The Importance and Overuse of Policy and Custom Claims: A View from One Trench

The Honorable David F. Hamilton

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol48/iss3/6

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
THE IMPORTANCE AND OVERUSE OF POLICY AND CUSTOM CLAIMS:
A VIEW FROM ONE TRENCH

The Honorable David F. Hamilton*

INTRODUCTION

My role in this Symposium is not as a scholar but more, I suppose, as a laboratory specimen for examination. I hope to learn at least as much as I teach in this Symposium. As a specimen for examination, I recognize that what I contribute may not be what I intend to contribute. My viewpoint is from one of the front lines of civil rights litigation, one United States District Court, in the midst of a shifting kaleidoscope of civil rights issues.

Our focus in this Symposium is on Monell cases—those plaintiffs alleging under 42 U.S.C. § 19831 that the policies or customs of local governments have caused violations of their federal rights.2 From my vantage point in a district court, I offer some observations on three aspects of Monell litigation. First, I suggest that, despite the importance of Monell claims, litigants and courts spend excessive time on these claims, primarily because a plaintiff with a viable claim against individual officers or other government employees should ordinarily be able to recover damages without having to prove a Monell claim against a local government. As a result, in my view, Monell claims should be litigated and tried less often. When serious Monell claims are litigated, however, they may take on substantial importance. Second, I will address some of the practical problems highlighted by the Supreme Court’s decision in McMillian v. Monroe County3 concerning which governmental entities are subject to Monell liability and which are exempt from § 1983 liability as arms of the state government. Fi-

---

* David F. Hamilton was appointed United States District Judge for the Southern District of Indiana by President Clinton in 1994. Judge Hamilton was formerly a partner at Barnes & Thornburg, a private law firm in Indianapolis. He served as Counsel to the Governor of Indiana from 1989-91. He was involved in civil rights cases both as Counsel to the Governor and as a volunteer lawyer for the Indiana Civil Liberties Union. Judge Hamilton graduated from Haverford College and Yale Law School, and served as law clerk to Judge Richard D. Cudahy on the United States Court of Appeals for the Seventh Circuit.

nally, I will address remedies for conflict of interest issues that can arise in Monell cases when one lawyer or law firm represents both the individual defendants on individual claims and the local government defendant on Monell claims. Before turning to these specific issues, however, I address some background matters on the volume and importance of these cases.

I. BACKGROUND

The flow of Monell policy and custom cases is substantial. Apart from prisoner petitions, the statistics kept by the Administrative Office of the United States Courts show that during fiscal year 1997, in the category of private civil rights cases described as “other,” meaning other than employment, voting, housing, and welfare matters, 18,396 were filed in the federal district courts. This is the category that would include, for example, claims of excessive force or unlawful arrest, or unlawful search or seizure. These are cases in which Monell policy and custom claims are often presented. That number is about 6.7% of all civil filings in the district courts. In addition to these cases, we must also consider the 28,635 claims filed by prisoners in state, local, and federal custody during the same period alleging civil rights violations, aimed primarily at conditions of confinement. Those petitions amount to more than 10% of all civil filings on a national basis. These statistical categories are not perfectly matched up with the Monell custom and policy cases that are the subject of this Symposium. For example, Monell claims are often asserted in employment cases against local governments that are excluded from this reporting category, and not all police, jail, and prison cases include Monell claims. Nevertheless, these figures provide a reasonable baseline for estimating at least the relevant order of magnitude. When we

5. Id. at 128-29. This percentage was reached by taking the total number of cases listed as “Other Civil Rights” (18,396) in 1997 and dividing it by the total number of all civil cases commenced in 1997, listed as “Total Cases” (272,027).
6. Id. at 129-30.
talk about Monell custom and policy claims and legal doctrines, we are
talking about subjects of great practical importance in the daily and
weekly work of district courts all over the country.\(^8\)

My view is from a trench, not from a high vantage point that lets me
examine the whole landscape of civil rights litigation and enforce-
ment. In managing and resolving this volume of cases, the district
courts decide a high volume of summary judgment motions and Rule
12(b)(6) motions,\(^9\) especially when dealing with Monell policy and
custom claims. Few of these cases will reach a trial without first sur-
viving a dispositive motion. We are busy trying or settling those cases
that are not resolved on motions. Relatively few of the large number
of these cases present the cutting-edge legal issues that may be of
greatest interest to the scholars in this Symposium, who are looking at
solutions to legal problems I do not yet even see on my horizon. In
my experience, the substantial majority of cases require application of
relatively well-established legal doctrines to the specific facts devel-
oped in the record. The most common issue is simply whether the
plaintiff has enough evidence that the local government's agents have
committed similar wrongs against a sufficient number of others to per-
mit a finding of a municipal custom or policy.\(^10\)

My initial emphasis on the volume of Monell cases should not dis-
tract any of us from the importance of these cases, both individually
and collectively. In private civil rights cases, especially those involving
actions of law enforcement officers or prison officials, the federal
courts are constantly patrolling the boundaries between liberty and
order, the boundaries between the rights of individual citizens to be
left alone or to be treated decently by governments, and the ability of
society to protect itself from crime and other antisocial conduct.
Where there is a serious claim that government officers and employ-
ees have violated a person's constitutional rights as a matter of gov-
ernment policy or custom, the claim may have added importance for
members of the public who are not before the court as parties.
Among the responsibilities assigned to the federal district courts, none
are more important in preserving our freedom than finding the appro-

---

8. For example, a Westlaw search conducted on September 7, 1998, of the ALLFEDS
database for references to "Monell" within the same paragraph as "policy" or "custom" turned
up 459 opinions in calendar year 1997. At the district court level, of course, the vast majority of
decisions are not published or reported on national electronic databases.


10. See generally Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985) (holding that proof of a
single incident of unconstitutional activity by local government employees is generally not suffi-
cient to prove a custom or practice).
appropriate balance between the demands of liberty and the need for order in these cases.

Despite the high stakes for society in these civil rights cases, it is easy for judges and lawyers to get caught up in the mental gymnastics required to apply the complex "system"—and I use the term loosely, without intending to imply a high degree of rationality or coherence—of legal doctrines that govern private efforts to obtain relief for alleged violations of civil rights. The role of the district court judge, of course, is to deal with the law as a given. It is not my role in court opinions or in this paper to try to explain or rationalize why, for example, local governments can be sued for damages under *Monell* while state governments cannot be sued for damages under *Will v. Michigan Department of State Police*, let alone to explain why that situation makes any practical sense in balancing the rights of citizens against the powers of government. Those are simply given features of the legal landscape in which I operate.


12. A recent Seventh Circuit decision provides a good example of how tangled the doctrines governing civil rights cases have become. In *David B. v. McDonald*, 156 F.3d 780 (7th Cir. 1998), the Cook County Public Guardian had filed suit in 1979 in federal court on behalf of a class of delinquent children with emotional or mental problems. *Id.* at 781. The suit sought to require Illinois state officials to provide to the class members the same social and educational services the state provided to emotionally or mentally handicapped children who were not delinquent. *Id.* at 781-82. When the case began, the defendants were the directors of state agencies that could provide the services, and the basis for the federal claim was the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). *Id.* at 783. The parties agreed to a consent decree in 1981 to provide the services plaintiffs sought. *Id.* at 782. In 1995, however, the state legislature enacted legislation limiting the authority of the state Department of Children and Family Services (DCFS) to provide services to delinquent children over age 13. *Id.* The DCFS then sought relief from the consent decree because the new state legislation imposed obligations that potentially conflicted with its obligations under the consent decree. *Id.* at 783-84. The district court denied relief. *David B. v. Patla*, 950 F. Supp. 841 (N.D. Ill. 1996). The Seventh Circuit held in 1997 that the Rehabilitation Act did not support federal subject matter jurisdiction, and remanded the case to determine whether a substantial federal claim was present to support federal subject matter jurisdiction. *David B. v. McDonald*, 116 F.3d 1146, 1149-50 (7th Cir. 1997).

After the district court found on remand that it still had jurisdiction, the Seventh Circuit reversed, relying on the Eleventh Amendment. *David B.*, 156 F.3d at 783-84. Because the plaintiff class sought injunctive relief, the defendants were state officials named in their official capacities. *Id.* at 783. That is the standard technique, relying on the legal fiction that a state official violating federal law is acting outside his or her official powers, for avoiding Eleventh Amendment problems in cases seeking injunctive relief. *See ex parte Young*, 209 U.S. 123 (1908). After the 1997 remand, the plaintiffs had to abandon their claim under the Rehabilitation Act and shifted their theory to the Due Process Clause, arguing that the custodians of the plaintiff class had a duty under the Fourteenth Amendment to provide the services the class sought. *David B.*, 156 F.3d at 782-83. In its 1998 decision, however, the Seventh Circuit held that plaintiffs had not named the correct state officials in their individual capacities to support a due process claim. *Id.* at 783. The problem was that the officials with the federal duty to class members under the Fourteenth Amendment were the plaintiffs' custodians, not the directors of the social service agencies. *Id.* at 783-84. The Seventh Circuit added that plaintiffs could not sue the juvenile
The view from this trench is not a perspective that encourages reflection. It may be worth mentioning some institutional biases—or perhaps "predispositions" would be a better word. First, my predisposition is to try a case once and only once, if I can help it. Also, my predisposition is to spend my time, and to encourage lawyers and parties to spend their time and energy available in litigation, on core questions of liability and damages—that is, on the issues that go to the merits of a claim—while trying to minimize the time and energy spent on collateral matters. As a result, I have a predisposition to prefer that threshold and collateral issues like statutes of limitations and identifying the correct defendants be resolved by relatively bright-line legal rules that lawyers, litigants, and judges can understand readily and apply quickly.

Another important feature of private civil rights litigation is the wide variation in lawyers' familiarity with the complex network of legal doctrines that govern these cases. In my court there are a number of experienced and skilled lawyers who make their livings representing plaintiffs or local governments and their officials. These lawyers know the civil rights field thoroughly. But many private civil rights cases are brought or defended by lawyers who, regardless of the expertise they may have in other fields, simply have not done enough civil rights work to know even the most important doctrines and the best solutions to common problems for both plaintiffs and defendants. Also, of course, a number of private civil rights cases are filed pro se by litigants who often are mystified by the complexities of such basic matters as deciding which defendants should be sued in what capacity for what kind of relief.

With this wide range of expertise and experience in confronting the often complicated legal doctrines and potential procedural pitfalls, it is easy for a private civil rights case to be ensnared quickly in motions practice, especially 12(b)(6) motions challenging the plaintiff's pleadings. These motions are usually a slow and expensive way to deal with problems such as whether the plaintiff has identified the right court or its judges to enforce their due process claims, but would have to raise their due process claims in proceedings before that court. Id. Because of the Rooker-Feldman doctrine, the plaintiffs could not pursue those claims in a federal district court but would have to appeal through the state courts and the Supreme Court of the United States. Id. at 784 (citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)). Accordingly, the 1979 case was remanded in 1998 with instructions to vacate the consent decree and to dismiss for lack of subject matter jurisdiction, and with an invitation to plaintiffs to try to sue some other defendants in federal court, or to file a new lawsuit in state court. Id.

13. FED. R. CIV. P. 12(b)(6).
defendants or can, if she proves her case, obtain the relief she really seeks. Many of these pleading errors can be and should be corrected once they are identified by a defendant's motion and/or a judge's decision. As a result, these motions rarely resolve a case.

One simple and effective technique for minimizing the time and expenses drained by poor pleading on either side is for the district judge or magistrate judge to use an initial pretrial conference to identify the problems and to give the party with the problem (most often the plaintiff) an opportunity to replead quickly. Handling such matters with a quick oral explanation of the governing legal doctrine can prevent opposing counsel and the court from spending a lot of time writing the briefs or the opinions explaining problems that can often be resolved in a few minutes. Almost by definition, of course, that approach is rarely needed when counsel on both sides know the field, but too often one or both sides do not. The court can then use its power to manage a case so as to avoid elementary motions practice that is both useless and, I must add from the judge's point of view, boring. It is better to explain the basics orally and early, and to tell the parties which problems need to be fixed quickly.

II. Too Much Time and Energy Is Spent on Monell Policy and Custom Claims:

The Reasons for Bringing a Monell Claim

We are not dealing here with a rationally designed system of legal doctrines. We are dealing with a web of legal doctrines that are complex and, for many lawyers and litigants, and not a few judges, confusing. This web of legal doctrines has grown incrementally since the Supreme Court in *Monroe v. Pape*\(^1\) essentially rediscovered § 1983 after nearly a century of disuse. The growth has been more like the slow growth of a coral reef than the construction of a piece of machinery designed by rational experts to accomplish a well-defined purpose. This process is evident from the Justices' opinions in *Monell* itself.

*Monell* presented a challenge to an explicit governmental policy—a policy that required pregnant government employees to take unpaid leaves of absence before such leaves were medically required.\(^1\)\(^5\) That original core of *Monell* remains important and viable. One reason it remains important is that in cases challenging explicit government policies on constitutional grounds, the prospects of individual liability usually are not promising (because of the qualified immunity de-

---

\(^1\) 365 U.S. 167 (1961).

From my perspective, though, a good deal of the unnecessary Monell litigation stems from the invitation in Monell, based on the "custom or usage" language in § 1983 itself, to treat some "customs" or widespread practices as the equivalent of explicit government policies. My point here is not to criticize that element of Monell. From the perspective of a victim of governmental abuse, it would make little sense to draw a bright legal line between an explicit unconstitutional policy and a widespread practice or custom of violating constitutional rights. My point, however, is that in a substantial proportion of the cases asserting Monell claims based on alleged practices or customs, the Monell claims should have little practical significance.

From the plaintiff's perspective, adding a Monell claim to the case may seem to offer a number of practical advantages:

1. Finding a deep pocket in typical police, jail, and employment cases.

2. Avoiding the feared unwillingness of a jury to award large sums against individual officers and employees.

3. Expanding the relevant evidence beyond the alleged misconduct by the individual defendants to include wrongs committed by other officers or employees.

4. Finding a suitable defendant where individual officers and employees will defend their own actions by saying they were following an explicit policy and could not have been expected to know that the policy was unconstitutional.

5. Challenging a widespread practice to achieve deterrence.

6. Finding a viable damages remedy in cases where the constitutional standards are not sufficiently clear and the power to prevent the injury is not easy to locate, such as cases where the problem stems from an inadequate budget or from a policymaker's failure to make a policy.

In my experience with civil rights cases, most Monell claims based on alleged practices and customs appear to be motivated by the first three grounds—a desire to add a defendant with a deeper pocket, a concern about a jury's expected reluctance to award large damages against an individual defendant, and/or a desire to broaden the scope of relevant evidence. In the Seventh Circuit, at least, these motivations will only rarely justify any significant investment of time, money, and energy in litigating the Monell claim. This is the result of several important features of the legal landscape: indemnification, bifurcation of trials, and issue preclusion.
A. Indemnification

Indemnification laws and practices often make the search for a deep pocket unnecessary. Indemnification of individual defendants is widespread. In the Seventh Circuit, for example, Indiana law gives local governments discretionary authority to indemnify individual defendants for compensatory damages.\textsuperscript{16} Illinois law goes further and obliges local governments to indemnify individual defendants for compensatory damages.\textsuperscript{17} As the Seventh Circuit has explained, in such instances the Monell issue:

[H]as little, probably no, practical significance. No damages were awarded against the City that were not also awarded on a joint and several basis against the individual defendants; and since the City indemnifies its employees for damage awards made against them in respect of the torts they commit in the course of their employment, [plaintiff] will collect his judgment in full whether or not the City is held liable.\textsuperscript{18}

Wisconsin goes even further and provides indemnification as a matter of right for both compensatory and punitive damages.\textsuperscript{19}

Even where indemnification is not required as a matter of law, as in Indiana, there may be powerful reasons for the local government to provide it. In any individual case, a commitment by the local government to indemnify the individual defendants certainly offers a way for the defendants to maintain a united front against the plaintiff. Police unions or other public employee unions have substantial political clout that can persuade local governments to provide indemnity. Also, notwithstanding the Supreme Court’s decisions refusing to inter-

\textsuperscript{16} IND. CODE § 34-4-16.7-1, \textit{repealed by} Ind. Pub. L. No. 1-1998 (to be recodified at IND. CODE § 34-13-4-1). Indiana Code § 34-4-16.7-1 leaves indemnification in Indiana up to the governor for the state and the “governing body of the political subdivision” to decide whether payment “is in the best interest of the governmental entity.” This provision was repealed and recodified by Indiana Public Law 1-1998, which substituted the new Ind. Code § 34-13-4-1 for the old version. No substantive change was effected by the recodification of this provision as part of the major recodification of the civil procedure code.

\textsuperscript{17} 745 ILL. COMP. STAT. 10/9-102 (West 1993); Wilson v. City of Chicago, 120 F.3d 681, 683 (7th Cir. 1997). The Illinois statute was amended in 1986 to limit its application to compensatory damages after the Seventh Circuit held in \textit{Kolar v. County of Sangamon}, 756 F.2d 564 (7th Cir. 1985), that the earlier version of section 9-102 waived the county’s immunity from punitive damage awards under 42 U.S.C. § 1983. \textit{Id.} at 567.

\textsuperscript{18} Jones v. City of Chicago, 856 F.2d 985, 995 (7th Cir. 1988).

\textsuperscript{19} WIS. STAT. ANN. § 895.46 (West 1997); see Lawson v. Trowbridge, 153 F.3d 368, 379 & n.3 (7th Cir. 1998); Bell v. City of Milwaukee, 746 F.2d 1205, 1271 (7th Cir. 1984) (holding city defendant liable to pay punitive damages awarded against individual defendants); see also Board of County Comm’rs v. Brown, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting) (collecting some state indemnity statutes and arguing that such statutes may support reconsideration of the Monell ban on vicarious liability).
pret § 1983 to authorize vicarious liability for the local government.\textsuperscript{20} The practice of indemnification fits with a more practical recognition that civil rights litigation based on acts committed within the scope of employment is part of the cost of operating a local government.

In addition, the jury ordinarily will not be informed about indemnification.\textsuperscript{21} If there is a claim for punitive damages against individual defendants in civil rights cases in Indiana, the court will instruct the jury, upon request, that they may consider the individual defendant’s financial resources in deciding upon an amount of punitive damages.\textsuperscript{22} For alert jurors, such an instruction about punitive damages at least suggests that the absence of a similar instruction about compensatory damages means that compensatory damages will not be paid by the individual defendants. Some jurors do figure this out, or correctly assume that the local government will pick up the tab of a plaintiff’s verdict.

\textbf{B. Bifurcation of Trials}

Courts have powerful reasons for bifurcating trials on claims against individual defendants from trials on Monell claims against local government defendants.\textsuperscript{23} Evidence of other wrongs needed to prove the local government’s policy or custom will often be unfairly prejudicial to the individual defendant and will confuse and distract the jury from the principal events in question.\textsuperscript{24} These factors provide a district court with substantial reasons to bifurcate the trial of the individual

\begin{itemize}
\item \textsuperscript{20} See Monell, 436 U.S. at 692-95.
\item \textsuperscript{21} See Lawson, 153 F.3d at 379 (holding evidence of indemnification generally is not admissible, but after individual defendants offered evidence of their lack of assets and implied they would be personally responsible for punitive damages, district court erred by refusing to allow plaintiff to show that individual defendants would be indemnified under the Wisconsin statute).
\item \textsuperscript{22} Id.
\item \textsuperscript{24} Dawson, 896 F. Supp. at 540; Ismail, 706 F. Supp. at 251.
\end{itemize}
and the policy claims. The trial of a Monell policy and custom claim will require a great deal of evidence that is not relevant to the claim against the individual defendants.\textsuperscript{25} Trying the claims together produces longer trials, and juries face the difficult challenge of sorting out the differences between the individual claims and the policy and custom claim.\textsuperscript{26} Moreover, there is often a substantial risk that the additional evidence needed to prove the policy and custom claim will tend to prejudice the individual defendants.\textsuperscript{27} Although limiting instructions might be used as an alternative, they are not likely to be a satisfactory solution in most cases. Perhaps most important, very practical pressures encourage bifurcation. The bifurcated trial is certain to be shorter and to be more focused on what happened to the plaintiff. The resulting trial should be easier for the jury to digest, and district courts certainly have a preference for shorter rather than longer trials.

\textbf{C. Issue Preclusion}

The result of the first trial of claims against individual defendants is likely to render moot the Monell claim against the local government itself.\textsuperscript{28} After the claims against the individual defendant have been tried, there is little to be gained in a typical case by actually conducting a separate trial on the Monell claim. If the verdict is for the defense, there will not be a viable Monell claim because the verdict will amount to a finding of no constitutional violation.\textsuperscript{29} If the verdict is for the plaintiff and the local government agrees that the individual defendant is entitled to indemnification for actual damages, neither side nor the court is likely to have a significant reason to pursue the Monell claim. The plaintiff's actual damages will have been determined by the first jury, and no punitive damages will be available at that point. From the court's standpoint, at least so long as the local government will indemnify the individual defendant, so that the plaintiff will be compensated regardless of the outcome of a trial on a Monell claim, I have a lot of other cases that need attention. Even if there will be an appeal or other motions practice, the threat of a Monell claim trial may also be used to put pressure on a reluctant local

\begin{itemize}
\item \textsuperscript{25} Ricciuti, 796 F. Supp. at 86.
\item \textsuperscript{26} Ismail, 706 F. Supp. at 251.
\item \textsuperscript{27} Myatt, 816 F. Supp. at 1264 & n.8; Dawson, 896 F. Supp. at 540.
\item \textsuperscript{28} E.g., City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (reversing summarily the circuit court decision holding plaintiff could proceed on Monell claim after jury returned defense verdict on claim against individual officer that could not be explained on basis of qualified immunity); Sanchez, 596 F. Supp. at 195 & n.3 (dismissing Monell claims after city agreed to pay judgment against individual defendant because no additional damages would be available).
\item \textsuperscript{29} Heller, 475 U.S. at 799.
\end{itemize}
government to resolve the indemnification issue early and thereby to avoid the *Monell* trial.

Thus, where the plaintiff's goal in bringing a *Monell* claim is to ensure that a deep pocket is available and/or to broaden the scope of admissible evidence for the plaintiff, the factors discussed here will render a *Monell* claim pointless from a practical standpoint, at least. On the basis of anecdotal experience, but admittedly without quantitative support, I believe those features apply to a substantial majority of cases alleging misconduct by police officers or other local government personnel.

Nevertheless, in describing this scenario, I have built in a number of assumptions that mean there will be some important exceptions. One exception is where there is a viable defense of qualified immunity that requires a jury's resolution of disputed facts, such that the jury renders a special verdict finding the plaintiff's rights were violated but also finds facts establishing the defense of qualified immunity.\(^{30}\) Another exception is where indemnification is not available for some reason. Under Indiana's indemnification law, for example, the local government (city police department, county sheriff, etc.) may have independently concluded that the individual defendant acted so improperly that indemnification is either definitely or probably not available.\(^{31}\) Police departments have taken that approach, for example, where the individual officer-defendant faces or even has been convicted on criminal charges for the conduct that harmed the plaintiff. In other cases involving, for example, off-duty conduct by a police officer, there may be a dispute about the scope of employment that could prevent indemnification from being available.

The scenario of the bifurcated trial does not mean that a plaintiff should not plead a *Monell* practice or custom claim where there are sufficient grounds for it. With some local governments, the threat of a *Monell* trial may still be needed to add a little pressure in favor of indemnification. But if the general scenario I have described fits the case, it will not make sense for anyone to spend much time and money

---

\(^{30}\) E.g., Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992) ("When the issue of qualified immunity remains unresolved at the time of trial, . . . the district court may properly use special interrogatories to allow the jury to determine disputed issues of fact upon which the court can base its legal determination of qualified immunity."); Nessel v. City of Northlake, No. 93 C 6176, 1994 WL 685508, at *2 (N.D. Ill. Dec. 5, 1994) (denying motion to bifurcate trial; if individual defendants prevailed on qualified immunity defense, *Monell* claim would still need to be tried); cf. Nelson v. Streeter, 16 F.3d 145, 149 (7th Cir. 1994) (noting that whether judge deciding qualified immunity must follow the jury's findings of fact in answer to special interrogatories is an open question).

\(^{31}\) See supra note 16.
litigating or deciding the *Monell* issues. An early agreement or court order to bifurcate the trial of individual liability and *Monell* claims and to defer discovery and motions practice on the *Monell* claim can avoid a substantial waste of time and money. I suggest that such orders be available routinely in most cases combining claims against individual defendants and *Monell* claims against local governments, at least where the local government agrees (to the plaintiff's satisfaction) that it will be responsible for a judgment against the individual defendants.

Despite these limitations on their role, *Monell* custom and policy claims retain an important role in protecting individual rights. That role is narrower than simply finding a deep pocket or opening up doors to a lot of prejudicial evidence. As I said at the outset, I hoped to learn from the Symposium, and I did. Flint Taylor spoke persuasively about cases of truly *systemic* government wrongdoing in which *Monell* claims can be used to expose government tolerance of official wrongdoing. There may be a few cases in which government wrongdoing appears so systemic and widespread that a *Monell* trial would, if plaintiffs prevail, have significant deterrent value—significantly greater than successful litigation of individual claims. Such cases will be rare, I think (and hope), especially if a plaintiff and plaintiff's counsel already have assurances of payment of at least compensatory damages and fees. At the same time, these may be some of the most important cases. Where a plaintiff and her knowledgeable lawyers are prepared to invest substantial time and money in such an effort, the court may want to consider whether the particular case is one of these rare cases that warrant the greater efforts necessary to litigate and resolve the *Monell* issues.

Also, the original role of *Monell* claims remains, of course: cases challenging explicit government policies that violate federal rights.

---


33. At least one court has held that where the local government had agreed to pay the judgment against the individual officer, the *Monell* claim presented no further case or controversy. *Sanchez* v. City of Riverside, 596 F. Supp. 193, 195 (C.D. Cal. 1984) (rejecting plaintiffs' argument that the *Monell* claim was independently significant). More recently, however, the Ninth Circuit has questioned that conclusion and indicated that the need to try a *Monell* claim may be more a question of court priorities. *See Larez* v. City of Los Angeles, 946 F.2d 630, 640 & n.4 (9th Cir. 1991) (affirming judgment of nominal damages against city in second phase of bifurcated proceeding after compensatory damages were awarded against individual defendants, and distinguishing and questioning *Sanchez* on this point). Even under the approach taken in *Sanchez*, though, there would be a case or controversy on the *Monell* claim unless and until the claim against the individual defendant was actually paid, so that the plaintiff had no further possible need for the *Monell* claim.
These cases are far less common, however, than attempts to add "custom or practice" claims to claims against individual government employees.

Monell policy and customs may have one other role, but one in which causation can be difficult to establish. These would be claims in which the plaintiff's injuries are fairly traceable to a local government's budgeting decisions. One example I have dealt with involved jail safety policies and devices. In Stovall v. McAtee,34 the plaintiff had been arrested one night for public intoxication and put in the lock-up in a local jail. The plaintiff alleged that other detainees beat him up that night.35 These days such incidents and claims are all too common in jails. Plaintiffs have a difficult time proving such claims. The most straightforward cases for plaintiffs are those in which the plaintiff can identify particular prison or jail personnel who had actual knowledge of a specific threat to harm the plaintiff.36 In the absence of a threat specific to the injured detainee or prisoner, the legal standards (at least in the Seventh Circuit) appear to be so indefinite that individual liability would be foreclosed by qualified immunity.37

In the face of a pattern of inmate-on-inmate abuse, a decision not to fund reasonable protective measures (such as staffing sufficient to make frequent rounds, surveillance cameras, staffing to monitor surveillance cameras, distress alarms, segregated facilities for intoxicated detainees who are vulnerable to assaults by other inmates) can be

34. 35 F. Supp. 2d 1125 (S.D. Ind. 1997).
35. Id. at 1126.
36. See, e.g., Haley v. Gross, 86 F.3d 630, 642-43 (7th Cir. 1996) (affirming judgment for plaintiff where prison officials knew that cellmate posed imminent danger); Santiago v. Lane, 894 F.2d 218, 223-24 (7th Cir. 1990); Goka v. Bobbitt, 862 F.2d 646, 649-51 (7th Cir. 1988); cf. Walsh v. Mellas, 837 F.2d 789, 795-96 (7th Cir. 1988) (stating that notice of a specific threat is not necessary if inmate is a member of identifiable group for whom risk of assault is substantial).
37. See Walsh v. Brewer, 733 F.2d 473, 475-76 (7th Cir. 1984) (noting that threat of harm may be actionable under the Eighth Amendment even in the absence of actual assault if conditions in prison amount to "reign of terror"); see also Lewis v. Richards, 107 F.3d 549, 554 (7th Cir. 1997) (using "reign of terror" language); James v. Milwaukee County, 956 F.2d 696, 700 (7th Cir. 1992) (providing a collection of cases demonstrating that a plaintiff can show existence of so substantial a risk of harm that defendants' knowledge of the risk can be inferred); Estate of Davis v. Johnson, 745 F.2d 1066, 1071 (7th Cir. 1984) (noting that to demonstrate callous indifference to inmate safety, a plaintiff must show a "strong likelihood" of violence, not just a random act of violence); cf. Hale v. Tallapoosa County, 50 F.3d 1579, 1583 (11th Cir. 1995) (finding a genuine issue of fact as to whether the sheriff and county were deliberately indifferent to the "substantial risk of serious harm" faced by detainees in county jail lock-up where evidence showed that inmate-on-inmate violence occurred "regularly" when the jail was overcrowded; sheriff and county failed to take measures that could reduce risk; sheriff's efforts to obtain funding to build a new jail would be relevant to sheriff's individual liability, but would not necessarily relieve him or the county from liability), overruled in part by, Turquitt v. Jefferson County, 137 F.3d 1285, 1289-90 (11th Cir. 1997) (en banc) (holding that Alabama sheriffs act as state officials, not county officials, in the daily management of county jails).
treated as a policy that amounts to deliberate indifference to the safety of inmates. In those circumstances, the most appropriate remedy may be against the governmental entity that budgeted inadequately. A sheriff sued in an individual capacity may argue, with ample justification, that he or she made reasonable efforts to obtain additional funding from the local legislative or fiscal body, but that the legislators refused to provide the funding. Individual local legislators are entitled to absolute legislative immunity for claims under § 1983 based on their legislative activities, including their budgeting decisions.  

A recent Seventh Circuit decision on a related matter of county jail administration, Armstrong v. Squadrito, 39 illustrates the need for and value of Monell claims where individual responsibility may be difficult to ascertain. Plaintiff Armstrong “voluntarily turned himself in” to the County Sheriff for failing to appear at a contempt hearing for overdue child support payments. 40 The state statute authorizing the arrest directed the sheriff executing the warrant to take the person “immediately” before the court that issued the writ. 41 According to standard operating procedure, the jail officials notified court officials of the arrest and put Armstrong on a list of “will call” detainees. 42 Jail policy was that jail officials would wait for the court to notify them of the “will call” detainee’s court date and would take no further action to ensure a prompt hearing or timely release. 43 In Armstrong’s case, however, someone had inverted two digits in the case number in the records sent to the court. 44 As a result, the state court never called for Armstrong. 45 Also, according to Armstrong, jail officials kept telling him to be patient and refused to accept his complaint forms asking about his court appearance date. 46 After Armstrong’s employer hired a lawyer for him because he needed Armstrong at work, Armstrong was released after fifty-seven days in custody awaiting an “immediate” hearing. 47

Among several constitutional claims in Armstrong’s § 1983 case was a claim under Monell asserting that the jail’s “will call” policy

39. 152 F.3d 564 (7th Cir. 1998).
40. Id. at 567.
42. Armstrong, 152 F.3d at 567-68.
43. Id. at 568.
44. Id.
45. Id.
46. Id.
47. Id. at 568-69.
amounted to deliberate indifference to detainees' rights because there was a conscious decision not to put in place a procedure to protect against errors that would delay appearances and releases. The jail officials argued the policy was saved by their complaint policy because a detainee could obtain relief from his continued detention by filing a complaint with jail officials. The Seventh Circuit agreed that such a policy could save the "will call" policy from being deliberately indifferent to the risk of unlawful and prolonged detention, but that Armstrong also presented facts tending to show that the jail's actual practice and policy was to refuse to accept complaints requesting information about a "will call" detainee's status. The Seventh Circuit reinstated the Monell claim as well as claims against individual defendants.

Armstrong provides an important illustration of the value of Monell policy and custom claims in situations where there is room for individual defendants to argue about just who is responsible for a deprivation of the plaintiff's rights.

III. THE STATE GOVERNMENT/LOCAL GOVERNMENT BOUNDARY

A 1997 Supreme Court decision has given new life to an issue that has nothing to do with whether the plaintiff's rights were violated. The issue is whether certain governmental units should be treated as arms of state government or as local governments for purposes of Monell claims. The issue arises because of the dichotomy between Monell and Will v. Michigan Department of State Police. There are lots of easy cases, of course, but the Supreme Court's decision in McMillian v. Monroe County opens up new opportunities for litigating that boundary line office-by-office, state-by-state, and function-by-function.

The plaintiff in the case, Walter McMillian, had been convicted of murder and sentenced to death. After spending six years on death row, the Alabama state courts reversed his conviction because the state had suppressed exculpatory evidence, including prior statements by the state's chief witness that contradicted his trial testimony. McMillian then sued the county sheriff and investigators for the

48. Armstrong, 152 F.3d at 577-78.
49. Id. at 578-79.
50. Id.
51. Id. at 580-82.
54. Id. at 783.
55. Id.
county and the state. He alleged that the sheriff and the county investigator had intimidated the state’s chief witness into making false statements and had suppressed that witness’s exculpatory statements. The Supreme Court took the case to decide whether the sheriff, who had been sued in his official capacity, was a policy-maker for the county or for the state. The Supreme Court, in a five to four decision, held that when an Alabama sheriff investigates crimes and assists in criminal prosecutions, the sheriff acts as a policy-maker for the State of Alabama and not for the county where he or she serves. As a result, McMillian could not sue either the county or the State of Alabama for damages for his six years on death row.

Because the holding in McMillian was so narrow, limited to Alabama sheriffs acting in a particular capacity, the case is more important for its methodology than for its actual holding, at least outside Alabama. The problem is that the methodology is not enlightening. The majority explained at the outset of the opinion that whether the sheriff acted as a state or county official would not be decided “in some categorical, ‘all or nothing’ manner,” but would depend on the official’s function at issue in the particular case, and on the official’s status under state law. As a result, McMillian invites litigation of this issue office-by-office, function-by-function, and state-by-state. Moreover, the majority’s approach in McMillian offers little guidance as to how to balance conflicting indications in state law. The majority supported its conclusion with a state constitutional provision designating the “sheriff[s] [of] each county” as members of the state’s executive department, another constitutional provision giving the state supreme court the authority to remove a sheriff from office, state case law holding that sheriffs are state officers so that tort claims against sheriffs for their official acts are suits against the state rather than the county, and with statutory provisions making sheriffs responsible for carrying out orders of state courts and for enforcing the state’s criminal law in their respective counties. The majority found unpersuasive the facts that the county pays the sheriff’s salary and

56. Id. at 783-84.
57. Id. at 784.
58. Id. at 785-86.
59. McMillian, 520 U.S. at 793.
60. Id. at 783-84.
61. Id. at 785-86.
62. Id. at 785.
63. Id. at 787.
64. Id. at 788.
65. McMillian, 520 U.S. at 789.
66. Id. at 789-90.
provides the sheriff with equipment, supplies, and personnel, and that each sheriff is elected by voters in one county and has a jurisdiction limited to that county.67

The combination of the narrow holding and lack of clear guidance in balancing competing factors (highlighted by the five to four decision in the Supreme Court)68 invites a great deal of new litigation. McMillian creates new uncertainty for litigation against, among other entities, school corporations, sheriffs, prosecutors, and court clerks. Even where circuit law was well-established before McMillian, it is now open to reconsideration. For example, before McMillian, the Seventh Circuit had held that Illinois sheriffs are county officials and therefore are not entitled to Eleventh Amendment immunity.69 In the wake of McMillian, the Seventh Circuit distinguished Illinois sheriffs from Alabama sheriffs and reaffirmed its view that Illinois sheriffs act as county officers when they perform their primary law enforcement duties.70

Last year, I dealt with the role of prosecutors under Indiana law. They clearly act as state officials when prosecuting, but under McMillian there was more room for argument about their role when hiring and firing employees.71

---

67. Id. at 791-92; cf. id. at 796-804 (Ginsburg, J., dissenting) (arguing the balance of these factors tips toward treating the sheriff as a county official).
68. Id. at 781.
69. See Gossmeyer v. McDonald, 128 F.3d 481, 488 (7th Cir. 1997) (finding a detective with an Illinois sheriff's department was a county officer, not state officer); Ruehman v. Sheahan, 34 F.3d 525 (7th Cir. 1994) (finding an Illinois sheriff acted as a county officer when designing and implementing a computer system that tracked state court arrest warrants); cf. Scott v. O'Grady, 975 F.2d 366, 371 (7th Cir. 1992) (noting an Illinois sheriff acted as a state officer when executing a state court's writ to evict occupants of a building).
70. Franklin v. Zaruba, 150 F.3d 682, 684-86 (7th Cir. 1998).
71. See Bibbs v. Newman, 997 F. Supp. 1174, 1180-81 (S.D. Ind. 1998) (holding prosecutor acted as state official when hiring and firing deputy prosecutor). Other circuits have drawn similar distinctions based on state law in deciding whether prosecutors were subject to suit under § 1983 or were protected by Eleventh Amendment immunity. See, e.g., Coleman v. Kaye, 87 F.3d 1491, 1499-1506 (3d Cir. 1996) (deciding for § 1983 purposes, New Jersey county prosecutor made policy for county when refusing to promote investigator); Ying Jing Gan v. City of New York, 996 F.2d 522, 535-36 (2d Cir. 1993) (finding a New York county district attorney is a state policy-maker when deciding when or whom to prosecute, but is a municipal policy-maker under § 1983 on administrative matters such as office policy and training of employees); Gobel v. Maricopa County, 867 F.2d 1201, 1206-09 (9th Cir. 1989) (stating a plaintiff might be able to prove for § 1983 purposes that an Arizona county attorney, a position described in the state constitution as an "office of the county," was a county policy-maker when holding "roundup" of bad check offenders); Crane v. Texas, 766 F.2d 193, 194-95 (5th Cir. 1985) (holding a Texas district attorney is a county policy-maker and not protected by the Eleventh Amendment in case alleging county policy of issuing misdemeanor capias without judicial finding of probable cause).
In Indiana, we have a similar question concerning clerks of the state courts in each county.\textsuperscript{72} The same issue has also arisen concerning school corporations in Indiana.\textsuperscript{73}

Another good illustration of the effects of \textit{McMillian} is the Eleventh Circuit's en banc decision in \textit{Turquitt v. Jefferson County}.\textsuperscript{74} A jail inmate fatally stabbed a pre-trial detainee in an Alabama county jail.\textsuperscript{75} The victim's estate sued, alleging "that the jail was severely overcrowded and that, because the jail lacked a classification system, inmates were housed together without regard for their relative dangerousness or conviction status."\textsuperscript{76} The complaint also alleged that the individual defendants (the sheriff and several deputies) knew of the killer's dangerousness but "took no action to control him," and that they "did not exercise adequate supervision" over jail inmates and "failed to properly train and supervise" jail staff.\textsuperscript{77} The victim's estate also sued the county, which moved to dismiss on the grounds that the sheriff was not a policymaker for the county when he operated the jail.\textsuperscript{78}

The Eleventh Circuit applied \textit{McMillian}, which had also dealt with Alabama sheriffs, and held in \textit{Turquitt} that an Alabama sheriff is also a state policymaker, and not a county policymaker, when "operating a county jail."\textsuperscript{79} The Eleventh Circuit explained that Alabama law delegates to sheriffs the responsibility to supervise inmates in jails and gives state officials, not county officials, the authority to supervise the sheriffs.\textsuperscript{80} Alabama law also gives sheriffs the authority to hire, fire, and supervise jail personnel, and a state agency has some oversight authority over county jails.\textsuperscript{81} Under Alabama law, however, a county

\textsuperscript{72} \textit{Compare} Parsons v. Bourff, 739 F. Supp. 1266, 1267 (S.D. Ind. 1989) (holding a clerk is a state official and not subject to § 1983 suit in his official capacity) \textit{with} Winters v. Mowery, 884 F. Supp. 321 (S.D. Ind. 1995) (overruling another prior decision and holding a clerk of a judicial circuit in Marion County is not a state official where county would pay any judgment against the clerk).

\textsuperscript{73} \textit{See} Board of Trustees v. Landry, 622 N.E.2d 1019, 1024-25 (Ind. App. 1993) (holding school corporation was arm of state for purposes of § 1983), \textit{rev'd on reh'g}, 638 N.E.2d 1261, 1265-66 (Ind. App. 1994) (holding school corporation is a political subdivision that could be sued under § 1983).

\textsuperscript{74} 137 F.3d 1285 (11th Cir. 1998).

\textsuperscript{75} \textit{Id.} at 1286.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.} at 1287.

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.} at 1288.

\textsuperscript{80} \textit{Turquitt}, 137 F.3d at 1288-89. The court pointed out that the state had taken over supervision of sheriffs through a 1901 constitutional amendment designed in part to protect the rights of prisoners because of concern that county courts were failing to punish sheriffs who had allowed lynch mobs to murder prisoners. \textit{Id.}

\textsuperscript{81} \textit{Id.} at 1289.
is responsible for funding the operation of the jail and for erecting and maintaining the jail, which means providing a facility of "sufficient size and strength to secure the prisoners." In response to the plaintiff's argument that the county and the sheriff are "partners" in operating county jails, the Eleventh Circuit relied on Alabama case law holding that the sheriff's authority over jail operations is "totally independent" of the county government. The Eleventh Circuit, therefore, concluded that the county was not responsible for alleged wrongs in the "operation" of the jail.

I have no reason or basis for arguing with the unanimous Eleventh Circuit about this particular application of *McMillian* or the intricacies of Alabama law. But I believe the case highlights a problem in the *McMillian* analysis. The problem is that the "functional" approach under *McMillian* seems to make the case turn on the fluid concept of jail "operations." If we assume for purposes of argument that the allegations in the complaint were true, that the victim had been a pre-trial detainee in a severely overcrowded county jail, the county was responsible under Alabama law for providing the jail building and maintaining it, and for appropriating funds to operate it. The sheriff was responsible for actually operating it. It is not difficult to imagine the individual defendants' likely response to claims that they failed to "operate" the jail properly: we did the best we could to manage too many inmates in a jail that was too small and with insufficient staffing, security monitoring devices, and alarms. If the county gave us more money, we could do a better job. Assuming further that there is a sound factual basis for that defense, what does it mean to say that the sheriff rather than the county is responsible for "operating" the jail?

In the short term, *McMillian* gives defendants a wild card they can play to try to block a damages claim for reasons having nothing to do with the merit or lack of merit of the underlying claim. I use the term "wild card" because the majority offers so little guidance for applying its approach to other offices, other states, and other functions of particular officials. The practical consequences of *McMillian* in the coming years will be a lot of time spent and ink spilled in resolving these

82. Id. at 1289-90.
83. Id. at 1290 (citing King v. Colbert County, 620 So. 2d 623, 625 (Ala. 1993)).
84. Id. at 1291-92.
issues. I offer this line of litigation as additional evidence that the system of civil rights doctrines and remedies makes little sense and deserves to be revisited.

The dissenting opinion by Justice Breyer, joined by Justices Stevens and Ginsburg, in *Board of County Commissioners of Bryan County v. Brown,* offers a glimmer of hope, and should not be overlooked. In *Brown,* a jury had found a county liable for injuries inflicted by a deputy sheriff when he arrested the plaintiff. The county’s liability was based on the sheriff’s decision to hire the deputy (a son of the sheriff’s nephew) without adequately reviewing the deputy’s background, which included a number of arrests and misdemeanor convictions for driving offenses, assault and battery, resisting arrest, and public drunkenness. The Supreme Court majority of five justices held that the county could not be held liable for the plaintiff’s injuries. The majority explained that where a claim of municipal liability rests on a single decision, such as a hiring decision, that does not itself violate federal law or direct someone else to violate federal law, “the danger that a municipality will be held liable without fault is high.”

The majority, therefore, held:

A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a 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.”

The Supreme Court remanded the case to apply the newly-articulated standard.

There is room, of course, for a reasonable argument that where a sheriff decides to hire a deputy with a significant record of assault and battery, resisting arrest, public intoxication, and drunk driving, the risk that the deputy will use excessive force against suspects is at least substantial, if perhaps not “plainly obvious.” Justice Souter made this point for three dissenters.

86. Id. at 402.
87. Id. at 401.
88. Id. at 415-16.
89. Id. at 408.
90. Id. at 411 (emphasis added).
91. *Brown,* 520 U.S. at 416.
92. Id. at 425-27 (Souter, J., dissenting).
In a separate dissenting opinion with broader implications, however, Justice Breyer argued that it is time to rethink Monell.\textsuperscript{93} Going beyond the issues in Brown itself, Justice Breyer reviewed the "highly complex body of interpretive law" that has followed Monell.\textsuperscript{94} He acknowledged the majority's concern that a decision in favor of the plaintiff in Brown itself might tend to undermine Monell's line between individual and governmental liability.\textsuperscript{95} He argued, however, that the majority's concern, "rather than leading us to spin ever finer distinctions as we try to apply Monell's basic distinction between liability that rests upon policy and liability that is vicarious, suggests that we should reexamine the legal soundness of that basic distinction itself."\textsuperscript{96} Justice Breyer stopped short of expressing a willingness to overrule Monell, but he laid out a persuasive argument for reconsidering the question of municipal liability based on the weak underpinnings of the Monell holding, the complex and inconsistent body of law that has developed after Monell, and the widespread availability of indemnification for individual defendants.\textsuperscript{97} He concluded by urging the Court to ask for further argument on the continued viability of the Monell distinction between vicarious liability, which is prohibited, and liability based upon policy and custom, which is permitted.\textsuperscript{98}

As I have said, my vantage point here is not the lofty perch of the academy or the Supreme Court. From my vantage point, however, I can say that I hope the Court will eventually take up Justice Breyer's invitation to reconsider the central holding of Monell. Unless and until it does, however, lower courts and litigants will continue to struggle with these difficult issues that have little to do with whether the plaintiff's constitutional rights were violated.

IV. CONFLICT OF INTEREST ISSUES FOR DEFENSE COUNSEL IN MONELL CASES

Finally, I would like to address a problem that arises in cases combining Monell claims and claims against individual officers or employees. In these cases the local government and the individual defendants often use the same defense lawyer, selected and paid for by the local government. Especially if indemnification clearly will be available to the individual defendants, this approach enables the de-

\textsuperscript{93} Id. at 430-31 (Breyer, J., dissenting).
\textsuperscript{94} Id. at 430.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 430-31.
\textsuperscript{97} Brown, 520 U.S. at 431-36.
\textsuperscript{98} Id. at 437.
fendants to maintain a solid defensive front. There is, however, some potential for conflicts of interest to develop, especially to the potential detriment of individual defendants who rely on counsel provided by the local government. The local government may have at least a short-term interest in seeing that if the plaintiff wins a verdict, it is a verdict against the individual employees or officers who have acted improperly, and for which the local government may be able to avoid indemnifying the individual defendants. In Indiana, for example, a local government may decide not to indemnify individual defendants for punitive damage awards. A plaintiff who wins a verdict with minimal compensatory damages and a sizable punitive damage award in my court has won a pyrrhic victory. In addition, there may be political or public relations reasons for a local government to prefer a verdict that any wrongdoing was the act of maverick employees or officers rather than a result of policy decisions of senior officials.

Because of these potential conflicts of interests among defendants represented by the same lawyer, courts have an obligation to be alert to the possibility of an actual conflict. Nevertheless, courts have every reason to be skeptical when the plaintiff argues that defense counsel faces a potential or actual conflict of interest among his or her defendants/clients. Such efforts by plaintiffs are ordinarily attempts to drive a wedge between defendants to encourage individual defendants to turn against their employer or to gain a tactical advantage by raising the cost of litigation for the opponents.

Unfortunately, however, the Second Circuit's decision in *Dunton* gives plaintiffs a powerful reason to raise the conflict issue. In *Dunton*, the Second Circuit found that defense counsel faced an actual conflict that prevented the individual defendant from receiving a fair trial on the claim against him. To what we may presume was the astonishment and dismay of the plaintiffs, the Second Circuit concluded that the remedy for having one defendant and its counsel treat another defendant unfairly was to reverse the plaintiff's verdict and remand for a new trial. Based on this precedent, a plaintiff who smells a potential favorable verdict has every reason to seek a clean record on the issue of the joint representation for defendants.

---

100. *Dunton*, 729 F.2d at 909-10.
101. Id. at 911.
102. See Clay, 608 F. Supp. at 304 (recognizing *Dunton* "gave a plaintiff a vital stake in such a motion by reversing his favorable judgment there and forcing a new trial," but not endorsing *Dunton* remedy).
From my perspective, however, and as Judge Shadur suggested in *Clay*,\textsuperscript{103} vacating a plaintiff's verdict is not the correct remedy for such problems. This is a matter of simple fairness to a plaintiff. In addition, the *Dunton* rule appears to be unique in civil litigation. We all accept the idea that a criminal defendant who has been sent to prison as a result of his lawyer's ineffectiveness is entitled under the Sixth Amendment to a new trial, although that remedy is understandably available only if a stringent standard can be satisfied.\textsuperscript{104} But I do not believe there are any other areas of *civil* law in which the courts conclude that the remedy for a poor performance or a conflict of interest on the part of a lawyer for a civil litigant is to grant a new trial in which that lawyer's client gets a second chance to win the case. One might ask, for example, whether the courts would be willing to give a civil rights plaintiff the benefit of a similar remedy if the plaintiff's lawyer has faced an actual conflict of interest. I am aware of no decision recognizing such a remedy, which inflicts additional risk and expense on defendants who have already prevailed at a trial.\textsuperscript{105} If vacating a plaintiff's verdict is an available remedy where there is a conflict of interest among defendants and their joint counsel, moreover, the natural result will be to encourage unnecessary litigation of these conflict of interest issues. Where the professional ethics of defense counsel are not sufficient to avoid the problem, the prospect of malpractice liability should be sufficient. And if there is still a problem that surfaces after a trial (or so close to trial that a continuance to find new defense lawyer would substantially prejudice the plaintiff), the remedy ought to be against the defense lawyer and/or the local government that employed the lawyer, not against the plaintiff who has won a judgment.

\textsuperscript{103} Id. at 304-05.
\textsuperscript{105} Cf. *Tuke v. United States*, 76 F.3d 155, 156 (7th Cir. 1996) ("The delay has cost his client the litigation and exposes [the lawyer] to a suit for malpractice."); *Coleman*, 814 F.2d at 1147 (declining to decide, where defendants were not diligent in protecting their interests, whether a diligent defendant might be entitled to relief from default judgment entered based on lawyer's repeated violation of discovery orders).