concerned with the financial burdens the Sherman Amendment would have imposed on local governments.[241] The Sherman Amendment would have allowed for compensatory damages only, but the Court concluded that Congress' concern with the burden on local governments and innocent taxpayers would have applied to punitive damages as well.

After finding no indication that Congress intended to deviate from the well-established principle of municipal immunity from punitive damages, the Court turned to considerations of policy to determine whether a contrary result might be dictated.[242] The Court concluded that none of the policies behind punitive damages or the section 1983 remedies would be advanced by imposing punitive damages on a municipality.[243] The Court decided that although municipalities are "persons" for purposes of suit under section 1983, they are incapable of the malice necessary to justify the imposition of punitive damages. The Court also found that a governmental entity cannot be punished effectively by the payment

235. *Id.* at 258-59.

236. *Id.* at 258.

237. *Id.* at 263-66. Although the Court often looks to historical context for indications of legislative intent in the absence of express statements in the statute, its use of this factor seems to be selective. *Compare Owen*, 445 U.S. at 635-50 *and* Pierson v. Ray, 386 U.S. 547, 554-55 (1967) (Court looked to historical context in deciding whether Congress intended to abrogate common-law immunities) *with Monell*, 436 U.S. at 690-95 (Court failed to look to historical context to see whether Congress intended to impose liability based on *respondeat superior*).

238. *Fact Concerts*, 453 U.S. at 260-63. The Court looked to decisions in state courts that had denied recovery of punitive damages from municipalities. Two themes emerged from those cases. First, a municipality " 'cannot, as such, do a criminal act or a willful and malicious wrong.' " *Id.* at 261 (quoting Hunt v. City of Booneville, 65 Mo. 620, 624 (1877)). The second theme was that "courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Id.* at 263.

239. *Id.* at 264.

240. *Id.* at 264-65.

241. *Id.* at 265.

242. Although the Court generally has used considerations of policy in § 1983 cases to buttress its conclusions on legislative intent, it suggested in *Fact Concerts* that policy considerations might override its conclusions on intent drawn from an examination of historical context. *Id.* at 266.

243. *Id.* at 268-71.

of punitive damages. To the extent anyone suffers, it is the innocent taxpayer. The Court concluded that the possibility of obtaining punitive damages from those representatives of the municipality actually responsible for the harm sufficiently furthers the deterrence and punitive functions of section 1983.[244]

The Court's purpose in *Fact Concerts* was to settle the punitive damages issue in section 1983 municipal liability. Like the *Owen* Court, it had no occasion to address the policy or custom requirement and did not comment on the *Monell* rejection of *respondeat superior*. Unlike the holding in *Owen*, however, the holding in *Fact Concerts* constricts rather than broadens the reach of municipal liability. Therefore, the Court did not need to extend justifications like accident reduction and loss spreading. Reading between the lines of the majority opinion in *Fact Concerts*, however, it is possible to find support for a *respondeat superior* theory of section 1983 municipal liability. Precedent the Court relied on for the proposition that municipalities should be immune from punitive damages indicates a clear recognition that municipalities themselves do not act.[245] The Court's failure to acknowledge this fact in *Monell* was an important factor in its rejection of *respondeat superior*.[246]

In addition, the Court's approach in *Fact Concerts* to determining legislative intent further supports the position that the *Monell* Court took the wrong approach. In *Monell* the Court, without looking to whether a common-law tradition of imposing liability on municipalities based on *respondeat superior* existed, refused to infer from legislative silence the intent to impose liability based on *respondeat superior*. The Court in *Fact Concerts* made an extensive examination of the common-law tradition of providing municipal immunity against payment of punitive damages. If the Court had made the same kind of examination in *Monell* of the common-law tradition of basing municipal liability on *respondeat superior*, it arguably would have found that Congress intended the basis of section 1983 municipal liability to be *respondeat superior*. Furthermore, the Court's acknowledgement that historically it was well understood that the community should share the obligation to compensate[247] has the modern ring of the cost spreading justification for imposing liability on employers based on *respondeat superior*.

The two major section 1983 municipal immunity cases after *Monell* have added substance to at least one important aspect of the section 1983 municipal liability picture. It is now clear that municipalities may not assert qualified immunities that might be available to their officers and that municipalities may not be assessed punitive damages. Given much of the language and reasoning in *Owen* and *Fact Concerts*, however, it is not so clear why the Court concluded in

244. *Id.* at 269-70.

245. The Court cited an 1877 Missouri case for the proposition that punitive damages should not be imposed on municipalities because they "can not, as such, do a criminal act or a willful and malicious wrong." *Fact Concerts*, 453 U.S. at 261 (citing Hunt v. City of Booneville, 65 Mo. 620 (1877)).

246. *See supra* notes 94-98 and accompanying text.

247. *Fact Concerts*, 453 U.S. at 259-63.

Monell and continues to assert that section 1983 municipal liability should not be based on *respondeat superior.*

B. *The Policy or Custom Requirement—The Distortion Takes an Alarming Shape*

To shed light on some of the persistent inconsistencies that still obscure the section 1983 municipal liability picture, the Supreme Court recently has addressed the policy or custom requirement in two significant cases. In a police misconduct case, *City of Oklahoma City v. Tuttle*,[248] the Court examined the question whether a plaintiff can use proof of a single incident of misconduct to establish a municipal policy or custom of inadequate training or supervision sufficient to render the municipality liable under section 1983.[249] The issue in *Pembaur v. City of Cincinnati*[250] was whether and under what circumstances a decision by municipal policymakers on a single occasion will satisfy the policy or custom requirement.[251] Although these cases purported to clarify the section 1983 municipal liability picture, a close analysis reveals that they cloud more issues than they resolve. Furthermore, these cases amply illustrate the problems raised by the Court's refusal in *Monell* to impose liability based on *respondeat superior.*

Plaintiff in *Tuttle*, widow of a man killed by a gunshot wound inflicted by a police officer, introduced expert testimony that the officer had been inadequately trained, but she offered no evidence that the particular officer or any other officer had been involved in similar incidents.[252] At trial the jury was instructed that it could infer from "a single unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge."[253] The jury returned a verdict against the city, and the United States Court of Appeals for the Tenth Circuit affirmed.[254]

The Supreme Court by a majority of seven reversed, concluding that the instruction was erroneous and that proof of a single incident of misconduct standing alone is insufficient to establish municipal liability.[255] Justice (now Chief Justice) Rehnquist, in reviewing the development of section 1983 municipal liability, noted the *Monell* Court's adoption of the policy or custom requirement and that Court's use of legislative history to support its rejection of *respondeat superior.*[256] Justice Rehnquist concluded that to impose liability based solely on proof of a single incident would be "to impose it simply because

248. 471 U.S. 808 (1985).
249. *Id.* at 813-14.
250. 106 S. Ct. 1292 (1986).
251. *Id.* at 1298.
252. *Tuttle*, 471 U.S. at 821-12.
253. *Id.* at 813.
254. *Id.*
255. *Id.* at 824-25.
256. *Id.* at 818.

the municipality hired one 'bad apple.' "[257]

In addition to rendering this narrow holding, Justice Rehnquist, speaking only for a plurality, addressed the more general question of what constitutes municipal policy and what proof is required to establish a policy or custom of inadequate training. In his remarks, most of which must be classified as dicta, Justice Rehnquist attempted to shed some light on the elusive concept of "policy." Because the word policy is a requirement of the Court's own making,[258] the traditional approach of statutory interpretation was unavailable. The plurality looked instead to the dictionary to find a definition of policy,[259] concluding that "the word 'policy' generally implies a course of action consciously chosen from among various alternatives."[260] In addition, the plurality drew a distinction between "unconstitutional policies" and "policies that are not themselves unconstitutional,"[261] finding that to establish liability for the latter requires "considerably more proof than the single incident."[262]

Both the tentative attempt at defining policy and distinguishing between constitutional and unconstitutional policies have serious implications for the future of section 1983 municipal liability. As the plurality pointed out, if policy connotes conscious choice of alternatives, it is hard to conceptualize pursuing a *policy* of inadequate training or supervision. Although this would not preclude approaching the inadequate training or supervision problem as a matter of governmental custom, a "custom" approach would require proof of a pervasive pattern of the inadequacy of the training and of incidents resulting from it.

More portentous, however, is the question the plurality raised but failed to answer—whether a policy not in itself unconstitutional "can ever meet the 'policy' requirement of *Monell*."[263] If the Court ultimately should conclude that such a policy does *not* meet the *Monell* requirement, a large segment of section 1983 municipal liability will be eradicated. The existence of a policy or custom of inadequate police training or supervision is not in itself unconstitutional even

257. *Id.* at 821.

258. Although the Court developed the policy or custom requirement as a way to implement the § 1983 causation requirement in municipal liability cases, it is not a requirement that can be found in the statute. This fact is aptly pointed out by Justice Stevens in his separate opinion in *Tuttle*, 471 U.S. at 841-42 (Stevens, J., dissenting), and in his opinion in *Pembaur*, 106 S. Ct. at 1302 (Stevens, J., concurring in part and concurring in the judgment).

259. The Court quoted a dictionary defining policy as " 'a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.' " *Tuttle*, 471 U.S. at 823 n.6 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 910 (1983)).

260. *Id.* at 823.

261. *Id.* at 823-24. Prior to *Tuttle* the Supreme Court had not specifically recognized this distinction. In fact, in Polk County v. Dodson, 454 U.S. 312 (1981), the Court stated that the § 1983 plaintiff had failed to allege that his claimed deprivation "was caused by any constitutionally forbidden rule or procedure," thus suggesting that the rule or procedure challenged causing the deprivation must itself be unconstitutional. *Id.* at 326. In a footnote in *Tuttle*, the Court cast doubt on the continued validity of basing § 1983 municipal liability on inadequate supervision or training, stating: "We express no opinion on whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the 'policy' requirement of *Monell*." *Tuttle*, 471 U.S. at 824 n.7.

262. *Tuttle*, 471 U.S. at 824.

263. *Id.* at 824 n.7.

though much police misconduct resulting in constitutional violations can be attributed to it. In fact, very little police misconduct results from consciously chosen policies that are themselves unconstitutional. If the Court continues its restrictive interpretation of the word policy and ultimately concludes that policies not in themselves unconstitutional cannot constitute a basis for section 1983 municipal liability, Congress' expansive intent in creating the section 1983 remedies will be frustrated. Inadequate training or supervision creates a tremendous potential for unconstitutional behavior. A municipality creating such a risk through inadequate procedures should bear the cost of compensation when the risk becomes a reality.

The Court's concept of policy is not the only troubling aspect of the *Tuttle* decision. The plurality's focus on fault as an aspect of the section 1983 municipal liability case poses an even greater threat to protection of civil liberties. The *Tuttle* plurality's approach to the *Monell* policy or custom requirement adds a detail to the section 1983 municipal liability picture that the majority in *Monell* did not intend. The *Monell* majority imposed the policy or custom requirement to ensure that municipalities would not be liable for constitutional invasions they had not actually caused. The *Tuttle* plurality, however, concluded that the *Monell* policy or custom requirement "provides a *fault-based* analysis for imposing municipal liability."[264] In distinguishing the policy or custom causation requirement from *respondeat superior*, the Court stated that "municipal liability should not be imposed when the municipality was not itself *at fault*."[265] The Court also stated that the policy or custom requirement "was intended to prevent the imposition of municipal liability under circumstances where no *wrong* could be ascribed to municipal decisionmakers."[266] Again, in commenting on the amount of proof necessary if the policy is not itself unconstitutional, the plurality stated that such cases would require "considerably more proof than the single incident . . . to establish both the requisite *fault* on the part of the municipality, and the causal connection between the policy and the constitutional deprivation."[267]

Furthermore, the Court in a footnote noted, "[I]t is open to question whether a policymaker's 'gross negligence' in establishing police training practices could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required."[268] Thus, the plurality opinion raises the disturbing possibility that the Court ultimately may require that the section 1983 plaintiff establish actual intent or state of mind amounting to deliberate disregard for constitutional rights.[269]

264. *Id.* at 818 (emphasis added).

265. *Id.* (emphasis added).

266. *Id.* at 821 (emphasis added).

267. *Id.* at 824 (emphasis added).

268. *Id.* at 824 n.7.

269. The Court has granted certiorari in a case in which it could decide this issue. *See* Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1374 (1986). *Kibbe* is discussed *infra* note 276.

Justice Rehnquist and the plurality were not alone in their focus on fault. Justice Brennan, author of the *Monell* policy and custom requirement, concurred in the judgment in *Tuttle* but found that the plurality's approach "needlessly complicated" municipal liability and "unsettled more than it clarified."[270] However, although purporting to address the case as a problem of proof of causation,[271] and recognizing that a cause of action under the statute requires only proof "that (1) a person (2) acting under color of state law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution or laws of the United States,"[272] he also consistently framed his references to the policy and custom requirement in terms of fault.[273] Justice Brennan even interpreted his own opinion in *Monell* to be a rejection of *respondeat superior* because "such liability would violate the evident Congressional intent to preclude municipal liability in cases in which the city itself was not at *fault*."[274] This interpretation ignores the fact the *Monell* policy or custom requirement relates only to causation.

The *Tuttle* Court did not directly address whether fault is a necessary part of section 1983 municipal liability cases, so it is difficult to assess the import of the Court's focus on fault. One possible explanation is that several members of the Court simply have misunderstood the nature of the policy or custom requirement. The Court's concern in *Monell* was clearly with the causation language in the statute and its conclusion that Congress intended to exclude all forms of vicarious liability. There is not the slightest hint in *Monell* that section 1983 municipal liability should be based on fault. Nor is there any suggestion in the statute or its legislative history to indicate that Congress intended municipalities, or any other section 1983 "persons," to be liable only when plaintiffs can establish fault. Furthermore, the Court made clear by its holding in *Owen* that a municipality is liable even if the municipality could not have known that its policy or custom would result in a constitutional harm. Thus, fault could not be an aspect of the section 1983 municipal liability case.

There are several possible explanations for the Court's focus on fault. Perhaps the Court has misunderstood the distinction between basing liability on *respondeat superior* and basing it on actual causation.[275] The *Monell* Court concluded that *respondeat superior* is inconsistent with the causation language of the

270. *Tuttle*, 471 U.S. at 825 (Brennan, J., concurring).

271. In Justice Brennan's opinion, causation in a § 1983 municipal liability case is divided into two parts. First, the plaintiff must show that the city itself caused the harm by establishing the existence of an official policy or established custom such as training procedures. Second, the plaintiff must show that the policy or custom caused the constitutional deprivation. *Id.* at 829-30 (Brennan, J., concurring).

272. *Id.* at 829 (Brennan, J., concurring).

273. *Id.* at 830-31 (Brennan, J., concurring). Justice Brennan's focus on the fault concept pervaded his whole opinion. Justice Brennan wrote that the single incident of "outrageous" police misbehavior was insufficient to establish that the municipality was "at fault" for the constitutional violation. *Id.* at 831 (Brennan, J., concurring). "[W]ithout some evidence of municipal policy or custom independent of the police officer's misconduct, there is no way of knowing whether the city is at *fault*." *Id.* (emphasis added).

274. *Id.* at 828 (Brennan, J., concurring) (emphasis added).

275. *But see supra* text accompanying notes 108-10 (arguing that actual causation need not be viewed as inconsistent with *respondeat superior*).

statute so it devised the policy or custom causation requirement. However, the rejection of *respondeat superior* does not necessarily mean a fault element was added. To say that a governmental policy or custom has caused constitutional injury does not necessarily mean that the government was at fault for having allowed it. It is possible the Court has confused the concept of accepting legal responsibility for having created a risk of a harm with the concept of having been *at fault* for having created a risk of harm.

Another possibility is that the Court actually intended to change the content of the section 1983 prima facie case by establishing fault as a new element of section 1983 municipal liability—at least in police misconduct cases. If so, in addition to establishing the requisite causation, the plaintiff apparently must plead and prove that the objectionable policy came about as a result of fault—probably gross negligence or deliberate indifference—on the part of policymakers.[276] If this is the correct interpretation of the Court's focus on fault, it marks a distinct departure from the Court's previous approaches to the requirements of the section 1983 prima facie case. The Court never has interpreted the statute to include a fault requirement. In fact, ever since the Court in *Monroe* specifically rejected a specific intent requirement, the Court has steadfastly held to its position that a section 1983 plaintiff need only plead and prove that the defendant acting under color of state law caused a constitutional violation.[277]

Furthermore, the addition of a fault requirement conflicts with the forty-second Congress' intent to provide constitutional remedies of tremendous scope in section 1983. To require section 1983 plaintiffs to plead and prove fault would seriously constrict the reach of those remedies. Constitutional injury may occur under color of state law even if no one is technically "at fault" in the sense of having intentionally or negligently caused the harm. In the police misconduct cases it is likely that inadequacies of training or supervision are attributable to someone's fault. However, under a policy or custom causation approach the focus should be on the inadequacies, not on the question whether anyone was at fault in creating those inadequacies. The insistence on the policy or custom requirement in a police misconduct case invites a focus on fault. "Negligent su-

276. Even this showing may not suffice. In a footnote, the *Tuttle* plurality stated:

> We express no opinion on whether a policy that itself is not unconstitutional, such as the general "inadequate training" alleged here, can ever meet the "policy" requirement of *Monell*. In addition, even assuming that such a "policy" would suffice, it is open to question whether a policymaker's "gross negligence" in establishing police training practices could establish a "policy" that constitutes a "moving force" behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required.

Tuttle, 471 U.S. at 824 n.7.

It is likely that the Supreme Court will address this issue in *Kibbe v. City of Springfield*. In *Kibbe* the United States Court of Appeals for the First Circuit sustained a jury verdict on the basis that the jury could have found from the evidence that the police department's gross negligence in training was the cause of the constitutional deprivation claimed. Kibbe v. City of Springfield, 777 F.2d 801, 809 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1374 (1986).

277. *See, e.g.*, Daniels v. Williams, 106 S. Ct. 662, 664 (1986); Parratt v. Taylor, 451 U.S. 527, 535 (1980), *overruled in part*, Daniels v. Williams, 106 S. Ct. 662 (1986). For a discussion of *Monroe*, see *supra* text accompanying notes 33-67.

pervision" is a well-established common-law tort concept,[278] so it is not surprising that courts faced with a purported policy of inadequate training or supervision inject a fault element. An easy way to avoid this problem would be to eliminate the policy or custom requirement in favor of imposing section 1983 municipal liability based on *respondeat superior*. Absent that approach, however, it is critical that the Supreme Court clarify its position with regard to fault and reassert its consistent conclusion that the section 1983 case requires only proof of a constitutional violation caused by one acting under color of state law and that the policy or custom requirement relates only to causation.

It is difficult to judge the impact the *Tuttle* decision will have on section 1983 municipal liability cases. The actual holding in the case settled only the narrow question whether proof of a single incident of misconduct is sufficient to establish a policy or custom of inadequate training or supervision. Most lower courts faced with the issue already had resolved it consistently with the *Tuttle* result.[279] The major impact of *Tuttle* will be the plurality's approach to "policy" and its focus on fault. Although falling short of actually defining "policy," *Tuttle* indicated that policy requires a conscious choice from among alternatives. How much and what kind of proof will be sufficient to establish a policy of inadequate training is still an open question despite the *Tuttle* plurality's attempt at guidance. Presumably, to establish a "policy" of inadequate training or supervision, the plaintiff must prove that municipal policy makers deliberately chose to pursue a course of inadequate training or supervision.[280] Because the *Tuttle* Court failed to specify or quantify the proof necessary, it is likely that significant confusion will arise concerning what kind of evidence is appropriate and how much evidence is sufficient.[281] The *Tuttle* plurality's greatest impact

278. Negligent supervision and the closely related concept of negligent entrustment of dangerous instrumentalities to those unable to handle them safely have arisen most often in the area of torts committed by children. *See* 2 HARPER, JAMES & GRAY, *supra* note 109, § 8.13, at 599-603; PROSSER & KEETON, *supra* note 63, § 33, at 197-203.

279. *See, e.g.*, Wellington v. Daniels, 717 F.2d 932, 936-37 (4th Cir. 1983); Languirand v. Hayden, 717 F.2d 220, 228-30 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

280. Carter v. District of Columbia, 795 F.2d 116, 122 (D.C. Cir. 1986) ("To succeed, a plaintiff must show a course deliberately pursued by the city . . . .").

281. In Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986), the district court had permitted plaintiffs to introduce a broad range of evidence to try to prove their case against the municipal actors. The United States Court of Appeals for the District of Columbia Circuit concluded that the admission of much of the evidence by the district court in an "unrestrained manner" constituted reversible error, notwithstanding the fact the district court had directed verdicts in favor of the city and the chief of police. *Id.* at 122, 133.

However, the court of appeals continued, stating, "We recognize that the § 1983 case against the District that the plaintiffs stated and attempted to prove required a showing that the municipality was both on notice of and indifferent to widespread police brutality." *Id.* at 133. Earlier, the court noted:

> Plaintiffs presented evidence that sought to demonstrate: (1) misconduct similar to the events in suit so widespread that it would not have persisted without the city's tacit approval; (2) the unfamiliarity of top officials with complaints lodged against police force members, indicating the city's lack of concern with the constitutional rights of persons who encounter police officers in the District; and (3) the inadequate response accorded to complaints of police misconduct, which signaled to police officers that their misbehavior would not be treated by the city as a matter of large concern.

Id. at 122.

Plaintiffs in *Carter* attempted to prove "custom or policy" by introducing, "*inter alia*, bare

certainly will be its interpolation of a fault element in police misconduct cases. Even if the Court did not intend to impose a fault requirement in *Tuttle*, it is already apparent that lower federal courts are applying the fault approach.[282] The United States Court of Appeals for the District of Columbia Circuit already has interpreted *Tuttle* and *Monell* as subjecting municipalities to liability "not 'based on theories akin to *respondeat superior*' but on 'a fault based analysis' "[283] and approved an instruction that a plaintiff must "show fault on the part of the city based on a course its policymakers consciously chose to pursue."[284]

This kind of interpretation could have dire consequences. To inject a fault element into the concept of policy or custom greatly adds to the plaintiff's burden in a section 1983 case. Proof of fault in establishing policy in a police misconduct case will be difficult, time-consuming, and expensive. Furthermore, it complicates the issues in cases that already are complex and confusing.

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complaints, pleadings, and press clippings, unsubstantiated by testimony, concerning alleged incidents of the use of excessive force by police officers." *Id.* at 123. Plaintiffs could prove only six occurrences:

> (1) the testimony of witness Craig Scott that in May 1982, police officers beat him repeatedly both at the scene of his arrest and after taking him into custody; (2) the death of prisoner Darrell Rhones in police custody in December 1983, and the D.C. Medical Examiner's conclusion that the death was caused by a "choke-hold" administered by police officers; (3) the death of seven persons, acknowledged by Police Chief Turner, in incidents involving D.C. police in a two-month period in late 1983 and early 1984; (4) a fine imposed against officer Vanderbloemen for striking two persons without cause, and improperly arresting one of them; (5) the reprimand of officer Markovich for looping a belt around the neck of a prisoner and taunting him and; (6) the police chief's admission that officer Anderson had kicked a handcuffed suspect.

Id. (citations to record omitted).

This litany was contrasted with the evidence presented in Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982), *vacated and remanded*, 735 F.2d 838 (5th Cir.) (per curiam) (en banc), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir. 1984) (per curiam) (en banc). In *Webster* a teenage auto theft suspect was shot in the head by one of the arresting officers after he emerged from the van unarmed and with his hands raised. The officer put down a "throwdown" gun beside the mortally wounded youth so that it would make the shooting appear justifiable. None of the other officers came forward with the truth until a federal investigation was initiated at the insistence of the boy's family. The policy or custom showing in *Webster* was based on evidence that "75-80% of the municipality's officers . . . carried 'throw down' guns." *Webster*, 689 F.2d at 1222. The court of appeals in *Carter* stated that it did not suggest by its reference to *Webster* that a numerical standard would be determinative. "Egregious instances of misconduct, relatively few in number but following a common design, may support an inference that the instances would not occur but for municipal tolerance of the practice in question." *Carter*, 795 F.2d at 124. This "common design" was found lacking in plaintiffs' case. *Id.*

The court of appeals in *Carter* also rejected evidence that top police officials were unfamiliar with and gave inadequate attention to complaints by the public. *Id.* at 124-25. Finally, the court did not disagree with the admission of unsubstantiated hearsay from newspapers, personnel files, and other sources about allegations of police misconduct, but found reversible error based on the risk of prejudice to particular police defendants who were mentioned by name as having been involved in prior incidents. *Id.* at 126-31. From all that was presented the court of appeals determined that there was insufficient proof of the existence of an official policy or custom of tolerance or approval of abusive police conduct by the city or the police chief. *Id.* at 124. However, the manner in which the evidence was introduced was found to be an abuse of the trial court's discretion and the court of appeals required that a new trial be granted for the individual defendants. *Id.* at 132. *Carter*, therefore, leaves unanswered the question how much and what type of proof is necessary to show the requisite "custom or policy" for establishing § 1983 liability.

282. *See Carter*, 795 F.2d at 122.

283. *Id.* (quoting *Tuttle*, 471 U.S. at 818).

284. *Id.*

In *Pembaur v. City of Cincinnati*[285] the Supreme Court addressed the policy and custom requirement in a different factual context from the one encountered in *Tuttle*. Although the case involved the appropriateness of the conduct of law enforcement personnel, it was not a typical police misconduct case. Rather, *Pembaur* raised the question whether law enforcement personnel were implementing official policy at the time the constitutional injury occurred. In *Pembaur* county deputy sheriffs and municipal police officers, acting on instructions from the county prosecutor to "go in and get" witnesses, broke down the door of plaintiff's office. Plaintiff sued the city and county under section 1983, claiming fourth and fourteenth amendment violations.[286] The district court dismissed the claims against the city and county, concluding that the officers were not acting pursuant to a *Monell* official policy. The United States Court of Appeals for the Sixth Circuit reversed the dismissal of the complaint against the city of Cincinnati, but affirmed the dismissal of the complaint against the county.[287] Although it found the sheriff and prosecutor to be officials authorized to establish official policy, the court concluded that evidence of one occasion in which the officials decided to force an entry in violation of the fourth amendment was insufficient to establish an official policy.[288]

The Supreme Court reversed and in doing so addressed "whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy [the official policy] requirement."[289] Justice Brennan, once again writing for the majority,[290] used the *Monell* policy requirement as the starting point for his analysis. Noting that "*Monell* is a case about responsibility,"[291] Justice Brennan attempted to clarify the *Monell* "official policy" requirement by stating that it was "intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is

285. 106 S. Ct. 1292 (1986).

286. *Id.* at 1295.

287. Pembaur v. City of Cincinnati, 746 F.2d 337, 342 (6th Cir. 1984), *rev'd*, 106 S. Ct. 1292 (1986).

288. *Id.* at 341.

289. *Pembaur*, 106 S. Ct. at 1294.

290. Justice Brennan delivered the opinion of the Court for part I, which contained the facts, procedural history, and reasons for granting certiorari; in part IIA, he delivered an analysis of *Monell* and the background of municipal liability under § 1983. He was joined by Justices White, Marshall, Blackmun, Stevens, and O'Connor. In part IIB the Court limited the liability for municipalities to those situations in which the decisionmaker possesses final authority with respect to the action ordered. The Court limited liability to those instances "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 1300. This portion of the opinion represented a plurality view, with only Justices White, Marshall, and Blackmun joining Justice Brennan. In part IIC the Court applied the municipal liability test to the facts in *Pembaur* and determined that liability for a single incident could be found under § 1983. Justice Brennan was again joined by Justices White, Marshall, Blackmun and Stevens in part IIC. Justice White filed a separate concurring opinion. *Id.* at 1301 (White, J., concurring). Justice Stevens also filed a separate opinion. *Id.* at 1302 (Stevens, J. concurring in part and concurring in the judgment). Justice O'Connor filed a separate opinion. *Id.* at 1304 (O'Connor, J., concurring in part and concurring in the judgment). Justice Powell was joined by Chief Justice Burger and Justice Rehnquist in filing a dissenting opinion. *Id.* at 1304 (Powell, J., dissenting).

291. *Id.* at 1297.

limited to action for which the municipality is actually responsible."[292] It is immediately obvious that Justice Brennan's approach in *Pembaur* is significantly different from his approach in *Tuttle*. In his concurring opinion in *Tuttle*, Justice Brennan emphasized *fault* as the basis of municipal liability;[293] by contrast, in *Pembaur* he stressed *responsibility*.[294] Municipal responsibility is limited to circumstances in which it can be established that the municipality has *acted* to cause the harm.[295] Thus, once again the focus clearly is on causation and away from fault.

From the determination that municipal acts form the basis of municipal liability, Justice Brennan concluded that a single decision by a municipal policymaker may be sufficient to satisfy this requirement.[296] In reaching this result, Justice Brennan attempted to clarify the concept of official policy, declaring that, though " 'official policy' often refers to formal rules or understanding . . . intended to . . . establish fixed plans of action to be followed under similar circumstances consistently and over time, . . . a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations."[297] Justice Brennan concluded that if such a decision is made by an authorized policymaker, then it is "an act of official government 'policy' as that term is commonly understood."[298]

Justice Brennan's approach has significantly enlarged the concept of official policy articulated in *Monell* and *Tuttle*. The majority in *Monell* implied that official policy exists only after some kind of formal decision has been made by officials in policymaking positions.[299] The plurality in *Tuttle* reaffirmed this view and also indicated that the plaintiff must establish that his or her injury resulted from an already existing policy.[300] Like the *Tuttle* plurality, the majority in *Pembaur* looked to the dictionary for the meaning of "policy" but found a definition with more substance.[301] The Court's dictionary research revealed

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292. *Id.* at 1298.

293. *Tuttle*, 471 U.S. at 830-31 (Brennan, J., concurring).

294. *Pembaur*, 106 S. Ct. at 1298-99.

295. *Id.* at 1297-98.

296. *Id.* at 1298.

297. *Id.* at 1299.

298. *Id.*

299. In *Monell* the Court stated that municipal liability attaches when "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." *Monell*, 436 U.S. at 690.

300. In *Tuttle* the plurality stated: "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Tuttle*, 471 U.S. at 823-24.

301. In fact, the *Pembaur* majority used a number of sources in its search for a definition of "policy." It collected its findings in a footnote:

> While the dictionary is not the source definitively to resolve legal questions, we note that this description of "policy" is consistent with the word's ordinary definition. For example, Webster's defines the word as "a specific decision or set of decisions designed to carry out such a chosen course of action." Webster's Third New International Dictionary 1754 (1981). Similarly, the Oxford English Dictionary defines "policy" as "[a] course of action adopted and pursued by a government, party, ruler, statesman, etc.; any course of action adopted as advantageous or expedient." VII Oxford English Dictionary 1071 (1933). See

that official policy is not necessarily a final rule of general applicability; nor is it necessary that the plaintiff establish that an already existing policy caused the injury. Policy can be made on the spot and have applicability only to the particular situation in which the constitutional violation occurs by an authorized decisionmaker.[302] The determination that "where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly"[303] naturally raises the question of how to determine which decisions by which municipal officers constitute "official policy." Speaking to that issue, Justice Brennan concluded that "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered."[304] Thus, a "policymaker" is one who is "responsible for establishing final government policy respecting [a particular] activity."[305] In his statement of the holding of the case, Justice Brennan elaborated on both the policy and policymaker aspects of official policy by concluding that "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[306]

Although it has helped to clarify the meaning of official policy and policymaker, the Court's decision in *Pembaur* also has accentuated the distortion inherent in the municipal liability picture created by the policy or custom requirement. The Court's focus on the status of the decisionmaker as the determining factor in deciding whether official policy has been made highlights the difficulty of not accepting *respondeat superior* as the theory of recovery in a section 1983 municipal liability case. Although Justice Brennan attempted to distinguish between acts of the municipality for which it should be responsible and acts of employees of the municipality for which it should not be responsible, his approach implicitly recognized that municipalities can act only through their employees. This approach effectively limits municipal liability to responsibility for acts of a certain category of municipal employee—those high level employees who have final decisionmaking authority. In essence, it thus imposes municipal liability based on *respondeat superior* for the acts of some employees but not

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also, Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979) ("any governing principle, plan, or course of action"); Random House Dictionary 1113 (1966) ("a course of action adopted and pursued by a government, ruler, political party, etc.").

Pembaur, 106 S. Ct. at 1299 n.39.

Thus, in the "battle of the dictionaries," the *Pembaur* Court's flexible approach to "policy" appears to come out ahead of the *Tuttle* Court's more rigid approach if number of sources is any criterion for judgment.

302. *Pembaur*, 106 S. Ct. at 1299.

303. *Id.*

304. *Id.*

305. *Id.* at 1299-1300.

306. *Id.* at 1300. This holding could be read to exclude the concept of custom as a possible basis for recovery in a § 1983 case. However, the majority makes clear that custom is a basis for recovery but that it was not in issue in the case. *Id.* at 1299 n.10.

others.[307] The municipality is deemed responsible for the acts of high level decisionmaking employees but not for the acts of low level, frontline employees. This distinction based on the particular status of the employee is especially unacceptable. It is the low level employee who has the greatest exposure to the public and, therefore, the greatest potential for committing constitutional violations.[308] Furthermore, the *Pembaur* approach may present difficult problems of proof. In one sense, the approach eases the plaintiff's burden because a single decision may constitute policy. However, the plaintiffs in such cases must establish that the decisionmaker had policy-making status.

Another problem with the *Pembaur* decision is that the approach taken by the majority and the result reached seem inconsistent with the approach and result in *Tuttle*. In *Tuttle* the plurality focused on fault as the basis of liability and concluded that a single act of misconduct without more is insufficient to establish a policy of inadequate training or supervision. In *Pembaur* the majority focused on causation as the basis of liability and concluded that a single decision by an authorized policymaker is sufficient to constitute official policy and can form the basis for recovery under section 1983. It is difficult to explain the different approaches taken in the two seemingly similar cases. One obvious difference between the two decisions exists: *Tuttle* is a classic police misconduct case in which the section 1983 municipal liability claim is based on a policy of inadequate training or supervision; *Pembaur*, by contrast, is a policy case in which the government actor carried out official policy proclaimed by an authorized policymaker. Another distinction between the cases is that the policy causing the constitutional violation in *Pembaur* was in itself unconstitutional; the policy in *Tuttle* was not in itself unconstitutional, but rather resulted in unconstitutional conduct. The question is whether these distinctions justify the different approaches.

Assuming the legitimacy of the policy or custom requirement,[309] the factual distinctions between the two cases appear to justify a distinction based on the single incident aspect. A single incident of police misconduct could easily occur even if no policy or custom of inadequate training or supervision existed. Misbehavior could result from any number of things. Therefore, additional proof of the policy independent of the incident giving rise to the suit should be required. On the other hand, if official policy is simply the decision of a decisionmaker who has the final authority with respect to a particular issue, there is no reason a single decision by such a person that creates policy resulting in

307. The dissenters in *Pembaur* noted and disagreed with the majority's focus on the status of the decision-maker as the basis for determining that an official policy caused plaintiff's harm. Their criticism was that this approach results in circular reasoning because "policy is what policymakers make, and policymakers are those who have authority to make policy." *Id.* at 1308 (Powell, J., dissenting). However, far from advocating a *respondeat superior* approach, the dissenters would require a focus on the question of whether official policy had been formed by looking to the nature of the decision and the process by which it was reached, in order to distinguish between actual policies and ad hoc decisions. *Id.* at 1308-09 (Powell, J., dissenting).

308. *See supra* notes 106-07 and accompanying text.

309. Obviously, the illegitimacy of the policy or custom requirement is a major focus of this Article. However, because the policy or custom requirement is the approach to municipal liability the Court has chosen, it is necessary to understand how it functions in particular cases.

constitutional deprivation should not be the basis of section 1983 municipal liability.

The more difficult question is why the Court focused on the concepts of fault and causation in *Tuttle* and only on the concept of causation in *Pembaur*. Possibly the Court focused on fault in *Tuttle* because the official policy challenged was not in itself unconstitutional and did not focus on fault in *Pembaur* because the official policy was in itself unconstitutional. If this distinction is operative, then when the policy itself is unconstitutional, the plaintiff need only prove that the policy in fact caused an invasion of his or her civil rights. On the other hand, if the policy is not unconstitutional, the plaintiff must establish in addition to causation that the municipality was at fault for allowing a policy to exist that has the potential for causing constitutional injury. However, although the Court in *Tuttle* indicated that a distinction may exist between unconstitutional policies and those not in themselves unconstitutional, it focused on the *quantum* of proof necessary to prove the latter. It did not focus on the need to establish fault in the case of a policy not in itself unconstitutional.[310] In fact, the *Tuttle* plurality decision suggested that fault is a requirement regardless of whether the policy is constitutional or unconstitutional.[311] The *Pembaur* majority, on the other hand, never mentioned fault and drew no distinctions between its approach to policy and the approach taken in *Tuttle*.[312] Its focus was exclusively on the causation aspects of the policy or custom requirement.

It is not clear that the Court's focus on fault in *Tuttle* is based on a distinction between policies that are in themselves unconstitutional and policies that are *not* in themselves unconstitutional. However, this reason does not justify the difference in approach. Municipal policies or customs of inadequate training or supervision create significant risks that constitutional rights will be invaded even if the policy or custom is not unconstitutional. To impose on the plaintiff an additional fault requirement is contrary to the intent of the drafters of the statute, who required only proof of a constitutional deprivation perpetrated under color of state law. Proof that the training or supervision is inadequate and that the inadequately trained or supervised municipal employee caused a constitutional violation should be sufficient. The fault requirement would place an additional and unintended burden on the plaintiff.

In the four section 1983 municipal liability cases it has decided since *Monell*, the Supreme Court has attempted to add to and clarify the sketch of munic-

310. The *Tuttle* Court concluded that if the policy is not in itself unconstitutional, a single incident cannot suffice to establish fault. Specifically, the Court stated that "where the policy relied upon is not itself unconstitutional, *considerably more proof* than a single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824 (emphasis added). Thus, although the Court included the notion of fault, the focus is on the amount of proof necessary to establish fault.

311. The *Tuttle* plurality's constant references to fault and its focus on the amount of proof necessary to establish "the *requisite* fault on the part of the municipality" lead to this conclusion. *Id.* at 824 (emphasis added).

312. In a footnote in the majority opinion the *Pembaur* Court specifically found that its approach to policy was not inconsistent with the approach taken in *Tuttle*. *Pembaur*, 106 S. Ct. at 1299 n.11.

ipal liability drawn in *Monell*. However, the Court's line-drawing efforts have raised more questions than they have settled. The responsibility for the resulting confusion lies with the *Monell* policy or custom requirement. The Court's inability to present a clear picture of section 1983 municipal liability is directly attributable to the Court's error in perspective caused by the policy or custom requirement.

V. CONCLUSION

Congress enacted section 1983 over a century ago to provide broad remedies to anyone whose civil rights are violated by "persons" acting under color of state law. The Supreme Court's interpretation of the statute in *Monell* to include municipalities within the meaning of the word "person" expanded the potential for protection against abuses of governmental power. Unfortunately, however, the Court's rejection of *respondeat superior* in favor of the policy or custom requirement has impeded the development of the sketch of municipal liability into a picture that reflects the vision of freedom intended by the forty-second Congress. The *Monell* policy or custom requirement has limited the scope of protection and added extraneous considerations that have blurred the image of governmental responsibility for unconstitutional behavior of those acting on behalf of the government.

It might be argued that at least a municipal liability dimension adheres to the section 1983 action whereas none existed prior to *Monell*. However, the municipal liability aspect is developing in a manner that may be detrimental to the long range future of section 1983 civil rights protection generally. The inclination of the Supreme Court to interpret the policy or custom requirement to include a fault element could color its approach to the requirements of the section 1983 prima facie case in situations other than municipal liability.

At the very least, as an alternative to re-creating the basis of liability in section 1983 municipal liability cases, the Court could alleviate the problem somewhat by attempting to clarify the policy or custom requirement. Too many features of it are as yet unresolved[313] and those aspects the Court has had occasion to address remain obscure. Consistency in approach and result would greatly benefit lower courts attempting to apply the Court's picture of section 1983 municipal liability. In particular, the Court should take its earliest opportunity to explain its references to fault in *Tuttle*. Unless the Court addresses this issue directly, lower courts are likely to render decisions under the misapprehension that fault is a necessary element of the section 1983 municipal liability case.

The only certain way the Court could correct the distortion created by the policy or custom requirement would be to reconsider the basis of liability issue in section 1983 municipal liability. A careful reexamination of the legislative history, the language of the statute, the background of tort liability, and the policies at stake would demonstrate to the Court that its rejection of *respondeat*

313. For instance, the Court has not yet had occasion to explore the meaning or contours of "custom" in the § 1983 municipal liability setting.

superior in *Monell* was unwarranted.[314] Above all, when addressing a section 1983 municipal liability question, the Supreme Court should recognize that its function is to use the tools Congress provided in section 1983 for the purpose Congress created them—to represent the picture of personal liberty the forty-second Congress envisioned. The more care the Court takes in discerning and then illustrating the expansive intent of Congress, the greater the likelihood that a clear picture of section 1983 municipal liability will emerge.

314. At this point, however, it is unrealistic to expect that such reconsideration will occur. Justice (now Chief Justice) Rehnquist in his plurality opinion in *Tuttle* has made clear that reconsideration is extremely unlikely. *See Tuttle*, 471 U.S. at 818 n.5. Currently, Justice Stevens is the lone voice on the Court favoring *respondeat superior* as the basis of § 1983 municipal liability. *See id.* at 834-38 (Stevens, J., dissenting); *Pembaur*, 106 S. Ct. at 1303 (Stevens, J., concurring in part and concurring in the judgment).