Federal Jurisdiction -- Civil Rights -- Monell v. Department of Social Services: The Court Compromises on Municipal Liability Under Section 1983

Thomas L. Allen
can never be justified, the supreme court may have undervalued the
need for a psychiatric examination that can arise in special circum-
stances, overreacted to the burden such an exam imposes on certain
witnesses, and denied North Carolina trial courts a potentially effective
evidentiary tool for assessing witness credibility.

KURT D. WINTERKORN

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Section 1983 of the Civil Rights Act provides a federal cause of
action for any person whose constitutional rights have been violated
"under color of state law." Since the Supreme Court's expansive defi-
nition of "under color of state law" in Monroe v. Pape in 1961, the

70. For a discussion of the role of the expert psychiatric witness in the interaction of law and
modern science and an earlier reluctance of the North Carolina courts to increase reliance on
psychiatric opinion, see A Survey of Statutory Changes in North Carolina in 1943, 21 N.C.L. Rbv.
323, 348 (1943).

71. Justice Exum, in his concurring opinion, concluded, "Situations calling for the entry of
such an order would, it seems, be rare indeed. But if called for, our judges should have the power
to enter the order." 294 N.C. at 29, 240 S.E.2d at 628 (concurring opinion).

1. 42 U.S.C. § 1983 (1976) provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of
any State or Territory, subjects, or causes to be subjected, any citizen of the United States
or other person within the jurisdiction thereof to the deprivation of any rights, privileges,
or immunities secured by the Constitution and laws, shall be liable to the party injured
in an action at law, suit in equity, or other proper proceeding for redress.

2. Jurisdiction to hear § 1983 claims is conferred upon the federal courts by 28 U.S.C.
§ 1343(3) (1970), which provides in part:
The district courts shall have original jurisdiction of any civil action authorized by law to
be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation,
custom or usage, of any right, privilege or immunity secured by the Constitution of
the United States or by any Act of Congress providing for equal rights of citizens or of
all persons within the jurisdiction of the United States.

statute has been the principal tool used by the federal judiciary to protect citizens' constitutional rights from state encroachment and to provide compensation for persons injured by constitutional violations.\(^4\) The utility of section 1983 was, however, long impaired by the holding in *Monroe* that municipalities and other local governmental entities were not "persons" for section 1983 purposes and hence could not be sued pursuant to the statute.\(^5\) In *Monell v. Department of Social Services*,\(^6\) the Court overruled *Monroe*, holding that municipalities can be sued under section 1983 when a municipal policy, ordinance, regulation, or custom inflicts constitutional injury.\(^7\) The Court did, however, place a significant limitation on the scope of municipal liability under section 1983 by holding that local governments cannot be held liable on a *respondeat superior* theory for the section 1983 violations of their employees.\(^8\) In addition, the Court intimated that a further limitation on municipal liability—in the form of a qualified immunity for municipal defendants in section 1983 actions—may be developed in the near future.\(^9\)

*Monell* was initiated by several employees of the Department of Social Services and the Board of Education of the City of New York who brought a class action under section 1983 challenging, on due process grounds, the constitutionality of a mandatory pregnancy leave policy allegedly adopted by the Board and the Department.\(^10\) Plaintiffs sought declaratory and injunctive relief, as well as back pay for the period of forced leave.\(^11\) As defendants, the complaint named the Department and its Commissioner, the Board and its Chancellor, and the City of New York and its Mayor.\(^12\) The individual defendants were

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5. 365 U.S. at 187.
7. Id. at 690.
8. Id. at 694.
9. Id. at 701.
10. Id. at 661. According to the employees' allegations, this policy arbitrarily required them to take unpaid leaves of absence at a certain stage of their pregnancies, regardless of their physical capability to work beyond that stage. *Id.*
11. *Id.* Plaintiffs were required to quit work approximately one month before it would have become medically necessary for them to do so. *Monell v. Department of Social Servs.*, 394 F. Supp. 853, 859 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 259 (2d Cir. 1976), *rev'd*, 436 U.S. 658 (1978).
12. 436 U.S. at 661.
sued solely in their "official capacity," meaning that any monetary recovery from them was to be paid out of municipal funds.\textsuperscript{13}

While the \textit{Monell} case was pending in federal district court,\textsuperscript{14} the Supreme Court, in \textit{Cleveland Board of Education v. Lafleur},\textsuperscript{15} struck down, on due process grounds, a mandatory pregnancy leave policy similar to that involved in \textit{Monell}. The district court recognized that under \textit{Lafleur} the New York City policy in \textit{Monell} was unconstitutional,\textsuperscript{16} but dismissed the action nonetheless, holding that any attempt to secure back pay from the City under section 1983, either by suing the Board, the Department, or the City directly, or by suing the individual defendants in their official capacity, was barred by the doctrine of municipal immunity announced in \textit{Monroe v. Pape}.\textsuperscript{17} The district court's judgment was affirmed by the United States Court of Appeals for the Second Circuit on similar grounds.\textsuperscript{18}

The Supreme Court, in a seven to two decision based entirely on the legislative history of the Civil Rights Act, reversed the judgments of the lower courts, holding that municipalities and other local governmental entities may, in some circumstances, be held liable under section 1983. In so doing, the Court rejected the interpretation of the legislative history of section 1983 that had formed the sole basis of the \textit{Monroe} Court's holding that local governments were immune from liability under the statute.\textsuperscript{19}

Section 1983 originated as section one of the Civil Rights Act of 1871,\textsuperscript{20} sometimes known as the Ku Klux Klan Act.\textsuperscript{21} During consideration of the Act, the House rejected an amendment, offered by Senator Sherman, that would have imposed liability on towns and counties

\textsuperscript{13} For a discussion of official capacity suits, see notes 38-40 and 47-48 and accompanying text \textit{infra}.
\textsuperscript{14} 394 F. Supp. 853 (S.D.N.Y. 1975).
\textsuperscript{15} 414 U.S. 632 (1974).
\textsuperscript{17} \textit{Id.} The court held plaintiffs' claims for injunctive and declaratory relief moot because both the Board and the Department had abolished their mandatory pregnancy leave policies. \textit{Id}.
\textsuperscript{18} 532 F.2d 259 (2d Cir. 1976).
\textsuperscript{19} The \textit{Monroe} Court expressly refused to consider policy reasons for or against municipal immunity. 365 U.S. at 191.
\textsuperscript{20} Ch. 22, § 1, 17 Stat. 13.
\textsuperscript{21} The general purpose of the Act was to suppress violence in the post-Civil War South, where gangs of Klan members were allegedly terrorizing blacks and white Republicans. For a vivid description of the situation the Act was intended to remedy, see the remarks of Senator Sherman, \textit{CONG. GLOBE}, 42d Cong., 1st Sess. 154-58 (1871).
for damage done to their inhabitants “by persons riotously and tumultuously assembled.” The Monroe Court interpreted the House rejection of the Sherman Amendment as an indication of Congress’ intent that municipalities not be held liable under any portion of the Act, including section 1983. In Monell, the Court concluded, after a thorough reexamination of the legislative history of the Act, that Monroe had erred in its interpretation of legislative intent and that the 1871 Congress, despite its rejection of the Sherman Amendment, had intended that municipalities be included as “persons” within section 1983.

The key to the Court’s opinion in Monell is the distinction drawn between municipal liability under the Sherman Amendment and that imposed by section 1983. The Sherman Amendment was a rather drastic piece of “riot act” legislation. It provided that towns and counties would be liable for all damage done to person or property by private persons “riotously and tumultuously assembled,” even if the government had no prior knowledge of the impending riot. According to the Court, section one of the Act (now section 1983), on the other hand, imposed liability only for the municipality’s own constitutional violations.

Therefore the Court did not find in the debates on the Sherman Amendment a complete bar to municipal liability under section 1983.

22. Id. at 800. The full text of the Sherman Amendment is included in the appendix to the majority opinion in Monell. 436 U.S. at 702.

23. 365 U.S. at 191. According to the Monroe Court’s interpretation, the 1871 Congress considered itself constitutionally powerless to impose § 1983 liability on towns and counties, because local governments were instrumentalities of state, not federal, law. Id. at 190.

24. 436 U.S. at 690.

25. According to its sponsor, the purpose of the Sherman Amendment was to compensate for the state courts’ inability to cope with the Klan problem. Senator Sherman noted that, despite the prevalence of Klan violence, indictments of Klan members were rare. And even when an indictment was handed down, a jury of sympathetic peers would usually render a verdict of not guilty. Sherman felt that his amendment, by holding the town or county liable for Klan violence, would encourage the local citizenry to take action to suppress the Klan. Sherman claimed that a similar law had been enacted in England to quell the widespread social disorder following the Norman Conquest, and that several states had enacted statutes to the same effect. Cong. Globe, 42d Cong., 1st Sess. 760, 761 (1871) (remarks of Sen. Sherman).

26. The most prominent objection to the Sherman Amendment was that it would impose on towns and counties an obligation to protect their citizens and their property from rioters. In effect, the Sherman Amendment would have required local government entities to establish police forces to keep the peace. Several congressmen believed that since a local government was an instrumentality of state law, the federal government had no constitutional power to impose such an obligation on towns and counties. See, e.g., id. at 788-89 (remarks of Rep. Kerr). Justice Brennan, reasoning from established case law existing at the time of the 1871 debates, concluded that the Congressmen would not have perceived a similar constitutional problem in simply requiring local governments to abide by the Constitution in their own actions. 436 U.S. at 679-82. Furthermore,
They did find, however, in the rejection of the Sherman Amendment, a significant limitation on that liability. On the basis of the plain language of the statute and "Congress' rejection of the only form of vicarious liability presented to it," the Court concluded that the 1871 Congress did not intend municipalities to be vicariously liable under traditional principles of tort law for the section 1983 violations of their employees. Instead, the Court held that a municipality can be named as a defendant in a section 1983 action only when some municipal policy, ordinance, regulation, or custom inflicts a deprivation of constitutional rights.

The Court's opinion in Monell concluded with a cursory discussion of the possibility that a limited form of immunity may be conferred upon municipal defendants in section 1983 actions. Though the Court chose to "express no views on the scope of municipal immunity beyond holding that municipal bodies . . . cannot be entitled to an absolute immunity," the possibility of a qualified immunity for local governments—similar to that granted to governmental officials in section 1983 actions—was implicitly left open.

Though Monroe v. Pape greatly expanded the scope of section 1983 by interpreting "under color of state law" to include the misuse of power by state officials, the Monroe Court also placed a major restriction on the utility of section 1983 with its holding that municipalities were not "persons" for section 1983 purposes and hence could not

Brennan pointed to certain passages in the debates that showed "unequivocally" that Congress intended municipalities to be held liable under § 1983. Id. at 683-90. 27. 436 U.S. at 693 n.57. 28. Id. at 694. Mr. Justice Stevens did not join this portion of the Court's opinion, because it was "merely advisory" and not necessary to resolve the issues presented by Monell. Id. at 714 (concurring opinion). 29. Id. at 690. 30. Id. at 701. 31. Id. 32. Prior to Monroe, § 1983 had been interpreted narrowly by the courts and, as a result, only a handful of § 1983 actions were successfully maintained. For a brief analysis of the statute's slow beginnings, see Developments in the Law—Section 1983 and Federalism, supra note 4, at 1156-61. The Monroe decision paved the way for a phenomenal increase in the use of § 1983. Though there are apparently no statistics on the exact number of § 1983 actions brought each year, one authority estimates that while approximately 300 § 1983 claims were filed in 1960, over 12,000 such claims were filed in 1977. Newman, Suing the Lawbreakers: Proposals To Strengthen the Section 1983 Damage Remedy For Law Enforcers' Misconduct, 87 YALE L.J. 447, 452 (1978). 33. In Monroe, plaintiffs sought monetary relief under § 1983 for injuries allegedly inflicted by Chicago police officers. Plaintiffs alleged that the officers broke into their home without a warrant, ransacked the house, and took one of the plaintiffs to a police station where he was interrogated for 10 hours without being placed under arrest or taken before a magistrate. 365 U.S. at 169. The defendants argued that § 1983 was inapplicable to these facts because the officers were
be sued pursuant to the statute. An attempt in *City of Kenosha v. Bruno*\(^{34}\) to limit *Monroe* to its facts, by arguing that the immunity applied only to actions for damages and not to suits for equitable relief, was unsuccessful. *Monroe* and *Kenosha* combined to produce a doctrine of absolute municipal immunity from any action, legal or equitable, brought under section 1983.\(^{35}\)

From its inception, the municipal immunity doctrine was unpopular both with commentators, who criticized it frequently,\(^{36}\) and with the lower federal courts, which devised several means to circumvent *Monroe*. The Supreme Court's eleventh amendment jurisprudence\(^ {37}\) provided one method of awarding injunctive relief against a municipality despite the *Monroe* immunity doctrine.\(^ {38}\) This was accomplished through the familiar fiction of "official capacity" suits. The plaintiff, seeking an injunction against some unconstitutional municipal action, would simply bring suit against the responsible individual governmental employee in his official capacity. By ordering the "official capacity" defendant to cease enforcement of the unconstitutional municipal practice, the court would reach a result tantamount to an injunction against the municipality itself. All the courts of appeals agreed that "official capacity" suits for equitable relief were cognizable under section 1983, despite their similarity to actions directly against the governmental entity.\(^ {39}\) The Supreme Court itself gave implicit recognition to the "official capacity" method of circumventing *Monroe* while ostensibly adhering to the municipal immunity doctrine.\(^ {40}\) Thus, well before *Monell*, injunctive relief under section 1983 could be awarded against a municipality, albeit indirectly.

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\(^ {34}\) 412 U.S. 507 (1973).

\(^ {35}\) The municipal immunity doctrine has been the subject of extensive commentary. For an exceptionally thorough and well-documented analysis, see Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483 (1977).


\(^ {37}\) See, e.g., *Ex parte Young*, 209 U.S. 123 (1908).

\(^ {38}\) See generally Levin, *supra* note 35, at 1496-504.

\(^ {39}\) See *id.* at 1501 n.67.

\(^ {40}\) In *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 (1976), a municipal workers union named the City of Charlotte, the City Council, and the individual council members in their official capacity as defendants in a suit to obtain an injunction ordering that union dues be withheld from members' paychecks. The Court held that the municipal immunity
The lower courts continued their efforts to circumvent the municipal immunity doctrine by devising monetary damage remedies for persons injured by unconstitutional municipal action. Much of this activity centered around the judicial creation of a cause of action against local governmental entities similar to that created by the Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*. In *Bivens*, the Court held that a cause of action could be implied from the fourth amendment, giving a person whose fourth amendment rights are violated by a federal officer a monetary damage remedy against the offending officer. By analogy to *Bivens*, commentators argued that a similar cause of action against local governmental entities could be implied from the fourteenth amendment. By proceeding under a *Bivens*-type cause of action, rather than section 1983, a person injured by municipal constitutional violations could evade the restrictions imposed by the section 1983 municipal immunity doctrine and thereby obtain compensation from the municipality in the form of money damages. By the time *Monell* was decided, four federal courts of appeals had accepted the *Bivens* analogy and found a cause of action against local governmental entities implied under the fourteenth amendment. Three others intimated that such an action might be maintained, while one refused to find an implied cause of action.

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41. 403 U.S. 388 (1971).
42. Id. at 397.
43. E.g., Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 Nw. U.L. Rev. 770 (1975); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 923 (1976). The movement toward the creation of a *Bivens*-type cause of action against municipalities was fueled by language in the majority and concurring opinions in *City of Kenosha v. Bruno*, 412 U.S. at 514, 516, that seemed to indicate that the Court would find no obstacle to such a development.
44. Turpin v. Mallet, 579 F.2d 152, 164 (2d Cir. 1978) (decided one day before *Monell*; holding that plaintiff, victim of officially condoned police harassment, could maintain action against city); Owen v. City of Independence, 560 F.2d 925, 933 (8th Cir. 1977) (public official's job terminated without due process), vacated for reconsideration in view of *Monell*, 98 S. Ct. 3118 (1978); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 577 (7th Cir. 1975) (employee dismissed without due process); Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975) (citizen's fourth amendment rights violated by city building inspectors).
45. Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977); Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 805 (9th Cir. 1975).
46. Kostka v. Hogg, 560 F.2d 37, 43 (1st Cir. 1977). Finding a *Bivens*-type cause of action on the facts of *Kostka* would have required the court to impose vicarious liability on municipalities for the constitutional violations of their employees. The court indicated that they may have found...
Another method of circumventing *Monroe* in order to award damages to persons injured by unconstitutional municipal action was adopted by two courts of appeals. These courts extended the “official capacity” method of recovery to actions for money damages by ordering “official capacity” defendants to obtain compensatory payments from the funds of the governmental entity that would have been immune had it been sued directly. These decisions were cited prominently in petitioners’ brief in *Monell*, providing a basis for the core of their argument that the individual defendants, sued in their official capacity, could be ordered to obtain funds from the municipal treasury in order to compensate the employees for the period of illegal forced leave.

The willingness of some courts to extend the “official capacity” method of recovery to actions for monetary damages, like the creation of a *Bivens*-type cause of action against municipalities, was illustrative of the lower courts’ desire to fashion some means of compensation for constitutional injury inflicted by local governments, and of their continued dissatisfaction with the municipal immunity doctrine. By approaching the matter straightforwardly and overruling *Monroe* outright, the Court has done much to clarify an area of the law that had become seriously confused as a result of the lower courts’ attempts to circumvent the municipal immunity doctrine. Some aspects of the Court’s opinion suggest, however, that this area will still be a controversial one. The Court’s refusal to impose *respondeat superior* liability on local governments for the constitutional torts of their agents, and the suggestion that local governments may eventually be accorded a qualified immunity from section 1983 liability, suggest that section

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a *Bivens*-type cause of action had the municipality been directly responsible for the alleged constitutional violation. *Id.* at 45. The argument that the fourteenth amendment created a *Bivens*-type cause of action against local governments was before the Supreme Court in *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), but the Court refused to decide the issue because it had been raised only at oral argument and had not been fully briefed. *Id.* at 278.


48. Brief for Petitioners at 32-69. The court of appeals decision in *Monell* rejected this argument, drawing a distinction between “official capacity” suits for equitable relief and those for money damages by analogy to a similar distinction in Supreme Court eleventh amendment cases. 532 F.2d 259, 265-67 (2d Cir. 1976). This analogy, however, was tenuous; the Court had, in an earlier case, explicitly stated that the language of § 1983 did not permit any distinction based on “the nature of relief sought.” *City of Kenosha v. Bruno*, 412 U.S. at 513. The *Kenosha* language effectively precluded the Court from adopting the court of appeals rationale in *Monell*, as Mr. Justice Powell recognized in his concurrence. 436 U.S. at 712 (concurring opinion).

49. 436 U.S. at 694.

50. *Id.* at 701.
1983 will remain a hollow remedy for many persons injured by unconstitutional municipal action.

The *respondeat superior* limitation is especially significant, and strong policy reasons argue against it. Under the *Monell* standard of municipal liability, a local government will be subject to section 1983 liability only when it is *directly* responsible for a constitutional violation, such as when some officially adopted policy or ordinance inflicts constitutional injury. A local government will not, under *Monell*, be liable for its employees’ ultra vires constitutional torts, that is, those committed without governmental authority. In practical terms this means that victims of unreasonable searches and seizures, police brutality, and other forms of police misconduct will still be unable to seek compensation for their injuries by bringing a section 1983 action against the employing governmental entity. The only avenue of relief for these persons is an action against the offending officer, which has long been criticized as being ineffective from both a compensatory and deterrence standpoint.\(^5\)

When a citizen sues a police officer alleging some form of police misconduct, several factors combine to make a jury verdict for the plaintiff unlikely. The officer is protected by a qualified immunity,\(^22\) which insulates him from liability in all but the most egregious of situations.\(^53\) Also, the jury is naturally reluctant to levy a damage judgment against the policeman, whose job is difficult, dangerous, and not very lucrative.\(^54\) Even in those situations in which a judgment against the officer is obtained, the plaintiff’s prospects of compensation are subject to the possibility that the officer may be judgment-proof.\(^55\) Commentators have argued that the compensatory purpose of section 1983 would

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53. The immunity protects the officer from liability for action taken in good faith and with reasonable grounds to believe in the constitutionality of the action. In practice, this qualified immunity often has the effect of an absolute one. See notes 89-91 and accompanying text infra.


55. See, e.g., Kates & Kouba, *supra* note 36, at 136-37; Comment, *supra* note 36, at 1209. Professor Davis has summed up the situation with this description of a fictional conversation between an attorney and a client who has been injured by police misconduct:

What the lawyer says to the bruised and battered client is something like this: “I believe you when you say the policeman beat you up. A suit against him will cost several thousand dollars, and we have about one chance in ten to get a judgment. If we get it, the
be much better served by an action directly against the governmental entity, on a respondeat superior theory. Such an action would also serve as a more effective deterrent to police misconduct than the action against the individual officer, because high government officials would be influenced to supervise their employees more closely, and to discipline officers who violate citizens’ constitutional rights.

The Monell Court did not consider any of these policy arguments in reaching its decision not to impose respondeat superior liability on municipalities. Instead that decision was based solely on prior case law interpretation of the statutory language of section 1983, combined with Congress’ rejection in 1871 of the Sherman Amendment. In Rizzo v. Goode, the Court interpreted the language of section 1983 to preclude the imposition of respondeat superior liability on a section 1983 defendant, holding that liability could result only when the defendant had acted affirmatively to “cause” the constitutional violation. Defendant in Rizzo, however, was an individual supervisory official who, under a respondeat superior theory, would be held personally liable for any constitutional injury inflicted by subordinates. Arguably, the case for vicarious liability is stronger when the defendant is a governmental entity which, unlike the individual official, is capable of absorbing the cost of employees’ liability and spreading it across the entire

amount may be several hundred dollars. And we have no assurance of collecting it. Do you want me to file an action?”

K. Davis, supra note 51, at 595.


57. E.g., K. Davis, supra note 51, at 597; Kates & Kouba, supra note 36, at 140; Comment, supra note 36, at 1209. It has been argued that a direct action against the municipality may have the opposite effect. Because, under a respondeat superior standard, the officer would not be personally liable for unconstitutional misconduct, it is contended that the officer would no longer have any incentive to refrain from such action. Crosley v. Davis, 426 F. Supp. 389, 393 n.11 (E.D. Pa. 1977). This seems highly implausible. First, the present inefficacy of the remedy against the officer throws great doubt on its deterrent effect. Second, though an officer would not be personally liable under a respondeat superior standard, he would be subject to disciplinary action by superiors. The threat of losing one's job would probably be a more effective deterrent than the threat of a lawsuit which, as experience has shown, rarely results in an adverse judgment.

58. 436 U.S. at 691-95.
60. Id. at 371. The facts of Rizzo are discussed in note 71 infra.
The Court's legislative history argument is also vulnerable because of the difference between the nature of liability imposed on municipalities by the Sherman Amendment and that imposed by a respondeat superior theory of municipal liability. The Sherman Amendment would have held towns and counties liable for damage done by private citizens "riotously and tumultuously assembled." In contrast, a respondeat superior standard would impose liability only when the municipality's own agents inflict constitutional injury. Because of this distinction, it is indeed questionable to infer from the House rejection of the Sherman Amendment that the congressmen would have similarly rejected a proposal to hold local governments liable for the constitutional torts of their employees.

Policy considerations, though not articulated in the opinion, may also have influenced the Court in enunciating the Monell standard of municipal liability. Many of the lower courts that found a Bivens-type cause of action against local governments stopped short of imposing vicarious liability on municipalities. These courts, of course, did not consider the language of section 1983 or the statute's legislative history when making that decision, but instead relied solely on policy rationales.

The primary concern expressed by these lower courts was that respondeat superior liability might decimate municipal treasuries, many of which already are strained almost to the breaking point. Others

61. Though the language of § 1983 does not differentiate between governmental and natural "persons" in this fashion, support for such a distinction can be found in the statute's legislative history. In the only portion of the debates that speaks directly to the issue of how courts should construe the language of § 1983, Representative Shellabarger emphasized that the section is "remedial" in nature and that "such statutes are liberally and beneficently construed." CONG. GLOBE, 42d Cong., 1st Sess. 68 (1871). Given the remedial inefficacy of § 1983 for persons injured by police misconduct, a finding of respondeat superior liability under the statute might be just the type of liberal construction envisioned by its authors.

62. See Turpin v. Mailet, 579 F.2d 152, 165-66 (2d Cir. 1978); Owen v. City of Independence, 560 F.2d 925, 933 n.9 (8th Cir. 1977), vacated for reconsideration in view of Monell, 98 S. Ct. 3118 (1978); McDonald v. Illinois, 557 F.2d 596, 604-05 (7th Cir. 1977); Riley v. City of Minneapolis, 436 F. Supp. 954, 956-57; Adekalu v. New York City, 431 F. Supp. 812, 819-20 (S.D.N.Y. 1977). See also Koskka v. Hogg, 560 F.2d 37, 44-45 (1st Cir. 1977) (refusing to find Bivens-type cause of action because case involved vicarious liability); Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975) (finding Bivens-type cause of action when city ordinance was alleged to be unconstitutional); Crosley v. Davis, 426 F. Supp. 389, 392 (E.D. Pa. 1977) (suggesting, but not adopting, standard of municipal liability similar to that in Monell). A few lower federal courts, however, did find respondeat superior liability under a Bivens-type cause of action. See cases cited note 56 supra.

63. E.g., Turpin v. Mailet, 579 F.2d 152, 165-66 (2d Cir. 1978); Adekalu v. New York City, 431 F. Supp. 812, 820 (S.D.N.Y. 1977). Judge Kaufman, writing for the court of appeals in Turpin, stated: "By permitting liability only in those instances where the municipality is directly responsible for the unconstitutional behavior, the drain on the local fisc will be minimized. In a
questioned the need for this liability, given the practice, now adopted in several states, of government indemnification of officers who suffer adverse judgments in section 1983 actions. According to these courts, this practice substantially alleviates the problem of judgment-proof policemen, and guarantees that plaintiffs injured by police misconduct will be compensated. Imposing vicarious liability on municipalities by judicial fiat also would have entailed a substantial federal reordering of local affairs, thereby raising serious questions of federalism. Perhaps the Court considered the decision to impose respondeat superior liability on municipalities one to be made by the states, by amendment to their respective tort claims acts.

Though the respondeat superior limitation will insulate local governments from liability for their officers' ultra vires misconduct, it should not apply to those cases in which a municipality (or its policymaking officials) has, for instance, actively encouraged police abuse of citizens' constitutional rights, or has tolerated such abuse in the face of a pattern of police misconduct. Governmental action of this kind would rise to the level of a "policy" or "custom" of advocating police misconduct, and would then fit squarely within the standard of municipal liability announced in Monell. Lower courts, in delineating the degree of governmental involvement necessary to find liability under a Bivens-type cause of action, have recognized this distinction and have
indicated that liability would attach when a local government has encouraged, or tacitly approved of, police abuse of constitutional rights.  

The conclusion that liability can be imposed under section 1983 for mere "tolerance" of police misconduct may be challenged, however, on the basis of language in *Rizzo v. Goode* in which the Court stated that some "affirmative link" between the defendant and the constitutional violation was necessary to satisfy the section 1983 causation requirement. *Rizzo* involved an attempt to impose section 1983 liability on supervisory officials by alleging that they had failed to supervise their subordinate officers to prevent constitutional violations. The fact situation faced by the Court in *Rizzo* is, however, distinguishable from that posed when a plaintiff proves a pattern of police misconduct, thereby raising the inference that municipal officials, by acquiescing in the face of this pattern, had adopted a de facto policy of advocating police abuse. In *Rizzo* such a pattern was alleged but not proved, and the Court emphasized that only a few instances of police misconduct had been shown actually to have occurred. When unconstitutional police behavior is more prevalent, a different result than that reached.
in *Rizzo* may be based on recognition of the lack of any substantive difference between passive tolerance of widespread police misconduct and affirmative advocacy of such misconduct. In addition, concerns of federalism played an important role in the Court's decision in *Rizzo* because of the interference in the municipality's affairs that would have resulted from the injunction sought by plaintiffs. Similar concerns would not be raised by awarding damages to persons injured by specific police abuse. These damage awards would influence municipal officials to alter their procedures in order to deter police misconduct, but they could do so on their own terms rather than those of a federal court judge.

Another issue that should attract the immediate attention of the lower courts concerns the development of a qualified immunity for municipal defendants in section 1983 actions. Presumably this would be similar to immunities granted government officials in section 1983 actions, and would protect a local government from liability for action taken in good faith and with reasonable grounds to believe that the action was constitutional. The desirability of such an immunity is, however, questionable. Not only is a qualified immunity for municipalities not justified by the rationales used by the Court to support official immunity in past decisions, but it also would have the effect of eviscerating the section 1983 damage remedy for persons injured by unconstitutional municipal action.

In deciding some of the official immunity cases under section 1983, the Court has simply adopted the tort immunity accorded the various officials at common law, apparently with the belief that the 1871 Congress did not intend to disturb existing common law doctrines when enacting section 1983. The same approach to the issue of municipal...
immunity is unavailable, however, because under nineteenth century common law a municipality was absolutely immune for any activity that could subject it to a section 1983 claim. Though common law doctrines regarding municipal tort liability have recently been abrogated in most jurisdictions, local governments still retain absolute immunity for any tort liability arising from the exercise of "discretionary functions," which include any policy-making or legislative activity. Thus, even under contemporary notions of municipal tort liability, a municipality would be absolutely immune for any activity cognizable under section 1983. This proves further the futility of looking to tort doctrines to justify any form of municipal immunity under section 1983.

Policy considerations have also played a major role in the Court's past official immunity decisions. First, the Court has felt that some form of immunity was needed to ameliorate the unfairness of imposing personal liability on officials who were merely doing their job in good faith and without any intention to inflict constitutional injury. Consequently, the Court has required that officials must have been acting maliciously or without reasonable grounds to believe in the constitutionality of their actions in order to incur section 1983 liability. Second, the Court has feared that the threat of personal liability might chill an official's proper exercise of discretion or might even deter citizens from pursuing public service.

These concerns are significantly alleviated when a municipality is made the defendant. Indeed, municipal liability provides a refreshing

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80. Under common law doctrines prevailing during the nineteenth century, a municipality's liability in tort depended upon the type of activity that gave rise to the claim. See generally W. Prosser, Handbook of the Law of Torts 977-87 (4th ed. 1971). If the activity was of a "proprietary" nature — i.e. similar to that performed by a private corporation — the local government enjoyed no immunity. Examples of proprietary activities included the municipal operation of a public utility, ferry, airport, or garage. Id. at 980-81. But municipalities were absolutely immune from any liability arising from its involvement in uniquely "governmental" activities, such as passing laws or implementing governmental policies, id. at 979, the only activities that would give rise to a § 1983 claim under the Monell standard of municipal liability.

81. See generally K. Davis, supra note 51, § 25.00 to .00-2.

82. Id. § 25.13. The justification for the discretionary function exception is that the judiciary should not interfere with legislative freedom by levying damage judgments against local governments when legislative decisions cause personal injury. Id. This separation of powers argument is, of course, inapplicable to the issue of municipal immunity under § 1983 because the very purpose of the statute is to ensure federal court supervision over local affairs.


85. Id.

solution to the problems of unfairness and potential deterrence posed by official liability. Holding a municipality responsible for constitutional violations will remove the harshness of imposing liability on individual officials and will instead spread the cost of constitutional injury among all the community’s taxpayers as an expense of government. Moreover, though some government officials may be inhibited by the possible impact of their actions on the municipal treasury, the chilling effect would surely not be as great as that attendant to personal liability.  

There may, however, be another policy reason justifying a qualified immunity from municipal defendants in section 1983 actions. Mr. Justice Powell noted in his concurrence that such an immunity may be necessary to “remove some of the harshness of liability for good-faith failure to predict the often uncertain course of constitutional adjudication.” Though this is a genuine concern, the Court should be wary of any rationale supporting a qualified immunity for municipalities. Past experience with similar immunities for government officials has shown that, in practice, a qualified immunity often has the effect of an absolute one. This is because the qualified immunity protects government officials unless their actions are contrary to “settled” constitutional law. Because few areas of law are clearly “settled,” the official who violates constitutional rights can almost always hide behind the qualified immunity. Should the Court find that municipalities in section

87. Note, supra note 43, at 957. In the first appellate decision to consider the scope of municipal immunity after Monell, the United States Court of Appeals for the Tenth Circuit came to an opposite conclusion. Bertot v. School Dist. No. 1, No. 76-1129 (10th Cir. Nov. 15, 1978). The court held that a school district was entitled to the same qualified immunity from § 1983 liability as was its school board members because “conscientious board members will be just as concerned that their decisions or actions might create a liability for damages [against] the board or the local entity as they are that they would against themselves. . . . The restriction on the exercise of independent judgment is the same.” Id.; see slip op. at 5. Earlier courts of appeals decisions, which questioned the applicability of the deterrence argument to the case of a municipal defendant in a Bivens-type cause of action, suggest that there will be a split of opinion on this issue among the circuits. See, e.g., Owen v. City of Independence, 560 F.2d 925, 940 (8th Cir. 1977), vacated for reconsideration in view of Monell, 98 S. Ct. 3118 (1978) (“primary justification for the defense of good faith . . . , to insure that public officials will not hesitate to discharge their duties out of fear of personal monetary liability . . . , does not exist where the city itself will bear the monetary award”); Kostka v. Hogg, 560 F.2d 37, 41 (1st Cir. 1977) (“[w]hile the imposition of damages liability on a political subdivision could conceivably result in chilling the performance of some official functions, the likelihood of substantial inhibition is not great since the officials will not be held personally liable”).

88. 436 U.S. at 713.
89. Freed, supra note 65, at 564.
91. Freed, supra note 65, at 564. The effect of the “settled law” concept can be seen in the Court’s recent decision in Procunier v. Navarette, 434 U.S. 555 (1978). In that case, plaintiff, a
1983 actions are protected by a qualified immunity based on the "settled law" concept, the decision in Monell may well be "'drained of meaning.'"92 Such an immunity would largely emasculate the section 1983 damage remedy, making it extremely difficult for citizens to be compensated for constitutional injury inflicted by local governments. The remedial purpose of section 1983 demands that at most only minimal immunity93 be accorded municipal defendants in section 1983 actions.

In Monell, the Court finally responded to years of judicial and scholarly criticism of the municipal immunity doctrine by overruling Monroe v. Pape and holding that local governments may be subject to liability under section 1983. The decision can best be seen as a compromise between two extremes—the total municipal immunity of Monroe on the one hand, and full municipal liability, including respondeat superior liability, on the other. The Court settled for a standard of municipal liability midway between those two, similar to standards adopted by a number of lower federal courts in Bivens-type causes of action. The issue not resolved in Monell is the scope of the qualified immunity for municipal defendants in section 1983 actions. The lower courts first considering this issue should recognize that such an immunity could have an extremely damaging effect on the remedial function of section 1983, and, accordingly, should restrict the scope of the immunity.

THOMAS L. ALLEN

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92. 436 U.S. at 701 (quoting Scheuer v. Rhodes, 416 U.S. 232, 248 (1974)). Defendants in Monell, for example, would be completely absolved of liability under § 1983 because the Court's decision in Lafleur was handed down three years after the alleged constitutional violations occurred.

93. One author has suggested that municipal immunity be limited to those situations in which potential liability looms so great that it poses a threat to the continued operation of the municipality. Note, supra note 43, at 958. As an example, the author posits a case in which blacks bring an action against an illegally segregated school system, seeking damages for reduced earning capacity totaling millions of dollars. Id.