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MUNICIPAL RESPONSIBILITY FOR CONSTITUTIONAL TORTS

Jack M. Beermann*

The fundamental principle in the law of municipal liability under § 1983 is that municipalities may be held liable only for their own conduct, not for the conduct of municipal employees. Stated somewhat differently, municipalities may not be held vicariously liable for the conduct of municipal employees but rather can be held liable only when municipal policy is the moving force behind the violation. While this principle is simple to state, it has proven difficult to apply.

The Supreme Court has not developed its municipal liability jurisprudence in a manner that is consistent with its methodology in other § 1983 areas. The Court has employed a variety of interpretive methodologies in § 1983 cases, the most important of which is the incorporation of well-established common law doctrines into the application of § 1983. These common law doctrines include: (1) the common law of 1871, on the theory that Congress intended to incorporate well-established common law doctrines into the tort-like remedy it was creating; and (2) contemporary common law, on the theory that Congress did not intend to freeze outdated common law doctrines into § 1983. The Court's municipal liability jurisprudence differs in that it is dominated by an underdeveloped analysis of text and legislative history with little attention to either the common law background against which the statute was passed or more recent common law developments, both of which may point toward broad municipal liability for the constitutional violations of employees. In my view, this is because the Court is concerned about the policy implications of broad vicarious municipal liability.

Plaintiffs, in search of the deep pocket, continually construct ingenious theories for holding municipalities responsible for the conduct of municipal employees. The Court's reaction to these efforts has
been mixed, apparently because some members of the Court are less adamant than others about confining municipal liability within narrow limits. In response to arguments for broader municipal liability, the Court has allowed for such liability beyond violations occurring pursuant to a formally adopted, unconstitutional, municipal policy. The Court has made four key doctrinal decisions that broaden the scope of municipal liability: (1) the municipal policy itself does not have to be unconstitutional;1 (2) the policy need not have been adopted by the highest municipal legislative body or executive official but rather municipalities may be held liable for the decisions of an official with final authority over an area of municipal activity;2 (3) the decision of one with final authority need not be framed as a general rule to cover all similar situations but rather can appear to govern only the single situation at hand;3 and (4) municipal policies such as “failure to train” may be actionable even where an actual policy is difficult to identify.4 These decisions have caused a great deal of litigation, and some confusion, over the appropriate situations for municipal liability.

The confusion over the appropriate circumstances for holding municipalities liable, the relaxation of municipal immunities in state law, and the firm position of vicarious liability in tort law generally, call for a reexamination of the Court’s rules regarding § 1983 municipal liability. Justice Stevens has consistently called for vicarious municipal liability,5 and recently Justice Breyer, joined by two additional members of the Court, called for reexamination of the Court’s restrictions on municipal liability.6 From the opposite perspective, elimination of municipal liability or restriction of such liability to violations resulting from unconstitutional formally adopted municipal policies may be more consistent with the views of a majority of the current Court. Moving in either direction to a clearer rule would have significant benefits in terms of reducing uncertainty and litigation.

This Article proceeds as follows: Part I describes the origins of the Court’s municipal liability jurisprudence from the outright rejection of municipal liability in Monroe v. Pape7 through the adoption of the

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3. See, e.g., id. at 480.
4. See, e.g., Tuttle, 471 U.S. at 823.
5. See Pembaur, 475 U.S. at 489 (Stevens, J., dissenting); Tuttle, 471 U.S. at 835-40 (Stevens, J., dissenting).
"municipal policy or custom" standard of liability. This section casts a critical eye on the Court's use of the text and legislative history of § 1983. Part II describes in detail the Court's municipal liability jurisprudence and explains how the Court's rulings have created uncertainty and thus contributed to a great deal of litigation over § 1983 municipal liability. The Article concludes with some observations on vicarious municipal liability.

I. THE DEVELOPMENT OF MUNICIPAL LIABILITY AND THE REJECTION OF VICARIOUS LIABILITY

The Supreme Court's § 1983 municipal liability jurisprudence begins with Monroe v. Pape, which is also the most widely noted § 1983 case, since it established that local officials could be held liable in damages for their constitutional violations. In Monroe, City of Chicago police officers were alleged to have violated the Fourth Amendment rights of the plaintiff by entering his home and arresting him without a warrant and by holding him for several hours in the police station without bringing charges. In addition to suing the individual officer, the plaintiff sued the City of Chicago, hoping to recover damages from the city itself. The Court unanimously held that the city was not a proper defendant in a § 1983 action because it was not a "person" within the meaning of the statute.

A. The Sherman Amendment

Because § 1983 does not explicitly address municipal liability, and because the word "person" leaves some doubt as to Congress' intent, the Court needed to look beyond the text of § 1983 to decide whether municipalities were proper § 1983 defendants. It found its answer in

8. See infra Part I.
9. See infra Part II.
10. For this Article, I decided to focus on primary materials to take as fresh a look as possible at the case law and the legislative history underlying the § 1983 municipal liability question. Thus, I have cited very little of the valuable secondary authorities on this subject. There are, of course, many valuable articles on the subject but I thought it was important, especially in looking at the legislative history, to be influenced as little as possible by secondary sources. After this Article was written, I did read an excellent review of the legislative history surrounding the enactment at § 1983 and the rejection of the Sherman Amendment. See Robert J. Kaczorowski, Reflections on the Legislative History of Monell v. Department of Social Services, 31 Urb. Law (forthcoming 1999).
12. Id.
13. Id. at 169-71.
14. Id.
15. Id. at 191-92.
some legislative history related to the Civil Rights Act of 1871, of which § 1983 was a part. The primary authority for the Monell Court’s conclusion that cities are not “persons” within the meaning of § 1983 was the rejection in the House of Representatives of an amendment to the Civil Rights Act of 1871 passed in the Senate that would have made cities liable for the failure to prevent private violence within city boundaries.

This failed amendment, known as the Sherman Amendment, was designed to deal with the widespread problem of racial violence in the South directed at Blacks and their supporters, i.e., Republicans. Some members of the Forty-second Congress apparently believed that local government liability would force reluctant local governments to take action against violence directed at the newly freed slaves and their supporters that the governments had previously been unwilling to prevent. Paired with § 1985(3), a provision providing a civil action against private conspiracies to deprive persons of their rights, the Civil Rights Act of 1871 would have created a comprehensive scheme for attacking private violence against Blacks and their allies in the struggle for full membership in society.

The legislative history of the failed Sherman Amendment reveals that opposition was based on constitutional and federalism objections

16. Id. at 188-91.
18. There were actually two versions of the Sherman Amendment, and the Court’s analysis is based on the second version. Monroe, 365 U.S. at 188-91. The first version, as proposed, declared that all of the inhabitants of a county, city, or parish are liable in damages for violence depriving the victim of any federal right (including racially motivated violence). Cong. Globe, 42d Cong., 1st Sess. at 663. Procedurally, the proposal instructed victims to sue the “county, city, or parish” in which the violence occurred and then enforce any judgment in such an action by levying on “any property, real or personal, of any person in said county, city, or parish.” Id. The proposal further provided that the local government could recover the full amount of the judgment from the actual perpetrators. Id. This version passed the Senate and was rejected by the House with no discussion, per the instructions of the Republican leadership. Id. at 725. The second version of the Sherman Amendment, which is the one referred to by the Supreme Court in several municipal liability decisions including Monell and Monroe, created liability only for the city, county or parish itself and did not provide for enforcement of judgments against inhabitants. Id. at 798; Monell v. Department of Soc. Servs., 436 U.S. 658 (1978); Monroe, 365 U.S. at 167. This version was passed by the Senate and rejected by the House after extensive debates centering on the constitutionality of imposing a peacekeeping obligation on municipalities. See infra notes 21-35 and accompanying text. After the rejection of this second version of the Sherman Amendment, Congress approved a measure, currently codified as 42 U.S.C. § 1986, creating liability against persons who know of conspiracies to deprive victims of federal rights and who fail to act to prevent such deprivations. Cong. Globe, 42d Cong., 1st Sess. at 804; see Monroe, 365 U.S. at 190.
to the imposition of liability on municipalities for the conduct of third parties. The view was expressed that such liability would be unconstitutional because some municipal governments might not have the power under state law to combat violence by third parties. The federalism objection was that Congress lacked the power to impose the peacekeeping obligation on local governments.

The controversy surrounding the rejection of the Sherman Amendment was relied upon by the Court in rejecting municipal liability in toto, even municipal liability founded upon the municipality’s own actions.21 One aim of this Article is to establish that the Court seriously overstates the importance of the rejection of the Sherman Amendment, and that the rejection of the amendment is not strong authority for rejecting municipal liability generally and vicarious municipal liability in particular for two reasons. First, the arguments made in Congress against the Sherman Amendment were not arguments against municipal liability generally, rather they were arguments directed at particular perceived problems with the Sherman Amendment. Second, the rejection of the Sherman Amendment was not, as the Court has claimed, particularly resounding. In fact, two versions of the amendment passed in the Senate,22 and at least one was agreed to by a conference committee,23 indicating some support for it even in the House. Thus, no broad conclusions regarding municipal liability should be drawn from the rejection of the Sherman Amendment.

The Court characterized the objections voiced against the Sherman Amendment’s imposition of peacekeeping obligations on municipalities as opposition to municipal liability generally.24 The Court’s decision was made in the face of a strong textual argument that Congress included cities in its definition of “person.”25 Just two months prior to the passage of the Civil Rights Act, Congress passed a Dictionary Act which provided that “the word ‘person’ may extend and be applied to bodies politic and corporate.”26 In rejecting the argument that this Act established that cities were “persons” within the meaning of § 1983, the Court noted that the definition of “person” was permissive, and stated that “[t]he response of the Congress to the proposal [the Sherman Amendment] to make municipalities liable for certain actions being brought within federal purview . . . was so antagonistic

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23. Id. at 804.
25. Id. at 191.
that we cannot believe that the word ‘person’ was used in this particular Act to include them.”

Opposition to the Sherman Amendment thus became opposition to municipal liability generally.

In subsequent cases, the Court repeated its view that the reasons for rejecting the Sherman Amendment entailed the complete rejection of municipal liability in § 1983 cases, but the evidence it cited for this view never went beyond arguments for rejecting municipal liability for failure to prevent third parties from violating civil rights. Constitutional objections voiced in Congress to imposing peacekeeping duties on municipalities were transformed by the Court into objections concerning federal power to impose liability upon municipalities for their own civil rights violations. For example, in *Moor v. County of Alameda,* the Court stated that “the root of [the Sherman Amendment’s] difficulties stemmed from serious legislative concern as to Congress’ constitutional power to impose liability on political subdivisions of the States.” But a careful reading of the Court’s citations to the debates in Congress reveals that most of the comments, fairly read, rejected only municipal responsibility for violations committed by third parties within municipal borders and did not reach the issue of whether the federal government has the power to make municipalities liable for their own violations. In fact, there are also references to permissible forms of municipal liability, such as municipal liability

29. *Id.*
30. *Id.* at 708.
31. For example, Representative Willard’s comments, which the *Moor* Court cites for congressional doubts about its power to “impose liability on political subdivisions of the States,” repeatedly refer to imposing duties, not liabilities, on subdivisions. *Id.* Further, he compared the Sherman Amendment unfavorably with laws that impose liability on a community where it is proven that the community was at fault, implying that he might favor municipal liability when the municipality was at fault. *Cong. Globe,* 42d Cong., 1st Sess. 704, 791 (1871). It should also be noted that Representative Willard explicitly stated that his comments addressed the wisdom, and not the constitutionality, of the Sherman Amendment. *Id.* at 791; see *id.* at 795 (remarks of Rep. Blair). The Sherman Amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone . . . here it is proposed not to carry into effect an obligation which rests upon the municipality, but to create that obligation.

*Id.* Rep. Burchard also stated, “there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated.” *Id.*

[T]he only power to charge a municipality of a State for the destruction of property by a mob arises from the laws of the State. . . . I want to know where is the authority for making a State corporation, an integral part of the State, a county, responsible in a court of the United States for damages without limit for the destruction of the life of a citizen by riot?
for breach of contract, where the municipality voluntarily took upon itself the obligation to perform its contract, thus indicating that Congress did not reject municipal liability in toto.

The comments cited in Moor that came the closest to a complete rejection of municipal liability are those of Representative Poland, mainly because he used the word "liability" while others referred to constitutional problems with imposing an "obligation" on local governments, i.e., the obligation to keep the peace. Representative Poland discussed the Sherman Amendment in terms of an attempt by Congress "to impose a liability on a mere State municipality, a mere subdivision of the State." He also used the language of obligation, however, stating that he interpreted the House's rejection of the Sherman Amendment as signifying that "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations." He also stated that the House insisted that before it would agree to any civil rights act "that the section imposing liability upon towns and counties must go out." While it is possible to read Representative Poland's use of the word "liability" as a complete rejection of municipal liability of any form, because the discussion was always of the Sherman Amendment itself, not the general idea of municipal liability, he may not have intended his comments to go so far.

Another set of comments that can be read as completely rejecting the idea of municipal liability attack in principle the idea that the federal government has the power to address any legislation to the state or a unit of the state. These comments start from the premise that

Id. (remarks of Rep. Bingham). Because the Sherman Amendment provided the context for all of the comments regarding municipal liability, there is little discussion of municipal liability for violations committed by municipal officials.

32. See id. at 795 (remarks of Rep. Blair).

[W]hen a municipality, under the authority given by a State, makes a contract, it thereby lays itself liable to every remedy upon that contract, and it is liable to be sued by its own consent, and with the consent of the State that created it, in any court having jurisdiction of the subject matter of that contract.

Id. It is unclear whether Rep. Blair is saying that consent to be sued is implicit in the making of the contract or that additional consent to be sued would be necessary.

33. Id. at 793 (emphasis added).
34. Id. at 804 (emphasis added).
35. Id. (emphasis added).

It has many times been solemnly decided by the Supreme Court that these agencies adopted by the States to aid in local administration are above the touch or control of any power, are subject only to the exclusive regulation of the States. . . . If Congress can invade the counties or cities for the purposes contemplated by this measure it can also the States themselves and can then absorb, divert, and consume the treasury, property and rights of the States.
local governments are purely creatures of the state, and in fact, are arms of the state and non-entities as far as the federal government is concerned. Being purely creatures of the state, the federal government has no business directing its commands to local governments. Legislation, on this theory, should be directed either at the states themselves or at the people, but not at local governments who are not entities separate from the states themselves.

Thus, while there is some diversity among the comments in opposition to the Sherman Amendment, by far the most frequently expressed constitutional objection to the amendment was that Congress lacked the power to impose the peacekeeping obligation on local governments. While Representative Poland did use the word “liability,” he made no special effort to distinguish his opposition from the general opposition to liability for failure to keep the peace that was proposed in the Sherman Amendment. The Court went too far when it interpreted the rejection of the Sherman Amendment as implying a rejection of municipal liability generally.

In concluding that the rejection of the Sherman Amendment entailed a complete rejection of municipal liability, the Court also ignored the fact that two versions of the Sherman Amendment passed the Senate and that after the House rejected the first version, the Conference Committee agreed to a more moderate version, which ultimately was also rejected in the House. Given the Senate’s repeated acceptance of municipal liability for the violations of third parties, and the Conference Committee’s agreement on a version of such liability, it is unfair to read the rejection of the Sherman Amendment as a resounding rejection of all forms of municipal liability.

It appears likely that the House’s rejection of the first version of the Sherman Amendment was due to the leadership’s disagreement with
the amendment's provision making all inhabitants of the locality liable and allowing enforcement of judgments against the property of any inhabitant, without regard to whether the particular inhabitant was part of the riot. Some senators expressed disagreement with this aspect of the Sherman Amendment, and Senator Sherman explained the rejection of the first version by the House as owing to the view that enforcement of a judgment on an innocent member of the community "might be made the means of oppression." Further, the principal alteration of the proposal that emerged from the Conference Committee after the House's rejection of the first version was the elimination of this feature and substitution of a provision allowing for enforcement of judgments against the municipalities themselves, with power in the federal judge to order municipalities to raise funds to satisfy the judgments. This would make all inhabitants of the locality share in the loss, rather than imposing it on one unlucky person whose property happened to be easy to reach.

In statutory interpretation it is often viewed as dangerous to try to garner the meaning of one provision from debates surrounding the rejection of another. Given the diversity of views within Congress on the desirability of the Sherman Amendment, it is particularly dangerous to read the rejection of the Sherman Amendment as Congress rejecting anything more than the actual terms of the various versions of that amendment itself. In legal reasoning terms, the Sherman Amendment debates are no more than dicta regarding the meaning of § 1983, and as a matter of statutory construction conventions, efforts to discern the meaning of § 1983 from debates surrounding the rejection of the Sherman Amendment yield, at best, weak arguments.

B. Movement Toward Municipal Liability

The weakness of the Court's reasoning rejecting municipal liability became even more evident when the Court revisited the idea of municipal liability fifteen years later. Before examining the Monell Court's reversal of Monroe's absolute rejection of § 1983 municipal liability, it is worthwhile to consider some of the steps along the road. The background of the expansion of tort liability in the private sphere during the 1960s and 1970s included well-established principles of vicarious liability of private entities in tort law. Further, the fairness of vicarious liability of private entities was not really questioned during

38. See Glazer, supra note 37, at 1402 n.161.
40. Id. at 822 (remarks of Sen. Sherman), quoted in Glazer, supra note 37, at 1402 n.161.
this period, at least as to employee conduct that in some way furthered the business interests of the employer. At the same time, state courts and legislatures were revamping sovereign and municipal immunity doctrines to make local governments liable in a much wider variety of circumstances.\textsuperscript{42}

Thus, it should not have been surprising that federal courts, paralleling state tort law developments, began to recognize the unfairness of failing to hold municipalities liable for injuries caused by municipal unconstitutional conduct. Arguments were made (some accepted and some rejected) for municipality accountability for constitutional violations under certain narrow circumstances. For example, at least one lower court accepted the argument that a city was a "person" when the only relief sought was equitable.\textsuperscript{43} While the Supreme Court rejected this view, it did hint at another way around the limited definition of "person"—a suit directly under the Fourteenth Amendment against a municipality, which would not be limited by the text of § 1983.\textsuperscript{44}

In \textit{City of Kenosha v. Bruno},\textsuperscript{45} the plaintiffs sued for injunctive relief after the city refused to renew their liquor licenses, apparently because of nude dancing at their establishments.\textsuperscript{46} They claimed that the failure to hold adversary hearings before the denials violated due process.\textsuperscript{47} In light of \textit{Monroe}, the city argued that it was not a proper defendant to a § 1983 action, even when the only relief requested was equitable.\textsuperscript{48} The Court first determined that federal jurisdiction was not available under the jurisdictional provision of the Civil Rights Act of 1871\textsuperscript{49} because the city was not a person under § 1983, thus re-
jecting the argument that cities were persons when the only relief sought was equitable. Rather than stopping there, however, the Court remanded the case to the district court for a determination of whether jurisdiction was available under the general federal question statute, 28 U.S.C. § 1331. The Court also commented on the due process standards that would apply if the district court determined that it had jurisdiction, noting that its recent cases had established the standards to be applied to due process claims, including due process challenges to deprivations of liquor licenses. Justice Brennan, in a concurring opinion, tried to explain the importance of the Court's apparent determination that if the then existing $10,000 amount in controversy requirement for federal jurisdiction were met, the plaintiffs could sue the city under the general federal question statute.

While it was never clearly explained in either opinion in Bruno, the reasoning amounted to a holding that restrictions inherent in § 1983 actions might be avoided by pleading a Bivens action directly under the Fourteenth Amendment. Justice Brennan cited, inter alia, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, implying that the Bivens action might exist because Bivens defendants need not necessarily be persons as defined by the Court's § 1983 jurisprudence. The Bivens action was a judicial creation, and the text of § 1983 is not relevant to developing the contours of that action.

The Court's focus in Bruno on jurisdiction results from the fact that the basis of federal jurisdiction over Bivens actions is different from the basis of federal jurisdiction over § 1983 actions. Section 1983 actions may be brought in federal court under 28 U.S.C. § 1343, a jurisdictional provision passed as part of the Civil Rights Act of 1871. Jurisdiction under § 1343 is limited to actions arising under federal civil rights statutes. Bivens actions, by contrast, are brought in federal court under the general federal question statute because Bivens actions arise directly under the Constitution, not under any federal civil rights statute. At the time Bruno was decided, this distinction was important because the general federal question statute had an

51. Id. at 514 (citing 28 U.S.C. § 1331).
52. Id. at 515.
53. Id. at 516 (Brennan, J., concurring).
55. Id.
57. Id.
58. Id. § 1331.
amount in controversy requirement of $10,000,\textsuperscript{59} while § 1343 has never had such a requirement. Plaintiffs with small claims were thus relegated to state court unless they could fit their claim into a specialized federal statute without an amount in controversy requirement, like § 1343. Now that the amount in controversy requirement for general federal question jurisdiction has been repealed,\textsuperscript{60} the distinction no longer has any practical importance.

It is somewhat remarkable that the Court would apparently so easily allow plaintiffs to plead their way around a restriction on municipal liability that had been founded upon the important federalism concerns articulated in \textit{Monroe} and subsequent cases. In my view, this reflects the weakness of the normative foundations of \textit{Monroe}’s rejection of municipal liability. If the Court had remained committed to the \textit{Monroe} Court’s view that federal courts should not impose liability on local governments, it surely would not have allowed plaintiffs to avoid the rule against such liability with a pleading trick. Further, under current law regarding the availability of \textit{Bivens} actions, the Court would almost certainly not allow a plaintiff to bring a \textit{Bivens} action against a local government. The Court would likely hold that the existence of § 1983 is a “special factor counseling hesitation” and thus federal courts should not provide remedies in constitutional tort cases against local governments beyond those allowed under § 1983.\textsuperscript{61}

It should also be noted that \textit{Bruno} did not lead to large scale avoidance of the bar against § 1983 municipal liability. There are no other cases allowing \textit{Bivens} actions against municipalities, and it is unclear if the doctrinal significance of \textit{Bruno} was widely understood at the time it was decided. In fact, it is not even clear that the Court itself focused on the relationship between its holding and its previous rejection of § 1983 municipal liability. While Justice Brennan’s concurring opinion cites \textit{Bivens},\textsuperscript{62} and he seems to have understood the relationship between \textit{Bruno} and \textit{Monroe}, it is impossible to know whether others had a similar understanding.

Plaintiffs attempted other ways around \textit{Monroe}’s bar on municipal liability that are worth noting. In \textit{Aldinger v. Howard},\textsuperscript{63} the plaintiff attempted to bring state law claims against a county in federal court through the device of pendent jurisdiction.\textsuperscript{64} The paradigm case of

\textsuperscript{59.} \textit{Id.}
\textsuperscript{60.} \textit{Monroe v. Pape}, 365 U.S. 167 (1968).
\textsuperscript{63.} 427 U.S. 1 (1976).
\textsuperscript{64.} \textit{Id.} at 1.
Pendent jurisdiction involves a plaintiff with both federal and state claims against a defendant. Pendent jurisdiction in such a case allows the assertion of state law claims against the non-diverse defendant if the state and federal claims arise out of a "common nucleus of operative fact." Federal jurisdiction over the case is founded upon the claims arising under federal law. In *Aldinger*, however, while the plaintiff had viable § 1983 claims against county officials, the plaintiff had no federal claims against the county itself since the county was not a person under § 1983. The plaintiff was thus attempting to use pendent jurisdiction to bring a defendant into federal court over whom there would otherwise be no federal jurisdiction.

The Court rejected the idea of "pendent party" jurisdiction over the county, holding that without some independent basis for federal jurisdiction, state law claims against the county must be brought in state court. The *Aldinger* Court understood that the plaintiff was seeking to avoid the *Monroe* rule, and it explicitly stated that its rejection of pendent party jurisdiction over the county was heavily influenced by the exclusion of counties as persons under § 1983. The Court stated that "the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of § 1983 is sufficient to defeat the asserted claim of pendent-party jurisdiction." *Aldinger* illustrates the importance of the jurisdictional element to understanding § 1983. One important reason for bringing a § 1983 claim, rather than whatever claims there might be under state law, is the perception that there is an advantage to litigating claims against local government entities and local government officials in federal court rather than state court. *Aldinger* involved jurisdiction only, and the plaintiff apparently thought federal jurisdiction so important that she took the trouble and risk of constructing a theory to allow the assertion of state law claims against the non-diverse defendant when the law was unclear on whether she could bring the claims in federal court.

Another attempt to avoid the *Monroe* rule, and one that is more interesting in terms of § 1983 jurisprudence, is the argument that

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67. The Court noted that pendent party or ancillary jurisdiction, as it is sometimes called, might be appropriate under some circumstances such as where a party seeks to intervene to protect property already before the federal court, but no such circumstance was alleged to exist in *Aldinger*. See id. at 9-11.
68. Id.
69. Id. at 17.
70. Id.
71. Id.
where state law allows actions against municipalities in state court, federal law should apply that state law doctrine to § 1983 claims in federal court. In *Moor v. County of Alameda*, the plaintiff attempted to sue a California county in federal court under § 1983. The plaintiff argued that under the California Tort Claims Act, the county was vicariously liable for the conduct of its sheriff and deputy sheriff, and that under 42 U.S.C. § 1988, the state law should be applied in § 1983 actions.

Section 1988 instructs federal courts, in exercising their civil rights jurisdiction, to fill gaps in federal law by applying the law of the state in which the federal court sits. Among the Court's reasons for rejecting the plaintiff's argument under § 1988 was the rather straightforward conclusion that because the Court held that Congress defined person not to include municipal governments, there was no gap in § 1983 that needed to be filled with state law. The Court stated that allowing a civil rights suit against a municipality, even in a state in which municipalities are vicariously liable for torts of employees, would be "less than consistent with the Court's prior holding... that Congress did not intend to render municipal corporations liable to federal civil rights claims under § 1983." Without a gap in § 1983, there was no occasion for looking to state law concerning municipal liability.

C. Establishment of Municipal Liability

Finally, in *Monell v. Department of Social Services*, the Court overruled *Monroe* and held that cities are persons subject to suit under § 1983, but only when the violation results from city policy or custom. The *Monell* Court took a fresh look at both the debates regarding the rejected Sherman Amendment and the debates regarding § 1983 itself, and concluded that Congress intended to include municipal governments within § 1983's definition of person.

With regard to the debates surrounding the Sherman Amendment, the *Monell* Court recognized that the opposition to the amendment

73. Id. at 695.
74. Id. at 696.
76. Moor, 411 U.S. at 701-02.
77. Id. at 706.
79. Id. at 690-91.
80. Id. at 673-83.
centered around the imposition of the peacekeeping obligation on municipalities.\textsuperscript{81} The Court observed that "opponents expressly distinguished between imposing an obligation to keep the peace and merely imposing civil liability for damages on a municipality that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment."\textsuperscript{82} Further, the Court noted that even Representative Poland, a staunch opponent of the Sherman Amendment, "indicated that Congress could constitutionally confer jurisdiction on the federal courts to entertain suits seeking to hold municipalities liable for using their authorized powers in violation of the Constitution."\textsuperscript{83} The Court concluded that the constitutional objections to the Sherman Amendment were not probative on whether Congress intended to impose liability on municipalities under § 1983 for their own violations.\textsuperscript{84}

Turning to the positive case for municipal liability under § 1983, the Court relied upon four factors to support its conclusion that Congress intended to include local governments as defendants in § 1983 actions.\textsuperscript{85} First, the Court stated that since Congress intended § 1983 "to give a broad remedy for violations of federally protected civil rights . . . [and] Congress intended [§ 1983] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § [1983]."\textsuperscript{86} Second, the Court noted that a Member of Congress, Representative Bingham, linked § 1983 to his view that the Fourteenth Amendment was intended to make cities liable for taking private property for public use without compensation.\textsuperscript{87} Third, the Court observed that municipal corporations were treated like other corporations and were frequently sued in federal courts, and that this was "well known to Members of Congress."\textsuperscript{88} Fourth, the Court noted that the Dictionary Act, which was passed just two months before § 1983, provided that in federal legislation "the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense."\textsuperscript{89}

\begin{flushright}
81. \textit{Id.}
82. \textit{Id.} at 679.
83. \textit{Id.} at 679-80.
84. \textit{Monell}, 436 U.S. at 683.
85. \textit{Id.} at 683-89.
86. \textit{Id.} at 686.
87. \textit{Id.} at 686-87.
88. \textit{Id.} at 688.
\end{flushright}
Having made the case for municipal § 1983 liability, the *Monell* Court stated that municipal liability was limited to situations in which "action pursuant to official municipal policy of some nature caused a constitutional tort." The Court explicitly rejected vicarious municipal liability for the constitutional torts of municipal employees: "[i]n particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."

The Court offered two reasons for its limitation of municipal liability to violations resulting from official municipal policy. First, the language of § 1983, which makes "persons" liable when they "subject or cause" the victim "to be subjected" to a deprivation of a federal right, indicated to the Court that defendants may be held liable only when they cause a violation. The Court concluded that pure vicarious liability would not meet § 1983's causation requirement.

Second, the Court once again relied upon the rejection of the Sherman Amendment. The Court stated that "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."

The Court's reliance on the causation language in § 1983 is a much stronger argument than its reliance on the rejection of the Sherman Amendment. In the end, however, in light of the general interpretive principles the Court has enunciated in its § 1983 jurisprudence, the Court has not offered a satisfactory justification for rejecting vicarious municipal liability. Turning first to the rejection of the Sherman Amendment, the Court's statement that imposing vicarious liability on municipalities for the torts of their employees "would have raised all of the constitutional problems associated with the obligation to keep the peace" is a serious overstatement. Expecting a municipality to prevent its employees from violating federal rights is quite dif-

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90. *Monell*, 436 U.S. at 691. Notice, however, that the Court does not limit municipal liability to liability for municipal policies that are themselves unconstitutional, but allowed for liability when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* Working out when liability should attach for a municipal policy that is not itself unconstitutional has been very difficult. See *infra* notes 137-145 and accompanying text.

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


94. *Id.* at 693.

95. *Id.* (emphasis added).
different from placing upon a municipality the obligation to prevent private citizens from engaging in riotous conduct. In the former situation, federal law does not require the municipality to engage in an entirely new set of activities. Rather, federal law requires merely that in conducting its affairs, the municipality must not, through its agents, violate federal law.

The difference between liability for failure to keep the peace and liability for the conduct of municipal agents can be seen from the perspective of the opponents of the Sherman Amendment. The primary problem with the Sherman Amendment was that a municipality might not have the power under state law to take the actions that the Sherman Amendment would have required. By contrast, when the municipality is acting through its employees, the municipality has an obligation to confine its actions within the limits of the Constitution. State law cannot authorize municipalities to violate the Constitution. As long as an employee's action is within the scope of municipal employment, so that vicarious liability would attach under normal circumstances, any constitutional question regarding federal power to impose vicarious liability is of a different order than objections to liability for the actions of non-employees not acting on behalf of the municipality. Further, as discussed above, the scope of the debates surrounding the Sherman Amendment cast serious doubt on using the rejection of the Sherman Amendment as authority for construing § 1983. The opponents of the Sherman Amendment simply were not addressing any question beyond whether municipalities should be liable for damages caused by third parties rioting within municipal boundaries.

The Court's reliance on § 1983's causation requirement is a more acceptable method of construction than its reliance on the rejection of the Sherman Amendment, but it may ultimately prove an unsatisfactory basis for rejecting vicarious liability. The statute's causation requirement suggests a limitation on § 1983 liability, and the Court concluded that "causation [is] absent" when the only basis for municipal liability is vicarious liability for the conduct of municipal employees. To evaluate the Court's causation requirement reasoning, it is necessary to briefly consider the Court's methodology more generally.

96. Id. at 694.
97. Id.
98. Id. at 691.
E. Exploring Vicarious Municipal Liability

The most significant problem with the Court’s municipal liability jurisprudence is that it has developed without regard to the interpretive methodologies that the Court employs in other § 1983 contexts. The Court has adopted a variety of interpretive methodologies to round out the contours of the § 1983 remedy. The sources of law that the Court has employed to develop the § 1983 remedy as a “species of tort law” include: (1) the common law as it existed in 1871 (on the theory that Congress probably intended to incorporate well-established common law doctrines into the remedy it was creating); (2) contemporary common law principles (on the theory that Congress would not have intended to freeze outdated doctrines into the remedy it was creating); (3) the law of the state in which the federal court hearing the case sits (because Congress, in § 1988, instructed federal courts to use the law of the forum state to fill gaps in § 1983); and (4) federal common law principles derived from the policies underlying § 1983.

In addition to the reasons for looking to particular common law sources discussed above, resorting to common law principles is justified because § 1983 is viewed as a “species of tort liability” that should be construed consistent with normal tort law principles.

The Court avoided applying background tort law principles to the question of municipal liability because it found, in the causation language of § 1983, congressional rejection of vicarious municipal liability. However, had the Court treated the issue as it has treated other § 1983 textual issues, it would not have found so much meaning in § 1983’s causation concept. Congress’ use of the word “causes” in § 1983 would have been taken as a general cue to consult general common law tort concepts, rather than answer the question definitively.

100. See generally Beermann, supra note 75 (discussing methods the Supreme Court has used to fill gaps in § 1983).

101. Id.

102. In Monroe, this was part of the justification for not requiring a high standard of culpability such as willfulness. Monroe v. Pape, 365 U.S. 167, 187 (1968). The Court stated that under ordinary tort law principles, people are responsible for the natural and probable consequences of their actions, and that § 1983 should be read against the background of tort liability. Id.

103. Id. at 191.

104. For a comparison with the Court’s use of the word “causes,” see the Court’s holding in Monroe. Id. at 167. The Court has acknowledged that some municipal policy will always be a cause in fact of a constitutional violation by a municipal employee committed in the course of employment because the decision to perform the function for which the employee was hired is a municipal policy. Id. at 190-91. For example, in Board of County Commissioners v. Brown, 520 U.S. 397, 415-16 (1997), the Court noted that the normally innocuous decision to hire a particular employee could be viewed as the “cause” of that employee’s constitutional violations. Id. at
Given the interpretive methodologies traditionally employed in § 1983 cases, reliance on the statutory causation requirement is not sufficient, on its own, to sustain the argument against vicarious municipal liability. With even more definite language, the Court has felt free to consult the common law background to answer questions regarding § 1983's scope. For example, although Congress stated that "[e]very person" is a potential § 1983 defendant, the Court has incorporated common law official immunities to exempt a great number of officials (persons) from § 1983 liability.\textsuperscript{105} Congress' use of the phrase "subjects or causes to be subjected," under this methodology, provides an even stronger signal to consult the background common law, since "causes" is at least somewhat less clear than "[e]very person."\textsuperscript{106}

This is not to say that opening up the analysis to include the traditional sources of law in § 1983 cases would provide a clearer answer.\textsuperscript{107} Background tort law principles can be used to support or reject a rule of vicarious municipal liability, although the weight of authority appears to be on the side of imposing vicarious liability. On the negative side, vicarious liability principles are necessary in tort law because normal tort law requirements of duty, breach and proximate causation are not met when an employer is asked to answer for the torts of an employee.\textsuperscript{108} It is only the addition of the doctrine of respondeat superior that provides a basis for holding an employer liable—tort law's traditional requirements for liability are not met. Understood more broadly, however, common law principles can be read to support vicarious municipal liability. Vicarious liability was well established in tort law in 1871.\textsuperscript{109} Because the framers of § 1983 did not address the issue directly, under the Court's interpretive principles, it should be presumed that Congress meant to incorporate the doctrine into § 1983. Further, even if vicarious liability had not been developed in 1871, it is so well-established in today's tort law that, under the Court's theory, it should be incorporated into § 1983 so that


\textsuperscript{106} Id. at 548.

\textsuperscript{107} For example, in Smith v. Wade, 461 U.S. 30 (1983), while most members of the Court agreed that eighteenth century common law was important in determining the proper standard for punitive damages in § 1983 cases, the majority and dissent disagreed sharply on the content of that law. Id. at 38-56.

\textsuperscript{108} Id. at 48-56.

\textsuperscript{109} See infra notes 114-19 and accompanying text.
the statute does not become an out-dated anachronism. Moreover, the Court has also failed to adequately explain why it does not follow § 1988's apparent command to apply the law of the forum state to fill gaps in § 1983 cases. If § 1988 were applied, then vicarious § 1983 liability should exist in those states in which municipalities are vicariously liable for the torts of municipal employees.

The policies underlying § 1983 also send mixed signals as to whether municipalities should be vicariously liable. The Court has consistently identified the policies underlying § 1983 as compensating victims of constitutional torts and deterring future violations, but deterrence no greater than that created by the imposition of compensatory damages. Vicarious municipal liability would improve the prospects of compensation, since municipalities are more likely to have sufficient reachable assets than individual officials. Further, this would improve deterrence for two reasons. First and most obviously, municipalities would have an additional incentive to attempt to prevent employees from committing constitutional torts. Second, the deeper municipal pocket would encourage more victims of constitutional torts to bring suit than might do so if the prospects for substantial monetary recovery were dim. Even assuming that municipal liability itself creates little extra deterrence, plaintiffs in these cases would presumably join the individual officers as defendants, thus enhancing the deterrent effect of § 1983 each time a case is brought that might otherwise not have been.

In addition, the same elements of fairness underlying vicarious liability generally support subjecting municipal governments to vicarious liability in § 1983 cases. In private tort claims, the judgment has been made that it is fair to hold employers liable for employees' torts committed in the scope of employment because employers ultimately are the beneficiaries of the actions of employees, at least within the scope of employment. Further, vicarious liability spreads the loss widely to all those who share in the fortunes (or misfortunes) of the entity, whether they be shareholders or residents. Finally, as between the individual municipal employee and the municipality itself, it may be fairer for the municipality to pay the damages. The numerous municipalities that indemnify their workers obviously agree with this judgment.

110. For a discussion of this feature of the Court's § 1983 jurisprudence, see Beermann, supra note 75, at 67 & n.99.

111. I say "additional" because indemnification and other factors already provide some incentive for municipalities to supervise employees.
The Monell Court rejected application of the policies underlying vicarious liability to § 1983 cases on the dubious grounds that these policies were also offered in favor of the Sherman Amendment.\textsuperscript{112} The Court noted that the Sherman Amendment was supported as a device to encourage municipalities to prevent constitutional violations and to spread the cost of violations when they nevertheless occurred, and that neither of these justifications were sufficient "to sustain the amendment."\textsuperscript{113} It simply does not follow, however, that no other provision of the civil rights act was intended to accomplish similar goals, albeit in a different fashion. Whatever one thinks of the rule the Court adopted, this is very poor reasoning.

If the language of § 1983 was considered vague enough to justify looking to common law principles to determine whether § 1983 ought to allow for vicarious municipal liability, then it is useful to explore just what the common law has to say about vicarious liability generally and vicarious municipal liability in particular. As might be expected, eighteenth century law is mixed, with good support for vicarious liability generally, but relatively little support for vicarious municipal liability. More recent common law principles provide stronger support for vicarious municipal liability.

In the late eighteenth century, the vicarious liability of employers for the torts of their employees was well established. Employers were liable for torts committed by employees in the course of the employer's business.\textsuperscript{114} Difficulties and disagreements among courts, arose in determining whether an employee's torts were committed in the course of the employer's business. Some courts maintained a relatively narrow "course of business" test, disallowing liability if an employee violated the employer's instructions and sometimes even insisting that the employee's actions had been ordered or ratified by the employer before liability could attach. Other courts allowed for broader vicarious liability and held employers liable whenever a tort was committed by an employee on duty, as long as the employee's actions were connected to his service.\textsuperscript{115}

The most controversial area in eighteenth century vicarious liability rules appears to have been whether employers could be held liable for their employees' willful tortious conduct and fraudulent action. This

\begin{footnotes}
\item[113] Id.
\item[115] See Friedlander v. Texas Pac. Ry. Co., 130 U.S. 416, 425 (1888) (stating general rule that employer is liable for all conduct of employee within course of employment, but employee's fraud benefiting himself is not within course of employment).
\end{footnotes}
issue is important for § 1983 purposes because a great deal of unconstitutional conduct, such as police brutality and equal protection violations, require intentional conduct that might be outside narrow vicarious liability rules. While some courts applied familiar "course of business" principles and held employers liable for torts involving more than negligence,\textsuperscript{116} other courts were reluctant to hold employers liable for conduct beyond employee negligence.\textsuperscript{117} A middle ground which some courts occupied was to hold employers liable for willful conduct only if the employer authorized, ratified, or benefited from the malicious or fraudulent conduct.\textsuperscript{118} It appears that the general rule in the nineteenth century was that employers were liable for employee conduct that was more than negligent if the employee acted in furtherance of the employer's business and not for purely personal reasons that could not, in any sense, benefit the employer.

In light of these principles, if the Court were to abandon its textual reasons for disallowing vicarious municipal liability and look instead to background tort principles, eighteenth century vicarious liability rules raise questions but do not present serious obstacles to vicarious municipal liability in § 1983 cases. Even though most § 1983 claims involve intentional or willful action, especially since negligence does not ordinarily violate due process, vicarious liability should still attach since in those cases in which the conduct occurs while the employee is acting in furtherance of job related activities. For example, police brutality, if committed while making an arrest is clearly within the scope of employment and thus should give rise to vicarious liability. In cases such as sexual harassment, and sexual or other assault, however, courts might hold that the employee was acting out of a purely personal motive and in no sense in service to the employer when committing an assault. Thus, the conduct might be beyond the reach of vicarious liability. While this conduct may give rise to § 1983 liability

\begin{footnotes}
\item[116] Craker v. Chicago & N.W. R.R. Co., 36 Wis. 657, 668 (1875) (explaining employer is no more likely to authorize negligence as malicious conduct); see Annotation, \textit{Civil Action for Assault Upon Female Person}, 6 A.L.R. 985, 1007-08 (1920) (explaining employer is liable for employee assault committed while employee is engaged in employer's business even if assault was contrary to explicit instructions of employer).
\item[118] See Friedlander, 130 U.S. at 425; Milwaukee & Miss. R.R. Co. v. Finney, 10 Wis. 330, 337 (1860) (holding when employee's malicious actions result in breach of employer's contract with third party, employer is liable for employee's conduct in tort but damages are limited to those available in contract, and no exemplary damages are available because employer did not authorize or ratify employee's conduct). Finney's limitation of damages to contract damages is actually an example of judicial reluctance to hold employers liable for malicious employee conduct; the fact that the conduct resulted in a breach of contract is what the court relied upon to justify holding the employer liable. \textit{Id.}
\end{footnotes}
against the employee engaged in it, courts may not hold employers vicariously liable for such conduct because of the view that the employee's motive in sexual assaulting or harassing the victim is unconnected with the business of the employer.

Another, and perhaps more serious obstacle to § 1983 vicarious municipal liability is the little support in eighteenth century law for municipal liability generally and vicarious municipal liability more specifically. Until the middle to late twentieth century, sovereign immunity shielded municipalities from tort liability. Municipalities could not be held liable for non-performance or negligent performance of governmental duties such as providing police and fire protection or maintaining streets free from obstruction. Further, because municipal liability was the exceptional case, there was no developed doctrine of vicarious municipal liability.

Despite the obstacles described above, the Court could construct a regime of vicarious municipal liability without violating its § 1983 construction practices. If the Monell Court was correct, Congress rejected the prevailing eighteenth century rule against municipal liability by including municipalities as persons subject to suit under § 1983. Regarding vicarious municipal liability, once Congress decided to subject municipalities to liability, there is no strong reason, and no indication in the legislative history or other contemporary understanding, not to subject municipalities to liability under generally applicable liability rules including vicarious liability. As discussed above, the rejection of the Sherman Amendment, upon which the Court has relied for not allowing vicarious municipal liability, is not sufficient authority for rejecting such liability.


120. See Hewison v. City of New Haven, 37 Conn. 475, 482-83 (1871); Wilcox v. City of Chicago, 107 Ill. 334, 338 (1883). Municipalities might be liable for corporate or proprietary activity, i.e., activity for the corporate good of the municipality rather than in the public interest. Id.; see also Connelly v. City of Sedalia, 2 S.W.2d 632, 634 (Mo. Ct. App. 1928) (holding city not liable because seizure and conversion of abandoned tires was in furtherance of public good). Further, municipalities would not be liable for any activity beyond the legal powers of the municipality under state law, even if the basis of liability would not have been vicarious liability. Municipal officials could not authorize the municipality to act outside legal bounds. As the Massachusetts Supreme Judicial Court stated:

As a general rule, the [municipal] corporation is not responsible for the unauthorized and unlawful acts of its officer, though done colore officii; it must further appear, that they were expressly authorized to do the acts, by the city government, or that they were done bona fide in pursuance of a general authority to act for the city, on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation.

Thayer v. City of Boston, 36-37 Mass. (19 Pick.) 511, 516-17 (1837).
Further, even if it was clearly established that in 1871 municipalities would not have been vicariously liable in tort, the Court has allowed for incorporation of subsequent developments into § 1983 rules so that § 1983 does not become outdated and anachronistic. Because municipal liability and vicarious municipal liability are well established today, given Congress' choice to include municipalities in the group of potential § 1983 defendants, liability rules in keeping with mainstream tort law should apply.

The fact that most conduct giving rise to § 1983 liability is intentional, willful, or malicious does not present a serious obstacle to vicarious municipal liability. For example, with regard to police officers and other officials authorized to use force, vicarious liability for excessive force is well within established liability rules. Courts have also allowed vicarious liability for assault and battery even by employees not generally required to use force as long as "the act . . . is done in the course of doing the master's work, and for the purpose of accomplishing it." While eighteenth century rules may be less generous to plaintiffs, there is ample authority in both eighteenth century and current law for holding employers vicariously liable for intentional torts, such as assault and battery, if the employee is authorized or expected to use force on the job or if the conduct occurred in furtherance of the employer's business.

Regarding cases in which the employee appears to act out of purely personal motives, such as sexual harassment or sexual assault, there are a variety of possibilities. One court, for example, affirmed vicarious liability for sexual assault because the assault occurred "in the course of employment" even though the assault appeared to have been motivated by purely personal aims. Other courts have not allowed vicarious liability for sex crimes, on the ground that such conduct is not ordinarily within the scope of employment since it is motivated by personal concerns and not out of a desire to further the

123. Rego v. Thomas Bros. Corp., 164 N.E.2d 144, 145 (Mass. 1960). The Rego court relied upon Levi v. Brooks, 121 Mass. 501 (1877), in which the court held an employer liable for an assault and battery that occurred while the employee was repossessing the victim's property on behalf of the employer. Id. at 505.
124. See Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976) (holding employer may be liable for sexual assault by deliveryman who raped patron who failed to pay cash for C.O.D. order; deliveryman told victim he was a rapist, suggesting personal, not business related, motivation for assault).
employer’s interests. Federal courts could develop a body of law, in § 1983 cases, to distinguish those cases in which vicarious liability should exist from those cases in which it should not. While the principles underlying this body of law may be drawn from state law and other sources, ultimately it would be a set of federal rules designed to govern § 1983 cases.

In sum, if federal courts looked to traditional sources for filling gaps in § 1983, including the common law of 1871 and contemporary common law principles, vicarious municipal liability would be justifiable. If Congress’ decision to include municipalities in the universe of § 1983 defendants is taken seriously, there is ample authority for federal courts to develop a set of vicarious liability rules that would hold municipalities liable under circumstances similar to those that give rise to vicarious liability in the private sector. It should also be remembered that the Court’s rejection, until now, of vicarious municipal liability is founded on the dubious foundation of the rejection of the Sherman Amendment which actually has little if anything to say regarding whether municipalities should be vicariously liable under § 1983. Vicarious municipal liability would be within accepted norms for construing § 1983.

As we have seen, the result of the Court’s reexamination of Monroe’s absolute rule against § 1983 municipal liability is that municipalities can be held liable for action taken pursuant to municipal policy or custom but cannot be held liable merely because a municipal employee commits a constitutional tort. Because the ban on vicarious liability is built on the same faulty doctrinal bases as the original ban on municipal liability, it may ultimately be reexamined. Monell itself, however, leaves important questions unanswered, and it is to subsequent developments that I now turn.

II. The Monell Rule in Operation

Monell left several important questions regarding municipal policy unanswered. First, how is municipal policy identified? Must there be a formal action by the highest municipal rulemaking body (such as the city council) or can policy be made less formally and by officials other

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126. Federal courts have created a body of law in an analogous situation, applying employer liability under Title VII for sexual harassment. That body of law examines whether the employer had sufficient knowledge of the harassment to make the employer responsible for it to the extent that liability is justified. See Faragher v. City of Boca Raton, 524 U.S. 775, 784 (1998).
than top municipal policymakers? Second, does municipal policy exist only when action is taken pursuant to a rule that formally purports to cover a range of situations, or can municipal action taken with only one instance in mind be deemed municipal policy for liability purposes? While a majority of the Supreme Court continues to support the Monell rule, the Court has not insisted that municipal policy be limited to formally adopted, generally stated municipal edicts.

The relative likelihood that municipal governments will have sufficient assets to satisfy a judgment has given plaintiffs a strong incentive to try to establish that they have been victimized pursuant to a municipal policy even when at first glance it would appear that any violation occurred at the hands of individual municipal employees. Thus, there has been a great deal of litigation over the proper application of the Monell rule, and the intricacies of its application promise to continue spawning more.

A. Municipal Liability Beyond Pure Legislative Policy

In line with the Court’s willingness to find municipal policy beyond formal decisions of the highest municipal legislative and executive bodies, the Court has made four key rulings which have opened the door to the possibility of municipal liability absent a clearly stated unconstitutional policy. These decisions have in turn created a great deal of litigation over municipal liability. The first is that municipal policy does not necessarily have to come from the highest level within the municipal government. Rather, if an individual employee or group of employees has final decisionmaking authority over an issue, then that official’s (or body’s) decisions represent municipal authority in an area.ііі For example, if the police chief has final authority to make rules regarding police officers’ proper use of firearms, then the municipality can be held liable under § 1983 for constitutional torts resulting from that policy. Second, the Court has found municipal policy from a single decision by the municipal official with final authority, even if that decision is not formulated as a rule to govern all cases. For example, the Court held that because the county attorney had final authority to determine the proper steps police officers should take in executing arrest warrants, the county attorney’s decision that, in a particular case, officers should forcibly enter an office to execute a warrant was deemed county policy and thus could lead to

\[127. \text{Monell itself was a case of this type since it was decisions of the New York City Department of Social Services and Board of Education that were challenged, not ordinances promulgated by the City Council. See Monell v. Department of Soc. Servs., 436 U.S. 658, 660-61 (1978).}\]
§ 1983 county liability. Third, the Court has allowed for the possibility of municipal liability without any formally stated policy at all, when municipal decisionmaking evidences a gross disregard for the rights of potential victims. Examples include the failure to train municipal employees when training is necessary to avoid violating federal rights and failure to adequately screen municipal employees when screening is necessary to avoid violating federal rights. Fourth, municipal liability does not require that the municipal policy alleged to have caused the violation itself be unconstitutional. Rather, the violation may be committed by a municipal official acting pursuant to a constitutional municipal policy. For example, it is not necessary for liability to find that the municipality's training or screening policy is itself unconstitutional, but rather that a constitutional policy was so deficient that the municipality knew or should have known to a high degree of certainty that constitutional violations would result.

These doctrinal developments have encouraged plaintiffs to bring cases against municipalities claiming that the official who violated their rights had final authority, that the action in their particular case, because it came from the official with final authority, represented municipal policy or that the municipality failed to adequately train or screen the employee who committed the violation. These cases have proven controversial among the justices, some of whom see all claims of these types as thinly veiled attempts to impose vicarious liability on the municipality while others view it as perfectly fair to hold municipalities responsible under these circumstances. The cases that have reached the Supreme Court since Monell can be understood as working out these issues, with some cases dealing with more than one of the issues.

For convenience, here are the issues that have transformed the Monell rule into a complicated morass:

**Type One:** A municipal official with final authority can make municipal policy without action by the highest municipal legislative body or executive official.

**Type Two:** The actions of an official with final authority may constitute municipal policy even if the official has acted only in one instance and has not formulated the decision as a general rule to govern similar situations.

Type Three: Municipal policy may exist where the municipality has exhibited gross disregard for the possibility that federal rights will be violated by failing to train employees adequately or by failing to perform adequate background checks on applicants for municipal employment.

Type Four: Municipal liability is possible even when the municipal policy alleged to have caused the violation of federal rights is not itself unconstitutional as long as the violation is closely related to the municipal policy.

The first post-Monell Supreme Court case in which municipal liability was an issue was *Polk County v. Dodson.*\(^{131}\) In this case, a convicted criminal defendant sued, *inter alia,* the public defender and the county that employed her, alleging that the quality of his representation was constitutionally inadequate.\(^{132}\) This case is well known for its holding that a public defender's representation of a criminal defendant is not action "under color of" law as required for § 1983 liability.\(^{133}\) The Court also addressed the plaintiff's claim against the county, which in principle could be a viable claim since the county had assumed responsibility to provide constitutionally adequate representation for criminal defendants.\(^{134}\) The Court rejected the plaintiff's claim against the county for a variety of reasons, the most important of which was that the Court strongly implied that the county could only be liable when county policy was itself unconstitutional.\(^{135}\) The Court stated that the claim against the county was foreclosed because even if the plaintiff "was deprived of a Sixth Amendment right to effective counsel . . . he failed to allege that this deprivation was caused by any constitutionally forbidden rule or procedure."\(^{136}\)

Had the Court stuck with this apparent holding and required an unconstitutional policy for municipal liability, the issues surrounding municipal liability might have remained relatively simple. Soon after *Dodson,* however, the possibility of liability without an unconstitutional municipal policy was acknowledged, thus inaugurating the line

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132. *Id.* at 312.
133. *Id.* at 326.
134. *Id.*
135. The Court gave two reasons for rejecting county liability in addition to the reason discussed in text. First, the Court held that insofar as the claim was founded upon a theory of respondeat superior, the claim was foreclosed by *Monell.* *Id.* Second, the Court appeared to have held that the representation was not constitutionally inadequate. The defendant's complaint was that the public defender would not prosecute a frivolous appeal, and, as the Court noted, "a policy of withdrawal from frivolous cases would not violate the Constitution." *Id.*
136. *Id.*
of cases categorized above as Type Four. In *City of Oklahoma City v. Tuttle*, the plaintiff sued after her husband was shot and killed by a city police officer. She alleged that the shooting was unconstitutional and that it was caused by a city policy of inadequate training of police officers. The plaintiff's problem was that she had proof of only one incident of excessive force, and the Court rejected her argument that a policy of inadequate training could be proven by a single incident. In a plurality opinion for four Justices, Justice Rehnquist acknowledged that when a municipal policy is itself unconstitutional, a single application of that policy is sufficient to create municipal liability. Because the alleged policy of inadequate training was not itself unconstitutional, Justice Rehnquist stated "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation."

Justice Brennan, in a concurring opinion joined by two others, agreed that there must be a substantial causal relationship between the municipal policy and the violation for liability to be imposed on the municipality. For present purposes, the important point is that a majority of the Court acknowledged that the municipal policy itself does not need to be unconstitutional, only that the constitutional violation be sufficiently connected to municipal policy that might itself be constitutional.

The possibility of liability based on a constitutional municipal policy coupled with the relatively unclear causation and fault requirements the Court has imposed regarding such liability creates the potential for a large number of claims against municipalities. It is always possible to trace a municipal employee's constitutional violation to a municipal policy, such as the decision to create the municipal department for which the employee works. While a claim based upon a municipal policy of establishing, for example, a police department would not

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138. *Id.* at 805.
139. *Id.*
140. *Id.* at 808-09.
141. *Id.* at 824.
142. *Id.* Justice Rehnquist, however, did not commit himself to the rule that a constitutional policy can ever be sufficient for municipal liability. He noted that he was not deciding whether the municipal policy that is not unconstitutional is ever sufficient. *Id.* at 824 n.7. But his statement in text does not make much sense without such a rule.
143. *Tuttle*, *471 U.S.* at 833 n.9.
144. *Id.* at 824.
meet Tuttle's fault and causation requirements. The Tuttle opinions and subsequent decisions leave a great deal of uncertainty regarding just where those limits are.

The Court's next major § 1983 municipal liability decision, Pembaur v. City of Cincinnati, raised issues of final authority (Type One) and in one instance, not formulated as a general rule (Type Two). In Pembaur, county deputy sheriffs violated Pembaur's Fourth Amendment rights by forcibly entering his medical office to serve capiases on two of his employees, who were sought as witnesses to Pembaur's alleged criminally fraudulent billing of state welfare agencies for medical services. Pembaur refused to admit the deputies to the office to serve the capiases on the employees. The deputies called their supervisor who told them to call an assistant prosecutor and follow his instructions. They called the assistant prosecutor who in turn called the county prosecutor himself. The county prosecutor's instructions were "go in and get" the witnesses, and the deputies did so by forcing open the door with the help of Cincinnati city police.

The first issue raised by Pembaur was whether the county prosecutor had final authority over the decision in this case such that the prosecutor's policy regarding service of capiases would constitute county policy. On this issue, the court of appeals concluded that under Ohio law, the sheriff and prosecutor had final authority to make county policy on law enforcement matters. The opinions at the Supreme Court level are unclear on the basis for holding that the prosecutor had final authority to establish law enforcement policy for the county, and subsequent developments reveal why. In a subsequent municipal liability case, City of St. Louis v. Praprotnik, the plurality opinion, for four justices, stated that "whether a particular official has 'final policymaking authority' is a question of state law." While the preceding statement was essentially quoted from Justice Brennan's plurality opinion in Pembaur, he vehemently disagreed.

145. Id.
146. 475 U.S. 469 (1986).
147. The Supreme Court held that "the Fourth Amendment prohibits police from searching an individual's home or business without a search warrant even to execute an arrest warrant for a third person." Id. at 474 (citing Steagald v. United States, 451 U.S. 204 (1981)).
148. Id. at 472.
149. Id. at 473.
150. Id.
151. Id.
152. Pembaur, 475 U.S. at 475.
153. Id. at 476.
155. Id. at 123 (quoting Pembaur, 475 U.S. at 483 (plurality opinion) (emphasis added)).
with this conclusion in *Praprotnik*, stating that while "state law will naturally be the appropriate starting point . . . ultimately the factfinder must determine where such policymaking authority actually resides, and not simply 'where the applicable law purports to put it.'"\(^{156}\) Thus, the Court could not agree even on the appropriate source of law for determining whether an official has final policymaking authority. This is a recipe for continued uncertainty.

The Court appears now to have a majority for the view that state law largely governs the determination of whether an official has authority to make policy for a municipality, although allowance is made for departing from state law, albeit in as yet undisclosed circumstances. In *McMillian v. Monroe County*,\(^ {157}\) the Court, in a five-four decision, determined that the county sheriff was actually a state official and thus did not make policy for the county.\(^ {158}\) The Court’s opinion stated that while state law was not absolutely dispositive, "our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official’s functions under relevant state law."\(^ {159}\) Interestingly, the dissent did not disagree with the Court’s focus on state law, it simply read that law differently.\(^ {160}\)

*Praprotnik* illustrated another problem that arises in final authority cases, namely the importance of distinguishing between final decision-making authority and final policymaking authority. An official is not a policymaker merely because he or she is vested with final decision-making authority over an area, unless he or she is also vested with authority to establish the standards under which that authority is exer-

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156. *Id.* at 143 (Brennan, J., concurring) (quoting *Praprotnik*, 485 U.S. at 126) (plurality opinion).
158. *Id.* at 783. The Court held that Alabama county sheriffs were state officials and not county officials even though the sheriffs are paid by the county, receive their equipment from the county, are elected by county voters, and have jurisdiction only within county borders. *Id.* at 791. The Court found more compelling provisions of the Alabama constitution and laws that explicitly designate county sheriffs as state officials with authority to enforce state law within county borders. *Id.* at 790. The Court also found it persuasive that no county official has the power to direct the sheriff’s activities, including the highest legislative and executive county officials. *Id.* at 791.
159. *Id.* at 786. Additional support for the view that the Court has decided that state law practically governs the determination of whether an official lies in the Court’s deference to the Court of Appeals on the issue in light of that court’s greater expertise in the law of states within its jurisdiction. *Id.* The only qualification expressed by the Court is that states cannot negate all municipal liability by designating municipal policymakers as state officials. *Id.* Rather, municipal liability is precluded only when the official is genuinely a state, and not municipal, official. *Id.* at 787.
160. *Id.* at 795-803.
cised. Returning to Praprotnik, the plaintiff, a city employee, suffered adverse employment actions allegedly in violation of his First Amendment rights. He sued his supervisors and the city. He argued that the employment actions of his supervisors constituted municipal policy because they had final authority over employment actions within their departments. The Court held, however, that municipal liability was improper because even if the individual decisions of the supervisors were not reviewed by higher municipal officials, the supervisors were expected to operate within guidelines established legislatively by the mayor and aldermen or administratively by the city Civil Service Commission. These higher officials made policy which lower officials executed, with or without review. Municipalities are not liable merely because an official has the authority to make a final decision, the official must also have the final authority to formulate the policies under which the decision is made.

The second issue in Pembaur is the Type Two issue regarding whether the advice rendered by the county prosecutor to "go in and get" the witnesses was a decision rightly called policy. As Justice Powell pointed out in the dissent, the Court focused on whether the prosecutor had the authority to make policy and not on whether the prosecutor had actually done so in the particular case. Perhaps the general rule was the opposite, but special circumstances in the particular case—that the premises were those of the witnesses' employer and that the employer was the subject of the investigation—justified the search. Most likely, there was no general rule and the county prosecutor made a decision with the particular situation in mind without thinking about a general rule. In its most natural understanding, "policy" connotes a decision designed (and perhaps also phrased) to govern more than just the case at hand. There was no allegation in Pembaur that the county attorney had made a general rule that businesses could be searched without a warrant to find witnesses. Justice

161. Praprotnik, 485 U.S. at 112.
162. Id.
163. Id.
164. Id. at 129-31 (plurality opinion); see id. at 140-41 (Brennan, J., concurring).
165. Id.
166. Pembaur, 475 U.S. at 492 (Powell, J., dissenting).
167. Id.
168. There is no suggestion in Pembaur that the county policy of seeking the county prosecutor's advice is sufficient to create county liability. That innocuous policy would probably not, under the Court's standards, be sufficiently connected to any resulting violation to create county liability on its own. However, the fact that it was county policy to consult the prosecutor meant that the prosecutor had policymaking authority for the county over law enforcement matters such as that at issue in Pembaur.
Powell argued that whether policy exists can be discerned using two factors, first whether a decision was stated as a general rule to govern all similar situations and second whether it was formulated in a policymaking process. In his view, neither factor pointed in favor of finding a policy in Pembaur.

There are hints here of a fundamental disagreement within the Court over what it means for an official to make policy. The majority in Pembaur may have been of the opinion that if a municipality has no stated general rule, then whatever the official with final authority does is municipal policy. The dissent would disagree and argue that this is, in effect, vicarious liability for the decisions of the official with final authority. The dissent's reasoning means that if the municipality has no general rule on a subject (which, given the number of issues that can arise, may describe the majority of cases), then there can be no municipal liability. To the dissent, when no general rule exists, then municipal liability for the conduct of an official in a particular case is vicarious liability, not liability based on municipal policy or custom.

This conflict over the nature of policy is illustrated best by cases raising Type Three "gross disregard" issues where claims against municipalities are framed in terms of municipal failure to adequately train employees, failure to maintain a safe workplace for employees or failure to adequately screen employees for their positions. City of Canton v. Harris is the most important of these cases. In Harris, an arrestee sued over the failure of police officers to summon medical help while she was in custody. After her arrest, Harris slumped to the ground twice and was incoherent when asked whether she needed medical attention. Ultimately the police just left her lying on the floor until after she was released from custody, at which time she was admitted to the hospital for treatment of emotional illness. Her claim against the city was based on the city's delegation of authority over whether to summon medical help to the police shift commander coupled with the city's failure to train shift commanders on whether an arrestee needed treatment for emotional illness.

170. Id.
172. Id. at 378.
173. Id. at 381.
174. Id.
175. Id. at 381-83.
The municipality's stated policy in *Harris* was to provide medical treatment to arrestees whenever necessary. Thus, it could be argued that the shift commander's failure to summon help for Harris violated municipal policy and thus should not give rise to municipal liability. The Court, however, unanimously agreed that under certain circumstances, a municipality could be held liable for failing to train its employees to avoid constitutional violations. In the words of the concurring Justices, "where municipal policymakers are confronted with an obvious need to train city personnel to avoid the violation of constitutional rights and they are deliberately indifferent to that need, the lack of necessary training may be appropriately considered a city 'policy' subjecting the city itself to liability."  

The Court's standard in *Harris* for deciding whether a municipal policy caused the violation hints at something that later became more explicit: the determination of whether a municipal policy is present depends in part on whether the municipality is culpable for the violation. In *Harris*, the determination of whether a policy existed turned on whether the municipality was culpable by being deliberately indifferent to the medical needs of detainees. What looks like a positive issue ("is there a municipal policy?") has become the explicitly normative question of whether the case is an appropriate one, in terms of culpability, to hold the city responsible for its contribution to the constitutional violation. Every municipality chooses a level of training for all employees so municipal policy is always implicated for violations caused by lack of proper training. Municipal § 1983 liability is proper only when the city policy is somehow faulty. In the case of inadequate training, it is only when the need for training to avoid violations is so obvious that the failure to provide the training establishes that municipal policymakers—those whose duties include establishing proper training regimens—made a deliberate choice to provide inadequate training.  

*Harris* helps answer a set of Type One questions concerning identifying municipal policies that can give rise to liability. Innocuous policies such as the decision to establish a police force or zoning board are

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176. Id. at 381 n.2.
177. *Harris*, 489 U.S. at 393 (O'Connor, J., joined by Scalia, J., and Kennedy, J., concurring); see id. at 388.
178. The plurality in *Tuttle* had also stated the issue as one of causation and fault. City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1998). More recently, in *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997), the Court stated much more forcefully that municipal liability depends, in some cases, on whether the municipality was at fault in causing the violation. Id. at 415.
not sufficient, even though violations may be causally linked to such policies.\textsuperscript{180} To create liability, a municipal policy must either itself be unconstitutional or evidence a conscious disregard for potential victims of constitutional violations.\textsuperscript{181} Only in one of these two situations will the Court find that a constitutional violation has been caused by municipal policy. Further, the causal link between the faulty municipal policy and the violation must be close.\textsuperscript{182} These are not precise standards, and they contribute to making municipal § 1983 liability a difficult and complicated body of rules.

While the \textit{Harris} standard is a difficult one for plaintiffs to meet, because it did not cut off inadequate training and similar claims altogether, it created a significant amount of litigation alleging that municipal failures similar to failure to train constituted policies sufficient to create liability. Two examples that reached the Supreme Court are failure to provide a safe workplace\textsuperscript{183} and failure to adequately screen municipal employees before hiring.\textsuperscript{184}

In \textit{Collins v. City of Harker Heights},\textsuperscript{185} a municipal worker was killed because of an unsafe condition at the workplace.\textsuperscript{186} The worker's widow sued the city, alleging that the unsafe condition was the result of the city's deliberate indifference to the safety of its employees.\textsuperscript{187} The Court assumed, without deciding, that this allegation was sufficient to raise the possibility of municipal liability.\textsuperscript{188} The Court, however, rejected the constitutional claim on the basis that municipal workers have no constitutional right to a safe workplace, and thus even if the worker’s death was the result of deliberate indifference, there could be no § 1983 liability without a constitutional violation.\textsuperscript{189} The confusion that led to \textit{Collins} is understandable because the “deliberate indifference” standard for municipal liability closely resembles some standards for finding substantive liability, such as the standard used to judge whether prison medical care violates the Eighth Amendment. However, \textit{Collins} reminds us that for § 1983 municipal liability to exist, there must be both a municipal policy \textit{and} a violation of federal rights.\textsuperscript{190}

\textsuperscript{180} See Tuttle, 471 U.S. at 823 (plurality opinion).
\textsuperscript{181} \textit{Harris}, 489 U.S. at 379.
\textsuperscript{182} \textit{id}.
\textsuperscript{184} See \textit{Board of County Comm'rs v. Brown}, 520 U.S. 397 (1997).
\textsuperscript{185} 503 U.S. 115.
\textsuperscript{186} \textit{id}.
\textsuperscript{187} \textit{id}.
\textsuperscript{188} \textit{id}.
\textsuperscript{189} \textit{id}.
\textsuperscript{190} \textit{id}.
\textsuperscript{180-190} See \textit{Tuttle}, 471 U.S. at 823 (plurality opinion).
B. Board of County Commissioners v. Brown

The Court's most recent § 1983 municipal liability case involved an allegation that a county sheriff hired the son of his nephew as a deputy without reviewing the nephew's criminal record in detail.\textsuperscript{191} The deputy/nephew had been convicted of various traffic offenses and misdemeanors, including assault and battery.\textsuperscript{192} The deputy was later sued under § 1983 for a Fourth Amendment violation when he allegedly forcibly pulled a passenger out of a car that had been involved in a high speed chase and threw her to the ground, causing injuries to her knees that required surgery.\textsuperscript{193} The victim also sued the county, claiming that the sheriff was the county policymaker regarding hiring deputies and that his failure to review in detail his nephew's criminal record amounted to a county policy of inadequate screening of candidates for deputy.\textsuperscript{194}

The county in \textit{Brown} conceded that the sheriff was the policymaker regarding the sheriff's department.\textsuperscript{195} The plaintiff argued that since the sheriff was the policymaker, anything he did, whether an individual decision or a general rule, constituted municipal policy.\textsuperscript{196} It was argued this was not vicarious liability because the authority of the municipality itself has been delegated to the sheriff. Thus, the actions of the sheriff within the sphere of delegated authority constituted actions of the municipality itself.\textsuperscript{197}

The Court's reaction to this argument was to insist on what appears to be a stricter standard for municipal liability than what had been previously articulated. The Court stated:

\begin{quote}
As our § 1983 municipal liability jurisprudence illustrates, however, it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its \textit{deliberate} conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. . . . Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be
\end{quote}

\begin{itemize}
\item \textsuperscript{191} See \textit{Board of County Comm'rs v. Brown}, 520 U.S. 397, 401 (1997).
\item \textsuperscript{192} \textit{Id}.
\item \textsuperscript{193} \textit{Id.} at 400-02.
\item \textsuperscript{194} \textit{Id.} at 402.
\item \textsuperscript{195} \textit{Id.} at 401.
\item \textsuperscript{196} \textit{Id.} at 404.
\item \textsuperscript{197} \textit{Brown}, 520 U.S. at 404. This argument was also accepted by the Court of Appeals. \textit{Id}.
\end{itemize}
applied to ensure that the municipality is not held liable solely for the actions of its employees.\textsuperscript{198}

The final statement in the language quoted above reveals the motivation for this strict standard: the Court appears concerned that cases raising Type Three issues involving failure to train, supervise, screen, protect, or similar claims are attempts to hold municipalities liable for the conduct of the untrained, unsupervised or unscreened employee. Further, municipal liability for every action by municipal officials with final authority in an area will amount to vicarious liability for the actions of a large number of officials since a great deal of municipal business is undoubtedly carried on by officials with final authority and little guidance from municipal legislative bodies or higher executive officials.

Later in \textit{Brown}, the Court elaborated on the high standard of culpability it was imposing in cases of inadequate screening of employees.\textsuperscript{199} It stated that:

\begin{quote}
"[D]eliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. ... A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a \textit{particular} constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."\textsuperscript{200}
\end{quote}

On the facts of the particular case, the Court concluded that the deputy's record was not so bad that the sheriff would have known, had he checked, that excessive force was the likely result.\textsuperscript{201}

The fact that Burns had pleaded guilty to traffic offenses and other misdemeanors may have made him an extremely poor candidate for reserve deputy. Had Sheriff Moore fully reviewed Burns' record, he might have come to precisely that conclusion. But unless he would necessarily have reached that decision \textit{because} Burns' use of excessive force would have been a plainly obvious consequence of the hiring decision, Sheriff Moore's inadequate scrutiny of Burns's record cannot constitute "deliberate indifference" to respondent's federally protected right to be free from a use of excessive force.\textsuperscript{202}

\textsuperscript{198} \textit{Id.} at 405.
\textsuperscript{199} \textit{Id.} at 411.
\textsuperscript{200} \textit{Id.} (emphasis added).
\textsuperscript{201} \textit{Id.} at 414.
\textsuperscript{202} \textit{Id.}
The Court’s reasoning here was confused at best. It appears that the Court linked the degree of culpability to what the sheriff would have found had he checked the deputy’s record more carefully. But normally the degree of culpability must be determined *ex ante*, with regard to the potential consequences from the chosen course of action, since it is impossible to know the actual consequences at the time the potentially culpable decision is made. The decision of how deeply to check an applicant’s background is made by considering the duties of the position for which the applicant is applying, the harm that a person in that position can cause, and the likelihood that unfavorable information will be uncovered. The actual content of the applicant’s background is by definition unknown when the decision of how deeply to check is made, so it is difficult to understand why the Court thinks that the content of the applicant’s background is relevant to the official’s and thus the city’s culpability for not checking it.

The content of the applicant’s background is relevant to causation of the violation, not culpability for failing to check the applicant’s background. If a thorough check of an applicant’s background would have revealed nothing negative, then a failure to check the applicant’s background could not have caused a violation. For example, failing to check the background of an applicant for a position in a childcare center may be extremely culpable given the potential for great harm through child abuse. If, however, an applicant’s record was completely clean, the failure to check the background would not be a cause of any abuse that occurred after the applicant was hired. The element of “deliberate indifference” to potential plaintiffs’ federal rights should be determined by examining the duties of the position for which the candidate is applying, not by the content of the particular applicant’s record. The Court, however, repeatedly treats the issue as one of culpability, not causation.

The majority’s extremely hostile reaction to the plaintiff’s claim (so hostile that it led Justice O’Connor to state a completely illogical standard of culpability) is attributable to the Court’s fear that Type Three cases, especially those founded upon hiring decisions, are disguised vicarious liability claims. The Court could easily foreclose all claims raising Type Three issues by holding that training, screening and other similar failings are not “policies or customs” within the Court’s munic-

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203. *See Brown*, 520 U.S. at 413 (“Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury it did not cause.”). The Court’s reference here to causation shows that the Court collapsed questions of culpability into questions of causation, and should have referred to causation when it referred to culpability.
ipal liability standards, or that the causal link between such failings and violations is never sufficient. A majority of the Court, however, is apparently unwilling to do so.

The Court in Brown, did suggest a holding that would not have suffered from the same flawed reasoning as its culpability holding. The Court noted that in all previous cases, the sheriff had adequately screened the backgrounds of candidates for deputy and that the failure to screen this deputy’s background “can only be described as a deviation from Sheriff Moore’s ordinary hiring practices.” In Type Three cases, where the training or screening is normally adequate, but the decisionmaker deviates from usual practice, perhaps the true “policy” of the municipality is to employ usual practices, not the deviant ones. This reasoning works only in Type Two cases where liability is founded upon one-time actions by a policymaker who is acting on a single case and does not purport to establish a rule to govern future cases—the act of promulgating an unconstitutional general rule should give rise to liability even if it is the only defective rule among thousands.

The Court has thus changed the focus in Type Three cases from locating a municipal policy or custom and asking whether that policy or custom caused the violation, to applying a culpability standard under which municipalities are to be held liable only when the plaintiff can prove a high level of municipal culpability for the violation. The Court does not support this shift with evidence from the legislative history that culpability was relevant on this issue to the Congress that wrote and passed § 1983. There is also no textual support for this culpability inquiry. If culpability is to be the test, then the Court, at a minimum, should explain its derivation and should explicitly reform the Monell test to reflect this rather significant change.

III. Municipal Responsibility for Constitutional Torts

The case against maintaining the Monell rule is strong from a variety of perspectives. The rule is so complicated that a change to a more definite rule, whether expanding or shrinking municipal liability, could save litigation expenses. Because plaintiffs who ultimately lose

204. Id. at 410.

205. In a recent administrative law decision, the Court criticized an agency for applying a legal standard in a manner that was not consistent with the standard’s verbal formulation. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998). The Court held that an agency that applies a standard in a way that cannot be squared with the language of the standard is not engaged in reasoned decisionmaking. Id. It seems that the Court’s application of the Monell test fails the Court’s own test for reasoned decisionmaking, since the standard itself refers only to policy and custom and makes no mention of culpability as relevant to municipal liability.
their claims for municipal liability often can state plausible claims, plaintiffs attorneys and municipalities spend a great deal of time and money on litigation that could be avoided by a more definite rule. Judicial time could also be saved if judges did not have to decide difficult questions regarding the proper application of the Monell rule.

In my view, fairness concerns as well as the policies underlying § 1983, point toward a rule of vicarious liability. When a person has been injured by a violation of federal rights committed by a municipal employee in the course of employment, the municipality is responsible for the violation in the same way that private employers are responsible for the torts of their employees. From the point of view of a municipal employee who committed the violation in good faith, it is unfair that the focus of civil rights litigation is on the individual, rather than the employing entity.\textsuperscript{206} From the victim's point of view, several considerations point toward allowing the claim to be brought directly against the municipality.

The common law's widespread acceptance of vicarious liability exhibits a consensus that employers are responsible for the tortious conduct of their employees. The municipal employer benefits from the employee's activities and may also save money by not supervising the employee more closely. The employee would not have been in the position to commit the violation if it were not for the municipality's decision to pursue whatever program the employee was involved in. Often, municipalities are behind violations in ways that are difficult to prove and would not stand up to scrutiny under the Monell rule. Failure to train allegations and similar claims are too difficult for plaintiffs to make out even when it is common knowledge that a particular municipality encourages or ignores wayward behavior on the part of its officials.\textsuperscript{207} Individual officials may also get sympathy within the judicial system that would not be a factor if claims could be brought against municipalities themselves. Immunities and the realities of the assets that individual municipal employees are likely to have make damages sufficient to meet § 1983's compensation goal difficult to recover. For all these reasons, fairness counsels strongly in favor of a significant expansion of municipal liability.

These fairness concerns would be beside the point if Congress had intended to confine municipal liability to the bounds established in

\textsuperscript{206} Many municipalities recognize this and indemnify their employees, but not all of them do so.

\textsuperscript{207} Cf. Rizzo v. Goode, 423 U.S. 362 (1976) (holding action seeking injunctive relief against a pattern of abuse by Philadelphia law enforcement officials did not to present case or controversy within federal judicial power).


Monell. But, as Justice Stevens has argued, the Court, and not Congress, is responsible for the doctrinal mess that is the Monell rule.208 Relying on the remedial purposes of § 1983 as well as the common law of vicarious liability at the time § 1983 was passed, Justice Stevens has concluded that Congress intended "to impose liability for the governments' own illegal acts—including those acts performed by their agents in the course of their employment."209 He has made a persuasive case against the doctrinal foundations of the Monell rule.210

Justice Breyer, joined by two additional members of the Court, recently called for a reexamination of the Monell rule.211 Justice Breyer agreed with Justice Stevens that Congress' rejection of the Sherman Amendment was not a sufficient basis for the Monell Court's rejection of vicarious liability.212 Justice Breyer also argues that vicarious liability satisfies § 1983's causation requirement because the municipality itself is responsible for the actions of municipal employees.213 Finally, Justice Breyer made a compelling case that the Monell rule is fraught with needless complications that do not help to identify municipal policies in any meaningful sense.214

Justice Breyer also pointed out that many states authorize indemnification of employees found liable in civil rights cases, but he erred when he stated that an indemnification regime mimics vicarious liability.215 Indemnification is a poor substitute for vicarious liability because employees retain their immunities and because to a jury it may still appear that any damages may be paid out of the employee's own pocket. While indemnification resolves the employee's fairness concerns, and may help some victims recover their damages, it does not resolve all of the difficulties of the Monell rule.

The conflict over the Monell rule is another instance of disagreements that exist regarding the proper scope of § 1983 liability generally. The justices who support the Monell rule may view many civil rights cases brought against municipalities and their employees as, in reality, simple tort cases that belong in state court. From the plaintiff's perspective, however, state court tort remedies are insufficient. First, the victorious plaintiff would not, in state court under tort law,

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209. Pembaur, 475 U.S. at 489 (Stevens, J., concurring).
210. Id.
212. Id. at 430-32.
213. Id.
214. See id. at 433.
215. Id. at 436.
be entitled to an award of attorney fees as provided for under federal civil rights law.\textsuperscript{216} Second, municipalities may not be required to pay full damages under state law. Many states impose limits on the damages recoverable against government entities, limits which probably would not apply in a federal civil rights action.\textsuperscript{217} These limitations may be sensible as matters of state policy, but they are in fundamental conflict with the purposes of federal law, and should not be relied upon as a substitute for liability under § 1983.


\textsuperscript{217} See Felder v. Casey, 487 U.S. 131 (1988). The Court granted certiorari in a case concerning whether limits on wrongful death damages apply in § 1983 claims brought in state court, but the Court ended up deciding that the case was not reviewable because there was no final judgment in the state court. Jefferson v. City of Tarrant, 522 U.S. 75 (1998).